

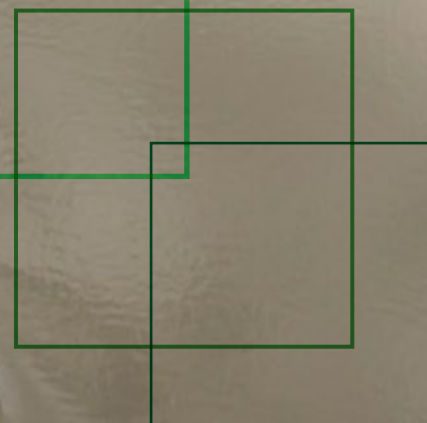


International
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INDIGENOUS & TRIBAL PEOPLES' RIGHTS IN PRACTICE

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A GUIDE TO
ILO CONVENTION No. 169



PROGRAMME TO PROMOTE ILO CONVENTION NO. 169 (PRO 169)
International Labour Standards Department, 2009



INDIGENOUS & TRIBAL PEOPLES' RIGHTS IN PRACTICE



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INTRODUCTION

In 1989, the International Labour Organisation (ILO) adopted the Indigenous and Tribal Peoples Convention (ILO Convention No. 169). Since then, the Convention has been ratified by 20 countries. In these countries, the ILO supervisory bodies have monitored and guided the implementation process through regular examination of reports and provision of comments to the concerned governments. In this context, workers' organizations have also assisted indigenous and tribal¹⁾ peoples' organizations to bring specific issues to the attention of the ILO supervisory bodies. Moreover, the Convention has inspired governments and indigenous peoples far beyond the ratifying countries, in their work to promote and protect indigenous peoples' rights. The 20 years that have passed since the adoption of the Convention thus represent 20 years of efforts, dialogue and achievements in the challenging process of gradually deepening the understanding and implementation of indigenous peoples' rights.

In 2007, the United Nations General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples (A/RES/61/295). The adoption was the culmination of years of discussions and negotiations between governments and indigenous peoples and is a landmark achievement, which provides the international community with a common framework for the realization of indigenous peoples' rights.

Following the adoption of the UN Declaration, there is now a general consensus that there must be a focus on implementation of indigenous peoples' rights at the country-level to ensure that international instruments bring the necessary changes for the millions of indigenous peoples around the world, who are still living in marginalized and disadvantaged situations.

Convention No. 169 and the UN Declaration are compatible and mutually reinforcing (see section

1) Convention No. 169 uses the terminology of 'indigenous and tribal peoples' (see section 1 for a more detailed discussion of the term). The Convention does not differentiate between the rights ascribed to the two groups. However, for practical reasons, this Guide uses the term 'indigenous peoples', which is also the most commonly used term and the one that is used by international instruments such as the UN Declaration on the Rights of Indigenous Peoples.

2), although these instruments were negotiated at different time periods by different bodies and therefore diverge in some respects. However, the implementation process of the two instruments is largely the same, and experiences generated so far in the context of Convention No. 169 can thus to a certain degree serve to inspire the further efforts to implement the Declaration.

The main purpose of this Guide is to provide governments, indigenous and tribal peoples and workers' and employers' organizations with a practical tool for the implementation of indigenous peoples' rights, based on the experiences, good practices and lessons learned that have been generated so far.

The Guide does not attempt to provide a blueprint for implementation. The diversity of situations faced by indigenous peoples does not allow for a simplistic transfer or replication of models from one country to another. Rather, the Guide is a catalogue of ideas that hopefully will be assessed, discussed and, eventually, will inspire adaptation of good practices to national and local circumstances.

The Guide has been developed through collaborative efforts, thereby reflecting the multi-party and collective nature of the implementation process. The main sources of information and input for the Guide are:

- Analysis and comments provided by the ILO supervisory bodies in order to guide the implementation of Convention No. 169 in ratifying countries.
- A series of case studies, conducted by indigenous peoples' organizations and researchers that document key positive experiences, achievements and impacts of the implementation of indigenous peoples' rights.
- A series of short examples of key experiences, which the reader can further study by following the links and references included in the Guide.

HOW TO USE THIS GUIDE

This Guide is not meant to be read from beginning to end, but is rather a catalogue from which the reader can choose the most relevant entry point and follow the cross-references to explore how the full range of indigenous and tribal peoples' rights relate to each other.

The guide is divided into sections covering all the main aspects of indigenous and tribal peoples' rights. Each section is divided into the following main categories:

- An **introductory part**, which explains the relevant article(s) of Convention No. 169 and their implications. This section also provides references to similar provisions of the UN Declaration on the Rights of Indigenous Peoples.
- A summary of **comments of the ILO supervisory bodies**, which have been provided to give guidance and assistance to countries regarding implementation of Convention No. 169. Such comments do not exist in relation to all areas of the Convention and are thus only available in relation to some sections of the Guide.

A series of **examples of practical application** of the concerned provisions of ILO Convention No. 169, drawn from all areas of the world. Annex D provides an index of the various cases presented in the Guide.

Convention No. 169 is an holistic instrument, which attempts to address all key aspects of indigenous peoples' rights. The range of rights contained in this instruments are inter-related and issues such as the right to consultation and participation are cross-cutting and have repercussions, for example, for the rights stipulated in sectors such as health and education.

This is reflected in the Guide, which starts with a focus on key principles of the general policy of Convention No. 169 (mainly articles 1-12) and then addresses more specific substantive issues (mainly

articles 13-32).

The Guide is divided into the following sections, covering the various areas of indigenous rights:

- 1. Identification of indigenous and tribal peoples.** This section explains the coverage of the Convention and the criteria used to identify indigenous and tribal peoples in different regions, including the right to self-identification.
- 2. The concept of indigenous peoples in the context of rights.** This section elaborates on the implications of the use of the term 'peoples' and its connotations with regard to the right to self-determination, as recognized in the UN Declaration on the Rights of Indigenous Peoples.
- 3. Government responsibilities.** This section explains the responsibility of States to undertake coordinated and systematic action to end discrimination against indigenous and tribal peoples, by respecting their fundamental rights and also developing special measures to that effect.
- 4. Indigenous institutions.** This section explains the right to maintain and develop indigenous institutions as a fundamental right, which is crucial for maintaining indigenous and tribal peoples' identity and autonomy.
- 5. Participation, consultation and consent.** This section explains the fundamental principles of participation and consultation with a view to achieving agreement or consent, which are the cornerstone of Convention No. 169.
- 6. Customary law, penal systems and access to justice.** This section explains the right to retain customs and customary law, including penal systems, as long as these are not in conflict with international human rights, as well as the need to improve indigenous and tribal peoples' access to justice.
- 7. Land and territories.** This section explains the crucial concepts of indigenous and tribal peoples' lands and territories and the related rights, including to ownership and possession.
- 8. Natural resources.** This section explains indigenous and tribal peoples general right to the natural resources in their territories as



well as the rights to consultation, participation and benefit-sharing in cases where the State retains the rights over mineral resources.

- 9. Development.** This section explains indigenous and tribal peoples' rights to determine their own priorities for the process of development and how this relates to the current international development agenda.
- 10. Education.** This section explains indigenous and tribal peoples' general right to education as well as the need for special educational measures to meet their needs and priorities, for example for bilingual intercultural education.
- 11. Health and social security.** This section explains indigenous and tribal peoples' general rights to health and social security as well as the need to take into account their economic, geographic, social and cultural conditions and their traditional preventive care, healing practices and medicines.
- 12. Traditional occupations, labour rights and vocational training.** This section explains the need to protect indigenous and tribal peoples' traditional occupations and provide special measures to protect them from discrimination and violation of other fundamental labour rights in the labour market.

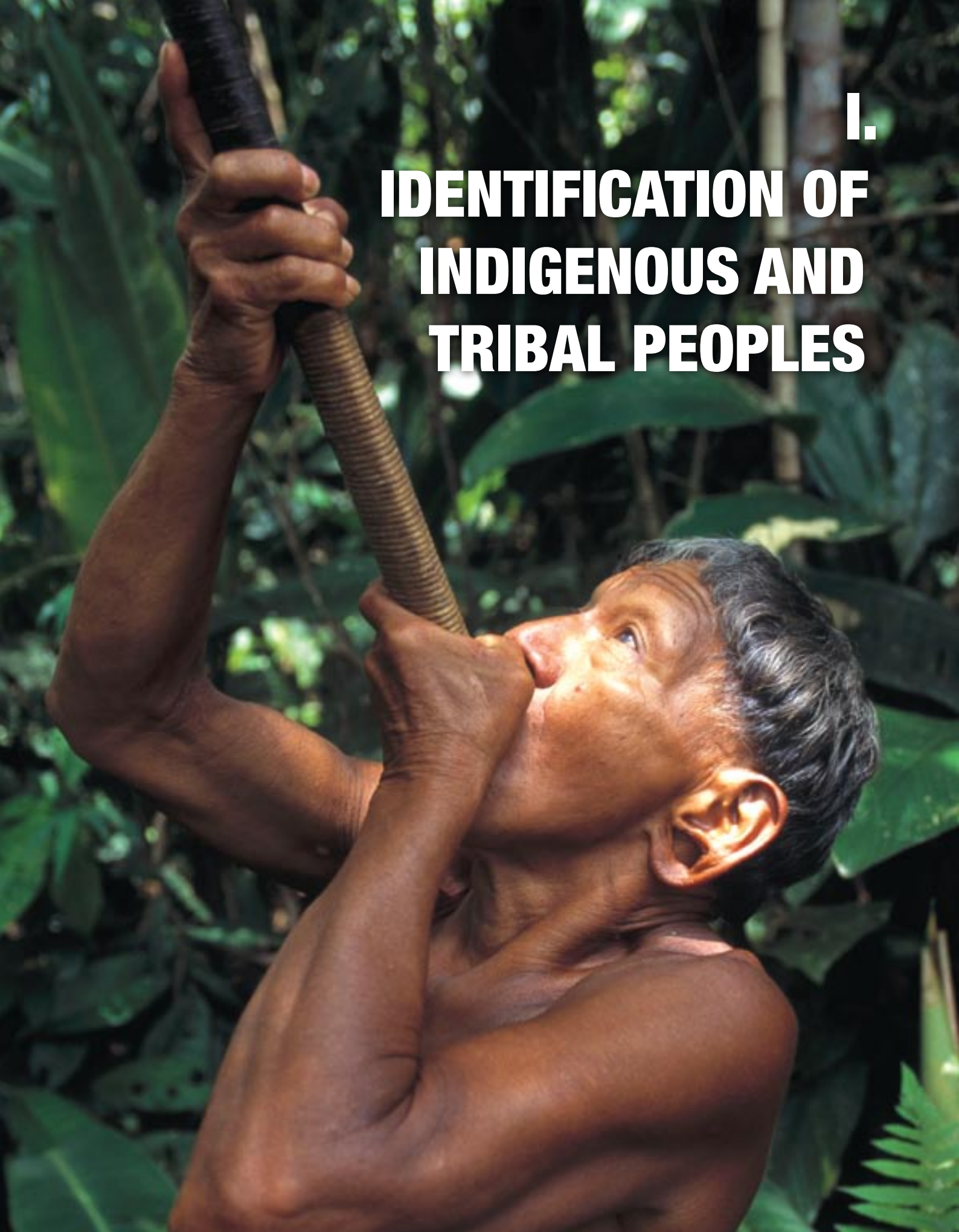
13. Contacts and cooperation across borders.

This section explains the right of indigenous and tribal peoples to maintain contact in cases where they have been divided by international borders.

- 14. Convention No. 169: ratification, implementation, supervision and technical assistance.** This section explains the procedural aspects of Convention No. 169; how it can be ratified; how the supervisory and complaints mechanisms work; its legal standing in the national legal systems; and the possibility of getting technical assistance from the ILO.

This Guide is meant to inspire and motivate the reader to seek further information. Therefore, a series of references and links are provided throughout the text. Also, in Annex C, there is a list of suggested **further reading** on the various issues dealt with in the Guide.

Additional information and the full text of some of the case studies can be found at the ILO's website on indigenous peoples: www.ilo.org/indigenous or be requested on CD-ROM from pro169@ilo.org. Also a series of information resources, including video interviews, PowerPoint presentations and background materials are available at www.pro169.org.

A photograph of a man in a forest, shirtless, holding a long, ribbed wooden tool vertically. He is looking up at the tool with a focused expression. The background is a dense, green forest with various plants and trees. The text "I. IDENTIFICATION OF INDIGENOUS AND TRIBAL PEOPLES" is overlaid in white, bold, sans-serif font on the right side of the image.

I.
**IDENTIFICATION OF
INDIGENOUS AND
TRIBAL PEOPLES**

1.1. COVERAGE OF ILO CONVENTION NO. 169

Indigenous and tribal peoples constitute at least 5,000 distinct peoples with a population of more than 370 million, living in 70 different countries. This diversity cannot easily be captured in a universal definition, and there is an emerging consensus that a formal definition of the term “indigenous peoples” is neither necessary nor desirable. Similarly, there is no international agreement on the definition of the term “minorities” or the term “peoples”.

The Convention does not strictly **define** who are indigenous and tribal peoples but rather describes the peoples it aims to protect (Article 1).

ILO Convention No. 169

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.

Article 1(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.

Elements of tribal peoples include:

- Culture, social organization, economic conditions and way of life different from other segments of the national population, e.g. in their ways of making a living, language, etc.;
- Own traditions and customs and/or special legal recognition.



Elements of indigenous peoples include:

- Historical continuity, i.e. they are pre-conquest/colonization societies;
- Territorial connection (their ancestors inhabited the country or region);
- Distinct social, economic, cultural and political institutions (they retain some or all of their own institutions).

The elements outlined in Article 1(1) constitute the **objective criteria** of the coverage of ILO

Convention No. 169. It can objectively be determined whether a specific indigenous or tribal people meets the requirements of Article 1(1) and recognizes and accepts a person as belonging to their people.

Article 1(2) recognizes the **self-identification** of indigenous and tribal peoples as a fundamental criterion. This is the **subjective criterion** of Convention No. 169, which attaches fundamental importance to whether a given people considers itself to be indigenous or tribal under the Convention and whether a person identifies himself or herself as belonging to this people. Convention No. 169 was the first international instrument to recognize the importance of self-identification.

The Convention's coverage is based on a combination of the objective and subjective criteria. Thus, self-identification complements the objective criteria, and vice versa.

The Convention takes an inclusive approach and is equally applicable to both indigenous and tribal peoples. The Convention thereby focuses on the present situation of indigenous and tribal peoples, although the historical continuity and territorial connection are important elements in the identification of indigenous peoples.

The criteria elaborated in Article 1(1) b of Convention No. 169 have been applied widely for the purpose of identifying indigenous peoples in international and national political and legal processes, far beyond the group of States that have ratified the Convention. It is used as an international working definition for the purpose of identifying indigenous peoples, including in the application of the UN Declaration on the Rights of Indigenous Peoples, and has also been the basis on which various UN specialized agencies have developed their own operational definitions of the term indigenous peoples, including the World Bank and the United Nations Development Programme.



UN Declaration on the Rights of Indigenous Peoples

The UN Declaration on the Rights of Indigenous Peoples identifies “indigenous peoples” as being the beneficiaries of the rights contained in the Declaration, without defining the term.

The preamble of the Declaration, however, makes reference to certain characteristics normally attributed to indigenous peoples, such as their distinctiveness, dispossession of lands, territories and natural resources, historical and pre-colonial presence in certain territories, cultural and linguistic characteristics, and political and legal marginalization.


Also, article 33, para. 1, states that: Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

1.2. IDENTIFICATION OF INDIGENOUS PEOPLES IN STATISTICS

The recognition and identification of indigenous peoples has repercussions for their visibility in national statistics and information systems, as well as for the capacity of States to respond to their specific needs and priorities and to monitor the impact of interventions.

In many countries, there are no disaggregated data or accurate statistics on the situation of indigenous peoples and even basic demographic information regarding their numbers and location may be lacking. Therefore, an analysis of the situation in indigenous communities will often depend on rough estimates or make use of proxies in order to, for example, assess the situation in a particular geographical area that is predominantly inhabited by indigenous peoples. It is even rarer to find disaggregated data that describe the differentiated situation of distinct indigenous peoples in a given





country or within indigenous communities, for example as related to gender and age.

The risk is that the specific situation of indigenous peoples, as well as differences between and within indigenous communities, is invisible in national statistics. This makes it difficult to accurately monitor the effects of state interventions addressing indigenous peoples and leaves policy-makers without necessary information for developing policies and programmes.

Some of the main difficulties with regards to the collection of disaggregated data on indigenous peoples are:

- Controversy over definitions or terminology
- Fluidity of ethnic identity
- Migration, conflicts and wars
- Lack of legal provisions/political acceptance
- Lack of understanding of the importance of disaggregated data
- Weak national capacity for data collection, analysis and disaggregation
- Resistance from indigenous peoples if they are not themselves in control of data collection

(Including Indigenous Peoples in Poverty Reduction Strategies, ILO 2007)

Experience, particularly from Latin America, has shown that overcoming these difficulties is a process, based on dialogue, through which a deeper understanding and respect for diversified indigenous identities is developed. Recently the focus on including indigenous peoples in national censuses has been gaining ground in Asia also, with indigenous peoples' organizations and experts in Nepal and the Philippines working with the government and donors in the preparation of the upcoming national censuses.

1.3. COMMENTS BY THE ILO SUPERVISORY BODIES: COVERAGE

In monitoring the application of Convention No. 169 in countries that have ratified it, the ILO supervisory bodies, particularly the Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts) (see section 14 for more

information) have made a number of comments, concerning the application of Article 1 regarding the scope of application of the Convention.

Paraguay: Including self-identification as a fundamental criterion

The Committee of Experts noted that the statistical data provided by the Government from the 2002 census carried out by the Directorate of Statistics, Surveys and Census, indicates the number of indigenous persons in the country by region and by ethnic group. It also noted, however, that the Government had not modified the Indigenous Communities Charter, and that self-identification as a criterion for defining indigenous peoples as provided for by the Convention had not been incorporated. The Committee of Experts recalled that under Article 1(2) of the Convention, 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 and thus requested the Government to give legislative expression to this criterion in consultation with indigenous people.

(Committee of Experts, 77th Session, 2006, Individual Direct Request, Paraguay, submitted 2007).

Argentina: Recognizing indigenous communities as legal entities

The Committee of Experts noted that in some provinces, indigenous communities were applying for legal personality as civil associations. The Committee requested the Government to take steps to ensure that the communities are recognized as indigenous communities, "since a civil association seems to imply the formation of something new, which is not fully consistent with the Convention's principle of recognition of a pre-existing reality".

The Committee also noted with interest a court decision in the Chaco Province, in which the Convention and the Provincial Constitution were relied on "to order the Province of Chaco to set up a register of indigenous communities and organizations with declaratory effect, and to register the Council concerned within five days "because the legal personality of indigenous groups is a pre-existing fact of reality and requires unconditional and unqualified recognition by the State; what already exists is thus declared, namely the pre-existence

of the personality of indigenous communities and organizations”.

Committee of Experts, 77th Session, 2006, Individual Direct Request, Argentina, submitted 2007.

Colombia: Applying the Convention to Afro-Colombian communities

In 2005, the Committee of Experts received information about two Colombian communities of African extraction, which claimed that “the Curbaradó and Jiguamiandó communities fulfill the criteria for a tribal people set forth in the Convention”, and that they have “used their land in accordance with their ancestral and traditional practices”.

The communication made reference to a national Act, which provides that “the black community consists of the combined families of Afro-Colombian extraction who have their own culture, a common history and their own traditions and customs in the context of the relation between occupied and rural areas, who demonstrate and maintain awareness of identity which distinguishes them from other ethnic groups”.

In its conclusions, the Committee of Experts considered that, in the light of the information provided, the black communities of Curbaradó and Jiguamiandó appeared to fulfill the requirements set out in Article 1.1.(a), of the Convention.

Furthermore, building on the principles of self-identification, the Committee of Experts noted that: “indicating that the representatives of the community councils of Curbaradó and Jiguamiandó participated in the preparation of the communication, it would appear that, in seeking the application of the Convention to their communities, they identify themselves as being tribal”.

Committee of Experts, 76th Session, 2005, Observation, Colombia, published 2006.

Mexico: Language as criteria for determining who are indigenous

According to the Government’s report, Mexico’s indigenous population is numerically the largest in Latin America, estimated by the 2000 National Council of Population (CONAPO) Survey at 12.7 million and made up of 62 indigenous peoples.

The CONAPO survey included questions about the indigenous languages spoken and membership of indigenous groups of at least one member of the household. The survey provided six categories in answer to the questions; the fourth of which was “Do not speak an indigenous language and belong to an indigenous group”.

However, the Government’s report also indicated that the “de-indianization” process led many indigenous persons to abandon their communities of origin, contributing to a significant loss in their indigenous languages and their ethnic identities.

Since formal censuses were first introduced in Mexico in 1895, language had been the main criterion used for identifying the indigenous population. However, since many indigenous people had lost their language, the Committee of Experts requested the Government to state whether the persons in the category “Do not speak an indigenous language and belong to an indigenous group” enjoyed the protection afforded by the Convention.

The Committee noted that “the application of Article 1 is not limited, as it does not include language as a criterion for defining the peoples protected by the Convention”.

Committee of Experts, 76th Session, 2005, Individual Direct Request, Mexico, submitted 2006.

Greenland: recognition as a people rather than as individual communities

In 1999, a case was brought to the ILO pursuant to Article 24 of the ILO Constitution alleging that Denmark had failed to comply with Article 14(2) of Convention No. 169, which stipulates that Governments shall take steps to identify the lands that indigenous peoples traditionally occupy, and to guarantee effective protection of their rights of ownership and possession. The complaint arose out of the relocation in May 1953 of the population living in the settlement of Uummanaq (Thule District) in northwestern Greenland, due to the extension of the Thule Air Base. Subsequently, the Uummanaq population claimed specific land rights within the Greenlandic territory. In the context of this case,



it was debated whether the Uummannaq population constituted a distinct indigenous people with distinct land rights or whether it was part of the broader Greenlandic indigenous people (Inuit).

In examining the case, the ILO tripartite committee noted that the parties to the 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 furthermore noted 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”.

The Committee noted that “the land traditionally occupied by the Inuit people has been identified and consists of the entire territory of Greenland”. Consequently, “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”.

Governing Body, 280th Session, March 2001, Representation under Article 24 of the ILO Constitution, Denmark, GB.280/18/5.

1.4. PRACTICAL APPLICATION: STATEMENT OF COVERAGE

The ILO statement of coverage is widely used as an overall guiding principle in national and regional processes of identifying indigenous peoples. Some countries do not speak of “indigenous” or “tribal” peoples but use other local or national terms. Some of these terms have references to where the peoples live or how they traditionally make their living. In countries in Asia, for example, the language holds expressions like “hill people” or “shifting cultivators”, while some indigenous peoples in Africa are known as “pastoralists” and “hunter-gatherers”. In Latin America, the term “peasants” has been used in some countries. Over the last decades, most





countries and regions have provided such practical interpretations of the concept of indigenous and tribal peoples. In parallel, indigenous peoples are increasingly identifying as specific peoples or nations and also gaining constitutional and legal recognition as such in many countries. Another tendency is related to the increasing number of indigenous migrants that move to urban settings, where they assume new forms of expressing identity. The new expressions of identity are contributing to changes, such as the transformation of traditional community structures and the appearance of extended communities, bi-national or transnational communities.

Africa: Identification of indigenous peoples by the African Commission on Human and Peoples Rights

In 2003, a Working Group under the African Commission on Human and Peoples' Rights (ACHPR) issued a Report on Indigenous Populations/Communities in Africa.

The report concluded that a strict definition of indigenous peoples is “neither necessary, nor desirable”, and would risk excluding certain groups. The Report also addressed the common argument that “all Africans are indigenous”, which it saw as an argument relative to European colonization that is not the point of departure or current understanding

of the term. Furthermore, the Report emphasized that it is not an issue of “special rights” over and above other sections of society; it is an issue of the need for specific rights to address the specific forms of discrimination and marginalization faced by indigenous peoples.

The Report recommended an approach to identifying, rather than defining, indigenous peoples, based on a set of criteria and emphasized the following characteristics of African indigenous peoples:

- Their cultures and ways of life differ considerably from those of the dominant society;
- Their cultures are under threat, in some cases on the verge of extinction;
- The survival of their particular way of life depends on access and rights to their traditional land and resources;
- They often live in inaccessible, geographically isolated regions; and
- They suffer from political and social marginalization and are subject to domination and exploitation within national political and economic structures.

Report of the African Commission's Working Groups of Experts on indigenous Populations/Communities, adopted by the ACHPR, at its 28th Session, 2005. Published by the ACHPR and IWGIA.

Africa: Examples of identification of indigenous peoples

In Africa, indigenous peoples are also referred to by terms such as ethnic minorities, vulnerable groups, pastoralists, hunter/gatherers, Pygmies, etc. The majority of communities who self-identify as indigenous practice pastoralism or hunting and gathering for their livelihoods, although there are also small farming/hunting communities who identify as indigenous. These communities are gradually being accepted as indigenous, particularly in Kenya and South Africa. The process has been promoted and encouraged by the visit to both countries by the UN Special Rapporteur on human rights and fundamental freedoms of indigenous people in 2006. In Kenya, the Special Rapporteur recommended that “the rights of pastoralists and hunter-gatherer communities should be constitutionally entrenched and that specific legislation should be enacted to include affirmative action where necessary.”

In South Africa, the cabinet adopted a memorandum in 2004 setting out a policy process to recognise Khoe and San as vulnerable indigenous communities, who have been marginalised and deserve special protection. However, this has not yet been translated into an official policy recognising the Khoe and the San as the indigenous peoples of South Africa.

In Uganda, there is no official government policy recognising indigenous people as understood under international law but there is a process towards recognition of some groups as particularly marginalised and vulnerable and as minorities. The Ministry of Gender, Labour and Social Development has, for instance, recently embarked on an exercise to establish a data bank providing information on minority ethnic communities. In Rwanda, despite the lack of official recognition of indigenous peoples as such, the National Commission of Unity and Reconciliation recognised, in 2006, that the Batwa had been systematically forgotten and ignored and merited special attention. The Commission thus recommended special measures in favour of the Batwa in terms of education and health services. *Reports of the UN Special Rapporteur on the human rights and fundamental freedoms of indigenous people, Mission to South Africa and Kenya, 2006; IWGIA, the Indigenous World, 2006;*

CAURWA, Convention relative aux droits de l'enfant, Contre rapport présenté par CAURWA, Kigali, 2004. Case prepared by Naomi Kipuri.

Nepal: Recognition of indigenous nationalities

The Nepali Government first recognized the concept of “indigenous nationalities” in 1997, with the promulgation of an ordinance on the creation of a National Committee for the Development of Indigenous Nationalities. Together with the subsequent government planning document, the Ninth Plan (1997-2002), this constituted formal recognition of a list of specific ethnic groups as being indigenous. However, neither documents defined the term “indigenous nationalities” nor its legal significance and it took another 5 years before the National Foundation for the Development of Indigenous Nationalities (NFDIN) came into being. With the establishment of NFDIN in 2002, indigenous peoples had a semi-autonomous foundation, with a governing council consisting of both government and indigenous peoples’ representatives.

The Government list of recognized indigenous groups and the recognition procedure has caused some controversy. The list is currently comprised of 59 groups, but there are groups that are not on the list that also claim to be indigenous peoples. There are also communities who have been recognized as belonging under a larger group identity, but who claim to be a distinct people, deserving their own separate name and recognition.

To a large extent, these conflicts have grown out of the systems and practices that have developed in Nepal to ensure indigenous peoples’ representation and access to government services. Each of the 59 recognized groups has a national organization. Until recently, both NFDIN and the indigenous peoples’ own umbrella organization, the Nepal Federation of Indigenous Nationalities (NEFIN), have relied exclusively on these organizations as the basis for representation, consultation and participation. In this way, the national organizations and their individual leadership have become de facto gatekeepers in processes of indigenous communities’ consultation and participation. Many of the recognized groups cover large linguistic and culturally diverse populations. If some communities do not feel well



represented by the existing national indigenous organizations, they are likely to seek recognition as separate indigenous peoples to gain better access to Government. In this way, tensions and conflicts concerning the representativeness in the national indigenous organizations' spill over into questions regarding government recognition of certain groups.

After ratification of ILO Convention No. 169 in 2007, the Nepali Government established a Committee to review the list of recognized indigenous groups. Also, a Government Task Force on Implementation of ILO Convention No. 169 (see section 3) has recommended that the Government adopt a formal definition of indigenous peoples, based on the identification criteria in the Convention. The process is not yet concluded but it is likely that it will lead to a less static and more process-oriented approach to recognition of indigenous groups in the future. The underlying question of how to ensure communities rights to consultation, participation and representation, regardless of their connection to national organizations, has not yet been resolved.

Another significant question emerging in Nepal is whether recognition as indigenous peoples should

automatically entitle communities to affirmative action programs from the government (see section 11). *Programme to Promote ILO Convention No. 169, project reports Nepal, 2008-9; Krishna Bhattachan: Indigenous Peoples and Minorities in Nepal, 2008.*

The World Bank: criteria to determine the application of the Bank's policy on indigenous peoples

The World Bank uses the term "indigenous peoples" in a generic sense to refer to distinct groups with the following characteristics in varying degrees: "(a) self-identification as members of a distinct indigenous cultural group and recognition of this identity by others; collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories; customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture; and (d) an indigenous language, often different from the official language of the country or region."

This operational definition of the term indigenous peoples is based on the statement of coverage



of Convention No. 169, and includes all the main elements of the ILO-definition: self-identification as indigenous; historical attachment to ancestral territories; distinct cultural, economic, social and political institutions.

Operational Policy 4.10 on Indigenous Peoples, World Bank 2005;

John Henriksen: Key Principles in Implementing ILO Convention No. 169, ILO, 2008.

Bangladesh: Identification

With a population of 120 million, Bangladesh is the eighth most populous country in the world. The indigenous population accounts for 1.08% of the national population. The indigenous peoples in Bangladesh are identified by different names such as pahari (hill people), jumma (from the tradition of jhum/jum or shifting cultivation), adivasi (original inhabitant) upajati or tribal. There are also certain laws which use indigenous hillmen or indigenous tribes interchangeably.

Previously, the Government of Bangladesh preferred to use the terms “tribe” or “tribal” as opposed to the “adivasi” or “indigenous” which are the preferred terms of the indigenous groups. However, in the

Poverty Reduction Strategy Paper published in 2005 (“PRSP-I”), the terms “Adivasi/Ethnic Minority” was used, while in the more recent PRSP-II, the terms “indigenous people” and “indigenous communities” were both used, reflecting perhaps the wider currency of the latter terms in the media and generally use by Bangladeshi civil society.

Bangladesh ratified the ILO Indigenous and Tribal Populations Convention, 1957 (No. 107) in 1972, which covers a number of issues including fundamental rights, land rights, employment, vocation training, health, etc. In Bangladesh there is no constitutional recognition of the indigenous peoples except under the blanket category of “Backward Sections of Citizens”.

Different estimates have been given on the number of distinct indigenous peoples in Bangladesh, ranging from twelve to forty-six. The reasons for this uncertainty include the number of names by which a community is known by different people, the different ways of spelling the names of the groups, the categorization of the sub-groups as separate groups and the increasing number of groups identifying themselves as indigenous.

Raja Devasish Roy: The ILO Convention on Indigenous and Tribal Populations, 1957 and the Laws of Bangladesh: A Comparative Review, Forthcoming;
The Finance Act, Chittagong Hill Tracts (CHT) Regulation 1900.
Case prepared by Chonchuirinmayo Luithui

India: Identification of scheduled tribes

India is a federal republic with a parliamentary form of government. The Indian polity is governed by the Constitution, which was adopted on 26 November 1949. India has a population of over 1 billion and ranks right after China as the second most populous country in the world. India was one of the first nations to ratify the ILO Convention on Indigenous and Tribal Population, 1957 (No. 107) in September 1958. However, it has not ratified Convention No. 169, which revised Convention No. 107.

The Government of India has contested the use of the term “Indigenous Peoples” for a particular group of people, saying that all citizens are indigenous to India, and it has preferred to use the term “Scheduled Tribes”. The 2001 census puts the number of persons belonging to a Scheduled Tribe at 84.3 million, constituting 8.2% of the total population. The Anthropological Survey of India has identified 461 tribal communities in India, while other estimates of the number of tribes living in India reach up to 635.

Article 366(25) of the Constitution of India refers to Scheduled Tribes as those communities who are “scheduled”¹⁾ in accordance with Article 342 of the Constitution through a declaration by the President. Scheduled Tribes tend to live in specific areas and the Constitution of India recognizes these as “Scheduled Areas”.

The Lokur Committee, an advisory committee set up in 1965 to revise the lists of Scheduled Castes and Scheduled Tribes, defined the characteristics²⁾ of a community to be identified as Scheduled Tribes as:

1) Members of a community, which has been declared a scheduled tribe, benefits from all the laws and schemes created specifically for the scheduled tribes including reservation of seats in appointments and education.

2) A scheme for determining whether an individual belongs to a Scheduled Tribe has been laid down in Annual Report 2006-2007, published by the Ministry of Tribal Affairs, New Delhi. This is available at <http://tribal.nic.in/TribalAR0607-E.pdf>

- (a) primitive traits;
- (b) distinctive culture;
- (c) shyness of contact with the community at large;
- (d) geographical isolation; and
- (e) backwardness – social and economic.

The list of Scheduled Tribes is area-specific and therefore a community declared as a Scheduled Tribe in one state need not be so in another state. For example, the Santals living in Assam do not have access to the benefits as Scheduled Tribes, which are accorded to the Santals in Jharkhand, Orissa and West Bengal.

The tribal peoples in India prefer to identify themselves as “Adivasi” which literally means the original inhabitants. However, in the northeastern region of India, the indigenous communities prefer to call themselves indigenous peoples. While there are many large indigenous communities whose number are more than a million (like the Santals, Oraon, Nagas and Bhils), there are also tribes such as the Jarawas and Onges who are on the verge of extinction.

Constitution of India: http://india.gov.in/govt/constitutions_india.php;

Virginus Xaxa; Tribes as Indigenous People of India, <http://www.icrindia.org>;

IWGIA: Indigenous Peoples in India, <http://www.iwgia.org>.

Case prepared by: Chonchuirinmayo Luithui.

Indonesia: Process towards recognition

The issue of definition of indigenous peoples remains a sensitive one and has not been fully resolved. Different definitions are used in various official documents:

- The Second Amendment of the Constitution identifies indigenous peoples as “traditional legal communities” and as “traditional peoples”.
- The National Assembly’s Decree on Agrarian Reform and Natural Resource Management (Decree No. 9 of 1999) also identifies indigenous peoples as “traditional peoples”.
- Presidential Decree No. 111/1999 and Social Ministry Decree No. 06/PEGHUK/2002 defines indigenous communities as “remote indigenous communities”: “Remote

indigenous community is a local social (cultural) group, which is spread-out and lacks access to public social, economical and political services.”

- The Law on Coastal and Small Island Management (2007) incorporates a definition which has been developed by AMAN (Aliansi Masyarakat Adat Nusantara)³⁾ - the national indigenous peoples umbrella organization: *“Indigenous communities are a group of people who have lived in their ancestral land for generations, have sovereignty over the land and natural resources, and who govern their community by customary law and institution which sustain the continuity of their livelihood.”*⁴⁾

The AMAN-definition is largely inspired by and based on the ILO definition. It is gradually being accepted by national institutions and authorities, e.g. the Ministry of Fisheries and the National Human Rights Commission. The example shows that the statement of coverage of Convention No. 169 has implications beyond the territories of states that have ratified the Convention.

John Henriksen: Key Principles in Implementing ILO Convention No. 169, ILO, 2008.

Norway: Recognition of the Sami as an indigenous people

In 1990, Norway became the first State party to ratify Convention No. 169. In the ratification process, the National Parliament of Norway (the *Storting*), acknowledged the Sami people as an indigenous people in Norway in accordance with the statement of coverage of the Convention. This was a natural conclusion as the Sami territory, history, culture, traditions, language, livelihood, dress and feeling of belonging stretch beyond the territory of Norway. The Sami define themselves as a distinct people, different from the Finnish, Russian, Norwegian and Swedish peoples in the four countries they inhabit.

The Sami Act of 12 June 1987, which was adopted by the National Parliament three years prior to the ratification of the Convention, rests largely on the notion that Norway as a state is established

³⁾ English translation: The Indigenous Peoples' Alliance of the Archipelago.

⁴⁾ Adopted at the First AMAN Congress, 17 March 1999.



on the territory of two peoples, the Norwegians and the Sami, and that the Sami have lived within the territory of the present Norway prior to the establishment of the State. This fact distinguishes the Sami from minority groups in the country.

There is no formal definition of the term “Sami”, apart from the criteria in Section 2-6 of the Sami Act, which are connected with the right to participate in the elections to the Sami Parliament. Although these criteria have no formal legal relevance and significance outside the Act’s area of application, these criteria nevertheless indicate who are considered to be a Sami. The Sami Act stipulates the following criteria for the right to participate in the Sami Parliament elections:

“Everyone who declares that they consider themselves to be a Sami, and who either (i) has Sami as home language, or (ii) has or has had parents, grandparents or great-grandparents with Sami as home language have the right to be enrolled in the Sami census in the region of residence.”

The Sami Act uses both objective and subjective criteria in identifying who is to be regarded as a Sami. The fundamental element is the subjective self-identification as Sami: that a person considers

himself/herself to be a Sami and therefore belonging to the Sami people. The objective criterion is related to the Sami language; that the person himself/herself, or parents, grandparents or great-grandparents have or had Sami as their first language or home language. The term “Sami” not only identifies the Sami as a distinct people, it is also linked to the traditional territory of the Sami people – known as ‘Sápmi’.

The definition of the term “Sami” in the Norwegian Sami Act is based on the notion of “indigenesness” – although the term is not used. It is based on an acknowledgment that the Sami people have a particular and historical association with the traditional Sami territory, and that they inhabited this area prior to the establishment of the Norwegian State. It is based on recognition of the Sami society as a distinct society, very different from the majority Norwegian society.

John Henriksen: Key Principles in Implementing ILO Convention No. 169, ILO, 2008;

White Paper No. 52 (1992-93): Stortingsmelding nr. 51 (1992-93) – Om norsk samepolitikk.

Bolivia: Recognition of rights – statistical uncertainty

In Bolivia, indigenous peoples are key actors in the national political and social processes, and there is a very high degree of visibility and legal recognition of their rights. Bolivia has elevated both ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples to the status of national law (Ley de la República No. 1257 and No. 3760). The 2009 Constitution of Bolivia provides ample recognition of the pluralistic character of the state:

Article 1 – Bolivia is constituted as a Unitary Social State of Pluri-national Communitarian Law [*Derecho*], free, independent, sovereign, democratic, intercultural, decentralised and with autonomous areas. It is grounded on plurality and political, economic, legal, cultural and linguistic pluralism, within the country’s integration process.

Article 2 – Given the pre-colonial existence of the indigenous and aboriginal peasant nations and peoples and their ancestral control of their territories, their self-determination within the framework of State unity is guaranteed, which includes their right to autonomy, self-government and culture, and the

recognition of their institutions and the consolidation of their territorial entities, in accordance with this Constitution and the Law.

In order to operationalise indigenous peoples’ rights, the State needs to develop legal and operational criteria to identify who are the holders of such rights. However, defining who is indigenous and not, is one of the complex questions which has been discussed in Bolivia since the time of conquest and which is still not concluded.

There are three main reference points to the discussion on identification of indigenous peoples and individuals in Bolivia:

- 1.** The criteria arising from international legal instruments, namely those of ILO Convention No. 169, which are aligned with indigenous peoples’ own proposals;
- 2.** The legal definitions included in the Bolivian legislation;
- 3.** The operational definitions provided by the National Institute of Statistics (INE) and other institutions, based on information stemming from national Census and Surveys.

The criteria outlined in Convention No. 169 are reflected to varying degrees in the few definitions of indigenous peoples, which exist in the national legislation. The Supreme Decree 23858 (1994) describes indigenous peoples as:

- Human communities descending from populations that settled prior to the time of conquest or colonization and that are comprised within the present State boundaries; they have history, organization, language or dialect and other cultural characteristics which their members identify with acknowledging themselves as pertaining to the same social and cultural unit; they retain a territorial bond in terms of managing their habitat and their social, economic, political and cultural institutions
-

Although the normative definitions may appear clear, the operational application is highly complex and not yet fully resolved.

For example, one of the requirements for claiming “Communal Lands of Origin” (CLO), as indigenous

territories are called in Bolivia, is that the claimant is certified as an indigenous community by a public institution. In the rural Andes-region of Bolivia, which is characterized by a high degree of homogeneity in terms of cultural and social practices and institutions, virtually all communities can claim indigenous status. Moreover, even communities that have been established as an effect of migration from the Andes-region to the lowland areas of the Amazon-region would qualify. Therefore, the certification of “indigenous communities” has been reduced to a strictly administrative procedure, which does not resolve the underlying issue.

Another challenge is that different public institutions have developed different operational definitions. The National Institute of Statistics (INE), for example, includes several questions to identify the indigenous population in the census. These comprise:

- The language currently spoken;
- The language in which the person learned to speak (above 4 years);
- Self-identification as belonging to one of the

indigenous peoples of Bolivia (above 15 years of age)

In official publications, INE defines indigenous peoples only on the basis of the language spoken. By using the *spoken language* as the criteria, the official figure is that 49.9% of the Bolivian population is indigenous. However, the indigenous organizations and the public in general, see the criteria of *belonging to an indigenous people* as the more valid criteria. Based on this, the indigenous population constitutes 62% of the total population above 15 years of age.

In general, the use of an indigenous language as identification criteria is problematic, as it is influenced by a number of factors, including:

- Many people do not report their knowledge of an indigenous language, due to the still prevailing negative perception and stigmatization of indigenous language and identity;
- The expansion of the dominant language



(Spanish) and the reduction or disappearance of indigenous languages;

- The expansion of some indigenous languages at the expense of others; for example the Quechua language, which in many places is replacing the Aymara language. This makes the use of language as an identifier of ethnic identity much more complex;
- Territorial contexts, where the knowledge of a widely spoken language such as Quechua does not imply self-identification as indigenous;
- The disappearance of indigenous languages among the numerically small peoples in the lowlands of Bolivia.

Moreover, none of the sector-specific administrative registers, for example regarding health or education, include an identifier to distinguish the indigenous from the non-indigenous population. Therefore, it is not possible to monitor the specific impacts on the indigenous population of national programmes, and it is not possible to adequately set priorities for public investments to bridge the inequality gaps with regards to access to social services.

Although the recognition and implementation of collective rights is generally not dependent on the numerical size of an indigenous people, there are cases in which the number of individuals belonging

to a community or a people does matter. This is, for example the case when determining the extension of a collective territory (CLO), which is based on the calculation of the spatial need of a given group, calculated on the basis of their numbers, demographic growth and the characteristics of their social and productive organization.

In spite of a very advanced legal recognition in Bolivia of indigenous peoples' rights, there is thus still a need to further develop operational criteria, methodologies and procedures in order to overcome the "statistical invisibility" and better address the existing patterns of exclusions, inequality and differentiated access to social services.

Ramiro Molinas Barrios: Los Derechos de los Pueblos Indígenas en un Proceso de Cambio de la Naturaleza de la Nación y del Estado, ILO, 2009; <http://www.minedu.gov.bo/pre/ley/DS23858.pdf>; Características socio demográficas de la población indígena, INE, Bolivia, 2003.

Guatemala: Classification criteria in national census

In Guatemala, the understanding of the diverse indigenous identities has evolved and deepened over the last 30 years. This is reflected in the questions asked and the accepted categories of answers in the national censuses carried out from 1981-2002:

YEAR:	SOURCE:	CLASSIFICATION CRITERIA:
1981	IX Census	The criteria used was the "social estimate of the person", implying that the person gathering information for the census would make an assessment based on his or her own perception of whether a person belonged to the category "indigenous" or "not-indigenous"
1994	X Census	Respondents were asked the following questions: Are you indigenous? (yes/no) In which language did you learn to speak? (four main indigenous language groups + Spanish) Do you speak a Maya language? (four main indigenous language groups + Spanish) Do you wear Mayan clothes? (yes/no)
2002	XI Census	All respondents were asked the following questions: Are you indigenous? (yes/no) To which ethnic group do you belong? (27 options; 21 Maya groups, Xincas, Garífunas, Ladinos, none, other) Persons older than 3 years: Mother tongue? (27 options; 21 Maya languages, Xinca, Garífuna, Spanish, none, others?) Other languages? (27 options, 21 Maya languages, Xinca, Garífuna, Spanish, none, others)

UNDP: Informe de Desarrollo Humano, Guatemala, 2005.

Peru: Indigenous peoples in the census

In Peru, the 1st Census of Indigenous Communities in Peru, conducted in 1993, indicated that the country's indigenous population was comprised of 8 million Quechuas, 603,000 Aymaras and 299,000 indigenous people from the Amazon region, accounting for 40% of the Peruvian population. This was the only time that this type of census was conducted in Peru, as any reference to mother tongue or language spoken was eliminated from the 10th National Census in 2005 which, in practice, led to the statistical disappearance of the indigenous peoples. In the 11th National Census conducted in 2007, mother tongue was used as the sole identification criterion, despite the fact that indigenous organisations proposed other indicators for the identification of indigenous and Afro-descendant peoples.

<http://www.inei.gob.pe/>

Case prepared by Myrna Cunningham

Japan: Identifying Ainu

Historically, the Japanese Government has not recognized the Ainu as an indigenous people. The 1899 Hokkaido Aboriginal Protection Act was the first legal instrument on the issue, but aimed at assimilating the Ainu into Japanese culture. This was changed with the 1997 Ainu Culture Promotion Law, which aims at preserving the Ainu culture. The law recognizes the Ainu as an ethnic group in Hokkaido and guarantees, inter alia, social welfare assistance to the Ainu living in Hokkaido. However, it does not acknowledge the rights of the Ainu living outside of Hokkaido and does not provide for the rights to practice and further develop Ainu culture in general. This limited approach was also reflected in the 2006 survey, which only covered the Ainu living in communities with a significant Ainu population in Hokkaido, while Ainu living in other areas were automatically excluded. Self-identification is another challenge, as most Ainu have inter-married with Japanese and have moved to different regions. Moreover, many parents decide not to tell their children that they have Ainu ancestors in hopes of protecting the children from the social stigma that is still widespread. For these reasons, identifying oneself as Ainu or having access to or knowledge of one's family background may be difficult.

Therefore, the estimated figures of Ainu who have

mixed Japanese descent range from about 25,000 to one million persons. This extremely loose estimate has become a political rallying point for Ainu activists to force government attention to their issues, while the figures do not necessarily reflect the personal identity of all those with mixed Ainu and Japanese origin.

There is also a recent trend within certain sectors of Japanese society that it has become fashionable to be identified as Ainu, since Ainu culture is looked upon as holy or spiritual. It thus seems that some people identify themselves as Ainu without any background. This has created some friction in the Ainu community, as it is considered crucial to have a family background or community recognition in order to identify oneself as Ainu. Self-identification is not enough to legitimize "Ainuness" in the community. June 6, 2008, marked a historical day as the Japanese Parliament passed a resolution, calling for the recognition of the Ainu as an indigenous people of Japan. On the same day, the Chief Cabinet Secretary made a statement, recognizing that the Ainu people is indigenous to the northern part of the Japan archipelago, especially Hokkaido, and that they, as an indigenous people, possess a unique language, religion and culture. He further announced the establishment of a "Governmental Panel of Experts on Ainu Affairs". The Panel will undertake a review of Ainu matters, with the purpose of improving its policy for the Ainu. The final report from the committee is scheduled to be finalized in the summer 2009. Until this, it is still not clear whether the Government's recognition of the Ainu as an indigenous people implies full recognition of the rights that are ascribed to indigenous peoples under the ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples.

This recent policy development has also strengthened the Ainu movement, which is now discussing the integration of separate Ainu organizations into one larger umbrella organization or network, thereby overcoming previous frictions. This collective way of working is unifying all parties, especially among Ainu themselves. The friction within the Ainu community has always been problematic, but these recent events seem to be bringing a positive change into the movement.

Kanako Uzawa: Challenges in the process of self-recognition, ILO, 2008.



**II.
THE CONCEPT OF
INDIGENOUS PEOPLES
IN THE CONTEXT OF RIGHTS**

As opposed to the previous ILO Convention No. 107, adopted in 1957 on “indigenous and tribal populations”, Convention No. 169 uses the term “peoples”.¹⁾ It was decided during the discussions leading to the adoption of Convention No. 169 that this term was the only one which could be used to describe indigenous and tribal peoples: “there appears to be a general agreement that the term “peoples” better reflects the distinctive identity that a revised Convention should aim to recognise for these population groups” (International Labour Conference, 75th Session. *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (no. 107)*. Report VI(2), Geneva 1988, pp. 12-14).

However, during the adoption of Convention No. 169 in 1989, the ILO’s mandate being economic and social rights, it was considered outside its competence to interpret the political concept of self-determination. For this reason, a disclaimer as regards the understanding of the term “peoples” was included in Article 1(3):

ILO Convention No. 169, Article 1(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.

The objective of Article 1(3) was thus to avoid international legal questions related to the concept of “peoples”, in particular the right to self-determination, which is acknowledged as a right of “all peoples”, as provided for in common article 1 of the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICECSR).

With the adoption of the UN Declaration on Rights of Indigenous Peoples in 2007, the international community has acknowledged indigenous peoples’ right to self-determination:

1) The Indigenous and Tribal Populations Convention, No. 107 (1957) was revised by Convention No. 169. It is therefore no longer open for ratification, but remains in force in a number of countries (e.g. Bangladesh, India and Pakistan).

The **UN Declaration on the Rights of Indigenous Peoples** identifies indigenous peoples as “peoples” with the right to self-determination:

Article 3

Indigenous Peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

The Declaration recognizes that indigenous peoples, based on the right to self-determination, have the right to freely pursue their economic, social and cultural development. This right cannot be realized unless their practices, customs, priorities and institutions are fully acknowledged.

James Anaya (2008; cited in Henriksen 2008), the UN Special Rapporteur on the human rights and fundamental freedoms of indigenous peoples, notes that the Declaration represents a break with the historical and ongoing denial of indigenous peoples’ right to self-determination, and calls upon states to remedy that denial.

The remaining articles of the Declaration elaborate upon the elements of self-determination for indigenous peoples in light of their common characteristics and mark the parameters for measures to implement a future in which self-determination for them is secure. The Declaration requires that states, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of the Declaration (Article 38); including “autonomy or self-government” for indigenous peoples over their “own internal and local affairs” (Article 4), in accordance with their own institutions, practices and customs.

The Government of Sweden has recently on two occasions (UN Documents E/C.12/SWE/5 2006 and CCPR/C/SWE/6 2007) explicitly acknowledged that indigenous peoples, including the Sami in Sweden, have the right to self-determination under common Article 1 of ICCPR and ICESCR: “It is the view of the Government of Sweden that indigenous peoples have the right to self-determination insofar as they constitute peoples within the meaning of common Article 1 of the 1966 International Covenant on Civil and Political Rights and 1966 International Covenant on Economic, Social and Cultural Rights” (UN Document CCPR/C/SWE/6 2007: para 5).

Also, the Danish 2008 Act on Greenland Self-Government (see section 4.2.) is explicitly built on recognition of the right to self-determination of the people of Greenland under international law.

Another example in this regard is the draft Nordic Sami Convention (see section 13.2.), formulated by a Nordic expert group in November 2005 (Nordisk Samekonvensjon 2005),²⁾ which recognizes the Sami as “a people” with the right to self-determination. *John Henriksen: Key Principles in Implementing ILO Convention No. 169, ILO, 2008.*

While Convention No. 169 is silent on the issue of self-determination, it does provide for participation, consultation, self-management and the right of indigenous peoples to decide their own priorities, all of which are important mechanisms for the realization of the right to self-determination as reflected in the Declaration.

Also, it is important to note that Convention No. 169 does not place any limitations on the right to self-determination or on the obligations that States may have under the broader body of international law regarding indigenous peoples in relation to this right.

In addition, Article 35, consistent with Article 19(8) of the ILO Constitution, clarifies that Convention No. 169 sets out minimum standards, the application of which should not adversely affect more favourable rights granted at the national level or through international instruments ratified or accepted by the country in accordance with international treaty law:

ILO Convention No. 169, 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.

Article 19(8) of the ILO Constitution

In no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation.

The provisions of Convention No. 169 and the Declaration are thus compatible and mutually reinforcing. The Declaration’s provisions deal with all the areas covered by the Convention. In addition, the Declaration affirms rights that are not covered by the Convention, including the right to self-determination.³⁾

2) An unofficial English translation of the draft convention is available at the Norwegian Government’s website: <http://odin.dep.no/filarkiv/280873/>.

3) For more information see: Information Note for ILO staff and partners: ILO standards and the UN Declaration on the Rights of Indigenous Peoples, 2008, available at <http://www.pro169.org>.



III. GOVERNMENT RESPONSIBILITIES



All over the world, deep-rooted inequalities exist between indigenous peoples and the dominant communities within state boundaries. ILO Convention No. 169 and the UN Declaration call upon governments to ensure indigenous peoples' fundamental rights and work together with indigenous communities to end discrimination both as it relates to inequalities in *outcomes* – differences in health, education, employment, etc – and as it relates to inequalities in the *processes* of governance – participation and involvement of indigenous peoples in decision-making, government institutions and programs. To achieve these ends, the Convention specifies the need for a) *coordinated and systematic action*, which will ensure the integration of indigenous rights into government structures across sectors and programs; b) reaffirms that indigenous peoples must enjoy all *fundamental rights*, granted to all citizens and c) provides for *special measures*, in order to eliminate discrimination.

3.1. COORDINATED AND SYSTEMATIC ACTION

Indigenous peoples' situation is the result of historical discrimination processes that have influenced all aspects of their lives and which cut across sectors and transcend administrative borders and institutional structures. This is reflected in the broad scope of Convention No. 169, covering the whole range of issues pertaining to indigenous peoples' rights and well-being. Consequently, Convention No. 169 explicitly calls for governments to undertake *coordinated and systematic action* to ensure that all the provisions of the Convention are fully implemented. This is reflected in Article 2 of the Convention:



Convention No. 169, Article 2:

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.

Article 2(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 2 of the Convention specifies that the purpose of government action is to ensure equality in terms of rights and opportunities and eliminate the socio-economic gap between indigenous peoples and other sectors of society while recognising their special rights, needs and aspirations as peoples. Practically, coordinated and systematic action implies undertaking comprehensive reviews and revisions of laws, policies, programmes and projects to ensure that these are all aligned with the provisions for indigenous peoples' rights as well as the establishment of adequate monitoring mechanisms to continuously assess the situation of indigenous peoples. All such action should be undertaken with the participation of indigenous peoples and with due respect to their social and cultural identity, customs, traditions, institutions, aspirations and ways of life. The provisions on co-ordinated and systematic action are thus naturally linked to those on consultation and participation (see section 5).



The ILO supervisory bodies have emphasized that such coordinated and systematic action is the “key to overcoming the deep-seated and enduring inequality that affects indigenous peoples” (Governing Body, 289th Session, March 2004, Representation under article 24 of the ILO Constitution, Mexico, GB.289/17/3: para.133). This is a crucial message, as indigenous peoples’ rights are sometimes wrongly interpreted as providing more privileges and advantages to indigenous peoples than to other sectors of society. On the contrary, recognition of indigenous peoples’ rights is the prerequisite for these peoples to participate and benefit on an equal footing in the national society and is as such an instrument to eliminate discrimination.

20 years after the adoption of Convention No. 169, and following the 2007 adoption of the UN Declaration on the Rights of Indigenous Peoples, it is generally acknowledged that the challenge is to convert these rights into practical realities, through adequate measures and implementation mechanisms. Convention No. 169 contains a series of specific provisions on implementation to guide the process. At the general level, the ILO supervisory bodies have often emphasized the need to read Article 2 on coordinated and systematic action in conjunction with Article 33 on the establishment of appropriate institutions and mechanisms:



Convention No. 169, 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.

Committee of Experts: general observation 2008, published 2009.

Articles 2 and 33 of the Convention, read together, provide that governments are under an obligation to develop, with the participation of indigenous and tribal peoples, coordinated and systematic action to protect the rights and to guarantee the integrity of these peoples. Agencies and other appropriate mechanisms are to be established to administer programmes, in cooperation with indigenous and tribal peoples, covering all stages from planning to evaluation of measures proposed in the Convention.

Again, the Convention underlines that the participation of indigenous peoples in the planning, coordination, execution, supervision and evaluation of such institutions and mechanisms is crucial as is the provision of adequate resources.

The UN Declaration on the Rights of Indigenous Peoples has similar provisions on the states' responsibilities:

The UN Declaration on the Rights of Indigenous Peoples:

Article 8(2)

States shall provide effective mechanisms for prevention of, and redress for:

- (a)** Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
- (b)** Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- (c)** Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
- (d)** Any form of forced assimilation or integration;
- (e)** Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 15(2)

States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

According to the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, implementing the UN Declaration will normally require or may be facilitated by the adoption of new laws or the amendment of existing legislation at the domestic level, as envisaged by Article 38 of the Declaration which calls for appropriate "legislative measures". Also new regulatory frameworks will normally be required, as those in place in most countries are still lacking or insufficient. The Special Rapporteur highlights that the legal and institutional transformations required by the Declaration are usually not sufficiently addressed solely by enacting specific "indigenous laws", as many states have done, but rather will normally also involve the transformation of broader legal structures in key areas (UN Document A/HRC/9/9 2008: para. 50).



Coordination on indigenous issues within the UN system:

In 2001, the UN Permanent Forum on Indigenous Issues (UNPFII) was established, comprised of eight government and eight indigenous representatives. The UNPFII meets every year, and thousands of indigenous representatives from all over the world use the opportunity to present and discuss their issues and experiences. With the establishment of the Permanent Forum, indigenous peoples have gained an important platform within the UN from which they aspire to ensure that indigenous issues are taken into consideration in all activities of the UN-System.

The mandate of the UNPFII is to provide expert advice and recommendations to the UN Economic and Social Council (ECOSOC) and the UN system in general on issues of importance for indigenous peoples. These recommendations can address almost every aspect of indigenous peoples' lives – namely economic and social development, culture, the environment, education, health and

human rights. Furthermore, the Forum shall raise awareness and promote the integration and coordination of activities related to indigenous issues within the UN system and prepare and disseminate information.

In parallel, more than 30 UN agencies, funds and programmes have established the Inter-Agency Support Group (IASG). The aim of the IASG is to support the UNPFII and in general coordinate among its members to better promote indigenous peoples' rights throughout the UN system. This is in accordance with Article 42 of the UN Declaration on the Rights of Indigenous Peoples, which stipulates that:

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

See more at: www.un.org/esa/socdev/unpfii

3.2. FUNDAMENTAL RIGHTS

Fundamental rights are inalienable and inherent human rights that every human being has from birth, regardless of race, ethnicity, gender, religion, class as well as indigenous origin and identity. Indigenous peoples are entitled to enjoy all human rights and fundamental freedoms, as does everyone else. Such basic rights include the right to liberty and equality, as well as rights to citizenship, to health, education, etc. These fundamental rights apply equally to men and women.

It may seem needless or redundant to state that indigenous peoples should enjoy such fundamental rights but, unfortunately, their histories are often marked by genocide, ethnocide, discrimination, forced labour – and, in many cases, violations of their fundamental rights still continue. Current violations of fundamental rights can, for example, take the form of denial of citizenship, bonded labour and human trafficking or restricted access to education and health services. Often, women are more affected by such violations than men.



ILO Convention No. 169:

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 (3)

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

Article 20(2)

Governments shall do everything possible to prevent any discrimination between workers belonging to the peoples concerned and other workers [...]

Article 20(3)

The measures taken shall include measures to ensure: [...] (d) that workers belonging to these peoples enjoy equal opportunities and equal treatment in employment for men and women, and protection from sexual harassment.

The UN Declaration on the Rights of Indigenous Peoples also has a strong focus on indigenous peoples' right to enjoy human rights and fundamental freedoms, including in the following articles:

The ILO Declaration on Fundamental Principles and Rights at Work sets out four categories of fundamental principles and rights at work, namely:

- (a)** freedom of association and the effective recognition of the right to collective bargaining;
- (b)** the elimination of all forms of forced or compulsory labour;
- (c)** the effective abolition of child labour;
- (d)** the elimination of discrimination in respect of employment and occupation.

It also "declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership of the ILO to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions". ILO Convention No. 169, in Articles 20(2) reinforces these fundamental rights (see also section 12):

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Specific mechanisms on indigenous peoples within the UN Human Rights Council.

Within the United Nations, the Human Rights Council deals with human rights and fundamental freedoms for all. The task of the Council is to promote universal respect for the protection of human rights and to address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon. The Human Rights Council (HRC) was established in 2006 and consists of 47 UN Member-States. A number of UN processes dealing specifically with indigenous peoples fall under the HRC. Among these are the *Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people and the Expert*

Mechanism on the Rights of Indigenous Peoples (EMRIP).

The EMRIP was established in December 2007, in order to provide the HRC with studies and research-based advice on the best means to develop and mainstream international standards that promote and protect the human rights of indigenous peoples. The Experts will point out measures to ensure implementation of the rights of indigenous peoples, among other things by reviewing and evaluating best practices and obstacles for the promotion and protection of indigenous peoples' rights. EMRIP reports annually to the Human Rights Council on its work.

The UN Special Rapporteur has a mandate to, among others:

- Examine ways and means of overcoming existing obstacles to the full and effective protection of the human rights and fundamental freedoms of indigenous peoples;
- Gather, request, receive and exchange information and communications from all relevant sources on alleged violations of indigenous peoples' human rights and fundamental freedoms;
- Formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of indigenous people.
- In the fulfillment of his mandate, the Special Rapporteur:
- Presents annual reports on particular topics or situations of special importance regarding the promotion and protection of the rights of indigenous peoples;
- Undertakes country visits;
- Exchanges information with Governments concerning alleged violations of the rights of indigenous peoples;
- Undertakes activities to follow-up on the recommendations included in his reports.

See more information at: <http://www.ohchr.org>

3.3. SPECIAL MEASURES

In cases where indigenous peoples are in a disadvantaged position, due to lack of recognition and protection of their right as well as inequalities generated through historical processes of discrimination and marginalization, there may be a need for *special measures* to overcome this situation. This is reflected in Article 4 of Convention No. 169:

Convention No. 169, 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.

In addition to the general provision for special measures in Article 4, a number of specific provisions refer to the development of special measures, for example related to protection of lands (Article 14.2) and the environment (Article 7.4), employment (Article 20), health (Article 25s) and education (Article 28).

Rather than amounting to “additional” rights or privileges, special measures to protect the institutions, property, labour, cultures and environment of indigenous peoples are legitimate and called for under the Convention because their ultimate objective is to ensure that indigenous peoples enjoy all human rights, in line with everyone else. Special measures are not deemed to be discriminatory vis-à-vis the non-indigenous part of the population.¹⁾

1) ILO Convention No. 111, which addresses discrimination in employment and occupation, provides that “Special measures of protection or assistance provided in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination” (Article 5.1).

International human rights law imposes obligations on states to respect protect and fulfill internationally recognized human rights. The special measures envisaged in the Convention are of particular importance in this context.

Special measures aiming at the achievement of effective equality - e.g. a quota system to ensure equal access of indigenous and tribal peoples to civil service employment would have to be ended once their objective has been achieved. On the other hand, positive measures may be necessary on a continuing basis, e.g. measures to protect indigenous cultures, environment or lands rights.

Article 27 of the **International Covenant on Civil and Political Rights** stipulates that persons belonging to ethnic religious or linguistic minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. In its General Comment No. 23 (1994) on article 27, the Human Rights Committee stated: “[A] State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.

The Human Rights Committee also observed that “as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria” (UN doc. CCPR/C/21/Rev.1/Add.5).

3.4. KEY PROVISIONS FOR IMPLEMENTATION

In summary, the key provisions of Convention No. 169 with regards to implementation point to the duality of the overall purpose:

- To overcome discrimination and ensure that indigenous peoples benefit on an equal footing in the national society (see also section 3.2. on fundamental rights);
- To ensure that indigenous peoples can develop their social and cultural identity, customs, traditions and institutions, in accordance with their own aspirations (see also section 4 on respect for indigenous institutions).

Consequently, the Convention reflects this duality in the suggested implementation mechanisms, which aim at:

- Ensuring that indigenous peoples have equal access to rights and services within the national society and that the concern for indigenous peoples is considered in all sectors (mainstreaming);
- Overcoming the marginalization and discrimination of indigenous peoples and responding to their special needs, rights and aspirations.

The key elements for ensuring adequate implementation are:

- Coordinated and systematic action, ensuring coherence among the various government institutions that hold responsibilities vis-à-vis indigenous peoples;
- Establishment of adequate institutions and mechanisms with the necessary resources that enable them to fulfill their function;
- Development of special measures to safeguard the persons, institutions, property, labour, cultures and environment of indigenous peoples;
- Establishment of institutionalized mechanisms that ensure adequate consultation and

participation of indigenous peoples in all stages of implementation, including planning, co-ordination, execution and evaluation (see also section 5).

In most cases, coordinated and systematic action is a longer-term process that will require a number of simultaneous and complementary steps:

- Careful analysis and amendment of existing laws, policies and programs in all sectors, in consultation with the peoples concerned, to ensure that these are in line with the Convention;
- Enactment of new legislation or regulations where necessary, and following consultation to make the provisions of the Convention operational;
- Establishment of specific institutions to promote and implement indigenous peoples' rights, or - particularly in countries with a large indigenous population - institutions to coordinate the implementation, across sectors and levels of governance;
- Establishment of permanent mechanisms at all levels of governance for indigenous peoples' participation in decision-making, including for the planning, implementation, monitoring, evaluation and reporting on implementation measures;
- Establishment of clear priorities and timeframes for implementation, in order to generate collaboration and minimize risk of conflict;
- Assignment of necessary budgetary resources, both for specific actions and for mainstreaming efforts across sectors;
- Awareness-raising, training and capacity-building of indigenous representatives and communities, decision-makers, government officials, judges, media as well as the public in general.

(See also section 14 on implementation and supervision of the Convention).

3.5. COMMENTS BY THE ILO SUPERVISORY BODIES: COORDINATED AND SYSTEMATIC ACTION

Mexico: Coordinated and systematic action at all levels of governance

In 2004-5, the ILO's supervisory bodies dealt with a set of extensive allegations regarding non-implementation of Convention No. 169, including in the context of constitutional reforms at both the federal and state levels in Mexico. Considering that some provisions of the reforms delegated the responsibility for regulating matters such as the criteria for recognition of indigenous peoples and communities to federated entities, the Committee of Experts underlined the importance of Article 2 of the Convention and requested the Government to "take the necessary measures to ensure, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of indigenous peoples and to guarantee that, when adopting the relevant legislative and administrative measures, both at the level of the federal Government and of state assemblies, the

rights set forth in the Convention are guaranteed as a minimum common denominator" (Committee of experts, 75th Session, 2004, Observation, Mexico, published 2005).

Furthermore, making reference to the general framework of discrimination existing in Mexico and noting that in effect the socio-economic situation of indigenous populations is inferior to that of the population in general, the Committee stressed the need for a particular effort by the Government to end this situation and emphasized that this is the task that the Government itself undertook when ratifying Convention No. 169.

The Committee also noted the programmes formulated by the Government to achieve equality for indigenous peoples and underlined that "increasing the number of isolated plans is not sufficient to achieve an effective inclusion policy. It is not entirely clear where the complementary nature and coordination between the programmes described by the Government lies".



The Committee stressed that full and effective application of Article 2 on coordinated and systematic action “is key to overcoming the deep-seated and enduring inequality that affects indigenous peoples”. Therefore, it requested the Government that, “when establishing the various development plans and programmes for the peoples concerned, it ensures that these fall within a framework of coordinated and systematic action, with the full participation of the indigenous peoples”. *Governing Body, 289th Session, March 2004, Representation under article 24 of the ILO Constitution, Mexico, GB.289/17/3.*

Bolivia: Coordinated and systematic action.

In 2004, the Bolivian Government reported to the Committee of Experts that, “in a context of great dispersion of the support provided for indigenous development, a structured approach has been developed focusing on fundamental aspects and the ethnic democratization of the country”. In 2003, a Ministry had been created with responsibility for Indigenous Affairs and Aboriginal Peoples (MAIPO) as the leading state body for indigenous matters, “responsible for ensuring the preparation and implementation of standards, policies, programmes and projects relating to indigenous peoples, even though other ministries, such as the Ministry of Mining and Hydrocarbons, also manage projects relating to indigenous matters in their fields of competence”.

The Government indicated that, in order to facilitate the participation of indigenous peoples, an Advisory Council had been established, composed of six government representatives and six representatives of indigenous organizations. The Council has operated on an irregular basis, particularly due to the constant rotation of the personnel of both the state bodies and indigenous organizations, but the Government indicated that priority is to be given to its reactivation and consolidation.

The Committee of Experts expressed concern at the irregular functioning of the machinery for participation and consultation and emphasized that “the achievement of permanent dialogue at all levels, as required by the Convention, would contribute to preventing conflict and building an inclusive model of development”. Furthermore, the Committee noted

that “the fundamental problem for the application of the Convention is not so much the absence of legislation, as the difficulties in its implementation” and urged the Government to redouble its efforts to achieve the coordination of existing programmes, with the participation of indigenous peoples at all stages of their implementation, from planning through to evaluation.

Furthermore, the Government indicated that practices of exclusion and discrimination continued to affect public policies (lack of clarity and precision, particularly in the promotion of equitable economic development) and the formulation and implementation of laws. The 1995 changes to the Constitution opened up new and substantial possibilities to reverse the situation of exclusion which had historically affected indigenous peoples. The special measures developed in this regard included the creation of Indigenous Municipal Districts (DMI). However, the implementation encountered difficulties, due to the discontinuous nature of indigenous lands; the dual frontiers between the political division of the State and indigenous lands, which had given rise to the overlapping of territories; the granting of title to community lands, which had not always followed municipal limits and given rise to incompatibilities between public ownership, private property and communal property; and the establishment of municipalities without considering their viability, combined with a centralized distribution of resources.

Committee of Experts, 76th Session, 2005, Individual Direct Request, Bolivia, submitted 2006.

Guatemala: The need for continuous dialogue on application

In 2007, the Committee of Experts noted that a coordinating body (the Indigenous Interinstitutional Coordination of the State) had been set up in Guatemala, comprising 29 state institutions involved in indigenous issues with the purpose of coordinating and advising on public policy relating to indigenous peoples. The Committee of Experts recalled that Articles 2 and 33 of Convention No. 169 provide for coordinated and systematic action with the participation of indigenous peoples from the conception through to the evaluation stages of the measures provided for in the Convention.

It emphasized that consultation “extends beyond consultation on specific cases: it means that application of the provisions of the Convention must be systematic and coordinated and undertaken in cooperation with the indigenous peoples as part of a gradual process in which suitable bodies and machinery are established for the purpose”. *Committee of Experts, 77th Session, 2006, Observation, Guatemala, published 2007.*

Argentina: Development of adequate mechanisms, at federal and provincial levels

In Argentina, several initiatives were taken in 2006-7 to strengthen the institutional basis for better implementation of Convention No. 169, particularly the bodies responsible for coordinated and systematic action (Articles 2 and 33 of the Convention), and those responsible for consultation, participation and representativeness issues.

In this context, an Indigenous Participation Council (CPI) was established, with a mandate that included ensuring indigenous peoples’ participation in the alignment of domestic legislation with Convention No. 169. Also, the CPI set up a bureau for the coordination of representatives at regional level. In a second stage, a Coordinating Council will be established, consisting of representatives of the Ministries of the Interior, the Economy, Labour, Education and Justice, the provinces and the indigenous peoples to oversee the National Register of Indigenous Communities, identify problems and establish priorities for solving them, and setting up the programme of activities of the National Institute for Indigenous Affairs (INAI) for the long- and medium-term.

The Committee of Experts noted with interest that the Government is laying the institutional bases for coordinated and systematic application of the Convention, and expressed the hope that the Government would pursue its efforts to strengthen these bodies in order to broaden the institutional basis for further participation of indigenous peoples in public policies affecting them, in accordance with Articles 2 and 33 of the Convention.

With regards to federalism, the Committee of Experts noted “that the Government refers to difficulties in applying some key provisions of the

Convention, such as those pertaining to land and natural resources, because of the deepening of federalism that occurred following the constitutional reform of 1994 which placed responsibility for these matters in the hands of the provinces”. The Committee noted the priority given to establishing federal competence for matters involving indigenous communities and peoples. The Constitution of the Argentine Republic provides for involvement of the provinces in the issuing of legislation, which means that the provinces can take part in developing the rights of indigenous peoples and communities in law, provided they recognize the minimum fundamental rights laid down in the national Constitution. In this context, it is important to note that in Argentine law international treaties (such as Convention No. 169) take precedence over national law (Constitution, Arts. 31 and 75, para. 22).

The Committee expressed the hope that the national Government would take the necessary steps to disseminate the rights laid down in the Convention among provincial governments and parliaments, and that it would make use of the abovementioned participation to ensure that the provincial parliaments develop legislation that meets the requirements of the Convention.

Committee of Experts, 77th Session, 2006, Observation, Argentina, published 2007; 79th Session, 2008, Argentina, published 2009; Governing Body representation, 2008, GB. 303/19/7.

3.6. PRACTICAL APPLICATION: GOVERNMENT RESPONSIBILITIES

3.6.1 Coordinated and systematic action

Nepal’s Task Force for the implementation of Convention No. 169

Nepal ratified ILO Convention No. 169 in 2007 and established a high-level government Task Force to review existing government programmes and policies and prepare a comprehensive plan for the implementation of the Convention. The Task Force was comprised of representatives from 15 relevant ministries as well as indigenous representatives from the National Foundation for the Development of Indigenous Nationalities (NFDIN) and the Nepal



Federation for Indigenous Nationalities (NEFIN).

The main objectives of the Task Force were as follows:

- (a)** Clearly identify the government responsibilities on the basis of the provisions of the Convention;
- (b)** Clearly identify those provisions of the Convention that have been implemented by the government;
- (c)** Develop and present a detailed Action Plan that identifies activities to be implemented with a view to reform of legal, administrative and policy matters and while formulating this plan, consideration will be given to priorities determined by indigenous nationalities and the capacity of the Government;
- (d)** Provide recommendations on establishment of necessary mechanism to coordinate implementation activities at the central and local level.

The Task Force established focal points in each of the ministries and carried out a series

of consultations with indigenous peoples' representatives and other stakeholders. Within a ten month period, the Task Force produced a legal and policy review identifying gaps between the provision of the Convention and existing Nepali law. Based on this, the Task Force developed a National Action Plan for Implementation of the Convention. National consultations on the draft plan were carried out in November 2008 with representatives from the 59 recognized indigenous nationalities, as well as other indigenous representatives. As of March 2009, however, the plan had not been finally endorsed by the Government.

The approach taken to implementation in Nepal is noteworthy particularly for its coordinated nature, both in bringing all of the main government stakeholders together in a high-level Task Force and in proposing comprehensive review and reform of existing legislation and programmes to ensure integration of the Convention into all relevant government sectors. The Task Force itself is no longer active, following the submission of the Action Plan and the completion of its mandate, but it is expected that another high-level coordination

mechanism will take its place.
Programme to Promote ILO Convention No. 169, project reports Nepal, 2008-9.

Bolivia: Mainstreaming indigenous peoples' rights in the state apparatus

In Bolivia, the State historically has pursued a goal of “integrating” indigenous peoples, in order to build a homogenous nation. However, in the second half of the 20th century, it became increasingly clear that these efforts had failed and that indigenous peoples maintained their identity as distinct peoples. Recognition of indigenous peoples as distinct peoples was reflected in the institutional structure established to address indigenous issues.

The first institution established was the Bolivian Indigenist Institute, which was established already in the 1940s, but was essentially an ignored agency until the emergence of a strong indigenous movement in the 1990s. In 1993, the agency was replaced by the National Secretariat for Ethnic, Gender and Generational Issues. In 1994, the Vice-Ministry of Indigenous Issues and Aboriginal Peoples was established, followed in 2000 by the Ministry of Peasant Issues and Indigenous and Aboriginal Peoples. Under this Ministry, a Vice-Ministry for Indigenous Affairs was created. In 2003, the Government established the Ministry of Indigenous Affairs and Aboriginal Peoples.

Throughout this process, the main challenge was to define a new relationship between indigenous peoples and the State, the Government and society at large. In this context, one of the key problems was the invisibility of the indigenous population, as indigenous peoples were not recognized in government policies, structures and institutions as distinct peoples with specific rights. Some of the factors leading to this invisibility were:

- Weak implementation of existing standards as well as slow elaboration of new standards to recognize indigenous peoples' rights in the Constitutions and within specific sectors;
- Fragmentation of policies and sectoral programmes related to indigenous peoples;
- Weak reflection of indigenous peoples' rights in sectoral policies and programmes as well as lack of administrative regulations and procedures, including for monitoring

and evaluating the impact of programmes to eradicate poverty and reach the Millennium Development Goals;

- Lack of mechanisms to gather periodic information from key administrative registers such as health and education.

These problems also contributed to the difficulties encountered in developing an adequate institutional structure to implement indigenous peoples' rights. The successive institutions were all characterized by limited institutional capacity and political influence, limited financial resources and staff, non-qualified staff, limited scope of activities and meager results.

The change of government in Bolivia in 2006 implied a radical shift in policies vis-à-vis indigenous peoples. The National Development Plan 2006-10 does not have a specific focus on indigenous peoples but includes the rights of indigenous peoples as a cross-cutting theme, as the basis for all government policies throughout the Plan.

The Plan is oriented towards the “decolonisation” of the State, implying “in the area of politics, to accept the political practices of the dominated and excluded peoples; in the area of economy, to recognize the economies of the agricultural and nomadic peoples as well as those of the urban communities” (Plan Nacional de Desarrollo de Bolivia 2006-10).

Similarly, the current institutional structure of the State does not contemplate a specific institution with responsibility for indigenous peoples' rights. The Government has publicly stated that in a country like Bolivia, with a majority indigenous population, these rights cannot be addressed by a single Ministry but must be addressed by the entire State apparatus. Consequently, all government policies and programmes must contribute to the implementation of indigenous peoples' rights as recognized in the Constitution and in legislation, with the full participation of indigenous peoples' organizations.

In this context, the Government has prioritized a few specific programmes in the Ministry of Development Planning and the Ministry of the Presidency, aimed at mainstreaming indigenous peoples in development strategies, policies and programmes at national and provincial levels as well as in the executive, legislative

and judicial branches. The mainstreaming efforts include action at national and provincial levels to raise awareness and sensitize the general population on indigenous peoples' rights.

In addition, the Ministry for Rural Development, Agriculture and Environment has a special vice-Ministry on Lands and Territories to address issues related to Communal Lands of Origin (CLO). *Ramiro Molinas Barrios: Los Derechos de los Pueblos Indígenas en un Proceso de Cambio de la Naturaleza de la Nación y del Estado, ILO, 2009.*

Ecuador: Development Council

There are 14 officially recognized indigenous peoples in Ecuador. In late 2006, the UN Special Rapporteur on indigenous issues pointed out that “[w]hile the 1998 Ecuadorian Constitution embodies specific collective rights for indigenous peoples and nationalities in various fields, these have yet to be incorporated into the corresponding secondary legislation, making their full implementation difficult”. It was furthermore noted that the Government had established a number of state institutions to address the situation of indigenous peoples, creating opportunities for indigenous people to participate in the implementation of government policies.

The 2007 Law on Public Institutions of the Indigenous Peoples of Ecuador,²⁾ regulates the composition and mandate of the Council for the Development of the Nations and Peoples of Ecuador. Under the Law, the Council is charged with defining public policies and strategies to promote the sustainable development and the improvement of social, economic and spiritual conditions of the indigenous peoples of Ecuador. The Council is governed by two different executive boards, namely the Council of Indigenous Nationalities and Peoples and the National Executive Council. While the former is constituted exclusively by indigenous representatives, the National Executive Council includes a representative of the President of the Republic, who chairs the Committee. *http://www.codenpe.gov.ec;*
R. Stavenhagen, Report of the mission to Ecuador, UN Doc. A/HRC/4/32/Add.2, 28 December 2006.

2) Ley Orgánica de las Instituciones Públicas de Pueblos Indígenas del Ecuador que se Autodefinen como Nacionalidades de Raíces Ancestrales.

Philippines: The National Commission on Indigenous Peoples.

In the Philippines, indigenous peoples represent approximately 15-20% of the total population. The legal framework for the protection of their rights is provided by the Indigenous Peoples Rights Act (IPRA) of 1997. Pursuant to this Act, the National Commission on Indigenous Peoples (NCIP) was established as an independent agency under the Office of the President.

NCIP is “the primary government agency responsible for the formulation and implementation of policies, plans and programs to promote and protect the rights and well-being of the Indigenous Cultural Communities/Indigenous Peoples (ICC/IPs) and the recognition of their ancestral domains” (IPRA, section 38). The NCIP is composed of seven Commissioners belonging to ICCs/IPs. The Commissioners are appointed by the President of the Philippines from a list of recommended candidates submitted by indigenous peoples. Additionally, it should be noted that section 16 of the Indigenous Peoples Right Act stipulates that “the State shall ensure that the ICCs/IPs shall be given mandatory representation in policy-making bodies and other local legislative councils.”

http://www.ncip.gov.ph;

R. Stavenhagen, Report of the mission to the Philippines, UN Doc. E/CN.4/2003/90/Add.3, 5 March 2003.

Venezuela: Recognition in Constitution and legislation.

Venezuela is home to approximately 27 different indigenous groups. In 1999, a new Constitution was passed which, for the first time, recognized indigenous peoples' rights. It was drafted by a Constituent Assembly, composed of 131 members, three of which were elected exclusively by indigenous peoples. This represented an important watershed in the political participation of indigenous peoples in the political life of the nation. Indigenous peoples' right to political participation is now enshrined in article 125 of the Constitution, which affirms the State's obligation to ensure their representation in the National Assembly. In this connection, the 2005 Organic Act on Indigenous Peoples and Communities establishes that indigenous peoples must be represented in the

National Assembly by at least by three delegates.

The Organic Act also recognizes indigenous peoples' right to maintain and develop their own social and political organization, as grounded in their customs and traditions, and provides for the creation of indigenous municipalities, which will be governed according to the customary law of the various indigenous communities involved. Furthermore, the Act recognizes special indigenous jurisdiction. It will be exercised within indigenous territories by the legitimate traditional authorities on the condition that it is in conformity with human rights as enshrined in the Constitution and in the international agreements ratified by Venezuela.

The Constitution establishes Venezuela as a democratic, multiethnic and multicultural society, and recognises indigenous languages as official languages for its indigenous peoples. It establishes respect for interculturality (Art. 100); recognition of indigenous peoples and communities, including their organisation, culture, habits and customs, language and habitat; inalienable and non-prescriptible native rights to land; and the right to ethnic identity, including sacred places, and intercultural and bilingual education.

In accordance with the mandate set out in Article 119 of the Constitution, Venezuela initiated a land demarcation and titling process for the 35 indigenous peoples living in the territory. This provides the conditions that ensure that the indigenous communities and peoples can actively participate in the country's life, preserve their culture and exercise self-determination in internal matters. *The Constitution of Venezuela:* <http://www.tsj.gov.ve/legislacion/constitucion1999.htm>; *Ley Orgánica de Pueblos y Comunidades Indígenas:* <http://www.assembleanacional.gov.ve>

Africa: Non-discrimination and development of institutions

The Constitutions of Burundi, Congo and the DRC have taken steps towards the inclusion of indigenous peoples by emphasising minority protection and the value of tolerance. In its Preamble, the 2005 Constitution of Burundi declares that minority political parties and the protection of ethnic and cultural minorities are integral to good

governance. The Constitution further requires that all Burundians live in harmony and tolerance with each other. Every Burundian further has the duty to promote tolerance in his or her relations with others. The 2002 Congolese Constitution criminalises incitement to ethnic hatred and also places a duty on individuals to promote mutual tolerance. The 2006 DRC Constitution goes one step further by including membership of a "cultural or linguistic minority" as a basis for non-discrimination alongside "race" and "ethnicity". In addition, the State has the duty to promote the harmonious coexistence of all ethnic groups in the country and to protect all "vulnerable and minority groups".

Uganda has recognized that the Northern part of its territory, Karamoja, occupied mostly by pastoralist communities, has special problems that require special action on the part of government. It is this recognition which has led to the creation of the Ministry in Charge of Karamoja Affairs. The implementation of special programmes aimed at addressing the human rights issues of the indigenous Karamojong³⁾ pastoralists has not been very successful but it provides a framework that successive governments can build upon and possibly create better conditions for the area and its people.

The Central African Republic has also created territorial entities which have the potential of evolving into self-managing units. Since the 1960s, seven *communes* have been created with autonomous municipal councils. Despite the fact they were created to settle nomadic communities such as the Mbororo, the fact that these communities have their own autonomous, elected councils could be an entry point for reinforcing their participation in the day-to-day management of their own affairs. Pastoralists have also put in place a National Federation of Pastoralists, which has certain decision-making powers on pastoralist issues. In a similar vein, the Government of Ethiopia has adopted a new strategy on pastoral development, which has increased the level of cooperation between the pastoralists and regional governments. Following the federal government's lead, the Oromiya, Afar

3) Karamojong are the people of Karamoja. It is common among indigenous communities in Africa to have the name of the territory to be one and the same as the name of the people occupying it. This links people to their place of origin as an inalienable right.

and Southern Peoples' regional governments have formed pastoral commissions.

In Burkina Faso, the State and territorial collectives are mandated with the identification, protection and conservation of areas where pastoralism take place. *2005 Constitution of Burundi; 2002 Congolese Constitution; 2006 DRC Constitution; Reports of the Working Group of the ACHPR on indigenous populations/communities, concerning Ethiopia and Burkina Faso. Case prepared by Naomi Kipuri*

Australia: Aboriginal and Torres Strait Islander Social Justice Commissioner

In 1992, the position of the Aboriginal and Torres Strait Islander Social Justice Commissioner was created under the Australian Human Rights Commission, in response to the extreme social and economic disadvantages faced by indigenous Australians as well as the findings of the Royal Commission into Aboriginal Deaths in Custody and the National Inquiry into Racist Violence. The Commissioner's role includes reviewing the impact of laws and policies and monitoring the enjoyment and exercise of human rights for indigenous Australians. The Commissioner produces an annual Social Justice and a Native Title Report, which are tabled in Parliament and he promotes understanding and respect for the rights of indigenous Australians. He does this by reviewing legislation, providing policy advice and undertaking research on human rights issues including health, family violence, children's rights, cognitive disabilities and the 'stolen generation'.
http://www.hreoc.gov.au/social_justice/index.html

3.6.2. Combating discrimination and closing the socio-economic gaps

Australia: Closing the gap

Our challenge for the future is to embrace a new partnership between Indigenous and non-Indigenous Australians... [T]he core of this partnership for the future is closing the gap between Indigenous and non-Indigenous Australians on life expectancy, educational achievement and employment opportunities. This new partnership on closing the gap will set concrete targets for the future: within a decade to halve the widening gap in literacy, numeracy and employment outcomes and opportunities for Indigenous children, within a decade to halve the appalling gap in infant mortality rates between Indigenous and non-Indigenous children and, within a generation, to close the equally appalling 17-year life gap between Indigenous and non-Indigenous when it comes to overall life expectancy. (Prime Minister Kevin Rudd, Apology to Australia's Indigenous Peoples, 13 February 2008)

The life expectancy of indigenous Australians is 17 years lower than other Australians. While most Australian women can expect to live to an average age of 82 years, indigenous women can expect to live only 64.8 years and the life expectancy of indigenous men is lower still at 59.4 years. In response to this alarming situation, the Council of Australian Governments (COAG)⁴⁾ in December 2007 agreed to a partnership between all levels of government to work with indigenous communities to achieve the target of "closing the gap".

In March 2008, a "Close the Gap Statement of Intent" on indigenous health was signed between the Government and the indigenous peoples (see section 11.2.). Since the targets were set, all Australian governments have been working together to develop fundamental reforms to address these targets, and have

4) COAG comprises the Prime Minister, State Premiers, Territory Chief Ministers and the President of the Australian Local Government Association.

also acknowledged that it is “an extremely significant undertaking that will require substantial investment”. In 2008, COAG agreed to initiatives for indigenous Australians to the sum of \$4.6 billion across early childhood development, health, housing, economic development and remote service delivery.

COAG notes that “these new agreements represent a fundamental response to COAG’s commitment to closing the gap. Sustained improvement in outcomes for Indigenous people can only be achieved by systemic change. Through these agreements, all governments will be held publicly accountable for their performance in improving outcomes in these key areas.”

[http://www.coag.gov.au/coag_meeting_outcomes/2008-11-29/index.cfm#indigenous;](http://www.coag.gov.au/coag_meeting_outcomes/2008-11-29/index.cfm#indigenous)
http://www.humanrights.gov.au/social_justice/health/targets/closethegap/part2_1.html

India: Affirmative action for scheduled tribes.

The “Scheduled Tribes” (see section 1.4.) belong to the most socially and economically disadvantaged communities in India. Many laws and programmes have been framed with a view to improving the conditions of disadvantaged groups, including the Scheduled Tribes. There are certain provisions in the Indian Constitution regarding fundamental rights, which are framed specifically to protect their rights.⁵⁾ Some of the provisions on affirmative actions are:

- Article 15 (4), which stipulates that the Government should make “special provision for the advancement of any socially and educationally backward classes of citizens or for... the Scheduled Tribes”.
- Article 16(4) and (4A) empowers the State to develop mechanisms or schemes or regulations for the reservation of appointments or posts and promotions with consequential seniority in favour of Scheduled Tribes.

Articles 15 and 16 provide for special measures, including affirmative action to reserve jobs and seats in educational institutions for marginalised peoples. The reservation policy has created opportunities for the indigenous community to have access to

5) These are in addition to the general provisions, which are applicable to all the Indian citizens

better education and jobs. However, the reservation policy only covers the public sector and does not extend to the private sector. Moreover, the benefits are often monopolised by the better-off sections of the communities rather than reaching those who are most in need. Further, there are many indigenous peoples who have not been categorised as “Scheduled Tribes” and thus are denied these benefits.

- Article 29 of the Constitution empowers “any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own” with the right to conserve them.

Article 29, along with various other constitutional provisions - including the specific provisions for different states (Articles 371A and 371G) and the fifth and sixth schedules of the Constitution - give a wide scope and are powerful tools for the indigenous communities to establish institutions, which would include the establishment, preservation and perpetuation of culture and customary practices over the generations.

There are also other fundamental rights along with the judicial interpretations given by the Supreme Court through which recourse can be sought to protect the basic rights of the indigenous peoples.⁶⁾ Such rights include equality before law, right to life, right to education for all children between the ages of six and fourteen, freedom of expression and association, prohibition of human trafficking and child labour.

The Directive Principles of State Policy under the Constitution also ask states to ensure welfare of the indigenous people while implementing measures of governance; thus adding weight to judicial interpretations in favour of indigenous peoples.⁷⁾ These provisions, if used effectively, can be valuable in protecting the rights and interests of indigenous peoples.

Case prepared by: Chonchuirinmayo Luithui.

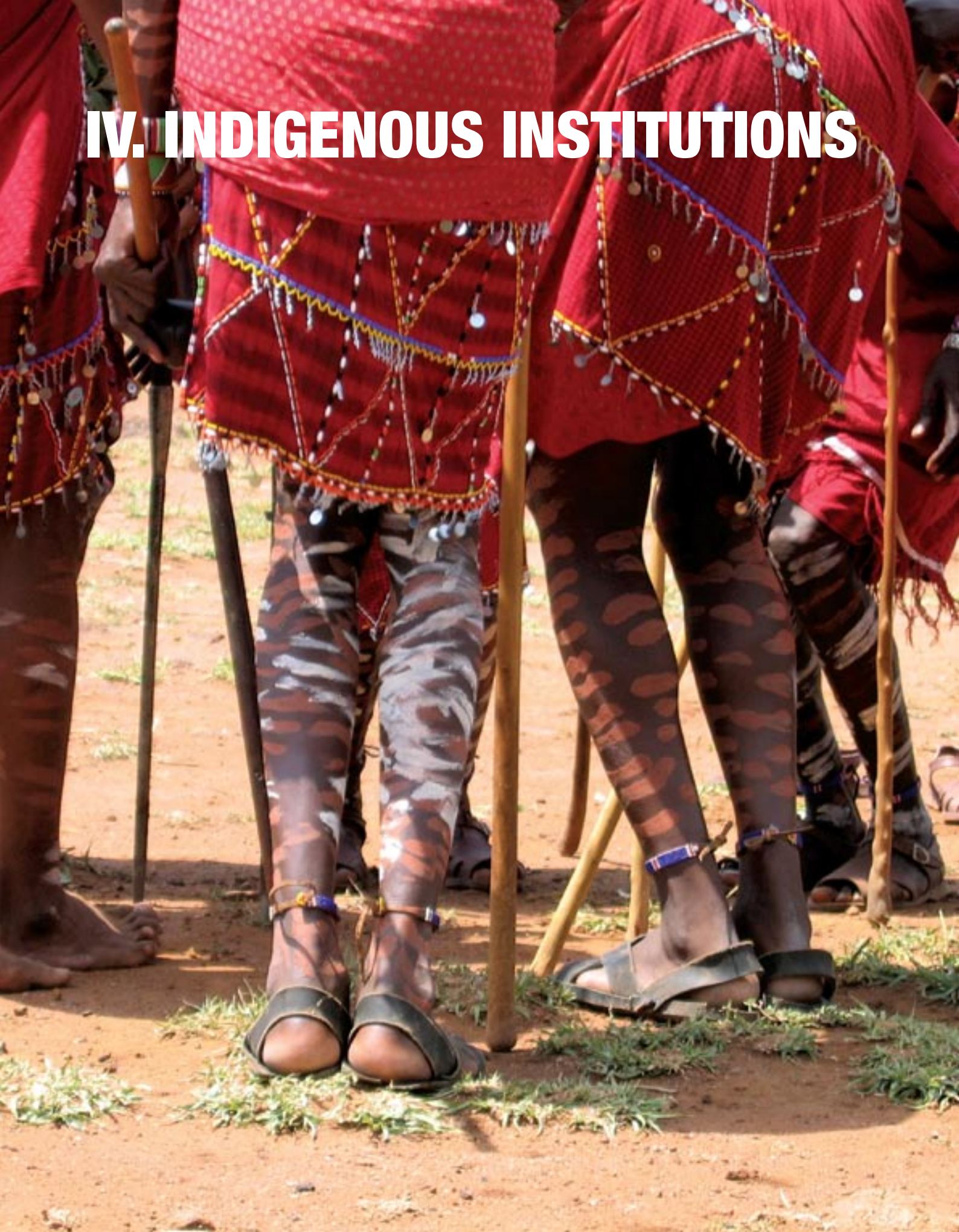
6) According to Article 141 the law declared by the Supreme Court is binding to all the courts of the land which basically means that it becomes the law of the land.

7) Article 46 specifically provides that the State shall promote the educational and economic interest of schedule castes and schedule tribes and other weaker sections of the society.





IV. INDIGENOUS INSTITUTIONS



4.1. RETAINING AND DEVELOPING INDIGENOUS CUSTOMS, TRADITIONS AND INSTITUTIONS

Indigenous peoples' right to retain and develop their own social, economic, cultural and political institutions is a fundamental right under international human rights law. The existence of such institutions is also a core element in the description of indigenous peoples. Article 1(1) of Convention No. 169 identifies indigenous peoples as those who have retained some or all of their own social, economic, cultural and political institutions, irrespective of their legal status (see section 1.1). The existence of distinct social, economic, cultural and political institutions is an integral part of what it means to be an indigenous people and is largely what distinguishes indigenous peoples from other sections of the national population. International human rights provisions on indigenous peoples' rights thus encompass the promotion and protection of indigenous peoples' collective right to maintain, control and develop their own social, economic, cultural and political institutions – including their practices, customs, customary law and legal systems. Such institutions are also vital to ensuring consultation with and participation of indigenous peoples in decision-making processes that affect them (see section 5).



Respect for indigenous peoples' institutions is integral to **Convention No. 169**, as stipulated in a series of provisions:

Article 2(1). [Government action shall include measures for]:

(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

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

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;

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;

(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.

Article 8(2). These peoples shall have the right to retain their own customs and institutions where these are not incompatible with fundamental rights [...]

In some instances, the term “institutions” is used to refer to physical institutions or organizations, while in other instances it may have a broader meaning that includes indigenous peoples’ practices, customs, and cultural patterns. The preamble of the UN Declaration on the Rights of Indigenous Peoples recognizes the inherent inter-connectivity between indigenous peoples’ institutions, traditions or customs. The Declaration recognizes “the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic, and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources” (UN Declaration Preamble: para. 7)

Specifically, with regards to indigenous institutions, the **UN Declaration on the Rights of Indigenous Peoples** stipulates that:

Article 5: Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions ...

Article 18: Indigenous peoples have the right to [...] maintain and develop their own indigenous decision-making institutions.

Article 20: Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions.

Article 34: Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Indigenous peoples’ cultures and traditions are dynamic and responsive to the realities and needs of their time. They present a vast spectrum of differentiated institutions and organizational forms. Some have retained traditional legal, social, administrative and governance systems, while others have adopted or been forced to adopt new institutions and organizational forms.

Sometimes, indigenous societies are perceived as

being static and homogenous, thereby wrongly implying that if they changed or adopted new organizational forms they would become less “indigenous”. However, in reality indigenous societies are multifaceted and dynamic.

The provisions of Convention No. 169 should not be understood as being restricted only to traditional institutions, but rather also apply to current practices of indigenous peoples’ economic, cultural and social development. In other words, indigenous peoples’ cultural adaptations and technological development should not reduce or impair the applicability of these provisions. This also implies that indigenous peoples are entitled to establish contemporary institutions, if traditional institutions are no longer adequate to meet their needs and interests.

4.2. PRACTICAL APPLICATION: RESPECT FOR INDIGENOUS INSTITUTIONS

Bangladesh: Traditional governance institutions

There are eleven indigenous peoples in the Chittagong Hill Tracts (CHT) area of Bangladesh, each with their own language, customs and cultures.¹⁾ Those not regarded as being indigenous are predominantly members of the Bengali people. The indigenous peoples of the CHT are recognized as “indigenous” to the CHT region by the CHT Regulation of 1900 and Act No. 12 of 1995.

Although Bangladesh has a unitary system of government, the legal and administrative system in the Chittagong Hill Tracts (CHT) is separate and distinct from those in other parts of the country. A series of traditional indigenous institutions and contemporary elected councils at the district and regional levels share the administrative authority in the CHT region with the central government, through its district and sub-district officers.

There are three main levels of traditional governance in the CHT:

- The *karbari*, normally an elderly man, is the traditional head or chief of a hamlet or village. In practical terms, the *karbari* position is, in most cases, *de facto* hereditary;

1) These are the Bawn, Chak, Chakma, Khumi, Khyang, Lushai, Marma, Mru, Pankhua, Tanchangya, and Tripura.

- The *headman*, who is in charge of a *mauza*. The *mauza* is a unit of land revenue administration in Bangladesh that has fixed and demarcated geographical boundaries. In the CHT, the *mauza* is also a unit of civil and judicial administration under the charge of the traditional *headman*, in addition to being a unit of revenue administration. The *headman* is responsible for resource management, land and revenue administration, maintenance of law and order, and the administration of customary indigenous justice, including as an appellate authority over the *karbari's* judicial functions;
- The three *chiefs* or *rajas*, who are in charge of the three administrative and revenue “circles”, of which the 369 *mauza* in the CHT are part. The *raja's* jurisdiction – at one time based upon tribal and clan divisions – was territorialized during British rule through the demarcation of fixed geographical areas.

Although, traditional indigenous institutions play an important role in the politics and administration of the CHT, the most powerful institutions with regard to day-to-day administrative functions are the elected district councils. These district councils are in charge of matters such as primary education, public health, fisheries, livestock, small and cottage industries. According to the 1997 CHT Accord, land administration, law and order, and secondary education are also to be transferred to these councils, which are directly subordinated to the CHT Regional Council.

However, indigenous leaders of the CHT are largely dissatisfied with the status of indigenous peoples' rights in the CHT, and call for, among other things, a meaningful revival of autonomy for the indigenous peoples of the CHT and efforts to reduce discrimination against indigenous peoples on the part of non-indigenous politicians, civil servants, and mainstream society.

Raja Devasish Roy (2004) Challenges for Juridical Pluralism and Customary Laws of Indigenous Peoples: The Case of the Chittagong Hill Tracts, Bangladesh

John Henriksen: Key Principles in Implementing ILO Convention No. 169, ILO, 2008.

Greenland: Self-Government

Greenland is the world's largest island with an area of around 2.2 million sq. km, of which some 410,000 sq. km are not covered by ice. The total population of Greenland is 56,462 (Statistics Greenland, 2008).

The journey of the people of Greenland towards self-government has been long. From the colonization of Greenland in 1721 it was administered by the Danish Government. From 1945 to 1954, Greenland figured on the list of non-self governing territories under Chapter XI of the United Nations Charter. This status changed in 1954 when Greenland was integrated into the Danish Realm.

In 1979, the Greenland Home Rule Arrangement came into force. The Arrangement made





it possible for Greenland to assume legislative and executive power regarding Greenland's internal administration, direct and indirect taxes, fishing within the Exclusive Economic Zone (EEZ; i.e. within 200 nautical miles of the Greenland coastline), hunting, agriculture and reindeer breeding, social welfare, labour market affairs, education and cultural affairs, vocational education, other matters relating to trade, health services, the housing area, and protection of the environment.

After 20 years of home rule, practically all fields of responsibility that may be transferred under the Home Rule Act had been taken over by the Home Rule Government. Recognising that there was a need for revising Greenland's position within the unity of the Danish Realm, a Greenland Home Rule Commission was set up at the turn of the year 1999-2000, later followed by a Greenland-Danish Self-Government Commission in 2004.

In accordance with the terms of reference, the Commission was tasked to "on the basis of Greenland's present constitutional position and in accordance with the right of self-determination of the people of Greenland under international law, deliberate and make proposals for how the

Greenland authorities can assume further powers, where this is constitutionally possible". Thus, the new arrangement is to be placed "within the framework of the existing unity of the Realm" and take its "point of departure in Greenland's present constitutional position", i.e. the existing Danish Constitution.

The Self-Government Commission concluded its work in April 2008, with the presentation of a Draft Act on Greenland Self-Government. The Act provides for the Self-Government authorities to assume responsibility for more fields than those already taken over under the Home Rule, with the exception of the constitution, foreign affairs, defence and security policy, the Supreme Court, nationality, and exchange rate and monetary policy.

Greenland Self-Government authorities will, accordingly, have the legislative and executive power within the fields of responsibility taken over, and judicial power will lie with the courts of law, including with courts to be set up by the Self-Government authorities.

Another significant element of the Act is that it rests on the principle of balancing rights and

obligations. Consequently, Greenland must to a greater extent than today be able to generate the necessary revenue in order to finance increased Self-Government and, thus, in this way become less dependent on the subsidy from the Danish Government.

The main idea of the proposed economic model is that revenue from mineral resource activities in Greenland should accrue equally to the Self-Government authorities and the Danish Government, but that revenue accrued to the Danish Government should be used to reduce the Danish Government subsidy to Greenland, and that Greenland itself finances fields of responsibility that are taken over in the future. This guarantees the Self-Government authorities a stable foundation for economic planning as it is the Self-Government authorities themselves that decide which fields of responsibility are to be taken over and when. When the Danish Government subsidy to the Self-Government authorities has been reduced to zero, negotiations are to be initiated between the Self-Government authorities and the Government on economic relations in the future.

The Act also recognises that Greenlandic is a key part of the Greenlandic people's cultural identity, and that the language therefore should be the country's official language.

Finally, the Act stipulates that independence for Greenland rests on the wish of the people of Greenland and that if the people so wish, negotiations between the Danish government and the Greenland Self-Governance authorities should commence. A final Agreement on Self-Governance should be endorsed by a referendum in Greenland and be concluded with the consent of the Danish Parliament.

On Tuesday 25 November 2008, the draft Act on Self-Government was submitted for a referendum in Greenland. Of the 39,611 people entitled to vote in Greenland, 75.5 percent of the electorate voted "yes". The results of the referendum on Self-Governance in Greenland thus made it clear that the people of Greenland have voiced a resounding "yes" to Self-Governance. Following the referendum and the consent of the Danish Parliament, the Act on Self-Governance will come into force on 21 June 2009.

For more information see: <http://www.nanoq.gl>; Draft Act on Greenland Self-Government; Abbreviated version of the Executive Summary of the Greenland-Danish Self-Government Commission's Report on Self-Government in Greenland (E/C.19/2009/4/Add.4).

Norway: The traditional siida institutions

The legal re-introduction of the traditional Sami reindeer husbandry *siida* system/institution was to a large extent influenced and justified by international legal provisions, including article 5(b) of Convention No. 169.

Traditionally, the Sami lived in groups, *siida*, varying in size, as determined by the resources available in the area. Within the *siida* there was no social stratification. The form of governance was a stateless local democracy with a leader. The leader presided at meetings, was responsible for dividing hunting spoils, asserted the rights of the *siida* to neighboring groups, mediated in internal conflicts and was the spokesperson for the *siida*.

Within Sami reindeer herding communities, the *siida* system was functional until the 1970s, when new reindeer husbandry legislation nullified the role of the *siida* as a legal and social entity. A new system was introduced, through which the *traditional collective siida* system was replaced by a system of *individual reindeer-herding license or operational units*. Individuals now had to apply for a reindeer-herding license ("*driftsenhet*") from state reindeer authorities, and reindeer herding was re-organized into reindeer herding districts ("*reinbeitedistrikt*"). The boundaries between such areas were often arbitrarily drawn and in conflict with traditional *siida* boundaries. This resulted in internal conflicts and over-grazing, as the traditional system for managing grazing resources and disputes was no longer functional, and individual reindeer owners were forced to compete for scarce resources.

The reindeer husbandry Act of 2007 ("*reindriftsloven*"), which replaces the reindeer husbandry Act of 1978, re-introduces the *siida* as a significant legal entity. The amendment is based on the recognition that the system of individual reindeer-herding licenses and the organization into reindeer-herding districts do not work well with the

traditional Sami reindeer husbandry economic and social system. Although, the system of licensing and districts has been maintained, the *siida* has been given a prominent role in the organization and management of Sami reindeer husbandry in Norway, as of 1 July 2007.

Case cited in: John Henriksen: Key Principles in Implementing ILO Convention No. 169, ILO, 2008; Hætta, Odd Mathis Hætta: The Sami– Indigenous People of the Arctic, Davvi Girji OS, 2003.

New Caledonia: The Customary Senate

The status of the *Kanak* people, i.e. the indigenous people of *New Caledonia*, is regulated in accordance with the 1998 Noumea Agreement signed between the French government and the Kanak independence movement (Front de Libération Nationale Kanak et Socialiste) and the conservative party (Rassemblement Pour La Calédonie dans la République). In particular, the Noumea Agreement provides for the establishment of the *Customary Senate*. It is composed of 16 Kanak customary chiefs, who must be consulted on any issues affecting Kanak identity.

Noumea Accord, in Australian Indigenous Law Reporter 17, 2002, p. 88 ff.

Colombia: Traditional Indigenous Authorities

The Constitution of Colombia recognizes the special jurisdiction of indigenous traditional authorities, exercised in accordance with their customs within indigenous traditional territories, provided

that it does not contradict the Constitution and legislation of the State. The Constitution also recognizes indigenous territories as entities of public administration at local level and establishes that such territorial entities will be governed by “their own authorities”, whose constitution and functions are regulated by the customary law of each indigenous community.

Complex social phenomena are at play in the Cauca region of Colombia. Such phenomena include the presence of landowners with strong social and political clout; zero industrial development and organisation of workers; a high percentage of poor indigenous peoples and peasants; and serious issues with public order, characterised by the displacement and disappearance of people and armed confrontations.

Faced with this situation, the seven indigenous groups in the Cauca (Nasa, Guamiano, Totoró, Yanacona, Inga, Kokonukos and Eperará Siapidara) formed the Cauca Regional Indigenous Council (CRIC) in 1971. One of its initial priorities was to recover and gain control of the territory, maintaining the structure of “reservations and councils” which, although it originated in Spanish colonial times, has become an institution for the recognition of all indigenous ancestral territories. Indigenous councils are autonomous governance bodies in the territory. They carry out political, legal, health, education, production and gender training and





other programs. Among other matters, the Councils issue legislative documents called “Resolutions”, many of which are related to the armed conflict, the presence of religious groups and drug traffickers, and government policy as it relates to their territory. They also have peace corps that work to unify the territory and recuperate those who have been kidnapped or recruited by the various armed groups. Political participation has allowed them to win offices in mayoralties and municipal councils. Indigenous councils actively participated in discussions on the reform of the Political Constitution during the 1991 National Constituent Assembly and, in 1999, an agreement was signed with the government for the comprehensive development of an indigenous policy. *Constitution of Colombia: <http://www.secretariassenado.gov.co/leyes>*
Case prepared by Myrna Cunningham.

Nicaragua: The Communities of the Atlantic Coast.

Under Article 89 of the Constitution of Nicaragua, the communities of the Atlantic Coast, organized

in the two autonomous regions of RAAN and RAAS (Autonomous Regions of the North and South Atlantic), encompassing respectively the northern and southern parts of the Atlantic area, are conferred the right to retain their own models of social organization and to manage local matters in accordance with their own customs and traditions. The principles on which the Autonomy Law was based were encapsulated in the Autonomy Commission’s proposals. It stated that:

Our political Constitution holds that Nicaragua is a multi-ethnic nation and recognises the right of the Atlantic Coast Communities to preserve their cultural identity, their languages, art and culture, as well as the right to use and enjoy the waters, forests and communal lands for their own benefit. It also recognises their rights to the creation of special programs designed to contribute to their development while respecting their right to live and organise themselves according to their legitimate cultural and historical conditions.



The main provisions in the law are outlined as follows: the setting up of autonomous regime for the regions of the Atlantic Coast, within the unitary Nicaraguan state. The law specifically provides for two autonomous regions to exercise jurisdiction over the indigenous peoples. (Articles 1-6); although Spanish is the official language of the Nicaraguan state, the languages of the communities of the Atlantic Coast will be official within the autonomous regions. (Art. 7)

The Autonomy Law establishes that people who live in the autonomous regions have the right to develop forms of social and productive organisation that adhere to their values and it establishes the following organisational structure, which respects indigenous peoples' traditional forms of organisation, which have been expressed to other forms of government throughout history:

- Regional Autonomous Council
- Regional Autonomous Government
- Territorial Assembly
- Community Assembly

Other traditional forms of organisation include the Council of Elders (Almuk Nani), a community-based organisation dating back to pre-Colombian times. The Council is comprised of elders or respected members of the community who are highly regarded and honoured in the indigenous society. Their roles include:

- political representation in internal governance and recognition of the chief of each community;
- guiding communities towards absolute respect for spirits or religious beliefs, land tenure and the rational use of natural resources;
- defending the indigenous identity through respect for traditions, social and legal norms and rejecting acculturation and ethnocide;
- promoting further regional autonomy by pushing for effective participation at various levels of government;
- encouraging initiatives focused on respect for and recognition of the indigenous communities' traditional and historical lands;
- providing conditions conducive to the



integration and consolidation of customary law into the administrative legal system of the Autonomous Region;

- developing relations with international agencies that foster indigenous solidarity in the economic, political and cultural spheres.

Article 4 of Law 445 on communal lands states that “the communal assembly is the maximum authority in indigenous and ethnic communities. This communal authority is responsible for legal representation of the communities...”. The same article establishes that “the territorial authority is the maximum authority in the territory and is convened according to the procedures established by the group of communities in the territory”.

Article 5 of Law 445 refers to communal authorities as traditional administrative governance institutions that represents the community. Articles 11 and 15 of the same law establish that the municipality, regional government and regional council must each respect the right of indigenous peoples and ethnic communities to communal tenure of land and natural

resources within their jurisdiction.

Case prepared by Myrna Cunningham.

<http://www.manfut.org/RAAN/ley445.html>

Guatemala: Indigenous authorities

In Guatemala, there are authorities of the Mayan World, such as the Ajq'i'j or Mayan priests, healers and midwives, whose services are determined by the Maya calendar. These are not recognised by the State. The Municipal Law of 2002 recognises indigenous peoples' communities as legal entities (Article 20) and indigenous municipalities, where these still exist (Article 55). Even more important is the recognition of auxiliary mayors, also called communal mayors, as representatives of the communities (Article 56) and not as delegates of the Government. Therefore, and as stipulated in the Peace Accords, the communal mayors can be elected by the communities instead of being designated by the municipal mayor. The communal mayors are intermediaries between the municipality and the communities.

Case prepared by Myrna Cunningham

<http://www.ops.org.gt/docbas>

**V.
PARTICIPATION,
CONSULTATION
AND CONSENT**



5.1. CONSULTATION AND PARTICIPATION: THE CORNERSTONE OF THE CONVENTION

The establishment of appropriate and effective mechanisms for the consultation of indigenous and tribal peoples regarding matters that concern them is the cornerstone of Convention No. 169, yet remains one of the main challenges in fully implementing the Convention in a number of countries.¹⁾ The Convention requires that indigenous peoples are able to effectively participate in decision-making processes which may affect their rights or interests. The establishment of processes of consultation is an essential means of ensuring effective indigenous peoples' participation in decision-making. Thus, **Articles 6 and 7 on consultation and participation are key provisions of Convention No. 169 and the “basis for applying all the others”**, though a number of other Articles also make reference to consultation and participation.²⁾ The principles of consultation and participation should be read in conjunction with the provisions on coordinated and systematic action to implement indigenous peoples' rights (see section 3.1).

ILO Convention No. 169, Articles 6 & 7:

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.

Article 6(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.

1) Committee of Experts, General Observation on Convention No. 169, 79th Session, 2008, published 2009.

2) See, for example, Committee of Experts, 76th Session, 2005, Observation, Guatemala, published 2006, para.6



The main objective of these provisions is to ensure that indigenous peoples can effectively participate at all levels of decision-making in political, legislative and administrative bodies and processes which may affect them directly. Under the Convention, consultation is viewed as a crucial means of dialogue to reconcile conflicting interests and prevent as well as settle disputes. Through the interrelatedness of the principles of consultation and participation, consultation is not merely the right to react but indeed also a right to propose; indigenous peoples have the right to decide their own priorities for the process of development and thus exercise control over their own economic, social and cultural development.

The core area of application for the concepts of consultation and participation is in the context of relationships between indigenous peoples and states.

Committee of Experts, General Observation, 2008

Given the enormous challenges facing indigenous and tribal peoples today, including the regularization of land titles, health and education, and the increasing exploitation of natural resources, the involvement of the indigenous and tribal peoples in these and other areas which affect them directly, is an essential element in ensuring equity and guaranteeing social peace through inclusion and dialogue... Consultation can be an instrument of genuine dialogue, social cohesion and be instrumental in the prevention and resolution of conflict. Committee of Experts, General Observation on Convention No. 169, 79th Session, 2008, published 2009.

The obligation to consult indigenous peoples arises on a general level in connection with the application of all the provisions of the Convention. In particular, it is required that indigenous peoples are enabled to *participate* freely at all levels in the formulation, implementation and evaluation of measures and programmes that affect them directly. In addition, the obligation of governments to consult indigenous peoples is further emphasised in the following cases:

- When considering legislative or administrative measures (Article 6(1)(a));
- Prior to exploration or exploitation of sub-surface resources (Article 15(2));
- When consideration is given to alienating indigenous peoples' lands or transmitting them outside their own communities (Article 17);
- Prior to relocation, which should take place only with the free and informed consent of indigenous peoples (Article 16);
- On the organization and operation of special vocational training programmes (Article 22);
- On measures aimed at children being taught to read and write in their own indigenous language (Article 28).

In addition, Convention No. 169 contains numerous references to the concept of participation, covering a wide range of areas (Articles 2, 6, 7, 15, 22, 23). Other terms are also used in the Convention indicating participation:

- Obligation to “cooperate” with indigenous peoples (Articles 7, 20, 22, 25, 27, 33);
- Obligation *not* to take measures contrary to the freely-expressed wishes of indigenous peoples (Article 4);
- Obligation to seek “free and informed consent” from indigenous peoples (article 16);
- Right to be consulted through “representative institutions” (Article 16).

In the Context of Convention No. 169, the obligation to ensure appropriate consultation falls on governments and not on private persons or companies. Ensuring consultation and participation is the responsibility of the State.

James Anaya (2004: pp 153-154) is of the view that this requirement of consultation and participation applies not only to decision-making within the

framework of domestic or municipal processes but also to decision-making within the international realm. Mr. Anaya asserts that UN bodies and other international institutions have already increasingly allowed for, and even solicited, the participation of indigenous peoples' representatives in their policy-making and standards-setting work in areas of concern to indigenous peoples.³⁾

With regards to the consultation process, the Convention provides a series of qualitative elements. Consultations with indigenous peoples shall be carried out:

- **Through representative institutions**

Prior to undertaking any consultations, the concerned communities have to identify the institutions that meet these requirements (see also section 4 on the respect for indigenous institutions). With regards to determining representativeness, the ILO supervisory bodies have underlined that “the important thing is that they should be the result of a process carried out by the indigenous peoples themselves”.⁴⁾ While acknowledging that this can be a difficult task in many circumstances, the ILO supervisory bodies further stressed that “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”.⁵⁾

- **By supporting the development of indigenous peoples' own institutions and initiatives and also, where appropriate, providing these with the necessary resources**

This is particularly important given the fact that the legitimacy, capacity and resource base of most indigenous peoples' governance

3) For example, indigenous peoples' representatives participated actively throughout the negotiations on the UN Declaration on the Rights of Indigenous Peoples; The UN Permanent Forum on Indigenous Issues was created to give indigenous peoples more voice within the UN system – and half of its members are indigenous peoples' representatives; The UN Expert Mechanism on Indigenous Peoples' Rights has been established, and all of its members are of indigenous origin.

4) See Governing Body, 289th Session, March 2004, Representation under article 24 of the ILO Constitution, Mexico, GB.289/17/3

5) See Governing Body, 282nd Session, November 2001, Representation under article 24 of the ILO Constitution, Ecuador, GB.282/14/2, para.44.



institutions have been undermined in discriminatory historical processes and there is thus an asymmetry in the relationship between indigenous peoples and the states.

- **In good faith and in a form appropriate to the circumstances**

This means that consultations should take place in a climate of mutual trust. In general, Governments need to recognize representative organizations, endeavor to reach an agreement, conduct genuine and constructive negotiations, avoid unjustified delays, comply with the agreements which are concluded and apply them in good faith. Governments also need to ensure indigenous peoples have all relevant information and that it can be fully understood by them. Sufficient time must be given to allow 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.⁶⁾

- **Through appropriate procedures**

Procedures are considered appropriate if they create favourable conditions for achieving agreement or consent to the proposed measures, independent of the result obtained.⁷⁾ General public hearing processes

would not normally be sufficient. “The form and content of the consultation procedures and mechanisms need to allow the full expression of the viewpoints of the peoples concerned, in a timely manner and based on their full understanding of the issues involved, so they may be able to affect the outcome and a consensus could be achieved, and be undertaken in a manner that is acceptable to all parties.”⁸⁾

- **With a view to achieving agreement or consent**

In accordance with Article 6 of Convention No. 169, the objective of the consultation is to achieve agreement or consent. In other words, agreement or consent needs to be a goal of the parties, and genuine efforts need to be made to reach an agreement or achieve consent.

- **Periodic evaluation of the operation of the consultation mechanisms**

There should be a periodic evaluation of the operation of the consultation mechanisms, with the participation of the peoples concerned, with a view to continue to improve their effectiveness.⁹⁾

6) Gernigon, Bernard, Alberto Odero and Horacio Guido “ILO principles concerning collective bargaining” in *International Labour Review*, Vol. 139 (2000), No. 1 [See also Mexico Article 24 noted below re: mutual trust.]

7) See *Governing Body*, 289th Session, March 2004,

Representation under article 24 of the ILO Constitution, Mexico, GB.289/17/3, para.89

8) Committee of Experts, *General Observation*, 2008, published 2009.

9) Committee of Experts, *General Observation*, 2008, published 2009.

The **UN Declaration on the Rights of Indigenous Peoples**, also focuses on consultation and participation and establishes that the purpose of the consultation is to achieve **free, prior and informed consent**. Moreover, the Declaration recognizes that indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs (article 4).

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to *participate fully*, if they so choose, *in the political, economic, social and cultural life of the State*.

Article 18

Indigenous peoples have the right to *participate in decision-making in matters which would affect their rights*, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their *free, prior and informed consent* before adopting and implementing legislative or administrative measures that may affect them.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

The UN Development Group (UNDG) Guidelines on indigenous peoples' issues provides the following **"Elements of Free, Prior and Informed Consent"** (UNDG 2008: p. 28):

Free should imply no coercion, intimidation or manipulation;

- **Prior** should imply consent has been sought sufficiently in advance of any authorization or commencement of activities and respect time requirements of indigenous consultation/consensus processes;
- **Informed** – should imply that information is provided that covers (at least) the following aspects:
 - a. The nature, size, pace, reversibility and scope of any proposed project or activity;
 - b. The reason/s or purpose of the project and/or activity;
 - c. The duration of the above;
 - d. The locality of areas that will be affected;
 - e. A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit sharing in a context that respects the precautionary principle;
 - f. Personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others)
 - g. Procedures that the project may entail.

- **Consent** Consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation. Consultation requires time and an effective system for communicating among interest holders. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions. The inclusion of a gender perspective and the participation of indigenous women is essential, as well as participation of children and youth as appropriate. This process may include the option of withholding consent. Consent to any agreement should be interpreted as indigenous peoples have reasonably understood it.

5.2. COMMENTS BY THE ILO SUPERVISORY BODIES: CONSULTATION AND PARTICIPATION

Many of the cases addressed by the ILO supervisory bodies concern alleged failure by governments to undertake appropriate processes of consultation with indigenous peoples as stipulated by Article 6 of Convention No. 169. A number of these cases particularly address the situation of consultation regarding the exploitation of natural resources (see section 8).

Committee of Experts, General Observation on Convention No. 169, 2008

“With regard to consultation, the Committee notes two main challenges: (i) ensuring that appropriate consultations are held prior to the adoption of all legislative and administrative measures which are likely to affect indigenous and tribal peoples directly; and (ii) including provisions in legislation requiring prior consultation as part of the process of determining if concessions for the exploitation and exploration of natural resources are to be granted.”

Mexico: Consultations on constitutional reform

In 2001, a complaint was brought to the ILO, alleging that Mexico had violated Article 6 of the Convention in the legislative procedure leading to the approval of the Decree on Constitutional Reform in the Areas of Indigenous Rights and Culture. In this context, an ILO tripartite committee (see section 14.6.) was established to examine the process that led to the adoption of the constitutional reforms.

The Committee observed that, “from 1992 until the present time, relations between the Government and indigenous peoples have been extremely complex, with an undercurrent of conflict at times manifest, at times latent, and on some occasions even violent.”

The Committee noted the “efforts made by the Government and the organizations which participated in this process to have a dialogue and arrive at satisfactory solutions, but it cannot ignore the difficulties arising from this process and the various interruptions to communication between the parties, which did not help to create an atmosphere of trust. It has also noted the breakdown in dialogue prior to the contested legislative process.”

According to the complainants, the constitutional reform process did not take account of the consultation process laid down in Convention No. 169 and they stated that; “at the risk of distorting the right of indigenous peoples to consultation, a conceptual distinction must be made between an act of consultation which conforms to the Convention and any act of nominal consultation, information or public hearing carried out by the public authorities”.

The Governing Body noted that, *[I]n view of the diversity of the indigenous peoples, the Convention does not impose a model of what a representative institution should involve, the important thing is that they should be the result of a process carried out by the indigenous peoples themselves. But it is essential to ensure that the consultations are held with the institutions that are truly representative of the peoples concerned. As the Governing Body has already established in a previous case, "... the principle of representativity is a vital component of the obligation of consultation. (...) 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 context, the Committee noted *the difficulty represented by consultations of general scope, as is the case for a constitutional reform, and of national application, which in this case also affect approximately 10 million indigenous peoples. Likewise, it notes that the consultations carried out before Congress and the states led to feelings of frustration and exclusion on the part of the indigenous peoples. It is also aware that the differences in values, ideas, times, reference systems, and even in ways of conceiving consultation between the interlocutors add to the complexity of the task. In that connection, the establishment in Mexico of clear criteria as to the form of consultations and as to representativity could have made it possible to obtain more satisfactory results for both parties. Furthermore, it acknowledges that both the National Congress and the state legislatures were not unaware of the opinions of the indigenous peoples with respect to the reforms, but were not obliged to accept them. It would have been helpful if they had established a mechanism to try to achieve agreement or consent concerning the measures proposed.*

The Committee added that it was *clear throughout the process of the adoption of the Convention, and it has been reaffirmed by the supervisory bodies, that consultation does*

not necessarily imply that an agreement will be reached in the way the indigenous peoples prefer. Everything appears to indicate that the views of the complainants as to what would constitute full consultation would, to all appearances, have given rise to a more complete set of consultations, which is why it is appropriate to recall them here as pertinent proposals as to how consultations should be carried out in other similar situations. Nevertheless, the Committee cannot conclude that such a list of "best practices" is actually required by the Convention, even though they would have constituted an excellent way of applying fully the principles established in Article 6.

Finally, the Committee considered that "the climate of confrontation, violence and lack of mutual trust stopped the consultations from being conducted more productively. It is imperative in all consultations to establish a climate of mutual trust, but all the more so with respect to indigenous peoples, given their lack of trust in state institutions and their feeling of marginalization, both of which have their origins in extremely old and complex historic events, and both of which have yet to be overcome."
Governing Body, 289th Session, March 2004, Representation under article 24 of the ILO Constitution, Mexico, GB.289/17/3

Guatemala: Consultation as the institutional basis for dialogue

In 2005, a report submitted to the Committee of Experts by an indigenous organization stated that although efforts had been made sporadically towards providing an institutional basis for participation of indigenous peoples, there was no coherent policy on institutions that combined political, administrative and financial measures to attain the objectives of the Convention.

The report indicated that "participation continues to be symbolic and the political and electoral system remains an instrument of exclusion" and further that "there is no specific institutional machinery for consultation and that, during the previous administration, 31 concessions were granted for the exploitation of mineral resources and 135 for exploration, with no prior consultation with the indigenous peoples as to the viability of such activities or their environmental impact".

The Committee of Experts emphasized that “the provisions on consultation, particularly Article 6, are the core provisions of the Convention and the basis for applying all the others. Consultation is the instrument that the Convention prescribes as an institutional basis for dialogue, with a view to ensuring inclusive development processes and preventing and settling disputes. The aim of consultation as prescribed by the Convention is to reconcile often conflicting interests by means of suitable procedures”.

CEACR, 76th Session, 2005, Observation, Guatemala, published 2006.

Colombia: Consultation on legislative measures concerning consultation

In 1999, a complainant alleged that the process of promulgation as well as the content of Decree No. 1320, which establishes provisions for the process of consultation with the indigenous and black communities prior to exploitation of renewable natural resources found within their territories, was not in conformity with the obligation to undertake consultations with indigenous peoples under Convention No. 169.

In its response, the ILO Governing Body underlined that the concept of prior consultation established in Article 6 must be understood within the context of the general policy set out in Article 2(1) and (2)(b) of the Convention, which stipulate that Governments shall develop coordinated and systematic action to protect the rights of indigenous peoples and guarantee respect for their integrity, including the full realization of their social, economic and cultural rights, their social and cultural identity, their customs and traditions and their institutions.

The Governing Body noted that the right of indigenous peoples to be consulted whenever consideration is given to legislative or administrative measures which may affect them directly, as well as the obligation of the Government to carry out prior consultation with the peoples affected, is “derived directly from Convention No. 169, not from the recognition of that right by national legislation”.

Considering that the purpose of Decree No. 1320 was to regulate prior consultation before exploitation

of resources within the territory of indigenous and black communities and thus constituted a legislative measure that is likely to affect the communities directly, the Committee noted that there is a clear “obligation to consult the country’s indigenous peoples before the adoption and promulgation of the Decree in question” and further that “issuing Decree No. 1320 without prior consultation was not compatible with the Convention”.

The Committee further emphasized that: *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.*

Governing Body, 282nd Session, November 2001, Representation under article 24 of the ILO Constitution, Colombia, GB.282/14/3.

5.3. PRACTICAL APPLICATION: CONSULTATION AND PARTICIPATION

5.3.1. Procedures for consultation

Norway: Procedures for Consultation

In May 2005, the Government of Norway and the Sami Parliament agreed on procedures for consultation, which were subsequently approved in Cabinet. The consultation procedures are regarded as normative guidelines. Norway ratified ILO Convention No. 169 in 1990.

The agreement recognizes that the Sami, as an indigenous people, have the right to be consulted in matters that may affect them directly. The agreement’s objective is manifold:

- 1.** To contribute to the implementation in practice of the State’s obligations to consult indigenous peoples under international law;



2. To achieve agreement between State authorities and the Sami Parliament whenever consideration is being given to legislative or administrative measures that may directly affect Sami interests;
3. To facilitate the development of a partnership perspective between State authorities and the Sami Parliament that contributes to the strengthening of Sami culture and society;
4. To develop a common understanding of the situation and developmental needs of the Sami society.

The agreement establishes that the procedures apply to the Government and its ministries, directorates and other subordinate State agencies or activities in matters that may affect Sami interests directly, including legislation, regulations, specific or individual administrative decisions, guidelines, measures and decisions. The obligation to consult the Sami Parliament includes all material and immaterial forms of Sami culture, including music, theatre, literature, art, media, language, religion,

cultural heritage, immaterial property rights and traditional knowledge, place names, health and social welfare, day care facilities for children, education, research, land ownership rights and rights to use lands, matters concerning land administration and competing land utilization, business development, reindeer husbandry, fisheries, agriculture, mineral exploration and extraction activities, wind power, hydroelectric power, sustainable development, preservation of cultural heritage, biodiversity and nature conservation.

Matters which are of a general nature, and are assumed to affect the society as a whole are in principle not covered by the agreement, and such matters shall not be subject to consultations. Geographically the Procedures for Consultations are applicable to traditional Sami areas.

In its commentary on individual provisions contained in the agreement, the Government informs its entities that *consultations shall take place in good faith, with the objective of achieving agreement to the proposed*

measures. This means the process of consultations with the Sami parliament is something more than an ordinary public process through which appropriate bodies are invited to consider various proposals (process of hearing), as the parties must sincerely and genuinely seek to reach an agreement to the proposed measures. This also means that State authorities are under an obligation to initiate consultations with Sami Parliament and make all necessary efforts to achieve an agreement even though the State authority concerned may believe that the likelihood of achieving an agreement is limited. However, the agreed procedures for consultations do not dictate that an agreement or consent to the proposed measures must always be reached. The required extent of the consultations may vary in specific situations. The most important requirement is that necessary consultation processes and procedures are established in order to enable the Sami Parliament to exert real influence on the process and the final result. A simple information meeting will thus normally not fulfill State authorities obligation to consult indigenous peoples under ILO Convention No. 169.

The explanatory commentary provides further explanation about the contents of the consultation obligation:

Fulfillment of the consultation obligation requires that both parties are informed about the counterpart's position and assessments. The State party shall ensure that its interests and views are communicated to and understood by the Sami Parliament, and that the State party has understood the position of the Sami Parliament. The Sami Parliament has a corresponding responsibility to communicate its points of view on the matter concerned. If the parties do not reach an agreement, they are expected to consider compromises and possible changes in the original proposal with the aim to narrow the gap between their positions. When necessary, provisions shall be made for further consultations.

John Henriksen: Key Principles in Implementing ILO Convention No. 169, ILO, 2008.

Prosedyrer for konsultasjoner mellom statlige myndigheter og Sametinget, 2005.

Morocco: the establishment of the IRCAM.

On 17 October 2001, an advisory body called

IRCAM (Royal Institute for the Amazigh Culture) was established in Morocco with the mandate to provide advisory opinions on the measures designed to safeguard and promote Amazigh language and culture, in all its forms and expressions. This body is intended to support the work of other institutions, which are charged with implementing policies aimed at introducing the teaching of the Amazigh language in the education system and ensuring its visibility in the social and cultural life of the country as well as in the media, at national, regional and local level.

The Amazigh is an indigenous people, which represent more than 60 per cent of the population of Morocco. On the assumption that their culture is an integral part of the Moroccan identity and represents its undeniable substratum, King Mohamed VI decided to create an institution that should address issues pertaining to the identity and the cultural heritage of the Amazigh people. Broad consultations were carried out with various associations and experts from the Amazigh population of Morocco with a view to obtaining a broad consensus on the membership of the Royal Institute, in accordance with article 6 (consultation and participation) of ILO Convention No. 169.

The Institute engaged with relevant Amazigh actors, through an open approach to consultation and participation in the development of policies and actions likely to protect the cultural and linguistic heritage of the Amazigh. This led to a national reflection about the voice and means needed to safeguard the identity of Amazigh people as well as to the planning of actions aimed at revitalizing the cultural and artistic life of the Amazigh communities.

The assessment of the work performed during these years by the IRCAM that ILO Convention No. 169, through its provisions, can be an instrument of cultural consolidation and cohesion. Thus, the provisions of articles 6 (consultation and participation), 27 and 28 (education) have been translated into tangible reality through this institution in which the essential part of the Amazigh community of Morocco see itself reflected.

Tamaynut association: The policy to address the Amazigh case in Morocco in light of ILO Convention No. 169, ILO, 2008.

5.3.2. Establishment of consultative bodies

Bolivia: indigenous and peasant organizations and their interaction with the government.

Geographically, Bolivia has two main regions; the highlands densely populated by indigenous agricultural communities and the lowlands, characterized by more diverse but numerically smaller indigenous peoples, traditionally living from agriculture, hunting and gathering.

Since the national revolution in 1952, the term “peasant” was a concept that covered all rural inhabitants of the highlands, including the indigenous communities. Since then, most of the indigenous communities in the highlands were organized in peasant unions, which addressed their needs from a class-based - rather than from an ethnic - perspective. The main umbrella organization of these unions is the Unique Confederation of Trade Unions of Peasant Workers (CSUTCB), established in 1979.

In the 1980s, the indigenous peoples of the lowlands started to organize, claiming collective rights based on their identity as peoples. The main indigenous umbrella organization of the lowlands is the Confederation of Indigenous Peoples of Bolivia (CIDOB), established in 1982. CIDOB currently represent 34 different peoples.

In 1997, the National Council of Markas and Ayllus¹⁰⁾ of Qollasuyo (CONAMAQ) was established, rejecting the unions as an adequate organizational form in the highlands and aiming at revitalizing the traditional Markas and Ayllus.

In parallel, the unions started to address the cultural aspects of the marginalization of the indigenous peasants and gradually combined class-based claims with claims for collective rights, based on ethnicity and culture. This process culminated in 2005, with the landslide electoral victory of President Evo Morales, known as the “first indigenous president”. However, his political party, the Movement Towards Socialism (MAS), is not specifically an indigenous but rather a peasant

movement, which combines socialist ideology with ethnic-cultural elements.

Together, CONAMAQ, CIDOB and CSUTCB constitute the legitimate representation of almost all the indigenous peoples and communities of both the highlands and the lowlands of Bolivia, including the indigenous peasants. In the context of the Constituent Assembly, which led to the adoption of the new Bolivian Constitution in January 2009, the three organizations agreed on a “Unity Pact”, which implied the elaboration of joint proposals for the establishment of a pluri-national State.

The three organizations also participate in various consultative mechanisms at different levels, established by previous governments. These include:

- The Educational Councils of the Aboriginal Peoples (CEPOS). These are not bound to a specific territory but are organized along ethnic lines with Councils for each of the most numerous indigenous peoples (Aymara, Quechua, Guaraní) as well as a multi-ethnic Council for the Amazon region. The Councils participate in the formulation of educational policies and monitor their adequate implementation.
- The National Council for Decentralization (CONADES), which is a consultative body between the national administration, the legislative power, departmental administrations, municipalities, civil society and academic and research institutions. CONAMAQ, CIDOB and CSUTCB all participate in CONADES.
- The National Council for Dialogue, established in 2006 by the UN-system agencies in Bolivia. The Council comprises UN agencies, CIDOB, CONAMAQ and CSUTCB, with an aim of establishing a mechanism for consultation and participation, along the lines stipulated in ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples.

Case cited in: Ramiro Molinas Barrios; Los Derechos de los Pueblos Indígenas en un Proceso de Cambio de la Naturaleza de la Nación y del Estado, ILO, 2009.

¹⁰⁾ Markas and Ayllus are the traditional organizational forms and governance institutions of the Quechua and Aymara peoples of the highland.

Australia: Establishment of a National Indigenous Representative Body

In 2008, the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr. Tom Calma, released a paper, outlining key considerations in the development of a new National Indigenous Representative Body in Australia. The paper identifies the many and varied issues that need to be considered in the establishment of a new representative body but does not propose a model for the body itself, as the decisions should be taken through consultations with the indigenous peoples of Australia. Considering the general applicability of Mr. Calma's considerations, a comprehensive summary is presented below:

Principles that should underpin a National Indigenous Representative Body:

- Legitimacy and credibility with both government and Indigenous peoples.
 - “Two-way” accountability – to Government and to indigenous peoples.
 - Transparency and accountability in its operations, in the mechanisms for determining membership or election; in policy making processes; and financial processes.
 - True representativeness of a diverse indigenous polity (ensuring participation of different groups of indigenous peoples, traditional owners, youth and women for example).
 - A consistent and “connected” structure, with a clear relationship between the national body and indigenous peak bodies, service delivery organisations and other representative mechanisms.
- Independence and robustness in its advocacy and analysis.

Possible roles and functions of a National Indigenous Representative Body:

- *Government Programme Delivery*; e.g. determining priorities for the federal budget, contributing to planning processes, or monitoring government service delivery.
- *Advocacy*; its effectiveness will depend on a number of issues, including whether it is located within or outside of government and whether there is a robust representative structure.
- *Policy formulation and critique*; respect for the principle of free, prior and informed consent requires a new, more open and collaborative approach to policy development by government departments, where consultations are carried out to reach consensus, not simply to provide input.
- *Contributing to Law Reform*; it could actively pursue law reform and be involved in coordinating and supporting test cases in cooperation with indigenous legal organisations and movements.
- *Review and Evaluation*; if equipped with investigative authority and a robust regional structure, it could be well-placed to receive “field reports” on government performance, which could feed into advocacy and policy formulation.
- *Clearing House*; it could act as a “clearing house” to share information between indigenous representative organisations and service delivery organisations.





- *International Role*; it could have an overall coordinating role for international engagement to ensure strategic and well-targeted participation, supplemented by capacity building programmes.
- *Research*; it could have its own research coordination arm and could commission expert and community-based research or coordinate with existing research centres.
- *Facilitation and Mediation*; it could support mediation training and possibly accredit professionals and organisations for mediation between indigenous peoples and non-indigenous interests.

Structure of a National Indigenous Representative Body:

Two key issues to consider are how the “narrow” national leadership will remain connected with the broader base of indigenous peoples and communities at the local and regional level through to the State/Territory and national level; and what the national structure itself should look like.

Some options to engage at the regional and State/Territory level include:

- Formal mechanisms whereby the National

Body has components that exist at different levels.

- A mixture of processes to engage different sectors of the indigenous community (such as forums at different levels or membership processes for individuals and organisations); or
- Relatively informal processes whereby indigenous peoples can have their say at a national congress or through other processes that draw people together on an expert or issue specific basis.

Some options for the national structure include:

- The national structure could be made of *delegates* nominated by the regional and State/Territory levels of the body, or this could be based on a *direct election* model at the national level;
- It could be a *membership based* organisation, whereby communities, organisations or individuals can join the organisation;
- It could involve indigenous peak bodies, regionally or State/Territory-based indigenous bodies and/or indigenous service delivery organisations in its activities;
- It could allocate positions to a national board



- or executive of representatives for particular sectors of the indigenous community;
- It could be through a process of merit selection presided over by a panel of eminent indigenous peers; or
- A combination of these methods.

Consideration also needs to be given to:

- How the National Body can maintain a gender balance and ensure equal participation and representation for women and youth; and
- Whether there ought to be processes to enable the broad-based participation of indigenous peoples in the national decision-making process – such as through the convening of an annual policy Congress open to all indigenous peoples

Relationship of the National Indigenous Representative Body with federal government and Parliament:

The National Body could be established as a government authority or as a non-government organisation. In any case, a tight relationship with government is particularly important for two of

the national body's proposed functions: policy advice to government and review of government performance. There are a range of options for how the Representative Body might operate:

- It could have *ex-officio* membership of the Ministerial Taskforce on Indigenous Affairs as well as the Secretaries Group on Indigenous Affairs, and therefore have a “seat at the table” where the major decisions on Indigenous affairs are made at the federal government level. Alternatively, it could operate as an advisor to these bodies.
- It could be invited to participate in discussions of the Council of Australian Government (COAG), as well as the various committees of COAG.
- It could have a role in the committee systems of the Parliament.
- Alternatively, an exclusively indigenous committee, with democratically chosen representatives, and all the powers of Parliamentarians, could be established. This could evolve, effectively, into an indigenous chamber of Parliament.

Resourcing the National Indigenous Representative Body:

A critical issue will be deciding how the National Body is to be funded for its regular activities. Government funds may be useful, but they may come at a cost of the independence of the organisation. It is also possible for the Body to be funded through grants or fundraising. A further option is through the establishment of an “Indigenous future fund” that could be funded through a direct grant from government(s) or through the allocation of a percentage of mining tax receipts annually for a fixed period.

Summary of Aboriginal and Torres Strait Islander Social Justice Commissioner: Building a sustainable National Indigenous Representative Body – Issues for consideration, 2008.

Documents related to the establishment of a national representative body are available at the website of the Aboriginal and Torres Strait Islander Social Justice Commissioner: http://www.hreoc.gov.au/social_justice/repbody/index.html

Norway, Sweden and Finland: The Sámi Parliaments

The Sámi are the indigenous people of *Sápmi*, i.e. the northernmost part of Europe, encompassing the northern parts of present-day Norway, Sweden and Finland up to the Kola Peninsula in Russia. Estimates indicate that Sámi people number around 60,000–70,000, the majority of whom live in Norway.

The *Sámi Parliament* is a representative advisory body that was established in Norway, Sweden and Finland respectively in 1987, 1992 and 1995 by the so-called Sámi Act with a view to allowing the consultation of Sámi people on matters affecting them. The mandate and regulation of this body may change considerably from one country to another. In particular, it is worth noting the “obligation to negotiate” contemplated at section 9 of the Finnish Sámi Parliament Act, since it marks a significant difference between this Act and the correspondent Acts enacted in Norway and Sweden. Finnish authorities are, in fact, obliged to negotiate with the Sámi Parliament “in all far-reaching and important measures which may directly and in a specific way affect the status of the Sámi as an indigenous people”. Conversely, Norwegian authorities are merely called to give the Sámi Parliament an

opportunity to express its views, while Swedish legislation is silent on the point. In practice, concerns have been expressed about the fact that the Parliaments, although consulted, have often had only limited influence on final decisions, as their views are not given adequate weight.

In this regard, it should be noted that the *Procedures for Consultations* adopted in Norway have contributed to strengthening the role of the Norwegian Sámi Parliament, which has subsequently been engaged in consultation processes regarding, among other things, the new minerals act, the marine resources act and the biological diversity act.

S. Errico, B. A. Hocking, “Reparations for Indigenous Peoples in Europe: the Case of the Sámi People”, in Lenzerini F. (ed.), Reparations for Indigenous Peoples. International and Comparative Perspectives (Oxford, 2008), p. 379;
IWGLA, The Indigenous World 2008, p. 27;
UN Human Rights Committee, Concluding Observations on Norway, UN Doc CCPR/C/NOR/CO/5, 25 April 2006.

Philippines: The Indigenous Peoples Consultative Body

Section 50 of the 1997 *Indigenous Peoples Rights Act* provides for the establishment of a *Consultative Body* consisting of the traditional leaders, elders and representatives from the women and youth sectors of the different indigenous peoples, which will advise the National Commission on Indigenous Peoples (NCIP) on matters relating to the problems, aspirations and interests of indigenous peoples. In 2003, NCIP adopted *Guidelines for the Constitution and Operationalization of the Consultative Body*. These Guidelines recognize the constitution of Consultative Bodies at national, regional and provincial levels and, further, at community level when the need arises, to hold more focused consultations (Sec 12). Among other things, the Consultative Body is called to “deliberate on important IP issues and concerns and give inputs or make recommendations of policies for adoption by the Commission”. The Body was established in 2006.

NCIP Administrative Order No. 1, Series of 2003, 17 October 2003;
Stavenhagen, Report on the Mission to Philippines, UN Doc. E/CN.4/2003/90/Add.3, 5 March 2003.

The Advisory Council of Indigenous Peoples of the Andean Community

The Andean Community is a regional organisation established for the purpose of promoting trade cooperation and integration among its members, i.e. Bolivia, Colombia, Ecuador and Peru. On 26 September 2007, the Andean Council on Foreign Affairs – a body of the Andean Community made up of the Ministers of Foreign Affairs of Bolivia, Colombia, Ecuador and Peru – established the Advisory Council of Indigenous Peoples of the Andean Community. The Advisory Council is designed to be a consultative body, providing advice on political, cultural, social and economic aspects of the sub-regional integration, as it affects indigenous peoples. The body is constituted by one indigenous delegate from each State, to be chosen among the highest ranks of the indigenous national organizations according to procedures which will be established at national level. It is not clear what is the value attached to the advisory opinion provided by this Council and how it can thus influence in practice the final decisions made by the Andean Community on matters affecting indigenous peoples.

<http://www.comunidadandina.org/normativa/dec/d674.htm>

India: Tribes Advisory Council

The Constitution of India empowers the President to declare any area as a Scheduled Area to be listed under its Fifth and Sixth Schedule (Article 244 (i)). The Fifth Schedule is applicable to states other than the North Eastern States of Assam, Meghalaya, Tripura and Mizoram, which are governed by the Sixth Schedule¹¹⁾.

The Fifth Schedule provides for the establishment of a Tribes Advisory Council in each State that has a Scheduled Area. The Councils must consist of about 20 members, of whom three-fourths must be representatives of the Scheduled Tribes elected in the Legislative Assembly of the State. Its mandate is to advise the Governor, upon his request, on matters concerning “the welfare and advancement of the Scheduled Tribes in the State”. Furthermore, it is provided that, among other issues, regulations

11) Nagaland, Manipur, Sikkim and Arunachal Pradesh are also excluded from the purview of the Fifth Schedule as they are governed by special provisions under the Constitution.



concerning the transfer of land by and among Scheduled Tribes and the allotment of land to members of the Scheduled Tribes cannot be made without consulting the Tribes Advisory Council.

The Constitution of India: http://india.gov.in/govt/constitutions_india.php

Guatemala: Joint Commission on Indigenous Land Rights

Indigenous peoples represent approximately half of the population of Guatemala. The recognition of their rights is rooted in the Agreement on Identity and Rights of Indigenous Peoples signed in 1995 after more than 30 years of domestic armed conflict. This Agreement provides for the establishment of the Bipartisan Commission on Indigenous Land Rights, charged with the task of carrying out studies on, as well as drafting and proposing adequate measures to address, the issue of indigenous peoples' land. It is constituted of both governmental and indigenous members. One of the achievements of this Commission was the creation of the Land Fund (*Fondo de Tierras*) in 1999. The Land Fund has the mandate to develop and implement the national policy concerning access to land, including through the realization of a programme to regularize land titles. Its Executive Board is composed of governmental representatives as well as a representative of indigenous organizations and a representative of the organizations of peasants/ agricultural workers. The functioning of this Fund and its achievements with respect to indigenous peoples are however controversial.

<http://www.congreso.gob.gt/Docs/PAZ>

Guatemala: Leyes y Regulaciones en Materia Indígena (1944-2001), Tomo II, OIT, Costa Rica, 2002.

Land Fund: <http://www.fontierras.gob.gt>

See also R. Stavenhagen, Report of the mission to Guatemala, UN Doc. E/CN.4/2003/90/Add.2, 24 February 2003.

5.3.3 Participation in elective bodies

States ensure indigenous peoples' participation in decision-making in various ways. Some States have introduced a *quota* system to guarantee the participation of a certain number of indigenous representatives in the national legislative assemblies. To the same purpose, some States have redefined

or created special electoral districts to facilitate the participation of indigenous peoples in elective bodies. In some cases, electoral laws and related regulations have been reviewed with a view to providing indigenous peoples with direct channels of participation in public elections that bypass the structure of political parties.

New Zealand: Maori participation in elective bodies

Historical circumstances, political will and Maori struggles have resulted in substantial Maori political representation in the New Zealand Parliament. The guaranteed Maori seats in Parliament have existed for the last 140 years, and their number varies depending on the number of Maori registering for the Maori roll. The Mixed Member Proportional Representation system (MMP) allows candidates to enter into Parliament either via the 69 electorates (which include 7 Maori electorates) or through pre-determined Party lists. Maori voters have the opportunity to register either for the Maori roll that decides on the 7 Maori MPs or the General roll. The Maori guaranteed seats confirm the Maoris' unique position in New Zealand society, give them control over who will represent them in Parliament and contribute to their fair numerical representation. At the same time, the option of Maori enrolment in the general roll prevents marginalisation and pushes political parties to take Maori viewpoints into account when designing their policies.

New Zealand introduced the MMP system in 1993. Since then, the Maori percentage in Parliament has increased (17.3%, which translates to 21 Maori MPs out of 121) to the point that it is now slightly above the percentage of Maori in New Zealand society (15.1%). MMP has allowed the election of some Maori MPs who would not otherwise have been elected, but has also allowed the Maori Party, formed in 2004, to enter Parliament. Parties rank Maori candidates highly on party lists in an effort to secure the support of Maori voters; 25% of party list MPs are Maori. Also, since the introduction of MMP, Maori participation in elections has increased and so has Maori engagement with national politics. Recent measures in favour of Maori and the most recent additional funds in the 2007 budget could be partly attributed to the Maoris' increased representation and visibility in the political scene. In addition, the



Maori Party has initiated positive steps for Maori, including the review of the State Owned Enterprise Landcrop operations on Maori lands, and has repeatedly opposed – albeit so far unsuccessfully – the adoption of restrictive bills for Maori.

The combination of the guaranteed Maori seats and the MMP represents is an example of participation of indigenous peoples in elective bodies to the same at least extent as the other sections of the population.

Maori representation in Parliament has not been replicated at local government level: less than 5% of members elected to local councils are Maori. The *Plenty Regional Council (Maori Constituency Empowering) Act 2001* and the *Local Government Act* provided local authorities with the choice to establish Maori constituencies, but very few Councils opted for this. In general, Maori disengagement with local politics and lack of political will still act

as important obstacles to the fair representation of Maori in local government. Fortunately, consultation with Maori in decisions that affect them at the local level has increased.

Dr. Alexandra Xanthaki: Good Practices of Indigenous Political Participation: Maori Participation in New Zealand Elective Bodies, ILO, 2008.

Nepal: Participation in the constitutional reform process

In April 2008, Nepal held elections for a Constituent Assembly (CA) that is going to write a new constitution for the country. The elections came as part of a peace process that ended 10 years of armed conflict in the country. The elections were postponed three times, as political parties and population groups argued and created pressure for a form of elections that could result in an assembly representative of the country's highly diverse population. In the end, the country settled on a

system by which each citizen voted twice: once in an “open” election for an individual candidate and once in a “proportional” election for a political party. The votes on the proportional list were then distributed by each party over pre-created lists, so that they provided a set of candidates that matched the ethnic make-up of the country proportionally. Thus 120 indigenous candidates were elected through the proportional election, corresponding roughly to indigenous peoples’ proportion of the total population of the country. In addition, there were 82 indigenous candidates elected directly through the open election and 16 candidates nominated separately. In total, there are now 218 indigenous members of the CA out of a total of 601, by far the highest proportion of indigenous members ever elected to a national political body in Nepal.

Despite progress in achieving indigenous representation in the CA, many indigenous activists argue that meaningful indigenous consultation and participation has not been established. The criticism covers a series of different points. To begin with, the indigenous representatives have almost exclusively been elected through political parties, which retain the right to expel them. Bearing in mind that many of the indigenous CA members are less educated and experienced in national politics, it is argued that their ability to take strong stands on indigenous issues is limited. Within the parties the indigenous politicians only have a limited presence in the decision-making bodies, despite their proportional numbers in the CA. Some activists have also opposed the way in which the candidates have been selected, arguing that the political parties have controlled the process rather than allowing

indigenous communities to choose their own representatives.

The issue of indigenous peoples’ participation in the CA process concerns not only their representation, but also the mechanism for consultation. During his visit to Nepal in November 2008, Prof. James Anaya, the UN Special Rapporteur on the situation of human rights and fundamental indigenous peoples, raised the issue of consultation in the CA process with the Government. He emphasized “the need to develop additional mechanisms in the constitution-making process to consult directly with indigenous peoples, through their own chosen representatives and in accordance with their own methods of decision-making, as required by the international standards to which Nepal has committed.”

The question of indigenous peoples’ participation in the CA process has now been taken up by the courts in Nepal, as 20 indigenous organizations have filed a case in the Supreme Court. They are alleging that the current CA process violates their rights to consultation and participation under Nepal’s Interim Constitution, ILO Convention No. 169, ICERD, and the UN Declaration on Indigenous Peoples. On March 1st, the Supreme Court has issued a show cause order to the government on this issue and the case is ongoing.

Lama, Mukta S: Nepal, IWGIA Year Book 2009 Copenhagen, Denmark (Forthcoming); OHCHR Press Release, “UN expert urges action on Nepal’s commitment to indigenous peoples rights”, 02/12/08.





Kenya: Representation in elective bodies

Traditional leadership is not formally recognized in Kenya. There are only 210 parliamentary constituencies in the country, whose boundaries are determined by the electoral commission of Kenya without taking into consideration the need to ensure representation of all communities at the national level. Elections to the national assembly and local councils are based on universal suffrage and representatives, if they constitute a minority in a given area. In the absence of express provisions and special measures of representation, indigenous peoples and minorities continue to be excluded. This situation has been acknowledged by the High Court in the case of *Rangal Lemeiguran & others vs. Attorney General & Others* (Ilchamus Case). The Ilchamus community sought a declaration in the Constitutional Court (High Court) that the statistical chance of an Ilchamus candidate being elected as a member of parliament in the present constituency is in practice so minimal as to effectively deny them any chance of ever being represented in the National House of Assembly (as has been the situation for the past forty years). This, they claimed, contravened their fundamental rights and freedom of expression and freedom of conscience as protected under section 70 of the Constitution of Kenya. They therefore asked for an electoral constituency to be created that would cater to and reflect their needs and aspirations and the nomination of one of their representatives in parliament to articulate their issues.

In a landmark decision, the High Court held that minorities, such as Ilchamus, have the right to participate and influence the formulation and implementation of public policy, and to be represented by people belonging to the same social, cultural and economic context as themselves. For a political system to be truly democratic, it has to allow minorities a voice of their own, to articulate their distinct concerns and seek redress and thereby lay a sure base for deliberative democracy. This decision has been heralded as marking a positive turn in the Kenyan judiciary for recognition of indigenous right. See: <http://www.kenyalaw.org>
Case prepared by Naomi Kipuri.

5.3.4. Participation in local governance

As regards the participation at local level, the issue is being addressed in the context of recent developments towards the decentralization of States and devolution of powers to regional and local authorities. In some cases, this process has been accompanied by the recognition of some spheres of autonomy in favour of indigenous peoples. In other cases, indigenous communities are recognized as territorial divisions for the purpose of States' administrative organization. In this context, the State may acknowledge the social and political organization of indigenous communities.



Panama: Special territorial units

Article 5 of Panama's Magna Carta states that political divisions may be established by law, governed by special regimes. In this regard, Panama has five special territorial units that enjoy administrative autonomy through General, Traditional, Regional and Local Councils. They are all governed by their traditions and customs, and make their own decisions within the framework stipulated by the Constitution and the country's legislation. As for the State, it recognises the unique characteristics of the indigenous society as compared to national society, and the indigenous communities adjust to certain State interests on sovereignty, security and use of resources in order to gain their own native land. The indigenous peoples make the majority of decisions in cultural, economic and political matters that affect their populations, and keep watch to ensure indigenous rights are fulfilled.

The Kuna Yala Comarca, an area of 5.500 Km², is located in north-eastern Panama and includes both land and coastline. The Comarca is governed by the Kuna General Council (CGK) (Onmaked Summakaled), which is the highest authority, comprised of the local councils of the 49 communities, each one represented by a Saila. The region is run by three general chiefs (Caciques) elected by the CGK. The CGK meets for 4 days every 6 months. In addition to the 49 Sailas that

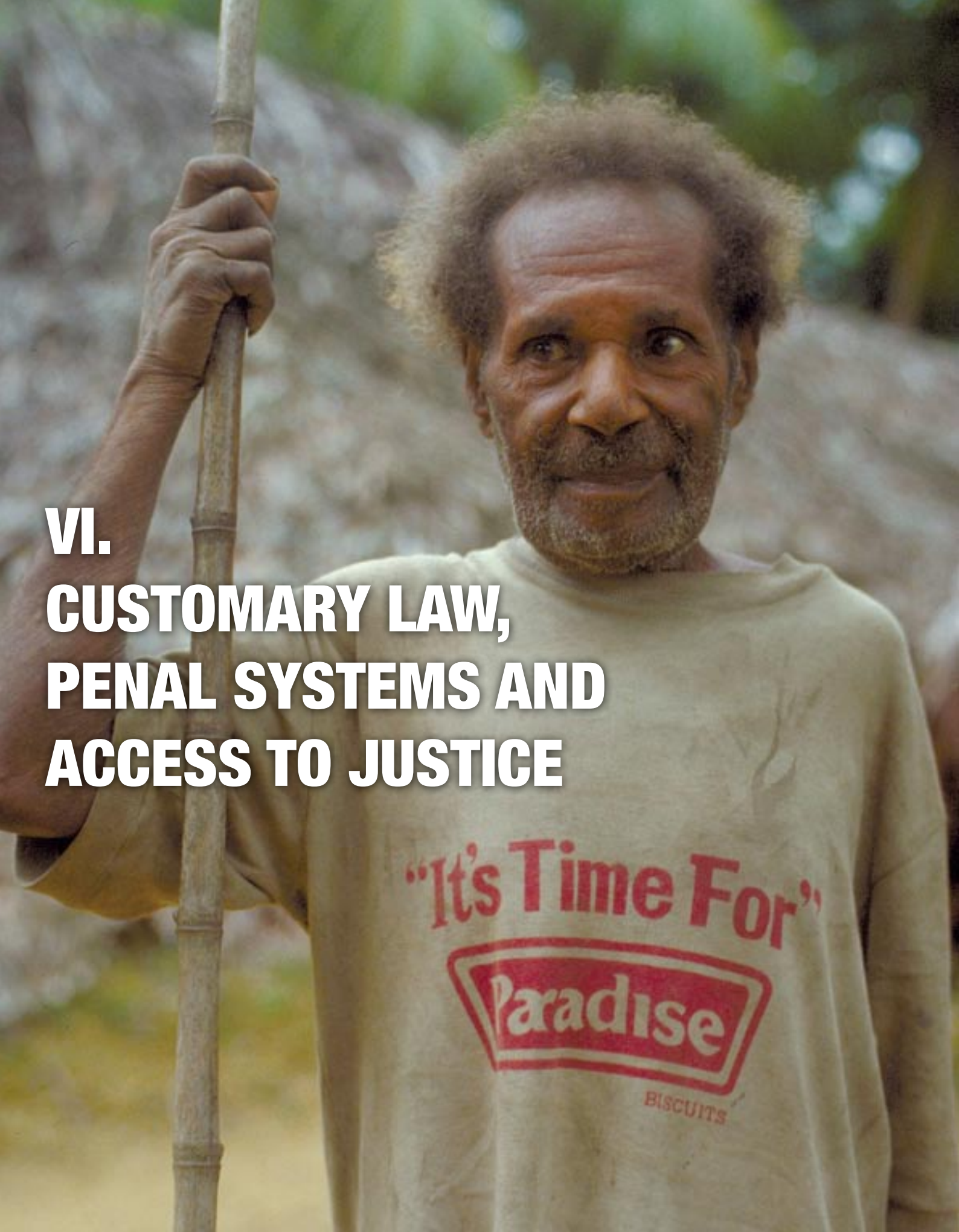
represent their communities, participation on these councils is mandatory for National Assembly representatives, the regional Governor, the 4 district (*corregimiento*) representatives and the regional directors of each institution established in the Comarca. Furthermore, each community is obligated to include one woman on its delegation. The participation of women was approved by the Sailas in a session of the CGK, yet this agreement has still not been carried out, for the most part, by the communities.

Concurrently, the Kuna Council of Culture (Onmaked Namakaled) was created in 1971. This council, run by the Sailas Dumagan of Kuna tradition, is responsible for upholding and disseminating Kuna culture, and cannot get involved in political matters.

The Kuna Council of Culture and CGK rank above all other Kuna organisations, as well as government and private institutions, but act in consultation and coordination with them. Any institution wishing to negotiate or carry out agreements or projects in the Kuna Yala Region must do so with the accept of these authorities in the appropriate jurisdiction.

http://www.oas.org/Juridico/MLA/sp/pan/sp_pan-int-text-const.pdf

Case prepared by Myrna Cunningham



**VI.
CUSTOMARY LAW,
PENAL SYSTEMS AND
ACCESS TO JUSTICE**

6.1. CUSTOMS AND CUSTOMARY LAW

Many indigenous and tribal peoples have their own customs and practices, which form their customary law. This has evolved through the years, helping to maintain a harmonious society.

Often, in order to apply these customs and practices, indigenous peoples have their own institutional structures such as judicial and administrative bodies or councils. These bodies have rules and regulations to make sure customary laws are followed. Failure to do so is often punished, and individual lapses often have their own specific punishment.

An effective implementation of internationally recognized indigenous peoples' rights - including land and resource rights, and cultural, social and economic rights - requires that customs, customary law and legal systems of indigenous peoples are recognized and acknowledged, in particular in relation to collective rights of fundamental importance to indigenous peoples.

Convention No. 169 recognises the right of indigenous peoples to their own customs and customary law. It states that when applying national laws, these customs and customary laws should be taken into account.

Convention No. 169, 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.



According to Article 8(2) of the Convention, only those customs and institutions that are incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights are exempt from the principle enshrined in Article 8(1). This provision establishes cumulative exemption criteria: the customs must be incompatible with both (a) national legislation as well as (b) international human rights provisions. Thus, national legal provisions that are incompatible with rights recognized under international human rights law cannot be used to justify ignorance of indigenous peoples' customs in the application of national legislation. On the other hand, **indigenous customs cannot be justified if these are in violation of fundamental human rights.** This is, for example, the case with female genital mutilation,¹⁾ which is performed in some indigenous communities as a customary practice, or the ritual of burying disabled children or children of unwed mothers alive, prescribed by cultural norms.²⁾ Article 34 of the UN Declaration on the Rights of Indigenous Peoples reaffirms the principle contained in Article 8(2) of the Convention, that it is international human rights law which establishes standards to determine which customs are unacceptable; international human rights law establishes *minimum universal standards* for human rights and freedoms – derived from the inherent dignity of the human person. Article 34 of the Declaration states that indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards. Moreover, Article 35 of the Declaration states that indigenous peoples have the right to determine the responsibilities of individuals of their communities. This provision is closely linked to the issues of customary law, as such laws are important sources for the description of the rights and responsibilities of indigenous individuals residing in indigenous communities (Henriksen 2008).

1) Commonly practiced by some indigenous peoples, for instance in Kenya and Tanzania.

2) (a) Hugo Marques (2008) *The Indian Child who was Buried Alive* <http://www.lifesitenews.com/ldn/2008/feb/08022604.html>;

(b) O'Brien, Elisabeth (2007) *Anthropology Professor says Tribal Killings of Disabled Babies should be Respected* <http://www.lifesitenews.com/ldn/2007/jul/07070403.html>

United Nation's Declaration on the Rights of Indigenous Peoples

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Constitutional recognition of indigenous peoples' legal customs and systems is an important measure for the development of a legal regime, which effectively accommodates indigenous customary law and practices and enables them to co-exist with the national legal system. Whether customs and customary laws are recognized and taken into account by national authorities in policy decisions and in the application of national laws and regulations seems to depend on two main factors:

1. The level of general acceptance of legal pluralism within the national juridical system;
2. The issue which the custom or customary law is sought to be made applicable for.

The general tendency is that indigenous customs and customary law are more accepted when they are applied in relation to individuals within indigenous communities. This applies to customary personal law, and various religious, cultural or social customs and rituals within communities. In contrast, the collective aspects of indigenous customary law often seem to be regarded as a "threat" to national legal systems rather than as an additional and valuable contribution to the development of legal pluralism – which is a prerequisite for multi-culturalism. Indigenous customs and customary laws are more reluctantly, if at all, taken into account in relation to matters which affect economic interests of the state or third parties, especially when concerning customary rights over lands, territories and resources (Roy 2004: pp. 305-312).



Still, the level of acceptance of legal pluralism, through state acceptance and application of indigenous peoples' customs and customary law appears selective and pragmatic, and largely determined by the economic interests of the majority population or certain sectors of the national community (Henriksen 2008).

6.2. OFFENCES AND PENAL SYSTEMS

Convention No. 169 establishes that indigenous peoples' traditional methods of punishment shall be respected and also taken into account in the administration of general law.



Convention No. 169

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.



Under Article 9(1), States are obliged to respect indigenous peoples' customary methods for dealing with criminal and other offences, to the extent such methods are compatible with the national legal system and international human rights law. Customary punishment methods that violate individual human rights are thus not legitimized under this provision. The other criterion in Article 9(1) – compatibility with the national legal system – is not limited to the question of substantive legal compatibility, as it is also a question about whether this is compatible with the overall system of administration of justice in the country concerned. Many indigenous peoples still practice their traditional methods for dealing with minor offences committed by their members, without state interference – whereas more serious offences normally are dealt with under the applicable national legal procedures. However, also in cases where general legal procedures are applied in response to offences committed by indigenous individuals, the customs of the indigenous people concerned shall be taken into account by authorities and courts dealing with such issues (Article 9 (2); cf. Henriksen 2008).

Members of indigenous peoples are often overrepresented among prisoners and among deaths in custody. In Australia, between 1980 and 1997, at least 220 Aborigines died in custody. While Aborigines represent only 1.4 % of the adult population, they accounted for more than 25 % of all custodial deaths due, for example, to poor prison conditions, health problems and suicide. This highlights the need for efforts by judges, courts and national administrators to find alternative forms of punishment when dealing with indigenous or tribal offenders.³⁾

3) ILO Convention No. 169: A Manual, ILO, 2003.

6.3. ACCESS TO JUSTICE

Indigenous peoples' marginalized position is often reflected in their limited access to justice. Not only do they have a special risk of becoming victims of corruption, sexual and economic exploitation, violations of fundamental labour rights, violence etc. but they also have limited possibilities for seeking redress. In many cases, indigenous peoples are not familiar with national laws or the national legal system and do not have the educational background or the economic means to ensure their access to justice. Often, they do not speak or read the official language used in legal proceedings, and they may find courts, hearings or tribunals confusing. To address this situation, Article 12 of the Convention stipulates that indigenous peoples should have access to using the legal system to ensure the applicability of their guaranteed rights and that, where necessary, indigenous peoples should have interpretation in courts and other legal proceedings. This is to make sure that they can understand what is going on, and also, that they can be understood themselves.

ILO Convention No. 169:

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.



An operational approach to improving access to justice

The UNDP defines “access to justice” as: “The ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards”. In linking access to justice to the broader human rights and development framework, the UNDP focuses on people’s capacity to demand accountability in two ways: by using human rights to define the minimum scope of legitimate claims; and by enhancing the accountability mechanisms and processes through which they protect these claims. Such accountability mechanisms comprise not only the formal and customary justice systems, but also a range of other mechanisms, including the media, parliamentary commissions etc. Access to justice is thus understood as a process, which must be contextualized to the specific circumstances and which requires capacity-building of all actors. The UNDP identifies the following key elements in this regard:

- Legal protection (recognition of rights within the justice systems, thus giving entitlement to remedies either through formal or traditional mechanisms).
- Legal awareness (people’s knowledge of the possibility of seeking redress through the formal or traditional justice systems).
- Legal aid and counsel (access to the expertise needed to initiate and pursue justice procedures).
- - Adjudication (the process of determining the most adequate type of redress or compensation, either regulated by formal law as in the case of courts or by traditional legal systems).
- Enforcement (the implementation of orders, decisions, and settlements emerging from formal or traditional adjudication).
- Civil society and parliamentary oversight (watchdog and monitoring functions with regards to the justice systems).⁴⁾

4) UNDP: Programming for Justice - Access for All. A Practitioner’s Guide to a Human-Rights –Based Approach to Access to Justice, 2005.





6.4. PRACTICAL APPLICATION: CUSTOMARY LAW

Latin America: Recognition of indigenous customary law

In Latin America, the incorporation of indigenous customary law into the national legal systems has been developing since the 1990s in order to address the gaps of inefficient and deplorable justice administrations; as states' response to intense pressure from indigenous organization; and to fulfil the requirements derived from the ratification of ILO Convention No. 169.

Bolivia, Colombia, Ecuador, México, Nicaragua, Paraguay, Perú and Venezuela recognise legal pluralism through their constitutions by recognizing the multicultural or multiethnic nature of their societies.

Donna Lee Van Cott: Legal Pluralism and Informal Community Justice Administration in Latin America.
<http://www.nd.edu/~cmendoz1/datos/papers/vancott.pdf>

Ecuador: Recognition of legal pluralism

Recognition of legal pluralism has been developing in Ecuador since 1998, the year when Ecuador ratified Convention No. 169. The 1998 National Constitution, established that "the authorities of the indigenous peoples will exercise judicial functions, applying norms and procedures for the solution of internal conflicts in accordance with their customs or customary law, whenever they are not contradictory to the Constitution and the laws. The law will make those functions compatible with those of the judicial national system."

This constitutional recognition reaffirms the heterogeneity of the cultures and the existence of legal pluralism in the country. It implies that in the same territory, two or more legal systems coexist.

Despite the ratification of Convention No. 169 and the constitutional changes, Ecuador has not fully developed into a multicultural and pluralistic State. In practice, indigenous legal systems are being undermined by judges and others legal authorities,

who regard the indigenous systems as “static”, “archaic” and “savage” and thus continue to act within the frame of a society characterized by only one culture, one language and one judicial system. Hence, they are ignoring the flexible and dynamic nature of contemporary indigenous systems, which tend to adjust to changing relations with outside actors as well as changes within their communities.

To remedy this situation, the Council for the Development of Ecuadorian Nationalities and Peoples (CODENPE), established an agreement with the District Attorney’s Office to create a Unit of Indigenous Justice. Indigenous prosecutors monitor the respect for, and the application of indigenous laws in national legal proceedings involving indigenous peoples. CODENPE and the Supreme Court are coordinating efforts in order to nominate indigenous judges to rule over criminal cases in the provinces where indigenous prosecutors work. *Lourdes Tiban: El derecho indígena y su relación con la justicia ordinaria*
http://www.latinoamerica-online.info/2008/indigeni08_derecho.htm;
<http://www.ecuanex.net.ec/constitucion>.
Case prepared by Brenda Gonzales Mena.

Bangladesh: Recognition of customary family laws

The situation in Bangladesh is an example of the fact that state recognition of indigenous legal frameworks varies depending on the nature of the cases.

The personal laws of the indigenous peoples of the Chittagong Hill Tracts (CHT) in Bangladesh on marriage, inheritance, and related matters are regulated by unwritten customs, practices and usages. The State accepts this situation, as customary family laws of the different indigenous peoples of the CHT normally do not come into conflict with other laws and systems, since the region has its own partially autonomous self-government system that acknowledges indigenous law and jurisprudence. Customary personal laws of the indigenous peoples of the CHT are regulated substantively by the traditional institutions of the CHT; village leaders, headmen, and traditional chiefs or rajas.

However, the legal status of their customary laws

with regard to lands and natural resources in the CHT is far more contested. Customary land and forest rights are enjoyed usually only where, and to the extent, they do not conflict with state law. *Raja Devasish Roy (2004), Challenges for Juridical Pluralism and Customary Law of Indigenous Peoples: The Case of the Chittagong Hill Tracts, Bangladesh; Defending Diversity: Case Studies (Ed. Chandra Roy), the Saami Council, pages 89-158; Case cited in John Henriksen: Key Principles in Implementing ILO Convention No. 169, ILO, 2008.*

Kenya: Selective acceptance of customary law

There is limited recognition of customary law in Kenya and in many former English colonies, where the constitutions allow the statutory recognition of customary law over matters such as adoption, marriage, divorce, burial and the devolution of property on death. Customary law is also applied to a limited extent in the recognition of local leadership, such as chiefs, although parallel structures have been created to subvert and undermine existing ones. At the same time, the authority and validity of these laws are seriously eroded through the repugnancy clause inherited from colonial laws and traditions, requiring consistency between customary law, all written laws and the constitution. The clause makes customary laws acceptable only as long as they are not repugnant to written law.

Female genital mutilation (FGM) is common and deeply entrenched among many African communities, indigenous and non-indigenous. FGM is a social rite of passage in these societies, and girls who have not gone through FGM are perceived as incomplete and face stigmatization. FGM is likely to result in serious and long-lasting physical complications and is considered an act of violence against women, or rather female children, and as a human rights violation.

Although no governmental institution perform circumcisions on girls in Kenya anymore, and the Children’s Act of 2001/No. 8 prohibits circumcision of girls, the practice of FGM is still widespread in Maasai and other communities. This is partly due to inadequate preventive measures from authorities to protect girls from being forcibly mutilated. From a human rights law perspective, this is an



unacceptable custom – and the State is obliged to ensure that it is not practiced, despite the fact that this phenomenon in some cases may be defined as an indigenous custom.

In contrast, the repugnancy clause has often been used to negate positive customary laws. For example, the Maasai customs regulating rights to lands and resources are to a limited degree recognized or taken into account.

G. Nasieku Tarayia (2004) Legal Perspectives of Maasai Culture, Customs and Traditions; Defending Diversity: Case Studies (Ed. Chandra Roy), the Saami Council. Case prepared by Naomi Kipuri and John Henriksen.

Finland, Norway and Sweden: Recognition of Sami customs and customary law

Although, in principle, Sami customs and customary practices are applicable sources under the respective national legal systems, they are to an extremely limited degree taken into account in policy decisions or in the development and application of national legislation.

Article 9 of the draft Nordic Sami Convention, addresses the issue of Sami legal customs, and reads as follows:

The states shall show due respect for the Saami

people's conceptions of law, legal traditions and customs. Pursuant to the provisions in the first paragraph, the states shall, when elaborating legislation in areas where there might exist relevant Saami legal customs, particularly investigate whether such customs exist, and if so, consider whether these customs should be afforded protection or in other manners be reflected in the national legislation. Due consideration shall also be paid to Saami legal customs in the application of law.

Case cited in John Henriksen: Key Principles in Implementing ILO Convention No. 169, ILO, 2008.

Namibia: Recognition of Traditional Authorities

The Namibia Constitution recognises customary law and traditional authorities as part of its legal system. The Traditional Authorities Act No. 25 of 2000 provides for the establishment of traditional authorities consisting of chiefs or heads of traditional communities and traditional councillors. These are responsible for implementing customary law and settling disputes. To be recognised, they must submit an application to the State, and the authority to confer recognition or withhold it from traditional leaders is thus vested in government. However, the CERD Committee, among others, has questioned the lack of clear criteria for the recognition of traditional leaders, and the fact that no institution exists to assess applications for

recognition independently of government. However, some NGOs see the Traditional Authorities Act as an opportunity for indigenous peoples to participate more effectively in decision-making, although some challenges remain, including the required training in administrative and leadership skills that the full implementation of the Act for indigenous peoples would imply.

CERD, Concluding Observations: Namibia, August 2008, UN Doc. No.: CERD/C/NAM/CO/12

Namibian Constitution, Traditional Authorities Act; R Kappeca & WIMSA 'Civil Rights in Legislation and Practice: A Case Study from Tsunkwe District West, Namibia' in Hitchcock and D Vinding (eds) Indigenous Peoples Rights in Southern Africa (2004) 91.

Case prepared by Naomi Kipuri

Greenland (Denmark): Criminal code based on customary law

The Criminal Code in Greenland is partly based on the customary law of the Greenland Inuit. This is particularly the case insofar as sanctions for criminal offences are concerned, whereas guilt is determined as in Danish criminal law.

Imprisonment as a sanction is only applicable in relation to extremely serious offences, or when it is otherwise deemed necessary. Individual sanctions normally consist of measures such as caution, fine, suspended imprisonment, and community service sentence. Hence, there is no closed prison facility in Greenland, only nighttime correctional institutions. During the day, inmates can leave the correctional institution to work, study, and perform other activities, including fishing and hunting.

The judicial system of Greenland also differs markedly from judicial systems of other countries in other ways. For instance, district judges, assessors and defense counsels are lay locals and not trained lawyers. Only when a case is brought before the appeal court, the High Court of Greenland, do legally trained prosecutors, judges and attorneys become involved.

Commission on Greenland's Judicial System, Report No. 1442/2004;

John Henriksen: Key Principles in Implementing ILO Convention No. 169, ILO, 2008.

Philippines: Conflict resolution institutions

The Indigenous Peoples' Rights Act recognizes indigenous peoples' right "to use their own commonly accepted justice systems, conflict resolution institutions, peace building processes or mechanisms and other customary laws and practices within their respective communities and as may be compatible with the national legal system and internationally recognized human rights" (sec.15).

<http://www.ncip.gov.ph/mandatedetail.php?mod=ipra>



An aerial photograph of a dense, lush green forest. The trees are tightly packed, creating a textured, vibrant green canopy. The lighting is bright, highlighting the various shades of green and the intricate patterns of the forest floor.

VII. LAND AND TERRITORIES

7.1. THE CONCEPT OF LAND

Most indigenous peoples have a special relationship to the land and territories they inhabit. It is where their ancestors have lived and where their history, knowledge, livelihood practices and beliefs are developed. To most indigenous peoples the territory has a sacred or spiritual meaning, which reaches far beyond the productive and economic aspect of the land. In the words of UN Special Rapporteur Martinez Cobo;

"It is essential to know and understand the deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture... for such people, the land is not merely a possession and a means of production... Their land is not a commodity which can be acquired, but a material element to be enjoyed freely." ¹⁾

The centrality of the concept of land and territories is strongly reflected in Convention No. 169, which has a series of provisions to explain the concept of land and territories; the rights of indigenous peoples to possession and ownership; as well as the requirements for identifying the lands; protecting their rights, and; resolving land claims.

As the central starting point, **ILO Convention No. 169** stipulates that:

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.

1) Jose R. Martinez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities: *Study on the Problem of Discrimination Against Indigenous Populations*. UN Document No.E/CN.4/Sub.2/1986/7/Add.1, paras. 196 and 197.

This is reaffirmed in Article 25 of the UN Declaration on the Rights of Indigenous Peoples, which stipulates that indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally-owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

The territory is the basis for most indigenous peoples' economies and livelihood strategies, traditional institutions, spiritual well-being and distinct cultural identity. Consequently, loss of ancestral lands threatens their very survival as distinct communities and peoples. It must thus be understood that when the Convention talks about "lands", the concept embraces the **whole territory** they use, including forests, rivers, mountains and coastal sea, the surface as well as the sub-surface.

7.2. PROTECTING THE RIGHT TO OWNERSHIP AND POSSESSION

Considering the crucial importance of lands and territories for indigenous peoples, the Convention contains a series of provisions to protect their right to ownership and possession





ILO Convention No. 169:

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 17:

- 1.** Procedures established by the peoples concerned for the transmission of land rights

among members of these peoples shall be respected.

- 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.

Also the UN Declaration on the Rights of Indigenous Peoples addresses the crucial theme of land and territories:

The UN Declaration on the Rights of Indigenous Peoples:

Article 26:

- 1.** Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
- 2.** Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
- 3.** States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be

conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27:

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.



Based on the recognition of the historical displacement of indigenous peoples from their lands and territories; the dependency of their traditional way of life on land; their vulnerability to the loss of land and the long occupancy that they often have practiced, the Convention calls for **measures of protection** of their land rights. As stipulated in articles 14, 17, 18 and 19, such measures include the following elements:

Recognition of the right to ownership and possession of lands traditionally occupied by indigenous peoples, Article 14(1).

Indigenous peoples have the right to ownership and possession of the lands that they have traditionally occupied. These are lands where indigenous peoples have lived over time, and which they want to pass on to future generations. The establishment of indigenous peoples' land rights is thus based on the traditional occupation and use and not on the eventual official legal recognition or registration of that ownership by the States, as the traditional occupation confers "a right to the land, whether or not such a right was recognized [by the State]".²⁾

Article 7(1) of Convention No. 169, further explains that indigenous peoples 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".

Thus, as emphasized by the ILO supervisory bodies, 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".³⁾



2) Committee of Experts, 73rd Session, 2002, Observation, Peru, published 2003, para. 7

3) Governing Body, 282nd Session, November 2001, Representation under article 24 of the ILO Constitution, Colombia, GB.282/14/3

Similarly, Article 26(3) of the **UN Declaration on the Rights of Indigenous Peoples**, stipulates that states, in giving legal recognition and protection to indigenous peoples' lands, territories and resources, shall do so with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned. Consequently, the identification of such lands, territories and resources, and the identification of the scope of the rights pertaining to such lands and resources, cannot only be based on state-adhered legal concepts and traditions – which are frequently in direct conflict with those of indigenous peoples. The Supreme Court of Belize is of the view that Article 26 of the UN Declaration on the Rights of Indigenous Peoples reflects a general principle of international law on indigenous peoples' rights to lands and resources.⁴⁾

Indigenous peoples' lands might in some cases include lands which have been recently lost or lands that have been occupied by indigenous peoples in more recent time (often following their displacement from lands they previously occupied). As expressed by the ILO supervisory bodies: "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".⁵⁾

The right to ownership and possession comprise both individual and collective aspects. The concept of land encompasses the land which a community or people uses and cares for as a whole. It also includes land which is used and possessed individually, e.g. for a home or dwelling.

4) Supreme Court of Belize, Claim No. 171 of 2007 and Claim No. 172 of 2007; Case cited in John Henriksen: Key Principles in Implementing ILO Convention No. 169, ILO, 2008

5) Governing Body, 276th Session, November 1999, Representation under article 24 of the ILO Constitution, Mexico, GB.276/16/3, para. 37.



In many cases, individual rights are established within a collectively owned territory. However, the supervisory bodies have raised concerns in cases where collective lands are converted into individual properties, stating 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”.*⁶⁾

Right to lands not exclusively occupied by an indigenous people (Article 14.1)

Land can also be shared among different communities or even different peoples, with complementary rights within a given area. This is especially the case with grazing lands, hunting, fishing and gathering areas and forests, which, may be used by nomadic pastoralists, hunters or shifting cultivators on a rotational or seasonal basis. In other

6) Governing Body, 273rd Session, November 1998, Representation under article 24 of the ILO Constitution, Peru, GB.273/14/4, para. 26. See also comments relating to the claim for land rights of the Thule community (section 1.4).

cases, certain communities may have rights to certain types of resources within a shared territory, as they have developed complementary livelihood strategies. Also such non-exclusive land rights are established on the basis of traditional occupation.

Identification and protection of the areas belonging to indigenous peoples (Article 14.2.)

In order to effectively protect indigenous peoples’ land rights, governments must establish procedures for identifying the lands of indigenous peoples and establish ways to protect their rights to ownership and possession. These procedures can take a variety of forms; in some cases they will include demarcation and titling while in other they may imply the recognition of self-governance arrangements or co-management regimes (see the examples of Greenland self-governance and the Finnmark Act, sections 4.2. and 7.5.).

What is important is that the process of identifying and protecting lands forms part of the government’s coordinated and systematic action to guarantee the respect for the integrity of indigenous peoples and ensure adequate consultation with regards to the proposed measures.

In most cases, the regularization of land ownership is a complex task that involves a variety of stakeholders and steps, including the adoption of legislation, the definition of adequate procedures and the establishment of institutional mechanisms for implementation and resolution of competing claims. While acknowledging that the regularisation of land ownership is a complex process that requires time, the supervisory bodies of the ILO have also recommended that transitional measures may be adopted during the course of the process in order to protect the land rights of the indigenous peoples while awaiting the final resolution.⁷⁾

Establishment of mechanisms to resolve land claims

It is almost inevitable that the process of regularising land ownership and possession will give rise to competing land claims. In most cases, these

7) Governing Body, 299th Session, June 2007, Representation under article 24 of the ILO Constitution, Guatemala, GB.299/6/1, para. 45.

arise between indigenous and non-indigenous communities or individuals but also, in some cases, between different indigenous communities. Therefore, the establishment of appropriate procedures for resolving land claims is absolutely essential, taking into account the general principles of ensuring consultation and participation of indigenous peoples in decision-making on the establishment of “appropriate procedures”. As underlined by the ILO supervisory bodies, the establishment of such mechanisms for resolving land claims is also a way to prevent violent incidents.⁸⁾

In this regard, the UN Declaration, in Article 27, obliges states to recognize and adjudicate the rights of indigenous peoples to their lands, territories and resources. Moreover, Article 26(3) of the Declaration obliges states to give legal recognition and protection to indigenous peoples’ lands, territories

8) Governing Body, 289th Session, March 2004, Representation under article 24 of the ILO Constitution, Mexico, GB.289/17/3, para. 134.



and resources, taking into account indigenous peoples customs, traditions and land tenure systems.

Recognition of customary procedures for transmission of lands within communities

The Convention states that indigenous peoples have the right to pass lands on from one generation to another, according to the customs of their own community.

Protection against abuse and intrusion

Based on past negative experiences where indigenous peoples have been tricked or forced to give up their lands, the Convention provides protection from others coming into these lands for their own personal gain without permission from the relevant authorities and from outsiders trying to take the lands of indigenous peoples away from them through fraud or other dishonest means.

Provision of more lands where necessary

Due to population growth, environmental degradation, etc., there are many cases, where indigenous peoples need additional land in order to sustain their livelihoods.

7.3. DISPLACEMENT

Considering the crucial importance of lands and territories for indigenous peoples, it is obvious that any non-voluntary or forced displacement have severe impacts, not only on their economies and livelihood strategies but also on their very survival as distinct cultures with distinct languages, institutions, beliefs, etc.

Article 16 of Convention No. 169 deals explicit with displacement of indigenous peoples.



ILO Convention No. 169, 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.

- The first basic principle, established in Article 16(1) of the Convention, is that **indigenous peoples shall not be removed from their lands**. This is the basic principle that should be applied under all normal circumstances.
- However, acknowledging that there may be circumstances where this becomes unavoidable, Article 16(2) establishes that this should be only as an **exceptional measure**. This could, for example, in the near future be the case for some pastoralist and small island communities that are severely affected by changes in the global climate.

- To ensure that such situations are handled in an adequate way that respects indigenous peoples' rights and integrity, Article 16(2) further stipulates that relocation should only take place with their **free and prior informed consent**. Free and informed consent means that the indigenous peoples concerned understands fully the meaning and consequences of the displacement and that they accept and agree to it. Obviously, they can do so only after they have **clear and accurate information** on all the relevant facts and figures.
- If indigenous peoples do not agree, and the relocation is still unavoidable, then Article 16(2) outlines that the relocation should only take place following **appropriate procedures** established by national legislation and including **public inquiries** where indigenous peoples have the opportunity to effectively present their views.
- Article 16(3) stipulates that in cases where relocation has been necessary, indigenous peoples should have the **right to return** as soon as the reason for which they had to leave is no longer valid. For example, in the case of a war, or natural disaster, they can go back to their lands when it is over.
- Article 16(4) stipulates that in cases where such unavoidable relocation becomes a permanent situation, indigenous peoples have the right to **lands of an equal quality and legal status** to the lands they previously occupied, for example in terms of agricultural potential of the lands and the legal recognition of ownership to that land. Thus, if indigenous peoples cannot return to their lands, for example because they have been flooded, there must be a plan for their resettlement and rehabilitation. If indigenous peoples so wish, they can accept other forms of payment for their lost lands.
- Finally, Article 16(5) stipulates that indigenous peoples have the right to receive **full compensation** for any loss or injury the relocation may have caused, e.g. loss of house or property, adverse health impacts due to change of climate, etc.

The **UN Declaration on the Rights of Indigenous Peoples**, has similar provisions on redress, restitution and compensations, in *Article 28*:


1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resource equal in quality, size and legal status or of monetary compensation or other appropriate redress.

7.4. COMMENTS BY THE ILO SUPERVISORY BODIES: RIGHT TO LANDS AND TERRITORIES

Peru: Conversion of communally owned land into individual property

In 1998, an Act was promulgated for the coastal region in Peru, empowering individual community members to take the decision to dispose of communal lands. Thereby, the Act allegedly bypassed the decision-making authority of the General Assembly of the Community, which is the highest-ranking decision-making body in the communities.

In its conclusions, the Tripartite Committee established to analyse the case considered that it is not for the ILO to determine whether individual or collective ownership is most appropriate for indigenous peoples in a given situation, although Convention No. 169 recalls the special importance of the relationship of indigenous peoples with the lands or territories, and in particular the collective aspects of this relationship. From its experience acquired in the application of the Convention, the Committee noted that the loss of communal land often damages the cohesion and viability of the people concerned. The Committee further noted that:



This is why, in the preparatory work for the Convention, many delegates took the position that lands owned by indigenous persons, and especially communal lands, should be inalienable. In a closed decision, 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 should be consulted through their representative institutions whenever consideration is being given to legislative or administrative measures which may affect them directly (Article 6).

In its concluding remarks to the specific case, the Committee noted that:

In the present case, apparently the Government has decided to favour individual ownership of the land and, in doing so, has ruled out the possible participation of community institutions in the decision-making process, which is not in conformity with the Convention. The Committee notes the Government's statement that this form of individual landownership is more productive and that it is only regulating an existing practice; although this may or may not be in accordance with the wishes of the peoples concerned, the Committee has not seen any indication that the indigenous peoples of the country have been consulted on the matter as required by the Convention.

Report of the Committee set up to examine the allegation regarding non-compliance with ILO Convention No. 169. Submitted 1997. GB.270/16/4.

Colombia: traditional occupation.

In examining a case concerning the granting of an environmental licence to an oil company for exploration activities within the territory of the indigenous U'wa people without prior consultation, the ILO Committee of Experts noted that the Government had applied the criterion of "regular and permanent presence of indigenous communities" in deciding whether the project would affect the communities in question.

The planned exploratory well is located in the middle of the U'wa ancestral lands but about 1.7 kilometres



from the boundaries of the legally recognised reserve. However, the Committee concludes that the area of operations of the exploratory well project would have an impact on the communities in that area, including the U'wa communities.

The Committee recalls that the concept of indigenous peoples' *"rights of ownership and possession over the lands which they traditionally occupy"*, as stipulated in Article 14(1) of Convention No. 169, is not necessarily equivalent to the criterion of *"regular and permanent presence"* used by the government. Furthermore, the Committee, recalls that 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)"*.

Thus, the Committee concludes that: *"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."*
Governing Body, 282nd Session, November 2001, Representation under article 24 of the ILO Constitution, Colombia, GB.282/14/3.

7.5. PRACTICAL APPLICATION: LANDS AND TERRITORIES

Bolivia: Empowerment through land rights

The territory of the Ese Eja, Tacana and Cavineño peoples is located in the northern part of the Bolivian Amazon region. The area is remote and distant from the political centre of power, and there is hardly any presence of public institutions. Historically, the natural resources in the area (timber and non-timber produce such as rubber and nuts) have been variously exploited by external actors, depending on trends in the world market. The indigenous peoples have suffered from exclusion, domination and lack of knowledge of their rights and most of them have been exploited as unpaid labourers, not least through practices of forced labour and debt bondage. Those who did not fall victims to these practices were forced to move to more inaccessible areas, thus provoking social fragmentation and conflicts between the indigenous groups. More than a century of imposition of foreign social, economic, cultural and political domination undermined the indigenous peoples' institutions and capacities but did not lead to their elimination.

The emerging indigenous peoples' movement and organisation around land claims in the 1990s led to



significant legal and political changes. In 1991, Bolivia ratified Convention No. 169, which triggered a series of legal reforms, including the Constitutional Reform of 1994, which recognized and solidified the collective rights instituted in the Convention. Article 171 of the revised Constitution, granted indigenous peoples the ownership of their Communal Lands of Origin (CLO), and rights to the sustainable use of their natural resources. Another result was the 1996 Agrarian Reform Law, which recognized the collective rights of indigenous peoples to their territories, as well as indigenous customary law and indigenous norms of distribution, redistribution and use.

The reforms were followed by long-term and large-scale efforts to demarcate and title CLOs, which, over a period of ten years, resulted in the legal recognition of more than 500 “peasant” communities (see section 1.4.) and 10 CLOs in the Northern part of the Amazon, having profound political, legal, social and economic impact on the communities.

In this context, the Ese Ejja, Tacana and Cavineño peoples, through the Indigenous Organisation of the Bolivian Amazon Region (CIRABO), claimed collective titling of their territory (CLO). The CLO was legally recognized through two consecutive land titles issued in 2001 and 2005. The total surface

of the CLO is 407,584 hectares and the titles are held collectively by the 28 communities living in the territory, with a total population of 3,594 inhabitants (2000).

The process towards legal recognition of the CLO involved a series of actors and steps, including awareness-raising, capacity-building, legal and administrative procedures and field demarcation. Also, it implied a confrontation with the local, regional and national elite, which had previously controlled the area. In contrast, for the Ese Ejja, Tacana and Cavineño peoples, the titling process implied aspirations of a new type of social, economic, cultural and political relations. The titling marked a major transition point with evident qualitative differences:

“The land belonged to private employers and we, the indigenous families, worked as ‘siringueros’ [rubber tappers], we lived there until we died. We were all controlled by the employers, because they thought they were the owners of the land and we only worked for them.”⁹⁾

“They did not recognise us as indigenous, they wanted us to present our papers as peasants but

9) Testimony, workshop in the Tacana Community San Salvador, 2007.

we denied, we had to present as an indigenous community, and therefore we united with our brothers Tacana and Cavineño, to have them recognise our rights. Now, we manage our territory, we are the owners, we decide over our natural resources and at the same time, we maintain our cultures.”¹⁰⁾

The Ese Ejja, Tacana y Cavineño peoples are moving towards Indigenous Autonomy, as recognized in the 2009 Bolivian Constitution, based on the use and control of their territory, and linked to an integrated vision of their future, related to their identity, cultural practices, rituals, spiritual beliefs and system of territorial administration and control.

Centro de Estudios Jurídicos e Investigación Social (CEJIS): Impactos sociales, económicos, culturales y políticos de la aplicación del Convenio No. 169 de la OIT, a través del reconocimiento legal del Territorio Multiétnico II, a favor de los pueblos indígenas Ese Ejja, Tacana y Cavineño en el norte amazónico de Bolivia, ILO, 2009.

Norway: The Finnmark Act

In April 2003, the Norwegian Government submitted the Finnmark Act concerning land rights in Finnmark County to the National Parliament.

10) Interview with Ese Ejja leader Antenor Monje M, November 2007

The proposed legislation was strongly criticized and rejected by the Sami Parliament and various Sami bodies and organization. It was argued that the proposed legislation did not meet the requirements of international law, including Article 14 of the ILO Convention No. 169. It was also said that the Government had not undertaken proper consultations with the Sami Parliament in developing the legislation.

The National Parliament established direct contact with the Sami Parliament concerning the substantive content of the Finnmark Act, when it became clear that there were strong doubts whether the proposed legislation and the process met international standards.

In 2004, the Parliament’s Standing Committee on Justice established a dialogue with the Sami Parliament and the County Council of Finnmark. This process concluded with an agreement on the content of the Finnmark Act between the National Parliament and the Sami Parliament. Furthermore, in 2005, the Government and the Sami Parliament signed an agreement on procedures for consultations between State authorities and the Sami Parliament, aimed at avoiding similar situations



in the future.

In summary, the content of the Finnmark Act, as agreed between the National Parliament and the Sami Parliament, is as follows:

The Finnmark Act transfers approximately 95 per cent of Finnmark County (about 46,000 sq. km) to a new agency called the Finnmark Estate. This area was previously owned by the Norwegian State. The purpose of the Act is to facilitate the management of land and natural resources in the county of Finnmark in an ecologically sustainable manner for the residents of the county, and “particularly as a basis for Sami culture and reindeer husbandry”. The basic principle of the Act is to legally recognize that the indigenous Sami people, through long-term use of land and natural resources, including water resources, have the right of use and ownership of the territory concerned.

A Commission and a tribunal are set up for the purpose of further identifying the use and ownership of lands and resources in Finnmark, based on the principle of established custom and immemorial usage. According to section 3 of the Finnmark Act, it shall be implemented in conformity with ILO Convention No. 169 and international law

concerning indigenous peoples and minorities. It is stated in section 3 of the Act that ILO Convention No. 169 shall prevail in cases of conflict between the Convention and the provisions of the Act.

John Henriksen: The Finnmark Act (Norway), a Case Study. ILO, 2008.

Uganda: Right to ancestral territory

Like most African countries, Ugandan laws place the control of natural resources with the state. The Benet, a small hunting-gathering community living in the northeastern part of the country, were evicted when the forest in which they lived was turned into a protected area. The Benet took the case to the High Court complaining that their ancestral territory had been denied them and that they had no means of livelihood. On 27 October 2005, the Ugandan High Court ruled that “the Benet Community [...] are historical and indigenous inhabitants of the said areas which were declared a Wildlife Protected Area or National Park.” The Court ruled that the area should be de-gazetted and that the Benet are “entitled to stay in the said areas and carry out agricultural activities including developing the same undisturbed”.

<http://www.actionaid.org/uganda>

Uganda Land Alliance: <http://www.ulaug.org>



India: Land and Territories

The 1949 Constitution of India has provisions to protect indigenous peoples' rights over their land.

- Article 371A is a special provision for the state of Nagaland, which is inhabited mostly by the Naga indigenous peoples. According to the Article, no Act of the Indian Parliament shall apply to the State of Nagaland in respect of matters such as the *ownership and transfer of land and its resources*.
- Article 371G, like Article 371A, excludes the application of Act of the Indian Parliament in certain respects, including the *ownership and transfer of land*, in the State of Mizoram.

There are twelve "Schedules" to the Constitution of India, which classify the nature of administration and the powers, authority and responsibilities of the various administration organs. The Fifth and Sixth Schedules deal with administration in the tribal areas.

The **Fifth Schedule** deals with the administration and development of tribal areas and the establishment of Tribal Advisory Councils, to advice on matters pertaining to the welfare and advancement of the Scheduled Tribes. Among others, it empowers the Governor of a State to make regulations on areas such as the transfer of land by or among members of the Scheduled Tribes. This prevents transfer of land to outsiders and protects the indigenous peoples against alienation from their land.

The **Sixth Schedule** provides for the administration of tribal areas in the States of Assam, Meghalaya, Mizoram and Tripura by designating tribal areas as autonomous districts or autonomous regions (where there are different Scheduled Tribes). The Schedule entrusts District Councils to make laws pertaining to "*all areas within such region*" and Regional Councils to make laws on areas including the "*allotment, occupation or use, or setting apart, of land; management of forest; canal or water course for agricultural purpose and shifting cultivation*".¹¹⁾

The 2006 law on **Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006** (in short the Forest Rights Act) has been commended as a watershed event in

¹¹⁾ Sixth Schedule; Paragraph 3(1).



the struggle of the indigenous peoples for their land.

The Act aims at correcting historical injustices in the reservation of forest land, which previously disregarded the presence of forest-dwelling communities, the majority of them being indigenous peoples. In the earlier legislations related to forest, the forest dwellers were regarded as illegal occupants or trespassers.¹²⁾ The present law recognises community rights as well as individual rights, including the rights to hold, live and cultivate on the forest land and ownership over minor forest produce. The forest dwellers are also given the right to protect, regenerate and conserve community forest; the right to have access to biodiversity; and community right over traditional knowledge. It also recognises community tenure and secures this through a due process initiated by the lowest unit of administration, the Gram Sabha or Village Assembly. In case of displacement, resettlement of the holder of forest rights can only take place after free informed consent has been obtained in writing from the Gram Sabha.

These are some of the laws and policies created specifically for indigenous peoples and although they could be considered as limited in some areas, they go a long way in protecting the rights of the indigenous peoples to their lands.

<http://tribal.nic.in/actTA06.pdf>.

Case prepared by Chonchuirinmayo Luithui.

Nicaragua: The Awas Tigni community

Awes Tingni is a Sumo-Mayangna indigenous community in one of the Northern Autonomous Regions of the Caribbean of Nicaragua. In December 1993, the national government granted a concession to a private company for logging in the territory, which was claimed by Awes Tingni on the basis of traditional land tenure. The case was reviewed by the Inter-American Court of Human Rights on August 2001. After negotiations, an agreement was signed in 2004, which provided for economic benefits for the community and committed the government to a process by which it would definitively identify and title the community's traditional lands. A second concession granted by the government to another company was declared

invalid by the Nicaraguan Supreme Court. After a long and complex process, the demarcation and titling of land were finalized for Awes Tingni in the beginning of 2009.

Nicaragua responded to the demand for titling of indigenous and ethnic land and territory on the Nicaraguan Caribbean coast by enacting Law 445 in 2003. This law establishes the rights set out in the International Treaties signed by England and Nicaragua when the Moskitia territory was incorporated into the rest of Nicaragua in 1894. Law 445 puts into practice the provisions of these international treaties as well as the 1987 constitutional provisions, and is a specific legal instrument regulating the demarcation and titling of the lands of indigenous peoples and ethnic communities.

The biggest problem encountered in the demarcation process is the lack of financial resources to be provided by the State. As such, the demarcation and titling process is moving slowly.

<http://www.manfut.org/RAAN/ley445.html>

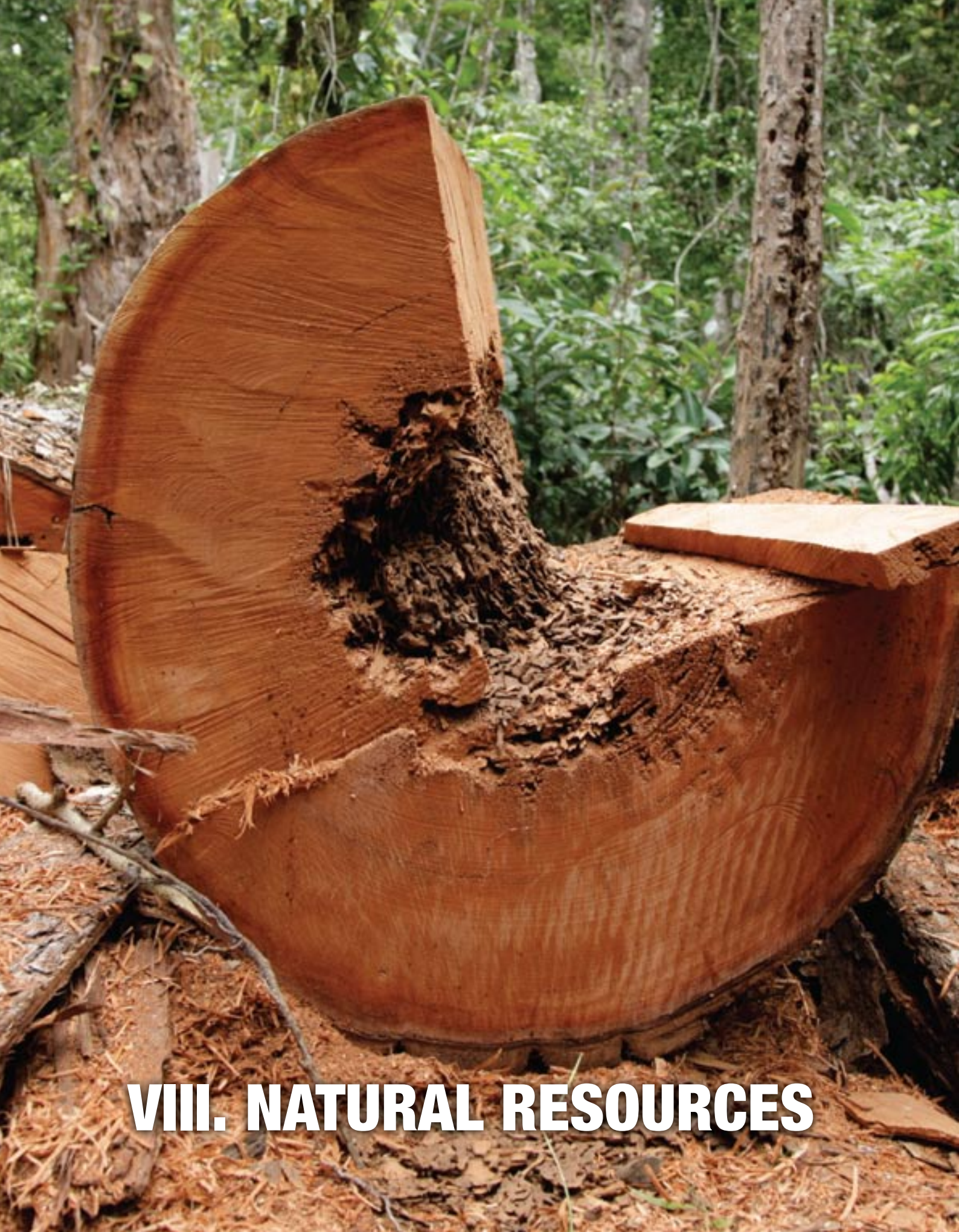
Case prepared by: Myrna Cunningham.

Panama: Land law

Much of the land occupied by indigenous communities in Panama, both ancestrally and today, is located outside the polygons of recognised indigenous territories. With the enactment of Law 411 in 2008, the property or land of indigenous families found outside the established regions (see Section 5.3.4.) were recognised, as they feared being displaced at any time. One example is the 40 plus Emberá–Wounan communities not recognised or protected by past legislation and that have formed the General Congress of Communal Land. This Congress is a traditional representative organisation for these communities, and its members are legitimately selected by the people.

Case prepared by: Myrna Cunningham.

¹²⁾ For example, the Forest Act, 1927; the Wild Life Conservation Act, 1972; the Forest (Conservation) Act, 1980.



VIII. NATURAL RESOURCES

8.1. RIGHTS TO NATURAL RESOURCES, CONSULTATION, BENEFITS AND COMPENSATION

The recognition of indigenous peoples' rights to natural resources is inextricably tied to the rights to lands and territories (see section 7). Therefore, Convention No. 169 establishes as a basic principle that indigenous peoples have the rights to the natural resources pertaining to their lands and to participate in the use, management and conservation of these resources:

ILO Convention No. 169:

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.

The Convention thus specifies that indigenous peoples have **rights to the natural resources** of their territories, including the right to participate in the use, management, protection and conservation of these resources. As a basic principle, these resources comprise both renewable and non-renewable resources such as timber, fish, water, sand and minerals.

However, there are many cases in which the State Constitutions provides that the States alone owns mineral and other resources. Article 15(2) recognizes this situation while also stipulating that indigenous peoples have rights regarding consultation, participation in the benefits of resource exploitation as well as compensation for damages resulting from this exploitation.

ILO Convention No. 169:

Article 15(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.

There are numerous examples where the exploration or exploitation of mineral or sub-surface resources on indigenous peoples' lands has led to conflicts. In these situations, Article 15(2) of Convention No. 169 seeks to reconcile interests by recognizing the following rights to indigenous peoples. It must also be specifically noted that the responsibility for ensuring that these rights are respected lies with the concerned governments and not with the private companies or entities that are licensed to undertake the exploration or exploitation.

The right to be consulted before natural resources on their lands are explored or exploited.

During consultation, indigenous peoples shall be able to state their concerns. For example, they can give reasons why resources should not be extracted or why certain areas should be exempted due to environmental concerns, impact upon sacred sites, pollution, health problems, loss of basis of subsistence economy, etc. Considering that exploratory and exploitative activities are often long-term processes where companies are granted concessions of periods of 30-50 years, it is important to underline that the obligation to consult does not only apply when taking the decision to explore or exploit resources but also arises on a



general level, throughout the process as it affects indigenous peoples.¹⁾ In this regard, Article 15 should be read in conjunction with Articles 6 and 7 of the Convention, requiring consultation and participation of indigenous peoples in the formulation, implementation and evaluation of development plans affecting them (see also section 5 on consultation and participation).

The right to having the impact of exploration and exploitation ascertained.

Article 15(2) stipulates that indigenous peoples shall be consulted, with a view to ascertaining whether and to what degree their interests would be prejudiced by exploration and exploitation of resources. This article should be read in conjunction with Articles 6 and 7(3) of the Convention, which specify that the social, spiritual, cultural and environmental impact of development activities on indigenous peoples shall be assessed in cooperation with them, and that the results of such studies shall be considered as fundamental criteria for the implementation of these activities. Moreover, Article 7(4) stipulates that governments, in collaboration with indigenous peoples, shall take measures to protect and preserve the environment of their territories. A number of institutions and agencies have come up with guidelines for such impact assessments, stipulating among other issues the need to build upon and integrate indigenous peoples' knowledge, ensure participation throughout the process, integrate gender concerns and address capacity-building as an integral element.

The right to benefit in the profits made from exploitation and use of natural resources. Indigenous peoples have the right to participate in the sharing of the benefits generated by the exploration or exploitation of the natural resources on their lands. This benefit-sharing can take a variety of forms, including specific agreements with individual communities; negotiated agreements between states and self-governing territories or redistribution of taxes and revenues to specific indigenous peoples' development purposes.

The right to be compensated for damages caused by exploration and exploitation of natural resources.

Unfortunately, exploration and exploitation may have a negative effect on the environment, health, social institutions and livelihoods of indigenous peoples. In these cases, Article 15(2) specifically states that indigenous peoples should receive a fair compensation.

The provisions of Convention No. 169 are reaffirmed in the **UN Declaration on the Rights of Indigenous Peoples**, which stipulates that:

Article 32,

- 1.** Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
- 2.** States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
- 3.** States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

8.2. COMMENTS BY THE ILO SUPERVISORY BODIES: NATURAL RESOURCES

The ILO supervisory bodies have examined a large number of cases, alleging lack of consultation with indigenous peoples in the context of exploration and exploitation of natural resources. The following case is illustrative of the challenges faced by many countries in the implementation of indigenous peoples' rights in this regard.

¹⁾ see GB.282/14/2, case cited in section 8.2



Ecuador: Consultation regarding the exploitation of natural resources

In 1998, the Ecuadorian Government signed an agreement with a company for the exploitation of oil in an area comprising 70 percent of the 150,000 hectares territory of the Independent Federation of the Shuar People of Ecuador (FIPSE), made up of ten associations which represent approximately 5,000 people.

The complainant alleged that, although oil is a resource to which the Government has inalienable property rights and the oil company acted in the name of the Government, the members of the FIPSE were not informed that an agreement for the mining of hydrocarbons in the territory's subsurface had been signed nor were they at any time consulted in this regard.

In 1998, an extraordinary assembly of the FIPSE had decided not to allow any negotiations between individual members or communities and the 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". The

complainant alleged that this public declaration by the FIPSE was not respected, as the company tried to divide the local organizations, to create fictitious committees to coordinate their activities and to denigrate indigenous organizations in the eyes of the public. It is also alleged that the Government violated Convention No. 169 by signing a document agreed between Arco officials and some FIPSE members supposedly approving exploration and exploitation activities on Shuar territory following the public declaration by the FIPSE assembly.

In reply the Government declared that the consultations required under Convention No. 169 were not applicable, as the agreement with the oil company was signed on 27 April 1998 and the Convention was only ratified by Ecuador on 15 May 1998. Therefore, the Government stated that the provisions of the Convention were not applicable to the events referred to due to the principle of the non-retroactivity of the law. The Government noted that the Constitution as well as the Hydrocarbons Act reflect its concern with safeguarding the rights of the indigenous peoples, and that economic contributions and other benefits have been established to compensate for any damages caused to the environment by the oil companies.



The Government also put forward its view that projects for the exploration and exploitation of hydrocarbons are motors of economic growth and therefore serve the interests of national development. It noted its concern at the fact that the Amazon region of the country contains both the highest indigenous population and the greatest hydrocarbon potential, a resource that is a part of the State patrimony. The Government also indicated that the cooperation agreements signed between Arco and three of the FIPSE's associations remained null and void because other associations belonging to the FIPSE rejected them.

In its response, the ILO Tripartite Committee noted that national legislation in many countries establishes that the rights to subsurface resources are part of State patrimony. The Convention recognizes this legal principles but also *“establishes an obligation when administering those resources: the obligation of the State to consult the indigenous and tribal peoples which could be affected prior to authorizing activities for the exploration and exploitation of the subsurface resources situated on indigenous territories”*.

The Committee affirmed that the provisions of the Convention cannot be applied retroactively but that some of the facts outlined in the complaint concern activities that have taken place since the Convention came into force in Ecuador on 15 May

1999. Although, at the time of taking the decision to sign the share agreement between the company and the Government, Convention No. 169 had not yet been ratified, the Committee observes 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”*.

The Committee noted that *“the spirit of consultation and participation constitutes the cornerstone of Convention No. 169 on which all its provisions are based”*.

The Committee stressed its awareness 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”*.

The Committee considered 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 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.”

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”.

Given the continuation of the activities authorized under the share agreement, the Committee considered that the Government had the obligation to consult the indigenous communities as from the entry into force of the Convention in order to allow the community to participate in its own economic, social and cultural development.

Furthermore, the Committee underlined “that the principle of representativity is a vital component of the obligation of consultation”. It noted 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 the specific case, the Committee considered that “not only was the appropriate consultation



not carried out with an indigenous organization clearly representative of the peoples concerned [...] but 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 [...] and the company”. The Committee recalled 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.”
Governing Body, 282nd Session, November 2001, Representation under article 24 of the ILO Constitution, Ecuador, GB.282/14/2.

8.3. PRACTICAL APPLICATION: NATURAL RESOURCES

Congo: Consultation and participation in logging.

Within the framework of certification of the Unité Forestière d’Aménagement (UFA) of Kabo (Northern Congo), Congolaise Industrielle du Bois (CIB) initiated a consultation and participation process with the indigenous Mbendzele and Bangombe populations in the region regarding the localisation and surveying of annual logging areas (AAC).

Based on the principle that the forest is the natural environment of these semi-nomadic indigenous

peoples, the society in question incorporated members of the Kabo indigenous community into its work teams to help define and identify sites, trees and other areas in the forest that are sacred or that are a resource to be preserved, as they are economically required for their survival.

This resulted in the active participation of the population in the preservation of the environment and the sacred and cultural sites in the forest. Using a GPS tracking system, community members, as true experts of the environment, contribute substantially to the protection of plant and animal resources used in their sacred rituals and cultural traditions.

Furthermore, this participative approach helps to prevent conflict and to reinforce the involvement of the Mbendzele and Bangombe communities in matters they consider to be priorities. In addition, it provides access to employment and, therefore, income for the individuals working on the team.

CIB’s participative forest management approach, working in cooperation with the indigenous populations, shows that the provisions of ILO Convention No. 169 can be applied to in the reconciliation of the economic interests of the State and the cultural and religious aspirations of the indigenous communities.

Case described in: *La consultation et la participation des populations autochtones «pygmées» à*





l'identification et la protection de leurs usages des ressources forestières et fauniques dans l'aménagement forestier: expérience de l'UFA Kabo de la CIB Nord du Congo, ILO 2008.

Tanzania: Managing wildlife

In March 2009, a Bill was passed by parliament in Tanzania, which provides for the devolution of power from the Wildlife Department (a governmental body) at the national level to village level institutions, mandated to manage and regulate utilization of wildlife resources falling under Village Lands. Villages are then directed to form Authorized Associations (AA) to act as technical agents with the capacity to address issues related to wildlife resources.

The Bill:

1. Provides for the devolution of power from the central government to the village level and this makes it necessary for hunting companies to negotiate with communities for access to wildlife resources;
2. Allows for the involvement of indigenous communities in the management of wildlife resources in their areas; Clarifies and defines mandates (previously overlapping) of stakeholders in the management of wildlife resources to the benefit of indigenous communities;
3. Provides communities a share in the benefits of resources in their own areas.

It is still to be seen how the Bill will be implemented.

Tanzania Natural Resource Forum: <http://www.tnrf.org>.

Case prepared by Naomi Kipuri.

Taiwan: Indigenous Peoples Basic Law.

Amounting to approximately 1.7 % of the total population, the indigenous peoples of *Taiwan* have their rights spelled out mainly in the *Indigenous Peoples Basic Law* enacted on 5 February 2005. At Article 21, this Law stipulates that the Government or the private actors “shall *consult* indigenous peoples and obtain their consent or participation, and *share* with indigenous peoples *benefits* generated from land development, resource

utilization, ecology conservation and academic researches in indigenous people's regions”.
<http://www.apc.gov.tw>

Venezuela: The Organic Act on Indigenous Peoples and Communities.

The Constitution of the Bolivarian Republic of Venezuela states, at Article 120, that the exploitation of natural resources in indigenous lands is subjected to the prior consultation of the indigenous communities concerned and must be carried out without damaging indigenous peoples' cultural, social and economic integrity. The procedure of consultation is regulated in the Organic Act on Indigenous Peoples and Communities which, besides requiring that an agreement is reached between the parties, further provides for the assessment of the social, cultural and environmental impact of the extractive activities on the indigenous communities, the compensation for any damages caused by these activities and the sharing of benefits - of economic and social nature - flowing from the exploitation of natural resources.

<http://www.assembleanacional.gov.ve>

Philippines: The Indigenous Peoples Rights Act.

Section 57 of the *Indigenous Peoples Rights Act* establishes that non-indigenous parties can carry out extractive activities in the ancestral domains of indigenous peoples on condition that “a formal and written agreement is entered into with the ICCs/IPs [Indigenous Cultural Communities/Indigenous Peoples] concerned or that the community, pursuant to its own decision making process, has agreed to allow such operation”. Section 7 of the Act also recognizes indigenous peoples' right to benefit and share the profits from allocation and utilization of the natural resources found in their ancestral domain.

However, the enforcement of these provision has proved to be a challenge. The former UN Special Rapporteur on indigenous issues, Rodolfo Stavenhagen, has reported that “[l]egal safeguards such as those referring to the free, prior and informed consent, as well as the requirement of environmental impact and assessment studies before undertaking development projects, are recognized in principle' but, in practice, 'indigenous peoples' concerns are generally not given due

attention, and ... powerful economic and political interests prevail over their legitimate rights.” He has further emphasized that “indigenous areas are frequently subject to sweeping military operations to clear the way for future development projects, be they mining, logging, or large-scale plantations on indigenous lands”.

http://www.ncip.gov.ph; R. Stavenhagen, Report of the mission to the Philippines, UN Doc. E/CN.4/2003/90/Add.3, 5 March 2003.

Canada: The Nunavut Agreement.

Indigenous peoples in Canada, encompassing First Nations (Indians), Métis and Inuit, number around 4.4 % of the total population. The national Constitution of 1982 recognizes their aboriginal and treaty rights. In 1995, Canada also announced the Inherent Right Policy, based on a general recognition of the inherent right of self-government of indigenous peoples. Against this background, some agreements have been negotiated between indigenous peoples and federal and provincial governments, including the Nunavut Land Claims Agreement Act which, together with the Nunavut Act (1993), set up the new territory of Nunavut in 1999. The preamble of the Nunavut Land Claims Agreements explicitly states that one of the objectives of the negotiations conducted by the Inuit People and the Government of Canada was “to provide for certainty and clarity [...] of rights for Inuit to participate in decision-making concerning the use, management and conservation of land, water and resources”.

Article 27 of the Agreement specifies that prior to undertaking exploration activities for petroleum and other resources in the Nunavut Settlement Area, the Government and the proponent shall consult the Designed Inuit Organization (DIO).

*The Nunavut Act: <http://laws.justice.gc.ca/en/result>;
The Nunavut agreement: <http://www.nucj.ca>;
R. Stavenhagen, Report of the mission to Canada, UN Doc. E/CN.4/2005/88/Add.3, December 2004.*

Bolivia: Law on Hydrocarbons and its regulation.

In May 2005, the new *Law on Hydrocarbons 3058* was enacted. This law establishes that hydrocarbon deposits, regardless of which state they are in, belong to the State.

Article 57 of the law also regulates allocation of the

Direct Hydrocarbons Tax (IDH). Four percent of the IDH goes to producing departments, two percent to non-producing departments and, lastly, it stipulates that the executive branch shall allocate the balance of this tax to indigenous and aboriginal peoples, among other beneficiaries. Subsequent negotiation determined that 5% of the IDH shall be earmarked for an indigenous peoples’ development fund.

The Law establishes the right to consultation and participation of the indigenous, aboriginal and peasant peoples, as well as the right of the indigenous communities and peoples to be consulted on any plans for hydrocarbon operations. Article 114 stipulates that, pursuant to Articles 4, 5, 6, 15 and 18 of ILO Convention No. 169, there shall be prior, mandatory and timely consultation of the peasant, indigenous and aboriginal communities and peoples, regardless of their type of organisation, on any plans for hydrocarbon operations, as provided for in the current Law.

Article 115 establishes that in accordance with Article 6 and 15 of ILO Convention No. 169, consultation shall be carried out in good faith and based on the principles of truthfulness, transparency, information and opportunity. It shall be carried out by the applicable Bolivian Government authorities using appropriate procedures that are in keeping with the circumstances and characteristics of each indigenous group, to determine to what degree they will be affected, and to reach an agreement or consent of the indigenous and aboriginal communities and peoples. Such consultation shall be mandatory, and the resulting decisions shall be respected. In all cases, the consultation shall take place on two occasions:

- a) Prior to the tender, authorisation, contracting, announcement and approval of hydrocarbon measures, works or projects, as a necessary precondition; and
- b) Prior to the approval of environmental impact assessment studies (...)."

Chapter II of the Law establishes compensation and indemnification. When hydrocarbon operations in indigenous territories have negative impacts, the communities shall be financially compensated by the owners of the operations. (Article 119)



Article 120 referring to indemnification stipulates that:

“Indemnification shall consider the damages derived from the loss of profits for traditional production activities and/or exploitation of natural resources that the peasant, indigenous and aboriginal communities and peoples might develop in the impacted areas.”

It is important to point out that these articles of the new *Law on Hydrocarbons* protect the rights of the indigenous peoples specifically, going beyond other legal provisions. The country’s indigenous organisations, in particular the Confederation of Indigenous Peoples of Bolivia (CIDOB), actively worked to have these chapters included in the new law.

www.sirese.gov.bo/MarcoLegal/Hidrocarburos/
Case cited in: *Ramiro Molinas Barrios; Los Derechos de los Pueblos Indígenas en un Proceso de Cambio de la Naturaleza de la Nación y del Estado*, ILO, 2009.

Thailand: Peoples Constitution

Indigenous peoples in *Thailand* encompass fisher communities (*Chao-lae*) and hunter-gatherers living in the south as well as various highland peoples living in the northern and northwestern part of the country. Only nine “hill tribes” are officially recognized, namely the Hmong, Karen, Lisu, Mien, Akha, Lahu, Lua, Thin and Khamu.

Part XII of the 2007 Constitution of Thailand is dedicated to “Community Rights”. At section 66

it establishes that “[p]ersons assembling as to be a community, local community or traditional local community shall have the right to ... participate in the management, maintenance and exploitation of natural resources, the environment and biological diversity in a balanced and sustainable fashion.” However, as to the practical implication of this provision, the former UN Special Rapporteur on indigenous issues, has warned that “despite the recognition of customary natural resource management by local communities, legal instruments adopted in recent years, such as the Land Act, the National Reserve Forests Act or the National Parks Act, have failed to recognize indigenous and tribal peoples’ traditional land tenure and use patterns. The enforcement of these laws have resulted in the expulsion of many indigenous and tribal peoples, considered to be illegal encroachers on their ancestral lands, as well as in a number of unresolved disputes between state lands (including national parks, watershed areas and forestry preservation areas) and community lands. Corruption by law enforcement officers related to the forest industry is said to be rampant.”

The Peoples Constitution: <http://www.asianlii.org/th/legis/const/2007/>;

R. Stavenhagen, General considerations on the situation of human rights and fundamental freedoms of indigenous peoples in Asia, UN Doc. E/C.19/2007/CRP.11, 15 May 2007, para. 10; IWGIA, *The Indigenous World 2008*, p.303 ff.



IX. DEVELOPMENT

9.1. THE RIGHT TO DEVELOPMENT

The right to development is in itself an inalienable human right. The strong link between human rights and development has figured prominently in United Nations deliberations for more than half a century, but was made explicit in 1986 through the adoption of the UN Declaration on the Right to Development.

The **UN Declaration on the Right to Development** stipulates that:

- 1.** The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.
- 2.** The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

Poverty reduction is the overarching aim of most national and international development strategies including those supported by bi- and multilateral donors and lenders. Poverty reduction is also a crucial concern for indigenous peoples as they are disproportionately represented among the poor. The World Bank estimates that indigenous peoples constitute approximately 5% of the world's population, but 15% of those living in poverty.¹⁾

However, indigenous peoples have often ended up being the victims of development instead of its beneficiaries. While the construction of infrastructure, oil exploitation, logging and mining has contributed to economic growth for certain sectors of society, the consequences for indigenous peoples have often been devastating. Their land has been taken away, their forests have disappeared and their rivers are left contaminated. They have thus been

1) World Bank: Implementation of Operational Directive 4.20 on Indigenous Peoples, 2003.

deprived of their means of livelihood, often with no compensation or access to alternative livelihoods. Indigenous peoples' poverty is a reflection of their generally marginal position within national societies. This implies that indigenous peoples are also marginalized with regards to participation in the shaping of the development strategies and with regards to access to resources aimed at alleviating poverty.

The fundamental starting point is the understanding that indigenous peoples are distinct peoples who have their own histories, territories, livelihood strategies, values and beliefs and thus hold distinct notions of poverty and well-being. The preamble of the UN Declaration on the Rights of Indigenous Peoples recognizes that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising their right to development in accordance with their own needs and interests. If indigenous peoples' own perceptions and aspirations are not addressed in development strategies and programmes, there is a risk that these will either fail or even aggravate the situation by for example depriving indigenous peoples of access to crucial resources, undermining traditional governance structures or contributing to the loss of indigenous languages. Governments must make sure that indigenous peoples are consulted and participate in the national development process at all levels. Without indigenous peoples, inclusive, poverty-oriented and sustainable development is not possible.

In response to this, Convention No. 169 stipulates a rights-based approach to development, based on the respect for indigenous peoples' right to determine their own priorities and underlining the importance of the concepts of consultation and participation:





ILO Convention No. 169:

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 cooperation, 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 cooperation 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.

In summary, the rights of indigenous in the context of development are:

- **Right to control their own economic, social and cultural development** and to develop their own institutions and initiatives. Governments should facilitate this by providing the necessary resources.
- **Right to be consulted and to participate** in all steps of relevant plans and programmes for development at the local, national and regional level. The traditions, cultural values and needs of indigenous peoples should be taken into account in the formulation of policies, programmes and projects, not only when it comes to local projects at the village level, but also when formulating the overall development policies of a country.
- **Right to impact assessment studies:** Before any development activities are undertaken, studies should be undertaken to assess their potential social, cultural, spiritual and environmental impacts of such activities.
- **Right to benefits:** All developmental projects and programmes should better the socio-economic situation of indigenous and tribal peoples. They should not be harmful to their well-being.
- **Right to lands, territories and resources:** The rights of indigenous peoples to ownership, possession and use of their lands, territories and resources need to be recognized and legally protected. This is a fundamental criterion for them being able to develop their societies in accordance with their own needs and interests.



The **UN Declaration on the Rights of Indigenous Peoples** has similar provisions:

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Indigenous peoples on the international development agenda

Both governments and international development agencies have responsibilities for including indigenous peoples in development processes. Within the last 15-20 years, agencies such as the World Bank, the Asian Development Bank, United Nations Development Programme, the European Commission and a number of bilateral donors (for example Denmark, Norway and Spain) have adopted policies for the inclusion of indigenous peoples in development programmes. These policies and strategies reflect good intentions and increasing understanding of indigenous peoples' rights, and they have helped placing indigenous peoples on the international development agenda.

Nevertheless, there are still challenges with regards to the implementation of these development strategies. Often, there are no permanent mechanisms for securing the participation of indigenous peoples, there are no specific statistics or data available on the situation of indigenous peoples and the staff of government and development institutions has little knowledge of indigenous peoples' rights, needs and priorities. For indigenous organisations, it remains a challenge to push for further participation in development processes, particularly as this becomes more centralized at the national level through the Aid Effectiveness Agenda.

Indigenous peoples rights in the Aid Effectiveness framework:

In 2005, more than 100 countries and agencies adopted the Paris Declaration on Aid Effectiveness. The Paris Declaration is organised around five key principles for international development cooperation: ownership, alignment, harmonisation, managing for results, and mutual accountability. These principles will contribute to reducing the transaction costs as well as the fragmentation and lack of effectiveness and sustainability of development efforts. However, extensive research by the ILO also indicates that the approach carries a number of inherent risks for further exclusion of indigenous peoples if specific safeguards are not developed. In summary, the risks related to the five main principles are:

PARTICULAR RISKS FACED BY INDIGENOUS PEOPLES IN RELATION TO THE PRINCIPLES OF THE PARIS DECLARATION:

Principles	Some general implications	Specific risks related to indigenous peoples
<p>Ownership: Developing countries exercise strong and effective leadership over their development policies and plans.</p>	<p>Development becomes more State-centred, although civil society should also play a role. The quality of policies and plans will depend on the governance (including corruption) and capacity situation in the given country.</p> <p>The use of donor conditionalities as an instrument for reform is challenged. Instead, donors can focus on policy dialogue in support of changes in the partner countries.</p> <p>In line with the country-driven approach, donors should delegate authority to staff at the country-level.</p>	<p>Many indigenous peoples, particularly in Africa and Asia, have only weak participation in government structures and national decision-making process and therefore risk not being taken into account in policies and plans.</p> <p>Donors may hesitate to engage in policy dialogue on indigenous peoples' issues.</p> <p>Most development agencies face difficulties in ensuring the capacity to address indigenous peoples' issues in their decentralised structures.</p>
<p>Alignment: Donors base their support on developing countries' own policies, strategies and systems.</p>	<p>Donors will no longer define individual country strategies but use the countries' own planning, budget and monitoring frameworks, including arrangements and procedures for public financial management.</p> <p>Donors should help address capacity weaknesses of partner countries' institutions.</p>	<p>Lack of participation by indigenous peoples in decision-making often implies that their needs and priorities are not reflected in national policies, strategies and programmes and they do not benefit from poverty reduction efforts.</p> <p>If the partner country is reluctant, donors may not find ways to comply with their own institutional policies on supporting indigenous peoples.</p>
<p>Harmonisation: Donors coordinate their activities and minimise the cost of delivering aid.</p>	<p>Donors will establish common arrangements at the country-level for planning, funding, disbursement, monitoring, evaluating and reporting and sharing of information.</p> <p>Instead of individual interventions, donor will aim at providing budget support or support to Sector-Wide Approaches (SWAs).</p>	<p>The lack of an overall strategy on support to indigenous peoples (in the context of the commitments stipulated by the Rome and Paris Declarations) may eventually undermine the value of individual donor policies¹⁾ on support to indigenous peoples.</p>
<p>Managing for results: Developing countries and donors orient their activities to achieve the desired results, using information to improve decision-making.</p>	<p>National policies should be translated into prioritised results-oriented operational programmes, reflected in Medium-Term Expenditure Frameworks (MTEF) and annual budgets. This requires strengthening the linkages between planning and budgeting.</p> <p>Donors should rely on partner countries' statistical, monitoring and evaluation systems</p>	<p>Most indigenous peoples do not have the institutional capacity or political leverage to ensure that their needs and priorities are reflected in MTEFs or budgets.</p> <p>In most countries, adequate data on indigenous peoples are not available and national statistical bureaux do not have the capacity to provide disaggregated data.</p>
<p>Mutual Accountability: Donors and developing countries are accountable to each other for progress in managing aid better and in achieving development results.</p>	<p>It is acknowledged that the successful implementation of the Paris Declaration requires continued high-level political support, peer pressure, and coordinated action at global, regional and country levels.</p> <p>Compliance in meeting the commitments will be publicly monitored against 12 indicators of aid effectiveness, were developed as a way of tracking and encouraging progress against the broader set of partnership commitments.</p> <p>Both donors and developing countries should increase their accountability towards citizens and parliament.</p>	<p>The agenda set by the Rome and Paris Declarations focuses on the effectiveness rather than the quality and relevance of aid. Consequently, none of the 12 monitoring indicators is related to governance, human rights, participation, quality or inclusiveness of development. In other words, the reformed aid architecture in itself provides no safeguards to ensure that "effectiveness" does not jeopardise the rights-based approach.</p> <p>In many countries, marginalisation with regards to access to education and information excludes indigenous peoples from participating in monitoring and holding governments accountable.</p>





9.2. PRACTICAL APPLICATION: DEVELOPMENT

Denmark: Strategy for Danish Support to Indigenous Peoples.

The first “Strategy for Danish Support to Indigenous Peoples” was formulated in 1994 by the Danish Agency for International Cooperation (Danida). In 2000-2001, Danida invited a team of indigenous experts to review the implementation of the Strategy and provide recommendations for its revision.

The overall assessment of the review team was that the multifaceted Strategy “has allowed Denmark to focus on the areas of crucial importance for indigenous peoples at a number of different levels; international promotion of indigenous rights, support to indigenous peoples through multilateral and bilateral cooperation, cooperation with NGOs and IPOs as well as economy and trade related issues”.

The review team further stated that: “[t]he existence of a coherent and comprehensive Danish strategy has created results at many levels, from the very local level, where Danish-funded NGOs are supporting the capacity-building of indigenous organisations, to the international level, where Denmark is playing a leading role in the UN processes on indigenous rights.”

While the review complimented the overall policy, it also pointed to the fact that more work needed to strengthen coordination and coherence in the implementation. In order to strengthen the operational impact, the team specifically recommended that:

- The diversity of indigenous peoples’ issues and the situations in which they live should be reflected at all levels of Danish cooperation. For instance, the application and reinforcement of legal instruments will vary from country to country, as will indigenous peoples’ capacity and institutional strength.
- The capacity to address indigenous peoples should be raised within the relevant Ministries and Embassies, providing staff with basic knowledge on identifying indigenous peoples, indigenous rights, methodological lessons learned, etc.
- Decentralised dialogue should be initiated to involve indigenous peoples in programme countries²⁾ in permanent monitoring, follow-up and exchange of experiences on the implementation of the Danish strategy.

2) Danish bilateral cooperation focuses on a series of so-called “programme countries”. Currently these are: Bangladesh, Benin, Bhutan, Bolivia, Burkina Faso, Egypt, Ghana, Kenya, Mali, Mozambique, Nepal, Nicaragua, Tanzania, Uganda, Vietnam and Zambia.



- The Danish strategy should be systematically disseminated to indigenous partners and, where relevant, be made available in languages known by indigenous peoples.
- The exchange of experience should include operative techniques for specific areas, based on concrete experience (e.g. in the fields of bilingual education and resource management).
- Action research on specific issues should be promoted, linking indigenous peoples and academics in order to generate new knowledge on specific issues, and linking this research to processes of empowerment of indigenous peoples.
- Institutional strengthening of indigenous peoples should be prioritised, as there is an absence of institutions on the indigenous side to fully engage in the development process.

A revised Strategy for Danish Support to Indigenous Peoples was adopted in 2004, based on the findings of the review and a consultation process with representatives of indigenous peoples and NGOs. The Strategy maintains a rights-based approach, stating support for the right to self-determination as the basic principle for defining indigenous rights in both national and international contexts. The overall

objective is:

- To strengthen the right of indigenous peoples to control their own development paths and to determine matters regarding their own economic, social, political and cultural situation.

The strategy intends to integrate the concern for indigenous peoples at all levels of Denmark's foreign policy and development cooperation and raise indigenous issues through policy dialogue with partner countries. It falls in line with international agreements, including ILO Convention No. 169, ratified by Denmark.

The five key elements of the Strategy are:

- 1. Strengthening of indigenous peoples' rights through international processes;** promotion of the respect for indigenous peoples' rights through political dialogue based on international declarations and agreements and support to indigenous peoples' participation in relevant international fora.
- 2. Inclusion of indigenous peoples' concerns in bilateral development cooperation;** deepened dialogue, where relevant, on indigenous peoples' issues with Danish cooperation countries and inclusion

of indigenous peoples' needs in sector programme support.

3. **Inclusion of indigenous peoples' concerns in multilateral development cooperation;** dialogue with relevant multilateral institutions on policy development as well as exchange of experiences and exploration of areas of cooperation and common interest.
4. **Cooperation with indigenous organization and NGOs;** financial support to indigenous organizations and relevant NGOs, and support for activities aimed specifically at promoting the conditions and rights of indigenous peoples.
5. **Consideration of indigenous peoples in economic and trade related issues;** innovative approaches to overcoming the economic and trade related problems of indigenous peoples, including issues relating to the protection of indigenous peoples' knowledge.

Based on the Strategy, the Danish Ministry of Foreign Affairs and Danida are providing support to indigenous peoples in the abovementioned fields, including through large-scale sector programme support to Bangladesh, Bolivia, Nepal and Nicaragua.

Strategy for Danish Support to Indigenous Peoples, Ministry of Foreign Affairs, 2004;
For more information, see: <http://www.um.dk> and <http://www.amg.um.dk/en>

Bangladesh: The National Poverty Reduction Strategy Paper (PRSP-I and PRSP-II)

In 2005, after intense lobbying by indigenous activists and cooperation of concerned consultants and senior officials, extensive consultations were held with indigenous leaders from the plains regions and the Chittagong Hill Tracts (CHT) on the 2005 *National Poverty Reduction Strategy Paper* of Bangladesh ("PRSP-I"). Many of the recommendations of these leaders were accepted and the PRSP-I displays a respectful approach towards the rights and welfare of indigenous peoples. The term used to refer to the indigenous peoples is "Adivasi/Ethnic Minority", which is far more acceptable to the people concerned than "tribal" or "upajati". The document acknowledges the indigenous peoples' history of exclusion and experience of discrimination, among others and states that:

"Over the years the adivasi/ethnic minority communities have been made to experience a



strong sense of social, political and economic exclusion, lack of recognition, fear and insecurity, loss of cultural identity, and social oppression. Mainstream development efforts have either ignored their concerns and/or had a negative impact on them. Often issues and actions that affect them are not discussed with these communities or organizations representing them. Thus they are subjected to stark socio-economic deprivation. Mass relocation of non-ethnic minority people in the traditional adivasi/ethnic minority areas caused land-grabbing, leading to livelihood displacement among the adivasi/ethnic minority people.”

The PRSP-I refers to the “inadequate representation [of Adivasi/Ethnic Minorities] at various levels of government and policy processes” hampering their possibility of influencing policy decisions that affect their lives. In addition, it acknowledges their comparatively low opportunities in education (especially in remote areas), and their difficulties in accessing necessary information. Among the “actions to be taken” that it recommends are the full implementation of the 1997 CHT Peace Accord; resolution of land and forest-related problems in the plains; prevention of “land grabbing” and “displacement”; increasing access to education,

including in the mother tongues of the groups concerned; affirmative action for jobs; and the formation of an inclusive advisory body to advise on matters pertaining to Adivasi issues.

Although the PRSP-I was a landmark improvement in government policy, the PRSP-II (published in 2008) provides further entrenchment of the importance of indigenous issues in governance and poverty reduction. The term “indigenous people” is used interchangeably with “indigenous communities” and the PRSP-II includes a vision statement that acknowledges the preservation of the “social and cultural identity” of the indigenous peoples, and the need to ensure the exercise of the indigenous peoples’ “social, political and economic rights” and their “security and fundamental human rights”. In the section on future actions, in addition to reiterating the importance of implementing 1997 CHT Peace Accord, the PRSP-II mentions the ratification of ILO Convention No. 169 and the implementation of the provisions of the UN Declaration on the Rights of Indigenous Peoples. Other important matters for action include land rights, participation in development programmes, human development, empowerment, indigenous languages and children’s access to education, access to electricity, and the



mainstreaming of indigenous issues in national policies. In the section on *Challenges*, the document acknowledges the absence of census and other statistical data on indigenous peoples.

The process of consultation in the case of PRSP-II was less inclusive than was the case with PRSP-I. However, a crucial difference is that the provisions of PRSP-II on indigenous peoples are anchored in two identifiable government institutions, the Ministry of CHT Affairs for issues concerning the CHT and the Special Affairs Division for the plains. The activities of the two institutions are sought to be further mainstreamed into existing and future development programmes of the government, including through other key line ministries. This provides a stronger anchoring to budgetary allocations.

Raja Devasish Roy: The ILO Convention on Indigenous and Tribal Populations, 1957 and the Laws of Bangladesh: A Comparative Review; Forthcoming Publication

Kenya: Indigenous Peoples Planning Framework

Kenya (as well as a number of other African countries such as Cameroon, DR Congo and Central African Republic) developed an Indigenous Peoples Planning Framework (IPPF) in collaboration with the World Bank in 2006, under the auspices of the office of the President. The IPPF is designed within the framework of the national Poverty

Reduction Strategy and it provides that: *“aspirations of indigenous peoples are taken into consideration in all Bank financed projects. These include ‘to live in peace with their neighbors, to have access to sufficient land to practice agriculture and graze their livestock, or to have access to forests to gather honey for consumption and sale, to practice their culture, to have equitable access to social infrastructure and technical services; ensure that indigenous peoples receive social and economic benefits that are culturally appropriate and inclusive in both gender and intergenerational terms and to be fairly represented in the institutions which make decisions affecting their lives at local, regional and national levels. The IPPF guidelines are meant to avert any potentially adverse effects from project interventions on indigenous peoples by ensuring free, prior and informed consultation; or if avoidance proves not to be feasible, minimize, mitigate or compensate for such negative impacts.”*

The IPPF has been developed due to the World Bank’s Operational Policy No. 4.10, which requires specific action when investments of the Bank and the Global Environment Facility affect the interests and rights of indigenous peoples, including their lands and natural resources. The IPPF in Kenya has yet to be implemented and is restricted to World Bank funded projects, thus not covering programmes of other donors.

Case prepared by Naomi Kipuri.



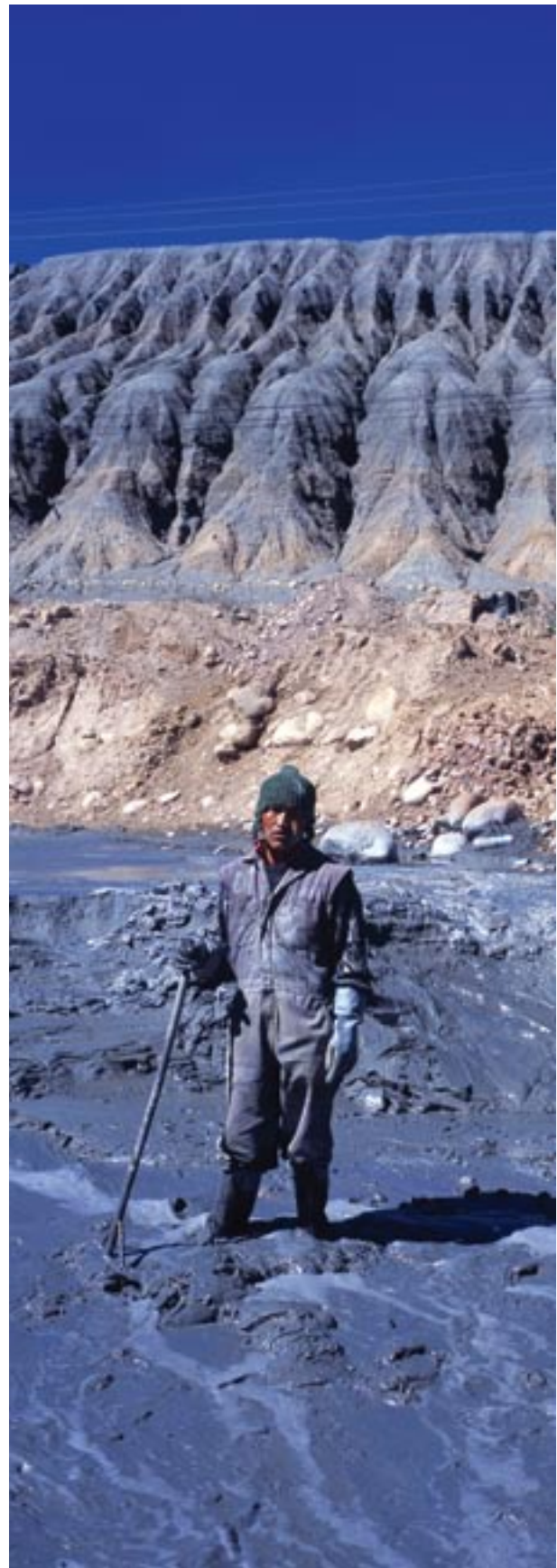
New Zealand: Transforming historic grievances into development for the future

New Zealand's largest-ever settlement of grievances, arising from 19th-century seizures of land and forests during European settlement, was passed in Parliament in September 2008. The agreement transfers around 10% of New Zealand's intensively managed planted forest to the Central North Island (CNI) Collective, who represent over 100,000 indigenous Maori. Maori have been engaged in grievance claims since the 1970s and this latest settlement, which includes license rentals accumulated since 1989, is worth around 450 million New Zealand dollars.

Once the settlement is completed, the CNI Collective will be New Zealand's largest single landowner in the forestry sector, and one of the largest investors in the industry. The economic benefits will be significant and much needed as the Maori are among the nation's poorest citizens, with low education and income levels, poor health and housing standards, and higher numbers of unemployed. The settlement has the potential to provide Maori descendants with the scale and quality of resources needed to create sustainable opportunities for themselves.

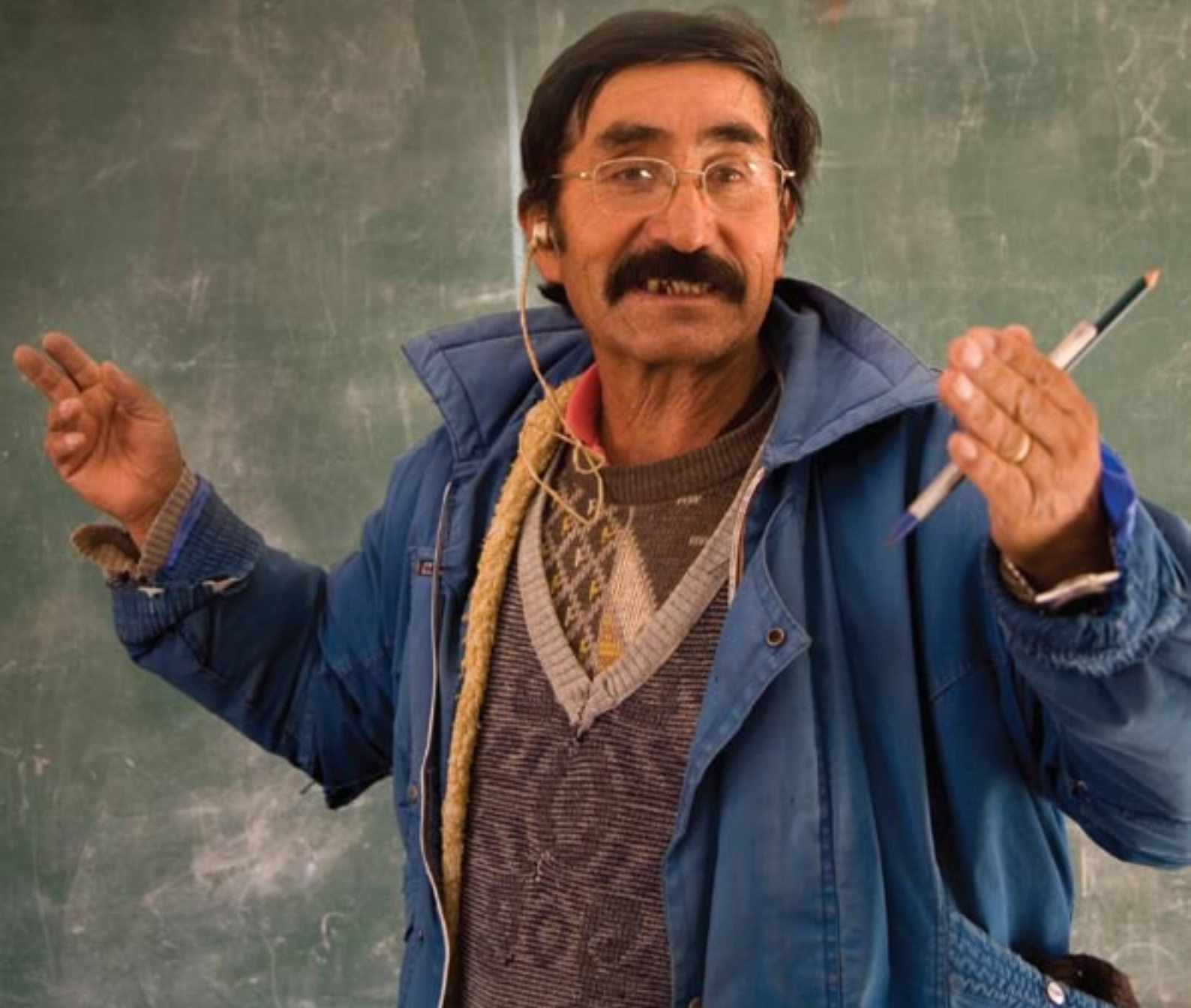
The CNI Collective will set up a holding company structure and forestry management structure to manage the land collectively and ensure that economic benefits from the forestry and financial assets are maximised sustainably over time. One option for the Collective is to focus its investment on boosting New Zealand's contribution to the global forestry industry. New Zealand-style plantation timber is highly sought after, for its superior quality, and Forest Stewardship Council (FSC) accreditation confirms that the forests are being sustainably managed.

George Asher, Lead Negotiator, Central North Island Iwi Collective: Indigenous tribes transform historic grievances into a bright future, 2008; <http://www.cniforest.co.nz>.



X. EDUCATION

llama tu mamá?



Indigenous peoples have historically been among the poorest and most excluded and disadvantaged social sectors in the world. One of the biggest factors contributing to the disadvantaged position of indigenous peoples is the lack of quality education.

Millions of indigenous children around the world are deprived of the right to education.¹⁾

1) http://portal.unesco.org/education/en/ev.php-URL_ID=30859&URL_DO=DO_TOPIC&URL_SECTION=201.html.

Issues confronting indigenous children in education

Unequal access to education.

In Guatemala, indigenous people have had half the years of schooling of non-indigenous people; in Mexico adult indigenous people have had an average of three years of schooling compared to six years of schooling for non-indigenous people; and in Peru indigenous adults average six years of schooling while non-indigenous average nine. Moreover, indigenous schools tend to have teachers with less experience and less education, and bilingual education is poorly implemented. One of the biggest factors contributing to the disadvantaged position of indigenous peoples in Latin America is lack of quality education.²⁾

Suppressing indigenous languages.

The Nordic states have historically adopted and implemented policies aimed at

suppressing the indigenous Sami culture, in particular through the educational system. During the 19th century, in an effort to support a nationalist agenda, Norway decided to make the Sami people as Norwegian as possible. The Sami language was effectively banned in Norwegian schools until the late 1960s.³⁾

Indigenous children and child labour

ILO research has revealed that indigenous children are disproportionately affected by child labour, which harms their health, safety and/or morals, as well as by the worst forms of child labour, which include slavery, forced labour, child trafficking, armed conflicts, prostitution, pornography and illicit activities like drugs trafficking. Combating child labour among indigenous children requires a rights-based approach in which the accessibility and quality of education are key elements.

See: *Guidelines for Combating Child Labour among Indigenous and Tribal Peoples, ILO 2007.*

2) Williams, Sandra (2007) *Indigenous Education Latin America*, available at http://poverty.suite101.com/article.cfm/indigenous_education_latam_america.

3) John Henriksen: *Key Principles in Implementing ILO Convention No. 169, ILO, 2008.*



The problem for many indigenous peoples in relation to education is not only the inferior schooling, or complete lack of formal education, but also the content and objective of education made available to them. There are numerous examples where education has been a core element in state policies aimed at assimilating indigenous peoples into mainstream societies – and thereby contributed to the eradication of their cultures, languages and ways of life.

Thus within education there are a number of areas to be considered in implementing the Convention:

- Individual and collective aspects of the right to education;
- The quality of indigenous peoples' education;
- Diminishing discrimination and prejudice through education.

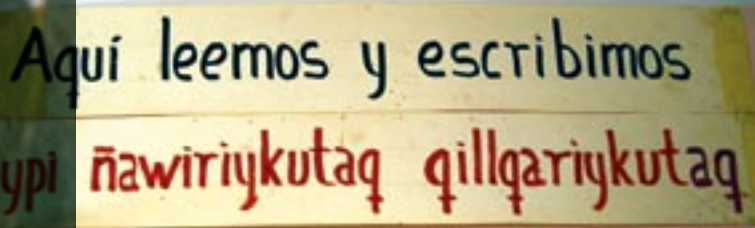
10.1. INDIVIDUAL AND COLLECTIVE ASPECTS OF THE RIGHT TO EDUCATION

International human rights law recognizes the right to education as a fundamental human right for everyone. Education enables individuals to achieve the full development of their personality and abilities, as well as enabling them to participate effectively in the society. These individual rights to education are provided under the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child. International human rights law acknowledges that the individual right to education, even if it is fully implemented, is not sufficient to meet the needs of indigenous societies. In addition to the individual need and right to education, indigenous peoples have collective educational needs and rights, based on their distinct histories, cultures, values, languages, knowledge, livelihood strategies and ways of learning – and their wish to transmit these to future generations.

The Committee on the Rights of the Child, in its general comment No. 11 (2009) expresses the duality of the individual and collective aspects of the right to education in the following way:

The education of indigenous children contributes both to their individual and community development as well as to their participation in the wider society. Quality education enables indigenous children to exercise and enjoy economic, social and cultural rights for their personal benefit as well as for the benefit of their community. Furthermore, it strengthens children's ability to exercise their civil rights in order to influence political policy processes for improved protection of human rights. Thus, the implementation of the right to education of indigenous children is an essential means of achieving individual empowerment and self-determination of indigenous peoples.⁴⁾

4) CRC/C/GC/11



When elaborating on indigenous peoples' right to education, it is thus necessary to take into account two categories of rights: (1) the individual right to education, reaffirming that everyone has equal right to education, and (2) indigenous peoples' collective rights to education that takes into account their special needs. ILO Convention No. 169 reflects these two complementary principles of individual and collective rights in Articles 26 and 27:

ILO Convention No. 169 stipulates that:

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 cooperation 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.

Articles 26 and 27 reflect the fundamental philosophy of Convention No. 169, which is to promote and protect indigenous peoples' right to simultaneously maintain and develop their own cultures, ways of life, traditions and customs, and to continue to exist as parts of their national societies with their own identity, cultures, structures and traditions (see also sections 3.2. and 3.3. on equality and special measures). Further, Article 27 stipulates the following key principles:

Education programmes for indigenous peoples shall be developed and implemented in cooperation with them to address their specific needs.

This implies that indigenous peoples are entitled to fully participate in the development and execution of such education programmes, in order to ensure that education programmes effectively meet their specific needs and that their values, cultures, knowledge and languages become an integral part of such programmes. The provision also emphasizes that education programmes shall reflect indigenous peoples' own *aspirations for the future* as far as social, economic and cultural matters are concerned. This is a reflection of an acceptance that education is an important way of ensuring that indigenous societies can develop in accordance with their own priorities and aspirations.

Responsibilities for the conduct of education programmes should be progressively transferred to indigenous peoples themselves.

In addition, Article 27(3) recognizes that indigenous peoples have the right to establish their own educational institutions and facilities, and obliges states to provide appropriate resources for this purpose. The criterion however is that such institutions meet minimum national standards for education. In practical terms, these two provisions acknowledge that indigenous peoples have the right to a certain degree of *educational autonomy* - in the implementation of general education programs and services, and through the establishment of their own educational institutions.



The **UN Declaration on the Rights of Indigenous Peoples:**

Article 14

- 1.** Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.
- 2.** Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.
- 3.** States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 14 of the UN Declaration on the Rights of Indigenous Peoples reaffirms that indigenous peoples have the right to establish and control their own educational systems and institutions. This should be

interpreted in the light of Articles 3 and 4 of the Declaration, which reaffirm that indigenous peoples have the right to self-determination, and that, in exercising their right to self-determination, they have the right to autonomy and self-government in matters relating to their internal and local affairs. It is natural to consider education a matter relating to indigenous peoples “internal and local affairs” – entitling indigenous peoples to the right to educational autonomy. The main role of the state in relation to indigenous education, whenever indigenous peoples wish to implement such autonomy, is to ensure that their educational systems and institutions meet the national minimum standards for education. It is however required that such an assessment takes place in cooperation with and with the full participation of indigenous peoples. Moreover, the state is obliged to provide adequate financial resources for the establishment and administration of such institutions.⁵⁾

5) John Henriksen: *Key Principles in Implementing ILO Convention No. 169*, ILO, 2008.

10.2. THE QUALITY OF INDIGENOUS PEOPLES' EDUCATION

Education can be a means to address two of the most fundamental concerns and rights of indigenous peoples: respect for their cultural and linguistic diversity.

Indigenous peoples constitute the vast majority of the world's cultural and linguistic diversity. This cultural and linguistic diversity is a resource, made up of unique and complex bodies of knowledge, know-how and practices that are maintained and further developed through extended histories of interactions with the natural environment and other peoples and transmitted to future generations. The links between language, culture and the environment suggest that biological, cultural and linguistic diversity are distinct but closely and necessarily related manifestations of the diversity of life. Indigenous cultures are therefore crucial to the efforts of achieving sustainable development.

UNESCO estimates that over 50% of some 6700 languages spoken today are in danger of disappearing:

- 96% of the world's languages are spoken by 4% of the world's population
- One language disappears on average every two weeks
- 80% of the African languages have no orthography

<http://www.unesco.org/culture/ich/index.php?pg=00136>

In addition, in order to overcome discrimination and marginalisation, indigenous peoples need to gain the knowledge necessary to fully and equally participate in the national society, including by knowing their rights and mastering the national language.

In response to this situation, Convention No. 169 provides a number of articles specifically concerning the content and quality of indigenous peoples' education:

ILO Convention No. 169

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.

These provisions reflect indigenous peoples demand for intercultural and bilingual education, which is based on the respect for cultural and linguistic diversity and promotes education as an instrument for the advancement of democracy, tolerance and human rights. Some of the key principles of such intercultural and bilingual education, in line with Convention No. 169 are:

Incorporation of indigenous peoples' knowledge, history, values and aspirations in the curriculum.

The development of diversified, culturally appropriate and locally relevant curricula that build relevant qualifications and take into consideration the needs of both boys and girls are key to ensuring the respect for indigenous cultures and the preservation, transmission and development of indigenous knowledge. In some countries where indigenous

peoples constitute a minority of the population, indigenous education will be a minor component within the general educational sector, while in other countries it will be a main feature of the entire sector. In some countries, indigenous peoples are themselves developing locally relevant curricula in order to respond to the problem of alienation while in others, the curricula have been integrated into the national education policies and strategies. In order to build the necessary technical capacity, the development of policies and strategies for training, recruitment and deployment of indigenous teachers – including access of indigenous students to secondary and higher education – is a necessary starting point. In some countries, the provision of scholarships or other special measures may be necessary in order to promote indigenous students', and particularly girls', access to education. In addition, school designs are often defined according to mainstream norms and preferences that ignore indigenous values and practices. Programmes that support the development of educational infrastructure should diversify school design in different cultural contexts.

Access to general knowledge and skills.

Intercultural education implies a mutual learning process as it relates to schools and curricula to account for the challenges of cultural diversity, using education as an instrument for advancing the participation of all groups in the shaping of the national society. In this regard, it is crucial that indigenous peoples have access to education that encompasses the skills and knowledge that are necessary in order to fully participate and contribute to the broader society. This is even more important in the context of urbanization and economic

globalization, where more and more indigenous people compete for jobs in the labour market.

Bilingual education and literacy in indigenous languages.

Although bilingualism and multilingualism are the way to prevent languages from becoming endangered, paradoxically, it is not encouraged among most of the major language groups, whose speakers regard monolingualism as the norm and the preferred state for human language (UNESCO: Atlas of the World's Languages in Danger of Disappearing, 2001). Many countries have constitutional and legislative provisions regarding linguistic rights but these are often not implemented in the context of formal education. The challenge is thus, in line with Convention No. 169, the Declaration on the Rights of Indigenous Peoples and the UNESCO Universal Declaration on Cultural Diversity, to offer bilingual education to indigenous children, allowing them to fully develop their skills in both their indigenous and the national languages. While there is a need to generally provide for bilingual education in the broader sector, some numerically small and educationally disadvantaged groups are specifically vulnerable to losing their languages and being marginalised in the education sector. These groups should be identified and targeted through special measures. Further, in order to offer bilingual education and contribute to the preservation of indigenous languages, education programmes should, where necessary, elaborate alphabets, grammars, vocabularies and didactic material in indigenous languages.⁶⁾

⁶⁾ See also: Tool Kit: Best Practices for Including Indigenous Peoples in Sector Programme Support, DANIDA, 2004.



The Education for All Framework:

The vast majority of the World's countries have adopted the Education for All (EFA) framework, which specifies six education goals for meeting the learning needs of all children, youth and adults by 2015. The six goals, which also form part of the Millennium Development Goals (MDGs), are:

Goal 1: Expand early childhood care and education.

Goal 2: Provide free and compulsory primary education for all.

Goal 3: Promote learning and life skills for young people and adults.

Goal 4: Increase adult literacy by 50 percent.

Goal 5: Achieve gender parity by 2005, gender equality by 2015.

Goal 6: Improve the quality of action.

The EFA framework acknowledges the need for a special focus on the most vulnerable and disadvantaged children, including indigenous children; the need to use the learners' own language and introducing other languages that they need; and the need for relevant and useful curriculum, based on the learners' local environment and focused on broader knowledge and competencies which they can apply in their lives. It is further acknowledged that quality for everyone will mean special approaches, including for indigenous peoples, as "*[m]any of these will not be able to receive a quality education without special measures and attention to address their needs*".

It is thus of the utmost importance that governments, indigenous peoples, donors and civil society organisations work together

to ensure that special approaches are devised to reach the Goals for indigenous peoples, within the context of national EFA strategies. See: <http://www.unesco.org/education/efa>

The UN Committee on the Rights of the Child

also recognizes that the indigenous child's right to education is not only a matter of access but also of content. The Committee recommends that state parties, with the active participation of indigenous peoples, review and revise school curricula and textbooks to develop respect among all children for indigenous cultural identity, history, language and values.⁷⁾

Moreover, the Committee is of the view that indigenous children have the right to be taught to read and write in their own indigenous languages, or in the language most commonly used by the group to which they belong, as well as in the national language(s) of the country in which they belong. This recommendation echoes article 28(1) of Convention No. 169, and makes it applicable to all states parties to CRC. The Committee also recommends that state parties take effective measures to increase the number of teachers from indigenous communities, and allocate sufficient financial, material and human resources to implement indigenous educational programs and policies effectively.⁸⁾

7) UN Committee on the Rights of the Child, *Recommendations on the Rights of Indigenous Children*, 3 October 2003 (Day of General Discussion on the Rights of Indigenous Children).

8) John Henriksen: *Key Principles in Implementing ILO Convention No. 169*, ILO, 2008.



10.3. DIMINISHING DISCRIMINATION AND PREJUDICES THROUGH EDUCATION.

Convention No. 169 does not exclusively address education within the traditional education sector, but also makes provisions for using communication and awareness-raising as means of empowerment and to overcome discrimination and prejudices.

ILO Convention No. 169:

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.

Awareness-raising and training are crucial means of strengthening the institutional capacity of indigenous peoples to develop their own societies and communities and fully participate and contribute to the broader national society. This is particularly important, as most indigenous institutions have been weakened or undermined and are in a disadvantaged position with regard to promoting and implementing their rights.

On the other hand, awareness-raising, training and education can positively contribute to overcoming prejudices against indigenous cultures and

languages. This is in line with indigenous peoples' demand for providing intercultural education to all sectors of society and not seeing it exclusively as an indigenous peoples' priority. Ultimately, intercultural communication and education has the potential to prevent and reduce conflict in multicultural societies.

The **UN Declaration on the Rights of Indigenous Peoples** has similar provisions:

Article 15

- 1.** Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.
- 2.** States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

10.4. PRACTICAL APPLICATION: THE RIGHT TO EDUCATION

Cameroon: non-formal education

A study on non-formal education in the Baka community in the town of Mbang, Cameroon revealed the importance of modulating and adapting teaching systems to the uniqueness of indigenous communities. The study also showed that, in addition to increasing the access of Baka children to the education system, adapted learning has also contributed to safeguarding ancient cultural practices of the indigenous community, increasing indigenous peoples' involvement in the administration and choice of education programmes, reinforcing bilingualism and reducing discriminatory practices.

As the Baka community of Cameroon experiences discrimination in access to education, and considering their nomadic fisher-gatherer lifestyle, an initiative was implemented – called ORA (Observe, Reflect, Act). ORA is developed in the spirit of consultation and participation of the community



concerned, also taking into consideration the social and ecological environment of learners and thus defining an innovative approach where the indigenous peoples are the key actors.

These teaching methods adapted to the reality of indigenous peoples in Cameroon are the result of the Government's 1995 initiative to implement a conceptual framework for basic non-formal education.

The non-formal education experience conducted in the town of Mbang (south-eastern Cameroon) clearly demonstrates that taking into consideration cultural specificities, in particular indigenous languages, bolsters community cohesion, breaks down discriminatory prejudices and strengthens inter-ethnic dialogue. The leading role of parents, especially women, in the education of children and transmission of ancestral values must be highlighted, given that women are the holders of know-how and knowledge that is bound to disappear if not transmitted to future generations.

The study emphasises the interaction between the environment and educational content: based

on the knowledge of the forest, which is the students' natural environment, non-formal education overcomes the challenge of teaching indigenous children in the Baka community, while reinforcing their personality and aspirations.

Establishing an appropriate legislative framework inspired by the provisions of ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples, might turn out to be a sound means for consolidating the results of these pioneering experiences.

Venant Messe: Best practices of the implementation of ILO Convention No. 169 in education matters. Case of the education of Baka children in the rural town of Mbang (Cameroon), ILO 2008.

Greenland: Language, education and self-government

The *Kalaallisut* language is the Greenlandic dialect of the Inuit language. For many years it had to compete with Danish, the language of the colonizers, and like many other indigenous languages, it was an endangered language.



Today, Kalaallisut is a living language and it is spoken by 80 per cent of the 56,700 people living in Greenland. It is used in Parliament, in media, schools and higher education and it thrives side by side with Danish in a modern bilingual society. The process towards preservation of the Inuit culture and language is intimately linked to the development of self-government in Greenland.

Traditionally, education took place within the family. The mother was the most important teacher; she was the one bringing up new generations in a sustainable hunting society. School education was introduced with colonialism. One of the purposes of Danish colonization was to Christianise the Inuit, and the missionaries were greatly concerned that the population be able to read the Bible. Public schools were introduced in Greenland in 1905, and the Church and School Act became the framework under which the whole population in Greenland, including the remote villages, was to be given basic education. The curricula included religion, Greenlandic, and mathematics, and trained catechists were in charge of teaching. Besides teaching, these catechists also performed church duties.

In 1925, the Act on Administration introduced compulsory education for children aged 7 to 14 and opened up for teaching Danish language, culture

and history. Danish was the language of instruction, and education became more and more influenced by Danish norms and traditions.

During World War II, Greenland was completely cut off from Denmark and thereby gained experience in managing its own affairs. After the war, Greenlanders began to demand more influence and equality of status.

In 1953, the Danish Parliament amended the Constitution, making Greenland part of the Danish Realm, and giving the Greenlanders the same legal status as Danish citizens. Two seats in the Danish Parliament were reserved for Greenlandic representatives – as is still the case today. A referendum held in Denmark, but not in Greenland, later approved the constitutional amendment, which marked the first step towards a gradual decolonization of Greenland. Greenland's new status also resulted in important investments within the sectors of education, health and infrastructure. In order for the Greenlanders to benefit from these investments, a new policy promoting the concentration of the population in the cities was launched. All of this resulted in major, but not always welcomed, changes in the life of the Inuit.

Although the Danish development policy implemented from 1953 to the late 1970s was



beneficial in some aspects, this policy had its shortcomings. For instance, from 1951-1960, the number of pupils in the public schools increased by 70% and doubled between 1960 and 1967, yet not enough Greenlandic teachers had been trained, and Danish teachers were brought in from Denmark. The high percentage of Danish teachers, who tended to leave again after a couple of years, created problems with the continuity in education.

In 1979, Greenland Home Rule was established, which gave Greenland a semiautonomous government under Inuit leadership. The Home Rule law transformed the language and education policies. The law established Greenlandic as the main language although Danish had to be thoroughly taught. Both languages were to be used in the administration.

The new school law from 1980 had as its key objective “to strengthen the position of the Greenlandic language”, by making it the language of instruction, while Danish would be taught from Grade 4 as a first foreign language. The contents of the school subjects were adjusted to a greater extent to the needs of Greenlandic society. Yet, these objectives were conditioned by the availability of Greenlandic teachers and teaching materials; often Danish teachers would be teaching, at the expense of instruction in Greenlandic. Throughout

the 1980s efforts were therefore made to increase the number of Greenlandic teachers and improving the quality of training.

The gradual improvement in instruction in the public schools resulted in the need for the introduction of high school/college training in Greenland. A two-year “Adult Education” course in Danish, but with substantial accommodations of Greenlandic culture, was introduced. Later, additional high school/college training courses were established on the west coast.

In 1997, school administration was decentralized. While the responsibility for the overall legislative framework remained with the central authority, the municipal councils were now given the responsibility to define the administrative and pedagogic goals for their schools, in accordance with the local situation.

As of 2007, there were 24 urban schools and 62 village schools with a total of 10,688. There are 909 teachers, including principals as well as teachers trained as kindergarten teachers but upgraded to work in public schools. 74 % of the teachers and 81% of the 73 principals are Greenlandic speakers.

Greenland has three high schools with a total of 850 students and 85 teachers. Most of the students are bilingual, with Greenlandic as their mother tongue.

In the high schools, teaching is done in Danish following the Danish curriculum; only a few classes with typical Greenlandic subjects like “Hunting and fishing” are being taught in Kalaallisut. The rationale is that this will prepare the students, so they are able to continue in the Danish higher education system.

Greenland's language and education policies comply with the provisions of Convention No. 169 on education and communication as stipulated in Articles 26-29, 31 and 32. Some of the main elements and results are:

- Greenlandic children have equal access to education;
- Greenlanders themselves develop and implement their education programmes;
- Children are taught to read and write in their own language as well as Danish;
- Children receive the general knowledge and skills to participate fully and equally in their local and national community;
- The textbooks used provide “fair information” and largely take into account the history of Greenland “the local knowledge and skills, and the indigenous value system”;
- Kalaallisut is being preserved and developed.

This has been achieved through a process that has been facilitated by a number of factors:

- The limited impact of Danish culture during almost 300 years of colonisation due to the geographical distance and the climate, which limited the number of Danish settlers.
- The early acknowledgement by Danish colonizers of the importance of documenting and systematising the language by developing a Greenlandic script, establishing schools and teachers training college.
- The implementation of a policy that early on involved the Kalaallit in decision-making processes at the local level through the district councils.
- The fundamental differences between Greenland and Denmark in terms of language, mentality, livelihood and culture that prevented any form of assimilation.
- The strong attachment to Kalaallisut as a vital part of the Greenlandic identity.
- The prominent place Kalaallisut has had from the very start in the education system and

later in the media (printed media and radio) and other means of communication.

- The fact that primary education was made compulsory and free at an early stage.

Henriette Rasmussen: Oqaatsip Kimia: The Power of the Word, ILO, 2008.

Peru: Teacher training

The Programme for Training of Bilingual Teachers in the Peruvian Amazon (FORMABIAP) was established in 1988, with the objective of responding to the real educational needs of the indigenous girls and boys from the Amazon Region; to educate new generations to exercise their individual and collective rights; and to defend and sustainably manage their territories in accordance with the principles of autonomy and self-determination. The Programme is jointly managed by the indigenous organization the Interethnic Association for the Development of the Peruvian Forest (AIDSEP) and the Ministry of Education.

The Mission of FORMABIAP is to:

- Build the capacity of social actors to design, implement and lead innovative proposal, in accordance with the needs and aspirations of the indigenous peoples;
- Promote the exchange of indigenous peoples' knowledge, practices and values with those of other cultures from an intercultural perspective, for the sustainable development of the Amazon Region.

The training of the indigenous primary school teachers takes five years, combining cycles of formal schooling at the Teacher Training Centre with training cycles undertaken in the communities of origin of the indigenous students. During the cycles at the Training Centre, the students appropriate the theoretical and methodological instruments they need for their future functions as bilingual and intercultural pedagogues. During the training cycles undertaken in the communities, they re-appropriate and deepen their knowledge concerning their own society through research and participatory action, while integrating themselves in the educational life of the community, undertaking pedagogical practice, which increases during their years of study.

The cycles of formal schooling aim at:

- Developing attitudes and capacities in the future teacher that will allow him or her to design education proposals in accordance with the social, ecological, cultural and linguistic reality of his or her people, while integrating contributions of modern curricula in a reflexive and critical way.
- The cycles of training undertaken in the communities aim at:
- Facilitating the students to regain the indigenous knowledge and practices they did not have access to during their previous years of schooling.
- Collecting the necessary elements for systematizing the indigenous knowledge.
- Validating the proposed primary school curriculum and the educational materials, elaborated through the pedagogical practice.
- Maintaining and developing permanent links with their people to ensure that the future professional teacher is committed to work within and for his or her people.

Through this modality, 189 indigenous teachers from the following 15 Amazonian peoples have finalized their studies: Achuar, Awajun, Ashaninka, Nomatsiguenga, Bóóraá, Kandozi, Shawi, Kukama-Kukamiria, Wampis, Uitoto, Shipibo, Chapara,

Shiwilu, Tikuna y Kichwa.

Since 2005, FORMABIAP has also developed a programme to train pre-school teachers. The students are mothers from the communities, who are trained through a strategy whereby training sessions are undertaken in one of the communities of a given people, combined with cycles of practice, undertaken in the students' own communities. The programme aims at training teachers who are rooted in their culture and language to recuperate and apply their knowledge of cultural education and gender perspectives in their work with the mothers and children under the age of five. The underlying understanding is that education at this level is basically undertaken within the family and the community in a non-formalised way.

<http://www.formabiap.org>

Algeria: The positive effects of introducing the Amazighe language into the education system

After a school boycott in the indigenous region of Kabylie in 1995, Algeria enacted a law establishing Amazighe language teaching in the elementary school system. As a result, Tamazight is now taught to indigenous students at various levels in Berber-speaking regions, despite recurrent shortcomings. This measure, although partial, has had some



positive effects, such as stimulating the creativity of indigenous children who are discovering their language and becoming aware of its scientific aspect, and the editorial proliferation that Algeria is experiencing, notably in literary and artistic production, which, in itself, is the best way to preserve a culture with a mostly oral tradition.

Another positive effect of this decision is that a dozen jobs are created in the education sector each year, in order to provide increasingly greater coverage of language teaching at all levels. This has sparked renewed interest in the Amazighe culture and civilisation, notably at the university level. Amazighe language and culture departments, which opened just a few years earlier, now have hundreds of students enrolling annually.

Case prepared by: Belkacem Boukherouf.

Norway: Sami right to education

The 1999 Education Act in Norway has strengthened Sami children's right to study and be taught in the Sami language. The Act stipulates that all pupils in primary and lower secondary school in areas defined as Sami districts are entitled to study and be taught in the Sami language. Outside the Sami districts, any group of ten pupils, regardless of their background, who so demand, have the right to study and be taught in the Sami language. They retain this right for as long as at least six pupils remain in the group. Pursuant to the Education Act, Sami pupils in upper secondary schools have the right to study the Sami language.

A special state grant is provided to daycare centres that have adopted statutes oriented towards Sami language and culture. The intention of the grant is to cover the additional expenses incurred in providing Sami daycare places, thereby ensuring that Sami children at daycare centres have the possibility of developing and strengthening their Sami language skills and their culture. The special grant for Sami daycare centres was transferred to the Sami Parliament on 1 January 2001. The Government said that this is in line with the efforts to strengthen the Sami right to self-determination.⁹⁾

As far as the content of education is concerned, in areas defined as Sami districts and according

9) CRC/C/129/Add.1 6 October 2004, paragraph 589.

to specific criteria elsewhere in Norway, teaching is given in accordance with the special Sami curriculum. For Sami pupils, this teaching is intended to build a sense of security in relation to the pupils' own culture and to develop Sami language and identity, as well as equipping Sami pupils to take an active part in the community and enabling them to acquire education at all levels. State support is provided for the development of textbooks written in the Sami language. The Sami University College has a special responsibility for training Sami teachers. However, several challenges remain on the implementation of the Sami curriculum in Sami schools in Norway.¹⁰⁾ New research suggests that the school culture needs to change, in order to ensure that schools are better equipped to address the specific needs of Sami children.

John Henriksen: Key Principles in Implementing ILO Convention No. 169, ILO, 2008.

Argentina: Training and awareness-raising campaign of the indigenous peoples of Neuquén

Argentina is a federal republic, where powers are shared between the central and provincial governments, and the provinces retain a degree of self-government. Each province enacts its own constitution in accordance with the principles, declarations and guarantees of the National Constitution. In 2000, Argentina ratified Convention No. 169. Subsequently, the indigenous Mapuche in Neuquén Province advocated for reform of the Constitution of the Provincial State of Neuquén, as the previous Constitution disregarded their individual and collective rights. The goal was a new Constitution that would allow them to enjoy the rights enshrined in Convention No. 169 and the National Constitution.

The amendment of the Provincial Constitution was achieved through numerous coordinated actions. For instance, Mapuche leaders had a strong presence in the negotiations and interacted in a constructive way with the Constitutional Reform Commission and gained support from well-known individuals, who helped to lobby and gain broader support. One significant element in this regard was the training and capacity-building of

10) http://www.eurolang.net/index.php?option=com_content&task=view&id=3081&Itemid=1&lang=sv.

Mapuche leaders on indigenous peoples' rights, focusing on Convention No. 169. The leaders used effective information-sharing mechanisms to further disseminate the contents of the training to the communities. Based on the newly acquired knowledge, the general Mapuche population voiced their demands strongly, for example by distributing pamphlets and press releases, and organising letter-writing campaigns and demonstrations.

In 2006, the Constitution of Neuquén was amended. The new Constitution recognizes the pre-existence of the indigenous peoples and their cultural and ethnic distinctiveness. It provides for indigenous peoples' collective rights to their ancestral lands, the distribution of suitable additional land, and it guarantees their participation in issues related to their natural. Also, the Constitution recognizes the cultural diversity and linguistic richness and provides bilingual and multicultural education. These rights had already been recognized in the National Constitution, but the Argentinean education system is decentralised and until 2006, the Province of Neuquén had failed to incorporate this right into its Constitution.

This case proves that the existence of favourable national legislation, coupled with the appropriate training of indigenous peoples at all levels regarding their rights, can increase the effective implementation of international legal instruments such as Convention No.169. Some of the remaining challenges for effective implementation of bilingual and intercultural education in Neuquén are:

- Ensuring the effective participation of indigenous peoples in designing and implementing this new educational system.
- Incorporating the traditional indigenous methods of teaching and learning, which include the family and the community, while creating the appropriate balance with the general Argentinean culture.
- Conceptualising a bilingual and intercultural education system, whose focus is to enrich not only the indigenous community, but the population as a whole.

Constitution of Argentina: http://www.argentina.gov.ar/argentina/portal/documentos/constitucion_ingles.pdf;

Constitution of Neuquén Province: http://www.jusneuquen.gov.ar/share/legislacion/leyes/constituciones/constitucion_nqn/cnqn_aindice.htm;
Centro de Políticas Públicas para el Socialismo (CEPPAS) and Grupo de Apoyo Jurídico por el Acceso a la Tierra (GAJAT): Del derecho consagrado a la práctica cotidiana: La contribución del Convenio 169 de la OIT en el fortalecimiento de las comunidades Mapuche de la Patagonia, ILO, 2008.



XI.
HEALTH AND
SOCIAL SECURITY





11.1 EQUALITY AND ADEQUACY OF SERVICES

Health is defined by the World Health Organization as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.”¹⁾ This definition reflects a holistic understanding of health that corresponds to many indigenous peoples’ traditional concepts of health, which include physical, mental, emotional and spiritual aspects as well as relations between individuals, communities, the environment and the society at large.

In this sense, the major determinants of health are outside the direct influence of the health sector and include factors such as access to land, environmental protection and cultural integrity. Consequently, displacement from ancestral lands, ill-planned development and resettlement policies, repression of traditional institutions, customs and beliefs and the related drastic changes in life styles are some of the factors that affect indigenous peoples’ health. Many indigenous communities are, for example, disproportionately affected by violence, suicides and substance abuse.

1) Constitution of the World Health Organisation; www.searo.who.int/LinkFiles/About_SEARO_const.pdf

Negative effects of colonisation.

Many indigenous peoples have suffered severe negative impact on their health and general demographic situation. For example, when the Onge people of Little Andaman Island, who were hunters, gatherers and fishers, were resettled in 1976 by the Government of India, there was a drastic decline in their population. Infant mortality rates doubled in the seven years between 1978 and 1985 and many women became sterile. One determining factor was malnutrition due to the shrinking of living space and the corresponding decrease in the availability of food sources.²⁾ The 1991 census of India put the numbers of the Onge people at 99, a decrease from the 672 people registered in 1885.³⁾

Statistical data on the health status of indigenous peoples, particularly in Africa and Asia, is scarce. However, according to the WHO, the health status of indigenous peoples in both poor and industrialized

2) Venkatesan, D. 1990. Ecocide or Genocide? The Onge in the Andaman Islands. *Cultural Survival Quarterly* 14(4),

3) Rao, V.G., Sugunan, A.P., Murhekar, M.V. and Sehgal, S.C.; 2006; Malnutrition and high childhood mortality among the Onge tribe of the Andaman and Nicobar Islands; *Public Health Nutrition*: 9(1).

countries is invariably lower than that of the overall population,⁴⁾ and available data shows wide disparities between the health status of indigenous peoples and that of other population groups.

Traditional health systems have developed over generations to meet the particular needs of indigenous peoples within their local environment. In all regions of the world, traditional healing systems and biomedical care co-exist, and the WHO estimates that at least 80% of the population in developing countries relies on traditional healing systems as their primary source of care.⁵⁾

Similarly, most indigenous communities have traditional systems for providing social security to its members, including mechanisms for distributing wealth, sharing food resources and providing labour and assistance in case of misfortune. Very little information exists about the importance of such systems, but it must be assumed that they play a major role, for example, with regards to the distribution of remittances from indigenous workers who have migrated outside their communities. All over the world, traditional healing and social security systems have been gradually undermined by lack of recognition, environmental disintegration

4) <http://www.who.int/mediacentre/factsheets/fs326/en/index.html>.

5) The Health of Indigenous Peoples - WHO/SDE/HSD/99.1

and social disruption. Also, traditional healing and social security systems may have difficulties in responding to new challenges related to changes in, for example, livelihood systems, introduction of new diseases, social values and roles related to gender and age.

In parallel, indigenous peoples are often marginalised in terms of access to public health and social security services, and in many cases the services provided are not adequate or acceptable for indigenous communities. For example, public health workers may have discriminatory attitudes towards indigenous cultures and practices and are often reluctant to be stationed in remote areas; there may be linguistic barriers; the infrastructure is often poor and services expensive.

Right to basic health care is a fundamental right to life and States have an obligation to provide proper health services to all citizens. Convention No. 169 stipulates in Articles 24 and 25 that indigenous peoples must have equal access to social security schemes and health services, while these should take into account their specific conditions and traditional practices. Where possible, governments should provide resources for such services to be designed and controlled by indigenous peoples themselves.

Status of Scheduled Tribes compared to the rest of the national population in Key Health Indicators (1998-99), India¹⁾

HEALTH INDICATOR	SCHEDULED TRIBES	ALL	% DIFFERENCE
Infant Mortality	84.2	67.6	24.5
Neo-natal mortality	53.3	43.4	22.8
Child Mortality	46.3	29.3	58.0
Under-5 mortality	126.6	94.9	33.4
ANC check-up	56.5	65.4	13.6
% Institutional deliveries	17.1	33.6	49.1
% Women with anemia	64.9	51.8	25.2
% Children undernourished (Weight for Age)	55.9	47.0	18.7
Full immunisation	26.4	42.0	37.1

1) NFHS, 1998-99, quoted in Planning Commission, 2005, Table 2.11

ILO Convention No. 169:

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 cooperation 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.

The UN Declaration on the Rights of Indigenous Peoples has similar provisions:

Article 21(1)

Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.



Some of the operational implications of indigenous peoples' rights to social security and health care are:

- Development of mechanisms for participation at decision-making levels (health and social security policies, programmes);
- Allocation of specific resources in order to overcome the wide disparities between indigenous peoples and other population groups;
- Focus on capacity building; training of indigenous health workers and strengthening of indigenous institutions to ensure local ownership of health institutions and culturally appropriate approaches to health and social security services;
- Recognition of indigenous peoples' intellectual property rights to traditional knowledge and traditional medicines;
- Regular and systematic gathering of disaggregated quality information to monitor the situation of indigenous peoples and the impact of policies and programmes;
- Formulation of a research agenda identifying priorities, e.g. traditional healing practices and systems, mental health, substance abuse, links between land loss and poor health, the health impact of macro policies;
- Development of specific approaches to address indigenous women and children as they are in many cases seriously affected by bad health conditions.⁶⁾

The **UN World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 2001** in its Programme of Actions has urged States to adopt action-oriented policies and plans, including affirmative action, to ensure equality, particularly in relation to access to social services such as housing, primary education and health care.⁷⁾

6) Tool Kit: Best Practices for Including indigenous peoples in sector programme support, Danida, 2004.

7) Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 2001.

11.2. PRACTICAL APPLICATION: HEALTH AND SOCIAL SECURITY

Nicaragua: Decentralisation of the health system

The Health Act states that the Ministry of Health (MINSa) is the governing body for the health sector in Nicaragua; however, in compliance with the guidelines of the 2008-2015 National Human Development Plan, MINSa is moving forward with the decentralisation process. As part of the process, in November 2008, MINSa signed a Framework Agreement on Coordination of the Regionalisation of Health Care in the Autonomous Regions of the Nicaraguan Caribbean coast. This agreement provides for the institutional implementation of the regionalisation of health care, delegating to the Regional Councils and Regional Autonomous Governments of the RAAN and RAAS the jurisdiction and responsibility for the autonomous organisation, direction, management and delivery of services, as well as management of the sector's human, physical and financial resources. The essence of this agreement is that the integration, development and strengthening of traditional and natural medicine will be directed regionally, so as to promote complementarity and integration of services and roles between the agents of natural and traditional medicine and Western medicine.

Case prepared by Myrna Cunningham.

Tanzania: Restocking through traditional social security system.

The Danish-supported ERETO project in Tanzania addresses indigenous Maasai pastoralists in the Ngorongoro Conservation Area (NCA). It aims to improve access to water for people and livestock, provide veterinary services and restock poor pastoral households. ERETO builds directly on the Maasai concept and measurement of poverty and on a clan-based mechanism for social security and redistribution of wealth, which is used as the key implementation mechanism for restocking. As heads of households, women play a key role in the restocking, which has so far benefited 3,400 households. It has reversed the trend of marginalisation and restored these households to pastoralism, which to them is more than just an economic system but is a heritage, spirituality and a determinant of identity.

Danida: Tool Kit: Best Practices for Including Indigenous Peoples in Sector Programme Support, 2004.

Nepal: Creation of social security and affirmative action programmes

There is broad political agreement that the existing inequality between indigenous peoples and dominant communities in Nepal needs to be addressed. Indigenous peoples in Nepal in general have lower wealth, educational achievement, health and political influence than the national average. However, there is also significant diversity among the indigenous groups in Nepal. Some groups, such as the Thakali and the Newar, are actually above the national average in most statistics, while others, such as the Chepang or the Raute are severely marginalized. To deal with the large diversity and target support to those groups that need it most, the indigenous peoples' umbrella organization, Nepal Federation of Indigenous Nationalities (NEFFIN), independently started dividing indigenous peoples into five categories, ranging from advantaged to endangered. Government and donors have since adopted this categorization also. The Ministry of Local Development, for example, started providing cash transfers to individuals from the highly marginalized and endangered indigenous groups in 2008.

Some indigenous organizations are calling for generalized ethnic-based affirmative action to benefit all indigenous people. This is complicated somewhat by the very substantial socio-economic differences among the groups. While the five categories are useful in differentiating the indigenous peoples, the system is based on neither objective criteria nor recurrent data collection. Therefore, some voices are now calling for a more dynamic system, in which affirmative action would be based on a regularly reviewed set of socio-economic criteria. Thus, disadvantaged indigenous groups would qualify based on their level of disadvantage, rather than on the basis of their status as indigenous people. However, these discussions are ongoing in the constitution-making process, and no comprehensive policy has yet been devised.

Programme to Promote ILO Convention No. 169, project reports Nepal, 2008-9; Bennett, Lynn and Parajuli, Dilip (2007). Nepal

Inclusion Index: Methodology, First Round Findings and Implications for Action. Draft paper.

United States: Suicide prevention programs

Suicide accounts for nearly one in five deaths among Native American and Alaskan Native youths (15-19 year olds); a considerably higher proportion of deaths than for any other ethnic groups within the United States. In fact, differences in suicide rates between Native American and Alaskan Native youths and other ethnic youths have been noted for over three decades.

Suicide prevention programmes that are culturally appropriate and incorporate culturally specific knowledge and traditions have been shown to be the most successful and well received by Native American and Alaskan Native indigenous communities. Such prevention programmes are largely successful because they incorporate positive messages regarding cultural heritage that increase the self-esteem and sense of mastery among Native American and Alaskan Native youths, and focus on protective factors in a culturally appropriate context. They also teach culturally relevant coping methods such as traditional ways of seeking social support. <http://indigenoussuestoday.blogspot.com/2008/02/suicide-native-american-and-alaskan.html>.

Brazil: Enawene Nawe

The Enawene Nawe are a small Amazonian indigenous people who live in the forests of Mato Grosso, Brazil. They were first contacted in 1974, when they numbered only 97 individuals. Today their population is around 500.

The Enawene Nawe have refused to get closer to the towns and hospitals because of the health problems and suffering they have experienced when they came in contact with the outsiders. They are also aware that they should not rely on outsiders for healthcare. Therefore, in addition to their herbalists, shamans and mastersingers, community members are receiving training in Western healthcare and medicines. The new specialists are called "Baraitalixi" or "little herbalists". The training is conducted in the longhouses in their language and in the presence of everyone. The Baraitalixi,

supported by professional health staff via radio contact, are advising and treating up to 80 cases a month.

A special ward has also been set up for the indigenous people at the local hospital with hooks for the hammocks of the Enawene Nawe, and space is provided for relatives to stay. The hospital staff is also given basic training about the Enawene Nawe to ease contact.

Case prepared by Choncuirinmayo Luithui. 'Healthcare and the Enawene Nawe' in: How Imposed Development Destroy the Health of Tribal peoples; Survival International Publication, 2007.

Australia

There are significant disparities in health status between Aboriginal and Torres Strait Islander peoples and other Australians, encompassing their whole life cycles. There is a 17-year gap in life expectancy between the indigenous peoples and other Australians, higher mortality rates, earlier onset of diseases and more incidences of stress-related problems affecting social and mental wellbeing.

In July 2003, the Australian Health Ministers agreed to establish a *National Strategic Framework for Aboriginal and Torres Strait Islander Health (NSFATSIH)* whose key goal is: "To ensure that Aboriginal and Torres Strait Islander peoples enjoy a healthy life equal to that of the general population that is enriched by a strong living culture, dignity and justice."

Building on this endorsement, in December 2007, the Council of Australian Governments (COAG) committed to work with indigenous communities to close the gap on indigenous disadvantage, recognizing that special measures are needed to improve indigenous peoples' access to health services and that the active involvement of these peoples is crucial in the design, delivery, and control of these services.

COAG declared its commitment to:

- close the life expectancy gap within a generation (by 2030)
- halve the gap in mortality rates for indigenous children under five by 2018
- halve the gap in literacy and numeracy outcomes by 2018

In addition COAG has also agreed to:

- provide access to early childhood education for all four-year-olds living in remote indigenous communities by 2013
- halve the gap in Year 12 or equivalent attainment rates by 2020
- halve the gap in employment outcomes by 2018

Further, the Australian Government established the National Indigenous Health Equality Council in July 2008 to advise on the development and monitoring of health-related goals and targets.

In New South Wales, a special policy has been developed to address the high level of need related to mental health and wellbeing in Aboriginal communities and the relatively low levels of utilisation of specialist mental health services. The Aboriginal Mental Health and Well Being Policy 2006-2010 sets out strategies and actions to:

- Enhance key working partnerships such as those between the Area mental health services and Aboriginal Community Controlled Health Services (ACCHSs);
- Improve mental health leadership to ensure appropriate service responsiveness for Aboriginal people, their families and carers across emergency and acute, early intervention and prevention, and rehabilitation and recovery services;
- Develop specific mental health programs for Aboriginal people of all ages who have or are at risk of mental illness.;
- Increase expertise and knowledge through a range of data and evaluation activities;
- Strengthen the Aboriginal mental health workforce, both in increased positions in Area Health Services and ACCHSs and in training and skill development.

*Council of Australian Governments' Meeting, Melbourne 20 December, 2007: http://www.coag.gov.au/coag_meeting_outcomes/2007-12-20/; *Aboriginal and Torres Strait Islander Health Performance Framework, 2008 Report; <http://www.health.gov.au/>; <http://www.health.gov.au/internet/ministers/publishing.nsf/Content/mr-yr08-nr-nr104.htm>; *New South Wales Aboriginal Mental Health and Well Being Policy 2006-2010: <http://www.health.nsw.gov>.***

au/policies/pd/2007/pdf/PD2007_059.pdf.
Case prepared by: Chonchuirinmayo Luithui

India

Indigenous peoples in India (known as Scheduled Tribes) fall way behind the rest of the national population in terms of key health indicators (see table in section 11.1). For example, the rate of child mortality among Scheduled Tribes is 58% higher than for the rest of the Indian population. Health care is a major problem in the remote and isolated areas where the majority of indigenous peoples live, and lack of food security, sanitation and safe drinking water, poor nutrition and high poverty levels aggravate the situation.

Most indigenous communities in India continue to be dependent on forest and natural resources for their livelihood and subsistence. However, through processes of modernization and development and the accompanying destruction of indigenous habitats, indigenous systems of medicine, skills and natural resources used in traditional remedies are fast disappearing.

There are no specific policies to target health care of indigenous peoples in India yet, but the health situation of Scheduled Tribes has found mention in the 11th Five Year Plan (2007 -2012) and a comprehensive strategy has been laid out in the Draft National Tribal Policy, 2006.

The approach of the 11th Five Year Plan is to “attempt a paradigm shift with respect to the overall empowerment of the tribal people”. The Plan provides for increased efforts to make available affordable and accountable primary health care facilities to Scheduled Tribes and to bridge the yawning gap in rural healthcare services. Periodic reviews are to be conducted on the delivery system and function of the health care institutions under three broad headings to optimise service in the tribal areas: (i) health infrastructure; (ii) manpower; and (iii) facilities, like medicine and equipment.

The Draft National Tribal Policy (2006) proposes a detailed, targeted strategy, which aims to address the specific problems faced by indigenous peoples in relation to health and medical care. This includes enhancing access to modern healthcare by

developing new systems and institutions; a synthesis of Indian systems of medicine like Ayurveda and Siddha with tribal systems and modern medicine; decentralizing control of medical staff to village and district level; area-specific methods for provision of clean drinking water, which take into account the different kinds of terrain in tribal areas.

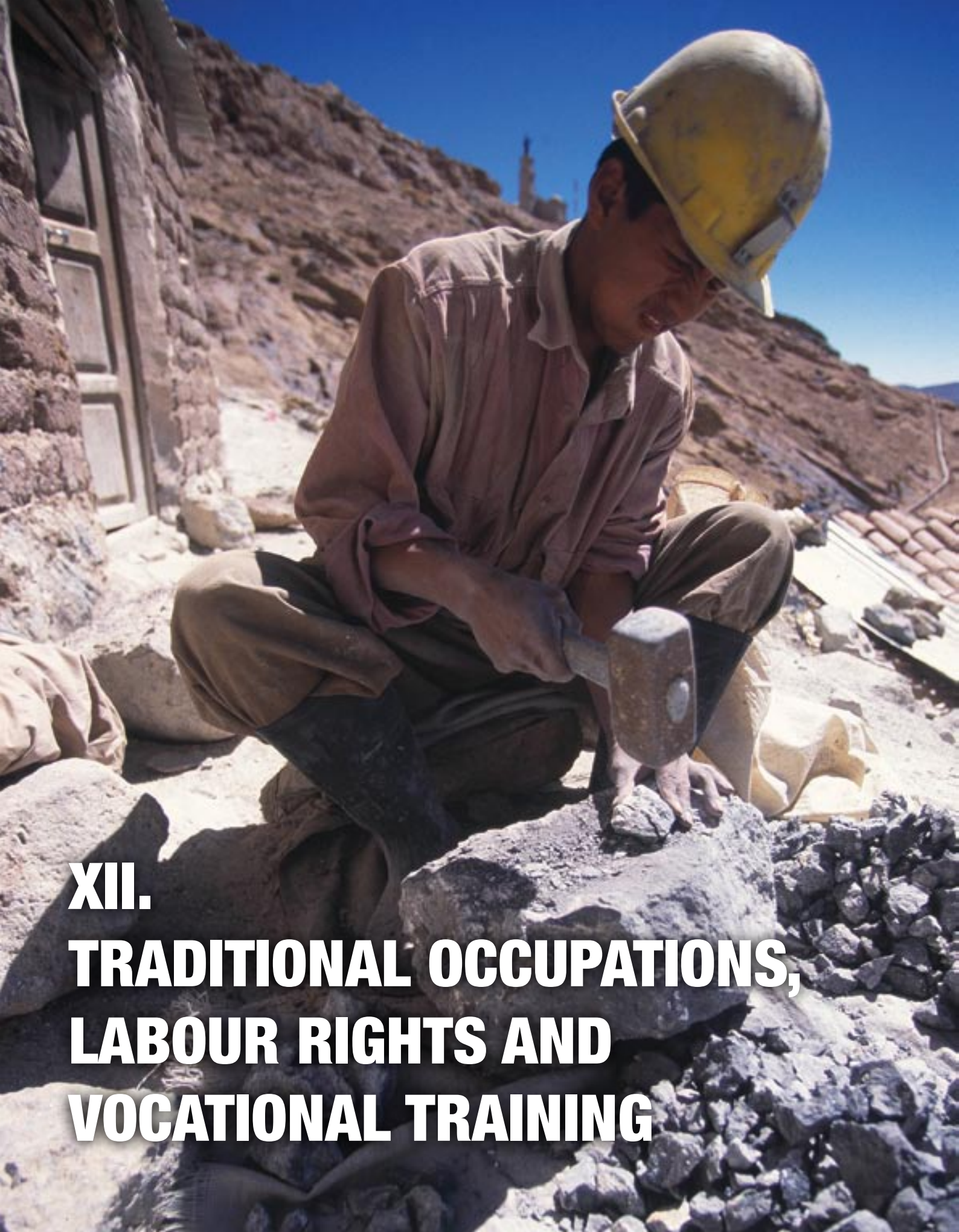
The Policy is still a draft but an encouraging feature (also reflected in the Eleventh Plan) is the recognition of the need for strategies, which combine indigenous medicine with mainstream allopathic systems.⁸⁾

Moving away from a purely service-delivery approach has the potential to make healthcare in interior tribal areas much more accessible, while also providing scope for indigenous peoples to contribute their extensive traditional knowledge.

Social Justice, Eleventh Five Year Plan 2007-2012, Planning Commission, Government of India; <http://tribal.nic.in/finalContent.pdf>.



⁸⁾ It is also significant to note that the National Health Policy, 2002 recognises the need for special measures and separate schemes, tailor-made to the health needs of scheduled tribes, among other vulnerable groups, and emphasises the need to strengthen alternative systems of medicine



**XII.
TRADITIONAL OCCUPATIONS,
LABOUR RIGHTS AND
VOCATIONAL TRAINING**

The ILO's concern for indigenous peoples started as early as 1920, primarily as a concern for their conditions as exploited workers (see section 14.1). This concern led, among other things, to the adoption of the ILO's Forced Labour Convention (No. 29) in 1930. Continued research during the 1950s showed that indigenous peoples had a need for special protection in the many cases where they were victims of severe labour exploitation, including discrimination, and forced and child labour. In recognition of the need to address the situation of indigenous peoples in a holistic and comprehensive way, ILO Convention No. 107 was adopted in 1957. The Convention has a special section on conditions of employment and was adopted with a view 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"* (preamble, ILO Convention No. 107).

Due to the continued and crucial relevance of labour rights for indigenous peoples, Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples also include special provisions on employment and labour rights.

12.1. RESPECT FOR INDIGENOUS PEOPLES' TRADITIONAL OCCUPATIONS

Most indigenous peoples have developed highly specialized livelihood strategies and occupations, which are adapted to the conditions of their traditional territories and are thus highly dependent on access to lands, territories and resources. Such traditional occupations include handicrafts, rural and community-based industries and activities such as hunting, fishing, trapping, shifting cultivation or gathering. In some cases, indigenous peoples are simply identified by their traditional occupations, as, for example, pastoralists, shifting cultivators and hunter-gatherers.

In many cases, lack of respect for indigenous peoples' rights and cultures lead to discrimination against their traditional livelihoods. This is for

example the case in parts of South-East Asia, where practices of rotating agriculture are forbidden by law and in parts of Africa, where pastoralists' rights to land and grazing are not recognized.¹⁾ Convention No. 169 stipulates that such traditional occupations should be recognised and strengthened:

ILO Convention No. 169

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.

12.2. RESPECTING LABOUR RIGHTS

In many cases, increased pressure on indigenous peoples' lands and resources implies that traditional livelihood strategies are no longer viable and investments and job opportunities within indigenous territories are often few. Many indigenous workers have to seek alternative incomes and the overwhelming majority of communities have some or even most of their members living outside their traditional territories, where they have to compete for jobs and economic opportunities.

¹⁾ For further information on traditional occupations of indigenous and tribal peoples and the many difficulties and challenges faced by them, see *Traditional Occupations of Indigenous and Tribal Peoples*, ILO, Geneva, 2000.



Even where they continue to live in their traditional territories, indigenous people may be taking up new economic activities as primary, secondary or tertiary occupations. For example, a shifting cultivator may take up fishing or wage labour during the dry season after his swidden crop has been harvested and before the next cropping cycle starts.²⁾

There is a general lack of reliable data and statistics about indigenous peoples' particular situation with respect to employment. However, where evidence is available, it indicates that indigenous peoples are being discriminated against and are disproportionately represented among the victims of forced labour and child labour. Some of the barriers and disadvantages they face in the national and international labour markets are:

- Many indigenous workers are not able to compete on an equal footing, as their knowledge and skills are not appropriately valued, and they have limited access to formal education and vocational training.
- Indigenous workers are often included in the labour market in a precarious way that denies their fundamental labour rights.
- Indigenous workers generally earn less than other workers and the income they receive compared to the years of schooling completed is less than their non-indigenous peers. This gap increases with higher levels of education.

Labour exploitation and discrimination affect indigenous men and women differently, and gender is often an additional cause of discrimination against indigenous women. Many indigenous women:

- Have less access to education and training at all levels;
- Are more affected by unemployment and under-employment;
- Are more often involved in non-remunerated work;
- Receive less pay for equal work;
- Have less access to material goods and formal recognition needed to develop their occupation or to obtain access to employment;
- Have less access to administrative and leadership positions;
- Experience worse conditions of work, for example related to working hours and occupational safety and health;
- Are particularly vulnerable to sexual abuse and harassment and trafficking, as they often have to seek employment far away from their communities;
- Are limited by discriminatory cultural practices, which, for example inhibit the education of the girl-child or prevent women from inheriting land or participating in decision-making processes.³⁾

2) Raja Devasish Roy, "Occupations and Economy in Transition: A Case Study of the Chittagong Hill Tracts", in *Traditional Occupations of Indigenous and Tribal Peoples*, ILO, Geneva, 2000, pp. 73-122.

3) *Eliminating Discrimination against Indigenous and Tribal Peoples in Employment and Occupation – a Guide to ILO Convention No. 111*, ILO 2007.



In order to overcome this situation, ILO Convention No. 169 contains a number of provisions, addressing indigenous peoples' labour rights.

ILO Convention No. 169,

Article 20:

1. Governments shall, within the framework of national laws and regulations, and in cooperation 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.

The Convention emphasizes the need to adopt special measures for the protection of indigenous workers, where they are not effectively protected by existing national labour standards. The objective is to prevent discrimination and ensure that they are treated the same as all other workers.

In addition, the Convention specifies the following conditions:

- Indigenous and tribal workers should not be discriminated against when looking and applying for work, which includes everything from manual labour to higher positions. Men and women should have the same opportunities.
- They should not be paid less than anyone else doing the work of equal value, and this should not be restricted to lower-paid kinds of work.
- They should not work under exploitative conditions. This is especially important when working as seasonal, casual or migrant workers, e.g. on plantations during harvest times.
- Men and women should be treated equally and, in particular, women should be protected against sexual harassment.
- They have the right to form or join associations and to participate in trade union activities.
- They should receive information about workers' rights and ways to seek assistance.
- They should not work under conditions causing adverse health impacts without being properly informed about the necessary precautions.



The **UN Declaration on the Rights of Indigenous Peoples** has similar provisions on labour rights:

Article 17

- 1.** Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.
- 2.** States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.
- 3.** Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Indigenous peoples and fundamental labour standards

In addition to Convention No. 169, indigenous workers enjoy the protection under the broader body of international labour standards. In particular, the ILO's eight fundamental Conventions address the issues of forced labour, discrimination, child labour, and freedom of association. The fundamental Conventions are the following:

- Equal Remuneration Convention, 1951 (No. 100)
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111)
- Minimum Age Convention, 1973 (No. 138)
- Worst Forms of Child Labour Convention, 1999 (No. 182)
- Abolition of Forced Labour Convention, 1957 (No. 105)
- Forced Labour Convention, 1930 (No. 29)
- Abolition of Forced Labour Convention, 1957 (No. 105)
- Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)
- Right to Organize and Collective Bargaining Convention, 1949 (No.98)



These Conventions have been ratified by almost all ILO member states. As reaffirmed by the 1999 ILO Declaration on Fundamental Principles and Rights at Work, also non-ratifying states have an obligation to respect, promote and realize the rights and principles set out in the fundamental Conventions, including for indigenous peoples.

Forced labour

Forced labour occurs when people are subjected to psychological or physical coercion in order to perform work, which they would not otherwise have freely chosen. Forced labour includes situations such as slavery, practices similar to slavery, debt bondage, or serfdom. ILO research indicates that indigenous peoples in many areas are at high risk of becoming victims of forced labour, as a result of longstanding discrimination.

In Latin America, today as centuries ago, the main victims of forced labour are indigenous peoples. In South Asia, bonded labour remains particularly severe among the Dalits and Adivasis. Women and girls from the hill tribes of the Mekong region of South-East Asia are known to be particularly vulnerable to trafficking for sexual exploitation. In Central Africa, forced labour appears to be a particular problem for the Baka, Batwa and other

so-called “pygmy” peoples.

The ILO’s Forced Labour Convention No. 29 from 1930 obliges ILO member states to suppress the use of forced or compulsory labour in all its forms within the shortest possible period. In 1957, Convention No. 29 was followed up by the Abolition of Forced Labour Convention No 105. This Convention outlines specific purposes for which forced labour can never be imposed. Thus, forced labour can never be used for economic development or as means of political education, discrimination, labour discipline, or punishment for having participated in strikes.⁴⁾

Child labour in indigenous communities

There is a need to distinguish generally between *acceptable child work and child labour*. Using children for slavery and forced labour; subjecting them to child trafficking and forced recruitment for armed conflicts; using children in prostitution and pornography or in illicit activities like drugs trafficking; or simply making them do work that harms their health, safety or morals, is to expose them to the worst forms of child labour. In contrast to this, most indigenous children have particular working roles

⁴⁾ For further information see the Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work 2005 (“A global alliance against forced labour”), ILO 2005.

reflecting elaborate cultural notions of childhood development distinguished by age-groups, gender, social status and often accompanied by rituals such as those marking entry into adulthood. Such light work that is not harmful but which contributes to children's development and provides them with skills, attitudes and experience that make them useful and productive members of their community during their adult life can in no way be equated with harmful child labour.

Indigenous child labour prevails in rural areas, but is also on the rise in urban settings. Children of female-headed households and orphans are the most vulnerable. Indigenous children work within the formal as well as the informal sector, but tend to be more numerous in the latter, where they usually work very long hours and are often paid in kind only. Indigenous children constitute a growing percentage of the migrant labour force working in plantations and other forms of commercial agriculture. In Guatemala, for example, exploitative child labour includes working in commerce agriculture, firework manufacturing and handicrafts.

Child labour affects boys and girls differently. Because of the widespread gender discrimination, including in some indigenous cultural practices, girls in the rural areas are less likely to go to school and many migrate instead to urban areas to work as domestic servants. This makes them less "visible" and more vulnerable to exploitation, sexual abuse and violence. Some indigenous children combine school with work but the majority of child labourers have little or no schooling.

Although general efforts to eliminate child labour have increased, indigenous children are not benefiting as much as non-indigenous children. In fact, child labour among indigenous peoples has until recently received little attention from governments and international institutions as well as from indigenous peoples themselves. It largely remains an invisible issue, and no comprehensive data on the magnitude of the problem or the conditions and types of work in which indigenous children are engaged exist. However, a series of cases and examples drawn from all over the world indicate that indigenous children are disproportionately affected by high rates of child



labour. Further, recent studies have shown that indigenous children are at particular risk for ending up in the worst forms of child labour. Combating child labour among indigenous children requires specific approaches, based on the special needs and rights of these peoples.

ILO Convention No. 182 on the Worst Forms of Child Labour, and Convention No. 138 on Minimum Age are the ILO's main instruments to combat child labour.⁵⁾

Discrimination in Employment and Occupation

The main instrument of the ILO to fight discrimination is the Convention on Discrimination in Employment and Occupation, 1958 (No. 111). Convention No. 111 defines discrimination as “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity and treatment in employment or occupation.”

“Equality of opportunity and treatment” includes two aspects: (1) the notion of equal treatment which requires that all persons should be treated on an equal footing; and (2) the notion of equal opportunity which requires that everyone must be offered comparable means and opportunities. The notion of equal opportunity suggests that everybody should be brought to an equal level in order to access work opportunities.

With the focus on *effect* rather than on the process, it is irrelevant whether the discrimination was intentional or not, and Convention No. 111 aims at eliminating both *direct* and *indirect* discrimination.

Direct discrimination refers to rules, policies or practices that exclude or disadvantage certain individuals because they belong to a particular group or because they have certain characteristics.

Indirect discrimination is often hidden, more subtle and therefore more difficult to identify. It occurs when apparently neutral measures (rules, policies or practices) have a disproportionately adverse impact on one or more particular groups. Even well-intentioned measures may be discriminatory in their effect.

The Peruvian teacher training centre FORMABIAP (see section 10.4.) has trained bilingual intercultural teachers over a number of years, taking into account the linguistic and cultural specificities of the indigenous peoples of the Amazon Region. However, new national rules for selection of candidates were introduced in order to improve the general educational quality in the country. These rules established admission requirements that were almost impossible to fulfil for the overwhelming majority of indigenous students. Most of these students come from remote areas and have been taught in a language, which they do not master completely. They are taught in institutions with inadequate infrastructure and materials by teachers who have discriminatory attitudes and no specialized training. As a result of the new admission criteria, indigenous students have de facto been excluded from training to become bilingual teachers. In response to this situation, in 2008, FORMABIAP developed a special course for indigenous students, which, as a special measure, aimed at bringing the indigenous students to the same level as the non-indigenous students so the former could compete on an equal footing. Even so, for the third successive year, no indigenous student passed the admission exam in 2009.⁶⁾

The provisions of Convention No. 111 are highly relevant to indigenous peoples when they face discrimination based on their race, religion or national and social origin. Along with Convention No. 169, Convention No. 111 calls for special measures or affirmative action to meet the particular needs of indigenous peoples and other groups that are being discriminated. Such measures can, for example, be special educational grants or reserved jobs in the public sector.⁷⁾

5) For more information, see: Guidelines for Combating Child Labour among Indigenous and Tribal Peoples, ILO, 2006.

6) <http://www.formabiap.org>.

7) For more information see: Eliminating Discrimination against Indigenous and Tribal Peoples in Employment and Occupation – a Guide to ILO Convention No. 111, ILO 2007.

12.3. ACCESS TO VOCATIONAL TRAINING

Without equal access to training, any real possibility of entering employment or occupation is illusory, inasmuch as training is one of the keys to the promotion of equality of opportunities.

Convention No. 169 contains specific provisions on vocational training:

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 cooperation 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.

The Convention does not only cover vocational training of general application but also special training programmes that are based on indigenous peoples' economic environment, social and cultural conditions and practical needs, as such training is more likely to promote their equal opportunities. When developing such training it is important to consult with indigenous peoples, and, where appropriate, transfer the responsibility for such programmes to them.

12.4. PRACTICAL APPLICATION: EMPLOYMENT AND LABOUR RIGHTS

Nepal: The Kamaiyas

The Kamaiya system was a system of bonded labour that was widely practiced in the western lowlands of Nepal until it was abolished in 2000. Over 98% of the kamaiyas, or bonded labourers, came from the indigenous Tharu community, and the effects of the system still continue to affect them in terms of lack of access to land, labour exploitation, lack of education and widespread poverty.

The Tharus are indigenous to the lowland plains belt of Nepal, known as the Tarai. The Tarai has gone through a radical transformation in the last 60 years; from being a malaria-infested and sparsely-populated jungle to becoming the agricultural bread-basket and industrial heartland of the country. Before the 1950s, the region was almost exclusively inhabited by indigenous peoples of whom the Tharu were the largest single group. Today, over half of Nepal's population lives in the narrow strip of flat land. The waves of settlement by high-caste hills peoples deprived Tharus of their ancestral land, to which they seldom held legal title. The new settlers were better educated and often had political connections, whereby they could gain access and title to the land. In fact, large tracts of land were owned by ministers and politicians themselves. Within a period of a few years many Tharu families were deeply indebted to the new land owners and reduced to the status of bonded labourers.

With the coming of multiparty democracy in 1990, some NGOs began to challenge the system of bonded labour, through a community development approach, including awareness programmes, literacy and income-generating projects for the kamaiyas. Progress towards an actual abolition of bonded labour was slow, but in 2000 a group of kamaiyas launched a sit-down strike in front of local government office demanding freedom from debt-bondage, payment of minimum wage, and registration of the land on which they were living. A coalition of human rights organisations, NGOs and trade unions quickly gathered around them, and the action spread into a freedom movement culminating with the government issuing the Kamaiya Freedom Declaration on July 17th, 2000. Over 25,000 bonded



labourers and their family members were freed from bondage overnight, with the government declaring their debts to landlords void and threatening up to 10 years imprisonment for anyone keeping bonded labourers.

When the government issued the Freedom Declaration, it also stipulated plans for rehabilitation, including land grants for the freed kamaiyas. However, as of 2008, about half of the freed kamaiyas are still landless. Furthermore, the land grants provided have generally been quite small in size. Thus the fundamental condition that gave rise to bonded labour in the first place, namely the Tharus' alienation from ancestral domain, is still a problem. The ongoing economic vulnerability of the group makes them susceptible to other forms of labour exploitation including forced labour, child labour and payment below the minimum wage.

Peter Lowe. Kamaiya: Slavery and Freedom in Nepal. Kathmandu, MS-Nepal, 2001
ILO Katmandu News report. 8th Kamaiya Liberation Day observed in Nepal with the demand for effective rehabilitation of freed Kamaiyas. http://www.ilo.ktm.org.np/read_more.asp?id=127

Latin America: Child labour and vocational training.

Of the approximately 40 million indigenous people

in Latin America, almost half of them (15-18 million) are girls, boys and adolescents. Generally, it is estimated that indigenous children are twice as likely to work as their non-indigenous peers. In order to combat child labour among indigenous children, the development of high quality vocational training, relevant to the particular linguistic and cultural context of indigenous peoples must be provided. In Central America, initiatives are taken to create education and vocational training appropriate to the needs of indigenous peoples. In Nicaragua, the Autonomous University of the Caribbean Coast of Nicaragua (URACCAN) and the Bluefields Indian and Caribbean University (BICU) are specific educational institutions, established to provide special programmes for indigenous peoples in the Autonomous Regions.

URACCAN contributes to strengthening the Regional Autonomy by complementary processes of self-development, local capacity-building, multiethnic unity and integral training of men and women in the Region. Its mission is to contribute to the strengthening of Autonomy by training the human resources in the Region and for the Region; by making room for the development of knowledge, skills and attitudes in order to preserve natural resources while promoting sustainability; and creating local capacity so that the full exercise



of human, indigenous and autonomic rights can be fulfilled. In addition to bilingual, culturally-relevant formal university courses in indigenous law and traditional medicines, these universities offer programmes in leadership, literacy and community organizing to adults who have no previous formal education.

<http://white.oit.org.pe/ipec/>;

<http://www.Uraccan.edu.ni>.

Case prepared by: Brenda Gonzales Mena.

Trade unions and indigenous communities combating forced labour in the Peruvian Amazon region

Indigenous peoples have for centuries been the most affected by practices of forced labour in Latin America. The region has the second highest number of victims of forced labour in the world, over 1.2 million people according to ILO estimates. In-depth field research in the rural areas of Bolivia, Paraguay and Peru, has confirmed that indigenous peoples are particularly vulnerable to a form of forced labour called debt bondage. Indigenous workers are recruited by labour intermediaries who – through wage advances and other manipulations - induce them into an artificial debt that they cannot repay. Long hours of work are not sufficient to repay this debt, thus trapping the workers into greater debt and a longer debt repayment period. This system perpetuates the poverty or extreme poverty of the workers and impedes human and social development.

In Peru, a study carried out in 2004 by the ILO and

the Peruvian Ministry of Labour and Employment Promotion confirmed the existence of forced labour practices in the context of illegal logging in the tropical Amazon region, with an estimated number of 33,000 victims, most of which belong to indigenous peoples.

The study revealed two main forms of forced labour in logging activities in the Amazon:

- The most common modality is that indigenous communities are contracted to provide timber from their own land. The communities in return receive money, food or other goods that are advanced to them under the condition that the community members, who know the area, will deliver timber.
- The second modality consists in situations where indigenous and other workers are hired to work in logging camps.

Both modalities use deception to entrap workers in a cycle of debt and servitude that is often passed on from one generation to the next.

These forced labour practices are linked to the larger issue of discrimination against indigenous peoples in the labour market. They are frequently at the bottom of the occupational ladder, engaged in low-pay, irregular and unprotected employment and subject to discrimination in remuneration.

In 2006 and 2007, the ILO office in Peru and the Building and Wood Workers' International (BWI) signed two agreements to specifically address forced labour. The two organizations committed



themselves to a series of joint activities, on awareness-raising, dissemination of information, and efforts to organize workers in the forestry sector.

As a result, a trade union pilot project to combat forced labour in the forestry sector in Bolivia and Peru was launched in August 2008, financed by the Netherlands Trade Union Federation (FNV). The project is implemented in the Ucayali Region by the National Federation of Workers in the Wood and Allied Industries (FENATIMAP), an organisation that comprises workers from several trade unions and associations linked to the forestry sector, mainly located in the Peruvian Amazon region. FENATIMAP has for many years coordinated its actions with representatives from indigenous communities, and has further extended its relations with indigenous organisations during the implementation of this project.

The objective of the project is to contribute to the reduction of the number of workers in situations of forced labour through a series of awareness-raising and capacity-building activities. These activities include training of trade union promoters on issues such as forced labour, fundamental rights of workers and indigenous peoples, legal mechanisms to respond to violations of these rights, and organisational ways to advance collective action. Indigenous leaders participate in the training and later organise training and awareness-raising activities in their respective communities and organisations, together with FENATIMAP's promoters.

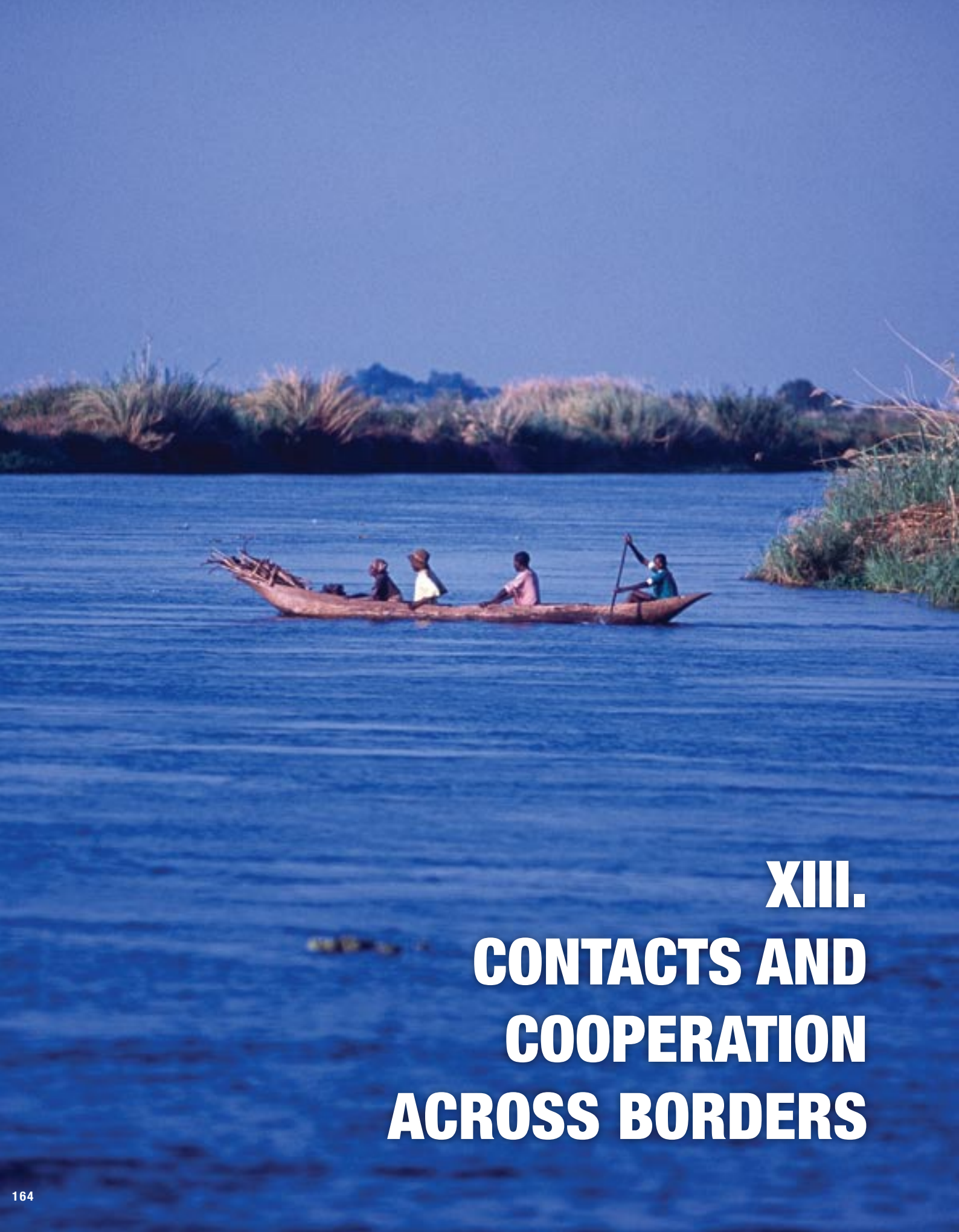
As a result of the coordinated implementation of the project, indigenous organisations are establishing formal links with FENATIMAP to enable further joint action to protect the fundamental rights of workers and indigenous peoples. Awareness-raising activities are being organised in several locations in the region, and the network of indigenous communities and organisations participating in these actions is expanding. The established links are also proving valuable for the collection of information on situations of forced labour and illegal logging in the region. The project has additionally disseminated information on forced labour and indigenous peoples' rights in the local media, making the issues more visible to the authorities and the general public.

The project demonstrates that the coordination between indigenous organisations and trade unions can facilitate indigenous peoples' access to legal mechanisms; provide a wider network of support; and open up new possibilities of dialogue within institutions where they have traditionally not participated. The trade unions have gained a better understanding of the realities and problems faced by indigenous peoples, and can raise their concerns in diverse contexts, including the different mechanisms of social dialogue in which they participate.

Bedoya and Bedoya: Trabajo forzoso en la extracción de la madera en la Amazonía Peruana, ILO 2005;

A Global Alliance Against Forced Labour, ILO Global Report 2005.

Case prepared by Sanna Saarto, ILO's Programme to Combat Forced Labour, Peru.



**XIII.
CONTACTS AND
COOPERATION
ACROSS BORDERS**

13.1. PEOPLE AND PEOPLES DIVIDED BY BORDERS

It follows from the very definition of indigenous peoples that they inhabited a country or region prior to conquest, colonisation or establishment of state boundaries (see section 1.1). Therefore, many indigenous peoples have been involuntarily divided or separated by state borders that run across their territories and hamper contact for members of their people divided by the border. This is, for example, the case for the Sami people and the traditional Sami territory, which is divided by the state boundaries of four nation states (Finland, Norway, Russia and Sweden) due to geopolitical circumstances. In other cases, state boundaries effectively prevent indigenous peoples from maintaining and developing contacts and cooperation with *other* indigenous peoples and communities across state boundaries, e.g. the Chin in Burma and India.

In order to remedy these situations, Convention No. 169 has a specific article on contacts and cooperation across borders:

ILO Convention No. 169

Article 32

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

This provision is not only applicable to those indigenous peoples who have been internally divided by state boundaries, but is also applicable to indigenous peoples that are not divided by state boundaries, but who would benefit from cooperating with other indigenous peoples across state boundaries.

The UN Declaration on the Rights of Indigenous Peoples contains a similar provision:

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Indigenous peoples' right to maintain and develop contacts and cooperation across national boundaries is by its nature different from other internationally recognized rights of indigenous peoples, as its implementation requires political, administrative and/or legal measures from more than one state. A precondition for the implementation of this right is thus that the states concerned have a friendly and cooperative relationship upon which specific arrangements for the implementation of this right can be established.



13.2. PRACTICAL APPLICATION: CROSS-BORDER CONTACT AND COLLABORATION

Venezuela: Free transit of indigenous persons and goods across borders.

The 2002 Constitution of the Venezuelan “Amazonas” State, recognizes the right of indigenous peoples living in international borderlands to freely transit with their goods across the borders. As expressly spelled out in the Constitution, the rationale for this right is found in the pre-existence of indigenous peoples with respect to the foundation of the national State.

At the federal level, the Organic Act on Indigenous Peoples and Communities states the right of indigenous peoples living in borderlands to maintain and develop relations and cooperation with indigenous peoples and communities living in neighbouring countries, as regards social, cultural, economic, spiritual, environmental and scientific activities. In this connection, the Act establishes the State’s duty to adopt adequate measures, with the participation of the indigenous peoples and communities concerned, through international agreements, treaties and conventions, with a view to facilitating and fostering the integration, cooperation, transit, exchanges and economic development of the indigenous peoples concerned.

The possibility of establishing contacts and cooperation across borders is presented as a specific *right* of the indigenous peoples living in borderlands on the assumption that these peoples have traditionally maintained relations across borders since an age predating the establishment of modern States and their boundaries. Correspondingly, the State has a duty to facilitate these relations and promote them by the adoption of adequate measures, including international agreements. It is also explicitly stated that the indigenous peoples concerned shall *participate* in the drafting of these instruments.

The Constitution of the Amazonas State: www.iadb.org/sds/ind/index_ind_e.htm;

Ley Orgánica de Pueblos y Comunidades Indígenas: www.assembleanacional.gov.ve.

Colombia: Areas of Border Integration

Law No. 191 of 1995 regarding Border Areas

is designed to foster cooperation and eliminate the obstacles to the natural interaction between communities living across the national borders. In particular, it aims at promoting cooperation with regard to local development, the protection of the environment and the supply of public services. To this end, it provides, in Article 5, for the establishment of “Areas of Border Integration” on the basis of international agreements to be signed with neighbouring States. Where indigenous communities live in the areas concerned, the establishment of these is subjected to the prior consultation with the representative institutions of the indigenous communities concerned. The Law also recognizes that within the framework of the cooperation and integration agreements signed by the local authorities of cross-border countries, indigenous representatives institutions of neighbouring countries can sign their own cooperation agreements covering matters within their jurisdiction.

http://www.iadb.org/sds/ind/index_ind_e.htm

Norway, Sweden, Finland and Russia: Sami cross-border collaboration and reindeer husbandry

The Sami are a classic example of a people with distinct identity, language, culture, social structures, traditions, livelihoods, history, and aspirations that have been separated by state borders.

For centuries, the Sami were subjected to constantly changing geopolitical situations, legal and political regimes. Eventually the traditional Sami territory was divided between Finland, Norway, Russia and Sweden. The Sami people were henceforth forcibly divided by state boundaries.

Because of the differences in the political and legal systems between the Nordic countries and Russia, there have been no serious political discussions at the state level about the need to redress Sami cross-border rights in the Russian-Nordic context. The Sami living in the former Soviet Union (USSR) suffered tremendously as a result of the State programme of centralizing the means of production. The Sami were forced to leave their traditional villages, which were often destroyed to prevent their return, and relocated to large towns or centres for the State collectivization programme. This resulted in the destruction of their traditional social, cultural and economic structures. They were effectively isolated





from the Sami living in the Nordic States. After the collapse of the USSR, the Sami in Russia started to rebuild their culture and re-establish contact with Sami in the other countries.

Today, elected Sami parliaments exist in Finland, Norway and Sweden. The Sami Parliament in Finland was established in 1972, whereas the Sami parliaments in Norway and Sweden were established in 1989 and 1993 respectively. Although, these three parliaments do not have identical powers, functions and tasks, they share the ability to freely and on their own initiative raise any matter of concern to the Sami in the respective countries. In 1998, the three Sami parliaments formalized their cross-border cooperation through the establishment of the Sami Parliamentary Council. The Parliamentary Council comprises 21 members, appointed by the respective Sami parliaments from among the representatives elected to each

of them. The Sami in Russia only have observer status in the Sami Parliamentary Council, as they do not have their own parliament. Every fourth year, the Sami Parliaments convene a conference of Sami parliamentarians to discuss principal issues of concern to the Sami people as a whole. The Conference of Sami Parliamentarians gathers the members of all three Sami parliaments in a joint plenary session of all three parliaments.

However, since the boundaries between Sweden and Norway, and Finland and Norway were established in 1751, there has been some state recognition of cross-border Sami rights in these countries. The recognition of such rights is still evolving and no final settlement has been reached – although the process has been ongoing for more than 250 years.

The draft Nordic Sami Convention (see below), also

addresses cross-boundary reindeer husbandry rights. Article 43 of the draft Convention states that the right of the Sami to graze reindeer across national borders is based on custom. The draft Convention seeks to ensure Sami autonomy in relation to the management of grazing lands across national boundaries and it states that, if agreements have been concluded between Sami villages or communities concerning the right to reindeer grazing across national borders, these agreements shall be respected by state authorities and shall prevail. In the event of a dispute concerning the interpretation or application of such an agreement, a party (Sami villages/communities) shall have the opportunity to bring the dispute before an arbitration committee for decision. The composition of such an arbitration committee and its rules of procedure shall be jointly decided upon by the three Sami parliaments. A party dissatisfied with the arbitration committee's decision of the dispute shall have the right to file a suit on the matter in a court of law in the country on which territory the grazing area is situated.

There are various other forms of cross-border Sami cooperation and contacts, such as cooperation between the Sami Radio/TV broadcasters in Finland, Norway, Russia and Sweden, various forms of cultural cooperation, Pan-Sami national teams in football and Nordic winter sport disciplines, etc.

Cross-border Sami cooperation is primarily funded by the governments of Finland, Norway and Sweden, based on a proportional formula through which the country with the biggest Sami population contributes the most.¹⁾

John Henriksen (2008): The continuous process of recognition and implementation of the Sami people's right to self-determination, The Cambridge Review of International Affairs, Volume 21, Number 1, Center of International Studies – University of Cambridge. Case cited in: John Henriksen: Key Principles in Implementing ILO Convention No. 169, ILO, 2008.

Norway, Sweden and Finland: Draft Nordic Sami Convention

In 1995, the Sami Council (a pan-Sami non-

¹⁾ The total Sami population is estimated to be somewhere between 80-95,000 individuals in the respective countries as follows: Finland 8,000; Norway 50-65,000; Sweden 20,000; and Russia 2,000. These figures are estimates only as the national censuses do not include a specific Sami component.

governmental organization) submitted its proposal for a draft Sami Convention to the governments of Finland, Norway and Sweden, and the three Sami parliaments. An agreement to follow-up the proposal was made within the context of the overall Nordic political cooperation, although the Russian authorities were not invited to join this process due to the differing political and legal situation in Russia.

In 2001, an Expert Group was established, through a joint decision by the governments of Finland, Norway and Sweden to take the process further. The Expert Group submitted a unanimous proposal on a Nordic Sami Convention to the governments and the Sami parliaments in November 2005.

The provisions of the proposed Convention are largely based on the acknowledgment of the Sami as one people with the right to self-determination. According to Article 1, the objective is to affirm and strengthen such rights of the Sami people that are necessary to secure and develop the Sami language, culture, livelihoods and society, with the smallest possible interference from national borders.

Article 10 stipulates that states shall, in cooperation with the Sami parliaments, strive to ensure continued harmonization of legislation and other regulation of significance for Sami activities across national borders. Article 11 obliges the states to implement measures to render it easier for the Sami to pursue economic activities across national borders and to provide for their cultural needs across these borders. For this purpose, the states shall strive to remove remaining obstacles to Sami economic activities that are based on their citizenship or residence or that otherwise are a result of the Sami settlement area stretching across national borders. The states shall also give Sami individuals access to the cultural provisions of the country where they are staying at any given time.

Article 12 stipulates that states shall take measures to provide Sami individuals residing in any of the three countries with the possibility to obtain education, medical services and social provisions in another of these countries when this appears to be more appropriate.

Article 13 contains provisions concerning the

symbols of the Sami people: The states shall respect the right of the Sami to decide over the use of the Sami flag and other Sami national symbols. The states shall moreover, in cooperation with the Sami parliaments, make efforts to ensure that the Sami symbols are made visible in a manner signifying the Sami's status as a distinct people in the three countries.

Article 20 of the draft Convention recognized that the Sami Parliaments in Finland, Norway and Sweden have the right to form joint organizations, and that the States, in cooperation with the Sami parliaments, shall strive to transfer public authority to such organizations as needed.

Article 22 decides that the states shall actively seek to identify and develop the area (a Sami region within the respective countries and across state boundaries), within which the Sami people can manage their particular rights pursuant to the Convention and national legislation.

Article 14 establishes that in each of the three countries there shall be a Sami parliament, as the highest representative body of the Sami people in the country. The Sami parliaments shall act on behalf of the Sami people of the country concerned, and shall be elected through general elections among the Sami in the country.

Due to legal technicalities, the Sami are not to be party to the Convention. The Expert Group discussed the possibility of developing a Convention to which the Sami people would also be a formal party, but concluded that rendering the Sami people a party to the Convention would most likely deprive it of its status as a legally binding instrument under international law. Thus, the Expert Group decided to develop a Convention to which only the States are formal parties, but which cannot be ratified or changed without the approval of the Sami parliaments.

The proposed Sami Convention, and the process under which it was developed, encapsulates the most progressive sides of the Nordic discourse on the Sami people's rights. However, it remains to be seen whether the States eventually are willing to accept these proposed standards. The respective

Sami parliaments have all endorsed the proposed Convention, whereas the States are still reviewing its content. It is expected that formal negotiations between the governments and the Sami parliaments in Finland, Norway and Sweden will start in the near future.

John Henriksen (2008): The continuous process of recognition and implementation of the Sami people's right to self-determination, The Cambridge Review of International Affairs, Volume 21, Number 1, Center of International Studies – University of Cambridge; An English language version of the proposed Nordic Sami Convention is available at: http://www.regjeringen.no/Upload/AID/temadokumenter/sami/sami_samekonv_engelsk.pdf.

Case cited in: John Henriksen: Key Principles in Implementing ILO Convention No. 169, ILO, 2008.

The Circumpolar area: The Arctic Council

Inaugurated in September 1996, the Arctic Council is an organization founded on the principles of circumpolar cooperation, coordination and interaction to address the issues of sustainable development, including environmental protection, of common concern to Arctic States and northerners. The eight Arctic states are members of the Council; Canada, Denmark/Greenland/Faroe Islands, Finland, Iceland, Norway, Russia, Sweden and USA. Six indigenous organizations/communities have the status of permanent Participants on the Council: The Aleut International Association, Arctic Athabaskan Council, Gwich'in Council International, Inuit Circumpolar Conference, Russian Association of Indigenous Peoples of the North (RAIPON), and the Sami Council. The Permanent Participant status enables indigenous peoples to actively participate in the work of the Council.

<http://arctic-council.org>

Ecuador-Peru: The Bi-national Park El Cóndor

The border area between Ecuador and Peru in the Amazon region of the "Cordillera del Cóndor" was for years an area of occasional armed conflicts, since the demarcation of the borders between the two countries in 1941 had failed to establish the border in that region. The area is inhabited by indigenous Shuar and Huambisa, who are closely related culturally and linguistically. Thus, communities on both sides of the border have been severely affected and involved in the conflict.

The idea of creating a Bi-national Park was proposed by indigenous and environmental organizations of both countries, but was considered an almost utopian dream. However, when a Peace Agreement was signed by the two countries in 1995, the proposal was partially included and a binational environmental protection area has been established at both sides of the border.

http://www.ambiente.gov.ec/paginas_espagnol/4ecuador/docs/areas/condor.htm

Ecuador-Peru: The Bi-national Federation of the Zápara

At one time, the Zápara people were one of the most numerous peoples in the Amazon Region. However, during the 19th and 20th century, the population was drastically reduced due to epidemics and the exploitation of rubber in the region, which was largely based on practices of slavery and forced labour perpetrated on the indigenous population. The traditional territory of the Zápara was divided by the border established between Ecuador and Peru in 1941, with the largest population located on the Peruvian side (estimated at around 700) and only around 150-200 Zaparas on the Ecuadorian side. Of these, only about 15 speak their language. Therefore, the Zápara language and culture was

declared World Intangible Cultural Heritage in 2001 by UNESCO. Since then, several initiatives have been undertaken to protect and support the Zápara culture, including initiatives for preserving the language and providing bilingual education for the Zápara children.

In 2003, a group of Ecuadorian Záparas travelled on the rivers across the border and visited the Záparas of Peru, who had been separated from them for more than 60 years. This led to a series of bi-national meetings and in 2006, a Bi-national Federation of the Zápara People of Ecuador and Peru was established. The Third Bi-national Meeting of the Zapara People took place in March 2009, with the aim of

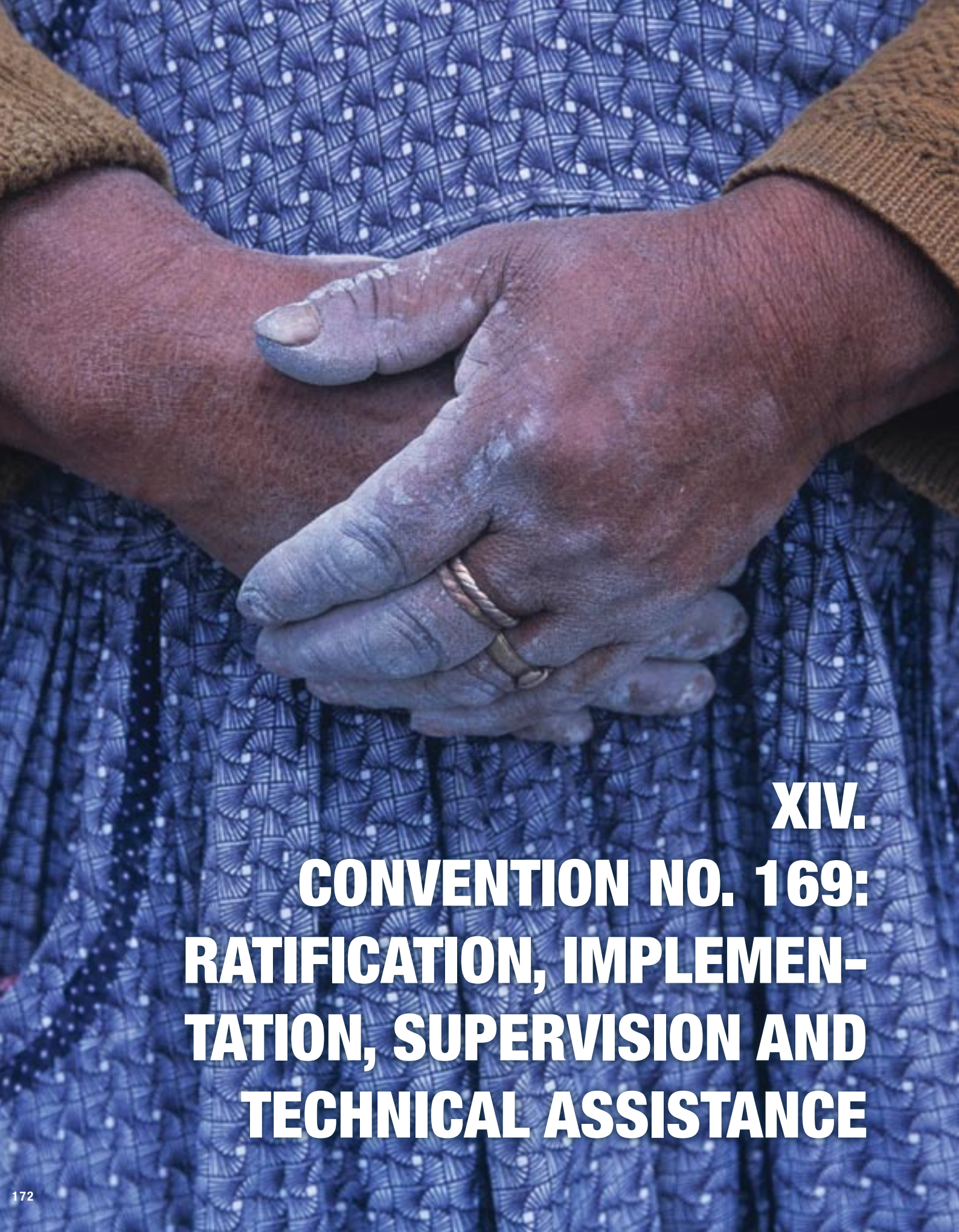
- Strengthening and organising links between family members;
- Defining policies for bilingual intercultural education;
- Exchanging handicrafts;
- Defining organizational policies for the recuperation of the history and philosophy of the Zápara people.

<http://piatsaw.blogspot.com>

<http://www.codenpe.gov.ec>

http://www.elnuevoempresario.com/noticia_6045





**XIV.
CONVENTION NO. 169:
RATIFICATION, IMPLEMEN-
TATION, SUPERVISION AND
TECHNICAL ASSISTANCE**

14.1 HISTORY OF THE ILO'S INVOLVEMENT WITH INDIGENOUS PEOPLES

In 1919, after the horrors of World War I, world leaders decided to form the League of Nations. By doing so, they hoped among many other things to prevent war and improve the quality of life on a global basis. One of the measures taken to fulfil these goals was the establishment of the International Labour Organization (ILO), whose main objective was to address social peace. With the words “there can be no lasting peace without social justice” this objective is clearly reflected in the ILO Constitution.

The ILO is a standards-setting agency that adopts Conventions and Recommendations and provides assistance to governments and others in putting these into practice. As of 2009, the ILO has adopted 188 Conventions on a wide range of issues, such as working conditions, employment policy, occupational safety and health, maternity protection and social security, as well as discrimination, freedom of association, child labour and forced labour.

Looking into the conditions of workers around the world, the ILO realized that indigenous peoples were especially exposed to severe forms of labour exploitation. As early as 1920, the ILO began to address the situation of so-called “native workers” in the overseas colonies of the European powers. Increasingly, it became evident that these peoples had a need for special protection in cases where they were expelled from their ancestral lands and had become seasonal, migrant, bonded or home-based labourers. One of the outcomes of this recognition was the adoption in 1930 of the ILO's Forced Labour Convention (No. 29).

In 1945, the United Nations was created, and the ILO became a UN specialised agency. The ILO began to widen its examination of the situation of indigenous workers and throughout the 1950s, with the participation of other agencies of the UN system, the ILO worked on the Indigenous and Tribal Populations Convention (No. 107). Convention No. 107 was finally adopted in 1957 as the first international treaty dealing with the rights of “indigenous and tribal populations”.

As years went by, certain weaknesses in Convention No. 107 became obvious, particularly its underlying assumption that the only possible future for indigenous peoples was integration into the larger society and that others should make decisions on their development. With the growing awareness, organization and participation of indigenous peoples at the national and international levels during the 1960s and 1970s, these assumptions were challenged. In 1989, Convention No. 107 was replaced by Convention No. 169.

Convention No. 107 covers a wide range of issues, including employment and occupation, rights to land and education in indigenous languages. The Convention is now closed for ratification but it remains binding on those 18 countries that have ratified it and which have not yet denounced it or ratified Convention No. 169. These are Angola, Bangladesh, Belgium, Cuba, Dominican Republic, Egypt, El Salvador, Ghana, Guinea Bissau, Haiti, India, Iraq, Malawi, Pakistan, Panama, Portugal, Syria and Tunisia. In these countries, the Convention can still be used as an instrument to guarantee indigenous and tribal peoples certain minimum rights. However, the ILO Committee of Experts on Application of Conventions and Recommendations and the ILO Governing Body invited all countries that have ratified Convention No. 107 to consider ratifying Convention No. 169.

14.2 THE ILO'S TRIPARTITE STRUCTURE

The ILO is unique among UN agencies because it is not composed only of governments. It has a tripartite constitution, comprising governments, employers and workers. These three parties are the *ILO constituents*, who all have formal roles to play in the decision-making and procedures of the institution. Due to this general characteristic of the ILO, indigenous peoples as such do not have a formal position within the ILO tripartite structure.

The tripartite structure of the ILO is reflected throughout its structure, including in the International Labour Conferences and the ILO Governing Body.

The International Labour Conference

The Conference provides a forum for debate and discussion on important social and labour issues. It adopts standards, and is the principal policy-making body of the Organization. Each of the ILO's 183 member States is represented by four delegates to the annual ILO Conference. Two are from the government, and one each from the national workers' and employers' organizations. During the discussions concerning the adoption of Convention No. 169, a number of indigenous representatives participated as members of delegations of workers, employers and governments.

The Governing Body

The ILO programme and budget are set by the Governing Body, and approved by the Conference. It also sets the Conference agenda. The Governing Body elects the Director-General of the ILO, its chief executive official, for a period of five years, and supervises the day-to-day operations of the ILO Office. The Governing Body is composed of 56 members: 28 government members, 14 employer members and 14 worker members.

The tripartite constituents of the ILO also have privileged access when it comes to accessing the ILO supervisory procedures related to ratified conventions. However, indigenous peoples have found practical ways to engage with the ILO supervisory bodies, often through collaboration with workers organizations (see sections 14.5 and 14.6).

Due to the characteristics of the ILO, its main government partner in member states is the Ministry of Labour (or its equivalent, however named). However, as the responsibility for indigenous peoples' rights often is the responsibility of a government body other than the Ministry of Labour, the ILO can work directly with whatever institution the government has designated for this theme. Also, the ILO technical cooperation activities (see section 14.11) can directly address and include indigenous peoples

14.3 RATIFICATION

The Programme of Action of the Second Decade of the World's Indigenous People adopted by the UN General Assembly in 2005 states that consideration should be given by States that have not yet done so to ratification of Convention No. 169 and the strengthening of mechanisms to monitor the implementation of the Convention.¹⁾

Ratification is the voluntary act by which a State establishes at the international level its consent to be bound by a convention. Since 1989, 20 countries have ratified Convention No. 169 as provided in the table below:

COUNTRY	RATIFICATION DATE
Argentina	3.7.2000
Bolivia	11.12.1991
Brazil	25.7.2002
Chile	15.9.2008
Colombia	7.8.1991
Costa Rica	2.4.1993
Denmark	22.2.1996
Dominica	25.6.2002
Ecuador	15.5.1998
Fiji	3.3.1998
Guatemala	5.6.1996
Honduras	28.3.1995
Mexico	5.9.1990
Nepal	14.9.2007
Netherlands	2.2.1998
Norway	19.6.1990
Paraguay	10.8.1993
Peru	2.2.1994
Spain	15.2.2007
Bolivarian Republic of Venezuela	22.5.2002

In most cases, ratification of Convention No. 169 follows a process of dialogue between the government, indigenous peoples, members of parliament and often broader sectors of civil society, which will often include elements of awareness-raising, capacity-building, research, legal reviews

1) UN doc. A/60/270, 5 August 2005, paragraph 56.

and exchange of experiences. In many cases, the ILO, through its International Labour Standards Specialists and technical cooperation programmes, provides assistance and technical input to such activities (see section 14.11).

ILO Conventions, unlike other international treaties, cannot be ratified with reservations. Some Conventions allow ratifying States to limit or modify the obligations of a Convention (e.g. by way of a declaration explicitly permitted or required under the Convention), but this is not the case with

Convention No. 169. Therefore, it is important that governments, indigenous peoples, traditional ILO constituents (workers and employers) as well as other stakeholders are fully informed about all the provisions of the Convention as well as the implications of ratification. Moreover, this is important for generating ownership of the post-ratification implementation process; and by involving these principal actors, their participation in the implementation of the Convention is usually better guaranteed.



Ratification of Convention No. 169 by Nepal

Nepal ratified Convention No. 169 in September 2007. The ratification followed a long process of promotion, dialogue, research, exchange of experiences, training and capacity-building of different actors, including indigenous representatives, political parties, bureaucrats, international organizations, civil society organizations, trade unions, employers organizations, academics and media persons. Several national workshops provided opportunities for leading national politicians and indigenous representatives to discuss the Convention's relevance for Nepal's highly diverse, complex and unequal society. The discussions took place during the height of the 10-year long armed conflict, in which Nepal's indigenous peoples were disproportionately involved both as combatants and as civilian casualties, owing to their history of social, political, economic and geographic exclusion. Given the political context in the country in which exclusion of certain groups was fuelling the Maoist-inspired civil war, the ILO facilitated the exchange of experiences from Guatemala, where the Convention was ratified in 1996 as an integral part of the Peace Accords. An agreement between the all-party government and the Nepalese Federation of Indigenous Nationalities (NEFIN) in August 2007 led to the eventual ratification. Subsequently, the ratification of Convention No. 169 came to play an important part in the peace process in Nepal, becoming a major precondition for the indigenous movement to support the elections and the Constituent Assembly process. The implementation of the Convention is still ongoing in Nepal, but already the Convention has formed the basis for claims for meaningful consultation and participation in the constitution making process. It is also hoped that the principles of the Convention, will go on to provide a comprehensive framework for addressing key questions related to indigenous peoples in Nepal's new state structure.

Each country has its own national procedures for the ratification of international treaties, which varies according to the constitutional set-up of the country. The procedure is usually initiated by the line ministry responsible for the issues covered by the Convention. Once a government decides in favour of ratifying Convention No. 169, the approval of the parliament or other legislative body may have to be sought. Once this is obtained, the body or organ competent to do so under the national procedure signs the so-called *instrument of ratification*.

Once the national process is concluded, the government sends the instrument of ratification to the ILO informing it of its decision to ratify and be bound by the Convention. When it receives this instrument, the ILO registers the ratification and informs other member States. It is only through registration by the ILO that the ratification becomes effective on the international plane.

One year after the registration of ratification, the Convention enters into force in the country concerned, i.e. it becomes binding on the country under international law.

14.4. IMPLEMENTATION IN GOOD FAITH

Under international law, treaties in force for a country must be implemented in good faith.²⁾ Also, the ILO Constitution states that ILO members must make provisions of ratified Conventions effective.³⁾ This means that the government must take all measures necessary to apply the provisions of the Convention in law and in practice through the adoption and effective implementation of appropriate legislation, regulations and policies. It is also necessary to put in place the administrative arrangements, mechanisms or institutions needed to ensure that the State's obligations under the Convention are complied with.

The legal status of the Convention within the national legal system varies from country to country (see section 14.7). In the majority of countries that have ratified the Convention so far, ratified treaties are an integral part of the national law. Under these systems, the provisions of the Convention often

²⁾ Vienna Convention on the Law of Treaties 1969, Article 26.

³⁾ Article 19(5)(d) of the Constitution of the ILO.

prevail over conflicting national law. In some cases, the Convention is considered to have a status similar to that of the country's Constitution (e.g. Colombia) in others the Convention prevails over national legislation (e.g. Nepal and Costa Rica).⁴⁾

Article 9(1) of the Nepal 1990 Treaty Act

*In case of the provisions of a treaty to which the Kingdom of Nepal or HMG has become a party following its ratification accession, acceptance or approval by the Parliament conflict with the provisions of current laws, the latter shall be held invalid to the extent of such conflict for the purpose of that treaty, and the provisions of the treaty shall be applicable in that connection as Nepal laws.*⁵⁾

Article 7 of the Constitution of Costa Rica

*Public treaties, international agreements and concordats duly approved by the Legislative Assembly shall have a higher authority than the laws upon their enactment or from the day that they designate.*⁶⁾

concerning the requirements of the Conventions to the public authorities concerned (see also section 3.1 on systematic and coordinated action).

In its General Observation on Convention No. 169 (2008), the Committee of Experts underlines that: “[T]he Convention refers to three interrelated processes: coordinated and systematic government action, participation and consultation. [...] *Articles 2 and 33 of the Convention*, read together, provide that governments are under an obligation to develop, with the participation of indigenous and tribal peoples, coordinated and systematic action to protect the rights and to guarantee the integrity of these peoples. Agencies and other appropriate mechanisms are to be established to administer programmes, in cooperation with indigenous and tribal peoples, covering all stages from planning to evaluation of measures proposed in the Convention.”

Even where the Convention, once ratified forms a part of the national law, it will still be necessary to develop specific measures to apply the Convention, for instance:

- To enact legislation or regulations regarding those provisions of the Convention which are not sufficiently provided for or operationalised in the given national context;
- To eliminate any conflict between the provisions of the Convention and earlier national laws and practices;
- To develop and implement coordinated and systematic government action as envisaged under the Convention;
- To establish relevant institutions and mechanisms, particularly those concerning consultation, participation and consent;
- To provide information and guidance

4) For further information on the legal status of the Convention in ratifying States see: Application of Convention NO. 169 by national and international courts in Latin America - A Case book, ILO 2009.

5) <http://www.unhcr.org/refworld/type,LEGISLATION,,NPL,3ae6b51724,0.html>

6) <http://www.constitution.org/cons/costaric.htm>

In some other countries, ratified international treaties do not become automatically part of the national law. In such a case, the country is required to give effect to its international obligations through separate legislation. Among the countries having ratified the Convention, this is the case, for instance, in Norway and in Fiji (see section 14.7 on the use of Convention No. 169 in national courts).

14.5. ACCOMPANYING IMPLEMENTATION: THE PROCESS OF REGULAR SUPERVISION

One specific feature of the ILO normative system is that ratifying States have to report periodically on the measures taken to give effect to the Convention and on any problems encountered. This is an obligation under the ILO Constitution. Ratification of an ILO Convention is thus the beginning of a process of dialogue and cooperation between the government and the ILO. The purpose is to work together to make sure national legislation and practice are in line with the provisions of the Convention.

One year after the entry into force of the Convention, the government has to send its first report on the implementation of the Convention to the ILO. The one-year interim period is to give the government time to make sure national law and practice are in agreement with the Convention. After this, the normal reporting period for Convention No. 169 is every five years. However, if the situation needs to be followed closely, the ILO supervisory bodies may request a report outside the regular reporting cycle.

In accordance with the ILO Constitution, the government has to submit a copy of its report to the most representative workers' and employers' organizations to enable them to make comments on the report, if any. These organizations may also send their comments directly to the ILO.

The government's *first report* following the entry into force of the Convention should cover all the provisions of the Convention and answer each of the questions set out in the comprehensive *Report Form*. Governments are asked to report on legislation, rules and regulations that give effect to the Convention as well as on the scope of application of the Convention, including which groups of the national population it covers. In this sense, the first report of the government can serve as a baseline against which future progress in implementation is assessed.

Subsequent reports can then normally be limited to provide information on:

- New legislation or other measures affecting the application of the Convention;
- Replies to questions in the report form on the practical application of Convention (for example statistics, results of inspections, judicial or administrative decisions) as well as comments received from workers and employers organizations;
- Replies to any comments previously received from the ILO supervisory bodies.

The supervisory bodies often request additional reports beyond the regular reports due every five years. There is thus an on-going dialogue between the governments concerned and the ILO supervisory bodies regarding implementation.

The ILO bodies undertaking the regular supervision of the application of ratified Conventions are the Committee of Experts on the Application of Conventions and Recommendations (CEACR; Committee of Experts) and the Committee on the Application of Standards (CAS) of the International Labour Conference.

The Committee of Experts consists of 20 independent experts, who meet annually in Geneva in November and December. The Committee's mandate is to examine the reports submitted by ILO member States on the measures taken to give effect to ratified Conventions and it assesses the conformity of the country's law and practice with its obligations under the Convention. In this task, the Committee also relies on information received from workers' and employers' organizations, as well as relevant publicly available information, e.g. official United Nations reports.

The Committee of Experts engages in a process of ongoing dialogue with the government, which can be very effective in identifying implementation and information gaps and suggesting measures and mechanisms for improved implementation. Following each examination of reports, the Committee may address comments to the government concerned to guide and strengthen the implementation. Due to the complexities of Convention No. 169, it is one of the Conventions that has generated extensive comments from the ILO supervisory bodies for many countries. The comments of the Committee of Experts come in two forms:

- "Observations", which are the Committee of Experts' public comments on the application of ILO Conventions; and
- "Direct requests", which are sent directly to the government in question, and generally ask for more information on specific subjects.



The Committee of Experts' observations are included in its annual report to the International Labour Conference, which meets in June. This report is discussed by the Committee on the Application of Standards (CAS), which comprises representatives of governments, employers and workers. The CAS's main task is to examine the application of ratified Conventions by a number of countries ("individual cases") on the basis of the observations issued by the Committee of Experts.

As an outcome of such individual cases, the CAS adopts conclusions addressed to the ILO Member State examined.

Indigenous peoples do not have direct access to submitting reports to the ILO supervisory bodies. However, indigenous peoples can ensure that their concerns are taken into account in the regular supervision of ILO Conventions in several ways:

- By sending verifiable information directly to the ILO on, for example, the text of a new policy, law, or court decision.
- By making alliances with trade unions, and through them, raising issues of concern. As a consequence of the tripartite setup of the ILO, employers' and workers' organizations can submit reports on the application of an ILO convention at any time, irrespective of when a report on that convention is due. This can be done by any workers' or employers' organization, which can be based anywhere and not necessarily in the country concerned.
- By drawing the attention of the ILO to relevant official information from other UN supervisory bodies, fora or agencies, including the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people and the UN Permanent Forum on Indigenous Issues.

Finally, as in the case of Norway, indigenous peoples and states can seek innovative ways to provide indigenous peoples with direct access.



Norway: Innovative arrangements for reporting under Convention No. 169

In 1993, the Government of Norway submitted its first report to the ILO concerning Convention No. 169. The Sami Parliament in Norway disagreed strongly with certain sections of the governmental report, in particular the section addressing land and resource rights. The Sami Parliament submitted a written response to the Government, reflecting the substantive disagreement between the Government and the Sami Parliament on the status of implementation of Convention No. 169, and requested that the views of the Sami Parliament be incorporated into the report or annexed to the governmental report. However, the Government of Norway rejected this request, and the views of the Sami Parliament were not forwarded to the ILO. Governmental officials informed the Sami Parliament that the government was not in a position to forward the Sami Parliament's report to the ILO, because the government found it to be too critical towards the views of the Government.

This problem was closely linked to the diverging interpretation and understanding of the core land rights provisions of the Convention: The Government and the indigenous Sami Parliament in Norway differed in their understanding of the substantive content of Article 14 of the Convention. The Government interpreted its obligations under Article 14 to be limited to ensuring a strongly protected usufruct right to lands and natural resources for the Sami, whereas the Sami Parliament believed the

State is obliged to recognize and protect Sami rights of ownership and possession, as well as usufruct rights.

The Sami Parliament informed the ILO about this situation. The ILO Committee of Experts raised concerns that the report did not contain any information about the views of the Sami Parliament. This was most likely the result of the Sami Parliament initiative. This incident motivated the Government of Norway and the Sami Parliament to reach an agreement, under which the Government will send its reports on Convention No. 169 to the Sami Parliament for comments, and transmit the Parliament's comments to the ILO as part of its official report.

In this context, the Committee of Experts stated that; *"The Committee welcomes warmly the dialogue between the Government and the Sami Parliament on the application of the Convention. It notes that this corresponds to the approach suggested in point VIII of the report form, and looks forward to continuing this exchange of information and views. It considers that this can best be carried out in the context of the regular reporting on the implementation of the Convention."*⁷⁾

In April 2003, the Government submitted a proposal for a Finnmark Act – on land and resource rights - to the Norwegian National Parliament (the Storting). The proposal was strongly criticised by Sami institutions, in particular the Sami Parliament, for not meeting the international legal requirements for recognition and protection of Sami rights, and the obligation to consult the Sami

⁷⁾ Document No. (ilolex) 061995NOR1691.



whenever consideration is given to legislative measures which may affect them directly.

The Sami Parliament prepared its own independent report/assessment of the proposed Finnmark Act for the ILO. In accordance with the earlier agreement between the Government and the Sami Parliament, the report was officially submitted to the ILO Committee of Experts.

The concluding observations of the ILO Committee of Experts concluded that the Finnmark Act – as proposed by the Government in 2003 – was incompatible with Norway’s obligations under ILO Convention No. 169.⁸⁾ The Committee stated that the process (lack of consultations) and the substance are inextricably intertwined in the requirements of the Convention and in the conflict concerning the governmental proposal.

As a result of these observations, the National Parliament of Norway entered into a direct dialogue with the Sami Parliament regarding the contents of the Act. This dialogue process concluded with the adoption of a radically revised and amended Finnmark Act by the National Parliament in June 2005 – fully endorsed by the Sami Parliament.

The observations of the Committee of Experts directly influenced the outcome of the legislative process in two ways:

8) Concluding observations and recommendations from the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) of 2003, responding to the periodic report from the Government of Norway, concerning the implementation of Convention No. 169: ILO CEACR, 2003.

(a) it convinced the Norwegian National Parliament that an adoption of legislation with direct impact on Sami land rights, without conducting appropriate consultations with the Sami Parliament, would be a violation of Norway’s international obligations; (b) it influenced the substantive negotiations between the National Parliament and the Sami Parliament.

This example shows that the development of a distinct procedure pertaining to Convention No. 169 - allowing indigenous peoples’ organizations to report directly on the implementation of Convention No. 169 (formally or otherwise) - significantly contributes to and strengthens the supervisory mechanisms.

The procedure adopted by Norway has been welcomed by the Committee of Experts as a practical expression of the consultation required under Convention No. 169 as well as of point VIII of the report form for Convention No. 169, which states that *“governments may find it helpful to consult organizations of indigenous or tribal peoples in the country, through their traditional institutions where they exist, on the measures taken to give effect to the present Convention, and in preparing reports on its application. In so far as this is not already stated in the report, please indicate whether such consultations have been carried out, and what the result has been”*.⁹⁾

9) Norway example cited in John Henriksen: Key Principles in Implementing ILO Convention No. 169, ILO, 2008.



14.6. COMPLAINTS REGARDING NON-OBSERVANCE OF CONVENTION NO. 169

In addition to the regular supervision, the ILO has “special procedures” to deal with alleged violations of ILO Conventions. The most commonly used form of complaint in the ILO system is called a “Representation”, as provided for under Article 24 of the ILO Constitution. A Representation, alleging a Government’s failure to observe certain provisions of ratified ILO Conventions can be submitted to the ILO by a workers’ or employers’ organization. These should be submitted in writing, and invoke Article 24 of the ILO Constitution, as well as outline which provisions of the Convention in question are alleged to have been violated.

The ILO Governing Body has to decide whether the representation is “receivable” - that is, if the formal conditions have been met to file it. Once the representation has been found receivable, the Governing Body appoints a Tripartite Committee (i.e. one government representative, one employer representative and one worker representative) to examine it. The Tripartite Committee draws up a report, which contains conclusions and recommendations and submits it to the Governing Body for adoption. The Committee of Experts then follows-up on the recommendations in the context of its regular supervision. The reports of Tripartite Committees are available online at www.ilo.org/ilolex (see section 14.12).

Representations have been received since 1989 on the application of Convention No. 169 in Argentina, Bolivia, Brazil, Colombia, Denmark, Guatemala, Ecuador, Mexico and Peru.

14.7. THE CONVENTION IN NATIONAL COURTS.

When dealing with cases relating to the rights of indigenous peoples, national courts can rely on relevant international law. Where the national legal system provides that ratified international treaties have the force of law and thus form an integral part of the law of the country, the Convention can be invoked before the courts, which, in turn can directly rely on its provisions in their decisions. The

courts may use the Convention in the absence of - or to complement - a national norm. Frequently, the Convention has a higher rank than the laws generally, which means that in cases where the national law is in conflict with the Convention, the latter prevails and is to be applied by the courts.

Following the principle that national law should be interpreted in the light of the country’s international obligations, the Convention also plays a role as regards the interpretation of national law concerning or affecting indigenous peoples. Such an interpretative use of the Convention is also possible in countries where ratification of a Convention does not automatically make its provisions part of the national law. In non-ratifying States, the courts can rely on the Convention, e.g. in order to determine general principles of law or customary international law.

The exact legal position of the Convention needs to be examined for each country on the basis of the relevant provisions of the national constitution or other relevant laws, as well as the jurisprudence of the courts on this topic. The box below therefore provides only a very general starting point for such an examination. The table nevertheless shows that in a large number of countries the Convention forms part of the national law and can be directly invoked before the Courts.

The position of Convention No. 169 in the legal systems of ratifying countries

- **Argentina:** International treaties have force of law upon ratification and their rank is higher than national law (Constitution, arts. 31 and 75, para. 22);
- **Bolivia:** International treaties have the force of law, human rights conventions have the same rank as the Constitution (Constitution, arts. 257(I) and 410(II));
- **Brazil:** International treaties have force of law upon ratification, and their rank may be higher than national law (Constitution, art. 5);
- **Chile:** Ratified international treaties have the force of law. The Constitution establishes that sovereignty recognizes as a limitation in its exercise the essential rights deriving from human nature, and that it shall be the duty of State bodies to respect and promote such rights, as guaranteed by the Constitution, as well as by international treaties ratified by Chile and currently in force, which is the case of Convention



No. 169. (Constitution, art. 5 (2)):

- **Colombia:** International treaties have force of law upon ratification, human rights conventions have the same rank as the Constitution (Constitution, arts. 53 and 93, para. 1);
- **Costa Rica:** International treaties have force of law upon ratification and their rank is higher than national law (Constitution, art. 7);
- **Denmark:** International treaties do not have force of law upon ratification;
- **Dominica:** International treaties do not have force of law upon ratification;
- **Ecuador:** International treaties have the force of law upon the ratification and have a higher rank than ordinary laws. Treaties on human rights which recognize rights that are more favorable than those contained in the Constitution will prevail over any other legal norm or any act of the public authorities (Constitution, Articles 417, 424 and 425);
- **Fiji:** International treaties do not have force of law upon ratification;
- **Guatemala:** International treaties have force of law upon ratification, human rights conventions prevail in domestic order (Constitution, art. 46);
- **Honduras:** International treaties have force of law upon ratification and their rank is higher than national law (Constitution, arts. 16 and 18);
- **México:** International treaties have force of law upon ratification and their rank is higher than national law (Constitution, art. 133);
- **Nepal:** International treaties have force of law upon ratification and prevail over conflicting national law (1990 Treaty Act, sec. 9);
- **Netherlands:** International treaties are directly applicable and their rank is the same as the Constitution (Constitution, art. 94);
- **Norway:** International treaties do not have force of law upon ratification (Constitution, art. 110);
- **Paraguay:** International treaties have force of law upon ratification and their rank is higher than

national law (Constitution, 137, para. 1 and 141);

- **Peru:** International treaties have the force of law upon ratification. Human rights treaties have the same rank as the Constitution (Constitution, Articles 3, 55 and Fourth final and transitory provision);
- **Spain:** International treaties have force of law upon ratification and their rank is higher than national law (Constitution, art. 96, para. 1);
- **Venezuela:** International treaties have force of law upon ratification, human rights conventions have the same rank as the Constitution (Constitution, arts 22 and 23).

14.8. ENTRY INTO FORCE AND RETROACTIVITY

Convention No. 169 contains a provision, stipulating that it comes into force 12 months after the registration of its ratification by the ILO. Until the Convention comes into force, it has no effect in international law.

ILO Convention No. 169:

Article 38(3) establishes that: “this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.”

In its analysis of the application of the Convention, the ILO Committee of Experts has reaffirmed on several occasions that the Convention cannot be applied retroactively. However, on several occasions, the Committee has also stated that if the consequences of decisions taken prior to its entry into force continue to affect the indigenous peoples in question, the Convention would be applicable with respect to such consequences.

Convention No. 169 came into force in Mexico in 1991. In 1998, a complaint was raised under Article 24 of the ILO Constitution, alleging among other things that the government had not provided the affected communities with the promised quantity of land to be awarded in compensation for the eviction from their lands due to the construction of a dam, ordered in 1972. The Committee established to analyse the case observed the Government's declaration that it *"cannot be alleged that the decrees issued in 1972, 1973 and 1974 for the construction of the dam violate the provisions of Convention No. 169, as that Convention only came into force for Mexico in September 1991. 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."*¹⁰⁾

14.9. FLEXIBILITY IN THE IMPLEMENTATION

The diversity of indigenous peoples and the general situation of the countries that have ratified Convention No. 169 is enormous, for example with regards to the percentage of indigenous population, geographical characteristics and the overall development situation of the concerned countries. Furthermore, the Convention specifies the need to develop measures of implementation in consultation with the concerned indigenous peoples and in accordance

¹⁰⁾ Governing Body, 276th Session, November 1999, Representation under article 24 of the ILO Constitution, Mexico, GB.276/16/3, para. 36).

with their own priorities for development. Therefore, it is not possible to apply a uniform approach to implementation of the Convention; the process needs to be carefully designed and developed by the concerned governments and indigenous peoples and tailored to the particular circumstances.

ILO Convention No. 169 in Article 34 provides for the necessary flexibility of the *nature* and *scope* of measures of implementation:

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 34 does not limit the obligation of ratifying States to make effective all the provisions of the Convention. However, the measures to this end shall be determined in a flexible manner, taking into account the particular circumstances.

It is also important to recall that no limitations on the obligations of an ILO Convention other than those specifically provided for in the instrument are possible (i.e. no reservations).

14.10. POSSIBILITY OF SEEKING CLARIFICATION ON PROVISIONS OF ILO CONVENTIONS

It is primarily up to concerned governments to judge whether or not their national law and practice are or can be compatible with the standards laid down in international labour conventions, subject – in the event of ratification – to the procedures established by the ILO for the review of reports relating to the application of ratified Conventions.

ILO constituents have the possibility of seeking clarifications regarding the meaning of particular provisions of ILO Conventions by requesting an informal opinion from the International Labour Office. Because the Constitution of the ILO confers no special competence upon the Office to interpret Conventions, it must limit itself to providing information enabling the constituents to assess the appropriate scope of any given provision of a Convention. In this process, the Office takes

into account any relevant elements that may have emerged from the ILO's preparatory work and the comments of its supervisory bodies.

14.11. ILO TECHNICAL COOPERATION AND ADVISORY SERVICES

The International Labour Standards Department of the International Labour Office in Geneva together with the ILO standards specialists in the regions work to give all kinds of training, explanations, advice and assistance on matters relating to the ratification and application of international labour Conventions.

These services are offered both in response to specific requests received from governments or employers' or workers' organizations and through routine advisory missions and informal discussions initiated by the Office. Matters which may be dealt with include the comments of the supervisory bodies and measures they might call for; new legislation; and government reports to be drafted. The constituents may also send draft legislation to the ILO for comment and advice.

The International Labour Standards Department also has a special technical cooperation programme on indigenous and tribal peoples, which provides assistance to governments, indigenous organisations and other partners: **the Programme to Promote ILO Convention No. 169** (PRO 169), which aims at promoting the rights and improving the socio-economic situation of indigenous and tribal peoples.

PRO 169 is based within the International Labour Standards Department and has field coordinators in a number of ILO offices. PRO 169 works on a wide range of thematic as well as international, regional and country-specific issues. PRO 169 combines a flexible demand-driven approach, responding to emerging needs and opportunities with longer-term strategic initiatives at regional and country-level. In Africa, comprehensive research on the situation of indigenous peoples is undertaken in collaboration with the African Commission on Human and Peoples' Rights and country-level activities in Cameroon, Kenya and Namibia are addressing policy reform, capacity-building of government and indigenous partners as well as local economic

development.

In Asia, the focus is on dialogue and conflict resolution as well as policy reform and capacity-building of indigenous and government partners. In September 2007, a major achievement was reached as Nepal ratified Convention No. 169 as part of the current peace and state reform process.

In Latin America, PRO 169 is increasingly responding to needs and requests for technical cooperation related to the implementation of Convention No. 169, identified through the ILO supervisory bodies.

More information is available at <http://www.ilo.org/indigenous> or through email: pro169@ilo.org

14.12. ILO INFORMATION RESOURCES

The ILO's website on indigenous and tribal peoples (<http://www.ilo.org/indigenous>), contains a series of information resources, manuals, guidelines and information about ILO programmes and projects on indigenous peoples' rights.

The Programme to Promote ILO Convention No. 169 (PRO169) has established a **training website**, which provides a series of materials for conducting training on indigenous and tribal peoples' rights, including videos, power point presentations and background materials (<http://www.pro169.org>). ILOLEX (<http://www.ilo.org/ilolex>) is the **ILO's trilingual database** (Spanish, French and English), which provides information about ratification of ILO Conventions and Recommendations, comments of the Committee of Experts, Representations, Complaints, interpretations of ILO Conventions, and numerous related documents. In ILOLEX, you can search for information about a specific Convention and/or a particular country.

ILO's database APPLIS provides information on the application of International Labour Standards. The ILO Handbook of procedures relating to international labour Conventions and Recommendations (revised edition 2006), offers detailed information on issues such as ratification and supervision.

The website of the International Labour Standards Department is a comprehensive source of information regarding the ILO standards system and related activities (<http://www.ilo.org/normes>)

ANNEXES



ANNEX A: INDIGENOUS AND TRIBAL PEOPLES CONVENTION, 1989 (CONVENTION NO. 169)

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 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 this 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. FINAL 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.

ANNEX B: UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Adopted by General Assembly Resolution 61/295 on 13 September 2007

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations

among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights¹⁾ and the International Covenant on Civil and Political Rights,²⁾ affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

1) See resolution 2200 A (XXI), annex.

2) A/CONF.157/24 (Part I), chap. III.

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights³⁾ and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:

3) Resolution 217 A (III).

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

(d) Any form of forced assimilation or integration;

(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
2. States shall take effective measures to ensure that this right

is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.
2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.
3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.
2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.
2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.
2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.
3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions

in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.
2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.
2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. 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 or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional

games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected.

The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.



ANNEX C: FURTHER READING

The literature on indigenous peoples' rights is rich and diverse. Some key publications, elaborated by ILO and other institutions/authors are:

Anaya, J.: *Indigenous Peoples in International Law*, Oxford University Press, second edition, 2004.

Bedoya and Bedoya: *Trabajo Forzoso en la Extracción de la Madera en la Amazonia Peruana*, ILO, 2005.

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Tomei, M., *Indigenous and Tribal Peoples and Poverty Reduction Strategy Papers (PRSPs): an Ethnic Audit of Selected PRSPs*, ILO, 2005.

Thomas, V.(ed.), *Traditional Occupations of Indigenous Tribal Peoples: Emerging Trends*, Project to Promote ILO Policy on Indigenous and Tribal Peoples, 2000.

Case studies contributing to the Guide:

Bigombe L., P. & Loubaky M. C.: *La consultation et la participation des populations autochtones « pygmées » à l'identification et la protection de leurs usages des ressources forestières et fauniques dans l'aménagement forestier: expérience de l'UFA Kabo de la CIB Nord du Congo*, ILO 2008.

Centro de Estudios Jurídicos e Investigación Social (CEJIS): *Impactos sociales, económicos, culturales y políticos de la aplicación del Convenio No. 169 de la OIT, a través del reconocimiento legal del Territorio Multiétnico II, a favor de los pueblos indígenas Ese Eja, Tacana y Cavineño en el norte amazónico de Bolivia*, ILO, 2009.

Centro de Políticas Públicas para el Socialismo (CEPPAS) & Grupo de Apoyo Jurídico por el Acceso a la Tierra (GAJAT): *Del derecho consagrado a la práctica cotidiana: La contribución del Convenio 169 de la OIT en el fortalecimiento de las comunidades Mapuches de la Patagonia Argentina*, ILO, 2007.

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Morocco
Mexico
Namibia
Nepal
Netherlands
New Caledonia
New Zealand
Nicaragua
Norway

Panama
Paraguay
Peru
Philippines
Russia
Rwanda
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