

INTERNATIONAL LABOUR CONFERENCE

Convention 107

CONVENTION CONCERNING THE PROTECTION AND INTEGRATION OF INDIGENOUS AND OTHER TRIBAL AND SEMI-TRIBAL POPULATIONS IN INDEPENDENT COUNTRIES

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

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

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

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

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

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

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

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

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

PART I. GENERAL POLICY

Article 1

1. This Convention applies to—

- (a) members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- (b) members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong.

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

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

Article 2

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

2. Such action shall include measures for—

- (a) enabling the said populations to benefit on an equal footing from the rights and opportunities which national laws or regulations grant to the other elements of the population;
- (b) promoting the social, economic and cultural development of these populations and raising their standard of living;
- (c) creating possibilities of national integration to the exclusion of measures tending towards the artificial assimilation of these populations.

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

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

Article 3

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

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

- (a) are not used as a means of creating or prolonging a state of segregation, and
- (b) will be continued only so long as there is need for special protection and only to the extent that such protection is necessary.

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

Article 4

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

- (a) due account shall be taken of the cultural and religious values and of the forms of social control existing among these populations, and of the nature of the problems which face them both as groups and as individuals when they undergo social and economic change;
- (b) the danger involved in disrupting the values and institutions of the said populations unless they can be replaced by appropriate substitutes which the groups concerned are willing to accept shall be recognised;

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

Article 5

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

- (a) seek the collaboration of these populations and of their representatives;
- (b) provide these populations with opportunities for the full development of their initiative;
- (c) stimulate by all possible means the development among these populations of civil liberties and the establishment of or participation in elective institutions.

Article 6

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

Article 7

1. In defining the rights and duties of the populations concerned regard shall be had to their customary laws.

2. These populations shall be allowed to retain their own customs and institutions where these are not incompatible with the national legal system or the objectives of integration programmes.

3. The application of the preceding paragraphs of this Article shall not prevent members of these populations from exercising, according to their individual capacity, the rights granted to all citizens and from assuming the corresponding duties.

Article 8

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

- (a) the methods of social control practised by the populations concerned shall be used as far as possible for dealing with crimes or offences committed by members of these populations;
- (b) where use of such methods of social control is not feasible, the customs of these populations in regard to penal matters shall be borne in mind by the authorities and courts dealing with such cases.

Article 9

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

Article 10

1. Persons belonging to the populations concerned shall be specially safeguarded against the improper application of preventive detention and shall be able to take legal proceedings for the effective protection of their fundamental rights.

2. In imposing penalties laid down by general law on members of these populations account shall be taken of the degree of cultural development of the populations concerned.

3. Preference shall be given to methods of rehabilitation rather than confinement in prison.

PART II. LAND

Article 11

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

Article 12

1. The populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations.

2. When in such cases removal of these populations is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. In cases where chances of

alternative employment exist and where the populations concerned prefer to have compensation in money or in kind, they shall be so compensated under appropriate guarantees.

3. Persons thus removed shall be fully compensated for any resulting loss or injury.

Article 13

1. Procedures for the transmission of rights of ownership and use of land which are established by the customs of the populations concerned shall be respected, within the framework of national laws and regulations, in so far as they satisfy the needs of these populations and do not hinder their economic and social development.

2. Arrangements shall be made to prevent persons who are not members of the populations concerned from taking advantage of these customs or of lack of understanding of the laws on the part of the members of these populations to secure the ownership or use of the lands belonging to such members.

Article 14

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

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

PART III. RECRUITMENT AND CONDITIONS OF EMPLOYMENT

Article 15

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

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

- (a) admission to employment, including skilled employment;
- (b) equal remuneration for work of equal value;
- (c) medical and social assistance, the prevention of employment injuries, workmen's compensation, industrial hygiene and housing;
- (d) the right of association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers' organisations.

PART IV. VOCATIONAL TRAINING, HANDICRAFTS AND RURAL INDUSTRIES

Article 16

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

Article 17

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

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

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

Article 18

1. Handicrafts and rural industries shall be encouraged as factors in the economic development of the populations concerned in a manner which will enable these populations to raise their standard of living and adjust themselves to modern methods of production and marketing.

2. Handicrafts and rural industries shall be developed in a manner which preserves the cultural heritage of these populations and improves their artistic values and particular modes of cultural expression.

PART V. SOCIAL SECURITY AND HEALTH

Article 19

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

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

Article 20

1. Governments shall assume the responsibility for providing adequate health services for the populations concerned.

2. The organisation of such services shall be based on systematic studies of the social, economic and cultural conditions of the populations concerned.

3. The development of such services shall be co-ordinated with general measures of social, economic and cultural development.

PART VI. EDUCATION AND MEANS OF COMMUNICATION

Article 21

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

Article 22

1. Education programmes for the populations concerned shall be adapted, as regards methods and techniques, to the stage these populations have reached in the process of social, economic and cultural integration into the national community.

2. The formulation of such programmes shall normally be preceded by ethnological surveys.

Article 23

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

2. Provision shall be made for a progressive transition from the mother tongue or the vernacular language to the national language or to one of the official languages of the country.

3. Appropriate measures shall, as far as possible, be taken to preserve the mother tongue or the vernacular language.

Article 24

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

Article 25

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

Article 26

1. Governments shall adopt measures, appropriate to the social and cultural characteristics of the populations concerned, to make known to them their rights and duties, especially in regard to labour and social welfare.

2. If necessary this shall be done by means of written translations and through the use of media of mass communication in the languages of these populations.

PART VII. ADMINISTRATION

Article 27

1. The governmental authority responsible for the matters covered in this Convention shall create or develop agencies to administer the programmes involved.

2. These programmes shall include—

- (a) planning, co-ordination and execution of appropriate measures for the social, economic and cultural development of the populations concerned;

- (b) proposing of legislative and other measures to the competent authorities;
- (c) supervision of the application of these measures.

PART VIII. GENERAL PROVISIONS

Article 28

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

Article 29

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

Article 30

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

Article 31

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.

2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 32

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation 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 33

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.

2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 34

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

Article 35

At such times as 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 36

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

- (a) the ratification by a Member of the new revising Convention shall *ipso jure* involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 32 above, if and when the new revising Convention shall have come into force;
- (b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

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

Article 37

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



**International Labour Conference
Conférence Internationale du Travail**

Convention 169

**CONVENTION CONCERNING INDIGENOUS AND TRIBAL
PEOPLES IN INDEPENDENT COUNTRIES, ADOPTED BY THE
CONFERENCE AT ITS SEVENTY-SIXTH SESSION, GENEVA,
27 JUNE 1989**

Convention 169

**CONVENTION CONCERNANT LES PEUPLES INDIGÈNES ET
TRIBAUX DANS LES PAYS INDEPENDANTS, ADOPTÉE
PAR LA CONFÉRENCE À SA SOIXANTE-SEIZIÈME SESSION,
GENÈVE, 27 JUIN 1989**

Convention 169

**CONVENTION CONCERNING INDIGENOUS AND TRIBAL
PEOPLES IN INDEPENDENT COUNTRIES**

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 frame-
work 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. CONTRACTS AND COOPERATION 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.

The foregoing is the authentic text of the Convention duly adopted by the General Conference of the International Labour Organisation during its Seventy-sixth Session which was held at Geneva and declared closed the twenty-eighth day of June 1989.

IN FAITH WHEREOF we have appended our signatures this twenty-eighth day of June 1989.



**UNITED NATIONS
ECONOMIC AND SOCIAL COUNCIL**

*Commission on Human Rights Sub-Commission on Prevention of
Discrimination and Protection of Minorities Working Group on
Indigenous Populations Eighth Session, 1990, Geneva, Switzerland*

Comment on:

*First Revised Text of the Draft Universal Declaration on Rights of
Indigenous Peoples, Prepared by the Chairman-Rapporteur of the Working
Group on Indigenous Populations, Mrs. Erica-Irene Daes, pursuant to Sub-
Commission Resolution 1988/18 (U.N. Doc. E/ CN.4/sub.2/1989/33).*

Submitted by:

Professor James Anaya, University of Iowa College of Law; Professor
Hurst Hannum, Fletcher School of Law and Diplomacy, Tufts University;
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Professor Robert Williams, Jr., University of Arizona College of Law.

INTRODUCTION

On March 9-10, 1990, the University of Iowa Center for International and Comparative Studies and Program for Human Rights and Social Justice sponsored a *Workshop on the First Revised Text of the Draft Universal Declaration on Rights of Indigenous Peoples* (UN Doc. E/CN.4/sub.2/1989/33). The purpose of the Iowa Workshop was to draw together a group of legal scholars knowledgeable in the fields of indigenous rights and international law to discuss and critique this important draft international legal instrument prepared by the United Nations Working Group on Indigenous Populations.

This Comment is the result of the two days of extended discussions in Iowa on the Working Group Draft Declaration. It is intended to stimulate and advance the debate on the difficult tasks which lie ahead for the Working Group in developing an international standard-setting instrument for the protection of the survival of indigenous peoples under international human rights law.

The Comment was produced by the four Workshop panelists: Professor James Anaya, of the University of Iowa College of Law; Professor Hurst Hannum, of the Fletcher School of Law and Diplomacy, Tufts University; Professor Douglas Sanders, of the University of British Columbia Faculty of

Law; and Professor Robert Williams, Jr., of the University of Arizona College of Law. Professors Burns Weston and Robert Clinton, both of the University of Iowa College of Law faculty, also participated actively in the Workshop discussions, and made valuable contributions towards refining the issues analyzed in this Comment.

In their discussions, the Iowa Workshop participants agreed that the Working Group Draft Declaration raised a number of vitally important issues relevant to indigenous peoples' rights under evolving norms and standards of international human rights law. This Comment focuses on three of the most important issues addressed in the Draft Declaration: the claim that indigenous people's rights are collective rights, and should be recognized as such under international human rights law; the claim that indigenous peoples possess rights to the territories they have traditionally occupied under international law; and the claim that indigenous peoples have human rights to autonomy over their own affairs under international law. These three issues raise a number of major conceptual and practical questions with regard to international law, its institutionalized standard setting activities, and its authoritative decision-making processes.

This Comment seeks to develop a better understanding of these vital issues. It is an attempt by a group of legal scholars to situate and assess the Draft Declaration's provisions respecting indigenous peoples' collective rights, territorial rights, and autonomy rights claims in the broader context of contemporary and evolving notions of international human rights law.

I. THE WORKING GROUP DRAFT DECLARATION AND THE RECOGNITION OF INDIGENOUS PEOPLES' COLLECTIVE RIGHTS

In their appearances before the UN Working Group on Indigenous Populations and other international human rights bodies during the past decade, indigenous peoples and their representatives have stressed that the basic rights they claim under international human rights law are collective rights; the rights of distinct peoples to survival and development. This claim has gained increased acceptance in the international legal community. The Working Group Draft Declaration and the International Labour Organization Convention 169, for example, both utilize the term "peoples" throughout their texts as the proper descriptive term for indigenous collectivities, recognizing that they are not simply groups of individuals, but cohesive cultural communities.

Despite broadened acceptance of the centrality of collective rights to the survival and development of peoples such as indigenous peoples, there continues to be controversy over the recognition of the concept "collective"

rights in international law generally. Some state representatives and scholars have taken the position that only individual rights should be recognized in international law. Collective rights, it has been argued, conflict with individual rights. Opposition to the recognition of collective rights is still taken seriously in international law, when opposition to the recognition of individual rights would be quickly rejected by most authorities in the field.

Nonetheless, it is clear that opposition to the recognition of collective rights in international law is weakening. Provisions responsive to cultural and religious minorities are contained in the Covenant on Civil and Political Rights, in the Convention on the Rights of the Child, and in the Helsinki process, particularly in the Vienna Concluding Document of January, 1989. Concepts such as "pluralism," "diversity" and "multiculturalism" are gaining a more general acceptance in state policies.

The Western group of nations at the United Nations is seen as including the states most critical of the recognition of collective rights. Yet state practice in many Western nations has been most congenial in accepting group claims. The Nordic countries, for example, have been supportive of cultural pluralism (as shown in the newer constitutional amendments in Sweden and Norway and in the home rule provisions of Greenland). As well, state policies in Canada, the United States, Australia and New Zealand have become more committed in recent years to greater self-government for indigenous peoples. New Zealand, which historically sought to avoid the recognition of Maori autonomy, has now begun the process of recognizing tribal authorities.

It is worth noting in fact that two particular collective rights are clearly recognized in contemporary international law. States and peoples have the right of self-determination. National, ethnic and religious groups have a right to physical survival, as provided in the Convention Against Genocide.

The basic collective rights claims asserted by indigenous peoples relate to both of these internationally recognized rights. Indigenous peoples claim rights to distinct group survival and to develop according to their own traditions and their own creativity. They seek the basic human rights to cultural survival and development. In this context, culture includes language, religion, modes of social organization and dispute resolution, and culturally significant economic activity. The rights to be recognized as belonging to each indigenous collectivity must be judged by the contribution of those rights to the survival and development of the group. The legitimacy of the goal of tribal survival has now been recognized in the views of the Human Rights Committee in *Lovelace v. Canada* and in *Kitok v. Sweden*.

Undoubtedly, indigenous peoples have cultures distinct from those of the national population in the states in which they find themselves. A recognition of their human rights to cultural survival and development requires that particular rights be recognized which contribute to the survival and development of the group. Those rights cannot be effectively managed by

individuals. Culture lives in collectivities. It is sustained and developed by the collectivity.

There will be conflicts between collective rights and individual rights. This is inevitable, for experience demonstrates what all jurisprudence has to teach us—that rights conflict with other rights. Individual rights conflict with individual rights. Individual rights conflict with collective rights. Collective rights conflict with collective rights. In all cases, decision-makers must attempt to assess the importance of the competing rights and discern the most favourable balance.

The Working Group Draft Declaration's recognition of the collective rights of indigenous peoples reflects, rightly and accurately, we believe, the broadening recognition of the collective rights of groups such as indigenous peoples in contemporary international law as well as in evolving state practice. The Draft specifically recognizes indigenous peoples' "collective right to exist as distinct peoples and to be protected against genocide" (Prin. 3) as well as their collective right "to maintain and develop their ethnic and cultural characteristics and distinct identity" (Prin. 4). The collective right to protection against ethnocide, defined to include prevention of acts having the effect of depriving indigenous peoples of their cultural identity (Prin. 5), and a number of other important collective rights aimed at assuring the development of indigenous cultural identity are also recognized in the Draft Declaration.

When placed in the context of evolving conceptions of contemporary international law, the Draft's provisions relating to collective rights seek to extend international law's basic protections to the specific human rights needs and aspirations of indigenous peoples. The Working Group Draft Declaration, therefore, represents a most significant and important effort on the part of the international human rights standard-setting process to protect the basic human rights of indigenous peoples—their collective rights to survival and development as peoples.

II. THE EMERGENCE OF INDIGENOUS TERRITORIAL RIGHTS IN INTERNATIONAL LAW

In international human rights fora around the world, indigenous peoples have emphasized that the spiritual and material foundations of their cultural identities are sustained by their unique relationships to their traditional territories. International legal recognition of indigenous peoples' collective human rights to exist as distinct peoples pursuing their own cultural development would mean little, they have consistently argued, without a corresponding recognition of the distinct collective nature of indigenous rights to traditionally-occupied territories. For indigenous peoples, the right to claim protection of their traditional lands and resources is intimately and

inextricably tied to their continuing survival, growth and development as indigenous peoples.

The Working Group Draft Declaration on Rights of Indigenous Peoples responds directly to many of the major concerns voiced by indigenous peoples about protection of their territorial rights under international law. The Draft recognizes the "collective and individual" rights of indigenous peoples to "ownership, possession and uses of the lands and resources which they have traditionally occupied or used" (Prin. 12). Their lands "may only be taken away from them with their free and informed consent," as witnessed by a treaty or agreement (*id.*). States, under the Draft, have a duty to recognize indigenous peoples' "own land-tenure systems" (Prin. 13) and to provide "special measures" to ensure indigenous peoples' ownership and control over surface and substance of resources" of their traditionally-occupied territories (Prin. 14).

The Working Group Draft Declaration does not explicitly recognize indigenous peoples' ownership and control over the natural resources located *beneath* their traditional territories. The present Draft does, however, recognize a right on the part of indigenous peoples to protection of their environment, "in particular against any action or course of conduct which may result in the destruction, deterioration or pollution" of their traditional lands and surface resources (Prin. 16). This right is made effective by requiring indigenous consent and "just and fair compensation" for any such action or course of conduct resulting in environmental degradation of their territories (*id.*).

The Draft Declaration additionally requires that States consult with indigenous peoples and with both domestic and transnational corporations prior to the commencement of any "large-scale" mineral and subsurface development project affecting indigenous peoples and their territories. These consultations are to be held "in order to enhance the project's benefits and to mitigate any adverse economic, social, environmental and cultural effect." The Draft requires "just and fair compensation" to indigenous peoples for adverse effects from such large-scale development activities (Prin. 17).

Combined, these sections of the Draft seek to provide an effective set of mandated state protection measures for indigenous peoples' recognized ownership and control rights over the surface and subsurface resources of their traditional territories. At the same time, the Working Group has apparently sought to avoid the sensitive political and legal issues raised by traditional state assertions of sovereignty and national control over minerals and other subsurface and natural resources located in indigenous territories. The balance of these sections in the Draft, however, tilts clearly toward protection and priority of the human rights belonging to the indigenous peoples who live on the surface of those territories. This part of the Draft, therefore, is consistent with and reinforces the human rights principles relating to protection of indigenous land rights in relation to surface and subsurface resource

development contained in ILO Convention 169 (*see* Proposed Indigenous and Tribal Peoples Convention, 1989 (No. 1969), articles 15.1, 15.2).

One of the most significant features of the present Draft Declaration from the perspective of indigenous land rights *and* the progressive elaboration of human rights standards in international law is its outright rejection of colonial era legal principles such as the European Doctrine of Discovery and the *terra nullius* doctrine. International law still recognizes these and related colonial era legal doctrines as legitimating foundations for a State's denial of indigenous territorial and other rights under its domestic law. Indigenous peoples, in the present wording of the Draft, possess the right "to reclaim land and surface resources or where this is not possible, to seek just and fair compensation for the same, when the property has been taken away from them without consent, in particular, if such deprivation has been based on theories such as those related to discovery, *terra nullius*, waste lands, or idle lands." Restitution for the confiscation of indigenous peoples' lands may "take the form of land or resources of quality and legal status at least equal to that of the property previously owned by them," and provided they agree (Prin. 15).

The Working Group Draft Declaration's prescriptions relating to indigenous peoples' collective ownership rights to their lands and surface resources advance significantly the progressive recognition of the fundamental incompatibility of many of the colonial era's international law doctrines with universally recognized human rights norms. Rejection of those racially-inspired, colonial era legal principles which hold that indigenous peoples hold no internationally recognizable rights in their traditional territories has figured prominently in the emerging discourse of indigenous rights in international human rights law.

Similarly, the other major protections incorporated in the Draft Declaration relating to indigenous land rights can be viewed as corresponding to existing and evolving human rights standards in international law, while making more specific the relevance of those developing standards to the unique situations of indigenous peoples. The environmental protections afforded the indigenous surface estate, the rights specified for special State measures to ensure continued ownership and control by indigenous peoples of their territories, and the just compensation and the consultation requirements are among the most important provisions in the Draft Declaration. All seek to ensure that the critical sustaining relationships between indigenous peoples and their lands are protected under international law as human rights belonging specifically to indigenous peoples.

Protection for the intimate relationship with their lands which indigenous peoples have compellingly documented as necessary to their continued cultural survival can clearly be drawn from existing international legal texts such as the Convention Against Genocide (defining genocide as any act "deliberately inflicting on the group conditions of life calculated to bring

about its physical destruction in whole or in part”), and the existing ILO Convention 107 (recognizing the right of ownership, collective or individual, over lands belonging to indigenous peoples).

Protection of indigenous peoples’ territorial rights where those rights are essential to the survival and development of the peoples concerned can also be strongly inferred from other international human rights instruments, particularly those relating to protection of cultural rights and the right to development.

The central importance of recognizing indigenous peoples’ unique relationship with their traditional territories is declared by the Draft Declaration’s preambular language to the effect that the General Assembly recognizes “the specific need to promote and protect those rights and characteristics which stem from indigenous history, philosophy of life, traditions, culture and legal, social and economic structures, especially as these are tied to the lands which the groups have traditionally occupied.” Large scale mineral and subsurface resource development on indigenous territories has been consistently cited in Geneva and elsewhere as the most significant threat to indigenous survival in the world today. The Draft Declaration, therefore, should make it clear that indigenous peoples’ human rights to control and protection of their land and its environment have ultimate priority over any ownership rights a State might assert with respect to development of the subsurface estate or other resources. This would assure that the right of consultation recognized as belonging to indigenous peoples prior to the commencement of such projects is made effective by establishing that the survival and continuing development of indigenous peoples on their lands is the governing human rights principle and goal of all development-related negotiations between States and indigenous peoples. It would also assure that international human rights law’s constraints on State action would be most concerned with those situations where the danger to indigenous peoples’ cultural survival and development is greatest. It would protect indigenous territorial rights through negotiation, consultation and consent with a goal towards assuring the cultural survival and development of indigenous peoples on their traditionally-occupied territories.

III. INDIGENOUS PEOPLES’ AUTONOMY RIGHTS UNDER INTERNATIONAL LAW

This part of the Comment discusses the rights of indigenous peoples to autonomy over their own affairs, together with related rights to transnational contacts as recognized in the present version of the Draft Declaration (Principles 23-28). The implications of recognizing that indigenous peoples have a degree of international personality have raised concerns among some States. A small number of States have expressed concerns that such rights

are incompatible either with international law or with their own constitutional systems. In most respects, these concerns are misplaced, although it must be recognized that indigenous peoples for the most part *do* want greater political and economic control over their own lives than many States currently recognize.

First, the right of indigenous peoples to control their own affairs through their own institutions flows directly from their right to maintain and develop their distinctive cultures. An operative premise of United Nations practice is that each culture has value and dignity which must be respected and encouraged to flourish. (See U.N. Charter, arts. 13, 55, 57, 73; UNESCO Declaration of the Principles of International Cultural Cooperation of 4 November 1966.) States have affirmed the premise especially with regard to indigenous peoples. (See, e.g., Comments of Norway and Ukrainian Soviet Socialist Republic in U.N. Doc E/CN.4/sub.2/1989/33/Add.3 at 5, 10; Comments of Australia, Mexico and Panama in U.N. Doc E/CN.4/sub.2/1989/33/Add.1 at 2, 7-8.) Central to indigenous cultures are their historical and continuing attributes of self-governance. As concluded by the special rapporteur in the *UN Study of the Problem of Discrimination Against Indigenous Populations*:

The specific forms of internal organization of these peoples are an inherent part of their cultural and legal heritage which has contributed to their cohesion and to the maintenance of their social and cultural tradition...

Self-determination, in its many forms, is thus a basic precondition if indigenous peoples are to be able to enjoy their fundamental rights and determine their future, while at the same time preserving, developing and passing on their specific ethnic identity to future generations. (U.N. Doc. E/CN.4/sub.2/1986/7/Add.4 at 20.)

Recognizing the importance of autonomy to the cultural integrity of indigenous peoples, the recently revised ILO convention on indigenous peoples includes several provisions upholding indigenous customs, customary laws, and implementing institutions (Proposed Indigenous and Tribal Peoples Convention, 1989 (No. 169), arts. 8.1, 8.2, 9.1, 10).

Secondly, the content of "autonomy" is an extremely flexible one; it is not a term that mandates any particular arrangement. Specific autonomous arrangements will necessarily vary, just as indigenous peoples and their cultures vary. Accordingly, the present Draft's recognition of indigenous peoples' "collective right to autonomy in matters relating to their own internal and local affairs" (Prin. 23) should be interpreted as granting to indigenous groups that degree of autonomy which is necessary for each to develop its unique culture and political institutions, consistently with the substantive

rights set forth in the Draft Declaration. The Declaration should not be read to imply that any particular degree of separation *or* interaction between indigenous communities and the dominant society is required; each situation will be different.

Given the variable nature that indigenous autonomy arrangements are likely to assume, the Draft Declaration ought to make clear that the determination of what constitutes an appropriate autonomy regime in any particular case is to be accomplished through mutually respectful cooperation between the indigenous groups and States concerned. The present wording of the Draft does affirm the right of indigenous peoples to decide upon the structures of their autonomous institutions (Prin. 24). But if the right of indigenous peoples to control their own affairs is to be meaningful, it must also include the right to determine cooperatively with States the appropriate substantive *powers* of the indigenous self-governing mechanisms as well as the terms of indigenous participation within the larger society. This conclusion was embraced by the 1989 *U.N. Seminar of Experts on the Effects of Racism and Racial Discrimination on the Social and Economic Relations Between Indigenous Peoples and States* (U.N. Doc. E/CN.4/1989/22, HR/PUB/89/5 at 8).

Thus the suggestion by some States, that international norms upholding the exercise of appropriate powers by autonomous groups or regions interfere with state sovereignty, is simply misguided. Under contemporary and evolving notions of international human rights law, sovereignty and its corollary doctrines of exclusive jurisdiction, territorial integrity, and the like are generally viewed as operative only to the extent that they advance rather than suppress human rights. No state can today claim that human rights issues are solely within its domestic jurisdiction, and UN activity concerning indigenous peoples itself has confirmed the deep international concern in securing the rights necessary for the survival of indigenous cultures.

As for domestic constitutional or political concerns, the implementation of indigenous autonomy rights should not present insurmountable problems. Concerns raised by some States (*see, e.g.,* Canada's comments on the Draft Declaration, UN Doc. E/CN.4/Sub.2/1989/33/Add.1 at 30) over the coexistence of autonomy rights with the laws of the state within which indigenous peoples reside is ill-founded, as jurisdictional distinctions among federal, state, and local government bodies are commonly made in many countries (including Canada). Indeed, many States grant broad authority in economic and political fields to autonomous entities, even in the sensitive area of foreign affairs. For example, Greenland, the Faroe Islands, Hong Kong (after 1977), the Swiss cantons, Spain's autonomous regions, the Netherlands Antilles, and other entities enjoy certain rights to participate in international meetings of concern to them or, under certain circumstances, even to enter into agreements with foreign states or join international organizations.

The Draft Declaration's recognition of indigenous peoples' autonomy rights necessarily raises a number of other related questions under international human rights law.

The Draft Declaration's reference to the responsibilities of individuals to their community in *Principle 25* might give rise to some concern, and the Declaration should not suggest that compulsion could be exerted on any individual to join or not to leave a community contrary to his or her own wishes. Of course, individual members of an indigenous community will naturally be bound to some extent by community decisions, just as individual citizens are bound by the decisions of a democratically elected national government. Inclusion of this Principle in the Draft, therefore, does not seem to be necessary.

The second clause of *Principle 25* would apply "universally recognized" human rights to indigenous peoples, and neither indigenous nor State representatives have objected to this formulation (which would probably be limited to those human rights recognized under customary international law). More difficult issues could arise where acts of an indigenous or autonomous community may be inconsistent with a state's treaty obligations. (In the non-indigenous context, *see*, for example, *Tyrer v. U.K.*, Eur. Court Hum. Rts. Judgment of 25 April 1978, Ser. A No. 26 (birching in Isle of Man held to violate European Convention on Human Rights, although U.K. declared it would not exercise its available constitutional powers to prohibit the practice formally). In such instances, permissible limitations based on, e.g., "*ordre public*" or "public morals" may need to be considered from the perspective of indigenous societies rather than only in the context of the dominant society.

No objection has been raised by States to the substance of *Principle 26*, which recognizes as belonging to indigenous peoples the rights of freedom of movement and to leave and return. These rights are found expressed in many other international treaties and declarations as basic human rights. The maintenance of such contact is specifically authorized in some States where transnational ethnic communities exist, such transnational contact is an obvious necessity for the continuing development of indigenous cultures.

Similarly, there should be no disagreement with *Principle 27*, which restates the customary international norm of *pacta sunt servanda*. Such a principle declaring international human rights law's concern with State practices respecting treaties and agreements between states and indigenous peoples might be more appropriately placed in the preamble to the Declaration. The existence of treaties and other agreements between indigenous peoples and national governments confirms the cooperation and mutual respect between indigenous peoples and the surrounding society which are necessary if both are to develop freely. The fact that such treaties and agreements have been entered into also reflects the distinct status of indige-

nous peoples, underscoring the need for and appropriateness of the present Declaration.

Principles 27 and 28 address, in general terms, the issue of whether or not indigenous peoples should be treated as participants in the international legal order. As noted above, some degrees of international personality have been accorded to many non-state entities in recent decades, including international organizations, national liberation movements, autonomous regions, nongovernmental organizations, transnational corporations, and individuals. The international personality of indigenous peoples should be recognized to the degree that is necessary in order to further the fundamental human rights goals of protecting and developing indigenous cultures and societies.

On the other hand, formulation of an international monitoring procedure or dispute-resolution mechanism goes beyond the substantive norms commonly found in a Declaration of principles. *Principle 28*, as presently formulated, is so broad as to have little meaning, and the issues it raises would perhaps be more appropriately addressed in a subsequent convention on indigenous rights. Where indigenous rights are recognized domestically, the normal processes of conflict resolution (such as those mentioned in the second sentence of *Principle 28*) should be employed.

However, we do strongly support the idea of ensuring that there is an international body which could monitor implementation of the Declaration after its adoption. The obvious institution would be the Sub-Commission's Working Group on Indigenous Populations, although consideration of other alternatives should not be excluded.

A final issue addressed by some States is whether or not a formal definition of "indigenous" is needed. We would agree with the Working Group's decision thus far not to adopt such a definition, although some preambular reference to the *distinct, threatened, and non-dominant peoples* who are the subjects of the Declaration might be appropriate. A formal definition might be necessary if a subsequent convention is drafted; in that event, the working definition proposed in the Martinez-Cobo study would be an appropriate starting point.

In summary, one must recognize that the Draft Declaration does not mandate any particular kind of degree of autonomy for indigenous peoples under international law. Nor should it be read as necessarily encouraging greater separateness for indigenous peoples under a State's domestic legal system. Internal autonomy and international personality are not ends in themselves; they are only means to more fundamental goals, to assure the survival and development of indigenous peoples. These goals have been at the heart of international efforts during the past decade by the Working Group and others, and we believe it is necessary and right that they are recognized in the *First Revised Text of the Draft Declaration on Rights of Indigenous Peoples*.

CONCLUSION

From the viewpoint of the progressive development and evolution of the international human rights standard setting process, we agree that the *First Revised Text of a Draft Universal Declaration on Rights of Indigenous Peoples* is a most significant and important document. The Working Group's Draft Declaration addresses in direct and forceful terms those human rights concerns that have figured most prominently and consistently in the stories told by indigenous peoples in Geneva and other contemporary international fora. We, of course, expect and accept that this present version of the Draft will necessarily undergo substantive revision and refinement of terms. Nonetheless, it is important to recognize what has been achieved so far. The core critical concepts of indigenous peoples' collective rights, territorial rights and autonomy rights have been recognized by the Working Group as indispensable elements in an international legal instrument devoted to the protection of indigenous peoples and their continuing survival and development in the world.

As we have sought to demonstrate in our discussion and analyses of these crucial concepts and human rights concerns, the Working Group Draft Declaration's provisions relating to indigenous peoples' collective, territorial, and autonomy rights are consistent with and find strong support in modern international law, as well as in contemporary state practices.

As legal scholars committed to the progressive elaboration and development of international human rights standards, however, we readily acknowledge that honest and even fruitful debates can be had over the most desirable and effective terms and language to be incorporated in the Draft Declaration. States, indigenous groups, and others will benefit, as will the Working Group itself no doubt, from a lively and sincere exchange of viewpoints on what the final version of Draft ought to look like. Our view, simply stated, is that the present version of the Working Group Draft Declaration on Rights of Indigenous Peoples provides a well-conceived, firm, and principled foundation in international human rights law for securing the protection of indigenous peoples' fundamental human rights to survival and development.



**UNITED NATIONS
ECONOMIC AND SOCIAL COUNCIL**

*Commission on Human Rights
Sub-Commission on Prevention of Discrimination
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DISCRIMINATION AGAINST INDIGENOUS PEOPLES

Report of the Working Group on Indigenous Populations
on its ninth session

Chairperson/Rapporteur: Ms. Erica-Irene A. Daes

E/CN.4/Sub.2/1991/40, pages 29-36, August 15, 1991

ANNEX II

**A. PREAMBULAR AND OPERATIVE PARAGRAPHS TO THE
DRAFT UNIVERSAL DECLARATION ON THE RIGHTS OF
INDIGENOUS PEOPLES AS SUBMITTED BY THE MEMBERS OF
THE WORKING GROUP AT FIRST READING**

1st Preambular Paragraph

Affirming that all indigenous peoples are free and equal in dignity and rights in accordance with international standards, while recognizing the right of all individuals and peoples to be different, to consider themselves different, and to be respected as such,

2nd Preambular Paragraph

Considering that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of human-kind,

3rd Preambular Paragraph

Convinced that all doctrines, policies and practices of racial, religious, ethnic or cultural superiority are scientifically false, legally invalid, morally condemnable and socially unjust,

4th Preambular Paragraph

Concerned that indigenous peoples have often been deprived of their human rights and fundamental freedoms, resulting in the dispossession of lands, territories and resources, as well as in poverty and marginalization,

5th Preambular Paragraph

Welcoming the fact that indigenous peoples are organizing themselves in order to bring an end to all forms of discrimination and oppression wherever they occur,

6th Preambular Paragraph

Recognizing the urgent need to promote and respect the rights and characteristics of indigenous peoples which stem from their history, philosophy, cultures, spiritual and other traditions, as well as from their political, economic and social structures, especially their rights to lands, territories and resources,

7th Preambular Paragraph

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from adverse discrimination of any kind,

8th Preambular Paragraph

Endorsing efforts to consolidate and strengthen the societies, cultures and traditions of indigenous peoples, through their control over development affecting them or their lands, territories and resources,

9th Preambular Paragraph

Emphasizing the need for demilitarization of the lands and territories of indigenous peoples, which will contribute to peace, understanding and friendly relations among all peoples of the world,

10th Preambular Paragraph

Emphasizing the importance of giving special attention to the rights and needs of indigenous women, youth and children,

11th Preambular Paragraph

Recognizing in particular that it is in the best interest of indigenous children for their family and community to retain shared responsibility for the upbringing of the children,

12th Preambular Paragraph

Believing that indigenous peoples have the right freely to determine their relationships with the States in which they live, in a spirit of co-existence with other citizens,

13th Preambular Paragraph

Noting that the International Covenants on Human Rights affirm the fundamental importance of the right to self-determination, as well as the right of all human beings to pursue their material, cultural and spiritual development in conditions of freedom and dignity,

14th Preambular Paragraph

Bearing in mind that nothing in this Declaration may be used as an excuse for denying to any people its right to self-determination,

15th Preambular Paragraph

Calling upon States to comply with and effectively implement all international instruments as they apply to indigenous peoples,

16th Preambular Paragraph

Solemnly proclaims the following Declaration of The Rights of Indigenous Peoples:

PART I**Operative Paragraph 1**

Indigenous peoples have the right to self-determination, in accordance with international law. By virtue of this right, they freely determine their relationship with the States in which they live, in a spirit of co-existence with other citizens, and freely pursue their economic, social, cultural and spiritual development in conditions of freedom and dignity.

Operative Paragraph 2

Indigenous peoples have the right to the full and effective enjoyment of all of the human rights and fundamental freedoms which are recognized in the Charter of the United Nations and other international human rights instruments.

Operative Paragraph 3

Indigenous peoples have the right to be free and equal to all other human beings and peoples in dignity and rights, and to be free from adverse distinction or discrimination of any kind based on their indigenous identity.

PART II**Operative Paragraph 4**

Indigenous peoples have the collective right to exist in peace and security as distinct peoples and to be protected against genocide, as well as the individual rights to life, physical and mental integrity, liberty and security of person.

Operative Paragraph 5

Indigenous peoples have the collective and individual right to maintain and develop their distinct ethnic and cultural characteristics and identities, including the right to self-identification.

Operative Paragraph 6

Indigenous peoples have the collective and individual right to be protected from cultural genocide, including the prevention of and redress for:

- (a) any act which has the aim or effect of depriving them of their integrity as distinct societies, or of their cultural or ethnic characteristics or identities;

- (b) any form of forced assimilation or integration;
- (c) dispossession of their lands, territories or resources;
- (d) imposition of other cultures or ways of life; and
- (e) any propaganda directed against them.

Operative Paragraph 7

Indigenous peoples have the right to revive and practise [sic] their cultural identity and traditions, including the right to maintain, develop and protect the past, present and future manifestations of their cultures, such as archaeological and historical sites and structures, artifacts, designs, ceremonies, technology and works of art, as well as the right to the restitution of cultural, religious and spiritual property taken from them without their free and informed consent or in violation of their own laws.

Operative Paragraph 8

Indigenous peoples have the right to manifest, practise [sic] and teach their own spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.

Operative Paragraph 9

Indigenous peoples have the right to revive, use, develop, promote and transmit to future generations their own languages, writing systems and literature, and to designate and maintain the original names of communities, places and persons. States shall take measures 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 effective means.

Operative Paragraph 10

Indigenous peoples have the right to all forms of education, including access to education in their own languages, and the right to establish and control their own educational systems and institutions. Resources shall be provided by the State for these purposes.

Operative Paragraph 11

Indigenous peoples have the right to have the dignity and diversity of their cultures, histories, traditions and aspirations reflected in all forms of education and public information. States shall take effective measures to eliminate prejudices and to foster tolerance, understanding and good relations.

Operative Paragraph 12

Indigenous peoples have the right to the use of and access to all forms of mass media in their own languages. States shall take effective measures to this end.

Operative Paragraph 13

Indigenous peoples have the right to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their own economic, social and cultural development, and for the enjoyment of the rights contained in this Declaration.

Operative paragraph (to be numbered)

Nothing in this Declaration may be interpreted as implying for any State, group or individual any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or to the Declaration of Principles of International Law on Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.

PART III**Operative Paragraph 14**

Indigenous peoples have the right to maintain their distinctive and profound relationship with their lands, territories and resources, which include the total environment of the land, waters, air and sea, which they have traditionally occupied or otherwise used.

Operative Paragraph 15

Indigenous peoples have the collective and individual right to own, control and use the lands and territories they have traditionally occupied or otherwise used. This includes the right to the full recognition of their own laws and customs, land-tenure systems and institutions for the management of resources, and the right to effective State measures to prevent any interference with or encroachment upon these rights.

Operative Paragraph 16

Indigenous peoples have the right to the restitution or, to the extent this is not possible, to just and fair compensation for lands and territories which have been confiscated, occupied, used or damaged without their free and informed consent. Unless otherwise freely agreed upon by the peoples concerned, compensation shall preferably take the form of lands and territories of quality, quantity and legal status at least equal to those which were lost.

Operative Paragraph 17

Indigenous peoples have the right to the protection of their environment and productivity of their lands and territories, and the right to adequate assistance including international cooperation to this end. Unless otherwise freely agreed upon by the peoples concerned, military activities and the storage or disposal of hazardous materials shall not take place in their lands and territories.

Operative Paragraph 18

Indigenous peoples have the right to special measures for protection, as intellectual property, of their traditional cultural manifestations, such as literature, designs, visual and performing arts, cultigens, medicines and knowledge of the useful properties of fauna and flora.

Operative Paragraph (to be numbered)

In no case may any of the indigenous peoples be deprived of their means of subsistence.

B. OPERATIVE PARAGRAPHS AS REVISED BY THE CHAIRPERSON/RAPPORTEUR PURSUANT TO SUB-COMMISSION RESOLUTION 1990/26.

Draft operative paragraph 18

PART IV

“The right to maintain and develop within their areas of lands and other territories their traditional economic structures, institutions and ways of life, to be secure in the traditional economic structures and ways of life, to be secure in the enjoyment of their own traditional means of subsistence, and to engage freely in their traditional and other economic activities, including hunting, fresh- and salt-water fishing, herding, gathering, lumbering and cultivation, without adverse discrimination. In no case may an indigenous people be deprived of its means of subsistence. The right to just and fair compensation if they have been so deprived;”

Draft operative paragraph 19

“The right to special State measures for the immediate, effective and continuing improvement of their social and economic conditions, with their consent, that reflect their own priorities;”

Draft operative paragraph 20

“The right to determine, plan and implement all health, housing and other social and economic programmes affecting them, and as far as possible to develop, plan and implement such programmes through their own institutions;”

Draft operative paragraph 21

PART V

“The right to participate on an equal footing with all the other citizens and without adverse discrimination in the political, economic, social and cultural

life of the State and to have their specific character duly reflected in the legal system and in political and socio-economic and cultural institutions, including in particular proper regard to and recognition of indigenous laws and customs;”

Draft operative paragraph 22

“The right to participate fully at the State level, through representatives chosen by themselves, in decision-making about and implementation of all national and international matters which may affect their rights, life and destiny;”

“(b) The right of indigenous peoples to be involved, through appropriate procedures, determined in conjunction with them, in devising any laws or administrative measures that may affect them directly, and to obtain their free and informed consent through implementing such measures. States have the duty to guarantee the full exercise of these rights;”

Draft operative paragraph 23

“The collective right to autonomy in matters relating to their own internal and local affairs, including education, information, mass media, culture, religion, health, housing, social welfare, traditional and other economic and management activities, land and resources administration and the environment, as well as internal taxation for financing these autonomous functions;”

Draft operative paragraph 24

“The right to decide upon the structures of their autonomous institutions, to select the membership of such institutions according to their own procedures, and to determine the membership of the indigenous people concerned for these purposes; States have the duty, where the peoples concerned so desire, to recognize such institutions and their memberships through the legal systems and political institutions of the State;”

Draft operative paragraph 25

“The right to determine the responsibilities of individuals to their own community, consistent with universally recognized human rights and fundamental freedoms;”

Draft operative paragraph 26

“The right to maintain and develop traditional contacts, relations and cooperation, including cultural and social exchanges and trade, with their own kith and kin across State boundaries and the obligation of the State to adopt measures to facilitate such contacts;”

Draft operative paragraph 27

“The right to claim that States honour treaties and other agreements concluded with indigenous peoples, and to submit any disputes that may arise in this matter to competent national or international bodies;”

Draft operative paragraph 28

PART VI

“The individual and collective right to access to and prompt decision by mutually acceptable and fair procedures for resolving conflicts or disputes and any infringement, public or private, between States and indigenous peoples, groups or individuals. These procedures should include, as appropriate, negotiations, mediation, arbitration, national courts and international and regional human rights review and complaints mechanisms;”

Draft operative paragraph 29

PART VII

“These rights constitute the minimum standards for the survival and the well-being of the indigenous peoples of the world;”

Draft operative paragraph 30

“Nothing in this Declaration may be interpreted as implying for any State, group or individual any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein . . . ”



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STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS

Final report (last part):

submitted by José R. Martínez Cobo*
Special Rapporteur of the Subcommission on
Prevention of Discrimination and Protection of Minorities

VOLUME V CONCLUSIONS, PROPOSALS AND RECOMMENDATIONS

UNITED NATIONS
New York, 1987

Part III. Conclusions, proposals and recommendations

NOTE:

The present publication contains only chapters XXI and XXII of the study by the Special Rapporteur. References to chapters I to XX are in italics, as for example: see *chapter I* paras. 1-13.

INTRODUCTION

(a) The Sub-Commission on Prevention of Discrimination and Protection of Minorities, by resolution 4 B (XXIII) of 26 August 1970, recommended, through the Commission on Human Rights, that a complete and comprehensive study of the problem of discrimination against indigenous populations be undertaken. Acting on this recommendation, the Economic and Social Council, in paragraph 7 of its resolution 1589 (L) of 21 May 1971, authorized the Sub-Commission

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**For this reprinting of excerpts from U.N. document E/CN.4/Sub.2/1986/Add.4, the footnote numbers have been changed; however the symbols and headings designating various sections have been retained from the original. The original spelling has also been retained—Eds.

to make a complete and comprehensive study of the problem of discrimination against indigenous populations and to suggest the necessary national and international measures for eliminating such discrimination, in co-operation with the other organs and bodies of the United Nations and with the competent international organizations.

(e) Chapter XXI of the report, which is reproduced in the present publication, can be read as an accessible and comprehensive summary of the concerns and issues raised in the report as a whole. . . .

(f) In the same statement, the Special Rapporteur, Mr. Martinez Cobo, observed that the concluding chapter clearly showed that the social conditions in which the majority of indigenous populations lived were favourable to the specific types of discrimination, oppression and exploitation in various fields described in the study. In many countries they were at the bottom of the socio-economic scale. They did not have the same opportunities for employment and the same access as other groups to public services and/or protection in the fields of health, living conditions, culture, religion and the administration of justice. They could not participate meaningfully in political life. Indigenous populations had long been resigned to this situation. Even more regrettably, they had, in many cases, attempted to become part of other cultures as the only apparent means of achieving a better life.¹ In his concluding remarks to the Sub-Commission, the Special Rapporteur stated that the report should be regarded as an appeal to the international community to take heed of the painful discrimination practised against indigenous peoples, one of the largest but weakest sectors of the world's population.²

Part III CONCLUSIONS, PROPOSALS AND RECOMMENDATIONS

Chapter XXI CONCLUSIONS

B. Specialized agencies

11. ILO has been taking measures with regard to indigenous populations for many years now,³ particularly during the period 1953 to 1957, which culminated in the adoption of two basic texts, the Convention on indigenous and tribal populations (No. 107) of 1957 and Recommendation 104 of the same

1. E/CN.4/Sub.2/1984/SR.27 para. 58.

2. E/CN.4/Sub.2/1984/SR.32 para. 48.

3. See *chapter II* paras. 31-134 and annex I.

name.⁴ In recent years, Convention 107 has increasingly been a target for criticism by both indigenous populations and other persons concerned with such matters. As a result, ILO is now tending towards the revision of these texts as far as possible, which would seem to be the right approach.

E. Countries covered in the study

19. The Special Rapporteur is very much aware that the list of 37 countries on which the present study is based is far from exhaustive. Many countries in which indigenous populations live today have not been covered by the study. This was not the result of arbitrary selection of any kind but of the accessibility or inaccessibility of appropriate information for the preparation of the basic materials needed to give the study a solid foundation. All requests for information were sent to all States Members of the United Nations, and the list of countries covered was based only on the availability of adequate information for the preparation of the basic materials. In this respect, the absence of African countries is to be noted in particular.

20. The Special Rapporteur has always considered that certain population groups in several African countries or regions should be considered as indigenous in those countries or regions. It was, however, impossible to cover them in the present study because of the lack of sufficient information on the populations which could be considered as indigenous in the relevant countries. This was unavoidable, particularly since the data furnished to the Special Rapporteur in reply to requests for information for the study either denied the existence of such populations or stated that all groups in those countries were indigenous, or both. . . .

F. Definition

21. *Chapter V* contains data on the range of criteria and formulae for the definition of indigenous populations in use in the various countries studied. It can be seen that both in definitions in legal texts and in those proposed by other means, great importance has been attached to objective elements (ancestry, culture, language, etc.). It may also be seen that subjective elements (self-identification and acceptance) are gaining ground as important criteria for definition. It must be asked whether pure objective and subjective criteria exist, particularly in the formulations proposed at various levels on that basis. In any event, it should be established that the indigenous populations themselves must be consulted about the criteria they consider valid, since it is their right to determine who belongs to those populations, and who does not.

4. *Ibid.*, paras. 64-99 and annexes II and III.

H. Basic principles and elimination of discrimination

Basic provisions

24. It is obvious that the State could theoretically provide a more systematic and consistent means of action through clearly defined and co-ordinated legal channels, within a specific body of laws. Effective and systematic State action can be achieved, however, with or without this special legal regime, and conversely, the absence of such action does not necessarily derive from the lack of such a regime.

Constitutional provisions

27. The information for some countries shows that their constitutions contain no provisions regarding indigenous populations. Some Governments have provided specific information on this point. A number of other countries seem to have considered issues concerning their indigenous populations so basic that provisions regarding them have been included in their constitutions. While the provisions of some of these constitutional texts are very brief and abstract, others address themselves more explicitly to the need for special measures in favour of indigenous populations, although there are marked differences in the approach adopted and the scope of such provisions. (See chapter VII, paras. 60-89.)

Basic legal status

28. The countries which supplied information susceptible of analysis with regard to basic legal status fall into two main groups. Some countries have created a special legal status which seeks to protect the indigenous inhabitants and absolve them of a number of obligations, but at the same time restricts their exercise of certain rights until they attain what is considered to be a necessary level of development which could place them on an equal footing with the rest of the population. Other countries have accorded to their indigenous peoples all the rights and obligations of citizens. Some have also enabled them to benefit from certain special provisions on their behalf, considered necessary since such peoples tend to be the underdogs in society for as long as they continue to suffer from the circumstances of that position.

I. Basic policy

40. It is clear that, in this regard, there is a considerable diversity of criteria. There are many approaches to the theoretical aspects of the question. There are complex and delicate social and cultural aspects. Complicated social and legal problems arise. The theoretical possibilities which emerge include at least policies of segregation, assimilation, integration, amalgamation, pluralism, self-reliance, self-management and ethno-development.

41. *Chapter IX* contains a brief review of these criteria and aspects; it should be stressed that the importance of the fact that policies of pluralism, self-reliance, self-management and ethno-development seem to provide for better opportunities and means for direct participation by indigenous populations in the formulation and implementation of the policies officially adopted by the State.

42. The historical development of the processes of formulation and evolution of such policies shows the extent of the out-and-out domination and imposition which accompanied the early stages of conquest and colonization, and developed into a less heavy-handed domination with the stabilization of colonial subjugation, subsequently evolving into "indigenism"-i.e. policies drawn up without the participation of indigenous populations - and later into "indianism", or the taking of control of those processes by the indigenous inhabitants themselves, and indigenous policies of pluralism, self-reliance and self-management and ethno-development.

J. Administrative arrangements

46. In a few countries, the special importance of the indigenous populations has been recognized by the creation of a ministry or body at cabinet level to plan and co-ordinate policy and programmes directed at those groups.

47. Many Governments have created offices or agencies within the pertinent administrative or governmental areas in order to ensure that the formulation and implementation of policy towards the indigenous populations receive appropriate attention and consideration.

51. The selection and tenure of personnel who serve in administrative bodies concerned with the indigenous population is usually subject to the general rules applicable to civil servants. Some Governments, however, have demonstrated a greater sensitivity than others in recruiting specially qualified personnel including members of indigenous groups, in the belief that such measures are essential to the success of administrative efforts. Where specially qualified personnel is for some reason unavailable, in-service training programmes have been created in an attempt to compensate for that shortcoming.

K. Special areas for action

1. Health

54. Like other segments of the population, indigenous peoples have special health needs which reflect their physical and socio-cultural environment.

57. Morbidity and mortality rates are much higher among indigenous populations than among other groups living in same areas. Appropriate and effective measures must be developed to bring down these rates, and in particular the rates for children, at least to the levels prevailing among other population groups in various countries.

59. Indigenous medical practices and medicines have not been studied enough and have in the past been repudiated and excluded from State efforts to promote basic health services.

2. Housing

The present housing situation

64. It should be remembered that the majority of indigenous persons and families are to be found in rural areas and in the slums of the urban centres.

65. The great majority of the problems which affect rural indigenous housing arise from the economic impotence of indigenous peoples within the market economy that surrounds them, their socially and culturally oppressed position, and their lack of political and social power to bring about desired changes in their housing conditions.

66. Although indigenous populations have some special housing problems which are attributable to their way of life, their traditions and their customary economic occupations, other problems they face can be attributed to neglect, lack of the necessary action or discrimination by public authorities or by non-indigenous persons or groups.

Imposition of non-traditional patterns of housing on indigenous populations

82. The desire on the part of public authorities and private enterprises in many countries to impose non-indigenous housing patterns on indigenous people has often resulted in marked failure, particularly where these changes are not warranted by circumstances.

Need for consultation with, and participation of, indigenous populations in housing schemes

83. It is obvious that more indigenous input is needed if indigenous housing is to improve. Consultation with and contributions by indigenous populations are clearly needed in order to ascertain the situation and needs as they

themselves see them, as well as to give control of indigenous housing, or significant participation in it, to indigenous populations so that it conforms to their own traditions and plans. Indigenous personnel should be increasingly involved in and trained for the necessary operations.

86. Indigenous populations have a right to a clean, healthy and satisfying environment and to adequate housing of a standard which will meet the needs of families in the communities of their choice. They are prepared to contribute a fair share of the resulting costs in common with other sectors of society. Thus, indigenous housing should in no case fall below the minimum standard set for other rural populations, with the necessary adaptations dictated by the socio-cultural factors invoked and accepted by the indigenous populations themselves.

3. Education

General criteria

89. The right of indigenous populations to education has not been duly guaranteed and is not really observed.

90. States frequently do not recognize traditional indigenous education based on autochthonous educational processes and often deliberately aim at doing away with it and replacing it by formal, alien and alienating educational processes.

91. Although there has been a significant improvement in the effective access of indigenous persons to public education of all kinds and at all levels, such education continues to be characterized to a greater or lesser extent by a marked tendency to deprive indigenous pupils of everything indigenous.

92. This unmitigated aggression against indigenous culture and life-style can in no circumstances be justified, particularly in contexts and environments of cultural and linguistic pluralism, which States nowadays espouse, or to which they at least pay lip service.

Notable shortcomings in present educational arrangements

97. The following shortcomings are currently to be found in all countries, although to varying degrees:

- (a) In a very large number of cases, there are still no schools in or near indigenous communities;

- (b) There are either no, or far too few, teachers with the necessary knowledge of the relevant indigenous language and culture;
- (c) In a great many cases, it is still not possible to learn to read and write in the indigenous mother tongue or in the predominant vernacular of the area where the community has settled;
- (d) The necessary stress is not laid on teaching or instruction in the indigenous culture;
- (e) Insufficient efforts are made to avoid the alienating effects of the presence in the indigenous school of the predominant non-indigenous culture and, in many cases, deliberate attempts are still made to replace the indigenous by the non-indigenous culture;
- (f) In teaching the pupil the official language, insufficient care is taken to prevent him from being cut off from his mother tongue, and in many cases this continues to be a deliberate objective;
- (g) The aid programmes for indigenous students in the form of fellowships, allowances, subsidies, accommodation, transport, adequate clothing, etc. are inadequate.

Educational materials for indigenous persons

98. The avowed purpose of these materials was, until very recently, the deliberate assimilation of indigenous populations into the mainstream of society as a whole by making them abandon their own cultural patterns in favour of those of the prevailing sectors of society. In one country this is still the explicit purpose of some of the materials and programmes applied to one of the sectors into which the indigenous population are classified.

103. Indigenous culture, traditions, history and institutions are transmitted orally and not by the written word, and until recently have not been recorded either in writing or by other means. There is a risk that the authenticity of these cultural expressions will not survive when attempts are made to put them down in writing or transcribe them from memory, notes or recordings made by persons without a proper understanding of the subject.

104. An important element in the education of indigenous populations in the broader framework of society is to teach them to assert and protect their rights and obligations as groups and individuals within that society. Their own internal means and methods of creating that awareness must be respected, supported and complemented by means which can be used within society as a whole for the protection of their rights and the assertion of their obligations.

Educational materials for non-indigenous persons

106. Not enough is being done to combat and eliminate misconceptions and prejudice against indigenous populations.

Participation in the founding and operation of educational institutions

108. Very little is being done in many countries to ensure that indigenous populations participate adequately in, and are given the opportunity to collaborate in, the founding and operation of educational establishments and institutions that are active in indigenous communities.

4. Language

120. On the basis of the ideas set out in the introduction to *chapter XV* of the study, the following conclusions emerge:

121. The policies followed in a great many States were based on the assumption that indigenous populations, cultures and languages would disappear naturally or by absorption into other segments of the population and the "national culture". It was expected that the indigenous languages would disappear, perhaps even before that, in the face of the dynamism, the quality and the attraction of the official languages - international languages which were assumed to have real or imaginary advantages of all kinds, and were considered particularly suited to science, technology, art and civilization. For that reason, no stress was laid on State plans to teach the indigenous languages or use them as languages of instruction for some of the initial phases of education. That was assumed to be contrary to the best interests of those societies and involved danger for national unity, since it was feared that it would lead inevitably to linguistic insularity and excessive social and political fragmentation.

122. It is believed today that these policies, which in some cases have prevailed for centuries, do not seem to have been well-grounded, to judge by their effects. Although some peoples and their languages have disappeared for a variety of reasons, the great majority are still with us. The vigorous presence of indigenous peoples and languages in many parts of the world is an established fact. Defence by these groups of their languages is determined and tenacious. The linguistic *impasse* remains practically the same as in the past. Many contemporary experts question and deny the supposedly undesirable effects of promoting the indigenous languages in terms of antagonistic insularity and micronationalism.

126. The opinion that the use of a multiplicity of recognized languages in a country constitutes an obstacle to national unity has no firmly established factual bases anywhere.

5. Culture and Cultural, Social and Legal Institutions

133. Some sectors resort to an ideology of colonial origin which preaches the need to “civilize” groups with a “primitive” conception of the cosmos, based on the assumption that “modern” culture is superior to “primitive” culture and on notions of social Darwinism, which underpin the prevalence of “strong” groups over “weak” groups. This commonly forms the part of the conceptual scheme of predominant groups in areas of close co-existence, involving the construction of *ad hoc* frameworks of disdain, hostility and aggression.

134. In multi-ethnic societies, action must always be based on criteria which, at least in principle, assert the equality of the cultural rights of the various ethnic groups. The State has the obvious obligation to formulate and implement a cultural policy which will, among other things, create the necessary conditions for the co-existence and harmonious development of the various ethnic groups living in its territory, either under pluralist provisions which guarantee that one group will not interfere with another, or under other programmes which guarantee equal and genuine opportunities for all.

145. The presence of the indigenous culture (languages, traditions, history, customs, cultural contributions, music, plastic arts, crafts) should also be reflected in the State’s cultural dissemination media. This will help to create an awareness of the existence and importance of the indigenous peoples or their contributions to the dissemination of the culture of the non-indigenous peoples and thus make for a better understanding and wider dissemination of the cultures existing in the country. This will widen the framework in which the cultures of the various communities comprising the nation are disseminated and promoted and will give fuller meaning to the right to take part in the country’s cultural life.

147. Not only have religious [sic] objects and relics disappeared, but also documentation or records of enormous cultural importance to the indigenous population and to mankind as a whole. Subsequently, however, in some countries, measures have been adopted to protect archaeological sites because of their religious and cultural importance to present-day indigenous populations.

149. In some matters indeed, an indiscriminate implementation of the law in general could restrict the freedom of indigenous peoples to follow their traditional practices. For example, there are questions of marriage, family relationships, the burial of the dead, and so on, in which indigenous persons or groups continue to follow traditional practices and customs. Some concessions must be made in such matters.

153. It is not sufficient, therefore, to prevent or sanction the abuses involving cultural penetration or imposition. The right of indigenous populations to preserve, develop and perpetuate their culture and their cultural, social and legal institutions by transmitting them to future generations, when they have clearly expressed the desire to do so, must be recognized and protected.

155. Where traditional law continues to be observed by indigenous populations, the question of legal systems arises. While some countries do not recognize the validity of indigenous laws and customs, in the face of the undeniable fact that such legal norms continue to exist, other countries have recognized their existence for some purposes.

6. Employment

Occupation

164. Hunting, fishing and agriculture as traditionally practised by indigenous populations have been denounced as primitive, ineffective and even harmful practices that should be abandoned. Indigenous settling and farming, or stock-raising, have been said to be prejudicial to the national economy because they perpetuate subsistence economy patterns.

166. The only occupation that seems to have been encouraged, and even assisted in some way, has been that of traditional handicrafts, but without efforts to reduce in any way the considerable share of the profits accruing to middlemen.

The Colonial Background

172. Eliminating forms of compulsory personal services and establishing legal provisions aimed at limiting payment in kind and providing safeguards against coercive recruitment practices were major concerns during the first half of this century in many areas. In practice, however, compulsory labour systems, various forms of bondage of indigenous labourers and widespread exploitation of indigenous workers in mining and plantation economies continue to exist in all parts of the world. The incidence and gravity of such practices vary and are cause for serious concern.

Coercive labour systems

181. The Working Group on Slavery has recognized that a “special problem exists in countries with indigenous populations who might be vulnerable to exploitation, such as debt bondage and other slavery-like practices. . . .” That Working Group has also dealt in particular with debt bondage or bonded labour, forced labour, abusive and exploitative labour practices, and non-enforcement of minimum-wage provisions. All these aspects should be thoroughly examined in the light of existing international standards and in that of the international standards that are to be developed by the Working Group on Indigenous Populations, with special reference to the problems faced by indigenous populations in different parts of the world.

7. Land

191. There are national and international norms which recognize the right of ownership. There was no report of any system which excluded indigenous persons from enjoying the right of ownership, since they qualify as “persons”, “nationals”, or “citizens”, as required by different legislations in order legally to acquire the right to own land.

192. Where the free administration of property is concerned, restrictions are found in some systems. While in some there are general restrictions on the administration of movable and immovable property and on some personal rights, a number of countries impose restrictions only on acts disposing of real estate, in particular, land and, more especially, “indigenous land”.

193. Land, particularly indigenous land, is subject to a special system of protection set up in accordance with the relevant provisions or declarations of Governments to protect indigenous peoples themselves and ensure that they are not deprived of their land without a definite interest on their part and unless there is a good reason. In some systems, this is linked with the ownership of the land by indigenous communities or groups, or with the fact that the power to dispose of that land is vested exclusively in communities or groups, whose members have only the temporary and specific usufruct of a parcel of land within the communal property.

196. 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.

197. For such peoples, the land is not merely a possession and a means of production. The entire relationship between the spiritual life of indigenous peoples and Mother Earth, and their land, has a great many deep-seated implications. Their land is not a commodity which can be acquired, but a material element to be enjoyed freely.

198. Indigenous peoples have a natural and inalienable right to keep the territories they possess and to claim the land of which they have been deprived. In other words, they have the right to the natural cultural heritage contained in the territory and freely to determine the use to be made of it.

199. No proper or really effective guarantees exist regarding the right of indigenous populations to the land which they and their forefathers have worked from time immemorial, the forms of land tenure, the use of the resources traditionally generated, or the resources which that land contains. In some countries, the plunder of land is effected by means of legal instruments, promulgated by the Governments on which landowners still have a significant influence.

200. Large-scale violations of the rights of indigenous populations to their land and its resources have occurred systematically for many centuries.

201. The experiences of indigenous peoples are full of well-documented cases of what happens when their rights to religious freedom and culture are violated by the expropriation of the land with which they have been linked, as nations, for thousands of years. One cannot really speak of respect for indigenous cultures when powerful States and gigantic companies are allowed to destroy that relationship whenever they wish to exploit the resources of indigenous lands.

206. At times, the very state agency charged with the protection of indigenous lands has alienated indigenous land or allowed non-indigenous persons to settle on indigenous land without any compensation or redress in the face of claims against such actions.

207. Certain areas have been reserved, by treaties and other agreements or by legislative acts or executive orders, for indigenous possession and use. It is, however, possible to reclassify specified areas of reserved land and not only through judicial acts. They can be forced out of existence through a variety of pressures and harassment that are as effective as legislative, executive, or any other formal legal action, if not more so.

214. It is obvious that before the coming of the invaders from abroad, the indigenous peoples occupied and claimed as their own vast areas of the territories on which they had developed as peoples and nations. Recognition of "original occupation" as "aboriginal title" was one of the major considerations in early accords, agreements and treaties concluded with indigenous peoples, which gave relevance to the prior physical and economic occupation of those areas.

215. The recognition and protection of land rights is the basis of all indigenous movements and claims today in the face of the continuous encroachment on their land.

216. Millenary or immemorial possession should suffice to establish indigenous title to land, official recognition and subsequent registration, in the absence of specifically applicable legislative or executive measures explicitly extinguishing aboriginal rights. As these rights are not "created" by legislation [sic], neither should they be extinguished by unilateral acts.

217. Recognition here means acknowledgement of a *de facto* situation that provides a basis for the existence of a right. Official recognition and subsequent registration should follow as a matter of course, once possession and economic occupation are proved.

233. In the main body of the study some examples are given of the invasion of indigenous lands by non-indigenous persons or companies, frequently multi-nationals. It is an undeniable fact that such invasions have occurred and are still occurring, throughout the world and that government authorities have not acted with the necessary firmness and effectiveness to avoid or mitigate the disastrous consequences for the indigenous communities affected. In addition to the actual development of resources, there are other forms of development and many aspects of penetration and alienation which have devastating effects for all such communities. While it is not always possible to avoid or put an end to the exploitation which occurs in each specific case, means of palliating the adverse consequences can and must be found, as part of a growing movement to provide the communities affected with a more direct and effective voice in all aspects of licensing or leasing and a greater share in the profits.

234. As a general norm, it may be asserted that the natural riches of indigenous land belong to the indigenous people, and it is they who can develop it. Often, they lack the equipment and the technical and administrative know-how to do so adequately when the purpose of this development is to meet the

requirements of the market economy. The basic decision as to the form and scale of the development of the natural resources of their lands should devolve on the indigenous peoples alone.

235. In many legal systems, mineral and hydrocarbon deposits belong to the State, so that the granting of licences [sic] for the exploration and mining of deposits is handled mainly by the government authorities. As the land belongs to the indigenous communities, they must be allowed to share in the profits resulting from such mining activities. They must also be compensated for damage caused. Still more important, they must be allowed to participate in the process of granting exploration and mining licences and to examine all the potential consequences of the proposed exploration and mining activities. Particular care should be taken to ensure that the licences or concessions granted by the State are not of such a kind, or awarded in such quantities, or so extensive that they negate the right of the indigenous peoples to enjoy the use of their land.

236. Sacred land or land of historical and spiritual significance for indigenous peoples must in all cases be excluded from licences or concessions and protected from intrusions of all kinds.

243. Whenever the removal of populations is necessary for any exhaustively justified reason, they should be moved to areas that resemble their ancestral land as closely as possible, with fauna and flora of the same type. The suffering of these populations has to be reduced to an absolute minimum.

8. Political Rights

255. Various factors, economic and social ones for the most part, everywhere influence the effectiveness of political rights.

260. Everywhere there has been growing participation by indigenous persons in elections, both as voters and as candidates. In several countries, the vote received by indigenous candidates has risen sharply, a trend also found among non-indigenous electors, who increasingly vote for indigenous candidates.

261. However, the representation of indigenous peoples remains inadequate and is sometimes purely symbolic. The necessary measures must be taken to ensure that their representation in public office is genuine and just.

263. Another aspect which must be considered, albeit in a preliminary manner, is the self-determination and autonomy demanded by indigenous groups, peoples and nations.

264. It has been stressed that indigenous peoples, by their very existence, have the natural and original right to live freely on their own territories.

265. It is beginning to be acknowledged that indigenous peoples have their own national identity based on historical realities that transcend mere solidarity *vis-a-vis* discrimination and exploitation.

266. Respect for the forms of autonomy called for by indigenous peoples is the necessary condition for guaranteeing and ensuring these rights.

267. The specific forms of internal organization of these peoples are an inherent part of their cultural and legal heritage, which has contributed to their cohesion and to the maintenance of their social and cultural tradition.

268. Respect and support for the internal organization of indigenous peoples and their cultural expressions constitute an essential consideration for any arrangement aimed at securing appropriate participation by indigenous communities in all affairs which affect them. Consequently, Governments must abandon their policies of intervening in the organization and development of indigenous peoples, and must grant them autonomy, together with the capacity for controlling the relevant economic processes in whatever way they themselves consider to be in keeping with their interests and needs.

269. Self-determination, in its many forms, is thus a basic pre-condition if indigenous peoples are to be able to enjoy their fundamental rights and determine their future, while at the same time preserving, developing and passing on their specific ethnic identity to future generations.

270. Broadly speaking, indigenous peoples have the right to self-determination which will enable them to continue to exist in dignity, in keeping with their historic right as free peoples.

271. The right to self-determination exists at various levels, and includes economic, social and cultural, as well as political factors, which must be studied in each case so that the level and type required can be determined.

272. In the widest sense of its "external" connotations this right means the right to constitute a State and includes the right to choose various forms of association with other political communities.

273. With regard to its "internal" connotations within the national society, however, this right to self-determination means that a people or group possessing a definite territory may be autonomous in the sense of possessing a separate and distinct administrative structure and judicial system, determined by and intrinsic to that people or group.

274. The right to self-determination is also a right of individuals, in the sense that every person has the right to self-expression and to fulfil his or her human potential as he or she thinks best.

276. As far as it applies to indigenous nations and peoples, the essence of this right is the right to free choice, and therefore the indigenous peoples themselves must to a large extent create the specific content of the principle.

9. Religious Rights and Practices

279. The concept of religion must include not only what have been considered the "world's great religions" but also other beliefs or creeds which essentially fulfil the same function. Within this wider view of religious rights and practices, recognition and protection must be given to all forms of religion which seek the moral improvement of human rights and foster understanding and brotherly love among them.

281. Indigenous populations should not be subjected to systematic campaigns of forced conversion, which have had the results described in *chapter XIX*, to the partial extent possible on the basis of the available data. A thorough study should be made both of the subjection of indigenous populations to the system of religious missions in a number of countries and of such conversion, which has not always been attempted by peaceful means. The view has been taken, however, that such a task goes beyond the scope of the present study.

10. Equality in the Administration of Justice and Legal Assistance

282. Despite the increasingly marked endorsement of provisions relating to equality before the law and the equal protection of laws and stipulations concerning the equal administration of justice for all, the principle of equality in the administration of justice is not at present actually applied to indigenous people.

289. There was no report of systematic efforts to give students of law or lawyers even basic instruction in the principles of indigenous customary law

as it exists in various countries, which means that lawyers have no grounding in these matters.

290. A basic reference should be made here to the fact that the administration of justice takes very little account, or none at all, of traditional customary indigenous law and applies the law which corresponds to the predominant sectors of the population. This means that the indigenous population has imposed on it an alien legal system which it has never voluntarily accepted since it has preserved in practice its own customary legal system which has developed in the course of history.

Chapter XXII PROPOSALS AND RECOMMENDATIONS

B. United Nations

1. Working Group on Indigenous Populations

305. It should be supported and assisted in carrying out the specific functions assigned to it, which are, it is worth repeating: firstly, to review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations, including information requested annually by the Secretary-General from Governments, specialized agencies, regional intergovernmental organizations and nongovernmental organizations in consultative status, particularly those of indigenous peoples. The Working Group is required to analyse such materials and submit its conclusions to the Sub-Commission, bearing in mind the report of the Special Rapporteur to the Sub-Commission. Secondly, to devote special attention to the evolution standards concerning the right of indigenous populations, taking account of both the similarities and differences in the situations and aspirations of indigenous populations throughout the world.

310. The Special Rapporteur firmly supports the idea of a fund to ensure genuine indigenous representation at the sessions of the Working Group; this should take the form of financial and information assistance to indigenous representatives entitled to such aid in accordance with the relevant standards so that they can be informed of what the Working Group is doing and can attend its sessions, wherever they are held.

312. The Working Group should, pursuant to its mandate as contained in paragraph 2 of Economic and Social Council resolution 1982/34, on the evolution of standards, formulate a body of basic principles, based on those to be duly formulated in the text of a draft declaration, and propose in due course a draft convention on the subject for the competent bodies of the United Nations.

C. Specialized agencies

1. International Labour Organisation

335. Convention 107 has not proved very effective in protecting and developing the human rights and fundamental freedoms of indigenous populations in countries which are parties to it, since today, more than 25 years after its adoption, there is little difference between the countries which are and which are not bound by it, and such differences as exist are not always in favour of the States parties to it.

336. ILO should be supported in its efforts to effect a revision of Convention 107 and Recommendation 104 both dated 1957, so as to take into account the wishes and demands of indigenous populations, and at the same time to work, if the competent bodies of the United Nations so decide, towards the adoption of a United Nations convention on indigenous populations, as has already been suggested.

337. More suitable and precise substantive provisions and more practical and effective procedural principles are needed. Particularly in substantive terms, stress must be placed on ethno-development and independence or self-determination, instead of on "integration and protection". Where standards of implementation are concerned, more effective methods must be developed, including ways and means of inspecting and supervising the actual execution of the relevant provisions, instead of dealing with the question in supplements to periodic reports, to be considered by the Committee of Experts on the Application of Conventions and Recommendations. In any case, more careful attention should perhaps be paid to the results of the action undertaken in effectively complying with the pertinent norms.

E. Non-governmental organizations

355. Action in regard to the rights and freedoms of indigenous populations should be based on close contact, consultation and the fullest measure of

cooperation with non-governmental organizations, particularly those established by indigenous populations themselves.

356. It is gratifying to note the granting of consultative status to three more indigenous organizations, bringing to six the present number of organizations having such status, namely, The International Indian Treaty Council, the World Council of Indigenous Peoples, the Indian Law Resource Centre, the Indian Council of South America, the Inuit Circumpolar Conference and the Four Directions Council. It is hoped that the applications of other indigenous organizations for consultative status will be successful.

357. Consultative status should be accorded to any indigenous organization which meets the relevant conditions and represents indigenous groups not already represented at the United Nations.

F. Ideas for the definition of indigenous populations from the international point of view

368. The Special Rapporteur wishes to begin by expressing a number of basic ideas that will provide the intellectual framework for this effort. It must be stated in this respect that the question of a definition is one that must be left to the indigenous communities themselves. The fundamental assertion must be that indigenous populations must be recognized according to their own perception and conception of themselves in relation to other groups; there must be no attempt to define them according to the perception of others through the values of foreign societies or of the dominant sections in such societies.

369. The right of indigenous peoples themselves to define what and who is indigenous must be recognized.

370. The correlative of this faculty is, obviously, the faculty of defining or determining what or who is not indigenous.

371. No State may take, by legislation, regulations or other means, measures that interfere with the power of indigenous nations or groups to determine who are their members.

372. Artificial, arbitrary or manipulatory definitions must, in any event, be rejected.

373. As regards the circumstance that gave rise to the notion of indigenous populations, it must be said that the special position of indigenous populations within the society of nation-States existing today derives from their historical rights to their lands, as well as from their right to be different and to be considered as different.

374. Much of their land has been taken away and whatever land is left to them is subject to constant encroachment. Their culture and their social and legal institutions and systems have been constantly under attack at all levels, through the media, the law and the public educational systems. It is only natural, therefore, that there should be resistance to further loss of their land and rejection of the distortion or denial of their history and culture and defensive/offensive reaction to the continual linguistic and cultural aggressions and attacks on their way of life, their social and cultural integrity and their very physical existence. They have a right to continue to exist, to defend their lands, to keep and to transmit their culture, their language, their social and legal institutions and systems and their way of life, which have been illegally and unjustifiably attacked.

375. It is in the context of these situations and these rights that the question of definition should arise. Social scientists have reached the conclusion that ethnic groups can be characterized only by the distinctions which they themselves perceive between themselves and other groups with which they have to interact. They exist as such ethnic groups as long as they consider themselves different from those other groups. Ethnic groups determine their rules concerning membership, contemplating inclusion or exclusion of individuals whom they may accept or reject as members, or those they will adopt or ostracize, and those who may or may not represent them. On an individual basis, belonging to such groups depends on two main factors: self-identification as members of the group (group consciousness) and recognition by the group that those given individuals belong to it (acceptance by the group). Thus the group may, under its own rules governing membership, and inclusion and exclusion of individuals, accept or reject some persons as its members, while adopting or ostracizing others. It may, further, keep these rules unchanged or modify them as it wishes, without any outside interference.

376. It is clear that indigenous peoples consider themselves to be different from the other groups that form the society of present-day nation-States in which they now find themselves included. They consider themselves to be the historical successors of the peoples and nations that existed on their territories before the coming of the invaders of these territories, who even-

tually prevailed over them and imposed on them colonial or other forms of subjugation, and whose historical successors now form the predominant sectors of society. It is also abundantly clear that indigenous peoples consider themselves different from those other peoples and demand the right to be considered different by other sectors of society and by the international community.

377. Indigenous peoples wish to keep whatever territory has been left to them and to regain land illegally taken from them, so as to have an adequate land base for their existence as different peoples. They also want their culture, language, social and legal institutions which they consider essential for their own organization and existence, to be respected and recognized in those nation-States. They wish to keep, develop and transmit to future generations their territories, social and legal institutions and systems, their culture and their language.

378. Indigenous populations may, therefore, be defined as follows for the purposes of international action that may be taken affecting their future existence:

379. Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present nondominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

380. This historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors:

- (a) Occupation of ancestral lands, or at least of part of them;
- (b) Common ancestry with the original occupants of these lands;
- (c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, life-style, etc.);
- (d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);

- (e) Residence in certain parts of the country, or in certain regions of the world;
- (f) Other relevant factors.

381. On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group).

382. This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.

H. Basic principles and elimination of discrimination

2. Study of Treaties Concluded with Indigenous Peoples

388. During the preparation of this study, it became clear that, for indigenous peoples and nations in various countries and regions of the world, the treaties concluded with present nation-States, or with the countries acting as colonial administering Powers at the time in question, are of paramount importance.

389. A thorough and careful study should be made of areas covered by the provisions contained in such treaties and conventions, the official force of such provisions at present, the observance, or lack of effective observance, of such provisions and the consequences of all this for the indigenous peoples and nations concerned.

I. Basic Policy

399. The Special Rapporteur is fully aware that each country will determine its ethnic, cultural, linguistic and religious policies on the basis of prevailing conditions and other criteria which it deems pertinent. The suggestions put forward in this regard are based on the existing alternatives and the preferences which the needs of indigenous populations and current world thinking appear to demand. While the recommendations do not represent any attempt to dictate policies to any sovereign State, a number of suggestions can nevertheless be made.

400. States should seek to gear their policies to the wish of indigenous populations to be considered different, as well as to the ethnic identity explicitly defined by such populations. In the view of the Special Rapporteur,

this should be done within a context of socio-cultural and political pluralism which affords such populations the necessary degree of autonomy, self-determination and self-management commensurate with the concepts of ethnic development described in *chapter IX* and *XV*.

403. Pluralism, self-management, self-government, autonomy and self-determination within a policy of ethnic development, as defined in the San Jose Declaration, appear to be the formula called for by the times in which we are now living and to do justice to the aspirations and desires of indigenous populations, which have for so long been subjected to interference and imposed conditions of all kinds. The Special Rapporteur is convinced that, following these guidelines would not be promoting artificial distinctions or separatist aspirations where such feelings do not exist, but would simply be recognizing the multiform nature of the societies of States with indigenous populations. It is essential not to prevent such groups from fully regaining a historical awareness of their own existence as such and to enable them to control their future according to their own aspirations and traditions. To do otherwise is to prolong the subjugation and oppression of groups and cultures capable of making a significant contribution to mankind, today as in the past. They should be afforded that opportunity like any other people on our planet, if frictions and conflicts caused by lack of understanding and injustice are to be avoided.

J. Administrative measures

404. Countries with indigenous populations should review periodically their administrative measures for the formulation and implementation of indigenous population policy, taking particular account of the changing needs of such communities, their points of view and the administrative approaches which have met with success in countries where similar situations obtain.

405. Governments which have not yet done so should consider establishing institutions, machinery and specialized administrative procedures, since entities with specific and clearly defined mandates are in a better position to accord due attention to solving the difficult and complex problems currently facing indigenous populations in the countries in which they live.