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**Partial revision of the Indigenous
and Tribal Populations Convention,
1957 (No. 107)**

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INTRODUCTION

At its 234th Session (November 1986) the Governing Body of the ILO decided to place on the agenda of the 75th Session (1988) of the International Labour Conference the following item: "Partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)".

The ILO has been carrying out activities connected with indigenous and tribal populations since the earliest days of the Organisation. Convention No. 107, and its accompanying Recommendation (No. 104), were adopted at the same time that the ILO was leading the Andean Indian Programme, an integrated programme of technical co-operation involving the participation of a number of other intergovernmental organisations.

This Convention remains the only international instrument so far adopted dealing specifically with the problems of these populations (although other international instruments also affect their rights). With the years, however, concepts have changed significantly and there have been criticisms from many sides of the Convention's basic approach. In addition, since the Convention's adoption indigenous and tribal populations themselves have begun to organise associations for the defence and promotion of their own interests; they also feel that the Convention is seriously outdated.

Against this background, following a decision taken by the Governing Body at its 231st Session (November 1985), a Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), was held in September 1986. The experts recommended unanimously that the Convention be revised as a matter of urgency, and drew particular attention to the need to review the Convention's basic integrationist approach and its provisions concerning land rights, as well as those dealing with the recruitment and conditions of employment and work of these populations. They emphasised that the Convention's revision should be a partial one, that is that it should be based on the text of the existing instrument in order to preserve its inherent strengths in so far as possible.

The Governing Body's discussion of the report of the Meeting of Experts and on the question of whether to include this item on the agenda, also placed special emphasis on these questions, and it is with these that the present report is concerned.

The relevant parts of the report of the Meeting of Experts as well as the text of Convention No. 107 are appended to the present report for convenient reference.

The question will be dealt with by the Conference under the double-discussion procedure provided for in article 39 of the Standing Orders of the Conference. In accordance with the provisions of that article, the Office has prepared this report to serve as a basis for the first discussion at the Conference. The report begins with a review of the involvement of the ILO and the activities

of the other intergovernmental organisations with respect to indigenous and tribal populations. After discussing the growth of non-governmental organisations concerned with these questions, it goes on to discuss the need for revision of the Convention. There are separate chapters on the question of integrationism, land rights, recruitment and conditions of employment and work. These chapters are followed by the questionnaire, to which governments are invited to reply, giving the reasons for their replies.

In accordance with the provisions of the Standing Orders of the Conference, the present report is to be communicated to governments not less than 12 months before the opening of the 75th Session of the Conference in 1988, and the second report not later than four months before the opening of that session. In order that the Office may have time to examine the replies to the questionnaire and to prepare the second report, governments are requested to send their replies so as to reach Geneva not later than 30 September 1987.

The attention of governments is drawn to the recommendation addressed to them by the Governing Body at its 183rd Session in June 1971, on the basis of the resolution concerning the strengthening of tripartism in the overall activities of the International Labour Organisation, adopted by the Conference at its 56th Session (1971), "that they consult the most representative organisations of employers and workers before they finalise replies to ILO questionnaires relating to items on the agenda of sessions of the General Conference". This is also required, for countries which have ratified that Convention, by Article 5 (1) (a) of the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144). Governments are requested to indicate in their replies which organisations have been so consulted. It is assumed that the results of the consultation will be reflected in the governments' replies; under the Standing Orders of the Conference only replies of governments are taken into account in the preparation of the subsequent report.

In accordance with a recommendation made by the above-mentioned Meeting of Experts, it is suggested that in preparing their replies to the questionnaire governments also consult representatives of indigenous and tribal populations in their countries, if any. There is clearly no requirement to do so, but as one of the major objectives of the proposed revision of the Convention is to promote consultation with these populations in all activities affecting them, this consultation may appear desirable to governments even at this early stage.

CHAPTER I

INTERNATIONAL ACTION CONCERNING INDIGENOUS AND TRIBAL POPULATIONS

ACTION TAKEN BY THE ILO

Before the adoption of Convention No. 107 and Recommendation No. 104

Since its creation in 1919, the ILO has been concerned with the situation of indigenous and tribal populations. It undertook studies as early as 1921 on the situation of indigenous workers, and in 1926 the Governing Body established a Committee of Experts on Native Labour to formulate international standards for the protection of indigenous workers. The work of this Committee served as the basis for the adoption of a number of Conventions, including the Forced Labour Convention, 1930 (No. 29), as well as other Conventions more directly concerned with indigenous workers.

A Committee of Experts on Indigenous Labour held two meetings, in 1951 and in 1954, and had a considerable impact on the general approach of the instruments which were later adopted by the ILO. At its second session in 1954, for example, the Committee paid particular attention to the plight of forest-dwelling indigenous peoples, considering working papers on their conditions of life and work, integration and legislation affecting them. It concluded that populations of this kind in independent countries faced increasingly serious threats to their existence as ethnic, cultural and economic entities with the right to self-fulfilment. Much attention was also given to the nature of the land rights to be secured for indigenous peoples, and to the legal and administrative difficulties resulting from the existence of tribes which overlapped international frontiers, or from the nomadic or semi-nomadic way of life of other tribes and their lack of awareness of national or local boundaries.

At the same session the concept of integration was discussed at some length. Distinctions were drawn between concepts of integration and artificial assimilation, and the Committee concluded that "the cultural autonomy of each social unit involved should be respected as the best guarantee of the contribution it may make to the welfare of the 'great society'".*¹

The Committee also concluded that the four main positive principles that should serve as the basis for a combined programme of protection and integration should be the safeguarding, preservation and development of the indigenous forest-dwelling population's economic basis, the raising of its standard of living, the development of medical and health action with the object

* The notes will be found at the end of each chapter.

of maintaining at least the same health conditions as existed before contact with the invading society, and the development of fundamental education. It also stated that "in a later stage of action the principle to be followed is that the indigenous people themselves are better able to formulate their needs than outsiders acting on their behalf and that therefore any measure that stimulates their interest and intelligent participation in the programme of integration will contribute to a natural widening of the scope of the practical measures to be adopted". On the basis of the Committee's recommendations, the 1956 and 1957 Sessions of the International Labour Conference discussed what would become Convention No. 107 and Recommendation No. 104.

As part of its work in this area at that time, in 1953 the ILO published the book *Indigenous peoples*, a substantial volume divided into four major parts (Preliminary definitions and data; Living conditions; The place of indigenous workers in the economy; and National and international action).² It still remains a valuable reference source.

Convention No. 107 and Recommendation No. 104

The law and practice report, *Living and working conditions of indigenous populations in independent countries*, submitted to the 39th Session of the International Labour Conference in 1956, was drafted in close co-operation with the United Nations, the FAO, UNESCO and the WHO.³ It examines in detail the pertinent programmes of the international organisations which were then assisting indigenous peoples either directly or indirectly; the report also mentions the Andean Indian Programme, a multidisciplinary technical assistance project to help the indigenous peoples of the Andean High Plateau (*sierra*), carried out jointly by the United Nations, ILO, FAO, UNESCO, UNICEF and WHO under the ILO's general co-ordination (see below).

One notable difference between the 1956 law and practice report and the book *Indigenous peoples* published three years earlier, is the inclusion of detailed information on "tribal and semi-tribal" population groups. The report suggested the formula, the essence of which was subsequently adopted, of "peoples with a tribal or semi-tribal structure whose social and economic conditions are similar to those of the [indigenous] peoples". The practical effect was a considerable increase in the kinds and numbers of groups considered potentially to fall within the scope of an international instrument. The report listed a large number of tribal populations in the Near and Middle East, including such groups as the Kurds, Bakhtiari and Baluchi who had tended traditionally to cross national frontiers. African tribal groups were also included, with specific mention of tribal populations in such countries as Ethiopia, Somalia, Liberia, Libya and South Africa. While affirming that it would be up to individual States to determine which of their national population groups should fall within the scope of an international instrument, the report nevertheless attempted an analysis of indigenous groups by economic activity, noting that this classification corresponded roughly with the various stages of economic and social development achieved, and with the degree of integration into the national community.

A Committee on Indigenous Populations met during the 1956 and 1957 Sessions of the International Labour Conference; on both occasions there was also ample plenary discussion on the proposed instruments. It is worth noting in this context that there was no real discussion of the concept of integration itself, though it was stated that integration must not be forced. Most comments revolved around such questions as the ILO's competence to deal with such a broad issue and the suitability of a Convention as the most appropriate instrument to deal with such a wide-ranging and complex set of problems. On the first point, it was stressed that the two instruments had been drafted with the full co-operation and assent of the other agencies, which recognised the ILO's leading role in the area of indigenous populations, and furthermore that the instruments provided for an ongoing role by the other specialised agencies in their implementation. On the second point, while certain delegates stressed a preference for the elaboration of general principles, the overwhelming support of the Conference was for the adoption of both a Convention and Recommendation. The Indigenous and Tribal Populations Convention, 1957 (No. 107), and its accompanying Recommendation (No. 104) were adopted with near unanimity by the 1957 Session of the International Labour Conference.

There has been no further ILO standard-setting activity relating specifically to indigenous or tribal populations since 1957. Certain Conventions have been adopted, however, which have a particular effect on indigenous and tribal peoples, including the Plantations Convention, 1958 (No. 110), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the Employment Policy Convention, 1964 (No. 122), and the Rural Workers' Organisations Convention, 1975 (No. 141).

Convention No. 107 and Recommendation No. 104 today remain the only international instruments adopted by any international organisation for the protection of indigenous and tribal populations. The Convention, which came into force on 2 June 1959, has been ratified by 27 States, 14 of them in Latin America and the Caribbean. The majority of these ratifications were registered in the 1950s or 1960s (the only ratifications since 1970 being Panama in 1971, Bangladesh in 1972, Angola in 1976 and Guinea-Bissau in 1977, the last three confirming obligations undertaken on their behalf before independence, and Iraq in 1986). The virtual absence of ratifications in recent years can be traced to the reservations of governments and others with regard to the instrument's basic orientation.

Technical assistance

In addition to its standard-setting activities, the ILO carried out technical assistance programmes for indigenous and tribal populations throughout the 1950s, 1960s and early 1970s, above all through its Andean Indian Programme. The Programme began with the establishment of action centres in Bolivia, Ecuador and Peru in 1954, and was subsequently extended to Colombia in 1960, to Chile and Argentina in 1961, and to Venezuela in 1964. Its major aim was to improve the living and working conditions of the indigenous people of the Andes, in order to facilitate their integration within the economic, social and political life of their respective national communities. In addition to collaborating with the various United Nations specialised agencies, the ILO also maintained close

co-operation with other international bodies, such as the Inter-American Indian Institute, the Organisation of American States (OAS) and the Inter-American Development Bank, for the conduct of the various projects undertaken within this programme. The Andean Indian Programme culminated in the Proyecto Multinacional de Desarrollo Comunal Andino (1971-73), after which responsibility for the programme was handed over to the individual States concerned. Nevertheless the ILO has continued to provide technical co-operation to the countries of the Andean region in matters concerning rural development and indigenous populations, through projects financed either by the ILO itself, or by the United Nations Development Programme and other multilateral and bilateral donors.

The Panel of Consultants on Indigenous and Tribal Populations

The principal recommendations adopted by the Panel, which met in Geneva in 1962, concerned national policies and training of personnel, international exchange of experience, training of national personnel in integration techniques, and the special problems of nomadic and semi-nomadic populations. In 1968 a follow-up technical meeting was held in Niamey, Niger, on the problems of nomadism in the Sahelian region of Africa. It endorsed many of the recommendations which had been adopted previously by the Panel of Consultants in 1962. No further meetings were convened by the ILO on this subject until the Meeting of Experts held in 1986.

Recent ILO activities

In more recent times the focus of the technical work and research undertaken by the ILO (and other international organisations) has shifted from the specific problems of groups such as indigenous and tribal populations to rural development in general. Consideration has nevertheless been given by the ILO to the social and economic effects on these populations of technical assistance and other programmes.

In Latin America, for instance, a number of projects implemented since the late 1970s have been aimed at least partially at indigenous groups. These include a 1979-81 project for the self-sufficiency of vulnerable groups in Bolivia; a 1984-85 project in Bolivia to organise productive activities for rural women; a 1981 project in an indigenous zone of Costa Rica to support artisan and agricultural activities; a project undertaken between 1979 and 1983 in Ecuador concerning appropriate endogenous technologies in rural areas; a study undertaken in 1981 and 1982 in Ecuador concerning rural migration among indigenous communities of the Cañar province; and a study undertaken in 1980 in Peru, concerning traditional forms of peasant labour in the Peruvian Andes. Finally, mention should be made of a broad-based subregional project to assist organisations of indigenous workers in the Andean region. This project, carried out by the ILO with financial assistance from the Government of Italy, covers Bolivia, Colombia, Ecuador and Peru.

Another recent example is the Identification and Programming Mission to the Sudan undertaken as part of the emergency programme of action for the

African region. The report of the mission, published in 1986, considers the particular needs of nomadic populations in the Sudano-Sahelian desert regions within the package of projects proposed for future action.⁴ Similar missions have been carried out in Mali and Mauritania.

A further example is the analysis conducted by the ILO's Petroleum Committee, concerning the effects of petroleum exploration on indigenous populations. A study published by the ILO in 1984, entitled *Social and economic effects of petroleum development programmes*, contained a section on native peoples and petroleum resources development, with particular reference to indigenous peoples in Peru, Alaska and Canada.⁵ The study provides examples of cases where both the governments and the industrial concerns involved, realising the potentially grave conflict between resources exploitation and the way of life of these peoples, have taken account of the legal environment in which they operate, and have gradually developed guide-lines and modes of conduct for the integration and protection of the indigenous peoples concerned. It also notes that isolated forest-dwelling tribal groups are easily dispossessed when minerals are discovered on their lands, and when they lack either title to the land or the right to subsoil and other natural resources which are found on it.

Programmes directed specifically at the needs of rural women have also included tribal groups. For example, the ILO has been working since 1983 with tribal women in several villages of Palghar Taluka, Maharashtra, India, and with a political organisation of tribals in the area, in practical experimentation with income and employment-creating activities for poor tribal women. Another project covering rural women in India, Nepal and Pakistan, including areas with a heavy concentration of scheduled castes and scheduled tribes, aims to provide local employment opportunities to poor rural women as an alternative to seasonal migration. In 1984 and 1985 pilot training courses for tribal women and youth were organised in Bangladesh, since the disadvantaged socio-economic status of these groups usually prevents them from gaining access to general education and training facilities.

The ILO has also assisted other research, such as a study it recently financed in India entitled *Socio-economic condition of tribals and landless in the Lower Palani Hill Ranges of Anna District, Tamilnadu*. More recently, the ongoing ILO concern for indigenous and tribal populations was amply reflected at the 12th Conference of American States Members of the ILO, held in Montreal, Canada, from 18 to 26 March 1986. A number of Government and other members drew attention to the loss of cultural identity which threatens millions of indigenous peoples. Several members discussed the link between the exploitation of indigenous populations and political conflicts and violent confrontations, pointing out that violence had led to the scattering and impoverishment of indigenous populations owing to the loss of lands. Attention was also drawn to conflicts between social institutions in indigenous communities and those in parts of the modern sector. The Committee on Rural Development at the Montreal Conference made a number of specific recommendations for practical activities for the benefit of indigenous populations.

THE UNITED NATIONS AND OTHER INTERNATIONAL ORGANISATIONS
AND INDIGENOUS AND TRIBAL POPULATIONS*United Nations*

Since the early 1970s the United Nations has undertaken a number of activities which have a direct or indirect effect on standard-setting for indigenous and tribal populations. First, there has been considerable development in the codification of human rights law since the adoption of the ILO's instruments in 1957. Mention must first be made of the two human rights covenants adopted by the United Nations General Assembly in 1966, both of which affirm that all peoples have the right of self-determination. In addition, article 27 of the International Covenant on Civil and Political Rights contains the important principle that "in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." There are also various declarations and instruments in the area of discrimination, in particular the International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the General Assembly in December 1965. The Committee on the Elimination of Racial Discrimination, created by the Convention, has on many occasions considered the situation of indigenous populations as part of its supervisory work. A very full account of United Nations instruments in this area is given in the Martínez Cobo study cited below.

Important studies have been undertaken by Special Rapporteurs of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, in the areas of self-determination and minorities, as well as on indigenous populations specifically. The *Study on the rights of persons belonging to ethnic, religious and linguistic minorities*, begun in 1971, contains many references to the situation of indigenous peoples in independent countries. It should be noted in relation to this and other studies, however, that the Sub-Commission has drawn a clear distinction between the categories of minorities and indigenous populations.

At its 24th Session in 1971 the Sub-Commission appointed Mr. José R. Martínez Cobo as its Special Rapporteur to prepare a *Study of the problem of discrimination against indigenous populations*. His exhaustive study took over a decade to complete. Containing 22 lengthy chapters, it is the most comprehensive analysis of the subject conducted within the United Nations system in recent years. The concluding chapter of this study⁶ contains a large number of useful recommendations for future action on behalf of indigenous populations, including certain fundamental principles of relevance for the formulation of standards. In the section dealing with the United Nations specialised agencies, the study contains recommendations on possible future ILO activities in this area. It recommends, for example, that "the International Labour Organisation should be supported in its efforts to effect a revision of Convention No. 107 . . . so as to take into account the wishes and demands of indigenous populations". The study also states that in revising the ILO standards, "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'." 7

The creation of the United Nations Working Group on Indigenous Populations was authorised by the Economic and Social Council in its Resolution No. 1982/34 of 7 May 1982. In that resolution ECOSOC authorised the Sub-Commission to establish annually a Working Group on Indigenous Populations in order to review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous populations and to give special attention to the evolution of standards concerning the rights of indigenous populations, taking account of both the similarities and the differences in the situations and aspirations of indigenous peoples throughout the world.

At its first session the Working Group decided that it should examine the application of existing human rights standards in relation to indigenous peoples, and discuss the evolution of standards regarding indigenous populations, in the light of real-life experience. While the Working Group continues to examine the application of existing standards, it decided at its fourth session in 1985 that its aim should be to produce, in due course and as a first formal step, a draft declaration on indigenous rights which might be adopted by the General Assembly. It has begun drafting principles for inclusion in a declaration, and plans to continue doing so in future sessions. It is expected that the drafting of such a declaration, and its approval by the General Assembly, will take some time.

Another important development within the United Nations is the creation by the General Assembly in 1985 of a Voluntary Fund for Indigenous Populations in order to facilitate the participation of representatives from indigenous communities and organisations in the deliberations of the Working Group. From the perspective of the indigenous peoples themselves, one of the most positive elements of the Working Group's procedures has been the very full scope given for participation by indigenous representatives. Indigenous peoples' organisations have been given the opportunity to make their own recommendations for the language to be used and the issues to be covered in any future United Nations instruments on the rights of indigenous populations.

The question of collaboration among the international organisations involved in the subject will be examined in greater detail below. It should be noted here that measures are being taken to decrease the possibility of conflict between a revised ILO Convention and the declaration presently being examined by the Working Group on Indigenous Populations. The Office has participated actively in each session of the Working Group, and will continue to do so; similarly, the Working Group has been informed regularly and in detail of ILO activities as regards the supervision of the application of Convention No. 107 and of considerations concerning the possible revision of the Convention. In addition, as recommended by the Meeting of Experts, close contact is being maintained in this connection between the Office and the United Nations Centre for Human Rights. Finally, it may be recalled that during the Meeting of Experts the Director of the Centre for Human Rights pledged the co-operation of the United Nations

in a common endeavour to strengthen the level of international protection for indigenous populations.

Other United Nations specialised agencies

Recent activities of other United Nations specialised agencies in the area of indigenous peoples' rights have been summarised at some length in the Martínez Cobo report. It should be noted that UNESCO, the FAO and WHO, as well as the OAS, have been consulted regularly by the ILO with regard to the application of Convention No. 107, and have been sent copies of government reports and comments of the ILO Committee of Experts for their observations.

The proceedings and recommendations of certain conferences organised by the other specialised agencies provide some useful guide-lines for the revision of Convention No. 107. For example, the World Conference on Agrarian Reform and Rural Development, organised by the FAO in 1979, gave detailed consideration to alternative forms of land tenure and use within the framework of agrarian reform programmes. The Conference urged governments to protect the rights of small cultivators and nomadic populations and to preserve and adapt or create systems of broad-based community control and management of land and water rights in accordance with development needs. It also drew up a Programme of Action to give effect to these principles.

In December 1981 UNESCO, together with the Latin American Faculty of Social Sciences (FLACSO), hosted a meeting in Costa Rica on ethnocide and ethno-development. The "Declaration of San José" adopted at the meeting affirmed that ethno-development is an inalienable right of Indian groups.

Among other activities, UNESCO has stated that its programmes include an examination of the use of mass media in connection with rural indigenous programmes, the use of ritual as an urban integrative technique factor in Aymara culture, the access of indigenous populations to international, regional and national means of redress, and the links between caste and tribe.

Organisation of American States

Of the regional inter-governmental organisations, the Organisation of American States has since its inception been particularly active in developing programmes and administrative structures on behalf of the indigenous peoples of the Americas. While the inter-American system has adopted no instruments concerned specifically with the situation of indigenous and tribal populations, a number of important principles have been affirmed in the programmes of action drawn up by the Inter-American Indian Institute of the OAS, and in the resolutions adopted at the most recent Inter-American Indian Congresses.

Within the framework of the OAS, increasing recognition has been given to the role to be played by the organisations of indigenous peoples themselves. As the Director of the Institute noted in his address to the Ninth Inter-American Indian Congress (New Mexico, United States, 1985), there are now highly organised and independent movements in the Andean region that have achieved an inter-relationship between the struggle for land and cultural development. These movements form common fronts with other popular, rural and urban

sectors. In the Amazon region subsidiary organisations are just beginning to consolidate, though relative isolation prevails owing to the nature of the environment, poor communication, and the patterns of occupation and settlement. In the Central American and Caribbean regions, notes the report, the situation varies from nation to nation, but there are cases of involvement of the Indian population in acute conflicts, the outcome of which will determine national alternatives.⁸

The Institute's Director also described the ethical and legal principles which constituted the basic frame of reference for its Five-Year Inter-American Indian Action Plan, which had been authorised by the OAS General Assembly at its 1979 Session, and by the Eighth Inter-American Indian Congress in November 1980. (The ILO has participated actively in this programme.) These fundamental principles were described as follows: (a) *self-determination*, as a right of the Indian people to participate in the decisions which affect their lives; (b) *equality*, cultural and social, in repudiation of colonialist and discriminatory treatment of the Indian population; (c) *the right to participate in the social benefits of nations*, in recognition of the historic and current efforts of the Indian peoples in the formation of the society and culture; (d) *human dignity*, in recognition of the maturity and identity of the Indian peoples, of their cultural values, and their history; and (e) *unrestricted co-operation* with the Indians in recovering and protecting their lands and other natural resources, in obtaining state services, and in being included in comprehensive development programmes.

Brief mention should also be made of the work of the Inter-American Commission on Human Rights. Although this Commission has not been involved directly in standard-setting activities affecting indigenous populations, it has considered a number of specific human rights cases since the early 1970s involving indigenous peoples. The Commission found in 1971 that, under article 2 of the American Declaration of the Rights and Duties of Man, indigenous peoples are entitled to special legal protection because they suffered severe discrimination. The Commission has also called upon the member States of the OAS to implement the recommendations made by the various Inter-American Indian congresses and conferences, in particular the provisions of article 39 of the Inter-American Charter of Social Guarantees, which deals with the protection of indigenous populations.

International financial institutions

Many of the resolutions adopted by indigenous peoples' organisations, as well as academic writings and petitions to international organisations, have stressed the damaging impact of uncontrolled development projects that take place in areas traditionally occupied by indigenous peoples. In view of the fact that such projects are frequently financed in whole or in part by the large international financial institutions, it is vitally important that certain regulatory standards should exist.

It is interesting to note in this regard that the World Bank – which has been involved in providing assistance to some development projects in areas being used or occupied by indigenous and tribal populations – is the only international lending organisation to have adopted a written policy applicable across-the-board

to projects it finances which would affect such areas. The World Bank has given much consideration to the criteria to be used for the selection and monitoring of such projects. The World Bank defines "tribal people" as ethnic groups exhibiting some of the following characteristics: geographically isolated or semi-isolated, identifying closely with one particular territory, ethnically and linguistically distinct from the wider national society, unacculturated or partially acculturated into the societal norms of the national society, and whose social, economic and cultural traditions and practices distinguish them from the rest of the national society. The World Bank's policy is that it would provide assistance to development projects in areas being used or occupied by tribal people only (i) if such projects include adequate measures to safeguard the integrity and well-being of those concerned, and (ii) if the World Bank is satisfied that the borrowing government or agency supports and can implement such measures effectively. The World Bank has stated that it "welcomes the valuable work done by NGOs for the well-being of tribal people and supports the view that tribal people, through their representatives, should participate in the design and execution of bank-assisted projects which may affect their welfare. It believes that the best way to ensure such participation is by strengthening the direct dialogue between such representatives and the governments of their respective countries, which are the World Bank's official counterparts in all project work."⁹

Notes

¹ See, in particular, the discussion in "The Second Session of the ILO Committee of Experts on Native Labour", in *International Labour Review* (Geneva, ILO), Nov. 1954, pp. 418-441.

² ILO: *Indigenous peoples: Living and working conditions of aboriginal populations in independent countries* (Geneva, 1953).

³ idem: *Living and working conditions of indigenous populations in independent countries*, Report VIII (1), International Labour Conference, 39th Session, Geneva, 1956.

⁴ idem: *After the famine: A programme of action to strengthen the survival strategies of affected populations*, Report of the ILO Identification and Programming Mission to the Republic of the Sudan, September 1985 (Geneva, 1986).

⁵ idem: *Social and economic effects of petroleum development programmes*, Consultant's report prepared by Norconsult for the ILO (Project No. ILO/NOR/79/INT/20) (Geneva, 1984).

⁶ United Nations: *Study of the problem of discrimination against indigenous populations*, by Mr. José R. Martínez Cobo, Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities (Geneva; doc. E/CN.4/Sub.2/1983/21/Add.8; mimeographed).

⁷ *ibid.*, p. 44, paras. 336 and 337.

⁸ See the report by the Director of the Inter-American Indian Institute to the Ninth Inter-American Indian Congress, Santa Fe, New Mexico, 28 October to 1 November 1985 (OEA/Ser.K/XXV 1.9/CII/Doc.4/85).

⁹ The Committee of Experts has on several occasions examined the impact of projects financed by international financial institutions on indigenous and tribal peoples in ratifying countries.

CHAPTER II

INTERNATIONAL NON-GOVERNMENTAL ORGANISATIONS (NGOs), INDIGENOUS PEOPLES' ORGANISATIONS AND THE FORMULATION OF STANDARDS

INDIGENOUS PEOPLES' ORGANISATIONS

One of the major developments that have taken place since the adoption of Convention No. 107 and Recommendation No. 104 in 1957 is the establishment of organisations of indigenous and tribal people to defend and promote their own interests. One of the most important reasons for revising the Convention is to incorporate the principle that such groups should have a role in making decisions which affect them. In 1957 it was very rare that indigenous groups were sufficiently organised to be able to discuss with government authorities or intergovernmental organisations, the planning and implementation of programmes or policies that affected them. Since then, such organisations have been established on the local, national, regional and international levels; they are fully capable of expressing the interests and needs of the groups they represent, and of speaking on their behalf. While not all areas of the world where these peoples live are at an equal stage of development in this respect, there are clear indications that this trend is continuing and expanding and is likely to develop further in future years.

As indicated below, many of these groups have been active at the sessions of the United Nations Working Group on Indigenous Populations. They have also begun to establish closer ties with the ILO in recent years, even though the possibilities offered them under ILO procedures are much more limited than in the United Nations. In the first place, some of these groups have submitted, for the Office's consideration, draft revised texts of Convention No. 107 or parts of it. A number of them have also visited the ILO in order to become better acquainted with ILO procedures and standards, and have established formal or informal channels of communication with the Office. Several of these organisations are now included on the ILO's Special List of NGOs, and the Meeting of Experts on the revision of Convention No. 107 gave some of these organisations an opportunity to participate directly in the ILO's deliberations on matters concerning them. Their contribution greatly helped the Meeting of Experts to make recommendations which took account of the concerns both of governments and of those directly affected.

A number of international NGO conferences held over the past decade have given indigenous peoples the opportunity to present their grievances and to formulate general principles. The first of the major meetings of this kind, the International NGO Conference on Discrimination against Indigenous Populations in the Americas, held in Geneva in September 1977, drew up a Draft

Declaration of Principles for the Defence of the Indigenous Nations and Peoples of the Western Hemisphere.¹ In September 1981 an International NGO Conference on Indigenous Peoples and the Land was held, again in Geneva.

A number of international indigenous peoples' organisations (including several in consultative status with the United Nations and/or included on the ILO special list of non-governmental organisations)² have elaborated their own draft standards or declarations of principles, or even draft texts of proposed new international instruments. In April 1981, for example, the Third General Assembly of the World Council of Indigenous Peoples (WCIP) held in Canberra, Australia, adopted a Draft International Convention on the Rights of Indigenous Peoples. A further declaration of principles was adopted at the Fourth General Assembly of the World Council of Indigenous Peoples, held in Panama in September 1984.

Additional declarations of principles have been prepared in connection with the sessions of the United Nations Working Group on Indigenous Populations, by indigenous peoples' organisations, the International Indian Treaty Council, the Indian Law Resource Center, Four Directions Council, National Aboriginal and Islander Legal Service, National Indian Youth Council, Inuit Circumpolar Conference and International Indian Treaty Council. The United Nations has recently prepared an analytical compilation of existing legal instruments and proposed draft standards relating to indigenous rights, which includes the above-mentioned texts prepared by indigenous peoples' organisations.³ Particular consideration is given below to two of these sets of principles, namely those adopted by the WCIP in Panama in 1984, and those adopted by several indigenous organisations at the 1985 Session of the United Nations Working Group. These statements are of particular interest because of their scope, and because of the organisations which adopted them.

Both documents espouse the principle that all indigenous peoples have the right of self-determination, by virtue of which they may freely determine their political status and pursue their economic, social, religious and cultural development. The 1985 document goes further, however, in affirming that indigenous peoples thereby "have the right to whatever degree of autonomy or self-government they choose". With regard to local government, the WCIP statement affirms that "each indigenous people has the right to determine the form, structure and authority of its institutions", that "the institutions of indigenous peoples and their decisions, like those of States, must be in conformity with internationally accepted human rights both collective and individual" and that "indigenous peoples and their members are entitled to participate in the political life of the State". In this regard the 1985 document provides that "the laws and customs of indigenous nations and peoples must be recognised by States' legislative, administrative and judicial institutions and, in case of conflicts with state laws, shall take precedence". The document goes on to lay emphasis on the actions that States should not take, affirming that "no State shall assert any jurisdiction over an indigenous nation or people, or its territory, except in accordance with the freely expressed wishes of the nation or people concerned", and "no State shall deny an indigenous nation, community, or people residing within its borders the right to participate in the life of the State in whatever manner and to whatever degree they may choose".

Both sets of principles devote considerable attention to the important issue of rights to land, minerals and other natural resources, including subsoil rights. The WCIP text contains the following four basic principles: (a) indigenous people shall have exclusive rights to their traditional land and its resources, and where the lands and resources of the indigenous people have been taken away without their free and informed consent such lands and resources shall be returned; (b) the land rights of an indigenous people include surface and subsurface rights, full rights to interior and coastal waters and rights to adequate and exclusive coastal economic zones within the limits of international law; (c) all indigenous peoples may, for their own needs, freely use their natural wealth and resources in accordance with the two principles mentioned above; and (d) no action or course of conduct may be taken which, directly or indirectly, may result in the destruction of land, air, water, sea ice, wildlife, habitat or natural resources without the free and informed consent of the indigenous peoples affected. The 1985 document contains similar principles. It also affirms, however, that the rights to share and use land, subject to the underlying and inalienable title of the indigenous nation or people, may be granted by their free and informed consent, as evidenced in a valid treaty or agreement, and that discovery, conquest, settlement on a theory of *terra nullius* and unilateral legislation are never legitimate bases for States to claim or retain the territories of indigenous nations or peoples. Both documents contain similar principles regarding the fundamental right of indigenous peoples to retain their traditional customs, language and religious practices, and to establish their own educational institutions. They both affirm that treaties between indigenous nations or peoples and States should be recognised in the same way as other treaties under international law, and that indigenous peoples have the right to travel and to maintain relations across international boundaries.

Similar principles are found in many other statements by indigenous gatherings. These principles, laid down by those persons affected by state policy towards indigenous and tribal populations, must be taken into account in the revision of Convention No. 107. However, there are certain political aspects in the area of indigenous peoples' rights which necessarily must remain outside the scope of the revised ILO instrument. These include the nature of self-determination and the right of indigenous peoples to enter into political relations across national frontiers. The Meeting of Experts carefully considered the statements of the indigenous representatives attending its sessions, and adopted positions which will be examined below.

Moreover, many of the principles enshrined in the above-mentioned documents reflect the interests and concerns of the most homogeneous and articulate of the indigenous peoples' organisations. The populations they represent have well-defined territories, they have in the past entered into treaty relations with colonising powers, they are familiar with international law, and many of them are now seeking to bring about radical changes in the nature of their relationship with the governments of the States in which they reside. It must be remembered that there are many other indigenous and tribal groups and organisations which also seek to protect their economic, social and cultural, and civil and political rights against abuse by the State and other encroachers, but whose primary concerns are local autonomy and self-fulfilment, rather than the

more ambitious declarations of principle adopted by certain international indigenous organisations. Moreover, in many regions of the world, organisations of indigenous and tribal peoples are at an embryonic stage or have not yet been formed. This applies particularly to such groups in Africa and continental Asia.

At the national level, too, the approach and objectives of indigenous peoples' groups can differ considerably. This point was noted in the report on rural development and indigenous populations⁴ prepared by the International Labour Office for the 12th Conference of American States Members of the ILO in March 1986. It contrasts the situation in Canada and the United States with that in the majority of Latin American countries. In the former, indigenous populations constitute well-defined ethnic minorities, attaching prime importance to the preservation of their racial and tribal identity. Their claims concern mainly compliance with land treaties, the protection of their rights, including that of self-determination as Indian nations and tribes, and defence against discrimination and segregation. In Latin America, as the ILO report notes, most indigenous organisations were set up in the last decade and have yet to achieve great influence. They are generally responsible in their own countries for representing indigenous groups in the defence of their cultural identity and land ownership of peasant communities and tribal groups, and managing the expansion or improvement of public services and the individual rights of their members. In Latin America, according to the ILO report, the development of indigenous organisations has been held back by ideological and political differences, but they are steadily becoming more cohesive and influential.

NON-INDIGENOUS NGOS

Over the past two decades there has also been a significant growth in the activities of non-indigenous NGOs working to defend indigenous and tribal peoples' rights at the national and international levels. Their work and publications are also of importance for standard-setting activities. Of these organisations, Survival International has paid particular attention to the formulation and implementation of international standards; like the World Council of Indigenous Peoples, it was asked to appoint an expert to the Meeting of Experts on the revision of Convention No. 107. It has also actively monitored the application of Convention No. 107 in certain countries.

Other organisations, such as the Anti-Slavery Society, the International Work Group for Indigenous Affairs (IWGIA), the Indigenous Populations Documentation, Research and Information Centre (DOCIP) and others, have played an invaluable role by preparing regular reports on indigenous peoples' conferences, international developments as they affect indigenous populations, and on severe human rights violations against indigenous peoples. Academic and human rights institutes have also made a major contribution to standard-setting projects, for example through examination of national legislation on indigenous peoples' rights.⁵

Lastly, mention should be made of the increasingly important role played by NGOs at the national level, perhaps most particularly those connected with the Roman Catholic and other churches, in speaking out against the violation of indigenous peoples' rights and demanding adequate protective measures. The

welfare of indigenous populations in many countries was entrusted to religious or missionary groups from the beginning of the colonial period; even today in several countries in Latin America missionary groups have partial or total responsibility for the administration of Indian lands and welfare. An excessively paternalistic attitude by missionaries, and in some cases widespread abuse and disrespect for indigenous cultures, has at times been widely criticised. Over the past decade, for example, such criticisms have led to the expulsion from several Latin American countries of the Summer Institute of Linguistics, which previously had almost unlimited control over the forest-dwelling Indians within its jurisdiction. In more recent times, however, such pro-Indian religious groups as the Indigenous Missionary Council (CIMI) in Brazil and the Paraguayan Episcopal Conference (CEP) increasingly have played an advocacy role. Their publications have denounced the violation of Indian land rights and demanded enforcement of the laws, including the application of penal measures against encroachers on Indian lands.

In conclusion, the growth of organisations of indigenous peoples at all levels, with increasingly firm demands, is now an established fact. As envisaged by the ILO's Committee of Experts on Indigenous Labour over 30 years ago, in many countries these peoples no longer need external groups to intervene on their behalf. Measures now need to be taken to ensure that they and their representatives are consulted adequately, at both the local and the national levels, in connection with all aspects of state policy that affect them. Similarly, for groups less familiar with external procedures, NGOs that work with them and defend their interests should also be consulted.

Notes

¹ Reproduced in United Nations: *Study of the problem of discrimination against indigenous populations*, by Mr. José R. Martínez Cobo, Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities (Geneva; doc. E/CN.4/Sub.2/1983/21/Add.8; mimeographed).

² The nine indigenous organisations in consultative status with the United Nations are the following: World Council of Indigenous Peoples; International Indian Treaty Council; Inuit Circumpolar Conference; World Indigenous Association; Indian Law Resource Center; Indian Council of South America; National Indian Youth Council; National Aboriginal and Islander Legal Service Secretariat; and Four Directions Council.

³ United Nations: *Standard-setting activities: Evolution of standards concerning the rights of indigenous populations*. (At the time of preparing the present report, the United Nations document had not been distributed officially, and therefore has no reference number.)

⁴ ILO: *Rural development, taking into account the problems of the indigenous populations as well as the drift of the rural population to the cities and its integration in the urban informal sector*, Report II, 12th Conference of American States Members of the ILO, Montreal, 1986.

⁵ See in particular R. Stavenhagen (ed.): *La Legislación Indigenista y los Derechos Humanos de las Poblaciones Indígenas en América Latina* (Mexico City, Instituto Interamericano de Derechos Humanos and Colegio de México, 1985).

CHAPTER III

BASIC ORIENTATION: THE QUESTION OF INTEGRATIONISM

When the Governing Body decided to convene the Meeting of Experts on the revision of Convention No. 107, it noted that the Convention's basic orientation established integration as the fundamental objective of all activities undertaken by governments in relation to indigenous and tribal populations, and that it was necessary to re-examine this orientation in order to take into account different views and new circumstances. The Meeting of Experts was unanimous in concluding that the integrationist language of the Convention is outdated, and that the application of this principle is destructive in the modern world.

In 1956 and 1957, when the Convention was being discussed by the Conference, it was felt that integration into the dominant national society offered the best chance for these groups to become a part of the development process of the countries in which they live. There have, however, been a number of undesirable consequences resulting from the adoption of this principle as the basic orientation of Convention No. 107. As stated in the Meeting of Experts, it has become a destructive concept, owing in part to the way it has been interpreted by governments; in practice, this concept has led to the extinction of ways of life that are different from that of the national society. The implications of this principle have also discouraged indigenous and tribal organisations from taking full advantage of the strong protection offered by other aspects of the Convention, as they have fostered a certain distrust of the instrument. In addition, virtually every commentator on the Convention in recent years has stated that its integrationist approach, as well as its implicit assumption of the cultural inferiority of these groups, render it entirely outdated and disqualify it as a basis for national policies. This, in fact, appears to be the leading cause for the virtual absence of ratifications of late.

The need to revise the Convention in order to eliminate its integrationist orientation is also borne out by opinions expressed by other international organisations and a number of States. It has already been noted that United Nations and UNESCO bodies have recommended specifically that Convention No. 107 be revised in this regard. During the Meeting of Experts on the revision of Convention No. 107, all of the organisations of the United Nations system that had participated in drafting the Convention, as well as others present, supported the ILO's initiative in re-examining Convention No. 107 with a view to revision, and agreed with the basic tenor of the revision proposed (paragraphs 24 to 28 of the report of the Meeting of Experts).

The basic orientation which should replace this integrationist approach is also clear from national and international developments, and from the conclusions of the Meeting of Experts. While its formulation in an international

Convention poses a difficult problem, the new orientation should encompass two basic principles:

- respect for the cultures, ways of life and traditional institutions of these peoples; and
- effective involvement of these peoples in decisions that affect them.

While these principles will be explored in more detail below, it may be noted here that they raise problems as to the degree of autonomy which these groups should have. These concerns were discussed extensively by the Meeting of Experts, with contributions from the representatives of indigenous and tribal populations present. The indigenous and tribal representatives felt that the term "self-determination" best expressed their own aspirations, but added that it should not be construed so as to imply, in the context of the revision of Convention No. 107, any form of political independence from the countries in which they live. The experts themselves recognised that this term represented the aspirations of the indigenous and tribal representatives, as expressed by their organisations in a number of meetings and other forums, but felt that because of its connotations the term was inappropriate for an ILO instrument, even though it has been used in other international instruments and by other organisations. This should be kept in mind in the following parts of this section.

BASIC POLICY-MAKING AND ADMINISTRATION: DEVELOPMENTS IN STATES

The 1956 law and practice report gave detailed consideration to the legal and administrative position of indigenous and tribal peoples in a wide range of countries in the Americas, Asia, the Near and Middle East, Africa, Australia and New Zealand. It examined constitutional and special legislative measures, agrarian laws and general legislation which affected them. It also compared the role and functions of "Indian institutes" and similar administrative bodies in different parts of the world, as well as those of certain religious missions that had widespread authority concerning indigenous peoples at that time. It was based in part on the 1953 ILO work entitled *Indigenous peoples* which, together with the 1956 law and practice report, retains much of its validity. The discussion that follows concerns some of the main trends in state policy towards indigenous and tribal populations, illustrated wherever possible with examples from specific countries. It also draws in part on the United Nations Sub-Commission report, which contains considerable information in this respect.

As regards the administration of indigenous and tribal affairs, a basic indicator of the changes in approaches to problems concerning indigenous and tribal populations is the fact that the majority of States which have ratified Convention No. 107, as well as a number of other countries, have now established official bodies for the formulation and administration of indigenous policy. One of the basic principles of Convention No. 107 is that governments shall have the primary responsibility for developing co-ordinated and systematic action on behalf of indigenous and tribal populations (Article 2); Recommendation No. 104 advises that "administrative arrangements should be made, either through government agencies specially created for the purpose or through appropriate co-ordination of the activities of other government agencies" for the administration of indigenous policy (Paragraph 36).

The creation of such an agency, of course, is no guarantee that its subsequent actions will reflect the concerns of the indigenous groups in the country, and in fact many such agencies have been heavily criticised by indigenous and tribal organisations. One measure that may help to ensure that these peoples' concerns are properly reflected is their participation in both formulating and implementing policies affecting them. There are several ways to reach this objective; first, formal procedures can be instituted to ensure regular consultation between the government agency with overall responsibility for indigenous and tribal affairs, and representatives of these groups. Second, the activities of the government agency can be overseen by a consultative body on which indigenous or tribal representatives elected by their own peoples are prominently represented. Third, members of these populations may participate actively as officials of the government agency. Fourth, there can be a minimum number of elected indigenous or tribal representatives at the level of national or regional parliamentary bodies. Fifth, bodies directly concerned with indigenous and tribal questions can be established within the legislative branch of government, or indigenous peoples guaranteed participation in development commissions examining issues which affect their interests. All of these approaches can be found in different countries, though this list by no means exhausts the possible alternatives.

Different approaches by States to indigenous and tribal policy will depend largely on historical factors and the nature of past relations *de jure* and *de facto* between these populations and the government. Some major differences will serve to illustrate this point. In Latin America, for example, distinctions are normally drawn between two categories of indigenous populations. The forest-dwelling Indians represent a very small percentage of the national populations, and until quite recently they have had very limited contact with the national society at large. They are particularly susceptible to disease following initial contact with outsiders, and their lands are also extremely vulnerable to external encroachment since their possession of land rests on traditional occupation alone and has generally not been recognised by the State. The second group of Latin American Indians is comprised of those who have been forcibly integrated within rural society under various forms of serfdom from the early days of European colonisation until the mid-twentieth century, and who more recently constitute the most exploited sector of the rural labour force. They number many millions throughout the hemisphere and represent the majority of the national population in a small number of Latin American countries. Their lands are highly fragmented. Moreover, very many of them have lost all direct access to land as a result of the agrarian transformations of the past few decades; they increasingly form part of the landless rural and urban labour force. This growing landlessness and marginalisation has doubtless contributed to the social conflict that now pervades parts of Central and South America, notably in areas with strong concentrations of indigenous people. Similar, though distinguishable, situations exist in other parts of the world, particularly in Asia. As will be seen below, there are increasing signs in the Americas that States are beginning to recognise the needs and demands of indigenous peoples, in particular when they are organised within an indigenous movement.

In cases where indigenous peoples formerly entered into a treaty relationship

with the colonising power, or where the indigenous peoples have enjoyed a considerable degree of autonomy in determining their lifestyles and the use of their natural resources, the main trend in state approaches to this problem has been different. In the 1970s and 1980s commissions of inquiry in such diverse countries as Australia, Canada and Norway have considered the complex issues of political status, rights to land and other natural resources, the establishment of indigenous councils, and indigenous oversight of development policies and programmes within their natural habitat. Consideration has also been given to important ecological issues. Although most North American, Australasian and European States have not ratified Convention No. 107, some of the recent initiatives taken in these States illustrate new approaches to indigenous participation in development and have major implications for the revision of Convention No. 107.

In Asia the total number of indigenous and tribal populations is very large indeed. In some cases a special legal status created for tribal populations during the colonial era survives in the independent States to this day. However, the *de facto* situation of these populations varies greatly from country to country, reflecting among others the overall approach to development planning in regions they have traditionally inhabited. There are cases where such development has taken place with and through the tribal populations and has clearly worked to their benefit; there are other cases where "internal colonisation" and development programmes have been planned independently of the existence of the traditional populations and without meaningful consultation. This has at times led to severe social conflict in certain Latin American countries.

In the light of these considerations, closer attention should be given to administrative arrangements and procedures for consultation with indigenous and tribal populations.

In Latin America from the 1950s onwards, several States created specialised departments within government ministries with overall responsibility for indigenous affairs. A detailed account of the administrative systems of ten Latin American States that have ratified Convention No. 107 was provided in the *International Labour Review* in 1978.¹ At first, these specialised departments tended to have no special procedures for consulting representatives of indigenous populations, although official or semi-official advisory bodies might be consulted regularly on matters of indigenous policy.² There has been a recent trend towards a more global approach to the planning of indigenous policy, in so far as it may inter-relate and overlap with other aspects of development planning. Several governments have formulated national plans for indigenous policy, in accordance with the provisions of the Inter-American Indian Institute's Five-Year Plan.³

Recent reports provided by Latin American governments to the ILO's Committee of Experts on the Application of Conventions and Recommendations concerning the application of Convention No. 107 have often indicated an awareness of the dangers of paternalism and the need for improved consultation with indigenous peoples. The Government of *Brazil*, for example, has described changes in the structure of the National Indian Foundation (FUNAI). It states that there has been a significant increase in the number of Indians directly employed by FUNAI, including persons in high-level positions, and that more authority is now delegated to the regional units of FUNAI, thus increasing the

participation of Indians in formulating overall policy. Furthermore, amendments to the FUNAI Statute through Decree No. 89420 of 1984 provide for a Council to oversee policy implementation. As this Council appears to be comprised largely of government officials, the Committee of Experts has requested the Government to indicate exactly how the representatives of indigenous peoples and indigenous support groups are consulted on matters of general policy. There have, however, been frequent changes in the leadership of FUNAI in recent years, resulting in some uncertainty over its direction and authority.

Reports by the Governments of *Colombia*, *Costa Rica* and *Panama* have described increased indigenous participation in policy-making and development. As regards *Colombia*, the Government described in 1984 the conclusions and recommendations of the First National Indigenous Congress, which provided indigenous peoples' representatives with a forum in which to express their opposition to certain development approaches that had been followed up to that time. The Colombian Government also reported its adoption of a National Development Programme for Indigenous Populations (PRODEIN), whose administrative structure included a National Indigenous Council composed of delegates from regional and national indigenous organisations. The Government of *Costa Rica* described in 1982 how Integrated Development Associations (ADI) have been created in each of its Indian reserves, with members elected by the community in accordance with traditional practice. Since then, as the Government has reported elsewhere, the 1982-86 National Development Plan has included the "Espíritu Santo Maroto" National Development Plan for Indigenous Communities, drawn up with "full indigenous participation in the search for their own self-determination".⁴ In a 1986 report on the application of Convention No. 107, the Government provided information on a restructuring of the National Commission for Indigenous Affairs (CONAI), and the drafting of a Programme for Ethnodevelopment, which was prepared and implemented with the widespread participation of indigenous leaders. In its 1982 report the Government of *Panama* described consultations with indigenous peoples on general policy issues. For example, a study concerning the bases for a national definition of an indigenous policy was carried out in full consultation with the representatives of indigenous peoples. Furthermore, the Government states that at the request of indigenous peoples it adopted a resolution in 1981 suspending the registration of private titles in areas which had been designated as future Indian reserves.

In both *Argentina* and *Paraguay* important new legislation has been enacted in the 1980s, affecting the status of indigenous communities and providing for new or revised administrative arrangements. In *Argentina*, Act No. 23302 of 1985 provides for policy-making with regard to the indigenous population and support to indigenous communities. Indigenous communities are to be granted separate legal personality and each indigenous community must be specially registered as such. The Act also lays down important new provisions on land adjudication and ownership, on education, which must include teaching in native languages, and on preventive health care. The Act provides for the establishment of the National Institute for Indigenous Affairs, which is to implement the Act and operate with the participation of representatives of the communities concerned. In *Paraguay*, the Indigenous Communities Statute (Act No. 904) was

adopted in 1981; it provides for the recognition of the legal personality of duly registered Indian communities and for the recognition of Indian land rights. It also approves a new statute for the National Indian Institute (INDI), the official agency responsible for the administration of Indian affairs; INDI is to have a consultative board comprised of government officials as well as non-governmental representatives from indigenist, church and other organisations. In the Paraguayan case, however, it should be mentioned that no indigenous organisation is involved directly in the consultative board. (It may be noted that the International Labour Office has been consulted to varying degrees during the planning and implementation of the above-mentioned developments in several of these countries.)

In Asia, Convention No. 107 has been ratified by Bangladesh, India and Pakistan. The Government of *Pakistan* reported to the Committee of Experts in 1985 that the residents of tribal areas have been allowed to manage their internal affairs according to their own customs and traditions. The tribal areas have been accorded special status in the Constitution of Pakistan, and the national legislation is extended to these areas only with the prior consent of the inhabitants. Since the country gained independence in 1947, the Ministry of States and Frontier Regions has been responsible for overall co-ordination of policy matters relating to administration and development activities in tribal areas. For practical purposes, it would appear that the tribal peoples of Pakistan enjoy a very considerable degree of autonomy. The inhabitants of the Federally Administered Tribal Areas, for example, pay no taxes or excise duties, and are not subject to national criminal or civil legislation without the consent of tribal elders. Thus any formal integration within the national society is by negotiation and agreement, with significant power being retained by the tribal authorities themselves. There is a very different arrangement in *India*, where most of the 50 million or so tribals have the status of "Scheduled Tribes" and enjoy special protection incorporated into national and state laws. No separate regions or administrative structures have been created for them, and indeed they have no special rights to the lands they occupy. The administration of tribal affairs is spread out among a number of government entities, but a unique position is held by the Commissioner of Scheduled Castes and Tribes who acts as an ombudsman. In tribal areas of *Bangladesh*, although the Chittagong Hill Tracts area (where most tribals live) has a separate status under the Chittagong Hill Tracts Regulations, 1900, as amended, the tribal peoples enjoy a much smaller degree of local autonomy. At present, all civil authority is vested in the hands of a government-appointed Commissioner, and there are no formal procedures for consultation with tribal authorities. In recent comments, the Committee of Experts has raised a number of questions concerning policy towards the Chittagong Hill Tracts and, among other things, recommended the establishment of an inter-ministerial committee to evaluate the Government's policy towards the tribal populations.⁵

In the *People's Republic of China*, article 6 of Chapter III of the 1982 Constitution contains provisions concerning national minorities and autonomous regions, under which the regional authorities may establish laws and regulations which conform to the political, economic and cultural characteristics of the national minority or minorities living in the region. In 1984 this was further

regulated by an Act concerning the Autonomy of National Minorities. There are five Autonomous Regions and other smaller entities for national minorities. These Autonomous Regions and other areas designated for minorities are governed by Minority Congresses at each level, representatives to which are selected by the minorities in accordance with their traditional political institutions. They have the power to adapt national legislation to the needs and institutions of their inhabitants in such fields as, for example, the languages in which instruction is given. They are also responsible for fostering programmes for the retention of the cultures of these national minorities. There are some 67 million persons in the country who belong to minority nationalities, many of whom come within the coverage of Convention No. 107.

In *Canada*, following the publication of a major White Paper in 1969, there has been a series of policy reviews over the past two decades resulting in a substantially new direction in policy towards indigenous populations. Previous policies had been largely assimilationist and Indians could only make claims through the pertinent government department. But the creation, first of an Indian Claims Commissioner in 1969, and then of an Office of Native Claims in 1974, gave Canadian Indians the opportunity to pursue their claims directly through court action. Over 230 cases had been taken to the Office of Native Claims by the mid-1980s, and such decisions as the James Bay Agreement of 1975 were seen as landmarks in the growing recognition of Indian rights. In 1983, following the "repatriation" of the Constitution, the establishment of a Special Committee on Indian Self-Government facilitated detailed consideration of the implications of autonomy for indigenous peoples,⁶ though a significant number of questions remain unresolved.

In *Norway*, the Government has established a number of official consultative bodies and review committees in which the Sami people participate. For example, a Norwegian Sami Rights Committee has considered a number of legislative and other issues, including a possible constitutional provision on Sami rights and the viability of representative Sami organs chosen by direct election.⁷ The Norwegian Government has also joined with other governments of the region in a joint effort to examine these questions on a common basis.

A different situation altogether is found in Greenland, which has achieved Home Rule in relation to Denmark. The population of Greenland is almost wholly Inuit (or Eskimo), and political control over virtually all domestic affairs was transferred to the Greenland authorities in 1979. As one eminent authority has characterised it, the basic philosophy is "that the population of Greenland does not wish national independence but improved possibilities of strengthening and expanding the identity of Greenland through an independent responsibility".⁸

In *Australia*, the Government has taken many initiatives in recent years to improve consultation with the Aboriginal population, and to provide guarantees for Aboriginal participation in policy decisions through Commissions designed for that purpose. In August 1985 a representative of the Government of Australia made a statement to the United Nations Working Group on Indigenous Populations concerning "Self-determination and the National Aboriginal Conference". He stated that the Australian Government's policy of Aboriginal self-management called for "the development of an effective process of

consultation with Aboriginal people, at both the national and community levels", so that the Aboriginal people might assert control of all aspects of their lives. He noted that the Australian Government provided funds for a large number of Aboriginal organisations managed by Aboriginals which provide services and programmes for the Aboriginal community. For example, the Aboriginal Development Commission with an all-Aboriginal board of ten members was established in 1980 to further the economic and social development of Aboriginal and Torres Strait Island people and, in particular, assist them towards self-management and self-sufficiency. He noted, furthermore, that the former National Aboriginal Commission (NAC) had been terminated in 1985 following a report that "there was almost unanimous agreement by Aboriginals that the NAC in its present form was ineffective as an instrument of Aboriginal political influence or action", and that steps had been taken to establish a new national consultative organisation.

Furthermore, the Government of Australia has recently adopted a detailed *Report of the Committee of Review of Aboriginal Employment and Training Programs* (August 1985). The report is critical of the former National Employment Strategy for Aboriginals (NESA) introduced in 1977, and recommends fundamental changes in federal labour market policies directed at Aboriginal people. Among other things, the report stresses its concern with local level control of community economic development by Aboriginal people, and emphasises that future employment initiatives must seek to improve the opportunities for productive employment in the areas traditionally inhabited by Aboriginals.⁹

As regards the African continent, the Office has little recent information about special administrative arrangements or agencies concerned with specific disadvantaged indigenous or tribal groups. Ongoing ILO research and technical assistance projects in the Sahel region will in time produce more specific information on recent developments in government activities on behalf of nomadic populations. There remain large numbers of such nomadic peoples in several countries of the Sahel as well as farther south in Africa, in spite of recent government programmes for their settlement or "sedentarisation". While *Egypt* and *Tunisia*, both of which have ratified Convention No. 107, have reported that their nomadic populations are fully sedentarised, nomadic populations still survive in many parts of this region. For Sub-Saharan Africa, mention should be made of *Botswana*. In 1974 a Bushman Development Office was established in the Ministry of Local Government and Lands, at first concerned specifically with the problems of the Basarwa people. The Bushman Development Officer was instructed to identify what the special needs of the Basarwa, with a view to planning development projects. While the Basarwa Development Programme focused originally on Basarwa citizens alone, it eventually expanded its focus and in 1977 became the Remote Areas Development Programme.¹⁰

Nomadic populations are also found in the Middle East. The *Syrian Arab Republic*, which has ratified the Convention, reported that most of its Bedouin populations have been fully sedentarised, and that the General Directorate for Tribal Affairs was abolished some time ago. Some of these populations remain nomadic, however, and the Government envisages further measures to encourage them to settle. It maintains special schools for the Bedouins, including both fixed

and mobile installations. *Iraq* has recently ratified Convention No. 107, but no information has yet been received on measures the Government may have taken.

It should be noted that the foregoing review of national measures concerning indigenous and tribal populations is not exhaustive. Furthermore, not all of these measures are in entire accord with Convention No. 107 or with the suggestions contained in the present report; none the less, they do reflect the concern of governments which have taken specific action.

There are, however, a number of countries which, to the Office's knowledge, have not given serious consideration to the situation of the indigenous and tribal peoples living inside their territory. This refers primarily to countries in Africa – where as already noted it is often difficult to determine which groups should be given special treatment – and in Asia and the Pacific, but also to several countries in Latin America. Included in this group are a number of countries which once had legislation or other measures dealing with these population groups, which has fallen into disuse or been repealed, and others where no such measures have ever been taken.

In these countries there is often a feeling – sometimes expressed in the reports of countries that have ratified Convention No. 107 – that the principle of equality before the law to which they subscribe, obviates the need for special protective measures for these groups. It is not necessary to explore this in great detail here, especially as the Committee of Experts has dealt with this question on a number of occasions (in particular under Convention No. 107 and under the Discrimination (Employment and Occupation) Convention, 1958 (No. 111)), and has consistently said that the need for special measures to protect particularly vulnerable groups implies neither that the national legislation contains impermissible discriminatory language, nor that the rest of the national population will suffer as a result of such measures.

A more serious problem concerns ethnic conflicts within a country, often between a “dominant” national population, and another, less integrated or less economically developed group. In some countries with a high population density, the dominant ethnic group has spread into areas inhabited by indigenous and tribal peoples who sometimes live in extremely primitive conditions and have had little contact with the outside world. This occasionally leads to racial and ethnic conflicts, violence, and even actions amounting to genocide. Governments in these countries may find it very difficult to regulate such “internal colonisation” and to control conflicts, but there are also cases in which the governments concerned appear to be promoting the forced integration, or even elimination, of other ethnic groups. In other cases, governments have simply been unable to undertake the often difficult task of establishing an acceptable policy for these groups.

Another problem which arises with relative frequency is that indigenous and tribal populations are caught in the middle of conflicts which do not concern them directly. They may be forced – sometimes by both parties – to choose sides. It is apparent that this is not the kind of problem that can be resolved by an international Convention, although previous attention to the rights and protection which these groups should enjoy may help them avoid being embroiled in such conflicts.

Most common are situations in which governments cannot or do not intervene in situations in which indigenous and tribal populations are being exploited by others. This may occur when the lands they occupy are taken from them by local landowners or commercial undertakings, or when they are being recruited under exploitative conditions to work far from their homes. It may be that major development projects are under way, and it is more expedient to ignore the presence of isolated tribal groups than to settle their claims. In such cases, if prior consideration has been given to the kinds of rights that such peoples should enjoy, and if mechanisms for dealing with their claims have been established, fair treatment need not impede the accomplishment of other government priorities.

This much said, it is not the purpose of the present report to point out cases where the rights of these groups have been ignored or abused. There are a great many such cases, and they occur in countries around the world. The International Labour Office, the United Nations Centre for Human Rights and other international organisations receive allegations of exploitation, violence, killings, and even of genocide, almost daily. Many cannot be dealt with for lack of verifiable corroboration, or for lack of jurisdiction. There is, however, no doubt that in countries which have given attention to the situation of the indigenous and tribal peoples within their borders, the possibilities of abuse are lessened, and the country is able to benefit from the ethnic diversity and cultural richness which their presence, alongside that of the dominant national population, can provide.

ORIENTATION OF THE INSTRUMENT: BASIC PRINCIPLES

As noted in the introduction to this chapter and elsewhere in this report, Convention No. 107 has been found by many commentators among academic writers, other international organisations and representatives of indigenous and tribal peoples, in particular, to reflect an integrationist approach which urgently needs to be modified. The first three conclusions adopted by the Meeting of Experts convened to advise the Governing Body on this subject read as follows:

1. The Convention's integrationist approach is inadequate and no longer reflects current thinking.
2. Indigenous and tribal peoples should enjoy as much control as possible over their own economic, social and cultural development.
3. The right of these peoples to interact with the national society on an equal footing through their own institutions should be recognised.

In the opinion of the Meeting of Experts, the integrationist approach of the Convention manifested itself in two fundamental ways. In the first place, the 1957 Convention assumed that all government programmes should, for the ultimate benefit of the groups covered by the Convention, be directed toward their integration into national society. Safeguards were provided, as in Article 2, paragraph 4: "Recourse to force or coercion as a means of promoting the integration of these populations into the national community shall be excluded." This, however, is merely a restriction on the kinds of measures to be used, and does not change the basic orientation of the instrument, best expressed in Article 2, paragraph 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.*” (emphasis added)

The second aspect of the integrationist approach of the Convention is an inherent assumption of the cultural inferiority of the groups covered by the instrument. This, of course, is the justification of the basic impulse towards integration. An example of this assumption is found in Article 3, paragraph 1, of Convention No. 107:

“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.” (emphasis added)

A number of similar references are found in the Convention, implying a lower stage, or degree, of cultural development of the populations covered.

This approach can also be characterised as “paternalistic”, with benevolent as well as harmful aspects. It is benevolent in its adoption of a protective attitude toward weaker elements of society – which the Meeting of Experts insisted should be maintained, as will be indicated below. It is harmful, however, in the sense that it assumes that governments can and should take measures for the benefit of these groups regardless of their wishes, since they are presumed to be incapable of expressing a valid opinion.

These remarks should not be construed as an implication that the International Labour Conference, or the other organisations collaborating in the adoption of Convention No. 107, were acting in bad faith. The presumption that indigenous and tribal groups were incapable of speaking for themselves was reasonable in 1957, at least as regards most parts of the world. Even today, there are many isolated forest-dwelling or nomadic tribal populations who do not have the necessary experience in dealing with the complexities of the modern world. There are many millions of tribal peoples suffering from powerlessness in the countries where they live, who are being exploited for their labour and who are losing their lands because they do not have the necessary skills to protect themselves. One of the reasons for revising Convention No. 107 is precisely that the position of many of these groups is becoming more precarious, and indeed many such groups have disappeared since Convention No. 107 was adopted.

On the other hand, there are both new facts and new attitudes which must now be taken into account. Foremost among the new facts is the ongoing organisation of indigenous and tribal peoples on the local, national, regional and international levels, especially evident in the past decade. Such organisations are becoming highly developed in the Americas, in the Pacific and in the Nordic countries, and rapidly acquiring skills to provide practical and legal assistance for those they represent. By contrast, the level of development of such organisations throughout many parts of Asia is very uneven, while little is known of any such organisations in Africa. It is expected, however, that the development of indigenous and tribal organisations will intensify in years to come, and spread to all regions of the world. In some countries they have already become, or are becoming, significant political forces.

The change in attitudes is in many ways even more profound. Mention has already been made of the change of attitude toward the "top down" development model which prevailed during the early years of the United Nations system, when governments and intergovernmental organisations felt that it was necessary to centralise all development decisions, and that the wishes of those affected were at best irrelevant. It has now become evident that such an approach is simply unworkable, and that development cannot succeed unless there is a broadly based participatory approach to both planning and implementation. This does not mean that global approaches should be abandoned, but that the involvement of all those concerned, starting from the local level, greatly augments the chances of success, even when those being consulted are seen by their governments as unsophisticated in the context of the wider society. This is, of course, one of the philosophical bases for the decolonisation movement which began in the early 1960s.

In commenting on the draft of the present report, UNESCO noted that it was not wise to rely on a single policy of integrationism or non-integrationism. Some indigenous peoples prefer one approach, and some the other, while the greater part prefer integration and equality in the public domain (work, education, etc.), and non-integration in the private domain (cultural rights, religious rights, certain language rights, etc.). What is needed is a number of possible models, all of which involve the principles of equality and of participation in decisions affecting the community.

Against this background, it is necessary to examine the approach of a revised Convention and the practical implications for the text. These questions are covered in paragraphs 36 to 60 of the report of the Meeting of Experts, extracts of which are appended to the present report under Appendix I.

Before going further, reference should be made to paragraph 39 of the experts' report, which states that most of the experts considered that the revision proposed should be based on the existing Convention. This view was endorsed by the Governing Body when discussing the inclusion of this question on the agenda of the Conference as the "*partial* revision" of Convention No. 107. The question of revising the basic orientation of the Convention implies that the Conference must decide whether or not such a change in orientation is necessary, and if so, define its conceptual foundation. Such a revision would require the modification of a number of provisions, largely through simple editing to reflect the new orientation.

Degree of control over the decision-making process

As noted above and examined in detail in the report of the Meeting of Experts, although the indigenous and tribal representatives present voiced a preference for the concept of "self-determination" as the basic orientation of the revised instrument, the experts did not agree that this phrase should appear in its operative part (paragraphs 50 to 52 of the report of the Meeting of Experts). There was, however, some support for the idea that a reference might be made to this concept in the Preamble to the revised Convention, which will be examined at a later stage by the Conference. All of the experts agree that the principle expressed in Conclusion 2 should be incorporated: that these peoples "should

enjoy *as much control as possible* over their own economic, social and cultural development”.

It is evident that the granting of “as much control as possible” will vary considerably among different member States and among different indigenous and tribal groups. As is the case in many other international labour Conventions, a degree of flexibility is essential in consideration of the wide variety of national situations. In analysing the question of control, the Meeting of Experts first considered whether the revised Convention should recognise the basic principles of increased consultation of indigenous and tribal peoples and their participation in decision-making (see paragraph 49 of the report). It was noted, however, that such obligations on ratifying States “could quickly be perverted – as they often had been – to mean *pro forma* consultations in which no real account was taken of the views expressed and of the true needs of the people being affected”. On the other hand, granting a higher degree of decision-making power to groups within the national population could result in the establishment of a “State within a State”. Reference has already been made in the first section of this chapter to cases in which governments have even incorporated the phrases “self-determination” or “autonomy” into national legislation or basic policy documents, without creating any implication of a right to secede or of political separation. In balancing these arguments, a consensus emerged which is reflected in paragraph 58 of the experts’ report and in Conclusion 2:

Indigenous and tribal peoples should have the right, reinforced by procedural mechanisms, to play an effective participatory role in the planning and implementation of development programmes affecting them ... [They should not] have absolute control and the right of ultimate decision.

In examining this aspect of the report of the Meeting of Experts, participants in the Conference discussion should keep in mind that it does not reflect the highest aspirations of the indigenous and tribal peoples. It would, however, constitute a considerable advance over the assumption of cultural inferiority and the integrationist approach inherent in Convention No. 107. Issues of self-determination, and the exact definition of the meaning of this term, must be left to the highest political organs of the United Nations and cannot be debated in the ILO. In drafting the proposals in the present report, the Office has proceeded on the assumption that a revised Convention must recognise:

- (a) that indigenous and tribal peoples have a right to participate in the decision-making process in the countries in which they live for all issues covered by the revised Convention and which affect them directly;
- (b) that this right of participation should be an effective one, offering them an opportunity to be heard and to have an impact on the decisions taken;
- (c) that in order for this right to be effective it must be backed up by appropriate procedural mechanisms to be established at the national level in accordance with national conditions; and
- (d) that the implementation of this right should be adapted to the situation of the indigenous and tribal peoples concerned in order to grant them as much control as is possible in each case over their own economic, social and cultural development.

The Office considers that, if the above-mentioned principles are accepted as the basis for revising the orientation of the Convention, it will not be necessary to attempt a more precise definition.

Terminology

Convention No. 107 refers in its title and in a number of its Articles to indigenous and tribal *populations*. During the Meeting of Experts, the indigenous participants and a number of the experts considered that the Convention should be amended to refer to indigenous and tribal *peoples* (see paragraphs 30 to 32 of the report). The indigenous representatives stated that the term "peoples" indicated that these groups had an identity of their own, and better reflected the view they had of themselves, while "populations" implied merely a grouping. They also noted that several countries already used the term in internal legislation, and that its use had become accepted in discussions in the United Nations and other international forums.

On the other hand, as the report of the Meeting of Experts noted in paragraph 31:

Others felt that it was precisely because of the implications of the term that its use in a revised Convention raised difficult questions. They respected the wishes of the indigenous and tribal representatives to be referred to as peoples, but felt that to incorporate such a term in an ILO Convention might imply a degree of recognition to these groups which went beyond the ILO's competence and was in conflict with the practices in a large number of countries which might otherwise be able to ratify the Convention. On the other hand, they agreed that it was a legitimate point which should be carefully considered by the Conference in revising the instrument.

In ILO practice the terms have been used interchangeably in the past. The 1953 publication *Indigenous peoples: Living and working conditions of aboriginal populations in independent countries* used both terms in its English and Spanish titles, though the French version used "populations" in both parts of the title. In the United Nations, the recently completed major study by the Sub-Commission on Prevention of Discrimination and Protection of Minorities is entitled *Study of the problem of discrimination against indigenous populations*, and the name of the United Nations Sub-Commission Working Group on this question is the "Working Group on Indigenous Populations". On the other hand, most United Nations documentation and the Working Group itself in its documentation, often use the term "peoples". The Special Rapporteur appointed by the Sub-Commission to carry out the above-mentioned study expressed a preference for the term "peoples", and this is current usage also in other international forums.

The concern of those who do not wish to use the term "peoples" is that it will imply recognition of a right to a degree of political autonomy which is unacceptable to many States. The Office considers that this implication can be avoided, if the Conference discussion makes it clear that the term is used to recognise that these groups have an identity of their own and consider themselves to be peoples, but that the implications of the term within the national context of ratifying States must be determined at the national level. Thus, in the present report the Office has followed the example of the Meeting of Experts in using the term "peoples", and proposes its use in a revised Convention.

EXAMINATION OF INDIVIDUAL ARTICLES OF THE CONVENTION

As already stated, the principle of integrationism and the presumed cultural inferiority of indigenous and tribal peoples are reflected in most Articles of the Convention. The Meeting of Experts and the Governing Body have recommended that there should be no substantive revision of most of the provisions of the Convention – with the exception of those concerning land rights and labour – apart from modifying their orientation. In some cases this will require only small changes in the wording, while in others somewhat more extensive changes will be necessary. This recommendation is followed throughout the remainder of this chapter in examining each of the Articles of the Convention.

Article 1

Article 1 of Convention No. 107 defines the coverage of the instrument. It should be revised in order to remove the inherent assumption of the cultural inferiority of indigenous and tribal peoples, as outlined below. It may also be appropriate to amend it further in order to delete the notion that these groups must necessarily become integrated into the national society.

Coverage

This Article applies to “indigenous” as well as “tribal” populations in independent countries, and the Meeting of Experts concluded (see paragraphs 33 to 35 of its report) that this should not be modified. It may be noted that several countries that have tribal populations which are not considered as indigenous have ratified Convention No. 107; attempts to analyse the historical precedence of different parts of the national populations would detract from the need to protect vulnerable groups which in all other respects share many common characteristics, wherever they are found. While recent discussions in the United Nations Sub-Commission do not follow this example (see paragraph 89 of the report of the Meeting of Experts), there is no element of conflict with the draft working definition offered by the United Nations Special Rapporteur on this question, as the definition in Convention No. 107 simply allows for a wider coverage with a view to including all groups similarly situated.

Cultural inferiority

Paragraph 1 of this Article contains two subparagraphs, both of which include presumptions of the cultural inferiority of indigenous and tribal peoples. Subparagraph (a) refers to populations “whose social and economic conditions are at a less advanced stage than the stage reached by other sections of the national community”. Subparagraph (b) speaks of populations regarded as indigenous because of their descent from populations present at the time of conquest or colonisation, which “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.”

Both of the phrases quoted above imply a lack of cultural development of indigenous or tribal peoples, and indeed, their cultural inferiority. Many such groups, however, have an unbroken cultural tradition and highly developed social structures which pre-date the cultures and institutions of the dominant societies of the countries in which they live. Others, of course, have much less well developed institutions and can be considered as “primitive” cultures, though this is a difficult concept to define since modern anthropological research has shown that many such cultures are extremely complex. Others still are descended from highly developed cultures but have lost many of the characteristics of these cultures. This last category covers groups that were the dominant populations in their territories before colonisation but which are now in a culturally disadvantaged situation.

The assumption that the groups covered are culturally inferior and should be given the opportunity to benefit from the advantages offered them by superior cultures, should be deleted from the Convention. At the same time, it should remain clear that the revised instrument refers to groups that are marginal to the dominant societies, that have certain characteristics which distinguish them from these societies, and that are in need of special protection.

The question then arises of how to redraft this provision. Three basic ideas need to be included in paragraph 1 of Article 1. The first is that the groups covered may be indigenous in the anthropological sense of the term – i.e. that their ancestors occupied the area “at the time of conquest or colonisation”, as Article 1 (b) of Convention No. 107 provides. The second is that they may be tribal, which is to say that they may share all of the characteristics of indigenous peoples except for the descent from groups that inhabited the area before conquest or colonisation. The third concept is that these groups retain their own traditional social, economic, cultural and political institutions, without, however, characterising these institutions as less developed or primitive.

Other problems

The wording of paragraph 2 of this Article also raises problems owing to the integrationist approach of the Convention. It applies the term “semi-tribal”, used in the title and elsewhere in Article 1, to “groups and persons who, although they are in the process of losing their tribal characteristics, are not yet integrated into the national community”.

There are two problems with this paragraph. The first is that it assumes a process (“not yet integrated”) whereby these groups will inevitably lose their tribal characteristics and be fully integrated into the national community. If the basic argument made above concerning the integrationist approach of the Convention is accepted, this assumption should be removed.

The second problem is the term “semi-tribal”. The intention is clear: the Convention’s applicability should not be subject to calculations of the degree to which the indigenous or tribal groups concerned retain their traditional characteristics. The approach which has always been taken by the Committee of Experts, in the light of this provision and the flexibility required by Article 28, is that the Convention is applicable in different ways depending on the extent to which the groups covered still require protection.

In the light of these considerations, this Article might be revised in the following ways.

First, all occurrences of the term “semi-tribal” should be deleted; the idea contained in paragraph 2 of this Article should be incorporated in the body of paragraph 1.

Second, paragraph 1 (*a*) of Article 1 should be redrafted to refer to peoples in independent countries whose social and economic conditions distinguish them from other sectors of the community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws and regulations.

Third, paragraph 1 (*b*) of Article 1 should be redrafted to refer to 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 and which, irrespective of their legal status, retain some or all of their traditional social, economic, cultural and political institutions.

Lastly, paragraph 3 of this Article, which would become paragraph 2, would state that the indigenous and other tribal peoples mentioned in paragraph 1 of this Article are referred to in the remainder of the Convention as “the peoples concerned”.

Article 2

Article 2 is the fundamental policy provision of Convention No. 107; it is the Article most frequently criticised for its integrationist approach. In considering the orientation of the revised Convention, and in the light of earlier discussions on the basic principles of respect and consultation, the Meeting of Experts suggested combining Articles 2 and 5 of the Convention into one provision containing these two fundamental policy points (see in particular paragraphs 54 to 60 of the report of the Meeting of Experts). While the experts did not recommend any specific wording, the Office considers the basic idea appropriate for revising the Convention’s basic orientation.

In combining the basic principles of respect for these peoples, protection where needed, and effective participation in making decisions on matters which affect them, the basic obligation of governments might be defined as exercising primary responsibility for developing co-ordinated and systematic action, in co-operation with the peoples concerned, to ensure both their protection and their participation in the life of their respective countries, with full respect for their social and cultural identity.

This Article might then go on to provide, as does the present Article 2, for the kinds of measures which governments should take. These should, of course, be stated in rather general terms in order to apply to a wide variety of circumstances. The Office considers that subparagraph (*a*) of paragraph 2 retains its applicability. Paragraph 2 might go on to provide for measures to ensure that the economic and social rights, and the cultural, political, social and religious institutions of these peoples are recognised and protected (see paragraph (*b*) of the draft suggested during the Meeting of Experts, paragraph 54 of its report). It might then provide for measures for raising the standard of living of the peoples concerned (see Article 2, paragraph 2 (*b*), of Convention No. 107), but without implying, as does the present Article 2, that they are in need of social or cultural development.

The basic principle of consultation, contained in a weaker form in Article 5 of Convention No. 107, should be included in the Article that sets forth the basic orientation for governments' actions. Taking into account what has been said above, as well as the discussions of the Meeting of Experts, this Article might provide that governments should, whenever possible, undertake consultations with the peoples concerned, or with their representatives, whenever consideration is being given to measures or programmes which may affect them. It will also appear from what has been said above that such consultations should be carried out in such a way as to provide these peoples with an effective voice in the process of reaching decisions that affect them.

It would, of course, be necessary to retain one of the strongest protections offered in the present Convention, which is found in Article 2, paragraph 4.

Article 3

There would appear to be no need for any amendment to this Article other than the deletion of the introductory phrase of its first paragraph, which implies a condition of cultural inferiority. Thus, paragraph 1 of Article 3 might begin with "Special measures . . ." and continue with its present wording.

Article 4

In this case as well, only minor editing seems to be called for to eliminate integrationist overtones. The introductory phrase of this Article limits the specified protection to actions relating to the integration of the populations concerned, and would appear unnecessary; it might simply be deleted.

Another phrase which presumes the cultural inferiority of these peoples is found in the middle of subparagraph (b). It would appear advisable to delete "unless they can be replaced by appropriate substitutes which the groups concerned are willing to accept".

Finally, subparagraph (c) of Article 4 presumes that indigenous and tribal peoples will, as a matter of course, have to adjust themselves to new conditions of life and work. The presumption may be removed by adding a proviso such as "whenever such adjustments take place".

Article 5

As indicated above, the part of Article 5 which relates to consultation with the indigenous and tribal peoples might be incorporated into Article 2. Subparagraphs (b) and (c) of Article 5, according to the indigenous representatives present at the Meeting of Experts, carry implications of cultural inferiority and might be deleted, but consideration might be given to moving part of the concept contained in Article 5 (c) to Article 7. If the provision on consultation is moved from subparagraph (a) of Article 5 to a revised Article 2, the other two subparagraphs need not be retained in view of their questionable orientation. If this suggestion is accepted, the present Article 5 would be deleted from a revised Convention.

Article 6

During the Meeting of Experts frequent mention was made of this Article, which was considered to be of fundamental importance because of the emphasis it places on the economic development of areas inhabited by these peoples. None of the participants found it to be in need of revision in itself, but it was felt that some additional reinforcement of the principle of consultation might be appropriate here.

This concern might be met by making the present text of Article 6 the first paragraph of an expanded Article; a second paragraph might then provide that the peoples concerned should be involved at all stages in the formulation and implementation of development plans, and should enjoy as much control as possible over their own economic, social and cultural development. The first part of this sentence would specifically call for the application of the principle expressed in general terms under the proposed Article 2 above to the development process, while the second part would correspond to the suggestion made in Conclusion 2 of the Meeting of Experts, which was discussed earlier in this chapter under the heading "Degree of control over the decision-making process".

Another suggestion made during the Meeting of Experts was that a revised Convention might provide for social and environmental studies to be carried out to assess the possible impact of planned development projects on the indigenous and tribal peoples affected by them. It was noted that this is already the practice in a number of countries, and is required by some international development assistance agencies in respect of projects which they finance or execute. It may be noted that requiring such studies would enhance the value of consultations with these peoples, by promoting a factual assessment of the concerns of all parties to the discussions. It would also respond to a frequent concern of the Committee of Experts on the Application of Conventions and Recommendations, which has found that some governments take the position that any economic development, whatever its impact on the indigenous or tribal inhabitants of an area, meets the requirements of Article 6 of Convention No. 107. If a requirement for "impact studies" were to be inserted in a revised Convention, this would appear to be the most logical place for it. This requirement would, of course, be subject to the proposed requirement for the involvement of these peoples in all stages of development.

Article 7

The relationship between the customary laws of indigenous and tribal peoples and the laws of the country in which they live, was discussed at some length by the Meeting of Experts (see paragraphs 96 to 98 of the experts' report). While some of the concerns expressed might be met by greater attention to the requirements of this Article in the present Convention by the Committee of Experts, there are some small adjustments which might be made to the present text.

Paragraphs 1 and 3 of Article 7 appear to require no changes.

The second half of paragraph 2 contains one of the most heavily criticised aspects of the integrationist and patronising approach of Convention No. 107;

the paragraph could be amended by deleting the rest of the text after "institutions". In order to deal with the issue of conflicts between customary and national law, the deleted portion could be replaced by a requirement that, where necessary, procedures should be established to resolve conflicts between customary and national law. Such procedures, sometimes based on extensive studies of the customary laws concerned, already exist in a number of countries. For instance, a detailed study of this sort has recently been completed by the Law Reform Commission of Australia, and particular attention has been paid to conflicts between customary tribal law and written law in southern Africa.

Article 8

The introductory phrase of this Article is among those which imply that the culture of indigenous and tribal peoples is inferior; this phrase might simply be deleted. If so, each of the two subparagraphs could remain in its present form as a complete sentence.

Article 9

This Article appears to require no revision.

It should be noted that the suggestions made below under recruitment and conditions of employment (Article 15) would overlap the present Article to a certain extent. The two provisions, however, are meant to deal with somewhat different situations. The present Article refers to situations of slavery and similar practices, which are still current in some parts of the world, especially in regard to indigenous and tribal peoples. The provisions on recruitment and conditions of employment, on the other hand, deal with employment relationships exclusively. It appears important to leave the present Article in the "General policy" part of the revised Convention as a general principle, with the more specific provisions in a later part of the instrument.

Article 10

As concerns the first paragraph of this Article, a general feeling was expressed during the Meeting of Experts that there was no reason to emphasise preventive detention, and that the provision might be reworded to require protection against the abuse of the fundamental freedoms of members of these peoples and the right to take legal proceedings for the effective protection of these rights.

The second paragraph is among those that speak of the degree of cultural development of these peoples, and it might be redrafted to require account to be taken of their culture.

The third paragraph appears to require no revision.

Articles 11 to 15

The Articles on land rights (Articles 11 to 14) and on recruitment and conditions of employment (Article 15) are dealt with in another section of this report.

Article 16

This Article appears to require no revision.

Article 17

The first paragraph of this Article appears to require no revision.

The second paragraph contains patronising language referring to the “stage of cultural development” of these peoples, and to the “occupations for which these populations have traditionally shown aptitude”. It might be revised to state that the special training facilities created under the first paragraph should be based on a careful study of the economic environment, the social and cultural conditions and the practical needs of the peoples concerned.

The third paragraph of this Article is also extremely patronising. The concern it expresses would be covered by the more general expression of the temporary nature of special measures already provided for under Article 3, paragraph 2 (*b*), of Convention No. 107, for which no changes have been proposed. It should therefore be possible simply to delete this paragraph.

Article 18

This Article is another of those which contain patronising language. This could be corrected in the first paragraph by simply deleting the second half of the sentence, beginning with “in a manner”.

The part of the first paragraph which concerns methods of production and marketing is valuable, however. In addition, the Meeting of Experts discussed the value of retaining traditional knowledge and technologies, and the need in many cases to provide technical assistance to indigenous and tribal peoples so that they can take advantage of opportunities available to the rest of the national population. The second paragraph of this Article might thus be revised to require the provision of technical assistance for the development of handicrafts and rural industries, where appropriate, taking into account traditional technologies and the cultural heritage of these peoples. It could go on to require the provision of this technical assistance in order to enable these peoples to raise their standard of living and to familiarise themselves with alternative methods of production and marketing.

Article 19

It was noted during the Meeting of Experts that this Article was not very clear. Indeed, the Committee of Experts has not often made reference to it. For the sake of clarity, it may be advisable to revise the Article to require simply that social security schemes be extended progressively, wherever practicable, to cover the peoples concerned.

Article 20

The provision of health services to indigenous and tribal peoples is an extremely important aspect of the measures taken for their protection and

development. While it is dealt with in only one Article of Convention No. 107, this one Article has been the focus of a number of comments by the Committee of Experts and of a fruitful exchange of information and advice between the ILO and the World Health Organisation. The WHO has called particular attention to the need to focus on primary health care and the training of community members in providing health care to indigenous and tribal peoples. It has also recalled the need to ensure that there is co-ordination between health care and other sectors providing development assistance, and has noted that one of the fundamental problems that has emerged where international development support is concerned, at both the community and national levels, is the missing management link at the intermediate or "district" level. It states that it is presently laying considerable emphasis on co-operation at this level to build up district health systems based on primary health care. Finally, it has called attention to the particular health problems encountered by indigenous and tribal peoples when they migrate to the cities.

While the health question is of the greatest importance, primary reliance must be placed on practical measures closely adapted to the situation in each country. Thus, very little amendment is suggested to Article 20 of Convention No. 107. The first and third paragraphs of this Article appear to require no revision. The second paragraph, however, might benefit from the addition of two concepts which were discussed in the Meeting of Experts. The first would be that health services provided by governments should be planned and administered, where possible, with the co-operation of the peoples concerned. This is consistent with other recommendations made in the present report.

The second addition, which was suggested during the Meeting of Experts by the representative of the World Health Organisation, and endorsed by a number of indigenous observers present, was a reference to traditional healing practices. As was stated, these practices are often more effective than is generally realised, and much may be learned from them. In the context of the partial revision of Convention No. 107, the addition of a reference to such practices would be in accordance with the general approach of treating with respect the cultures and traditions of these peoples. The second paragraph of this Article might thus be supplemented by a requirement that in the provision of health services for these peoples, account be taken of their traditional healing practices.

Article 21

This Article appears to require no revision.

Article 22

The first paragraph of this Article is one of those which refer to the stage of development of these peoples and implies the inferiority of their cultures. It might therefore be modified to require the adaptation of educational programmes to the special needs of these peoples, taking into account in particular their cultural characteristics. The latter aspect plays a vital role in assisting disadvantaged peoples to preserve or to rebuild their cultural identity, and thus should be reflected in an instrument which is based on respect for their cultures.

For the same reason, it may be desirable to delete the phrase “as regards methods and techniques”, since it appears to restrict the adaptation of education programmes only to methods of education, to the exclusion of the adaptation of their contents.

The second paragraph of this Article might be supplemented by a phrase requiring that the formulation of education programmes be carried out in full consultation with the peoples concerned and be preceded by ethnological surveys. This would form an integrated approach, when taken together with the first paragraph of this Article, to the formulation of education programmes for indigenous and tribal peoples, which would take into account their needs as perceived both by the national education authorities, and by themselves.

Article 23

It may be noted that initial teaching in the mother tongue of the peoples concerned, as provided in this Article, is considered by UNESCO to be the most effective method of introduction to formal education. In supervising the application of Convention No. 107, the Committee of Experts has noted that in some ratifying countries measures have been taken to provide instruction in the mother tongue, with progressive transition to the national language.

It cannot be said, however, that the practice required by Article 23 of Convention No. 107 has been widely followed, even by ratifying countries. As outlined in the United Nations *Study of the problem of discrimination against indigenous populations*,¹¹ actual practice varies widely. While several countries provide in their legislation, or even in their Constitutions, for instruction to be given in the languages of national minorities, the principle is rarely applied to all linguistic groups in the country. In some countries this has not proved feasible for all indigenous and tribal groups because of the large number of different languages spoken by various parts of the national population (in India, for example, there are literally hundreds of different tribal and other languages in use). In some such cases, an effort has been made to prepare instructional materials in the more widely used indigenous languages in an effort to extend educational programmes in their own languages progressively to all parts of the national population. In most countries, however, even where the principle has been enshrined in national legislation, it is not applied in practice, or is applied only to a few linguistic groups.

In some countries there is a lively debate about whether any national minority should be provided with education in its own language, and if so how the transition should be made to the national language. Most countries that have linguistic minorities consider, however, that where it is feasible at least initial instruction should be provided in these languages. In supervising the application of the Convention in ratifying countries, the Committee of Experts has recognised the practical difficulties involved, while continuing to urge action whenever possible. Thus the principles contained in this Article remain consistent with the position of most governments, even where it is not practicable to apply them immediately.

In the course of consultations on the present report, UNESCO stated that there was no reason to restrict the application of this Article to children. While no

suggestion for amendment is being made in this connection, it might be kept in mind by governments.

In the light of these considerations, it does not appear that the first or third paragraphs of Article 23 require amendment.

As concerns the second paragraph, the only modification which might be made would be to provide for a transition from the mother tongue or the vernacular language, to equal fluency in the national language, rather than simply to leave behind the mother tongue as the present drafting would imply. Such a change in the text would reflect the more general approach of respect for indigenous cultures, of which language is obviously an integral part.

Article 24

This Article is purely oriented towards the integration of indigenous and tribal peoples into the national community, and it might simply be omitted from the revised Convention.

Article 25

This Article appears to require no revision.

Article 26

This Article appears to require no revision.

Article 27

As concerns the first paragraph of this Article, the Committee of Experts has noted in supervising the application of the Convention that the creation of a single agency or office to deal with all matters concerning indigenous and tribal populations may not be the most effective way of handling such questions. While this paragraph does not necessarily limit the requirement to a single agency for this purpose, such is the apparent implication. A number of indigenous organisations have also expressed the opinion that the creation of these agencies has sometimes proved an impediment to the protection and promotion of the rights of these peoples. The reason is essentially that this may relegate indigenous affairs to an agency of little power and importance, and lead to the assumption that once such an agency is created there is no further need for other organs of the government to consider the situation of these peoples.

On the other hand, it is clearly necessary to have some kind of administrative body with responsibility for co-ordinating, if not for executing, all activities relating to indigenous and tribal peoples. If no such body exists, the opposite problem may arise: that no one has responsibility in this area, leaving indigenous and tribal groups in the country with no effective access to government and with no machinery for their protection.

For these reasons, it is suggested that the first paragraph of Article 27 might be amended by adding a reference to other appropriate mechanisms after the word "agencies". This would provide for somewhat greater flexibility in the exact means of applying this provision, while retaining its basic requirement.

In the second paragraph, it may be appropriate to revise the reference to “social, economic and cultural development” in subparagraph (a), which is inconsistent with the general approach recommended in this report. This might be replaced by a requirement that government programmes for indigenous and tribal peoples should be planned, co-ordinated and executed in co-operation with the peoples concerned. The other two subparagraphs of this paragraph do not appear to require any revision.

Article 28

This Article provides that the nature and scope of measures to be taken to give effect to Convention No. 107 shall be determined in a flexible manner, having regard to the conditions characteristic of each country. The Meeting of Experts referred on a number of occasions to the need to retain this provision in a revised Convention, particularly in view of the different conditions prevailing in different countries with regard to indigenous and tribal peoples. The Office does not suggest modifying this Article.

Article 29

This article appears to require no revision.

Articles 30 to 37

These are the standard final Articles of Conventions.

It will be necessary to decide whether the revised Convention will close Convention No. 107 to further ratifications. The Office presumes that, since the purpose of the present revision is largely to change the orientation of an instrument which is now considered to be out of date, it will be decided to close Convention No. 107 to further ratifications once the revised Convention enters into force, and that ratification of the revised Convention by a State which has ratified Convention No. 107 will result in the automatic denunciation of Convention No. 107.

Notes

¹ See Lee Swepston: “The Indian in Latin America: Approaches to administration, integration and protection”, in *Buffalo Law Review*, 1979, Vol. 27, No. 4, pp. 715-756; a shorter version entitled “Latin American approaches to the ‘Indian Problem’” appeared in *International Labour Review* (Geneva, ILO), Mar.-Apr. 1978, pp. 179-196.

² For example, the Indigenous Affairs Association of Paraguay (AIP).

³ In Argentina, Colombia, Costa Rica and Panama, for example.

⁴ *El Indio Costarricense: Su Situación Actual*, Report to the Ninth Inter-American Indian Congress, Santa Fe, New Mexico, 1985.

⁵ ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 4 A), International Labour Conference, 72nd Session, Geneva, 1986, pp. 255-256, observation addressed to the Government of Bangladesh.

⁶ See *América Indígena* (Mexico City, 1985), Vol. 45; a special edition concerning the situation of indigenous peoples in Canada. See primarily the articles by J. S. Frideres: "Demandas de los indígenas en Canadá"; and by Boyce Richardson: "Los pueblos nativos de Canadá".

⁷ Norway: Summary of the First Report of the Norwegian Sami Rights Committee, in English, communicated by the Government of Norway to the ILO, referring to NOU 1980:53, "Vern av Urbefolninger".

⁸ Isi Foighel: "Home rule in Greenland: A framework for local autonomy", in *Common Market Law Review*, Feb. 1980, pp. 91-108.

⁹ *Report of the Committee of Review of Aboriginal Employment and Training Programs* (Canberra, Australian Government Publishing Service, 1985). The scope of the report is broader than might appear from its title. Within its consideration of employment issues, it also examines questions of land rights and land tenure, and self-determination with regard to the issue of local government.

¹⁰ See Hitchcock: "Development, planning, government policy and the future of the Basarwa in Botswana", in Carmel Shrire and Robert Gordon (eds.): *The future of former foragers: Australia and Southern Africa*, Occasional Paper No. 18 (Cambridge, Massachussets, Cultural Survival Inc.).

¹¹ United Nations: *Study of the problem of discrimination against indigenous populations*, by Mr. José R. Martínez Cobo, Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities (Geneva; doc. E/CN.4/Sub.2/1983/21/Add.2), paras. 131-184.

CHAPTER IV

LAND, ENVIRONMENT AND NATURAL RESOURCES

INTRODUCTORY COMMENTS

The loss of traditional lands and the lack of control over development projects carried out on these lands are the most important problems confronting indigenous and tribal peoples in all parts of the world today. Their lands and territorial base are increasingly under threat, as large-scale government or privately sponsored development programmes are implemented, such as hydroelectric schemes, oil exploration and pipeline construction, settlement and colonisation programmes, logging and ranching enterprises, agricultural modernisation and growth in capital intensive commercial farming in the areas occupied by indigenous and tribal peoples. Indigenous and tribal rural peoples in the Indian subcontinent, those living in the Andean plateau or in the forests of Latin America, the nomads of Africa, as well as the circumpolar people are all losing the territories necessary to their survival.

The issue of land rights is bound to prove particularly complex when attempting to define international standards. First, there are great differences in national systems of land ownership and tenure, and ownership and control of natural and environmental resources under and around the land. Second, it must be remembered that there is a fundamental difference between the relationship which many indigenous peoples have with the land, and the attitude of other sectors of many national populations who view land as an alienable and productive commodity. As the United Nations Special Rapporteur on indigenous populations has written on this issue, from the perspective of indigenous peoples, "The whole range of emotional, cultural, spiritual and religious considerations is present where the relationship with the land is concerned . . . The land forms part of their existence."¹

The same point was emphasised on several occasions at the Meeting of Experts. The expert from the World Council of Indigenous Peoples, in describing the special relationship of indigenous and tribal peoples with the lands they occupy, stated that reference should be made to "traditional territories" rather than simply to land. This concept includes all things pertaining to the lands themselves, such as waters, the subsoil, air space, all the occupants and plant and animal life and all the resources. Another expert stressed the importance of including coastal waters and sea-ice, as well. It was noted moreover that many indigenous peoples do not equate ownership with the power to transmit all rights over the territories to other persons; instead, they consider themselves trustees of the territories they occupy, and perceive a continuity running from their ancestors, through themselves to future generations, all of whom possess rights to the territories.²

The special relationship that indigenous peoples often have with their land and environment must be taken into account. However, the nature of this special relationship is likely to render standard setting particularly difficult in the light of different approaches to land and natural resources. On the one hand, given the particular characteristics of indigenous cultures and lifestyles, States may be faced with the need to recognise systems of ownership and tenancy which differ from those prevailing for the remainder of the national population. On the other hand, where development and conservation programmes are concerned, States will have to balance the interests of society at large with the particular needs of the more vulnerable indigenous and tribal groups.

When Convention No. 107 was drafted in the mid-1950s there had already been encouraging signs that for the first time many States were taking measures to recognise, and in certain cases safeguard, traditional forms of indigenous and tribal ownership of land. In a number of countries the alienation or seizure of their lands had been forbidden, title deeds to these lands had been granted, and conditions had been laid down under which the owners or co-users, as the case might be, could lease or mortgage their properties. In other countries provision had also been made for the return of alienated indigenous community land to descendants of the original occupants, and for the elimination of abusive practices against indigenous tenant labourers.

In the three decades since Convention No. 107 was adopted, the conflict between the needs of indigenous and tribal peoples and government development policies and programmes has often been a serious problem. In recent years the Office has received much information concerning the actual or threatened removal of indigenous and tribal peoples whose traditional lands have been selected as the site for hydroelectric or mineral extraction projects. For the most part, available information indicates that there has been little or no meaningful prior consultation with the indigenous and tribal peoples concerned, and more often than not, no attempt is made to soften the impact of these projects on vulnerable groups.³

The picture, however, is not altogether negative. As will be seen later in this chapter, some States have begun to examine how they can reconcile the interests of national economic development with the fundamental rights and needs of indigenous and tribal peoples. In other cases, indigenous peoples have taken action through national courts to challenge development strategies and demand the protection of their traditional lands. In other instances, agreements have been reached between indigenous organisations and the State or private enterprises to share profits from mining activities on their traditional lands. In many parts of the world the organisations and representatives of indigenous peoples are making stronger demands for a fairer share in, and greater control over, the exploitation of underground wealth and other resources which pertain to the lands they have traditionally occupied.

The Meeting of Experts discussed these problems at length. As indicated above, the participants at the meeting reached the conclusion that indigenous and tribal peoples should enjoy "as much control as possible" over their own economic, social and cultural development. There was also much discussion as to whether a revised Convention should recognise the rights of indigenous and tribal peoples to the subsoil and other natural resources pertaining to their lands. While

several experts pointed to the practical problems which would ensue if a revised Convention were to extend the ownership rights contained in Convention No. 107 to the subsoil and other natural resources, there was general agreement in the meeting that procedures should be established to negotiate the conditions under which the exploitation of these resources might take place, and to obtain the consent of the indigenous and tribal peoples concerned.

OWNERSHIP AND CONTROL

The Meeting of Experts gave particular consideration to two aspects of ownership and control of land and resources. First, the meeting recognised the need to ensure the effectiveness of the right of possession, use or ownership of these lands; in other words, that these people be able to exercise these rights in practice. It was noted that in many countries the extent of lands to which such groups had rights had not been defined, and titles had not been registered even with respect to those lands which had been defined.

Second, the Meeting of Experts discussed restrictions on indigenous and tribal ownership of land, in particular whether or not these lands should be inalienable. The meeting noted in its conclusions that the indigenous and tribal representatives present unanimously considered that these lands should be inalienable. Nevertheless, while strong feelings were expressed in favour of including the principle of inalienability in a revised instrument, other experts felt that the inclusion of this principle would require certain States to alter fundamental provisions of domestic law. In this regard one government expert drew a distinction between two separate aspects of inalienability – on the one hand, restraints upon the right of indigenous or tribal owners of land to dispose of or mortgage their land; and on the other, their right to enjoy uninterrupted occupancy of the land, coupled with the notion that national governments do not have the right to impose economic development without the full and free consent of the indigenous or tribal landholders. On the second point, he observed that national governments would not relinquish their capacity to make ultimate decisions on matters of national interest or on the utilisation of natural resources.⁴

Much national legislation on indigenous land ownership provides not only that indigenous lands shall be inalienable, but places additional restrictions on their use and transfer. In some cases lands are not subject to attachment, seizure or transfer. Some legislation includes provisions that the lands should be held in common, and may not be broken up among the individual families of the community concerned. Convention No. 107 expresses no specific preference for communal or individual ownership of land. In the Meeting of Experts, however, a number of experts felt that a future instrument should express preference for collective rather than individual forms of ownership.

Paragraphs 5 and 6 of Recommendation No. 104 call for restrictions on the leasing and mortgaging of indigenous lands, based primarily on the conclusions and recommendations of the ILO Committee of Experts on Indigenous Labour, which met in 1954. As part of the protective measures proposed for forest-dwellers, the Committee had urged that leasing should be prohibited, save exceptionally as defined by law, and a ban placed on mortgaging.⁵

The United Nations Special Rapporteur has given detailed consideration to this issue and urged the recognition of the principle of unrestricted ownership and control of land, including all natural resources. He did not recommend a blanket prohibition of alienation, but rather a number of safeguards against unlawful alienation, with restrictions on encumbrance, attachment and prescription.⁶

It is useful to look in some detail at law and practice with regard to concepts of ownership in Latin American countries that have indigenous and tribal peoples within their national frontiers. In five Latin American countries (Bolivia, Ecuador, Guatemala, Mexico and Peru), indigenous peoples form either a majority or a very substantial percentage of the national population; they have experienced a significant degree of incorporation within the national economy ever since the Spanish colonial era. Although certain indigenous groups in these countries have communal titles and are protected by legislation against the alienation or other encumbrance of their customary lands, many others either have private ownership titles to their land, or are tenant farmers or landless agricultural labourers. There may be little or no difference between their situation and that of the non-indigenous peasantry and rural labour force as regards systems of ownership and use of land. In other countries where a smaller percentage of the national population is defined as indigenous (for instance, Argentina, Chile, Colombia, Costa Rica, Nicaragua and Panama), the ownership and tenure of indigenous land has at times been regulated by special protective legislation, which usually includes provisions against the alienation and seizure of such land. There are also a number of Latin American countries, usually bordering the Amazon Basin, where forest-dwelling groups have until recently had little contact with the remainder of national society, and where special legislation has been enacted to safeguard against the dispossession of their traditional lands. In the Andean countries of South America there are substantial numbers of both settled highland-dwelling indigenous peoples and nomadic forest-dwellers within the same country.

One of the most difficult decisions facing Latin American States having a settled indigenous population is whether to legislate for separate systems of indigenous ownership of land. Often, these lands have already been largely fragmented, but indigenous organisations are now demanding a partial restructuring of agrarian property systems in order to take account of traditional forms of ownership which are deeply rooted in history. To understand the complexities involved, it is important to provide some historical background information.

In Latin America during the period of Spanish colonial domination there were legal restrictions against the transfer of indigenous property. Many indigenous communities received title to their lands from the Spanish Crown; at one stage, special courts were created to prevent the alienation of indigenous property.⁷ Post-independence legislation, however, tended to recognise only private forms of property ownership; this resulted in a heavy loss of lands by indigenous communities, which still continues.

While the indigenous *comunidades* were generally broken up by law, many of them survived in practice, in particular in remote Andean regions where there was less pressure on their traditional lands. But by the end of the nineteenth century certain countries were already witnessing reactions against the adverse

effects of liberal concepts of land ownership on the security of indigenous lands.

Constitutional and social legislation enacted in the aftermath of the 1910-17 revolution in *Mexico* was to have a profound impact on the concept of indigenous land rights throughout Latin America. It reversed the trend towards privatisation, reaffirmed the legal basis of communal land ownership, called for the restitution of alienated land to the original indigenous occupants, and recognised the social function of property. The Constitution provided for the restitution, in the form of *ejidos*, of the communal lands of which indigenous and other communities had been unlawfully dispossessed during the previous decades; it also required that land be granted to population centres which lacked *ejidos*, and to which *ejidos* could not be restored due to lack of titles or impossibility of identification, or because they had been legally transferred. Furthermore, a new Agrarian Code provided regulations on the ownership and use of the *ejido*. It stipulated that the collective agrarian property rights acquired by the *ejidos* could not in any form be alienated, ceded, transmitted, rented or mortgaged wholly or in part.⁸

In subsequent decades, legislation was enacted elsewhere in Latin America, reaffirming the lawful existence of indigenous *comunidades*. The Peruvian Constitution of 1920 and the Bolivian Constitution of 1938 both recognise this status explicitly.

As in Mexico previously, a major land reform programme undertaken in Bolivia in the 1950s was also based to a large extent on the preservation or restitution of customary indigenous forms of land ownership. An agrarian reform law of 1953 provided that the lands usurped from indigenous communities after 1900 should be restored to them when these communities could prove right of ownership, and that the lands of indigenous communities should be inalienable except in certain cases to be established in a special regulation.⁹

In the 1960s and 1970s agrarian reform laws were enacted in many Latin American countries, leading to significant changes in systems of land tenure and ownership. While indigenous peoples may have benefited from these redistributive measures, the reforms did not necessarily take into account their customary systems of ownership and control. In *Peru*, for example, over 10 million hectares of land were expropriated following the enactment in 1968 of an important agrarian reform law; the majority of beneficiaries were indigenous people from the *sierra* uplands. However, whereas communities of indigenous peoples from non-forest areas had formerly enjoyed legal recognition and separate tenure systems as "Indigenous Communities", legislation adopted under the agrarian reform programme transformed them into "Rural Communities" and no longer recognised the more settled agricultural indigenous groups in these regions as having the special status of indigenous peoples.¹⁰ The Government of Peru has since stated in its 1977 report on the application of Convention No. 107 that it cannot distinguish between the treatment afforded these populations and others in the same regions.

In *Colombia* an agrarian reform law enacted in 1961 called for the Colombian Agrarian Reform Institute (INCORA) to allocate more lands to indigenous peoples with insufficient land for their subsistence needs, and to establish new *resguardos* for indigenous peoples without land. But the same law also granted

INCORA the authority to divide *resguardos* where necessary, apparently subordinating customary land rights to the requirements of efficient production.¹¹

In *Chile* legislation enacted in recent years has reversed earlier legislative prohibitions against the alienation of indigenous lands. Act No. 17729 was enacted in 1972 with the aim of preventing the further division of indigenous lands. It prohibited the sale and alienation of these lands, and also prevented their use and usufruct by non-indigenous persons. In March 1979 Legislative Decree No. 2568 established procedures under which members of indigenous communities could petition for individual ownership. As the Government of Chile informed the United Nations Committee for the Elimination of Racial Discrimination, one aim of the Decree was to provide machinery for obtaining individual titles of ownership, free of charge and on a voluntary basis, for the persons concerned. This legislation and its effects have been criticised widely by Mapuché organisations and other non-governmental organisations, who have asserted that the division of Mapuché lands has been proceeding rapidly since it was adopted.¹²

In *Argentina* the question of indigenous land rights was until recently left to provincial rather than federal legislation. In September 1985 federal Act No. 23302 concerning indigenous policy and support for aboriginal communities was adopted. It stipulates that indigenous communities should receive sufficient land for their agricultural, forestry, mineral, industrial or artisanal needs in accordance with the character of each community. In principle, the lands adjudicated are to be unseizable. The only exceptions, designed to help beneficiaries to obtain credit from official state bodies, are to be provided for in the accompanying regulation, which has not yet been adopted.¹³

In the countries of Central America, where there has been much fragmentation of indigenous lands over the past century, measures have been taken or contemplated in several States to provide for separate forms of indigenous land ownership. In *Costa Rica* lands inhabited by indigenous populations were declared to be inalienable in 1945. Further legislation enacted in the 1970s provided that indigenous reserves registered in the name of the Land and Settlements Institute (ITCO) were inalienable and reserved exclusively for indigenous settlement. Whereas the lands were not transferable except to other Indians, ITCO could grant leases on these reserves for a limited period of time. In 1976 and 1977 new laws were enacted creating additional reserves for indigenous peoples, and stipulating that any property on the reserve lands currently owned by non-Indians was to be confiscated and turned over to Indians.¹⁴ The Government's 1986 report on the application of Convention No. 107 stated that this process had not yet been completed, but that reserves were being created.

In *Panama* the Constitution guarantees to indigenous communities the collective ownership of the reserve lands necessary for their economic welfare. A number of reserves were created for the Guaymí indigenous peoples by legislation adopted in 1934, which specified that indigenous lands should be worked in common, and should be inalienable and non-leasable. Subsequently, Act No. 18 of 1952 provided that for administrative purposes the regions then occupied by indigenous tribes should be converted into four administrative and territorial units known as "*comarcas*", which were likewise inalienable; the Act

also provided for a degree of indigenous self-government. The statutes of these *comarcas* specify that their communal lands should be imprescriptible, unseizable and inalienable, except in cases of expropriation for public purposes.¹⁵

In *Nicaragua* and *Guatemala* consideration is now being given to legislative and other measures designed to reaffirm recognition of indigenous land rights in situations where indigenous peoples have been heavily involved in, or affected by, civil conflict. In *Nicaragua*, following the compulsory removal of Miskito and other indigenous peoples from their traditional lands in the conflict area in 1982, the Government responded to indigenous demands for the protection of their traditional land rights by creating a commission to examine principles and policies for the exercise of the right of autonomy by the indigenous peoples and communities of the Atlantic coast. A document published by this commission in 1985 states that the indigenous people and ethnic communities of the Atlantic coast have the right to individual or collective possession of the lands they have traditionally occupied. Similarly, the customary procedures for the transfer of property and for land use among the people of the Atlantic coast should be respected. These rights are to be legally and effectively guaranteed. The document also states that indigenous peoples and other ethnic communities have the right to the use of the lands, forests, and surface, subterranean and coastal waters of the lands they inhabit.¹⁶

In *Guatemala* the 1985 Constitution contains a special section on the need to protect indigenous communities and indigenous lands. It stipulates that the land belonging to indigenous co-operatives, communities or any other form of communal or collective holding of agrarian property shall enjoy special protection from the State; that indigenous and other communities having land which has historically belonged to them and which they have traditionally administered in a special manner shall maintain this system; and that the State shall, under special programmes and appropriate legislation, make state land available to indigenous communities which need it for their development. It further stipulates that these questions shall be regulated by special legislation.¹⁷ (To the best of the Office's knowledge, no such regulations have yet been adopted.)

A number of general trends can be detected from this summary of law and practice with regard to securing ownership and control of lands and resources for the more settled indigenous peoples of Latin America. First, whilst problems should not be underestimated, a number of States have recently adopted or given consideration to measures that will guarantee systems of ownership markedly different from those recognised for non-indigenous peasant farmers. In this sense, there has been an evident departure from an integrationist philosophy towards one of autonomy and self-management with adequate consultative procedures. Second, despite some exceptions, it is generally accepted that restrictions may be placed upon the alienation or other transfer of the lands concerned. Third, there is a new awareness that it is not sufficient simply to recognise indigenous ownership and control over communal lands that remain in the possession of indigenous peoples: more land must be made available, either through the adjudication of state lands or through agrarian reform programmes.

Finally, it may be noted that in several quarters there is a renewed awareness

of the need to safeguard indigenous forms of land ownership in order to tackle social conflicts that have their origin in the inequitable distribution of land and other resources. This point was raised frequently during the 12th Conference of American States Members of the ILO (Montreal, March 1986). During this meeting, a number of delegates cited the link between the exploitation of indigenous populations and political conflicts and violent confrontations. It was pointed out that violence had led to the scattering and impoverishment of indigenous peoples owing to the loss of their lands and the ensuing loss of their cultural heritage.¹⁸

The distinction between forest-dwelling indigenous and tribal peoples, and more settled or acculturated peoples, is by no means always a clear one. In some cases, for the purposes of legislative measures of protection, a more useful distinction might be drawn between groups whose claims are based on historically derived land rights, and who have a clear awareness of their legal rights and their ability to enter into negotiations with national governments, and groups who are more physically and culturally isolated from the remainder of national society, and thus are more vulnerable.

The situation of forest-dwellers has changed in a number of respects since the adoption of the 1957 instruments, in some parts of the world at least. Regional and even national organisations of forest-dwelling indigenous and tribal peoples have now been created in several countries, particularly in the Amazon Basin. Their representatives have gained familiarity with national laws and legal procedures, and have at times sought legal redress in order to resist encroachment on and exploitation of their traditional lands by outsiders. But there are many other forest-dwelling groups still dependent on state, missionary or private bodies for whatever protection they may have against dispossession from their lands. The problems of removal, and control over mineral and other natural resources, will be examined later. In this section, the Office aims to examine trends in legislative and administrative measures to recognise particular forms of ownership and control by indigenous and tribal forest-dwellers over their traditional territories.

When Convention No. 107 was adopted, very few States had enacted specific legislation in this area, but since then, legislation covering the rights of forest-dwellers to their lands and natural resources had been adopted in a number of ratifying Latin American States. In *Brazil* article 198 of the 1967 Constitution recognises that the lands inhabited by forest-dwelling aboriginals are inalienable in accordance with the terms established by federal law; furthermore, the indigenous peoples are to enjoy permanent possession of these lands with the right to exclusive use of the natural resources within them. Indigenous peoples are considered by law to be minors, and thus to be legally incompetent to exercise the right of ownership until their emancipation from tutelage. Indigenous lands are thus held in trust by the State. Whereas the Brazilian Indian Statute of 1973 provided that all native land was to be administratively demarcated within a five-year period, the ILO Committee of Experts on the Application of Conventions and Recommendations has on several occasions expressed its concern at the slow pace of demarcation, which is as yet very far from complete.¹⁹

In *Colombia* there are reserved zones for forest-dwellers under agrarian

reform legislation, as well as church-administered mission territories. Under Decree No. 2117, the Colombian Agrarian Reform Agency (INCORA) is empowered to create zones of state-owned lands reserved for members of indigenous tribes or groups which do not own lands. This decree stipulates that definitive title will be granted to the indigenous beneficiaries when at least half of the agricultural units in the reserved areas have been placed under active cultivation, within a minimum period of five years. The Government of Colombia has stated in an official publication that by the end of 1980 INCOR had approved the creation of approximately 80 indigenous reserves in remote areas of the country.²⁰

In *Peru*, as noted above, article 163 of the 1979 Constitution provides that the lands of Rural and Native Communities are non-attachable and imprescriptible. They are also inalienable except as provided by the Act cited above. Moreover, Legislative Decree No. 22175 of 1974 concerning Native Communities and the promotion of farming in the forest and forest border regions provides that full property titles are to be granted to the Native Communities and outlines the criteria to be taken into account in the delimitation of their land areas. In the case of settled tribes, ownership is to be recognised for the land area actually occupied; in the case of Native Communities which engage in seasonal migration, for the total area over which these migrations extend; and when the community possesses insufficient land, for the area necessary for its requirements. Though the lands are to be inalienable, imprescriptible and non-mortgageable, the Act stipulates that free access is to be permitted for oil and mineral exploitation in the forest regions. In its 1984 report on the application of Convention No. 107, the Government indicated that approximately half of the Native Communities in the provinces in which these provisions have been applied have so far received land titles. It states furthermore that programmes for accelerating the granting of land titles are under way in certain provinces, and that a special commission has been established to make proposals for the demarcation of the Native Communities. However, concern has been expressed by indigenous representatives at repeated violations of communal property, invasions of indigenous lands by colonists, and delays in furnishing property titles.

In *Paraguay* indigenous peoples in the forest regions had no formal rights of land ownership until the early 1980s. In 1981 a new Act, the Indigenous Communities Statute (Act No. 904), was adopted. It guarantees to indigenous peoples the right of ownership of land and other productive resources, on an equal footing with other citizens. The State thereby recognises the lawful existence of indigenous communities, granting them legal personality. Indigenous peoples are to be settled on lands adequate for their physical and cultural needs, in so far as possible on their traditional lands or on those which they actually occupy. Under this Act, national lands are to be adjudicated free of charge to indigenous communities; they are inalienable, imprescriptible, non-mortgageable and non-leasable. The transfer and registration of these lands is to take place when the indigenous community in question has gained its legal personality. There are indications that, to date, a number of indigenous groups have been unable to secure ownership of their traditional lands, in particular in eastern regions of the country where large-scale ranching and agro-industrial enterprises have made competing claims for ownership of areas of traditional indigenous

occupation. In its 1986 comments to the Government on the application of Convention No. 107, the ILO Committee of Experts drew attention to reports that certain indigenous communities, in particular from the Mbya groups, now risked eviction from their traditional lands in eastern Paraguay, and asked for additional information.

In *Ecuador* the Government has expressed the hope that legislation will soon be adopted with regard to the lands of forest-dwelling peoples. In the meantime, the Government has ordered the delimitation of indigenous lands in certain specific cases, following petitions by the indigenous peoples concerned that their lands be safeguarded effectively. One such example is Ministerial Agreement No. 0177 of 11 June 1985, which noted that the impending expansion of African palm cultivation threatened the traditional lands of indigenous groups in Napo province, and instructed IERAC to delimit the lands currently in the possession of Native Communities in order to guarantee their territorial integrity, assure their survival and procure the conservation of their existing resources.

Over 30 years ago the ILO Committee of Experts on Indigenous Labour noted the need for firm and unambiguous measures to delimit and demarcate the traditional lands of forest-dwellers, with full guarantees of ownership and possession in order to safeguard against the dangers of eventual dispossession. Since then, a number of Latin American States have in fact amended and reinforced their legislation, providing for separate systems of land ownership in the forest regions, generally with legislative prohibitions against alienation, mortgaging and other forms of transfer. Moreover, as the indigenous forest-dwelling peoples become better organised at the regional and national levels, they are demanding more effective implementation of the existing laws and firmer sanctions against individuals and agencies that continue to encroach on their traditional lands. This latter point will be examined in more detail later in this chapter.

In other areas of the world as well, important developments have taken place since the ILO's 1957 instruments were adopted with regard to concepts of indigenous and tribal land ownership, and with regard to procedures for dealing with ownership claims.

In *Australia* the first step towards granting Aboriginal title to land was the creation, by legislation, of the Aboriginal Lands Trust of South Australia in 1966. The Lands Trust, membership of which is confined to people of Aboriginal descent, holds freehold title to many former Aboriginal reserves in South Australia and leases the lands for 99 years to the Aboriginal communities traditionally associated with them. In 1981 the South Australia government passed a Land Rights Act to vest in a corporate body composed of all traditional landowners, inalienable freehold title to over 100,000 square kilometres. At the federal level, the important Aboriginal Land Rights (Northern Territory) Act was passed in 1976. It likewise established that land be vested in Aboriginal Land Trusts, the beneficiaries being those with traditional rights and interests in the land, which was to be held collectively in inalienable freehold title. The Northern Territory Act also provides for a land claims procedure whereby claims based on traditional attachment or ownership of areas of vacant Crown land are heard by a Land Commissioner, who makes recommendations to the Minister of Aboriginal Affairs, who in turn has the final decision over whether the grant should be made.

By 1986 Aborigines held inalienable freehold title to more than 450,000 square kilometres of the Northern Territory of Australia.

More recently, an Aboriginal Steering Committee was created in 1983 to advise the federal Government on proposed legislation; it issued a preferred land rights model in 1985 to stimulate further discussion with a view to the eventual adoption of federal legislation on this issue. The model proposed that Aboriginal landholders would have substantial rights over mineral exploration and development on their land. Furthermore, they would be able to argue before a special independent tribunal against projects involving mineral exploration activities, or for favourable terms and conditions for exploration and mining on their land. The model recommends payments in the form of mining royalty equivalents, with the Government determining the proportion to be paid and its distribution, as well as compensation for damage or disturbance to Aboriginal lands. The protection of sites declared to be sacred and significant would not be open to negotiation for mining or other purposes. There were further proposals on other aspects of land rights: for example, Aborigines were to have recognised land ownership in the form of inalienable freehold title; all Aboriginal and Islander reserves and missions were to be granted to Aboriginal and Islander owners; all vacant Crown land which was unused and unallocated would be available for claim; land claims could be made on the basis of traditional entitlement, historical association, long-term occupation or use; and lastly, all legitimate prior interests in land which was the subject of a grant would be protected.²¹ When the present report was prepared, no legislation had as yet been adopted on the basis of this model.

In *Canada* a distinction has been made in law and practice between land rights which accrue to Indians on the basis of treaties, and claims made on the basis of aboriginal title by such native peoples as the Inuit and Inuvialuits of the Arctic who never concluded treaties with the Government during the period of British colonial rule. In the major historic treaties, the Indians agreed to relinquish large areas of land for settlement, in exchange for reserve lands that could be alienated only to the Crown. In non-treaty areas such Native peoples as the Inuit pressed their claims through the federal Parliament and the courts, but claims made on the basis of aboriginal title were not recognised prior to 1973.

A policy statement issued by the Government in 1973 covered both of these contingencies. First, it defined the "specific" land claims policy, which aimed to remedy specific acts and omissions of the federal Government relating to treaty obligations, legislative requirements, and the administration of Indian land and other assets. The Government affirmed that its policy on specific claims was to recognise claims by Indian bands which disclose "lawful obligations" as regards the non-fulfilment of a treaty, the breach of obligations arising out of government administration of Indian funds or other assets, or the illegal disposition of Indian land. Second, it defined the policy of "comprehensive claims", based on the notion of aboriginal title, relating to the traditional use and occupancy and the special relationships of Native peoples with the land since time immemorial. The term "comprehensive claims" was utilised, because any settlement of claims based on these criteria could include a variety of terms such as protection of hunting, fishing and trapping, land title, money, and other rights and benefits, in exchange for the general and legally undefined Native title.

A number of comprehensive claims have been settled since 1973. The James Bay and Northern Quebec Agreement of 1975, and the supplementary Northeastern Quebec Agreement of 1978, provided for the fee simple ownership of land, as well as for exclusive hunting, fishing and trapping rights over substantial additional land areas.

Under the Western Arctic Claim of 1984, it was agreed that the Inuvialuit Native peoples should receive title to approximately 91,000 of the 435,000 square kilometres of land that they traditionally used and occupied. Title to the land was to be vested in the Inuvialuit Land Corporation, which in turn was to be owned and controlled by the beneficiaries. While settlement lands could be leased without restriction, they could only be sold to other Inuvialuit or to the Crown. The 1984 agreement also contains certain provisions concerning mineral and subsurface rights, which will be examined later in this chapter.²²

The 1982 Constitution Act of Canada recognises and reaffirms the existing aboriginal and treaty rights of the aboriginal peoples of Canada. It further specifies that "treaty rights" include rights that now exist by way of land claims agreements or that may be so acquired. Since the adoption of the new Constitution, constitutional talks have been held with aboriginal peoples in order to clarify the nature and content of the treaty and land rights thereby guaranteed.

In *India* federal legislation does not provide for uniform rights of land ownership for the Scheduled Tribes throughout the country. Since independence, legislation has been passed in a number of states, declaring either that tribal lands are inalienable or that members of the Scheduled Tribes are not allowed to transfer any land by way of sale, exchange, mortgage, lease or otherwise to any person other than a member of the Scheduled Tribes without government permission. A number of states have also passed legislation for restoring to tribal peoples the lands sold by them to non-tribals and for debt redemption.²³ In its reports on the application of Convention No. 107, the Government has provided detailed information concerning the various forms of ownership exercised by tribal peoples in different states. In its 1962 report, for example, the Government noted that there were several states in which tribal lands were generally held under the individual form of ownership; that there were other states where individual and collective forms of ownership existed side by side, with the rights of ownership varying considerably from tribe to tribe; and that in some states no special legislative measures had been taken to protect the land rights of tribal peoples, though general legislation might provide security of tenure for all tenants, including tribals. In its 1982 report to the Committee of Experts, the Government has provided details of the measures taken by the governments of the states and Union territories to bring land records for tribals up to date, with a view to implementing land reforms and restoring lands which have been illegally transferred.

In *Bangladesh*, as in *India*, legislation concerning tribal areas is to a large extent based on laws dating from the colonial period. The Chittagong Hill Tracts Regulation, No. 1 of 1900, first introduced the procedure for providing lands to the tribal people. Under this Regulation, as amended up to 1983, specific rules regulate or restrict the transfer of land in the Tracts, and regulate the requisition by the Government of land required for public purposes. In 1986 the

Government informed the ILO in its report on the application of Convention No. 107 that, whereas the 1900 Regulation conferred certain land rights but not the right of ownership, the Chittagong Hill Tracts Land Acquisition Act of 1958 recognised the right of ownership and that tribal people enjoyed the full benefits of such ownership. The Government also stated that, whereas tribal and semi-tribal people may own land through co-operative and individual ownership, in practice they enjoy collective ownership under the leadership of tribal Chiefs and Headmen, who in turn collect revenue and rent on behalf of the Government. Given the fact that many non-tribals have settled in the Hill Tracts in recent years which at times has led to conflicts between tribals and non-tribals, the Committee of Experts has suggested that it would be useful to determine whether the Chittagong Hill Tracts Regulations' implied policy of restricting ownership principally to the tribals has been respected.

With regard to systems of land ownership and the degree of control exercised by tribal peoples over their lands and resources, the situation in other Asian countries is too diverse to allow for generalisations. In *Pakistan*, for example, the tribal peoples in the Federally Administered Tribal Areas are not considered to be particularly vulnerable in comparison with the remainder of the national population. They enjoy significant autonomy from the rest of Pakistan, own much property both within and outside the Tribal Areas, and appear to be in effective control of their lands. Yet there are many other Asian countries, notably in the South-East Asian region, whose populations include millions of forest-dwelling tribal peoples, which to date have not enacted any specific legislation or taken other measures concerning tribal rights of ownership.

One such country is *Malaysia*, where the British colonial administration at one stage provided substantial protection for the customary landholdings of the indigenous Malay peoples, whose land rights were legally recognised in perpetuity; no protection, however, was provided to any of the aboriginal forest-dwellers, whose lands were at first treated as if unoccupied. During the later period of British colonial rule a Department of Aboriginal Affairs was created, and the federal Government was given power to establish aboriginal land reserves. There were no legal provisions for granting land title to aboriginal forest-dwellers, their lands being held in trust by the Department. Upon independence, the Department retained power over these aboriginal reserves, with the authority to control contacts by outsiders with the persons residing in them. However, as one source has noted, these tribal peoples are particularly vulnerable to threats of expulsion as they are unable to obtain land titles, and contracts have been granted to timber cutters for logging operations in their areas.²⁴ The Orang Asli and other tribal peoples have made demands for secure land titles, but it appears that consideration is being given to disbanding the Department of Aboriginal Affairs in the near future. If this is done, legislation will have to be adopted in order to institute new legal provisions concerning tribal rights of land ownership and administration.

This brief and partial survey of recent developments regarding patterns of land ownership of indigenous and tribal peoples highlights certain basic problems and trends. It is evident that the principal problem is that in most parts of the world these peoples do not have secure title to enough land to ensure their

continued survival. Where they do have some rights, these are of recent origin and often are not fully secured.

This section has focused on Latin America, given the large number of governments that are aware of the problems of indigenous peoples within their borders and have tried to deal with these problems. There are other countries, not mentioned here, where measures have also been taken; these include the Scandinavian countries, New Zealand and the United States.

There are some 30 million indigenous and tribal peoples in the Americas, but they represent only about 10 per cent of all tribal peoples world-wide. Far too many countries have taken no measures to protect these groups, or have allowed pertinent provisions to fall into disuse. The trends outlined in this section reflect the situation in countries which have taken action. In other countries indigenous and tribal peoples are increasingly in danger of losing their lands.

RIGHTS TO SUBSOIL AND MINERAL AND OTHER NATURAL RESOURCES

Paragraph 4 of Recommendation No. 104 provides that members of indigenous and tribal populations should receive the same treatment as other members of the national population in relation to the ownership of underground wealth or to preference rights in the development of such wealth. In the Meeting of Experts there was much discussion as to whether a revised Convention should deal with the rights of indigenous and tribal peoples to the subsoil and other natural resources pertaining to their lands. In this regard consideration was given not only to underground wealth, but also to inland waters, coastal waters and sea-ice, wildlife and other natural and environmental resources.

As indicated above, the Meeting concluded that indigenous and tribal peoples should enjoy as much control as possible over their economic, social and cultural development. Indigenous peoples themselves have increasingly been demanding the right to control all aspects of the resources pertaining to the lands they occupy. For example, a draft declaration of principles drawn up in 1985 by the Inuit Circumpolar Conference, the Four Directions Council, the International Indian Treaty Council and other indigenous organisations and submitted to the United Nations Working Group on Indigenous Populations, stated that indigenous nations and peoples are entitled to the permanent control and enjoyment of their aboriginal ancestral-historical territories. This includes surface and subsurface rights, inland and coastal waters, renewable and non-renewable resources, and the economies based on these resources. The draft declaration stated also that rights to share and use land, subject to the underlying and inalienable title of the indigenous nation or people, may be granted by their free and informed consent, as evidenced in a valid treaty or agreement.

An international convention cannot provide detailed guide-lines on the precise conditions in which all activities relating to the exploitation of natural resources may or may not take place on the lands of indigenous and tribal peoples; rather, it should provide a general framework for dealing with these questions. (It should be noted, however, that such detailed guide-lines have been included in the recommendations of the United Nations Special Rapporteur on Indigenous Populations.²⁵)

The ILO Meeting of Experts took note of the complexities involved in recognising rights of indigenous and tribal peoples over natural resource exploitation, especially in legal systems where the rights to the subsoil and natural resources are retained by the State. However, it also took note of the damage caused to indigenous lands and lifestyles when States that do retain these rights accord to entities outside these communities the right of exploration and exploitation of subsoil resources within traditional indigenous territories.

The question of mineral rights ownership in different legal systems is too complicated to explore exhaustively in this report. Brief examples of different approaches are provided below.

In Latin America, during the colonial era, the Spanish Crown retained full rights to all mineral and subsurface resources. During the nineteenth century the legislation in certain countries was changed to provide that land ownership included the right to exploit any subsurface minerals, but current Latin American legislation provides almost without exception that the State retains full rights of ownership over subsurface resources.

Legislation in *Mexico* may be cited by way of example. Whereas landowners had full rights over subsurface resources until 1910, the 1917 Constitution reaffirmed the principle of state ownership of mineral rights. Article 27 of the Mexican Constitution provides that ownership of the lands and waters within the bounds of the national territory is vested originally in the nation, as is the direct ownership of all natural resources of the continental shelf and the submarine shelf, of all mines, solid mineral fuels, and the space above the national territory to the extent and within the terms fixed by international law. Ownership of these resources by the nation is inalienable and imprescriptible; their exploitation, appropriation and use may be undertaken through concessions granted by the federal Government.

Constitutions and, more recently, the mining codes enacted in other Latin American countries tend to provide for similar state control over mineral resources, particularly strategic ones. In *Peru*, for example, the General Mining Code, Decree No. 18880 of June 1971, declared state control over all minerals found in the land, sea and sea-bed up to 200 miles from the Peruvian coast. In certain cases, however, the lawful owners of the surface lands may be given preferential rights to the exploitation of subsurface resources. In *Brazil* owners of land were considered to be the owners of subsurface resources until the enactment of the 1934 Mineral Code. Section 119 of this Code provided that the industrial exploitation of mines and mineral deposits on private property required federal authorisation or concession. The 1946 Mineral Code of Brazil granted landowners preferential rights to explore and exploit minerals found under the surface of their lands; the 1967 Mineral Code of Brazil provides that landowners should receive, in addition to compensation for damage caused by the exploration and exploitation of minerals, 10 per cent of all royalties paid to the State from the minerals actually extracted.

The Brazilian Indian Statute, Act No. 6001 of 1973, stipulates that indigenous peoples should receive the same compensation and royalties as other members of the population for the exploitation of mineral resources. Section 44 of the Act provides that ground wealth in the native areas can only be exploited by the forest dwellers, who have the exclusive right to practise placer mining,

panning and screening for nuggets and for precious and semi-precious stones in the areas in question. Section 45 provides that the exploitation of subsoil wealth in the areas belonging to the Indians, or in the domain of the Union but in the possession of indigenous communities, shall conform with the legislation in force and the provisions of this Act. The Ministry of the Interior, through the National Indian Foundation (FUNAI) as the competent agency of assistance to the Indians, shall represent the Union as owner of the soil, but a share in the profits of exploitation, as well as indemnities and royalties for the occupation of the land shall revert to the benefit of the Indians and constitute a source of native income. Furthermore, in order to safeguard the well-being of the forest-dwellers, the granting of authorisation to third parties for prospecting or mining on tribal possessions shall be subject to prior understandings with FUNAI.²⁶ The last provision has been amended by Decree No. 88985 of 10 November 1983 which allows the Government to grant authorisation to state enterprises, and exceptionally to private companies, to explore and work on indigenous lands in connection with minerals which are considered to be strategic and necessary for national security and development. FUNAI has expressed concern over the implications of Decree No. 88985, which removes its veto powers over mineral activities on indigenous lands under its protection, and the question has also been raised by the Committee of Experts.²⁷

In other countries of the Amazon region, which have also experienced substantial agro-industrial and mineral development over the past decade, including a considerable increase in the exploration and exploitation of petroleum, the Office is not aware of any legislation which provides for indigenous participation in profits. Even where legislation has been enacted providing for the titling of indigenous lands, it is commonly stipulated that access may be granted to these lands for the purpose of exploiting strategic or other minerals. In *Peru*, for example, section 31 of Decree No. 22175, the Act on Native Communities and Agricultural Development of the Forest and Forest-border Regions, stipulates that there should be free rights of passage in lands of the forest and forest-border regions for purposes including the exploration and exploitation of minerals and petroleum. The regulation governing this Act (Supreme Decree No. 003-79-AA) does not provide for compensation, although the owner or occupant of the land in question has the right to be resettled.

In other Latin American countries some governments have accepted the principle that indigenous peoples have the right to determine the use of the natural resources on their lands or to share in the benefits of mining and other activities on their traditional lands; other governments have entered into negotiations with indigenous peoples concerning participation in benefits, even though no specific legislation has been enacted in this regard. In *Colombia*, according to the Government, the National Institute for Renewable Natural Resources and the Environment (INDERENA) has proposed to grant indigenous communities a high degree of responsibility in the defence, conservation and management of the natural resources within their own territories. It notes however that, although a National Code of Natural Resources and the Protection of the Environment was enacted by Decree No. 2811 of 1974, there are as yet no regulations concerning the exploitation of natural resources on indigenous

lands.²⁸ In *Nicaragua* the 1985 Principles and Policies of the Autonomy Commission provide that:

Planning the use of the region's natural resources should benefit the economic and social development of the population of the Atlantic Coast, envisaging a balanced national economy. A portion of the profits derived from the sale of resources will be reinvested in the region as determined by the people of the Coast through their own authorities. The indigenous peoples and communities of the Atlantic Coast will determine the rational use of the natural resources of the region.

In *Panama* negotiations have taken place between indigenous peoples and the Government since the early 1980s concerning proposals to establish a major copper mining project, known as Cerro Colorado, within the lands of an existing Guaymi reserve. When the Guaymi peoples demanded guarantees of a share in the profits together with the demarcation and titling of their lands, the project was shelved while environmental studies were conducted. At the Meeting of Experts it was noted that the negotiations in this country concerning indigenous participation in mining profits might provide an important precedent for the region.

In other parts of the world there are few instances where legislation has given specific recognition to indigenous or tribal ownership of, or other rights to, mineral or subsoil resources. Particular mention should be made of *Australia*, where the Government has devoted considerable attention to the issue of Aboriginal mining rights over the past decade. Sections 40 to 48 of the Aboriginal Land Rights (Northern Territory) Act, 1976, deal with mining interests and mining operations. The Act provides that traditional Aboriginal owners shall control mining and other activity on their land, except where the national interest requires that mining or exploration be undertaken, and stipulates that a share of the royalties received from mining operations on Aboriginal land shall be paid into the Aboriginals' Benefit Trust Fund. Forty per cent of this amount is to be handed to the Land Councils for their administrative costs, 30 per cent is to be paid to communities within the areas affected by mining, and the remaining 30 per cent is to be available for the benefit of Aboriginal peoples throughout the Territory.

The Meeting of Experts discussed the practical effects of this legislation, and of certain amendments which are now being considered in view of the controversy which the Act has aroused in certain sectors. It was noted that, with rare exceptions, all mineral rights in Australia are vested in the Crown, and that non-Aboriginal Australian landowners cannot normally exercise the right of veto in relation to the exploitation of subsurface resources. The right of Aboriginal landowners in the Northern Territory to withhold consent thus goes beyond that enjoyed by other Australians. The national Government is therefore giving consideration to limiting this veto so that it will apply only to exploration: if exploration is permitted, then any subsequent mining resulting from that operation would not be subject to Aboriginal consent. The national Government can invoke "national interest" to override the withholding of consent; in this event, the Governor-General must issue a proclamation, which can be disallowed by either House of Parliament, thus ensuring a public debate in respect of any attempt to invoke the national interest. In addition to being able to withhold consent, Aboriginal owners of land have the right to negotiate the terms and

conditions for exploration and mining on their land. These terms and conditions have included environmental conditions, employment contracts, training facilities, social controls, location of towns and camps and payments. Where negotiations fail, arbitration procedures are available.

In *Canada*, where there have been highly complex negotiations and agreements in recent years concerning Indian and Native rights to mineral and other resources, the precise nature of these agreements has varied considerably from one case to another. Certain benefits are specified in existing law. Section 31 of the Indian Mining Regulations provides for percentage royalty payments for minerals other than petroleum; the Schedule to the Indian Oil and Gas Regulations provides for separate royalty payments for these two resources.²⁹

There are other rights and benefits which may accrue to Indian and Native peoples under comprehensive claims settlements. A policy paper published in 1981 stated that the federal Government was prepared in certain cases to include subsurface rights in comprehensive land claim settlements. The rationale for granting such rights is to provide Native people with the opportunity and the incentive to participate in resource development. The granting of subsurface rights in areas close to indigenous communities and in critical wildlife habitats is a protective measure designed to eliminate the possibility that resource development rights will be granted to prospective developers against the wishes of the local community.³⁰ The provisions of two comprehensive claims settlements may be cited by way of example.

Under the 1975 James Bay and Northern Quebec Agreement, the 10,000 Native beneficiaries received a multi-million dollar cash settlement; moreover, a land area was set aside for the exclusive use and occupancy of the beneficiaries, and additional lands were set aside for aboriginal hunting, fishing and trapping. The Agreement stipulated that the government of Quebec, the James Bay Energy Corporation, Hydro-Quebec and the James Bay Development Corporation and other duly authorised persons would have a specific right to develop resources in these lands. Depending on the project proposed and its location, impact assessment and review are to be submitted to federal and provincial authorities.³¹

Under the 1984 Western Arctic Claim, the Inuvialuit people were granted full surface and subsurface rights to a portion of the lands for which they received title. Access for development of subsurface resources is guaranteed as regards Inuvialuit lands where there are existing hydrocarbon or mining rights, or where Inuvialuit do not own the subsurface. However, the Inuvialuit have the right to negotiate "participation agreements" with prospective developers, including rents for the use of the surface, as well as special arrangements such as training and employment programmes, and other participatory benefits. Furthermore, the Agreement provides that the Inuvialuit Development Corporation may, if it so requests, hold a certain number of prospecting and mining permits at any one time, for which royalty payments are to be waived for the first 15 years of production. In addition, the Inuvialuit will from time to time be granted local use coal permits free of royalty and other charges, allowing them to develop and mine coal in the Inuvialuit Settlement Region for community use and for regional and industrial use by the Inuvialuit Development Corporation.³²

Indian lands in the *United States* are generally held in trust by the federal

authorities. Indian resource rights are thus governed by special legislation. The Indian Mineral Leasing Act of 1938 provided that

... lands within any Indian reservation or lands owned by any tribe, group or band of Indians under federal jurisdiction, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorised spokesmen for the Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.³³

In 1982 a new Indian Mineral Development Act came into force; it provides that the Indian tribe itself might conclude an agreement if it so wishes, subject to government approval. Whereas the 1938 Act specified the rents and royalties payable for mining and petroleum production in Indian land, competitive bidding systems are now prevalent, and higher royalties have frequently been required in order to procure tribal consent for mining operations.

The foregoing examples reflect situations in which indigenous and tribal peoples have been allowed either to exercise some control over the process of mineral and natural resource development, or to engage in negotiations over participation in benefits and profits. Even in these situations, however, there have been widespread complaints by the indigenous and tribal peoples concerned, with regard to the inadequacy of existing arrangements for their protection and participation. But in many parts of the world, particularly as regards forest-dwelling indigenous and tribal peoples, not even minimal guarantees in this field exist. As a result, the commencement of mineral, logging, hydroelectric and other development schemes has often led to the displacement of these peoples from their traditional environment.

REMOVAL OF INDIGENOUS AND TRIBAL PEOPLES FROM THEIR LANDS

Article 12 of Convention No. 107 provides that governments may remove indigenous and tribal populations from their traditional lands, in accordance with national laws and regulations, for reasons relating to national security, or in the interest of national economic development or health. This Article has elicited widespread criticism, on the grounds that its wording tolerates dispossession whenever a government wishes to put these lands to alternative use.

It has been suggested that a new instrument should include the principle that removals be of a *temporary* nature, wherever possible. In this regard, the United Nations Sub-Commission study on indigenous populations recommends that

Whenever the removal of populations is necessary for an exhaustively justified reason, the indigenous populations involved should be moved to areas that resemble their ancestral lands as closely as possible with fauna and flora of the same type. The suffering of these populations should be reduced to an absolute minimum and any losses compensated. Unless natural phenomena make it impossible, their return to their ancestral lands should always be an essential part of any plan.³⁴

The Meeting of Experts discussed the question of removal at some length. The Meeting concluded unanimously that the authority of States to appropriate indigenous or tribal lands, or to remove these peoples from their lands, should be limited to exceptional circumstances, and should take place only with the informed consent of these peoples. If this consent cannot be obtained, such authority should be exercised only after appropriate procedures designed to meet

the exceptional circumstances for such appropriation or removal and which guarantee to these peoples the opportunity to be effectively represented.³⁵

Actual or threatened removals continue to occur in disturbing numbers throughout the world. Broadly speaking, such removals appear to fall into three categories. First, there are cases where large-scale hydroelectric and other construction or mineral extraction projects have either flooded indigenous and tribal lands, or wrought such damage to their traditional environment as to make it impossible for them to preserve their traditional lifestyles. Second, there have been "internal colonisation" or transmigration programmes, under which governments have promoted or sponsored the settlement of indigenous and tribal lands, leading at times to the effective dispossession of these groups from their traditional territories. Third, there have been conflicts which have led governments to evacuate these peoples from their traditional territories, sometimes on a temporary basis; in other cases, the conflict itself has compelled the peoples concerned to flee their lands.

In recent years a considerable number of major hydroelectric and dam construction projects have led to the appropriation of large areas of indigenous and tribal lands, and the displacement of these peoples from their traditional territories. In Latin America, for example, the construction of the Itaipu Dam in Paraguay led to the removal of Mbya Indians; the Tucurui Dam in Brazil involved the flooding of the lands of Parakaná Indians and thus their displacement. In Asia large-scale projects currently under consideration, each of which would involve the displacement of thousands of tribal peoples, include the Sardar Sarovar Dam in India, the Bakun Hydroelectric Project in Sarawak, Malaysia, and the proposed series of hydroelectric dams along the Chico River Basin in Luzon, the Philippines. A brief examination of three of these situations will serve to demonstrate the problems and complexities involved, and the different procedures envisaged or adopted to deal with compensation claims.

In the *Philippines* the Government planned in the early 1970s to construct four hydroelectric dams along the Chico River Basin. The proposed dams would have submerged at least 2,753 hectares of ancestral land of the Bontok and Kalinga tribal peoples, displacing at least 15,000 tribal families. One study indicates that survey teams from the Philippine National Power Corporation first warned residents in 1974 that their land was marked for inundation, offering each affected family a 2-hectare relocation site as well as cash compensation. The study further states that the Government did not consult the tribal peoples concerned, and justified the proposed land appropriations on the grounds that these tribal lands were part of the public domain. However, the Government's failure to recognise indigenous claims to land ownership provoked widespread hostility among the tribals, to such an extent that they refused to litigate over these lands or submit their case to the Supreme Court. The study concludes that continuing land usurpation, exacerbated by the Chico Dam proposals, has caused these tribals to adopt an attitude of open hostility to the national legal system.³⁶ There has been widespread and often violent conflict between the Kalinga and Bontok tribal peoples and the national authorities, and the Chico Dam proposals had not been implemented by the mid-1980s.

In *Brazil* the Tucurui Dam Project was part of a major infrastructural programme in the eastern Amazon, involving mineral extraction and

road-building as well as the construction of a hydroelectric plant. The project was extensively funded by, among other organisations, the World Bank, which developed its own guide-lines for the protection of indigenous lands within its "Carajas Amerindian Sub-Project". As part of this sub-project, the Brazilian National Indian Foundation (FUNAI) was to demarcate the lands of indigenous peoples within the project area. In 1982 the Government reported under Convention No. 107 that the demarcation and protection of indigenous lands constituted a major problem only with respect to three Indian groups; in its 1984 report the Government indicated that the lands of only a very small number of Parakaná Indians would in fact be flooded by this dam, and that those affected had been relocated to a nearby area offering ample opportunities for their traditional pursuits. The Government stated moreover that the lands of only three indigenous groups within the project area had not by then been demarcated, and that the demarcation of these lands would be considered a priority.

In *India* the Sardar Sarovar Dam Project, which will require the relocation of many thousands of tribal peoples, has raised complex questions concerning who should be eligible for compensation and the nature of this compensation. In this regard the Committee of Experts has requested specific information on the arrangements for resettling and compensating the tribal peoples in question, particularly as regards the uncultivated parts of their traditional lands, which they use for such traditional pursuits as hunting and fishing. It has also asked about the provision of lands to replace those which the tribals are losing, and requested information on which tribals will be entitled to compensation. It may be noted that the Government of India, in consultation with the World Bank, which is financing this project, is one of the very few governments that have made a serious attempt to resolve these complex questions in a way which is consistent with the requirements of Convention No. 107 and with the needs of the peoples affected, after consultations with these peoples. While a number of serious questions are not resolved, the Government has furnished to the ILO information concerning legislation, awards and agreements relating to this project, stating among other things that the collective ownership of common facilities in tribal villages is recognised in the compensatory awards. It has also indicated that under the provisions of a 1985 Resolution of the government of Gujarat, all "landless" tribals who are in actual occupation of land and carry on cultivation, even by way of encroachment or unauthorised occupation, are being given title to the land which they are using. As a result, it states that these "landless" tribals are being compensated with land in the new locations where they are resettled. The Committee of Experts is continuing its dialogue with the Government on these and other issues.

The three examples cited above represent very different situations. In the Brazilian case it appears that detailed guide-lines were drawn up, that consultations took place, at least with FUNAI, though not with the Indians themselves, that steps were taken to demarcate the lands of various indigenous groups in the region, and that ultimately relatively few persons were affected by the dam. On other occasions, however, FUNAI itself expressed concern that too little attention has been paid to the presence and needs of vulnerable forest-dwelling peoples before decisions were taken regarding road-building, mineral and other infrastructural projects. In the Philippine case it appears that

no consultations were held with the tribal peoples concerned, even though the project in question was to affect the traditional land of many thousands of persons. The extent of tribal opposition has been a major factor in blocking the project up to now, and in reinforcing tribal demands for firmer recognition of their traditional systems of ownership and control. In the case of the Indian project, which would similarly affect many thousands of tribals, measures have been taken to increase the compensation originally envisaged and to widen the definition of those to be compensated, although it appears that further steps are needed. These issues are of particular importance, as the project referred to here is only the first step of a far larger project.

While the ultimate decision concerning projects of this kind will remain with governments, it is vital that there be as much consultation as possible with the indigenous and tribal peoples who will be affected, before decisions are taken. For these consultations to be meaningful there must first be a recognition of the rights of these peoples to the lands they occupy, taking into account their own forms of ownership, supplemented by the demarcation of the lands in question. Another prerequisite appears to be the recognition of traditional indigenous and tribal institutions that are capable of entering into negotiations with the State on behalf of those they represent.

Usually, several years elapse between the planning of large-scale infrastructural projects and the first stages of their implementation. Thus, their potential impact on the land base of indigenous and tribal peoples can be assessed carefully, and meticulous environmental impact studies carried out in consultation and collaboration with the peoples concerned. Moreover, as these projects are immensely costly and generally require substantial external financing, international funding agencies have an important role to play in developing their own guide-lines for the protection of the indigenous and tribal peoples affected.

When tribal peoples are displaced from their lands, the displacement can be temporary or permanent, voluntary or coercive, total or partial. But there are cases where these distinctions are none too clear. During the era of colonial settlement of indigenous and tribal lands, these peoples were often forced to move onto reservations, where they enjoyed a measure of protection afforded by state, missionary or private bodies in exchange for the sacrifice of a large part of their traditional territories, and sometimes a total loss of freedom. Today there are cases where States do not provide for compulsory transfer, but actively encourage the settlement of indigenous or tribal peoples in specific locations, while at the same time promoting colonisation schemes designed to bring outsiders into regions hitherto reserved for the exclusive use of these peoples. Unless adequate safeguards are taken, any such colonisation programme is likely to involve the removal of indigenous and tribal peoples from at least part of their traditional lands.

Different, though related, problems affect nomadic tribal peoples. States may justify programmes to settle or sedentarise these peoples on the grounds of economy, efficiency, national security, and even equity. They may affirm, for example, that it is only possible to provide them with the necessary social services if they are settled in particular areas. However, if programmes to settle indigenous and tribal peoples occur in situations where competing claims are

being made to their traditional lands by outside colonists or developers, there is a danger that these peoples may be compelled to change their lifestyles and lose effective access to their traditional lands.

In *Bangladesh*, for example, the ILO Committee of Experts has noted that tribals in the Chittagong Hill Tracts are traditionally *jhoom* cultivators, who have practised shifting agriculture. The Government has stated that it is discouraging *jhoom* as insufficiently productive, that most tribals now live in settled villages with lands settled in their names, and that sedentarisation has made it possible to extend education and health services and other basic amenities to tribal people. However, the Committee of Experts, taking note of reports that there has been large-scale settlement of non-tribals in this area, has asked the Government to indicate what lands have been acquired by non-tribals in the Chittagong Hill Tracts in recent years. In this connection, the Committee of Experts has also brought to the attention of the Government the views expressed by certain tribal leaders to the effect that there should be a formal prohibition on the acquisition of land in the Chittagong Hill Tracts by non-tribals, at least for a period of some years.

Similar problems have arisen in *Indonesia*, where large numbers of people are migrating, in a government-sponsored programme, from overcrowded areas of the inner islands to the less developed areas of the outer islands. Concern has been expressed that, because of the limited land available in areas of traditional tribal occupation, continued settlement may only be possible in certain areas if tribals relinquish lands which are presently under shifting cultivation. While the Government has introduced measures to discuss land claims and to involve tribal peoples in the planning process, it has also been alleged that the transmigration programme has led to increased alienation of tribal land, and to a change in the lifestyle of tribals from traditional hunting and gathering to settled agriculture in the areas affected.³⁷

Finally, consideration should be given to cases of removal of indigenous and tribal peoples from their lands owing to national emergencies or on grounds of national security. Elsewhere in this report, it has been noted that these peoples are particularly vulnerable in situations of conflict. At times they have fled their traditional areas when their security could not be guaranteed. In other instances their access to, and use of, their lands has been severely restricted when the areas in which they reside have come under military control. In yet other instances governments have removed them from their traditional lands, at least on a temporary basis. In such cases, complex questions arise concerning the degree and dimensions of an emergency which might justify such wholesale removals. Removals which are conducted on a compulsory basis and without adequate prior consultation with the peoples affected are likely to prove counterproductive even from the standpoint of national security itself. While removals may be justified as a response to an emergency situation, they are likely to prolong and exacerbate this emergency if the needs and wishes of the indigenous and tribal peoples are not taken fully into account.

The question of removal is closely related to that of the right of ownership. It is obvious that firm restrictions on the alienation of indigenous and tribal lands to other members of the population will provide the greatest safeguard against removals in the context of colonisation programmes, without impairing the right

of States to control the use of the national territory in the event of genuine emergencies, or in order to control the exploitation of vital strategic resources. In practice, though indigenous and tribal peoples should enjoy preferential treatment in this area owing to their vulnerability and particular needs, they frequently suffer from discriminatory treatment in comparison with other members of the population. Development decisions can be taken against their wishes and without consultation. There may be cases in which indigenous lands are the only ones on which vital infrastructural projects can take place; but all too often, they are chosen because they are the easiest to appropriate.

The problems and solutions outlined above bear out the conclusions of the Meeting of Experts to which reference was made at the beginning of this section. That appropriation should take place only in exceptional circumstances and with the consent of these peoples is already stipulated in Article 12 of Convention No. 107 and will be questioned by no one. The Meeting of Experts recognised that it was impossible to define for all cases of appropriation exactly what conditions should apply; it therefore added that in exceptional circumstances States should order removals without consent only after defining appropriate procedures which guarantee that these peoples will be effectively represented. This recommendation would not appear to be controversial.

TRANSFER AND SECURING OF THE RIGHTS OF OWNERSHIP

Article 13 of Convention No. 107 contains two paragraphs which cover substantially different issues. The first one provides for the recognition of customary procedures concerning land ownership and use, while the second calls for measures against potential abuses by outsiders who seek to secure the ownership or use of these lands.

During the Meeting of Experts, emphasis was laid on the importance of recognising the traditional institutions and procedures of indigenous and tribal peoples for transmitting rights to their lands, although it was also recalled that all land rights had to be exercised within the framework of national legislation. This apparent contradiction need not lead to the kind of conflict between competing systems that some of the experts feared.

Earlier in this chapter it was seen that the legislation of a number of countries, particularly in Latin America, has in recent years reaffirmed the right of indigenous communities to the ownership and control of their communal lands. However, in certain cases the legislation provides for the extinction of this right, and even for the dissolution of the indigenous communities themselves when indigenous peoples have abandoned their communities and thus relinquished their rights, or where the lands under communal ownership are exploited individually by most or all of the members of the community concerned.³⁸

Complex issues can also arise in the context of agrarian reform and colonisation programmes. For instance, while codified national law may recognise rights to land primarily on the basis of actual use and occupation, traditional or customary law often provides for the rights of shifting cultivators or nomadic groups to lands which are used on an intermittent basis. Colonisation programmes which are conducted without due regard to traditional forms of ownership and control are likely to lead to land disputes caused by conflicting

concepts of ownership. During the ILO Meeting of Experts, a number of experts pointed to the need for studies on the relationship between customary laws and the positive law of the countries in which indigenous and tribal peoples live. These studies are of particular importance with regard to concepts of ownership and inheritance laws.

With regard to Article 13, paragraph 2, of Convention No. 107, the Meeting of Experts stressed the need for effective protection against dispossession by persons or bodies not belonging to the peoples concerned. In many countries there are no prescribed sanctions for trespass on indigenous and tribal lands, though some general provisions may exist. Section 36 of the Brazilian Indian Statute of 1973, for example, provides that the State shall take suitable administrative measures or propose, through the Federal Public Prosecutor, adequate judicial measures to protect the forest-dwellers' possession of the lands they occupy. Elsewhere, specific penalties may be provided for by law. In Australia, for example, both the Aboriginal Land Rights (Northern Territory) Act, 1976, and the Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act, 1984, provide for penalties for persons who enter or remain on Aboriginal land except in accordance with these and other pertinent laws.

In recent years a number of international non-governmental human rights organisations as well as indigenous peoples' organisations have drawn attention to the widespread encroachments, often accompanied by coercion or violence, on indigenous and tribal lands. Stronger provisions may therefore be advisable, in order to provide for more effective protection against such encroachments.

AGRARIAN PROGRAMMES AND RESTITUTION

Article 14 of Convention No. 107 stipulates that national agrarian programmes should secure for indigenous and tribal peoples sufficient land to provide the essentials of a normal existence and the means required to promote the development of the lands which they already possess.

Article 14 contains two subparagraphs. Subparagraph (b), which establishes the principle that indigenous and tribal peoples should receive treatment equivalent to that accorded to other sections of the community with regard to technical and other assistance for the development of their lands, should elicit no controversy. It is complemented by two paragraphs of the accompanying Recommendation No. 104, the first of which (Paragraph 7) provides that appropriate measures should be taken for the elimination of indebtedness among farmers belonging to the populations concerned, and that co-operative systems of credit should be organised, and low-interest loans, technical aid and, where appropriate, subsidies, should be extended to these farmers to enable them to develop their lands. Paragraph 8 of the Recommendation provides that, where appropriate, modern methods of co-operative production, supply and marketing should be adapted to the traditional forms of communal ownership and use of land and production implements among the populations concerned and to their traditional systems of community service and mutual aid.

Subparagraph (a) of Article 14 poses more complex problems. It likewise establishes the principle that there should be equivalent treatment with regard to the provision of lands; but it does not specify any procedures or criteria whereby

sufficient lands might be made available in order to provide for "the essentials of a normal existence" for the peoples concerned.

The Food and Agriculture Organisation (FAO) is the United Nations specialised agency with particular competence in this field. While the FAO may not have addressed directly the question of adapting agrarian programmes to the specific needs of indigenous and tribal peoples, certain of its guide-lines and programme policies are quite relevant to the situation of these peoples. For example, the Programme of Action adopted at the FAO's World Conference on Agrarian Reform and Rural Development in 1979 recommended new approaches to agrarian reform, and urged governments to protect the rights of nomadic populations, and to preserve and adapt or create systems of broad-based community control and management of land and water rights in accordance with development needs. (The FAO has of course been consulted in formulating the present report.)

In certain cases, indigenous and tribal peoples are quite capable of exercising community control and management of their lands and resources. This is the case where their lands are contiguous, where there has been little or no alienation of these lands to outsiders, and where their rights over these cohesive territories have been recognised by law or agreement. However, as noted earlier, the situation of millions of indigenous and tribal peoples is markedly different. Where their lands have been fragmented over hundreds of years, their major demand may be for the restitution of sufficient ancestral land to provide them with a cohesive territory over which they may exercise management and control in accordance with their own traditions.

It is thus necessary to distinguish between the provision of adequate lands as a measure of good policy, and the restitution of land in recognition of some form of obligation. The question of restitution is immensely complex. In its most extreme variant, restitution on the basis of historical claims to indigenous land would require a drastic revision of national systems of property ownership. But the principle of restitution on the basis of need and entitlement has been included in the declarations of indigenous peoples' organisations, in the recommendations of the United Nations Special Rapporteur on Indigenous Populations, and in the legislation of a number of States.

The Special Rapporteur recommended that indigenous lands should be returned under agrarian reform programmes. He stated that restoration of the indigenous land base under agrarian reforms which would return ownership of the land to indigenous peoples without purchase or taxation, is crucial, and that it is also essential that indigenous lands be contiguous in order to preserve the unity of the people. He stated that priority must be given to the return of land seized from indigenous communities, and that governments should be encouraged to appoint commissions of inquiry to establish how lands can be obtained for the indigenous communities that need them, and how land rights can best be granted and protected once they have been restored to those indigenous peoples who have been deprived of them.³⁹

A number of experts and observers at the ILO Meeting of Experts also stressed the importance of restitution, noting that rights based on treaties, grants or immemorial possession were not given the respect they deserved. It was noted that indigenous and tribal peoples occupied lands which were greatly reduced

from their earlier holdings, and which in many cases were insufficient to provide for their current needs and future development. The Meeting was also informed that the principle of restitution had been recognised in the constitutions or legislation of several Latin American countries. In some cases, the right to restitution was accorded in relation to lands lost during a specified period preceding the adoption of the pertinent legislation.⁴⁰ Although it was acknowledged that there were practical problems in fully implementing such a right, there was support for the inclusion of this principle in the revised Convention.

In Latin America a number of legislative measures have been adopted within the framework of national agrarian reform laws, providing for the restitution to indigenous communities of the lands of which they had been unlawfully dispossessed over a specified period of time. The Mexican Agrarian Code of 1924 recognised the right to restitution of the lands, forests and waters which had been illegally invaded or appropriated between 1876 and 1915. The Bolivian Agrarian Reform Act of 1953 provided that all lands usurped from indigenous communities after 1 January 1900 be restored to them when they could prove title of ownership. More recently, the Peruvian Agrarian Reform Act of 1969 declared null and void all transfers of the lands of indigenous communities which had taken place after 1920, and ordered that these lands be restored to them upon the payment of compensation.

In other Latin American countries indigenous peoples have been demanding similar restitutions on the basis of older laws, which may be still in force and which recognise their ownership of particular land areas. In Colombia, for example, the indigenous delegates to the First National Indigenous Congress held in 1982 demanded the enforcement of Act No. 89 of 1890, and the restitution to indigenous communities of the lands included in their ancient property titles.

In other parts of the world some governments have accepted in principle their obligation to deal with claims to land on the basis of historical treaties. Mention has already been made of the Specific Claims policy outlined by the Government of Canada, under which recognition will be given to claims made by Indian Bands concerning a "lawful obligation", in the event of the non-fulfilment of a treaty or agreement between Indians and the Crown, or of the illegal disposition of Indian land. In Australia measures have also been taken for the restitution of lands, while in the United States claims for restitution have in recent years been upheld by the courts.

Such claims are inevitably problematic, in strictly legal as well as in political terms. In Latin America in particular, complex legal questions have arisen when indigenous and non-indigenous peoples have laid claim to the same land area, with both parties perhaps producing titles to the land, dating from different historical periods. Whereas the validity of such competing claims may be technically debatable, the practical outcome may depend largely on overall state policies with regard to traditional systems of land ownership. A significant number of States in Latin America and elsewhere have accepted the principle that procedures must be established to deal with land claims made by indigenous peoples on the basis of historical rights, ancient title and immemorial possession.

EXAMINATION OF INDIVIDUAL ARTICLES CONCERNING LAND RIGHTS

All issues concerning the protection of indigenous and tribal lands are related closely to the right of ownership. Where there are firm provisions concerning the effective ownership and control of lands and resources by these peoples, there is less danger that ownership rights may be curtailed owing to conflicting national priorities. It has been noted that the relevant Articles of Convention No. 107, while recognising the right of these peoples to own the land they occupy, do not provide for any administrative measures to render that right of ownership effective. Furthermore, Article 11, while recognising the right of ownership over lands, makes no mention of other resources which pertain to these territories, and the control of which may be necessary for the continuation of the traditional lifestyle of these peoples, or alternatively for their economic development under conditions which will not destroy their cultures. A further criticism which has been made of this part of the Convention, both at the Meeting of Experts and elsewhere, is that Articles 12 and 13 place too many limitations on the effective exercise of ownership, thereby facilitating the appropriation of indigenous and tribal lands or the removal of these peoples from their traditional lands, without providing for adequate safeguards and procedures when conflicts of interest arise.

It is therefore suggested that some amendments be made to Articles 11 to 14 of Convention No. 107, in the light of national developments and of problems noted in the application of the Convention. The amendments suggested here have two basic purposes (in addition to revising the Convention's integrationist approach, as suggested for Articles considered in the previous chapter). As indicated above, it appears that land questions must be re-examined substantively, more so than the other Articles of the Convention. Thus, the first reason for reviewing these Articles is to modify or strengthen them to take account of the needs of these peoples, in the light of developments since 1957.

The second reason is perhaps even more important than any modifications concerning substantive land rights. The suggestions made below would above all provide for procedures reflecting the basic approach of promoting consultations with representatives of the peoples affected, and their participation in taking all decisions which affect them.

Article 11

While views were expressed in the Meeting of Experts to the effect that indigenous peoples have generally expressed a preference for collective forms of ownership, individual forms of ownership are also widespread, in particular among certain tribal peoples covered by this Convention. The present wording of this Article should therefore be retained. However, a new paragraph might be added, providing that governments should take steps, where this has not already been done, to determine the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of the right of ownership.

Possible new Article

It has been noted that Paragraph 4 of Recommendation No. 104 provides that members of the populations concerned should receive the same treatment as other members of the national population in relation to the ownership of underground wealth or to preference rights in the development of such wealth. During the Meeting of Experts it was noted that in many countries those who hold title to land do not have rights to the subsoil and other resources; even though indigenous and tribal peoples have special needs and special claims in regard to such resources, a stronger provision which simply extends ownership of these resources to these peoples would prove incompatible with the legal systems of a number of countries.

Yet it has been shown above that these peoples are especially vulnerable when resources on the lands they occupy are exploited by others, and that such exploitation often results in their effective dispossession from lands that have been rendered unsuitable for their traditional lifestyles. In addition, it has been suggested above that these peoples should have "as much control as possible" over development as it affects them.

Clearly, the insertion in a revised Convention of rights which would require radical changes in national legal systems, if the Convention were ratified, would be counterproductive. Whatever provision is adopted on this subject should therefore establish the general principle that these peoples should have certain rights, while providing also for special measures for their protection where there may be difficulty in the immediate recognition of these rights.

A new provision might therefore provide that the right of ownership over lands, provided for already in Article 11 of Convention No. 107, should extend to natural resources, including flora and fauna, waters, ice and mineral and other subsoil resources pertaining to the lands traditionally occupied by the peoples concerned. Taking account of objections which are likely to be raised, a second paragraph might provide that, where under the national legal system, land ownership does not carry with it the ownership of mineral and other subsoil resources pertaining to the land, special measures should be taken to protect the peoples concerned in relation to the exploitation of such resources. It would of course be understood that, in accordance with other suggestions made in this connection, the adoption of such special measures would follow consultations with representatives of these peoples.

Article 12

The Meeting of Experts strongly endorsed the need to revise this Article in order to limit the circumstances in which removals from indigenous and tribal lands may occur, and to provide for adequate safeguards against potential removals. It has been noted that safeguards do exist in certain countries, to the extent that parliamentary or other public inquiries are required before the appropriation of any indigenous or tribal lands may occur.

A revised Article might first establish the general principle that the peoples concerned should not be removed from their habitual territories without their free consent. The list of situations in which removals can take place might be deleted from the first paragraph of this Article. The revised Article might go on to

provide that, in cases where removal is necessary as an exceptional measure, and where the free consent of these peoples cannot be obtained, no such removal should take place except following adequate procedures, including public inquiries, which provide the opportunity for effective representation of the peoples concerned. Examples were given above of cases in which such procedures have been established.

During the Meeting of Experts concern was expressed that the second paragraph of Article 12 of Convention No. 107 does not provide that these peoples have the right of ownership over new lands provided to them in compensation for lands from which they have been removed. Thus, this paragraph might be amended by adding that lands with which they are provided as compensation should, in addition to the present requirement, also have a legal status at least equal to that of the lands previously occupied by them. No amendments are needed to the second sentence of paragraph 2 of this Article, or to paragraph 3, concerning other forms of compensation in cases of removals.

Article 13

The first paragraph of this Article concerns procedures for the transmission of rights of ownership and use of land. As reported above, the indigenous and tribal representatives present at the Meeting of Experts unanimously considered that their lands should be inalienable, and indeed, legislation enacted in recent years in several countries has provided for inalienable forms of indigenous or tribal land ownership, or placed other restrictions on the transfer of these lands. Yet an absolute prohibition on the transfer of rights of ownership and use of land may not always be appropriate or acceptable to the indigenous and tribal peoples concerned. Thus, although there is a clear and pressing need for protection, it may not be possible to reach agreement on a general requirement of inalienability in the revised Convention. It is however suggested that, in accordance with the general approach of respect for these peoples' customs, the final phrase of paragraph 1 of this Article beginning with "in so far", be deleted; thus, the paragraph would still require that the traditional procedures for the transmission of rights of ownership and use of land of the peoples concerned be respected, within the framework of national laws and regulations. In order to take account of cases in which additional protection is needed, this paragraph might also provide that any decision regarding the capacity to transmit rights of ownership and use of land should be taken in consultation with the peoples concerned.

No changes are required to paragraph 2 of Article 13. However, it has been suggested that a revised Convention should specify that penalties should be imposed in the event of harmful trespass on the traditional lands of these peoples. While the proposed revision of Article 11 would require States to guarantee effective protection of these lands, it is not without merit to suggest that a further requirement in Article 13 concerning sanctions in the event of harmful trespass would reinforce this general principle. To this end, an additional paragraph in this Article might provide that any unauthorised intrusion upon, or use of, the lands of the peoples concerned by persons not belonging to these peoples should be considered an offence, and that appropriate penalties should be established by law.

Article 14

There would seem to be no need to revise the present wording of this Article. However, as noted earlier, complex issues have arisen with regard to claims made by indigenous and tribal peoples for restitution of their traditional lands, on the basis of ancient title, treaty rights or immemorial possession. With increasing frequency, these peoples have been demanding that national agrarian programmes should provide them with lands in accordance with these claims. In a number of countries machinery has already been established to deal with such claims. While a Convention applicable to a wide variety of national situations should not prescribe the exact manner in which such claims should be handled, a new provision might establish the principle that governments should, in fact, deal with such claims. A new paragraph in Article 14 might provide that adequate machinery should be established within the national legal system to resolve land claims by the peoples concerned.

Notes

¹ United Nations: *Study of the problem of discrimination against indigenous populations*, by Mr. José R. Martínez Cobo, Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities (Geneva; doc. E/CN.4/Sub.2/1983/21/Add.4), Ch. XVII, para. 51.

² ILO: *Report, Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957* (No. 107), Geneva, 1986 (Geneva; doc. APPL/MER/107/1986/D.7, found in GB/234/5/4).

³ Proposals are being made separately for measures in the revised Convention requiring consultation.

⁴ ILO: *Report . . .*, op. cit. See especially paras. 70 and 71.

⁵ idem: *Living and working conditions of indigenous populations in independent countries*, Report VIII (1), International Labour Conference, 39th Session, Geneva, 1956, p. 16.

⁶ United Nations: *Study of the problem of discrimination . . .* (Geneva; doc. E/CN.4/Sub.2/1983/21/Add.8), Ch. XXII, especially paras. 526, 529 and 531.

⁷ ILO: *Indigenous peoples: Living and working conditions of aboriginal populations in independent countries* (Geneva, 1953), p. 294.

⁸ ibid., pp. 321 to 331 on the Mexican *ejido*. See also *Codificación agraria y leyes sobre tierras*, Editorial Información Aduanera de México, 1951.

⁹ See Bolivia Legislative Decree No. 03464 of 1953 on agrarian reform, especially sections 42, 57 and 58.

¹⁰ See Peru Legislative Decree No. 17716, 24 June 1969, and Decree No. 37-70-A of 1970 on peasant communities.

¹¹ A Colombian government publication, *Fuero Indígena* (República de Colombia, Ministerio de Gobierno, 1983), examines the implications of past and present indigenous and agrarian reform legislation for the protection of indigenous lands.

¹² United Nations: *Study of the problem of discrimination . . .* (Geneva; doc. E/CN.4/Sub.2/1983/21/Add.4), Ch. XVII, in particular paras. 239 to 256.

¹³ See Argentina Act No. 23302, 8 November 1985 on indigenous policy and assistance to indigenous communities.

¹⁴ See Costa Rica Act No. 5251 of 13 July 1973 setting up CONAI. See Executive Decree No. 5904-G of 10 April 1976 and 6036-G of 12 June 1976, providing for the creation of additional reserve lands.

¹⁵ For example, Act No. 18 of 14 February 1952 created the reserves of San Blas, Bayamo and Darien, Tabasara and Bocas del Toro. Act No. 16 of 19 February 1953 created the *Comarca* of San Blas.

¹⁶ Autonomy Commission: *Principles and policies for the exercise of the right to autonomy by the indigenous people and communities of the Atlantic Coast of Nicaragua*, Managua, Nicaragua, 1985.

¹⁷ Constitution of Guatemala, 1985 (ILO: *Legislative Series*, 1985 – Gua. 1).

¹⁸ *Provisional Record of the Twelfth Conference of American States Members of the ILO*, Montreal, Canada, March 1986.

¹⁹ See, for example, Report III (Part 4 A), *Report of the Committee of Experts*, Convention No. 107, Observation on Brazil, International Labour Conference, 1984.

²⁰ *Fuero Indígena*, op. cit., p. 25.

²¹ From a statement of the observer from the Government of Australia to the Fourth Session of the United Nations Working Group on Indigenous Populations, Geneva, 1985.

²² For the differences between specific and comprehensive claims, see *Outstanding business: A native claims policy (specific claims)* (Ministry of Indian Affairs and Northern Development, Ottawa, 1982) and *In all fairness: A native claims policy (comprehensive claims)* (Ministry of Indian Affairs and Northern Development, Ottawa, 1981). Specifically on the Inuvialuit agreements, see *The Western Arctic claim: A guide to the Inuvialuit final agreement* (Indian and Northern Affairs, Canada, 1984).

²³ For an overall survey of legislation and policy concerning tribal peoples in India, see M. L. Patel: *Changing land problems of tribal India* (Bhopal, Progress Publishers, 1972).

²⁴ Gordon P. Means: "The Orang Asli: Aboriginal policies in Malaysia", in *Pacific Affairs*, Winter 1985-86.

²⁵ United Nations: *Study of the problem of discrimination . . .*, op. cit., Ch. XVII.

²⁶ *Estatuto do Índio*, Act No. 6001, 19 December 1973, section 45.

²⁷ See, for example, *Política indigenista brasileña*, Report of the Government of Brazil to the Ninth Inter-American Indian Congress, Santa Fe (New Mexico, United States), 1985.

²⁸ Government of Colombia: *Acciones y proyecciones de la política indigenista del Estado colombiano*, Bogotá, Mar. 1985 (mimeographed).

²⁹ Stuart McGill and G. J. Crough: *Indigenous resource rights and mining companies in North America and Australia* (Canberra, Australian Government Publishing Service, 1986).

³⁰ *In all fairness . . .*, op. cit., p. 24.

³¹ Government of Canada: "The Northern Quebec agreements: Government of Canada involvement" (date unknown).

³² *The Western Arctic claim . . .*, op. cit.

³³ McGill and Crough, op. cit., p. 16.

³⁴ United Nations: *Study of the problem of discrimination . . .* (Geneva; doc. E/CN.4/Sub.2/1983/21/Add.8), para. 558.

³⁵ ILO: *Report . . .*, op. cit., conclusion 6.

³⁶ See Maria Lourdes Aranal-Sereno and Roan Libarios: "The interface between national land law and Kalinga land law", in *Philippine Law Journal*, Dec. 1983.

³⁷ See, for example, *Transmigrasi: Indonesian resettlement policy, 1965-1985*, by Mariël Otten, International Work Group for Indigenous Affairs, Copenhagen, Oct. 1986.

³⁸ For example, Title X of the *Estatuto especial de comunidades campesinas* in Peru provides for the dissolution and extinction of the communities in a number of cases, such as (a) when agricultural lands have been converted into urban lands; (b) when the lands under the dominion of the community are exploited in a significant or total manner; and (c) when these communities have no active institutional life and are without communal authorities in a three-year period after the enactment of this statute (section 112). Act No. 23302 in Argentina also establishes obligations for members of the indigenous communities, specifying that the ownership of their lands will revert to the State, province or municipality in the event that these obligations are not carried out.

³⁹ United Nations: *Study of the problem of discrimination . . .*, op. cit., paras. 565 and 568-570.

⁴⁰ ILO: *Report . . .*, op. cit., para. 81.

CHAPTER V

LABOUR, RECRUITMENT AND CONDITIONS OF EMPLOYMENT

Article 15 of Convention No. 107 provides that governments shall 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. It goes on to require the prevention of discrimination in a number of labour-related fields (admission to employment, remuneration, medical and social assistance, safety and health and freedom of association).

Recommendation No. 104 deals with recruitment and conditions of employment in far greater detail. It contains a number of specific recommendations aimed at safeguarding against the abuse of indigenous and tribal workers with regard to such issues as recruitment, protection of wages, repatriation, stabilisation measures for the indigenous and tribal workforce, and steps to discourage their migration. Several of the Recommendation's provisions concern the elimination of coercive systems of recruitment and employment, by providing, among other things, for the licensing and supervision of private recruiting agents, for regulations concerning the maximum amounts and manner of repayment of advances on wages, and for prohibition of interference with the personal liberty of workers on the ground of debt.

In Chapter XVI of his study,¹ entitled *Occupation, employment and vocational training*, the United Nations Special Rapporteur on indigenous populations paid particular attention to the persistence of coercive labour systems affecting indigenous peoples in many parts of the world. He noted that, although such exploitative labour systems as serfdom, debt bondage and the numerous forms of compulsory service have generally been abolished in law, there is evidence that coercive labour systems continue in practice, and that the victims are frequently indigenous and tribal people. In this regard he identified "unfree labour", provoked or forced migration, inadequate recruitment systems, and working conditions incompatible with human dignity. All of the Special Rapporteur's recommendations for action in the area of labour and employment dealt with the elimination of coercive labour. He recommended that the use of "cheap indigenous labour" should be rejected and replaced as soon as possible by real employment opportunities for indigenous workers, and that there should be strict enforcement of provisions governing recruitment practices, minimum wages and the termination of contractual relationships. He also advocated measures against violations of the prohibition of forced and compulsory labour. These abusive practices, to which indigenous peoples have been and continue to be subjected, should be rejected and eliminated in practice as they have been prohibited by law. He urged that ways and means should be devised to contribute to the elimination of serfdom and debt bondage in all their forms, and

recommended that special attention be paid to the manner in which adequate control can be exercised over independent labour contractors who take advantage of induced indebtedness in order to procure a cheap labour supply for seasonal work on commercial plantations. The Special Rapporteur noted that adequate protection of the indigenous labour force is best assured when indigenous workers form their own organisations to negotiate for better living and working conditions. He recommended accordingly that governments should permit, facilitate and promote the establishment among indigenous workers of their own trade union and co-operative organisations.²

During the ILO Meeting of Experts a number of speakers stated that Article 15 of Convention No. 107 should be revised. The Meeting highlighted a number of areas where indigenous and tribal peoples were considered to be particularly vulnerable. These included, for example, the special problems of the migrant labour force; the problems of the exposure of indigenous agricultural workers to toxic substances and pesticides; the exploitation of child labour; the existence of slavery-like practices; and the absence of adequate mechanisms to ensure that indigenous and tribal peoples enjoy in fact those rights guaranteed to them by law.

Many of these areas are covered by other ILO instruments which apply to all members of the national labour force. The ILO Conventions on forced labour, discrimination, plantation workers and rural workers' organisations are particularly relevant to indigenous and tribal workers. However, these peoples are especially vulnerable to exploitative labour practices, above all when there is large-scale recruitment within their communities for agricultural or mining labour far from their homes. They have frequently been seen as a source of cheap labour, and they have been exposed to living and working conditions incompatible with accepted standards of health and safety. In part this is because their labour is often exploited in remote areas where government supervision may be inadequate, and because they have a poor knowledge of their legal rights or the means whereby these rights can be enforced. These abuses are, however, by no means confined to areas where it would be difficult to control them, and are often tolerated even when they are generally known.

Such problems are not new. Ever since its earliest days, the ILO has been adopting standards to protect these peoples in the area of employment. However, the nature of the problems has been changing. The principal factor appears to be a marked increase over the past few decades in the number of landless rural workers, resulting in increases in seasonal (and therefore unstable) employment and in migration to the cities. While the problem of landlessness affects indigenous and non-indigenous workers alike, in many countries indigenous or tribal peoples comprise a significant proportion of this landless and seasonal workforce. Certainly, this phenomenon is closely related to the problems discussed in the previous chapter on land rights.

What this means in practice is that openly coercive systems of employment are perhaps not, at present, the most urgent labour problem of indigenous and tribal peoples, although protection against recruitment in abusive conditions remains vital. Until quite recently in many parts of the world, indigenous and tribal peoples were obliged in law or in practice to perform compulsory labour for landlords, or to undertake forced labour for specific periods of the year. While

such practices have not been eliminated, their incidence has been greatly reduced not only by legislative and administrative measures, but also by the emergence of a substantial labour reserve actively competing for the available work. Many indigenous and tribal peoples, deprived of alternative means of subsistence, are compelled by sheer economic necessity to undertake seasonal labour under arduous conditions which are frequently at variance with the provisions of national labour laws. While *de jure* discrimination against these workers is very rare, in practice it is often indigenous and tribal people who perform the bulk of low-paid seasonal labour, without the economic and social benefits guaranteed to other sectors of the national labour force.

In very few cases has special legislation been enacted to protect indigenous and tribal workers. It is true that certain governments have undertaken special studies or programmes to improve employment opportunities for these peoples. Yet in most countries, according to available information, no special measures have been enacted, although steps may have been taken to extend the ordinary provisions of labour legislation to seasonal and other marginal workers.

BEFORE THE ADOPTION OF CONVENTION No. 107

Since the 1920s the ILO has devoted considerable attention to the situation of indigenous and tribal workers. In 1926 the ILO Governing Body set up a Committee of Experts with a view to drawing up international standards of protection for such workers; the Committee's efforts eventually led to the adoption of a number of Conventions and Recommendations. The ILO Committee of Experts on Indigenous Labour, which met in 1951 and 1954, proposed certain minimum standards concerning the employment of indigenous workers. These standards included, for instance, the regulation of recruitment practices, the provision of adequate and accurate information in a language understood by the worker, regarding the place of work, starting date, remuneration and conditions of life and work, and the protection of wages and control of advances to workers. The 1953 book *Indigenous peoples* examined in considerable detail the prevailing recruitment methods and practices throughout the world at that time.³ With regard to employment in general, it noted even then that in most countries indigenous peoples had been forced, owing to the loss of their lands, to seek work in mines or on the estates, farms and plantations that developed as the countries became integrated in the market economy. Moreover, when the great commercial farming enterprises grew up in regions at some distance from the cheap and accessible supply of indigenous labour, recruitment systems were developed. The book describes various types of coercion and abuse in recruiting indigenous and tribal people, including the Latin American system of *enganche*, whereby the recruiter receives a lump-sum payment or commission for the workers delivered to the plantation. The owner of the plantation seldom assumes any obligation with respect to the contractual relationship between worker and recruiting agent, and accepts no liability for abuses committed by the latter. Advance payments are also used in recruitment to coax workers into debts which they cannot repay; the indebtedness is used to retain a constant supply of cheap indigenous manpower. The book also noted that the plantation economy and commercial farming for export had created employment opportunities and a

demand for seasonal farm labour, bringing about periodic migrations of indigenous and tribal people.

The book *Indigenous peoples* also contains extensive information on the compulsory labour systems which were then widespread in the rural areas of Latin America and Asia, such as the *pegujal* system in Guatemala, the *yanacónaje* in Peru, the *huasipungo* in Ecuador, the *colonato* in Bolivia and bonded labour in India, among others. In all of these systems the indigenous peoples were given access to lands for their subsistence requirements, in exchange for obligations to do work which generally did not pay the legal minimum wage.

In addition, the 1953 book examined the large migratory flows of indigenous and tribal peoples who performed agricultural labour within their own countries and across national frontiers. This analysis showed that indigenous and tribal communities had been forced into migration and wage-earning employment by the loss of the lands which had previously supported them, in particular in Asia and Latin America.

The ILO's 1957 instruments were based largely on the 1953 book. The Convention called generally for special measures and for non-discrimination, while the Recommendation included provisions aimed at protecting indigenous workers against the exploitative practices of recruiting agents and employers. Thus there are several provisions concerning the protection of wages and the personal liberty of workers, contracts of employment and overall safeguards to ensure that the worker understands and freely and knowingly accepts the conditions of employment.

There are also provisions in the Recommendation that call upon governments to adopt positive policy measures in the area of indigenous and tribal employment. For example, Paragraph 13 of the Recommendation provides that measures should be adopted to promote the stabilisation of workers and their families in or near employment centres, and that in applying such measures, special attention should be paid to the problems involved in the adjustment of these workers and their families to the forms of life and work of their new social and economic environment. Paragraph 14 calls for measures to discourage migration when it is considered contrary to the interests of the workers and their communities, by promoting measures designed to raise the standards of living in the areas which they traditionally occupy. Paragraph 15 calls upon governments to establish public employment services in areas in which workers belonging to the populations concerned are recruited in large numbers.

The Recommendation's provisions are thus quite far-reaching. First, they call for a number of legislative and practical measures to safeguard against abuses at the local level. This requires effective controls, through the establishment of procedures and supervisory machinery which will both inform indigenous and tribal workers of their legal rights and enable them to pursue remedies in the event of violation of these rights. Second, they call upon States to carry out a wider range of economic and social policy measures, in order to seek viable alternatives to systems of migratory employment which are liable to prove prejudicial to the interests of the indigenous and tribal peoples concerned.

DEVELOPMENTS SINCE 1957

In the three decades since the adoption of Convention No. 107 and Recommendation No. 104, there have been major changes in the systems of occupation, employment and recruitment of indigenous and tribal peoples throughout the world. Such compulsory labour systems as serfdom, debt bondage and other servile practices have generally been abolished in law. However, as was observed in the ILO's 1953 book, compulsory labour can be effectively ended only by eliminating the anachronistic systems of land tenure and employment which keep indigenous and tribal peoples in a socially and economically inferior position in relation to the rest of the population.

In Latin America these practices have generally disappeared, not only as a result of amendments to labour legislation, but also thanks to agrarian reform measures and other agrarian transformations which have sought to replace traditional employment systems with free wage labour. However, as the United Nations Special Rapporteur has observed, such agrarian restructuring may serve also to increase the incidence of absolute rural landlessness among indigenous peoples. He noted that in the years since the ILO's *Indigenous peoples* was published, there have been significant changes in the main occupational categories, that the rapid rise in industrialisation in recent years has affected even the most isolated areas, and that the process of modernisation has brought an increasing number of indigenous peoples within the wage economy. Yet he also noted that in many countries the abolition of semi-feudal tenancy systems, together with the modernisation and commercialisation of agriculture, has led to a large-scale expulsion of Indian labour from traditional *haciendas*. Where these measures have not been accompanied by effective agrarian reform programmes, the former tenants drift into the cities or seek occasional and seasonal labour in the countryside. While some indigenous peoples or groups may have found regular work and thus protection under the national labour legislation, there has none the less been a marked rise in the number of those who have access neither to land nor to regular employment. Poor social conditions in Indian reservations and their degeneration have also led to disproportionately high levels of unemployment among indigenous populations of the more industrialised countries, in urban as well as rural areas.

Systems of bonded labour or debt-peonage have by no means disappeared altogether, and are especially persistent where enforcement systems are weak. In India, for example, the Bonded Labour System (Abolition) Act was adopted in 1976, but studies carried out by the Government show that the elimination of this system in practice is proving extremely difficult. In recent years the United Nations Working Group on Slavery has considered reports on the continuing existence of bonded labour in this country and elsewhere, affecting tribal as well as other sectors of the national population, and the measures taken by the Government of India to render its elimination truly effective. There are indications that indigenous peoples continue to be subjected to servile labour practices in other parts of the world as well, above all in isolated forest regions. In Brazil, for example, the Government forwarded with its 1982 report on the application of Convention No. 107 a FUNAI report referring to the existence of servile labour practices endured by the Kaxinawá and Tukuná Indians working in

nut or rubber gathering enterprises in isolated regions of Amazonia, and noted that steps had been taken to improve their situation through the creation of pre-cooperative organisations. Allegations concerning similar practices in other parts of Latin America and in Asia have recently been submitted to the United Nations Working Groups on Slavery and Indigenous Populations, and increased attention to such questions by non-governmental organisations at both the national and international levels makes it probable that further such cases will come to light.

In these cases there is of course no *de jure* discrimination or open coercion sanctioned by the governments concerned. Indigenous and tribal peoples suffer from practical discrimination in employment when they do not enjoy the safeguards provided for by law which are more generally available to other sectors of the national population. The employment opportunities available to these peoples often provide the least remuneration, the worst of living and working conditions, and the least effective guarantees that they will be protected under national labour laws. The extent to which they can in fact benefit from the protection of the law will depend not only on supervisory mechanisms, but also on overall agrarian reform and rural employment policies. In some Latin American countries, as noted in the previous chapter, indigenous peoples have received substantial land areas under national agrarian reform programmes. But in other cases recent agrarian measures, while eradicating servile labour practices, have been concerned more with the modernisation of agriculture and with the stimulation of capital-intensive farming than with the provision of land to the former indigenous tenant farmers. Such measures, though requiring landowners to bring their lands under active cultivation, have also permitted some landowners to rid themselves of tenant farmers who were considered surplus to the requirements of modern agricultural production. Thus, as noted by the United Nations Special Rapporteur, one of the adverse effects of such programmes may be the expulsion of indigenous farmers from lands to which they previously had access under more traditional agrarian systems. As will be seen below, despite the existence of land reform programmes in almost every Latin American country, there has been a very significant increase in the number of indigenous peoples who are now part of the landless rural labour force.

In all of Latin America, over the past two or three decades, there has been a definite increase in land taken over by commercial farming, and thus a corresponding increase in the demand for seasonal labour during the harvesting period. In certain countries indigenous peoples comprise most of this seasonal labour force. Recent reports published by the ILO describe the extent of contemporary indigenous landlessness, and the high incidence of seasonal labour among these landless workers.

The report on rural development submitted to the 12th Conference of American States Members of the ILO in 1986 took note of the high levels of unemployment now affecting the indigenous peoples of the Latin American continent. While the rural labour force had dropped from 43 per cent of the total labour force of the region in 1970 to 33 per cent in 1985, the unemployment and underemployment figures remained high despite this decrease in the relative size of the rural labour force. It was estimated that most of the 9.9 million unemployed rural workers were landless indigenous workers, many of them

living in conditions of absolute poverty with incomes so low that they could spend little for clothing, fuel, shelter and other necessities.⁴

Also in 1986 the ILO published a study concerning seasonal labour in the agricultural sector of Latin America, noting two issues of special concern. First is the very large number of persons now engaged in seasonal agricultural employment, estimated at between 10 and 13 million. Second are the appalling conditions of work they endure. Among other factors the study pointed to the uncertainty of the legal status of labour relations between seasonal workers and the agricultural undertakings which employ them; the widespread practice of resorting to intermediaries to contract workers; and the clandestine nature of labour relations in the case of the numerous seasonal workers coming from neighbouring countries. It also referred to the methods utilised for calculating and paying salaries, and the excessively long hours worked by seasonal migrant labourers who generally sought to maximise their earnings during the period of the contract. Although this study makes no distinction on the basis of ethnic origin, a very substantial proportion of these workers are from indigenous and tribal peoples, in particular in those countries where these peoples make up a large percentage of the rural labour force.⁵

The ILO has no instruments that deal specifically with the problems of migrant workers within individual countries, although some of the problems of internal seasonal migrants are addressed in other Conventions, such as the Protection of Wages Convention, 1949 (No. 95), and the Plantations Convention, 1958 (No. 110). The ILO has, however, provided technical assistance to certain governments, examining the problems related to seasonal migrant labour. A brief review of the situation in two countries, Guatemala and Bolivia, in which substantial numbers of indigenous peoples engage in seasonal labour, may serve to illustrate some of the problems encountered and how they can be handled.

In 1970 the ILO submitted to the Government of Guatemala a report concerning colonisation, agrarian transformation, rural development and agricultural labour, following several years of technical assistance in these areas.⁶ It noted that at the peak of the coffee, cotton and sugar harvests some 350,000-400,000 persons were engaged in seasonal labour. In its conclusions, the report made reference to inappropriate recruitment systems, low salaries, subhuman transport conditions, unacceptable conditions of life and labour, and the high incidence of disease due to climatic differences and the almost complete absence of hygienic measures. In its recommendations, it urged the Government to publish as soon as possible regulations concerning migrant workers, to study the phenomenon of internal migration, to improve transport conditions, and to give priority to the regulation of piece work in order to avoid abuses. In 1978 and 1980 reports were submitted to the United Nations Working Group on Indigenous Populations alleging that many of the indigenous migrant workers did not undertake work voluntarily on the plantations, but were cajoled into debt by labour contractors who often acted also as money lenders. These reports also noted various defects in the regulation of contractors' activities, and asserted that the labour inspectorate was inadequately staffed. The ILO Committee of Experts has taken up these issues in its comments on Convention No. 110, requesting the Government to take measures to guarantee adequate transport conditions, to

limit the advances on wages that may be paid to recruited workers, and to lay down the maximum period of service that may be provided for in a contract of employment, among other things. In its 1985 Observation on this Convention, the Committee was able to note with satisfaction the adoption of Decree No. 103-84 of 27 February 1984 issuing regulations for the application of the Convention, with provisions concerning the engagement and recruitment of workers, their transport, living conditions and conditions of employment, including wages, housing and general welfare. In its recent reports on this Convention, the Government of Guatemala has stated that the competent authorities are ensuring better supervision of the activities of the recruiting agents for agricultural workers, and that every year has brought about a reduction in the number of authorised recruiting agents.

In 1977 the United Nations Working Group received a number of allegations concerning inadequate recruitment systems, forced indebtedness of indigenous seasonal migrant workers, and poor conditions of transport and work for these workers on commercial plantations in Bolivia. Since that time the ILO has provided technical assistance to the Government of Bolivia, concerning seasonal migrant labour in the Santa Cruz region. Subsequent reports prepared by the Government indicate that the systems of recruitment and employment have undergone transitions in recent years. When commercial agriculture first developed in this region in the late 1950s, recruiting agents working on a commission basis transported large contingents of indigenous peasant farmers from the *altiplano* to Santa Cruz, generally deferring the payment of part of the wages until the end of the harvest season. Although this practice has diminished, it was estimated that labour contractors still provided some 60 per cent of the seasonal labour force in the early 1980s, and that certain types of coercion, such as the retention of wages in order to compel the worker to remain with the same agricultural enterprise, were still common. The Government's studies recommended a number of changes in the administration of the migrant labour system. On 24 May 1984 the Government of Bolivia adopted Supreme Decree No. 20255, which determined how the General Labour Law and its regulatory Decree would apply to seasonal workers. The new regulations ban the private labour contracting system and require the Ministry of Labour and Employment Development to organise employment services operating free of charge. Workers may be contracted only in their place of origin or at the worksite. No payment may be exacted from them for their transport or that of their immediate family to or from the worksite. Workers are entitled to earn the prevailing wage in the area, reflecting the price paid for a ton of sugar-cane or for a pound of cotton. Only deductions provided by law, such as union dues, are permitted. Wages are to be paid at least monthly, and outstanding wages must be paid within seven days at the end of the contract. The working day is fixed at eight hours, though by mutual agreement it may be extended to up to 12 hours. While the possibility of creating a social security system applicable to sugar-cane workers and cotton pickers is under consideration, employers currently must provide medical, hospital and pharmaceutical assistance free of charge for the duration of the employment contract. The Decree also provides for interim measures regarding occupational injury, illness and survivors' benefits. This legislation is an excellent example of how labour law can be adapted to the particular needs of seasonal rural workers.

It is also important for national law and practice to facilitate and promote freedom of organisation for all rural workers, including indigenous and tribal workers. In some countries there are restrictions on the exercise of such freedoms, for instance through provisions that place limitations on the right to strike during key agricultural periods, such as the harvest time. The ILO Rural Workers' Organisations Convention, 1975 (No. 141), is of particular importance to these workers, promoting the establishment and growth, on a voluntary basis, of strong and independent organisations of rural workers as an effective means of ensuring their participation without discrimination in economic and social development. The Report on Rural Development submitted to the 12th Conference of American States Members of the ILO notes the dual problem encountered in establishing rural workers' organisations – on the one hand the non-observance in many countries of the relevant national laws and regulations and, on the other, the fact that rural workers are unaware of their elementary rights of association. A further problem arises in the case of seasonal workers. They are rarely affiliated to the more established rural workers' organisations, which are generally dominated by permanent salaried workers and tend to fight only for the interests of the majority. In this regard it is interesting to note the degree of co-operation given by certain governments of the Andean region to an ILO technical assistance project which is concerned specifically with workers' education for organisations of indigenous workers in the Andean Pact countries. Seminars organised within the framework of this project have facilitated the discussion of topics of particular relevance to the workers concerned.

SPECIAL MEASURES

The special measures required by Article 15 of Convention No. 107 have been adopted by very few countries. Where they exist, they involve either legislative and administrative measures to protect indigenous and tribal peoples from abusive conditions, or special programmes to enhance their employment opportunities, thus providing for the elimination of *de facto* discrimination. An example of such programmes is the comprehensive approach adopted in a number of Andean countries, through the inter-agency Andean Indian Programme, from the 1950s until the early 1970s. Another approach is the preferential recruitment of indigenous or tribal peoples, or the use of quota systems which guarantee them adequate proportional representation in certain sectors of employment. For instance, the Government of Pakistan has reported under Convention No. 107 that new industries are being created in the Federally Administered Tribal Areas, in which employment is reserved exclusively for tribals, except where none are qualified; in this case training is provided to the tribals. The Government of Bangladesh has reported that tribals benefit from a quota system for the allocation of employment in government service, and from special training programmes created for them. Similar quota systems exist for the scheduled tribes of India.

Apart from these approaches there appear to be very few cases in which legislation provides special labour protection for indigenous or tribal peoples. In Latin America, for example, several governments have stated in their reports under Convention No. 107 that no need has been found to take special measures,

and that all citizens are equal before the law. (It may be noted that the Committee of Experts has stated on a number of occasions that the existence of formal equality before the law does not obviate the need for special measures when there is *de facto* discrimination.) There are at least two countries, however, where special labour protection for indigenous workers is provided for by law. The first is Brazil, where, as noted earlier, all Indians are considered to have a special status under the guardianship of the National Indian Foundation (FUNAI). Sections 14 to 16 of the Indian Statute provide that Indians shall benefit from the general labour legislation, but that conditions of work may be adapted to their customs; that any contract of employment concluded with "isolated" Indians shall be invalid; and that FUNAI must approve contracts of employment for other Indians, and set up certain guide-lines for their employment. According to these guide-lines, encouragement must be given to team contracts or to contracts for work at home, so as to favour the continuation of community life. A model contract of employment established by FUNAI has been communicated to the ILO by the Government of Brazil. It should be noted, however, that the Committee of Experts has raised a number of questions as to the application in practice of these requirements.

The Paraguayan Labour Code, adopted in 1961, contains a special section on the employment of indigenous labour. It covers the employment of indigenous workers from the communities which are "not integrated with the rest of the population". It requires food and suitable living quarters to be provided by the undertaking which employs them. It also provides that it shall be unlawful for company stores or canteens to serve intoxicating liquor or harmful drugs to indigenous workers; that wages shall be paid once a week; that up to 50 per cent of the wage may be paid in merchandise, subject to mutual agreement; and that no undertaking shall transport indigenous workers from one part of the national territory to another without their consent and without the prior approval of the competent ministerial bodies. Forced labour, and the use of fraud or trickery to acquire the services of these people against their will are also prohibited. Lastly, the Labour Code provides that the State, through the competent bodies of the Ministries concerned, shall protect indigenous workers who have not been integrated into national life, safeguarding their institutions, property, persons and labour. In this case also the Committee of Experts has requested further information on practical implementation.

In other Latin American countries there are provisions for a strict application of general labour legislation where indigenous peoples are concerned. In Peru the 1974 Native Communities Act (which relates to forest-dwelling Indians) provides that public officials are obliged, under pain of civil and penal liability, to give immediate attention to the complaints of native communities regarding any violation of labour legislation or other actions which prejudice them. In Mexico Indigenous Co-ordinating Centres of the National Indigenist Institute have been given special responsibility for ensuring that Indian workers are not exploited. The Government of Mexico has stated in a report on the application of Convention No. 107 that these centres have no legal authority to compel action, but that, upon hiring, Indians are instructed on their rights and counselled on the conditions of work they should expect.

In some countries particular attention has been paid to the needs of

indigenous and tribal peoples within overall employment policy programmes. The Government of Canada has provided information on such programmes in its reports on the implementation of the Employment Policy Convention, 1964 (No. 122). In its 1986 report on this Convention, it stated that, since native people have needs beyond those of most Canadians, the Canada Employment and Immigration Commission attempts to deliver a significant portion of its relevant services and programmes for the benefit of this target group in line with the Canada Jobs Strategy. To assist the Commission in implementing this policy there is an established functional network consisting of a native employment directorate at national headquarters, regional native employment co-ordinators, and native employment counsellors at Canada Employment Centres. The directorate participates in the development of policies and strategies affecting native groups; it also investigates and responds to inquiries on this subject. A major activity is the provision of functional guidance with respect to employment and training needs and concerns of native workers. Functional guidance and assistance to the regions are provided mainly by direct communication with regional native employment co-ordinators. There are also some 97 native employment counsellors working with native clients in various Canada Employment Centres.

In Australia a major review of Aboriginal employment and training programmes has been conducted since 1984. A report of the Committee of Review of Aboriginal Employment and Training Programs,⁷ published in 1985, contains detailed recommendations for future employment and training policy measures on behalf of Aboriginal peoples. The report considers such issues as the experience of Aboriginal people in the regular labour market; current Aboriginal employment and training programmes, and the participation of Aboriginal people in these programmes; Aboriginal youth and schooling, and post-school education and vocational training; wage and salaried employment in the public and private sectors, and Aboriginal commercial business; Aboriginal involvement in resource development; employment development in the urban context, in remote Aboriginal communities and in Aboriginal communities located in or around small non-Aboriginal towns; and lastly, the employment potential of existing Aboriginal service organisations. The report recommends major changes, new approaches and further investments in each of these areas in order to address the serious problems of unemployment and underemployment now affecting Aboriginal peoples in the various sectors of the urban and rural economy.

The issue of disproportionately high unemployment among indigenous and tribal populations has, however, been given little attention and few statistics are readily available. As indicated earlier in this chapter, when these peoples lose their lands and traditional occupations, they inevitably form the lowest economic stratum of society. In the United States, for example, the unemployment of Indians on Federal Indian Reservations is frequently over 60 per cent; similar rates exist in indigenous and tribal reserve areas of other developed countries. In developing countries the rate of unemployment is impossible to measure, but is massive. Like the landless and partially employed rural labour force, displaced indigenous and tribal people migrate in great numbers to the cities, forming a permanent underclass.

While solutions to these problems are neither simple nor apparent, one suggestion made during the 1986 Meeting of Experts deserves special mention. It was noted that development projects which take place in or near indigenous areas almost never offer employment or training to the people living there. Whether such projects are in these peoples' best interest might be questioned; but some benefits at least should accrue to these communities in the form of employment opportunities and training which will leave some money and skills in the community when the project is completed.

Another issue brought up in the Meeting of Experts was the question of safety and health of indigenous and tribal workers. This is not dealt with in either the Convention or the Recommendation, and no information is available to the Office on special measures which may have been taken by member States. It was noted during that meeting that, since so many migrant workers are indigenous or tribal peoples, the inadequate protection of their safety and health often means that these peoples suffer disproportionately high incidences of occupational diseases and accidents. Two special problems were mentioned. The first was that these people are often illiterate and/or unable to function in the language of the area where they are working. Thus, where instruction is not given to them in a clear and understandable form on the safety measures provided or on the special dangers inherent in the work, they face a much greater risk than other workers. The second problem, which has become more acute in recent years, regards indigenous workers who work on plantations where pesticides are used. Being far from the protection offered by inspection services and regulations, and unable to defend their interests as they are frequently undocumented workers, there are high and increasing numbers of occupational diseases among these peoples.

These special dangers arise from the fact that indigenous workers are especially vulnerable to exploitation; these dangers differ in degree and not in kind from those affecting other rural workers. They should be given close attention by international organisations and by governments seeking to improve the situation of rural workers, but it would not appear that special provisions to this effect in a revised Convention would contribute to improving the situation of indigenous workers.

CONCLUSIONS

The conditions of recruitment and employment of indigenous and tribal peoples throughout the world are so diverse that no uniform approach can be formulated to deal in detail with the many and complex issues involved. This chapter has attempted to describe some of the major current problem areas, and to illustrate a number of legislative and other measures adopted in individual countries. The wording of Article 15 of Convention No. 107 appears appropriate to deal with these issues, although it might be supplemented with two additional paragraphs, as suggested below.

As noted earlier, issues of concern to indigenous and tribal workers are often covered by ILO instruments of general application dealing, for instance, with employment policy, recruitment, forced labour, discrimination, freedom of association and rural workers' organisations or plantation workers. However, two issues which do not appear to be covered adequately by existing ILO instruments are the protection of indigenous and tribal seasonal migrant workers who

undertake temporary labour in agricultural or mining enterprises within their own country, and safeguards against coercive labour system practices in the recruitment of labour for agricultural undertakings.

In recent years, available information indicates that the incidence of temporary work in agriculture has increased markedly in many countries of the world, and that temporary workers are deprived of many of the rights and safeguards provided to other members of the agricultural labour force. Indigenous workers are particularly vulnerable to exploitative conditions of labour in seasonal agricultural employment.

An additional paragraph might be added to Article 15 of Convention No. 107 which would provide that special measures should be taken for the protection of seasonal and migrant workers belonging to the peoples concerned, particularly in connection with exposure to pesticides and other toxic substances.

A second additional paragraph might require member States to take all possible measures to ensure that members of these peoples are not subjected to coercive recruitment systems, including bonded labour and other forms of induced indebtedness.

Notes

¹ United Nations: *Study of the problems of discrimination against indigenous populations*, by Mr. José R. Martínez Cobo, Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities (Geneva; doc. E/CN.4/Sub.2/1982/2/Add.3), Ch. XVI.

² *ibid.* (Geneva; doc. E/CN.4/Sub.2/1983/21/Add.8), Ch. XXI, paras. 495-501.

³ ILO: *Indigenous peoples: Living and working conditions of aboriginal populations in independent countries* (Geneva, 1953), especially Part III.

⁴ *idem*: *Rural development, taking into account the problems of the indigenous populations as well as the drift of the rural population to the cities and its integration in the urban informal sector*, Report II, 12th Conference of American States Members of the ILO, Montreal, 1986.

⁵ *idem*: *El trabajo temporario en el sector agropecuario de América Latina* (Geneva, 1986).

⁶ *idem*: *Informe al gobierno de la República de Guatemala sobre colonización, transformación agraria, desarrollo rural y trabajo agrícola*, OIT/TAP/Guatemala/R. 18 (Geneva, 1970).

⁷ *Report of the Committee of Review of Aboriginal Employment and Training Programs* (Canberra, Australian Government Publishing Service, 1985).

CHAPTER VI

CONCLUSIONS

It is evident from the preceding chapters that the Indigenous and Tribal Populations Convention, 1957 (No. 107), is out of date. It is in need of revision in three fundamental respects: its basic orientation, and its provisions on land rights and on the recruitment and conditions of employment of indigenous and tribal peoples.

The ILO Convention No. 107, and its accompanying Recommendation No. 104, are the only international standards ever adopted relating specifically to indigenous and tribal peoples. The other organisations concerned, which have taken various measures in their own fields in this connection, have endorsed the ILO's efforts to revise the Convention and have collaborated actively in the early stages of this revision, as they did in the adoption of the earlier instruments. They have pledged their continuing co-operation in this effort.

Perhaps it would be advisable to recall some of the basic concepts discussed in this report. The main reason for revising the Convention is to modify its basic orientation, which currently advocates integration into the national society as the principal objective of all national policies relating to indigenous and tribal peoples. It also assumes the cultural inferiority of these peoples, which is clearly unacceptable. This inappropriate orientation has led to an almost complete halt in its ratification since the beginning of the 1970s, and to the rejection of its protection even by those whom it was intended to benefit. The need for revision was recognised by the Governing Body when it decided to convene the September 1986 Meeting of Experts, and endorsed unanimously by that Meeting. The Governing Body decided to include the Convention's revision on the Conference agenda at the first possible moment after the Meeting of Experts made its report.

This Convention should be reoriented to reflect respect for the cultures and the ways of life of indigenous and tribal peoples, and to recognise their right to conserve them. It has been argued that international law would be taking a step backward if the revised Convention failed to recognise the right of these peoples to self-determination and control of all activities which affect them. Others have argued that the recognition of such rights in the revised Convention would seriously limit its prospects for ratification or would lead to the creation of a State within a State. Both arguments, however, fail to take into account the characteristics of ILO Conventions, and the requirements of a Convention on this subject.

In an area such as this one, an ILO Convention must establish general guide-lines or promotional measures, as well as specific obligations. Because the ILO's supervisory mechanism pays such close attention to the extent to which

obligations assumed under Conventions are met in ratifying countries, it is inappropriate for Conventions to prescribe rights or duties which cannot be implemented both in law and in practice in a wide variety of national contexts. In addition, the problems involved in attempting to protect indigenous and tribal populations are extremely complex. It is therefore obvious that the revision of Convention No. 107 must steer a careful course. It must include clear statements on the basic rights of these peoples. It must also take into account that there are indigenous and tribal peoples in almost every country. In some cases they are totally isolated forest-dwelling peoples, while in others they are integrated into the national cultures and economies except for the retention of some distinguishing cultural characteristics. There are groups which wish to retain their traditions and cultures, and others which want to be integrated into the national society in order to enjoy the benefits accorded to other citizens.

However, their situations are similar enough to make it possible to formulate certain fundamental rights which apply to all these peoples, wherever they are found. They should all have the right to retain their cultures and to manage their own affairs, and the countries where they live should respect these rights. The extent to which these needs exist in every State, and the manner in which these rights should be respected in every case, is not for an ILO Convention to determine in any global manner; instead, it should establish the basic principle of respect for these rights, and require ratifying countries to take the measures necessary to decide at the national level, in consultation with those affected, how they should be implemented. This is the basic principle behind most ILO Conventions. The revised Convention should make allowance for variations in national circumstances, and take into account the situation of the indigenous and tribal peoples themselves.

In addition to the Convention's basic orientation, there are other aspects of the instrument with respect to which the experience accumulated in supervising the implementation of Convention No. 107, or developments which have taken place since its adoption in 1957, have revealed gaps or weaknesses. Foremost is the question of land rights. When this Convention was adopted, these peoples had already lost large parts of their lands. They were known to be subject to abuses by more powerful segments of society, and had in many cases lost the land base necessary for the continuation of their cultures and even for their physical survival.

This situation has deteriorated even further over the past 30 years. There are cases in which governments have taken measures to protect the lands these peoples still retain, and even to restore to them the lands they had lost. In general, though, there is greater pressure than ever from individuals or groups which seek to rob them of their lands, from movements of population which push them off their lands, and from national development programmes which remove them from their lands. All of this is made worse by the fact that only very few governments have demarcated the lands which these peoples occupy but to which they seldom have title.

The suggestions made here for the revision of the Convention's land rights provisions are based on the discussions of the Meeting of Experts, and focus on procedures. The way in which rights to land are recognised, and the mechanisms of their transfer from one person or entity to another, are so deeply rooted in the

law of individual countries that any global requirements in this respect would be useless. The concepts of land rights among indigenous and tribal societies also differ widely, but they share certain basic characteristics. For instance, most though not all of these peoples practise communal ownership, and in most of their systems it is not possible to own land in the sense of being able to transfer all rights to it outside the clan, tribe or people. The one aspect that is universal is the conflict between the need of indigenous and tribal societies to retain their lands in order to survive, and the tendency of States to take that land away or to allow others to take it.

The suggestions made in this report have therefore concentrated on the procedures by which rights to land are determined or recognised at the national level. Convention No. 107 already contained the basic principle that the right of ownership, collective or individual, of the members of these populations over the lands which they traditionally occupy shall be recognised. No change to this is suggested. What is suggested is to add a requirement that governments take the measures necessary to put this right into practice. On a more substantive level, it is suggested transferring to the Convention the provisions of Recommendation No. 104 for equal treatment of these peoples as concerns underground wealth. It is also suggested establishing more firmly in the Convention the principle that these peoples shall not be removed without their free consent from their habitual territories. Both of these suggestions are made in response to problems and abuses which have been noted in supervising the application of Convention No. 107. The other suggestions made here focus on ensuring that these peoples have an effective part in taking decisions which affect them, as when it is proposed to remove them from their lands or to define in national law their rights of ownership.

The other field to which special attention is given is recruitment and conditions of employment. This subject is closely linked to that of land rights, since it is principally the loss of their lands which forces these peoples into labour force, where they are particularly exposed to abuses. Although there have been some changes in the patterns of recruitment and conditions of employment over the past 30 years, the basic problems have remained the same. The provisions of Convention No. 107 have not allowed the supervisory bodies to deal adequately with the kinds of problems which have arisen. It is therefore suggested that the revised Convention require ratifying States to take special measures for the protection of seasonal and migrant workers belonging to these peoples, and to take all possible measures to ensure that these peoples are not subjected to coercive recruitment systems.

It is inevitable that discussions on this subject will be difficult, since they must attempt to resolve conflicts between radically different systems of law – indeed, systems of thought – of indigenous and tribal peoples and the countries where they live. Yet it should be possible to agree rapidly on the principle of respect for the different cultures, traditions and ways of life involved. It is, after all, inherent in the ILO itself to bring different interests together and to work out solutions to common problems.

No one can argue that renewed measures are not necessary to protect these peoples. Wherever they are found, they are terribly vulnerable; they have lost their independence, their lands, and many have lost their lives. With the

continuing co-operation of the other organisations of the United Nations system, and with the greatest possible participation of the peoples most directly affected, it should be possible to increase the protection offered to these vulnerable groups.

QUESTIONNAIRE

In accordance with article 39 of the Standing Orders of the International Labour Conference, governments are requested to send their replies to the following questionnaire, indicating their reasons for each reply, so as to reach the International Labour Office in Geneva by 30 September 1987 at the latest. In this connection, the attention of governments is drawn to the recommendation contained in the Introduction to this report concerning the consultation of the most representative organisations of employers and workers, as well as of representative organisations of indigenous and tribal peoples in the country, where they exist.

Introduction

1. Do you consider that the International Labour Conference should undertake a partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)?

2. If so, and in view of the nature and variety of questions covered in this Convention, would you agree that the Office prepare, as a working basis for the Conference discussion, conclusions with a view to a revised Convention on this subject?

Possible Convention

I. PURPOSE OF THE PARTIAL REVISION

3. Do you consider that the basic orientation of a revised Convention should reflect respect for the cultures and traditions of the indigenous and tribal peoples concerned, and their right to be consulted concerning decisions which affect them?

4. Do you consider that replacing the basic orientation of Convention No. 107, which is focused on integration, by the orientation described in the previous question, will require the partial revision of a number of its Articles?

5. Do you consider that it is necessary also to revise the Articles of Convention No. 107 that –

(a) deal with land (Articles 11 to 14) and

(b) with recruitment and conditions of employment (Article 15)?

6. Do you consider that the revised Convention should replace the term “populations” with the term “peoples” in order to reflect the terminology used in other international organisations and by these groups themselves?¹

¹ Provisions which otherwise remain unchanged would of course incorporate this modification, if approved. This questionnaire has been drafted on the assumption that this change will be approved.

II. SCOPE AND DEFINITIONS

7. Do you consider that Article 1, paragraph 1 (a), should be amended to refer to 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 and regulations?

8. Do you consider that Article 1, paragraph 1 (b), should be amended to refer to 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 and which, irrespective of their legal status, retain some or all of their traditional social, economic, cultural and political institutions?

9. Do you consider that paragraph 2 of Article 1 should be omitted from the revised instrument, and that other references in the Convention to "semi-tribal populations" should also be omitted?

III. GENERAL POLICY

10. Do you consider that Article 2, paragraph 1, should be amended to provide that governments shall have the primary responsibility for developing co-ordinated and systematic action, in co-operation with the peoples concerned, to ensure both their protection and their participation in the life of their respective countries, with full respect for their social and cultural identity?

11. Do you consider that paragraph 2 of Article 2 should be amended as follows:

- (a) subparagraph (a) should remain unchanged;
- (b) subparagraphs (b) and (c) should be replaced by a requirement that the action to be taken should include measures for –
 - (i) ensuring that the economic and social rights, and the cultural, political, social and religious institutions of the said peoples are recognised and protected?
 - (ii) raising the standard of living of the peoples concerned?

12. Do you consider that paragraph 3 of Article 2 should be omitted from the revised instrument?

13. Do you consider that paragraph 4 of Article 2 should remain unchanged?

14. Do you consider that Article 3 should remain unchanged, except for deleting from paragraph 1 the words "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"?

15. Do you consider that the introductory phrase of Article 4 should be omitted from the revised instrument?

16. Do you consider that subparagraph (a) of Article 4 should remain unchanged?

17. Do you consider that the words "unless they can be replaced by appropriate substitutes which the groups concerned are willing to accept" should be deleted from subparagraph (b) of Article 4?

18. Do you consider that the words "whenever such adjustments take place" should be added at the end of subparagraph (c) of Article 4?

19. Do you consider that Article 5 should be replaced by a provision which requires that governments should, whenever possible, undertake consultations with the peoples concerned, or with their representatives where they exist, whenever consideration is being given to legislative or administrative measures which may affect them?

20. Do you consider that these consultations should be carried out in such a way as to provide these peoples with an effective voice in deciding on such measures?

21. Subject to questions 22 and 23, do you consider that Article 6 should remain unchanged?

22. Do you consider that a paragraph should be added to Article 6 providing –

(a) that the peoples concerned should be involved at all stages in the formulation and implementation of plans for development of the areas which they inhabit, and

(b) that they should enjoy as much control as possible over their own economic, social and cultural development?

23. Do you consider that another paragraph should be added to Article 6 providing that, whenever appropriate, social and environmental studies should be carried out before any such development activities are begun, in order to assess the possible impact of these activities on the peoples concerned?

24. Do you consider that paragraph 1 of Article 7 should remain unchanged?

25. Do you consider that paragraph 2 of Article 7 should be amended to provide that these peoples should as far as possible be allowed to retain their own customs and institutions?

26. Do you consider that the above-mentioned provision should be supplemented by a requirement that, where necessary, procedures should be established to resolve conflicts between customary and national law?

27. Do you consider that paragraph 3 of Article 7 should remain unchanged?

28. Do you consider that Article 8 should remain unchanged except for the deletion of its introductory phrase "To the extent consistent with the interests of the national community and with the national legal system"?

29. Do you consider that Article 9 should remain unchanged?

30. Do you consider that paragraph 1 of Article 10 should be amended by replacing "improper application of preventive detention" by "abuse of their fundamental rights"?

31. Do you consider that paragraph 2 of Article 10 should be amended by replacing "degree of cultural development" by "culture"?

32. Do you consider that paragraph 3 of Article 10 should remain unchanged?

IV. LAND

33. Subject to question 34 below, do you consider that Article 11 should remain unchanged?

34. Do you consider that a paragraph should be added to Article 11 providing that governments should take steps, where this has not already been done, to determine the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their right of ownership?

35. Do you consider that the right of ownership over lands already provided for in Article 11 should extend to natural resources, including fauna and flora, waters, ice and mineral and other subsoil resources, pertaining to the lands traditionally occupied by the peoples concerned?

36. Do you consider that where, under the national legal system, land ownership does not carry with it the ownership of mineral and other subsoil resources pertaining to the land, special measures should be taken to protect these peoples in relation to the control and exploitation of such resources?

37. Do you consider that paragraph 1 of Article 12 should be amended by deleting all the words after "habitual territories", taking into account the next question?

38. Do you consider that in cases where the removal of these peoples is necessary as an exceptional measure, and where the free consent of these peoples cannot be obtained, no such removals should take place except following adequate procedures including public inquiries, which provide the opportunity for effective representation of the peoples concerned?

39. Do you consider that paragraph 2 of Article 12 should remain unchanged, except for the addition of a requirement that lands provided in compensation should be of legal status at least equal to that of the lands previously occupied by them?

40. Do you consider that paragraph 3 of Article 12 should remain unchanged?

41. Do you consider that paragraph 1 of Article 13 should be amended by deleting all the words after "regulations"?

42. Do you consider that paragraph 1 of Article 13 should be supplemented by providing that any decision regarding the capacity of these people to transmit

rights of ownership and use of land should be taken in consultation with the peoples concerned?

43. *Do you consider that paragraph 2 of Article 13 should remain unchanged?*

44. *Do you consider that a paragraph should be added to Article 13 providing that any unauthorised intrusion upon, or use of, the lands of the peoples concerned by persons not belonging to these peoples should be considered as an offence, and that appropriate penalties for such offences should be established by law?*

45. *Subject to question 46, do you consider that Article 14 should remain unchanged?*

46. *Do you consider that a paragraph should be added to Article 14 providing that adequate procedures should be established within the national legal system to resolve land claims by the peoples concerned?*

V. RECRUITMENT AND CONDITIONS OF EMPLOYMENT

47. *Subject to questions 48 and 49, do you consider that Article 15 should remain unchanged?*

48. *Do you consider that a paragraph should be added to Article 15 requiring Members to take special measures for the protection of seasonal and migrant workers belonging to the peoples concerned, particularly in connection with exposure to pesticides and other toxic substances?*

49. *Do you consider that another paragraph should be added to Article 15 requiring Members to take all possible measures to ensure that members of these peoples are not subjected to coercive recruitment systems, including bonded labour and other forms of induced indebtedness?*

VI. VOCATIONAL TRAINING, HANDICRAFTS AND RURAL INDUSTRIES

50. *Do you consider that Article 16 should remain unchanged?*

51. *Do you consider that paragraph 1 of Article 17 should remain unchanged?*

52. *Do you consider that paragraph 2 of Article 17 should be replaced by a provision that any special training facilities should be based on a careful study of the economic environment, social and cultural conditions and practical needs of the peoples concerned?*

53. *Do you consider that paragraph 3 of Article 17 should be omitted from the revised instrument?*

54. *Do you consider that paragraph 1 of Article 18 should be amended by deleting all the words following "populations concerned"?*

55. *Do you consider that paragraph 2 of Article 18 should be replaced by a requirement that technical assistance should be provided where appropriate for the development of handicrafts and rural industries?*

56. Do you consider that the technical assistance referred to in the previous question should take into account both traditional technologies and the cultural characteristics of these peoples, and that it should enable them to raise their standard of living and to familiarise themselves with alternative methods of production and marketing?

VII. SOCIAL SECURITY

57. Do you consider that Article 19 should be amended to provide that social security schemes should be extended progressively, wherever practicable, to cover the peoples concerned?

VIII. HEALTH

58. Do you consider that paragraph 1 of Article 20 should remain unchanged?

59. Do you consider that paragraph 2 of Article 20 should be amended to provide that health services should be planned and administered in co-operation with the peoples concerned and based on systematic studies of their economic, social and cultural conditions?

60. Do you consider that the same paragraph should be supplemented by providing that in the provision of these health services, account should be taken of the traditional healing practices of the peoples concerned?

61. Do you consider that paragraph 3 of Article 20 should remain unchanged?

IX. EDUCATION AND MEANS OF COMMUNICATION

62. Do you consider that Article 21 should remain unchanged?

63. Do you consider that paragraph 1 of Article 22 should be amended to provide that education programmes for the peoples concerned should be adapted to their special needs, and should in particular take account of their cultural characteristics?

64. Do you consider that paragraph 2 of Article 22 should be amended by adding that the formulation of education programmes should be carried out in full consultation with the peoples concerned?

65. Do you consider that paragraph 1 of Article 23 should remain unchanged?

66. Do you consider that paragraph 2 of Article 23 should be amended by providing that provision should be made for a progressive transition from the mother tongue or vernacular language to equal fluency in the national language or in one of the official languages of the country?

67. Do you consider that paragraph 3 of Article 23 should remain unchanged?

68. Do you consider that Article 24 should be omitted from the revised instrument?

69. Do you consider that Article 25 should remain unchanged?

70. Do you consider that Article 26 should remain unchanged?

X. ADMINISTRATION

71. Do you consider that the first paragraph of Article 27 should be amended by adding after "agencies" a reference to other appropriate mechanisms?

72. Do you consider that paragraph 2 (a) of Article 27 should be amended to provide that the programmes adopted in application of the Convention should include planning, co-ordination and execution, in collaboration with the peoples concerned, of the measures provided for in the Convention?

73. Do you consider that subparagraphs (b) and (c) of paragraph 2 of Article 27 should remain unchanged?

XI. GENERAL PROVISIONS

74. Do you consider that Article 28 should remain unchanged?

75. Do you consider that Article 29 should remain unchanged?

XII. TRANSITIONAL PROVISIONS

76. Do you consider that the ratification by a Member of the revised Convention should ipso jure involve the immediate denunciation of Convention No. 107?

77. Do you consider that Convention No. 107 should be closed to further ratifications when the revised Convention comes into force?

XIII. SPECIAL PROBLEMS

78. (1) Are there any particularities of national law or practice which, in your opinion, are liable to create difficulties in the practical application of the instrument as conceived in this report?

(2) If so, how would you suggest that these difficulties be met?

79. (Federal States only) Do you consider that, in the event the instrument is adopted, the subject-matter would be appropriate for federal action, or wholly or in part for action by the constituent units of the federation?

80. Are there, in your opinion, any other pertinent problems not covered by the present questionnaire which ought to be taken into account when the instrument is being drafted? If so, please specify.

APPENDIX I

EXTRACTS FROM THE REPORT OF THE MEETING OF EXPERTS ON THE REVISION OF THE INDIGENOUS AND TRIBAL POPULATIONS CONVENTION, 1957 (No. 107)

(Geneva, 1-10 September 1986)

REPORT

1. The Programme and Budget for 1986-87 included provision for a Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107). In accordance with a decision taken by the Governing Body at its 231st Session (November 1985), the Meeting was held in Geneva from 1 to 10 September 1986 with the purpose of examining whether the Convention should be revised and, if so, how it should be revised.

2. Following consultations with the Government, Employers' and Workers' groups of the Governing Body, it was decided to appoint 18 experts (eight appointed after consultation with governments, four after consultation with employers' organisations, four after consultation with workers' organisations and two from international non-governmental organisations). Before the beginning of the Meeting, the Government of Yugoslavia, which had been invited to nominate an expert, indicated that for technical reasons it was unable to do so. After the opening of the Meeting, the Government of India, which had nominated an expert, informed the Office that this expert had been assigned to other duties and was therefore unable to attend.

3. The Meeting was also attended by representatives of the United Nations, the WHO, the FAO, UNESCO, UNHCR, the World Bank and the Inter-American Indian Institute, and by observers representing the International Confederation of Free Trade Unions, the World Federation of Trade Unions and the International Organisation of Employers, who participated actively in the discussions.

4. The Governing Body, in addition, invited eight non-governmental organisations which had expressed an interest in the subject-matter to attend as observers.

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Election of Chairman and Reporter

6. The Meeting unanimously elected Mr. Rodolfo Stavenhagen as its Chairman and Reporter.

Opening sitting and procedure

7. The Meeting was opened by Mr. S. K. Jain, Deputy Director-General of the ILO. Recalling the history of ILO standard setting in this field, and in particular the Andean Indian Programme, he observed that Convention No. 107 and its accompanying Recommendation No. 104 were still the only international instruments relating specifically to these groups. They had emerged from ILO operational activities carried out in common with other agencies of the United Nations system which had subsequently collaborated closely in the preparation of the two instruments in 1956 and 1957 and were still active in work related to the supervision of their application. He welcomed the attendance of representatives from those agencies, as well as others with an interest in the proceedings, considering it vital that they maintain their co-operation in the supervisory procedure. It had now become necessary to revise the Convention, for the situation world-wide had

changed over the past 30 years. The Convention had promoted integration as the desired objective, but this was no longer regarded as appropriate, as international organisations and an increasing number of governments were moving towards greater recognition of the right of indigenous and tribal peoples to retain their own identities and to participate fully in the planning and execution of activities affecting their way of life. In addition, the emergence of organisations of indigenous peoples themselves, especially over the past ten years, showed the growing vitality of movements to defend the rights and promote the interests of such groups. He referred in particular to the key contribution of the late Jef Rens, one of the chief architects of the Andean Indian Programme and of Convention No. 107, who had had the insight to perceive that the Convention needed revision in order to reflect a changing world and to take account of the legitimate aspirations of indigenous and tribal peoples.

Presentation of the working document

8. The Meeting had before it a working document prepared by the Office.

9. The document was introduced by Mr. Thiecouta Sidibé, representative of the Director-General and Director of the International Labour Standards Department of the ILO. He recalled the mandate of the Meeting which was to determine whether it was advisable to revise Convention No. 107 and, if so, to determine the scope and content of such revision and to make appropriate recommendations for this purpose. The recommendations of the Meeting would be submitted to the Governing Body of the ILO which in November 1986 would take a decision on the basis of those recommendations as to whether to include such an item on the agenda of the 1988 General Conference of the Organisation or one of its subsequent sessions. Explaining the standard procedure for such a venture, he stressed that the time available for the preparatory work was comparatively brief.

10. The situation of indigenous and tribal peoples throughout the world was serious. There had been abuses and even massacres; many governments had acted in a repressive manner and in some cases the indigenous and tribal people themselves had acted in a manner that some regarded as unacceptable. Nevertheless, considerable efforts had been made to improve the situation where governments had endeavoured, in consultation with representatives of indigenous and tribal peoples, to take action in the interests of all concerned. The purpose of the Meeting was not to review all known incidents, however, but to analyse the problems involved in a search for solutions. Chief among the points made in the working document was that the notion of integration had to be removed from the Convention. Recognition should be given to the right of indigenous and tribal peoples to determine the extent and pace of economic development affecting them, to maintain lifestyles different from those prevailing for the remainder of national populations, and to retain and develop their own institutions, languages and cultures independently of the dominant societal groups. The Meeting's task was to determine the extent to which the Convention could be reoriented. The working document gave considerable background information on international activity relating to the subject, including that taken by the ILO. The second chapter gave an outline of the appearance of non-governmental organisations representing indigenous and tribal peoples which had become extremely active during the previous ten years. Some of their representatives were attending the Meeting. The ILO was a tripartite organisation, including not only governments but also employers' and workers' organisations. Most of its Conventions made provision for consultation between governments and the representatives of those concerned by the issue involved, before action was taken. As the scope of Convention No. 107 went considerably beyond the field of labour and covered all the conditions in which indigenous and tribal peoples lived, the presence of such representatives was therefore especially welcome.

11. The Meeting was also called upon to examine whether to recommend measures to take account of the changed circumstances, in particular as regards amending Article 5, paragraph (a), which stated the principle of consultation without specifying procedures or machinery to ensure harmonious relations between governments and indigenous and tribal peoples. While it was possible for the observers from indigenous and tribal organisations to express their opinions on this and other matters at the Meeting, it would not necessarily be possible to take account of all the many and varied views likely to be advanced.

12. The third chapter examined the most significant developments and tendencies in member States. It had not been intended as an exhaustive list of the actions taken but to illustrate trends. There was some difference in the amount of information available concerning different parts of the world. The Americas were well documented, as was the situation of the aboriginal population of Australia. The situation in Africa and Asia was less well known on account of the low number of ratifications. It should be borne in mind, however, that the Convention had been intended to apply to all countries with indigenous or tribal populations. A number of common developments could be identified from the information available. The first was the appearance of organisations of such groups to defend and promote their interests. The second was the serious attention given in a great many countries to the question of reassessing their policies on such populations and to the administrative arrangements used to give effect to these policies. These developments had on the whole proved successful and a number of countries were currently examining these questions with assistance from the ILO, and from the Inter-American Indian Institute in Latin America.

13. Considerable attention had been given to land rights in several countries, and action had been taken to delimit land and to return some or all of the land which these groups had lost, as well as to create mechanisms that would ensure progress in this respect. However, in a great many cases, the situation had considerably worsened. Indigenous and tribal peoples faced constant pressure on the land they occupied; procedures were in most cases inadequate to deal with complaints on situations not provided for in national legislation, as many of these groups did not hold title to their land. Demographic and other internal change in many countries also exerted pressure on formerly isolated populations who then found themselves regarded as obstacles to national development. Relocation programmes in frontier areas for reasons of national security had also affected them. A large number of countries were implementing large-scale projects to develop their infrastructure, often with international assistance, and this also resulted in the displacement of such populations from their lands, as did mining operations. They were losing their land rapidly without possibility of adequate recourse. At the same time, new development strategies were being implemented by increasing numbers of international organisations and governments which called for a greater degree of participation by the persons affected rather than the hierarchical approach implicit in Convention No. 107.

14. The fourth chapter of the working document examined the possibilities for revision. In particular, it stressed the move away from integration towards recognition of the right to make choices and take decisions regarding the degree to which indigenous and tribal peoples were integrated into the national society. The concepts of autonomy and self-determination were also gaining increasing recognition from governments, subject to considerations of national sovereignty, as was the right of such populations to choose freely the social, cultural, economic and juridical institutions forming part of their lives. Attention was drawn in particular to section B of Chapter IV which covered the manner in which the Convention approached integration and the ways in which it might be revised. The Meeting could usefully consider how to remove the aim of integration as the principal goal of governments in this connection and to replace it by the principle of respect for the culture, property and right in general of the populations concerned to their own way of life. The Office considered that several Articles could well be amended in a similar vein without removing the protective provisions they also included. Amendment might also extend to the issues of land, the environment and natural resources and this was discussed in section C of the same chapter. Again, suggestions were made to guide the Meeting's discussions as to how to amend the provisions dealing with these questions in order to take account of issues raised in the work of supervising the application of the Convention. These related to conflicts of law and of basic concepts concerning the occupation and ownership of land. Delimitation and the identification of indigenous and tribal land were obvious issues. The present Convention did not deal with mineral rights and rights relating to natural resources, and some amendment might be considered in this respect as well. It should be recalled, however, that in many countries such rights are vested in the State and any suggestions entailing change would imply major changes in national legislation.

15. Relocation was an issue addressed in Article 12 of the Convention. That Article had often been regarded as offering little protection and as ineffective in practice. How could it be amended without calling national sovereignty into question? Here again suggestions were made. Attention was also drawn to the problems of the transmission of property rights and to programmes for the restitution of land and agrarian reform.

16. Two points in particular should be borne in mind. While the Governing Body had decided to consider a partial revision of the existing instrument, this did not mean that such revision should be of limited impact but simply that the revision should be based on the existing instrument. The working document included numerous proposals for amendments, but these were based on only a few new concepts. The nature of an international Convention should also be borne in mind. A Convention required ratification to be valid, for only then did governments voluntarily accept its obligations and make possible the supervision of its application on a regular basis by the ILO's supervisory bodies. The proposals made by the Meeting should therefore be a compromise between the ideal, the requirements of flexibility and adaptability to different situations, and the basic needs of the populations it was intended to protect and to assist.

17. Finally, the Meeting was called upon to consider avenues for future action. A number of interesting suggestions had been put forward in this respect by the recent 12th Conference of American States Members of the ILO. These and others were reproduced in the working document concerning activity by the ILO and the international community. The outcome of the Meeting was awaited with great interest and it was trusted that the vast range of experience to be found among the experts would ensure that all aspects of the situation received due attention.

Documentation and other information available

18. During the Meeting a number of articles, statements and other materials were passed to the secretariat which will be useful in preparing for the revision of this Convention.

19. The United Nations Centre for Human Rights in particular made available a considerable amount of useful documentation. Copies of the conclusions and recommendations of the *Study of the problem of discrimination against indigenous populations*, carried out by Special Rapporteur José Martínez Cobo for the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities, were made available. The reports of each of the four sessions held so far of the Sub-Commission's Working Group on Indigenous Populations, were also passed to the ILO secretariat.

20. Particularly useful was a document recently issued by the Centre for Human Rights, an *Analytical compilation of existing legal instruments and proposed draft standards relating to indigenous rights*.

Participation in the Meeting's discussions

21. As indicated above, in addition to the experts appointed by the Governing Body and the representatives of other intergovernmental organisations, a number of observers were invited by the Governing Body to attend. A certain number of other persons were also present. This clearly demonstrated the interest aroused by the Meeting. The decision was taken to allow the observers the right to speak during the sessions, subject of course to priority for experts and representatives of other intergovernmental organisations, and many of these participants played an active and useful part in the discussion. -

22. The Meeting of Experts found the contribution of these observers extremely valuable, especially in the light of the fact that the Governing Body had recognised that the establishment of organisations representing the interests of these peoples was an important factor in deciding to consider the Convention's revision. Some of the experts felt that these observers may have played a somewhat too active part in the discussions, but the Meeting as a whole recognised that if the views of these groups are not taken fully into account the possibility of their accepting a revised Convention as an instrument which can be used to promote their interests will be greatly reduced.

23. The Meeting therefore recommends that ways be found of involving the representatives of these peoples, and others with experience in this field, in the further discussions in the ILO leading to the revision of the Convention.

Collaboration with other international intergovernmental organisations

24. Following invitations by the Governing Body, a number of international inter-governmental organisations were represented at the Meeting of Experts. The United Nations, the FAO, UNESCO and the WHO had participated actively in the drafting of Convention No. 107 and Recommendation No. 104, and still collaborate in supervising the application of the Convention. The Governing Body considered it important that they also be invited to the Meeting of Experts, and in addition had invited the Organisation of American States – which was represented by the Inter-American Indian Institute – and the World Bank. A representative of the United Nations High Commissioner for Refugees also accompanied the United Nations representatives. The Meeting fully agreed with this initiative. While recognising that several of these other organisations are active in various aspects of the protection of indigenous and tribal populations, it was also felt that an overall approach carried out through co-operation among these organisations was essential to the drafting of comprehensive standards of general scope.

25. The representatives of these organisations who took the floor on this question supported warmly the ILO's initiative in reviewing Convention No. 107 with a view to revision, and agreed with the basic tenor of the revision proposed, as expressed in the working document before the Meeting. Mr. Kurt Herndl, the United Nations Assistant Secretary-General for Human Rights, paid tribute to the International Labour Organisation which, by its Convention No. 107, had been one of the pioneers in the efforts to promote and protect the human rights of indigenous populations. He added that the fact that the present meeting was taking place was eloquent testimony to the continuing and important role of the ILO in this field, and pledged the co-operation of the United Nations in a common endeavour to strengthen the level of international protection for indigenous populations.

26. The representative of the FAO stated that his Organisation attached considerable importance to the revision of Convention No. 107, and made a number of concrete suggestions throughout his participation for the revision in particular of the provisions concerning land rights. The representative of UNESCO recalled his Organisation's participation in the adoption of Convention No. 107, its recent work in the field of ethno-development in particular, and its continuing interest in participating in the revision process. The representative of the WHO pointed out the coincidence in approach between the health-related Articles in Convention No. 107, and current WHO programmes and concepts, and indicated that the WHO would co-operate actively in the proposed revision. The representative of the World Bank indicated his Organisation's willingness to co-operate with the ILO in the future in areas of mutual concern.

27. In addition, the Director of the Inter-American Indian Institute, attending on behalf of the OAS, expressed his firm support for the revision of the Convention, and pledged his Organisation's continuing collaboration in the efforts to do so.

28. The Meeting of Experts welcomed the active participation of the representatives of these organisations, all of whom made a constructive contribution to its discussions. It felt that there was a need for continued consultations and collaboration among the different international organisations which carried out activities in this field.

General discussion

29. The Meeting of Experts noted that it had been convened to advise the Governing Body on the revision of Convention No. 107. Its mandate in this regard was clear, in that it was not requested to draft precise language, but to put forward ideas and approaches. It first discussed some basic ideas.

Terminology

30. There was a long discussion over the terminology which should be used in the revised Convention to designate those covered by it. Several of the experts, supported by

all the indigenous and tribal representatives present, thought that the term "populations" used in Convention No. 107, should be replaced by "peoples". The latter term indicated that these groups had an identity of their own, and a right to self-determination. It better reflected the view these groups had of themselves, and was not degrading as was the term "populations" which implied merely a grouping. It was noted that several countries already used the term in internal legislation, and that its use had become accepted in discussions in the United Nations and other international forums.

31. Others felt that it was precisely because of the implications of the term that its use in a revised Convention raised difficult questions. They respected the wishes of the indigenous and tribal representatives to be referred to as peoples, but felt that to incorporate such a term in an ILO Convention might imply a degree of recognition to these groups which went beyond the ILO's competence and was in conflict with the practices in a large number of countries which might otherwise be able to ratify the Convention. On the other hand, they agreed that it was a legitimate point which should be carefully considered by the Conference in revising the instrument.

32. At various places in this report, the term "dominant society" is used. This is intended to refer to the segment of national society which effectively controls the decision-making process on the national level. The experts appointed by the Employers' group of the Governing Body expressed their reservations over the use of this term.

Coverage of Convention No. 107 and of the revised instrument

33. The Meeting notes that the working document before it made it clear that Convention No. 107 is intended to apply to a wide variety of indigenous and tribal peoples in all parts of the world, and that it has been so applied in the past. For instance, it applies to Indians in the Americas, whatever may be their degree of integration into the national cultures, to different extents depending on their needs and circumstances. It also applies to tribal peoples in Asia, such as in Bangladesh, India and Pakistan which have ratified the Convention, and a number of other countries which have not. It has been considered applicable also to nomadic populations in desert and other regions. All of these groups share certain characteristics such as being relatively isolated and less economically developed than the rest of the national community. This wide degree of coverage should not be modified, although it does make it more difficult to adopt language which is sufficiently flexible to cover all these situations.

34. Especially difficult problems were noted as concerns sub-Saharan Africa, where the entire population had tribal links and all were indigenous. The experts from Africa shared the opinion that the Convention is applicable in Africa, while referring to particular difficulties of application which arise. It is clear that the present Convention applies to such relatively isolated groups in this continent as the San or Bushmen, the Pygmies and the Bedouin and other nomadic populations. Other groups share many of the characteristics of these peoples, and would also be covered. These experts cited the basic principles of consent, consultation and participation applied in their countries for activities affecting the entire national population and not simply these groups. The Meeting was informed of a recent comment by the Committee of Experts regarding one African country, in which it stated that the fact that the national legislation made no distinction between different population groups was not in itself a sufficient reason for deciding that the Convention is not applicable to a country, but that it was also necessary to examine whether different ethnic groups appeared to be isolated from the national community or to be in a relatively less advantaged position.

35. As concerns nomadic populations in particular, the representative of the FAO referred to the special problems of establishing the rights and guarantees which should be recognised for them, especially since they often share the use of territories with other population groups. This problem is dealt with more fully in the section of this report on land rights.

General issues

36. Agreement was reached rapidly that the Convention needed revision in order to bring it into conformity with changed circumstances and views. It was noted in particular

that in 1957, when Convention No. 107 was adopted, there had been no international organisations of indigenous and tribal peoples who could be consulted on what international provisions should provide, but that this situation had now changed significantly as indigenous and tribal peoples began to form their own organisations on the national, regional and international levels.

37. Certain basic principles guided the deliberations of the Meeting of Experts. First, the Meeting considers unanimously that the protections offered to indigenous and tribal peoples must be reinforced, while recognising that there are various opinions on how this should be done in a revised instrument. At the same time, account has to be taken of the need for flexibility to cover a wide variety of national situations, but this flexibility in the Convention must be backed up by a strong supervisory mechanism able to consider adequately these varying situations.

38. There was widespread recognition that any revised instrument would be of very limited value if it could not be ratified by a large number of countries. Two basic requirements were thus essential. First, the indigenous and tribal peoples themselves would have to regard the revised Convention as being consistent with their aspirations and needs. Secondly, the proposals made by the present Meeting and those contained in a revised instrument had to be realistic and take account of the legal systems of member States. This did not however mean that the revised Convention had to reflect the lowest common denominator among national systems. It should be a forward-looking and progressive instrument since its basic purpose would be to improve the situation of the indigenous and tribal peoples and not simply to reflect current conditions.

39. Most of the experts considered also that the revision proposed should be based on the existing Convention as suggested in the working document before it. They felt that the basic orientation had to be changed, and that modifications should also be made to certain Articles beyond simply reflecting the new orientation. However, there were many strong protective elements in Convention No. 107 which should be preserved, and to open the entire text of the Convention to a renewed discussion would be to risk attenuating the protections offered therein. A fresh discussion on all the principles contained in the Convention would also take a great deal of time, which was not desirable.

40. The issue of the ILO's competence to deal with the subject occasioned very little discussion. The Meeting feels that this issue was resolved at the time of the original discussion of the issue, and notes the opinion of the other organisations attending the Meeting that the ILO should revise the Convention. Note was taken of the broad mandate of the ILO in dealing with economic, social and cultural questions, of the ILO's long involvement with the question, and of the need for a comprehensive approach to the problems raised. It was essential, however, that in revising the Convention the ILO should work closely with the other international organisations involved in the subject. The importance of close collaboration on this subject between the ILO and the United Nations was stressed. Reference was made to the standard-setting activities of the United Nations Working Group on Indigenous Populations, established by the Economic and Social Council in 1982 within the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. The greatest effort must be made so that the draft texts being considered by the United Nations would contain no provisions which would contradict or conflict with those adopted by the ILO. One of the surest ways to avoid this situation would be to organise constant consultations between the bodies concerned, and between the secretariats of the two organisations. The Meeting welcomes the positive approach taken by these other organisations to collaborating with the ILO in the present discussions.

41. Some basic principles of substance were generally agreed by the Meeting. Perhaps the most important is that there must be a recognition of the right of indigenous and tribal peoples to be different from the dominant society in the countries where they live. This implies a rejection of the notion of cultural superiority by the dominant societal groups, which is implicit in the present Convention. However this notion is expressed in the Convention (see below the section on basic orientation) it must be a dominating factor in the new instrument. One expert cautioned, however, that this concept should not lead to their being entirely outside the national communities in which they live.

42. There was also a substantial discussion on the question of individual rights as compared with collective rights. Convention No. 107 refers in many instances to rights recognised for members of the populations concerned, while hardly referring at all to any concept of group rights. A number of the participants representing indigenous and tribal peoples spoke on this issue, stating that they were concerned essentially with the collective right of their peoples to exist as peoples. The present concentration on individual rights was therefore misplaced because it ignored the fact that indigenous and tribal peoples were struggling for their rights as collectivities. For instance, the provisions of the Convention concerning land rights gave insufficient recognition to the nearly universal practice of collective occupation of land by indigenous groups. The Meeting considers that this should receive close attention in revising the Convention. The Employers' experts stressed, however, that this approach should not exclude recognition and protection of the individual rights of the members of the populations concerned.

43. The Meeting considers also that developments which have taken place in other international organisations cannot be ignored. For instance, a number of instruments adopted by United Nations bodies and those of the specialised agencies, as well as in regional meetings such as the Inter-American Indian Congresses, have referred to the right of self-determination. The Meeting notes that the interpretation of this term and of the scope of its application enjoys no general acceptance, and that its use without qualification in a revised instrument would cause difficulties (see below the section on basic orientation, particularly paragraphs 50 to 60, where the issue is discussed more fully). The concepts embodied by this idea, especially as concerns the economic, social and cultural rights of the indigenous and tribal peoples, cannot be ignored, however.

44. Against this background, the Meeting went on to discuss a number of issues in more detail.

Basic orientation

45. The Governing Body had noted when it convened the present Meeting of Experts that the Convention's basic orientation was towards integration as the fundamental objective of all activities undertaken by governments in relation to indigenous and tribal populations, and that it was necessary to re-examine this orientation to take into account different views and changed circumstances. In particular, it was necessary to revise the instrument in order to take account of the existence of organisations of indigenous and tribal peoples and of their capacity to express the views and to defend the interests of the groups they represented.

46. The Meeting is unanimous in concluding that the integrationist language of Convention No. 107 is outdated, and that the application of this principle is destructive in the modern world. In 1956 and 1957, when Convention No. 107 was being discussed, it was felt that integration into the dominant national society offered the best chance for these groups to be a part of the development process of the countries in which they live. This had, however, resulted in a number of undesirable consequences. It had become a destructive concept, in part at least because of the way it was understood by governments. In practice it had become a concept which meant the extinction of ways of life which are different from that of the dominant society. The inclusion of this idea in the text of the Convention has also impeded indigenous and tribal peoples from taking full advantage of the strong protections offered in some parts of the Convention, because of the distrust its use has created among them. In this regard, it was recalled that the Sub-Commission's Special Rapporteur had stressed in his study (see paragraph 19 above) the necessity of adopting an approach which took account of the claims of indigenous populations. In his opinion, the policies of pluralism, self-sufficiency, self-management and ethno-development appeared to be those which would give indigenous populations the best possibilities and means of participating directly in the formulation and implementation of official policies.

47. It was recognised generally by the Meeting that governments feel a legitimate concern over national identity and the sovereignty of the State. This concern should not, however, be translated into policies which seek to eliminate all differences among the various cultural groups which make up most nations. This was the implication which had been given to the concept of integration by many governments.

48. Reference was made to the changes which had taken place in views on economic development. When Convention No. 107 was adopted in 1957, the process could be described as a "top-down" approach, that is one in which the national government decided what was best for all inhabitants of the country including the indigenous and tribal populations, and imposed its own concepts without discussion or consultation. This had also been the attitude of the international organisations working with governments on development projects. There had been a change in perceptions, however, as stated in the working document before the Meeting. There was an increasingly general recognition that development has to involve the persons affected at all levels of decision-making and implementation if it is to be valid. The same concepts apply to other subjects affecting indigenous and tribal peoples as well.

49. Definition of the concept which should be used to replace the basic orientation of integrationism gave rise to a long and complex discussion. Clearly, there must be guarantees of equality of treatment, combined with recognition of the right to be different. There should also be scope for individual choice by members of the groups concerned. The first ideas offered in attempting to define these concepts were that there should be recognition of the basic principles of increased consultation of indigenous and tribal peoples and participation by them in decision-making. It was quickly agreed by most experts, however, that these ideas by themselves were too weak to take account of the real needs. Experts and observers from non-governmental organisations, especially those representing indigenous and tribal peoples, supported by experts from workers' circles, pointed out that any such obligations could quickly be perverted – as they often had been – to mean *pro forma* consultations in which no real account was taken of the views expressed and of the true needs of the people being affected. The weight of these views was endorsed by most of the participants in the meeting.

50. The representatives of indigenous and tribal organisations who were present stated that the only concept which would respond to their needs was that of self-determination. The intention behind this was supported by most of the experts, who felt however that the use of the term posed some difficult problems. They recognised that it had been used in a number of international documents adopted both before and after Convention No. 107, including some referring directly to indigenous and tribal peoples. It was stated, however, that the term might be understood as implying a right to secede from the States within which they live and to form new independent political entities. This idea was outside the mandate of the ILO and of the present Meeting. Even if defined to exclude this notion, it implied a greater degree of decision-making power being reserved to the indigenous and tribal peoples than some experts could accept. It was also felt that the use of this term in a revised instrument would in itself prevent ratification because of fears of such implications.

51. The proponents of the idea recalled that the term had been used in a number of international instruments already, a point clarified by the Assistant Secretary-General for Human Rights of the United Nations. They stated that any use of the term should make it clear that it was to be applied only to economic, social and cultural rights, which were clearly within the ILO's mandate. There was also some discussion of using a phrase such as "internal self-determination" to indicate that it would be understood only to mean self-determination within the structure of existing States, but no agreement could be reached on this. They thought that the fears that use of this term would prevent ratification were unfounded. During this discussion, reference was made to the following paragraphs of the Study of Discrimination against Indigenous Populations carried out for the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities.

580. Self-determination, in its many forms, must be recognised as the basic precondition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their own future.

581. It must also be recognised that the right to self-determination exists at various levels and includes economic, social, cultural and political factors. In essence, it constitutes the exercise of free choice by indigenous peoples who must, to a large extent, create the specific content of this principle, in both its internal and external expressions, which do not necessarily include the right to secede from

the State in which they live and to set themselves up as sovereign entities. This right may, in fact, be expressed in various forms of autonomy within the State, including the individual and collective right to be different and to be considered different, as recognised in the statement on Race and Racial Prejudice adopted by UNESCO in 1978.¹

52. It was generally agreed that it would be counter-productive to suggest including the term "self-determination" in the operative part of a revised ILO instrument. Some of the experts expressed the opinion that the ILO should not take a retrograde step in revising this instrument, by failing to take into account developments in international law and relations, and strongly favoured including the term as the guiding principle of a new Convention, but no general consensus emerged in favour of this suggestion. On the other hand, there was a large measure of consensus for a reference of some kind to this concept in the preamble of the revised instrument.

53. The Director of the Inter-American Indian Institute read out to the Meeting Resolution No. 4 of the IXth Inter-American Indian Congress (Santa Fé, New Mexico, United States, 1985), which called upon States to ensure the organised participation of these peoples in taking decisions on development; to recognise the multi-ethnic and pluricultural nature of national societies; to stimulate bilingual education; and to replace integrationist concepts by a policy of respect and autonomous development based on the values, objectives and aspirations of these peoples, in order to achieve equality within diversity.

54. After considerable discussion, a group of experts and observers offered the following text as an attempt to meet the objections which had been raised while reflecting the principles included in the concept of self-determination:

Replace the fourth preambular paragraph of Convention No. 107 with:

Considering that the International Covenant on Economic, Social and Cultural Rights affirms 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;

Recognising that these rights are fundamental to the survival and future development of indigenous and tribal peoples as distinctive and viable societies;

Replace Articles 2 and 5 with:

Article 2

In co-operation with indigenous and tribal peoples, governments shall have the responsibility for developing co-ordinated and systematic action to ensure:

- (a) that indigenous and tribal peoples are able to enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination;
- (b) that indigenous and tribal peoples' territorial rights, economic rights, and political, social, cultural, and religious institutions are recognised and protected;
- (c) that indigenous and tribal peoples be accorded the respect of determining for themselves the process of development as it affects their lives and institutions.

55. This proposal received substantial general support among many experts, who endorsed the ideas contained in it. They felt that, while it was clear that the present Meeting had not been convened to offer specific amendments to the text of the present Convention, the text quoted above reflected many elements of consensus among them. All of the employer experts and some government experts, expressed reservations, however.

56. Those offering the proposal wished it to be clarified that the principle of self-determination to which reference was made in the draft preambular paragraphs should be understood to mean self-determination in economic, social and cultural fields. In addition, the reference to political institutions in the draft Article 2, paragraph (b), should be understood to refer to the political institutions of indigenous and tribal peoples themselves which were used to regulate their internal affairs. It was also stated that the intention was that draft Article 2 would create no rights in itself, but would provide basic guide-lines in the light of which the rest of the revised Convention would be interpreted.

¹ United Nations, Sub-Commission on Prevention of Discrimination and Protection of Minorities, in *Study of the problem of discrimination against indigenous populations*, Ch. XXI: "Conclusions" (United Nations doc. E/CN.4/Sub.2/1983/21/Add.8).

57. Reservations were expressed by some experts concerning the concept contained in draft Article 2, paragraph (c), while others supported it strongly. The point at issue was whether indigenous and tribal groups would have the right to full control of the development process as it affected them. Those in favour of including this concept pointed to the evolution of perceptions of how the development process should be decided upon, citing an increase in recognition of the need for a more participatory process. They felt that the reason for the failure of so many of the economic development programmes was that they were imposed from above instead of emerging from the wishes of the people being directly affected. They also felt strongly that indigenous and tribal peoples should have the right under all circumstances to determine whether and how programmes of economic development would affect them.

58. Others felt strongly that national governments neither could nor would surrender the right to make decisions on economic development which often affected the entire population of the country. These experts agreed fully that indigenous and tribal peoples should have the right, reinforced by procedural mechanisms, to play an effective participatory role in the planning and implementation of development programmes affecting them, but did not agree that they should have absolute control and the right of ultimate decision. Mr. Yllanes Ramos, employer expert, identified himself particularly with this position, which was also shared by a certain number of other experts.

59. Some of the participants felt that the above-mentioned draft did not go nearly far enough. They felt that it was the role of the present Meeting to suggest the highest possible standards, fully reflecting the aspirations of the indigenous and tribal peoples, rather than anticipating already at this early stage compromises which might be made at later stages of the discussion of a revised Convention.

60. As already stated, however, all the experts felt that some statement of principles similar to that contained in the above draft should be the basic orientation of any new instrument on the rights of indigenous and tribal peoples. While there was not full agreement on every element of this statement of principles, it did reflect broad consensus among them on the kind of principles which should guide the interpretation of all other provisions of the revised Convention, subject to the reservations indicated above.

Land rights

61. As stated in the working document, the continued possession of the lands they occupy is essential to the cultural and even physical survival of indigenous and tribal peoples. These groups are facing unprecedented pressure on their lands, largely as a result of the fact that many of them do not hold title to the lands they occupy in a form recognised by the national societies, combined with increased development activities and population movements into their territories by non-indigenous or non-tribal persons and organisations.

62. While many experts felt that Articles 11, 13 and 14 of the Convention offer significant protection in several respects, it was widely felt that they needed to be adapted to take account of these pressures as well as to reflect more closely the special nature of the relationship between indigenous and tribal peoples and the lands they occupy. On Article 11 in particular, the feeling was expressed by experts on several occasions that the strong fundamental guarantee in this Article should not be attenuated. A number of experts and all of the observers from non-governmental organisations felt that Article 12 offered no significant protection.

Concepts of land and ownership of land

63. The expert from the World Council of Indigenous Peoples, supported by a number of experts and by indigenous and other observers, described the special relationship of indigenous and tribal peoples with the lands they occupy. He stated that reference should be made to traditional territories rather than simply to land. This included all the things pertaining to the lands themselves, including waters, the subsoil, air space, all the occupants and plant and animal life and all the resources relevant to the land. The expert from Survival International stressed the importance of including coastal waters and sea-ice in

this category. Territory was thus not simply a factor of production as for other peoples, but a source of spirituality as well. In addition, many indigenous peoples did not perceive the concept of ownership as an ability to transmit all rights over the territories to other persons. They felt instead that they were the trustees of the territories they occupied, and that there was a continuity running from their ancestors, through themselves to future generations, all of whom possessed rights to the territories. They therefore regarded these territories as inalienable, in the sense that they could not transfer permanently the rights of those who were to follow after them. In addition, these lands were held collectively in almost all indigenous and tribal societies.

64. One expert noted that the term "territoriality" was preferred. This was not simply because it encompassed the environment, which was not emphasised by the word "land". It also implied the collective right of peoples to their territories. The experts also noted the importance of giving due consideration to rights of passage and grazing rights.

65. A number of experts supporting these views suggested that an instrument might express preference for collective over individual forms of ownership. An expert from employer circles disagreed. Another expert pointed out that some indigenous societies, including those of the Andes, recognised individual rights of ownership and that Article 11 of the Convention should not speak only of collective rights.

66. The representative of the FAO stated that in many situations, particularly among tribal and nomadic peoples, there were different kinds of rights to land use held simultaneously over the same parcels by different groups. For all these reasons, the concept of ownership implying exclusive rights was not easily adaptable to indigenous and tribal forms of landholding.

67. While noting the explanations given in this connection, most of the experts felt that as a practical matter the concept of ownership must be recognised and guaranteed in accordance with national legal systems, in order to provide effective protection for the rights of these peoples. It was pointed out by one expert that it was not necessary to refer only to the concept of ownership, as in some Latin American countries the right of permanent possession was a stronger concept than the right of ownership. The experts from African countries stated that in that continent all rights to the subsoil were retained by governments, and that its possession was a right guaranteed to all citizens. If land was appropriated, compensation in land or in money had to be paid.

68. One employer expert stated that Article 11 of Convention No. 107 was very strong, and probably in itself was an obstacle to ratification by some countries. It appeared to him that the statements made in this connection could be expressed by providing that States should recognise the territorial settlements of the populations concerned since the survival, continuity, preservation and development of these populations depended on such settlements; and that this recognition should be granted within the framework of national legislation.

Demarcation of lands

69. Whatever the form of rights which should be recognised, there was a need to provide for the right of possession, use or ownership of these lands to be effective. In many countries the extent of lands possessed by such groups had not been defined and titles had not been registered even to those lands which had been defined. The observer from the FAO pointed to the fundamental importance of delimiting land areas and land rights for these peoples, as well as of providing for the adjudication of conflicts by appropriate procedures. Some experts and a number of indigenous observers stressed the need for indigenous and tribal peoples themselves to define, or to participate in the definition and demarcation of, these territories. No reservations were expressed by any expert in this regard, and it therefore appears important that a revised Convention should incorporate an obligation for ratifying States to undertake such demarcation when this has not already been done.

Extent of rights to be recognised

70. Much of the discussion on land rights revolved around whether the revised Convention should include an explicit recognition of an extended concept of land or

territorial rights, and the degree of control over these lands which it should attempt to guarantee to indigenous and tribal peoples. Strong views were expressed on both sides of the argument. Some experts and most of the observers stated that complete or nearly complete power should be vested in these groups to control their lands. Many of the experts insisted that a State must always reserve the right to remove members of any population group when serious emergencies or questions of overriding national interest were involved. Nevertheless, strong feelings were also expressed that the principle of inalienability should be recognised in a revised instrument. Some experts felt that this was impractical and unrealistic, since States would never ratify an instrument requiring them to alter fundamental conceptions of domestic law, and that therefore no protection would be provided. One of the experts stated that the Meeting could not recommend creating a State within a State. Different ways were discussed of arriving at solutions which would be acceptable to the different points of view.

71. In this regard, one government expert pointed out that, in accordance with the views expressed by indigenous representatives at this Meeting, there were two aspects to inalienability. First, there were the constraints upon the right of the indigenous or tribal owners of land to dispose of or mortgage their land. Second, there was the right of indigenous or tribal people to enjoy uninterrupted occupancy of the land, with the notion that no national government had the right to impose economic development where there was not free and full consent given by the indigenous or tribal landholders. On the second point, it could not be expected that national governments would accept the principle that their capacity to make ultimate decisions on matters of national interest or on the utilisation of national resources should be removed. In his view, it would be more realistic to consider procedures and mechanisms which would ensure that, if and when the withholding of consent of these peoples was overridden by the State, it would be a decision made subject to public inquiry and processes which guaranteed the participation of these groups in such an inquiry.

72. Several experts noted the importance of ensuring protection of the renewable resources used by the peoples concerned, especially those with extensive land use priorities, to permit the pursuance of traditional economies. One expert stressed the need for protection against the pollution and the degradation of the environment by development projects, and stated that compensation should be made payable for these effects.

Subsoil, water and other resources

73. There was a significant amount of discussion on whether the rights of indigenous and tribal peoples to the subsoil and other natural resources pertaining to their lands should be recognised in a revised Convention. It was noted that their own traditions included these concepts, but in many countries the owners of land did not have rights to the subsoil and other resources. These rights were instead retained by the State. It was pointed out that this resulted with increasing frequency in the State according to non-indigenous and non-tribal entities the right of exploration and exploitation of subsoil resources in traditional indigenous or tribal territories, involving effective dispossession and damage to the land itself and disruption of their way of life.

74. Many experts pointed to the practical problems that would ensue if a revised Convention extended to subsoil resources the rights contained in the present Article 11. The Meeting therefore examined other ways of accommodating these different views and needs. One expert explained how recent legislation and practice relating to one area of his country had recognised the right of the indigenous peoples to exercise a right of veto over mineral ventures within their lands, even though the State retained rights to the subsoil, and to share in the profits once exploitation was begun. There were various procedures provided for to negotiate the conditions under which exploitation could take place and to obtain the consent of the indigenous people, but the government retained the right of decision. The observer from the Inter-American Indian Institute described recent negotiations between the government and indigenous groups in one Latin American country concerning indigenous participation in mineral profits, which might provide an important precedent. One expert stressed the need for social and environmental impact studies preceding development activities, and for information on proposed projects to be made publicly available.

75. Several experts and other participants referred to the need to recognise the rights of indigenous and tribal peoples to water and for special measures in this regard. Whereas many participants felt that the land rights of indigenous and tribal peoples should include rights over water resources within their traditional territories, different opinions were expressed concerning the issue of coastal waters. One expert stated in this regard that no State could concede rights over coastal economic zones and the continental shelf.

Removal of indigenous and tribal peoples from their habitual territories

76. Another part of the discussion concerned Article 12 of Convention No. 107. This Article provides that the "populations concerned shall not be removed without their free consent from their habitual territories", but then goes on to provide a number of exceptions whereby governments can remove them even without their consent, subject to certain conditions. This Article has been subjected to increasing criticism by many organisations of indigenous and tribal peoples and others working for their benefit. Their position, expressed again in the present Meeting, is that as it is worded the Article provides no effective restrictions on the right of States to remove these groups whenever they may wish to do so. It was stated that increasing numbers of removals were being imposed, usually in order to allow economic development projects to be carried out in these territories, as well as for national security reasons.

77. Some experts and observers argued that to recognise the principle that indigenous and tribal peoples had full control over their territories would not constitute a real barrier to constructive and well-considered development. In order to protect their interests, these peoples had to be accorded a real degree of power, but they would not stand in the way of all development. Most experts recognised the need for these peoples to have an effective voice in the decisions affecting them, as has been reflected elsewhere in this report, but they could not recommend including in a revised Convention a power equal to that enjoyed by States. There was, however, a substantial measure of agreement that the revised Convention should include the requirement that the removal of indigenous and tribal peoples from the lands or territories which they have traditionally occupied should not be undertaken except with the informed consent of these peoples, or after an examination of whether the removals are necessary for overriding reasons of national interest, decided upon after procedures designed to ensure full involvement in the decision-making process by the groups affected. If such removals did prove necessary after carrying out such procedures, these groups should receive compensation, including lands at least equal in extent, quality and legal status to that which they had lost, which allowed the continuation of their traditional lifestyles and which were suitable to provide for their present needs and future development, in addition to the other forms of compensation provided for in Article 12 of Convention No. 107.

78. In this connection, several experts and a number of observers stated that any removals which were carried out should only take place in emergency situations and should be of a temporary nature. It was stated these peoples should have a residual right to these territories, which would revert to them after the circumstances occasioning the removal had ended.

Transfer of rights of ownership

79. Article 13 of Convention No. 107 covers this subject. The importance of recognising indigenous and tribal peoples' own procedures, within their traditional institutions, for transmitting rights to these lands was stressed by several speakers. Several experts felt that the concluding phrases of paragraph 1 of this Article were patronising, while others recalled that all land rights had to be exercised within the framework of national legislation.

80. Stress was also laid on the need for protection against dispossession by persons or institutions not belonging to the populations concerned (Article 13, paragraph (2)). Such protection should be made effective in practice as well as in theory.

Restitution of territories

81. In addition to providing for the security of lands currently occupied by indigenous and tribal peoples, a number of experts and observers stressed the importance of restitution

to these peoples of lands of which they had been dispossessed. In some countries they had rights, which were not given the respect they deserved, based on treaty rights, on grants or on immemorial possession, but these lands had been taken from them over the centuries. They now occupied lands which were greatly reduced from their earlier holdings, and which in many cases was insufficient to provide for their present needs and future development. One expert described in some detail that the principle of restitution had been recognised in the constitutions or legislation in several Latin American countries, and stated that it should be included in the revised Convention. There were practical problems with its full implementation, but the principle was an important one. In some such cases, the right to restitution was accorded in relation to lands lost over a certain number of years previous to the adoption of legislation in this connection.

82. After the detailed discussions which took place on many aspects of land rights, Mr. Hogetveit attempted to summarise the points of consensus which he thought had emerged. The points he suggested were the following:

- (a) Recognition and protection of collective territorial rights to lands and waters, including coastal waters, traditionally used by indigenous and tribal peoples.
- (b) Demarcation of their territories.
- (c) Establishment of institutions whereby the indigenous and tribal peoples may freely make decisions concerning their lands and waters.
- (d) Restrictions on the transfer of rights over indigenous and tribal territories to non-indigenous or non-tribal persons and institutions.
- (e) Protection against total or partial expropriation of these territories.
- (f) Protection against removal.
- (g) Exploitation of subsurface resources should take place only with the full and free consent of the indigenous or tribal peoples, and they shall have the right to benefits from the profits from such exploitation.
- (h) Establishment of procedures to return lands and waters which they have lost.

83. Serious reservations on various points were expressed by some experts. Several of them pointed out that exceptions or limitations would be required on the basic principles reflected in this list. It was agreed that, while these points did not produce a consensus in the Meeting, they did serve to indicate important ideas which reflected the concerns expressed by the experts. It was decided to include these points in the report as a reflection of the essential principles discussed in this connection.

Discussion of possible revision of various Articles

84. The Meeting discussed the kind of revision which might be appropriate for various Articles. There was no systematic attempt to obtain consensus on these points, but only to indicate where various participants found a need for some amendment.

85. It should be stated here that the floor was open during this discussion to all participants in the Meeting. It is indicated below when the experts appointed by the Governing Body made suggestions, and when they came from other speakers. The Meeting did not have sufficient time to debate all these proposals, but it thought it useful to inform the Governing Body where problems had been perceived nearly 30 years after the adoption of Convention No. 107. The specific recommendations of this Meeting, dealt with elsewhere in this report, relate principally to the aspects of the Convention concerning basic orientation and land rights, but the following section provides a catalogue of ideas on a large number of other points.

86. While no mention is made under all the specific Articles below of the need to reorient the Convention away from its present integrationist approach, this may be assumed as applying to each provision where this idea is present. There is also much language in the present Convention assuming the cultural inferiority of indigenous and tribal peoples, which should be replaced by a right to maintain their values, customs, religions and internal institutions.

87. The text of Convention No. 107 is appended to this report for easy reference.

Article 1 – Definition

88. Reference to the concepts of a “less-advanced stage” of development, and “of that time” in paragraph 1 were not considered acceptable, since they reflect a notion of cultural inferiority. Use of the term “regarded as indigenous” in paragraph 1 (b) was taken to imply that these groups had no right to define themselves. Several speakers thought that some language should express the notion that these peoples were disadvantaged in relation to the national community, whether economically or in other fields. One of the experts offered the following language as a possible replacement:

Indigenous and tribal peoples, individually and collectively, in independent countries whose social, economic and cultural traditions and practices distinguish them from the national dominant society.

89. Some experts requested an explanation of the term “semi-tribal”. It was stated that this term was meant to indicate that there could be different forms of social organisation among the groups covered by the Convention, and that they would continue to be covered to the extent appropriate in the situation. Reference was made in this connection to the flexibility required by Article 28 of Convention No. 107 and recognised by the supervisory bodies, to the effect that the Convention applied to the extent and under the conditions necessary in different situations. One expert suggested that the term “tribal and semi-tribal” should not be used in the revised Convention since it was not used in some countries and was not necessary to describe the peoples in question. Another expert suggested that reference be made to the draft working definition contained in the United Nations Sub-Commission study of this subject.¹ A number of other experts felt, however, that the definition should remain in its present form in view of the wider coverage it allowed for groups in many parts of the world who lived in similar situations but who were defined in different ways in the context of different countries.

90. See also paragraphs 33 to 35 above.

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Article 7

96. The discussion on this Article bore essentially on the relation between national law and the customary laws and procedures of indigenous and tribal peoples. A distinction was drawn between the positive laws of nations, as expressed in their constitutions and other forms of legislation, and the largely uncoded laws of the indigenous and tribal peoples. There was a wide measure of agreement that significant weight has to be given to these customary laws and procedures, but that in cases of conflicts the national laws should prevail. Procedures should be established to resolve conflicts between customary and national laws, and consideration should be given to the customary laws and procedures as far as possible. Examples were given of some countries in which such procedures had already been established and where a great deal of attention had been paid to how to resolve the conflicts which inevitably arose. The exact procedures which should be established could easily be left to the various countries.

97. The point was also made that individuals should have the right to appeal to the national legal system if they did not wish to be governed only by customary laws and procedures. The expert representing the World Council of Indigenous Peoples pointed out that customary law was not static, and that it might therefore be preferable to refer to laws decided according to traditional methods by the indigenous or tribal peoples themselves.

¹ United Nations, *op. cit.*, para. 379. The draft working definition reads as follows:
 “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 non-dominant 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.”

98. Some of the participants, in particular the observers from indigenous organisations, stated that the imposition of national laws on their peoples often caused great hardship and was sometimes in sharp conflict with their own desires and institutions. These participants felt that only their own rules should govern the various kinds of relationships among themselves.

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Part III – Article 15 – Recruitment and conditions of employment

105. Some speakers, including both experts and observers, felt that this section of the Convention should be revised and modernised in a comprehensive fashion. One observer stated that the revised Convention should take account of the special situation of indigenous and tribal persons who were migrant labourers. Many of these people, having lost their lands in connection with problems dealt with in other parts of the Meeting's discussions, had entered into the migrant labour force and encountered special problems. One of the major problems was that they were often undocumented, or illegal, migrants and thus were not covered by legal protections available to other workers. A particularly acute problem was exposure to toxic substances and, because they most frequently worked in agricultural occupations, exposure to pesticides. There should thus be a provision providing for an effective right to be informed of the dangers inherent in different kinds of work, especially through appropriate warnings in the languages spoken by these workers. Referring to a point made under Article 3 above, he stated that the words "so long as they are not in a position to enjoy the protection granted by law to workers in general" should be deleted from the end of paragraph 1, because of the continuing nature of the special protection needed by these peoples. Reference was made to a recent United Nations seminar on the exploitation of child labour which recognised indigenous peoples as a class in need of special protection against the exploitation of their labour.

106. The same speaker, supported by several experts and other participants, suggested that preferential hiring practices should be applied to indigenous and tribal persons at least for development projects taking place in or near their areas. They should also receive training to acquire the necessary skills. This would help relieve immediate problems connected with lack of employment opportunities, as well as creating skills in these communities. This preferential hiring of indigenous and tribal persons should also apply to the agencies administering programmes affecting their communities.

107. Another observer stated that indigenous and tribal groups were subjected in some areas of the world to extremely abusive conditions of exploitation of their labour, amounting to virtual slavery. He felt that this Article should give the highest priority to eliminating slave-like practices, requiring governments to allot the financial and other practical means necessary to accomplish this, and requiring them to seek the collaboration of the ILO and other international organisations in this effort.

108. The observer from the ICFTU felt that the part of paragraph 1 following the word "conditions" could be replaced by language providing for special measures to be adopted in addition to the protection guaranteed by law to workers in general, and that these special measures should also apply to occupational safety and health measures.

109. One of the experts questioned the phrase "within the framework of national laws and regulations" in paragraph 1 of this Article.

110. As concerns the second paragraph of Article 15, one of the experts stated that "shall do everything possible to prevent all discrimination" was too weak, and that ratifying countries should be required to take effective legal measures in this regard.

111. An observer from an indigenous organisation pointed to the need for the creation of adequate mechanisms to ensure that the persons concerned could in fact enjoy the rights guaranteed to them. He stated that in many countries in Latin America the legislation was acceptable but the enforcement was totally lacking. Ratifying countries should be required to provide sufficient funds in their budgets for this purpose, and there should be a mechanism for the ILO to deal with complaints in this regard.

112. One observer suggested that the requirement for safe means of transport in Paragraph 9 (e) of Recommendation No. 104 should be transferred to the Convention.

* * *

159. The experts decided to emphasise certain points of special importance in the following conclusions and recommendations:

CONCLUSIONS

1. The Convention's integrationist approach is inadequate and no longer reflects current thinking.
2. Indigenous and tribal peoples should enjoy as much control as possible over their own economic, social and cultural development.
3. The right of these peoples to interact with the national society on an equal footing through their own institutions should be recognised.
4. The Meeting concluded that the traditional land rights of these peoples should be recognised and effectively protected, and noted that the indigenous and tribal representatives present unanimously considered that these lands should be inalienable.
5. The Meeting agreed that, in order to make these rights effective, ratifying States should take measures to determine the lands to which these peoples have rights, by demarcation or delimitation where this has not already been done.
6. The authority of States to appropriate indigenous or tribal lands, or to remove these peoples from their lands, should be limited to exceptional circumstances, and should take place only with their informed consent. If this consent cannot be obtained, such authority should be exercised only after appropriate procedures designed to meet the exceptional circumstances for such taking and which guarantee to these peoples the opportunity to be effectively represented.
7. In cases where the appropriation or removals referred to in the previous paragraph proves necessary after these procedures, these groups should receive compensation including lands of at least equal extent, quality and legal status which allow the continuation of their traditional lifestyles and which are suitable to provide for their present needs and future development.¹
8. In all activities proposed to be taken by the ILO or by ratifying States affecting indigenous and tribal peoples these peoples should be integrally involved at every level of the process.¹
9. The Meeting noted that the indigenous and tribal representatives present unanimously stressed the importance of self-determination in economic, social and cultural affairs as a right and as a basic principle for the development of new standards within the ILO.

RECOMMENDATIONS

The Meeting of Experts recommends to the Governing Body:

- (a) that it place the revision of this instrument on the agenda of the International Labour Conference in 1988 or as early as possible thereafter;
- (b) that full account should be taken of the views expressed at this Meeting in revising the Convention;

¹ The employer experts expressed their reservations on these two points.

- (c) that the scope of the revision should be limited to social, economic and cultural considerations;
- (d) that it take all possible measures to ensure the participation of indigenous and tribal representatives in the process leading to the revision of this Convention and in other ILO activities in this field;
- (e) that the ILO should adopt a programme of activities for the protection of the rights and interests of indigenous and tribal peoples, taking account of the above-mentioned conclusions.

APPENDIX II

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

(Articles 29 to 35 and 37 are not reproduced.)

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

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

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

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

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

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

Considering that the adoption of general international standards on the
subject will facilitate action to assure the protection of the popu-
lations 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 determined in a flexible manner, having regard to the conditions characteristic of each country.

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.

