

## Overview of International Instruments relating to Indigenous Peoples\*

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Pending the adoption of the Proposed American Declaration of the Rights of Indigenous Peoples by the Organization of the American States,<sup>1</sup> the ILO instruments — Convention 107<sup>2</sup> and Convention 169<sup>3</sup> — and the ILO Recommendation 104,<sup>4</sup> are the only international documents relating exclusively to indigenous and tribal peoples. These instruments set forth, in a very comprehensive manner, the basic rights of these peoples and the obligations of the different States all over the world.

Notably, addressing these instruments would require focusing mainly on how the ILO approaches the rights of indigenous peoples in light of the

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1. OEA/Ser.K/XVI (6 December 200).
2. Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Population in Independent Countries, (ILO Convention no. 107), 328 U.N.T.S. 249 (26 June 1957) [hereinafter ILO Convention no. 107].
3. Indigenous and Tribal Peoples Convention (ILO Convention no. 169), 72 ILO Off. Bull 59 (Ser A., No. 2) (September 1991) reprinted in 28 *ILM* 1348 (1989); [hereinafter ILO Convention no. 169].
4. Indigenous and Tribal Peoples Convention (ILO Recommendation 104), (1957).

special needs of the convention. Why the ILO? Why was it necessary for the ILO to address the issue of the rights of the indigenous peoples?<sup>5</sup>

The ILO concern on indigenous peoples dates back to the resolution of the issue on forced labor among the native workers in Florence.<sup>6</sup> It was in 1930 when the ILO adopted the Convention on Forced Labor<sup>7</sup> aimed at putting an end to practice of forced or compulsory labor practice. Later instruments were adopted to regulate and eliminate abusive conditions of employment among indigenous workers. However, the situation that was addressed at that time was the plight of the indigenous communities in developed states and not those in developing states.

After World War II, the ILO decided to draft general instruments on indigenous peoples. Such decision was largely based on the ILO experience among the Indians of the Americas. Back then, there was a huge program, in cooperation with other UN agencies, and which the ILO spearheaded in dealing with Indian communities. With this, Convention 107 was adopted and followed by Recommendation 104.<sup>8</sup>

As the concept of indigenous peoples became more and more visible in the international arena, this led to the process of rendition of the Convention between governments and the indigenous communities. Between 1986-1989, it was a process in which NGOs representing IPs actively participated.

The adoption of Convention 169 was a revolutionary approach for the ILO.<sup>9</sup> Convention 107 was based on the assumption that indigenous peoples were temporary societies which have to be preserved considering they have

5. See generally ILO Constitution Annex ("Declaration Concerning the Aims and Purposes of the ILO), reprinted in *CONSTITUTION OF THE ILO AND STANDING ORDERS OF THE INTERNATIONAL LABOUR CONFERENCE* (1989).
6. Report of the Meeting of Experts, ILO Doc. GB.234/5/4 (1986) reprinted in part in Patrial revision of the Indigenous and Tribal Population Convention, 1957 (No. 107), Report VI(1), at 3, International Labour Conference, 75TH Session (1988).
7. Convention Concerning Forced Labor or Compulsory Labor (ILO Convention no. 29), 39 U.N.T.S. 55 (1930).
8. See International Labour Conference. Record of Proceedings, 19TH Session (Geneva, 1956); International Labour Conference, Record of Proceedings, 40TH Session (Geneva, 1957).
9. Lee Swepston, *A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989*, 15 *OKLA. CITY U. L.REV* 677, 682-687 (1990).

been integrated in mainstream society.<sup>10</sup> The new convention takes the opposite view that indigenous peoples are a common society, disappearing as a result of modernization. Convention 107 encourages the assimilation of indigenous peoples.<sup>11</sup> On the contrary, Convention 169 takes the opposite view by ensuring recognition and respect of cultural and ethnic diversity. Thus, where Convention 107 was made to provide these people with protection during the condition of modernization, Convention 169 seeks to encourage them to set their own development priorities.<sup>12</sup>

Convention 169 strengthens the provisions on the recognition and protection of traditional institutions, traditional values, and customary laws respecting the rights of indigenous peoples.<sup>13</sup> It further reinforces the concepts of land and territory.<sup>14</sup> It introduces new provisions on the rights to natural resources, indigenous lands, and to ancestral lands that they have lost.<sup>15</sup> It also introduces the right to self-definition,<sup>16</sup> including the right to of these people to form their own priorities.<sup>17</sup> There are also provisions concerning cooperation between the peoples themselves.

It is inevitable to stress a few selected issues in the Convention such as the scope of the convention, the definition of indigenous peoples as there exists a distinction as to what and who are these peoples.

The lengthy convention is divided into three major sections. The first section concerns the general policy that governs a State in dealing with indigenous and tribal peoples.<sup>18</sup> The second deals with various substantive issues, including the question of the land and territory.<sup>19</sup> The final section is couched in general terms and sought to address all other issues.<sup>20</sup>

What is the scope of the convention and who are entitled to its protection? All ILO Conventions refer to both indigenous and tribal peoples, not only to indigenous. The term indigenous refers to people who have retained totally or partially, their traditional languages, institutions, and

10. ILO Convention no. 107, art.2. See Working Document for the Meeting of Experts on the Revision of Convention No. 107, 34 (1986).

11. Article 2(c), ILO Convention no. 107.

12. *Id.* art. 7.

13. ILO Convention no. 169, arts. 4, 6, 7, 12, 15, 17, 20, 22-23, 25, 27-28, 33.

14. *Id.* Part II.

15. *Id.*

16. *Id.* arts. 1(2) and 4(2).

17. *Id.* art. 7(1).

18. *Id.* arts. 1-12.

19. *Id.* arts. 13-32.

20. *Id.* arts. 33-44.

cultures -- all those distinguishing them from developed societies. In addition, indigenous means territories occupied by people before other populations began to settle. This latter definition is that which is very common, and has, in fact, been incorporated in most municipal laws out of the South American experience.

In many parts of the world, it is difficult, and even almost impossible, to make a clear cut distinction between the time in which each of the tribal or other traditional communities arrived in the region and the time they took over or that population arrived. Thus, the ILO, when it first acted in the 1950s, began to work strictly on the question whether both indigenous and tribal peoples are entitled to its protection. The intent was for the ILO to understand the social situation. It was also to establish priorities based on rules and ancestral rights in a possible area. Practically speaking, the description of population roots as tribal rather than indigenous was accepted. However, as is known today, the convention makes no distinction on the way tribal and indigenous populations are to be treated.

Another crucial aspect of the convention pertains to the question as to who are the indigenous peoples. Essentially, they are the peoples who identify themselves as such. It is important to stress that the convention does not really provide the definition of who these people are; rather, it simply states the scope of the definition that would exclude some people.<sup>21</sup> Ultimately, the definition of indigenous people is a question of self-identification by the people to the communities where they belong.<sup>22</sup>

There is another important aspect when it comes to scope. Convention 107 refers to populations<sup>23</sup> while Convention 169 deals with peoples.<sup>24</sup> The inclusion of the word "peoples" rather than populations was a result of lengthy discussions and consultations.<sup>25</sup> This term recognizes the existence of organized societies with an identity of their own and not mere groupings sharing some common heritage. Further, a provision was also included indicating that the use of the term peoples shall not be construed as having any implications to the rights that attach to the people as it is commonly used.<sup>26</sup>

The question of whether the use of the term "peoples" connotes the exercise of the right of self determination and, consequently, the right of

21. *Id.*

22. *Id.*

23. ILO Convention no. 107, art. 1.

24. ILO Convention no. 169, art. 1.

25. Report of the Meeting of Experts, *supra* note 6, para. 53, Report VI(1) at 109, International Labour Conference, 75TH Session (1988).

26. ILO Convention no. 169, art. 1(5).

secession from the countries of where they lived also needs to be addressed. The conventions recognize that the ILO has no position with respect to this aspect.<sup>27</sup> The convention does not impose any obligation on self-determination and it does not take the position against or for its exercise.<sup>28</sup>

The convention espouses certain fundamental principles. There are two basic assumptions of national policy in favor of the indigenous people. These are consultation and participation.

Article 6 requires the participation of the peoples in all levels of decision making.<sup>29</sup> It also requires governments to consult them whenever considerations is given to legislative or administrative measures that may affect them.<sup>30</sup> Consultations have to be undertaken in good faith in the form of appropriate circumstances.<sup>31</sup> In most cases, it is generally assumed that consultations are not necessarily required to reach an agreement. These are simply guarantees of participatory rights. However, the convention actually goes further as it aims to achieve an agreement.<sup>32</sup>

Article 7 is the central provision. It says that IPs have the right to decide their own priorities and govern their own economic, social, and cultural activities.<sup>33</sup> They must also participate in the operation of various reforms that affect them.<sup>34</sup> Governments are required, whenever appropriate, to establish cooperation measures with their indigenous and tribal peoples.<sup>35</sup>

It requires actual consultation where these peoples have the right to express. Governments are meant to supply them with enabling conditions in order that they have complete access to information.<sup>36</sup> This imposes also upon governments real obligation to identify the institutions that would best serve the needs of these people.

27. See Report of the Meeting of Experts, *supra* note 6, paras. 50-52, Report VI(1) at 108-109.

28. Cf. Statement by the Chairman of the Committee on Convention no. 107, International Labour Conference, Provisional Record, 76TH Session, 1989, No. 25, at 25/7; See Report of the Committee on Convention no. 107, Provisional Record 25, para. 31, International Labour Conference, 76TH Session (Geneva 1989).

29. ILO Convention no. 169, art. 6(1)(b).

30. *Id.* art. 6(1)(a).

31. *Id.* art. 6(2).

32. *Id.* art. 6(2).

33. *Id.* art. 7(1).

34. *Id.* art. 7(1).

35. *Id.* art. 7(4).

36. *Id.* art. 7(3).

Now, there are certain aspects of human rights which the convention addresses.

The principle is that there is the principle equality of rights<sup>37</sup> but at the same time, respect for the special qualities of a certain group of people.<sup>38</sup> The rights to ancestral lands is fundamental to the continue survival of indigenous tribes. The convention recognizes that land is a natural resource. In addition, it is, in fact, not only a source of livelihood, but also a source of cultural cohesion, as well as spiritual welfare of many indigenous peoples. Hence, the recognition of the special right to land areas of indigenous peoples is based on their economic, social, and cultural survival.

The basic provision on land rights requires that the rights of ownership and possession of these peoples concerned shall be enforced.<sup>39</sup> It talks of the rights of ownership and possession. There are many cases in which IP have full exercise of such rights as long as there is firm assurance that these rights will be continuously protected.

The indigenous peoples also have their rights to the resources.<sup>40</sup> This is an especially difficult provision as it includes the right participate in the use, management, and conservation of these resources.<sup>41</sup> It is therefore clear that they have a right exactly what these rights consist of will have to be defined in their cultures.<sup>42</sup>

As far as sub-surface mineral resources are concerned, two major concepts exist. Ownership of land does not necessarily entail the rights to the subsurface. Access to those sources however normally requires ownership of the surface real. Experience shows that conflicts have arisen between indigenous tribal peoples, occupying land which have been leased or sold.

There are also provisions on displacement and settlement.<sup>43</sup> These relate to the basic principles of consultation, occurring at every stage before decision making. There is a series of provisions on traditional training,<sup>44</sup> education,<sup>45</sup> social security,<sup>46</sup> and also a provision on cooperation.<sup>47</sup>

37. *Id.* art. 2 and 3.

38. *Id.* art. 5.

39. *Id.* art. 14.

40. *Id.* art. 15.

41. *Id.* art. 15(1).

42. *Id.* art. 13.

43. *Id.* arts 16-19.

44. *Id.* arts. 21-23.

45. *Id.* arts. 26-31.

46. *Id.* arts. 24-25.

Convention 169 have been ratified by 17 member states out of the 175 ILO member states. Among the 17, 13 are in South and Central America. Only 1 country ratified in Asia Pacific Region. Convention 169 has entered its long policy formulation phase. Take the example of the enactment of the Indigenous Peoples Rights Act.<sup>48</sup> The convention serves as model for cooperation and even a guideline for international financial institutions, such as the World Bank, on human rights aspects. The Convention is an encouraging sign of national and international cooperation gradually moving toward the recognition of the problems and aspirations of the indigenous tribal peoples and, of course, solutions and approaches.

47. *Id.* art. 32.

48. Republic Act 8371, An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/ Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds therefor, and for other Purposes (1997).

## Globalization and Indigenous Peoples: From Politics of Identity to Policy of Solidarity

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*"That the law has taken pains to describe in great detail the indigenous peoples as a category of people reflects the complexity of the question of identity facing indigenous peoples, even more so for indigenous children and youth, in the present Philippine context, with all the opportunities and temptation of hyphenated or multiple identities."<sup>1</sup>*

### I. INTRODUCTION

Linking indigenous peoples with globalization necessitates a relaying of a personal experience.

I had an encounter with a London-based transnational company. I was then documenting the cultural politics surrounding the geothermal project in Mount Apo.<sup>2</sup> The chief anthropologist of the self-proclaimed biggest mining company in the world phoned me. He said their company was interested in mining the gold in the Subanon area. He complained, however, that the local bishop, together with the Irish missionaries, were stopping them. "Listen!" he exclaimed. "Your tribal people are poor. Your government that welcomes us is poor. The Church that opposes us is also poor. Whereas, being the biggest mining company in the world, we can offer the best social welfare package for your people." Then he asked his real question: "Is the voice of the Catholic bishop the voice of the indigenous people?" It was

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1. Ponciano L. Bennagen, *Re-affirming indigenous identity for service leadership, in THE CHANGING FACE OF THE FILIPINO: A SALESIAN TRIBUTE TO THE YOUTH OF THE PHILIPPINES 277* (2002) [hereinafter Bennagen].
2. For a more thorough discussion, see ALBERT E. ALEJO, *GENERATING ENERGIES IN MOUNT APO: CULTURAL POLITICS IN A CONTESTED ENVIRONMENT* (2000).