APPLICATION OF CONVENTION NO. 169
BY DOMESTIC AND INTERNATIONAL COURTS IN LATIN AMERICA

A CASEBOOK

"A momentous step in the consolidation of the contemporary international regime on indigenous peoples, Convention No. 169 provides significant recognition of indigenous peoples' collective rights in key areas, including cultural integrity; consultation and participation; self-government and autonomy; land, territory and resource rights; and non-discrimination in the social and economic spheres."[1]

S. James Anaya, UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous People

1) UN doc. A/HRC/9/9, 11 August 2008, para. 32

PREFACE

The year 2009 marks the 20th anniversary of the adoption of the Indigenous and Tribal Peoples Convention, 1989 (No. 169) by the International Labour Conference. Together with the 2007 UN Declaration on the Rights of Indigenous Peoples and other human rights instruments, the Convention is a central element of the contemporary international normative framework for the promotion and protection of the rights of indigenous and tribal peoples.

Since its adoption, Convention No. 169 has been crucial in shaping national laws and policies regarding indigenous and tribal peoples worldwide. Particularly in ratifying countries, the courts have relied on the Convention when dealing with cases concerning the rights of indigenous peoples. Such judicial use of the Convention has made an important contribution to its application at the national level.

This Casebook contains summaries of judicial decisions from ten countries in Latin America, as well as a selection of relevant judgements and reports from the Inter-American human rights system. The introduction sets out the context of the national legal systems of the countries concerned and gives an overview of the types of cases selected. The case summaries highlight how the courts have relied on Convention No. 169. The full texts of the decisions (in Spanish) can be downloaded at www.pro169.org or ordered on CD-ROM by email (pro169@ilo.org).

The Casebook will be useful for judges, lawyers and legal educators, and a source of information for indigenous and tribal peoples and their organizations in the context of advocacy and litigation. The publication is also intended as a way to share the experiences of Latin America with interested stakeholders in other regions.

The Casebook has been developed and co-ordinated by the ILO Programme to Promote ILO Convention No. 169 and the Equality Team of the ILO's International Labour Standards Department. Special thanks to Christian Courtis, formerly with the International Commission of Jurists, who selected the cases and authored the introduction and case summaries. The book was supported by DANIDA, the Danish interational development agency.

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INTRODUCTION:
APPLICATION OF CONVENTION NO. 169 BY COURTS IN LATIN AMERICA

This Casebook compiles judicial decisions from the Latin American region[2] that rely on the Indigenous and Tribal Peoples Convention, 1989 (No. 169) as a tool for interpretation or as a basis for decision. By way of introduction, a number of clarifications may be useful to explain the information presented, and to place it in context.

1) The legal context of the countries in the region
Latin America is the region with the highest number of ratifications of ILO Convention No. 169 – fourteen as of 1 September 2009[3]. This is not a mere coincidence; many countries in the region are multilingual and multicultural, and in some cases the indigenous population is the majority in the country, or constitutes a significant percentage. In addition, the constitutional reform processes that began throughout the region in the late 1980s, have led to the incorporation of provisions on the rights of indigenous peoples and communities in the constitutions of many of these countries.

Therefore, it is not surprising that some of these legal and constitutional changes have had an impact on the jurisprudence in various countries. Some common factors – applicable to varying degrees in each country, but nonetheless indicating a regional trend - may help to understand this development.

a) *Relationship between constitutional reform processes and transitional or democratic consolidation processes*

Many countries in the region have undergone a transition from authoritarian regimes to democracy during the period from the mid 1980s to the beginning of 2000[4]. In many of these cases, the process was accompanied by important constitutional reforms. In other cases, although there was not an actual transition from an authoritarian regime to a democracy, constitutional reform stimulated processes of mobilisation and political renewal. Most of these constitutional reforms have resulted in a significant number of new rights and institutional innovations, as will be seen in the points mentioned below.

b) *Expansion of constitutional justice*

Even if the concept of constitutional justice was not unknown in many of the jurisdictions in the region, it is certainly true that during a large part of the 20th century, judicial control of constitutionality was not generally applied. Many of the constitutional reforms that took place in the last decade of the 20th century have reinforced constitutional control through the creation of specialised constitutional courts or constitutional divisions of the superior courts of justice or supreme courts, and through the express contemplation in the constitution of legal actions, such as the action for protection of constitutional rights (acción de amparo) or claim of unconstitutionality. This has led to a significant expansion of the constitutional jurisdiction, which was unprecedented in many countries in the region[5].

c) *Ratification of and granting privileged legal status to international human rights treaties*

Many of the countries in the region have increased the ratification of international human rights treaties – reinforcing the acceptance of the rule of law and the enforceability of fundamental human rights, as opposed to the authoritarian past that was characterised by a massive violation of human rights. The ratification of international treaties may be seen as an expression of confidence in the international human rights system, which in the past was the forum where serious violations of human rights could be denounced. At the same time, ratification of international treaties was a message to the international community regarding the State's commitment to the enforcement of the rule of law and respect for human rights.

The ratification of a significant number of regional and universal human rights treaties must be placed in the context of the prevalence in the region of a monist tradition in terms of the relationship between international law and domestic law. In legal systems following the monist tradition duly ratified international treaties form part of domestic law. As a result, the rights recognized in the ratified human rights treaties extend the list of fundamental human rights consecrated in the new constitutions[6].

Finally, although not consistently, many countries in the region, have granted a privileged legal status to human rights treaties.[7] In some cases they have been granted constitutional rank; in others, they are considered part of the so-called "constitutionality block"[8], and in yet other cases they are given an intermediate ranking – below the constitution but above ordinary legislation.

2) Reference to the Latin American region includes Belize throughout this casebook.

3) The ratifying States are Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Paraguay, Peru and Venezuela. In other countries in the region, the ratification is pending an internal approval process.

4) See, for example AA.VV., Transición democrática y reforma constitucional en Centroamérica) (Democratic transition and constitutional reform in Central America), Fundación para la Paz y la Democracia, San José, 2001; Roberto Gargarella, "Recientes reformas constitucionales en America Latina: una primera aproximación" (Recent constitutional reforms in Latin America: a preliminary study), in Desarrollo Económico, Vol. 36, No. 144 (January – March 1997), pp. 971-990; José María Serna de la Garza, La reforma del Estado en América Latina: los casos de Argentina, Brasil y México (Reform of the State in Latin America: the cases of Argentina, Brazil and México), UNAM, Mexico, 1998; Rodrigo Uprimny y Mauricio García Villegas, "Corte constitucional y emancipación social en Colombia" (The Constitutional Court and social emancipation in Colombia), in Boaventura de Sousa Santos and Mauricio García Villegas (eds.), "Emancipación social y violencia en Colombia" (Social emancipation and violence in Colombia), Norma, Bogota, 2004.

5) See, for example, Víctor Bazán, "Algunos problemas y desafíos actuales de la jurisdicción constitucional en Iberoamérica" (Some problems and current challenges in the constitutional jurisdiction in Latin America), in the Anuario Derecho Constitucional Latinoamericano 2007, Volume I, Fundación Konrad Adenauer, Montevideo, 2007, pp. 37-61.

6) On the application of human rights treaties by local judges, see, in general, Martín Abregú y Christian Courtis (comps.), La aplicación de los tratados de derechos humanos por los tribunales locales (The application of human rights treaties by local courts), Editores del Puerto-CELS, Buenos Aires, 1997; Víctor Abramovich, Alberto Bovino y Christian Courtis (comps.), La aplicación de los tratados sobre derechos humanos en el ámbito local. La experiencia de una década (The application of human rights treaties in the local arena. The experience of a decade), Editores del Puerto-CELS, Buenos Aires, 2007. More specifically on the application of the ILO provisions by national courts, see Xavier Beaudonnet, "La utilización de las fuentes universales del derecho internacional del trabajo por los tribunales nacionales" (Use of universal sources of international labour law by national courts) Revista Derecho del Trabajo, Ediciones La ley, July 2006, Constance Thomas, Martin Oelz y Xavier Beaudonnet, ILO, Geneva, 2004 ; Geraldo Von Potobsky, "Eficacia jurídica de los convenios de la OIT en el plano nacional (Legal effectiveness of the ILO conventions in national arenas), in Les normes internationales du travail, un patrimoine pour l'avenir, Mélanges en l'honneur de Nicolas Valticos, op.cit.

7) See, in this regard, Carlos Ayala Corao, La jerarquía constitucional de los tratados relativos a derechos humanos y sus consecuencias (Constitutional ranking of treaties related to human rights and their consequences), FUNDAP, Querétaro, 2003.

8) See Rodrigo Uprimny, "El bloque de constitucionalidad en Colombia: un análisis jurisprudencial y un ensayo de sistematización doctrinal", (The constitutionality block in Colombia: a jurisprudential analysis and essay on doctrinal systemisation) in Compilación de jurisprudencia y doctrina nacional e Internacional, United Nations Office of the High Commissioner for Human Rights, 2001.

d) *Consolidation of the regional human rights system*

The relationship between domestic constitutional law and international human rights law has been particularly affected by the expanding inter-American system of human rights. Nearly all countries in the region have now ratified the American Convention on Human Rights, and have recognized the judicial competence of the Inter-American Court of Human Rights.

One of the effects of this expansion has been, naturally, an increase in workload for the system's organs – the Inter-American Court and Commission of Human Rights – in terms of cases heard and resolved, as well as the range of countries concerned by these cases. Simultaneously, the countries participating in the regional human rights system have learned to take into account internally the decisions and interpretative criteria applied by the Court and the Commission. This process is slow and complex, and far from complete. However, it has led to increased openness of many domestic courts to consider the inter-American jurisprudence – especially the jurisprudence of the Inter-American Court of Human Rights. This may explain the gradual move towards invoking international human rights standards by domestic courts.

e) *Constitutional recognition of new rights*

One last element frames the recognition of the rights of indigenous peoples in the constitutions of the region. The constitutional reforms in the region have been characterised by an expansion of the lists of fundamental rights, with a tendency to include a comprehensive range of rights (civil, political, economic, social and cultural rights, collective rights, minority rights and environmental rights). This has provided an opportunity to also ensure the express constitutional recognition of the rights of indigenous peoples – a topic that is hard to ignore given the weight and degree of political mobilisation of the indigenous peoples and communities in many countries of the region.[9)]

Many of the constitutional clauses that recognize the rights of indigenous peoples have taken international standards in the field as their inspiration, frequently among them ILO Convention No. 169.

2. The influence of ILO Convention No. 169 on countries in the region

Although these factors vary from country to country, and do not fully explain the phenomenon analysed here, certain elements stand out in terms of understanding the great success ILO Convention No. 169 has had in the region. Part of the influence of ILO Convention No. 169 is in establishing itself as a model to inspire constitutional and legal reforms in the area of indigenous

9) See, in this regard, Rachel Sieder (ed.), Multiculturalism in Latin America: Indigenous Rights, Diversity and Democracy, Basingstoke, New York, 2002; Cletus Gregor Barié, Pueblos Indígenas y Derechos Constitucionales en América Latina: un panorama (Indigenous Peoples and Constitutional Rights in Latin America: a panorama), Abya-Yala, National Commission for the Development of Indigenous Peoples – Inter-American Indigenous Institute, La Paz, 2da. ed., 2003; Fernando Flores Jiménez (coord.), Constitución y Pluralismo Jurídico, (The Constitution and Legal Pluralism), Corporación Editora Nacional-Instituto de Derecho Público, Quito, 2004; Daniel Bonilla, La Constitución Multicultural, (The Multicultural Constitution), Siglo del Hombre-Uniandes-Instituto Pensar, Bogotá, 2006.

issues in the region. Many of the concepts included in the Convention (e.g. "indigenous peoples", "self-identification", "territories", "consultation", or "customs") appear in one way or another in the constitutions and legislation in the various countries of the region[10)].

What is noteworthy in terms of underlining the relevance of this publication is that the influence of ILO Convention No. 169 has not been limited to that of a model for law-making. In addition, the Convention is important in local political processes. It is used and invoked by indigenous communities and peoples, and by other actors, both public and private, who have defended the rights and interests of these communities. Litigation before domestic courts and where possible, before regional human rights bodies, has been an important area in this regard.

3. Some criteria guiding the selection of the cases

This casebook compiles a selection of judicial decisions in which ILO Convention No. 169 has been relied upon, from the inter-American human rights bodies and from ten countries in the region.

The case summaries are presented in a standardized manner, identifying the country, the court, the judgment, a summary of the facts giving rise to the case, the legal arguments presented, and the court's decision (with emphasis on the role of ILO Convention No. 169 in the case). The case summaries also include a list of the legal provisions applied, and excerpts of particularly relevant paragraphs of the judgment. A final section comments on the importance of the case and the innovations that it introduces in relation to the application of ILO Convention No. 169. In some cases, comments are made on the court's interpretation of ILO Convention No. 169. Where relevant, references are then made to the reports and comments of the ILO supervisory bodies dealing with issues similar to those raised in the court case. All the reports of the ILO supervisory bodies referred to may be consulted in the APPLIS and ILOLEX databases available on the ILO website at www.ilo.org/normes.

Given the different origins of the cases, the diversity of legal systems and local legal traditions, and the varying extent and manner in which domestic courts in the region use ILO Convention No. 169, certain considerations have guided the selection of the cases presented in this document. With regard to some jurisdictions, the selection has included nearly all the significant or existing cases, while in others – Colombia and Costa Rica, for example[11)] – there is an enormous wealth and variety of cases and only relatively few have been selected due to their importance and to illustrate certain topics or legal actions. The most important considerations that have guided the case selection are as follows:

10) See, for example, Cletus Gregor Barié, Pueblos Indígenas y Derechos Constitucionales en América Latina: un panorama, (Indigenous Peoples and Constitutional Rights in Latin America: a panorama), Abya-Yala, National Commission for the Development of Indigenous Peoples – Inter-American Indigenous Institute, La Paz, 2nd. ed., 2003, pp. 58-62.

11) In Colombia, for example, the Constitutional Court has passed judgment on more than forty cases where ILO Convention No. 169 was invoked. In the selection herein, more than one dozen such cases have been chosen, with some notes on the repetition of the doctrine adopted in other cases. See, in this regard, Catalina Botero Marino, "Multiculturalismo y derechos de los pueblos indígenas en la jurisprudencia de la Corte Constitucional colombiana", (Multiculturalism and rights of indigenous peoples in Colombian Constitutional Court jurisprudence), in Revista Precedente. Anuario Jurídico, Facultad de Derecho y Humanidades, Universidad ICESI, Cali, 2003, pp. 45-87.

a) *Regional and domestic judgments*

The selection of cases includes both decisions of domestic courts and of the bodies of the regional human rights system, namely the Inter-American Court and the Inter-American Commission of Human Rights.

In the case of domestic courts, the cases mainly concern the application of ILO Convention No. 169 as a legal norm incorporated into domestic law of the respective countries. In case of the inter-American bodies, it is important to highlight that these bodies do not have jurisdiction to resolve disputes based on violations of ILO Convention No. 169, as their mandate concerns the regional human rights instruments. However, the regional human rights bodies have used ILO Convention No. 169 as an interpretative tool to specify the obligations of the States under the international instruments within their competence (such as the American Convention on Human Rights and the American Declaration on Rights and Duties of Man) when dealing with their application to indigenous peoples and communities, or their members. Thus, for example, the right to property or the right to fair judicial process has been interpreted with reference to the provisions of ILO Convention No. 169 when the rights of indigenous communities and peoples have been at stake.

Although most of the selected cases are from national jurisdictions, it is important to also take note of cases from the regional human rights bodies, not only because the interpretation provided by these bodies is of interest, but also for the reasons already mentioned, regional jurisprudence often has an impact on the local jurisprudence in countries participating in the regional human rights system.

b) *Countries party to, or not party to, ILO Convention No. 169*

Most of the jurisprudence presented comes from, or refers to, countries that are parties to ILO Convention No. 169, and therefore for these countries this international instrument constitutes a direct source of legal obligations.

However, there are judgments that refer to ILO Convention No. 169 even when the relevant country has not ratified it. The collection includes three judgments where this is the case: a judgment by the Supreme Court of Belize, one by the Inter-American Court of Human Rights dealing with Suriname, and a judgment from the Supreme Court of Justice of Venezuela, as it was then known, before Venezuela ratified the Convention. In all of these cases, the various judicial bodies assigned an interpretative value to ILO Convention No. 169, as an example of the existing international norms in the field.

c) *Countries with monist tradition and countries with a dualist tradition; the legal rank of ILO Convention No. 169*

A third consideration guiding the selection of cases relates to the way ILO Convention No. 169 is incorporated into domestic law and its ranking in the hierarchy of norms. This question arises in legal systems where there is automatic incorporation of international treaties (that is, in countries following the monist tradition).

In terms of incorporation, the countries included in this publication almost all follow the monist tradition, which is predominant in Latin America. Incorporation of an international treaty into domestic law occurs after it has been duly ratified. The only exception among the countries selected is Belize, a common law country that belongs to the dualist tradition. Here, separate legislation is required for incorporation of international treaties. Unratified treaties or ratified treaties that are not incorporated can, however, be used to identify rules of international customary law or general principles of law.

In monist legal systems the relationship between norms of international and domestic provenience is an issue of particular importance. There are considerable differences in this regard between countries whose judgments appear in this document. Different approaches exist in different jurisdictions, and these are reflected in the different case summaries.

In some countries, international human rights treaties and ILO Convention No. 169 are assigned a ranking similar to the Constitution. Bolivia and Colombia stand out among this group of countries, as they have achieved the assimilation of ILO Convention No. 169 to the Constitution by using the concept of the “constitutionality block”. According to this concept, incorporation of international human rights treaties into domestic law requires that constitutional interpretation includes a joint reading of the fundamental rights set out in the Constitution with the human rights contained in international treaties. Both groups of rights must be complementary and mutually reinforcing, forming a single group in which priority is given – in the event there is a difference between one source and the other – to a pro homine interpretation, that is, in favour of the one that recognizes a broader scope for the rights.

The solution provided by the Argentinean constitutional reform of 1994 is different, but provides similar results. Constitutional rank was granted to a series of expressly listed international human rights treaties. In addition, Congress was granted the power to raise other treaties to constitutional status, by means of a supermajority vote[12]. ILO Convention No. 169 is not on this list, but it nonetheless has a rank higher than regular laws[13]. The Constitution of the Bolivarian Republic of Venezuela assigns constitutional rank to all human rights treaties[14], although in practice the courts have been less inclined to directly apply such treaties than in other countries. The case of Costa Rica is special: although the Constitution itself assigns international treaties a rank higher than regular laws and below the Constitution[15], the Constitutional Chambers of the Supreme Court has interpreted this to mean that human rights treaties have constitutional rank, and may even take precedence over the Constitution where they recognize broader rights or guarantees[16].

In terms of the other countries represented in this document, where the question of the legal rank of human rights treaties in domestic law has been posed, the tendency has been to place them below the Constitution and above laws passed by the legislative body. This is the case

12) See Constitution of Argentina; article 72, subsection 22, paragraph 3.

13) article 75, subsection 22, paragraph 1 of the Constitution of Argentina: “Treaties and conventions have a higher ranking than laws”

14) See the Constitution of the Bolivarian Republic of Venezuela, article 23.

15) See the Constitution of the Republic of Costa Rica, article 7.

16) See Costa Rica, Supreme Court of Justice, Constitutional Court, Judgments 1992-3435 and 1993-5759.

in Ecuador[17] and Guatemala[18]. In Mexico and Brazil, despite the fact that the wording of the Constitution is unclear on this point, there has been a gradual acceptance of the interpretation that ranks international treaties above regular laws but below the Constitution, even though it is not possible to say that this view has been definitively accepted[19].

In any case, regardless of the actual solution that has been adopted in individual cases, the legal and jurisprudential tendency in the region has been to give more weight to international human rights treaties, and to take them into account more often in judicial decisions.

d) *Types of legal action*

Another factor shedding light on the manner in which ILO Convention No. 169 has been used by Latin American courts is the wide variety of types of legal action in which this instrument has been referenced. Moreover, in these various types of legal action, the Convention has been used as an argument by the party initiating the legal proceeding to support their claims, but also by respondents, in many cases bodies representing the State. One of the considerations that has guided the case selection was therefore the objective of illustrating this variety of legal action and different actors relying on the Convention.

By way of example, ILO Convention No. 169 is used in claims of unconstitutionality, actions for the protection of constitutional rights (acción de amparo), actions for legal protection (*tutela*), in disputes between authorities, electoral disputes, actions for nullity in administrative legal proceedings, regular civil actions (where property or displacement is an issue, for example), criminal proceedings and actions on agrarian matters, among others. In some countries – like Colombia and Guatemala – certain qualified persons are allowed to request an opinion on the compatibility of the Constitution with a treaty or other legal norms from the court that has been assigned control over constitutionality.

In a significant number of cases, it is the indigenous community, its members, or the persons acting to represent them who invoke ILO Convention No. 169. In several of the cases studied, the ombudsman or a domestic human rights institution invokes the Convention, where the legislation has granted them the right to initiate legal proceedings in defence of human rights, specific collective rights, or public interest. In some criminal cases, the competent Ministry itself brings ILO Convention No. 169 into play. In another series of cases, the Convention is used as an argument by public authorities – legislative or administrative – as an element to justify the adoption of public measures. Thus, for example, in a judgment on constitutionality by the Colombian Constitutional Court, the Congress justifies the validity of a law when faced with a presidential objection by noting that the relevant provisions have the purpose of complying with international obligations arising from ILO Convention No. 169. In a case before the Bolivian Constitutional Court, the administrative authority in charge of agrarian reform invokes ILO Convention No. 169 as a defence.

In summary, the experience of the courts in Latin America illustrates a wealth of possibilities to invoke ILO Convention No. 169, which in no way is limited to constitutional litigation.

e) Topics

Although there are a wide variety of types of legal action, the variety of topics they concerned is even greater. One needs only glance through the index of keywords contained in this Casebook to discover that the substantive areas in which ILO Convention No. 169 is relevant and has been used are numerous.

A significant portion of the cases reviewed and selected deal with conflicts over indigenous lands and territories and the exploration and exploitation of their natural resources. Various cases also refer to consultation and participation of indigenous peoples in decisions relating to these matters.

Another group of cases deals with the relationship between State criminal law and customary criminal law, addressing mainly the following issues: limitations on the use of State criminal law once community criminal justice has been exercised; and limitations on the use of customary indigenous criminal law by the Constitution and human rights instruments.

Finally, the selection includes cases that deal with various other topics: the right of members of indigenous communities to education and health, respect for their political autonomy and manner of electing their authorities, respect for their cultural identity and cultural symbols, and the establishment of government bodies responsible for carrying out State obligations pursuant to the Constitution and ILO Convention No. 169 on indigenous peoples and communities.

f) *Different uses of ILO Convention No. 169 by the courts*

The selection of cases also seeks to reflect the differences in the ways the various courts make use of ILO Convention No. 169. Some of these differences are a result of the distinct status the Convention has in the various domestic legal systems, but this factor is not sufficient to explain fully its diverse uses. At least two aspects illustrate the issue more clearly.

First, courts may directly apply a norm enshrined in ILO Convention No. 169, while in other cases the Convention is used as an interpretative tool or standard with respect to other legal norms. This difference does not solely depend on whether the country follows the monist or dualist tradition. Although most of the countries in the region have adopted a monist approach with respect to international and domestic law, many courts in the region do not usually apply international norms directly, perhaps due to the predominance of a legal tradition that has its origins in a culture of codified law. However, even in these cases, ILO Convention No. 169 has been relied upon as a tool to interpret domestic legal norms, including constitutional requirements, ordinary laws or other infra-constitutional norms.

17) See the Constitution of Ecuador, article 163.

18) The case of Guatemala is also different: article 46 of the Constitution states that, in regard to human rights that international treaties "take precedence over internal law". The Constitutional Court has interpreted this, however, in quite an arguable way: that the concept of "internal law" should not include the Constitution, and therefore, that the human rights treaties take precedence over regular, non-constitutional legislation and not over the Constitution. See Constitutional Court of Guatemala, decisions in Files 280-90 and 199-95.

19) For Mexico, see National Supreme Court of Justice, thesis P. LXXVII/1999, Federal Judicial Seminar, book X, November 1999, p. 46; thesis P. VIII/2007, April 2007, Federal Judicial Seminar, book XXV, April, 2007, p. 6.

Second, it is useful to differentiate another type of use of the Convention which is related to the one mentioned above, although not completely coinciding with it: the use of a norm found in ILO Convention No. 169 as an argument to decide an issue "in addition to the foregoing". Here, the Convention provides a supplementary argument or is simply used in an illustrative manner. In many cases the Convention is referenced when the issue is already decided, as an argument that reinforces or complements the reasoning – that is, as an additional argument to weigh in favour of the reasons that were formulated based on other principles. In some cases, the judges appear to be building an argument in two phases: a first one based on domestic legal principles and a second phase, where the solution is based on the principle that domestic law shall not violate, but rather must be in line with the State's international obligations.

These are a series of nuances that further the gradual introduction of norms arising from international law into domestic law. In some cases, judges are developing a greater sense of the need for the State to assume its international obligations in a serious manner, translating them into judicial decision-making criteria where inconsistencies exist.

4. Conclusion

Although the variety and wealth of jurisprudential material presented in this book is illustrative rather than exhaustive, it demonstrates an interesting regional trend. Certainly, not all countries in the region that are parties to ILO Convention No. 169 have advanced to the same degree as others and the use of ILO Convention No. 169 may still be sparse or lacking. It is thus useful to study good practices.

The selection of cases may be useful to those who are studying indigenous peoples' rights and the enforcement of international human rights law by courts. It may also be of use to indigenous peoples themselves and those working to defend their rights, in that it offers a panorama of legal strategies that have been used successfully in the countries in the region. It further provides the International Labour Organization with interesting evidence of the application of the organization's principles outside the ILO system. It may also serve as an inspiration to State parties to ILO Convention No. 169 that have less experience in the domestic application of these principles.

TABLE OF CASES

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Argentina

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10. Judgment T-737/05, July 14, 2005 (Rapporteur: Alvaro Tafur Galvis), Constitutional Court.
11. Judgment T-778/05, July 27, 2005 (Rapporteur: Manuel José Cepeda Espinosa), Constitutional Court.
12. Judgment T-382/06, May 22, 2006 (Rapporteur: Clara Inés Vargas), Constitutional Court.
13. Judgment T-704/06, August 22, 2006 (Rapporteur: Humberto Antonio Sierra Porto), Constitutional Court.
14. Judgment C-208/07, March 21, 2007 (Rapporteur: Rodrigo Escobar Gil), Constitutional Court.
15. Judgment C-030/08, January 23, 2008 (Rapporteur: Rodrigo Gil Escobar), Constitutional Court.

Costa Rica

1. Vote 1992-3003, Case 3003 07/10/1992 L, Judgment of October 7, 1992, Constitutional Chamber of the Supreme Court.
2. Vote 1996-2253, Case 4320-P-92, Judgment of May 14, 1996, Constitutional Chamber of the Supreme Court.
3. Vote 2002-02623, Case number 96-006433-0007-CO, Judgment of March 13, 2002, Constitutional Chamber of the Supreme Court.
4. Vote 2000-08019, Case number 00-000543-0007-CO, Judgment of September 8, 2000, Constitutional Chamber of the Supreme Court.
5. Vote 2000-10075, Case number 00-000543-0007-CO, Judgment of November 10, 2000, Constitutional Chamber of the Supreme Court.
6. Decision 2001-817, file number 00-429-597-PE-3, Decision of October 18, 2001, Court of Criminal Cassation, Second Judicial Circuit of San José.
7. Vote 2003-03485, file number 99-002607-0007-CO, Judgment of May 2, 2003, Constitutional Chamber of the Supreme Court.
8. Vote 2003-08990, file number 03-007279-0007-CO, Judgment of August 26, 2003, Constitutional Chamber of the Supreme Court.
9. Vote 468-F-04 “Possessory Action Proceedings initiated by Heluber Madrigual Vargas”, Judgment of June 20, 2004, Agricultural Court of the Second Judicial Circuit of San José.

Ecuador

1. No. 994-99-RA, Independent Federation of Shuar People of Ecuador v. ARCO Oriente Inc Company, Judgment of March 16, 2000. Constitutional Court of Ecuador.
2. No. 020-2000-TC, Ernesto López Freiré et al. v. President of the Republic and President of the National Congress, Judgment of November 21, 2000. Constitutional Court of Ecuador.
3. No. 170-2002-RA, Claudio Mueckay Arcos v. Regional Directorate of Mining of Pichincha: Regional Director, Judgment of August 13, 2002. Constitutional Court of Ecuador.

Guatemala

1. Case 199-95, Advisory Opinion on Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO), May 18, 1995. Court of Constitutionality.
2. File E.312.2003 Case 6, Judgment of June 25, 2003. Criminal Court of First Instance, for Drug Activities and Crimes against the Environment in Totonicapan Department.
3. Amparo No. 46-2003 Case 1, Judgment of October 30, 2003. Court of Appeals, Serving To Uphold Constitutional Rights, Third Chamber.
4. tttFile No. 517-2003 Case I, Judgment of November 18, 2003. Community Peace Court Municipality of San Luis, Petén Department.

Mexico

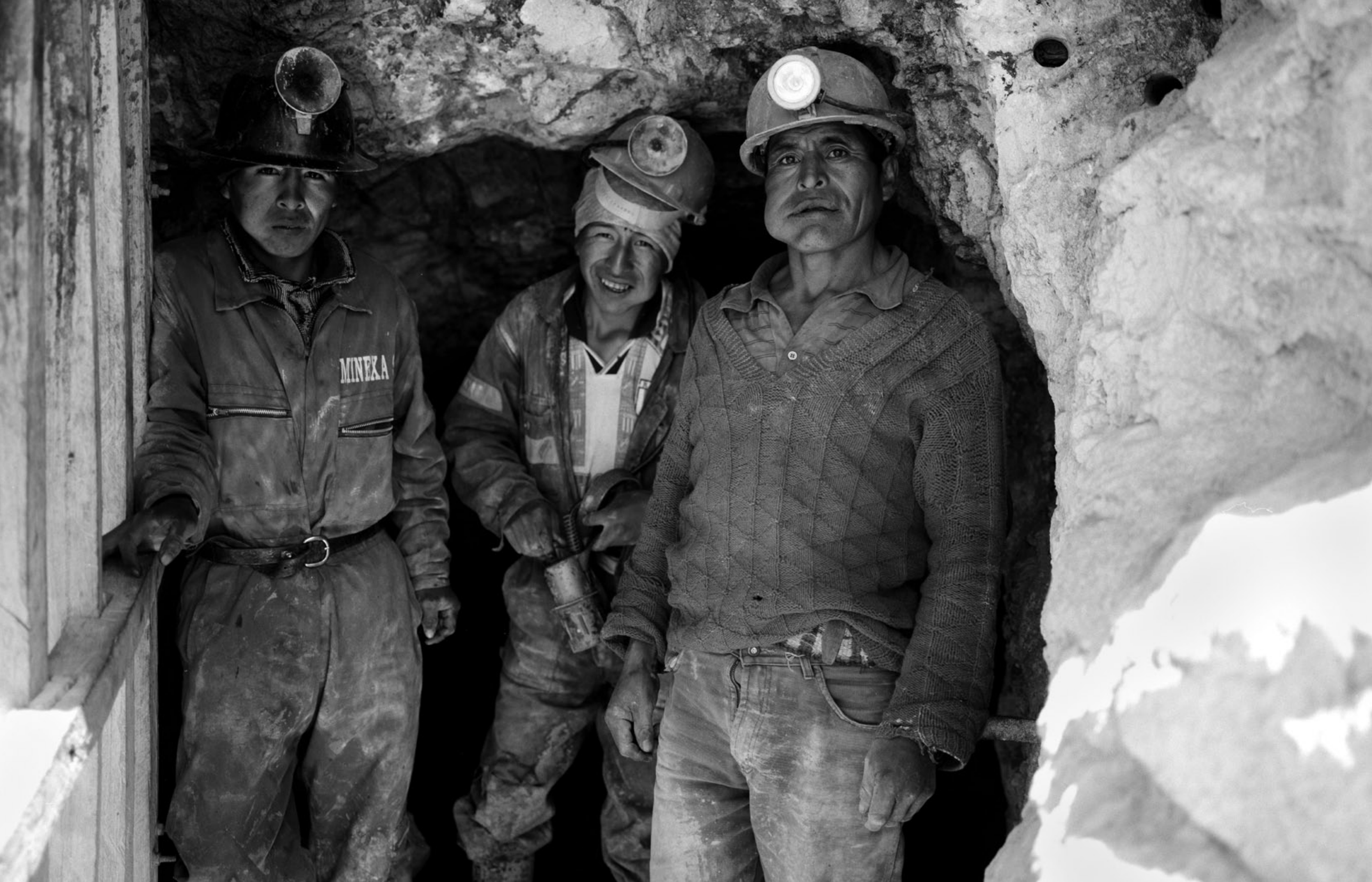
1. Herminio Quiñones Osorio and other v. LVII Legislature of the State of Oaxaca and other, File SUP-JRC-152/99, Judgment of November 11, 1999. Electoral Court of the Judicial Branch of the Federation.
2. Joel Cruz Chávez et al v. Fifty-ninth Legislature of the State of Oaxaca et al, SUP-JDC-11/2007, Judgment of June 6, 2007. Electoral Tribunal of the Federation Judiciary.

Venezuela

1. Indigenous community of Jesús, María y José de Aguasuay on action for annulment for unconstitutionality and constitutional protection, Judgment of October 6, 1998 (Rapporteur: José Luis Bonnemaison W.), Supreme Court.
2. Indigenous community of Jesús, María y José de Aguasuay et al. on full declaratory judgment action regarding ownership, Judgment No. 01035 of April 27, 2006 (Rapporteur: Levis Ignacio Zerpa), Supreme Court.

KEYWORDS

Access to justice – *OAS 1, 2; Colombia 1, 2, 5, 9, 10, 13; Mexico 2*
Affirmative action – *Argentina 3, 4; Colombia 6, 13, 14; Costa Rica 2, 6, Guatemala 3*
Bilingual education – *Colombia 14*
Co-ordinated action – *Costa Rica 8*
Community Justice – *Bolivia* 2; *Colombia* 1; *Guatemala* 2, 5
Conflict between individuals and community – *Bolivia 2, Colombia 1, 4*
Consultation and participation – *OAS 1, 2, 3, 4; Argentina 2; Bolivia 3; Colombia 3, 5, 7, 8, 9, 10, 11, 12, 14, 15; Costa Rica 2, 4, 5, 7; Ecuador 1, 2, 3; Guatemala 1*
Criminal justice – *Colombia 1; Costa Rica 6; Guatemala 2, 4, 5*
Culture and social, religious and spiritual values – *OAS 1, 2, 3, 4; Argentina 1; Belize 1; Bolivia 2; Brazil 1; Colombia 1, 2, 4, 5, 8, 11, 14, 15; Ecuador 1, 3; Guatemala 1, 3, 4*
Customary law – *Colombia 11; Mexico 1, 2*
Urban areas – *Colombia 11*
Self-identification – *Argentina 3, Colombia 5, Ecuador 2*
International law – *OAS 1, 2, 3, 4; Belize 1; Colombia 2*
Customary criminal law – *Bolivia 2; Colombia 1; Costa Rica 6; Guatemala 2, 5*
Collective rights – *OAS 1, 2; Argentina 1; Belize 1, Colombia 1, 4, 8, 13, 14, 15, Ecuador 1, 3*
Development process – *Ecuador 1, 3*
Discrimination – *OAS 4; Belize 1, Brazil 1, Colombia 4, 6, Costa Rica 2; 7, Guatemala 3*
Economic, social and cultural rights – *Colombia 6, 13; Costa Rica 8*
Elections – *Colombia 9, 11; Mexico 1, 2*
Emergency situations – *Costa Rica 8*
Environment – *Argentina 2; Colombia 3; 5, 8, 12; Ecuador 3*
Human rights - *OAS 1, 2, 3, 4; Argentina 4; Bolivia 2; Colombia 1, 3, 4, 8, 13; Venezuela 1*
Indigenous children and adolescents – *Colombia 9*
Indigenous women – *Colombia 6, 11; Guatemala 3*
Institutions – *Colombia 1, 2, 6, 9, 10; Costa Rica 2, 7; Ecuador 1, 2; Mexico 1, 2*
Lands and territories – *OAS 1, 2, 3, 4; Argentina 1, 2; 3; Belize 1; Bolivia 1, 3; Brazil 1; Colombia 2, 4, 5, 7, 15; Costa Rica 4, 5, 9; Ecuador 1, 3; Guatemala 1; Venezuela 1,2*
Legal personality – *OAS 3; Costa Rica 3; Venezuela 1*
Legal principles – *Belize 1*
Means of subsistence – *OAS 1, 2, Argentina 4; Brazil 1; Colombia 1, 5; Ecuador 3*
Natural resources – *OAS, 4; Argentina 1; Bolivia 3; Colombia 3, 5, 7, 15; Costa Rica 4, 5; Ecuador 1, 3*
Political organization – *Colombia 2, 5, 9, 10, 11, 12; Costa Rica 2, 3, 7; Ecuador 1, 2; Mexico 1, 2*
Positive obligations – *Colombia 6, 13; Costa Rica 8*
Property – *OAS 1, 2; Argentina 1, 2, 3; Belize 1; Bolivia 1; Colombia 4; Costa Rica 9; Ecuador 3; Venezuela 1*
Procedures for supervision of the ILO – *Colombia 8, 10*
Special measures – *OAS 3, 4; Argentina 3, 4, Colombia 6, 11, 13, 14; Costa Rica 2, 3, 7, 8; Guatemala 3; Mexico 2; Venezuela 1*
Non bis in idem – *Guatemala 2, 5*
Social security and health – *Colombia 5, 6*
Status of the Convention in national law – *Argentina 3; Bolivia 3; Brazil 1; Colombia 7, 8, 14; Costa Rica 1, 4, 5; Guatemala 1, 4; Venezuela 1, 2*
Sub-surface resources – *Colombia 3, 7; Costa Rica 4, 5; Ecuador 1, 3*
Traditional occupations – *OAS 1, 2; Belize 1; Brazil 1; Colombia 5; Ecuador 3*


MINERA

PART 1:

THE ORGANIZATION OF AMERICAN STATES (OAS)

(Inter-American Commission on Human Rights and Court of Human Rights)

OAS 1

Court: Inter-American Court of Human Rights

Case: Yakye Axa Indigenous Community vs. Paraguay, Judgment of June 17, 2005 (Merits, reparations and costs)

Keywords: Lands and territories, property, culture, social, religious and spiritual values, means of subsistence, traditional occupations, consultation and participation, human rights, collective rights, international law, access to justice.

Summary of the facts of the case:
The Inter-American Commission of Human Rights together with representatives from the affected Indigenous Community filed a claim against Paraguay before the Inter-American Court of Human Rights.

The Yakye Axa Indigenous Community, a traditional community of hunter-gatherers who inhabit their ancestral lands in the Paraguayan Chaco, is claiming land title to their traditional territories, which are now private property. It is alleged that the lack of effective action by the Government of Paraguay to recognize the legal personality of the Yakye Axa Indigenous Community, and in particular, to grant the community title to their ancestral lands, has resulted in the community having to settle in an inhospitable location while waiting for an answer to their claim, in conditions that are extremely precarious. The lack of access to health care services and means of subsistence has resulted in the death of many of the community members. The children in the community do not have adequate food, health, clothing or education.

Law applied:
American Convention on Human Rights. Alleged violations of the right to a fair trial and to judicial protection (Articles 8 and 25 of the American Convention on Human Rights), to life (Article 4 of the American Convention) and to property (Article 21 of the American Convention). The Court found there had been a violation of all of these rights.

The Court considered that, for the purposes of the interpretation of the scope of the right to a fair trial, to property and to life, in regard to indigenous peoples, reference must be made to Convention No. 169 of the International Labour Organization.

Relevant considerations of the court:
With respect to the right to a fair trial and protection for the recognition of leaders, legal personality of the community, and land title:

"95. In this regard, Article 14(3) of ILO Convention No. 169, incorporated into Paraguayan domestic legislation by Law No. 234/93, provides that adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

96. This international provision, in combination with Articles 8 and 25 of the American Convention, places the State under the obligation to provide an effective means with due process guarantees to the members of the indigenous communities for them to claim traditional lands, as a guarantee of their right to communal property."

In terms of the right to property[20] with respect to indigenous communities, the Inter-American Court held:

"127. In the instant case, in its analysis of the scope of Article 21 of the Convention, mentioned above, the Court deems it useful and appropriate to resort to other international treaties, aside from the American Convention, such as ILO Convention No. 169, to interpret its provisions in accordance with the evolution of the inter-American system, taking into account related developments in International Human Rights Law."

"130. ILO Convention No. 169 contains numerous provisions pertaining to the right of indigenous communities to communal property, which is addressed in this case, and said provisions can shed light on the content and scope of Article 21 of the American Convention. The State ratified and included said Convention No. 169 in its domestic legislation by means of Law No. 234/93.

131. Applying said criteria, this Court has underlined that the close relationship of indigenous peoples with the land must be acknowledged and understood as the fundamental basis for their culture, spiritual life, wholeness, economic survival, and preservation and transmission to future generations".

"136. The above relates to the provision set forth in Article 13 of ILO Convention No. 169, that the States must respect "the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship."

In terms of the scope of the measures the State must adopt to restore land title over ancestral lands to the community, the Court held that:

"150. In this regard, Article 16(4) of ILO Convention No. 169, when it refers to the return of indigenous peoples to territories from which they were displaced, states that

> When such return is not possible, [...] these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

151. Selection and delivery of alternative lands, payment of fair compensation, or both, are not subject to purely discretionary criteria of the State, but rather, pursuant to a comprehensive interpretation of ILO Convention No. 169 and of the American Convention, there must be a

20) Article 21 of the American Convention sets out the following:
"1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law."

consensus with the peoples involved, in accordance with their own mechanism of consultation, values, customs and customary law."

Finally, interpreting the right to life, the Court made the following observations:
"163. In the instant case, the Court must establish whether the State generated conditions that worsened the difficulties of access to a decent life for the members of the Yakye Axa Community and whether, in that context, it took appropriate positive measures to fulfil that obligation, taking into account the especially vulnerable situation in which they were placed, given their different manner of life (different worldview systems than those of Western culture, including their close relationship with the land) and their life aspirations, both individual and collective, in light of the existing international *corpus juris* regarding the special protection required by the members of the indigenous communities, in view of the provisions set forth in Article 4 of the Convention, in combination with the general duty to respect rights, embodied in Article 1(1) and with the duty of progressive development set forth in Article 26 of that same Convention, and with Articles 10 (Right to Health); 11 (Right to a Healthy Environment); 12 (Right to Food); 13 (Right to Education) and 14 (Right to the Benefits of Culture) of the Additional Protocol to the American Convention, regarding economic, social, and cultural rights, and the pertinent provisions of ILO Convention No. 169."

Comments:
This is an important case and the Court considers that for the purposes of interpreting the rights generally set out in the American Convention (due process and fair trial, property, life) as applied to indigenous communities, reference must be made to ILO Convention No. 169. In this regard, the Court notes the importance of the existence of adequate administrative and legal procedures that ensure the right of recognition of the legal personality of the community and the granting of land titles over its traditional lands. In terms of the right to property, the Court considers that for the traditional lands of indigenous communities or peoples, this must be understood in the sense of collective property, in accordance with the special relationship the land has for indigenous peoples in terms of their culture and lifestyle - in line with ILO Convention No. 169. It is also important to note that as part of the reparations, the Court orders the State to take the necessary measures to deliver these ancestral lands to the community in accordance with the guidelines set out in ILO Convention No. 169, among others, consultation with the community, and respect for its values, practices and customs (see paragraphs 215 to 217).

It should also be noted that in paragraph 151 the Court refers to "consensual measures" with the indigenous peoples.

OAS 2

Court: Inter-American Court of Human Rights

Case: Sawhoyamaxa Indigenous Community vs. Paraguay, Judgment of March 29, 2006 (Merits, reparations and costs)

Keywords: Lands and territories, property, social, religious and spiritual values, means of subsistence, traditional occupations, consultation and participation, human rights, collective rights, international law, access to justice.

Summary of the facts:
This is a claim against Paraguay before the Inter-American Court of Human Rights, filed by the Inter-American Commission on Human Rights together with the representatives of the affected Indigenous Community.

The Sawhoyamaxa Indigenous Community, a traditional society of hunters, fishermen and gatherers, has lived for centuries in the Paraguayan Chaco. Their ancestral lands were divided and sold at the end of the XIX century without any consideration provided in return to the indigenous group. The community claims the land title over traditional lands that are now privately owned.

It is alleged that the lack of effective action by the government of Paraguay to recognize the legal personality of the Sawhoyamaxa community and, in particular, to grant land titles over ancestral lands has resulted in the community having to settle in an inhospitable location while waiting for an answer to their claim, in conditions that are extremely precarious. The lack of access to basic minimum services and means of subsistence has resulted in the death of many members of the community. The children in the community do not have adequate food, health, clothing or education.

Law applied:
American Convention on Human Rights. Alleged violations of the right to a fair trial and to judicial protection (Articles 8 and 25 of the American Convention on Human Rights), to life (Article 4 of the American Convention) and to property (Article 21 of the American Convention). The Court found there had been a violation of these legal guarantees and the right to a fair trial, to life, property, and to recognition of legal personality (Article 3 of the American Convention).

The Court considered that, for the purposes of the interpretation of the scope of the right to property in regard to indigenous peoples, reference must be made to Convention No. 169 of the International Labour Organization.

Relevant considerations of the court:
In terms of the right to property in regard to indigenous communities, the Inter-American Court held:

"117. In analysing the content and scope of Article 21 of the Convention in relation to the communal property of the members of indigenous communities, the Court has taken into account ILO Convention No. 169 in the light of the general interpretation rules established under Article 29 of the Convention, in order to construe the provisions of the aforementioned Article 21 in accordance with the evolution of the Inter-American system, considering the development that has taken place regarding these matters in international human rights law. The State ratified ILO Convention No. 169 and incorporated its provisions into domestic legislation by Law No. 234/93.

118. Applying the aforementioned criteria, the Court has considered that the close ties the members of indigenous communities have with their traditional lands and the natural resources associated with their culture, as well as the incorporeal elements deriving there from, must be secured under Article 21 of the American Convention. The culture of the members of indigenous communities reflects a particular way of life, of being, seeing and acting in the world, the starting point of which is their close relationship with their traditional lands and natural resources, not only because they are their main means of survival, but also because they form part of their worldview, of their religiousness, and consequently, of their cultural identity.

119. The foregoing is related to the contents of Article 13 of ILO Convention No. 169, in that States must respect "the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship."

In terms of the scope of the measures that the State must adopt to restore to the community title over their ancestral lands, the Court held that:

"150. In this regard, Article 16(4) of ILO Convention No. 169, when it refers to the return of indigenous peoples to territories from which they were displaced, states that

> When such return is not possible, [...] these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

151. Selection and delivery of alternative lands, payment of fair compensation, or both, are not subject to purely discretionary criteria of the State, but rather, pursuant to a comprehensive interpretation of ILO Convention No. 169 and of the American Convention, there must be a consensus with the peoples involved, in accordance with their own mechanism of consultation, values, customs and customary law".

Comments:
In line with the judgement in the "Yakye Axa" case (OAS 1), the Court considered that in order to interpret the right to property set out in the American Convention as applied to indigenous communities, ILO Convention No. 169 should be referenced. In this regard, the Court holds that when dealing with traditional lands of indigenous peoples or communities, this should be understood as collective property, in accordance with the special importance the land has for the culture and lifestyle of the indigenous communities – as stated in Convention No. 169. It is important to also note that among the reparation measures, the Court ordered the State to take measures to deliver the ancestral lands to the community, in accordance with the guidelines established by ILO Convention No. 169 (see paragraph 214 that sets out the parameters used in the "Yakye Axa" case, in particular, consultation with the community, and respect for their values, practices and customs). Again, the Court emphasises "consensual measures".

OAS 3

Court: Inter-American Court of Human Rights

Case: Case of the Saramaka people v. Suriname, Judgment of November 28, 2007 (Preliminary objections, merits, reparations, and costs)

Keywords: lands and territories, natural resources, consultation, culture and social, religious and spiritual values, special measures, legal personality, human rights, international law.

Summary of the facts:
A claim was filed against Suriname by the Inter-American Commission on Human Rights, together with representatives of the Pueblo Saramaka communities, for violations related to the failure to recognize the legal personality of the indigenous peoples, failure to recognize the collective property rights over the land occupied by the communities, granting permits to third parties to exploit natural resources without consulting the community and without granting them participation in the benefits, and due to the absence of effective judicial legal protection against these violations.

The Court applied the doctrine developed in previous cases, but in this instance to a "tribal community". It deemed that there were violations of the right to recognition of legal personality of the tribal people, the right to property (understood in this case, applying to a tribal people, as community or collective land rights) and the right to effective legal protection, due to the non-existence of national recourses or their lack of effectiveness.

The Court developed in this judgment a detailed analysis of certain components of the right of property. Among these were the right of indigenous and tribal peoples to use and enjoy the existing natural resources on their lands. Even if this is not considered an absolute right and is subject to limitations, the Court established parameters whereby such limitations are not acceptable. Among these are included a failure to designate the resources necessary for the survival of the way of life of the community or for its cultural and religious activities, prior consultation with the community in order to obtain its free and informed consent, community participation in the benefits of the exploitation, and carrying out a prior social and environmental impact study.

Law applied:
American Convention of Human Rights, International Covenant on Civil and Political Rights, International Pact on Economic, Social, and Cultural Rights, ILO Convention No. 169.

Relevant considerations of the court:
"92. The Court recognizes that it has arrived at such an interpretation of Article 21 in previous cases in light of Article 29(b) of the Convention, which prohibits an interpretation of any provision of the Convention in a manner that restricts its enjoyment to a lesser degree than what is recognized in the domestic laws of the State in question or in another treaty to which the State is a party. Accordingly, the Court has interpreted Article 21 of the Convention in light of the domestic legislation pertaining to indigenous peoples´ rights in Nicaragua and Paraguay, for example, as well as taking into account the International Labour Organization's Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries (hereinafter "ILO Convention 169")[21].

93. As will be discussed *infra* (paras. 97-107), Suriname's domestic legislation does not recognize a right to communal property of members of its tribal communities, and it has not ratified ILO Convention 169. Nevertheless, Suriname has ratified both the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social, and Cultural Rights. The Committee on Economic, Social, and Cultural Rights, which is the body of independent experts that supervises State parties' implementation of the ICESCR, has interpreted common Article 1 of said instruments as being applicable to indigenous peoples. Accordingly, by virtue of the right of indigenous peoples to self-determination recognized under said Article 1, they may "freely pursue their economic, social and cultural development", and may "freely dispose of their natural wealth and resources" so as not to be "deprived of [their] own means of subsistence". Pursuant to Article 29(b) of the American Convention, this Court may not interpret the provisions of Article 21 of the American Convention in a manner that restricts its enjoyment and exercise to a lesser degree than what is recognized in said covenants. This Court considers that the same rationale applies to tribal peoples due to the similar social, cultural, and economic characteristics they share with indigenous peoples."

"130. These safeguards, particularly those of effective participation and sharing of benefits regarding development or investment projects within traditional indigenous and tribal territories, are consistent with the observations of the Human Rights Committee, the text of several international instruments, and the practice in several States Parties to the Convention.[22] In *Apirana Mahuika et al. v. New Zealand*, for example, the Human Rights Committee decided that the right to culture of an indigenous population under Article 27 of the ICCPR could be restricted where the community itself participated in the decision to restrict such right. The Committee found that "the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question

21) Cf. Case of The Mayagna (Sumo) Awas Tingni Community, supra note 49, paras. 148-149, and 151; 148-149, and 151; Case of the Indigenous Community Sawhoyamaxa, supra note 75, paras. 118-121, and Case of the Indigenous Community Yakye Axa, supra note 75, paras. 124, 131, 135 and 154. (Footnote to the Court judgment - footnote 84)

22) Cf., e.g. I.L.O. Convention No. 169, article 15(2) (stating that "[i]n cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.") Similar requirements have been put in place by the World Bank, Revised Operational Policy and Bank Procedure on Indigenous Peoples (OP/BP 4.10). Other documents more broadly speak of a minority's right to participate in decisions that directly or indirectly affect them. Cf., e.g. UNHRC, General Comment No. 23: The rights of minorities (Art. 27), supra note 93, para. 7 (stating that the enjoyment of cultural rights under article 27 of the ICCPR "may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them"); UNCERD, General Recommendation No. 23, Rights of indigenous peoples, supra note 76, para. 4(d) (calling upon States parties to "[e]nsure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent"). (Footnote to the Court judgment – footnote 128)

have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy."

Comments:
Despite the fact that Suriname is not a party to ILO Convention No. 169, the Inter-American Court makes use of the Convention to identify the right to collective property or communal land, and the effective participation in the benefits of exploitation of natural products, where it concerns indigenous and tribal communities. The Court has conducted an integrated interpretation, noting that the principles established in ILO Convention No. 169 are also reflected in the texts of other international human rights instruments, and by the practice of their supervisory bodies.

OAS 4

Body: Inter-American Commission on Human Rights

Case: Case 12.053, Mayan Communities in the District of Toledo v. Belize, Report on the merits Nº 40/04, October 12, 2004.

Keywords: lands and territories, natural resources, culture and social, religious and spiritual values, special measures, discrimination, human rights, international law.

Summary of the facts:
The representatives of the Mayan communities from the south of Belize filed a complaint with the Inter-American Commission regarding the violation of property rights, and the rights to equality and effective judicial protection; the granting of lumber and oil concessions to third parties over traditional lands used and occupied by the Mayan people without consultation with the community, failure to recognize and guarantee the territorial rights of the Mayan people to these lands, and failure to grant the Mayan people the judicial protection of their rights and interests in the lands due to delays in legal proceedings. The petitioners also denounce negative effects on the natural environment, which have threatened the Mayan people's subsistence and culture. Among the legal instruments cited, the petitioners invoke ILO Convention No. 169.

The Inter-American Commission accepts the arguments of the indigenous communities and considers that the rights to property, equality and effective judicial protection have been violated. The Commission does not condone the lack of recognition and land title over the ancestral lands occupied by the communities, the absence of consultation with the communities before granting concessions to third parties, and the lack of results from judicial actions attempted by the communities. Therefore, the Commission recommends that the State provide effective reparations to the Mayan people, including recognition of the right to communal property over the lands they have traditionally occupied and used, and to demarcate and provide titles to the territory over which this right to communal property exists, in accordance with the customary practices of land use by the Mayan people. The Commission also recommends that the State abstain from all acts that may allow agents of the State or third parties to affect the existence, value, use and enjoyment of goods located in the territory occupied and used by the Mayan people, until such time as the land boundaries have been demarcated and land title established.

Law applied:
American Declaration on the Rights and Duties of Man, American Convention on Human Rights, ILO Convention No. 169.

Relevant considerations of the Commission:
"87. In particular, the Inter-American bodies have previously held that the evolution of the body of international human rights law relevant to the interpretation and application of the American Declaration may be found in the provisions of other significant international and regional human rights instruments. These include the American Convention on Human Rights that, in many proceedings, may be considered representative of an authorised expression of the fundamental principles established in the American Declaration. A relevant evolution has also been derived from the provisions of other multilateral treaties approved both within and outside the framework of the inter-American system, including the Geneva Convention of 1949, the United Nations Convention on the Rights of the Child, the Vienna Convention on Consular Relations, and of particular relevance in this case, International Labour Organization Convention No. 169 on Indigenous and Tribal peoples in Independent Countries and other instruments related to the rights of indigenous peoples".

Footnote to page 80: "Without limiting the terms and characteristics that can be used to identify indigenous peoples, the Commission observes that the prevailing authorities include as indigenous peoples those who are descended from populations that inhabited the territory prior to colonisation and who retain some or all of their own traditional institutions. See, for example, ILO Convention No. 169, *supra*, Art. 1 (where it is affirmed that the Convention applies, among others "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 or regulations".

"118. This interpretative criteria is supported by the provisions of other international instruments and discussions that serve as important indicators of international attitudes on the function of traditional land ownership in modern systems of human rights protection. ILO Convention No. 169 Concerning Indigenous and Tribal Peoples, for example, states that the property rights and rights of possession of indigenous peoples over lands they traditionally occupy, requires that the governments safeguard these rights and establish adequate procedures to resolve land claims. In addition, both the Draft American Declaration on the Rights of Indigenous Peoples and the Draft Declaration of the United Nations on the Rights of Indigenous Peoples, affirm the right of these peoples to own, develop, control and use the lands and resources they have owned and used traditionally by other means".

Footnote to page 123: "ILO Convention No. 169, supra, Articles 13-17. See also the Awas Tingni case, Concurring Opinion of Judge García Ramírez, supra, paragraph. 7. Although the Commission recognizes that Belize is not a State party to ILO Convention No. 169, it considers that the terms of this treaty provide evidence of modern international opinion on questions related to indigenous peoples and, therefore, that certain provisions may be appropriately considered for the interpretation and application of the Articles of the American Declaration in the context of indigenous communities. See, analogously, the Dann case, *supra*, paragraphs. 127-131".

Comments:
Like the Inter-American Court, the Commission considers that for the effects of interpreting the applicable law when dealing with indigenous peoples and communities, reference must be made to ILO Convention No. 169, even though Belize has not ratified it. Belize is also not party to the American Convention on Human Rights, and therefore the complaint is based on violations of the American Declaration of the Rights and Duties of Man – and it is thus this instrument that has been interpreted in light of ILO Convention No. 169.

The Commission makes reference to Convention No. 169 to identify the petitioning communities as indigenous, to justify their claim of the right to collective property over lands traditionally occupied by the community and the resources found on them, and to indicate the requirement, if applicable, for consultation prior to the exploitation of existing resources in the territory and the need to adopt special measures for the protection of the rights of indigenous peoples and communities.

PART 2:

DOMESTIC COURTS

ARGENTINA

ARGENTINA 1

Court: Civil and Commercial Court of Jujuy, Court of First Instance.

Case: Quera Aboriginal Community and Aguas Calientes - Cochinoca People v. Jujuy province, Judgment of September 14, 2001.

Keywords: lands and territories, property, culture and social, religious, and spiritual values, collective rights.

Summary of the facts:
This is an application for land title by an indigenous community in Jujuy province, in northern Argentina. The community is claiming adverse possession (*usucapio*) of its territory, as community property.

The application claims title for community rights, referring to the legal principles in the Argentinean Constitution, and to the concept of an indigenous people, based on Article 1 of ILO Convention No. 169. It also notes the special cultural and spiritual relationship the indigenous peoples have with the lands and territories they collectively occupy, as recognized by ILO Convention No. 169 to which Argentina is a party.

The Province contests the claim, stating that the community only acquired legal personality in 1996, so that the twenty year period has not passed as required for adverse possession.

The Court considers that the formal recognition of the community's legal personality is merely an act that formalises the pre-existence of the community at the time of the request for legal personality; the people must provide evidence that they possessed the quality of a community by virtue of language, religion, preservation of customs, group identification, intention to have community possession of the land, free choice of representatives, etc.

The Court accepts the evidence of the community's peaceful and uninterrupted possession and grants the application, declaring collective title over the lot claimed by the community.

Law applied:
Constitution of Argentina, article 75 subsection 17; provisions on adverse possession in the Civil Code of Argentina, National Law 23302, ILO Convention No. 169, Provincial Law 5030.

Relevant considerations of the court:

Regarding the pre-existence of the indigenous community:
"In any case, we must note that in addition to the referenced legislation already presented, the reform of the National Constitution recognizes not only the ethnic and cultural pre-existence of the indigenous peoples in Argentina, but also guarantees the right to legal personality for their communities and the community possession and property of the lands they traditionally occupy (article 75, subsection 17). The intention of the constitutional principles is that by granting legal personality, this will serve to make an already existing right functional; in other words, this basic principle does not establish the right but rather declares its pre-existence and makes it effective, guaranteeing among others, the right to community property and land. Thus, there is recognition that the aboriginal communities were pre-existing before the State (…) and the preventative measures adopted include the allocation of "traditionally occupied" lands, which necessarily guarantees the right to property over the lands historically exercised by these communities and is not based on their coming into being as legal persons" (from the opinion of Justice Caballero de Aguiar).

On the concept of community property over the land:
"the aboriginal community that has recently been granted legal personality is not exactly a universal or particular successor according to private law, but we must take into account that our positive law has incorporated a new property concept, that of community property, and in accordance with this, possession is not exercised by a specific physical person but rather by the group that makes up this community (articles 2,7,9 and related law 23302 and law 24071[23]), as well as articles 2 and 3 of provincial law 5030, modified by law 5131)" (from the opinion of Justice Caballero de Aguiar).

Comments:
This is an interesting case because a civil court, which was required to issue a judgment involving property and company law in individual litigation, had to apply constitutional requirements and ILO Convention No. 169 directly, to adapt private law institutions to the concept of legal recognition of a pre-existing collective (the indigenous community) and to the notion of collective or community property over the land. To accomplish this, it was necessary to provide an interpretation of the requirement of possession by the community over a period of twenty years consistent with constitutional and international norms. It is also important to note the reference to the incorporation of "a new property concept, that of community property".

Based on testimonial evidence and a visit to the community, the Court considers that the indigenous community not only complies with the requirement of peaceful and uninterrupted possession for twenty years, but also that they have been in possession of their territory since the pre-Hispanic era.

23) Law 24.071 is the law ratifying ILO Convention No. 169 by the Argentinean Congress. Some courts will tend to cite international treaties by their ratifying law, since in many cases this is the official published source of the treaty text.

ARGENTINA 2

Court: National Supreme Court of Justice

Case: Hoktek T'Oi Pueblo Wichi Indigenous Community v. Secretary of the Environment and Sustainable Development, Appeal proceedings on an action for the protection of constitutional rights (*acción de amparo*), September 8, 2003,

Keywords: lands and territories, property, environment, natural resources, consultation and participation.

Summary of the facts:
The members of the Hoktek T'Oi indigenous community are challenging, by means of an action for the protection of constitutional rights (acción de amparo), two decrees issued by the authorities of Salta province, which authorised clearing activities (cutting down trees) on the community's ancestral territory. After extensive legal proceedings, which included a decision by the Supreme Court of Justice, the Salta province Court of Justice allowed the action for the protection of constitutional rights, and annulled the decrees challenged by the community. The Province appealed the decision of the provincial court before the National Supreme Court of Justice. The Supreme Court confirmed the provincial court's judgment and rejected the Province's appeal.

Law applied:
Constitution of Argentina, articles 41 and 75 subsection 17; law 25.449; ILO Convention No. 169 (judgment of the Salta province Court of Justice).

Relevant considerations before the courts:

From the Salta province Court of Justice (as reflected in the Supreme Court judgment):
"That the provincial court then examined the mentioned constitutional clause. Thus, it expressed that based on the admission of the ethnic and cultural pre-existence of indigenous peoples, it was able to establish "the recognition of community possession and property of traditionally occupied lands" and stipulated that "their participation must be ensured in the management of their natural resources and other interests that affect them", which they understood to constitute an operative group of legal principles (...). They invoked various national and provincial laws related to the issue and considered that Law 24.071 had ratified ILO Convention No. 169 on "Indigenous and Tribal Peoples in Independent Countries".

In addition, it highlighted the generic provisions contained in article 41 of the National Constitution and invoked the provincial constitutional clauses that already guaranteed the protection of the environment at the time the contested provisions were issued, classifying these clauses as operative."

"(W)hen the first clearing permit was granted, the aboriginal peoples already had rights with a constitutional and legal ranking and based on this, it can be seen that there was insufficient compliance with the technical standards for land conservation and modifications, and with the

Law for the Defence of Forest Resources (Law 13.273, applicable to the province in the suit). On the contrary, the original court pointed out that "it was necessary to verify whether issuing the clearing permit affected the rights of the community making the claim or not". On this point, they considered that "even before the certificate of 1996 was granted, there were complaints that the clearing that had begun was prejudicial to the community that depends on the mountain and its resources for its survival", and requested that in the event the situation of the Hoktek T'Oi community was not taken into account, that the work be suspended and impact studies be conducted on the flora, fauna, soil, and especially, in regard to the cultural and human impact, and invoked legal and constitutional principles to support this ".

"By limiting the analysis to include only the elements set out in the existing legislation on the requirements for clearing activities, by refusing to conduct a current and not only future impact study on the effect such activities could produce in the habitat and on the life of the community, especially in terms of the members of the community, its flora and fauna, and whether to confirm or refute the affirmations, and by issuing the act directly authorizing the activity in question, this constitutes as a whole an arbitrary administrative procedure that may be corrected by a constitutional action for legal protection."

From the Supreme Court of Justice judgment:
"(I)n accordance with the mandate of this court regarding the claims by the community filing the constitutional action, the original court qualified as arbitrary the simplification of the issue to the mere compliance with the requirements for clearing activities (...). This situation highlights a serious error in interpretation in the judgment under appeal, which clearly placed the burden on the provincial administration to prove the allegations of the indigenous people whose rights to participate in the administration of their natural resources and other interests that affect them were guaranteed by the National Constitution. And this resulted from the equally clear mandate of this Court in the previous decision in the case, when it expressed that it must consider "whether the provisions of article 75, sub-section 17 of the National Constitution had been respected".

"That it is also irrelevant to consider the grievances related to the powers of the local government in terms of environmental protection, due to the fact that the guarantee of participation by the relevant indigenous peoples as argued in the case and their perfect compatibility with said powers were already considered and adopted by this Court (...) when requiring the aforementioned proof".

Comments:
The provincial Court of Justice and the Supreme Court of Justice uphold the claim by the indigenous community in this case, which alleges the infringement of their rights over their ancestral land, due to the authorisation granted by the Salta provincial authority to private companies to cut lumber. Although the provincial government alleges that the authorisations granted are valid based on its powers over environmental matters, the provincial court and the Supreme Court note that the Constitution and ILO Convention No. 169 recognize the right of indigenous peoples to recognition of their ancestral lands and to participate in decisions relating to the natural resources situated on those lands. It is also important to note the reference to the right to participation by the indigenous community in environmental studies and their broad impact as well as in the protection of the environment. These rights are clearly enunciated in article 7, paragraphs 3 and 4 of ILO Convention No. 169.

ARGENTINA 3

Court: Civil, Commercial and Mining Court of First Instance No. 5, Administrative Office, IIIrd Judicial District of Río Negro.

Case: Sede, Alfredo and others v. Vila, Herminia and another, Proceedings for eviction (file 14012-238-99), August 12, 2004

Keywords: lands and territories, property, self-identification, status of the Convention in domestic law, special measures, affirmative action.

Summary of the facts:
This is an application for eviction by private owners of a farm against members of an indigenous community. The members of the Kom Kiñe Mu community on the Ancalao reserve had performed work for the farm owners and the labour relationship was terminated. The members of the indigenous community opposed the eviction, arguing ancestral possession of their community lands.

The Court accepts that the defendants are members of the indigenous community and notes that the existence of the community and the community possession of ancestral lands is recognized by Argentinean law, and uses ILO Convention No. 169 to establish the criteria for belonging to indigenous communities (self-identification), and to interpret the concept of title over the lands, noting that the pre-existence of the community and community possession is sufficient to establish the concept of title.

For these reasons, the Court rejects the application for eviction of the members of the indigenous community.

Law applied:
Constitution of Argentina, article 75 subsection 17; national Law 23.302; Civil Code, Rio Negro Constitution, article 42; Rio Negro provincial Laws 2.641 and 2.287; ILO Convention No.169.

Relevant considerations of the court:

Regarding the recognition of community property over the ancestral land of the indigenous people:
"In addition, the Rionegra Constitution supports the pre-existence of the aboriginal culture (article 42 fully operative together with article 14) and ILO Convention No. 169 (Article 14) on Indigenous and Tribal Peoples in Independent Countries, as ratified by Law 24.071, recognizes property rights over the land the indigenous peoples traditionally occupy".

On self-identification as a criterion for belonging to the indigenous community:
"Many criteria have been discussed, but the governing element in our law is found in the broad criteria of Article 1 of ILO Convention No. 169/1989 (Law 24.071) and article 2 and 3 of provincial Law 2.287, which are also applied internationally. A definition of indigenous peoples must include in the broadest possible way all aspects that the indigenous peoples consider to be fundamental for their identity, and in this regard, the element of self-identification is the starting point for that definition. Using this criteria, one is able to formulate a definition that respects the ideas, beliefs, traditions, and other aspects that the indigenous peoples consider necessary to be able to exercise their rights and above all, to obtain a definition that is free from the political connotations that rule when the territorial integrity of the State is held up like a golden calf for all to worship (...)".

Regarding the operative nature of the recognition of the right of property over ancestral lands by the indigenous community:
"(t)he right recognized by the legislator is fully operative (...). It must be respected wherever a community is found that continues to occupy the land in a traditional way, even if the legislative framework is not fully complete. In any case, it has been noted that ratification of ILO Convention No. 169 by way of law 24.071 represents the current state of the law regarding the constitutional clause".

Comments:
In this case, the Court considers that possession of ancestral lands by members of the indigenous community is sufficient title to prevent their eviction by the persons alleging property title over the farm. The Court uses self-identification as an element to determine the issue of belonging to the defendants' indigenous community. It also considers that the right of indigenous communities to property over their ancestral lands arises from constitutional requirements and from ILO Convention No. 169, and that recognition of this right constitutes a form of historic reparations for the treatment suffered by indigenous peoples in the past. The judgment also notes that community property over ancestral lands by indigenous peoples constitutes a new type of property right, governed largely by public law, and therefore it is necessary to adapt certain notions of private law in order to apply it. Interestingly, the Court states that ratification of ILO Convention No. 169 represents the current state of the law regarding the constitutional clause.

ARGENTINA 4

Court: National Supreme Court of Justice

Case: Ombudsman v. National Government and another (Chaco Province), Reference for a preliminary ruling, Judgment of September 18, 2007

Keywords: special measures, affirmative action, human rights.

Summary of the facts:
The Ombudsman filed a claim against the national Government and Chaco Province, denouncing the situation of extreme misery of the Toba tribal communities, inhabitants in that province, and demanding compliance by the State with its obligation to adopt affirmative action for these indigenous peoples.

The claim notes that the indigenous population is in a very serious socio-economic situation, and because of this, most of the population suffers from endemic diseases that are the result of extreme poverty, as well as lack of sufficient food, access to drinking water, medical care, and housing. It states that due to this situation, in the month preceding the claim there had been 11 deaths.

The Ombudsman alleges that this situation reveals a breach by the State of the obligations established in the Constitution of Argentina, in various international human rights treaties, in ILO Convention No. 169, and in national Law 23.302 (Law on Indigenous Peoples).

The Supreme Court of Justice accepts the Ombudsman's arguments and orders the State:

a) With regard to the protective measures for the indigenous community that inhabit the region, to inform the Court on: 1) the communities that live in these territories and the number of inhabitants that make up the communities; 2) the budget allotted for indigenous affairs and the plan to use the resources set out in the respective laws; 3) existing food and health care programmes; 4) existing programmes to provide drinking water, fumigation and disinfection activities; 5) existing education plans; and 6) existing housing programmes.

b) To appear at a public hearing before the Supreme Court to present and discuss the information requested.

c) As a precautionary measure, to supply drinking water and food to the indigenous community that lives in the affected region, as well as adequate means of transport and communications, to each of the health posts.

Law applied:
Constitution of Argentina, international human rights treaties.

Relevant considerations by the courts:
"(I)t is the responsibility of the State judiciary to seek out ways to guarantee the effectiveness of the rights and avoid their infringement as a fundamental and overriding objective when administering justice and deciding on cases submitted before them, especially when the right to life and physical integrity of the person is at stake. This should not be seen as an undue interference by the judiciary when the only purpose is to protect legal rights or to make up for omissions when such rights may be breached."

Comments:
Although this decision is a precautionary measure, and therefore does not have a significant interpretative value, the Supreme Court has considered the description by the Ombudsman of the serious poverty of the indigenous peoples affected to be truthful, and has accepted in principle that this situation may be attributed to the breach of the State's obligations with respect to indigenous peoples, as set out in the Constitution, in the law, and in international human rights treaties, including ILO Convention No. 169.

BELIZE

BELIZE 1

Court: Supreme Court of Belize

Case: Aurelio Cal in his own behalf and on behalf of the Maya Village of Santa Cruz and others v. the Attorney General of Belize and others (consolidated claims, claims 171 and 172 of 2007), Judgment of October 18, 2007.

Keywords: lands and territories, property, means of subsistence, culture, social, religious and spiritual values, traditional occupations, discrimination, collective rights, legal principles, international law.

Summary of the facts:
This case involves two consolidated claims initiated by the Mayan communities in southern Belize, for the purpose of recognition of the customary law of property over their lands, based on the occupation and traditional use of the land by the Mayan peoples. The claimants base their petition on provisions in the Constitution of Belize, Mayan customary law, international human rights law (including ILO Convention No. 169), and common law. They also allege that this lack of recognition and protection, as evidenced by the absence of land boundaries and titles, is discriminatory. In addition, they note that the Government has granted or has threatened to grant concessions to third parties over the disputed territories, ignoring the claimants' rights. The application asks the Court to recognize the right of property (in the constitutional sense of the term) of the indigenous communities over the lands they have occupied in accordance with Mayan customary law, and to recognize the existence of collective title by the communities over the land; to order the Government to define the borders and grant land title over this property in accordance with Mayan custom and practices; and to order the government to abstain from undertaking or allowing third parties to undertake acts that affect this property.

Although the parties eventually reached a satisfactory solution for the indigenous communities, the Court analysed the communities' arguments, the State's response, and the evidence presented, essentially accepting the arguments and petition of the claimants. The court cited, among other legal instruments, ILO Convention No. 169.

Law applied:
Constitution of Belize, Preamble and articles 3, 3 a), 3 d), 4, 16 and 17; common law precedents, ILO Convention No. 169, Article 14.

Relevant considerations of the court:
"130. Moreover, although Belize has yet to ratify Convention No. 169 of the International Labour Organization concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169) of 7th June 1989, it is not in doubt that Article 14 of this instrument contains provisions concerning the indigenous peoples' right to land that resonate with the general principles of international law regarding indigenous peoples".

Comments:
This is an extremely interesting case, since it provides an extensive discussion of the question of the holding of collective land rights of indigenous communities despite the conquest and occupation by a new power, based on common law precedents. Belize is not a party to ILO Convention No. 169. However, the Court relied on the Convention to determine Belize's obligations under general principles of international law concerning indigenous peoples[24)], which, in turn, influenced the Court's interpretation of the Constitution. This is important for two reasons. First, it offers an example of the possible application of ILO Convention No. 169 in common law countries characterised by a dualistic tradition in terms of the relationship between international law and domestic law. Second, it demonstrates the compatibility of ILO Convention No. 169 with a line of common law precedents relating to collective property rights over land by indigenous communities, and therefore it constitutes a good example that could be replicated in other common law jurisdictions, especially when these countries are parties to the Convention.

Another salient aspect of the case is that it takes into account the findings of the Inter-American Commission on Human Rights in its report on the merits of the case of the *Mayan Communities of Toledo v. Belize* (a case that is also commented on in this publication, where the Inter-American Commission refers to ILO Convention No. 169).

24) Common law countries tend to follow the dualist tradition regarding the incorporation of international treaties, which requires the enactment of separate legislation for this purpose. By contrast, general principles of international law and customary law are usually considered part of domestic law without such incorporation by legislation.

BOLIVIA

BOLIVIA 1

Court: Constitutional Court

Case: Constitutional Judgment 106/2003, File 2003-07132-14-RDN, Judgment of November 10, 2003.

Keywords: lands and territories, property.

Summary of the facts:
This case deals with an application for nullity presented by the owner of a rural lot of land against the Bolivian National Institute for Agrarian Reform (INRA). The applicant requests the nullity of an administrative decision by INRA, which seized part of his lot as the result of a process to clear titles over community lands. The process of clearing title originated in a request to recognize and issue title to community lands by four indigenous communities (Chacobo-Parahuara, Yaminagua-Michineri, Cavineño and Esse-Ejja-Tacana-Cavineño). Following a modification of the law in force, a transitory regime provided that the proceedings to clear title initiated prior to the modification (including the one that is relevant to this action) must have issued the title within ten months from the date of publication of the new law. According to the appellant, since ten months have passed and title has not yet been issued, the proceedings to clear title and the seizure of the lot should be extinguished.

Among the arguments made by INRA responding to the action, it was noted that the immobilisation and proceedings to clear title over the community lands are being undertaken pursuant to ILO Convention No. 169.

The Constitutional Court considers that expiry of the legal term of 10 months cannot be deemed to extinguish the proceedings to clear title over the lands, nor does it exhaust the competence of INRA to continue the title clearing process; if this were the case, the rights of the indigenous communities to claim recognition and land title would be infringed. Therefore, the Court declares the action in nullity to be without merit.

Law applied:
Constitution of Bolivia, articles 31 and 171, Law on the Agrarian Reform National Service, international human rights law ratified by Bolivia (including ILO Convention No. 169).

Relevant considerations of the court:
"Therefore, the fact that the process to clear title over the Aboriginal Community Lands pursuant to the 16 applications that are based on the third transitory provision of the Law on the Agrarian Reform National Service, does not involve the INRA losing jurisdiction over the procedures to clear title, means that the argument that the proceedings do not end with the corresponding resolution is not founded, since this would mean leaving the adverse possessors of the Aboriginal Community Lands without any means of defence, which would infringe their fundamental rights as set out in the Constitution and international human rights instruments. These instruments have been integrated into the constitutional system in Bolivia as part of the constitutionality block, and denying these rights would mean leaving the aboriginal communities that have filed 16 applications in a situation of uncertainty and unable to clear the land title over the lands they occupy, which in turn would mean a denial of the provisions set out in article 171 of the Constitution."

Comments:
In this case, it is interesting that the State authority is the party citing ILO Convention No. 169 as argument to support its competence to clear title and grant title over the indigenous community lands. The Constitutional Court found in favour of the State, noting that a contrary decision would infringe the rights of the indigenous communities.

Relevant reports and comments by ILO supervisory bodies:
In another context (consultation and clearing title) the supervisory bodies have followed up on the process to clear title over aboriginal community lands in a report adopted by the Governing Body of the ILO in March, 1999, relating to a representation made under article 24 of the ILO Constitution, in which it was alleged that there had been a breach by Bolivia of ILO Convention No. 169 (document GB.274/16/7). There were also relevant comments by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) on the application of ILO Convention No. 169 of 1995, 2003, 2004, 2005 and 2006.

BOLIVIA 2

Court: Constitutional Court

Case: Constitutional Judgment 0295/2003-R, File 2002-04940-10-RAC, Judgment of March 11, 2003.

Keywords: conflict between individuals and community, community justice, customary criminal law, culture, social, religious and spiritual values, human rights.

Summary of the facts:
This is an action for the protection of constitutional rights (*acción de amparo*) filed by a couple who are members of an indigenous community, in a case where the indigenous community has imposed, although not yet made effective, a sanction of expulsion and threatened to cut off power and water supply. The appellants allege that this measure infringes "their right to work, right to enter, remain on and freely move about the national territory, and the right to private property and to receive a fair wage for their work".

After convening a hearing and requesting expert anthropological evidence, the Constitutional Court determined that the sanction imposed by the community was in response to the appellants' breach of community rules, such as setting a common price for services, payment of quotas and fines, and the duty to carry out community work.

The Court notes that the Constitution of Bolivia recognizes the right of indigenous communities and peoples to maintain their customary law and to carry out community justice where there have been breaches of these rules. The Court also mentions that in any case, the application of community rules and sanctions is limited by the Constitution, and in this regard also refers to ILO Convention No. 169. In the present case, the Court accepted the action for the protection of constitutional rights and orders the community to allow the appellants to remain in the community on the condition that they comply with the community rules. It also orders the community authorities to report to the Court within six months, "Whether the appellants have adapted their way of life to the community customs".

Law applied:
Constitution of Bolivia, articles 1, 7, 32 and 171; ILO Convention No. 169, Article 8.

Relevant considerations of the court:
"Last, but not least, it should be noted that ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, which was ratified by Bolivia on December 11, 1991, states in Article 8 that:

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

Therefore, the decision in this judgment receiving the action allowing the parties to remain in the San Juan del Rosario Community providing they comply with the obligations, duties and participate in the work there, is fully compliant with the cited international law".

Comments:
Various aspects of the judgment are noteworthy. For example, it is interesting that the Court requested expert anthropological evidence to determine fully the scope of the situation that gave rise to the action for the protection of constitutional rights.

The Court also correctly examined the situation in the context of the community customary law, applying constitutional requirements and the provisions of ILO Convention No. 169, which recognizes the right of indigenous communities to be governed by their own rules and institutions. The Court highlights, however, that this is not an absolute right and is limited by constitutional requirements and human rights law.

Finally, the Court sought to balance the community interest in preserving order in the community with the interest of the appellants to remain in the community. Therefore, in order to implement a compromise solution, the court revoked the pending sanction, subject to the appellants' obligation to obey the community rules, thereby recognizing the legitimacy of the community authorities' right to determine breaches of rules committed by the appellants.

BOLIVIA 3

Court: Constitutional Court

Case: Constitutional Judgment 0045/2006, File 2005-12440-25-RDL, Judgment of June 2, 2006

Keywords: consultation and participation, natural resources, lands and territories, status of ILO Convention No. 169 in national law.

Summary of the facts:
This is a claim of unconstitutionality filed by a political representative in relation to the Law on Hydrocarbons. The appellant asks the Court to declare unconstitutional, among others, articles 114 and 115 of the Law on Hydrocarbons, which orders prior consultation with peasant, indigenous and aboriginal communities and peoples in a mandatory and timely fashion, in order to be able to carry out any type of hydrocarbon activities. According to the party filing the claim, said norms violate the principle of equality, since they establish a more favourable treatment for indigenous peoples, and dictate mandatory consultation and respect for the resulting decisions. This favourable treatment, together with the mandate to indemnify the uses of certain lands and the prohibition over expropriation of others, violates, according to the appellant, the social function of property as established in the Constitution.

In terms of what is relevant to this document, the Constitutional Court notes that the legislator has justified the challenged provisions by relying on Articles 4,6,15 and 18 of ILO Convention No. 169. The Court also holds that ILO Convention No. 169 forms part of the "constitutionality block", which means that it must be understood as an integral component of the Constitution and as a control parameter over the constitutionality of legislation.

Following this, the court analyses Article 15(2) of ILO Convention No. 169. According to the Court's interpretation, this Article imposes the requirement of consultation, but does not determine that the indigenous communities must necessarily agree in order to carry out the hydrocarbon activities. The prior consultation is designed, according to the Court, to quantify the damage that the indigenous peoples may suffer as a result of the extraction of hydrocarbons. The court concludes that this prior consultation is mandatory and must be carried out in a timely fashion with the indigenous communities whenever any activity related to hydrocarbons is planned, and that this requirement is compatible both with the Constitution and with ILO Convention No. 169.

Nonetheless, the judgment notes that, to the extent the law establishes that the purpose of the consultation is, in addition to determining the effect on the interests of the indigenous communities and peoples, to actually achieve their consent, such purpose would exceed the scope of the constitutionality block since, according to the Constitutional Court, Article 15(2) of ILO Convention No. 169 does not include this meaning. According to this interpretation, the indigenous communities or peoples do not have the right to veto the hydrocarbon exploitation. Notwithstanding, the law guarantees the payment of a fair indemnification, so that the interests of the indigenous community or people are not left unprotected.

Therefore, the Court declares that although there is a constitutional obligation to carry out the consultation, to provide for a binding nature of its result is unconstitutional.

The Court also declares the unconstitutionality and compatibility with ILO Convention No. 169, regarding the legal provisions that establish the need to compensate and indemnify the indigenous communities in the event of negative socio-environmental impacts or negative effects on their community lands.

Law applied:
Constitution of Bolivia, ILO Convention No. 169, Law on Hydrocarbons.

Relevant considerations of the court:
"It is necessary to determine whether ILO Convention No. 169, ratified by Bolivia pursuant to Law 1257 of July 11, 1991, forms part of the Bolivian constitutionality block, because in addition to being a convention on human rights, its object is to promote the effective application and respect for fundamental human rights throughout the world and is based on policies designed to avoid the discrimination of indigenous and tribal peoples, so that they may effectively enjoy the human rights consecrated for all mankind; the provisions in article 171.I of the national Constitution expressly recognize the social, economic, and cultural rights of the indigenous peoples who live in the national territory, and therefore, the rights consecrated in ILO Convention No. 169 must be considered as an integral part of the constitutionality block since they consecrate the rights of indigenous and tribal peoples therein and constitute a parameter used to verify the constitutional or unconstitutional nature of a law."

"In conclusion, the provision under consideration (Article 15.2 of ILO Convention No. 169) imposes an obligation on the State to carry out consultation on the effects on the interests of the indigenous and tribal peoples, taking into account the specific sociological situation of the relevant peoples; such consultation does not have a determining or definitive character in terms of requiring the agreement of these peoples in order to be able exploit the sub-surface resources that are the property of the State, but rather, the provision under consideration imposes the duty to consult whether these interests may be harmed so that the peoples may be duly and fairly indemnified. Therefore, consultation is not to be understood as a request for authorisation, but rather, implies an effective consultation with the indigenous and tribal peoples who occupy the territories that are the object of the exploitation, regarding the quantification of harm to their interests that may be suffered as an effect of the extraction, and of course, cannot be seen as the power to prevent the exploitation of the sub-surface resources that belong to the State, since the overriding interests of the majority as expressed by the State authorities are above the interests of any type of group".

"With respect to the provisions set out in article 115 of the Law on Hydrocarbons, it should be noted that the text of this law reflects the fact the Law on Hydrocarbons adopted the right of consultation set out in Article 15.2 of ILO Convention No. 169, however, the argument that this consultation has the purpose, in addition to determining the effect on the interests of the indigenous peoples or peasants, to obtain their consent, is not in line with the constitutionality block, since according to the previous analysis, the cited Article 15.2 of ILO Convention No. 169 does not have this purpose. This is especially true here, since as was mentioned, hydrocarbons are the property of the State and thus, no person, interest group or other group of people may oppose the exploitation of hydrocarbon resources; this does not mean that the groups affected by such exploitation lose their rights, since as a result of the consultation on the effects that may be suffered, they must receive a fair indemnification in accordance with each case, pursuant to the provisions of article 116 of the Law on Hydrocarbons.

On the other hand, with respect to the mandatory nature of the consultation, this disposition may have two meanings, one constitutional and the other not. In terms of the constitutional aspect, the State has an inescapable duty to consult the indigenous peoples regarding the prejudice that they may suffer due to the hydrocarbon activities, which is in line with principles of justice and equity; however, the provisions in article 115 of the Law on Hydrocarbons make it mandatory to consider the results of the consultation as an authorisation, and this is a second way of understanding the mandatory nature, which grants authority to the consultation and makes it binding on the State to obtain the consent of the indigenous people to carry out hydrocarbon activities. This latter meaning exceeds the purview of the constitutionality block, which, as was mentioned, cannot have the purpose of preventing the exploitation of the sub-surface resources that belong to the State. Therefore, this mandatory nature must be understood as meaning that the consultation is an inescapable duty by the State and thus, the text that states: "or obtain consent from the indigenous and aboriginal communities" is unconstitutional and it is so declared."

Comments:
This is an important judgment and it is the first where the Constitutional Court of Bolivia deals with the interpretation of ILO Convention No. 169. In this regard, the following points are noteworthy.

First, it is extremely significant that the Constitutional Court considers that ILO Convention No. 169 forms part of the constitutionality block, which means that any legislation must be compatible with ILO Convention No. 169 and shall be deemed null and void if in contradiction with it.

Second, the Constitutional Court has declared constitutional the mandatory nature of prior consultation with indigenous peoples and communities in the case of hydrocarbon exploitation.

Thirdly, article 115 of the Law on Hydrocarbons is directly inspired by Article 6(2) of ILO Convention No. 169, which is the general provision in the Convention dealing with consultation, and therefore, is also applicable to consultation with respect to hydrocarbons[25]. Although ILO Convention No. 169 does not establish that the results of the consultation are mandatory or binding on the State, providing for such mandatory nature is not in contradiction with the Convention.

25) It is relevant to compare both texts:
Law on Hydrocarbons, article 115: "(Consultation). In accordance with articles 6 and 15 of ILO Convention No. 169, consultation shall be carried out in good faith, based on principles of truth, transparency, information and timeliness. It shall be carried out by the competent authorities of the government of Bolivia and using appropriate procedures in accordance with the circumstances and characteristics of each indigenous people, in order to determine to what extent they would be affected and with the objective of achieving agreement or consent to by the Indigenous and Aboriginal Peoples. Consultation is mandatory and the decisions resulting from the consultation process must be respected."
ILO Convention No. 169, article 6(2): "The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures." (our emphasis).

BRAZIL

BRAZIL 1

Court: Fifth Federal Trial Court, Judicial Section of Maranhão (Justiça Federal de 1ª Instância, Seção Judiciária do Maranhão, 5ª Vara).

Case: Joisael Alves and others v. General Director of the Alcântara Launch Centre, Judgment No. 027/2007/JCM/JF/MA, Case No. 2006.37.00.005222-7, Judgment of February 13, 2007.

Keywords: Means of subsistence, traditional occupations, lands and territories, culture and social, religious and spiritual values, discrimination, status of the Convention under national law.

Summary of the facts:
This is an action for the protection of constitutional rights (*acción de amparo*) filed by members of a community of African descendants who live in their traditional territory ("quilombola"). This action is directed against the activities of an aerospace base located near the community. According to the petition, the activities of the aerospace base affect their traditional forms of production, preventing their access to their farm plots. The appellants request that the launch centre be ordered to cease the activities that prevent the community from farming and harvesting their subsistence crops in their traditional areas.

The Court considers the prejudice to be well-founded, grants the action for protection of constitutional rights, and orders the aerospace base to abstain from affecting the activities of traditional farming by the community of African descendants. Among other arguments, the judge supports his decision by ILO Convention No. 169.

Law applied:
Constitution of Brazil, article 3, IV; ILO Convention 169, Article 14.

Relevant considerations of the court:
"The State cannot ignore the constitutional protection that is one of the fundamental objectives of the Federal Republic of Brazil, that is, "to promote the good of all, without regard to origin, race gender, age, or any other form of discrimination" (Federal Constitution of 1988, article 3, IV), which therefore includes the traditional communities of African descendants (*surviving communities of quilombos*), particularly when, as the representative from the Public Ministry points out, the Brazilian State has confirmed the intention to establish public policy to fight discrimination against the traditional ways of life of the indigenous and tribal peoples, pursuant to the publication of Legislative Decree No. 43/2000, ratifying ILO Convention No. 169, which sets out in Article 14: "The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized".

Comments:
This is the first jurisprudential application of ILO Convention No. 169 in Brazil. It is also worth noting that the Convention was applied for the protection of the group of African descendants, in this case communities, which were brought to Brazil during colonisation. "[T]heir social, cultural, and economic conditions distinguish them from other sectors in the country and they are wholly or partially governed by their own customs or traditions", as set out in Article 1 of the Convention. It is also interesting that the judge interpreted the ratification of ILO Convention No. 169 as a confirmation of a constitutionally established objective, namely the promotion of the well being of all, without any type of discrimination whatsoever.

COLOMBIA

COLOMBIA 1

Court: Constitutional Court

Case: Judgment T-254/94, May 30, 1994 (Rapporteur: Eduardo Cifuentes Muñoz)

Keywords: conflict between individuals and community, customary criminal law, community justice, criminal justice, means of subsistence, culture and social, religious, and spiritual values, institutions, human rights, access to justice.

Summary of the facts:
This is an action for the protection of constitutional rights (*tutela*), which is the equivalent of the "*acción de amparo*" in Colombia, filed by a member of the indigenous community in El Tambo, Municipality of Coyaima, Department of Tolima (*note: "Department" is a geopolitical division equivalent to province*), who after being accused of various infractions, was sentenced by the community to exile and punished by the confiscation of his land. The complainant alleges that he was sanctioned on the basis of rumours, without any grounds and without any proof whatsoever, and that therefore the sanction has violated his right to due process. He adds that the sanctions are contrary to the prohibition in the Constitution of exile and confiscation as a punishment. He also alleges violations of the right to work and the right to life in respect of himself and his children, since the confiscation of his land deprives them of their means of subsistence. Finally, he notes that the sanction affects his personal honour and reputation.

The action was previously rejected by two judicial instances, and the Constitutional Court was the final appeal in this case. At this stage, the decisions of the previous judicial proceedings were corrected with regard to two important issues. Regarding both issues, the Constitutional Court relied on ILO Convention No. 169.

First, the Court decided that the decisions of indigenous communities that apply sanctions in accordance with their customary community law constitute valid decisions within their jurisdiction. This is based, according to the Constitutional Court, on the recognition of indigenous communities not merely as associations, but as a community to which the Constitution assigns the right to organise itself – including the exercise of judicial functions.

Secondly, the Court affirms that where indigenous communities apply sanctions, as in the case of any decision taken within their competence, these are subordinated to the respect for the fundamental rights set out in the Constitution (and in human rights treaties, which in Colombia form part of the constitutionality block). This means that the application of criminal sanctions by indigenous communities over its members is subject to verification of the respect of fundamental rights.

In the case at hand, although the Constitutional Court rejected the allegations regarding the lack of investigation and evidence for the application of the sanction, it held that the sanctions were disproportionate to the alleged infraction and breached the prohibition of exile and confiscation of goods set out in the Colombian Constitution. The Court also noted that the sanction of exile and confiscation of the land that the appellant relied upon for subsistence also affected his children and their right to physical integrity. The Court concluded that the sanction violated the rights of the appellant to due process and the right of his children to physical integrity. Therefore, it revoked the sanction imposed and ordered the case be submitted again to the community so that a sanction can be imposed in accordance with the guidelines established by the judgment.

Law applied: Constitution of Colombia, articles 4, 6, 7, 38, 95, 246 and 330; ILO Convention No. 169, Articles 1(2), 8 and 9.

Relevant considerations of the court:
"Indigenous communities are not legally comparable to a simple association. They are an historical reality, dynamic and characterised by objective and subjective elements that cannot be reduced to *animus societatis* that characterises civil associations. The members are born as indigenous people and belong to a culture that is maintained or is in the process of being recovered. Belonging to an indigenous community does not arise from a spontaneous voluntary act of two or more people. The consciousness of an indigenous or tribal identity is a fundamental criteria for the determination of when an indigenous community exists, such that the mere intention of creating an association is not sufficient to generate this type of collectivity (D 2001 of 1988, Article 2, ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, ratified by Law 21 of 1991, article 1 section 2)".

(...)

"The full validity of constitutional fundamental rights in indigenous territories as a limitation on the principle of ethnic and constitutional diversity is recognized in international law, in particular in terms of viewing human rights as a universal code of social coexistence and dialogue between cultures and nations, and the basis for peace, justice, freedom and the prosperity of all peoples. In this regard, ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, ratified by Congress pursuant to Law 21 of 1991, establishes that:

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

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

"Article 9

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

Comments:
Although the result of the case is to revoke a sanction applied by the indigenous community in accordance with customary law, the case is important since it recognizes the legitimacy of the indigenous jurisdiction, which is limited by the respect for fundamental rights. The Constitutional Court bases the decision on ILO Convention No. 169, which it uses to distinguish an indigenous community from a simple association, and to note the subordination of the indigenous jurisdiction to the respect for fundamental rights as established by the Constitution and by international human rights instruments.

COLOMBIA 2

Court: Constitutional Court

Case: Judgment C-139/96, April 9, 1996 (Rapporteur: Carlos Gaviria Díaz)

Keywords: culture and social, religious and spiritual values, institutions, political organization, lands and territories, human rights, access to justice.

Summary of the facts:
The judgment arises from a citizen's action to declare the unconstitutionality of articles 1, 5 and 40 of Law 89 of 1890 "*which determines the way that savages must be governed so they may adapt to civilised life*". The petitioners argue these provisions are unconstitutional since the term "savages" used in the law to refer to indigenous peoples is an infringement of the principle of human dignity, the right to honour and reputation, and they also grant powers of government to ecclesiastic authorities, which violates the constitutional principle that confers these powers solely to the three branches of public power.

In its deliberations, the court highlights the importance of recognizing and protecting social coexistence within a territory of cultural groups with a different vision; it also notes the importance of respect for multiculturalism and tolerance, which generates the coexistence of cultural diversity and political unity based on the respect for fundamental rights. The coexistence of these principles, both of which are constitutional principles (diversity and fundamental rights), must be weighed to establish which one has priority in the event of a conflict. The court employs ILO Convention No. 169 to establish this interpretative basis.

The Court declares the unconstitutionality of the challenged dispositions, which were issued in a historical context different from the current one, where those who were different were deemed savages, and thus it was determined that it was necessary to civilise them through an integrationist policy. The Court considered such policies to be contrary to valid constitutional precepts because terms such as *savages* and *adapt to civilisation* infringe on the dignity of these peoples and the fundamental value of their ethnic diversity. The Court also held that neither the governmental nor ecclesiastic authorities shall influence the decisions taken by the indigenous communities, since they are autonomous and the only limitation is the law and constitutional requirements. Finally, it notes that the law infringes on the autonomy of the communities when it grants jurisdictional powers to the tribal governors, since each individual community has the competence to exercise these powers. In terms of the sale of lands, the court determined that the provisions under consideration accord treatment to the indigenous peoples that render them unable to dispose of their lands, which infringes on their cultural diversity since this means they are deemed incapable of disposing of their lands due to their quality of being indigenous peoples, and also infringes on the prohibition against transfer of indigenous territories. In terms of passing a law that regulates indigenous jurisdiction, the court refers to jurisprudence regarding the direct normative effects of the Constitution, which creates such a jurisdiction without making its operation dependent on any type of legal creation, however, warns that the co-ordination between such jurisdiction and the national judicial system must be regulated by the legislator.

Law applied:
Constitution of Colombia, articles 1, 7, 13, 63, 246, 329 and 330; ILO Convention No. 169, Article 8.

Relevant considerations of the court:
"In a society like Colombia, where there are 81 indigenous peoples, many of whom are only known to specialists in the area, and whose legal systems may be classified into 22 groups, it is somewhat risky to establish general rules to settle the conflict between diversity and unity. While the legislator has the competence to set out guidelines for the co-ordination between the indigenous judicial system and the national judicial system, the effectiveness of the right to ethnic and cultural diversity and the value of pluralism may be satisfactorily achieved only if one allows a broad freedom to the indigenous communities and sets limits on the autonomy of the communities' specific conflict resolution mechanisms, such as regular legal actions or the action for the protection of constitutional rights (*tutela*). These mechanisms also fulfil the requirement established by ILO Convention No. 169 Article 8 section 2 ("Concerning Indigenous and Tribal Peoples in Independent Countries"), which was incorporated into our legislation pursuant to Law 21 of 1991.

The procedure for conflict resolution must fit the circumstances of the particular case: the culture involved and the degree of isolation or integration of the culture with respect to the majority culture, the effect on interests or individual rights of the members of the community, etc. It is up to the judge to apply equitable criteria, the "justice in the particular case" according to Aristotle's definition, in order to settle the conflict, taking into account the constitutional and jurisprudential parameters established in this regard."

(…)

"Although one can understand that the terms of the cited article (referring to the article being challenged) have been tacitly derogated by new laws governing this area (see e.g., ILO Convention No. 169, which speaks of "indigenous and tribal peoples") and, in particular, by the 1991 Constitution, the court does not find any reason to allow the cited article to remain in force, regardless of its meaning or the terms used in its expression, since it is contrary to the Constitution."

Comments:
In this case, the court is updating nineteenth century legislation, which is characterised by anachronistic language and a paternalistic concept of indigenous peoples, to the tenor of the 1991 Constitution and ILO Convention No. 169. It is noteworthy that in this judgment, in addition to reiterating the relevant constitutional principles and their effect, the court also refers to the terms of ILO Convention No. 169 and notes that indigenous peoples are full cultural subjects with the right to live in accordance with their beliefs. In other words, in addition to recognizing as relevant the principle of cultural diversity, it recognizes equality rights with respect to the other inhabitants.

COLOMBIA 3

Court: Constitutional Court

Case: Judgment SU-039/97, February 3, 1997 (Rapporteur: Antonio Barrera Carbonell).

Keywords: consultation and participation, natural resources, sub-surface resources, environment, collective rights, fundamental rights.

Summary of the facts:
The Ombudsman, representing several members of the U'wa indigenous community, filed an action for the protection of constitutional rights (*tutela*, which in Colombia is equivalent to the action of *amparo*) against the Ministry of the Environment and the Sociedad Occidental del Colombia Inc., on the basis that the defendants infringed the rights of the community by not carrying out a full and serious prior consultation process, as established regarding exploration for hydrocarbons on indigenous territory. It is alleged that there was only a meeting with the community leaders, which is insufficient to be considered as having carried out a consultation process and therefore, the issuance of the licence and the subsequent execution of the project infringe the rights of cultural identity and participation in decisions that affect the community members. The Ombudsman also requests the suspension of the environmental licence that was granted and the defendants are ordered to carry out all necessary measures to conduct a prior consultation with the community and for the protection of the rights of the indigenous people.

The Ombudsman also requests that the Council of State (Consejo de Estado) annul the administrative act granting the environmental licence and requests the provisional suspension of this licence in order to prevent the community's rights being affected. Both legal actions are based on allegations that the administrative act is incompatible with the rights of the indigenous people, their territory, self-determination, language and ethnic culture, due to the fact that the exploitation of non-renewable natural resources is dependent on the preservation of the cultural, social and economic integrity of the indigenous communities and the participation by their representatives in such decisions, as set out in Articles 6 and 15 of ILO Convention No. 169.

The defendant, Sociedad Occidental de Colombia Inc., argues in its defence that it followed all necessary steps to make the community aware of the technical studies, based on the relationship that should exist between the indigenous community and the company, and therefore conducted 33 meetings with the indigenous peoples and interested public bodies so that the community could learn of various other experiences that had been successful, and also to hire some of the indigenous people for exploration on non-indigenous land. Thus, the defendant's counsel argues that the consultation was not a mere formality as the plaintiffs allege, but rather that they did everything possible so that the community could have access to information on the community's right to enjoy the benefits of the exploitation of the sub-surface resources. Finally, the company concluded that the action for the protection of constitutional rights (*tutela*) was not the suitable venue to discuss who properly should exercise jurisdiction over hearing administrative matters.

The Constitutional Court in this case analysed the facts and defined the protection that the State should give to the right to identity and ethnic, cultural, social and economic integrity of the indigenous communities where there is exploitation of the natural resources situated on indigenous territories.

The Court summarised the jurisprudence relevant to the issue of ethnic and cultural diversity, emphasizing the collective right recognized as applicable to indigenous communities as subjects of fundamental rights pursuant to the 1991 Constitution. The Court noted that it is not only individual members of indigenous communities who are subjects of these rights, but that the Constitution also recognized that the community as a collective body is the subject of rights. Based on this, it determined that such rights must be harmonised with interests in the exploitation of natural resources in order to ensure sustainable development and the preservation of the cultural, ethnic, economic and social identity of the communities living in the territories to be exploited. The way to harmonise and balance these interests is the creation of a mechanism for the communities to participate in the decisions that affect them, and this participation is a fundamental right related to the participatory mechanisms set out in article 40, section 2 of the Constitution. The Court notes that this is a fundamental right since it is through this mechanism that community ensures its subsistence as a social group. Thus, both the Constitution and ILO Convention No. 169 establish the right of the indigenous peoples to be consulted on the exploitation of resources with their full and complete knowledge of the project (details of the project, how it is to be carried out) and the effects it will cause on the social, cultural, economic and political environment and the benefits and disadvantages of the project. The affected communities must be heard on these aspects and if there is no agreement, the administration's actions must not be authoritarian or arbitrary, but rather, objective, reasonable and proportionate. In any case, the necessary mechanisms must mediate in order to mitigate, correct or restore the effects by the relevant authority that are produced or generated to the detriment of the community or its members.

The Court concludes that the process of prior consultation with the U'wa indigenous communities was not carried out in a full and suitable manner regarding the hydrocarbon exploration project, since at the meetings that were held several different members of the communities were present, but not its representatives. In addition, no meeting was carried out to review the effects of the project, which was not executed since the licence had not yet been issued. Thus, since the consultation was not carried out within the established parameters and the potential harm that could be caused to the indigenous community by the project was not calculated, the Court considered that the U'was community's right of participation, right to ethnic, cultural, social and economic integrity and right to due process were infringed and granted the injunction, ordered the suspension of the environmental licence and ordered that the proper consultation be carried out.

Law applied:
Constitution of Colombia, preamble, articles 1, 79, 99, 240.2 and 330; Decree 2591 of 1991, article 31; Law 99 of 1993, article 76; ILO Convention No. 169, Articles 5, 6, 7 and 15

Relevant considerations of the court:
"The indigenous community's right of participation as a fundamental right (article 40, section 2 of the Constitution) is strengthened by ILO Convention No. 169, as ratified by Law 21 of 1991, which is designed to guarantee the territorial rights of the indigenous peoples and the protection of their cultural, social, and economic values, as a means to ensure their subsistence as a group. Thus, ILO Convention No. 169, which forms part of domestic legislation pursuant to articles 93 and 94 of the Constitution, together with the referenced law, forms part of the constitutionality block that is intended to guarantee and make such participation effective.

Various principles in ILO Convention No. 169 are intended to guarantee the participation by indigenous communities in decisions that affect them relating to the exploitation of natural resources in their territories, to wit: [citation of Articles 5, 6, 7 and 15 of ILO Convention No. 169]

Based on article 40, section 2, and paragraph 330 of the Constitution and the terms of ILO Convention No. 169 cited above, the Court is of the view that the procedure to consult the indigenous communities that may be affected due to the exploitation of natural resources, includes creating a relationship of communication and understanding, marked by mutual respect and good faith between the communities and public authorities in order to achieve the following:

a) That the community receive a full understanding of the projects designed to explore or exploit the natural resources in the territories they occupy or that belong to them, along with the mechanisms, procedures, and activities required to execute the projects.

b) That the community also be advised and instructed on how the execution of the relevant projects may involve effects or prejudice to the elements that constitute the basis of their social, cultural, economic and political cohesion and thus, the essence of their subsistence as a unique group.

c) That they be given the opportunity to freely and without outside interference weigh fully the benefits and disadvantages of the project on the community and its members at a meeting with their members or representatives present, to have their concerns and questions heard that may arise regarding the defence of their interests, and to give their views on the viability of the project. In so doing, it is hoped the community will have an active and effective participation in the decision that will be adopted by the authority, and insofar as possible, this decision should be agreed upon or negotiated.

When it is not possible to arrive at an agreement, the authority's decision must be free of arbitrariness and authoritarianism, and thus shall be objective, reasonable and in accordance with the constitutional goal required by the State of protection of the indigenous community's social, cultural, and economic identity.

In any case, the necessary mechanisms must be put in place to mitigate, correct, or reverse the effects that the measures generated by the authority to the detriment of the community or its members may produce or generate.

Therefore, merely informing or notifying the indigenous community about a project to explore or exploit natural resources is not equivalent to consultation. The aforementioned guidelines must be fulfilled, and plans for co-operation or agreement with the community must be presented so that the community may indicate, through its authorised representatives, its agreement or disagreement with the project and the ways in which their ethnic, cultural, social, and economic identity will be affected."

Comments:
This is a leading case by the Constitutional Court of Colombia on the right of indigenous communities to be consulted before decisions are taken that may affect their territory and the natural resources situated on their lands. The judgment expresses the mandatory nature of the consultation, considers it to be a collective right of a fundamental nature, and sets out the parameters necessary to carry out this prior consultation with the indigenous communities, based on ILO Convention No. 169 and the Constitution of Colombia.

The judgment is also important because it is the first one to state ILO Convention No. 169 is part of the "constitutionality block", that is, the group of international instruments on fundamental rights that form a unified concept together with the principles of fundamental rights set out in the constitution, and therefore, must be interpreted in an integrated manner. The doctrine has been taken up and applied again in later judgments[26].

Relevant reports and comments from ILO supervisory bodies
The ILO supervisory bodies have followed up on the situation of the U'wa people regarding the issues of consultation, natural resources, and territories in two reports adopted by the Governing Body of the ILO in 2001 regarding certain representations made under article 24 of the ILO Constitution, in which it was alleged that there was a failure by Colombia to respect ILO Convention No. 169, (doc. GB/282/14/3 and 282/14/4) and in comments by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) in 2001, 2003, 2004, 2006 and 2007.

With respect to a environmental licence granted to a company to carry out oil exploration activities in the U'wa indigenous people's territory, a tripartite committee examining a representation made under article 24 of the ILO constitution, considered that "the concept of consultation with the indigenous communities that might be affected with a view to exploiting natural resources must encompass genuine dialogue between the parties, involving communication and understanding, mutual respect and good faith, and the sincere desire to reach a consensus. A meeting conducted merely for information purposes cannot be considered as being consistent with the terms of the Convention. Furthermore, according to Article 6, the consultation must be "prior" consultation, which implies that the communities affected are involved as early on as possible in the process, including in environmental impact studies." [27] The Committee also noted meetings or consultations conducted after an environmental licence has been granted do not meet the requirements of Articles 6 and 15(2) of the Convention.
The tripartite committee thus considered that the Government had violated the Articles in question by issuing the environmental licences in question without conducting the due process of prior consultation with the peoples affected. It asked the Government to modify Decree 130 of 1998, which regulates the prior consultation of the indigenous communities regarding the exploitation of renewable natural resources within their territory, in order to harmonise it with the Convention, in consultation with, and the active participation of the representatives of the indigenous peoples in Colombia, pursuant to the provisions of the Convention.

26) See, for example, Judgments T-652/98, T-606/01, C-418/02, C-891/02, T-955/03 and C-030/08, among others.
27) Paragraph 90 of report GB/282/14/3.

COLOMBIA 4

Court: Constitutional Court

Case: Judgment SU-510/98, September 18, 1998 (Rapporteur: Eduardo Cifuentes Muñoz)

Keywords: discrimination, culture and social, spiritual and religious values, lands and territories, human rights, collective rights, property, conflict between individuals and community.

Summary of the facts:
In this case, a group of indigenous people and the representative of the United Pentecostal Church of Colombia (Spanish acronym: IPUC) filed a claim against the traditional authorities of the Arhuaca indigenous community in the eastern region of the Sierra Nevada of Santa Marta because they considered their right to freedom of religion and creed and their right to free development of their personality to be infringed. The appellants allege that they chose to practice the evangelical religion and that the community has prevented the access of their pastors to the territory to preach. The plaintiffs affirm that they have been discriminated in terms of the distribution of lands and have been punished and mistreated by the authorities of the indigenous community (who tied them up for long periods of time, depriving them of their freedom, imposed fines on them and closed their temple). The authorities in the community argue that these new beliefs affect their unity and culture and consider that this activity is "destroying the indigenous people". They state in their defence that they have not discriminated against nor punished the members of the community because they practice their religion, but rather because their behaviour violates the rules of social coexistence in the community.

The Constitutional Court requested a background study on the Arhuaca worldview and the evangelical religion before arriving at a decision. Based on the study, the Court concluded that both worldviews are incompatible, to the extent that for the Arhuaca indigenous people the collective takes precedence over the individual and for the evangelicals, individual salvation and communication with God take precedence. Based on this, the Court stated that this change in religion "does not mean a mere substitution of one belief for another, but rather a complete change in the way of being".

The Court distilled the controversy to the following questions. First, whether under the Constitution, the traditional authorities of the indigenous people are authorised to limit the freedom of religion of their members in order to maintain the diversity and integrity of their culture. Second, and in the event of a positive answer to the foregoing question, whether each of the eventual limitations: closing the temple, prohibiting religious proselytism, etc., are in fact compatible with the Constitution. Third, whether for the aforementioned purposes, the traditional authorities of the indigenous people may limit access to the reserve by religious congregations from outside their culture, or whether this infringes the freedom of religion of these congregations, who argue their freedom to preach their religious beliefs throughout the national territory.

On the first question, the Court notes that although the recognition of the right of indigenous communities to subsistence and to maintain their cultural identity is not an absolute right, the preservation of indigenous communities may involve limitations on other rights within the

indigenous territory. Taking into consideration the study on the compatibility of the Arhuaca and evangelical world visions, the Court notes that the practice of a religion that is incompatible with the Arhuaca culture inside the indigenous territory is a source of tension and affects the unity and group identity of the community. The Court concludes that it cannot force the indigenous community to guarantee the freedom of religion within its territory, and also notes that nobody is obliged to be part of that community, nor to live within that territory.

Regarding the second question, the Court refers again to its previous arguments, in the sense that even if the indigenous authorities are theoretically the competent bodies to set and apply their own sanctions, these sanctions may not be disproportionate or senseless, and they may not cause serious physical or mental damage. However, the Court notes that in the present case, it was not proven that the punishments applied exceeded the limits established by the Constitution.

On the third question, the Court mentions that the restrictions imposed by the community were the closing of the temple, the prohibition on religious proselytising and the collective religious practice in public places on indigenous territory. However, the community has not prohibited private religious practice or educating children in the evangelical religion. The Court decided that the prohibition against building a temple on indigenous territory constitutes a legitimate exercise of the autonomy granted to the indigenous authorities, and that the restriction of the public worship of another religion is also not unjustified, in terms of the right of the indigenous community to have respect for their cultural identity. In addition, the Court does not find that the allegations of discrimination against the indigenous members practicing the evangelical religion were proven in respect of the lands issue, although it recalls that, in principle, the question also touches on the autonomy of employment by community members in the indigenous territory. Finally, the Court also considers that the prohibition established by the community against non-indigenous church members entering the community territory was justified. The Court states that, in principle, the exclusion of persons not belonging to the community constitutes part of the powers that it has as owner of the lands.

Although the Court recognizes that none of the rights of the indigenous communities is absolute - including the right to subsistence, cultural identity, autonomy, and collective ownership of the territory – in the present case it does not find there is any constitutional interest that would take priority to displace the relevant exercise of rights. The limitations on religious freedom and freedom of mobility are not, according to the Court, unreasonable, since they are based on the protection of the community's cultural identity.

Therefore, the Court concludes that there has not been any violation of the rights of the evangelical members of the indigenous community and the members of the evangelical church, and rejects the action for the protection of constitutional rights.

Law applied:
Constitution of Colombia, articles 1, 7, 8, 9, 11, 12, 17, 29, 58, 63, 229 and 246; Law 21 of 1991, articles 13-19; ILO Convention No. 169, Articles 8 and 9.

Relevant considerations of the court:
"43. In general, the Board of the indigenous community has understood that articles 1 and 7 of the Constitution enshrine the principle of respect for ethnic and cultural integrity and diversity, on which is based article 8 (protection of the State's cultural patrimony), 9 (right to self-determination of peoples), 10 (official status of the languages and dialects of ethnic groups, 68 (respect for identity in regard to educational materials), 70 (culture as a basis of Colombian nationality and the recognition of equality and dignity of all cultures) and 72 (protection of the State's archaeological patrimony).[28] In this respect, it may also be noted that the constitutional requirements mentioned above, on which the special protection for indigenous communities is based, are strengthened and complemented by the dispositions in ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, ratified by Colombia pursuant to Law 21 of 1991.

From the foregoing, it can be clearly inferred that for the court, the principle of diversity and personal integrity is not simply a rhetorical declaration, but is a vision, legally speaking, of a participatory and pluralistic democracy in Colombia[29] and conforms to "the acceptance of diversity linked to the acceptance of multiple lifestyles and various ways of understanding the world that are different from Western culture.[30]"

(...)

"The court did not hesitate to recognize, based on constitutional declarations (Constitution, articles 58, 63 and 229) and the respective international instruments (ILO Convention No. 169 [Law 21 of 1991], Articles 13 to 19), that the collective property exercised by the indigenous communities over their reserves and territories is of the nature of a *fundamental right*, not only because these territories constitute their main means of subsistence, but also because they form part of their world vision and religious practices.[31] As land owners, the indigenous communities are entitled to all the prerogatives that article 669 of the Civil Code grants to property holders, which establishes the duty by third parties to respect the mentioned rights." [32]

Comments:
In this case, where there is a conflict between the majority of community members and certain other members, the Constitutional Court, in accordance with the guidelines set out in ILO Convention No. 169, gives priority to the right to preserve the community identity, over and above the right of some of its members to practice a religion incompatible with that of the community, and that of the non-indigenous members of an evangelical church to spread their religious teachings through the community's territory. The court considers that the restriction of some rights within the indigenous community's territory, although it must be limited, may be justified if necessary to maintain the community's cultural identity.

28) ST-428/92 (Rapporteur. Ciro Angarita Barón); ST-342/94 (Rapporteur. Antonio Barrera Carbonell); SC-104/95 (Rapporteur. Hernando Herrera Vergara); ST-496/96 (Rapporteur. Carlos Gaviria Díaz); SU-039/97 (Rapporteur. Antonio Barrera Carbonell)

29) ST-188/93 (Rapporteur. Eduardo Cifuentes Muñoz); ST-342/94 (Rapporteur. Antonio Barrera Carbonell); SU-039/97 (Rapporteur. Antonio Barrera Carbonell)

30) ST-380/93 (Rapporteur. Eduardo Cifuentes Muñoz); SC-104/95 (Rapporteur. Hernando Herrera Vergara)

31) ST-188/93 (Rapporteur. Eduardo Cifuentes Muñoz); ST-380/93 (Rapporteur. Eduardo Cifuentes Muñoz); SC-104/95 (Rapporteur. Hernando Herrera Vergara); SC-139/96 (Rapporteur. Carlos Gaviria Díaz)

32) ST-257/93 (Rapporteur. Alejandro Martínez Caballero)

COLOMBIA 5

Court: Constitutional Court

Case: Judgment T-652/98, November 10, 1998 (Rapporteur: Carlos Gaviria Díaz)

Keywords: consultation and participation, lands and territories, natural resources, environment, culture and social, religious and spiritual values, traditional occupations, means of subsistence, social security and health, self-identification, institutions, political organization, affirmative action.

Summary of the facts:
The Constitutional Court ruled on various issues of legal protection (*tutela*), dealing with the effects of the construction and operation of a dam on the subsistence, lifestyle, and territory of the Embera-Katío people of Alto Sinú. The arguments presented correspond to a political division within the community.

The Court decided to overturn the decisions of the previous proceedings and to protect the legal rights of survival, ethnic, cultural, social, and economic integrity, participation and due process for the indigenous people. The Court made the following rulings:

- It considered the right of the indigenous people to be consulted on the project was infringed and that given the initiation of the project despite the lack of consultation, it ordered the company to compensate the community and its members with an amount that would at least guarantee their survival. With respect to the final execution of the project, the Court ordered that consultation be undertaken in accordance with the grounds of the judgment, inspired by ILO Convention No. 169, and that filling the reservoir be suspended until after the consultation has been completed.

- It ordered the government authorities to unify the reserve of the Embera-Katío people since it considered the division to be artificial and to prejudice the unity and identity of the indigenous people.

- It ordered the government authorities to co-ordinate the organization of the corresponding special regime over the area where the indigenous reserves overlap with a nature park, since it considered that, due to the flooding of the arable land, it was necessary to establish special exceptions to benefit the indigenous people in respect of the rules prohibiting cultivation in nature parks.

- It ordered the municipal authorities to register the members of the indigenous people in the General Health System (*Sistema General de Salud*), to provide them with medical care and medication, since the Court considered that the changes caused by the project made it more difficult and more costly to access health services.

- It ordered the responsible authorities to intervene actively in the consultation process, to ensure that the foreseeable risks to the health and survival of the indigenous people were not minimised, and to resume the operation of programmes that were agreed upon within the framework of the ethnic development plan, until such time as they may be replaced by agreements resulting from the consultation process.

- It considered that the government authorities interfered unduly in matters under the ambit of the autonomy of the indigenous people, and ordered the relevant authorities to refrain from doing so again in the future.

Law applied:
Constitution of Colombia, articles 7, 11, 12, 29, 40.2, 58, 79, 80, 329, 330 and 33; Decree 2001 of 1988, article 2; ILO Convention No. 169, Articles 1, 5, 6, 7 and 15.

Relevant considerations of the court:
"The fundamental right to collective property of ethnic groups over territories where they have been living includes the right to create a reserve headed by the indigenous people. It should be noted that the administrative actions designed to create reserves must be based on the respect of the right of personality of each of the indigenous peoples and native inhabitants of San Andres, Providencia, and Santa Catalina (*raizales*); for legal effects, these peoples must be identified in application of Article 1, section 1, subsection b, and Article 2 of ILO Convention No. 169, and article 2 of Decree 2001 of 1988, (…).

It should be noted that both in the copy of file No. 40.930 of the administrative actions carried out by the Colombian Institute for Agrarian Reform (Spanish acronym: *INCORA*) for the creation of the Iwagadó Reserve, as well as in file No. 40.827 for the creation of the Karagabí Reserve, it is stated that they refer to one sole indigenous people: the Embera-Katío of Alto Sinú; it is also stated therein that there is no solution for continuity between the geographic area inhabited by one part and the other part of this people and that the creation of two neighbouring reserves instead of one is merely due to the fact that INCORA, due to purely procedural considerations, did not combine these administrative actions. Thus, they failed to recognize and protect the right to cultural integrity of this people, infringing article 330 of the Constitution, and failed to apply the cited Articles of ILO Convention No. 169 and of Decree 2001 of 1988, without recording the reasons that in their opinion would justify this action. Therefore, this court considers that INCORA's *de facto* action, by the irregular creation of the two reserves, clearly constitutes an immediate obstacle to the solution of the internal conflict. Thus, INCORA and the Ministry of the Interior are ordered, within forty-eight hours following the publication of this judgment, to undertake proceedings according to each entity's area of operations to unify the reserves of the Embera-Katío people of Alto Sinú; moreover, priority must be given to carrying out this action."

(…)

[On the consultation that was not carried out]

"In conclusion, the court is of the view that the proceedings to issue the environmental licence that permitted the construction of the Urrá I hydroelectric project were completed in an irregular fashion, infringing the fundamental rights of the Embera-Katío people of Alto Sinú, since there was a failure to carry out the consultation that should have been done officially and completely. Therefore, not only was the right of participation infringed (article 40 (2) and article 330 of the Constitution), but also the right to due process (article 29 of the Constitution), and this people's

right to integrity (article 330 of the Constitution) In addition, the principle of respect for the multicultural character of the Colombian nation that is enshrined in article 7 was infringed, and the right to subsistence of the Embera people living in the Department of Cordoba was seriously affected (article 11 of the Constitution), and the State also failed to respect its international law commitments that were incorporated into domestic law pursuant to Law 21 of 1991 regarding the protection of the human rights of indigenous peoples."

(…)

[Regarding the consultation that must be carried out in relation to filling and operating the reservoir]

"As has been established, after the multipurpose company corrected and provided the complete information regarding the area of Embera territory that would be flooded when the reservoir was filled, even if it would not affect the perimeter of this land, it was explained clearly so the indigenous people could be absolutely certain about the loss of resources they would suffer. The few lowland marshes that are periodically filled with fertile silt from the river rising, and which are included in the lands that INCORA granted to the indigenous people as part of the reserve, could only be used for temporary farmland at the times the level of the reservoir would be below the average level designated for the normal operations of the hydroelectric plant.

Despite this, the firm in charge of the project did not recognize the true effects of the project on the fishery resources throughout the area influenced by the hydroelectric project, the long period of time and high cost that would be required to repopulate the rivers in the area with native species (especially severe since they had decided not to remove most of the biomass before filling the reservoir), the effects on the climatic conditions in the basins, or the foreseeable impacts on the morbidity and mortality in the reservoir's zone of influence.

For these reasons, due to the irregularities that occurred in the recognition of the Embera authorities (a matter that this court will consider in a later discussion), and because the process has still not begun to organise a regime applicable to the area of overlap between the National Paramillo Natural Park and the current reserves, the application of Decree 1320 of 1998 to this consultation process would appear from every standpoint to be contrary to the Constitution and the principles incorporated into domestic law pursuant to Law 21 of 1991 [that is, ILO Convention No. 169]; therefore, the Ministries of the Interior and the Environment are ordered to abstain from allowing this and to follow these guidelines in this case: a) the term already agreed must be respected so that the indigenous people's representatives and their communities may draft their own list of impacts from the filling and operation of the reservoir; b) an agreement must be negotiated regarding the prevention of future impacts, the mitigation of those that have already occurred and the foreseeable impacts, compensation for the loss of use and enjoyment of part of the lands in the current reserves, participation in the benefits of the exploitation of the natural resources, and all other issues included in the consultation agenda, within three (3) months following the publication of this judgment on appeal; c) said term may only be extended at the request of the Embera-Katío people of Alto Sinú, the firm in charge of the project, the Ombudsman or the Agrarian Agency, for a reasonable time, that in no case may exceed twice the term established in the previous subsection; d) if during this time it is not possible to achieve an agreement or co-operation on all issues, *"the authority's decision must be free of arbitrariness and authoritarianism, and thus shall be objective, reasonable and in accordance with the constitutional goal required by the State for protection of the indigenous community's social, cultural, and economic identity. In any case, the necessary mechanisms must be put in place to mitigate, correct, or reverse the effects that the measures generated by the authority to the detriment of the community or its members may produce or generate."*

Comments:
This is a complex case, since it deals with multiple aspects related to the impact of the relevant project on the indigenous people.

The Court discussed, in line with ILO Convention No. 169, questions related to respect for the integrity of the territory of the indigenous people, questions related to the autonomy and political representation of the people, questions related to the right of consultation in two proceedings (prior to the approval of the project and before the final execution of the project), and questions related to the effect that the project had and will have on the integrity, culture, territory, and lifestyle of the indigenous community. In all these cases, the Constitutional Court ordered the State and the company to consult the people, indemnify them for the damages already caused, adopt measures to ensure their survival and cultural integrity, and ensure the informed participation of the indigenous people in the decision-making process designed to minimise the impact of the project on the community and compensate them for the inevitable consequences.

In addition to directly citing ILO Convention No.169, the court refers in this case to its previous jurisprudence, such as Judgment SU- 039/97, in which the Court also based its decision on the Convention.

Relevant reports and comments by the ILO supervisory bodies:
The ILO supervisory bodies have dealt in detail with the question of the construction of the Urrá hydroelectric dam in a report adopted by the Governing Body in November, 2001, regarding a representation made under article 24 of the ILO Constitution, in which is was alleged that Colombia failed to respect ILO Convention No. 169 (doc. GB.282/14/4). Moreover, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) made references to this same issue in 1999, 2001, 2003 and 2004.

In report GB.282/14/4, the tripartite committee responsible for examining the representation referred, among other things, to the issue of the lack of prior consultation with the affected indigenous communities on the Urrá project, and noted that the requirement of prior consultation must be considered in light of paragraphs 1) and 3) of Article 7 of the Convention No. 169. The tripartite committee considered that "while Article 6 does not require consensus to be obtained in the process of prior consultation, it does provide that the peoples concerned should have the possibility to participate freely at all levels in the formulation, implementation and evaluation of measures and programmes that affect them directly"[33]. Moreover, the committee referred specifically to the order to convene a consultation process as discussed in Constitutional Court Judgment T-652, which is mentioned in this section. Noting that the governmental authorities and the Urrá company organised separate co-ordination and negotiation sessions for different groups of the Embera-Katío people of Alto Sinú and signed different agreements, the tripartite

33) Paragraph 61 of document GB/282/14/4.

committee emphasised that it would have been desirable "to support a single consultation process with all the legitimate authorities of the Embera Katío people of Alto Sinú, as well as the establishment of a single agreement, as far as possible, with a view to preserving the ethnic integrity of the people"[34]. Finally, it should be mentioned that the tripartite committee, like the Constitutional Court, considered that Decree 1320 of 1998, which governs the prior consultation with indigenous and African-descent communities regarding the exploitation of renewable natural resources within their territory, was in contradiction with ILO Convention No. 169. Therefore, the committee requested the Government modify it, "to bring it into line with the spirit of the Convention, in consultation with and with the active participation of the representatives of the indigenous peoples of Colombia, in accordance with the provisions of the Convention"[35].

34) Ibid. paragraph 63.

35) Ibid. paragraph 68 (a).

COLOMBIA 6

Court: Constitutional Court

Case: Judgment C-088/01, January 31, 2001 (Rapporteur: Martha Victoria Sáchica Méndez).

Keywords: economic, social and cultural rights, positive obligations, indigenous women, social security and health, affirmative action, discrimination.

Summary of the facts:
This case deals with a Presidential challenge to various articles of the legislative Bill "t*o regulate the participation of indigenous peoples in the general social security system of health care*." In accordance with the petition of the President of Colombia, these articles violate the right to equality of low-income people because they give priority to indigenous people and generate a fiscal imbalance to cover health care needs for these populations. The President specifically challenges: i) the exclusion of payment for health care services by people who can probably afford it; ii) that certain pregnant indigenous women and children under 5 years old would be benefited by receiving food subsidies, a benefit that other persons in the social security system do not receive; iii) that setting the payment per person should be based on the quality of being an indigenous person, and not on the basis of the epidemiological profile, risks and cost of the service; iv) that it is likely that the creation of indigenous insurers will not be sufficiently solid to provide the coverage that the service requires; v) that it breaches the principles of the administrative function since it should be the administrative authorities that choose the providers and not the beneficiaries; and vi) that the principle of solidarity is infringed since there is no requirement of co-payment or any user contribution.

The Congress did not accept these objections because the initiative for the Bill was based on the fact the indigenous communities needed a different treatment in the health care system than the one they were receiving, that is, they required care that was adapted to their cultural reality – to their epidemiological characteristics, height, weight, concepts of illness, and the way they handle health care within their community. In addition, the Congress argued that the indigenous communities had an economy based on solidarity and that, pursuant to the provisions of Article 14 of ILO Convention No. 169, the State was obliged to assist the indigenous peoples to manage health care, and therefore, these communities could organise themselves for this purpose.

The Constitutional Court declared the constitutionality of nearly all of the challenged legislative provisions. The Court notes that the unequal treatment given to the indigenous communities as compared to other people in the same situation is justified constitutionally by the principle of diversity that, in terms of health care, is manifested through the concept of illness and the way such peoples manage their economy. The Court also concluded that the principle could not justify a failure to respect the economic, social and cultural rights due to a lack of budgetary provisions. The Court also held that the affirmative action, such as granting food aid to this sector, was due to the high infant mortality rates that occur in these communities. Similarly, and in accordance with the ethnic diversity of these communities, the court held that it is important that they freely choose for themselves their health care provider institutions.

Law applied:
Constitution of Colombia, articles 7, 209, 246, 230; Law 100 of 1993; Decree 23578 of 1995, article 6; Decree 1804 of 1999 article 5(5); ILO Convention No. 169, Article 25.

Relevant considerations of the court:
"In its arguments, the Congress avers that the legislation constitutes an expression of Article 25 of ILO Convention No. 169, and according to this, health services must be organised at a community level, and planned and managed in co-operation with the relevant communities, taking into consideration specific conditions such as "their methods of prevention, healing practices, and traditional medicines". In addition, it explained that the law has established conditions that are stricter than those contemplated in Decree 2357 of 1995. Finally, it stated that "the Ministry of Finance is not correct in attempting to apply Decree 1804, which was designed to solve the issue of insolvency of the large health care provider institutions (Spanish acronym: *EPS*) and if applied in a general way would prejudice the economy of solidarity expressed by the indigenous communities' Subsidised Health Regime Administrators (Spanish acronym: *ARS*), and therefore, there is no reason to prohibit this type of positive discrimination that allows vulnerable groups to have equal conditions of access as compared to the rest of Colombian society in terms of the administration of the resources of the subsidised health regime".

Article 6 of Decree 2357 of 1995 states:

> "The Health Solidarity Companies are authorised to affiliate beneficiaries to the subsidised regime, in order to guarantee provision of the Obligatory Health Plan of the Subsidised Regime (Spanish acronym: *POS-S*), and the National Health Agency has funds equivalent to 100 minimum legal monthly salaries for every five thousand persons affiliated. These funds may be made up by contributions from the members, donations, and excess savings from capital."

Decree 1804 of 1999 (article 5, section 5) derogates from this provision, and establishes that any entity that administers resources for the subsidised regime should have funds of 10,000 minimum legal monthly salaries.

It is clear that the legislator intends to permit the existence of Subsidised Health Regime Administrators created by indigenous communities, in addition to the general requirements stipulated by the Colombian government for the rest of society.

The Presidential objection is not based on constitutional reasons, but on mere convenience. In fact, it is not the responsibility of the Constitutional Court to evaluate -- unless the challenge is supported by empirical data that clearly indicates a constitutional breach -- whether the minimum capital required for Health Administrators created by the indigenous communities is sufficient to properly provide for the obligations arising from the contract for the administration of resources under the subsidised regime. Therefore, article 14 of the Bill is declared enforceable."

Comments:
The interesting aspect of this case is that the Congress is invoking ILO Convention No. 169, in order to justify the constitutionality and defend the arguments regarding the text of legislation approved by the Congress itself, when faced with a Presidential challenge. Even if there is not a majority opinion by the Constitutional Court on ILO Convention No. 169, the statements issued follow the parameters of this instrument in relation to the differential provision of health care services to indigenous communities, the guiding principles of the service, and the possibility of selecting the health care service providers.

COLOMBIA 7

Court: Constitutional Court

Case: Judgment C-418/02, May 20, 2002 (Rapporteur: Alvaro Tafur Galvis)

Keywords: consultation and participation, natural resources, sub-surface resources, lands and territories, status of the Convention under national law.

Summary of the facts:
This is an action to claim unconstitutionality of section 122 of the Mining Code (Law 685 of 2001) which establishes the power of the State mining authority to determine and define, within the indigenous territories, the so-called "indigenous mining areas", in which the exploration and exploitation of the soil and sub-surface minerals must be adjusted to the provisions of the Code for the protection and participation of indigenous communities and groups situated in those territories. According to the plaintiff, the establishment of a power by the mining authority to determine and define "indigenous mining areas" infringes on the right of the indigenous communities to be consulted prior to taking decisions that may affect them. This could also infringe on the ways of life of indigenous peoples. They also allege the infringement of certain constitutional requirements and Articles 56 and 7 of ILO Convention No. 169.

The Constitutional Court notes the strengthened protection to the right of consultation of indigenous peoples as a mechanism to preserve social, cultural and economic integrity of these indigenous communities, based on constitutional requirements and those in ILO Convention No. 169. In its examination of the challenged legislation, the Court recalls the need to interpret it in the context of other articles of the Mining Code, constitutional requirements, and those in ILO Convention No. 169. Thus, it notes that the purpose of the legislation is to establish, within an indigenous territory, a special regime for exploration and exploitation of the natural resources in the soil and subsoil. This regime grants priority to indigenous communities over exploration and exploitation and also provides that in the case of proposals for exploitation by individuals, these must be decided with the participation of the indigenous communities. The Court holds, that in any event, the decision to establish and define "indigenous mining areas" may affect the rights and interests of the community, and therefore, the requirement of prior consultation of the interested community is wholly applicable, in accordance with article 330 of the Colombian Constitution and ILO Convention No. 169.

Law applied:
Constitution of Colombia, articles 1, 79 and 330; ILO Convention No. 169, Articles 6 and 7.

Relevant considerations of the court:
"The right of the indigenous community to participate as a fundamental right is strengthened by ILO Convention No. 169, ratified by Law 21 of 1991, which is intended to guarantee the rights of indigenous peoples over their territory and the protection of their cultural, social, and economic values, as a means to ensure their subsistence as a group. It should be noted that it is up to each State to set out, in the constitution and in the law, the suitable mechanisms to make the participation of the communities effective as an instrument to protect their interests, which as was already mentioned, are a projection of the interests of the society itself and the State. The Court had discussed the scope of Article 6 and 7 of ILO Convention No. 169 in the following terms:

> "Pursuant to Article 6, section 1, subsection a) of ILO Convention No. 169 of 1989 of Concerning Indigenous and Tribal Peoples in Independent Countries, ratified by Colombia by Law 21 of 1991, the State parties have the obligation to consult ethnic groups living in their territories, "*through appropriate procedures, and in particular through the representative institutions, each time there are legislative or administrative measures that may affect them directly*". In addition, Article 7 of the Convention recognizes that such collective groups have "*the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.*"

Thus, there exists in principle a broad international commitment that obliges the Colombian State to carry out the referenced prior consultation process each time that it is expected a legislative or administrative measure might be able to affect directly the ethnic groups that inhabit that territory. At the same time, article 34 of the same treaty stipulates: "*The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.*" That is, the instrument grants the State parties a significant margin of discretion to determine the conditions necessary to fulfil their international obligations that are contained therein. Naturally, this shall be construed in this way to the extent that the parties use this flexibility in such a way they do not fail to comply with the essential objective of their obligations, which in this case, consists of ensuring the effective participation of the ethnic groups in the decisions that concern them: otherwise, the cited article 34 would be given a scope that contradicts the most elemental norms on the interpretation of treaties, such as that set out in article 31(1) of the Vienna Convention of 1969, according to which "*a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and* ***in the light of its object and purpose***" (our emphasis).

> "Given the constitutional organization of the Colombian government, the correct bodies to determine when and how to comply with the mentioned international obligation are, in theory, the Constituent Assembly and the Legislator, since these are the suitable channels for the expression of the sovereign will of the people (article 3, Constitution). Therefore, the Constitutional Court, at the time of determining when it is mandatory to carry out a prior consultation with the ethnic groups, must be subject to the existing constitutional and legal guidelines to the extent they do not nullify the object and purpose of the Convention that has been cited above on several occasions, nor contradict the full force and validity of the fundamental rights of such ethnic groups".

On this same matter, the Court, in the above-cited judgment, notes that the Constitution only recognizes explicitly the mandatory nature of prior consultation in the situation set out in article 330, as follows:

> "Exploitation of natural resources in indigenous territories shall be carried out without weakening the cultural, social and economic integrity of indigenous communities. In the decisions adopted with respect to such exploitation, the government shall foster the participation of the representatives of the respective communities."

Along the same lines as the constitutional purpose assigned to the mechanism of consultation, which constitutionally and legally expresses the special right of participation, the relevant constitutional jurisprudence has also discussed the issue in these terms:

> "it involves the adoption of relationships that foster communication and understanding, characterised by mutual respect and good faith between these communities and the public authorities with a view to encouraging: a) **That the community acquires a full understanding** about the projects designed to explore or exploit the natural resources in the territories belonging to or occupied by the communities and the mechanisms, procedures and activities required to put the projects into operation. b) That **the community also be informed and educated on the way the execution of said projects may have an effect or may prejudice the elements that constitute the basis of their social, cultural, economic, and political cohesion and thereby, the foundation of their subsistence as a group with unique characteristics.** c) That they be given the opportunity to freely and without outside interference, through their members or representatives, consciously evaluate the benefits and disadvantages of the project on the community and its members, be heard regarding their concerns and opinions on the defence of their interests and give their views on the viability of the project. With the above, it is hoped the community participates actively and effectively in the decision taken by the authority, and to the extent possible, this should be process of agreement and co-operation."

The Court also discussed the *scope* of the consultation and noted that:

> "When it is not possible to arrive at an agreement, the authority's decision must be free of arbitrariness and authoritarianism, and thus shall be objective, reasonable and in accordance with the constitutional goal required by the State of protection of the indigenous community's social, cultural, and economic identity. In any case, the necessary mechanisms must be put in place to mitigate, correct, or reverse the effects that the measures generated by the authority to the detriment of the community or its members may produce or generate.
>
> Therefore, merely informing or notifying the indigenous community about a project to explore or exploit natural resources is not equivalent to consultation. The aforementioned guidelines must be fulfilled, and plans for co-operation or agreement with the community must be presented so that the community may indicate, through its authorised representatives, its agreement or disagreement with the project and the ways in which their ethnic, cultural, social, and economic identity will be affected."

(...)

"In line with what is set out above, it was made clear by the Court that while the definition and organization of the "*indigenous mining zone*" in a specific indigenous territory has the direct purpose of determining the specific regime for the exploitation of the natural resources found in the soil or subsoil, this regime must comply with the rule contained in article 330 of the Constitution and the spirit of the dispositions of ILO Convention No. 169 (Law 21 of 1991), and the application of articles 93 and 94 of the Constitution".

Comments:

The judgment offers a good summary of the jurisprudence of the Colombian Constitutional Court in terms of the right of consultation, re-examines the scope of this right, and highlights its deep constitutional roots (and basis in ILO Convention No. 169). When applying the principles in this case, the Court makes an integrated interpretation of the challenged legislation: it declares its compatibility with the Constitution, interpreting it as requiring that a prior consultation be carried out with the interested communities before the mining authority exercise their powers granted by the legislation. According to this interpretation, while the consultation is not mentioned expressly in the challenged article, its text does not prevent the application of the constitutional requirements and those set out in ILO Convention No. 169 that mandate carrying out a consultation when decisions are being made that may affect the rights and interests of an indigenous people or community. This doctrine has been repeated in later judgments (see, for example, Judgment C-891-00, of October 22, 2002).

COLOMBIA 8

Court: Constitutional Court

Case: Judgment SU-383/03, May 13, 2003 (Rapporteur: Álvaro Tafur Galvis)

Keywords: culture and social, religious and spiritual values, consultation and participation, human rights, collective rights, environment, status of the Convention in national law; supervisory procedures of the ILO.

Summary of the facts:
The Organization of Indigenous Peoples of the Colombian Amazon (Spanish acronym: *OPIAC*) filed a petition for the temporary protection of their right to life, identity, and cultural integrity, to free development of the personality, and due process, which they claim were infringed by the President's Office, the Ministry of the Interior, Ministry of Justice, and Ministry of the Environment, the National Council and Department of Narcotics, and the National Police. According to the plaintiffs, aerial spraying with glyophosphate to eradicate illicit crops in the Amazon region has affected the legal crops that are the means of subsistence for the region's inhabitants. In addition, the indigenous communities located there have used the coca plant since time immemorial and grow it on their land, and have also been affected by the fumigation. The authorities also failed to carry out prior consultation with respect to the policy of crop eradication, as set out in ILO Convention No. 169, which also forms part of the constitutionality block.

The defendants affirm, among other arguments, that the indigenous communities did not have to be consulted since in accordance with the provisions of ILO Convention No. 169, the prior consultation must be carried out when there is to be exploitation of natural resources and there are issues of environmental licences and impact studies, which is not the case here. The authorities also note that glyophosphate is a product of low toxicity and there has not been any evidence of damage to human health and, contrary to the plaintiff's allegations, the environmental effect is to restore it after the consequences suffered from the cultivation of illegal crops.

The Constitutional Court determined that the action for the protection of constitutional rights (*tutela*) was a suitable recourse to resolve the conflict relating to the lack of consultation, due to the fact that the Court had established in its own jurisprudence that the right of the indigenous communities to be consulted was a fundamental right and moreover, that the communities are a collectivity with its own rights, so that it is not necessary to prove individual damages. The Court analysed in detail the international law on the rights of indigenous people and the developments in jurisprudence and the law with respect to prior consultation.

The Court concluded that the State had the obligation to carry out a proper prior consultation with the indigenous communities on decisions relating to the Illicit Crop Eradication Programme, which is causing effects in their territories, and that the lack of this consultation affected the fundamental right to diversity and ethnic and cultural integrity, right to participation and to free development of the personality of the indigenous and tribal peoples of the Colombian Amazon region. It therefore ordered the President, the Ministry of the Interior, the Ministry of Justice, the Ministry of the Environment, the Ministry of Housing and Territorial Development, the National Council of Narcotics and all of its departments, the National Department of Narcotics and the National Police, to consult effectively and efficiently with the indigenous and tribal peoples of the Colombian Amazon region on decisions that affect them relating to the Illicit Crop Eradication Programme "*in order to reach an agreement or to obtain their consent on the proposed measures, with the full respect for the principles and rules contained in ILO Convention No. 169*".

In terms of the prejudice related to the environmental damages presumably caused by fumigation, the Court decided that the suitable recourse was not the action for the protection of constitutional rights (*tutela*), but rather the popular action, and therefore the Court did not decide on that question.

Law applied:
Constitution of Colombia, articles 7, 286, 287, 329 and 330. ILO Convention No. 169, Law 21 of 1991, Decree 1050 of 1968, Decree 1320 of 1998, Decree 1397 of 1996.

Relevant considerations of the court:
"[T]he ILO Governing Body decided that Convention 107 should be reviewed and dealt with it in the 1988 and 1989 Conferences of the Organization, producing ILO Convention No. 169, which is founded on the principle that the structure and way of life of the indigenous and tribal peoples "*is permanent and enduring*", and that the international community has an interest to safeguard the intrinsic value of native cultures[36].

The Guide to ILO Convention No. 169[37] summarises the main focus of the Convention in the following terms:

> "*The new Convention promotes respect for the cultures, ways of life, traditions, and customary law of the indigenous and tribal peoples. It assumes that these peoples will continue to exist as part of the nations where they live, maintaining their own identity, structures, and traditions. In addition, it is based on the principle that these structures and ways of life have an intrinsic value that must be safeguarded.*
> ***This instrument also assumes that these peoples can speak on their own behalf, that they have the right to participate in the decision-making processes that affect them, and that their contributions will be beneficial for the country where they are living***" (our emphasis).

It should be noted that Colombia is one of the countries that has ratified ILO Convention No. 169 "*Concerning Indigenous and Tribal Peoples*", which was approved at the 76th International Conference of the ILO that met in Geneva on June 27, 1989[38], an instrument that deals with the rights of the indigenous peoples on their land, their participation, education, culture and development, within the framework of the global context of safeguarding their identity, in order that the indigenous people in the world can enjoy their fundamental rights in the same way as

36) Idem.

37) article 31 of the Vienna Convention on Treaty Law – Laws 32 of 1985 and 406 of 1997 – states a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, and also highlights the cited rule that the preamble is relevant when looking at the integral application, the interpretation and the practices of each instrument.

38) ILO Convention No. 169 has been ratified by Norway, Mexico, Colombia, Bolivia, Costa Rica, Paraguay, Peru, Honduras, Denmark, Guatemala, the Netherlands, Fiji and Ecuador. It entered into force on September 6, 1991, twelve months after the date on which the ratifications by the two first countries (Norway and Mexico) were registered.

the rest of the population in the member States, and taking into consideration the distinctive contributions of these peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding (Preamble).

Fortunately, the Colombian State, like the other member countries of the mentioned Convention, is obliged to adopt the measures necessary so that the indigenous and tribal peoples living in the national territory can assume the control of their institutions, ways of life, and economic development, providing them with the instruments that will foster the strengthening of their identity, language and religion, in order to safeguard their members and their goods, culture, and territories.

The right of these people to be consulted on the decisions that affect them has special connotations and meaning in ILO Convention No. 169, and is an aspect that was not considered in Convention 107, thus representing one of the important differences between the two instruments. Indeed, Convention 107 "*assumed that the problem of indigenous and tribal populations was one that would disappear with the gradual integration of these peoples into the societies in which they lived*", thus presuming that the States could take decisions affecting the structure of the indigenous peoples and their development.

In contrast, ILO Convention No. 169 "*assumes that these peoples can speak for themselves, that they have the right to participate in decision-making processes where the decisions affect them, and that their contribution shall be considered beneficial for the country where they are living*[39]", thus, Articles 6[40] and 7[41], since they set out the duty to carry out prior consultation and define the way in which this participatory mechanism should be exercised, are considered to be fundamental by the Guide to ILO Convention No. 169.

With respect to Article 6, the cited Guide states:

> "Article 6 requires governments to establish means by which these peoples can freely participate at all levels of decision-making in elective and administrative bodies, too at least the same extent as other sectors of the population. It also requires governments to consult indigenous and tribal peoples, through adequate procedures and their representative institutions, whenever consideration is given to legislative or administrative measures that may affect them directly. Consultations on the application of the Convention have to be undertaken in good faith and in a form appropriate to the circumstances, with the aim of achieving an agreement or consent to the measures proposed."

And on Article 7, the document explains:

> *"Consultation with indigenous and tribal peoples is also obligatory in the following situations:*
> *-before undertaking any type of exploration or exploitation of minerals and/or other natural resources that are found on the lands of said peoples;*
> *-each time it is necessary to move indigenous and tribal communities from their traditional lands to another place; and*
> *-before designing and carrying out educational and training programmes for the said peoples."*

In the present case, it is relevant to note that Article 8 and 9 of ILO Convention No. 169[42] require that the member countries carry out affirmative action that foster the recognition of the right of indigenous and tribal peoples and in comparison, the Guide for application of the instrument refers to the issue as follows:

> *"The Convention states in Article 8(3) that indigenous peoples must exercise the same rights granted to all citizens and assume the corresponding duties. However, in practice these rights are often denied. This is due to the fact that these peoples are not aware of their rights under domestic legislation, or of the procedures used to enforce such rights. They are often punished for crimes that they do not understand. Between members of indigenous and tribal communities and most judges, communication and mutual understanding are difficult since they have no common language, and the crimes defined in the domestic legislation do not match those in their customary law. In order to remedy this situation, the Convention states in Articles 8(2) and 9(1) that indigenous and tribal peoples have the right to maintain their own customs and institutions, and even the methods they used traditionally to repress the crimes committed by their members, provided they are compatible with the national legal system and with internationally recognized human rights. Conflicts that may arise from the application of these provisions shall be resolved through ad hoc procedures. The governments must also, when applying domestic laws and regulations and applying criminal sanctions, take into account the social, economic, and cultural characteristics of the indigenous and tribal peoples. These peoples, according to Article 12, must be able to take legal proceedings for the effective protection of their rights, and shall take the relevant measures to be understood and be understood in such proceedings. To this end, governments shall provide interpretation services or other effective means."*

39) A Guide to ILO Convention No. 169, quoted in 7.

40) ILO Convention No. 169, article 6: "1. In applying the provisions of this Convention, Governments shall:
(a) Consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
(b) Establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
(c) Establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.
2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

41) ILO Convention No. 169, article 7: "1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development, which may affect them directly.
2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.
3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.
4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit."

42) article 8: "1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.
2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.
3. The application of paragraphs 1 and 2 of this article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties."
Article 9: "1. To the extent compatible with the national legal system and internationally recognized human rights the methods customarily practiced by the peoples concerned for dealing with offences committed by their members shall be respected.
2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases."

It should also be noted that in order to limit the application of the Convention, section 2 of Article 1[43] of the Convention, in order to determine whether the group involved can be deemed to be a "people", it uses as a fundamental criteria – although not the sole criteria – the degree of self-identification as indigenous or tribal, since as is noted in the Guide, the term "peoples" was agreed upon after "*extensive discussions and consultation both in meetings and outside (…) since this recognizes the existence of societies organised with their own identity, instead of simple groups of individuals who share certain racial or cultural characteristics.*"[44].

ILO Convention No. 169 is the most important binding international instrument on the human rights of indigenous and tribal peoples[45], i) because "*the contracting States do not obtain any advantage or disadvantage or have any self-interest except for their common interest*[46]", ii) because "each of the substantive provisions generates obligations and the fulfilment of these must be certified by periodic reports sent to the ILO by the governments and studied by independent or tripartite supervisory bodies[47]", and iii) since together with 32 other treaties, also ILO treaties, it constitutes part of the international Conventions against discrimination.

In addition, the instrument has had a significant influence in the constitutional recognition of the rights of indigenous and tribal peoples for their cultural, social, and economic survival[48]."

(…)

"In co-operation with United Nations committees in charge of supervising the application of recognized human rights in the afore-mentioned agreements – the Human Rights Committee, Committee on Economic, Social and Cultural Rights, Committee for the Elimination of Racial Discrimination, Committee on the Rights of the Child, and the Committee on the Elimination of Discrimination Against Women – when analysing the reports by the States on the application of the treaties, they examined the indigenous issues with special care.

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

44) The Guide also warns that "ILO Convention No. 169 does not impose any limitations on the right of self-determination of these peoples, and does not declare itself in favour or against this right. In other words, there is no provision in ILO Convention No. 169 that is incompatible with any international legal instrument that may define or establish the rights of indigenous and tribal peoples to self-determination" – A Guide to ILO Convention No.169, ILO and International Centre for Human Rights and Democratic Development.

45) In the list of International Human Rights Treaties of the United Nations, updated in December 2001, ILO Convention No. 169 is number 65 on the list – Course in International human rights, Villán Duran Carlos, Editorial Trotta, Madrid 2002.

46) International Court of Justice Opinion of May 28, 1951, regarding reservations to the Convention for the Prevention and Punishment of the Crime of Genocide.

47) ILO, Multidisciplinary Team (MDT) "Working Towards the Recognition of Identity and Indigenous Community Rights in Latin America: A Synthesis of evolution and topics for reflection", Arturo S. Bronstein.

48) Colombia 1991, Paraguay 1992, Peru and Chile 1993, Bolivia and Argentina 1994, Nicaragua 1995, Ecuador 1998, Venezuela 1999.

Reports were also presented by the governments to the ILO Commission of Experts on the Application of Conventions and Recommendations, which is comprised of independent members, in relation to the application of ILO Convention No. 169, a group that also fostered a dialogue between the ILO and the national authorities so they could evaluate the strengths and measures that the ILO Members States adopted in order to fulfil the provisions of the Convention.

In this regard, it should be noted that various representations were submitted to the Governing Body of the ILO, based on article 24 of the Constitution of the International Labour Organization, during the 276th and 277th meeting in November, 1999 and March, 2000 in accordance with recommendations by the roundtable, at which the Colombian Medical Union Association (Spanish acronym: *ASMEDAS*) and the Workers' Central Organization of Colombia (Spanish acronym: *CUT*) alleged the Colombian government infringed ILO Convention No. 169 on Indigenous and Tribal Peoples[49].

These matters led to the approval of the report by the Director-General, approved at the 282nd meeting of the Governing Body, requesting the Colombian government, among others, to modify Decree 1320 of 1998 "*to make it conform to the spirit of the Convention, with the active participation of and in consultation with the representatives of the indigenous and tribal peoples (..).*""

(...)

"4.2 Legal and jurisprudential development of the right of indigenous and tribal peoples to prior consultation
4.2.1 Constitutional principles and rules and their interpretation in constitutional jurisprudence
a) Pursuant to Law 21 of March of 1991, the Congress approved ILO Convention No. 169, which established, as has been mentioned, that among other provisions the governments must carry out prior consultation with the indigenous and tribal peoples each time there are planned legislative or administrative measures that may directly affect these peoples.

These would be measures such as those stipulated in the Preamble of the Convention that correspond to the "evolution of international law and the changes occurring in the situation of the indigenous and tribal peoples in all regions of the world *(...) in order to eliminate the trend toward the acceptance of previous legal rules*", since the same section of this instrument recognizes the desire to make effective "*the aspirations of these peoples to take control of their own institutions, ways of life and their economic development, and to strengthen their identities, languages, and religions within the framework in which they live.*"

The aspects mentioned in the Guide to ILO Convention No. 169 mention prior consultation as one of the fundamental aspects of the Convention, and note that constitutional jurisprudence has

49) The referenced claims (docs. GB 282/14/3 y 282/14/4 focused on i) the construction and entry into operation of the Urrá hydroelectric project, as well as the circumstances in which the government carried out the prior consultation process with the indigenous communities affected by the project –T-652 of 1998; ii) on issuing Decree number 1320 of 1998 on prior consultation –idem; iii) on the construction of the Troncal del Café highway that crosses the indigenous community of Cristianía without having previously consulted the interested community -T-428 of 1992; and iv) on the issuing of the environmental licence for oil exploitation activities by the Occidental de Colombia company without having carried out the requisite prior consultation with the indigenous U'wa people–SU-039 of 1997 (notes 64, 95, 99, 100, 105, 114, 159, 160 and 162).

defined it as a basic tool to "*preserve the ethnic, social, economic, and cultural integrity of the indigenous communities in order to protect their survival as a social group.*"[50)]

Therefore, the progress in the law governing the recognition of indigenous and tribal peoples within the international community undoubtedly constitutes a precedent in terms of defining Colombia as a nation under the rule of law, organised in the form of a unitary State that is decentralised, with some autonomy vested in its territorial entities, democratic, participative, and pluralistic, and speaks of the recognition and protection of the ethnic and cultural diversity of the Colombian nation – in articles 1 and 7 of the Constitution – provisions that have been interpreted in constitutional jurisprudence as "*fundamental principles that represent a mandatory frame of reference for the interpretation of constitutional requirements*[51)]."

(…)

"It is of particular importance in the present case to refer to ILO Convention No. 169[52)], specifically, the right of indigenous and tribal peoples to participate in prior consultation in accordance with the Constitution and the constitutionality block and pursuant to the dispositions in articles 93 and 94 of the constitutional system, not only because the instrument containing the provision is from the International Labour Organization and sets out the labour rights of these peoples in article 53 of the Constitution but also i) because the participation of the indigenous communities in decisions taken in respect of the natural resources in their territories is set out in article 330 of the Constitution, and this can not be understood as the negation of the right of these peoples to be consulted in other aspects inherent to their subsistence as a recognisable community pursuant to article 94 of the Constitution, ii) because said Convention is the most recognized instrument against the discrimination that is suffered by indigenous and tribal peoples, iii) because the right of indigenous peoples to be consulted prior to administrative and legislative decisions that directly affect them is a measure of affirmative action that the international community has adopted and recommended to combat the origins, causes, forms and modern manifestations of racism, racial discrimination, xenophobia, and the related forms of intolerance that affect the indigenous and tribal peoples (...)".

(...)

"It is worth remembering that the indigenous and tribal peoples, once they achieved the recognition of the international community for their right to not be assimilated by dominant cultures, began the struggle to have this progress included in constitutional instruments, therefore it is not reasonable to assume that the 1991 Constitution involves a move backward in this process, which moreover, as has been explained, is progressing in the international community toward full self-determination.

Thus, the mechanism of prior consultation and the right of participation of the indigenous peoples as a concrete and specific action, together with the conditions in which this must take place according to the terms of ILO Convention No. 169, its Guide, and the recommendations of the

50) Judgment SU-039 of 1997, Rapporteur Antonio Barrera Carbonell –note 64.

51) Judgment T-380 of 1993, Rapporteur Eduardo Cifuentes Muñoz.

52) Regarding the constitutionality block that is comprised of the ILO Conventions together with the Constitution, the following may be consulted, among others: Judgment T-1303, Rapporteur Marco Gerardo Monroy Cabra.

ILO, and in accordance with the stipulations of the articles of the Constitution regarding the regular participation of indigenous peoples, and their specific participation, are binding on the State:
- Because Article 6 of ILO Convention No. 169, ratified by Law 21 of 1991, provides that the indigenous and tribal peoples have the right to prior consultation on administrative and legislative decisions that affect them, without limitations.
- Given that none of the provisions of the Convention can result in the assimilation of the indigenous and tribal peoples into the majority culture.
- Given that the rights and duties consecrated in the constitutional system must be interpreted in accordance with international treaties on human rights ratified by Colombia.
- Because ILO Convention No. 169 is an international human rights instrument and is the most important instrument of this type regarding the respect of the rights of ethnic minorities."

(…)

"Moreover, in accordance with article 94 of the Constitution, the participation set out in article 330 of this instrument is a development of the prior consultation requirement established in ILO Convention No. 169, regardless of the way this mechanism, which is inherent in the very existence of the indigenous and tribal peoples, is expressed in all the rights and guarantees that the constitutional system recognizes for these peoples, whether merely listening to them in order to arrive at an agreement, or obtaining their consent to the proposed measures, and in this way the multicultural and multi-ethnic character of the Colombian State is protected (Article 6 of ILO Convention No. 169, articles 1 and 7 of the Constitution).

Finally, Article 13 of ILO Convention No. 169 stipulates that when applying the terms of the agreement, the governments shall respect the importance that the relevant indigenous peoples place on their cultures and spiritual values as related to their lands and territories that they occupy or use in some other way, and pay special attention to the collective aspects of this relationship.

The foregoing does not imply that the court is ignoring the right of the indigenous and tribal peoples to prior consultation when there are proposed projects to exploit the natural resources of their ancestral territories, and on the contrary i) the Constitution specifically mentions this type of consultation, ii) the importance of it has been recognized in the constitutional jurisprudence[53)], and iii) the strict observance of this type of participation is of concern to the international community, because the effects of mining and large projects on indigenous territories without prior consultation "(…) threatens to displace or has already displaced hundreds of thousands of indigenous and tribal peoples (…)" from their lands.[54)]

53) In Judgment SU-039 of 1993 this Corporation filed an action for protection of constitutional rights against the right of the U'wa community to be consulted before the issuing of an environmental license over their territory. In this case, the court noted: "(..) the participation of the indigenous communities in decisions that may affect them relating to the exploitation of natural resources, is noteworthy in that the mentioned participation through the mechanism of consultation acquires the connotation of a fundamental right, since a basic instrument is created to preserve the ethnic, social, economic and cultural integrity of the indigenous communities and thus, to guarantee their continuing existence as a social group." In addition, in Judgment T-652 of 1998 this protected the Emberá Catio community since the environmental body had issued a license for the construction of a hydroelectric project in their territory without the requirement of prior consultation (note 92).

54) An International Agenda, Burger Julian, official in charge of the program to benefit indigenous peoples in the United Nations Center for Human Rights, in "Study on the Peoples" Cultural Survival 1993, Bellaterra editions 2000, Barcelona.

What this means is that the fundamental right of indigenous and tribal peoples to be consulted on legislative and administrative decisions that may affect them directly, in terms of the cultural, social and economic integrity of the indigenous cultures, should be construed broadly in terms of the meaning of participation and the protection of ethnic and cultural diversity in Colombia, which includes the specific mechanism regarding decisions on the exploitation of natural resources in indigenous territories."

(…)

Therefore, the decisions in question must be revoked, partially, to provide constitutional protection over the cultural integrity of the indigenous and tribal people of the Colombian Amazon, through the mechanism of prior consultation on the measures relating to the Illicit Crop Eradication Programme, which affects them directly.

This protection has to include all stages of the consultation, including the aspects of the procedures to be followed, because as was determined in Judgment C-410 of 2002, previously quoted, and also as was considered by the Commission of Experts that the ILO Governing Body designated to examine the claims presented against the government regarding the application of ILO Convention No. 169, "*although Article 6 does not require achieving consensus on the process of prior consultation, it does contemplate that the interested peoples should have the opportunity to participate freely at all levels of the design, application, and evaluation of the programmes that affect them directly*" –GB.282/14/4. 61".

(…)

"Thus, in line with ILO Convention No. 169, the consultations ordered cannot be understood as a mere formality, given that carrying them out in good faith means that the indigenous and tribal peoples of the Colombian Amazon be informed about the content of the Programme that is taking place in their territories in order to obtain their consent on the impact of the measures on their habitat and on their cognitive and spiritual framework.

They must also be made aware of the measures currently taking place and all the implications related to them, in order that these peoples are able to consent to the definition and continuation of the Programme, to discuss the different proposals relating to the Programme and also be able to formulate alternatives.

It should be noted that the right to prior consultation that is set out in ILO Convention No. 169, does not include the right of indigenous and tribal peoples to veto legislative and administrative measures that affect them; rather, it is an opportunity for the State parties to consider and evaluate the positions that the members and representatives of national ethnic minorities have on their decisions, thus encouraging the parties to meet, discuss, and if possible, arrive at an agreement.

The consultation ordered, therefore, cannot be used to impose a decision or to avoid fulfilling an obligation, but rather must be understood as a suitable occasion that should not be wasted for the governmental bodies responsible for authorizing, executing and supervising the State policy of eradication of illicit crops, to consider the right of the indigenous and tribal peoples to explain their views on the elements that such policy should include, with a view to respecting their right to cultural integrity and the autonomy of the authorities in their territories."

Comments:
This is one of the constitutional judgments to develop the application of ILO Convention No. 169 in greater detail. Based on that treaty, the Court arrives at the conclusion that any legislative decision affecting the indigenous peoples and communities must be subject to consultation since consultation is considered a "broadly construed" mechanism for participation.

Besides quoting extensively from ILO Convention No. 169, the Constitutional Court also used the Guide to Convention No. 169 prepared by the ILO. The Court also mentioned the recommendations of the ILO Governing Body, which emerged from representations presented by Colombian union organizations alleging a breach of ILO Convention No. 169 by the Colombian Government.

The Court also presented an illustrative summary of the jurisprudential developments in the area, specifically mentioning Judgments C-169 of 2001, C-418 of 2002, SU- 039 of 1997, SU-510 of 1998, T-488 of 1992 and T-422 of 1992 as relevant precedents.

COLOMBIA 9

Court: Constitutional Court

Case: Judgment T-603/05, June 9, 2005 (Rapporteur: Clara Inés Vargas Hernández)

Keywords: elections, consultation and participation, political organization, institutions, indigenous children and adolescents, access to justice.

Summary of the facts:
Two indigenous adolescents, aged 16 and 17 years old, filed an action for the protection of constitutional rights (*tutela*), alleging the infringement of their fundamental right to express their opinion, to participation, voting rights, right to ethnic, cultural, social and economic identity, and survival of indigenous peoples, rights of the child, and equality rights. They complain that the way the elections were held in the indigenous community to which they belong prevented more than half of eligible voters from voting, due to organizational problems and political manipulation by the authorities. They request the election be annulled and held again, and that the inauguration of the mayor elected in that election be postponed. It should be noted that, in accordance with the practices and customs of the indigenous community, the right to vote may be exercised as of 15 years of age, as opposed to the general rule that provides the voting age for citizens is 18 years old.

The Court underlines the fundamental character of the right to vote and to participate, and reaffirms the right of the indigenous communities to maintain their practices and customs and their cultural identity. It also points out that although the indigenous communities enjoy autonomy in the election of their authorities in accordance with their own practices and customs, it is also their duty to guarantee the proper, ethical, and efficient organization of the elections, in such a way as to facilitate the right to vote for all members of their community.

In the present case, the Constitutional Court accepts as proven the stated facts and considers that the problems existing with the electoral mechanism designed according to the practices and customs of the community have violated the fundamental rights as alleged and in particular, the right to participation and the right to vote, since the exercise of these rights was unjustifiably limited, and a significant number of people belonging to the community had their right infringed since they were also unable to vote for the same reasons. The Court therefore ordered the community authorities to take the necessary measures to guarantee all members free exercise of their voting rights, in accordance with the democratic principle of citizen participation.

Law applied:
Constitution of Colombia, articles 1, 2, 40, 258 and 330; ILO Convention No. 169, Articles 2, 4, 5, 6, 7 and 8.

Relevant considerations of the court:
"In terms of international law, ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, ratified by our country pursuant to Law 21 of 1991, refers to the autonomy of indigenous communities and the recognition of fundamental constitutional rights in their territories, as a limit on the principle of ethnic diversity, while recognising the aspirations of these peoples to assume control of their own institutions and way of life, as well as their economic and social development, and to maintain and strengthen their identities, languages, and religions.

Thus, the mentioned international instrument provides that governments must assume the responsibility to develop, with the participation of the interested peoples, a co-ordinated and systematic action "*with a view to protecting the rights of these peoples and to guarantee respect for their integrity*", and these actions must include measures that promote the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions; (Article 2, subsection b); they must also adopt special measures as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned (Article 4, section 1); in addition, the State parties must respect the integrity of the values, practices and institutions of these peoples (Article 5, subsection b); establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose (Article 6, subsection c).

In particular, the Convention guarantees the right of the indigenous communities to "*decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development*" (Article 7, section 1).

It also provides that "*in applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws guaranteeing the right to retain their own customs and institutions*", providing these are not incompatible with the fundamental rights defined by the national legal system or with internationally recognized human rights (Article 8 sections 1 and 2)."

Comments:
Two aspects of the judgment should be highlighted. The first is the legal protection of the fundamental right of adolescents to vote, as a direct application of indigenous practices and customs. While the Colombian Constitution does not guarantee the right of adolescents to vote, the Constitutional Court, implicitly employing the *pro homine* principle, extends the action for the protection of constitutional rights to cover the fundamental right of adolescents to vote, in accordance with indigenous customary law.

The second aspect is the subjection of the autonomy of indigenous communities, in this case regarding the election of their authorities, to constitutional control, such as the guarantee of the rights of the members of their community.

In both cases, the Constitutional Court finds support in ILO Convention No. 169, using it as a general framework for interpretation.

COLOMBIA 10

Court: Constitutional Court

Case: Judgment T-737/05, July 14, 2005 (Rapporteur: Alvaro Tafur Galvis)

Keywords: consultation and participation, institutions, political organization, access to justice, ILO supervisory procedures.

Summary of the facts:
The petitioners are authorities of the Yanacona Villamaría de Mocoa Indigenous Village who filed an action for the protection of constitutional rights (*tutela*) against the Municipal Mayor's Office of Mocoa, alleging violations of their fundamental rights to petition, free development of the personality, equality, due process, and the principle of respect and recognition of ethnic and cultural diversity. They state that as members of the Yanacona Indigenous People, the members of the village, after obtaining the approval of the Village Head and the Indigenous Regional Organization, requested the Mayor to recognize them as the authority, in accordance with the law in force. The Mayor rejected the petition, since he had previously recognized other authorities of this same Yanacona Villamaría Indigenous Village. The petitioners, however, note that the "village and the recognized authorities" are a group of families that have separated from their indigenous group and have abusively seized the name and rights over the village. The claimants requested the Mayor of Mocoa to revoke the act that had recognized this other person as the governor of the Yanacona Village, and to recognize the claimants as the legitimate authorities. The Mayor also rejected the new petition, arguing that the request to revoke had been presented too late and that the recognized authority of the village had already taken office.

The Constitutional Court mentions the fundamental right to recognition and the special protection to be given to ethnic and cultural diversity, given the plurality of indigenous peoples living in Colombia. It also recalls the obligation of the State, established under ILO Convention No. 169, to conduct prior consultations with the political authorities of the ethnic and indigenous communities, with respect to all decisions involving their interests, using mechanism that guarantee the direct and active participation of all members of these communities.

The Constitutional Court held that, given the conflict between the various groups in the community, the Mayor should have called a consultation meeting. Therefore, the lack of this consultation meeting in accordance with ILO Convention No. 169 constitutes for the Constitutional Court an infringement of the rights of the claimants to diversity, ethnic and cultural integrity, and due process. The Court ordered that the consultation process be initiated and then a consultation with the Yanacona people be undertaken, with the prior assistance of the Colombian Institute of Anthropology.

Law applied:
Constitution of Colombia, articles 7, 8, 9, 23, 68, 70, 72, 329 and 330; ILO Convention No. 169, Article 6.

Relevant considerations of the court:
"In this measure, the protection of the territories of these indigenous or ethnic communities is reflected in the controlled exploitation of the existing natural resources and in the guarantees of economic, social, and educational development and of health, which must benefit these communities. In addition, the State must at all times and for all effects, carry out prior consultation with the political authorities in the ethnic and indigenous communities in the country, regarding all decisions that may involve their interests, whether political, social, economic, or cultural interests, and for this purpose must develop consultation mechanisms that guarantee the direct and active participation of all members of these communities, as set out in Article 6 of ILO Convention No. 169, as ratified by Law 21 of 1991: [quote of the article]

(...)

Thus, there is a special respect expressed for multiculturalism in our country, involving the full application of constitutional duties imposed by the State to benefit these social groups and extending this commitment to international treaties that have been signed in this area.

In this way, Law 21 of 1991 ratifying ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries imposes on those States where indigenous populations exist, the duty to assume the responsibility to develop, with the participation of the interested peoples, co-ordinated and systematic actions intended to protect their rights and guarantee the respect of their integrity. These actions must include, as is set out in Law 21 of 1991, encouragement for and making fully effective the social, economic, and cultural rights of these peoples, respecting their social and cultural identity, customs and traditions, and their institutions".

(...)

"Therefore, the constitutional protection and ratification by the Colombian State of international legal instruments that foster the integrity of indigenous peoples, is intended first and foremost to ensure that these peoples preserve their culture, and social and economic framework according to their own world vision in an autonomous and independent fashion, respecting their right to be different. This is the reason these people have a guarantee of their culture and its survival going forward.

Thus, the importance of ILO Convention No. 169 of 1989 and in particular, the importance of the prior consultation mentioned in Article 6, lies not only in the fact that this process of consultation must occur prior to the events when dealing with the exploitation of existing natural resources in the territory, but also because this prior consultation must be extended to apply to all administrative and legislative decisions that affect or involve these minorities' interests, even when they are different that those set out in article 330 of the Constitution, since this will also guarantee their right to identity. In this way, the prior consultation set out in ILO Convention No. 169 will include all relevant cases where the interests of indigenous people are at stake."

(...)

"In addition, the consultation process that the authorities carry out with the indigenous peoples on decisions that affect their interests must be preceded by consulting them to determine how

such consultation process will be carried out. Clearly, the Colombian government must take into account that these prior consultation processes can not conform to one simple model applying across the board to all indigenous peoples, since in order to give effective application to ILO Convention No. 169 and in particular, to the provisions contained in Articles 6 and 7 of the instrument, the consultation processes must first of all guarantee the practices and customs of the indigenous peoples, respecting the methods or decision-making processes that they have developed.

In this context, it must be noted that since prior consultation by the State was not carried out before issuing Decree 1320 of 1998, regulating the prior consultation process with the indigenous and Negro communities on the exploitation of natural resources in their territory, this led the ILO Governing Body to examine representations made by the Colombian Medical Union Association and the Workers' Central Organization, and it was recommended the Government modify Decree 1320 of 1998, making it conform to ILO Convention No. 169, and that for this purpose it should first consult the indigenous peoples of Colombia. It also urged the Government to establish "*consultation in each concrete case together with the interested peoples, any time there are legislative or administrative measures planned that might affect their interests directly, before undertaking or authorising any programme for exploration or exploitation of the existing resources on their lands.*"

In this way, the participation of indigenous peoples in the decision-making process of the Colombian government, whenever their interests are involved, should be carried out within the framework of strongly protective international and constitutional law and not be a mere legal exercise to respect the right to defence of those who might be affected by State action, because this prior consultation is meant to achieve the effective protection of the collective interests and fundamental rights of these communities.

Together with the consultation processes that the State must carry out in each particular case, and whenever one of its acts involves or affects the interests of indigenous peoples, it should also be noted that social or political organizational processes with each of the groups or indigenous peoples, must be based on their internal rules or principles, which is intended to foster the protection and development of their culture, ideology, and ancestral customs, thus ensuring that the multiculturalism mentioned in the Constitution and guaranteed specifically in article 7 of the Constitution, shall endure. For this reason, the prior consultation processes with the indigenous peoples and the form in which the consultation should occur, must also be the object of a prior consultation with these indigenous peoples in order to comply with the dispositions of ILO Convention No. 169".

(...)

"Therefore, and given all the foregoing reasons, the Municipal Mayor of Mocoa, when faced with a conflict of this type where the interests of the Yanacona indigenous community are at stake, shall immediately proceed to call for a consultation with the parties involved, in accordance with ILO Convention No. 169 of 1989 ratified by Law 21 of 1991, and in accordance with various judgments of this court".

(...)

"Thus, to the extent that the claimant did not apply the provisions contained in ILO Convention No. 169 at the appropriate time, in particular those related to the prior consultation that should be carried out with the Yanacona community, a consultation should have been organised immediately, as soon as it became clear there was a conflict between the groups into which the village had been divided."

Comments:
In addition to confirming principles of interpretation already established in previous cases, this judgment is interesting because the Constitutional Court is enforcing the obligation of consultation with the indigenous communities pursuant to Article 6 of ILO Convention No. 169, to a conflict between various groups in the same indigenous people, that is, to an intra-community conflict and not, as in the other cases, to a conflict between the community and authorities outside the community.

It is also worth noting that the judgment makes reference to the recommendations made to Colombia by the ILO Governing Body, originating from a representation made under article 24 of the ILO Constitution alleging breach of the duty of prior consultation with indigenous people before modifying legislation that affects them.

COLOMBIA 11

Court: Constitutional Court

Case: Judgment T-778/05 of July 27, 2005 (Rapporteur: Manuel José Cepeda Espinosa)

Keywords: elections, culture and social, religious and spiritual values, special measures, consultation and participation, political organization, customary law, indigenous women, urban areas.

Summary of the facts of the case:
This is an action for the protection of the constitutional rights (*tutela*) filed against a judgment overturning the election of a candidate to councilwoman (member of the City Council) in the city of Bogotá, for not meeting the minimum age requirement (25 years) set out in the decree regulating the conditions for the election of councilpersons. The candidate elect, of indigenous Arhuaco origin, cites the unconstitutionality of enforcing the age requirement article in her case and, consequently, is requesting that the judgment be vacated and that she be permitted to take the elected office. According to the appellant, the requirement as applied to the indigenous candidate violates the indigenous peoples' right to cultural identity, the multiethnic and multicultural character of Colombia and her political rights.

The Court has gathered jurisprudence on the multiethnic and multicultural character of Colombia in accordance with Colombia's Political Constitution and ILO Convention No. 169. The Court explains various aspects of indigenous peoples' right to cultural identity, indicating that – according to the Constitutional Court's own jurisprudence - it is a fundamental and constitutionally protected right. It also stresses that one of the possible consequences of indigenous peoples' right to cultural identity is the establishment of exceptions to general standards to which the rest of the community is held, when those standards contradict the cultural values of the community. In terms of the territorial scope of application of the right to cultural identity, the Court maintains that this right is not limited to the place where the community is located, given that the principle of ethnic and cultural diversity "is the foundation of a peaceful and harmonious coexistence that respects pluralism anywhere in the country, as it is a defining principle of the social and democratic rule of law." Although some expressions of the right to cultural identity might be limited to a community's territory (in particular, those directly related to territory), the Court states that such is not the case with the right to cultural identity in the context of political participation.

In this particular case, the Court accepted the finding – based on an assessment by anthropological experts – that the appellant is indigenous and that in the Arhuaca community, maturity in the political sphere is achieved "when, having gone through the rituals of baptism and menstruation, one shows signs of wanting to be publicly active". The Court also warns that the minimum age requirement was not established by the Constitution but by a decree. The Court concludes that the enforcement of the minimum age requirement for councilpersons violates the appellant's right to effective enjoyment of the right to cultural identity, and decides that in this case, an exception to this requirement must be made for ethnocultural diversity. According to the Constitutional Court, "as the right to cultural identity in the exercise of political representation is not limited to a territorial area nor rescinded for membership in a political movement that is not exclusively indigenous, the petitioner can exercise said right in accordance with the customs of his or her community". Consequently, the Court grants the legal protection, suspends the consequences of the decision overturning the election of the appellant, and stipulates that she take the office for which she was elected.

Law applied:
Political Constitution of Colombia, articles 1, 2, 7, 63, 70, 108, 171, 176, 246, 329 and 330; ILO Convention No. 169.

Relevant considerations of the court:
"In implementation of the principle of cultural diversity, indigenous communities hold fundamental rights as collective subjects. The 1998 Judgment SU-510 illustrates this conceptual breakthrough, in addition to unifying the jurisprudence on the topic so far.

The 1998 Judgment SU-510 reviewed the case of some members of the Ika community, who abandoned their traditional religious beliefs to accept the evangelical religion. The plaintiffs alleged that the Arhuaca authorities punished them by hanging them from trees, among other things, and that the evangelicals' right to profess their religion was being violated. The Court decided to protect the right to cultural and ethnic diversity, finding a valid limitation to the right to freedom of religion. The Court found that it was permissible for traditional authorities that prohibited religious proselytism in their territory to punish their members for external acts that conflict with the Ika religion and, therefore, with the right of the indigenous population to preserve its cultural identity, given the importance of religion in the community. In its judgment, the Court declared as follows on the principle of ethnic and cultural diversity:

> 43. Generally, the Corporation has understood that articles 1 and 7 of the Constitution establish the principle of respect for ethnic and cultural integrity and diversity, and from which are derived constitutional articles 8 (protection of the cultural wealth of the nation), 9 (the peoples' right to self-determination), 10 (official languages and dialects of ethnic groups), 68 (respect for identity in matters of education), 70 (culture as a foundation of Colombian nationality and recognition of the equality and dignity of all cultures) and 72 (protection of the archaeological heritage of the nation). In this regard, it goes without saying that the quoted constitutional requirements on which the special protection afforded indigenous communities are founded, have been strengthened and complemented by the provisions of the ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, adopted by Colombia through Act 21 of 1991."

(...)

"Another expression of the right to cultural identity that has been the subject of many pronouncements by the Constitutional Court is the indigenous communities' right to be consulted through appropriate procedures and, in particular, through representative institutions that respect their political organization, whenever consideration is being given to measures which may affect them directly in their territories in certain matters defined by law; a right that has been qualified as a fundamental right of the indigenous communities. In this regard, the jurisprudence

has declared that the 1989 ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, ratified by Colombia through Act 21 of 1991, is part of the constitutionality block, backing protection of the principle set out in article 7 of the Constitution."

(...)

"Another expression of the right to cultural identity is indigenous peoples' right to self-determination. The right to self-determination is a collective right that falls on the people and which has been recognized in the international treaties adopted and ratified by Colombia, such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and ILO Convention No. 169, as well as article 330 of our very own Constitution. The indigenous communities' right to self-determination has been tackled by the Constitutional Court on several occasions. It refers to the indigenous communities' autonomy in matters of self-government that respects their traditions, thus allowing them to take control of their own institutions and ways of life and to guide their economic and social development, upholding and strengthening their identities, languages and religions."

Comments:
The interesting new approach in this judgment is the application of the indigenous community's own cultural standard (in this case, on the age at which maturity for political representation is attained) to a general election, i.e. not limited to one indigenous community or reserve. The Court uses standards from the Constitution and Convention No. 169 to maintain that Colombia's multicultural and multiethnic identity entails respect for the cultural identity of its indigenous peoples nation-wide. From there the Court derives the pre-eminence of the Arhuaca customary law standard on the age when individuals are considered to be mature enough for political involvement, over the decree establishing the minimum age requirement.

COLOMBIA 12

Court: Constitutional Court

Case: Judgment T-382/06 of May 22, 2006 (Rapporteur: Clara Inés Vargas)

Keywords: consultation and participation, political organization, environment, health, education.

Summary of the facts of the case:
The plaintiffs, representatives of the Uitoto, Andoque and Muinane Monoyuna ethnicities, believe that the federal government and Congress violated the indigenous communities' right to prior consultation in the Forestry Act bill process. Their claim is founded on constitutional requirements and on ILO Convention No. 169. The defendants responded that the action for the protection of constitutional rights (*tutela*) was not the appropriate route for challenging a general act.

The Constitutional Court restated here its jurisprudence on the constitutional nature of the communities' right to prior consultation and its backing in ILO Convention No. 169. Based on the foregoing, it concluded that in light of what had previously been established in the 2002 Judgment C-891, the authorities must provide the indigenous communities with all the necessary elements to make those communities aware of the bills, both before and during the legislative process, and ensure that they are clearly and accurately informed and have the opportunity to participate in the legislative debate, if interested.

Nonetheless, the Court believed that the chosen route was not ideal, since legal protection (*tutela*) does not apply to general, impersonal and abstract acts such as laws and other legislative acts. In any event, the Court cautions that, given that the law is in force, a claim of unconstitutionality is a viable option.

Law applied:
Articles 40(2), 93, 171 and 330 of the Political Constitution; articles 12 and 13 of Decree 1797 of 1996; Article 34 of ILO Convention No. 169.

Relevant considerations of the court:
"3.3.2. Notwithstanding the foregoing, and based on the constitutional pedagogy that this Court must promote, the Chamber will clearly state whether, as believed by the authorities of the present action for legal protection (*tutela*), protection is absolutely inadmissible on the same grounds, as a means of protecting the indigenous communities' right to prior consultation in the consideration of a bill in Congress.

To this end, it is useful to first differentiate between the scenarios that compromise the effectiveness of the right. It is undeniably important to differentiate between each of these situations, if one considers the aforementioned directive of *flexibility* set out in Article 34 of Convention No. 169. According to this directive, States have some leeway in establishing, by law or by constitution, measures to enforce prior consultation. Therefore, because the scope of the right depends on the characteristics, procedures and limits provided for each sphere of authority – either administrative or legislative – the action for the protection of constitutional rights must

refer thereto in order to establish the actual scope of the right in each case. Consultation carried out to grant an environmental permit in accordance with the 1993 Act 99 does not have the same repercussions or content as consultation carried out to create a legislative initiative.

As such, the scenarios into which the development of the right to prior consultation can be grouped are: the first is the creation of the government initiative before the text is submitted to Congress; the second refers strictly to the effectiveness of the right during the bill process; and the third applies to the practice of administrative law, when specific or individual acts that might affect or be of interest to the indigenous communities are carried out, e.g. issue of an environmental permit, establishment of a concession, implementation of an illegal crop fumigation programme[55] or the contracting of works[56].

The first two scenarios, as established in the 1989 Convention No. 169, are two reference points that can be used to enforce prior consultation and participation of the indigenous communities in legislative measures or acts.

a. The first, as was observed, includes the Government's obligation to consult indigenous peoples through their various institutions on bills it intends to present to the legislature. In this regard, we can see that the jurisprudence has allowed for the possibility of using preparatory workshops to duly inform communities about which regulatory measures are to be presented and what kind of consequences they might have on each tribe, and then to carry out the respective Round Table. Nevertheless, as noted, in the event consensus is not reached, and if all administrative recourse to achieve said consensus has been exhausted in good faith, the foregoing should not prevent the bill from being introduced before Congress.
(...)
b. Nevertheless, the second event in which the effectiveness of the right to prior consultation is compromised is the processing of a bill in Congress. According to the lower court judges, in no case does legal protection come from fundamental rights when a bill is being processed in accordance with article 6, number 5 of Decree 2591 of 1991. They also considered that, as such, only a claim of unconstitutionality is applicable. In this regard, this Chamber must clarify that, as we are dealing with the indigenous communities' right to participation and prior consultation, legal protection (*tutela*) would be appropriate as an exception, in order to guarantee that the basic core rights of these minorities are respected in Parliament. Of course, the judge does not have the legal authority to interfere in the terms or conclusions of a debate or to influence the rule of the majority that governs the decisions of the legislature. Legal protection, pursuant to the *ratio decidendi* of the 2004 Judgment T-983A, would be limited to protecting the privileges and essential powers assigned to the members of Congress and citizens, in accordance with the strict terms indicated in the basic regulations governing parliamentary proceedings."

55) Compare to Judgment SU-383 of 2003, quoted.
56) Compare to Judgment T-652 of 1998, quoted.

Comments:
Although the claim was rejected in the end on procedural grounds, the judgment is important because it sets guidelines for the application of the right of indigenous peoples and communities to consultation before decisions that might affect them are made in the parliamentary discussion phase of a law. To that effect, based on the notion of "flexibility" cited in Article 34 of Convention No. 169, the Court suggests some of the avenues by which the right to consultation could be enforced before and during the parliamentary procedure.

Furthermore, the Court points out that the constitutionality claim avenue still remains open. In a subsequent judgment in which the Court had the opportunity to examine a similar argument that took this avenue, it declared the Forestry Act to be unconstitutional, for violating the right to prior consultation of the indigenous and Afro-descendant communities, among other arguments [57].

57) See Judgment C-030/08 of January 23, 2008 (Rapporteur: Rodrigo Escobar Gil), (Colombia 15).

COLOMBIA 13

Court: Constitutional Court

Case: Judgment T-704/06 of August 22, 2006 (Rapporteur: Humberto Antonio Sierra Porto).

Keywords: special measures, affirmative action, positive obligations, economic, social and cultural rights, human rights, collective rights, access to justice.

Summary of the facts of the case:
This is an action for the protection of constitutional rights (*tutela*) brought by the association of chiefs of an indigenous community living in extreme poverty against municipal and national authorities. The community condemns the failure of the authorities involved to enforce the allocation of budgetary items earmarked for the community over a four-year period. According to the claim, the municipal authority of Uribia did not allocate the corresponding items, and refuses to include acknowledgement of the past debt in the inter-administrative agreement that must be formalized in order to execute the items. The claim was also filed against the federal authorities that should have overseen the allocation of funds, but did not. Community representatives are claiming that their rights have been violated, as regards their rights to human dignity, participation, the autonomy of indigenous communities, recognition of cultural diversity, not to be the victims of discrimination based on cultural grounds, to health, education, and recognition of their legal personality and to petition authorities. The claim is based on constitutional requirements and international human rights treaties, including ILO Convention No. 169.

The Court recalls the constitutional and international obligations assumed by Colombia in matters respecting the subsistence and cultural identity of indigenous peoples, referring emphatically to ILO Convention No. 169. The Court points out that the State is obligated to take affirmative action for the full enjoyment of those rights by indigenous communities, underscoring the close relationship between the enjoyment of economic, social and cultural rights and the enjoyment of the right to subsistence and cultural identity. This is reflected in the obligation to provide the resources required to satisfy such rights to indigenous communities, especially the most neglected. The Court also stresses that, despite the existence of decentralised systems for the assignment of competencies in a State, it is the principles of co-ordination, subsidiarity, concurrence and solidarity that govern, according to which all territorial authorities involved are responsible for ensuring that the resources do in fact reach the indigenous communities.

In the case in point, the Court accepts that, despite the fact that the resources were transferred to the municipality; it did not deliver said resources to the community nor is there any indication that they have been earmarked. Nevertheless, the Court also holds the departmental and federal bodies responsible for the violation of the indigenous community's right, due to their lack of supervision over the effective delivery of funds to the communities. The Court also points out that the State was obligated to train the community on how to adequately oversee the delivery of resources – another obligation that it did not fulfil. In conclusion, the Court finds that the indigenous communities' rights to human dignity, health, education, participation, autonomy and non-discrimination on cultural grounds were, in fact, violated. As redress, the Court orders the delivery of the resources intended for the indigenous community that were not delivered, and that the financial burden be divided among the responsible bodies. The Court also orders the municipality to sign the inter-administrative agreement required to deliver the funds.

Law applied:
Articles 1, 7, 8, 9, 10, 13, 49, 63, 67, 68, 70, 72, 93 and 330 of the Political Constitution of Colombia; Articles 2, 6 and 7 of ILO Convention No. 169.

Relevant considerations of the court:
"12. ILO Convention (No. 169) *concerning Indigenous and Tribal Peoples in Independent Countries* was adopted by Colombia through Act 21 of 1991. This document is binding for the State of Colombia and holds a pre-eminent place in the constitutional legal code, pursuant to the provisions of the first section of the abovementioned article 93. According to this line of thinking, ILO Convention No. 169 belongs to the so-called "constitutionality block" and must be taken into consideration as the rule when interpreting fundamental constitutional rights. Consequently, it must be the benchmark for establishing the meaning and scope of the fundamental constitutional right to recognition and protection of the ethnic and cultural diversity of indigenous peoples.

The introduction of ILO Convention No. 169 points out the role played by the Universal Declaration of Human Rights, as well as the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the many international instruments on the prevention of discrimination, as regards the development of the situation of indigenous and tribal peoples in all regions of the world and how, as a result of these instruments, since 1957 measures have been adopted with a view to having indigenous peoples "***exercise control over their own institutions,*** *ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live.*" (emphasis added).

In the preamble section of the Convention, the following acknowledgements and observations stand out: (i) in many parts of the world these peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population; (ii) their laws, values, customs and perspectives have often been eroded; (iii) calling attention to the distinctive contributions of indigenous and tribal peoples to the *cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding*.

Along these lines, the purpose of the Convention is to continue and call attention to the contributions made by the United Nations and some of its agencies (FAO, UNESCO and WHO) and by the Inter-American Indian Institute. The Convention is divided into ten parts. Below the Court comments on some of the Articles in the General Policy section of the Convention.

Article 2 of the Convention emphasises the responsibility of governments for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of indigenous peoples and to guarantee their integrity. Such actions shall include, among other things, ensuring that indigenous peoples benefit on an equal footing from the rights and opportunities that national laws and regulations grant to other members of the population.

Action is also directed at promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions

and their institutions. Actions must also seek to eliminate socio-economic gaps that may exist between indigenous and other members of the national community. Article 2 underscores that such action must be carried out in a manner compatible with the aspirations and ways of life of the indigenous peoples.

Article 6 of the Convention prescribes the conditions that governments must meet in applying the 1989 Convention No. 169. On one hand, it stresses the need to consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures that may affect them directly. On the other hand, Article 6 also stresses the need to establish means by which indigenous peoples can freely participate, to at least the same extent that other sectors of the population participate in the defence of their own interests, in matters that concern them.

According to the provisions of Article 6, it is crucial that indigenous peoples be provided with scenarios and instruments for the full development of their own institutions and to present their own initiatives, and provide the resources necessary for this purpose. Aside from this, Article 6 also emphasises that the provisions of the Convention shall be undertaken in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent of the indigenous peoples on the proposed measures.

The provisions of Article 7 are especially relevant, as the Article emphasises the scope of the right of indigenous communities to participate in decisions regarding matters that affect them. As regards the process of development and management of the lands they occupy, indigenous peoples shall have the right to decide their own priorities in accordance with their beliefs, institutions and spiritual well-being, and shall have the right to exercise control over their own economic, social and cultural development.

Article 7 stresses the need to empower indigenous peoples to participate in "*the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.*" It goes on to say that plans for the overall economic development of areas inhabited by indigenous peoples must include as a priority "*the improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation.*"

In summary, the section setting out the general policy of the Convention emphasises the need to guarantee the fundamental rights of indigenous peoples and, in this way, provide them with sufficient spaces, instruments and resources to freely, autonomously and actively participate in the formulation, implementation, control and assessment of legislative or administrative measures that might affect their interests, so that their traditions, customs and institutions are respected and their improvement on all fronts is promoted.

On the other hand, it also stresses the need for ongoing co-operation founded on studies assessing the social, spiritual and cultural impact or the impact that the legislative or regulatory measures adopted might have on the environment. Co-operation with the peoples concerned and protection of the environment shall take priority in the policies adopted by governments."

(…)

"Along the same line of argument, the State is obligated to guarantee the availability of resources, implement a series of measures and carry out a series of tasks and actions designed to ensure that the conditions for enforcing fundamental constitutional rights are met. The State's failures as regards this purpose may result in serious ignorance of those rights. Something different emerges from the provisions of ILO's 1989 Convention No. 169, the Universal Declaration of Indigenous Peoples' Rights and from the countless examples of Inter-American Court of Human Rights jurisprudence. As the Court had the opportunity to indicate in previous sections, the Convention, Declaration and jurisprudence of the Court situated in San José, Costa Rica require that the State provide indigenous communities with sufficient resources, that relevant measures be adopted in both the national and territorial sphere, and that actions be carried out that will lead to the effective participation of indigenous communities in matters that affect them, and that they can participate autonomously, without impositions, in the manner that best suits their own traditions and institutions".

(…)

"17. Nevertheless, it is not sufficient that the Constitution and international treaties approved and ratified by Colombia establish a series of rights declaring the recognition and protection of indigenous peoples' right to ethnic and cultural diversity. The avenues that make this right feasible in practice must also be guaranteed. Otherwise, the fundamental constitutional right of indigenous peoples to the recognition and due protection of their ethnic and cultural diversity would run the risk of becoming a dead letter. This results in a close connection between political and civil rights, social, economic and cultural rights and collective rights. The effective realisation of social rights is a *conditio sine qua non* to guarantee the enjoyment of the fundamental constitutional right of indigenous peoples to the recognition and due protection of their ethnic and cultural diversity. To put it in other terms: without the guarantee of fulfilment of social rights, the fundamental constitutional right of indigenous peoples to the recognition and due protection of their ethnic and cultural diversity would be totally devoid of meaning.

For example, Article 25 of the 1989 Convention (No. 169) establishes that governments shall endeavour to:

> *"ensure that adequate health services are made available to the peoples concerned, or shall provide them with resources to allow them to design and deliver such services under their own responsibility and control, so that they may enjoy the highest attainable standard of physical and mental health."*

Article 25 underscores the importance of the community-based nature in the organization of these services, and also emphasises the need to plan and administer these services in co-operation with the peoples concerned, and take into account "*their economic, geographic, social and cultural conditions as well as their traditional preventive care, healing practices and medicine.*" Article 25 also adds that the provision of such health services shall be co-ordinated with other social, economic and cultural measures in the country.

With regard to the right to education, Article 26 of the Convention requires that States take measures to ensure that members of the indigenous groups concerned can "*acquire education*

at all levels on at least an equal footing with the rest of the national community". In turn, Article 27 prescribes that:

> *"education programmes and services for the peoples concerned shall be developed and implemented in co-operation with them to address their special needs, and shall incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations."*

Article 27 places special emphasis on the need to provide indigenous peoples with the training required to participate in the formulation and implementation of education programmes so that administration of these programmes can gradually be transferred to the indigenous peoples. Article 27 also stresses that governments:

> *shall recognize the right of these peoples to establish their own educational institutions and facilities, provided that such institutions meet minimum standards established by the competent authority in consultation with these peoples. Appropriate resources shall be provided for this purpose. (Underlining added)"*

(…)

"It must be recalled here that the situation of abandonment and poverty in which indigenous peoples generally find themselves – during centuries of State imposition or indifference – and the lack of practical fulfilment of their fundamental constitutional rights can eventually considerably destroy the right of indigenous communities to actively and consciously participate in the handling of matters that affect them, and ends up *de facto* ignoring the fundamental constitutional right to recognition and due protection of the ethnic and cultural diversity of the indigenous peoples. It may even lead to the extinction of these very indigenous peoples. Perhaps it is for this reason that Article 30 of Convention No. 169 of 1989 emphasises the need for governments to adopt:

> *"measures appropriate to the traditions and cultures of the peoples concerned, to make known to them their rights and duties, especially in regard to labour, economic opportunities, education and health matters, social welfare and their rights deriving from this Convention."*

(…)

"44. In the Court's view, no State body, be it national or territorial, can remain indifferent to the obligation resulting from the aforementioned Article 7 and other constitutional articles regulating the constitutional requirement of recognition and due protection of the ethnic and cultural diversity of indigenous peoples, binding on all public authorities, no exceptions. The responsibilities of both national and territorial State bodies as regards guaranteeing that indigenous reserves share in the country's current revenue must be interpreted in accordance with the Constitution overall. These obligations must be carried out in good faith in accordance with the provisions of ILO Convention No. 169 of 1989, approved by Act 21 of 1991, by the Universal Declaration of Indigenous Peoples' Rights and in harmony with the constitutional principles of concurrence, co-ordination, subsidiarity and solidarity. Thus, neither national nor territorial bodies can remain indifferent to the fact that reserve resources are being diverted, or managed irregularly or in contradiction with constitutional, legal and regulatory objectives".

(…)

"58. With regard to the responsibility of the Nation and Department regarding the matter under examination, it must be pointed out here that as regards the validity of Act 715 of 2001, the obligations of national bodies, namely, the National Department of Planning, Ministry of Governmental Affairs and Ministry of Finance and Public Credit, are not a simple transfer of resources. The foregoing was demonstrated in detail in previous sections. It was also indicated that, after the reform, article 89 of the aforementioned Act 715 stipulated that this responsibility would be limited only to the transfer of resources. The Court pointed out, however, that this provision of article 89 of the aforementioned Act had to be read in conjunction with the provisions of the constitutional system in its entirety, in harmony with the obligations derived from the international commitments made by Colombia and, in particular, in light of the provisions of the 1989 ILO Convention No. 169 and the Universal Declaration of Indigenous Peoples' Rights regarding the protection of the fundamental constitutional right and due protection of the ethnic and cultural diversity of indigenous peoples.

Comments:
This is a very important judgment. The Constitutional Court underscores the close connection between the indigenous communities' right to subsistence and respect for cultural identity, and the adequate delivery of budgetary resources that would make this possible. The Court extensively refers to ILO Convention No. 169 to identify this positive obligation of the State, as a condition for the full enjoyment of the rights of indigenous communities.

The Court energetically intervenes, pointing out the responsibilities of the various government departments involved, in a case where mismanagement of public funds by the municipality and the lack of control by other levels of government were obvious. In this regard, it is important to point out that the Court has established a direct link between the lack of funds delivered to the community and the violation of its rights, and also acknowledges the community's right to judicial redress to remedy this violation.

COLOMBIA 14

Court: Constitutional Court

Case: Judgment C-208/07 of March 21, 2007 (Rapporteur: Rodrigo Escobar Gil)

Keywords: education, bilingual education, special measures, affirmative action, culture and social, religious and spiritual values, consultation and participation, collective rights, status of the Convention in national law.

Summary of the facts of the case:
This claim of unconstitutionality was filed by a member of the Nasa "Kwet Wala" Indigenous Reserve against Decree 1278 of 2002 regulating public competition for joining the State educational service, which fails to make any mention of the details regarding the education of indigenous peoples. According to the appellant, imposing a standardised competition system for joining the educational service, without taking into consideration the specific educational needs of indigenous peoples, violates the indigenous peoples' right to an education that respects and develops their cultural identity. The appellant points out that in past systems, exceptions were made to the general standards; for example, indigenous communities could select teachers from among their members and exceptions were made to some of the formal requirements, such as degree or the competition, as a result of consultation and consensus with the indigenous peoples. In this case, there was no prior consultation and the decree makes no mention of the education of indigenous peoples, nor does it establish any exception or modulation. This would allow persons who do not belong to an indigenous community and who do not know its culture to take on teaching positions in the communities. Consequently – according to the appellant – the Decree would violate both the right to an education that respects and develops the cultural identity of indigenous peoples as well as the indigenous peoples' right to be consulted when legislative measures are being taken the might affect them. The appellant cites constitutional requirements and ILO Convention No. 169.

The Constitutional Court reaffirms its previous jurisprudence on the right of indigenous communities as regards their ethnic and cultural diversity, and underscores two rights that are part of this right to cultural identity: the right to prior consultation and the right to educational identity, based on constitutional foundations that include - through the use of the concept of "constitutionality block" - the standards of ILO Convention No. 169. In accordance with the principles determined by the Constitutional Court, any State decision that affects the interests of indigenous groups, including those referring to the hiring of education professionals, requires the participation and consultation of those groups in the process. With regard to the right to educational identity, this is realised through the right to receive from the State special education adapted to their cultural requirements.

The Court believes that, despite the fact that the General Education Act, which is regulated by the contested decree, establishes the foundation for special education for ethnic groups, and that past regulations dealt with the issue, in establishing a new general Teaching Statute, the controversial standard failed to make any specific mention of measures designed to guarantee indigenous peoples' right to educational identity. Although the Court believes that establishing competition requirements or a career system does not violate the right to educational identity *per se*, the contested decree does fail to make any mention of measures designed to guarantee indigenous peoples' educational identity. As such, the State authorities have not fulfilled the mandate of adopting special measures in matters regarding indigenous communities. Consequently, this omission is unconstitutional. The Court determines that, as the General Education Act includes principles regulating the issue, the effect of the judgment will be to render the contested decree inapplicable in administrative situations related to the staffing of educational institutions located in indigenous territories and that serve an indigenous population, until the legislator issues a statute correcting the omission and establishing standards applicable to indigenous groups.

Law applied:
Articles 7, 40.2, 67, 68, 70, 125, 150.23, 329, 330 and 365 of the Political Constitution of Colombia; Articles 2, 6, 7 and 27 of ILO Convention No. 169; articles 55 to 63 of the General Education Act.

Relevant considerations of the court:
"It is important to note that the special treatment that the 1991 Political Constitution gives to ethnic and cultural diversity has the full backing of international law and, specifically, the International Labour Organization (ILO) Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, adopted by Colombia via Act 21 of 1991. Said instrument, which according to the constitutional jurisprudence is part of the constitutionality block, right in its introduction makes its objective clear, indicating that it looks after indigenous peoples' rights to land, participation, education, culture and development, in the overall context of the protection of their identity, so that the surviving indigenous communities on the planet can enjoy fundamental rights to the same degree as the rest of the population in member States, and in consideration of the distinctive contributions of these peoples to cultural diversity, social and ecological harmony of humankind and to international co-operation and understanding.

In this direction, the Convention imposes on governments the duty of assuming responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity (Article 2). In the words of the Convention, such action shall include measures that meet the following three basic assumptions: (i) Ensuring that members of these traditional communities benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population; (ii) Promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions; (iii) Assisting the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life.

Consequently, in keeping with the constitutional mandates and provisions of the aforementioned Convention that advocate pluralism and the protection of ethnic and cultural identity, Colombia has the utmost responsibility to play an active role in ensuring that indigenous and tribal peoples that inhabit the national territory can take control of their institutions, ways of life and economic development, giving them the instruments that will help to strengthen their identity, education,

language and religion, and ensuring the survival of the traditional communities and the people in them, and their culture, property and territories they inhabit".

(...)

"Interpreting the mandates contained in article 7 of the Constitution and Article 6 of ILO Convention No. 169, the Court has also expressed that the consultation process that government authorities must carry out with ethnic groups to adopt a decision that affects their interests "shall be preceded by consultation regarding how the consultation process will be carried out". On this matter, the Court has said that "Colombia shall take into consideration that prior consultation processes cannot fit into just one model that indiscriminately applies to all indigenous peoples. To enforce implementation of ILO Convention No. 169, especially the provisions of article 6 and article 7 of the Constitution, consultation processes shall, first and foremost, guarantee the practices and customs of indigenous peoples, respecting any decision-making methods and procedures that they have developed".

(...)

"The fundamental right of indigenous communities to receive special education is also recognized by ILO Convention No. 169 which, as previously stated, is incorporated in local law through Act 21 of 1991 and is part of the constitutionality block. As such, its standards, along with the Constitution, are a mandatory benchmark for the Court within trials on the constitutionality of laws.

Articles 26, 27, 28 and 29 of the aforementioned instrument, in addition to claiming the necessary existence of the right to an educational identity for indigenous and tribal groups, attempts to define its true scope of application, stipulating that: (i) measures shall be taken to ensure that members of the indigenous peoples concerned have the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community; (ii) education programmes and services for the indigenous peoples concerned **shall be developed and implemented in co-operation with them to address their special needs**, and shall incorporate their histories, knowledge and technologies, their value systems and their further social, economic and cultural aspirations; (iii) the competent authority shall ensure the training of teachers who are members of these ethnic groups and their involvement in the formulation and implementation of education programmes; (iv) education must be bilingual, at least in the early years, which means that members of the indigenous communities must be taught how to read and write in their own language and in the national language; and, finally, (v) measures shall be taken to preserve and promote the development and practice of the indigenous languages of the peoples concerned.

As can be observed, lin the implementation of a special education system for ethnic groups, ILO Convention No. 169 provides for the mechanism of prior consultation, expressly stating in Article 27 that "*education programmes and services for the peoples concerned shall be developed and implemented in co-operation with them to address their special needs, and shall incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations*".

To that extent, there is no doubt that consultation prior to the adoption of a special education system for ethnic groups is a fundamental right and, consequently, must be present in any type of legislative or administrative measure that the State intends to take on the matter; measures that must also be adopted taking into account the specific conditions of the different ethnic groups, so that they are guaranteed the preservation and continuity of their traditions and history".

(...)

"The Political Constitution and ILO Convention 169, endorsed by Colombia through Act 21 of 1991, give special *status* to native communities established in the national territory, which includes indigenous groups, by recognising and protecting the ethnic and cultural diversity of the Colombian nation".

(...)

In accordance with the statute, the staffing of teaching and managerial positions in indigenous communities would need to be governed by the traditional system of open public competition provided for therein which, according to the general rules, would make it possible for any person to aspire to such positions, ignoring the premise that teachers in those communities should preferably be members of those very communities, and know their languages, dialects, cultures, cosmogonies, cosmovisions, practices, customs and own beliefs, pursuant to the requirements of the Political Constitution and ILO Convention No. 169, incorporated into national law through Act 21 of 1991, and even the very General Education Act (Law 115 of 1994).

(...)

In this regard, it must be reiterated that the Political Constitution and ILO Convention No. 169 recognize the right of members of ethnic groups to receive education and teaching that respects and develops their cultural identity, education that is bilingual in communities with linguistic traditions and, to complement the foregoing, the right to have education programmes and services for such peoples governed by law, and to be developed and implemented in co-operation with their most representative authorities to address their special needs, and which shall incorporate their histories, knowledge and technologies, their value systems and their further social, economic and cultural aspirations. Based on this understanding, it is evident that, even supposing that the general principles of the career system were applicable to indigenous communities, the specificities referred to were not taken into account by the legislator, and the cultural difference recognized by the legal code in the education and teaching field was totally ignored.

Comments:
Here the Constitutional Court is monitoring fulfilment of the government's obligation to take special measures to guarantee that the education provided to indigenous peoples respects and promotes their cultural identity. It is interesting that what the Court believes to be an unconstitutional omission is the lack of specific treatment of the issue, and consequently, the subjugation of indigenous peoples to the general system of the Teaching Statute, without consideration for the special educational needs of these groups.

The Court reiterates part of its previous jurisprudence regarding the constitutionality block, referring to ILO Convention No. 169 to identify the fundamental rights of indigenous peoples and correlated government obligations in the matter.

COLOMBIA 15

Court: Constitutional Court

Case: Judgment C-030/08 of January 23, 2008 (Rapporteur: Rodrigo Escobar Gil).

Keywords: lands and territories, consultation and participation, culture and social, religious and spiritual values, natural resources, collective rights.

Summary of the facts of the case:
This is a claim of unconstitutionality filed against the General Forestry Act (Law 1021 of 2006). The Act was challenged for not having been subject to prior consultation with the indigenous and Afro-descendant communities affected by its provisions, as provided for by Article 6 of ILO Convention No. 169.

The Constitutional Court reiterated the jurisprudential line drawn in the recognition of ethnic and cultural diversity as a constitutional principle and foundation of Colombian nationality. The Court emphasized that this special protection is reflected in the duty to conduct consultation processes with the indigenous and tribal communities in the adoption and implementation of decisions likely to affect them, a duty that results from various constitutional requirements and ILO Convention No. 169.

Nevertheless, given that in this case, the passing of a law without prior consultation was challenged, the Court added new criteria to its previous jurisprudence. Thus, the Court pointed out that, when bills are at issue, the duty of consultation does not apply to all legislative measures that might affect the indigenous communities, only to those that might affect them directly. In any event, the Court clarified that this can occur both when the legislator expressly decides to regulate the matters provided for in Convention No. 169 and when the measure, despite its general scope, directly impacts on the indigenous and tribal communities. The Court also added some considerations on opportunity and method of consultation for legislative measures, and on the possible legal consequences of the failure to do so.

The Court found that, despite the fact that the law did contain certain provisions preserving the autonomy of indigenous and Afro-Colombian communities in the exploitation of forests in their territories, general policies, definitions, guidelines and criteria likely to affect the areas generally inhabited by indigenous and Afro-descendant communities were also established, with this potentially impacting their ways of life and their close relationship with the forest. As such, in the Court's opinion, the communities should have been consulted before the law was enacted, in order to seek approximations on how to avoid having the law negatively affect them, and even on the very content of the guidelines and criteria that, even when applied generally, can have a direct impact on the indigenous and tribal territories or on their ways of life. For the Court, the lack of consultation establishes the unconstitutionality of the standard. The Court also establishes guidelines that must be met for consultation to be considered valid: the bill must be announced to the communities; they must be informed of its scope and how it might affect them, and they must be given effective opportunities to state their opinion on the bill.

Law applied:
Articles 1, 2, 3, 7, 9, 13, 93, 103, 329 and 330 of the Political Constitution of Colombia; Articles 6, 20 and 21 of ILO Convention No. 169.

Relevant considerations of the court:
"In keeping with the constitutional jurisprudence, moreover, the indigenous communities general right to participation in accordance with our higher system, there is a special statement in the ILO Convention No. 169 provisions that are part of the constitutionality block, according to which governments must "*consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly*".[58]"

"In this context, the Constitutional Court has stated that, as regards indigenous and tribal peoples, one of the forms of democratic participation provided for in the Constitution is the right to consultation, as set out in articles 329 and 330 of the Constitution in particular. These articles require the communities' participation in the make-up of indigenous territorial bodies and in the exploitation of natural resources in their territories. The articles are backed by ILO Convention No. 169, adopted via Act 21 of 1991, which is intended to guarantee the rights of the indigenous peoples to their territory and the protection of their cultural, social and economic values, as a means of safeguarding their survival as human groups."

"As such, we can see that two broad groups of commitments for signatory States come out of the framework of ILO Convention No. 169. The first, regarding measures that must be promoted to achieve the Convention's aim in the different aspects covered therein, which, as previously mentioned, is generally aimed at fostering conditions that will allow for the development of indigenous and tribal peoples in a manner that respects ethnic and cultural diversity, guarantees conditions for the autonomy required to do so and that operates in a framework of equality. This refers specifically to their relationship with land or territories; working conditions; occupational training related aspects, craftsmanship and rural industries; health and social security; education and media; and contact and co-operation across borders. The second group deals with how these measures should be adopted and implemented, with the key element being participation and respect for diversity and autonomy."

"4.2.2.2.1. First, dealing specifically with legislative measures, it is clear that the duty of consultation does not apply to all legislative measures that might affect the indigenous communities, only to those that might affect them *directly*. In this case, in light of the Court's statements in Judgment C-169 of 2001, the consultation considered in Article 6 of ILO Convention No. 169 shall adhere to the terms and conditions of the Constitution and the law.

There is no doubt that general laws have some effect on all their addresses. As such, a law, in any sphere, that applies to Colombians in general will also affect members of indigenous and tribal communities with Colombian national status; however, in this case without requiring that, in applying subsection a) of Article 6 of ILO Convention No. 169, prior consultation with said communities be a mandatory condition for the valid processing of the corresponding bill. Claiming the opposite would be the equivalent of declaring that a very significant part of the legislation should be put through a specific process of prior consultation with the indigenous and tribal communities, given that laws that affect all Colombians in general, some to a greater degree than others, also affect the indigenous communities, to the extent that their members, as Colombians, are among the intended objects of the laws, which exceeds the scope of Convention No. 169.

(...)

On the other hand, it is clear that what must go through a consultation process are those measures likely to affect the indigenous communities specifically because they are indigenous, and not those provisions that apply across the board to all Colombians in general. This criterion results not only from the *direct* quality that the effect of a legislative measure must have for consultation to be mandatory, but also from the fact that this applies when *provisions of the Convention must be applied*. Although, due to the extent of the aim of the Convention, it must be said that Article 6 establishes a general duty of consultation on all measures likely to directly affect indigenous peoples, this statement establishes an interpretive guideline on the scope of this duty of consultation, from which, in principle, are subtracted the measures that do not fall within the Convention's scope of application. Thus, although one of the key aspects of the Convention is promoting the participation of indigenous and tribal peoples in all proceedings where measures that affect them are adopted, we cannot lose sight of the fact that the Convention itself provides for different methods of participation, and has given the States themselves extensive leeway in determining how these methods will be enforced. As such, although it is advisable to have the highest levels of participation and preferable that the adoption of administrative and legal measures be preceded by broad and effective consultation processes with the interested parties, the binding scope of the duty of consultation set out in the Convention is more restrictive, and is limited to measures adopted for the implementation of the provisions of the Convention, i.e. measures that specifically affect indigenous and tribal peoples."

"4.2.2.2.2. In terms of the conditions of time, manner and place in which the aforementioned consultation should take place, it must be pointed out that, given that Convention No. 169 does not establish any rules of procedure and as long as these rules are not established in law, consideration must be given to the flexibility provided for in the Convention and the fact that, according to the Convention, the consultation process is subject to the principle of good faith. This means that, on one hand, States must determine the conditions under which consultation must take place and, on the other hand, for the consultation to be satisfactory in a constitutional system, it must be carried out effectively and pertinently. Yet in this context, it is not possible to talk about peremptory terms or mandatory conditions on how it should be carried out. It is about providing forums for participation that are appropriate, as they allow for effective intervention with sufficiently representative spokespersons, depending on the type of measure being adopted. Thus, when the matter at hand involves regulating State intervention in the exploitation of natural resources in a specific area of territory where a specific indigenous community is settled, it is clear that the consultation process must be carried out with the legitimately created authorities of said community. However, as a further example, if it were to involve regulating how the consultation process in general must be carried out with the indigenous and tribal communities, it would also be clear that the required consultation could not be carried out with each of the authorities of the indigenous and tribal peoples. In the absence of an authority that represents all peoples in general, one would have to turn to authorities that, in good faith, are considered to be the most suitable for carrying out this consultation process."

58) ILO Convention No. 169, article 6

"First of all, one must determine the moment in which the consultation must be held and the authority responsible for carrying it out. The Convention establishes an obligation for governments; however, it would be appropriate to ask whether, in a broader sense, said obligation could be extended to other situations, especially when, as is the case with legislative matters, a different State authority is in charge of adopting them.

Thus, it could be said that the Government has the duty to promote consultation when putting forward bills of its own initiative. But what happens when, in the development of the initiative which the Constitution assigns them, actors other than those set out in article 155 of the Constitution or other than the government decide to submit to the legislative chambers for consideration bills whose content is likely to directly affect the indigenous and tribal communities?

In this case, it would appear necessary for the government, when notice is given that a bill is being introduced for which a consultation process is required, to contact the appropriate bodies set out in the legislation, such as the *Mesa Permanente de Concertación con los Pueblos y Organizaciones Indígenas* [Permanent Round Table with Indigenous Peoples and Organizations] created by Decree 1397 in 1996 or other applicable bodies, in order to define this scenario and which would be the most appropriate authorities and mechanisms of consultation.

"As stated in the constitutional jurisprudence, insofar as the standards on which the duty of consultation set out in ILO Convention No. 169 is incorporated into the Constitution, and specifically as the duty of consultation set out therein has been considered an expression of the fundamental right to participation and linked to the fundamental right to cultural, social and economic integrity in this specific case, failure to carry out consultation in those cases where it is imperative pursuant to the Convention has immediate consequences on the internal system."

"In some circumstances, it might be possible to find that the law as such is unconstitutional. Yet it is also possible that, in a law that concerns indigenous and tribal peoples in general and that directly affects them, failure to consult is determined through a process that excludes said communities from the scope of application of the law. Or it could be that, in an event of this kind, a legislative omission would be established so that the law as such is preserved in the system, but required measures are adopted to rectify the legislative omission resulting from the lack of specific measures for indigenous and tribal communities. If the law does not contain these specific provisions, this would create a legislative gap resulting from the necessity that, in a matter that does affect everyone, it affects the indigenous people in areas vital to their identity, takes into consideration special provisions and that prior consultation must be carried out regarding these provisions. In that case, insofar as the general law would have to be applied to indigenous peoples, a legislative omission would be decreed, owing to a lack of specific and previously consulted standards."

"In this case, notwithstanding the general nature of the law – which is not, pursuant to ILO Convention No. 169, specifically aimed at regulating the situation of indigenous and tribal communities –, the possibility of specific encumbrance to such communities is derived from its material content, as its provisions are intended to protect an object (the forest) that has special relevance for the communities, and that is still intimately and indissolubly connected to their way of life.

Based on the foregoing considerations, the Court concludes that the specific subject matter of Act 1021 of 2006 is likely to directly and specifically affect the indigenous and tribal communities; consequently, prior to being carried out, it must undergo a consultation process with said peoples, under the terms and conditions of subparagraph a) of Article 6 of ILO Convention No. 169.

5.2. Based on the legal precedents in the case, it can be concluded without much difficulty that, as regards Act 1021 of 2006, the indigenous and tribal peoples were not consulted under the terms of ILO Convention No. 169.[59] There was a broad socialisation process that did not, however, meet the criteria established by the Constitutional Court because it was not specific. There is no evidence that the communities were duly notified or that the potential impacts of the project were explained to them, nor were forums for co-ordination created.

While it is true that, as previously indicated, there is some leeway in how consultations should be carried out, as long as there are no legislative developments on the matter and as long as the requirement that consultation must take place *before* any action, as regards legislative measures, it is not absolute with regard to the time the bill is introduced. It is no less certain whether a bill of the scope, complexity and implications of the one intended to comprehensively regulate forestry matters required that the government conduct specific consultation with the indigenous and tribal communities, consultation that would enforce their right to participation, as a prerequisite to its filing in Congress. This process would have helped to identify difficulties, establish relevant discrepancies in approaches, seek alternatives and, in any case, foster an enriched debate in Congress through the contribution of previously chosen positions in which, although consensus was not imperative, would have helped to clearly assess the aspects that might be problematic from the communities' viewpoint.

For these reasons, neither the project's general socialisation activities nor the unilateral measures geared towards purging the project of aspects that might be considered critical from the viewpoint of the indigenous and tribal communities are sufficient. Rather, a consultation process would be required that meets the guidelines of subparagraph a) of Article 6 of ILO Convention No. 169, under the conditions determined by the constitutional jurisprudence."

"d. To that extent, in accordance with the constitutional system, in particular ILO Convention No. 169, which in these matters is part of the constitutionality block, the communities should have been consulted prior to the adoption of the law in order to seek consensus on how to avoid having the law negatively affect these communities, as well as on the content of the guidelines and criteria that, even when general in scope, may have a direct impact on indigenous and tribal territories or on their ways of life.

Consultation, which has some special features, was not carried out in this case and cannot be replaced by a general participative process that was carried out regarding this bill.

59) The lack of prior consultation is assessed in the actions of the Ministry of Agriculture during the debate of the bill in Congress, and in the actions expressing that it was not required because the broad socialisation process given to the project was sufficient; in communications from the indigenous organizations to Congress regarding the lack of consultation; in the statements made by some congressmen and, finally, in government interventions in the current process, whose starting point is, precisely, the consideration that consultation did not take place because, due to the nature of the law, it was not necessary.

For the requirement of consultation to be met, the communities would have had to have been informed about the bill via sufficiently representative authorities, explained the scope and how it might affect them and given effective opportunities to decide on the matter. This process did not take place, which is why the Court concludes that, given that the law is about a matter that is deeply linked to the world view of these communities and their relationship to the land and that, by action or omission, is likely to affect them directly and specifically, there is no other alternative than to declare the law to be unenforceable".

Comments:
Another interesting application of the jurisprudence developed by the Constitutional Court as regards the indigenous and tribal communities' right to consultation is in the adoption of measures that might affect them. In this case, the lack of consultation determined the unconstitutionality of a law passed by Congress. The Court broadens its previous doctrine on the duty of consultation, applying it to the law–making procedure. In this case, the Court analyses the impact that the law might have on the indigenous and Afro-descendant communities, coming to the conclusion that its provisions are likely to affect the forest and, consequently, the way of life and cultural integrity of these communities. Accordingly, given the potential effect on the rights or interests of the indigenous and Afro-descendant peoples, Congress should have consulted them. The lack of consultation then gives rise to the invalidity of the standard in light of the relevant constitutional provisions and of Convention No. 169 which, in accordance with the Constitutional Court doctrine, is part of the so-called "constitutionality block".

The Court's decision is related to the 2006 Judgment T-382 (Colombia 12), also mentioned in this publication, in which a similar argument was defeated for not having taken the right route, although the Constitutional Court had already indicated the need for consultation, in accordance with the subject matter covered by the law.

COSTA RICA

COSTA RICA 1

Court: Constitutional Chamber of the Supreme Court

Case: Vote 1992-3003, Case 3003 07/10/1992 L, Judgment of October 7, 1992.

Keywords: status of the Convention in national law.

Summary of the facts of the case:
This is a mandatory constitutionality consultation of the former Bill for the approval of ILO Convention No. 169, presented by the Board of the Legislative Assembly in accordance with the Constitutional Jurisdiction Act.

The Constitutional Chamber discusses Convention No. 169, its justification and connections to other international instruments, and to Costa Rican constitutional and legal requirements. It also brought up some points that might generate doubts, providing one interpretation that makes them compatible with the Constitution. The Court comes to the conclusion that Convention No. 169 does not at all contradict Costa Rica's Political Constitution and that, on the contrary, it fully adheres to the values established by the Constitution.

Law applied:
Political Constitution of Costa Rica; ILO Convention 169.

Relevant considerations of the court:
"1. The Convention consulted, within the general scope of the subject matters entrusted to the International Labour Organization (ILO), gives expression in a legally enforceable international instrument to a series of rights, freedoms and economic, social and cultural conditions that tend to not only strengthen the dignity and attributes essential to the indigenous as human beings, but also primarily to provide specific means for them to fully realise their condition as human beings in light of the depressed, even exploited and mistreated, situation in which the indigenous in many nations live. This situation is not at all foreign to the American continent where the minority, and sometimes majority indigenous peoples are practically marginalised by the dominant civilisation, while suffering from depression and the abandonment of their own traditions and cultures. In summary, today in the field of human rights it is hereby recognized: a) that, in addition to the fulfilment of their rights and freedoms as human beings, it is necessary to afford to the indigenous other legally guaranteed conditions that can compensate for the inequality and discrimination they suffer, in order to guarantee real and effective equality in all aspects of social life; b) that it is also necessary to guarantee respect for and preservation of the historical and cultural values of indigenous peoples, acknowledging their distinctiveness, without other limitation than the need to also preserve the dignity and fundamental values of any human being recognized today in the civilised world – which means that respect for the traditions, language, religion and general culture of these peoples shall allow as exceptions only those required to eradicate practices universally considered to be inhumane, such as cannibalism; c) without prejudice to the foregoing, indigenous peoples must also be afforded the rights and means necessary to freely and honourably access the spiritual and material benefits of the dominant civilisation; such means that stand out due to their importance are access to education and the official language. In these regards, the provisions of parts 1, 2 and 4 of Articles 1 and 19 and 26 to 31 of the Convention should be rescinded."

"8. The Articles of the Convention do not appear to do anything that, when correctly interpreted and applied, might contravene the Constitutional Law. In this sense, the provisions of Articles 6.1.a), 16 and 25.2 merit some commentary, as the only Articles that could raise some doubt: a) As regards Article 6.1. a), understanding that the duty to "consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly", the same as the next provision of establishing channels of participation, development and initiative for these peoples, here only objectives that coincide for certain are indicated, with the principles and democratic values correctly understood, which imply the ongoing exercise of power by the people or, in other words, their permanent participation in the decision-making process on matters that concern them; b) As regards Articles 16, which makes provisions for the involuntary relocation of indigenous peoples, it is necessary to stress that this provision does not infringe or attempt to infringe on constitutional standards or principles because the Chamber believes that, in expressly referring to the appropriate procedures established by national legislation, it eliminates the possibility of any limitation in this sense; c) As regards Article 25.2, the Chamber understands that the Convention, in validating the "traditional preventive care, healing practices and medicines" of the indigenous, they are being used in parallel or complementary to the healing practices or care imposed by public health care standards.

9, Conclusions: The Chamber believes that, far from clashing with our country's Constitution, the Convention reflects the most dearly held values of our democratic nationality, developing the human rights of Costa Rica's indigenous peoples, and can be seen as a starting point for a review of the secondary legislation so that it can be adapted to these needs."

Comments:
Although not a decision in an administrative case – since the role of mandatory consultation of constitutionality is to determine the compatibility of a bill proposing the approval of an international agreement with the Costa Rican Constitution – the vote is important not only because it declares that Convention 169 is in line with the Constitution, but also because it proposes guidelines for interpreting the Convention. This vote has been used as a precedent in subsequent decisions of the Constitutional Chamber of the Supreme Court.

COSTA RICA 2

Court: Constitutional Chamber of the Supreme Court

Case: Vote 2253-1996, Case 4320-P-92, Judgment of May 14, 1996.

Keywords: institutions, political organization, discrimination, special measures, affirmative action, consultation and participation.

Summary of the facts of the case:
This is a claim of unconstitutionality brought by the representatives of an indigenous community development association against the Law on the Creation of the National Council for Indigenous Affairs (CONAI). The claim challenges the legally established way in which the CONAI Assembly was incorporated. According to the complainant, the fact that so-called "pro-indigenous" groups that do not represent indigenous communities or peoples can participate in the Assembly through a voice and vote, and that these groups can be created without limit distorts the make-up of the Assembly, as it gives excessive weight to organizations that are not indigenous and that do not necessarily represent indigenous interests. According to the litigants, this method of incorporation of the CONAI Assembly violates the principle of equality.

The Court states that, in reality, the clause does not violate the principle of equality, but rather Convention No. 169, in that adequate incorporation of the Assembly that correctly represents the indigenous peoples has not been established. According to the Constitutional Chamber, Convention No. 169 requires the adoption of special measures in this regard, in this case by designing legal mechanisms that afford indigenous peoples and communities adequate and organised participation. However, the make-up of the Assembly does not achieve this end, as allowing the participation of a possibly infinite number of non-representational organizations detracts from the voice and participation of the indigenous peoples and communities. Consequently, the Court declares the challenged norm to be unconstitutional for violating Convention No. 169.

Law applied:
Articles 6, 7, 8, 12 and 33 of ILO Convention No. 169.

Relevant considerations of the court:
"The individuals filing the claim allege that the principle of equality established in article 33 of the Political Constitution and Article 24 of the American Convention on Human Rights has been violated. According to this principle, equal persons must be given equal treatment, and unequal persons different treatment; the differences that exist between subjects justifies different treatment. These specific differences or situations constitute what the Court has called in numerous cases of jurisprudence (see Judgment No. 337-91 at 14:56 on February 8, 1991) "objective elements of differentiation" that justify and merit different treatment, known in constitutional doctrine as "affirmative discrimination," which consists of giving special treatment to those persons or groups in disadvantaged situations. The aim of different treatment is to compensate for the original situation of inequality and is geared towards achieving "true equality" among subjects. It must be stressed that this difference in treatment does not violate the principle of equality; on the contrary, it results from the application of this principle and from an appropriate interpretation of Constitutional Law. Various legal instruments promote true equality among subjects; for example, the specific situation of the indigenous, who have traditionally been marginalised for historical, social, economic and cultural reasons. They suffer the consequences of a society that does not understand nor respect their differences, and that occasionally tends to see them as unable to manage their own lives and destinies. Faced with this situation, the international community felt the need to adopt pro-indigenous measures. As such, the International Labour Organization (ILO) Convention (No. 169) on Indigenous and Tribal Peoples in Independent Countries was incorporated into our own legal system through Act No. 7316 on November 3, 1992, establishing special protection for indigenous peoples and their culture. The Convention aims to provide indigenous peoples with both individual and collective protection measures."

"IV. As previously indicated by the Chamber, Constitutional Law establishes the State's right to provide indigenous peoples with adequate instruments that guarantee their right to participate in decisions that affect them and to organise themselves in elective institutions, administrative organizations and others responsible for policies and programmes that concern them (Articles 6 and 33 of ILO Convention No. 169). Consequently, the legislator must develop legal mechanisms that allow them to fully exercise this right. Standards in this matter must be directed at affording indigenous peoples broad and organised participation. Nevertheless, this is not the case with the challenged standard, as it establishes a mechanism that, far from benefiting the indigenous, is actually detrimental to them. As such, the standard is not ideal for achieving the aims of Convention No. 169, pursuant to which, in granting participation in the General Assembly to as many pro-indigenous associations as they wish to create, takes away strength and importance from the will of the indigenous people.

V. In conclusion, subsection d) of article 2 of the Act under examination does not violate the principle of equality. Consequently, the allegation of the persons filing the claim is not merited in this case. However, it does conflict with Constitutional Law, as it violates Articles 6, 7, 8, 12 and 33 of ILO Convention No. 169 and the provisions of article 48 of the Political Constitution, since the participation of an indefinite number of pro-indigenous associations in the CONAI General Assembly makes it impossible for indigenous peoples to enjoy a level of representation that ensures that their will determines the course of decisions that affect them, as required by ILO Convention No. 169."

Comments:
In this decision, the Constitutional Chamber refers to Convention No. 169 to analyse the institutional design of the Assembly of the body intended to protect the rights and interests of the indigenous people, in light of the mandate of adopting adequate mechanisms for the participation of indigenous peoples and communities. The Court places special importance on the mandate of adopting special measures to protect the rights of the indigenous peoples and communities; as such, it submits the institutional design of an administrative body to strict scrutiny.

COSTA RICA 3

Court: Constitutional Chamber of the Supreme Court

Case: Vote 2002-02623, Case number 96-006433-0007-CO, Judgment of March 13, 2002.

Keywords: political organization, institutions, legal personality, special measures.

Summary of the facts of the case:
The case is a claim of unconstitutionality brought by a member of an indigenous community against an Executive Branch decree regulating the Indigenous Act. According to the appellant, despite the fact that the Indigenous Act establishes that reserve inhabitants can organise themselves internally into "*traditional community structures*", the decree requires the creation of a Community Development Association for the full enjoyment of rights. This would violate the freedom of association established by the Constitution.

The State representative (Attorney's General Office) maintains that the challenged standard cannot be claimed to infringe on the freedom of association. Among its arguments, it points out that ILO Convention No. 169 obliges government authorities to take necessary measures to ensure that the indigenous peoples enjoy, on equal footing, the rights and opportunities afforded the other members of the community by national legislation, and that this is precisely the aim of the challenged standard.

The Constitutional Chamber justifies the challenged standard, indicating that it does not violate the freedom of association because no one is forced to become a member of a Community Development Association. According to the Court, this was the method chosen by the legislator and by the Executive to fulfil the obligation established by ILO Convention No. 169 to guarantee indigenous peoples' right to organization and to participate in the making of decisions that affect them, as well as to create bodies of representation and participate in the election of individuals for these positions. The Court further indicates that the "community development association" is the legal figure that is most similar to the communal nature of traditional indigenous organizations, and suggests that it is reasonable to require certain conditions of organization to benefit from subsidies and benefits funded by the public treasury.

Law applied:
Article 25 of the Political Constitution of Costa Rica; Community Development Act; Articles 2, 6 and 7 of ILO Convention No. 169.

Relevant considerations of the court:
"As results from the transcribed standards, [Arts. 2, 6 and 7 of ILO Convention No. 169] the State is obligated to guarantee indigenous peoples' right to organise and participate in the making of decisions that affect them, as well as create bodies of representation and to participate in the election of individuals who will hold these positions. Article 6 of the aforementioned Convention sets out the State's obligation to establish the means through which the peoples concerned can freely participate, and its obligation to consult the indigenous groups – through their representative institutions – whenever legislative or administrative measures that might affect them are being discussed. This does not imply, as suggested in the claim, an obligation to be part of these groups; on the contrary, it is a free decision that implies taking part in the course of the community. The Convention expressly states that adopting a given organization does not prevent members of said peoples from "exercising the rights recognized for all citizens in the country and assuming the corresponding obligations."

"Now, it is the Community Development Act (No. 3859) that regulates community development associations and article 3 of the Regulations to the Indigenous Act, which is being challenged, **does nothing more than determine the type of organization that meets the foundations established by the legislator in the Indigenous Act, used as a framework**, which, furthermore, complies with ILO Convention No. 169 in that it both materialises the State's obligation to ensure that the indigenous communities adopt a legal organization in line with their traditions and which allows them to exercise the rights and obligations they have been afforded. We must not lose sight of the fact that community development associations – more than any other legal structure – are the most similar to the communal nature of traditional indigenous organizations; furthermore, this type of legal structure allows this sector of the population to enjoy special benefits (article 19 of Law 3859) that they would not enjoy in any other type of legal structure, for example, receiving services, donations, grants and annual money transfers from the State and its institutions, which of course brings with it ordinary control of these public resources".

Comments:
The Constitutional Chamber of the Supreme Court has applied Convention No. 169 here to justify the requirement that indigenous communities must form community development associations to obtain benefits and to channel their participation. It is necessary to understand the decision in relation to the argument made by the party challenging the law, believing that it violates the individual right of association. In this regard, one might wonder whether the decision would have been similar if the challenge had been based not on the violation of the individual right to freedom of association, but rather on the possible conflict of the obligation to create a specific type of association with the obligation to respect the collective right of the indigenous communities and peoples to maintain and exercise their traditional forms of political organization. As this was not the argument, some doubt remains as to the scope of the position of the Constitutional Chamber in this regard.

COSTA RICA 4

Court: Constitutional Chamber of the Supreme Court

Case: Vote 2000-08019, Case number 00-000543-0007-CO, judgment of September 8, 2000.

Keywords: consultation and participation, lands and territories, natural resources, sub-surface resources, status of the Convention in national law.

Summary of the facts of the case:
This is a claim for the protection of constitutional rights filed by indigenous community development associations and other litigants against the granting of a hydrocarbon exploration and operation concession to a private company by the Executive Branch through the Ministry of the Environment and Energy. The challenge is based on the non-fulfilment of procedural and prior participation requirements, among them the lack of consultation of the indigenous communities whose territories are affected by the concession. ILO Convention No. 169 was identified as one of the standards violated.

The Constitutional Chamber deals separately with the arguments of general community participation in environmental matters and those related specifically to consultation regarding indigenous territories and communities.

As such, the Chamber has determined that the procedure did not violate the adequate information requirements and consideration of the right to petition founded on the right to a healthy environment.

However, the Court believes that the authorities did not meet the requirement of prior consultation of the indigenous communities, as established in Article 15(2) of ILO Convention No. 169. It was proven to the Constitutional Chamber that the respective Ministry failed to issue a consultation summons, which was mandatory, and that this failure was not rectified by the announcement of the bidding process in the press. Consequently, it allows the legal protection and overturns the act of adjudication.

Law applied:
Articles 6(1), 13, 15(2) and 15(6) of ILO Convention No. 169; articles 11, 41 and 129 of the Political Constitution of Costa Rica.

Relevant considerations of the court:
"Nevertheless, since the appellants are also invoking violation of Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, approved by the Legislative Assembly pursuant to Law No. 7316, the scope of these regulations must also be reviewed. In subsection 15(2), the Convention states:

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

Based on what was added to this legal protection and its statements, in the opinion of the Chamber, the authority against whom appeal is taken acted illegitimately in violating ILO Convention No. 169, and consequently article 48 of the Political Constitution, especially since it has been proven that the appealed Ministry failed to apply these provisions, since such standards are mandatory for our authorities, as they establish the fundamental rights of the members of the indigenous populations. In this sense, articles 11, 41 and 129 of the Political Constitution are also affected. The mandatory consultation of indigenous peoples prior to the awarding of oil concession No.1-97 is not open for discussion, meaning the Chamber makes it clear that before committing State resources, the provisions of the aforementioned international treaty must be met."

"What comes out of the reading of the administrative record is that, in fact, formal consultation was omitted - a situation that violates due process in regards to the fundamental rights of the indigenous peoples concerned - making it impossible for them to defend the natural environment of their lands and their right to develop with a guaranteed quality of life (Article 13 of the aforementioned Treaty and 50 of the Political Constitution)."

"Although the authority against whom appeal is taken reported that the bidding process and the awarding were published - the first in The Gazette and in two national newspapers and the second in a national newspaper - these actions certainly do not satisfy the firm legal obligation towards indigenous peoples, where the collective national media are or may not be understood. In any case, they are not an admissible or "suitable" medium in the understanding of the aforementioned Convention. In other words, the consultation process cannot be substituted in this case with publication in the press, as indicated above; rather, appropriate procedures should have been carried out, as set out in Article 6(1) of the Convention. As such, it is not accurate, as has been maintained thus far, that the State's discretion regarding a public hearing, a matter applicable to SETENA in general, also applies to indigenous communities, since Article 15(2) of the Convention is crystal clear on this duty, within the terms and conditions of Article 6(1)."

"Likewise, for the purpose of duly enforcing this judgment, the Administration will also have to establish which indigenous communities are involved in the matter of this legal protection, so that a consultation process that fulfils the provision of ILO Convention No. 169 can be carried out."

Comments:
This is a brief and conclusive judgment in which the Constitutional Chamber of the Supreme Court directly applies Convention 169, providing the grounds for overturning the award of an oil concession. The Chamber considers consultation of indigenous communities to be mandatory before any decisions are made that might affect their territories and resources. The Chamber interprets the communities' right to be consulted as a necessary requirement for the participation and respect of minorities in a democracy.

Also see vote 2000-10075 in this publication (Costa Rica 5).

COSTA RICA 5

Court: Constitutional Chamber of the Supreme Court

Case: Vote 2000-10075, Case number 00-000543-0007-CO, Judgment of November 10, 2000.

Keywords: consultation and participation, lands and territories, natural resources, sub-surface resources, status of the Convention in national law.

Summary of the facts of the case:
This case is related to vote 2000-08019 (Costa Rica 4), also covered in this publication, in that the Constitutional Chamber overturned the awarding of an oil exploration and operation concession to a private company for not having met the requirement of prior consultation of the indigenous communities whose territories would be affected. In this case, the representative of the company that had been awarded the overturned concession and the Minister of Environment and Energy are requesting that the judgment be reversed.

What is relevant in this case is that the Minister of Energy indicates that the Constitutional Chamber incorrectly interpreted Article 15 of ILO Convention No. 169 since, in her understanding, the Convention does not indicate the precise moment when the indigenous communities must be consulted. The Chamber rejects this argument, stating that consultation must be "appropriate to the circumstances", according to the Convention. In this regard, it does not see why there would be a need for consultation when exploration work has already begun.

Nevertheless, the judgment modifies the scope of vote 2000-08019 in that it restricts the nullity of the awarding strictly in areas containing indigenous territory. The Chamber states that the consultation process must be carried out for the exploration and operation of these areas.

Law applied:
Article 15 of ILO Convention No. 169.

Relevant considerations of the court:
"The Minister gets a different meaning from Article 15 of ILO Convention No. 169 than the Constitutional Chamber, allowing her to assert that this Court granted an inappropriate assessment within its power. The disagreement in readings possibly resides in the fact that, as she adds on page 380, "*consultation of the aforementioned communities is part of the pre-exploration or prospecting process, without implying, however, that it must be carried out at a specific time*". It is true that the Convention does not indicate what this specific time is, but the subsection in question does state that governments (the applicable authorities or those with jurisdiction in a given matter) "shall" consult the peoples concerned through appropriate procedures, in particular through their representative institutions, "*whenever consideration is being given to (…) administrative measures that may affect them directly.*"

"How can this standard be understood in the sense that if the Ministry of Environment and Energy were to go ahead and grant authorisation to a company to conduct exploration, they would have to wait for the entire process to be completed, or what is worse, for the company awarded the concession to have started exploration work, before initiating consultation procedures with the communities? As stated on page 381, the actor admits that activities are already being carried out in block 12 (marine block), which is not indigenous territory, but this means that for administrative contracting, there are acts of execution, regardless of whether they correspond to indigenous territories or not. Furthermore, it must be noted that in the report submitted on that occasion by Minister a.i. to the Chamber (pages 110 and following), there was no mention of the indigenous communities, and precisely because the judgment was unclear on which communities would be affected by the exploration and how. In the last paragraph of the conclusions it is indicated which administration will determine which communities, so that the decision can be made. In any event, the authority given to Article 15 of ILO Convention No. 169 by the Chamber, based on its own precedents, makes it possible to reiterate here that a consultation process "*appropriate to the circumstances*" must be carried out, as emphasised in this standard, so that the public interest that State authorities legitimately have in carrying out oil exploration and operation can be combined with the interest of the indigenous communities that might be affected by it, according to the blocks that were awarded. One of the key elements is that one should not wait until an authorised company (concession holder) initiates such work in an indigenous territory and, only at that moment undertake consultation, as it cannot be considered an "eventuality" given that the process […] up until the authorization was granted through the adjudication act, in itself implies (administrative) measures which could potentially affect the community given that the administration could reasonably have foreseen, from the very moment the decision to give such activities in concessions was taken, the potential influence on the indigenous territories or communities. It is at that moment that the right recognized by the Convention arises, so that the indigenous are consulted on measures that might be taken in the future, and that we now know were taken in the end. For this reason, the proposed motion for dismissal must be disallowed, as is indeed provided."

Comments:
This judgment, which is a direct application of Convention No. 169, restates the criterion established in vote 2000-8019 that consultation prior to the awarding of contracts for the exploration and exploitation of sub-surface resources that affect indigenous communities is mandatory.

COSTA RICA 6

Court: Court of Criminal Cassation, Second Judicial Circuit of San José

Case: Decision 2001-817, case number 00-429-597-PE-3, decision of October 18, 2001.

Keywords: customary criminal law, criminal justice.

Summary of the facts of the case:
During a criminal investigation, a member of an indigenous community was charged and remanded to custody. Once the legal period had expired, the Public Prosecutor's Office requested an extension of custody, alleging that it was probable that the accused was responsible for the actions for which he had been charged, that he presented a risk of flight, obstruction and repetition of the offence, and that the crime is punishable by a prison sentence.

The Court of Cassation stated that, in addition to the exceptionality of extending custody, due consideration was not given in this case to whether there had been a previous judgment by the indigenous community. The Court emphasised that the investigation deviated from what is set forth in ILO Convention No. 169. Consequently, it decided to dismiss the motion for extension of custody and ordered the accused be released.

Law applied:
Criminal Procedural Code, section 258; ILO Convention No. 169.

Relevant considerations of the court:
"In addition to the foregoing, ILO Convention No. 169 must be kept in mind, as there is no evidence in the case that they proceeded in accordance with the Convention, nor any legal basis in the charge or the motion for extension of custody, that the case in point must be resolved by the Courts of the Republic and not according to the indigenous community's method of conflict resolution. In view of the foregoing, the motion for extension of custody is denied (section 258 of the Criminal Procedural Code). It is ordered that the criminal court be notified of this decision".

Comments:
This is another interesting example of the enforcement of Convention No. 169 criteria by lower courts; in this case, in a decision on the extension of custody within the framework of a criminal investigation involving a member of an indigenous community. The Court negatively assesses the Public Prosecutor's failure to verify how the same conflict had been previously handled by the indigenous community, in accordance with the principle of respect for the methods traditionally used by the peoples concerned to deter offences committed by their members, included in Article 9(1) of ILO Convention No. 169.

COSTA RICA 7

Court: Constitutional Chamber of the Supreme Court

Case: Vote 2003-03485, case number 99-002607-0007-CO, Judgment of May 2, 2003.

Keywords: institutions, political organization, discrimination, special measures, affirmative action, consultation and participation.

Summary of the facts of the case:
This is a claim of unconstitutionality similar to the one decided on in Vote 1996-2253, previously mentioned in this casebook (Costa Rica 2). The appellant, on his own behalf and representing an indigenous community development association, challenges the standards of the Law on the Creation of the National Council for Indigenous Affairs (CONAI). In establishing the composition of this body's Assembly, the Law provides for the inclusion and participation in decision-making of certain official institutions that have no relation to indigenous peoples. According to the appellant, this make-up of the Assembly is detrimental to the indigenous peoples because a large number of votes are assigned to these bodies, such that their wishes are overrepresented. The claim states that the law grants voting rights to institutions such as the National Electric Company, the AyA, INA, IMAS, the Ministry of Public Safety, the University of Costa Rica and the National University under the same condition as to indigenous communities. It also points out the arbitrariness of municipal representations: some are represented, others are not and others have more votes in the Assembly. The appellant claims that ILO Convention No. 169, the Constitution and the American Convention on Human Rights have been violated.

The Constitutional Chamber refers in large part to the decision in vote 1996-2253, citing many of the paragraphs of this decision and applying its doctrine to the case in point. Consequently, it concludes that the challenged standards are unconstitutional, as they misrepresent the indigenous peoples and weaken their decision-making power on issues that affect them. As with the previous case, the Court upholds its decision on the violation of Convention No. 169.

Law applied:
Articles 6, 7, 8, 12 and 33 of ILO Convention No. 169.

Relevant considerations of the court:
"It is evident, then, that the challenged standards, by including representatives from State departments and institutions and municipal bodies, make it impossible, as did the revoked subsection d), for indigenous peoples to have representation that allows their wishes to effectively determine the course of decisions that affect them, as is required by ILO Convention No. 169, to the point that the unconstitutionality of subsections a) and b) of Act No. 5251 is but a necessary consequence of the foregoing (…)".

Comments:
The decision complements and reiterates the criteria established in vote 1996-2253, the text of which (including transcriptions and applications of Convention No. 169) expressly cites.

COSTA RICA 8

Court: Constitutional Chamber of the Supreme Court.

Case: Vote 2003-08990, case number 03-007279-0007-CO, Judgment of August 26, 2003.

Keywords: positiv obligations, special measures, emergency situations, economic, social and cultural rights, co-ordinated action.

Summary of the facts of the case:
The Guaymí de Osa Indigenous Reserve Development Association filed a claim for the protection of constitutional rights in which it condemns the failure of the administrative authorities responsible – among them the administrative body in charge of protecting the rights of the indigenous people – to provide the necessary co-operation to repair the bridge over the Rincón River, which had been swept away by strong rains in the area. The population of the Guaymí Indigenous Reserve was cut off for several days, with residents forced to swim or cross the river on horseback. The authorities ignored the request, using the excuse that the construction foreman's contract was not extended, which was necessary to make the requested repairs. The Association is claiming that Article 6 of ILO Convention No. 169, among other standards, was violated.

The Constitutional Chamber accepts the appellants' arguments, and believes that the administrative body did not take the necessary measures to overcome the emergency situation and guarantee the rights of the indigenous community. The Court refers to Convention No. 169 to emphasise the positiv obligation of the State to guarantee the rights of indigenous peoples. Consequently, the appeal is allowed and, accordingly, the applicable administrative body is ordered to take the relevant measures to repair the bridge over the Rincón River as soon as possible.

Law applied:
Law on the Creation of the National Council for Indigenous Affairs, No. 5251, article 4, subsections a) and b), and Article 8; ILO Convention No. 169.

Relevant considerations of the court:
"III. - Before getting into resolving the root of this appeal, it would be suitable to refer to the legal framework applicable to indigenous affairs. The International Labour Organization's Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, incorporated into our legal system through Act No. 7316 of November 3, 1992, obligates States to develop co-ordinated action with the participation of indigenous peoples in the interests of protecting the rights of these peoples and guaranteeing respect for their integrity. To fulfil this commitment, governments must adopt necessary measures to validate the social, economic and cultural rights of these people – always respecting their social and cultural identity – by creating an institutional and legal framework that establishes mechanisms of co-ordination and co-operation between public authorities and this sector of the population."

"(...) The Chamber believes that, faced with the obvious situation of isolation of the indigenous peoples of the Guaymí Reserve, and in accordance with the international commitments made by the Government of Costa Rica through ILO Convention No. 169, the assistance required to restore access of this population to the various health and education centres, among other things, should have been forthcoming without delay. In other words, in a hazardous situation such as was faced by the residents of this reserve, the fair thing to do would have been to take appropriate measures to rectify the situation. If this had required a further extension of the aforementioned contracts – in the interests of having the necessary human resources to replace the bridge over the Rincón River - the appropriate thing to do would have been to grant said extension when requested. The Chamber does not fail to note that this extension should have been granted in accordance with the hazardous situation faced by this population, and in this regard, the State is obligated to take any and all measures to guarantee the reinstatement and enjoyment of the fundamental rights of the residents of the Guaymí Indigenous Reserve."

Comments:
Based on the principles derived from Convention No. 169, in this vote the Constitutional Chamber specifies the conduct that the administrative body should have taken in the emergency that afflicted the appellant indigenous community. Specifically, the Court bases its decision on the State's obligation, derived from Convention No. 169, to take co-ordinated action with the indigenous communities to protect their rights and to guarantee respect for their identity. In this case, the judgment obligates the State to take necessary measures to repair the bridge.

COSTA RICA 9

Court: Agricultural Court of the Second Judicial Circuit of San José

Case: Vote 468-F-04, Possessory Action Proceedings initiated by Heluber Madrigual Vargas, judgment of June 20, 2004.

Keywords: property, lands and territories.

Summary of the facts of the case:
The plaintiff requested registration of a farm, claiming that he performed possessory proceedings allowing him to acquire title on the claimed lands. The motion was dismissed in the first instance and the person concerned appealed.

The Court of Appeal upheld the dismissal of the petition, given that a substantial part of the contested land is located in the territory of the Conte Burica Guaymi Indigenous Reserve. The Court stated that the indigenous territory is collective and that it belongs to the entire community; consequently, it cannot be divided. The law also assigns an inalienable feature to the land. The Court based its decision on ILO Convention No. 169, among other standards.

Law applied:
Decree 5904-G of March 11, 1976; Act 6172 of November 29, 1977; Article 14 of ILO Convention No. 169.

Relevant considerations of the court:
"All of these national regulations are also backed by international agreements ratified by Costa Rica, such as the ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, which was approved by Act 7316 of November 3, 1992. Article 14 of said Convention recognizes indigenous peoples' right of ownership over the lands they traditionally occupy. Indigenous property is not individual but rather collective property, with the entire community being the owner, and cannot be divided into private property precisely due to its legal nature intended for the community. Based on this, the petitioner of these proceedings cannot hope to gain title of the land he indicates that he owned, as the Wastelands Act of January 10, 1939 establishes that these territories are inalienable, i.e. they cannot be owned by individuals. As indicated, this law, although no longer in force, assigned this inalienable quality, which was embedded continuously in subsequent regulations, and today topped by the aforementioned International Convention."

Comments:
In this case, an Agricultural Court cites Convention No. 169 as the basis for the inalienability of the ancestral lands of the indigenous communities, thus dismissing the petition for registration by an individual. This is one example of enforcement of the Convention by a lower court, as an interpretive and justifying guideline of the solution reached by the judge.

ECUADOR

ECUADOR 1

Court: Constitutional Court

Case: No. 994-99-RA, Independent Federation of Shuar People of Ecuador v. ARCO Oriente Inc Company, Judgment of March 16, 2000.

Keywords: land and territories, political organization, institutions, natural resources, sub-surface resources, culture and social, religious and spiritual values, consultation and participation, development process, collective rights.

Summary of the facts of the case:
This is an action for the infringement of constitutional rights brought by an organization representing an indigenous community, the Shuar People, against a privately owned oil company.

The Ecuadorian Government has signed a contract with the company to extract hydrocarbons, in an area of which 70% is on indigenous territory, without allowing the community to be involved. With this contract, the oil company entered the community's territory without the permission of its authorities, and attempted to sign agreements with members of the community who were not authorised by the Indigenous Federation, and with some community associations, in disregard of the structures for political organization and the indigenous people's communal authority. The lawsuit also alleges that the company's activity has given rise to acts of bribery, blackmail, and the use of force in the community's territory.

According to the plaintiffs, the activities pursued by the company endanger the unity of the indigenous community, its ways of organization, the integrity of its practices and institutions, and the inalienability of communal territory, and furthermore disregards the right of the organization to decide on its own priorities in the process of development. The lawsuit alleges the violation of constitutional requirements and ILO Convention No. 169.

Law applied:
Constitution of Ecuador, article 84, sections 1, 2, 3, and article 273; ILO Convention No. 169, Articles 5, 7, 8(2), 13(1) and 14(1) (Court of First Instance Sentence); Constitution of Ecuador, article 84, sections 1, 5, 6, and article 7 (Constitutional Court Sentence).

The Court of First Instance (Civil Court I of Morona Santiago) ruled in favour of the action for the protection of constitutional rights, ordering the company not to interfere in the life of the community without the authorisation of the indigenous community. The Constitutional Court upheld the judgment.

Relevant considerations of the court:

On the consideration of the indigenous community as being entitled to collective rights:
[The population groups organised within the Federation of Shuar Peoples] "are those human groups who occupy and hold these lands, in which they pursue 'their traditional forms of coexistence and social organization, the creation and exercise of authority', as is expressly stated in section 7 of article 84 of the Constitution."

On the how the company's activity endangers community life:
"The discriminatory and unilateral actions by the respondent cause disagreement between groups of the same community, leading to clashes between those who accept the criteria for the appeal and those who have either not been consulted or else disagree with the thinking of the respondent, which cause a division within the heart of the group, and these clashes — brought about by the accused — lead to social fragmentation, with internal schisms, which may be detrimental to culture and harmful to the community."

Comments:
It is interesting to note that this case is being brought by an indigenous community, in defence of its collective rights, against the action of a private agent —in this case, the oil company. Although it is evident that the issue of use of natural resources is an important factor, the fact is that the indigenous community chose to present the case as a situation of disruption of the integrity and unity of the indigenous people and the company's lack of respect or disregard for the community's authorities. The Court of First Instance refers to Convention No. 169 to substantiate the disruption of the collective rights and interests of the community.

Relevant reports and commentaries from ILO supervisory bodies:
The case of oil exploitation in Block 24, where 70% of the territories of the Independent Federation of Shuar Peoples of Ecuador (FIPSE) is located, has been discussed in detail in the report adopted by the ILO Governing Body in 2001 regarding a representation made under article 24 of the ILO Convention, alleging non-observance by Ecuador of Convention No. 169 (doc. GB. 282/14/2). The Committee of Experts on the Application of Conventions and Recommendations (CEACR) has also addressed this matter in its comments since 2003.
Observing that the oil companies consulted only with certain groups of Shuar people in order to obtain consent for oil exploitation, the tripartite Committee of the Governing Body charged with examining the above-mentioned representation noted that the "principle of representativity is a vital component of the obligation of consultation."[60] The Committee declared that it was aware that it might be difficult in many circumstances to determine who represents a particular community. However, the Committee stressed that "if an appropriate consultation process is not developed with the indigenous and tribal institutions or organizations that are truly representative of the communities affected, the resulting consultations will not comply with the requirements of the Convention." According to the Committee, in the case being considered, "not only was the appropriate consultation not carried out with an indigenous organization clearly representative of the peoples concerned in the activities of Arco on Block 24, the FIPSE, but that the consultations that were carried out excluded it, despite the public statement issued by the FIPSE in which it determined 'not to allow any negotiation between individual members or any of its centres and associations and the Arco company.'"[61]. Therefore, the tripartite Committee concluded that any consultation carried out in the future concerning Block 24 must take into account the above-cited FIPSE statement.

60) Paragraph 44 of the document GB. 282/14/2.
61) Ibid.

ECUADOR 2

Court: Constitutional Court

Case: No. 020-2000-TC, Ernesto López Freiré et al. v. President of the Republic and President of the National Congress, Judgment of November 21, 2000.

Keywords: political organization, institutions, self-identification, consultation and participation.

Summary of the facts of the case:
This is a claim of unconstitutionality brought by over 1,000 citizens, challenging the validity of an Executive Branch decree that sets forth the composition of the Council for the Development of the Nationalities and Peoples of Ecuador (Consejo de Desarrollo de las Nacionalidades y los Pueblos del Ecuador).

Article 2 of the decree in question (Executive Decree No. 383 of December 3, 1998) establishes that the Council for the Development of the Nationalities and Peoples of Ecuador (CODENPE) shall be made up of a representative of each of the "following nationalities: Shuar, Achuar, Huaorani, Siona, Secoya, Cofán, Záparo, Chachi, Tsa 'chila, Epera, Awa, and a representative of each of the Peoples of the Quichua nationality: Saraguro, Cañari, Puruhá, Waranka, Panzaleo, Chibuleo, Salasaca, Quitu, Cayambi, Caranqui, Natabuela, Otavalo, two representatives of the Quichua Peoples of the Amazon, and a representative of the Manta and Huancavilca peoples."

The appellants consider the distinction that the decree makes between "nationality" and "people" arbitrary, which in turn is results in unequal treatment for certain indigenous groups compared to others in the composition of the Council. The appellants indicate that the respective article of the Constitution (Article 83)[62] does not make any distinction between peoples and nationalities, and that as such the President has overstepped his authority in making this differentiation and using this as the basis for establishing the number of representatives to the Council.

The Constitutional Court interprets the terms used in article 83 of the Constitution in the light of Article 1(2) of ILO Convention No. 169. The court rules in favour of the appellants, indicating that the distinction in the presidential decree affects the principle of equality established in article 23 section 2 of the Ecuadorian Constitution. Consequently it declares the decree being challenged as unconstitutional.

Law applied:
Constitution of Ecuador, articles 23 and 284; ILO Convention No. 169, Articles 1(2) and 1(3).

62) article 83 of the Political Constitution of Ecuador establishes that "The indigenous peoples, who define themselves as nationalities of ancestral origins, and the black or Afro-Ecuadorian peoples, are part of the Ecuadorian State, unique and indivisible."

Relevant considerations of the court:

On self-identification with an indigenous group as a criterion for determining identity:
"To better understand the problem that is posed, it is fitting to refer to Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries adopted by the General Conference of the International Labour Organization on June 27, 1989, of which Ecuador is a signatory, and that states clearly in paragraph 2 of Article 1, that "self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply," complementing paragraph 3 of the same Article which states, "The use of the term "peoples" in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law."

Comments:
In this case the Constitutional Court uses Convention No. 169 to interpret the terms of a constitutional provision. According to the Court's criterion, Article 1(2) of Convention No. 169 is useful for clarifying that in the use of the term self-identification in article 83 of the Constitution of Ecuador, it does not make sense to distinguish between peoples and nationalities.

ECUADOR 3

Court: Constitutional Court

Case: No. 170-2002-RA, Claudio Mueckay Arcos v. Regional Directorate of Mining of Pichincha: Regional Director, judgment of August 13, 2002.

Keywords: lands and territories, consultation and participation, development process, natural resources, sub-surface resources, environment, traditional occupations, means of subsistence, property, culture and social, religious and spiritual values, collective rights.

Summary of the facts of the case:
This is an action for the protection of constitutional rights brought by the Ombudsman, representing the rights of the Chachis (FECHE) and black communities (UONNE) that inhabit the land of the Cayapas River, in the north-western part of Esmeraldas Province. The communities hold the deeds for their territory or else they inhabit it through ancestral possession. The communities subsist through the activities of hunting, fishing, gathering foods, and forestry which, and they depend absolutely on the Cayapas River for transportation cultural integration, food, and hygiene.

The Ministry of Energy and Mines has granted a mining concession to a private company to "prospect, explore, exploit, benefit, found, refine and trade in the minerals" that exist in a block located on the communities' territory.

The action for the protection of constitutional rights alleges that the granting and commencement of mining activities will cause irreparable damage to the natural resources, the health and lives of the families of the communities that inhabit the zone, and violate the collective rights of the black and indigenous communities, for having disregarded the requisites for prior consultation with the communities, the license, and the assessment of environmental impact.

The Court of First Instance (Penal Court Three of Esmeraldas) ruled in favour of the action for the protection of constitutional rights. The Constitutional Court upheld the ruling by the Court of First Instance, and stated that the concession endangers the right to a healthy environment, the collective right of the indigenous and Afro-Ecuadorian peoples to conserve ownership of their community lands, for the usufruct, administration, and conservation of the natural resources found within these, to conserve their diversity and management practices, and not to be displaced from their land. It furthermore states that the object of the ownership of community land is to ensure the maintenance of the culture, values, beliefs and traditions, and the social, economic and organizational development of the indigenous peoples and Afro-Ecuadorians. It also emphasises that there has been a violation of the right of these peoples to be consulted on plans and programs for the exploration and exploitation of the renewable resources that are found on their lands, and that the lack of legal regulation cannot be used as justification for disregarding this right.

Consequently, the Court decided to suspend the controversial mining concession.

Law applied:
Constitution of Ecuador, articles 23, 83, 84, 85, 91; ILO Convention No. 169, Article 15.

Relevant considerations of the court:

On the violation of the right to consultation prior to the concession:
"That, the mining concession, without a doubt, will environmentally affect the settlements of the Chachis and black people living in the concession zone, who are in ancestral possession of these lands or whose ownership has been legally recognized, in some cases, lands that are bathed by the Cayapas River, which serves as the channel for communication and connecting these peoples, resource that is indispensable in the pursuit of their daily lives, upon which they depend for food, through fishing, and for hygiene through the use of its water, therefore, appropriate consultation prior to granting the concession was required, even more so given that article 88 of the Constitution orders that any State decision —such as a mining concession— which might affect the environment must be consulted previously with the criteria of the community, which must be duly informed; and Article 15 of ILO Convention No. 169 on Indigenous and Tribal Peoples to which the Ecuadorian State has subscribed, provides for the protection of natural resources in indigenous lands and territories, for which consultation procedures must be established to assess the effects that exploitation would have on the lives of the peoples, to determine whether their interests would be prejudiced, and to what extent, before undertaking or authorising any program for prospecting or exploitation of the resources that exist on their lands. Hence, the completion of the consultation was imperative, the omission of which determined the illegality of the act that is in question."

Comments:
The Constitutional Court here expressly applies Article 15 of Convention No. 169, in addition to interpreting the relevant constitutional requirements in a way that is compatible with the Convention. From a substantive point of view, it identifies the scope of the collective rights of the communities of indigenous and African descent, stressing the particular importance that their territory and the environment have for their livelihood, culture, and values. From the procedural point of view, the judgment recognizes the right of the communities of indigenous and African descent to consultation before making decisions that could affect their rights and interests. It is also important to note that the Court did not accept the excuse given by the State, namely the lack of regulations for the consultation: the lack of consultation, whether or not a law exists to regulate it, has the effect of invalidating the concession.

GUATEMALA

GUATEMALA 1

Court: Constitutional Court

Case: Case 199-95, Advisory Opinion on Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO), May 18, 1995.

Keywords: Status of the Convention in national law, culture and social, religious and spiritual values, lands and territories, consultation and participation.

Summary of the facts of the case:
This is an opinion that the Congress of the Republic requested of the Constitutional Court concerning the compatibility of ILO Convention No. 169 with the Constitution of Guatemala, in accordance with the provisions of the Law on Legal Protection, Personal Exposition and Constitutionality.

The Constitutional Court analyses in detail the antecedent to Convention No. 169, and then presents the Guatemalan constitutional framework that is relevant to the subject. Herein follows the analysis of the compatibility of the Convention with the Constitution. Finally it analyses the compatibility of each of the Convention's parts with the Constitution. The Constitutional Court concludes that Convention No. 169 is fully compatible with the Constitution of Guatemala.

Law applied:
Constitution of Guatemala; ILO Convention No. 169.

Relevant considerations of the court:
"ILO Convention No. 169 brings new elements to effectively remove the barriers that prevent the indigenous peoples from enjoying human rights and fundamental freedoms to the same degree as the rest of the population; on the one hand, it promotes respect for their culture, religion, social and economic organization, and their specific identity as a people, which no democratic state of law or social group may deny them; and, on the other hand, incorporates the mechanism of participation and consultation with the peoples who are stakeholders, through their organizations or their representatives, in the process of planning, discussion, execution, and decision-making on issues that are specific to them, as a way to ensure integrity, recognition, respect, and promotion of cultural, religious, and spiritual values."

(...)

"On the first point, meaning its study as a whole, it is necessary first to analyse it to determine the place that the Convention occupies within the legal system and its position with respect to the Constitution to determine whether, at any given time, it could supersede aspects of the overriding legal framework by contradicting it, as some sectors have suggested. In this regard, it should be mentioned that article 46 of the Constitution acknowledges the general principle that the human rights treaties and conventions that Guatemala has accepted and ratified take precedence over domestic law. In this regard, this Court has held that the Constitution should be interpreted as a harmonious whole, in which each part is interpreted in a manner consistent with the others,

that no provision should be considered in isolation, and that conclusions that are in concurrence should be preferred, rather than those that oppose the different precepts of the Constitution.
In the first place, the fact that the Constitution takes precedence over domestic law must be understood as the recognition of evolution on the subject of human rights. Their hierarchy is set forth by introducing into the internal legislation those regulations that go beyond the explicit recognition of rights, but never with the power to reform and least of all overturn its precepts in the case of being in contradiction with the provisions of the Constitution itself. This entrance or incorporation into national legislation would therefore take place not by means of article 46, but through the first paragraph of article 44, which reads: "The rights and guarantees granted by the Constitution do not exclude others that, although not mentioned expressly herein, are inherent to the human person." In accordance with the foregoing, the Constitution guarantees their hierarchy and rigidity through the provisions of article 44 third paragraph, article 175 first paragraph, article 204, and that which is relative to the fact that only constituent power or the procedures set forth in article 280 of the Constitution have the power to reform it. (...)
In principle it may be said that ILO Convention No. 169, on the whole, does not contradict the Constitution, in that it does not regulate any subject that clashes with fundamental law but rather, to the contrary, it addresses aspects that have been considered constitutionally necessary to be developed in the ordinary legislation."

(...)

"Articles 2, 3, 4, and 5 aim to ensure human rights and fundamental freedoms for members of indigenous and tribal peoples, without discrimination, recognising the values, customs and ideals that are particular to them, which is consistent with the constitutional precepts contained in articles 66, 67, 68, and 69.
Article 6 of the Convention provides that in implementing its provisions, governments shall consult the peoples concerned, considering the measures that will affect them, allowing the free participation of members of these peoples, for the purpose of reaching consensus through dialogue, negotiation and coming to agreements, as is done in similar cases with other sectors of society. The Constitution sets forth mechanisms for democratic participation through which the citizens may speak out on matters of the election of authorities, decisions of particular importance, and in those cases where their participation is necessary in plans for urban and rural development, in such a way that participation in planning, discussion and decision-making on the problems that pertain to an indigenous people do not violate any constitutional provision, but rather reaffirm and strengthen the democratic principles on which the State of Guatemala is based."

(...)

"As such, Article 7 of the Convention sets forth that the peoples concerned shall have the right to decide their own priorities… and to exercise control "to the extent possible," over their own economic, social and cultural development, which makes evident that this is not a mandatory regulation of immediate and inflexible application. Article 8 of the Convention sets forth that due regard shall be given to the customary laws of the people, and the retention of their own customs and institutions "where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights," meaning so long as these are not incompatible with the Constitution.

Article 9 also contains a provision in the same sense, setting forth that "to the extent compatible with the national legal system and internationally recognized human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected." As may be observed, Article 8 and 9 always refer to the application of customary law within the context of the existing laws in the country in question; as such, Article 8 in stating that in the application of the law to the peoples concerned, their customs and customary law shall be taken into account, does not establish what shall be judged based on these customs, but rather that these shall be taken into account during judgment. Article 9 in stating the need for respect for the methods that people use for dealing with offences, sets forth that this shall be insofar as these are compatible with the national legal system and internationally recognized human rights, and that if the methods are not consistent with these, they shall not be applied. Article 10, which sets forth that "preference shall be given to methods of punishment other than confinement in prison," when applied to members of indigenous peoples, must also be understood as referring to different types of punishment contemplated in the legislation. It may be stated that in many communities punishment by confinement in prison is not used but rather measures to make reparation for damages, meaning that if these mechanisms have been effective in some communities these could be introduced into the legislation to implement with these indigenous groups; however, in the absence of alternative punishments to imprisonment, this must be applied, but have incorporated various other punishments into the legislation other than imprisonment, these should be preferred. It is not possible to attempt to apply these if they do not exist in the legislation."

(...)

"Part II of the Convention, Articles 13 to 20, regulate issues relating to land, recognising the special relationship that the indigenous have with the lands and territories that they occupy or otherwise use and, in particular, the collective aspects of this relationship. The concept of lands refers to the legal aspects of these. It sets forth the need to recognize the right to ownership and possession of the lands that they traditionally occupy; as well as the right of these peoples not to be moved from those lands, regulating that when the transfer and relocation of these peoples is considered necessary, this should only be done with their consent, and that they should return to their traditional lands when the reasons that motivated the transfer and relocation have ceased, and if return is not possible they shall be compensated according to the terms contemplated in the Convention. It should specify the punishments for unauthorised intrusion on their land, taking measures to prevent such offences. In this sense, this Court may say that the obligation of governments to respect the special cultural importance of the relationship with the lands or territories, and the fact of granting the peoples concerned the right to ownership and possession of the lands that they traditionally occupy, is consistent with the provisions of articles 66, 67 and 68 of the Constitution. Furthermore, the procedures used to decide land claims by the peoples concerned shall be instituted in accordance with Article 14 paragraph 3 of the Convention, or in accordance with the national legal system, in that private property is guaranteed as a personal right in the Constitution of the Republic (article 39), in the case that the land that the people in question occupy was owned by another person, the legal recourse to claim and enforce the right to ownership would have to follow the legal procedures established by the Constitution. In this case the land could be expropriated for reasons of collective use, social benefit or public interest (article 40), but otherwise, according the Constitution prohibits the confiscation of property, which, of course, the Convention also does not permit."

(...)

"As has been outlined, in ILO Convention No. 169 there are no provisions that may be considered incompatible with the Constitution, in that by interpreting the regulations within the general framework of the flexibility with which it was conceived, the Convention can only give rise to the positive outcomes that were foreseen for promoting respect for the culture, religion, social and economic organization, and the identity of the indigenous peoples of Guatemala, as well as their involvement in the process of planning, discussion and decision-making on the affairs of their community.
Guatemala has signed, approved, and previously ratified several international legal instruments for the recognition, promotion and defence of human rights in general, which nominally also apply to the indigenous peoples; however, taking into account that while it is true that the rules of democracy are formally the same for everyone, there is obvious inequality of the indigenous peoples in relation to other sectors of the population, and as such the Convention was designed as a legal mechanism aimed especially at removing some of the obstacles that prevent these peoples from the real and effective enjoyment of fundamental human rights, so that they at least enjoy the same degree of equality as the rest of society. Guatemala is acknowledged and described as being a unitary, multiethnic, multicultural and multilingual State, united within its territorial integrity and the different socio-cultural expressions of the indigenous peoples, who still coherently sustain their identity, especially those of Mayan descent, such as the Achi, Akateco, Awakateko, Chorti, Chuj, Itza, Ixil, Jakalteco, Kanjobal, Kaqchikel, Kiche, Mam, Mopan, Poqomam, Poqomchi, Q'eqchi, Sakapulteko, Sikapakense, Tectiteco, Tz'utujil, and Uspanteco. This Court maintains that Convention No. 169 does not contradict what is set forth in the Constitution and it is a complementary international legal instrument that develops the provisions upheld in articles 66, 67, 68, and 69 of the aforementioned, which does not preclude but rather, to the contrary, tends to strengthen the system of values proclaimed in the text of the Constitution."

Comments:
The President and the Congress of the Republic of Guatemala have the authority to ask the Constitutional Court to provide Advisory Opinions. In this case, Congress used this mechanism to ask the Constitutional Court for an opinion on the compatibility of Convention No. 169, which was before Congress for approval, with the Constitution. In this Advisory Opinion the Constitutional Court provides a general evaluation of Convention No. 169, and an analysis of each of its parts, noting that this international instrument is fully compatible with the Constitution of Guatemala, which also includes clauses for the recognition of the rights of the indigenous peoples.

Although this is not a lawsuit brought as an administration case, the Advisory Opinion is important because it provides guidelines for the interpretation of new cases, and in this sense it is used by different courts.

GUATEMALA 2

Court: Criminal Court of First Instance, for Drug Activities and Crimes against the Environment in Totonicapan Department

Case: File E.312.2003 Case 6, judgment of June 25, 2003.

Keywords: customary criminal law, community justice, criminal justice, *non bis in idem* (double jeopardy).

Summary of the facts of the case:
This is a criminal investigation of aggravated theft, involving three members of an indigenous community.

The judge dismissed the case against the three defendants, because it was demonstrated that they had been tried by the authorities of the indigenous community, which had punished those responsible. The judge indicated that the recognition of the legal validity of the punishment levied by the community precluded the possibility of applying new criminal sanctions on those responsible, as that would violate the principle of *non bis in idem* (double jeopardy). The ruling was made based on constitutional requirements, and quotes extensively the applicable provisions from ILO Convention No. 169

Law applied:
Constitution of Guatemala, articles 46, 58 and 66; ILO Convention No. 169, Articles 2, 8, 9 and 10.

Relevant considerations of the court:
"As such, the judge presiding over the court proceedings, upon analysing articles 46, 58 and 66 of the Constitution of the Republic of Guatemala as a legal basis for the applicability of indigenous law, concluded that these guarantee the free exercise of the rights enshrined in these articles and imply the right of every citizen to be tried according to their own legal system within the framework of their cultural identity, distinct from that which the State has defined as official. This implies respect for the legitimate application of indigenous law within the constitutional framework of the Guatemalan State. In analysing these articles, it is clear that the State has the obligation to recognize the rights and the existence of the "peoples" or indigenous communities in its legal structure. The constitutional provisions go further by putting forth that the State shall promote their way of life and social organization, as well as customs, dress, and language.
The constitutional mandate of article 66 is developed and made applicable by means of the promotion that the State, through the agencies and institutions that make it up, is obliged to carry out, which implies the explicit commitment to act in accordance with the tenets of the Constitution and taking into account the Advisory Opinions of the Constitutionality Court, case 170-2002 concerning the Rome Statute, and Case 199-95 concerning ILO Convention 169.
In that it has already been made explicit that Convention No. 169 is in force in our legislation and is not contradictory or incompatible with constitutional law, as is set forth in the Advisory Opinion of the Constitutionality Court, which states: "This Court is of the opinion that having analysed Convention No. 169 it does not contradict what is set forth in the Constitution and it is

a complementary international legal instrument that develops the provisions upheld in articles 66, 67, 68, 69 of the aforementioned, which does not preclude but rather, to the contrary, serves to strengthen the system of values proclaimed in the text of the Constitution."

"An analysis of the minutes dated 25 June 2003, signed by the authorities of the Chiyax Community department of this municipality, reaches the same conclusion in the punishment set forth therein, which does not contravene the provisions of International Law on Human Rights nor the Constitution of the Republic of Guatemala, thereby making its approval and legal recognition relevant. Based on those points and the considerations of fact and law set forth above, which when considered together with the Criminal Law principles of non-intervention or minimal intervention that basically state it may be applied as a last resort only when all other legal proceedings have failed (which is not the case because here there was a legal and effective application of Indigenous Law in the resolution of the conflict), and when taken together with the principle of *non bis in idem*[63], providing that a person cannot be tried twice for the same crime, it must be considered that if one were to apply here an additional formal punishment or one pursuant to the Criminal Code provisions, it would be contrary to the aforementioned guiding principle. Since it is impossible to issue a final judgment, be it a conviction or an acquittal in the case, the conclusion, given this impossibility to bring the matter to trial, which is in itself objective grounds for a stay of proceedings of the criminal action, is to declare in the present case that the Prosecuting body has a lack of capacity to bring the criminal and public action due to the lack of exclusive jurisdiction in the action, since it was entirely managed by the authorities of the Chiyax community and in application of their indigenous law(...)".

Comments:
This is another case recognising the legal validity of a punishment imposed by the community authorities in a case of crime, and the consequent dismissal of the criminal trial, through the application of the principle of *non bis in idem*. In addition to extensively citing the provisions of Convention No. 169, the judge also referred to the Advisory Opinion on the Convention No. 169 by the Constitutionality Court (see Guatemala 1), which found the content of the Convention to be compatible with the Constitution of Guatemala.

63) Non (or ne) bis in idem translates from Latin as "not twice for the same", and means that no legal action can be instituted twice for the same cause.

GUATEMALA 3

Court: Court of Appeals, Serving to Uphold Constitutional Rights, Third Chamber

Case: Legal protection No. 46-2003 Case 1, judgment of October 30, 2003.

Keywords: culture and social, religious and spiritual values, affirmative action, special measures, discrimination, indigenous women.

Summary of the facts of the case:
This is an action for the infringement of constitutional rights brought by the Ombudsman against a decision by the Director of the Penitentiary System that requires that all persons detained in prisons use an orange uniform. This has forced indigenous inmates to shed their traditional clothing. The Ombudsman alleges violation of the right to cultural identity of indigenous peoples and cites ILO Convention No. 169 in his support.

The Court of Appeals upheld the action for the infringement of constitutional rights, noting that the imposition of the requirement to wear a uniform and the corresponding prohibition from using traditional dress is a case of discrimination against indigenous groups, and especially against indigenous women. The Court notes the incompatibility of the decision with the State's obligation to recognize, respect and promote the culture and traditions of the indigenous peoples, which include the use of traditional dress. Consequently, it overturned the administrative decision and restored the right of affected inmates to use traditional dress.

Law applied:
Constitution of Guatemala, articles 2, 6, 12, 19, 39, 66, 203 and 204; ILO Convention No. 169, Articles 1, 2 and 5; International Covenant on Civil and Political Rights, Article 10; American Convention on Human Rights, Article 5.

Relevant considerations of the court:
"Uniforming male or female prisoners of the Mayan people, as in this case, constitutes blatant discrimination and a violation of article 66 of the Constitution of the Republic that recognizes that Guatemala is composed of different ethnic groups, among which are indigenous groups of Mayan descent.

That the State recognizes, respects and promotes their way of life, customs, traditions, ways of social organization, the use of indigenous dress by men and women, and dialects; in turn it is unacceptable that in an arbitrary manner and without any legal basis or justification to purport to uniform members of indigenous groups of Mayan descent, which is an act that clearly constitutes discrimination against these people, notwithstanding the incidents that have brought them before the court. Furthermore, article 4 of the Constitution of the Republic of Guatemala states that all human beings are free and equal in dignity and rights, and that no person may be subjected to servitude or other condition that impairs his dignity, meaning that no action executed on behalf of the State of Guatemala, as in this case, may cause a loss of dignity, which is what the action for the infringement of constitutional rights alleges."

Comments:
In a brief judgment, the court identifies how an administrative decision that at first glance appears to be neutral affects the right to use traditional dress as a manifestation of the right to cultural identity and recognition of the culture and traditions of the indigenous peoples. This is an example which illustrates the potential negative impact of administrative measures that have failed to take into account the cultural differences of those of indigenous origin, and makes the appropriate judicial remedy for having affected them.

GUATEMALA 4

Court: Community Peace Court Municipality of San Luis, Petén Department

Case: File No. 517-2003 Case I, judgment of November 18, 2003.

Keywords: criminal justice, culture and social, religious and spiritual values, status of the Convention in national law.

Summary of the facts of the case:
This is a criminal proceeding instituted against a member of an indigenous community, reported by National Police officers. The accused was charged with the crime of "trafficking in national treasures." According to the police authority, the accused was trading in objects of archaeological value, moving these from one community to another.

The judge dismissed the charges, given that the accused was demonstrated to be a Mayan priest. The judge considered that evidence was given that the accused moved the objects of historical and cultural value for use in Mayan rituals and ceremonies, and not with the intention of selling or trading them. The ruling was based on constitutional requirements and ILO Convention No. 169, also citing the Advisory Opinion of the Constitutionality Court (see case Guatamala 1 in this publication), which considers that the Convention is compatible with the Constitution of Guatemala.

Law applied:
Constitution of Guatemala, article 66; ILO Convention No. 169, Articles 4, 5, 8, 9(1) and 9(2).

Relevant considerations of the court:
"Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries; Guatemala is characterised sociologically as a multiethnic, multicultural, and multilingual country, united as a State and in the indivisibility of its territory, and as such upon signing, approving and ratifying the Convention on the subject, it has developed complementarities within its domestic legal system. Guatemala has signed, approved, and previously ratified several international legal instruments for the recognition, promotion and defence of human rights in general, which nominally also apply to the indigenous peoples; however, taking into account that while it is true that the rules of democracy are formally the same for everyone, there is obvious inequality of the indigenous peoples in relation to other sectors of the population, and as such the Convention was designed as a legal mechanism aimed especially at removing some of the obstacles that prevent these peoples from the real and effective enjoyment of fundamental human rights, so that they at least enjoy the same degree of equality as the rest of society. Guatemala is acknowledged as being a unitary, multiethnic, multicultural and multilingual State, united within its territorial integrity and the different socio-cultural expressions of the indigenous peoples, who still coherently sustain their identity, especially those of Mayan descent.

"Subsection a) of Article 5 [of Convention No. 169], states: "The social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected, and due account shall be taken of the nature of the problems which face them both as groups and as

individuals." Subparagraph b) of the aforementioned Article, of the same Convention provides that integrity of the values, practices and institutions of these peoples shall be respected. Consequently, paragraph 1, of Article 8 of the aforementioned international instrument, states: "In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs." Paragraph 2 of the above Article states: "These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle." This means that in principle State institutions, including the courts, must respect the institutions and customs of the indigenous peoples. Taking into account the provisions of paragraph 1 of Article 9 of ILO Convention No. 169, which states: "to the extent compatible with the national legal system and internationally recognized human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected." If the Customary Law of the Indigenous Peoples recognizes an individual authority figure or community institution; the institutions created under State legislation, including the Judicial Branch, should not reproach or consider as a crime activities that are proper to or in observance of the customs of the indigenous community; but rather these should observe and distinguish the equivalent institutions that operate within Indigenous Law. At some point the government institutions, especially the Judicial Branch, which the Constitution entrusts to administer Justice, should make a clear distinction between the Law and Justice, given that Our Indigenous Law, which has been recognized internationally, also has its institutions. In this regard it is not the law that should be applied, but due and timely justice. This interpretation is in accordance with paragraph 2 of Article 9 of the aforementioned international instrument, which provides: "The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases."

Comments:
Although this is a simple case, dismissing the criminal suit because the actions did not constitute a criminal offence, the case deserves to be highlighted for several reasons. First, it is an application of Convention No. 169 by an ordinary judge. Second, because of the judge's consistent and comprehensive reading of the constitutional requirements in relation to those of Convention No. 169. Third, because the judge correctly identified the problem — the transfer of objects of historical and ritual value was motivated in this case by the performance of indigenous rituals and ceremonies, which, far from constituting a crime, is the exercise of a right protected by the Constitution and Convention No. 169. Fourth, because the judge recognized the application of Maya Customary Law to the case, as part of the recognition of the religious authority of the accused, and fifth, the use of testimonial evidence to prove that authority.

MEXICO

MEXICO 1

Court: Electoral Court of the Judicial Branch of the Federation

Case: Herminio Quiñones Osorio and other v. LVII Legislature of the State of Oaxaca and other, File SUP-JRC-152/99, Judgment of November 11, 1999.

Keywords: elections, customary law, political organization, institutions.

Summary of the facts of the case:
Representatives of an indigenous community of Oaxaca, Mexico, challenged the decision of the State Legislature to invalidate the election of municipal authorities (city councillors) held in the community under the regulations of customary law. The lawsuit also called for new elections. The appellants alleged violations of Articles 1, 2, 4, 5, 7, 8 and 12 of ILO Convention No. 169, among others.

The court noted an apparent contradiction in the lawsuit, which appeared to claim both the validation of the elections and the holding of new elections. However, it decided to reinterpret it, so as to consider that the appellants' main claim was that of validation of the elections that were held in accordance with indigenous customary law, and the call for new elections should be seen as subsidiary. The court also decided to reclassify the type of legal measure employed. Under these considerations, the lawsuit was declared sound.

Law applied:
Constitution of the United Mexican States, articles 4; 41, base IV, and 99, para. 4, section V; Administrative Law on the Judicial Branch of the Federation, article 199, section XII; General Law on the System of Measures for Appealing Electoral Issues, article 26(3); ILO Convention No. 169.

Relevant considerations of the court:
"In this sense, it is clear that the actors allege violations of their political and electoral right to vote in elections that, under the customary law system, are recognized in accordance with the provisions of article 4, paragraph 1 of the Constitution of the United Mexican States and ILO Convention No. 169, in conjunction with article 133 of the Federal Constitution, as well as 16 articles and 25 of the Constitution of the Free and Sovereign State of Oaxaca; so that with the above-described references, the Supreme Judicial Council of the Federation considers that the appellants meet the third of the requirements in order to undertake a trial for the protection of the political and electoral rights of citizens as set out in article 79 of the General Law on the System of Measures for Appealing Electoral Issues."

Comments:
The decision of the Electoral Court of the Federation is important because it recognizes, based on Convention No. 169, the right of members of the indigenous community to hold elections under customary law and, in turn, the right to appeal to the electoral justice system when those rights are disregarded.

However, the Court's reclassification of the type of legal measure does not seem to have considered the implications of Convention No. 169. The appellants, as representatives of the community, decided to bring a lawsuit for constitutional review of the elections. The Court found this procedure improper because, according to electoral law, only political parties are entitled to make this claim. However, the Court reclassified the appeal, making it a claim for the protection of the political and electoral rights of the citizens.

The paradox is that a claim for the protection of the political and electoral rights of the citizens is an argument to uphold the rights of individual citizens, in such a way that the Court did not legitimise the community as a collective subject whose rights have apparently been violated, nor did it consider the appellants as representatives of the community, but merely as individual members of the community. The application of Convention No. 169 would have seems to require an interpretation of the requisites for legitimacy of the instruments for legal protection on electoral issues, for the purpose of embracing the collective dimension of the right of the indigenous community to elect its municipal authorities through customary law.

MEXICO 2

Court: Electoral Tribunal of the Federation Judiciary

Case: Joel Cruz Chávez et al v. Fifty-ninth Legislature of the State of Oaxaca et al, SUP-JDC-11/2007, Judgment of June 6, 2007.

Keywords: elections, special measures, access to justice, customary law, political organization, institutions.

Summary of the facts of the case:
The appellants are bringing an action against the authorities of the State of Oaxaca for a failure to call elections in an indigenous municipality. They are appealing the continued suspension of municipal electoral rights that has gone on for five years, which also affects their right to elect authorities in accordance with the customary law of the indigenous community. They argue that, through various actions, the authorities in the State of Oaxaca have prolonged the postponement of elections, thus preventing the community from electing its own authorities.

The Court states that the appellants did not correctly identify the prejudicial act, but believes that, as a special measure for an indigenous community, this fault can be overcome (through what is referred to as "*suplencia de la queja*"[64]). Along the same lines, given the exception submitted by State authorities, in the sense that the claim was filed belatedly, the Court decides to allow some leeway in the interpretation of the term of the challenge, again using the concept of "special measure". The flexibility in the term for submitting the claim is based on the specific characteristics of the indigenous community affected. In both cases, to justify the use of "special measures", the Court turns to ILO Convention No. 169.

On the question of law, the Court considers, among other issues, the lack of consultation of the indigenous community regarding the call for elections as a basis for judgment for determining the existence of an unjustified continuation of the violation of the community's electoral rights. The Court believes that continuation of the situation lacks appropriate grounds, reverses the standard that allows the situation to continue and orders State authorities to adopt the required measures to call councillor elections in the municipality (which includes consulting the community).

Law applied:
Constitution of the United Mexican States, articles 41, subsection IV and 99, section IV, subsection V; 184; 186, and subsection III, para. c); Organic Law of the Federation Executive Branch, articles 187 and 189, subsection I, para. f); Act regarding Means of Recourse in Electoral Matters, articles 25 and 84, section 1, para. b), ILO Convention No. 169, Articles 2, 4(1), 8(1), 12 and 30.

Relevant considerations of the court:
"The systematic and functional interpretation of article 2, section A, subsection VIII, 17 and 133 of the Political Constitution of the United Mexican States, articles 2, 4, 9, 14 and 15 of the Federal Act for the Prevention and Elimination of Discrimination, Articles 1 and 12 of *the Convention on Indigenous and Tribal Peoples, 1989,* and part 1, Article 1 of the American Convention on Human Rights leads one to (allow actions) initiated by members of indigenous communities or peoples to safeguard the political and electoral rights of citizens, which propose, as a result of the ignorance or infringement of citizen prerogatives protected by this constitutional control mechanism, the impairment or enervation of the political autonomy that said peoples and communities to elect their authorities or representatives according to their own standards, procedures and traditional practices. This Superior Court of the Electoral Tribunal of the Federation Judiciary is able not only to overlook the shortcoming in the grounds for disagreement, pursuant to article 23, section 1 of the Act regarding Means of Recourse in Electoral Matters, but also to correct any fault or shortcoming in the statement of claim, such as, based on the items on the record or those required by the case, determining the act that actually causes damage to the plaintiff, even though said act is not explicitly named in the statement of claim, and act accordingly, without further limitation than those derived from the principles of congruency and contradiction inherent to any jurisdictional proceeding. As such, it is believed that such a measure is consistent with the constitutional principles that recognize the rights of these communities and their members, in addition to being suitable pursuant to the requirements derived from the federal legislation in force and the international treaties signed and ratified by Mexico in this matter, and it is even similar in nature to the provisions of the federal regulations in similar cases in where members of vulnerable or historically unprotected social groups are party to judicial proceedings."

"In the absence of secondary legislation that is directly applicable, the essential regulatory content of indigenous peoples' right to full access to the State jurisdiction or, likewise, given the role that rights play in eradicating factual inequalities among indigenous communities with regard to the rest of the population, the measures that must be adopted to enforce this constitutional principle are likely to be developed or realised based on other, lower regulatory provisions, as are the international treaties signed and ratified by Mexico, or secondary laws (in this case, federal) that are unequivocally taken as an expression of legal powers, guarantees or positions that are not constitutionally stated but that are clearly derived from their relationship to the fundamental right. Rather, without this clear relationship, we are dealing with mechanisms or instruments that serve the same or similar purpose, which in this case, in accordance with the principle of completeness; their adoption would be justified because the same reasons essentially exist.

On these grounds, it must be remembered that the International Labour Organization's Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries is in force in our country, and was adopted by the General Conference of said international organization on June 27, 1989, ratified by Mexico on September 5, 1990 and published in the Official Gazette on January 24, 1991. Some of its provisions are as follows:

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

64) Court's authority to correct errors or deficiencies in a petition for legal protection.

2) *Special measures* shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the indigenous peoples (art. 4, section 1); and

3) The indigenous communities shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights. Measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means (art. 12).

The legal principles stated, as provided by article 133 of the Political Constitution of the United Mexican States, comprise part of the "*supreme law of the Union*", in that they are part of the system of federal resources, and both state and federal judges are obligated to adhere to said principles in actions taken to resolve disputes within their jurisdiction.

In view of the foregoing and the provisions of the aforementioned Convention, it is considered that, in accordance with the role and nature of the rights of indigenous communities and their members, it is crucial that *special measures* be adopted or implemented that allow these subjects to have full and effective judicial protection of their legally relevant interests, under conditions that are truly equal compared to the rest of the population, in those cases where they believe they have been violated or ignored. As such, it has become necessary to eliminate factual barriers that prevent or make impossible any form of access to courts of justice and the determination of speedy, complete and impartial decisions, as is guaranteed for everyone governed by the Mexican legal system.

Such special measures must be suitable, objective and proportional to achieve their aim, namely the elimination of the obstacle or barrier noted and, ultimately to provide indigenous peoples with real and effective access to the State jurisdiction".

"Based on this interpretation and in keeping with the interpretation taken from the constitutional text, the Act for the Prevention and Elimination of Discrimination and the diverse international instruments referred to (ILO Convention No. 169), through its organs, Mexico must provide necessary corrective or compensatory measures that allow subjects in situations of inequality to access the free and effective exercising of their fundamental rights. In any other way, said rights become mere rhetorical statements lacking possibility, which vitiates their role as instruments for the full development of the person and undermines the dignity of the person, the sustenance of the entire State framework."

"For its part, in keeping with the above, under the terms and conditions of Article 8, section 1 of the *Convention on Indigenous and Tribal Peoples 1989,* when national legislation applies (in this case, the Act regarding Means of Recourse in Electoral Matters) to indigenous peoples (and their members), their customs or customary law must be taken into consideration.

The mandate in question is reflected in the duty of the judicial or applicable jurisdictional body to find out and resolve the controversy in which members of indigenous communities and peoples are involved (individually or collectively), to interpret the constitutional and legal provisions governing the contentious proceedings and the fundamental subject of the dispute, with special consideration for the customary indigenous standards of the case and the specific conditions or cultural qualities of the people or community involved; this includes lifestyle and the customs, knowledge and degree of artistic, scientific or industrial development of a determined socially cohesive human group, which identify them to each other and allows them to ascribe themselves to that social group.

Such cultural customs and particularities of indigenous communities and peoples must be weighed by the judge when the controversy or dispute to which members of these communities are party is being resolved, but also when analysing whether the procedural requirements of a given trial or recourse are being met, given their importance, as solely through their accreditation is it feasible to examine the matter in depth and, in this case, obtain full and effective legal protection. This is also in keeping with the purpose of the constitutional provision, as established in the second legal reason, as with this provision they are trying to make the delivery of justice compatible with the indigenous culture and cosmovision as much as possible and within the parameters of the Magna Carta, such that those subject to trial do not perceive the State jurisdiction and bodies carrying out justice as foreign bodies as being incompatible with their environment.

Likewise, the provision under discussion tries to give the judge the opportunity to examine the scope of the undeterminated and abstract standards, provided for by the legislator for most cases in general, when indigenous peoples are involved, whose behaviour and conduct respond to their own traditions and customs, as well as the specific conditions in which they live their lives, which are not necessarily the same as the elements considered by the legislator when the laws were drafted to determine those general regulatory hypotheses."

"The duty to act under the terms listed is derived from the provisions of Article 30 of the aforementioned Convention on Indigenous and Tribal Peoples 1989, according to which governments must adopt measures appropriate to the traditions and cultures of the indigenous peoples, to make known to them their rights and duties, especially those derived from the Convention itself (which includes citizen prerogatives of political participation), as would be, for example, the use of written translations and the use of other forms of mass communication in the languages of these peoples."

Furthermore, in order to determine the lack of conditions to hold elections pursuant to standards of customary law, the General Council of the local electoral institute did not take into consideration the opinion of the inhabitants of Tanetze de Zaragoza, which they were obligated to do pursuant to art. 6, number 1, para. a) of ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, which Mexico ratified, which word for word states:

> *"1. In applying the provisions of this Convention, Governments shall: a) Consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;".*

Comments:
The Electoral Tribunal uses Convention No. 169 here to gain some leeway in the rigid application of formal requirements - the precise identification of the challenged act and the period for challenging it. To do so it uses the notion of “special measure”, justified in this case because the rights of an indigenous community are at issue.

Convention No. 169 is also cited in assessing the diligence of the State authority in re-establishing the infringed right. In this case, failure to consult the community on the elections is taken as a lack of due diligence, which determines, among other factors, the decision of the Court in considering the delaying of elections to be unduly motivated according to indigenous customary law.

VENEZUELA

VENEZUELA 1

Court: Supreme Court

Case: Indigenous community of Jesús, María y José de Aguasuay on action for annulment for unconstitutionality and constitutional protection, Judgment of October 6, 1998 (Rapporteur: José Luis Bonnemaison W.).

Keywords: lands and territories, ownership, legal personality, means of subsistence, discrimination, status of the Convention in national law.

Summary of the facts of the case:
In its action for constitutional annulment, the indigenous community of Jesús, María y José de Aguasay challenges a municipal bylaw in Maturín, State of Monagas, in north-eastern Venezuela. The challenged bylaw, intended to mark the municipality's territory, declared the community's ancestral lands to be municipal land and authorised the use of these lands by third parties. To do so, it declared that the indigenous community was "extinct". The community is claiming violations of the right to ownership and the constitutional clause ordering the protection of indigenous communities. The community is petitioning the recognition of the existence of the indigenous community and the existence of the property title to their ancestral lands, in addition to the annulment of the concessions to third parties of entitlement to these lands.

The Supreme Court assesses the evidence submitted by the community, to the effect that it was legally recognized in the indigenous census of 1982 and 1992. The Court also positively assesses official documents from the Central Statistics and Information Technology Bureau of the President's Office, which indicates that the community has succeeded at preserving its ethnic identity, language, various social customs and religious beliefs, as well as the settlement of its ancestral lands. The Court concludes that the community exists and is not "extinct". This brought the Court to find in favour of the annulment of the bylaw awarding the disputed territory to the municipality because it considered the indigenous community to be extinct. The Court also states that the bylaw disregards the community's human rights, and violates the constitutional clause ordering the protection of indigenous communities, using ILO Conventions No. 107 and 169, among other international instruments, to interpret this clause.

Accordingly, the Court accepts the community's argument and annuls the challenged standards of the municipal bylaw.

Law applied:
1961 Constitution of Venezuela (now repealed), articles 58, 61, 72, 77 and 119; ILO Convention No. 107, ILO Convention No. 169.

Relevant considerations of the court:

"Article 77 of the Constitution of the Republic provides that:
"the law will determine the exception regime required to protect indigenous communities".

To illustrate the constitutional content of this standard (*concise per se*) and construct its scope and information, in short to interpret it, the Court finds it appropriate to cite the following texts:

1) Act incorporating Convention No. 107, Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, Extraordinary Official Gazette No. 3,235 of August 3, 1983:

> "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 recognized."
>
> "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."

2) Convention No. 169, Concerning Indigenous and Tribal Peoples in Independent Countries, adopted by the General Conference of the International Labour Organization on June 26, 1989:

> "Part II. Land"
>
> "Article 13:
> 1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship."
>
> "2. The use of the term "lands" in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use."
>
> "Article 14:
> "1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect."
>
> "2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of

ownership and possession."

"3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned." (...)

The Court adopts the essence of the aforementioned texts as the content and interpretation of the exception regime, provided for in article 77 of the Constitution, and warns that the challenged by-law flagrantly violates the aforementioned mechanism because, as already stated, in the current judgment, the challenged act extinguishes an existing indigenous community and, consequently, declares the lands to be common land."

Comments:
The Supreme Court as such no longer exists: with the enactment of the Constitution of the Bolivarian Republic of Venezuela in March of 2000, the Court was dissolved and replaced by the *Tribunal Supremo de Justicia*. This judgment is based on the previous 1961 Constitution, which contained a brief clause on the rights of indigenous peoples (Art. 77). The 2000 Constitution has incorporated broader and more detailed clauses on the rights of indigenous peoples, which in part uses the language of Convention No. 169.

The highlight of this case is that the Supreme Court used Convention No. 169 to interpret and give scope to the constitutional standard on indigenous peoples, even though at the time the judgment was handed down, Venezuela had not yet ratified Convention No. 169 – although it had ratified Convention No. 107, which is also mentioned in the judgment as a source of interpretation of the constitutional standard.

VENEZUELA 2

Court: Supreme Court (*Tribunal Supremo de Justicia*)

Case: Municipality of Aguasay, State of Monagas v. the indigenous community of Jesús, María y José de Aguasuay et al. on full declaratory judgment action regarding ownership, Judgment No. 01035 of April 27, 2006 (Rapporteur: Levis Ignacio Zerpa).

Keywords: lands and territories, ownership, status of the Convention in national law.

Summary of the facts of the case:
This judgment is related to the case Indigenous community of Jesús, María y José de Aguasuay on action for annulment for unconstitutionality and constitutional protection, judgment of October 6, 1998, decided by the now defunct *Corte Suprema de Justicia* (Venezuela 1 in this case book).

In this case, it was the municipality of Aguasay that brought a declaratory judgment action to have the Supreme Court declare that the lands occupied by the indigenous community of Jesús, María y José de Aguasay were common lands belonging to the municipality and that, accordingly, the contracts signed with a mining company by the community were null and void. The municipality bases its claim on a new bylaw enacted after the Supreme Court judgment in which the content of the previously annulled bylaw was repeated, once again including in the municipality's territory the community's ancestral lands, although on different grounds. The municipality is no longer awarding itself the land using the rationale that it belongs to "extinct indigenous communities" (see Comments section of Supreme Court judgment); rather it bases ownership on a 1783 royal conferral, stating that the municipality had peacefully owned, enjoyed and administered that territory as sole owner since colonial times.

The Supreme Court (*Tribunal Supremo*) turned down the action, stating that the municipality's statements and claims were contradictory because the municipality was simultaneously claiming that it had been the peaceful and continuous owner of the territory and that the indigenous communities and mining company had disrupted this ownership. Yet at the same time, this requires acknowledgement of title, a judgment establishing its title and protection against acts of possession by the supposed intruders. The Court also upholds the *res judicata* exception brought by the indigenous community, considering that there is some – despite the formal changes – similarity between what was decided by the Supreme Court in its previous judgment and the claim in this case. The Court maintains that the municipality cannot ignore what was found to have been proven in the previous proceedings, namely the existence of the community and the ancestral ownership of its territory. It also adds that the new Constitution and ratification of Convention No. 169 support the arguments put forward by the Supreme Court as the grounds for its decision.

Law applied:
Constitution of the Bolivarian Republic of Venezuela, Act approving Convention No. 169 concerning Indigenous and Tribal Peoles in Independent Countries, ILO Convention No. 169.

Relevant considerations of the court:
"From this perspective, it must be pointed out that the regulatory grounds essentially adopted in the aforementioned decision [referring to the previous Supreme Court judgment] are now broadened, increased and strengthened in a very special way in our current legal system.

(...)

The Constitution of the Bolivarian Republic of Venezuela establishes the following with regard to indigenous peoples:

[transcribed constitutional requirements]

Furthermore, the Act approving Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, Official Gazette No. 37,305 of October 17, 2001, adopted by the General Conference of the International Labour Organization on June 26, 1989 provides that:

> "Part II. Land"
>
> Article 13
>
> 1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.
>
> 2. The use of the term "land" in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.
>
> "Article 14
>
> 1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
>
> 2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.
>
> 3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned."

With regard to the aforementioned Act, it must be indicated that the Convention, which had not been adopted by the now defunct Congress of the Republic when the bylaw was declared null and void, was the regulatory basis of the aforementioned decision of the defunct Supreme Court (*Corte Suprema*)".

Comments:
This case is closely related to the previous decision by the Supreme Court (case Venezuela 1). A constitutional reform was implemented between the two cases, which led to the adoption of the text of the Constitution of the Bolivarian Republic of Venezuela, enacted in March 2000. For the matters that concern us here, the new Constitution brought about two important changes. First, the former *Corte Suprema de Justicia* was dissolved and was superseded by a *Tribunal Supremo de Justicia*. Second, a full chapter and extensive and detailed provisions were included on the rights of indigenous peoples, in addition to including the rights, interests and recognition of indigenous peoples in other clauses.

Another significant change that occurred between the two decisions was the ratification by Venezuela of Convention No. 169 (adopted domestically by congressional law published on October 17, 2001 and ratified internationally on May 22, 2002).

What is relevant here is that, in addition to the legitimacy of the *res judicata* exception lodged by the indigenous community and the consequent rejection of the municipality's claim, the Supreme Court not only considered that the regulatory grounds set out by the Supreme Court in the previous judgment were still valid, but it also maintained that – given the constitutional and legal changes, including the ratification of Convention No. 169 – said regulatory grounds at the time the new judgment was handed down were "broadened, increased and strengthened in a very special way in our current legal system". The Supreme Court has backed the consistent interpretation of the constitutional requirements establishing the rights of indigenous peoples with the provisions of ILO Convention No. 169.

ANNEX 1

INDIGENOUS AND TRIBAL PEOPLES CONVENTION, 1989 (NO. 169)

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its seventy-sixth session on 7 June 1989, and

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

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

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

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

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

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

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

Having decided upon the adoption of certain proposals with regard to the partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), which is the fourth item on the agenda of the session, and
Having determined that these proposals shall take the form of an international Convention revising the Indigenous and Tribal Populations Convention, 1957,

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

PART I. GENERAL POLICY

Article 1
1. This Convention applies to:

(a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

3. The use of the term “peoples” in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

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

2. Such action shall include measures for:

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

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

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

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

2. No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned, including the rights contained in this Convention.

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

2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.

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

Article 5
In applying the provisions of this Convention:

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

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

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

Article 6
1. In applying the provisions of this Convention, Governments shall:

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

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

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

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

Article 7
1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.

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

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

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

2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.

Article 9
1. To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.

2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

Article 10
1. In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics.

2. Preference shall be given to methods of punishment other than confinement in prison.

Article 11
The exaction from members of the peoples concerned of compulsory personal services in any form, whether paid or unpaid, shall be prohibited and punishable by law, except in cases prescribed by law for all citizens.

Article 12
The peoples concerned shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights. Measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means.

PART II. LAND

Article 13
1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

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

Article 14
1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

Article 15
1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

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

Article 16
1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.

2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.

4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

Article 17
1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.

2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.

3. Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

Article 18
Adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.

Article 19
National agrarian programmes shall secure to the peoples concerned treatment equivalent to that accorded to other sectors of the population with regard to:

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

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

PART III. RECRUITMENT AND CONDITIONS OF EMPLOYMENT

Article 20
1. Governments shall, within the framework of national laws and regulations, and in co-operation with the peoples concerned, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general.

2. Governments shall do everything possible to prevent any discrimination between workers belonging to the peoples concerned and other workers, in particular as regards:

(a) Admission to employment, including skilled employment, as well as measures for promotion and advancement;
(b) Equal remuneration for work of equal value;

(c) Medical and social assistance, occupational safety and health, all social security benefits and any other occupationally related benefits, and housing;

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

3. The measures taken shall include measures to ensure:

(a) That workers belonging to the peoples concerned, including seasonal, casual and migrant workers in agricultural and other employment, as well as those employed by labour contractors, enjoy the protection afforded by national law and practice to other such workers in the same sectors, and that they are fully informed of their rights under labour legislation and of the means of redress available to them;

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

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

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

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

PART IV. VOCATIONAL TRAINING, HANDICRAFTS AND RURAL INDUSTRIES

Article 21
Members of the peoples concerned shall enjoy opportunities at least equal to those of other citizens in respect of vocational training measures.

Article 22
1. Measures shall be taken to promote the voluntary participation of members of the peoples concerned in vocational training programmes of general application.

2. Whenever existing programmes of vocational training of general application do not meet the special needs of the peoples concerned, governments shall, with the participation of these peoples, ensure the provision of special training programmes and facilities.

3. Any special training programmes shall be based on the economic environment, social and cultural conditions and practical needs of the peoples concerned. Any studies made in this connection shall be carried out in co-operation with these peoples, who shall be consulted on the organisation and operation of such programmes. Where feasible, these peoples shall progressively assume responsibility for the organisation and operation of such special training programmes, if they so decide.

Article 23
1. Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these peoples and whenever appropriate, ensure that these activities are strengthened and promoted.

2. Upon the request of the peoples concerned, appropriate technical and financial assistance shall be provided wherever possible, taking into account the traditional technologies and cultural characteristics of these peoples, as well as the importance of sustainable and equitable development.

PART V. SOCIAL SECURITY AND HEALTH

Article 24
Social security schemes shall be extended progressively to cover the peoples concerned, and applied without discrimination against them.

Article 25
1. Governments shall ensure that adequate health services are made available to the peoples concerned, or shall provide them with resources to allow them to design and deliver such services under their own responsibility and control, so that they may enjoy the highest attainable standard of physical and mental health.

2. Health services shall, to the extent possible, be community-based. These services shall be planned and administered in co-operation with the peoples concerned and take into account their economic, geographic, social and cultural conditions as well as their traditional preventive care, healing practices and medicines.

3. The health care system shall give preference to the training and employment of local community health workers, and focus on primary health care while maintaining strong links with other levels of health care services.
4. The provision of such health services shall be co-ordinated with other social, economic and cultural measures in the country.

PARVI. EDUCATION AND MEANS OF COMMUNICATION

Article 26
Measures shall be taken to ensure that members of the peoples concerned have the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community.

Article 27
1. Education programmes and services for the peoples concerned shall be developed and implemented in co-operation with them to address their special needs, and shall incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations. They shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

2. The competent authority shall ensure the training of members of these peoples and their involvement in the formulation and implementation of education programmes, with a view to the progressive transfer of responsibility for the conduct of these programmes to these peoples as appropriate.

3. In addition, governments shall recognise the right of these peoples to establish their own educational institutions and facilities, provided that such institutions meet minimum standards established by the competent authority in consultation with these peoples. Appropriate resources shall be provided for this purpose.

Article 28
1. Children belonging to the peoples concerned shall, wherever practicable, be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong. When this is not practicable, the competent authorities shall undertake consultations with these peoples with a view to the adoption of measures to achieve this objective.

2. Adequate measures shall be taken to ensure that these peoples have the opportunity to attain fluency in the national language or in one of the official languages of the country.

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

Article 29
The imparting of general knowledge and skills that will help children belonging to the peoples concerned to participate fully and on an equal footing in their own community and in the national community shall be an aim of education for these peoples.

Article 30
1. Governments shall adopt measures appropriate to the traditions and cultures of the peoples concerned, to make known to them their rights and duties, especially in regard to labour, economic opportunities, education and health matters, social welfare and their rights deriving from this Convention.

2. If necessary, this shall be done by means of written translations and through the use of mass communications in the languages of these peoples.

Article 31
Educational measures shall be taken among all sections of the national community, and particularly among those that are in most direct contact with the peoples concerned, with the object of eliminating prejudices that they may harbour in respect of these peoples. To this end, efforts shall be made to ensure that history textbooks and other educational materials provide a fair, accurate and informative portrayal of the societies and cultures of these peoples.

PART VII. CONTACTS AND CO-OPERATION ACROSS BORDERS

Article 32
Governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields.

PART VIII. ADMINISTRATION

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

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

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

PART IX. GENERAL PROVISIONS

Article 34
The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.

Article 35
The application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements.

PART X. FINAL PROVISIONS

Article 36
This Convention revises the Indigenous and Tribal Populations Convention, 1957.

Article 37
The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 38
1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.

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

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

Article 39
1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 40
1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.

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

Article 41
The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

Article 42
At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 43
1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides:

(a) The ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 39 above, if and when the new revising Convention shall have come into force;

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

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

Article 44
The English and French versions of the text of this Convention are equally authoritative.

ANNEX 2

The position of Convention No. 169 in the legal systems of ratifying countries
The legal position of the Convention needs to be examined for each country on the basis of the relevant provisions of the national Constitution or other relevant laws, as well as the jurisprudence of the courts on this topic. The box below provides only a very general starting point for such an examination. It nevertheless shows that in a large number of countries the Convention forms part of the national law and can be directly invoked before the Courts.

- **Argentina:** International treaties have force of law upon ratification and their rank is higher than national law (Constitution, arts. 31 and 75, para.22);
- **Bolivia:** International treaties have the force of law, human rights conventions have the same rank as the Constitution (Constitution, arts. 257(I) and 410 (II));
- **Brazil:** International treaties have force of law upon ratification, and their rank may be higher than national law (Constitution, art.5);
- **Chile:** Ratified international treaties have the force of law. The Constitution establishes that sovereignty recognizes as a limitation in its exercise the essential rights deriving from human nature, and that it shall be the duty of State bodies to respect and promote such rights, as guaranteed by the Constitution, as well as by international treaties ratified by Chile and currently in force, which is the case of Convention No. 169 (Constitution, art. 5 (2));
- **Colombia:** International treaties have force of law upon ratification. Human rights conventions have the same rank as the Constitution (Constitution, arts. 53 and 93, para.1);
- **Costa Rica:** International treaties have force of law upon ratification and their rank is higher than national law (Constitution, art.7);
- **Denmark:** International treaties do not have force of law upon ratification;
- **Dominica:** International treaties do not have force of law upon ratification;
- **Ecuador:** International treaties have the force of law upon the ratification and have a higher rank than ordinary laws. Treaties on human rights which recognize rights that are more favourable than those contained in the Constitution will prevail over any other legal norm or any act of the public authorities (Constitution, Articles 417, 424 and 425);
- **Fiji:** International treaties do not have force of law upon ratification;
- **Guatemala:** International treaties have force of law upon ratification. Human rights conventions prevail in domestic order (Constitution, art.46);
- **Honduras:** International treaties have force of law upon ratification and their rank is higher than national law (Constitution, arts. 16 and 18);
- **México:** International treaties have force of law upon ratification and their rank is higher than national law (Constitution, art. 133);
- **Nepal:** International treaties have force of law upon ratification and prevail over conflicting national law (1990 Treaty Act, sec. 9);
- **Netherlands:** International treaties are directly applicable and their rank is the same as the Constitution (Constitution, art. 94);
- **Norway:** International treaties do not have force of law upon ratification (Constitution, art. 110);
- **Paraguay:** International treaties have force of law upon ratification and their rank is higher than national law (Constitution, 137, para.1 and 141);
- **Peru:** International treaties have the force of law upon ratification. Human rights treaties have the same rank as the Constitution (Constitution, Articles 3, 55 and Fourth final and transitory provision);
- **Spain:** International treaties have force of law upon ratification and their rank is higher than national law (Constitution, art.96, para.1);
- **Venezuela:** International treaties have force of law upon ratification. Human rights conventions have the same rank as the Constitution (Constitution, arts 22 and 23).

ANNEX 3

ILO Supervisory System

Member States must *submit periodic reports* to the ILO regarding the implementation of the conventions they ratify, indicating not only whether national legislation complies with the Convention in question, but also reporting to the ILO what has been done to ensure that the Convention has had a practical impact.

It is important to remember that, unlike the rest of the UN system, the ILO is a *tripartite* organization, which means that its constituents, and consequently its decision-makers, are not only governments but also workers and employers (*ILO constituents*). They all play an active role in the supervision of the conventions ratified.

> *More detailed information on ILO supervisory procedures can be found in "Rules of the Game: a brief introduction to International Labour Standards" and in the "Handbook of procedures relating to international labour Conventions and Recommendations".*[65]

Regular supervision of ILO Conventions

The submission of reports on ILO conventions is regulated by article 22 of the ILO Constitution. Member States are required to submit reports containing information on the ILO conventions ratified at one and *five year* intervals, depending on the convention in question, reporting any issues that have been encountered in the implementation of the convention. Reports must be delivered on Convention No. 169 at least every five years.

Workers and employers organizations may submit observations on the implementation of the conventions ratified on their own (art. 23 of the ILO Constitution) to their governments or directly to the International Labour Office. For example, they may point out a discrepancy in the law or in practice regarding a convention that might have otherwise gone unnoticed.

The ILO body that examines application of the conventions ratified is the Committee of Experts on the Application of Conventions and Recommendations (CEACR). The committee, which meets once a year, is comprised of 20 independent experts. The Committee examines reports from member States, observations from labour and management organizations and other relevant information, such as information from the United Nations system. This system includes information from the UN committees responsible for supervising human rights agreements and official information from UN bodies and relevant mandates, including the Permanent Forum on Indigenous Issues and the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people.

The CEACR participates in ongoing dialogue with governments on the application of the ratified conventions. Regular supervision can be very effective in identifying gaps in application and information, and proposing measures and mechanisms to improve application. The Committee's comments on fulfilment of the obligations derived from the standards by member States can take the form of "observations" or "direct requests":

- **Observations.** Observations are public comments by the CEACR about the application of ILO conventions. They highlight points where progress has been made, as well as areas of concern; furthermore, they may request more information about a given topic. Observations are published annually in book form[66] and in the ILOLEX online database (http://www.ilo.org/ilolex/english/index.htm).

- **Direct requests.** These are sent directly to the government in question, usually requesting more information on specific topics. They are also published on the ILO web site (ILOLEX).

65) http://www.ilo.org/global/What_we_do/InternationalLabourStandards/InformationResources/Publications/lang--en/index.htm

66) Report of the Committee of Experts on the Application of Conventions and Recommendations, Part III (1A).

Special procedures

In addition to regular procedures to supervise the application of ILO conventions, other procedures exist to deal with more serious situations and alleged violations of the conventions. The complaint procedure most frequently used in the ILO system is as follows:

- **Representations.** The complaint procedure is governed by article 24 of the ILO Constitution. Complaints of breaches of certain provisions of the ILO conventions ratified by a government *can be submitted to the ILO through a workers' or emplyoers' organization*. Representations must be submitted in writing and reference made to article 24 of the ILO Constitution. Likewise, they shall indicate which provisions of the convention in question have allegedly been violated. Once the representation has been received, the ILO Governing Body will appoint a *Tripartite Committee* (i.e. one government representative, one emlployer representative and one worker representative) to review the representation.

Can indigenous peoples take part in the supervision of ILO conventions?

Where do indigenous people fit in the tripartite structure of the ILO? There are many ways in which indigenous peoples can make sure that their concerns are taken into consideration in the regular CEACR supervision of ILO conventions:

- If a new policy, law or judicial ruling appears, this type of information can be sent *directly to the ILO*. The texts contained in laws or judicial rulings, for example, can be considered *verifiable and objective information*.

- For the ILO to officially take into consideration this type of information, it must be sent by one of the ILO constituents. Normally, workers' organizations have a more direct interest in indigenous issues. However, to ensure their concerns are heard, it is important that indigenous peoples strengthen their *alliances with workers' organizations* (unions).

- *Technical co-operation* is another way that the ILO can help governments and indigenous peoples to apply the conventions they have ratified. Sometimes technical co-operation is directly related to the supervision of ILO conventions and can help to overcome application issues;

- for example, through *innovative approaches*, such as establishing formal relations and procedures between indigenous peoples and governments. For example, Norway asked the Saami Parliament to submit its own independent comments on the government's regular reports pursuant to the Convention, and these comments were considered by the ILO along with the Government's report.

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