



International
Labour
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► Understanding the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169)

A tool for judges and legal practitioners

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Understanding the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169): A tool for judges and legal practitioners

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► Foreword

This tool is intended to promote a better understanding in practice of the ILO [Indigenous and Tribal Peoples Convention, 1989 \(No. 169\)](#). It is targeted at judges and counsel in national and international courts, teachers, public servants, independent lawyers, international officials, jurists and other practitioners in the legal system engaged in subjects related to indigenous peoples.¹ The tool is organized in twelve thematic sections:

- 1 identification of indigenous and tribal peoples
- 2 institutions and participation
- 3 human rights
- 4 obligation of consultation
- 5 development, participation and impact studies
- 6 land rights
- 7 customary laws and access to justice
- 8 working conditions, employment and social security
- 9 health
- 10 education
- 11 flexibility
- 12 minimum standards

Founded in 1919, the ILO is a tripartite organization in which governments, workers' organizations and employers' organizations participate in the creation and supervision of international labour standards, all of which are guided and governed by the principle of social dialogue. Accordingly, throughout this publication, illustrations are provided of the contributions made by the ILO's tripartite constituents to the formulation and supervision of Convention No. 169. The ILO [Centenary Declaration for the Future of Work](#) 2019, recognizes that social dialogue "contributes to the overall cohesion of societies" and "provides an essential foundation of all ILO action". Social dialogue, whether informal or institutionalized, has also proved to be essential in ensuring the effective implementation at the national level of international labour standards, including Convention No. 169.

This publication is the outcome of collaboration between the Conditions of Work and Equality Department, the International Labour Standards Department and the ILO Office for Central America, Haiti, Panama and the Dominican Republic, and has benefited from the comments of the Bureau for Workers' Activities (ACTRAV) and the Bureau for Employers' Activities (ACT/EMP). It is part of the ILO Strategy on indigenous peoples' rights for inclusive and sustainable development, endorsed by the ILO Governing Body in November 2015, which envisages the development of training and promotional activities to achieve a better understanding of Convention No. 169. It also forms part of the training programmes for judges undertaken by the ILO International Training Centre, and supplements other tools, including the [Handbook for ILO Tripartite Constituents: Understanding the Indigenous and Tribal Peoples Convention, 1989 \(No. 169\)](#), and [Excerpts from the reports and comments of the ILO Supervisory Bodies: Applying the Indigenous and Tribal Peoples Convention, 1989 \(No. 169\)](#).²

1 Convention No. 169 covers both indigenous and tribal peoples, affording both categories the same rights. For practical reasons, the term "indigenous peoples" is used in this publication to also refer to tribal peoples.

2 These and other tools for the promotion of Convention No. 169 can be found at:
<https://www.ilo.org/global/topics/indigenous-tribal/toolbox/lang--es/index.htm>



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► Introduction

The Indigenous and Tribal Peoples Convention, 1989 (No. 169), is the only international treaty open for ratification which adopts an integral approach to the protection of the rights of indigenous and tribal peoples. It is the result of the revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), and is based on recognition of the aspirations of indigenous and tribal peoples to control their institutions, ways of life and economic development, as well as respect for their cultures. It recognizes the individual and collective rights of indigenous peoples, sets out obligations for governments in relation to the formulation and implementation of policies and programmes for these peoples, and promotes economic empowerment and decent work for indigenous men and women. Convention No. 169 also promotes dialogue and mutual trust between governments and indigenous peoples with a view to achieving peace and social justice.

There are around 476 million people belonging to indigenous peoples throughout the world. Indigenous men and women workers are more likely to be in the informal economy than non-indigenous workers, and to live in extreme poverty. In particular, indigenous women are confronted with low rates of socio-economic development, with fewer opportunities for access to basic education and formal employment.³ Faced with this situation, Convention No. 169 offers a unique framework for the protection of the rights of indigenous peoples as an integral aspect of inclusive and sustainable development. As the only international treaty on the subject, it contains specific provisions promoting the improvement of the standards of living of indigenous peoples from an inclusive perspective, and includes their participation from the initial stages in the planning of public policies that affect them, including labour policies.

476

million people belonging to indigenous peoples throughout the world.

It is important to bear in mind that, as women and men workers, people belonging to indigenous peoples are covered by the ILO's other Conventions and Recommendations, and particularly the fundamental Conventions on forced labour, child labour, equality and non-discrimination,⁴ freedom of association, the right to organize and collective bargaining.⁵ For example, within the context of the application of the Conventions on forced labour and child labour, the ILO supervisory bodies have examined situations of labour exploitation in certain indigenous communities, and have requested the adoption of adequate measures to protect them against practices that constitute forced labour⁶ or to protect boys and girls against the worst forms of child labour.⁷ There are also other instruments which, even though they are focussed on more general issues relating to the world of work, contain specific provisions on indigenous peoples. These include: the Job Creation in Small and Medium-Sized Enterprises Recommendation, 1998 (No. 189); the Human Resources Development Recommendation, 2004 (No. 195); the Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204); and the Employment and Decent Work for Peace and Resilience Recommendation, 2017 (No. 205).

3 International Labour Office (ILO), 2020. *Implementing the ILO Indigenous and Tribal Peoples Convention No. 169: Towards an inclusive, sustainable and just future*.

4 See: ILO, 2007. *Eliminating discrimination against indigenous and tribal peoples in employment and occupation: A Guide to ILO Convention No. 111*.

5 For more detail on these Conventions, see: NORMES, [Conventions and Recommendations](#).

6 See, for example, Committee of Experts on the Application of Conventions and Recommendations (CEACR), Convention No. 29, Congo, direct request, 2017; Convention No. 29, Bolivia (Plurinational State of), observation, 2018; Convention No. 29, Paraguay, observation, 2017; Convention No. 29, Peru, observation, 2019.

7 See, for example, CEACR, Convention No. 182, Guatemala, observation, 2018; Convention No. 182, Ecuador, direct request, 2018; Convention No. 182, Honduras, direct request, 2018.

Discussions have been held in the ILO Governing Body on the [Strategy on indigenous peoples' rights for inclusive and sustainable development](#). These discussions have focussed on the need to establish a solid institutional base to promote the participation of indigenous peoples and have emphasized the importance of gaining the support of employers' and workers' organizations to achieve the effective implementation of Convention No. 169.⁸

The process of the preparation and discussion of Convention No. 169 started with a Meeting of Experts convened by the Governing Body in 1986, with the participants including representatives of the tripartite constituents and two representatives of non-governmental organizations defending the rights of indigenous peoples. The purpose of the Meeting was to make recommendations on the principles upon which the revision of Convention No. 107 should be based and which would serve as the foundation for Convention No. 169. Taking into account the conclusions of the Meeting, and the law and practice in ILO member States, the International Labour Office (the Office) prepared a questionnaire on the content of a revised Convention on indigenous peoples, to which governments, employers' organizations and workers' organizations replied. In some cases, together with their replies, governments communicated the positions of indigenous organizations. Based on the replies received, the Office prepared and submitted draft conclusions to the International Labour Conference in 1988 with a view to the adoption of a Convention. Taking as a reference the conclusions adopted at that Conference, the Office prepared a first draft of a Convention, which was submitted for consideration to governments, workers' organizations and employers' organizations for their comments. Based on the comments received, the Office prepared a final draft text of Convention No. 169, which was submitted for consideration to the International Labour Conference in 1989. During the discussions of the Convention at the Conference, various indigenous organizations participated as observers with the right to speak. It should also be noted that some workers' and employers' organizations included indigenous representatives in their delegations.

[The countries that have ratified Convention No. 169](#) have gained experience in its application which can be useful for other countries in the world. In Latin America, the Convention has been used by judges when dealing with issues related to indigenous peoples. Some high-level courts in the region have recognized the Convention as part of their "constitutional block".⁹ Subjects that have led to the use of the instrument by national judges and courts include the identification of indigenous peoples, participation and consultation, land rights, access to justice, the exercise of indigenous customary law, and matters relating to labour, education, social security and intercultural health.

8 See: [GB.325/POL/2](#); [GB.325/PV](#); [GB.334/POL/2](#); [GB.334/PV](#); [GB.335/POL/2](#); [GB.335/PV](#).

9 See, for example, the ruling of the Transitional Liquidation Chamber of the Constitutional Court of the Plurinational State of Bolivia of 23 July 2012 (No. 0645/2012) on the action for non-compliance lodged by the Central Indigenous Organization of Native Peoples of the Amazonian Pando against the Departmental Director of the Forest and Land Inspection and Social Control Authority a.i. of the National Agrarian Reform Institute, section III. See also the ruling of the Constitutional Court of Colombia of 1 July 2010 (No. T-547/10) on the claim for the protection of rights lodged by the Land Council of the Indigenous Cabildos of the Sierra Nevada of Santa Marta against the Ministry of the Interior and of Justice, et al. (paragraph 4.1).

► Methodology

The explanations provided in this document are based on:

- The [preparatory work for the Convention](#), including the discussions and conclusions of the 1986 Meeting of Experts on the revision of Convention No. 107, the preparatory reports drawn up by the International Labour Office with inputs from the tripartite constituents for the two tripartite discussions held at the International Labour Conference in 1988 and 1989, and the records of those discussions. In accordance with Articles 5 and 32 of the Vienna Convention on the Law of Treaties, for the interpretation of ILO Conventions, it is necessary to take into account the practice of the Organization of examining the preparatory work leading up to the adoption of a Convention. This is important in view of the tripartite nature of the Organization, as reflected in the contributions of the ILO's tripartite constituents in the setting of standards.¹⁰

- The comments and recommendations made by the ILO supervisory bodies within the framework of the regular supervisory system and the special procedures. These contribute to a deeper understanding of the scope of the obligations contained in the Convention, and are available on the [NORMLEX](#) database.¹¹ The ILO supervisory bodies include:

The Committee of Experts on the Application of Conventions and Recommendations (CEACR), which is composed of 20 eminent jurists who, in accordance with the criteria of objectivity, impartiality and independence, supervise the application of ILO Conventions. Their supervision is based on the examination of the regular reports provided by States that have ratified the Conventions and the observations made by workers and employers' organizations in this respect. In its examination, the CEACR adopts observations and/or direct requests addressed individually to governments.

It can also make general observations on the application of a Convention. These comments are published in the annual reports of the CEACR.¹²

►► The Committee of Experts on the Application of Conventions and Recommendations (CEACR), which is composed of 20 eminent jurists who, in accordance with the criteria of objectivity, impartiality and independence, supervise the application of ILO Conventions.

¹⁰ See: CEACR, Convention No. 169, general observation, 2010.

¹¹ See, ILO, 2019: [Rules of the Game: An introduction to the standards-related work of the International Labour Organization \(Centenary edition 2019\)](#).

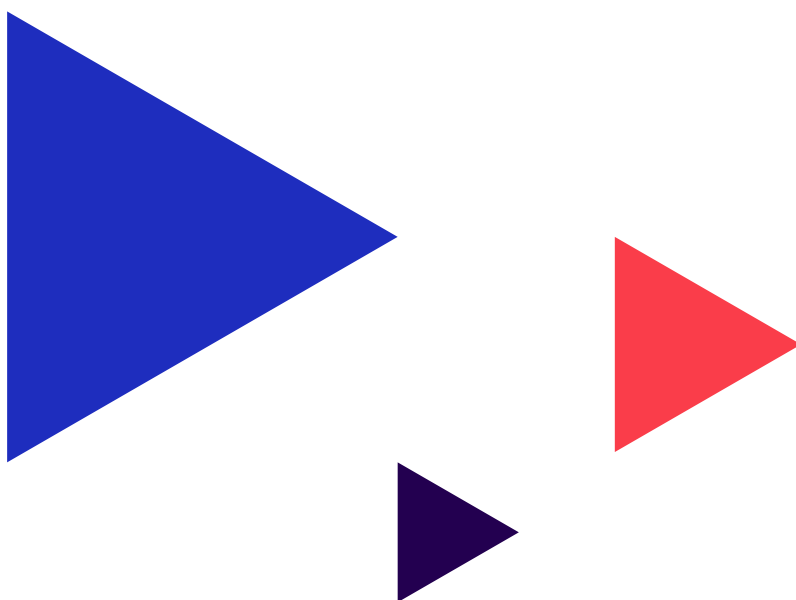
¹² For a fuller explanation of the mandate and practices of the CEACR, see, ILO, [Application of International Labour Standards 2020. Report of the Committee of Experts on the Application of Conventions and Recommendations](#), paragraph 32.

The Committee on the Application of Standards (CAS), which is a standing tripartite committee of the International Labour Conference composed of government, employer and worker members. It examines every year the report of the CEACR, from which it selects a limited number of cases related to the observations of the CEACR on the application of the Conventions ratified by a member State. In the context of this procedure, the governments concerned are invited to provide information on the situation under examination. The CAS adopts conclusions in which it recommends that governments adopt specific measures to resolve the issues relating to the application of a Convention.¹³

The ad hoc tripartite committees established by the ILO Governing Body to examine representations, in accordance with article 24 of the ILO Constitution. Under article 24, employers' and workers' organizations may make a representation against a member State which, in their view, has failed to adopt

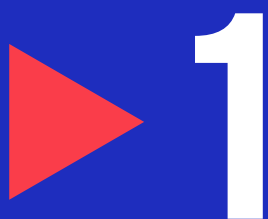
measures for the effective observance of a Convention that it has ratified. An ad hoc tripartite committee established under article 24 is composed of three members of the Governing Body representing governments, employers' organizations and workers' organizations, respectively. The committee examines the representation and the government's reply and submits a report to the Governing Body on the legal and practical aspects of the case, which contains recommendations.¹⁴

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- The [Handbook for ILO Tripartite Constituents: Understanding the Indigenous and Tribal Peoples Convention, 1989 \(No. 169\)](#), published by the International Labour Office in 2013, which benefited from the comments of the Bureau for Employers' Activities (ACT/EMP) and the Bureau for Workers' Activities (ACTRAV).
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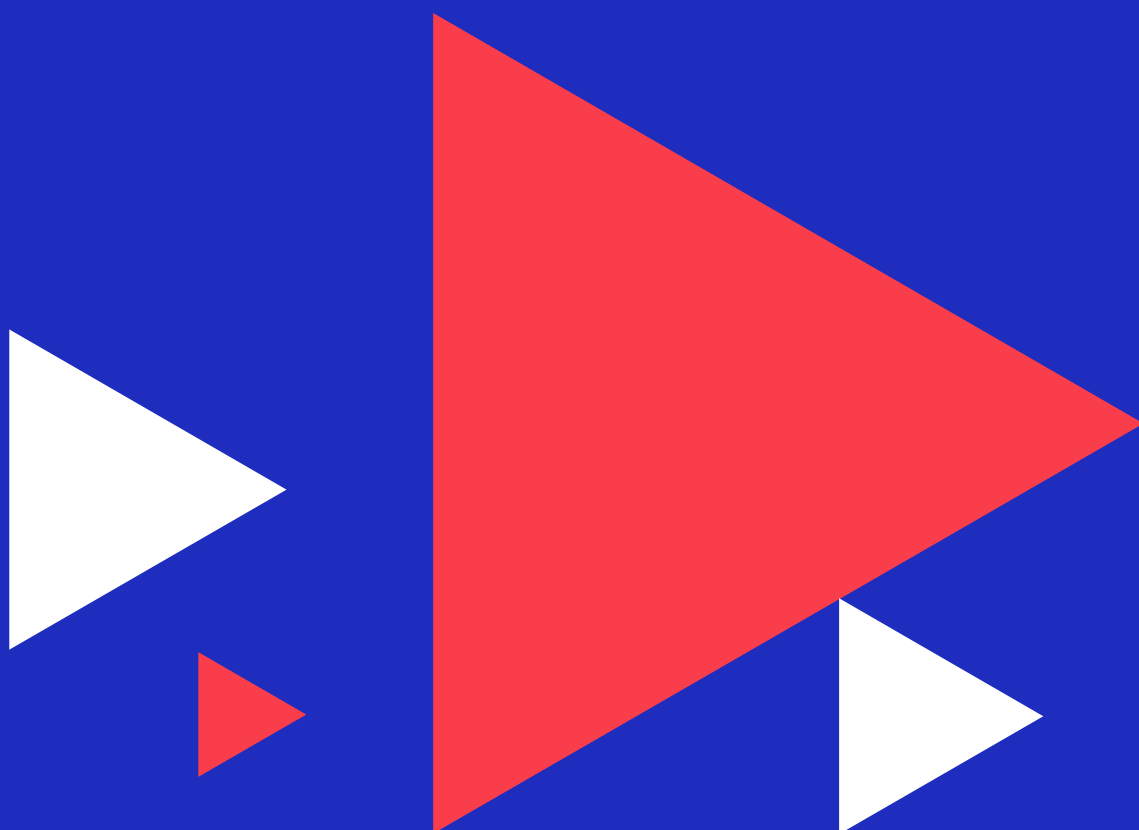


13 Since the entry into force of Convention No. 169, the CAS has discussed eight cases relating to the application of the Convention (Honduras in 2016, Central African Republic in 2014, Peru in 2009 and 2010, Paraguay in 2006 and 2003, and Mexico in 2000 and 1995). The conclusions adopted in these cases can be found on the NORMLEX website. <https://www.ilo.org/dyn/normlex/en>.

14 See in the Appendix to this paper a list of the representations made in relation to the application of Convention No. 169.



Identification of indigenous and tribal peoples



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.

► 1.1 Use of the term “peoples”

One of the important changes introduced by Convention No. 169 in relation to its predecessor, Convention No. 107, is the use of the term “indigenous peoples” instead of “indigenous populations”. Various participants in the 1986 Meeting of Experts considered that the term “populations” used in Convention No. 107 should be replaced by the term “peoples” which, in their view, implies that indigenous groups have an identity their own.¹⁵ During the discussion at the International Labour Conference in 1988, the indigenous organizations that participated as observers were also in favour of the use of the term “peoples”, including the Inuit Circumpolar Conference, which emphasized the importance of recognizing “indigenous peoples as distinct peoples rather than populations”.¹⁶

During the Conference discussion of the legal implications of the term “peoples”, the Employer members indicated that the term might have different meanings in different countries, while the Worker members strongly supported its use, and some Government members expressed reservations in this respect.¹⁷

An ad hoc Working Party set up by the Conference Committee on the Revision of Convention No. 107 proposed an explicit clarification in the text of the new Convention that the term “peoples” “shall not be taken to affect the interpretation given to this term in other international instruments or proceedings, in particular as concerns the question of self-determination.”¹⁸ The Employer advisor of Australia proposed to “find a formula which makes it clear that the revised Convention No. 107 will not be interpreted to mean or imply that rights to self-determination or other rights under international law, or as understood in other international organisations, are, by the adoption of the proposed revised Convention, being granted to the peoples concerned.”¹⁹ The Employer advisor of the United States, as a Cherokee American Indian, explained that “[w]hat indigenous peoples have been seeking is not

15 ILO, 1986. Report of the Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), Geneva 1-10 September 1986 (APPL/MER/107/1986/D.7), paragraph 30, as reproduced, in large part, in the Appendix to: ILO, 1988. Partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), International Labour Conference, 75th Session, Report VI (1).

16 ILO, 1988. International Labour Conference, 75th Session, Provisional Record No. 32, p. 32/5.

17 Ibid., paragraphs 31 and 34.

18 Ibid., paragraph 35.

19 ILO, 1988. International Labour Conference, 75th Session, Provisional Record No. 36, p. 36/19.

►► The CEACR has reiterated that “having reliable statistical data on the indigenous population, their location and socio-economic conditions constitutes an essential tool for effectively guiding and defining policies relating to indigenous peoples, as well as monitoring the impact of the action carried out”.

the creation of new States, but the recognition of their right to be different and to maintain their identity, and a degree of autonomy within existing States.”²⁰ The Workers supported the use of the term “peoples” as it reflected the views which these peoples have of themselves.²¹

In its report prepared for the International Labour Conference in 1989, the Office indicated that the majority of replies from ILO constituents favoured the use of the term “peoples”. It added that most of the constituents that had initially expressed opposition to the term could accept it subject to the inclusion of the qualifying clause proposed by the ad hoc Working Party concerning its implications.²² The clause was finally included in paragraph 3 of Article 1 of the Convention. During the second discussion of the Convention in 1989, the Chair of the Committee on the revision of Convention No. 107 clarified that “the ILO’s mandate and scope of action does not enable the Organisation to define, grant or restrict the right to self-determination”.²³

► 1.2 Criteria for identification

The identification of the groups covered by Convention No. 169, as either “indigenous peoples” or “tribal peoples”, is the first step to be taken by governments for the effective application of the instrument. Courts can be called upon to determine whether or not a particular group is covered by the Convention, and therefore their capacity to enjoy the rights set out in the instrument. In this regard, Article 1 of the Convention establishes both objective and subjective criteria for the identification of indigenous and tribal peoples. The objective criteria for tribal peoples include social, cultural and economic conditions that distinguish them from other sections of the national community, and a status that is regulated wholly or partially by their own customs or traditions, or by special laws or regulations. In the case of indigenous peoples, they have to be descended from the populations which inhabited the country, or a geographical region to which the country belongs, prior to conquest or colonization or the establishment of the present state boundaries, as well as retaining some or all of their own social, economic, cultural and political institutions. These objective criteria are supplemented by the subjective criterion of awareness of indigenous or tribal identity, which is considered to be fundamental by the Convention.

The CEACR has emphasized the importance of guaranteeing that all peoples who meet these criteria, irrespective of their legal recognition

²⁰ Ibid., p. 36/21.

²¹ Ibid., p. 36/20.

²² ILO, 1989. Partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), International Labour Conference, 76th Session, Report IV (2 A), as from p. 4.

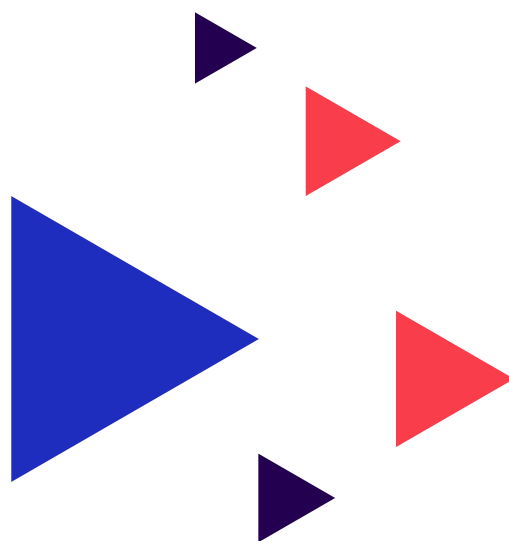
²³ ILO, 1989. International Labour Conference, 76th Session, Provisional Record No. 31, p. 31/5.

in national legislation as indigenous or tribal peoples, enjoy the rights recognized in the Convention.²⁴ It has also recalled that self-identification as indigenous is a fundamental criterion for determining the groups to which the Convention applies and has invited governments to incorporate this criterion in their censuses.²⁵ Certain governments have in practice included information on the use of this subjective criterion in population censuses in their reports on the application of the Convention.²⁶ The CEACR has reiterated that “having reliable statistical data on the indigenous population, their location and socio-economic conditions constitutes an essential tool for effectively guiding and defining policies relating to indigenous peoples, as well as monitoring the impact of the action carried out”.²⁷

The category of tribal peoples is used less frequently than indigenous peoples in national legislation in Latin America. In the case of communities of African descent, who are not considered to be “indigenous”, but who comply with the criteria established in Article 1 of the Convention, they are covered through their status as a tribal people.²⁸ It should also be noted that, under the terms of the Convention, indigenous and tribal peoples enjoy the same rights and guarantees of protection.

► 1.3 Legal status

Rules have been adopted in some countries for indigenous or tribal peoples to obtain recognition of their legal personality or status with a view to exercising the rights recognized in the Convention.²⁹ In this regard, while noting the procedures adopted for the recognition of the legal personality of an indigenous people and its registration, the CEACR has recalled the principle of the recognition of a pre-existing reality so that the procedure for such recognition has declaratory, rather than executory effect.³⁰



24 CEACR, Convention No. 169, general observation, 2019.

25 CEACR, Convention No. 169, Paraguay, direct request, 2006.

26 See, for example, CEACR, Convention No. 169. Guatemala, direct request, 2018; Mexico, direct request, 2019.

27 CEACR, Convention No. 169, general observation, 2019.

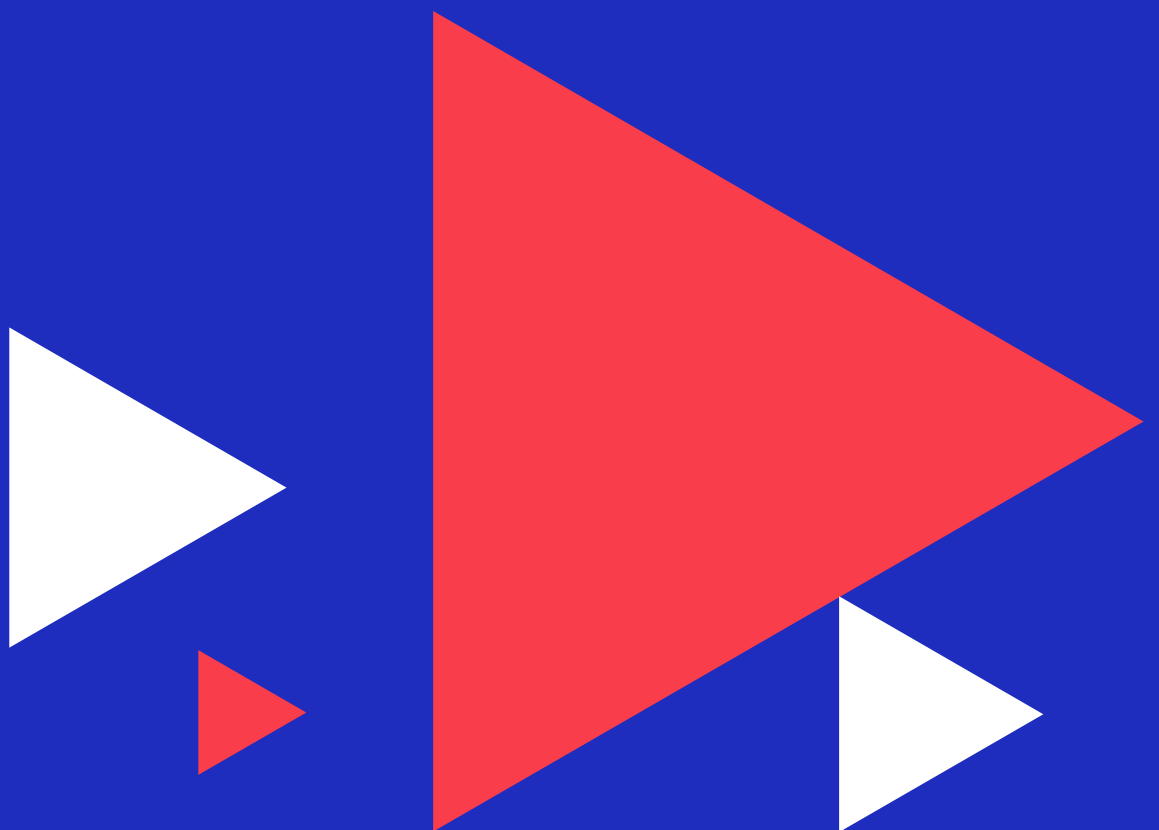
28 In an observation relating to Colombia, the CEACR, based on the information provided by a union, considered that the communities of African descent of Curbaradó and Jiguamiandó in the department of Chocó appeared to fulfil the requirements set out in the Convention: see, CEACR, Convention No. 169, Colombia, observation, 2006. The same consideration applied in relation to Brazil for the Quilombolas communities: see, CEACR, Convention No. 169, Brazil, observation, 2008.

29 In Argentina, the legal personality of an indigenous community is obtained through its registration with the National Indigenous Institute (INAI). In Costa Rica, indigenous peoples can exercise their rights in the form of Integrated Development Associations.

30 CEACR, Convention No. 169, Argentina, direct request, 2006.

▶ 2

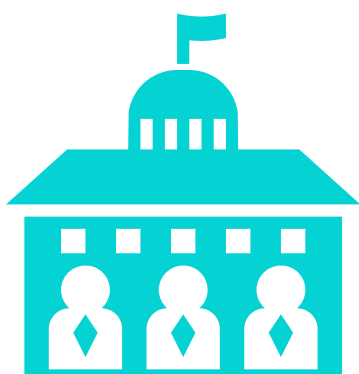
Institutions and participation



► 2.1 Institutions, systematic and coordinated action

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 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.

Articles 2 and 33, taken together, establish the requirement for governments to create, coordinate, implement and evaluate measures for the effective realization of the rights set out in the Convention, with the participation of indigenous peoples. This includes the requirement to provide the necessary economic means to the institutions with competence for the application of the Convention and to ensure coordinated and systematic action by them.

The Office report on the revision of Convention No. 107 for the 1988 Conference emphasized that it was clearly necessary “to have some kind of administrative body with responsibility for co-ordinating, if not for executing, all activities relating to indigenous and tribal peoples”, and added that “[i]f no such body exists, the opposite problem may arise: that no one has responsibility in this area, leaving indigenous and tribal groups in the country with no effective access to government and with no machinery for their protection”.³¹

31 ILO, 1988. Report VI (1), op. cit., p. 41.

Articles 2 and 33, taken together, establish the requirement for governments to create, coordinate, implement and evaluate measures for the effective realization of the rights set out in the Convention, with the participation of indigenous peoples. This includes the requirement to provide the necessary economic means to the institutions with competence for the application of the Convention and to ensure coordinated and systematic action by them.

During the first discussion of the revised Convention at the Conference, the possibility was considered of maintaining the term “protection” contained in Article 2 of Convention No. 107. The Worker members considered that the term “had patronising overtones”, while the Employer members did not consider that it was “derogatory”, a view that was shared by some Government members.³² In this regard, the Office indicated that a “balance between protective action and measures to allow and encourage participation must therefore be sought.”³³ The final text of Article 2 of Convention No. 169 maintains the term “protect”.

The CEACR has stressed that Articles 2 and 33 of the Convention “provide for coordinated and systematic action with the participation of indigenous peoples in applying the provisions of the Convention, and that Article 33, paragraph 2, provides for such participation from the

conception through to the evaluation stage of the measures provided for in the Convention.”³⁴

It has also indicated that the achievement of permanent dialogue at all levels with indigenous peoples “would contribute to preventing conflict and building an inclusive model of development.”³⁵

Moreover, in its 2019 general observation, the CEACR indicated that the “aim of systematic and coordinated action is to guarantee consistency among the different governmental institutions responsible for implementing the programmes and policies relating to indigenous peoples”.³⁶ It added that, “[i]rrespective of the type of structure established, [...] the body responsible for indigenous affairs must have adequate staff and financial resources, a well-defined legal framework and decision-making power” and that “indigenous peoples must be represented and participate in those institutions”.³⁷

32 ILO, 1988. International Labour Conference, 75th Session, *Provisional Record* No. 32, paragraph 48.

33 ILO, 1989. Report VI (2 A), op. cit., pp. 14-15.

34 CEACR, Convention No. 169, Guatemala, observation, 2006.

35 CEACR, Convention No. 169, Bolivia (Plurinational State of), direct request, 2005.

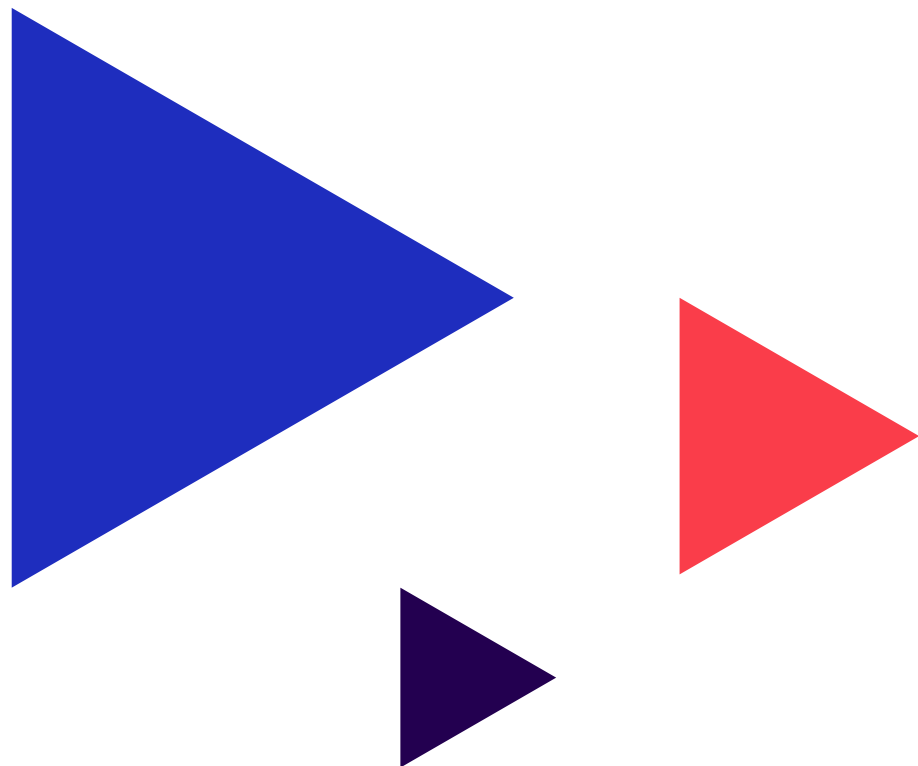
36 CEACR Convention No. 169, general observation, 2019.

37 Ibid.

The CAS has also recalled the need for coordinated and systematic action to protect the rights of indigenous peoples. It has emphasized that Articles 2 and 33 of the Convention require “state institutions that enjoy[...] the trust of indigenous peoples and in which their full participation [is] ensured”.³⁸

During the discussion in the Governing Body of the ILO Strategy for indigenous peoples’ rights for inclusive and sustainable development 2015, the Employers’ group emphasized the need to build institutional capacities, taking into account the problem of the lack of coordination between federal, state, provincial and municipal governments.³⁹ The Workers’ group emphasized the need to promote approaches to the application of Convention “in connection with other ILO instruments”.⁴⁰

▀▀ The CEACR indicated that the “aim of systematic and coordinated action is to guarantee consistency among the different governmental institutions responsible for implementing the programmes and policies relating to indigenous peoples”.



38 CAS, Convention No. 169, individual examination, Peru, 2010.

39 See, GB.334/POL/PV, paragraphs 20 and 21.

40 Ibid, paragraph 14.

► 2.2 Participation of indigenous and tribal peoples

Article 6

1. In applying the provisions of this Convention, governments shall:
 - b. (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.

With a view to addressing the situation of indigenous peoples who cannot enjoy or exercise fully their right of political participation to the same extent as the rest of the population in the countries where they live, Article 6(1)(b) of the Convention places the requirement on governments to create mechanisms for the participation of indigenous peoples in two respects: first, at all levels of decision-making in elective institutions and administrative and other bodies; and, second, in the adoption of the policies and programmes which affect them.

In the working document prepared by the Office for the 1986 Meeting of Experts, it was recalled that at the 12th Conference of American States members of the ILO in 1986, a Government member had emphasized the need for indigenous peoples to participate in the development of policies affecting them in order to “resolve the conflict between social institutions in indigenous communities and those in parts of the modern sector”.⁴¹ The report prepared by the Office for the 1988 discussion indicated that, for the right of participation of indigenous peoples to be effective, it must offer them “an opportunity to be heard and to have an impact on the decisions taken” and must be “backed up by appropriate procedural mechanisms to be established at the national level in accordance with national conditions”.⁴²

During the first discussion of the Convention at the Conference, various governments supported the proposal made by the Government member of Japan to guarantee the participation of indigenous peoples on an equal footing with other members of the national community.⁴³ With regard to paragraph (c) of Article 6 (1), it should be noted that the obligation of governments to provide, in appropriate cases, the necessary resources for the development of indigenous peoples' institutions and initiatives originates in a proposal made by the Worker members during the first discussion to add a reference to “resources” in an economic sense and as a means necessary for indigenous peoples to develop their institutions”.⁴⁴

41 ILO, 1986. Meeting of Experts on the revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), (Geneva, 1-10 September 1986), Working document, International Standards and Indigenous and Tribal Populations, p. 32.

42 ILO, 1988. Report VI (1), op. cit., p. 30.

43 ILO, 1988. International Labour Conference, 75th Session, Provisional Record No. 32, p. 32/10, paragraph 77.

44 Ibid, paragraph 79.

The CEACR has emphasized that it is “key to develop and strengthen institutions with the participation of indigenous peoples.”⁴⁵ It has also indicated that, “[w]hile the Convention does not impose a specific model of participation, it does require the existence or establishment of agencies or other appropriate mechanisms, with the means necessary for the proper fulfilment of their functions, and the effective participation of indigenous and tribal peoples”.⁴⁶

Some countries that have ratified the Convention have taken action to ensure the effective participation of indigenous peoples in the development of policies that affect them.⁴⁷

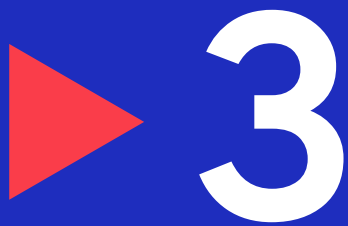
■ ■ The CEACR has emphasized that it is “key to develop and strengthen institutions with the participation of indigenous peoples.”



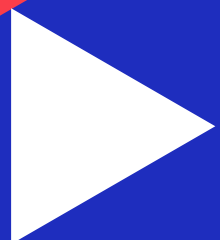
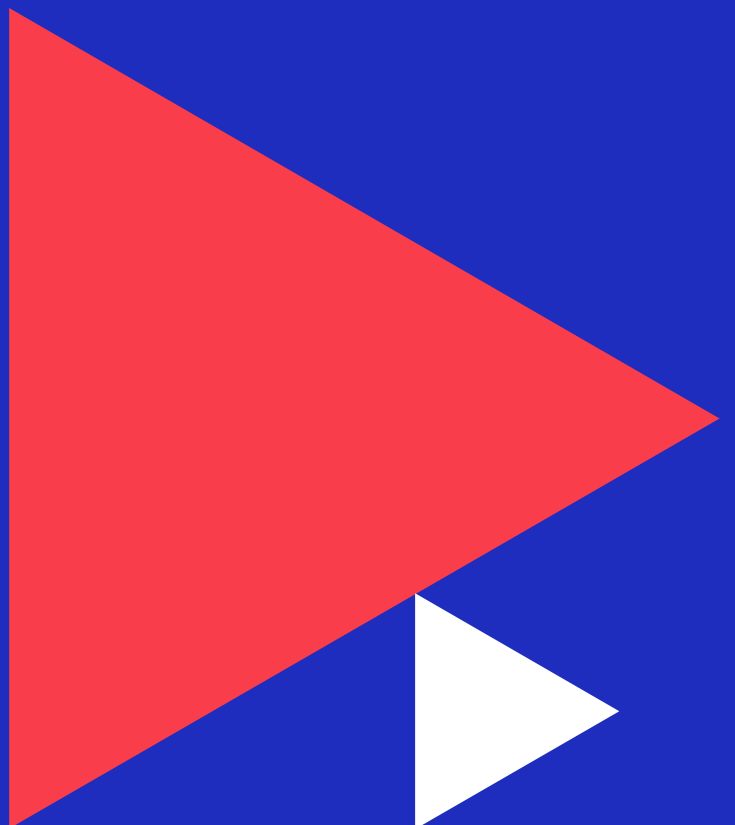
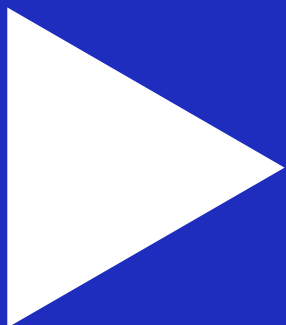
45 CEACR, Convention No. 169, general observation, 2019.

46 CEACR, Convention No. 169, general observation, 2010.

47 By way of illustration, the CEACR has noted with interest the action taken by the Government of Colombia, through the Directorate for Indigenous, Roma and Minority Affairs, to strengthen dialogue between the Government and Afro and indigenous communities, with the participation of the Ministry of Labour (see CEACR, Convention No. 169, Colombia, direct request, 2013). Similarly, it has noted the establishment in Costa Rica of a standing dialogue forum, which includes representatives of indigenous peoples, the activities of which encompass the promotion of interinstitutional coordination and links and the formulation of policy on indigenous lands (see CEACR, Convention No. 169, Costa Rica, observation, 2015).



Human rights



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.

► 3.1 Non-discrimination

Convention No. 169 is relevant from the human rights perspective. In its preambular paragraphs, it recalls “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”.

Article 3 of the Convention recognizes that indigenous peoples shall enjoy the full measure of human rights and fundamental freedoms without discrimination, at both the individual and collective levels. This provision reinforces the prohibition of discrimination in employment and occupation set out in the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

Convention No. 169 leaves behind the integrationist approach of its predecessor, Convention No. 107, and instead recognizes the right of indigenous peoples to preserve and develop their own institutions, languages and cultures. In this respect, Article 4 of the Convention sets out the requirement for governments to adopt special measures for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned, and establishes that such measures shall not be contrary to the freely-expressed wishes of the peoples concerned.

The CEACR has considered it necessary for governments to make efforts to eliminate discrimination against members of indigenous peoples,⁴⁸ particularly in relation to employment and occupation.⁴⁹ It has also requested governments to provide information on the bodies responsible for examining complaints of discrimination against indigenous peoples, and the outcome of any proceedings instituted in this regard.⁵⁰ Some countries have provided information to the CEACR on national human rights plans, programmes and action that address the issue of historical discrimination against indigenous peoples, including such issues as violence against indigenous women in the context of reproductive health.⁵¹

48 See, for example, CEACR, Convention No. 169, Central African Republic, direct request, 2014.

49 CEACR, Convention No. 169, Paraguay, direct request, 2014.

50 CEACR, Convention No. 169, Guatemala, direct request, 2011.

51 CEACR, Convention No. 169, Guatemala, direct request, 2005; Paraguay, direct request, 2017; Mexico, observation, 2019.

The CEACR has also emphasized the need to take into consideration and address the effects of multiple discrimination.⁵² Indigenous peoples may be subject to discrimination on multiple grounds, including ethnicity, sex, social origin, disability, health and HIV status. Gender-based discrimination, in particular, frequently interacts with other forms of discrimination. Indigenous women are often confronted by discrimination based on gender, ethnicity and indigenous identity.⁵³

► Specific action has been taken in various countries to protect the integrity of groups in voluntary isolation or during initial contacts.

► 3.2 Protection of personal integrity

On various occasions, the CEACR and the CAS have noted with deep concern acts of violence against indigenous communities, including murders and intimidation, also within the context of social protest.⁵⁴ In its 2019 general observation, the CEACR calls for action to bring an end to the climate of violence and emphasizes “the importance of taking appropriate measures to ensure that all acts of violence against indigenous persons or peoples are investigated and that the personal integrity and safety of members of indigenous peoples are guaranteed.”⁵⁵ It has also recalled the “importance of ensuring that indigenous peoples are aware of their rights and have access to justice in order to assert their rights”.⁵⁶

Similarly, the CEACR has expressed concern at information provided by workers’ and employers’ organizations on the criminalization of social protest. In this regard, it has recalled the obligation of States to “ensure that indigenous peoples fully enjoy all their human rights”.⁵⁷

Specific action has been taken in various countries to protect the integrity of groups in voluntary isolation or during initial contacts.⁵⁸ The CEACR has also addressed this situation in the context of its regular supervision, including under Article 18 of the Convention, which provides for the imposition of penalties for any unauthorized intrusion on the lands of indigenous peoples, and has requested governments to provide information on such measures.⁵⁹

52 ILO, 2012. CEACR. General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, paragraph 748.

53 See, for example, United Nations General Assembly. Report of the Special Rapporteur on the rights of indigenous peoples, Victoria Tauli Corpuz, (A/HRC/30/41), 6 August 2015.

54 CAS, Convention No. 169, individual examination, Mexico, 1995.

55 CEACR, Convention No. 169, general observation, 2019. See also: CEACR, Convention No. 169, Brazil, observation, 2019, which refers to the “physical and psychological integrity” of indigenous and tribal peoples.

56 CEACR, Convention No. 169, general observation, 2019.

57 CEACR, Convention No. 169, general observation, 2019. See also: CEACR, Convention No. 169, Guatemala, observation, 2018; and Colombia, observation, 2019.

58 See, for example, CEACR, Convention No. 169, Peru, direct request, 2017; and Bolivia (Plurinational State of), direct request, 2019.

59 See, for example, CEACR, Convention No. 169, Ecuador, direct request, 2014.

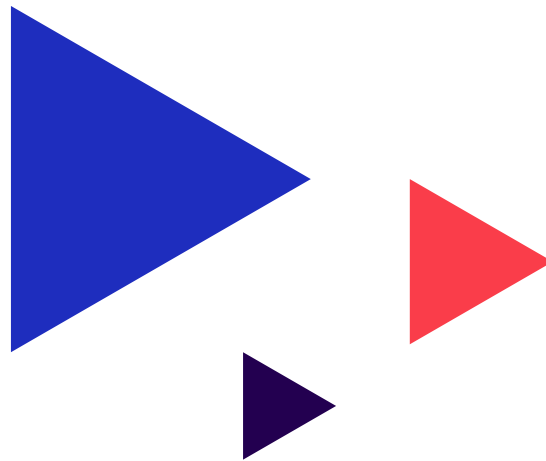
► 3.3 Indigenous women

Article 3 of the Convention provides in paragraph 1 that its provisions shall be applied without discrimination to male and female members of indigenous peoples.

In its reply to the questionnaire sent out by the Office with a view to the drafting of Convention No. 169, the Government of Sweden emphasized that the instrument should give consistent attention to the situation of the female indigenous population.⁶⁰ In the discussion at the Conference in 1988, the Government member of Canada proposed the inclusion of a provision establishing that the Convention would apply equally to males and females of these populations, which was supported by the Worker members and several Government members.⁶¹ In particular, the Government member of Norway emphasized that “the status of indigenous women was often eroded as a result of economic changes and thus governments needed reminding of their duties towards indigenous women”.⁶²

The ILO’s 2019 report on the implementation of Convention No. 169 indicates that indigenous women face more unfavourable socio-economic conditions than non-indigenous women, resulting in high levels of poverty.⁶³ In its comments, the CEACR has paid special attention to the situation of indigenous women, particularly in relation to employment, access to education and health.⁶⁴ For example, in its 2017 direct request to Peru, the CEACR asked the Government to provide information on the measures taken “to increase indigenous women’s access to education, the labour market and land [ownership], as well as their participation in prior consultation processes, in equitable conditions”.⁶⁵

In the context of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the CEACR has drawn attention to the situation of discrimination faced by indigenous women and those of African descent.⁶⁶ In various countries, indigenous women are involved in domestic work, for which reason the CEACR has also addressed the situation of indigenous women domestic workers in the context of the Domestic Workers Convention, 2011 (No. 189).⁶⁷



60 ILO, 1988. International Labour Conference, 75th Session, Report VI (2), Partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), p. 103.

61 ILO, 1988. International Labour Conference, 75th Session, Provisional Record No. 32, p. 32/9, paragraph 58.

62 Ibid.

63 See, ILO, 2019: [Implementing the ILO Indigenous and Tribal Peoples Convention No. 169: Towards an inclusive, sustainable and just future](#), especially parts 2 and 3.

64 See, for example, CEACR, Convention No. 169, Mexico, observation, 2019; Paraguay, direct request, 2017; Nicaragua, direct request, 2018.

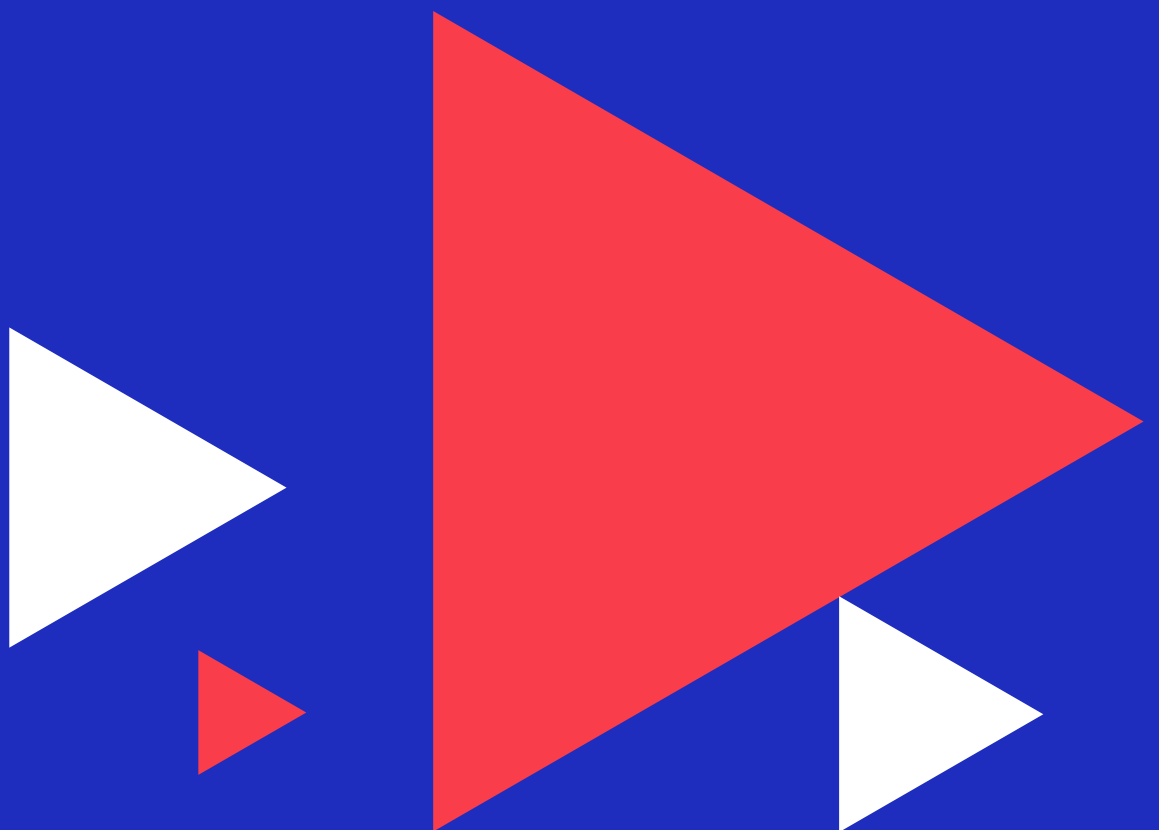
65 CEACR, Convention No. 169, direct request, Peru, 2017.

66 CEACR, Convention No. 111, Brazil, observation, 2009.

67 See, for example, CEACR, Convention No. 189, Bolivia (Plurinational State of), direct request, 2017.

▶ 4

Obligation of consultation



► 4.1 Consultation as the cornerstone of the Convention

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;
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.

The obligation to consult indigenous peoples whenever legislative or administrative measures are planned which may affect them directly constitutes the “cornerstone of Convention No. 169 on which all its provisions are based”.⁶⁸ It is therefore important for judges to be aware of the content of this obligation and its scope of application in view of its fundamental importance when examining not only cases concerning consultation, but also those related to the application of the various obligations set out in the Convention.

Consultation was a key concept during the preparation of Convention No. 169 as it crystallizes the transition from an integrationist approach to the promotion of the right of indigenous peoples to participate actively in the development and implementation of decisions that may affect them. The establishment of consultation mechanisms has been recognized as one of the elements of the ILO Strategy on indigenous peoples’ rights for inclusive and sustainable development, 2015. It has also been the subject of observations by employers’ and workers’ organizations within the framework of the supervisory system, and therefore abundantly examined by the CEACR and the CAS, as well as by tripartite committees in the context of representations.

Consultation is a fundamental principle of democratic governance and of inclusive development⁶⁹ which, in the view of the CEACR, “should be seen as an essential instrument for the promotion of effective and meaningful social dialogue, mutual understanding as well as legal certainty”.⁷⁰ Consultation can also be instrumental in the prevention and resolution of conflict.⁷¹

The CEACR has emphasized that consultation also aims to promote “the application of all the provisions of the Convention in a systematic and coordinated manner, in cooperation with the indigenous peoples, which entails a gradual process of establishing adequate bodies and mechanisms for this purpose”.⁷² Similarly, a tripartite committee emphasized “the need for efforts to create consensus regarding procedures; to facilitate access to the said procedures and to ensure their widespread dissemination, as well as creating a climate of trust with the indigenous

68 CEACR, Convention No. 169, general observation, 2010.

69 ILO, 2013. *Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169): Handbook for ILO tripartite constituents*, p. 11.

70 CEACR, Convention No. 169, general observation, 2018.

71 CEACR, Convention No. 169, general observation, 2009.

72 CEACR, Convention No. 169, general observation, 2018.

peoples conducive to productive dialogue.”⁷³ It is important to bear in mind that the obligation to consult indigenous peoples clearly and explicitly falls on governments, and not on private persons or companies.⁷⁴

Consultations must be formal and fulfil the requirements set out in Article 6 of the Convention. They also have to be carried out through “representative institutions” of indigenous peoples, guided by the principle of “good faith”, in a “form appropriate to the circumstances”, through “appropriate procedures” and “with the objective of reaching agreement or consent to the proposed measures”. Each of these elements is analysed in the paragraphs below.



► 4.2 Measures to be consulted

4.2.1 “whenever consideration is being given to legislative or administrative measures ...”

Article 6 of the Convention establishes the obligation to consult indigenous peoples concerning any legislative or administrative measure which may affect them directly. The Article does not set out additional requirements concerning the type of measure on which consultations are to be held. For example, the term “legislative measure” encompasses draft legislation intended for approval by the competent legislative body, at both the federal and state levels in federal systems. A tripartite committee indicated that constitutional reforms “constitute legislative measures within the meaning of Article 6 and, as such, fall unquestionably within the scope of this Article”.⁷⁵ The CEACR has also insisted that consultations must be held with indigenous peoples on any proposed legislation governing the right to prior consultation.⁷⁶

In practice, national regulations have included public policies or regulatory decrees issued by the executive authorities among the administrative measures subject to consultation.⁷⁷ With reference to the definition of “administrative measures”, a tripartite committee indicated that national law and practice “may make a distinction between administrative decisions and measures, provided that this does not” prevent or restrict the holding of consultations”.⁷⁸ With regard to

73 ILO, 2006. Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Union of Metal, Steel, Iron and Allied Workers (STIMAHCS), (GB.296/5/3), paragraph 44.

74 ILO, 2013. *Handbook for ILO tripartite constituents*, op. cit., p. 14.

75 ILO, 2004. Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Union of Academics of the National Institute of Anthropology and History (SAINAH), (GB.289/17/3), paragraph 83.

76 CEACR, Convention No. 169, Honduras, observation, 2019. See also: ILO, 2013. *Handbook for ILO tripartite constituents*, op. cit., p. 13.

77 See, for example, Costa Rica, Decree No. 40932 of 6 March 2018, and Peru, Regulations issued under the Consultation Act (Supreme Decree No. 001-2012-MC), section 3.

78 ILO, 2016. Report of the Committee set up to examine the representation alleging non-observance by the Government of Chile of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the First Inter-Enterprise Trade Union of Mapuche Bakers of Santiago, (GB.326/INS/15/5), paragraph 150.

measures adopted in situations of urgency or emergency, the tripartite committee considered that, “while certain circumstances, such as natural disasters, may require the taking of urgent and emergency measures, consultation procedures should be re-established as soon as possible”.⁷⁹

When examining whether consultations are required, some national courts have drawn a distinction between measures of general scope and measures that are intended exclusively for indigenous peoples.⁸⁰ In this respect, it is necessary to take into account that “Article 6(1) (a) of the Convention does not establish any exceptions with regard to the scope of ‘legislative and administrative measures’”.⁸¹ Accordingly, irrespective of this distinction, measures which may affect indigenous peoples directly should be subject to consultation.

In addition to Article 6, there are other provisions of the Convention which establish the requirement to consult indigenous peoples in specific situations: before undertaking or permitting any programmes for the exploration or exploitation of resources pertaining to their lands (Article 15(2)); whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community (Article 17(2)); the organization and operation of special training programmes (Article 22(3)); the establishment of their own educational institutions and facilities (Article 27(3)); and measures relating to the literacy of indigenous children in their own language or in the language most commonly used by the group to which they belong (Article 28(1)). In all these cases, consultation has to be undertaken in accordance with the requirements set out in Article 6 of the Convention.

4.2.2 “... which may affect them directly”

In accordance with Article 6 of the Convention, the fundamental criteria for determining the measures that must be subject to consultation is that they may affect indigenous peoples directly. The inclusion of the term “directly” in the wording of this Article was proposed by the Employer members, in response to the concerns expressed by certain governments that the scope of the obligation of consultation should be well defined.⁸² Some national courts have referred to this criterion, using the terms directly “affect” or “prejudice”, and have tried to give it content in their case law.⁸³ Some existing legal frameworks for the implementation of prior consultation also contain definitions of the criterion.

In the context of a representation, the issue was examined of whether a legislative measure respecting forests which explicitly excluded indigenous lands from its scope should be subject to consultation. In this regard, the tripartite committee indicated that “the need to identify the lands that will be excluded shows that the Act is likely to have a direct effect on the peoples concerned”.⁸⁴

⁷⁹ Ibid., paragraph 137.

⁸⁰ See, for example, the Constitutional Court of Peru (plenary ruling), on the appeal made by 6226 citizens to find unconstitutional Legislative Decree No. 994 promoting private investment in irrigation projects to extend agricultural lands, issued on 26 July 2011 (Case No. 00024-2009-PI), basic principles 3(6). See also the Constitutional Court of Colombia, ruling on the appeal to find unconstitutional the process of the development of the Forest Act, issued on 23 January 2008 (No. C-30/08), paragraph 4.2.2.2.1.

⁸¹ ILO, 2016. Convention No. 169, Chile, representation, GB.326/INS/15/5, op. cit., paragraph 149.

⁸² ILO, 1988. Report VI (2), op. cit., pp. 28-30; and Provisional Record No. 32, 1988, op. cit., p. 32/10, paragraph 76.

⁸³ See for example, the Constitutional Court of Peru on the appeal made by 6226 citizens against the executive authorities to find unconstitutional Legislative Decree No. 994, issued on 26 July 2011 (Case No. 00024-2009-PI). In the ruling, with reference to the criterion of direct prejudice, the Court indicated that: “Even so it is not difficult to understand that this includes any state measures (administrative or legislative) the effect of which is to harm, prejudice, affect unfavourably or cause a direct deterioration in the collective rights and interests of indigenous peoples. See also, Constitutional Court of Colombia, Case No. C-030/08, in which the Court develops the concept of “direct prejudice” in relation to legislative measures.

⁸⁴ ILO, 2009. Report of the Committee set up to examine the representation alleging non-observance by Brazil of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Union of Engineers of the Federal District (SENGE/DF) (GB.304/14/7), paragraph 41.

► 4.3 Good faith

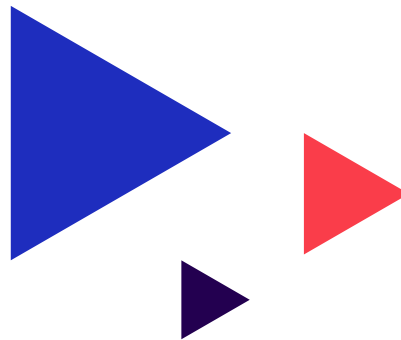
The principle of good faith is fundamental to prior consultation and has the objective of ensuring that consultation is not merely a formality, as indicated at the International Labour Conference in 1988,⁸⁵ but makes a real contribution to the effective participation of indigenous peoples.

The ILO supervisory bodies have emphasized that during consultation there must be “a genuine dialogue between governments and indigenous and tribal peoples characterized by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord”.⁸⁶ Accordingly, “pro forma consultations or mere information [do] not meet the requirements of the Convention”.⁸⁷ The CAS has also emphasized that “genuine dialogue must be based on respect for indigenous peoples’ rights and integrity”.⁸⁸ The CEACR has also emphasized that consultation procedures contribute to reinforcing trust between the government and indigenous peoples.⁸⁹

In some countries, the consultation procedure includes a stage of following up observance of the agreements reached through consultation.⁹⁰ In its comments, the CEACR has requested governments to provide information on the measures adopted to give effect to the agreements reached with the communities consulted.⁹¹

► 4.4 Prior consultation

Consultation must provide indigenous peoples “with an effective voice in the process of reaching decisions that affect them.”⁹² As indicated by a tripartite committee, to achieve this objective it is necessary to ensure that consultations are held “sufficiently early” prior to the adoption of the measure in question.⁹³ It is therefore essential for governments to “ensure that indigenous peoples have all relevant information and that it can be fully understood by them”, and that sufficient time is given “to allow indigenous peoples to engage their own decision-making processes and participate effectively in decisions taken, in a manner consistent with their cultural and social traditions.”⁹⁴



85 ILO, 1988. International Labour Conference, 75th Session, *Provisional Record* No. 32, p. 32/10, paragraph 74.

86 CEACR, Convention No. 169, general observation, 2019. See also, ILO, 2001. Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL), (GB.282/14/2), paragraph 38.

87 CEACR, Convention No. 169, general observation, 2010.

88 CAS, Convention No. 169, Peru, individual examination, 2009.

89 CEACR, Convention No. 169, Chile, observation, 2019.

90 This is the case, for example, of the Consultation Act (No. 29785) of 2011, section 15, in Peru, and Decree No. 40932 of 2018 in Costa Rica on prior consultation, which establishes the general procedure for the consultation of indigenous peoples, section 37.

91 See, for example, CEACR, Convention No. 169, Guatemala, direct request, 2011; and Chile, observation, 2018.

92 ILO, 1988. Report VI (1), op. cit., p. 35.

93 ILO, 2008. Report of the Committee set up to examine the representation alleging non-observance by Argentina of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Education Workers Union of Río Negro (UNTER), local section affiliated to the Confederation of Education Workers of Argentina (CTERA) (GB.303/19/7), paragraph 64.

94 ILO, 2013. Handbook for ILO tripartite constituents, op. cit., p. 15.

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- The ILO supervisory bodies have emphasized that during consultation there must be “a genuine dialogue between governments and indigenous and tribal peoples characterized by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord”.

► 4.5 Representative institutions

In accordance with the recognition of the aspirations of indigenous peoples “to exercise control over their own institutions”, as set out in the preamble to the Convention, Article 6 requires consultation to be carried out through the representative institutions of indigenous peoples. This requirement has been described as the “principle of representativity”.⁹⁵ The 1986 Meeting of Experts recognized that indigenous peoples “already had their own decision-making institutions and procedures.”⁹⁶ Accordingly, during the discussion of the draft text of Article 6 of the Convention, the Worker members emphasized that it was necessary to ensure that indigenous peoples could express themselves in consultations through their representative institutions, which was also supported by the Employer members.⁹⁷

The Convention does not determine the required nature or characteristics of a representative body of indigenous peoples. As emphasized by a tripartite committee, in view of the diversity

of indigenous peoples, “the Convention does not impose a model of what a representative institution should involve, the important thing is that they should be the result of a process carried out by the indigenous peoples themselves.”⁹⁸ Moreover, depending on the circumstances of the case, “the appropriate institution may be representative at the national, regional or community level; it may be part of a national network or it may represent a single community.”⁹⁹ Another tripartite committee considered that it is essential that “the authorities ensure that all the organizations resulting from such a process are invited to take part in the consultation and participation procedures, and that the procedures allow all the different views and sensitivities to be expressed”.¹⁰⁰

It is important to bear in mind 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.”¹⁰¹ Article 6(1)(c) provides that governments shall “establish means for the full development of these peoples’ own institutions and initiatives, and in appropriate cases provide the necessary resources for this purpose.”

95 ILO, 2001. Convention No. 169, Ecuador, representation, GB.282/14/2, op. cit., paragraph 44.

96 ILO, 1986. Report of the Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), Governing Body, 234th Session, November, (GB.234/5/4), paragraph 94.

97 ILO, 1989. International Labour Conference, 76th Session, Provisional record No. 25, op. cit., p. 25/11, paragraph 72.

98 ILO, 2004. Report of the committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Union of Workers of the Autonomous University of Mexico (STUNAM) and the independent Union of Workers of La Jornada (SITRAJOR), (GB.289/17/3), paragraph 102.

99 ILO, 2013. *Handbook for ILO tripartite constituents*, op. cit., p. 14.

100 ILO, 2008. Convention No. 169, Argentina, representation, GB.303/19/7, op. cit., paragraph 76.

101 ILO, 2001. Convention No. 169, Ecuador, representation, GB.282/14/2, op. cit., paragraph 44.

► 4.6 Appropriate procedures

For a consultation process to be considered appropriate it must “create favourable conditions for achieving agreement or consent to the proposed measures”, irrespective “of the result obtained”.¹⁰² The report prepared by the Office for the 1988 Conference emphasized that the participation of indigenous peoples must be backed up “by appropriate procedural mechanisms to be established at the national level in accordance with national conditions” which “should be adapted to the situation of the indigenous and tribal peoples concerned”.¹⁰³

The ILO supervisory bodies have recalled the need to establish “effective consultation mechanisms that take into account the vision of governments and indigenous and tribal peoples concerning the procedures to be followed.”¹⁰⁴ In particular, the CEACR has emphasized the need for indigenous and tribal peoples “to participate and be consulted [...] including in the drafting of provisions on consultation processes, as well as the need for provisions on consultation to reflect [...] the elements set forth in Articles 6, 7, 15 and 17(2) of the Convention”.¹⁰⁵ It should also be borne in mind that the CEACR has emphasized the importance that a “[p]eriodic evaluation of the operation of the consultation mechanisms, with the participation of the peoples concerned, should be undertaken to continue to improve their effectiveness.”¹⁰⁶

► 4.7 Purpose of consultation

Under the terms of Article 6, consultation shall be undertaken “with the objective of achieving agreement or consent to the proposed measures.” This implies that consultations have to be held without interference,¹⁰⁷ and offer indigenous peoples the “opportunity to be heard and to have an impact on the decisions taken”.¹⁰⁸

During the discussions in the Conference in 1988, the Government member of the United States proposed the use of the term “full consultation” instead of “seeking consent”. This proposal was modified by the Government member of Norway, who proposed the wording “consult fully with a view to obtaining the consent”.¹⁰⁹ The Government member of Canada considered that the Norwegian proposal was already implied in the language proposed by the United States, which “required not only formal consultations, but consultations in good faith through appropriate mechanisms”.¹¹⁰ Accordingly, the terms “full consultation” were reflected in the conclusions adopted by the Conference following the first discussion.¹¹¹

In its replies to the proposed draft text of Article 6 prepared by the Office, which included the term “full”, the Indigenous Peoples’ Working Group, whose comments were transmitted by Canada, proposed to replace “consult fully” by “obtain the consent of”, which was supported by the unions from Denmark, Japan, Norway, Switzerland and the United States.¹¹² The final draft of Article 6 submitted for discussion by the Conference in 1989 did not contain the term “fully”. Instead, the draft text indicated that consultations shall be undertaken “with the objective of achieving agreement or consent to the proposed

¹⁰² ILO, 2013. *Handbook for ILO tripartite constituents*, op. cit., p. 15.

¹⁰³ ILO, 1988. Report VI (1), op. cit., p. 30.

¹⁰⁴ ILO, 2001. Convention No. 169, Ecuador, representation, GB.282/14/2, op. cit., paragraph 45, reiterated in CEACR, Convention No. 169, Ecuador, observation, 2013.

¹⁰⁵ CEACR, Convention No. 169, Peru, observation, 2009.

¹⁰⁶ CEACR, Convention No. 169, general observation, 2010.

¹⁰⁷ CEACR, Convention No. 169, general observation, 2019.

¹⁰⁸ CEACR, Convention No. 169, general observation, 2010.

¹⁰⁹ ILO, 1988. International Labour Conference, 75th Session, *Provisional Record* No. 32, p. 32/10, paragraph 74.

¹¹⁰ Ibid.

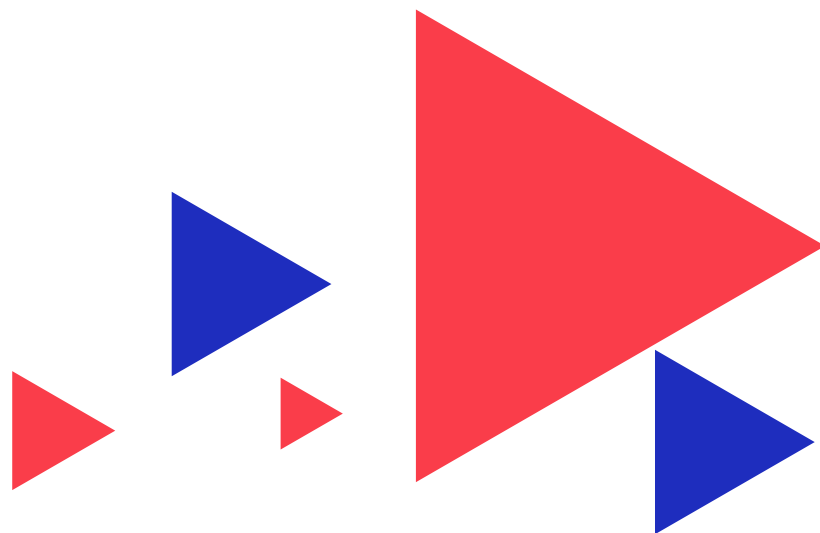
¹¹¹ Ibid., paragraphs 72 to 81.

¹¹² ILO, 1989. Report IV (2 A), op. cit., p. 20; and *Provisional Record* No. 25, op. cit., p. 25/11, paragraph 68.

measures.”¹¹³ During the 1989 Conference, the Worker members insisted on replacing the term “consult” by the words “obtain the consent of”. In response, the Employer members indicated that the language proposed in the draft text was in accordance with ILO use of the term “consult”, which meant dialogue at least, and they therefore did not support the proposal by the Worker members as they considered it too rigid.¹¹⁴ Various other Government members opposed the amendment, which was not therefore adopted.¹¹⁵

Based on an examination of the preparatory work for the Convention, the CEACR has reiterated that consultations “do not imply a right to veto, nor is the result of such consultations necessarily the reaching of agreement or consent”.¹¹⁶ A tripartite committee indicated that, although Article 6 does not provide “that consent must be obtained [...] for the consultations to be valid [...] it does require pursuit of the objective of achieving agreement or consent, which means setting in motion a process of dialogue and genuine exchange between the parties to be carried out in good faith.”¹¹⁷

▶▶ The ILO supervisory bodies have recalled the need to establish “effective consultation mechanisms that take into account the vision of governments and indigenous and tribal peoples concerning the procedures to be followed.”



113 ILO, 1989. Partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), International Labour Conference, 76th Session, Report IV (2 B), p. 10.

114 ILO, 1989. International Labour Conference, 76th Session, Provisional Record No. 25, op. cit., p. 25/11, paragraph 68.

115 Ibid.

116 CEACR, Convention No. 169, general observation, 2010.

117 ILO, 2008. Convention No. 169, Argentina, representation, GB.303/19/7, op. cit., paragraph 81.

► **4.8 Consultation concerning extraction activities, participation in the benefits and compensation**

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.



On various occasions, courts have had to rule on cases relating to the application of consultation in relation to projects for the extraction of natural resources located on the lands traditionally occupied by indigenous peoples. The report prepared by the Office for the 1988 Conference indicated that “[a]n international convention cannot provide detailed guide-lines on the precise conditions in which all activities relating to the exploitation of natural resources may or may not take place on the lands of indigenous and tribal peoples; rather, it should provide a general framework for dealing with these questions.”¹¹⁸

During the preparation of Convention No. 169, there was general consensus that indigenous peoples should have rights over the natural resources pertaining to the areas that they occupy.¹¹⁹ In this respect, there was also “a wide measure of agreement, firstly that the peoples concerned should be enabled to control wildlife and other resources which pertain to their traditional lands, and which are fundamental to the continuation of their traditional lifestyles”.¹²⁰ The Employer advisor of the United States indicated that the “revised Convention must give greater recognition to means other than ownership for the effective control” of land, adding that the “rights of indigenous peoples should be broadened to a territorial concept which would encompass flora, fauna as well as natural resources, such as coastal fishing and sub-surface mineral resources”.¹²¹

However, it was proposed by certain governments, indigenous organizations and workers’ organizations that mechanisms should be established with indigenous peoples for their participation in good faith before the commencement of programmes of exploration and exploitation of natural resources in their lands, ensuring their participation in the benefits.¹²² The Employer members considered that it was

difficult to make absolute statements concerning ownership of subsoil resources, and they therefore “favoured the adoption of a position which would not interfere with the rights of States, but which would call for consultation with indigenous and tribal peoples concerning resource development; and the protection of their living conditions as far as possible.”¹²³ The outcome was a specific provision on consultation in Article 15(2) of the Convention, which provides for the obligation of governments to “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.” It should be borne in mind that Article 15(2) of the Convention respects the principle applied in many national legislations that subsoil resources belong to the State.

Although the national legislation in certain countries envisages participation mechanisms during the process of the evaluation of environmental impact studies, the CEACR has maintained that the “impact study carried out by the company is no substitute for the consultations required” by Article 15(2), and has recalled that “responsibility for consultation lies with the Government, not the company.”¹²⁴ A tripartite committee recalled that, in accordance with Article 6, consultation must be “prior”, “which implies that the communities affected are involved as early on as possible in the process, including in environmental impact studies”, and emphasized that “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.”¹²⁵

118 ILO, 1988. Report VI (1), op. cit., p. 57.

119 ILO, 1989. Report IV (2 A), op. cit., p. 40.

120 ILO, 1988. Report VI (2), op. cit., p. 53.

121 ILO, 1988. International Labour Conference, 75th Session, Provisional Record No. 36, p. 36/21.

122 ILO, 1989. Report IV (2 A), op. cit., pp. 34-41.

123 ILO, 1988. International Labour Conference, 75th Session, Provisional Record No. 32, op. cit., p. 32/16, paragraph 129.

124 CEACR, Convention No. 169, Guatemala, observation, 2005.

125 ILO, 2001. Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers’ Union (CUT), (GB.282/14/3), paragraph 90. National courts have also emphasized the importance of consultations being held sufficiently in advance so that indigenous peoples can influence the final outcome of the decision. See, for example, the ruling of the Constitutional Court of Guatemala on an appeal against the ruling on an action for the protection of constitutional rights (amparo) brought by Bernard CaalXól against the Ministry of Energy and Mining. The Court found that “processes of dialogue and the seeking of agreements must be undertaken from the first stages of the formulation and planning of the proposed measure, so that indigenous peoples can genuinely participate and have a voice in the decision-making process.”

The CEACR has encouraged governments to include the requirement of prior consultation in legislation respecting the exploration and exploitation of natural resources.¹²⁶

With regard to situations in which exploration and exploitation projects were authorized before the entry into force of Convention No. 169, a tripartite committee indicated that “the provisions of the Convention cannot be applied retroactively, particularly as regards questions of procedure”, but that the Convention is applicable to all activities that have been undertaken since it entered into force.¹²⁷ The committee also emphasized that “the obligation to consult the peoples concerned does not only apply to the concluding of agreements but also arises on a general level in connection with the application of the provisions of the Convention.”¹²⁸

With regard to consultation procedures, the CEACR has indicated that “governments must take into account the procedural requirements laid down in *Article 6* of the Convention and the provisions of *Article 7* of the Convention, according to which ‘Governments shall ensure that, whenever appropriate, studies are carried out, in cooperation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall

be considered as fundamental criteria for the implementation of these activities”.¹²⁹

Article 15, paragraph 1, of the Convention provides as a general principle that indigenous peoples have rights to the natural resources pertaining to their lands, which include the right “to participate in the use, management and conservation of these resources.” With reference to the participation of indigenous peoples in the benefits from the exploitation of the resources pertaining to their lands, as envisaged in *Article 15(2)*, the CEACR has considered that “there is no single model for benefit sharing as envisaged under Article 15(2) and that appropriate systems have to be established on a case by case basis, taking into account the circumstance of the particular situation of the indigenous peoples concerned.”¹³⁰ The same provision sets out the duty of governments to provide the indigenous peoples affected by exploitation programmes with “fair compensation for any damages which they may sustain as a result of such activities.” With regard to the definition of the terms “fair compensation”, during the discussion of the draft Convention it was considered that this is an issue that should be addressed in accordance with the rules and procedures laid down at the national level.¹³¹

¹²⁶ CEACR, Convention No. 169, general observation, 2010.

¹²⁷ ILO, 2001. Convention No. 169, Ecuador, representation, GB.282/14/2, op. cit., paragraph 28.

¹²⁸ Ibid., paragraph 30.

¹²⁹ CEACR, Convention No. 169, Guatemala, observation, 2005.

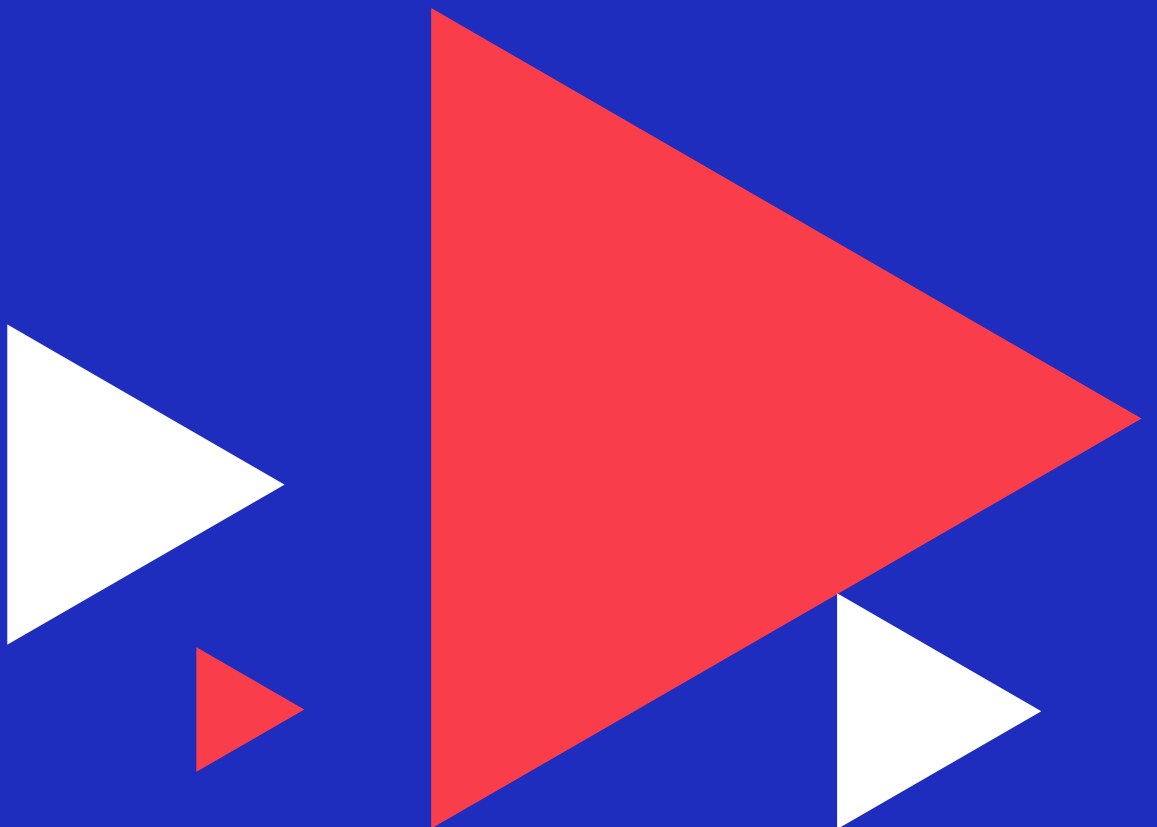
¹³⁰ CEACR, Convention No. 169, Norway, observation, 2009.

¹³¹ ILO, 1989. Report IV (2 A), op. cit., p. 41.



▶ 5

Development, participation and impact studies

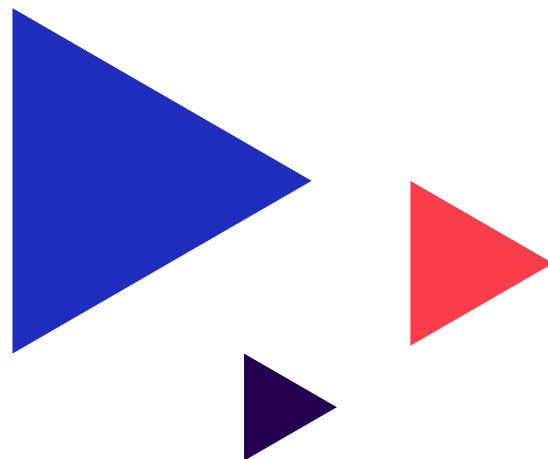


Article 7

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.

► 5.1 Right to decide development priorities

The preamble to Convention No. 169 recognizes the aspirations of indigenous peoples to exercise control over their ways of life and economic development within the framework of the States in which they live. In its conclusions, the 1986 Meeting of Experts indicated that “[i]ndigenous and tribal peoples should enjoy as much control as possible over their own economic, social and cultural development”.¹³² Some participants in the Meeting of Experts considered that “the reason for the failure of so many of the economic development programmes was that they were imposed from above instead of emerging from the wishes of the people being directly affected”, and that “indigenous and tribal peoples should have the right under all circumstances to determine whether and how programmes of economic development would affect them”.¹³³

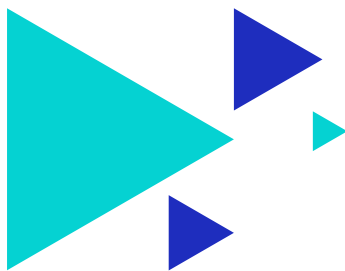


¹³² ILO, 1988. Report VI (1), op. cit., Appendix, Extracts from the Report of the Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), conclusion 2.

¹³³ Ibid., paragraph 57.

The CEACR has emphasized that “the fundamental concept of the Convention is the right of indigenous peoples to participate effectively in decisions that may affect them, as well as in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly”, in accordance with the provisions of Article 7(1) of the Convention.¹³⁴ It has also emphasized that, even where “there is some degree of general participation at the national level, and ad hoc consultation on certain measures, this may not be sufficient to meet the Convention’s requirements concerning participation in the formulation and implementation of development processes”.¹³⁵

The concept of participation envisaged in Article 7 of the Convention also implies that “indigenous peoples should not only respond and be able to influence externally initiated proposals, but should actively participate and propose measures, programmes and activities that shape their development”.¹³⁶ Moreover, a tripartite committee emphasized that special projects for regions in which indigenous peoples live “must be carried out in a manner that promotes improvement in their living and working conditions and their health, and with their participation and cooperation”.¹³⁷



► 5.2 Participation in impact studies

The purpose of the requirement to carry out social, spiritual and cultural impact studies for development projects in cooperation with indigenous peoples is to prevent or mitigate their negative impacts on the peoples concerned. The report prepared by the Office for the 1988 Conference emphasized that “requiring such studies would enhance the value of consultations with these peoples, by promoting a factual assessment of the concerns of all parties to the discussions.”¹³⁸ One of the conclusions proposed by the Office with a view to the first discussion indicated that: “Whenever appropriate, social and environmental studies should be carried out, in collaboration with the peoples concerned”.¹³⁹ The Worker members proposed an amendment so that the wording would establish an obligation, which was supported and adopted by consensus.¹⁴⁰ They also tabled another amendment intended to require governments “to ensure that the peoples concerned had adequate resources to carry out such studies for themselves.”¹⁴¹ However, this proposal was not supported by the Employer members and various Government members, and was therefore withdrawn.

In the context of a representation, a tripartite committee indicated that “Articles 2(1), 2(2) (b), 6, 7 and 15(2) require consultation of the peoples concerned before the finalization of any environmental study and environmental management plan”.¹⁴² The CEACR has recalled the need to ensure that “any legislative proposal relating to environmental impact assessments: (i) complies with Articles 6 and 15 of the Convention with regard to consultations with indigenous peoples on projects for the exploration or exploitation of existing resources on lands traditionally occupied by the aforementioned peoples; (ii) ensures the cooperation of the peoples concerned in the assessment of the social, spiritual, cultural and environmental

¹³⁴ CEACR, Convention No. 169, general observation, 2019.

¹³⁵ CEACR, Convention No. 169, general observation, 2009.

¹³⁶ ILO, 2013. Handbook for ILO tripartite constituents, op. cit., p. 19.

¹³⁷ ILO, 2016. Convention No. 169, Chile, representation, GB.326/INS/15/5, op. cit., paragraph 149.

¹³⁸ ILO, 1988. Report VI (1), op. cit., p. 36.

¹³⁹ ILO, 1988. Report VI (2), op. cit., p. 107, conclusion No. 16.

¹⁴⁰ ILO, 1988. International Labour Conference, 75th Session, *Provisional Record* No. 32, op. cit., p. 32/12, paragraph 93.

¹⁴¹ Ibid., paragraph 74.

¹⁴² ILO, 2001. Convention No. 169, Colombia, representation, GB.282/14/3, op. cit., paragraph 78.

■ In accordance with Article 7(3) of the Convention, the CEACR has requested information from governments on the manner in which indigenous and tribal peoples participate in activities relating to the assessment of the social, spiritual, cultural and environmental impact that development projects may have on their territories and collective rights

impact that the development activities can have on these peoples, in accordance with Article 7 of the Convention; and (iii) addresses situations envisaged in Article 16(2)-(5) of the Convention regarding projects that involve the removal of the peoples concerned from the lands they traditionally occupy.”¹⁴³ Moreover, in accordance with Article 7(3) of the Convention, the CEACR has requested information from governments on the manner in which indigenous and tribal peoples participate in activities relating to the assessment of the social, spiritual, cultural and environmental impact that development projects may have on their territories and collective rights.¹⁴⁴ It has also requested information on the manner in which the outcome of environmental, social and cultural impact studies, undertaken with the participation of the peoples concerned, have

been considered as fundamental criteria for the implementation of mining activities in indigenous communities.¹⁴⁵

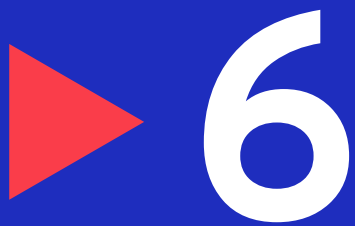
Some governments have adopted measures to ensure that environmental impact studies also take into account the effects of the projects in question on indigenous peoples. In its 2013 report, the Government of Costa Rica indicated that the National Environmental Technical Secretariat, when undertaking an environmental impact study, reviews the geographical location of the project with a view to ascertaining the presence of indigenous peoples and, where they exist, informs the developer so that this can be taken into account in the environmental assessment. Courts have also referred to the application of Article 7(3) in their case law.¹⁴⁶

¹⁴³ CEACR, Convention No. 169, Chile, observation, 2018.

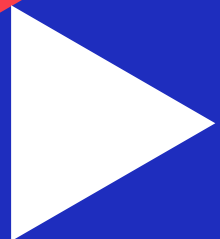
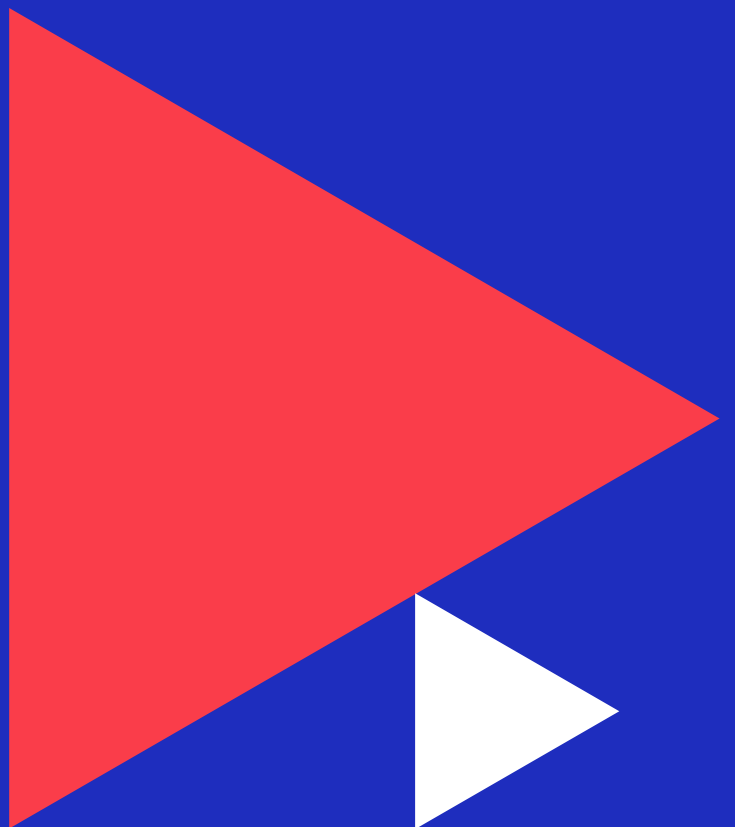
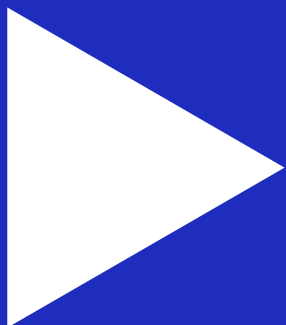
¹⁴⁴ CEACR, Convention No. 169, Nicaragua, direct request, 2018.

¹⁴⁵ CEACR, Convention No. 169, Colombia, direct request, 2019.

¹⁴⁶ See, for example, the Supreme Court of Justice of Chile, report on the Bill to modernize the SEIA (No. 20 2018), 5 September 2018; and the Constitutional Court of Colombia, ruling No. 123/18.



Land rights



► 6.1 Special relationship between indigenous peoples and the lands they traditionally occupy

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 13 of the Convention recognizes the special relationship between indigenous peoples and the lands that they traditionally occupy. The second paragraph of the Article defines the term lands as encompassing “the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.”¹⁴⁷ Such uses may include activities such as hunting, fishing or religious and cultural rituals.¹⁴⁸ During the discussion in the 1986 Meeting of Experts, the representative of the World Council of Indigenous Peoples, with reference to the special relationship of indigenous peoples with the lands that they occupy, indicated that in the revised Convention “reference should be made to traditional territories rather than simply to land.”¹⁴⁹ He emphasized that the concept of lands should include waters, the subsoil, air space, as well as plant and animal life and all resources.¹⁵⁰ Another expert emphasized the importance of including in that concept coastal waters and sea ice.¹⁵¹

On the other hand, several experts were of the view that the new Convention should give preference to collective forms of ownership.¹⁵² During the discussions at the 1988 Conference, the Employer advisor of the United States considered that a “limited focus on individual ownership failed to provide for the intrinsic and fundamental collectiveness of indigenous societies.”¹⁵³

In view of the divergence of views between governments, employers’ organizations, workers’ organizations and indigenous organizations in relation to the use of the terms *lands and territories*, the office proposed to use both terms in the draft text of the Convention. Following intense debate, this proposal was approved and is reflected in the final text of Article 13. In this respect, in his intervention in the Conference in 1989, the Employer advisor of Mexico considered that governments would need to “solve problems regarding lands in the light of their respective legal, political and economic systems.”¹⁵⁴

147 The concept of territories, as indicated in Article 13 of the Convention, has also been referred to in national case law. See: Constitutional Court of the Plurinational State of Bolivia, appeal for the protection of constitutional rights (*amparo*) brought by the Technical Director of the Tarija Departmental Roadways Service against the President of the Itika Guasu Guaraní Assembly, issued on 25 October 2010 (2003/2010-R).

148 CEACR, Convention No. 169, general observation, 2019.

149 ILO, 1988. Report VI (1), op. cit., Appendix, Extracts from the Report of the Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), pp. 110-111, paragraph 63.

150 Ibid.

151 Ibid.

152 ILO, 1988. Report VI (1), op. cit., p. 46.

153 ILO, 1988. International Labour Conference, 75th Session, *Provisional Record* No. 36, op. cit., p. 36/21.

154 ILO, 1989. International Labour Conference, 76th Session, *Provisional Record* No. 31, op. cit., p. 31/3.

The definition of lands contained in Article 13(2) of the Convention has to be taken into account for the application of Articles 15 and 16 of the Convention. A tripartite committee indicated that Article 15(2) of the Convention does not require indigenous peoples to be in possession of ownership title, but that consultations are required “in respect of resources owned by the State pertaining to the lands that the peoples concerned occupy or otherwise use, whether or not they hold ownership title to those lands.”¹⁵⁵ The tripartite committee added that “the rights to lands that are traditionally occupied as recognized by the Convention do not only relate to ownership and occupation, but also to the survival of indigenous peoples as such and their historical continuity.”¹⁵⁶ The importance of the collective aspect of the relationship of indigenous peoples with their lands was emphasized by another tripartite committee, which indicated that “the loss of communal land often damages the cohesion and viability of the people concerned.”¹⁵⁷

►► The term lands is defined to include “the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use”.

► 6.2 Rights of ownership and possession (demarcation and title)

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.

¹⁵⁵ ILO, 2007. Report of the Committee set up to examine the representation alleging non-observance by Guatemala of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Federation of Country and City Workers (FTCC), (GB.299/6/1), paragraph 48.

¹⁵⁶ Ibid., paragraph 44.

¹⁵⁷ ILO, 1998. Report of the Committee set up to examine the representation alleging non-observance by Peru of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the General Confederation of Workers of Peru (CGTP), (GB.270/16/4), paragraph 30.

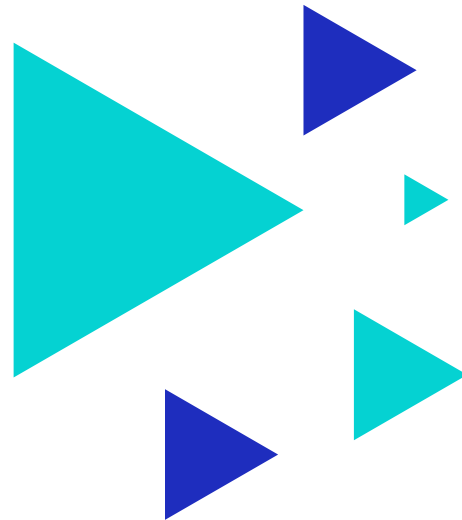
Many of the cases brought by indigenous peoples before national and international courts relate to the question of lands. Article 14 sets out the rights of indigenous peoples to ownership and possession of the lands that they traditionally occupy. It should be borne in mind that the recognition of land rights is based on their traditional occupation, and not official recognition or registration of that ownership.¹⁵⁸

The term “traditionally” was the subject of discussion during the preparatory work for the Convention. In this regard, the Office indicated that the term “cannot realistically be taken to imply that these peoples should have recognised rights of ownership over all the lands traditionally occupied by them at all previous stages of their history”, and is not intended to give rise to “a detailed inquiry into past history”.¹⁵⁹

Article 14(2) also establishes the obligation for governments to identify the lands which indigenous peoples traditionally occupy, with a view to guaranteeing effective protection of their rights of ownership and possession. To give effect to this obligation, “governments are required to establish procedures to identify indigenous peoples’ lands and protect their rights of ownership and possession, including through demarcation and titling”.¹⁶⁰ Certain experts and a number of indigenous observers who participated in the 1986 Meeting of Experts recommended that it was necessary for indigenous and tribal peoples themselves to define, or to participate in the definition and demarcation of these territories.¹⁶¹

It should be noted that, in light of the suggestion made by some constituents that a provision should be included to ensure the collaboration of indigenous peoples in the adoption of measures for the identification of their lands, the Office explained that this principle was already ensured in the general provisions of the Convention, and it was not therefore necessary to repeat it.¹⁶²

In its comments, the CEACR has requested governments to provide information on the procedures that exist for the demarcation and regularization of the lands traditionally occupied by indigenous peoples, including indications on the quantity of lands regularized and to be regularized”.¹⁶³ A tripartite committee, in recognizing “that the regularization of land ownership requires time, that the adoption of legislation is not sufficient in itself and that it is the outcome of a complex process”, considered that “indigenous peoples should not be prejudiced by the duration of this process” and that it would therefore be desirable “to adopt transitional measures during the course of the process to protect the land rights of the peoples concerned”.¹⁶⁴



¹⁵⁸ ILO, 2013. *Handbook for ILO tripartite constituents*, op. cit., p. 21.

¹⁵⁹ ILO, 1988. Report VI (2), op. cit., p. 48.

¹⁶⁰ ILO, 2013. *Handbook for ILO tripartite constituents*, op. cit., p. 21.

¹⁶¹ ILO, 1988. Report VI (1), op. cit., Appendix, Extracts from the Report of the Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), p. 111, paragraph 69.

¹⁶² ILO, 1988. Report VI (2), op. cit., p. 50.

¹⁶³ See, for example, CEACR, Convention No. 169, Argentina, observation, 2009.

¹⁶⁴ ILO, 2007. Convention No. 169, representation, Guatemala, GB.299/6/1, op. cit., paragraph 45.

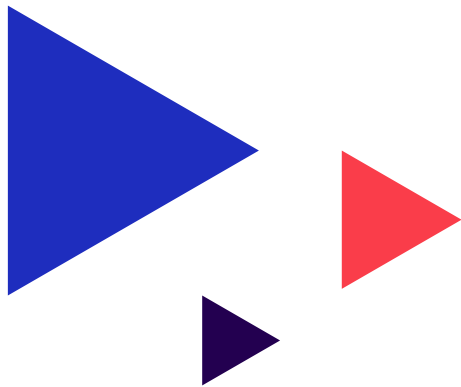
The CEACR has considered that the provisions of the Convention “that address land issues, more specifically Articles 13 and 14, must be construed in the context of the general policy referred to in Article 2, paragraph 1, namely that governments shall have the responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.”¹⁶⁵ It added that, in practice, “these provisions must be implemented in parallel with those on consultation set forth in Article 6”.¹⁶⁶

Article 14 also envisages the situation of nomadic peoples and shifting cultivators with regard to their rights to lands that they use intermittently. In this respect, a tripartite committee considered that the Convention “was drafted to recognize situations in which there are rights to lands which have been traditionally occupied, but also may cover other situations in which indigenous peoples have rights to lands they occupy or otherwise use under other conditions”.¹⁶⁷

► 6.3 Procedures to resolve land claims and disputes

In addition to recognizing the land rights of indigenous peoples, Article 14 sets out the requirement to establish adequate procedures within the national legal system to resolve land claims by indigenous peoples. In its 1988 report, the Office, based on the replies received from constituents on the inclusion of this provision, noted that there was general agreement on the need to include this provision and that it had been pointed out that “administrative as well as legislative measures are required to deal with land claims.”¹⁶⁸ However, it also considered, in view of the flexibility of the Convention, that it would be inappropriate to define in too much detail the lands to which this provision applies, as the legal status of lands varies from country to country.¹⁶⁹

A tripartite committee insisted on the importance of ensuring that “the appropriate procedures for resolving land disputes have been applied and that the principles of the Convention have been taken into account in dealing with the issues affecting indigenous and tribal peoples”.¹⁷⁰ The CEACR has requested information from governments on the mechanisms that exist to resolve disputes that arise between indigenous peoples and third parties, as well as between indigenous peoples, in the context of demarcation and titling processes.¹⁷¹ It has also recognized the importance of adopting land restitution plans for internally displaced persons with the participation of indigenous peoples.¹⁷²



¹⁶⁵ CEACR, Convention No. 169, Colombia, observation, 2006.

¹⁶⁶ Ibid.

¹⁶⁷ ILO, 1999. Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Radical Trade Union of Metal and Associated Workers, (GB.276/16/3), paragraph 37.

¹⁶⁸ ILO, 1988. Report VI (2), op. cit., p. 63.

¹⁶⁹ Ibid.

¹⁷⁰ ILO, 2001. Report of the Committee set up to examine the representation alleging non-observance by Denmark of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the National Confederation of Trade Unions of Greenland (Sulinermik Inuussutissarsiatteqartut Kattuffiat-SIK) SIK, (GB.280/18/5), paragraph 34.

¹⁷¹ CEACR, Convention No. 169 Venezuela (Bolivarian Republic of), direct request, 2018.

¹⁷² CEACR, Convention No. 169, general observation, 2019.

► 6.4 Transmission of land rights

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 17 of the Convention ensures respect for arrangements for the transmission of land rights among members of indigenous peoples, and grants them the right to be consulted whenever consideration is being given to their capacity to transmit their land rights. In its report to the 1988 Conference, the Office suggested the inclusion of this provision “in accordance with the general approach of respect for these peoples’ customs”.¹⁷³

Although the Convention does not prohibit the division of the collective lands of indigenous peoples into individual plots, a tripartite committee considered that the “ILO’s experience with indigenous and tribal peoples has shown that when communally owned indigenous lands are divided and assigned to individuals or third parties, the exercise of their rights by indigenous communities tends to be weakened and [they] generally end up losing all or most of the lands, resulting in a general reduction of the resources that are available to indigenous peoples when they keep their lands in common”.¹⁷⁴

In practice, in countries such as Nicaragua and the Plurinational State of Bolivia, the legislation recognizes the collective ownership of indigenous peoples of their lands.¹⁷⁵ Land demarcation and titling plans have also been implemented with the collaboration of indigenous peoples.¹⁷⁶

►► A tripartite committee insisted on the importance of ensuring that “the appropriate procedures for resolving land disputes have been applied and that the principles of the Convention have been taken into account in dealing with the issues affecting indigenous and tribal peoples”.

¹⁷³ ILO, 1988. Report VI (1), op. cit., p. 73.

¹⁷⁴ ILO, 1998. Convention No. 169, Peru, representation, GB.273/14/4, op. cit., paragraph 26.

¹⁷⁵ CEACR, Convention No. 169, Nicaragua, direct request, 2018; Bolivia (Plurinational State of), direct request, 2019.

¹⁷⁶ CEACR, Convention No. 169, Ecuador, direct request, 2014.

► 6.5 Guarantees in relation to removal



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.

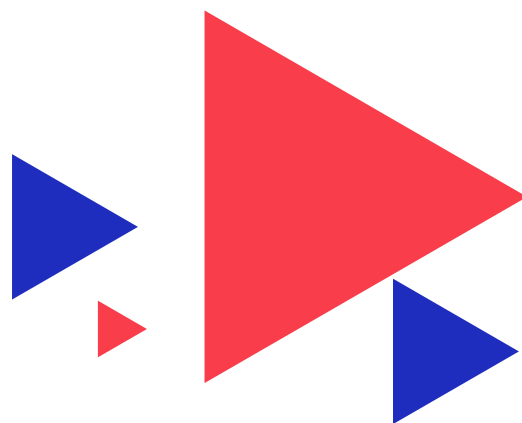
Article 16 of the Convention establishes the general rule that indigenous peoples shall not be removed from the lands which they occupy. However, it also envisages the exceptional case of the removal and relocation of indigenous peoples subject to the free and informed consent of the peoples concerned. Article 12 of Convention No. 107, the predecessor to Convention No. 169, provides that: “The populations concerned shall not be removed without their free consent from their habitual territories”. However, this prohibition was subject to exceptions envisaged in national laws and regulations for reasons relating to national security, or in the interests of national economic development or of the health of the populations. This provision was not retained in Convention No. 169.

The majority of the participants at the 1986 Meeting of Experts agreed that the revised Convention “should include the requirement that the removal of indigenous and tribal peoples from the lands or territories which they have traditionally occupied should not be undertaken except with the informed consent of these peoples, or after an examination of whether the removals are necessary for overriding reasons of national interest, decided upon after procedures designed to ensure full involvement in the decision-making process by the groups affected”.¹⁷⁷

With regard to the scope of paragraph 2 of Article 16 of the Convention, the Office indicated that it implied that “the peoples concerned should have a real and meaningful opportunity to participate in making the decision”, and commented that it appeared worthwhile to require special procedures for removals, rather than leaving them to the general consultation mechanism.¹⁷⁸ In their interventions in the 1989 Conference, the Employer members indicated that, with regard to relocation, the “principle of compensation, as well as the possibility of the return of lands, should be included.”¹⁷⁹ The Worker members emphasized that the text of the revised Convention could not be weaker than that of Convention No. 107.”¹⁸⁰

Article 16 establishes requirements to be fulfilled by governments where it is not possible to obtain the consent of the people concerned. It provides, first, that removal and 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. Second, whenever possible, these peoples shall have the right to return to their traditional lands as soon as the grounds for removal and relocation cease to exist or, where that is not possible, they 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. Third, the peoples concerned shall be entitled, if they prefer, to receive compensation in money or in kind for any loss or injury resulting from relocation.

The CEACR has emphasized “the need to adopt specific measures to prevent the removal of indigenous peoples from their land”,¹⁸¹ and has requested governments to provide information on “the consultations held with the peoples concerned before their relocation, on the quality and quantity of lands available to them before and after the relocation and on the implementation of any mechanisms for the payment of compensation for the damage caused”.¹⁸²



177 ILO, 1988. Report VI (1), op. cit., Appendix, Extracts from the Report of the Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), paragraph 77.

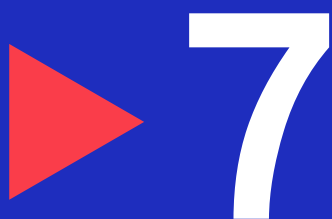
178 ILO, 1988. Report VI (2), op. cit., p. 56.

179 ILO, 1989. International Labour Conference, 76th Session, Provisional Record No. 25, op. cit., p. 25/18, paragraph 125.

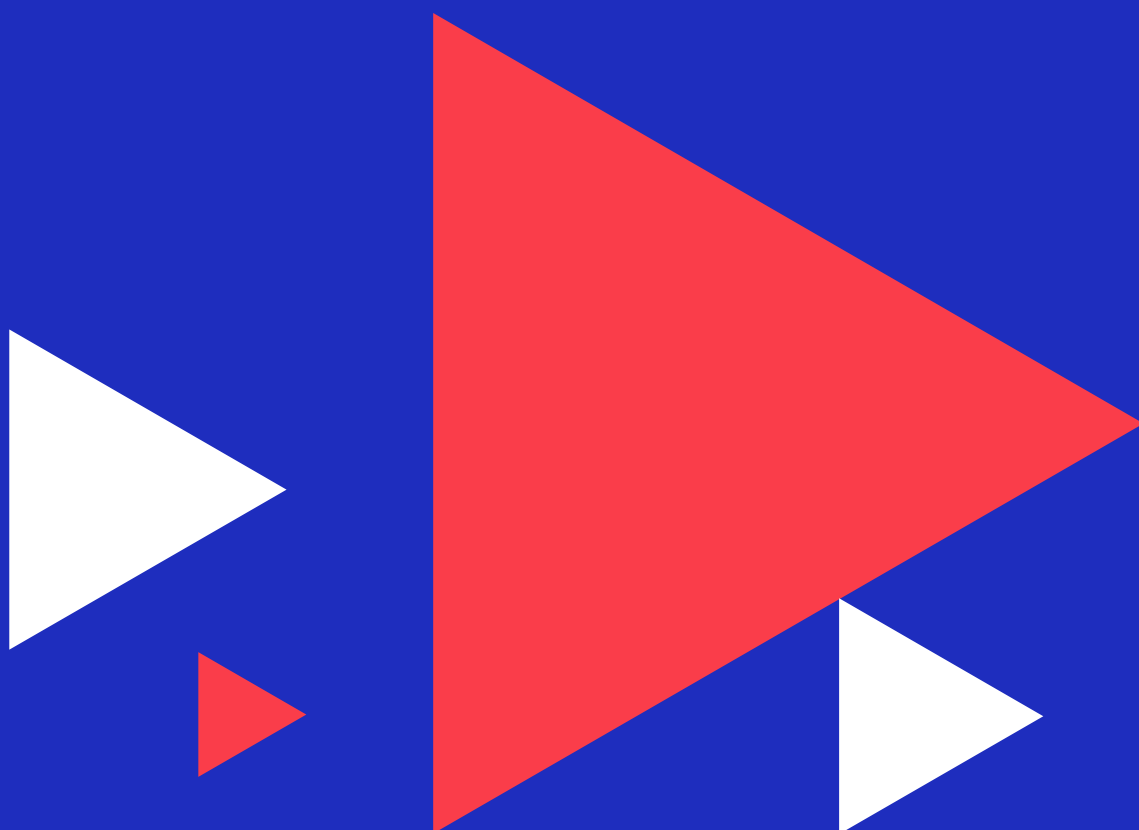
180 Ibid., paragraph No. 134.

181 CEACR, Convention No. 169, general observation, 2019.

182 CEACR, Convention No. 169, Paraguay, direct request, 2007.



Customary laws and access to justice



► 7.1 Requirement to take customary law into account

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.

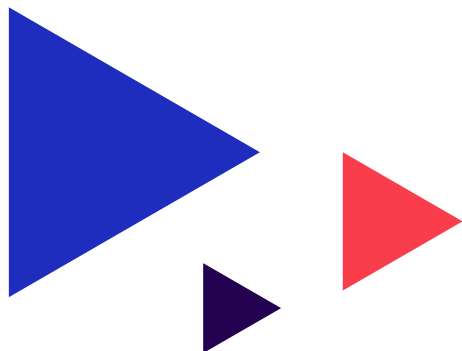
Article 9

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.

The Convention recognizes the right of indigenous peoples to retain their customary laws and the methods customarily practiced by them for dealing with offences, subject to respect for the national legal system and internationally recognized human rights. The application of this right has been broadly discussed by national courts, including in relation to penal matters. During the 1986 Meeting of Experts, observers representing indigenous organizations indicated that “the imposition of national laws on their peoples often caused great hardship” and therefore felt that “only their own rules should govern the various kinds of relationships” among indigenous peoples.¹⁸³ Other experts maintained that “individuals should have the right to appeal to the national legal system if they did not wish



183 ILO, 1988. Report VI (1), op. cit., Appendix, Extracts from the Report of the Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), 1986, paragraph 98.

to be governed only by customary laws and procedures”.¹⁸⁴

During the first discussion of the Convention at the Conference in 1988, a proposal by the Worker members was discussed that, instead of the terms “due regard shall be had to” the customary laws of indigenous peoples in the application of the law, the Convention should call for their “recognition” and “respect”.¹⁸⁵ The Employer members considered that the proposed amendment “would lead to preference being given to customary law and thus possible conflict with written legislation.” Nor was the Workers’ proposal supported by Government members. The Government member of Norway agreed with the Employer members in expressing concern that the terms “recognize” and “respect” could give preference to customary law and thus make the ratification of the Convention difficult.¹⁸⁶

Another subject discussed during the drafting of Convention No. 169 was the need to deal with the issue of conflicts between customary and national law.¹⁸⁷ The Office explained that most of the replies received on the content of Article 8 indicated that it would be inappropriate to include the principle of the primacy of customary law.¹⁸⁸ The final text of Article 8 of the Convention therefore provides that procedures shall be established, whenever necessary, to resolve conflicts in the application of indigenous customary law.¹⁸⁹

The CEACR has requested governments to adopt “measures to promote coordination and communication mechanisms between the justice institutions and the indigenous authorities so that they take into consideration indigenous peoples’ customs and customary law when national law is applied to them.”¹⁹⁰ It has also emphasized the need to ensure that the customary law of indigenous peoples is taken into account in processes for the demarcation and identification of indigenous lands.¹⁹¹

The provisions of Article 1 of the Convention respecting methods of punishment other than confinement in prison applied to members of indigenous peoples was a proposal made by the Worker members at the Conference in 1988, which was supported by the Government members.¹⁹² The Government member of Colombia emphasized that “any readaptation should be consistent with the cultures of the persons concerned.”¹⁹³ The Employer members considered that “alternative penalties could only be imposed if contemplated in national law”.¹⁹⁴

184 Ibid., paragraph 97.

185 ILO, 1988. International Labour Conference, 75th Session, Provisional Record No. 32, op. cit., p. 32/12, paragraph 96.

186 Ibid.

187 ILO, 1988. Report VI (1), op. cit., p. 37.

188 ILO, 1989. Report IV (2 A), op. cit., p. 25.

189 The Constitutional Court of Ecuador has referred to Articles 8 and 9 of the Convention in support of the recognition of the right of indigenous peoples to develop and practice their customary law. See: Ecuador, Constitutional Court, extraordinary appeal for protection against the decisions adopted by the indigenous jurisdiction of Pueblo de Panzaleo, 30 July 2014 (Case No. 0731-10-EP).

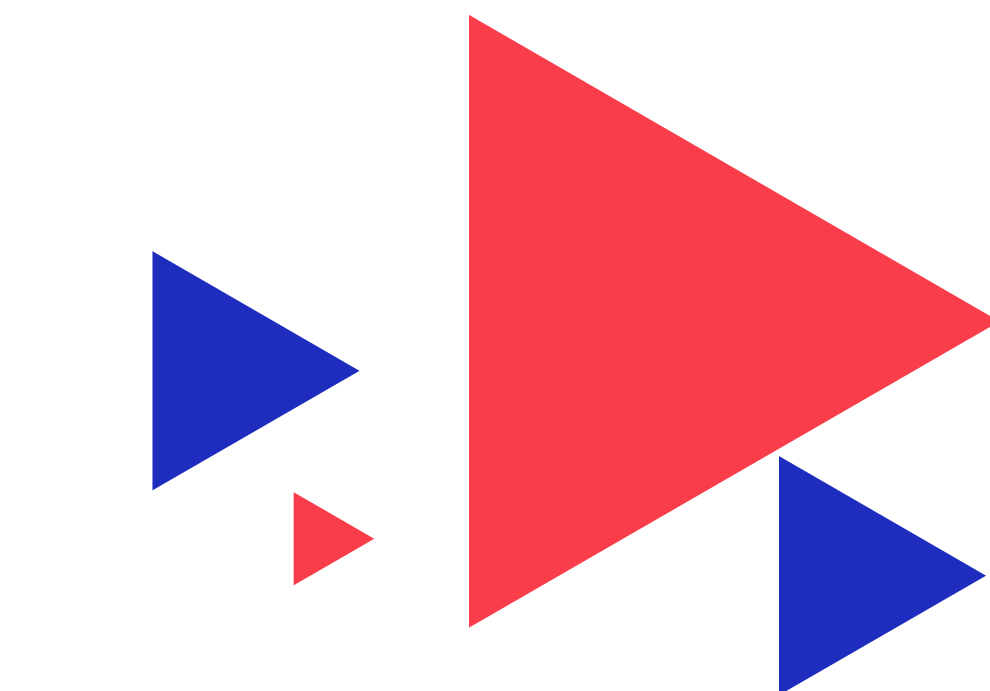
190 CEACR, Convention No. 169, Guatemala, direct request, 2018.

191 CEACR, Convention No. 169, Norway, observation, 2014.

192 This Article has also been applied by the Constitutional Court of Colombia. See: appeal for protection of rights brought by Leonardo Gerary against the court of first instance for the execution of sentences and security measures of Ibagué, Tolima, 4 September 2014 (case No. T 642/14). The Court indicated that, “in accordance with ILO Convention No. 169, in cases respecting the investigation and judgment of offences by the ordinary courts, in the absence of elements placing them under the special indigenous jurisdiction, as well developed in the case law of the Court, all the courts of the Republic, without exception of any kind, shall take into account the economic, social and cultural characteristics of the members of such peoples, giving preference to methods of punishment other than confinement in prison” (p. 27 of the ruling).

193 ILO, 1988. International Labour Conference, 75th Session, Provisional Record No. 32, op. cit., p. 32/15, paragraph 123.

194 Ibid.



► 7.2 Access to justice

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.

Article 12 of the Convention sets out the requirement for governments to adopt measures to ensure that the members of indigenous peoples can understand and be understood in legal proceedings, thereby ensuring their effective access to justice. This presupposes access to interpreters for those who do not speak the language used in the respective proceedings. Various Government members at the 1988 Conference considered that “denial of this right could become a denial of justice.”¹⁹⁵

The CEACR has indicated that “the objective of Article 12 of the Convention, in providing for special protection for these peoples is to compensate for the disadvantages they may be under in that they may not possess the linguistic or legal knowledge required to assert or protect their rights.”¹⁹⁶ It has encouraged governments to “take measures to guarantee effective access to justice for indigenous peoples in order to ensure that they can initiate individual or collective legal proceedings to effectively protect their rights.”¹⁹⁷ It has also noted that certain countries have adopted specific rules, within the judicial system, to facilitate the access of indigenous peoples to justice.¹⁹⁸

¹⁹⁵ Ibid., paragraph 117.

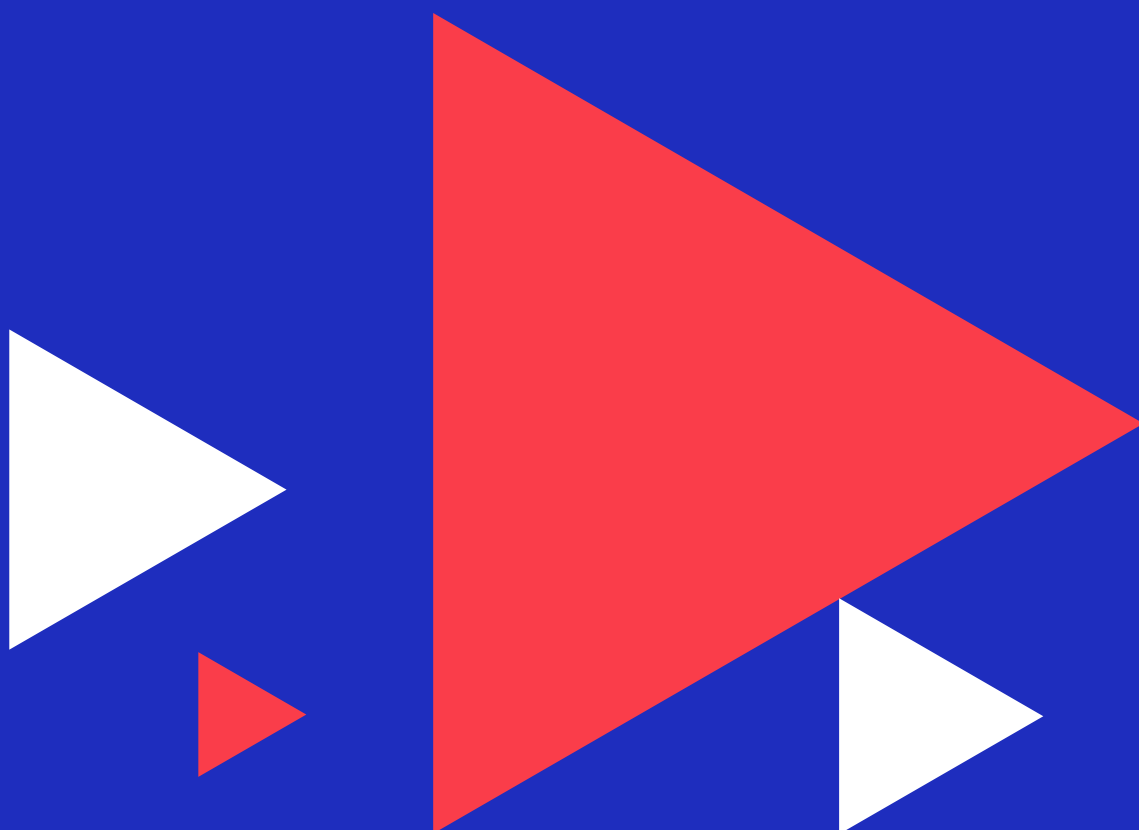
¹⁹⁶ CEACR, Convention No. 169, Mexico, observation, 1998.

¹⁹⁷ CEACR, Convention No. 169, Guatemala, direct request, 2018.

¹⁹⁸ See, for example, CEACR, Convention No. 169, Costa Rica, direct request, 2015.

▶ 8

Working conditions, employment and social security



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. (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.

Article 24

Social security schemes shall be extended progressively to cover the peoples concerned, and applied without discrimination against them.

► 8.1 Recruitment and working conditions

Articles 20 and 24 of the Convention reinforce the protection afforded to indigenous peoples by other ILO Conventions in the field of employment and social security.¹⁹⁹ Persons who are members of indigenous peoples often work in the informal economy.²⁰⁰ At the same time, as indicated in the preparatory reports for the Convention, special reference was made during the 1986 Meeting of Experts to the problems faced by indigenous workers, which include lack of documentation and the consequent absence of coverage by labour legislation, as well as exposure to toxic substances in agricultural work.²⁰¹

Article 20 of Convention No. 169 addresses the protection of indigenous peoples in relation to the various aspects of work: protection against discrimination, access to employment, equal remuneration for work of equal value, occupational safety and health, freedom of association and the right to collective bargaining, protection against coercive recruitment and sexual harassment.

With regard to protection against discrimination, although Convention No. 107 already contains provisions ensuring equal treatment for indigenous workers in relation to non-indigenous workers, the Office suggested that the revised Convention could place emphasis on the need for governments to pursue a policy designed to promote equality and adopt the necessary measures to ensure that the national legislation is applied effectively to indigenous workers.²⁰²

During the discussions at the 1988 Conference, the Worker members proposed the inclusion in the text of the Convention of the obligation to establish labour inspection services, as reflected in the final paragraph of Article 20, which provides that: "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".

It should also be emphasized that paragraph 3 of Article 20 establishes the obligation to protect men and women indigenous workers against sexual harassment, which can also be read in conjunction with the provisions of the Violence and Harassment Convention, 2019 (No. 190).

With regard to labour inspection, the CEACR has emphasized from its first comments that "one of the most important means for ensuring effective protection of fundamental labour rights is frequent and effective inspections of workplaces where indigenous workers are employed."²⁰³ This has also been reiterated by the CAS.²⁰⁴

In its 2019 general observation, the CEACR also recalls that in its comments it has noted with concern serious abuses against indigenous workers, especially in rural areas and the agricultural sector. In this respect, it emphasizes that "it is fundamental to strengthen labour inspection in regions inhabited by indigenous peoples."²⁰⁵ It also highlights "the importance of adopting measures to promote the participation of women in the labour market" and of developing "vocational training programmes taking into account indigenous peoples' economic, environmental, social and cultural conditions."²⁰⁶

In practice, in countries such as Paraguay and the Plurinational State of Bolivia, measures have been adopted to reinforce labour inspection in

199 Reference should be made to the eight fundamental Conventions: the Forced Labour Convention, 1930 (No. 29); the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); the Right to Organise and Collective Bargaining Convention, 1949 (No. 98); the Equal Remuneration Convention, 1951 (No. 100); the Abolition of Forced Labour Convention, 1957 (No. 105); the Discrimination (Employment and Occupation) Convention, 1958 (No. 111); the Minimum Age Convention, 1973 (No. 138); and the Worst Forms of Child Labour Convention, 1999 (No. 182); as well as other Conventions, including: the Labour Inspection Convention, 1947 (No. 81); the Employment Policy Convention, 1964 (No. 122); and the Social Security (Minimum Standards) Convention, 1952 (No. 102).

200 ILO, 2019. *Implementing the ILO Indigenous and Tribal Peoples Convention No. 169: Towards an inclusive, sustainable and just future*, especially parts II and III.

201 ILO, 1988. Report VI (1), op. cit., Appendix, Extracts from the Report of the Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), 1986, paragraph 105.

202 ILO, 1988. Report VI (2), op. cit., pp. 65-66.

203 CEACR, Convention No. 169, Mexico, observation, 1998.

204 CAS, Convention No. 169, Mexico, individual examination, 1995.

205 CEACR, Convention No. 169, general observation, 2019.

206 Ibid.

areas where indigenous peoples are located.²⁰⁷ In Mexico, legislative measures have been adopted to ensure that indigenous workers who do not speak the language of their employers have access to an interpreter to be informed of their terms and conditions of employment.²⁰⁸

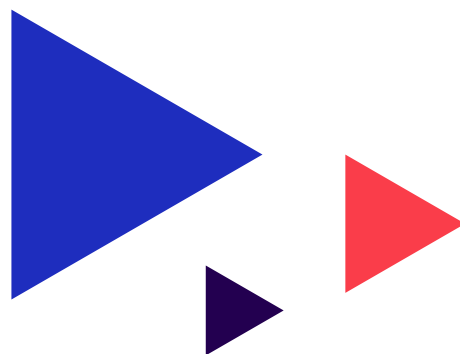
The CAS has also emphasized the importance of governments providing information on the application of the Convention in practice, and particularly on the various aspects relating to the recruitment and conditions of employment required for the application of Article 20 of the Convention.²⁰⁹

With reference to access to employment, during the 1986 Meeting of Experts emphasis was placed on the need to provide indigenous persons with the skills necessary to gain access to the world of work.²¹⁰ In this regard, it is also important to take into account the provisions contained in Part IV of the Convention on vocational training, handicrafts and rural industries.

► 8.2 Social security

Article 24 of the Convention sets out the obligation for governments to ensure the progressive coverage of indigenous peoples, without discrimination, by national social security schemes.²¹¹ As the Office indicated in its 1988 report, this provision enshrines the principle that social security schemes should be extended to the peoples concerned as soon as possible.²¹²

The CEACR has emphasized “the importance of ensuring that account is taken of the characteristics, needs and specific views of indigenous and tribal peoples in the formulation and implementation of national social protection systems”.²¹³ In countries such as Colombia, action has been taken to ensure that indigenous peoples have access to social security, including for those without the capacity to pay.²¹⁴



207 CEACR, Convention No. 169, Paraguay, observation, 2017; Bolivia (Plurinational State of), direct request, 2013.

208 CEACR, Convention No. 169, Mexico, direct request, 2013.

209 CAS, Convention No. 169, Paraguay, individual examination, 2006.

210 ILO, 1988. Report VI (1), op. cit., Appendix, Extracts from the Report of the Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), 1986, paragraph 106.

211 The Constitutional Chamber of the Supreme Court of Justice of Costa Rica has indicated that “The Social Security Fund of Costa Rica is legally required, on the basis of ILO Convention No. 169 and the United Nations Declaration, to take into consideration the specific conditions of indigenous populations when establishing the requirements for insurance and medical care.” See, appeal for the protection of constitutional rights (amparo) made by Meryanne Bolaños et al. against the Social Security Fund of Costa Rica et al., 28 July 2017 (Case No. 16-008633-007-CO), introductory paragraph VI.

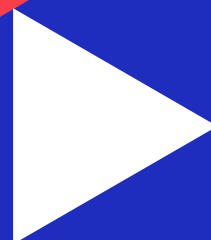
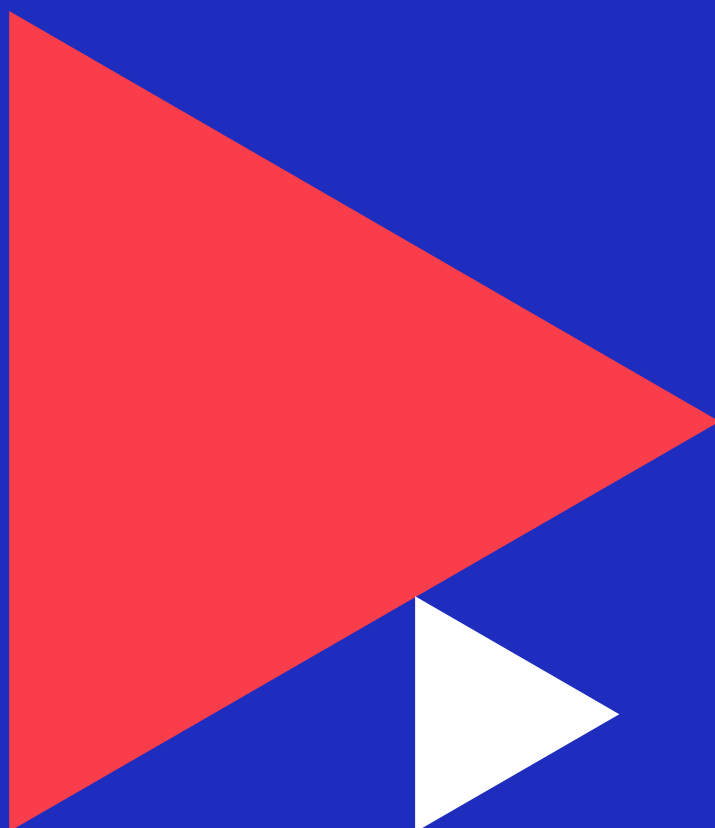
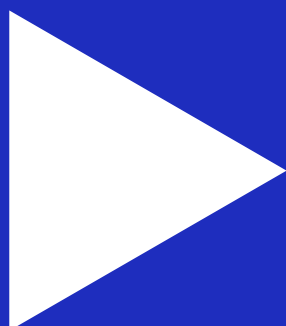
212 ILO, 1988. Report VI (2), op. cit., p. 76.

213 CEACR, Convention No. 169, general observation, 2019.

214 CEACR, Convention No. 169, Colombia, direct request, 2019.



Health



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.

► 9.1 Access to health care, taking into account traditional healing practices

The lack of access to health services that are adequate in light of the economic, social and cultural situation of indigenous peoples is covered by the guidance contained in Article 25 of the Convention. In accordance with this provision, health services must be organized, to the extent possible, under the responsibility and control of indigenous communities, taking into account their living conditions, and in particular their traditional health-care practices.²¹⁵

Recognition of the right of indigenous peoples to make use of their traditional healing practices is “in accordance with the general approach of treating with respect the cultures and traditions of these peoples”.²¹⁶ The World Health Organization, which participated as an observer in the preparatory meetings for the revision of the Convention, recalled the need to ensure coordination between health care and other sectors providing development assistance, and emphasized the particular health problems encountered by indigenous peoples when they migrate to cities.²¹⁷ With reference to the wording “the highest attainable standard of physical and mental health”, the Office explained that it is based on the wording of the International Covenant on Economic, Social and Cultural Rights.²¹⁸

²¹⁵ This Article has been referred to by the Constitutional Court of Colombia, in relation to the appeal to find unconstitutional subsection (i) of section 14 of Act No. 1122 of 2007 (introducing modifications in relation to health care in the general social security system), in a ruling of 4 February 2010 (C-063-10). The Court recalled “the duty that the Colombian State has acquired at the international level for the protection and promotion of the cultural diversity of the population, among other areas, in relation to health” and indicated that “Article 25 provides that health services shall, to the extent possible, be organized at the community level; that they shall be planned and administered in cooperation with the peoples concerned and take into account, among other factors, their traditional preventive methods, healing practices and medicine; and that the provision of such health services shall be coordinated with other social, economic and cultural measures in the country” (p. 49).

²¹⁶ ILO, 1988. Report VI (1), op. cit., p. 39.

²¹⁷ Ibid.

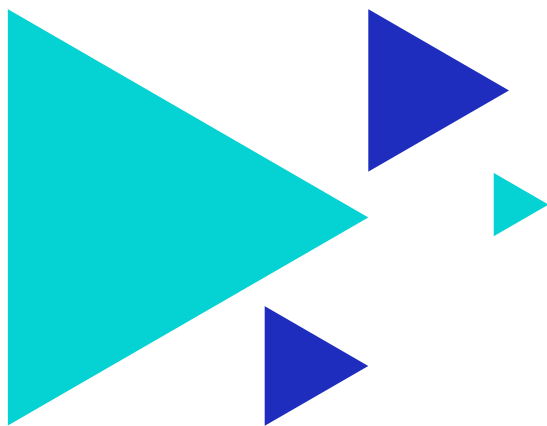
²¹⁸ ILO, 1988. International Labour Conference, 75th Session, Provisional Record No. 32, op. cit., p. 32/20, paragraph 173.

- The World Health Organization, which participated as an observer in the preparatory meetings for the revision of the Convention, recalled the need to ensure coordination between health care and other sectors providing development assistance, and emphasized the particular health problems encountered by indigenous peoples when they migrate to cities.

The CEACR has requested governments to provide information on the manner in which indigenous peoples participate in the design and implementation of health programmes.²¹⁹ It has requested information on the action taken to address various problems confronting indigenous peoples, such as indigenous infant mortality caused by malnutrition and newborn mortality.²²⁰ It has also requested information on the manner in which health plans intended for indigenous peoples take into account their traditional forms of medicine.²²¹

► 9.2 Reproductive health

Reproductive health has also been addressed under Article 25 of the Convention. The CEACR has noted programmes intended to ensure the full exercise of sexual and reproductive rights and, in this respect, has requested information on the manner in which “informed consent concerning sexual and reproductive rights has been included in programmes intended for indigenous communities.”²²² The CEACR has also noted with interest the formulation of policies on care for pregnant women which recognize the participation and important role played by midwives from indigenous peoples in the promotion and provision of care for women and newborns.²²³



²¹⁹ CEACR, Convention No. 169, Honduras, direct request, 2019.

²²⁰ CEACR, Convention No. 169, Brazil, direct request, 2005.

²²¹ CEACR, Convention No. 169, Nicaragua, direct request, 2013.

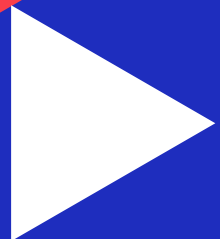
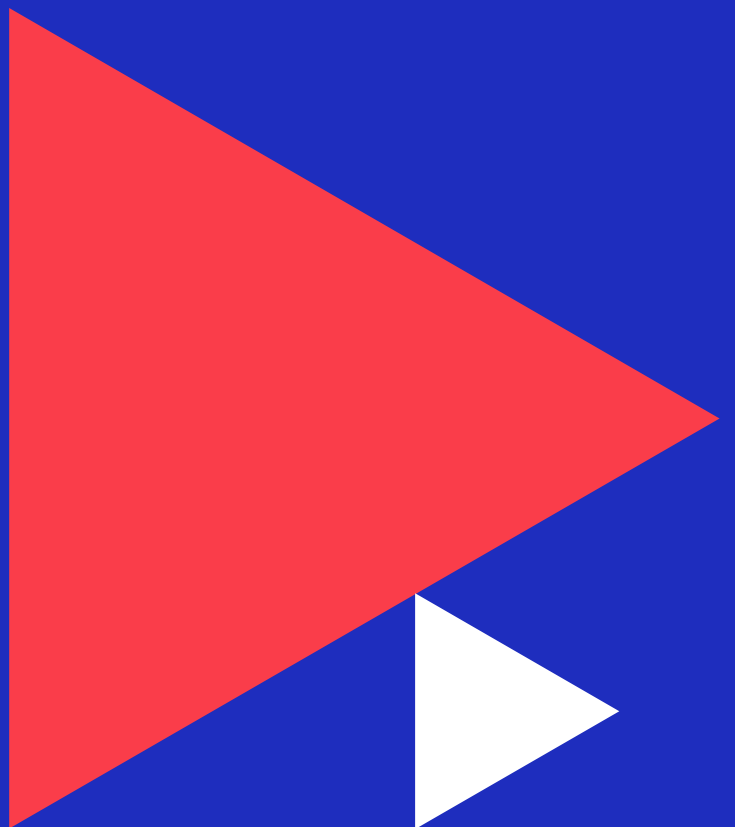
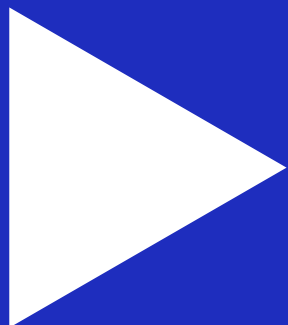
²²² CEACR, Convention No. 169, Mexico, observation, 2013.

²²³ CEACR, Convention No. 169, Guatemala, direct request, 2018.



▶ 10

Education



Article 26

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

Article 27

1. Education programmes and services for the peoples concerned shall be developed and implemented in co-operation with them to address their special needs, and shall incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations.
2. The competent authority shall ensure the training of members of these peoples and their involvement in the formulation and implementation of education programmes, with a view to the progressive transfer of responsibility for the conduct of these programmes to these peoples as appropriate.
3. In addition, governments shall recognise the right of these peoples to establish their own educational institutions and facilities, provided that such institutions meet minimum standards established by the competent authority in consultation with these peoples. Appropriate resources shall be provided for this purpose.

Article 28

1. Children belonging to the peoples concerned shall, wherever practicable, be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong. When this is not practicable, the competent authorities shall undertake consultations with these peoples with a view to the adoption of measures to achieve this objective.
2. Adequate measures shall be taken to ensure that these peoples have the opportunity to attain fluency in the national language or in one of the official languages of the country.
3. Measures shall be taken to preserve and promote the development and practice of the indigenous languages of the peoples concerned.

Article 29

The imparting of general knowledge and skills that will help children belonging to the peoples concerned to participate fully and on an equal footing in their own community and in the national community shall be an aim of education for these peoples.

► 10.1 Right to education at all levels

Articles 26 to 29 of the Convention are intended to ensure, on the one hand, the realization of the right to education of indigenous peoples, without discrimination, and, on the other, the right of indigenous peoples to participate in the design and administration of education programmes and systems, including the right to transmit their own language.

During the preparatory discussions, emphasis was placed on the importance of education programmes for indigenous peoples being designed with full recognition of their cultural characteristics, including their values, cultures and interests.²²⁴ As indicated by the Office in

its 1988 report, this aspect “plays a vital role in assisting disadvantaged peoples to preserve or to rebuild their cultural identity”.²²⁵

It should be noted that paragraph 3 of Article 27 sets out the requirement to consult indigenous peoples concerning the creation and development of their education systems.²²⁶ During the drafting of the Convention, it was considered that “it is not only the formulation but also the implementation and evaluation of education programmes that should be carried out in consultation with the peoples concerned”.²²⁷

In its comments, the CEACR has urged governments to take measures to ensure that education systems meet the particular needs of indigenous peoples and allow their involvement in their design and implementation.²²⁸ In particular, it has requested information on the consultations held with indigenous peoples regarding the content of the curricula of education programmes.²²⁹

►► In its comments, the CEACR has urged governments to take measures to ensure that education systems meet the particular needs of indigenous peoples and allow their involvement in their design and implementation.

224 ILO, 1986. GB.234/5/4, op. cit., paragraph 121.

225 ILO, 1988. Report VI (1), op. cit., p. 39.

226 The Constitutional Court of Colombia has recalled that “in relation to the establishment of a special education system for ethnic groups, ILO Convention No. 169 provides for the mechanism of prior consultation, and explicitly establishes 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.” See: appeal to find unconstitutional Decree No. 1278 of 2002 issuing the Statute for the professionalization of teaching, ruling of 21 March 2007 (C-208-07), parts 6 and 8.

227 ILO, 1988. Report VI (2), op. cit., p. 84.

228 CEACR, Convention No. 169, Nicaragua, direct request, 2013.

229 CEACR, Convention No. 169, Chile, direct request, 2018.

Article 28 of the Convention calls on governments to adopt the necessary measures for the preservation of indigenous languages in the education of members of these peoples, considering that the mother tongue of a peoples is an indispensable link to traditional cultures”

► 10.2 Right to be educated in their own language

Article 28 of the Convention calls on governments to adopt the necessary measures for the preservation of indigenous languages in the education of members of these peoples, considering that the mother tongue of a people is an indispensable link to traditional cultures”.²³⁰ This also has to be supplemented by measures to ensure that members of indigenous peoples attain fluency in the official language of the country in which they live so that they have access to a broader range of opportunities.

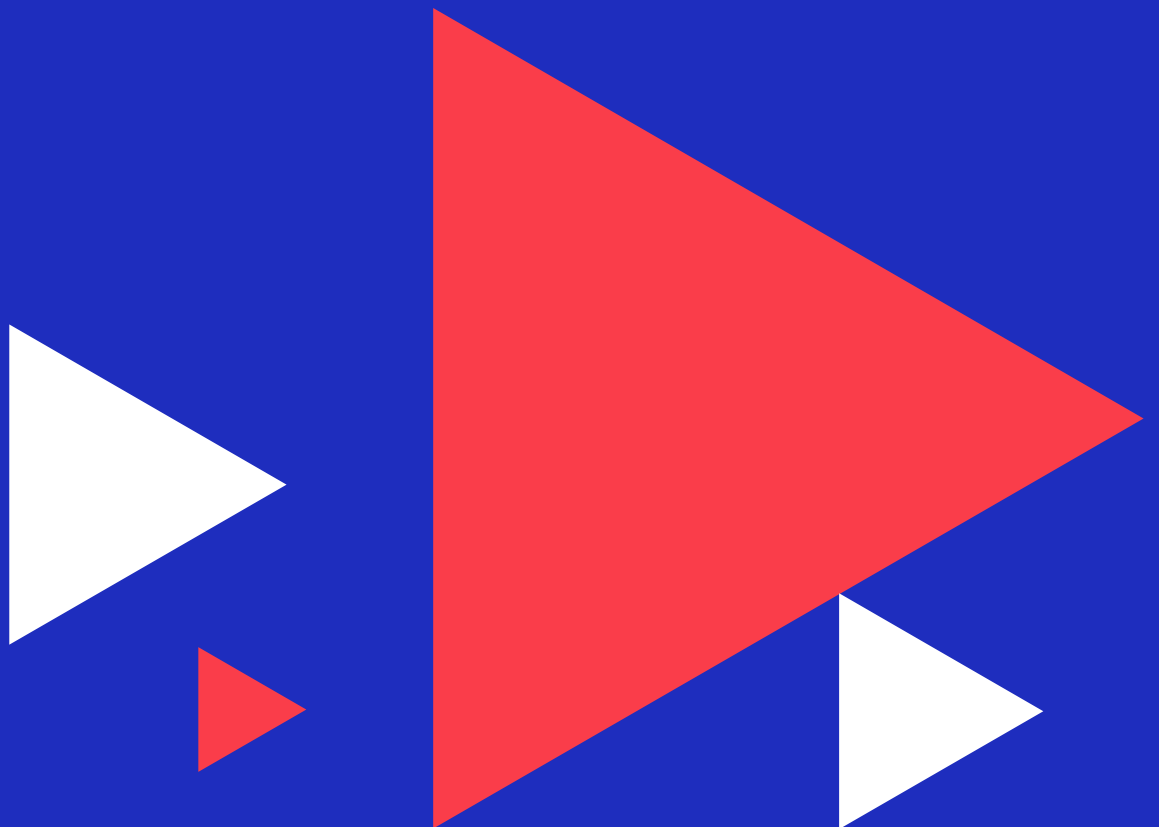
The CEACR has followed up compliance with Article 28, for example, by requesting information from governments on the results achieved in addressing illiteracy, “with special emphasis on girls and women, and in teaching the languages most commonly spoken in indigenous communities”.²³¹

²³⁰ ILO, 1986. GB.234/5/4, op. cit., paragraph 121.

²³¹ CEACR, Convention No. 169, Paraguay, direct request, 2017.

▶ 11

Flexibility

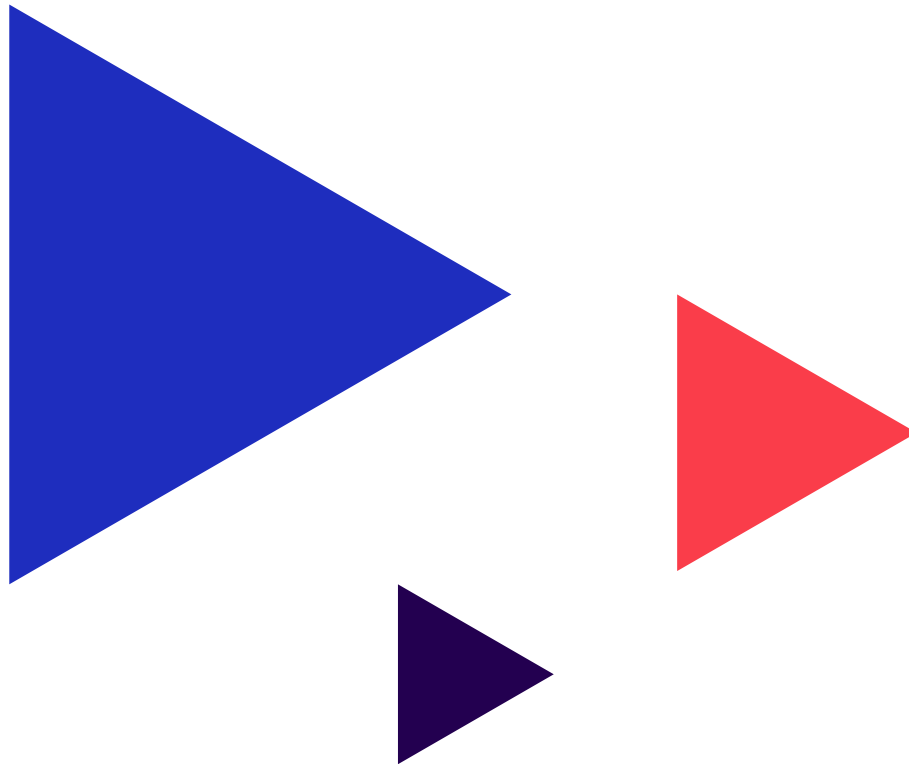


Article 34

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.

The purpose of flexibility is the adaptation of the Convention to the various different national situations and the fundamental needs of indigenous peoples. During the preparatory work, reference was therefore made to flexibility as a basic principle of the Convention.²³² This principle has also been referred to by national courts.²³³

In the conclusions to its 1988 report, the Office indicated that “the extent to which these needs exist in every State, and the manner in which these rights should be respected in every case, is not for an ILO Convention to determine in any global manner; instead, it should establish the basic principle of respect for these rights, and require ratifying countries to take the measures necessary to decide at the national level, in consultation with those affected, how they should be implemented”.²³⁴



232 ILO, 1988. Report VI (1), op. cit., Appendix, Extracts from the Report of the Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), 1986, paragraph 16.

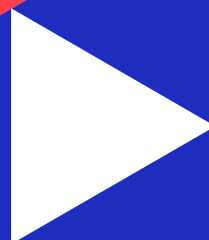
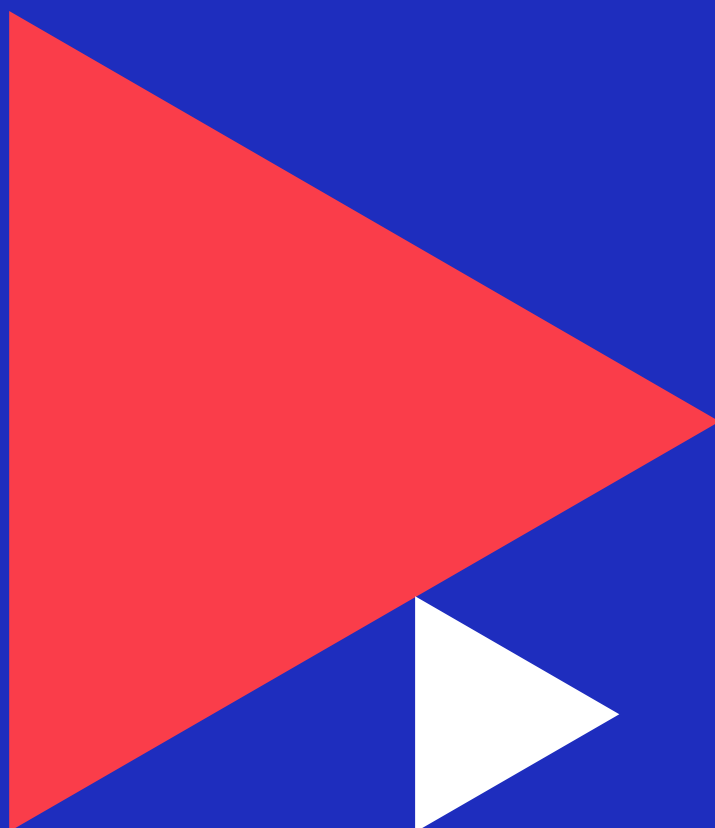
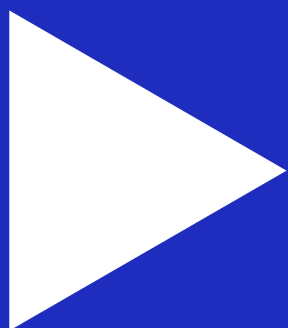
233 See the ruling by the Supreme Court of Chile, on an appeal against a decision denying recourse to protection against the Regional Environmental Commission of the De Los Ríos region favourably assessing an environmental impact study, 14 October 2010 (No. 4,078-2010), introductory paragraph V. The Court indicated that “Article 34 of Convention No. 169 contains a provision allowing flexibility in the incorporation of that international treaty into domestic law, and provides that: ‘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.’”

234 ILO, 1988. Report VI (1), op. cit., p. 90.



12

Minimum standards



As is generally the case with ILO Conventions and Recommendations, the provisions contained in Convention No. 169 are minimum standards. This principle is set out in article 19, paragraph 8, of the ILO Constitution, which provides that:

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

Moreover, Article 35 of Convention No. 169 provides that:

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.

This Article of Convention No. 169 is a contextual expression of the principle set out in article 19, paragraph 8, of the ILO Constitution, which defines ILO standards as minimum standards. Accordingly, Article 35 is a clause that safeguards any higher level of protection or the guarantee of more favourable treatment for indigenous peoples at the national level under the terms of other ILO Conventions and Recommendation, international instruments, treaties, national laws, awards, etc. Nevertheless, Article 35 does not have the effect of incorporating into the Convention additional or different obligations that may be contained in other international instruments.

▀▀ This Article of Convention No. 169 is a contextual expression of the principle set out in article 19, paragraph 8, of the ILO Constitution, which defines ILO standards as minimum standards.



► **Annex - Chronological list of the representations relating to Convention No. 169 examined under article 24 of the ILO Constitution**

Mexico – [GB.272/7/2](#), June 1998

Peru – [GB.273/14/4](#), November 1998

Plurinational State of Bolivia – [GB.274/16/7](#), March 1999

Mexico – [GB.276/16/3](#), November 1999

Denmark – [GB.280/18/5](#), March 2001

Colombia – [GB.282/14/3](#), November 2001

Colombia – [GB.282/14/4](#), November 2001

Ecuador – [GB.282/14/2](#), November 2001

Mexico – three representations examined in the same document [GB. 289/17/3](#), March 2004.

Mexico – [GB.296/5/3](#), June 2006

Guatemala – [GB.299/6/1](#), June 2007

Argentina – [GB.303/19/7](#), November 2008

Brazil – [GB.304/14/7](#), March 2009

Peru – [GB.313/INS/12/1](#), March 2012

Chile – [GB.326/INS/15/5](#), March 2016





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