

# Indigenous and tribal populations: A return to centre stage

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## Introduction

For many years indigenous and tribal peoples were the forgotten stepchildren of the intergovernmental organisations dealing with human rights, including the ILO. Yet they needed protection at least as much as those on whom the political limelight had been focused. Now the situation has changed dramatically and the international organisations are again turning their attention towards them. The ILO has an important role to play in protecting these groups, particularly through the adoption of international standards.<sup>1</sup>

The focus of the ILO's present activity in this area is the Governing Body's recent decision to submit to the International Labour Conference the question of the partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107). Before examining the proposed revision, it will be useful to review the history of indigenous affairs in the international organisations.

## The situation until 1972: The ILO's leadership

Beginning in the early 1950s considerable attention was directed towards the living and working conditions of indigenous and tribal populations by intergovernmental organisations under the leadership of the ILO, which had a long history of concern with indigenous populations.<sup>2</sup> In effect, the United Nations system assigned responsibility for this subject to the ILO during this time, and there the responsibility remained for more than 20 years.

What did the ILO do with this responsibility? There were three basic achievements. The first was the creation of the Andean Indian Programme, the second the publication of a study which remains the basic work in this field, and the third the adoption of the only international instruments dealing with this subject. Let us look at them in turn – keeping in mind that these

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were the only activities any organisation in the United Nations system carried out concerning these peoples until 1971.

*The Andean Indian Programme* was an inter-agency, multisectoral programme, in which the United Nations, the FAO, UNESCO, UNICEF and the WHO participated under the co-ordination of the ILO. The Programme began in Bolivia, Ecuador and Peru in 1954, and was subsequently extended to Argentina, Chile, Colombia and Venezuela. Its major aim was to improve the living and working conditions of the indigenous people of the Andes in order to facilitate their integration into the economic, social and political life of their respective national communities. It culminated in the *Proyecto Multinacional de Desarrollo Comunal Andino* (1971-73), after which responsibility for the programme was handed over to the individual States concerned.<sup>3</sup>

The Andean Indian Programme was in fact preceded by the convening of the first session of the ILO's Committee of Experts on Indigenous Labour in 1951, which held its second (and final) session in 1954. The Committee suggested that the International Labour Conference might consider "the social problems of indigenous populations of independent countries". This suggestion was accepted, and the preliminary studies were begun for what would become Convention No. 107 and Recommendation No. 104.

*The 1953 study*<sup>4</sup> was the ILO's second remarkable achievement during these years. It was a major research effort which formed part of the Andean Indian Programme, but more than 30 years later it remains a useful reference work; nothing like it has been done since.

The third of the ILO's efforts was the adoption in 1957 of the *Indigenous and Tribal Populations Convention (No. 107) and Recommendation (No. 104)*. These instruments were adopted in close co-operation with the United Nations (as regards general problems), the FAO (land problems), UNESCO (problems of education and communications, and the socio-anthropological aspects of integration) and the WHO (health problems). Convention No. 107 and Recommendation No. 104 today remain the only international instruments adopted by any international organisation for the protection of indigenous and tribal populations. The Convention, which came into force on 2 June 1959, has been ratified by only 27 States. The reason for this appears to be the reservations felt by many governments, as well as by indigenous and other organisations, over its basic orientation, which will be examined below.

To conclude this brief history of ILO activities in this area, the Organisation has of course continued to supervise the application of Convention No. 107 by ratifying States, and for this purpose has consulted regularly the other organisations which collaborated in its adoption. It has also continued to provide technical assistance to a number of countries in this field on a regular basis. In recent years especially, there has been a concentrated attempt by the ILO to make this assistance as culture-specific as the situation will allow.<sup>5</sup>

## Developments in the United Nations

It will be evident from the above that until the beginning of the 1970s no organisation in the United Nations system other than the ILO had paid any significant attention to the subject of indigenous and tribal populations. The situation was about to change, however. At its 24th Session in 1971 the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed Mr. José R. Martínez Cobo as Special Rapporteur to prepare a *Study on the problem of discrimination against indigenous populations*. His exhaustive study took over a decade to complete. Containing 21 lengthy chapters, it is the most comprehensive analysis of the subject conducted within the United Nations system in recent years.<sup>6</sup>

With the stimulus of the Martínez Cobo study, the international non-governmental organisations (NGOs) concerned with human rights awoke to the fact that there was a huge need for publicity and action on indigenous affairs. They thus convened the event which was the next great step in bringing this issue to the public and institutional consciousness of the world: the International NGO Conference on Discrimination against Indigenous Populations in the Americas, held in Geneva in September 1977. The Conference drew up a Draft Declaration of Principles for the Defence of the Indigenous Nations and Peoples of the Western Hemisphere, which concerned such issues as the nature of indigenous peoples under international law, treaty rights, the extent of States' jurisdiction over indigenous peoples, the settlement of disputes, national and cultural integrity, and environmental protection. Four years later, in September 1981, an International NGO Conference on Indigenous Peoples and the Land was also held in Geneva. As this article is being written, discussions are under way on another International NGO Conference on the same subject.

Meanwhile, the indigenous and tribal peoples of the world were stirring themselves. They had already created a number of organisations at the national and regional levels, but had not become a presence among the intergovernmental organisations such as the United Nations. They were, quite naturally, more concerned with immediate problems at home. Once things started happening at the international level, however, their slow movement towards international co-operation with each other was catalysed, and they began to organise and to formulate their own positions.

A number of international indigenous peoples' organisations have elaborated their own draft standards or declarations of principles, or even draft texts of proposed new international instruments. In April 1981, for example, during the Third General Assembly of the World Council of Indigenous Peoples, a Draft International Convention on the Rights of Indigenous Peoples was adopted. A further declaration of principles was adopted at the Fourth General Assembly of Indigenous Peoples in September 1984, and additional declarations of principles have been prepared

and adopted by indigenous peoples' organisations in connection with the sessions of the United Nations Working Group on Indigenous Populations or in the many other meetings they have held.

With this acceleration of events, the United Nations decided to set up a special body to examine the question. The creation of the United Nations Working Group on Indigenous Populations was authorised by the Economic and Social Council in its resolution No. 1982/34 of 7 May 1982. In that resolution ECOSOC authorised the Sub-Commission mentioned above to establish annually a Working Group on Indigenous Populations to meet before each annual session of the Sub-Commission in order to review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous populations, and to give special attention to the evolution of standards concerning their rights.<sup>7</sup>

Discussions on both developments and standards have continued in the sessions of the Working Group held since its creation in 1982. The Working Group has had a difficult task in attempting to combine the two functions of hearing the indigenous peoples report on their situations and drafting United Nations standards. It has, however, begun to become a real focus for events and for developing international action. From the perspective of indigenous peoples themselves, one of the most positive elements of the Working Group's procedures has been the very full scope allowed for participation by their representatives, who have been given the opportunity to make their own recommendations for a United Nations instrument on the rights of indigenous populations.

## **The ILO decides to revise Convention No. 107**

Throughout the 1970s and the early 1980s there was a steady crescendo of criticism of international labour Convention No. 107 of 1957. Clearly, international law was needed. This one international instrument existed, but when indigenous peoples and their advocates began to look at it really closely, they saw that it was seriously flawed.

The problem with this Convention stems from the ethos of the period in which it was adopted, i.e. at the height of the paternalistic era of the United Nations system, the heyday of the "top-down" development approach. Essentially, the ILO – with the collaboration of the rest of the United Nations system – did something perfectly acceptable at the time: the Conference met in Geneva and decided what was best for these underprivileged groups, but they omitted to ask the underprivileged themselves what they thought of the idea. In fairness it may be said that the indigenous movement did not exist at the time, and that the United Nations system was acting from the highest of motives; but the result was Convention No. 107.

The Convention proceeds from the basic assumption that integration into the dominant society should be the objective of all programmes affecting

indigenous and tribal peoples. There is much protective language as well, which aims at securing the rights of these peoples, and an objective appraisal of the Convention would show that it has been a significant force for helping indigenous and tribal peoples in ratifying countries to maintain their identities, lands and cultures. There is, however, an internal inconsistency in the Convention which does not make it a fully credible expression of purpose, nor a good basic statement of principle on which to base action.

The integrationist approach of the Convention has made it difficult for indigenous groups, or NGOs working on their behalf, to have resort to its protective provisions. Its revision had been suggested by the United Nations Special Rapporteur and by a large number of indigenous and other NGOs. Taking account of these suggestions – and of evidence of increasing pressure on indigenous and tribal peoples' lands and ways of life – the ILO decided to act.

First, the ILO Governing Body convened a Meeting of Experts in September 1986 to advise it on the Convention's possible revision. In addition to the usual composition of ILO meetings (representatives of governments and of employers' and workers' organisations), the Governing Body took the unusual step of inviting two NGOs to appoint experts; and so the World Council of Indigenous Peoples and Survival International became the first NGOs with full powers of participation in any ILO meeting on the subject. The Meeting of Experts was also attended by representatives of a number of other NGOs in an observer capacity. It agreed unanimously that Convention No. 107 was in urgent need of revision to remove its integrationist approach and to reinforce its provisions on land rights.

When the Governing Body examined these recommendations at its November 1986 Session it decided to place the Convention's partial revision on the agenda of the International Labour Conference at the earliest possible date, in June 1988. Thus the Convention's revision will be discussed for the first time by the Conference in 1988, and will be finalised at its 76th Session in 1989.

What does this revision imply? Based on the discussions at the Meeting of Experts, on the Governing Body's discussions following this meeting, and on the law and practice report prepared by the International Labour Office as a basis for the Conference discussions,<sup>8</sup> certain predictions may be made without prejudicing the Conference's right to decide.

### **Basic orientation**

First of all, it may be expected that the Conference will replace the integrationist approach of Convention No. 107 with an orientation towards respect for the cultures, religions and ways of life of the peoples covered by the instrument. This is fundamental, and there has been no disagreement that this should be the guiding principle in all future action.

It may be interesting to examine how the original orientation might be changed. Article 2 of Convention No. 107 is its basic policy provision, and its first paragraph reads: "Governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries." On the basis of the report of the Meeting of Experts, the law and practice report being circulated to governments suggests that this might be redrafted to provide that the basic obligation of governments shall be to assume primary responsibility for developing co-ordinated and systematic action, in co-operation with the peoples concerned, to ensure both their protection and their participation in the life of their respective countries, with full respect for their social and cultural identity.

The difference will be apparent. The presumption that there will be progressive integration – a concept that has been abused in many cases to mean forced assimilation – would be removed. It would be replaced by the principle of consultation and a certain amount of discretion over the manner and pace of achieving participation in the life of the country.

There has already been a lively debate about what is referred to above as "a certain amount of discretion". Representatives of indigenous organisations, and some other non-governmental observers, at the ILO's Meeting of Experts stated that the only adequate response to their needs would be an affirmation of the right to self-determination. The Meeting of Experts felt that an ILO Convention was not the place for such a concept, which should be dealt with by the United Nations. They did, however, feel that it was important that the revised instrument include strong language affirming the right of these peoples to "enjoy as much control as possible over their own economic, social and cultural development".<sup>9</sup>

Another way in which the orientation of Convention No. 107 has been found to be unacceptable is that it is often patronising, and presumes that indigenous and tribal populations are culturally inferior to the dominant national population. For example, Article 17, paragraph 3 (on vocational training facilities), states: "These special training facilities shall be provided only so long as the stage of cultural development of the populations concerned requires them. . . ." This kind of language, which is found throughout Convention No. 107, is clearly unacceptable and should be replaced in the revised Convention.

## Land rights

The Conference will also re-examine the provisions of Convention No. 107 concerning land rights. While the Convention has some strong provisions on land rights, an important problem is defining cases in which governments can legitimately remove these peoples from the lands they occupy. The Meeting of Experts, along with virtually all commentators on the Convention, felt that Article 12 of Convention No. 107 leaves too much to

the discretion of governments, but the Conference will have a difficult time trying to decide where the limits of proper government discretion should be drawn in this regard. This issue was discussed in some detail in a recent article in the *Review*,<sup>10</sup> so need not be gone into again here. It will, however, certainly be a major theme in the Conference discussions on the revision of Convention No. 107, as it is proving to be in the United Nations Working Group on Indigenous Populations.

### **Recruitment and conditions of employment**

This will probably be the third major theme of the revision. Indigenous and tribal populations are almost always the weakest and least protected portion of the national population, and traditionally have been particularly vulnerable to exploitation for their labour. They suffer inordinately high rates of unemployment, occupational injuries, and violations of basic rights of workers. They suffer in particular from various forms of coercive recruitment systems connected with seasonal migrant labour. The Conference will therefore be asked to consider strengthening Convention No. 107 to provide additional protection in this regard as well.

### **Concluding remarks**

In this brief overview of the situation, and in particular of the ILO's activities in this field, it has not been possible to discuss in any detail the real situation of indigenous and tribal peoples around the world. It is desperate, and is becoming worse every day. Their cultures are under constant attack – sometimes merely by exposure to other cultures which threaten to overwhelm them, but also in many instances by governments which feel that their cultures should be eliminated in the name of national unity. Convention No. 107 can be, and has been, interpreted to support such policies. Its revision is thus essential in the absence of any other international instrument, and of any likelihood that one will be adopted by any other organisation in the near future.

Concern has been expressed about the potential for conflict with the standards which the United Nations is examining. There are three aspects to consider. The first is that the United Nations expects that it will be some years before it adopts a declaration on the subject, and that only after that will work begin on a Convention. Secondly, the ILO and United Nations secretariats and deliberative bodies consult on a regular basis to avoid any such conflict.

The most important aspect is that the two organisations have different roles in this field. It is up to the United Nations to define, through long and detailed discussions with all the parties involved, the basic moral and legal principles that should govern the relations between governments and the indigenous and tribal peoples living in their countries. The ILO, on the other

hand, has always taken a more limited approach, better suited to its mandate and procedures. The revision of Convention No. 107 is expected to focus on mechanisms rather than on statements of principle. Mention has been made above of the mechanisms of consultation, of examination of procedures for the removal of indigenous and tribal populations from their lands, and of protection against abuses with regard to labour. The ILO's procedures for adopting standards and supervising their application are uniquely suited to securing the effective establishment and operation of such mechanisms at the national level. If the International Labour Conference can concentrate on defining the need for consultation with indigenous and tribal peoples and on ways of ensuring that decisions affecting them are taken with proper care, and leave the statements of principle to the United Nations, it will make a definite contribution to the protection of this least-protected category of disadvantaged people in the world.

And then, once out-of-date standards are replaced by a modern instrument, the ILO and the rest of the international community can proceed to define and implement practical programmes of action for the protection and economic development of indigenous and tribal peoples. This must be the next subject of debate in this badly neglected part of the international development programme.

## Notes

<sup>1</sup> The present article is concerned with the various efforts launched on behalf of indigenous and tribal peoples at the international level rather than with their substantive conditions, since these have been adequately described elsewhere (inter alia in the *Review* articles and other ILO publications cited below). It may be noted in very general terms that continued international efforts are necessary because of the deteriorating situation of many of these groups.

<sup>2</sup> For more details see, for example, United Nations, Economic and Social Council: *Study on the problem of discrimination against indigenous populations*, Ch. II (see footnote 5 below); L. Swepston: "The Indian in Latin America: Approaches to administration, integration and protection", in *Buffalo Law Review* (Buffalo, New York), Vol. 27, No. 4, pp. 715-758, a shorter version of which was first published as "Latin American approaches to the 'Indian problem'", in *International Labour Review*, Mar.-Apr. 1978, pp. 179-196.

<sup>3</sup> See J. Rens: "The Andean Programme", in *International Labour Review*, Dec. 1961, pp. 423-461; and idem: "The development of the Andean Programme and its future", *ibid.*, Dec. 1963, pp. 547-563. See also United Nations, ECOSOC, *op. cit.*, Ch. II, Part F.

<sup>4</sup> ILO: *Indigenous peoples: Living and working conditions of aboriginal populations in independent countries*, Studies and Reports, New Series, No. 35 (Geneva, 1953).

<sup>5</sup> Consultations with other organisations of the United Nations system have yielded no information on technical assistance activities focused on indigenous and tribal populations. The Inter-American Indian Institute, a specialised agency of the Organisation of American States, is however conducting such activities.

<sup>6</sup> The separate chapters in which this study was originally issued have now been collected and are being reissued by the United Nations under the document number E/CN4/Sub.2/1986/7, plus addenda. At the time of writing, addenda 1 to 3 had appeared.

<sup>7</sup> Note that both the United Nations' study and its Working Group focus on *indigenous* peoples, while the ILO's instruments and activities cover indigenous *and tribal* peoples.

<sup>8</sup> ILO: *Partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)*, Report VI (1), International Labour Conference, 75th Session, Geneva, 1988.

<sup>9</sup> ILO: *Report on the Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)*, Geneva, 1-10 September 1986, doc. GB.234/5/4, para. 159, Conclusion 2.

<sup>10</sup> L. Sweptston and R. Plant: "International standards and the protection of the land rights of indigenous and tribal populations", in *International Labour Review*, Jan.-Feb. 1985, pp. 91-106.

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