

THE MAPUCHE STRUGGLE FOR LAND AND RECOGNITION  
A LEGAL ANALYSIS



UNREPRESENTED NATIONS AND PEOPLES WORKSHOP  
LEWIS & CLARK LAW SCHOOL  
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Prepared by:  
Susan M. Culliney  
Marisa Peterson  
Ian Royer

Unrepresented Nations and Peoples Workshop  
Lewis & Clark Law School  
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## Preface

This report is a product of work undertaken by law students in the Unrepresented Nations and Peoples Workshop at Lewis & Clark Law School in Portland, Oregon, in association with the Unrepresented Nations and Peoples Organisation in The Hague. At the suggestion of UNPO, the Workshop selected for investigation and legal analysis the situation of the Mapuche, an indigenous group and UNPO member, in Chile.

The report was written while *Norín Catrimán et al. v. Chile* was pending before the Inter-American Court of Human Rights; the case involves the application of Chile's anti-terrorism legislation to Mapuche protesters, resulting in alleged irregularities in due process and the consideration of the alleged victims' ethnic origin in a way that was unjustified and discriminatory. To the authors of this report, the issues raised in *Norín Catrimán* are symptoms — albeit serious symptoms — of the plight of the Mapuche. This report addresses what the authors perceive as the core human rights concerns affecting the Mapuche: their lack of constitutional recognition and the failure by Chile to apply international standards to issues concerning their ancestral land.

The report begins by examining the history of the Mapuche and their relations with Chile, then addresses the need and the process for Chile to move from statutory recognition of the Mapuche to constitutional recognition and finally examines the requirements, under international and Inter-American human rights law, for the Chilean treatment of Mapuche land. While the report represents the collaborative effort of all three authors, the first section was primarily researched and written by Ian Royer, the second by Marisa Peterson and the third by Susan Culliney.

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SMC  
MP  
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## The Mapuche Heartland



## I. THE MAPUCHE

In *Norín Catrimán et al. v. Chile*, currently before the Inter-American Court of Human Rights, a number of Mapuche protesters are claiming that the Chilean state has acted in a discriminatory fashion by prosecuting them under a Pinochet-era anti-terrorist law, effectively eviscerating the due process rights of indigenous activists.<sup>1</sup> The underlying conflict between the Mapuche and the Chilean government centers on hotly-contested land disputes. “Mapuche” means “people of the land”; as the name indicates, they assert that the survival of their culture depends on deeply-rooted ties to their ancestral land. These beliefs have historically clashed with the colonial push for economic development.

### *The Early Days*

Mapuche society is anchored in communal relationships supported by heavy reliance on the surrounding natural environment.<sup>2</sup> At their height, Mapuche territories extended from the Eight Region of the Bio-Bio River to western Argentina and south to the Island of Chiloé.<sup>3</sup> Mapuche history is dominated by efforts to maintain their land and culture in the face of outside aggressions. They have repeatedly mobilized, and continue to do so, in an effort to counter some of the most dangerous powers in human history; the Incas, the Spanish Crown, the Pinochet government have all attempted to usurp Mapuche land either militarily, economically or both.

The origins of Mapuche society remain obscure. They were the first inhabitants of Araucania but their immigration to the region is clouded with mystery.<sup>4</sup> Nonetheless, the existence of a Mapuche society has been traced back to 500 BC.<sup>5</sup> By the time the Spanish arrived in 1541, the Mapuche occupied 5.4 million hectares and numbered about one million.<sup>6</sup>

Prior to Spanish arrival, little is known about Mapuche society. They lived in small kinships communicating and trading with one another in a network stretching across their lands and they spoke a common language (Mapudungun). Each small group was led by the “cacique” (chief) and land was worked communally, but individuals retained ownership of the fruits of

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<sup>1</sup> *Norín Catrimán et al. v. Chile*, Case 619-03 (2013).

<sup>2</sup> David R. Ader, *People of the Land without Land: A Socio-Demographic Study of Mapuche Poverty*, U. Pa. St. 14 (2013) (hereinafter Ader).

<sup>3</sup> Diane Haughney, *Neoliberal Economics, Democratic Transition, and Mapuche Demands for Rights in Chile* (University of Florida Press: 2006), 5 (hereinafter Haughney).

<sup>4</sup> Anita Perricone, *The Mapuche People and Human Rights: Lights and Shadows after the Ratification by Chile of ILO Convention 169*, 10 U. Degli Studi di Trento (hereinafter Perricone).

<sup>5</sup> Ader, at 13.

<sup>6</sup> Id.

their labor.<sup>7</sup> The Mapuche economy was based on hunting, gathering and fishing. Their lack of technological development was directly related to the incredible richness of the resources found on their land.<sup>8</sup>

The Spanish entered what is Chile today in the early 1540s. They encountered an indigenous population organized in a well-structured agrarian society.<sup>9</sup> An expedition led by Pedro de Valdivia founded Santiago in 1541. Later that year, indigenous peoples destroyed the town.<sup>10</sup> Spanish influence was brutal on the Mapuche. The people were enslaved (mostly in gold mines) or assimilated and their land was reduced to a source of commodities for Spanish exploitation.<sup>11</sup>

The conflict between the Spanish and the Mapuche lasted 91 years, eventually leading to the Treaty of Quilin in 1641. This was the first legal recognition of the Mapuche as a distinct people by an invading power.<sup>12</sup> The treaty established a border between the Spanish colonial lands and indigenous Araucania at the Bio-Bio River. Many more agreements between the Spanish and the Mapuche followed and “[t]he treaties resulting from Parliaments recognized multiple times the independence of Mapu from the Spanish Crown.”<sup>13</sup> After the Treaty of Quillin, small conflicts erupted sporadically at the border, but the Spanish did not seek to expand their territory onto Mapuche lands.<sup>14</sup>

The Mapuche are the only indigenous people who gained independence from Spain, and from the late 16th to the late 19th centuries they developed independently from the Spanish Crown while being simultaneously influenced by it. Indeed, the Mapuche shifted from an economy based on hunting and fishing to one based on raising livestock.<sup>15</sup> The Mapuche who remained in the north within the conquered valley were assimilated and a new “mestizo” generation was born.<sup>16</sup>

Napoleon’s invasion of Spain in 1807 sparked the beginning of the decolonization of the Spanish Empire. Chile’s independence movement was born in 1810, suddenly thrusting the

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<sup>7</sup> Id, at 14.

<sup>8</sup> Perricone, at 10.

<sup>9</sup> Id, at 11.

<sup>10</sup> Ader, at 16.

<sup>11</sup> Id, at 16-17.

<sup>12</sup> Perricone, at 13.

<sup>13</sup> Id.

<sup>14</sup> Ader, at 18.

<sup>15</sup> Id.

<sup>16</sup> Id, at 19.

Mapuche into a difficult situation.<sup>17</sup> While the Spanish Crown legally recognized and negotiated land rights with the Mapuche; this was not the case with the new Chilean independence movement. In 1817, the Spanish loyalists were defeated and Mapuche autonomy was rescinded.<sup>18</sup>

A significant portion of the newly-formed Chilean population had ancestral ties to the Mapuche and thus assumed that assimilation was the natural route.<sup>19</sup> Chile's central valley became more and more crowded with European settlement resulting in settlers encroaching on Mapuche land. Settlements were further catalyzed by the birth of capitalism in Europe. The Chilean government promoted European settlement in an effort to stimulate economic development and settlers were encouraged to move south and encroach on Mapuche lands. Araucania was extremely fertile land and the Chilean government desperately wanted to exploit it.<sup>20</sup>

Initially, the Chilean government recognized the Mapuche as a distinct people. In 1813, the Chilean government established an Indigenous Settlement Commission with the purpose of confining the Mapuche to reservations.<sup>21</sup> Additionally, the Decree of March 4th 1819 by President Bernardo O'Higgins recognized the Mapuche right to enter into contracts, the law of July 10th 1823 recognized indigenous rights to property and the Treaty of Tappihue in 1825 recognized a Mapuche state within Chile.<sup>22</sup>

In the mid-19th century, the Chilean population settled further and further south and the government began seeking control of Mapuche lands.<sup>23</sup> In 1866, the Chilean government enacted the Indigenous Reservations Law which led to a wide-spread Mapuche rebellion in 1870 and again, on a larger scale, in 1880. These clashes prompted the Chilean government to engage in what it called the "Pacification of Araucania" between 1862 and 1883.<sup>24</sup> The Mapuche were overwhelmed by the Chilean government who enjoyed huge advances in military technology derived from the industrial revolution.<sup>25</sup> In 1881, the Chilean government established a

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<sup>17</sup> Perricone, at 14.

<sup>18</sup> Ader, at 21.

<sup>19</sup> Id., at 22.

<sup>20</sup> Id.

<sup>21</sup> José A. Mariman, *The Mapuche Issue, State Decentralization and Regional Autonomy*, 59 *Revista Caravelle* 189-205 (hereinafter Mariman).

<sup>22</sup> Perricone, at 14.

<sup>23</sup> Ader, at 22.

<sup>24</sup> Mariman, at 2.

<sup>25</sup> Ader, at 23.

defensive settlement in Temuco. By 1883, the Mapuche had been militarily defeated and forced onto reservations.<sup>26</sup>

Mapuche lands were auctioned off to land speculators. The influx of investors in Araucania resulted in the exploitation of land and people. The consensus in Chilean society was that “the assimilation of the Mapuche people and eradication of their culture would be the best thing for national unity.”<sup>27</sup> To achieve this end, the Chilean government restricted Mapuche lands. These policies were not enacted arbitrarily; they were “planned by the national political strategy to eradicate the Mapuche by assimilating them into Chilean society.”<sup>28</sup> However, the Chilean government’s integration policies backfired and resulted in more divisions between Mapuche and Chilean society.<sup>29</sup> “During the 19th century, the conquest of new territory and the imposition of Chilean sovereignty involved the submission of indigenous peoples and the proclaimed policy aim of ... assimilating them and eliminating them as a distinct culture.”<sup>30</sup>

#### *The 20th Century*

In the decades preceding the Allende government, the Mapuche were increasingly involved in Chilean politics. The Mapuche organized under groups such as the “Corporacion Araucania” and demanded restoration of their land rights. These groups proved unsuccessful in the face of the successive conservative Chilean governments that preceded Allende. The 1962 Law of Agrarian Reform allocated all the lands taken from the Mapuche before 1946 for public use. This sparked a new phase in Mapuche political strategy: direct action in the form of protests and land occupations.<sup>31</sup>

The United States also played a key role in the Mapuche’s loss of lands. The US pressured the Chilean government to open Mapuche lands to private interests. The US offered loans and other forms of financial aid in order to modernize the Chilean economy and place power in the hands of employers *vis-a-vis* the work force<sup>32</sup>.

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<sup>26</sup> Daniel Carter, *Chile’s Other History: Allende, Pinochet, and Redemocratisation in Mapuche Perspective*, 10 *Studies in Ethnicity and Nationalism* 5, at 59-75 (2010) (hereinafter Carter).

<sup>27</sup> Ader, at 25.

<sup>28</sup> Id, at 27.

<sup>29</sup> Id, at 25.

<sup>30</sup> Haughney, at 19.

<sup>31</sup> Carter, at 7.

<sup>32</sup> Ader, at 28.

When Salvador Allende was elected in 1970, the Mapuche struggle was integrated into Marxist class struggle.<sup>33</sup> Leftist ideologies demanded the redistribution of lands from the hands of private enterprise to the landless peasants. These ideas swept through the Mapuche population and leftist student organizations often joined in land occupations.<sup>34</sup> However, the Mapuche were not passive recipients of leftist property redistribution. Mapuche leaders saw the potential power in a broad class-based alliance.<sup>35</sup>

The government of Salvador Allende restored lands to the Mapuche on a large scale: Chile officially recognized 2,060 Mapuche reservations covering an area of 850,000 acres.<sup>36</sup> In 1972, the Chilean Parliament passed Law 17.729, based on legislation proposed by the Mapuche in 1970, which abolished previous land subdivisions in favor of collective ownership. Under this law, in order to subdivide the land, 100% of the Mapuche community on the land would have to consent. Additionally, the Allende government established a Commission for the Restitution of Usurped Lands. The Allende government's reforms must be analyzed against the backdrop of a "socialist political project" as distinguished from reforms on Mapuche terms. Thus, land redistribution was centered on the economic uprising of the Chilean proletariat rather than the inherent rights of Chile's indigenous peoples. Nevertheless, "the sluggishness of the process of legal recognition" facilitated the confiscation and redistribution of those lands by the Pinochet government.<sup>37</sup>

The Pinochet government's economic policies and oppression ended any improvements for Mapuche society enacted by the Allende government.<sup>38</sup> The Nationalist Pinochet government refused to recognize the Mapuche: they recognized only one identity, Chilean citizenship.<sup>39</sup> Simultaneously, the Pinochet government imposed a US-backed economic agenda which fiercely conflicted with indigenous ideas of community ownership. The Pinochet government privatized Mapuche lands and outlawed traditional communal land use via Decree 2.568. Corporate rights were put in the forefront while social issues were set aside. Chile's development became anchored in the private sector.<sup>40</sup> All the lands recovered by the Mapuche during the Allende

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<sup>33</sup> Carter, at 8.

<sup>34</sup> Ader, at 30.

<sup>35</sup> Carter, at 8.

<sup>36</sup> Ader, at 30; Perricone, at 17.

<sup>37</sup> Perricone, at 17.

<sup>38</sup> Carter, at 11.

<sup>39</sup> Id, at 11.

<sup>40</sup> Ader, at 32.

administration were given back to their former owners. Mapuche lands were also opened to development and, in 1974, the Pinochet government enacted Law No. 701 authorizing the National Forestry Corporation to transfer Mapuche land to forestry companies.<sup>41</sup> In 1978, the Pinochet government passed Decrees 2568 and 2570 converting communal lands (reservations) into private property. The Mapuche were then declared to be peasants and were no longer considered as a separate indigenous class. The dictatorship was successful in taking lands from the Mapuche, but their efforts to eliminate the Mapuche identity in favor of a unified Chilean identity failed. Under Pinochet, the Mapuche had no hope of successfully furthering the establishment of their rights through traditional political means; instead, Mapuche leaders organized on the local level to resist the loss of their identity<sup>42</sup>

Growing opposition at home and abroad in the late 1980s and early 1990s led to the decline of the dictatorship.<sup>43</sup> Democracy was reestablished in 1990 and Patricio Aylwin was elected President. However, Chile's new democracy proved little help to the Mapuche situation. "The steps backwards taken during the dictatorship set the stage for contemporary problems and conflicts between the Mapuche people and the Chilean society."<sup>44</sup> The Aylwin government ceased dictatorial oppression but left Pinochet's neoliberal economic policies intact. Indeed, even today, private foreign forestry companies possess three times more ancestral Mapuche land than the Mapuche people.<sup>45</sup>

In 1993, the Aylwin government passed the Indigenous Peoples Act. On its face, it established Mapuche rights to participation, rights to land, cultural rights and the right to development. The Act also established the National Indigenous Development Corporation (CONADI), a collegiate decision-making body that includes indigenous representatives in the formulation of indigenous policy<sup>46</sup>

The new government's reforms addressing indigenous rights brought hope to the Mapuche, but little more. Market forces overcame legislative attempts at redressing the Mapuche situation. The current indigenous struggle has evolved into a multi-faceted protest centered on recognition and land rights.

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<sup>41</sup> Ader, at 33.

<sup>42</sup> Carter, at 11.

<sup>43</sup> Ader, at 34.

<sup>44</sup> Id.

<sup>45</sup> Id, at 35.

<sup>46</sup> Special Rapporteur on the Rights of Indigenous Peoples, *Mission to Chile* (2003), U.N. Doc. E/CN.4/2004/80/Add.3 at 9 (hereinafter Special Rapporteur 2003).

### *Contemporary Grievances*

The 1993 Indigenous Peoples Act provided that the Chilean government “recognized rights that were specific to indigenous peoples and expressed its intention to establish a new relationship with them”<sup>47</sup> and promoted the indigenous rights to participation, to land, cultural rights and right to development. Under Section 7, “the state recognizes the right of indigenous peoples to maintain and develop their own cultural manifestations ...” Section 12 guarantees specific lands as indigenous and, under Section 13, indigenous land shall “enjoy the protection of the law and may not be sold, seized, encumbered, or acquired by prescription, except among indigenous communities or individuals of the same ethnicity.”<sup>48</sup> The Act directed the Chilean state to create mechanisms that would apply these policies in the protection of indigenous rights.

Generally, the Mapuche have found the Act’s participatory mechanisms and opportunities to expand autonomy disappointing. First, the Mapuche contend that the Indigenous Peoples Act is effectively preempted by sectoral laws (originally enacted by Pinochet) that facilitate and protect registration of private property rights over resources that have traditionally belonged to indigenous communities.<sup>49</sup> The Mining Code and the Water Code are both examples of laws born in the dictatorship that take precedence over the Indigenous Peoples Act. The UN Special Rapporteur on the Rights of Indigenous Peoples remarked in 2003 that “many concessions have apparently been granted for mining exploration and production on indigenous land.”<sup>50</sup> Additionally, CONADI has proven ineffective. Its primary purpose is to return land to indigenous communities using a land fund. However, the asking price for land has risen, as has the number of land claims, while CONADI’s land fund is limited.<sup>51</sup>

The current Mapuche conflict centers on their efforts to recuperate their lands. The Mapuche face several problems: traditional Mapuche lands sought to be recovered are extremely limited and overexploited; they are in remote locations on vast forest plantations; development has destroyed the natural woodland resources that the Mapuche valued in their land; herbicides and pesticides used in massive plantations have caused health problems and negatively affected Mapuche agriculture; and logging has had devastating environmental effects on land and water.<sup>52</sup>

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<sup>47</sup> Id, at 7.

<sup>48</sup> Indigenous Peoples Act (Act No. 19.253/1993).

<sup>49</sup> Special Rapporteur 2003, at 20.

<sup>50</sup> Id, at 12.

<sup>51</sup> Id, at 14.

<sup>52</sup> Id, at 10.

The exploitation of forests has been a particular concern of the Mapuche. In the last 30 years, forestry has become one of the most important activities in the Chilean economy. Decree Law No. 701 of 1974 subsidizes firms in the forestry sector. “The Decree established a bonus system that benefited mainly large landowners, covering 75% of costs of lands suitable for forestry, in order to recover and prepare them for logging exploitation.”<sup>53</sup> Although Decree Law No. 701 was amended to subsidize small landowners and peasants that engaged in reforestation, it has nonetheless resulted in the abandonment of rural settlements, the exhaustion of water resources and the deterioration of roads.<sup>54</sup> The ever-growing presence of forest plantations has affected “hunting and gathering . . . , traditional herbal medicine, spiritual life and the social and cultural fabric of their communities.”<sup>55</sup>

The inability of the Mapuche to use their lands in a traditional fashion has led to severe economic inequality. Health, education and housing issues present substantial hurdles as “the profound economic inequalities that persist in the country affect indigenous people more than other Chileans.”<sup>56</sup> For instance, the UN Special Rapporteur found that bilingual education programs lack funding, systemic discrimination is directed at indigenous people seeking medical services, and traditional medicine is scorned.<sup>57</sup> The Mapuche suffer from the lack of access to education: “80% of the household heads hav[e] less than 4 years of schooling and less than 3% of the total population ha[s] any type of training beyond high school.”<sup>58</sup> Indeed the “poverty rate for the Mapuche is still almost 10 percentage points greater than that for the non-indigenous population.”<sup>59</sup>

The UN Committee on the Elimination of Racial Discrimination (CERD) outlined issues facing the Mapuche in a 2009 report, raising concerns relating to racism, land appropriations, recognition and consultation.<sup>60</sup> CERD noted that the Mapuche are amongst the poorest and most marginalized groups in Chile.<sup>61</sup> On the environmental front, CERD denounced waste dumps and

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<sup>53</sup> Perricone, at 147.

<sup>54</sup> Id, at 148.

<sup>55</sup> Special Rapporteur 2003, at 10.

<sup>56</sup> Id, at 18.

<sup>57</sup> Id.

<sup>58</sup> Claudio A. Agostini, Philip H. Brown, Andrei Roman, *Estimating Poverty for Indigenous Groups in Chile by Matching Census and Survey Data*, The William Davidson Institute, U. Mi. (2008).

<sup>59</sup> Id, at 15.

<sup>60</sup> UN Committee on the Elimination of Racial Discrimination, *Concluding Observations*, U.N. Doc. CERD/C/CHL/CO/15-18 (2009), 5.

<sup>61</sup> Id.

plans to establish sewage treatment facilities on Mapuche land as detrimental to indigenous health and the surrounding environment.<sup>62</sup> CERD expressed concerns that the legislative process for creating a national institution for the defense of human rights has been slow. In the meantime, there is no clear definition of racism in Chilean law and the state does not offer adequate (if any) remedies to those experiencing discrimination.<sup>63</sup> CERD also noted that the state measures for transferring land back to the Mapuche have been slow, exacerbated by the lack of mechanisms for recognition of indigenous people's rights to their land and natural resources.<sup>64</sup> The Mapuche have low participation rates and lack significant political actors. Additionally, the Mapuche are not recognized as an indigenous group with ancestral rights in the Chilean constitution and the Chilean state fails to meaningfully consult the Mapuche on issues that affect them<sup>65</sup>.

The Mapuche have responded to the disappointments of the new government by employing various protest tactics. "The most typical sort of Mapuche organization has been the 'gremial' organization with a peasant focus, based in the rural communities and presenting itself as representative of all Mapuche people, or at least aspiring to do so."<sup>66</sup> In their protests, the Mapuche rely primarily on land occupation. Additionally, some Mapuche engage in direct action in the form of property destruction aimed at stalling the exploitation of their land. These actions include acts of arson on forest plantations, attacks on logging equipment and the erection of blockades on access routes.<sup>67</sup>

The state responded to this mosaic of indigenous actions by resurrecting Pinochet-era anti-terrorist legislation and prosecuting Mapuche activists and organizers in criminal courts. In a general manner, the Counter Terrorism Act heavily restricts rights afforded to defendants. "This law, heavily criticized by lawyers and academics, establishes an extremely ambiguous list of acts that constitute terrorist attacks, even including arson and depredation. Precisely these less serious acts have been use to accuse members of the Mapuche people of acts of terrorism."<sup>68</sup> These restrictions included overarching secrecy in the pre-trial investigation phase and the possibility of greatly enhanced sentences. Witnesses can be "faceless," meaning they can testify anonymously and avoid cross-examination. Additionally, any criminal act involving a police officer or a

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<sup>62</sup> Id, at 4.

<sup>63</sup> Id, at 2.

<sup>64</sup> Id, at 5.

<sup>65</sup> Id, at 4.

<sup>66</sup> Mariman, at 5.

<sup>67</sup> Special Rapporteur 2003, at 13.

<sup>68</sup> Perricone, at 15.

member of the armed forces as a perpetrator or a victim is tried in military courts and is outside the jurisdiction of normal criminal courts. Experts believe that “this combination of new criminal procedure, the counter-terrorist law and military jurisdiction creates a situation in which the right to due process is weakened and this affects, in a selective way, a clearly identified group of Mapuche leaders.”<sup>69</sup>

The return of democracy to Chile brought hope to the Mapuche. The new government abandoned Pinochet’s policy of indigenous cultural elimination. The 1993 Indigenous Peoples Act highlighted this perceived shift in Chile’s approach to the Mapuche. However, the government’s recent shortcomings have reignited the historic conflict. The Mapuche have engaged in variety of political actions (including illegal destruction of property) aimed at defending their land rights and the survival of their culture. The government has responded by applying the Pinochet-era anti-terrorist legislation. Meanwhile, the underlying dispute remains centered on land rights and has currently drawn international attention.

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<sup>69</sup> Id, at 16.

## II. RECOGNITION

### *International Legal Framework*

The international community has demonstrated a commitment to the plight of indigenous peoples the world over. In order to entrench the rights of indigenous peoples, various conventions and declarations have been adopted. Among the first of these was the Indigenous and Tribal Peoples Convention, commonly known as ILO Convention No. 169; it is critically important to the defense of Mapuche rights. Convention 169 enumerates the rights of indigenous peoples and the full application of this convention's standards would alleviate much of the conflict between the Mapuche and the Chilean government. Articles 6 and 7 are key to addressing many of the problems currently facing the Mapuche. Article 6 establishes the right to consultation whenever "consideration is being given to legislative or administrative measures which may affect them directly."<sup>70</sup> Article 7 provides for indigenous participation rights during the "formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly."<sup>71</sup>

Another important document is the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) of 2007, affirming the rights and equality of indigenous peoples.<sup>72</sup> This declaration, while not binding, is evidence of international commitment to indigenous issues and can be seen as a codification of international norms. Additionally, the UN Committee on the Elimination of Racial Discrimination (CERD) has issued a general recommendation to bolster the claims of indigenous communities. General Recommendation No. 23 emphasizes that "the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination apply to indigenous peoples."<sup>73</sup> It includes calls upon states to respect all aspects of indigenous culture, history and life and to ensure dignity, land rights and political participation for all indigenous groups.<sup>74</sup>

One of the key functions of ILO Convention 169, and the UN Declaration on the Rights of Indigenous Peoples, is to form the basis for the duty of nations to consult with their

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<sup>70</sup> ILO Convention No. 169, 1650 U.N.T.S. 383, Art. 6; text in the appendix to this report.

<sup>71</sup> Id, Art. 7.

<sup>72</sup> U.N. Doc. A/RES/61/295; text in the appendix to this report.

<sup>73</sup> CERD General Recommendation 23, U.N. Doc. A/52/18 p. 122 (1997), Art. 2.

<sup>74</sup> Id, Art. 4.

indigenous populations on all measures that may affect these populations.<sup>75</sup> Consultations with indigenous peoples must be “in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.”<sup>76</sup> Article 32 of the UN Declaration on the Rights of Indigenous Peoples states that “[i]ndigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.”<sup>77</sup> The article also declares that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”<sup>78</sup>

Arguably, the most important of these international instruments for the protection of the rights of indigenous peoples in South America is the American Convention on Human Rights of 1969;<sup>79</sup> the influence of OAS convention is particularly strong because of the “local” nature of the organization from which it emanated and the binding nature of the decisions of its Commission and Court. Chile signed the Convention in 1969 but did not ratify it until 1990. The American Convention does not directly enumerate the rights of indigenous peoples. Indeed, there is no mention of indigenous rights anywhere in the text of the Convention. However, in several key cases, the Inter-American Court of Human Rights has interpreted the American Convention as including much, if not all, of the relevant parts of ILO Convention 169; the Court has found it “useful and appropriate to resort to other international treaties, aside from the American Convention, such as ILO Convention No. 169, to interpret its provisions in accordance with the evolution of the inter-American system, taking into account related developments in International Human Rights Law.”<sup>80</sup>

This approach has been particularly apparent in cases involving indigenous communities throughout South America; the Court has used ILO Convention 169 to interpret Articles 8, 21 and 25 of the American Convention. The Court has explained that “ILO Convention No. 169 contains numerous provisions pertaining to the right of indigenous communities to communal

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<sup>75</sup> See generally F. MacKay, *Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review*, 4 *Sust. Dev. L & Pol'y* 43 (2004).

<sup>76</sup> ILO Convention No. 169, Art. 6(2).

<sup>77</sup> UNDRIP, Art. 32

<sup>78</sup> UNDRIP, Art. 32

<sup>79</sup> OAS Treaty B-32; 1114 U.N.T.S. 123.

<sup>80</sup> *Yakye Axa Indigenous Community v. Paraguay* (2005), Series C, No. 125, ¶ 95.

property ... and said provisions can shed light on the content and scope of Article 21 of the American Convention.”<sup>81</sup> Article 21 deals with the right to property, while Articles 8 and 25 concern the right to a fair trial and the right to judicial protection respectively. In a particularly novel application, the Inter-American Commission of Human Rights has applied the ILO Convention No. 169 to states that are not a party to it. In its decision in *Maya Indigenous Communities of the Toledo District v. Belize*, the Commission stated that while “Belize is not a state party to ILO Convention (No. 169), it considers that the terms of that treaty provide evidence of contemporary international opinion concerning matters relating to indigenous peoples, and therefore that certain provisions are properly considered in interpreting and applying the articles of the American Declaration in the context of indigenous communities.”<sup>82</sup> Although the notion of binding non-parties to a treaty may seem extreme, the Inter-American Commission and Court have consistently held this view for many years. On another occasion, the Court explained that “human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions.”<sup>83</sup>

#### *Recognition in Chilean Law*

There are currently two Chilean statutes that establish indigenous rights and attempt to create governmental organizations to interact with indigenous communities. The first, called simply the Indigenous Peoples Act (No. 19.253 of 1993), provided official recognition of various indigenous groups within Chile, and created a National Corporation for Indigenous Development (CONADI), responsible for organizing the consultation efforts.<sup>84</sup>

Years later, after ratifying ILO Convention No. 169, Chile enacted Supreme Decree 124<sup>85</sup> in an endeavor to bring the Indigenous Peoples Act into compliance with the ILO Convention by setting out the requirements for consultation and methods of participation for indigenous peoples in Chile. In the introduction to SD 124, Chile declared that the motive for the decree stem from the ratification of ILO Convention No. 169.<sup>86</sup> According to many critics, including the Mapuche,

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<sup>81</sup> *Id.*, at ¶ 130.

<sup>82</sup> *Maya Indigenous Communities of the Toledo District v. Belize* (2004), IACHR Report No. 40/04, Case 12.053, footnote 123 (hereinafter *Maya Communities*).

<sup>83</sup> *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001), Series C, No. 79, ¶ 146.

<sup>84</sup> Observation (CEARC), adopted 2012, 102nd ILC Session: Chile, *Articles 2 and 33. Coordinated and systematic action with the participation of indigenous peoples. New State institutions for indigenous peoples*, available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3058398](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3058398).

<sup>85</sup> SD 124, Septiembre 4, 2009, Biblioteca del Congreso Nacional de Chile.

<sup>86</sup> SD 124, Septiembre 4, 2009, Biblioteca del Congreso Nacional de Chile, ¶ 3-5 of the Introduction.

SD 124 does not comply with the terms of the Convention.<sup>87</sup> The ILO Committee of Experts on the Application of Convention and Recommendations, or CEACR, echo the Mapuche complaints asserting that SD 124 contains three main shortcomings that put it in conflict with Convention 169. First, SD 124 does not provide for good faith dialogue in all circumstances. Specifically SD 124 “establishes a mechanism intended to gather the views of indigenous peoples and not allow dialogue in good faith.”<sup>88</sup> In other words, the Decree gives the Mapuche someone to talk to, but there is no requirement to achieve consent. Second, it excludes key state bodies from the obligation to consult.<sup>89</sup> Third, it restricts the scope of consultation for some public bodies to the effect that, when indigenous leaders do have access to a public body, they cannot actually influence the actions of that organization.<sup>90</sup> These failings are endemic in the regional indigenous fora, which the Chilean government claims are “fundamental bodies for dialogue and participation.”<sup>91</sup> These fora do not have a decision-making body to make policy, and they often have nothing in the way of a budget and there is no system of review for their actions.<sup>92</sup> According to the CEACR, some of the fora are not even operational.<sup>93</sup>

Because Chile created SD 124 for the ostensible purpose of bringing existing Chilean law into compliance with ILO Convention 169, these persistent shortcomings are particularly disturbing. Any attempt to give SD 124 the benefit of the doubt is countered by the many instances in which it seems designed to limit indigenous peoples’ ability to participate in government. Even the better-organized parts of the system, like CONADI, are plagued with inefficiencies. CONADI is in charge of facilitating much of the consultation between indigenous peoples and the Chilean government. However, indigenous leaders allege that the time limits for consultation imposed by CONADI are in many cases much too short to effectively address the complex issues at hand.<sup>94</sup> While Chile has announced an intention to replace CONADI with a new institutional system, the consultation process to be utilized as the new system is developed was organized by CONADI. There is obvious need for careful observation of that situation as it develops to ensure that the incompetence of one generation is not passed on to the next.

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<sup>87</sup> Id., *Articles 6 and 7. Consultation and Participation. New Legislation.*

<sup>88</sup> Id.

<sup>89</sup> Id.

<sup>90</sup> Id.

<sup>91</sup> Id., *Article 7. Participation. Process of Development.*

<sup>92</sup> Id., *Articles 6 and 7. Consultation and Participation. New Legislation.*

<sup>93</sup> Id., *Article 7. Participation. Process of Development.*

<sup>94</sup> Id., *Articles 6 and 7. Consultation and Participation. New Legislation.*

### *Constitutional Recognition*

In 2009, less than a year after Chile ratified ILO Convention No. 169, the UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, visited Chile. During the UN Special Rapporteur's visit, the Chilean Senate voted to amend the constitution to include specific rights for indigenous peoples.<sup>95</sup> Some members of the government requested information about how the process of consultation should work during constitutional reform. The Special Rapporteur issued a special statement, and ultimately focused his whole report, on the importance of consultation during constitutional reform and the relevant international norms.

While acknowledging that the proposed reform had the potential to be extremely useful to the Mapuche, the Special Rapporteur did not go into how far reaching the benefits of this amendment could be. However, it seems that the Special Rapporteur intended to suggest that Chile should take a page from Colombia and Costa Rica's book and make indigenous rights issues easy accessible to the courts. The Special Rapporteur specifically mentioned that, in Colombia and Costa Rica, the failure to properly consult with an indigenous group automatically nullified any law, act, or adopted measure, a power emanating from their individual constitutions.<sup>96</sup>

In Colombia "international treaties have force of law upon ratification, human rights conventions have the same rank as the constitution."<sup>97</sup> Costa Rica gives international treaties a rank higher than national law, but not expressly on the same level as its constitution.<sup>98</sup> The explanations are fairly simple, especially when compared with the explanation of the Chilean system, which reads: "Ratified international treaties have the force of law. The Constitution establishes that sovereignty recognizes as a limitation in its exercise the essential rights deriving from human nature, and that it shall be the duty of State bodies to respect and promote such rights, as guaranteed by the Constitution, as well as by international treaties ratified by Chile and currently in force."<sup>99</sup> That complex statement seems to suggest that state bodies have the same responsibility to promote the rights enumerated in the Chilean Constitution and international

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<sup>95</sup> Special Rapporteur on the Rights of Indigenous Peoples, *International Principles applicable to Consultation in relation to Constitutional Reform in Chile* (2009), ¶ 1-5 (hereinafter Special Rapporteur 2009).

<sup>96</sup> *Id.*, at ¶ 6.

<sup>97</sup> International Labor Standards Department, *Indigenous and Tribal People's Rights in Practice* (2009), 183.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*, at 182.

treaties. That being established, it makes sense that the Special Rapporteur would juxtapose the inadequacies of the current Chilean system with the Costa Rican and Colombian systems.

Utilizing the recently-ratified Convention No. 169, the Special Rapporteur focused on Articles 6 and 7 which establish the right to consultation in any matter which “may affect them directly.”<sup>100</sup> More than that, the Special Rapporteur explained that Article 6 of the same convention has been interpreted to apply specifically in situations involving constitutional reform. The relevant language reads:

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 ...

“Legislative” measures, according to the ILO, include constitutional reforms and thus “fall unquestionably within the scope of [Article 6] of the Convention.”<sup>101</sup> The Special Rapporteur continued, outlining other international documents that establish the right to consultation, with this advice: “The practice of the duty to consult indigenous peoples should be interpreted flexibly, depending on the size of the subject of the consultation, and the specific circumstances of each country, including the institutional and constitutional procedures.”<sup>102</sup>

The Special Rapporteur then addressed the international principles relative to the consultation rights of indigenous peoples. In other words, the Special Rapporteur attempted to illustrate effective consultation practices. First, consultation should be applied before the project or measure that is to be consulted on is actually implemented.<sup>103</sup> He pointed out that the ILO supervisory bodies intended affected communities to be involved as early as possible in the process.<sup>104</sup> Similarly, the report noted that the UN Declaration on the Rights of Indigenous Peoples requires consultation prior to the implementation of the project.<sup>105</sup> The Inter-American Court of Human Rights similarly requires governments to consult indigenous peoples in the early

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<sup>100</sup> Special Rapporteur 2009, ¶ 7.

<sup>101</sup> 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), 2004, available at NORMLEX, ¶ 83.

<sup>102</sup> Special Rapporteur 2009, ¶ 17.

<sup>103</sup> Id, at ¶ 18.

<sup>104</sup> Id.

<sup>105</sup> Id, at ¶ 19, citing the UN Declaration on the Rights of Indigenous Peoples, Art. 19.

stages of project planning, and not leave the consultation to the last possible minute when community approval becomes the last step in the project.<sup>106</sup>

Second, the Special Rapporteur's report noted that the consultation process is not simply about gathering information. The ILO is not satisfied with purported consultation processes that end with mere meetings or information collection.<sup>107</sup> The report cited several cases in which the judgment required a "genuine dialogue" between the parties with a record of good faith discussions.<sup>108</sup> The report also pointed out that the ILO does not accept simply meeting with indigenous representatives to satisfy the consultation requirements, citing a Mexican constitutional reform case of 2001 in which hearings were not systematic enough for a satisfactory consultation process.<sup>109</sup> Simply calling meetings and gathering information does not permit indigenous individuals and groups to offer their opinions or engage in a dialogue with project leaders, and no consensus will therefore be reached through such superficial actions.<sup>110</sup>

Third, the consultation must reflect the principle of good faith, which allows the parties to proceed with confidence. Consultations should embody good faith and not limit the process to a formality.<sup>111</sup> Instead, the process must truly embody participation from indigenous peoples and encourage a real dialogue between the parties, thereby helping to dispel feelings of conflict.<sup>112</sup> The very mechanisms of the consultation process should seek to embody this notion of good faith and create an atmosphere of trust.<sup>113</sup> The Special Rapporteur's report pointed that the lack of trust and confidence among the parties will derail the consultation process.<sup>114</sup> Three basic measures can help build a feeling of trust and good faith. Both parties, state authorities and indigenous peoples alike, should contribute to the good faith principle; both parties should accept the consultation process; and the consultation process should be accomplished with the

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<sup>106</sup> Id, at ¶ 19.

<sup>107</sup> Id, at ¶ 21.

<sup>108</sup> Id, citing the Judgment of the Colombian Constitutional Court, Case C-169/01 (2001), p. 18-19; Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Convention on Indigenous and Tribal Peoples, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers (CUT), GB.276/17/1, GB.282/14/3 (1999), ¶ 90; *Saramaka People v. Suriname* (2007), Series C, No. 172, ¶ 134 (hereinafter *Saramaka People*).

<sup>109</sup> Special Rapporteur 2009, ¶ 22.

<sup>110</sup> See, e.g., id.

<sup>111</sup> Id, at ¶ 23.

<sup>112</sup> Id.

<sup>113</sup> Id.

<sup>114</sup> Id, at ¶ 25.

partnership of acknowledged indigenous groups.<sup>115</sup> This last measure, that the consultation process should be conducted through the actual indigenous peoples' representative institutions, is specifically required by ILO Convention 169 and the UN Declaration.<sup>116</sup>

Finally, the consultation process must inform the indigenous people about the project or measure to be implemented.<sup>117</sup> This includes access to information in a timely manner, comprehension of the project or measure, responses to additional information requests, translations into indigenous languages where necessary, and the inclusion of any other relevant documents, especially international agreements that inform the project or measure to be implemented.<sup>118</sup>

For the Mapuche, a constitutional amendment on their recognition would mean that any violations of indigenous rights could open a direct door to the courts. Not only would this allow the Mapuche more power to be heard, it should also speed reaction times. This is especially relevant in relation to land use issues. In many cases, before an indigenous group's complaint can be heard, and before anything can be done, catastrophic damage has already been accomplished.

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<sup>115</sup> Id.

<sup>116</sup> Id, at ¶ 26.

<sup>117</sup> Id, at ¶ 46.

<sup>118</sup> Id.

### III. LAND

Mapuche have strong cultural ties to their lands. In addition to the importance of consultation emerging when considering Mapuche statutory rights and the argument for constitutional reform, government consultation with indigenous peoples also plays a critical role in issues intersecting with rights to land and the environmental degradation of traditional territories. The consultation methods in regards to land use are similar to the consultation methods discussed in the constitutional section above. The duty that States must abide by these consultation requirements when dealing with indigenous land disputes and actions that impact traditional lands has a strong basis in international law. However, States have a poor track record in complying with this duty, and may end up neglecting to consult with indigenous peoples, or may not consult in a meaningful way. This failure of the duty to consult has led to little on-the-ground land progress for the Mapuche. Because cultural identity is linked to the land, and land is connected to consultation, the disruption of the relationship between Mapuche and their land remains largely unresolved.

#### *Disruption of the Mapuche from their Traditional Lands*

Mapuche consider themselves to be people of the land. The close affiliation between land and the Mapuche cultural identity suggests that land issues lie at the heart of the contemporary problems facing this group. In his report of 2003, the UN Special Rapporteur on the Rights of Indigenous Peoples noted that “[o]ne of the most pressing problems affecting the native peoples of Chile concerns their ownership of land and territorial rights, particularly in the case of the Mapuche.”<sup>119</sup> The very separation of Mapuche from their land during the Pinochet years may have helped to catalyze the more contemporary expressions of Mapuche identity and political unrest.<sup>120</sup> Chilean history largely disrupted this relationship between Mapuche and their ancestral lands.

Early Chilean governments disrupted the Mapuche ties to the land by physically moving them from their traditional areas. During the late 17th century and continuing through the early 18th century, the Chilean state followed a process of moving the Mapuche people onto “reducciones,” or reservations, by granting land titles, but ultimately splitting up families and

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<sup>119</sup> Special Rapporteur 2003, at 9.

<sup>120</sup> Carter, at 59.

causing chaos to the Mapuche identity.<sup>121</sup> That situation, with indigenous peoples and any disputes in regards to their ancestral lands largely ignored, endured until the 1960s.<sup>122</sup>

The 1970s, also known as the Agrarian Reform, represents a brief period of land transfers returning territory to the Mapuche. President Allende helped to transfer some land back to indigenous communities and instituted a land reform policy.<sup>123</sup> This period would later be seen as known as “the only period in Chilean history when the State has ever taken genuine steps to satisfy Mapuche demands, leading to real gains in terms of land and rights.”<sup>124</sup>

The period following the 1973 military coup, after which Pinochet came into power, is known as the Agrarian Counter-Reform. The policies enacted wiped away any progress made, and only 16% of the land initially recovered remained in Mapuche hands.<sup>125</sup> The military government replaced the Mapuche land grant titles with individual property deeds that largely fell into non-indigenous control.<sup>126</sup> Pinochet’s law dividing communities, Decree Law 2568, pushed Mapuche further toward becoming simply “small-scale, autonomous landholders, indistinguishable from the Chilean peasantry.”<sup>127</sup>

The Indigenous Peoples Act 1993 has established the Land Fund to reacquire indigenous lands. As of 2003, this fund had returned 255,000 hectares of disputed land in the previous decade.<sup>128</sup> Unfortunately, the Land Fund has been plagued by land speculation that drives the price of property and procedural hang-ups that prevent the concept of returning lands from being fully realized.<sup>129</sup> Most recently, Chile has reported “reviv[ing] the mechanisms for handing over land to indigenous peoples in a transparent and objective fashion, on the basis of a points system established by law, so that applicants are aware of the applicable rules in advance. An essential element of the new approach is the inclusion of an agreement on providing production support

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<sup>121</sup> Carter, at 62.

<sup>122</sup> Martin Correa, Raul Molina and Nancy Yanez, *La reforma agraria y las tierras mapuches* (Santiago, Chile, LOM: 2005).

<sup>123</sup> Special Rapporteur 2003, at 7.

<sup>124</sup> Joanna Crow, *Debates about Ethnicity, Class and Nation in Allende’s Chile (1970-1973)*, 26 *Bulletin of Latin American Research* 319 at 336 (2007).

<sup>125</sup> Eduardo Mella, *Los mapuche ante la justicia* (Santiago, Chile, LOM: 2007), at 66.

<sup>126</sup> Carter, at 67; Special Rapporteur 2003, at 7.

<sup>127</sup> Carter, at 68, citing Roger Yvon Kellner, *The Mapuche during the Pinochet Dictatorship (1973–1990)*, (PhD dissertation, University of Cambridge: 1993), at 161-65.

<sup>128</sup> Special Rapporteur 2003, at 9

<sup>129</sup> Id.

and technical assistance in conjunction with each handover.”<sup>130</sup> Chile states that land returns have “benefit[ed] 44 communities and 1,181 families in the regions of Bío-Bío, Araucanía and Los Ríos.”<sup>131</sup> In addition, Chile has reportedly raised its budget for funding land grants and instilled transparency into the system so as to ensure property prices are not unfairly staged.<sup>132</sup>

*Indigenous Recovery of Land under International Law*

The Mapuche today stand at a point where history has disrupted their ties with the land, but contemporary attempts to reconnect those ties have not yet rectified past wrongs. Meanwhile, the overall goal of regaining lands may have shifted. Globally, indigenous movements are turning away from “material demands for living or farming space, to the assertion of the right to a cultural space as an existential demand.”<sup>133</sup> The meaning of land is shifting from simply subsistence toward desiring a “territory belonging to a people within which they demand the right to their own institutions, control of resources, and cultural freedom.”<sup>134</sup> Even the Inter-American Commission on Human Rights makes this connection, noting: “For the IACHR, the special relationship between indigenous and tribal peoples and their territories means that ‘the use and enjoyment of the land and its resources are integral components of the physical and cultural survival of the indigenous communities and the effective realization of their human rights more broadly.’”<sup>135</sup>

Indigenous rights to land are well recognized internationally as well as domestically in Chilean law. The Inter-American Commission on Human Rights has stated:

The unique relationship between indigenous and tribal peoples and their territories has been broadly recognized in international human rights law . . . As reiterated by the IACHR and the Inter-American Court, preserving the particular connection between indigenous communities and their lands and resources is linked to these peoples' very existence and thus “warrants special measures of protection.”<sup>136</sup>

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<sup>130</sup> Chile Report to the Human Rights Committee under the ICCPR, U.N. Doc. CCPR/C/CHL/6 (2012) (hereinafter Chile Report 2012), Art. 27 ¶ 152.

<sup>131</sup> Chile Report 2012, Art. 27 ¶ 153.

<sup>132</sup> Chile Report 2012, Art. 27 ¶¶ 155-156.

<sup>133</sup> Peter Wade, *Race and Ethnicity in Latin America* (London, Pluto: 1997), at 96.

<sup>134</sup> Carter, at 73.

<sup>135</sup> IACHR, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II, Doc. 56/09, ¶ 53 (2010) (hereinafter IACHR Report 2010), quoting *Maya Indigenous Communities*, ¶ 114.

<sup>136</sup> *Id.*, ¶ 53, quoting *Mary and Carrie Dann (United States)* (2002), IACHR, Report No. 75/02, Case 11.140, ¶ 128.

Within its land section, ILO Convention No. 169 requires “governments [to] respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories.”<sup>137</sup> Indigenous people have rights of occupation in lands traditionally occupied, or at least must be granted access to conduct “subsistence and traditional activities.”<sup>138</sup> Chile, therefore, as a party to the Convention, is obligated to take affirmative steps to not only recognize those lands that the Mapuche traditionally occupied, but also to “guarantee effective protection” of those ownership rights granted by the Convention.<sup>139</sup>

Chile itself has taken the first steps toward rectifying past land abuses. The nation has recognized in its Indigenous Peoples Act that “the land [is] the principal foundation of [Chile’s indigenous peoples’] existence and culture.” Any disputes arising from land occupation must be resolved using “adequate procedures . . . within the national legal system.”<sup>140</sup> Chile also reports that it “is making efforts to guarantee the right of minorities to have their own cultural life, to profess and practise their own religion, and to use their own language.”<sup>141</sup> Chile professes to have, through implementing Convention No. 169 with its Indigenous Peoples Act, “[s]trengthen[ed] recognition of the relationship between indigenous persons and the land, and protection of the land . . . .”<sup>142</sup>

#### *Environmental degradation*

In addition to outright land acquisition, there are concerns over how non-indigenous landowners treat the terrain in an unsustainable manner. Mapuche leaders point to several factors that further thwart their relationship with the land: the limited land that is owned by Mapuche is severely degraded and remote (territories are simply inholdings surrounded completely by fenced forestry plantations impeding access); poor forestry practices leading to erosion, pesticide overuse, reductions in forest biodiversity; and the pollution and otherwise overutilization of water sources.<sup>143</sup> Two major land uses (the damming of rivers, and forestry plantations) provide examples of how land acquisition leads to further environmental abuses.

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<sup>137</sup> ILO Convention 169, Art. 13(1).

<sup>138</sup> Id, Art. 14(1).

<sup>139</sup> Id, Art. 14(2).

<sup>140</sup> Id, Art. 14(3).

<sup>141</sup> Chile Report 2012, Art. 27 ¶ 140; see also Art. 27 ¶ 141 (examples of advances Chile has made on behalf of indigenous peoples, including legislation, housing, and other recognitions of indigenous values).

<sup>142</sup> Id, Art. 27 ¶ 141(c).

<sup>143</sup> Special Rapporteur 2003, at 14..

Dams appearing on the Chilean landscape disrupt the Mapuche relationship with their ancestral lands. The Panguel dam project of 1997 significantly affected the Mapuche culture.<sup>144</sup> The 2004 Ralco dam in the region of Bío-Bío was at first met with controversy and opposition, and initially displaced scores of indigenous people.<sup>145</sup> Eventually, the dam's project leaders made reparations in the form of education, welfare, and cultural considerations. Though at first these repayments seemed too little in exchange for dam company profits, the dispute was ultimately settled in a way agreeable to the displaced families.<sup>146</sup>

Forestry plantations are another form of environmental degradation that undermines the Mapuche's connection with the land. Decree Law No. 701 of 1974 subsidized forestry plantations.<sup>147</sup> Monocultures of forest plantations require pesticides and increased water use, which impacts the native biodiversity (game animals, medicinal plants, and fish) that Mapuche rely on for their traditional lifestyle.<sup>148</sup> These forestry plantations are now the sites where land dispute violence has erupted in recent years.<sup>149</sup>

In order to alleviate these concerns over land treatment, the National Corporation for Indigenous Development (CONADI) arose out of the Indigenous Peoples Act, purportedly to protect yet sustainably develop indigenous lands.<sup>150</sup> CONADI's administrative procedures help negotiate between indigenous peoples and other entities, and also function to acquire disputed land for return to the indigenous groups.<sup>151</sup> However, CONADI has been plagued with implementation issues and suffers from a negative image. When CONADI's first director opposed a hydroelectric dam project, he was removed from office.<sup>152</sup> Furthermore, the Land Fund experiences problems from speculators raising the price of property beyond the acquisition power of CONADI.<sup>153</sup>

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<sup>144</sup> Jorge Calbucura, *Investing in Indigenous Peoples' Territories, a New Form of Ethnocide? The Mapuche Case*, in *Walking Towards Justice: Democratization in Rural Life* (Michael M. Bell, Fred Hendricks and Azril Bacal, eds.), 9 Research in Rural Sociology and Development, at 234 (2003).

<sup>145</sup> Carter, at 71.

<sup>146</sup> Special Rapporteur 2003, at 11.

<sup>147</sup> Id., at 10.

<sup>148</sup> Id.

<sup>149</sup> See, generally, Florencia E. Mallon, *Courage Tastes of Blood: The Mapuche Community of Nicolás Ailio and the Chilean State, 1906-2001*, in *Radical Perspectives: A Radical History Review Series* (Daniel J. Walkowitz and Barbara Weinstein, eds.) (2005).

<sup>150</sup> Leslie Ray, *Language of the Land: The Mapuche in Argentina and Chile* (Copenhagen, IWGIA: 2007), at 132.

<sup>151</sup> Special Rapporteur 2003, at 12

<sup>152</sup> Carter, at 71.

<sup>153</sup> Special Rapporteur 2003, at 12

### *Consultations in Land Use Projects*

Although the 2009 report from the Special Rapporteur is in reference to adopting rights of indigenous peoples in Chile's constitution, as discussed in the preceding section, the same framework of consultation applies generally to land use projects in Chile. The consultation process applies to the environmental and land issues because consultation should be applied before the project or measure that is to be consulted on is actually implemented; that the consultation process is not simply about gathering information, but is about a genuine dialogue; that good faith must be reflected in the consultation to allow the parties to proceed with confidence; and that consultation must seek to inform the indigenous people about the project or measure to be implemented, by ensuring the appropriate language and logistical barriers are overcome.<sup>154</sup> The consultation process should help alleviate environmental issues, like dams and forestry that adversely affect the Mapuche. Chile has a duty to consult with its indigenous groups, even when it retains the sub-surface rights to minerals or other land-use resources, prior to even permitting the surveying for these resources.<sup>155</sup> The people who may be involved in the process "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."<sup>156</sup>

ILO Convention 169 provides an overlapping duty to avoid removing indigenous peoples from the "lands they occupy," with the duty to consult, with stipulations if certain steps are not possible. If removal of indigenous peoples from their lands is "necessary as an exceptional measure", then the state must obtain their "free and informed consent."<sup>157</sup> If consent is unobtainable, then forced relocation can only occur following codified procedures, "including public inquiries ... which provide the opportunity for effective representation of the peoples concerned."<sup>158</sup> After removal, "[w]henver possible" the dislocated people "shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist."<sup>159</sup> But if returning the people to their land cannot occur due to "agreement" or "appropriate procedures", then the peoples are to be given "lands of quality and legal status at least equal to that of the

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<sup>154</sup> See Special Rapporteur 2009; see also *Saramaka People*, ¶¶ 133-137.

<sup>155</sup> ILO 169, Art. 15(2).

<sup>156</sup> *Id.*, Art. 15(2).

<sup>157</sup> *Id.*, Art. 16(1) and (2).

<sup>158</sup> *Id.*, Art. 16(2).

<sup>159</sup> *Id.*, Art. 16(3).

lands previously occupied” whenever possible.<sup>160</sup> The exchanged lands must be “suitable to provide for their present needs and future development.”<sup>161</sup> As an alternative, where the indigenous peoples prefer monetary or in kind compensation, this choice shall be honored.<sup>162</sup> In the end, the peoples who were relocated must be “fully compensated for any resulting loss or injury.”<sup>163</sup>

Three cases in the inter-American human rights system demonstrate how the consultation process required by ILO Convention 169 does not always function well in South American states, and exemplify the shortcomings in some states in fulfilling the standards set by the American Convention on Human Rights and international consultation process. In *Saramaka People v Suriname*, a tribal community (afforded the same rights as indigenous peoples under ILO Convention 169 by the court) filed a claim against the state of Suriname in the Inter-American Court of Human Rights. The Saramaka successfully argued, *inter alia*, that Suriname had violated its duty to consult with them when it allowed third parties to extract natural resources from their lands, including building a dam that flooded Saramaka territory.<sup>164</sup> In *Sawhoyamaxa Indigenous Community vs. Paraguay*,<sup>165</sup> the subsistence hunters and gatherers of the Sawhoyamaxa community filed against Paraguay in order to reclaim their ancestral lands that were sold to third parties in the 19th century. Finally, in *Maya Communities in the District of Toledo v. Belize*,<sup>166</sup> Mayan representatives successfully argued in front of the Inter-American Commission on Human Rights a violation of Mayan rights to land, and a violation of the duty to consult by Belize, when the state gave third parties rights to natural resources on traditional Mayan lands without consulting with the community. The Maya also condemned the resource extraction actions as environmentally degrading, which affected their traditional and subsistence activities.

The deciding bodies in these three cases used ILO Convention 169 to decide in favor of the indigenous groups, emphasizing the importance and power of this instrument. Even though Suriname did not have domestic legislation on the rights of indigenous people, and even though

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<sup>160</sup> Id, Art. 16(4).

<sup>161</sup> Id.

<sup>162</sup> Id.

<sup>163</sup> Id, Art. 16(5).

<sup>164</sup> *Saramaka People*, ¶ 12.

<sup>165</sup> *Sawhoyamaxa Indigenous Community vs. Paraguay* (2006), Series C, No. 172 (hereinafter *Sawhoyamaxa*).

<sup>166</sup> *Maya Communities*.

the state had not ratified the convention, the court nonetheless found the state subject to Convention 169 and thus in violation of its duties towards its indigenous populations, extending the duty to the “tribal” Saramaka.<sup>167</sup> The *Sawhoyamaxa* court applied Convention 169 in addressing the alleged property rights of the indigenous community, saying that the important cultural and spiritual values that these people hold for their land must be respected.<sup>168</sup> In the *Mayan Communities* case, the Inter-American Commission invoked several international agreements in ruling for the Mayan peoples, among them the American Convention on Human Rights, the Geneva Convention of 1949, the United Nations Convention on the Rights of the Child, the Vienna Convention on Consular Relations; and the court particularly noted ILO Convention No. 169 on Indigenous and Tribal Peoples.<sup>169</sup> Even though Belize was not a party to Convention 169, the court considered the notion of consultation with indigenous peoples established enough as an international norm to hold Belize to its principles.<sup>170</sup>

The *Saramaka People* court found that indigenous peoples had a right to the natural resources situated on their own land, and that the state must have due consideration of what the community needed for its survival before determining what it could extract. In the words of the Inter-American Commission, the Inter-American Court has specifically recognized, drawing upon the *Saramaka People* case, that:

Indigenous property rights over territory extend in principle over all those lands and resources that indigenous peoples currently use, and over those lands and resources that they possessed and of which they were deprived, with which they preserve their internationally protected special relationship — i.e. a cultural bond of collective memory and awareness of their rights of access or ownership, in accordance with their own cultural and spiritual roles.<sup>171</sup>

Additionally, in the *Saramaka People* case, consultation with the community, as well as an environmental impact statement, was necessary before the state could proceed with allowing third party extractive activities.<sup>172</sup> The *Saramaka People* court discussed these duties as

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<sup>167</sup> *Saramaka People*, ¶ 93.

<sup>168</sup> *Sawhoyamaxa*, ¶ 119.

<sup>169</sup> *Maya Communities*, ¶ 87.

<sup>170</sup> *Id.*

<sup>171</sup> IACHR Report 2010, ¶ 78.

<sup>172</sup> See also *id.*, ¶ 275.

“safeguards” to protect indigenous interests and couched the principles within existing examples of international and foreign law.<sup>173</sup> The court linked this duty back to cultural recognition:

Indigenous peoples’ right to be consulted about decisions that may affect them is directly related to the right to cultural identity, insofar as culture may be affected by such decisions. The State must respect, protect and promote indigenous and tribal peoples’ traditions and customs, because they are an intrinsic component of the cultural identity of the persons who form part of said peoples. The State duty to develop consultation procedures in relation to decisions that affect territory, is thus directly linked to the State obligation to adopt special measures to protect the right to cultural identity, based on a way of life intrinsically linked to territory.<sup>174</sup>

The *Sawhoyamaxa* court also tied together an important relationship between land rights and consultation when it concluded that the decision of whether to return the land to the indigenous group or allow the community to take compensatory payment is a decision made by the indigenous peoples themselves, in consultation with the state.<sup>175</sup>

These cases act as cautionary tales of the consequences for a state that does not take its consultation obligations toward indigenous people seriously. Several principles emerge from these cases. First, consultation helps retain the indigenous group’s interest in their traditional lands. Second, a state cannot claim ignorance of a culture to defend its environmentally degrading actions because, to do so, is admitting to inadequate consultation. Third, a state neglecting the consultation process may simply be ordered to pay reparations, which may not be equivalent to the proper consultation process in the first place.

Consultation is critical for establishing and maintaining the integrity of an indigenous people’s right to, and their interest in, traditional lands. The remedy recommended by the Inter-American Commission in *Maya Communities* included reparations, recognition of the property right to lands “traditionally occupied and used” and the need to map out and provide title to the

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<sup>173</sup> *Saramaka People*, ¶ 130, citing *Apirana Mahuika et al. v. New Zealand*, U.N. Doc. CCPR/C/70/D/547/1993; *The Mayagna (Sumo) Awas Tingni Community* (2001) ¶¶ 148-149, 151; *Sawhoyamaxa*, ¶¶ 118-121; *The Indigenous Community Yakye Axa* (2006), Series C, No. 125, ¶¶ 124, 131, 135, 154; ILO Convention No. 169, Art. 15(2); World Bank, Revised Operational Policy and Bank Procedure on Indigenous Peoples, OP/BP 4.10 (2005); HRC, General Comment No. 23, The Rights of Minorities, U.N. Doc. CCPR/C/21/Rev.1/Add.5, ¶ 7; CERD, General Recommendation No. 23, U.N. Doc. A/52/18, p. 122 (1997), U.N. Declaration of the Rights of Indigenous Peoples, Art. 4(d).

<sup>174</sup> IACHR Report 2010, ¶ 276.

<sup>175</sup> *Sawhoyamaxa*, ¶ 150, 151.

territory remaining in dispute.<sup>176</sup> The Commission recommended that Belize refrain from allowing any entity to cause change to the traditional territory until the lands were properly mapped and the title disputes resolved. Similarly, the *Saramaka People* court noted that, had the state consulted, it could have demarcated the Saramaka territory, in order to grant title to the land that the community claimed as its own.<sup>177</sup>

An interesting principle emerged from the *Saramaka* case, where the Suriname tried to argue that its misunderstanding of the Saramaka traditional land tenure system was the reason that the state could not grant the community any land rights.<sup>178</sup> However, the *Saramaka People* court dismissed the state's defense that it did not understand the community's land tenure system by noting that, had the state of Suriname consulted with this group of people, it would have obtained such information in order to properly recognize the land rights.<sup>179</sup> A state cannot therefore plead ignorance when it violates indigenous peoples' rights; the duty to consult exists to notify the state of such information.<sup>180</sup>

A lack of consultation leads to retroactive remedies and *ad hoc* explanations for why the state did not consult the indigenous community. Suriname thought that it did not need to consult if there were no traditional sites in the area, but the court astutely pointed out that "the question for the State is not whether to consult with the Saramaka people, but whether the State must also obtain their consent."<sup>181</sup> However, in redressing the wrongs, the *Saramaka People* court ordered the state to "repair the environmental damage caused by the logging concessions awarded by the State in the territory traditionally occupied and used by the Saramaka people"<sup>182</sup> and monetarily compensate the community for the logging damage.<sup>183</sup> It is impossible, however, to compare such retroactive compensation with the value of proper consultation in the first instance.

Consultation acts as an important step to returning disputed lands to indigenous groups. A state is required under prevailing international norms to have a clear understanding of indigenous land claims in order to proceed with its projects in any disputed traditional land areas.

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<sup>176</sup> *Maya Communities*, ¶ 118.

<sup>177</sup> See *Saramaka People*, ¶ 115.

<sup>178</sup> *Id.*, ¶ 99.

<sup>179</sup> *Id.*, ¶ 101.

<sup>180</sup> See also *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (deciding that Nicaragua violated the American Convention on Human Rights when it failed to demarcate the community's traditional lands).

<sup>181</sup> *Saramaka People*, ¶ 147.

<sup>182</sup> *Saramaka People*, ¶ 191.

<sup>183</sup> *Saramaka People*, ¶ 199.

For these reasons, consultation may act as a first step for the indigenous groups toward regaining their land, having a say in the ongoing environmental degradation on lands they do not own but remain important to them, and gaining a more solid foothold in the state's political processes. However, a state that illegally bypasses the consultation process may be able to get away with simply paying reparations, which may not be as meaningful to a people who identify themselves by reference to their land. There is little doubt that constitutional recognition would help to solve these issues by ensuring a right to consultation that would be less tenuous than a statutory guarantee.

Chile has responded to the call for states to comply with the consultation requirements embodied in international instruments. The nation has noted that “the consultation process . . . has gained in impetus and importance under the current Government” that impliedly was lacking under the former administration.<sup>184</sup> According to Chile, CONADI, the entity established to act as a go-between with the indigenous peoples of Chile and the Chilean government, “has established a ‘Convention No. 169 Unit’, the main objectives of which are to foster opportunities for dialogue and understanding between indigenous peoples and the rest of society . . .”<sup>185</sup> In pursuit of these ideals, Chile reports it has initiated a “Consultation on Indigenous Institutions” in 2011 in order to, among other things, “establish[] a consultation and participation procedure, including the rules on participation in the Environmental Impact Assessment System . . .”<sup>186</sup> Chile acknowledges, however, that the process has been “suspended in order to make improvements to address the difficulties caused by the complex nature of the task . . .”<sup>187</sup> Eventually, Decree No. 124 (currently exercising jurisdiction over consultation with indigenous peoples) will “be replaced by an instrument to be agreed with the native peoples in accordance with Convention standards,” and through “a five-stage process of “indigenous pre-consultation” was launched to gather comments, suggestions and proposals from indigenous peoples’ organizations and leaders, in order to develop a draft regulation to replace the Decree.”<sup>188</sup> Finally, Chile states that it has allocated funding in 2011-2012 toward indigenous consultation “for the first time in the history of CONADI.”<sup>189</sup>

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<sup>184</sup> Chile Report 2012, Art. 27 ¶ 146.

<sup>185</sup> Id., Art. 27 ¶ 144.

<sup>186</sup> Id.

<sup>187</sup> Id., Art. 27 ¶ 145.

<sup>188</sup> Id.

<sup>189</sup> Id., Art. 27 ¶ 150.

Land is the heart of both the identity and the controversy for the Mapuche, the People of the Land. As Mapuche were separated from their land, so were they separated from their cultural identity. As Mapuche are reunited with ancestral territories, so will their cultural identity be returned. Consultation, constitutional recognition and property rights to ancestral lands are all pathways toward regaining land and regaining that sense of cultural identity that has been disrupted through history.

## **APPENDIX**

### **Principal International Instruments**

ILO C169 Indigenous and Tribal Peoples Convention  
UN Declaration on the Rights of Indigenous Peoples

#### **Indigenous and Tribal Peoples Convention**

ILO Convention No. 169, 1989

(Convention concerning Indigenous and Tribal Peoples in Independent Countries; 27 June 1989; entry into force 5 September 1991)

##### **Preamble**

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its 76th Session on 7 June 1989, and

Noting the international standards contained in the Indigenous and Tribal Populations Convention and Recommendation, 1957, and

Recalling the terms of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the many international instruments on the prevention of discrimination, and

Considering that the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards, and

Recognising the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live, and

Noting that in many parts of the world these peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live, and that their laws, values, customs and perspectives have often been eroded, and

Calling attention to the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding, and

Noting that the following provisions have been framed with the co-operation of the United Nations, the Food and Agriculture Organisation of the United Nations, the United Nations Educational, Scientific and Cultural Organisation and the World Health Organisation, as well as of the Inter-American Indian Institute, at appropriate levels and in their respective fields, and that it is proposed to continue this co-operation in promoting and securing the application of these provisions, and

Having decided upon the adoption of certain proposals with regard to the partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention revising the Indigenous and Tribal Populations Convention, 1957;

adopts this twenty-seventh day of June of the year one thousand nine hundred and eighty-nine the following Convention, which may be cited as the Indigenous and Tribal Peoples Convention, 1989;

#### **PART I. GENERAL POLICY**

##### **Article 1**

1. This Convention applies to:

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

## **Article 2**

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

## **Article 3**

1. Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.
2. No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned, including the rights contained in this Convention.

## **Article 4**

1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.
2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.
3. Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures.

## **Article 5**

In applying the provisions of this Convention:

- (a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;
- (b) the integrity of the values, practices and institutions of these peoples shall be respected;
- (c) policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted, with the participation and co-operation of the peoples affected.

## **Article 6**

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

- (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
  - (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
  - (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.
2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

#### **Article 7**

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.
2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.
3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.
4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

#### **Article 8**

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

#### **Article 9**

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

#### **Article 10**

1. In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics.
2. Preference shall be given to methods of punishment other than confinement in prison.

**Article 11**

The exaction from members of the peoples concerned of compulsory personal services in any form, whether paid or unpaid, shall be prohibited and punishable by law, except in cases prescribed by law for all citizens.

**Article 12**

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

**PART II: LAND****Article 13**

1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.
2. The use of the term lands in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

**Article 14**

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.
3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

**Article 15**

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

**Article 16**

1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.
2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.
4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.
5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

#### **Article 17**

1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.
2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.
3. Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

#### **Article 18**

Adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.

#### **Article 19**

National agrarian programmes shall secure to the peoples concerned treatment equivalent to that accorded to other sectors of the population with regard to:

- (a) the provision of more land for these peoples when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;
- (b) the provision of the means required to promote the development of the lands which these peoples already possess.

### **PART III: RECRUITMENT AND CONDITIONS OF EMPLOYMENT**

#### **Article 20**

1. Governments shall, within the framework of national laws and regulations, and in co-operation with the peoples concerned, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general.
2. Governments shall do everything possible to prevent any discrimination between workers belonging to the peoples concerned and other workers, in particular as regards:
  - (a) admission to employment, including skilled employment, as well as measures for promotion and advancement;
  - (b) equal remuneration for work of equal value;
  - (c) medical and social assistance, occupational safety and health, all social security benefits and any other occupationally related benefits, and housing;
  - (d) the right of association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers' organisations.
3. The measures taken shall include measures to ensure:
  - (a) that workers belonging to the peoples concerned, including seasonal, casual and migrant workers in agricultural and other employment, as well as those employed by labour contractors, enjoy the protection

afforded by national law and practice to other such workers in the same sectors, and that they are fully informed of their rights under labour legislation and of the means of redress available to them;

(b) that workers belonging to these peoples are not subjected to working conditions hazardous to their health, in particular through exposure to pesticides or other toxic substances;

(c) that workers belonging to these peoples are not subjected to coercive recruitment systems, including bonded labour and other forms of debt servitude;

(d) that workers belonging to these peoples enjoy equal opportunities and equal treatment in employment for men and women, and protection from sexual harassment.

4. Particular attention shall be paid to the establishment of adequate labour inspection services in areas where workers belonging to the peoples concerned undertake wage employment, in order to ensure compliance with the provisions of this Part of this Convention.

#### **PART IV: VOCATIONAL TRAINING, HANDICRAFTS AND RURAL INDUSTRIES**

##### **Article 21**

Members of the peoples concerned shall enjoy opportunities at least equal to those of other citizens in respect of vocational training measures.

##### **Article 22**

1. Measures shall be taken to promote the voluntary participation of members of the peoples concerned in vocational training programmes of general application.

2. Whenever existing programmes of vocational training of general application do not meet the special needs of the peoples concerned, governments shall, with the participation of these peoples, ensure the provision of special training programmes and facilities.

3. Any special training programmes shall be based on the economic environment, social and cultural conditions and practical needs of the peoples concerned. Any studies made in this connection shall be carried out in co-operation with these peoples, who shall be consulted on the organisation and operation of such programmes. Where feasible, these peoples shall progressively assume responsibility for the organisation and operation of such special training programmes, if they so decide.

##### **Article 23**

1. Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted.

2. Upon the request of the peoples concerned, appropriate technical and financial assistance shall be provided wherever possible, taking into account the traditional technologies and cultural characteristics of these peoples, as well as the importance of sustainable and equitable development.

#### **PART V: SOCIAL SECURITY AND HEALTH**

##### **Article 24**

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

##### **Article 25**

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

2. Health services shall, to the extent possible, be community-based. These services shall be planned and administered in co-operation with the peoples concerned and take into account their economic, geographic, social and cultural conditions as well as their traditional preventive care, healing practices and medicines.
3. The health care system shall give preference to the training and employment of local community health workers, and focus on primary health care while maintaining strong links with other levels of health care services.
4. The provision of such health services shall be co-ordinated with other social, economic and cultural measures in the country.

## **PART VI: EDUCATION AND MEANS OF COMMUNICATION**

### **Article 26**

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

### **Article 27**

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

### **Article 28**

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

### **Article 29**

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

### **Article 30**

1. Governments shall adopt measures appropriate to the traditions and cultures of the peoples concerned, to make known to them their rights and duties, especially in regard to labour, economic opportunities, education and health matters, social welfare and their rights deriving from this Convention.
2. If necessary, this shall be done by means of written translations and through the use of mass communications in the languages of these peoples.

### **Article 31**

Educational measures shall be taken among all sections of the national community, and particularly among those that are in most direct contact with the peoples concerned, with the object of eliminating prejudices that they may harbour in respect of these peoples. To this end, efforts shall be made to ensure that history textbooks and other educational materials provide a fair, accurate and informative portrayal of the societies and cultures of these peoples.

## **PART VII: CONTACTS AND CO-OPERATION ACROSS BORDERS**

### **Article 32**

Governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields.

## **PART VIII: ADMINISTRATION**

### **Article 33**

1. The governmental authority responsible for the matters covered in this Convention shall ensure that agencies or other appropriate mechanisms exist to administer the programmes affecting the peoples concerned, and shall ensure that they have the means necessary for the proper fulfilment of the functions assigned to them.

2. These programmes shall include:

- (a) the planning, co-ordination, execution and evaluation, in co-operation with the peoples concerned, of the measures provided for in this Convention;
- (b) the proposing of legislative and other measures to the competent authorities and supervision of the application of the measures taken, in co-operation with the peoples concerned.

## **PART IX: GENERAL PROVISIONS**

### **Article 34**

The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.

### **Article 35**

The application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements.

## **PART X: FINAL PROVISIONS**

### **Article 36**

This Convention revises the Indigenous and Tribal Populations Convention, 1957.

### **Article 37**

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

### **Article 38**

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.
2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

#### **Article 39**

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

#### **Article 40**

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.

2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

#### **Article 41**

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

#### **Article 42**

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

#### **Article 43**

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides -

(a) the ratification by a Member of the new revising Convention shall *ipso jure* involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 39 above, if and when the new revising Convention shall have come into force;

(b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

#### **Article 44**

The English and French versions of the text of this Convention are equally authoritative.

## **United Nations Declaration on the Rights of Indigenous Peoples**

(Adopted by the General Assembly on 13 September 2007 as Resolution 61/295)

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

#### **Article 1**

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

#### **Article 2**

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

#### **Article 3**

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

#### **Article 4**

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

#### **Article 5**

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

#### **Article 6**

Every indigenous individual has the right to a nationality.

#### **Article 7**

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

#### **Article 8**

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress

for:

- (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
- (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
- (d) Any form of forced assimilation or integration;
- (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

#### **Article 9**

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

#### **Article 10**

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

#### **Article 11**

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

#### **Article 12**

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

#### **Article 13**

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

#### **Article 14**

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.
2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.
3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

#### **Article 15**

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.
2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

#### **Article 16**

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.
2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

#### **Article 17**

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.
2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.
3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

#### **Article 18**

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

#### **Article 19**

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

**Article 20**

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

**Article 21**

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

**Article 22**

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.
2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

**Article 23**

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

**Article 24**

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.
2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

**Article 25**

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

**Article 26**

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

**Article 27**

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

**Article 28**

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

**Article 29**

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

**Article 30**

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

**Article 31**

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

**Article 32**

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

#### **Article 33**

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

#### **Article 34**

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

#### **Article 35**

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

#### **Article 36**

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

#### **Article 37**

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

#### **Article 38**

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

#### **Article 39**

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

#### **Article 40**

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

**Article 41**

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

**Article 42**

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

**Article 43**

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

**Article 44**

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

**Article 45**

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

**Article 46**

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.
2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.
3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.