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English Edition

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PRESENTATION



As in recent issues of our Journal, in this tenth edition we highlight one theme, to which we dedicate five of nine total articles. This theme refers to the plight of the millions of migrants and refugees who find themselves in dire situations in many countries around the world. The article by Katharine Derderian and Liesbeth Schockaert of *Médecins sans Frontières* realistically portrays the terrible human tragedy of refugees and, from the point of view of human rights, discusses the concept of refugee, according to the criteria of the United Nations High Commissioner for Refugees (UNHCR), under whose guidance and with whose generous support we were able to organize this edition. The UNHCR criteria and the foundations of the protection system for refugees are explained in the article by Juan Carlos Murillo.

In addition to the articles mentioned above that address general problems, we published the following contributions, which focus on specific problems relating to the human rights of refugees and migrants:

International Cooperation and Internal Displacement in Colombia, by Manuela Trindade Viana, focuses on problems related to internal displacement in Colombia, a country that contains 25% of the world's internally displaced population (11.5 million).

Access to antiretroviral treatment for migrant populations in the Global South, by Joseph Amon and Katherine Todrys, of the *Human Rights Watch*, denounces the violation of laws that guarantee access to health resources for non-permanent populations of migrants and refugees.

European Migration Control on African Territory, by Pablo Ceriani Cernadas, analyses the inhuman immigration control policies adopted by European governments and EU organizations on the coast and in the waters of North African countries.

Our tenth edition is completed with the contributions by Anuj Bhuwania ("**Indian torture**" and the **Madras Torture Commission Report of 1855**), Daniela De Vito, Aisha Gill and Damien Short (**Rape Characterised as Genocide**), Christian Courtis (**Notes on the implementation by Latin American courts of the ILO Convention 169 on indigenous peoples**) and Benyam E. Mezmur (**Intercountry Adoption as a Measure of Last Resort in Africa**). Bhuwania argues that police torture in India is a legacy of colonialism, as illustrated by the "Madras Torture Commission Report of 1855". De Vito, Gill and Short discuss the theoretical consequences of defining rape as a

particular kind of genocide. Courtis presents emblematic cases of the application of the ILO 169 Convention on Indian and tribal populations in Latin America. Finally, Mezmur focuses on the problems associated with the policies for adoption of African children by families from other continents.

We hope that the articles presented in this edition will help to enrich the debate surrounding the growing number of problems associated with the displacement of vast human contingents, who were forced to leave their homes, not only due to wars, persecutions and political totalitarianism, but also due to various economic causes, whose detrimental consequences to the human rights of their victims are equally dramatic.

We would like to thank the following professors and partners for their help with the selection of articles for this edition: Carina du Toit, Carlos Ivan Pacheco Sánchez, Florian Hoffmann, Gaim Kibreab, Glenda Mezarobba, Guilherme da Cunha, Iniyana Ilango, Jeremy Sarkin, José Francisco Sieber Luz Filho, Juan Amaya Castro, Laura Pautassi, Malak Poppovic, Paula Miraglia, Rajat Khosla Renata Reis, Roberto Garretón and Upendra Baxi.

As mentioned on our website, beginning with this edition, we have adopted new rules for citations and bibliographical references in order to facilitate the reader's experience. Because this is a recent change, we count on our readers' understanding in the case of any mistakes caused by such change. In this matter, we would like to thank the following individuals who contributed to the formatting of the articles: Clara Parra, Elaini Silva, Mila Dezan, Rebecca Dumas and Thiago Amparo.

We conclude by stressing once again the importance of the guidance and support provided to us by the UNHCR for the publication of this edition, which originated as a doctrinal investigation and development of the "Mexican Action Plan for the Strengthening of International Protection of Refugees in Latin America", geared towards cooperation with academic institutions that are dedicated to the research, promotion and instruction of international law related to refugees.

In particular, we would like to thank the offices of UNHCR in Argentina and Brazil, and the Legal Regional Unit for the Americas.

The editors



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Among the books that Mr. Courtis has written and edited are: *Social rights as demandable rights* (Trotta, Madrid, 2002, coauthored by Victor Abramovich); *Social rights: instructions for usage* (Fontamara, Mexico, 2003); *The gateway of citizenship. The meaning of social rights in the social constitutional State* (del Puerto, Buenos Aires, 2006, coauthored by Victor Abramovich); *Not even a step behind. The prohibition of regression in the subject of social rights.* (del Puerto, Buenos Aires, 2006); *The application of human rights agreements in the local context. Experience of a decade* (del Puerto, Buenos Aires, 2007); *Courts and the Legal Enforcement of Economic, Social and Cultural Rights. Comparative experiences of justiciability* (International Commission of Jurists, Geneva, 2008); and *The promised world. Excerpts on social and human rights* (Fontamara, Mexico, 2009).

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ABSTRACT

This article presents some cases that are emblematic of the application of the International Labour Organisation's Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, by courts of Latin America. It discusses: a limited number of cases that cover various topics and represent the distinct countries of the region; and the regional court of human rights – the Inter-American Court of Human Rights. These cases are highlighted either according to their subject, by the innovative insight they offer, or by the relevance of their consequences. Before outlining these cases, however, some clarifications are presented which might be useful in explaining the material set forth below and the context in which the material should be situated.

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KEYWORDS

Convention 169 – ILO – Indigenous and Tribal Peoples – Courts. Latin America – International Treaties Applicatio



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NOTES ON THE IMPLEMENTATION BY LATIN AMERICAN COURTS OF THE ILO CONVENTION 169 ON INDIGENOUS PEOPLES

Christian Courtis

This paper presents some emblematic cases of the application of the International Labour Organization's (ILO) Convention 169 Concerning Indigenous and Tribal Peoples in Independent Nations by Latin American courts¹. I chose a small number of cases that cover diverse topics and represent different countries in the region, as well as the regional court of human rights – the Inter-American Court of Human Rights. It is clear that there has been considerable experience in the application of Convention 169 in Latin America, with some countries having developed important jurisprudence through a significant number of judgments in the field. Therefore, this work makes no pretense of being an exhaustive review of the material: the perspective adopted is simply to select a handful of cases, based on the novelty of interpretation offered or on the relevance of its consequences. Before outlining the cases, I make some preliminary clarifications that may be useful in explaining the material presented here, and the context in which they should be understood.

1. Some facts on the legal context of the countries of the region.

The Latin American and Caribbean region is that in which the greatest number of ratifications of Convention 169 have taken place – 14 (fourteen), at the time of this writing (May 2009)². This is no accident: many countries in the region are multilingual and multicultural, and in some cases, indigenous people constitute a majority or significant portion of the population. In addition to ratifying Convention 169, along with a series of constitutional reforms taking place at the end of the 1980s, an important number of these countries have incorporated

Notes to this text start on page 79.

provisions relating to the rights of indigenous peoples and communities into their constitutions.

It is no wonder, then, that many of these constitutional and legal changes have impacted the jurisprudence of many countries. Some common factors – applicable to different degrees in each country, but nevertheless representing a regional tendency – can help us understand this panorama.

1.1 The relationship between the processes of constitutional reform and democratic transition or consolidation

A significant number of countries in the region have experienced a transition from authoritarian regimes to the implementation of democratic institutions in the period ranging from the mid-1980s to the early 2000s (GARGARELLA, 1997, p. 971-990; SERNA DE LA GARZA, 1998; UPRIMNY; GARCÍA VILLEGAS, 2004). In many cases, the process was accompanied by substantial constitutional reforms. In other cases, although there was not exactly a transition from an authoritarian to a democratic regime, constitutional reforms accompanied important processes of political mobilization and renewal. The majority of these reforms have led to a significant number of new rights and institutional innovations, as described in the following paragraphs.

1.2 The expansion of constitutional justice

Although the idea of constitutional justice was not foreign in many of the region's jurisdictions, the fact is that, during much of the twentieth century, judicial control of constitutionality was not common in the region. Many of the constitutional reforms that took place in the last decade of the twentieth century have reinforced constitutional control through the creation of special constitutional courts or constitutional sections within superior courts of justice or supreme courts, and through the express provision of actionable rights within the constitution – such as allowing for “amparo” complaints or judicial review. This has led to a notable expansion of the use of constitutional jurisdiction, which is unprecedented in many countries in the region (BAZÁN, 2007, p. 37-61).

1.3 Ratification and the grant of privileged status to international human rights treaties.

Other innovations tested in many countries in the region have stemmed from the privileged status of international human rights treaties. During the period described, many of the region's nations have augmented the number of ratifications of international human rights treaties – a message reinforcing their acceptance of the Rule of Law and the observance of fundamental rights, as opposed to an authoritarian past characterized by massive human rights violations. The ratification of international human rights instruments can be understood as confidence in the

international human rights system, which, in the past, was the forum in which grave human rights violations could be denounced, and at the same time as a message to the international community about the State's new commitment to the rule of law and respect for human rights.

However, the ratification of a substantial number of international human rights treaties, both regional and universal, have taken place in the context of a prevalent monist tradition that helps define the relationship between international and domestic laws. This means that ratified international human rights treaties become part of domestic law, and that the rights recognized in those treaties can be added to the expanded list of fundamental rights consecrated by the region's new constitutions³.

Finally, although not uniformly, many countries in the region have conferred upon human rights treaties a privileged legal status, at least with respect to ordinary laws (CORAO, 2003). In some cases, such treaties have been given constitutional status⁴, while in other cases they are considered part of the so-called "block of constitutional law" (UPRIMNY, 2001), and in still other cases they have an intermediate status – below that of the constitution but above ordinary legislation.

1.4 Strengthening the regional human rights system

This renewed relationship between local constitutional law and international human rights law has been buttressed by the strengthening of the Inter-American System of Human Rights. Practically all of the countries in the region have ratified the American Convention on Human Rights and have accepted the contentious jurisdiction of the Inter-American Court of Human Rights.

One effect of this expansion has been, of course, a considerable increase in the activities of the organs of the system – the Inter-American Court and Commission for Human Rights – in terms of the cases received and resolved, the countries involved and the breadth of the themes considered. At the same time, the countries that make up the regional human rights system have had to internalize its decisions and the interpretive criteria defined by said system. The process is slow and complex and is far from being complete. But it has resulted in many local courts being more receptive to Inter-American jurisprudence – especially that established by the Inter-American Court of Human Rights. This can explain how courts have become gradually accustomed to invoking international human rights standards.

1.5 Recognition of new constitutional rights

A final element consists of the recognition of the rights of indigenous peoples in the constitutions of the region. Constitutional reforms in the region have been characterized by the expansion of the list of fundamental rights and substantive principles, which include the full range of known rights (civil,

political, economic, cultural, collective, minority, and environmental rights). In this context, there has also been constitutional recognition of the rights of indigenous communities – a theme that would be impossible to ignore considering the strength and degree of political mobilization of indigenous peoples and communities in the region (SIEDER, 2002; BARIÉ, 2003; FLORES JIMÉNEZ, 2004; BONILLA, 2006).

Many of the constitutional provisions that recognize the rights of indigenous peoples have been inspired by related international standards, which include, as a prime example, Convention 169 of the International Labour Organization.

2. Convention 169's influence on countries in the region

While these factors vary from country to country and do not fully explain the phenomenon being analyzed, they at least offer some elements that may be helpful in understanding the success Convention 169 has had in the region, especially in comparison with other regions of the world. Part of the Convention's influence is reflected in the aspirational character of the constitutional and legal reforms related to indigenous peoples in the region – in the sense that many of the concepts articulated therein, such as “indigenous peoples and communities,” “self-identification,” “traditional territories,” “autonomy,” “consultation,” and “uses and customs,” amongst others – are incorporated in one way or another in the constitutions and legal norms of various countries in the region (BARIÉ, 2003, p. 58-62).

However, what is important for the purposes of this study is that the influence of Convention 169 is not limited to the role of “model legislation” to be followed by local political powers. Convention 169 has been employed and invoked by indigenous peoples and communities themselves, as well as by other actors – both public institutions and civil society – that have acted in defense of the rights and interests of these communities. Additionally, this international instrument has been employed in litigation before local courts and, when necessary, before the bodies of the regional human rights system.

3. Some criteria for understanding the selection of cases presented in this paper

As mentioned above, this paper includes, in a selective manner and without any claim to exhaustivity, some judicial decisions that have applied Convention 169 of the ILO. The decisions come from both national courts and the Inter-American Court of Human Rights. I have grouped the decisions thematically to demonstrate certain lines of convergence between the courts of distinct countries in the region and the regional human rights court.

However, it is useful to put these cases in context in order to properly understand the reasons behind their selection. The different case backgrounds and the diversity of local legal systems and juridical traditions give a mixed picture.

It should be clarified that the degree to which the application of Convention 169 has been developed varies significantly amongst the region's local courts: in some countries, there are few cases and the application of Convention 169 by local courts is in its beginning stages, while in others – including Colombia and Costa Rica – the richness and variety of cases are enormous⁵. In either case, although the examples cited here are few, the reader can get an idea of the variety of existing cases if certain variables that must be taken into account are explained.

3.1 Regional Judgments/National Judgments

Convention 169 has been applied both by the local courts of various countries⁶, as well as by the bodies of the regional human rights system, namely the Inter-American Court and Commission for Human Rights.

In the former case – with some exceptions, such as in Belize – Convention 169 is a legal norm incorporated into the domestic law of the countries in question. In the latter case, in contrast, it is important to note that Inter-American bodies do not have jurisdiction in resolving controversies based on violations of Convention 169, as their jurisdiction is based on regional human rights instruments. However, the regional human rights bodies have used the ILO's Convention 169 as an interpretive norm in specifying the obligations of States established by other international agreements (such as the American Convention on Human Rights and the American Declaration of the Rights and Obligations of Man) as applied to indigenous peoples or communities and their members. Thus, for example, regional human rights bodies have interpreted the right to property ownership or the right of due process, as applied to the rights of indigenous peoples and communities – in light of those rights established by Convention 169.

Although the majority of cases discussed here consist largely of domestic jurisprudence, I have also included some extremely important cases decided by the Inter-American Court for Human Rights, not only because the Court's interpretation is noteworthy, but also because regional jurisprudence often has a subsequent effect on the local jurisprudence of countries that form part of the regional system for human rights.

3.2 Countries with a monist tradition/ Countries with a dualist tradition; normative hierarchy of the Convention

A related question is how the treaty is incorporated into domestic law and its normative hierarchy in cases where there is direct incorporation of international law. The dominant tradition in Latin America is monist – that is to say, an international treaty is incorporated into domestic law once it is ratified. However, it is important to remember that some countries in the region have a *common law* tradition, in which dualism predominates. Amongst such countries, Belize was involved in an interesting case invoking Convention 169 as an interpretive or persuasive tool, even though the country is not part of the agreement⁷.

Rather, it is a second question which derives from the relationships between international and domestic law in the monist tradition and which captures some significant differences between countries in the region that have had experiences with the judicial application of Convention 169. Here, needless to say, there are different approaches in different jurisdictions, which are in some cases reflected in the judgments discussed.

In some countries, international human rights treaties and Convention 169 have been assigned to a category similar to the constitution. These countries include Bolivia and Colombia, which have assimilated Convention 169 into the constitution by employing the notion of a “constitutional block.” According to this idea, the incorporation of international human rights treaties into domestic law requires an interpretation that blends the fundamental rights found in the constitution with the human rights included in international treaties. Both groups of rights should complement and support each other, forming a unit where, in the case of differences between the sources, a *pro homine* interpretation should be employed – that is, the source extending rights the furthest should have primacy.

The way in which Argentina’s 1994 constitutional reforms addressed the topic is distinct, but the results have been similar: a number of explicitly listed international human rights treaties have been given constitutional status, and Congress may give constitutional status to other international treaties with a qualified majority vote (Art. 75, sec. 22). However, Convention 169 does not form part of this list. The Constitution of the Bolivarian Republic of Venezuela assigns constitutional status to all international human rights treaties (Art. 23), although in practice the courts have been less inclined to directly implement treaties than in other countries. It is also an open question as to whether the ILO’s Convention 169 is a human rights treaty – a question that has not yet been discussed in these terms. The case of Costa Rica is peculiar: although the text of the Constitution assigns international treaties a level of importarantee more rights to the people⁸.

In other countries in the region that have considered the question of the normative hierarchy of human rights treaties innce higher than that of the law but lower than that of the Constitution (Art. 7), the Constitutional Tribunal of the Supreme Court has interpreted international human rights treaties at the same level of importance as the constitution or of even greater importance, in cases where the treaties gua domestic law, the tendency has been to assign them to a level lower than that of the Constitution but higher than that of ordinary legislation. This is the case in Ecuador (Art. 425⁹) and in Guatemala (Art. 46). This is also the case in Argentina for treaties not included in the *numerus clausus* list of human rights treaties with constitutional importance – a list that does not include Convention 169. In Mexico and Brazil, despite the constitutional text not being clear on this question, we can see a slow rise in the interpretation of treaties as supralegal, but still infra-constitutional, although this interpretation has not been definitively established^{10,11}.

In any case, and beyond the specific solution adopted, the trend in case law and legislation in the region is to give greater weight to international human rights treaties, and to consider them more frequently in court rulings.

3.3 Types of Litigation

Other factors that can help explain the scope of the application of Convention 169 by Latin American courts (and, in some cases, the Caribbean courts) is the wide variety of lawsuits in which it has been employed. Moreover, within this range of lawsuits, the Convention has been used by plaintiffs, and as an exception or justification by the defense, and, in some cases, it has been used in this way by State bodies.

For example, Convention 169 has been invoked in complaints of unconstitutionality, requests for protection against illegal conduct or for constitutional guardianship, in disputes between the branches of government, in political-electoral actions, in actions for annulment in contentious administrative matters, in ordinary civil actions (which discuss issues of property or eviction, for example), in criminal cases, and in cases concerning agricultural laws, amongst others. In some countries – such as Chile, Colombia, and Guatemala – qualified parties may request an opinion concerning the compatibility of the constitution with a treaty or other norm from the court assigned to handle constitutional questions: in these instances, Convention 169 has been the object of consultation with the regular or constitutional courts.

In terms of variety with respect to the parties in cases employing Convention 169, the indigenous community, its members, or their representatives invoke the Convention in a significant number of cases. In several cases, the Ombudsman (Attorney General) invokes the Convention – in cases where the law allows the state to bring cases in defense of human rights, either on behalf of specific groups or on behalf of named collective or diffuse interests. In some criminal cases, the prosecutor or public defender has invoked Convention 169. In another series of cases, the Convention is employed by public authorities – legislative or administrative – as a basis for the public policy adopted. For example, in a ruling by the Constitutional Court of Colombia, Congress invoked Convention 169 to justify a law in the face of the President's objections, noting that the matters being considered were enacted with the purpose of complying with international obligations arising from the Convention¹². In a case before the Bolivian Constitutional Court, the administrative authority charged with agrarian reform invoked Convention 169 as a defense¹³.

In short, the experience in Latin American courts shows a great wealth of possibilities for the invocation of Convention 169, which is not at all limited to cases of a constitutional nature.

3.4 Themes

If the variety of the types of lawsuits is large, the thematic variety of these cases is even greater. The areas in which Convention 169 is relevant and those in which it has been used as an interpretive tool are manifold.

However, it must be noted that a significant percentage of the cases decided by courts in the region deal with disputes related to land and the exploitation

of natural resources situated therein, and that several of these cases relate to the consultation and participation of the community in decisions related to this theme.

Another significant portion of the cases deal with the relationship between State criminal law and customary or tribal criminal law, in at least two ways: regarding the limits of the application of State criminal law once community criminal justice is exercised, and regarding the limits placed on the use of indigenous criminal law by the constitution and other human rights instruments.

Finally, there are also cases that cover a variety of other aspects: the right to education and health care for indigenous communities, respect for political autonomy and the manner in which authorities are elected, respect for cultural identity and cultural symbols, and the formation of State bodies to effectuate the obligations relating to indigenous peoples and communities laid out in the constitution and in Convention 169.

3.5 Different ways Convention 169 is used by the courts

Finally, there are also differences in the ways in which different courts in the region use Convention 169. Some of these differences are due to the distinct *status* of the Convention in domestic law, but this factor does not explain all the variations recorded in cases where it has been used. At least two other variables can be useful in capturing nuances that help to clarify the issue.

On the one hand, there is a difference between cases in which the court directly applies Convention 169, and those cases in which the Convention is used as an interpretive standard or instrument for other laws. This difference does not exactly correspond with monist or dualist traditions: although the majority of countries in the region have adopted a monist approach with respect to the relationship between international and domestic law, many courts in the region still do not directly apply international law – perhaps due to a strong legalist tradition, which stems from the culture of codification. Even in these cases, Convention 169 has been used as an interpretive tool for other laws – at times, for constitutional norms, and at other times for legal norms and other infra-constitutional norms.

Another useful distinction is the use of the interpretive norm or standard offered by Convention 169 as a main argument used to decide a question, as opposed to using it “in addition to,” that is, as a supplementary argument or simply illustrative point. In effect, although in many cases the criteria offered by Convention 169, or by the interpretation of a domestic law in light of or in harmony with Convention 169 – an “interpretation finding the two to be consistent” – constitutes the basis of the decision, in many others the Convention is cited as the decisive issue, as an argument that can reinforce or complement the decision-making criteria – that is to say, it can add some argumentative weight to a decision made on the basis of another law. In some cases, judges appear to construct an argument in two parts: the first based on domestic laws, and the second explained by the fact that the solution described on the basis of domestic law does not violate, but is consistent with, the international obligations assumed by the State.

Different sources, however, inform the gradual introduction of criteria from international law into domestic law. In either case, national courts have become more conscious of the need to take seriously the international obligations of the State, and to translate them into judicial decision-making criteria in cases of conflict.

4. Overview of Cases

I chose to group some of the illustrative cases by theme, taking into consideration matters which indicate the relevance of the ILO's Convention 169 for the claims of indigenous peoples and communities, which have been the subject of court decisions in various countries. I will review cases related to four thematic areas: a) the claims related to collective title for the ancestral lands of indigenous peoples and communities; b) the right of indigenous peoples and communities to be consulted before decisions are made that may affect their rights and interests; c) the positive obligations of the State in situations where there is an acute lack of indigenous peoples and communities; and d) applications of Convention 169 in criminal law.

4.1. Claims for Collective Title of the Ancestral Lands of Indigenous Peoples and Communities

Not surprisingly, one of the most important claims made by indigenous peoples and communities concerns the recognition of title for their ancestral lands. Land constitutes an identity trait for indigenous people, defining their way of life and world view. The land has, for indigenous peoples and communities, a religious significance, and is also the foundation of their economy, which generally fluctuates with the seasons. One unique characteristic about indigenous claims on land is the claim of collective ownership, in the name of the people or the community as the owners, and not in terms of individual property of the members of the community. In Latin America, the ancestral land of indigenous communities and people has frequently been the object of pillage and plunder by the State and by third parties. The close relationship of indigenous peoples and communities to the land has led to the recognition that their collective property ownership constitutes a condition for the survival of those peoples and communities.

Given the importance of the issue, the jurisprudence of the region has not been blind to these claims, in which the invocation of the ILO's Convention 169 has played a relevant role. The Inter-American Court for Human Rights, for example, has employed Convention 169 as the interpretive standard for property law in those cases where a claim about the ancestral territory of indigenous peoples and communities is at stake¹⁴.

In the case of *Yakye Axa*¹⁵, the Inter American Court of Human Rights confronted a claim for land title of an ancestral territory of a hunter-gatherer indigenous community, living in a situation of extreme poverty, from the Chaco forest in Paraguay. The community's ancestral land was held as private property

by third parties. In this case, it was argued that the lack of effective action by the Paraguayan government to recognize the legal character of the indigenous community, and grant it title to its ancestral lands, led the community to wait for a response to pending claims in an inhospitable environment, in extremely precarious conditions. The lack of access to health care and a means of survival caused the death of many members of the community. Given the conditions of the settlement, children of the community were deprived of food, health care, clothing, and adequate education. The State was charged with a violation of the right to life, to private property, due process and legal protection.

In the case, the Inter-American Court considered that, in cases where issues of the right to property – and the right to life, due process, and legal protection – are applied to indigenous communities, the Court must refer to Convention 169¹⁶. In this sense, the court notes that “the close relationship of indigenous peoples with the land must be acknowledged and understood as the fundamental basis for their culture, spiritual life, wholeness, economic survival, and preservation and transmission to future generations”¹⁷. In particular, the Court states that

[t]he above relates to the provision set forth in Article 13 of ILO Convention No. 169, that the States must respect “the special importance of cultures and spiritual values of the peoples with respect to their relationship with lands or territories or both, as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship”¹⁸.

In this case, the Court decides that the time that elapsed since the community first made its claims, without the State granting effective title to their ancestral lands, constitutes a violation of the community’s right to property.

Furthermore, the Inter-American Court consults Convention 169 to determine the extent of the measures the State must adopt to reinstate community ownership over its ancestral lands, given the situation of occupation of these lands by private property owners. In this regard, the Court invokes Article 16.4 of Convention 169, which states that when the return of the people to their ancestral lands is not possible,

[...] these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

The Court added that the payment of just compensation or both is not subject to the pure discretion of the State, but must be – in conformity with an integrated interpretation of Convention 169 with the American Convention – decided in concert with the affected peoples, in accordance with their own consultation processes, values, customs, and traditional laws¹⁹.

The Inter-American Court has repeated this doctrine in the **Sawhoyamaxa**²⁰ and **Saramaka**²¹ cases.

Some local courts have had to resolve similar issues. One case resolved by the Argentine courts provides a good example of interpreting the common law – in this case, the notion of property from the Civil Code – in light of the standards established by ILO's Convention 169. The case is related to a community from **Quera y Aguas Calientes**²², in the Jujuy province of northern Argentina, in which the Civil and Commercial Court decided a case about usurpation (adverse possession), initiated by an indigenous community. The petition concerned a claim for collective or community ownership of the land in the name of the community as the property holder – and not in the name of its individual members.

The complaint grants the rights of ownership to the community itself, referring to the norms of the Argentine Constitution and the concept of indigenous peoples stemming from Article 1 of ILO's Convention 169. It also talks about the special cultural and spiritual relationship that the indigenous have with the land and with the territories they collectively occupy, recognized by the cited Convention, which Argentina has ratified.

For its part, the provincial State asks that the complaint be rejected, citing the fact that the community only acquired legal personality juridical in 1996, and therefore could not have complied with the twenty-year time period necessary for the application of adverse possession.

The court finds that the recognition of the legal personality is merely an act that formalizes a pre-existing community: when they asked for legal personality, the people had to prove that they possessed a common language, religion, conservation of customs, group identification, and willingness for communal land ownership, in addition to holding free election of representatives, amongst other requirements. The granting of legal personality is merely declarative, and not constitutive of the legal personality of the community. The Court states that, after the constitutional reforms of 1994;

the constitutional norm is designed to allow for the granting of legal personality to operationalize an existing right, that is to say the right is not established with the grant, but the grant signals that the right is preexisting and merely makes it effective, guaranteeing, amongst other rights, the right of collective property ownership. In other words, it recognizes that the aboriginal communities pre-date the national government [...] and they adopt, as a precautionary measure, the ownership of lands "that they traditionally occupy," with which they are guaranteed the right to communal ownership of lands which has been exercised historically and not just since such communities became juridical persons.

What is interesting is that a civil and commercial court, accustomed to deciding cases of individual and corporate ownership, has to directly apply constitutional norms as well as Convention 169 to adjust the institutions of private law to a notion of collective ownership that pre-exists its legal recognition (i.e., the indigenous

community) and the notion of collective or community land ownership in general. To do this, the court must interpret the twenty-year requirement for adverse possession – established in the Civil Code - in accordance with constitutional and international norms when it is applied to the indigenous community. As such, the court states that:

the aboriginal community that has recently received its legal personality will not be treated as a universal or particular successor in terms of private law; rather, we have to take into account that our positive law has incorporated a new concept of ownership, specifically communal property, in which possession is not exercised by a specific physical person, but instead by the group that forms this community.

Based on testimony and a visit to the community, the court held that the intergenerational “indigenous community” not only complied with the requirement of peaceful and uninterrupted possession for twenty years, but also had been in possession of its lands since pre-Hispanic times. Therefore, the court tested the pacific and uninterrupted possession by the community, accepted its demand, and granted collective title to the parcel of land claimed.

4.2. The right of peoples and communities to be consulted before decisions are made that may affect their rights and interests

One of the most important common themes in the area of indigenous rights in the region is linked to the right of the peoples and communities to be adequately consulted before the public authorities make decisions that may affect them. These measures include, for example, those involving the exploitation of natural resources found in their territory, the provision of educational services in indigenous communities, and the design of development plans for indigenous peoples and communities. It is a procedural requirement that must be complied with before a decision is made, and a lack of compliance renders invalid decisions made without consultation. The international instrument where this right is most clearly expressed is Convention 169 of the ILO²³.

The Inter-American Court of Human Rights has established case law on the issue²⁴. I will outline here, however, various cases decided by domestic courts.

The Constitutional Court of Colombia has clearly established the need for consultation with indigenous communities, fixing the interpretive basis in the requirement of “appropriate consultation,” and invalidating administrative and legislative acts adopted without fully complying with this requirement. Two important cases illustrate its position.

In ruling SU-039/97²⁵, a true *leading case* on the continent on this question, the Constitutional Court had to consider a petition for protection (equivalent to an *amparo* in Colombia) presented by the Ombudsman, who was representing a group of members of the U’wa indigenous community, against the Ministry of the Environment and Western Society of Colombia, Inc., arguing that the defendants

violated the rights of the community by not effectuating a complete and serious consultation before granting a license for oil exploration within their territory. According to the complaint, defendants only had meetings with a few leaders from the community, which did not satisfy the requirement of adequate consultation. The Ombudsman requested the suspension of concession of the environmental license, and the adoption of necessary measures to carry out the procedure of prior consultation with and for the protection of the indigenous community. He also asked, in a separate complaint, for both the nullification of the administrative act that granted the environmental license and the provisional suspension thereof. Both legal actions were based, furthermore, on the violation of the indigenous people's rights to territory, self-determination, language, and ethnic culture – since the exploitation of non-renewable natural resources is determinative of the preservation of the cultural, social and economic integrity of the indigenous community and the participation of its representatives in those decisions, as prescribed by Articles 6 and 15 of Convention 169.

In its decision, the Constitutional Court emphasized not only that individual members of the indigenous community are the subjects of rights, but also that the Constitution recognizes that these rights apply to the community as a group. Later, the Court states that the interests in the exploitation of natural resources in a manner that guarantees sustainable development must be harmonized with the rights of communities living in the exploited areas to conserve their cultural, ethnic, economic, and social identity. The form of harmonization and balancing of these interests is the creation of a participation mechanism for the communities concerning the decisions that affect them. The Court states that this is a fundamental right, as it is this participation mechanism that ensures the survival of the community as a social group, affirming that Convention 169 forms part of a “constitutional block” – which requires an integrated interpretation of the fundamental rights recognized in the political constitution and the other normative instruments that form this block. As a consequence, the harmonized interpretation of the constitution and Convention 169 requires the right of consultation with the indigenous peoples when exploiting natural resources. The consultation must seek to give the community full knowledge of the project and its possible impact on their social, cultural, economic, and political development, as well as an assessment of the project's advantages and disadvantages. The affected communities must be heard and, should they not reach an agreement, administrative action must not be authoritarian or arbitrary, but objective, reasonable, and proportionate. In any event they must find mechanisms to mitigate, restore, or correct the effects of any detrimental administrative measures affecting the community or its members.

The Court found that the consultation process with the U'wa concerning the oil exploration project was not carried out in a full and appropriate manner, as the meetings were attended by various community members, but not with their leaders. The defendants also did not hold a meeting to review the effects of the project – which was never planned because the license had already been issued.

Therefore, because the defendants did not effectuate the consultation process within established parameters, and in anticipation of the possible damage the project could cause for the indigenous community, the Court found that the U'wa community's rights of participation, of ethnic, cultural, social and economic integrity, and of due process had been violated. The ruling granted the temporary injunction, suspended the environmental license and ordered due consultation.

This doctrine has been reiterated and applied in subsequent decisions²⁶.

In a recent case of the utmost institutional importance, the Colombian Constitutional Court brought this doctrine one step further by *declaring a law unconstitutional* for lack of adequate consultation with indigenous and Afro-Colombian communities potentially affected by it. In effect, with decision C-030/08²⁷, the Constitutional Court considered the constitutionality of the so-called General Forest Act (Law 1021 of 2006), in light of its having omitted prior consultation established by article 6 of the ILO for affected indigenous and Afro-Colombian communities.

The Constitutional Court reinforced the jurisprudential line drawn in recognition of ethnic and cultural diversity as a constitutional and fundamental principle of Colombian nationality. It emphasized that this special protection is translated into a duty to create a consultation process for indigenous and Afro-Colombian communities, turning the adoption and implementation of decisions that affect them, a duty that arises from various constitutional norms and from Convention 169 of the ILO.

However, given that the case questioned the sanction of a law without prior consultation, the Court added new criteria to its old jurisprudence. As such, the Court states that, when it comes to legislation, the duty of consultation does not arise in any case that may affect indigenous communities, but only in those that directly affect them. The Court clarified, however, that a law may be considered as having a direct effect when dealing with themes covered in Convention 169, as well as when, due to its general nature, such law has a direct impact on indigenous and tribal communities. The court also considered issues related to the manner and timing of consultation in cases of legislation, as well as the possible legal consequences of non-compliance.

The Court considered that, although there were legal provisions which preserved the autonomy of indigenous and Afro-Colombian communities for the use and enjoyment of forests in their territories, the law also establishes general policies, definitions, guidelines, and criteria that may, in a general manner, affect areas in which indigenous and Afro-Colombian communities are settled, with possible repercussions for their livelihoods and the close relationship such communities maintain with the forest. A lack of consultation, the Court determined, renders a law unconstitutional.

The Court also set guidelines with which the law must comply to be considered valid: to inform communities about the legislation; to illustrate the scope of legislation and how such legislation could affect them, and to give them effective opportunities to respond to such legislation.

The Constitutional Section of the Costa Rican Supreme Court has followed a similar path in declaring unconstitutional the adjudication of a concession for hydrocarbon exploration and exploitation to a private company by the Executive branch for a failure to engage in adequate prior consultation with the affected indigenous community. In vote 8019 of 2000, the Court decided on a related petition for relief, initiated by development associations in indigenous communities and other litigants, and founded, amongst other laws, in a violation of Convention 169²⁸.

The court decided that the authorities failed to comply with the requirement of prior consultation with indigenous communities, as established in article 15.2 of ILO Convention 169. The court interpreted the indigenous communities' right of prior consultation as a necessary requirement for the respect and participation of minorities in a democracy. The Constitutional Section offered as proof the Minister's failure to order consultation, which was compulsory, and the failure to publish details concerning the bidding process in the press. Consequentially, the court approved the petition for relief and nullified the administrative adjudication.

A final example comes from the Constitutional Court of Ecuador. This court also considered, in the case of *Arcos v. Dirección Regional de Minería*²⁹, a petition for relief – filed by the Ombudsman, on behalf of the Chachis indigenous community and the Afro-descendent community from the Esmeraldas province – concerning a concession that had been granted by the government to a private mining company to “prospect, explore, exploit, benefit, smelt, refine, and market minerals” existing in the territory of these communities. Amongst other grievances, the petition was based on the non-compliance with the requirement of prior consultation with affected communities, invoking article 15 of the ILO's Convention 169.

The petition claims that the concession and the commencement of mining activities caused irreparable harm to natural resources and the health and life of families in communities residing in the territory, in addition to violating the collective rights of the black and indigenous communities by ignoring the requirements of prior consultation with the communities and the obtainment of their approval for an environmental impact assessment.

The Constitutional Court upheld the decision of the lower court and ordered the suspension of the mining license in question, citing the proof that said mining concession would affect the environment where the Chachis and black populations resided and would alter their way of life. The court stressed that both the Constitution and ILO Convention 169 require prior consultation

to assess the effects of exploitation on the lives of the people, determine if their interests would be prejudiced, and to what extent, before undertaking or permitting any prospecting or exploitation of resources existing on their land. Hence, the act of prior consult was imperative, and its omission rendered the act illegal.

It is also interesting to note that one of the defenses presented by the State was the

lack of a statutory framework concerning prior consultation. The Court rejected this argument, sustaining that the State could not claim ignorance of the right of indigenous peoples and communities to be consulted merely due to the lack of a regulatory framework.

4.3. The positive obligations of the State in situations of extreme need amongst indigenous peoples and communities.

Another area in which Latin American courts have produced very interesting judgments is that concerning the positive obligations of the State in those cases where indigenous communities face situations of extreme shortage. An important aspect of these cases refers to compliance with positive obligations relating to economic, social, and cultural rights of indigenous peoples and communities – and, more specifically, compliance with enumerated core minimum obligations that are essential to these rights. Many of these cases have to do with situations where, due to the lack of compliance with essential rights such as the right to food, health, and life of the community members, in some cases the survival of the community itself is at risk.

Concerning this problem, Convention 169 offers a rich approach that articulates various facets that emerge from a complex understanding of the principles of equality and the prohibition against discrimination. On the one hand, it obliges the State to adopt measures to promote the full realization of economic, social, and cultural rights of indigenous communities without discrimination – that is to say, it emphasizes the State's obligation to not exclude the indigenous community from its obligations with respect to economic, social, and cultural rights (article 2.2 a and b, and article 3). Moreover, the Convention establishes the specific obligation to adopt measures aimed at eliminating socioeconomic differences between members of indigenous communities and other members of the national community (Article 2.2, c). On the other hand, Convention 169 requires that the measures adopted by the State respect the identity, integrity, and specific ways of life of the indigenous peoples and communities, even though these special measures may undermine the rights generally accorded to the rest of the population (articles 2.2, b 3.2 and 4). Convention 169 also requires the participation of the indigenous peoples and communities in determining their own development (articles 2.1 and 4.2).

In this sense, the Inter-American Court of Human Rights has set new standards, developing an extensive interpretation of the right to life. Two of the cases already mentioned, *Yakye Axa v. Paraguay* and *Sawhoyamxa v. Paraguay*, address the scope of positive obligations arising from the duty of the State to guarantee that right³⁰. In both cases, the lack of access for both communities to their ancestral land and the resulting impossibility of satisfying their basic needs through their own traditional means resulted in a situation of extreme need, reflected in a serious demonstration of malnutrition, a high incidence of preventable illnesses and deaths caused by both of these.

The court interprets the right to life in the broadest sense, deriving its

interpretation from it the State obligation to ensure conditions for a dignified life. In the case of *Yakye Axa*, the court synthesizes its doctrine in the following way:

This Court has asserted that the right to life is crucial in the American Convention, for which reason realization of the other rights depends on protection of this one. When the right to life is not respected, all the other rights disappear, because the person entitled to them ceases to exist. Due to the basic nature of this right, approaches that restrict the right to life are not admissible. Essentially, this right includes not only the right of every human being to be free from arbitrary deprivation of life, but also the right to be free of conditions that impede or obstruct access to a decent existence.

One of the obligations that the State must inescapably undertake as guarantor, to protect and ensure the right to life, is that of generating minimum living conditions that are compatible with the dignity of the human being and with not creating conditions that hinder or impede it. In this regard, the State has the duty to take positive, concrete measures geared toward fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk and whose care becomes a high priority³¹.

The Court has identified, amongst these obligations, duties related to access to healthcare, education, potable water and food, and has put emphasis on the need to take into consideration, when adopting measures to comply with said obligations, the identity as well as the vulnerability of indigenous peoples and communities, in line with ILO Convention 169 – considered by the court to be part of the international *corpus juris* with respect to the rights of indigenous people. Accordingly, the court has held that:

In the instant case, the Court must establish whether the State generated conditions worsened the difficulties of access to a decent life for the members of the Yakye Axa Community and whether, in that context, it took appropriate positive measures to fulfill its obligation, taking into account the especially vulnerable situation in which the community members were placed, their different manner of life (different worldview systems than those of Western culture, including their close relationship with the land) and life aspirations, both individual and collective, existing international corpus juris regarding the special protections required by the members of the indigenous communities; the provisions set forth in Article 4 of the Convention; the general duty to respect rights, as embodied in Article 1(1); the duty of progressive development set forth in Article 26 of that same Convention; and Articles 10 (Right to Health), 11 (Right to a Healthy Environment), 12 (Right to Food), 13 (Right to Education) and 14 (Right to the Benefits of Culture) of the Additional Protocol to the American Convention, regarding economic, social, and cultural rights, and the pertinent provisions ILO Convention 169³².

In both cases, the Inter-American Court decided that the State failed to comply with these positive obligations, and it condemned the State for violations of the right to life. Amongst the remedies, the Court ordered the provision of essential services to cover the basic needs of the affected indigenous communities³³.

Faced with similar facts, the Supreme Court of Argentina has responded vigorously to a petition presented by the Ombudsman against the national government and the Chaco province, denouncing the situation of extreme misery suffered by members of the Toba ethnicity, inhabitants of the province³⁴. The petition demanded compliance by the State with its obligation to adopt positive measures in relation to the situation of the indigenous communities as well as, in accordance with the Argentine legislation and Constitution, with ILO Convention 169.

The complaint states that the indigenous population finds itself in a grave socioeconomic situation, and consequently the vast majority of the population suffers from endemic diseases that are the result of extreme poverty and lack of adequate food, medical attention, and dignified housing. It denounces the fact that, in the month before the complaint was presented to the court, the community registered 11 deaths.

The Argentine court considered the statements of the Ombudsman as credible, and placed an injunction on the state to:

- a) inform the court, concerning the protective measures taken on behalf of the indigenous community residing in the region, of: 1) the communities that populate these territories and the quantity of inhabitants integrated therein; 2) the budget dedicated toward indigenous matters, describing the end use of legally mandated resource streams; 3) the implementation of health, food, and well-being programs; 4) the implementation of programs for the provision of potable water, fumigation and disinfection; 5) the implementation of education plans; and 6) the implementation of housing programs;
- b) appear at a public hearing before the Supreme Court to present and discuss the information requested; and
- c) as a precautionary measure, provide potable water and food to the indigenous community residing in the affected region, as well as adequate modes of transportation and communication at each one of the health posts.

The Colombian Constitutional Court has also had the opportunity to rule on this issue. In decision T-704/06, the court had to consider a petition for protection, which was initiated by an association of indigenous chiefs representing a community living in extreme poverty, against municipal and national authorities³⁵. The community denounced an omission on the part of the authorities in effectuating the surrender of budget allocations meant for the community and their associates during a period of four years. According to the petition, the municipal authority in Uribe did not deliver to the corresponding parties, and did not include any recognition of a prior debit in the administrative agreement needed to formalize payment to the parties. The petition also names the federal government for failure to monitor the issuance of funds. The representatives of the community allege violations of the rights of human dignity, participation, autonomy of the indigenous communities, recognition of cultural diversity,

to not be discriminated against for cultural reasons, to health, education, the recognition of legal personality and to the right to petition the authorities, in accordance with constitutional norms and international human rights treaties, including ILO Convention 169.

The Court recalls the constitutional and international obligations assumed by the Colombian State with respect to the subsistence and cultural identity of indigenous peoples, making an important reference to ILO Convention 169. The Court states that the State is obligated to undertake positive actions to ensure that indigenous communities are granted the full enjoyment of these rights, emphasizing the close relationship between the enjoyment of economic, social, and cultural rights, the right of subsistence, and the right to cultural identity. This translates into an obligation to support the indigenous communities, especially those that are the least developed, with the resources necessary to satisfy the abovementioned rights. The Court also states that despite the existence of decentralized regimes for the separation of powers within the government, the guiding principles of coordination, subsidiarity, concurrence and solidarity still apply – meaning that with these, all involved local entities have the responsibility to ensure that resources effectively reach indigenous communities.

In this case, the Court proved that, although the resources had been handed over to the municipality, the municipality had neither given them to the community nor conserved them. However, the court also finds the departmental and national organs responsible for violations of the rights of the indigenous community, for failure to effectively control the dispersal of funds meant for the communities. The Court also stated that the State had an obligation to train the community so that it could adequately monitor the dispersal of funds – an obligation with which it also failed to comply. In conclusion, the Court declared that the rights of respect for human dignity, health, education, participation, and the autonomy of the indigenous communities, as well as the right to not be discriminated against for cultural reasons, had been violated. The Court has made available, as a form of reparation, the transfer of funds that are due to the indigenous community but were never dispersed, dividing the financial burden amongst the organs found responsible. The Court also ordered the municipality to sign the administrative agreement needed to transfer the funds.

For its part, the Constitutional Section of the Supreme Court of Costa Rica handed down a sentence in favor of an indigenous community following a petition for relief filed by the Development Association of the Indigenous Reserve of Guaymi de Osa, which denounced an omission by the administrative authorities in providing necessary assistance to repair a bridge that had been washed away by heavy rains in the area³⁶. The population on the Indigenous Reserve of Guaymi was incommunicado for several days, forcing inhabitants to cross the river swimming or on horseback. The authorities ignored inhabitants' requests for assistance, providing the excuse that they had not renewed the position of work supervisor, which was necessary to complete the requested repair. The Association alleged that the authorities had violated, amongst other laws, article 6 of ILO Convention 169.

The Constitutional Section accepted the arguments of the complaint, and found that the administrative organ had not taken the necessary steps to address the emergency situation and to guarantee the community's access to health and education centers, amongst others. The Court employed Convention 169 to emphasize the positive obligations the State has in terms of the economic, social, and cultural rights of the indigenous community. Accordingly, the Court granted relief and ordered the appropriate measures to restore the bridge over the Rincon River without delay.

4.4. Applications of Convention 169 in Relation to Criminal Law

Convention 169 also includes aspects related to the application of criminal law, which has been an additional object of consideration before courts in various countries in Latin America.

Schematically, it can be noted that Convention 169 requires, on the one hand, respect for the justice systems of indigenous peoples and communities, limited by the observance of fundamental rights established by the constitution and internationally recognized human rights (article 9.1). On the other hand, in those cases where an indigenous person is subject to the State's criminal justice system, Convention 169 imposes some specific guarantees, like the right to an interpreter (article 12), the preference for non-custodial sentences whenever possible (article 10.2) and the duty of the judicial authorities to take into account the customs and cultural characteristics of indigenous people in criminal matters (articles 9.2 and 10.1).

Several examples from the Guatemalan justice system illustrate how Convention 169 is applied in this area.

Respect for the judicial decisions of the indigenous community has resulted in the dismissal of cases from the State criminal justice system in cases where an issue has been resolved by community authorities applying the principle of *ne bis in idem*. This was the thesis sustained by the Lower Criminal Court of Drug Activity and Crimes Against the Environment in Totonicapan, in a case where the Public Ministry initiated a criminal investigation for aggravated robbery against three indigenous people, when the act in question had already been adjudicated and a sanction applied to those responsible by the indigenous authorities. The judge stated that recognition of the legal validity of the sanction applied by the community rendered impossible the application of new criminal sanctions to those responsible and ordered the case dismissed, citing ILO Convention 169³⁷.

Consideration for the customs and culture of the indigenous people has also led judges to uphold the inappropriate criminal nature of certain kinds of conduct, and therefore to dismiss charges or acquit the accused of such charges. One example occurred before a justice of the peace in the municipality of San Luis, in the department of Peten, in northern Guatemala. This example concerns a criminal case initiated against a member of the indigenous community after agents of the National Police reported such community member. The accused charged

with “trafficking national treasures.” According to the police, the accused traded objects of archeological value, transporting them from one community to another.

The judge dismissed the criminal case, relying on evidence that the accused was a Mayan priest. The judge also found credibility in the fact that the accused transported the objects of historical and cultural value for use in Mayan ceremonies and rituals, not with the intention of selling or otherwise commercializing them. The decision was based on constitutional norms and on ILO Convention 169³⁸. According to the decision:

Subparagraph (a) of Article 5 [of Convention 169] establishes: “The social, cultural, religious and spiritual values and practices of these people shall be recognized and protected, and the nature of the problems which face them both as groups and as individuals shall be duly considered.” Subparagraph (b) of the same Article of the same Convention establishes that the integrity of the values, practices, and institutions of these peoples must be respected. Consequently, numeral 1 of Article 8 of the international instrument mentioned above, establishes: “In applying national laws and regulations to the people in question, due regard shall be given to their customs or customary laws.” Numeral 2 of the same article establishes: “These peoples shall have the right to retain their own customs and institutions, where such are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. Procedures shall be established, whenever necessary, to resolve conflicts that may arise in the application of this principle.” What this implies for state institutions, including the courts, is that as a fundamental principle, they must respect the institutions and customs of indigenous people. Taking into account what is established in numeral 1 of Article 9 of ILO Convention 169 states: “To the extent compatible with the national legal system and internationally recognized human rights, the methods customarily practiced by the peoples concerned to deal with offences committed by their own community members shall be respected.” If within customary law there is an individual or community authority, the institutions created according to state law, including the judiciary, may not reproach or consider criminal any activity that is in practice or observance of a custom, that is to say, an activity of an indigenous community institution; on the contrary, the [S]tate must respect and distinguish the institutions that function in parallel within indigenous law, whenever government institutions, and especially the judiciary are called upon by constitutional law to impart justice, must make a clear distinction between the law and justice, considering that our indigenous law, which enjoys international recognition, also has its own institutions, in which case the law must not be applied, but instead prompt and comprehensive justice; this interpretation conforms with numeral 2 of Article 9 of the same international instrument cited, which establishes: “The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

In the same vein, the Appellate Court of Guatemala, in considering a petition for relief, held that the imposition of the rule obliging indigenous women deprived of their liberty to wear uniforms in prison, and the corresponding prohibition of their

use of traditional dress, violate the obligation to respect the customs and culture of indigenous peoples, affecting the right to cultural identity³⁹. The case was initiated by the Ombudsman for Human Rights, with a basis in several sections of ILO Convention 169. The Court sustained that prohibition of the use of traditional dress constitutes a typical case of discrimination against indigenous groups and especially against indigenous women. The Court emphasized the incompatibility of the resolution with the State's obligation to recognize, respect, and promote the culture and traditions of indigenous peoples, amongst which is the use of traditional dress:

To force male or female Mayan prisoners to wear a uniform, as in the present case, constitutes flagrant discrimination and a violation of article 66 of the Political Constitution of the Republic, which recognizes that Guatemala is formed by diverse ethnic groups, including indigenous groups of Mayan descent.

The State recognizes, respects, and promotes indigenous groups' ways of life, customs, traditions, forms of social organization, use of traditional dress by men and women and use of dialects; on the other hand, it cannot accept a law, which is completely arbitrary and without legal basis or justification, that attempts to force members of Mayan-descendant indigenous groups to wear uniforms, in an act that clearly constitutes discrimination against these citizens, notwithstanding the fact they are subject to the laws of the courts.

Consequently, the Court reversed the administrative order and restored the right to use traditional dress to affected prisoners.

The Constitutional Court of Bolivia has also considered questions related to the application of criminal sanctions in the community. In Constitutional Decision 295/03, the court had to consider a petition for constitutional protection for a married couple who were members of an indigenous community upon whom the community had imposed – but not yet executed – the sanction of expulsion and threats to cut off energy and water services⁴⁰. The impugned alleged that the sanction infringed on their “rights to work, to enter, remain, and move freely throughout the national territory, the right to have private property and to receive just remuneration for work.”

After holding a hearing and completing an anthropological survey, the Constitutional Court found that the sanction imposed by the community was in response to non-compliance, on the part of the impugned, with community laws – like the fixing of a common price for service, the payment of fees and fines, and the obligation to do communal work.

The Court noted that the Bolivian Constitution recognizes the right of indigenous peoples and communities to maintain their traditional laws and exercise community justice in cases of violations of these laws. The Court recalls, however, that the application of community laws and sanctions is limited by the Constitution, also citing Article 8 of ILO Convention 169⁴¹. In this case, the Court accepted the petition and ordered the community to allow the impugned parties to stay in the community, under the condition that they adjust to the community laws. It also

ordered the community authorities to inform the Court, within the following six months, “whether the appellants had adapted their lifestyle to the customs of the Community.”

The decision seeks to balance both the interests of the community in preserving its communal order and the interests of the impugned in staying in the community. By implementing a conciliatory settlement of claims, the court agreed to revoke the pending punishment, but only if the appellants adjusted to the community’s laws – recognizing, in this way, the legitimacy of the community authorities’ decision regarding breaches committed by the impugned parties.

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NOTES

1. On Convention 169 and on the rights of indigenous peoples in international law generally, see Anaya (2005).
2. May 2009. Ratifying States are Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Mexico, Paraguay, Peru and Venezuela.
3. On the implementation of human rights treaties by local judges, see generally Abregú and Courtis (1997); Abramovich, Bovino and Courtis (2007). Specifically, on the application of ILO conventions locally, see Gianibelli (2007, p. 355-388) and Goldin (2007, p. 315-354). See also Thomas, Oelz and Beaudonnet (2004, p. 249-285).
4. In the case of Argentina, for a list of human rights treaties including Article 75, paragraph 22 of the Constitution, which may be extended if a human rights treaty is adopted with a qualified majority. It is also the case of Brazil, which gives human rights treaties adopted by a qualified majority procedure the value of a constitutional reform (Federal Constitution, Article 5, § 3).
5. In Colombia, for example, the Constitutional Court has decided more than forty cases in which the Convention is invoked 169. See, for example, Botero Marino (2003, p. 45-87).
6. Among the countries of the region in which there have been judicial applications of Convention 169 are Argentina, Belize, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Peru and Venezuela.
7. BELIZE. Supreme Court. Aurelio Cal on his own behalf and on the behalf of the Maya Village of Santa Cruz and others v. the Attorney General of Belize and others, consolidated claims, claims 171 and 172 of 2007. Decision. 18 Oct. 2007, par. 130.
8. COSTA RICA. Supreme Court. Constitutional Chamber. Decisions 1992-3435 and 1993-5759.
9. Still, article 417 of the 2008 Constitution of Ecuador sets forth that, "[i]n the case of the agreements and other international human rights instruments, the principles of no restriction on rights, direct applicability and open-endedness, as set forth in the Constitution, shall be applied to human beings" – a solution that addresses the "constitutionality block."
10. MEXICO. Supreme Court of the Nation. Theses P. LXXVII/1999, *Semanario Judicial de la Federación*, t. X, Nov. 1999, p. 46; Thesis P. VIII/2007. Apr. 2007, *Semanario Judicial de la Federación*, t. XXV, Apr. 2007, p. 6.
11. As I said earlier, Brazil's human rights treaty was approved through a special procedure, and a qualified majority have constitutional status, but the problem of legal hierarchy of human rights treaties not approved as such remains, i.e., practically most human rights treaties that were ratified before the adoption of the constitutional reform establishing the special procedure with a qualified majority.
12. See COLOMBIA. Constitutional Court. Decision C-088/01. Jan. 31, 2001. [Presiding Judge SÁCHICA Martha Victoria Mendez].
13. See BOLIVIA. Constitutional Court. Constitutional Case 106/2003. File 2003 to 07,132-14-RDN. Decision. Nov. 10, 2003.
14. The Inter-American Court began its case law on the subject with the *Awas Tingni* case. Such case, considered for the first time that the right to property established in Article 21 of the American Convention on Human Rights, whose text is similar to Article 1 of Protocol 1 to the European Convention on Human Rights, must be interpreted, when concerning indigenous peoples and communities, as a right to collective or communal ownership of land. See INTER-AMERICAN COURT OF HUMAN RIGHTS. *Mayagna (Sumo) Awas Tingni v. Nicaragua*. Ruling. 31 Aug. 2001, par. 148-149. In the cases discussed here, the Inter-American Court extends its foundations, making use of Convention 169.
15. INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Decision. June 17, 2005.
16. INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Decision. June 17, 2005, par. 127 y 130.
17. INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Decision. June 17, 2005, par. 131.
18. INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Decision. June 17, 2005, par. 136.
19. INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Decision. June 17, 2005, par. 150 y 151.
20. See INTER-AMERICAN COURT OF HUMAN RIGHTS. *Sawhoyamaya Indian Community v. Paraguay*. Decision of March 29, 2006, par. 117-119 and 150-151.
21. See INTER-AMERICAN COURT OF HUMAN RIGHTS. *Saramaka People v. Suriname*. Decision. 28 Nov. 2007, par. 93-94 and 131.
22. See ARGENTINA. Civil and Commercial Chamber of Jujuy. First room. *Aboriginal community of Quera and Aguas Calientes - Cochinoca People v. Jujuy Province*, decision of September 14, 2001.
23. See Convention 169, Article 6:1(a): "[I]n applying the provisions of this Convention,

governments should] 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." See also articles 7 and 15 of the Convention.

24. See, e.g., INTER-AMERICAN COURT OF HUMAN RIGHTS. *Saramaka People v. Suriname*. Decision. 28 Nov. 2007, paras. 133-137.

25. COLOMBIA. Constitutional Court. Decision SU-039/97. Feb. 3, 1997. [Presiding Judge: Antonio Barrera Carbonell].

26. See, for example, among others, COLOMBIA. Decisions T-652/98, Nov. 10, 1998; T-606/01, Jun. 7, 2001; C-418/02, May 28, 2002a; C-891/02, Oct. 22, 2002b; and T-955/03, Oct. 17, 2003.

27. COLOMBIA. Constitutional Court. Decision C-030/08. Jan. 23, 2008. [Presiding Judge: Rodrigo Escobar Gil].

28. COSTA RICA. Supreme Court. Constitutional Chamber. Vote 2000-08019. Case 00 to 000,543-0007-CO. Decision. Sept. 8, 2000.

29. ECUADOR. Constitutional Court. No. 170-2002-RA: Claudio Arcos v. Mueckay Regional Bureau of Mines of Pichincha: Regional Director. Decision. Aug. 13, 2002.

30. INTER-AMERICAN COURT OF HUMAN RIGHTS. *Yakye Axa Indigenous Community v. Paraguay*. Decision. June 17, 2005, paras. 161-169, 172 and 175, and *Sawhoyamaya Indian Community v. Paraguay*. Decision of March 29, 2006, paras. 152-178.

31. INTER-AMERICAN COURT OF HUMAN RIGHTS. *Yakye Axa Indigenous Community v. Paraguay*. Decision. June 17, 2005, paras. 161 and 162.

32. INTER-AMERICAN COURT OF HUMAN RIGHTS. *Yakye Axa Indigenous Community v. Paraguay*. Decision. June 17, 2005, para. 163.

33. INTER-AMERICAN COURT OF HUMAN RIGHTS. *Yakye Axa Indigenous Community*

v. Paraguay. Decision. June 17, 2005, paras. 205, 220 and 221; and *Sawhoyamaya Indian Community v. Paraguay*. Judgment of March 29, 2006, paras. 224, 229, 230 and 232.

34. ARGENTINA. Supreme Court of the Nation. Ombudsman's Office c / National State and other (Chaco Province) s/ investigative process. Provisional Measure: Decision. Sept. 18, 2007.

35. COLOMBIA, Constitutional Court. Case T-704/06. Aug. 22, 2006. [Presiding Judge: Humberto Antonio Sierra Porto].

36. COSTA RICA. Supreme Court. Constitutional Chamber. Vote 2003-08990. Case 03 to 007,279-0007-CO. Decision. Aug. 26, 2003.

37. GUATEMALA. District Court. Criminal, Drug Trafficking and Environmental Offenses Tonicapán Department. Case Of E.312.2003. 6th. Decision. June 25, 2003a.

38. GUATEMALA. Justice of the Peace Community of San Luis Municipality, Department of Peten. Trial No. 517-2003 Of. I. Decision. Nov. 18, 2003c.

39. GUATEMALA. Court of Appeals constituted for the Court of Relief. Third Chamber. Amparo No. 46-2003 Of. 1. Decision. Oct. 30, 2003b.

40. BOLIVIA. Constitutional Court. Constitutional Case 0295/2003-R. Decision 2002-04940-10-RAC. Decision. Mar. 11, 2003.

41. See ILO Convention 169, 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."

RESUMO

O artigo apresenta alguns casos emblemáticos da aplicação da Convenção 169 da Organização Internacional do Trabalho sobre Povos Indígenas e Tribais em Países Independentes por tribunais da América Latina. O trabalho discute: um número reduzido de casos sobre temas diversos e que representam diferentes países da região; bem como o tribunal regional de direitos humanos – a Corte Interamericana de Direitos Humanos. Os casos selecionados foram aqueles que apresentaram perspectivas particularmente interessantes com relação à temática abordada, inovação em sua interpretação ou relevância de suas consequências. Antes de apresentar os casos, entretanto, exponho alguns esclarecimentos que podem ser úteis para a compreensão do material selecionado e o contexto no qual estes casos estão inseridos.

PALAVRAS-CHAVE

Convenção 169 – Organização Internacional do Trabalho – Povos Indígenas e Tribais – Cortes – América Latina – Aplicação de Tratados Internacionais.

RESUMEN

Este trabajo presenta algunos casos emblemáticos de aplicación del Convenio 169 de la Organización Internacional del Trabajo sobre Pueblos Indígenas y Tribales en Países Independientes por tribunales de América Latina. Discute un número reducido de casos que cubren temas diversos, y representan a distintos países de la región, y al tribunal regional de derechos humanos –la Corte Interamericana de Derechos Humanos y se destacan por su temática, por lo novedoso de la interpretación que ofrecen o por la relevancia de sus consecuencias. Antes de reseñar los casos, se efectúan algunas aclaraciones previas que pueden ser útiles para explicar el material que aquí se expone, y el contexto en el que debe situarse.

PALABRAS CLAVE

Convenio 169 – OIT – Pueblos Indígenas y Tribales – Tribunales – América Latina – Aplicación de los tratados internacionales

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