



Human Rights Law Clinic Papers 2025

State Responsibility for Indigenous and Tribal Peoples Rights under Convention no. 169 of the ILO: The German case

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Loizidu v Turkey 1996 23 EHRR 513

Lopez Burgos v Uruguay, Communication No. R.12/52, UN Doc. Supp. No. 40 (A/36/40)

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Rep 2004, 136

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Representation Procedure under Article 24 concerning Colombia (C169, 2001), ILO Committee of Experts

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Draft Articles of Responsibility of States for Internationally Wrongful Acts

International Covenant on Civil and Political Rights

International Covenant on Civil and Political Rights Optional Protocol 1

International Labour Organisation Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries

United Nations Declaration on the Rights of Indigenous Peoples

lii - List of Abbreviations

AIPP Asia Indigenous Peoples Pact

ARSIWA Articles of Responsibility of States for Internationally Wrongful Acts

BMZ Germany's Federal Ministry of Economic Cooperation and Development

CAS	Conference Committee on the Application of Standards
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CRC	Convention on the Rights of the Child
DGB	German Trade Union Confederation
DRC	Democratic Republic of the Congo
ECtHR	European Court of Human Rights
FPIC	Free, Prior and Informed Consent
FZS	Frankfurt Zoological Society
ICCPR	International Covenant in Civil and Political Rights
ILC	International Labour Conference
ICJ	International Court of Justice
ILO	International Labour Organisation
KfW	Kreditanstalt für Wiederaufbau
SRM TWG	Standards Review Mechanism Tripartite Working Group
TANAPA	Tanzania National Parks Authority
UNDRIP	United Nations Declaration on the Rights of Indigenous People

Introduction

The rights of indigenous and tribal peoples are enshrined in international legal frameworks, including the International Labour Organisation (ILO) Convention No. 169 (ILO 169)¹ and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).² These instruments emphasise principles and obligations that member states of the ILO and the United Nations (UN) must take to protect these groups. However, ILO 169 is the only indigenous rights instrument legally binding on the states that have ratified it. Despite these protections, indigenous peoples continue to face significant human rights violations, particularly in the context of conservation projects funded by international actors.³ This memorandum examines how Germany's ratification of ILO 169 can be leveraged to compel the state to fulfil its obligations and ensure that its financing of conservation projects in countries that have not ratified ILO 169, such as Congo, the Democratic Republic of the Congo (DRC), and Tanzania do not result in forced evictions, violence, and other abuses against indigenous and tribal communities.

The memorandum is structured in two parts: the first assesses the feasibility of using the Representation Procedure under Article 24 of the ILO Constitution⁴ to hold Germany accountable for its role in funding conservation projects that violate indigenous rights. This includes an analysis of the jurisdictional challenges posed by the fact that the violations occur outside Germany's territory. The second explores alternative avenues within the ILO system, focusing on how Survival International⁵ can use the reporting mechanisms of the ILO and advocate for stronger oversight of Germany's funding practices to influence the ILO's assessment of Germany's compliance with ILO 169.

The main findings of this memorandum are twofold. First, pursuing Germany through the Representation Procedure is currently unviable due to the jurisdictional limitations of the ILO system, as the violations are occurring in other states which we believe will make the case

¹ Indigenous and Tribal Peoples Convention 1989 (adopted 27 June 1989, entered into force 5 September 1991) International Labour Organisation Convention No 169.

² United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (13 September 2007).

³ John H Knox, 'Dismantling the Fortress: Reforming International Conservation' (SSRN, 6 August 2024) <https://ssrn.com/abstract=4919230> accessed 20 March 2025.

⁴ Constitution of the International Labour Organisation (adopted 1 April 1919, entered into force 28 June 1919) 15 UNTS 40, art 24.

⁵ Referred to from this point onwards as 'Survival'.

inadmissible. Second, there is a political avenue to influence Germany's actions by using legal arguments to shape perceptions of its responsibility and pressure it to cease funding harmful projects. Based on these findings, the memorandum recommends that Survival could focus on intervening in the ILO reporting process, through workers organisations, as a primary strategy while advocating for Germany to adopt stricter due diligence measures in its international funding practices. These recommendations aim to advance the protection of indigenous rights and ensure that Germany's actions align with its commitments under international law.

1. The Representation Procedure under ILO Constitution

In this section, the memorandum briefly explains the Supervisory system/mechanism and the avenues within the ILO for monitoring ratified conventions. It then elaborates one of these mechanisms, the Representation Procedure, how it works, and its admissibility conditions. Specifically, this section will discuss the limits of jurisdiction as a condition of the ILO receiving complaints concerning extraterritorial violations. However, it is argued that Survival should monitor future developments and changes in how courts and quasi-judicial bodies interpret jurisdiction and extraterritorial rights obligations, in response to climate change and environmental law.

1.1 The Supervisory system/mechanism and the ILO 169

The ILO's Supervisory system is a unique international framework designed to ensure member states implement the conventions they ratify effectively. This system includes regular examinations of how standards are applied, identifying areas for improvement, and offering assistance. The supervision is carried out by two main bodies: the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the International Labour Conference's Committee on the Application of Standards (CAS). The CEACR is focused on 'factual and legal judgments [...] it is composed of prominent lawyers'⁶ that evaluate the government performances regarding the conventions, while CAS is formed by labour and business groups that as 'more a political body'⁷ issues final punishments and judgments based on the CEACR expertise.⁸

Additionally, special procedures exist in the ILO Constitution for addressing specific issues, such as the Representation Procedure (Articles 24 and 25) or Complaint Procedure (Articles 26 to 34) regarding the application of ratified conventions. The first can be filed by an Industrial Association of Employers or Workers, when 'any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party'.⁹ The second

⁶ Faradj Koliev and James H Lebovic, 'Shaming into Compliance? Country Reporting of Convention Adherence to the International Labour Organisation' (2022) 48 International Interactions 262.

⁷ Ibid.

⁸ Ibid.

⁹ International Labour Organisation Constitution (n 4) art 24.

can be filled against a State to address persistent violations that were already reported and/or punished by the ILO monitoring system or the Representation Procedure.¹⁰

Beyond these mechanisms, the ILO conducts General Surveys to monitor developments in national laws and practices, even in countries that have not ratified certain conventions.¹¹ Member states are required to report periodically on their efforts to implement conventions and any obstacles they face.¹² The ILO's technical support helps countries align their legislation and practices with international labour standards, ensuring universal principles and values are upheld.¹³

After ratifying the treaty, the State must submit a detailed report to the CEACR analyses and share it with the organisations that form their own country's tripartite partners. This presents the opportunity for the confederations to influence the CEACR's reading/assessment of the report by making comments on it or sending information directly to the ILO.¹⁴ The CEACR provides observations or sends direct requests to the state, highlighting areas of compliance or concern, whilst also relying on 'publicly available information, e.g. official United Nations reports'.¹⁵ These observations are published in the CEACR's annual report and discussed at the International Labour Conference (ILC), where participants engage with the findings.¹⁶

ILO 169 has been ratified by 24 countries to date. Germany's ratification entered into force in June 2022.¹⁷ As reported on the ILO website, the state and ILO recognise that this was a solidarity ratification due to the fact that there are no indigenous peoples in the territory.¹⁸ The ratification

¹⁰ International Labour Organisation, Complaint Procedure (Article 26) (ILO, 2024) <<https://www.ilo.org/international-labour-standards/ilo-supervisory-system-regular-supervision/applying-and-promoting-international-labour-standards/complaint-procedure-art26>> accessed 7 April 2025.

¹¹ International Labour Organisation, 'ILO supervisory system/mechanism' (ILO, 2025) <<https://www.ilo.org/about-ilo/how-ilo-works/ilo-supervisory-systemmechanism>> accessed 23 April 2025.

¹² Ibid.

¹³ Ibid.

¹⁴ International Labour Organisation, Indigenous and Tribal Peoples' Rights in Practice: A Guide to ILO Convention No 169 (PRO 169, International Labour Standards Department 2009) 178.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ International Labour Organisation, 'Information System on International Labour Standards, Requested reports and replies to CEACR comments: Germany' (*Normlex*, 2025) <https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:14000:0::NO:14000:P14000_COUNTRY_ID:102643> accessed 10 April 2025.

¹⁸ International Labour Organisation, 'Germany Ratifies ILO Convention, 1989 (No. 169) as a Strong Expression of Solidarity for the Protection of Indigenous and Tribal Peoples' Rights' (ILO News, 25 June

creates binding obligations, yet, at the time of ratification, both stressed that solidarity ratification adds authority and strengthens the convention. Nonetheless, solidarity ratification is not a legal concept and when ratified, the State has the responsibility to implement the convention in a coordinated and systematic way.¹⁹

According to the ILO system, indigenous people and their organisations 'do not have direct access to submitting reports to the ILO supervisory bodies'.²⁰ However, an ILO Guide explains ways that they can engage: (i) 'sending verifiable information directly to the ILO';²¹ (ii) engaging with trade unions, since employers' and workers' organisations 'can submit reports on the application of an ILO convention at any time, irrespective of when a report on that convention is due',²² and it can be done with organisations of any country and not just the countries involved; (iii) providing information to UN supervisory bodies in order for them to inform the ILO.²³ The second option from the ILO guide provides an opportunity for indigenous people and NGOs to engage with trade unions during the state reporting process to inform the CEACR experts, as it was done in the case of Norway and the Sami Parliament.²⁴ Section 2 will explore this further.

Additionally, Article 34 ILO 169 states that '[t]he 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'.²⁵ This article highlights how the situation of legislation and challenges indigenous peoples face can be different for each country, therefore, the ways in which the rights are implemented can require different measures. Furthermore, one could argue that States that do not have indigenous people but have ratified ILO 169 should consider their involvement in extraterritorial activities impacting indigenous peoples in other territories as 'the conditions characteristic of each country'.²⁶ This could allow the ILO room to read the ILO 169 in a way to push Germany to adopt measures to ensure that its funding of conservation projects

2021) <<https://www.ilo.org/resource/news/germany-ratifies-ilo-convention-1989-no-169-strong-expression-solidarity>> accessed 20 March 2025.

¹⁹ ILO, Indigenous and Tribal Peoples' Rights in Practice: A Guide to ILO Convention No 169 (n 15) 6.

²⁰ Ibid 179.

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Ibid 180.

²⁵ ILO 169 (n 1) art 34.

²⁶ Ibid.

complies with ILO 169. Section 2 will explore this further. The following subsection will explore the Representation Procedure and the current limits of jurisdiction interpretation.

1.2 Explanation of Representations Procedure under ILO 169

The Representation Procedure under Articles 24 and 25 of the ILO Constitution²⁷ is a mechanism that allows an industrial association of employers or workers to file a complaint against a member state for failing to comply with an ILO convention it has ratified. It is a mechanism that relies on a conciliation process, and if that is not possible, shaming the State by publishing the recommendations. This procedure has been improved over the years through the Standing Orders of the ILO.²⁸

The process of filing a representation involves several key steps. First, an industrial association of employers or workers submits a written representation to the International Labour Office,²⁹ alleging that a state failed to effectively implement a ratified convention. The ILO's Governing Body then examines the representation to determine if it meets the admissibility criteria.

If the representation is deemed admissible, the complainant has to state if it wants to take part in a Conciliation process of initially six months, which can be extended for a further six months, and in specific cases, another 6-months. If conciliation is not achieved, the arguments of both parties will be analysed.³⁰

A Tripartite Committee — comprising government, employer, and worker representatives — is established to investigate the case.³¹ This Committee issues a report with findings and recommendations, both legal and practical,³² which are submitted to the Governing Body for approval. If the State does not offer enough evidence to rebut the allegations, the case will be published. Prior to this, the process, including the allegations against the State, is confidential.

²⁷ ILO Constitution (n 4) Article 24-25.

²⁸ International Labour Organisation, 'Standing Orders Concerning the Procedure for the Examination of Representations under Articles 24 and 25 of the Constitution of the International Labour Organisation' (1932, as amended) Annex I.

²⁹ Link for the form: <https://www.ilo.org/international-labour-standards/ilo-supervisory-system-regular-supervision/applying-and-promoting-international-labour-standards/representation-procedure-art24>

³⁰ Standing Order (n 28) Article 5.

³¹ Ibid Article 3.

³² International Organisation of Employers, Fact Sheet on the ILO Supervisory System: Article 24 Representation Procedure (August 2024) 3.

Finally, the state is expected to implement the recommendations, and the ILO monitors compliance.

The procedure's effectiveness depends on the state's willingness to cooperate, as the recommendations are not legally binding. Also, the Committee at any time can 'suspend its examination of the merits of the representation to enable'³³ both sides to solve the dispute at the national level.³⁴

For a representation to be admissible it must relate to a convention that the state has ratified, and indicate how the state has failed to secure the effective observance of the Convention.³⁵ It must also provide sufficient evidence to support the allegations.

The admissibility criteria in Article 2 (f) of the Standing Order requires special attention, it says that the representation 'must indicate in what respect it is alleged that the Member against which it is made has failed to secure the effective observance within its jurisdiction of the said Convention'.³⁶ The other five conditions³⁷ can be easily met in the case of Germany's obligation to respect ILO 169, however, the jurisdiction clause presents a key challenge to admissibility as argued in the next subsection.

1.3 The limits of jurisdiction

The following section will show why jurisdiction is the main issue for fulfilling the admissibility criteria for the Representations Procedure, and explore the interpretations of extraterritorial jurisdiction and the Articles of Responsibility of States for Internationally Wrongful Acts (ARSIWA).³⁸ Through the use of case law, this section will assess the viability of proving that

³³ Standing Order (n 28) para. 18.

³⁴ Ibid.

³⁵ ILO Constitution (n 4) Article 24.

³⁶ Standing Order (n 28) Article 2 (f).

³⁷ Article 2 of the Standing Order says '2. The receivability of a representation is subject to the following conditions: (a) it must be communicated to the International Labour Office in writing; (b) it must emanate from an industrial association of employers or workers; (c) it must make specific reference to article 24 of the Constitution of the Organisation; (d) it must concern a Member of the Organization, subject to the provisions of article 12; (e) it must refer to a Convention to which the Member against which it is made is a party'.

³⁸ International Law Commission, *Draft Articles of Responsibility of States for Internationally Wrongful Acts*, annexed to UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83.

Germany has jurisdiction and, thus, responsibility for the violations of ILO 169 occurring as a result of their funding of conservation projects.

The main limitation for bringing a case to the ILO is the issue of jurisdiction. Jurisdiction under international law is primarily based on the notion of States having sovereignty over their own territory.³⁹ As the only model of jurisdiction recognised under the Representation Procedure in relation to ILO 169, it is unlikely that a case against Germany to be admissible under the ILO's current interpretation of jurisdiction. The ILO has published 25 Representation Procedure cases in relation to ILO 169 and all cases applied the territorial model as the primary definition of jurisdiction.⁴⁰ For example, the Central Unitary Workers' Union brought a case against Colombia that impacted the U'wa community.⁴¹ The U'wa reside in Colombia and the Sierra de Mérida in Venezuela.⁴² This presented the ILO with an opportunity to explore extraterritorial jurisdiction within a Representations Procedure. However, they avoided the issue by only focusing on the 'territory of the commune of Samoré' in Colombia when assessing the impact against the U'wa.⁴³ Thus, the ILO has focused on territorial jurisdiction in its definition of jurisdiction under Article 24 when considering ILO 169. Consequently, for a case against Germany to be found admissible would be a ground-breaking step under this procedure and require a reconceptualisation of jurisdiction under the ILO.

However, human rights bodies have recognised that States have extraterritorial human rights obligations, in two specific circumstances, thus extending jurisdiction beyond the State's borders. One is the spatial model of jurisdiction, where states have 'effective control of an area' outside of its territory.⁴⁴ Second is the personal model of jurisdiction where a State has the 'authority and control over individuals' outside of their territory.⁴⁵ It is not unrealistic that the ILO would adopt one of these other models of jurisdiction under the Representations Procedure.

³⁹ Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press 2008) 5.

⁴⁰ International Labour Organisation, 'Representations (Art. 24)' (*Normlex* 2025) <https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:50010:::50010:P50010_ARTICLE_NO:24> accessed 10 April 2025.

⁴¹ International Labour Organisation, 'REPRESENTATION (article 24) - COLOMBIA - C169 - 2001' (*Normlex*, 2025)

<https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:50012:0::NO:50012:P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507143,en:NO> accessed 14 April 2025.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press 2011) 127.

⁴⁵ *Ibid.*, 173.

The spatial model can be used to ensure states are adhering to their obligations under human rights law extraterritorially. In *Loizidou v Turkey*,⁴⁶ the European Court of Human Rights (ECtHR) established that Article 1 on jurisdiction of the European Convention on Human Rights is 'not restricted to the national territory' of contracting parties and that 'acts and omissions of their authorities which produce effects outside their own territory' can be attributed to the state that holds effective control of an area.⁴⁷ The criteria used by the ECtHR in *Loizidou* to determine effective control relied largely on the size and presence of the Turkish military in the area.⁴⁸ In *Al-Skeini and others v United Kingdom*⁴⁹, the ECtHR also defined effective control through other indicators such as 'the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region'.⁵⁰

The International Court of Justice (ICJ) has also relied on the spatial model to apply human rights law outside of a state's national territory. In the ICJ's Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*⁵¹ in 2004, the Court decided the International Covenant on Civil and Political Rights (ICCPR)⁵² was applicable to Israel 'when they exercise jurisdiction outside of their national territory'.⁵³ The Court rejected Israel's view that the ICCPR only applied to its sovereign territory and confirmed Israel was obligated to apply the ICCPR to the Occupied Palestinian Territory as the 'occupying power', and thus under Israel's 'effective control'.⁵⁴

The ECtHR and ICJ's criteria establishing the spatial model can be applied to Germany's funding of overseas projects. Although there are impacts outside of Germany's territory, Germany does not hold effective control in the national parks of Congo, DRC or Tanzania, insofar as it does not

⁴⁶ *Loizidu v Turkey* 1996 23 EHRR 513. <[https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-58007%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58007%22]})>

⁴⁷ *Ibid*, para 52.

⁴⁸ *Ibid*, para 56.

⁴⁹ *Al-Skeini and Others v UK* [GC] (2011) 53 EHRR 18.

<[https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-105606%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-105606%22]})>.

⁵⁰ *Ibid*, para 139.

⁵¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136

<<https://www.icj-cij.org/sites/default/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>>.

⁵² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁵³ *Legal Consequences of the Construction of a Wall* (n 51) para 109.

⁵⁴ *Ibid*, para 112.

have sufficient 'influence and control over the region'.⁵⁵ Germany does not have a military presence in any of the states and the economic support it provides through conservation projects would not outweigh state sovereignty. The Frankfurt Zoological Society (FZS), who receives funding from the German government and allocates it to the Tanzania National Parks Authority (TANAPA), maintains that it does not possess a 'mandate to determine how the Government of Tanzania organises its conservation institutions'.⁵⁶ While Germany's funding may exert some influence, and places responsibility on Germany for their own actions, funding of conservation projects alone does not amount to effective control because direct orders are not coming from the German government. Thus, reinforcing the park rangers, and control, are under the authority of the Tanzanian government. Therefore, even though the spatial model presents an opportunity for extraterritorial jurisdiction in international law, it does not give Germany jurisdiction over the violations of ILO 169.

The personal model of extraterritorial jurisdiction does not require effective control over an area to be established. Instead, state authority and control over individuals is required. Although *Al-Skeini* helped define effective control for the spatial model, the ECtHR primarily used the personal model in *Al-Skeini* to establish the jurisdictional link through the 'particular relationship between the [UK] soldiers and the civilians'.⁵⁷ The ECtHR concluded the 'United Kingdom, through its soldiers engaged in security operations in Basra...exercised authority and control over individuals killed...so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention'.⁵⁸

The Human Rights Committee also emphasises the relationship between the individual committing a violation and the state when applying the personal model.⁵⁹ The *Lopez Burgos v Uruguay*⁶⁰ communication established a state's obligations under the ICCPR⁶¹ and Optional

⁵⁵ *Al-Skeini and Others v UK* (n 49) para 139.

⁵⁶ Benjamin Hindrichs, 'How German government funds are used to dispossess Tanzania's Maasi in Serengeti land grab' (*Mongabay*, 29 November 2024) <<https://news.mongabay.com/2024/11/how-german-government-funds-and-tanzanian-conservation-agencies-fuel-the-serengeti-land-grab/>> accessed 06 April 2025.

⁵⁷ *Al-Skeini and Others v UK* (n 49) para 124.

⁵⁸ *Ibid.*

⁵⁹ *Lopez Burgos v Uruguay*, Communication No. R.12/52, UN Doc. Supp. No. 40 (A/36/40).

⁶⁰ *Ibid.*

⁶¹ ICCPR (n 52).

Protocol 1⁶² are based on 'the relationship between the individual and the State in relation to a violation of the rights set forth in the Covenant, wherever they occurred'.⁶³ The communication goes further to say it is 'unconscionable' to allow states to perpetrate violations on another state's territory, which it would not allow on its own territory.⁶⁴ Therefore, the Committee reads the personal model of jurisdiction as the state's relationship, authority and control over the individual committing the violation, not the location of such violation.

In the case of Germany's funding of conservation projects, it is difficult to establish jurisdiction under the personal model. The individuals committing violations, for instance, the national park rangers in Tanzania are employed by TANAPA,⁶⁵ under the authority of the Tanzanian government.⁶⁶ Therefore, they fall under the territorial jurisdiction of the states where the parks are located. Moreover, it will be unlikely to establish a personal jurisdictional link between the German government and actors on the ground on the basis that it is funding the conservation projects via NGOs. Both cases considered by the ECtHR and Human Rights Committee established that the individuals who committed the violations were state agents, and therefore, the authority and control is clear. In Germany's case, government grants do not legally bind workers of NGOs to being state agents or under state's control.

Although violations of ILO 169 have occurred in conservation projects supported by Germany in Congo, DRC and Tanzania, it is difficult to apply the territorial, spatial, or personal models of jurisdiction. Currently, Germany's funding of conservation projects does not outweigh the violations occurring in other sovereign states' territories and, equally, are not carried out by German government agents. Therefore, it is unlikely that Survival will be able to establish Germany's responsibility for the violations against indigenous peoples in another state's territory.

ARSIWA helps assess whether Germany bears international responsibility. The purpose of ARSIWA is to define 'the general conditions under international law for the State to be considered

⁶² International Covenant on Civil and Political Rights Optional Protocol 1 (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

⁶³ *Lopez Burgos v Uruguay* (n 59) para 12.2.

⁶⁴ *Ibid.*

⁶⁵ Benjamin Hindrichs, 'How German government funds are used' (n 56).

⁶⁶ Tanzania National Parks, 'History' (*TANAPA, unknown date*)
<<https://www.tanzaniaparks.go.tz/pages/history>> accessed 18 April 2025.

responsible for wrongful actions or omissions'.⁶⁷ Under ARSIWA, a state is responsible for internationally wrongful acts if (Article 8) 'a person or group of persons shall be considered an act of a State...[if they are] acting on the instructions of, or under the direction or control of, that State'.⁶⁸ One of the ways Article 8 is assessed is whether 'State organs supplement their own actions by recruiting or instigating private persons or groups'.⁶⁹ Another, which is more complex in proving, is 'determining whether conduct was carried out "under the direction or control" of a State'.⁷⁰ As seen in *Nicaragua v United States*,⁷¹ the ICJ concluded that even though there was 'heavy subsidies and other support provided to them [the contras, right wing militias in Nicaragua] by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf'.⁷² The Court did accept the 'United States was held responsible for its own support of the contras', but it did not amount to the direction or control from the United States to the contras.⁷³

Therefore, applying ARSIWA to Germany's situation, it will be difficult to prove the National Park employees acted under the control of Germany, as it does not hold control over all the aspects of their conduct. In *Nicaragua v United States* the United States CIA had prepared manuals to aid the contras in their warfare, but this was deemed insufficient by the ICJ 'for concluding that any such acts which may have been committed are imputable to the United States'.⁷⁴ Even if Germany issued instructions that resulted in rights violations, that would not establish legal responsibility because it would not meet the criteria of Germany having control or direction of persons or groups carrying out the violations. Furthermore, Germany's economic support, without evidence of control or direction is insufficient. Therefore, relying solely on the economic support provided makes it difficult to determine Germany's responsibility.

As seen through the issues of extraterritorial jurisdiction, the ILO's definition of jurisdiction and ARSIWA, there is a challenge of proving Germany's jurisdiction and responsibility for the

⁶⁷ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), UN Doc A/56/10, General Commentary para 1 <https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>.

⁶⁸ ARSIWA (n 38) art 8.

⁶⁹ ARSIWA with commentaries (n 67) art 8, para 2.

⁷⁰ Ibid.

⁷¹ *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States)* (Mertis) [1986] ICJ Rep 14 <<https://www.icj-cij.org/sites/default/files/case-related/70/070-19860627-JUD-01-00-EN.pdf>>

⁷² Ibid, para 109.

⁷³ ARSIWA with commentaries (n 67) art 8, para 4.

⁷⁴ *Nicaragua v United States* (n 71) para 292 (5).

violations of ILO 169. Therefore, it is unlikely that a case under the Representations Procedure will be found to be admissible. This is because the ILO's admissibility criteria as well as judgments and opinions from the ICJ, ECtHR and Human Rights Committee holds sovereign territory as the primary definition for determining jurisdiction. As a result, it is recommended that Survival waits before it submits a Representations Procedure.

1.4 Recommendation to monitor the development of jurisdiction

The following section recommends monitoring the development of jurisdiction interpretations of the ILO, and human rights bodies. This is because interpretations of jurisdiction could evolve through the influence of climate change and environmental law in relation to human rights law. As a result, this could lead to an expansion of the scope of jurisdiction.

The potential developments of jurisdiction can be monitored through international human rights bodies. A communication from the UN Committee on the Rights of the Child, *Saachi et al. v Argentina et al.*,⁷⁵ has already pushed the boundaries of extraterritorial jurisdiction. Although the petition was found inadmissible due to the non-exhaustion of domestic remedies, it is useful to explore the Committee's opinion because it expanded on the models of extraterritorial jurisdiction. The petition argued that states were 'failing to prevent and mitigate the consequences of climate change' and thus violating 'articles 6, 24 and 30' of the Convention on the Rights of the Child (CRC).⁷⁶ The claimants argued emissions originating in a state's territory that have an impact through climate change, even if outside of the state's territory, violated the CRC.⁷⁷ Germany, a defending state, contested the case's admissibility because the 'authors who did not reside in Germany are not within its jurisdiction and that a prerequisite for the extraterritorial application of children's rights is that national actions have a direct and foreseeable impact on the rights of the alleged victims in other countries'.⁷⁸ However, the Committee agreed with the Inter-American Court's 2017 Advisory Opinion that there was extraterritorial responsibility because when 'transboundary damage occurs that affects treaty-based rights, it is understood that the persons whose rights have been violated are under the jurisdiction of the State of origin if there is a causal

⁷⁵ Committee on the Rights of the Child, *Decision adopted under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, Communication No. 107/2019, UN Doc CRC/C/88/D/107/2019 (22 September 2021).

⁷⁶ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

⁷⁷ Committee on the Rights of the Child (n 75).

⁷⁸ *Ibid*, para 4.2.

link between the act that originated in its territory and the infringement of the human rights of persons outside its territory'.⁷⁹ Therefore, this is a clear example of how the Committee, and the Court, are starting to expand the interpretation of extraterritorial jurisdiction. Both extended the definitions of jurisdiction beyond the territorial, personal and spatial models when assessing human rights violations linked to climate change.

An important aspect also considered after jurisdiction was established by the Committee in *Saachi et al.* was whether the 'alleged harm suffered by the victims was reasonably foreseeable' by the state.⁸⁰ One might suggest this could be considered in future cases and for the ILO admissibility. In relation to Germany, it can be argued they were aware of the violations happening in the conservation projects⁸¹ before and after the ratification of ILO 169, which means that indigenous peoples rights violations were foreseeable. Therefore, if the development of extraterritorial jurisdiction continues, there is a possibility the ILO's interpretation of jurisdiction could expand and increase the chances of a case being admissible through the Representations Procedure.

This presents opportunities for cases to test the limitations and interpretations of jurisdiction, which could open the door to bringing a case to the ILO that relies on a similar interpretation. Survival can not only monitor this development through future jurisprudence of international law and the ILO's own interpretation, but also actively promote the broader interpretation of jurisdiction in ILO 169.

⁷⁹ Ibid, para 9.5.

⁸⁰ Ibid, para 9.7.

⁸¹ Robert Flummerfelt and Minority Rights Group International, '*To Purge the Forest by Force: Organised Violence Against Batwa in Kahuzi-Biega National Park*' (2022) <<https://minorityrights.org/resources/to-purge-the-forest-by-force-organized-violence-against-batwa-in-kahuzi-biega-national-park/>> 3-4.

2. Political and Legal avenues under the ILO system

The memorandum will now explore another avenue within the ILO that can be utilised by Survival to promote the development of extraterritorial jurisdiction under ILO 169 and underpin a future claim under the Representation Procedure. First, this section will identify the provisions of ILO 169 that have been violated by German-funded development projects in Tanzania, DRC, and Congo, and explore key arguments that can be used to convince the ILO to develop an innovative interpretation of extraterritorial State responsibility. Secondly, the section will explain how Survival can engage with the Supervisory system/mechanisms.

2.1 Potential legal arguments for German responsibility under ILO 169

The following section draws on Article 34 of ILO 169 and UNDRIP, to identify key arguments that Survival can use to establish German responsibility for the breaches of the rights of indigenous peoples in Tanzania, DRC and Congo. Significantly, during the reporting process, Germany is required to report on the action taken to implement ILO 169 by national authorities, including ‘specific steps for its implementation’ as well as ‘arrangements for adequate supervision and penalties’.⁸²

Although Germany and the ILO have claimed Germany’s ratification of ILO 169 is a ‘solidarity ratification’, this concept does not exist in international law. Instead, Survival should argue that Germany’s obligations under ILO 169 should be interpreted in line with Article 34. Article 34 states that ‘[t]he 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’.⁸³ The Article contains a core element, such as the ‘conditions characteristic of each country’. While Germany does not have indigenous peoples, it is clear that the actions of the authorities result in the violation of the rights of indigenous peoples. For example, the Batwa people in Kahuzi-Biega National Park (DRC) suffered systematic violence— including forced displacement (Article 16), extrajudicial killings, sexual violence (Article 3), and destruction of livelihoods (Article 23) — in a state-backed campaign to expel them from ancestral lands (2019–2021), perpetrated by park rangers and Congolese Army.⁸⁴ Germany, through Kreditanstalt für Wiederaufbau — KfW, state-

⁸² International Labour Office, Report Form for the Indigenous and Tribal Peoples Convention, 1989 (No 169) (International Labour Organisation, 1990) 2.

⁸³ ILO 169 (n 1) art 34.

⁸⁴ Flummerfelt (n 81) 3-4.

owned investment and development bank and other organisations — funded the park's paramilitary rangers despite prior warnings of abuses.⁸⁵ Consequently, it is possible to argue that in accordance with Article 34, it is this broader context that is specifically 'characteristic of' Germany, that should be used by the ILO to determine '[t]he nature and scope of the measures to be taken to give effect to this Convention'. More specifically, as Germany is aware that these violations are occurring but continues to fund such projects, it is complicit in these violations through the lack of adequate supervision of public funding.

The implementation measures that Germany is required to adopt must be determined by its particular circumstances. Specifically, it should ensure that arrangements are made to ensure that development projects are adequately supervised and penalties put in place if ILO 169's provisions are violated.⁸⁶ However, it is clear that Germany has failed to do so. For instance, Germany's Federal Ministry of Economic Cooperation and Development (BMZ) funds FZS who allocates funding to TANAPA. This funding equipped rangers with vehicles and planes used in evictions suffered by the Maasai pastoralists from their ancestral lands in Tanzania.⁸⁷ In June 2022, Tanzania's Ministry of Natural Resources annexed 1,500 km² of Maasai land for the Pololeti Game Controlled Area without consultation (Article 6).⁸⁸ The violations were systematic and happened over the years with knowledge of the BMZ and FZS. Under Article 34, Germany has the general positive obligation to make effective the provisions of the Convention by taking measures to prevent the violation of the rights of indigenous peoples. During the reporting process, Germany should be specifically required to report on the measures it has taken to ensure that ILO 169 is complied with by government-funded development projects as well as its 'arrangements for adequate supervision and penalties'.⁸⁹

By using Article 34, one can argue that Germany is responsible for the violation of other rights present in ILO 169, that have occurred as a result of State-funded development projects. This is because Germany has failed to adopt sufficient measures to prevent these violations. The Government was aware of previous violations in other countries,⁹⁰ and has continued to fund those projects, which is a lack of due diligence and demonstrates complicity with the actions taken

⁸⁵ Ibid 34.

⁸⁶ International Labour Office, Report Form for the Indigenous and Tribal Peoples Convention (n 82).

⁸⁷ Benjamin Hindrichs, 'How German government funds are used' (n 56).

⁸⁸ Ibid.

⁸⁹ International Labour Office, Report Form for the Indigenous and Tribal Peoples Convention (n 82).

⁹⁰ Flummerfelt (n 81) 3-4.

by Tanzania, Congo, and DRC. It is argued that Article 34 requires Germany to apply ILO 169 principles to legislation and development policies. This also means adapting the funding mechanisms through national institutions and NGOs to prevent harm to indigenous peoples.

It can be argued that, in accordance with Article 34, the funding of conservation projects must include robust human rights due diligence processes to identify, prevent, and mitigate risks to indigenous communities. Specifically, Germany must ensure that recipient organisations, including Big International Non-Governmental Organisations (BINGOs), conduct thorough assessments of potential human rights impacts, particularly on indigenous peoples. This includes consulting with affected communities, assessing risks of land dispossession or forced evictions, and implementing measures to avoid harm. Also, this links back to the principles of consultation, participation, and non-discrimination enshrined in ILO 169 and UNDRIP, by requiring BINGOs adhere to these standards. In this sense, it is imperative that in the short term, Germany must recognise the violations in order to suspend the funding in countries that do not comply with ILO standards.

The prevention of harm is a core principle of international human rights law, particularly in the context of indigenous peoples. Articles 2, 6, and 7 of ILO 169 emphasise the state's responsibility to protect indigenous peoples from harm and ensure their participation in decisions affecting them. This principle is reinforced by the requirement of Free, Prior, and Informed Consent (FPIC) under UNDRIP (Articles 10, 19, and 32),⁹¹ which mandates that states and other actors obtain the consent of indigenous peoples before implementing projects that affect their lands, territories, or resources.⁹² FPIC is not merely a procedural, but a substantive right that ensures indigenous communities have a decisive voice in projects impacting their livelihoods. Failure to do so risks perpetuating harm and lack of redress. Germany must condition the funding on recipients that involve indigenous people in the decision-making, respect FPIC and consultation.

Based on this discussion, it is suggested that Survival use the Supervisory system/mechanism to argue that under Article 34, Germany has the obligation to ensure that State-funded development projects comply with ILO 169. In order to comply with its obligations under ILO 169, in the short term, Germany should undertake due diligence and suspend the funding in countries that violate

⁹¹ UNDRIP (n 2) arts. 10, 19, 32.

⁹² Ibid.

ILO 169 standards, and in the long term require FPIC and due diligence clauses in development contracts and condition funding on compliance with ILO 169 standards.

2.2 Engaging with the ILO system

As stated in section 1.1, the monitoring system of the ILO offers restricted access for indigenous peoples. The tripartism principle⁹³ of the ILO obliges indigenous people to adopt strategies to engage, usually, with workers representatives. Despite the innovative characteristics of ILO 169, it was originally designed to protect the communities inside the state jurisdiction and territory.

The 2024 meeting of the Standards Review Mechanism Tripartite Working Group (SRM TWG) produced a report issuing recommendations to the Governing Body of the ILO regarding indigenous and tribal people's rights. The SRM TWG recommends further research to identify key challenges and opportunities to the ratification and implementation of ILO 169, and a review of the strategy of the organisation concerning indigenous and tribal peoples in 2025.⁹⁴ Hence, it is argued there is a window of opportunity for Survival to influence the development of how the ILO interprets indigenous rights and ensure states such as Germany are held accountable for facilitating violations. It is possible for Survival to engage in two main ways: partner with a trade union to send direct information to the ILO; and engage with the workers' confederation in Germany to have access to the next State report and influence the interpretation of the CEACR. The next subsections will explain each option.

2.2.1 Sending a report directly to the ILO

It is possible for indigenous peoples or NGOs to partner with trade unions to send reports directly to the ILO at any time.⁹⁵ As Germany does not have indigenous peoples, it will be important to mobilise the argument explained above based on the Article 34 ILO 169, as the Convention should be applied differently depending on the conditions characteristic of each country.

⁹³ International Labour Organisation, Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169): Handbook for ILO Tripartite Constituents (ILO 2013) 8.

⁹⁴ International Labour Organisation, Report of the Ninth Meeting of the Standards Review Mechanism Tripartite Working Group, ILO Doc GB.352/LILS/3 (Geneva, 16–20 September 2024) Annex I, paras 13.3.3-13.3.4.

⁹⁵ ILO, Indigenous and Tribal Peoples' Rights in Practice: A Guide to ILO Convention No 169 (n 15) 6.

The ILO 169 Guide⁹⁶ and the ILO 169 Handbook⁹⁷ do not specify the practice of shadow reporting by a civil society organisation or NGO, a usual practice in the UN human rights monitoring system. Despite the absence of shadow reporting, there is precedent for NGOs representing indigenous peoples submitting evidence to the ILO. The Asia Indigenous Peoples Pact (AIPP) joined forces with one of the leading workers' organisations at the national level in Bangladesh, to submit a report to the CEACR regarding the implementation of the ILO 107, to push Bangladesh to protect indigenous peoples rights in 2022.⁹⁸

A similar report submitted by Survival could provide detailed evidence of these violations, including testimonies from affected communities, documentation of land dispossession, and analysis of Germany's role in funding and overseeing these projects.⁹⁹ To maximise the impact of its report, Survival should consider the following steps based on the example of the shadow report. Firstly, it should emphasise Germany's responsibility under ILO 169 to ensure that its development policies, including funding for conservation projects, respect the rights of indigenous peoples. Secondly, include specific recommendations for how Germany can address the violations, such as requiring human rights due diligence for all funded projects, establishing mechanisms for consultation with indigenous communities, and providing redress for affected individuals.

The recommendation is for Survival to identify and engage with a trade union/workers organisation to submit a report (direct information) to the ILO on the application of the ILO 169 before the State's report. This trade union does not need to be based in Germany.

2.2.2 Engaging with Germany's report on ILO 169

The following section will assess why it is important for Survival to monitor and engage in the state reporting process to attempt to influence the CEACR's interpretation of jurisdiction and

⁹⁶ Ibid.

⁹⁷ ILO, Understanding the Indigenous and Tribal Peoples Convention 1989 (No. 169): Handbook for ILO Tripartite Constituents (n 93).

⁹⁸ Asia Indigenous Peoples Pact (AIPP), 'Submission of Shadow Report on ILO Convention No. 107 to the Committee of Experts on the Application of Conventions and Recommendations (CEACR)' (Kapaeeng Foundation, 22 November 2022) <<https://aippnet.org/submission-shadow-report-ilo-convention-no-107-committee-experts-application-conventions-recommendations-ceacr/>> accessed 20 March 2025.

⁹⁹ Flummerfelt (n 81) 34.

Germany's obligations under ILO 169, as part of a longer-term strategy to bring a case under the Representations Procedure. The next scheduled report for Germany under ILO 169 is for 2026.¹⁰⁰

Spain and Luxembourg, who do not have indigenous peoples in their territory, have also ratified ILO 169 and the comments from their state reports suggests the ILO is praising the ratification and the promotion of obligations for other states, regardless of their practices. The comments from Spain's report in 2010 mentions the positive contribution Spain has made financially to 'support the ratification and better implementation' of ILO 169, even though there are 'no indigenous or tribal peoples in Spain, and as a result, the provisions of the convention are not applicable within its territory'.¹⁰¹ In 2023, the CEACR praised Luxembourg for its commitment to indigenous peoples when signing the convention and its understanding of the importance of the 'fundamental rights' and 'integrity' of indigenous peoples which are integral for 'biodiversity and climate action'.¹⁰² This is a limited interpretation of the jurisdiction of ILO 169 bound to territory, without connection with extraterritorial state obligation or how states can impact indigenous peoples. Engaging with the reporting process can challenge the CEACR's current view.

In 2024, Germany received comments from the CEACR following their scheduled state report in 2023.¹⁰³ The CEACR comments implied that Germany is impacting indigenous peoples rights as the German government 'carefully examines the effects of measures and projects on indigenous people' from its development policies'.¹⁰⁴ Besides that, the content was not significant enough towards effective change. Therefore, it is recommended that Survival attempts to influence the CEACR's through this process.

¹⁰⁰ International Labour Organisation, 'Requested reports and replies to CEACR comments: Germany' (*Normlex* 2025)

<https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:14000:0::NO:14000:P14000_COUNTRY_ID:102643> accessed 20 March 2025.

¹⁰¹ International Labour Organisation, 'Direct Request (CEACR) - adopted 2010, published 100th ILC session (2011)' (*Normlex* 2025)

<https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:2337401,102847> accessed 20 March 2025.

¹⁰² International Labour Organisation, 'Direct Request (CEACR) - adopted 2022, published 111th ILC session (2023)'

<https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4309694,102757,Luxembourg,2022> accessed 20 March 2025.

¹⁰³ International Labour Organisation, 'Direct Request (CEACR) - adopted 2023, published 112nd ILC session (2024)'

<https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:4379127,102643:NO> accessed 20 March 2025.

¹⁰⁴ Ibid.

The Germany report due in 2026 is the main opportunity for Survival to influence the ILO. In order to do this, it is necessary to engage with the German recognised trade union¹⁰⁵ that will have access to the state's report. Governments must share this report with national tripartite partners,¹⁰⁶ which provides the opportunity to make comments and submit information in the state report and show the CEACR how Germany is supporting violations of indigenous rights outside its territory. The CEACR can make observations or order a direct request to Germany to clarify specific measures regarding the implementation of the convention. Engaging with the legal experts of the ILO could influence the CEACR to make observations in one of the annual reports, then CAS could issue conclusions on the topic.¹⁰⁷

By engaging with this process, we suggest that Survival should use Germany's 2026 report to raise awareness of Germany's obligations under ILO 169. This report will be an opportunity for Germany to demonstrate its commitment to the rights of indigenous peoples. If Germany fails to address these issues adequately, Survival could push for CEACR to issue recommendations or call for further action, creating a basis for future advocacy and accountability.

¹⁰⁵ The trade union to engage with is the German Trade Union Confederation (DGB) is a member of the European Trade Union Confederation (ETUC) and the International Trade Union Confederation (ITUC). It also delegates German trade union representatives to the International Labour Conference held by the International Labour Organisation (ILO). <[https://en.dgb.de/structure-of-the-dgb#:~:text=DGB%20international,International%20Labour%20Organization%20\(ILO\)>](https://en.dgb.de/structure-of-the-dgb#:~:text=DGB%20international,International%20Labour%20Organization%20(ILO)>) accessed 11 April 2025.

¹⁰⁶ International Labour Office, Handbook of Procedures Relating to International Labour Conventions and Recommendations (International Labour Standards Department, 2022) para. 44.

¹⁰⁷ ILO, Understanding the Indigenous and Tribal Peoples Convention 1989 (No. 169): Handbook for ILO Tripartite Constituents (n 93) 7.

3. Recommendations and Conclusion

In conclusion, this memorandum has shown the limits of jurisdiction are likely to prevent Survival from holding Germany to account under ILO 169 through the Representations Procedure. This is because the violations of ILO 169 are happening outside of Germany's territory and the recognised models of extraterritorial jurisdiction, spatial and personal, do not provide a sufficient legal basis to establish Germany's jurisdiction over the violations of indigenous peoples' rights in Congo, DRC and Tanzania. Despite this, the potential development of extraterritorial jurisdiction through climate change and environmental law may expand the interpretation of jurisdiction in the future.

Article 34 of ILO 169 is also key to any future case against Germany because it provides flexibility in the reading of the Convention for each country. As such, the first recommendation is for Survival to monitor the development of jurisdiction in international law and within the ILO. Survival can engage with ILO to influence their interpretation of jurisdiction and Germany's obligations under ILO 169. This will help establish the legal arguments put forward by any potential Representations Procedure in the future.

Therefore, the second recommendation is to submit reports directly to the ILO via a trade union. This will detail the violations of ILO 169 and the abuses suffered by indigenous peoples, but also present analysis of Germany's involvement through their funding of conservation projects and how Germany can address these violations through better due diligence: in the short term, cutting funding for States that are not compliant with ILO 169 standards and in the long term implementing funding conditions to ensure the protection of indigenous peoples rights.

The final recommendation is for Survival to engage with DGB who are in a position to make comments on Germany's scheduled state report in 2026. By engaging in this process, Survival can present information and comments to the CEACR with DGB to influence how Germany's obligations are assessed on the issue of jurisdiction. The recommendations given in this memorandum provide short and long term options for Survival to influence the ILO to help protect the rights of indigenous peoples and uphold Germany's obligations under the ILO 169.

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