



# Governing Body

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## Report of the Director-General

Fourth supplementary report: Report of the Committee set up to examine the representation alleging non-observance by Indonesia of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

### ► Contents

	Page
I. Introduction .....	3
II. Examination of the representation.....	4
A. The complainant's allegations .....	4
B. The Government's reply.....	9
III. The Committee's conclusions .....	13
Scope of application of Convention No. 111 .....	14
Identification of the Ompu Ronggur as an indigenous people .....	14
IV. The Committee's recommendations .....	16



## ▶ I. Introduction

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1. By a communication received on 19 August 2019, the Indonesian Union of Plantation Workers (SERBUNDO) made a representation to the International Labour Office under article 24 of the ILO Constitution, alleging non-observance by the Government of Indonesia of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).
2. Convention No. 111 was ratified by Indonesia on 7 June 1999 and is still in force in that country.
3. The provisions of the ILO Constitution concerning the submission of representations are as follows:

### *Article 24*

#### *Representations of non-observance of Conventions*

In the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that 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, the Governing Body may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit.

### *Article 25*

#### *Publication of representation*

If no statement is received within a reasonable time from the government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any, made in reply to it.

4. Representations are examined in accordance with the Standing Orders concerning the procedure for the examination of representations, as revised by the Governing Body at its 291st Session (November 2004).
5. In accordance with articles 1 and 2(1) of the Standing Orders, the Director-General acknowledged receipt of the representation, informed the Government of Indonesia thereof, and brought the representation before the Officers of the Governing Body.
6. At its 337th Session (October–November 2019), the Governing Body declared that the representation was receivable and decided to set up a tripartite committee to examine the matter, composed of Mr Vimarsh Aryan (Government member, India), Mr Guido Ricci (Employer member, Guatemala), and Mr Magnus Norddahl (Worker member, Iceland). On 18 December 2019, the Office sent letters to the Government of Indonesia and the complainant organization informing them of the decision of the Governing Body. It also informed them of the measures, adopted by the Governing Body at its 334th Session (October–November 2018), concerning the operation of the representations procedure under article 24 of the Constitution, providing in particular for the adoption of arrangements to allow for optional voluntary conciliation or other measures at the national level (document GB.334/INS/5, paragraph 21, as amended by the Governing Body).

7. By letter dated 29 January 2020, the complainant organization informed the Office that it did “not consider that the possibility of optional voluntary conciliation or other measures at the national level would be an appropriate option at this time”. On 13 February 2020, the Office informed the Government of Indonesia of the complainant organization’s position.
8. By communication received on 24 April 2020, the Government of Indonesia submitted its reply to the representation and by communication received on 25 August 2020, it provided English translations of some of the annexes to its reply.
9. The Committee met on 17 December 2020 and 12 and 20 April 2021 to examine the representation and to adopt its report.

## ► II. Examination of the representation

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### A. The complainant’s allegations

10. In its representation, made on behalf of the “Ompu Ronggur indigenous community and its members”, the Indonesian Union of Plantation Workers (SERBUNDO) alleges violations of Articles 1, 2 and 3 of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), in conjunction with Part II(a) of the Declaration of Philadelphia, on the ground that existing national legislation and related practice would have the effect of both impairing and nullifying equality of opportunity and treatment of the Ompu Ronggur in respect of their traditional occupations and the complex of interdependent rights that sustains them.
11. The complainant states that the Ompu Ronggur community and its members have been and continue to be subjected to systemic discrimination. It adds that the situation of the community is “emblematic of entrenched and systemic discrimination against indigenous peoples throughout the Indonesian archipelago”. SERBUNDO explains that, as result of such discrimination, the Ompu Ronggur’s rights are not adequately secured and their traditional lands have been encroached upon, with repercussions on their traditional occupations.
12. SERBUNDO indicates that the Ompu Ronggur community is a “Batak Toba indigenous community”, known by the administration as Sabunganihuta II, comprised of 120 families, located in North Sumatra Province.<sup>1</sup> The complainant declares that the “Ompu Ronggur self-identifies as indigenous, as do the other Batak groups, and Batak Toba are recognized as such by other indigenous peoples and the State”. According to the complainant, the Ompu Ronggur community has occupied and used its traditionally-owned lands (*huta*), defined in accordance with Batak customary law, since time immemorial. It states that contiguous boundaries with neighbouring *huta* are well understood and observed, as illustrated and confirmed in written agreements concluded between Ompu Ronggur and its neighbours.<sup>2</sup> In 2015, the community began developing

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<sup>1</sup> The complainant explains that Batak Toba is one of five sub-groups of the Batak indigenous people of North Sumatra.

<sup>2</sup> Annex 2 to the representation, Affidavit of Pancur Simanjuntak, states that “The map depicts our customary tenure system and the lands we have traditionally owned. Our community knows exactly where everything lies. They are not just pointing at random things. The neighbouring communities have also agreed with this. We held discussions with them to confirm our common borders, and they signed statements to this effect”, 3.

a map of its *huta* as part of a nationwide process aimed at seeking recognition and registration of land rights that was conducted by the *Aliansi Masyarakat Adat Nusantara* (Indigenous Peoples Alliance of the Archipelago) (AMAN). The community's map was finalized in 2016 and covers 971 hectares, encompassing the various integrated ecological zones that forms the *huta*.<sup>3</sup>

13. SERBUNDO indicates that the community performs a range of traditional occupations on its *huta*, including: agriculture; agro-forestry, which involves also the collection and sale of benzoin resin extracted from cultivated kemenyan trees and the cultivation of brown "forest" rice; harvesting timber for house construction and related wood carving; hunting; and the collection of non-timber forest products and the manufacture of items therefrom for household use or for sale at the market. The complainant declares that these occupations have been practised by the community since time immemorial, are fundamental to its economy, and are inextricably linked to the community's traditional land tenure and management systems and its related governance.
14. In the late 1980s, the Government granted a forestry/plantation concession to the PT. Toba Pulp Lestari company for the production of pulp and paper, covering an area of approximately 268,000 hectares, 168,000 of which are in the district where the Ompu Ronggur community is located. In 1992, a permit was formally issued to the same company (Permit No. 493/KPTS-II/1992). The complainant indicates that, with the exception of the period spanning from 2000 to 2004, when the concession was suspended, the company has progressively clear-cut natural forests and cyclically planted and harvested fast-growing eucalyptus and other pulpwood trees over substantial areas of the lands traditionally owned by Ompu Ronggur and other Batak Toba communities. The clear-cut and planted areas are shown, along with the date on which each area was cleared, on maps produced by the Ompu Ronggur community that are annexed to the representation.<sup>4</sup> The complainant indicates that these maps were presented to the President of Indonesia in October 2016 and to the Minister of Forestry in March 2017. According to the maps, the company would have converted 231.22 hectares of the Ompu Ronggur community's traditional lands into plantation between 2004 and 2018 – representing more than a quarter of the community's *huta* – and the process of clearances and conversion continues.<sup>5</sup> In its supplementary communication of 29 January 2020, the complainant indicates that, since 9 September 2019, the company has cleared additional areas of the community's traditionally-owned forest and has planted eucalyptus seedlings.
15. According to the representation, none of the Batak Toba communities affected by the concession were consulted or notified about the issuance of the permit to the company in 1992. Nor were these communities, including the Ompu Ronggur, consulted since the permit was issued or in relation to any of the specific clearances occurring on their lands between 2004 and 2019, year of the submission of this representation. The complainant indicates that the Ompu Ronggur have continuously manifested their objection to the concession and have maintained records of the complaints they made with the

<sup>3</sup> Annex 3 to the representation, map 1. The process of mapping the *huta* is described in the affidavit of Pancur Simanjuntak, Annex 2 above. In map 1, the mid-green zone corresponds to the *Tombak Raja*, the sacred forest; the orange zone is the land used for livestock grazing; the dark green area is where people collect firewood, hunt, and some have planted [benzoin] resin trees; the pale green area is where the community grow agricultural crops, have rice paddies, and more resin trees, among other things; and, finally the purple zone is the location of an ancestral village, where the fore parents lived from 1890 until 1920.

<sup>4</sup> Annex 3, map 2.

<sup>5</sup> Annex 2 to the representation, Affidavit of Pancur Simanjuntak.

Government over the last 20 years. SERBUNDO states that the complaints have been ignored and that the community lives in a constant state of insecurity “because further clearances and planting of eucalyptus by [the company] could occur at anytime and anywhere in its customary lands”. In its supplementary communication, the complainant states that the community has not been notified, nor has it been accorded the opportunity to participate in decision-making around the additional clearance and planting on its traditional lands occurring after the representation was filed.

16. SERBUNDO states that, because of the concession, the community has lost a substantial portion of the land that has been sustaining its traditional occupations. The complainant provides illustrations of the various traditional occupations performed by the Ompu Ronggur and the impact produced on each of them by the concession. It indicates, for example, that the destruction of substantial areas of Ompu Ronggur’s kemenyan forest used for resin collection and the removal of large trees from most of the other remaining areas – which has caused the disruption of the micro-climate determining the health and productivity of the kemenyan forest and the quality and quantity of resin they produce – has resulted in a reduction in the income of the community of over 80 per cent since the company began its operations. The cultivation of rice has also been affected as a result of both the land lost to the company (forest rice) and the floods inundating and destroying the paddy fields as a consequence of the clearance of the forests. The complainant further states that hunting has become impossible because game animals have become scarce due to forest clearances and the establishment of mono-crop plantations. Equally scarce has become the timber that the community used for wood-carving as well as the non-timber forest products that the women from the community have been using for the production of handicrafts, like floor mats and woven bags. The traditional occupation of the traditional chiefs of the community has also been affected because they can no longer exercise their authority over the management of the community’s lands. SERBUNDO stresses that the discrimination suffered by the community and its members in respect of their traditional occupations has also an intergeneration dimension: because of the inability to continue to perform their occupations as before, community’s members are unable to pass down to the younger generations the traditional knowledge at the basis of such occupations, such as the traditional wisdom on hunting or their traditional weaving knowledge. The complainant also indicates that the reduction in income resulted from the land loss and its impact on Ompu Ronggur’s traditional occupations has affected children’s access to education.
17. The complainant maintains that the discriminatory treatment against the Ompu Ronggur in respect of their occupations is rooted in existing national legislation and practice that present a series of structural and discriminatory defects to the detriment of the recognition of the community’s rights, including their land rights. SERBUNDO refers to the national inquiry of 2015 by the National Human Rights Commission (Komnas HAM) on “the right of indigenous peoples on their territories in the forest zones” in which the Komnas HAM found several root causes for the violations of these peoples’ rights including the lack of legal recognition/status as indigenous people,<sup>6</sup> which makes their legal rights/claims unclear or uncertain and has resulted in absence of boundaries of indigenous territories and security of tenure. The complainant also

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<sup>6</sup> The Komnas HAM uses the expression “indigenous peoples” as the English translation of the concept of *masyarakat hukum adat* or customary law communities that is found in the national legislation. The complainant also uses the two expressions interchangeably.

refers to a number of reports by UN treaty bodies and Special Mandates that have highlighted the same problem.

18. SERBUNDO explains that the Constitution of Indonesia recognizes the existence of *masyarakat hukum adat*,<sup>7</sup> or *adat*/customary law communities, and their traditional customary rights, “as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law” (article 18(B)). It states that the legislation referred to in the Constitution has not yet been adopted. In the absence of a framework law, the decision of whether an *adat* law community “still exists” depends on the affirmative recognition by a local government law (for example, District *Perda*) and the protection offered by the Constitution is made dependent on this recognition. SERBUNDO maintains that, in most cases, District *Perda* are either not adopted, or there are substantial delays in their adoption where drafted and, where they exist, haphazard implementation often results in ongoing non-recognition of indigenous peoples and their communities. The complainant also refers to the findings from the 2015 national inquiry conducted by the Komnas HAM according to which very few indigenous peoples have gained official recognition and, in practice, local governments do not give recognition and some even expressly deny the existence of certain indigenous peoples. SERBUNDO also refers to article 28(I)(3) of the Constitution, which provides that the rights of *adat* law communities “shall be respected in accordance with the development of times and civilisations”, and indicates that this provision subordinates *adat* law communities’ rights to principles of “progress and civilisation”, imposing therefore restrictions that are discriminatory and do not apply to any other racial or ethnic group in Indonesia.
19. The complainant states that the Ompu Ronggur community has sought to obtain formal recognition through a District *Perda* since 2012 by submitting a draft to the District legislature but, at the time of this representation, the District *Perda* has not yet been enacted. SERBUNDO emphasizes that this lack of formal recognition precludes the community from taking any legal action to have their rights recognized and secured.
20. SERBUNDO indicates that the recognition of the customary land rights of *adat* law communities is made dependent on the official recognition of the existence of the concerned communities. In this regard, it refers to article 3 of the Basic Agrarian Law (BAL), as well as to the Forestry Law and the Decree Number P.32 /Menlhk-Sekretariat/2015 on Forests Rights, issued by the Minister of Environment and Forestry. The complainant further maintains that, under the BAL, greater security of tenure is provided to non-indigenous citizens and corporations because, whereas regulations, procedures and institutions exist to issue and regulate their land tenures, none exist for the recognition, registration or protection of indigenous peoples’ collective tenures based on customary law (*hak ulayat*), leaving their lands vulnerable to appropriation. Moreover, the BAL, by declaring that the exercise of customary land rights must conform to national interests, has, in practice, allowed the Government to treat customary land as state land.
21. The complainant indicates that following the decision No. 35/PUU-X/2012 by the Constitutional Court in 2013 – which declared some provisions of the 1999 Forestry Law to be unconstitutional to the extent that they incorporated customary forest lands into the state-controlled forest estate – customary forests are no longer considered to be part

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<sup>7</sup> Communities governed by customs or customary law societies.



of the state forest. However, the Court's decision maintained the requirement for the formal recognition of existence of *adat* law communities via local legislation as a precondition for the recognition of their customary forest land rights.

- 22.** The complainant states that effective protection against discrimination for the Ompu Ronggur community and its members in respect of their traditional occupations requires simultaneous protection of land, resource and other rights, because the discrimination that they experience with respect to their traditional occupations is itself rooted in, and aggravated by, the discriminatory denial of these rights. SERBUNDO underscores that it will take 50–70 years for the Ompu Ronggur to restore the currently degraded forest to allow their traditional occupations to reach levels enjoyed prior to the concession. Therefore, the discrimination suffered will affect and harm the community for at least the next two to three generations, including its cultural integrity and the transmission of traditional knowledge that is intrinsic to learning and practicing these traditional occupations. The complainant states that the discrimination suffered by the community must be identified, interpreted and understood in the context of the specific rights of indigenous peoples. The UN Declaration on the Rights of Indigenous Peoples and the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169) <sup>8</sup> are both relevant in this regard. It maintains that in order to achieve equality, measures need to be taken to eliminate the rules that discriminate against *adat* law communities and to remove the underlying causes of the discrimination.
- 23.** In the light of all the above, SERBUNDO alleges that the Government has violated Article 1 of Convention No. 111 because of the discriminatory treatment of the Ompu Ronggur community and its members that has resulted in the substantial impairment or nullification of the community's traditional occupations and associated rights. The complainant maintains that the Government has also failed to comply with participation and other procedural guarantees that should have been applied to the case at hand, including obtaining the free, prior and informed consent of the community. It underscores that permits restricting property rights must not be issued if the public purpose in question can be achieved in a different way and considers that in the case of the Ompu Ronggur, the Government did not explore alternatives to avoid affecting their lands and occupations. It argues that the Government has tolerated and acquiesced, on an ongoing basis, to the repeated destruction and conversion of Ompu Ronggur's lands and forests, without any regard for the community and its rights, and has made no attempt to remedy these acts and omissions. In addition, the complainant alleges that the Government has violated Articles 2 and 3 of Convention No. 111 because of its failure to adopt policy and legal measures to address the discrimination that impairs and nullifies indigenous peoples' rights to freely engage in their traditional occupations and livelihoods. It indicates that the Government has not taken measures in response to the recommendations resulting from the national inquiry conducted by the Komnas HAM, nor has it taken action following the 2013 decision by the Constitutional Court. The complainant also alleges that the Government has failed to comply with its immediate obligations under Articles 2 and 3(b) and (c) of Convention No. 111 to repeal any statutory provisions and any administrative measures that may discriminate directly or indirectly against indigenous peoples.
- 24.** SERBUNDO argues that, while there are numerous deficiencies in existing law that require amendment to remedy the discrimination against indigenous peoples, one of the primary obstacles lies in the prevailing interpretation and implementation of

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<sup>8</sup> For information: Indonesia did not ratify ILO Convention No. 169.



article 18(B)(2) of the Constitution, referred to above, according to which *adat* law communities have to be explicitly recognized and accredited via local, provincial and, in some cases, national regulations or decrees in order to access the protections provided by the law. The complainant maintains that national law and practice negate the right to legal personality of *adat* law communities and, by implication, their right to have rights, by vesting authority in various government entities to accredit or certify – or not accredit or certify – their existence, and hence their ability to hold, exercise, enjoy and enforce the rights recognized in national laws. It underscores that this obstacle applies to no other racial or ethnic group and argues that the above-mentioned provision should be interpreted in accordance with the principle of self-identification. It emphasizes that, at present, the State can at any time, during the process of formal recognition/accreditation, refuse to recognize the existence of an indigenous community or that such recognition can be obstructed or delayed, as it is happening with the Ompu Ronggur community. The complainant states that this constitutes an insurmountable obstacle for almost all indigenous peoples in Indonesia to obtain legal recognition and protection of their rights, and represents a structural and systemic discrimination against them.

25. In view of the foregoing, the complainant requests the ILO to fully consider the full spectrum and inter-dependency of indigenous peoples' rights in assessing the nature, scope and content of the discrimination suffered by Ompu Ronggur and its gravity, including the "essential" and inextricable inter-relations between indigenous peoples' traditional occupations and effective guarantees for their land and resource rights; and, should it find that Convention No. 111 has been contravened, to assist Indonesia to remedy this situation with the full and effective participation of indigenous peoples' representatives, including policy, legislative and other measures as well as any necessary technical support and cooperation.
26. In its supplementary communication of 29 January 2020, SERBUNDO provides information on a meeting held in Jakarta on 25 November 2019 with the Ministry of Labour, in which the community's members were offered jobs with the private company holding the concession. The offer was declined because this proposal was in contrast with the guarantees for which the community seeks protection. The complainant also provides information on a meeting held on 21 December 2019 with the District Regent who was however not aware of any initiatives taken by the central Government to address the complaints of the community. Finally, SERBUNDO states that, on 9 January 2020 and 14 January 2020, it was contacted by officials of the Ministry of Labour who declared that the State "will commit to resolve the problem if you will suspend the representation". This option was rejected by the complainant.

## B. The Government's reply

27. In its communications of 30 January 2020 and 20 April 2020, the Government indicates that it conducted field visits and convened a series of meetings with relevant parties in order to verify the claims made by the complainant. It has gathered that three communities, including the Ompu Ronggur, live around the concession area and share an overlapping claim of rights over the land in such area. The Government indicates that these communities live in different locations and, in particular, that the Ompu Ronggur community lives in Sabungan Nihuta II Village, Sipahutar district, which is located 10 km away from the concession area. The Government states that the land area claimed by the Ompu Ronggur community in the representation is located in the Aek Napa, Sabungan Nihuta IV Village, Sipahutar district, which is inhabited by the Ompu Guru

Sitahuak community. The Government indicates that Sabungan Nihuta IV Village is directly adjacent to the concession area.

- 28.** The Government indicates that, according to the testimony of the Ompu Guru Sitahuak community, the Ompu Ronggur have never lived with the descendants of the Ompu Guru Sitahuak and that in 2014 the Ompu Ronggur community arrived to the Huta Aek Napa and unilaterally claimed that this area is the customary land of Ompu Ronggur's descendants. The Government underlines that, in the light of the information above, the matter at hand is an internal dispute between the descendants of King Simanjuntak, notably between the Ompu Ronggur and the Ompu Guru Sitahuak, over traditional land rights, and to a certain extent a third community, the Ompu Bolus.
- 29.** The Government explains that pursuant to article 33(3) of the Indonesian Constitution, it can grant land management licences to private companies over state-owned land (forest and soil). It indicates that the private company holder of the concession over the land which is the object of this representation obtained concession rights in 1992 over an area of land covering various Regencies in the North Sumatra Province on the basis of a Decree by the Ministry of Forestry (SK.493/KPTS-II/1992) that has subsequently been amended several times, most recently in September 2019 (SK.682/Menlhk/Setjen/HPL.0/9/2019).
- 30.** The Government indicates that the private company has 1,241 workers, including 32 workers from the Ompu Guru Sitahuak community and three workers from the Ompu Bolus community. It states that no member of the Ompu Ronggur community has worked for the company. It indicates that, in a meeting held on 25 November 2019 between representatives of the central government and representatives of SERBUNDO and the Ompu Ronggur community (AMAN Tano Batak), it was stated that the Ompu Ronggur community does not wish to work at the company. The Government indicates that the private company runs various community development programmes as a part of its corporate social responsibility and has established business partnerships with communities living around its operational area. In Sipahutar District, the company has established forestry partnerships with the Coalition of Forest Farmers Group (Gapoktan) of the Sabungan Nihuta IV Village. The Government states that the private company has no business partnership with the Ompu Ronggur community because they live beyond the concession area.
- 31.** The Government maintains, on the basis of its field observations that, since the Sabungan Nihuta II Village is not affected by the operation of the private company, the members of the Ompu Ronggur community are still able to carry out their customary farming activities, such as planting corn and rice. The Government also considers that the Benzoin (resin) forest still exists and is located outside of the concession area. It adds that the private company offers job opportunities that can be filled by members of the local communities, without discrimination, and that the company has relations with six trade unions, which do not include SERBUNDO.
- 32.** Concerning the problem between the Ompu Guru Sitahuak, Ompu Ronggur and Ompu Bolus, the Regent of North Tapanuli facilitated a meeting on 16 April 2015 which resulted in several agreements laying down that: (1) the disputed area is legally a state forest area over which management rights have been granted to the private company; (2) the three communities must resort to the court as the appropriate forum to settle their claims; and (3) for those who had planted rice and corn crops on the "conflicted area", the opportunity was given to harvest their crops once before September 2015, after which they would no longer be allowed to conduct any such activities in the area.

33. The Government indicates that after the aforesaid agreement was reached, the Ompu Guru Sitahuak communities complained to the local government that the Ompu Ronggur and the Ompu Bolus had violated the contents of the agreement. The Government also explains that the private company has allowed both communities to plant crops in the area, despite the agreement.
34. The Government reiterates that it considers the case which is the object of this representation a domestic problem as it concerns overlapping claims among three local communities concerning a part of the lands granted in concession to the private company. The Government underscores that it has sought to mediate the problem even prior to the filing of the representation, without success. It also maintains that SERBUNDO's allegations are beyond the scope of employment issues and relate closer to land disputes.
35. Turning to the national legal framework, the Government recalls that the Constitution recognizes the existence of customary law communities and recognizes their traditional rights. It explains that the phrase "as long as these remain in existence" used in article 18(B)(2) of the Constitution: (i) provides space for the possibility of development and modernization of the various customary law communities; (ii) serves to ensure that "there are no parties with ill intents to exploit the special rights of the customary law community"; and (iii) prevents legal problems by ensuring that land rights do not remain without a legal holder in the case in which the customary law community is no longer "in existence". The Government indicates that Regulation No. 52 of the Ministry of Home Affairs concerning "Guidelines for the Recognition and Protection of the Customary Law Community" define a customary law community as "[...] Indonesian citizens who have distinctive characteristics, live in harmonious groups according to their customary law, have a connection to their ancestral origins and/or shared habitat, have a strong relationship with the land and the environment, have a value system that determines economic, political, social, cultural, legal institutions, and utilize a particular region hereditarily".
36. Concerning SERBUNDO's allegation that customary rights (*ulayat*) under the BAL are treated by the Government as state property, the Government indicates that article 3 of the BAL recognizes customary rights and maintains that the phrase "in accordance with the interests of the State" contained in this provision is not discriminatory but rather an application of limitations allowed under applicable norms of international law, which permits the State to defend "preponderant interests" in the exercise of customary rights. As regards the Forestry Law, the Government explains that, following the decision of the Constitutional Court No. 35/PUU-X/2012, the status of customary forests under the Forestry Law has been changed from state forest to titled forest.<sup>9</sup> In the light of the foregoing, the Government considers that SERBUNDO's allegation that customary forests may be converted arbitrarily by the State no longer have weight. It indicates that the customary forests have equal standing with other titled forests. It further adds that the Ministry of Environment and Forestry Regulation No. P21/Menlhk/Setjen/Kum.1/4/2019 distinguishes between state forest and customary forest and, together with the Ministry of Agrarian Affairs and Spatial Planning Regulation No. 10/2016, it regulates the recognition of customary forests.
37. The Government considers that the concept of "indigenous peoples" invoked by the complainant with respect to the Ompu Ronggur community is associated with

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<sup>9</sup> For definitions, see article 1 of the Forestry Law.

Convention No. 169 and differs from the concept of customary (*adat*) law communities recognized in Indonesia. The Government maintains that, given the fact that the entire population of Indonesia has remained unchanged since the time of its colonization and subsequent independence and the fact that Indonesia is a multicultural and multi-ethnic nation that does not discriminate against its people on any grounds, the rights stipulated in Convention No. 169, accorded exclusively to indigenous peoples, are not applicable in the context of Indonesia. The Government considers that SERBUNDO's claim with regard to the Ompu Ronggur community as an indigenous people is incorrect and recalls that Indonesia has ratified neither Convention No. 169 nor the Indigenous and Tribal Populations Convention, 1957 (No. 107).

- 38.** The Government refers to a series of laws and regulations recognizing the existence of customary law communities and protecting their rights. It explains that a mechanism has been established to process the recognition of customary law communities, which comprises the stages of identification, verification and validation, as well as determination, involving all relevant stakeholders. It states that to date approximately 65 customary law communities have been legally recognized. It further explains that, based on this recognition, the State protects the rights of the concerned communities, among others, to their customary territories in accordance with national laws and regulations. Concerning, in particular, customary forests, the Government indicates that the Ministry of Environment and Forestry Regulation No. P21/Menlhk/Setjen/Kum.1/4/2019 sets out a number of requirements for the establishment of customary forests which include the following: a request is to be made to the Minister of Environment and Forestry by the community; the community must have been legally recognized as a customary law community by a local regulation; and the area claimed should partially or entirely be in the form of a forest.
- 39.** The Government states that, to date, there has been no local regulation recognizing the Ompu Ronggur community as a customary law community. Therefore, their claim to customary forest is groundless. With regard to SERBUNDO's allegations that, by not respecting the principle of self-identification, the Government would be denying the legal personality of the community, the Government considers that such principle is irrelevant in the context of the Ompu Ronggur community for two reasons: firstly, the concept of customary law community is different from the concept of indigenous peoples, which does not apply in Indonesia; and, secondly, the principle of self-identification is a principle adopted in Convention No. 169, which the Government has not ratified. The Government further indicates that the application of the principle of self-identification would raise new issues such as unilateral claims from various communities to obtain the rights of customary law communities.
- 40.** In the light of all the above, the Government considers that the fact that the Ompu Ronggur community has not yet obtained the status of a customary law community cannot be used as basis for the argument that discrimination has occurred. It rejects SERBUNDO's views that the term indigenous peoples is equivalent to the term customary law community. It also rejects its allegations that the Government has violated Articles 1, 2 and 3 of Convention No. 111 for the reasons below.
- 41.** Firstly, the concession area granted to the private company is located 10 km away from the village inhabited by the Ompu Ronggur community; its operations do not impact on the activities of the community; and the community does not have the right to claim the land managed by the company as their customary land because the community has not been legally recognized as a customary law community. Moreover, the Ompu Ronggur is still carrying on their traditional agricultural activities and their traditional livelihoods

are neither impaired nor nullified. Concerning SERBUNDO's allegations that the Government failed to comply with the obligation to obtain the free, prior and informed consent of the community, the Government emphasizes that such obligation was developed in the context of Convention No. 169, which is not binding on the Government. The Government has, however, ensured that the company carried out consultations with the communities living in or around the concession area whose livelihood was likely to be affected by the operations. The Government states that the company has no obligations to consult and obtain the free, prior and informed consent of the Ompu Ronggur because this community is not affected by the activities of the company given the distance from their village to the concession area.

42. Secondly, with respect to Article 2 of the Convention, the Government underscores that it has an extensive national legal infrastructure that recognizes the existence of customary law communities and their rights, ranging from the Constitution to the land legislation and the related implementing regulations. It states that the fact that the Ompu Ronggur does not yet have customary land rights is not the result of discriminatory national policies and/or laws but is due to the lack of application by the community to obtain recognition. The Government considers that the requirement for legal recognition falls within the use of "methods appropriate to national conditions and practice" referred to in Article 2 of Convention No. 111. In this respect, the Government also underscores that the application of the principle of self-identification in a highly pluralistic country like Indonesia requires a careful application to avoid potential abuse.
43. Finally, concerning Article 3 of the Convention, the Government highlights that it has regularly submitted reports on the progress of the application of Convention No. 111 to the Committee of Experts on the Application of Conventions and Recommendations (CEACR) in compliance with Article 3(f). It also affirms that the decision by the Constitutional Court mentioned above serves as evidence of Indonesia's commitment to adhere to Article 3(b) and (c).
44. Furthermore, the Government considers that the representation submitted by SERBUNDO is beyond the issue of employment and occupation within the context of Convention No. 111 and that arguments submitted by the complainant contain some false and misleading information.

### ▶ III. The Committee's conclusions

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45. The Committee notes the complainant organization's allegations according to which the Ompu Ronggur community and its members suffered discrimination, in respect of their ability to continue to perform their traditional occupations, in that they do not enjoy access to land and resource rights on an equal footing with the rest of the population. It also notes the Government's observations thereon.
46. The representation relates to Articles 1, 2 and 3(b) and (c) of Convention No. 111, which read as follows:

*Article 1*

1. For the purpose of this Convention the term discrimination includes--
  - (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect

- of nullifying or impairing equality of opportunity or treatment in employment or occupation;
- (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.
2. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.
3. For the purpose of this Convention the terms employment and occupation include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

#### *Article 2*

Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

#### *Article 3*

Each Member for which this Convention is in force undertakes, by methods appropriate to national conditions and practice: [...]

- (b) to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy;
- (c) to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy; [...]
47. At the outset, the Committee will address two preliminary questions raised in the complainant's allegations and in the Government's reply.

### Scope of application of Convention No. 111

48. The Committee notes the Government's statement that SERBUNDO's allegations are beyond the scope of employment issues. In this regard, the Committee recalls that the CEACR considered that Convention No. 111 applies to all workers, including self-employed workers in the rural sector such as the Ompu Ronggur, and that their traditional occupations (such as farming, hunting and handicraft production, among others) are "occupations" within the meaning of the Convention and are dependent on access to land (see the CEACR's General Survey on equality in employment and occupation, 1988, paragraphs 89–90, and the General Survey on the fundamental Conventions, 2012, paragraph 752). The Committee therefore considers that SERBUNDO's allegations would fall within the scope of application of the Convention.

### Identification of the Ompu Ronggur as an indigenous people

49. Turning to the second question, the Committee notes SERBUNDO's statement that the Ompu Ronggur self-identify as indigenous and indicate that the Batak Toba group, to which they belong, is recognized as indigenous by other groups and by the State. The Committee also notes that, according to the Government, the complainant's claim that the Ompu Ronggur community is an indigenous people is incorrect. The Government explains that the concept of "indigenous peoples" differs from the concept of "customary (*adat*) law communities" recognized in Indonesia and adds that the rights stipulated in Convention No. 169 are not applicable in the context of Indonesia.



50. Recalling further that Convention No. 169 has not been ratified by Indonesia, the Committee will not enter into this discussion. It will therefore examine the present representation as a case of alleged discrimination based on the prohibited grounds of race, colour and national extraction under Article 1(1)(a) of Convention No. 111, under which the supervisory bodies of the ILO have traditionally addressed discrimination against ethnic groups.
51. The Committee will now examine the substance of the matter, based on the national legal provisions relevant to the case, vis-à-vis the provisions of Convention No.111.
52. The Committee notes that the complainant and the Government make reference to legislation concerning “customary law communities” as the relevant framework to address the present case. It notes that “customary law communities” and their traditional rights are recognized in articles 18(B)(2) and 28(I)(3) of the Constitution, which were recalled above (see paragraph 18), as well as in various laws, including Law No. 39/1999 concerning human rights, which provides, among others, for the protection of traditional customary land rights (article 6). The Committee notes that traditional customary land rights are referred to in the Basic Agrarian Law (BAL), particularly in article 3, although the BAL does not make provisions for their recognition and registration.
53. The Committee notes that, as indicated by both the complainant and the Government, in order for “customary law communities” to claim their traditional rights over customary lands, including forests, they must first be officially recognized as “still existing” through local legislation/regulations.<sup>10</sup>
54. The Committee notes the complainant’s declaration that the Ompu Ronggur community requested official recognition in 2012, without receiving a response. It also notes that the complainant highlights that the requirement to obtain official recognition represents an “insurmountable” obstacle for almost all customary law communities in Indonesia.<sup>11</sup>
55. The Committee notes the Government’s statement that the Ompu Ronggur do not have the right to claim the land as their customary land because the community has not been legally recognized as a “customary law community”. It also notes the Government’s indication that “based on the data held by the Government, to date, there has not been any Local Regulation in North Tapanuli Regency that recognizes and determines [Ompu Ronggur] as a Customary Law Community”. The Committee further notes the Government’s explanation that the objective of such requirement is to prevent false claims from parties that cannot fulfil the basic criteria of customary law community. To this end, a comprehensive and careful mechanism to process the recognition of a customary law community has been put in place and a “customary law community” must go through the stages of identification, verification and validation, as well as determination, involving all relevant stakeholders.
56. In view of the above, the Committee is of the opinion that the crux of the matter seems to reside, first and foremost, in the request for recognition of the status of “customary law community” by the Ompu Ronggur in order to secure access to a specific portion of land to perform their traditional occupations. The right claimed by the Ompu Ronggur to access productive resources, such as the land, allowing them to perform their

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<sup>10</sup> This requirement is derived from the expression “as long as these remain in existence” that is used in article 18(B)(2) of the Constitution and is repeated in the Forestry Law and the BAL.

<sup>11</sup> In this regard, SERBUNDO mentions the findings from the 2015 national inquiry conducted by the National Human Rights Commission (Komnas HAM) (see para. 17 above).



traditional occupations is dependent on the acquisition of the status of customary law community. Given the extended period elapsed since 2012 – the year where the complainant alleges that the Ompu Ronggur community filed its request for recognition as customary law community, without receiving a reply to date – the Committee considers it important to determine both, whether:

- (i) a formal request for recognition was submitted by the Ompu Ronggur community in 2012, and
  - (ii) a District *Perda* or local government law describing the procedure for recognition of whether an *adat* law community still exist has been enacted by the District legislature where the Ompu Ronggur community is located.
- 57.** In this regard, given the information available and the divergence of opinions regarding the status of the procedure that would allow the Ompu Ronggur community to access the portion of the land where they claim to carry out their traditional occupations, and in order to expedite the process, the Committee invites the complainant organization to provide the Government with all the necessary documentation linked to their original request. The Committee expects that this will allow the relevant bodies to examine without delay the documentation, pursuant to the local regulation (District *Perda*), and issue a decision. The Committee calls on the Government to ensure that the decision taken will be in full conformity with Convention No. 111.
- 58.** The Committee reminds the Government that it can avail itself of the ILO technical assistance in this process.

## ▶ IV. The Committee's recommendations

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- 59. Having reached the conclusions set out in the present report on the matters raised in the representation, the Committee recommends that the Governing Body:**
- (a) **Approve the present report, and in particular the conclusions contained in paragraph 57, on the basis of the information presented to the Committee;**
  - (b) **invite the Government of Indonesia to send information concerning the Committee's conclusions in its next report on the application of Convention No. 111 under article 22 of the ILO Constitution; and;**
  - (c) **make the report publicly available and declare closed the procedure initiated by the representation.**