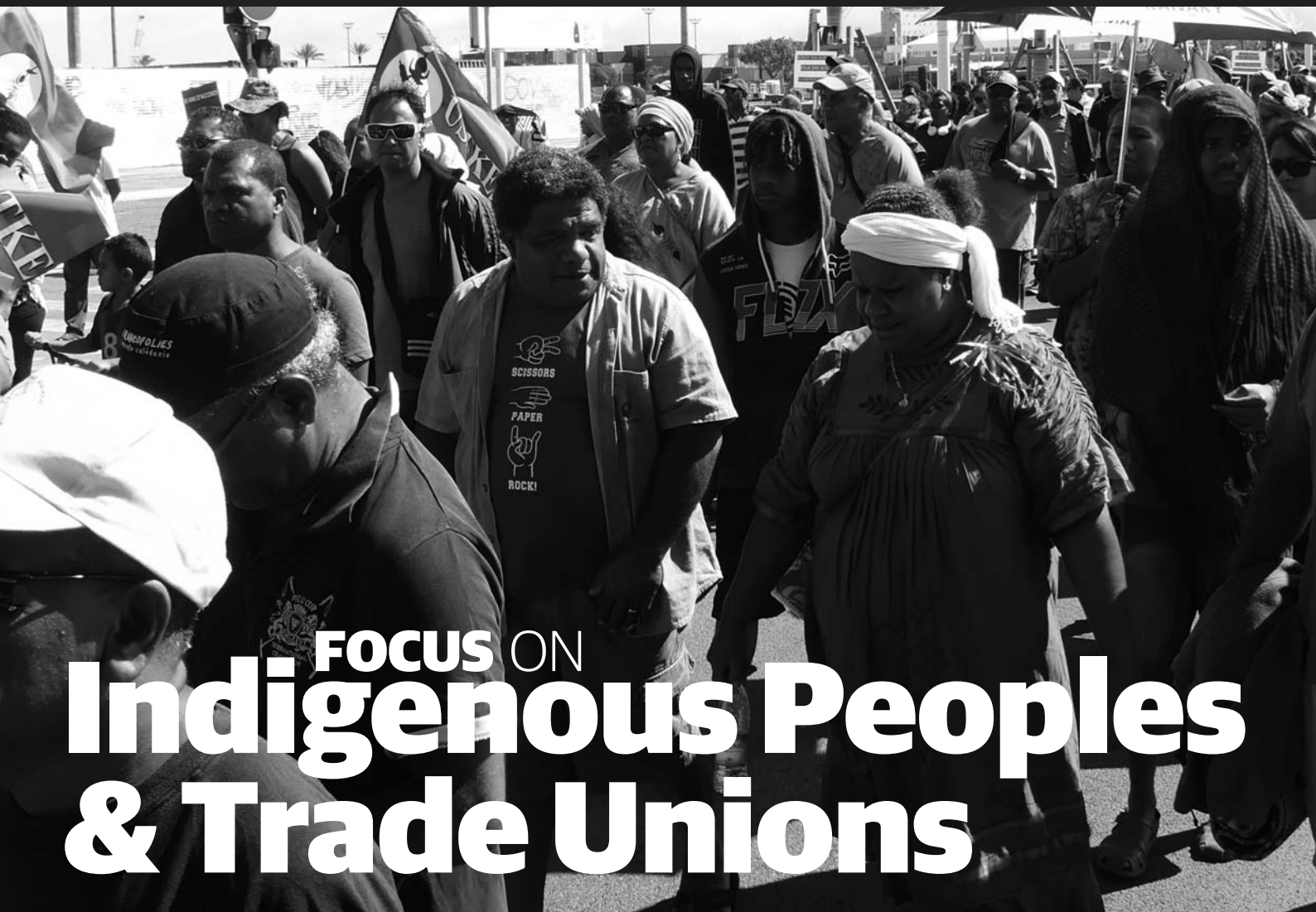


# union rights



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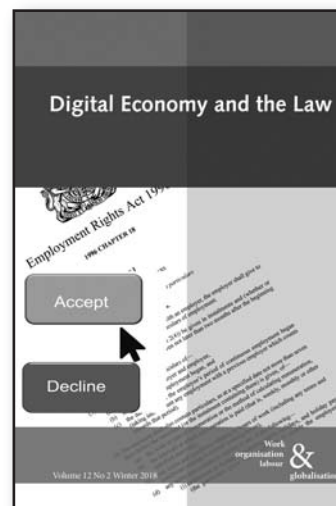


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# union rights

Journal of the International Centre for Trade Union Rights

- Centro Internacional para los Derechos Sindicales
- Centre International pour les Droits Syndicaux

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# Editorial

Ciaran Cross  
Editor

The Indigenous and Tribal Peoples Convention, 1989 (C169) remains the pinnacle achievement of the trade union movement's legacy of solidarity with indigenous and tribal peoples. Its contribution to the creation of internationally recognised-rights of indigenous peoples reaches a milestone in 2019, marking thirty years since its adoption. As related here – by, among others, one of the key figures in the Convention's drafting and adoption – the ILO has since its foundation had a leading role in promoting the voices of indigenous peoples on the international level, not only in terms of welfare and protection, but by advancing indigenous peoples' status as active agents in the foundation and realisation of their collective rights to self-determination. C169 has had a profound impact on the international framing of those rights and on their institutionalisation through constitutional reform efforts in many signatory states.

Uptake on ratification of C169 has however been poor (see p.17) – perhaps precisely *because* it extends to indigenous and tribal peoples rights which are akin to (but still short of) sovereignty. Fears of secessionist movements and fragmentation have haunted international discourse in this area – all the more so with respect to states whose territorial borders are a fragile legacy, negotiated for and imposed by competing European imperial powers.

Significant work on both the international and national levels remains to be done. Even in those countries that have ratified C169, its implementation is far from complete. In Colombia, on 22 October

2018, José Domingo Ulcué Collazos, an indigenous teacher and member of the union FECODE (Federación Colombiana de Educadores) was executed. He worked in the Munchique Los Tigres indigenous reserve. His murder is the latest in a catalogue of violent and deadly attacks on civil society and community leaders in Colombia in recent years; teachers, trade unionists and indigenous leaders have been particularly targeted.

Such acts of lethal violence, exploitation and marginalisation, discrimination and racism directed at indigenous peoples – their cultures, communities and territories – are well documented across the world. The roots of this violence lie in centuries long processes of colonisation, the rapacious demands of industrial capitalism for access to natural resources, as well as in a narrow Eurocentric identity politics which – since at least the time of John Locke – has inextricably linked concepts of land and labour to citizenship and nation-building. Presaged in Locke's concept of individual property rights derived from one's toil on the land is an ideology which ultimately equates productivity with ownership and virtue. This paved the way not only for the international doctrine of '*terra nullius*' – furnishing an era of genocidal land dispossession with its foremost legal euphemism – but also for the divisive labour practices that have historically underpinned settler colonialism. The fact that even organised workers of the 'metropole' shared in the systematic racism of the 'colony' remains an uncomfortable historical fact for some in the labour movement today, in many parts of the world. The example included here of Canada – where some Indigenous people still harbour suspicions towards unions as colonial institutions – is certainly not unique.

For some, settler colonialism never ended. For the Kanak and Saharawi peoples, self-determination is a precursor of social justice, but the labour movement may still serve as a vital vehicle for its achievement. The motto of the Kanak trade union – *Factories, Tribes, Same Struggle* – is a reminder that indigenous peoples and the labour movement are not necessarily distinct demographics. Indigenous peoples have long participated actively both in labour markets, and in the labour movement.

Ultimately however, these complex issues raise unique challenges. In the US, tribal sovereignty has lately (and controversially) been invoked to justify the exclusion of tribal enterprises from the coverage of federal laws protecting workers' trade union rights. To better understand what is at stake for Native Americans, we invited two leading lawyers to present their case.

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# The Adoption of Convention 169: Unions and Indigenous Peoples' Involvement

The International Labour Organisation (ILO) has adopted the only two international Conventions on indigenous and tribal peoples: the Indigenous and Tribal Populations Convention, 1957 (No. 107), which was revised and replaced by the Indigenous and Tribal Peoples Convention, 1989 (No. 169). One of the most interesting parts of the story of how these two conventions came into existence and have been applied, is the positive role of workers' organisations in both adopting and supervising them.

## Why the ILO?

A first point to address is why these Conventions were adopted under the auspices of the ILO at all, and not the United Nations (UN).

The ILO was established in 1919 at the same time as the League of Nations. Early on it began to examine the situation of 'native peoples' – populations of colonised countries in Africa and Asia in particular, who had no rights and no protection in their work lives. They were often subject to forced labour and other forms of severe exploitation. The ILO had been established to adopt international Conventions to regulate working life, and soon adopted the Forced Labour Convention (No. 29) in 1930 aimed in particular at making forced labour of indigenous populations illegal. The organisation went on to adopt other conventions on such things as hours and other conditions of work to protect these colonised peoples, in a group of instruments known as the 'native labour code' – a real advance in international law and in protection. This was one of the first concrete steps towards decolonisation.

After World War II, the ILO became the first specialised agency of the new UN system, as the only surviving part of the League of Nations. As it resumed work, one of the major work items became the situation of life and work for those groups that the ILO termed 'indigenous and tribal peoples' – meaning the huge numbers of those the organisation considered to be 'primitive' peoples, who were largely outside the formal economy or were living in an economically marginal situation. This kind of paternalistic attitude was prevalent in the international development community and in many countries for years after this, but it did result in some badly needed protections.

One of the concrete results was the adoption of the Indigenous and Tribal Populations Convention, 1957 (No. 107). The Convention was adopted by the ILO, at the behest of and on behalf of the entire UN system, and with their full cooperation, because at that time

the UN itself had no experience in adopting conventions and the ILO had already begun working on the issue. Convention 107 was an important working tool of the ILO for many years, and guided a number of technical interventions on the ground. However, for more than 25 years after the adoption of Convention 107, the workers' contingent played little role in its promotion or supervision, and the Convention gradually lost its relevance in the face of changing developments. Over time it became apparent that the orientation of C107 was very patronising and was intended to promote assimilation and the eventual abandonment of indigenous cultures, and there were calls for the Convention to be revised.

The ILO revised the Convention in 1989, when it adopted the Indigenous and Tribal Peoples Convention, 1989 (No. 169). Today Convention 169 remains the only international Convention that can be ratified, which deals directly with the rights and cultures of these vulnerable peoples. And this is where the contribution of workers' organisations has become prominent.

## A new wind

As the UN began its work on this subject the early 1970s, indigenous peoples became increasingly aware of the potential for international help. The first indigenous non-governmental organisation (NGO) – the World Council of Indigenous Peoples – was established in Canada in 1975. This set off a wave of international activism as indigenous peoples began to seek relief at the international level from persecution and loss of lands and rights. However, proponents of indigenous rights found Convention 107 to be paternalistic and oriented more toward assimilation than protection, as the longer-term solution to the 'Indigenous problem'. And they were right. The Convention had been adopted at a time when the new UN and its component parts (including the ILO) took a 'top-down' approach to all development questions. Briefly put, the Convention and international assistance efforts reflected the attitude that the lack of social and economic development of the indigenous peoples would only be overcome when they joined the economic mainstream, and their identities were absorbed into the dominant populations<sup>1</sup>.

As the international discussion ripened the ILO itself became concerned at where it was leading. Rising criticism reflected a view that the Convention was unsustainable and called for its withdrawal in favour of an effort by the UN to adopt a new and

C169 remains the only international Convention dealing directly with the rights and cultures of indigenous peoples that can be ratified

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The indigenous caucus enjoyed an unprecedented level of participation in the drafting and adoption of C169, largely due to the support of the Workers' Group

more progressive international instrument – an effort that in the end was only partially successful. The ILO, quite simply, became embarrassed that it was responsible for a Convention so widely rejected by those it was supposed to protect.

The Governing Body of the ILO approved a recommendation to hold a Meeting of Experts to advise it on the desirability of revising Convention 107. The meeting held in September 1986 was a major departure for the ILO from its established practice of allowing only representatives of governments, employers and workers to participate fully. It was decided to invite representatives of non-governmental organisations representing indigenous and tribal peoples, or representing their interests. This was the first exposure to the ILO for the indigenous activists, used to the slower and less formal approach of the UN, and they needed help in the ILO process. They expressed themselves fully and enthusiastically in favour of revision, and provided information to the meeting and to the formal tripartite constituents on the real situation of indigenous and tribal peoples. The role the workers' representatives played in allowing and encouraging such information was crucial to the success of the indigenous participation. The recommendation of the Meeting to put the Convention's revision on the Conference agenda in 1988 and 1989 was accepted.

The ILO now began its regular path towards the adoption of a new Convention, with the preparation of two reports for the 1988 session and two for the 1989 session. For the 1988 session it prepared a detailed 'law and practice' report, and included a questionnaire on the orientation and content of the new instrument. No instance appears in the analysis of replies to the questionnaire in which any workers' organisation took an unsupportive attitude toward the development of indigenous rights at the ILO.

### At the Conference

When the first discussion was before the Conference in 1988, the Workers' role developed drastically. As in the Meeting of Experts two years earlier, a number of indigenous NGOs, and other NGOs supporting their cause, had requested and received permission to attend the discussions. In addition, participants from a number of governments, employers and workers had explored within their own membership and staff for indigenous persons who could represent their interests with more credibility in these unusual circumstances. The Workers' Group in particular had found a number of indigenous trade unionists who could speak for them, particularly from countries where national indigenous movements were already well developed – especially Australia, Canada and the United States.

However, the NGO participants were unfamiliar with ILO procedures, because they had never attended ILO meetings; their limited resources had been focused on the UN. The Committee made special arrangements for their participation in the

discussions, allowing them to speak when each major subject – consultation and participation, land rights, special provisions on labour, etc. – was due to be discussed. In addition to this, the indigenous caucus met with each of the three statutory groups regularly to inform them on the realities of the indigenous and tribal peoples' lives and rights, and to advocate for the solutions they wanted in the new Convention's wording. All these measures, adopted with the solid support of the Workers' Group, gave 'non-occupational' NGOs an unprecedented level of participation in the adoption of an ILO Convention, even though the ILO Constitution did not allow them a right to vote.

The Workers' Group in the responsible Committee went a step further. As each subject came up before the Committee, the Workers' Group met for hours with the indigenous representatives. In most instances, the Workers submitted the proposals of the indigenous caucus as their own, and put them before the Committee for discussion and voting when necessary. Writing as the ILO secretariat member responsible for administering the discussion, I can certify that before the discussion progressed very far, on a number of occasions when draft amendments were submitted from the Workers' Group, the usual heading 'Amendments proposed by the Workers' Group' was replaced by 'Amendments proposed by the Indigenous Caucus', with the words 'Indigenous Caucus' scratched out and replaced by 'Workers' Group'. In other words, the Workers embraced the right of the indigenous NGOs to speak for themselves, and lent their constitutional role of participation to the indigenous participants, even if the Workers' Group occasionally did not accept all the proposals of the indigenous caucus – particularly when they felt that some of the proposals would have made it impossible to adopt the Convention or to allow it to be ratified. This gave the indigenous participants an all-but-formal role in the discussions and in the adoption process, to a degree they have never enjoyed in the UN or in any other international organisation.

This high degree of support by the Workers' Group remains unique in UN-system history. The workers' support gave indigenous representatives a platform well beyond the purely advisory role they play in any other inter-governmental institution. That said, this rather rosy picture of the effect of indigenous participation should be qualified to an extent. This was the first attempt by these indigenous advocates to take part in standard-setting. Unfamiliar with the ILO and its mechanisms, they felt rushed by the time pressure of the way ILO adopts standards<sup>2</sup>, and the results were not always what they wanted. Some of the more vocal indigenous representatives were very bitter about the outcome, which did not go as far as they had hoped. While appreciating the Workers' Group's support, they wanted the right to negotiate and vote in their own names – which they have never been able to secure in any international

organisation. The content of the Convention nevertheless reflects the strong support given by the Workers' Group for indigenous positions.

### Advancing substantive rights

First of all, the Convention contains no attempt at defining indigenous and tribal peoples, following the wish of such peoples to define themselves. It does have a statement of coverage, but makes self-identification a fundamental principle. In another far-reaching development, the Workers' Group supported the indigenous caucus's fervent advocacy to use the term 'peoples' in the Convention, which eventually succeeded. This could only be achieved by adding a proviso to the text (Article 1, paragraph 3) that the ILO discussion did not prejudice a wider determination of the meaning and impact of the term 'peoples', which international law associates with the term 'self-determination'. The Conference felt that this was well beyond the ILO's mandate, though it was resented by some of the indigenous participants.

On another vital point, consultation and participation, the Workers' Group supported the expressed wishes of the indigenous caucus to make development decisions affecting them subject to consultation, participation in the decision-making process, and consent. On this last point the Conference could not agree to insert a requirement for consent, considering this would give indigenous and tribal peoples a right of veto not accorded to any other component part of the nations in which they live. The indigenous peoples' fervent advocacy for the right to consent, of course, flies in the face of national governments' determination to take all the final decisions concerning national development, without any part of the national population having the right to block government decisions. (The right of free, prior and informed consent was later incorporated in the UN Declaration on the Rights of Indigenous Peoples, adopted 19 years later by the Human Rights Council. This was possible because this non-binding instrument is aspirational rather than regulatory.) In fact, the detailed and active ILO supervisory process, with the warm support of workers' organisations and representatives, has spent more time debating the meaning of consultation and participation in this Convention, than any other issue, and has come to the conclusion that consultation that is pro forma or fake – that does not allow for a real possibility of affecting development decisions – is simply not in accordance with the Convention's requirements.

In other ground-breaking ways, the revised Convention accorded rights to indigenous peoples that had never been imagined in the earlier instrument, such as the right to participation in the management and even benefits of resource exploitation on their lands; augmented rights to protection at work, where indigenous peoples are often viciously exploited; protection against sexual harassment at work, the first time this concept appeared in any international Convention; and the

right to manage health services and education in their communities. All these advances resulted at least in part from proposals made by the Workers' Group on behalf of the indigenous representatives, and none would have survived into the final text without the solid support of the Workers' Group.

### Supervision of the application of the Convention

The ILO's uniquely strong supervisory procedures rely on governments' regular reports, but also on input of employers' and workers' organisations into the process. The support of workers' organisations in putting forward violations of the Convention brought to their attention by indigenous and tribal peoples has been crucial. Since NGOs other than employers' and workers' organisations have no formal role in the supervision of ILO Conventions, indigenous advocates have turned to workers' organisations, and have found a receptive attitude. First, workers' organisations in a number of countries have supplemented governments' reports with information they have received from indigenous organisations, bringing to the attention of the ILO Committee of Experts on the Application of Conventions and Recommendations information the Committee could not otherwise have received formally. This has resulted in many comments by the Committee of Experts, and a number of cases being discussed at the International Labour Conference in its tripartite Committee on the Application of Standards, where the Workers' Group has raised criticisms of governments for not respecting the Convention (to be fair, often with the support of the Employers' Group and a number of governments).

In addition, workers' organisations from a large number of countries have submitted formal complaints (known as 'representations') alleging failures to respect the Convention, mostly on the grounds of violation of the fundamental requirement to consult indigenous peoples before taking decisions concerning them.

### A proud legacy

With the 30th anniversary of the adoption of Convention 169, the workers' constituents of the ILO have a right to be proud of the role they have played in promoting and protecting the indigenous and tribal peoples around the world, in the face of abuse, corruption and displacement. May they continue to do so.

### Notes

- 1 In fact, C107 remains important in a small number of countries that refuse to ratify the revised Convention, including Bangladesh, India and Pakistan. Here the protective elements of the Convention outweigh the impact of the orientation.
- 2 By comparison, the UN's deliberations that led to the adoption in 2007 of the UN Declaration on the Rights of Indigenous Peoples, lasted for 17 years.

C169 advanced the rights of indigenous peoples; the cooperation and support of workers' organisations remains crucial in confronting violations of these rights

# The ILO's Quest for Social Justice: C169 and Peace Building

C169 has played a critical role in peace processes in several countries where indigenous peoples' unaddressed grievances were among the root causes of conflicts

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The centenary of the International Labour Organisation (ILO) is an opportunity to reflect on how, by upholding indigenous peoples' rights, this organisation has made a historic and unique contribution to universal peace. The Treaty of Versailles proclaimed that lasting peace cannot be attained without social justice – the *raison d'être* of the ILO. At the same time, social justice can be imperilled by intolerance, racial discrimination as well as by the resentment that results from decades of marginalisation of one specific part of the population, namely indigenous and tribal peoples.

The ILO's founders believed it necessary to guarantee decent living and working conditions to all workers, including 'natives', whose exploitation was a matter of concern for the international community of the early twentieth century. The League of Nations Union acknowledged that the continuance of forced labour was bound to create discontent and was inimical to progress. As early as 1925, a Norwegian delegate to the Assembly of the League of Nations drew attention to the potential role of the International Labour Office 'in bringing about better conditions for native labour'. Thus, the ILO became the first international organisation to adopt international standards to protect indigenous workers against the abuse of compulsory labour and conditions analogous to slavery. Between 1936 and 1955, the International Labour Conference adopted five conventions and two recommendations on the matter.

In a number of regional conferences held in the American continent between 1939 and 1946, trade unions further drew the ILO's attention to the social inequality faced by indigenous communities in rural areas. This marked a turning point in the way the ILO approached indigenous peoples, by starting to address issues – such as land tenure, education, and use of customary laws – beyond the traditional labour field of ILO action. As illustrated in a study on the working and living conditions of indigenous populations in Peru – published by the ILO in 1938 – this new perspective was influenced by the need to engage indigenous communities in plans for national economic development and to avoid social conflicts deriving from the existence of indigenous forms of governance operating at the margin of the government's authority.

By the end of the 1950s some ILO members supported the preparation of an international convention, based on the principles of international solidarity and social justice, to help protect indigenous populations from abuse and segregation. The Indigenous and Tribal Populations Convention (No.

107), was adopted in 1957. It was later revised, due to criticism raised by indigenous organisations who saw in it a tool for governments to promote cultural assimilation. A 1987 report prepared by the International Labour Office on the revision of C107 suggests that a new instrument was needed to decrease the imbalance of power of indigenous groups vis a vis the rest of the society, thereby helping to prevent ethnic conflicts, violence, forced integration and even actions amounting to genocide. The product of this revision – the 1989 Convention on Indigenous and Tribal Peoples (No. 169) – is the only international treaty open for ratification exclusively and specifically addressing indigenous and tribal peoples' rights.

Though C169 does not explicitly refer to peace building or conflict resolution, its principles, if properly implemented, have great potential for promoting dialogue, understanding and cooperation. Its preamble specifically highlights the contributions of indigenous and tribal peoples for cultural diversity and social harmony. The Convention emphasises the recognition of indigenous and tribal peoples' own aspirations, institutions and initiative for development, along with its focus on institutionalised consultation and participation. Moreover, by placing respect for human rights and equality and the need for addressing socio-economic disadvantages facing indigenous and tribal peoples at the centre, the Convention has an important role to play in tackling the root causes of indigenous and tribal peoples' historic exclusion and marginalisation. More recently, the need to take special account of indigenous peoples in times of conflicts was emphasised in the ILO's 2017 Employment and Decent Work for Peace and Resilience Recommendation (No. 205), which calls upon governments to ensure that indigenous peoples are consulted if territories inhabited or used by them are affected by a crisis, and related recovery and stability measures. Both C169 and the Recommendation illustrate that ensuring decent work and living conditions for indigenous peoples continues to be central to the ILO's mandate. C169 has played a critical role in peace processes in several countries where indigenous peoples' unaddressed grievances were among the root causes of conflicts.

## Guatemala

The Guatemalan government and the Guatemalan National Revolutionary Unit signed a Peace Accord in December 1996, ending 36 years of conflict. The dispossession and exclusion of the Maya peoples and the unequal distribution of resources along ethnic



lines was part of the context in which widespread use of violence had grown into fully-fledged civil war<sup>1</sup>. Peace negotiators recognised that lasting peace would require addressing the historical grievances of the indigenous peoples. An ILO official, Ian Chambers, had been appointed legal adviser for the UN peace negotiation team and was instrumental in the design of a mechanism by which they could bring their positions to the negotiation table. Eventually, the parties concluded the *Agreement on the Identity and Rights of Indigenous Peoples* in 1995. Not only did the agreement incorporate the principles set out in C169, but the Convention's ratification was also pursued, and achieved in June 1996 – ahead of the signing of the peace agreement, which incorporated the 1995 Agreement on indigenous rights.

## Nepal

Centuries old processes of discrimination and exclusion of indigenous peoples, referred to as Janajatis, were among the root causes of a civil war that started in Nepal in 1996. The Maoist party's justifications for its armed insurrection against the Government included the State's failure to address inequality and discrimination against women, indigenous peoples and Dalits and other social groups affected by social exclusion. Accordingly, when a peace process eventually started, the Maoist party's claims included addressing these issues. The Janajati movement equally demanded recognition and reforms that would ensure indigenous participation in State institutions. Following the Comprehensive Peace Accord in 2006, the ratification of C169 was undertaken to bolster the still fragile peace. A conference bringing together political decision makers, indigenous peoples and experts organised by the ILO and the Nepal Federation of Indigenous Nationalities in 2005 was a decisive contribution to integrating indigenous peoples' rights into the peace process, the political discourse and eventually for bringing about ratification<sup>2</sup>.

## Chile

Chile has long history of social tensions between the State and indigenous (Mapuche) peoples. These can be traced back to the middle of the nineteenth century when the government took control of Mapuche lands in the Araucanía region in an attempt to enlarge its national agricultural production<sup>3</sup>. Tensions grew with the arrival of the forestry and mining industries in the region, which until today has led to multiple episodes of violence between Mapuche leaders and police. In 1989, Patricio Alwyin (who later became President) and Mapuche leaders signed the *Pacto de Nueva Imperial*, cementing efforts to listen to and recognise the claims of indigenous organisations. The Agreement set forth a commitment to ratify C169, which was only fulfilled in 2008. The Chilean Supreme Court endorsed ratification of C169 through two pronouncements. It

has also drawn the attention of parliament to the importance of ensuring that indigenous peoples' participatory rights recognised by the Convention are respected in the evaluation of environmental impact assessments related to resource-extraction projects affecting them. In 2016-17, the government undertook a nation-wide consultation process with indigenous organisations, on the basis of Article 6 of C169, with a view to recognising indigenous peoples' existence and their collective rights in the Constitution. C169 thus serves as a legal framework for continued dialogue and negotiation between indigenous peoples and government.

## Colombia

C169 has been instrumental in the peace process in Colombia. Its ratification by Colombia occurred with the adoption of the 1991 Constitution that recognises and protects ethnic and cultural diversity. In 2011, the government adopted Decree No. 4633, which provides for measures for assistance, reparation and restitution of land rights to the victims of the internal armed conflict, including indigenous peoples. The Decree imposes on the government the obligation to guarantee respect for the indigenous peoples' rights over their ancestral lands in line with C169 Articles 13, 14 and 15. Moreover, it recognises the right of affected indigenous peoples to be consulted in relation to the plans for collective reparation. C169 has been particularly endorsed by the Colombian Constitutional Court, which, through reiterated jurisprudence, has called upon the government to comply with the rights recognised therein, including the right to consultation, land rights and the right of indigenous peoples to exercise their customary laws. The 2016 Peace Agreement includes a specific reference to C169 and reaffirms the importance of consulting with indigenous communities on the design of mechanisms for justice for the victims. The ILO Committee of Experts on the Application of Conventions and Recommendations has followed-up on the compliance with the reparation measures for indigenous peoples, requiring the government to provide information on the way they have contributed to restoring the rights established in the Convention. The Committee has also insisted the government guarantees that Afro-Colombian communities are also covered by the Convention.

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Trade unions have been fundamental in advancing indigenous peoples' rights within the ILO and elsewhere. Especially since the adoption of C169, indigenous peoples and unions have built relationships of collaboration and mutual support. In 2014 the Trade Union Confederation of the Americas adopted a Declaration for the Strengthening of Alliances between Trade Unions

... continued on Page 28 ...

Trade unions have been fundamental in advancing indigenous peoples' rights within the ILO and elsewhere by building relationships of collaboration and mutual support

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# Litigating Indigenous Peoples' Rights in Africa: The Impact of Convention 169

C169 formalised a more expansive view of the rights of indigenous peoples in international law, but its narrow ratification base and lack of meaningful implementation models limit its utility

Thirty years after the adoption of ILO Convention No. 169 (C169), only twenty-three States have ratified it. Only one ratifying country is in Asia (Nepal) and one in Africa (Central African Republic). This sparse support is disappointing given that many more ratified its precursor, Convention No. 107: Bangladesh, India, and Pakistan in Asia, and Angola, Egypt, Ghana, Guinea-Bissau, Malawi, and Tunisia in Africa.

In replacing C107 with C169, the ILO was responding to the emergent indigenous peoples' movement, which rejected C107 as founded on an out-dated integrationist approach. In so doing, C169 re-imagined indigenous peoples as communities deserving of special protections vis-à-vis the majority population and presented a new way of understanding these communities' concerns. The principles enshrined in C169 — which formalised a more expansive view of the rights of indigenous peoples in international law — and the conceptual shift harkened by its adoption, have informed the way these issues have been subsequently framed and understood by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and by regional human rights institutions. Although many of the concepts and terminology of international human rights law on indigenous peoples derives from the Conventions, much work remains in the realm of C169's ratification and implementation.

This article examines the lack of support for the Convention in Asia and Africa, and assesses the ways in which practitioners have sought to protect the rights of indigenous communities despite C169's limited ratification. In particular, this article will focus on the experience of Minority Rights Group (MRG), a non-profit organisation working to secure the rights of ethnic, religious, and linguistic minorities and indigenous peoples worldwide. MRG's experience litigating land rights cases on behalf of indigenous and tribal communities in Africa shows that a more expansive view of the rights of indigenous peoples has made its way into the jurisprudence of the African Human Rights system. Although C169 has informed the way African human rights bodies have interpreted the rights of indigenous peoples under the African Charter of Human and Peoples' Rights (African Charter), its narrow ratification base and the lack of meaningful implementation models in the countries that have ratified the Convention limit its utility from a strategic litigation perspective.

## States' reticence to ratify C169

Although it is hard to know precisely why the majority of African and Asian States have chosen not to ratify C169, particular concerns were voiced in discussions at the ILO, as well as in discussions leading to the adoption of the UNDRIP. The most intractable sticking point involves an ongoing debate surrounding the applicability of the term 'indigenous peoples' in Asia and Africa<sup>1</sup>. In submissions during the C169 drafting sessions, China flatly denied that any indigenous populations lived in their country<sup>2</sup>. The Indian representative reiterated that, 'the tribal peoples in India were not comparable in terms of their problems, interest and rights, to the indigenous populations of certain other countries. For this reason, attempts to set international standards on some of the complex and sensitive issues involved might prove to be counter-productive'<sup>3</sup>. Some governments particularly feared that use of the term 'peoples' instead of 'populations' could give rise to secessionist aspirations. The representative for India 'felt that the Committee should carefully consider the impact that the use of "peoples" could have in countries beset with the problems of integration'<sup>4</sup>. Similar objections were raised to the use of the word 'territories' in relation to the ancestral lands of indigenous and tribal peoples.

Notably, some of the countries that had ratified C107 simply clung to its integrationist approach. During the C169 drafting sessions, for example, the representative for Bangladesh stated that 'the existing provisions of [C107] were sufficiently comprehensive. He expressed concern that any attempt to introduce radical changes in the focus and orientation of the Convention would have detrimental effects on territorial integrity and conflict with existing constitutions and legal systems of many countries, and could discourage many countries from ratifying it'<sup>5</sup>.

While each country has its own historical, political, and social context that informs debates over indigeneity, C169 makes self-identification as indigenous or tribal the 'central criterion' for determining the groups to which the Convention applies<sup>6</sup>. Accordingly, countries that contest the applicability of the notion of 'indigenous peoples' in their territories are unlikely to ratify a legally binding instrument that allows groups that self-identify as indigenous or tribal and thus access the special protections enshrined in the Convention.

African States voiced similar concerns in the context of the adoption of the UNDRIP. They argued that 'indigenous peoples' lacked a clear definition,

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creating 'tensions among ethnic groups and instability within sovereign States' in a region recently recovering from ethnic conflict. They also argued that including the term 'self-determination' threatened the territorial integrity and political unity of African countries<sup>7</sup>. However, the drafting committee was able to overcome this scepticism with the help of activists in the International Working Group on Indigenous Affairs, who lobbied intensely to persuade African States to sign onto the UNDRIP, arguing that the Declaration was in keeping with the rights enshrined in the African Charter<sup>8</sup>. Indeed, the African Human Rights system has taken an expansive view of the rights afforded to indigenous peoples under the African Charter. In 2005, the African Commission on Human and Peoples' Rights' (ACHPR) Working Group of Experts on Indigenous Populations/Communities concluded that 'the African Charter recognises collective rights, formulated as 'peoples' rights' and that these rights allow indigenous communities to 'claim protection under Articles 19-24' as a people<sup>9</sup>.

While adopted with almost universal support by the General Assembly, the UNDRIP is not a binding instrument. This salient difference helps explain why countries that voted in favour of the UNDRIP have not ratified C169. Approval of the UNDRIP does not obligate States to adopt and apply the standards it contains; ratifying C169 does.

### Landmark indigenous rights cases in Africa

MRG's experience before the ACHPR and the African Court of Human and Peoples' Rights confirms their willingness to adopt an expansive view of the rights of indigenous peoples under the African Charter. Two cases in particular have set important precedents.

The first involved the Endorois in Kenya, an indigenous community evicted from their ancestral lands following the creation of the Lake Bogoria National Reserve in the 1970s. In the first decision of its kind, the ACHPR recognised indigenous peoples' collective rights to their traditionally owned land. The Commission further found that by restricting the Endorois' access to ancestral lands, Kenya had violated several rights under the African Charter, including their right to development. It held that Kenya had breached the African Charter by failing to seek the Endorois' free, prior and informed consent or adequately compensate them, thus establishing for the first time that governments must engage their people in their development policies<sup>10</sup>. The Commission's recommendations were however never adequately implemented.

The second concerned the first indigenous rights case decided by the African Court of Human and Peoples' Rights. Alongside the Centre for Minority Rights Development and the Ogiek Peoples' Development Program (OPDP), MRG challenged the eviction of the Ogiek, another indigenous community in Kenya, who had lived in the Mau forest since time immemorial. The Court recognised that the Ogiek are

an indigenous peoples, concluding that self-identification is a relevant factor for such a determination. The judgment recognised the special relationship indigenous peoples have to their ancestral lands and stated that the preservation of the Mau forest could not justify the failure to recognise the Ogiek's indigenous or tribal status, nor the denial of rights associated with that status. It further held that the depletion of the Mau Forest could not justify their eviction, or the denial of access to their land to exercise their cultural rights<sup>11</sup>. To avoid the implementation problems associated with the Endorois decision, MRG has taken proactive steps to ensure the Court's judgment is adequately implemented and continues to collaborate with the Attorney General's office in Kenya on this front.

### Conclusion

The Endorois and Ogiek judgments further develop international legal standards that apply to indigenous communities and are an important (and complimentary) part of the standard-setting exercise the ILO has engaged in since the 1930s. Indeed, in its pleadings before the African Commission, MRG cited C169 to establish both self-identification as a central criterion in determining whether a group is indigenous, and the content and scope of consultation obligations. Yet despite significant progress in defining and expanding the scope of indigenous and tribal peoples' rights and applying them through UN and regional human rights bodies, much work remains in the realm of implementation.

The sparse ratification of C169 means it has limited utility from a strategic litigation perspective. The international community and the ILO must continue encouraging countries in Asia and Africa to ratify the Convention. Doing so will extend the protections of the only binding international treaty on the rights of indigenous and tribal peoples to millions of indigenous peoples in Africa and Asia today. In Africa, the ILO should consider enlisting the ACHPR to encourage further ratification of C169 in a manner similar to the strategy adopted to overcome regional opposition to the UNDRIP.

Unions too must play a role in advocating ratification. In the only African country to have ratified C169, Central African Republic, trade unions were active in raising the situation of indigenous peoples at the ILO in the 1990s; two national centres — Confédération Syndicale des Travailleurs de la Centrafrique (CSTC) and the Union Syndicale des Travailleurs de Centrafrique (USTC) — have been active in subsequent workshops and discussions<sup>12</sup>. Such support is often sadly lacking. The Confédération Syndicale du Burundi (COSYBU) is on record at the ILO in 2012 denying that indigenous peoples exist in the country<sup>13</sup>. Burundi is however home to the Batwa people, a highly marginalised indigenous community that has inhabited the forests of Central Africa since time immemorial.

The international community, the ILO and unions should continue to encourage wider ratification in order to extend the protections of the treaty to millions of indigenous peoples in Africa and Asia today



# Labour and the Kanak People's Struggle for Sovereignty

For USKTE, the November referendum on 'self'-determination was an 'electoral farce' – one stage of a longer strategy to subsume the Kanak people's struggle for sovereignty

On 14 July 2018, as the French military was parading in the streets of Nouméa, an extraordinary Congress of the *Parti Travailliste de Kanaky* (PT, English: Labour Party of Kanaky) voted to abstain from New Caledonia's 4 November referendum on sovereignty. Later, in their 16th Congress the *Union Syndicale des travailleurs Kanak et des exploités* (USTKE) also decided to opt out with a large majority. That the USTKE (which from its very foundation in 1981 has been at the forefront of the independence movement) and the PT (its political wing) decided so, may seem puzzling. Yet, it makes sense for practical and tactical reasons.

First, there was the view that the referendum was rigged<sup>1</sup> and not about 'self'-determination since 'non-colonised' Caledonians outnumbered 'colonised' Kanak people in the electoral list of people eligible to cast their vote, at odds with the UN Declaration on the Rights of Indigenous Peoples (Art. 3). In the words of the PT: 'it is anything but a referendum of self-determination. There is no question, for us colonised people, of associating ourselves with what is an electoral farce, something that will trap the Kanak people once more. There will be as many non-Kanak as Kanak who will vote in this referendum, which is proof that it is not a referendum of self-determination'<sup>2</sup>.

Who's legitimately eligible has long been a matter of contention, although Kanak independence forces in 1983 acknowledged so-called 'victims of history' (descendants of European convicts and other Pacific and Asian communities long established) in a context of shifting demographics orchestrated by successive French governments resulting in Kanak people becoming a minority. The right to vote is therefore a frontline in the contested terrain of independence, epitomised as the 'Mother of battles' in the view of independence warriors: back in 1984, Eloi Machoro sparked the insurrection by smashing a ballot box with his machete.

Second, there was the reckoning that this referendum was the pinnacle of an overarching process of social reengineering<sup>3</sup>, on-going since the 1998 Accord de Nouméa as an attempt to engulf the Kanak struggle into a 'common destiny', including the conception of a newly branded 'Caledonian citizenship'. Kanak labour forces have long considered social partnership as a colonial manoeuvre, a trap: back in 2000, the USTKE rejected the Social Pact designed for promoting social dialogue and reconciliation. The counter-argument has always been that there cannot be any 'common destiny' in a context of deep-rooted social exclusion and broad

inequalities. Kanak labour's tactical position is thus to reject the chessboard altogether and instead to direct the struggle towards matters of discrimination and injustice. This resonated in the 2018 May Day slogan: '1988 – 2018 30 ans d'Accords et des inégalités toujours plus fortes', thirty years of agreements and growing inequalities. The struggle for social justice is indeed bound to the struggle for sovereignty.

## Colonial Background

New Caledonia has been a French colony since 1853. Like Australia, it was established as a convict colony but not long after opened to free settlers. The Kanak people themselves were ruled apart from European settlers under the regime of *indigénat* and were only recognised as French citizens in 1946, with the right to vote subsequently granted to all in 1957. Kanak People have resisted colonisation and its history has been marked by violent outbursts and repression. In 1975, in a context similar to apartheid, a Kanak coalition of the *Union Calédonienne* and labour activists, among others, proclaimed independence<sup>4</sup>.

New Caledonia has been engaged in a far-reaching process of decolonisation. Pro-independence activists in December 1986 succeeded in getting New Caledonia registered on the UN list of countries to be decolonised. The 1980s Kanak insurrection – euphemistically referred to as the 'Events' (those were violent times) – led to the Accords de Matignon in 1988. Resulting from this, but still within the framework of the French Constitution, New Caledonia now has some independent status, being a 'sui generis collectivity' since the 1998 Accord de Nouméa.

The 1988 and 1998 Accords laid the ground for social dialogue over reconciliation and sovereignty. A vast program for reconciliation and partnership has been promoted, newly framed by the French authorities through the concept of 'Caledonian citizenship' and supported by those who reject independence; for others, it is a strategy to subsume the Kanak people's struggle for sovereignty. The 2018 electoral consultation on the path towards full (or further?) sovereignty was included in the Accord de Nouméa.

## Anti-Colonial Political Unionism: The Kanak Labour Struggle

USTKE was set up in the wake of the 1975 self-proclaimed declaration of independence and in the spirit of the Kanak People political insurgency.

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Established in December 1981, USTKE was subsequently involved in association with pro-independence political parties such as the *Union Calédonienne* (UC) and Palika in the creation of the *Front de Libération Nationale Kanak et Socialiste* (FLNKS, English: Kanak and Socialist National Liberation Front) in September 1984. USTKE left

FLNKS in 1989 but continued to provide support for their political action. USTKE later decided to return to politics and present candidates in pro-independence lists in the 2007 legislative elections and then, in November of the same year, went on to create its own political arm, the PT. The long-lasting leader of the PT, Louis Kotra Uregei, was a founding

## Factories, Tribes, Same Struggle

### Ingrid Chanene, USTKE communication unit

The Union Syndicale des travailleurs Kanak et des exploités (USTKE) is the second largest trade union force in New Caledonia. Our trade union representation at the national level is around 14 to 18 percent depending on the year - it could reach 20 to 22 percent in good years. Today, USTKE is most strongly represented in the sectors of commerce, the civil service, in mines and in construction. Over more than 30 years, our union has established its reputation for trade union action, and in the preamble of its statutes, the USTKE sets out its clear determination for the independence of its country. Many achievements were gained under the chairmanship of one of the founding members, Louis Kotra Uregei. The last major strikes were ten years ago (2007-2009) when dozens of comrades ended up in prison, including the union's then president, Gérard Jodar. 2010 saw Marie-Pierre Goyetche as the first woman at the head of the confederation, which she led until the end of 2012, when André Forest took over the reins.

#### The founding of the Labour Party

In its motion at the XII Congress in December 2006, USTKE made the following decisions: 'the political structures that hold institutions no longer meet the aspirations of workers and more broadly of the population. On the strength of this observation, and with the sole concern and stated objective of promoting a public interest policy based on a clear social project, the USTKE decides to put in place a political alternative through which to integrate these institutions'. It was in this context that the Parti Travailleiste de Kanaky (PT, English: Labour Party of Kanaky), was born in December 2008 at its founding convention in Rivière-Salée, a suburb of Nouméa. Since the end of 2008, USTKE has relied on the PT to raise issues related to employment, training, working conditions, etc. This communication is relayed to the members of the political bureau of the party, who in turn raise these questions at the level of the communities where they sit (at commune and provincial level, and in the Congress of New Caledonia).

#### Employment policy and re-balancing

Since mid-2010, USTKE has re-entered social dialogue with the other social partners (six representative trade unions - USOENC, FSAOFF, COGETRA, UT-CFE-CGC, CSTC-FO, CSTNC, and the employers' federations - MEDEF-NC, CGPME-NC, UPA-NC). The reform of the Instances Représentatives du Personnel (Staff Representative Bodies) has been on the table since 2010. In October 2011, USTKE signed the Economic and Social Agreements. But in July 2010, when the members of our confederation were healing their wounds following the departure of the dissidents who went on to create other trade union structures (CNTP and FSL), the law on local employment was adopted. Some amendments could make this law more drastic towards metropolitan migrants seeking employment on our Caillou ('our Rock' - New Caledonia). Because our beautiful country is coveted not only in terms of nickel, but also for the environment, the economy, politics, and even social issues, the job market is flooded by expatriates - who pursue positions of responsibility.

The USTKE constantly promotes Kanak access to leadership positions. What about re-balancing, in the context of local

employment in private enterprises, government services, or in other sectors? Our union mobilised in the streets of Nouméa on 3 August 2016 on this issue; this was followed by a symposium organised at the University of New Caledonia (UNC) the same month. The issue of Kanak access to positions of responsibility comes back regularly in industrial disputes. With just cause, on 8 September 2017, USTKE mobilised itself against the Direction des Infrastructures, de la Topographie, et des Transports Terrestres (Directorate of Infrastructure, Topography, and Land Transport) because a Kanak executive was not appointed to the post of Director. USTKE sees more and more cases such as this. More recently, on 10 August, USTKE denounced the managerial policy of the director, and her behaviour towards agents of the Direction du Travail et de l'Emploi de N-C (Directorate of Labour and Employment NC), in particular those of Kanak origin. The promotion of local employment was highlighted in this conflict, which ended with the accession of an officer to the position of controller at the employment service. This outcome has also been widely supported by officials of USTKE.

Returning to the symposium in August 2016, several experts took part in the analysis of a large quantity of statistical data, producing many significant and contextual comments. In one report, researchers from the Laboratoire des Recherches Juridique et Economique (Laboratory of Legal and Economic Research) of the UNC, report on inequalities in access to employment from 1989 to 2014, finding that the unexplained gap between Kanak and non-Kanak has changed very little (46.4 percent in 1996 and 44.2 percent in 2009)<sup>1</sup>. This is just one example of the inequalities between the indigenous population and other communities that have populated New Caledonia since settlement began in 1853 with colonisation of the country by France. Other examples exist both in terms of training, access to housing, etc.<sup>2</sup>

#### USTKE and the referendum

Ten years on from the founding of the PT, on 7-9 September 2018, the USTKE held its 16th congress at the Kowé Kara assembly hall, where the delegates decided by a majority not to participate in the first referendum of self-determination<sup>3</sup>. There was incomprehension among pro-independence activists associated with the Front de Libération Nationale Kanak et Socialiste (Kanak and Socialist National Liberation Front), who rose up on social networks at this decision - but USTKE is an independent trade union organisation struggling for the liberation of the Kanak people. According to the supporters of non-participation, the electoral lists are distorted by mass immigration over the past 30 years from France and elsewhere. The referendum must simply concern the first people, the Kanak people, and it is therefore inevitable that the aforementioned referendum must only concern the Kanak people, who must decide for themselves, and who must therefore have the sole right to vote on this crucial issue.

#### Translated by Daniel Blackburn

- 1 Samuel Gorohouna & Catherine Ris, Laboratoire des Recherches Juridique et Economique, at: <https://larje.unc.nc>
- 2 Equipes de recherche - LARJE, at: <https://larje.unc.nc>
- 3 See article of 7 September 2018, at: [www.ustke.org](http://www.ustke.org)

USTKE:  
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member of USTKE. The PT is now part of *Front de Libération Nationale Kanak et Socialiste / Union Calédonienne* (UC-FLNKS) and Nationalists Group in the Congress of New Caledonia.

USTKE's slogan 'Usines, Tribus, Même Combat' ('Factories, Tribes, Same Struggle') and its 1981 foundation statement (see abstract below) both illustrate the distinctive role of indigenous labour activism as a catalyst in the broader struggle for colonial emancipation in New Caledonia.

The indigenous people's struggle and the labour struggle are deeply intertwined in a form of anti-colonial social-movement unionism

*We as a People are different and the 'cultural', 'social' and 'political' distinctiveness of Kanak workers is improperly represented by existing unions (...) Before colonisation, our society was a rich civilisation, a culture based on ancestral rules which command respect; a culture that the (brutal) colonial forces wanted to break but that is still alive and standing and which is our distinctive identity (...) We are numerically superior, but economically subordinated (our value systems not being the same) and we are considered as inferior beings (...) The exploitative violence of capitalism does not suit the Kanak way of life (...) We are a colonised People, our dignity has been scorned; we seek to regain our freedom and we will carry on the struggle til we see the day of an independent and socialist Kanak country...<sup>5</sup>*

It is unequivocal that according to USKTE the anti-capitalist struggle is an underlying component of the broader struggle for independence.

### Looking Ahead

Two further referenda will be held – in 2020, and again in 2022, if pro-independence forces do not win the former. Although defeated, the results of the November 2018 referendum have emboldened the independence movement, with the USTKE and the Labour Party now both calling for unity and convergence of forces in preparation for the next electoral consultation.

What did the referendum reveal? First, that identity politics failed. Allegiance to France was predicted to win by a large margin of 70 percent. Results were far more mitigated with only 53.7 percent in favour of remaining part of France, and 43.3 percent against. That is to be understood in a context where indigenous people form about 40 percent of the population. No wonder that they celebrated the result as a milestone victory: one can easily deduce that a very large majority of Kanaks voted for independence. Second the run-up to the referendum showed a strong mobilisation of the Kanak youth. On a darker note perhaps, the geographic distribution of the votes showed sharp contrast between the South (Nouméa region for the main) and the North and Loyalty Islands, non-

indigenous or indigenous strongholds respectively, which illustrated in the polls the entrenched racial divide in New Caledonia.

The USTKE will continue to pursue their anti-capitalist/anti-colonial agenda with an emphasis on social injustice. Their abstention was a part of that agenda. Young Kanak activists exulted loudly in the streets: "so long as there's Kanak people, there'll be a struggle". This was relayed by Kanak labour forces that relentlessly declared that so long as extreme inequalities prevail, the struggle will carry on.

Beyond the boundaries of industrial relations, alongside other trade unions, the indigenous people's struggle and the labour struggle are deeply intertwined in a form of anti-colonial social-movement unionism which finds space and legal footing within the French frame for industrial democracy and freedom of voice and collective action. However, if the material bases for discontent (housing, youth incarceration, discrimination at employment, income inequalities, etc.) are not being addressed, the social fracture and related tensions are likely to heighten in the two-year timeframe to next referendum.

### Additional References

- Le Queux, S. & Graff, S. (2015a) 'Industrial Relations in New Caledonia: Context and Focus on the Kanak Indigenous People's Labour Struggle in the Background of the Politics of Reconciliation and Decolonisation', *Labour & Industry*, Special issue on Pacific Employment Relations, 25 (3), 185–195.
- Le Queux, S. & Graff, S. (2015b) 'Nouvelle-Calédonie: des relations professionnelles politisées dans le prisme du militantisme Kanak', *Chronique Internationale de l'IRES*, n° 150 pp. 25-38.
- USTKE: 'Le XVIème Congrès se prononce en faveur de la non-participation au référendum': [http://ustke.org/actualites/actualite-syndicale/USTKE--Le-XVIeme-Congres-se-prononce-en-faveur-de-la-non-participation-au-referendum-at\\_996.html](http://ustke.org/actualites/actualite-syndicale/USTKE--Le-XVIeme-Congres-se-prononce-en-faveur-de-la-non-participation-au-referendum-at_996.html)

### Notes

- 1 On 1 March 2016, a United Nations (UN) observatory taskforce was posted to New Caledonia with a mandate to oversee the electoral process leading to the forthcoming referendum on accession to full sovereignty. This taskforce was set up following allegations from Kanak leaders (FLNKS and UC-FLNKS) of electoral fraud: for several years Kanak representatives have lodged complaints to the UN Committee on Decolonisation about the occurrence of what they considered to be electoral rigging, principally in Nouméa.
- 2 *Translated from* [http://ustke.org/actualites/actualite-politique/Refus-de-participer-at\\_1008.html](http://ustke.org/actualites/actualite-politique/Refus-de-participer-at_1008.html)
- 3 Graff, S. (2016) *Visibilité du destin commun et invisibilité de l'histoire : discours, célébrations et construction de la citoyenneté en Nouvelle-Calédonie*, Anthrovision, 4.1. <https://journals.openedition.org/anthrovision/2250>
- 4 Leblic, I. (1993) *Les Kanak face au développement: La voie étroite*, Grenoble, Presses universitaires de Grenoble.
- 5 *Author's translation of extracts of the 1981 USKTE founding statement* (see Israël 2007: 285-286) Israël H. (2007) *Une histoire du mouvement syndical en Nouvelle-Calédonie*, Nouméa, Éditions Îles de Lumière

# Silencing the Saharawi: Legal Fiction and Real Plunder in Africa's Last Colony

Since 2013, the EU Commission has been pushing to consolidate its trading arrangements with the Morocco into a 'Deep and Comprehensive Free Trade Area' (DCFTA). For over a decade, the existing agreements with Morocco have in practice been knowingly applied to Western Sahara and its waters – a non-self governing territory over which Morocco has claimed sovereignty since Spanish withdrawal from the former colony in the 1970s. Already in 1966, following the Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514), the UN General Assembly adopted a Resolution (2229) calling for 'the administering Power to determine at the earliest possible date, in conformity with the aspirations of the indigenous people of Spanish Sahara and in consultation with the Governments of Mauritania and Morocco and any other interested Party, the procedures for the holding of a referendum under United Nations auspices with a view to enabling the indigenous population of the Territory to exercise freely its right to self-determination'. That referendum is yet to happen, despite a 25-year UN mission designed to bring it about.

As Morocco's largest trading partner, the EU itself acknowledges that the four-decade long dispute over the occupation of Western Sahara has had devastating consequences, including creating 174,000 Saharawi refugees – for whom the EU committed €5 million to 'supply basic food products' and €1.15 million to 'ensure clean water' in 2017<sup>1</sup>. Lest one mistake such contributions to this humanitarian crisis as a heartfelt gesture, it is worth recalling that the EU also provides €14 million (and growing) in annual support to the Moroccan fishing industry under its bilateral fisheries agreement – much of which is put into infrastructure in Western Sahara, where the unlawful plunder of resources continues unabated<sup>2</sup>.

Following landmark rulings from the Court of Justice of the European Union (CJEU), the EU's practice of applying its agreements with Morocco to the territory of the Saharawi is now clearly unlawful, but the EU appears determined to push on. Earlier this year, over one hundred organisations, including the Saharawi trade union, UGTSARIO (Unión General de Trabajadores de Saguia el Hamra y Río de Oro), were named by the EU Commission as having been 'consulted' on the matter of such application. In fact, the vast majority had expressly refused to participate in what they deemed to be a complete sham.

## EU Talks Trade, But Won't Listen

The Polisario Front proclaimed the Saharawi Arab Democratic Republic (SADR) in February 1976. In

1979, the UN recognised Polisario as the representative of the Saharawi people (General Assembly Resolution 34/37) and in 1984 the SADR became a member of the African Union (prompting Morocco to leave the organisation; since its own readmission in 2017, Morocco has been campaigning to reverse SADR membership).

Polisario has launched multiple challenges before the EU's courts against the application to Western Sahara of both planned and existing EU-Moroccan agreements - on liberalisation, fisheries, agriculture and aviation - arguing that no agreement with Morocco can be applied to the territory without the consent of the Saharawi people<sup>3</sup>. The CJEU has – to an extent – validated Polisario's complaint, albeit in a manner which has allowed it to take comfort in legal fiction, rather than address a concrete reality. As a matter of textual interpretation, the Court rejected the view that these agreements apply to the territory of Western Sahara; nor can they so apply without the consent of the people of Western Sahara, as this would constitute a clear breach of international law. In finding that the agreements do not apply to Western Sahara, the Court however ruled that the Polisario Front therefore doesn't have any standing before the Court in respect of the agreements, on the basis that Western Sahara is not legally affected by such agreements.

That legal fiction is unravelling quickly. The EU is satisfied that its gaining access to the resources and markets of Western Sahara is without qualification beneficial to the economic development of the territory. It has committed to making the practice lawful, rather than ending the unlawful practice, and is undertaking to make the necessary amendments to include Western Sahara in the scope of its agreements with Morocco. What about consent? With no small trace of opportunistic pedantry, the EU Parliament adopted a resolution in December 2018, referring to the CJEU rulings and recalling that 'the CJEU did not specify in its judgment *how* the people's consent has to be expressed and considers therefore that some uncertainty remains as regards this criterion'<sup>4</sup>.

In the fog of such uncertainty, the EU held a 'consultation' on this question in 2018. In its proposal to the Council recommending amendments of the EU-Morocco Association Agreement, the Commission confidently concluded that the results of the consultation showed how 'most people now living in Western Sahara are very much in favour' of the amendments<sup>5</sup>. That conclusion is bewildering based on the facts. The

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The application of EU trade agreements with Morocco to Western Sahara is clearly unlawful. The EU Commission claims to have 'consulted' the Saharawi – but a large coalition of civil society groups, including the Saharawi trade union, refused to participate

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## Bangladesh

In October, workers striking at two garment factories (Intramex Group in Gazipur and Soad Fashions in Shiddhirganj) were attacked by police, who deployed teargas, batons and rubber bullets against them. Both groups were protesting unpaid wages. Seventeen Intramex workers were reportedly injured and two – Marfat Ali and Mobarak Hossain – hospitalised. Police detained three Soad workers and around fifty were injured, with many hospitalised.

*ICTUR wrote to urge the government to promptly investigate these attacks on workers, to provide remedy to the victims of police violence, and to take action to address workers' legitimate demands for the payment of their salaries and other arrears.*

## China

In November, a dozen student labour activists were rounded up, arrested and detained in Beijing, Guangzhou, Shanghai, Shenzhen and Wuhan. Unidentified men reportedly beat them and dragged them away into cars. One of the activists, Zhang Shengye, has been prominent in a campaign to release the many student activists who were arrested and detained in August this year while supporting workers to establish a trade union at Jasic Technology in Shenzhen. In December, several more arrests of activists were made, including of the lawyer advising those detained over organising at Jasic.

*ICTUR has written to the authorities to demand that all of the activists arrested are immediately released and the charges against them dropped.*

## India

Haryana roadways employees went on strike in mid-October to protest privatisation plans. To coerce them back to work, authorities conducted mass arrests of strikers and union officials under the pretext of the Haryana Essential Services Maintenance Act (ESMA). Some 1400 cases were filed under the Act, leading to 241 arrests; another 418 workers were arrested under provisions of the Indian Penal Code; around 400 employees were terminated and a further 400 suspended. On the weekend of 27 October, 14 union officials were arrested. The authorities sealed the Faridabad offices of the All India Road Transport Workers Federation (AIRTWF), All India Trade Union Congress (AITUC) and Indian National Trade Union Congress (INTUC). On 31 October, police deployed teargas and charged and attacked protestors with batons in Fatehabad district, leaving many victims with injuries. In November, a court ordered the government to reinstate all employees, to refrain from further arrests, and withdraw cases filed under the ESMA.

Workers at the SIPCOT Industrial Estate, Oragadam were arrested en masse in retaliation for protests over wage cuts, conditions and the victimisation of union organisers. In July, workers at the Yamaha plant formed a new union, but company management refused it recognition and dismissed two of its organisers. Police broke up a protest demanding their reinstatement on 2 October near the Kanchipuram bus terminus, arresting 500 workers who were released the same day. Two further disputes (Royal Enfield and Myoung Shin India Automotive) also concern the victimisation of workers trying to form unions, wages and conditions. On 23 October around 1500-2000 workers from

all three plants were arrested in Oragadam and later released without charge. The workers were marching to the Kanchipuram administration office to request an intervention in their dispute.

*ICTUR wrote to demand that all those arrested are immediately released, charges against them are dropped and that remedial action is implemented for victims of police attacks and arbitrary detention. ICTUR further called on the government to urgently investigate the reported violence, and where necessary to undertake reform of the criminal and civil law to ensure that workers are afforded adequate protection in the exercise of their fundamental rights.*

## Iran

In October, fifteen employees of the Heavy Equipment Production Company (HEPCO) were sentenced to between a year to two and a half years in prison and 74 lashes for 'disrupting public order' and 'instigating workers via the internet to demonstrate and riot' - in retaliation for striking in May this year. HEPCO workers took part in the strike to protest wage arrears, a decline in occupational safety and uncertainty surrounding continued production.

In September 2018, over 250 workers were arrested and detained following participation in a nationwide strike by truck drivers to protest low wages and living standards, as well as wages unpaid for several months. Several members of the judiciary called for the strikers to be condemned to death on grounds of national security, including Iran's Prosecutor General Mohammad Jafar Montazeri.

Participants in nationwide strikes and sit-ins organised by the Coordinating Council of Iranian Teachers Trade Associations

(CCITTA) and Iranian Teachers' Trade Association (ITTA) held in mid-October faced widespread retaliation and intimidation from the authorities. They were protesting the repression of their rights to freedom of association and the on-going detention of trade union leaders. A number of participants were subsequently arrested and detained.

*ICTUR wrote to the government to condemn in the strongest terms possible, the application – and threat of application – of capital or corporal punishment against trade unionists in retaliation for legitimate trade union activities. Such uses of the criminal law must be considered the most egregious and abhorrent violations of trade union rights. ICTUR further called for the immediate release of all workers and trade unionists detained for exercising and defending their rights; that charges against them are dropped and any existing convictions quashed; and that the government promptly give effect to the recommendations of the ILO supervisory bodies, by ensuring victims are provided adequate remedies and necessary reform of the criminal and civil law is implemented.*

## Kazakhstan

On 10 November in Shakhtinsk, Dmitry Senyavskii – leader of the Fuel and Energy Workers' Union (FEWU) Karaganda Region local branch – was violently attacked by two unidentified assailants. Senyavskii was hospitalised with serious injuries and consequently unable to travel to Astana for a meeting with international trade union representatives. Despite the fact that Senyavskii and his family faced a campaign of harassment in the months leading up to the attack, Kazakh authorities have deemed the assault as a case of 'hooliganism'.

*Following the government's 2017 closure of the Confederation of*



*Independent Trade Unions of Kazakhstan (KNPRK), the Kazakh authorities have repeatedly targeted trade union leaders. ICTUR wrote to urge the government to undertake an immediate investigation into the attack on Dmitry Senyavskii, and to cease the judicial harassment of trade union leaders in retaliation for their legitimate trade union activities.*

## Philippines

On 20 October nine members of the National Federation of Sugar Workers (NFSW) were massacred in Sagay, Negros Occidental. A group of armed men attacked their workers' camp, established to protest the slow pace of land reform and to call for improvements to their living and working conditions. Witnesses reported that the attackers hunted down workers who tried to escape and executed them. Two of the victims were minors. In a statement on 28 October, President Duterte ordered police to shoot any farmers who took part in further land occupations ('If they resist violently, shoot them, and if they die, I do not care').

A campaign of violence and harassment against unions in the Philippines has continued amidst the repeated stigmatisation of trade unions by the highest offices of State, purporting to link their lawful activities with those of the insurgency and to justify the militarisation of unionised plantations.

The authorities have particularly targeted the Kilusang Mayo Uno (KMU) and affiliated unions in Mindanao - where martial law was imposed in May 2017 and this December extended for another year. Violence escalated in recent months against the KMU-affiliated Nagkahiusang Mamumuo sa Suyafa Farms (NAMASUFA), which has been organising at a banana

plantation owned by Japanese Sumitomo Fruits Corp (Sumifru). The workers at the company's packing plants went on strike in October. Police and military violently dispersed strikers on several occasions, with numerous arrests and many workers injured. In the build up to industrial action in August and September, two NAMASUFA officials escaped assassination attempts. On 31 October, Danny Boy Bautista, an activist member of NAMASUFA, was shot dead in Barangay Poblacion, Compostela.

*ICTUR wrote to demand that the authorities establish a thorough and independent investigation into these egregious human rights abuses, and to have regard to the failures and shortcomings of previous investigations into mass killings of workers in the Philippines. ICTUR condemned the 'red-labelling' and stigmatisation of trade unions that has contributed to this climate of violence, and urged the government to ensure that fundamental rights – especially those relating to human life and personal safety – and the principles of freedom of association are fully respected.*

## South Africa

On 17 September, police fired rubber bullets and stun grenades at members of the South African Transport and Allied Workers' Union (SATAWU) who were on strike over wages at Denel Aeronautics in Kempton Park, Gauging. At least one person was injured and hospitalised.

On 6 November, a private security company fired on workers with rubber bullets in Gauteng. Workers were on strike over wages at the United Pharmaceutical Distribution workers. At least five workers were seriously injured.

On 16 November, police fired rubber bullets at around 2000 striking workers in Midrand, Johannesburg, during a protest organised by National Union of

Public Service and Allied Workers (NUPSAW) over wages at the Dis-Chem company. Three were injured in the incident and two arrested.

On 21 November, at least six workers were shot - one fatally - and another stabbed during strike action at Sibanye-Stillwater's Beatrix (Free State) and Kloof (Gauteng) goldmines. Around 15,000 AMCU members began a strike in November over wages at the company. The victims were members of the National Union of Mineworkers (NUM) and the Association of Mineworkers and Construction Union (AMCU). Both unions have called on the authorities to intervene.

On 3 December, Ndlela Radebe, the regional Chair of Gauteng miners' union NUM was stabbed and injured while addressing members during an ongoing strike against retrenchments at Goldfields South Deep goldmine.

*ICTUR wrote to condemn in the strongest terms the climate of violence in South Africa and to demand that the government urgently address and investigate these incidents, provide victims with adequate remedies and hold perpetrators to account.*

## Turkey

On 13 November, Abdullah Karacan, general president of the DİSK affiliated Lastik-İş union (Rubber and Chemical Workers' Union) was shot and killed in Adapazarı. The union's regional president, Mustafa Sipahi, and a workplace representative, Osman Bayraktar, were also injured in the shooting. At least thirty-five workers are facing trial in retaliation for participation in a strike at Istanbul's new airport in September to protest poor working and living conditions, and health and safety issues at the site (where an estimated 38 workplace fatalities occurred in

the last three years). Police and military deployed teargas against protestors, raided and searched dormitories and initially detained over 400 workers; 43 appeared before court; 24 were placed in pretrial detention and 19 were released under judicial controls. Özgür Karabulut - President of the union Dev Yapı-İş - was arrested on 5 October for a speech he made to the workers. Trade union representatives from the construction workers' union İnşaat-İş were also arrested. On 5 December, 35 workers were released on bail pending trial.

*ICTUR wrote to urge the Turkish authorities to immediately launch an investigation into Karacan's murder, and to release unconditionally all those who have been detained for activities carried out in their capacities as trade unionists and drop any outstanding charges against them.*

## Zimbabwe

On 11 October 2018, around 150 police surrounded the offices of the Zimbabwe Congress of Trade Unions (ZCTU) in Harare to prevent a demonstration against new tax measures. Some thirty trade unionists - including the ZCTU president Peter Mutasa and secretary general Japhet Moyo - were beaten by police and arrested. Mutasa, Moyo and five other ZCTU officials were detained in police custody for two nights and have been charged with participating in a gathering with intent to promote public violence.

*ICTUR wrote to call on the government to immediately cease its harassment of ZCTU officials and members, to drop all charges against them, and release any individuals still in detention. ICTUR further urged the authorities to initiate an independent investigation into the Zimbabwe National Army's August attack on the ZCTU headquarters – in which at least two ZCTU officials were injured.*

# A Pending Task: Addressing Inequality in Education

Two union representatives from Education International's affiliates in Paraguay and Norway share their insights on the current status of C169 implementation in their respective countries

*Education International (EI), as the voice of the world's educators, supports the ILO Indigenous and Tribal Peoples Convention 1989 (No 169), the only international treaty that specifically addresses the rights of Indigenous Peoples. EI recognizes the critical role that teachers and their organizations in the education system have in ensuring the promotion of the collective rights of Indigenous Peoples, including the right to learn and use their own language: 'The Convention recognizes the aspiration of these peoples to exercise control over their own institutions, ways of life and economic, development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live' (C169, preamble).*

## Norway: There is still a lot to be done

Almost thirty years ago, in 1990, Norway was the first country in the world to ratify ILO Convention 169<sup>1</sup>. In Norway, the Sámi people are recognised as an indigenous people. The Sámi people live in an area divided between four countries: Norway, Sweden, Finland and Russia. Of these, only Norway has ratified C169. This has contributed to giving Sámi people in Norway the right to further develop their culture and obliged the authorities to initiate measures to support this work, although there are still many issues to be solved, including those of language and education.

Every fifth year, the Norwegian government reports on how it fulfils the Convention to the Expert Committee, by answering requests and describing new measures. Norway delivered the latest report<sup>2</sup> in August 2018. The Norwegian Sámi Parliament is allowed to provide its own report on behalf of the Sámi people in Norway. That report is sent to the Committee as a supplemental report<sup>3</sup> and gives an alternative view on what needs to be done to fulfil the commitments.

The Education Act<sup>4</sup> gives all Sámi children an individual right, regardless of where they live in the country, to receive instruction in one of the three Sámi languages that are acknowledged as official Sámi languages (North Sámi, Lule Sámi and South Sámi). In Sámi districts<sup>5</sup>, all children have the right to receive their education also through the medium of Sámi. Outside these districts, there needs to be at least 10 pupils to get education through the medium of Sámi. In districts with a relatively large Sámi speaking population, this has mostly been successful. Outside the Sámi districts, many parents and children face problems getting the education in

Sámi language they have a right to. Both in and outside the Sámi districts there is a significant lack of trained Sámi teachers and kindergarten personnel. Concerning Lule Sámi and South Sámi areas, the situation is especially difficult.

The Sámi Parliament has pointed out that there must be set special measures to recruit Sámi speakers to Sámi teacher training programmes. Some measures are in place, but time will tell if these work as intended. The lack of Sámi speaking personnel is not particular to the education sector. In health services and the justice system this is also a problem.

Even if Sámi languages are official languages in Norway, they are not equal under the Education Act regarding teaching materials. You cannot use teaching materials that are not simultaneously available in both Norwegian orthographies, but the act does not provide for the right to get teaching materials in Sámi languages. Materials written in the Sámi languages are lacking for all subjects in kindergarten and school; these are needed to give Sámi children education through the medium of Sámi, and in order to fulfil the law. Since the law came into force, teachers have considered it necessary to make teaching materials themselves to give pupils appropriate instructions. This forces an additional workload on those teachers who teach in Sámi, compared with those who teach in majority language.

Clearly, Sámi language education does not have the same status as majority language education. With regard to Sámi languages and Sámi education, there is still a lot to be done.

## Paraguay: The journey to achieve the full exercise of Indigenous Peoples' rights

In Paraguay, the indigenous population is distributed in nineteen towns belonging to five linguistic groups and most of them live in the Chaco region. Throughout history, from the Spanish invasion to the present, the indigenous population continues to confront the abuse, discrimination and dispossession of their lands. The organization of Indigenous Peoples in defence of their rights at national levels was consolidated in the 1970s. After the dictatorship of Alfredo Stroessner (1954-1989), Paraguay adopted a new Constitution in 1992 recognising the pre-existence and rights of Indigenous Peoples. In 1993 Paraguay ratified ILO Convention 169.

During 1990-2000 different social movements demanded justice and historical reparations. In

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is Assistant Secretary General of the Paraguayan teachers' union OTEP-Autentica (Organización de Trabajadores de la Educación del Paraguay)



## Country ratification for ILO C169



Argentina – 3 July 2000  
 Bolivia – 11 December 1991  
 Brazil – 25 July 2002  
 Central African Republic –  
 30 August 2010  
 Chile – 15 September 2008  
 Colombia – 7 August 1991

Costa Rica – 2 April 1993  
 Denmark – 22 February 1996  
 Dominica – 25 June 2002  
 Ecuador – 15 May 1998  
 Fiji – 3 March 1998  
 Guatemala – 5 June 1996  
 Honduras - 28 March 1995

Luxembourg – 5 June 2018  
*(will enter into force on 05 June 2019)*  
 Mexico – 5 September 1990  
 Nepal – 14 September 2007  
 Netherlands – 2 February 1998  
 Nicaragua – 25 August 2010  
 Norway – 19 June 1990

Paraguay – 10 August 1993  
 Peru – 2 February 1994  
 Spain – 15 February 2007  
 Venezuela – 22 May 2002

2003, the Truth and Justice Commission (*Comisión Verdad y Justicia*) was established to investigate crimes committed by public officials during the Stroessner administration, including extrajudicial executions, kidnapping of indigenous children and dispossession of their lands. In 2008, former President Fernando Lugo issued official apologies.

Public policies adopted at the present time are not necessarily compatible with Convention 169, nor are they elaborated with the participation of Indigenous Peoples. Although poverty has been reduced, the extreme poverty rate is 63 percent for indigenous children under 5 years of age (compared to 26 percent of the national average). The Law of Indigenous Education has advanced the educational offer of indigenous institutions, but the illiteracy rate is 40 percent (compared to 5 percent of the non-indigenous population). Budget allocations to public education are insufficient. The salary of some indigenous educators is lower than the rest of the teaching staff, their merits for seniority are not recognized and they do not receive the corresponding incentive. In 27 percent of the communities no teacher teaches, and 71.9 percent report a lack of classrooms and problems in the facilities.

For OTEP-Autentica, the dissemination of knowledge about C169 is a pending task with the 2,000 indigenous teachers of the respective communities. Working in coordination with EI's Latin America Regional Office we develop policies to make visible the reality of Indigenous Peoples; educate unionists; organize professional training for indigenous teachers to accredit them and integrate them into the teaching career and to access benefits established in professional legislation; and support Indigenous demands.

### Notes

- 1 Reference: [https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:4724538886017:::P11300\\_INSTRUMENT\\_SORT:1](https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:4724538886017:::P11300_INSTRUMENT_SORT:1)
- 2 Norway's sixth report: <https://www.regjeringen.no/contentassets/c51a2d17daf84ae7bfedbc4c105ef0e2/norges-rapportering-2018.pdf>
- 3 The Sámi Parliament's report can be found here: [www.sametinget.no/Nyhetsarkiv/Sametingets-rapportering-til-ILO-2018](http://www.sametinget.no/Nyhetsarkiv/Sametingets-rapportering-til-ILO-2018)
- 4 The Norwegian Education Act Chapter 6 Sami Education describes the right to be taught in Sámi languages: [www.regjeringen.no/contentassets/b3b9e92cce6742c39581b661a019e504/education-act-norway-with-amendments-entered-2014-2.pdf](http://www.regjeringen.no/contentassets/b3b9e92cce6742c39581b661a019e504/education-act-norway-with-amendments-entered-2014-2.pdf)
- 5 Sami districts are the Sámi administrative areas pursuant to section 3-1 i the Sámi Act.

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# Foreign Investment and Modern Slavery in Paraguay

In 2016, 35 indigenous people were found in inhumane conditions at a cattle ranch in the Chaco, resulting in the conviction of one farmer for the crime of human trafficking

It is in the arid forests of the Chaco, a rich environment naturally adapted to intense heat and scarcity of water, that the Paraguayan government plans to consolidate the country as one of world's top beef exporting hubs. The State's long-term agenda was pushed forward by the former president Horacio Cartes – himself a big rancher in this biome that covers more than half of the country. Over the course of the next decade, the goal is to create in Paraguay a herd of 20 million head of cattle. That is the equivalent to three times the Paraguayan population.

The cattle farming business in Paraguay has been growing at a pace as striking as the advance of illegal deforestation and reports of precarious work. The most serious cases affect indigenous people, including children, who form the backbone of the workforce supporting the expansion of farming activity in the Chaco.

A common complaint concerns low wages, quite often below the legal minimum. The workforce is also subjected to productivity-based pay systems, which sometimes lead to complex relations of debt bondage with the employer. It is common for temporary services, such as land clearing and fencing, to be intermediated by 'contractors' – labour recruiters who usually pay the indigenous people a part up front and the rest when the task has been completed. These contractors often charge for boots, clothes, food, transportation or even accommodation. In this context, workers kept isolated in farms might be coerced to continue labouring for months under very degrading conditions, in order to pay alleged debts.

Located 450 kilometers from the Paraguayan capital, Asunción, the town of Filadelfia is the entry point to the Chaco. It was founded nearly 90 years ago by Mennonite, Christian and Protestant colonists who migrated from Europe and settled in the region. In the indigenous communities around Filadelfia, the complaints related to working conditions have been made primarily against the Mennonite colonists, most of whom are involved in cattle farming.

The farmer, a member of the Mennonite community, was convicted of the crime of human trafficking. He is also a member of Chortitzer, one of the three large Mennonite cooperatives that run Cencoprod, a company that dominates the economy of the Chaco.

The workers were Aché indigenous people recruited in their native community, some 800 kilometers from the farm. The group was filling charcoal kilns with the trunks of native trees – a process that generally precedes the planting of grassland for cattle raising. The conditions were very precarious. Having only improvised tents as a shelter, some slept on mattresses on the ground, others on wooden boards. Meals were cooked in the woods, hygiene conditions minimal. They were supposed to work for six months, but after three they couldn't take it anymore. In an area where temperatures can reach up to 50 degrees Celsius, workers were not given regular access to drinking water.

A call for help was submitted to Paraguay's Public Prosecutor's Office. It was the first inspection in the history of the Chaco that rescued indigenous workers from conditions of modern slavery in farming activities. Months later, a second inspection found teenagers engaged once again in the production of charcoal, working in inhumane conditions. The Public Prosecutor's Office itself evaluates that, if more inspections were made, new cases of slave labour would almost certainly come to light.

In March this year, the Paraguayan Ministry of Labour opened an office in Filadelfia specifically to receive complaints from indigenous people who work in the cattle ranches. But the office does not have the capacity to make field trips nor the autonomy to conduct on-site checks of irregularities. This is because, in Paraguay, government inspectors can only enter farms with a court order. As such, the workers not only have to go to the office to personally file a complaint, they also have to give their boss the official notice summoning the employer to provide explanations.

## Clients overseas

Some of the world's largest car firms – BMW, Citroën, Peugeot and Renault – have sourced leather from supply chains in the Chaco region. In a joint investigation by Repórter Brasil and the British media organisation The Guardian, reporters approached these companies to ask for their views on the forced labour conviction and what steps they intended to take to protect brand reputation and human rights in their supply chains.

**ANDRÉ CAMPOS** is a journalist and supply chain researcher. He is a member of the Brazilian NGO Repórter Brasil



## Modern slavery

In addition to recurring denunciations by unions and social movements, the few inspections that have been conducted recently by the Paraguayan State have set off warning signals. In November 2016, a group of 35 indigenous people was found in inhumane conditions at a cattle ranch named Estancia Ruroka, in the department of Boquerón.



BMW said it was unaware of the conviction involving an associate of the cooperative, but confirmed that one of its leather suppliers purchased materials from Cencoprod. ‘In cases like this, we conduct an investigation with our direct supplier to check the facts’, the company said. ‘The BMW Group definitively does not tolerate any kind of violation of human rights in its production chains.’

Renault and the PSA group (responsible for the Citroën and Peugeot brands) stated that their leather supplier – the Italian company Italthierry Auto Leather S.p.A. – stopped buying from Cencoprod in 2016. Renault reaffirmed their commitment to ‘have an active sustainable purchasing policy encompassing respect for human rights, labour law, compliance, safety, quality and the environment’. Cencoprod and Italthierry were approached but did not comment.

Tackling issues of traceability and sustainability has been a major focus in recent years, said Chortitzer communication manager Patrick Friesen. ‘Obviously, the customer is king. If the customer wants traceability, then we have to comply’, he says. ‘We have very strict rules regarding the traceability of livestock and the by-products’. However, he says, Chortitzer was not buying livestock from Estancia Ruroka, and so those systems did not apply.

It is an extremely large cooperative, Friesen explains. ‘We as a cooperative do not, as a rule, require our partners to do anything’, he says. When asked about the Ruroka case, he replies, ‘we can encourage them, motivate them and also tell the member that they will face the legal consequences. We do not protect them if they do something wrong’. As he points out, ‘the cooperative is not a police entity, or a citizen control body’. He hopes that the Paraguayan state will step up its oversight in the Chaco region: ‘Paraguay’s branding is in the hands not only of the private sector, but also of the government’.

## Foreign investors

International money is crucial to the cattle expansion in Paraguay, not only from buyers but also from meat processing companies and foreign ranchers who are drawn to the land due to its cheap price. Brazil plays a key role in this scenario. Unlike the Mennonite colonists historically settled in the Chaco, who mostly farm medium-sized estates of around 400 hectares, Brazilian ranchers who invest in land in the region generally acquire properties up to 30 times larger. In addition to the Mennonites and the Brazilian investors, the region has also attracted Argentine and Uruguayan cattle farmers.

To understand the scale of the Brazilian influence on the smaller neighboring economy, the two largest meat packing companies operating in Paraguay today are owned by investors from Brazil. Together they are responsible for nearly 70 percent of the country’s beef exports. Headquartered in São Paulo, Brazil’s richest state, the Minerva group is today the

leader in the Paraguayan beef processing market, followed by the company Concepción, which is owned by the Brazilian businessman Jair Antonio de Lima.

Although they are of concern to environmental and indigenous organisations, the large-scale investments indicate that the Brazilian meat industry has come to the Chaco to stay. In 2017, Minerva reported record revenues of R\$12.1 billion. The result is partly due to the acquisition in July last year of nine units of the Brazilian company JBS, the world’s largest animal protein processor, in Argentina, Uruguay and Paraguay. Over the past five years, Minerva has been increasing its network of suppliers and acquiring meat-packing plants across South America.

In 2013, Minerva received an investment of US\$85 million from the International Finance Corporation (IFC), the private-sector lending arm of the World Bank Group, to expand its business in Paraguay. Four years later, the United States Agency for International Development (USAID) published an extensive monitoring report on the environmental and social safeguards linked to this investment. ‘Large beef exporters, such as Minerva, operate under strict sanitary controls’, said the USAID report. ‘There is, however, limited-to-no experience of large beef processors in Paraguay applying environmental and social criteria in supply chain management’.

The report points out that the investment in Minerva was classified as Risk A – the highest category, according to the IFC’s own standards. Among the potential negative impacts are precisely a rise in environmental devastation, an increase in cases of forced labour and the encroachment of cattle farming on indigenous lands. Four years after the approval of the IFC financing, the USAID technical staff concluded that there are still no concrete mechanisms in place to guarantee that cattle purchased from producers in the Chaco have not grazed on illegally deforested land or to make sure that indigenous workers are not subjected to slave labour conditions.

In 2018, Repórter Brasil submitted a number of questions to Minerva on its operations in Paraguay, including whether the company has acquired cattle from farmers charged with using forced labour in the Chaco. However, through its press relations agency, the company said it would not comment. The IFC was also questioned, and sent a reply saying that it ‘believes that the path to a sustainable cattle sector in Paraguay is to develop market driven strategies to increase productivity on already cleared land, while protecting the remaining forest in private hands’. The IFC further stated that they are ‘currently working with Minerva to improve its supply chain management in Paraguay to achieve best industry practices over time; the company is also engaged in an ongoing process seeking continuous improvement of its environmental and social practices in all geographies it operates’.

Cattle farms are booming, but robust mechanisms are needed to tackle the abuse and exploitation of indigenous workers, who form the backbone of farming activity in the region

**CARLOS JULIANO BARROS** is a reporter and filmmaker. He is a member of the Brazilian NGO Repórter Brasil



# Yesterday, Today and Tomorrow: Indigenous Peoples and Unions in Canada

Historically, unions sought to exclude Indigenous workers from employment, but some unions also extended their solidarity, and Indigenous workers were often active in unions and in strike action

Last year, Canada celebrated its 150th birthday. The notion that Canada did not exist prior to 1867 was greeted by many Indigenous peoples (First Nations, Inuit and Métis) as insulting – to say the least. More than 600 First Nations – speaking 50 different languages – have lived in this land since thousands of years before the arrival of Europeans. The Inuit reside in Canada’s extreme north. The Métis are of mixed European and Indigenous ancestry and have been a crucial part of the Canadian story from well before confederation. Certainly the fur trade, Canada’s primary nation-building enterprise, would not have succeeded without the participation of Indigenous peoples. The country’s name derives from the Iroquoian word ‘kanata’, meaning settlement or community<sup>1</sup>. Canadian intellectual John Ralston Saul is convinced that Indigenous cultures are deeply entrenched throughout our society, distinguishing us from Europeans and Americans<sup>2</sup>.

Any consideration of Indigenous peoples, wage labour and trade unions has to take place in the context of the historical experience of colonialism and its attendant racism. Colonialism involved the dispossession of Indigenous peoples’ land and resources, the erosion of their economic and political systems, constant attacks against their cultural and spiritual practices, and the incarceration of tens of thousands of Indigenous children in residential schools – where thousands were abused and died, and where they were taught that Indigenous cultures and languages were inferior to those of Europeans<sup>3</sup>. Residential schools left an intergenerational legacy of poverty, unemployment, addiction and broken lives, which still afflicts many Indigenous communities. This history is marked by the injustices inflicted on Indigenous peoples; so too is the history of their participation in the labour market.

part of the year in Victoria’, where they comprised a significant part of the paid labour force. Entire villages would sometimes be virtually deserted in the late nineteenth century as Indigenous men, women, and even children migrated to work for wages<sup>6</sup>.

Indigenous peoples throughout the country worked for wages on a seasonal basis, while maintaining their involvement in traditional land-based economies, but they were pushed out of the paid labour force when non-Indigenous workers arrived. There is a long history of union efforts to exclude Indigenous workers from employment in order to preserve jobs for non-Indigenous workers<sup>7</sup>.

Indigenous peoples were however often active in unions and in strike action. There are reports of Indigenous fishermen supporting strikes on the Fraser River in 1893, and addressing rallies ‘in support of the striking fishermen’. Indigenous longshoremen played a key role in 1906 in the formation of a local of the Industrial Workers of the World<sup>8</sup>. Indigenous women participated when they travelled hundreds of miles to pick hops around Puget Sound. Although not represented by a union, these workers ‘were known to strike for wages’<sup>9</sup>.

There are also examples of unions extending solidarity to Indigenous workers and demanding justice on their behalf. In 1962, 80 Indigenous workers from Norway House and Split Lake picketed the Inco mine in Thompson, Manitoba, demanding the chance to work for wages. Inco resisted, but the union, the International Union of Mine, Mill and Smelter Workers, supported the Indigenous picketers who were demanding the right to work. In a telegram to the *Winnipeg Free Press* the union wrote: ‘Indians [sic] all the way from Nelson House are parading at the International Nickel Company’s gates demanding their right to work. Many of these people were the first here, clearing the land where the company now stands. Now that the dirty work is finished they feel they have been cast aside. They want the same rights and privileges as their white brothers’<sup>10</sup>.

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Manitoba

## Yesterday

Indigenous peoples were especially active as wage-workers in British Columbia in the late nineteenth century. They worked in canneries and sawmills, in mining and agriculture, on the docks and sealing boats and as domestic servants and cooks in urban centres. For a part of that period they comprised the majority of wage workers in the province<sup>4</sup>, and have been described as ‘essential to the capitalist development of British Columbia’<sup>5</sup>. John Lutz reports that ‘from 1853 through to the 1880s, two thousand to four thousand Aboriginal People canoed up to eight hundred miles to spend

## Today

As Leslie Spillett — an Indigenous leader in Winnipeg and former trade union leader — confirmed in an interview with the authors, some Indigenous people see unions as another colonial institution, engaged in practices at odds with Indigenous cultures. It is true that historically unions have acted in the interests of non-Indigenous workers, failing to adequately represent the interests



of Indigenous workers, and even actively excluding them from paid employment.

Today's unions are working to eradicate those colonial and racist tendencies. Many are trying to incorporate Indigenous members in respectful ways, but much work remains to be done. A study of Indigenous experiences in the Canadian Union of Public Employees (CUPE) and the Public Service Alliance of Canada (PSAC), found that racism directed at Indigenous workers was a dominant theme<sup>11</sup>.

We found the same in our research with the CUPE Local 500, representing City of Winnipeg employees<sup>12</sup>. This demonstrates that there remains considerable work in getting Indigenous members engaged with their union. In keeping with this lack of engagement, not many members participated in our study; those who did, however, were generally pro-union. As one Indigenous worker said, "I have many, many times been grateful that we have a union. I believe in unions".

Encouragingly, none told us that they are opposed in principle to unions. A number of those we interviewed described negative experiences in previous non-union workplaces. One told us she "got screwed around quite a bit" at a previous non-union job. Another said, when asked if she is a supporter of unions, "yes, definitely, because I hear about other people and their experiences without unions and there's just nothing to protect them.... I've heard some really bad stories". A third told us, speaking about a previous non-union job, that "I've been humiliated, just put up with all kinds of terrible, terrible conditions with nowhere else to go, but at least with your union, at least you get formal policy, you get formal procedures, you get it down in writing, those are all really important things to happen".

Another member observed that unions are especially important for Indigenous peoples because in a non-union environment individuals have to make their own case for higher wages and benefits. For many Indigenous people, that is difficult: due to the damage colonialism has inflicted on their sense of self-esteem and because such individualism is inconsistent with Indigenous peoples' traditional collective orientation.

Some Indigenous workers that we interviewed expressed the concern that their culture and spirituality are not valued. They said that they would like to be able to smudge (a cleansing ceremony using the smoke from medicinal plants) in the workplace, or have an elder they could speak with, and would like to be able to take time off to attend Sundance and other traditional ceremonies that are more important to them than the dominant Christian holidays. Negotiating with the employer so that Indigenous employees can practice their traditional ceremonies would go a long way to convincing them that they are valued members of the union and of Canadian society. Despite all the good work CUPE 500 and other unions are now doing to reach out to Indigenous members, a more

concentrated effort is required to engage them more with their union, or encourage Indigenous workers to join a union.

## Tomorrow

In its Final Report of 2015, The Truth and Reconciliation Commission<sup>13</sup> - established to examine the historical injustices and legacy of residential schools - included the recommendation that Indigenous peoples should 'have equitable access to jobs, training, and education opportunities in the corporate sector, and that Aboriginal communities gain long-term sustainable benefits from economic development projects'<sup>14</sup>. Clearly there is a role for unions to play in meeting that wide-ranging objective.

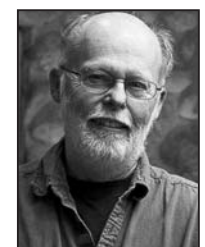
The blood, sweat and tears of Canada's Indigenous peoples are embedded in our institutions, our culture and our economic success. It's high time they receive their fair share. It is our hope that unions will take this challenge to heart: it could be what injects new life and purpose into the labour movement, helping to write a more honest and hopeful chapter in the Canadian story.

## Notes

- 1 Laura Neilson Bonikowsky, 'The Origin of the Name Canada': <https://www.thecanadianencyclopedia.ca/en/article/lets-call-it-efisga-feature>
- 2 Stephen Henighan, 'Citizen Saul'. *The Walrus*, 23 June 2017: <https://thewalrus.ca/citizen-saul>
- 3 Truth and Reconciliation Commission of Canada. 2015. *Final Report of the Truth and Reconciliation Commission of Canada, Volume One: Summary*. Toronto: James Lorimer and Company.
- 4 Knight, Rolf. 1996. *Indians at Work: An Informal History of Native Labour in British Columbia, 1858-1930* (Vancouver: New Star Books).
- 5 Lutz, John. 1992. 'After the Fur Trade: The Aboriginal Labouring Class of British Columbia, 1849-1890,' *Journal of the Canadian Historical Association*. Volume 3, Number 1: 70.
- 6 Lutz, John. 2008. *Makuk: A New History of Aboriginal-White Relations*. Vancouver: UBC Press: 169, 189.
- 7 Lithman, George. 1984. *The Community Apart: A Case Study of a Canadian Indian Reserve Community*. Winnipeg: University of Manitoba Press: 78; Parnaby, Andy. 2006. 'The Best Men that Ever Worked the Lumber: Aboriginal Longshoremen on Burrard Inlet, BC, 1863-1939', *The Canadian Historical Review*, 87, 1, March: 77
- 8 Knight, Rolf. 1996. *Indians at Work: An Informal History of Native Labour in British Columbia, 1858-1930* (Vancouver: New Star Books): 17.
- 9 Raibmon, Paige. 2006. 'The Practice of Everyday Colonialism: Indigenous Women at Work in the Hop Fields and Tourist Industry of Puget Sound', *Labor: Studies in Working-Class History of the Americas*, 3, 3: 23.
- 10 Winnipeg Free Press September 19 and 20, 1962
- 11 Mills, Suzanne and Louise Clarke. 2009. "'We Will Go Side by Side with You.'" Labour Engagement with Aboriginal Peoples in Canada', *Geoforum*, 40: 96.
- 12 Fernandez, Lynne and Jim Silver. 2017. *Indigenous Workers and Unions: The Case of Winnipeg's CUPE 500*. Winnipeg: Canadian Centre for Policy Alternatives-Manitoba.
- 13 Truth and Reconciliation Commission of Canada website: <http://www.trc.ca/websites/trcinstitution/index.php?p=890>
- 14 *Truth and Reconciliation Commission of Canada: Calls to Action*, 92(ii). 2015: 337

Today some Indigenous people continue to see unions as another colonial institution, engaged in practices at odds with Indigenous cultures. Much work remains to be done

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# Native Americans, Tribal Sovereignty and Unions

The Tribal Labor Sovereignty Act - which narrowly failed to pass Congress - provoked strong criticism from US labour. We asked two prominent lawyers what the Act means for Native Americans

**KAIGHN SMITH JR.** is a lawyer who has represented tribal nations and their enterprises throughout the US for over 25 years. He is a shareholder at the law firm, Drummond Woodsum, author of *Labor and Employment Law in Indian Country*, and a reporter for the American Law Institute's *Restatement of the Law of American Indians*



To understand labour relations in 'Indian country' (e.g. 'reservations' Native Americans retained after untold land cessions to the US under the barrel of the gun), one must understand the fundamental nature of tribal sovereignty and the relationship between tribal nations and the United States.

Indigenous peoples have occupied what is now the US from time out of mind, and in so doing exercised governmental authority over their respective tribal citizens and their lands. After the American Revolution, the US Constitution defined treaties with tribal nations as the 'Supreme law of the land'. The Constitution also granted Congress broad authority over Indian affairs. Centralising power over Indian affairs within the federal government had practical consequences: it was essential for systematic colonisation.

The Supreme Court established early on that tribes are 'domestic dependent nations' and that the US has a trust responsibility to protect their sovereign authority as governments. The Supreme Court subsequently described the sovereignty of Indian tribes as of 'a unique and limited character', which 'exists only at the sufferance of Congress and is subject to complete defeasance. *But until Congress acts, the tribes retain their existing sovereign powers*'<sup>1</sup>. The Court also established that the federal trust responsibility to protect tribal sovereignty requires ambiguities in statutes affecting tribal nations to be construed in favour of tribal self-determination<sup>2</sup>. Thus, if Congress is silent on the question of whether a federal law may be imposed on a tribe in a manner that would undermine its inherent sovereign authority, the 'proper inference... is that the sovereign power remains intact'<sup>3</sup>.

## Labour and Employment Relations In Indian Country

It is well-established that tribes have inherent sovereign power to govern labour and employment relations within Indian country, their territorial jurisdiction, in accordance with their own laws. Tribal nations engage in a host of economic activities on their lands to raise governmental revenues for the provision of governmental services to their members. These include the operation of casino resorts, timber and other natural resources industries, and many more. In these settings, tribes retain inherent sovereign authority to enact and enforce labour and employment laws. Many tribes have enacted laws to govern unions and collective bargaining as well as employment discrimination.

Non-citizens of Indian nations who take up employment with tribes or their enterprises in Indian country are also subject to these laws.

The National Labor Relations Act (NLRA) - enacted in 1935 - establishes and protects the right of private-sector employees to organise and join unions and to engage in collective bargaining with employers. The NLRA expressly excludes the federal government, states, and municipalities from its application; it applies only to private employers. Labour organising in the public sector is separately governed by state and federal laws, which differ in substantial ways from the NLRA. Congress is silent on the application of the NLRA to tribal nations or their enterprises within Indian country.

For nearly 75 years, the National Labor Relations Board (NLRB) had held that tribal nations and their enterprises in Indian country are not 'employers' subject to the NLRA, in recognition that tribal nations are sovereign governments, like the state and federal governments.

## NLRB applies the NLRA to tribal gaming operations

In 2004, the NLRB changed course and held that a tribe engaged in gaming within Indian country to generate governmental revenues in accord with the Indian Gaming Regulatory Act (IGRA) was an 'employer' subject to the NLRA. The ruling was upheld on appeal<sup>4</sup>. The Court said that because operation of a casino was 'not a traditional attribute of self-government' and the tribe employed non-citizens at the casino, tribal sovereign interests did not warrant construing Congress's silence in favour of the tribe.

The *San Manuel* decision has been roundly criticised by federal Indian law scholars. Tribal nations engage in gaming pursuant to the IGRA to generate governmental revenues to support badly needed governmental services for tribal members. The IGRA *requires* that tribes use the net revenues from gaming to support tribal governmental services. Such an enterprise is thus no different than the lotteries, horse racing facilities, and liquor stores that *states* operate as employers. These public employers may be subject to the public sector labour laws of states, but they are clearly excluded from the NLRA. These are governmental operations to generate governmental revenues, not 'commercial' or private sector activities. The decision can also be criticised because it jettisoned the requirement to construe Congressional silence so as not to



undermine tribal sovereignty: the ‘proper inference’ is that the NLRA cannot be applied to Indian tribes.

In the wake of *San Manuel*, the federal courts have continued to grapple with this issue.

The Little River Band of Ottawa Indians has had an operational labour law on its books for a decade, modelled on public sector labour laws of states. It allows union organising within the Band’s governmental agencies and subordinate economic organisations, including its IGRA gaming operations. Like the labour laws of most states and the federal government, the law prohibits strikes and restricts collective bargaining over specific subject areas. The Band’s law covers union elections, collective bargaining, and the resolution of unfair labour practices.

In 2013, the NLRB challenged the Band’s laws and ruled that it could strike them down to the extent that they (a) apply to the tribe’s gaming enterprise, and (b) vary from the NLRA. The Band appealed and lost. For the first time, a federal agency was empowered to strike down the duly enacted and operational laws of a federally recognised Indian tribe. As the Band argued in Court, ‘[i]t is hard to imagine a greater affront to a sovereign’s authority (and its dignity) than to topple its own, carefully thought-out policy judgments in these areas and to substitute those of another power’<sup>5</sup>. Tribal nations within the jurisdiction of the US Court of Appeals for the Sixth Circuit are now subject to union organising under the NLRA and cannot enact public sector labour laws that vary from it.

In June 2016, the Supreme Court declined to review the case, leaving the state of law in disarray. For example, tribal nations in Wyoming, Colorado, New Mexico, Oklahoma, and Kansas are subject to a rule set by the US Court of Appeals for the Tenth Circuit, which can generally be described as more protective of tribal sovereignty. Tribes in Montana, Idaho, Arizona, California, the Northwest, New York, and Connecticut are subject to decisions of the US Courts of Appeals for the Ninth and Second Circuits, which are less protective of tribal sovereignty. In other parts of the country, it is hard to gauge what the rule is.

### The Tribal Labor Sovereignty Act

The Tribal Labor Sovereignty Act (TLSA) was first proposed in Congress in 2015. The Act would have amended the NLRA to exclude an ‘Indian tribe, or any enterprise or institution owned and operated by an Indian tribe and located on its Indian lands’ from the definition of ‘employer’. Tribal Nations and inter-tribal organisations as well as the US Chamber of Commerce’s Native American Enterprise Initiative argued that the measure appropriately supported tribal self-government and created parity between tribal governments and federal, state, and municipal governments – likewise excluded under the NLRA.

However, the TLSA met stiff opposition from organised labour. The AFL-CIO wrote in response

that the federation ‘does not believe that employers should use [the principle of sovereignty for tribal governments] to deny workers their collective bargaining rights and freedom of association... fundamental human rights that belong to every worker in every nation’. The AFL-CIO cited an informal opinion from the ILO’s International Labour Standards Division, stating that ‘it is critical that the State (the national authority) takes ultimate responsibility for ensuring respect for freedom of association and collective bargaining rights throughout its territory’<sup>6</sup>.

In April 2018, the bill failed to pass the Senate. It remains to be seen whether it will be re-invigorated.

### Conclusion

Tribal nations, like all sovereign governments, can enact laws within their respective jurisdictions to reflect their unique values and public policy priorities. Tribal nations want their workplaces to be fair. They want to attract and retain a high quality work force. Providing employees with fair wages and good working conditions furthers those interests. But the legal impetus to establish this setting should come from within tribal nations themselves, not foisted upon them from the outside. Tribes are subject to the Indian Civil Rights Act (ICRA), which prohibits tribal governments from interfering with essentially the same rights as those protected from state interference in the Bill of Rights and Fourteenth Amendment. Employees within Indian country may invoke ICRA as necessary, but (appropriately) the interpretation and enforcement of ICRA is within the exclusive authority of any given Indian nation to decide<sup>7</sup>.

The imposition of the NLRA upon the enterprises of tribal nations in Indian country forces a law intended to govern private sector employment relations upon public sector employment relations. There is no concurrent push to impose the NLRA on federal, state, and municipal employees; over twenty US states prohibit collective bargaining rights for public employees altogether<sup>8</sup>. Furthermore, the extension of the NLRA to cover tribal enterprises can hardly be considered a panacea for ensuring workers’ rights to organise in tribal enterprises. Maina Kiai, former UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, observed that the NLRA ‘legalises practices that severely infringe workers’ rights to associate’ and ‘provides few incentives for employers to respect workers’ rights’<sup>9</sup>. Tribal nations like the Little River Band may do better.

Imposing the NLRA upon tribal enterprises in Indian country intrudes upon tribal sovereignty by displacing tribal law with a foreign law. It is a modern act of colonisation.

Imposing the NLRA upon tribal enterprises in Indian country is seen as an intrusion upon tribal sovereignty, by displacing tribal law with a foreign law - a modern act of colonisation

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... Endnotes on page 28 ...

... continued from Page 13 ...

The Saharawi trade union, UGTSARIO, describes a catalogue of repressive measures imposed by the Moroccan authorities, aimed in particular at those known to support self-determination

consultation process was held *in* Morocco. According to the Western Sahara Resource Watch (WSRW) only eighteen groups participated, all of which are Moroccan-based organisations opposed to Saharawi self-determination<sup>6</sup>. Furthermore, the Commission lists the consulted parties: these include Polisario, WSRW (both of which refute having participated) and a ‘Delegation of 85 associations jointly signing a letter to the EU Commission and the EEAS [European External Action Service] on 3 February 2018 on amending the Protocols’. That letter - in fact signed by 89 groups, including UGTSARIO – unequivocally condemns the consultation:

*‘Under the current conditions, we will not participate in a consultation process hosted by EU Commission [...] This is a deeply destructive and unsustainable approach which directly contravenes EU and international law, strengthens and funds Morocco’s illegal occupation, and threatens to undermine the UN Political Process and the efforts of the United Nations special envoy to Western Sahara. The Saharawi people, do not benefit, economically or otherwise, from the illegal exploitation of their natural resources and trade with the European Union; nor has the Saharawi people’s consent been credibly sought...’<sup>7</sup>*

Such a clear message did not hold the Commission back from listing the signatories as having been consulted, or from drawing its positive conclusions to proceed with the amendments.

This approach to the social, labour, human rights, and environmental dimensions of EU trade policy is hardly new. If the Commission’s historical choice of negotiating partners is an indication of what its interests are, one might deduce that constructive social dialogue and democratic representation are pretty low on – if not entirely absent from – the agenda<sup>8</sup>. But in the case of Western Sahara, these tactics reach a new low. Even the 2013 Final Report of the (EU-commissioned) ‘Trade Sustainability Impact Assessment’ on the Morocco DCFTA highlighted many alarming concerns about the suppression of the Saharawi and their attempts to campaign for independence (not to mention issues relating to Morocco’s domestic situation)<sup>9</sup>. It cites instances of ‘torture and other ill-treatment’ – identifying ‘advocates for independence of Western Sahara’ as a particularly vulnerable group – as well as ‘cases of excessive use of force by law enforcement agencies’ undertaken on the territory of Western Sahara for the specific purpose of suppressing support for independence, and a culture of impunity around such abuses. Saharawi workers’ rights to organise under such conditions are practically non-existent.

### A form of blackmail

In 2008, Spanish union Comisiones Obreras (CCOO) observed that the exercise of trade union rights for the Saharawi is nigh impossible under the

occupation: ‘the courts do not accept complaints from Saharawis because they interpret them as attacks on the kingdom of Morocco. ... There are Saharawis who have been in prison for over one year without being convicted. It seems that there is no proper trade union protection for Saharawi workers because they can be dismissed for their opinions...’<sup>10</sup>.

UGTSARIO was founded in 1975, and has been a member of the Organisation of African Trade Unions since 1987. It has participated in all Congresses of the ITUC and has applied for affiliation. Its general secretary, elected by the UGTSARIO Congress, is a member of the National Secretariat of Polisario, in accordance with the Basic Law of the Front. It is active in the Saharawi refugee camps of Tindouf, Algeria – where unemployment is extremely widespread – in the SADR-controlled (‘liberated’) region, and in the occupied territories, albeit under conditions in which unionisation of Saharawi workers faces insurmountable obstacles.

In an October 2018 report ICTUR received from UGTSARIO, the union describes a catalogue of repressive measures imposed by the Moroccan authorities: arbitrary restrictions on movement of Saharawi workers, discrimination, refusals to grant paperwork certifying Saharawis the right to work (meaning that this can be arbitrarily denied them at any time), precarious working conditions, unpaid overtime, no holiday entitlement, workers being classified as temporary workers for years, forced dispersals of demonstrations to demand workers’ rights, and exclusion from social protection (including maternity benefits, unemployment benefits or compensation for dismissal or work accidents). Such conditions leave workers with precious little basis for organising, as well as exacerbating a situation of massive unemployment.

The systematic abuse of Saharawi workers’ rights is aimed in particular at those known for their public defence of the right of the Saharawi people to self-determination. As the union explains: ‘it is a form of blackmail that is intended to keep the Saharawis away from all political activity. They are not allowed to organise in unions. They are not paid for seniority and the payment of their salaries is deliberately delayed... The workers are dismissed without any compensation and without written notification. UGTSARIO’s report lists twenty workers who have had their salaries suspended for having participated in demonstrations in support of the right of the Saharawi people to self-determination and in solidarity with Saharawi political prisoners. Earlier this year the UGTSARIO’s affiliated lawyers union called on the Moroccan government to release 151 Saharawi war prisoners, provide information on forced disappearances, and ensure freedoms for ‘media, observers, personalities and parliamentary delegations to the occupied Saharawi territories’, as well as denouncing ‘the plunder and the illegal exploitation of Western Sahara natural resources by the Moroccan occupation forces’<sup>11</sup>.

That plunder is not the only debt that the EU owes to the Saharawi. Since 2003, UGTSARIO has campaigned - in cooperation with the CCOO and Spanish Unión General de Trabajadores (UGT) - for compensation for Saharawi who worked for Spanish companies (and the Spanish administration) during the colonial era, particularly those of the former Spanish phosphate factory, Fosbucráa – the largest industrial centre in the territory. Since Spain's withdrawal, these Saharawi pensioners have been continually excluded from any social protection. The CCOO and UGT have demanded that the Spanish state 'recognise and pay the benefits to which the former workers and their beneficiaries are entitled'. Several thousand files have been sent to the Spanish administration. Despite amendments to Spain's social security law, the claims of these Saharawi workers have been ignored.

UGTSARIO's campaigns to raise international awareness of the unjust treatment of Saharawi workers have garnered widespread support and solidarity of unions across Africa, Europe and Latin America. In November 2018, the 43rd European Conference on Solidarity with the Saharawi People (EUCOCO) was held in Madrid. Participants restated their support for Saharawi self-determination, and stressed the need for action at the European level, as well as at the ILO, on the situation of Western Sahara. The Confederación Sindical Galega (CSG) proposed to create a Solidarity Network with the Saharawi, to facilitate more participation of union organisations. The meeting also denounced the EU's extension to Western Sahara of its agreements with Morocco, and resolved to deliver a (second) resolution on the matter to the EU Parliament.

### 'Inclusion' or Subsumption?


The EU's current approach to Western Sahara betrays a cynical self-interest behind a façade of social dialogue; the Commission insists that the benefits of trading with the EU are simply too good for the Saharawi to (be allowed to) turn down. Presciently, the EU's 2013 Impact Assessment notes that, in order to link human rights objectives to the DCFTA, the issue of 'freedom of association' raises the following consideration: '[...] civil society broadens the societal base that is involved in the DCFTA, making the DCFTA more inclusive. This would also apply to Western Sahara.' While denying the trade unions and civil society organisations of Western Sahara any voice on the issue of whether the DCFTA should even apply to their territory, making the agreement 'more inclusive' seems like a slim prospect. Today, that assessment reads like a Freudian slip: the EU's principle interest in 'inclusion' is its steadfast determination to subsume Western Sahara within the agreement's scope – regardless of what the Saharawi say. By doing so, they are aiding the subsumption of Western Sahara by Morocco.

### Notes

1 [https://ec.europa.eu/echo/where/africa/algeria\\_en](https://ec.europa.eu/echo/where/africa/algeria_en)

- 2 Matthew Porges, 'Morocco, Western Sahara and the EU'. 20 March 2018, LRB Blog: <https://www.lrb.co.uk/blog/2018/03/20/matthew-porges/morocco-western-sahara-and-the-eu>
- 3 C-104/16 P Council v Front Polisario; T-180/14 - Front Polisario v Council; C-266/16 Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs. For an overview of cases (including ongoing proceedings) and links, see here: <https://www.wsrw.org/a246x4109>
- 4 EP, Committee on International Trade, MOTION FOR A EUROPEAN PARLIAMENT NON-LEGISLATIVE RESOLUTION, 2018/0256M (NLE) 11.9.2018, para. 5 [emphasis added]: [http://www.europarl.europa.eu/meetdocs/2014\\_2019/plmrep/COMMITTEES/INTA/PR/2018/12-10/1164370EN.pdf](http://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/INTA/PR/2018/12-10/1164370EN.pdf)
- 5 See REPORT ON BENEFITS FOR THE PEOPLE OF WESTERN SAHARA AND PUBLIC CONSULTATION ON EXTENDING TARIFF PREFERENCES TO PRODUCTS FROM WESTERN SAHARA – COMMISSION STAFF WORKING DOCUMENT. Brussels, 11.6.2018. SWD(2018) 346 final: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018SC0346&from=EN>
- 6 WSRW, 'Here, the EU Commission is lying about WSRW - and 93 other groups': <https://www.wsrw.org/a105x4180>
- 7 WSRW, 'Unison condemnation of the EU Commission from Western Sahara groups': <https://wsrw.org/a105x4072>
- 8 See C. Cross, Legitimising an unsustainable approach to trade: A discussion paper on sustainable development provisions in EU Free Trade Agreements. Dec 2017, ICTUR, Powershift, TNI, et al
- 9 Available here: [http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc\\_151926.pdf](http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151926.pdf)
- 10 [http://www.ccoo.es/0ae7c12b3c4abbe55\\_b4d696aca8a75d400001.pdf](http://www.ccoo.es/0ae7c12b3c4abbe55_b4d696aca8a75d400001.pdf)
- 11 'Saharawi Lawyers Union denounces plunder of Western Sahara resources', Sahara Press Service, 02/01/2018: <http://www.spsrasd.info/news/en/articles/2018/01/02/12940.html>

Constructive social dialogue and democratic representation seem to be pretty low on – if not entirely absent from – the EU's trade policy agenda. Its approach to Western Sahara is a new low



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## Asia

Leaders of the ASEAN Trade Union Council (ATUC) called for 'genuine engagement of unions at the regional and national levels on issues affecting the world of work' at a meeting of the regional group on 24-25 November 2018 in Indonesia. The ATUC leaders adopted the Bali Declaration, which called for: improved capacity of unions to deal with technological advances; upholding decent work pillars when engaging with corporate social responsibility; deeper trade union engagement in sustainable development based on the 2030 Agenda; for unions to enable migrant workers either to become members or at least be represented by unions in the country of employment; to push for universal social protection coverage across ASEAN countries; and particularly for the inclusion of migrant workers in building social protection floors. The Declaration also affirmed that ATUC is seeking formal accreditation as a labour dialogue partner in the ASEAN regional inter-governmental group.

## Australia

In November Australia adopted the world's second law against modern slavery. With a model similar to that adopted in the UK in 2015, the new law requires companies with a turnover of A\$100 million or more (61 million euro) to publish annual statements outlining the risk of slavery in supply chains and reporting what action they have taken to address these risks. The law has been welcomed by some anti-slavery campaigners, but, like the UK model, it lacks penalties for businesses failing to comply with supply chain requirements. Australian Council of Trade Unions President Michele O'Neil has said 'we need fines to really be able to say they cannot get away with tolerating the presence of slavery' and that the law as it stands is 'too weak to properly fight to eradicate modern slavery'.

## Bangladesh Accord

The international action plan established after the 2013 Rana Plaza factory collapse, in which more than 1100 people died, the Accord on Fire and Safety in Bangladesh, has been wound-up, after the authorities

refused to extend its term of operations, following complaints from garment factory owners over the expense of improvements needed to meet Accord standards. The Accord, which had broad support from global unions, brought together more than 180 retailers and importers from Europe, North America and Asia, including Primark in the UK, H&M in Sweden and the Italian group Benetton, and covered 1690 of the 5721 formal garment factories in the country.

A smaller rival scheme, the Alliance for Bangladesh Worker Safety, remains in operation. It groups together 29 North American retailers, including Costco, Walmart and Sears, covering 655 factories, but has been criticised by global unions. Another scheme established by the Bangladesh government, the National Initiative, covered a further 745 factories. Among formal factories, many remained outside any of the three schemes, and there are believed to be thousands of other garment factories operating informally.

## Cambodia

On 11 December 2018, six union leaders – Ath Thorn, Chea Mony, Yang Sophorn, Pav Sina, Rong Chhun and Mam Nhim – were convicted of instigating violence, causing damage, and blocking traffic, in respect of their role in protests in late 2013 when garment workers participated in major protests demanding an increase in the minimum wage. At least four people were killed and 28 were hospitalised after military police violently dispersed the protests in January 2014. All six leaders were given suspended prison sentences of two and a half years, and were ordered to pay a collective fine of approximately 7500 EUR. The prosecutions had dragged for years but sentencing came quickly after Prime Minister Hun Sen intervened in early December, ordering the Labour and justice Ministries to end the outstanding cases. Critics have raised concerns that the leaders had been originally charged with carrying out criminal acts directly but their subsequent convictions were for 'instigating' the actions. The global union federations view the events as an attempt by the authorities to both

appease international human rights critics, by freeing the union leaders and ending the prosecutions, while retaining the coercive power to enforce the prison sentences if the union leaders are found guilty of relatively minor offences over coming years.

## Canada

In November the federal government passed back-to-work legislation, ordering postal workers to end a national strike that had received overwhelming backing from members in the face of employer intransigence during negotiations for a new collective agreement. Back-to-work orders have been used before to shut down strikes in Canada, despite the Constitutional protection of freedom of association that exists under the Canadian Charter of Human Rights and Freedoms. The action is hard to reconcile with Canada's much-celebrated 2017 ratification of ILO Convention 98, recognised in a full-page advert in IUR in each edition produced since the ratification. That advert does not appear in this edition of IUR.

## Hungary

Thousands have joined protests in Budapest against amendments to the labour law that allow employers to ask for up to 400 hours of overtime work per year, and which increase the reference period for calculating overtime from 12 to 36 months. The country's largest trade union centre, Magyar Szakszervezeti Szövetség (MaSZSZ, English: Hungarian Trade Union Confederation) says that the reforms were introduced without consultation, and are opposed by the trade unions. Critics have dubbed the reforms 'the slave law'. ITUC General Secretary Sharan Burrow said the law 'does not have popular backing' and 'goes against both the ILO Decent Work Agenda and the European Pillar of Social Rights'.

## ITUC Congress

At the ITUC's fourth Congress, held in Copenhagen in December, General Secretary Sharan Burrow was re-elected – though by a close margin. Burrow noted that 'we leave the Congress united to build workers' power to change the rules. The





international union movement stands for peace, democracy and rights for working people. We must defeat and transform the failed economic model of today. We must defend workers' and other human rights and demand a new social contract. As the world shifts, with technological and climate change and as people move, because of desperation or from choice, we must have a Just Transition. And equality for all people is at the centre of our mandate'.

In a combative tone, Burrow also laid down a challenge to multinational corporations: 'Companies like Amazon, whose business model is based on extracting public subsidies, paying little or no taxes, mistreating or dehumanising workers, were sent a clear message. If you do not change the way you operate, if you don't respect the rights of workers, we will change you. We will change the rules and break up Amazon', said Burrow.

In addition to the core objectives summarised in Burrow's speech (they are set out in full at [www.ituc-csi.org](http://www.ituc-csi.org)), five urgent resolutions were passed calling for:

- human rights and peace in Colombia
- solidarity with workers and students in Iran
- labour law reforms in Hungary
- labour rights and solidarity with independent trade unions in Kazakhstan
- freedom for former President of Brazil, Lula da Silva

Refugees and migrants were further recognised by Congress with the message that refugees are welcome in our workplaces and our communities.

The ITUC General Council also elected Ayuba Wabba, President of the Nigerian Labour Congress, as ITUC President; Cathy Feingold of AFL-CIO (USA) and Karl-Petter Thorwaldsson of LO Sweden as Deputy Presidents; and Owen Tudor, Victor Báez and Mamadou Diallo as Deputy General Secretaries. The next Congress will be in 2022.

## Mauritania

The US has removed preferential terms from Mauritania under its African Growth and Opportunity Act

(AGOA) system in response to the country's failure to tackle the serious and on-going issue of forced labour. The US labour centre AFL-CIO last year lobbied the US trade representative, insisting that the country had failed to take action necessary to maintain AGOA trade terms. The slavery problem in Mauritania has also resulted in rulings against the country from the African Union, as reported in IUR Vol. 25.2.

## South Africa

In September Zingiswa Losi became the first woman president of the COSATU trade union centre, replacing Sdumo Dlamini, who held the position for more than 10 years. Losi, COSATU's second deputy president since 2015, stood unopposed, backed by COSATU's major affiliate, the National Education, Health and Allied Workers' Union (NEHAWU). Losi is politically regarded as a continuation leadership, having allied herself to Dlamini during the sacking of former leader Zvelinzima Vavi and the departure from COSATU of the union from which both Vavi and Losi hailed, the metalworkers' union NUMSA.

## Thailand

Defamation law has again been used by business interests in Thailand against human rights activists for raising concerns around the working conditions of migrant workers in food production facilities. Thammakaset Co. Ltd., a company that operates chicken farms has filed criminal defamation complaints against Sutharee Wannasiri, over comments she made on Twitter in 2017, concerning the treatment of foreign workers, and against Nan Win, one of the workers concerned. The charges carry potential prison sentences or substantial fines. In 2016 the company sued British labour researcher Andy Hall, also in relation to working conditions of migrants in Thammakaset's operations. Hall has also been pursued relentlessly by a fruit packing company over similar allegations, in a case covered frequently in IUR in recent years.

## Unions in Europe

*Rough Waters*, a new book from the European Trade Union Institute analyses the development of trade

unions in eleven countries (Austria, France, Germany, Greece, Hungary, Italy, the Netherlands, Poland, Spain, Sweden and the UK) since the early 2000s. The individual chapters focus on unions' structural, organisational, institutional and discursive power resources. The chapters reveal how economic crisis, austerity, and pressure to devolve collective bargaining have impacted in these countries diverse industrial relations frameworks. It is available from [www.etui.org/Publications](http://www.etui.org/Publications).

## US: employment structures / right to strike

The National Labor Relations Board (NLRB) has ruled that janitors in San Francisco were not protected against dismissal when they picketed in front of their workplace over concerns relating to their employment, pay, and conditions. The employment structure meant that janitors were technically employed by one company, Ortiz Janitorial Services, which was subcontracted by another company, Preferred Building Services, to work in the building of a third company. When the building owners subsequently ended their contract with Ortiz, the workers were sacked. The Board interpreted the protest as secondary action placing pressure on the third party to cease doing business with Preferred Building Services, despite the clear signs used by the workers insisting that they were not boycotting the building and that the protest was an 'informational picket' concerning a dispute with the cleaning contractor.

## US: labour law network

The International Lawyers Assisting Workers Network (ILAW Network) is now a membership organisation for union-side labour lawyers' founded by the Solidarity Center. The Centre – established by the AFL-CIO – operates labour projects around the world, and is one of the core recipients of funding from the US government's National Endowment for Democracy. The Solidarity Center describes its new project as 'the only global network of union and worker rights lawyers and advocates'. Lawyers who wish to participate in this can find more information at [www.ilawnetwork.com](http://www.ilawnetwork.com).

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and Indigenous Peoples, which expresses that C169 is a priority instrument for unions in the Americas. In some parts of the world indigenous peoples, as part of the working class, have joined unions in protecting fundamental rights at work. A 2015 ILO publication on alliances between unions and indigenous peoples in Latin America highlights the common actions undertaken by these actors in combating forced labour. Alliances between unions and indigenous peoples have also facilitated submissions of observations to the ILO supervisory bodies, thus playing an important role in monitoring compliance with the Convention.

Implementing this unique ILO instrument can contribute to consolidating peace and social justice. *The views expressed herein are those of the authors and do not necessarily reflect the views of the ILO.*

### Notes

- 1 Patrick Castello. 'Historical background', in *Negotiating Rights: the Guatemala Peace Process, Conciliation Resources*, London, 1997, p. 10-17, at 12.
- 2 The proceedings of the conference have been published as Nepal Federation of Indigenous Nationalities/ILO, ILO Convention No. 169 and Peace Building in Nepal (Sarah Webster and Om Gurung, eds.), 2005.
- 3 Jorge Pinto Rodríguez, '¿Un Estado en Deuda con el Pueblo Mapuche? Del Pacto de Nueva Imperial en 1989 a la Comisión Asesora Presidencial de 2016', *Revista Anales Séptima serie No.13/2017*.

... continued from Page 9 ...

### Notes

- 1 See generally Benedict Kingsbury, *Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT'L L. 414 (1998).
- 2 International Labour Conference, Seventy-sixth Session 1989, Report IV (2A), Partial Revision of the Indigenous and Tribal Populations Convention 1957 (No. 107), p. 3.
- 3 International Labour Conference, Provisional Record, Seventy-Sixth Session (1989), Appendix 25, p. 25/3.
- 4 Ibid.
- 5 Ibid.
- 6 ILO Convention No. 169, 27 June 1989, 28 ILM 1382 (1989), Article 1.
- 7 Draft Aide Memoire, African Group, United Nations Declaration on the Rights of Indigenous Peoples, 9 November 2006, Sections 2.0-3.0.
- 8 Renee Sylvain, *Indigenous Peoples in Africa* in OXFORD RESEARCH ENCYCLOPEDIA OF AFRICAN HISTORY (2017), pp. 9-12. See also Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples, 2007.
- 9 Report of the African Commission's Working Group of Experts on Indigenous Population/Communities, Adopted by the African

- Commission on Human and Peoples' Rights at its 28th ordinary session (2005), pp. 112-113.
- 10 *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, African Commission of Human and Peoples' Rights, Communication No. 276/03, 29 November 2009.
  - 11 See *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Application No. 006/2012, Judgement, 26 May 2017. The Ogiek are currently awaiting the Court's judgment on reparations, which will address, *inter alia*, their request for an order requiring the restitution of their ancestral lands.
  - 12 See Francesca Thornberry, *Working Conditions of Indigenous Women and Men in Central Africa: An Analysis Based on Available Evidence* (International Labour Office Working Paper No. 2, 2017), p. 15.
  - 13 Direct Request, Committee of Experts on the Application of Conventions and Recommendations, Observations from the Trade Union Confederation of Burundi (COSYBU) on Contracts of Employment (Indigenous Workers) Convention No. 64, adopted 2012, published 102nd ILC Session Report (2013), available at [https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0:NO:13100:P13100\\_COMMENT\\_ID:3080708](https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0:NO:13100:P13100_COMMENT_ID:3080708).

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### Notes

- 1 *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978) (emphasis added).
- 2 *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *Oneida Cty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 247 (1985).
- 3 *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148, n.14 (1982).
- 4 See *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1309 (D.C. Cir. 2007).
- 5 *Brief of Petitioner/Cross-Respondent Little River Band of Ottawa Indians Tribal Government*, Docket No. 44 at PageID# 49

- accessible at <https://ecf.ca6.uscourts.gov/n/beam/servlet/TransportRoom> (last visited Dec. 6, 2018).
- 6 See full statement here: <https://aflcio.org/about/advocacy/legislative-alerts/letter-representatives-opposing-act-would-deny-protections> (last visited Dec. 10, 2018)
  - 7 *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).
  - 8 See 'Do International Freedom of Association Standards Apply to Public Sector Labor Relations in the United States?', Lance A. Compa, Cornell University, ILR School: <http://digitalcommons.ilr.cornell.edu/articles/780>
  - 9 See Country visit: United States of America (A/HRC/35/28/Add.2), available here: <http://freeassembly.net/reports/usa>



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