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

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. In submissions during the C169 drafting sessions, China flatly denied that any indigenous populations lived in their country. 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’. 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’. 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’.

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. 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,
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. 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. 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’.

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. 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.

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 Centrafricaine (CSTC) and the Union Syndicale des Travailleurs de Centrafricaine (USTC) — have been active in subsequent workshops and discussions. 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. Burundi is however home to the Batwa people, a highly marginalised indigenous community that has inhabited the forests of Central Africa since time immemorial.

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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


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.


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3 International Labour Conference, Provisional Record, Seventy-Sixth Session (1989), Appendix 25, p. 25/3.

4 Ibid.

5 Ibid.


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.


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4 See San Manuel Indian Bingo & Casino v. NLRB, 475 F.3d 1306, 1309 (D.C. Cir. 2007).


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