

The Legal Protection of Indigenous Peoples in the Arctic and the Third Pole-Himalaya

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1. Introduction

When we think of the Arctic and Himalayas, we often picture icy, uninhabitable landscapes or impenetrable mountains buffeted by winds. However, upon closer inspection, we discover that these regions are home to a diverse array of life, including lush vegetation and unique cultures. Many Indigenous peoples still live in these areas, but their way of life is threatened by the changes occurring in the cryosphere.

This article explores the legal protections available to Indigenous peoples in the Arctic and Himalayas, highlighting the similarities and connections between the two regions.

2. The definition of “Indigenous people” in international law

Before discussing the subject, it’s important to understand what the term “Indigenous people” actually means.

There exists a significant current that opposes the positivist approach to defining this term. This perspective, supported by Indigenous peoples’ associations and scholars, suggests that a single viable definition is unattainable without being grossly exclusive or “hyper-inclusive.” Therefore, this group advocates for a definition that offers a certain degree of elasticity, allowing for a flexible adaptation to reality and a precise identification of the individuals who should enjoy the protections intended for this category.¹

The term “Indigenous people” has only recently gained recognition in international law, serving as a basis for political interventions, actions by NGOs, and private initiatives.²

The definition proposed by the 1989 International Labour Organisation (ILO) Convention refers to peoples in independent states who are considered “Indigenous” because of their descent

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¹ UN Doc. E/CN.4/Sub.2/1996/21; UN Doc. E/CN.4/Sub.2/1997/14.

² KINGSBURY, “Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy”, in *American Journal of International Law*, 1998, vol. 92, no. 3, pp. 414-457.

from the peoples who inhabited a certain country or a particular geographical area when it was conquered, colonised, or since the establishment of contemporary state borders. These peoples, regardless of their legal status, maintain all or part of their social, economic, cultural, and political institutions. The definition emphasizes that self-identification is a fundamental criterion to distinguish Indigenous peoples as such.³

The United Nations, following the anti-positivist approach, left the identification of a people as Indigenous to the practice, with the assistance of authoritative opinions expressed by competent UN bodies. One such opinion was expressed by the UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities in its 1986 Report.⁴ It stated that “Indigenous peoples” are those communities, peoples, and nations that have historical continuity with the pre-invasion and pre-colonial societies that developed in their respective territories.

They consider themselves distinct from other sectors of societies that now prevail in those territories, or parts of them. As a result, they form a non-dominant group of a given society that is determined to preserve, develop, and transmit to future generations their ancestral territories and their ethnic identity, which is a founding element of their continued existence as a people. They accomplish this through their legal and institutional system and their social and cultural fabric.⁵ This “historical continuity” can be indicated by the prolonged persistence of one or more of the following factors: the occupation of areas of land, common ancestry with the original occupants of the land, culture and its specific manifestations, language, residence in certain areas of the country, or certain regions of the world.⁶

Following the definitions, there are approximately 40 different Indigenous peoples in the Arctic, 11 of which are settled north of the Arctic Circle. In total, these Indigenous groups represent nearly

³ ILO Convention No. 169, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, 1989, art. 1.

⁴ UN Doc. E/CN.4/Sub.2/1986/Add.3, *Study of the Problem of Discrimination against Indigenous populations*, 1986; UN Doc. E/CN.4/Sub.2/1986/Add.4, *Study of the Problem of Discrimination against Indigenous populations*, 1987.

⁵ UN Doc. E/CN.4/Sub.2/1986/Add.4, *Study of the Problem of Discrimination against Indigenous populations*, 1987, para. 379.

⁶ UN Doc. E/CN.4/Sub.2/7/Add.4, *Study of the Problem of Discrimination against Indigenous populations*, 1987, para. 380.

one million individuals.⁷ In the Third Pole, the number of Indigenous peoples is even higher, with 8.4 million individuals in Nepal Himalaya alone belonging to at least 59 distinct groups.⁸

3. The sources of international law that protect the rights of Indigenous peoples in the Arctic and Himalayan regions.

The Arctic and Himalayan Indigenous peoples are protected through the recognition of their fundamental rights. Two international instruments that are relevant in this regard are the ILO Convention and the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP)⁹.

The ILO Convention remains one of the primary instruments of international law that protects Indigenous peoples.¹⁰ The preamble of the treaty shows the connection with the evolution of the international community's sensitivity to human rights that occurred during the 20th century. The preamble of the Convention considers the developments in international law since 1957, as well as the changes in the situation of Indigenous and

tribal peoples worldwide. These developments made it necessary to adopt new international norms on the subject and eliminate the assimilationist orientation of previous norms. The Convention recognizes the aspirations of these peoples to exercise control over their institutions, their ways of life, and their economic development. Moreover, it acknowledges their right to maintain and develop their own identity, language, and religion within the framework of the nation-states on whose territories they are settled. The Convention recognizes and protects various rights connected to the use of land, conditions of employment, and selection of Indigenous workers, handicrafts, rural industries, social security, health, education and access to the media, cross-border cooperation, and administration. In contrast, Article 1 of the UNDRIP acknowledges the right of Indigenous peoples to enjoy all human rights and fundamental freedoms, both individually and collectively, as outlined in the Universal Declaration of Human Rights and other internationally recognized human rights instruments. Additionally, it confirms their right to self-determination,

⁷ WANG, ROTO, "Indigenous population in the Arctic", in *Nordregio*, 2019, ww.nordregio.org.

⁸ KIRAT KAMAL SAMPANG RAI, "Climate Change and its Impact on Indigenous Peoples in Nepal Himalaya", in *Indigenous Affairs* 1-2/08, p. 61.

⁹ *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, 13 September 2007.

¹⁰ Among the states where Indigenous communities of the Arctic and the Third Pole-Himalayas are settled, only Denmark (1996), Nepal (2007), and Norway (1990) ratified the ILO Convention.

autonomy, and self-government in their internal affairs, as well as the right to nationality and other rights that protect their unique identity, such as those related to the preservation of their culture, language, education, media, and religion. UNDRIP also recognizes the rights of Indigenous peoples to economic development and their governance, the right to health, the protection of vulnerable groups like women, children, and the elderly, as well as certain rights related to land ownership, including restitution or reparation, and its protection in the context of environmental concerns.

The UNDRIP is currently the most comprehensive and detailed framework for protecting the rights of Indigenous peoples. It establishes universal standards for their survival, dignity, and well-being, while also adapting general human rights and fundamental freedoms to the unique situation of Indigenous peoples. Its nature and binding character differ from that of the ILO Convention: the latter has an *inter partes* binding force, while the UNDRIP, being a declaration, is not legally binding on the signatory states.¹¹ Unfortunately, some states, such as Russia, do not adhere to it, which weakens its symbolic

significance. On the other hand, some states, like Norway, Finland, and Sweden, have used the UNDRIP to draft and adopt national legislation on Indigenous peoples' rights. In addition, they engaged in the draft of a Nordic Sami Convention, which has not entered into force yet.¹²

Therefore, the recognition and protection of specific Indigenous peoples' rights offered by international law are equivalent for communities in the Arctic and the Third Pole-Himalaya, although largely relying on the willingness of the states to adhere to such instruments.

4. Organs that protect the rights of Indigenous peoples in the Arctic and Third Pole regions.

The mere recognition of rights for Indigenous peoples is not enough to implement them. It is necessary to establish specific organs to safeguard their rights.

Both the ILO Convention and the UNDRIP provide for non-judicial remedies. The Committee of Experts on the Application of Conventions and Recommendations is the primary mechanism within the ILO system

¹¹ CONFORTI, IOVANE, *Diritto internazionale*, Napoli, 2021, p. 68-106.

¹² KOIVUROVA, "The Draft Nordic Saami Convention: Nations Working Together", in *International Community Law Review*, 2008, vol. 10, pp. 279-293.

responsible for monitoring the effective implementation of Convention No. 169 and ensuring compliance with its provisions. It plays a crucial role by providing impartial and technical assessments of how international labour standards are being applied in member states through direct observations and requests.¹³

A second mechanism allows a workers' or employers' organization to lodge a written complaint with the ILO Governing Body for alleged violations of the ILO Convention by a member state. After receiving a complaint, the Governing Body reviews its admissibility and then selects a committee to investigate it. This committee is composed of a representative from the government, one from the workers, and one from the employers. The committee evaluates the complaint and publishes a report that outlines its conclusions and any recommendations for addressing the issue. The ILO then contacts the relevant national government and may ask for additional information or statements on the matter.¹⁴

Within the UN system, the primary responsibility for human rights and fundamental freedoms lies with the

Human Rights Council. The Council focuses on promoting the observance of human rights, assessing situations of alleged violation, and making appropriate recommendations. Several bodies within the Council's structure deal specifically with Indigenous peoples.

The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) was established in 2007 by a resolution of the Human Rights Council. It is made up of seven independent experts of Indigenous origin, representing different geographical areas of the world. The primary objective of EMRIP is to promote compliance with and full implementation of the provisions of the UNDRIP. This can be done by clarifying terms used in the declaration, reviewing good practices adopted in the field, or suggesting effective measures that states can take at the national level. EMRIP plays a crucial role in monitoring the effective implementation of the UNDRIP and is a key interlocutor of the Human Rights Council.

It's important to note that this particular subsidiary body does not have the authority to accept or pass on any complaints or allegations regarding

¹³ Committee of Experts on the Application of Conventions and Recommendations, in *International Labour Organization*, www.ilo.org.

¹⁴ ILO Constitution, 1944, art. 24.

violations of UNDRIP provisions. This responsibility falls under the jurisdiction of the Special Rapporteur on the Rights of Indigenous Peoples, who was appointed in 2001 by the Commission on Human Rights as part of the thematic Special Procedures system. The Special Rapporteur is responsible for a wide range of tasks related to protecting the rights of Indigenous peoples. These tasks include identifying and sharing best practices, gathering information on violations of Indigenous rights, making recommendations to prevent and remedy violations, and working closely with other UN bodies and human rights organizations. The Special Rapporteur also participates in the annual meeting of the Permanent Forum on Indigenous Issues, engages in dialogue with governments and NGOs, and promotes the UNDRIP. Finally, the Special Rapporteur prepares an annual report on its mandate, which is submitted to the Human Rights Council and the General Assembly.¹⁵

As part of its mandate, the Special Rapporteur receives complaints and reports of human rights violations committed against Indigenous peoples. These complaints can be filed by

individuals or organizations and must include the identification of the victims or communities affected, the identity of the offender, a detailed description of the violation, along with the circumstances in which it occurred, any measures taken by state authorities, and any possible initiatives taken before international bodies to seek redress. Once the allegation has been received, the Special Rapporteur does not pronounce the violation or request the state to remedy it. Instead, the Special Rapporteur initiates a discussion with the member state concerned, inviting it to comment on the allegation, provide clarifications, or remind the state of its duties. At most, the Special Rapporteur can request information on the procedures in place at the national level for redress of the situation reported.¹⁶

The non-judicial remedies are available to Indigenous peoples of the Arctic and the Third Pole equally. When considering supranational judicial protection for Indigenous peoples' rights, the chances appear different instead.

Indigenous peoples of the Arctic are subjected to the jurisdiction of the Inter-American Court of Human Rights

¹⁵ UN Doc. A/HRC/Res/51/16.

¹⁶ "Special rapporteur on the situation of human rights and fundamental freedoms of indigenous people", in *International Justice Resource Center*, www.ijrcenter.org.

(IACtHR) and, in part, to the European Court of Human Rights (ECtHR): the former holds territorial jurisdiction over Alaska, USA, and Canada the latter on Norway, Sweden, Denmark, and Finland, all countries where Indigenous peoples are settled.

The IACtHR has been monitoring the correct application of the American Convention on Human Rights (ACHR) since 1979, which, however, does not devote any specific provisions to Indigenous realities, even though they are present in large proportions in the territories of the state parties.¹⁷ Nevertheless, the Court has repeatedly pronounced on the recognition of the rights of Indigenous peoples, adopting an innovative approach to the criteria of interpretation and remedies, as well as the definition of the content of individual rights and freedoms, in an attempt to ensure the broadest and most effective

protection of Indigenous peoples within national legal systems.¹⁸ The organization, jurisdiction, functions, and procedures of the IACtHR are outlined in the ACHR, Chapter VIII. The Court exercises both an advisory and a contentious function. Only the Inter-American Commission on Human Rights and state parties have standing to act before the Court. Although the geographical area of interest of the Inter-American Court could, in principle, extend to numerous Arctic areas, where multiple Indigenous peoples are settled, the effectiveness of such judicial protection has been – and still is – neutralized by the failure of the United States to ratify and Canada to sign the ACHR.

On the other side, the ECtHR oversees the correct application of the European Convention on Human Rights (ECHR). As the ECHR does not contain provisions properly dedicated to Indigenous peoples, it is not called upon to pronounce on

¹⁷ American Convention on Human Rights, San José de Costa Rica, 22 November 1969. Within the Inter-American regional system, the Inter-American Commission of Human Rights (IACHR) stands out as a quasi-judicial and quasi-political organ. It admits petitions from individuals, groups, and NGOs who are recognised in the Organisation of the American States. See IACHR, *Rules of Procedure*, art. 23. If the IACHR finds a violation of rights protected under the Convention, it issues recommendations to the State to end or repair the violations. If the State does not adhere to the recommendations of the Inter-American Commission, the IACHR may decide to refer the case to the IACtHR if it concerns a State party to it.

¹⁸ POSENATO, “La giurisprudenza della Corte interamericana in materia di diritti alla vita e alla proprietà dei popoli indigeni e tribali”, in *DPCE ONLINE*, 2018, vol. 34, p. 2, p. 23. See IACtHR, *Aloboetoe y otros v. Surinam*, 4-12-1991; *Aloboetoe y otros v. Surinam. Reparaciones y Costas*, 10-9-1993; *Bámaca Velásquez v. Guatemala*, 25-11-2000; *Bámaca Velásquez v. Guatemala*, 22-2-2002; *Comunidad Moiwana v. Surinam*, 15-6-2005; *Comunidad Indígena Yakye Axa v. Paraguay*, 17-6-2005; *Yatama v. Nicaragua*, 23-6-2005; *López Álvarez v. Honduras*, 1-2-2006.

claims specifically relevant to them, nor has it ever had to pronounce on human rights issues about Indigenous peoples. Nevertheless, such matters could well arise, due to the jurisdiction that the Court might have over the actions of states where Indigenous peoples live. The ECtHR jurisprudence, however, has over time made a substantial contribution to the treatment of issues concerning Indigenous peoples, with particular reference to rulings on the prohibition of discrimination, the recognition of rights related to identity, language, education, religion, and land ownership, which the other two regional courts, mentioned above, have drawn inspiration from in their decisions.¹⁹

On the contrary, currently, there is no regional court in the Asian Himalayan region. Consequently, Indigenous peoples residing in the Third Pole area are deprived of regional judicial protection of their rights. This means that individuals and communities are unable to file complaints regarding any violation of their fundamental rights before a specific court.

Conclusions

Following the cross-cutting, albeit brief, analysis of the jurisdictional and non-

jurisdictional instruments available to the international community for the protection of Indigenous peoples, it is possible to draw some quick conclusions regarding the effectiveness of these guarantees.

On the substantive level, even though there is no common, shared definition of 'Indigenous people', this does not appear as a lack, but, on the contrary, as an opportunity to adapt the concept in the best possible way to an individual case, to more effectively promote the protection of Indigenous peoples in the different contexts in which they live and carry out their traditions and activities.

The ILO Convention and UNDRIP, with different scopes, then, have certainly enriched the landscape of international law with an extensive catalogue of rights specifically dedicated to Indigenous peoples. Although it has no binding force, the UNDRIP is charged with considerable symbolic importance, both for the authority of the forum in which it was drafted and the detailed enunciation of individual rights and freedoms, in multiple spheres of human life, which are enunciated and recognized precisely in the heads of Indigenous peoples. These two instruments, therefore, offer, at least

¹⁹ THORNBERRY, *Indigenous Peoples and human rights*, Manchester, 2002, p. 292 ff.

potentially, a rich and wide-ranging protection to Indigenous peoples, including those inhabiting the Arctic and Third Pole-Himalaya areas, and thus present themselves as a valuable substantive apparatus to guarantee the identity of Indigenous peoples as such.

On the other hand, the discourse related to the effectiveness and efficacy of the mechanisms for the protection of these rights, both through non-judicial bodies and – above all – through the work of regional courts, appears to be different. Although the IACtHR does not admit individual appeals, it could potentially deal with the rights of the Indigenous peoples of the Arctic zones corresponding to the territories of Canada and the United States, but such effective action is frustrated by the non-adherence of these two countries to the IACtHR system. By contrast, the role of the ECtHR in this regard appears to be entirely marginal.

The Indigenous peoples of the Arctic currently enjoy little – although not

sufficient – jurisdictional protection from supranational tribunals. In contrast, the Himalayan groups are excluded from such protection due to the absence of a regional court that could address their specific needs and claims.

Instead, the protection offered by non-judicial international bodies, covered by both the ILO and the UN system, remains fully available: with their investigative and reporting work, they can offer protection through constant dialogue and cooperation with the national governments of their member states, strengthening the effective implementation of the content of Convention No. 169 and the UNDRIP.

Therefore, it is possible to conclude that, to date, the main instruments for the protection of the – albeit numerous – rights recognized to Indigenous peoples in the Arctic and the Himalayas are not jurisdictional, while their justiciability appears to be lacking.

