

Indigenous Peoples' Rights Providing By International Legal Tools*

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Abstract. *According to the UN data, more than 300 million people in the world today are indigenous people in more than 70 countries, many of which are on the verge of extinction. Being heirs of unique cultures and having a different social, economic and political lifestyle, they try to preserve their way of life in a society dominated by a completely different culture. Throughout history, their rights were constantly violated in the crudest way; they were exterminated, deprived of their land and resettled in areas unsuitable for life. Now times have changed, and international law recognizes the right of indigenous peoples to restore historical justice and protect their traditional way of life.*

The paper analyzes the main international documents on the protection of the rights of indigenous peoples, the author traces the dynamics of the establishment and development of international standards in this field, which makes it possible to trace the evolution of international law, determine its role in the modern system of protecting the rights of indigenous peoples and assess the potential for the future.

Keywords: international law, human rights, indigenous people, aborigines, International Labor Organization Convention No. 107, International Labor Organization Convention No. 169.

Introduction

Many in their youth were fond of reading the novels of James Fenimore Cooper, Mein Reed, Karl May. They played Indians with friends in the yard and wanted to be like the main characters of Western movies. Despite the romantic image of the Indians, cultivated by the media, filmmakers and writers, we are aware of their difficult relationship with the white settlers, of the numerous crimes committed during the colonization and settlement of new territories. Only a small part of once numerous and powerful tribes and peoples of the North American continent has remained. Nevertheless, they are unique peoples and are distinguished by the diversity of cultures, beliefs and traditions that the international community today is urging to preserve and develop.

The rights of indigenous peoples and their protection today are both international and domestic issue. International public law is the main guideline for the development of domestic legislation, and the norms enshrined by it must be taken into account by the national law of states.

International law establishes the principle that absolutely all people have equal rights and freedoms. It does not depend on their religious, racial, linguistic or national affiliation. Representatives of aboriginal peoples should fully have the same rights that are guaranteed to everyone else, regardless of their place of residence and numbers. The status of representatives of indigenous peoples should in no way be inferior to the legal status of other peoples and citizens in these countries. Every nation has its own identity, the right to develop and preserve its language, culture and identity.

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Methods

The methodological basis of the research was comparative-legal, historical, systemic and other general scientific methods. When developing the topic, the author relied on the main theoretical positions and conclusions contained in the writings by domestic and foreign authors, both of general theoretical nature, and concerning the problems that directly constitute the subject of research. The complex nature of the problems under study presupposes the need to address not only the various branches of law, but also the work in the field of philosophy, history, and ethnography. In this connection, the theoretical basis of the research was not only special legal literature, but also ethnographic and historical research.

Results and discussion

The main means of international legal protection of the rights of aboriginal peoples are the normative documents developed by the international community that consolidate the rights of indigenous peoples, as well as the activities of international intergovernmental and non-governmental organizations, aimed at the implementation of these norms. Before proceeding to the study of the provisions of the Convention of the International Labor Organization on Indigenous and Tribal Peoples in Independent Countries and the implementation of its norms in practice, it is advisable to review briefly other international instruments affecting the rights of indigenous peoples.

Today, the international law has a number of universal and regional acts aimed specifically at protecting the rights of indigenous peoples. Some of them contain provisions that directly or indirectly address indigenous issues. First of all, it is necessary to name the Charter of the United Nations, which requires governments to "promote human rights and fundamental freedoms for all without distinction as to race, sex, language and religion".¹ The Charter of the United Nations for the first time enshrined the right of peoples to equality and self-determination, as one of the basic principles of international law. And if all other principles and norms speak of the legal personality of states, then this principle is based on the legal personality of peoples.² On its basis, a whole system of norms has formed and developed in the international law – the international law of nations,³ an integral part of which is also the right of indigenous peoples.

The Universal Declaration of Human Rights of 1948, which calls on states to guarantee the effective recognition and observance of the rights of each person for equality, participation in the political and cultural life of the society, non-discrimination, etc., is also of great importance. Article 2 of the Declaration proclaims: "Everyone must have all the rights and freedoms set forth in this

¹ V. A. Kartashkin, E. A. Lukasheva (eds.), "Charter of the United Nations. San Francisco, June 26, 1945," in *International acts on human rights. Collection of documents*, Second edition, supplemented, Moscow, Norma Publishing House, 2002.

² L. V. Andrichenko, "International legal protection of indigenous peoples," in *Journal of Russian Law*, V (2001).

³ R. A. Tuzmukhamedov, *Rights and freedoms of peoples in modern sources of international law*, Kazan, Almaty, 1995.

Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other views, national or social origin, property, birth or other status".⁴

The International Covenants on Economic, Political, Social, Civil and Cultural Rights 1966, which establish the inadmissibility of discrimination on grounds of color, race, social and national origin, can also be singled out. The right of peoples to self-determination and to dispose of their natural resources is proclaimed. Article 27 of the International Covenant on Civil and Political Rights states: "in countries where ethnic, religious and linguistic minorities exist, persons belonging to such minorities cannot be denied the right, together with other members of the same group, to enjoy their culture, profess their religion and perform its rites, as well as use their native language".⁵

The International Convention on the Elimination of All Forms of Racial Discrimination, 1966, is also aimed at protecting the rights of aboriginal peoples. This convention was a continuation of the UN Declaration on the Elimination of All Forms of Racial Discrimination, adopted in 1963. It was designed to implement the principles outlined in it and to ensure the speedy implementation of practical measures. The problems of implementing this Convention were discussed at a number of world conferences within the framework of the United Nations. For example, in 1978, the problems of indigenous peoples were considered and recommendations were developed for States. In particular, the right of aboriginal peoples to identify themselves with their own names and freely express their cultural, ethnic and other characteristics was enshrined. The right to the official status and the right to create own representative organizations, the right to preserve the traditional economic structure and traditional way of life within the boundaries of the settlement areas, and the right to preserve and use one's own language in the education and management system, etc. were enshrined. Then a similar conference in 1983 returned to the problems of indigenous peoples, where special attention was paid to their special relation to the land. It was pointed out that territories, as well as the right to natural resources and land, should not be confiscated from these peoples.

According to the Convention, the Committee on the Elimination of Racial Discrimination was established, consisting of 18 experts who should be impartial and highly moral.

The 1989 Convention on the Rights of the Child then referred to the rights of indigenous people. Article 30 enshrines that, "in those States where ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own

⁴ V. A. Kartashkin, E. A. Lukasheva (eds.), "Charter of the United Nations. San Francisco, June 26, 1945".

⁵ V. A. Kartashkin, E. A. Lukasheva (eds.), "International Covenant on Civil and Political Rights, 1966," in *International acts on human rights. Collection of documents*. Second edition, supplemented, Moscow, Norma, 2002.

Indigenous Peoples' Rights Providing By International Legal Tools, Astra Salvensis, V (2017), no. 10, p. 17-25

culture, to profess and practice his or her own religion, or to use his or her own language”.

The Convention on Biological Diversity, 1992, also in turn expresses the interests of indigenous peoples; the document refers to the need to preserve and respect, and to support indigenous knowledge reflecting their traditional way of life. This knowledge is relevant to the preservation and sustainable use of biological diversity in many countries.

The international instruments reflecting the rights of aboriginal peoples should also include the International Labor Organization Convention on Discrimination in Respect of Employment and Occupation No. 111 of 1958, the United Nations Convention against Discrimination in Education, 1960, the Declaration of the United Nations General Assembly on the Rights of Persons Belonging to Non- belonging to national or ethnic, religious and linguistic minorities of 1992, and other documents.

Documents that were specifically aimed at protecting the rights of aboriginal people play an important role in securing the international legal status of indigenous peoples. The beginning of such specialized protection of indigenous peoples was made by the adoption in 1957 of ILO Convention No. 107 "On the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Population in Independent Countries".⁶ With the adoption of this international document, the term "indigenous population" first entered the international legal lexicon.

ILO Convention No. 107 was the first international legal instrument aimed solely at the problems of Aboriginal peoples. This document consists of thirty-seven articles, united in 8 sections. The document is devoted to such issues as land ownership, vocational training, rural crafts, working conditions, social security, health care, education, etc. This document was the first international document recognizing the right of collective ownership of land.

Simultaneously with this convention a Recommendation on the Protection and Integration of Indigenous and Other Population with Tribal and Semi-Tribal Life in Independent Countries (ILO Recommendation No. 104)⁷ was adopted. This document is not legally binding. The proposals outlined there were directed towards the implementation of Convention No. 107, and in some cases supplemented the content of the document. For example, in the sphere of land legal relations, the Recommendation stipulated that the direct or indirect lease of lands belonging to the aboriginal population by individuals or legal entities that are not their members should be subject to restrictions. In addition, the document calls for issuing low-interest loans to the indigenous population and providing them with technical, monetary and other assistance in the cultivation of their territories.

⁶ ***, *Indigenous people: global aspiration for justice: Report to the Independent Commission on International Humanitarian Affairs*, Moscow, International Relations, 1990, p. 206.

⁷ V. A. Kartashkin, E. A. Lukasheva (eds.), "ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries, 1989," in *International acts on human rights. Collection of documents*. Second edition, supplemented, Moscow, Norma, 2002.

This recommendation was also devoted to recruitment and working conditions, handicrafts and rural crafts, vocational training, social security, education, health, language use, etc.

ILO Convention No. 107 was ratified by twenty-seven countries. At the same time, many states where representatives of the indigenous population (including the former USSR and the USA) live, did not join it. This convention was more focused on "integration" (as it already follows from the name of the convention) of the indigenous population in the dominant society and on its development from the position of the majority. Representatives of the indigenous population themselves completely disagree with this provision. As under the guise of the term "integration", the indigenous population was actually assimilated. As a result, the convention was considered obsolete, and many experts considered it to restrict the rights and freedoms of the indigenous population, recognized it as "harmful" and "lenient" towards indigenous peoples.⁸

This thesis can be considered quite justified, since, reading in the text of the convention, it seems that the indigenous and other tribal or semi-tribal population are at a low level of socio-economic, cultural and social development, they must be "attached" and "accustom" to the benefits of "civilization", made similar to other citizens of the state. The third article of the convention says: "As long as the socioeconomic and cultural status of the concerned population⁹ does not allow it to enjoy the benefits of the general legislation of the country, to which it belongs, special measures shall be taken to protect its institutions, identity, property and labor" (ILO Convention No. 107 "On the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Population in Independent Countries", 1957, p. 30). In this regard, the question arises, how can the socio-economic and cultural way of life prevent the population concerned from using the general legislation of the country? The legislation, access to which must be absolutely the same for all segments of the population.

The use of the native language by the population concerned as a means of communication and in the field of education does not have clear legal guarantees. The Convention establishes a provision according to which a gradual transition from the native language or local dialect to the national language or to one of the official languages of the country should be ensured. And only as far as possible measures should be taken to preserve and develop their native language or the most common local dialect. Such an approach will lead to the loss of the native language, which is one of the most important conditions for preserving culture and identity.

In order to improve the norms of Convention No. 107 and the need to develop provisions for the protection of indigenous rights, in 1985, the International Labor Organization began the process of its revision. And in 1986,

⁸ Lee Swepston "Indigenous and Tribal Peoples and International Law: Recent Developments," in *Current Anthropology*, XXX (1989; no. 2).

⁹According to Article 1 of the Convention, the indigenous and other tribal or semi-tribal populations mentioned in paragraphs 1 and 2 of this Article are referred to hereinafter as "the populations concerned".

Indigenous Peoples' Rights Providing By International Legal Tools, Astra Salvensis, V (2017),
no. 10, p. 17-25

the ILO organized an expert meeting, which involved representatives of indigenous organizations. Following the meeting it was recognized that the integration approach of the Convention does not meet the needs of indigenous peoples and does not reflect modern thinking. The possibility of self-determination of these peoples in economic, social and cultural fields, and the need to consolidate this right in the new norms of the International Labor Organization were especially emphasized.

It was also concluded that the competence of the State to seize the territories of indigenous or tribal populations or to evict these peoples from their territories should be limited to exceptional circumstances and should only be carried out with their clear consent. In the future, this rule was confirmed in Article 16 of ILO Convention No. 169 "On Indigenous Peoples and Tribal Peoples in Independent Countries".¹⁰

The ILO Convention No. 169 was adopted in June 1989 and entered into force on September 5, 1991. This document includes a preamble and 44 articles in 10 sections. These sections include: general policy, land, training, employment and working conditions, social security and health, education and communication, management, international contacts and cooperation, general provisions, and final provisions. This document became the successor to ILO Convention No. 107. However, many states that have ratified Convention No. 107 but have not ratified Convention No. 169 remain participants in the first of them (the Russian Federation and the United States have not ratified either the first or the second convention).

The preamble of the new Convention states the need to adopt new international regulations aimed at changing the legal status of aboriginal peoples in order to eliminate the orientation to assimilation that existed in the previously valid norms. The world community recognized that the distinct socio-economic development, culture and language of indigenous peoples constitute a significant part of the cultural heritage of humanity and need to be protected.

According to the opinion of leading international experts, the ILO Convention No. 169 best reflects the provisions that will to a greater extent ensure the survival, preservation and development of the indigenous peoples, their traditional way of life, culture and languages. The Convention has enshrined: ownership of lands they traditionally occupy; the right to participate in the preparation, implementation and evaluation of plans and programs that affect their interests; the right to choose one's own priorities in the course of its development; the right to preserve their own customs and institutions; the right to establish their own educational institutions, etc.

In addition to the rights granted to indigenous peoples, the Convention reflects the responsibilities of the governments of the countries participating therein. They are responsible for ensuring these rights. The governments of these countries are obliged to promote the fullest implementation of the economic, cultural and social rights of indigenous peoples. States must consult in cases of

¹⁰ *Bulletin of the Ministry of Foreign Affairs of the USSR*, no. 17, 1989.

adoption of legislative acts that affect the rights and interests of indigenous peoples. States are obliged to create conditions for the development of their institutions, together with them to implement measures to protect and preserve the environment and territories that are inhabited by indigenous peoples. States are obliged to provide them with adequate medical care and with the means to implement it, as well as take measures to preserve national languages.

Great attention is paid to the issues of land legal relations of indigenous peoples in the Convention. Article 14 states: "The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect".¹¹ Thus, such types of legal relations as property and ownership with respect to traditionally occupied lands are confirmed, as well as the right to use and traditional access to lands. Governments are under an obligation to take measures to determine the territorial boundaries of lands traditionally occupied by representatives of indigenous peoples.

In accordance with the Convention, the rights to natural resources relating to the lands of indigenous peoples are regulated. They have the right to participate in the use, management and conservation of these resources. Where the Government intends to mine or explore resources on indigenous lands, it is obliged to consult with indigenous peoples in order to ascertain the consequences of such activities. It is necessary to find out whether the interests of these peoples will be damaged. And if so, then resolve the issue of paying fair compensation.

The main innovation of the ILO Convention No. 169 was also a change in the very concept of "indigenous peoples and tribal and semi-tribal peoples".

According to Article 1, the Convention covers:

(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.¹²

¹¹ R. A. Tuzmukhamedov (ed.), "ILO Convention No. 107 "On the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Population in Independent Countries", 1957," in *Rights and freedoms of peoples in modern sources of international law (a collection of documents)*, Kazan, Knizhnyi dom, 1957.

¹² The ILO Convention No. 107 of 1957 applied, on the one hand, to persons being part of the tribal and semi-tribal population in independent countries and those at a lower socioeconomic development stage than the rest of the nationwide collective whose legal status is regulated in part

Emphasis is made that self-identification of such peoples as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply. The use of the term "peoples" in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

Summary

Unlike the Convention of 1957, which emphasized that indigenous peoples are at a lower socio-economic stage of development, the Convention of 1989 does not set itself the task of integrating these peoples into a dominant society and does not give rise to the division of peoples into "civilized" and "backward".

The International Labor Organization Convention No. 169 plays a key role in the development of the legal status of indigenous peoples and their protection at the international and national levels. An important provision is also the duty of ratifying states to provide reports on the application of this Convention. This allows the International Labor Organization to monitor its compliance. Today, Convention No. 169 serves as the basis for the ILO's work in protecting the rights of indigenous peoples and providing them with technical, legal or other assistance.

Only ILO Convention No. 169 is binding for the ratifying states and is a comprehensive act to cover the basic rights of Aboriginal peoples. The analysis of the listed documents allows saying that interstate cooperation in the field of protection of the rights of indigenous peoples has already developed and is actively developing within the framework of the UN. Formation of international standards and specific obligations of states of an international legal nature in this sphere continues. International mechanisms and procedures for resolving disputes and conflicts between indigenous peoples and governments continue to develop.

In 2006, the UN Human Rights Council adopted the Declaration on the Rights of Indigenous Peoples, which in September 2007 was approved by the UN General Assembly.¹³ This document is another breakthrough towards the establishment of international standards for the protection of the rights of indigenous peoples.

Conclusions

We should note finally that this is not enough yet to solve all the problems of indigenous peoples. So far, no position has been worked out on such rights as

or in full by their own customs, traditions or special legislation. As well as to persons who are part of the tribal or semi-tribal population in independent countries and are considered as indigenous people because they are descendants of the inhabitants who inhabited the country or the geographical area of which this country is a part, at the time of its conquest or colonization, and regardless of its legal status, a leading way of life that is more in keeping with the socio-economic and cultural system of those times than the structure of the country to which they belong.

¹³ R. Sh. Garipov, "The United Nations Declaration on the Rights of Indigenous Peoples and the Legislation of the Russian Federation," in *Current Status and Development Paths of Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation*, Second edition, revised and supplemented, Moscow, Publication of the Council of Federation of the Federal Assembly of the Russian Federation, 2013.

the right to self-government, self-determination and, most importantly, the right to land, mineral and natural resources. Problems remain in the field of preserving languages, culture, traditions and social sphere. So far, the indigenous population has the lowest standard of living and the highest level of alcoholism, drug abuse, crime and unemployment. All this serves as a powerful incentive for the international community to continue engaging in the development of international rights and standards in this field. Modern international law and national legislation should contribute not only to the survival, but to the development and prosperity of indigenous peoples throughout the world.

*Indigenous Peoples' Rights Providing By International Legal Tools, Astra Salvensis, V (2017),
no. 10, p. 17-25*