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THE FORGOTTEN NORTH: PEOPLES AND LANDS IN PERIL

By Ursula Kazarian*

INTRODUCTION

Arctic indigenous peoples are extremely susceptible to the immediate impacts of climate change. While many indigenous groups face serious battles over rights to land and resources, the Arctic groups face the impending, compounding factor of some of the most drastic impacts from climate change. Their dependence on the integrity of local ecosystems for their survival as autonomous groups makes them even more vulnerable to the melting of ice and permafrost and to the decline of local animal and fish species.¹ This Article provides a broad overview of Arctic countries' legal relationship to their respective indigenous groups and discusses legal tools available to Arctic indigenous groups to protect their traditional existence from the impacts of climate change in light of competing national interests.

DEFINING INDIGENOUS ENVIRONMENTAL RIGHTS IN THE ARCTIC IN THE CLIMATE CHANGE CONTEXT

The preservation of indigenous culture and traditional knowledge in the Arctic is both directly and indirectly threatened by the rapid and dramatic environmental changes occurring in the region. According to the Intergovernmental Panel on Climate Change ("IPCC"), warmer temperatures and unpredictable weather patterns have already caused increased incidences of non-fatal heart attacks and respiratory diseases. In addition, the residual effect of climate change—such as a reduction in traditional sources of food—has led to a shift to western diets and, consequently, to an increase in diet-related diseases including diabetes and obesity.² Therefore, beyond encouraging environmental protection in the Arctic solely for its own intrinsic value, it is important to recognize the distinct challenges that climate change and the warming Arctic have created, and will continue to create, for the indigenous peoples whose survival as such is so intricately tied to the environmental integrity and health of the region.

While the right to self-determination of peoples was clearly codified in 1984,³ the details of the "group rights" that fall under this rubric vary depending on the structure of national legal systems and the integrity of national enforcement mechanisms. There are international legal tools for the protection of minority groups against ethnocide,⁴ for individuals against cruel treatment, and for indigenous peoples.⁵

The United Nations Special Rapporteur to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Indigenous Groups defines communities, peoples and nations as

... those which having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.⁶

This definition, or a closely related variation of it, has been used in numerous legal contexts as human rights law develops.

The continued traditions and cultural fabric of the Arctic indigenous peoples are clearly distinct from the cultures of the nation-states in which they reside. These peoples are generally not integrated into the cultural fabric of the rest of the nation-state, at least in part, because of the extreme physical conditions that have led to geographic isolation of the groups and less physical intrusion by foreign populations. Their livelihoods depend on the ecosystems that surround them. Thus, if the preservation of their culture and traditions is recognized by relevant national legislation, according to international legal principles, an obligation exists to respect the natural systems upon which those peoples survive.

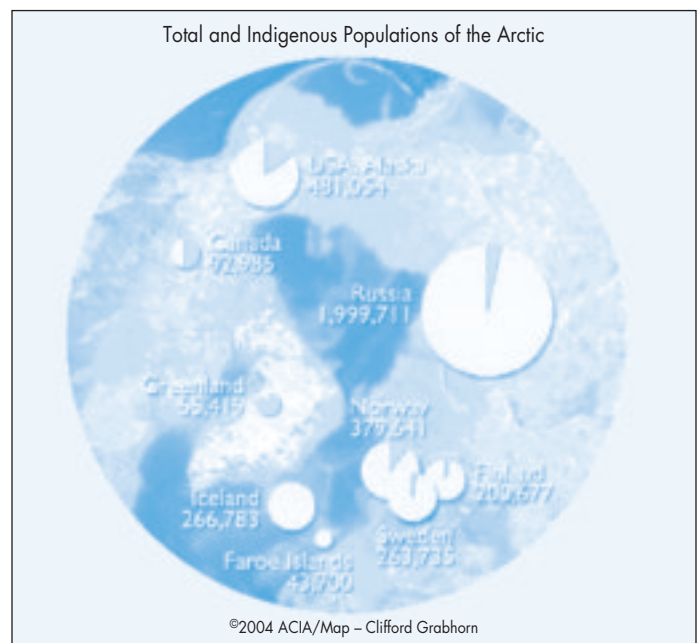


FIGURE 1: ESTIMATE OF ARCTIC POPULATION, 1990.

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Nonetheless, creating consensus to solve the climate change crisis has proven a formidable task. Competing interests include *inter alia* countries' right to development,⁷ fair trade principles,⁸ and indigenous rights. Climate change litigation invites the additional difficulty of proving causation for recoverable harms. While filing individual claims in national and international courts certainly increases attention to a subject, if the causation is impossible to pinpoint, then the resulting precedent would not be particularly useful in repairing the harms caused by global warming. It will thus take the adoption of new attitudes in the courts of Arctic countries to enforce the laws already in place to protect their indigenous groups, as well as the continued development of new legal regimes

in the region, to create the case for compensating—and just as importantly, for preventing—those harms that are either a direct or indirect result of climate change.

While courts and committees battle over how to address the global impacts of climate change on local levels, the very nature of the problem is progressing more quickly than had been anticipated. Ice sheets in Antarctica and Greenland are melting faster than predicted, and in the latter case, the topographical nature of the glaciers may result in the ice sheet sliding into the North Atlantic Ocean, with devastating consequences.⁹ While scientists have debated the cumulative impacts of the disintegrating ice sheet in western Antarctica and the apparent thickness of the ice on the eastern side of the continent,¹⁰ the landless Arctic is clearly disappearing at an alarming rate. Scientists predict that the summer presence of the Arctic ice cap will completely disappear by 2050, if not sooner.¹¹ Along with the changing physical landscape, the growing geopolitical significance of the Arctic and its resources is unequivocally clear.¹² National governments are well aware of the accelerated melting rates in the Arctic and thus the increased access to previously inaccessible hydrocarbon reserves, and they may be preparing to exploit the rapid change in environmental conditions for energy stores and economic gain. Thus, national and international climate change law must progress to prevent irreparable harm to the region and the people who live there, as well as address any grievances related to climate change, when, not if, they occur.

ADDRESSING THE EFFECTS OF CLIMATE CHANGE IN THE ARCTIC

INDIGENOUS RIGHTS: CURRENT NATIONAL LEGISLATION AND CASE LAW

Every Arctic country has a different legal and custodial relationship with its respective indigenous peoples. However, it is clear that defending indigenous rights in light of climate change

will be directly linked either to past national precedent or else by international cooperation. Given the frequent and obvious conflict between protecting indigenous rights and the national right

to development, it is no wonder that the greatest hope to preserve indigenous rights lies generally through international mechanisms.

Thus, a brief overview of each Arctic country's relevant legal systems and the historical development of opportunities for indigenous peoples on a national level is helpful.

Norway

According to Scott Forrest of the University of Northern British Columbia, Norway has adopted the most "assimilationist" policy towards its

indigenous peoples out of all of the Nordic countries. He writes,

Whereas Sweden-Finland made a legal distinction between land uses based on herding and those of agriculture, originating with the establishment of taxlands . . . Norway acknowledged no such difference. Norway's attitude toward the Sami is evidenced in a 1902 law, which granted land ownership only to Norwegian speakers. The effects of Norwegian legislators' negative attitudes towards the Sami way of life are seen in the various statutes designed to regulate the practice.

The Reindeer Herding Acts (RHA) of 1854 and 1933 were not designed to protect reindeer herding and the Sami way of life, but to ensure that herding did not interfere in the development of other 'culturally and economically superior' land uses such as farming and forestry.¹³

Forrest therefore views Norwegian policy as putting the country's right to development ahead of indigenous rights.

Sweden

According to Forrest, Sweden has taken progressive steps with regard to Sami rights, but only when they are in alignment with protecting the rights of non-Sami Swedes:

Swedish law makers took a narrow interpretation of Sami ethnicity based almost exclusively on economic activity. Those that participated in a 'traditional Sami' livelihood (primarily reindeer herding) were classified as Sami. Likewise, Sami that pursued agriculture were considered Swedes or Finns. Paternalism thus only applied to reindeer herders, while Sami who chose other activities were legally and culturally assimilated.

The Reindeer Herding Act ("RHA") of 1886 embodied this philosophy as it granted hunting and fishing rights on designated lands only to herding Sami. These activities were considered as supplemental to the

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primary Sami activity of reindeer herding. Non-herders who previously had once enjoyed land use for subsistence purposes were now prevented from doing so. The long term effect of these instruments has been to cause factionalism among the Sami between herders and non-herders. The 1886 and 1898 RHAs also specified that the Sami's right to the land was usufruct (right of use), not ownership.

Worse was to come in the 1928 RHA, which created a Lapp sheriff administration to regulate Sami reindeer herding. This marked a new era in state-Sami relations in Sweden. The motivation for herding legislation in this period was not the protection of herding, but of the new agricultural settlements that were developing in the north. A policy of segregation was thought to be the best approach to minimize herder-settler conflicts.¹⁴

Forrest, while critical, concedes that Sweden has, in fact, been cognizant of the Sami's right to herd reindeer, an activity that is critical to their cultural survival. In the 1988 case, *Kitok v. Sweden*, the UN Human Rights Committee considered a Swedish decision to uphold a Sami village's denial of letting a member back into the village after he had left his work in reindeer husbandry.¹⁵ Under Swedish law, a Sami who undertakes another occupation for three years loses membership rights to herd reindeer, unless the village votes to return membership status to that person. In this case, the village denied Ivan Kutok that privilege after he had abandoned reindeer husbandry due to economic misfortune and then later wished to return. The Committee held that Sweden did not violate Kitok's rights under Article 27¹⁶ of the United Nations International Covenant on Civil and Political Rights. The Committee further upheld the reasoning from a Canadian case, *Lovelace v. Canada*,¹⁷ that collective survival for an indigenous group may take priority over the individual rights of a single member. This may not build a clear or direct foundation for future climate change cases, but the deference given to Sami self-governance may play a factor when considering arguments to preserve the Sami way of life through environmental protection.

Finland

Unlike Norway and Sweden, reindeer herding is not legally reserved as a Sami right. One of the first significant changes to reindeer herding in Finland was the transformation of the traditional *siida* system into government defined reindeer districts under Russian rule in 1898.¹⁸ Under this arrangement, herders were required to be registered in one of these districts, and the state had the right to limit the number of reindeer in each district. As in Norway and Sweden, the objective of this administrative restructuring of Sami territory was to provide a system of compensation for damage done by reindeer.¹⁹ This system had the unintended effect of allowing the herds to safely wander throughout the district for much of the year without attention. This encouraged many non-Sami farmers to adopt reindeer herding either as a secondary or primary economic activity.²⁰ The 1948 Reindeer Husbandry Act granted every Finnish citizen the

right to breed reindeer in an appropriate district, and the Sami lost what rights to the land they had occupied under the *siida* system. Now, reindeer herding in Finland is flourishing, but the Sami are now a minority among herders and must seek legal means to exercise their claim to their land.²¹

In addition to allowing all Finnish citizens to compete with the Sami in the field of reindeer herding, the Finnish government has encroached upon Sami territory through logging and mineral exploitation. In *Landsman v. Finland*, the UN Human Rights Committee did not find a violation of Article 27 under a self-determination analysis, although it noted that an increase in such activities would merit a reconsideration.²² In the precedent case, *Lubicon Lake Band v. Canada*, the Committee had found similar activities to violate cultural integrity guarantees under Article 27.²³ As a result, the Finnish government has come under criticism for violating the Samis' rights.

Greenland and the Faeroe Islands (Denmark)

Despite a self-ruling Greenlandic government, the Queen of Denmark is still the head of state for both Greenland and the Faeroe Islands. Although the government of Denmark has put forward a strategy on protecting indigenous rights,²⁴ there has been very little information about the implementation of the strategy or the enforcement of any indigenous rights laws.

Russia

The Russian Federation lists forty-four distinct indigenous peoples with populations under 50,000 as having special rights and protections under the Constitution and federal laws and decrees.²⁵ Article 69 of the 1993 Constitution for the first time explicitly established the guaranteed rights of small indigenous peoples "in accordance with the generally accepted principles and standards of international law and international treaties of the Russian Federation."²⁶ The Constitution effectively overrides any regional or federal legislation that might endanger small indigenous groups; however, federal and regional legislation can be used to expand these rights.²⁷

A 1992 Presidential decree ordered the councils of ministers of the republics of the Russian Federation and all local and regional authorities to demarcate the territories inhabited and used by indigenous minorities for their traditional activities.²⁸ Additionally, the 1999 Law on Guarantee of Rights of Indigenous Minorities guarantees socio-economic and cultural development to all indigenous minorities of the Russian Federation, protection of nature in the traditional places they inhabit, their traditional way of life, economic activities, and occupations.²⁹ However, despite these laws, enforcement and implementation have been cited by numerous groups as the key problems to actually protecting indigenous rights. It is becoming ever more popular to take human rights cases to the European Court of Human Rights ("ECHR"), although Russia has not always adhered to the decisions ECHR has handed down to it.

Canada

Canada is home to many indigenous groups, with the Inuit covering the most territory. A significant achievement for the Inuit was the creation in 1999 of the territory of Nunavut, which

means “Our Land” in the Inuit language, Inuktitut. As land is considered a fundamental right to the preservation of culture and identity, it is important to note that aboriginal title in Canada can be extinguished in two ways: by constitutional amendment, and by agreement of the aboriginal people concerned.³⁰ Although the creation of Nunavut appears to be a victory in self-government, the Inuit have in fact ceded their aboriginal rights and title in exchange for a grant of rights from the Canadian government—something that could, in theory, open the door to a future constitutional amendment that would revoke the viability of Nunavut’s semi-autonomy.³¹ This is significant in that the Inuit must take great care as to how they proceed within Nunavut’s internal structure as well as with regard to Nunavut’s political relations with the Canadian federal government.

Finally, while the Inuit comprise the largest ethnic majority in the Canadian north, they are actually the smallest group of aboriginal people in Canada. Other northern indigenous peoples include the Tlingit, Innu, Cree, Gwich’in, and Metis, who inhabit and claim aboriginal titles to Northern Territories.³² There have been the usual conflicts over land rights, and the overlap between indigenous rights and environmental protection will surely be an increasingly pursued topic in Canadian courts.

United States

The United States has historically dealt with its Alaskan natives in a very different manner from the native tribes living in the continental United States. When the United States acquired the territory of Alaska from Russia in 1867, Alaskan natives had a functioning relationship with the Russian Empire. There were very few ethnic Russians living in Alaska at that time, and the few settlements they did inhabit were generally impermanent.³³ When the United States took possession of the vast territory, Alaskan natives were clearly able to see the strife that had plagued the natives of the continental United States since its inception and sought to avoid similar problems concerning title and rights to land and resources.

The 1884 Organic Act for the Territory of Alaska acknowledged the aboriginal right to possession of traditional territory until Congress passed such legislation as to specify the terms of future title acquisition.³⁴ The Supreme Court later found that the Organic Act did not recognize absolute aboriginal title but did acknowledge and preserve continuing aboriginal rights, subject to Congressional action.³⁵

Fearing legal entanglement that would lead to termination and thus non-recognition of their special status, native groups joined together to push forward the Alaska Native Claims Settlement Act (“ANCSA”) in 1971, through which Alaskan natives traded aboriginal claims to vast tracts of land for recognized title to smaller tracts of land and a total monetary compensation of \$962.5 million.³⁶ However, the passage of ANCSA caused ambiguity in the status of native hunting and fishing rights and was followed in 1980 by the 1980 Alaska National Interest Lands Conservation Act (“ANILCA”). ANILCA, in turn, included provisions for a preference for subsistence rights over commercial and sport interests on federal public lands in Alaska, although it did not limit the subsistence preference to natives.³⁷

Although ANILCA helped to clarify some of the concerns left by ANCSA, the fight to clarify native subsistence rights continues. For instance, in *Amoco Production v. Village of Gambell* the U.S. Supreme Court held that the outer continental shelf was outside the boundary of Alaska as defined by ANILCA and therefore was not subject to the subsistence provisions of ANILCA.³⁸ By this decision, the Court favored the interests of oil production over the competing indigenous hunting and fishing rights. This is a perhaps ominous indication of the difficulties the Alaskan natives will encounter in bringing climate change-related claims to U.S. federal court.

Thus, no established precedent has yet been set in any of these countries to directly link climate change, environmental protection, and indigenous rights to self-determination in the Arctic. However, the tide may be turning, as creative new uses of established legal tools are being developed to address the direct causal link between climate change and rights to cultural preservation.

THE USE OF THE U.S. ALIEN TORT CLAIMS ACT TO HOLD MULTINATIONAL CORPORATIONS ACCOUNTABLE

The use of Alien Torts Claims Act (“ATCA”)³⁹ against multinational corporations (“MNCs”) to address wrongs suffered by individuals or groups has become increasingly popular in U.S. courts in recent years. Long after its awakening in *Filartiga v. Pena-Irala*,⁴⁰ the ATCA has become a new tool to bring MNCs that abuse human rights to justice. In *Aguinda v. Texaco*, the New York federal court heard claims by citizens—mostly indigenous tribal leaders—of Ecuador’s rainforest region that Texaco’s operation of an oil pipeline through their lands caused environmental degradation that resulted in illness and destroyed their traditional way of life in the forest, and therefore destroyed their livelihood. Finding in favor of Texaco, the Court dismissed the claim under ATCA on the basis of *forum non conveniens*, allowing the case to go to the Ecuadorian court system.⁴¹ The Court did not, however, claim that the case should not have been held in the United States; it merely held that in that particular case, Ecuador was the proper jurisdiction. In fact, in 2003 the federal district court in New York looked to *Aguinda* when deciding to hold Talisman Energy, Inc. responsible in the United States under ATCA for human rights violations in Sudan, stating:

in deciding the *forum non conveniens* motion, the Second Circuit [in *Aguinda*] painstakingly weighed the various factors militating for and against trying the action in the United States. Such analysis would have been wholly superfluous if there was no subject matter jurisdiction to try the case in federal court in the first place. Thus, the recent *Aguinda* decision adds credence to the notion that corporations may be held liable for international law violations under the ATCA . . .

While the Second Circuit has not explicitly held that corporations are potentially liable for violations of the law of nations, it has . . . acknowledged that corporations are potentially liable for violations of the law of nations that ordinarily entail individual responsibility, including *jus cogens* violations.⁴²

The Court in *Talisman* thus helped to further the growing judicial consensus that MNCs can and will be tried in U.S. courts under ATCA for human rights violations.⁴³ Thus the ATCA is a potential tool for Arctic indigenous populations residing outside of the United States who are adversely impacted by U.S. MNCs violations.

THE USE OF THE PUBLIC NUISANCE DOCTRINE TO HOLD MULTINATIONAL CORPORATIONS ACCOUNTABLE

Since the ATCA cannot apply to U.S. citizens,⁴⁴ the indigenous peoples of Alaska would be unable to file a tort claim under ATCA. However, the Inupiat Eskimo tribe of Kivalina in northern Alaska recently filed a complaint under public and private nuisance law and conspiracy in District Court for the Northern District of California against several oil and gas companies. The village is suing the companies for their role in causing and denying global warming and thereby causing the massive ice melt that threatens their traditional existence and is forcing them to relocate their village.⁴⁵ A positive result for Kivalina could signal the emergence of a devastating trend for oil and gas companies in the United States.

Moreover, at least theoretically, the non-U.S. jurisdictional Arctic indigenous groups could file claims under ATCA against any number of corporations that are large emitters of greenhouse gases, for contributing to climate change and thus destroying their traditional ways by means of environmental degradation. The main issue would be to prove that actively contributing to climate change through sustained emissions is either in contradiction to a U.S. treaty, or is contrary to customary international law on the basis of *jus cogens*. At present, proving either of these claims would be extremely difficult if not impossible; however, it is one option to consider as jurisprudence regarding the impacts of climate change continues to develop. Finally, even if future case law acknowledges the causal link between climate change and self-determination rights of Arctic indigenous peoples, the focus may shift to the question of proper compensation.

In 1997, the Ninth Circuit Court of Appeals denied damages to Alaska natives from the Exxon Valdez oil spill, finding that although the natives were more severely affected by the oil spill than non-natives, the actual injury to their cultural, spiritual, and psychological benefits was no different than that of non-native Alaskans.⁴⁶ Whether such reasoning is applied to Kivalina's complaint may signal the legal trend for climate change-related damages. However, the policy question of enforcing corporate responsibility may support Kivalina's position. For instance, the payment for the relocation of a tribe, as the Kivalina village requests, may not be enough to promote a change in the policies of oil companies that would actually halt the environmental degradation from business activities; it would simply compensate the tribe for the displacement. Punitive damage awards may offer one possible method to help promote the change of corporate business ethics that impact global warming and climate change; however, how courts will respond to complaints such as that of Kivalina remains to be seen.

Aside from seeking a decision on the national level, and while regional instruments such as the Arctic Council⁴⁷ are under development, indigenous groups also have the option of utilizing more broadly based international mechanisms. The binding level of the decisions of international bodies, however, depends on whether a given country has agreed to supranational jurisdiction. For instance, Russia has not ratified several of the Protocols specifying particular types of human rights, and this has fueled widespread controversy in addition to existing criticism over its compliance with European Court of Human Rights decisions.⁴⁸ The vast expanse of Russia's northern territory, coupled with a marked deficiency in official information pertaining to the rights of indigenous peoples, results in extreme uncertainty as to how the rights of Russia's indigenous groups will be respected in the future.

Another example is the Inter-American Court of Human Rights ("IACHR"). Unlike the European human rights system, an individual cannot bring a claim directly into the system; he or she must first file the claim with the Commission, and upon its approval it may be forwarded to the Court. A substantial portion of the cases heard so far has been from indigenous groups, and the jurisprudence has leaned in favor of enforcing indigenous rights throughout the Americas.⁴⁹

However, the decisions are only binding in countries that have ratified the Convention and submitted to the contentious jurisdiction of the Court either on a blanket or individual case basis. The two Arctic countries in the Americas, Canada and the United States, have ratified the Convention, but they have not submitted to the Court's jurisdiction. In 2005 the Inuit Circumpolar Conference submitted a petition to the Commission that called for an investigation into the United States' contributions to global warming and for action to be taken.⁵⁰ It is an encouraging step forward in increasing awareness, but it is questionable whether it will encourage any change in U.S. activity. If the Court is to have any "teeth" in addressing Arctic indigenous claims regarding climate change, the jurisdiction of the Court over both of the Arctic countries presents a critical necessity.

In sum, securing jurisdiction over the countries of the Arctic, including Russia, the United States and Canada, remains a major hurdle for the two regional institutions. Until national level legislation opens itself to international influence, enforcement of any of the decisions of international courts is less likely. The same holds true for the International Court of Justice ("ICJ"): while it will not be able to hear a case unless a country submits to its jurisdiction, the Court can still give an Advisory Opinion which can serve the same purpose as the non-binding opinions of the regional human rights courts. It is thus up to the appropriate UN agencies to bring cases to the ICJ for such opinions.

The recently released IPCC report lists policies, instruments, and co-operative arrangements to mitigate the impacts of climate change worldwide.⁵¹ These recommendations are generally aimed at economic incentives and strategies at the nation-state level. While this is probably the most effective direction

to take at the international legal level, the best national-level mitigation strategy for the peoples whose lives are effectively outside of the nation-state system, remains a question. The patchwork of different fora for discussion of these issues offers promise that at least the Arctic's ecosystems and its peoples will not be ignored; however, the need for a streamlined approach for the region—cutting across Russia, Scandinavia, Canada, and the United States—is arguably apparent. Petitions to the IACHR for one set of tribes and to the ECHR for another set, with little to no recourse for groups in Russia, results in a dispersed and weakened minority group that threatens to be forgotten in the maelstrom of increasing state economic activity in the region.

CONCLUSION

International law is developing more quickly than domestic law in addressing the needs of indigenous peoples, particularly with respect to climate change. International legal institutions recognize the overlap between environment and human rights as a critical factor to protecting cultural and traditional integrity, as indigenous peoples are viewed as particularly vulnerable to eco-

logical degradation. The most dramatic effects of climate change are being seen in low-lying coastal areas in the tropics as well as in the polar regions, and especially in the Arctic. Not only are the ice melting and the ecosystem changing; countries are clamoring to stake their claims to exploration for oil and gas on the now navigable continental shelf. Such new industrial activity would bring even more change to the places Arctic indigenous peoples call home.

Though the dialogue on the international level may be more willing to acknowledge the moral responsibility to protect indigenous culture and tradition, the real implementation and enforcement of such principles must necessarily come from binding, national-level initiatives and legislation. International pressure to strengthen existing national laws or to create new ones that properly reflect the relationship between indigenous cultures and global warming induced environmental changes will certainly play an important role in the coming years; however, until national governments take the definitive step to expressly recognize and protect these rights, the future of these northernmost indigenous communities remains uncertain.



Endnotes: The Forgotten North

¹ See generally Henry Huntington & Shari Fox, *The Changing Arctic: Indigenous Perspectives*, in ARCTIC CLIMATE IMPACT ASSESSMENT 63 (Lelani Arris ed., Cambridge Univ. Press 2005), available at http://www.acia.uaf.edu/PDFs/ACIA_Science_Chapters_Final/ACIA_Ch03_Final.pdf (last visited Apr. 21, 2008).

² INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, FOURTH ASSESSMENT REPORT, CLIMATE CHANGE IMPACTS, ADAPTATION & VULNERABILITY 653, 671–72 (2007), available at <http://www.ipcc-wg2.org/> (follow “The Full Working Group II Contribution to the Fourth Assessment Report Available Here”); then follow “Chapter 15: Polar Regions (Arctic and Antarctic)” (last visited Apr. 4, 2008) [hereinafter IPCC].

³ United Nations International Covenant on Civil and Political Rights, Art. 1, General Comment 12, Mar. 23, 1976, 999 U.N.T.S. 171.

⁴ United Nations International Covenant on Civil and Political Rights, Art. 27, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter Art. 27].

⁵ U.N. Declaration of the Rights of Indigenous Peoples, A/HRC/I/L.10, Annex (29 June 2006).

⁶ UNITED NATIONS, SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, REPORT ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, U.N. Doc. E/CN.4/Sub.2/1996/41 (1996), available at <http://www1.umn.edu/humanrts/demo/subcom96-toc.htm> (last visited Apr. 4, 2008).

⁷ See generally Jack Donnelly, *In Search of the Unicorn: The Jurisprudence of the Right to Development*, 15 CAL. W. INT'L L. J. 473 (1985).

⁸ Doug Struck, *Dispute over NW Passage Revived*, WASH. POST, Nov. 6, 2006, at A18, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/05/AR2006110500286.html> (last visited Apr. 4, 2008).

⁹ John Roach, *Greenland Ice Sheet is Melting Faster, Study Says*, NAT'L GEOGRAPHIC NEWS, Aug. 10, 2006, available at <http://news.nationalgeographic.com/news/2006/08/060810-greenland.html> (last visited Apr. 4, 2008).

¹⁰ See BBC NEWS, *Antarctic buffers sea level rise*, May 22, 2005, available at <http://news.bbc.co.uk/2/hi/science/nature/4565935.stm> (last visited Apr. 5, 2008) (discussing the mitigating impacts of thickening ice sheets in the interior of Antarctica on global warming). But see Andrew J. Monaghan et al., *Insignificant Change in Antarctic Snowfall Since the International Geophysical Year*, 313 Sci. 827, 827–31 (Aug. 11, 1006) (presenting original research and

concluding that overall precipitation in Antarctica has not increased and that Antarctic ice sheets do not mitigate the negative impacts of global warming).

¹¹ CBS NEWS, *New Warning on Arctic Ice Cap Melting, Satellite Images Show Volume of Sea Ice At Summer's End Was Half That of 2003*, Dec. 13, 2007, available at http://www.cbsnews.com/stories/2007/12/13/tech/main3613698.shtml?source=RSSattr=HOME_3613698 (last visited Apr. 14, 2008).

¹² See IPCC, *supra* note 2.

¹³ Scott Forrest, *Territoriality and Sami-State Relations*, ARCTIC CIRCLE (1997), <http://arcticcircle.uconn.edu/HistoryCulture/Sami/samisf.html> (last visited Apr. 4, 2008).

¹⁴ Forrest, *id.*

¹⁵ Kitok v. Sweden, Communication No. 197/1985, U.N. Human Rights Committee, CCPR/C/33/D/197/1985.

¹⁶ See Art. 27, *supra* note 4.

¹⁷ See Sandra Lovelace v. Canada, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981), available at <http://www1.umn.edu/humanrts/undocs/session36/6-24.htm> (last visited Apr. 24, 2008).

¹⁸ Forrest, *supra* note 13.

¹⁹ Forrest, *supra* note 13.

²⁰ Forrest, *supra* note 13.

²¹ Forrest, *supra* note 13.

²² *Landsman v. Finland*, U.N. Communication, CCPR/C/58/D/671/1995.

²³ *Lubicon Lake Band v. Canada*, 1990 Annual Report of the Human Rights Committee, U.N. Doc. A/45/40, Vol. II, App. A (1990).

²⁴ See Danish Ministry of Foreign Affairs, *Support to Indigenous Peoples*, available at http://www.um.dk/NR/rdonlyres/05BBD684-3752-42C1-ADD2-E6DC93BBFA9C/0/strategy_for_danish_support_to_indigenous_peoples.pdf (last visited Apr. 4, 2008).

²⁵ Gail Osherenko, *Indigenous Peoples, the Environment, and the Law: An Anthology* 290 (Lawrence Watters, ed., Carolina Acad. Press 2004).

²⁶ Osherenko, *id.* at 292.

²⁷ Osherenko, *id.* at 294.

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²⁸ Osherenko, *supra* note 25, at 298.

²⁹ Osherenko, *supra* note 25, at 296.

³⁰ See Charles Marecic, *Indigenous Peoples, the Environment, and the Law: An Anthology* at 206–207 (Watters, Lawrence, ed., Carolina Academic Press 2004).

³¹ Marecic, *id.* at 210.

³² Marecic, *id.* at 202.

³³ DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 894 (Thomson West 2004).

³⁴ GETCHES ET AL., *id.*

³⁵ See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1954).

³⁶ See GETCHES ET AL., *supra* note 33, at 896. See also 43 U.S.C. §§1601–1628 (2008).

³⁷ 16 U.S.C., §§3101–3133 (2008).

³⁸ GETCHES ET AL., *supra* note 33, at 916–17.

³⁹ 28 U.S.C. §1350 (2008).

⁴⁰ See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (establishing an extension of U.S. jurisdiction to consider tort claims when in violation of customary international law).

⁴¹ *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); see also Alonso Soto, *Chevron says victim of unfair trial in Ecuador*, REUTERS, July 2, 2007, available at <http://www.alertnet.org/thenews/newsdesk/N02240195.htm> (last visited Apr. 4, 2008).

⁴² *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

⁴³ See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331 (S.D.N.Y. 2005); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006).

⁴⁴ See *Miner v. Begum*, 8 F. Supp. 2d 643, 644 (S.D. Tex. 1998).

⁴⁵ See *Complaint, Kivalina v. ExxonMobil Corp.*, (N.D. Cal. Feb. 26, 2008), available at <http://www.adn.com/static/adn/pdfs/Kivalina%20Complaint%20-%20Final.pdf> (last visited Apr. 6, 2008).

⁴⁶ See *In re Exxon Valdez*, 104 F.3d 1196 (9th Cir. 1997).

⁴⁷ About Arctic Council, Arctic Peoples website, <http://www.arcticpeoples.org/arctic-council/> (last visited Apr. 6, 2008).

⁴⁸ Additional information regarding the non-ratification by Russia of Protocol 14 to the Council of Europe Convention for the Protection of Human Rights can be found at “An International Blog at the Univeristy of Leiden,” available at http://weblog.leidenuniv.nl/fdr/1948/2007/03/how_russia_hijacks_the_european_court_of_human_rights_1.php (last visited Apr. 4, 2008). Special reference is made to the *Ilascu* case, in which the arbitrary arrest of four Moldovans in the Transnistrian region of Russia was found by ECHR to have violated basic human rights. Russia only partially complied with the ECHR decision, refraining from releasing the prisoners immediately. While not an indigenous rights case, the *Ilascu* case is considered a good representation of Russia’s hesitant attitude to comply with international human rights law.

⁴⁹ See generally *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R., Case No. 11.577 (2001) (establishing the norm that reparations must be made to indigenous communities when destructive environmental practices are forced upon indigenous communal lands without consultation with or agreement of the affected communities); see also *Dann v. United States*, Case No. 11.140, Inter-am. C. H.R. No. 75/02 (2002) (deciding that the U.S. should provide an “effective remedy” for the Dann sisters of the Shoshone native tribe for the federal taking of the Dannes’ land in direct contradiction to Article 2 of the American Declaration on the Rights and Duties of Man).

⁵⁰ See Sheila Watt-Cloutier, *Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States*, Dec. 7, 2005, at 74, available at http://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf (last visited Apr. 17, 2008).

⁵¹ See IPCC, *supra* note 2.