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UNCLOS, UNDRIP & TARTUPALUK: THE GRIM TALE OF HANS ISLE AND GRAENSE

*Christopher Mark Macneill**

I. INTRODUCTION

“Inuit have lived in the Arctic from time immemorial.”¹ The Arctic, in the face of climate change, has become a hot spot for exploration, resource extraction, and increased shipping and scientific activity.² “[The] Inuit . . . have had a common and shared use of the sea area and the adjacent coasts”³ among their own communities, and contemporaneously with the world. This vast circumpolar Inuit Arctic region includes land, sea, and ice stretching from eastern Russia (Chukotka region) across the Bering Strait, to Alaska, the Canadian Arctic, and Greenland, representing an Inuit homeland known as Nunaat.⁴ Hans Isle, a small Arctic Island, is located within the territorial limits of both Canada and Greenland, resulting in both nations asserting claim to the island, its maritime boundaries, seabed and resources, despite the long Inuit traditional occupation and use there.

On June 14, 2022, Canada, Denmark, and Greenland⁵ reached agreement on the boundary and territorial disputes encompassed in the region between Greenland and Canada. This new agreement attempts to resolve the long-standing dispute over Hans Isle sovereignty and modernize the previous land boundaries in relation to the continental shelf. However, many Inuit leaders assert the importance of their sovereignty over the land, sea, and ice of the Arctic, including Hans Isle, and the Agreement is in discord.

The Inuit are indigenous, and their associated rights have been recognized in and by international legal and political instruments and bodies, such as the recommendations of the U.N. Permanent Forum on Indigenous Issues, [and] the 2007 U.N. Declaration of the Rights of Indigenous Peoples (“UNDRIP”),⁶ and others.⁷ This includes their inherent right to self-determination and a long list of rights recognized in UNDRIP.⁸ The Inuit are also citizens and subjects via settlement and colonization of the coastal Arctic states of the Kingdom of Denmark (Greenland)⁹, Canada, the United States, and Russia and have the national rights acquired domestically within these nations without diminishment of their rights as a people under international law.¹⁰

In 1977, the Inuit founded the Inuit Circumpolar Council (“ICC”) to represent 180,000 Inuit from Alaska, Canada, Greenland, and Russia. The ICC exercises their rights including protection of the Arctic environment and the inextricably linked Inuit way of life.¹¹ It has been active in establishing policies, consulting with Arctic nations and the Arctic Council, and advising the United Nations concerning the Arctic, environment, and indigenous matters.

In 1991, an Arctic Environmental Protection Strategy (“AEPS”) non-binding agreement was signed “between the eight Arctic States and [i]ndigenous peoples’ organizations representing Inuit, Sami, and Russian [i]ndigenous peoples.”¹² Subsequently in 1991, “[r]ecognizing the special relationship of [i]ndigenous [p]eoples to the Arctic region, the Arctic States assigned the special status of Permanent Participants in the AEPS to the ICC, Saami Council and Russian Association of Indigenous Peoples of the North (“RAIPON”).”¹³ This and other cooperative agreements formed by this group led to the September 9, 1996 Ottawa Declaration¹⁴ and formation of the Arctic Council (“AC”), an intergovernmental organization created to enhance cooperation in the circumpolar north.¹⁵ The AC is made up of the eight recognized states with sovereign lands within the Arctic circle—Russia, Sweden, Finland, Norway, Iceland, Denmark (which owns Greenland), Canada, and the United States. These respective jurisdictions and international law govern the lands and waters within the Arctic. Subordinate to these eight Arctic states, the AC created a category of Permanent Participants, which includes six organizations representing Arctic indigenous peoples, to provide a means for active participation of the Arctic indigenous peoples within the Council.¹⁶ Absent voting rights, the Permanent Participants do have “full consultation rights in connection with the AC’s negotiations and decisions, and make valuable contributions to its activities in all areas. Their participation in the AC’s projects and initiatives is facilitated by the Indigenous Peoples’ Secretariat.”¹⁷ The AC also added fourteen non-Arctic observer status nations and features a rotating Chairmanship of the Arctic Circle that changes every two years among the

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eight original Arctic states, and ‘Chairmanship’ excludes the permanent indigenous participants and non-Arctic nations.¹⁸ Since 2021, Russia has chaired the AC.¹⁹

II. UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (“UNCLOS”)

While the oceans have “long been subject to the freedom of-the-seas doctrine—a principle put forth in the seventeenth century essentially limiting national rights and jurisdiction over the oceans to a narrow belt of sea surrounding a nation’s coastline,”²⁰ UNCLOS was adopted in 1982 and expanded territorial rights with respect to the sea, a states’ continental shelf, the seabed, as well as other matter related to navigation and use of the seas of the world. Until recently with the acceleration of climate change, the Arctic Ocean has historically been unnavigable, particularly Canada’s Northwest Passage, and as such void of any justifiable claims of feasible navigation. That, however, has changed as the Arctic ice fields have thinned allowing seasonal circumpolar navigability. Now, the geo-political game is on for access, influence, and control of the use and or protection of the Arctic and its vast untapped reserves of natural resources.

UNCLOS came into force on November 16, 1994 and its regulatory regime for the protection and use of the world’s seas and oceans is considered “possibly the most significant legal instrument of this century.”²¹ Its key provisions are:

[n]avigational rights, territorial sea limits, economic jurisdiction, legal status of resources on the seabed beyond the limits of national jurisdiction, passage of ships through narrow straits, conservation and management of living marine resources, protection of the marine environment, a marine research regime, and a more unique feature, a binding procedure for settlement of disputes between States.²²

These significant treaty features represent an unprecedented international community goal of sustainably regulating all of the world’s seas resources and ocean uses.

While UNCLOS has provided a remarkable framework to guide harmony and mutual respect among nations regarding the seas, including the Arctic, the convention aims to guide the relations between recognized “states” including coastal states, archipelagic states, land-locked states, geographically disadvantaged states, and all other states.²³ However, UNCLOS does not interact with UNDRIP and fails to recognize coastal indigenous people and particularly the Inuit Nunaat or Nunangat, who do not have U.N. state status. In contrast, UNDRIP recognizes the right of self-determination and innate rights of sovereignty to indigenous people.

Contrary to the boundaries, borders, and rules that UNCLOS establishes between states, the “Inuit have no borders” and those that exist were imposed on them during colonization. Thus, UNCLOS is rife with prescriptions for identifying state territorial ownership and rights, but silent on addressing inherent indigenous sovereignty rights.

III. WHO OWNS THE ARCTIC

Traditionally the Arctic Ocean has been frozen and non-navigable for all or most of the year, and the Inuit have sustained life on the Arctic (land and sea) as part of their territory.²⁴ “Ice-based territory is unique to indigenous peoples of the Arctic. Unlike anywhere else in the world, these areas of the ocean have supported human populations and are a vital part of Arctic indigenous peoples’ homelands.”²⁵

Juxtaposed with Inuit traditional lifestyles sustained from the Arctic Ocean, its ice, waters, and coastline is the new

“Race to the North” . . . for exploitation of hydrocarbon and mineral wealth, strategic advantage, tourism opportunities, and cargo transport. Navigability is the critical condition that enables all of these activities, and a key component of Arctic navigability is sea ice cover. The temporal and geographic distribution of navigability is a critical determinant of the evolving applications of international maritime law.²⁶

With Arctic ice cover in decline, Arctic routes for destination shipping present a navigable alternative to the Suez Canal and Panama Canal routes. Such alternatives include the Northwest Passage (“NWP”), the Transpolar Route, or the Northern Sea Route, which are thirty to fifty percent shorter than the Suez or Panama Canals’ transglobal shipping routes.²⁷ Arctic sovereignty for the eight Arctic states²⁸ and a growing list of self-proclaimed ‘near-Arctic’ states, due to climate change, ice coverage retreat, and increased arctic access has become increasingly significant “as a place of geopolitical and military competition,”²⁹ For example, the United States has long held a right of innocent passage through the international straits of the world, including the NWP and its multitude of intra-archipelagic interconnecting water passages (ice covered or not) who’s western terminus is the Beaufort Sea in which the U.S. is littoral. Furthermore, all “Arctic coastal states are both mutually and independently re-establishing authority and sovereignty in the Arctic from their shorelines seaward.”³⁰ At the Arctic Ocean Conference in Ilulissat Greenland in 2008, five littoral Arctic states—Canada, Denmark, Norway, Russian Federation, and the United States,³¹ asserted that “by virtue of their sovereignty” they hold “sovereign rights and jurisdiction in large areas of the Arctic Ocean.”³²

Control of access and use, including shipping, air, and littoral international passage, over Arctic territories, including the sea and the seabed, is all part of a greater bundle of rights associated within a contemporary western notion of sovereignty attributable to littoral and Arctic states. While Canada’s sovereignty includes an Arctic territory with thousands of islands within its Arctic Archipelago and the seas enclosed therein, it is also based on Inuit land claim agreements “as well as more than four millennia of Inuit land use [and sea/ice] and occupancy throughout the region.”³³

Layered into an international mosaic of Arctic sovereignty claims is UNDRIP which affirms that “[i]ndigenous peoples have the right to the lands, territories, and resources which

they have traditionally owned, occupied or otherwise used or acquired.”³⁴ Moreover, “[i]nternational and Canadian law provide support for Inuit having territorial rights over Arctic waters, ice, as well as the resources that lie above and below the ice.”³⁵

Establishing sovereignty over the Arctic Ocean within a nation’s territory, and an Arctic nation’s outer boundary under UNCLOS rules for extended continental shelf, and the seabed resources below is quite complex. Canada, Russia, Denmark, United States, and Norway—known as the five Arctic littoral, states—are all claiming sovereignty over large areas of the Arctic Ocean seabed.³⁶ However, “[s]overeignty . . . means different things to different people and to different countries. Inuit have their own definition of sovereignty.”³⁷

Conventional notions of sovereignty in the western world are a product of Eurocentric and colonialist paradigms known as the Westphalian sovereignty, which in modern times has shaped international relations and law.³⁸ Westphalian sovereignty is premised on territorial boundaries and control within. In contrast, indigenous sovereignty is not “purely a legal source of political authority, but rather a social and cultural way of defining community.”³⁹ Indigenous sovereignty “recogni[z]es . . . relationships and interdependencies, rather than granting one actor (i.e., the state) the right to make decisions independently without interference from others.”⁴⁰ Indigenous sovereignty also involves the relationship between the people and the land, commonly known as stewardship. Notably, Inuit sovereignty is not mutually exclusive bestowing authority to only one state entity. Instead, it is collaborative, consultative, and community-oriented, requiring inclusiveness of multiple voices within deliberations to engage genuinely in good faith nationally and internationally on matters affecting their homeland(s). In essence, it includes and values the interdependence and interconnectedness of affected political actors and the environment.

The importance of indigenous sovereignty is reflected in Canada’s sovereignty, the Inuit Council of Canada President, Monica Ell-Kanayuk, 2019 citing former Foreign Affairs Minister and Prime Minister of Canada, Joe Clark maintains: Canada’s sovereignty in the Arctic is indivisible. It embraces land, sea, and ice. . . . From time immemorial Canada’s Inuit people have used and occupied the ice as they have used and occupied the land.⁴¹ The Inuit are particularly interested in Arctic marine co-management based on a shared Inuit-Canadian sovereignty within Canada’s international boundaries and collaborative involvement within adjacent international Arctic waters.⁴² “Marine areas are not only economic spaces but are social spaces for indigenous peoples, traditional fishing and hunting rights also encompass access to such areas to conduct traditional, spiritual, and cultural activities.”⁴³

The Arctic is a region where the Inuit habitants lived traditionally without international boundaries prior to European discovery and colonization. It is a well-established rule that coastal states are obligated to recognize the human rights of all persons (individuals as well as communities) within their territory or subject to their jurisdiction, irrespective of ‘their nationality or statelessness’.⁴⁴ Coastal state respect for traditional indigenous

fishing and hunting rights inherent to marine resource access and use, plus trans-maritime boundary access is crucial for sustainable indigenous communities.⁴⁵

IV. HANS ISLAND AGREEMENT (“HIA”)

Grænse is Danish for “border (the line or frontier area separating regions), boundary or limit”.⁴⁶ Greenland which is part of the Danish Commonwealth and Kingdom of Denmark is separated from Nunavut, Canada by the waters of the Labrador Sea, Davis Strait, and Baffin Bay—and these waters form a transitional zone between the Arctic and Atlantic oceans.⁴⁷ Both Greenland and Nunavut, Canada are part of the continent of North America.⁴⁸ At its closest point Greenland is ten miles (sixteen kilometers) away from Ellesmere Island, Nunavut, Canada, separated by Nares Strait.⁴⁹

Hans Island (Tartupaluk—it’s Inuit name) is a half-square-mile rock island located in the middle of the Nares Strait.⁵⁰ It “sits within the [twelve]-mile territorial limit of both Canada and Greenland, making it close enough that each country involved can claim it under international law.”⁵¹ The dispute between Denmark and Canada over Hans Island began in 1880, when the island “got lost in the shuffle of the British transferring remaining [A]rctic territories to Canada. Due to the use of predominantly outdated, 16th-century maps, the small island was not explicitly included in the transfer, and as such wasn’t even recognized until decades later.”⁵²

On June 14, 2022, Canada, Denmark, and Greenland⁵³, formed the Hans Island agreement on the boundary and territorial disputes regarding Hans Island.⁵⁴

The new agreement between Canada and the Kingdom of Denmark, together with Greenland, resolve[d] the long-standing dispute over sovereignty of Tartupaluk/Hans Island by creating a land boundary. It also modernize[d] the 1973 boundary within 200 nautical miles and establishe[d] the maritime boundary in the Lincoln Sea. It further establishe[d] a boundary on the continental shelf beyond 200 nautical miles in the Labrador Sea.⁵⁵

Inuit leaders from Canada and Greenland were consulted during the negotiations and have welcomed the agreement.⁵⁶

Greenland’s Prime Minister Mute Bourup Egede announced on June 15, 2022, “[t]he boundary of Tartupaluk will mark the very close ties between our countries, people, and culture . . . It will signal the beginning of a closer partnership and cooperation between us”⁵⁷ for the Inuit of Nunaat, Greenland and Nunavut, Canada. Whereas Natan Obed, President of Inuit Tapiriit Kanatami (“ITK”), the national Inuit organization of Canada has said: “[f]or Inuit, our lands, waters and ice form a singular homeland that we used, crossed and inhabited freely before formal boundaries were created by political jurisdictions . . . [o]ur use of these areas underlie claims to sovereignty by nation states.”⁵⁸ Aqqaluk Lyngé, a Greenlandic Inuit human rights leader, politician, and scholar, reiterates this view and states: “we are a small nation who occupies the vastest territory of human kind. It is

only the national states formed some 300 years ago that divide us It is a fact that Inuit is one nation connected via language, culture, and the vast territory that we share.”⁵⁹


In addition to the ‘Circumpolar Inuit Declaration on Arctic Sovereignty’ launched in Norway on April 28, 2009, by Inuit leaders from Greenland, Canada, Alaska, and Russia,⁶⁰ the Inuit have been lobbying internationally for joint control and management of the seas between Greenland and Canada.⁶¹ The HIA will be signed into law by both countries once their respective parliament’s grant approval.⁶²

V. CONCLUSION

The HIA in many ways produces a similar result to the traditional story of attempting to split the baby in that it proposes to resolve the dispute by splitting Hans Isle to the disadvantage of both Canada and Denmark and the Inuit people. Both Canada and Denmark for decades have professed to be the mother of unassigned Hans Isle, coveting colonialist control of it as a commodity. To resolve their dispute they have agreed to split the Isle which is significant cultural significance to the Inuit populations, without regard for the impact on their interests.

Idealistically, the Inuit of Greenland and Nunavut should be recognized as one, and title to Hans Isle should be jointly recognized as residing with the Inuit, with Canada and Denmark cooperatively assigned subordinate participant roles as protectorates.⁶³ Realizing the improbability of Denmark and Canada’s acceptance of this option, it is my hope that Hans Island and the Arctic region can begin to be managed jointly by the Inuit of Nunaat.

The Arctic’s intersection of UNCLOS and UNDRIP presents a paradox between ‘exogenous’ states and ‘indigenous’ people, and the juxtaposition of sovereignty within ‘inherent’ versus ‘exherent’ rights.⁶⁴ Whereas indigenous people have inherent rights recognized by UNDRIP, non-indigenous occupation and domination is construed as an exherent right. Post-World War II UNCLOS served its purpose, designed to deal with conflicts between states related to the sea, territorial domains, and mechanisms for dispute settlements. However, UNCLOS, by construction, deals with existing recognized sovereign nations. UNDRIP, in contrast, deals with the recognition of the rights of indigenous people who otherwise are subjugated and oppressed by the colonization of larger dominant internationally recognized nations. UNDRIP has been demonstrably unsuccessful as it provides only limited autonomy to indigenous people, with no control over external affairs and reinforces tiered sovereignty as a form of ongoing condescending subordination and colonization globally.

Empowering Inuit stewardship of the Arctic across multiple borders would promote a genuine exercise of indigenous sovereignty. This concept of sovereignty includes national cooperation and international partnership, based on a shared Inuit, Canada, and Denmark-Greenland interests of Hans Island. While the HIA has employed a consultative approach with the Inuit of both Canada and Greenland, the lead and control has been retained by Canada and Denmark, which tragically seems to reinforce a colonial perspective that indigenous governance methods are inferior. However, Inuit sovereignty should be taken seriously due to equity concerns upheld by Westphalian sovereignty. 

ENDNOTES

¹ See INUIT CIRCUMPOLAR COUNCIL, CIRCUMPOLAR INUIT DECLARATION ON ARCTIC SOVEREIGNTY (Apr. 28, 2009), <https://www.inuitcircumpolar.com/icc-international/circumpolar-inuit-declaration-on-arctic-sovereignty/>.

² Christopher Mark Macneill, *A Trip to Lomonosov Ridge: The Arctic, UNCLOS, and ‘Off the Shelf’ Sovereignty Claims*, 35 J. ENV’T L. & LITIG. 227, 228 (2020).

³ Kuupik Vandersee Kleist, *The Arctic Seas—The History & Destiny of Inuit*, in NILLIAJUT 2: INUIT PERSPECTIVES ON THE NORTHWEST PASSAGE SHIPPING AND MARINE ISSUES, 50 (Karen Kelley ed., Inuit Tapiriit Kanatami, 2017).

⁴ See *supra*, note 1, at 1.2.

⁵ News Release, Global Affairs Canada, Canada and the Kingdom of Denmark, Together with Greenland, Reach Historic Agreement on Long-Standing Boundary Disputes (June 14, 2022), <https://www.canada.ca/en/global-affairs/news/2022/06/canada-and-the-kingdom-of-denmark-together-with-greenland-reach-historic-agreement-on-long-standing-boundary-disputes.html>.

⁶ See, e.g., G.A. Res. 61/295, U.N. Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

⁷ *Id.* at art. 1 (including the U.N. Expert Mechanism on the Rights of Indigenous Peoples, and others).

⁸ See *id.* at art. 3 (“the right to self-determination . . . [to] freely determine their political status and [to] freely pursue their economic, social and cultural [including linguistic] development”); *id.* at art. 4 (including the right to internal autonomy or self-government); *id.* at art. 37 (including the right to recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with states; *id.* at art. 5 (including “the right to maintain and strengthen our their political, legal, economic, social

and cultural institutions, while retaining [the] right to participate fully . . . in the political, economic, social and cultural life of the State.”); *id.* at art. 18 (including “the right to participate in decision-making in matters which would affect their rights” and to “maintain and develop their own indigenous decision-making institutions.”); *id.* at art. 25–32 (including the right to own, use, develop and control their lands, territories, and resources and the right to ensure that no project affecting our lands, territories or resources will proceed without their free and informed consent); *id.* at art. 7 (including the right to peace and security); *id.* at art. 29 (including the right to conservation and protection of our environment).

⁹ Greenland is part of the Kingdom of Denmark.

¹⁰ See U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 6, at art. 1.

¹¹ See Press Release, Inuit Circumpolar Council, Inuit—Strength and Peace (June 30, 2022), <https://www.inuitcircumpolar.com/press-releases/14th-ice-general-assembly-inuit-strength-and-peace/>.

¹² *The History of the Arctic Council*, Arctic Council, <https://arctic-council.org/about/timeline/> (last visited Apr. 24, 2023).

¹³ *Id.*

¹⁴ See generally Declaration on the Establishment of the Arctic Council, Sept. 19, 1996, 35 I.L.M. 1387.

¹⁵ *International Cooperation In The Arctic*, ARCTIC COUNCIL, <https://arctic-council.org/explore/work/cooperation/> (last visited Apr. 24, 2023).

¹⁶ *Id.* (listing the “Six Permanent Participants” as: Aleut International Association, Arctic Athabaskan Council, Gwich’in Council International, Inuit

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