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SYMPOSIUM ON THE FUTURE OF A MELTING ARCTIC: CHALLENGES FOR INTERNATIONAL LAW

THE FUTURE OF A MELTING ARCTIC: IMPLICATIONS FOR INDIGENOUS RIGHTS

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Introduction

In her memoir, *The Right to Be Cold*, Inuk leader and activist Sheila Watt-Cloutier reflected on the transformative change happening to the Arctic and argued that preserving the Arctic and Inuit cultural survival are one and the same.[1] As the Intergovernmental Panel on Climate Change highlighted, Arctic warming is affecting people's livelihoods, cultural practices, economies, and self-determination.[2] Much like elsewhere in the world, the histories and cultures of Indigenous Peoples in the Arctic are multiple and distinct. As the melting of the cryosphere accelerates, environmental changes threaten Indigenous Peoples' ability to maintain their traditional livelihoods, culture, and rights, and simultaneously open the region to global economic activities. This creates a "double bind" for Arctic Indigenous Peoples. On one hand, they face the loss of traditional territories through environmental degradation due to anthropogenic climate change. On the other hand, they face a new wave of political and legal encroachment in the form of climate mitigation, including mineral extraction and renewable energy projects on Indigenous lands.

Sources of the Rights of Indigenous Peoples

The 1989 International Labour Organization Convention No. 169 (ILO 169) is the only binding international agreement dealing solely with Indigenous and Tribal Peoples' rights.[3] Looking at positive obligations, Article 4(1) provides that states shall adopt special measures to safeguard "the persons, institutions, property, labour, cultures and environment of the peoples concerned." In addition to the general obligation to consult the people concerned in Article 6(1)(a), Article 7(3) creates a positive obligation to assess the social, spiritual, cultural, and environmental impact of planned development activities in cooperation with the peoples concerned. Furthermore, Article 7(4) requires states to take positive measures, in cooperation with the peoples concerned, to protect and preserve the environment of the territories Indigenous Peoples inhabit. However, among Arctic states, only Denmark and Norway have ratified ILO 169.

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[1] SHEILA WATT-CLOUTIER, THE RIGHT TO BE COLD: ONE WOMAN'S FIGHT TO PROTECT THE ARCTIC AND SAVE THE PLANET FROM CLIMATE CHANGE (2018).

[2] Michael Meredith et al., *Polar Regions*, *in* IPCC SPECIAL REPORT ON THE OCEAN AND CRYOSPHERE IN A CHANGING CLIMATE 203, 259 (Hans-Otto Pörtner et al. eds., 2019).

[3] Indigenous and Tribal Peoples Convention, June 27, 1989, 1650 UNTS 383.

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In contrast to ILO 169, the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP) has been formally endorsed by all Arctic states,[4] except the Russian Federation, which abstained in the UN General Assembly resolution vote. Although UNDRIP is not itself binding, some argue that its provisions reflect customary international law.[5] Within this framework, the principle of Free, Prior and Informed Consent (FPIC) has emerged as the primary vehicle for operationalizing Indigenous rights. It mandates that consent must be *Free* from coercion or manipulation and sought *Prior* to the authorization or commencement of any project (public or private). Furthermore, it requires that communities be *Informed* through full disclosure of the project's scope, duration, and potential environmental impacts.[6] This definition has been reinforced jurisprudentially by the Inter-American Court of Human Rights. In *Sarayaku v. Ecuador*, the Court held that the state's obligation to consult is a substantive safeguard that must be undertaken in the "early stages of the design or planning" of a measure, well before any rights are granted to third parties.[7]

Although FPIC serves as a key safeguard against encroachment on Indigenous traditional territories without their explicit consent, its scope remains contested, often resulting in divergence between the right to consultation and the right to consent. In contrast to the other Arctic states, which have begun to implement FPIC in some shape or form in their own domestic legislation, Russia has yet to endorse UNDRIP, instead offering only narrow constitutional protections. This is problematic for ensuring coherence in protections, given the speed at which the extraction of natural resources and the development of renewable energy is accelerating.[8]

While UNDRIP and ILO 169 constitute the *lex specialis* for Indigenous rights, general human rights treaties provide a crucial foundational layer of protection in the Arctic. Most notably, Article 27 of the International Covenant on Civil and Political Rights (ICCPR) on minority rights has helped protect the cultural integrity of Arctic Indigenous Peoples. In its 1994 General Comment No. 23, the ICCPR's Human Rights Committee (HRC) explicitly linked cultural rights under Article 27 to land rights, stating that culture "manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples."[9] Through the jurisprudence of the HRC, ICCPR Article 27 has been interpreted to extend the protection of culture to include the material basis of that culture, linking traditional livelihoods and land use to Indigenous culture.[10] It has also been interpreted to reinforce FPIC. In *Poma Poma v. Peru*, the HRC concluded that where measures "substantially compromise" culturally significant economic activities, effective participation "requires not mere consultation but . . . [FPIC] of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members."[11]

[4] Originally, Canada, the United States, New Zealand, and Australia voted against UNDRIP in the UN General Assembly. However, they have since all endorsed the declaration with Canada implementing a federal UNDRIP Act. Declaration on the Rights of Indigenous Peoples Act, S.C. 2021, c 14 (Can.). *See* Asia Pacific Forum and UN Human Rights Office of the High Commissioner, Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions, UN Doc. HR/PUB/13/2 (2013).

[5] S. James Anaya, *The Significance of the UN Declaration on the Rights of Indigenous Peoples*, 118 AJIL UNBOUND 134 (2024).

[6] UN Permanent Forum on Indigenous Issues, Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, UN Doc. E/C.19/2005/3 (Jan. 17, 2005).

[7] Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012).

[8] UN Human Rights Committee, Written Statement Submitted by Society for Threatened Peoples, UN Doc. A/HRC/57/NGO/306 (Sept. 20, 2024).

[9] UN Human Rights Committee, General Comment No. 23: The Rights of Minorities (Art. 27), para. 7, UN Doc. CCPR/C/21/Rev,1/Add5 (Apr. 8, 1994).

[10] Länsman et al. v. Finland, Commc'n No. 511/1992, UN Doc. CCPR/C/52/D/511/1992 (1994).

[11] Poma Poma v. Peru, Commc'n No. 1457/2006, para 7.6, UN Doc. CCPR/C/95/D/1457/2006 (H.R. Comm. Mar. 27, 2009).

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The 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD), to which all Arctic states are parties,[12] is also relevant to the protection of Indigenous rights. The Committee on the Elimination of All Forms of Racial Discrimination—the UN treaty body monitoring implementation of CERD—has regularly called upon Arctic states to demonstrate that their resource management policies do not disproportionately burden Indigenous communities. Together with the ICCPR, CERD ensures that even in Arctic states that have not ratified ILO 169, binding legal obligations still compel the protection of Indigenous livelihoods, cultures, and land use.

In relation to climate change-induced harms, the link between the physical environment and human rights was first articulated in the 2005 petition filed by the Inuit Circumpolar Council (ICC) to the Inter-American Commission on Human Rights.[13] The petition alleged that the United States, by being a significant contributor to greenhouse gas emissions, was violating fundamental human rights of the Inuit. The core argument was that the preservation of Inuit culture is impossible without the preservation of the Arctic environment. In that regard, the warming of the Arctic could be considered a *prima facie* violation of the right to culture. Although the Commission declined to process the petition, the document was the first to frame climate change as a human rights issue.

The Rights of Indigenous Peoples in Climate Law

International climate change law is also of relevance to Indigenous rights in the Arctic. Although the UN climate change regime has affirmed that Indigenous Peoples are at the heart of global efforts to address the multifaceted climate and biodiversity crises, its framing of Indigenous rights reflects the same fundamental structural asymmetry underpinning the international legal system more generally, privileging state sovereignty over Indigenous self-determination.[14] As the UN special rapporteur on the rights of Indigenous Peoples wrote in 2017, "Indigenous peoples are, however, not simply victims of climate change but have an important contribution to make to address climate change."[15] Moreover, the Paris Agreement includes only a cursory acknowledgment that adaptation should be based on and guided by, among other things, "knowledge of [I]ndigenous [P]eoples."[16] As the Paris Agreement's preamble reflects, international climate change law effectively treats Indigenous rights on par with other human rights obligations as a "respective obligation" of individual states—hence fragmenting protection and allowing national interests to override collective Indigenous rights—rather than as a uniform standard of international law that works toward realization of the right of Indigenous Peoples to self-determination.

The UN climate change regime also dilutes the distinct status of Indigenous Peoples as rights-holders with inherent sovereignty by grouping and conflating them with local communities. While widely used in the UNFCCC and other multilateral environmental agreements, this terminological grouping has been criticized by the Inuit Circumpolar Council as belonging to "an alarming trend in the behavior of States to diminish

[12] International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 UNTS 195.

[13] Inter-American Commission on Human Rights, Petition Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (Dec. 7, 2005).

[14] Report of the Special Rapporteur on the Rights of Indigenous Peoples, UN Doc. A/HRC/36/46 (Nov. 1, 2017); *see also* JULIA DEHM, RECONSIDERING REDD+: AUTHORITY, POWER AND LAW IN THE GREEN ECONOMY, 230–35 (2021).

[15] Report of the Special Rapporteur on the Rights of Indigenous Peoples, *supra* note 14, at 15.

[16] UN Framework Convention on Climate Change, Art. 7(5), May 9, 1992, 1771 UNTS 107. Nevertheless, the integration of Indigenous Knowledge was a key component of the first global stocktake. Outcome of the First Global Stocktake, UN Doc. FCCC/PA/CMA/2023/L.17 (Dec. 13, 2023).

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the standards in the UNDRIP, including actions to devalue Indigenous [P]eoples' status, rights and participation rather than upholding their responsibilities and uplifting the status, rights and participation of Indigenous [P]eoples."[17] The result is a participation paradox where Indigenous Peoples are increasingly visible through mechanisms like the UNFCCC's Local Communities and Indigenous Peoples Platform yet they can be excluded from the substantive decision-making mechanisms that manage their traditional territories.

The weakness of the climate regime in protecting Indigenous rights is exacerbated by the "bottom-up" architecture of the Paris Agreement. By granting states the flexibility to define emissions reductions based on national circumstances, it still creates a permissive environment for what has been termed green colonialism[18] on Indigenous land, despite its preambular acknowledgment that states should promote and consider their respective human rights and Indigenous rights obligations when taking action to address climate change. Technologically advanced states have designed NDCs that rely upon accelerating the green transition through the construction of large-scale renewable projects that have the potential to impact Indigenous lands. Furthermore, while few NDCs currently explicitly detail speculative technologies for climate protection, the potential threat of these technologies to the enjoyment of human rights has been formally recognized at the highest levels. In 2023, the UN Human Rights Council's Advisory Committee explicitly warned that "new technologies for climate protection" (NTCP)[19] should not be considered given the potential risks they pose to human rights, particularly for Indigenous Peoples.[20] Despite this authoritative caution, the net-zero logic embedded in the Paris regime continues to incentivize land-intensive transition strategies that can disproportionately affect Indigenous territories. In this context, the emerging discursive shift from mitigation to interventions threatens to recreate the paternal settler-colonial relationship.[21]

Green Colonialism and the Energy Transition

Current climate-induced Arctic environmental transformations are comprehensive. While the idea of the "melting of the Arctic" might imply only ocean-based changes, these transformations range from the loss of marine access due to receding sea ice to the destruction of terrestrial ecosystems via permafrost thaw and shifting vegetation zones. For Indigenous Peoples, the result is a loss of culture and of the ability to exercise their right to self-determination under UNDRIP Article 25, which states:

> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

The warming Arctic is also exposing the region's developmental potential. The global shift toward renewable energy requires a massive influx of critical minerals, such as rare earth elements, copper, and nickel. Some regions

[17] Inuit Circumpolar Council, Policy Paper on the Matter of "Local Communities" (2020).

[18] Eva Maria Fjellheim, *"You Can Kill Us with Dialogue": Critical Perspectives on Wind Energy Development in a Nordic-Saami Green Colonial Context*, 24 HUM. RTS. REV. 25 (2023).

[19] For the HRC, NTCP means "geoengineering," a larger and widely used term that refers to a broad set of methods and technologies operating on a large scale that aim to deliberately alter the climate system in order to alleviate the impacts of climate change." *See* Human Rights Council Advisory Comm., Impact of New Technologies for Climate Protection on the Enjoyment of Human Rights, UN Doc. A/HRC/54/47 (Aug. 9, 2023).

[20] *Id.*

[21] Kyle Powys Whyte, *Indigeneity in Geoengineering Discourses: Some Considerations*, *in* THE ETHICS OF "GEOENGINEERING" THE GLOBAL CLIMATE: JUSTICE, LEGITIMACY AND GOVERNANCE 60 (Stephen M. Gardiner & Katherine A. McKinnon eds., 2020).

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of the Arctic are rich in these resources. This creates a perverse incentive structure where the very climatic changes threatening Indigenous livelihoods and culture serve as the catalyst for increased industrial encroachment. Contrary to the view that Arctic mineral extraction is speculative or geographically isolated, recent developments demonstrate that the green transition already has the potential to impact Indigenous territories. For example, the state-owned Swedish mining company LKAB recently identified the Per Geijer deposit near Kiruna as Europe's largest source of rare earth elements. However, mining these rare earths would conflict with the Gabna Sámi community, whose reindeer migration routes would be severed by the mine.[22] The extraction of rare earths in or near Kiruna thus threatens to endanger the cultural survival of the community. While Arctic mining pales in comparison with other regions,[23] from both a human rights and an Indigenous rights perspective, the relevant metric is not the volume of minerals but the severity of interference with traditional land use.

In another context, such failure of due diligence was illustrated in 2021, when the Norwegian Supreme Court unanimously found that the construction of the Fosen Vind wind farms violated the rights of Sámi reindeer herders under ICCPR Article 27.[24] The Court ruled that the project's interference with cultural practice was not mitigated by its contribution to green energy production, rejecting the state's attempt to balance climate mitigation against Sámi rights protected under Norwegian law.[25] Although this may look like a victory for Sámi rights, the decision provided only *ex-post* compensation and the wind turbines are still operating. Both Kiruna and Fosen are examples of how the green transition, which is a direct response to the drivers of what is currently transforming the Arctic, could replicate the extractive logic of the colonial era by prioritizing resource intensive activities, irrespective of the consent of the local population.[26] In practice, we observe a procedural thinning of FPIC, as it is frequently reduced from a substantive right of self-determination to a consultative box-ticking exercise. States and corporations often interpret consultation as a process of information delivery rather than a dialogue involving the power to withhold consent.[27]

What the current climate crisis demonstrates is that if international law is to protect Indigenous Peoples adequately and respect their right to self-determination, FPIC must be reconceptualized as more than a procedural hurdle for project proponents, and become a substantive right to say "no." While the development of the FPIC as a legal principle emerged in the Indigenous struggle in relation to industrial development on Indigenous lands, the global climate crisis forces a recognition that FPIC must be understood also as a right to oppose green energy projects, not because Indigenous Peoples oppose climate action, but as an assertion of their right to determine their own model of development.

Conclusion: Toward Indigenous Climate Justice

The melting Arctic brings with it a fundamental normative tension between the global obligation to adapt to and mitigate the effects of climate change and the imperative to uphold Indigenous self-determination. The

[22] *See* Hugo Mörk and Oskar Ceder, *This Land Was Made for You and Me: Sweden's Mining Industry and the Sámi*, BLOGGING FOR SUSTAINABILITY (Apr. 3, 2025).

[23] Oxford Institute for Energy Studies, *Can the Arctic Be a Significant Contributor of Critical Minerals for the Global Energy Transition?* (2025) (noting limited global market share but acknowledging localized environmental risks).

[24] Statnett SF et al. v. Sør-Fosen sijte et al., HR-2021-1975-S (Norges Høyesterett [Supreme Court of Norway] Oct. 11, 2021)

[25] Øyvind Ravna, *The Fosen Case and the Protection of Sámi Culture in Norway Pursuant to Article 27 ICCPR*, 30 INT'L J. MINORITY & GROUP RTS. 156 (2022).

[26] Fjellheim, *supra* note 18.

[27] Larry Ibrahim Mohammed, *When Wind Power Is Rejected: Sámi Self-Determination and Restorative Energy Justice in Arctic Norway*, 132 ENERGY RES. & SOC. SCI. 104569 (2026).

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speed and intensity of environmental transformation in the region—and the challenge they pose to Indigenous rights—give new urgency to the need to move beyond a state-centered approach to rights. The impacts of climate change are not distributed equally, especially in the Arctic; those who contributed least to the crisis are bearing the heaviest burden of both the consequences of a changing climate and the "green" response. Consequently, to promote Indigenous climate justice, it is even more necessary than before to recognize the interdependence of land, people, and culture, which is the basis of the rights of Indigenous Peoples. The next step for international law is to solidify the principle that a state's approval of developmental projects without genuine FPIC, whether for benefiting from or counteracting changes, are violations of obligations owed to Indigenous Peoples.

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