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ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE

Rebalancing state and Indigenous sovereignties in international law: An Arctic lens on trajectories for global governance

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Abstract

The environmental and economic realities of Arctic climate change present novel problems for international law. Arctic warming and pollution raise important questions about responsibilities and accountabilities across borders, as they result from anthropogenic activities both within and outside the Arctic region, from the Global North and the Global South. Environmental interdependencies and economic development prospects connect in a nexus of risk and opportunity that raises difficult normative questions pertaining to Arctic governance and sovereignty. This article looks at how the Arctic has been produced in international legal spaces. It addresses the implication of states and Indigenous peoples in processes of Arctic governance. Looking at specific international legal instruments relevant to Arctic climate change and development, the author attempts to tease out the relationship between the concepts of Indigenous rights and state sovereignty that underlie these international legal realms. What do these international legal regimes tell us with respect to the role of Arctic Indigenous peoples and the role of states in governing the 'global' Arctic? It is argued that while international law has come a long way in recognizing the special status of Indigenous peoples in the international system, it still hesitates to recognize Indigenous groups as international law makers. Comparing the status of Indigenous peoples under specific international regimes to their role within the Arctic Council, it becomes evident that more participatory forms of global governance are entirely possible and long overdue.

Keywords: Arctic sovereignty; global governance; international environmental law; self-determination; United Nations Declaration on the Rights of Indigenous Peoples

1. Introduction

The End of the Trail sculpture by early twentieth century American artist James Earle Fraser embodies a longstanding colonialist ideology of western–Indigenous relations. From one perspective it is said to be an homage to the 'transformation of proud, spiritual people into

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the next century'.[1] Gaze lowered, torso fallen, on a horse with bowed head – the provoking defeatedness of the statue conveys a doubted survival, surrender or death, much less political leadership looking into the future. It forecasts an uncertain outlook for Indigenous peoples.[2] For a long time it was precisely this pattern of thought, of sovereigns in tragic demise, that propelled a global trend of systemic injustice towards Indigenous peoples: patronist legislation, subjugation jurisprudence, guardianship systems, forced assimilation, governmental aggression, social and economic abuse.[3]

Similar to national legal systems, the international legal order can be said to have once embodied persecutive ideologies and even though it has condemned its own origins anchored in the subjugation of Indigenous peoples (in part by invalidating the doctrine of discovery[4] and affirming Indigenous peoples' 'right to self-determination'[5]), our international legal system has further to evolve in making place for Indigenous knowledge, science and sovereignty in international relations. In the present work, sovereignty is understood beyond the classical frame of international law, as an inherently pluralist and contested concept. It is taken to denote authority over territory, resources and 'peoples' that, under the Westphalian system is exclusive to states, but, in reality, is also claimed and concretely manifested by Indigenous actors involved in international lawmaking. One aspect of sovereignty that is exercised by both states and Indigenous peoples – especially in the context of Arctic governance[6] – is their 'permanent sovereignty over natural resources', that is to say their 'legal, governmental control and management authority over natural resources'.[7] Despite many overlapping dimensions of state and Indigenous sovereignty, the consistent refusal to recognize Indigenous peoples as 'sovereign

[1]National Cowboy and Heritage Museum, 'End of Trail: Introduction', available at nationalcowboymuseum.org/learn-discover/online-unit-studies/end-of-the-trail-introduction/.

[2]A widely cited working definition of the concept of Indigenous peoples endorsed by Indigenous representatives is the definition advanced by Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities Jose R. Martinez Cobo: 'Indigenous communities, peoples and nations are 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 the societies now prevailing on 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 system.' See UN, *Study of the Problem of Discrimination Against Indigenous Populations* by José R. Martinez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1986/7/Add. 1-4(1986-1987), at paras. 379–82. See also Secretariat of the Permanent Forum on Indigenous Issues, The Concept of Indigenous Peoples, UN Doc. UN PFII/2004/WS.1/3(2004).

[3]See M. Battiste (ed.), *Reclaiming Indigenous Voice and Vision* (2000); S. J. Anaya, *Indigenous Peoples in International Law* (2004). On Indigenous civil rights in Canada, Australia, and New-Zealand see P. Grimshaw, R. Reynolds and S. Swain, 'Paradox of "Ultra-Democratic" Government', in D. Kirkby and C. Coleborne (eds.), *Law, History, Colonialism: The Reach of Empire* (2010), 78.

[4]See *Western Sahara*, Advisory Opinion of 16 October 1975, [1975] ICJ Rep. 12.

[5]Self-determination is defined in similar language in both international human rights covenants and the UNGA, United Nations Declaration on the Rights of Indigenous Peoples, UN Doc. A/RES/61/295(2007) (UNDRIP). Art. 3 UNDRIP states: 'Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' The international legal definition of self-determination is narrower than how self-determination is understood by certain indigenous peoples. The Inuit Circumpolar Council (ICC), an international non-governmental organization representing Inuit of Alaska, Canada, Greenland, and Russia, defines self-determination more broadly: 'It is our right to freely determine our political status, freely pursue our economic, social, cultural and linguistic development, and freely dispose of our natural wealth and resources.' ICC, 'A Circumpolar Inuit Declaration on Sovereignty in the Arctic, adopted by the Inuit Circumpolar Council', April 2009, available at iccalaska.org/wp-icc/wp-content/uploads/2016/01/Signed-Inuit-Sovereignty-Declaration-11x17.pdf.

[6]T. Koivurova, 'Redefining Sovereignty and Self-Determination through a Declaration of Sovereignty: The Inuit Way of Defining the Parameters for Future Arctic Governance', in I. Ziemele et al. (eds.), *Making Peoples Heard: Essays on Human Rights in Honour of Gudmundur Alfredsson* (2011), 491.

[7]See ECOSOC, Prevention of Discrimination and Protection Of Indigenous Peoples: Indigenous peoples' permanent sovereignty over natural resources, Final report of the Special Rapporteur, Erica-Irene A. Daes, UN Doc. E/CN.4/Sub.2/2004/30(2004), para. 18.

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legal actors'[8] has been one of the primordial and enduring injustices of international law, since the time of early colonial encounters and treaty-making between Indigenous peoples and Europeans.

In the era of climate change, invalidating the ill-fated ideology embodied in Fraser's sculpture is more relevant than ever, lest the disappearance of Arctic ice and heightened risk of inundation of small island developing states be used by governments to justify international legal and co-operative frameworks that disproportionately concentrate power in state actors to the detriment of Indigenous sovereignty and the right to self-determination, both concepts understood here as conveying Indigenous ownership[9] and authority over territory and resources, at multiple scales of governance. Both terms are relevant here because under current international, regional, and national legal systems, Indigenous peoples' rights are discussed and framed in the language of self-determination, whereas use of the term sovereignty in relation to Indigenous peoples captures more precisely the nation-to-nation relationship that was originally recognized between Indigenous peoples and European colonizers through treaty-making, and continues to characterize the legal realities within many states.[10]

With the Paris Agreement, Indigenous rights have been explicitly asserted as a fundamental pillar of the global climate change regime. However, in a world where it is still essentially states that create international legal norms, the struggle to recognize Indigenous peoples as international lawmakers persists. This article illuminates Arctic Indigenous peoples' implication in the crafting and development of international legal spaces. It argues that, despite the limited authority granted to Indigenous peoples in official decision-making structures under multilateral regimes, international Indigenous rights challenge the continued exclusive authority of state actors in international legal negotiations and call for the recognition of Indigenous peoples as international *legal* actors. In the case of the Arctic, Indigenous transnational activism introduces an Indigenous sovereignty in international relations that is different from, and cannot be subsumed under, state sovereignty or state-determined conceptions of self-determination. The authority that is evoked by transboundary collective organizations of Indigenous peoples such as the Inuit Circumpolar Council (ICC) can be described as advancing a distinctly Indigenous sovereignty in the practice of international law that challenges the dichotomy and limitations of state-centred conceptualizations of both self-determination and sovereignty upon which the international legal order is based.

The aim of the present work is to understand how the Arctic is legally seen, constructed, and reconstructed in international law. It addresses the implication of states and Indigenous peoples in processes of Arctic governance by looking at specific international legal instruments relevant to Arctic climate change – the UNDRIP,[11] the Paris Agreement[12] adopted under the United Nations Framework Convention on Climate Change (UNFCCC),[13] and the International Maritime Organization's (IMO) Polar Code.[14] It attempts to tease out the relationship between the concepts of Indigenous rights and state sovereignty that underlie these international legal regimes.

[8]P. Macklem, 'Indigenous Recognition in International Law: Theoretical Observations', (2008) 30 *Michigan Journal of International Law* 177.

[9]It is important to understand this as Indigenous determinations of ownership rather than western legal conceptions of individual or collective property.

[10]As the late Erica-Irene A. Daes remarked, using as examples Vattel, *Worcester v. Georgia* and other US jurisprudence on tribal sovereignty and the right of sovereign immunity of tribes, 'in legal principle there is no objection to using the term sovereignty in reference to indigenous peoples ... Different forms of indigenous sovereignty are recognized and operative within different states'. ECOSOC, *supra* note 7, para. 20.

[11]UNGA, UNDRIP, *supra* note 5.

[12]Paris Agreement, 55 ILM 740, 12 December 2015.

[13]United Nations Framework Convention on Climate Change, 31 ILM 849, 9 May 1992.

[14]International Code for Ships Operating in Polar Waters, MEPC 68/21/Add. 1, Annex 10, 3.

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What kind of Arctic spatialities are reflected in these internationally produced visions of the Arctic? And what do these spatialities say about the plural and evolutionary nature of the legal claim and concept of sovereignty, expressed by both states and Arctic Indigenous peoples?[15] It then turns to the question of what international law emanating from the Arctic looks like, by first drawing attention to the role that Arctic Indigenous peoples have held in advancing Arctic concerns in international environmental law through the ICC, an international non-governmental organization representing Inuit of Alaska, Canada, Greenland, and Russia. Secondly, the Arctic Council is discussed as a site of 'global' Arctic governance with a view to understanding whether it nurtures a different relationship between state and Indigenous sovereignties.

2. Climate change and the Arctic

The implications of Arctic climate change can be conveyed under multiple narratives – blue growth (marine and maritime sector development); biodiversity decline; volatile and extreme weather events; food insecurity; increased flooding; and the displacement of Arctic communities. Climate change in the Arctic translates into trade prospects for some and human rights risks for others. Commercial activities in the Arctic such as resource exploitation implicate international stakeholders and hence Arctic industrial presence embodies globally-spread, as well as diverse local and Indigenous, corporate, and cultural interests.

Given the interests at stake in the ongoing global negotiation of Arctic governance, it is imperative to keep in mind certain historical dimensions of Western legal culture, most notably, global practices of excessively harsh policymaking against Indigenous communities and the repressive origins of international law and environmental legislation.[16] Historicizing brings to the forefront the persisting legacy of international law's exclusions, reminding us that in the spaces we live, we continuously encounter remnants of past – and in some cases, extremely brutal – political and economic systems. In this sense, we are constantly time travelling into our legal pasts as we shape our legal futures, enmeshing these different temporalities. In this time travel, we face the history of our system of international law anchored in the 'civilizing mission'[17] and question how to shift its impacts from subjugation of repressed peoples to emancipation, towards what Anghie and Chimni denote as 'truly global justice'.[18] The classical doctrine of conquest[19] and the historically

[15]Sovereignty and self-determination open up vast landscapes of international legal scholarship. This article explores and engages in these discussions in a way that looks at the meaning, relevance, deployment and interpretation of these topics in the context of the rights of Indigenous peoples. While the autonomy that self-determination implies can also be perceived as separatist, demanding a dissolution of existing territorial boundaries or the creation of new political structures such as in the case of decolonization or secession, this article is concerned with self-determination as a fundamental human right of all peoples, and follows Anaya in emphasizing the unity that is inherent in the concept: 'peoples as such, including indigenous peoples with their own organic social and political fabrics, are to be full and equal participants at all levels in the construction and functioning of the governing institutions under which they live'. S. J. Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era', in C. Charters and R. Stavenhagen (eds.), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (2009), 184.

[16]A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005); E. Louka, *International Environmental Law: Fairness, Effectiveness and World Order* (2006). See Louka's discussion of 'coercive conservation' practices by colonial and post-colonial governments in developing countries at 28–9. See also D. Bodansky, J. Brunnée and E. Hey (eds.) *The Oxford Handbook of International Environmental Law* (2007), 2: 'International environmental law continues to struggle with the complaint that it reflects the concerns of developed countries more than those of developing countries and that it merely rearticulates some of the patterns of colonial exploitation in environmental terms.'

[17]A. Anghie, '"The Heart of my Home": Colonialism, Environmental Damage and the Nauru Case', (1993) 34 *Harvard International Law Journal* 445; Anghie, *supra* note 16.

[18]A. Anghie and B. S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts', (2003) 2 *Chinese Journal of International Law* 77.

[19]On the history of the right of conquest see S. Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (1996); see also L. G. Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of their Lands* (2005).

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discriminatory legal technique of recognition[20] paved the way for the uninhibited exploitation of human and environmental resources in the era of colonialism, to the benefit of colonial rulers.[21] Traces of this legacy remain. Today's global commodities chains provide ample examples of massive-scale foreign land acquisitions that channel environmental resources and workers from global Southern spaces towards fulfilling the market needs of wealthy nations.[22] Is the increasingly accessible and lucrative Arctic region now at risk of facing similar environmental and human impacts? What kind of legal modes of international co-operation are necessary to avoid such an outcome? To answer these questions, it is imperative to understand first how global warming affects Arctic Indigenous self-determination.

2.1 Arctic climate change and self-determination

Climate change is widely acknowledged as directly curtailing Arctic Indigenous peoples' right to self-determination, forcing unprecedented challenges upon their 'cultural, spiritual, social and economic health and corresponding human rights'.[23] The 5th Assessment Report of the Inter-Governmental Panel on Climate Change (IPCC) clearly states that the impacts of climate change on the health and well-being of Arctic Indigenous peoples are significant and projected to increase. Amongst the effects of climate change on Arctic Indigenous peoples, the IPCC Report lists unpredictable and extreme weather changes, increasingly unsafe hunting conditions, risks to safe travel and subsistence activities, inhibited access to critical hunting, herding and fishing areas, increased exposure to UV-B radiation, exposure to new and emerging diseases, reduced traditional food supply, food contamination from traditional food preservation methods, threatened community and public health infrastructures, psychological and mental distress and anxiety, and displacement of entire communities.[24]

In its submission to the 21st Conference of the Parties (COP) of the UNFCCC, the Office of the High Commissioner for Human Rights included the right to self-determination as one of the human rights most affected by climate change.[25] The devastating effects of rising global temperatures on the self-determination of Indigenous groups, coastal and small island communities have been repeatedly emphasized before UN bodies.[26] Arctic Indigenous peoples have been at the

[20]See Anghie's discussion of recognition in A. Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law', (1999) 40 *Harvard International Law Journal* 1, 38. See also I. Brownlie, *Principles of Public International Law* (1990).

[21]M. Rafiqul Islam, 'History of the North-South Divide in International Law: Colonial Discourses, Sovereignty, and Self-Determination', in S. Alam et al. (eds.), *International Environmental Law and the Global South* (2015), 23.

[22]See M. Kuegelman, S. Levenstein and C. Atkin (eds.), *The Global Farms Race: Land Grabs, Agricultural Investment, and the Scramble for Food Security* (2013); P. B. Matondi et al., *Biofuels, Landgrabbing and Food Security in Africa* (2011); J. Zigler, *Betting on Famine: Why the World Still Goes Hungry* (2013); R. Cramb, 'Oil Palm and Rural Livelihoods in the Asia-Pacific Region: An Overview', (2012) 53 *Asia Pacific Viewpoint* 223; A. Cassel and R. Patel, *Agricultural Trade Liberalization and Brazil's Rural Poor: Consolidating Inequality* (2003); T. Bartley et al., *Looking Behind the Label: Global Industries and the Conscientious Consumer* (2015).

[23]ICC, 'Inuit Call for Action from Global Leaders at UNFCCC COP 21 in Paris, France', 2015, available at static1.squarespace.com/static/5627862ce4b07be93cfb9461/t/564c8521e4b00d3489f701fa/1447855393362/Arctic+ICC.pdf.

[24]J. N. Larse et al., 'Chapter 28 : Polar Regions', in V. R. Barros et al. (eds.), IPCC, *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2014), 1567–612.

[25]OHCHR, 'Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change', 26 November 2015, available at www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf.

[26]See, for example, OHCHR, Summary report of the Office of the United Nations High Commissioner for Human Rights on the outcome of the full-day discussion on specific themes relating to human rights and climate change, UN Doc. A/HRC/29/19 (2015); Government of the Maldives, 'Submission of the Maldives to the Office of the UN High Commissioner for Human Rights, Maldives Submission under Resolution HRC 7/23', 25 September 2008, available at www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Maldives_Submission.pdf.

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forefront of domestic and regional legal efforts demanding that governmental inaction on climate change be determined a violation of their human rights, including the right to self-determination.[27]

Besides the actual physical changes through which climate change impacts Arctic Indigenous peoples, it also substantially changes the polar region's economic landscape. New opportunities linked to the changing landscape have introduced non-Arctic actors into the region. These actors inevitably bear upon the life space of Arctic Indigenous peoples.

2.2 Arctic climate change and the global economy

Arctic prospects for more efficient global shipping routes, fisheries, tourism, oil and gas exploration, and energy development have attracted non-Arctic states and global corporate interests to the circumpolar region.[28] While the Arctic has, for centuries, been a place of international trade, advances in technology, communication and transport, and increasingly globalized value chains have intensified non-Arctic presence and influence in the region. The self-determination of Arctic Indigenous peoples is evidently impacted by the spatial claims of these other actors implicated in the process of Arctic development. Growing economic interdependencies between Arctic and non-Arctic states could come into tension with Indigenous peoples' interests, depending on what kind of processes are followed for rule-making over natural resource exploitation and development projects. Historically, Arctic Indigenous sovereignty was systematically undermined in the process of Arctic resource development. Following European Arctic exploration in the seventeenth century, polar resource development was exclusively defined by Europeans and subsequently North American states for two centuries, becoming a vehicle for 'the making of the Westphalian nation-state system'.[29]

Today, international law today affirms that obtaining the free and prior informed consent (FPIC) of Indigenous peoples in relation to regulatory measures or development projects that affect them is a fundamental aspect of securing self-determination and cultural integrity.[30] Despite these legal requirements, Hughes' review of practices in the Arctic region shows that Indigenous peoples have, for the most part, not been perceived as equal partners in economic decision-making, with consultation processes taking place only 'long after the overall broader strategic development plans have been established'.[31] The social and environmental consequences of Northern extractive industry projects often entail aggravated risks to the self-determination of Indigenous women.[32]

[27]See Arctic Athabaskan Council, 'Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting caused by Emissions of Black Carbon by Canada', 23 April 2013, available at earthjustice.org/sites/default/files/AAC_PETITION_13-04-23a.pdf; S. Watt-Cloutier, ICC, '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, 7 December 2005, available at earthjustice.org/sites/default/files/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf.

[28]On Asia's expanding investment in the Arctic region see J. Peng and N. Wegge, 'China's Bilateral Diplomacy in the Arctic', (2015) 38 *Polar Geography* 233; N. Hong, 'Emerging Interests of Non-Arctic countries in the Arctic: A Chinese perspective', (2014) 4 *The Polar Journal* 271. On China's Polar Belt Road Initiative see N. Liu, 'Will China Build a Green Belt and Road in the Arctic?', (2018) 27 *RECIEL Special Issue on the Arctic* 55.

[29]J. M. Shadian, 'Of Whales and Oil: Inuit Resource Governance and the Arctic Council', (2013) 49 *Polar Record* 392.

[30]UNDRIP, *supra* note 5, Arts. 10, 19, 29, 28, 32. Normative foundations of the requirement include Art. 1 of the Covenants. See also Committee on the Elimination of Racial Discrimination (CERD), General Recommendation No.23: Indigenous Peoples, UN Doc. A/52/18, annex V(1997). For a comparative analysis on implementations of the international duty to consult and its relationship to the FPIC in the context of Latin America see S. J. Anaya and S. Puig, 'Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples', (2017) 67 *University of Toronto Law Journal* 435.

[31]L. Hughes, 'Relationships with Arctic Indigenous Peoples: To What Extent Has Prior Informed Consent Become a Norm?', (2018) 27 *RECIEL Special Issue on Arctic Environmental Governance* 26.

[32]K. Koutouki, K. Lofts and G. Davidian, 'A Rights-based Approach to Indigenous Women and Gender Inequities in Resource Development in Northern Canada', (2018) 27 *RECIEL* 63.

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China's official Arctic Policy could also be perceived as treating Indigenous peoples as less-than-equal partners in Arctic development, as compared to states. The policy signals 'respect'[33] as the basis of China's implication in Arctic affairs and in this regard, affirms China's respect for international law, for the sovereignty, sovereign rights and jurisdiction of Arctic states, and for the 'rights and freedoms of non-Arctic states'. Respect in relation to Indigenous peoples is not framed using the language of international law, of self-determination, or by reference to UNDRIP. Rather, China expresses its respect in non-legal terms, towards Arctic Indigenous peoples' 'tradition and culture'.

Global economic and environmental conditions allow non-Arctic states, multinational firms, and international institutions to increasingly shape the life space of Arctic peoples. Arguing that the globalization of the Arctic is certainly not a new process, Keskitalo and Nuttall point to the novelty of its intensification under the incessant resource demands and complex corporate structures of global markets that position the Arctic 'even more firmly within the contemporary global economic system'.[34]

There are also other legal complexities that arise from Arctic climate change. With an expanding body of scientific and traditional ecological knowledge revealing to us the truly planetary dimensions of Arctic warming and atmospheric pollution,[35] the urgency of addressing our collective environmental responsibilities towards the Arctic has become vividly clear. As emphasized by Young, 'the most acute environmental problems in the region ... are products of global forces; they cannot be addressed through the development of Arctic regimes'.[36] Emissions and chemical pollutants originating from non-Arctic countries are transported to the Arctic, where they deteriorate local human and ecosystem health, aggravate ice decline, and accelerate the rate of warming.[37] For this reason, the mitigation of Arctic climate pollutants is inherently a 'global legal'[38] endeavour, not merely a regional one. The borderless reality of climate pollutants and the cyclical effects of Arctic climate change illustrate how global and local actors co-produce Arctic climate outcomes, and how protection of the Arctic ecosystem thus requires globally-inclusive regulatory strategies that enroll differently situated actors and varying spatial scales of law. Inuit leader and activist Sheila Watt-Cloutier captures the emerging global awareness surrounding these legal interconnections:

> International agencies, national governments, civil society and the media have begun to see that the Inuit hunter, falling through the melting ice, is connected to the cars we drive, the policies we create, and the disposable world we have become.[39]

[33]State Council Information Office of the People's Republic of China, 'China's Arctic Policy', January 2018, available at www.scio.gov.cn/zfbps/32832/Document/1618243/1618243.htm.

[34]E. C. H. Keskitalo and M. Nuttall, 'Globalization of the "Arctic"', in B. Evengård et al. (eds.), *The New Arctic* (2015), 175, 179–80.

[35]One of the first comprehensive studies on the Arctic impacts of climate change was the 2004 Arctic Climate Impact Assessment (ACIA), that drew upon the work of over 250 scientists and six representative groupings of Arctic Indigenous peoples. See ACIA, *Impacts of a Warming Arctic: Arctic Climate Impact Assessment* (2004).

[36]O. R. Young, 'Governing the Arctic Ocean', (2016) 72 *Marine Policy* 271, 274.

[37]AMAP, 'Chemicals of Emerging Arctic Concern: Summary for Policy-Makers', 2017, available at www.amap.no/documents/download/2890/inline; AMAP, 'Black Carbon and Ozone as Arctic Climate Forcers: Summary for Policy-Makers', 2015, available at www.amap.no/documents/download/2506/inline.

[38]Walker's concept of 'global law' attempts to capture the way in which the legal world is evolving beyond the Westphalian dichotomy of national and international law, and how governance is spatially produced within and beyond the state, from underneath and outside statist spheres through an assemblage of cross-scalar legal instruments and actors. It emphasizes the inherently pluralistic and decentralized nature of 'international' governance in practice. N. Walker, *The Intimations of Global Law* (2014).

[39]S. Watt-Cloutier, 'Foreword', in S. Duyck, S. Jodoin and A. Johl (eds.), *Routledge Handbook of Human Rights and Climate Goverance* (2018), xix.

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Evidently, in the era of climate change, amplified environmental interdependencies, rising trade prospects, and intensifying long-range transboundary pollution all connect in a nexus of risk and opportunity that raises difficult normative questions pertaining to Arctic governance and development. While the Arctic is a place of historical Indigenous sovereignty, the Central Arctic Ocean (CAO) is considered part of the global commons. This creates the potential for both collaboration and conflict between the resource exploitation agendas of Arctic, non-Arctic and the self-identified 'near-Arctic' states, Arctic Indigenous peoples, and other Arctic communities. Reflecting a collaborative approach to governing 'global' Arctic space, the 2018 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (between Canada, United States, Russia, Norway, Denmark, China, South Korea, Japan, Iceland, and the European Union) was negotiated with the direct involvement of Arctic Indigenous peoples. The Agreement makes explicit reference to the UNDRIP and formalizes Arctic Indigenous participation as well as the role of Indigenous and local knowledge in its implementation and subsequent evolution. The inclusive approach taken in these negotiations could be seen as a progressive response to conflicts we have seen unfold in the interplay of state and Indigenous declarations over Arctic sovereignty. The Ilulissat Declaration,[40] which was adopted in 2008 by the five Arctic coastal states alone and affirms the Law of the Sea (codified in the United Nations Convention on the Law of the Sea[41]) as the primary legal framework applicable to the Arctic Ocean, brought to the forefront the exclusion of Arctic Indigenous peoples in intergovernmental deliberations over Arctic resources and sovereignty disputes. Inuit of *Inuit Nunaat*[42] responded to the Ilulissat Declaration through their 2009 Circumpolar Inuit Declaration on Sovereignty in the Arctic[43] in which they highlighted the Artic coastal states' failure to reference 'existing international instruments that promote and protect the rights of indigenous peoples' as part of the 'international mechanisms and international law to resolve sovereignty disputes'.

In regards the UNCLOS regime itself, the lack of Inuit engagement and representation in UNCLOS processes has been raised by Arctic Indigenous representatives as contrary to UNDRIP standards.[44] As Nicol notes, the UNCLOS framework that applies to state claims over maritime spaces is 'based upon Westphalian understandings of state sovereignty ... It allows that states, and only states, have the right to claim maritime territory'.[45] There are evident risks for the Inuit – self-identified 'maritime people'[46] whose 'entire culture and identity is based on free movement over the sea and sea ice'[47] as other entities perform, in Macklem's terms, a 'distribution of sovereignty'[48] under UNCLOS, in traditionally Inuit-inhabited territory.

[40]Ilulissat Declaration, 28 May 2008, available at cil.nus.edu.sg/wp-content/uploads/2017/07/2008-Ilulissat-Declaration.pdf.

[41]United Nations Convention on the Law of the Sea (UNCLOS), 1833 UNTS 3, 10 December 1982.

[42]Inuit Nunaat refers to international circumpolar homeland of the Inuit. Art. 1.2 of the ICC's Circumpolar Declaration on Sovereignty in the Arctic Declaration states: 'From time immemorial, Inuit have been living in the Arctic. Our home in the circumpolar world, *Inuit Nunaat*, stretches from Greenland to Canada, Alaska and the coastal regions of Chukotka, Russia. Our use and occupation of Arctic lands and waters pre-dates recorded history. Our unique knowledge, experience of the Arctic, and language are the foundation of our way of life and culture.' ICC, 'A Circumpolar Declaration on Sovereignty in the Arctic', 2009, available at inuit.org/about-icc/icc-declarations/sovereignty-declaration-2009/.

[43]Ibid.

[44]See D. Sambo Dorough, 'Statement at UNPFII, 12th session, New York', 30 May 2013; C. Watt, 'Inuit Rights to the Arctic, *Law Now*, 7 May 2015, available at www.lawnow.org/inuit-rights-to-the-arctic/; Hutchins Legal INC., 'Canada's Submission to the Commission on the Limits of the Continental Shelf and the Legal Protections for Inuit Rights to the Arctic Ocean, Paper commissioned by Senator Charlie Watt', March 2014, available at liberalsenateforum.ca/wp-content/uploads/2014/07/Watt_Canadas-Claim-to-the-Continental-Shelf-2014.pdf.

[45]H. Nicol, 'From Territory to Rights: New Foundations for Conceptualising Indigenous Sovereignty', (2017) 22 *Geopolitics* 794, 806.

[46]ICC, 'The Sea Ice Never Stops: Circumpolar Inuit Reflections on Sea Ice Use and Shipping in Nunaat', 2014, available at www.sdwg.org/wp-content/uploads/2016/04/Inuit-Response-to-AMSA-Final-Report.pdf, ii.

[47]Ibid.

[48]Macklem, *supra* note 8.

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Debates over the Ilulissat Declaration and UNCLOS reveal how international co-operative frameworks construct exclusive 'clubs' of agreement on the Arctic. Arctic Indigenous peoples' authority over territory, natural resources, and ecosystem governance can be understood as being spatially altered by the force of climate change itself and furthermore challenged by sovereign interests pervading Arctic space. The emergent legal architecture leaves many still evolving questions regarding the sharing and enclosure of Arctic space under the force of the contemporary global economy. Will Arctic Indigenous peoples be full and equal participants in the shaping of globalized Arctic space, as required under international Indigenous rights? Looking at traditional modes of international legal co-operation, the answer is not evident. The following section discusses relevant international agreements in order to tease out the relationship between the concepts of Indigenous rights and state sovereignty that underlie these international legal realms. It seeks to understand what the international legal landscape tells us about the role of Arctic Indigenous peoples and the role of states in governing the 'global' Arctic.

3. The Arctic as international law narrative

International legal regimes see, and reconstruct, global issues in a specific way and the Arctic is one of them. The IMO and its Polar Code, the UNFCCC, and the Paris Agreement – each of these legal spheres approach the relationship between Indigenous rights and state sovereignty from an essentially statist perspective. While the UNDRIP provides a clear international legal basis for centralizing Indigenous peoples in decision-making that impacts their life space, it is evident that in multiple spheres of international co-operation and legal negotiation, states do not rise to those standards.

3.1 UNDRIP

Adopted by the UN General Assembly in 2007 after two decades of negotiation, the UNDRIP is the only international instrument to explicitly address Indigenous peoples' right to self-determination.[49] It is widely considered to set the minimum international standard for the protection and promotion of Indigenous rights. The only contemporary legally binding international instrument on Indigenous rights is ILO Convention No. 169 which has thus far only been ratified by 22 states, 15 of which are Latin American. Together, the two mutually enforcing instruments are considered to 'define Indigenous peoples' rights to lands, territories and resources under international law'.[50]

UNDRIP consolidates existing international human rights norms[51] and firmly establishes their applicability to Indigenous peoples as a distinct, autonomous segment of the 'international public'. At the time of its adoption, Victoria Tauli-Corpuz, Chair of the UN Permanent forum on Indigenous Issues remarked:

> This Declaration has the distinction of being the only Declaration in the UN which was drafted with the rights-holders, themselves, the Indigenous Peoples. We see this is as a strong Declaration which embodies the most important rights we and our ancestors have long fought for; our right of self-determination, our right to own and control our lands, territories

[49]While the ILO's work on indigenous peoples' rights goes back to the time of its establishment in 1919, neither of the two legally-binding treaties relating to indigenous peoples that were adopted by the ILO (ILO 169 and the earlier 107 which is outdated but remains in force) affirm the right to self-determination. As Macklem notes, ILO Convention No.169 'comprehends international indigenous protection as measures internal to and compatible with the sovereign authority of the State in which they are located'. See Macklem, *supra* note 8. As discussed further on in the present work, this same critique applies to the UNDRIP, despite its integration of the seemingly emancipatory language of self-determination.

[50]B. Feiring, *Indigenous Peoples' rights to lands, territories and resources* (2013).

[51]HRC, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. J. Anaya, UN Doc. A/HRC/9/9 (2008), para. 85.

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> and resources, our right to free, prior and informed consent, among others … This is a Declaration which makes the opening phrase of the UN Charter, "We the Peoples …" meaningful for the more than 370 million Indigenous persons all over the world.[52]

Indeed, the international process of decolonization ignored colonialism's effects of dispossession and subjugation of Indigenous peoples, in the interest of the international community of states. Indigenous peoples were initially excluded from the international project to legally enshrine the freedom and equality of all peoples. In the UN General Assembly Resolution 1514 (XV) Declaration on the Granting of Independence to Colonial Countries and Peoples,[53] self-determination was not recognized as a right of Indigenous peoples, effectively marginalizing their concerns to the benefit of newly independent states. The 'saltwater thesis' that prevented recognition of Indigenous sovereignty in colonial nations essentially protected the territorial integrity of states while diminishing the independent governing authority of Indigenous peoples.[54]

To this day, Indigenous peoples are excluded from the 'international distribution of sovereignty'[55] that is performed by international law. Their wrongful historical dismissal as sovereigns in international law has only been legally acknowledged and rehabilitated to the extent of self-determination, leaving unchanged their lack of international legal authority in intergovernmental negotiations. And yet, colonial legacies have shown that when power over Indigenous peoples is concentrated in the state and its legal institutions, their social and economic life space is compromised, encapsulated, and circumscribed by systems in which they have been historically marginalized and neglected. The Canadian experience is revelatory in this regard. Borrows highlights how Canada's Supreme Court jurisprudence is built on the doctrine of discovery and continues to base Aboriginal title on distinctions between post- and pre-contact with Europeans.[56] UN Human Rights Council reports on Canada have pointed to the continued marginalization of 'Indigenous public' concerns by governmental authorities.[57] On a human health level, the tuberculosis epidemic is perhaps the most striking example of the deep and persistent inequality between the provision of public services to Indigenous and non-Indigenous citizens in Canada; in 2015 rates of tuberculosis among the Inuit were 270 times higher than in the non-Indigenous population.[58] Reflecting on Inuit access to public services in Quebec in his account of the negotiation of the James Bay Agreement between Nunavik Inuit and the Quebec government, former Inuit negotiator Zebedee Nungak notes:

> Quebec's services deficit was more than sixty years of not providing any to Inuit citizens in Nunavik. Now it was presenting its services for the first time as part of an ethnic land claims deal. How enormously generous! Or we were supposed to think. But, we were simply too

[52]UNGA, 'Statement of Victoria Tauli-Corpuz, Chair of the UN Permanent Forum on Indigenous issues on the occasion of the adoption of the UN Declaration on the Rights of Indigenous Peoples', 13 September 2007, available at www.un.org/esa/socdev/unpfii/documents/2016/Docs-updates/STATEMENT-VICTORIA-TAULI-CORPUZ-IDWIP-2007.pdf.

[53]UNGA, Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc. A/RES/1514/XV(14 December 1960).

[54]J. Nichols, '"We Have Never Been Domestic": State Legitimacy and the Indigenous Question', in J. Borrows et al. (eds.), Centre for International Governance Innovation, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws Special Report*, 39, available at www.cigionline.org/sites/default/files/documents/UNDRIP%20Implementation%20Special%20Report%20WEB.pdf, 43.

[55]Macklem, *supra* note 8.

[56]See J. Borrows, 'Sovereignty's Alchemy: An analysis of *Delgamuukw v. The Queen*', (1999) 37 *Osgoode Hall Law Journal* 537; J. Borrows, 'Revitalizing Canada's Indigenous Constitution: Two Challenges', in Borrows et al., *supra* note 54.

[57]HRC, 'Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum: The situation of indigenous peoples in Canada, 27th session', 2014, available at www.ohchr.org/Documents/Issues/IPeoples/SR/A.HRC.27.52.Add.2-MissionCanada_AUV.pdf.

[58]Government of Canada, Indigenous and Northern Affairs Canada, 'Tuberculosis Task Force Backgrounder', 7 November 2017, available at www.canada.ca/en/indigenous-northern-affairs/news/2017/10/tuberculosis_taskforce.html.

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> busy trying to tie down our Aboriginal rights to pointedly dwell on Quebec's extreme tardiness on its public services obligations.[59]

It is precisely due to the shared failure of international, national, and sub-national legal systems to embody Indigenous peoples' interests that the UNDRIP was adopted. It aims to universalize Indigenous rights and to re-establish the authority that once belonged to Indigenous peoples. Macklem notes international Indigenous rights 'speak to injustices produced by the way in which the international legal order conceives of sovereignty as a legal entitlement that it distributes among collectivities that it recognizes as States'.[60] He posits the central purpose of international Indigenous rights is to 'mitigate some of the adverse consequences of how international law validates morally suspect colonization projects that participated in the production of the existing distribution of sovereign power'.[61]

Certain aspects of the UNDRIP are considered international customary law,[62] it is called an Indigenous instrument[63] reflecting an international minimum standard for the human rights of Indigenous peoples.[64] Despite its non-legally binding character, UNDRIP has legal implications for national and international law, as well as regional human rights systems.[65] Fakhri notes that one of the outcomes of the recent dispute over seal hunting adjudicated under the World Trade Organization, was an affirmation of the UNDRIP as part of the legal standards to be considered in any EU discussions regarding seal welfare.[66] However, even with UNDRIP's expanding reach into global legal systems, spaces of international legal negotiation still fail to recognize the 'parallel sovereignty'[67] of Indigenous peoples that is enshrined in international Indigenous law. In this sense, what Macklem describes as the 'mitigating' purpose of international Indigenous rights has yet to pierce through the sphere of international legal negotiations. While Indigenous peoples' right to self-determination, in other words, to 'control their own destinies under conditions of equality'[68] has certainly been affirmed in international law, the latter still does not recognize Indigenous peoples as full and equal participants in international law-making. Even within the UNPFII – the UN's high-level advisory body on Indigenous issues that is composed of an equal number of government-appointed and Indigenous-appointed experts – certain procedural aspects followed are seen as reflecting 'technologies of domination that impede the efforts of Indigenous peoples to be full and equal actors'.[69]

The international dimension of self-determination is not explicitly recognized in UNDRIP. Article 4 locates Indigenous peoples' right to self-determination in 'the right to autonomy or

[59]Z. Nungak, *Wrestling with Colonialism on Steroids: Quebec Inuit Fight for their Homeland* (2017), 80.

[60]Macklem, *supra* note 8, at 209.

[61]Ibid.

[62]HRC, *supra* note 51.

[63]Tauli-Corpuz, *supra* note 52.

[64]Macklem, *supra* note 8.

[65]On UNDRIP's reception into Canadian case law and its application in the interpretation of Aboriginal rights and domestic human rights legislation, see *Nunatukavut Community Council Inc v. Canada (Attorney General)*, 2015 FC 981, paras. 101–6; *Mitchell v. Minister of National Revenue*, 2001 SCC 33, paras. 80–3; *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445, paras. 350–4; *Simon v. Canada (Attorney General)*, 2013 FC 1117, para. 121. On regional systems see HRC, Ten years of the implementation of the United Nations Declaration on the Rights of Indigenous Peoples: good practices and lessons learned 2007–2017, UN Doc. A/HRC/EMRIP/2017/CRP.2 (2017), paras. 24–35.

[66]M. Fakhri, 'The WTO, Self-Determination and Multi-jurisdictional Sovereignty', (2015) 108 *AJIL Unbound* 288, 292.

[67]Lenzerini introduces the term to denote the shifting of 'significant sovereign prerogatives' from states to Indigenous peoples that has emerged in light of international legal developments on Indigenous rights, and contemporary state practice recognizing Indigenous autonomy. F. Lenzerini, 'Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples', (2006) 42 *Texas International Law Journal* 155.

[68]S. J. Anaya, 'Self-Determination as a Collective Human Right Under Contemporary International Law', in P. Aikio and M. Scheinin (eds.), *Operationalizing the Right of Indigenous Peoples to Self-Determination* (2000), 3.

[69]M. Lindroth, 'Paradoxes of Power: Indigenous Peoples in the Permanent Forum', (2011) 46 *Cooperation and Conflict* 543.

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self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions'. Article 46(1) emphasizes the outer limits of this right and all others in providing that nothing in the UNDRIP 'may be ... construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States'. Articles 46(2) and (3) provide that the exercise of UNDRIP rights are further subject to 'such limitations as are determined by law and in accordance with international human rights obligations'. Article 46(3) delineates 'the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith' as the interpretive frame for UNDRIP rights. These provisions remain silent on that fact that Indigenous perspectives on self-determination and principles of 'justice, democracy, good governance and good faith' may be drastically different than state-based conceptualizations. In fact, state-created frameworks for self-government or recognition aimed at materializing the Indigenous right to self-determination are continually challenged on the basis that they reproduce colonial relationships.[70]

The overall configuration of Indigenous self-determination in UNDRIP understates the international representational dimension of Indigenous self-determination. In general, there remains a lack of formal mechanisms for Indigenous peoples to exercise their self-determination in the elaboration of international law, and thus the scope of their participation in shaping contemporary processes of globalization remains restricted.

3.2 UNDRIP's implications for international regimes

While the UNDRIP's affirmation of the self-determination of Indigenous peoples is often situated in the domestic legal decision-making context, there is also an external dimension to self-determination extending to the international sphere. Anaya captures the inherent unity that self-determination implies across multiple scales of law:

> ... peoples as such, including indigenous peoples with their own organic social and political fabrics, are to be *full and equal participants at all levels* in the construction and functioning of the governing institutions under which they live.[71]

Evidently, the governing institutions under which Indigenous peoples live includes international institutions, the sites through which states collectively create international legal norms. As an 'expression of the collective views of the United Nations',[72] implementation of the UNDRIP cannot be seen as exclusively relating to individual states, its implementation must also be extended to international institutions. In this regard, UNDRIP requires that we revisit multiple sites of international lawmaking, including those set out below which are especially relevant to Arctic Indigenous peoples in the era of climate change.

3.2.1 UNFCCC and Paris Agreement

While Indigenous representation in UNFCCC processes has strengthened over the last decade, Indigenous groups remain largely on the sidelines of international legal negotiation. In fact, in a report on 119 intended nationally determined contributions (INDCs) that had been deposited

[70]See, for example, Michelle Daigle's juxtaposition of self-determination as it is lived by the Omushkegowuk Cree nation against understandings of self-determination within official state structures. M. Daigle, 'Awawanenitakik: The Spatial Politics of Recognition and Relational Geographies of Indigenous Self-Determination', (2016) 60 *The Canadian Geographer*, 259–69.

[71]Anaya, *supra* note 15 (emphasis added).

[72]ILO, Equality Team, 'Information note for ILO staff and partners: ILO Standards and the UNDRIP', 13 September 2007, available at pro169.org/res/materials/en/convention169/Information%20Note%20on%20ILO%20standards%20and%20UNDRIP.doc.

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by 147 Parties by 1 October 2015, the UNFCCC made no mention of Indigenous peoples or rights in its discussion of 'opportunities for enhanced action to address climate change in the longer term'.[73] The legal outcome of the Paris Agreement further exemplifies the shortcomings of international legal processes with regard to the meaningful participation of Indigenous peoples, who have historically been, and continue to be, marginalized in interstate spheres of negotiation.

For several years now, the ICC[74] has been urging parties to the United Nations Framework Convention on Climate Change to acknowledge the significant climate-forcing role of black carbon and to develop measures to mitigate black carbon emissions entering the Arctic – 70 per cent of which come from outside the Arctic region.[75] These concerns have not been addressed under UNFCCC processes to date and the overwhelming majority of UNFCCC members ignore the issue of black carbon emissions in their reporting commitments under the Paris Agreement.[76]

Even with the massive mobilization of Indigenous groups at the 21st Conference of the Parties of the UNFCCC, and the widely-recognized status of Indigenous peoples as being most acutely affected by climate change, the Paris Agreement failed to affirm Indigenous rights as an explicit legal dimension of the climate regime. Negotiations resulted in a preambular mention of Indigenous peoples, stating that 'Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on … the rights of indigenous peoples.'[77] Under Article 7(5) on adaptation actions, parties acknowledge adaptation actions 'should be based on and guided by … knowledge of indigenous peoples … where appropriate'.

At the same time, the Paris Agreement carves out a new role for Indigenous peoples in international climate governance, in establishing a Local Communities and Indigenous Peoples' Platform for the 'exchange of experiences and sharing of best practices on mitigation and adaptation'.[78] At COP 23, progress was made on the specific functions and operationalization of the Platform. In Decision 2/CP.23,[79] the Subsidiary Body for Scientific and Technological Advice 'recalls' UNDRIP and decides 'that the overall purpose of the platform will be to … enhance the engagement of local communities and Indigenous peoples in the UNFCCC process'. The Platform is intended to serve as a knowledge portal[80] and as a mechanism to 'build the capacities of Indigenous peoples and local communities to enable their engagement in the UNFCCC process'.[81] Decision 2/CP.23 emphasizes Indigenous autonomy and leadership in recommending:

> that the processes under the platform, including its operationalization, take into account … principles proposed by indigenous peoples organizations of full and effective participation of indigenous peoples; *equal status of indigenous peoples and Parties*, including in leadership roles; self-selection of indigenous peoples representatives in accordance with indigenous peoples' own procedures …[82]

[73]UNFCCC, Synthesis Report on the aggregate effect of the intended nationally determined contributions, UN Doc. FCCC/CP/2015/7(2015).

[74]The ICC holds Consultative Status II at the United Nations and is a Permanent Participant of the Arctic Council.

[75]ICC, *supra* note 23; ICC, 'Inuit Call on Global Leaders at UNFCCC COP 18 in Doha, Qatar: Making the most of the 2013-2015 review and the second commitment period under the Kyoto Protocol', 5 December 2012, available at iccalaska.org/wp-icc/wp-content/uploads/2016/03/ICC-Statement_UNFCCC-COP18.pdf. On emissions sources see AMAP (2015), *supra* note 37, at 9. Overall, Arctic states account for 10% of global anthropogenic emissions of black carbon.

[76]See S. Khan and K. Kulovesi, 'Arctic Black Carbon: Global Problem-solving through the Nexus of Science, Law and Space', (2018) 27 *RECIEL Special Issue on Arctic Environmental Governance* 5.

[77]Paris Agreement, *supra* note 12, Preamble.

[78]UNFCCC, Decision 1/CP. 23, Adoption of the Paris Agreement, UN Doc. FCCC/CP/21/2015/10/Add.1 (29 January 2016), para. 135.

[79]UNFCCC, Decision 2/CP.23, Local communities and indigenous peoples platform, UN Doc. FCCC/CP/2017/11/Add.1 (8 February 2018).

[80]Ibid., para. 6(a).

[81]Ibid., para. 6(c).

[82]Ibid., para. 8 (emphasis added).

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The Decision is promising in the sense that it advocates Indigenous peoples' equality in emergent international processes. However, Reed and Sadik[83] note that even though Indigenous peoples' representation and participation in the negotiation process of the Decision was 'unprecedented', the Decision explicitly qualifies the facilitative working group established under the Platform as a 'non-negotiating body', and neither of the processes currently foreseen under the Platform grant decision-making authority to Indigenous peoples in what remains an entirely 'party-driven' UNFCCC.

If international law is understood as serving certain functions, as placing limits and constraints on spatial claims on the one hand, and as empowering and validating spatial claims on the other, how are we to interpret the Paris Agreement on Indigenous rights? On one hand Indigenous rights, autonomy and knowledge are increasingly validated under the emergent framework. At the same time their authority in the international system of climate governance is determined exclusively by states. As such, the ongoing development of the Paris Agreement illustrates the longstanding imbalances within the international community, where Indigenous voices 'are not understood to have a role ... beyond that of a general consultative nature, arguably only where convenient'.[84]

3.2.2 Polar Code and the International Maritime Organization

The IMO is a specialized UN agency composed of 173 member states responsible for regulating global shipping and the prevention of marine pollution by ships. As such, it is an institution that produces global legal standards which profoundly impact the life space of Arctic Indigenous peoples. In anticipation of increased shipping in the Arctic under climate change, the IMO began developing special rules for vessels operating in polar waters. Even though negotiations began in 2009 and the Polar Code entered into force at the start of 2017, Arctic Indigenous peoples played no sustained role in this entire process.[85] With regards to the ICC, Borough cites several factors that led to their decision not to engage in the process, notably financial and human resource limitations, as well as 'procedural rules that center on a heavily state- or party-driven process creating limited ability for Indigenous peoples' representatives to influence the subject matter' and 'environmental NGOs that attempted to capitalise on the concerns and agenda of Indigenous peoples in the context of marine environmental protection ...'.[86]

As a result, Indigenous knowledge and science on the marine ecosystem have been prevalently ignored in a global rule-making process directly affecting their traditionally occupied lands, cultural integrity and food security. Under the current version of the Polar Code many major socio-environmental global shipping issues that are linked to Inuit self-determination and food security remain unaddressed, including black carbon emissions and grey water discharge.

The IMO only began interacting directly with Arctic Indigenous groups in 2016, when the NGO World Wildlife Fund (an accredited observer at the IMO) invited a delegation of Indigenous leaders from Canada, Russia, and the United States to the 70th session of the IMO's Marine Environment Protection Committee (MEPC) to meet with the IMO Secretary General and to address IMO members during a panel discussion at IMO headquarters in

[83]G. Reed and T. Sadik, 'Operationalizing the Local Communities and Indigenous Peoples' Platform: A Step in the Right Direction?', *CIGI*, 4 December 2017, available at www.cigionline.org/articles/operationalizing-local-communities-and-indigenous-peoples-platform-step-right-direction.

[84]H. Nicol, 'Nunavut, Sovereignty and the Future of Arctic Peoples' Involvement in Regional Self-Determination', (2013) 37 *The Northern Review* 127, 136.

[85]D. S. Dorough, 'The Rights, Interests and Role of the Arctic Council Permanent Participants', in R. C. Beckman et al. (eds.) *Governance of Arctic Shipping: Balancing Rights and Interests of Arctic States and User States* (2017), 68, 98.

[86]Ibid.

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London.[87] Discouragingly, the IMO's briefing on the 70th session of the MEPC makes no mention of this historic address or the concerns that were expressed by the Arctic Indigenous delegation.[88]

At the 72nd and 73rd sessions of its MPEC, the IMO considered the adoption of greenhouse gas (GHG) emissions reduction targets and heavy fuel oil restrictions – two issues that gravely impact Inuit livelihoods. One of the major outcomes of the 73rd session is that IMO members agreed to commence work towards banning the use and carriage of heavy fuel oil in the Arctic. Notably, this decision closely aligns with the *Utkiagvik Declaration*,[89] adopted just a few months earlier by the 13th General Assembly of the ICC, which stresses the importance of phasing out heavy fuel oil to support food security in Inuit communities. Despite this congruence, it is imperative to note that Arctic Indigenous peoples were only able to participate in the IMO processes as observers through their affiliation with accredited NGO delegations and were not granted a formal role in negotiations. In fact, the IMO's procedures for observer accreditation rely on IMO member-state determinations of which international NGOs are 'truly international', 'demonstrate considerable expertise' and 'have the capability to make a substantial contribution to the work of IMO'.[90] Evidently, when it comes to Indigenous peoples' organizations, such a state-led process of recognition and validation stands starkly in contrast with the standards for state–Indigenous relations contained in the UNDRIP. It gives IMO member states the power to deny Arctic Indigenous peoples' organizations consultative status in the process of creating regulatory frameworks that disproportionally impact Arctic Indigenous food security and cultural integrity. NGOs with IMO Observer status primarily represent a broad range of industry interests and under established IMO practice the global shipping industry is heavily involved in the treaty-drafting process.[91] As such, the outcome of the Polar Code reflects the weaker influence of IMO Observers representing environmental interests in the negotiation process, as compared to those representing the global shipping industry.[92]

It remains to be seen to what extent the UNDRIP will influence the IMO's response to Arctic Indigenous representatives' demands for 'consistent Indigenous representation'[93] at the IMO. Without the official recognition and participation of Arctic Indigenous peoples in IMO processes, it is possible that even environmentally progressive achievements under the IMO (such as the recent agreement to curb GHG emissions from global shipping by at least 50% by 2050) are implemented in a manner that ignores Indigenous peoples' interests. One of the lessons of early experiments in multilateral climate governance has been that without meaningful participational rights, climate responses may further threaten already highly vulnerable populations, interfering with the fulfilment of their fundamental human rights.[94]

[87]See 'IMO Secretary General meets with Arctic indigenous leaders', *Chamber of Shipping*, 28 October 2016, available at www.cosbc.ca/index.php?option=com_k2&view=item&id=2948:imo-secretary-general-meets-with-arctic-indigenous-leaders&Itemid=292; S. S. Zerehi, 'Indigenous leaders head to London to lobby for stronger Arctic shipping regulations', *CBC News*, 25 October 2016, available at www.cbc.ca/news/canada/north/polar-code-international-shipping-arctic-1.3818865.

[88]See IMO, 'Marine Environment Protection Committee (MEPC), 70th session, 24-28 October 2016', 28 October 2018, available at www.imo.org/en/mediacentre/meetingsummaries/mepc/pages/mepc-70th-session.aspx.

[89]ICC, 'Utkiagvik Declaration', July 2018, available at www.arctictoday.com/wp-content/uploads/2018/07/2018-Utigavik-Declaration.pdf.

[90]IMO, 'Member States, IGOs and NGOs', 2019, available at www.imo.org/en/About/Membership/Pages/Default.aspx.

[91]A. Chircop, 'The IMO, its Role under UNCLOS and its Polar Shipping Regulation', in R. C. Beckman et al. (eds.), *Governance of Arctic Shipping: Balancing Rights and Interests of Arctic States and User States* (2017), 107, 117.

[92]Ibid.

[93]J. George, 'Pressure's on UN shipping agency to embrace heavy fuel oil ban', *Nunatsiaq News*, 12 April 2018, available at nunatsiaq.com/stories/article/65674pressures_on_un_shipping_agency_to_embrace_heavy_fuel_oil_ban/.

[94]J. Schade and W. Obergassel, 'Human Rights and the Clean Development Mechanism', (2014) 27 *Cambridge Review of International Affairs* 717; A. Savaresi, 'REDD+ and Human Rights: Addressing Synergies between International Regimes', (2013) 18 *Ecology and Society* 5.

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4. International law as Arctic narrative

4.1 Inuit role in the development of international law on hazardous substances

Despite the many participation constraints imposed on non-state actors in international negotiations, the spatial knowledge and environmental activism of Arctic Indigenous peoples have played a fundamental role in certain areas of international environmental lawmaking. In fact, since the 1970's, Inuit have been formally organized across state borders, advocating for the expansion of international law in the Arctic 'in the context of seeking increased self-determination'.[95] Their transboundary activism has profoundly influenced international treaty-making on persistent organic pollutants and mercury.[96] These treaties are the first and only areas of international law to explicitly recognize that the food security and self-determination concerns of Arctic Indigenous groups are threatened by globally-produced contaminants.[97] The fundamental factor underlying the Inuit's successful efforts to catalyze international regulation on chemicals and heavy metals contamination has been their collective organizing across states and the establishment of the ICC in 1977.

The ICC was founded with a vision to 'strengthen unity among the Inuit of the circumpolar region, promote Inuit rights and interests on an international level'[98] and to 'ensure Inuit participation in political, economic and social institutions which … the Inuit, deem relevant'.[99] In terms of transnational Arctic Indigenous co-operation, the ICC is preceded by the Saami Council, established in 1956 by Saami communities in Finland, Russia, Norway, and Sweden. The ICC is, thus, an Indigenous institution that predates any formal co-operation between Arctic states. This historical aspect of international co-operation on the Arctic has led to the observation that 'trans-Arctic diplomacy was … pioneered not by the six governments of the adjacent states, but by a non-governmental "trans-national" association of native peoples'.[100] The ICC's vision and transboundary constitution makes it clear that statist perspectives of self-determination and the right to cultural integrity which fail to recognize Indigenous authority over territory or resources as existing beyond domestic governance arrangements, do not provide an effective means to the realization of these legal concepts as understood by the Inuit.

The ICC has obtained observer status at the UN and permanent participant status in the Arctic Council, the high-level intergovernmental forum established by the eight Arctic states to foster co-operation on common Arctic issues with a focus on 'sustainable development and environmental cooperation'.[101] During its existence, the ICC has emerged as a powerful transnational Indigenous institution perpetuating a distinctly Indigenous concept of sovereignty that does not involve seeking statehood, but instead, brings to global attention the critical external dimension of self-government and autonomy of Indigenous peoples in the world of international co-operation. In unifying Inuit peoples across several state borders and advocating on their behalf

[95]H. Selin and N. E. Selin, 'Indigenous Peoples in International Environmental Cooperation: Arctic Management of Hazardous Substances', (2008) 17 *RECIEL* 72, 75.

[96]Inuit Tapiriit Kanatami (ITK), 'Inuit Priorities for Canada's Climate Strategy: A Canadian Inuit Vision for Our Common Future in Our Homelands', 2016, available at www.itk.ca/wp-content/uploads/2016/09/ITK_Climate-Change-Report_English.pdf, 41.

[97]Stockholm Convention on Persistent Organic Pollutants, 40 ILM 532, 22 May 2001, Preamble; Minamata Convention on Mercury, Kumamoto, 10 October 2013, in force 16 August 2017, available at www.mercuryconvention.org/Portals/11/documents/Booklets/COP1%20version/Minamata-Convention-booklet-eng-full.pdf, Preamble.

[98]ICC, 'ICC Charter', available at www.inuitcircumpolar.com/icc-international/icc-charter/, Art. 3(a)(b).

[99]Ibid., Art. 3(c).

[100]L. P. Bloomfield, 'The Arctic Last Unmanaged Frontier', (1981) 60 *Foreign Affairs* 87, 90 cited in Selin and Selin, *supra* note 95.

[101]Arctic Council, Ottawa Declaration of the Establishment of the Arctic Council, 19 September 1996, available at oaarchive.arctic-council.org/bitstream/handle/11374/85/EDOCS-1752-v2-ACMMCA00_Ottawa_1996_Founding_Declaration.PDF?sequence=5&isAllowed=y, Art. 1(a).

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in the international legal sphere, the ICC disrupts state-based conceptions of both sovereignty and self-determination.

Despite the ICC's highly visible role in international environmental negotiations and its critical contribution to the development of international treaties on POPs and mercury, these instruments share the common limitations of other international legal instruments in that non-state actors are not granted authority in decision-making, implementation or monitoring due to the limitations of their observer status. Alternatively, the Arctic Council has centralized Arctic Indigenous representative organizations in all decision-making, so as to bring it closer to the full and equal participation called for under the UNDRIP. It provides useful insight as to how spaces of international negotiation can better integrate Indigenous knowledge systems, science, and leadership.

4.2 Rebalancing sovereignties

Within the Arctic Council, six Arctic organizations of Indigenous peoples are recognized as Permanent Participants and granted active participation and full consultation rights in all aspects of the Council's work. Dorough notes that despite not having formal voting power, the Permanent Participants exercise 'extraordinary influence over all issues for consideration due to the consensus decision making approach of the Arctic Council'.[102] Koivurova and Heinämäki interpret the status of Permanent Participant as giving rise to a '*de facto* power of veto should they all reject a particular proposal'.[103] Indeed, the institutional composition of the Arctic Council allows it to surpass the epistemological limitations of the traditional international legal order in that the centrality of Indigenous transboundary representation and participation removes the state as the definitional reference point of sovereignty in international relations. Moreover, the institutionalization of Indigenous sovereignty expands the breadth of knowledge and science that is produced by the Arctic Council and upon which its decisions are made.

The Arctic Council does not have the status of a legal organization and even though it has produced three international legally binding agreements in recent years, it falls outside the traditional understanding of an international legal institution. But, for Koivurova and Heinämäki, the experience of the Arctic Council shows that soft law possesses a 'revolutionary potential'[104] for Arctic organizations of Indigenous groups, as a norm-making method that is not dependent on international law's state-based structures. In many ways, the Arctic Council is reflective of an intergovernmental platform that mitigates state sovereignty in recognizing, at the very least implicitly, the parallel sovereignty of Indigenous groups that is embodied in contemporary international Indigenous rights. It has provided the possibility for a more representative array of Arctic actors to negotiate a more inclusive Arctic future, and has attempted to deviate from historical injustices in recognizing the international representational implications of the right to self-determination of Indigenous peoples.

5. Conclusion

It has been argued throughout this work that the crisis of climate change forces us to re-evaluate power imbalances and invisibilities engrained in the international legal order. Through an examination of specific international legal instruments relevant to Arctic climate change, the article has essentially tried to highlight the limitations of trying to solve global problems through

[102]Dorough, *supra* note 85, at 82.

[103]T. Koivurova and L. Heinämäki, 'The Participation of Indigenous Peoples in International Norm-Making in the Arctic', (2006) 42 *Polar Record* 101, 104.

[104]Ibid., at 103.

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conventional international legal structures. It suggests that global solutions to global problems such as the human impacts of Arctic climate change do not necessarily lie in traditional international lawmaking.

Although Arctic climate change is a global matter, treating Arctic problems within existing global regulatory regimes and dominant discursive paradigms may neglect the significance of Indigenous claims to sovereignty and self-determination, leading to a statist homogenization of the Arctic life space. This homogenizing effect can be seen as one of the major limitations of conventional international law and scholarship. As Stepien et al. note, notions of vulnerability and adaptation that dominate climate change scholarship have excluded certain Arctic problems from political and scientific discourse.[105] Although international treaties embody universalist ideals centred on a common humanity, the structural imbalances and interpretive styles of our international legal order have historically benefited the exploitation of human and environmental resources for economic purposes, in the interests of states and to the detriment of Indigenous peoples. In particular, Arctic Indigenous peoples, though ever-present in the international sphere and influential in international-norm creation on certain issues, have never been able to crystallize their full participation.[106]

As such, the international order continues to grapple with its state-centric limitations. In all international institutions, Indigenous peoples are still subject to the ultimate decision-making authority of states. Their activism, involvement and influence in international co-operation is above all, mediated and structured by governments. This state-centricity can be seen as representing an ontological limitation of international law that bears heavily on its legitimacy, curtails the full and equal participation of Indigenous peoples, and restricts the role of Indigenous knowledge and science in the production of international law. Because the circuits of international legal negotiation and exchange are so exclusive and mainly engage with Indigenous peoples' representative organizations as 'observers', they produce a narrowed view of what constitutes 'the global' and efface fundamental differences between Indigenous peoples' organizations and other non-state actors, the most important being Indigenous peoples' historic sovereignty in international relations, and existing forms of Indigenous sovereignty as evoked by the nation-to-nation relationship that characterizes legal realities between Indigenous peoples and states in a number of national contexts.

The relationship between the legal concepts of state sovereignty on the one hand, and Indigenous sovereignty and self-determination on the other (with self-determination being understood as the minimum scope of Indigenous sovereignty in international customary and treaty law) continues to evolve. The Arctic Council, as the only intergovernmental sphere to recognize Indigenous peoples' organizations beyond observership, as Permanent Participants 'with full consultation rights on all negotiations and decisions', should serve as inspiration for collective rule-making on global environmental problems. This is because the Arctic Council is an early example of a site of global governance that makes place for both state and Indigenous sovereignties. Seen in this light, the Arctic Council points us towards possibilities for how to bring to life 'a theory of resistance into international law',[107] in this particular case, correcting the wrongful historical dismissal of Indigenous peoples as sovereigns by duly recognizing their legal authority in intergovernmental negotiations. Instead of thinking of the Arctic

[105]A. Stepien et al., 'Arctic Indigenous Peoples and the Challenge of Climate Change', in E. Tedsen, S. Cavalieri and R. A. Kramer (eds.), *Arctic Marine Governance: Opportunities for Transatlantic Cooperation* (2014), 71.

[106]Koivurova and Heinämäki, *supra* note 103. See also Koivurova, *supra* note 6, for Koivurova's discussion on state responses to Saami and Inuit agency in international relations and other practices of external self-determination. On the participation of Indigenous groups within the climate regime see E. A. Kronk Warner, 'South of South: Examining the International Climate Regime from an Indigenous Perspective', in S. Alam et al. (eds.), *International Environmental Law and the Global South* (2015), 451.

[107]B. Rajagopal, 'International Law and Social Movements: Challenges of Theorizing Resistance', (2003) 41 *Columbia Journal of Transnational Law* 397. The term is understood here to imply the disruption of the international legal dominance of the state and individual.

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Council as merely the environmental side of regional Arctic co-operation, it should be regarded as an established intergovernmental mechanism that provides an early learning opportunity on how to approach collective rule-making on global environmental problems in a manner that brings international relations out of the statist lens and closer to the principles embodied in international Indigenous rights instruments. One way to think about how to make international law more inclusive, is to consider how we could break out of the deadlock of 'observer' status and integrate at the very least, models of permanent participation or transboundary Indigenous representation in negotiating bodies.

Overall, the way Arctic climate change is addressed in international legal spaces still fails to recognize the international representational elements required for the realization of Indigenous self-determination beyond the territorial integrity of the state. That is to say, self-determination as it is understood by the Inuit of *Inuit Nunaat*, whose use and occupation of the Arctic and sub-Arctic 'transcends political boundaries'.[108] Under the Arctic Council, however, that same Arctic is also similarly understood as a space of international co-operation, except in this case, collective rule-making over any dimension of the Arctic necessarily engages both state and Indigenous sovereignties, at the very least de facto.

[108]ICC Charter, *supra* note 98.

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