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International law and governance of the arctic in an era of climate change

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6.1 INTRODUCTION

Indigenous peoples are disproportionately affected by the impact of climate change.¹ The nature and intensity of the effects of climate change on indigenous peoples are defined by their geographic location and relative reliance on the natural environment and its resources for livelihood, culture and spirituality.² Their capacity to address climate change hinges on their relative exposure to shifting environmental conditions as well as on available knowledge, material and technical resources.³ This capacity is defined at the institutional level by the legal framework governing access to land and natural resources, governance structures and participation in decision-making processes relevant to climate change mitigation and adaptation.⁴

The area of the Arctic region is about 14.5 million km². It includes the ice-covered Arctic Ocean and the surrounding land covering all of Greenland and Spitsbergen, and the northern parts of Alaska, Canada, Norway, and Russia.⁵ In addition, the northern parts of Finland and Sweden in the north of the Arctic Circle belong to the Arctic region.⁶ Some of the land parts of the Arctic, such

1 See R. Tsosie, *Indigenous People and Environmental Justice: the Impact of Climate Change*, 78 U. Colo. L. Rev. 1625, 1633 (2007); L. Westra, *Environmental Justice and the Right of Indigenous Peoples International and Domestic Law Perspectives*. Earthscan (2007), 8, 20.

2 J. M. Hanna (ed.), *Native Communities and Climate Change: Protecting Tribal Resources as Part of National Climate Policy*, University of Colorado, Natural Resources Law Center & Western Water Assessment (2007), 5; M. Macchi, et al., *Indigenous and Traditional Peoples and Climate Change*, IUCN (2008), available online at: <https://policycommons.net/artifacts/1369021/indigenous-and-traditional-peoples-and-climate-change/1983196/>.

3 J. D. Ford, T. Pearce, F. Duerden et al., *Climate Change Policy Responses for Canada's Inuit Population: The Importance of and opportunities for Adaptation*, 20 *Global Env'tl. Change* 177 (2010), at 181–3.

4 *Ibid.* See also S. Thériault, *Indigenous Peoples and Climate Change Policies: A Comparative Assessment of Indigenous Governance Models in Local Climate Change Law*. *Environmental Regulation in Cities and Other Localities* 243 (B. J. Richardson ed., 2012); R. Tsosie, *Climate Change, Sustainability and Globalization: Charting the Future of Indigenous Environmental Self-Determination*, 4 *Env'tl. & Energy L. & Pol'y J.* 188 (2009), at 210–14.

5 *Polar Discovery*, available online at <http://polar.discovery.who.edu/arctic/geography.html>.

6 There is no generally accepted definition of the Arctic. The AMAP defined the Arctic marine area as north of the Arctic Circle (66°32'N), north of 62°N in Asia, and 60°N in North America, including the northern parts of Finland and Sweden; see *Arctic Transform, Intro-*

as Greenland, are covered with ice sheets whereas others, such as Alaska, have lush tundra. These areas have large mammals, such as caribou, bear, wolf, and fox, and many varieties of plants. In summer, migratory birds and other wildlife come to the Arctic to raise their young.⁷ The Arctic is inhabited by significant numbers of indigenous and coastal communities. There are over 40 ethnic groups who have inhabited the region for thousands of years.⁸ Out of the total population of 4 million people, 10 % are indigenous peoples.⁹ They include the Inupiat and Yup'ik Eskimos, Alutiiq and Athabascans in Alaska; the Kalaallit and Inughuit in Greenland; the Sami in northern Fennoscandia; and the so-called northern minorities in Russia, who include the Chukchi, Evens, Evenks, Nenets, Mivkhi, Sami, Sakhas, and Khants.¹⁰ Each of these groups has its own culture, language, history, and traditional ways of life. The traditional activities of the Arctic indigenous peoples include reindeer herding, subsistence hunting, sheep farming and fishing.¹¹

Despite the variations in the means of livelihood, cultural practices and language, all groups share something in common. Most of the indigenous communities have already undergone substantial changes due to globalisation, the Western way of life, state policies, and the introduction of mixed economy.¹² Today the activities of the Arctic indigenous peoples include, among others, commercial salmon canning, timber production, and oil-related businesses. Many indigenous groups, nevertheless, still mostly rely on the natural resources of the traditional lands on which they live.¹³ Their connection to traditional activities embraces their economic and cultural survival. Nevertheless, technology, industrial development, immigration, and tourism are causing large-scale social change and adversely affecting the Arctic environment. As a result, for the indigenous peoples, the survival of their traditional

duction to the Background Papers, available online at <http://arctic-transform.org/download/Intro.pdf>.

7 See Polar Discovery, *supra*.

8 Arctic Indigenous peoples, available online at <http://www.arcticcentre.org/?Deptid=24486>.

9 M.L. Parry *et al.*, *Climate Change 2007: Impacts, Adaptation and Vulnerability*, Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press, (2007) 657.

10 M. Nuttal, *Protecting the Arctic Indigenous Peoples and Cultural Survival*, Harwood: Routledge, (2002), 2.

11 *Ibid.*

12 Elena Gladun, Soili Nysten-Haarala, Svetlana Tulaeva, *Indigenous Economies in the Arctic: To thrive or to survive*, 14th of July 2021, ELEMENTA Science of the Anthropocene, available at: <https://online.ucpress.edu/elementa/article/9/1/00088/116748/Indigenous-economies-in-the-ArcticTo-thrive-or-to>.

13 *Ibid.*

culture and livelihood, and indeed identity, has become a significant challenge.¹⁴

In Canada, the ability of indigenous communities to tackle the impacts of climate change vary considerably according to geography, culture, economy and their particular colonial legacies across the country.¹⁵ For instance, Northern indigenous communities, including the Inuit, Inuvialuit, Gwich'in and Dene, are coping with the acute environmental, social and geopolitical effects of climate change, which already exert considerable pressure on their culture, economies and infrastructures.¹⁶ In other parts of the country, such as in the coastal regions of British Columbia, increased water temperature, greater winter rainfalls and changes to the physical nature of the aquatic habitat and water quality are threatening the vitality of salmon populations, which are key to the culture, spirituality and economies of many local indigenous communities.¹⁷ In addition to being differently situated in terms of climate change impacts, the capacity for indigenous communities to address climate change may vary depending on the specific legal framework governing their territorial rights, especially their rights to access, use and control their ancestral lands and natural resources, and to participate meaningfully in territorial and environmental governance.¹⁸

This Chapter examines the role of territorial rights of indigenous peoples, as defined in land claims agreements, in enhancing or hindering their capacity to address climate change through mitigation and/or adaptation measures.¹⁹ Section 35 of the Constitution Act, 1982, recognises 'existing aboriginal and treaty rights' – including 'rights that now exist by way of land claims agree-

14 See for detailed discussions, K. Hossain, The Human Rights Committee on Traditional Cultural Rights: the Case of the Arctic Indigenous Peoples, in *Global and Local Encounters Norms, Identities and Representations in Formation*, Renvall Institute Publication 25 (T. Veintie, P. Kristiina Virtanen eds., 2009), at 29–30. See also M. Nuttal, *supra*, 2.

15 D. S. Lemmen *et al.*, *From Impacts to Adaptation: Canada in a Changing Climate*, Government of Canada (2007), available online at: <https://publications.gc.ca/site/eng/320166/publication.html>.

16 K. Koutouki, N. Lyons, Canadian Inuit Speak to Climate Change: Inuit Perceptions on the Adaptability of Land Claims Agreements to Accommodate Environmental Change, 27 *Wis. Int'l L.J.* 516 (2009–10) at 531–8; S. F. Trainor *et al.*, Arctic Climate Impacts: Environmental Injustice in Canada and the United States', 12 *Local Env't* 627 (2007).

17 J. M. Hanna, *supra*, 7–8. The US Pacific Northwest Tribes' relationship with salmon is also found in British Columbia coastal communities, see D. C. Harris, *Fish, Law, and Colonialism: The Legal Capture of Salmon in British Columbia*, University of Toronto Press (2001).

18 Center for Indigenous and Environmental Research (CIER) and University of British Columbia (UBC), *Climate Change and Adaptive Capacity in Aboriginal Communities South of 60th Assessment Report*, March 31 (2011), available online at <http://www.cier.ca/information-and-resources/publications-and-products.aspx?id=2056>, at 10.

19 K. Koutouki, N. Lyons, *supra*, addressed this topic. This article, largely based on field research conducted in three regions of Northern Canada, focuses on Inuit perceptions on climate change and their land claims agreements. The present chapter instead proposes a strictly formal analysis of land claims agreements in the context of climate change.

ments or may be so acquired' – of the Aboriginal peoples of Canada.²⁰ In addition to aboriginal and treaty rights, the legal status of indigenous people is defined in statutory law. For instance, the Indian Act²¹ and its related statutes and regulations define the land rights of First Nations communities living on reservations, as well as the structure and powers of Indian Band Councils.²²

Land claims agreements, also known as 'modern treaties,' have been negotiated between indigenous peoples and the Canadian Government since the adoption of a federal policy to that effect in 1973.²³ The precise content of these agreements varies according to the respective needs and aspirations of the parties and the power relationships at play during the negotiations. Most land claims agreements contain provisions regarding: the ownership, use and management of lands, waters and natural resources (for example, fish and wildlife); environmental protection and environmental impact assessment; economic development; and self-governance and participation in public governance structures.²⁴

This Chapter analyses the aspects of those agreements that are relevant to climate change using as a primary case study the land claims agreement concluded between the Nunatsiavut (Labrador) Inuit, the province of Newfoundland (Northern Labrador) and Canada (LILCA).²⁵ The first part of the Chapter explains the indigenous land claims negotiations process in Canada. The second and third parts examine land claims agreements from two perspectives: their relative flexibility and capacity to evolve in order to foster indi-

20 Constitution Act 1982, RSC (1985), Appendix II, No. 44, ss. 35(1), (3). According to s. 35(2), the Aboriginal peoples of Canada are the Indians, the Metis, and the Inuit.

21 Indian Act of 1876, RSC c. I-5 (1985).

22 Indian Band Councils are the governing structures created by the Indian Act. The expression 'First Nations' is widely used to designate the indigenous peoples of Canada subjected to the regime of the Indian Act. The Metis and the Inuit are not governed by the Indian Act. For an examination of the role and limits of the governance structures established by the Indian Act in mitigating and adapting to climate change, see Thériault, *supra*.

23 This policy has been modified several times. For the current policy, see Indian and Inuit Affairs Program, Federal Policy for the Settlement of Native Claims (Department of Indian and Northern Affairs Canada 1998).

24 For a more detailed description of each land claims agreement, see Aboriginal Affairs & Northern Development Canada, General Briefing Note on Canada's Self-Government & Land Claims Policies & the Status of Negotiations – Jan. 2012, available online at http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/al_ldc_ccl_gbnjan2012_1324327698586_eng.pdf; CIER and UBC (2011), *supra*. Canada has been negotiating self-government agreements since the adoption of a policy to that effect in 1995: Minister of Indian Affairs and Northern Development, Aboriginal Self-Government, Public Works & Government Services Canada (1995).

25 2005 Labrador Inuit Land Claims Agreement (LILCA) online available at http://www.exec.gov.nl.ca/exec/igas/land_claims/agreement.htm. The region of Nunatsiavut is located in the northern tip of Labrador, in the province of Newfoundland. There are approximately 5,300 Nunatsiavut Inuit, the majority of whom live in the communities of Nain, Hopedale, Portville, Makkovik, and Rigolet.

genous communities' adaptation to climate change, and the possibilities provided by these agreements for indigenous groups to participate meaningfully in the governance of climate change. The Chapter concludes that while land claims agreements, especially the most recent ones, such as the Nunatsiavut Inuit agreement, provide indigenous peoples with multiple tools to address climate change, they lack the flexibility Inuit communities need to adapt to rapidly shifting environmental conditions. While land claims agreements contain arrangements to guarantee indigenous peoples' participation in the governance of their lands and natural resources, either through self-governance or co-management institutions, they still do not participate meaningfully in aspects of decision-making relevant to addressing climate change. Lastly, this Chapter examines the consequences of globalisation in the Arctic Ocean as well as issues of protection on Human Rights under contemporary international law.

6.2 DEFINING INDIGENOUS PEOPLES

The term 'indigenous people' is not defined in any international instrument, not even in the Declaration on the Rights of the Indigenous Peoples. The term, however, can be found in the debates of the 1989 International Labour Organization (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries, which entered into force on 5 September 1991.²⁶ No definition was finally invoked in the convention. Article I(1) of the Organization of American States (OAS)²⁷'s declaration on the rights of indigenous peoples provides that the declaration applies to 'indigenous peoples' as well as peoples whose social, cultural, and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partly by their own customs or traditions or by special laws or regulations.²⁸

26 Article 1 of the ILO Convention no. 169, 1650 U.N.T.S. 383, states:

1. This Convention applies to: a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions. 2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply. See Convention (no. 169) concerning Indigenous and Tribal Peoples in Independent Countries (1989). Available online at <http://www.unhchr.ch/html/menu3/b/62.htm>.

27 Please see at: <https://www.oas.org/en/sare/documents/DecAmIND.pdf>.

28 Proposed American Declaration on the Rights of the Indigenous Peoples [hereinafter Proposed American Declaration], Approved on 26 February 1997, available online at <http://www.cidh.oas.org/Indigenous.htm>.

The clearest definition of 'indigenous peoples' has been put forward by Jose R. Martinez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities:

Indigenous communities, peoples and nationals are those which, having a historical continuity with pre-invasion and precolonial 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.²⁹

In addition, two other definitions are important. Special rapporteur Francesco Capotorti of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, suggested the following: 'A group, numerically inferior to the rest of the population of a State, in a non-dominant position, whose members being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.'³⁰ Another definition is provided by Jules Deschenes, Special Rapporteur to the Commission on Human Rights (Resolution 1984/62):

"A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense

29 Permanent Forum on Indigenous Issues, The Concept of Indigenous Peoples, A background paper, UN Doc. PFII/2004WS.1/3 (2004), available online at <http://www.un.org/esa/socdev/unpfii/documents/PFII%202004%20WS.1%203%20Definition.doc>; See also, Sub-Commission on the Promotion and Protection of Human Rights, Study of the Problem of Discrimination against Indigenous populations, UN Doc. E/CN.4/Sub.2/1986/7/Add.4 at para 379 (1986). The Cobo definition further continues to mean historical continuity as consisting of the presence of one or more of the following factors: a) occupation of ancestral lands, or at least of part of them; b) common ancestry with the original occupants of these lands; c) culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.); d) language (whether used as the only language, as mother tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general, or normal language); e) residence on certain parts of the country, or in certain regions of the world; f) other relevant factors. On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group). This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.

30 Sub-Commission on the Promotion and Protection of Human Rights, Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/384/Rev.1 (1979).

of solidarity with one other, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law ...³¹

From these discussions, an understanding can be derived as to who indigenous peoples are, although they are not clearly defined. Despite the lack of formal definition there has been a steady evolution in the normative development towards a greater recognition of the rights of indigenous peoples, starting with the adoption of the Declaration on the Rights of the Indigenous Peoples. Today it is possible to clearly identify indigenous peoples, even in the absence of any formal definition.

6.2.1 Right to culture under Article 27

The ICCPR was adopted in 1966 and entered into force on the 23rd of March 1976.³² The international political movement to improve the standards of protection for the world's indigenous peoples had not yet gained momentum. Consequently, there was no reference to 'indigenous people' in the ICCPR. Yet, the ICCPR adopted Article 27, which also applies to indigenous peoples. The Article reads as follows:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.³³

Culture manifests, among the other things, a different identity and dignity through traditional practices, which indigenous peoples, among the other minorities, possess strongly.³⁴ In the first in the evolution of indigenous rights

31 Sub-Commission on the Promotion and Protection of Human Rights, Proposal Concerning a Definition of the Term 'Minority', UN Doc. E/ CN4./Sub.2/985/31 (1985). For a general treatment, see E. Gayim, *The Concept of Minority in International Law: A Critical Study of the Vital Elements*, 27 *Juridica Lapponica Arctic Centre* 14 (2001).

32 International Covenant on Civil and Political Rights. Treaty Series, 999, 171. Bibliography: United Nations (General Assembly).

33 Article 27 ICCPR, *supra* note 27.

34 Indigenous peoples are also in many instances classified as both minority and indigenous at the same time, although indigenous rights as developed by the inter-governmental organization is far more extensive, stronger and detailed than minority rights. See R. MacKay, *The Rights of Indigenous Peoples in International Law*, Berkeley (1998), available also online at http://www.omced.org/cases/case_McKay.pdf. See also B. Robbins, E. Stamatopoulou, *Reflections on Culture and Cultural Rights*, 2(3) *The South Atlantic Quarterly* 430 (2004), where the authors state that indigenous peoples are claiming, among others, the protection for their tangible and intangible cultural heritage and traditional knowledge – for example, the assertion of intellectual property rights to dances, songs, stories, and

under the ICCPR, their rights were specified by the HRC as part of protecting minority culture where they form the minority. Clearly, the HRC viewed that traditional livelihoods were at the heart of protecting the culture of indigenous peoples. This view was earlier adopted by the HRC in 1988 in the *Kitok* case, where the HRC upheld the rights of persons, in community with others, to engage in economic and social activities that are part of the culture of the community to which they belong.³⁵

The right to enjoy one's culture within the meaning of Article 27 of the ICCPR has further been clarified by the General Comment, which is intended to systematise the Committee's interpretation of specific provisions or aspects of the Covenant, adopted by the HRC on Article 27 in 1994.³⁶ The HRC observed 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. That right may include such traditional activities as fishing or hunting, and the right to live in reserves protected by law. The enjoyment of these rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions that affect them.³⁷ Article 27 restricts the State in

so on as their cultural rights. Under this heading the indigenous peoples are claiming intellectual property rights over knowledge of any kind that concerns them, knowledge that over the decades has been commercially exploited and occasionally even patented by the private sector.

35 See Human Rights Committee [hereinafter HRCttee], *Kitok v. Sweden*, Com. no. 197/1985, II HRCttee Official Rec. 442 (1987/1988), at para. 9.2: 'The regulation of an economic activity is normally a matter for the State alone. However, where that activity is an essential element in the culture of an ethnic community, its application to an individual may fall under Article 27.' See also the *Lubicon Lake Band* case, *Chief of the Lubicon Lake Band v. Canada*, Com. No. 167/1984, decided in 1990, where the HRCttee found a violation of Article 27 by Canada because it had permitted various economic activities endangering the traditional hunting and fishing by the band. The band invoked Article 1 of the ICCPR that their right under the said article was violated by the state party, but the Human Rights Committee viewed that it was not possible to examine self-determination under Article 1. However, the committee agreed to examine the communication based on Article 27. The wording of Article 1 of the Optional Protocol makes it clear that it is only individuals who can resort to this procedure.

36 HRCttee, General Comment no. 23, 50th Session, (1994), UN Doc. HRI/ GEN/1/Rev.3, at para. 7 (1994).

37 *Ibid.*; See also the following paragraphs:

3.2. The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that article – for example, to enjoy a particular culture – may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority.

6.1. Although Article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a 'right' and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are,

its use of traditional land on which indigenous people live and with which their traditional livelihoods are associated. The restrictions may be found in two communications before the HRC, in which the Sami people accused Finland of having interfered with reindeer herding. The Committee, in the first *Länsman* case decided in 1994, developed a two-part test, the first aspect being procedural (consultation) and the second material (economic sustainability).³⁸ According to the first part of the test, indigenous peoples need to be meaningfully consulted before the State may permit interference with their traditional livelihood. Second, Article 27 prohibits States not to endanger the practicing of traditional livelihood to the extent that it would lose its capacity to sustain the members of the community.³⁹ In the second *Länsman* case decided in 1996, the HRC underlined that when assessing what amounts to a denial of culture, States need to take into account the cumulative effect of activities interfering with the livelihood when assessing whether Article 27 may be breached.⁴⁰ The committee also made it clear that the economic well-being of the majority is not a legitimate justification for interfering with the culture of minorities (margin of appreciation) but that it is the sustainability of the indigenous livelihood that is protected by Article 27.

The HRC also took a clear stance on what livelihoods count as part of the culture of indigenous peoples and therefore fall within the scope of Article 27. The HRC stated that the right to enjoy one's culture cannot be determined *in abstracto* but has to be placed in context. The committee observed that Article 27 does not only protect *traditional* means of livelihood of national minorities, as indicated in the State party's submission. The method of traditional practices may have developed over the years, which may now include modern technology. The HRC confirmed that the use of modern technology does not prevent indigenous peoples from invoking Article 27.⁴¹ Hence, modern ways of practicing traditional livelihoods are also protected by Article 27. This view was further clarified by the *Apirana Mahuika* case decided in 2000, where the committee regarded commercial and non-commercial fishing by Maoris – even Maoris' becoming major shareholders in a modern fishing company – as protected by Article 27.⁴²

therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.

38 HRCtee *I. Länsman et al. v. Finland*, Com. no. 511/1992, UN Doc. CCPR/C/57/1 at paras 74–85 (1994).

39 *Ibid.*, para. 9.5–9.8.

40 HRCtee, *J. Länsman et al. v. Finland*, Com. No. 671/1995, U.N. Doc. CCPR/C/58/D/671/1995 at para. 10.7 (1996). This kind of approach was adopted already in the *Lubicon Lake Band* case.

41 HRCtee, *I. Länsman et al. v. Finland*, *supra*, at para 9.3.

42 HRCtee, *Apirana Mahuika et al. v. New Zealand*, Com. no. 547/1993, UN Doc. A/56/40 (Vol. II): 11–29 at para 9.4 (2000).

6.2.2 Subsistence rights under Article 1(2)

Indigenous peoples often argue for their status as ‘peoples’, and thereby demand the right to self-determination as fundamental. This issue has generated a great deal of debate both in terms of meaning and scope. There is a huge amount of literature on this issue. The question of whether indigenous peoples constitute ‘peoples’ who can claim the right to self-determination under Article 1 of the covenant, although important, is not, however, relevant in the context of this Chapter. In its interpretation of Article 1 of the covenant, the HRC advocates the idea that indigenous peoples are ‘peoples’ in the sense of resource management of the traditional land on which they live. This accords them the right to internal self-governance as ‘peoples’,⁴³ since ‘[i]n no case may a people be deprived of its own means of subsistence’.⁴⁴ The idea was reiterated in the Declaration on Rights of Indigenous Peoples.⁴⁵ The declaration has interpreted internal self-governance with respect to indigenous peoples’ traditional and cultural belongings,⁴⁶ so that they can maintain and develop their political, economic, and social systems or institutions in order to enjoy their own means of subsistence and development.⁴⁷ Also, the right to practise and revitalise their cultural traditions and customs, which includes

43 Today, it is well established that a people can exercise their self-determination through political participation both as groups and/or individual, for instance, by gaining membership in the state delegation to international treaty participation, if the matters are of interest to the people. See also Committee on Elimination of Racial Discrimination (CERD), General Recommendation XXIII, 51st Session, UN Doc. A/52/18 (1997), Annex. V, where CERD called on the governments to recognize and protect the rights of indigenous peoples to own, develop, control and use their common lands, territories and resources. CERD also stressed that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.

44 ICCPR Art. 1(2).

45 United Nations. (2011). United Nations Declaration on the Rights of Indigenous Peoples, available at: https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.

46 Article 3 of the Proposed American Declaration states that indigenous peoples have right to self-determination, but up to the extent to which they freely determine their political status and freely pursue their economic, social and cultural development. Also Proposed American Declaration, Article 4 cautiously proclaims that the exercise of self-determination is limited to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous function. See S. Joseph, Human Rights and the WTO: Issues for the Pacific 40 VUWLR 351 (2009), available online at <http://www.nzlii.org/nz/journals/VUWLawRw/2009/18.pdf>, Operative Part, para 3.

47 See Proposed American Declaration, Art.20 (1). See also Proposed American Declaration, Art.26, which proclaims that indigenous peoples have the right to own, use, develop, and control the lands, territories, and resources that they possess by reason of traditional ownership or other traditional occupation or use and those otherwise acquired. See *ibid*.

the right to maintain, protect, and develop the past, present, and future manifestations of their cultures, has been clearly stated in the Declaration.⁴⁸

In reading the right to enjoy one's culture as a minority under Article 27 alongside the right to self-governance of the resources belong to 'peoples' under Article 1(2) of the ICCPR, a cultural manifestation of self-determination can be found. This includes a particular way of life associated with indigenous peoples. This view has also been acknowledged by national governments. For example, Canada acknowledges indigenous peoples' inherent right to govern themselves in relation to matters that are internal to their communities and integral to their unique cultures, identities, traditions, languages, and institutions, with respect to their special relationship with their land and resources.⁴⁹ The foundation for these rights is found in both customary and treaty laws. Indigenous people are, therefore, protected by law to enjoy the right to natural and cultural resources through traditional activities, and to maintain the traditional way of life including traditional commercial activities. As far as Article 1 of the ICCPR is concerned, the effective participation of indigenous people has to be ensured in any decision-making that affects them.⁵⁰

6.3 LAND CLAIMS IN CANADA: AN OVERVIEW

In 1973, the Supreme Court of Canada handed down its landmark decision in *Calder v Attorney-General of British Columbia*.⁵¹ A majority of judges affirmed the existence of Aboriginal title at common law where such title had not been extinguished by treaty or other legal means. Following this, the Federal Government adopted its policy regarding the negotiation and settlement of outstanding indigenous land claims.⁵² As of June 2015, 24 agreements have been concluded, covering most of Canada's Northern regions and including three indigenous nations in British Columbia.⁵³

48 See Proposed American Declaration, Art. 11.

49 Government of Canada, The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government, available online at http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html.

50 HRCtee, General Comment no. 23, *supra*, para 7.

51 [1973] SCR 313 (Can.).

52 See Department of Indian and Northern Affairs Canada, *supra*. In 1973, most indigenous peoples in Northern Canada, the Atlantic Provinces, Quebec, and British Columbia could still potentially claim Aboriginal rights in their ancestral lands and natural resources.

53 The last update (from 2021) can be found available at: <https://www.rcaanc-cirnac.gc.ca/eng/1629394337445/1629394435193>; The land claims process has so far been more successful in the northern regions of Canada than in the more southern regions, where the lands claimed are inhabited by a non-indigenous majority and subjected to an increased number of competing uses. C. Alcantara, Explaining Aboriginal Treaty Negotiation Outcomes in Canada: The Cases of the Inuit and the Innu in Labrador, 40 Canadian J. Pol. Sci. 185 (2007), at 204.

These agreements ultimately seek to replace 'undefined aboriginal rights with a new set of specific treaty rights' in order to provide 'certainty' over land rights.⁵⁴ In order to achieve legal certainty, Canada has traditionally required that indigenous peoples surrender their aboriginal rights to land and natural resources in exchange for clearly defined rights and benefits.⁵⁵ However, since 1986, in response to criticism voiced by indigenous groups and commentators against the 'extinguishment' policy, the Federal Government has sought to achieve the goal of 'certainty' through legal mechanisms that do not require total extinguishment of aboriginal rights.⁵⁶ For instance, some of the land claims agreements concluded since 1986 have replaced 'the language of cession, release and surrender' by clauses providing that aboriginal rights are 'modified' in the agreement. This latter comprises a final and exhaustive definition of the rights and conditions for their exercise.⁵⁷

At the core of all land claims agreements lay indigenous land rights and harvesting rights. These agreements provide indigenous people with the exclusive right to occupy certain tracts of land, generally limited to settlements and their immediate surroundings. These are completed by hunting, fishing and gathering rights on extensive territories corresponding to their traditional lands. For instance, the Nunatsiavut Inuit, upon concluding the LILCA in 2005, secured their ownership over 15,800 km² of land in Northern Labrador (the 'Labrador Inuit Lands').⁵⁸ In addition to land rights, the Nunatsiavut land claims agreement recognises extensive fishing, hunting and gathering rights

54 *Ibid.*, at 185. This objective is framed in the Federal Policy for the Settlement of Native Claims in the following terms: '[Land claims settlements are meant to] provide clear, certain and long-lasting definition of rights to land and resources.', Department of Indian and Northern Affairs Canada Indian and Inuit Affairs Program, Federal Policy for the Settlement of Native Claims 5 (1993).

55 Treaty clauses aimed at extinguishing Aboriginal rights over land and natural resources are found in the treaties concluded between Canada and indigenous peoples during the period 1850–1921. For example, Treaty no. 8, concluded in 1899, which covers a vast territory (324,900 sq. miles) overlapping Alberta, Saskatchewan, British Columbia, and the Northwest Territories, includes a clause stating that 'the said Indians DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors forever, all their rights, titles and privileges whatsoever, to the lands included within the following limits.'

56 A. C. Hamilton, *Canada and Aboriginal Peoples: A New Partnership*, Minister of Indian Affairs and Northern Development (1995); Royal Commission on Aboriginal Peoples, *Treaty-Making in the Spirit of Coexistence: An Alternative to Extinguishment*, Minister of Supply and Services Canada (1995).

57 M. C. Hurley, *Settling Comprehensive Land Claims*, Library of Parliament (2009), available online at: <https://caid.ca/AboSelGov2009.pdf> This issue will be discussed more thoroughly in the next section of this chapter.

58 LILCA, *supra*, Chapter 4.

to the Nunatsiavut Inuit over their traditional territories, covering over 120,000 km² of land and ocean area (the 'Settlement Area').⁵⁹

Furthermore, land claims agreements provide opportunities for aboriginal participation in decision-making processes that may affect their rights, especially in regard to the management of land and natural resources. These agreements have created 'co-management' boards regarding environmental impact assessment and more generally the governance of wildlife, water, land and protected areas.⁶⁰ The boards are generally comprised of an equal number of representatives from the concerned governmental authorities and indigenous groups. Their role is mainly advisory, as the State, in most cases, possesses ultimate decision-making authority.⁶¹

Since 1995, the Federal Government has been negotiating self-government agreements with indigenous groups, either aside from, or part of, broader land claims negotiations.⁶² Self-government arrangements differ significantly regarding their form, the sources of their powers and the extent of their jurisdiction. For example, the Federal Government and the Nunavut Inuit have agreed on achieving self-government through the creation of a new Canadian territory called 'Nunavut', which came into existence on 1 April 1999.⁶³ The jurisdiction of the territory is outlined in a federal statute.⁶⁴ The Nunavut Government is not formally an 'Inuit' institution of self-government, since all residents of Nunavut (indigenous or otherwise) may be elected to public office and vote during elections. That said, the Nunavut Inuit have *de facto* control over the government, as they represent over 85 per cent of the territorial population.⁶⁵ The Nunatsiavut Inuit and the Nisga'a negotiated the creation of their self-government institutions as part of their land claims settlement. The structure, functioning and powers of these governments are defined by the land claims agreement. These governments, unlike the Nunavut govern-

59 *Ibid.*, Chapters 12–13. The whole settlement area where Inuit can exercise their hunting and fishing rights consists of 72,520 km² of land and an additional 48,690 km² of ocean area.

60 The term 'co-management' refers to the arrangements by which power and responsibility for the management of a specific territory or natural resource are shared between the government and local resource users. See generally D. Armitage, F. Berkes, N. Doubleday, *Adaptive Co-Management, Collaboration, Learning, and Multi-Level Governance*, UBC Press (2007), 3.

61 See, for example, T. Rodon, *En partenariat avec l'Etat. Les expériences de cogestion des Autochtones du Canada*, Presses de l'Université Laval (2003), 149–77.

62 Christopher Alcantara and Adrienne Davidson, *Negotiating Aboriginal Self-Government Agreements in Canada: An Analysis of the Inuvialuit Experience*, *Canadian Journal of Political Science / Revue canadienne de science politique* Vol. 48, No. 3 (September 2015 septembre), pp. 553–575.

63 The Nunavut Act, SC 1993, Chapter 28.

64 *Ibid.*

65 A. Légaré, *Canada's Experiment with Aboriginal Self-Determination in Nunavut: From Vision to Illusion*, 15 *Int'l Journal on Minority & Group Rights* 335 (2008), at 347.

ment, are shaped along 'ethnic' lines, as political participation and voting rights are restricted by ethnicity or descent.⁶⁶

The extent to which climate change was factored into the negotiation and shaping of land claims and self-government agreements has yet to be researched. However, considering the silence of land claims agreements regarding climate change and its potential impacts on indigenous rights, it seems fair to assume that when considered – if considered at all – the needs of indigenous communities in relation to climate change mitigation and adaptation played at best a marginal role in land claims negotiations. Therefore, although land claims agreements may indirectly provide indigenous communities with useful tools to respond to climate change, they may also hamper indigenous climate change action in unforeseen manners.

The imperative of climate change adaptation requires land claims agreements, among other factors, to: (1) be flexible enough to be modified to adapt to new needs and challenges induced by climate change; and (2) guarantee indigenous people a meaningful role in climate change governance at the local, regional, national and global levels.⁶⁷ This Chapter will consider land claims agreements between Canada and indigenous peoples, relying primarily on LILCA, with regard to these two factors.

6.4 RECONCILING CERTAINTY AND FLEXIBILITY IN TIMES OF CLIMATE CHANGE

Achieving 'certainty' regarding rights and obligations is the paramount objective of land claims agreements, both from the State and indigenous perspective.⁶⁸ As mentioned previously, 'certainty' has historically been achieved by requiring that indigenous parties to a treaty or land claims agreement to cede, surrender and release to the State all their remaining rights over lands and natural resources in exchange for the rights and benefits provided by the treaty.⁶⁹

If 'certainty' is a shared goal by all parties to land claims negotiations, indigenous peoples vehemently oppose the extinguishment of their rights as a means to achieve this objective. Achieving 'certainty' in this manner severs their unique relationships and responsibilities to the land and 'identif[ies] the

66 LILCA, *supra*, Chapter 17; 1999 Nisga'a Final Agreement available online at <http://www.nkn.ca/files/u28/nis-eng.pdf>, Chapter 11.

67 These issues did not emerge with the onset of climate change. However, the rapidly changing climatic conditions make them more acutely relevant and urgent.

68 L. Dufraimont, *Continuity and Modification of Aboriginal Rights in the Nisga'a Treaty*, 35 UBC L. Rev. 455 (2001–2), at 480. The author defines 'certainty' as 'clear agreement on the extent of the rights of each party, backed up by guarantees that those rights will be respected'. *Ibid.*, at 481.

69 *Ibid.*, at 495.

Crown as the source of all existing Aboriginal rights'.⁷⁰ Hence, indigenous people demand that 'certainty' be achieved through mechanisms that affirm, rather than eliminate, their aboriginal rights.⁷¹ Moreover, without repudiating 'certainty' as an objective for land claims agreements, indigenous peoples require that such agreements be conceived as constitutional documents meant to govern the evolving relationships between the parties in the long term, rather than as legal documents settling definitively and exhaustively outstanding indigenous land claims.⁷²

Since its comprehensive land claims policy was modified in 1986, the Federal Government has agreed, in some land claims negotiations, to experiment with alternative arrangements intended to provide for 'certainty' without requiring the blanket extinguishment of aboriginal rights.⁷³ For example, the LILCA, which constitutes 'the full and final settlement of the aboriginal rights' of Labrador Inuit in Canada,⁷⁴ confirms the existence of the Labrador Inuit aboriginal rights 'in and to Labrador Inuit Lands', although extinguishing their rights to sub-surface resources and in all other lands in Canada.⁷⁵ The existing rights, however, are 'modified, and continue as modified, as set out in the Agreement'.⁷⁶ Moreover, for greater 'certainty', the Nunatsiavut Inuit agreed in LILCA to cede and release to the government of Canada and the Province any aboriginal right in Labrador Inuit Lands that may be recognised by a court of last resort 'to the extent that the aboriginal right is other than, or different in attributes or geographical extent from, the rights of Inuit as set out in the Agreement'.⁷⁷

Finally, LILCA is meant to be the Nunatsiavut Inuit's *full* and *final* settlement. Hence, while confirming that the agreement may be amended consensually,⁷⁸ it does not contain binding mechanisms providing for its periodic review. Accordingly, the parties' capacity to demand that a land claims agreement be modified in order, for instance, to account for an aboriginal right newly

70 *Ibid.*, at 496. See also M. L. Stevenson, *Visions of Certainty: Challenging Assumptions*, Law Commission of Canada & British Columbia Treaty Commission, *Speaking Truth to Power: A Treaty Forum*, Minister of Public Works and Government Services Canada (2000), at 115; M. Saint-Hilaire, *La proposition d'entente de principe avec les Innus: vers une nouvelle génération de traité?*, 44 *Les Cahiers de Droit* 395 (2003), at 402–3.

71 Dufraimont, *supra*, at 497; Saint-Hilaire, *supra*, at 405–12.

72 Stevenson, *supra*, at 121.

73 Saint-Hilaire, *supra*, at 407.

74 LILCA, *supra*, Art.2.11.1 (a).

75 *Ibid.*, Arts. 2.11.2, 2.11.3.

76 *Ibid.*, Art.2.11.4.

77 *Ibid.*, Art.2.11.5. These clauses constitute a modified version of those found in the 1999 Nisga'a Final Agreement, *supra* (see Dufraimont, *supra*). According to some commentators, those alternative clauses, while at first glance less offensive to indigenous peoples, have the same result as the traditional extinguishment clauses; see, for example, Saint-Hilaire, *supra*, at 415–18; Stevenson, *supra*, at 114.

78 LILCA, *supra*, Art.2.16.1.

recognised by a court of justice, or for significant changes in the parties' situation, hinges to a large extent on the quality of the relationships between the actors, as well as on the competing interests at stake and their relative weight at the negotiation table.⁷⁹

The 'need to be flexible in order to allow the relationship to grow and evolve with time',⁸⁰ while also providing for 'certainty', is widely acknowledged. This imperative has now become even more pressing since the impacts of climate change may render some of the rights provided by land claims agreements less relevant – if not obsolete – in regard to emerging needs and challenges induced by shifting environmental conditions. For example, in the Canadian North, melting ice and changing snow conditions may restrict access to some territories for harvesting activities, thus reducing the total area where the rights guaranteed by the land claims agreements can be effectively exercised. Moreover, in response to climate change, the trajectory of some migratory species hunted by a group of Inuit may shift to territories that are not covered by their land claims agreement. Land claims agreements, however, do not expressly provide for the potential replacement of lands which can no longer be accessed, due to shifting environmental conditions, for exercising harvesting rights, nor for the renegotiation of the territorial boundaries where harvesting rights can be exercised in the event of a radical change in the migratory pattern of some animal species where harvesting rights can be exercised in the event of a radical change in the migratory pattern of some animal species.

Land claims agreements may be amended to respond to climate change by securing the consent of all parties.⁸¹ However, without mechanisms aimed at outlining the circumstances and conditions at which the parties *should* renegotiate the agreement and at levelling the power relationships between the parties through equitable renegotiation procedures, amending land claims agreements could impose a daunting burden on indigenous groups, especially in situations where their interests regarding climate change adaptation compete with other powerful interests (for example, where potential replacement lands are subject to mining or oil and gas interests).⁸²

79 For a critique of land claims agreements not providing for periodic review mechanisms, see Saint-Hilaire, *supra*, at 403.

80 Stevenson, *supra*, at 121.

81 For example, as of this writing, the James Bay and Northern Quebec Agreement available online at <http://www.gcc.ca/pdf/LEG000000006.pdf>, has been modified 21 times since it was concluded in 1975. In a qualitative study conducted in Inuit communities in the Inuvialuit region, Nunavut and Nunavik, researchers Konstantia Koutouki and Natasha Lyons found that 'Inuit perceive their land claims agreements not as rigid legal documents with predefined constraints, but as active and flexible documents that are subject to ongoing negotiations and alterations'. Koutouki, Lyons, *supra*, at 531.

82 For a discussion of the power relationships between the State and indigenous peoples in the context of land claims agreements negotiations, see Alcantara, *supra*, at 188.

Beyond finding alternative models to the complete extinguishment of Aboriginal rights to achieve 'certainty', the land claims agreements' flexibility could be enhanced through equitable periodic review mechanisms and dispute resolution processes designed to ensure that these agreements can evolve through time.⁸³ Such mechanisms would foster the reconciliation of land claims agreements with indigenous visions of treaty-making as an ongoing dialogue creating 'a permanent living relationship' of a constitutional nature between co-existing nations.⁸⁴

The only land claims agreement to have included a periodic review mechanism is the agreement-in-principle concluded between the Canadian Government, the province of Quebec and the Innu First Nations of Mamuitun and Nutashkuan.⁸⁵ This agreement-in-principle first 'recognize[s], affirm[s] and continue[s]' the aboriginal rights of the Innu communities party to the agreement, provided that these rights 'shall have the effects and shall be exercised in the manner provided for in the Treaty..'.⁸⁶ For greater certainty, the agreement specifies that 'the effects and manner in which the aboriginal rights of these First Nations are exercised other than those set out in the Treaty shall be suspended'.⁸⁷

Although the agreement is meant to 'be of an indefinite duration', it provides, in addition to confirming the possibility for mutually agreed upon amendment,⁸⁸ that the agreement shall be subjected to periodic reviews during which 'the Parties shall determine whether the Treaty should be amended to take into account new circumstances which have significant effects on its provisions'.⁸⁹ The review process could permit the updating of the agreement in order for the concerned indigenous groups to benefit from 'any constitu-

83 As affirmed in Justices LeBel and Deschamps's dissenting opinion in *Beckman v Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103 (Can.), at para 111 (the majority judgment does not comment on this point): 'Nor does legal certainty imply that an equitable review mechanism cannot be provided for in a treaty'.

84 J.S.Y. Henderson, *Empowering Treaty Federalism*, 58 Saskatchewan L. Rev. 241(1994), at 248–9.

85 Agreement-in-Principle of General Nature Between the First Nations of Mamuitun and Nutashkuan, the Government of Quebec and the Government of Canada (hereinafter 'Mamuitun and Nutashkuan Agreement-in-Principle'), available online at: <https://www.rcaanc-cirnac.gc.ca/eng/1100100031951/1539797054964>. This agreement-in-principle was concluded 31 March 2004. Agreements-in-principle are documents outlining the major elements of the final treaty to be negotiated. The negotiations between the State and the First nations of Mamuitun and Nutashkuan are suspended indefinitely. Hence, the provisions of the agreement in-principle have yet to become legally binding between the parties. For a detailed analysis of this agreement, see Saint-Hilaire, *supra*, at 418–25.

86 Mamuitun and Nutashkuan Agreement-in-Principle, *supra*, Art.3.3.1.

87 *Ibid.*, Art.3.3.4.

88 *Ibid.*, Arts. 17.1.1–17.1.4.

89 *Ibid.*, Arts.3.3.10, 17.2.2. The first two periodic reviews should take place during the seventh and the seventeenth year following the coming into force of the agreement. Thereafter, the reviews shall take place every 20 years.

tional amendment related to the aboriginal peoples', or from 'current or future international conventions regarding aboriginal peoples' that have been ratified and implemented by Canada.⁹⁰ It could also allow treaty amendment to integrate aboriginal rights newly recognised by a court of law of appellate jurisdiction, but only in regard to 'a matter which the provisions of the Treaty are not truly designed to settle'.⁹¹

In the latter case, if the parties are unable to reach an agreement regarding the incorporation in the treaty of the newly recognised aboriginal right, one of the parties could submit the dispute to the arbitration procedure set out in the agreement.⁹² The arbitrator, chosen by the parties from the list that they have previously established, would resolve the issue according to equity, and without being bound by strict rules regarding proof and procedure.⁹³ The arbitration award would be final and bind the parties.⁹⁴ The arbitration procedure, however, would not be applicable to any other disputes resulting from the periodic review process, for instance, regarding the incorporation in the agreement of constitutional amendments or international conventions pertaining to indigenous peoples.⁹⁵

This agreement-in-principle provides a solid basis to conceive more flexible and dynamic land claims agreements, thus enhancing the capacity of indigenous groups to adapt to fast changing environmental conditions. Developing a detailed scheme for a periodic review procedure aimed at fostering indigenous peoples' ability to adapt to climate change would exceed the scope of this chapter. Periodic review processes in land claims agreements could expressly provide for the treaty to be reviewed at determinate intervals to account for climate change impacts that are impairing the rights and obligations of the parties, including indigenous communities' land and harvesting rights. In order for such process to preserve 'certainty' regarding the rights and obligations of the parties, however, the specific circumstances justifying the review would need to be precisely outlined in the agreement. To settle any dispute that may arise regarding such an amendment in a timely, equitable and cost-effective manner, the agreement should include dispute resolution mechanisms tailored to minimise power imbalances between the parties. These mechanisms should cover the appointment of the arbitrator, the rules and

90 *Ibid.*, Arts. 3.3.11, 3.3.12, 17.2.7.

91 *Ibid.*, Art. 3.3.13.

92 *Ibid.*, Arts. 15.2.1, 15.5.1.

93 *Ibid.*, Arts. 15.3.1, 15.5.5.

94 *Ibid.*, Art.15.5.6.

95 *Ibid.*, Art.15.2.1. This provision specifies that the dispute resolution procedures provided for in the agreement apply to 'the settlement of any dispute which arises in the application and interpretation of the Treaty'. It would not apply to disputes related to the amendment and periodic review process. Saint-Hilaire, *supra*, at 424.

principles binding on the arbitrator concerning the procedure and substance of the dispute, and the enforceability of the award.⁹⁶

6.5 PROMOTING MEANINGFUL PARTICIPATION OF INDIGENOUS COMMUNITIES IN CLIMATE CHANGE GOVERNANCE

Indigenous peoples are often depicted as being 'vulnerable' to or 'victims' of climate change. These epithets play an obvious political role. They reflect the fact that indigenous peoples are disproportionately affected by the impacts of climate change, while also being widely marginalised from climate-related decision-making processes.⁹⁷ This reality, however, should not obscure the active role that indigenous peoples could play, and in some cases already play, in mitigating and adapting to climate change. Accordingly, many commentators emphasise the importance of fostering indigenous peoples' participation in the governance of climate change, not only with a view to refining the state of knowledge regarding the impacts of climate change, but also in designing policies, programs and actions for climate change mitigation and adaptation that are tailored to the specific circumstances of the affected communities.⁹⁸

Indigenous participation in climate change governance can be assessed at multiple levels, from local to global decision-making processes. At the local and regional levels, indigenous peoples' capacity to control access and uses of their ancestral lands and resources could foster their capacity to adapt to climate change. For instance, such control could enable indigenous groups to protect land and resources that are essential to their culture, way of life and economies against industrial development, or to adopt norms in matters related to hunting, fishing, gathering and agricultural activities that would enhance their ability to adapt to changing environmental conditions in culturally acceptable ways. Moreover, indigenous people could play a role in mitigating climate change, for instance by imposing strict greenhouse gas emissions levels on economic development projects on their ancestral lands (for example, mining and hydrocarbons projects), by managing forestry, or by adopting 'green' building codes. At the national and global levels, indigenous people could be involved in transforming the politics of climate change, notably in attempting, along with other actors such as the small insular countries, to reshape the dominant understanding of climate change from an essentially

96 Saint-Hilaire, *supra*, at 405.

97 M. Limon, Human Rights and Climate Change: Constructing a Case for Political Action, 33 *Harv. Envt'l L. Rev.* 440 (2009), at 451; H. M. Osofsky, Inuit Petition as a Bridge – Beyond Dialectics of Climate Change and Indigenous People's Rights, 31 *Am. Indian L. Rev.* 675, (2007), at 689–91; Tsosie, *supra*, at 1627–8, 1631–2.

98 Hanna, *supra*, at 1; Thériault, *supra*; Tsosie, *supra*, at 199–200.

techno-scientific and economic issue to an issue regarding primarily human and indigenous fundamental rights.⁹⁹

In Canada, the capacity of indigenous people to address climate change through their own governance institutions varies considerably, depending on the model of governance they inherited or negotiated through their particular colonial legacies.¹⁰⁰ Since 1995, the Canadian government has concluded self-government agreements with several indigenous groups. These agreements, while providing indigenous people with increased powers over their communities, lands and natural resources, are not without their shortcomings in terms of climate change action, as illustrated by the Nunatsiavut self-government agreement.

The Inuit from Nunatsiavut negotiated a self-government agreement as part of their broader land claims negotiations.¹⁰¹ The Nunatsiavut governance system is structured by regional governmental institutions and five local governments representing each Inuit community. The regional government is comprised of a President, an Executive Council and a Legislative Assembly.¹⁰² Only Nunatsiavut Inuit are eligible to hold public office in the regional government and vote during elections. The Legislative Assembly is elected to 'represent the Labrador Inuit and to ensure government of Nunatsiavut by the Labrador Inuit under the Labrador Inuit Constitution'.¹⁰³ The local governments are headed by a council formed by an *AngajukKak* (who acts as the mayor) and elected councillors.¹⁰⁴

Both levels of governments possess extensive powers to enact laws on subject matters relevant to addressing climate change. In particular, the Nunatsiavut regional government 'may make laws in relation to the protection of the environment in Labrador Inuit Lands and in Inuit Communities'.¹⁰⁵ In the exercise of this power, the Nunatsiavut Assembly adopted the Nunatsiavut Environmental Protection Act in February 2011, which aims to 'maintain an environment that is capable of sustaining the health of the Inuit' and to 'ensure

99 Limon, *supra*, at 451. For a precedent of indigenous peoples' – for instance, the Inuit's – influence in shaping the agenda of international environmental negotiations, see D. L. Downie, T. Fenge (eds), *Northern Lights Against POPs: Combating Toxic Threats in the Arctic*, McGill-Queen's University Press (2003).

100 On the different models of indigenous governance in Canada, see Y. D. Belanger (ed.), *Aboriginal Self-Government in Canada: Current Trends and Issues*, Purich, Saskatoon (2008).

101 The Nunatsiavut self-government was created by LILCA, *supra*, Chapter 17. This chapter is completed by the Labrador Inuit Constitution adopted under the authority of the Agreement, available online at <http://www.nunatsiavut.com/index.php/en/constitution>.

102 Labrador Inuit Constitution, *supra*, Art.3.1.2.

103 *Ibid.*, Art.4.1.3.

104 *Ibid.*, Art.10.4. The AngajukKak of each community also sit at the Nunatsiavut Legislative Assembly, *ibid.*, at Art.4.1.4; LILCA, *supra*, Art. 17.1.1.

105 LILCA, *supra*, Art.17.11.1. See also Art.11.3.3 (environmental assessment procedure).

good management of the environment and its natural resources in accordance with Inuit knowledge, culture and values'.¹⁰⁶

In order to achieve these goals, the statute contains provisions regarding water and land protection, environmental authorisations and environmental impact assessment procedures without explicitly addressing climate change.¹⁰⁷ However, it provides the Nunatsiavut government and its Minister of Lands and Natural Resources with extensive powers to develop regulations regarding the imposition of standards for environmental quality, the establishment of emission limits and the reduction of climate impact.¹⁰⁸

In addition to the Nunatsiavut Environmental Protection Act, the Labrador Inuit Charter of Rights and Responsibilities¹⁰⁹ recognises the right of every Labrador Inuk:¹¹⁰

“To an environment that is not harmful to his or her health or well-being and to have the environment protected for the benefits of present and future generations through reasonable Inuit laws and other measures that: (a) prevent pollution and ecological degradation; (b) promote conservation; (c) secure ecologically sustainable development and use of renewable and non-renewable resources while promoting justifiable economic and social development of Labrador Inuit.”

In accordance with the Labrador Inuit Constitution, this environmental right can be enforced by the Nunatsiavut Assembly and, ultimately, by the Inuit Court.¹¹¹

Beside environmental protection, the Nunatsiavut government may adopt laws regarding the administration, control and management of Inuit-owned lands, the exercise of Inuit wildlife harvesting rights and Inuit ‘environmental health’.¹¹² Furthermore, Inuit local governments may make by-laws regarding the prevention and remediation of erosion, zoning and the regulation of buildings.¹¹³ These powers could be exercised in order to impose energy efficiency standards on buildings or to mitigate the effects of erosion on coastal communities. These have become more acute with global warming and the resulting intensification of storms and permafrost melting.¹¹⁴

106 2010-07 Bill to Provide Protection of the Environment in Labrador Inuit Lands and the Inuit Communities, and to Provide for the Environmental Assessment of Initiatives on Labrador Inuit Lands, Art.1.3.

107 *Ibid.*, Arts.3.5.1, 3.5.2, 3.7.1–3.7.6, 4.1–4.18.

108 *Ibid.*, Art.133. To the author’s knowledge, such regulations have yet to be adopted.

109 Labrador Inuit Constitution, *supra*, Chapter 2.

110 The term ‘Inuk’ is used to designate an individual who is Inuit.

111 Labrador Inuit Constitution, *supra*, Art.2.3.3. About the Inuit Court, see LILCA, *supra*, Part 17.31, and Labrador Inuit Constitution, *supra*, Part 9.2.

112 LILCA, *supra*, Arts. 4.4.4, 10.12.1, 12.7.1, 12.7.2, 17.13.1 (a).

113 *Ibid.*, Arts. 17.41.3(b), 17.41.3(c). In the event of a conflict between Inuit local governments’ by-laws and a federal or provincial law, the latter prevails. Art.17.41.4.

114 ACIA (2004), *supra*, 93–7.

Finally, beyond the powers of their self-governing institutions, the Nunatsiavut Inuit participate actively in decision-making processes regarding wildlife, plants, lands, the ocean, national parks and protected areas in the entire settlement area through the consultation mechanisms and co-management institutions established by LILCA.¹¹⁵ However, ultimate decision-making authority generally rests with State authorities, who can accept or reject in part or as a whole recommendations made by co-management boards or the Nunatsiavut government.¹¹⁶ If conducted in good faith and with the sincere will to integrate Inuit knowledge, values and needs into decision-making processes, co-management could foster the capacity of Inuit communities to adapt to climate change. This would enable the intimate experience of Inuit with their shifting environment to be factored into laws and policies.¹¹⁷

Overall, upon concluding the LILCA, the Nunatsiavut Inuit acquired significant powers that could be mobilised to tackle climate change. These powers are bound by important limits that may constrain their capacity to address effectively climate change impacts on their communities. Among those limits, the jurisdiction of the Nunatsiavut government to impose restrictions on greenhouse gas emissions extends only to Inuit-owned lands in Nunatsiavut, rather than to the entire region.¹¹⁸ Moreover, in the event of a conflict between an Inuit law and a provincial or federal law regarding an environmental matter, the latter will prevail.¹¹⁹ Inuit environmental laws, furthermore, do not apply to undertakings that were in existence when they came into force.¹²⁰

The Nunatsiavut Inuit also exercise limited control over economic development projects promoted by the State and industries outside Inuit-owned lands

115 LILCA, *supra*, Chapter 5 (water management); Chapter 6 (ocean management); Chapter 9 (national parks and protected areas); Chapter 11 (environmental assessment); Chapter 12 (wildlife and plants); Chapter 13 (fisheries). The settlement area covers more than 120,000 km² of lands. By contrast, the legislative powers of the Nunatsiavut government only extend to Inuit-owned lands, which covers an area of approximately 15,800 km².

116 For example, LILCA, *supra*, Art.10.6.1 (approval of the land use plan); 12.9.4–12.9.7 (approval of the Torngat Wildlife and Plants Co-management Board's decision); 13.11.8 (approval of the Torngat Joint Fisheries Board's recommendations).

117 D. Armitage, F. Berkes, A. Dale *et al.*, Co-Management and the Co-Production of Knowledge: Learning to Adapt in Canada's Arctic, 21 *Global Environ. Change* 995 (2011), at 996. According to many commentators, however, co-management processes are often fraught with tensions, particularly with regard to the integration of indigenous knowledge and preferences to decision-making processes, especially where competing interests of resource users are at stake; see, for example, P. Nadasdy, *Hunters and Bureaucrats. Power, Knowledge, and Aboriginal-State Relations in the Southwest Yukon*, UBC Press (2003); M. G. Stevenson, *The Possibility of Difference: Re-Thinking Co-Management*, 65 *Human Organization* 167 (2006); G. White, *Cultures in Collision: Traditional Knowledge and Euro-Canadian Governance Processes in Northern Land-Claim Boards*, 59 *Arctic* 401 (2006).

118 LILCA, *supra*, Art.17.11.1, see remark at fn 78.

119 LILCA, *supra*, Arts. 11.3.4, 17.11.13.

120 LILCA, *supra*, Art.17.11.2.

but on lands that may still be significant for Inuit harvesting activities or for other cultural and symbolic reasons. With the increased interest of investors for exploitation of natural resources in the North, which will be rendered more accessible following permafrost and ice melting (for example, minerals, oil and gas), industrial development could eventually exert significant pressure on Inuit culture and economies.¹²¹ Like other recent land claims agreements, the LILCA provides for Inuit participation in the economic benefits resulting from economic development activities in the settlement area.¹²² These provisions could foster the capacity of Nunatsiavut Inuit to access material and technical resources necessary to address climate change, or to invest in 'green' development projects on their territories.¹²³ However, Inuit strategies for climate adaptation, notably in regard to local food production, could be thwarted by incompatible economic development projects imposed on them by the State and economic actors.

The Inuit's capacity to adapt their food economies to climate change could be hampered by rigid biodiversity conservation initiatives ill-adapted to their needs.¹²⁴ Although the Nunatsiavut Inuit have a voice in wildlife management through self-government and co-management arrangements, in case of conflicts between the Inuit and the State, the State conservation measure prevails.¹²⁵ Indeed, it is widely acknowledged that Inuit adaptation to climate change hinges on effective measures aimed at protecting the biota threatened by climate change.¹²⁶ Such measures, if conceived and implemented without taking into account Inuit needs in terms of climate adaptation, may hamper their ability to address climate change. Conservation measures may potentially result in depriving the Inuit of much needed food sources without, in return, giving them access to equivalent replacement resources (for instance, an increased access to alternative wildlife resources).¹²⁷

121 L. Johnson, *The Fearful Symmetry of Arctic Climate Change: Accumulation by Degradation*, 28 *Env't & Planning* 828 (2010).

122 LILCA, *supra*, Chapters 7, 14.

123 LILCA, *supra*, Chapter 7. See also Arts. 6.7.1–6.7.16 (impacts and benefits agreements for major economic development project in the ocean zone covered by LILCA) and Art.9.2.2 (impacts and benefits agreements related to the establishment or enlargement of national parks).

124 S. Thériault, *The Food Security of the Inuit in Times of Change: Alleviating the Tension Between Conserving Biodiversity and Access to Food*, 2 *J. Hum. Rts. & the Env't* 136 (2011).

125 LILCA, *supra*, Arts.12.7.4, 12.7.5, 12.9.4, 12.9.5.

126 See, for example, G. Duhaime *et al.*, *Sustainable Food Security in the Canadian Arctic: An Integrated Synthesis and Action Plan*, in *Arctic Food Security* 73 (G. Duhaime and N. Bernard eds., 2008).

127 Thériault (2011), *supra*, at 137–8. For an example of a resource management conflict between the State and the Inuit that has the effect of compromising both Inuit food economies and resource conservation objectives, see M. Tyrrell, *Sentient Beings and Wildlife Resources: Inuit, Beluga Whales and Management Regimes in the Canadian Arctic*, 35 *Hum. Ecology* 575 (2007).

Finally, the Inuit, like other indigenous groups, have so far been largely marginalised in national and international decision-making processes related to climate policies.¹²⁸ Despite the well-known and disproportionate impacts of climate change on their communities, they have not been consulted prior to the adoption of federal policies on climate change. A discussion of the potential modalities of indigenous participation in national and international climate change policy-making processes would exceed the scope of this chapter. Considering the acuteness of the actual and likely effects of climate change on aboriginal and treaty rights protected by the Canadian constitution,¹²⁹ the Canadian government may have breached its constitutional duty to consult, if not to reasonably accommodate, indigenous peoples before making decisions regarding its climate policies at the national and international levels.¹³⁰

6.6 GLOBALISATION IN THE ARCTIC ACCELERATED BY CLIMATE CHANGE

Globalisation results in increasing industrialisation and other anthropogenic activities, leading to economic development that causes increased emission of greenhouse gases. The emission of greenhouse gases contributes to global warming. Due to global warming, the overall climate of the world is changing rapidly. In the Arctic, the general warming is likely to be faster, with temperature increases likely to range between 2°C and 9°C by 2100.¹³¹ During the winter, the warming could be three to four times greater than global averages.¹³² These results will be visible in the Arctic, with higher temperatures, a rise in sea level, melting of sea ice and glaciers, and increased precipitation

128 T. Koivurova, L. Heinämäki, *The Participation of Indigenous Peoples in International Norm-Making in the Arctic*, 42 *Polar Record* 101 (2006), at 102; *Tsosie*, *supra*, at 195–208.

129 More specifically *Constitution Act, 1982*, *supra*, s. 35.

130 This duty has been affirmed by the Supreme Court of Canada in many decisions, including *Haida Nation v British Columbia* (Minister of Forest), [2004] 3 SCR 73 (Can.); *Mikisew Cree First Nation v Canada* (Minister of Canadian Heritage), [2005] 3 SCR 388 (Can.); *Beckman v Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103 (Can.). As affirmed by the Supreme Court in *Haida Nation*, '[t]he foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it'. para 35. In order to establish a breach to the government's duty to consult, it would be necessary to establish a link between Canada's omission to tackle effectively climate change and impairment to an aboriginal or treaty rights. The proof of such link could be daunting. See e.g. Limon, *supra*, at 457.

131 See T. Koivurova *et al.*, *Background Paper Indigenous Peoples in the Arctic*, Arctic Transform 5 (2008), available at: <https://www.arctic-transform.eu/download/IndigPeoBP.pdf>; IPCC latest report of 2022 verifies these predictions and its analysis can be found at: <https://www.carbonbrief.org/in-depth-qa-the-ipccs-sixth-assessment-on-how-climate-change-impacts-the-world>.

132 J. McIver, *The Arctic*, in *Indigenous Peoples, the Environment and Law*, 160 (L. Watters ed., 2004).

in some areas and drought in others.¹³³ There will be large-scale impacts on the unique Arctic environment. Arctic ecosystems support species well adapted to the extreme conditions, such as short growing seasons, low light availability and cold temperatures.¹³⁴ In the marine area of the Arctic, sea ice is the dominant feature.¹³⁵ The survival of certain marine animals, such as polar bears, is dependent on the existence of ice. Although the absence of sea ice is causing a reduction in Arctic marine species, it is important to note that some species, especially commercial fish (for example, cod and herring in the North Atlantic and walleye and Pollock in the Bering Sea), are expected to benefit from the larger expanse of open water leading to increased productivity.¹³⁶

The rapid melting of sea ice as a consequence of the warming of the Arctic, is, on the one hand creating new opportunities and, on the other hand, posing new challenges to the Arctic environment.¹³⁷ The opportunities include increased economic activities, whereas the challenges are mostly about preserving the unique nature of the Arctic environment. The opening up of two major sea routes for a longer period of time will increase shipping and navigation.¹³⁸ In addition, the regional waters surrounding the Arctic countries will also be used for shipping. Due to these facts, there will be a rise in commercial activities. Transportation routes will also be established on the land area to carry goods from the sea ports. The Arctic seabed is considered to be the next big reservoir of the world's undiscovered oil and gas resources so seabed activities will most likely increase as well as an increase in the onshore and offshore mining and mineral activities. The tourism industry will flourish. Consequently, there will be a gradual rise in industrial and other commercial

133 J. J. McCarthy *et al.*, *Climate Change 2001: Impacts, Adaptation and Vulnerability*, Contribution of Working Group II to the Third Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press (2001), 26.

134 ACIA (2005), *supra*, 481.

135 E. J. Molenaar *et al.*, Introduction to the background papers, *Arctic Transform* (2008).

136 Parry *et al.* (2007), *supra*, 669.

137 WWF, Six ways loss of Arctic ice impacts everyone, 2020, available at: <https://www.worldwildlife.org/pages/six-ways-loss-of-arctic-ice-impacts-everyone>.

138 The Arctic Climate Impact Assessment (ACIA) Report 2004 identified ten major findings as consequences of the rapid climate change in the Arctic One of the findings (number six) states that the reduced sea ice is very likely to increase marine transport and access to resources. See S. Hasso, *ACIA: Impacts of a Warming Arctic*, Cambridge: Cambridge University Press (2004), 10–11, 82–85; In 2008 there was an update by the WWF on ACIA that verified ACIA's findings and can be found at: https://wwfeu.awsassets.panda.org/downloads/final_climateimpact_22apr08.pdf; The most recent Arctic Climate Change update of 2021 briefly discussed the abovementioned issues and can be found at: <https://www.amap.no/documents/doc/arctic-climate-change-update-2021-key-trends-and-impacts.-summary-for-policy-makers/3508>.

activities, as well as societal changes resulting from large-scale infrastructural developments.¹³⁹

The increase in the commercial activities will have negative consequences on the Arctic environment. Increased shipping and navigation will hinder the movement of migratory marine mammals and, at the same time, there will be an increase in the risk of oil spills.¹⁴⁰ Mineral and mining activities will contribute to the emission of greenhouse gases into the atmosphere, which will further accelerate climate change, causing the Arctic sea ice to melt faster. Seabed activities will rise, and will likely generate pollution caused by oil spills occurring during, for example, hydrocarbon exploitation and transportation. As clean-up operations, especially in the areas of sea ice, will be extremely difficult and expensive, a single large oil spill in the wrong place and at the wrong time of the year would have very serious, population-wide impacts on seabirds, fish, and marine mammals.¹⁴¹ Pollution as a whole will cause the extinction of endemic species and will alter the bio system irreversibly, resulting in far-reaching consequences for the ecosystem at large. Industrial and other commercial activities as well as infrastructural development will have negative environmental impacts in the whole region.¹⁴² Consequently, coastal communities in the Arctic, whose livelihoods depend upon the unique nature of the Arctic environment, will be affected greatly. Indigenous communities will likely lose their livelihoods and culture, since their “traditional lifestyle and cultural heritage depend upon the preservation of the Arctic environment”.¹⁴³ The Arctic Climate Impact Assessment (ACIA) report, a scientific report describing the impacts of climate change in the Arctic, identifies indigenous peoples as exceptionally vulnerable to the climate change.¹⁴⁴

139 According to the Arctic Human Development Report, it is unlikely that Arctic societies and cultures can remain resilient in the face of all the biophysical and societal changes. The Arctic societies face an unusual combination of biophysical and socio-economic stresses, many of which can be linked to oil and gas development. See O. R. Young, N. Einarsson, A Human Development Agenda for the Arctic: Major Findings and Emerging Issues, in Arctic Human Development Report, (Akureyri: Stefansson Arctic Institute, 2004), 230. See also O. Langhelle *et al.*, Framing Oil and Gas in the Arctic from a Sustainable Development Perspective, in Arctic Oil and Gas Sustainability at risk 32 (A. Mikkelsen, O. Langhelle eds., 2008).

140 ACIA (2005), *supra*, 84–85.

141 S. Smith, Environmental Impacts of Offshore Oil and Gas Development in the Arctic, WWF International Arctic Programme, available online at: <https://www.pame.is/document-library/amsp-documents/187-offshore-oil-and-gas-wwf/file>.

142 B. Carpenter, Warm is the New Cold: Global Warming, Oil, UNCLOS Art.76, and How an Arctic Treaty Might Stop a New Cold War, 39 Environmental Law Review (2009) 239.

143 The Arctic region is inhabited by more than thirty indigenous peoples, see more information at: <https://www.arcticcentre.org/EN/arcticregion/Arctic-Indigenous-Peoples>; N. Matz-Lück, Planting the Flag in Arctic Waters: Russia’s Claim to the North Pole, 1(2) Göttingen J. of Int’l L. 255 (2009).

144 ACIA (2005), *supra*, 651, 685, 1014. See also Parry *et al.*, (2007), *supra*, 672.

The following sections examine the way in which indigenous peoples in the Arctic are affected by climate change.

6.6.1 Societal change

Indigenous peoples in the Arctic live as a community, closely connected to each other, just as their livelihood and culture are deeply connected to the land on which they live. Hunting, gathering, trapping, and reindeer and caribou herding are traditional activities.¹⁴⁵ As climate change creates opportunities for rapid globalisation, social changes occur through capital flows, human migration, and gradual industrialisation. Consequently, new lifestyles, educational systems, technology, food, and diseases are introduced. In addition, modern transportation, infrastructural change, and State policies have increasingly affected all features of indigenous lifestyles.¹⁴⁶ The breakdown of interpersonal ties leads to more and more nuclear families.¹⁴⁷ The traditional knowledge, which gives members of indigenous communities the understanding of their environment, binding them strongly to nature, has now become inadequate as changes are occurring so fast. Many people feel alienated from the land of their ancestors.¹⁴⁸ The introduction of mixed culture, the gradual loss of traditional activities,¹⁴⁹ and the introduction of the modern school system, which has caused younger generations to slowly lose their native languages, contribute to large-scale societal change. The greatest challenges for many indigenous communities therefore include: relocation and urbanisation, as well as the northward advancement of agriculture.¹⁵⁰ The ultimate effect of societal change is the emergence of various social problems, such as poverty, depression, alcoholism, drug addiction, permanent unemployment, and rising suicide rates.¹⁵¹

145 James D. Ford, Nia King, Eranga K. Galappaththi, Tristan Pearce, Graham McDowell, Sherilee L. Harper, *The Resilience of Indigenous Peoples to Environmental Change*, *One Earth*, Volume 2, Issue 6, 2020, Pages 532-543, ISSN 2590-3322, <https://doi.org/10.1016/j.oneear.2020.05.014>.

146 M. Nuttal, *supra*, 53–54.

147 Koivurova *et al.* (2008), *supra*, 16.

148 ACIA (2005), *supra*, 670, 675. See also Parry *et al.*, *supra*, 668.

149 Due to rapid climate change, traditional cultural festivals of the indigenous communities, which need certain climatic conditions to be observed, now need to be re-timed or are not being celebrated, resulting in a loss of traditional culture. See Koivurova *et al.* (2008), *supra*, 17.

150 M. Nuttal, *supra*, 4–5, 11–13.

151 ACIA (2005), *supra*, 17.

6.6.2 Economic disparities

Climate change and globalisation have introduced a mixed economy within the indigenous communities of the Arctic. Cash flow from the South has gradually replaced traditional harvesting. International trade, investment, tourism, and other commercial activities are creating new opportunities, the benefits of which can be enjoyed by indigenous communities.¹⁵² Agricultural growth, increased fisheries, resource extraction (offshore and onshore), and the tourism industry will create more jobs for locals and promote greater investments in infrastructure.¹⁵³ These socio-cultural changes will lead to the introduction of modern school systems in Arctic communities, which will enable youth to access increased job opportunities. At present, indigenous people in the Arctic face high rates of unemployment and poverty as globalisation has caused living costs to rise. Climate change causes permafrost to thaw, resulting in higher maintenance costs. The devastation of roads causes remote coastal communities to be cut off from the main population centres, disrupting intercommunity trade.¹⁵⁴ However, with the melting of sea ice, marine transportation has become more accessible, and for longer periods of time.¹⁵⁵ This will eventually open up new routes. The traditional hunting ground of ice-dependent marine species, such as the polar bear, has been affected, as hunters need to travel longer distances than before. Traditional hunting rooted in indigenous culture provides traditional foodstuff that cannot be replaced by imported food because of nutrition and costs.¹⁵⁶ The gap between rising costs of living and decreasing possibilities to acquire financial resources may mean impoverishment for many people. Food security may consequently be threatened¹⁵⁷ despite the possibility of alternative sources of subsistence from increased production in agriculture and fisheries. Traditional subsistence activities bring economic benefit from the production of different kinds of goods which are then exported by indigenous people. These include products made from the hides of hunted animals, such as clothing, handicrafts, souvenirs, and other accessories. Both production and export are being affected due to the overall changes in the Arctic causing indigenous communities to suffer economically.

152 Gassiy, V., 2018, 'Indigenous Communities in the Arctic Change in Socio-Economic and Environmental Perspective', in M. Kanao, Y. Kakinami, G. Toyokuni (eds.), *Arctic Studies – A Proxy for Climate Change*, IntechOpen, London, available at: <https://www.intechopen.com/chapters/64644>.

153 ACIA (2005), *supra*, 16.

154 Please see this report of 2021 by the World Bank that discusses in detail these issues: <https://www.worldbank.org/en/topic/indigenouspeoples>.

155 ACIA (2005), *supra*, 668–70.

156 F. Lynge, *Indigenous Peoples between Human Rights and Environmental Protection – An Arctic Perspective*, 64 *Nordic Journal of Int'l Law* (491) 1995.

157 ACIA (2005), *supra*, 657.

6.6.3 Development of infrastructure

With the increase in capital flow, industrial activities in the Arctic are gradually growing, resulting in drastic infrastructural changes. Construction activities and transportation are adversely affecting the region. Due to high noise levels, wildlife relocation is taking place. Reindeer and caribou herding activities are being affected, which will negatively impact indigenous communities.¹⁵⁸ Coastal erosion, together with rising sea levels, is disrupting inter-community communication. Moreover, sewage systems, airstrips, power lines, and roads built on permafrost are already being endangered.¹⁵⁹ The maintenance and repair of damage to infrastructure are highly expensive. Indigenous communities do not have the financial resources available to maintain and repair this damage.¹⁶⁰ Permafrost thawing, coastal erosion, lower lake water levels and changing river run-off – especially potential decreases in summer months – are threatening to jeopardise fresh water supply, due to damage to water containers and lake drainage in coastal areas. As a result, hydropower generation, oil pipelines and permafrost-based waste containers may be affected. It is then probable that contamination and pollution will grow.¹⁶¹ One potential benefit will be that the rise in temperature will lower the costs of heating and insulation throughout the Arctic for indigenous communities.¹⁶²

6.6.4 Livelihood and cultural changes

Changes in the societal structure, economy, and infrastructure of the Arctic significantly impact indigenous communities. As discussed previously, hunting, trapping, and gathering are significant aspects of the indigenous culture in the Arctic. Traditionally, indigenous people in the North engage in reindeer or caribou herding. Their livelihood and culture are rooted in these activities. Polar bears, seals, and some fish stocks depend on ice cover.¹⁶³ Due to the melting of sea ice, the population of ice-dependent mammals may decline in numbers or migrate to other areas.¹⁶⁴ For hunters, reaching harvesting areas located offshore will become impossible.¹⁶⁵ The construction of new infra-

158 Information have been gathered by the 2022 IPCC report and especially chapter 3 on the Polar Regions available at: https://www.ipcc.ch/site/assets/uploads/sites/3/2022/03/05_SROCC_Ch03_FINAL.pdf.

159 Koivurova *et al.*, *supra*, 14.

160 ACIA (2005), *supra*, 660, 670, 1004.

161 ACIA (2005), *supra*, 1011, 1013, 2005. See also Parry *et al.*, *supra*, 665, 672; Koivurova *et al.*, *supra*, 15.

162 ACIA (2005), *supra*, 1004.

163 Especially ringed seal, arctic fox, and polar bear, ACIA (2005), *supra*, 660.

164 ACIA (2005), *supra*, 75, 660.

165 ACIA (2005), *supra*, 662.

structure both onshore and offshore (such as oil installations and transportation routes) is causing the relocation of wildlife habitats. This forces hunters to move to new locations for hunting, making traditional knowledge to become less applicable and less accurate. Hunting thereby becomes more expensive, impacting the harvesting outcome. With more frequent storms and other natural disasters, hunters face accidents, requiring them to be prepared for new situations.¹⁶⁶ In cases where traditional subsistence is primarily based on one species, for example, the ringed seal for some Inuit communities,¹⁶⁷ the threat to basic food supply is very real. On the other hand, some indigenous communities stand to benefit from the newly gained access to large fish stocks.¹⁶⁸

6.7 PRELIMINARY CONCLUSION

The Arctic indigenous peoples are significant actors in the region. Climate change and its impacts on the region are so drastic that overall changes are occurring faster in the Arctic than in any other region. The changes are creating opportunities for rapid globalisation, which is severely affecting the indigenous population. The survival of indigenous peoples in the Arctic mostly depends on the unique character of its ecosystem. However, changes in the ecosystem and globalisation resulting from such changes are adversely impacting traditional indigenous lifestyles. On one hand, globalisation is adversely affecting their traditional livelihood and culture, and on the other hand they are being deprived of the benefits of globalisation. They are being marginalised from both sides, and their rights under international law are behind curtailed. This is particularly evident for Articles 27 and 1(2) of the ICCPR.

166 ACIA (2005), *supra*, 670.

167 Koivurova *et al.*, *supra*, 13.

168 ACIA (2005), *supra*, 659, 669.