

CLIMATE CHANGE, INDIGENOUS PEOPLES AND THE ARCTIC: THE CHANGING HORIZON OF INTERNATIONAL LAW*

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INTRODUCTION

The Inter-governmental Panel on Climate Change (IPCC) recognized in its 2007 report that “[w]arming of the climate system is unequivocal”¹ and that “most of the observed increase in global average temperatures since the mid-20th century is *very likely* due to the observed increase in anthropogenic GHG [greenhouse gas] concentrations.”² While the exact rate and

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¹ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT 2 (2007) [hereinafter IPCC report], *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf.

² *Id.* at 5 (emphasis in original).

pace of climate change is uncertain, the phenomenon itself is no longer in doubt.³ Never before have we witnessed such extreme weather events, increased temperatures, melting glaciers and the resultant consequences on human beings.

The IPCC Report identified that some systems, sectors, and regions will be especially affected by climate change: the Arctic is among the most vulnerable “because of the impacts of high rates of projected warming on natural systems and human communities.”⁴ The Antarctic has a sophisticated network of treaties protecting its fragile environment,⁵ but the Arctic is governed mainly by soft law instruments and the domestic laws of the Arctic states. The cornerstone of international law is the principle of sovereignty; however, international law does recognize areas that are outside the sovereignty of states, called the global commons. These comprise the high seas, outer space and the Antarctica.⁶ Should the Arctic also form part of the global commons? Although the Arctic displays some characteristics of the global commons, it lacks one important element – the requirement that it should not be under the sovereignty of any state.

This article looks at the impact of climate change on the Arctic and its people, particularly the indigenous peoples, using the Inuit petition to the Inter-American Commission on Human Rights as a case study. The article then discusses the United Nations Declaration on Rights of Indigenous Peoples, particularly the free, prior and informed consent (FPIC) principle. The article looks at relevant international law principles and discusses whether contemporary international law

³ IPCC report, *supra* note 1 at 2.

⁴ *Id.* at 9; see also SUSAN J. HASSOL, IMPACTS OF A WARMING CLIMATE 5 (2007), available at <http://www.amap.no/documents/doc/impacts-of-a-warming-arctic-2004/786>. See generally Erika M. Zimmerman, *Valuing Traditional Ecological Knowledge: Incorporating the Experiences of Indigenous People into Global Climate Change Policies*, 13 N.Y.U. ENVTL. L.J. 803 (2005).

⁵ See generally PHILIPPE SANDS & JACQUELINE PEEL, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 577-98 (3rd ed. 2012).

⁶ See generally SUSAN BUCK, THE GLOBAL COMMONS: AN INTRODUCTION (1998).

is adequate to protect the rights of indigenous people, given the overlapping legal regimes at play in the Arctic. The article then discusses whether the global commons can provide a framework and the challenges that climate change poses for the contemporary legal structure.

I. THE IMPACT OF CLIMATE CHANGE ON THE ARCTIC

The Arctic is vulnerable to many environmental issues, particularly climate change:

The increasingly rapid rate of recent climate change poses new challenges to the resilience of arctic life. In addition to the impacts of climate change, many other stresses brought about by human activities are simultaneously affecting life in the Arctic, including air and water contamination, overfishing, increasing levels of ultraviolet radiation due to ozone depletion, habitat alteration and pollution due to resource extraction, and increasing pressure on land and resources related to the growing human population in the region. The sum of these factors threatens to overwhelm the adaptive capacity of some arctic populations and ecosystems.⁷

This clearly shows that the Arctic is not immune to the environmental issues facing other parts of the world. The problem, however, is that the impacts of climate change tend to be more acute in the Arctic (the Polar Regions) than in other parts of the world.⁸ Moreover, the ecosystem of the Arctic is unique and many of the environmental issues can have a lasting impact on the Arctic environment. Climate Change, while being a global issue, has a disproportionate impact on the Polar

⁷ HASSOL, *supra* note 4, at 5.

⁸ For a discussion of the disproportionate impact of climate change on various communities and regions, see *International Impacts & Adaptation*, U.S. ENVTL. PROTECTION AGENCY (June 21, 2013), <http://www.epa.gov/climate-change/impacts-adaptation/international.html>.

Regions⁹ and causes the Arctic ice to melt at an alarming rate.¹⁰ According to the Arctic Environmental Assessment:

These climate changes are being experienced particularly intensely in the Arctic. Arctic average temperature has risen at almost twice the rate as the rest of the world in the past few decades. Widespread melting of glaciers and sea ice and rising permafrost temperatures present additional evidence of strong arctic warming. These changes in the Arctic provide an early indication of the environmental and societal significance of global warming.¹¹

The Assessment summarizes the environmental and social impacts of climate change on the Arctic. Environmental impacts include: rising temperatures, rising river flows, declining snow cover, increasing precipitation, thawing permafrost, diminishing lake and river ice, melting glaciers, melting Greenland ice sheet, retreating summer sea ice, rising sea levels, and ocean salinity change as well as impacts on natural systems and society. Social impacts include: loss of hunting culture, declining food security, human health concerns and expanding shipping.¹² Of course, this latter aspect may or may not be negative. Thanks to climate change, the Northwest Passage between Asia and Europe became ice free for the first time from the Pacific to the Atlantic in the summer of 2007.¹³ Some may consider that this is a positive development in relation to navigation, as opening up new sea lanes that were not accessible before would

⁹ See *Climate Change in the Polar Regions*, G.R.I.D-ARENDAL, <http://www.grida.no/polar/ipy/2841.aspx> (last visited Sept. 6, 2013).

¹⁰ See HASSOL, *supra* note 4, at 8. See generally Randall S. Abate, *Climate Change, the United States, and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable International Environmental Human Rights*, 26 A STAN. ENVTL. L.J. 2 (2007).

¹¹ HASSOL, *supra* note 4, at 8.

¹² *Id.* These impacts are generally corroborated by IPCC report, *supra* note 1.

¹³ See generally Michael Byers & Suzanne Lalonde, *Who owns the Northwest Passage?*, 42 VAND. J. TRANSNAT'L L. 1133 (2009); TIME MAG., Oct. 2007.

considerably reduce the time it takes to go from the US to Russia. With access becoming more feasible, the competition for the region's resources has also increased.¹⁴ Apparently, everybody wants a piece of the pie. Increased access has its own impacts – the possibility for another 'Exxon Valdez-type incident'¹⁵ cannot be ruled out. Drilling can upset the pristine environment of the Arctic as well as its wildlife. Unlike the Antarctic, the Arctic is home to approximately 4 million people of which about 500,000 are indigenous peoples. The impact on their traditional way of life can be considerable.¹⁶

The impacts of climate change on the Arctic have significant ramifications for other parts of the globe. The melting of arctic glaciers is a major factor that contributes to rising sea-levels¹⁷ and will create significant problems for small island states and low-lying cities.¹⁸ Ironically, while the Polar Regions contribute very little by way of greenhouse gas (GHG) emissions, they are disproportionately affected by climate change. This raises equity issues, particularly in relation to indigenous communities. While the contribution of these communities to climate change is insignificant, the contribution of the Arctic states is considerable with US now ranked as the second highest emitter of carbon dioxide.¹⁹ Its per capita contribution is among the highest in the world.²⁰ Thus, these vulnerable communities, through no fault of their own, will suffer disproportionate consequences. A good example is the Native Village of Kivalina in Alaska, which is at the brink of being washed into the sea. The Army Corp of Engineers has decided that this village, with its 400 inhabitants,

¹⁴ James Graff, *Fight for the Top of the World*, TIME MAG., Oct. 2007, at 31.

¹⁵ See generally *Exxon Valdez*, U.S. ENVTL. PROTECTION AGENCY (Mar. 28, 2013) (describing the Exxon Valdez incident), <http://www.epa.gov/osweroe1/content/learning/exxon.htm>.

¹⁶ See *infra* Part 3.1.

¹⁷ See IPCC Report, *supra* note 1, at 2.

¹⁸ See *id.*

¹⁹ DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAEKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 673 (2011) [hereinafter HUNTER].

²⁰ *Id.* at 674.

will have to be relocated at a cost of \$95-125 million.²¹ It is not clear who will pay for the relocation. The legal action brought by the Village of Kivalina against several utility companies failed in the US District Court for Northern District of California.²²

II. INDIGENOUS PEOPLES AND THE ARCTIC

Discussion of the Arctic necessitates reference to the indigenous groups that inhabit it.²³ According to Koivurova *et al.*:

The Arctic region is home to several groups of indigenous peoples (including Inupiat, Yup'ik and Aleut in Alaska, Inuit in Greenland and Canada, Saami in Fennoscandia and Russiaand, Yup'k, Chukchi, Even, Evenk, and Nenets in Russia). Out of the total population of 4 million people in the Arctic, 10% are indigenous. There is a great variation of cultural, historical and economical backgrounds among the groups. However, a common feature for most of the indigenous communities in the Arctic is that they have already undergone substantial changes due to the globalization of the western way of life,

²¹ See Rachel M. Gregg, *Relocating the Village of Kivalina, Alaska due to Coastal Erosion*, CLIMATE ADAPTATION KNOWLEDGE EXCHANGE (Dec. 18, 2010), http://www.cakex.org/case-studies/2773_. Kivalina Relocation Master Plan was released by the US Army Corps of Engineers in 2006 which determined that the best option is to relocate Kivalina. However, many of the sites identified for relocation were declared unsuitable due to cost, susceptibility to erosion and flooding and/or social and cultural objections. Christine Shearer, *Kivalina: A Climate Change Story*, TRUTHOUT (May 20, 2012, 12:00 AM), <http://truth-out.org/news/item/2187-kivalina-a-climate-change-story> (referring to an estimated cost ranging from \$100 to \$400 million).

²² *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), available at <http://cdn.ca9.uscourts.gov/datastore/opinions/2012/09/25/09-17490.pdf>. See also HUNTER, *supra*, note 19, at 733.

²³ TIMO KOIVUROVA ET AL., BACKGROUND PAPER: INDIGENOUS PEOPLES IN THE ARCTIC 3 (2008), available at http://www.academia.edu/1127936/Background_paper_Indigenous_peoples_and_the_Arctic.

state policies, modern transport and the introduction of mixed economy. Climate change poses a new threat for all of the indigenous peoples.²⁴

One of the main impacts of climate change will be on the harvesting activities of indigenous peoples.²⁵ These groups rely on subsistence harvesting, which is not simply an economic issue for them but is intrinsically linked to their way of living, their health and their culture.²⁶ Globalization coupled with climate change poses a challenge to this traditional way of life and may, “in some areas[,] remove the subsistence basis for indigenous identity.”²⁷ Many cultural practices and festivals are intrinsically linked to traditional subsistence, which is now being threatened by climate change. “Ice itself is understood by Inuit as extension of their cultural, social and economic space, and indivisible part of their traditional territory; this part of their world is about to disappear.”²⁸ Another feature of indigenous culture is traditional knowledge,²⁹ which is also being threatened by climate change. As the Inuit petition shows, these groups are no longer able to rely on their knowledge of climate and nature as the changing climate is making their knowledge less reliable.³⁰ It is against this backdrop that one must study the petition filed by the Inuit Circumpolar Conference against the United States in the Inter-American Commission on Human Rights, which is discussed below.³¹

²⁴ *Id.*

²⁵ *Id.* at 11.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 17..

²⁹ See Zimmerman, *supra* note 4, at 805-06.

³⁰ See KOIVUROVA, *supra* note 23, at 17. For a discussion of the human rights of indigenous peoples, see Rebecca M. Bratspies, *Human Rights and Arctic Resources*, 15 SW. J. INT'L L. 251 (2009).

³¹ See Discussion *infra* Sec. II(A).

A. The Inuit Petition³²

In December 2005, the Inuit of the US and Canada, together with the Inuit Circumpolar Conference, filed a petition before the Inter-American Commission on Human Rights.³³ They alleged the violation of their human rights on the basis that the US government, by failing to reduce its GHG emissions, is contributing to global climate change and, thus, shares responsibility for the consequential environmental changes in the Arctic and the resulting impacts on the lives and livelihoods of its Inuit inhabitants.³⁴ They alleged that climate change is causing the Arctic region to melt at an alarming rate, “destroying the habitat of polar bears, seals and caribou upon which the Inuit depend for subsistence and cultural identity.”³⁵ The Inuit argued that as a result of such changes, its traditional way of life, is being jeopardized, which violated their human rights.³⁶

Moreover, the petitioners argued that climate change is violating their right to practice their culture, as their traditional way of life and culture are intrinsically linked to their physical surroundings.³⁷ They also alleged that the US, then the largest contributor to GHG emissions in the world, had consistently refused to take meaningful steps to reduce GHG emissions,

³² This section is based on the following work: Sumudu Atapattu, *Climate Change, Differentiated Responsibilities and State Responsibility: Devising Novel Legal Strategies for Damage Caused by Climate Change*, in CLIMATE LAW AND DEVELOPING COUNTRIES: LEGAL AND POLICY CHALLENGES FOR THE WORLD ECONOMY 37, 37-62 (Benjamin Richardson et al. eds., 2009). This section was also influenced by WAGNER & DONALD M. GOLDBERG, AN INUIT PETITION TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS FOR DANGEROUS IMPACTS OF CLIMATE CHANGE (2004), available at http://www.ciel.org/Publications/COP10_Handout_ECJIEL.pdf.

³³ For a summary of this petition, see *Summary of the Inter American Commission on Human Right Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States*, EARTHJUSTICE, (Dec. 7, 2005) http://earthjustice.org/sites/default/files/library/legal_docs/summary-of-inuit-petition-to-inter-american-council-on-human-rights.pdf. [hereinafter Petition Summary].

³⁴ *Id.*

³⁵ Abate, *supra* note 10, at 5.

³⁶ Petition Summary, *supra* note 33

³⁷ *Id.*

despite having ratified the UNFCCC.³⁸ The specific rights that they alleged were violated include the right to: use and enjoy traditional lands; enjoy personal property; health and life; residence and movement, and inviolability of the home; their own means of subsistence; and culture, to the extent that it is recognized under international law.³⁹ The requested relief included (i) preparing a report, with facts and applicable law, declaring that the US is internationally responsible for the violation of rights embodied in the American Declaration on Rights and Duties of Man;⁴⁰ (ii) holding a hearing; (iii) adopting and implementing a plan to protect the Inuit land and resources; and (iv) providing assistance to the Inuit to adapt to the impacts caused by climate change where they cannot be avoided.

While the strategy of using the human rights framework in relation to environmental issues is not new,⁴¹ this was the first instance where it was used in relation to a *global* environmental problem. Despite the fact that the petition itself was dismissed, it succeeded in many other respects: it gave a human face to climate change, a problem that was hitherto largely considered an environmental problem. It also highlighted that the consequences of climate change are taking place now, dismantling the widely held belief that climate change is an abstract issue that will give rise to undetermined consequences for 'future generations.'⁴² Although the Inter-American Commission initially declined to entertain the petition, after a renewed request in January 2007, the Commission invited Sheila Watt-Cloutier, the then Chairperson of the Inuit Circumpolar

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *American Declaration of the Rights and Duties of Man*, INTER-AM. COMMISSION ON HUM. RTS., <http://www.cidh.oas.org/Basicos/English/Basic2.american%20Declaration.htm> (last visited Sept. 15, 2013).

⁴¹ See generally Abate, *supra* note 10; Sumudu Atapattu, *The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law*, 16 TUL. ENVTL. L.J. 65 (2002).

⁴² See David Hunter, *The Implications of Climate Change Litigation: Litigation for International Environmental Law-Making*, in ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES (William Burns and Hari Osofsky eds., 2009).

Conference, Martin Wagner of Earthjustice and Daniel Magraw of the Center for International Environmental Law to a hearing on climate change and human rights on March 1, 2007.⁴³

The petition filed by the Inuit before the Inter-American Commission demonstrated that the damage being caused by climate change in the Arctic region is indeed significant. Quoting from the Arctic Climate Impact Assessment, the petition noted:

The Arctic is extremely vulnerable to observed and projected climate change and its impacts. The Arctic is now experiencing some of the most rapid and severe climate change on Earth. Over the next 100 years, climate change is expected to accelerate, contributing to major physical, ecological, social, and economic changes, many of which have already begun.⁴⁴

Although the outcome of the case did not bring relief to the petitioners, it certainly brought international attention to the issue, which was one of the objectives of the petitioners.⁴⁵ At the time the petition was filed before the Inter-American Commission, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) had not been adopted. The next section discusses the salient features of UNDRIP and particularly, the principle of free, prior and informed consent (FPIC) and the relevance of that principle to indigenous groups in the Arctic.

⁴³ Jonathon Spicer, *Hearing to Probe Climate Change and Inuit Rights*, REUTERS (Feb. 21, 2007), <http://www.reuters.com/article/2007/02/21/us-globalwarming-arctic-rights-idUSN204267120070221>.

⁴⁴ HASSOL, *supra* note 4, at 10.

⁴⁵ See Hunter, *supra* note 42.

III. INDIGENOUS COMMUNITIES⁴⁶ AND THE RELEVANCE OF FREE, PRIOR AND INFORMED CONSENT

After nearly two decades of negotiations the UNDRIP⁴⁷ was adopted by the UN General Assembly in 2007, ending years of contentious wrangling surrounding the Declaration.⁴⁸ It endorsed the right of indigenous peoples to the full enjoyment of all human rights as recognized in the UN Charter, the Universal Declaration of Human Rights and international human rights law. In addition, it endorsed the right of equality and non-discrimination⁴⁹ as well as the right to self-determination. Article 8 incorporates the right against forced assimilation, and Article 11 endorses the right to practice cultural traditions.⁵⁰ Furthermore, the Declaration recognizes the right of indigenous peoples to practice spiritual and religious traditions, customs and ceremonies and the right to lands, territories and resources that have been traditionally owned, used, or occupied by these

⁴⁶ See Jeremy Firestone, Jonathan Lilley & Isabel Torres de Noronha, *Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International and Comparative Environmental Law*, 20 AM. U. INT'L L. REV. 219 (2005).

⁴⁷ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf [hereinafter DRIPS].

⁴⁸ Tara Ward, *The Right to Free, Prior and Informed Consent: Indigenous Peoples' Participation Rights within International Law*, 10 NW. J. INT'L HUM. RTS. 54, 58 (2011).

⁴⁹ See KOIVUROVA, *supra* note 23, at 20-21 (arguing that the general principles of equality and non-discrimination were insufficient to protect indigenous peoples and therefore, specific instruments like ILO 169 were necessary).

⁵⁰ DRIPS, *supra* note 47. See also Convention on the Protection and Promotion of the Diversity of Cultural Expressions, art. 2, Oct. 20, 2005, 2440 U.N.T.S. 311, available at <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf> (stating the principle that “[t]he protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples”).

peoples.⁵¹ Despite its importance, the Declaration remains a soft law instrument.

The Declaration also endorses the free, prior and informed consent principle in relation to indigenous peoples in certain instances. It combines the earlier formulations found in ILO Convention No 169⁵² and the World Bank Operational Procedure⁵³ and clearly establishes the free, prior and informed consent (FPIC) as the norm to be applied in relation to indigenous rights.⁵⁴ Tara Ward contends that FPIC has been articulated as an application of the right to self-determination rather than as a derivative right to culture or the right to non-discrimination.⁵⁵ However, it can be argued that FPIC stems largely from participatory rights and the word “consent” in the Declaration implies the right of veto.⁵⁶ While UNDRIP is a soft law document, many of the provisions embody international human rights principles and, to that extent, reflect customary international law in relation to indigenous people.⁵⁷ It is not clear, however, whether FPIC falls into this category. Given the history behind its evolution, the lack of consensus on its

⁵¹ DRIPS, *supra* note 47.

⁵² Indigenous and Tribal Peoples Convention, June 27, 1989, ILO 169, available at http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C169.

⁵³ The World Bank, *B.P. 4.10*, (July 2005), available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553664~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html>.

⁵⁴ Ward, *supra* note 48, at 58.

⁵⁵ *Id.* See also, Catherine Irons Magallanes, *Indigenous Rights and Democratic Rights in International Law: An “Uncomfortable Fit?”*, 15 UCLA J. INT’L L. & FOR. AFF. 111, 115 (2010).

⁵⁶ Again, this is a contentious issue:

[F]or some indigenous rights advocates, FPIC is seen as a right to veto projects, while others argue that FPIC is not meant to be a veto right, but rather a way of ensuring that indigenous peoples meaningfully participate in decisions directly impacting their lands, territories, and resources.

See Ward, *supra* note 48, at 58.

⁵⁷ See Bratspies, *supra* note 30, at 277 (noting that the status of the Declaration remains “ambiguous”).

parameters, and the fact that it seems to be observed more in the breach, it is unlikely that FPIC is part of customary international law. However, the adoption of UNDRIP is an important milestone because it creates norms that can shape states' behavior and subject states' activities to international scrutiny. While the US, Canada, Australia and New Zealand – states with sizeable indigenous populations - did not initially support the Declaration, all four states have since signed it.

UNDRIP refers to FPIC in four specific instances: (a) Article 10 that deals with forcible removal from indigenous land, (b) Article 19 that deals with adopting and implementing legislation and administrative measures that may affect indigenous peoples, (c) Article 29 on storage or disposal of hazardous materials on indigenous land, and (d) Article 32 that deals with development projects.⁵⁸ This is the first time that FPIC has received such specific articulation in so many different contexts.

A. FPIC – What Does It Mean?

Over the years, we have seen many examples of development projects that have been implemented without adequate participation by the relevant stakeholders. Very often people learn of projects and imminent displacement only when the bulldozers arrive. By then, all the decisions have been made and it is too late to protest. The World Bank has been guilty of these practices, particularly in relation to indigenous people.⁵⁹ These communities were often seen as obstacles to development. In their letter to the incoming president of the World Bank, indigenous groups stressed that the adverse impacts on indigenous people are rarely acknowledged, let alone addressed, by the Bank. It further noted that the current operational policy on indigenous peoples is not based on a human rights approach and is inconsistent with UNDRIP. “It is particularly a glaring

⁵⁸ Spicer, *supra* note 43.

⁵⁹ See *World Bank: Power Project Threatens Indigenous Peoples*, HUM. RTS. WATCH (July 11, 2012), <http://www.hrw.org/print/news/2012/07/11/world-bank-power-project-threatens-indigenous-peoples>.

fact that the World Bank is the only Multilateral Development Bank that does not recognize the rights of indigenous peoples to free, prior and informed consent.”⁶⁰ Likewise, in its letter to the President of the Bank, the Human Rights Watch (HRW) stressed the need to protect the rights of indigenous peoples and the environment before it funds a power transmission line connecting Kenya to a dam in Ethiopia.⁶¹ HRW noted that while the project’s goal is to provide electricity to people in Kenya, where more than 80% of the population has no access to electricity, the Bank has been unwilling to apply its social and environmental safeguard policies.⁶² It pointed out that “rights of hundreds of thousands of indigenous people” would be threatened by the Gibe III dam.⁶³

The World Bank requires that projects it funds follow its policies and procedures to mitigate adverse environmental and social impacts. If a project will result in the loss of livelihood, the bank requires effective consultation with the affected people, adequately compensating them for their losses, and ensuring that they can at least maintain their previous living standards under the new circumstances. When indigenous people are involved, the bank’s policy requires additional procedures to ensure that the consultation, compensation and relocation process respects the cultural and physical needs of the affected community.⁶⁴

⁶⁰Letter from 98 Indigenous Peoples’ Orgs. & Institutions & 43 Non-Governmental Orgs. to John Kim, Incoming President of the World Bank, available at <http://www.forestpeoples.org/sites/fpp/files/publication/2012/06/indigenous-peoples-letter-incoming-president-world-bank-english.pdf>.

⁶¹HUMAN RIGHTS WATCH, *World Bank: Power Project Threatens Indigenous People: Rigorously Apply Social, Environmental Safeguards in Ethiopia, Kenya*, (July 11, 2012) <http://www.hrw.org/news/2012/07/11/world-bank-power-project-threatens-indigenous-peoples>.

⁶²*Id.*

⁶³*Id.*

⁶⁴*Id.*

The HRW called on the Bank to: fully examine the social and environmental impacts of the transmission system before proceeding with the project; rigorously apply its policies relating to environmental assessment, involuntary settlement and indigenous peoples to the project; urge the Ethiopian government to protect rights relating to freedom of expression, association and assembly; and enhance monitoring and supervision of all projects in Ethiopia.⁶⁵

Similarly, in November 2011, the Indian Law Resource Center (ILRC) alerted the indigenous community to a new development at the Bank, which seeks to introduce a new loan program, called the “Program for Results (P4R).”⁶⁶ P4R would do away with critical safeguards that protect indigenous people⁶⁷. No consultations have been held with indigenous people with regard to this new policy.⁶⁸ If adopted, ILRC stressed, it would “virtually eliminate 26 of the Bank’s safeguard policies, including those [relating] to indigenous people.”⁶⁹ The idea is to fund programs initiated by borrower governments, which will rely on borrower governments’ laws and protections with regard to environmental and social risk assessment, management and enforcement, bypassing the Bank’s safeguards.⁷⁰ In many of these countries these safeguards may not be sufficient. In addition to eliminating protection for indigenous peoples, it has no effective complaint mechanism for them either.⁷¹

Making use of the Bank’s Inspection Panel, Anuak indigenous people from Ethiopia’s Gambella region submitted a complaint, implicating the Bank in the human rights abuses

⁶⁵ *Id.*

⁶⁶ The World Bank, *OP 9.00 – Program-for-Results Financing*, OPERATIONAL MANUAL (providing an overview of PforR).

⁶⁷ See THE WORLD BANK, PROGRAM-FOR-RESULTS FINANCING 1-2 (2011), available at http://siteresources.worldbank.org/EXTRELENDING/Resources/7514725-1313522321940/PforR_Overview_12.2011.pdf.

⁶⁸ John Schertow, *Call on the World Bank to Respect Indigenous Peoples, Before It’s Too Late!*, IC MAGAZINE (Nov. 9, 2011) <http://intercontinentalcry.org/call-on-the-world-bank-to-respect-indigenous-peoples-before-its-too-late/>.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

committed by the Ethiopian government.⁷² They alleged that they were severely harmed by the Protection of Basic Services Project (PBS) financed by the Bank, which they claimed was contributing to a program of forced “villagization.”⁷³ They referred to similar occurrences in four other regions of Ethiopia and reported a process involving intimidation, beatings, torture, rape and extra-judicial killings:

In the Gambella region, villagization has been carried out by force and accompanied by gross violations of human rights. Through the Villagization Program, the Anuak people, including the Requesters and their families and communities, have been victims of inter alia threats and harassment; arbitrary arrest and detention; beatings and assault in some cases, leading to death; torture in custody; rape and other sexual violence; forced displacement from traditional lands, homes and livelihoods; destruction of property including housing and crops; and inhumane conditions at the new villages including a lack of access to food and livelihood opportunities, in some cases leading to starvation.⁷⁴

The complainants stressed that relocation was not voluntary, and when they refused to move to the new location, they were beaten.⁷⁵ One complainant alleged that one of his brothers was beaten to death by soldiers and another, whose location is unknown, was detained.⁷⁶ It is clear that relocation of

⁷² *Ethiopian Indigenous People Demand Accountability from World Bank for Contributing to Grave Human Rights Abuses*, INCLUSIVE DEV. INT’L (Sept. 24, 2012), <http://www.inclusivedevelopment.net/ethiopian-indigenous-people-demand-accountability-from-the-world-bank-for-contribution-to-grave-human-rights-abuses/>.

⁷³ *Id.*

⁷⁴ *Policy and Legal Analysis of the Ethiopia PBS Request for Inspection*, INCLUSIVE DEV. INT’L 6, available at <http://www.inclusivedevelopment.net/wp-content/uploads/2012/09/Legal-and-Policy-Analysis-for-Anuak-Request-for-Inspection.pdf> (last visited Sept. 5, 2013).

⁷⁵ *Id.*

⁷⁶ *Id.*

indigenous people without consultation is contrary to the World Bank Operative Policy on Indigenous People.⁷⁷

While common sense dictates that FPIC requires non-coerced, freely given consent, based on relevant information, provided in a timely manner, and given prior to any decisions being made, it is hard to find an authoritative pronouncement on the issue. The Inter-American System of Human Rights has been most vocal, although the other tribunals and human rights bodies have also sought to elaborate on rights of indigenous peoples.

B. Case Law

The Inter-American human rights system has been at the forefront of articulating indigenous rights. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*⁷⁸ was the first time that the collective property rights of indigenous peoples were recognized. In the case of *Mary and Carrie Dann v. US*⁷⁹ the Inter-American Commission found that the US had violated the Danns' right to equality under the law, right to a fair trial and the right to property. The state also failed to fulfill its obligation to ensure that the status of the Western Shoshone traditional lands was "determined through a process of informed and mutual consent on the part of the Western Shoshone people as a whole."⁸⁰ Thus, any determination with regard to indigenous lands must "be based on fully informed consent of the whole community, meaning that all members be fully informed and have the chance to participate."⁸¹ In *Maya Communities of the Toledo District v. Belize*,⁸² the Commission held that Belize violated property rights of indigenous peoples by granting concessions on the lands "without effective consultations with

⁷⁷ See Discussion, *supra* Sec. III(A).

⁷⁸ Inter-Am. Ct. H.R. (Ser. C) No. 79 (Aug. 31, 2001).

⁷⁹ Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, doc. 5 rev. ¶ 1 at 860, XX (2002).

⁸⁰ Ward, *supra* note 48, at 62.

⁸¹ *Id.* at 62-63.

⁸² Case 12.053, Inter-Am. Comm'n. H.R., Report No 40/04, OEA/Ser.L./V/II 122 Doc. 5 rev. 1 at 727 (2004).

and the informed consent of the Maya people.”⁸³ The Commission stressed that the duty to consult is a fundamental component of the state’s obligations with regard to communal property rights and that consultation with the goal of obtaining consent is required.⁸⁴

The case of *Saramaka People v. Suriname*⁸⁵ is very important in many respects and clearly adopts the principle of FPIC. It also discusses when it is permissible to subordinate property rights in the interests of society.⁸⁶ In this case, the Surinamese government had granted resource concessions to private companies within the territories of the Saramaka people without obtaining their consent or consulting them.⁸⁷ The Court held that Suriname had violated the rights of the Saramaka people to judicial protection and property rights and failed to have effective mechanisms to protect them from acts that violate their rights to property. However, the Court noted that these property rights are not absolute and the State has the right to restrict property rights in the interests of society. These restrictions must be previously established by law, necessary, proportionate, and with the aim of achieving a legitimate objective in a democratic society.⁸⁸ Moreover, such restrictions cannot violate the right of indigenous peoples to survival.⁸⁹ In order to restrict property rights, the Court prescribed a series of safeguards: (a) states must ensure effective participation of the affected parties; (b) guarantee that the affected people will receive a reasonable benefit from the project; (c) prior to granting the concession, environmental and social impacts must be evaluated in order to mitigate any negative impacts.⁹⁰

Furthermore, participation must be in line with their customs and traditions; states have a duty to disseminate and receive

⁸³ Ward, *supra* note 48, at 63.

⁸⁴ THE WORLD BANK, *supra* note 67.

⁸⁵ Inter-Am. Ct. H.R. (Ser. C) No. 172 (Nov. 28, 2007) *available at* <http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html>.

⁸⁶ Id. ¶ 143.

⁸⁷ Id. ¶ 142.

⁸⁸ Id. ¶ 173.

⁸⁹ Id. ¶ 112.

⁹⁰ Id. ¶ 106.

information; and consultations must be in good faith, culturally appropriate and have the intent to reach an agreement. In the case of large-scale development projects that could impact the survival of indigenous people, states must obtain their free, prior and informed consent.⁹¹ This case endorses several important principles and sheds light on what ‘consultation’ entails. The Court limited the application of FPIC to large-scale development projects that threaten the survival of indigenous people. The language of UNDRIP in relation to FPIC, however, is not so restrictive. Article 32 that deals with development strategies provides that:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.⁹²

Article 32 is not restricted to situations where the survival of the indigenous peoples is at jeopardy. FPIC is required prior to approving any project that affects lands of indigenous people. While the decision in *Saramaka* seems rather restrictive from

⁹¹ Ward, *supra* note 48, at 64 (noting that the case clearly set a precedent within the Inter-American system).

⁹² DRIP, *supra* note 47, art. 32.

that point of view, it did endorse the importance of effective consultations.⁹³

In *Kichwa People of Sarayaku v. Ecuador*,⁹⁴ the Commission argued that the State of Ecuador violated, *inter alia*, the right to participate in government by failing to effectively consult with the affected communities prior to granting licenses to explore for oil.⁹⁵ The Commission argued that there is an implicit obligation to ensure prior consultations that require effective participation of indigenous peoples with regard to any development.⁹⁶ It further articulated that the “information provided to the affected people must be in clear and accessible language, and that the information provided be sufficient and complete enough to guarantee that if consent is given, it has been given free from manipulation.”⁹⁷ Such consultations must be held sufficiently in advance and the right to prior consultation “implies the right to play a real role in the decision-making process.”⁹⁸ The Inter-American Court held that the “State must consult the Sarayaku People in a prior, adequate and effective manner, and in full compliance with the relevant international standards applicable, in the event that it seeks to carry out any activity or project for the extraction of natural resources on its territory, or any investment or development plan of any other type that could involve a potential impact on their territory...”⁹⁹

Thus, these cases endorse that, at a minimum, there is an obligation to consult with indigenous peoples when decisions are being made with regard to their lands and resources. Some institutions have extended this requirement to FPIC, but that

⁹³ Jo M. Pasqualucci, *International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples*, 27 WIS. INT’L L.J. 51 (2009) (agreeing that the formulation applied by the Inter-American Court falls short of the standard in UNDRIP).

⁹⁴ Inter-Am. Ct. H.R. (Ser. C) No. 245 (June 27, 2012). *available at* http://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 65.

⁹⁸ *Id.*

⁹⁹ Pasqualucci, *supra* note 93, at 92.

right seems to be emerging rather than fully entrenched in international law. If a project involves relocation of indigenous people or could threaten their survival, it is safe to assume that obtaining their consent is a requirement.

However, in practice, this requirement, as laudable as it is, may run into problems. Indigenous groups are not homogenous and may speak different languages, or at least dialects, or may have different priorities. Where there are several indigenous groups, does FPIC require the State to obtain the consent of all the groups at least in instances where relocation is envisaged? The challenges of applying FPIC are illustrated by Baker in her case study of the Oaxaca wind project in Mexico.¹⁰⁰ Communal land, language issues, one sided contracts, title to land, coercion and environmental concerns are some of the challenges facing the community.¹⁰¹

Thus, one can safely argue that, with regard to drilling for oil or other minerals in the Arctic, FPIC should be applied as such activities have the potential to relocate the indigenous communities or threaten their very survival. It is not clear whether FPIC would apply in relation to the Northwest Passage, although oil pollution and increased traffic and tourism can pose significant challenges to these indigenous communities. An argument can be made that FPIC should apply given the

¹⁰⁰ See Shalanda Baker, *Why the IFO's free, prior, and informed consent policy doesn't matter (yet) to indigenous communities affected by development projects* WILJ (forthcoming, 2014)

¹⁰¹ *Id.* Another case that involved the violation of rights of indigenous peoples was the *Ogoni* case before the African Commission on Human Rights. The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, Afr. Comm'n H.R., Commc'n No. 155/96, ¶ 69 (2001). The Commission, relying on the African Charter, found the violation of, inter alia, rights to life, environment, property, health, food, housing, standard of living and called upon the Nigerian government to ensure that appropriate compensation is provided to victims of human rights violations, ensuring appropriate environmental and social impact assessments are prepared for future oil development and provide information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.

potential impact on these vulnerable communities and their traditional way of life.¹⁰²

IV. USING THE GLOBAL COMMONS AS A FRAMEWORK

With regard to the indigenous peoples in the Arctic, several regimes of international law interact with one another: international human rights law with particular reference to rights of indigenous people; law of the sea to the extent that it involves new sea lanes opening up and with regard to marine pollution; environmental protection of the Arctic and the Arctic Council. Given the similarities between the polar regions and the pristine nature of the Arctic environment, the question arises whether we should look at the global commons as a framework to govern the Arctic.

A. Governance of the Arctic¹⁰³

Currently, there are eight Arctic nations (US, Canada, Norway, Sweden, Russia, Denmark, Finland and Iceland). They adopted the Arctic Environmental Protection Strategy in 1991.¹⁰⁴ The Arctic Council was established in 1996 “as a high level intergovernmental forum to provide a means for promoting cooperation, coordination, and interaction among the Arctic States, with the involvement of the Arctic indigenous communities and other Arctic inhabitants on common Arctic

¹⁰² See Zimmerman, *supra* note 3 (arguing that the climate change crisis in the Arctic presents two problems from an environmental justice perspective: (a) ignoring the traditional ecological knowledge and failing to consult indigenous groups in policy decisions deprives them their right to participate in climate change policies; (b) climate change poses a distributive justice problem because indigenous communities will bear a disproportionate burden of the negative consequences of climate change).

¹⁰³ For a good overview of the legal regime, see Linda Nowlan, *Arctic Legal Regime for Environmental Protection*, IUCN ENVIRONMENTAL POLICY & LAW PAPER NO. 44 (2001). See also, Stephanie Holmes, *Breaking the Ice: Emerging Legal Issues in Arctic Sovereignty*, 9 CHI. J. INT’L L. 323 (2008).

¹⁰⁴ See Barry Hart Dubner, *On the Basis for Creation of a New Method of Defining International Jurisdiction in the Arctic Ocean*, 13 MO. ENVTL. L. & POL’Y REV. 1 (2005)

issues, in particular issues of sustainable development and environmental protection in the Arctic.”¹⁰⁵ Thus, the Arctic Council is unique as it provides for the participation of indigenous communities as permanent participants.¹⁰⁶ Prior to the adoption of multilateral action, there were several unilateral actions by Arctic states, the Arctic Waters Pollution Prevention Act enacted by Canada in 1970 being the best-known example.¹⁰⁷

The Arctic Environmental Protection Strategy (AEPS) identifies the following as its main objectives: (a) to protect the Arctic ecosystem, including humans; (b) to provide for the protection, enhancement and restoration of the environmental quality and sustainable utilization of natural resources; (c) to recognize and to the extent possible, accommodate the traditional and cultural practices of indigenous peoples; (d) review the state of the Arctic environment regularly; and (e) eliminate pollution.¹⁰⁸

While the establishment of the Arctic regime may have been influenced by the Antarctic regime,¹⁰⁹ one cannot ignore the contrasting features of the two regimes: while the Antarctic

¹⁰⁵ *About the Arctic Council*, ARCTIC COUNCIL (Apr. 7, 2011), <http://www.arctic-council.org/index.php/en/about-us/arctic-council/about-arctic-council>.

¹⁰⁶ Six indigenous groups are permanent participants of the Council: Arctic Athabaskan Council (AAC); Aleut International Association (AIA); Gwich'in Council International (GGI); Inuit Circumpolar Council (ICC); Russian Arctic Indigenous Peoples of the North (RAIPON); and Saami Council (SC), available at <http://www.arctic-council.org/index.php/en/about-us/permanentparticipants>.

¹⁰⁷ See Dubner, *supra* note 104 (contending that this unilateral intervention was “an excellent idea.”). This legislation prohibited waste discharge and had extensive regulation within 100 miles from the northern coast of Canada. This action by Canada was much criticized claiming that Canada was exercising extra territorial jurisdiction over much of the Arctic Ocean. While Canada defended its act, multilateral action is preferable to unilateral action even if the objective is to protect the environment. See also, Michael Byers and Suzanne Lalonde, *supra* note 13.

¹⁰⁸ See Dubner, *supra* note 104.

¹⁰⁹ For an overview of the Antarctic Treaty System, see SANDS, *supra* note 5; See also, Erika Lennon, *A Tale of Two Poles: A Comparative Look at the Legal Regimes in the Arctic and the Antarctic*, 8 SUSTAINABLE DEV. & POL'Y 32 (2008).

regime is binding on parties, the Arctic regime remains a soft law attempt with none of the instruments adopted by the parties having any binding effect.¹¹⁰ Second, the Antarctic is virtually uninhabited, making preservation and banning certain activities more feasible, whereas the Arctic has four million inhabitants, approximately 10% of whom are indigenous peoples.¹¹¹ Finally, eight nations have sovereignty over the Arctic whereas territorial claims over the Antarctic are frozen. Thus, while the two Polar Regions display similar environmental characteristics, the legal regimes governing them are quite different. Dubner argues that “[t]he two objectives of the Arctic Council – the promotion of protection of the environment and implementation of sustainable development – are inconsistent in the Arctic’s fragile environment.”¹¹² It is unclear why he argues that these two objectives are inconsistent; however, his argument about voluntary action hindering progress in the Arctic and sovereignty claims over resources has some merit:

A proposed international regime designed to protect the future of the Arctic region will be impossible to create unless States are willing to give up sovereignty to their natural resources, such as oil and minerals.

¹¹⁰ See SANDS, *supra* note 5, at 597 (noting that the soft law approach is a first step, but “ultimately it will be necessary to establish appropriate institutional arrangements and substantive rules, perhaps similar to those applied in the Antarctic, to ensure that agreed obligations are respected and enforced.”).

¹¹¹ *Peoples of the Arctic*, ARCTIC COUNCIL <http://www.arctic-council.org/index.php/en/environment-and-people/arctic-peoples/122-peoples-of-the-arctic> (last visited Nov. 12, 2013).

¹¹² See Dubner, *supra* note 104. Several factors contribute to the problems facing the Arctic region: (a) low temperatures of the region resulting in slow decomposition of pollutants; (b) Arctic flora regeneration is slow due to cold temperatures, frozen earth and limited sunlight; (c) lack of wildlife diversity due to climatic conditions; (d) marine areas both as habitat and feeding grounds, play a more significant role in the Arctic than in other areas; (e) Arctic climate is highly susceptible to global warming trends; and (f) greater difficulty of cleaning up the Arctic environment due to the frigid conditions there. In addition, other countries are contributing to the problems in the Arctic by heavy metal pollutants, the Arctic Haze, chemical and toxins coming from ocean dumping etc.

The States must shift their focus away from voluntary actions to a binding regional regime and, in the future, to an international regime.¹¹³

However, most of the environmental problems in the Arctic,¹¹⁴ including changes in the climate, originate from other parts of the world. Thus, international action and particularly greater international cooperation is needed to address this issue. With regard to climate change, which is having the greatest impact on the Polar Regions, it may already be too late to mitigate consequences caused by greenhouse gases already emitted into the atmosphere.

One of the justifications that Canada put forward in enacting the Arctic Pollution Prevention Act was that the preservation of the Arctic Ocean was for the benefit of mankind and that Canada was acting as the trustee.¹¹⁵ Canada later changed this to state that the Arctic Ocean is a fragile ecosystem that needed to be protected from vessels.¹¹⁶ However, its assertion of acting as the trustee for all mankind is interesting and points towards the notion that the Arctic Ocean can at least be considered as part of the global commons. According to Koivurova et al., Norway has lived up to its obligations under Article 14 of the ILO Convention by enacting the Finnmark Act in 2005,¹¹⁷ which recognized Saami rights to land and water. A draft for a Nordic Saami Convention is also in the works, but as of now, it has not been adopted.¹¹⁸

¹¹³ *Id.*

¹¹⁴ See generally TIMO KOIVUROVA, ENVIRONMENTAL IMPACT ASSESSMENT IN THE ARCTIC: A STUDY OF INTERNATIONAL LEGAL NORMS (2003).

¹¹⁵ See Dubner, *supra* note 104.

¹¹⁶ *Id.*

¹¹⁷ Finnmark Act (Act No. 85 of June 17, 2005 relating to Legal Relations and Management of Land and Natural Resources in the County of Finnmark), available at <http://www.wipo.int/wipolex/en/details.jsp?id=11129>.

¹¹⁸ See Timo Koivurova, *The Draft Nordic Saami Convention: Nations Working Together*, 10 INT'L CMTY. L. REV. 279 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1860313.

As Duncan Currie points out:

It is ironic that both climate change, and the oil and gas that has given rise to climate change, threaten to embroil the Arctic Ocean and bordering States in disputes over sovereignty, access to resources, navigation and the protection of the environment. The use of the Northwest Passage by tankers or other vessels may be facilitated by the melting of Arctic ice due to climate change, but other changes brought about by climate change, including icebergs, movement of ice and changed currents, mean that any such use will bring new risks to the Arctic environment.¹¹⁹

B. Global Commons

Does the global commons framework provide an additional tool here? What are the characteristics of the global commons?¹²⁰ The basic feature is that they lie beyond the limits of national jurisdiction – in other words, they cannot be subject to the jurisdiction of any state. The high seas, outer space and Antarctica are generally considered as falling within the category of global commons. More recently, and with the advent of global environmental problems such as climate change, scholars have called for the expansion of this status to the Arctic.¹²¹ However, as pointed out earlier, unlike other global commons areas, the Arctic is subject to the sovereignty of eight states.

¹¹⁹ See Duncan Currie, *Sovereignty and Conflict in the Arctic Due to Climate Change: Climate Change and the Legal Status of the Arctic Ocean*, 11 (Aug. 5, 2007), available at <http://www.globelaw.com/LawSea/arctic%20%20and%20climate%20change.pdf>.

¹²⁰ See generally SUSAN BUCK, *THE GLOBAL COMMONS: AN INTRODUCTION* (1998); JOHN VOGLER, *THE GLOBAL COMMONS: ENVIRONMENTAL AND TECHNOLOGICAL GOVERNANCE* (2d ed. 2000) (describing the global commons).

¹²¹ See KEMAL BASLAR, *THE CONCEPT OF THE COMMON HERITAGE OF MANKIND IN INTERNATIONAL LAW* (Kluwer Law 1998); HUNTER, *supra* note 19, at 453.

Many scholars contend that the common heritage of mankind principle (CHM) should apply to the resources of the global commons.¹²² While the principle of permanent sovereignty over natural resources applies in relation to resources within states, the common heritage principle applies in relation to resources outside the sovereignty of states.¹²³ Before sustainable development was adopted as a framing principle for many environmental issues, the “right of capture” applied in relation to the resources in the high seas (particularly fisheries); this favored those states that were more technologically advanced.¹²⁴ The rapid depletion of fisheries (a typical ‘tragedy of the commons’ issue) led to the adoption of different principles and frameworks to ensure that all states had equal access to these resources, at least in theory.¹²⁵ Sustainable development and sustainable exploitation of resources also influenced the development of these new principles.

While a detailed discussion of the common heritage principle is beyond the scope of this paper, the concept is considered to include at least four features: (a) non appropriation; (b) international management; (c) sharing of benefits; and (d) reservation for peaceful purposes.¹²⁶ Some add preservation for future generations as the fifth criterion,¹²⁷ which

¹²² See Valnora Leister & Mark Frazier, *From Local to Global Commons: Applying Ostrom’s Key Principles for Sustainable Governance*, available at <http://www.lund2012.earthsystemgovernance.org/LC2012-paper94.pdf>.

¹²³ See HUNTER, *supra* note 19, at 452.

¹²⁴ *Id.* at 453.

¹²⁵ *Id.*

¹²⁶ *Id.* at 455.

¹²⁷ See BASLAR, *supra* note 121, at 81 (quoting Ambassador Pardo of Malta who is considered as the father of this concept:

[I]n the Maltese view the common heritage concept has five basic implications. First, the common heritage of mankind could not be appropriated; it was open to use by all international community. Second, it required a system of management in which all users have a right to share. Third, it implied an active sharing of benefits, not only financial but also benefits driver from shared management and transfer of technology, thus radically transforming the conventional relationships between states and traditional concepts of common heritage implied reservation for peaceful purposes, insofar as politically achievable, and fifth, it

reflects the influence of sustainable development. While many of these features are uncontroversial, the requirement that benefits arising from the exploitation of these resources should be shared led to an outcry.¹²⁸ Two global commons regimes incorporate this principle -Outer Space Treaty¹²⁹ and the Law of the Sea Convention¹³⁰ in relation to deep seabed mining.¹³¹ The Antarctica regime does not include it probably because there is a fifty-year moratorium on mineral exploitation under the Protocol on Environmental Protection to the Antarctic Treaty.¹³² The support for this concept is divided along developed and developing country lines, similar to many other principles of international environmental law, including the common but differentiated responsibility principle¹³³ and the right to development.¹³⁴

Thus, what does this framework offer our discussion? Some aspects of the global commons framework are applicable to the Arctic and given the fragile nature of the Arctic environment and given how the Polar Regions affect and, in turn, are affected by climate change, international management becomes imperative, despite the sovereignty of the eight Arctic nations. That does not pose a threat to sovereignty. Just like states accept other international obligations, the Arctic, too, will be subject to international obligations. The establishment of the Arctic

implied reservation for future generations, and thus environmental implications).

¹²⁸ Part XI on “The Area” (that deals with deep seabed mining) in the Law of the Sea Convention, 1982 was later amended due to the objections of many developed countries, including the US, see Hunter, *supra* note 19, at 457. See also UN Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 387 [hereinafter UNCLOS].

¹²⁹ Treaty on Principles Governing Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Jan. 27, 1967, 610 U.N.T.S. 205.

¹³⁰ UNCLOS, *supra* note 128, art. 136.

¹³¹ *Id.* Part XI.

¹³² See SANDS, *supra* note 5, at 586. The Protocol is available at ATS, *The Protocol on Environmental Protection to the Antarctic Treaty* <http://www.ats.aq/e/ep.htm> (last visited Nov. 11, 2013).

¹³³ See HUNTER, *supra* note 19, at 464-467.

¹³⁴ *Id.* at 446-452.

Council and the adoption of several declarations show that the Arctic nations are on the right track. However, apart from one treaty that covers polar bears, none of the instruments adopted by the Arctic states so far are binding.

V. CHALLENGES FOR INTERNATIONAL LAW

The main challenge for international law will be to reconcile the various overlapping legal regimes at play in the Arctic: international environmental law, legal regime governing climate change, international human rights law, law of the sea including marine pollution, navigation and dumping at sea, rights of indigenous peoples, the global commons framework, the Arctic Council and its emerging legal regime. Sometimes these regimes may complement one another and, at times, they may conflict with one another.

When an issue involves indigenous communities, the question arises, whether FPIC should be the overarching principle and, without the free, prior and informed consent of indigenous peoples, whether a particular project can go ahead. While it would be desirable to apply this principle in relation to all activities, it seems unlikely that states would consult with indigenous groups prior to engaging in shipping in this region. Moreover, FPIC is applied in relation to indigenous peoples and in the Arctic, only about 500,000 people out of four million inhabitants belong to an indigenous group. Thus, is there any obligation to consult with other inhabitants? Applying procedural principles of international environmental law and international human rights law, one can certainly argue that participatory rights of these people should be respected and upheld and that there is certainly an obligation on states to provide timely information and give an opportunity to those who could be affected by a particular activity to be heard.

With climate change, the Northwest Passage has opened up,¹³⁵ which can cause additional challenges along with a rush to

¹³⁵ See Graff, *supra* note 14 (noting that for the first time in recorded history, the Northwest Passage was ice-free from the Pacific to the Atlantic); *see*

exploit resources in that area.¹³⁶ As Currie points out: “[i]t may well be that international interest in protecting the fragile Arctic marine environment from oil spills will require more than coastal state controls and include prohibitions on transport and mineral extraction, where necessary.”¹³⁷ While the extent of the resources in the Arctic is not clear, a US Geological Survey study estimates that the Arctic contains two hundred and fifty five of the world’s undiscovered oil reserves.¹³⁸ International law will have to deal with the new challenges posed by these emerging issues.

VI. RECOMMENDATIONS AND CONCLUSIONS

In sum, the problems facing the Arctic will be compounded by climate change,¹³⁹ which will be the main threat to the region in the coming years.¹⁴⁰ The Tromso Declaration,¹⁴¹ adopted by the Arctic Council in 2009, emphasized that human-induced climate change is one of the greatest challenges facing the Arctic and that preserving the Arctic environment depends mainly on

also Matthew L. Hoppe, *Environmental Protection for the New Northwest Passage*, 20 COLO. J. INT’L ENVTL. L. & POL’Y 69, 70 (2008).

¹³⁶ Graff, *supra* note 14 (stating “[b]ut now that global warming has rendered the Arctic more accessible than ever – and yet at the same time more fragile – a new frenzy has broken out for control of the trade routes at the top of the world and the riches that nations hope and believe may lie beneath the ice.”) (emphasis in the original); *see also* Currie, *supra* note 119, where he refers to Exxon Valdez type incidents in the northern latitudes.

¹³⁷ Currie, *supra* note 119, at 11.

¹³⁸ Graff, *supra* note 14. *See also* Dubner, *supra* note 104 (noting that the Arctic contains both onshore and offshore oil and gas reserves as well as large coal reserves).

¹³⁹ *See* Duncan French & Karen Scott, *International Legal Implications of Climate Change for the Polar Regions: Too Much, Too Little, Too Late?*, 10 MELB. J. INT’L L. 631 (2009).

¹⁴⁰ *See* HASSOL, *supra* note 4, at 8-11. Hassol finds that “climate changes are being experienced particularly intensely in the Arctic. Arctic average temperature has risen at almost twice the rate as the rest of the world in the past few decades.” *Id.* at 8.

¹⁴¹ ARCTIC COUNCIL, *Tromso Declaration* (Apr. 29, 2009), available at http://library.arcticportal.org/1253/1/Tromsoe_Declaration-1.pdf.

substantially reducing global emissions of carbon dioxide.¹⁴² The Declaration also emphasized the importance of adaptation in consultation with the indigenous peoples.¹⁴³

Dubner contends that there are two overlapping issues: the Arctic Ocean itself and the environment surrounding the Arctic Ocean. One proposal is to create a new jurisdictional boundary called an “Arctic Indicator” starting from the baselines of countries surrounding the Arctic.¹⁴⁴ Within the indicator, the Arctic Ocean will be treated as a national refuge/park and there would be a moratorium on mineral development as, he argues, resort to the concept of sustainable yield does not solve the problem.¹⁴⁵ The second proposal is to create “a legal regime that would have the sole responsibility of protecting the fragile environment surrounding the Arctic Ocean.”¹⁴⁶ Although Dubner argues that the concept of a territorial sea is not needed in the Arctic Ocean,¹⁴⁷ it is doubtful that Arctic states would be willing to give up their sovereignty, given the oil and gas reserves that are estimated to be available there. Emphasizing that all states must share the responsibility of protecting the Arctic region, Dubner stresses that:

A mineral moratorium in the Arctic Ocean is essential. Preventing pollutants from entering that area is essential. Protecting the lives of the indigenous people of the Arctic region is essential. Creating a legal regime that will be binding on the entire international community is essential. Even for those cynics who argue that greed was the motivating factor of the 1982 Law of the Sea Convention, the necessity for protecting these fragile areas can be seen. Even if greed was the essential ingredient, rather than the common heritage of mankind, greedy people would understand that allowing the

¹⁴² *Id.* at 1-2.

¹⁴³ *Id.* at 3.

¹⁴⁴ Dubner, *supra* note 104, at 21

¹⁴⁵ *Id.*.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* (questioning whether the concept of a territorial sea is needed in any coastal region).

degradation of the Arctic region to continue would only result in less natural resource production over time. It boils down to what one wants their grandchildren to have available to them in the future.¹⁴⁸

While there are many unknowns in relation to climate change and the Arctic, one thing is clear: climate change will cause unprecedented damage to the fragile nature of the Arctic and its people. International law, in turn, will have to deal with the unprecedented challenges posed to it by climate change and ensure that overlapping legal regimes at play work to protect the fragile environment and the vulnerable communities living there.

¹⁴⁸ *Id.* at 22.