

**International environmental law in the Arctic: A dawn for new
international legal environmental instruments for the Arctic?**

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Abbreviations

ABA	Arctic Biodiversity Assessment
ACAP.....	Arctic Contaminants Action Program
AEPS	Arctic Environmental Protection Strategy
AMAP	Arctic Monitoring and Assessment Program
AMSA	Arctic Marine Shipping Assessment
AOR	Arctic Ocean Review Project
CAFF	Conservation of Arctic Flora and Fauna Working Group
EPPR	Emergency Prevention, Preparedness and Response
EEZ	Exclusive Economic Zone
GHS	Greenhouse Gases
ICJ	International Court of Justice

IEL	International Environmental Law
ILO	International Labour Organization
ITLOS.....	International Tribunal for the Law of the Sea
PAME	Protection of the Arctic Marine Environment
SDWG	Sustainable Development Working Group
SLBMs	submarine -launched Ballistic missiles
UNCLOS	United Nations Convention on the Law of the Sea
UNFCCC	United Nations Framework Convention of Climate Change

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Abstract: This article addresses the state of international environmental law (IEL) in the Arctic. The focus is on the ongoing legal mechanisms put in place for the maintenance of IEL in the various Arctic States. From the onset, climate change has drastic legal effects on the Arctic States. The consequences have led to changes in the environmental politics of the Arctic States. The soft law approach that has traditionally been applied for several decades sometimes conflicts with the principle of State sovereignty. A few provisions of the UNCLOS and other related international instruments are ambiguous. There is no exclusive IEL treaty involving all the Arctic States. The requirement of one as it is the case with the Antarctic Treaty System in the polar seems apparent. The preparation of a new one and/or other related international legal environmental instruments for the future Arctic region is highly recommended.

Key words: International law, international environmental law, climate change, Arctic, Arctic council, soft laws as well as treaties.

Historical review of environmental law in the Arctic

Although much was not known about the IEL in the Arctic until after 1945, its origin could be traced as far back as in the 19th century with the signing of bilateral fisheries treaties.¹ It was during the 19th century that the people of the Arctic States began understanding that the process of industrialization

1 See for instance Article 1 of the Convention Between the United States of America and His Majesty the Emperor of All the Russias, Relative to Navigating, Fishing, Etc., in the Pacific Ocean established at St. Petersburg on April 17, 1824. <http://www.explorenorth.com/library/history/bl-rusus1825.htm> accessed on 10/12/2017

and development required limitations on the exploitation of certain natural resources.² The natural resources included but not limited to flora and fauna. The adoption of the necessary legal instruments therefore, became crucial. The notion of IEL in the Arctic had started gaining some grounds in 1909 when the United States of America concluded a treaty in boundary waters with Great Britain relating to questions arising between the United States and Canada. Although the treaty was between an Arctic (America) and a non Arctic State (United Kingdom) the out come of the treaty was expected to aid in the disputes settlement of IEL between America and Canada which were both Arctic States. It thus set as a base for the IEL in the Arctic. In fact, the parties agreed not to permit the construction or maintenance on their respective sides of the boundary of any remedial or protective works or any dams or other obstructions in waters flowing from boundary waters.³ In other words, waters flowing across an international boundary shall not be polluted on either side to the injury of health or property on the other. It should therefore, be acknowledged that albeit the IEL in the Arctic only became significant after the establishment of the United Nations (1945) and the various environmental conferences in the 1970s and the 1990s, its historical facts must always be referred to as far back as in the 19th century.

General Introduction

International Law does not only govern the relations between independent States as stated in the locus *classicus* case of *S.S Lotus*⁴ but also that between the States and; International Organizations, the States and Non-governmental Organizations as well as States and multinational companies. Similarly, the international and comparative law addresses legal issues of different States while at the same time

2 Principle of International Environmental Law by Philippe Sands and Jacqueline Peel with Adrianna Fabra and Ruth Mackenzie. 3th edition [2012] at page 22

3 See Article IV of the Treaty between the United States and Great Britain relating to boundary waters, and question arising between the United States and Canada

4 See the S.S Lotus Case (France v Turkey) judgement of 7th September, 1927 at para. 44

noting their similarities and differences. It should be made known about the onset that IEL is a discrete area of the international law. The program leading to the submission of the present thesis was focused on the studies of the Arctic States and governance. It may not be wise to proceed without attempting the definition of the other key words identified above as their exact meanings will enhance understanding about this paper.

To begin with although the environment is hardly defined in both the national and the international law, it however, addresses issues of biological diversity, soil, water, air, atmosphere, ozone layer, climate, landscape, cultural heritage, socio-economic systems, as well as human health. In fact, the environment per se specifically means the physical factors of the surroundings of human beings including the land, soil, water, atmosphere, climate, sound, odours, tastes and the biological factors of the animals and plants of every description.⁵ Environmental law therefore, refers to the body of rules and regulations, orders and statutes concerned with the maintenance and protection of the natural environment of a given country.⁶ On the other hand, the international environmental law is a set of international rules and norms that aim to protect the environment.

It is worth noting that the present paper is limited to the environmental law within the Arctic States. It may be of interest to note that IEL the Arctic is increasingly becoming more important. In deed, some of the fundamental significance might have been due to the acceleration of climate change, the melting of the sea ice and the increase in the human activities in the respective States of the Arctic. It follows suit that climate change is undoubtedly the principal cause of environmental problems in the Arctic region. Perhaps, it should be reiterated here that “climate change” is a change of climate which is

5 National Environmental Act (No. 47 of 1980) - Sect 33

6 <http://www.businessdictionary.com/definition/environmental-law.html>

attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.⁷

The effects of climate change are adverse to the Arctic due to the fact that the ice appears to be melting at a higher temperature rate. On the other hand, Arctic can be defined as an ocean surrounded by land consisting of sovereign and permanent human population where there is usually a presence of tundra, snow, ice and marine mammals. Alternatively, it is the area of the globe above 66° N parallel an approximation of the Arctic Circle which encloses Alaska (part of the United States), Greenland (part of Denmark) as well as all the other Arctic States. Specifically speaking, it is naturally made up of eight sovereign nations States: Finland, Sweden, Norway, Russia, Denmark, Canada and the United States. The respective parts of the territorial jurisdiction of the above sovereign States remain subject to the international legal environmental obligations. It will be apposite to abreast ourselves with factors common to all the Arctic States. All the 8 States therein prioritized their policies towards human development especially through economic development such as the extraction of natural resources. Moreover. The recognition of the active participation of the indigenous communities in matters that affect the indigenous people is another characteristic of the Arctic States. At the international scene, there is the general acquiesce for the States to cooperate for good governance or work on the Arctic.

As a major step to combating climate change and other related IEL issues within the Arctic States, a high level leading intergovernmental forum – the Arctic Council was established in 1996. The main objective was (and remains) to promote cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic indigenous communities and other Arctic inhabitants on common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic.⁸ Most of the work of the Arctic Council is based on “soft law” approach.

7 See the 1992 Convention on Climate Change Art. 1 (2)

8 Art. 1 (a) of the Declaration on the establishment of the Arctic Council, September 17, 1996

Soft laws in turn refer to those legal agreements, decisions as well as declarations which though not legally binding, have the effect of being enforced directly or indirectly by the parties therein. In other words, they are not legally binding at the first phase of adoption but may later be integrated into the national laws through framework Conventions. Put differently, the rules of conduct, statements, principles, policies not intended to be legally binding but which are expressions of intent by the international or regional community in a given critical issue of interest to all may also be referred to as soft laws. It is important to note that soft laws are contrary to hard laws (treaties) since the later can be legally enforced. In fact, a treaty is an international agreement concluded between the States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.⁹ It is not questionable that the soft law mechanisms traditionally implemented by the Arctic States have been very effective for some decades ago in the Arctic. It is also true that it was only from the 1970s that IEL additionally gained more popularity in the Arctic.¹⁰ It seems that it was from that period that the Arctic States began coordinating in response to international environmental issues and/or started adopting regional agreements. It was not long ago that environmental concerns about the Arctic were integrated within the international law or when increased attention over the compliance of environmental obligation in the Arctic emerged. It is my intention to analyze and show that in the flux of the rapid climate changes in the Arctic, the governance of the various Arctic States may begin abandoning the soft law system to establishing exclusive IEL treaties to safe guard the future of the Arctic States. The notion of soft law approach therefore, fundamental for most arguments that will be raise in this paper.

9 Art. 2 (1) (a) of the Vienna Convention on the law of treaties [23rd May 1969]

10 See for instance, the UN Conference on Human Development June 6 – 16, 1972; UN Conference on Environment and Development (1992); the Kyoto Protocol to 1992 Climate Change Convention (1997); the Biodiversity Protocol to 1992 Biodiversity Convention (2000); the Earth Summit (2002) and the United Nations Conference on Sustainable Development (2012)

In an attempt to discussing the exigencies in the above topic, I will be focusing on certain questions. These will include: What constitute the scope of IEL in the Arctic? **(Par I)**. In other words, how does the IEL operates in the Arctic? How does the principle of State sovereignty functions within the Arctic States vis-a-vis the IEL? After examining the scope of the IEL in the Arctic, I will chronologically analyze climate change and it immense legal effects on the Arctic **(Part II)**. This is because climate change is an integral part of the scope of IEL within the Arctic States. This may include the Arctic States scramble for the continental shelf, increased in commerce and security, oil spills, just to name a few. The last part will adumbrate on the contemporary legal environmental issues in the Arctic **(Part II)**. A call for the preparation of new legal IEL instruments in the Arctic cannot be successful without the examination of the current situation. It will be on this third part that judging from the ongoing environmental law matters in the Arctic, a treaty will most probably be better than the traditional soft laws. The fact that soft laws appear weak in their sanctions enforcement mechanisms and yet, a few provisions of the UNCLOS are ambiguous, makes the last part of the work indispensable to the topic. I will finally conclude by looking at the way forward for the enactment and implementation of effective international environmental rules in the Arctic.

1. The scope of international environmental law in the Arctic

This first part of the work will focus on the functioning of the IEL vis-a-vis governance within the Arctic States. It will be in the course of examining how environmental issues operate within the Arctic States that one can determine whether there is an apparent need to change or improve on their current *modus operandi*. Some environmental analysts may argue that there is little or no need to move soft law mechanisms to hard law approaches. It is my opinion that the Arctic States begin negotiating for an

exclusive environmental treaty involving all and only the 8 Arctic States. The need for one seems crucial when one thinks how the Arctic will look like in the next two decades. In order to have a good understanding about the scope, the principles of IEL in the Arctic **(A)**, the role of the Arctic Council on the IEL in the Arctic **(B)** and the active part taken by the indigenous people of the Arctic Arctic States **(C)** will be at the forefront.

1.1 The main principles governing international environmental law in the Arctic

There are many principles that guide the IEL in the Arctic and it is based on those principles that the IEL is what it is today in the Arctic. A 'principle' guides the decision maker in any given circumstances. It is a normative value that must be taken into consideration but which however, does not and cannot by itself conclude the matter.¹¹ Perhaps, it will be imperative to make a distinction between 'principles' and 'rules' of IEL to actually understand how these principles are useful for the scope of IEL in the Arctic. A rule is essentially practical, and moreover, binding ...; there are rules of art as there are rules of government ... a principle expresses a general truth which guides our actions, serves as theoretical basis for the various acts of our life, and are the application of which in reality produces a given consequence.¹² A law principle is therefore that which judicial officials must take into account if it is important, as a deliberation descent in one direction or another.¹³ It should be born in mind that the principles of IEL are not the same like the principles of international law such as *jus cogens*. While the latter establishes the roles, the former (principles of IEL) forms part of the

11 Offshore Oil and Gas Development in the Arctic under International Law: Risk and Responsibility by Rachael Lorna Johnstone 2015 at pg. 21

12 See Gentini Case (Italy-Venezuela Mixed Claim Commission, 1903), in J.H. Ralston and W.T.S Doyle, Venezuelan Arbitrations of 1903 at pg. 556. http://legal.un.org/riaa/cases/vol_X/477-692.pdf

13 See the case concerning Pulm Mills on the River Uruguay (Argentina v Uruguay). Judgment of 20, April, 2010 para. 205 and 210 of the I.C.J. Rep. 14

international customary law and at the same time serve as part of *sine quo non* for human existence in the Arctic. The principles governing IEL in the Arctic are therefore, very significant given the far reaching consequences of environmental effects in the respective Arctic States.

1.1.1 The principle of state sovereignty

It is interesting to note that although the States are sovereign in international law, the situation is somewhat different with the IEL in the Arctic. In international law, the States are equal and sovereign, and nothing contained in the United Nations Charter authorizes them to intervene in matters which are essentially within the domestic jurisdiction of other States or requires the Members to submit such matters to settlement under the Charter.¹⁴ In the Arctic, the States have sovereign rights to exploit their own resources pursuant to their own environmental policies but must ensure that the activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of their national jurisdiction. The *Trail Smelter* Case Arbitration Award of April 16, 1938, and March 11, 1941¹⁵ had long established the principle and all the Arctic States operates today with respect to it. In that arbitration, the award was infavour of the Unites States. That is, Canada was asked to pay damages caused by the activities of its companies situated at the border between her and the United States, and whose activities were causing harm over the territory of the United States. The damage was specifically on the pasture land, crops, trees and agriculture caused by sulphur dioxide emissions from the smelting plant (Smelting Company) owned by Canada at a considerable distant. The principle of State sovereign rights to exploit natural resources also include the right to be free from interference

14 See Article 2 (1) and (7) of the United Nations Charter

15 Trail smelter case (United States, Canada) joint award of April 16, 1938, and March 11, 1941 http://legal.un.org/riaa/cases/vol_III/1905-1982.pdf accessed on 10/12/2017

over their exploitation.¹⁶ It is worth noting that the principle has been expanded to include developmental issues inasmuch as environmental matters are to be properly addressed within the Arctic. The Arctic States must in accordance with the Charter of the United Nations and the principles of international law, have the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, but must ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.¹⁷

Since most of the Arctic States are coastal and a lot of their companies seem to be located towards the coast, the principle is aiding in shaping the national environmental policies in another way. For instance, even though Finland is a sovereign State within international law, it will most probably refuse to allow certain companies to be established at the coastal borders due to what would be the outcome from the Companies' activities. Therefore, the freedom of the States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited.¹⁸ The principle of States sovereignty in international law and its limits by international environmental law is not the only one governing the functioning of the IEL within the Arctic. The principle of Arctic State corporation on environmental issues is equally crucial.

1.1.2 The principle of State cooperation on environmental matters in the Arctic

16 Principle of International Environmental Law by Philippe Sands and Jacqueline Peel with Adrianna Fabra and Ruth Mackenzie. 3th edition [2012] at page 192

17 Principle 2 of the Rio Declaration on the environment and development 3 – 14 June, 1992.

18 See the preamble of the Draft articles on Prevention of Trans-boundary Harm from Hazardous Activities, with commentaries 2001

The principle of State cooperation is also of utmost importance in international environmental law including the Arctic States. It includes the collection of scientific data concerning the continental shelf, the dissemination of information, the protection of the marine environment as well as other scientific research. Absolute cooperation is required when the Arctic States are negotiating their non-regulatory commitments for solving problems or for the establishment of international organizations to handle IEL matters. Consequently, international issues concerning the protection and improvement of the environment in the Arctic should be handled in a cooperative spirit by all Arctic States, on an equal footing.¹⁹ The principle is even more important for the functioning of the IEL in the Arctic given that they rely highly on the soft law approach. The soft law mechanisms will fail entirely if the States negotiate in *mala fide* or are unwilling to implement sanctions on a betrayer State. The Arctic States cooperate in good faith and, as necessary, seek the assistance of one or more competent international organizations in preventing significant trans-boundary harm or at any event in minimizing the risk thereof.²⁰ The Arctic States also cooperate on both global regional basis, directly or through competent international organizations (the Arctic Council) formulating and elaborating international environmental rules and standards.²¹ Specifically speaking, the Arctic States cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem.²² In view of the different contributions to global environmental degradation, Arctic States have common but differentiated responsibilities as far as their IEL is concerned. The effective cooperation here should be interpreted widely to include the discouragement of the relocation as well as transfer to the other Arctic States of substances that may cause severe environmental degradation. The principle of State sovereignty and State cooperation alone, cannot detail the functioning scope of IEL within the Arctic

19 Principle 24 of the United Nations Conference on the Human Environment 5-16 June, 1972

20 Art. 4 of the Draft articles on Prevention of Trans-boundary Harm from Hazardous Activities, with commentaries 2001

21 Art. 197 of the UN Convention on the Law of the Sea 10 Dec. 1982.

22 Principle 7 of the UN Conference on Environment and Development (1992)

States. Closely related to the afore mentioned principles is that of prevention and precaution. The two principles are similar but differ to some extent as examined *infra*.

1.1.3 The preventive and precautionary principles of international environmental law shaping the scope of environmental law in the Arctic

Today in IEL, a growing emphasis is being put on the duty of prevention. Much of international environmental law has been formulated by reference to the impact that activities in one territory may have on the territory of another.²³ This principle is even one of the most important in IEL because sovereign States are not only called upon to prevent trans-boundary environmental hazards. They are equally obliged under IEL to prevent activities that may cause environmental harm within their respective national States. The Arctic States are internationally obliged to exercise due diligent in ensuring that they prevent their environmental activities from causing trans-boundary environmental hazards to their neighbouring States. However, the duty of diligent is not intended to guarantee that significant harm be totally prevented, if it is not possible to do so. All is that the State of origin is required to exert the best possible efforts to minimize the risk.²⁴ Generally speaking, the content of “due diligence” obligations may not easily be described in precise terms since “due diligence” is a variable concept. The concept may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological

23 See the reports of the international Arbitral Award on Award in the Arbitration regarding the Iron Rhine (“Ijzeren Rijn”) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, decision of 24 May 2005 para 222

24 Commentaries on the Draft Articles on Prevention of Trans-boundary Harm from hazardous Activities, Yearbook of the International Law Commission (2001-II), Part 2, para. 7

knowledge.²⁵ The recent adoption by the Seabed Chamber of the International Tribunal of the Law of the Sea only confirmed rules that had earlier been established in the 1970s.²⁶ Also, by 1982, it had closely been stated that Sovereign States must ensure that the activities within their jurisdictions do not cause damage to the natural systems located outside their national jurisdiction.²⁷ The environmental preventive principle has therefore, existed in many United Nations documents of the IEL of which most of the Arctic States are members. However, the preventive motive must be taken in an earlier stage of the activities because it may not be useful taking it at a later stage since the damage might not further be reduced or stopped. The principle is buttressed by an extensive body of domestic environmental protection legislation that establishes the authorization procedures together with the adoption of international environmental standards.²⁸

The preventive principle of IEL is similar to that of the precautionary approach but it should be noted that some differences exist between them. The later was rooted in the Rio Declaration on environment and development. It differs from the preventive principle by reiterating that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.²⁹ Nowadays, the principles of the precautionary motive and prevention have been extended to nuclear weapons activities that can be catastrophe for the environment. In fact, the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings not leaving out the unborn

25 Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area (Advisory Opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea) Case No. 17, 1 February 2011, para 117 https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_op_010211_en.pdf

26 See principle 24 of the Declaration of the United Nations Conference on the Human Environment 5-16 June, 1972

27 Principle 21 (d) of the [A/RES/37/7. World Charter for Nature - the United Nations](#)

28 Principle of International Environmental Law by Philippe Sands and Jacqueline Peel with Adrianna Fabra and Ruth Mackenzie. 3th edition [2012] pg. 201

29 See Principle 15 of the Rio Declaration on the environment and development 3 – 14 June, 1992

generation.³⁰ More over, every Arctic State is under an international law obligation of not allowing, wittingly its territory to be used for acts contrary to the rights of other States.³¹ There are equally basic environmental law principles that aid in the functioning of the IEL within the Arctic States.

1.1.4 The principle of sustainable development

Although the IEL principles explained supra are very important, the role played by sustainable development remains special given the drastic effect of climate change in the Arctic. It is probably due to the practice of sustainable development that the indigenous people of the Arctic State are still capable of retaining their cultural heritage today. Sustainable development could be defined as the development meets the needs of the present without compromising the ability of future generations to meet their own needs.³² This implies that individuals (both rich and poor) should strive to meet up with their basic needs while reserving the opportunity to fulfil their aspirations for a better life. It is in this light that the Arctic States are ensuring that environmental considerations are integrated into their economy and other developmental plans. In Finland, the Arctic Council policies aid tremendously for such an integration. Again, the Saami indigents in northern Finland do not only exploit their natural resources in a rational manner but they also strive to preserve it for the benefit of the future generation. I will elaborate on this point when writing about the indigenous people and their environment infra.

The basic principle of sustainable development in IEL law had long been confirmed in the international law when the ICJ stated that:

30 Offshore Oil and Gas Development in the Arctic under International Law: Risk and Responsibility by Rachael Lorna Johnstone 2015 at pg. 35

31 The obligation was long established in the Corfu Channel Case. See the International Court of Justice judgment of April 9th, 1949 especially pgs. 15 and 22

32 Report of the World Commission on the Environment and Development, Our common future (1987), the Brundtland Report at para 27

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind-for present and future generations-of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.³³

It should be recalled from the facts of the above case that a treaty for the construction of a series of dams along the Danube had been signed in 1977 by both parties. The applicant later filed a case before I.C.J. for resolution after disputes arose between the parties. Article 3 (4) of the United Nations Convention on Climate Change as well as other relevant IEL instruments³⁴ had earlier formulated the reasoning taken by the court in the above case. There are recognitions now that there are environmental risks that threaten human survival. In fact, we cannot permit the onward march of technology and development without giving attention to the environmental limits that must govern these issues including sustainable development.³⁵ It appears that Arctic States have been gradually drifting away from environmental issues to addressing more developmental matters. This was observed through the United Nations Conference on the exclusively on human environment in the early 1970s that later

33 See the *Gabcikovo-Nagymaros (HUNGARY/SLOVAKIA)* Case. 1997 ICJ Reports 78 Para. 140.

34 See for instance the preamble and articles 1, 8 and 11 of the 1992 UN Convention on Biodiversity

35 World Commission on Environment and Development, *Our Common Future*, 1987, p. 5; see also D. H. Meadows, D. L. Meadows and J. Randers, *Beyond the Limits*, 1992

moved to the declaration on the environment and development by 1992. Since then, the literature on development seems to be growing faster than that on the environment.

It is submitted that there are many IEL principles governing the environmental law on the Arctic. However then, enacting the principles is one thing and implementing them is another. The fact that natural resources are not sustainably managed only reminds ones that realizing the principle of sustainable development for example, is still far fetch. It is fundamental to here note that all the IEL principles remain forms of soft laws and hence, are not legally binding. Other forms of environmental instruments that are legally enforceable may therefore, provide the Arctic States with heavier sanctions against violators of environmental law within the Arctic. The above principles of the IEL in the Arctic would seem to be a myth without the functioning of the Arctic Council.

1.2 The Arctic Council and its role on the IEL in the Arctic

It is important to note that by the end of 1980, the US-Canadian tensions regarding Arctic shipping had intensified and there was also the fervent need to decrease East-West tension. Subsequently in 1991, the Rovaniemi Declaration on Arctic Environmental Protection Strategy (AEPS) was realized and later in 1996 Arctic Council was established as its successor. The Arctic Council was established as a high level non governmental Organization with the principal objective to cooperate, oversee and coordinate the programs established under the AEPS.³⁶

There is a growing national and international appreciation of the importance of Arctic ecosystems and an increasing knowledge of global pollution and resulting environmental threats. The Arctic is highly sensitive to pollution and much of its human population and culture is directly dependent on the health of the region's

³⁶ Para. 1 (a) (b) of the Declaration on the Establishment of the Arctic Council, Ottawa, September 17, 1996

ecosystems. Limited sunlight, ice cover that inhibits energy penetration, low mean and extreme temperatures, low species diversity and biological productivity and long-lived organisms with high lipid levels all contribute to the sensitivity of the Arctic ecosystem and cause it to be easily damaged. This vulnerability of the Arctic to pollution requires that action be taken now, or degradation may become irreversible ... The implementation of the Strategy will be carried out through national legislation and in accordance with international law, including customary international law as reflected in the 1982 United Nations Convention on the Law of the Sea.³⁷

The AEPS had to inter alia protect the Arctic ecosystem; enhance and restore the environmental quality and the sustainable utilization of natural resources including their use by local populations and indigenous peoples in the Arctic; to review on a regular basis the state of the Arctic environment; to identify, reduce, and eliminate pollution within all the Arctic States. The Arctic Council came up and its membership is restricted to the Arctic States only although non Arctic States are granted audience as observers. Moreover, the Saami Council and the Association of Indigenous Minorities of the North, the Inuit Circumpolar Conference, Siberia and the Far East of the Russian Federation remain the permanent participants in the Arctic Council.³⁸

Most of the actual work of the Arctic Council is carried out in its 6 working groups that identified persistent organic contaminants, oil pollution, heavy metals, noise, radioactivity and acidification as their priority areas. Each working group is headed by a Chair and a Vice-Chair, who rotate on a biennial basis. The full working group meets biennially to assess progress of work, discuss the program

³⁷ Arctic Environmental Protection Strategy signed by the 8 Arctic States in June 1991 at pg. 6

³⁸ Ibid at para 2

priorities, to develop a work plan. It is therefore understandable that the working groups are those that actualized the environmental policies on the Arctic. It would perhaps, be very illustrative if I briefly discuss the functions of the working groups regarding the insofar as Arctic environmental issues are involved.

1.2.1 Monitoring and Assessment Program

One of the groups is the Arctic Monitoring and Assessment Program (AMAP) that was created in 1991 with the view of implementing the objectives of the AEPS.³⁹ This working group provides reliable and sufficient information on the status of, and threats to, the Arctic environment. It equally offers scientific advice on actions to be taken in order to support Arctic governments in their efforts to take remedial and preventive actions relating to contaminants. It has been taking preventive measures directly or through competent international organizations, especially those consistent with the 1982 United Nations Convention on the Law of the Sea regarding marine pollution in the Arctic, irrespective of origin.⁴⁰ So far, it has produced integrated assessment reports on the pollution status and trends of the conditions of Arctic ecosystems. It has been identifying possible causes for the changing conditions, detecting emerging environmental problems, their possible causes, and the potential risk to Arctic ecosystems including indigenous peoples and other Arctic residents; recommend actions required to reduce risks to Arctic ecosystems.

The AMAP assessment designs and implement a coordinated monitoring programme to monitor the levels of pollutants and assess the effects of pollution in all compartments of the Arctic environment. These areas include the atmospheric, terrestrial, freshwater and marine environments as well as human

³⁹ Arctic Monitoring and Assessment Program (AMAP), para. 6.

⁴⁰ Ibid para. 7

populations. Its assessments are performed according to agreed guidelines based on data already published in scientific literature, data obtained from its monitoring program and the traditional knowledge. The AMAP priorities are centered on petroleum hydrocarbon pollution, environmental consequences and biological effects on the Arctic resulting from global climate change, stratospheric ozone depletion not leaving out the effects of pollution on the health of humans living in the Arctic.

The Arctic Climate Impact Assessment has been one of the projects that the AMAP seems to have recorded a lot of successes. The Arctic Climate Impact Assessment carried in 2005 suggests that the Arctic climate is warming at a very speedy rate (about twice) as that of the rest of the world. Average temperature increase in Arctic since the 1950s: 2-3°C and some times up to 4°C during winter. Moreover, that the temperature in the Arctic may be increased by 4-7 over the next century while the precipitation may increase up to 35%.⁴¹ it is understandable that such increase will definitely create far reaching effects on the biodiversity, animal, vegetation transport, commerce and other human activities in the Arctic. AMAP as a working group of the Arctic Council therefore, aids in foreseeing and suggesting for the possible solutions to solving the Arctic problems most especially for the 8 member States of the Arctic.

1.2.2 Protection of the Arctic Marine Environment

Another working group of the Arctic Council has been the Protection of the Arctic Marine Environment (PAME) that was equally established in 1991 and incorporated into the Arctic Council in 1996 after Ottawa Charter was adopted. Its primordial objective is to address both global and regional policies that relate to the Arctic environmental protection through Arctic maps and data. In this light, the Arctic

41 Arctic Climate Impact Assessment 2005 pgs. 3, 4 and 100. also at [file:///C:/Users/User/Downloads/Arctic-Climate-Impact-Assessment%20\(2\).pdf](file:///C:/Users/User/Downloads/Arctic-Climate-Impact-Assessment%20(2).pdf) accessed on 24/12/2017

Marine Shipping Assessment (AMSA) provides policy advice and recommendations on marine safety and marine environmental protection as it related to shipping in the Arctic marine environment. The PAME working group in a way to carry out its duties effectively conducts a comprehensive Arctic marine shipping assessment through the auspices of the Arctic Marine Strategy Plan. The Arctic Ocean Review Project (AOR) project led by Canada, Iceland, Norway, Russia and the United States and was agreed by the Arctic Council at its 2009 Ministerial Meeting, as a follow up to the 2004 Arctic Marine Strategic Plan.⁴² This seems to have yielded some fruits as the Arctic Council in 2009 noted increased in the marine access and navigation in the Arctic Ocean. Consequently, the Council called for the development and the implementation of suitable national and international regulations, where appropriate, to advance the safety of Arctic marine shipping, including marine pollution prevention, reduce accident risk, and facilitate effective emergency response.⁴³

1.2.3 Conservation of Arctic Flora and Fauna

Similarly, the Conservation of Arctic Flora and Fauna Working Group (CAFF) which consists of permanent participants, observers to the Arctic Council and representatives from each member State of the Arctic is playing a vital role. The Arctic 8 member States agree to conserve Arctic flora and fauna and their habitats in their natural diversity and to further protect the resources from the pollution threat. The CAFF moreover, recognizes the special relationship and importance of the Arctic flora and fauna and their habitats to indigenous peoples. Measures to improve research and information through international cooperation aimed at protecting flora and fauna, and their habitat are taken regularly. Much of the CAFF work is performed by the ABA that concentrate on the ecosystem and species

42 <https://www.arctic-council.org/index.php/en/our-work2/8-news-and-events/327-arctic-ocean-review-project-aor>

43 TROMSØ DECLARATION On the occasion of the Sixth Ministerial Meeting of The Arctic Council The 29th of April, 2009, Tromsø, Norway at pg. 4

characteristic of the Arctic. It thereby attracts information from different sources and then analyse the current environmental changes regarding the CAFF. In fact, its main purpose has been to

Synthesize and assess the status and trends of biological diversity in the Arctic ... as a major contribution to international conventions and agreements in regard to biodiversity conservation; providing policymakers with comprehensive information on the status and trends of Arctic biodiversity.⁴⁴

From 1995, CAFF came out with some formidable objectives which included; the need to protect the ecosystem from human-caused threats; to regularly compile and disseminate information on Arctic conservation; to consult and cooperate with appropriate international organizations and seek to develop other forms of cooperation; and to seek and develop more effective laws, regulations and practices for flora, fauna and habitat management, utilization and conservation.

The objectives of the ABA were nicely formulated in the mid 1990s when the effects of global warming in the Arctic were not yet felt as is the case today. 20 years after, the consequences of climate change in the Arctic are already alarming and it is postulated that the situation will worsen in the subsequent years. My humble submission is that despite the beautiful works of the ABA to the CAFF and finally the Arctic Council, the entire works culminate in the so-called soft laws which are not legally binding and hence cannot be enforced upon the Arctic States that are hesitant to implement the roles. It is for the above reason that one would advocate and suggest that the Arctic States in order to prevent the worst environmental hazard in future, begin planning of transferring all their soft laws into hard laws.

44 See the Arctic Council Ministers in Salekhard, Russia (2006) at <https://oaarchive.arctic-council.org/browse?value=Ministerial+meeting&type=subject>. Accessed on 24/01/2018

1.2.4 Emergency Prevention, Preparedness and Response Working Group

The Emergency Prevention, Preparedness and Response Working Group functions more on emergency cases (EPPR).⁴⁵ Its mandate is concerned with the prevention, preparedness and response to environmental emergencies in the Arctic. Members of the Working Group exchange information for best practices and conducts projects (development of guidance and risk assessment methodologies, response exercises, training - just to name a few).⁴⁶ Its scope has subsequently been expanded to include natural disasters. The work has focused mainly on oil and gas transportation and extraction, and on radiological and other hazards. It has recorded some successes in the area of oil spills on the Arctic waters and other environmental risk activities. Its current projects and activities include, cooperation on spill response in the Arctic; emergency source control management and spill prevention strategies for high priority risks; community radiation information project kola region; community radiation information on emergency exercises; Arctic rescue; Arctic Guide and updating the environmental risk assessment.

In the domain of pollution, the Arctic Council plan for the eliminate of pollution of the Arctic (ACAP). In fact, it has been focusing on the prevention of adverse effects from pollution of the Arctic environment. The group equally intervenes on matters relating to Arctic pollution sources thereby strengthening other mechanisms that can encourage various Arctic States to reduce emission and pollutants. The question that must be posed here is whether there are enough sanctions to levy on the Arctic States that fail to observe the policies. The answer is obvious that that if there exist any sanctions to that effect, the sanctions however, appear weaker thereby giving room for stronger sanctions to deter defaulters. The enactment of an environmental treaty by the Arctic States is therefore,

45 <http://arctic-council.org/eppr/about-eppr/>

46 <http://arctic-council.org/eppr/>

apparent as its sanctions will be heavier and again it will be legally binding to all the member States of the Arctic.

The last thought not the least is the Sustainable Development Working Group that was established later in 1998 (SDWG). Its fundamental objective was to protect and enhance the culture and the economic development of the Arctic communities and inhabitants in an environmentally sustainable means.⁴⁷

It is important to recognize the role played by Barents Euro Arctic Council, the Northern Forum Nordic Council and the International Arctic Science Committee. The Barent – Euro Arctic Council for example has been performing almost the same functions like the Arctic Council enumerated above, when changes are being made *mutatis mutandis* regarding the environmental law on the Arctic. I am not unaware of the fact that it was established by Finland, Norway, Denmark, Sweden, Russian Federation and Iceland and the European Commission to the exclusion of the other Arctic States.⁴⁸ It is true that Canada and the United Nations are not yet members of the organization but its efforts towards environmental protection and preservation in the Arctic cannot go unacknowledged. However then, although the Arctic Council and Barent – Euro Arctic Council have been very primordial on the environmental squabbles in the Arctic, they do not have the status of inter-governmental organization. They were created through international treaties. Their founders established them through mere declarations. The need for an Arctic environmental law treaty therefore, remains fundamental to a better way forward for the future of the Arctic States.

The Nordic Council – a geo-political inter-parliamentary forum established for co-operation between the Nordic States⁴⁹ seems to be very instrumental on international environmental matters within the Arctic. With over 87 parliamentary members (reputed personnel) from 5 Arctic States who meet

47 Principles of International Law by Philippe Sands and Jacqueline Peel with Adrianna Fabra and Ruth Mackenzie. 3th edition [2012] at pg. 596

48 <http://www.barentscooperation.org/en>

49 <http://www.norden.org/en>

regularly to discuss co-operation on tackling the effects of global warming amongst other things, one can be sure of some positive outcome. This co-operation is highly required within the Arctic States because it may be practically impossible to prevent fisheries from migrating from one part of the sea to another as the ice continue to melt although there exist territorial boundaries in the sea. Again, the co-operation can be very effective when the members unanimously decide to isolate a member State that fails to execute certain obligations that have been taken with respect to their cross boundaries environmental hazards. The fact that the federation of Russia, Canada and the United States are not members to the Nordic Council reminds one to question concrete consensus reached by the 5 Nordic Council. This is because Russia, Canada and United States are the most influential States in the Arctic. The success of the Nordic Council in formulating roles to handle international environmental struggles in the Arctic could be compared with what is usually referred to as “a toothless bull dog” because the roles cannot be as useful as intended.

The IEL in the Arctic would not have been what it is today irrespective of the governing principles and the role played by the Arctic Council in the Arctic as analyzed supra. This is because the indigenous population continue to play an active role. The Arctic indigenous people are actively participating in the Arctic environmental process given the fact that the Arctic is a barometer for global environment. That will constitute the next lines of this dissertation.

1.3 The indigenous and their environment in the Arctic

The functioning of the IEL in the Arctic has been very successful not only due to the applicability of the principles within the Arctic States by the government through the Arctic Council. The indigenous people and their communities and other local communities have equally played a vital role in the

environmental management and development by virtue of their knowledge and traditional practices.⁵⁰ It is interesting to note that the indigenous peoples have not always wanted to have an international legally binding definition of themselves. This is basically because they do not have a homogenous single group but rather, constitute of many different peoples with many common and distinct elements. Until date, there is no universally accepted definition of the indigenous people.⁵¹ However, they could be defined as those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them.⁵² They at present form non-dominant sectors of society. They are determined to preserve, develop and transmit their ethnic identity, ancestral territories as the basis of their continued existence to future generations in accordance with their own cultural patterns, social institutions and legal system.⁵³

It is important to note from the onset that the indigenous people live in almost all the 8 States of the Arctic and that may be one of the reasons why their influence can easily be felt on the environmental matters in the Arctic. The Inuit people for instance live in Denmark, Russia, Canada and the United States. In fact, it is estimated that about 70,000 Sami live in Finland, Norway, Sweden and Russia; 155,000 Inuit Alaska, Canada, Greenland, and Russia; some 55,000 Athabaskan and Gwich in Alaska and Canada, and about 15,000 Alutic in Alaska and Canada.⁵⁴ When addressing the indigenous people and their environment in the Arctic, the principle of State sovereignty or trans-boundary delimitation is limited. The Sami people in Denmark, Sweden and Norway in accordance with their tradition are

50 Principle 22 of the Rio Declaration on the environment and development 3 – 14 June, 1992

51 Human Rights & Disability Advocacy by Maya Sabatello and Marianne Schulze 2014 at pp.160

52 See José Martínez Cobo (1986/7). Study of the Problem of Discrimination Against Indigenous Populations. UN Doc E/CN.4/ Sub.2/1986/7) at www.un.org/esa/socdev/unpfii/.../workshop_data_background.doc

53 See *ibid supra*

54 International Law and the Arctic by Michael Byers 2013 at pgs. 217 - 218

permitted to move their reindeer herds across the borders into other State. Consequently they are like State`s own subjects, allowed to use land and share for themselves their animals.⁵⁵

1.3.1 Environmental self-determination of the indigenous peoples of the Arctic

The concept of self-determination of the indigenous people in the Arctic one of the important contributing factors to IEL within the Arctic States. It should be recalled that the consent of a State in any international legal instrument such as treaties is very primordial for the State to be legally binding.⁵⁶ This implies that treaties duly signed and ratified are binding only to the consented States. Similarly, declarations are not legally binding except through the application of Customary International Law⁵⁷ as is the case with the Universal Declaration of Human Rights. The principle of State sovereignty is problematic to the environmental rights of the indigenous people in the Arctic in two folds. On the one hand, the States cannot be bound by norms without their consent. Consequently, the indigenous people`s right to self-determination may not be materialized without the consent of the State. On the other hand, indigenous people cannot practically participate in decisions making between Member States because the indigenous population does not constitute a State. It is true that the indigenous people are categorized under Non-Governmental Organizations and can be consulted when the issue of the day concerns the indigenous population. However then, the extent to which this may be actualized remains questionable due to the soft laws approach surrounding the representation or consultation in the Arctic.

55 Lennard Sillanpaa, *Impact on International Law on indigenous rights in Northern Europe* (Ottawa: Indian and Northern Affairs, Canada, 1992), 6

56 See article 9, 11 – 17 of the Vienna Convention on the Law of Treaties 23 May 1969

57 See Article 38 (b) of the Statute of International Court of Justice

The rights of the indigenous people to self-determination here must not be interpreted to the strict meaning of independent statehood as provided by relevant international law instruments.⁵⁸ Rather, it requires the Arctic States to accord some meaningful political opportunities both at the local and at the government level for decision making. Put differently, the self-determination of the indigenous people referred to in this work is *simpliciter*; their right to maintain their environment be it culturally, economically, socially just to name a few. The right to self-determination is seen as granting indigenous peoples internal self-determination – the right to determine their future within the existing nation-states. It seems like Saami were the very first indigenous group to be accorded such opportunities. Indeed,

The Saami Council was created in 1956 in the wake of A post World War II wave of liberalism, human rights and social justice that swept northern Europe. It fed up the northern countries' desires to be seen as leaders in equality and human rights, and consequently the proponents of Saami were able to secure governmental support in establishing a Saami Parliament that grew in administrative and economic strength in each Nordic Country. Its primary goal was to reverse the policies of linguistic and cultural assimilation that had become domestic policy and prevented the Saami people from being able to enjoy their collective rights as a people.⁵⁹

This right to the self-determination of the indigenous in the Arctic extends to their land and other natural resources. They shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after

58 See for instance, article 1 of the [International Covenant on Civil and Political Rights](#) and [International Covenant on Economic, Social and Cultural Rights](#) of 16 December 1966: article 1 (2) of the UN Charter all to which all the Arctic States are members

59 Shayna Plaut, “‘Cooperation is the Story’ - Best practices of Transnational Indigenous Activism in the North.” (2012) 16 *International Journal of Human Rights* 193 at 197

agreement on just and fair compensation and, where possible, with the option of return.⁶⁰ More so, they 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, as well as those which they have otherwise acquired. Various States shall give legal recognition and protection to these lands, territories and resources. The recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned. These cases are increasingly becoming more realistic in the Arctic with the increase in the challenges of global warming in the Arctic. Many indigenous people are forced to relocate due to the consequential effects of climate change in the Arctic. The Arctic States are therefore, called upon to provide effective mechanisms for just and fair redress for any such activities, and to take appropriate measures to mitigate adverse environmental and economic impact. It would appear that if the above declarations of the Arctic indigenous people are transformed into environmental hard laws such as treaties, then one can be ascertained of a better future for the Arctic indigenous people. The simple reason being that the hard laws are not only binding to all the Arctic States but also carry with it heavier sanctions than compare with the case of mere declarations. Be that as it is, the role of the indigenous people in their environmental politics in the Arctic warrants some applause.

1.3.2 The indigenous people's in their environmental politics in the Arctic

Moreover, Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions. In this light, the States shall consult and cooperate in *bona fide* with the indigenous peoples concerned

60 Article 10 of the United Nations Declaration on the Rights of Indigenous Peoples 13 Sept. 2007

through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.⁶¹ It stands to be question what type of representation that the law is providing here when it is understood that the individuals have no capacity to negotiate with the State. I am not unaware of the fact that the representation could be through the people`s Non Governmental Institutions but this still seem to me more like paper work rather than the practical. This is aggravated by the fact that there are mere declarations thus, leaving room for those States that may implement it *in toto*.

However then, the Arctic Council allows the representatives of the indigenous people through local government to be present at the meetings when especially when the topic to be discussed concerns the local population. Almost all matters of environmental protection in the Arctic relates to their entire communities and hence, the people too. This golden opportunity that the indigenous people of the Arctic States are given to actively participate in the Arctic meetings of international environmental issues seems to be rarely offered else where out of the Arctic. These representatives of the indigenous population are the people who actually execute the implementation and the follow up of the environmental principles in the Arctic. It should be made known that the representations have not been very effective through out all the Arctic States. Russia`s northern indigenous people have almost no opportunities for major political participation, partly due to their minority within the traditional home land, and partly as a result of centralized and autocratic nature of Russian politics.⁶²

It is not uncommon nowadays in the Arctic to see the indigenous group of one State crossing the international boundary to cooperate with the same group in the other State. A glaring example are the Inuvialuit of Canada and the Inupiat of Alaska who are virtually the same people yet divided by an international border. It will therefore, not be astonishing to see that the two groups will like to have one

61 Article 18 and 19 of the United Nations Declaration on the Rights of Indigenous Peoples 13 Sept. 2007

62 International Law and the Arctic by Michael Byers 2013 at pg. 221

and the same voice in their environmental issues especially on protection and management of the polar bear. The indigenous population thus has much to offer to the IEL as they regularly regard IEL as a crucial tool for advancing their political objectives.

Despite the representation of the indigenous people in the Arctic Council and their cooperation on trans boundaries issues, much is still to be questioned about their success in Arctic matters. I do not see how we can talk about their proper representation in the Arctic Council when they (indigenous people) do not have any voting rights during Arctic Council meetings. Moreover, the States are sovereign in international law as earlier explained at the introduction of this work. The fact that the indigenous people cooperate at the borders or better still, the principle of cooperation by the Arctic indigenous people cannot override State sovereignty. Consequently, the crossing of the borders by the indigenous within their Arctic States remains weak. It can become stronger or more legally enforceable if the Arctic States abandon their soft law approach to the adoption IEL treaties legally binding on all the Arctic States as is the case with the Antarctic Polar System. It is perhaps, due to the short comings of the Arctic indigenous people at the Arctic Council that efforts are now geared towards their human rights perspective as a way of reducing their paper representative at the Arctic Council.

1.3.3 The indigenous, human rights and their environment in the Arctic

I will be adumbrating on human rights as well as rights to a healthy environment of the indigenous people within the 8 Arctic States. Human rights in essence are those rights which are inborn, inherent, inalienable, in transferable and belong to everyone by virtue of being human. Consequently, the indigenous people wherever and whenever, are bearers of the rights too. The primary objective of human rights law is to protect each individual from abuse of power by State agents and to ensure that

basic needs can be met. Environmental law, in turn, seeks to protect and preserve the basic living and non-living resources and ecological processes on which all life depends. It can thus be seen as an inherent part of the human rights agenda or as a broader or sometimes competing goal. In either case, unlike human rights law, international environmental law is primarily concerned with controlling the activities of non-State actors who are the predominant cause of environmental harm. It is therefore understandable that without a healthy environment in the Arctic, many human rights therein may be violated. I submit that with the enforcement of human rights to the Arctic environment, environmental protection may palpably be enhanced within the Arctic States. The enforcement could also to an extent, support the participation of citizens in environmental decision-making, especially vulnerable groups and the indigenous peoples of the Arctic.

It is germane to note that environmental issues seem more crucial for the indigenous people because they depend directly upon nature and its resources. Many of the indigenous people in the Arctic are living in environments of high vulnerability and richness in natural resources. It is the traditional livelihoods and traditional way of life of indigenous peoples, that makes environmental rights more relevant for the indigenous population in the Arctic. This is of course the case for those indigenous people who still practice a way of life closely connected to nature. Yet, everyone shall have the right to live in a healthy environment and to have access to basic public services. Article 1 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters that was later adopted in 1998 adds more impetus in this area of the law. More so, the environmental rights of indigenous peoples can be derived from right to life. The right to life is a condition *sine qua non* for the right of people to a healthy environment. This is because without one's life or existence, there cannot be right to environment. The right to life which in turn brings about indigenous peoples right to the environment has been recognized and protected in several international

law instruments.⁶³ This must not be construed to mean that indigenous people's rights to the environment are limited to those provisions⁶⁴ This must not be construed to mean that indigenous people's rights to the environment are limited to those provisions. My concern here is to pin point those that relate to the environmental issues in the Arctic.

Another point worth noting is the ILO Convention⁶⁵ concerning the indigenous and tribal peoples in independent countries to which Norway and Denmark are parties while Finland and Sweden are still studying its ratification. Given the impact that the indigenous people have in the Arctic, it will be fair to suggest that the remaining 4 Arctic States take majors to become parties to the Convention. In that light, the Convention albeit not exclusively on environmental matters in the Arctic, it provides some base for an environmental treaty to be followed. It will be wise to revisit some few cases involving the indigenous people of the Arctic States since all the 8 Arctic States are members of the European Conference and the CCPR.

In *Lubicon Lake Band v. Canada*⁶⁶ (1984), A Band asserted that Canada's proposed large-scale expropriation of land, for commercial interests (oil and gas) exploration and exploitation, would deprive the indigenous community of its ability to manage its natural resources. It further avowed that it will consequently deprived the indigenous community from fulfilling its economic, social and cultural rights, thereby threatening the group's survival. The Human Right Committee hearing the matter correctly found that both historical inequities and current and proposed policies of the Canadian government were threatening the life and culture of the Lubicon Lake Band. The Committee further found a violation of the rights guaranteed in article 27 of the International Covenant on Civil and

63 Article 2 of the European Convention on Human Rights 1953; Article 4 of the American Convention on Human Rights 1969; and article 3 of the Universal Declaration of Human Rights 1948.

64 See Ibid supra

65 Indigenous and Tribal Peoples Convention 1989 (NO. 169)

66 *Lubicon Lake Band v. Canada*, Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40)

Political Rights 1966. Similarly, in the case of *Poma Poma v. Peru*⁶⁷ (2009), the fact at issue was that of effective consultations and effective participation of the indigenous people on matters concerning them. In that case, a dispute broke out over the exploitation of natural water resources, which caused a direct negative impact on the indigenous Aymara peoples' traditional means of subsistence – the raising of llamas and alpacas on which the Ayamara community depend. The Human Rights Committee again ruled that the same Article 27 above was violated by the State. The Committee went further and explained that in considering the meaning of the requirement of “effective” participation, mere consultation is insufficient. Instead, free, prior and informed consent is required. These requirements are equally important for all the other Arctic States insofar as the representation of the indigenous on their environmental issues is concerned.

Albeit the European Convention on Human Rights does not exclusively contain the right to environment, the European Court of Human Rights has extensive jurisprudence in environmental cases and has in most cases applied article 8 by making changes *mutatis mutandis*. In fact, the right to respect private and family life as guaranteed therein has been applied to protect indigenous people's culture and traditional way of life.

It should be acknowledged that until date, there seems to be no legally binding global human rights instrument that includes an explicit ‘right to environment’ although various States known to rather included ‘a right to a healthy environment’ in their domestic laws.

Despite all the above functioning of the IEL in the Arctic, climate change and its legal consequences still remain a grate concerned for all the Arctic States to start aiming at IEL treaties for the Arctic States. This will constitute the next part of this dissertation.

67 *Poma Poma v. Peru*, Comm. 1457/2006, U.N. Doc. CCPR/C/95/D/1457/2006 (HRC 2009)

2. Climate change and its drastic legal effects on the Arctic States

Climate change and the melting of ice have a potential impact on vulnerable ecosystems, the livelihoods of local inhabitants and indigenous communities, and the potential exploitation of natural resources.⁶⁸ Climate change, attributed to the anthropogenic greenhouse gas emissions, is a major overriding environmental issue of our time.⁶⁹ It is no more news that climate change in the Arctic causes significant changes in water, snow, ice and permafrost conditions, with rapid effects on biodiversity, ecosystems, economic and human living conditions in the Arctic. These developments are real; they are occurring now and are not just matters of speculation about the future.⁷⁰ In fact, increased atmospheric concentrations of greenhouse gases (GHGs) are very likely to have a larger effect on climate in the Arctic than anywhere else on the globe.⁷¹ Academic research on the role of IEL in the Arctic has been increasing recently probably for two fundamental reasons. On the one hand; climate change and economic globalization are opening up the Arctic to new economic activities, creating a demand for legal rules to ensure safety and order. On the other hand, the media frenzy over an alleged great power game between the Arctic States has prompted scholars to take an interest in environmental law and politics in the region.⁷²

The Arctic by virtue of its geographical location is vulnerable to pollution but yet, warm air and the ocean currents that usually flow from the tropics end up their pollutants on those from the municipal metal mining and smelting. One most disgusting case here is that the persistent organic pollutants do not dissolve in water. It follows suit that the adaptation of the indigenous or the local population as well

68 Arctic Ocean Conference, ILULISSAT, Greenland, 27 – 29 MAY 2008 para 2 at

http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf

69 Statement by the United Nations Secretary-General Ban Ki-moon at the opening of the High Level Segment of COP 14 in Poznan, December 11, 2008. Available at <http://unfccc.int/2860.php>.

70 Oran R. Young, Arctic Review on Law and Politics, vol. 1, 2/2010 p. 164-185, 165 ISSN 1891-6252

71 The Arctic Impact Assessment 2005 at pg. 100

72 International Law and the Arctic. [Koivurova, Timo European Journal of International Law](#) Vol. 25, Iss.1., (February 2014): 349-355. pg. 349

as the animals of the Arctic States are adversely affected by such persistent organic pollutant. The effect is even more grievous to animals that rely on fat reserves to survive the winter. However then, the analysis on this part is limited to the effects of climate change with legal implications for the Arctic environment. Other effects such as the socio-economic may only be mentioned passively reasons being that they can constitute a whole topic on their own. The scramble for the Arctic Continental shelf **(A)**, the increase in security and commerce **(B)** and the resource access on oil spill **(C)** will be at the lime line.

2.1 The Arctic States scramble for the Arctic Continental shelf

One of the most important legal consequence of climate change in the Arctic has been the increase for the scramble by the Arctic States to possess and possibly own the continental shelf. The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.⁷³ The establishment of the outer edge of the continental margin in the Arctic is left at the discretion of the 5 coastal Arctic States. These 5 coastal Arctic States are notably Canada, the United States, Norway, Russia and Denmark. These coastal States seem to be preparing certain submissions to the Commission on the Limits of the Continental Shelf regarding the outer limits of their extended continental shelves.⁷⁴ As to that which concerns Russia, the planting of the Russian flag on the seabed floor of the North Pole in August, 2007 gained world wide attention.⁷⁵ It could have been a clear demonstration of her interest in the continental shelf even though some analysts noted that it did not

73 UNCLOS Article 76 (1)

74 <https://fas.org/sgp/crs/misc/R41153>. Accessed on 20/01/18

75 The Politics of Arctic Sovereignty: Oil, ice and Inuit governance [2014] by Jessica M. Shadian at pg. 175

constitute a legal claim to the Arctic seabed. Recently, the interest has expanded to include the underwater of the Lomonosov Ridge that spans a reasonable distance across the center of the entire Arctic Ocean. In fact, Russia has been attempting to claim the enormous underwater of the Lomonosov Ridge as an extension of its continental margins. If such claims were accepted, it would most probably grant her nearly one half of the Arctic area.⁷⁶

Another legal implication pertains to the new international water boundaries that may be claimed in comparison with those that existed in the past when there was no ice melt. For instance, it is forecast that in the coming decades, global warming will reduce the ice pack in Canada's northern archipelago sufficiently to permit ships to use the trans-Arctic shipping route during the summer months.⁷⁷ This Northwest Passage invokes new jurisdictional issues in the Arctic. Canada avows that any such passage falls within its territorial jurisdiction since the water is an inland waterway. It therefore submits that the control, surveillance and regulation must be within the competency of Ottawa. However then, the United States claims that such a Northwest passage would palpably constitute an international strait bounded by two high seas. On the other side of the coin, Canada and Denmark are both claiming sovereignty over the Hans Island located in the Arctic Straits between Greenland and Canada's Ellesmere Island. It should be noted that since 1973 during delimitation negotiations between Canada and Denmark, a final statement has never been adopted although good diplomatic relations exist between the two Arctic Countries. Some analysts argue that the two countries are vying for control over a future sea lane that might be created when the Arctic ice would have melted sufficiently to create a Northwest Passage.⁷⁸ Other international environmental law writers hold the opinion that the two Arctic countries are staking out territorial jurisdiction based on the future economic benefit that may accrue from

76 Changes in the Arctic: Background and Issues for Congress by Ronald O'Rourke, March 30, 2010 at pg. ii

77 Changes in the Arctic: Background and Issues for Congress by Ronald O'Rourke January 2018 at pg. 20

78 Changes in the Arctic: Background and Issues for Congress by Ronald O'Rourke January 2018 at pg. 21

the area.⁷⁹ In either case, both analysts seem to be correct and I do not have any contrary view. It is submitted that if the Arctic States begin negotiating for an International Environmental Treaty exclusively for the 8 Arctic States, then such future territorial claim may be avoided. Reason being that the changing nature of the Arctic precipitated by global warming will be taking into account when drafting the treaty.

It appears that Canada's sovereignty claim over the Northwest Passage is contested by almost all the other Arctic States as well as some of her neighbouring maritime States. This may not only be due to the fact that it considers waters through it to have passed through islands of the Canadian Arctic Archipelago but also it uses straight base lines method in encircling its Archipelagic waterways. It would appear that Canada has the intention of converting waters that might at some point have been a part of the territorial sea or even the Exclusive Economic Zone. The Northwest Passage route for shipping is as important in the Arctic as it is in international law. Climate change in the Arctic is gradually causing a decrease in the sea ice extend and retreat of land ice as well as permafrost thereby easing access to natural resources. Increasing activities of extractive industries all over Arctic all could have resulted from the scramble for the continental shelf due to climate change. It should be emphasize that environmental protection, climate change, and the protection of Arctic indigenous cultures only exemplifies the complexity, vagueness and uncertainty of Arctic issues. Yet, the Arctic States do not suffice in mitigating the speedy and multifaceted changes that are currently taking place within the Arctic region.⁸⁰ The point that must be noted here is that insofar as the Arctic States continue to reach out for the newly continental shelf, the weaker States risk being left to drag behind. This is further explained by the fact that the powerful Arctic States like the federal Republic of Russia may continue to disregard the non legally binding instruments between her and the weaker neighbouring Arctic

79 Natalie Mychajlyszyn, *The Arctic: Geopolitical Issues*, Canadian Library of Parliament, October 24, 2008 at pg. 2

80 *Diverse Soft-Law Cooperation Forms in the Arctic – Do They Complement or Contradict Each Other?* International Community Law Review. Vol. 14, Issue 3, [2012] 273 – 299 at 281.

States. As a result of the scramble for the continental shelf by the Arctic States, there is an apparent need for the various States to strengthen their border checks. The examination of the increased in the security of the Arctic States is therefore, warranted since there are no binding treaties relating to the environmental relationship of all the Arctic States.

2.2 Increase in security and commerce within the Arctic States borders

States in international law are well known to tighten the security at their borders. In the case of the European Union, it is noted that security at the borders of Greece and Italy is bent on strengthening borders controls as they both serve as the gate way countries to Europe. The case is slightly different in the Arctic States. The Arctic States do not only concentrate on border control over the sea but are also seen to increase their commercial activities within the borders. This is because the more ice melt in the Arctic, the greater the room for various Arctic States to improve their economy. Put differently, the greater part of the Arctic border in control by a single State will to some extent improve the growth of its economy. Since new routes are created not only for commercial purposes but also for exploration and exploitation. The effects thus, created by the global warming in the Arctic are increasingly being felt in almost all organs of governance in the Arctic.

Moreover, it is also noted that environmental analysts began to perceive the need for the increase in security in the Arctic for decades ago. This is due to the fact that the Arctic is not only the Arctic Ocean but also the northern tips of three different continents: Europe, Asia and America. In other words, it is the place where the Euroasian, North American and Asian Pacific regions meet, where the frontiers come close to one another and the interests of states belonging to mutually opposed military blocs and nonaligned ones cross.⁸¹ By the end of 2007, the RADARSAT-2 satellite was successfully launched by

⁸¹ MIKHAIL GORBACHEV'S Presentation of the order of Lenin and the Gold Star to the City of Murmansk October 1, 1987. https://www.barentsinfo.fi/docs/Gorbachev_speech.pdf at pg 3

Canada through its air space for the purpose of monitoring their air space jurisdiction. Consequently, by May 2008, the satellite began commercial operation via in space commissioning. The satellite is now very useful in patrolling the Arctic waters as it monitors ice and shipping activities in the area.⁸²

Moreover, Russia appears to be the super power in the Arctic in terms of surface area second by the US. It is not a coincident that the two States are immediate neighbours and are both try to increase direct control over half of the Arctic littoral. It seems like as the effects of climate change continue to be felt more on the ice in the Arctic, the US keeps paying attention to any future missiles attack from Russia. The US has even been collaborating with the other Arctic States especially Norway in order to be able to stand firm in the Arctic. Such collaboration is triggered by the newly economic opportunities by virtue of the fact that the ice covered area continue is gradually being uncovered (ice melt). It is no more news that all the other Arctic States to the exclusion of Russia and the US have growing incentives to categorically take steps and prevent any dangers associated with the militarization of the Arctic.⁸³

Furthermore, submarine -launched Ballistic missiles (SLBMs) have increasingly been a concern for both US and Russia. This is because SLBMs and the Ballistic missile nuclear submarines have recently been developed into well suit the new developments introduced by global warming in the Arctic.⁸⁴

Commercial activities within the Arctic have substantially increased especially in the domain of oil and gas. This has been triggered not only by global warming but also by virtue of the fact that oil and gas are non renewable resources. Yet, the Arctic is known to contain large petroleum hydrocarbon reserve and even undiscovered resources that constitute a significant part of the world's remaining resource base.⁸⁵ Arctic States are therefore, rushing out to explore the golden opportunity brought about by

82 The scramble for the Arctic: ownership, exploitation and conflict in the far north. By Sale, Richard; Potapov, E. Frances Lincoln [2010] pg. 153

83 Sovereignty and Security in the Arctic by Edgar Dosman 1989 at pg. 18

84 Sovereignty and Security in the Arctic by Edgar Dosman 1989 at pg. 10.

85 Arctic Council (AMAP) Assessment 2007: Arctic Oil and Gas Activities para. 1

global warming in the Arctic. They at certain stages turn to pay little or no attention to the environmental consequences of their respective onshore exploitation of oil and Gas since it is only regulated by regulations and customary practices. Greenland for instance, had awarded over 22 exploitation licences by the end of 2013.⁸⁶ Russia and Norway seem to be busy with oil and gas exploitation among other economic activities in the Barents, Kara and Pechora Seas.⁸⁷ In fact, since Russia produced its very first oil from the Prirazlomnoye field south of Novaya Zemlya in 2014,⁸⁸ she has the persistent quest to explore the ice covered waters, and thanks to the ice melt that is gradually easing her exploitation.

As the Arctic States continue their quest for oil and gas, they are called upon not to cause any harm by their activities. This call is not limited to commercial exploitation. It equally extends to arm and military activities. This is because the environment is under daily threat and the use of nuclear weapons could constitute a catastrophe for the environment. ...also recognizes that the environment is not an abstraction but presents the living space, the quality of life and the very health of human beings, including generations unborn.⁸⁹ The existence of the obligation of the States to ensure that activities within their jurisdiction and control respect the environment of other States or areas beyond national control is now part of the corpus of international law relating to the environment.⁹⁰ It is true that commercial activities within the Arctic are booming due to the new routes created by ice melt although access on oil the spill remains a fact. It may be interesting to examine whether Arctic legally non

86 Government of Greenland, Mineral Licence and Authority, 'List of Mineral and petroleum Licences in Greenland; April 1, 2014

87 Wilson Center, 'Opportunities and Challenges for Arctic Oil and Gas Development' Eurasia Group Report for the Wilson Center, January 2014. https://www.wilsoncenter.org/sites/default/files/Arctic%20Report_F2.pdf accessed on 27/01/2018

88 **Gazprom** 'First oil from Russian Arctic shelf loaded' press release 18 April, 2014. at www.gazprom.com/press/news/2014/april/article189209 accessed on 01/01/2018

89 Legality of the threat or use of nuclear weapon. The Advisory Opinion of 8 July 1996. I.C.J Reports 1996, pa 226 para. 29

90 See ibid 88 supra

binding documents are still, and will continue to be the appropriate means of settling environmental matters in the Arctic. The situation is further compounded by the fact that oil spill may create far reaching negative consequences wherever it occurs.

2.3 Resource access on oil spill in the Arctic

In March 2006, the worst oil spill in the Arctic history was recorded. It was estimated to have involved over 900 tons of oil on the Alaska field. The occurrence added a value on the environmental problems within the Arctic especially as it took up to 5 days for the repairs. It should be recalled that oil spill at the sea as the case in the Arctic is even worst than that which occurs on the land. This is due to the fact that, at sea, it involves greater tonnages of oil, and dispersing and sinking culminating in a difficult process of environmental clean up.⁹¹ Climate change in the Arctic is therefore, creating access to resources which are in turn causing serious environmental harm. One is tempted to question the effectiveness of the soft law approaches towards such environmental hazards. The question is obvious because of what would happen to an Arctic State that fails to observe the non legally binding documents entered into with the other States. I said the worst case scenario because the oil spill in the Arctic now is becoming rampant. The need to try hard laws seems apparent given the fact that the situation may even escalate and become worst in the subsequent years. After the 2006 oil spill in the Arctic, the United States largest off shore oil spill erupted from the deep water horizon drilling rig on the flow of the Gulf Mexico in 2010.⁹² Coincidentally, by that same period, the Arctic Council intensified discussions about an international Arctic Treaty for the management and/or development of Arctic resources. Specifically speaking, the establishment of binding policies to protect the Arctic

91 The scramble for the Arctic: ownership, exploitation and conflict in the far north. By Sale, Richard; Potapov, E. Frances Lincoln 2010 at pg. 189

92 The Politics of Arctic Sovereignty 2014 by Jessica M. Shadian at pg. 4

environment was on the top of their agenda. All the efforts still ended with the adoption of non legally binding documents which till date, do not create the same effects as hard laws. What then appear to be the current situation of environmental issues within the Arctic? To get into an in-depth of the above question, one may want to take a close look on the current environmental situation of the Arctic States.

3. Contemporary legal environmental issues in the Arctic

On this last part, the current situation for the 8 Arctic States is examined. The Arctic region lacks a comprehensive and Arctic-specific environmental treaty binding on all Arctic stakeholders. It is largely governed by the work of the Arctic Council and a loose hodgepodge of “soft law” agreements. In principle, there is no standing legislative body *stricto sensu* that details international environmental standards, norms and procedures in the Arctic.⁹³ It is on this section that the need for the Arctic States to start making necessary arrangements for an environmental treaty exclusively for the Arctic States is indispensable. I will use the case of hydrocarbon extraction in the Arctic as the case study where the soft law approach seems to have offered very little insofar as the IEL in the Arctic is concerned.

3.1 Contemporary legal environmental issues vis-avis governance in the Arctic

The examination of environmental policies of the 8 Arctic States with regard to the governance may aid to the understanding of their current IEL issues. As to that which concerns Finland, it must be acknowledged that she is currently safeguarding funding for indigenous people’s participation in affairs that concern the indigenous communities. Her foreign policies are centered on environmental and

93 Carl Bruch, Is International Environmental Law Really Law?: An Analysis of Application in Domestic Courts, 23 Pace Envtl. L. Rev. 423 (2006) Also available at: <http://digitalcommons.pace.edu/pelr/vol23/iss2/5>

economic activities such as improved transport and other infrastructural development. At her international level, her focused is on strengthening cooperation with the Arctic Council, indigenous people's status both at the Arctic Council and Barents Euro Arctic Council.

The kingdom of Denmark with its disputed delimitation area between Greenland and Jan Mayen seems to be emphasizing the positions and roles of Faroe Islands, and self-government of Greenland. It has decided to maintain close cooperation between Greenland and the European Union, and to implement the relevant articles of the 1982 United Nation Convention on the Law of the Sea to the fullest. Note that the so called relevant articles of the above Convention may not be as useful as intended by the drafters as discussed infra.

The Norway bounded by Russia in the Barents Sea on her part has interest on developing the High North, manage its marine living resources and combat illegal fishing in and around the Arctic region. In fact, increasing maritime safety around Svalbard and maintaining friendly relations with Russian Federation is also on its top governance agenda in the Arctic.

The United States of America bounded by Russia in Bering Sea and Chukchi Sea is more involved with her homeland security, international governance and ensuring that its continental shelf and other boundaries are extended. The extension may only be realized in a couple of years to come provided it does not receive stiff and persistent objections from the other 7 States in the region. Although the United States has up till date not ratify the 1982 Convention on the Law of the Sea, it is believed to have done so through customary international law. It is in this light that it is enhancing its cooperation on scientific and marine research, transportation, environmental protection and other relevant economic issues in the Arctic.

Russia has priority preserving nature, keeping strategic resources in the region as well as mutual advantage of international cooperation with sub-Arctic States. It is somewhat strange to see that

Canada on its part is bent on exercising Arctic sovereignty and to further develop northern governance. This gives the impression that it is seeking autonomy in the region.

Irrespective of the above national and foreign policies of the Arctic States on environmental matters, there is still an ample need for the States to begin nurturing plans for an exclusive IEL treaty in the Arctic.

3.2 Arctic soft laws and their short comings on hydrocarbon extraction in the Arctic

It appears that because soft laws are generally not legally binding, the current legal framework in the Arctic is affording more unsuitable solutions to the ongoing offshore hydrocarbon extraction and related environmental issues. The situation is further aggravated by the inescapable effects of climate change in the Arctic region which do not only result in continuous ice-melt but also require good governance in the region. Soft laws can be determined by the bindingness of the obligations created by an instrument. The less binding an international law instrument, the more a soft law mechanism adopted therein. Soft law is usually the first alternative when the creation of other international legally binding instruments such as treaties fails. The Arctic States are increasingly making use of soft law instruments, and are doing so with intention: they do not want to create an international treaty.⁹⁴ Yet, the ever increasing environmental problems of the Arctic require an exclusive environmental treaty for the Arctic States to supplement the lapses left by the soft law mechanisms.

It is useful to take note that offshore hydrocarbon extraction is basically the extraction of oil and gas in the sea as opposed to onshore extraction that takes place at the coast or closer to the coast. 'Oil' means petroleum in any form including crude oil, fuel oil, sludge, oil refuse and refined products.⁹⁵ It should

⁹⁴ AALCO quarterly bulletin volume 3, Numbers 1 & 2 March and June 2007 at Pg. 187

⁹⁵ Article 2 (1) of the Agreement on cooperation on Marine Oil Pollution Preparedness and Response in the Arctic

be noted that a couple of decades ago, the extraction of gas and oil in the Arctic was more of the onshore than offshore. Today, there exist mainly offshore hydrocarbon extractions as a result of fast melting ice triggered by climate change in the Arctic. Recently in 2014, it was enthusiastic to see Russia's Prirazlomnoye field South of Zemlya produced its very first barrels of oil which was also the first from waters that have been covered by ice for several years.⁹⁶

The Arctic offshore oil and gas Guidelines document that appear to be the working document on the hydrocarbon extraction in the Arctic has been criticized woefully as it bears with it lots of disadvantages. Their non-binding nature implies low determination and constrains any normative functional interplay with other institutions.⁹⁷ The paragraphs that follow are critical examination of some of its working principles regarding the extraction of oil and gas in the Arctic region.

3.2.1 Disadvantages of soft law application to the Arctic environmental problems

Given the significance of oil and gas in the Arctic and in the world economic market in large, the current soft law approach in the Arctic appears to be offering negative effects on their extraction. Some influential Arctic States seem to be over exploring and exploiting natural resources therein irrespective of the soft law mechanism put in place. The principle of precautionary approach sounds promising. It provides that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. Although this principle was further upheld in the Arctic Guidelines⁹⁸ it however, lacks

96 See Press release at: <http://www.gazprom.com/press/news/2014/april/article189209/> accessed 15/03/2016

97 Stokke, Olav Schram. "Interplay Management, Niche Selection and Arctic Governance." In *Managing Institutional Complexity: Regime Interplay and Environmental Governance*, edited by Sebastian and Olav Schram Stokke Oberthur. Cambridge, MA: MIT Press, 2011. at pg. 158

98 Arctic Offshore Oil and Gas Guidelines (2009) at Pg. 6

legal sanctions for the States that violate it. For instance, Russia is increasingly exploring and exploiting oil seeps found at the banks of the Ukhta River in the far northern Timan – Pechora region. In fact, its oil and gas production concentration in the Nenets Autonomous Okrug, the Yamal – Nenets Autonomous Okrug and the Northern part of the Komi Republic are indication of violation of the principle of precautionary approach. It is submitted that the principle of precautionary approach that is not legally backed up does not equally offer support as intended by the drafters. Instead, it has created room for influential Arctic States to explore and exploit oil and gas in the Arctic region without minding what become of the smaller States. This will most probably not be the case with an environmental treaty in the Arctic due to the strict and heavy sanctions imposed by a treaty by its nature.

It is also important to stress that soft law approach on hydrocarbon extraction in the Arctic region is even felt more negatively in the application of its other principles. One of the principles provides that national authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.⁹⁹ From the tenor of this principle, it contains vague and imprecise terms such as ‘should’, and emanates from bodies lacking international law-making authority as rightly argued by some authors.¹⁰⁰ In other words, the State that pollutes for example is not necessarily obliged to pay for its pollution yet, the extraction of oil and gas causes a lot of pollution. This has stimulated the States like Canada to intensify its extraction along the Mackenzie River near Norman Wells, the near shore Beaufort as well as along the coast of Baffin Island and Scott Inlet. Since the words of the above

99 See Principle 16 of the Rio Declaration on Environment and Development 1992

100 Christian Chinkin, “Normative Development in the International Legal System” in Dinah Shelton (ed.), *Commitment and Compliance: the role of Non-Binding Norms in the International Legal System* (Oxford University Press: New York 2000) at Pg. 30

principle are not precise, it is somewhat difficult to hold Canada accountable to pay for the pollution caused during the extraction of oil and gas in the afore mention areas. With this in mind, one's left with the conviction that soft law mechanism on offshore oil and gas extraction in the Arctic region is in effective.

Moreover, it is another soft law approach that the Indigenous people and their communities as well as other local communities should have a vital role in their environmental management and development because of their knowledge and traditional practices. Arctic States are called upon to recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.¹⁰¹ The extraction of the oil and gas is *inter alia* included in their environmental management and development. According to that approach therefore, the indigenous and local population ought to be consulted on issues of hydrocarbon extraction in the Arctic region. This is technically not the case insofar as the indigenous and local population are denied the right to vote in decisions affecting their lives. Hitherto, offshore oil and gas exploitation in the Arctic remains the major economic driver in many areas in the region.¹⁰² The technical exclusion of their right to vote on issues of hydrocarbon extraction results to the extraction of their non-renewable resources without their consent. In the light of the above tactical exclusion, soft laws on offshore oil and gas extraction that were intended to favour the indigenous population in the Arctic do not end up meeting with that objective in practice.

In addition, Arctic soft law is to the effect that the States shall provide prior and timely notification to potentially affected States on hydrocarbon extraction with significant adverse trans-boundary environmental effect and shall consult with those States at an early stage and in *bona fide*.¹⁰³ This soft

101 Principle 22 of the Rio Declaration on Environment and Development 1992

102 Arctic Monitoring and Assessment Program (AMAP): Arctic Oil and Gas, 2007, at Pg. 1.

103 Principle 19 of the Rio Declaration on Environment and Development 1992

law cannot meet up with its intended objectives *in toto* by virtue of the principle of States' sovereign equality in international law.¹⁰⁴ If a sovereign State is extracting oil and gas within its jurisdiction in the Arctic, the extent to which prior notice is to be given to its trans-boundary remains within the discretion of the State executing the act. It is submitted that because the States are sovereign and can act the way they wish within their territorial jurisdiction, any prior notice to the States becomes insignificant. The principle is of little or no interpretative importance to aid the extraction of oil and gas in the Arctic region. Furthermore, the declaration is not legally binding on its own terms hence, it makes no formal difference. Russia is making unequivocal claims to parts of the Arctic Ocean. It has asserted its intention to defend its territorial claims, and has hinted at extending them if it so desires.¹⁰⁵ The soft laws approach may instead instigate the Arctic States to act more liberally on the extraction of oil and gas in the region. It has been suggested that the broad continental shelf claims by the Arctic states are prompted by melting sea ice, a development that opens the continental shelf and deep sea-bed to potential hydrocarbon offshore extraction.¹⁰⁶ There seem to be a fierce competition between the Arctic States as to who gets there first to occupy the oil and gas. In was in the regards of the States' sovereign equality and the act of acting liberally that Russia planted the Russian flag on the ocean floor on 2 August 2007.

Another Arctic soft law approach worth noting is 'more rational management of resources'. According to that approach, the States should adopt an integrated and coordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve environment for the benefit of their population.¹⁰⁷ This path is faced with a great number of

104 See Article 2 (1) United Nations Charter

105 International Relations and the Arctic: Understanding Policy and Governance, edited by Robert W. Murray and Anita Dey Nuttall [2014] at Pg. 9

106 <http://arctic-transform.org/download/OffHydBP.pdf> at Pg. 3

107 Principle 13 of the Declarations of the United Nations Conference on Human Environment (Stockholm) 1972

disadvantages as far as hydrocarbon extraction is concerned. It lacks any corresponding theory of responsibility. It is based solely upon voluntary adherence and rely upon non-judicial means of enforcement.¹⁰⁸ Already, in international law, the States have permanent sovereignty over their natural resources and the right to exploit them.¹⁰⁹ It is not logical to get into the soft law approach concerning management of resources including oil and gas whereas such matters are already regulated by international law. International laws duly signed and ratified override national or non-binding international agreements as is the case with soft laws on offshore hydrocarbon extraction in the Arctic. In the same light, an IEL treaty exclusively for the 8 Arctic States duly signed and ratified will not only override the national law but will also be legally binding.

Today, the principal concern surrounding offshore oil and gas activities in the Arctic is the risk of major accidents involving large scale oil spills.¹¹⁰ Occurrence of large oils spills during oil and gas extraction is not uncommon in the Arctic region. Although Canada, the United States and Norway have sophisticated systems for environment regulation of offshore hydrocarbon extraction, they are not absolute. Practically, soft law approach cannot *stricto sensu* prevent or prohibit such large scale accidents due to its non-binding nature. Usually, hard laws mechanism will bind the States and submit them to a punitive cost if they violate. It will be fair to say that the application of soft laws as way of sanctions on Arctic States who cause major accidents in the course of offshore oil and gas extraction appears inadequate.

108 Christian Chinkin, "Normative Development in the International Legal System" in Dinah Shelton (ed.), *Commitment and Compliance: the role of Non-Binding Norms in the International Legal System* (Oxford University Press: New York 2000) at Pg. 30

109 See United Nations General Assembly Resolution 1803 (1962) restated in Art 193 of the United Nations Convention on the Law of the Sea (1982)

110 *Managing Institutional Complexity: Regime Interplay and Global Environmental Change* edited by Sebastian Oberthür, Olav Schram Stokke - Business & Economics [2011] at Pg. 156

3.3 The failure of the UNCLOS and other related international instruments

The relevant UNCLOS here will be invoked and criticized as they are not offering the guidance as intended by its drafters. New situations are emerging due to the ice melt and these are circumstances which were not envisaged by the drafters at the time. If an exclusive Arctic IEL treaty is not established, the future of the Arctic may be unilaterally determined by some powerful Arctic States.

Other international instruments involving all the Arctic States such as the International Convention on Oil Pollution Preparedness, Response, and Co-operation (OPRC) will also be examined.

It would seem appropriate to recall certain relevant provisions of the UNCLOS. The UNCLOS is the only Convention in the area of IEL involving all the 8 Arctic States and thus, is highly regarded when disputes of environmental law on the Arctic arise. It flows that the sovereignty of every coastal State extends to its land territory, air space over the territorial sea, internal waters, the sea bed and the subsoil.¹¹¹ The territorial sea of a State on its part extends up to a limit not exceeding 12 nautical miles, measured from its baselines.¹¹² It should be remembered that on the territorial sea, all States exercise the right to innocent passage provided the flag of the particular nation is seen hanging on the ship. This implies a speedy and continuous passage without engaging in any fishing activity.¹¹³ The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed.¹¹⁴

Despite the above nice provisions, there are still problems that the Arctic certainly requires to establish its own treaty (environmental) to govern the environmental issues of the respective Arctic States.

Surprisingly, Arctic States do not only claimed certain off-shore waters as 'historic waters' but also

111 UNCLOS Article 2 (1) (2)

112 UNCLOS Article 3

113 See generally Article 17, 18 and 19 of the UNCLOS

114 See Part V of the UNCLOS

claimed as internal waters.¹¹⁵ Internal waters are waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State. It seems very difficult to be able to coin internal waters where foreign vessels do not have any right of passage within the Arctic States irrespective of the conditions that have been provided.¹¹⁶ The matter is even aggravated by the changing nature of the Arctic waters triggered by the effects of climate change or ice melt that continuous to affect the water structure. On the other hand, historical waters are those that a State may proof ownership by virtue of her continuous prolong sole usage, and the recognition of the usage by other States in international law. However, proving the existence of such waters in the Arctic seems more difficult especially when one move further from the shore. For instance, it will be practically difficult for Canada to proof claim of its waters of the Arctic archipelago since it has lots to do with foreign expeditions` voyages. The north-East passage had earlier been crisscrossed by the a Swede and later by a Norwegian – Roald Amundsen. An exclusive international environmental treaty for the Arctic States may be the best to address these difficulties brought about by internal and historical waters given the fact that it will be exclusively for the Arctic States.

Moreover, it cannot be said that the UNCLOS adequately addresses matters of IEL in the Arctic when it does not sufficiently defined the Arctic Ocean. It defines an enclosed or semi-enclosed sea to mean a gulf, a basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow the outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.¹¹⁷ It is questionable that the Arctic Ocean constitutes a semi-enclosed sea. In principles, its connection to other seas is not limited to narrow outlet and its not entirely by a

115 The scramble for the Arctic: ownership, exploitation and conflict in the far north. By Sale, Richard; Potapov, E. Frances
Lincoln 2010 at pg. 145

116 See Article 7 of the UNCOLS for the conditions

117 UNCLOS Article 122

territorial sea or even the en-compassion of the EEZ. It is submitted that so long as the ice continue to melt in the Arctic, the outlet of the enclosed-sea would certainly increase.

One may stand to reason that the provisions of article 234 of the UNCLOS could in turn offer absolute clarifications. The article states that coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. The wordings would have been very useful to the present and future of the Arctic States if not of the last sentence of that article. The last sentence reads thus, such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence. The ambiguity of the provisions lies on the last statement. The best available scientific evidence in Russia may not be the same in the United State or Canada. Moreover, not all the Arctic States have ratified the Convention. The Convention applies to the United States only by virtue of the practice of international law since she has not yet ratified it although the Conventional was signed from 1982. This to an extent explains her absence in the UNCLOS dispute resolution procedures regarding the Northwest Passage. Right from the travaux preparatoire to the conclusion of the Convention, there were no suggestions that the Northwest Passage would occur any time soon due to global warming. Evidence of climate change now present that the ice in the Arctic is melting at a faster rate and the situation will become precarious in the subsequent years. What is more is that the States are obliged to protect and preserve their marine environment.¹¹⁸ How realistic or practical can that be when we have migratory fishes for instance? The Convention seems to have provided the Arctic States the right to legislate for their selfish

118 UNCLOS article 192

environmental protection. Canada for example, can interpret the above provision (UNCLOS Article 192) as giving her the right to legislate for the environmental protection to ice-free water between the islands of its Arctic Archipelago¹¹⁹.

It is submitted that insofar as the Arctic States continue to rely on related treaty environmental provisions from other international law instruments such as the UNCLOS, the future of the Arctic States still remain a stake. The most suitable international legal instrument is an IEL treaty exclusively for the Arctic States that will categorically come out with unequivocal provisions relating to the future Arctic environmental situation.

The International Convention on Oil Pollution Preparedness, Response, and Co-operation that was signed in 1990 does not help either. Firstly, it does not include all the Arctic States. Rather, its member States are those that do not seem to have the same effects of climate change as is the case with all the Arctic States. There are state parties to the Convention based in the temperate region. Members such as Senegal and Liberia may not create much impacts when issues of ice melt are being deliberated at the Convention. Consequently, the Convention cannot be invoked to safeguard environmental squabbles which are exclusively within the competence of the Arctic States. Assuming that all the Arctic States were to have signed and ratified the Convention, the next unresolved matter would have been that the Convention was signed a couple of decades ago. The fact that environmental issues in the Arctic are emerging now and will most palpably become precarious in the future would have been a good reason to abandon the Convention and create a new one. This is because the drafters of the Convention at the time did not take into consideration the foreseeability factor of the climatic effects which is surfacing now. The Convention therefore, cannot be applied *stricto sensu* to the 8 Arctic States. There

119 The scramble for the Arctic: ownership, exploitation and conflict in the far north. By Sale, Richard; Potapov, E. Frances
Lincoln 2010 at pg. 150

is indeed, a new dawn for the Arctic States to begin negotiating for an exclusive IEL treaty for the Arctic States that will take into account the vulnerability of the Arctic environment.

Conclusion

From all the fore goings, it will be fair to say that a new dawn has come for the Arctic States to begin negotiating for legally binding instruments for the future environmental issues within the Arctic. The requirement of an environmental treaty exclusively for the 8 Arctic States seems crucial now. This is due to the fact that global warming effects are greater in the Arctic than elsewhere in the globe. The consequences are due to increase tremendously in the subsequent years. The soft law mechanisms that were applied in the past may not still be very useful in addressing Arctic environmental problems within the Arctic. With the rapid increase of climate change, Major Arctic States like the Federal Republic of Russia and the US appear to be over shadowing other Arctic States. They are doing so for the predominantly for the reason that soft laws mechanisms are not legally binding.

Furthermore, the interrelation of soft law cooperation within the Arctic seems to be ambiguous on a policy level and at various environmental meetings. Even though the Arctic websites portray that they maintain and cooperate or enjoy firm relations, there is little or no evidence of cooperation in the practical day life.¹²⁰

The inclusion of non State Actors in the Arctic Council to some extent, makes it laborious for the Arctic Stakehood to denominate definitive environmental rules in the Arctic. In 2013, 6 other non States were added to the Arctic Council which has so far been the principal organ for the realization of Arctic decision and declarations relating to the Arctic environmental issues. The recent inclusion of Japan, Italian Republic, Republic of India, Republic of Singapore, Republic of Korea, and People`s Republic

¹²⁰ *Diverse Soft-Law Cooperation Forms in the Arctic – Do They Complement or Contradict Each Other?* International Community Law Review. Vol. 14, Issue 3, [2012] 273 – 299 at 295

of China¹²¹ has only helped to reduce the rate of cooperation amongst the Arctic States when addressing environmental matters.

Permit me illustrate here with a practical example. Take for instance, the Inuit Declaration of 2008 involving Canada, Norway, Russia, Denmark and the United States was indeed, a very good document. It provided some solid foundation for the environmental management of the Arctic by the Coastal States. It perhaps, set a base for similar decisions since like opinions were accepted on meetings on shipping and fisheries in the Arctic. However then, the question that remains unanswered is that if the coastal States are already nursing such views (views of shipping and fisheries to be regulated by the 5 coastal States) what then will be the position of other 3 Arctic States as well as the six international organizations? The remaining 3 Arctic States and the six international organizations have through Arctic Council – soft laws approach, been assured to actively participate fully in the Arctic environmental meetings. It will be fair to say that global warming in the Arctic may weaken the participation of the other 3 Arctic States in the Arctic key environmental negotiations. The next best alternative could be an exclusive environmental treaty involving all the Arctic States since it will not only be legally binding on them but will also allow participation on *pari pasu* bases.

Harder legislation may equally aid in reducing transaction cost, orders the relations amongst Member States as well as intensify the credibility of their commitments.

121 <https://arctic-council.org/index.php/en/about-us/arctic-council/observers>

More over, the inclusion of Arctic Athabaskan Council,¹²² the Gwich'in Council International,¹²³ the Inuit Circumpolar Council,¹²⁴ the Russian Association of Indigenous Peoples of the North¹²⁵ and the Saami Council¹²⁶ as permanent participants in the Arctic Council contributes immensely to making difficult for the Arctic States to reach consensus deliberations during meetings. These organizations are there for their individual interest which may sometimes differ from the priorities set forth by the State concern. An organization representing the indigenous people who are concentrated on one part of the country may find it easy to cooperate with its State than that representing dotted population of the indigenous. Despite such inclusion and growing recognition of the indigenous role or civil society, their actual participation and cooperation within the Arctic States still seems to be solely govern by sovereign States.

122 The AAC is an international treaty organization established to defend the rights and further the interests internationally of American and Canadian Athabaskan member First Nation governments in the eight-nation Arctic Council and other international fora. <http://www.arctic-council.org/index.php/en/about-us/permanent-participants/aac> accessed on 02/02/2018

123 The GCI was established as a non-profit organization in 1999 by the Gwich'in Tribal Council in Inuvik, NWT, to ensure all regions of the Gwich'in Nation in the Northwest Territories, Yukon and Alaska are represented at the Arctic Council, as well as to play an active and significant role in the development of policies that relate to the Circumpolar Arctic. It represents **Gwich'in in Canada and USA**. <http://www.arctic-council.org/index.php/en/about-us/permanent-participants/gci> accessed on 02/02/2018

124 The ICC represents approximately 160,000 Inuit in Alaska/United States, Canada, Greenland/Denmark and Chukotka/Russia. Founded in 1977 by the late Eben Hopson Sr. in Barrow, Alaska, the ICC has flourished and grown into a major international indigenous peoples organization. <http://www.arctic-council.org/index.php/en/about-us/permanent-participants/icc> accessed on 02/02/2018

125 The RAIPON is the Russian umbrella organization which organizes 35 regional and ethnic organizations of indigenous peoples in the regions where they live. It represents 41 groups of Indigenous peoples of the North, Siberia and the Far East. Although their total number is more than 270 000, they live in 60 % of the whole territory of the Russian Federation from Murmansk to Kamchatka. <http://www.arctic-council.org/index.php/en/about-us/permanent-participants/raipon> accessed on 02/02/2018

126 The Saami Council is a voluntary Saami organization (a non-governmental organization), with Saami member organizations in Finland, Russia, Norway and Sweden. Since its foundation in 1956 the Saami Council has actively dealt with Saami policy tasks. <http://www.arctic-council.org/index.php/en/about-us/permanent-participants/sc> accessed on 02/02/2018

I understand that the Arctic States have been working harder to enact and implement their decisions and regulations from various meetings. The fact remains that those resolutions can hardly be effectively enforced in the phase of international law. The Arctic States are bound to “legally enforceable” commitments, yet the agreements that create these commitments do not contain any binding dispute settlement mechanisms. The Arctic states each have input as to what interpretations mean, but there are no forums to file or hash out a complaint of non-compliance.¹²⁷ Again, the so called soft laws contained vague words and phrases in their instruments. Expression such as “should” rather than “shall”—language that does not create an exact burden or obligation between sovereign States in international law.¹²⁸ With all these in mind, you will surely see with me that it is high time the Arctic States begin negotiating ever lasting binding Instruments (an environmental treaty for example) that can be enforced in international law. Of course, that must be nicely negotiated in good faith and in unequivocal terms. The Arctic Council that much is expected from on matters of IEL in the Arctic cannot do more than it can. The Council is not even an observer of the UNFCCC. Hence, the Arctic Council can only organize certain side events. Yet, the UNFCCC is one where hard core issues of global warming including those in the Arctic are dissolved. If the Arctic Council that is the principal actor for negotiating and enforcing Arctic soft laws is not an active participant in such a conference, then the success of soft laws on related issues may be questioned. It will be of utmost importance to bear in mind that the individuals, people of the population that constitute the various Arctic States must play their vital role accordingly. It is obvious that to recall the maxim "Ubi societa, ibi jus" (where there is society, there is law) but in the case of the IEL in the Arctic, harder laws. It is my opinion that identifying a problem is a step into solving it.

127 Experts, Networks and International Law by Holly Cullen, Joanna Harrington and Catherine Renshaw 2017 ed. At pg. 742

128 Georgetown Journal of International Law Volume 46, Issue 3 *Spring 2015* 735 -764, 43

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