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Editors' Note

Kamrul Hossain & Marcin Dymet

Any discussions on the Arctic must be linked with the impending consequences of climate change. We have learned that the effects of climate change in the Arctic are drastic. We are aware that the presence of ice is important for the Arctic in order to maintain its natural ecological processes, which provide life support systems for humans, animals and plants. Climate change results in relatively faster rises in temperatures across the Arctic. Arctic climatological science provides us with evidence on the adverse consequences of changing conditions, such as those observed with melting ice sheets. Scientists often visualize the Arctic changes in order to illustrate results of their expeditions and investigations. The outcomes are indeed quite ominous.

If you put "Arctic" in a google image search, it is given that you find a great deal of images showing the detrimental effects of climate change. Amongst the iconic pictures, for example, are those of the polar bear – an ice-dependent species – depicted to be fighting intensely to survive on tiny ice masses surrounded by open waters. These images provide the tangible examples of imminent loss of biodiversity as a result of the changing climate. To what degree will the loss of biodiversity affect the Arctic and its natural environment, and subsequently the overall social-ecological processes? How much knowledge so far do we have on the Arctic? At the moment we still lack an adequate amount. This lack of sufficient knowledge is likely the reason why recently signed Central Arctic Ocean Fisheries Agreement offered a moratorium on Arctic fishing for next sixteen years until further scientific information is available.

Despite the lack of sufficient knowledge on the extent of climate-related ecological consequences, certain industries in the region are expanding, notably in oil, gas, and mineral extraction further supplemented by maritime navigation – including through the Northern Sea Route (NSR) and the Northwestern Passage (NP). This is particularly relevant for the European parts of the Arctic, of which the largest share is held by Russia. In recent years, Russia has been investing heavily in both oil and gas developments as well as in infrastructural developments to support anticipated opportunities with Arctic maritime navigation. The Yamal peninsula and Norilsk specifically are becoming promising hubs to attract substantial investments. The Yamal region in particular has been rich in oil and gas reserves, especially with liquefied natural gas (LNG). Norilsk likewise has abundant stores of nickel, copper, and palladium deposits. Transportation of these resources is increasingly being carried out through the NSR and so far

sixteen ports provide facilities, with two of them – the ports of Murmansk and Sabetta – being open year-round with full facilities.

Both national and foreign direct investments are active in the expansion to promote sophisticated infrastructure for Arctic development. Actors from both within and outside the Arctic are increasingly engaged in such developmental prospects. Nations with heavy energy demands, (e.g. East Asian countries) are seemingly on the forefront to promote business cooperation. China, for example, in early 2018 endorsed its official Arctic policy, highlighting joint cooperation for building "Polar Silk Road" as an extension of its massive Belt and Road Initiative. As one of the major shipping nations of the world, China continues to use the NSR. Last September, its icebreaker vessel – the Snow Dragon – accomplished the three month long 9th Arctic Expedition, which connected both the NSR and NP. The latest Chinese icebreaker vessel – the Snow Dragon II – has also been inaugurated this year. Chinese companies, the Silk Road Fund and Asian Infrastructure Invest Bank, have jointly invested in infrastructure development along the NSR in the Arctic. It is not only China, but also for example, South Korea – a major shipbuilding country – which is investing in building icebreaker vessels to transport LNG, in particular from the Yamal LNG projects. The world's first ice-breaking LNG carrier was delivered by South Korea in late 2016. The country has received a contract to build yet another 15 icebreaker LNG carriers, of which nine are due to be delivered by the end of 2018 and the rest in 2019. These carriers will transport LNG from Sabetta port to Asian markets. It is therefore apparent that there will be great pressure on Arctic environment with even further developmental potential, which could in turn accelerate the effects of climate change.

As such activities unfold in the Arctic, the effects of Arctic development are not adequately known as there is a gap in science-based findings on the impending consequences. Today one of the primary points in the agenda of Arctic development is to explore the ways in which engaged actors must responsibly behave. In its agenda, the Finnish chairmanship of the Arctic Council (AC), put sustainable development of the Arctic as one of its top priorities. Recently the AC has held its first ever presentation at UN headquarters at the High-Level Political Forum on Sustainable Development where, in addition to consequences stemming from the changes facing the Arctic, the value of collaboration for sustainable development was highlighted. Engaging all relevant stakeholders from both within and beyond the Arctic and integrating the Arctic in global-level actions will create room for the promotion of sustainable development in the Arctic. The reference to global action is sought, for example, in

a recent intergovernmental conference on an international legally-binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity in areas beyond any national jurisdiction (BBNJ). Although, the aim of the instrument provides general focus on BBNJ, and not the Arctic specific concerns, in a side event during the meeting, it was discussed whether, and how, the AC could play a role in protecting biodiversity in Arctic areas beyond national jurisdiction within the framework of some potential collaborative instrument.

The presentation above is just the reflection of some of the developments. There are lot more ongoing in terms of Arctic policy and law. This sixth volume of the Current Developments in Arctic Law presents some of the interesting developments. The volume includes 11 interesting short articles with updated knowledge on their contents. While these contributions are not peer-reviewed, and opinions expressed therein are of those of the individual authors of each chapter, we hope that the readers will find these articles and the volume in its entirety interesting and insightful.

Rovaniemi, 14 December 2018

Quotas, Cultures, and Tensions. Recent Schedule Amendments for Aboriginal Subsistence Whaling under the International Convention for the Regulation of Whaling

*Nikolas Sellheim**

1. Introduction

The testimonies by indigenous whalers from Alaska, Greenland, Chukotka and the US Pacific Northwest at the 67th meeting of the International Whaling Commission (IWC) in Florianópolis, Brazil, in September 2018 were truly moving. Makah, Inuit, Eskimos and Chukchi as well as Caribbean Bequaians stood side by side, backed by their respective national governments, asking the Commission to listen to their plights and to renew the quota for some large cetaceans that are subject of the International Whaling Commission. For this quota renewal, which must be decided upon by the Commission by a ¾ majority, takes place only every 6 years and 2018 thus marked the year of such renewal.

This contribution examines the process of the recently adopted quota allocation and changes to the management of cetaceans subject to Aboriginal Subsistence Whaling (ASW). Drawing from field notes of the author who attended the meeting as an observer, this paper summarises the discussions on the International Convention for the Regulation of Whaling (ICRW).[1] Particular emphasis is thus placed on the individual understandings of what the ICRW is to achieve and what role indigenous communities play in it.

2. A brief history of the Whaling Convention and Commission

To understand the current whaling regime, it is necessary to briefly sketch the history of the International Whaling Commission (IWC). The IWC is based on Article III of the ICRW, which was concluded by the major whaling nations at that time: Argentina, Australia, Brazil, Canada, Chile, Denmark, France, the Netherlands, New Zealand, Norway, Peru, South Africa, the Soviet Union, the United Kingdom and the United States. The convention came into force on 10 November 1948 and had an original membership of eight of the whaling states. By 2018, this membership has risen to 89 members, the latest of which

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[1] International Convention for the Regulation of Whaling of 2 December 1946 (161 UNTS 72).

is Liberia which has become a full member of the IWC in August 2018.

Originally, the IWC was considered a "whalers' club,"[2] primarily concerned with the advancement and further development of the whaling industry, as enshrined in the last preambular paragraph of the ICRW: "Having decided to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry."[3] The world's whale species were thus perceived as a resource that could be exploited on a large scale while being protected for the benefit of the whaling industry. In order to do so, an elementary part of the ICRW is the Schedule which outlines specific provisions and catch limits for specific regions and species. At the time of the ICRW's conclusion, however, species-based quotas were not applied. Instead, whale hunting was regulated by the so-called blue-whale-unit (BWU), based on the importance of the blue whale for international trade. The BWU thus provided for the ratio one blue whale, two fin whales, two and a half humpback whale, or six sei whales. In other words, the larger the whale, the better for the respective whaler since with less effort more whale tonnage could be produced. This inevitably led to the so-called 'whaling Olympics' and a drastic reduction of stocks of large cetaceans. Only in 1972 it was decided to replace the BWU with species-based quota allocation.[4]

Throughout the 1970s a paradigmatic shift in the perception of 'the whale' occurred, prompted by the rise of the environmental movement, the adoption of the Marine Mammal Protection Act (MMPA) in 1972 in the United States and the 1972 UN Conference on the Human Environment (UNCHE). Given the ever-declining populations of large whales, the UNCHE called for a moratorium on commercial whaling, which the IWC agreed upon in 1982, yet starting from the whaling season 1985/86. In other words, more than ¾ of the Commission members voted for a Schedule amendment that put in place catch quotas of zero for all whale species under the purview of the Commission. Even though this zero catch quota was to be in place only for a few years, up to the present day it has not been lifted. To the contrary – it has been solidified given that the steep rise of membership since the putting in place of the moratorium caused a shift from whale utilisation to whale preservation within the Commission. After all, the majority of rather recent members are nations opposed to whaling, despite not

[2] Arne Kalland and Brian Boeran, *Japanese Whaling. End of an Era?* (Routledge 1992), 13.
[3] ICRW, Preamble.
[4] Alexander Gillespie, *Whaling Diplomacy. Defining Issues in International Environmental Law* (Edward Elgar 2005), 4.

necessarily themselves having a history of whaling.

Even though the joining of Caribbean, African and South Pacific Island states – most of whom are nations supporting the sustainable use of whales and thus oppose the moratorium – has increased, the number of states aiming for a lift of the moratorium, the necessary ¾ majority, has not yet been reached. This situation, i.e. the attempts of whaling nations[5] and supporters of sustainable use to have the moratorium lifted *vis-à-vis* so-called 'like-minded states' opposing the extractive use of whales, has led many, particularly media commentators, to ascribe the IWC to be in a state of deadlock.[6] Based on my own observations, however, it strongly depends on who is asked about the state of the IWC: it is first and foremost sustainable use supporters that are unable to lift the moratorium that consider the IWC to be dysfunctional due to the opposing views on whales and whaling. On the other hand, those supporting the moratorium and the non-extractive use of whales consider the Commission perfectly functionable since it is able to uphold the moratorium. Especially the so-called 'Buenos Aires Group', consisting of Argentina, Brazil, Chile, Costa Rica, Ecuador, Panama, Peru and Uruguay,[7] is a strictly anti-whaling alliance, as we will see below.

3. Aboriginal Subsistence Whaling

Despite a zero catch limit on whales being in place, since the adoption of this moratorium indigenous whaling, ASW, was excluded. The ICRW itself, however, does not hold any provision on ASW. Instead, paragraph 13 of the Schedule establishes "catch limits for aboriginal subsistence whaling to satisfy aboriginal subsistence need for the 1984 whaling season and each whaling season thereafter."[8] The IWC has thus recognised four regions in which ASW is conducted: Alaska and Washington State in the USA, Chukotka in Russia, Greenland and Bequia in St Vincent and the Grenadines. This means that communities engaged in whaling are assigned a quota based on the advice of the IWC's Scientific Committee in 6-year blocks. In order to get this quota, however, the respective national governments are to submit a 'Needs Statement', which outlines the subsistence needs of the respective indigenous people and which is decided upon by the Commission. This Needs

[5] First and foremost Japan, Norway and Iceland.
[6] E.g. Tom Hirsch 'Whaling moratorium under review' *BBC News*, 19 July 2004. URL: http://news.bbc.co.uk/2/hi/science/nature/3905487.stm (accessed 21 September 2018); Tetsushi Yamamura 'Japan seeks IWC reform to resume commercial whaling' *The Ahasi Shimbun*, 6 July 2018. URL: http://www.asahi.com/ajw/articles/AJ201807060009.html (accessed 21 September 2018).
[7] At IWC67, Nicaragua has somewhat diverted from the overall direction of the Buenos Aires Group.
[8] ICRW, Schedule, para. 13.

Statement was to be submitted before every quota renewal.

Two issues should be considered in this context: (1) ASW is not a matter of course despite ASW existing in the context of the IWC. This is best exemplified by the attempts of the Makah Tribe to obtain a quota for grey whales in the 1990s. However, since they voluntarily gave up whaling in 1915 due to conservation concerns, it was argued that a grey whale quota in 1990s would not be necessary. The struggle lasted for several years and only in 1997 a quota was assigned.[9] (2) Even though an indigenous people has a history of whaling, this does not mean that its government shows support for its whaling history. A case in point is the long-standing history of interaction with the sea of the Ainu in northern Japan, including the hunt for whales and seals.[10] Although Japan is the most vocal champion of sustainable use and commercial whaling, it has never submitted a Needs Statement on behalf of the Ainu. One reason might be that the situation of the Ainu as an indigenous people in Japan is a tricky one and marked by controversy.[11] This notwithstanding, it seems fair to say that ASW is far from being a normality within the IWC.

4. The Proposed Schedule Amendment

With this in mind let us now turn to the 67th meeting of the IWC, which was the venue when new ASW quotas were to be decided, based on the 6-year blocks underlying the quota allocation. However, the four states in which ASW is conducted – Denmark (on behalf of Greenland), the Russian Federation, St Vincent and the Grenadines, and the United States – submitted a proposal for Schedule amendments which went beyond quota allocation, but which contained more far-reaching elements the most important of which were (1) updated carry-over provisions; (2) a one-time extension of 7 years until 2025; and (3) limited automatic renewal of the quota including safeguards to protect whale stocks.[12]

4.1. Updated Carry-Over Provisions

Concerning the first point, it is particularly Section 13(b), which sets catch limits for ASW, which is of relevance. Previously, each ASW hunt was allocated a specific quota for a

[9] See Emily Brand, 'The Struggle to Exercise a Treaty Right: An Analysis of the Makah Tribe's Path to Whale' *Environs: Environmental Law & Policy* 32, 287–319.

[10] E.g. Carl Etter. *Ainu Folklore: Traditions and Cultures of the Vanishing Aborigines of Japan* (Westchester: Willcox & Follett, 1949), 164–173.

[11] Hiroshi Maruyama. Japan's post-war Ainu policy. Why the Japanese Government has not recognised Ainu indigenous rights? *Polar Record, 49*(2): 204–207.

[12] IWC, Proposal for a Schedule Amendment on Aboriginal Subsistence Whaling, IWC/67/01, later IWC/67/01 Rev 1., p. 1.

specific species. If the quota was not reached, a certain number of strikes were possible to carry forward into subsequent years. For instance, in the case of the ASW quota for bowhead whales in the Bering-Chukchi-Beaufort Seas, the Schedule read:

> For the years 2013, 2014, 2015, 2016, 2017 and 2018 the number of bowhead whales landed shall not exceed 336. For each of these years the number of bowhead whales struck shall not exceed 67, except that any unused portion of a strike quota from any year (including 15 unused strikes from the 2008–2012 quota) shall be carried forward and added to the strike quotas of any subsequent years, provided that no more than 15 strikes shall be added to the strike quota for any one year.[13]

The proposed amendment went significantly further and provided for the carry-over of a maximum of 50% of the annual strike limit. The United States, on behalf of the proponents, explained that in light of the drastically changing environmental conditions in the Arctic and the associated increasingly difficult hunting conditions, an updated carry-over formula would address the issue of *when* whales are caught and not *how many*. This would, according to the proponents, serve both the whalers and the whales since the former would no longer have the pressing need to meet their quota, possibly endangering themselves in difficult environmental conditions; and further, it would benefit the whales, and thus conservation, since the struck-and-loss rate would be notably reduced.

4.2. One-time Extension of 7 Years until 2025

In light of the political challenges surrounding the renewal of the ASW quota, the proponents suggested a Schedule amendment, which extends the period for a quota renewal until 2025, and thus creates a buffer year in which quota allocations and possible changes to the time period can be discussed, paired with the expiration of ASW quotas. In this particularly case, therefore, Section 13 (b) of the Schedule would see catch limits for the years 2019–2025 until new quotas would be decided.

4.3. Automatic Renewal

This proposition constituted the most controversial element of the Schedule amendment and would mean that the Schedule would automatically be amended at the end of each block period to include catch quotas for six (or ultimately seven) years for all ASW

[13] ICRW, Schedule, Section 13 (b) (1) (i).

countries. In other words, the proposed Schedule amendment would no longer be based on a ¾ majority of the Commission members, but would occur without affirmative action by the Commission. The proponents justified this step by noting that there is always the fear of quota renewals being voted down by the Commission, i.e. the Schedule amendments which include the quota renewals not reaching the ¾ majority. They furthermore argued that this automatic renewal would contribute to trust-building and transparency as well as benefiting the Commission to allocate time and resources to other matters. To this end, the proponents suggested the insertion of a sixth and seventh paragraph into Section 13 (a) of the Schedule, which were to read:

> (6) Commencing in 2026, and provided the appropriate Strike Limit Algorithm has been developed by then, catch limits (including any carry forward provisions) for each stock identified in sub-paragraph 13(b) shall be extended every six years, provided: (a) the Scientific Committee advises in 2024, and every six years thereafter, that such limits will not harm that stock; and (b) the Commission does not receive a request for a change in the relevant catch limits based on need.
>
> (7) The provisions for each stock identified in sub-paragraph 13(b) shall be reviewed by the Commission in light of the advice of the Scientific Committee.[14]

The role of the Scientific Committee in the context of automatic renewal is crucial. The proponents thus saw the role of the Scientific Committee as overseeing the automatic renewal based *inter alia* on unchanging catch limits, the unchanged conservation status of the whale stocks and the requirement of ASW countries following a timeline for review and providing all relevant documentation and information as they have done previously. Conversely, if these conditions were not met, an automatic renewal would not occur. To this end, the proposal remarks:

> The continued requirement for Scientific Committee advice that the status quo catch limits will not harm the hunt is an important safeguard. If, for example, there were a catastrophic decline in abundance, or any other basis for concern by the Scientific Committee such that it was unable to advise on the sustainability of the hunt, then the renewal would not automatically occur. Alternatively, if there were a request in the catch limits based on a

[14] IWC, Proposal for a Schedule Amendment, p. 2.

change in need, then the automatic renewal would also not occur.[15]

5. Discussion and Vote

As could be expected, the discussions surrounding the Proposal were emotional and somewhat heated.[16] Indigenous representatives from the national delegations of the United States, Russia and Denmark as well as the Commissioner of St Vincent & the Grenadines in moving speeches outlined the necessity for the quota renewal as well as for the other proposed Schedule amendments. Important in this aspect is that they did not ask the IWC for an increase in quota, but rather for an increase in flexibility[17] while the automatic renewal as well as the carry-over provisions provide for good management practices of indigenous peoples, which should be based on treaties, conventions and rights.[18] Yet, also the role of the scientific community was highlighted in the testimony by a representative of the Makah, who thanked the Scientific Committee for the review of the Makah hunt.[19] The Commissioner of St Vincent & the Grenadines noted that it is somewhat obsolete to justify the taking of four whales (1) since the same presentation has been made for the last 18 years and (2) the methods of the hunt since the 19th century have essentially remained the same. He furthermore noted that the right for indigenous peoples to hunt whales is not a handout, but it is their right.[20]

The ensuing discussion brought to the fore long-standing issues that have caused the disruption in the Commission. On the one hand, Commission members did not want to challenge the right of indigenous peoples to harvest whales. To this end, most states, including anti-whaling states such as New Zealand, Australia or India, supported the proposal. India, supported by Gabon, however, whilst supporting the proposal, urged the Commission to help indigenous peoples to develop alternative livelihoods which would move away from an extractive to a non-extractive use of whales. In how far this was to be achieved in resource-scarce communities in Alaska or Greenland was not elaborated upon, however.[21]

On the other hand, the commercialisation of whale products and thus the hunt for commercial

[15] Ibid., p. 10.
[16] Recordings of the discussions can be found on the YouTube channel of the International Whaling Commission: https://www.youtube.com/channel/UCLtg7GtpJ_eTaJuPqRyOOhQ.
[17] Alaskan representative, field notes, 11 September 2018.
[18] Greenlandic representative, field notes, 11 September 2018.
[19] Makah representative, field notes, 11 September 2018.
[20] St Vincent and the Grenadines, field notes, 11 September 2018.
[21] India, field notes, 12 September 2018.

purposes was, once again, discussed. Subject to debate was, in this context, the clause on automatic renewal of the quotas which some states saw as contributing to conservation issues while theoretically opening the door for commercial whaling. Concerning the former, only after the proponents had submitted a slightly revised proposal in which the role of the Scientific Committee was strengthened and thus a safeguard for conservation was provided, for example Grenada supported the proposal in its entirety. Concerning the latter, the fear was – based on my own reading of the comments made – rooted in the setting of a precedent of whales being handled as a commodity without the Commission serving as a regulator. Especially Colombia made this case and highlighted that it is the provision on automatic renewal which would prevent it from supporting the proposal. Indeed, also other members of the Buenos Aires Group expressed their opposition to the proposal due to their traditionally anti-whaling stance (Uruguay) or due to insufficient application of the precautionary principle (Costa Rica).[22] This stance was particularly supported by some NGOs whose interventions reflected unease particularly concerning the automatic renewal, none of which, however, opposed aboriginal subsistence whaling as such. This notwithstanding, it became clear throughout the discussions that scientific findings were to serve as the basis for the consideration of automatic renewal. Especially Iceland made the case that the arguments made were based on science and not on needs, irrespective of the divisions within the IWC.[23]

A third narrative was inserted into the discussion by Guinea, which was later on picked up by several other states, including Korea, which has always followed its own line of argumentation within the IWC: food security.[24] While the issue itself has been on the agenda at least since 1995 in the wake of the Sustainable Fisheries for Food Security hosted by Japan in 1994, which was supported by the FAO,[25] since the early 2000s the issue had entered the normative debates on the role of the IWC and has been brought up on numerous occasions. Especially at IWC65 in 2014 food security rose to the surface with the submission of a draft Resolution on Food Security by Ghana, Côte d'Ivoire, Mali, Republic of Guinea and Benin, which,

[22] Uruguay and Costa Rica, field notes, 11 September 2018.

[23] Iceland, field notes, 12 September 2018; While the term 'science' appears clear-cut, also Iceland would be subject to criticism later on in the meeting due to their strike limit algorithm tuning level which was more conservative than that other apply. For the role of science within the IWC, see Heazle, Michael. *Scientific Uncertainty and the Politics of Whaling* (Seattle: University of Washington Press, 2006).

[24] Guinea and Korea, field notes, 11 September 2018.

[25] IWC. Forty-Fifth Report of the International Whaling Commission (Cambridge: IWC Secretariat, 1995), p. 55.

however, did not reach consensus.[26] Be this as it may, also in the context of ASW food security played once again a role. Particularly a Chukchi whaling captain highlighted the importance of whales as a food source: "If we are left with no whales, my people will just [go] extinct."[27]

While the overall sense was that the proposal would find strong support, a consensus could not be reached. The final outcome reached the necessary ¾ majority for the Schedule amendments, however: Yes: 58; no: 7; abstain: 5.[28] Apart from Gabon, which abstained, all states voting 'no' or abstained were Latin American states, as Table 1 shows. It is noteworthy that Nicaragua, which has traditionally belonged to the Buenos Aires Group, voted, contrary to the other members, 'yes' to the proposal.[29]

Voting right suspended | Not present

	Yes	No	Abs		Yes	No	Abs		Yes	No	Abs		Yes	No	Abs
Antigua & Barbuda	X			Ecuador		X		Liberia	X			St Kitts & Nevis	X		
Argentina		X		Eritrea				Lithuania				St Lucia	X		
Australia	X			Estonia				Luxembourg	X			St Vincent	X		
Austria	X			Finland	X			Mali				San Marino			
Belgium	X			France	X			Marshall Islands	X			Sao Tome & Principe	X		
Belize				Gabon			X	Mauritania	X			Senegal			
Benin	X			Gambia				Mexico			X	Slovak Republic	X		
Brazil			X	Germany	X			Monaco	X			Slovenia	X		
Bulgaria	X			Ghana				Mongolia	X			Solomon Islands	X		
Cambodia	X			Grenada	X			Morocco	X			South Africa	X		
Cameroon				Guinea-Bissau				Nauru	X			Spain	X		
Chile			X	Guinea	X			Netherlands	X			Suriname	X		
China				Hungary				New Zealand	X			Sweden	X		
Colombia		X		Iceland	X			Nicaragua	X			Switzerland	X		
Congo				India	X			Norway	X			Tanzania	X		
Costa Rica		X		Ireland	X			Oman				Togo			
Côte D'Ivoire	X			Israel	X			Palau				Tuvalu	X		
Croatia	X			Italy	X			Panama		X		UK	X		
Cyprus	X			Japan	X			Peru			X	USA	X		
Czech Republic	X			Kenya	X			Poland	X			Uruguay		X	
Denmark	X			Kiribati	X			Portugal	X						
Dominica				Korea	X			Romania							
Dominican Republic		X		Laos	X			Russian Federation	X						

Table 1: Voting results of the ASW Proposal.

[26] IWC. Report of the 65th Meeting of the International Whaling Commission and Associated Meetings and Workshops (Cambridge: IWC Secretariat, 2014), p. 1.

[27] Chukchi representative, field notes, 11 September 2018.

[28] Some countries had their voting rights suspended either due to unclear credentials or failure to pay their participation fee. Others were not present at the meeting.

[29] In fact, Nicaragua clearly diverged from the course of the Buenos Aires Group in the meeting. Most importantly, Nicaragua voted 'yes' to Japan's Way Forward Proposal, which *inter alia* would have seen an allocation of a small quota for non-aboriginal hunts, meaning an effective lifting of the moratorium on commercial whaling. It furthermore abstained from the vote on Brazil's Florianópolis Declaration (see Section 6 below).

6. The ICRW in 2018

The rather overwhelming majority for the new ASW quotas and associated changes in the Schedule caused the meeting to enter a state of optimism. After all, many of the arguments that were put forth were indeed based on science and hardly any state requested a new Needs Statement from the ASW countries. The relief that swept through the indigenous organisations that were present and that were requesting a quota was significant and the happiness over the support from the IWC members caused many to enter a state of rejoice. Apart from some members of the Buenos Aires Group, nobody fundamentally questioned the right and needs of aboriginal communities to hunt whales. Particularly the Alaskan Eskimo Whaling Commission, whose members gave moving testimonies, received the result extremely positively, as Image 1 demonstrates.

Image 1: Relieved members of the Alaskan Eskimo Whaling Commission in front of the table showing the ASW vote. Courtesy of Nikolas Sellheim (2018).

Also for states supporting the principle of sustainable use – in their view the true objective of the convention – the outcome of the ASW vote was encouraging, particularly in light of the impending agenda items dealing with the future direction of the IWC. In this context, two contrasting proposals were going to be presented: one resolution by Brazil and others – the Florianópolis Declaration – which would locate the IWC in a more preservationist context; and one presented by Japan – the Way Forward Proposal – which would enable a co-existence between conservation and sustainable utilisation of whales. Moreover, the optimism that had grasped the Commission also resulted in working group work on yet another Resolution on Food Security, which, this time, was presented by Antigua & Barbuda, Cambodia, Ghana and Guinea. It seemed that for the first time since the adoption of the moratorium in 1982, the IWC would have indeed found a way to bridge the gap that has marked its operative capacities.

The sense of optimism was only short-lived, however. Because directly after the ASW vote, discussions on the future direction of the IWC quickly eradicated any hopes for bridging any gaps and the different interpretations of the ICRW[30] once again clashed. On the one hand, those favouring the proposal by Brazil saw the IWC as having moved beyond the utilisation of whales and having evolved into an organisation for the protection of whales. Thus, their interpretation of the convention focuses on the conservation elements therein, paired with the resolutions that were adopted fostering conservation and the resulting actions taken by the Commission bodies. On the other hand, sustainable use states, and first and foremost Japan, consider the IWC under the pretext of conservation *and* (or even *for*) sustainable use of whales. They thus stick to a formalistic, textual interpretation of the convention and in particular the last preambular paragraph, which is "to provide for the proper conservation of whale stocks *and thus make possible* the orderly development of the whaling industry."[31] The clash of interpretation and the gap that is characteristic for the current state of the International Whaling Commission is reflected in the voting outcomes of both proposals, as Table 2 shows:

[30] On the interpretation of treaties and the ICRW, see Malgosia Fitzmaurice, "The Whaling Convention and Thorny Issues of Interpretation," in *Whaling in the Antarctic. Significance and Implications of the ICJ Judgement*, edited by Fitzmaurice, Malgosia and Dai Tamada (Leiden: Brill Nijhoff, 2016), p. 53–138.
[31] ICRW, Preamble; own emphasis.

	Yes	No	Abs	N/P
Brazil Proposal (preservation)	40	27	4	
Japan Proposal (conservation & sustainable use)	27	41	2	1

Table 2: Voting results for the Brazil's Florianópolis Declaration and Japan's Way Forward Proposal

The vote on Florianópolis Declaration was perceived by sustainable use state as a manifestation of the division that runs through the IWC. In a powerful intervention, the Commissioner of Antigua & Barbuda noted that the proponents, given their lack of willingness to negotiate this matter further "send this organisation into the abyss where the whales go when they die. [...] No other organisation, would have gone to a vote on a matter that is so divisive."[32] As a result, Antigua & Barbuda suspended all work on their Resolution on Food Security and withdrew its proposal, further indicating its future unwillingness to financially contribute to the IWC and to participate in votes. Notably, none of the sustainable use states, not even Japan, withdrew from the organisation. Concerning the latter, it must be noted, however, that both the State Minister of Agriculture, Forestry and Fisheries, Masaaki Taniai, and Parliamentary Vice-Ministers for Foreign Affairs, Mitsunari Okamoto, gave opening statements in the meeting, indicating a unified position of the Japanese government on the matter of whaling.[33] In the coming months, Japan is to "reassess" its position within the IWC as a result of the vote.[34]

[32] Antigua & Barbuda, field notes, 13 September 2018.

[33] The presence is noteworthy since the relationship between the Ministry of Agriculture, Fisheries and Forestry and the Ministry of Foreign Affairs is strenuous as to Japan's position in the IWC (see Ed Couzens. *Whales and Elephants in International Conservation Law. A Comparative Study* (Abingdon: Routledge, 2014).

[34] Japan, field notes, 13 September 2018.

7. Conclusion

The 67th meeting of the International Whaling Commission was marked by hope and disappointment, particularly on the side of those states favouring the sustainable use of whales. While the Schedule amendments concerning Aboriginal Subsistence Whaling were adopted by a large majority, and the rights and needs of aboriginal whalers were substantiated within the Commission, this did not reflect into a normative change amongst Commission members. Concerning ASW, scientific certainty and an overall science- rather than a needs-based approach were taken that enabled Commission members to positively vote on the amendments to the Schedule. Contrasted with the outcomes of the votes on both Brazil's and Japan's proposals, this approach did not reflect into the voting behaviour of member states, however. To the contrary, the outcomes appear to have fortified the stances of the Commission members on whether or not non-indigenous extractive use of whales can be pursued. The rather clear result is that 41 of 70 members that voted on Brazil's and Japan's proposals favoured the solidification of the IWC as a whale preservation organisation in which only aboriginal people can hunt whales. One delegate remarked that this is merely political correctness and is not based on any sensible approach to whaling.[35] Indeed, Iceland's Commissioner noted that "Iceland does not categorise people into different groups of people. For us what matters is not some needs statement, but simply whether the catch limits, of stocks that are of sufficient abundance, [are] for the catches to be sustainable."[36]

In light of the Schedule amendments, the IWC has moved towards a more respectful treatment of aboriginal whaling communities and it does not appear to be unrealistic to see the quota block be extended to seven years in the future. Concerning the overall direction of the Commission, it will all hinge on Japan's "reassessment" of its position within the IWC. For if Japan decides to leave the organisation, its future is uncertain.

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[35] Anonymous delegate, field notes, 13 September 2018.
[36] Iceland, field notes 11 September 2018.

Relocation of Kiruna and Building the Markbygden Wind Farm and the Sami Rights

*Agnieszka Szpak**

Relocation of Swedish Kiruna and building one of the largest wind farms in the world, Markbygden in northern Sweden (near Piteå) will severely impact the Sami and their livelihood. In the first case the relocated railway already cuts through reindeer pasture land[1] and in the second it will limit the movements of the reindeer herders and endanger the reindeer themselves. Ingrid Inga, the president of the Sami Parliament, stated that "[w]e're not against wind power – but we are against big wind farms like Markbydgen because they affect the reindeer business – the local Sámi herders will lose about a quarter of their winter grazing land. That's really reprehensible from our point of view".[2] According to the Sami, no proper consultations were conducted. In reaction to Sami fears of violations of their rights, the Swedish administration stated that even if the proposed construction of a wind farm will prevent the Sami community from continuation of reindeer husbandry, national interest in combating climate change takes precedence.[3] Thus, ventures associated with renewable energy sources can lead to restrictions of the range of reindeer pasture, and the rights and interests of the Sami in this regard are ignored. Hence, paradoxically, not only climate change is a threat to the survival, human security and development of the Sami people, but also actions taken to prevent or mitigate these changes. The above examples also constitute evidence that very often the requirement of prior free and informed consent is not implemented in practice.[4] Brendan

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[1] L. Khazaleh, *Forced displacement in Sweden: When a mine company demolishes and rebuilds an entire city*, 2017, available at: https://www.sv.uio.no/sai/english/research/projects/overheating/news/2016/lopez.html (last visit: 22.09.2018).

[2] P. Burgess, *Sami Reindeer Herders in Sweden Lose Out to Wind Power*, 2010, available at: http://reindeerherding.org/blog/sami-reindeer-herders-in-sweden-lose-out-to-wind-power/?cn-reloaded=1#more-1371 (last visit: 22.09.2018).

[3] I. L. Stoyanova, *The Saami facing the impacts of global climate change* [in:] R. Abate, E. A. Kronk (ed.) *Climate Change and Indigenous Peoples: The Search for Legal Remedies*, Edward Elgar Publishing, 2013, p. 296. See also: International Work Group for Indigenous Affairs, *The Indigenous World 2016*, Copenhagen 2016, p. 33, https://www.iwgia.org/images/publications/0740_THE_INDIGENOUS_ORLD_2016_final_eb.pdf (last visit: 22.09.2018).

[4] B. Tobin, *Indigenous Peoples, Customary Law and Human Rights –Why Living Law Matters*, Routledge, New York 2014, p. 46.

Tobin indicates, however, that prior free and informed consent is generally considered mandatory in enterprises in the field of oil and gas industry and mining, logging, palm oil, protected areas, programs to mitigate the effects of climate change, energy and building dams as well as access to genetic resources, traditional knowledge and others aspects of the cultural heritage of indigenous peoples.[5] This is connected to the obligation emerging from Art. 7 (3) of the *ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries* (1989) that "Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities".[6] Conducting such research constitutes a safeguard ensuring that, when concessions within the indigenous territory are granted, the restrictions imposed on indigenous or tribal peoples with respect to their land rights do not entail a denial of their survival as a people.[7]

What does international law and (quasi)jurisprudence have to say to this?

International law, relevant in the present context, comprises *ILO Convention169* (mentioned above) and the *UN Declaration on the Rights of Indigenous Peoples* (2007).[8] Apart from the already quoted Art. 7 (3), Art. 7 (1) of the *ILO Convention* states that "[t]he peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly".[9] The UN Declaration stipulates that "[i]ndigenous 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

[5] Ibidem, p. 48.
[6] *ILO Convention 169* is available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 (last visit: 22.09.2018).
[7] Inter-American Court of Human Rights, *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of 27 June 2012 (Merits and Reparations), paragraphs 204–205, http://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf (last visit: 22.09.2018).
[8] UN Declaration is available at: https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (last visit: 23.09.2018).
[9] *ILO Convention 169*, op.cit.

indigenous decision-making institutions (Art. 18). Art. 32 (2) and (3) adds that States "shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact".[10] These are the most important and relevant norms applicable to the two title cases.

Taking into account these regulations, what were the main conclusions reached in the international jurisprudence or quasi-jurisprudence of the treaty monitoring bodies? Here it is worth noting that the Inter-American Court of Human Rights stated that the State must adopt measures necessary to ensuring that establishing protected areas will not constitute an obstacle for the return to indigenous peoples of their lands.[11] On this basis, one may conclude that projects aimed at the environmental protection and/or combating the climate change should be in accordance with the use of their traditional lands by indigenous people. Also in the individual communication to the UN Committee on the Elimination of Racial Discrimination, it was argued that every State must "obtain [indigenous communities'] consent prior to implementation of projects for the extraction of natural resources [and] ensure that the protection of the rights of indigenous peoples prevails over commercial and economic interests".[12]

African Court on Human and People's Rights also recognised that "the continued denial of access to and eviction from the Mau Forest of the Ogiek population cannot be necessary or proportionate to achieve the purported justification of preserving the natural ecosystem of the Mau Forest".[13] Mau Forest is a land traditionally occupied by the Ogiek people, there are their sacred

[10] *UN Declaration*, op.cit.

[11] Inter-American Court of Human Rights, *Xákmok Kásek Indigenous Community v. Paraguay*, Judgment of 24 August 2010 (*Merits, Reparations, and Costs*), paragraph 337 (26), http://www.corteidh.or.cr/docs/casos/articulos/seriec_214_ing.pdf (last visit: 22.09.2018).

[12] *Individual communication submitted under the Optional Protocol to the International Convention on the Elimination of All Forms of Racial Discrimination, Lars-Anders Ågren et al. versus Sweden*, point 5.10, https://sverigesradio.se/diverse/appdata/isidor/files/2327/13804.docx. (last visit: 22.09.2018).

[13] African Court on Human and People's Rights, *African Commission on Human and People's Rights v. Republic of Kenya (Ogiek people case)*, 26 May 2017, point 130; http://www.african-court.org/en/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99%20Rights%20v.%20the%20Republic%20of%20Kenya..pdf (last visit: 22.09.2018).

sites and their hunter-gatherer places.[14] In other words, the justification comprising the environmental protection can not be a basis for the denial to indigenous peoples of access to their lands.

In its opinions of 2003, 2007 and 2012 regarding Sweden the Advisory Committee on the Framework Convention on the Protection of National Minorities indicated that status and role of the Sami Parliament should be enhanced, particularly the obligation to consult the Sami Parliament in the decision-making process. This especially pertains to the land use.[15] Similar conclusions were reached by the Committee on Economic, Social and Cultural Rights in its Concluding observations of 2016[16] and Human Rights Committee in its Concluding observations of 2002 and 2009.[17] The significance of these decisions is evident when taking into account the two above cases of Kiruna and Markbygden wind farm. With reference to the Kiruna case, the Advisory Committee added that "the traditional way of life of [the Sami] is threatened, in particular in and around Kiruna municipality, due to the impact of urban development and expanding mining activities on reindeer herding and grazing lands. The representatives of Sami also complained that they have not been sufficiently consulted to ensure that their traditional way of life will be maintained and negative impacts of spatial planning decisions minimised".[18]

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[14] Ibidem, points 145, 155, 158.

[15] Advisory Committee on the Framework Convention for the Protection of National Minorities, *Opinion on Sweden*, 20 February 2003, point 63, https://www.coe.int/en/web/minorities/home?p_p_id=101&p_p_lifecycle=0&p_p_state=maximized&p_p_mode=view&_101_struts_action=%2Fasset_publisher%2Fview_content&_101_assetEntryId=15967938&_101_type=-content&_101_urlTitle=sweden-details&inheritRedirect=false (last visit: 22.09.2018); Advisory Committee on the Framework Convention for the Protection of National Minorities, *Opinion on Sweden*, 23 May 2012, points 21, 55, 149–151, https://www.coe.int/en/web/minorities/home?p_p_id=101&p_p_lifecycle=0&p_p_state=maximized&p_p_mode=view&_101_struts_action=%2Fasset_publisher%2Fview_content&_101_assetEntryId=15967938&_101_type=content&_101_urlTitle=sweden-details&inheritRedirect=false (last visit: 22.09.2018).

[16] Committee on Economic, Social and Cultural Rights, *Concluding observations on the sixth periodic report of Sweden*, 14 July 2017, point 15, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=5 (last visit: 22.09.2018).

[17] Human Rights Committee, *Concluding observations of the Human Rights Committee. Sweden*, 24 April 2002, point 15, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=5 (last visit: 22.09.2018); Human Rights Committee, *Concluding observations of the Human Rights Committee. Sweden*, 7 May 2009, point 20; http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=5 (last visit: 22.09.2018).

[18] Advisory Committee on the Framework Convention for the Protection of National Minorities, *Opinion on Sweden*, 23 May 2012, point 57, https://www.coe.int/en/web/minorities/home?p_p_id=101&p_p_lifecycle=0&p_p_state=maximized&p

In this context one should point to the *Saramaka People v. Suriname* case of the Inter-American Court of Human rights which rightly distinguished between two situations where free prior and informed consent is required or where consultations are sufficient. The Court introduced two tests applicable to those situations: the first one is the scale of the project and the second is its impact on indigenous peoples' lands. In the Court's opinion, "States must obtain the consent of indigenous and tribal peoples to carry out large-scale development or investment projects that have a significant impact on the right of use and enjoyment of their ancestral territories".[19] Accordingly, this may amount to some kind of a veto right. Similar conclusion was reached by the African Commission on Human and Peoples' Rights in the *Ogoni people case* of 2001.[20] What is important, the consent must be expressed in accordance with indigenous peoples customary laws and traditions.[21] It is also worth stressing that the Inter-American Court added that "[i]t should be emphasized that the obligation to consult is the responsibility of the State; therefore the planning and executing of the consultation process is not an obligation that can be avoided by delegating it to a private company or to third parties, much less delegating it to the very company that is interested in exploiting the resources in the territory of the community that must be consulted".[22] It is especially relevant for the Kiruna case as the whole process of relocation, including the obligation to consult the Sami, has been managed by the mining company without much intervention by State authorities.[23] Even though LKAB is a State-owned mining company the above conclusion of the Inter-American Court is applicable.

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[19] Inter-American Court of Human Rights, *Saramaka People v. Suriname*, Judgment of 28 November 2007 (*Preliminary Objections, Merits, Reparations, and Costs*), paragraphs 136–137, http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf.

[20] African Commission on Human and People's Rights, *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*, 27 October 2001, paragraph 53, http://www.achpr.org/communications/decision/155.96/ (last visit: 23.09.2018).

[21] Inter-American Court of Human Rights, *Saramaka People v. Suriname*, op.cit., paragraph 137; Inter-American Court of Human Rights *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of 27 June 2012 (Merits and Reparations), paragraph 180, http://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf (last visit: 23.09.2018); African Commission on Human and People's Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council)/Kenya*, 25 November 2009, paragraph 291, http://caselaw.ihrda.org/doc/276.03/ (last visit: 23.09.2018).

[22] Inter-American Court of Human Rights, *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of 27 June 2012 (Merits and Reparations), paragraphs 187, 199, http://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf (last visit: 23.09.2018).

[23] L. Khazaleh, op.cit.

The UN Human Rights Committee also emphasised that "[t]he Committee recognizes that a State may legitimately take steps to promote its economic development. Nevertheless, it recalls that economic development may not undermine the rights protected by article 27 [the rights of minorities to enjoy their culture]. Thus, the leeway the State has in this area should be commensurate with the obligations it must assume under article 27. The Committee also points out that measures whose impact amounts to a denial of the right of a community to enjoy its own culture are incompatible with article 27, whereas measures with only a limited impact on the way of life and livelihood of persons belonging to that community would not necessarily amount to a denial of the rights under article 27".[24]

All of those judgments and observations are relevant for the Kiruna relocation and building the Markbygden wind farm. They all indicate that the economic development and the environmental protection, clearly connected to combating climate change, may not serve as a justification for violating the Sami rights, in particular their land rights and the right to the maintenance and development of their culture. Sweden must respect its obligation to consult the Sami and obtain their free prior and informed consent in these two cases. Sami rights and interests may not be ignored and sacrificed at the altar of the environmental protection or economic development.

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[24] Human Rights Committee, *Poma Poma v. Peru*, 2009, CCPR/C/95/D/1457/2006, point 7.4, http://juris.ohchr.org/ (last visit: 23.09.2018).

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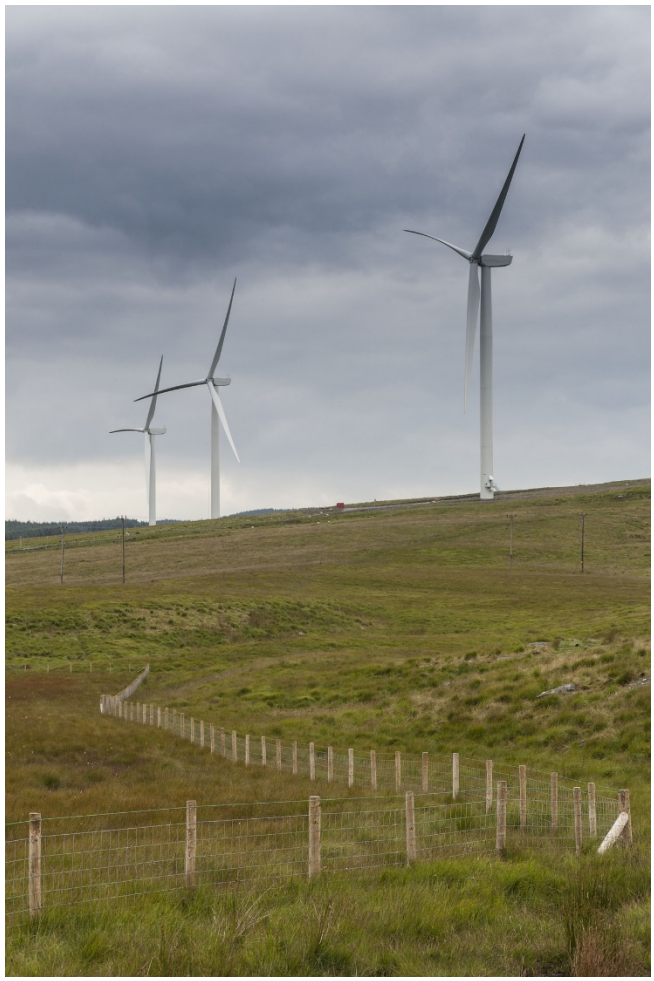

The Duel-Level Domestic Legal Situation of Russia's Peoples of the Far North

*Ellen Ahlness**

Introduction

It is difficult to fully grasp or appreciate the ethnic complexity of the Russian Federation. Despite national pressures over the better part of a century to assimilate indigenous communities, including the circumpolar indigenous peoples, indigenous communities have been able to maintain many cultural traditions. Today, indigenous associations and leaders, much like their international counterparts, are attempting to renegotiate their relationships with the state. However, the complex structure of Russian law necessitates that indigenous peoples need to further engage beyond lobbying and nation-state relationship building efforts.

The legal status of the Russian Indigenous Peoples of the North (RAIPON) is designated at a division between the regional and national levels, thus creating problems for indigenous rights and mobilization. While indigenous laws are often examined at the international level (given RAIPON membership in groups like the Arctic Council), this approach disregards the challenges existing in Russia's domestic politics. The purpose of this article is to articulate the legal situation for Russia's indigenous peoples of the North, as a result of the regional/national divide in lawmaking and enforcement that creates a challenging gap for indigenous mobilization and rights gains.

By focusing on the legal intricacies of indigenous classifications in the immediate post-Soviet years, I am able to review the influential legal and mobilization development. Further, I examine contemporary hostilities between the Russian government and RAIPON, Russia's foremost Arctic indigenous association. I then discuss the links between indigenous rights and civil society, and how these connections challenge indigenous mobilization. I conclude with the implications of recent legal developments in Russia, and present three recommendations on how indigenous groups in Russia may move forward in the complex and unreceptive environment.

Scope and History of Domestic Recognition

Out of 180 ethnic groups inhabiting Russia, only 46 are officially recognized as "indigenous small-numbered peoples of the North, Siberia, and the Far East". To be considered an indigenous group,

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and thus qualify for specific protections and state recognition, a group must not exceed 50,000 members, must maintain a traditional way of life, must live in areas that have traditionally been inhabited by their ancestors, and must self-identify as a distinct ethnic community.[1] Consequently, there are less than 270,000 individuals recognized by this classification, or less than 0.2% of Russia's total population.[2] The numerical threshold of 50,000 has been critiqued as an artificial legal category introduced by the Russian national government and contributes to asymmetrical legislative protection across ethnic groups[3]; the Nogay and Altai Kezhi groups are excluded from certain legal protections because they have more than 50,000 members.[4] While the size of the group matters for domestic classification purposes, all circumpolar indigenous peoples are recognized according to international law. [5]

The foundations of the contemporary legal situation for indigenous peoples emerged in the 1990s. The collapse of the Soviet Union led to a growing movement to create a minority policy within authoritarian regimes, as former Soviet states experienced ethnic awakenings while engaging in various approaches in the use of policy, symbols, and narratives.[6] The presence of ethnic minorities or indigenous peoples led to specialized state policy to address these groups, whether for the purposes of rights gains or denial.[7] In the case of the new Russian Federation Constitution, indigenous rights were acknowledged in vague terms, guaranteeing rights "in accordance with generally recognized principles of international law,"[8] while sharing responsibility with local offices for the defense of land and traditional livelihoods.[9] Because of the limited

[1] Russian Federation, Federal Law on the Guarantees of the Rights of Indigenous Numerically Small Peoples of the Russian Federation, adopted by State Duma, 16 Apr. 1999 and approved by Council of the Federation, 22 Apr. 1999.

[2] Yuri Slezkine, *Arctic Mirrors: Russia and the Small Peoples of the North* (Ithica: Cornell University Press, 1994).

[3] The list of included peoples was finalized by Decree of the Government of the Russian Federation on April 17th, 2006. No.536-p, № 17. P.2. Cl. 190. Russian Federation Code. 2006.

[4] A. Tomaselli and A. Koch, "Implementation of Indigenous Rights in Russia: Shortcomings and Recent Developments," *International Indigenous Policy Journal* 5, no. 4 (2014): 1–23.

[5] International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention, C169*, 27 June 1989, C169.

[6] A.H. Miller, G. Gurin, and O. Malanchuk, "Group Consciousness and Political Participation," *American Journal of Political Science* 25, no. 3 (1981): 494–511.

[7] K. Chandra, "What Is Ethnic Identity and Does It Matter?," *Annual Review of Political Science* 9, no. 1 (2006): 397–424.

[8] Article 69, Gazette of the Congress of People's Deputies of the RSFSR and the Supreme Soviet of the RSFSR (Vedomosti S'ezda narodnykh deputatov i Verkhovnogo Sovyeta RSFSR). 1991. №22. Cl.768.

[9] Article 72, Gazette.

rights Far North groups had in practice, several communities opted for autonomy under the 1996 Federal Law on National Cultural Autonomy and the 1999 Indigenous Rights Law. [10]

Currently, only one international instrument protects the rights of indigenous peoples: the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, No. 169 (ILO Convention 169), adopted by the International Labour Organisation (ILO) in 1989. The Russian Federation has not signed the instrument despite international pressure.

Domestic Recognition Pursuits

The management of land rights is divided between regional and federal authorities in Russian law. While Article 26 of the Constitution states that land use is subject to federal law, Article 74 promotes "considerable deference" to regional authorities. The blurred policymaking rules have allowed for inconsistant policies across Russia's subdivisions. Furthermore, regional variation established in the early post-Soviet years resulted in minimal policy change at the national level.[11] As a result of the two-level segmentation of law, indigenous groups must seek legal recognition and rights gains through both regional and national efforts.

Regional Rights Pursuits

Legal areas of concern for local movements tend to center on the possession, management, and use of natural resources, along with the protection of historical and cultural monuments.[12] There have been significant challenges to land and natural resource rights since the implementation of the Constitution. In the 2000s, the Ministry of Regional Development created a plan for sustainable development that received considerable attention and approval from indigenous peoples of the North. Later, regional ministries, not indigenous bodies, were incorporated in the development process.[13] In 2015, articles stipulating that local authorities could determine places of traditional residence and activities, and thus deserving of protection, were revoked. Consequently, local authorities lost

[10] Federal Law on the Guarantees of the Rights of Indigenous Numerically Small Peoples of the Russian Federation. Adopted by the State Duma, April 16, 1999.

[11] Ahlness, Ellen. "Federal or Regional Initiatives: Origins of Authoritarian Indigenous Policy." Paper presented at the Asia in the Russian Imagination Conference, Salt Lake City, UT. February 2018.

[12] Alexandra Xanthaki, "Indigenous Rights in the Russian Federation: The Case of Numerically Small Peoples of the Russian North," *Human Rights Quarterly* 26, no. 1 (2004): 74–105; V.A Kryazhkov, "Development of Russian Legislation on Northern Indigenous Peoples," *Arctic Review of Law and Politics* 4, no. 2 (2013): 140–55.

[13] Tamara Semenova, "Political Mobilisation of Northern Indigneous Peoples in Russia," *Polar Record* 43, no. 1 (2007): 23–32.

authority to protect indigenous land from encroaching resource extractors.

National attempts to undermine regional power affect autonomous oblasts and okrugs as well, particularly those that have limited means to support indigenous aspriations.[14] Regional variations in the abilities of groups to capitalize on their rights have already emerged, shaped in part by the variation in organization among local indigenous movements. [15] To illustrate, a 1992 presidential edict called for the allocation of lands to associations of northern indigenous communities. While several thousand associations have organized, resulting in greater control over traditional activities, the lack of financial means and opposition by state officials has compromised the movement in other regions.

Another case of regional variance examines the Sakha Republic (Yakutia) and its progressive indigenous rights. In part, the Republic established "exclusive jurisdiction" over indigenous and minority issues early on, addressing the use of traditional lands and resources, language status, and control over justice systems.[16] The Yukagir peoples, one of the smallest and most vulnerable of the indigenous groups, find many of their language and land rights aligned against more influential industry-interest groups. The continuation of Yukagir land management has been attributed to Sakha government support.

While it is typical for political subdivisions to experience decreasing autonomy as centralization progresses, Russia experienced a stagnation of federal legislation on indigenous peoples in the latter part of the 2000s. The elimination of state bodies specifically responsible for northern issues resulted in power consolidation at the regional level. While federal policy focuses on broad human and civil issues, regional bodies produce legislation that is "supplemental, more specific, and remedial".[17] In 2014, Parliament disbanded the Ministry for Regional Development, and its functions were divided among regional ministries. Indigenous advocates criticized this decree, placing indigenous peoples under the jurisdiction of regional Culture Ministries, which often lack the economic ability to meet the needs of underserved, rural people. Ultimately, while the right to consultation on developments is offered by the state to indigenous nations, it is not guaranteed; rather, it is linked to the goodwill and ability of local authorities.

[14] Semenova.

[15] Slezkine, *Arctic Mirrors: Russia and the Small Peoples of the North*; Nikolai Vakhtin, "Native Peoples of the Russian Far North," in *Polar Peoples: Self Determination and Development* (London: Minority Rights Group, 1994), 29–80.

[16] Sakha Republic, art. 38, 43-44, 98.

[17] Kryazhkov, "Development of Russian Legislation on Northern Indigenous Peoples."

National Obstructions and Repeals

Many challenges persist at the national level that limit indigenous rights in Russia. Federal policymaking is sluggish, lacking, and in some cases repealed. This results in the denial of the unique needs and recognition of indigenous peoples by the state. The only federal law that affords recognition of indigenous land tenure is the Law on Territories of Traditional Nature Use, ratified in 2001; however, this law is applied inconsistently and is internally problematic. At the time of writing, no regional Territories of Traditional Use have been ratified at the federal level, despite international pressure from states, indigenous associations, and international organizations. This limits the ability of indigenous peoples to inherit traditional lands, have open access to traditional hunting and fishing grounds on a sole source basis, organize local self-government to settle community matters, and increase quotas within local legislative and representative bodies.

Three years after the Law on Territories of Traditional Nature Use was passed, the federal government repealed the federal law on the Basics of the State Regulation of Social and Economic Development of the North of the Russian Federation, further denying policy considerations specific to indigenous peoples of the North. The Russian Constitution implies indigenous peoples have a protected status, but laws are often interpreted otherwise by provinces. A 2009 hunting law distributing lands for long-term lease resulted in huge discrepancies in regional interpretation; a 1995 law changed the category of 'fish' to 'objects of the animal world,' creating confusion and inconsistency in regional quotas. These cases illustrate a lack of coordinated administration and the capacity for regional authorities to exercise significant discretion.[18] More recently, 2017 saw a regulatory change that made fishing activities more difficult for indigenous peoples. With the legal change, indigenous peoples were no longer allowed to fish without special permits and were required to go through a lengthy license application process that dictated the time, location, and bounty allowed for fishing. This regulatory change is one case in a pattern of rights reductions by the state.[19]

[18] Kryazhkov; Tomaselli and Koch, "Implementation of Indigenous Rights in Russia: Shortcomings and Recent Developments."

[19] See also: amendments to the Federal Law of 1995, cl. 48 made in 2010 (SZRF no. 1 cl.32), the Law on Fisheries and Conservation of Aqatic Bioresources (SZRF 2004, no. 52 cl. 5270), and Law on Hunting and Conservation of Game Resources and Amendement of Certain Legal Acts of the Russian Federation (SZRF 2009, no. 30 cl. 3735).

Analysis of the Domestic Rights Environment

Despite the complexity of having to deal with two legal levels in Russia, circumpolar indigenous peoples have moved from relative powerlessness prior to Gorbachev's efforts to reform and the eventual collapse of the Soviet Union to making significant strides toward reasserting self-determination during the post-Soviet era. The indigenous peoples' relationship with the legal system was shaped through several developments in the early 1990s. First, native communities took advantage of the new policies of glasnost and perestroika to engage in domestic association-forming. Second, indigenous leaders formed a knowledge community to interact with Russian political leadership. Third, and finally, Northern communities partnered with international indigenous associations to identify and mobilize in response to domestic obstacles and global crises threatening them. These developments shaped the environment for international organizations and nonstate actors to interact with indigenous peoples as Russia re-integrated itself into the world community.[20] The Russian Association for Indigenous Peoples of the North (RAIPON) is the foremost nongovernmental organization whose engagement with the Russian state is shaped by post-Soviet processes.

The Role of RAIPON in an Obstenate State

Russia has a multitude of local, regional, and interregional indigenous organizations, and the national umbrella organization, RAIPON, operates under tight state control. With the legal status as a federal non-government organization (NGOs), RAIPON takes an active role in advancing the rights of indigenous peoples. In its first decade, RAIPON participated in the development of three key laws related to Northern indigenous needs.[21] While addressing indigenous needs, there remain a number of areas where indigenous-state land use and co-management compromises have yet to be reached. Generally, RAIPON tends to focus on language and land rights for the peoples of the Far North.[22]

[20] Xanthaki, "Indigenous Rights in the Russian Federation: The Case of Numerically Small Peoples of the Russian North."

[21] On the Guarantees of the Rights for Indigenous Peoples in the Russian Federation, On Basic Principles for the Establishment of Communities of Indigenous Peoples of the North, Siberia, and the Far East in the Russian Federation, and On the Traditional Land Use Areas of the Indigenous Peoples of the North, Siberia, and the Far East in the Russian Federation.

[22] European Research Centre on Multilingualism and Language Learning, "Nents, Khanty, and Selkup Language in Eduation in the Yamal Region in Russia [Regional Dossiers Series]" (2016), https://www.mercator-research.eu/fileadmin/mercator/documents/regional_dossiers/nenets_khanty_and_selkup_in__Russia_1st.pdf.

The Russian federal government's tight reins on RAIPON are credited to the organization's threatening connections with international organizations and liberal intergovernmental forums. The government seeks to minimize or eliminate this enmeshment with its policies on civil society and NGOs. Laws affecting indigenous groups and their mobilization are heavily integrated with laws meant to control civil society. Indigenous relationships were impacted by Russia's legal crackdown on civil society and NGOs. Indeed, RAIPON was suspended in November 2012 under an order by the Ministry of Justice for failing to comply with symbol, office location, and subsidiary registration, and remained suspended until April 2013. While RAIPON made the required amendments to its charter and registration, the state refused to accept the amendments. During this time, indigenous peoples of the North feared the suspension of rights and the dismantling of RAIPON. While the association appealed in district courts[23], it was not until the association submitted its registration to the state that the suspension was repealed.

Implications of Bi-level Legal Authority

Within Russia, laws are established at the federal level to create broad indigenous policies, while regional authorities create policy distinctions and specifics that allow for specialized application. Federal law formally protects indigenous peoples, but regional policies may undermine federal intent given wide variations in goodwill, resources, and enforcement. It is regional government that takes into account the national and ethnic characteristics of the population, a responsibility established during the Soviet Union's creation of autonomous oblasts. Civil society in Russia, to include indigenous networks, is under transition. The potential for indigenous mobilization depend on sustaining knowledge communities and informal networking at both domestic and international levels.

In Russia's current environment of inconsistent application of indigenous peoples' rights and their tentative trust that the federal government will honor past laws, now is the time for indigenous communities to prioritize rights-affirming strategies. Many scholars recommend prioritizing land rights first, as these form the basis for cultural rights.[24] Second, ethnic identification of indigenous peoples require solutions, as there are ethnic groups that can make a strong case as indigenous peoples, yet are denied legal benefits due to Russia's arbitrary classification requirements

[23] Zamoskvorechey District Court. Mosow, RU. June 29, 2012; Moscow City Court, Moscow, RU. October 18, 2012.

[24] Kryazhkov, "Development of Russian Legislation on Northern Indigenous Peoples."

(most notably its population limitation). To broaden the definition of indigenous communities to indigenous peoples themselves is a fundamental step in decolonizing processes. Third, indigenous groups must leverage their presence in representative bodies to promote legal developments that address not just political and socioeconomic relevance to indigenous communities, but also traditional knowledge and spiritual relevance. There is a great deal of material and intellectual capital from international indigenous organizations, as well as legal precedence, from which Russian indigenous peoples may draw.

Final Thoughts

The perseverance of indigenous communities to maintain cultural and land rights despite federal and regional assimilation efforts testifies to the strength of the communities of indigenous peoples in Russia's far north. The possibilities for Russian indigenous communities today have been shaped by the turmoil of the early 1990s and the bi-level authorities in Russia. While all groups have been affected by federal law repeals and lack of policy consistency, connections with international communities show promise for continued forward movement. RAIPON's association with the international Saami Council and four other international indigenous associations in the Arctic Council are examples of transboundary knowledge communities furthering domestic rights. Ultimately, the indigenous people of Northern Russia face a vastly different political environment than the circumpolar indigenous peoples residing in liberal states, and therefore they face unique domestic challenges. While each unique situation and progress varies, the narratives remain part of the common story of decolonization.

Older Person's Inclusion in the Arctic: An Assessment Based on Scientific Work of Arctic Change Network / Changes in Arctic Communities

Shahnaj Begum & Päivi Naskali***

This assessment is based on the idea and the output of "The Arctic Change and Elderly Exclusion: A Gender based perspective" project which was funded by the ***Nordic council of Ministers*** (2012-2015), and hosted by the Unit of Gender Studies at the University of Lapland. This project was led by Prof. Päivi Naskali, and coordinated by researcher Shahnaj Begum. The contributors of this project are the members of "*Arctic change network*" who have multidisciplinary research background. Research scholars were from seven countries: Finland, Sweden, Norway, Russia, Italy, Germany and Canada. In this project, the network examined ageing, wellbeing and climate change in the Arctic. A notable outcome of that collaboration is a text edited by the Finnish principals which is already published by Routledge series and shortly presented in the below assessment. The network has already demonstrated a strong foundation for ongoing collaborative productivity.

Introduction

In the Arctic, older people's well-being is connected very much with a pristine living environment. The findings of our previous study demonstrated that changes in climate and "… the living environment … are strongly interwoven in past and present lives of people in the Arctic" (Naskali et al., 2016, p. 248). Not only the physical environment but also the social environment is changing as the population ages. As the older people form an increasing part of the population, their inclusions in decision-making process should be ensured in order to strengthen the impact of ageing people in the Arctic. Our intention is, therefore, to offer them possibilities to feel valued. Older people's inclusion is problematic in the Arctic for several reasons. For instance, direct and indirect impact of climate change has negatively affected the ageing population in the Arctic. For this reason, we wanted to show how elderly exclusion is increasing in the Arctic. How it is possible to reduce exclusion and how we can promote inclusion? We therefore have

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highlighted on how, through inclusion, we can promote older peoples' well-being.

In this study, we suggest that in the Arctic, there is need to develop ways of recognition the resources the older people have: the older people's voice and the traditional knowledge that need to be heard better than it is heard in contemporary society, and how their knowledge should be used. In this context, it has to be noted that a significant number of indigenous peoples of the region holds traditional knowledge on various issues, in particular the older people are the main actors to transmit this knowledge to the next generations.

The aim of this short assessment is to strengthen the inclusion of ageing population in the Arctic region. Hence, the objectives of the "*Arctic Change*" project was to identify the specific challenges the ageing people face in the Arctic region that cause exclusion. We wanted to explore how the concept of inclusion takes place in regard to the older people in the Arctic context and how multiple dimensions play a role in exclusion. We promoted the rights of the older people. We also aimed to create an opportunity for the older people to produce knowledge about the drivers of exclusion they experience, and to use their knowledge in the promotion of social wellbeing.

Why elderly exclusion's conceptualization is important in the Arctic?

In general, social exclusion is considered as social marginalization. In this short assessment, the term "inclusion" is understood as opposed to the term "exclusion", which brings phenomenon with multiple dimensions (Scharf & Keating 2012), and also a process where different drivers can be identified. Thus "social exclusion" refers "…to the dynamic process of being shut out, fully or partially, from any of the social, economic, political or cultural systems which determine the social integration of a person in society" (Walker & Walker 1997). "Social exclusion is a multidimensional process of progressive social rupture, detaching groups and individuals from social relations and institutions and preventing them from full participation in the normal, normatively prescribed activities of the society in which they live" (Hilary, 2007, p. 15). Henceforth, social exclusion is the process in which individuals or groups are disadvantaged from various rights, resources and opportunities. Those opportunities are normally available to members of a different group. Social inclusion is a positive action to change the situations that lead to social exclusion. Inclusion is a process that improves the ability, opportunity, and dignity of people in society (World Bank, 2013).

Elderly exclusion and inclusion in the Arctic

The increase of the older people in the northern parts of Arctic countries is more than that of the general increase of population in these countries. Social exclusion has other causes than poverty: especially living in an unsafe environment cause also social exclusion (Nordic council of Ministers, report p. 25, 2009). Old people meet problems that are poorly recognized, e.g. problems with mental health have not been sufficiently understood, lack of proper care services in remote areas, loneliness and detachment from family members.

There is an urgent need for strengthening the conditions, which prevent exclusion and promote older peoples' inclusion in the society. Exclusion is a multidimensional phenomenon, and a central perspective to it is question of active citizenship. Being able to be a part of society and act as a fully competent citizen is self-evident right to working-age population, but when growing older many restrictions occur. Knowledge concerning the living conditions of the older people is needed for tackling the problem of exclusion. It is important to gain more knowledge from older people themselves about the special features in exclusion of the older people. To reduce exclusion, it is important for the Nordic countries to co-operate with the adjacent areas in forums that support sustainable development in the northern regions.

This assessment builds on the findings and conclusions of recent interdisciplinary work by the same network of experts who authored the book entitled "***Ageing, Wellbeing and Climate Change in the Arctic: An interdisciplinary analysis***", published by Routledge in the year 2016. The book was prepared by 20 researchers into the following three main themes in which we intended to illuminate the exclusion and inclusion of older people in the Arctic. The themes are briefly described below.

The authors of the Part I discussed on "***Position of older people and policies in the Arctic*".** Anastasia Emelyanova and Arja Rautio stated in their chapter that the population aging is a mega-force changing a demographic face of the Arctic, though fairly under researched within the science and not given enough policy attention within the circumpolar localities. An issue of societal exclusion and a level of empowerment and protection of senior people living in the Arctic is a specific theme asking for research analysis. Such 'exclusion vs. inclusion' focus is needed in order to understand how regional policy can optimize older peoples' participation in the community they belong to. If this diverse age group is prevented from being excluded from the public activities, the elderly people will benefit from national development to a full extent.

Joan Harbison stated that there is general lack of attention to the rights of people in later life. Within a context of ongoing globalization, author argues that contradictory ageist assumptions underpin current constructions of older people: on the one hand their health and wealth are portrayed as limiting their needs for state welfare, on the other they are cast as vulnerable, and in need of protection, which places restrictions on their rights and freedoms. Both these oppressive assumptions are internalized by older people. Together they remove older people's incentive to challenge the larger social structures on behalf of their own human rights. Feminist authors Seija Keskitalo-Foley and Päivi Naskali emphasizes that ageing is a strongly gendered issue but most of the research, politics and public discussions bypass the issues concerning gender or sexuality.

Authors Marit Aure and Sindre Myhr have pronounced that life quality among older people is related to where they live: the distance to family and relatives influences their social contact, the provision of help they may receive from relatives, and their ability to assist family members. These changes and the increased mobility generally have raised the question of whether elderly people are more mobile than previous generations and how this increased mobility may affect their life and societies that show the picture of exclusion and inclusion.

In Part II "***Elderly People and climate change***", authors (Barbara Schumann and Shahnaj Begum) claimed that because of climate change and other anthropogenic changes, Arctic population faces a huge transformation, one posing challenges to its society, economy, culture, environment and infrastructure. Climate change is also likely to affect human health. Increased temperatures might facilitate the spread of infectious diseases and warmer winter temperatures might reduce the burden of cardiovascular and respiratory diseases. Older people are particularly affected by these challenges. Differences in gender roles among this age group suggest that the changes in the Arctic will impact men and women differently. They referred to a number of studies showing that elderly women are disproportionately vulnerable to climate change. Access to health care is limited in sparsely populated regions such as Lapland, making it more difficult for its communities to adapt to adverse impacts of climate change in the context of demographic, economic and social changes.

In Part III – "***Wellbeing of elderly people***" authors Elina Vaara, Ilkka Haapola, Marjaana Seppänen and Antti Karisto specified that the perceived content of well-being may vary; there may be systematic differences in assessments during life course, between men and women, and citizens living in urban areas and those living in countryside. When well-being is defined

as a subjective experience, the knowledge people have about their own situation needs to be considered. Experience is always contextual and complex, sensitive to cultural and individual interpretations. Well-being is not a steady state but a process of shifts. They claimed that individual's definitions of a good life varied based on his or her lived experiences, relationship with nature, an enabling home and neighbourhood, social and physical surroundings.

Author Eija Jumisko mentioned in her chapter that in social and health policy, homecare is directly connected with inclusion of older people. Findings show that communication and interaction skills are crucial components of client-cantered care, but are not all of it. Older people are cautious at some aspects about criticizing current care as they looked back at the history of old people care.

Author Marianne Liliequist stressed on the well-being of the older Sami people. The reindeer herding constitutes a lifestyle that symbolizes the good in life for everyone in the Sami village. She has discovered two things that are highlighted by the older Sami who still live among their relatives in the Sami village, is to be active in the reindeer herding as long as possible and also for the older Sami who lives outside of the reindeer herding, is to mount the role as a creator of Sami identity for the younger generation.

In Part IV– "***Local traditions of Arctic communities***" author Trine Kvitberg and Rune Flikke, have identified that Arctic change has impact on Greenlandic indigenous women's health and illness experiences. Author Tarja Tapio has emphasized on nature, freedom and willingness to live the rest of one's life in that particular village in Tornedalen, North Sweden. These were repeatedly presented as interconnected, and illustrated along the lines of particular relationship in connection with nature, which do establish an agency for older people. Author Laura Siragusa has emphasized on the importance of nature and the ability to relate to the world as a way to engage with human and non-human beings among the Vepsian people that heritage language and traditional knowledge are connected to exclusion and inclusion of older people. For her, this relationship provides an experience of feelings and emotions, and know how to engage with the rural environment in which the elderly traditionally live. Author Mona Kiil stated that traditional healing practices among Northern Troms (Northern Norway) are part of a longstanding local knowledge tradition consisting of traditional healers and networks of care that aim at preventing or treating illness or crisis.

Conclusions and identified benefits for Arctic region

This assessment attaches a great importance to environmental issues and challenges, and enhances the need for international co-operation amongst the Arctic countries. Such a need is already increasingly becoming evident and important in a globalised world. One of the findings of this study suggests that the diversity within and between older groups of Arctic population is little recognized and that their voices are infrequently sought or heard. Our findings also suggest that climate change motivated factors provide an important consequence – the region's older people greatly suffer from multifaceted changes including social, cultural, environmental, and economic. Older people's agency becomes confined within parameters that are provided for them by more powerful actors in mainstream structures. There is need to assist older people to restore their agency, human rights, and ultimately social inclusion. Loss of agency challenges active ageing. Active ageing refers to the opportunity for the ageing population to keep playing an active role in society and live as healthy and fulfilling lives as possible. We conceive the idea that older people are active citizens with extensive knowledge of their particular living conditions.

There is a need to promote a broader understanding in this regard. In the Arctic region, the question is very topical. Since the aging population in the region is on the rise, it is extremely important to find methods to encourage the older people to express themselves and to find ways to pass the information to the central actors responsible for local development in municipal and regional levels. An important element and anticipated outcome of this assessment therefore further seeks to develop new ways to access and understand older Arctic people's subjective experiences of wellbeing in relation to broadly conceived opportunities for meeting their social needs.

The importance of the assessment thus lies in the attainment of new knowledge developed on the needs of these older people and about the reality of the older members of diverse and isolated communities in the context of changing Arctic. In this assessment, we treated human rights as one of the central issues to consider eligibility for inclusion. While we have identified a number of challenges facing the older people (Naskali et al., 2016), we however believe that it is essential to conduct follow-up investigation concerning the method to promote inclusion. While for older people, in order to ensure social inclusion, a policy concerning the promotion of active aging is required, the lack of knowledge, and policy framework, from local, regional and national levels hinder the process.

Arctic change has already formed an argument about the need for new ways

of thinking about wellbeing. The social, political and environmental issues will create awareness among the people. If we are thinking to enhance sustainability without having our wellbeing threatened, we need to find out novel, innovative solutions. This assessment will effect, and give an incentive to balance, the regional development tools for education, social policy and social welfare system. In particular, it is important to note that the knowledge of older people has been powerful forces in social development, which can be enhanced by encouraging, and channelling through, the smooth flow of ideas, best practices, people, knowledge, values and culture across borders. Initiatives taken by the networks will surely promote further cross border research, education and development works.

The knowledge gathered by ***Arctic change network*** will lead towards undertaking the growing social problems of ageing population as well as environmental problems. It addresses several threats or obstacles causing hindrance for inclusion, and also health related problems with a strong need of sustainable environmental development in the project region. The regional stakeholders need more knowledge on the perspective of the ageing population and ways to support their inclusion. By highlighting the information on ageing population, their exclusion and drivers of exclusion, the regional population will be benefited from increased expertise in these areas in the long term. The produced knowledge will contribute to social development across borders. It will also lead to develop well trained professionals and researchers. In this way, the region will be benefited from improved skills in these areas. Educational and social institutions should get opportunities to strengthen cross-border relations and build strong network through disseminating common materials regarding ageing and environmental issues for social and economic development. It offers older people who live in the Arctic region with possibility to develop new ways to produce, interact, and communicate knowledge experiences about their living conditions.

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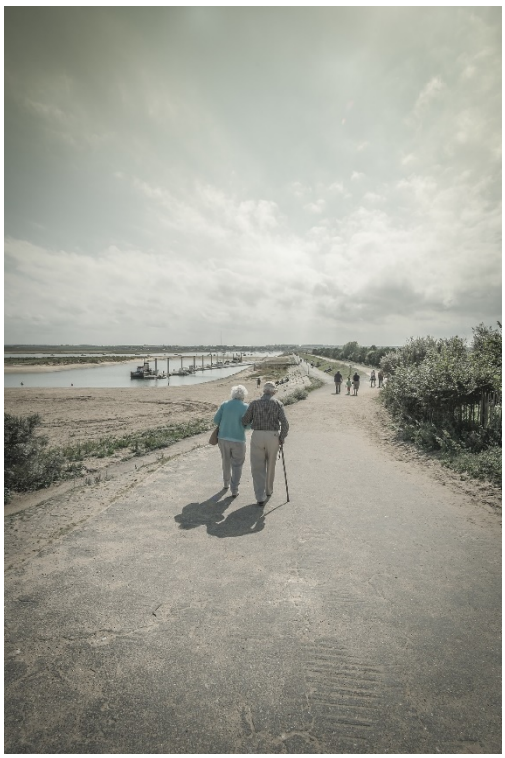

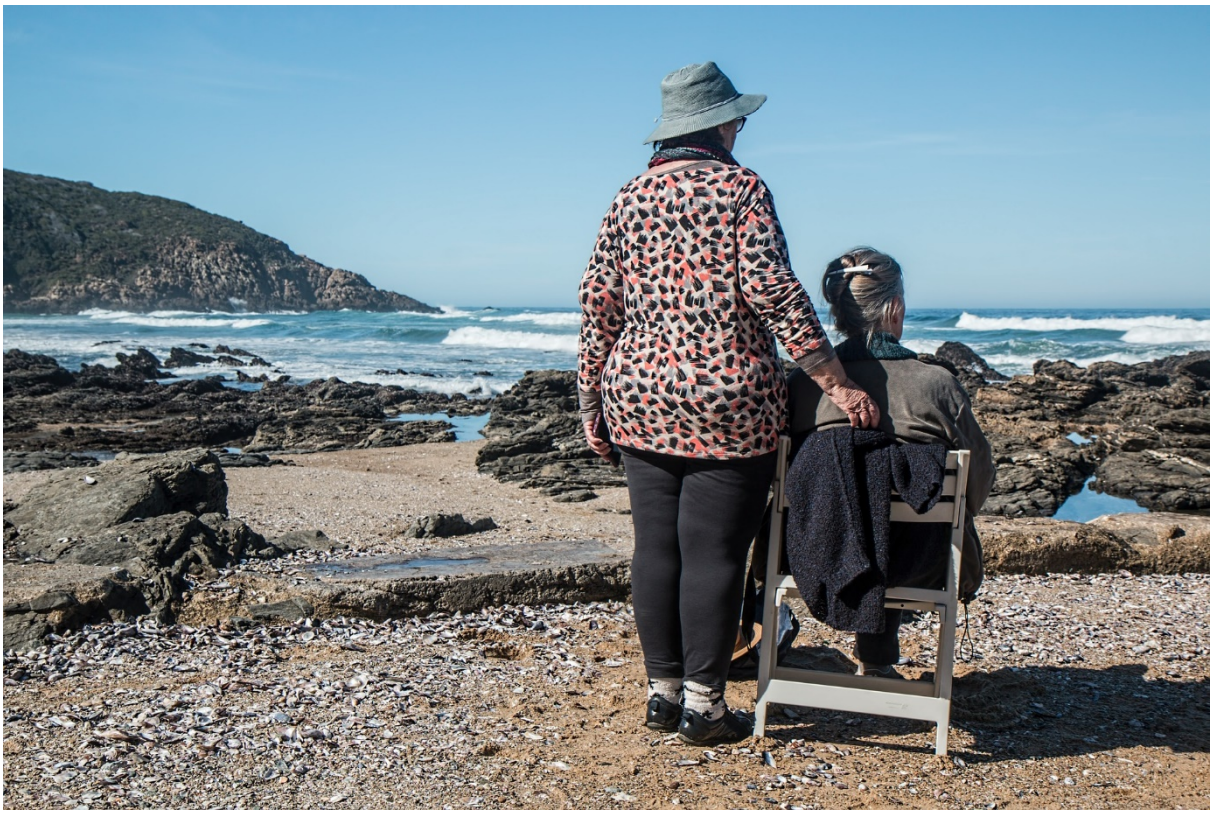

Assessing the Current and Future State of Arctic Governance: A Study of Academic Approaches to Arctic Law Development

*Nadezhda Filimonova**

In recent years, climate change's impact on the Arctic ecosystem and the increasing interests in developing the Arctic natural resources and shipping routes have raised a question of the future of Arctic governance. Although the concept of governance is rather new, several scholars (Exner-Pirot 2012; Koivurova 2008) point out that the questions of Arctic governance had been discussed already during the Cold War period. As an example, the authors talk about the 1973 "Agreement on the Conservation of Polar Bears" and the 1987 Mikhail Gorbachev's Murmansk speech. Drawing on these cases, one could suggest that the elaboration of Arctic governance has evolved as a top-down process. However, several authors (Pelaudeix 2015) mention that quite a few academic work[1] on Arctic governance were already published in the 1980s. In this view, the vision of Arctic governance has been forming by academia as well.

Currently, much of the ongoing academic discussions embrace the question of who the legitimate actors are in Arctic governance and what legal arrangements are needed to address promptly the ongoing physical and political transformations in the Arctic region. To tackle these questions, the academic literature presents a wide scope of discussions on Arctic governance. For instance, the issues of governance are analyzed at different levels of jurisdiction: domestic such as Danish policy on Greenland and Canadian policy on Nunavut (Jacobsen 2015; Loukacheva 2007); regional such as the Arctic Council and Polar Code implementation (Ingimundarson 2014; Sakhuja 2014), as well as on international level such as the application of the United Nations Convention on the Law of the Sea (UNCLOS) provisions for the Arctic region (Vylegzhanin 2011). The topic of Arctic governance is also studied through the lens of various issue areas, including fishing (Soliman 2014); natural resources extraction (Baker 2013); environmental issues (Stokke 2011) and shipping (VanderZwaag 2010). In addition, the topic of governance is examined through different policies: building regimes (Lidow 2015) and regime complexes (Young 2012), as well

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[1] Young, Oran. 1985. "The Age of the Arctic." *Foreign Policy* 61, pp. 160–79; Young, Oran. 1987. "Arctic waters: The Politics of Regime Formation." *Ocean Development and International Law* 18(1), pp. 101–14.

as the elaboration of an Arctic treaty (Rayfuse 2007). Quite a few articles (Bratspies 2015) discuss the impact of human rights norms on Arctic governance. Finally, the issues of governance embrace the topics of inclusion of non-Arctic states (Peng and Njord 2014; Sinha and Gupta 2014) and traditional knowledge of indigenous peoples (Fondahl and Irlbacher-Fox 2009) into the decision-making processes on Arctic governance.

Overall, taking into consideration the existing diversity of approaches, one of the major discussions in the academic literature regarding Arctic governance is whether there is a need for a hard or soft law to govern the region. In this paper, I will examine the concept of Arctic governance by applying a comparative approach to the existing academic literature embracing the issues of Arctic law development. The analysis of scholarly literature will provide us with an understanding of the academic perceptions of the future structure of the Arctic legal regime, its actors, and the structure of Arctic governance, in general. The importance of the understanding of academic stances on Arctic law development lies in the fact that scientists often are assigned by their national governments as experts, therefore, they might have a capacity to influence their states' foreign and national policies (Weible et al., 2012, p. 2). Thus, the study of academics approaches to Arctic law development will help to acquire a deeper understanding of state and non-state actor's views and interests in the elaboration of new rules for Arctic governance.

As a starting point, I will examine the ongoing academic debates on whether there is a need for an Arctic treaty and its efficiency, or whether the present governance system of the Arctic is sufficient to address the emerging challenges in the region. In the second section, I will unpack the notion of the current governance system of the Arctic by examining different scholars' approaches to the existing rules and norms related to the Arctic. In conclusion, I will discuss the major academic stances with regards to Arctic law development and identify trajectories for further research.

Proposal for a new Arctic treaty

The academic discussions evolved around the Arctic treaty elaboration mainly address the issue of constructing an Arctic governance system based on hard law instruments. Here, the scholars (Rayfuse 2007; Watson 2008; Verhaag 2003) suggest taking the Antarctic Treaty of 1959 as an example and applying it to the Arctic region. Overall, "…the Antarctic Treaty System (ATS) is open to any member state of the UN that conducts substantial research activities there" (Koivurova 2008, 17). Several scholars suggest that the Arctic treaty could incorporate some parts of ATS and its existing practices. For instance, in her

work, Rosemary Rayfuse (2007, 15) proposes that the 1980 Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) could be applied as a model to the Arctic region for establishing "…a regime responsible for the integrated and holistic management of all oceans-related activities in the Arctic Ocean areas beyond national jurisdiction." In particular, she claims that CCAMLR represents a valuable example of an innovative and precautionary approach to the ocean management since the reason of its adoption was to guarantee the protection of krill stocks in advance of their unregulated exploitation. In her view, she suggests an establishment of a 'Regional Oceans Management Organization' to regulate all commercial activities in the Arctic Ocean.

In addition, in his work, Timo Koivurova (2008) discusses the proposal made by the World Wildlife Fund (WWF) to enhance Arctic governance through the elaboration of a new treaty. The author illustrates that the WWF proposals of the treaty are based on the provisions of the UNCLOS, Polar Code and the 1995 United Nations Straddling Stocks Convention. Mainly, the WWF proposal embraces the following areas for regulation: "creating a network of marine protected areas and special management areas, including a stronger set of regulations for the construction and operation of ships increasingly operating in Arctic waters" (Koivurova 2008, 20). At the same time, Koivurova underlines that the WWF does not reject the idea of incorporating the ATS experience into Arctic governance. Following Rayfuse's proposals, the WWF suggests including in the treaty an ecosystem-based management based on CCAMLR.

Drawing on the issue of inclusion of various actors in the decision-making process, Sebastien Duyck (2011) suggests that the Arctic states could incorporate the model of Antarctic governance of the differentiated participation of various states. Hence, based on the ATS approach, the author states that "…the regime could be designed in such a way as to identify the level of inclusiveness in the participation to each annex based on the right and entitlement of different categories of states under the law of the sea in relation to the given activity" (Duyck 2011, 13).

However, not all the scholars support the idea that Arctic governance should be based on a solid treaty like the Antarctic Treaty. They present various arguments pertaining to the inefficiency of the elaboration of the hard law instrument for the Arctic region. For instance, Mark E. Rosen and Patricio Asfura-Heim (2013, 23) emphasize that there is no need for such a treaty because "…most areas in the Arctic are under the jurisdiction of the individual Arctic members of the Arctic Council". In addition, Oran Young (2012) suggests that the key provisions of the Antarctic Treaty and the 1991 Environmental

Protocol pertaining to the issues of demilitarization and denuclearization, and prohibition of mining activities do not address the occurring transformations in the Arctic region. All three authors agree that it is not politically feasible to elaborate such a treaty. In contrast, Koivurova (2008) talks about the possible negative consequences of the Arctic treaty adoption for the Arctic indigenous peoples' organizations. Particularly, his main concerns are whether the indigenous organizations will maintain their equal status under the adopted Arctic treaty "…since in almost all other inter-governmental organizations, regimes and negotiation processes, the status of indigenous peoples is only that of an NGO" (Koivurova 2008, 25). Drawing on the discussions presented in this section, the next section will review the literature on the existing legal norms, regime, regime complexes and rules with regards to the Arctic region, focusing on their efficiency and prospective areas for change.

Arctic governance as a set of regimes and regime complex

In academic literature, the question of Arctic governance being a set of rules and norms mainly deals with the topics of regimes and regime complex formation for the Arctic region. This type of literature considers that the existing conventions and agreements constitute the legal regime for the Arctic (Young 2010; Joyer 2009; Hoel 2009; Haftendorn 2013). Therefore, there is no need for the new international Arctic legal regime, as the current legal regime should be enhanced and expanded (Haftendorn 2013, Young 2016). In defining the notion of the regime, the academic works (Young 1998; Pelaudeix 2012) mainly apply the notion coined by Stephen Krasner (1982, 186), who defines a regime as an institution "possessing norms, decision rules, and procedures which facilitate a convergence of expectations."

In relation to the existing legal arrangements, the literature emphasizes the critical role of the UNCLOS in setting the regulations for certain important issue areas, including the delineation and negotiation of maritime boundary disputes in the Arctic Ocean based on Article 76 (Young 2010; Joyer 2009); the establishment and maintenance of search and rescue services by applying Article 98 (Sellheim, Zou and Inagaki 2017), and the elaboration and introduction of the marine protection legislation for the ice-covered waters based on Article 234 (Fields 2016; Weidemann 2014). In addition, the literature (Haftendorn 2013; Sellheim, Zou and Inagaki 2017; Young 2016) states that the newly signed and adopted Arctic binding agreements on research-and-rescue and oil spill prevention contribute to the enhancement of the UNCLOS provisions by imposing regulations on the specific issue area. Additionally, several works (Joyer 2009,

Young 2010, Haftendorn 2013) state that the existing Arctic agreements represent parts of the Arctic legal regime.[2]

Apart from the specific Arctic agreements, the literature states that several international conventions are highly relevant to regulate certain types of activities in the Arctic Ocean. For instance, several works (Hoel 2009; Joyer 2009; Young 2016; Haftendorn 2013) outline the application of international conventions on international shipping and biodiversity in the Arctic region. Several scholars, Young (2016) and Haftendorn (2013), underscore that it will be advantageous for Arctic governance to incorporate international conventions and agreements that are embracing the issues not directly related to the region.[3] For instance, Oran Young (2012a, 81) states that "…the efforts to regulate the impact of pollutants on Arctic systems would benefit from integration into multilateral environmental agreements, including the Stockholm Convention on persistent organic pollutants and the UN Framework Convention on Climate Change."

The application of the international conventions and agreements in the Arctic region allows several scholars (Young 2012a, Exner-Pirot 2012) to discuss the emergence of regime complexes in the Arctic region. Young (2012a, 4) defines a regime complex as "…a set of elemental regimes or elements that pertain to the same issue domain or spatially defined area, that are related to each other in a non-hierarchical manner." Referring to the Arctic region, Young (2012) and Exner-Pirot (2012) suggest that the national Arctic strategies of the eight Arctic states, and the international conventions and agreements pertaining to the Arctic, including UNCLOS and Polar Code, represent the patterns of a regime complex that governs the actors' behavior.

Overall, the literature holds a positive stance concerning the regime complex formation in the Arctic. Particularly, some works (Young 2012a; Young 2016) suggest that the regime complex approach encourages the participation of non-Arctic states and non-state actors, including indigenous people's organizations and scientists, in negotiations and decision-making processes, as well as in activities of various international organizations dealing with the Arctic issues. In

[2] Agreement on Cooperation on Aeronautical and Marine Search and Rescue in the Arctic (2013); Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic (signed 2013); The Maritime Delimitation and Cooperation Treaty in the Barents Sea and the Arctic Ocean (2011); Agreement on the Conservation of Polar Bears (1973).

[3] The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972); The International Convention for the Safety of Life at Sea (1974); The Convention on Biological Diversity (1992); Convention for the Protection of the Marine Environment of the Northeast Atlantic (1992)

addition, Young (2012a) and Exner-Pirot (2012) contend that the regime complex approach will allow for better addressing of the emerging environmental and socio-economic challenges in the Arctic region because of the complexity of the Arctic problems, the unpredictable geopolitical situation, and the current constrained scope of Arctic governance development, which is mainly limited to local and national levels.

However, there is some literature (Nilsson, Koivurova 2016; Pelaudeix 2012) that takes a critical stance on the efficiency of the existing regimes and regime complex as a part of Arctic governance. For instance, several works (Pelaudeix 2012) claim that the regime complex approach fails to embrace discussions on incompatible views of different actors, while other works (Nilsson, Koivurova 2016) state that the Arctic states remain the primary actors in defining Arctic governance by adopting international agreements and carrying out economic and political activities in the region.

In addition, Nilsson and Koivurova (2016) question the efficiency of incorporating different conventions and agreements into Arctic governance. In particular, the scholars express concern that linking the Arctic legal regime with global governance might create a case where the regulation of the issues pertaining to the region will be elaborated outside of the region's governmental structures. As an example, the authors argue that "the existence of the UN Framework Convention on Climate Change has served as an argument to keep mitigation of climate change off the Arctic Council's agenda" (Nilsson and Koivurova 2016, 187). Overall, the discussions on the agreements and conventions as structural parts of the Arctic legal regime and regime complex lead to questioning the structures and institutions that elaborate, implement, and apply all these international and regional legal arrangements.

Conclusion

The existing academic literature on Arctic law development shares a common perception of the need for a central role of law in Arctic governance. At the same time, academic approaches encompass divergent views regarding the future structure of the Arctic legal regime. One type of scholarly literature emphasizes the need for having a unified Arctic Treaty similar to the Antarctic Treaty of 1959. Its major argument states that a Treaty will create a holistic legal regime to regulate different kinds of socio-economic activities in the region. At the same time, such a legal proposal for the Arctic is criticized by several scholars for being not precise about the role and interests of indigenous people in the treaty.

Another type of academic literature emphasizes the already existing

diversity of international and national laws that might be applied to the Arctic region, and, therefore, rejecting the need for the new Arctic Treaty. Importantly, these scholars diverge from a state-centered approach to Arctic governance and try to broaden its notion by encompassing the role of regimes and regime complexes as actors regulating the Arctic activities. More specifically, the literature underscores the role of the UNCLOS and various environmental agreements in setting rules for the state actors' socio-economic activities and climate mitigation and adaptation policies in the Arctic. Drawing on the existing academic literature, the scholarly discussion might be further developed by examining the role of international lawyers and experts in negotiations of the Arctic treaties and conventions, as well as the Arctic states' national legislation. In this case, further research could be developed by studying the decision-making and negotiation process of these national and international documents. Finally, the literature talks about the application of international conventions to regulate certain issue areas in the Arctic region. The further research could be proceeding by examining the role of Arctic governance in enhancing and bringing changes to global environmental governance.

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Is the Arctic Way Forward for the Norwegian Oil Industry?

*Ilker K. Basaran**

Intro

Norway is one of the most active Arctic players in oil drilling and production. The first petroleum, discovery in the North Sea was Ekofisk field in 1969, and the production from this field started in 1971.[1] During the following years, several large discoveries were made in the North Sea, which remains Norway's main oil province today.[2] However, besides the North Sea, the Norwegian Continental Shelf comprises of the Northern Ocean areas of the Norwegian Sea and the Barents Sea, of which only the latter is entirely located above the Arctic Circle.

Oil Reserves

Norway is an oil-dependent country. it has proven oil reserves of 10.2 billion barrels[3], which also equals about 50 percent of Western Europe's oil and gas reserves.[4] In 2004, Norway exported an average of 2.9 million barrels of oil a day, making it the third-largest exporter of crude oil in the world, behind Saudi Arabia and Russia. Its earnings from the sale of oil and gas have constituted one-third of government revenue, as well as providing jobs for nearly a quarter of a million people who were employed not just in the energy industry but in providing the vital infrastructure - ships, buildings, and essential services - that is needed to support it.[5] Additionally, the recent historical drop in global oil prices is deteriorating the economic damage.

Decline in Reserves

After enjoying almost 40 years of virtually uninterrupted growth, the

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[1]See "Norway's Oil History in 5 Minutes", Government.no, available at https://www.regjeringen.no/en/topics/energy/oil-and-gas/norways-oil-history-in-5-minutes/id440538/ (Last visited on November 30, 2018).

[2] Henderson, James & Loe, Julia; "The Prospect and Challenges for Arctic Oil Development", The Oxford Institute for Energy Studies, 2014. p. 40. Available at https://www.oxfordenergy.org/wpcms/wp-content/uploads/2014/11/WPM-56.pdf (Last visited on November 30, 2018).

[3]Norwegian Petroleum Directorate 2016, available at http://www.npd.no/Global/Norsk/1-Aktuelt/Nyheter/Sokkelaret-2016/Presentation-The-Shelf-2016.pdf (Last visited on November 30, 2018).

[4] Koivurova, Timo & Hossain, Kamrul; "Offshore Hydrocarbon: Current Policy Context in the Marine Arctic", Arctic Centre, 4 September 2008, p.10. Available at http://arctic-transform.org/download/OffHydBP.pdf (Last visited on November 30, 2018).

[5] Howard, Roger; "The Arctic Gold Rush The: New Race for Tomorrow's Natural Resources", Continuum Publishing, 2009, p.201.

North Sea oil wells started to decline.[6] Norway's oil output has seen a 50 percent drop since 2000, and it lost 25,000 oil-related jobs in the last three years, which accounts for 11 percent of Norway's oil industry workforce.[7] Consequently, it is evident that the decline, in both oil reserves and recent global oil prices, has caused an enormous damage to the Norwegian economy.

Norway is in great need of finding new drilling fields and keep the production level high in order to compensate for the demand. In this perspective, the Arctic holds the greatest promise. The Norwegian government has taken numerous actions towards moving the production activity northward, to new fields located above the Arctic Circle.[8] It is also important to note that the Norwegian tax rules allow private companies to deduct exploration costs from income generated elsewhere in Norway. This means that the state effectively covers 80 percent of the costs, a major incentive for exploration.

Barents Sea Agreement

A 44-year-old border dispute regarding an area made up 12 percent of the whole Barents Sea, which is the equivalent of 45 percent of Norway's total land area (about 176.000 square kilometers) was settled in an agreement that was signed between the Russian Federation and Norway on September 15, 2010. The agreement entered into force on July 11, 2011.[9]

The settled area, formerly known as the Grey Zone, is believed to contain a substantial amount of biological and hydrocarbon resources. Some rough estimates reveal up to 17 billion barrels of oil and 5-6 trillion cubic meters of gas under the seabed, although most predictions suggest fewer carbon resources on the Norwegian side.[10]

While analysts estimate that it could take 12 to 15 years for commercial production to begin in the newly delineated sector, finding new resources is considered to be a timely endeavor, and it has a very positive effect on Norway's economy because uncertainty over this area cast a shadow over big energy projects for a

[6] Kennedy, Charles; "Norwegian Oil Production to Hit 25-Year Low, East Arctic the Key?" 28 August 2013, available at http://oilprice.com/Latest-Energy-News/World-News/Norwegian-Oil-Production-to-Hit-25-Year-Low-East-Arctic-the-Key.html (Last visited on November 30, 2018).

[7] See Oilprice.com "Why The Arctic Oil Dream Is Not Over Yet", May 23, 2016, available at http://www.nasdaq.com/article/why-the-arctic-oil-dream-is-not-over-yet-cm624690 (Last visited on November 30, 2018).

[8] Klare, Michael T.; "The Race for What is Left: Global Scramble for the World's Last Resources", Metropolitan Books, New York, 2012, p88.

[9] Arctic Forum Foundation, "Delimitation agreement: A new era in the Barents Sea and the Arctic?", available at http://eu-arctic-forum.org/allgemein/delimitation-agreement-a-new-era-in-the-barents-sea-and-the-arctic/ (Last visited on November 30, 2018).

[10] Id.

long time. Clarity will bring investment and prosperity.

The Barents Sea Prospect

The Barents Sea is believed to be an immature petroleum province with a huge potential, which can compensate the diminishing oil reserves in Norway.[11] Under the agreement, each country has the right to develop oil and gas on its side of the border, therefore, after the 2010 agreement regarding delimitation of the disputed Barents Sea region, seismic work began on the Norwegian side.

Significantly, the delimitation agreement also includes an annex regulating the unification of potential transboundary hydrocarbon deposits, based on analogs from the North Sea. The parties are required to reach agreement on the joint exploitation of deposits that extend into the continental shelf of other country, and no party may start production from such deposits unilaterally. This means that potential developments on the Norwegian side could be delayed or halted by Russia, which might have a different time perspective on exploitation.[12] Furthermore, any big cross-boundary discovery will require extensive Norwegian-Russian cooperation and joint development in order to reach the critical volumes needed to make the discovery commercial. Additionally, the parties have to find a common solution to the infrastructural development required for such a joint effort.[13]

In contrast to the other parts of the Arctic, the south-western part of the Barents Sea is almost ice-free, and the conditions are similar to those of the Norwegian and North Seas. As a result, the operational window for drilling is long compared to other parts of the Arctic.

The Goliat and the New Licenses

The Goliat, Norway's first Arctic oil field, and production site, was discovered in 2000 through the first exploration well drilled in the Barents Sea area.[14] The field is currently being developed by ENI[15] with a floating production, storage, and offloading (FPSO) facility that is located approximately 85 km northwest of Hammerfest. The Goliat field is believed to hold approximately 180 million

[11] Katherine Keil, K.; "The role of Arctic hydrocarbons for future energy security", Nautilus Institute, a NAPSNet Special Report, (2014), available at http://nautilus.org/napsnet/napsnet-special-reports/the-role-of-arctic-hydrocarbons-for-future-energy-security/ (Last visited on November 30, 2018).

[12] Henderson & Loe, supra note 2, p.52.

[13] Id.

[14] See Eni Norway web-site, available at http://www.eninorge.com/en/Field-development/Goliat/Facts/ (Last visited on November 30, 2018).

[15] In May 2009, the Norwegian government permitted Eni of Italy to produce with development of the Goliat Field, the first petroleum deposits to be exploited in the Barents Sea.

barrels of oil, and ENI will pump out 100.000 barrels of oil per day.[16]

Additionally, in 2016, Norway has awarded 10 new oil and gas licenses to explore the untapped area of the Arctic Barents Sea.[17] This was the first time Norway was offering licenses to new acreage in 20 years.[18] Later in 2017, Norway's Petroleum Directorate again awarded a record 75 new exploration licenses, eight of which are in Norway's Arctic Barents Sea, to Statoil, Aker BP Total, Shell, ConocoPhillips, and other companies.[19]

Conclusion

The new licensing rounds are significantly important because they demonstrate the Norwegian government's decisive stance behind the oil exploration decision in the Arctic Ocean. However, in the aftermath of Shell's historical Arctic withdrawal in Alaska,[20] and global commitment to reduce carbon emissions, the Norwegian effort to explore oil in the Arctic Ocean puts the government right under the spotlights as an epicenter of Arctic oil drilling discussions. Norway has to face an increasing pressure to keep the oil where it is and commit to 2015 Paris Agreement. And if this is not desirable, which seems to be the case right now, then Norway has to set an ideal example by conducting a sustainable, environmentally sound and safe, drilling operation in the Arctic Ocean.

[16] Id. See also Klare, supra note 8, p88.
[17] Oilprice.com, supra note 7.
[18] The Guardian, "Arctic oil drilling: outcry as Norway opens new areas to exploration", May 2016 https://www.theguardian.com/world/2016/may/19/norway-arctic-new-oil-drilling-licences (Last visited on November 30, 2018).
[19] The Barents Observer, "Governmnet Issued new 75 Licenses in Norwegian Waters", available at https://thebarentsobserver.com/en/industry-and-energy/2018/01/government-issues-75-new-licenses-norwegian-waters (Last visited on November 30, 2018).
[20] Biley, Alan; "End of the Road: Shell Finally Calls a Halt to Its Alaska Arctic Offshore Oil Exploration Campaign", Petroleum News, Vol.20, available at http://www.petroleumnews.com/pntruncate/278039287.shtml (Last visited on November 30, 2018).

Indigenous People's Right to Traditional Fishing: International Human Rights Framework and Domestic Regulations in Japan. A Brief Assessment of Recent "Illegal" Fishing Case by an Ainu in Monbetsu Region in Hokkaido

Kamrul Hossain[*], *Hiroshi Maruyama*[**] & *Leni Charbonneau*[**]

1. Introduction

A recent incident surrounding a fishing attempt by Hatakeyama Ekashi, an Ainu elder and the president of the Monbetsu Ainu Association, has provoked the tensions existing between Japan's domestic regulations for freshwater fishing and its obligations to respect, promote, and protect the rights of Indigenous peoples. In the fall of 2018, Hatakeyama Ekashi attempted to catch salmon in relation to Ainu rituals, only to be intervened by the police and ultimately prevented from fishing. It is under this context that this article examines the rights of Indigenous peoples as outlined in the framework of international human rights law. It asks how traditional practices are advocated for as a right to culture, and how traditional fishing practices of Indigenous people are incorporated in the aforementioned framework. This article is founded on considerations of the Ainu people as an Indigenous people of Japan, who have for generations been practicing fishing for both ritual and subsistence, qualifying the practice as an integral component of their culture. Hatakeyama Ekashi's case is presented in order to postulate that if Japan's regulations do not comply with its international obligations arising from the human rights treaties to which it is party, then the Ainu are indeed deprived of their acknowledged rights as Indigenous people. Furthermore, this article also concludes that the presented case demonstrates a point at which Japan is in conflict between prefectural regulations and its constitutional obligations

2. Indigenous peoples' rights within the framework of international human rights law

At its conceptual core, the term Indigenous people is constituted by reference to the original inhabitants of a

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given area. Generally, Indigenous peoples have a history of living on their territory for thousands of years. However, in many contexts and applications, the term "indigenous" also implies the social and political histories and contemporary effects on certain people groups which have been subjected to sovereign regimes following the rise of nation-states around the world. In other words, indigeneity conceptually incorporates histories of colonization or otherwise territorial expansion on the part of dominant state powers. In the process of nationalist or imperialist expansionist regimes, Indigenous peoples around the world were deprived of their own territories and resources, and pushed into the margins of the societies into which they were incorporated (though incorporation cannot be said to imply integration). Therefore, the distinctiveness of their cultures, languages, belief systems, subsistence practices, and ways of life have been continually jeopardized by dominant nation states, often under the guise of assimilationist practices. The recognition of Indigenous peoples varies, with some classified as "tribal groups" or ethnic minorities[1], which can compromise the international rights and standards pertaining to Indigenous peoples.

As Indigenous peoples have been commonly subjected to nation-state expansionism, Indigenous social organizations or political structures were often historically disregarded. Thus, these communities were historically deprived of any negotiating body to express concerns externally. The 20th century saw the development of some transnational networks in which Indigenous communities could share their concerns.[2] Some of these groups brought their issues to international forums such as the League of Nations and its successor the United Nations. However, pleas for the rights of self-determination and land and resource rights amongst others were long overlooked by these organizations, as the common discourse was that their issues pertain solely to the states in which they live. However, insistent grassroots and transnational cooperation eventually garnered some level of success and popularity, eventually culminating in a number of human rights instruments claiming to ensure the rights of Indigenous peoples who have been subject to oppressive settler or imperial regimes.

While neither the 1948 Universal Declaration of Human Rights (UDHR) nor 1966's International Covenant on Civil and Political Rights (ICCPR) and

[1] Barten, U. (2015). What's in a Name? Peoples, Minorities, Indigenous Peoples, Tribal Groups and Nations. *E C M I Journal on Ethnopolitics and Minority Issues in Europe*, *14*(1), 1-25.

[2]Vieira, A. C. A., & Quack, S. (2016). Trajectories of Transnational Mobilization for Indigenous Rights in Brazil. *Revista de Administração de Empresas*, *56*(4), 380–394. https://doi.org/10.1590/S0034-759020160403

the International Covenant on Economic, Social and Cultural Rights (ICESCR) explicitly articulate rights of "Indigenous peoples", a number of provisions have been identified as specifically applicable to Indigenous communities. In particular, Article 27 of the ICCPR has been clearly interpreted as applicable to indigenous peoples, by the Human Rights Committee (HRC) – the treaty monitoring body of the ICCPR. Article 27 reads as follows:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.[3]

The HRC further indicated what is to be regarded as culture and cultural practice with the inclusion of the General Comment 23 under Article 27, which is applicable to Indigenous persons, particularly in the cases where they constitute minority communities. Among other points, the Committee defined culture as "a particular way of life associated with the use of land resources, especially in the case of indigenous peoples... such traditional activities as fishing or hunting and the right to live in reserves protected by law".[4]

Similar language is employed within the framework of ICESCR where General Comment No. 21 on Article 15 1(a) – the Article offers enjoyment of the right to take part in cultural life – expressly recognizes the traditional rights of Indigenous peoples in connection to their lands and natural resources. The General Comment explicitly articulates the "cultural values" of Indigenous peoples, and connected rights to such values as they relate to lands and their relationship with nature.[5] Therefore, their "particular way of life, including their means of subsistence, the loss of their natural resources"[6] have been placed decisively as part of the enjoyment of rights under Article 15 1(a) of the ICESCR.

The explicit reference to Indigenous peoples, and their collective entitlements, is likewise prevalent in the International Labour Organization (ILO) Convention No. 169.[7] To date, the

[3] United Nations International Covenant on Civil and Political Rights (ICCPR) of 1966, Article 27.
[4] Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994), U.N. Doc. HRI/GEN/1/Rev.1 at 38 (1994), Para 7.
[5] Committee on Economic, General comment 21, Social and Cultural Rights (Forty-third session), E/C.12/GC/21, 21 December (2009), Para 36.
[6] Ibid.
[7] As of November 2018, 23 countries have ratified the Convention, Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169),

Convention is the only legally binding international instrument to address Indigenous peoples' rights. Article 5 of the Convention refers to "social, cultural, religious and spiritual values and practices" with reference to Indigenous peoples. These values are defined on a basis as both group rights and as individual rights. Article 2 (clause 2, section B) of the Convention, in reference to the state's responsibility, outlines the obligation for the promotion of the "full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions". By virtue of Article 23, members of a given Indigenous group enjoy rights to subsistence economy and traditional activities including hunting, fishing, trapping and gathering. Most importantly, Indigenous peoples are granted the right to be consulted in any matter that might be directly affecting them.[8]

The most significant instrument pertaining to this article is the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) adopted in 2007. The Declaration, which was received and ratified by a majority of states in the world, provides a normative framework and can be considered to form a "customary international law"[9] in respect to the realization of the rights of Indigenous peoples. The Declaration acknowledges the whole set of rights that Indigenous peoples are entitled to as distinct peoples. Despite the fact that the Declaration is not an internationally binding legal document, these rights are repeatedly endorsed as international standards by national courts.[10] For the cases at the focus of this paper, it is necessary to highlight the following stipulations of UNDRIP: the right of Indigenous peoples to carry out subsistence activities, as referred to in Article 20; the right to water resources as referenced in Article 25; the right to land outlined in Article 26; and the right to free, prior, and informed consent in all matters affecting their lands, traditional territories, and other resources provided by Article 32.2.

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https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314, accessed December 3, 2018.

[8] Indigenous and Tribal Peoples Convention (ILO Convention, C169) (1989), Art 6, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169, accessed December 3, 2018.

[9] Lenzerini, F., & Koivurova, T. (Eds.) (2016). Implementation of the rights of indigenous peoples: Committee on the Rights of Indigenous Peoples Report for the 2016 Johannesburg Conference. London: International Law Association, https://lacris.ulapland.fi/files/1981281/ILA_CRIP_report_2016.pdf, accessed December 3, 2018.

[10] See for example, *Àngela Poma Poma Vs. Peru* Case, human rights committee, U.N. Doc. CCPR/C/95/D/1457/2006.

3. Traditional fishing forming a right to practice indigenous people's culture

The fact that Indigenous communities have lived on their territories since time immemorial has generally allowed them to cultivate deep and comprehensive knowledge with respect to their surrounding physical environment. Relationships to the natural environment often form central tenants of Indigenous culture. Their cultures, then, are inextricably woven with the subsistence and ritual practices that have allowed them to ecologically sustain their livelihoods in their lands for generations. With consideration to the case at the focus of this article, a practice such as fishing then should not merely be regarded as a subsistence activity but also one that is saturated with spiritual significance and importance to cultural identity.

Under the context of the legal framework articulated in the previous section, Indigenous peoples are thus endowed with the right to enjoy and manage the land, water, and resources which they have traditionally owned, occupied or otherwise used or acquired.[11] To which the "free pursuit of economic, social, and cultural development"[12] is concerned, traditional fishing plays a significant role to those Indigenous peoples inhabiting areas steeped in water resources. Traditional fishing forms the "material bases of Indigenous peoples' culture"[13], and furthermore such activities safeguard their right to natural resources. Recognition of such a right is found in the authoritative statement – General Comment 23 – provided by the HRC.

The General Comment 23, for example, expressed that the provision of Article 27 of the ICCPR includes a positive obligation on part of the state. This means that states are not just to refrain from denying the right, but are obliged to adopt affirmative measures or actions for the protection and promotion of the stated rights. The positive measures would include adoption of legislative, judicial of administrative measure[14] in respect of Indigenous peoples exercising their right to fish. This also means that Indigenous peoples should be guaranteed a preferred position compared to non-indigenous population.[15] One way of fulfilling such privilege might be to adopt regulations or policies putting fishing quotas for Indigenous peoples' traditional and subsistence fishing, and putting

[11] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), Article 26.
[12] Ibid., Article 3.
[13] Indigenous and Tribal Peoples Convention (ILO Convention, C169) (1989), Art 15, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169, accessed December 3, 2018.
[14] Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994), U.N. Doc. HRI/GEN/1/Rev.1 at 38 (1994). Para 6.1.
[15] Ibid.

restrictions on non-indigenous and other commercial fishing. This would presumably occur within the framework of domestic regulation[16] in order to consistently give effect of international obligation under Article 27 of the ICCPR.

The HRC has applied the framework as outlined above in the year 2000 with the *Apirana Mahuika* case.[17] The Committee acknowledged Indigenous traditional fishing by Maori people as a right to practice culture under the framework provided by Article 27 of the ICCPR. The Committee extended the argument further by articulating commercial fishing as a Maori traditional practice, as they are major shareholders in the modern industry. Consequently, based on the discussions presented here, authors of this paper argue that, right to traditional fishing in waters traditionally owned, acquired or otherwise used by Indigenous peoples is grounded in the acknowledged human rights legal framework applicable to Indigenous peoples.

4. The Ainu is an indigenous people in Japan

The island nation of Japan has successfully crafted a popular image of itself as a mono-ethnic, homogenous state. Inside and outside the country, it is often regarded unambiguously as the land of the Japanese. However, several distinct populations endemic to the archipelago challenge such a taken-for-granted notion of the country. In addition to several minority groups, the country is also constituted by Indigenous peoples ethnically distinguished from the *Wajin* (ethnic Japanese). Among these are the varied peoples of Ryukyu, Okinawa and the Ainu; the latter are at the focus of this paper.

The northernmost island of Japan, called Hokkaido, is well-regarded today for its booming ski industry, agricultural production, and serene landscape. While these images are consistently perpetuated and promoted by the Japanese state, they suppress a longer-standing character of the land rooted in thousands of years of history. Before Japan's Meiji Restoration beginning in 1868, Hokkaido was known to its native inhabitants as *Ainu Mosir* or the land of the Ainu. Ainu Mosir was traditionally constituted by lands reaching beyond Hokkaido, into modern day Sakhalin (Karafuto), the Kuril Islands, and the Kamchatka Peninsula. Across these diverse tracts of land, the group collectively known as the Ainu have lived for centuries.

Though customs and practices varied amongst Ainu communities, there

[16] *Indigenous Fishing Rights* (2016), The Fish Site, https://thefishsite.com/articles/indigenous-fishing-rights, accessed December 3, 2018.

[17] *Apirana Mahuika et al. vs. New Zealand* (Communication No. 547/1993, 15/11/2000)), UN Doc. CCPR/C/70/D/547/1993 (2000).

existed ethnic commonalities such as subsistence practices (primarily hunting and fishing) and shared animistic beliefs. The Ainu participated in a sophisticated and well-established trade network in Eastern Eurasia, including with the Japanese. In recent centuries, the exploitative nature of Japanese trade practices with the Ainu increased. Following the establishment of the Meiji government this exploitation, matched with both assimilation and marginalization, became systematically institutionalized through official Japanese policy measures. The incorporation of Hokkaido into the Japanese state was made in geopolitical strategy against Imperial Russia's growing presence in the region.[18] Hokkaido subsequently underwent intensive developmental campaigns to support the imperialistic aspirations of Japan. As a result, the Ainu were removed from their homelands, forcibly relocated and placed into labour campaigns, and deprived of their traditional ways of living.[19]

Today, the Ainu still fight against the deeply sedimented discrimination and marginalization supported by years of Japanese colonization and rule. Ainu communities and individual activists work towards their due recognition of rights as Indigenous peoples, guaranteed to them by state policy and international law.

5. Recent "illegal" fishing case carried out by Hatakeyama Ekashi

Between 31 August and 1 September, Hatakeyama Ekashi- president of the Monbetsu Ainu Association- attempted to catch salmon for two traditional rituals: *Icharpa* (memorial service for ancestors) and *Ashiricheppunomi* (ceremony to welcome salmon) in the Mobetsu River without obtaining prior permission. The police intervened in and prevented his attempt citing the Hokkaido Regulations in the Freshwater Fishing Industry (hereafter the Hokkaido Regulations), which aim to govern the activities of fishermen in freshwater areas to conserve fishing stocks in the interest of commercial fisheries operating in the estuaries. The Hokkaido Regulations since 2005 have allowed the Ainu to catch salmon only for the purpose of performing cultural ritual if they get prior permission from the authorities.[20] However, Hatakeyama Ekashi has acted against these Regulations and attempted to fish without prior permission, which he states is justified on a basis of his right to

[18] Kimura, H., & Ealey, M. (2008). *The Kurillian knot: a history of Japanese-Russian border negotiations*. Stanford, Calif: Stanford University Press.

[19] Walker, B. L. (2009). *The conquest of Ainu lands: ecology and culture in Japanese expansion, 1590-1800* (1. paperback ed., repr). Berkeley, Calif.: Univ. of California Press.

[20] Hokkaido Regulations in the Freshwater Fishing Industry [Hokkaido Naisuimen Gyogyo Chosei Kisoku], Article 52.

cultural practice. Hatakeyama Ekashi, an Ainu elder and activist, has long provoked the policies that infringe upon his people's cultural rights to fish. In September 2017, he was seen by the police catching 50 or 60 salmon, and was recommended to apply for permission. He replied to the police, saying: "If you want to arrest me, you should do it. I am prepared. The Japanese legislation does not matter for me".[21] There is a sequel to this event of 2017 as follows:

> "The other day, the Monbetsu Fishermen's Union persistently persuaded me to submit the application to the authorities. Is that really valid? This year I announced in advance that I would fish salmon in our river for our rituals"

It led to the aforesaid event of 2018. On 16 September 2018, the Citizens' Alliance for the Examination of Ainu Policy held a meeting in Sapporo with Hatakeyama Ekashi to voice solidarity for his actions. More than 40 people participated in the meeting. On 9 October, the Citizens' Alliance coordinated a press conference in Sapporo for Hatakeyama Ekashi and Ishii Ekashi, a colleague who accompanied his efforts to fish salmon in the Mobetsu River. Hatakeyama Ekashi read a statement addressed to Prime Minister Shinzo Abe, Hokkaido Governor Harumi Takahashi and the Monbetsu Police Station of Hokkaido Police. According to the statement, before the attempt, the authorities, including the police, visited him at home and urged him to get permission to catch salmon from them seven times. At the same time, the police parked its vehicle near his home for days and pursued him whenever they saw him leaving the home. Hatakeyama and Ishii Ekashi have championed the return of the traditional right to fish salmon to the Ainu people.

6. Japan's domestic regulations and Ainu fishing right

In 1869, the Japanese government established the Hokkaido Colonial Commission in Sapporo to develop Hokkaido and exploit its natural resources, promoting the settlement of Japanese citizens in the region. Land was expropriated from the Ainu and offered at meagre sums to Japanese settlers; this was accomplished through policies such as the Land Regulation Act (1872) and the Hokkaido Ordinance for the Issuing of Land Certificates (1877). These policies were part of a scheme to forcibly relocate the Ainu, and the subsequent removal from their lands resulted in deprivations of their means of livelihood, including fishing, hunting,

[21] Hatakeyama, S. (2018). *Update on personal activist activities following police intervention in salmon fishing attempt in the Mobetsu Rover, September 2018*, Presentation at Cemipos seminar, Sapporo Japan, 24 November 2018,. http://cemipos.blogspot.com/, accessed November 27, 2018

and small-scale farming. Furthermore, overfishing by Japanese settlers resulted in a sharp decline of salmon populations.

In 1876, the Colonial Commission issued Notice Number 9, which banned the Ainu from using their traditional salmon fishing net (called *tesu*) and from fishing at night. The notice applied to every river in Hokkaido. In 1878, the stipulations of the ban were expanded and further articulated under Notice Number 30. Notice Number 30 prohibited everyone from fishing salmon in any tributary of a primary river, but did allow for the use of a towing net to fish salmon for Japanese settlers. Thus, the Ainu were denied the right to fish salmon in any tributary or main river, which had a devastating effect on the Ainu communities and their abilities to engage in subsistence practices.[22] Similar restrictions were placed on other subsistence activities such as hunting, which demonstrated the Colonial Office's intention to situate the Ainu within the agriculture industry instead of allowing them to pursue traditional practices.[23]

In 1947, the Constitution of Japan was enacted, which is characterised by the stated sovereignty of the Japanese people, pacifism and respect for fundamental human rights. In 1951, the Act on the Protection of Fishery Resources, which prohibits everyone from fishing salmon and trout in freshwater was enacted at the national level. In 1964, the Hokkaido Regulations in the Freshwater Fishing Industry came into force in Hokkaido in accordance with the Act. Prohibition was not laid on the artificial incubation of salmon and trout, fishing for research, and Ainu fishing for cultural performance, with the latter having the stipulation that prior permission from the authorities must be obtained.

In March 1997, in direct relation to the illegal planned construction of the Nibutani Dam, the Sapporo District Court ruled for the first time in an official setting that the Ainu people have a right to enjoy their culture.[24] This right is justified in accordance with Article 27 of the ICCPR and Article 13 of the Constitution of Japan. Article 27 was cited in the judgement of the Sapporo District Court as a protection of the Ainu people's right to enjoy their culture and consequently, obliges the Japanese government to faithfully observe it based on Article 98.2 of the Constitution providing the treaties concluded by Japan and established laws of nations shall be faithfully observed. Furthermore, Article 13 reads as follows:

[22] Yamada, S. (2011). *Kindai Hokkaidō to Ainu Minzoku: shuryō kisei to tochi mondai [Modern Hokkaido and Ainu People].* Sapporo-shi: Hokkaidō Daigaku Shuppankai, p. 171.
[23] Ibid, p. 175.
[24] The Sapporo District Court: Nibutani Dam Case, http://www.geocities.co.jp/HeartLand-Suzuran/5596/, accessed December 4, 2018.

> All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.

According to the judgement, Article 27 is applicable in Japan under Article 13 of the Constitution because Article 13 suggests: Culture is essential for ethnic minorities to maintain their ethnicity; ensuring the right to enjoy their culture means respect for individuals and agrees with the concept of democracy that a majority takes minorities into consideration.

Since 2005, the prohibition on fishing was reconfigured to state that fishing may be carried out with prior permission from the authorities. However, the application of the Hokkaido Regulations to Hatakeyama Ekashi and his Ainu colleagues infringed their rights to enjoy their culture protected by Article 13 of the Constitution, as the requirement to ask for permission compromises their rights as individuals and especially as an Indigenous people. Based on Article 98 of the Constitution stipulating the supremacy of the Constitution[25], the application is invalid on the ground that the Hokkaido Regulations are inconsistent with Article 13 of the Constitution.

7. Constitutional obligation to comply with international legal commitment

The Constitution of Japan states in its preface: "Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people." It is followed by the sentence: "This is a universal principle of mankind upon which this Constitution is founded." As such the Constitution declares that Japan is going to join the international community as a democratic state. It further states:

> "We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth."

The principle of international cooperation underlying the preface is condensed into this sentence. Based on this preface, Article 98 (2) of the

[25] The stipulation of Article 98 is that this Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of the government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.

Constitution provides that the international treaties concluded by Japan and established laws of nations shall be faithfully observed. Japan has so far ratified almost all international human rights treaties, including the ICCPR, ICESCR, and International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Although Japan has not ratified ILO 169 Convention applicable to tribal and Indigenous peoples, the country has however, signed the UNDRIP – an instrument providing normative framework to protect and promote indigenous peoples rights despite its non-binding character.

As referred to elsewhere in this article, the HRC periodically issues concluding observations on how to deal with the implementation of the provisions of the ICCPR in response to state parties' reports on the current situation. The latest concluding observations issued in 2014 by the HRC for the Japanese government made the following recommendation in relation to indigenous peoples, and for the promotion of their acknowledged rights:

> The State party should take further steps to revise its legislation and fully guarantee the rights of Ainu, Ryukyu and Okinawa communities to their traditional land and natural resources, ensuring respect for their right to engage in free, prior and informed participation in policies that affect them…[26]

Similarly, the Committee on Economic, Social and Cultural Rights (CESCR) – the treaty monitoring body of the ICESCR – also issues its concluding observations for the Japanese government. The latest one issued in 2013 states:

> The Committee remains concerned that, in spite of the recognition of Ainu as indigenous people and other progress achieved, Ainu people remain disadvantaged in the enjoyment of economic, social and cultural rights.[27]

On 30 August 2018, the Committee of the Elimination of Racial Discrimination (CERD) – the monitoring body under ICERD – urged the Japanese government "to adopt measures to protect land and natural resource rights of Ainu people, and continue to step up efforts for the realization of the rights to their culture…".[28] The Japanese government, however, has never adopted any legislation to recognise the right of the Ainu to culture, let alone

[26] United Nations International Covenant on Civil and Political Rights. CCPR/C/JPN/CO/6, Para 26.
[27] United Nations Economic and Social Council. E/C.12/JPN/CO/3, Para 30.
[28] United Nations International Conventions on the Elimination of All Forms of Racial Discrimination. CERD/C/JPN/CO/10-11, Para 16 (c).

their rights to land and natural resources. The negligence of the Japanese government to ensure the right of the Ainu to culture thus subsequently led to the police intervention in Hatakeyama Ekashi's attempt to catch salmon in the Mobetsu river. Such an action disregarded the acknowledged rights of the Ainu as an Indigenous people within the framework of international human rights law, and the constitutional obligation of the Japan to respect legal commitments presented in international treaties.

8. Conclusion

Based on the discussions above, the authors' conclusions are as follows: Japan has ratified almost all the crucial human rights treaties, which shows a positive attitude towards its commitment to international human rights law. Such a behaviour also reflects the spirit inherently rooted in the principles presented in the Constitution of Japan. The Ainu has also been officially recognized as an Indigenous people of Japan since the year 2008. However, as much as it is about protection and promotion of the rights applicable to the Ainu as Indigenous people, a failure on part of Japanese government is evident to comply with international standard. To remedy these shortcomings, authors of this article propose that Japanese government should enact its domestic law for the Ainu in compliance with international human rights standard, e.g. by enforcing the spirit of Article 27 of the ICCPR and Article 15 1(a) of the ICESCR as explained, and presented, in the authoritative statements, concluding observations, as well as in the jurisprudence, offered by the monitoring bodies of these treaties.

The Sami People's Right to Culture in the Context of the Tana Fishery Agreement (2017)

*Karolina Sikora**

Introduction

The Tana River is one of the world's largest river systems for Atlantic salmon, with the highest annual catch in the area.[1] In 2017 the Norwegian Parliament adopted the so-called Tana Agreement, which was also accepted by the Finnish Parliament. The Tana Agreement regulates fishery rights, fishing quotas and fishing techniques in the Tana River so as to protect and preserve salmon stocks in the river. However, the Sami people, who have inhabited the North Fennoscandia since time immemorial, argue that this agreement violates their fishing rights, and as a result, their right to culture. In this paper, I will present new fishing regulations and address the issue of violation of the right to culture of the Sami people in relation to the Tana Agreement. In the end, I will emphasise social reaction towards this conflict.

The Tana Agreement

Since 1873 Tana's legal status has been regulated jointly by Norway and Finland. However, the agreement has not been updated since 1990[2], until the Tana Agreement was adopted in 2017. Besides that, since the year 2000, the European Commission's Water Framework Directive (WFD)[3] has been in force. The directive (article 3, point 3) states that any river basin covering the territory of more than one Member State is assigned to an international river basin district. According to this rule, Norway and Finland signed a joint agreement concerning the Tana River, acknowledging that all actions regarding the Tana River's management and planning should be undertaken jointly by Finnish and Norwegian authorities.[4] However, there is also a

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[1] Teno Info. Information about Teno for Fishing Enthusiasts, 2018, p. 2, https://www.ely-keskus.fi/documents/10191/23117928/Teno+info+English.pdf/1a185302-fa5d-4ba6-bd90-17183fefdf21.

[2] Overenskomst mellom kongeriket Norge og republikken Finland om felles forskrifter om fisket i Tanaelvas fiskeområde. (Kgl. res. av 24. februar 1989. Trådte i kraft den 1. januar 1990.), http://tanafisk.no/wp-content/uploads/2011/08/overenskomst-mellom-Norge-og-Finland-om-felles-forskrifter-om-fisket-i-Tanaelvas-fiskeområde.pdf.

[3] European Commission. Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy.

[4] Finnmark Fylkeskommune and Elinkeinoelämän keskusliitto (no date). *Joint water management* of the *Finnish-. Norwegian river basin district (2016-2021). Tana, Neiden* and *Pasvik catchment areas* in *Finland* and *Norway*,

Norwegian act which was adopted in 1888 (Right to Fishery in Tana River)[5] and renewed in 2014.[6] According to that document, the right of local people to fish salmon in the Tana River is based on law, the principle of continuous use over a long period of historical time (immemorially, coming from customary law and court practice) and local customs.[7]

Rivers are part of states' territories. In the case of Tana River the situation is more complex, since the river is also a national border, a border of the European Union and a part of Sápmi, the traditional Sami territories. For those reasons, Norwegian law applies with the constraints imposed by ILO Convention 169 and must be applied in accordance with international law on indigenous peoples and minorities and provisions included in agreements with Finland concerning fishing in the Tana.[8]

The Sami people's right to culture

The Tana River is profoundly connected to the Sami people's culture, their way of life and identity. Traditional techniques of fishing have been passed down as traditional knowledge from one generation to the next for centuries. Furthermore, salmon constitute one of the main sources of subsistence in the Deatnu region. They provide basic survival, income and well-being for all local inhabitants, including indigenous people.

Recently, Finnish and Norwegian authorities have stated that the Tana River is overfished and salmon stocks are being slowly depleted. One of the causes of this situation is the use of net-types gear, which directs fishes into the trap.[9] Currently, four different gear types are permitted: drift nets, seines, weirs and gillnets.[10] The Tana is one of the few rivers in Europe, where such equipment can be used. Those techniques are also traditional Sami ways of fishing.

The fishing agreement from 2017 reduces the number of devices (drift nets or heat-set yarns) used at the same time when fishing (Tana Agreement 2017, paragraph 15). Therefore, the traditional catch techniques used by the Sami

http://ec.europa.eu/environment/water/pdf/Finnish_Norwegian_international_river_basin_district.pdf.

[5] *Lov 23. juni 1888* om *Retten* til *Fiskeri* i Tanavasdraget i *Finmarkens Amt.*

[6] Lov 20. juni 2014 nr. 51 om fiskeretten i Tanavassdraget (Tanaloven) § 6 første og annet ledd, lov 15. mai 1992 nr. 47 om laksefisk og innlandsfisk mv. (lakse- og innlandsfiskloven).

[7] Lov om fiskeretten i Tanavassdraget (Tanaloven), article 1, https://lovdata.no/dokument/NL/lov/2014-06-20-51/§6#§6.

[8] Lov om fiskeretten i Tanavassdraget (Tanaloven), article 3, https://lovdata.no/dokument/NL/lov/2014-06-20-51/§6#§6.

[9] Teno Info. Information about Teno for Fishing Enthusiasts, 2018, p. 2.

[10] Anon. 2016. Status of the River Tana salmon populations 2016. Report of the Working Group on Salmon Monitoring and Research in the Tana River System.

fishermen are regulated to a degree, whereas non-Sami fishermen who do not use those methods are not covered by regulations. In this way, Sami fishermen claim they face discrimination as their fishing practices are limited unfairly in comparison with those of non-Sami fishermen.

According to article 15.1 of ILO Convention 169, indigenous peoples have special rights to natural resources located on their land, including fisheries. The term "land" is understood as the "total environment" which indigenous peoples inhabit since time immemorial; therefore, rivers are included.[11] For indigenous peoples "land" is not only a geographical territory. They have a spiritual relationship with it, which builds up their identity, and gives a sense of belonging to a given community and the whole culture of a group. For that reason, indigenous peoples have the right to participate in the use, management and conservation of resources located on their lands. Article 15 (2) of ILO Convention 169 gives only a general framework of participation procedure. Specific conditions are included in article 6 of the Convention. According to those rules, participation should be provided by consulting indigenous peoples concerning all actions that may affect them directly. Consultations are to be held between groups' representatives and a state's legal bodies before the decision is undertaken, as consultation should, first of all, lead to obtaining the free, prior and informed consent of indigenous people, which is understood as their right to self-determination.[12] The consultations must be conducted in good faith and should aim to "really influence the decision making process".[13]

Additionally, according to the Tana Agreement the salmon fishing season starts 1st June and lasts until 20th August for local fishermen and from 10th June to 10th August for visiting fishermen (Tana Agreement 2017, paragraph 7). However, in different tributaries, the agreement reduces the number of fishing days differently (Tana Agreement 2017, paragraph 33). Moreover, previously some tributaries were reserved only for the local people, including the Sami. New regulations opened some of those tributaries also to visiting fishermen, including tourists, under the condition that they buy a fishing permit. The local Sami people argue that they do not have any control

[11] International Labour Organization 2003. ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169): A Manual, p. 30, http://pro169.org/res/materials/en/general_resources/Manual%20on%20ILO%20Convention%20No.%20169.pdf.

[12] Human Rights Council. Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries, 30 April 2012. A/HRC/EMRIP/2012/2, p. 13.

[13] Henriksen. 2008. Research on Best Practices for the Implementation of the Principles of ILO Convention No. 169. Case Study: 7 Key Principles in Implementing ILO Convention No. 169, p. 30.

over how many permits have been issued.[14] For that reason, a bigger share of fish may be caught by tourists, and not local inhabitants.[15] However, it is not only the Sami people who have disagreed with new regulations. Non–Sami inhabitants of the Deantu Valley claim that they bought properties in the region together with fishing rights, which now cannot be used as extensively as previously.

Furthermore, any boat with which a person wants to fish must be registered. Local people can register up to three boats, whereas if they are running a tourist business, they can register up to 15. In this case, the Sami people who do not live in the Tana valley permanently, and are not registered as local inhabitants, are considered visiting fishermen, who need to rent a boat from locals.

In this context, as a response to the provisions included in the Tana Agreement, the Sami people claim that their survival is threatened. Furthermore, they argue that their human rights as guaranteed in the International Covenant on Civil and Political Rights (1966) article 27 are being violated. The legal norm deriving from this article protects the right of people belonging to ethnic, religious and linguistic minorities to enjoy their own culture in community with others. In response to the violation of this norm, the Sami activist group "Ellos Deatnu" has been calling for civil disobedience.[16] In June 2017 the group proclaimed a "moratorium" on Tiirasaari Island (Čearretsuolu in Northern Sami language), on the Finnish side of the river.[17] The group does not recognise the new fishing agreement as binding on the territory of the island.[18]

However, the legal platform created by ILO Convention 169 has been undermined, as it has been ratified only by Norway and not by Finland. Nevertheless, both countries, Norway and Finland, have ratified the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The challenging legal aspect that arises here is that UNDRIP is a declaration and is not legally binding. Consequently, UNDRIP cannot constitute the sole legal

[14] Eye on the Arctic. Sami group occupies island in northern Finland to protest fishing rules. 13 July 2017, http://www.rcinet.ca/eye-on-the-arctic/2017/07/13/sami-group-occupies-island-to-protest-fishing-rules-in-northern-finland-river/.

[15] The Barents Observer. 13 July 2017. "We also get to eat salmon" – New fishing restrictions supported by people upstream the River Teno, https://thebarentsobserver.com/en/borders/2017/07/we-also-get-eat-salmon-new-fishing-restrictions-supported-people-upstream-river-teno.

[16] The Local. 21 July 2017. Northern Norwegian islands in moratorium over fishing. Rights, https://www.thelocal.no/20170721/northern-norwegian-islands-in-moratorium-over-fishing-rights.

[17] Ibidem.

[18] The Barents Observer. 21 July 2017. The village of Utsjoki is empty: Tourists have disappeared – "If this was France, we could already have quite an uprising here", https://thebarentsobserver.com/en/life-and-public/2017/07/village-utsjoki-empty-tourists-have-disappeared-if-was-france-we-could.

basis of an international complaint. However, the provisions included in the Declaration can serve as a form of customary law. Over time, the consistent, continued use and practice of UNDRIP can lead to the emergence of *opinio juiris*, which is already binding law.[19] In this context, article 26 of UNDRIP may be valid. The norm deriving from this article, in a similar way as ILO Convention 169, protects the rights to lands and resources which indigenous people have inhabited. Additionally, the provision guard the rights to use, own, develop, and control over these territories.

Conclusion

In the context of indigenous peoples, it is impossible to separate one right from the others. They are all overlapping and influencing each other. It seems that the common stem lays in the right to culture. Culture builds foundations for every community, not only indigenous communities. Indigenous culture gathers different factors like land, traditions and local knowledge and offers indigenous peoples sense of belonging. For that reason, when talking about fishery rights, one cannot exclude land rights and cultural rights. In the case of the Tana River, the Sami people are afraid that together with fishing capabilities, they will lose their identity, which is shaped at least in part by the above-mentioned factors. Besides being indigenous, they are at the same time human beings and members of a minority, and for that reason, they demand protection.

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[19] Maguire. 2014. The UN Declaration on the Rights of Indigenous Peoples and Self-Determination in Australia: Using a Human Rights Approach to Promote Accountability, *New Zealand Yearbook of International Law,* Vol. 12. p. 111.

http://ec.europa.eu/environment/water/pdf/Finnish_Norwegian_international_river_basin_district.pdf (Viewed 7.11.2018).

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Lov 20. juni 2014 nr. 51 om fiskeretten i Tanavassdraget (Tanaloven) § 6 første og annet ledd, lov 15. mai 1992 nr. 47 om laksefisk og innlandsfisk mv. (lakse- og innlandsfiskloven)

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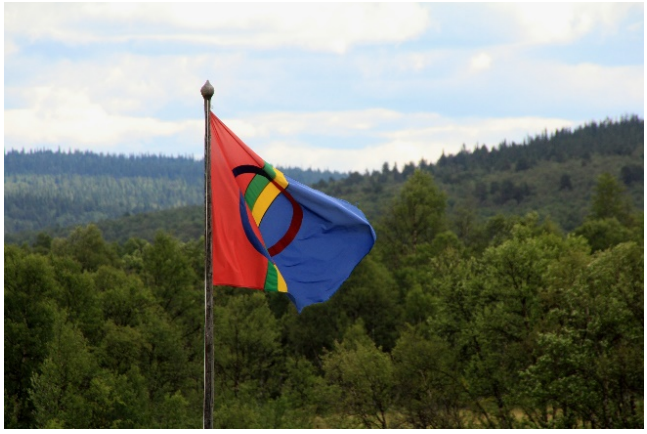

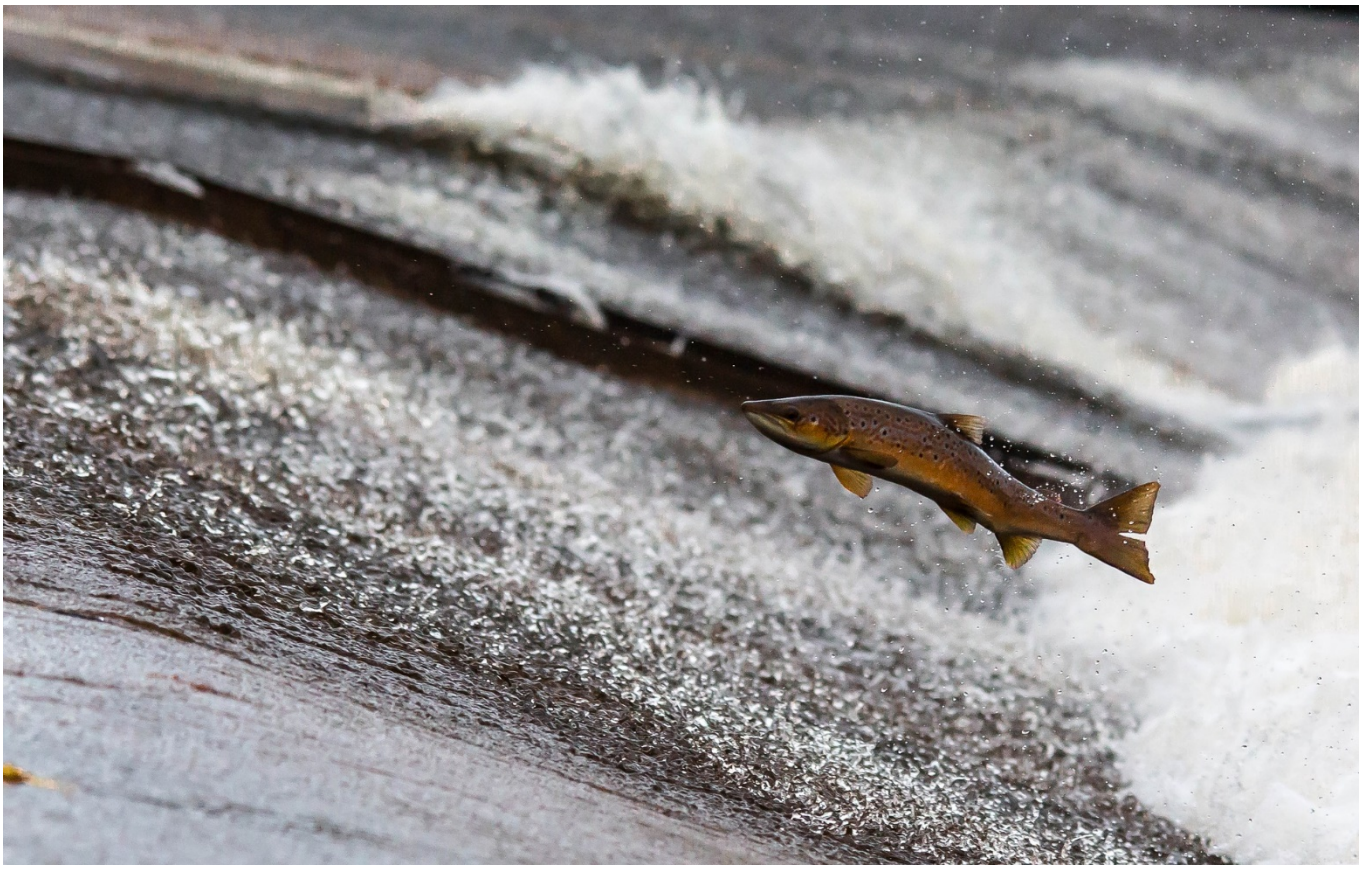

A Short Story about UArctic Activities from the Sub-group of Philosophy of Law in the Arctic

*Dawid Bunikowski**

One of the largest and most active networks of the University of the Arctic is the Arctic Law Thematic Network. There are more than one hundred members of the Network. This Network consists of four sub-groups. One of them is the Sub-group of Philosophy of Law in the Arctic. This short story is to present some activities of this Sub-group.

1. The Sub-group of Philosophy of Law in the Arctic

The Sub-group of Philosophy of Law in the Arctic is the "youngest" of the sub-groups of the Network. It was established in the end of 2015. This was a grass-roots level initiative (by Dr. Dawid Bunikowski from the University of Eastern Finland that time) that was supported by the Leadership of the Network (then Prof. Timo Koivurova) and the Authorities of the University of the Arctic (the UArctic President). The first Leader became D. Bunikowski. All the members of the Sub-group were invited by the Leader. In few cases they were recommended by the Leadership of the Network. There are twenty six members of the Sub-group now (December 2018). There are both older/distinguished and younger/talented scholars in the team. Many members are in their mid-careers though. Anyway, eleven professors and six associate professors as well as five senior researchers/assistant professors and four doctoral candidates form this Sub-group.

The aim of the Sub-group is "to establish a network of Arctic philosophers of law and scholars interested in legal philosophy in the Arctic".[1] The Sub-group includes "scholars with different academic backgrounds", i.e. "not only lawyers, but also Arctic anthropologists of indigenous religions and communities, historians, cultural ecologists or just philosophers".[2] This is a very interdisciplinary and

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[1] *Thematic Network on Arctic Law establishes new sub-group: Philosophy of Law in the Arctic*, https://www.uarctic.org/news/2015/11/thematic-network-on-arctic-law-establishes-new-sub-group-philosophy-of-law-in-the-arctic/ (08.12.2018).

[2] Ibidem.

international team. And, that was indeed the key idea in the process of establishing the Sub-group.

Substantially, what is the most important aim of the Sub-group in doing common research? As stated in other place, it is to try "to answer two questions:

1) What is "Arctic indigenous peoples' law" from the point of view of Western philosophy of law?

2) What is "law" for indigenous peoples in the Arctic?"[3]

2. Activities of the Sub-group of Philosophy of Law in the Arctic

The Sub-group is active as a place of sharing information about the members' publications and research ideas or projects. Also, this is to inform about events concerning the Sub-group's main research field. Anyway, the Sub-group is to do common research as well. Generally, activities of the members of the Sub-group might be described in this way: writing a common book/common book proposal, other publications, and other activities (presentations, organisation of seminars, courses, handbooks, book launches).

First of all, in mid-2016 the Sub-group published an e-book with a title *Philosophy of Law in the Arctic.*[4] The e-book was edited by D. Bunikowski and formally supported and released by the University of the Arctic (the Oulu headquarters). This was the first book of this kind in the literature. As it was stated and advertised at the UArctic website, "The book is a result of research conducted by many members of the Sub-group of Philosophy of Law in the Arctic. The aim of the book is to define and systematize Arctic legal philosophy problems. In this book, there are five thematic parts, with sixteen short articles all together".[5]

One of the relatively recent but very important common activities of the Sub-group is a new book proposal. In 2017, the Sub-group was intensively working on the book proposal on philosophy of law in the Arctic. The book proposal was finally written by the Leader and sent to Routledge in November 2017. The proposal was approved by the Routledge Publishing Committee in January 2018, with some thematic modifications, and is under contract that was signed in February 2018. The book title is *Philosophies of Polar Law* (in the Polar Law Series). The book is edited by D. Bunikowski and Adjunct Professor Dr. A. D. Hemmings (New Zealand/Australia). The book project concerns philosophies of law in both

[3] Ibidem.

[4] *New e-publication: Philosophy of Law in the Arctic*, https://www.uarctic.org/news/2016/7/new-e-publication-philosophy-of-law-in-the-arctic/ (09.12.2018).

[5] Ibidem.

poles (not only in the Arctic as it was initially planned) and is the first project of this kind in the worldwide literature. This ambitious book should be published in 2020.

Therefore, the members of the Sub-group are active in publishing their research results. For example, the most active members in this field in 2017 were: Emeritus Professor Patrick Dillon of the University of Exeter (UK) and the University of Eastern Finland, Associate Professor Elena Gladun from Tyumen State University (Russia), Associate Professor Maura Hanrahan from the University of Lethbridge (Canada), Senior Researcher Leena Heinämäki from the University of Lapland (Finland), Dr hab. Agnieszka Szpak from Nicolaus Copernicus University (Poland), and Dawid Bunikowski (Leader).

Some activities and other elements from 2017-2018 should be highlighted here. (However, it is impossible to note all the research activities or writings.) Thus, **Maura Hanrahan** published a book with a title *Unchained Man: The Arctic Life and Times of Captain Robert Bartlett* (2018, St. John's, NL: Boulder Publications). Maura told the author of this short article that "the book examines Arctic exploration using feminist and Indigenous lens while keeping the focus on a compelling narrative".[6] She also has a blog called All Things Arctic.[7] Moreover, she developed and delivered (January-April 2018) the University of Lethbridge's first Inuit Studies course: *Native American Studies 3850: The Inuit of the Arctic and subarctic*. The class limit was 40 and it was filled with other students wanting to register but they had no room. **Elena Gladun** issued the handbook *Law and Policy for Sustainable Development of the Russian Arctic*[8] (2018; by German researchers and Elena Gladun). It is the first (academic and international) experience of the kind. She also published a book chapter on *Preservation of Territories and Traditional Activities of the Northern Indigenous Peoples in the Period of the Arctic Industrial Development* in the book *The Interconnected Arctic* (Springer 2017).[9] **Leena Heinämäki** co-edited a book with a title *Experiencing and Protecting Sacred Natural Sites of Sámi and other Indigenous Peoples: The Sacred Arctic* (Springer 2017) and published four book chapters with Springer, Routledge and Brill (this concerns only one year - 2017). **Giorgio Baruchello** published his four volumes

[6] By the way, Maura is not only an acclaimed scholar but also a Canadian writer/author (e.g. see her best-seller *Tsunami*).

[7] For more see: https://captainbobbartlett.com/ (09.12.2018).

[8] This is the link to the book: https://yadi.sk/mail?hash=I6dP81GA5epeHWDumDy7zZL9VggvW5Uf%2ByexsjEYG7s%3D (09.12.2018).

[9] The book is under the link: https://www.springer.com/gp/book/9783319575315#otherversion=9783319575322 (09.12.2018).

of philosophical essays in 2017-2018 (1. *Mortals, Money, and Masters of Thought*; 2. *Philosophy of Cruelty*; 3. *The Business of Life and Death, Volume I: Values and Economies*; 4. *The Business of Life and Death, Volume II: Politics, Law, and Society*; all by Gatineau, Canada: Northwest Passage Books).

Dawid Bunikowski and **Patrick Dillon** developed their research on combining the theories of cultural ecology and of legal pluralism, with particular reference to the Arctic. Their research results were published in: 1) D. Bunikowski, P. Dillon, *Arguments from cultural ecology and legal pluralism for recognising indigenous customary law in the Arctic* (chapter), [in:] *Experiencing and Safeguarding the Sacred in the Arctic: Sacred Natural Sites, Cultural Landscapes and Indigenous Peoples' Rights*, eds. Leena Heinämäki, Thora Martina Herrmann, Springer 2017, and 2) P. Dillon, D. Bunikowski, *A framework for location-sensitive governance as a contribution to developing inclusivity and sustainable lifestyles with particular reference to the Arctic*, Current Developments in Arctic Law, vol. 5 (2017), eds. Kamrul Hossain, Anna Petrétei, Rovaniemi 2017. Bunikowski also developed these considerations in a legal context in a paper entitled *The Right of Indigenous Peoples to their Own Law* (Nordic Journal of Law and Justice, Retfærd, Nr. 2, 2017) and many other articles in 2016-2018. Dillon continued to research and write in the field of cultural ecology (see his latest chapter *Making and its cultural ecological foundations*[10] from 2018).

There was also some great honour for the Sub-group in the end of 2017. Elena Gladun was nominated as a Fellow of the Fulbright Arctic Initiative program in 2018-2019, which is unique as its second cohort unites 16 researchers from all the Arctic countries for one and a half year of international interdisciplinary research[11] and sharing information about all the participants and their activities (including Elena's research).[12] One of the recommendations in the application process was written by the Leader of the Sub-group. That said, this award is a great honour for the Sub-group as well.

3. Recent activities

However, from the last months in 2018 we shall remember that **Agnieszka Szpak** published a book in Polish (September 2018, Torun) about human security of indigenous peoples in the Arctic (the Sami case). The title in English sounds like that: *Human Security*

[10] This is available here: https://www.researchgate.net/publication/325119506_Making_and_its_cultural_ecological_foundations (09.12.2018).

[11] Here is the link to the program press release: https://www.cies.org/sites/default/files/FAI-Press-Release-2018-Scholar-Announcement.pdf (09.12.2018).

[12] See: https://www.cies.org/fulbright-arctic-initiative/2018-2019-scholars (09.12.2018).

of Indigenous Peoples in the Arctic. The Sami Case. Selected Issues. It is the first book of this kind written in Polish. It covers both political sciences and international law issues. It is good that the Sami problem is presented to the 38-million Polish audience: the worldwide literature (Hossain, Koivurova, Heinämäki, Tobin, Dillon etc.) that is analysed in the book becomes more known in one of the (relatively) northern countries.

Also, as we know, the UArctic congress was held in Oulu and Helsinki in September 2018.[13] One of our members, **Tahnee Prior** co-organised a side event on women of the Arctic.[14] This event was a spectacular success. As we realize, there are many serious problems concerning women (not only indigenous women) and their status in the Arctic. Tahnee is continuing her efforts to highlight this topic.[15]

4. Conclusions

The Leadership of the Sub-group does hope that there will be many activities to come in the near future. There have been many activities so far. Generally speaking, this seems important to develop a philosophical (and moral, ethical, axiological) approach to legal states of things and legal considerations while in the Arctic. Finally, all this what we do here is about justice (*ius*) and law (*lex*) in the Arctic.[16] However, we have many different perspectives, *approaches*, and ways of thinking here.

Attachment: **The list of the members of the Sub-group of Philosophy of Law in the Arctic (December 2018):**

1. *Professor* René Kuppe (Austria; University of Vienna, Department of Legal Philosophy, Law of Religion and Culture),

2. *Senior Researcher Dr.* Leena Heinamäki (Finland; University of Lapland, Northern Institute for Environmental and Minority Law), the vice-leader of the University of the Arctic Thematic Network on Arctic Law,

3. *Emeritus Professor* Patrick Dillon* (UK; University of Exeter, College of Social Sciences and International Studies; former Visiting Professor at the University of Eastern Finland, Philosophical Faculty),

4. *Leader of the Sub-Group Dr.* Dawid Bunikowski (based in Finland), the chair

[13] See about the congress: https://www.uarctic.org/calendar/uarctic-congress-2018/ (09.12.2018).
[14] See the programme: https://congress.uarctic.org/program/side-events/women-of-the-arctic/ (09.12.2018).
[15] More about her project is here: http://www.genderisnotplanb.com/ (09.12.2018).
[16] See also more: D. Bunikowski, *Why am I Interested in the Philosophy of Law in the Arctic? On Some Chosen But Essential Ethical Challenges of Conducting Research in the Field*, Current Developments in Arctic Law, vol. 4 (2016), eds. Timo Koivurova, Waliul Hasanat, Rovaniemi 2016.

of the Sub-group on Philosophy of Law in the Arctic,

5. *Associate Professor in International Law* Agnieszka Szpak (Poland; Nicolaus Copernicus University, Faculty of Political Science and International Relations),

6. *Assistant Professor in Legal Theory Dr.* Karol Dobrzeniecki (Poland; Nicolaus Copernicus University, Faculty of Law),

7. *Associate Professor* Tatiana Zykina (Russia; Northern (Arctic) Federal University, Department of Labour Law and Legal Science),

8. *Associate Professor of Community Health* Elisabeth Rink** (US; Montana State University, College of Education, Health and Human Development),

9. *Professor* Reetta Toivanen*** (Finland; University of Helsinki, Helsinki Institute of Sustainability Science HELSUS),

10. *Professor* Diana Ginn (Canada; Dalhousie University, Schulich School of Law),

11. *Professor* Rebecca Johnson (Canada; University of Victoria, Faculty of Law),

12. *Professor of Philosophy and Public Policy* Makoto Usami (Japan; Kyoto University, Graduate School of Global Environmental Studies),

13. *Researcher Dr.* Francis Joy# (Finland; University of Lapland, Arctic Centre),

14. *Professor of Anthropology of Law* Anne Griffiths (UK, Scotland; University of Edinburgh, Edinburgh Law School),

15. *Emeritus Professor* Tom G. Svensson¤ (Norway; University of Oslo, Museum of Cultural History),

16. *Professor* Ko Hasegawa (Japan; Hokkaido University, School of Law),

17. *Professor and Chair of Law and Globalisation* Jaakko Husa (Finland; University of Helsinki, Faculty of Law),

18. *Associate Professor* Christina Allard (Sweden; Luleå University of Technology, Division of Social Sciences / Law unit; Norway; the Arctic University of Norway),

19. *Research Fellow Dr.* Brendan M. Tobin (*Adjunct Lecturer*, Ireland; National University of Ireland, Irish Centre for Human Rights, Galway; *Ashoka Fellow*; formerly: Australia; Griffith University, Griffith Law School, Nathan Campus),

20. *Associate Professor* Elena Gladun (Russia; Tyumen State University; executive editor BRICS Law Journal),

21. *Professor* Giorgio Baruchello***** (Iceland; University of Akureyri, Faculty of Humanities and Social Sciences), Part-Mi'kmaq and a band member (Canada),

22. *Associate* ***Professor*** (in Native American Studies & PhD program, Cultural, Social and Political Thought) *Maura C. Hanrahan##* (Canada;

University of Lethbridge, Southern Alberta);

Recent members:

23. *Researcher and PhD candidate* Tahnee Lisa Prior (Canada; University of Waterloo),

24. *Researcher and PhD candidate* Dominika Tarinova (Slovakia/Austria; University of Vienna, Faculty of Law);

Indigenous (Sámi) scholars:

25. *Researcher and PhD candidate* Anne Nuorgam (Finland; University of Lapland),

26. *Researcher and PhD candidate* Anne-Maria Magga**** (Finland; University of Lapland and University of Oulu),

All the mentioned scholars are lawyers, with some exceptions:

* English cultural ecology professor (visiting professor in Eastern Finland since mid-90s till 2018).

** American public health professor working with the Inuit in Greenland and the Sioux in Montana.

*** Finnish social anthropologist interested in human rights, minority rights, and indigenous issues.

**** Indigenous social scientist (also finishing Master's Programme in International and Comparative Law - The MICLaw Master Programme, with specialisation in Arctic Law and Governance, at the University of Lapland).

***** Italian-Icelandic philosopher. Editor of Nordicum-Mediterraneum.

English historian of religion interested in the Sami culture and religion (shamanism).

¤ Norwegian social anthropologist conducting research on the Sámi in both Sweden and Norway, and for comparative reasons, similar studies among the Nisga´a, B.C., Canada and the Ainu (Japan).

Canadian-indigenous scholar with a very mixed background: sociology, anthropology, political science and her PhD in Sea-Use Law, Economics and Policy.

Eleventh Polar Law Symposium Held at UiT, the Arctic University of Norway in Tromsø, Norway, October 2 - 4, 2018

*Nigel Bankes**

The Eleventh Polar Law Symposium was held at UiT, the Arctic University of Norway in Tromsø, Norway from October 2 – 4, 2018. Remarkably, this was the first time that the Symposium had ever been held in Norway. The Symposium was co-convened by the KG Jebsen Centre for the Law of the Sea[1] and the Research Group for Sami Law at UiT.[2] The event coincided with the 50th anniversary celebrations of UiT. There were over 120 registrants.

The call for papers for the Symposium invited papers of law and policy issues in the polar regions including Indigenous peoples in the Arctic region, especially implementation of the United Nations Declaration on the Rights of Indigenous Peoples; climate change; climate change and the law of the sea; ecosystem management approaches; areas beyond national jurisdiction and the polar regions; the future of the law of the sea; fisheries issues; protected areas; navigation issues in polar regions; gender issues in indigenous discourse; seaborne tourism; polar institutions and linkages with global institutions.

As in previous years, the Symposium combined a number of plenary sessions with keynote speakers with a larger number of concurrent panels. Our first keynote speaker was President Aili Keskitalo of the Sami Parliament of Norway. Ms Keskitalo welcomed participants to Romsa (the Sámi name of the city of Tromsø) and Sápmi – the Sámi homeland and then offered an account of the the evolution of Sámi Rights in Norway, as well as some ongoing challenges to the recognition of those rights. Ms Keskitalo's address was followed by a concurrent session. One panel dealt with the rights of Indigenous peoples in Arctic states and a second dealt with a combination of issues including Arctic marine governance in areas beyond national jurisdiction, Svalbard and icebergs. After lunch, we had a plenary discussion session involving an exchange of views on the history and future of polar law between Professor Donald Rothwell of Australian National University and Professor Erik J.

* Professor and Chair of Natural Resources Law, The University of Calgary and Adjunct Professor, KG Jebsen Centre, UiT, the Arctic University of Norway.

[1] The JCLOS webpage and blog can be accessed here: <https://en.uit.no/forskning/forskningsgrupper/gruppe?p_document_id=355759>.

[2] For the research group's website see <https://en.uit.no/forskning/forskningsgrupper/sub?p_document_id=337793&sub_id=337823>.

Molenaar, JCLOS, UiT The Arctic University of Norway. The discussion was facilitated by Professor Rachael Lorna Johnstone, of the University of Akureyri and the University of Greenland and covered three main themes: the history of polar law and the interaction of Arctic law and Antarctic law with the global legal order; the influence and expectations of new actors at the poles; and the future development of polar law, anticipated challenges and potential solutions. This was followed by concurrent session with panels on climate law and the polar regions and institutions of Arctic governance. The first day concluded with concurrent panels on transitional justice, energy justice, and environmental justice and on Antarctica. That evening the organizers hosted a dinner for participants at the Clarion Hotel, The Edge in Tromsø.

The second day was due to have opened with a keynote address from Vittus Qujaukitsoq, the Minister of Mineral Resources, Labour, the Interior and Nordic Cooperation, of the Government of Greenland on the 'Constitutional History of Greenland'. Unfortunately, a change in government in Nuuk meant that he was unable to attend. However, Ms Natuk Lund Olsen, the head of Greenland's new Department of Independence was mandated to deliver the speech in his absence. As a result of this change we were also able to include keynote remarks to the plenary from Christian Prip of the Fridtjof Nansen Institute on the "Report of the Independent Review Team on Institutional and Governance Arrangements for the International Whaling Commission".[3] This report was prepared by Christian Prip, David Sheppard and Fabio Hazin and was submitted to the IWC in April, 2018 and then discussed at the 67th Meeting of the IWC in Brazil in September 2018.

This double billing was followed by a second panel on the rights of Indigenous peoples in Arctic states concurrently with a panel on sustainable development issues. After lunch Professor Marit Reigstad of the Department of Arctic and Marine Biology, UiT The Arctic University of Norway delivered a keynote address on "The Nansen Legacy – a new science structure to explore the new marine Arctic".[4] This in turn was followed by concurrent session with a panel on the new Central Arctic Ocean Fisheries Agreement (CAOF Agreement) and a panel on "new challenges" that dealt with such issues as: floating nuclear power plants in the Arctic, science fiction as source material for thought experiments describing potential Arctic futures, and infrastructure development along the Arctic coast. The second day concluded with a celebration of "Ten years of the law of the sea in an Arctic

[3] The report is available here <https://archive.iwc.int/pages/view.php?ref=6890&k=>.
[4] For the project's webpage see <https://arvenetternansen.com/>.

context" in recognition of the tenth anniversary of the LLM program at UiT, The Arctic University of Norway.

The final morning opened with a keynote address from Ambassador Marie Jacobsson, Principal Legal Adviser on International Law, Ministry of Foreign Affairs, Sweden entitled "From Antarctic minerals to Arctic security concerns and much in between". This was followed by a concurrent session. The first panel examined topics related Arctic marine governance and environmental protection. The second panel had been convened by Professor Guðmundur Alfreðsson, of the University of Akureyri, Iceland and the co-editor and co-founder of the Yearbook of Polar Law and the Polar Law Symposium. This panel dealt with the history of polar law and in particular a series of seminars on the "Small Nations of the North" convened by Professor Atle Grahl-Madsen of the University of Uppsala during the 1980s.

The conference closed with remarks from Professor Guðmundur Alfreðsson, from the conference organizers and from Professor Julia Jabour of the Institute for Marine and Antarctic Studies, University of Tasmania, who will be hosting the 12th Polar Law Symposium in Hobart Australia, in December 2019. This Symposium will coincide with the 60th anniversary of the signing of the Antarctic Treaty on December 1, 1959.

The organizing committee for the 11th Symposium consisted of Øyvind Ravna, Margherita Poto, Christin Skjervold, Erik Molenaar, Tore Henriksen and Nigel Bankes. The committee thanks all who attended and especially the keynote speakers, the panelists and the chairs of the various sessions. Papers from the conference may be submitted to the organizing committee for consideration for publication in the 11th volume of the Yearbook of Polar Law.[5]

[5] Correspondence with respect to publishing in this volume of the Yearbook should be directed to Nigel Bankes <ndbankes@ucalgary.ca>.

The ICE LAW Project, Two Years On

Philip Steinberg & Charlotte Barrington**

Introduction

The Project on Indeterminate and Changing Environments: Law, the Anthropocene, and the World (the ICE LAW Project) investigates the potential for a legal framework that acknowledges the complex geophysical environment in the world's frozen regions and explores the impact that an ice-sensitive legal system would have on topics ranging from the everyday activities of Arctic residents to the territorial foundations of the modern state. The project had its origins in a 2014 meeting of anthropologists, geographers, political scientists, and legal scholars, where the focus rapidly expanded from the place of sea ice in international law to broader questions that centre on the concerns and practices of peoples and institutions that encounter the specificities of polar landscapes and seascapes.

The nascent project secured a three-year international networking grant from the Leverhulme Trust, which has led to a series of workshops and community meetings, and will culminate in a final conference in April 2019 (see more details below).

Five sub-projects make up the ICE LAW Project: **Territory** (Stuart Elden, leader), **Resources** (Gavin Bridge, leader), **Migrations and Mobilities** (Claudio Aporta, Aldo Chircop, Kate Coddington and Stephanie Kane, co-Leaders), **Indigenous and Local Perspectives** (Jessica Shadian and Anna Stammler-Gossmann, co-leaders) and **Law** (Timo Koivurova, leader). More on the mission of each of the sub-projects, the overall aim of the ICE LAW Project, and activities held over the past two years may be found on the ICE LAW Project website (http://icelawproject.org) as well as in the Project's article in the 2017 edition of *Current Developments in Arctic Law* (Vol. 5, at 110). Here we focus specifically on activities planned for 2019.

Resources Sub-Project Workshop

The Resources Sub-Project will be holding a workshop on 'Economizing the offshore Arctic: Dynamic marine policies and global production networks in a thawing world', to be held at Durham University in March 2019. This workshop, featuring invited presentations, will take forward discussions from the Resources Sub-Project's previous event on 'Anticipating Abundance' (https://icelawproject.org/news-events/news-archives-2017/report-from-anticipating-abundance-economizing-the-arctic-resources-

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subproject-workshop-durham-may-2017/). The workshop is being co-organised by Gavin Bridge, Durham University (Resources subproject leader) and Berit Kristoffersen, UiT - The Arctic University of Norway. Updates regarding the workshop will be posted at https://icelawproject.org/2018/12/10/resources-sub-project-workshop-entitled-economizing-the-offshore-arctic-dynamic-marine-policies-and-global-production-networks-in-a-thawing-world-march-2019-in-durham-uk/ .

Migrations & Mobilities Sub-Project Workshop

The Migrations & Mobilities Sub-Project will be holding a workshop entitled 'Questioning territory: extending concepts of territory through engagement with experience, affect, and embodiment' in Albany, New York on March 8th 2019. Inspired by changing climatic conditions that are destabilizing formerly solid territory, indigenous approaches towards territory and territoriality that upend the stability of the concept, and feminist perspectives that emphasise the relational and embodied nature of control and power, the workshop encourages interested scholars to join invited speakers from feminist legal studies, international relations, political theory, and geography who are considering the relationship of embodiment, experience, affect and territory in interesting and diverse ways. The workshop seeks to bring together emerging work on the intersection of feminist thinking and studies of territory in order to develop new collaborations, writing opportunities, and future research topics. For more information, see the full announcement at https://icelawproject.org/2018/12/10/migrations-and-mobilities-sub-project-workshop-entitled-questioning-territory-extending-concepts-of-territory-through-engagement-with-experience-affect-and-embodiment-march-2019-in-durham-uk/ .

ICE LAW Final Conference

The Final ICE LAW Project Conference will run from 25th – 27th April 2019 in Durham, UK. The ICE LAW sub-project leaders will discuss findings from the workshops and community meetings that they have been holding for the past three years, along with four keynote speakers who will share their thoughts on topics that join the physical and regulatory environments of the Arctic:

- **Michael Bravo** (Cambridge) – Professor of Geography and Convener of Circumpolar History and Public Policy Research, Scott Polar Research Institute, Cambridge University, UK
- **Chris Burn** (Carleton) – Professor of Geography and Environmental Studies., Supervisor of Carleton's Graduate Programs in Northern

Studies, Carleton University, Canada

- **Bruce Forbes** (Lapland) – Professor of Global Change, Environmental sciences and Social and economic geography, Leader of the Global Change Research Group at the Arctic Centre.
- **Rachael Lorna Johnstone** (Akureyri/Greenland) – Professor of Law, Arctic Oil and Gas Studies, at Ilisimatusarfik (the University of Greenland) and Professor of Law at the University of Akureyri, Iceland.

The ICE LAW conference will be held in conjunction with the first annual Summer School of the DurhamARCTIC programme, an interdisciplinary training initiative for PhD students and early career researchers. Funding will be available for eligible PhD students and Early Career Researchers to attend this joint event. A poster session by Summer School participants will be integrated into the ICE LAW Project conference, and Summer School specific training will follow the conference, on 27 and 28 April. Application material for Summer School participants is available at https://www.dur.ac.uk/arctic/conference/ .

The conference will also include sessions looking at unsolicited papers presenting research that broadly addresses the ICE LAW project theme. To propose a paper, please submit an abstract (300 words maximum) to ice.law@durham.ac.uk no later than 15th January 2019.

For further details on the ICE LAW Project please visit the project's website https://icelawproject.org/ , and for information on DurhamARCTIC, please see https://www.dur.ac.uk/arctic/ .