Existence and Survival: A Dimension of Indigenous Self-Determination in the Context of Climate Change Impacts

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This article argues for an "existence and survival" dimension of the self-determination of Indigenous Peoples. This dimension is supported by the United Nations Declaration on the Rights of Indigenous Peoples as well as international and regional human rights law. This article proposes that such an existence and survival dimension should be expressly delineated in the context of climate change impacts. This article then analyses threats to the existence and survival of Arctic Indigenous People posed by climate change impacts as alleged before a variety of international legal fora. The article concludes by discussing possible legal consequences on States for breaches of the existence and survival dimension of self-determination with respect to Arctic Indigenous Peoples.

Introduction

Anthropogenic global warming is destabilising ecosystems all over the world but is having a particularly pronounced impact on the Arctic. The Arctic is warming four times faster on average than the rest of the planet (Rantanen, 2022). Recent projections suggest that the Arctic will be sea ice-free in September as early as the 2030s-2050s under any emissions scenario (Kim, 2023). Impacts from climate change in the Arctic are now threatening loss of land and natural resources that are crucial to the subsistence lifestyles of Indigenous Peoples (Abate and Warner, 2013: 6-7).

Indigenous communities in the Arctic, including members of the Inuit and Arctic Athabaskan Indigenous Peoples as well as the Native Village of Kivalina, have sought international legal redress related to climate change impacts in the Arctic that are negatively impacting their human rights as well as their very survival. This article reviews these claims from the perspective of the right of self-determination of Indigenous Peoples. This article argues that an "existence and survival" dimension of self-determination should be doctrinally recognised within the context of possibly

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existential threats to Arctic Indigenous Peoples presented by climate change impacts, and that breaches of such a dimension may carry legal consequences for Arctic States.

The Self-Determination of Indigenous Peoples under International Law

The right of self-determination is "one of the essential principles of contemporary international law" (ICJ, *Case Concerning East Timor*, 1995: ¶ 29), and a "fundamental human right" (ICJ, *Chagos Archipelago*, 2019: ¶ 144) with *erga omnes* status (ICJ, *Construction of a Wall in The OPT*: ¶¶ 155-156; ICJ, *Chagos Archipelago*, 2019: ¶ 180), meaning that States owe an obligation to the international community as a whole with respect to the norm, and that all States have a legal interest in its protection (ILC, 2001, art 48 comments (8), (9); Saul, 2011: 631-632). After the ratification of the UN Charter, self-determination became the primary vehicle for decolonisation efforts and it is now well settled that UN General Assembly resolution 1514 (XV) provides the legal foundation for the right of peoples in colonial territories to enter the international legal order as independent States (*Chagos Archipelago*, 2019: ¶ 150; Saul, 2011: 613; Drew, 2001: 658-659; Crawford, 2006: 106). The adoption of the Friendly Relations Declaration in 1970 strengthened a broadened conception of self-determination in defining additional forms of "alien subjugation, domination and exploitation" beyond that of colonialism, including foreign occupation (UNGA, 1970, Principle V; Espiell, 1980: ¶ 45; Cassese, 1995: 90; Wewerinke-Singh, 2019: 100-101; Jones, 2023: 3; UNGA, 1992: ¶ 2; ICJ, *Construction of a Wall in The OPT,* 2004: ¶¶ 87, 88, 115, 122, 52). Other international frameworks, including the Helsinki Final Act, have shifted the definitional focus of self-determination towards a continuing, permanent right of all peoples to determine their "internal and external political status" "when and as they wish," in order to perfect and protect their legal, political, economic, social, and cultural sovereignty (OSCE, 1975, Principle VIII; Cassese, 1995: 285-288; see also Vienna Declaration, 1993; CERD Committee, 1996).

Common article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) ("Common Article 1"), adopted in the late 1960s and both entering into force in 1976, augmented the right of self-determination by recognising an explicit human rights component of the norm. Common Article 1(1) of the two covenants guarantees that, "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Common Article 1(2) protects the rights of all peoples to, "for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence." Finally, Common Article 1(3) obligates States to "promote the realization of the right of self-determination, and shall respect that right."

In 2007, the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), representing the first "explicit and widespread" recognition by States that the right of self-determination applies to Indigenous Peoples as at least one other category of "peoples" with rights under international law (Quane, 2011: 259-260; Cambou, 2020: 2; Jones, 2021: 9; Xanthaki, 2022: 84). The UNDRIP states that Indigenous Peoples "have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms" under recognised international law (article 1), "are free and equal to all other peoples and individuals," (article 2), and "have the right to self-determination" (article 3).

According to the UN Expert Mechanism on the Rights of Indigenous Peoples (2021: ¶ 14), "All the rights in the Declaration are indivisible, interdependent and grounded in the overarching right to self-determination." The American Declaration on the Rights of Indigenous Peoples (ADRIP), adopted in June 2016 at the third plenary session of the OAS General Assembly, comprises a second international legal declaration related to the rights of Indigenous Peoples and contains similar recognition of the right of self-determination (article 3). The ADRIP arguably reflects an express recognition of the self-determination of Indigenous Peoples within the legal framework of the Inter-American system (Monteiro de Matos, 2020: 24).

There remains significant discussion in the literature regarding the scope and nature of Indigenous self-determination captured by the UNDRIP stemming in part from the language used in articles 4 and 46 (Xanthaki, 2022: 75-77). Article 4 of the UNDRIP focuses the exercise of Indigenous self-determination on a "right to autonomy or self-government in matters relating to [Indigenous Peoples'] internal and local affairs, as well as ways and means for financing their autonomous functions." Separately, paragraph 1 of article 46 states that nothing in the UNDRIP shall be deemed as authorising or encouraging the dismemberment or impairment of the territorial integrity or political unity of States. These two articles in particular have led some scholars to conclude that Indigenous self-determination contains a more limited purview of rights than that provided by the general law of self-determination and is focused primarily on the "internal" aspects of self-determination (Koivurova, 2010: 203; Quane, 2011: 269, 285; Cambou, 2019: 36-37). Other scholarship argues that Indigenous Peoples comprising "peoples" under international law are equal to all other "peoples" with respect to their rights, including the possibility of a right to secession—analysis also supported by the International Law Association in a 2010 report (Dorough, 2011: 512-513; Scheinin and Åhrén, 2018: 71-73; Xantahki, 2022: 77; ILA, 2010: 10). The UN Expert Mechanism on the Rights of Indigenous Peoples takes a third approach, describing "internal" self-determination for Indigenous Peoples as consisting of the ability to freely pursue their economic, social, and cultural development, whereas "external" self-determination includes the ability to maintain and develop relationships with their members across State borders and to participate in the international community with equal rights, including through participation in the international Indigenous movement and in international fora (Expert Mechanism on the Rights of Indigenous Peoples, 2021: ¶¶ 15-17).

As further discussed below, UN human rights mechanisms such as the UN Human Rights Committee (HRC) as well as the Inter-American human rights system have recognised that at least some Indigenous Peoples constitute "peoples" for purposes of Common Article 1 of the ICCPR and the ICESCR. The UNDRIP does not purport to declare or limit the full scope of the rights of Indigenous Peoples under international law, and in fact, it expressly declines such an interpretation under article 45. The principle of self-determination instructs the "equal rights" of peoples (UNGA, 1970, Principle V; Helsinki Final Act, 1975, Principle VIII), which the UNDRIP also affirms in article 2—declaring that Indigenous Peoples and individuals "are free and equal to all other peoples and individuals." Fidelity to the principle of equal rights cautions against distinguishing subsets of "peoples," some of whom possess a full panoply of international rights, and others with only a subset of rights. To the extent that at least some Indigenous Peoples constitute "peoples" under international law—a conclusion doctrinally supported by both HRC and Inter-American jurisprudence—the UNDRIP should not be interpreted to limit applicable

rights, whether rooted in Common Article 1 or elsewhere, including a right to "internal" and "external" aspects of self-determination (CERD Committee, 1996: ¶ 4).

The Triadic Relationship Between Self-Determination with Cultural Integrity and with Lands, Territories, and Resources

A defining characteristic of Indigenous self-determination is a triadic link between (i) self-determination with (ii) culture and cultural integrity and with (iii) lands, territories, and resources (Wiessner, 2012: ¶¶ 3.1, 3.2; Daes, 2005: 76-79; Åhren, 2016: ¶ 6.3.4; UN Expert Mechanism on the Rights of Indigenous Peoples, 2020: ¶ 5; Voukitchevitch, 2021: 189-190; Gilbert, 2016: 239; Fuentes, 2017: 233). This connection was acknowledged as early as 1989 in article 13 of ILO Convention No. 169 and has been affirmed and strengthened in the UNDRIP and the ADRIP. The UNDRIP prohibits the forced assimilation or destruction of culture and the forcible removal of Indigenous Peoples from their lands and territories (UNDRIP, arts. 8, 10; see also ADRIP, art X). Both the UNDRIP and the ADRIP recognise the right of Indigenous Peoples to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas, and other resources (UNDRIP, art 25, ADRIP, art XXV(1)), as well the right to the lands, territories, and resources which they have traditionally owned, occupied or otherwise used or acquired (UNDRIP art 26(1), (2); ADRIP arts XXV(2), (3)). States must also "give legal recognition and protection to these lands, territories and resources" with "due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned" (UNDRIP, art 26(3); ADRIP, art XXV(4)).

The triadic link between (i) self-determination with (ii) culture and cultural integrity and (iii) with lands, territories, and resources means that the disruption of the linkages between Indigenous Peoples with either their culture or with their lands, territories, or resources will necessarily implicate their self-determination. In the case of culture, for example, the HRC takes the position that at least some Indigenous communities are both "minorities" entitled to protection under article 27 of the ICCPR (right to minority culture), as well as "peoples" under article 1 of the ICCPR and thus beneficiaries of the right to self-determination contained therein (Scheinin, 2005: 6)—establishing a doctrinal link in international human rights law that infringements on the right to culture of Indigenous Peoples can also implicate the right of self-determination (HRC, 1990: *Lubicon* ¶ 32.2; HRC, 2019: *Sanila-Aikio*, ¶¶ 6.8-6.11; Castellino, 2005: 61). The HRC also cites to article 1 in its Concluding Observations country reports of States parties' conduct under the ICCPR in recommending how States may better protect the rights of Indigenous Peoples (Gilbert, 2016: 236-237), including the right to dispose freely of their natural resources pursuant to the right of self-determination (Cambou, 2022: 157). For example, in its 1999 Canada country report, the HRC affirmed that "the right to self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2)" including with respect to "aboriginal peoples" in Canada (HRC, 1999, Canada: ¶¶ 7-8).

The Committee on Economic, Social and Cultural Rights (CESCR), which monitors compliance with the ICESCR, has also affirmed the triadic connection between aspects of self-determination (in this case, the right to the means of subsistence and natural resources) with culture and with lands, territories, and resources in its General Comment No. 21 (2009: ¶ 36), concluding that the "strong communal dimension of indigenous peoples' cultural life is indispensable to [Indigenous

Peoples'] existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired," and must be protected by States parties in order to prevent degradation of their way of life, "including their means of subsistence, the loss of their natural resources, and ultimately, their cultural identity." In its General Comment No. 26 issued in 2023 related to cultural aspects of the right to land, the CESCR again affirmed aspects of this triadic link, observing that "land is also closely linked to the right to self-determination, enshrined in article 1 of the Covenant" and that, "Indigenous Peoples can freely pursue their political, economic, social and cultural development and dispose of their natural wealth and resources for their own ends only if they have land or territory in which they can exercise their self-determination" (¶ 11). The close link between land and the ability to take part in cultural life is "particularly relevant for Indigenous Peoples" on account of the "spiritual or religious significance of land to many communities" (¶ 10).

Existence and Survival in the Inter-American and African Regional Systems and before the UN Human Rights Committee

In both the Inter-American and African regional human rights systems, the triadic conception of Indigenous self-determination finds doctrinal emphasis in the protection of the existence and survival of Indigenous Peoples. In the 2007 *Saramaka* case, the Inter-American Court of Human Rights first relied on the right of self-determination, including Common Article 1 of the ICCPR and ICESCR, to interpret indigenous land and resource rights (Inter-Am. Ct. of H.R., *Saramaka*, 2007: ¶¶ 93-95; Shelton, 2011: 63, 75-76) and also articulated an "inextricable connection" between Indigenous Peoples with their territory and the "natural resources that lie on and within the land" which required protection under article 21 (Right to Property) of the American Convention on Human Rights (the "American Convention") to "guarantee their very survival" (Inter-Am. Ct. of H.R., *Saramaka*, 2007: ¶ 122). In the 2012 *Sarayaku* case, the Inter-American Court reiterated that article 21 protects the close connection between Indigenous Peoples with their territory and resources, something "necessary to ensure their survival" and to "ensure that they can continue their traditional way of living, and that their distinctive cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by the State" (Inter-Am. Ct. of H.R., *Sarayaku*, 2012: ¶ 146). The Inter-American Court also separately focused on cultural integrity and cultural survival as a "fundamental right" of Indigenous Peoples (¶ 217). The Inter-American Court has subsequently reaffirmed the link between lands, territories, and resources with culture and with indigenous survival in later cases, including in *Garífuna Community of Triunfo de la Cruz and its Members v. Honduras* (2015: ¶¶ 100-103), *Xucuru Indigenous People and its Members v. Brazil* (2018: ¶ 115), and in its 2017 advisory opinion related to the right to a healthy environment (¶ 48).

In the African regional human rights system, the *Endorois* decision from the African Commission on Human and Peoples' Rights (the "African Commission") and the *Ogiek* decision from the African Court on Human and Peoples' Rights (the "African Court") have affirmed a right to existence and survival connected to cultural integrity as well as to the use of lands, territories, and resources, in part through reliance on Inter-American doctrine. In the *Endorois* decision involving allegations of displacement of the Endorois Indigenous community in the Lake Bogorio area of Kenya, the African Commission stressed that article 17 (protecting the right to culture) of the African Charter on Human and Peoples' Rights (the "African Charter") imposed a "higher duty"

on States "in terms of taking positive steps to protect groups and communities like the Endorois" to avoid "the danger of extinction" (Afr. Comm. on H.P.R., *Endorois*, 2010: ¶ 248; Claridge, 2019: 268). Similarly, with respect to property protections under article 14 of the African Charter, the African Commission relied in part on *Saramaka* to conclude that States may have an obligation to take special measures to protect the connection of Indigenous Peoples with their lands and territories and to ensure the survival of Indigenous Peoples "in accordance with their traditions and customs" (¶ 187). In discussing the protection of the resources of Indigenous Peoples under article 21 (right of peoples to free disposition of natural resources), the African Commission again cited to *Saramaka* for the proposition that "the cultural and economic survival of indigenous and tribal peoples and their members depends on their access and use of the natural resources in their territory that are related to their culture and are found therein," which grants to Indigenous communities "the right to own the natural resources they have traditionally used with their territory"; without them, "the very physical and cultural survival of such peoples is at stake" (¶¶ 260-261, 267-268). In 2017, in the *Ogiek* decision, the African Court found breaches of these same three articles of the African Charter (among others) in reviewing allegations that Kenya had violated the rights of 30,000 members of the Ogiek Indigenous community by displacing the Ogiek from their ancestral land of the Mau Forest (Afr. Ct. H.P.R, *Ogiek*, 2017: ¶¶ 122-131, 176-190, 195-201). In its 2022 reparations order, the African Court affirmed that the "protection of rights to land and natural resources remains fundamental for the survival of indigenous peoples" and that the close ties between Indigenous Peoples with their land "must be recognised and understood as the fundamental basis of their cultures, spiritual life, integrity and economic survival." (Afr. Ct. H.P.R., *Ogiek*, 2022: ¶¶ 109, 112).

The existence and survival of Indigenous Peoples is also a concern of the HRC and has been addressed in HRC jurisprudence under article 27 of the ICCPR (right to minority culture). In the 2009 *Ángela Poma Poma* decision, the HRC reviewed correspondence made by an Indigenous author who alleged that the diversion of the river Uchusuma by the government of Peru had led to the deaths of thousands of head of livestock. Consequently, the "community's only means of survival—grazing and raising llamas and alpacas—has collapsed, leaving them in poverty," which deprived the community of their livelihood (¶¶ 2.1-2.3, 3.1). The HRC, citing its General Comment No. 23, first observed that article 27 is "directed to ensure the survival and continued development of cultural identity" of minority communities, which "may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them" (¶ 7.2). The diversion of water had a substantive negative impact on the author's enjoyment of her right to enjoy the cultural life of the community to which she belonged, and neither the author nor her community had been consulted prior to the water diversion, amounting to a violation of article 27 (¶¶ 7.5, 7.7). In the 2022 *Billy* decision, the HRC reiterated that protection of the right to minority culture under article 27 in the context of Indigenous Peoples was "directed towards ensuring the survival and continued development of the cultural identity" (¶ 8.13). The failure by Australia to implement timely adaptation measures against climate change impacts that were eroding lands and natural resources used for traditional fishing and farming and for cultural ceremonies by the Indigenous authors amounted to a violation of rights under article 27 (¶ 8.14).

Claims Made by Arctic Indigenous Peoples Implicating the Existence and Survival Dimension of Self-Determination in the Context of Climate Change

Members of Indigenous Peoples from the Inuit and Athabaskan Indigenous communities as well as from the Native Village of Kivalina have now presented claims in the Inter-American system as well as to UN Human Rights Council Special Procedures related to the existential nature of climate change impacts in the Arctic. These alleged impacts include threats to their means of subsistence, their connection to historic lands, territories, and resources, their cultural practices, their self-determination, and ultimately their existence and survival as peoples. One such petition was filed in 2005 by Sheila Watt-Cloutier before the Inter-American Commission on Human Rights (the "Inter-American Commission"), arguing that the acts and omissions of the United States with respect to climate change were infringing a variety of human rights protected by the American Convention and American Declaration of the Rights and Duties of Man (the "American Declaration"). Watt-Cloutier alleged "severe" impacts in the Arctic related to changes in weather, snow, and ice, as well as changes to biodiversity and new adverse health conditions, all of which were infringing on the rights to culture, the use and enjoy traditional lands, property, health and life, residence and movement, and the means of subsistence (Watt-Cloutier, 2005: 1-6). The petition specifically argued that deprivation of the means of subsistence amounted to a violation of the right of self-determination (Watt-Cloutier, 2005: 94.) The changes to the physical environment caused by climate change were "seriously threatening the Inuit's continued survival as a distinct and unique society" (Watt-Cloutier, 2005: 67). "Like other indigenous peoples, the Inuit rely on the natural environment for their cultural and physical survival . . . Destruction of the delicate arctic ecosystem is therefore inconsistent with [the Inuit's] right to be respected as … human being[s]" (Watt-Cloutier, 2005: 74). The petition was dismissed in 2006 by the Inter-American Commission and was never reviewed on its merits (OAS 2006). However, in 2007, Watt-Cloutier was permitted to provide testimony on these issues before the Inter-American Commission (Watt-Cloutier, 2007; CIEL, 2007).

A second petition by Arctic Indigenous Peoples before the Inter-American Commission was brought in 2013, this time by members of Arctic Athabaskan Indigenous Peoples seeking review of Canada's alleged failure to regulate the impacts of black carbon emissions and the consequent aggravation of warming in the Arctic (Arctic Athabaskan Council, 2013). The Arctic Athabaskan petition described how, "Athabaskan traditions, food sources, and livelihoods are inextricably tied to the ecosystems of the Arctic tundra and boreal forests," and that many Athabaskan peoples "live off the land" through a subsistence diet (Arctic Athabaskan Council, 2013: 1-2). The petition alleged that a significant cause of warming in the Arctic was "Canada's failure to regulate emissions of black carbon" a "potent climate warming agent" on account of the fact that while in the air, it absorbs sunlight and heats the atmosphere (Arctic Athabaskan Council, 2013: 2). Arctic Athabaskans' culture depended on a healthy Arctic environment, which is "essential to subsistence and survival" (Arctic Athabaskan Council, 2013: 2). This included the ability to pass on Arctic Athabaskan knowledge from one generation to the next, an essential aspect of cultural survival (Arctic Athabaskan Council, 2013: 3). The petition argued that the State had an obligation to protect Indigenous Peoples against environmental harms and that "the possibility of maintaining social unity, of cultural preservation and reproduction, and of surviving physically and culturally,

depends on the collective, communitarian existence and maintenance of the land" (Arctic Athabaskan Council, 2013: 54 (citing to Inter-Am. Ct. H.R., *Awas Tingni*, 2001: ¶ 39)). The petition argued that "special measures" can sometimes be required in order to help ensure the physical and cultural survival of Indigenous Peoples, which in the case of the Arctic Athabaskan Indigenous Peoples required Canada to take measures to protect them from the environmental degradation caused by black carbon affecting rights to culture, property, health, and means of subsistence (Arctic Athabaskan Council, 2013: 57.) As of this writing, the Inter-American Commission has not responded to the petition.

A third claim by Arctic Indigenous Peoples was presented in 2020 by members of five Indigenous communities in the United States—four located in the US state of Louisiana, and one located in the Native Village of Kivalina in the US state of Alaska (the "Five Tribes"), who submitted a joint complaint to a variety of Special Procedures established by the United Nations Human Rights Council alleging human rights violations by the United States government related to climate change impacts (Five Tribes, 2020). These Five Tribes alleged that they were being "forcibly displaced from their ancestral lands" because of climate change impacts and related human-made disasters, including "rising sea levels, catastrophic storms, and unchecked extraction of oil and gas" (Five Tribes, 2020: 9). Such climate change impacts were causing them to lose their cultural traditions and ancestral lands and were infringing on their "tribal nation sovereignty and self-determination," ultimately presenting existential risks (Five Tribes, 2020: 9). The Native Village of Kivalina alleged a connection between the "catastrophic changes to the environment" and "catastrophic land collapse" in the Arctic from increased flooding, erosion, and permafrost loss, to threats to the "lives and livelihoods of Alaska Native communities" (Five Tribes, 2020: 30-32). The Native Village of Kivalina faced "imminent threats" from rising temperatures and storm vulnerability (Five Tribes, 2020: 32). All of the Tribes expressly alleged "the endangerment of cultural traditions, heritage, health, life and livelihoods" and interference with "tribal nation sovereignty and self-determination" from climate change impacts. By refusing to act, the United States had "placed these Tribes at existential risk" (Five Tribes, 2020: 9).

The Five Tribes alleged several violations of human rights, including the right to life, the right to self-determination, the right to cultural heritage, the right to subsistence and food security, the right to safe drinking water, physical and mental health, and an adequate standard of living (Five Tribes, 2020: 38-48). The Five Tribes sought remedies against both the United States government as well as the Louisiana and Alaska state governments, including recognition of their "self-determination and inherent sovereignty," involvement in relevant decision-making processes (including free, prior, and informed consent to future infrastructure projects and oil and gas exploration), and government protection and funding to support the Five Tribes' cultural connection to their ancestral lands and their means of subsistence (Five Tribes, 2020: 10-11). They also sought funding for "adaptation measures" on account of increased sea-level rise and funding to implement the tribal-led relocation process for the Alaska Native Village of Kivalina and the Isle de Jean Charles Tribe (Five Tribes, 2020: 10-11).

On September 15, 2020, nine of the contacted Special Procedures sent a communication to the United States with respect to the Five Tribes Complaint (Human Rights Council, 2020). The communication expressed "utmost concerns" about the impacts of climate change on the Five Tribes, including to "their collective rights as indigenous peoples such as their right to self-determination, to their traditional lands, territories and resources, and to engage in their cultural

and religious practices" (Human Rights Council, 2020: 7). The response included an international legal annex that dedicated several paragraphs to the particular rights of Indigenous Peoples under international law. The annex observed the "real threat of cultural extinction" of Indigenous Peoples because of climate change impacts (Human Rights Council, 2020: 12-13). The annex further observed that article 25 of the UNDRIP protected the right of Indigenous Peoples to "maintain and strengthen their distinctive spiritual relationship" with historic lands, territories, waters, coastal seas, and other resources, including for purposes of upholding such responsibilities to future generations (Human Rights Council, 2020: 12). The annex also recalled the UN Framework Convention on Climate Change and the Paris Agreement, and specifically, provisions requiring States parties to "take precautionary measures to anticipate, prevent or minimize the causes of climate change" and to "address climate change, respect, promote and consider respective obligations on human rights, including the rights of indigenous peoples" (Human Rights Council, 2020: 13-14). As of this writing, no further public communications have taken place related to the Five Tribes Complaint.

Recognising an Existence and Survival Dimension to Self-Determination in the Context of Climate Change Impacts

Arctic Indigenous Peoples have now formally described and alleged threats to their existence and survival because of climate change impacts, which include threats to their self-determination and related cultural and land, territory, and resource rights. This article argues that the existential threats described by Arctic Indigenous Peoples from climate change impacts warrant recognition of an explicit "existence and survival" dimension of Indigenous self-determination. First, as discussed above, Indigenous Peoples themselves have recognised the link between alleged infringements on their self-determination from State action or inaction on climate change and the risks to their continued existence and survival, including from losses of territory, resources, culture, and their means of subsistence. Regional human rights jurisprudence already acknowledges that the cultural integrity of Indigenous Peoples and their connection to their lands, territories, and resources are integral components of Indigenous existence and survival (Summers, 2019: 5)—for example, in the *Saramaka*, *Sarayaku*, *Endorois*, and *Ogiek* decisions—and jurisprudence from the HRC has similarly tied the guarantee of the self-determination of Indigenous Peoples under Common Article 1 to article 27's protection of cultural practices associated with historic lands, territories, resources, and ways of life (*Lubicon,* 1990; *Sanila-Aikio*, 2019). There is thus a legal foundation in regional and international human rights law for delineating an express protection of the existence and survival of Indigenous Peoples as a specific dimension of Indigenous self-determination—a dimension that needs recognition and protection in the face of climate change impacts.

Second, delineating an existence and survival dimension of Indigenous self-determination is doctrinally supported and implied, *inter alia*, by the UNDRIP, which according to Hohmann enshrines "a right to the protection of indigenous peoples' continued survival and existence, both physically as individuals, and as collective entities, in accordance with levels of human dignity and well-being" in part through Articles 7(2), 8, and 43 (Hohmann, 2018: 150). An existence and survival dimension can be further inferred from the right of peoples to freely determine their political status, to freely pursue their economic, social, and cultural development, and the prohibition against depriving peoples of their own means of subsistence protected by Common Article 1 of the ICCPR and ICESCR, which all imply a breach of the human right of self-

determination in instances where peoples lose their ability to subsist or to freely determine and pursue their development. An existence and survival dimension can be further inferred from the equal rights of peoples under international law and the positive obligation on States to support the self-determination of peoples (ICCPR, art 1(3); ICESCR, art 1(3)), which suggest that the international legal system exists in part to protect the existence and survival of peoples (Friendly Relations Declaration, Principle V; UNDRIP arts 2, 3; ADRIP arts 2, 3; ICJ, *Construction of a Wall in The OPT*: ¶¶ 155-156; ICJ, *Chagos Archipelago*, 2019: ¶ 180). Finally, a right to existence and survival can be inferred from the prohibition against genocide, which is an act that fundamentally threatens the interests of the international community (Wouters and Verhoeven, 2005: 403), and from the right of peoples to defend their self-determination through force in the context of national liberation from colonisation (Yau, 2020: 63-65). The argument in international law that peoples may lawfully use force to resist some kinds of infringements on their self-determination suggests, *a fortiori*, a fundamental assumption that such peoples have an underlying right to existence and survival within the international system itself.

Recognition of an existence and survival dimension of self-determination frames possibly existential climate change impacts as infringements of an arguable peremptory norm of international law (Cassese, 1994: 140; ILC, 2001, art 26, comment (5); ILC, 2022, Annex (h); compare with Park, 2021: 711) and a fundamental human right as protected by Common Article 1. Such recognition would further delineate a duty on those States carrying obligations to Indigenous Peoples to refrain from threatening their existence and survival as well as to promote and protect it. In the context of climate adaptation action, for example, a State may be under an international legal obligation to implement appropriate adaptation measures to protect the existence and survival of Indigenous Peoples in its jurisdiction. In the *Billy* decision from 2022, the HRC concluded that Australia's delay in implementing relevant adaptation measures to protect the Indigenous authors from climate change impacts amounted to a breach of the positive obligations imposed by articles 17 and 27 of the ICCPR (HRC, *Billy*, 2022: ¶¶ 8.12, 8.14). Australia was under a subsequent obligation to protect the authors' "continued safe existence" and to make "full reparation" for such violations of human rights (¶ 11)—remedies consistent with principles of State responsibility requiring States to cease an internationally wrongful act and to make reparation "for the injury caused" by that internationally wrongful act (ILC, 2001, art 28 comment (2); arts 30, 31; Shelton, 2012: 373-374). As detailed above, Arctic Indigenous Peoples have described how changing conditions in the Arctic are leading to territorial, resource, and cultural loss impacting their existence and survival, mirroring the allegations made by the authors in *Billy*. The alleged delay by Arctic States in implementing appropriate adaptation measures to protect the existence and survival of Arctic Indigenous Peoples within their jurisdiction is not only a potential breach of the human rights obligations outlined in *Billy*, but also of the self-determination of such affected Arctic Indigenous Peoples, including the positive obligation to promote their self-determination. Secondary obligations flowing from a breach of self-determination could require, among other things, adaptation measures designed to protect the means of subsistence of Arctic Indigenous Peoples from climate change impacts as well as their connection to their lands, territories, resources, and related cultural practices and lifestyles. Appropriate adaptation measures must further protect the political, economic, social, and cultural sovereignty of Arctic Indigenous Peoples and their ability to make decisions related to their internal and external status in a warming world. In light of the rapid environmental changes taking place in the Arctic, implementation of

these kinds of adaptation policies, in addition to the obligation to make reparation, could involve significant financial costs to Arctic States or dramatic kinds of "special measures" to protect the physical and cultural survival of Indigenous Peoples in the language of regional human rights jurisprudence (Inter-Am. Ct. H.R., *Saramaka*, 2007: ¶¶ 85-86, 90-91, 96, 103, 121; Afr. Comm. H.P.R., *Endorois*, 2010: ¶ 187).

Billy is also noteworthy for opening the door to legal scrutiny of the emissions-generating conduct of States, particularly high-developed, high-emitting States. The HRC concluded that Australia's alleged actions and omissions with respect to mitigation measures could be reviewed on account of Australia being "among the countries in which large amounts of greenhouse gas emissions have been produced" and also ranking "high on world economic and human development indicators" (HRC, *Billy*, 2022: ¶ 7.8). While the HRC did not further opine on the *Billy* authors' mitigation claims, this admissibility determination suggests that high-developed States responsible for significant amounts of greenhouse gas emissions may have certain kinds of obligations to mitigate such emissions under the ICCPR. Just like the authors in *Billy*, Arctic Indigenous Peoples are facing "real predicaments" from the continued burning of fossil fuels that have "already compromised their ability to maintain their livelihoods, subsistence and culture," including "serious adverse impacts that have already occurred and are ongoing . . . more than a theoretical possibility" (HRC, *Billy*, 2022: ¶ 7.10). Years and years of issuing licenses for fossil fuel exploitation, exporting fossil fuels, or providing subsidies to fossil fuel enterprises, among many other State activities, could be framed as attributable State conduct (Wewerinke-Singh, 2019: 90-92) constituting a breach of the self-determination of Arctic Indigenous Peoples on account of such conduct transforming the Arctic and threatening Indigenous existence and survival, either as a direct breach of self-determination or perhaps a composite breach consisting of a series of actions or omissions wrongful in the aggregate (ILC, 2001, arts 12, 15; art 15 (comment 8)). Because omissions can also constitute a breach of an international obligation (Weatherall, 2020: 197-198; ILC, 2001, art 2 comment (4)), the omission or failure by high-developed, high-emitting Arctic States to dramatically reduce their emissions-generating conduct in a warming world could also constitute a failure to discharge positive obligations to promote the self-determination of Arctic Indigenous Peoples and their existence and survival. The fact that multiple States could be contributing to climate change impacts in the Arctic from the burning of fossil fuels does not prohibit or prevent the responsibility of a single State from being invoked in relation to such wrongful emissions-generating conduct under principles of State responsibility (ILC, 2001, art 47).

Secondary obligations associated with such a breach would require a State to cease the conduct in question and to make reparation (ILC, 2001, art 28 comment (2); arts 30, 31; Shelton, 2001: 373-374). States continue to permit the burning of fossil fuels even with atmospheric carbon dioxide at approximately 420 ppm as of this writing (NASA, 2023), with current warming of approximately 1.2°C over pre-industrial temperatures, and with projected warming of up to 2.8°C by 2100 (WMO, 2021; UNEP, 2022: xvi, xxi). There is also a real possibility of triggering irreparable climate change tipping points at or over 1.5°C (McKay, 2022)—all of which would aggravate the current harms suffered by Arctic Indigenous Peoples and threaten their existence and survival. Consequently, the obligation to cease the breach of the primary rule could impose a legal obligation on duty-bearing States to, among other things, drastically curtail their emissions-generating conduct to prevent further dangerous warming in the Arctic. The obligation to make reparation "caused by" a State's emissions-generating conduct could entail restitution, compensation and satisfaction, either singly

or in combination, to impacted peoples (ILC, 2001, art 34). Determining reparation is a "fact-sensitive exercise" closely related to the question of causation (Wewerinke-Singh, 2020: 137-138; Shelton, 2013: 385).

So far, this discussion of international legal responsibility has been limited to Arctic States. However, the obligation on all States to promote the self-determination of "all peoples" imposed by Common Article 1 as well as the general principle of self-determination (CERD Committee, 1996, ¶ 3; Friendly Relations Declaration, 1970, Principle V; OSCE, 1975, Helsinki Final Act Principle, VIII; UNGA, Vienna Declaration, 1993) may impose duties on other high-developed, high-emitting States outside the Arctic and without Arctic Indigenous populations to also reduce their emissions-generating conduct on account of such emissions contributing to the climate degradation of the Arctic and now threatening Arctic Indigenous existence and survival. This should not be conceived of as an "extraterritorial" obligation, but rather a consequence of the fact that the burning of fossil fuels can have planetary consequences and can impact peoples in all parts of the world.

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