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Human Rights and Arctic Resources

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HUMAN RIGHTS AND ARCTIC RESOURCES

Rebecca M. Bratspies*

"Look, this isn't the 15th Century."¹

"The huge irony is that [c]limate change is opening up the Arctic to oil and gas drilling, which almost certainly will cause more climate change."²

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I. Introduction

Because the _res nullius_, the unowned thing, is potentially the property of whoever successfully claims it,³ the scramble to claim and exploit resources deemed "unowned" has been a black chapter of human history. Cherished social and human values have been trampled in the rush for riches. The very idea of an "owned" versus an "unowned" resource, be it land, oil or living organisms, is, of course, a political construct, fraught with unspoken value judgments about the kind of use or possession worthy of that recognition.⁴ Throughout history, biases and prejudices have morphed judgments about the uses sufficient to demonstrate ownership into an assessment of _whose_ use or possession will be dignified with the label of ownership.⁵ This latter assessment, implicit in the first whenever there are competing claims to a resource, has been wielded to systematically dispossess indigenous peoples around the world.⁶

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³ The work of John Locke helped develop the legal concept of _terra nullius_. He wrote in _Two Treatises on Government_ that "whosoever then [an individual] removes out of the state that nature has provided . . . he has mixed his labor with, and joined it to something that is his own, and thereby makes it his property." JOHN LOCKE, _TWO TREATISES OF GOVERNMENT_, 329 (Cambridge University Press 1965) (1689). Later thinkers, including Emmerich de Vattel further developed this point in relation to indigenous peoples, proclaiming that the Indian nations "unsettled habitation in those immense regions cannot be accounted a true and legal possession; and the people of Europe . . . were lawfully entitled to take possession of it." EMMERICH DE VATTÉL, _THE LAW OF NATIONS_ ch. V, § 27 (Joseph Chitty ed., 1879).


⁵ In _Johnson v. McIntosh_, a case involving two non-Indian claimants to a parcel of land, the United States Supreme Court used this reasoning to conclude that the Piankeshaw Indians had few if any legally recognized rights over their traditional land, and did not have the right of general alienability. Johnson v. _McIntosh_, 21 U.S. (8 Wheat.) 543, 590 (1823). Assessing the nature of possession that gives rise to ownership, the Court concluded that the Piankeshaw Indians were mere "inhabitants" rather than owners of their land. _Id._ at 591. Justice Marshall, writing for the majority, relied on property theories recognized at the time to conclude that the various Indian nations had no fee simple ownership rights to land either individually, collectively, or as a nation, but instead held a right of mere occupancy. _Id._ at 588. This conclusion rested on the proposition that the tribes did not occupy their lands in a fashion that prevented its appropriation by farmers for agriculture. _Id._ at 590–92. Justice Marshall asserted that "[a]ll the proprietary rights of civilized nations on this continent are founded on this principle." _Id._ at 590.

⁶ There is some controversy about the definition of the term "indigenous people." A consensus description of the key characteristics of groups encompassed by the term can be found in Patrick Thornberry, _Indigenous People and Human Rights_ 37–40 (2002) (identifying association with a particular place, status as original inhabitants, and identity as a distinct society as the main elements of "indigenousness"); see also John Woodlife, _Biodiversity and Indigenous Peoples_, in _INTERNATIONAL LAW AND THE CONSERVATION OF BIOLOGICAL DIVERSITY_ 255, 256 (Michael Bowen & Catherine Redgwell eds., 1996) (describing "a profound relationship to the land" as the main characteristic that indigenous groups share); see also Russell Lawrence Barsh, _How Do You Patent a Landscape? The Perils of Dichotomizing Cultural and Intellectual Property_, 8 INT'L J. CULTURAL PROP. 14, 20 (1999) (asserting that land rights and knowledge are so
As global warming reshapes the Arctic environment, we stand at a critical moment. Environmental changes are creating new opportunities to exploit hitherto unreachable mineral resources.\(^7\) The melting of the Arctic ice means that vast reserves of oil and gas are suddenly accessible,\(^8\) not to mention the possibility of finally establishing the fabled "Northwest Passage."\(^9\) In turn, these new opportunities prompt new pressures for access from those who would profit through exploitation of those resources. In just a few short years, the Arctic has become a front-line in the global scramble for resources.

The Arctic is clearly not *terra nullius*.\(^10\) The Arctic states of Canada, the United States, Russia, Norway, and Denmark already have long-standing, if only roughly sketched, sovereignty interests in this territory. Sweden, Finland, and Iceland also have interests in the broader Polar region.\(^11\) In addition to these national claims, the Inuit and other Northern peoples have their own set of claims based on the fact that they have lived and worked in this region for centuries, or closely intertwined and that attempts to separate them are as peculiarly Western reductionism, which views the right to use land as separable from knowledge of how to use land properly.


10. I say this explicitly because ideas of *terra nullius* retain more traction than one might expect. Indeed, it was only during the latter part of the twentieth century that the idea of *terra nullius* was officially renounced. See Mabo v. Queensland II (1992) 175 C.L.R. 1 (Austl.); Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16) (unanimously rejecting the doctrine of *terra nullius* and concluding that the Western Sahara at the time of Spanish 1884 colonization was not *terra nullius*). By stating that the Arctic is not *terra nullius* I do not mean to suggest that other assertions of *terra nullius* were appropriate. After the *Mabo* decision, Australian Prime Minister Paul Keating was widely quoted as stating: "The lie was terra nullius—the convenient fiction that Australia had been a land of no one. The truth was native title." See, e.g., *The Native Title Act and Wik*, Swirk, http://www.skwirk.com.au/p-c_s-56_u-120_t-330_c-1137/TAS/9/The-Native-Title-Act-and-Wik/Land-Rights-and-Native-Title/Changing-rights-and-freedoms-Aboriginal-people/SOSE-History/ (last visited Mar. 6, 2009).

millennia. Nevertheless, the specter of terra nullius haunts the Arctic.

As has happened so many times throughout history, the newly-accessible resources are concentrated in the territories occupied, used, and claimed by indigenous peoples. The Inuit, the Sami, the Gwich' in and other Arctic peoples are most affected in this case. The tantalizing prospect of riches epitomized by reports of vast Arctic oil and gas reserves generates the same greed that in the past often drove society to disregard existing indigenous claims to traditional lands and the resources within those lands. We have the potential to do it differently this time. Decisions about how to govern access to and exploitation of Arctic resources offers an historic opportunity to turn words about indigenous rights into actions on the ground. Whether we seize that opportunity or not will tell us much about who we are as a world community.

International law offers some portents about how the rush to exploit the Arctic might play out. Among the more auspicious are recent legal developments explicitly recognizing indigenous claims to territory and resources. For example, the General Assembly recently adopted a Declaration on the Rights of Indigenous People, which


overwhelmingly affirms indigenous rights to the natural resources within their traditional territories. Likewise, a series of decisions handed down by the Inter-American Court of Human Rights, the International Court of Justice, and various state Constitutional Courts have explicitly rejected *terra nullius* in favor of recognizing indigenous claims and rights. Thus, any decisions about the Arctic take place against an elaborate backdrop of international and domestic law detailing the rights and responsibilities attributable to the states, vis-à-vis each other and vis-à-vis the Arctic's indigenous inhabitants.

However, there are ominous signals on the horizon as well. Russia has rushed to plant flags and to send patrol boats to the Arctic region. The United States is handing out Arctic drilling licenses with little reserve. Canada's government has actively supported an

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20. There is a complex interrelationship between assertions of indigenous sovereignty and of property rights. See *Anaya, supra* note 14 (explaining this interrelationship in greater depth); Michael Asch, *From Terra Nullius to Affirmation: Reconciling Aboriginal Rights With the Canadian Constitution*, 17 Can. J. L. & Soc. 23 (2002).


22. On February 6, 2008, the Department of the Interior Minerals Management Service auctioned off oil and gas exploration licenses for 29.4 million acres in the Chukchi Sea. The lease area lies twenty-five miles off the north-western coast of Alaska, and is thought to contain fifteen million barrels of recoverable oil and seventy-six trillion cubic feet of natural gas. See *Minerals Management Service, OCS Five-Year Oil and Gas Leasing Program* (2007), http://www.mms.gov/ooc/PDFs/FactSheet-OCSS-YearProgram.pdf (last visited Mar. 9, 2009). The area in question is also an environmentally sensitive habitat of Arctic polar bears. The lease sale came as the Department of Interior simultaneously delayed listing of the polar bear as an endangered species under the Endangered Species Act which might have prevented the sale because the exploration will negatively impact sensitive polar bear habitat.
creased Canadian military presence in the Arctic, and Parliament has allocated money for three new military icebreakers. Canada and Denmark have repeatedly jostled over conflicting claims to the tiny, uninhabited Hans Island near northwestern Greenland. These developments call into question whether international legal progress recognizing indigenous rights will really make a difference in the Arctic. What value is the developing human rights jurisprudence if it does not translate into a better, more just, more environmentally responsible process for deciding the fate of Arctic resources?

II. SOME BACKGROUND ABOUT THE ARCTIC

A. Place and Space

Three-quarters of the way through the International Polar Year seems an auspicious moment to reflect on the basic physical changes that are taking place in the Arctic. These changes have sovereignty implications in addition to their more visible effects on the Arctic environment and the global climate.

In its Fall 2007 Synthesis Report, the Intergovernmental Panel on Climate Change ("IPCC") stated that "warming of the climate sys-

23. In the summer of 2008, both Prime Minister Harper and Defense Minister Peter MacKay made high profile tours of the Arctic intended to underscore Canada's sovereignty claims. As part of Operation Nanook, MacKay visited Ellesmere Island, where he vowed that the Arctic "presence of Canadian Forces is increasingly important to not just claim our sovereignty but exert it." Capers and Capabilities: While Canadian Leaders Talk About Arctic Sovereignty, Vessels from Other Nations Cut Through Arctic Waters, CAN.-AM. STRATEGIC REV., Aug. 29, 2008, http://www.casr.ca/as-arctic-sovereignty-capabilities-1.htm. Around the same time, Harper asserted "to protect the North, we must control the North." Id.

24. Responding to United States criticism of these moves, Prime Minister Stephen Harper commented: "I've been very clear that we have significant plans for national defence and for defence of our sovereignty, including Arctic sovereignty." Browne, supra note 7.


26. The International Polar Year was designated by the National Snow and Ice Data Center to promote the study of polar ice. National Snow and Ice Data Center, http://nsidc.org/ipy/ (last visited Mar. 6, 2009).


28. The IPCC was set up in 1988 by the World Meteorological Organization and the United Nations Environmental project. At regular intervals, the IPCC produces assessment reports in order to provide decision makers with a reliable source of climate change information. Widespread participation has been a hallmark of the IPCC reports, with hundreds of experts from around the world, including scientists, policy-makers, and government officials, participating in
tem is unequivocal.  "29 And, despite some Tobacco Institute-like strategic denials, 31 the evidence is indeed overwhelming. Twelve of the warmest years on record have occurred between 1995 and 2007. 32 Overall, the temperatures recorded in the Northern Hemisphere over the last fifty years have been higher than at any time in the past millennium. 33 And, things are expected to get warmer. While our understanding of climate change is still evolving, there is a growing body of evidence that the rate of change is accelerating. 34

The Arctic is particularly vulnerable to the effects of climate change. And, because of the key role the Arctic plays in global climate, changes in the Arctic will reverberate around the globe. In par-


30. A main purpose of the Tobacco Institute was to maintain controversy over the health effects of smoking. See, e.g., K. Michael Cummings, Anthony Brown, & Richard O'Conner, The Cigarette Controversy, 16(6) Cancer Epidemiology Biomarkers & Prevention 1070, 1070–76 (2007); Charles Powers, Scientific Witness Program, Comments at The Tobacco Institute Executive Committee Meeting (Feb. 23, 1989), available at http://legacy.library.ucsf.edu/tid/yik40c00/pdf;sessionid=5E940F96B57FB6FEF235B1EA5B6218BA (an example of the Tobacco Institute's strategy). This document, like many other Tobacco Institute internal documents, was made public as part of the 1998 Master Settlement Agreement of the class action lawsuit brought by National Association of Attorneys General, and is available online at http://www.tobaccoinstitute.com/.


34. See, e.g., Holtz, supra note 32.
ticular, the Arctic Ocean plays an important role in moderating the global climate. Historically, the Arctic Ocean was frozen solid with sea ice for most of the year. This situation kept the region cool, and inaccessible. Over the past thirty years, however, both the thickness and extent of sea ice in the Arctic have declined markedly. The consequences from this loss of sea ice may be catastrophic. Because Arctic sea ice has a bright white surface, the vast majority of sunlight striking the ice is reflected back into space. When the sea ice melts, more of the darker ocean surface is exposed to sunlight. Rather than reflecting sunlight back into space, the darker ocean surface absorbs the majority of that sunlight. Thus, melting sea ice creates an unfortunate feedback loop: the more the sea ice melts, the more the exposed ocean surface absorbs sunlight and warms, thus further melting the sea ice and exposing more ocean surface to sunlight.

Evidence of this feedback loop is already accumulating. Satellite data over the past thirty years document that the Arctic sea ice coverage has shrunk by an average of 2.7% per decade, with larger average decreases during the summer months. In September 2007, Arctic sea ice reached the lowest level ever recorded—a mere 61% of its average extent, as measured from 1979 through 2000. In September 2008, the sea ice extent was 66% of the long-term average, only slightly better than the 2007 record low. This most recent data strongly reinforce the conclusion that we are witnessing a thirty-plus year downward trend in Arctic ice extent.

At the same time, average Arctic temperatures have increased at almost twice the global average over the past few decades. As a result, the 2004 Arctic Climate Impact Assessment ("ACIA") determined that the Arctic ice is melting so rapidly that half of it could be


41. Id.; see also ACIA Assessment, supra note 36, at 8.
gone by the end of the century.\textsuperscript{42} The 2007 IPCC Synthesis Report and the World Wildlife Fund’s 2008 update of the ACIA suggest that this estimate may have been optimistic.\textsuperscript{43} NASA now estimates that Arctic sea ice could be entirely gone by the end of this century.\textsuperscript{44}

The Fourth Assessment Report of the Intergovernmental Panel on Climate Change confirmed that these changes to the global climate are "very likely" (meaning 90\% certainty) human-made.\textsuperscript{45} Indeed, George Newton, chairman of the United States Arctic Research Commission, acknowledged as much at the 2006 Davos meeting when he advised that Arctic temperatures were expected to rise 41°F (5.5°C) over the next century.\textsuperscript{46} Although the numbers he proposed sound frightening, they are entirely consistent with ongoing observations of a warming Arctic.

Despite having contributed very little to the drivers of climate change, the Arctic’s indigenous peoples feel many of its effects first and most acutely.\textsuperscript{47} As noted above, the loss of sea ice not only warms the Arctic, but it also has the potential to accelerate global warming trends and to change climate patterns. These environmental changes pose a direct threat to the lives and livelihoods of the Arctic’s indigenous peoples. Their villages are subsiding,\textsuperscript{48} and their culture is

\begin{itemize}
\item \textsuperscript{42} ACIA \textit{Assessment}, supra note 36, at 30.
\item \textsuperscript{43} \textit{World Wildlife Fund for Nature, Arctic Climate Impact Science-An Update Since ACIA 2} (Martin Sommerkorn \& Neil Hamilton eds., 2008) (reporting that changes to the Arctic from climate change are occurring much faster than predicted in ACIA or the IPCC), \textit{available at} http://assets.panda.org/downloads/arctic_climate_impact_science_1.pdf.
\item \textsuperscript{44} NASA, \textit{The Arctic Perennial Sea Ice Could Be Gone by End of the Century}, Oct., 23, 2003, \textit{http://www.nasa.gov/vision/earth/environment/PerrenialSeaIce.html}.
\item \textsuperscript{45} \textit{Intergovernmental Panel on Climate Change, Climate Change 2007: The Physical Science Basis} 3 (Susan Solomon et al. eds., 2007), \textit{available at} http://www.ipcc.ch/ipccreports/ar4-wg1.htm.
\item \textsuperscript{46} See Browne, supra note 7.
\item \textsuperscript{47} It was this disconnect between responsibility and costs that prompted the Inuit Petition at the Inter-American Commission on Human Rights. The effects of global warming, although felt first in the Arctic, will not be confined there. Coastal dwellers around the world will soon face similar threats, and almost 40\% of the people on earth live within 100 km of the coast. See The World Resources Ctr., EarthTrends, http://earthtrends.wri.org/searchable_db/index.php?step=years&ccID%5B%5D=0&theme=1&variable_ID=63&action=select_years (last visited Mar.9, 2009) (relying on data from Columbia University’s Center for International Earth Science Information Network ("CIESIN"); Population, Landscape and Climate Estimates of the World provided by the Socioeconomic Data and Application Center, http://sedac.ciesin.columbia.edu/place/ (last visited Mar. 9, 2009). Small island states are particularly vulnerable.
\item \textsuperscript{48} The permafrost is thawing as the Arctic warms. This places the villages, buildings, roads, and pipelines built on top of the permafrost in serious jeopardy. \textit{See Permafrost Task Force, U.S. Arctic Research Comm’n, Climate Change, Permafrost, and Impacts on Civil Infrastructure} 8 (2003), \textit{available at} www.arctic.gov/files/PermafrostForWeb.pdf. Many are becoming uninhabitable. \textit{See}, e.g., William Yardley, \textit{Victim of Climate Change, a Town Seeks a Lifeline}, N.Y. Times, May 27, 2007, § 1, at 1, \textit{available at} http://www.nytimes.com/2007/05/27/us/
threatened—not only by loss of the ice itself, but also by the environmental and cultural consequences that flow from the loss of ice—thawing permafrost, changing conditions, and threatened animal populations. These changes from global warming create crisis conditions for Arctic peoples. As a result, the Arctic Climate Impact Assessment concluded that "climate change could have potentially devastating impacts on the Arctic and on the peoples who live there, particularly those indigenous peoples whose livelihoods and cultures are inextricably linked to the Arctic environment and its wildlife."50

Global warming also creates more insidious threats to indigenous cultures, in the form of an influx of people attracted by newly accessible Arctic resources. The United States Geological Survey estimates that up to one quarter of the world’s undiscovered oil and gas lies in the Arctic.51 Retreating sea ice makes extracting those resources more feasible and attractive. It also makes navigation of the Northwest Passage a real possibility, with the attendant increased risks of oil spills.52

Climate change also jeopardizes the survival of many living polar resources including: fish, marine mammals and other wildlife, and Arctic flora.53 Climate change not only threatens these animals by destabilizing the Arctic ecosystems on which they depend, but also threatens them indirectly by facilitating increased access by new actors

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51. U.S. GEOLOGICAL SURVEY, supra note 8 (estimating the undiscovered reserves at ninety billion barrels of oil, 1,669 trillion cubic feet of natural gas, and forty-four billion barrels of natural gas liquids).

52. See ACIA ASSESSMENT, supra note 36, at 82–84.

53. Id. at 58–65, 70–73 (describing effects on, inter alia, polar bear, seals, walruses, and caribou). This framing is not intended to suggest that the threatened Arctic species have value only when viewed through the lens of human exploitation.
seeking to exploit them for profit. The effect on the Arctic’s indigenous peoples, who depend on these animals for food and for cultural survival, will be devastating.

B. Sovereignty and People

The unforgiving nature of the Arctic’s terrain had historically limited the degree of outside interest and activity in the Arctic. Global warming is changing that. Disputes are already erupting over largely undefined boundaries and unexploited resources. So we have questions. How will governments and international agencies confront the massive challenges posed by global warming? Will they ensure that indigenous Arctic peoples have a seat at the table as decisions are made about new patterns of development and settlement? Will indigenous cultural concerns be given due consideration in any plans for resettlement as global warming renders existing Arctic communities unsafe? Will governments help traditional cultures adapt to the new economic systems and social pressures brought on by the rush to exploit Arctic resources? Who will determine the environmental values and protections for Arctic ecosystems? To begin to answer these questions, we must turn to the elaborate network of international law that details the rights and responsibilities Arctic states bear, not only vis-à-

54. Id. at 92–96.
55. See Adaptation Workshop, September 20–21, Arctic Peoples, Oct. 16, 2008, http://www.arcticpeoples.org/ (last visited Mar. 9, 2009). Bill Erasmus, International Chairperson of the Arctic Athabaskan Council described the gravity of the situation at a September 2008 Arctic Council meeting on adaptation: “Copenhagen-Representatives of Indigenous Peoples from across the Arctic are calling on governments to work with them in tackling the ‘catastrophic’ effects of Climate Change.” Bill Erasmus, representing the Arctic Athabaskan Council in Canada, called the situation a “crisis” at a meeting of circumpolar Arctic indigenous peoples over the weekend. Erasmus further explained,

The permafrost is melting, homes are destroyed, rivers are rising, lakes are disappearing, migratory patterns are changing, [and] seasons are not the same anymore.... Reindeer herders face the loss of herds, hunters face starvation, trappers are dying because they cannot read ice conditions anymore. People are losing their homes and their lives. Entire communities of [i]ndigenous [p]eoples are at risk across the Arctic. I think use of the word “crisis” is appropriate.

Id.

56. Of course, the Arctic’s indigenous peoples consider the existing borders to be “artificial boundaries.” See, e.g., Aqqaluk Lyngé, President, Inuit Circumpolar Conference, Address to Smithsonian Institution’s Greenland Week (May 21, 2005) (transcript available at http://www.channel6.dk/icc/Greenlanders_Are_Inuit_FINAL.doc). They are likely to feel the same way about any new boundaries drawn under the Law of the Sea Convention. Id.

57. In addition to the citizens of Newtok and Shishmaref, see supra note 48, other Arctic communities are also threatened by these changes. See ACIA ASSESSMENT, supra note 36, at 79–81. Indeed, at least one nuclear reactor may be in jeopardy, as well as significant Arctic populations. See SCIENTIFIC REPORT, supra note 50, at 908–27.
vis each other in the Arctic, but also the Arctic's indigenous peoples. The exploration begins with the very idea of sovereignty in the Arctic.

Sovereignty claims in the Arctic relate to both the terrestrial and submerged lands. Both sets of claims raised unique questions for international law, which had traditionally recognized sovereignty based on actual occupation under a claim of sovereign control.\textsuperscript{58} Most of the existing assertions of sovereignty over the terrestrial lands of the Arctic would not meet this test. Among the most desolate and sparsely populated regions in the world, the United Nations Environmental Programme estimates a total global Arctic population of about four million,\textsuperscript{59} spread across more than 16,700 sq. km of land.\textsuperscript{60} Almost half of that population lives in the Russian Federation.\textsuperscript{61} With the exception of Greenland and Northern Canada, indigenous peoples are in the overall minority in the Arctic, though they typically form majorities in many local communities.\textsuperscript{62}

Claims over terrestrial lands of the Arctic are a product of the same messy system that "governed" such claims around the world. These claims ultimately rest on the same principle of \textit{terra nullius} used to deprive indigenous peoples of their traditional land rights, but because the Arctic was such an inhospitable place, many of these sovereignty claims rest on symbolic rather than actual occupation. Thus, the self-proclaimed sovereigns often rested their sovereignty claims on far more tenuous manifestations of a permanent presence in this territory, than that of the indigenous groups they purported to supplant. Thus we see oddities like Ellesmere Island which was, for a time, inhabited wholly by policemen,\textsuperscript{63} or Shackleton claiming symbolic pos-

\textsuperscript{58} Seokwoo Lee, \textit{Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal}, 16 Conn. J. Int'l L. 1, 2–8 (2000) (providing an overview).


\textsuperscript{60} The Arctic: Environment, People, Policy 467 (Mark Nuttall & Terry V. Callaghan eds., Hardwood Academic Publishers 2000) (providing detailed, albeit dated population breakdowns for various Arctic countries and regions).

\textsuperscript{61} See Population distribution, supra note 59.

\textsuperscript{62} If the Russian Federation, where the overwhelming majority of Arctic residents are not indigenous, and Iceland, which has no indigenous population, are excluded, the numbers are much closer between indigenous and non-indigenous inhabitants.

session of the Polar Plateau by hoisting flags and burying a brass cylinder containing stamps and documents.64

Regardless of convolutions intended to bolster sovereignty claims, the land, at all times, remained used and occupied by its original inhabitants—the Inuit, Aleuts, Sami, and the other peoples of the north. However, as indigenous peoples had experienced elsewhere, their claims to their land were shunted aside as states jostled for control over Arctic territories. For example, when the United States "purchased" the territory of Alaska from Russia in 1867, it expressly upheld the pre-existing Russian grants of land to colonists as part of the purchase, but took no position on the question of "native rights."65 Eventually, an Act of Congress confirmed some land rights for the Inuit people, but only for the lands they actually occupied.66 In direct contradiction to how the Inuit actually used their lands, the Act accorded the Inuit no rights to their traditional lands apart from those occupied in the Western sense of the word.

The United States was not alone in dismissing indigenous rights in the Arctic. Denmark refused to acknowledge any legal effect of traditional indigenous communal land ownership and therefore considered the entirety of Greenland to be res nullius.67 Canada has a similarly troubled history with recognizing that the traditional land use patterns of its First Nations gave rise to property rights.68 Now, of course, it is those very same traditional uses of Arctic lands that undergird expansive state claims of sovereignty in the region.69 The irony of this situation passes largely unremarked.

67. Alexa Woodward, The Search for a Legal Identity in Greenland: To Be or Not To Be Indigenous (unpublished manuscript, on file with author). Although most of the land in Greenland was not suitable for agriculture, this policy did have significant ramifications for exploitation of mineral resources. See Robert Peterson, Colonialism as Seen From a Formerly Colonized Area, 32 Arctic Anthropology 118, 118–26 (1995), available at http://arcticcircle.uconn.edu/HistoryCulture/petersen.html.
69. For example, in what has become known as the "use it or lose it" speech, Canadian Prime Minister Stephen Harper called the Arctic "central to [their] identity as a northern nation." Press Release, Prime Minister Stephen Harper, Prime Minister Stephen Harper An-
While state claims over Arctic terrestrial land may bend traditional criteria for sovereignty, the submerged lands of the continental shelf poses an even more fundamental dilemma—if sovereignty rests on occupation, either actual or symbolic, how can states assert sovereignty at all. These lands are inaccessible for most of the traditional signifiers of sovereignty—nobody could live there, or indeed even visit. Thus, in applying concepts of sovereignty to the continental shelf on the basis of contacts far less than those found inadequate to establish either sovereignty or ownership in Johnson v. Mc'Intosh and its progeny, international law demonstrates just how elastic the concept of sovereignty can be in the hands of determined and powerful interests.\(^7\) It was, after all, the novelty of the action and the message it conveyed about national intent, rather than any attendant legal consequences, which made the Russian decision to plant a flag on the seabed into international news.

The legal regime for the submerged lands of the continental shelf is of relatively recent vintage. Buried under hundreds of feet of water, and therefore inaccessible, the very idea of "sovereignty" over most of the continental shelf was for centuries a wholly academic idea—of interest, perhaps, but of little practical importance. Sonar and other technologies developed at the end of World War II changed all that, bringing the submerged lands of the continental shelf within reach of human exploration. Subsequently, oil deposits were discovered, and suddenly sovereign boundaries on the continental shelf were of great national consequence.

In 1945, President Truman issued a Presidential Proclamation asserting U.S. sovereignty over the continental shelf surrounding the United States.\(^7\) Other nations soon followed suit.\(^7\) Conflicting claims proliferated. Academic musings about the nature of sover-

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\(^7\) See Peter Manis, Sovereignty, Self-Determination and Environment Based Cultures: The Emerging Voice of Indigenous Peoples in International Law, 23 Wis. Int'l L. J. 553, 559 (2005) (characterizing sovereignty as a highly elastic concept).

\(^7\) The population of Nunavut, Canada's northernmost province, is 85% Inuit. Jack Hicks & Graham White, Nunavut: Inuit Self-Determination Through a Land Claim and Public Government, in THE PROVINCIAL STATE IN CANADA: POLITICS IN THE PROVINCES AND TERRITORIES 389 (Keith Brownsey & Michael Howlett eds., 2001). Similarly, Denmark's Arctic claims rest entirely on its control over Greenland.

eighty ran headlong into realpolitik. There were valuable resources on the continental shelf, and states were eager to assert the sovereign right to exploit them. The legal constructs that had kept the oceans as *mare liberum* for centuries would not answer for oil extraction. Indeed, the 1969 North Sea Continental Shelf Cases\(^7\) proceeded on the assumption that claims by the contiguous state to sovereignty over the continental shelf were valid even without “occupation, effective or notional, or any express proclamation.”\(^4\) The Law of the Sea Convention (“UNCLOS”) codified this jurisprudential assumption in Article 77:

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.\(^5\)

Of course, coastal geography meant that many states would have overlapping or conflicting claims. And, indeed, many such disputes had already been resolved by the time UNCLOS came into force in 1994.\(^6\) The same is true in the Arctic. For the historically accessible portions of the Arctic, many conflicting continental shelf claims have already been resolved.\(^7\) However, with climate change making more of the Arctic accessible, states are looking to extend their existing claims or to assert entirely new claims to the continental shelf and its resources.

III. A BRIEF OVERVIEW OF THE RELEVANT LAW OF THE SEA PROVISIONS

The sovereignty claims asserted over the submerged lands of the Arctic Ocean’s Continental shelf can be managed in a relatively or-


\(^4\) Id. at 172 (Tanaka, J., dissenting) (quoting Geneva Convention art. 2(3), Apr. 29, 1958, 499 U.N.T.S. 311).


\(^6\) For a discussion of the various ways that these boundaries were resolved, including direct negotiation, mediation, and ICJ decision, see Robin R. Churchill, *The Role of the ICJ in Maritime Boundary Delimitation*, in OCEAN MANAGEMENT IN THE 21ST CENTURY: INSTITUTIONAL FRAMEWORKS AND RESPONSES 125, 125–42 (A.G. Oude Elferink & D. R. Rothwell eds., 2004).

\(^7\) See Map of Established Maritime Boundaries in the Arctic Region, http://www.icefloe.net/images/Arctic_Region.pdf (last visited Mar. 6, 2009) (compiling a list of the already delineated maritime boundaries between various states with Arctic pretensions).
derly fashion because they all arose around the same time, are based on the same legal principles, and raise the same legal questions. UNCLOS Article 76 creates a regime for resolving conflicting sovereignty claims to submerged Arctic lands. This provision defines the outer limits of a country’s shelf as the “natural” extension of the land mass either to the outer edge of the continental margin or to 320 kilometers from the coast. Annex II gives states up to ten years after their ratification of the treaty to map out their claims to the Arctic seabed and continental shelf. These claims are then submitted to the Commission on the Limits of the Continental Shelf which is tasked with approving and reconciling the claims. Annex II of UNCLOS lays out the composition and functions of this Continental Shelf Commission.

As parties to UNCLOS, the Arctic coastal states of Russia, Canada, Denmark and Norway have either already submitted, or are preparing to submit, proposed outer limits for their continental shelves under this part of the UNCLOS treaty. If and when the United States becomes a party to the UNCLOS treaty, it will presumably submit a similar set of claims. Because UNCLOS contemplates

78. UNCLOS, supra note 75.
79. Id.
80. UNCLOS, supra note 75, Annex II, art. 4. UNCLOS Article 4 states:

Where a coastal State intends to establish, in accordance with article 76, the outer limits of its continental shelf beyond 200 nautical miles, it shall submit particulars of such limits to the Commission along with supporting scientific and technical data as soon as possible but in any case within 10 years of the entry into force of this Convention for that State.

Id. It is this ability to use the UNCLOS Treaty to solidify claims to off-shore oil resources on the continental shelf that finally attracted the attention of the Bush Administration. For example, in a November 3, 2008 speech given at the Berkeley School of Law, John Bellinger, Legal Advisor to the State Department opined:

[UNCLOS] offers a coastal State the opportunity to maximize international recognition and legal certainty with respect to the continental shelf beyond 200 nautical miles off-shore. This is an especially valuable feature of the Convention right now, as it would maximize legal certainty regarding U.S. rights to energy resources in vast offshore areas, including in areas that are likely to extend at least 600 miles north of Alaska.


81. The Commission is made up of twenty-one experts drawn based on equal geographic representation from states that have ratified the UNCLOS. UNCLOS, supra note 75, Annex II, art. 76. Because the United States has not ratified UNCLOS, it has no representation on the Commission.

82. UNCLOS, supra note 75, Annex II.

expansive coastal state jurisdiction, these submissions will ultimately result in international recognition of Arctic state sovereignty over significant portions of the Arctic seabed, with the attendant sovereign right to control exploitation of any mineral resources therein.

These provisions of UNCLOS, along with the International Maritime Organization ("IMO") and the Arctic Council, form the core of the regime that governs the Arctic. Under UNCLOS, states have both the sovereign right to exploit mineral resources, and the express duty to protect and preserve the marine environment. Read in the context of the Arctic, these UNCLOS provisions are generally viewed as giving the five nations that border the Arctic Ocean primary responsibility for managing activities in the region, including both development and environmental protection. An additional provision, Article 234, which is particularly relevant to the Arctic, allows a coastal state to impose special environmental protection regimes over ice-covered waters, an issue of particular relevance for the Northwest Passage.

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84. UNCLOS originally proposed that the mineral resources of the deep seabed be viewed as the "common heritage" of humanity, with proceeds from their exploitation being distributed on an equitable basis. UNCLOS, supra note 75, art. 136. However, unwavering United States opposition and pressure has eroded this vision. See Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1994, 1836 U.N.T.S. 41.

85. Article 81 of UNCLOS provides: "The coastal State shall have the exclusive right to authorize and regulate drilling on the continental shelf for all purposes." UNCLOS, supra note 75, art. 81.

86. Information about the International Maritime Organization, a UN specialized agency, can be found at http://www.imo.org/.

87. Information about the Arctic Council can be found at http://www.arctic-council.org/. The member states of the Arctic Council are Canada, the United States, Russia, Finland, Iceland, Sweden, and Norway. In addition, six indigenous groups have permanent participant status.


89. UNCLOS, supra note 75, art. 193.

90. Id. art. 192.

91. Directed largely at appeasing Canadian worries about the Northwest Passage, Article 234 gives coastal states the authority to impose laws and regulations "for the prevention, reduction and control of marine pollution in ice-covered areas within the exclusive economic zone." Id. art 234.
In addition to these UNCLOS provisions, both the Rio Declaration,\(^\text{92}\) and the Convention on Biological Diversity\(^\text{93}\) emphasize the principle of sovereign control over resources. Thus, that the Law of the Sea mediated discussion about sovereignty allocation between the Arctic claimants is of critical importance to international environmental law.

As always, there is a central relationship between natural resources, trade, and governance. There are questions about how these environmental agreements should be coordinated with UNCLOS, and whether UNCLOS creates a regime capable of safely managing the exploitation of Arctic resources. One issue in particular is whether Article 192's recognition of sovereignty, when read in light of Article 193's duty to protect the environment, gives coastal states sufficient tools and incentive to protect the Arctic's fragile environment. In response, the five Arctic states issued the Ilulissat Declaration at the conclusion of the 2008 Arctic Ocean Conference. The Declaration proclaimed that:

The law of the sea provides for important rights and obligations concerning the delineation of the outer limits of the continental shelf, the protection of the marine environment, including ice-covered areas, freedom of navigation, marine scientific research, and other uses of the sea.\(^\text{94}\)

The Declaration continued that the five Arctic states "remain committed to this legal framework and to the orderly settlement of any possible overlapping claims."\(^\text{95}\) This language was intended to underscore the fact that although newly accessible, the Arctic was al-

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Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.


\(^\text{95}\) The Ilulissat Declaration, supra note 94.
ready governed by an extensive legal regime, and no new international agreements were necessary.

Given the resources that have been devoted to developing a comprehensive international legal system to define sovereign rights to Arctic resources, it is notable that the UNCLOS does not even mention indigenous peoples. This omission strikes a jarring note of discord with recent developments in international law affirming indigenous rights to their territories and the resources contained therein. These developments affirm that the fundamental right to own property, recognized in the Universal Declaration of Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, Protocol 1 of the European Convention on Human Rights and the American Declaration of the Rights and Duties of Man, extends to indigenous claims to traditional territories.

IV. Application of International Human Rights Law to the Arctic

As Canada’s Minister of Foreign Affairs, Peter MacKay recently pointed out, “this isn’t 15th century.” MacKay’s statement was in response to Russia’s decision to plant a flag on the Arctic seabed, and was intended to debunk the notion that any sovereignty claims flowed


98. International Covenant on Civil and Political Rights, art. 1, Dec. 16, 1966, 999 U.N.T.S. 171, available at http://www.ohchr.org/english/law/pdf/ccpr.pdf (declaring that all peoples have the right to fully and freely utilize their natural wealth and resources as they deem appropriate regardless of any international economic agreements). In Article 27, the ICCPR recognizes the group right of minority populations to enjoy their own culture. The General Comments for Article 27 make it clear that the drafters contemplated that groups might have lifestyles that depend on a territory and the use of natural resources. Id. art. 27.


100. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, art. XXIII, E/A/Ser.L/V/1.4Rev (1948) (affirming the right of every person to “own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.”).

101. Russian Subs, supra note 1.
from Russia’s dramatic act. MacKay was, of course, technically correct—six centuries separate the 21st century from the 15th century. Unfortunately, some central portions of the notion of sovereignty embodied by both the UNCLOS and ICJ decisions, a notion that is also embodied in the Convention on Biological Diversity (“CBD”), remain unchanged from its 15th century roots.

On May 4, 1493, two months after Columbus’s historic return to Europe, Pope Alexander VI issued his Papal Bull Caætera. This singular document purported to allocate possession of lands “not inhabited by Christians” between Portugal and Spain. There was, however, a fundamental problem with the Pope’s grandiose gesture—the lands in question were already inhabited.

To finesse this inconvenient fact, European colonizers developed two interrelated legal fictions, the Doctrine of Discovery and the principle of terra nullius. In short, these doctrines held that the kinds of land uses by so-called “native peoples” did not amount to ownership and therefore did not create property rights that the Europeans need respect. This principle allowed colonizers to ex-

102. Somewhat ironically, Canada has also engaged in some flag-planting posturing of its own in an attempt to reinforce its sovereignty claims. In July 2008, Canadian soldiers planted the Canadian flag over Hans Island, a tiny sliver of barren rock located between the Canadian territory of Ellesmere Island and the Danish territory of Greenland. Canada’s Defense Minister Bill Graham visited the island and proclaimed that it would “always remain Canadian.” Denmark registered an official protest because it has also planted its flag on Hans Island’s inhospitable ground. The diplomatic spat marks another chapter in the ongoing skirmish contesting ownership of this sliver of land in the middle of the Arctic Nares Straits. For both nations, Hans Island is a test case, and we can expect such territorial conflicts to become a lot more common north of the Arctic Circle. See generally Christopher Stevenson, Hans Off!: The Struggle for Hans Island and the Potential Ramifications for International Border Dispute Resolution, 30 B.C. INT’L & COMP. L. REV. 263 (2007).


104. Id. The Pope purported to grant the royal families of Spain “all and singular aforesaid countries and islands . . . hitherto discovered . . . and to be discovered . . . together with all their dominions, cities, camps, places, villages, and all rights, jurisdictions, and appurtenances of the same.” Id. Read in light of earlier Papal issuances, this Bull granted Spain the Western Hemisphere, while awarding the Eastern Hemisphere to Portugal. The Pope reached this result by drawing an imaginary line from the Arctic Pole to the Antarctic Pole about one hundred leagues to the west of the Cape Verde Islands.

105. In the United States, the definitive statement of this point is Johnson v. McIntosh, where Justice Marshall characterized the Piankeshaw claims to their land as “mere occupancy” rather than ownership. Johnson 21 U.S. (8 Wheat.) at 590 (1823).


107. The debate ran much deeper than just rights to land. For example, the Valladolid Debate of 1550 between Las Casas and Sepulveda wrestled with the very humanity of the occupants
ploit lands in the "New World." Indigenous peoples were thereby dispossessed and stripped of the legal protections for their lands that their non-indigenous neighbors routinely expected in their property. We are still dealing with the ramifications of these doctrines.  

That said, international law regarding sovereignty and indigenous peoples has evolved significantly since the 15th century, and in ways that may have a dramatic impact on questions of control over Arctic resources. First and foremost, international law is not only about states anymore. Individuals and groups can be actors under international law, with rights that states must respect, and powers that can be exercised in international arenas. Resolving the sovereignty question vis-à-vis the state claimants does not speak to the international human rights of individuals and groups, rights that treaties and customary laws require states to respect. While domestic law is obviously relevant on this point, international human rights law may be an important platform for indigenous groups seeking access to, or control of, Arctic resources.

Second, the very idea of sovereignty is far more nuanced today than it was in the 15th century. A growing recognition of aboriginal rights, both in international agreements and opinio juris, has forced a rethinking of what sovereignty means. This rethinking might have important ramifications for the Arctic, particularly for those mineral rights everyone is chasing and also for biodiversity. It may also lay the groundwork for claims based on a right to ice and to cultural usage of that ice, and may also give support to demands for environmental protection in the face of a shrinking, warming planet.  

of newly-discovered lands. See generally Lewis Hanke, The Spanish Struggle for Justice in the Conquest of America 114–17 (2002) (describing, in the context of the legitimacy of waging war, whether the occupants of the "New World" were endowed with souls and the legitimacy of waging war against them). That said, a central question in the Valladolid Debate was whether the Indians had property rights that Spanish colonists had to respect. While Sepulveda argued that the natives of the New World were not human, and therefore possessed no rights, de Las Casas made the case that they were endowed with the same natural rights that all humans possess. Id.  

108. See Stuart Banner, Possessing the Pacific: Land, Settlers and Indigenous People from Australia to Alaska (2007) (providing a more thorough exploration of how the early decisions about terra nullius still shape the discourse on indigenous rights).  

In short, international human rights law and international environmental law tell states how they must implement the sovereignty over Arctic resources assigned to them by UNCLOS Articles 76 and 78. Consequently, this body of law offers Arctic peoples a seat at the table when decisions are made.

V. International Law Developments

Recent groundbreaking developments in international law may reshape how we think about indigenous rights in the Arctic. A series of decisions handed down by international tribunals have recognized indigenous claims to traditional territories under international law. At the same time, various state constitutional courts have recognized indigenous claims under the common law. Sometimes these domestic decisions rely explicitly on international law and the growing international consensus about indigenous rights. Even when these domestic courts do not directly reference international law, they are clearly participating in an ongoing multi-level transnational dialogue. The theory of indigenous rights that is emerging from this dialogue differs tremendously from the Doctrine of Discovery articulated in the 15th century or from terra nullius.


A. International Jurisprudence

Questions of indigenous rights under international law have increasingly found their way to international tribunals. The International Court of Justice led the way with its Advisory Opinion on Western Sahara, in which it rejected the doctrine of terra nullius.113 The Inter-American Court of Human Rights has followed suit, deciding a series of landmark decisions that articulate how international law views indigenous rights to land and resources.

The most important of these decisions, Mayagna (Sumo) Awas Tingni Cnty v. Nicaragua, was decided in 2001.114 Brought under Article 21 of the American Convention on Human Rights,115 this case asserted that Nicaragua violated the Awas Tingni's right to property by granting timber concessions in the Awas Tingni's traditional territories.116 The suit alleged that Nicaragua's granting of timber concessions violated Article 21 of the American Convention.117 In finding for the Awas Tingni, the Inter-American Court relied on an "evolutionary interpretation" of human rights to construe Article 21 as encompassing the rights of indigenous communities that hold their property communally.118 The court stated, "the close ties of indigenous people with their land must be recognized and understood at the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival."119 In reaching this result, the court made it clear that customary practices and also possession suffice for indigenous communities to establish ownership that states must recognize.120

Subsequent decisions of the Inter-American Court have affirmed and further developed these points. In 2002, the Inter-American Commission on Human Rights affirmed that states must respect tradi-

114. Awas Tingni, supra note 110.
116. Awas Tingni, supra note 110, ¶ 3.
117. Article 21 declares that "Everyone has the right to the use and enjoyment of his [sic] property. . . . No one shall be deprived of his property except upon payment of just compensation." American Convention on Human Rights, supra note 115, art. 21.
118. Awas Tingni, supra note 110, ¶ 148.
119. Id. ¶ 149.
tional indigenous land claims in a case brought by Carrie and Mary Dann.\textsuperscript{121} As members of the Western Shoshone Tribe, the Dann sisters had for years tried to assert traditional land rights against the United States.\textsuperscript{122} After domestic avenues of relief were closed to them, the Dann sisters petitioned the Inter-American Commission alleging that their right to property was violated.\textsuperscript{123} In a far-reaching decision, the Commission concluded that the United States had failed "to ensure the Dann’s right to property under conditions of equality" through the process by which it appropriated Western Shoshone ancestral lands.\textsuperscript{124} Ultimately the Dann sisters appealed to the United Nations Committee on the Elimination of Racial Discrimination ("CERD") to persuade the United States to recognize and abide by the Commission’s decision and to cease violating their indigenous land rights.\textsuperscript{125} Using extremely direct language rarely found in diplomatic writings, CERD urged the United States to "freeze," "desist" and "stop" threatening or imminent actions against the Western Shoshone People.\textsuperscript{126} By this action, CERD affirmed the Inter-American Commission’s interpretation of international law concerning indigenous peoples.

Most recently, in a case involving Belize’s Maya Communities,\textsuperscript{127} the Inter-American Commission used the Awas Tingni rationale to find that the Belize government violated the complaining Mayan communities’ rights when it licensed logging and mineral extraction on


\textsuperscript{123} Because the United States is not a party to the American Convention on Human Rights, the plaintiffs alleged a violation of Article 23 of the American Declaration of the Rights and Duties of Man. Dann Case, supra note 121, ¶ 2. Although the Declaration itself is not an enforceable legal document, the Commission views it as the articulation of the duties states accept when they become members of the Organization of American States. See American Declaration of the Rights and Duties of Man, supra note 100. The Universal Declaration of Human Rights occupies a similar status with regard to membership in the United Nations. See Universal Declaration of Human Rights, supra note 96.

\textsuperscript{124} Dann Case, supra note 121, at 172.


\textsuperscript{126} Id. ¶ 10.

\textsuperscript{127} Awas Tingni, supra note 110, ¶¶ 134–44.
traditional Mayan lands. In reaching this conclusion, the Commission interpreted both Belizean domestic law and Belize's obligations under international law. The Commission found that the traditional land rights asserted by the petitioners had "autonomous meaning and foundation under international law." As a consequence, the Commission concluded that the asserted property rights were "not dependent upon particular interpretations of domestic judicial decisions concerning the possible existence of aboriginal rights under common law." In this decision, the Commission articulated the clearest vision yet of a free-standing international obligation toward indigenous peoples in making resource management decisions that affect their traditional land rights. As set out in this opinion, this international legal obligation applies to all states, regardless of domestic law.

These cases set out clear state obligations vis-à-vis recognizing indigenous claims to land, and respecting those claims in making resource management decisions. This jurisprudence from the Inter-American Court and Commission has clear ramifications for Arctic peoples as they struggle to have their right to participate in resource management decisions.

B. Declaration of Rights of Indigenous Peoples


Several key provisions of the 2007 Indigenous Rights Declaration speak directly to resource use and allocation questions that will be raised as global warming makes the Arctic more accessible to the rest of the world. Article 3 of the Declaration explicitly affirms that the international human right of self-determination extends to indigenous

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128. Id. ¶ 131.
129. Id.
130. The vote was thirty in favor, two opposed (Canada and the Russian Federation) with twelve abstentions. See H.R.C. Res. 2006/2, U.N. Doc. A/HRC/RES/1/2 (June 29, 2006).
peoples. At the same time, Article 23 explicitly affirms that the international human right to development also extends to indigenous groups. Finally, Article 32 underscores this right to control resource management decisions by calling on states to obtain prior informed consent from indigenous groups before enacting new laws or administrative measures.

Because these provisions of the Declaration make it clear that two international human rights at the center of the international environmental law and development discourse—self-determination and development—rest with indigenous peoples for their territories, indigenous peoples have a right to control the exercise of those rights within their territories. In addition, Article 10 of the Declaration prohibits forced removals of indigenous peoples from their traditional territories, and Article 26 recognizes that indigenous people have the right to their traditional lands and resources.

Versions of some of the key provisions in the Indigenous Rights Declaration are rooted in the International Labor Organization ("ILO") Convention 169 on Indigenous and Tribal Peoples. ILO Convention 169 was the first legally-binding recognition of many indigenous rights, including: indigenous peoples’ land rights and cul-
While ILO Convention 169 did not explicitly recognize the sovereignty rights of indigenous peoples, it did to a certain extent recognize rights of self-governance. Unfortunately, although ILO Convention 169 was negotiated in 1989, and entered into force in 1991, as of 2008 it had only twenty ratifications. In what will become a familiar pattern, the United States, Canada, and Russia are not parties, but Norway and Denmark are. Despite the relatively limited participation, the Convention has become an influential benchmark for the basic rights of indigenous peoples. It is often considered to “set the tone internationally” particularly for international agencies making decisions that affect indigenous rights.

The Indigenous Rights Declaration clearly goes much further than the ILO Convention 169 in protecting indigenous rights. Reading its provisions together, the Declaration explicitly recognizes that indigenous peoples have legally protected rights, arising from their traditional use and occupancy of land, that entitle them to participate in resource management decisions on or affecting their territories. Together, these rights make a powerful frame for ensuring that indigenous interests are included in decision-making and indigenous participants are at the table when decisions are made.

The catch, of course, is that under international law, Declarations of the General Assembly are not legally binding. Nevertheless, such Declarations can be profoundly influential, as the Universal Declaration of Human Rights shows. Since the United Nations characterizes the Indigenous Rights Declaration as “represent[ing] the dynamic development of international legal norms and reflect[ing] the commitment of the UN’s member states to move in certain directions,” the Declaration is likely to be very influential in the ongoing international dialogue on this point.

Nevertheless, the status of this Declaration remains ambiguous. Like the ILO Convention 169, three of the key Arctic states—the United States, Russia, and Canada—are not signatories to the Declaration, but Denmark and Norway are. The General Assembly does

141. Id. arts. 5, 7, 27.
142. Id. arts. 8–9, 17.
144. See, e.g., ANAYA, supra 14, at 47–58.
146. The vote was 143 in favor, four against, with eleven abstentions. The Arctic states had a wide range of positions. Canada and the United States voted against the Declaration (along with
not have the power to bind states by issuing a Declaration. There is, of

course, the argument that the Declaration has legal force because it
codifies customary international law on indigenous rights.147 This
claim has some force in light of the jurisprudence coming from the
Inter-American Court of Human Rights and the domestic jurispru-
dence discussed below.148 But, Canada has already stated that it does
not view the Declaration as customary international law149 and Aus-
tralia similarly signaled that the Declaration is not legally enforce-
able.150 The United States will likely follow suit.

Nevertheless, this diplomatic initiative, coupled with interna-
tional jurisprudential developments, is surely indicative of how inter-
national bodies view international law. Even if not technically
enforceable, these developments are an important representation—a
taking of the international temperature—that may profoundly influ-
ence states as they begin to consider what sovereignty over newly-
accessible Arctic resources should look like.

VI. DOMESTIC LEGAL DEVELOPMENTS

The Indigenous Rights Declaration and the growing body of in-
ternational jurisprudence are accompanied by a worldwide shift in do-
mestic legal jurisprudence on indigenous rights. As courts around the
world grapple with the lasting consequences of colonialism, they are

Australia and New Zealand); Norway and Denmark were among the Declaration's co-sponsors,
and Russia abstained. Clive Tesar, Arctic States Split on UN Declaration on Rights of Indigenous
147. Under international law, custom is a source of binding law. See Statute of the Interna-
tional Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055. The vigorous scholarly debate
about customary international law is beyond the scope of this essay.
148. See Awas Tingni, supra note 110; Dann Case, supra note 121; Toledo District, supra
note 17; see also Case of the Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172
(although this decision involved a minority tribal population that was not indigenous, the reason-
ing of this case tracks and expands the reasoning the court has previously articulated in the
context of indigenous peoples).
updir-eng.asp (last visited Mar. 9, 2009). See also, Press Release, General Assembly, General
Assembly Adopts Declaration on Rights of Indigenous Peoples: Major Step Forward Toward
News/Press/docs/2007/ga10612.doc.htm (comments of Canadian Ambassador John McNee
[hereinafter Major Step] (stating that "[t]he [Canadian] Government understood the Declara-
tion was not legally binding and had no legal effect in Canada.").
150. Major Step, supra note 149. (comments of Australian Representative Robert Hill, as-
serting that "it was the clear intention of all States that [the Declaration] be an aspirational
Declaration with political and moral force, but not legal force.").
rethinking the historic legal assumption of *terra nullius* that too often governed treatment of indigenous peoples. In the Australian *Mabo* case has been the most influential. In *Mabo*, the Australian High Court explicitly repudiated the doctrine of *terra nullius* and instead ruled that Australia’s aborigines had rights that survived British colonization.

The *Mabo* decision sparked a transnational jurisprudential dialogue about the relationship between pre-existing indigenous property rights and the state. Courts in Malaysia, Canada, and Belize discussed the *Mabo* court ruling as they grappled with how to address indigenous claims under their respective legal systems. These cases, individually and collectively, represent a thorough repudiation of the doctrine of *terra nullius* in favor of recognizing indigenous claims to communal property and the attendant mineral rights.

The 2007 *Cal* decision from the Belize Supreme Court is particularly noteworthy. Brought by a Mayan group demanding that Belizean law recognize their traditional land rights, the court’s decision squarely addresses the question of the interplay between domestic, international, and foreign law on this question. The *Cal* court explicitly drew on the transnational dialogue, international jurisprudence, and the Indigenous Rights Declaration as resources to help it interpret the Mayan claim under Belizean law. Citing *Mabo*, *Delgamuukw*, *Awas Tingni*, the *Dann Case*, and the Declaration, *inter alia*, Chief Justice Conteh explicitly recognized an international legal consensus about indigenous rights.

Although his ruling rested primarily on his interpretation of the Belizean Constitution, Justice Conteh explicitly used both Belize’s international treaty obligations and customary international law to interpret the scope of the rights of indigenous peoples to their lands and

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153. *Id.* at 42, 76.

154. *Sagong Bin Tasi & Ors*, 2 M.L.J. at 615 (citing *Mabo* as authority for the proposition that *terra nullius* is contrary to both international law and common law).


156. *Cal* v. Attorney General, Claim No. 171 of 2007 ¶¶ 77, 81, 92.
resources.157 After discussing how Belize's membership in various treaties obligated the government to respect indigenous land rights, he went on to say, "Treaty obligations aside, it is my considered view that both customary international law and general principles of international law would require that Belize respect the rights of its indigenous people to their lands and resources."158

Thus, the Cal decision marks a significant step forward in recognizing that, even within domestic legal systems, indigenous claims to property and other rights must be shaped by the international dialogue on these matters.

Together these developments represent the emergence of a growing consensus about what is legitimate vis-à-vis indigenous peoples and their rights to lands and resources. The contours of this consensus are still emerging but it represents a real opportunity to do things differently.

Rather than an Arctic race—a no-holds-barred rush for wealth and resources that destabilizes the region and enriches stakeholders outside the Arctic at the expense of its indigenous peoples—we have the possibility of stable and inclusive governance that allows responsible development while preserving Arctic ecosystems and cultures. The robust international and transnational law conversation about human rights and indigenous peoples suggests that this alternative future is at least possible.

VII. Conclusion

It is clear that the Arctic is "in the midst of a transformation we do not understand."159 We are at a crisis point—a point of change. Nevertheless, the underlying issues of justice and equitable access to resources are familiar—they are the same questions that have plagued the world since the 15th century.

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157. Id. ¶ 126. Paragraph 129 states, Belize's international obligation towards indigenous peoples, therefore weighed heavily with me in this case in interpreting the fundamental human rights provisions of the Constitution agitated by the cluster of issues raised, particularly, the rights to property, life, security of the person, the protection of the law and the right not to be discriminated against.

Id.

158. Id. ¶ 127.

While the questions may be the same, the answers to those questions have changed profoundly over time. From an embrace of *terra nullius*, international law has moved toward a recognition of indigenous rights that includes a claim to resources on their traditional lands and to consultation before decisions are made. This transformation has also accelerated over the past decade.

As a result, decisions about resources will be made in a legal environment that is worlds apart from the regime that existed before, even in the relatively recent past. Asserting sovereignty in the Arctic cannot just be a question for the United Nations Convention on the Law of the Sea. International recognition of national sovereignty over those coveted Arctic mineral resources is intimately entwined with a concomitant recognition of indigenous self-determination, the principles of advanced informed consent, and an expanded consideration of the right to property and to a wholesome environment.

International human rights law gives us some tools to do this. The evolving body of law concerning indigenous rights recognizes their rights to be part of the discussion about the future of the Arctic. It creates a shared understanding of the relationship between States and First Nations, and requires at a minimum consultation, and more likely participation of First Nations in resource decisions. So, in many ways, the changes wrought by global warming have become the testing point for how and whether the international legal process for recognizing sovereignty will be informed by international human rights norms. There is more at stake than the Arctic. The answer will also tell us much about the cherished belief that international law offers a vehicle of progress toward a better world.¹⁶⁰

Thus, the developing human rights jurisprudence may translate into a better, more just, more environmentally responsible process for deciding the fate of Arctic resources. The robust international and transnational legal conversation about human rights and indigenous rights makes this alternative future possible. We can make choices that translate this body of law into actions that shape a different path for the Arctic. Two-thirds of the way through the International Polar Year, that is worth remembering.

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