

Global Environmental Law Developments

Sea-ice Melting, Collective Inuit Peoples' Rights and the Human Rights Discourse: A Critical Legal Analysis of the Nunavut Governance System

Sandrine Le Teno^{a,*} and Christine Frison^b

^a*Advanced LL.M. in Public International Law, Université Libre de Bruxelles, Belgium*

^b*FNRS Postdoctoral researcher (grant n° I.B.172.18F), UCLouvain, Belgium*

Abstract. Climate change has increasing visible effects on the environment, particularly in the Arctic, where the sea-ice melted faster in 2020 than any time before. It directly threatens the Inuit people's survival, whose livelihood is mainly based on traditional modes of subsistence (hunting, fishing and gathering). In light of the environmental crisis, this paper carries out a critical analysis of the Nunavut (Canada) legal framework, granting Inuit specific rights regarding their traditional way of life. While recognizing that this framework implements international human rights legal standards, we argue that the human right lens presents limitations in addressing climate change impacts on Inuit livelihood. By acknowledging the developments following the adoption of the United Nations Declarations on the Rights of Indigenous Peoples and on the Rights of Peasants and Other Peoples Living in Rural Areas, leading to the recognition of some collective rights to communities and people living of the land, we address the gaps of human rights – which are mainly individual – to reflect the importance of recognizing collective rights in the adaptation to the global climate change challenge. Indeed, the paper argues for the necessity to recognize the community level in the climate international governance scene.

Keywords: Human rights, Inuit, collective rights, climate change, United Nations declaration on the rights of indigenous peoples

1. Introduction

When thinking of human rights (HR), have you ever considered the idea of a right to be cold? It “is less relatable than “the right to water” for many people [...] but] as hard as it is for [them] to understand, for us Inuit, ice matters. *Ice is life.*”¹ Today, climate change melts the Arctic sea-ice, harming the ancestral Inuit livelihood. This article will answer the following question: are the current

international HR and Nunavut legal instruments suitable to protect Inuit's rights in the face of climate change? Through a doctrinal legal research, it will address governance issues arising in the Canadian territory of Nunavut, framed within this idea of a right to be cold. It will also focus on the importance of considering community level and the associated traditional knowledge in the climate governance.

The Arctic Climate Impact Assessment highlights two particular sensitivities of the Arctic to climate change.² First, local ecosystems and populations are

*Corresponding author. E-mail: letenosandrine@gmail.com.

forced to adapt more rapidly than elsewhere to new and more dangerous living conditions.³ Second, Arctic vulnerable ecosystems⁴ are threatened by current and foreseen human environmentally risky activities in the region.⁵ Overlooking the risks for Arctic peoples, heavily relying on their surroundings for subsistence,⁶ Arctic States see in these changes new economic opportunities.⁷

Northern Indigenous Peoples are the world most climate sensitive populations and require specific attention.⁸ The United Nation HR Council recognizes the interrelation and interdependence between HR and the protection of the environment.⁹ Indigenous Peoples' traditional ways of life and culture are also protected in international law,¹⁰ as confirmed by the Inter-American Court of HR. Finally, a HR to the environment is granted under the Additional Protocol to the American Convention on Human Rights¹¹ and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).¹² Adopted by the General Assembly in 2007, it is of particular importance in the Arctic context, where 15% of the Arctic population is Indigenous.¹³ Although UNDRIP's legal value is still discussed,¹⁴ some argue that it reflects customary rules of international law, i.e. it is binding for States that are not persistent objectors.¹⁵ The article will endorse this interpretation.

We argue that preservation of the environment and Inuit traditional culture, governance issues over land and natural resources,¹⁶ as well as the interests of sub-states level¹⁷ (e.g. communities) should be considered in the economic development of the region for Arctic States in order to comply with their international commitments.

Canada endorsed UNDRIP in 2010, and in Canadian Arctic, Inuit represent half of the population¹⁸ (in 2016, 64 000 self-identified as Inuit¹⁹). One of the four regions is the Nunavut, which governance system is complex and based on two legal documents: the Nunavut Agreement (the Agreement) adopted in May 1993,²⁰ currently under review for devolution over natural resources,²¹ and the Nunavut Act adopted in April 1999.²² Climate change undercuts the rights they grant, by threatening the existence and survival of their objects (e.g. Inuit traditional practices are the essence of the protected Inuit culture and the reason for their self-determination claims).²³

We hypothesize that Nunavut climate change adaptation capacities are hindered by a lack of efficiency in its implementation policies and

programs, affecting Inuit rights. For a decade, devolution negotiations over natural resources have been ongoing, illustrating Canada's will to retain decision-making power over the matter. This limited consideration for Inuit's interests is also affecting Canada's ability to adapt to climate change.

This paper will analyze the compliance of the Nunavut governance system (2), and of the Agreement (3) with UNDRIP's standards, in the context of climate change. Finally, it will determine whether the HR discourse is protecting Inuit rights in Nunavut regarding climate change (4).

This study is conducted by outsiders (Belgian researchers) and based on non-empirical elements. We analyze the regulatory instruments mobilizing the legal interpretation methods.²⁴ We will use UNDRIP as a yardstick, in line with the Special Rapporteur on the Rights of Indigenous Peoples' methodology to assess the Agreement.²⁵ Lastly, we will analyze the nature of UNDRIP's rights (i.e. individual, collective, specific) by comparing it to the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP).²⁶

2. Nunavut Complex Multilevel-Governance System: A Response to Inuit's Self-Determination in the Context of Climate Change?

Nunavut is the Inuktitut²⁷ word for "our land".²⁸ Divided into 25 communities, 85% of its population is Inuit.²⁹ The territory results from an Inuit request and is a compromise between their will and rights to have their own land, the will of the federal government to maintain sovereignty in the Arctic and the territory's economic development.³⁰ Created pursuant to the Agreement's article 4 and the Nunavut Act, the Nunavut Government is the only one arising from a land claim agreement in Canada,³¹ and is considered the most ambitious model of Indigenous governance.³² The Agreement's conformity with UNDRIP's standard of self-determination, therefore, depends on the standard's nature.

UNDRIP's article 3 engages with Indigenous Peoples' self-determination, stating that "they freely determine their political status and freely pursue their economic, social and cultural development". Article 4 further sets a right to autonomy in their

local affairs and means for financing it. Finally, article 46(1), reaffirms the respect of the UN Charter's principle of territorial integrity and political unity of sovereign states (i.e. no rights can be exercised contrary to it). Indigenous self-determination is clearly limited by states' territorial integrity, as they live in already independent states. This is reinforced by the article 4 wording and confirmed in the Advisory Opinion of the African Commission on the Human and People's Rights on UNDRIP.³³ Granting a right to internal self-determination, UNDRIP only codifies their pre-existing right,³⁴ and is not an evolution (nor a revolution) in Indigenous rights.

Inuit negotiators of the Agreement considered political issues and self-determination as part of the land settlement process, and as necessary for their autonomy.³⁵ This is especially important facing climate change, which affects their livelihood and reinforces the need for their self-determination regarding natural resources.

Negotiations designed an integrated system of decision-making, involving three levels of governance:

- *the Federal Government of Canada*. It retains extended powers over Nunavut, being responsible for the territory's administration and the Inuit population. It is also in charge of the implementation of the Agreement.³⁶ Thus, it has the final word on some decisions (e.g. mining and exploration proposals on Crown owned lands or migratory species, fisheries and national parks³⁷), thereby limiting the powers of Inuit in these fields.
- *the Government of Nunavut*.³⁸ So far, Inuit were in majority at the Legislative Assembly (the political body), the territory being *de facto* Inuit-governed.³⁹ However, its competences (over education, culture, transportation, non-migratory renewable resources, etc.) do not cover mine, oil, gas and maritime resources,⁴⁰ in spite of their implications for the Inuit.
- *the Inuit organizations* representing Inuit's interests. *Nunavut Tunngavik Incorporated* (NTI) is the most important not-for-profit organization. It is in charge of monitoring the Agreement's implementation⁴¹ (e.g. filing lawsuits when the Governments violates the Agreement⁴²). It also participates to the development of cultural and social programs

and policies in cooperation with the Nunavut Government.⁴³ Finally, it is in charge of administrating the Inuit compensation fund and is financed by land claim money and royalties from the exploitation of resources.⁴⁴ Regional Inuit organizations are also involved and are in charge of administrating the land claim's surface rights of their region.⁴⁵

Moreover, the six co-management institutions⁴⁶ (i.e. the boards: Nunavut Wildlife Management Board,⁴⁷ Nunavut Impact Review Board,⁴⁸ Nunavut Planning Commission,⁴⁹ Nunavut Water Board,⁵⁰ Surface Rights Tribunal,⁵¹ Nunavut Marine Council⁵²) have an advisory role to Governments. Although boards' decisions can be vetoed, they have quasi-decision-making in practice.⁵³ Inuit are involved in the process of decision, as they constitute the majority of the boards' members,⁵⁴ and NTI participates to the final decisions.⁵⁵

Consequently, Nunavut is a multilevel system of governance, engaging multiple actors, with different mandates, located at different levels, and including Inuit. This system creates negotiation between actors rather than direct orders.⁵⁶ One can therefore argue that on paper Inuit are key actors, acting as watchdog institutions,⁵⁷ and their interests are represented in Nunavut governance, in accordance with UNDRIP's right to self-determination.

However, limits in its realization can be highlighted, showing that it is not fully implemented in practice. Structural limits lower the territory's integration abilities and its potential of action in response to climate change especially (e.g. lack of funds,⁵⁸ and limited competences of Nunavut in ongoing devolution negotiations⁵⁹). Further circumstantial limits prevent Inuit to effectively influence the daily management and adaptation policies and programs, and the Government's ability to provide adequate services to its inhabitants⁶⁰ (e.g. Inuit low level of employment⁶¹ and low positions⁶² in public institutions, and the territory's fiscal dependence⁶³). Therefore, the territory's resilience capacities remain narrow.

We believe that without a strong federal political will to make Inuit self-determination fully effective, greater autonomy will be hard to attain in practice. We hope that a devolution agreement will soon be found in order to help Inuit cope with climate change, while satisfying their social and cultural needs, according to UNDRIP's articles 3 and 4. Yet, some argue that Indigenous sovereignty relates

more to cultural independence than to political powers,⁶⁴ raising questions about the survival, importance, and protection of their right to culture within the Nunavut legal framework.

3. Protecting Inuit Rights in the Context of Climate Change: A Challenge for the Nunavut Legal Framework

The Inuit petition before the Inter-American Commission of HR emphasizes that climate change have permanently damaged the Inuit culture.⁶⁵ Indeed, the interconnection between the right to culture and other UNDRIP's rights (e.g. rights to land, resources and self-determination) is largely recognized,⁶⁶ especially by the court.⁶⁷ It is even more striking for Inuit of Nunavut, as the territory only has little influence on national policies and its action is limited to local outcomes.⁶⁸ Nevertheless, the Intergovernmental Panel on Climate Change recognizes the importance of sub-national governments in climate governance, as well as of traditional knowledge in the development of natural resources management adaptation strategies.⁶⁹ Hence, it emphasizes the necessity for local level and community participation in climate policy.

Relying on these and the adaptive grassroots of Inuit knowledge,⁷⁰ giving them a collective responsibility to sustainably use the environment,⁷¹ we assume that Inuit communities and their knowledge may significantly help Nunavut to cope with climate change.

We will examine if the Agreement protects Inuit's collective enjoyment of their Indigenous rights, in analyzing the rights it grants reflecting the idea of a right to be cold. For sake of clarity, we will separate the right to culture, having an intangible content (3.1), from the more tangible rights to land and natural resources (3.2), and the specific Inuit right to harvest in Nunavut (3.3). This distinction is theoretical, as all these rights are interdependent.

Besides, some aspects of Inuit modern way of life, entailed by their economic realities,⁷² may contribute to climate change, adding pressure on the Arctic environment (e.g. dependence on fossil fuel, mining extraction or harvest for survival).⁷³ It is important to recall that our research is based on non-empirical elements and our conclusions should therefore be understood as the result of a doctrinal analysis only.

3.1. The Inuit right to culture: Key for Nunavut's climate change adaptation?

In this section, we will not tackle the symbolic issue of the Inuktitut language, for it is encompassed in traditional knowledge, and not directly linked to climate change issues. We will rather focus on the Inuit culture preservation, as intended with the territory's creation,⁷⁴ and its inclusion in Nunavut governance.

In Nunavut, traditional knowledge is called *Inuit Qaujimajatuqangit*, defined as "all aspects of traditional Inuit culture including values, world-view, language, social organization, knowledge, life skills, perceptions and expectations".⁷⁵ It is considered as an effectiveness factor in the implementation of local strategies,⁷⁶ and is key in Nunavut, as most adaptation initiatives are community-based.⁷⁷ Protecting it from climate change is therefore necessary, despite the – yet limited – aggravation effect of traditional practices on environmental stresses.

The right to culture is a milestone in UNDRIP and is granted in several articles,⁷⁸ particularly article 31 ensuring to Indigenous a right to "maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, [...]".⁷⁹ States shall take effective measures, in cooperation with Indigenous Peoples, to recognize and protect the exercise of these rights.⁸⁰ Accordingly, Indigenous have the right to be responsible for the management of their culture, as defined within the article, and states shall ensure that Indigenous are the one in charge of its preservation, control and development.

In Nunavut, *Inuit Qaujimajatuqangit* is diffused within the governance system. For instance, NTI is involved in the decisions over cultural issues, and Inuit on issues regarding their livelihood (e.g. wildlife, water and natural resources management), through the boards.⁸¹ Moreover, together with the boards, the Government of Nunavut created a Task Force on *Inuit Qaujimajatuqangit* and hired dedicated coordinators in every Department, in order to involve Inuit knowledge in all its decision-making processes.⁸² In 2003, it led to the adoption of cultural immersion days for public servants, encouraging the practice of Inuit traditional activities.⁸³ Today, inclusion of traditional knowledge in some fields decreases

Nunavut vulnerability and favors the development of better adaptation strategies⁸⁴ (e.g. in climate change adaptation strategies,⁸⁵ the Education Act of Nunavut, the Nunavut Wildlife Act). Therefore, we conclude on the Nunavut's compliance with UNDRIP's standards, in theory.

Nonetheless, transmission of Inuit knowledge from generation to generation decreases,⁸⁶ endangering Inuit culture. This is reinforced with the loss of Inuit traditional environment (e.g. melting ice prevents transmission of igloo construction skills⁸⁷). This strengthens the environmental impact of some human, economic activities, as inclusion of *Inuit Qaujimajatuqangit* in decision-making over these activities seems to increase consideration for environment. However, some local initiatives arise in order to preserve traditional knowledge (e.g. in some regions skills are taught⁸⁸), thereby limiting the losses.

To conclude, the territory's ability to preserve and develop Inuit culture in practice, and to limit environmental degradation, depends on political will and funding to implement such policies. Today, both are lacking,⁸⁹ preventing the development of social policies responding better to Inuit's specific needs.⁹⁰ Moreover, as Inuit culture is linked to their land and resources, other Inuit rights should be protected to fully ensure their right to culture.

3.2. *The rights to land and resources: Essential components of the Inuit livelihood protection in regard to climate change*

Indigenous Peoples' attachment to their land and environment embodies their defining characteristic,⁹¹ and explains their fight for legal recognition of their right to ancestral lands.⁹² UNDRIP grants such a right in several provisions,⁹³ especially article 26, with a right to own, use, develop and control their traditionally owned or occupied lands. States shall legally recognize and protect these rights in respect of Indigenous traditions and land tenure systems, and redress Indigenous, when they were deprived of these lands, without consent.⁹⁴

As part of the HR to culture, sovereignty over resources is also granted under UNDRIP. Article 32 sets a right to manage the lands' and resources' development and use through a right to free, prior and informed consultation. Accordingly, Indigenous should be consulted, with the objective to obtain their consent on any project affecting their lands or

resources.⁹⁵ Courts developed specific conditions regarding consultation (i.e. conducted in good faith, through culturally appropriated procedure, at an early stage of the project's development, which must be accepted knowingly and voluntarily by Indigenous). For large-scale projects, higher standards are set (i.e. need for a free, prior and informed consent).⁹⁶ In the context of melting ice, consultation is essential to preserve Inuit rights over natural resources, as there unregulated and easier exploitation can become detrimental to Inuit.⁹⁷ It is even more crucial when they mobilize traditional knowledge during consultations, as it may encourage more environmentally respectful decisions.

Protection of the environment is also implied in the right to land, creating the obligation for states to take effective measures not to store or dispose hazardous materials on these lands.⁹⁸ Environmental protection should be put in balance with other rights, especially in times of climate change. In sum, UNDRIP provides Indigenous rights to live on, own, control the development and use, as well as environmental protection, of the lands they traditionally occupied and resources they are spiritually attached to.

In Nunavut, the Agreement grants Inuit a right to land, giving them a free and unrestricted access to land and water within the Nunavut Settlement Area, up to their full level of economic, social and cultural needs, but subject to federal conservation requirement.⁹⁹ Thanks to the Nunavut Planning Commission, Inuit are involved in the management of the non-Inuit territory and can control Inuit lands' use and development,¹⁰⁰ including some mineral and mining activities¹⁰¹ for which they receive compensation.¹⁰² Moreover, they have surface and sub-surface rights (fee simple titles¹⁰³) over respectively 18% and 1,9% of the territory.¹⁰⁴

Article 26 protects the Inuit right to resources, imposing an Inuit Impact Benefits Agreement, including ecological, economic, social and cultural impact assessment. Accordingly, benefits arising from Major Development Project¹⁰⁵ are shared with Inuit communities potentially affected by it,¹⁰⁶ through provisions on employment, training or cultural and environmental guarantees for instance.¹⁰⁷ Inuit can control its negotiations and implementation through the Nunavut Impact Review Board,¹⁰⁸ as well as the implementation of the federal Canadian Environmental Assessment Act.¹⁰⁹ Governments shall also consult with Inuit

organizations on petroleum exploration or production on Inuit or Crown lands,¹¹⁰ as well as on specific matter for other resources exploitation on Crown land.¹¹¹ Therefore, the Agreement fulfills UNDRIP's standards on Indigenous rights to land, resources and consultation on their use.

Limits can, however, be highlighted. First, nowadays Inuit combine in kind revenue from the land and cash income, often coming from environmentally damaging activities (e.g. mining activities).¹¹² Therefore, granting Inuit such extended rights can be an asset facing climate change only if their sense of stewardship is used and applied in all their decisions. In order for them to do so, social guarantees should be developed regarding climate change impacts on their traditional modes of subsistence. Second, the advisory competence of the boards limits Inuit influence on final decisions, especially over mining projects on Crown lands.¹¹³ Moreover, even if in theory traditional knowledge should be included in NTI's decisions, the latter, as well as Canada are encouraged to approve land or resources exploitation, as they economically benefit from it.¹¹⁴ Lastly, the duty to consult in Canada is not absolute and is completely lacking in some areas (e.g. absence of black carbon policy¹¹⁵).

Finally, UNDRIP's article 32 blurry wording on the possibility for Indigenous to refuse a project, in order to preserve their interest, lowers the standard it sets. Indigenous Peoples cannot effectively assert their rights in face of project promoters' interests. We conclude that the Agreement is in accordance with UNDRIP standards. Although project counterparts might appear as incentives for Inuit to accept environmental damaging activities, they could become tools to better protect it on the long run. Notwithstanding the importance of environmental conservation issues, the Agreement has no dedicated provision, lowering its consideration in decisions. The rights over natural resources added to the right to harvest suggest, however, that Inuit have an implied right to conservation,¹¹⁶ hereinafter addressed.

3.3. *The right to harvest: A vital right for Inuit livelihood contributing to the pressure existing on Nunavut ecosystems?*

For Inuit, hunting prepares young "not only for survival on the land and ice but also for life itself".¹¹⁷ In 2005, 70% of the Arctic Indigenous

population harvested country food, and the Nunavut Government estimated the annual food-oriented harvest revenues to \$30 million (CAN).¹¹⁸ While Inuit hunting practices are impeded by climate change, they might also reinforce pressure on the Arctic animal populations, in light of the ongoing sixth mass extinction process.¹¹⁹ Consequently, we argue that *Inuit Qaujimajatuqangit* should be involved in wildlife management.¹²⁰ In this section, we focus on Inuit harvesting rights, but not on the important issue of marine management,¹²¹ as it extends beyond the scope of this paper.

UNDRIP asserts a right for Indigenous to benefit from their own means of subsistence, thus, to use their resources according to their traditions, cultures and will.¹²² Article 29 also sets forth a right to environmental protection, which is linked to Indigenous right to culture. In order for Inuit to effectively enjoy it, protection and conservation of wildlife are necessary,¹²³ as once resources are depleted they cannot be used anymore. These two rights are consequently limited by the necessity of their balancing to ensure effectiveness of both.

Article 5 of the Agreement deals with all aspects of wildlife and involve Inuit in its management, thus ensuring the survival of traditional harvesting practices. Nunavut Act's article 23 gives competences over games' and culture's protection to the Nunavut Government. It also states that no restriction can be made to the Inuit right to hunt on unoccupied Crown Land, except if the Governor declared some species in danger of extinction (Nunavut Act, article 24).¹²⁴ It is reinforced by the board competence on wildlife conservation (the Agreement's article 5.1.4), which directly manages and regulates access to it through the establishment of quotas (i.e. total allowable harvest for each populations),¹²⁵ except for endangered species. The final word remains in the hands of the Governments,¹²⁶ but Inuit are involved through the board and quotas are based on the annual harvest information collected by the Hunters and Trappers Organizations (composed of Inuit members). However, since the more they report, the more constraints are imposed on them, they lack interest in reporting.¹²⁷ Consequently, institutions struggle to impose realistic quotas, to which Inuit often oppose.¹²⁸ If no quotas are established Inuit are free to harvest up to their economic, social and cultural needs.¹²⁹

In Nunavut, Inuit benefit from their own means of subsistence, as required by UNDIRP. One can

conclude that the Nunavut Wildlife Management Board is a crucial tool in Inuit adaptation to climate change;¹³⁰ quotas, nonetheless, are not suitable to protect Inuit hunters' interests. In practice, it fails to balance between conservation objectives and Inuit's harvesting rights, as it increases their dependence on wages, by limiting the timing of the hunt. In the end, quotas hinder Inuit adaptation abilities, harming their ancestral flexibility,¹³¹ and diminishing their vital access to country food, (i.e. damaging further their culture). As long as the institutions do not integrate Inuit hunters' needs (being social, economic or cultural) and their knowledge, Nunavut would not effectively implement the Inuit right to harvest in the context of climate change, contradicting with UNDRIP's standard. To offer Inuit the capacity to cope with their changing environment, while preserving it, the boards should provide more local flexibility and better use *Inuit Qaujimajatuqangit* within their respective competences.¹³²

4. The Human Rights Discourse: An Effective Mean to Protect the Indigenous Rights of Inuit in Times of Climate Change or a Domination Toolkit?

The Inuit Circumpolar Council pioneered and promoted recognition of climate change as a HR issue.¹³³ Thereby, a HR approach was chosen to address Indigenous claims, especially regarding their culture preservation, because it remains within the limits of HR's paradigm and acceptable for states.¹³⁴ Raising the issues of the embedment of collective Indigenous rights within the individualistic HR regime (4.1) and the recognition of their specific claims and indigeneity within this framework (4.2),¹³⁵ UNDRIP challenges the Eurocentric nature of HR.¹³⁶ Recognition by the African Charter of a collective HR to a healthy environment¹³⁷ emphasizes the importance of collective rights to tackle climate change, as it better connects between environmental law and HR.

4.1. From UNDRIP to UNDROP: Dropping the individual nature of human rights in response to collective Indigenous claims for better climate mitigation?

In 2018, UNDROP was adopted by the UN General Assembly, following the peasants

movement's "La Via Campesina" proposal and advocacy.¹³⁸ It recognizes the rights of peasants and rural populations, notably their right to land,¹³⁹ as well as their specific relationship to nature.¹⁴⁰ UNDROP is considered by literature as challenging the HR framework's limits and biases.¹⁴¹ Peasants themselves drafted it collectively, in their language, in order to respond to their self-defined needs,¹⁴² especially regarding climate change.¹⁴³ In that sense, it expressly specifies that its rights should be enjoyed individually, "in association with others or as a community".¹⁴⁴ On the contrary, UNDRIP has no such clear provision. It recognizes Indigenous collective rights in its preamble,¹⁴⁵ but only explicitly grants collective rights in a few articles (e.g. articles 1¹⁴⁶ and 7¹⁴⁷). Many UNDRIP's articles should, however, be understood as having a collective nature, especially rights to self-determination and culture, according to their previous interpretations by HR bodies.

The American Declaration is seen as safeguarding Indigenous collective right to culture.¹⁴⁸ The rights to land, resources,¹⁴⁹ and property went through a collectivization to answer Indigenous' claims.¹⁵⁰ UNDRIP's duty to consult can also be interpreted as reflecting the recognition of the Indigenous collective right to property.¹⁵¹

Furthermore, UNDROP specifically states that its rights also applies collectively to Indigenous Peoples (article 1.3), thereby confirming the collective nature of UNDRIP's rights. Indeed, recognition of Indigenous' collectivity in UNDROP can be transposed to other international instruments,¹⁵² especially UNDRIP, as it was adopted by the same body.

Recognition of Indigenous collective self-determination and cultural rights is particularly crucial when facing climate change, as both lies at the heart of the resilience and adaptation capacity of territories (see sections 2.2 and 3.1). If some argue that UNDRIP is a juxtaposition of individual, collective and special rights,¹⁵³ we believe it is rather a reaffirmation of pre-existing rights, avoiding to engage with Indigenous specific claims.

4.2. UNDRIP's rights: Specific Indigenous rights enabling their survival as peoples in face of climate change or classical human rights?

Indigenous cosmovisions create the need for a special legal regime departing from general HR rules.¹⁵⁴ However, UNDRIP only recognizes to

Indigenous collective HR that other peoples have,¹⁵⁵ grounded on their characteristics (i.e. their culture, relationship to land, etc.). By doing so, it deprived Indigenous Peoples of their HR to external self-determination,¹⁵⁶ when it is tightly linked to their cultural integrity, the first enabling the development and preservation of the second.

Denial to Indigenous of their right to full self-determination is *a priori* based on the HR principle of non-discrimination regarding other minorities, but in reality, it is based on their indigeneity. Indigenous' rights were mainly perceived in terms of culture, which already benefited from a HR protection, but not in terms of autonomy.¹⁵⁷ By endorsing the traditional HR view on the right to culture and promoting the equality of all citizens before the law, even Indigenous Peoples, UNDRIP followed a state-centric approach.¹⁵⁸ Yet, their indigeneity is the reason why Indigenous Peoples have not been given the same right to self-determination than other dominated peoples.¹⁵⁹ This limitation is discriminating, contrary to the HR principle used to refute Indigenous self-determination claims. Following this contradiction, special rights previously claimed by Indigenous were not granted within the HR framework,¹⁶⁰ and UNDRIP could only grant a right to internal self-determination.

To conclude, UNDRIP does not recognize specific collective rights to Indigenous, but classical and preexisting HR applicable to all. Negotiation further favored states' sovereignty over indigenous collective rights,¹⁶¹ supporting the HR discourse's western, neo-liberal roots.¹⁶² Hence, the use of international law to protect their rights resulted in their persistent marginalization and amounts to colonial expansion.¹⁶³ We argue that the traditional HR regime fails to effectively protect Indigenous and their culture, and to recognize the importance of the community level through the express recognition of collective rights. This diminishes consideration for communities in the global climate governance, when their involvement could be an effective response to tackle climate change. Their participation is already provided in some international environmental law provisions.¹⁶⁴

5. Conclusion

Climate change is disastrous for Inuit identity and security, putting their rights and survival at stake. This article brought face to face UNDRIP and the

Nunavut Agreement, and concluded that the latter respects and goes beyond UNDRIP's standards, on paper. Indeed, the Agreement guarantees to Inuit a specific right to harvest, combining UNDRIP's rights to culture and to their own means of subsistence. In practice, however, the Nunavut system is not able to preserve it in face of climate change. The analysis showed the inadequate nature of the HR framework to address Indigenous collective claims, rendering it hard for UNDRIP to be considered as a revolution in Indigenous rights. The HR framework does not seem to bring additional protection to Inuit in this context of crisis and UNDRIP only appears as a partial solution to protect Inuit endangered culture.¹⁶⁵ The HR to a healthy environment might become a game changer, if its development successfully departs from the individualistic approach traditionally used in HR.

Climate change is often not a priority for governments, and Nunavut is no exception. Despite the creation of a dedicated section within its "Department of the Environment" in 2000, only few initiatives including *Inuit Qaujimajatuqangit* were implemented (6 community adaptation plans in 2017).¹⁶⁶ Furthermore, albeit inclusive, Nunavut institutional, technological and behavioral mitigation or adaptation strategies¹⁶⁷ mainly have a local impact. If these local solutions were given greater consideration at the national and international levels, they could effectively contribute to reduce climate change impacts. Indeed, we argue that communities are the missing link to effectively connect international environmental law and HR.

Other tools than HR exist to address Inuit's needs in face of climate issues, which promote local and adapted responses. There are two categories of proposed solutions: endogenous (i.e. centrality of Inuit communities in their implementation) and exogenous (i.e. actor is external to the community).

Amongst endogenous solutions, Biocultural Protocols¹⁶⁸ and protected Sacred Natural Sites might respond to the Intergovernmental Panel on Climate Change's request to involve local actors and traditional knowledge in climate governance. Biocultural Protocols involve communities as key stakeholders within the multi-layers decision-making process, including government, local entities, NGOs, international environmental institutions, etc.¹⁶⁹ Yet, the different status of local communities and Indigenous Peoples shall be considered¹⁷⁰ for these to be satisfactory solutions. Besides, although sanctuary approaches to

environmental conservation also has its flaws,¹⁷¹ Sacred Natural Sites could continue to be developed throughout the Arctic, following the example of the Canadian Arctic Kuururjuaq Natinal Park (Nunavik) project.¹⁷² It could play a conservation role in areas to which Indigenous peoples and communities are spiritually attached. It might also be key for climate change adaptation, if managed in cooperation with (or fully by) traditional custodians, pursuant to the International Union for Conservation of Nature guidelines.¹⁷³ Entrusting lands' and resources' management to Indigenous or local communities would most likely result in a spiritual stewardship relationship, based on the intrinsic value of nature,¹⁷⁴ leaving room for greater environmental consideration.

Amongst exogenous solutions, we could list socially responsible investments,¹⁷⁵ aiming at protecting Indigenous' interests (e.g. Inter-American and the Asian Development Banks Indigenous policy¹⁷⁶). We could also include new governance systems in order for their voices to be heard at the international level. Involving them as permanent participants, similarly to the Arctic Council's participation rules, might be a solution.¹⁷⁷ Indigenous would be recognized as full actors in international law, rather than subjects of rights and objects of law, responding to their claims.¹⁷⁸ It could also lead to an evolution in the path chosen by the international community to tackle climate change and finally make it a priority.

To conclude, recent developments in the above-mentioned solutions might prove a change of perspective at the international level. At the national level, results of the recent Greenland's elections show that Inuit's political involvement can be a response to the threat posed by an economic development overlooking environmental concerns.¹⁷⁹ Political representation of Inuit and their communities might, therefore, be an effective solution to secure their self-defined "right to be cold", needed for their survival as peoples. Within this context, it might also be the only means to ensure better consideration for peoples having suffered domination for too long, while playing an invaluable stewardship role for the environment.

Endnotes

¹ Sheila Watt-Cloutier, *The Right to be Cold*, (Toronto, Ontario, Allen Lane, 2015) at 258 (emphasis added in the original text).

² Arctic Climate Impact Assessment, *Impacts of a Warming Arctic: Arctic Climate Impact Assessment*, (Cambridge University Press, 2004) (ACIA) at 5.

³ Victoria Herrmann, "Climate Change, Arctic Aesthetics, and Indigenous Agency in the Age of the Anthropocene" (2015) 7 YB of Polar L (HeinOnline) at 379.

⁴ ACIA, *supra* note 2 at 5.

⁵ Paule Halley et Marie-Ève Mercier, "La mise en œuvre du développement durable et l'exercice de la souveraineté canadienne dans l'Arctique" (2012) 72 *Études canadiennes/Canadian Studies* (Open Edition Journals) at 31.

⁶ Tristan Pearce *et al.*, "Inuit Traditional Ecological Knowledge (TEK), Subsistence Hunting and Adaptation to Climate Change in the Canadian Arctic" (2016) 68 : 2 *Arctic* 233-235.

⁷ Timo Koivurova, "Can We Conclude an Arctic Treaty: Historical Windows of Opportunity" (2015) 7 YB of Polar L at 421-422.

⁸ Flora da Silva Cortes Stevenson, "The Duty to Consult the Inuit in Canada's Black Carbon Policy Inaction" (2017) 30 : 2 *J of Envtl L & Prac* at 141. See also United Nations, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, Rodolfo Stavenhagen, Mission to Canada* (2 December 2004), UN Doc. E/CN.4/2005/88/Add.3 at para. 120.

⁹ Human Rights Council Resolutions 7/23 and 18/22.

¹⁰ *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 article 27; *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR) article 27; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 171 (entered into force 3 January 1976) (ICESCR) article 15; *Charter of the Organization of American States*, 30 April 1948, (A-41) (entered into force 13 December 1951) article 50.

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¹² *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, UN Doc A/RES/61/295 (2007)(UNDRIP), article 29.

¹³ Mauro Mazza, "Energy, Environment and Indigenous Rights: Arctic Experiences Compared", (2015) 7 YB of Polar L (HeinOnline) at 319.

¹⁴ Malgosia Fitzmaurice, "Conflict between States and Indigenous people over Natural Ressources in Light of the 1989 ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries and the 2007 UN Declaration of the Rights of Indigenous Peoples (including Relevant National Legislation and Case-Law)" (2012) 4 YB of Polar L (HeinOnline) at 233.

¹⁵ See Siegfried Wiessner, "Indigenous Self-Determination, Culture, and Land: a reassessment in light of the 2007 UN Declaration on the Rights of Indigenous Peoples", in E. Pulitano, eds, *Indigenous Rights in the Age of the UN Declaration* (Cambridge University Press 2012).

¹⁶ See Mazza, *supra* note 13.

¹⁷ See Barry Zellen, "The Inuit, the State, and the Battle for the Arctic" (2010) 11 : 1 *Georgetown J of Intl Affairs* (HeinOnline).

¹⁸ ACIA, *supra* note 2 at 6.

¹⁹ <<https://www.rcaanc-cirnac.gc.ca/fra/1100100013785/1529102490303>>.

²⁰ *Nunavut Land Claim Agreement*, S.C. 1993, c. 29 (NLCA).

²¹ La Presse Canadienne, "Le Nunavut pourrait désormais contrôler ses vastes ressources naturelles: Transferts de pouvoirs à venir pour le Nunavut" (22 May 2012), online: *La Presse Canadienne* <https://search-proquest-com.ezproxy.ulb.ac.be/docview/1015766262?rfr_id=info%3Axri%2Fsid%3Aprimo].

²² *Nunavut Act*, S.C. 1993, c. 28 (Nunavut Act).

²³ Sheila Watt-Cloutier, Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, 5 December 2005 at 15.

²⁴ In particular systematic interpretation and teleological interpretation, see Lina Kestemont, *Handbook on Legal Methodology. From Objective to Method* (Cambridge, Antwerp, Portland, Intersentia, 2018) at 21-33. Additionally, although UNDRIP and UNDROP are not legally binding treaties, the Vienna Convention on the Law of Treaties' principles (Articles 31, 32) will also be mobilized; see International Law Commission, *Draft articles on the law of treaties and commentaries*, Yearbook of the International Law Commission, 1966, vol. II, Commentary of Article 2 at 205, para. 3.

²⁵ Wiessner, *supra* note 15 at 55.

²⁶ *United Nations Declaration on the Rights of Peasants and Other Peoples Working in Rural Areas*, GA Res 39/12, UNGAOR, 39th Sess, UN Doc. A/HRC/RES/39/12 (2018) (UNDROP).

²⁷ It is the traditional Inuit language, still largely spoken among families, see André Légaré, "The Construction of Nunavut – the Impact of the Nunavut Project on Inuit Identity, Governance, and Society", Doctorate Thesis, under the supervision of Dr. Evelyn J. Peters, University of Saskatchewan, 2010 at 131.

²⁸ Peter Koulchisky, "La creation du Nunavut" (April-May 1999), online: *The Beaver* <<https://www.histoirecanada.ca/consulteur/politique-et-droit/la-creation-du-nunavut>].

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³⁰ Thierry Rodon, "Le Nunavut: une composition inachevée?" (2014) 38: 1/2 *Études/Inuit/Studies* (Érudit) at 96; Natalia Loukacheva, "Climate Change Policy in the Arctic: The Cases of Greenland and Nunavut" in Environment & Policy, T. Koivurova et al., eds., *Climate Governance in the Arctic* (Springer Science+Business Media B.V, 2009) at 330

³¹ Thierry Rodon, "“Working Together”: The Dynamics of Multilevel Governance in Nunavut" (2014) 5:2 *Arctic Rev of L & Pol* at 250.

³² Zellen, *supra* note 17 at 59.

³³ *Advisory Opinion of the African Commission on Human and People's Rights on the United Nations Declaration on the Rights of Indigenous Peoples*, 41st Ordinary Session, May 2007 at 31-32.

³⁴ Siegfried Wiessner, "The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges" (2011) 22: 1 *EJIL* at 135-138.

³⁵ Levesque, *supra* note 29 at 117.

³⁶ Rodon, *supra* note 30 at 101-102.

³⁷ *Ibid.*

³⁸ It is composed of a Commissioner, the chief executive of the government of Nunavut, who represents the Queen, an Executive Council and a Legislative Assembly.

³⁹ Rodon, *supra* note 31 at 254.

⁴⁰ Levesque, *supra* note 29 at 120.

⁴¹ Rodon, *supra* note 31 at 255.

⁴² *Ibid* at 257.

⁴³ Rodon, *supra* note 30 at 101-102.

⁴⁴ The fund represents more than \$1.1 billion and NTI receives royalties from resources exploitation on Inuit lands, see Légaré *supra* note 27 at 78-79.

⁴⁵ *Ibid* 77-78.

⁴⁶ Also called institutions of public governance, their members are nominated by NTI and the Governments, see *Ibid* at 138.

⁴⁷ NLCA, section 5.2.

⁴⁸ NLCA, section 12.2.

⁴⁹ NLCA, section 11.4.

⁵⁰ NLCA, section 13.2.1.

⁵¹ NLCA, section 21.8.

⁵² NLCA, section 15.4.1.

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⁵⁴ Rodon, *supra* note 30 at 102-103.

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⁵⁶ Christopher Alcantara and Jen Nelles, "Indigenous Peoples and the State in Settler Societies: Toward a More Robust Definition of Multilevel Governance" (2014) 44: 1 *Publius* (JSTOR) at 189.

⁵⁷ Légaré, *supra* note 27 at 82.

⁵⁸ *Ibid* at 134.

⁵⁹ See Canada, *Crown-Indigenous Relations and Northern Affairs Canada Departmental Plan 2019-2020*, Her Majesty the Queen in Right of Canada, 2019.

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⁶¹ 50% of public servants are Inuit, when article 23 of the Agreement provides for a 85% rate. See Government of Nunavut, *Towards a Representative Public Service, Statistics of the Public Service within the Government of Nunavut as of December 31, 2020*, online (pdf): gov.nu.ca < <https://gov.nu.ca/sites/default/files/trps.2020-2021.q3-english.pdf>].

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⁶⁴ Wiessner, *supra* note 15 at 50.

⁶⁵ See Watt-Cloutier, *supra* note 23.

⁶⁶ International Law Association, Committee on the Implementation of the Rights of Indigenous Peoples of the International Law Association, *Working Plan*, November 2014 para 3.

⁶⁷ *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am Ct HR (Ser C) No 79, Judgment of August 31, 2001 at para. 149; *Maya Indigenous Communities v. Belize*, IA Commission of HR, Case No. 12.053, Report No. 78/00 of October 5, 2000 at para. 154-156; *Bernard Ominayak and the Lubicon Lake Band v. Canada*, U.N. HRC, 45th Sess., Supp. No. 40, at 27, U.N. Doc. CCPR/C/38/D/167/1984 (1990) at para. 32-33.

⁶⁸ Loukacheva, *supra* note 30 at 347.

⁶⁹ Douglas Nakashima, et al., *Weathering Uncertainty: Traditional Knowledge for Climate Change Assessment and Adaptation*, (Paris, UNESCO and UNU, 2012), online (pdf): collections.unu.edu < https://collections.unu.edu/eserv/UNU:1511/Weathering-Uncertainty_FINAL_12-6-2012.pdf] at 6.

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- ⁷¹ Nelson Chanza and Anton de Wit, "Enhancing climate governance through indigenous knowledge: Case in sustainability science" 2016 112 : 3/4 S Afr J Sci at 37.
- ⁷² Ford *et al.*, *supra* note 70 at 161.
- ⁷³ Hermann, *supra* note 3 at 388-389.
- ⁷⁴ Levesque, *supra* note 29 at 116.
- ⁷⁵ *Ibid* at 121.
- ⁷⁶ Chanza and de Wit, *supra* note 71 at 37-38.
- ⁷⁷ Jolène Labbé, *et al.*, "The government-led climate change adaptation landscape in Nunavut, Canada" (2017) 25 *Envtl Rev* (NRCResearch Press) at 15.
- ⁷⁸ UNDRIP, articles 8, 11, 12, 13.
- ⁷⁹ UNDRIP article 31(1).
- ⁸⁰ UNDRIP article 31(2).
- ⁸¹ Rodon, *supra* note 30 at 101-102.
- ⁸² In its 2002 report notably, the Task Force affirmed that IQ should be a catalyst to integrate the GN to the Inuit culture and not vice-versa, see Levesque, *supra* note 29 at 122.
- ⁸³ Rodon, *supra* note 30 at 101.
- ⁸⁴ Levesque, *supra* note 29 at 123-128.
- ⁸⁵ See the Gouvernement of Nunavut, *Upagiatqavut: Setting the Course, Climate Change Impacts and Adaptation in Nunavut*, 2011, online (pdf): [climatechangenunavut.ca/sites/default/files/3154-315_climate_english_reduced_size_1.0.pdf](https://www.climatechangenunavut.ca/sites/default/files/3154-315_climate_english_reduced_size_1.0.pdf) ; the 2003 Nunavut Climate Change Strategy or the 2011 Atuliquaq: Action and Adaptation. See also Labbé *supra* note 78.
- ⁸⁶ Ford *et al.*, *supra* note 70 at 158.
- ⁸⁷ Watt-Cloutier, *supra* note 23 at 2.
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- ¹⁰² NLCA article 21.7.
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- ¹⁰⁵ NLCA article 26.1.1.
- ¹⁰⁶ Rodon, *supra* note 31 at 256.
- ¹⁰⁷ Benjamin J. Richardson, "The Ties that Bounds Indigenous People and Environmental Governance" (2008) 4 : 5 *CLPE* (Osgoode Hall LJ) at 44.
- ¹⁰⁸ NLCA article 26.
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- ¹¹⁵ See da Silva Cortes Stevenson, *supra* note 8.
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- ¹¹⁷ Watt-Cloutier, *supra* note 1 at 254.
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- ¹⁴¹ *Ibid* at 5-8.
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¹⁵⁵ Claey's and Edelman, *supra* note 140 at 57.

¹⁵⁶ Schulte-Tenckhoff, *supra* note 153 at 81-82.

¹⁵⁷ *Ibid* at 67.

¹⁵⁸ Champagne, *supra* note 135 at 16.

¹⁵⁹ Schulte-Tenckhoff, *supra* note 153 at 67.

¹⁶⁰ Engle, *supra* note 92 at 152.

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¹⁶² Engle, *supra* note 92 at 160.

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