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Arctic Indigenous Peoples' Cultural Rights and Climate Change

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Abbreviations

CEDAW – Committee on the Elimination of Discrimination against Women

CESCR – Committee on Economic, Social and Cultural Rights

CERD – Committee on the Elimination of Racial Discrimination

CETS – Council of Europe Treaty Series

CoE – Council of Europe

CRC – Committee on the Rights of the Child

ECHR – European Court of Human Right

GhG – Greenhouse Gases

HRC – Human Rights Committee

ICCPR – International Covenant on Civil and Political Rights

ICESCR –International Covenant on Economic, Social and Cultural Rights

ILO – International Labour Organisation

IP – Intellectual Property

NDS – Nationally Determined Contribution

NGOs – non-governmental organisations

OAS – Organization of American States

OHCHR – Office of the United Nations High Commissioner for Human Rights

par. – paragraph

TCE – Traditional Cultural Expressions

TK – Traditional Knowledge

UDHR – Universal Declaration of Human Rights

UN – United Nations

UNDESA – United Nations Department of Economic and Social Affairs

UNDRIP – United Nations Declaration on the Rights of Indigenous Peoples

UNESCO – United Nations Educational, Scientific and Cultural Organisation

UNFCCC – United Nations Framework Convention on Climate Change

UNITAR – United Nations Institute for Training and Research

UNTS – United Nations Treaty Series

UPR – Universal Periodic Review

WHO – World Health Organization

WIPO – World Intellectual Property Organization

Introduction

Climate change is a global phenomenon that has direct and indirect impacts on all human and natural systems on Earth. It is not a new phenomenon – the climate has been changing throughout the ages. The current changes, however, are the most rapid and alarming and lead to devastating consequences. The scientific consensus provides that anthropogenic emissions of greenhouse gases are unequivocally the dominant cause of the global warming observed since the mid-20th century and that human-induced climate change, including more frequent and intense extreme events, has caused widespread adverse impacts and related losses and damages to nature and people, beyond natural climate variability[1].

Therefore, the issue of climate change is one of the most pressing problems for the international community. Although climate change affects all the people on Earth, it does not affect them equally due to various geographical, political, social, but also cultural reasons, as those with pronounced cultural connections to land, sea, natural resources, and ecosystems, including Indigenous Peoples, face unequal devastation of their lives.

Indigenous Peoples are estimated to be over 370 million people living in over seventy countries worldwide, such as Canada, Australia, New Zealand, the United States, Finland, and Peru. However, as the effects of climate change are felt earlier in the Arctic than elsewhere in the world, the Indigenous Peoples of the North are severely affected by climate change. From 1971–2017, Arctic annual surface air temperatures rose 2.4 times faster than the Northern Hemisphere average, and the Arctic has been referred to as "the world's climate change"[2] barometer, while the Indigenous Peoples are "the mercury in that barometer"[3].

However, it is important to underline that what is happening today in the Arctic is the future of the rest of the world. Therefore, lessons learned from the situation of Indigenous Peoples regarding the complexities of climate change can be of crucial importance for all humanity, and a model of legal protection of Indigenous Peoples in the context of environmental degradation can be a benchmark for future protection against climate change and can influence the development of normative discussion on the fight

[1] UN General Assembly, Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change, Resolution 77/276, adopted 29 March 2023, UN Doc A/RES/77/276.
[2] UN Permanent Forum on Indigenous Issues, State of the World's Indigenous Peoples, 14 January 2010, ST/ESA/328, p. 96.
[3] Ibidem.

against climate change.

Although the Indigenous Peoples of the Arctic are by no means a homogenous group, they share some crucial similarities, such as their relation to land and environment, the importance of cultural practices and traditional ways of life, and the experience of colonization. They live in the Subarctic, Low Arctic, and High Arctic, and more importantly – they identify as Indigenous. As six Indigenous Peoples' organizations have been granted Permanent Participants status in the Arctic Council, a high-level intergovernmental forum founded in 1996 that addresses issues faced by the Arctic, the scope of the research is limited to the following Indigenous communities: Gwich'in, Inuit, Aleut, Athabaskan, Saami, Indigenous small-numbered peoples of the North, Siberia and the Far East, living in Canada, the United States of America, Greenland, Norway, Sweden, Finland and the Russian Federation.

Climate change impacts the life of the Arctic Indigenous Peoples in several ways. First, rising temperatures accelerate the melting of snow and ice, which changes the breeding and migration patterns of many animals, especially caribou, that are central to the diet of many Indigenous communities. This in turn makes hunting, which is an essential activity for Indigenous Peoples, more complicated. The melting of the sea ice makes hunting additionally difficult as "the sea ice is their highway", and their entire culture and identity are based on the free movement on the land. This mobility is also essential in trade, communication, and obtaining supplies for traditional clothing and art.

Besides mammals and fish, the other important part of Indigenous Peoples' diet is food plants. As Arctic warming reduces their survival ability in warmer climates, subsistence gathering may become more complex. This in turn, may result in Indigenous communities switching from traditional diets to less healthy ones, which are associated with diabetes, heart disease, and cancer. Moreover, depending on the location of certain communities, such a shift may not be entirely possible due to the dependence on air or water transport.

Changing availability of plant and animal species will lead to the loss of ecological knowledge and related language vital for transmitting living heritage concerning food and medicinal plants.

The inability to hunt also affects the loosening of family and social ties between the members of the Indigenous communities – due to the uncertain and frequently changing weather conditions, older members are less and less likely to pass their knowledge to younger generations, an example of which is the ability to build an igloo.

The igloo can be regarded as an emblematic example of the intangible culture of the North. As the dense snow necessary for constructing an igloo is slowly becoming rare, Indigenous Peoples going to further regions are forced to use tents. However, tents do not guarantee complete protection against extreme weather conditions like strong winds. The lack of snow has a direct impact on the safety of travelers. Moreover, the art of building igloos cannot be passed on to the next generation, resulting in a loss of traditional knowledge about a truly unique feature of the Indigenous culture. However, the cultural dimensions of the current climate change emergency too often have been overlooked.

Therefore, the situation of Indigenous Peoples as the rights holders is analyzed in **two main areas**. The provisions of human rights law and climate change law, and consequently, the States' obligations in these areas, are the first areas of consideration. The second area is secondary sources of international law providing Indigenous Peoples with the possibility of remedy in case of violation of their cultural rights as a result of anthropogenic climate change.

Cultural rights, although forming an integral part of the human rights framework, have a rather marginalized position compared to civil, political, and even social and economic rights. They have often been referred to as a "neglected" human rights category. Yet, for Indigenous Peoples, culture and cultural rights are central to the enjoyment of other human rights, as for them, the importance of cultural heritage, understood broadly, usually goes much beyond the Western concept, playing an essential role in ensuring the preservation of Indigenous communities' cultural identity and their very cultural and physical survival.

As for Indigenous Peoples, their existence is embedded in culture in its various manifestations, cultural rights are cross-cutting, and the non-respect of a person's culture may entail the violation of civil, economic, political, and social rights. This is especially pertinent in the case of climate change. As it will be discussed in the thesis, the climate change consequences have an impact on a wide variety of human rights – for example if a house destroyed during a hurricane is rebuilt without respect for cultural values, is the State's obligation to fulfill the right to adequate housing satisfied or the right has been violated? Is it enough on the part of the State to provide any food during the crop failure caused by unexpected changes in weather patterns, or should the food meet some additional criteria? As the consequences of climate change are long-term, these questions will be gaining importance.

Climate change law is a relatively new branch of international law. The

international climate change law cornerstone, the United Nations Framework Convention on Climate Change, was signed by one hundred fifty-four States at the United Nations Conference on Environment and Development held in Rio de Janeiro in 1992. Since then, the international climate change regime has been gradually expanding to include several international agreements, including the most recent one – the Paris Agreement, which makes reference both to the concept of human rights and to Indigenous Peoples.

However, climate change is not only a legal issue but also a moral one. It is essential to underline that although being severely threatened by climate change, Indigenous Peoples of the Arctic region contribute little to greenhouse gas emissions, and their ways of life can be described as sustainable. This, in turn, calls for environmental justice, which became widely recognized as minority and low-income neighborhoods fight to keep environmental hazards out of their communities. Taking seriously the climate-cultural nexus requires a multidimensional approach committed to environmental justice, as those most affected by climate change have often done the least to contribute to it and have fewer resources to protect their culture from its effects.

Indigenous Peoples are actively searching for legal ways to defend their rights at the international level. In 2023, there were two thousand three hundred forty-one cases of climate change litigation from around the world, out of which ten cases involved Indigenous Peoples' rights[4]. Climate litigants increasingly rely on human rights law and remedies, as litigation can serve to deliver on a key promise embedded in human rights law and discourse: victim's access to effective remedies for human rights violations.

Therefore, the dissertation aims at verifying the main **hypothesis,** which provides that there is a gap in international law, as a result of which current mechanisms do not provide the possibility of effective remedy for the Indigenous Peoples in the Arctic in the case of violation of their cultural rights arose from the climate change induced deterioration of the environment.

In light of the above hypothesis, the following **research questions** have been asked:

1. Who can be regarded as Indigenous Peoples in international law, and how did the colonization influence the current status of Indigenous Peoples?

[4] Sabin Center for Climate Change Law, Climate Change Litigation Databases, "Non-US Case Category: Human Rights", http://climatecasechart.com/non-us-case-category/human-rights/ [last accessed: 14.08.2023]

2. How does culture determine the existence of Indigenous Peoples?

3. What is the normative content of cultural rights, and what obligations do they impose on States?

4. Are cultural rights enforceable and justiciable?

5. How does anthropogenic climate change impact the cultural rights of the Indigenous Peoples of the Arctic region?

6. Can Indigenous Peoples hold States accountable for the current contribution to climate change through international climate change law?

7. Can the human rights approach to climate change help hold the States accountable for climate change?

Accordingly, the following **subsidiary hypotheses** have been formulated:

1. Respect for cultural rights is of crucial importance for Indigenous Peoples' survival.

2. Climate change severely impedes the enjoyment of cultural rights of the Arctic Indigenous Peoples.

3. International climate change law hardly provides means to hold States accountable for climate change.

4. The human rights approach to climate change can help to hold the States accountable for climate change through human rights courts and quasi-judicial bodies.

The research was conducted using the following **methods**: historical, dogmatic and comparative. The first research method will be employed to describe the legal and factual situation of the Indigenous Peoples of the North. Both historical and current conditions of life of the Indigenous Peoples will be described based on the study of the European and North American literature on the subject, together with the reports issued under the aegis of the Arctic Council, as well as reports issued by NGOs, such as the Indigenous Work Group of Indigenous Affairs, Inuit Circumpolar Council and International Indigenous Peoples Forum on Climate Change.

The dogmatic method will be crucial for the dissertation as it will serve to make the inventory of international legislation. The axis of analysis will be the universal and

regional laws for protecting Indigenous Peoples. The analysis will include action plans, resolutions, recommendations and follow-up mechanisms of various bodies of the United Nations system, the International Labour Organization and the United Nations Educational, Scientific and Cultural Organization, such as the ILO Convention No. 107 and No. 169, and the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage and the Convention for the Safeguarding of the Intangible Cultural Heritage. The vital part of the analysis will also be the reports of advisory and subsidiary bodies such as the Permanent Forum on Indigenous Issues and the Expert Mechanism on the Rights of Indigenous Peoples and the Intergovernmental Panel on Climate Change. On the regional level, two systems will be scrutinized: the Council of Europe and the Organization of American States. Subsequently, the dogmatic method will be employed to analyze international provisions with the criterion of environmental obligations, such as the Rio Declaration on Environment and Development, which directly mentions Indigenous Peoples, the United Nations Framework Convention on Climate Change and the Paris Agreement, as well as the UN program actions.

As the black letter law is central to the first stage of the thesis, in the second stage of the dissertation emphasis is being put on law in action and the comparative method, which will be employed to analyze and compare the jurisprudence of the Inter-American Court of Human Rights with the jurisprudence of the European Court of Human Rights.

In order to answer the research questions, the thesis has been divided into **five chapters**. **The first chapter** aims to explain who can be regarded as Indigenous Peoples in international law and who are the Indigenous Peoples of the Arctic region. Further on, the concept of sovereignty and self-determination will be considered, guided by the question of how previously independent Indigenous Peoples lost their status. After the theoretical basis, the history of Arctic Indigenous Peoples will be analyzed, focusing not only on their origins but also on their culture, in order to demonstrate that, in many instances, their present-day way of life is still very similar to that of their ancestors and it plays a crucial role in safeguarding their cultural identity. The chapter will finish with an analysis of the current status of Indigenous Peoples of the Arctic and the practice concerning self-determination.

The second chapter is dedicated to analyzing cultural rights *sensu largo* and *sensu stricto* and their place in the scope of human rights. The normative content of the cultural rights will be elucidated, together with the triad of States' obligations. As the climate change consequences impact a wide variety of human rights, the possible

consequences of non-respect of a person's culture will be investigated by analyzing the interconnection between cultural and other human rights. The analysis undertaken in the chapter will help answer the question of whether cultural rights are enforceable and justiciable and what consequences this may have.

The **third chapter** aims to analyze the impact of climate change on the cultural rights of the Indigenous Peoples of the Arctic region. The chapter focuses on the particular situation of the Arctic's Indigenous Peoples and their peculiarity in the context of culture and climate change. The legal context of such rights as the right to access tangible and intangible cultural heritage, the right to self-determination and land rights, the right to adequate housing, the right to adequate food, the right to water, and the right to health will be analyzed, followed by the specific impacts on the particular right of the Indigenous Peoples of the Arctic.

The fourth chapter focuses on the international climate change law. The chapter begins with an explanation of the processes that lead to climate change and provides a legal definition of this phenomena. As climate change law is a part of environmental law, the chapter aims to establish whether the principles of the latter could be applied in the climate change context. Considering that climate change further aggravates inequality all over the globe, the concept of environmental justice is introduced, as it allows to include not only legal but also moral claims and Indigenous Peoples' perspectives in the discourse about climate change. The analysis of States' obligations emanating from the international climate change law will help to investigate whether it could allow to hold States accountable for climate change. The newest international treaty on climate change, the Paris Agreement, establishes the global goal on adaptation, which should be based on and guided by the best available science and the traditional knowledge of Indigenous Peoples. Therefore, the prospects of Indigenous Peoples' participation and the States' obligations in this regard will be analyzed.

The fifth chapter, through the analysis of case-law of human rights courts and quasi-judicial bodies, will identify a number of challenges and limitations of the human rights-based approach to climate change litigation while also highlighting the Indigenous Peoples' possibilities of remedy in cases concerning violations of cultural rights as a result of climate change. The chapter begins with a discussion on the notion of accountability and elucidation of the concept of rights-based climate change litigation. Subsequently, the scope of the right to remedy in international law will be analyzed, with a special emphasis on Indigenous Peoples' needs, considering their reliance on culture and

environment.

The effective realization of human rights implies that there must be mechanisms that can be used when the violation of human rights occurs. The analysis of the potential of international mechanisms begins with the regional human rights courts and commissions due to the criteria of proximity to the alleged victims of human rights violations. With regard to Indigenous Peoples of the Arctic region, the case law of two regional courts and commissions is going to be the subject of the discussion: the Inter-American Court of Human Rights and the Inter-American Commission of Human Rights, and the European Court of Human Rights together with the former Commission of Human Rights. Both Canada and the United States are members of Organization of American States, and although they did not ratify the American Convention on Human Rights, the Commission and the Court hold that the American Declaration on the Rights and Duties of Man is a source of binding international obligations for the member States of Organization of American States.

The European Court of Human Rights can hear complaints concerning the Inuit from Danish Greenland and the Saami in Norway, Finland, and Sweden[5]. Therefore, the first category of analyzed cases concerns Indigenous Peoples as applicants. The following criteria were used in selecting the cases: 1) Indigenous Peoples as applicants, 2) cases relating to cultural rights and vulnerable groups, 3) claims relating to the environment.

The range of reparation measures that these two Courts can award to the victims of human rights violations and the means of monitoring the implementation of the judgments will also be an element of the analysis of the case law of the above-mentioned Courts.

The second part of the chapter focuses on the universal human rights protection system and its quasi-judicial bodies. Therefore, the jurisprudence of the treaty bodies, which have been chosen under the criteria of dealing with Indigenous Peoples' cultural rights and/or climate change, their role as quasi-judicial bodies, and the ratification status of the Arctic States concerned, will be analyzed.

The last part of the chapter focuses on alternative mechanisms of human rights protection, such as the United Nations Special Procedures, the Universal Periodic Review, the International Labour Organisation instruments and the UNESCO procedure.

The doctoral dissertation finishes with final remarks arising from the individual

[5] Until March 16, 2022, the Court could have also received the applications against the Russian Federation.

chapters and the entire work. The conclusions, which refer to the hypothesis and the research questions, were formulated based on the analysis of legal acts, resolutions of international organizations, and case law of the courts mentioned above and quasi-judicial bodies.

Particularly, the following has been analyzed:

- regulations in the field of international human rights law, both of a treaty and customary nature, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights;
- soft law and hard law instruments of international environmental law, such as the Rio Declaration on Environment and Development, the United Nations Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement;
- the case law of human rights courts and quasi-judicial bodies relating to Indigenous Peoples, cultural rights and climate change;
- the position of members of the international community towards the cultural dimension of the rights of Indigenous Peoples, as well as the treaty bodies, and especially the Human Rights Committee and the Committee on Economic, Social and Cultural Rights General Comments;
- as well as the Polish and international literature, from the scope of human rights, cultural rights and climate change law, and especially the works of Alexandra Xanthaki, which inspired the research.

The materials were gathered in Polish libraries and during the research query in the Peace Palace Library and consulted with Alexandra Harrington from McGill University and Kamrul Hossain from the University of Lapland. The materials were also presented during several conferences, including the Socio-Legal Studies Association Conference at the University of York and the Young Legal Researchers Conference at Hasselt University. Part of the research was conducted under the project “Indigenous Peoples v. Climate Change. Challenges for International Justice”, financed by the National Science Centre.

Chapter 1 : Indigenous Peoples of the Arctic

1.1. Introductory remarks

The present chapter aims at introducing the key concept and the focal point of the thesis, namely the notion of Indigenous Peoples. The chapter aims at establishing who can be regarded as Indigenous Peoples and whether there is a need for a legal definition at the international level. Further on, the concept of sovereignty and self-determination will be considered, guided by the question, how previously independent, Indigenous Peoples lost their status. After the theoretical basis, the history of Arctic Indigenous Peoples will be analyzed, focusing not only on their origins, but also on their cultural heritage, in order to demonstrate that in many instances their present-day way of life is still very similar to that of their ancestors. The chapter will finish with the analysis of the current status of Indigenous Peoples of the Arctic and practice concerning self-determination.

However, before discussing the aforementioned issues, one question needs to be answered, namely what exactly is the Arctic or the "North"? There are many possible definitions of the "North" based on criteria such as latitude (the Arctic circle, the 60th parallel), climate (the natural tree line, the mean July temperature isotherm of 10 degrees centigrade, the boundary of continuous permafrost), and human activity (population density). For this thesis, I have defined the Arctic based on two criteria: on one hand geographical, and on the other – human. First of all, my geographical definition of the Arctic is consistent with the definition provided by the scientists responsible for conducting the Arctic Human Development Report[6]: "Arctic encompasses all of Alaska, Canada North of 60°N together with northern Quebec and Labrador, all of Greenland, the Faroe Islands, and Iceland, and the northernmost counties of Norway, Sweden and Finland. The situation in Russia is harder to describe in simple terms. The area included, as demarcated by our demographers, encompasses the Murmansk Oblast, the Nenets, Yamalo-Nenets, Taimyr, and Chukotka autonomus okrugs, Vorkuta City in the Komi Republic, Norilsk and Igsrka in Krasnoyarsky Kray, and those parts of the Sakha Republic whose boundaries lie closest to the Arctic Circle., This, then, is the AHDR

[6] N. Einarsson, J. Nymand Larsen, A. Nilsson et al. (eds.), *Arctic Human Development Report*, Stefansson Arctic Institute, Akureyri 2004.

Arctic"[7]. However, as the main subject of the research are the Indigenous Peoples of the Arctic, the geographical scope is limited to the place of residence and activity of the Indigenous Peoples, who have been granted the status of Permanent Participants in the Arctic Council. As such, the Faroe Islands and Iceland are excluded from the scope of the research.

1.2. Towards a legal definition of Indigenous Peoples?

Definition of Indigenous Peoples is a controversial issue, as historically Indigenous Peoples have been subjected to multiple definitions and classifications imposed by others, that perpetuated stereotypes and injustice towards them. However, before analyzing current situation of Indigenous Peoples, scope of their rights and potential infringements upon them, the right-holders and their characteristic need to be determined.

The total population of Indigenous Peoples is estimated to be over 370 million people living in over 70 countries worldwide[8], such as Canada, Australia, Nigeria, the United States, Finland and Peru. Indigenous Peoples are by no means a homogenous group, yet they share some common characteristics such as their relation to land and environment and the importance of cultural practices and traditional ways of life[9]. Even more importantly they share the experience of the long-lasting history of colonization, extermination, land dispossession and discrimination.

The term "Indigenous" in English and "Indígena" in Spanish share a common root in the Latin term "indigenae", which was used to distinguish between persons who were born in a particular place and those who arrived from elsewhere ("advenae")[10]. As such, the term "Indigenous" is always constructed contrary to some other group – in the times of the first contact it would be the settling community and the representatives of colonizing states, while currently it would be the dominant social group.

Likewise Indigenous Peoples are dispersed around the world, so too the definitions of Indigenous Peoples are scattered in different international legal acts.

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[7] Ibidem, p. 17.
[8] M. Oelz, R. Kumar Dhir, M. Harsdorff, *Indigenous Peoples and Climate Change: From Victims to Change Agents through Decent Work,* International Labour Office, Geneva 2017, p. 9.
[9] J. Anaya, *Indigenous Peoples in International Law*, Oxford University Press, Oxford 2004, p. 3.
[10] Working Group on Indigenous Populations, *Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "indigenous people",* U. N. Doc., E/CN.4/Sub.2/AC.4/1996/2, p. 5.

Although Indigenous Peoples' rights entered on the agenda of the United Nations (UN) relatively soon, it was quite an unfortunate beginning, as the approach of the first instrument of the international law dedicated to Indigenous Peoples, the ILO Convention No. 107 on Indigenous and Tribal Populations, adopted in 1957, was mostly integrationist and assumed that Indigenous groups would eventually assimilate into national societies[11]. The situation changed in the 1980s, with the establishment of the UN Working Group on Indigenous Populations and the adoption of ILO Indigenous and Tribal Peoples Convention No. 169[12]. The approach of the Convention No. 169 differs significantly from its predecessor as it incorporates increased respect for ethnic and cultural diversity. The ILO Indigenous and Tribal Peoples Convention No. 169 does not include a definition of Indigenous Peoples, but is rather coherent with the concept of "self-identification" of Indigenous Peoples, recognized in Article 1.2 of the Convention: "Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply"[13]. However, some of the characteristic features of Indigenous Peoples can be identified in Article 1.1, according to which Indigenous Peoples are those "whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations"[14]. As such, the most important characteristic of Indigenous Peoples is their distinctiveness from the dominant society. Another important feature of Indigenous Peoples is "their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions"[15].

The wording of Article 1 of the Convention was inspired by the José R. Martínez Cobo's "Study on the Problem of Discrimination against Indigenous Populations" from 1986, commissioned by the United Nations Sub-Commission on the Prevention of

[11] R. Eversole, J. A. McNeish, *Introduction: indigenous peoples and Poverty,* [in:] *Indigenous Peoples and Poverty - An International Perspective,* eds. R. Eversole, J. A. McNeish, A. Cimadamore, CROP International Studies in Poverty Research, London 2005, p. 9.
[12] International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention, No. 169,* adopted on 27 June 1989 in Geneva (Convention No. 169).
[13] Ibidem, art. 1.2.
[14] Ibidem, art. 1.1 (a).
[15] Ibidem, art. 1.1 (b).

Discrimination and the Protection of Minorities[16]. The definition outlined in the study is one of the most cited descriptions of the concept of "Indigenous". The author expressed a number of basic ideas, including the right of Indigenous Peoples themselves to define who Indigenous Peoples are. The working definition reads as follows:

> Indigenous communities, peoples and nations are those which, having a historical continuity with preinvasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.
>
> 380. This historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors:
> (a) Occupation of ancestral lands, or at least of part of them;
> (b) Common ancestry with the original occupants of these lands;
> (c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, life-style, etc.);
> (d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual general or normal language);
> (e) Residence in certain parts of the country, or in certain regions of the world;
> (f) Other relevant factors.
>
> 381. On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group).[17]

In 1982 the World Bank developed a policy statement on "Tribal People in Bank-Financed Projects", as a response to problems in the field. However, as some of the

[16] Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study of the Problems of Discrimination against Indigenous Populations, by José R. Martínez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1986/7 and Add. 1–4.
[17] Ibidem, par. 379–383.

protectionist and integrationist premises of the ILO Convention No. 107 from 1957 found their way into the Bank's policy statement, in 1991 the World Bank revised its concerns in this area and issued Operational Directive 4.20 on "Indigenous Peoples". It contains a definition: "the terms 'indigenous peoples', 'indigenous ethnic minorities', 'tribal groups', and 'scheduled tribes' describe social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process. For the purposes of this directive, 'indigenous peoples' is the term that will be used to refer to these groups." This is not so much a definition as a description of a group of categories brought together by reason of shared patterns of vulnerability. The Directive goes on:

> Because of the varied and changing contexts in which indigenous peoples are found, no single definition can capture their diversity. Indigenous people are commonly among the poorest segments of a population. They engage in economic activities that range from shifting agriculture in or near forests to wage labor or even small-scale market-oriented activities. Indigenous peoples can be identified in particular geographical areas by the presence in varying degrees of the following characteristics:
> (a) a close attachment to ancestral territories and to the natural resources in these areas;
> (b) self-identification and identification by others as members of a distinct cultural group;
> (c) an indigenous language, often different from the national language;
> (d) presence of customary social and political institutions; and
> (e) primarily subsistence-oriented production.[18]

While the Operational Directive takes a rather functional view of Indigenous Peoples for the specific purposes of the World Bank activities, the criteria listed reflect details already indicated in the Martinez Cobo's study, however, they also capture not only Indigenous communities in areas of former European colonization, where descendants of European settlers now represent the majority population, but also Indigenous Peoples in Asia and Africa, who nevertheless will not be the subject of this thesis.

As it was already mentioned, the concept of Indigenous Peoples is always constructed in opposition to some other group. According to Erica-Irene A. Daes, the

[18] World Bank, Report No. 25332 Implementation of Operational Directive 4.20 on Indigenous Peoples: An Independent Desk Review, January 10, 2003, https://documents.worldbank.org/curated/en/570331468761 746572/pdf/multi0page.pdf, p. 1.

former Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations "the very concept of 'indigenous' embraces the notion of a distinct and separate culture and way of life, based upon long-held traditions and knowledge which are connected, fundamentally, to a specific territory. Indigenous peoples cannot survive, or exercise their fundamental human rights as distinct nations, societies and peoples, without the ability to conserve, revive, develop and teach the wisdom they have inherited from their ancestors"[19].

In a working paper on the concept of Indigenous Peoples, submitted in 1996, Erica-Irene A. Daes, although admitting that a single definition cannot capture all the differences of Indigenous Peoples in different regions of the world, has enlisted a set of factors which modern international organizations and legal experts, including Indigenous legal experts, have considered relevant to the understanding of the concept of "Indigenous", which include: "(a) Priority in time, with respect to the occupation and use of a specific territory; (b) The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions; (c) Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and (d) An experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist"[20].

Moreover, in her study, apart from enlisting the characteristics of the concept of "Indigenous", Erica-Irene A. Daes clearly separated this concept form the concept of minorities, stating that at least two factors, namely priority in time and attachment to a particular territory, have never been associated with the concept of "minorities"[21], while they play a crucial role in Indigenous Peoples identity and self-consciousness. Although it is clear that nowadays in many States Indigenous Peoples are to be considered a minority, they poses some characteristics that go beyond the minority framework.

As such, the term "Indigenous Peoples" will be employed in this thesis in accordance with the aforementioned criteria put together by Erica-Irene A. Daes, which

[19] Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study on the protection of the cultural and intellectual property of indigenous peoples, by Erica-Irene Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations, U. N. Doc. E/CN.4/Sub.2/1993/28, p. 4.
[20] Working Group on Indigenous Populations, *Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "indigenous people"*, U. N. Doc., E/CN.4/Sub.2/AC.4/1996/2, p. 22.
[21] Ibidem, p. 19.

in my opinion represent the widest scope among all the previously mentioned attempts of a definition of Indigenous Peoples, as they not only underline the cultural distinctiveness, but highlight the experience of marginalization, dispossession and discrimination.

Before concluding the remarks about the definition of Indigenous Peoples it has to be noted that the landmark achievement for Indigenous Peoples on the international level – the UN Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly in 2007[22] – does not include neither the definition, nor the enumeration of the characteristics of Indigenous Peoples, being therefore the embodiment of the most important concept for Indigenous Peoples: the right to self-identification as Indigenous. Since 1994 the works on adoption of a declaration concerning rights of Indigenous Peoples have been carried out and although some of the States expressed concerns about provisions including the right to self-determination of Indigenous Peoples and the control over natural resources existing on Indigenous Peoples' traditional lands[23], in 2007 the Declarations on the Rights of Indigenous Peoples was finally adopted by a majority of 144 states in favor. Significantly, the contrary votes were casted by the United States of America, Canada, New Zealand and Australia, however, later on these States have also expressed their support for the Declaration[24]. Although being an instrument of soft law, the Declaration can be considered a landmark achievement of Indigenous Peoples activists, as it expressly recognizes the right to self-determination to a sub-State group[25], the right of Indigenous Peoples to own their lands[26] and the collective dimension of the rights of Indigenous Peoples. Moreover, as it will be elaborated further on, the Declaration specifically assures the cultural rights of Indigenous groups and links them to the natural environment.

[22] UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, 2 October 2007, A/RES/61/295 [hereinafter: UNDRIP].
[23] See M. Barelli, *The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples*, "International and Comparative Law Quarterly" 2009, Vol. 58 (4), pp. 957–983.
[24] E. Pulitano, *Indigenous rights and international law: an introduction*, [in:] *Indigenous Rights in the Age of the UN Declaration*, ed. E. Pulitano, Cambridge 2012, p. 2.
[25] UNDRIP, *op cit.*, Art. 3
[26] Ibidem, art. 26

1.3. The history of sovereignty and self-determination through culture

No discussion on the rights of Indigenous Peoples is complete without the analysis of the right to self-determination, as it is the right that encompasses all other rights (an umbrella concept), such as the right to land and resources, and although classified rather as a political right, it is intrinsically connected with the exercise of cultural rights. However, as noted by Tadeusz Gadkowski "it is necessary to stress that the theoretical construct of the right to self-determination is very interesting, since on the one hand it is conceived of as a principle of international law, and on the other hand it can be seen as a crucial law in the inventory of human rights"[27], which means that "on the one hand the principle of self-determination is essential for the effective guarantee of human rights, while on the other hand the guarantee of human rights is ensured by the principle of self-determination"[28].

Notwithstanding its importance, the right to self-determination is perceived as a highly controversial right. However, despite the controversy and long period of negotiation, it has been included in 2007 in the United Nations Declaration on the Rights of Indigenous Peoples, which itself highlights the pivotal role of self-determination for Indigenous Peoples.

During the period of colonial expansion, Indigenous Peoples lost most of the lands historically belonging to them, i.e. as a result of conquest, occupation or cession. The colonial powers treated those lands as *terrae nullius*, although Indigenous Peoples often had their own, well-developed political as well as social, economic and cultural systems[29]. To understand the meaning of the right to self-determination in the context of Indigenous Peoples, one has to look into the origins of the right (historical background) and the current understanding in international law, necessarily connected with the concepts of sovereignty, autonomy and self-government.

There is no doubt that sovereignty is a crucial idea to international law. The concept of sovereignty as we know begun to develop in Europe in the late medieval period with the gradual replacement of the political authority of the Pope, Holy Roman Emperor

[27] T. Gadkowski, *The Principle of Self-Determination in the Context of Human Rights,* "Adam Mickiewicz University Law Review" 2017, Vol. 7, p. 26.
[28] Ibidem, p. 25.
[29] T. Gadkowski, *Nowe podmioty prawa do samostanowienia narodów na przykładzie ludów tubylczych,* „Wiedza i Umiejętności : zeszyty naukowe Wyższej Szkoły Umiejętności Społecznych w Poznaniu" 2021, Vol. 35, No 2, p. 21.

and feudal lords by the state structures of England, France, and Spain[30]. The concept of sovereignty was further developed by Jean Bodin in his "Six Bookes of a Commonweale"[31], published in 1576, and it gain much recognition as it suited the emerging nation-states of Europe. According to Bodin, a political community needs a supreme authority – a sovereign – that can impose its will on all members of the community so that order and stability can be maintained. This conception of sovereignty underlay the Westphalian model of the state that became dominant in Europe in the seventeenth century[32].

According to Rashwet Shrinkhal there are four different meanings of the term "sovereignty" and frequently ,used as: (a) domestic sovereignty, referring to the institutions of public authority within the State and to the intensity of operative control employed by those keeping the authority; (b) interdependence sovereignty, referring to the ability of public authority to control movements extending across border; (c) international legal sovereignty, referring to the construction of statehood in international law; and (d) Westphalian sovereignty, referring to the prohibition of foreign actors intervention within domestic authority arrangement of a State. He points out that the notion of traditional sovereignty is developed around the structure of State, control and authority being the reinforcement material, and is, therefore referred as traditional sovereignty; classical sovereignty or State sovereignty[33].

It clearly stems from the above that the concept of sovereignty was born in the European context and to suit the needs of European societies. However, it does not mean that the Indigenous Peoples prior to the contact with Europeans were not exercising sovereignty on their territories. Although socially and politically organized in vastly different ways than European States, they exercised jurisdictional control amounting to *de facto* sovereignty over their territories and peoples. Unlike European political systems, which were hierarchical and relied on coercive authority, Indigenous systems typically functioned on a participatory and consensual basis. Individual members retained considerable personal autonomy, and societal norms were usually maintained by

[30] K. McNeil, *Sovereignty and Indigenous Peoples in North America*, University of California Davis Journal of International Law and Policy 81, Vol. 22, 2016, p. 88.
[31] Jean Bodin, *Les six livres de la république*, Richard Knolles trans., Kenneth Douglas McRae ed. (Cambridge MA: Harvard University Press 1962).
[32] K. McNeil, *Sovereignty…, op. cit.,* p. 88.
[33] R. Shrinkhal, *"Indigenous sovereignty" and right to self-determination in international law: a critical appraisal*, AlterNative 2021, Vol. 17(1), p. 72.

persuasion and social pressure rather than force[34]. The political independence of Indigenous Peoples of North America was acknowledged by France and Britain considering the vast amount of treaties that was negotiated and concluded with the Indigenous Peoples. One major example is the so-called Two-Row-Wampum Treaty – treaty of peace and friendship entered into by the Haudenosaunee (Iroquois Confederacy) and the British Crown in 1664 at Albany. By that Treaty, each party acknowledged the sovereign independence of the other, and agreed not to interfere with it[35].

So how did Indigenous Peoples lose their sovereignty? The anecdotal answer was provided by a prominent Canadian political scientist, Peter Russell, who met with Dene leaders in Northwest Territories in 1974[36]. A Dene woman opened the discussion by asking: "Professor Russell, I have two questions for you: What is sovereignty? And how did the Queen get it over us?" Years later, he described his response: "For the first question, I had a nice, pat answer based on Bodin, Hobbes, and my understanding of European international law. But I stumbled over the second. The truth of the matter is that I didn't have a clue how Queen Victoria and her Canadian henchmen had 'got sovereignty' over the Dene." Later, he said he "came to know that the right answer to the Dene woman's second question was – in a word – 'trickery.' Or, as Kent McNeil puts it – 'the white man's legal magic'"[37].

Despite the humorous overtone of the answer, there is no doubt that, *inter alia,* by applying foreign legal concepts, such as for example "sovereignty", the colonizers were able to dominate the territories previously belonging to Indigenous Peoples. The question is whether a definition of sovereignty that has roots in a particular culture or legal order can be objective or universal?

Roger Merino proposes to apply a conceptual turn that in decolonial theory is called "border thinking"[38]. According to this view, decolonial epistemology does not mean a fundamentalist rejection of all western categories but the acknowledgment that there are non-western theoretical frameworks that must be grasped on their own terms;

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[34] K. McNeil, *Sovereignty…, op. cit.,* p. 12

[35] National Centre for First Nations Governance, *A brief history of our right to self-governance. Pre-Contact to Present*, National Centre for First Nations Governance, Canada, p. 8.

[36] Quoted in: K. McNeil, "Indigenous and Crown Sovereignty in Canada", a talk given at the University of Saskatchewan College of Law, 24 October 2019, https://digitalcommons.osgoode.yorku.ca/all_papers/330/ [last accessed: 09.01.2022].

[37] Ibidem.

[38] R. Merino, *Law and politics of Indigenous self-determination; the meaning of the right to prior consultation*, in: I. Watson (ed.), *Indigenous Peoples as subjects of international law*, Routledge, London and Paris 2018, p. 126.

only then it is possible to start a dialogue and exchange. Thus, it does not reject the use of western categories but invites us to rethink those categories from non-western epistemologies. Border thinking, therefore, allows a redefinition of western concepts and devices such as democracy, human rights and self-determination[39].

Therefore, it is indispensable to analyze what could be understood under the term "Indigenous sovereignty". In his research, Rashwet Shrinkhal, came across several definitions of "Indigenous sovereignty", adducing for example Siegfried Wiessner, who refers to the idea of "authentic indigenous sovereignty," by which he means the power to create a "safe space" for Indigenous Peoples; enabling them to live a life with the difference; ensuring their right of free, prior, informed consent; the right to have self-governance; the right to enter into treaties and other agreements; and casting a legal duty on the State to respect, protect and promote indigenous languages and culture[40].

For Professor Stefano Varese, Indigenous sovereignty implies "the recognition that there is no external supreme" and that "absolute power over the indigenous community" does not lie somewhere else but "within the community, in the collective body." He further explains the meaning of Indigenous jurisdiction in terms of rights and authority to interpret and apply law created by Indigenous Peoples within the limits of territory controlled by the Indigenous communities[41].

In comparison with the definition proposed by Stefano Verase, Federico Lenzerini proposes a definition centered around culture, as for him, Indigenous sovereignty is inclusive of right to ownership over traditional land, right to preserve identity and culture, participatory rights in decision making process especially in matters related to culture and life, and the right to self-governance through customary laws. He argues that Indigenous sovereignty is "parallel" to that of State but praxis of Indigenous sovereignty shall in no way traverse the supreme territorial sovereignty of the State[42].

In all of the above definitions the focus is placed more on the internal than external sovereignty. However, as pointed out by Neil MacFarlane and Natalie Sabanadze, sovereignty is about rights, but the rights of State: "In its most basic meaning, sovereignty is exclusive authority over a territory and the population living there. This authority is generally associated with a state monopoly on the legitimate use of force within its

[39] Ibidem.
[40] R. Shrinkhal, *op. cit.*, p. 73.
[41] Ibidem, p. 74.
[42] Ibidem.

territory. Internally, sovereignty implies that the state has the ultimate authority to take decisions within its space. Externally, it implies that others recognize the state's right to do what it wants within its space without interference" [43]. Similarly, Marc Weller classifies sovereignty as a right of a State: "Sovereignty is claimed by the State as a unipolar right, a right centred on the State alone"[44].

As such, while sovereignty is the right of State, the right of people(s) is the right to self-determination. Which brings the question, what is the relation between sovereignty and the right to self-determination and who exactly are "peoples" in international law? According to Ian Kalman "Self-Governance, or self-determination, is not sovereignty; and this distinction matters. Sovereignty is perceived differently in different contexts, but often involves the ability to define the terms of one's own authority, and to hold the powers associated with states, including the coercive use of force, and the regulation of inter-national movement"[45]. As noted by Rashwet Shrinkhal, sovereignty "is source for indigenous people's right to self-determination"[46]. This, however, requires a clarification, as it is the "past" sovereignty that is the source for (internal) self-determination. As it has been explained, Indigenous Peoples in the pre-contact times were sovereigns over their territories. As such, it is the history that is the source (not to mention a portion of "justice") of Indigenous right to self-determination.

As it has been already mentioned, the right to self-determination is one of the most controversial and ambiguous rights, as accurately described by Rodolfo Stavenhagen, the first United Nations Special Rapporteur on the rights of Indigenous Peoples:

> It does not help the matters that 'self-determination' means different things to different persons. It is, as one international lawyer asserts 'one of those unexceptionable goals that can be neither defined nor opposed'. Is it then, a goal, aspiration, an objective? Or is it a principle, a right? And if the latter, is it only a moral and political right, or is it also a legal right? Is it enforceable? Should it be enforceable? Or is it none of these, or all of these at the same time, and more?... [S]elf determination has become, indeed *is*, a social and political fact in contemporary world, which we are challenged to understand and master for what it is: an

[43] N. MacFarlane, N. Sabanadze, *Sovereignty and self-determination: Where are we?*, International Journal Vol. 68, No. 4, 2013, p. 611.
[44] M. Weller, *Self-Determination of Indigenous Peoples: Articles 3, 4, 5, 18, 23, and 46(1)*, in: J. Hohmann, M. Weller (eds.), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary*, Oxford Public International Law, Oxford 2018, p. 121.
[45] I. Kalman, *Indigenous Self-Governance: An International Perspective*, Institute for the Study of International Development, Montreal 2013, p. 5.
[46] R. Shrinkhal, *op. cit.*, p. 74.

> *idee-force* of powerful magnitude, a philosophical stance, a moral value, a social movement, a potent ideology, that may also be expressed, in one of its many guises, as a legal right in international law. Whereas for some the 'self' in self-determination can only be singular, individual human being for others the right of collective self-determination, that is, the claim of a group of people to choose the form of government under which they live, must be treated as a myth in the Levi-Straussian sense (that is, as a blueprint for living); not as an enforceable or enforced legal, political or moral right.[47]

The origins of the right may be traced back to the American and French Revolution, however, it was Woodrow Wilson's speech to the United States Congress on January 8, 1918 – the famous "Fourteen Points" that initiated the interested in the concept of self-determination[48]. Later on, the concept was introduced in the Article 1 of the UN Charter, however, "in the limited context of developing 'friendly relations among nations'"[49]. The concept soon gained much prominence in the context of decolonization and "evolved into the 'right' to self-determination"[50]. In 1960, an important progress was made in the context of right to self-determination with the adoption of General Assembly Resolution 1514 (XV) of 14 December entitled Declaration on Granting of Independence to Colonial Countries[51] (Declaration on Colonial Independence). A day after, on 15 December 1960, the General Assembly adopted the Resolution 1541[52], which sets forth a list of principles to guide States in determining whether they should transmit information on "non-self-governing" territories under art. 73 of the UN Charter. In the preamble, the Declaration on Colonial Independence "[s]olemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations", while paragraph 2 declares that "[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development"[53]. The paragraph 6, however, states that "[a]ny attempt aimed at the partial or total disruption of the national unity and

[47] R. Stavenhagen, *Self-Determination: Right or Demon?*, "IV Law and Society Trust" 1993, Issue No. 67, p. 12.
[48] T. Gadkowski, *The Principle…, op. cit.,* p. 26.
[49] H. Hannum, *Rethinking self-determination,* Virginia Journal of International Law, Vol. 34, No. 1, 1993, p. 11.
[50] Ibidem, p. 12.
[51] UN General Assembly, Declaration on the Granting of Independence to Colonial Countries and Peoples, 14 December 1960, A/RES/1514(XV).
[52] UN General Assembly, Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter, 15 December 1960, A/RES/1541.
[53] UN General Assembly, Declaration on Colonial Independence…, *op. cit.*, par. 2.

the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations"[54]. The limitation set forth in paragraph 6 traditionally accompanies any mention of the right to self-determination[55]. The Resolution 1541, although adopted a day after the Declaration on Colonial Independence does not mention the Declaration at all, although it virtually addresses the premises for decolonization, as the chapter XI of the UN Charter is applicable "to territories which were then [in 1945] known as the colonial type" and that the obligation to report continues until "a territory and its peoples attain a full measure of self-government"[56]. The exercise of the right to self-determination can have the form of "(a) Emergence as a sovereign independent State; (b) Free association with an independent State; or (c) Integration with an independent State".[57] Similarly, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Declaration on Friendly Relations), adopted by the General Assembly on 24 October 1970, maintains that "the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitutes modes of implementing the right of self-determination by that people"[58]. Although following previous United Nations formulations of the principle of self-determination, the Declaration on Friendly Relations places the goal of territorial integrity or political unity as a principle superior to that of self-determination, it restricts this limitation only on those States which conduct themselves "in compliance with the principle of equal rights and self-determination of peoples as described above and [are] thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour"[59]. Does this mean that a secession as a consequence of the right to self-determination, which infringes the State's right to territorial integrity is permitted under international law?

[54] Ibidem, par.6.
[55] H. Hannum, *op. cit.*, p. 12.
[56] UN General Assembly, Principles…, *op. cit.*, principle I, II.
[57] Ibidem, principle VI.
[58] UN General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970, A/RES/2625(XXV), at 124.
[59] H. Hannum, *op. cit.*, p. 17.

According to Christian Tomuschat, "one hundred years ago, even to raise such a question would have been considered preposterous or nonsensical"[60], as the "States were the only actors on the international stage". As he explains, "[w]ith the emergence of international human rights law, in particular, the traditional picture has changed dramatically. The consolidation of this new branch of international law amounts to a general recognition that States are not objectives in and by themselves and that, conversely their finality is to discharge a task incumbent upon them in the service of their citizens. In other words, States are no more sacrosanct. […] If they fundamentally fail to live up to their essential commitments they begin to lose their legitimacy and thus even their existence can be called into question"[61]. Especially, having in mind that the right to self-determination was included in the Article 1 of the Covenant on Civil and Political Rights and the Covenant on Social, Economic and Cultural Rights, adopted in 1966 and as such included in the human rights framework. Both Articles have the same wording:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Despite the broad wording and the recognition as an universal right (of all peoples), the right to external self-determination "continued to be perceived as a right applying mainly, if not exclusively to colonial peoples"[62]. It is understandable, as a contrary approach would open "the floodgates […] and the international community would come to be comprised of literally thousands of micro-[S]tates"[63]. The scope of the

[60] C. Tomuschat, *Self-determination in post-colonial world*, in: H. J. Steiner, P. Alston (eds.), *International Human Rights in Context. Law, Politics, Moral*, Claredon Press, Oxford 1996, p. 979.
[61] Ibidem.
[62] S. C. Roach, *Minority Rights and an Emergent International Right to Autonomy: A Historical and Normative Assessment*, International Journal on Minority and Group Rights, Vol. 11, No. 4, 2004, p. 420.
[63] A. Coleman, *Determining the Legitimacy of Claims for Self-Determination: A Role for the International Court of Justice and the Use of Preconditions*, St Antony's Intl Rev 2010 57 at 58, quoted in: J. Wouters,

right and its applicability was still vague and the Human Rights Committee General Comment No. 12 on the right to self-determination of the peoples, adopted in 1984, did not bring light into darkness[64]. As such, the secession as a consequence of the right to self-determination should be treated as a last resort – a remedial secession being "the most radical form of external self-determination"[65] – only in case the following criteria are present: "(i) the group wanting to exercise its collective right to self-determination must qualify as a 'people'; (ii) these people's rights must be routinely oppressed by their parent State; (iii) negotiations on the status of the break-away territory leads to no reasonable conclusion; (iv) widespread recognition by third States (v) and/or international involvement, in particular through the United Nations"[66].

However, the exercise of the right to self-determination leading to secession is regarded as the external self-determination, which shall be distinguished from the internal self-determination. In line with the 1970 UN Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States, external self-determination refers to the right freely to determine their international status, i.e. to form a new state or to integrate or associate with another[67].

The external self-determination might not always be what peoples concerned desire, due to many factors, as for example economic self-sufficiency. Moreover, external self-determination leading to creation of a new Sate is also highly dependent on international recognition[68]. This does not mean, however, that right to self-determination of a group of peoples that poses and moreover wants to poses different characteristics and goals than the dominant group inside the State, can only be exercised through a formation of a new State. As such, the right to self-determination is a two-fold right. The internal aspect of the self-determination entails "the right to authentic self-government, that is the right for all people really and freely to choose its own political and economic regime – which is much more than choosing among what is on offer perhaps from one political or

L. Hamid, We the People: Self-Determination v. Sovereignty in the Case of De Facto States, Inter Gentes, Vol. 1, Issue 1, 2016, p. 56.

[64] UN Human Rights Committee (HRC), *CCPR General Comment No. 12: Article 1 (Right to Self-determination), The Right to Self-determination of Peoples*, 13 March 1984.

[65] A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge University Press, Cambridge, 1995 at 120, quoted in: J. Wouters, L. Hamid, *op. cit.*, p. 58.

[66] J. Wouters, L. Hamid, *op. cit.*, p. 62.

[67] A. Tomaselli, *Exploring indigenous self-government and forms of autonomy,* in: C. Lennox, D. Short (eds.), *Handbook of Indigenous Peoples' Rights,* Routledge, London and New York 2018, p. 86.

[68] See in general J. Wouters, L. Hamid, *op. cit.*.

economic position only. It is an ongoing right"[69]. As explained by James Anaya, "*ongoing* self-determination continuously enjoins the form and functioning of the governing institutional order. In essence, ongoing self-determination requires a governing order under which individuals and groups are able to make meaningful choices in matters touching upon all spheres of life on a continuous basis. […] [F]or a culturally differentiated group, ongoing self-determination requires a democratic political order in which the group is able to continue its distinct character and to have this character reflected in the institutions of government under which it lives"[70]. As such, it has become widely accepted that the internal aspect of the right to self-determination is "normally fulfilled through internal self-determination — a people's pursuit of its political, economic, social and cultural development within the framework of an existing State."[71]

This understanding of the self-determination is applied in the context of Indigenous Peoples. It is reflected first and foremost in the UNDRIP. Although the draft of the declaration was ready in 1994, it took thirteen years to negotiate the final text of the Declaration – "[w]hile there are a myriad of reasons for this slow progress, there is one fundamental issue that underlies it – the reluctance (or refusal) of governments to recognise the application of the right of self-determination to Indigenous peoples"[72]. The reluctance of States is easy to understand if one focuses exclusively on the external dimension of the self-determination and its potential conflict with the States' right to territorial integrity. It is not, however, the only reason of States' skeptical attitude, as the "self-determination is the prototype of a collective right. It is not a right shared by individuals who belong to a common group, and exercised by them individually. It is a right that appertains to the collective entity as such"[73]. Similar reluctance assisted the States while including the right to self-determination in the ICCPR and ICESC from 1966[74].

Indigenous activists were insisting on including the right to self-determination as for Indigenous Peoples it is not only a pivotal right but also the acknowledgement of their sovereignty as a distinct nations prior to the colonization. However, a formation of an

[69] A. Cassese, *Self-determination of Peoples: A Legal Reappraisal,* Cambridge University Press, Cambridge 1995, quoted in: ibidem.
[70] J. Anaya, *Indigenous Peoples in International Law,* Oxford University Press, Oxford 2004, p. 106.
[71] J. Wouters, L. Hamid, *op. cit.,* p. 55.
[72] Aboriginal & Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002,* Human Rights and Equal Opportunity Commission, Canberra 2002, p. 206.
[73] J. Hohmann, M. Welle, *The UN Declaration on the Rights of Indigenous Peoples: A Commentary,* Oxford Public International Law, Oxford 2018, p. 121.
[74] S. C. Roach, *op. cit.,* p. 420.

independent State for Indigenous Peoples was not a goal itself when fighting for the right to self-determination, as "many indigenous peoples are uninterested in secession"[75]. On the other hand, States saw the right to self-determination as "a rigid choice between all or nothing – between the forming of an independent state or complete denial of a cultural and political identity"[76]. As such, there was a strong need of consensus between the States' fear of secession and Indigenous Peoples' needs. In Erica-Irena Daes' opinion "Indigenous peoples had been excluded from building the State in which they live in a meaningful way, but their situation was not the same as that of colonial peoples. Rather than determining their political status through possible independence, Indigenous peoples had a right to have their status addressed through the structure of the existing State in which they found themselves. The State would need to grant them meaningful representation in it, and meaningful self-government or autonomy"[77].

As a result, Article 4 of the UNDRIP states that: "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions"[78], while Article 46 contains a safety clause that "Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States"[79]. The scop of the right to self-determination was limited to its internal aspect and the possible forms of realization of the right were clearly indicated: self-government or autonomy.

In legal studies, autonomy is generally defined as a right to local self-rule, consisting of two types of self-governance: regional autonomy, or the right to exercise limited sovereignty over provincial territorial borders; and cultural autonomy, which can be characterized as a non-territorial and self-administered form of local governance (e.g. councils and trade unions) "in regard to matters which affect the maintenance and reproduction of a group's culture"[80]. According to William B. Henderson and Gretchen

[75] A. Tomaselli, *op. cit.*, p. 87.
[76] Aboriginal & Torres Strait Islander Social Justice Commissioner, *op. cit.*, p. 7.
[77] J. Hohmann, M. Welle, *op. cit.*, p. 132.
[78] UNDRIP, art. 4.
[79] UNDRIP, art.46.
[80] S. C. Roach, *op. cit.*, p. 411.

Albers, "Indigenous self-government is the formal structure through which Indigenous communities may control the administration of their people, land, resources and related programs and policies, through agreements with federal and provincial governments"[81]. Gary N. Wilson and Per Selle distinguish between self-government, "which implies Indigenous control over governance institutions, and autonomy, which is a broader concept that could also involve public governance arrangements that are open to both Indigenous and non-Indigenous citizens. This distinction is particularly relevant in the Inuit context because of the diversity of governance arrangements that exist and the different circumstances that led to their development. Suffice it to say that not all governments in the Inuit regions of northern Canada are fully self-governments. But all Inuit regional governance models involve varying degrees of autonomy and contain elements of self-government"[82].

Article 4 of the Declaration and the limitations set forth in Article 46 are not the only articles touching upon the notion of self-determination as for example Article 5, 18, 20, 33(2) and Article 34 provide additional rights and details on how the autonomy and self-government should look like:

> Article 5
> Indigenous people have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.
>
> Article 18
> Indigenous peoples have the right to participate in decision-making in matters which would affect
> their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
>
> Article 20
> Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and

[81] W. B. Henderson, G. Albers, *Indigenous Self-Government in Canada*, in: The Canadian Encyclopedia, December 4, 2020, https://www.thecanadianencyclopedia.ca/en/article/aboriginal-self-government [last accessed: 16.01.2022].
[82] G. N. Wilson, P. Selle, *Indigenous Self-Determination in Northern Canada and Norway*, Institute for Research on Public Policy, Study 69, Montreal 2019, p. 12.

development, and to engage freely in all their traditional and other economic activities.

Article 33(2)
Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34
Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in cases where they exist, juridical systems or customs, in accordance with international human rights standards[83].

Moreover, as it was mentioned previously, the right to self-determination is an umbrella right and is relevant to the meaningful exercise of all of the rights protected in the Declaration, including rights to maintain and develop institutional structures to support the exercise of the right to self-determination. The Declaration specifically recognizes the right of Indigenous Peoples to establish and control their educational systems and institutions (Article 14) and the right to practice and revitalize their cultural traditions and customs (Article 11), the right to establish their own media in their own languages (Article 16) and even more importantly – the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired (Article 26).

Therefore, the following subchapters bring closer the history and current situation of the Indigenous Peoples of the Arctic region and their structures of self-determination and self-governance. As it has been already indicated, six Indigenous Peoples' organizations have been granted Permanent Participants status in the Arctic Council, a high-level intergovernmental forum founded in 1996 that addresses issues faced by the Arctic: Inuit, Aleut, Athabaskan, Gwich'in, Saami and Indigenous small-numbered peoples of the North, Siberia and the Far East. The analysis of their history and current status is indispensable for the analysis of the impact of climate change on their cultural rights that will be carried out in the next chapters.

[83] UNDRIP, art. 5, 18, 20, 33(2), 34.

1.4. Inuit

Inuit (Inuk in singular) is the largest Indigenous group of the Arctic, living in four Member States of the Arctic Council, namely: the United States (Alaska), Canada, Greenland and the Russian Federation (Chukotka). Inuit own or have jurisdiction over half the Arctic and are considered to be "the largest Indigenous landholders in the world"[84].

The word Inuit means "the people" in Inuktitut, the Inuit language[85], and is applied generally across the Arctic to refer to Eskimo-speaking peoples. The Inuit Circumpolar Charter, signed in 1980, defined the Inuit as "Indigenous members of the Inuit homeland recognized by Inuit as being members of their people and shall include the Inupiat, Yup'ik (Alaska), Inuit, Inuvialuit (Canada), Kalaallit (Greenland) and Yupik (Russia)"[86]. While now the term "Inuit" is the only preferable denomination of this particular Indigenous Peoples, it was adopted by the Inuit Circumpolar Conference only in 1977 in preference to the term "Eskimo"[87]. The term "Eskimo" was once believed to mean "eaters of raw meat", but is now thought to come from an Algonquin Indian word that describes a style of snowshoes[88]. Although the term was once used extensively in popular culture (e.g. as a name for the marshmallow candies sold in New Zealand or Canadian sports teams) and by researchers, writers and the general public throughout the world, it is now considered offensive and derogatory[89]. However, the term Eskimo is not considered derogatory while describing the family of Eskimo-Aleut languages[90].

Archaeological, linguistic, cultural, and physical anthropological evidence suggests that Inuit have their origins in Siberia and possibly in Central Asia. Inuit are descendants of the waves of ancient peoples who crossed the Bering Sea from Siberia to Alaska[91]. The ancestors of present-day Indigenous Peoples can be traced to two distinct

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[84] The Royal Canadian Geographical Society, Canadian Geographic, *Indigenous Peoples. Atlas of Canada. Inuit*, 2018, https://indigenouspeoplesatlasofcanada.ca/article/inuit-nunangat/ [last accessed: 02.11.2021].
[85] P. R. Stern, *Daily life of the Inuit*, Greenwood, Santa Barbara 2010, p. XI.
[86] Inuit Circumpolar Council, Inuit Circumpolar Charter, Art. 1.6, https://www.inuitcircumpolar.com/icc-international/icc-charter/ [last accessed: 02.11.2021].
[87] M. Nuttall, „Inuit", in: *Encyclopedia of the Arctic. Volumes 1,2, and 3. A-Z*, M. Nuttall (ed.), Routledge, New York and London 2005, p. 991.
[88] P. R. Stern, *op. cit.*, p. XXIII.
[89] Z. Parrott, *Eskimo*, in: The Canadian Encyclopedia, June 9, 2021, https://www.thecanadianencyclopedia.ca/en/article/eskimo [last accessed: 02.11.2021].
[90] G. Holton, *Alaska Native Language Relationships and Family Trees. Language Relationships*, Alaska Native Language Center, University of Alaska Fairbanks, https://www.uaf.edu/anlc/languages.php [last accessed: 02.11.2021].
[91] P. R. Stern, *op. cit.*, p. XI.

migrations, which occurred between 5,000[92] and 10,000 years ago. The first migration was of inland Na-Dene-speaking groups, which includes the Athapaskan Peoples[93] of Alaska, northern Canada, British Columbia, and California. The second migration, around 7000 years ago, was that of Eskimo-Aleut-speaking groups, who arrived in North America with a maritime-focused culture and mode of subsistence. Around 4000 years ago, the Aleut and Eskimo groups diverged and developed similar, yet distinctive, ways of life[94]: it is said that Aleut had a more static way of life in comparison with the Inuit, whose way of life was more nomadic[95]. Today this distinctiveness is reflected also in the fact that the Aleut and Inuit are represented by different Indigenous organizations at the Arctic Council.

The oldest archaeological sites identified as Inuit in southwest Alaska and the Aleutian Islands date from around 2000 BC, and this period of development is known as the Norton culture[96]. Around 200 BC, Norton developed into what archeologists recognize as the earliest manifestations of the neoeskimo Thule Culture[97], the direct ancestors of the modern Inuit[98]. Some groups migrated across the North American Arctic and through central Canada, into Québec and Labrador, and on to Greenland[99]. Around 1000-800 BC the so-called Dorset culture emerged in eastern Canada[100], which was distinguished by large, semi-subterranean winter houses that were heated with oil lamps[101]. The Dorset people also used sleigh made out of sea mammals' bones and crampons to walk on ice, which suggests they probably also hunted seals[102]. Climatic warming allowed Dorset people to expand their territory northward, and gradually Dorset people occupied sites in the High Arctic and northwest Greenland. But by around 1200 AD following the arrival of both Norse and a new Arctic people – the Thule ancestors of modern Inuit – Dorset culture survived in only a few places including what is now northern Quebec and northern Labrador[103]. Between AD 1000 and 1500[104], the Thule

[92] R. Reichert, *Historia Inuitów i zarys badań archeologicznych w regionie rzeki Mackenzie i Arktyce Kanadyjskiej*, Księgarnia Akademicka, Kraków 2020, p. 10.
[93] Represented at the Arctic Council by the Arctic Athabaskan Council, see next subchapters.
[94] M. Nuttall, *op. cit.,* p. 991.
[95] J. Machowski, *Inuit. Opowiadania Eskimoskie,* Dialog, Warszawa 1991, p. 112.
[96] Ibidem.
[97] P. R. Stern, *op. cit.*, p. XIII.
[98] R. Reichert, *op. cit.,* p. 15.
[99] M. Nuttall, *op. cit.*, 991.
[100] J. Machowski, *op. cit.,* p. 244.
[101] P. R. Stern, *op. cit.*, p. XIII; R. Reichert, *op. cit.,* p. 12.
[102] R. Reichert, *op. cit.,* p. 12.
[103] P. R. Stern, *op. cit.*, p. XIII
[104] M. Nuttall, *op. cit.,* p. 992; P. R. Stern, *op. cit,* p. XIII.

Inuit had mainly superseded the Dorset and had reached northern Greenland, although it is not clear from the archeological record if the Dorset people died out, if they were overrun by the Thule, or if they were absorbed by the Thule[105].

Thule culture represents a technological florescence in Arctic Canada and Greenland. In addition to whaling equipment such as multi-person boats, kayaks that were entirely covered with seal skin, with only one hole for the hunter[106] and large toggling harpoons attached to sealskin floats, the Thule developed technologies for hunting seals at breathing holes[107]. They also had large sleds pulled by dogs and compound reinforced bows. Moreover, the Thule invented the prototype of modern sunglasses – they used to be made of wood, leather and bones, to protect from snow blindness[108]. The Thule built spacious semi-subterranean winter houses with raised sleeping platforms[109]. The building material of winter houses differs depending on the region – in Alaska the Thule used wood, but as it was rather scarce in the Canadian part, they replaced it with ribs and maxilla of whales; during summer periods, the Thule used leather tents[110]. Archeological evidence demonstrates that the Thule communicated in Inuktitut[111].

The art of the Thule culture differs from that of the Dorset culture. The Thule used to decorate their daily life objects with the daily life representations, such as depictions of tents, hunters with bows or whales, while the Dorset art was more spiritual[112]. One of the very interesting example of the Thule art, that was also highly practical is Inukshuk or Inuksuk (Inuksuit in plural)[113]. Inukshuk is a form of a sculpture representing a man, made of piled stones. They served as an orientation points on the plain, monotonous landscape of the Arctic and often as a message points[114]. To the present day, Inukshuk are integral to Inuit culture and are often intertwined with representations of Canada and the North and a red Inukshuk is found on the flag of Nunavut[115], the largest and northernmost territory of Canada, since 1999 under the Inuit independent government.

It was in Greenland and Labrador that the first European settlers to North America,

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[105] P. R. Stern, *op. cit.*, p. XV.
[106] R. Reichert, *op. cit.*, p. 16.
[107] P. R. Stern, *op. cit.*, p. XIV.
[108] R. Reichert, *op. cit.*, p. 16.
[109] P. R. Stern, *op. cit.*, p. XIV.
[110] R. Reichert, *op. cit.*, p. 18.
[111] Ibidem, p. 16.
[112] Ibidem, p. 18.
[113] Ibidem, p. 19
[114] Ibidem.
[115] N. Hallendy, *Inuksuk (Inukshuk)*, in: The Canadian Encyclopedia, December 8, 2020, https://www.thecanadianencyclopedia.ca/en/article/inuksuk-inukshuk [last accessed: 02.11.2021]

the Norse who had made their way across the North Atlantic from Norway to Iceland and beyond, met with the Thule people, whom they called "skraelings"[116]. Objects, such as walrus ivory that the Norse needed to pay taxes to the Norwegian crown, excavated from numerous Thule sites point to the likelihood that the ancestral Inuit had substantial interactions with the Norse, especially in the period 1200–1350 AD[117]. In Greenland, the Norse settlements existed for almost 500 years as farmers keeping cattle, sheep, and goats, and as marine mammal hunters[118], however, during the period known as the Little Ice Age, the Greenland Norse became cut off from Europe and most likely died out[119].

With the end of Norse colonization in Greenland and the disappearance of the Dorset, Inuit remained the only people in the North American Arctic[120]. However, that was about to change, as from the 15th and 16th centuries onward[121], Inuit came into regular and prolonged contact with Europeans who visited the Arctic first as explorers in search of the famous North West Passage[122], then as whalers and traders, and later as colonizers and administrators. Shortly, at times even without realizing it, their traditional territory, which belonged to them since the time immemorial, became part of modern States.

As such, today, the Inuit fall within the following geopolitical territories: Kalaallit living on the west, northwest, and east coasts of Greenland; the Canadian Inuit, living in Labrador, Québec, Nunavut, and the Northwest Territories; the Alaskan Inuit, living in the northern, western, and southwestern parts of the state; and the Siberian Yupik of Chukotka in northeastern Siberia. Their socio-economic, but also political status differs depending on the State they live in.

1.4.1. Inuit in Greenland

In Greenland, the Inuit comprises three distinct cultural and linguistic groups: the majority Kalaallit, who inhabit the west coast from Nanortalik district in the south to Upernavik district in the north; Inughuit in the north around Avanersuaq/Thule; and Iit

[116] M. Nuttall, *op. cit.*, p. 992.
[117] P. R. Stern, *op. cit.*, p. XV.
[118] M. Nuttall, *op. cit.*, p. 993.
[119] P. R. Stern, *op. cit.*, p. XV.
[120] Ibidem, p. XVI.
[121] M. Nuttall, *op. cit.*, p. 992.
[122] R. Reichert, *op. cit,* p. 20.

on the east coast[123].

Compared to other States inhabited by Inuit, Greenland is exceptional in the sense that, according to the data from July 2020, 88% of the population is Greenlandic Inuit with a total of 56,367 inhabitants[124], and the Greenlandic Inuit language – Kalaallisut – is the primary language of everyday conversation[125].

Greenland became a Danish colony in 1721 and since then the Danish crown administered Greenland through a State trading monopoly, keeping a very tight control on both the economy and abilities of Greenlanders to interact with the outside world until World War II. Other commercial entities were restricted from operating in the Danish colony, and very few outsiders were permitted to even visit the island[126]. In some respects this protected Inuit there from some of the most exploitative forms of colonization, but the Danish Government policies regarding for example the Greenlandic language were long based on paternalistic attitudes[127].

The situation begin to change in 1953 with Denmark making Greenland a province of Denmark. Many Greenlanders, however, did not regard this as a political gain and began pushing for Home Rule, which was finally achieved in 1979 when responsibility for many government functions, such as housing, health, and education, began to be transferred to Greenland[128]. Since Home Rule was introduced in Greenland, the country has been known officially as Kalaallit Nunaat ("the Greenlanders' Land")[129].

In 2009, Greenland entered into a new era with the inauguration of its Act on Self-Government, which gave the country further self-determination within the Kingdom of Denmark. Together with the Danish Constitution, the Self-Government Act articulates Greenland's constitutional position in the Kingdom of Denmark.

The Government of Greenland adopted the UNDRIP upon its ratification in 2007 and subsequent governments have committed to its implementation. The Government of Greenland had a decisive influence over the Kingdom of Denmark's ratification of ILO Indigenous and Tribal Peoples Convention No. 169 in 1996, as Greenland has prioritized actions to establish the Indigenous Peoples' collective rights to land and resources in their

[123] M. Nuttall, *op. cit.*, p. 992.
[124] D. Mamo, *The Indigenous World 2021*, IWGIA, Copenhagen 2021, p. 497.
[125] P. R. Stern, *op. cit.*, p. XXI.
[126] Ibidem.
[127] Y. Csonka, P. Schweitzer, *Societies and Cultures: Change and Persistence*, in**:** N. Einarsson, J. Nymand Larsen, A. Nilsson et al. (eds.), *Arctic Human Development Report*, Stefansson Arctic Institute, Akureyri 2004, p. 54.
[128] P. R. Stern, *op. cit.*, p. XXI.
[129] M. Nuttall, *op. cit.*, p. 992.

territories[130]. Though still formally under the reign of Denmark, Greenland is considered to be a modern Inuit State[131].

1.4.2. Inuit in Alaska

According to the Inuit Circumpolar Charter, the Inuit in Alaska can be divided into Inupiat and Yup'ik[132]. The Ińupiat (singular Ińupiaq) inhabit the Arctic tundra plains of the North Slope, the boreal forests of the northwest, and the coastal lowlands of the Bering Sea. The other major group, the Yup'ik, live along the coasts and rivers of southwest Alaska[133].

The isolation of the Inupiat made them one of the last groups of Alaska Natives to encounter Europeans and Americans – only several voyages of exploration made incidental contact in the early 19th century[134]. Several devastating epidemics swept through the coastal villages in the 1870s and 1880s. After the decline of the market for whale products in the 1890s, the remaining Inupiat were left to themselves until the second half of the 20th century[135].

Prior to European contact, the Alaskan Inuit specialized in hunting the bowhead whale, walrus, seals, and polar bears, and the social and cultural life of inland groups revolved around caribou hunting. The Yup'ik were renowned for their complex ceremonial life. For example, elaborate masks carved from wood, or made from sealskin, and depicting animal spirits and mythical figures, are worn at community feasts and dances to celebrate the memory of one's ancestors[136].

Beginning in 1847, American whalers from New England hunted the bowhead whale in the waters of Bering Strait, thus seriously affecting the viability of the Indigenous Ińupiat hunt. From the 1880s, gold mining formed the basis for the expansion of the Alaskan economy and its subsequent settlement by non-Indigenous peoples, and the agenda for Alaska's late 20th and early 21st century economic development was set

[130] D. Mamo, *op. cit.*, p. 498.
[131] P. R. Stern, *op. cit.*, p. XXI.
[132] Inuit Circumpolar Council, *op. cit.*
[133] M. Nuttall, *op. cit.*, p. 994.
[134] S. J. Langdon, *The Native People of Alaska*, Greatland Graphics, Anchorage 1993, p. 38.
[135] Ibidem.
[136] M. Nuttall, *op. cit.*, p. 994.

with the discovery of vast reserves of oil and gas at Prudhoe Bay on the North Slope in 1968[137].

The fear of large-scale industrial development, resulted in the establishment of the Alaska Federation of Natives, which lobbied the US Congress for the appropriate settlement of land claims for Alaska Natives[138]. In 1971, the Alaska Native Claims Settlement Act protected United States Inuit lands and granted the bands funds for economic growth[139]. Although, the Alaska Native Land Claims Settlement Act did not recognize the Indigenous Peoples' claim to the whole of the state of Alaska, it did establish twelve regional Native corporations, giving them effective control over one-ninth of the state. The Alaska Native Land Claims Settlement Act extinguished Native claims to the rest of Alaska and $962.5 million was given in compensation. In effect, the Act made Alaska's Indigenous Peoples shareholders in corporate-owned land[140].

The United States announced in 2010 that it would support the United Nations Declaration on the Rights of Indigenous Peoples as a moral guidance after voting against it in 2007. The United States has not ratified ILO Convention No. 169[141].

1.4.3. Inuit in Canada

Although Indigenous Peoples in Canada are legally referred to as "Aboriginal Peoples", mainly due to the section 35 of the Constitution Act of 1982, which recognizes three groups of Aboriginal Peoples: Indians, Inuit and Métis[142], currently, the term "Indigenous" is the accepted and preferred term used to describe First Nations, Inuit and Métis[143]. Similarly, the term "First Nations" superseded the term "Indian", since 1980, when hundreds of chiefs met in Ottawa and used "First Nations" for the first time in their Declaration of the First Nations. In 1982, the National Indian Brotherhood became

[137] Ibidem.
[138] M. Nuttall, *op. cit.*, p. 995.
[139] C. Waldman, *Encyclopedia of Native American Tribes*, Checkmark Books, New York 2006, p. 119.
[140] M. Nuttall, *op. cit.*, p. 995.
[141] D. Mamo, *op. cit.*, p. 570.
[142] The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, https://canlii.ca/t/ldsx [last accessed: 02.11.2021].
[143] Government of Canada, "INAN - Section 35 of the *Constitution Act 1982* - Background - Jan 28, 2021", https://www.canada.ca/en/immigration-refugees-citizenship/corporate/transparency/committees/inan-jan-28-2021/inan-section-35-consitution-act-1982-background-jan-28-2021.html [last accessed: 02.11.2021]

the Assembly of First Nations, the political voice for First Nations people in Canada[144]. "Indian" is a term that is now considered outdated and offensive, but as well as "Aboriginal", it is still used in pieces of legislation and therefore carries legal significance in Canada[145].

The Inuit homeland in Canada is called Nunangat. It consists of four regions: the Inuvialuit Settlement Region (northern Northwest Territories), Nunavut, Nunavik (northern Quebec) and Nunatsiavut (northern Labrador). It includes fifty-three communities and encompasses roughly thirty-five percent of Canada's land mass and fifty percent of its coastline. The majority of the 65,000 Inuit in Canada live in Inuit Nunangat, with one-quarter of our population living outside its borders[146]. The Inuit territory in Canada extends over the entire length of the Canadian North, from the Mackenzie Delta region close to the border with Alaska, to Baffin Island and further south in Québec and Labrador. The Inuit of the Mackenzie Delta region prefer to call themselves Inuvialuit[147].

Inuit in what is now Canada were the last to come into sustained contact with Europeans. The Hudson's Bay Company dominated Canada's fur trade from the time it received its charter in 1670 right up to the early 20th century. During this period, the Canadian Inuit became dependent on Hudson's Bay Company trading posts. In the 20th century, their lives were also affected by the expansion of other forms of economic development, such as mining and the exploitation of hydrocarbons. Following World War II, there was an expansion of mining activity and, together with the development of hydroelectric projects, this reinforced a southern Canadian vision of the Far North as a vast storehouse of natural resources, where the development and exploitation was regarded as necessary for the future of the Canadian nation.

Since 1970, Inuit have negotiated four comprehensive land claim agreements with the federal government, which will be analyzed in subchapter 1.10.

In 2007, Canada was one of four states that voted against the United Nations Declaration on the Rights of Indigenous Peoples. In 2010, the Canadian government

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[144] R. R. Gadacz, "First Nations", in: The Canadian Encyclopedia, August 6, 2019, https://www.thecanadianencyclopedia.ca/en/article/first-nations [last accessed: 02.11.2021].
[145] H. A. McCue, "Indian", in: The Canadian Encyclopedia, May 11, 2020, https://www.thecanadianencyclopedia.ca/en/article/indian-term [last accessed: 02.11.2021].
[146] The Royal Canadian Geographical Society, Canadian Geographic, *op. cit.*
[147] M. Nuttall, *op. cit.*, p. 993.

announced its endorsement of the UN Declaration and, in 2016, Canada re-affirmed its support “without qualifi¬cation”. Canada has not ratified ILO Convention 169 .

1.4.4. Inuit in the Russian Federation

The Siberian Yupik – the Inuit of the Russian Federation – are scattered along the isolated coasts of Chukotka in northwestern Siberia, and the entire population numbers around 2000 people .

Contact between Siberian Yupik and Europeans first occurred in the 10th century, but it was only in the 18th century that regular, extensive, and prolonged contact began to take place with Russians. Once this contact was established, a familiar pattern followed, whereby Siberian Yupik communities experienced wave of epidemics, such as smallpox, mumps, influenza, and chicken pox, which seriously affected the demographic composition of northeastern Siberia. The Yupik, however, suffered the extreme impact of Soviet economic policies during the 20th century. The Soviets established the Committee of the North in 1928, and Yupik economic life was collectivized through the organization of boat crews into seasonal hunting cooperatives.

The first State-initiated Yupik resettlement in Siberia took place in 1926, when ten Yupik families were moved from Provideniya Bay to the remote Wrangell Island, some 1000 miles away in the northern Chukchi Sea. That migration was a political venture as it was aimed at supporting Russia’s territorial claims to the island by establishing a permanent local colony. Following the end of World War II, many Yupik villages were closed down by the Soviet authorities and the inhabitants were resettled in Chukchi villages. In summer 1958, Russian authorities started a program of massive relocation of the Yupik population on the Chukchi Peninsula, Siberia. About 800 people, or roughly 70% of the small nation of 1,100 at that time, were forced to leave their home sites and were moved to other communities .

Despite the changes that have transformed much of their traditional life, the Siberian Yupik have maintained a distinctive ethnic identity within the Russian Federation. Although they have not yet been able to achieve similar to other Inuit level of land settlement agreements and self-government, the Siberian Yupik have formed organizations concerned with cultural survival and self-determination, which are themselves members of the Russian Association of the Peoples of the North (RAIPON), with the status of the Permanent Participant at the Arctic Council.

1.5. Athabaskan

The Athabaskan, or Athapaskans, are the Indigenous Peoples who belong to the Athapaskan linguistic family. This group occupies a vast territory in Arctic and sub-Arctic Alaska, and the Yukon Territory and Northwest Territories of Canada. The Athapaskans of Canada are designated by the ethnonym Déné or, more commonly, Dene[148]. The Athabaskan are represented at the Arctic Council by the Arctic Athabaskan Council, established in 2000[149].

For over 10,000 years, Arctic Athabaskan peoples of Canada and the United States have occupied over three million square kilometers of boreal forests and Arctic tundra of interior Yukon, and Northwest Territories, the northern regions of British Columbia, Alberta, Saskatchewan and Manitoba, and Alaska. Indigenous Athabaskan people include Gwich'in, Dene, Dogrib, Sahtu, Den Cho, Tanana, Kaska and many other communities[150]. Collectively, the Arctic Athabaskan peoples share twenty-three distinct languages, and live in communities spread far apart, such as the 5,400 kilometers, a distance that separates Tanana, Alaska and Tadoule Lake, northern Manitoba. People of Arctic Athabaskan descent correspond to approximately two percent of the population of Alaska and United States[151].

The Athabaskan have occupied interior Alaska for 6000–9000 years with their ancestors being the second of three major migrations from Asia to cross the Bering Land Bridge to North America[152]. The ancestors of today's Arctic Athabaskan peoples were semi-nomadic hunter-gatherers covering great distances in their search for food. When fires or postfire succession reduced the suitability of habitat in one place, bands adjusted

[148] S. Eveno, „Athapaskan", in: *Encyclopedia of the Arctic. Volumes 1,2, and 3. A-Z*, M. Nuttall (ed.), Routledge, New York and London 2005, p. 170.
[149] Arctic Athabaskan Council, Treaty of the AAC, 26th day of June, 2000, https://uaf.edu/caps/resources/policy-documents/aac-Treaty%20of%20the%20AAC%20_%20Arctic%20Athabaskan%20Council.pdf [last accessed: 02.11.2021].
[150] Earth Justice, Arctic Athabaskan Council, *Petition to the Inter-American Commission on Human Rights seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting caused by Emissions of Black Carbon by Canada*, Apr. 23, 2013, http://earthjustice.org/sites/default/files/SummaryAACpetitionl 3-04-23 .pdf [last accessed: 02.11.2021], [hereinafter Athabaskan Petition], p. 21.
[151] V. de la Rosa James, "The Arctic Athabaskan Petition: Where Accelerated Arctic Warming Meets Human Rights", California Western International Law Journal, No. 2 Vol. 45 2015, p. 237.
[152] G. P. Kofinas et al., "Resilience of Athabascan subsistence systems to interior Alaska's changing climate", Canadian Journal of Forest Research, Vol. 40 2010, p. 1347-1348.

their seasonal migration accordingly. This enabled people to continue to access a wide range of habitats, although the specific locations changed over time. Subsistence foods constituted a critical cultural as well as food resource[153]. Arctic Athabaskan peoples relied primarily on mammals (caribou, moose, muskox, snowshoe hare, porcupine, woodchuck, beaver, rabbits, bear, Dall sheep, ground squirrel, muskrat), birds (ptarmigan, grouse, spruce hen, ducks, geese) and their eggs, as well as medicinal and nutritive plants, mushrooms, and rosehips. At river camps during spring and summer, Arctic Athabaskan peoples traditionally fished for different kinds of fishes, such as salmon, grayling, ling cod, and pike. Fish were cleaned, split, dried, smoked and stored in caches to be eaten through the winter. During winter, when river and lake ice was solid but not too thick, people also caught fish through the ice[154].

The first contacts between Europeans and Athapaskan populations took place both progressively and in different places. To the east of the region, contact was essentially with fur traders and missionaries, while the Russians came to the Alaskan shores in 1741. At first such contacts remained sporadic, and even though more and more Europeans ventured into the North, it was due to the 1898 Klondike gold rush that the process was accelerated. One of the major transformations and disruptions wrought by these contacts was the participation of Indigenous populations in the fur trade. In 1717, the Hudson's Bay Company established the trading post of Fort Prince of Wales in Churchill in order to trade directly with the Chipewyans. Then around 1858, it created the post of Brochet in the hope of extending this trade to other Dene tribes. In the beginning, the Chipewyans (the largest group among eastern Athabaskans) played the role of intermediary between the Company and other Indigenous populations, or even at times Inuit[155].

The contact with Europeans for the Indigenous Peoples exposed them to particularly deadly diseases. During the 18th century, epidemics, most notably that of smallpox at the start of the 1780s, caused heavy losses among the Athabaskans, as more than two-thirds of these populations were decimated[156].

When the Hudson's Bay Company sold its rights to the British Crown in 1869, Rupert's Land (a vast interior region encompassing most of northern Ontario and north Québec, all of Manitoba, most of Saskatchewan, the southern half of Alberta, and a large

[153] Ibidem, p. 1352.
[154] Athabaskan Petition, *op. cit.*, p. 23.
[155] S. Eveno, *op. cit.*, p. 171.
[156] Ibidem, p. 172.

part of what is now the Northwest Territories and Nunavut) and the Northwest Territories entered the Canadian Dominion[157]. After the discovery of gold deposits in the Klondike in 1896 and oil fields in Norman Wells in the Mackenzie basin in 1920, Ottawa realized the potential of these territories and signed two treaties with the Indigenous Peoples: Treaty 8 in 1899 and Treaty 11 in 1921. The areas covered by the first treaty included northwestern Saskatchewan, northern Alberta, northwestern British Columbia, and part of the southern Northwest Territories (south of the Great Lake of Slaves); the areas covered by the second treaty were the Northwest Territories north of the Great Slave Lake[158].

When the fur market collapsed in the 1980s, the Athapaskans found themselves without a source of income to obtain the manufactured products and basic foodstuffs on which they had become dependent. In general, the oil and mining developments employed mainly inward migrants, not Indigenous Peoples. After the difficult years preceding the signing of the treaties with the government in Ottawa, the Athapaskans, like most native populations in Canada, followed the classic pattern of family allowances and mandatory schooling of children (which in many cases meant going to residential schools[159]), elements that incited these nomadic populations to settle in small communities. There they would be more exposed to western culture and its series of social problems.

Modern Arctic Athabaskan people generally live in small settlements; much of the population still "lives off the land," gathering traditional wild "country" foods and other resources for some or all of the year. They spend parts of the year at fishing camps along rivers, and spend other seasons following and hunting animals and waterfowl.[160] They are organized politically within their own governments through tribal councils, bands, or First Nations[161].

After years of negotiation, several Athabaskan peoples in northern Canada have concluded Comprehensive Land Claims and Self Government Agreements with the Crown.

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[157] Ibidem.
[158] Ibidem.
[159] See T. Marshall, D. Gallant, "Residential Schools in Canada", in: The Canadian Encyclopedia, June 1, 2021, https://www.thecanadianencyclopedia.ca/en/article/residential-schools [last accessed: 02.11.2021].
[160] Athabaskan Petition, *op. cit.*, p. 23.
[161] Ibidem, p. 22.

1.6. Gwich'in

Gwich'in are Dene (Athabaskan)-speaking Indigenous Peoples who live in northwestern North America. These communities are often referred to collectively as Dinjii Zhuh, although some First Nations and the Gwich'in Tribal Council retain the Gwich'in name. There are thought to be between 7,000 and 9,000 Dinjii Zhuh living in communities in Alaska, Yukon and the Northwest Territories[162]. Gwich'in are the Permanent Participants at the Artic Council, represented by the Gwich'in Council International (GCI), established in 1996. GCI consists of board members across the Gwich'in territory. There are four members from Alaska, two from the Yukon, and two from the Northwest Territories. The chair of GCI rotates every two years among the three regions. The vice chair of the Council always comes from Alaska[163].

Early explorers and anthropologists identified eight to ten regional Gwich'in groups in the territory between the Mackenzie River flats in the Northwest Territory and just beyond Fort Yukon on the Porcupine River in Alaska. Each of these historic regional groups spoke a different dialect of the language, but clearly identified themselves as distinct from their non-Gwich'in neighbours[164]. Today, there are two main Dinjii Zhuh languages (although there are various dialects within each): one that is spoken in Alaska and the other that is spoken in the Yukon and the Northwest Territories. Dinjii Zhuh Ginjik is one of the official languages of the Northwest Territories[165].

The ancestors of the modern Gwich'in were nomadic people, whose location and subsistence depended on the season – in the winter their main occupation was hunting, while in summer they stationed around lakes, to fish. In winter, people lived in dome-shaped caribou skin lodes when hunting in the mountains, while in summer spruce bark houses were built and used as smokehouses or living areas. Gwich'in used birch snow shovels, bone fishhooks, spears, arrow-heads, bone awls, caribou leg skin bags and sleds[166].

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[162] A. McFadyen Clark, "Dinjii Zhuh (Gwich'in)", in: The Canadian Encyclopedia June 19, 2020, https://thecanadianencyclopedia.ca/en/article/gwichin [last accessed: 02.11.2021].
[163] R. Olson, "Gwich'in Council International", in: *Encyclopedia of the Arctic. Volumes 1,2, and 3. A-Z*, M. Nuttall (ed.), Routledge, New York and London 2005, p. 818.
[164] S. Greer, *The Gwich'in of the Northwest Territories: Bibliography of Sources Related to Archaeology, History, Oral History, Traditional Culture and Land Use Patterns,* Gwich'in Social and Cultural Institute, 1996, p. 1-2.
[165] A. McFadyen Clark, *op. cit.*
[166] "Gwich'in History and Culture" In: *Canada's Western Arctic Including the Dempster Highway*, Scott Black, Georgina Montgomery, Alan Fehr (eds.), Western Arctic Handbook Committee, 2002, p. 211-213.

In 1789, the Dinjii Zhuh made contact with Alexander Mackenzie south of the Mackenzie Delta. Within two decades, they were trading at posts on the Mackenzie River. This trade network prompted the Hudson's Bay Company to establish Fort McPherson on the Peel River in 1840 and Fort Yukon (Alaska) in 1847. Having served as intermediaries in trade between the coastal Inuit and interior Indigenous communities, and between the Mackenzie and Yukon communities, the Dinjii Zhuh resented the existence of European trading posts in their territory[167]. During the middle of the 19th and into the early 20th century, due to epidemic diseases brought by Euromericans Gwich'in populations in Canada and Alaska were reduced by an estimated 60–80% within the next five decades[168].

In 1921, the Dinjii Zhuh and some other Indigenous nations signed Treaty 11 with the Canadian government, providing the federal government with land for development in exchange for certain rights to the land. Treaty 11 covers more than 950,000 km^2 of present-day Yukon, Northwest Territories and Nunavut. Hasty negotiations on the part of the Canadian government, combined with weak implementation of the terms of the treaty — particularly with regard to reserves and land claims — have led to considerable disagreement between the parties on what was meant by the treaty and which promises have not been fulfilled[169]. As recalled by Julienne Andre, from the Gwich'in community of Tsiigehtchic (formerly Arctic Red River), her peoples were suspicious of what the treaty meant[170]. It soon occurred that the treaty was largely forgotten, and the government of Canada steadily increased its control over Gwich'in land, often allowing extraction of the natural resources, without the consent of the communities[171].

In 1959, the federal Nelson Commission report found that provisions of the treaty had not been fulfilled by government[172]. During the early 1970', oil and gas companies were lobbying the Canadian government to construct a gas pipeline that would run from the Arctic Coast south to the United States. The proposed pipeline route crossed Inuvialuit and Gwich'in lands, as well as the lands of other Dene groups in the Mackenzie Valley[173].

In 1974, the Dene Nation brought the Canadian Government to court. The Dene

[167] A. McFadyen Clark, *op. cit.*
[168] P. Fast, "Gwich'in", in: *Encyclopedia of the Arctic. Volumes 1,2, and 3. A-Z,* M. Nuttall (ed.), Routledge, New York and London 2005, p. 816.
[169] A. McFadyen Clark, op. cit.
[170] Gwich'in History and Culture, *op. cit.*, 217.
[171] Ibidem, p. 220.
[172] S. Irlbacher Fox, "Gwich'in Comprehensive Land Claims Agreements", in: *Encyclopedia of the Arctic. Volumes 1,2, and 3. A-Z,* M. Nuttall (ed.), Routledge, New York and London 2005, p. 817.
[173] Gwich'in History and Culture, *op. cit.*, p. 220.

claimed that Treaty 11 did not represent a surrender of Aboriginal title and that Canada had not fulfilled the provisions of the Treaty. In 1976, Canada agreed to negotiate a Comprehensive Land Claim Agreement with the Dene Nation and Métis Association of the Northwest Territories[174]. During the negotiations, Gwich'in Tribal Council representatives decided to negotiate their own agreement, as a separate body.

On July 13, 1991, Gwich'in, territorial, and federal negotiators initialed a Gwich'in Land Claim Agreement, which provisions will be analyzed in the next subchapter.

1.7. Aleut

Aleut, self-names Unangan and Sugpiaq, are Indigenous Peoples of the Aleutian Islands, a 1300-mile-long volcanic island arc of almost entirely treeless tundra, and the western portion of the Alaska Peninsula of northwestern North America[175]. The Unangan people have traditionally lived in the Aleutian Islands region of southwestern Alaska and the Commander Islands in the Russian Federation for nearly 10,000 years. Today, there are a dozen Aleut communities in the Aleutian region, including the Pribilof Islands and Russia's Commander Islands, where Russian fur traders relocated Aleuts to have them hunt for them in the 18th century[176]. The Aleut people of Russia and Alaska are represented at the Arctic Council by the Aleut International Association, which was established in September 1998[177].

Archeologists have determined that many of the Aleut villages have been continuously occupied for more than 8,000 years[178] and that the contemporary Aleuts are the descendants of a population which first established itself at Anangula Island[179]. By 4000 years ago, they were living in some of the largest villages ever seen in the Arctic[180]. At the time of European contact, the Aleut population inhabited all of the major Aleutian

[174] A. Legare, *op. cit.*, p. 820.
[175] Britannica, The Editors of Encyclopaedia. "Aleut". *Encyclopedia Britannica*, 4 Jun. 2019, https://www.britannica.com/topic/Aleut [last accessed: 02.11.2021].
[176] K. Reedy-Maschner, "Aleut", in: *Encyclopedia of the Arctic. Volumes 1,2, and 3. A-Z*, M. Nuttall (ed.), Routledge, New York and London 2005, p. 45.
[177] [177] K. Reedy-Maschner, "Aleut Internatonal Association", in: *Encyclopedia of the Arctic. Volumes 1,2, and 3. A-Z*, M. Nuttall (ed.), Routledge, New York and London 2005, p. 49.
[178] R. W. Estlack, *The Aleut Internments of World War II,* McFarland & Company, Inc., Publishers Jefferson, North Carolina 2014, p. 7.
[179] S. J. Langdon, *op. cit.*, p. 14.
[180] K. Reedy-Maschner, "Aleut", *op. cit.*, p. 45.

Islands, the Alaska Peninsula as far east as Port Moller, and the Shumagin Islands to the south of the Alaska Peninsula and the total Aleut population is estimated to have been between 15,000-18,000 people at that time[181]. Although reconstruction of Aleut culture and history is difficult due to the devastating impact of Russian contact in the 18th century, it is believed that the Aleut were divided into nine named subdivisions.. The traditional Aleut language is derived from the Eskimo-Aleut language stock, and is thought to have been distinct by at least 3000 years ago[182].

Aleut settlements included villages and seasonal camps. Winter villages, which could be used year round, were generally placed in protected locations along the shoreline with a good beach, a nearby freshwater stream, a headland for observation and close proximity to marine mammals, fish and intertidal resources. On the mainland, settlements tended to be on the southside of the Alaska Peninsula, perhaps to avoid winter ice from the Bering Sea while in the Aleutian Islands, settlements often were located on the north side, probably to avoid the prevailing southwest winds. A typical village consisted of about 200 people living in five to ten dwellings. Tents or abandoned houses were used at seasonal camps where people gathered food[183].

Except for a low intensity use of terrestrial mammals such as caribou, bear, and foxes on the Alaska Peninsula and first Aleutian Island of Unimak, the Aleut were, and continue to be, oriented almost entirely toward the sea. Aleut villages were located on bays and next to salmon streams where they had access to sea mammals and fish year round. All species were harvested for food and for making clothing and tools, such as seals, sea otters, whales, walrus, salmon, halibut, herring, and cod, among many. A variety of edible plants and wild berries were eaten. Ducks, geese, cormorant, and other waterfowl were also hunted. All available wild species are still subsistence harvested today by the Aleut[184].

One of the most spectacular aspects of the Aleutian Tradition is the ancient Aleut skill at mummification of the dead. Many of these mummies were individuals of high status, and when interred in caves they were perfectly preserved for up to 2000 years. This preservation allowed archaeologists to investigate many aspects of the Aleutian Tradition that are not preserved in the ancient village sites. These include baskets, mats,

[181] S. J. Langdon, *op. cit*, p. 14.
[182] K. Reedy-Maschner, "Aleut", *op. cit.,* p. 47.
[183] S. J. Langdon, *op. cit*, p. 15
[184] K. Reedy-Maschner, "Aleut", *op. cit,* p. 45-46.

clothing, hats, masks, bags, shields, armor, spears, bows and arrows, kayaks, and many other aspects of perishable material culture[185]. On Kagamil Island, over two hundred excellently-preserved bodies have been discovered in several caves. According to William Laughlin, a widely-recognized expert on the Aleuts, mummification was practiced to preserve the spiritual power which resides in each person[186].

Over millennia, the Aleutian region has been the center of a vast interaction sphere. Aleut participated in trade and warfare over hundreds of miles with their closest neighbors, the Koniag of Kodiak Island, who today call themselves Alutiiq, and the Yupiit to their north, as well as between Aleut villages and islands[187]. In 1741, the Danish explorer Vitus Bering, in the employ of the Russian government, made the first European landing in Alaska[188].

The czarist government, interested in securing rights to these new lands and reaping profits from the harvest of sea mammals, commissioned additional voyages in search of new areas to exploit. In 1786, the Russians discovered the Pribilof Islands. The two main islands, Saint Paul and Saint George, are the major fur seal breeding grounds in the North Pacific. The Russians forcibly relocated a group of Aleut to harvest the seals; descendants of those first Aleuts continue to occupy the Pribilof Islands to this day[189].

In 1799 the Russian-American Company was established as the trading monopoly under the patronage of the Russian government to carry on the fur trade and to confront foreign activity in the North American colonies[190]. The Russian occupation devastated the Aleuts. Smallpox, measles, tuberculosis, venereal disease, and pneumonia that the Russians introduced into the islands decimated the people and helped to reduce the population from an estimated 20,000 to fewer than 5,000 natives. The Russians resettled many of the Unangan on other islands to meet their insatiable demands for hunters and laborers[191]. Russian Orthodoxy has been a prominent part of Aleut life since approximately the 1790s, when the first missionaries arrived and established churches in most Aleut communities. The Russian Orthodox Church triggered undeniable

[185] H. D. G. Maschner, "Aleutian Tradition", in: *Encyclopedia of the Arctic. Volumes 1,2, and 3. A-Z*, M. Nuttall (ed.), Routledge, New York and London 2005, p. 54.
[186] S. J. Langdon, *op. cit*, p. 22.
[187] K. Reedy-Maschner, "Aleut", *op. cit*, p. 45.
[188] S. J. Langdon, *op. cit*., p. 24.
[189] Ibidem.
[190] M. Belolutskaia, „Russian American Company", in: *Encyclopedia of the Arctic. Volumes 1,2, and 3. A-Z*, M. Nuttall (ed.), Routledge, New York and London 2005, p. 1797.
[191] R. W. Estlack, *The Aleut Internments of World War II*, McFarland & Company, Inc., Publishers Jefferson, North Carolina, 2014, p. 9.

accomplishments in education and literacy by supporting elements of traditional Aleut culture and by preserving their language. This enabled a peaceful intertwining of both cultures. For the majority of contemporary American Aleuts, the Russian Orthodox Church is woven into the fabric of their lives[192].

In 1867 the Americans purchased Alaska from Russia. The treaty excluded Indigenous Peoples and made them wards, not citizens, of the US government, a status that continued through statehood in 1959 until the passage of the Alaska Native Claims Settlement Act (ANCSA) in 1971. Hunting for furs continued under US rule until sea otters were almost extinct and the government banned the practice. Hunting for fur seals was eventually limited to the Pribilof Islands and controlled by the government, which is now a subsistence hunt[193].

Under the American rule, in 1942, due to the threat of the Japanese landing in the Aleutians all Aleut were forcibly evacuated from villages west of Unimak Island (save for those of Attu Island, who were taken to a prison camp in Japan). Hundreds of men, women, and children were taken to southeast Alaska and housed in abandoned canneries, where many elders and children died from disease or malnutrition. Not everyone returned to their villages after the war, and those who did found that the American servicemen, not the Japanese, had ravaged their homes, burned villages (supposedly to prevent Japanese use), stolen personal items, and riddled homes and churches with bullet holes using them as target practice. Several villages were no longer habitable and were permanently abandoned. Reparations for damaged or stolen personal property, church property, loss of lands, and human life were finally made in 1988 by the US government after many years of personal testimony and petitioning[194].

1.8. Sami

The Sami (or Saami, or Sámi) are Indigenous Peoples of the Arctic whose traditional territory, referred to as Sápmi, encompasses parts of far northern Finland (Lapland), Norway (Finnmark, Nordland, and Troms), and Sweden (Jämtland, Norrbotten, and Västerbotten) and the Kola Peninsula of Russia. There are about 80-100,000 Sámi altogether: 50,000 - 65,000 in Norway, 20,000 - 40,000 in Sweden, about

[192] Y. Csonka, P. Schweitzer, *op. cit.*, p. 56.
[193] K. Reedy-Maschner, "Aleut", *op. cit.*, p. 46.
[194] K. Reedy-Maschner, "Aleut", *op. cit.*, p. 46.

8,000 - 10,000 in Finland and about 2 000 in Russia[195]. The Sami are represented at the Artic Council by the Saami Council, established in 1956. Until 1992, the Saami Council was called the Nordic Saami Council. The Nordic Saami Council was founded at the second Nordic Saami Conference, held in Karasjok, Norway in 1956. At that time, the Nordic Saami Council was the world's first international Arctic Indigenous organization[196]. In 1992, the Russian Saami joined the organization, and the name was changed to the Saami Council[197].

Until after World War II, the Sami were officially called Lapps or Finns (in Norway), the names given them by the neighboring peoples[198]. The Swedish term Lapp refers to a patch of cloth for mending, a derogatory derivation, suggesting that the Saami wore only old clothing. The derivative term Laplander designates any person living within the geographical region of Lapland, including non-Indigenous[199].

The first mention of the Saami is in Tacitus' "Germania" from AD 98, where people called the "Fenni" are described, who most likely were the ancestors of the Saami[200]. He describes the "Fenni" as a people dressed in animal hides, who did not own anything or work the land, who slept on the ground, and who manifested wild behavior. The Germanic writer Jordanes of the sixth century AD mentions a people, the Adogit, living in the far north, land of midnight Sun, although he mistakenly classifies them as a Germanic people. In 555 the Byzantine historian Procopius referred to Scandinavia as Thule, and its inhabitants as Skridfinns[201].

Saami are descendants of the people who first inhabited the northern regions of Europe shortly after the end of the last Ice Age, approximately 10,000 years ago[202]. Some scholars believe that Saami ancestors migrated from central Asia, pushed to the northern reaches of Europe by migrating fellow Finno-Ugrians, Goths and Slavs. Or they may have migrated to the region by boat, following the coastlines. Another theory holds that they originated in the Alps. Still other scholars theorize that the Saami have been living on the Scandinavian Peninsula since before the last Ice Age, isolated from other European

[195] Council of Europe, *The Sámi. The People, their Culture and Languages*, Strasbourg 2015, p. 9.
[196] I. Overland, "The Saami Council", in: *Encyclopedia of the Arctic. Volumes 1,2, and 3. A-Z,* M. Nuttall (ed.), Routledge, New York and London 2005, p. 1815.
[197] P. Lantto, „Sami", in: *Encyclopedia of the Arctic. Volumes 1,2, and 3. A-Z,* M. Nuttall (ed.), Routledge, New York and London 2005, p. 1814.
[198] Ibidem, p. 1811.
[199] C. Waldman, C. Mason, *Encyclopedia of European Peoples*, Facts On File, New York 2006, p. 682.
[200] P. Lantto, *op. cit.*, p. 1811.
[201] C. Waldman, C. Mason, *op. cit.*, p. 683.
[202] Council of Europe, *op. cit.*, p. 9.

groups[203]. Today, however, it is considered most likely that the Saami as a distinct ethnic group originated within Sápmi, and they were the dominating group within this area up until the Middle Ages[204].

The Saami have traditionally relied on hunting, fishing, gathering and trapping and have a deep knowledge of the far north region that has been handed down for many generations. Reindeer herding, in particular, is of central importance to the Saami People[205]. The domestication of the reindeer by the Saami is an early historical phenomenon; in the first millennium AD, there were already signs of domesticated reindeer[206]. A frieze of rock art (petroglyph) at Alta in Norway that depicts reindeer being driven into a fenced circle dates to approximately 4500 BC[207]. However, the reindeers were still few in number and were mainly used for transport and as decoys in the hunt[208]. In about 1500 AD reindeer husbandry became the primary source of subsistence for the Saami; large herds were kept and around them was shaped a nomadic way of life[209].

Traditionally, the Saami society was organized in siidas, organizational units consisting of a number of families and in control of distribution of lands, water and natural resources. Within the siida, members had individual rights to resources but helped each other with the management of reindeer herds, hunting and fishing[210]. The siida system seems to have started evolving during the 9th century, and it was so firmly established that the Swedish courts acknowledged the right of the siidas to manage their own territories at least until the middle of the 18th century[211]. Although historical developments have weakened the Saami's traditional patterns of association, the siida system continues to be an important part of the Saami society[212].

Contacts between the Saami and the neighboring peoples probably began in the form of trade. Slowly, these relationships changed as the surrounding societies gained in strength, and the Saami became more subordinate, but still relatively independent. When

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[203] C. Waldman, C. Mason, *op. cit* **,** p. 682.
[204] P. Lantto, *op. cit.,* p. 1811.
[205] Special Rapporteur on Rights of Indigenous Peoples, J. Anaya, The situation of the Sami people in the Sápmi region of Norway, Sweden and Finland, A/HRC/18/35/Add.2, UN Human Rights Council 2011, p. 4.
[206] P. Lantto, *op. cit.,* p. 1812.
[207] H. Haarmann, "Sami", in: *Native Peoples of the World. An Encyclopedia of Groups, Cultures, and Contemporary Issues. Volume 1-3,* Steven Danver (ed.), Routledge, New York 2013, *p. 369.*
[208] P. Lantto, *op. cit.,* p. 1812.
[209] C. Waldman, C. Mason, *op. cit.,* p. 684.
[210] Special Rapporteur on Rights of Indigenous Peoples, *op. cit.,* p. 5.
[211] P. Lantto, „Sami" in: Encyclopedia, p. 1812.
[212] Special Rapporteur on Rights of Indigenous Peoples, *op. cit.,* p. 5.

the States began to lay claims to the Saami area, this had more direct effects for the Saami who were forced to pay taxes, in some areas to more than one State[213].

Starting in 1635 with the discovery of silver in northern Sweden many Saami were forced into slave labor in the mines. In 1673 the government officially sanctioned settlement by non-Indigenous in the Saami homeland[214]. In 1603 Scandinavians built the first Lutheran Church in Saami territory. The Russian Orthodox Church also intended to convert the Indigenous population in their domain. At the beginning, the Saami people resisted the new religions, but by the mid-17th century their sacred sites were destroyed and drums burned. The majority were Christianized by the end of 18th century[215].

The State borders that today divide Sápmi were established from the middle of the 18th to the middle of the 19th centuries. Over time, the arrival of new settlers within the Nordic region changed the composition of the population in the northern areas and reduced the Sami to a numerical minority in their homeland. The borders between States cut through linguistic and cultural communities and constrained reindeer-herding activities. During the 1800s and until about the time of the Second World War, Nordic Governments primarily followed the assimilating policies that were aimed at integrating them into the majority societies[216].

The industrial exploitation of the area gained speed in the late 19th century, when mining and the timber industry became established in the area. During the second half of the 20th century, hydropower development expanded in Sápmi. The industrial exploitation of the area, in combination with the development of communications and the use of the land for tourism and recreation, has had a major impact on the living conditions of the Saami and on the reindeer herding traditionally practiced by the Saami. The ownership of the land in Sápmi is claimed by the States, a notion the Saami have challenged with increasing strength since World War II, demanding control over the management of the land they regard as theirs[217].

The political mobilization among the Saami began at the beginning of the 20th century, although more permanent Saami organizations were not established until after World War II[218].

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[213] P. Lantto, *op. cit.*, p. 1814.
[214] C. Waldman, C. Mason, *op. cit.*, p. 683.
[215] Ibidem.
[216] Special Rapporteur on Rights of Indigenous Peoples, *op. cit.*, p. 5.
[217] P. Lantto, *op. cit.*, p. 1811.
[218] Ibidem, p. 1814.

As to the international obligations of the Nordic States, Norway was the first country to ratify ILO Convention No. 169 and voted in favor of the adoption of the Declaration on the Rights of Indigenous Peoples in 2007[219]. Sweden voted in favor of the Declaration on the Rights of Indigenous Peoples in 2007, but has not ratified ILO Convention No. 169[220]. Similarly, Finland voted in favor of adoption of the Declaration on the Rights of Indigenous Peoples, but has not ratified ILO Convention No. 169, although this has been recommended by United Nations treaty bodies and within the framework of the Universal Periodic Review[221].

1.9. Indigenous small-numbered peoples of the North, Siberia and the Far East

More than 160 distinct Indigenous Peoples inhabit the territories of contemporary Russia[222]. However, in Russian legislation the stand-alone term "Indigenous Peoples" cannot to be found anywhere – it appears only in conjunction with specific qualifiers referring to the size of the group and its place of residence. As such, the legally recognized Indigenous Peoples of the Russian Federation are the "Indigenous small-numbered peoples of the North, Siberia and the Far East of the Russian Federation" [223]. According to the Russian legislation, an Indigenous small-numbered people of the North needs to: 1) be a distinct ethnic group, and self-identify as such; 2) be "small", with a population not exceeding 50,000; 3) be Indigenous to and reside within a certain geographic realm ("The North, Siberia or the Far East"); and maintain a "traditional" way of life, while the scope of what "traditional" may include is partly subject to interpretation, partly to further regulation[224]. However, even if all criteria are met, recognition as Indigenous does not follow automatically as it is the state who grants (or withholds) a group's recognition.

Currently, only forty peoples are officially recognized as the Indigenous Peoples of the North, Siberia and the Far East (see Table 1).

By some accounts, the annexation of the territories where Indigenous populations were settled began in the 13th century in the northern part of what is known

[219] Special Rapporteur on Rights of Indigenous Peoples, *op. cit.*, p. 7
[220] Ibidem, p. 8.
[221] Ibidem, p. 9.
[222] D. N. Berger, *The Indigenous World 2019*, IWGIA, Copenhagen 2019, p. 44.
[223] J. Rohr, *IWGIA Report 18: Indigenous Peoples in the Russian Federation,* IWGIA, Copenhagen 2014, p. 9.
[224] Ibidem.

today as European Russia, when the Saami were the first people to pay levies to the state of Novgorod[225]. Since that time Indigenous Peoples in Russia's North have been subjected to both imperialist and communist colonization and assimilation policies, which eroded their cultural, spiritual, social, and economic traditions[226].

The Indigenous Peoples inhabiting the Arctic zone of Russia are represented at the Arctic Council by the Russian Association of Indigenous Peoples of the North (RAIPON), established in March 1990, under the name Association of the Indigenous Minorities of the Far North, Siberia, and the Far East[227]. RAIPON adopted its current name at its Second Congress in November 1993. RAIPON is an umbrella organization, that represents regional Indigenous organizations, such as for example the Association of Kola Sami or the Association of the Nenets people "Yasavey".

Denomination	**Denomination in Russian**	**Region**	**Estimated number**
Aleuts	алеуты	Kamchatka Krai	482
Alyutors	алюторцы	Kamchatka	2,000 - 3,000
Chelkans	челканцы	Altai Republic, Altai Krai	2,000
Chukchis	чукчи	Chukotka Autonomous Okrug, Magadan Oblast, Kamchatka, Sakha Republic	16,000*
Chulyms	чулымцы	Tomsk Oblast, Krasnoyarsk Krai	742
Chuvans	чуванцы	Chukotka, Magadan Oblast	1,511
Dolgans	долганы	Krasnoyarsk Krai, Sakha	6,945
Enets	энцы	Krasnoyarsk Krai	227*
Siberian Yupik, Inuit	эскимосы	Chukotka, Magadan Oblast	1,719
Evenks	эвенки	Sakha, Krasnoyarsk Krai, Khabarovsk Krai, Buryatian Republic, Amur	30,163

[225] World Bank, *Indigenous Peoples of Russia. Country profile*, The International Bank for Reconstruction and Development/The World Bank 2014, p. 4.
[226] S. Irlbacher Fox, "Self-government", in: M. Nuttall (ed.), *Encyclopedia of the Arctic. Volumes 1,2, and 3. A-Z,* , Routledge, New York and London 2005, p. 1882.
[227] P. Rethmann, "Russian Association of Indigenous Peoples of the North", in: *Encyclopedia of the Arctic. Volumes 1,2, and 3. A-Z*, M. Nuttall (ed.), Routledge, New York and London 2005, p. 1799.

		Oblast, Zabaykalsky Krai, Irkutsk Oblast	
Evens	эвены	Sakha, Magadan Oblast, Kamchatka, Chukotka, Khabarovsk Krai	17,199
Itelmens	ительмены	Kamchatka, Magadan Oblast	2,481
Kamchadals	камчадалы	Kamchatka, Magadan Oblast	1,927*
Kereks	кереки	Chukotka	100
Kets	кеты	Krasnoyask Krai, Tomsk Oblast, Yamal-Nenets Autonomous Okrug, Khanty-Mansi Autonomous Okrug (Yugra)	1113
Khanty	ханты	Yugra, Yamal, Tyumen Oblast, Tomsk Oblast	30,943*
Koryaks	коряки	Kamchatka, Chukotka, Magadan Oblast, Khabarovsk Krai, Primorsky Krai, Krasnoyarsk Krai, Sverdlovsk Oblast, Sakha	7,953*
Kumandins	кумандинцы	Altai Krai, Altai Republic, Kemerovo Oblast	2,892*
Mansi	манси	Yugra, Yamal, Tyumen Oblast, Sverdlovsk Oblast	12,269*
Nanai	нанайцы	Khabarovsk Krai, Primorsky Kray, Sakhalin Oblast, Jewish Autonomous Oblast, Kamchatka, Sakha	12,023
Negidals	негидальцы	Khabarovsk Krai	622
Nenets	ненцы	Yamal, Krasnoyarsk Krai, Yugra, Arkhangelsk Oblast, Nenets Autonomous Okrug, Krasnoyarsk Krai, Komi	44,640*

		Republic, Murmansk Oblast	
Nganasans (Tavgi)	нганасаны	Krasnoyarsk Krai, Omsk Oblast, Kurgan Oblast, Sverdlovsk Oblast, Irkutsk Oblast, Sakha, Primorsky Krai	1,262
Nivkhs	нивхи	Sakhalin, Khabarovsk Krai	4,673
Oroks	ороки	Sakhalin, Khabarovsk Krai, Buryatia, Primorsky Krai	350-360
Orochs	орочи	Khabarovsk Krai, Magadan Oblast, Sakhalin, Primorsky Krai	700
Sami	саамы, саами	Murmansk Oblast	1,771*
Selkups	селькупы	Yamal, Tomsk Oblast, Krasnoyarsk Krai	3,612
Shors	шорцы	Kemerovo Oblask, Khakassia, Krasnoyarsk Krai, Altai Krai, Altai Republic	13,108
Soyots	сойоты	Buryatia, Irkutsk Oblast	3,608*
Taz	тазы	Primorsky Krai	274*
Telengits	теленгиты	(): Altai Republic, Altai Krai	3,712*
Teleuts	телеуты	Kemerovo Oblast, Altai Republic, Altai Krai	2,500
Tofalars or Tofa	тофалары или тофы	Buryatia, Irkutsk Oblast, Krasnoyarsk Krai, Tomsk Oblast, Tuva Republic, Khakassia, Sakha	722
Tubalars	тубалары	Altai Republic, Irkutsk Oblast, Altai Krai	1,965*
Tozhu	тувинцы-тоджинцы	Tuva	1,858*
Udege	удэгейцы	Primorsky Krai, Khabarovsk Krai	2,011

Ulchs	ульчи	Khabarovsk Krai, Jewish Autonomous Oblast, Primorsky Krai, Kamchatka	2,765*
Veps	вепсы	Republic of Karelia, Murmansk Oblast, Kemerovo Oblast	5,936*
Yukaghirs	юкагиры	Sakha, Chukotka, Magadan Oblast	1,140

Table 1. Indigenous small-numbered peoples of the North, Siberia and the Far East, according to the Subcommittee on the North and small-numbered peoples of the Federation Council Committee on Federal Structure, Regional Policy, Local Government and Northern Affairs: https://archive.md/20120912214236/http://www.severcom.ru/nations/
*Information according to 2010 census, in: J. Rohr, IWGIA Report 18: *Indigenous Peoples in the Russian Federation*, IWGIA 2014, Appendix 2, pp. 65-66.

The Russian Federation Russia has neither ratified the ILO Convention No. 169, nor it has endorsed the United Nations Declaration on the Rights of Indigenous Peoples.

1.10. The Arctic practice concerning self-determination

The Arctic region provides a wide variety of examples on the realization of the right to (internal) self-determination of Indigenous Peoples. Indigenous political discourse in Canada is very different from that of Scandinavia or Greenland, and these differences inform the way in which self-determination is conceptualized and understood in different regions. The Inuit in both Nunavut (Canada) and Greenland have achieved extensive self-government powers beyond most Indigenous peoples in the world, while the self-determination of Sami is generally limited to cultural autonomy.

Greenland has achieved the most extensive political autonomy of all Indigenous Peoples in the world. In a way, Inuit Greenlanders are only a referendum away from a full political independence[228]. As it has been mentioned, Greenland became a Danish colony in 1721 and since then the Danish crown administered Greenland through a state trading monopoly. In 2008 a referendum was held in Greenland on expanded self-rule and 75% voted in favor. As the result, the Greenland Self-Government replaced the Home Rule arrangement on 21 June 2009. The Act on Greenland Self-Government (commonly referred to as the Self Rule Act) establishes new political and legal opportunities for

[228] R. Kuokkanen, *Indigenous self-government in the Arctic Assessing the scope and legitimacy in Nunavut, Greenland and Sápmi,* in: T. Koivurova et al., *op. cit.*, Kindle Location 8687.

Greenland to gain extensive self-governance and ultimately independence if the population of Greenland so chooses in the future. The Act contains 33 areas of jurisdiction for the self-rule government (Naalakkersuisuit or the Government of Greenland) to exercise legislative and executive authority over. The most important of these is the mineral resources. Two other issues of major significance include the recognition of the Greenlanders as a people in international law and adoption of Greenlandic as the official language. Within the framework of the Self-Government Act, Denmark retains the control of the constitution, citizenship, Supreme Court, foreign affairs, defence and currency. Denmark is, however, expected to involve Greenland on foreign affairs and security matters that affect or are in the interests of Greenland. Moreover, since Home Rule, Greenland has been permitted to have missions in countries of special interest to Greenland. Through the Home Rule Act and the Self-Government Act, Greenland has the right to elect its own parliament and government, the latter with executive authority over the areas of jurisdiction included in the Acts. The elected assembly or the Parliament of Greenland (Inatsisartut) consists of 31 members, who are elected by the population of Greenland for a four-year period. The elected assembly approves the government, which is responsible for the central administration, headed by a premier with a cabinet. The Parliament also appoints the premier, who nominates the ministers for the cabinet. There are currently eight ministers, all of whom are Inuit Greenlanders[229].

In the late 1960s and early 1970s, Alaskan Inuit played a pivotal role in advancing Inuit self-determination by spearheading land claims and establishing the North Slope Borough as a home rule government, the first majority Inuit public government in Inuit Nunaat. The Indigenous land claims movement in Alaska culminated in 1971 with the passage of the Alaska Native Claims Settlement Act (ANCSA) by the U.S. Congress[230]. The Settlement Act passed titles of land to Alaska Natives and formed thirteen regional for-profit corporations, twelve regional nonprofit social service corporations, and over two hundred village corporations[231]. The Aleut Corporation was established in 1972 under the terms of ANCSA as the regional corporation for the Aleut homeland in a settlement of $19.5 million. The corporation was entitled to 66,000 acres of surface lands

[229] R. Kuokkanen, *op. cit.*, Kindle Locations 8542-8545.
[230] T. Aqukkasuk Argetsinger, Advancing Inuit Self-Determination and Governance in Alaska and Canada amidst Renewed Global Focus on the Arctic, in: T. Koivurova et al. (eds.), *Routledge Handbook of Indigenous Peoples in the Arctic*, Taylor and Francis, London and New York 2021, Kindle Locations 9000-9001.
[231] K. Reedy-Maschner, "Aleut", *op. cit.*, p. 48.

and 1.572 million acres of subsurface estate. Voting shares of stock were issued to 3249 shareholders. The Aleut Corporation oversees twelve local village corporations designed to enhance housing, education, and health of its members[232]. ANCSA was novel for its time and served as an early reference point for Inuit in Canada, who settled four land claims agreements between 1975 and 2005. Inuit-led institutions in Alaska face challenges stemming from overlapping and sometimes conflicting mandates that can sow political division and undermine the prosperity of Inuit communities. Despite the absence of cohesive Inuit governance and representation at the regional or state-wide levels, Inuit-led institutions in Alaska possess significant experience and capacity in the areas of governance, economic development, and service delivery[233]. However, unlike ANCSA, Inuit land claims agreements are comprehensive, affirming specific rights that enable Inuit representative organizations to play a more dynamic and efficient role in creating prosperity for their beneficiaries[234].

Since 1970, Inuit in Canada have negotiated four comprehensive land claim agreements with the federal government. These agreements are: the James Bay and Northern Quebec Agreement and Complementary Agreements, which were reached in 1975 in northern Quebec; the Inuvialuit Final Agreement, which was reached in 1984 in the western Arctic; the Nunavut Land Claims Agreement, which was settled in 1993 in the eastern Arctic; and the Labrador Inuit Land Claims Agreement, which was settled in 2003 in northern Labrador[235]. Comprehensive Land Claims are modern-day treaties made between Indigenous Peoples and the federal government. They are based on the traditional use and occupancy of land by Indigenous Peoples who did not sign treaties and were not displaced from their lands by war or other means. These claims, which are settled by negotiation, follow a process established by the federal government to enable First Nations, Inuit and Métis to obtain full recognition as the original inhabitants of what is now Canada. Treaties are constitutionally protected, mutually binding agreements. Those signed by Indigenous Peoples between 1701 and 1923 are commonly referred to as historic treaties, and modern treaties refer to those agreements negotiated since then[236].

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[232] Ibidem, p. 48-49.
[233] T. Aqukkasuk Argetsinger, *op. cit.*, Kindle Locations 8863-8864.
[234] Ibidem, p. Kindle Location 8870.
[235] S. Bonesteel, *Canada's Relationship With Inuit. A History of Policy and Program Development*, Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians, Ottawa 2008, p. IX.
[236] K. Crowe, "Comprehensive Land Claims: Modern Treaties", in: The Canadian Encyclopedia, July 11, 2019, https://www.thecanadianencyclopedia.ca/en/article/comprehensive-land-claims-modern-treaties [last accessed: 03.11.2021].

The Land Claim Agreements did not create a new ethnic Inuit state, but a public government within the limits defined by the Canadian constitution. They have also developed distinct institutional models that incorporate different elements of public and Indigenous governance. Collectively, these regions constitute Inuit Nunangat, or "the place where the Inuit live" in Inuktitut, the Indigenous language of the Inuit[237]. Nonetheless, the creation of Nunangat has given the Inuit of the eastern Arctic a greater degree of autonomy and self-government than any other Indigenous group in Canada[238].

As such, Inuit must navigate complex layers of government and representation that can be grouped into three main categories: Inuit-owned, for-profit corporations; public regional governments; and federally recognized tribes and regional tribal health and social service providers. Despite the fractured and sometimes conflicting mandates and priorities of these institutions, they each possess significant experience and capacity that could be more effectively leveraged through a more cohesive and unified model of representation and governance[239].

Inuit are not the only Arctic Indigenous Peoples in Canada who negotiated Land Claims Agreements as after years of negotiation, several Athabaskan peoples and Gwich'in in northern Canada have concluded Comprehensive Land Claims and Self Government Agreements. Each of the Agreements is unique, but all provide some degree of legal certainty to ownership of land and natural resources in traditional territories, enabling the Crown to award rights to explore for and develop oil, gas, and minerals and other natural resources to third parties without fear of legal challenge based upon assertion of aboriginal title[240]. In exchange, these Agreements define constitutionally protected rights for aboriginal signatories. These rights include land ownership and natural resource development, culture, economic development, wildlife and environmental conservation, and financial compensation. In the last forty years Athabaskan peoples in Canada have

[237] G. N. Wilson, P. Selle, *op. cit.*, p. 13.
[238] M. Nuttall, *op. cit.*, p. 994.
[239] T. Aqukkasuk Argetsinger, *op. cit.*, Kindle Location 8994.
[240] In Canada, Aboriginal land rights are rooted in Aboriginal title. This title is recognized in the historical British document known as The Royal Proclamation of 1763. According to British law, Aboriginal title arises from long and continuous use and occupancy of land by Aboriginal peoples prior to the arrival of European colonial powers in North America. An Aboriginal group who negotiates through the Comprehensive Land Claim Process will obtain control and ownership of some lands and resources over a specific geographical area known as a "Settlement Area." In exchange, the claimant group will surrender its Aboriginal title. In sum, the process brings certainty to ownership and use of land and resources in order to facilitate the development of nonrenewable resource initiatives (oil, gas, and mining). (A. Legare, „Gwich'in Settlement Area", in: *Encyclopedia of the Arctic. Volumes 1,2, and 3. A-Z*, M. Nuttall (ed.), Routledge, New York and London 2005, p. 820).

concluded the following modern treaties with the Crown: Gwich'in Comprehensive Land Claims Agreement (December 1993); Sahtu Dene and Metis Comprehensive Land Claims Agreement, (1993); Tlicho Land Claims and Self-Government Agreement (August 2003); Eleven Yukon First Nations Final Agreements (May 1993-October 2005)[241].

On July 13, 1991, Gwich'in, territorial, and federal negotiators initialed a Gwich'in Land Claim Agreement. In September 1991, 90% of eligible Gwich'in voters turned out to vote on whether they would accept it; 94% of them voted in favor of it. The agreement was signed by Canada, the territorial government, and the Gwich'in on April 22, 1992. Federal legislation, Bill C-94 was passed in the Canadian Parliament in November 1994. It subsequently became a law on December 22, 1994, which brought the agreement into effect[242].

Major provisions of the agreement relate to land. The Gwich'in Settlement Area (GSA) is entirely located within the Subarctic zone of the Northwest Territories and covers an area of 56,935 square kilometers. It encompasses much of the Arctic Red River watershed and part of the Mackenzie Delta. The GSA is bordered by the Inuvialuit Settlement Region to the north, the Sahtu Settlement Area to the southeast, and the Yukon Territory to the west[243].

The major provisions of the GSA include: a cash settlement of 140,691,428.95 Canadian dollars over 15 years; a set percentage of resource royalties to be paid to the federal government; a settlement area of 32,000 square kilometers in the Northwest Territories and Yukon, including 16,264 square kilometers of surface rights, 6,065 square kilometers of surface and subsurface rights and 93 square kilometers of subsurface rights[244].

In the Gwich'in Settlement Area, Gwich'in have extensive wildlife harvesting rights. They also have guaranteed participation in decision-making bodies established for the management of wildlife, and the regulation of land, water, and the environment. These bodies include the Gwich'in Renewable Resource Board, the Gwich'in Land and Water Board, and the Gwich'in Land Use Planning Board, which have authority in the GSA. Gwich'in have representation on the Mackenzie Valley Environmental Impact Review

[241] Athabaskan Petition, *op. cit.*, p. 65.
[242] S. Irlbacher Fox, *op. cit.*, p. 817.
[243] A. Legare, *op. cit*, p. 820.
[244] Gwich'in History and Culture, *op. cit.*, p. 221.

Board, which has authority in the Northwest Territories. Gwich'in have the rights of first refusal for a variety of commercial wildlife activities in the Area and receive a share of Mackenzie Valley resource royalties[245]. Moreover, the Land Claim Agreement obligates the federal government to negotiate self-government with the Gwich'in[246].

As such, concluding the Land Claims Agreement is not itself equal with establishing self-government. However, the Land Claims Agreements regulate the legal situation of Indigenous Peoples on a certain territory, usually establishing Indigenous-led entity and provide basis for further negotiations leading to exercising the right to self-determination.

As it was mentioned, the situation is quite different in Scandinavia, where the scope of Saami self-government is, by and large, confined to cultural affairs, allocation of State funding and consultation with the governments. Currently, each of the nation State inhabited by the Sami, except for the Russian Federation, established a Sami assemblies, popularly referred to as Saami Parliaments. The establishment of these bodies was a landmark development in creation of the institution of Indigenous self-determination. The first Saami Parliament was established in Finland, in 1972 and was the first elected Sami body within any of the Nordic countries[247]. The Constitution of Finland recognizes the Sami as an Indigenous People and recognizes their right to cultural autonomy within their homeland, noting that "in their native region, the Sami have linguistic and cultural self-government"[248].

The Saami Parliament, or Sámediggi, in Norway was established in 1987[249] with the dual function of serving as an elected political body for the Sami and carrying out administrative duties delegated by law or according to agreements with relevant national authorities, within various areas affecting Sami people[250].

Sweden was the last to create a Saami Parliament, as it was established in 1993, with the principal function of "monitoring issues concerning the Sami culture in Sweden"[251]. The three Sámi Parliaments are also government agencies in charge of administering Sámi-related affairs, specifically Sámi cultural policy. All three Sámi

[245] S. Irlbacher Fox, *op. cit.*, p. 817.
[246] Ibidem, p. 818.
[247] Special Rapporteur on Rights of Indigenous Peoples, *op. cit*., p. 9.
[248] Ibidem, p. 8.
[249] L. Sillanpää, "Saami Parliaments", in: *Encyclopedia of the Arctic. Volumes 1,2, and 3. A-Z,* M. Nuttall (ed.), Routledge, New York and London 2005, p. 1816.
[250] Special Rapporteur on Rights of Indigenous Peoples, *op. cit.*, p. 6.
[251] Ibidem, p. 8.

Parliaments have somewhat ambivalent mandates, but all have been established as mainly consultative or advisory bodies rather than self-governing institutions. In Sweden, legislation explicitly states that the Sámi Parliament is not a self-government institution but rather a special state authority responsible for Sámi cultural affairs. The Sami Parliaments exercise limited decision-making authority over their own affairs, mainly through the administration and dissemination of state funding in areas of education, language, health and social services. In addition, the Sami Parliament in Norway has been delegated the sole authority over Sámi cultural heritage, including responsibility for sacred sites[252].

An important step was made in 2017 when the governments of Finland, Norway and Sweden signed the Nordic Saami Convention[253], which in Article 4 defines the criteria of belonging to the Sami People, among which their own cultural traditions are particularly underlined[254]. However, the Convention has aroused controversy, as it "does not guarantee the balance of power. Saami are given autonomy on internal matters, but only consultative status on issues of particular importance for the Saami people"[255].

1.11. Concluding remarks

As it has been demonstrated there is no agreed upon definition of Indigenous Peoples at the international level, and neither should be, as for Indigenous Peoples the most important is the ability to self-identify as Indigenous. However, Indigenous Peoples can be characterize as those who: (a) have priority in time, with respect to the occupation and use of a specific territory; (b) voluntarily perpetuate cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions; c) self-identify, as well as are recognized by other groups, or by State authorities, as a distinct collectivity; and (d) have the experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.

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[252] R. Kuokkanen,, *op. cit.*, Kindle Locations 8657.
[253] Text of the Convention avaiable at https://www.sametinget.se/105173 [last accessed: 03.11.2021].
[254] T. Gadkowski, *Prawo narodów do samostanowienia oraz do ich bogactw i zasobów naturalnych,* in: Z. Kędzia, A. Hernandez-Połczyńska (eds), *Międzynarodowy Pakt Praw Gospodarczych, Socjalnych i Kulturalnych. Komentarz,* Warszawa 2018.
[255] L. Vidmar, *Another One Bites the Dust? A Critical Appraisal of the new Draft of the nordic Saami Convention from the Perspective of indigenous Rights,* "Treatises and Documents, Journal for Ethnic Studies" 2017, Vol. 79, p. 173.

As discussed in the chapter, the right to self-determination, although classified rather as a political right, is intrinsically connected with the exercise of cultural rights. Indigenous sovereignty can be understood as a "safe space" for Indigenous Peoples, where they can live according to their traditional ways of life, ensuring their right of free, prior, informed consent and the right to have self-governance. Indigenous sovereignty is also inclusive of right to ownership over traditional land, right to preserve identity and culture, participatory rights in decision making process especially in matters related to culture and life, and the right to self-governance through customary laws. It is now widely agreed that the Indigenous Peoples' right to self-determination is fulfilled through internal self-determination — a people's pursuit of its political, economic, social and cultural development within the framework of an existing State. As a result of political debate, the UNDRIP recognizes two possible forms of realization of the right were clearly indicated: self-government or autonomy.

All the Indigenous communities of the Arctic region were prospering before the contact with the settlers. Although at the beginning of the colonization, the political independence of Indigenous Peoples of North America was acknowledged by France and Britain, an example of which are the treaties concluded with them, they soon begun to see Indigenous Peoples as inferior. They had rich cultures, with a variety of tools, cultural artifacts and rituals. Their economics were based on hunting and gathering, and their ways of life were sustainable. The common denominators in the Artic Indigenous Peoples' history are epidemic diseases introduced by the colonizers, which substantially reduced the Indigenous populations, forced relocations, introduction of new religions, extraction of natural resources and new development projects, such as mining, hydropower plants or timber industry on territories belonging and used by Indigenous Peoples. In other words, the experience of subjugation, marginalization, dispossession, exclusion and discrimination. This experience and its ongoing effects, as it will be demonstrated in the next chapters, heavily influence Indigenous Peoples' ability to cope with current climate change and the deterioration of the environment.

Another common denominator between the Indigenous Peoples of the Artic region is that besides all the attempts of their annihilation, or in best case assimilation, they are still actively fighting for their rights. They are not only engaged at the domestic levels, where they were able to re-gain some levels of autonomy and self-governance, to a greater or lesser extent, depending on the settler State, but their activism at the international level resulted in the adoption of the UNDRIP. As in the fight for their rights they are choosing

the human rights framework, and regarding the central role of culture for Indigenous Peoples (being one of their distinctive elements as compared with other social groups), the next chapter provides an analysis of cultural human rights.

Chapter 2 : Cultural Rights – the Cinderella of Human Rights

2.1. Introductory remarks

No other category of human rights has received as many denominations in the doctrine as cultural rights – they are often referred to as "a neglected category"[256], a "Cinderella"[257] of human rights, or simply as an "underdeveloped"[258] category of human rights. Therefore, the following paragraphs, while elucidating reasons for their rather marginalized position as compared to civil and political, and even social and economic rights, provide a definition of culture and cultural heritage, explain what is the normative content and what are the States' obligations in relation to cultural rights. Since human existence is embedded in culture in its various manifestations, the concept of interdependence and cultural dimension of human rights will be analyzed, based on the example of the right to education and residential schools forcibly attended to by Indigenous Peoples. As one of the reasons for certain degree of antagonism towards cultural rights, namely the cultural relativism, still echoes in the debates surrounding Indigenous Peoples rights, it will be investigated together with the possible limitations to cultural rights. The final question of the chapter is whether the cultural rights are enforceable and justiciable and what consequences it may have.

2.2. Notion of culture and cultural heritage

Culture is one of these terms that easily escape any attempts of complete definition[259]. It exceeds the possibilities and tools of one scientific discipline, especially the legal one. However, culture as a social phenomenon being fundamental for the development of the identity of individuals and groups, becomes increasingly in the center

[256] J. Symonides, *Cultural rights: a neglected category of human rights*, „International Social Science Journal" 1998, Vol. 50, No. 158.
[257] P. Alston, The Committee on Economic, Social and Cultural Rights, "NYU Law and Economics Research Paper", No. 20-24, 2020, p. 1; A. Xanthaki, "Cultural Rights", [in:] *Oxford Bibliographies in International Law*, http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0123.xml, [last accessed: 08.01.2023].
[258] H. Nieć, *Cultural rights: At the end of the World Decade for Cultural Development*, Intergovernmental Conference on Cultural Policies for Development, Stockholm, Sweden, 30 March – 2 April 1998.
[259] On the etymology of the word "culture" see: A. M. Kosińska, *Kulturalne Prawa Człowieka. Regulacje normatywne i ich realizacja,* KUL Lublin 2014, pp. 18-26.

of legal attention. On the international level the understanding of the term "culture" and "cultural heritage" has undergone a rapid evolution in the recent years, considering especially the emergence of the concept of intangible cultural heritage[260].

One of the first definition of culture on the international level was adopted in 1982 during the Mundiacult World Conference on Cultural Policies, organized by the UNESCO[261]. The Mexico City Declaration on Cultural Policies from 1982 defines culture sensu largo: "the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs"[262].

The validity of this definition is affirmed by the fact that it has subsequently been referred to by other authoritative documents and texts[263], not least by the 2001 UNESCO Universal Declaration of Cultural Diversity[264], which in the Preamble reaffirms that "culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs"[265].

A very detailed definition of culture has recently been offered by the Committee on Economic, Social and Cultural Rights (CESCR) in the General Comment No. 21: Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights):

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[260] On the history of cultural heritage law see: S. E. Nahlik, *Grabież dzieł sztuki. Rodowód zbrodni międzynarodowej*, Ossolineum, Wrocław-Kraków 1958; S. Borelli, F. Lenzerini (eds.) *Cultural Heritage, Cultural Rights, Cultural Diversity : New Developments in International Law*, BRILL, Leiden 2012; F. Francioni, A. F. Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law*, Oxford University Press, Oxford 2020; A. F. Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, Cambridge University Press, Cambridge 2006; J. Greenfield, *The Return of Cultural Treasures*, Cambridge University Press, Cambridge 1996; J. Blake, *International Cultural Heritage Law*, Oxford University Press, Oxford 2015.

[261] Since then, however, various definitions of culture have been adopted on the international level, with the notable example of the UN Committee on Economic, Social and Cultural Rights General comment No. 21 concerning the right of everyone to take part in cultural life, envisaged in the Art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights, that will be contemplated in the subsequent chapters of this thesis.

[262] UNESCO, Mexico City Declaration on Cultural Policies, World Conference on Cultural Policies, Mexico City, 26 July – 6 August 1982, p. 1.

[263] See 'Final Report of the Intergovernmental Conference on Cultural Policies for Development, Stockholm, Sweden, 30 March—2 April 1998', UNESCO Doc. CLT-98/Conf.210/5, 31 August 1998, 'Action Plan on Cultural Policies for Development', Preamble.

[264] UNESCO, Universal Declaration of Cultural Diversity, Resolution adopted on the report of Commission IV at the 20th plenary meeting, on 2 November 2001

[265] See fifth recital, which includes a footnote stating that such a definition "is in line with the conclusions of the World Conference on Cultural Policies (MONDIACULT, Mexico City, 1982)".

> culture . . . encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives. Culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities[266].

This is a very comprehensive formulation, but, as emphasized by the Committee itself through using the expression 'inter alia', many other elements could be included. The fact is that, if one would pretend to make a list of all elements that are part of the culture of a people, such a list would probably tend to be endless. The CESCR offers an alternative understanding of culture, coherent with the anthropological approach which gives a clear idea of its significance and extension.

An element of culture that is deemed worthy of preservation[267] or in other words, some portion of culture worth preserving for future generations, based on an active choice is referred to as "cultural heritage" and it was this element that was first granted the protection in international law. Although, the first examples of what later became the international protection of cultural heritage can be found in the ancient times in the speeches of Cicero and Polybius, in which they condemned the destruction of cultural property[268], it was not until 1954 that the first binding treaty concerning the protection of cultural property, yet limited only to the wartime, was adopted by the international community, namely the Convention for the Protection of Cultural Property in the Event of Armed Conflict[269]. Since that time, the modern international cultural heritage law has been first and foremost developed under the aegis of the United Nations Educational, Scientific and Cultural Organisation (UNESCO). The work of UNESCO was multidimensional and the scope of protection granted to cultural property was gradually

[266] CESCR, General Comment No. 21, "Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)", UN Doc. E/C.12/GC/21, 21 December 2009, par. 13.
[267] J. Blake, On Defining the Cultural Heritage, "The International and Comparative Law Quarterly" 2000, Vol. 49, Issue 1, p. 68.
[268] S. E. Nahlik, *op. cit.*, p. 75-78.
[269] UNESCO, Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 215.

enlarging to include protection during the peace time[270], the protection of cultural heritage[271], intangible cultural heritage[272] and cultural expressions[273].

The first international treaty to mention the cultural heritage is the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict[274]. Although the term occurs several times in the text of the Convention, it does not provide any definition of cultural heritage. As such, the first biding treaty to provide definition of cultural heritage is the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage:

> Article 1
> For the purposes of this Convention, the following shall be considered as "cultural heritage":
> monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
> groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
> sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view[275].

The Convention defines “natural heritage” as well:

> Article 2
> For the purposes of this Convention, the following shall be considered as "natural heritage":
> natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific

[270] UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231.
[271] UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, 1037 UNTS 151.
[272] UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003, 2368 UNTS 3.
[273] UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 20 October 2005, 2440 UNTS 311.
[274] UNESCO, Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 215.
[275] UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, *op. cit.*, Article 1.

point of view;
geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;
natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty[276].

It is important to note here that the division between these two types of heritage is a Western concept, not necessarily reflecting the Indigenous approach to heritage; the same may be said about the division into tangible and intangible heritage that normatively took place in 2003, with the adoption of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage[277].

The definition of intangible heritage set forth in Article 2 of the 2003 UNESCO Convention reads as follows:

Article 2 – Definitions

For the purposes of this Convention,
1. The "intangible cultural heritage" means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.

2. The "intangible cultural heritage", as defined in paragraph 1 above, is manifested inter alia in the following domains:
(a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
(b) performing arts;
(c) social practices, rituals and festive events;

[276] Ibidem, Article 2.
[277] UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003, 2368 UNTS 3.

(d) knowledge and practices concerning nature and the universe;

(e) traditional craftsmanship[278].

Comparing these two definitions one can easily notice the difference in the dynamic between these two kinds of heritage – while the tangible heritage is rather static, the intangible heritage is a living heritage, "constantly recreated by communities and groups"[279]. While the heritage protected by the 1972 UNESCO Convention takes form of monumental cultural expressions, such as buildings, monuments and sites, usually represented by the Western societies, the 2003 UNESCO Convention is centered around the processes that may or may not lead to the creation of any tangible form of cultural heritage.

The already mentioned Mexico City Declaration on Cultural Policies includes also the definition of cultural heritage: "the cultural heritage of a people includes the works of its artists, architects, musicians, writers and scientists and also the work of anonymous artists, expressions of the people's spirituality, and the body of values which give meaning to life. It includes both tangible and intangible works through which the creativity of that people finds expression: languages, rites, beliefs, historic places and monuments, literature, works of art, archives and libraries."[280]

However, the understanding of cultural heritage as an element of culture worth preserving rises several questions as for example who should be the active subject deciding which heritage is worth preserving – may it be a social group or is it the State that has the final decision? If the former – how are the States' international obligations being shaped in this regard, considering that the State may be itself the actor who, by its actions or omissions, destroys the cultural heritage of a certain social group?

The abovementioned Mexico City Declaration on Cultural Policies in paragraph 25 enumerates the causes of the destruction of the cultural heritage, pointing out such processes as urbanization, industrialization and technological diffusion. However, as the most intolerable damage to the cultural heritage the Declaration indicates the "colonialism, armed conflict, foreign occupation and the imposition of alien values"[281]. All of these kinds of damages have been constantly occurring in relation to Indigenous

[278] Ibidem.
[279] Ibidem.
[280] UNESCO, Mexico City Declaration… *op. cit.*, p. 3.
[281] Ibidem, par. 25.

Peoples' cultural heritage and it is important to underline that for Indigenous Peoples, the importance of cultural heritage, understood broadly, usually goes much beyond previously mentioned Western concept[282], playing an essential role in ensuring the preservation of Indigenous communities' cultural identity and their very cultural and physical survival, as "material culture as heritage is assumed to provide a physical representation and reality to the ephemeral and slippery concept of identity"[283]. Indigenous Peoples' cultural heritage represents a complex reality, where all the elements – including tangible properties and intangible heritage – are holistically connected[284]. As such, considering the fundamental role of the environment in Indigenous' cultural practices, it is vital to investigate to what extent climate change poses a severe threat to the preservation and safeguarding of culture and cultural heritage of Indigenous Peoples.

2.3. The place of cultural rights in the scope of human rights

As it has been mentioned, the first difficulty related to cultural rights is the definition of culture. Culture have become a difficult fit for international law and its understanding has itself undergone a significant evolution in the international law instruments – from a narrow, state-owned and usually "high culture" to the "culture" meaning "ways of life".

The first instrument adopted by the United Nations which enumerates cultural rights was the Universal Declaration of Human Rights (UDHR), adopted by the General Assembly on 10 December 1948. The first provision related to cultural rights was Article 27, which states:

> 1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
> 2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.[285]

[282] See L. Smith, *Uses of Heritage*, Routledge, London–New York 2006.
[283] Ibidem, p. 48.
[284] F. Lenzerini, *Reparations for Wrongs against Indigenous Peoples' Cultural Heritage*, in: A. Xanthaki et al. (eds.), *Indigenous Peoples' Cultural Heritage: Rights, Debates, Challenges*, Brill Nijhoff, Leiden 2017, p. 328.
[285] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

Although the inclusion of group and minority rights was contemplated, in the final wording of Article 27 adopted by the General Assembly, the "culture" meant rather the "one" culture of the "nation-state", and not the commitment to the respect of diversity and pluralism of different cultures within the national borders[286], thus giving out an assumption of a homogenous instead of a multicultural society[287]. According to Yvonne Donders, the background of Article 27 was the fact that culture used to be something of a small *élite*, in which large parts of the population did not take part and Article 27 was supposed to be an encouragement to States to have the masses participate in cultural life and to make culture more available to them[288].

The situation slightly changed in adopted eight years later, in 1966, the International Covenant on Civil and Political Rights, in Article 27, which recognized that persons belonging to ethnic, religious or linguistic minorities "shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language[289]". Although it was not widely acknowledged back in 1966, in 1994 the Human Rights Committee in its General Comment No 23, stated that although Article 27 does not prejudice the sovereignty and territorial integrity of a State party, at the same time, may consist in a way of life which is closely associated with land and use of its resources, which may particularly be true of members of Indigenous communities constituting a minority[290]. The Committee further observed that "that right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them"[291].

The next step in the development of the concept of cultural rights was made in the

[286] E. Stamatopoulou-Robbins, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond*, Boston 2007, p. 12.
[287] *Ibidem*, p. 15.
[288] Y. Donders, *Cultural Life in the context of Human Rights*, "Right to take part in cultural life (article 15 (1) (a) of the Covenant), Cultural Life in the context of Human Rights", Committee on Economic, Social and Cultural Rights, Background paper, E/C.12/40/13, p. 3.
[289] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.
[290] UN Human Rights Committee (HRC), *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, 8 April 1994, CCPR/C/21/Rev.1/Add.5, par. 3.2.
[291] Ibidem, par. 7.

International Covenant on Economic, Social and Cultural Rights (ICESCR) which, in Article 15, provides:

> 1. The States Parties to the present Covenant recognize the right of everyone:
> (a) To take part in cultural life;
> (b) To enjoy the benefits of scientific progress and its applications;
> (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
> 3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
> 4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields[292].

Similarly to Article 27 of the Universal Declaration on Human Rights, the right to take part in cultural life envisaged in the Article 15 of the ICESCR was still mainly meant to make the "high" material aspects of culture more broadly available[293] and even the Revised Guidelines from 1991, which prescribed the form and content of the periodic reports required to be submitted by States parties to the ICESCR call on States to provide information firstly on the measures taken "to promote popular participation in culture through cultural centres, museums, libraries, theatres [and] cinemas ..."[294].

As a consequence of *inter alia* meticulous work of the UNESCO, manifested through both soft and hard law instruments, the understanding of culture was gradually widened and in 2009 the Committee on Economic, Social and Cultural Rights issued a General comment No. 21 on the Right of everyone to take part in cultural life[295], in which it defined culture based on e.g. UNESCO Recommendation on participation by the people at large in cultural life and their contribution to it from 1976 and UNESCO Universal Declaration on Cultural Diversity from 2001 and in line with the anthropological

[292] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.
[293] Y. Donders, *Cultural Life in the context of Human Rights… op. cit.*, p. 4.
[294] R. O'Keefe, The „Right to Take Part in Cultural Life" under Article 15 of the ICESCR, "International and Comparative Law Quarterly ", No. 47, 1998 r., p. 3.
[295] CESCR, General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights), 21 December 2009, E/C.12/GC/21.

approach.

As such, having legal a definition of culture issued by an authoritative body should help overcome at least one of the obstacles for the wider recognition of cultural rights. Such a definition can change yet another negative presumption about cultural rights – cultural rights used to be seen by some as a "'luxury rights', as something that comes after 'bread and water', as an item only for societies at a certain stage of development"[296]. However, as it stems from the definition in the CESCR's General comment No. 21, cultural rights are by no means a luxury, but rather a necessary precondition to the full enjoyment of other human rights.

Another difficulty with cultural rights is not only that they are scattered through a great number of instruments[297], but the often non-direct language of provisions including cultural rights – according to Elsa Stamatopoulou "language-related rights are a good example of rights that "hide" in articles on various subjects, without necessarily being called "cultural rights"[298]. So what exactly are cultural rights?

According to William Kurt Barth, cultural rights comprise an aspect of human rights in that they are universal in character and guarantee all persons the right to access their culture[299], or rather the enjoyment of culture and its components in conditions of equality, human dignity and non-discrimination. As provided in 2010 by Farida Shaheed, the UN independent expert in the field of cultural rights "cultural rights protect the rights for each person, individually and in community with others, as well as groups of people, to develop and express their humanity, their world view and the meanings they give to their existence and their development through, inter alia, values, beliefs, convictions, languages, knowledge and the arts, institutions and ways of life"[300]. Moreover, cultural rights also protect access to cultural heritage and resources that allow such identification and development processes to take place[301], which has been acknowledged in the resolution adopted by the Human Rights Council on 30 September 2016, in which it called States to "respect, promote and protect the right of everyone to take part in cultural life,

[296] E. Stamatopoulou-Robbins, *Cultural Rights…, op. cit.*, p. 5.
[297] J. Symonides, *Cultural rights…* op. cit., p. 560.
[298] E. Stamatopoulou-Robbins, *Cultural Rights…, op. cit.*, p. 107.
[299] W. K. Barth, *On Cultural Rights: the Equality of Nations and the Minority Legal Tradition*, BRILL 2008, p. 5.
[300] F. Shaheed, Report of the Independent Expert in the Field of Cultural Rights, submitted pursuant to resolution 10/23 of the Human Rights Council, A/HRC/14/36, 2010, par. 9.
[301] Ibidem.

including the ability to access and enjoy cultural heritage"[302].

According to Anna Magdalena Kosińska cultural rights "are composed of: the right to participate in cultural life, the right to access products of culture and freedom of artistic creativity (also classified as a first generation freedom besides personal and political rights that guarantee the individual's freedom from state interference)"[303], while according to Elsa Stamatopoulou, traditionally there are five internationally recognized cultural rights:

1. The right to education;
2. The right to participate in cultural life;
3. The right to enjoy the benefits of scientific progress and its applications;
4. The right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which the person is the author, and
5. The freedom for scientific research and creative activity[304].

However, according to Janusz Symonides, in some cases cultural rights are presented as an aggregate – as one right – the right to culture or the right to participate in cultural life[305]. As such, cultural rights can be divided into cultural rights *sensu stricto* (the ones that make an explicit reference to culture) – e.g. the rights enshrined in the Article 15(1) of the ICESCR – and *sensu largo*[306] (the ones that make implicit reference to culture – although not expressly referring to culture they may constitute an important legal basis for the protection of cultural rights), which include "rights in the field of culture"[307], such as the right to education (itself a cultural right, but also an economic, social, civil and political right[308]), the right of everyone to rest and leisure[309], or according to the CESCR, the right of all peoples to self-determination and the right to an adequate standard of living[310].

While enumerating cultural rights, one have to mention also the Fribourg

[302] UN Human Rights Council, *Cultural rights and the protection of cultural heritage : resolution / adopted by the Human Rights Council on 30 September 2016* , 6 October 2016, A/HRC/RES/33/20, p. 2.
[303] A. M. Kosińska, *The Role of the Court of Justice in Creating standards for the implementation of Cultural Rights,* "Roczniki Kulturoznawcze" 2021, Vol. XII, Issue 4, p. 42.
[304] E. Stamatopoulou-Robbins, *Cultural Rights…, op. cit.*, p. 2-3.
[305] J. Symonides, *Cultural right…s*, *op. cit.*, p. 560.
[306] A. M. Kosińska, *Kulturalne…, op. cit.,* p. 77.
[307] F. Shaheed, Report of the Independent Expert in the Field of Cultural Rights, submitted pursuant to resolution 10/23 of the Human Rights Council, A/HRC/14/36, 2010, par. 5.
[308] E. Stamatopoulou-Robbins, *Cultural Rights…, op. cit.*, p. 143.
[309] F. Shaheed, *op. cit.*, par. 18.
[310] CESCR, General comment no. 21…, *op. cit.*, par. 2.

Declaration on Cultural Rights, which was adopted by the so-called "Fribourg Group" – a collaboration between fifty NGOs and UNESCO as an attempt to create a comprehensive declaratory instrument demonstrating "the fundamental logic specific to cultural rights and the cultural dimension of human rights as a whole[311]". Adopted in 2007, the Declaration outlines eight cultural rights that relate to identity and cultural heritage, freedom of identification with one or several communities and the right to change such identification, access to and participation in cultural life, education and training, information and communication, and cultural cooperation[312].

The state of affairs becomes even more complex when we consider the cultural dimension of human rights in general[313]. Since human existence is closely and inseparably connected and embedded in culture in its various manifestations, cultural rights are cross-cutting – they are interrelated with civil, economic, political, and social rights, in particular the right to life, liberty and security of person, the freedom of thought, conscience and religion, the freedom of opinion and expression, the freedom of association, freedom of movement, the right to an adequate standard of living, health care, food and housing, the right to self-determination. Because of this cultural layer, the list of rights that can be included into the category of cultural rights gets even more extensive and the interconnectedness between cultural rights and other human rights will be further developed in a separate subchapter.

This approach, however, seems to be coherent with the Indigenous Peoples' approach to human rights, as they view culture as holistic and all-inclusive, such that "each and every human rights topic includes a cultural dimension[314]". Therefore it is not surprising that cultural rights are reflected in at least seventeen of the forty-six articles of the United Nation Declaration on the Rights of Indigenous Peoples and "[t]he word 'culture' or 'cultural' is mentioned no fewer than eight times in the preamble and 16 times in the articles of the declaration[315]".

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311 J. Symonides, *Cultural rights…*, *op. cit.*, p. 569.

312 Fribourg Group, Fribourg Declaration on Cultural Rights, May 2007, https://www.unifr.ch/ethique/fr/assets/public/Files/declaration-eng4.pdf [last accessed: 08.01.2023].

313 See A. F. Vrdoljak, *The Cultural Dimension of Human Rights*, Oxford : Oxford University Press, 2013.

314 K. Deer, *The complexities in practical terms: cultural practices contrary to human rights, possible limitations to cultural rights, and tensions around who defines culture and rights*, Working Paper No. 2 submitted at the Seminar organized by the Office of the High Commissioner for Human Rights, in partnership with the International Organization of La Francophonie and UNESCO, in collaboration with the Observatory of diversity and cultural rights, Geneva 2010, p. 2.

315 E. Stamatopoulou, *Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples*, in: S. Allen, A. Xanthaki (eds), *Reflections on the un Declaration on the Rights of Indigenous Peoples*, Hart Publishing, Oxford-Portland 2011, p. 389.

2.4. Normative content of the right to take part in cultural life

Before engaging into the discussion concerning the States obligations regarding cultural rights as well as limitations to cultural rights (mostly related to the debate about universality of human rights and cultural relativism), it is pertinent to focus on the normative content of the right to participate in cultural life, especially concerning the extensive explanation contained in the CESCR General Comment no. 21 from 2009.

As it has been already mentioned, we can divide the cultural rights into cultural rights *sensu stricto* and *sensu largo.* The cultural rights *sensu stricto* are those that make explicit reference to culture, and cultural rights *sensu largo* are those that make implicit reference to culture – although not expressly referring to culture they may constitute an important legal basis for the protection of cultural rights ("rights in the field of culture")[316]. In the latter category one can include for example: the right to adequate standard of living (Article 25.1 UDHR and Article 11 of the ICESCR), from which the CESCR derived the right to adequate housing (General Comments no. 4 no. and 7), the right to adequate food (General Comment no. 12), the right to water (General Comment no. 15) as well as the right to social security (General Comment no. 19). The cultural rights *sensu largo* and the cultural layer of these rights will be the subject of discussion in the next subchapter.

As considerable analytical work has already been done on the right to education[317], the protection of the moral and material interests resulting from any scientific, literary or artistic production – generally referred to as intellectual property rights[318] – the following paragraphs focus on the least explored of cultural rights, namely the right to participate in cultural life enshrined in Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights.

The Committee on Economic, Social and Cultural Rights is the principal human rights body that should be dealing with cultural rights, since it monitors the

[316] F. Shaheed, Report of the Independent Expert in the Field of Cultural Rights, submitted pursuant to resolution 10/23 of the Human Rights Council, A/HRC/14/36, 2010, par. 5.

[317] See e.g. K.D. Beiter, *The Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights*, Brill 2005; G. de Beco, S. Quinlivan, J.E. Lord, *The Right to Inclusive Education in International Human Rights Law*, Cambridge University Press 2019; A. Reis Monteiro, *Revolution of the Right to Education*, Brill 2021.

[318] For the analysis of the intellectual property rights of Indigenous Peoples see: K. Prażmowska, *Misappropriation of Indigenous Cultural Heritage : Intellectual Property Rights in the Digital Era*, Santander Art and Culture Law Review, 2/2020 (6), pp. 119-150.

implementation of the International Covenant on Economic, Social and Cultural Rights. The Committee on Economic, Social and Cultural Rights was not established by its corresponding instrument (International Covenant on Economic, Social and Cultural Rights - ICESCR), but rather by the Economic and Social Council (ECOSOC) in 1985. The primary function of the Committee is to monitor the implementation of the Covenant by States Parties and in order to fulfil this function the Committee decided in 1988 to begin preparing "General Comments" on the rights and provisions contained in the Covenant[319]. The Committee develops and adopts General Comments that provide authoritative interpretations of the Covenant and provide direction to States and others regarding what is required for compliance, both with respect to particular rights and with cross-cutting principles[320].

The issuance of the General Comment no. 21 on right of everyone to take part in cultural life was long awaited. Before, for example Elsa Stamatopoulou, the former chief of the Secretariat of the UN Permanent Forum on Indigenous Issues, elaborated following elements of the right to participate in cultural life, constructing them mostly as freedoms: non-discrimination and equality; freedom from interference in the enjoyment of cultural life; freedom to create and contribute to cultural life; freedom to choose in which culture(s) and cultural life to participate; the freedom to manifest one's culture; freedom of dissemination; freedom to cooperate internationally; and the right to participate in the definition, preparation and implementation of policies on culture[321].

The approach taken by Elsa Stamatopoulou was then confirmed by the CESCR, which stated that "the right to take part in cultural life can be characterized as a freedom[322]". According to the Committee, cultural rights may be exercised by a person as an individual, in association with others, or within a community or group[323]. The question of collectivity of cultural rights has become the bone of contention for States, as they fear it may open the doors for the secession, yet the scholars as well assert their collective dimension[324].

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[319] CESCR, Fact Sheet No.16 (Rev.1), 1991, https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-16-rev-1-committee-economic-social-and-cultural-rights [last accessed: 10.01.2023].
[320] D Ikawa, *The International Covenant on Economic, Social and Cultural Rights and the Optional Protocol*, [in:] J. Dugard, B. Porter, D. Ikawa, L. Chenwi [eds.], Research Handbook on Economic, Social and Cultural Rights as Human Rights, Edward Elgar Publishing 2020, p. 15.
[321] E. Stamatopoulou-Robbins, *Cultural Rights …, op. cit.* , pp. 115-148.
[322] CESCR, General comment no. 21…, *op. cit.*, par. 6.
[323] Ibidem, par. 9.
[324] See A. Jakubowski, (ed.), *Cultural rights as collective rights : An international law perspective*, Brill 2016.

Apart from introducing the normative content of "culture" and "cultural life", the CESCR proceeded to unveil the other basic terms of the right to take part in cultural life. According to the Committee, there are three interrelated main components of the right to participate or take part[325] in cultural life: (a) participation in, (b) access to, and (c) contribution to cultural life. While participation is mostly connected with the identity of the right-holders as it covers in particular the right of everyone to act freely, to choose his or her own identity, to identify or not with one or several communities or to change that choice, to take part in the political life of society, to engage in one's own cultural practices and to express oneself in the language of one's choice, it also includes the right to seek and develop cultural knowledge and expressions and to share them with others, as well as to act creatively and take part in creative activity. Access to, on the other hand, should be understood as:

> the right of everyone — alone, in association with others or as a community — to know and understand his or her own culture and that of others through education and information, and to receive quality education and training with due regard for cultural identity. Everyone has also the right to learn about forms of expression and dissemination through any technical medium of information or communication, to follow a way of life associated with the use of cultural goods and resources such as land, water, biodiversity, language or specific institutions, and to benefit from the cultural heritage and the creation of other individuals and communities;[326]

The third element of the right to participate in cultural life, according to the Committee, is the contribution to cultural life, understood as the involvement in creating the spiritual, material, intellectual and emotional expressions of the community. The important implication of the contribution to cultural life is the participation in the development of the community to which a person belongs, and even more importantly – the elaboration and implementation of policies and decisions that have an impact on the exercise of a person's cultural rights[327]. This component of the right is particularly significant for Indigenous Peoples and is strictly related to the principle of prior and informed consent (e.g. Article 19 or 29.2 of the UNDRIP).

As to the elements of the right enshrined in the Article 15(1)(a) of the ICESCR,

[325] These two forms are used interchangeably.
[326] CESCR, General comment no. 21…, *op. cit.*, par. 15(b).
[327] Ibidem, par. 15(c).

the Committee stated that there are some necessary conditions for the full realization of the right of everyone to take part in cultural life on the basis of equality and non-discrimination, namely: availability, accessibility, acceptability, adaptability, and appropriateness (five "A's").

Although while elaborating on the availability, understood as "the presence of cultural goods and services that are open for everyone to enjoy and benefit from[328]" the Committee first enumerated the elements traditionally belonging to the so-called "high culture", such as libraries, museums, theatres, cinemas and literature, it then proceeded to include such elements as "nature's gifts, such as seas, lakes, rivers, mountains, forests and nature reserves, including the flora and fauna found there, which give nations their character and biodiversity"[329]. One may wonder though, if the "nations" mentioned include also Indigenous Peoples nations (having in mind that for example in Canada Indigenous Peoples, who are neither Inuit or Métis, are constitutionally referred to as First Nations). The next part of the paragraph 16(a) of the General Comment no. 21, in which the Committee followed to recognized as cultural goods also "intangible cultural goods, such as languages, customs, traditions, beliefs, knowledge and history, as well as values, which make up identity and contribute to the cultural diversity of individuals and communities"[330], does not resolve the issue unequivocally. However, considering the overall tone of the General Comment and the general approach taken by the CESCR , it would be inefficient not to include Indigenous Peoples in this category, bearing in mind their strong relationship with nature and environment.

According to the Committee, accessibility consists of effective and concrete opportunities for individuals and communities to enjoy culture fully, within physical and financial reach for all in both urban and rural areas, without discrimination, and it also includes the right of everyone to seek, receive and share information on all manifestations of culture in the language of the person's choice, and the access of communities to means of expressions and dissemination[331].

While acceptability entails that the laws, policies, strategies, programs and measures adopted by the State party for the enjoyment of cultural rights should be formulated and implemented in such a way as to be acceptable to the individuals and

[328] Ibidem, par. 16(a).
[329] Ibidem.
[330] Ibidem.
[331] Ibidem, par. 16(b).

communities involved, it necessary requires consultations with the individuals and communities concerned in order to ensure that the measures to protect cultural diversity are acceptable to them[332]. The requirement of consultation is also connected with the adaptability, understood as the flexibility and relevance of strategies, policies, programs and measures adopted by the State party in any area of cultural life, as without the consultation the respect of the cultural diversity of individuals and communities will not be maintained[333].

Ultimately, one of the necessary conditions for the full realization of the right of everyone to take part in cultural life on the basis of equality and non-discrimination is the appropriateness, which the CESCR defined as "the realization of a specific human right in a way that is pertinent and suitable to a given cultural modality or context, that is, respectful of the culture and cultural rights of individuals and communities, including minorities and indigenous peoples"[334]. The Committee based its definition on the Article 1(e) of the Fribourg Declaration on Cultural Rights, according to which "the effective realisation of a human right requires that its cultural dimensions are taken into account[335]". Appropriateness (or cultural acceptability or adequacy) should guide the process of implementing not only cultural rights *sensu stricto,* but also cultural rights *sensu largo* (e.g. the rights to food, health, water, housing and education), as "the way in which rights are implemented may also have an impact on cultural life and cultural diversity"[336]. As such, the "cultural values attached to, inter alia, food and food consumption, the use of water, the way health and education services are provided and the way housing is designed and constructed", or the interconnection between cultural rights and other human right, will be discussed further in the next subchapter.

It is indispensable to underline that although at times the line between the conditions for the full realization of the right of everyone to take part in cultural life on the basis of equality and non-discrimination (five "A's") may be blurred, they are all equally important and together they form the optimal conditions for the realization not only of the cultural right *sensu stricto,* but cultural rights *sensu largo* as well.

[332] Ibidem, par. 16(c).
[333] Ibidem, par. 16(d).
[334] Ibidem, par. 16(e).
[335] Fribourg Declaration on Cultural Rights, Article 1(e).
[336] CESCR, General comment no. 21…, *op. cit.,* par. 16(e).

2.5. The concept of progressive realization and the triad of States' obligations

The following paragraphs aim at establishing what is the character of States' obligations in the case of cultural rights, as the answer to this question will allow to further develop on the accountability and remedies for cultural rights violations in the context of climate change and Indigenous Peoples. For human rights to be effective it is necessary that they are implemented by States, as "the concept of human rights assumes the existence of parallel duties of States to implement them; without these obligations human rights are meaningless"[337]. Although as it has been already demonstrated, cultural rights are articulated in different international law instruments, and of different character, the following subchapters focus first and foremost on the States' obligations derived from the Covenant on Economic, Social and Cultural Rights.

While the Universal Declaration on Human Rights recognized both civil and political rights, and economic, social and cultural rights (Articles 22 to 27), the Cold War, however, led to the adoption of two separate legally binding documents[338]: the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR. In each of these instruments the States' obligations had been articulated in a different manner, and it is important to address these differences first, as for a long time they served as an excuse for the States to neglect cultural rights and contributed to the perception of cultural rights as the Cinderella of human rights.

If one compares Article 2.2 of the ICCPR:

> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

with the Article 2.1 of the ICESCR:

> 1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the

[337] J. Symonides, *Cultural rights… op. cit.,* p. 565.
[338] D. Ikawa, *The International Covenant on Economic, Social and Cultural Rights and the Optional Protocol,* [in:] J. Dugard, B. Porter, D. Ikawa, L. Chenwi (eds.), *Research Handbook on Economic, Social and Cultural Rights as Human Rights*, Edward Elgar Publishing 2020, p. 14.

> maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures

an important difference can be noticed. According to Philip Alston and Gerard Quinn "the concept of progressive achievement is in many ways the linchpin of the whole Covenant. Upon its meaning turns the nature of state obligations. Most of the rights granted depend in varying degrees on the availability of resources and this fact is recognized and reflected in the concept of 'progressive achievement'"[339]. In this sense the obligation differs significantly from that contained in Article 2 of the ICCPR which embodies an immediate obligation to respect and ensure all of the relevant rights. According to the CESCR, "the concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time[340]", but in any case "the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content"[341]. In the particular case of Article 15 of the ICESCR the Committee acknowledged that "while the Covenant provides for the 'progressive' realization of the rights set out in its provisions and recognizes the problems arising from limited resources, it imposes on States parties the specific and continuing obligation to take deliberate and concrete measures aimed at the full implementation of the right of everyone to take part in cultural life"[342].

However, does the progressive achievement conditioned by the availability of resources mean that States have only the obligation of conduct not the obligation of result? The Committee on Economic, Social and Cultural Rights provided an answer to this question in its General Comment No. 3: The Nature of States Parties' Obligations from 1990, in which it stated that obligations formulated by Article 2 include both obligations of conduct and obligations of results, and that the principal obligation of result is reflected in Article 2.1[343]. According to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights from 1997, which elaborate on the Limburg

[339] P. Alston, G. Quinn, *The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*, „Human Rights Quarterly" 1987, Issue 9, Vol. 2.
[340] CESCR, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23, par. 9.
[341] Ibidem.
[342] CESCR, General Comment, No. 21, par. 45.
[343] CESCR, General Comment No. 3, par. 9.

Principles, the obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right, while the obligation of result requires States to achieve specific targets to satisfy a detailed substantive standard[344].

2.5.1. Minimum core obligations

There are certain obligations that are not strictly depended on the availability of resources and are applicable with immediate effect – the minimum core obligations. The first formal articulation of the concept of the minimum core obligations by the Committee was provided in the General Comment No. 3 "The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)" from 1990, in which the Committee noted that "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party[345]" and that "if the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être"[346]. Although the Committee noted that "any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned"[347], it also noted that "in order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations[348]", and in any case "even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances[349]". According to the previously mentioned Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, such minimum core obligations apply irrespectively of the availability of resources of the country concerned or any other factors and difficulties[350]. Therefore, the resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights.

[344] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights from 1997, par. 7.
[345] General Comment, No. 3, par. 10.
[346] Ibidem.
[347] Ibidem.
[348] Ibidem.
[349] Ibidem, par. 11.
[350] Maastricht Guidelines on Violations of Economic, *op. cit.*

Thus, what are the minimum core obligations in the context of cultural rights? According to Elsa Stamatopoulou the core obligations include: (a) non-discrimination in law and in practice; (b) non-interference in the freedom of cultural expression of individuals and groups; (c) protection of the exercise of the freedom to participate in cultural life, when it is under threat by non-state actors, through the state's regular discharge of police and justice functions; (d) ensuring representative participation of society in the definition, preparation and implementation of policies on culture; (e) promoting policies of respect for cultural rights; and (f) taking steps towards the full enjoyment and fulfillment of cultural rights[351], which is related with the concept of transparency and accountability procedures in government rather than with the immediate effects of the taken steps.

In the context of the Article 15.1(a) of the ICESCR the Committee argued that the rudimentary obligation of the States Parties is to create and promote an environment within which a person individually, or in association with others, or within a community or group, can participate in the culture of their choice. This obligation, however, entails following core obligations:

> (a) To take legislative and any other necessary steps to guarantee nondiscrimination and gender equality in the enjoyment of the right of everyone to take part in cultural life;
> (b) To respect the right of everyone to identify or not identify themselves with one or more communities, and the right to change their choice;
> (c) To respect and protect the right of everyone to engage in their own cultural practices, while respecting human rights which entails, in particular, respecting freedom of thought, belief and religion; freedom of opinion and expression; a person's right to use the language of his or her choice; freedom of association and peaceful assembly; and freedom to choose and set up educational establishments;
> (d) To eliminate any barriers or obstacles that inhibit or restrict a person's access to the person's own culture or to other cultures, without discrimination and without consideration for frontiers of any kind;
> (e) To allow and encourage the participation of persons belonging to minority groups, indigenous peoples or to other communities in the design and implementation of laws and policies that affect them. In particular, States parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk.[352]

[351] E. Stamatopoulou, *Cultural Rights…, op. cit*, pp. 154-156.
[352] CESCR, General comment no. 21…, *op. cit.*, par. 55.

The last paragraph is especially pertinent in the case of Indigenous Peoples of the Arctic region and climate change. Climate change, and its consequences such as for example opening of new routes for merchant ships due to melting of the glaciers or large scale projects aimed at mitigating climate change, are directly threatening Indigenous Peoples' ways of life, their cultural expressions and their cultural heritage, both intangible and tangible. As follows from the Committee's General Comment, the minimum core obligation in the context of the right to participate in cultural life is to obtain free and informed consent of Indigenous Peoples when drafting and implementing the laws that may infringe upon their cultural rights. This includes not only domestic acts, but also international law acts related to climate change, of both multilateral and bilateral character.

2.5.2. Triad of States' obligations

The States' obligations in relation to the full realization of cultural rights are by no means limited to the minimum core obligations. It had been broadly acknowledged in both doctrine and jurisprudence that human rights guarantees, whether classified in legal terms as civil and political rights or economic, social, and cultural rights, entail both negative and positive States' obligations[353] – "negative" in this context means that a right can only be violated by taking action and "positive" means that a right can be violated simply by remaining passive.

In its General Comment No. 23 on Article 27 of the ICCPR, the Human Rights Committee stated that positive measures by States may be "necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group"[354] and that the enjoyment of Indigenous Peoples' cultural rights "may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them"[355].

Since the late 90' there has been a change in perception of the States' duties, which are now better defined as "the respect, protect, fulfill" framework. The clearest moments

[353] W. Kälin, J. Künzli, *The law of international human rights protection*, Oxford 2019, p. 87.
[354] HRC, General Comment No. 23: Article 27, *op. cit.*, par. 6.2.
[355] Ibidem, par. 7.

of the framework's formal adoption in international law and policy can be found in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, which were produced following a meeting in January 1997 and in the CESCR General Comment No. 12 on the right to food. According to David J. Karp, one key aim of the framework is the attempt to move beyond a false divide between "negative" and "positive" rights, as "when combined with the idea that it is more difficult to create judicial enforcement and accountability mechanisms for rights that can be violated simply by remaining passive, this association of two supposedly-different kinds of rights with a negative/positive binary made progress on socio-economic rights more difficult"[356]. As such, the "respect, protect, and fulfill" framework, as better embodying the spectrum of States' obligations, found its way into further General Comments by the CESCR, and the General Comment No. 21 as well.

According to the Committee, the Covenant imposes three types or levels of obligations on States parties: (a) the obligation to respect; (b) the obligation to protect; and (c) the obligation to fulfil. While the obligation to respect requires States parties to refrain from interfering, directly or indirectly, with the enjoyment of the right to take part in cultural life, the obligation to protect requires States parties to take steps to prevent third parties from interfering in the right to take part in cultural life. Lastly, the obligation to fulfil, being the most pro-active part of the States' obligations, requires States parties to take appropriate legislative, administrative, judicial, budgetary, promotional and other measures aimed at the full realization of the right to take part in cultural life.

2.5.2.1. Obligation to respect

Although, according to David J. Karp, "respect" can be viewed as a negative duty[357], it is evident in the General Comment No. 21, that "respect" means something more than simply "refraining from interfering" as it requires the adoption of specific measures. These measures are aimed at achieving respect for the particular elements of the right to take part in cultural life, such as the right to: a) freely choose their own cultural identity, to belong or not to belong to a community, and have their choice respected (which includes the right not to be subjected to any form of discrimination based on

[356] D.J. Karp, *What is the responsibility to respect human rights? Reconsidering the 'respect, protect, and fulfill' framework*, „International Theory" 2020, Issue 12, Vol. 1, p. 88.
[357] Ibidem, p. 89.

cultural identity, exclusion or forced assimilation); (b) enjoy freedom of opinion, freedom of expression in the language or languages of their choice, and the right to seek, receive and impart information and ideas of all kinds and forms including art forms, regardless of frontiers of any kind; (c) enjoy the freedom to create, individually, in association with others, or within a community or group, which implies that States parties must abolish censorship of cultural activities in the arts and other forms of expression, if any; (d) have access to their own cultural and linguistic heritage and to that of others; (e) take part freely in an active and informed way, and without discrimination, in any important decision-making process that may have an impact on his or her way of life.

The two last elements are especially pertinent to Indigenous Peoples as, according to the Committee, when it comes to the access to cultural and linguistic heritage, "States parties must also respect the rights of indigenous peoples to their culture and heritage and to maintain and strengthen their spiritual relationship with their ancestral lands and other natural resources traditionally owned, occupied or used by them, and indispensable to their cultural life"[358]. The obligation to respect cultural rights of Indigenous Peoples, however, cannot be considered as complied with, when Indigenous Peoples are overlooked in decision-making processes[359].

2.5.2.2. Obligation to protect

With regard to the second element of the "respect, protect, fulfil" framework, the Committee underlined that it is strictly connected with the obligation to respect. As such, the States parties first and foremost have the obligation to respect and protect cultural heritage in all its forms, in times of war and peace, and natural disasters. In developing this obligation, the Committee at the first glance, did limit its scope by indicating "the care, preservation and restoration of historical sites, monuments, works of art and literary works". Yet, by adding "among others" and evoking Article 7 of the UNESCO Universal Declaration on Cultural Diversity from 2001, the obligation to protect cultural heritage during natural disasters caused by climate change extends to both the tangible and intangible heritage of Indigenous Peoples.

Moreover, the States parties are obliged to respect and protect cultural heritage of all groups and communities, in particular the most disadvantaged and marginalized

[358] CESCR, General comment no. 21…, *op. cit.*, par. 49 (d).
[359] Ibidem, par. 49 (e).

individuals and groups, in economic development, related mostly to the globalization, and environmental policies and programs[360], and to promulgate and enforce legislation to prohibit discrimination based on cultural identity[361].

Notably, the Committee decided to dedicate a particular obligation "to respect and protect the cultural productions" of Indigenous Peoples' traditional knowledge, natural medicines, folklore, rituals and other forms of expression. And even more significantly, the Committee indicated particular violations of this obligation – the "illegal or unjust exploitation of their lands, territories and resources by State entities or private or transnational enterprises and corporations"[362].

2.5.2.3. Obligation to fulfil

With respect to the obligation to fulfil, the Committee further divided it into three subcategories: the obligation to facilitate, promote and provide. The essence of the obligation to facilitate the right of everyone to take part in cultural life lies in taking a wide range of positive measures that would contribute to the realization of this right, such as adopting polices, promoting the exercise of the right of association for cultural and linguistic minorities for the development of their cultural and linguistic rights, granting assistance, also financial, to artists, and public and private organizations in scientific and creative activities, and taking appropriate measures to support minorities or other communities in their efforts to preserve their culture and to remedy structural forms of discrimination so as to ensure that the underrepresentation of persons from certain communities in public life does not adversely affect their right to take part in cultural life.

The obligation to promote entails ensuring that there is appropriate education and public awareness concerning the right to take part in cultural life, particularly in relation to the specific situation of, *inter alia*, minorities and Indigenous Peoples.

The last category under the scope of the obligation to fulfil is the duty to provide all that is necessary for the fulfilment of the right to take part in cultural life. Two conditions must be met in order to claim the States party to fulfill this obligation: firstly, the individuals and communities must be unable to realize this right for themselves with the means at their disposal; secondly, this inability must be for reasons outside their

[360] Ibidem, par. 50 (b).
[361] Ibidem, par. 50 (d).
[362] Ibidem, par. 50 (c).

control. In order to fulfil this duty, States parties must, for example, design programs aimed at preserving and restoring cultural heritage, include cultural education in school curricula and guarantee access for all, without discrimination on grounds of financial or any other status, to museums, libraries, cinemas and theatres and to cultural activities, services and events (which might be consider as a nod towards the "high culture"). More importantly, States parties are obliged to enact appropriate legislation and establish effective mechanisms allowing effective participation in decision-making processes and the protection of the right to take part in cultural life. In case the rights of persons, individually, in association with others, or within a community or group are violated, there must exist an appropriate legislation and effective mechanisms for the victims to claim and receive compensation[363].

2.6. Interdependence and cultural dimension of human rights

As it has been already mentioned, cultural rights are by no means a luxury, but rather a necessary precondition to the full enjoyment of other human rights. It is coherent with the idea expressed in the Vienna Declaration adopted by the World Conference in 1993 that human rights are "universal, indivisible and interdependent and interrelated"[364]. Since human existence is embedded in culture in its various manifestations, cultural rights are cross-cutting and the non-respect of a person's culture may entail the violation of civil, economic, political, and social rights. This is especially pertinent in the case of Indigenous Peoples and climate change, as the climate change consequences have impact on a wide variety of human rights – if a house destroyed during a hurricane, is rebuilt without the respect for cultural values, is the State's obligation to fulfill the right to adequate housing satisfied or the right has been violated? Is it enough on the part of the State to provide any food during the crop failure caused by unexpected changes in weather patterns, or the food should meet some additional criteria? As the consequences of climate change are long-term, these questions will be gaining in importance. Therefore, the following paragraphs briefly explain the notion of the indivisibility and interdependency of human rights, while the specific impact of climate change on cultural rights of the Indigenous Peoples of the Arctic will be discussed in a separate chapter.

[363] Ibidem, 54 (a).

[364] World Conference on Human Rights, Vienna Declaration and Programme of Action, H 5, U.N. Doc. A/CONF.157/23, July 12, 1993, Article 5.

The indivisibility of human rights is an official doctrine of the United Nations, supported both by the General Assembly and by the Office of the High Commissioner for Human Rights[365]. An early statement is found in the 1968 Proclamation of Teheran: "Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible"[366]. The indivisibility was subsequently reaffirmed in the 1993 Vienna Declaration, together with the interdependency and interrelation. The concept of the interdependence and indivisibility of human rights provides that human rights are inherently complementary and equal in importance and "at a time when attention at the international level tended to focus on civil and political rights, its emergence served as an important reminder of the need to protect and promote economic, social and cultural rights with equal vigor"[367].

The interdependency and interrelation between human rights means that making progress in civil and political rights makes it easier to exercise economic, social and cultural rights. Similarly, violating economic, social and cultural rights can negatively affect other rights. What is peculiar about culture, and as follows – cultural rights, is that "when evaluated under a cultural perspective, basically all human rights may acquire a cultural dimension and become themselves, in a way, cultural rights. This is an inescapable consequence of the fact that culture invests all elements of the life of a person and/or a community, and may therefore influence and shape the concrete realization of all human rights"[368]. Although the concept of cultural relativism will be elaborated in the next subchapter, it is worth underlining that by no means cultural dimension should be equated with the cultural relativism. Quite contrary, taking into account the cultural dimension of human rights can foster their universality and effective implementation, making their enjoyment really meaningful for the right-holders. For this reason, Indigenous activists vocalize that the claims concerning culture are intimately tied to other rights, such as right to land, to self-determination, to adequate food, and to education. Therefore, the following paragraphs analyze the cultural dimension on the

[365] J.W. Nickel, *Rethinking Indivisibility: Towards A Theory of Supporting Relations between Human Rights*, „Human Rights Quarterly" 2008, Vol. 30, p. 985.
[366] Proclamation of Teheran, International Conference on Human Rights, 22 Apr.–13 May 1968, 13, U.N. Doc. A/CONF.32/41 (1968).
[367] H. Quane, *A Further Dimension to the Interdependence and Indivisibility of Human Rights?: Recent Developments Concerning the Rights of Indigenous Peoples*, "Harvard Human Rights Journal" 2012, Vol. 25, p. 49.
[368] F. Lenzerini, *The Culturalization of Human Rights Law*, Oxford University Press 2014, p. 123.

example of the right to education.

The right to education has been enshrined *inter alia* in Article 26 of the Universal Declaration of Human Rights, which states that:

2. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
3. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
4. Parents have a prior right to choose the kind of education that shall be given to their children.

and Article 13 of the ICESR:

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
(a) Primary education shall be compulsory and available free to all;
(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
(e) The development of a system of schools at all levels shall be actively pursued, an

adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

In none of these Articles a reference to culture can be found. There is no doubt, however, that the cultural dimension of the right to education plays a pivotal role in its implementation, an example of which are the residential schools in Canada that Indigenous Peoples were coerce to attend. Residential schools were government-sponsored religious schools that were established to assimilate Indigenous children into Euro-Canadian culture[369]. A total of one hundred thirty schools operated between 1831 and 1996 and over 150,000 First Nations, Metis and Inuit children were forced to attend residential school during this period. The official policy towards Indigenous children in those times can summarized as "kill the Indian in the child"[370].

Indigenous children were taught that their own language and cultural practices were inferior to the dominant culture and were instilled with the notion that they were

[369] J.R. Miller, "Residential Schools in Canada", The Canadian Encyclopedia, January 6, 2023, https://www.thecanadianencyclopedia.ca/en/article/residential-schools [last accessed: 17.04.2023].

[370] The phrase is wrongly attributed to Duncan Campbell Scott, deputy superintendent of the Canadian Department of Indian Affairs from 1913 to 1932, who over sought the expansion of the residential school system. The phrase, in fact, was uttered by Captain Richard Henry Pratt, superintendent of the influential Carlisle Indian Industrial School at Carlisle, Pennsylvania, United States. The ideas expressed in Pratt's speech are central to the development of the Carlisle Indian School and other boarding schools across the country, which aimed to "civilize" and "Americanize" the Indian. See https://carlisleindian.dickinson.edu/teach/kill-indian-him-and-save-man-r-h-pratt-education-native-americans,https://macleans.ca/culture/books/conversations-with-a-dead-man-the-legacy-of-duncan-campbell -scott/ [last accessed: 17.04.2023].

"less than" the majority society[371]. The attempt to assimilate children began upon their arrival at the schools: their hair was cut (in the case of the boys), and they were stripped of their traditional clothes and given new uniforms. In many cases they were also given new names[372], or simply numbers. Corporate punishment and sexual abuse were common. It is estimated that more than six thousand children died in residential schools[373]. The damage of the Canadian residential school process has long lasting effects[374], also on the next generations of Indigenous Peoples, and has been defined by some scholars as "cultural genocide"[375].

Similarly, Finnish boarding schools, which were attended by both Finnish and Sami children living in rural communities, played a key role in Finnish national identity building between 1866 and 1977. Sami cultural ways were openly hindered and belittled during this time – the children were forbidden to speak their mother tongue at school and in the dormitories and were severely punished if they did[376].

Although it can be argued that the right to education was implemented by Canada and Finland as the children were granted free access to the educational system, it is clear that its implementation without considering the necessary cultural dimension and cultural needs of the right-holders, made the right not only illusory, but augmented to inter-generational trauma and loss of cultural identity.

For that reason, the CESCR in its General Comment No. 13: The Right to Education stated that education in all its forms and at all levels shall exhibit *inter alia* the "acceptability - the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality)

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[371] S.A. Juutilainen, R. Miller, L. Heikkilä, A. Rautio, *Structural Racism and Indigenous Health: What Indigenous Perspectives of Residential School and Boarding School Tell Us? A Case Study of Canada and Finland*, „International Indigenous Policy Journal" 2014, Vol. 5, Issue 3, p. 1.

[372] J. R. Miller, *op. cit.*

[373] Ibidem.

[374] B. Elias et al., *Trauma and suicide behaviour histories among a Canadian indigenous population: An empirical exploration of the potential role of Canada's residential school system*, „Social Science & Medicine" 2012, Vol. 74, Issue 10; V. Kaspar, *The Lifetime Effect of Residential School Attendance on Indigenous Health Status*, „American Journal of Public Health" 2014, Vol. 104, No 11; P. Wilk, A. Maltby, M. Cooke, *Residential schools and the effects on Indigenous health and well-being in Canada—a scoping review*, „Public Health Reviews" 2017, Vol. 38, No 1.

[375] See D. Macdonald, *First Nations, residential schools, and the Americanization of the Holocaust: Rewriting Indigenous history in the United States and Canada*, "Canadian Journal of Political Science" 2007, Vol. 40, No. 4, pp 995-1015; Z. Akhtar, *Canadian Genocide and Official Culpability*, "International Criminal Law Review" 2010, Vol. 10, Issue 1, pp. 111-135; S. Mannitz, F. Drews, *Canada's Violent Legacy: How the Processing of Cultural Genocide is Hampered by Political Deficits and Gaps in International Law*, PRIF Reports, Frankfurt am Main 2022, Vol. 3.

[376] S.A. Juutilainen, R. Miller, L. Heikkilä, A. Rautio, *Structural Racism and Indigenous Health*, *op. cit*, p. 2.

to students and, in appropriate cases, parents"[377] and while referencing the World Declaration on Education for All, that "the primary education must […] take into account the culture, needs and opportunities of the community"[378]. Most importantly, the Committee underlined that the States' have the obligation to "fulfil (facilitate) the acceptability of education by taking positive measures to ensure that education is culturally appropriate for minorities and indigenous peoples, and of good quality for all"[379].

The CESCR typology of "availability, accessibility, acceptability, adaptability" was initially developed by the former UN Special Rapporteur on the Right to Education, Katarina Tomasevski[380]. But the "4-As" framework is also derived, in part, from previous General Comments of the Committee. Already in 1991, in its General Comment No. 4: The Right to Adequate Housing, the Committee had indicated that "the way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed, and that, inter alia, modern technological facilities, as appropriate are also ensured"[381].

Although Canada ratified the International Covenant on Economic, Social and Cultural Rights in 1976, the example of the residential schools shows that it was not only the right to education, but also the right to use one's language, and in general cultural rights *sensu largo* that had been violated[382].

2.7. Cultural relativism and necessary limitations to cultural rights

The debate on cultural relativism and universality of human rights has for a long time occupied the human rights discourse, being one the reasons for an unfavorable treatment of cultural rights. This is due to erroneous "tendency to equate cultural diversity

[377] CESCR, General Comment No. 13, The Right to Education (Art. 13 of the Covenant) (E/C.12/1999/10) (1999), par. 6(c).
[378] Ibidem, par. 9.
[379] Ibidem, par. 50.
[380] O. de Schutter, *International Human Rights Law*, Cambridge University Press, Cambridge 2010, p. 254.
[381] CESCR, General Comment No. 4, The Right to Adequate Housing (Art. 11(1) of the Covenant) (sixth session, 1991) (E/1992/23), par. 8(g).
[382] See: United Nations Human Rights, Office of the High Commissioner, https://indicators.ohchr.org/ [last accessed: 15.06.2023].

with cultural relativism, which has the effect of raising fears and misunderstandings regarding the recognition and implementation of cultural rights"[383]. While the aim of this subchapter is not to present the whole history of the debate[384], it is important to introduce the basic concepts and arguments as they have the impact on the realization of cultural rights of Indigenous Peoples, and especially Indigenous women, as well as limitation clauses to cultural rights.

2.7.1. Law as a necessary check on anthropology: cultural relativism vs. universality

Although in international law the tension between cultural relativism and universality of human rights has been resolved in favor of the latter, the echoes of the debate tend to return while talking about Indigenous rights, as Indigenous Peoples base their claims first and foremost on cultural values. So what is cultural relativism and how did it enter the discourse of human rights?

Cultural relativism is the principle mandating that members of a culture should be judged against principles of their own culture instead of the cultural principles of other groups and cultural relativism theory states "that cultures are equivalent value wise and therefore no culture is more or less legitimate than another"[385]. The idea of cultural relativism was introduced by Franz Boas, a founder of cultural anthropology who believed that "we have no right to impose our ideals upon other nations"[386]. Boas conducted field research among Inuit and the Kwakiutl Aboriginal community of northern Vancouver and based on his experience, in 1911 published "The Mind of Primitive Man", in which he discredited theories of racial superiority arguing that racial— and phenotype— factors do not a priori determine the values of any society. Instead, he advocated for understanding cultures through a critical engagement with their history[387].

From the point of view of anthropology, the theory of cultural relativism was

[383] Independent Expert, Report of the Independent Expert in the Field of Cultural Rights, submitted pursuant to resolution 10/23 of the Human Rights Council, F. Shaheed, A/HRC/14/36, 2010, par. 32.
[384] See e.g. F. Lenzerini, *The Culturalization of Human Rights Law*, Oxford University Press, Oxford 2014; W. Osiatyński, Human Rights and Their Limits, Cambridge University Press, Cambridge 2009.
[385] S. Omran, *Cultural Relativism or Multicultural Appropriation? Discovering Linguistic Appropriation of Indigenous Histories*, "Capstone Seminar Series: Disturbing Representations; Citizenship, Media, and Identities" Vol. 5, No. 1, 2015, p. 4.
[386] M. Colchester, *Cultural relativism and indigenous rights: Rethinking some dilemmas in applied anthropology (part 1)*, „Anthropology Today" 2021, Vol. 37, No. 3, p. 16.
[387] A. Prasad, *Cultural Relativism in Human Rights Discourse*, „Peace Review" 2007, Vol. 19, No. 4, p. 591.

necessary for the development of this science and Franz Boas is rightly referred to as the "Father of American Anthropology"[388]. The anthropologists have invoked the concept of cultural relativism to deconstruct myths of racial and cultural superiority: "resisting the axiological project that labels the West as norm and the Other as deviant, relativists conceived of cultures as being part of a greater global paradigm that cannot be ordered in any sort of hierarchy, but merely juxtaposed by their similarities and differences with one another"[389]. In other words, each culture should be understood as possessing unique identity and acknowledged for its self-worth, without imposing which culture is better or worst. Although the theory can be considered righteous and ethical when applied in anthropology, it did, however, cause a lot of difficulties when translated into international law's ground.

This is mainly because the cultural relativism quickly started to be equated with moral relativism, converting into radical cultural relativism, meaning that "culture is the sole source of the validity of a moral right or rule"[390]. In 1947, during the drafting of the Universal Declaration of Human Rights, Melville Herskovits, Franz Boas' student, persuaded the American Anthropological Association "to issue a statement on human rights which, in essence, opposed the draft Declaration for its excessive emphasis on the rights of individuals, rights which expressed the values of Western societies but not necessarily those of other cultures"[391]. The American Anthropological Association argued that "standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of beliefs or moral codes of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole"[392]. However, the Association argued also that "the individual realizes his personality through his culture, hence respect for individual differences entails a respect for cultural differences"[393]; and that "respect for differences between cultures is validated by the scientific fact that no technique of qualitatively evaluating cultures has been discovered"[394]. Although the last two statements were later

[388] See G.W. Stocking, *Franz Boas and the Founding of the American Anthropological Association*, „American Anthropologist" 1960, Vol. 62, No. 1, pp. 1-17.
[389] A. Prasad, *Cultural Relativism in Human Rights Discourse*, *op. cit.*, p. 591.
[390] J. Donnelly, *Cultural Relativism and Universal Human Rights*, „Human Rights Quarterly" 1984, Vol. 6, No 4, p. 400.
[391] M. Colchester, *Cultural relativism and indigenous rights*, *op. cit.*, p. 17.
[392] American Anthropological Association, Statement on Human Rights, June 24 1947, https://humanrights.americananthro.org/1947-statement-on-human-rights/ [last accessed: 24.04.2023].
[393] Ibidem.
[394] Ibidem.

on incorporated *inter alia* by UNESCO, the first statement had caused a lot of confusion while drafting the Universal Declaration of Human Rights as it had been quickly spotted by the opponents of the Declaration. To counterbalance this approach and to facilitate the drafting process of the Universal Declaration of Human Rights, UNESCO brought together a committee of philosophers who were to evaluate about seventy responses they had received to their questionnaire asking for reflections on human rights from Chinese, Islamic, Hindu, and customary law perspectives, as well as from American, European and socialist points of view[395]. The UNESCO philosophers argued that "basic human rights rest on 'common convictions'"[396], even though those convictions "are stated in terms of different philosophic principles and on the background of divergent political and economic systems"[397]. They also agreed that "even people who seem to be far apart in theory can agree that certain things are so terrible in practice that no one will publicly approve them and certain things are so good in practice that no one will publicly oppose them"[398].

Cultural relativists, such as Adamantia Pollis and Peter Schwab, insist that "[i]t is becoming increasingly evident that the Western political philosophy upon which the [UN] Charter and the [UDHR] are based provide only one particular interpretation of human rights, and that this Western notion may not be successfully applicable to non-Western areas for several reasons: ideological differences whereby economic rights are given priority over individual civil and political rights and cultural differences whereby the philosophic underpinnings defining human nature and the relationship of individuals to others and to society are markedly at variance with Western individualism"[399]. To sum up the arguments of cultural relativist: human rights are a Western concept, initially unknown to many cultures and as such they cannot be considered as universal and their imposition on other than Western cultures is an example of cultural imperialism and constitutes itself a violation of the dignity of other than Western cultures.

It is difficult not to agree with Janusz Symonides, that "this approach is not only wrong but is also dangerous"[400]. Far too often cultural relativism is used as an excuse for open violations of human rights. As instanced by Jack Donnelly, in the former Republic

[395] E. Stamatopoulou, *Cultural Rights…, op. cit.,* p. 21-22.
[396] M. A. Glendon in: W. Osiatyński, *Human Rights… op.cit.,* p. 147-148.
[397] Ibidem.
[398] Ibidem.
[399] A. Pollis and P. Schwab cited [in:] F. Lenzerini, *The Culturalization…, op. cit.*, p. 11.
[400] J. Symonides, *Cultural rights: a neglected category of human rights*, „International Social Science Journal" 1998, Vol. 50, No. 158, p. 567.

of Zaire, President Mobutu had created the practice of salongo, a form of communal labor with a supposedly traditional basis, which in fact, it had have little or no connection with Indigenous traditional practices, but rather, it was a revival of the colonial practice of corvee labor[401]. Another example are the traditional harmful practices, the notion of which will be explained subsequently.

Therefore, "the acceptance of the very idea that persons belonging to one culture should not judge the policies and values of other cultures, that any system of common values cannot and does not exist, indeed undermines the very basis of the international community and the 'human family'. They cannot function without the existence of standards allowing them to determine what is right or wrong, what is good or bad"[402]. According to Wiktor Osiatyński:

> Universality is implied in the very word *human*, which means that rights belong to every human being at all times and in all situations. Such a statement, however, clearly defies observable reality. Most people throughout history have not enjoyed their human rights. Therefore, we talk about the universality of standards. Every human being should have her human rights recognized and observed, and every community should attempt to reach such a standard. This universality of standards is justified by the fact that it is what protects the dignity of every person and makes human cooperation possible[403].

At the other end of the radical cultural relativism continuum, however, lies the radical universalism, which holds that "culture is irrelevant to the validity of moral rights and rules, which are universally valid"[404]. This position, though, would make the human rights rigid and make their implementation almost impossible. Therefore, according to Jack Donnelly, "international consensus represented by the Universal Declaration of Human Rights and the International Human Rights Covenants, in the conditions of the modern world, support a weak cultural relativist approach to human rights; that is, an approach that views human rights as prima facie universal, but recognizes culture as a limited source of exceptions and principles of interpretation"[405]. Although in principle I do agree with Jack Donnelly, that the culture should be seen as a principle of

[401] J. Donnelly, *op. cit.*, p. 412.
[402] Ibidem.
[403] W. Osiatyński, *Human Rights…, op. cit.,* p. 144.
[404] J. Donnelly, *op. cit.*, p. 400.
[405] Ibidem, p. 402.

interpretation, the possibility of culture being a limited source of exceptions should be treated with a lot of caution as it may lead to further violations of human rights and undermine the whole system. As such, "the existence of cultural differences should not lead to the rejection of any part of universal human rights"[406].

This approach has been acknowledged in the previously mentioned Vienna Declaration and Programme of Action adopted by the United Nations World Conference on Human Rights in 1993. The Declaration, in its paragraph 1, reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for and observance and protection of all human rights and fundamental freedoms for all: "The universal nature of these rights and freedoms is beyond question"[407]. In Article 5 the Declaration continues that "all human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis", however, "the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind"[408].

The adoption of such a clear statement would not be possible without the vocal support and contribution of non-governmental organizations, especially from the regions where governments were taking a more culturally relativist stand, such as Asia-Pacific[409]. It might seem that such a straightforward statement as the Vienna Declaration would put an end to disputes over cultural relativism and universalism of human rights. And to some extent it did, although nowadays cultural relativism is mostly invoked by some States in the area of women's rights, as according to Yakin Ertürk, Special Rapporteur on violence against women: "identity politics and cultural relativist paradigms are increasingly employed to constrain in particular the rights of women. Essentialized interpretations of culture are used either to justify violation of women's rights in the name of culture or to categorically condemn cultures 'out there' as being inherently primitive and violent towards women"[410].

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[406] J. Symonides, *op. cit.*, p. 567.
[407] World Conference on Human Rights, Vienna Declaration and Programme of Action, H 5, U.N. Doc. A/CONF.157/23, July 12, 1993, par. 1.
[408] Ibidem, par. 5.
[409] E. Stamatopoulou, *Cultural Rights… op. cit.,* p. 20-21.
[410] Special Rapporteur on violence against women, Report of the Special Rapporteur on violence against women, its causes and consequences, Intersections between culture and violence against women, Y. Ertürk A/HRC/4/34, 17 January 2007, par. 68.

2.7.2. Limitations to cultural rights: clash between women's right and cultural relativism

There are several reasons for permitting limitations of human rights, understood as legally permissible restriction of a human right. Firstly, they set the limits within which the legislator can operate in limiting certain rights; secondly, they set a scope of a right that cannot be exceeded; thirdly and most importantly, the purpose of limitation clauses is to protected certain right, which in the event of a collision has a greater value than the limited right[411]. Limitations are a necessary and normal element of the human rights treaty system, since without them there would be an unworkable system of absolute rights of each individual[412]. States may limit human rights in a normal times (as opposed to derogations) for a limited and exhaustive number of reasons. Article 4 of the ICESCR stipulates that the lawful limitation should fulfill following criteria: 1) it should be determined by law; 2) the limitation should be compatible with the nature of the right; 3) the purpose of such limitation can only be the promotion of the general welfare in a democratic society. Moreover, any limitations must be proportionate, meaning that the least restrictive measures must be taken when several types of limitations may be imposed[413]. In 1986 a group of distinguished experts in international law, convened by the International Commission of Jurists, the Faculty of Law of the University of Limburg (Maastricht, the Netherlands) and the Urban Morgan Institute for Human Rights (University of Cincinnati, Ohio, USA), considered the nature and scope of the obligations of States parties to the ICESCR[414]. According to the outcome document – The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights – Article 4 of the ICESCR was primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State; no limitation shall be made unless provided by national law of general application and

[411] K. Orzeszyna, M. Skwarzyński, R. Tabaszewski, *Prawo międzynarodowe praw człowieka,* C.H.BECK, Warszawa 2020, pp. 62-63.
[412] A. Muller, *Limitations to and Derogations from Economic, Social and Cultural Rights*, „Human Rights Law Review" 2009, Vol. 9, No 4, p. 564.
[413] CESCR, General Comment No. 21…, *op.cit.*, par. 19.
[414] International Commission of Jurists, Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights, Day of General Discussion organized in cooperation with the World Intellectual Property Organization (WIPO); The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights; The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights : background paper / submitted by the International Commission of Jurists E/C.12/2000/13, 2 October 2000, Geneva.

such law shall not be arbitrary or unreasonable or discriminatory [415].

At a meeting on the tenth anniversary of the Limburg Principles, a similar group of experts agreed on the previously mentioned Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, according to which a State cannot justify derogations or limitations of rights recognized in the Covenant because of different social, religious and cultural backgrounds[416].

As to the reasons why the limitations might be applied, the CESCR pointed that they "may be necessary in certain circumstances, in particular in the case of negative practices, including those attributed to customs and traditions, that infringe upon other human rights"[417]. Although the Committee in the part of the General Comment No. 21 dedicated to the limitations did not clarified the meaning of the "negative practices", further on, in paragraph 64 the Committee stated that "these harmful practices, including those attributed to customs and traditions, such as female genital mutilation and allegations of the practice of witchcraft, are barriers to the full exercise by the affected persons of the right enshrined in article 15, paragraph 1 (a)"[418]. Therefore, the Committee had signalized that there might be a potential collision of values, as some cultural practices are harmful to women.

The concept of "harmful traditional practices" originated in the United Nation agenda as early as the 1950's. In 1959 the Economic and Social Council requested the World Health Organization (WHO) to study ways to eradicate female circumcision. However, WHO refused to undertake this study, observing that these operations are "based on social and cultural background, the study of which is outside the competence of the World Health Organization"[419]. Due to the actions and criticism undertaken by feminists movements, the concept of "harmful cultural practices" started to gain more currency in the 1980's and 1990's, especially following the adoption of Convention on the Elimination of All Forms of Discrimination Against Women, which in Article 5 calls upon the States to "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the

[415] Ibidem, The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, par. 46-55.
[416] Ibidem, The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, par. 8.
[417] CESCR, General comment no. 21…, *op. cit.*, par. 19.
[418] Ibidem, par. 64.
[419] K. Brennan, *The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study*, "Law & Inequality: A Journal of Theory and Practice", Vol. 7, 1989, p. 378.

sexes or on stereotyped roles for men and women"[420].

In 2014 Committee on the Elimination of Discrimination against Women (CEDAW) and Committee on the Rights of the Child issued joint General Recommendation No. 31/No. 18 on harmful practices, in which they considered following practices as harmful to women and girls:

> neglect of girls (linked to the preferential care and treatment of boys), extreme dietary restrictions, including during pregnancy (force-feeding, food taboos), virginity testing and related practices, binding, scarring, branding/infliction of tribal marks, corporal punishment, stoning, violent initiation rites, widowhood practices, accusations of witchcraft, infanticide and incest. They also include body modifications that are performed for the purpose of beauty or marriageability of girls and women (such as fattening, isolation, the use of lip discs and neck elongation with neck rings) or in an attempt to protect girls from early pregnancy or from being subjected to sexual harassment and violence (such as breast ironing). In addition, many women and children increasingly undergo medical treatment and/or plastic surgery to comply with social norms of the body, rather than for medical or health reasons, and many are also pressured to be fashionably thin, which has resulted in an epidemic of eating and health disorders[421].

There are indeed some communities that impose harmful cultural practices on female members of the community and justify them using the argument of cultural continuance and tradition.

Does this mean, however, that cultural rights of the group are incompatible with human rights of women? Can the harmful traditional practices be protected under the umbrella of cultural rights? As lucidly explained by Elsa Stamatopoulou: "Customs of a group or a community, that violate women's human rights, as defined by international human rights instruments, are not cultural *human rights* of the group. It would be a contradiction in terms to recognize as human rights of a group, customs and practices that violate the human rights of half of the group, namely women. The issue is therefore not 'cultural human rights of the group v. the human rights of women', but 'the culture of the group v. the human rights of women'"[422].

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[420] United Nations Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, Article 5.
[421] Committee on the Elimination of Discrimination against Women and Committee on the Rights of the Child joint general recommendation No. 31/No. 18 on harmful practices, CEDAW/C/GC/31/CRC/C/GC/18, par.9.
[422] E. Stamatopoulou, *Cultural Rights… op. cit., p.* 234.

The real question is, however, how to eliminate such harmful traditional practices. In some cases, simply suppressing a harmful practice may only shift the problem, as it happened for example in the case of Darfur region of Sudan, where women have been gradually increasing the practice of female genital mutilation in an effort to create a more Arab identity for themselves[423]. The other example is the case of Cameroon, where although female genital mutilation is said to be slowly declining, at the same time, another harmful practice, referred to as "breast-ironing", is reportedly on the rise. The aim of that practices, which consists in placing hot objects on the breasts of a young girl, is to prevent the breasts from growing too soon so that the girl remains unattractive to men and does not engage in sexual intercourse at an early age[424]. Therefore, the change should always come from within the community. Yet, "since the community is not necessarily the egalitarian, democratic, and intimately affective space that it is claimed to be in communitarian discourse, the State is called on to play a 'protective role *vis-ŕ-vis* inequities within the community' in order to protect some of the cultural rights and other human rights of women"[425]. The role of the State should not be limited only to enacting legislation aimed at banning certain practices, but should rather include education and action programs, conducted with the engagement of the members of particular community.

There is hardly any practice of the Indigenous Peoples in the Arctic that could fall within the scope of "harmful traditional practices". It does not mean, however, that the Indigenous women are not experiencing the most common harmful practice – the violence against women. In Canada, Indigenous women and girls are twelve times more likely to be murdered or gone missing than any other women, and Inuit women in Nunavut are the victims of violent crime at a rate more than thirteen times higher than the rate for women in Canada as a whole[426]. However, problematizing the issue of women's rights and culture, the cause of the problem of violence against Inuit women is perceived to be *inter alia* the colonization and westernization of Indigenous way of life. According to a study

[423] S. E. Merry, *Gender Violence: A Cultural Perspective*, John Wiley & Sons, 2009, p. 128.
[424] Report of the Special Rapporteur on violence against women, its causes and consequences, Intersections between culture and violence against women, A/HRC/4/34, 17 January 2007, par. 34.
[425] E. Stamatopoulou, *Cultural Rights… op. cit.*, p. 236-237.
[426] E. Comack, Pauktuutit Inuit Women of Canada, *Addressing Gendered Violence against Inuit Women: A review of police policies and practices in Inuit Nunangat*, University of Manitoba 2020, https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/rvw-plc-prctcs-pauk/rvw-plc-prctcs-pauk-en.pdf [accessed: 29.04.2023], p. 12.

conducted by Elizabeth Comack, who interviewed forty-five Inuit women and forty social workers and police officers from four regions of Nunangat,

> corporate colonialism has profoundly impacted Inuit ways of living and being, an impact that is continuing into the present. While the housing crisis, food insecurity, and disrupted relations between Inuit men and women are some of the more obvious manifestations of the colonial encounter with *qallunaat*, the trauma that colonialism generates is also a key factor. The lived experience of trauma manifests in high rates of alcohol and drug abuse, suicide—and gendered violence against Inuit women. Addressing the pressing issue of gendered violence against Inuit women, therefore, requires acknowledging—and attending to—the colonial context in which it occurs[427].

Before the contact with Europeans, due to *inter alia* harsh Arctic environment, women's roles played an integral part of the traditional economy and were essential for survival on the land and the gender roles displayed in many Arctic regions were therefore seen as complementary rather than opposing[428]. Relocation to the settlements prepared by the government that took place in the 1950's "brought massive changes to Inuit economic, political, and social life. It caused a drastic reduction in Inuit autonomy and self-determination, because government power was more firmly established in the settlements than in the camps"[429]. Correspondingly, relocation "caused a decline in Inuit systems of leadership and authority"[430]. Therefore, the participants of the before mentioned study, attributed the violence in their communities "to 'the fallout of the residential school' and 'people feeling really disempowered' due to the imposition of the colonial system"[431].

As the colonialism has disrupted Inuit ways of being, including relations between Inuit men and women, a way to move forward, according to the participants of the study, would be decolonization, understood as placing the Inuit self-determination at the core of such an approach, "which means that actions must be Inuit-led, rooted in Inuit laws, culture, language, traditions, and societal values"[432]. Reinforcing the Indigenous Peoples culture can, therefore, empower the community and positively influence restoring the

[427] E. Comack, Pauktuutit Inuit Women of Canada, *op. cit.,* p. 27.
[428] K. J. Williamson, G. Hoogensen, A. T. Lotherington, L. H. Hamilton, S. Savage et al., *Gender Issues in the Arctic,* in: *Arctic Human Development Report*, Stefansson Arctic Institute, Akureyri 2004, p. 187.
[429] National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, Volume 1a, 2019 p. 309.
[430] Ibidem.
[431] E. Comack, Pauktuutit Inuit Women of Canada, *op. cit.,* p. 7.
[432] Ibidem, p. 113.

gender balance.

According to the recent General Recommendation of the Committee on the Elimination of Discrimination against Women, violence against women is multidimensional and Indigenous women "are also adversely affected by environmental violence, which can take the form of environmental harm, degradation, pollution or State failures to prevent foreseeable harm connected to climate change"[433].

2.8. Enforceability and justiciability of cultural rights

One factor contributing to the neglect of cultural rights has been the assertion that they cannot be adjudicated and enforced by courts. Given the fact that that these rights are subject to the principle of progressive realization, depending on the level of development of a State, one of the debates on economic, social and cultural rights is certainly the question of their enforceability and even justiciability[434].

According to the International Commission of Jurists the term 'justiciability' refers to the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur. Justiciability implies access to mechanisms that guarantee recognized rights. Justiciable rights award right-holders a legal course of action to enforce them, whenever the duty-bearers do not comply with their duties. The existence of a legal remedy – understood both in the sense of providing a procedural remedy (access to justice) when a violation has occurred or is imminent, and the process of awarding adequate reparation to the victim – are a defining features of a right[435].

Arguments against justiciability of cultural rights, according to Katie Boyle and Edel Hughes, generally center on four main themes: 1) a democratic deficit; 2) the judiciary interfering in the policy matters of the State impinges on the separation of powers; 3) the judiciary lacks the expertise to decide such matters and it is beyond the institutional capacity of the courts; 4) accountability can be secured through other institutional alternatives, such as administrative bodies (specialized tribunals,

[433] CEDAW, General recommendation No. 39 (2022) on the rights of Indigenous women and girls, 26 October 2022, CEDAW/C/GC/39, par. 37.
[434] E. Stamatopoulou, *Cultural Rights*…, *op. cit*., p. 52.
[435] International Commission of Jurists, Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative experiences of justiciability, Geneva 2008, https://www.refworld.org/docid/4a7840562.html, p. 6.

ombudsmen and alternative dispute resolution)[436]. Moreover, some argued that the adjudication of economic, social and cultural rights by an international body would infringe upon a State's sovereignty[437]. Additional important obstacle is the perceived uncertainty of the content of cultural (and social, and economic) rights and their "vagueness", being rather goals than rights[438]. However, according to the International Commission of Jurists "determination of the content of *every* right, regardless of whether it is classified as 'civil', 'political', 'social', 'economic' or 'cultural', is vulnerable to being labelled as insufficiently precise"[439].

There are several consequences of refusing cultural rights the element of justiciability. First of all, the belief that cultural rights should not be granted any kind of judicial or quasi-judicial protection, and should be left to the discretion of political branches of the State, is one of the main reasons why they have been a neglected category of human rights. Moreover, the absence of an effective method of recognizing justiciability for these rights results in: narrowing the range of mechanisms available for victims of rights violations to receive remedies and reparations; weakening the accountability of States; undermining deterrence; and fostering impunity for violations[440].

However, according to CESCR, General Comment No.9, on the domestic application of the Covenant

> In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions. The Committee has already made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation. Thus, in General Comment No. 3 it cited, by way of example, articles 3, 7 (a) (i), 8, 10.3, 13.2 (a), 13.3, 13.4 and 15.3. It is important in this regard to distinguish between justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration). While the general approach of each legal system needs to be taken into account, there is no

[436] K. Boyle, E. Hughes, *Identifying routes to remedy for violations of economic, social and cultural rights*, "The International Journal of Human Rights" 2018, Vol. 22, Issue 1, p. 50-51.
[437] A. Vandenbogaerd, *Towards Shared Accountability in International Human Rights Law, Law, Procedures and Principles*, Intersentia, Antwerp 2016, p. 91.
[438] E. Stamatopoulou-Robbins, *Cultural Rights*…, *op. cit*., p. 52.
[439] International Commission of Jurists, Courts and the Legal Enforcement…, *op. cit.*, p. 15.
[440] Ibidem, p. 3.

> Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions[441].

One of the reasons for the marginalization of cultural rights (together with social and economic rights), have been the absence of strong enforcement mechanisms in the ICESCR. Michael J. Dennis and David P. Stewart point to the already mentioned Cold War origins of the Covenants as an explanation for this disparate treatment[442]. However, one of the most recent institutional developments in the context of international accountability for violations of human rights was the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in 2008. With its adoption the long-standing debate and controversy about the justiciability of cultural rights at the international level appears to have ended[443]. However, it is important to mention that long before the adoption of the Optional Protocol to the ICESCR the cultural rights of minorities, including Indigenous Peoples, were also the object of consideration of the Human Rights Committee, as it will be demonstrated in the last chapter of the thesis.

The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the already mentioned UN doctrine that states that all human rights are, in fact, "universal, indivisible, interdependent and interrelated". It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.

As such, the once common notion that cultural rights are inherently unsuited to justiciability, has now been largely overcome. As it will be explained subsequently, the European Court of Human Rights has extended, for example, Article 8 of the European Convention on Human Rights to encompass the right to adequate housing respecting cultural dimensions in the case of Travellers and, more broadly, protection from unlawful eviction. Correspondingly, as it will be analyzed in Chapter 5, the Inter-American Court has granted protection to Indigenous Peoples in cases relating to their cultural rights and significantly developed their scope.

Without the possibilities of litigation when the cultural rights have been violated,

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[441] CESCR, General Comment No.9, The domestic application of the Covenant, UN Doc. E/C.12/1998/24.
[442] M. J. Dennis, D. P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?,* "The American Journal of International Law" 2004 ,Vol. 98, No. 3, p. 463.
[443] A. Vandenbogaerd, *op. cit.,* p. 91.

the protection of these rights would have been left almost exclusively to political bodies. While judicial action is not the exclusive means of implementation and redress, the role of the courts in the protection of cultural rights is fundamental. As it will be highlighted in other parts of this thesis, litigation is thus not only an instrument ensuring compliance with cultural rights but also guarantying the realization of the right to an effective remedy, also in the case of climate change induced violations of human rights.

2.9. Concluding remarks

Similarly to the definition of Indigenous Peoples, so too the definition of culture and cultural heritage is problematic at the international level. As a result of *inter alia* meticulous work of the UNESCO, the understanding of culture and cultural heritage has undergone a rapid evolution in the recent years, having in mind especially the emergence of the concept of intangible cultural heritage. Therefore, nowadays culture should be understood as "ways of life", including such elements as language, rites and ceremonies, natural environments, food, clothing and shelter and the arts, customs and traditions "through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces"[444]. This understanding of culture is more coherent with the Indigenous Peoples' approach, whose cultural heritage represents a complex reality, where all the elements – including tangible and intangible heritage – are holistically connected.

Although at the beginning, cultural rights were considered to be related to the so-called "high culture", including libraries, museums, theatres, cinemas and literature and the States' obligation were limited to making this elements of culture more available, nowadays cultural rights are by no means considered as a luxury, but rather a necessary precondition to the full enjoyment of other human rights. As follows from the analysis conducted in this chapter, cultural rights are human rights that aim at assuring the enjoyment of culture and its elements in conditions of equality, human dignity and non-discrimination. They are rights related to such themes as access to culture, participation in cultural life, cultural and artistic production, language, cultural heritage and intellectual property rights. Therefore, cultural rights can be divided into cultural rights *sensu stricto*

[444] CESCR, General Comment No. 21…, *op. cit.,* par. 13.

(the ones that make an explicit reference to culture) – e.g. the right to take part in cultural life – and *sensu largo* (the ones that make implicit reference to culture). Although the latter do not expressly refer to culture, they may constitute an important legal basis for the protection of cultural rights. In this category one can include for example: the right to education, the right adequate standard of living, from which the CESCR derived the right to adequate housing, the right to adequate food, as well as the right to water.

This approach seems to be coherent with the one taken by Indigenous Peoples, who view culture as holistic and all-inclusive and therefore cultural rights are reflected in at least seventeen of the forty-six articles of the United Nation Declaration on the Rights of Indigenous Peoples. This also underlines the centrality of cultural rights for Indigenous Peoples.

For the full realization of the right of everyone to take part in cultural life on the basis of equality and non-discrimination some conditions are necessary, namely: availability, accessibility, acceptability, adaptability, and appropriateness and the States are obliged to respect, protect and fulfill cultural rights. Although the full realization of all economic, social and cultural rights is subjected to the concept of progressive realization, the minimum core obligations are not strictly depended on the availability of resources and are applicable with immediate effect. According to the CESCR, one of the minimum core obligation in the context of the right to participate in cultural life is to obtain free and informed consent of Indigenous Peoples when drafting and implementing the laws that may infringe upon their cultural rights, which applies also to the laws related to climate change, e.g. in the case of large scale mitigation projects.

The debate on cultural relativism and universality of human rights has for a long time occupied the human rights discourse, being one the reasons for an unfavorable treatment of cultural rights. Cultural relativists argue that human rights are a Western concept, initially unknown to many cultures and as such they cannot be considered as universal. However, the universality of human rights is about the universality of standards. The concept of cultural relativism should by no means be equated with cultural dimension of human rights and cultural differences. Moreover, taking into account the cultural dimension of human rights can foster their universality and effective implementation, making their enjoyment really meaningful for the right-holders.

Another factor contributing to the neglect of cultural rights has been the assertion that they cannot be adjudicated and enforced by courts. Justiciability refers to the ability to claim a remedy before an independent and impartial body when a violation of a right

has occurred or is likely to occur and the absence of an effective method of recognizing justiciability for cultural rights results in narrowing the range of mechanisms available for victims of rights violations to receive remedies and reparations and it weakens the States' accountability. Refusing cultural rights the element of justiciability would be incompatible with the doctrine of universality, indivisibility, interdependency and interrelatedness of human rights and would drastically limit the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups, including Indigenous Peoples. Although the adoption of the Optional Protocol to the ICESCR was the final step in acknowledging the enforceability and justiciability of cultural rights at the international level, the cultural rights are also present in the case-law of international judicial and quasi-judicial bodies, especially the Human Rights Committee. Although judicial action should not be treated as the exclusive means of implementation and redress of cultural rights violation, as it will be demonstrated in the next chapters, the international courts and quasi-judicial bodies can play a significant role in the protection of cultural rights.

Chapter 3 : Impact of climate change on the cultural rights of the Arctic Indigenous Peoples

3.1. Introductory remarks

The aim of this chapter is to analyze the impact of climate change on the cultural rights of the Indigenous Peoples of the Arctic region. As indicated by Marcin Stoczkiewicz, for many years, climate change was perceived through the prism of threats to polar bears, then as an unspecified threat to future generations; however, only the perspective that climate change means that millions of people living today will not be able to enjoy their basic human rights fundamentally changed the discussion about this phenomenon[445].

The research on climate change effects on human rights has been so far focused mainly on the threats to the exercise of the right to life and the right to health, while cultural rights has again been a neglected category of human rights. However, as it has been demonstrated in Chapter 1 and Chapter 2, culture and as follows, cultural rights, play a pivotal role in Indigenous Peoples' lives. Therefore, this chapter focuses on the impact of climate change on the cultural rights *sensu stricto* and *sensu largo*. The former category includes the right to access tangible and intangible cultural heritage, while the latter includes the right to self-determination and land rights, the right to adequate housing, the right to adequate food, the right to water, and the right to health. Each of the subchapters begins with the legal context of the right, which is followed by the specific impacts on particular right of the Indigenous Peoples of the Arctic. It is important to mention that the right to adequate housing and adequate food have been recognized as an element of the right to an adequate standard of living and enshrined in Article 11 of the ICESCR, while the right to water has been recognized by the CESCR in the framework of Article 11 and 12 of the ICESCR[446]:

> Article 11
>
> 1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food,

[445] M. Stoczkiewicz, *Prawo ochrony klimatu w kontekście praw człowieka,* Wolters Kluwer 2021, p. 44.
[446] J. Jaraczewski, *Prawo do wody i warunków sanitarnych,* in: Z. Kędzia, A. Hernandez-Połczyńska (eds.), *op. cit.*, p. 572.

clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

As all the elements of the environment of the Arctic are interrelated, a change to one of them – let it be snow, water or animals – impacts the others, which has a direct effect on the life of Indigenous Peoples in many ways. While the impact of climate change has been analyzed first and foremost based on the two petitions brought by the Arctic Indigenous Peoples to the Inter-American Commission on Human Rights, the petitions will be further analyzed in Chapter 5. This is because this chapter provides a foundation for the analysis in Chapter 5, which through an analysis of case-law of human rights courts and quasi-judicial bodies, will identify a number of challenges and limitations of a human rights-based approach to climate change litigation, while also highlighting the Indigenous Peoples' possibilities of remedy in cases concerning violations of cultural

rights as a result of climate change.

3.2. Access to tangible and intangible cultural heritage

At the international level, the legal approach towards Indigenous Peoples' culture is threefold: from the perspective of human rights law as it has been discussed in the previous chapter; in the framework of UNESCO; and from the perspective of intellectual property rights (IP)[447]. Although the only binding treaty, which however has not been ratified by the Arctic States, concerning Indigenous rights – the 1989 ILO Indigenous and Tribal Peoples Convention[448] – does acknowledge that "handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the Peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures",[449] the importance of cultural heritage for Indigenous Peoples is first and foremost underlined in soft law documents. In 1993 the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities endorsed the study of the protection of the cultural and intellectual property of Indigenous Peoples prepared by the Special Rapporteur, Erica-Irene Daes, and requested that she expand her study with a view to elaborating draft principles and guidelines for the protection of Indigenous Peoples' heritage. As a result, in 1995 the Special Rapporteur submitted Principles and Guidelines Concerning the Protection of Cultural Heritage Of Indigenous Peoples,[450] which has constituted an important point of reference for further works on the issue of Indigenous Peoples' heritage. In her study, Erica-Irene Daes, defines Indigenous Peoples heritage as being :

> comprised of all objects, sites and knowledge the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its territory. The heritage of an indigenous people also includes objects, knowledge and literary or artistic works which may be created in the future based upon its heritage.

[447] See A. Xanthaki, *International Instruments on Cultural Heritage: Tales of Fragmentation*, in: A. Xanthaki et al. (eds.), *Indigenous Peoples' Cultural Heritage: Rights, Debates, Challenges*, Brill Nijhoff, Leiden 2017.
[448] ILO, Indigenous and Tribal Peoples Convention, C169, 27 June 1989.
[449] Ibidem, Article 23.
[450] UN Commission on Human Rights, *Protection of the Heritage of Indigenous Peoples. Final Report of the Special Rapporteur, Mrs. Erica-Irene Daes*, 21 June 1995, E/CN.4/Sub.2/1995/26.

> 12. The heritage of indigenous peoples includes all moveable cultural property as defined by the relevant conventions of UNESCO; all kinds of literary and artistic works such as music, dance, song, ceremonies, symbols and designs, narratives and poetry; all kinds of scientific, agricultural, technical and ecological knowledge, including cultigens, medicines and the rational use of flora and fauna; human remains; immoveable cultural property such as sacred sites, sites of historical significance, and burials; and documentation of indigenous peoples' heritage on film, photographs, videotape, or audiotape[451].

In Principle 4, the Special Rapporteur underlines that essential element of Indigenous Peoples' enjoyment of their human rights and human dignity is the international recognition and respect for their own customs, rules and practices for the transmission of their heritage to future generations[452]. However, the effective protection of Indigenous Peoples' heritage is not only beneficial for the Peoples concerned, as "cultural diversity is essential to the adaptability and creativity of the human species as a whole"[453]. In this sense, the effective protection of Indigenous Peoples' cultural rights against climate change and its consequences should not be regarded as solely beneficial for the direct representatives of such cultures, but also for the heritage and welfare of humankind. Furthermore, in Principle 2, the Special Rapporteur highlights that in order to ensure such an effective protection of Indigenous Peoples' heritage, it should be based on the principle of self-determination, which includes not only the right and the duty of Indigenous Peoples to develop their own cultures and knowledge systems, but also forms of social organization[454].

The Principles and Guidelines Concerning the Protection of Cultural Heritage of Indigenous Peoples from 1995 have been widely incorporated into the UNDRIP. This is especially visible in Article 3, which recognizes that "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development"[455]. As noted by Alexandra Xanthaki, although lacking binding force, the UNDRIP is a standard-setting

[451] Ibidem, p. 10
[452] Ibidem.
[453] Ibidem, p. 9.
[454] Ibidem.
[455] UNDRIP, Article 3.

document and should be regarded as an "interpretative tool of article 15 [of the International Covenant on Economic, Social and Cultural Rights] on the right to culture specifically for Indigenous Peoples"[456]. Various provisions of the Declaration refer to culture and the cultural heritage of Indigenous Peoples, such as for example Article 12 or Article 11, which recognizes the right of Indigenous Peoples "to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature"[457] and moreover stipulates that States shall provide redress through effective mechanisms, with respect to cultural, intellectual, religious, and spiritual property of Indigenous Peoples, taken without their free, prior, and informed consent or in violation of their laws, traditions, and customs[458]. Moreover, Article 25 underlines that Indigenous Peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard[459], while Article 31 explicitly recognizes the right of Indigenous Peoples 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"[460].

Although international cultural heritage law is itself fragmented,[461] in the second type of the approach, i.e. that of the UNESCO, it undergoes further fragmentation as the UNESCO Conventions not only make a distinction between tangible and intangible heritage, but they also introduce a dichotomy between the heritage belonging to the State or to the individual.

As it has been already mentioned, the tangible heritage had been defined in the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage[462]. However, Indigenous Peoples' heritage can also be regarded as intangible cultural heritage[463] and as such falls within the scope of the 2003 UNESCO Convention

[456] A. Xanthaki, *op. cit*., p. 17.
[457] UNDRIP, Article 11(1).
[458] Ibidem, Article 11(2).
[459] Ibidem, Article 25.
[460] Ibidem, Article 31.
[461] See A. Xanthaki, *International Instruments…, op. cit.*
[462] UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, *op. cit.*
[463] C. Antons, L. Rogers, *Cultural and Intellectual Property in Cross-border Disputes over Intangible Cultural Heritage*, in: C. Antons, W. Logan (eds.), *Intellectual Property, Cultural Property and Intangible Cultural Heritage*, Routledge, London–New York 2018, p. 70.

for the Safeguarding of the Intangible Cultural Heritage (the 2003 UNESCO Convention, Convention). Yet, the Convention refers to Indigenous Peoples only in the Preamble[464], "most likely as a consequence of the political sensitivity of the subject itself for certain States"[465]. Inscription on one of the international lists created by the Convention, namely the Representative List of the Intangible Cultural Heritage of Humanity and the List of Intangible Cultural Heritage in Need of Urgent Safeguarding,[466] aims to promote safeguarding of intangible heritage by recognizing the value of the element to the communities, groups, and individuals who practice and transmit their heritage, and Indigenous communities can be easily included in these terms[467]. Article 2(1) of the Convention defines intangible cultural heritage as "the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage". As the Convention covers skills and knowledge it overlaps with the work of the World Intellectual Property Organization (WIPO),[468] the United Nations specialized agency that deals with the issue of IP.

However, the IP system divides such heritage into three different categories: Traditional Cultural Expressions (TCE), Traditional Knowledge (TK), and genetic resources. As such, for the purpose of IP rights, TCE may include music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives, or many other artistic or cultural expressions. TCE may be either tangible or intangible, but most usually its forms constitute a combination of the two and the symbolic or religious element cannot be separated from the material form. An example would be a woven rug, which is a tangible expression that conveys elements of a traditional story, which in turn represents an intangible expression.[469] The word "traditional" does not imply that TCE are static, but rather qualifies a form of knowledge or an expression which has a traditional link with a community: it is developed, sustained, and passed on within a community, sometimes through specific customary systems of

[464] A.F. Vrdoljak, *Indigenous Peoples, Intangible Cultural Heritage and Participation in the United Nations*, in: C. Antons, W. Logan (eds.), *Intellectual Property, Cultural Property and Intangible Cultural Heritage*, Routledge, London–New York 2018, p. 54.
[465] T. Scovazzi, L. Westra, *The Safeguarding of the Intangible Cultural Heritage According to the 2003 Unesco Convention: The Case of The First Nations of Canada*, "Inter Gentes" 2017, Vol. 1(2), p. 35.
[466] 2003 UNESCO Convention, Articles 16 and 17.
[467] T. Scovazzi, L. Westra, *op. cit.*, p. 36.
[468] C. Antons, L. Rogers, *op. cit.*, p. 71.
[469] WIPO, Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions, World Intellectual Property Organization, Geneva 2020, p. 15.

transmission, and it is the relationship with the community that makes knowledge or expressions traditional.[470] As such, it is coherent with the approach that culture is not fixed, but rather dynamic, growing, and changing.

These three systems of protection of cultural heritage are not disjointed, but rather influence one another. However, while the IP rights serve different purpose, e.g. the protection against misappropriation of Indigenous Peoples' cultural heritage, their potential in the context of climate change may be limited.

In terms of tangible cultural heritage, there are many monuments and sites in the Arctic region, and most are threatened by climate change. Majority possess a high level of cultural relevance to the Indigenous Peoples, others are of a colonial heritage, and many are common heritage of mankind. Athabaskan Peoples before the Inter-American Commission on Human Rights have forewarned in general terms that climate change causes: "Land slumping, erosion, and landslides which threaten the structural integrity of cultural and historic sites. Flash floods and other flooding resulting from accelerated warming in the Arctic can result in washing away of cemeteries and other culturally significant sites"[471]. As Roberta Joseph of Dawson City, Yukon, observed, flooding in one village took everything: "a church, a community hall, water facilities, everything [...] their whole legacy was just taken"[472]. These impacts threaten Arctic Athabaskan peoples' right to culture by threatening the integrity of culturally significant sites and practices.

Another example is the Herschel Island / Qikiqtaruk (Yukon Territory, Canada), which was first settled by members of the Thule culture around the year 1000 CE and used by the Inuvialuit as a seasonal base for traditional hunting and fishing[473]. In 1890 American whalers (later united as the Hudson Bay Company) established a harbour at Pauline Cove, in 1896 Anglican missionaries built a mission house, and as a result of the Alaska Boundary Dispute in 1903 a permanent detachment of the North-West Mounted Police was established to assert Canadian sovereignty over the island. The working group of the Arctic Council on the Assessment of Cultural Heritage Monuments and Sites in the Arctic has enumerated that there are: "Twelve historic structures stand on the spit at Pauline Cove, the first of which was built in 1890. They relate to the whaling period, the

[470] Ibidem, p. 17.
[471] Athabaskan Petition.
[472] Ibidem, p. 63.
[473] See T. M. Friesen, *Inuvialuit Archeology on Hershel Island*, Government of Yukon 1998, https://emrlibrary.gov.yk.ca/Tourism/archaeology%20and%20palaeontology%20booklets/qikiqtaruk_herschel_island_1998.pdf [last accessed: 29.08.2022].

Anglican missionaries, the Royal Canadian Mounted Police and trading companies. Also located at the Pauline Cove settlement are semi subterranean ice houses, various cemeteries, the archaeological remains of historic and prehistoric cultures, along with over 1000 graves, and significant ice age land and marine mammal vertebrate fossils, including woolly mammoth, Yukon horse, muskox, bison, and walrus"[474]. As a result of the Inuvialuit Claims Settlement Act and The Inuvialuit Final Agreement in 1987 the island was established as a Territorial Park, administered jointly by the Yukon Government and Inuvialuit[475]. Furthermore, it has a status of a National Historic Site of Canada and was accepted on the 2008 World Monuments Watch List of 100 Most Endangered Sites[476]. The working group on the Assessment of Cultural Heritage Monuments and Sites in the Arctic estimated that "Herschel Island is subjected to increasing wave erosion and is a prime example of how climate change is threatening built and cultural heritage"[477].

Another example are the Alpine Ice Patches in Yukon and Northwest Territories, Canada, which are currently on the UNESCO Tentative List. Discovered in 1997, the Yukon Ice Patches are described by the Parks Canada Agency as a:

> remarkable natural phenomena characterized by intersecting occurrences of perennial, non-glacial ice fields, with critical habitat for mountain caribou and thinhorn sheep. [They] provide an extraordinary record of the technological traditions of Indigenous hunters spanning more than 7,500 years of Yukon's sub-arctic history. These sites have preserved an incomparable archive of archaeological and paleontological materials which exceptionally demonstrate the complex interrelationship of Indigenous knowledge, wildlife, climate, and material culture. The collected artifacts demonstrate the elaborate nuance of material selection, crafting customs, art, function and identity that provide a tangible connection between the inter-generational knowledge of a living culture and the ancestral traditions of the ancient past[478].

[474] Susan Barr et al., *Assessment of Cultural Heritage Monuments and Sites in the Arctic,* Arctic Council 2012, p. 29.
[475] Government of Yukon, *Herschel Island – Qikiqtaruk, Territorial Park Management Plan*, https://emrlibrary.gov.yk.ca/environment/HerschelManagementPlan.pdf [last accessed: 29.08.2022], p. 3.
[476] Susan Barr et al, *op. cit.*, p. 30.
[477] Ibidem.
[478] UNESCO, "Yukon Ice Patches", https://whc.unesco.org/en/tentativelists/6343/ [last accessed: 29.08.2022].

The working group on the Assessment of Cultural Heritage Monuments and Sites in the Arctic has emphasized the value of information preserved in the Yukon Ice Patches, stating that: "genetic materials in biological remains have provided insight into caribou population structure and health. With radiocarbon dating on artifacts and faunal material extending back more than 9,000 years, these remains help archaeologists reconstruct human use of alpine cultural landscape over much of the Holocene"[479]. The Yukon Ice Patches are located on traditional hunting grounds of the Carcross/Tagish First Nation, and were never used or occupied for any other purpose than seasonal hunting excursions. In fact, the Carcross/Tagish First Nation continue to harvest thinhorn sheep and hunt caribou in these territories to this day[480]. Hence, the Yukon Ice Patches are relevant not only as tangible cultural heritage, but they also allow the local Indigenous communities to continue and cherish their intangible cultural heritage – since prehistory. However, as stated by the Parks Canada Agency: "the sites are affected by climatic warming that continues to melt permanent ice, particularly which formed in the last thousand years during the Little Ice Age. Despite climate warming, these sites still experience winter accumulations of windblown drifting snow that continues to result in persistent snow packs occupied by caribou and sheep throughout the summer months. In the event of serious or permanent loss of persistent ice accumulations, these locations, and the associated artifact collection, will continue to epitomise an outstanding example of an ancient hunting tradition supported by oral histories"[481]. As Glen MacKay *et al.* have observed: "with climate change tipping the balance towards the catastrophic melt of alpine ice patches, it is important to take stock of what will be lost. Fragile archaeological artifacts released from the ice will degrade rapidly if they are not immediately collected. At large ice patches [...] the stratified dung layers will collapse into a single layer, making them much less useful for studying environmental change through time. Important relief habitat for mountain caribou will also be lost at a time when they are already trying to adapt to a rapidly warming alpine environment"[482].

In terms of intangible cultural heritage, because of climate change the traditional Indigenous way of life is almost impossible to continue and to be preserved. Traditional

[479] Susan Barr et al, *op. cit.,* p. 38.
[480] UNESCO, "Yukon Ice Patches", *op. cit.*
[481] Ibidem.
[482] G. MacKay, L. Andrew, N. Smethurst, T.D Andrews, *Rapid Loss of Perennial Alpine Ice Patches in the Selwyn and Mackenzie Mountains*, in: L. Parrott, Z. Robinson, D. Hik (eds) *State of the Mountains Report*, Vol. 2., Canmore 2019, pp. 26-28.

means of transportation, building and sustenance, traditional values, customs and knowledge, the Indigenous culture as a whole has developed in an Arctic environment and cannot survive without one. The pillars of Indigenous cultural heritage are ice and game, both disappearing as climate becomes warmer. The Inuit petitioners claimed that: "for the Inuit, 'ice is a supporter of life. It brings the sea animals from the north [...] and in the fall it also becomes an extension of [Inuit] land'"[483]. As snow is a critical resource for travel, shelter, and habitat, changes in snow and ice have impaired the safety of the Inuit and "even more critical to their continued survival as a people, these changes have damaged their subsistence harvest, the animals they harvest to survive, and their cultural practices"[484]. As climate change has reduced the capacity to travel, access to game, and safety, the Inuit have been forced to modify their traditional travel and harvest methods, damaging the Inuit culture. The changes in traditional subsistence harvest activities have interfered with one of the most important opportunities to educate the younger generation and "have diminished the role of elders in the younger generation's lives"[485]. Similarly, the Athabaskan petitioners before the Inter-American Commission on Human Rights have explained, that rapid Arctic warming is damaging, and in some places possibly threatening "the existence of the subsistence way of life central to Arctic Athabaskan cultural identities. At the heart of Arctic Athabaskan peoples' culture is hunting, trapping, fishing, and gathering. This includes the experience of participating in those activities and the community's sharing of the foods obtained from these activities"[486]. These activities are central to Arctic Athabaskan culture and heritage because they provide a basis for the elders to educate the younger members of society in traditional ways of life, kinship and bonding, and recreational enjoyment of hunting[487].

Traditional means of travel in the Arctic have become dangerous or impossible, neither dog nor caribou sleighs could be adapted to thin or poor quality ice and snow, under which there is either a rocky terrain or deep water. Snowmobiles are also not an option, because they also require a thick layer of good quality snow or an ice sheet capable of withstanding heavy weight. As the Chief Bill Erasmus of Yellowknife, Northwest

[483] 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 (2005), https://earthjustice.org/sites/default/files/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolarconference.pdf [last accessed: 29.08.2022], [hereinafter: Inuit Petition], p. 39.
[484] Ibidem.
[485]Ibidem, p. 48.
[486] Athabaskan Petition, *op. cit.*, p. 61.
[487] Ibidem.

Territories, Canada, has explained: "what happens [is the weather] becomes very unpredictable, especially in the fall and in the winter. We have people going through the ice like we never had before, good hunters going through the ice, a lot of times you don't hear about it, some of guys won't talk about it, they are embarrassed, they are proud people, they won't talk about it. Trappers don't want to talk about it and they don't want to talk about it because that means they don't know the land and environment. It discourages […] you to go out on the land, and it […] [be]comes a norm and you just don't go out. It affects people from not going out on the land. […] People have gone through the ice"[488]. This demonstrates that climate change impact on cultural rights has also severe impact on Indigenous Peoples' safety and mental health.

Rising temperatures cause immense changes to the Arctic flora and fauna, hence Indigenous Peoples can barely sustain themselves by practising their traditional occupations of hunting, trapping, fishing, and gathering. The Athabaskan petitioners before the Inter-American Commission on Human Rights have observed, that:

> warming and melting is shifting species populations and destroying their habitat by causing fluctuations in water levels, rising temperatures in streams, erosion that disturbs salmon spawning habitat, and forest fires that destroy caribou habitat. Current projections of continued warming in the Arctic and in the characteristics of the ice, snow, land, and weather, along with shifts in wildlife habitat, mean that these difficulties will only worsen in the future. [...] Changing weather patterns [...] have resulted in changes to animal movement, decreasing Athabaskan peoples' capacity to maintain and pass down traditional knowledge of hunting and cultural traditions associated with it[489].

Because of climate change impact on the Arctic flora and fauna, the older generations do not have means nor opportunity to pass their knowledge and experience onto the younger generations, thus their culturally core practices – hunting, trapping, fishing, and gathering – are being lost.

Therefore, neither the Indigenous Peoples of the Arctic can survive climate change, nor their cultural heritage. Their culture was developed and accumulated under conditions of extremely cold environment as means of human adaptation to that environment. Due to climate change, their traditional way of life cannot be practised or preserved, because it cannot be reliably applied to a different environment. The

[488] Ibidem.
[489] Athabaskan Petition, *op. cit.,* p. 62.

Athabaskan petitioners have explained that their intangible cultural heritage: "is becoming less reliable and less useful due to the rapidly changing environment. […] Weather forecasting is a crucial part of planning safe and convenient travel for harvesting, hunting, and associated cultural activities. Because much Arctic Athabaskan traditional knowledge relates to the 'relationship of living beings (including human beings) with one another and with their environment', the effects of accelerated warming on the Arctic Athabaskan elders' ability to maintain traditional knowledge are far-reaching"[490]. In the same way, the environment, livelihoods and culture of Sámi people are severely affected by climate change and "many changes are already visible, particularly for those Sámi families that keep the traditional livelihoods of the Sámi people alive. The Sámi, like all other Arctic Indigenous Peoples, experience environmental, health, social, cultural and economic impacts and consequences of climate change"[491].

3.3. Land rights and self-determination

A universal human right to land is not formally and specifically inscribed in a binding human rights treaty. According to Jérémie Gilbert this is not due to a mistake, but a "consequence of the historical dominance of Western liberal ideals regarding property rights to land"[492]. One of the main results of this is that land rights are mainly seen from the perspective of individual and exclusive ownership, which does not leave space for collective, common and shared usage of land. This approach also rejects the more collective, cultural and spiritual aspects of land rights of many Indigenous Peoples, and ignores transitory use of land by nomadic or semi- nomadic communities[493]. It is therefore not surprising that land rights has been widely included in the UNDRIP and the word "land" is repeated on twenty-one occasions in the text of the Declaration. For example, Article 25 acknowledges that "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources

[490] Ibidem.
[491] D. Mamo (ed.), *The Indigenous World 2020*, The International Work Group for Indigenous Affairs (IWGIA), 2020, p. 528.
[492] J. Gilbert, *The Human Right to Land. 'New Right' or 'Old Wine in a New Bottle'?,* in: A. von Arnauld, K. von der Decken, M.Susi (eds.), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric,* Cambridge University Press 2020, p. 97.
[493] See J. Gilbert, *Nomadic Territories: A Human Rights Approach to Nomadic Peoples' Land Rights,* "Human Rights Law Review" 2007, Vol. 7, Issue 4, pp. 681–716.

and to uphold their responsibilities to future generations in this regard"[494], while Article 26 recognizes the right to the lands, territories and resources which they have traditionally and urges States to legally recognize and protect these lands in accordance with the customs, traditions and land tenure systems of Indigenous Peoples[495].

Indigenous Peoples' land rights are threatened by climate change, because it makes it impossible for Indigenous Peoples to sustain themselves or even physically exist on the land subject to rapid flooding and erosion. The Inuit petitioners before the Inter-American Commission on Human Rights have reported that: "Loss of permafrost and sea ice both contribute to increasingly devastating coastal erosion. Because most Inuit live, hunt, and travel near the coast, coastal erosion and storm surges are having a cataclysmic impact on the Inuit"[496]. The report of the United States Government Accountability Office to Congressional Committees on the flooding and erosion of Indigenous villages in Alaska acknowledges that: "flooding and erosion affects 184 out of 213, or 86 percent, of Alaska Native villages to some extent. While many of the problems are long-standing, various studies indicate that coastal villages are becoming more susceptible to flooding and erosion due in part to rising temperatures"[497]. One of the members of the Alaskan Indigenous Peoples, Stanley Tocktoo of Shishmaref, has explained that: "we get maybe two or three storms a year now. We lose about twenty feet a storm. Even from high tide we lose ground from permafrost melting. That's what we're trying to do on the whole North side of our island, protect the permafrost from high-tide. Once the high tide comes around, the permafrost melts, and the next time we get low-tide the ground will collapse"[498].

It has to be underlined that for the Indigenous Peoples their land (including ice) has a deep cultural value and is a part of their identity. One could argue that Indigenous Peoples of the Arctic are symbiotic with their environment. The loss of their land forces Indigenous Peoples into starvation and poverty, or into urban areas to which they are not accustomed. In cities, Indigenous Peoples of the Arctic cannot maintain their society or culture, loosing connections and identity. This aspect has been well explained by the Athabaskan petitioners, who stated that: "Arctic Athabaskan peoples' culture directly

[494] UNDRIP, Article 25.
[495] Ibidem, Article 26.
[496] Inuit Petiton, *op. cit.*, p. 51.
[497] United States Government Accountability Office, Flooding and Erosion in Alaska Native Villages, GAO-04-142, 2003, p. 8, https://www.gao.gov/products/gao-04-142 [last accessed: 29.08.2022].
[498]Inuit Petition, *op. cit.*, p. 55.

relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity"[499]. Given the widely acknowledged and extensive connection between the natural environment and Arctic Athabaskan culture, the changes in Arctic snow, weather patterns, and land are threatening Athabaskan culture, as these changes interfere with the Arctic Athabaskan Peoples' ability to practice the subsistence way of life central to their culture.

The actions undertaken by the State or with permission of the State as means of exploitation of resources on the Indigenous' territories, in conjunction with climate change, could negatively impact the land rights of Indigenous Peoples. One of such examples was reported by the International Work Group for Indigenous Affairs, discussing a case of forest exploitation in Krasnoyarsk Region, Russia:

> the clear-cutting carried out by logging companies in the permafrost regions causes the permafrost to thaw, which leads to landslides and erosion; former forests are turned into swamplands and the removal of plant cover means that the surface is fully exposed to solar irradiance during the summer months. Later, the swamps dry out and that increases the risks of wildfires, further exacerbating the harm caused by global warming as gases are released into the atmosphere. Apart from the disastrous effect forest fires and clear-cutting have on the traditional lifestyle of Indigenous Peoples of Siberia, they also make it difficult for Indigenous obshchinas to fulfil their obligations of the Russian State and thus increase the risk of them losing their tenure and status[500].

As such, the lack of officially recognized titles to land can seriously impede Indigenous Peoples' adaptation to climate change. Moreover, with the current rate of climate change soon there may be no land that Indigenous Peoples could live on and migration could be their only chance for survival, resulting in losing their cultural traditions cultivated since the time immemorial.

Furthermore, the disappearing land can effectively impede the realization of the right to self-determination. As it has been stated in Chapter 1, Indigenous sovereignty is inclusive of the right to ownership over traditional land, right to preserve identity and

[499]Athabaskan Petition, *op. cit.*, p. 63.
[500]D. Mamo, *op. cit.*, pp. 561-562.

culture, participatory rights in decision making process especially in matters related to culture and life, and the right to self-governance through customary laws[501]. Although it is now widely agreed that the Indigenous Peoples' right to self-determination is fulfilled through internal self-determination, understood as a pursuit of its political, economic, social and cultural development within the framework of an existing State, in a form of self-government or autonomy, without territory the enjoyment of the right to self-determination is practically unachievable[502].

3.4. Right to adequate housing

Intrinsically linked with the right to land is the right to adequate housing. As it has been mentioned in the introductory remarks to this chapter, on the universal level the right to adequate housing has been recognized as part of the right to an adequate standard of living in Article 25 of the Universal Declaration of Human Rights and Article 11 of the ICESCR. It has been established as a free-standing human right through numerous resolutions, reports and interpretive instruments, especially the CESCR General Comment No. 4[503], which was further specified by General Comment No. 7 1997 on forced evictions[504].

One of the important dimensions of the adequacy of the housing is its cultural adequacy. In its General Comment No. 4, the CESCR stated that "the way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed, and that, inter alia, modern technological facilities, as appropriate are also ensured"[505].

Moreover, the right to housing should not be interpreted in a narrow or restrictive sense which equates it only with the shelter provided by merely having a roof over one's

[501] R. Shrinkhal, *op. cit.*, p. 74.
[502] B. Lewis, *op. cit.*, p. 163-165.
[503] CESCR, General Comment No. 4: The Right to Adequate Housing (Art. 11(1) ICESCR), 13 December 1991, UN Doc. E/ 1992/ 23.
[504] CESCR, General Comment No. 7: The Right to Adequate Housing (Art. 11(1) ICESCR): Forced Evictions, 20 May 1997, UN Doc. E/ 1998/ 22.
[505] CESCR, General Comment No. 4, *op. cit.*, par. 8(g).

head, but it should rather be seen as the right to live in security, peace and dignity[506], which is especially important in the context of climate change.

The United Nations Declaration on the Rights of Indigenous Peoples does not include a provision dedicated solely to the right to the adequate housing, however, Article 23 for example mentions that Indigenous Peoples have the right to be actively involved in developing and determining *inter alia* housing and other economic and social programs affecting them and, as far as possible, to administer such programs through their own institutions[507].

In the Arctic, there is already a shortage of adequate housing[508], which will only worsen because of climate change, forcing the Indigenous communities to relocate. Recently the International Work Group for Indigenous Affairs have reported, that: "in October, the Alaska Federation of Natives (AFN) declared a climate emergency. Alaska Native villages have been particularly hard hit by the effects of climate change. Melting permafrost, a lack of sea-ice build-up along the coast, drought, wildfires and erosion have made some villages uninhabitable [...] After decades of planning, the Yup'ik village of Newtok was finally able to begin its relocation to a new site, Mertarvik, 10 miles away. In November, the U.S. Army Corps of Engineers and the University of Fairbanks released a new report on the threats to Native communities from erosion, flooding and permafrost melting. Five communities - Shaktoolik, Shishmaref, Kivalina, Golovin and Napakiak - ranked highest in all three categories but many more are at high risk"[509].

Furthermore, traditional means of building, especially useful during hunting excursions in harsh Arctic weather, have become almost impossible, infringing upon cultural dimension of the right to adequate housing. Traditionally, Indigenous hunters would build igloos, ensuring their safety and comfort. Today, however, it is almost impossible to build an igloo, because of poor snow quality, caused by warming climate. Hence, Indigenous hunters have to resort to living in tents, which, however, do not protect them from the Arctic weather. As an Inuk hunter from Pangnirtung, Nunavut, explained: "We used to stay in igloos most of the winters those days, these days we mostly stay in tents [...] during winter the tents get cold due to not enough insulation. These days the

[506] A. Hernandez-Połczyńska, *Prawo do odpowiedniego mieszkania,* in: Z. Kędzia, A. Hernandez-Połczyńska, *op. cit.,* p. 519.
[507] UNDRIP, Article 23.
[508] K. Daley, *Meeting the northern housing challenge*, Polar Knowledge 2016, Vol. 1, No. 1, https://www.canada.ca/en/polar-knowledge/publications/polarleads/vol1-no1-2016.html [last accessed: 29.08.2022].
[509] D. Mamo, *op. cit.*, p. 581.

snow seems to be much harder"[510]. The lack of access to the farer land results in an increase of hunting in closer proximity to settlements and such local over-harvesting affects targeted wildlife and plant populations, with implications for long-term food security for subsistence-dependent communities[511].

The lack of snow, however, causes not only risk during the hunting expeditions, but impedes an educational element of passing valuable knowledge. As one of the members of the Labrador Inuit Youth Division reported: "it would be nice to be able to pass on how to build an igloo, especially before our elders are all passed away. And that is coming right around the corner, because a lot of our elders are passing on. We do have some elders who are capable yet of getting around and they have the interest and the knowledge of building igloos. So we try to use their resources to show the youth how to build igloos, but we have been unsuccessful so far [...] the snow is just a different texture" . This shows well that climate change impacts wide variety of rights, as in this case it is not only the right to adequate housing, the right to participate in cultural life, the right to access cultural heritage, also in its intangible form, but the right to education as well.

3.5. Food as a cultural practice[512]

The inability to hunt, caused by the unsafe snow conditions, results in an infringement of another right – the right to adequate food. As it has been mentioned, the right to adequate food, is recognized in Article 25 of the Universal Declaration of Human Rights as part of the right to an adequate standard of living and enshrined in Article 11 of the ICESCR. The Covenant also explicitly recognizes in article 11.2 the fundamental right of everyone to be free from hunger.

The normative content of the right to food has been defined by the CESCR in 1999 in the General Comment No. 12[513]. According to the Committee the right to adequate food is wider than the concept of a minimum package of calories, proteins and other

[510] Inuit Petition, *op. cit.,* p. 42.

[511] Athabaskan Petition, *op.cit.*, p. 43.

[512] With minor changes – K. Prażmowska, *Climate change impact on the right to adequate food on the example of Indigenous Peoples of the Arctic region*, in: J. Jaskiernia, K. Spryszak (eds.), *Wyzwania dla ochrony praw człowieka u progu trzeciej dekady XXI wieku*, Adam Marszałek 2021, pp. 714-731.

[513] CESCR, General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999, E/C.12/1999/5.

specific nutrients[514] and for its realization, the food should fulfill three criteria: it should be available, accessible and adequate. The concept of sustainability is also significant, as the food should be accessible for both present and future generations. Availability requires on the one hand that food should be available from natural resources either through the production of food, by cultivating land or animal husbandry, or by fishing, hunting or gathering[515]. On the other hand, it means that food should be available for sale in markets and shops. The food shall also satisfy the dietary needs of individuals, be free from adverse substances, and acceptable within a given culture. These elements are of crucial importance for Indigenous Peoples of the Arctic region, which has been recognized by the Committee in paragraph 13, in which the CESCR made a direct reference to Indigenous Peoples as this group of society that is particularly vulnerable due to jeopardized access to their ancestral lands[516].

For Indigenous Peoples the right to adequate food goes far beyond the mere satisfaction of physical needs. The component cultural acceptability of the right to food becomes of particular importance in their context, because food is indispensable to shaping Indigenous Peoples' identities, which can be noticed on every stage of the process of obtaining the food, from hunting and gathering, through conservation, to consumption. As it has been mentioned, hunting is central to Arctic culture because it provides a basis for the elders to educate the younger members of society in traditional ways of life, kinship and bonding, and recreational enjoyment of hunting[517]. In the words of Sheila Watt-Cloutier, the former Chair of the Inuit Circumpolar Conference:

> Hunting is not just about killing animals and filling stomachs. The process of the hunt and eating of our country food personifies what it means to be Inuit. It is on the land that our values and age-old knowledge are passed down from generation to generation. Generations—young and old—meet on the land. The wisdom of the land and process of the hunt teaches young Inuit to be patient, courageous, tenacious, bold under pressure, reflective to withstand stress, to focus and carry out a plan to achieve a goal….
>
> Hunting and eating the animals we hunt are spiritual and cultural activities[518].

[514] Ibidem, par. 6.

[515] UN Office of the United Nations High Commissioner for Human Rights, *Fact Sheet No. 34, The Right to Adequate Food*, Geneva, 2010, p. 2.

[516] Ibidem, par. 13.

[517] Athabaskan Petition, *op.cit.*, p. 61.

[518] Remarks by Sheila Watt-Cloutier, Chair of the Inuit Circumpolar Conference, The World Bank Environmentally and Socially Sustainable Development Week, Washington, DC, March 30, 2005, http://inuitcircumpolar.indelta.ca/index.php?ID=290&Lang=En. [last accessed: 30.08.2023].

Climate change makes hunting conditions more dangerous as the weather forecasting, which is a crucial part of planning a safe trip, is no longer reliable. Navigation becomes more difficult as the landscape changes, with permafrost melting causing erosion, and ponded water in areas that were previously solid.

Moreover, climate change impacts the breeding and migration patterns of many animals, especially caribou, that are central to the diet of many Indigenous communities. Climate change affects also the mortality of the animals; as rain-on-snow events have become more frequent and intense in autumn and winter across the northwestern Russian Arctic, they led to mass starvation among reindeer herds due to heavy ice cover on pastures[519]. Warmer and wetter winters have also increased mortality among wild reindeer populations in Svalbard, Norway, and populations of caribou and wild reindeer across the Arctic have declined by almost fifty per cent over the past twenty years[520]. Rising temperatures contribute to more frequent wildfires, which also affects the distribution of caribou and reindeer, with implications for livestock husbandry and subsistence in northern communities, especially the Sami People. Even with the little animals left, the melting of the snow makes hunting, which is an essential activity for Indigenous Peoples more complicated and dangerous. The melting of the sea ice makes hunting additionally difficult as "the sea ice is their highway"[521] and their entire culture and identity is based on the free movement on the land. This mobility is also essential in trade, communication and in obtaining supplies for traditional clothing and art[522]. Without this way of passage many Indigenous communities are cut off from the world.

Melting permafrost and changing weather patterns influences also the second stage of the provision of food as the underground methods of storing food are not effective anymore. Warming temperatures also cause the meat from hunting to spoil more quickly, causing less traditional food to be stored and consumed[523]. Cultural values related to traditional Indigenous food are also present in the consumption of the hunt. Complex and precise local rules determine the sharing and distribution of the catch, and the meat is

[519] AMAP, *Climate Change Update 2019…, op.cit.*, p. 6.
[520] Ibidem.
[521] See D. Smith, *The Sea Ice is Our Highway: The Importance of Sea Ice to the Inuit Way of Life,* [in:] *Climate Change and Arctic Sustainable Development: scientific, social, cultural and educational challenges,* UNESCO, Paris, 2009.
[522] See Inuit Circumpolar Council, *The Sea Ice Never Stops. Circumpolar Inuit Reflections on Sea Ice Use and Shipping in Inuit Nunaat*, Canada, 2014.
[523] Athabaskan Petition, *op.cit.*, p. 43.

commonly shared out to people beyond the household, whether those people are related to the hunter or not. For Arctic Indigenous Peoples, sharing can only be understood with reference to the sense of social relatedness that people feel they have with each other and with animals and the environment[524]. Due to the particular effort related to obtaining the food, Indigenous Peoples take advantage of all the parts of hunted animals and utilize the leathers for traditional clothing or housing, such as tents, as for example in the case of Nenets in the northern Arctic Russia[525]. Above mentioned examples illustrate well that food and its consumption are an important part of Indigenous Peoples culture, as well as of social, economic and political organization, which are currently threaten by the rapid climate change.

Besides mammals and fish, the other important part of Indigenous Peoples' diet are food plants, such as willows and fireweed, and berries – as Arctic warming reduces their ability to survive in a warmer climate or to out-compete invasive species, the subsistence gathering for berries and other vegetation may become more difficult[526]. Such traditional foods have been proven to be more nutritious and rich in micronutrients than market foods. Willows, fireweed and other traditional food plants, for example, had more vitamin C than a refrigerated lemon[527], which in some villages can be purchased in a local store. A reduction or disappearance of traditional food species may result in Indigenous populations switching from a traditional diet to less healthy ones, which are associated with an increased prevalence of chronic diseases such as diabetes, heart disease, and cancer[528]. Moreover, depending on the location of certain population such a shift may not be entirely possible due to the dependence on air or water transport[529]. Traditional foods provide the components of a high quality diet at relatively low monetary cost as according to the government of Nunavut, Canada the annual cost of substituting imported food for that obtained from subsistence hunting and harvesting would be C$35 million to purchase equivalent amounts of imported food, which is well above average household income of

[524] Inuit Petition, *op.cit.,* p. 19.
[525] A. Ally, "A world of fire and ice: life with the Nenets – in pictures", The Guardian, August 21, 2019, https://www.theguardian.com/artanddesign/gallery/2019/aug/21/a-world-of-fire-and-ice-life-with-the-nenets-in-pictures [last accessed: 30.08.2023].
[526] Athabaskan Petition, *op. cit.,* p.78.
[527] Ibidem, p. 45.
[528] Ibidem, p. 71.
[529] See AMAP, *Assessment 2015: Human Health in the Arctic.* Arctic Monitoring and Assessment Programme, Oslo 2015.

Indigenous People[530], which is estimated to be C$ 62 138, with thirty-three percent of households in the community having less than C$ 25 000 annually[531]. The prices of food purchased in the stores are heavily influenced by the costs of transportation, as for example in Tetlit Zheh, Canada, inhabited by the Gwich'in Peoples, where in 2005 the food prices were about fifty per cent higher than in cities in southern areas of Canada[532]. As the Indigenous Peoples are one of the poorest section of the society, without the access to traditional foods, currently threatened by climate change, Indigenous Peoples are entirely dependent on the States aid programs.

3.6. Right to water

Although the right to water has not been explicitly recognized in the ICESCR, the concept of basic water requirements to meet fundamental human needs was first established at the 1977 United Nations Water Conference in Mar del Plata, Argentina[533]. Its Action Plan asserted that all peoples, whatever their stage of development and their social and economic conditions, had the right to have access to drinking water in quantities and of a quality equal to their basic needs[534]. Subsequently, the right to water has been recognized in relation to particular groups and enshrined, for example, in Article 14.2 of the Convention on the Elimination of All Forms of Discrimination Against Women, which stipulates that States parties shall ensure to women the right to "enjoy adequate living conditions, particularly in relation to […] water supply"[535], while Article 24.2 of the Convention on the Rights of the Child requires States parties to combat disease and malnutrition "through the provision of adequate nutritious foods and clean drinking water"[536].

In 2003, CESCR adopted General Comment No. 15 on the right to water, in which the Committee defined the right as a right which entitles "everyone to sufficient, safe,

[530] CAFF, *The Economics of Ecosystems and Biodiversity (TEEB) Scoping Study for the Arctic*, Conservation of Arctic Flora and Fauna, CAFF Assessment Series Report 12, Akureyri 2015, p. 110.
[531] FAO, Indigenous Peoples' Food Systems: the many dimensions of culture, diversity and environment for nutrition and health, Rome 2009, p. 48.
[532] Ibidem, p. 49.
[533] J. Jaraczewski, *op. cit.*, p. 571.
[534] United Nations, Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977, E/CONF.70/29.
[535] United Nations Convention on the Elimination of All Forms of Discrimination Against Women, *op. cit.*, Article 14.2.
[536] United Nations Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, Article 24.2.

acceptable, physically accessible and affordable water for personal and domestic uses"[537]. According to the Committee water is required for a range of different purposes, "besides personal and domestic uses, to realize many of the Covenant rights. For instance, water is necessary to produce food (right to adequate food) and ensure environmental hygiene (right to health). Water is essential for securing livelihoods (right to gain a living by work) and enjoying certain cultural practices (right to take part in cultural life)"[538]. Moreover, the Committee underlined that "water should be treated as a social and cultural good, and not primarily as an economic good"[539] and that States parties should ensure that there is adequate access to water for securing the livelihoods of Indigenous Peoples. Additionally, States parties should take steps to ensure that "Indigenous peoples' access to water resources on their ancestral lands is protected from encroachment and unlawful pollution"[540] and that "States should provide resources for indigenous peoples to design, deliver and control their access to water"[541].

Indigenous Peoples held traditional views on caring for water, coupled with the belief that water is alive. The shared value of water as opposed to the water privately owned in a household is at the core of the relationship between the spiritual and physical world and life for Indigenous Peoples. Deeply held cultural significance and ancestral practices lead to the use of traditional natural sources on the land where fresh, clean and holy water can be found[542], as opposed to water from the tap. However, due to climate change the fresh water that has been accessible since the time immemorial, may soon no longer be available.

In relation to the right to water, climate change causes contamination and may cause water shortages in the future. Water levels in the Arctic are diminishing, because climate change causes violent springtime floods, followed by warm summers and dry winters. The Inuit petitioners before the Inter-American Commission on Human Rights have explained that "lack of snowfall, early thaws, increased erosion, melting permafrost, melting ice caps and changing wind conditions have combined to decrease water levels in lakes and rivers. In addition, the sudden spring thaw fills rivers with more water at one

[537] CESCR, General Comment No. 15, The right to water (arts. 11 and 12), UN Doc. E/C.12/2002/11, par. 2.
[538] Ibidem, par. 6.
[539] Ibidem, par. 11.
[540] Ibidem, par. 16(d).
[541] Ibidem.
[542] A. Cassivi, A. Covey, M. J. Rodriguez, S. Guilherme, *Domestic water security in the Arctic: A scoping review*, "International Journal of Hygiene and Environmental Health" 2023, Vol. 247, p. 9.

time than in the past, which erodes the banks and straightens the river paths. Because the water flows more intensely during a shorter period of time, the water level is unusually low once the spring flood is over. Water levels are further reduced by the longer warm season and increased temperatures, which evaporate more water than in the past"[543]. Moreover, melting permafrost causes contamination of drinking water and failure of water infrastructure. For example, the Athabaskan petitioners before the Inter-American Commission on Human Rights have observed that "permafrost thawing, erosion, floods, rockslides, and intense rainfall pose potential threats to water quality in the Arctic, and thus to Arctic Athabaskan peoples' health. These impacts may also diminish water quality by directly damaging water facilities or by limiting the efficient delivery of water"[544]. According to Sherilee L. Harper, in terms of climate change impact on water quality, "lowland areas have been flooded with salty ocean water during storms, chemical contaminants that were stored in the environment are being released into water sources, permafrost thaw and erosion have increased water turbidity, runoff has decreased in non-glacial watersheds and winter river discharge has increased in other regions, water temperatures have increased, and the occurrence and/or emergence of microbial contaminants has increased"[545]. Similarly, an increase in water-borne illnesses and diseases was highlighted as an important concern associated with climate change in the Scandinavian countries[546]. Therefore, the climate change impact on the right to water have consequences on yet another right – the right to health.

3.7. Cultural dimensions of the right to health

The right to the enjoyment of the highest attainable standard of physical and mental health was first articulated in the 1946 Constitution of the World Health Organization (WHO), whose preamble defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity"[547]. The preamble further states that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion,

[543]Inuit Petition, *op. cit.,* p. 37.
[544]Athabaskan Petition, *op. cit.,* p. 72.
[545] S. L. Harper, C. Wright, S. Masina, S. Coggins, *Climate change, water, and human health research in the Arctic*, "Water Security" 2020, Vol. 10, p. 1.
[546] A. Cassivi, A. Covey, M. J. Rodriguez, S. Guilherme, *op. cit.,* p. 2.
[547] World Health Organization, Constitution of the World Health Organization 1946, Geneva 1946, Preamble.

political belief, economic or social condition"[548]. The UDHR also mentioned health as part of the right to an adequate standard of living, in Article 25, while in the ICESCR it is enshrined in Article 12:

> 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
> (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
> (b) The improvement of all aspects of environmental and industrial hygiene;
> (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
> (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

In 2000 the Committee adopted General Comment No. 14, on the right to the highest attainable standard of health, in which it underlined that health is a fundamental human right indispensable for the exercise of other human rights and that "all health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned"[549]. The Committee indicated in particular that Indigenous Peoples have the right to specific measures to improve their access to health services and care, which should take into account "traditional preventive care, healing practices and medicines"[550]. The Committee underlined that medicinal plants, animals and minerals are necessary to the full enjoyment of health of Indigenous Peoples and as such, they should be protected[551]. Moreover, the Committee noted the collective dimension of heath as "in indigenous communities, the health of the individual is often linked to the health of the society as a whole"[552]. The Committee also noted the devastating effect on their health caused by development

[548] Ibidem.
[549] CESCR, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2000/4, par. 12(c).
[550] Ibidem, par. 27.
[551] Ibidem.
[552] Ibidem.

activities that lead to the displacement of Indigenous Peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands. Therefore, according to the CESCR, States should provide resources for Indigenous Peoples to design, deliver and control health services so that they may enjoy the highest attainable standard of physical and mental health[553].

The United Nations Declaration on the Rights of Indigenous Peoples followed this approach and the right to health is enshrined in Article 24, which states that "Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services"[554].

According to the Expert Mechanism on the Rights of Indigenous Peoples "Indigenous peoples' conceptualization of 'health' and wellbeing is generally broader and more holistic than that of mainstream society, with health frequently viewed by indigenous peoples as both an individual and collective right, strongly determined by community, land, and the natural environment. Indigenous concepts of health often incorporate spiritual, emotional, cultural and social dimensions in addition to physical health. These concepts are inextricably linked with realization of other rights, including rights to self-determination; development; culture; land; language; and the natural environment"[555].

Finally, one has to take into account particular situation of Indigenous Peoples when considering their right to health. According to the Permanent Forum on Indigenous Issues "the right to health materializes through the well-being of an individual as well as the social, emotional, spiritual and cultural well-being of the whole community. Colonization, including policies of oppression, dispossession and assimilation, have led to the health challenges faced by many indigenous peoples today, which will also affect future generations. As a consequence, the health of indigenous peoples is weakened by a range of underlying social and economic determinants, including poverty, inadequate housing, lack of education, food insecurity, lower employment, loss of traditional lands

[553] Ibidem.
[554] UNDRIP, Article 24.1.
[555] UN Expert Mechanism on the Rights of Indigenous Peoples, The right to health and indigenous peoples, with a focus on children and youth, A/HRC/EMRIP/2016/CRP.1, 7 July 2016, p. 3.

and languages, barriers to political participation and institutionalized racism"[556]. Therefore, the Indigenous Peoples of the Arctic, whose health is already diminished in both physical and cultural dimensions, have their right to health further threatened by encroaching climate change.

As it has been already mentioned, due to climate change Indigenous Peoples of the Arctic suffer from a declining quantity and quality of food and water, caused by diminishing flora and fauna, floods followed by droughts and contamination. Because of lesser snow quality, thinner ice and violent weather patterns, they also face greater physical risk pursuing their traditional ways of acquiring food, while the food they acquire cannot be safely stored due to the melting permafrost. Lastly, rising temperatures bring new diseases from warmer regions located to the South, and ancient diseases emerge, which were hibernating in the permafrost.

In terms of physical risk from weather related causes, the Athabaskan petitioners before the Inter-American Commission on Human Rights have claimed, that "the effects of accelerated warming further threaten Arctic Athabaskan peoples' right to health by posing greater risk of injury arising from changing weather conditions. For example, hunters attempting to intercept caribou at river crossings in conditions where freezing has been delayed face increased risk of injury as these rivers often have moving ice. Increased risks of injury related to weather events, such as storms, rockslides, avalanches, intense rainfalls, floods, and extreme temperature also threaten the health and well-being of Athabaskan peoples. [...] The inability of elders to predict the weather accurately further increases the risk that hunters and travellers will be caught unprepared, with dangerous, even life-threatening consequences in the harsh Arctic climate"[557].

On the other hand, Inuit petitioners before the Inter-American Commission on Human Rights have observed that climate change affects behaviour of polar predators, which are forced to approach human habitats: "changes in ice conditions have also contributed to more dangerous encounters between polar bears and humans because the ice floe edge is closer to the land than in the past, reducing the amount of habitat available for the polar bears. The bears are forced into a smaller area, closer to Inuit settlements and camping areas"[558].

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[556] UN Permanent Forum on Indigenous Issues, Recommendations on health, E /C.19/2013/L.2, 23 May 2013, par. 3.
[557] Athabaskan Petition, *op. cit.,* pp. 72-73.
[558] Inuit Petition, *op. cit.,* p. 88.

Traditional ice cellars used for storing of meat and fish are made in the permafrost. Because the permafrost is thawing, these methods of storage pose a risk of hunger or food poisoning, as the food decomposes in higher temperatures. According to the Inuit petitioners "traditional methods of food preservation have also become dangerous or infeasible with the loss of permafrost. Inuit have traditionally used the convenient permafrost for meat storage. Permafrost melt has made this method more arduous and more dangerous, requiring deeper holes or abandonment of the method, and increasing the risk of food-borne illnesses"[559].

Furthermore, warming climate brings a higher risk of animal to human transmission of new diseases, caused by arrival of new species as "climate stress and shifting animal populations [...] create conditions for the spread of infectious diseases in animals that can be transmitted to humans, such as West Nile virus"[560]. Similarly, the Athabaskan petitioners noted that warming climate allows new species of disease bearing insects to infiltrate the Arctic environment as "warming is causing changes in insect and pest populations and the movement of new wildlife diseases, such as brain worm in deer, and tick-borne Lyme disease, brucellosis, rabies, tularemia, and echinococus. Warming can exacerbate water and food-borne contamination that lead to intestinal disorders and illnesses; chemical and biological contaminants; and vector-borne and zoonotic (animal-borne) diseases, causing new patterns of diseases from bacteria, viruses and other pathogens carried by mosquitoes, ticks, and other animals experiencing habitat shifts"[561]. Such diseases are an increasing threat to Arctic Athabaskan peoples and thus their right to health.

As it has been mentioned, another climate change induced risk are the so called "zombie viruses" – the ancient diseases, which hibernate in the deep layers of permafrost and scientists are becoming highly concerned that climate change may set them free from the Arctic permafrost, which would allow them to spread among the Indigenous communities and throughout the rest of the world. As Kimberley R. Miner et al. have observed: "the Arctic cryosphere is collapsing, posing overlapping environmental risks. In particular, thawing permafrost threatens to release biological, chemical and radioactive materials that have been sequestered for tens to hundreds of thousands of years. As these constituents re-enter the environment, they have the potential to disrupt ecosystem

[559] Ibidem, p. 50.
[560] Ibidem, p. 63.
[561] Athabaskan Petition, p. 72.

function, reduce the populations of unique Arctic wildlife and endanger human health"[562]. These could be yet unknown mammalian diseases, but also known viruses, bacteria or their vectors, especially those present in the permafrost used for ancient burial sites (e.g. influenza, anthrax and smallpox). For example, Jeffrey Taubenberger et al. have identified the genetic sequence of Spanish Flu (H1N1) in 2005 as they were able to take a sample of the virus from a body of an Inuit woman who died of the Spanish Flu in 1918 and was buried in the permafrost[563]. Sara Goudarzi related a case from 2016, where "anthrax killed a 12-year-old boy in a remote part of Siberia. At least 20 other people, also from the Yamal Peninsula, were diagnosed with the potentially deadly disease after approximately 100 suspected cases were hospitalized. Additionally, more than 2,300 reindeer in the area died from the infection. According to Russian officials, thawed permafrost — a permanently frozen layer of soil — released previously immobile spores of Bacillus anthracis into nearby water and soil and then into the food supply"[564].

Moreover, it is not only physical health that has suffered the impact of climate change, but also the Indigenous Peoples' of the Arctic mental health has been damaged by the transformation of the once familiar landscape, and the resultant cultural destruction[565]. The loss of important cultural activities such as subsistence harvesting, passing on traditional knowledge to younger generations, weather forecasting, and igloo building can induce psychological problems[566]. Because of the increased danger and insecurity of travel, the practice of traditional cultural activities induces more stress than in the past, adding emotional barriers to the physical barriers to the practice of those cultural activities. In addition, the damage to homes, infrastructure and communities from increased coastal erosion, land slumping, and flooding result in displacement, dislocation, and associated psychological impacts[567].

3.8. Concluding remarks

An analysis of the observed and predicted effects of climate change reveals that it

[562] K.R. Miner, J. D'Andrilli, R. Mackelprang, et al., *Emergent biogeochemical risks from Arctic permafrost degradation*, "Nature Climate Change" 2021, Vol. 11, p. 809.
[563] J. Taubenberger, A. Reid, M. Lourens, R. Wang, G. Jin, et al., (2005). *Characterization of the 1918 influenza virus polymerase genes*, "Nature" 2005, Vol. 437, pp. 889-893.
[564] S. Goudarzi, *What Lies Beneath*, "Scientific American" 2016, Vol. 315, Issue 5, pp. 11-12.
[565] Inuit Petition, *op. cit.,* pp. 87-88.
[566] Arctic Climate Impact Assessment, *Impacts of a Warming Climate: Final Overview Report*, Cambridge University Press 2004, p. 111.
[567] Inuit Petition, *op. cit.,* p. 89.

threatens the enjoyment of a wide range of human rights of the Indigenous Peoples of the Arctic region. The right to access intangible and tangible cultural heritage, the rights to land and self-determination, the rights to adequate housing and adequate food, right to water and right to health are all at risk because of the various environmental changes occurring as a consequence of climate change. For Indigenous Peoples all these rights have a cultural dimension and as such can be regarded as cultural rights *sensu largo* and *sensu stricto.*

As it has been demonstrated, as Indigenous Peoples' cultural practices, such as hunting of certain local species, traditional medicinal practices involving particular plant or spiritual beliefs or customs related to nature, strongly rely on the natural environment, then these cultural practices are vulnerable to the environmental degradation, caused by climate change.

However, identifying that climate change impacts the Indigenous Peoples' rights is only a first step of pursuing a remedy for climate change. As it will be mentioned in Chapter 4, climate change represents a significant issue of environmental justice, since those who are least responsible for greenhouse gas emissions are also those who suffer most from the negative impacts of climate change. Therefore, the following chapter will examine, whether current international climate change law provides any possibility of remedy for the Indigenous Peoples in the Arctic in the case of violation of their cultural rights arose from the climate change induced deterioration of the environment.

Chapter 4 : International climate change law – towards Indigenous Peoples' protection?

4.1. Introductory remarks

Climate change is a global phenomenon that has a direct and indirect impact on all human and natural systems on Earth. It is not a new phenomenon – climate has been changing throughout the ages. The current changes, however, are the most rapid, alarming and lead to devastating consequences and the issue of climate change is one of the most pressing problem for the international community and as it has been established in Chapter 3, it severely impedes the enjoyment of cultural rights of the Indigenous Peoples of the Arctic region. Therefore, the chapter begins with an attempt to explain processes that lead to climate change and to provide a legal definition of this phenomena. As climate change law is a part of environmental law, the chapter aims at establishing what are the principles of the latter, what is their nature and whether they could be applied in the climate change context.

As climate change further aggravates the existing patterns of inequality all over the globe the concept of environmental justice needs to be introduced as it allows to include not only legal, but also moral claims and Indigenous Peoples' perspectives in the discourse about climate change.

At the first glance, international climate change law seems very distant from the issue of Indigenous Peoples' rights as the main addressee of international climate change norms are States. However, making the climate change law effective requires different approaches and participation of different stakeholders. This insight has been noted by the drafters of the latest instrument from the international climate change regime – the Paris Agreement, which makes reference both to the concept of human rights and to Indigenous Peoples. As such, this instrument itself requires a close scrutiny. However, beforehand it is necessary to place the Paris Agreement in its legal context – the international climate change law. Therefore the chapter aims at establishing what are the States' obligations emanating from the international climate change law.

There is no doubt that climate change is a global problem – no State alone can fight the climate change. For that reason, there is a strong need for international consensus and more importantly – cooperation. The problem with climate change (and as a

consequence – with litigating climate change) is that it is hardly possible to "find the guilty one": all countries in the world contribute to climate change. However, it is necessary to investigate, whether using international standards, which clarify the obligations and responsibilities of each and single State, can allow to hold the States accountable for said contribution.

As it will be discussed in Chapter 5, the rights-based approach to climate change litigation can be divided into two types: the cases dealing with adaptation and those concerning mitigation. Therefore, the chapter finishes with the two core features of the system created by the UNFCCC and related instruments – climate change mitigation and adaptation. Definition of these two concepts will be provided, together with their differences and risks. It will be also explained how inclusion of culture can contribute and benefit the adaptation measures and what are the obstacles to a successful climate change adaptation of Indigenous Peoples.

4.2. Climate change and the principles of international environmental law

According to the Intergovernmental Panel on Climate Change (IPCC), the UN body for assessing the science related to climate change, climate change "refers to a change in the state of the climate that can be identified (e.g., by using statistical tests) by changes in the mean and/or the variability of its properties, and that persists for an extended period, typically decades or longer. Climate change may be due to natural internal processes or external forcings such as modulations of the solar cycles, volcanic eruptions, and persistent anthropogenic changes in the composition of the atmosphere or in land use"[568].

The legal definition of climate change, however, set forth in Article 1 of the United Nations Framework Convention on Climate Change makes a distinction between climate change attributable to human and climate variability attributable to natural causes. It defines climate change as "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in

[568] IPCC, Summary for policymakers, in: Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Geneva 2014, p. 5.

addition to natural climate variability observed over comparable time periods"[569]. As such, the definition is coherent with the scientific evidence showing that there is a more than ninety five percent probability that human activities over the past fifty years have warmed our planet and that recent anthropogenic emissions of green-house gases are the highest in history [570].

The term "climate change" is sometimes used interchangeably with the term "global warming", although they describe different physical phenomena[571] and the former term is wider than the latter – "climate change includes global warming and everything else that increasing greenhouse gas amounts will affect"[572]. The term "global warming" became popular in 1988, when NASA scientist, James E. Hansen, had testified to US Congress about climate, however, it is only one element of the broader phenomenon of climate change and scientists believe that "changes to precipitation patterns and sea level are likely to have much greater human impact than the higher temperatures alone"[573].

The mechanism of climate change may be explained as follows: the sun radiates electromagnetic waves, called ultra-violet (UV) and near-infrared, that easily pass through the Earth's atmosphere and warm up its surface; however, the Earth's surface radiates back that energy into the space – in a form of heat, electromagnetic waves, called infrared, that do not easily pass through the Earth's atmosphere due to the greenhouse gases that absorb and reradiate them in all directions, thus keeping that warmth within the Earth's atmosphere and reflecting it back to the surface[574].

This phenomenon is called greenhouse effect as it is similar to the processes taking place in the greenhouses, where the sun-emitted ultra-violet waves get in through the glass, warm up the air and plants inside, then should be returned as heat into the cold outside, but are mostly kept in, because glass interferes with these infrared waves[575].

What needs to be noted here, is that the most common greenhouse gas is actually

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[569] United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.
[570] IPCC, Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Switzerland 2014, p. 2.
[571] M. Lineman, Y. Do , J.Y. Kim, G.J. Joo, *Talking about Climate Change and Global Warming*, "Plos One" 2015, Issue 10 No. 9, p. 2.
[572] E. Conway, *What's in a Name? Global Warming vs. Climate Change,* NASA 12.05.2008, https://www.nasa.gov/topics/earth/features/climate_by_any_other_name.html [accessed: 19.02.2020].
[573] Ibidem.
[574] See: J. F. B. Mitchell, *The "Greenhouse" Effect and Climate Change,* "Reviews of Geophysics" 1989, Vol. 27, Issue 1, pp. 115-139; V. P. Oktyabrskiy, *A New Opinion of the Greenhouse Effect,* "St. Petersburg Polytechnical University Journal: Physics and Mathematics" 2016, Vol. 2, Issue 2, pp. 124-126.
[575] J. F. B. Mitchell, *op. cit.*

water vapour, which unlike the others is almost not at all produced by humans, but it is temperature dependent in terms of its concentration, thus its existence depends on the other – global temperature regulating – greenhouse gases, that are not themselves temperature dependent (this is given by the Clausius-Clapeyron equation[576]). In other words, water vapour is a feedback greenhouse gas caused indirectly and solely by humans. Moreover, humanity contributes but a small fraction of global greenhouse gas emissions, however, this anthropogenic fraction is what tips the pre-industrial scale and breaks the natural balance of the global carbon cycle[577].

Scientists unequivocally indicate that the anthropogenic greenhouse gas emissions have increased since the pre-industrial era, driven largely by economic and population growth, and are now higher than ever. This has led to atmospheric concentrations of carbon dioxide, methane and nitrous oxide that are unprecedented in at least the last 800,000 years[578]. According to the IPCC, between 1750 and 2011, cumulative anthropogenic CO2 emissions to the atmosphere were 2040 ± 310 GtCO2[579]. About 40% of these emissions have remained in the atmosphere (880 ± 35 GtCO2); the rest was removed from the atmosphere and stored on land, mostly in plants and soils, and in the ocean. The ocean has absorbed about 30% of the emitted anthropogenic CO2, causing ocean acidification. The most alarming, however, is that about half of the anthropogenic CO2 emissions between 1750 and 2011 have occurred in the last 40 years[580].

Climate change has first and foremost impact on the Earth's natural system, which as a consequence has impact on the human system, as they are interchangeably connected. In many regions, changing precipitation or melting snow and ice are altering hydrological systems, affecting water resources in terms of quantity and quality. It is predicted that there will be more frequent hot and fewer cold temperature extremes over most land areas on daily and seasonal timescales, as global mean surface temperature increases. Moreover, the heat waves will occur with a higher frequency and longer duration. Many

[576] I. M. Held, B. J. Soden, *Water Vapor Feedback and Global Warming*, "Annual Review of Energy and the Environment" 2000, Vol. 25 Issue 1, pp. 441-475.
[577] I.C. Prentice et. al., *The Carbon Cycle and Atmospheric Carbon Dioxide*, in: J. T. Houghton et al. (eds.), *Climate Change 2001: The Scientific Basis*, Cambridge University Press 2000, pp. 183 – 237.
[578] IPCC, Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Geneva 2014p. 4.
[579] "GtCO2e" is an abbreviation for gigatons of equivalent carbon dioxide and it is a simplified way to put emissions of various greenhouse gases on a common footing by expressing them in terms of the amount of carbon dioxide that would have the same global warming effect; see A. Kirby, *Mind the Climate Gap – it's Got Wider*, Climate News Network, November 5th, 2013, https://climatenewsnetwork.net/mind-the-climate-gap-its-got-wider/ [last accessed: 30.03.2021].
[580] IPCC, 2014: Climate Change 2014: Synthesis Report, op. cit., p. 4.

terrestrial, freshwater and marine species have shifted their geographic ranges, seasonal activities, migration patterns, abundances and species interactions in response to the ongoing climate change. This in turn impacts the possibilities of gathering food, especially for social groups whose primary activity is hunting. Moreover, the assessment of many studies covering a wide range of regions and crops shows that negative impacts of climate change on crop yields have been more common than positive impacts[581].

Although climate change has impact on all human systems, not all the Earth's regions are and will be affected in the same manner, and as a consequence not all the human systems are and will be affected equally. Populations at disproportionately higher risk of adverse consequences of climate change include disadvantaged and vulnerable populations, dependent on agricultural or traditional livelihoods.

It is important to underline that although being severely threatened by climate change, the disadvantaged populations, especially with the traditional lifestyles, including Indigenous Peoples, are contributing little to greenhouse-gas emissions and their ways of life can be described as entirely sustainable. As the idea of environmental justice will be scrutinized in the next chapter, it is important to underline that sustainability is one of the principle of international environmental law.

Historically international environmental law was mainly concerned with regulating the access and usage of particular elements of the ecosystems. For example, a 1911 Convention was aimed at curbing the slaughter of northern fur seals.[582] This fragmentation is still visible in the international environmental law, which is shaped by an abundance of international treaties. The beginnings of international environmental law are generally linked with the United Nations Conference on the Human Environment, held in Stockholm in 1972, which gave legitimacy to environmental policy as a universal concern among nations[583]. It was the first world conference to make the environment a major issue and the participants adopted a series of principles for sound management of the environment including the Stockholm Declaration and Action Plan for the Human Environment. Since that time international environmental law has developed greatly in both scope and importance. This is evidenced by the conclusion over recent years of many

[581] Ibidem, p. 6.
[582] M. A. Drumbl, K. Uhlířová, *Actors and Law-Making in International Environmental Law,* in: M. Fitzmaurice, M. Brus, P. Merkouris, A. Rydberg, *Research Handbook on International Environmental Law,* Edward Elgar Publishing 2021, p. 22.
[583] A. M. Halvorssen, *The Origin and Development of International Environmental Law,* in: S. Alam et. al., *Routledge Handbook of International Environmental Law*, Routledge 2014, pp. 25-43.

multilateral environmental agreements which address a wide range of these environmental problems. Mark A. Drumbl and Kateřina Uhlířová propose a classification of the multilateral environmental agreements into two generations: first, which focuses on issues such as air and water pollution, wildlife conservation and protection of vulnerable habitat, e.g. the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter from 1972; and second, which involve issues, which implicate economic behavior and lifestyles at a multiplicity of levels, e.g. the Vienna Convention for the Protection of the Ozone Layer from 1985 with subsequent protocols or the United Nations Framework Convention on Climate Change from 1992[584].

The international environmental law, however, has been shaped not only by the so-called hard law, but also by the soft-law: "a special characteristic of international environmental law is that many environmental problems (such as land-based marine pollution, which is the greatest cause of marine environmental problems) are regulated by non-binding soft-law instruments which allow for quicker responses to international environmental problems"[585]. The most important examples of the soft-law documents which had influence on the development of international environmental law are the previously mentioned 1972 Stockholm and the 1992 Rio Declaration, the latter of which is widely considered to be the most authoritative codification of international environmental law principles. The Agenda 2030, although not focusing solely on the environment is also currently shaping international environmental.

At the Stockholm Conference, States agreed on two important documents: the Declaration of Principles for the Preservation and Enhancement of the Human Environment (Stockholm Declaration) and an Action Plan making suggestions for environmental management. Furthermore, States agreed to one of the most important outcomes of the Stockholm Conference: the establishment of the United Nations Environment Programme (UNEP), the first UN body to focus specifically on environmental issues. It was also the first UN body to be located in a developing country[586].

At the time, the Stockholm Declaration was credited as introducing the most ambitious and forward-looking set of environmental principles by the international

[584] M. A. Drumbl, K. Uhlířová, *op. cit.*, pp. 2-45.
[585] T. Koivurova, *op. cit.*, p. 58.
[586] A. M. Halvorssen, *op. cit.*, p. 32.

community. The Stockholm Declaration contains twenty-six principles, aspirational in nature. The rights embedded in Principle 1 are "freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being"[587]. Addressing natural resources, Principles 2 through 7 focus on rational planning, management and pollution control in order to safeguard natural resources for the benefit of future generations. Principles 11, 12 and 23 address the importance of implementing environmental policies in all States and the impact that such implementation will have on development in developing countries.

Principle 21 of the Stockholm Declaration, practically identical to Principle 2 of the Rio Declaration, reflects customary international law and is, therefore, considered binding international law[588]. This principle reaffirms the award in the Trail Smelter case, recognizing both States' sovereignty over their natural resources and the responsibility of all States to ensure that activities within their jurisdiction or control do not harm other States (the "no-harm principle"). To give effect to Principle 21, governments recognized the need to develop a specific body of international environmental law. Principle 22 states: "States shall cooperate to develop further the international law regarding liability and compensation for victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction"[589].

Interestingly, the Stockholm Declaration is rather anthropocentric than ecocentric, which is visible right in the title: the "Human Environment". Similarly, the successor of the Stockholm Declaration, the Rio Declaration on Environment and Development is quite anthropocentric. The Rio Declaration was adopted in 1992, when on the twentieth anniversary of the Stockholm Conference, the international community gathered for the UN Conference on Environment and Development (Earth Summit) in Rio de Janeiro, Brazil. At time the same time the Convention on Biological Diversity was opened for signature, which in Article 8(j) recommends that States respect, preserve and maintain knowledge, innovation and practices of Indigenous communities[590].

The Earth Summit was highly influenced by the findings of the Brundtland

[587] UN General Assembly, United Nations Conference on the Human Environment, 7 December 1970, A/RES/2657, available at: https://www.refworld.org/docid/3b00f1cf1c.html [last accessed: 24.08.2022].
[588] A. M. Halvorssen, *op. cit.*, p. 34.
[589] UN General Assembly, United Nations Conference on the Human Environment, *op. cit.*
[590] United Nations Convention on biological diversity, June 1992, 1760 UNTS 79, 31 ILM 818, Article 8(j).

Commission and the concept of "sustainable development" was adopted as the new paradigm for international environmental law: to achieve progress or economic development while simultaneously protecting the environment. The very first Principle of the Rio Declaration places human beings "at the centre of concerns for sustainable development"[591], stating that "they are entitled to a healthy and productive life in harmony with nature". However, the Declaration puts certain limitations on the way in which development should be advanced: for example, Principle 4 states that "environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it"[592].

The Rio Declaration is, in part, a renewed version of most of the Stockholm Principles. For example, Principle 2 is the mirror image of Stockholm Principle 21: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction"[593]. An important principle that has been operationalized in later agreements is the "common but differential" treatment for developing countries, stipulated in Principle 7 of the Rio Declaration. Focusing on a cooperative approach, it specifies how the developed countries recognize their responsibility for historic environmental degradation, hence leading to common, but differentiated, responsibilities. Accordingly, Principle 15 which states that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall be not used as a reason for postponing cost-effective measures to prevent environmental degradation" has been known as the "precautionary principle".

More importantly, the Rio Declaration is also the first international document that stresses the importance of Indigenous Peoples' knowledge and traditional practices in environmental management and development. Moreover, the Declaration encourages States to "recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development"[594].

Both of the Declarations are soft-law documents and therefore lack binding force.

[591] United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874, 1992.
[592] Ibidem.
[593] Ibidem, Principle 2.
[594] Ibidem, Principle 22.

However, some of the principles expressed therein may have the status of principles of law within the meaning of Article 38 of the Statute of International Court of Justice and as such, they are "potentially applicable to all members of the international community"[595]. For example, Svitlana Kravchenko, Tareq M.R. Chowdhury and Md Jahid Hossain Bhuiyan, identify as the principles of international environmental law: sustainable development; common but differentiated responsibilities; intergenerational equity; and access to information and public participation (good governance), which can be found in both of the Declarations. The other principles are the "precautionary principle" and "polluter pays principle"[596].

Moreover, at least one of the principles set forth in the Declarations, is considered to be of a customary nature: "the obligation not to cause environmental harm – although states are sovereign over their territory, a state is prohibited from acting within its territory in a way that causes environmental harm outside its territory"[597], found both in the Stockholm Declaration (Principle 21) and the Rio Declaration (Principle 2). The other elements of international environmental law, which are potentially sourced in international custom, and as such are binding on all States, according to Mark A. Drumbl and Kateřina Uhlířová are: 1) the precautionary principle, which precludes lack of scientific certainty from postponing cost-effective measures to prevent environmental degradation; 2) the requirement to conduct an environmental impact assessment; 3) the duties to cooperate, give prior notification, and negotiate or consult on activities that may have significant adverse transboundary environmental effects; 4) the common heritage of humankind, which shall not be appropriated by any state, shall be used for peaceful purposes, and shall be managed internationally, and the benefits thereof shall be equitably shared[598].

Another, principle of customary law, namely *sic utere tuo, ut alienum non laedas*, is nowadays reflected in a number of acts of international law, e.g. the Stockholm Declaration or the Rio de Janeiro Declaration, or directly in acts of international climate law, such as the United Nations Framework Convention on Climate Change. This principle of refraining from engaging in activities that have a negative transboundary impact envisages two primary obligations: the obligation of states to prevent, reduce and

[595] S. Kravchenko, T. M.R. Chowdhury, M. J. Hossain Bhuiyan, *Principles of International Environmental Law*, in: S. Alam et. al., *Routledge Handbook of International Environmental Law*, Routledge 2014, p. 43.
[596] Ibidem.
[597] M. A. Drumbl, K. Uhlířová, *op. cit.*, p. 24.
[598] Ibidem.

control pollution and environmental damage; and the obligation to cooperate internationally in the area of reducing environmental risks by notifying hazards, negotiating and, where appropriate, carrying out environmental impact assessment procedures[599].

Although the customary nature of these elements of international environmental law may be debatable, they still constitute general principles of law, and hence still formally form part of the corpus of international environmental law[600]. Moreover, all these principles could and should be applied with regard to climate change.

4.3. Concept of environmental justice

In order to understand Indigenous Peoples' claims it is crucial to analyze the concept of environmental justice. Although the concerns about environment have always accompany human beings[601], the term itself is associated with the social movement that originated in the 1980's in the United States[602]. In a 1987 study, which employed the use of zip codes, the United Church of Christ Commission for Racial Justice found that 37.6% of all landfills in the United States were in or near predominantly African-American neighborhoods[603]. As such, at the very beginning, the environmental justice activism and research focused on the relationship between race and poverty and the spatial distribution of waste and industrial sites producing pollution impacts[604]. Currently, however, the concept of environmental justice has much broader meaning, especially in the face of climate change, and can be defined as "the fair treatment and meaningful involvement of all people, regardless of race, class or colour, with respect to the development, implementation and enforcement of environmental laws, regulations and policies that fight penetration by entities that negatively impact their lifestyles"[605].

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[599] M. Nyka, *State Responsibility for Climate Change Damages,* "Review of European and Comparative Law", 2021, Vol. XLV, Issue 2, p. 141.
[600] M. A. Drumbl, K. Uhlířová, *op. cit.,* p. 24.
[601] For example, in 1713, Hans Carl von Carlowitz adressed the Prussian king, Frederick William I, about the idea of 'sustainable yield' – the principle of planting forests to ensure wood resources for future generations, see S. Graham (ed.), *Natural Resources and Environmental Justice : Australian Perspectives*, CSIRO Publishing, 2017, p. 19
[602] G. Walker, *Environmental Justice : Concepts, Evidence and Politics*, Taylor & Francis Group, 2012, p. 2.
[603] F. D. Gordon, G. K. Freeland, *International Environmental Justice : Competing Claims and Perspectives*, ILM Publications, 2012, p. 5.
[604] G. Walker, *op. cit.,* p. 2.
[605] F. D. Gordon, G. K. Freeland, *op. cit.*, p. 2-3.

The first questions to be asked when talking about environmental justice is what are the elements of such justice, what exactly is the object of the rights related to environmental justice and who are the right holders. Although the answer to the first question is not a contentious issue among scholars, the answer to the subsequent questions is highly contextualized.

The necessary elements of environmental justice include distributive and procedural aspects[606]. In essence, procedural justice creates meaningful opportunities to participate in decision-making[607]. There are various dimensions of procedural justice and in the context of environment, these include for example the availability of environmental information, inclusion in environmental policy-making and decision-making processes, access to legal processes for challenging decision-making and protecting environmental rights, but also inclusion in community-based participatory research in which scientists collaborate closely with community partners in the creation of knowledge about environmental concerns[608]. Procedural justice may be also understood as a precondition, for achieving distributive justice.

Distributive justice tackles the issue of allocation of goods in the society: "how a society or group should allocate its scarce resources or products among individuals with competing needs or claims"[609]. In this sense, distributive justice is connected to the other aspect of justice[610] – the social justice, which can be defined as "balancing of benefits and burdens by all citizens, resulting in equitable living and a just ordering of society"[611]. However, social justice can be also defined as "the institutional conditions for promoting self-development and self-determination of a society's members"[612]. According to Iris Marion Young, these two general values – self-development and self-determination – correspond to two general conditions of injustice: oppression, which should be understood as institutional constraint on self-development, and domination, which refers to institutional constraint on self-determination[613]. In the definition proposed by Iris Marion Young, the intersection of these three types of justice – procedural, distributive and social – is well visible, as there are the institutions which, through a set of created

[606] G. Walker, *op. cit.,* p. 47
[607] Ibidem, p. 31.
[608] G. Walker, *op. cit.,* p. 48-49.
[609] J. E. Roemer, *Theories of Distributive Justice*, Harvard University Press 1998, p. 1.
[610] S. Graham, *op. cit.,* p. 1.
[611] See K. Buettner-Schmidt, M. L. Lobo, *Social Justice: a Concept Analysis*, Journal of Advanced Nursing 2012, Issue 68 No. 4, pp. 948–958.
[612] I. M. Young, *Inclusion and Democracy*, Oxford University Press, Oxford 2002, p. 33.
[613] Ibidem, p. 31.

procedures, influence or determine the distribution of goods.

This leads to the second question – what is exactly the object of the rights related to environmental justice or at the allocation of which resources does the environmental justice focus on? Environmental justice encompasses the distribution of both benefits, such as access to water, greenspace, energy consumption, and burdens and negatives, e.g. air pollution, flood risk, noise, waste[614]. Therefore, the resources in this sense are both natural resources, such as water, air, soil, but also the access to and management of such resources. However, in the context of Indigenous Peoples it is indispensable to note that the environment is not only a set of resources, but it carries a deeply spiritual dimension. As such, access to certain areas for Indigenous Peoples may not only be important from the point of view of fulfilling basic human needs, such as access to water, but has more cultural and spiritual dimension. There are instances when a certain resource, such as for example a piece of land may not have any special value for outsiders, but it may carry a significant cultural value for Indigenous Peoples. This shows that the concept of environmental resource is also relative – it may be valuable to its user group but may have negative or neutral value to non-users[615]. Importantly, access to and control over resources encompasses power relations[616] – at the end, the whole history of humankind is built on the fight over different environmental resources, such as territory, water, minerals, wood, fossil fuels, etc.

With regard to the right holders, a distinction must be made between environmental justice and ecological justice – the former is centered around humans and their relation to the environment, while the latter is centered around the environment[617], which may be itself owed justice[618]. Although, undoubtedly all human beings are subjects of environmental justice, looking at the origins of the movement, it is clear that there are groups that much more often deal with environmental "injustice". Therefore, the claim of environmental justice is usually made by and on behalf of the most disadvantaged groups of the society: "those who are already disadvantaged in material, cultural and/or political terms are also those who are most vulnerable to hazards of various forms, including those deriving from climatic variability"[619]. This is especially pertinent in the context of

[614] G. Walker, *op. cit.,* p. 43.
[615] S. Graham, *op. cit.,* p. 4.
[616] Ibidem, p. 6.
[617] G. Walker, *op. cit.,* p. 10.
[618] S. Graham, *op. cit.,* p. 4.
[619] G. Walker, *op. cit.,* p. 187.

Indigenous Peoples, as they are not only one of the poorest section of the society[620], but their dependence on the environment, together with the long history of colonization and institutional discrimination, makes them particularly disadvantaged in the face of climate change.

Climate change adds another dimension to the debate over the notion of right holders in the context of environmental justice. Due to already observed and expected detrimental effects of climate change, the concern about future generations is inevitable. However, rights are usually considered as the property of living persons[621] and justice is a relationship always characterized by reciprocity in some sense[622]. Although the issue might be controversial, especially to understand how the yet not existing human beings should constrain our actions and behaviors today, one of the first official recognition of the concern for future generations became an important part of the groundbreaking study "Our common future", also referred to as "Brundtland Report", from 1987. The idea of sustainable development is intrinsically connected with the concern for future generations: "sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs"[623]. The definition contained in the Report became widely accepted and most commonly quoted, however as it will be shown in the next chapter, with the current rate of climate change, it is not only the future generation that will face the effects of climate change – climate change is a reality for Indigenous Peoples of the Arctic and one of the most important challenge for international community.

Moreover, climate change further aggravates the existing patterns of inequality all over the globe, which is well illustrated by the example of seawalls. Due to the raise in sea levels, both the Netherlands and Kiribati are threatened by floods and as a consequence – disappearance. However, as both States have different levels of wealth, also their response is different. Therefore, the citizens of both States facing the same threat, have different possibilities of survival. It is demonstrated in a symbolic way by the seawalls, built to protect them. While the one surrounding the Rotterdam, the

[620] ILO, Indigenous Peoples and Climate Change. From Victims to Change Agents Through Decent Work, International Labour Office, Gender, Equality and Diversity Branch, Geneva 2017, p. 7.
[621] R. P. Hiskes, *The Human Right to a Green Future : Environmental Rights and Intergenerational Justice*, Cambridge University Press 2008, p. 6.
[622] Ibidem, p. 3.
[623] United Nations General Assembly, Report of the world commission on environment and development: Our common future, Development and International Co-operation: Environment, 1987, p. 42.

"Maeslantkering", is modern, solid and technically advanced[624], the seawall surrounding Kiribati's Capital Island of Tarawa is constructed from reused rice bags, filled with sand[625]. Significantly, as it will be developed in the subsequent subchapter, the climate change adaptation and mitigation measures are not always implemented with a view to ensuring environmental justice. This demonstrates that justice is a complicated and highly contextualized concept, since the endeavor designed to enhance sustainability did not consider the needs of the non-dominant group of the society. Although the decision was perceived to be fair and had a legitimate aim of providing clean energy for the rest of the society, it was unfair at another level as different stakeholders at different spatial scales have different goals[626]. This demonstrates that justice in general, and environmental justice in particular, is a process rather than a single decision, which requires balancing, often incompatible, needs[627].

4.4. Climate change law as a developing branch of international environmental law

According to Daniel Bodansky five periods can be distinguished in the development of the general legal climate change framework: the foundational period, during which scientific concerns about global warming emerged; the agenda-setting phase, from 1985 to 1988, when climate change was transformed from a scientific to a policy issue; a pre-negotiation period from 1988 to 1990, when governments became heavily involved in the process; the formal intergovernmental negotiations phase, leading to the adoption of the UNFCCC in May 1992; and a post-agreement phase focusing on the elaboration and implementation of the UNFCCC and the initiation of negotiations on additional commitments, leading to the adoption of the Kyoto Protocol in December 1997[628]. Subsequently, the Copenhagen Conference had been intended to conclude and address the post-2012 period, after the ending of the Kyoto Protocol's first commitment

[624] See M. Kimmelman, *The Dutch Have Solutions to Rising Seas. The World Is Watching*, The New York Times, June 15, 2017, https://www.nytimes.com/interactive/2017/06/15/world/europe/climate-change-rotterdam.html [accessed: 02.03.2020].
[625] See UN Climate Change Conference, Humans of Kiribati, COP23, , https://cop23.com.fj/cop23-pacific-photo-competition/humans-of-kiribati/ [accessed: 02.03.2020].
[626] S. Graham, *op. cit.*, p. 6.
[627] Ibidem, p. 7.
[628] D. Bodansky, *The History of the Global Climate Change Regime*, in: U. Luterbacher, D. Sprinz (eds), *International Relations and Global Climate Change*, Cambridge 2001, MA: MIT Press, pp. 23–40.

period. This last period has since extended to encompass the adoption of the 2015 Paris Agreement.

The international climate change regime has been particularly vulnerable to political will and, according to Pierre-Marie Dupuy, can be divided into two key pillars – the scientific pillar and the policy pillar[629]. The scientific pillar is represented by the Intergovernmental Panel on Climate Change (IPCC), while the policy pillar consist of: 1) process leading to the adoption of UN Framework Convention on Climate Change (UNFCCC) (1990/1992); 2) Berlin Mandate leading to the Kyoto Protocol (1995/1997); 3) Marrakesh Accords (2001); 4) Bali Mandate leading to the Copenhagen Accord and the Cancun Agreements (2007/2010); 5) Durban Platform leading to the Paris Agreement (2011/2015). As can be seen, the mutual influences of the two pillars led to the adoption of key instruments of the climate change regime with the UNFCCC being the system's cornerstone: "the creation of the IPCC and the publication of its first assessment report in 1990 contributed to the adoption of the UN Framework Convention on Climate Change opened for signature in June 1992"[630]. Although Timo Koivurova rightly places IPCC, established in 1988 by the World Meteorological Organization (WMO) and the UN Environment Programme (UNEP), outside the official climate change regime[631], he strongly underlines that the assessment reports it has published "have been decisive in attaining scientific consensus about climate change, and each one of them has resulted in political action"[632]. The IPCC consists of over 2000 scientific and technical experts from around the world who collect scientific information about the causes of climate change, its potential effects and possible ways to mitigate these effects. What is important, is that "any non-profit body or agency qualified in matters covered by the IPCC, whether national or international, governmental or intergovernmental, may be admitted as an IPCC Observer Organization"[633] and the representatives of observer organizations may attend sessions of the IPCC and can encourage experts to review draft IPCC reports. One such observer organization is Inuit Circumpolar Council. This allows Indigenous Peoples to directly take part in the works of IPCC, which subsequently may influence the policy pillar of climate change regime, and the adoption of legal instruments. Moreover, by

[629] P. M. Dupuy, J. E. Viñuales, *International Environmental Law*, Cambridge University Press 2018, p. 173.
[630] Ibidem, p. 174.
[631] T. Koivurova, *op. cit.*, p. 165.
[632] Ibidem.
[633] International Panel on Climate Change, Structure, https://www.ipcc.ch/about/structure/ [last accessed: 08.06.2022].

2008, the International Indigenous Peoples' Forum on Climate Change was established as the caucus for Indigenous Peoples participating in the UNFCCC processes[634].

The negotiation process of the UNFCCC was integrated as part of the previously mentioned Rio Environment Conference. The objective of the UNFCCC, accroding to Article 2, is to stabilize greenhouse gas concentrations in the atmosphere at a level that allows ecosystems to adapt naturally to climate change so that food production is not threatened, while enabling economic development to proceed in a sustainable manner[635]. The Parties to the Convention are to be guided by a range of principles that reflect the understanding of global environmental responsibility elaborated in the Rio Declaration on Environment and Development and Agenda 21. As enumerated in Article 3, these principles include inter-generational equity, the precautionary principle, the right to sustainable development and the principles of equity and common but differentiated responsibilities. The issue of common but differentiated responsibilities has been central to the development of the climate change legal framework as climate change is affecting different communities in different ways. Moreover, these communities do not have the same means available to tackle climate change and their contributions to climate change are unequal[636].

Although, according to Timo Koivurova, the UNFCCC "did not require much even from the industrial countries: they undertook politically to reduce their greenhouse gas emissions to 1990 levels by 2000"[637], the success of the UNFCCC was that the basic elements of the climate regime were agreed on and the Convention serves as a premise by providing an umbrella, a framework, emphasizing the need to address these issues at a local level.

Therefore, all Parties to the Convention have general commitments, stipulated in Article 4.1, regarding: 1) the establishment of national inventories of greenhouse gas emissions and sinks; 2) the formulation and implementation of policies and measures to mitigate and adapt to climate change; 3) the sustainable management of forests, oceans and ecosystem; and 4) the integration of climate change considerations in national social,

[634] M. A. Perreaut Revial, *International Climate Law,* in: M. Fitzmaurice, M. Brus, P. Merkouris, A. Rydberg (eds.), *Research Handbook on International Environmental Law*, Edward Elgar Publishing 2021, p. 325.
[635] UNEP, UNITAR, The Climate Change International Legal Regime, Geneva 2017, https://elearning.informea.org/pluginfile.php/4563/block_html/content/PDF%20lessons%20-%20Climate%20Change%20ok.pdf [last accessed: 08.06.2022], p. 8.
[636] M. A. Perreaut Revial, *op. cit.*, p. 324.
[637] T. Koivurova, *op. cit.*, p. 165.

economic and environmental policies.[638] The industrial countries listed in Annex I, including all the Arctic States concerned, are additionally required to individually or jointly return their anthropogenic emissions to 1990 levels by 2000 and are required to adopt national policies and measures to mitigate climate change by both limiting the emission of greenhouse gases and by protecting greenhouse gas sinks. However, the wording of the UNFCCC is considered to be rather vague and aspirational and it is doubtful whether it represents a binding legal obligation[639].

The governing body of the Convention is the Conference of the Parties (COP), which meets regularly to review the adequacy of commitments, progress in implementation and effectiveness of the Convention and any related instruments it may adopt. At COP1 held in Berlin in 1995 (the Berlin Mandate), the parties to the UNFCCC recognized that in light of further scientific evidence (most prominently the Second Assessment Report released by the IPCC), the commitments in the Convention were "not adequate" to achieve its goal. The Kyoto Protocol was negotiated based on the premise of Article 4.2(d) of the UNFCCC, which provides for the review of the adequacy of the commitments at an early stage, and then at regular intervals.

The Kyoto Protocol extends and operationalizes the UNFCCC. As intended by the Berlin Mandate, the 1997 Kyoto Protocol covered the period beyond the year 2000 and required stronger commitments from Annex I parties to achieve quantified emission reductions within a specific timeframe[640]. The main goal of the Kyoto Protocol is to control emissions of the main anthropogenic greenhouse gases in ways that reflect underlying national differences in their emissions, wealth, and capacity to make the reductions, and as such is coherent with the common, but differentiated responsibility principle enshrined in the UNFCCC. In particular, the Kyoto Protocol establishes a distinction between 'Annex I' and 'non-Annex I Parties' (Article 1). Under the Kyoto Protocol, they bear different and more stringent legal obligations than non-Annex I parties. Amounts of greenhouse gas emissions are assigned to Annex I Parties, which pursue quantified emission limitation and reduction commitments: "The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantied emission limitation and

[638] United Nations Framework Convention on Climate Change… *op. cit.,* Article 4.
[639] UNEP, UNITAR, *op. cit.,* p. 9.
[640] Ibidem, p. 14.

reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012"[641]. Annex A of the Kyoto Protocol contains the list of six gases which emissions should be reduced, namely: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride. Annex B contains quantified targets, in which 39 parties are assigned specific amounts of emissions. The quantified targets were divided into different "commitment periods" and the first commitment period, also known as the "true-up period", lasted from 2008 to 2012 – Annex I Parties, had until then to mitigate and adjust any gaps in their greenhouse gas emissions targets[642].

The rationale behind the strict distinction was to acknowledge the greater responsibility but also the greater capacity of developed Parties with respect to climate change than non-developed Parties[643]. However, as argued by some, one of the main shortcomings of the Kyoto Protocol was actually the approach based on the principle of common but differentiated responsibilities as "it places the responsibility of reducing GHG emissions only with developed countries (i.e., Annex I countries) as if they were the only sinners of climate change"[644].

At its seventh session, the COP adopted a decision on the compliance regime for the Kyoto Protocol, with the objective to facilitate, promote and enforce compliance with the commitments under the Protocol. The Compliance Committee is made up of two branches: a facilitative branch and an enforcement branch. The facilitative branch aims to provide advice and assistance to Parties in order to promote compliance, whereas the enforcement branch has the responsibility to determine consequences for Parties not meeting their commitments. Both branches are composed of ten members, including one representative from each of the five official UN regions (Africa, Asia, Latin America and the Caribbean, Central and Eastern Europe, and Western Europe and Others), one from the small island developing States, and two each from Annex I and non-Annex I Parties[645].

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[641] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997 37 I.L.M. 22 (1998); 2303 U.N.T.S. 148; U.N. Doc FCCC/CP/1997/7/Add.1, Article 3.1.
[642] M. A. Perreaut Revial, *op. cit.*, p. 330.
[643] Ibidem, p. 331.
[644] Ibidem.
[645] UNFCCC secretariat, An introduction to the Kyoto Protocol Compliance Mechanism", https://unfccc.int/process-and-meetings/the-kyoto-protocol/compliance-under-the-kyoto-protocol/introduction [last accessed: 08.06.2022].

Through its branches, the Committee considers questions of implementation which can be raised by expert review teams under Article 8 of the Protocol, any Party with respect to itself, or a Party with respect to another Party (supported by corroborating information). The enforcement branch is responsible for determining whether a Party included in Annex I (Annex I Party) is not in compliance with its emissions targets, the methodological and reporting requirements for greenhouse gas inventories, and the eligibility requirements under the mechanisms. In case of disagreements between a Party and an expert review team, the enforcement branch shall determine whether to apply adjustments to greenhouse gas inventories or to correct the compilation and accounting database for the accounting of assigned amounts. Moreover, any Party not complying with reporting requirements must develop a compliance action plan as well, and Parties that are found not to meet the criteria for participating in the mechanisms will have their eligibility withdrawn. In all cases, the enforcement branch can make a public declaration that the Party is in non-compliance and will also make public the consequences to be applied[646]. In 2019, for example, the enforcement branch of the Compliance Committee declared Kazakhstan to be in non-compliance with guidelines under Article 7 and Article 5(1), of the Kyoto Protocol and the methodological and reporting requirements under the Protocol. Further on, it determined that Kazakhstan had not yet met the eligibility requirements under Articles 6, 12 and 17 of the Kyoto Protocol[647].

The Kyoto Protocol was adopted on 11 December 1997 and entered into force on 16 February 2005, and as it has been mentione, the first commitment period was set between 2008 and 2012. On 8 December 2012, in Doha, Qatar, the Doha Amendment to the Kyoto Protocol was adopted for a second commitment period, starting in 2013 and lasting until 2020. The Amendment sets a goal of reducing greenhouse gas emissions by 18% compared to 1990 levels for participating countries. The Amendment replaces the table in Annex B to the Protocol setting new quantified emission limitation or reduction commitment for certain Parties, such as for example Finland and Norway. The Amendment also broadens the list of the greenhouse gases by adding the nitrogen trifluoride to the list. The amendment entered into force on 31 December 2020, and its effectiveness it is yet to be evaluated. However, the world's biggest emitters did not join

[646] Ibidem.
[647] Sabin Center for Climate Change Law, Non-compliance Procedure of Kazakhstan under the Kyoto Protocol, http://climatecasechart.com/non-us-case/non-compliance-procedure-of-kazakhstan-under-the-kyoto-protocol/ [last accessed: 08.06.2022].

the Amendment.

The lack of political will and consensus was essentially the major shortcoming of the Kyoto Protocol. According to Marie-Aure Perreaut Revial:

> Although the Kyoto Protocol contained some specific targets for parties to reduce their emissions (Article 3.1), the fact that the world's biggest emitters – including the United States – did not ratify the Protocol significantly weakened the effectiveness of the Protocol in combatting harmful global climate change (Hsu, 2008). To an extent, this means that beginning with its rejection of the Kyoto Protocol in 2001, the United States has hindered attempts by other nations to even agree on the need for coordinated action to deal with global warming. Widely criticised as 'inadequate and inadequately implemented' (Rajamani, 2015), the Kyoto Protocol nonetheless must be seen as one of the first attempts at a global legal address to climate change. If anything, it paved the way for a better understanding of how to address a global yet locally rooted issue.[648]

Due to the above, the Paris Agreement differs significantly from the Kyoto Protocol. First of all, it sets a clear goal within the broader objective of Article 2 of the UNFCCC. Secondly, it discontinuities with the division between developed (former Annex 1 Parties) and developing countries and modifies the principle of common but differentiated responsibilities. Thirdly, the way towards the adoption of the Paris Agreement was more consciously led, by the French government, as even before the "COP21, each party was invited to submit its intended nationally determined contribution (INDC) which, to some extent, allowed most of the delegations to come to Paris prepared with tangible, although voluntary, commitment"[649]. The INDC were later translated into nationally determined contribution (NDC) and form integral part of the system created by the Paris Agreement.

The Paris Agreement was adopted by 196 Parties of the UNFCCC at COP 21 in Paris, on 12 December 2015 and entered into force on 4 November 2016, thirty days after the date on which at least fifty five Parties to the Convention accounting in total for at least an estimated fifty five percent of the total global greenhouse gas emissions have deposited their instruments of ratification, acceptance, approval or accession with the

[648] M. A. Perreaut Revial, *op. cit.*, p. 332.
[649] Ibidem, p. 328.

Depositary. The goals of the Paris Agreement are set in the Article 2.1, which reads as follows:

> This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:
> (a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;
> (b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and
> (c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development[650].

The temperature limits mentioned in the Article 2.1 are the results of a consensus reached during the negotiation process: although the goal of 1.5°Celsius would be preferable, especially by the low-lying island States, endangered by the sea-level rise and extreme weather events, such a target would have been extremely difficult to achieve and could make the Agreement only aspirational, rather than positioning it as a regulatory instrument. As such, the drafters of the Agreement choose to place the highest limit on 2°Celsius, with the long-lasting aim to limit the temperature increase to 1.5°C.

Article 2.2, on the other hand, modifies the principle of common but differentiated responsibilities by adding "and respective capabilities, in the light of different national circumstances"[651]. This language underlines the shift away from the formal differentiation between developed and developing country Parties (under the UNFCCC and the Kyoto Protocol) towards a more nuanced self-differentiated model. The Agreement, however, still uses the existing terminology of "developed" and "developing" countries, and the Annexes and provisions of the UNFCCC also remain in place and will, therefore, have some influence over the interpretation of the Agreement. Yet, the Paris Agreement does not contain a list that distinguishes between developed and developing

[650] Paris Agreement, December 12, 2015, in the annex of decision 1/ CP.21, "Adoption of the Paris Agreement" (hereinafter: Paris Agreements), Article 2.1.
[651] Ibidem.

country parties, "but rather a recognition of the additional support needed for developing, least developed and small island country parties to achieve the common goal set"[652].

As it was mentioned, before the adoption of the Paris Agreement, the Parties to the UNFCCC were asked to prepare the INDC, which were later translated into the NDC. The preparation of the NDC is the most important, not to say one of the very few, obligations imposed on States by the Paris Agreement. While the preparation of the NDC is a binding obligation, the achievement by a Party of its NDC is not. All Parties are required to submit emissions inventories and the "information necessary to track progress made in implementing and achieving"[653] their NDCs. These reports will be subject to an independent review by technical experts and a "facilitative, multilateral consideration of progress" by fellow governments[654]. The NDC are mentioned throughout the Paris Agreement: "As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2. The efforts of all Parties will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement"[655]. A country's NDC can include information on mitigation, adaptation, finance, technology transfer, capacity building, and transparency (Article 3). They are the main means for States to communicate their plans for reducing greenhouse gas emissions (Article 4). The Parties, regardless of their level of development, are required to submit the NDCs every five years (Article 4.9). Article 4.8 of the Paris Agreement states that all Parties shall provide "information necessary for clarity, transparency, and understanding" (ICTU) in their NDCs. Decision 1/CP.21 elaborated that ICTU should include, as appropriate, inter alia: quantifiable information on the reference point (including, as appropriate, a base year); time frames and/or periods for implementation, scope and coverage of the NDC; planning processes; assumptions and methodological approaches, including for estimating and accounting for anthropogenic GHG emissions and, as appropriate, removals; how the Party considers that its NDC is fair and ambitious, in the light of its national circumstances; how the NDC

[652] M. A. Perreaut Revial, *op. cit.*, p. 334.
[653] Paris Agreement, Article 13.7(b).
[654] Center for Climate and Energy Solutions, Paris Climate Agreement Q&A, https://www.c2es.org/content/paris-climate-agreement-qa/ [last accessed: 08.06.2022].
[655] Paris Agreement, Article 3.

contributes towards achieving the objective stated in UNFCCC Article 2[656]. Article 4.8 of the Paris Agreement requires Parties to present ICTU when they communicate their NDCs, to ensure that Parties define their NDCs with sufficient precision to enable both *ex ante* assessment of ambition, and *ex post* determination of implementation and achievement.

As such, the approach of the Paris Agreement differs from the Kyoto Protocol in the sense that national commitments of the Parties are not negotiated and included in the instrument, as was the case of the Kyoto Protocol, but are to be determined unilaterally by each State and communicated to the UNFCCC Secretariat. The Paris Agreement combines a bottom-up approach including NDCs with a top-down approach including rules on transparency and review. This structure differs from the solely top-down approach adopted by the Kyoto Protocol, which includes legally binding emission reduction targets.[657] Although the top-down regulatory approach had "positive effects when applied to long-range transboundary air pollution and ozone depletion, it has been deemed unsuitable as a general response to climate change"[658]. As such, the Paris Agreement leaves the lead of climate policy in the hands of States, which set both their level of ambition and the specific policies to pursue it[659]. While this approach makes it significantly easier for States to participate in the Paris Agreement, it also makes it more difficult to ensure that national commitments are sufficiently ambitious[660]. According to Marie-Aure Perreaut Revial, should all NDCs submitted prior to the Paris COP be fully implemented by 2030, they would result in a 2.7 to 3.5°C increase beyond pre-industrial levels, falling short of the Agreement's goal[661], which should serve as a warning. As there are no legally binding obligations to achieve NDCs, and no sanctions possible if a Party fails to reach its ambitions, "the Paris Agreement bets on bottom-up social and political processes, such as naming and shaming, to decide States to make ambitious commitments"[662].

Collective progress toward achieving the purpose of the Agreement in a comprehensive and facilitative manner will be assessed during a "global stocktake", to

[656] F. Z. Taibi, S. Konrad, O. Bois von Kursk, *Pocket Guide to NDCs*, European Capacity Building Initiative 2020, p. 18.
[657] M. A. Drumbl, K. Uhlířová, *op. cit.*, p. 11.
[658] P. M. Dupuy, J. E. Viñuales, *op. cit.*, p. 180.
[659] Ibidem, p. 197.
[660] B. Mayer, *The International Law on Climate Change*, Cambridge University Press 2018, p. 48.
[661] M. A. Perreaut Revial, *op. cit.*, p. 333.
[662] B. Mayer, *op. cit.*, p. 48.

take place for the first time in 2023 and every five years thereafter and "the outcome of the global stocktake shall inform Parties in updating and enhancing, in a nationally determined manner, their actions and support in accordance with the relevant provisions of this Agreement, as well as in enhancing international cooperation for climate action"[663]. However, one could ask if year 2023 as a starting year is not a too distant deadline, considering that the Paris Agreement entered into force on 4 November 2016.

Considering all of the above, why the Paris Agreement is thought of as a "new momentum" for climate change action? The answer to that is twofold: first of all, it provides an international framework for mitigation and adaptation processes, which will be discussed in the next subchapter, and more importantly, as it will be developed in Chapter 5, thanks to *inter alia* the reference in the Preamble to human rights, it serves as an anchor point for the climate change litigation. However, before engaging into the analysis of climate change litigation, it is pertinent to refer to one of the most recurring question concerning climate change, namely the question of international legal responsibility.

4.5. Question of international legal accountability for climate change

Climate change is a global issue, as are its causes and consequences. All the States worldwide contribute to the global emission of greenhouse gases (GhG), and as such all of them contribute to climate change. Establishing the accountable for climate change is not a goal in and of itself, but aims at imposing formal sanctions, such as punishment and remedial obligations, on those acting in breach of their obligations. In this sense, the legal accountability for climate change is an intricate issue, which requires diverse, and often non-obvious approaches .

According to Jutta Brunnée, "international legal accountability involves the legal justification of an international actor's performance vis-à-vis others, the assessment or judgement of that performance against international legal standards, and the possible imposition of consequences if the actor fails to live up to applicable legal standards"[664]. Historically, any response to a breach of international law has been made by States and they were the States that exclusively held the political, and more importantly legal, power

[663] Paris Agreement, Article 14.3.
[664] J. Brunnée, *International Legal Accountability through the Lens of the Law of State Responsibility*, „Netherlands Yearbook of International Law" 2005, Vol. 36, p. 24.

to impose legal accountability: "either vertically (states regulate the power of non-state actors through domestic law) or horizontally (states regulate the exercise of power by other states, albeit only to the extent that the exercise of one state's power negatively impacts on the exercise of another state's sovereignty)"[665]. The traditional imposition of legal liability on States that had violated international law by other States is yet only one form of accountability – the States' responsibility.

The law of State responsibility contains "the general conditions under international law for the State to be considered responsible for wrongful actions and omissions, and legal consequences which flow therefrom"[666] and has been codified in the International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts (ILC ARS). The ILC ARS are understood to contain secondary rules which determine the legal consequences of a breach of a primary (substantive) rule[667]. The distinction between primary and secondary rules translates into two types of obligations: "a breach of a primary obligation gives rise, immediately by the operation of the law of State responsibility, to a 'secondary' obligation or a series of such obligations (cessation, reparation…)"[668].

The International Law Commission recognized that "[e]very internationally wrongful act of a State entails the international responsibility of that State."[669] The constituent elements of internationally wrongful act of a State are listed in Article 2 of the ILC ARS, which states that a State has committed an internationally wrongful act when an action or omission: a) is attributable to the State under international law; and b) constitutes a breach of an international obligation of the State[670]. The International Law Commission distinguishes between responsibility for torts under international law and liability for acts not prohibited by international law, however, according to Maciej Nyka, in practice, "this distinction loses its relevance"[671].

With regard to climate change, State responsibility could be invoked on different

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[665] L. Yarwood, *State Accountability under International Law*, Routledge 2010, p. 18.
[666] J. R. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries,* Cambridge University Press, Cambridge 2002, p. 31.
[667] J. R. Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: a Retrospect*, "American Journal of International Law", Vol. 96, No. 4, p. 874.
[668] Ibidem, p. 876.
[669] UN General Assembly, Responsibility of States for Internationally Wrongful Acts, 28 January 2002, A/RES/56/83 (International Law Commission. Draft Articles on Responsibility of States for Internationally Wrongful Acts. Yearbook of the International Law Commission, 2001, vol. II, Part Two, 2001).
[670] Ibidem.
[671] M. Nyka, *op. cit.*, p. 150.

grounds. For instance, the breach of a specific obligation established in the UNFCCC regime could entail the international responsibility of a State. Thus, the international responsibility of a developed State Party could arise from its failure to "adopt national policies and take corresponding measures on the mitigation of climate change"[672], as it committed to do when ratifying the UNFCCC, or to ensure that its GhG emissions do not exceed its assigned amount as defined by Article 3 and Annex B of the Kyoto Protocol[673]. Similarly, developing States could be held responsible for omitting to "formulate, implement, publish and regularly update … programmes containing measures to mitigate climate change"[674] as they committed to do when ratifying the UNFCCC. The obligation of a State to "protect and preserve the marine environment" under the UN Convention on the Law of the Sea could provide yet another ground for responsibility when States fail to take action to curb GhG emissions under their jurisdiction, despite the inevitable impact of such pollution on the marine environment (e.g. acidification or sea-level rise)[675]. Nevertheless, according to Maiko Meguro, the obligations under the UNFCCC regime are shaped in such a as to avoid holding States individually responsible under the current law of State responsibility and thus being apprehended by the judiciary as to the content of respective efforts of emission reduction[676].

Another ground for invoking the State's responsibility, could be the breach of obligation *erga omnes.* As the law of State responsibility primary focuses on bilateral and reciprocal rights and duties, the concept of *erga omnes* obligations has drawn the attention of international lawyers who have found therein a means to expand the standing necessary to bring such cases before international courts[677]. For example, James Crawford, as the International Law Commission Special Rapporteur on State responsibility, argued that the conservation of resources amounting to a common heritage of mankind could give rise to obligations *erga omnes*[678]. However, according to Benoit Mayer, "while neither the UNFCCC nor the Paris Agreement has an effective mechanism to review compliance, the prospects for international litigation on general mitigation obligations are limited by the voluntary nature of international dispute settlement and by the limited incentive for a

[672] UNFCCC, Article 4(2)(a).
[673] Kyoto Protocol, Article 3(1).
[674] UNFCCC, Article 4(1)(b).
[675] United Nations Convention on the Law of the Sea, December 10, 1982, 1833 *UNTS* 3, Article 192.
[676] M. Meguro, *Litigating climate change through international law: Obligations strategy and rights strategy*, „Leiden Journal of International Law" 2020, Vol. 33, No. 4, p. 950.
[677] Ibidem, p. 936.
[678] Ibidem.

state to initiate contentious proceedings against another with respect to an *erga omnes* obligation"[679].

The law of State responsibility presents some shortcomings. As enumerated by Jutta Brunnée "the law of state responsibility provides for a form of international legal accountability that is limited in several important respects: it is triggered only by breaches of positive international law; it applies only to breaches of international law by or attributable to a state and operates only when responsibility can be invoked by other states; it circumscribes the legal consequences of and remedies for a breach; and it limits the countermeasures that are available to states to induce compliance"[680].

In the context of the specific grounds for the implementation of international legal responsibility in climate protection, a special role is played by the Paris Agreement, which in Article 8 emphasizes the role and importance of preventing, reducing and remedying loss and damage associated with the adverse effects of climate change, associated extreme meteorological events, slow-onset events. Moreover, during the Conference of the States Parties to the Convention in Warsaw (COP19) the Warsaw International Mechanism for Loss and Damage was adopted and introduced into the Paris Agreement, with a special reference to Article 8. However, although "the Warsaw International Mechanism for Loss and Damage is an instrument for the implementation of broadly understood environmental justice, mainly in the intra-generational dimension"[681], "it does not introduce mechanisms for the implementation of compensation liability of states"[682].

Therefore, the question is how to fill the accountability and enforcement gap in the context of human-rights implications of climate change left by international climate change law, which presently provide little to no means to sanction inadequate climate action? This question will be further developed in Chapter 5.

4.6. Climate change mitigation and adaptation : with or against Indigenous Peoples? [683]

[679] B. Mayer, *Climate Change Mitigation as an Obligation Under Human Rights Treaties?*, „American Journal of International Law" 2021, Vol. 115, No 3, p. 420.
[680] J. Brunnée, *International legal accountability…, op. cit.,* p. 25.
[681] M. Nyka, *op. cit.,* p. 150.
[682] Ibidem.
[683] With minor changes – K. Prażmowska-Marcinowska, *Climate change mitigation and adaptation : with or against Indigenous Peoples?* "Studia Iuridica" 2023, Vol. 96, pp. 286-300.

Climate change mitigation and adaptation are two core features of the system created by the UNFCCC and related instruments. Although very different, these two types of action are mutually indispensable for the fight with climate change, yet they have distinct dimensions for Indigenous Peoples.

Climate-change mitigation involves human interventions that reduce greenhouse gas emissions or enhance their removal from the atmosphere by sinks (understood as elements that absorb CO2, such as for example forests, vegetation, or soils)[684]. The examples of mitigation actions include for example: replacing greenhouse gas-emitting fossil fuels like coal, oil, and natural gas with clean, renewable energies like solar, wind, and geothermal; retrofitting old buildings to make them more energy efficient; planting trees and preserving forests so they can absorb and store more carbon dioxide from the atmosphere[685]. To be successful, mitigation requires long-term planning, economic resources, and should be generally managed in a top-down manner.

Adaptation, on the other hand, is "the process of adjustment to actual or expected climate and its effects. In human systems, adaptation seeks to moderate or avoid harm or exploit beneficial opportunities. In some natural systems, human intervention may facilitate adjustment to expected climate and its effects"[686]. Adaptation aims to manage climate risk to an acceptable level, taking advantage of any positive opportunities that may arise. Adaptive actions are usually undertaken on a private, local and regional level, and require central managing on a lesser level.

Adaptation could be understood as addressing the consequences of climate change, while the goal of mitigation is to address the cause of the problem. Adaptation options can be categorized in grey, green and soft measures. Grey measures refer to technological and engineering solutions to improve adaptation of territory, infrastructures and people. Green measures are based on the ecosystem-based (or nature-based) approach and make use of the multiple services provided by natural ecosystems to improve resilience and adaptation capacity. Soft options include policy, legal, social, management and financial measures that can alter human behavior and styles of governance, contributing to improve adaptation capacity and to increase awareness on climate change

[684] K.J. Mach,., S. Planton, C. von Stechow (eds.) *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)]. IPCC, Geneva 2014, p. 125.
[685] D. Rojas, Climate Adaptation vs. Mitigation: What's the Difference, and Why Does it Matter?, The Climate Reality Project, November 7, 2019, https://www.climaterealityproject.org/blog/climate-adaptation-vs-mitigation-why-does-it-matter [last accessed: 15.11.2022].
[686] K.J. Mach,., S. Planton and C. von Stechow, *op. cit.*, p. 117.

issues[687].

The UNFCCC refers to mitigation in Article 4.2(a), stating that the Annex I Parties "shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs", and adaptation in Article 4.4. While Article 4.2(a) is quite detailed, the Article 4.4 of the UNFCCC is limited only to financial assistance provided by the developed country Parties and other developed Parties included in Annex II to the "developing country Parties that are particularly vulnerable to the adverse effects of climate change"[688]. As such, it is quite clear that in 1992 far greater emphasis was placed on mitigation than adaptation to climate change.

As it was mentioned, the mitigation actions include replacing greenhouse gas-emitting fossil fuels like coal, oil, and natural gas with clean, renewable energies like solar. Although Indigenous Peoples are contributing little to greenhouse-gas emissions and their ways of life are considered sustainable, very often they bear the burden of mitigation undertakings. For instance, biofuel initiatives are a means of reducing greenhouse gas emissions may lead to an increase in monoculture crops and plantations and an associated decline in biodiversity and food security[689].

In September 2019, the UN Special Rapporteur on human rights and the environment, David Boyd, conducted an official visit to Norway and identified several pressing challenges with regard to Norway's obligation to respect, protect and fulfil the human rights of Sámi People. In Finnmark County he found that the development of inter alia wind farms and hydroelectric power plants have resulted in loss and fragmentation of pasture lands and constituted serious threats to the sustainability of Sámi reindeer husbandry, which is their primary subsistence activity[690]. The situation in Finnmark County is by no means isolated, as similar mitigation projects are being developed on Indigenous lands all over the world. This demonstrates that justice is a complicated and highly contextualized concept, since the endeavor designed to enhance sustainability did

[687] European Commission and the European Environment Agency, The European Climate Adaptation Platform Climate-ADAPT, Adaptation options, https://climate-adapt.eea.europa.eu/knowledge/adaptation-information/adaptation-measures [last accessed: 15.11.2022].
[688] UNFCCC, Article 4.4.
[689] UNDESA, Climate change, https://www.un.org/development/desa/indigenouspeoples/climate-change.html [last accessed: 15.11.2022].
[690] D. Mamo (ed.), *The Indigenous World 2020*, The International Work Group for Indigenous Affairs, Copenhagen 2020, p. 529.

not consider the needs of the non-dominant group of the society. Although the decision was perceived to be fair and had a legitimate aim of providing clean energy for the rest of the society, it was unfair at another level as different stakeholders at different spatial scales have different goals[691].

Therefore, justice in general, and environmental justice in particular, is a process rather than a single decision, which requires balancing, often incompatible, needs[692]. This poses a serious ethical dilemma, which requires careful analysis from the part of the authorities before any such project is developed. In any case, the minimum requirement should be prior consultation with Indigenous community concerned, which is coherent with the Article 19 of the UNDRIP: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them"[693].

The Paris Agreement, on the other hand, gives a lot of attention to both of the concepts, and especially to the adaptation. According to Mahmood Fayazi, Isabelle-Anne Bisson, Eugene Nicholas, the discourse of adaptation gradually appeared in the climate change literature in the 1990s, and in 2001, the IPCC for the first time claimed that adaptation strategy is necessary to complement climate mitigation efforts at all scales[694]. A strong emphasis on adaptation in the Paris Agreement, may indicate a consensus that climate changes are inevitable and at stake are only their extent and severity.

Article 7 of the Paris Agreement establishes "the global goal on adaptation of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change, with a view to contributing to sustainable development and ensuring an adequate adaptation response in the context of the temperature goal"[695]. In Article 7.5 "Parties acknowledge that adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach"[696]. This approach should take into consideration vulnerable groups, communities and ecosystems, and more importantly, should be based on and guided by the best available science and traditional

[691] S. Graham, *op. cit.*, p. 6.
[692] Ibidem, p. 7.
[693] UNDRIP.
[694] M. Fayazi, I.-A. Bisson, E. Nicholas, *Barriers to climate change adaptation in indigenous communities: A case study on the mohawk community of Kanesatake, Canada*, „International Journal of Disaster Risk Reduction" 2020, Vol. 49, p. 1.
[695] Paris Agreement, Article 7.1.
[696] Ibidem, Article 7.5.

knowledge, knowledge of Indigenous Peoples and local knowledge systems, with a view to integrating adaptation into relevant socioeconomic and environmental policies and actions, where appropriate. However, as the latest studies indicate, Indigenous Peoples are rarely consulted and their views are not incorporated into the national policies[697], including the NDC[698].

4.6.1. Culture as an empowering tool

One of the elements of Indigenous culture is the so-called Traditional Knowledge, which makes reference to knowledge and know-how accumulated across generations, which guide human societies in their innumerable interactions with their surrounding environment[699]. It can be defined as "a cumulative body of knowledge, practice and belief, evolving by adaptive processes and handed down through generations by cultural transmission"[700]. As culture and Traditional Knowledge are central to Indigenous Peoples, they are also central to their adaptive capacities and will guide their adaptation methods.

There are myriad ways in which Indigenous Peoples express their adaptive capacity, using Traditional Knowledge. An example of how integrating Traditional Knowledge can benefit the process of adaptation are the Low Impact Shipping Corridors – the adaptation strategy developed by the Canadian Government, that supports safety and sustainability under rapidly changing environmental conditions[701]. The Low Impact Shipping Corridors in Canadian Arctic are voluntary maritime routes where services and infrastructure investments are prioritized. When corridors were first established, Indigenous Knowledge was not included in their development and "the corridors lacked local perspective from the people who know the area the best and the cultural significance

[697] See C.R. Bijoy et al., *Nationally Determined Contributions in Asia: Are Governments Recognizing the Rights, Roles and Contributions of Indigenous Peoples?*, Asia Indigenous Peoples Pact (AIPP) Foundation, Chiang Mai 2022.
[698] See M. Mills-Novoa, D.M. Liverman, *Nationally Determined Contributions: Material Climate Commitments and Discursive Positioning in the NDCs*, „WIREs Climate Change" 2019, Vol. 10, Issue 5.
[699] D.J., Nakashima et al., *Weathering Uncertainty: Traditional Knowledge for Climate Change Assessment and Adaptation*, UNESCO, Paris 2012, p. 29.
[700] D. Riedlinger, F. Berkes, *Contributions of Traditional Knowledge to Understanding Climate Change in the Canadian Arctic*, „Polar Record" 2001, Vol. 37, Issue. 203, p. 315.
[701] J. Dawson et al., *Infusing Inuit and Local Knowledge into the Low Impact Shipping Corridors: An Adaptation to Increased Shipping Activity and Climate Change in Arctic Canada*, „Environmental Science & Policy" 2020, Issue 105.

of marine areas"[702]. The input from the Indigenous communities proved to be valuable and allowed to consider the wider perception. For example, community members form Inuvialuit settlement region recommended that ships avoid Baillie Island area as a rare plant species grows on this Island, and thus they recommended that ships be limited to coming within 16 km offshore in order to limit coastal erosion in that area[703], while community members form Ulukhaktok recommended the creation of no ice-breaking zones as ice-breaking could negatively impact caribou migration routes[704]. This exemplifies that inclusion of Indigenous Knowledge into adaptive strategies can ensure protection of flora and fauna.

However, integrating Indigenous Knowledge is beneficial not only for the ecosystems and communities concerned, but the safety of other people, as in the context of Low Impact Shipping Corridors, Sachs Harbour community members recommended that Prince of Wales Strait "be avoided by all ships at all times as, in their view, this Strait can be very dangerous as there is an island in the middle that is partially submerged by water thus there is a high risk of groundings or other accidents and incidents"[705]. In a global context, in Latin America and Australia, for example Indigenous fire-management practices have been identified as reducing the occurrence of dangerous fires, increasing biodiversity, and enhancing carbon sinks, which is beneficial for the whole planet[706].

One of the adaptive methods of Indigenous Peoples is the exchange of Traditional Knowledge between different, and sometimes culturally distant, communities. As the current climate change distorts the migration patterns of various animals in Nunatsiavut, an autonomous area claimed by the Inuit in Newfoundland and Labrador in Canada, the Nunatsiavut Government is leading an Indigenous Knowledge exchange project with First Nations hunters from the Northwest Territories: "First Nations hunters will come to Nunatsiavut to build capacity and provide the necessary skills to Labrador Inuit related to moose harvesting and processing. In exchange, Labrador Inuit will share their expertise on the harvesting, processing and use of ringed seals"[707].

Non-recognition and non-inclusion of Indigenous perspectives and lack of culturally-specific approaches to adaptation to climate change can seriously hamper

[702] Ibidem.
[703] Ibidem, p. 27.
[704] Ibidem, p. 30.
[705] Ibidem, p. 27.
[706] J.D. Ford et al., *The Resilience of Indigenous Peoples to Environmental Change*, „One Earth" 2020, Vol. 2, Issue 6, p. 535.
[707] Inuit Tapiriit Kanatami, National Inuit Climate Change Strategy, Ottawa 2019, p. 9.

Indigenous Peoples possibilities of adaptation. According to James D. Ford, Graham McDowell and Tristan Pearce, adaptive capacity may not necessarily translate into actual adaptation[708] and as William N. Adger et al. point out "cultural dimensions of climate change are rarely and only partially included in conventional assessments of climate change impacts and adaptation[709]". As such, the disregard for Indigenous Peoples culture should be identified as one of the obstacles to the successful adaptation.

4.6.2. Vulnerability does not fall from the sky : obstacles to successful adaptation of Indigenous Peoples

Although Indigenous Peoples have been adapting to environmental conditions since the time immemorial, current climate change is occurring faster than Traditional Knowledge can adapt and is strongly affecting people in many communities. Due to the worst condition of the snow, for example, the Inuit from Pangnirtung, Nunavut, Canada, are forced to use tents during their hunting trips:

> The snow is not the same anymore. The bottom of the snow is a lot softer than it used to be. It's no good for igloos anymore. [Twenty years ago] we used to be able to stop anywhere we needed a place to sleep just to build an igloo and sleep in that igloo. And nowadays you can't just find good snow anywhere. In [those] days we used to find them anywhere. The condition of the snow is not very good, the bottom of it is very soft. So that's what I've notice in the snow as well - not only on the bottom but on the top as well[710].

The tents, however, do not provide such a good isolation as igloos and as follows, the lack of good igloo snow creates a greater danger in emergency situations because the igloos are vital emergency shelters during the hunting trips.

Yet it is not only the rapidity of the climate change that can impede the successful adaptation of Indigenous Peoples. On the one hand, Indigenous Peoples have been identified as "highly vulnerable" within global climate change discourse, especially by studies focused on techno-engineering adaptations[711]. On the other hand, a growing body of research illustrates that Indigenous Peoples have significant resilience and are actively

[708] J.D. Ford, G. McDowell, T. Pearce, *The Adaptation Challenge in the Arctic*, „Nature Climate Change" 2015, Vol. 5, Issue 12, p. 1050.
[709] W.N. Adger et al., *op. cit.*, p. 5.
[710] Inuit Petition, *op. cit.*, p. 42.
[711] J. D. Ford, G. McDowell, T. Pearce, *op. cit.*, p. 1046.

observing and adapting to change in a diversity of ways[712]. As noted above, historically Indigenous Peoples have demonstrated high adaptability, however new vulnerabilities are emerging that relate to ongoing societal and environmental changes. As Jesse Ribot cautions "vulnerability does not just fall from the sky"[713], but it is rather socially constructed.

The former colonization that Indigenous Peoples had been subjugated to, still has impacts on their lives, making adaptation to climate change much more difficult. According to Mark Nuttall et al. "today, Arctic peoples cannot adapt, relocate, or change resource use activities as easily as they may have been able to do in the past, because most now live in permanent communities and have to negotiate greatly circumscribed social and economic situations. The majority of indigenous peoples live in planned settlements with elaborate infrastructures and their resource activities are determined to a large extent by strict resource management regimes, regulatory and legal regimes, land use and land ownership regulations, quotas and local and global markets"[714]. As such, the colonization during which Indigenous Peoples were forced to settle in a certain area, usually not chosen by them, is now limiting their adaptive capabilities. This is exemplified by the history of the Yup'ik Village of Newtok. The Yup'ik was a seasonally nomadic Indigenous group of what is now Alaska, who moved between camps as they hunted seals, moose, and musk oxen and gathered berries and wild greens and for whom Newtok was just a winter settling place. Every spring before the river ice broke, Yup'ik would travel across the river to Nelson island where they set up summer tents. In the 1950', however, the Bureau of Indian Affairs began building schools for the tribes in rural Alaska and a site was selected for them to settle without first seeking residents' input[715]. Not long after the village was established, the people of Newtok realized that the distant riverbank was eroding very quickly[716]. The rapid warming and rising of the sea level resulted in the village being almost inhabitable. Although in 2003 the Congress agreed to

[712] J. D. Ford et al., *op. cit.*, p. 532.
[713] See J. Ribot, *Vulnerability does not Just Fall from the Sky: Toward Multiscale Pro-poor Climate Policy*, (in:) M. R. Redclift, M. Grasso (eds*), Handbook on Climate Change and Human Security*, Edward Elgar Publishing 2013, pp. 164–172.
[714] M. Nuttall, P.-A. Forest, S. D. Mathiesen, *Adaptation to Climate Change in the Arctic*, A background paper prepared for the joint UArctic Rectors' Forum and Standing Committee of Parliamentarians of the Arctic seminar, Rovaniemi, 28 February 2008, pp. 4–5.
[715] C. Welch, *Climate Change has Finally Caught up to this Alaska Village*, "National Geographic" 22 October 2019, https://www.nationalgeographic.com/science/article/climatechange-finally-caught-up-to-this-alaska-village [last accessed: 15.11.2022].
[716] Relocate Network, "The Village – Newtok" https://relocatenewtok.org/about [last accessed: 15.11.2022].

create the new village of Mertarvik on higher, volcanic ground and the plot of land was secured through a land exchange with the National Department of Fish and Wildlife, the relocation started only in October 2019[717]. It remains to be guessed, whether the Yup'ik had been consulted in the 1950', they would have not need to be relocated due to costal erosion induced by climate change.

The story of Yup'ik raises a question, whether migration should be considered an adaptation action. Although primarily migration was labelled as a consequence of climate change, currently it is being described as a form of human adaptation[718]. While for some groups, under certain circumstances migration can be an effective form of adaptation, for others it leads to increased vulnerabilities and a poverty spiral, reducing their adaptive capacities[719]. Changing livelihood activities and relocation may be viewed as adaptation strategies by outsiders, but for communities this may represent the loss of important values[720]. According to Article 10 of the UNDRIP "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return" . However, in many instances the exposure to the climate change and the inaction of States forces Indigenous Peoples to migrate, which in consequence renders them more vulnerable to discrimination and exploitation in destination areas. Moreover, a vast majority of Indigenous communities does not want to leave their home areas[721]. There is strong evidence that when people are displaced from places that they value, their cultures are diminished, and in many cases endangered[722]. As such, migration should be considered a last resort adaptation measure.

Another obstacle to successful adaptation of Indigenous Peoples are lack of official titles to their lands. In the Pacific Islands, for instance, the disposition of land has made Indigenous Peoples more vulnerable to drought impacts because they do not have the ability to relocate or diversify their agriculture[723]. Also the resource activities of Indigenous Peoples are determined to a large extent by strict resource management regimes, which furthermore limits their adaptive possibilities. F. Stuart Chapin *et al.* in

[717] Relocate Network, "Mertarvik", https://relocatenewtok.org/mertarvik [last accessed: 15.11.2022].
[718] K. Vinke et al., *Migration as Adaptation?*, "Migration Studies" 2020, Vol. 8, No. 4, p. 626.
[719] Ibidem.
[720] J. D. Ford, G. McDowell, T. Pearce, 2015, *op. cit.,* p. 1050.
[721] See I. Wiśniewska, *Migot. Z krańca Grenlandii*, Wydawnictwo Czarne 2022.
[722] W. N. Adger et al., *op. cit.,* p. 113.
[723] J. D. Ford et al., *op. cit.,* p. 535.

their work in interior Alaska, document how formal State and federal institutions that manage ecosystem services remain focused on controlling a single resource as opposed to managing whole eco-systems[724]. Current laws regulating the protection of the environment, have restrictive effect on the lives of Indigenous Peoples, as for example in Greenland, where during most of the year the Inuit can hunt only seals, which do not provide enough meat to feed the families, and whose meat is usually only sufficient to feed the dogs, used later in travel[725]. Moreover, the market value of the seals is low and does not allow to maintain a family. Without income or possibility of proper alimentation, the quality of life and possibility of adaptation to current climate changes are deteriorating.

4.7. Concluding remarks

The legal definition of climate change is provided in Article 1 of the United Nations Framework Convention on Climate Change, according to which climate change is "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods". The definition makes clear that the current climate change is of anthropogenic origins.

Over decades, international environmental law developed a set of principles that should guide States in their actions, such as sustainable development, common but differentiated responsibilities, intergenerational equity, the precautionary principle, the polluter pays principle and *sic utere tuo, ut alienum non laedas*. All these principles could and should be applied with regard to climate change.

The concept of environmental justice postulates fair treatment and meaningful involvement of all people, regardless of race, class or color, with respect to the development, implementation and enforcement of environmental laws, regulations and policies that fight penetration by entities that negatively impact their lifestyles. It is comprised of two elements: procedural and distributive justice. While the procedural justice includes for example the availability of environmental information, inclusion in

[724] See F. S. Chapin, et al, *Policy Strategies to Address Sustainability of Alaskan Boreal Forests in Response to a Directionally Changing Climate*, "Proceedings of the National Academy of Sciences of the United States of America" 2006, Vol. 103, No.45.
[725] I. Wiśniewska, *op. cit.,* pp. 47–72.

environmental policy-making and decision-making processes, access to legal processes for challenging decision-making and protecting environmental rights it is also the precondition for distributive justice, which tackles the issue of allocation of goods in the society. Therefore, environmental justice encompasses the distribution of both benefits, such as access to water or greenspace, and negatives, e.g. air pollution, flood risk, noise and waste. For Indigenous Peoples the environment is not only a set of resources, but it carries a deeply spiritual dimension. As it has been explained, access to certain areas for Indigenous Peoples may not only be important from the point of view of fulfilling basic human needs, such as access to drinkable water, but has more cultural and spiritual dimension, an example of which are sacred sites or herbs used in ceremonies.

International climate change law is a relatively new branch of environmental law. It is centered around the UNFCCC, which in Article 4.1, obligates the State Parties to: establish national inventories of greenhouse gas emissions and sinks; formulate and implement of policies and measures to mitigate and adapt to climate change; manage the forests, oceans and ecosystem in a sustainable way; and integrate the climate change considerations in national social, economic and environmental policies. Moreover, the industrial countries listed in Annex I, including all the Arctic States concerned, are *inter alia* required to individually or jointly return their anthropogenic emissions to 1990 levels by 2000. However, the wording of the UNFCCC is considered to be rather vague and aspirational and it is doubtful whether it represents a binding legal obligation.

The Paris Agreement differs from its predecessor – the Kyoto Protocol – as the national commitments of the Parties are not negotiated and included in the instrument, but are to be determined unilaterally by each State and communicated to the UNFCCC Secretariat. Therefore, the Paris Agreement combines a bottom-up approach including NDCs with a top-down approach including rules on transparency and review. While this approach makes it significantly easier for States to participate in the Paris Agreement, it also makes it more difficult to ensure that national commitments are sufficiently ambitious. However, its importance lays in providing an international framework for mitigation and adaptation processes and serving as an anchor point for the climate change litigation, due to its reference to human rights. Moreover, the Paris Agreement emphasizes the role and importance of preventing, reducing and remedying loss and damage associated with the adverse effects of climate change.

However, up to date the international climate change law does not contain any mechanism which could provide means to hold States accountable for climate change and

the general law of State responsibility presents some shortcomings as well. Most importantly the law of State responsibility applies only to breaches of international law by or attributable to a State and operates only when responsibility can be invoked by other States. As it has been established in Chapter 1, due to the colonization, Indigenous Peoples lost their status as sovereign nations, and as a result, they cannot invoke the law on State responsibility, which involves only State-to-State relations.

While the prospects of Indigenous Peoples' redress will be analyzed in the subsequent chapter, it is important to underline that Indigenous Peoples still should participate in creating the climate change framework. One example of a good practice is the IPCC, which admitted as an Observer Organization the Inuit Circumpolar Council. This allows Indigenous Peoples to directly take part in the works of IPCC, which subsequently may influence the policy pillar of climate change regime, and the adoption of legal instruments. Moreover, by 2008, the International Indigenous Peoples' Forum on Climate Change was established as the caucus for Indigenous Peoples participating in the UNFCCC processes.

As it has been demonstrated, on a domestic level Indigenous Peoples should also be included in the climate change policy. According to the Paris Agreement, adaptation measures should take into consideration vulnerable groups, communities and ecosystems, and more importantly, should be based on and guided by *inter alia* knowledge of Indigenous Peoples. However, as the latest studies indicate, Indigenous Peoples are rarely consulted and their views are not incorporated into the national policies.

Non-recognition and non-inclusion of Indigenous perspectives and lack of culturally-specific approaches to adaptation to climate change can seriously hamper Indigenous Peoples possibilities of adaptation and the disregard for Indigenous Peoples' culture should be identified as one of the obstacles to the successful adaptation. As the story of Yup'ik community exemplifies, the former colonization of Indigenous Peoples still has impacts on their lives, making adaptation to climate change much more difficult. Another obstacle to successful adaptation of Indigenous Peoples identified in the chapter is the lack of the recognition of official titles to their lands.

As it has been shown, integrating Indigenous Knowledge into adaptation actions can be beneficial both for the source-communities and for the non-Indigenous parties involved. Where Indigenous rights are recognized and significant decision-making power is locally held, the resources are used in a sustainable manner, which contributes to the

conservation of biodiversity, and reduce deforestation and land degradation[726]. Since adaptation to climate change is something that primarily takes place on the local level, it is important that Indigenous Peoples themselves define the risks related to rapid climate change.

As such, the approach of the Paris Agreement, which underlines the value of Indigenous Knowledge, should be seen as an example of good practice and incorporated into domestic legal systems. However, the efforts should not end there, as States should take into account not only the provisions of the Paris Agreement, but the UNDRIP as well. Although globally there are increasing efforts to protect Indigenous rights, decisions on land use, development, and resource management continue to have limited input from Indigenous Peoples and without addressing the underlying causes of vulnerability that are rooted in marginalization, disempowerment and colonization there is hardly a chance for successful adaptation to climate change by Indigenous Peoples.

[726] J.D. Ford et al., *op. cit.*, p. 535.

Chapter 5 : Arctic Indigenous Peoples' right to remedy – the potential of international mechanisms

5.1. Introductory remarks

As it has been discussed in Chapter 4, the prospects of one State invoking the breach of another State's obligations in the context of climate change based on the UNFCCC regime are hardly perceptible and in this sense international climate change regime hardly provides means to hold States accountable for climate change. Therefore, the scholarship and practice shows "that international environmental law claims are more likely to succeed if they can be transposed into human rights claims"[727]. Due to the Paris Agreement reference to human rights, rights-based climate lawsuits were lodged with increasing frequency after the adoption of the Paris Agreement in 2015. Therefore, the chapter begins with the discussion on the notion of accountability and explains the concept of rights-based climate change litigation.

As the main research objective of this chapter is to analyze whether current human rights mechanisms provide any possibility of remedy for the Indigenous Peoples in the Arctic in the case of violation of their cultural rights arose from the climate change induced deterioration of the environment, the scope of the right to remedy in international law will be analyzed, with a special emphasis on Indigenous Peoples' needs considering their reliance on culture and environment.

The effective realization of human rights implies that there must be mechanisms which can be used while the violation of human rights occurs. Although human rights should be first and foremost protected at the domestic level, when the victims of human rights' violations are unable to realize their right to remedy at the domestic level, they should be able to assert their rights at the international level. The analysis of the potential of international mechanisms begins with the regional human rights courts and commissions due to the criteria of proximity to the alleged victims of human rights violations. Having regard to Indigenous Peoples of the Arctic region, the case law of two regional courts and commissions is going to be the subject of the discussion, namely the Inter-American Court of Human Rights and the Inter-American

[727] M. Meguro, *Litigating climate change through international law: Obligations strategy and rights strategy*, „Leiden Journal of International Law" 2020, Vol. 33, Issue 4, p. 938.

Commission of Human Rights, and the European Court of Human Rights together with the former Commission of Human Rights. As Canada and the United States did not ratify the American Convention on Human Rights, the Indigenous Peoples are only subject to the Commission's jurisdiction in enforcing the American Declaration of the Rights and Duties of Man. Therefore, the Commission's approach is going to be compared with the case-law of the Inter-American Court of Human Rights, which is believed to be pioneering considering the protection of Indigenous Peoples' rights.

The European Court of Human Rights, on the other hand, can hear complaints concerning various Arctic Indigenous Peoples: the Inuit from Danish Greenland, the Saami in Norway, Finland, Sweden. Therefore the first category of analyzed cases concerns Indigenous Peoples as applicants. The second category of cases relates to cultural rights. As recently the European Court was faced with the first climate change applications, the third criteria in the selection of the cases are the claims relating to the environment. The review of the landmark cases of the Court regarding the environment, together with the climate change applications, aims at examining whether the ECHR is a well suited body to answer the grievances of the applicants arose from large-scale and international problems such as climate change.

An important element of the analysis of the case-law of the above mentioned Courts is also the analysis of the range of reparation measures that these two Courts can award to the victims of human rights violations and the means of monitoring the implementation of the judgments.

As Indigenous Peoples can also bring their grievances to the universal system of human rights protection and its quasi-judicial bodies, it is necessary to analyze whether said system could offer any possibilities of effective remedies for the Indigenous Peoples of the Arctic region in the context of climate change. Therefore, the final subchapters focus on the jurisprudence of treaty bodies, which have been chosen under the criteria of dealing with Indigenous Peoples' cultural rights and/or climate change, their role as quasi-judicial bodies, and the ratification status of the Arctic States concerned; and on alternative mechanisms of human rights protection, such as the United Nations Special Procedures, the Universal Periodic Review, the ILO instruments and the UNESCO procedure.

5.2. Accountability and the rights-based approach to climate change

The form of accountability which is more "bottom-up", contrary to the "top down" approach represented solely by States, can be characterized as a tool for regulating and responding to the abuse of power[728] and it is exercised when "individuals, NGOs and private entities are able to hold states accountable for their actions', which is linked to a global trend of seeking 'to hold leaders accountable' as well as developments in trade and corporate responsibility"[729]. Therefore, a turn to accountability denotes (at least a slight) change of power relations.

Although there is no agreed-upon definition of accountability, the working definition of accountability has been created in the context of Human Rights and the Post-2015 Development Agenda, and goes as follows: "[accountability] refers to the obligation of those in authority to take responsibility for their actions, to answer for them to those affected, and to be subject to some form of enforceable sanction if their conduct or explanation is found wanting"[730]. As it follows, accountability has three dimensions: responsibility, answerability and enforceability. Responsibility requires that those in positions of authority have clearly defined duties and performance standards, enabling their behavior to be assessed transparently and objectively. Answerability requires public officials and institutions to provide reasoned justifications to those affected by their decisions, to oversight bodies, and to the electorate and the public at large. Enforceability requires putting mechanisms in place that monitor the degree to which public officials and institutions comply with established standards, and ensure that appropriate corrective and remedial action is taken when this is not the case[731]. Therefore, the last dimension of accountability includes, but by no means is limited to the right to remedy.

Accountability is a cornerstone of the human rights framework. As it has been explained in the Chapter 2, on the example of cultural rights, human rights have two facets: the normative content owed to rights-holders and the corresponding obligations of duty-bearers. For the effective realization of human rights, there must be a mechanism which can be used while the violation of human rights occurs – in other words, to hold accountable the duty-bearer while he is not adhering to the standards. The most used legal

[728] L. Yarwood, *op. cit.*, p. 32.
[729] Ibidem, p. 18.
[730] OHCHR. *Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda*. HR/PUB/13/1/Add.1, New York/Geneva, 2013, p. 4.
[731] Ibidem.

dimension of human rights accountability – in the sense of invoking and determining responsibility – has materialized in the international and regional accountability system through the individual complaints procedure[732].

As it has been shown in Chapter 3, climate change has an impact on a wide variety of human rights, and it is now widely accepted that climate change is a human rights issue. As early as in 2008 in the resolution 7/23, the Human Rights Council expressed concern that climate change poses an immediate and far-reaching threat to people and communities around the world and requested Office of the High Commissioner for Human Rights to prepare a study on the relationship between climate change and human rights[733].

The first direct reference to human rights in the context of the UNFCCC was made when in 2010 the decision 1/CP.16 adopted by the COP[734] referred to Human Rights Council resolution 10/4[735], which recognizes the adverse effects of climate change on the effective enjoyment of human rights and calls upon States to ensure respect for human rights in their climate actions. The Preamble to the Paris Agreement to the UNFCCC expands this language calling on States, when taking action to address climate change, to "respect, promote and consider their respective obligations on human rights"[736].

In 2018, CESCR adopted a statement in which it underlined that:

> 5. Under the Covenant, States parties are required to respect, protect and fulfil all human rights for all. They owe such duties not only to their own populations, but also to populations outside their territories, in accordance with articles 55 and 56 of the Charter of the United Nations. In so doing, they should act on the basis of the best scientific evidence available and in accordance with the Covenant.
>
> 6. This Committee has already noted that a failure to prevent foreseeable harm to human rights caused by climate change, or a failure to mobilize the maximum available resources in an effort to do so, could constitute a breach of this obligation. The nationally determined contributions that have been announced so far are insufficient to meet what scientists tell us is required to avoid the most severe impacts of climate change. In order to act consistently with their human rights obligations, those contributions should be revised to better reflect the "highest possible ambition"

[732] A. Vandenbogaerd, *op. cit.*, p. 89.
[733] Human Rights Council, Human rights and climate change, A/HRC/RES/7/23, 28 March 2008.
[734] Framework Convention on Climate Change Conference of the Parties, Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010, FCCC/CP/2010/7/Add.1.
[735] Human Rights Council, Human rights and climate change, A/HRC/RES/10/4, 25 March 2009.
[736] Paris Agreement, *op. cit.*, Preamble.

> referred to in the Paris Agreement (art. 4 (3)). The future implementation guidelines of the Agreement should require States to take into account their human rights duties in the design of their nationally determined contributions. This implies acting in accordance with the principles of gender sensitivity, participation, transparency and accountability; and building on local and traditional knowledge[737].

In October 2021, the Human Rights Council passed a ground-breaking resolution recognizing the right to a healthy environment, in which it recognized that the impact of climate change and environmental damage has negative implications, both direct and indirect, for the effective enjoyment of all human rights and "that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy human rights, including the right to life"[738]. At the same time, a new mandate for a Special Rapporteur on the promotion and protection of human rights in the context of climate change was also created. Just one month later, at COP26, the role of human rights was a crucial issue throughout the negotiations, and one that received some recognition in the final outcomes, including the Glasgow Climate Pact[739]. This shows that this two regimes – climate change regime and human rights regime – are no longer detached, but closely connected.

This is especially visible in the rights-based approach to climate change litigation. As it has been mentioned, international climate change law does not have its own secondary rules or enforcement mechanisms[740]. Human rights, on the other hand, provide both substantive obligations (those associated with e.g. the right to life, adequate housing, food and the highest attainable standard of health), which require preventative measures to avert human rights violations associated with environmental harm, as well as procedural obligations, which require access to remedies for human rights violations associated with environmental harms[741].

The rights-based approach consists of the invocation, before national and

[737] CESCR, Statement: Climate Change and the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/2018/1, Oct. 31, 2018, para. 5-6.
[738] Human Rights Council, Resolution 48/13 on The Human Right to a Clean, Healthy and Sustainable Environment, adopted on 8 October 2021, A/HRC/RES/48/13, p. 2.
[739] J. Setzer, C. Higham, *Global Trends in Climate Change Litigation: 2022 Snapshot*, London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science 2022, p. 33.
[740] M. Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights under International Law*, Hart Publishing 2019, p. 69.
[741] A. Savaresi, J. Setzer, *op. cit.*, p. 20.

international courts and quasi-judicial bodies, of violations of environmental law through the legal categories of international human rights law[742] and is understood to include cases that involve material issues of climate change science, policy, or law[743]. The rights-based litigation serves as an innovative way of holding governments accountable in the absence of strong, easily enforceable international commitments within the UNFCCC[744]. Therefore, climate litigants increasingly rely on various sources of law, including human rights law and remedies, in order to bridge these accountability and enforcement gaps[745].

In 2022, two thousand cases of climate change litigation from around the world had been identified and included in the Sabin Center's Climate Change Litigation databases – the largest global climate change litigation databases compiled to date[746], while in 2023 there were two thousand three hundred forty-one cases[747]. As of May 2023 one hundred twenty two cases relied in whole or in part on human rights, out of which ten cases involved Indigenous Peoples' rights[748]. The rationale behind the cases is that as human rights treaties require States to take measures to protect human rights, and as climate change hinders the enjoyment of various human rights, the human rights treaties may imply an obligation for states to mitigate climate change[749].

The rights-based cases can be divided into two types: those dealing with adaptation and those concerning mitigation. The former type argues that human rights law imposes obligations on States to act to address climate impacts, and/or to refrain from activities that cause climate change, while the latter argue that human rights law imposes on States the obligations to reduce greenhouse gas emissions and to adopt measures to fight climate change[750]. While the cases concerning adaptation are easier translated into the human rights framework as "establishing the extent to which that given State is actually contributing to climate change is not a determining factor for adaptation obligations, and there is no need of envisaging complex shared responsibility patterns and

[742] M. Meguro, *op. cit.*, p. 935.
[743] J. Setzer, C. Higham, *op. cit.*, p. 6.
[744] B. Lewis, *op. cit.*, p. 242.
[745] A. Savaresi, J. Setzer, *op. cit.*, p. 13.
[746] J. Setzer, C. Higham, *op. cit.*, p. 7.
[747] J. Setzer, C. Higham, *Global Trends in Climate Change Litigation: 2023 Snapshot*, London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science 2023, p. 2.
[748] Sabin Center for Climate Change Law, Climate Change Litigation Databases, "Non-US Case Category: Human Rights", http://climatecasechart.com/non-us-case-category/human-rights/ [last accessed: 26.05.2023].
[749] B. Mayer, *Climate Change Mitigation as an Obligation Under Human Rights Treaties?*, „American Journal of International Law" 2021, Vol. 115, No. 3., p. 410.
[750] A. Savaresi, J. Setzer, *op. cit.*, p. 15.

'fair share' quotas"[751], the cases involving mitigation has often been criticized by the doctrine[752]. As argued by Benoit Mayer, "a state is not generally capable of achieving mitigation outcomes that will make any real difference for the protection of the human rights of individuals within its territory or under its jurisdiction"[753]. Referring to the landmark domestic case *Urgenda Foundation v. State of the Netherlands***,** in which a Dutch environmental group, and nine hundred Dutch citizens sued the Dutch government to require it reduce GhG emissions, she points out that:

> "the Netherlands was ordered to enhance its mitigation action in such a way as to achieve 9 percent reduction in its projected level of emission for 2020, that is, about 0.03 percent reduction in global GHG emissions that year. Even if the same increase of ambition had been imposed on China, the largest GHG emitter, it would have translated into only about 2 percent reduction in global emissions. Such incremental changes in global GHG emissions (a flow) would translate, after many years, only in very small differences in GHG concentration in the atmosphere (a stock), hence in very little tangible mitigation outcomes"[754].

While it is undeniably true, given the complexities and global dimension of climate change, that a State, acting on its own, is unable to achieve sufficient mitigation outcomes to effectively halt climate change, the rights-based litigation influences the governments to take more determined climate action and fulfil their human rights' obligations. In the claim brought by Urgenda Foundation, the Hague Court of Appeal concluded that by failing to reduce greenhouse gas emissions by at least twenty-five percent by end-2020, the Dutch government is acting unlawfully in contravention of its duty of care under Articles 2 (right to life) and 8 (right to respect for private and family life) of the European Convention on Human Rights. Moreover, the Court pointed out that adaptation measures cannot compensate for the government's duty of care to mitigate greenhouse gas emissions and that the global nature of the problem does not excuse the Dutch government from action[755].

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[751] R. Luporini, *Strategic Litigation at the Domestic and International Levels as a Tool to Advance Climate Change Adaptation?: Challenges and Prospects*, „Yearbook of International Disaster Law Online" 2023, Vol. 4, No. 1, p. 216.
[752] See e.g. L. Rajamani, *Human Rights in the Climate Change Regime*, in: J. H. Knox, R. Pejan (eds.), *The Human Right to a Healthy Environment*, Cambridge University Press, Cambridge 2018.
[753] B. Mayer, *op. cit.*, p. 424.
[754] *Ibidem*.
[755] Sabin Center for Climate Change Law, Climate Change Litigation Databases, "Urgenda Foundation v. State of the Netherlands", http://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/ [last accessed: 26.05.2023].

The landmark decision in the Urgenda case further encouraged applicants to bring their cases to domestic, as well as regional and international judicial and quasi-judicial bodies. Although human rights should be first and foremost protected at the domestic level, where domestic legal proceedings fail to address human rights abuses, mechanisms and procedures for complaints or communications are available at the regional and international levels to help ensure that international human rights standards are indeed respected, implemented, and enforced at the local level. As of May 2022 one-hundred-and-three cases have been filed before fifteen international or regional courts and tribunals, including Inter-American Court and Inter-American Commission on Human Rights, the European Court of Human Rights, and the United Nations treaty bodies, such as the Human Rights Committee or the Committee on the Rights of the Child[756]. Given the transboundary character of climate change and the nature of its consequences, transposing an environmental claim into a human rights claim is not an easy task[757]. Human rights framework, however, provides potential plaintiffs with various institutional and procedural advantages as human rights treaties often allow individuals, and sometimes groups, to file complaints before international bodies or cases before regional human rights courts, while treaty bodies periodically review and make concluding observations on national reports[758]. Therefore, litigation can serve to deliver on a key promise embedded in human rights law and discourse: victim's access to effective remedies for human rights violations[759].

5.3. Right to remedy in international law

As it has been already noted, for the effective realization of human rights, there must be mechanisms which can be used while the violation of human rights occurs – in other words, to hold accountable the duty-bearer while he is not adhering to the standards. As explained by Federico Lenzerini : "the mere recognition of human rights on paper—although representing the first essential step on the path for their effective achievement—is in itself void if not accompanied by the necessary institutions and means to ensure their enforcement in the event of breaches. In this respect, it is axiomatic that the concepts of

[756] J. Setzer, C. Higham, Global Trends in Climate Change Litigation: 2023 Snapshot…, *op. cit.*, p. 9.
[757] M. Meguro, *op. cit.*, p. 940.
[758] B. Mayer, *op. cit.*, p. 421.
[759] M. Wewerinke-Singh, *op. cit.*, p. 147.

'rights' and 'justice' are two elements of the same complex legal reality, in which they contextually depend upon each other"[760]. For this reason, the right to remedy is a necessary element of the human rights framework, as it is essential in providing effective recourse where there has been an allegation of a human rights violation.

According to Dinah Shelton, the word "remedies" contains two separate concepts, the first being procedural and the second substantive: in the former sense, remedies are the processes by which arguable claims of human rights violations are heard and decided, whether by courts, administrative agencies, or other competent bodies; in the latter sense, the notion of remedies refers to the outcome of the proceedings, "the relief afforded the successful claimant"[761].

The substantive remedies afforded to the victims of human rights violations are referred to as "redress", which may be understood as "reparation or compensation for a wrong or consequent loss"[762]. The procedural aspect of remedy denotes access to justice, which refers to the process of hearing and deciding claims of human rights violation, while substantive redress concerns the result of that process: the actual relief granted to the victim of a human rights violation[763]. Therefore, the obligation to afford remedies for human rights violations requires, in the first place, the existence of remedial institutions and procedures to which victims may have access[764]. Access to justice implies that the procedures are effective, i.e. capable of redressing the harm that was inflicted[765]. Both the remedy and redress denote "range of measures that may be taken in response to an actual or threatened violation of human rights. They thus embrace the substance of relief as well as the procedures through which relief may be obtained"[766]. The reparation, on the other hand, is understood as "the action of making amends for a wrong or harm done by providing payment or other assistance to the wronged party"[767]. According to Dinah Shelton, "reparation is thus the part of justice that provides redress for the consequences of human rights and humanitarian law violations. It is a legal remedy, which can be claimed, enforced or even waived by its legitimate holders, those individuals who

[760] F. Lenzerini, *Part VI International Assistance, Reparations, and Redress. Reparations, Restitution, and Redress: Articles 8(2), 11(2), 20(2), and 28*, in: J. Hohmann, M. Weller, *The UN Declaration on the Rights of Indigenous Peoples: A Commentary*, Oxford Commentaries on International Law, Oxford 2018, p. 574.
[761] D. Shelton, *op. cit.*, p. 16.
[762] F. Lenzerini, *Part VI…, op. cit.,* p. 587.
[763] M. Wewerinke-Singh, *Remedies for Human Rights Violations Caused by Climate Change*, „Climate Law" 2019, Vol. 9, No. 3, p. 226.
[764] D. Shelton, *op. cit.*, p. 17.
[765] Ibidem, p. 18.
[766] D. Shelton, *op. cit.*, p. 16.
[767] F. Lenzerini, *Part VI…, op. cit.,* p. 587.

suffered directly or indirectly from the wrongful acts committed"[768]. Reparation may include all of the acts which also serve to redress individual harm from human rights violations: restitution, compensation, satisfaction, and guarantees of non-repetition; reparation is, however, sometimes used to refer only to monetary compensation[769].

As the law of remedies in the human rights framework has been developed *inter alia* based on the traditional law of State responsibility[770], there is a tendency to use "reparations" as the generic term for the various methods available to a State for discharging or releasing itself from international responsibility[771]. The basic principle with regard to reparation for a breach of an international obligation for which the State concerned is responsible, was laid down in the Chorzów Factory case, where the Permanent Court of International Justice emphasized that, "the essential principle contained in the actual notion of an illegal act is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed"[772]. According to Article 30 of the ILC ARS "[t]he State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require"[773]. Article 31 of the ILC ARS provides that the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act and that injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State, while Article 34 provides that full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination[774].

Notwithstanding the roots of the law of remedies in the scope of human rights, the international law of State responsibility is, however, an inadequate model because it derives from inter-state cases between juridically equal parties, "where diplomatic concerns and broader issues of cooperation or conflict affect the results"[775], and as such does not correspond exactly to the objective of human rights regime, which is based on

[768] D. Shelton, p. 18.
[769] Ibidem, p. 16.
[770] Ibidem, p. 2.
[771] Ibidem, p. 16.
[772] M. Shaw, *International Law*, Cambridge University Press, Cambridge 2017, p. 606-607.
[773] International Law Commission, *Draft Articles…, op. cit.,* Article 30.
[774] Ibidem, Article 31 and 34.
[775] D. Shelton, *op. cit.*, p. 8.

the duty of States to afford adequate and effective remedies to the right-holders as a consequence of breaching their human rights obligations. In this sense, the right to remedy is a twofold right: on one hand, it is a basic human right in and of itself, and on the other it is a means to protect other human rights.

At the international level, the right to remedy has been first and foremost recognized in ICCPR, which in Article 2(3) states that:

> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted[776].

Additionally, Articles 9(5) and 14(6) refer to compensation in case of unlawful arrest or detention and reversed conviction and pardon due to the miscarriage of justice. The Human Rights Committee, in the General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted in 2004, observed that "Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights" [777] and that "a failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant"[778] . Moreover, the remedies "should be appropriately adapted so as to take account of the special vulnerability of certain categories of person"[779]. As to the appropriate means of reparation, the Committee enlisted "restitution, rehabilitation and measures of satisfaction, such as public apologies, public

[776] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS, p. 171.
[777] HRC, General Comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, par. 15.
[778] Ibidem.
[779] Ibidem.

memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations"[780], pointing out that it "has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question"[781] and that "such measures may require changes in the State Party's laws or practices"[782]. This shows that the role of international human rights proceedings is not limited to being a mechanism solely of redress for the individuals who have been harmed, but underlines their role to encourage systemic changes and a means to monitor and induce compliance with treaty regimes in the interest of the whole international community[783].

In the Resolution adopted by the General Assembly in 2005, concerning Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, the victim's right to the remedies entails: "(a) Equal and effective access to justice; (b) Adequate, effective and prompt reparation for harm suffered; (c) Access to relevant information concerning violations and reparation mechanisms"[784]. The Basic Principles, besides individual access to justice, refer also to the States obligation to attempt to "develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate"[785]. The Basic Principles and Guidelines do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and as such they can serve as a benchmark and indication for States.

The right to remedy in the context of Indigenous Peoples bares strong cultural nuances. This has been expressed by the UNDRIP, which although is not a legally binding treaty, is a standard-setting document. Moreover, some of the provisions included in the UNDRIP have a customary law character, which has been confirmed

[780] Ibidem, par. 16.
[781] Ibidem, par. 17.
[782] Ibidem.
[783] D. Shelton, *op. cit.*, p. 9.
[784] UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147, par. 11.
[785] Ibidem, par. 13.

by the International Law Association Resolution 5/2012, adopted virtually unanimously and with no opposition, which states that, while the Declaration "as a whole cannot yet be considered as a statement of existing customary international law […] it includes several key provisions which correspond to existing State obligations under customary international law"[786]. According to Federico Lenzerini, such a limited catalogue of rules corresponding to customary international law includes the right to reparation and redress[787].

The United Nations Declaration on the Rights of Indigenous Peoples refers to the right to remedy (including both the procedural and the substantive aspects) in eight out of forty-six articles. Article 8, which recognizes the right not to be subjected to forced assimilation or destruction of their culture, calls upon States:

> to provide effective mechanisms for prevention of, and redress for:
> (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
> (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
> (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
> (d) Any form of forced assimilation or integration;
> (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

The list provided in paragraph 2 encompasses the main threats to the integrity of the value of Indigenous Peoples' cultural and ethnic identity. It may also appear as a sort of umbrella article for other provisions included in the UNDRIP, since the content of letter (b) echoes in Article 28, while the letter (c) is substantially reproduced in Article 10: "[…] No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return"[788].

Both Articles 11 and 12 deal in particular with Indigenous Peoples cultural traditions and tangible and intangible heritage. Article 11 recognizes the right to

[786] International Law Association, Resolution No. 5/2012, Rights of Indigenous Peoples, 2012, https://www.ila-hq.org/en_GB/documents/conference-resolution-english-sofia-2012-4, par. 2.
[787] F. Lenzerini, *Part VI…, op. cit.,* p. 590.
[788] UNDRIP, Article 10.

practice and revitalize cultural traditions and customs, which includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature. In case the Indigenous Peoples' cultural, intellectual, religious and spiritual property is taken without their free, prior and informed consent or in violation of their laws, traditions and customs, the States "shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples"[789]. Similarly, Article 12 recognizes the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies. As one important element of this right is to the use and control of ceremonial objects, Article 12(2) provides that the States shall establish fair, transparent and effective mechanisms developed in conjunction with Indigenous Peoples, which enable the access or repatriation of such ceremonial objects and human remains in their possession[790].

Importantly in the context of climate change, Article 20.2 recognizes the Indigenous Peoples' right to just and fair redress in the case of depravation of their means of subsistence and development, while Article 32 recognizes the Indigenous Peoples' right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. This right corresponds with the duty of the States to "provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact"[791].

Two main Articles concerning right to remedy are Articles 28 and 40. Article 28 states that:

> 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or *damaged* without their free, prior and informed consent.

[789] Ibidem, Article 11(2).
[790] On the repatriation, see K. Prażmowska-Marcinowska, *Repatriation of Indigenous Peoples' Cultural Property: Could Alternative Dispute Resolution Be a Solution? Lessons Learned from the G'psgolox Totem Pole and the Maaso Kova Case*, „Santander Art and Culture Law Review", Vol. 8, No. 2, pp. 115-138.
[791] UNDRIP, Article 32(3).

> 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress[792].

The provision determines the kind of reparation that is in general to be preferred – restitution – in cases of confiscation, occupation, usage or damage to the lands, territories and resources which have been traditionally owned by Indigenous Peoples. According to Federico Lenzerini "this is due to the fact that in most cases no form of compensation is adequate to effectively recompense the deep spiritual significance that the Motherland has for the very cultural identity and—in many cases—even the physical existence of Indigenous communities. For this reason, restitution is the form of redress to be preferred any time that it is actually practicable"[793]. When restitution is not practicable, then it must be replaced by compensation, which must be just, fair and equitable. The second paragraph of Article 28 clarifies that compensation is by no means limited to monetary redress. The use of the term "appropriate" shows that, whatever kind of reparation is selected, it must be adequate to effectively restore the damage suffered by the community concerned[794], which requires consultation with the community. Article 28 identifies the premise based on which specific measures of reparations must be decided on a case-by-case basis, in light of what is appropriate to effectively restore the wrongs suffered in the concrete case according to the perception of Indigenous Peoples themselves. There may be situations in which, due to the specific circumstances of the case, even *restitutio in integrum* may not represent the best practicable means of reparation, or may even be inadequate, when the harm suffered from the human rights violation is a consequence of an environmental degradation[795].

Article 40 of the UNDRIP sets forth important principles regarding Indigenous Peoples' right to remedy. First of all, it stipulates that Indigenous Peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective

[792] Ibidem, Article 28, emphasis added.
[793] F. Lenzerini, *Part VI…, op. cit.,* p. 591.
[794] F. Lenzerini, *Reparations for Wrongs against Indigenous Peoples' Cultural Heritage*, in: A. Xanthaki, S. Valkonen, L. Heinämäki, P. Nuorgam (eds.), *Indigenous Peoples' Cultural Heritage. Rights, Debates, Challenges*, Brill 2017, p. 336.
[795] F. Lenzerini, *Part VI…, op. cit.,* p. 575.

remedies for all infringements of both their individual and collective rights. Moreover, Article 40 requires that decisions concerning Indigenous Peoples are to be taken through giving "due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights"[796]. This principle is the embodiment of the Indigenous Peoples' holistic vision of life, in the context of which spiritual and social values usually have a significance which greatly overcomes any consideration for economic interests. According to Federico Lenzerini:

> it is essential to go beyond the classical Western-shaped language and conception of reparation, at least under a twofold perspective. First, in the Western world, reparation is essentially conceived as compensation to *individuals*, while with regard to Indigenous peoples it has a real sense only to the extent that it assumes a *collective* significance. Second, according to the Western vision, monetary compensation is commonly considered the only—or at least the paramount —goal to be achieved in order to ensure effectiveness of reparation itself. In the case of Indigenous peoples, material reparation is usually inadequate to ensure effective redress for the pain suffered, especially when it takes the form of compensation[797].

This is due to the strong interrelation of various aspects of Indigenous Peoples' rights and their strong cultural dimension: for example, in the case of violation of Indigenous Peoples' land rights, including not only expropriation, but also damage caused to the territories and resources, such violation implies the impossibility for the community concerned to properly enjoy their cultural rights often related to the elements of environment, the right to adequate housing, the right to adequate food, as well as the right to self-determination and autonomy, because all such rights find their concrete realization on the ancestral territories traditionally occupied by the community. In the case of such violation, monetary compensation hardly seems adequate to fulfil the function of the reparation, of "wip[ing] out all the consequences of the illegal act"[798].

As such, the provisions of the UNDRIP indicate that in the case of Indigenous Peoples the substantive element of remedy – reparation – should be understood broadly, and that in their case the catalogue of remedies should include all the possible measures,

[796] UNDRIP, Article 40.
[797] F. Lenzerini, *Part VI…, op. cit.,* p. 574.
[798] Permanent Court of International Justice, Case Concerning the Factory at Chorzów, Germany v. Poland, Jurisdiction, 1927 PCIJ Rep Series A No 9, 26 July 1927.

such as restitution, satisfaction, guarantees of non-repetition and compensation. Although in general remedies serve moral goals[799], for Indigenous Peoples the right to remedy is strongly related to restorative justice, which "embraces a broader notion of the harm that needs to be repaired by addressing the larger community" [800] and is "taking into consideration the larger societal interest in healing and stability"[801].

Although the obligation to ensure a victim's right to remedy rests first and foremost on States, when the victims are unable to realize their right to remedy at the domestic level, the international human rights systems allows them to seek remedies for the harm they suffer from unredressed human rights violations. While the individual access to international justice remains exceptional and based on specific treaty arrangements, both universal and regional systems of human rights protection offer possibilities of seeking the redress for harm suffered. As such, the next subchapters analyze the possibilities of remedy (meaning access to justice, as well as obtaining reparations) for the violations of Indigenous Peoples' rights, both through regional and universal judicial and quasi-judicial bodies.

5.4. Regional human rights courts and commissions

Regional human rights bodies have unique qualities that make them particularly suitable as forums for litigating human rights cases. As it has been already mentioned, when the victims of human rights' violations are unable to realize their right to remedy at the domestic level, they can assert their rights at the international level, including the regional systems of human rights protection. Therefore, having regard to Indigenous Peoples of the Arctic region, the case law of two regional courts and commissions is going to be a subject of discussion in the following paragraphs, namely the Inter-American Court of Human Rights and the Inter-American Commission of Human Rights, and the European Court of Human Rights together with the former Commission of Human Rights.

[799] D. Shelton, *op. cit.*, p. 19.
[800] Ibidem, p. 22.
[801] Ibidem.

5.4.1. Inter-American Commission and Court of Human Rights

Both the Inter-American Commission and the Inter-American Court of Human Rights are independent organs established by the Organization of American States (OAS). The Commission was created in 1959 and held its first session in 1960[802]. The Commission's work focuses on three main areas: the individual complaints system, monitoring human rights conditions, and identifying and attending to priority thematic areas. The Commissioners, either individually or in groups, carry out on-site visits to observe human rights conditions in the OAS Member States or to investigate particular issues of concern; these visits are often followed by a published report on the country or topic[803].

The Inter-American Court, on the other hand, was established based on the provisions of the American Convention on Human Rights, which entered into force in 1978. The Court fulfills two main functions: adjudicatory and advisory, as it hears and rules on the specific cases of human rights violations referred to it by the Inter-American Commission on Human Rights or a Member State. The Court also issues opinions on matters of legal interpretation brought to its attention by other OAS bodies or Member States.

Out of thirty-five OAS Member States only twenty accepted the jurisdiction of the Inter-American Court of Human Rights[804]. Both the United States and Canada became members of the OAS in 1948 and 1990, respectively[805]. However, they did not ratify the American Convention on Human Rights. As such, the Canadian and the US citizens' cases cannot be submitted to the Court's jurisdiction. Therefore, both Canada and the United States are only subject to the Commission's jurisdiction in enforcing the American Declaration of the Rights and Duties of Man and the Commission's ability to make recommendations to the States in relation to any violations found against them pursuant to denunciations made by individuals or civil society groups on their behalf[806]. With respect to those States not party to the

[802] L. J. Reinsberg, *Advocacy before the Inter-American System: A Manual for Attorneys and Advocates*, International Justice Resource Center, 2014, p. 6.
[803] Ibidem, p. 7.
[804] Ibidem, p. 8.
[805] World Data, "Members of the OAS: Organization of American States", World Data, https://www.worlddata.info/alliances/organization-of-american-states.php [last accessed: 20.06.2023].
[806] M.M. Macaulay, *Keynote Speech. Canada and the Inter-American Human Rights System*, „Revue québécoise de droit international" 2022, p. 17.

American Convention, the Commission examines the international responsibility of OAS Member States based on the American Declaration, and is authorized to do so by the OAS Charter[807].

Therefore, Indigenous Peoples from Canada and the US are only able to bring their claims to the Inter-American Commission, contrary to the Indigenous Peoples from the majority of South American States, who are able to submit (through the Commission) their cases to the Court and obtain a binding judgement in case their rights have been violated. This is a major obstacle for Arctic Indigenous Peoples, especially concerning the leading role that the Court has played in recognition of Indigenous Peoples' rights. As such, the following subchapters aim at analyzing two petitions from the Arctic Indigenous Peoples submitted to the Commission and the landmark cases before the Inter-American Court of Human Rights, in which the Court has been gradually expanding the scope of Indigenous Peoples' rights.

5.4.1.1. Arctic Indigenous Peoples' petitions concerning climate change

There is no doubt that Arctic Indigenous Peoples were at the forefront of climate change litigation. Already in 2005, Inuit from Canada and the United States submitted a 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"**.** Another petition, by Arctic Athabaskan Peoples, was submitted to the Commission in 2013. As the impact of climate change has been already analyzed in Chapter 3, the following paragraphs aim at establishing what violations they claimed and what remedies sought.

It is important to underline that the above petitions are not the only ones that were lodged by Indigenous Peoples from Canada and the US. For example, the case *Mary and Carrie Dann v. United States*[808] originated in a petition submitted by members of the Western Shoshone Indigenous Peoples who lived on a ranch in the rural community of Crescent Valley, Nevada. According to the petition, their land and the land of the Indigenous band of which they are members, the Dann band, is part of

[807] Organization of American States, Introduction. Basic Documents, https://www.oas.org/en/iachr/mandate/basics/introduction-basic-documents.pdf, p. 8 [last accessed: 20.06.2023].
[808] Inter-American Commission on Human Rights, *Mary and Carrie Dann v. United States*, Case 11.140, Report No. 75/02, December 27, 2002.

the ancestral territory of the Western Shoshone People and the Danns. The Petitioners contended that the State had interfered with the Danns' use and occupation of their ancestral lands by appropriating the lands as federal property through an unfair procedure before the Indian Claims Commission, by physically removing and threatening to remove the Danns' livestock from the lands, and by permitting or acquiescing in gold prospecting activities within Western Shoshone traditional territory[809]. As such, the petitioner claimed that the State had violated their right to property under Article XXIII of the American Declaration, because of the limitation that the State has placed on the Danns' occupation and use and of the Western Shoshone ancestral lands[810]. Article XXIII of the Declaration provides that „Every person has a right 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"[811]. The petitioners also claimed the violation of the right to equality under the law, enshrined in Article II of the American Declaration. They contended that the theory upon which the Indian Claims Commission determined the extinguishment of Western Shoshone, namely "gradual encroachment" by non-Indigenous settlers, miners and others, constitutes a nonconsensual and discriminatory transfer of property rights in land away from Indigenous Peoples[812]. The petitioners contended also that the State had denied the Danns their rights to judicial protection and to due process of law as affirmed by Article XVIII of the American Declaration and numerous other international instruments[813]. Last but foremost, the petitioners contended that the State's actions in relation to the Western Shoshone ancestral land violate the Danns' right to protection of cultural integrity, which according to them is affirmed in the American Declaration through Article XXII (right to property), Article III (right to religious freedom), Article VI (right to family and protection thereof) and Article XIV (right to take part in the cultural life of the community). The Petitioners underlined that in a Report on the Situation of Human Rights in Ecuador from 1997 the Commission has recognized the free exercise of these rights as "essential to the

[809] Ibidem, par. 2.
[810] Ibidem, par. 44.
[811] Inter-American Commission on Human Rights, American Declaration of the Rights and Duties of Man, adopted on 2 May 1948, Article XXIII.
[812] Ibidem, par. 54.
[813] Ibidem, par. 67.

enjoyment and perpetuation of the culture of indigenous peoples"[814]. In the circumstances of the Danns, the petitioners asserted that the United States was actively attempting to deprive the Danns of their traditional lands[815]. As the Western Shoshone culture is dependent upon the land and the natural resources, the petitioners argued that the State's actions are directly threatening the Danns' enjoyment of Western Shoshone culture. Among the acts that were said to threaten this deprivation were threats to confiscate the Danns' livestock, impediments to the gathering of subsistence foods, limits to their access to sacred sites, and the permission of private mining concessions and harmful military activities on traditional Western Shoshone lands, which activities have threatened the environment and destroyed available resources[816]. As such, their situation was not distant from the current situation of Indigenous Peoples' of the Arctic region.

In relation to the Commission's jurisdiction the Commission unequivocally resolved that it is competent to determine allegations against the United States:

> the State is a Member of the Organization of American States that is not a party to the American Convention on Human Rights, as provided for in Article 20 of the Commission's Statute and Article 23 of the Commission's Rules of Procedure, and deposited its instrument of ratification of the OAS Charter on June 19, 1951. The events raised in the Petitioners' claim occurred subsequent to the State's ratification of the OAS Charter. The Danns are natural persons, and the Petitioners are authorized under Article 23 of the Commission's Rules of Procedure to lodge the petition on behalf of the Danns.[817]

Subsequently, the Commission acknowledged a particular connection between Indigenous Peoples and the lands and resources that they have traditionally occupied and used, and underlined that their preservation is fundamental to the effective realization of the human rights of Indigenous Peoples and therefore warrants special measures of protection[818]. Moreover, the Commission observed that continued utilization of traditional collective systems for the control and use of territory are in many instances essential to the individual and collective well-being, and indeed the

[814] Inter-American Commission of Human Rights, Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, doc. 10 rev., April 24 1997, p. 103.
[815] *Mary and Carrie Dann v. United States, op. cit.,* par. 60.
[816] Ibidem.
[817] Ibidem, par. 95.
[818] Ibidem, par. 128.

survival of, Indigenous Peoples and that control over the land refers both its capacity for providing the resources which sustain life, and to the geographic space necessary for the cultural and social reproduction of the group[819].

However, although the Commission stated that there had been a violation of Indigenous Peoples' rights, it has limited itself to conclude that the State had failed to ensure the Danns' right to property under conditions of equality contrary to Articles II (right to equal protection under the law without discrimination), XVIII (right to judicial protection) and XXIII (right to property) of the American Declaration in connection with their claims to property rights in the Western Shoshone ancestral lands. As the Commission can only issue recommendations, it recommended the United States to provide Mary and Carrie Dann with an effective remedy, which includes adopting the legislative or other measures necessary to ensure respect for the Danns' right to property in accordance with Articles II, XVIII and XXIII of the American Declaration in connection with their claims to property rights in the Western Shoshone ancestral lands; and to review its laws, procedures and practices to ensure that the property rights of Indigenous Peoples are determined in accordance with the rights established in the American Declaration, including Articles II, XVIII and XXIII of the Declaration[820].

As the Commission is a quasi-judicial body, contrary to the Inter-American Court of Human Rights, it is not vested with the authority to issue specific reparations. While the reparations of the Inter-American Court, as it will be demonstrated in the next subchapter, are quite detailed and tailored to meet the needs of the victims of human rights violations, the Commission's recommendations can be regarded as "soft measures". However, the Commission's role is important as these recommendations are not only expected to be implemented, but also to influence government policies and actions[821]. Moreover, solely a recognition by an international body of a violations of Indigenous Peoples' rights can have an important social and moral value.

Yet, both petitions concerning climate change lodged by the Arctic Indigenous Peoples before the Commission did not achieve this kind of recognition. The first petition was brought in 2005 by the Inuit and was dismissed, while the second petition

[819] Ibidem.
[820] Ibidem, par. 173.
[821] V. de la Rosa Jaimes, *The Arctic Athabaskan Petition: Where Accelerated Arctic Warming Meets Human Rights*, California Western International Law Journal 2015, Vol. 45, No. 2, p. 233.

was brought by the Athabaskan Peoples in 2013 and for the last ten years is being reviewed for admission.

The Inuit petition was filed by Sheila Watt-Cloutier on behalf of all the Inuit living in Canada and the United States. This already shows how inadequate for Indigenous Peoples is the division of their land into modern States, considering that Inuit feel united and share similar issues. The Inuit claimed that the United States' failure to effectively limit carbon dioxide emissions caused climate change and the impacts of climate change violated the Inuit's human rights. The Inuit Petition acknowledged that climate change is caused by global cumulative emissions, but it singled out the United States as the nation responsible for violating their human rights because the United States had: the highest emissions at the time, as from 1950 to 2000, the United States emitted 57,874 million metric tons of CO2, making it the largest cumulative emitter over that period of time; the largest proportion of historical global emissions; and because it failed to take adequate actions to curb emissions[822].

The second petition, the Athabaskan petition, was lodged by Athabaskan Council, represented by Earthjustice and Ecojustice Canada, on behalf of all Arctic Athabaskan Peoples of the Arctic regions of Canada and the United States. The Athabaskans alleged that Canada is internationally responsible for the emissions of black carbon, which has caused rapid Arctic warming and melting. According to the Athabaskan Petition, black carbon emissions are "short-lived" climate pollutants which remain in the atmosphere for about one week and then settle to the ground and among the short-lived climate pollutants, black carbon has been identified as a particularly potent climate forcer in regions of ice and snow[823]. Black carbon has a twofold impact on the climate as it acts as a greenhouse gas while in the atmosphere and it darkens the color of the snow and ice which it falls upon, increasing their ability to absorb heat and facilitating melting[824]. According to the petitioners, Canada emits roughly 98,000 tons of black carbon annually[825]. Because this black carbon is emitted in or near the Arctic, it has a significantly higher climate warming impact than black carbon from lower latitudes. Major sources of Canada's black carbon emissions are

[822] Inuit Petition, *op. cit.,* pp. 68-69.
[823] Athabaskan Petition, *op. cit.,* p. 6.
[824] D. McCrimmon, *The Athabaskan Petition to the Inter-American Human Rights Commission: using human rights to respond to climate change*, "The Polar Journal" 2016, Vol. 6, Issue 2, p. 412.
[825] Athabaskan Petition, *op. cit.,* p. 2.

diesel emissions and the burning of biomass in agriculture and other sectors[826]. As alleged by the petitioners, Canada's failure to implement available black carbon emissions reduction measures that could slow the warming and melting violates many rights guaranteed to the Athabaskans in the Inter-American human rights system.

What draws the attention in both of the petitions is the central role of culture. The right to enjoy benefits of their culture is the first right claimed to be violated by both Inuit and Athabaskan. The right is enshrined in the American Declaration, in Article XIII which provides that: "Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries […]"[827]. The Inuit argued that as their culture is inseparable from the condition of their physical surroundings, the widespread environmental upheaval resulting from climate change violates the Inuit's right to practice and enjoy the benefits of their culture[828]. As it has been discussed in Chapter 3, the subsistence culture central to Inuit cultural identity has been damaged by climate change, and may cease to exist if action is not taken by the United States in concert with the community of nations and winter ice hunting has diminished because the later freeze and earlier, more sudden thaw allow less time each year for ice hunting, increase the risk of breaking ice, and affect the behavior and health of game[829]. Furthermore, the loss of this form of traditional knowledge further undermines Inuit culture – as predicting the weather, a crucial part of planning safe and convenient travel and harvest, as well as an important role for the Inuit elders, has become much more difficult because of changes in weather patterns, the elders can no longer fulfill one of their important roles, nor can they pass the science of weather forecasting to the next generation[830].

As it has been mentioned in Chapter 3, other aspects of Inuit culture are also jeopardized by the changing climate: land slumping, erosion and landslides threaten cultural and historic sites, as well as traditional hunting grounds; traditional methods of food storage are changing because of the melting permafrost and changing weather patterns; and the early spring thaw has forced a change in the traditional timing of

[826] Ibidem.
[827] Inter-American Commission on Human Rights, *American Declaration, op. cit.,* Article XIII.
[828] Inuit Petition, *op. cit.*, p. 5.
[829] Ibidem, p. 77.
[830] Ibidem, p. 77-78.

festivities[831].

However, the cultural elements are also visible in other rights that Inuit claimed to be violated. The United States was also alleged to have infringed on the right to property, the right to the preservation of health, the right to life, physical integrity and security, the right to their own means of subsistence, and the right to residence, movement, and inviolability of the home. In relation to for example, the right to preservation of health, the Inuit claimed that climate change is also profoundly affecting the Inuit's mental health, as the loss of important cultural activities such as subsistence harvesting, passing on traditional knowledge to younger generations, weather forecasting, and igloo building can induce psychological problems[832]. Moreover, climate change is accelerating a transition by Inuit to a more western store-bought diet with all of its inherent health problems[833], such as heart-diseases and diabetes.

Therefore, the petitioners asked the Commission to: (1) make an onsite visit to investigate and confirm the harms suffered by the named individuals whose rights have been violated and other affected Inuit; (2) hold a hearing to investigate the claims raised in this Petition; (3) prepare a report setting forth all the facts and applicable law, declaring that the United States of America is internationally responsible for violations of rights affirmed in the American Declaration of the Rights and Duties of Man and in other instruments of international law, and recommending that the United States: (a) adopt mandatory measures to limit its emissions of greenhouse gases and cooperate in efforts of the community of nations – as expressed, for example, in activities relating to the United Nations Framework Convention on Climate Change – to limit such emissions at the global level; (b) take into account the impacts of U.S. greenhouse gas emissions on the Arctic and affected Inuit in evaluating and before approving all major government actions; (c) establish and implement, in coordination with Petitioner and the affected Inuit, a plan to protect Inuit culture and resources, including, *inter alia*, the land, water, snow, ice, and plant and animal species used or occupied by the named individuals whose rights have been violated and other affected Inuit; (d) establish and implement, in coordination with Petitioner and the affected Inuit communities, a plan to provide assistance necessary for Inuit to adapt to the

[831] Ibidem, p. 78.
[832] Ibidem, p. 88-89.
[833] Ibidem, p. 1.

impacts of climate change that cannot be avoided; (e) provide any other relief that the Commission considers appropriate and just[834]. As such, the remedies that Inuit sought were in line with the current international climate change law, i.e. Paris Agreement, especially the points (2)(c) and (2)(d), which relate to adaptation measures.

However, in 2006, the Commission concluded in two brief paragraphs that the petition failed to establish "whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration"[835] and dismissed the petition as inadmissible.

As the Athabaskan petition was filed eight years later, it draws from the Inuit petition and it is more developed. However, still the most important right for Athabaskan is the right to culture. According to the petitioners, "the effects of black carbon on Athabaskan peoples' (i) subsistence-based living, (ii) traditional knowledge, and (iii) cultural sites violate their right to culture"[836]. As it has been discussed in Chapter 3, impacts of warming and melting infringe on Arctic Athabaskan Peoples' right to culture by interfering with hunting and associated cultural activities, including by making hunting conditions more dangerous and by diminishing the population of salmon, caribou, and other species that are significant culturally[837]. Another effect of black carbon pollution on the Arctic Athabaskan Peoples' right to culture arises out of the fact that traditional knowledge – an integral part of Arctic Athabaskan culture – is becoming less reliable and less useful due to the rapidly changing environment[838]. In addition, melting permafrost and changing weather patterns are interfering with the use of traditional underground methods of storing food and preparing hides[839]. These impacts threaten Arctic Athabaskan Peoples' right to culture by threatening the integrity of culturally significant sites and practices.

Similarly to the Inuit, the Athabaskan claimed violation of the right to property, the right to means of subsistence, and right to health, which all have a cultural dimension and are interrelated. For example, the use of permafrost for food storage is no longer practical in some areas, eliminating a traditional use of the land[840].

[834] Ibidem, p. 118.
[835] M. Wewerinke-Singh, State Responsibility…*op. cit.*, p. 22.
[836] Athabaskan Petition, *op. cit.*, p. 60-61.
[837] Ibidem, p. 61.
[838] Ibidem, p. 62.
[839] Ibidem, p. 63.
[840] Ibidem, p. 67.

Moreover, as elders are unable to accurately predict the weather, culturally significant sites like cemeteries are lost, travel conditions are more dangerous, houses are being destroyed and habitat that is vital for subsistence is shrinking, Athabaskan Peoples are under severe cultural and psychological stress[841].

The petitioners claimed that Canadian government action to reduce black carbon emissions can substantially remedy the rapid Arctic. As such, they asked the Commission to: (1) make an onsite visit to investigate and confirm the harms suffered by Arctic Athabaskan Peoples affected by accelerated Arctic warming and melting; (2) hold a hearing to investigate the claims raised in this Petition; (3) prepare a report setting forth all the facts and applicable law, declaring that Canada's failure to implement adequate measures to substantially reduce its black carbon emissions violates rights affirmed in the American Declaration of the Rights and Duties of Man, and recommending that Canada: (a) take steps to protect the rights of Arctic Athabaskan peoples by adopting mandatory measures to limit emissions of black carbon from key Canadian emissions sectors; (b) take into account the climate impacts of black carbon emissions on the Arctic and the affected Arctic Athabaskan Peoples in evaluating, and before approving, all major government actions; (c) establish and implement, in coordination with Petitioners and affected Arctic Athabaskan Peoples, a plan to protect Arctic Athabaskan culture and resources from the effects of accelerated Arctic warming and melting, including the land, water, snow, ice, and plant and animal species used or occupied by the Arctic Athabaskan individuals whose rights have been violated; (4) provide any other relief that the Commission considers appropriate and just[842].

Although compared to the Inuit petition, the Athabaskan petition draws a much closer connection between the action of the State and impact on the petitioners' rights, as it focuses on a regional pollutant which causes specific regional warming and that warming violates their human rights[843] and "does not refer merely to the broader impact of inadequately regulated emissions in general and the resulting climate change"[844], the petition has not yet been decided. Although usually proceedings before international bodies are to be considered lengthy, the Inuit petition was dismissed one

[841] Ibidem, p. 73.
[842] Ibidem, pp. 86-87.
[843] D. McCrimmon, *op. cit.*, p. 413.
[844] A. Szpak, *Arctic Athabaskan Council's Petition to the Inter-American Commission on Human Rights and Climate Change—Business as Usual or a Breakthrough?*, "Climate Change" 2020, Vol. 162, p. 1589.

year after being lodge. Therefore, this ten years period may give some hope as for example the Commission is waiting for the favorable moment to state that Canada had violated Athabaskan Peoples' rights. However, considering the highly promising judgment of the Inter-American Court in 2020 in the case *Indigenous Communities Members of the Lhaka Honhat Association v. Argentina* and wide international acknowledgment of the state of climate emergency, it is hard to imagine a more timely moment than now.

5.4.1.2. Landmark cases before the Inter-American Court of Human Rights

According to Gabriella Citroni and Karla I Quintana Osuna, the jurisprudence of the IACHR may be considered a "leading example for the determination of a broad set of measures of reparation in cases of violations of human rights, with particular emphasis on the redress of the moral damage suffered by the victims"[845]. The Inter-American Court holds that the right to cultural identity is a fundamental right of a collective nature, whose beneficiaries are *inter alia* Indigenous Peoples, and which must be respected in a multicultural, pluralistic and democratic society[846]. The Court's case-law regarding Indigenous Peoples' rights is extensive, and the Court dealt with several issues related to Indigenous Peoples, namely property rights, massacres, enforced disappearance, forced displacement, political and cultural rights. Following paragraphs discuss but a few landmark judgements in the cases brought by Indigenous Peoples to show the evolution of the Court's case law and examples of reparation measures ordered by the Court.

The first landmark case concerning Indigenous Peoples' rights is the case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*[847]. The leader of the community lodged a petition denouncing the State of Nicaragua for failing to demarcate the Awas Tingni Community's communal land and to take the necessary measures to protect the Community's property rights over its ancestral lands and natural resources. Furthermore, the petitioner denounced the State for failing to guarantee access to an effective remedy

[845] G. Citroni, K. Quintana Osuna, *Reparations for Indigenous Peoples in the Case Law of the Inter-American Court of Human Rights,* in: F. Lenzerini (ed.), *Reparations for Indigenous Peoples. International and Comparative Perspectives*, Oxford University Press 2008, p. 319.
[846] J.J. Faundes, *Diálogo entre la Corte Interamericana de Derechos Humanos y el Tribunal Europeo de Derechos Humanos en torno al derecho humano a la identidad cultural,* "Revista de Direito Internacional" 2020, Vol. 17, No. 3, p. 230.
[847] Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community. v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Series C, No. 79, 31 August 2001.

regarding the then imminent concession of 62,000 hectares of tropical forest to be commercially developed by a company in communal lands. The Court noted that the right to property enshrined by the American Convention of Human Rights protected the Indigenous Peoples' property rights originated in Indigenous tradition and, therefore, the State had no right to grant concessions to third parties in their land. Moreover, the Court acknowledged the link between cultural integrity and Indigenous communities' lands as "the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival"[848]. According to the Court, for Indigenous communities, relations to the land are not merely "a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations"[849]. Therefore, the Court ruled that Nicaragua had violated the right to judicial protection and to property. Consequently, the Court stated that it "has reiterated in its constant jurisprudence that it is a principle of international law that any violation of an international obligation which has caused damage carries with it the obligation to provide adequate reparation for it"[850] and proceeded to award very detailed reparations. First of all, the Court stated that "this Judgment is, in and of itself, a form of reparation to the members of the Awas Tingni Community"[851]. Secondly, it ordered the State to adopt "the legislative, administrative, and any other measures required to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores"[852] and to "carry out the delimitation, demarcation, and titling of the corresponding lands of the members of the Awas Tingni Community, within a maximum term of 15 months, with full participation by the Community and taking into account its customary law, values, customs and mores"[853]. Moreover, until the delimitation, demarcation, and titling of the lands of the members of the Community, Nicaragua was ordered to abstain from acts, led by the agents of the State or third parties, which might have affected the existence, value, use or enjoyment of the property located in the geographic area of the Awas Tingni Community[854]. Besides these reparations, the Court also noted that "the situation in which the members of the Awas Tingni Community find themselves due to

[848] Ibidem, par. 149.
[849] Ibidem.
[850] Ibidem, par. 163.
[851] Ibidem, par. 166.
[852] Ibidem, par. 164.
[853] Ibidem.
[854] Ibidem.

lack of delimitation, demarcation, and titling of their communal property, the immaterial damage caused must also be repaired, by way of substitution, through a monetary compensation"[855], and in a creative manner ordered the State to invest, "as reparation for the immaterial damages"[856], the total sum of fifty thousand United States dollars in works or services of collective interest for the benefit of the Awas Tingni Community. The investment was to be consulted with the with the Community and under the supervision of the Inter-American Commission. James Anaya, the former UN Special Rapporteur on the situation of the human rights and fundamental freedoms of Indigenous People, who was also the lead counsel for the Indigenous Peoples in the case *Awas Tingni v. Nicaragua*, referred to the judgment as a "new step in the international law of Indigenous Peoples"[857].

Since that judgment, the Court has been gradually broadening the scope of Indigenous Peoples' rights, underlining the value of culture and cultural identity. For example, in the case *Sawhoyamaxa Indigenous Community vs. Paraguay*[858], which concerned protecting territory through a collective right to private property and violation of right to life by depriving communities of traditional means of livelihood, the Court observed that given "the special meaning that these lands have for indigenous peoples, in general, and for the members of the Sawhoyamaxa Community, in particular, implies that the denial of those rights over land involves a detriment to values that are highly significant to the members of those communities, who are at risk of losing or suffering irreparable damage to their lives and identities, and to the cultural heritage of future generations"[859]. Accordingly, besides the payment of a compensation and the reimbursement of costs and expenses and the devolution of ancestral lands, the Court ordered Paraguay, to adopt the legislative, administrative and any other kind of necessary measures to create an efficient mechanism to claim the Indigenous ancestral lands to make effective their right to property, and that take into account their customary law, values, and customs; to establish a Community Fund for Development; to publish relevant abstracts of the judgment of the IACHR both in the Official Bulletin and in a national

[855] Ibidem, par. 167.
[856] Ibidem.
[857] See C.M. Grossman, S.J. Anaya, *The Case of Awas Tingni v. Nicaragua A Step in the International Law of Indigenous Peoples*, "Arizona Journal of International & Comparative Law" 2002, Issue 19, No. 1.
[858] Inter-American Court of Human Rights, *Sawhoyamaxa Indigenous Community vs. Paraguay*, Merits, Reparations, and Costs, Judgment, Series C, No. 146, 29 March 2006.
[859] Ibidem, par. 222.

newspaper and to broadcast by radio relevant abstracts of the judgment in a language chosen by the Sawhoyamaxa community[860]. Moreover, the Court in a very detailed manner, order the State to: provide Indigenous Peoples with drinking water, a sewerage system, medical assistance and sufficient medicines as to attend the needs of the members of the community; provide them with sufficient and appropriate food; teachers, stationery, and bilingual (Exnet and Spanish or Guarani) learning material for the community school; to create communication systems that allow the members of the community to be in contact with health institutions; and to create a registration program so that the community members can register and be issued their ID documents[861].

In the case *Saramaka People v. Suriname*[862], which concerned logging and mining concessions awarded by Suriname on territory possessed by the Saramaka People, the Court concluded that the international human rights law secures the right to the communal territory Indigenous Peoples have traditionally used and occupied, derived from their longstanding use and occupation of the land and resources necessary for their physical and cultural survival, and that the State has an obligation to adopt special measures to recognize, respect, protect and guarantee the communal property right of the members of the Saramaka community to said territory[863]. As the Court held that Suriname had violated the right to property, the right to juridical personality and the right to judicial protection, it determined several measures to guarantee non-repetition, namely it obliged the State to: delimit, demarcate and title the Saramaka lands, and until this is done, abstain from any acts that can affect their existence, value, use or enjoyment of their territory, unless the State obtains the free, prior and informed consent of the Saramaka people; affirm the legal personality and hence the collective juridical capacity of the Saramaka people, in accordance with their own customary laws, and traditions; and reform the State's legal framework to give effect to the property rights of indigenous peoples as well as their right to be consulted on matters that affect them (including the right to give or withhold their free prior and informed consent); and conduct environmental and social impact assessments prior to awarding concessions for any development or investment project within the Saramaka territory and implement adequate safeguards and mechanisms to minimize damages to the social, economic and cultural survival of the Saramaka

[860] G. Citroni, K. Quintana Osuna, *op. cit.*, p. 339.
[861] Ibidem.
[862] Inter-American Court of Human Rights, *Saramaka People v. Suriname*, Merits, Reparations, and Costs, Judgment, Series C., No. 172, 28 November 2007.
[863] Ibidem, par. 96.

People[864]. As measures of satisfaction, the Court ordered the State to translate its judgment into Dutch and to finance two radio broadcasts, in the Saramaka language, of the decision's key paragraphs. Moreover, in relation to material damages, as a considerable quantity of valuable timber was extracted from Saramaka territory without any consultation or compensation the Court ordered Suriname to pay seventy-five thousand United States dollars. In relation to immaterial damage, as the environmental damage and destruction of lands and resources traditionally used by the Saramaka People, according to the Court should be viewed with regards to the spiritual connection the Saramaka People have with their territory, and due to the suffering and distress that the members of the Saramaka people have endured as a result of the long and ongoing struggle for the legal recognition of their right to the territory they have traditionally used and occupied for centuries, which altogether constituted a denigration of their basic cultural and spiritual values, the Court ordered the State to allocate six hundred thousand United States Dollars to a community development fund to finance, among other things, educational, housing, agricultural, and health projects[865].

One of the latest landmark cases before the Inter-American Court of Human Right is the case *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*[866]. The judgment sets an important precedent, since for the first time the Court analyzed the rights to a healthy environment, adequate food, water, and cultural identity autonomously under Article 26 of the American Convention on Human Rights, which states that the "States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires"[867]. The case concerns a request for recognition of land ownership by over ninety Indigenous communities that make up the Association of Indigenous Communities Lhaka Honhat in the Argentine province of Salta[868], on the

[864] V. Jimenez, F. MacKay, L. M. Claps, *Leading case secures recognition of indigenous people's land rights*, Case study of the ILC Database of Good Practices, Rome 2017, p. 5.
[865] *Saramaka People v. Suriname, op. cit.,* par. 200-201.
[866] Inter-American Court of Human Rights, *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, Merits, Reparations, and Costs, Judgment, Series C, No. 400, 6 February 2020.
[867] American Convention on Human Rights, adopted on 22 November 1969, 1144 UNTS123.
[868] M.A. Tigre, *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, „American Journal of International Law" 2021, Issue 115, No. 4, p. 706.

border with Paraguay and Bolivia. Although the presence of Indigenous Peoples in that area dates back at least to 1629, the State never recognized the ancestral lands. Moreover, non-Indigenous settlers ("Creole") and the State itself had engaged in a series of activities within the territory that reduced forest resources and biodiversity and ultimately affected how the communities traditionally sought food and water. The communities were forced to modify their uses and customs because of the illegal activities managed by the Creole families, which severely affected their traditional way of life[869]. In this regard, the Court stated that:

> First, it should be made clear that, given the evolutive and dynamic nature of culture, the inherent cultural patterns of the indigenous peoples may change over time and based on their contact with other human groups. Evidently, this does not take away the indigenous nature of the respective peoples. In addition, this dynamic characteristic cannot, in itself, lead to denying the occurrence, when applicable, of real harm to cultural identity. In the circumstances of this case, the changes in the way of life of the communities, noted by both the State and the representatives, have been related to the interference in their territory by non-indigenous settlers and activities alien to their traditional customs. This interference, which was never agreed to by the communities, but occurred in a context of a violation of the free enjoyment of their ancestral territory, affected natural or environmental resources on this territory that had an impact on the indigenous communities traditional means of feeding themselves and on their access to water. In this context, the alterations to the indigenous way of life cannot be considered, as the State claims, as introduced by the communities themselves, as if they had been the result of a deliberate and voluntary decision. Consequently, there has been harm to cultural identity related to natural and food resources[870].

Therefore, the Court set out some important principles. First of all, the changes in cultural patterns and activities do not deprive Indigenous Peoples of their status, as culture is in itself dynamic. Secondly, the changes to the culture, although inevitable, should be undertaken by the Indigenous Peoples themselves, without the outside pressure. There is a vast difference between "adapting" their ways of life as a result of internal decisions and in accordance with Indigenous values, and the "adaptation" or rather "assimilation"

[869] A. M. Bernal, "Lhaka Honhat Association vs. Argentina: the human right to environment in the Inter-American Court", The Global Network for Human Rights and the Environment, April 10, 2020, https://gnhre.org/2020/04/lhaka-honhat-association-vs-argentina-the-human-right-to-environment-in-the-inter-american-court/#_ftn2 [last accessed: 25.06.2023].
[870] *Indigenous Communities of the Lhaka Honhat, op. cit.,* par. 284.

imposed from the outside. As one of the witnesses explained: "The main victim [of the above] is the aboriginal who, deprived of forest food resources cannot survive. Furthermore, he is unable to migrate because he has already reached a point where he can go no further, and he is not prepared to migrate to urban centers. […] His destiny is simply hunger, with its stages of malnutrition, diseases and death. In a degraded environment, there will be no animals or food plants, or fruit to exploit and sell […]. In that scenario, a culturally significant territory, a world vision and linguistic diversity are destroyed"[871]. This testimony further shows that for Indigenous Peoples, as observed in Chapter 3, migration is barely an option, and the abandonment of their traditional territories equals loss of their culture.

In relation to the right to a healthy environment, which could also be applied in the context of climate change, the Court noted that the principle of prevention of environmental harm forms part of customary international law and entails the State obligation to implement the necessary measures *ex ante* damage is caused to the environment, taking into account that, owing to its particularities, after the damage has occurred, it will frequently not be possible to restore the previous situation[872]. The Court specified that the rights to a healthy environment, to food, water, and participation in cultural life, require not only an obligation to respect but also a positive duty to guarantee environmental protection[873]. In the Court's view, although it is not possible to include a detailed list of all the measures that States could take to comply with this obligation, "the following are some measures that must be taken in relation to activities that could potentially cause harm: (i) regulate; (ii) supervise and monitor; (iii) require and approve environmental impact assessments; (iv) establish contingency plans, and (v) mitigate, when environmental damage has occurred"[874]. Therefore, the Court found that Argentina had violated Indigenous Peoples' "interrelated rights to take part in cultural life in relation to cultural identity, and to a healthy environment, adequate food, and water"[875].

As to restituting the rights to a healthy environment, food, water, and cultural identity, the Court ordered that the State must, within a maximum period of six years: delimit, demarcate and grant a single collective title without subdivisions or fragmentation for the Indigenous communities that are part of the Association of

[871] Ibidem, par. 285.
[872] Ibidem, par. 208.
[873] M.A. Tigre, *op. cit.*, p. 709.
[874] *Indigenous Communities of the Lhaka Honhat,*, *op. cit.*, par. 208.
[875] Ibidem, par. 289.

Aboriginal Lhaka Honhat Communities[876]; make active the transfer of the Creole population outside the territory, through specific mechanisms that promote, above all, the voluntary transfer of that population[877]; remove fences and livestock belonging to Creole settlers from indigenous lands[878]; to publish and disseminate the judgement[879]; and to adopt legislative and/or other measures to provide legal certainty for the right to property as part of existing federal regulations on the recognition of indigenous community property of all communities in Argentina[880]. Moreover, the Court ordered that the State present a study in six months that identifies the critical situations of lack of access to drinking water and food, and that it formulate an action plan in which it determines the actions it will take and the time in which they will be executed[881]. An additional study shall be prepared within a period of one year, providing a plan for the conservation of waters within the Indigenous territory, to ensure permanent access to water by all members of the community, and allow access to food in a nutritious and culturally adequate manner[882]. The Court ordered also setting up a Community Development Fund, which should be earmarked for actions addressed at the recovery of the Indigenous culture. Interestingly, and in a very detailed manner the Court stated that such Fund, while implementing programs relating to food security, should include "documentation, teaching and dissemination of the history of the traditions of the indigenous communities victims"[883]. Moreover, the Court ordered the State to allocate the extraordinary sum of two million United States dollars to the Fund, to be invested in accordance with the proposed objectives within four years of notification of this judgment[884].

According to Maria Antonina Tigre, the decision in Lhaka Honhat ultimately brings the recognition of the seriousness of the current ecological crisis to the Inter-American system and although the Court has not yet heard cases involving climate change, the case of Lhaka Honhat opens the door to these new categories of claims in the Inter-American system[885]. Especially, concerning that, as it will be explained in the next sections, its European counterpart is just about to decide on the admissibility of its first

[876] Ibidem, par. 326-327.
[877] Ibidem, par. 329.
[878] Ibidem, par. 330.
[879] Ibidem, par. 348-349.
[880] Ibidem, par. 354.
[881] Ibidem, par. 332.
[882] Ibidem, par. 333.
[883] Ibidem, par. 339.
[884] Ibidem, par. 342.
[885] M. A. Tigre, *op. cit.*, p. 712.

climate change related case.

In the Inter-American system, the Court itself is tasked with monitoring the States' compliance with the judgments and it periodically supervises compliance with the provisions relating to remedies set forth in its judgments[886]. The Court's monitoring authority derives from the Articles 33, 62.1, 62.3 and 65 of the American Convention on Human Rights and Article 30 of its Statute[887]. In the exercise of its supervising power, the Court can undertake country visits, as well as receive reports about the implementation of the remedies from the States and from the victims of human rights violations. As it has been mentioned, in the case *Sawhoyamaxa Indigenous Community vs. Paraguay* the Court awarded nine reparations.

In 2007, 2008, 2015, 2017 and 2019 the Court issued compliance monitoring orders in which it declared that the State fully complied with two reparation measures (i.e. to create communication systems that allow the members of the community to be in contact with health institutions and to create a registration program so that the community members can register and be issued their ID documents) and a partial compliance with three reparations (i.e. compensation for non-pecuniary damage; the reimbursement of costs and expenses; and the publication and the radio broadcast of the judgment)[888]. The Court also undertook two on-site visits to the Sawhoyamaxa Indigenous Community in 2017 and 2023. In the Court's order from 2023, with respect to the devolution of ancestral lands to the Community, the Court underlined that although the State has constructed and awarded the Community one-hundred forty houses, it does not equal with the formal devolution of the territory and the State has to award the Community the formal title of the ownership to the territory[889]. The Court declared that the State has made progress in the execution of the measures related to the supply of basic goods and services necessary for the subsistence of the members of the Sawhoyamaxa Community[890], however further information is needed. Therefore, the Court decided to keep open the monitoring procedure for compliance with the following reparation measures: a) physical and legal transfer of the traditional territory to the members of the Sawhoyamaxa Community; b)

[886] Inter-American Court of Human Rights, „Conozca sobre la Supervisión de Cumplimiento de Sentencia", https://www.corteidh.or.cr/conozca_la_supervision.cfm?lang=es [last accessed: 20.06.2023].
[887] Inter-American Court of Human Rights, *Sawhoyamaxa Indigenous Community vs. Paraguay*, Monitoring compliance with judgment, Order of the Inter-American Court of Human Rights, 21 March 2023, p. 2.
[888] Ibidem.
[889] Ibidem, p. 12.
[890] Ibidem, p. 19.

the creation of a community development fund; c) supply the basic goods and services necessary for the subsistence of the members of the Community while they are without land; d) adopt legislative, administrative and any other measures that are necessary to guarantee the effective enjoyment of the right to property of the Indigenous Peoples, and e) publish certain parts of the judgment in a newspaper with national circulation[891].

Although at the first glance it may seem that seventeen years is a lot when it comes to implementing the judgment, two issues need to be taken into consideration: first of all, the State has already paid the monetary compensation (which, as it will be explained in the next subchapter, is usually the only measure ordered by the European Court of Human Rights) and secondly, after seventeen years the Court is still pressuring the State to implement the judgment. Moreover, the Court is undertaking on-site visits, which is quite unusual, and on the one hand could be regarded as another element of pressuring the State, but also as an appreciation of the victims of human rights violations.

5.4.2. European Court of Human Rights

The European Court of Human Rights is the judicial organ of the Council of Europe, which primarily function is to examine applications from individuals, as well as inter-State applications. The Court was established based on the provisions set forth in the European Convention on Human Rights, signed in Rome on 4 November 1950.

The Convention enshrines such rights as for example the right to life or the prohibition of torture, or the right to respect for private and family life. A number of rights have been added to the initial text with the adoption of additional protocols, concerning in particular the abolition of the death penalty, the protection of property, the right to free elections or freedom of movement. From the Indigenous Peoples' standpoint, the most important provisions of the Convention are:

> Article 8 Right to respect for private and family life
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the

[891] Ibidem.

country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 13 Right to an effective remedy
Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14 Prohibition of discrimination
The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status[892].

Article 1 of the First Protocole to the Convention
Protection of property Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties[893].

As such, the Convention clearly states that a person whose rights set forth in the Convention were violated, should have an effective remedy before a national authority. The term "effective" means that the remedy must be sufficient and accessible, fulfilling the obligation of promptness and must enable the submission of a complaint about the alleged violation of the Convention[894]. Moreover, to be effective, a remedy must be capable of directly providing redress for the impugned situation. The means of submitting complaints will be regarded as "effective" if they could have prevented the alleged violation occurring or continuing or could have afforded the applicant appropriate redress for any violation that had already occurred. Thus a successful outcome of an effective

[892] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5 [hereinafter: the European Convention].
[893] Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, CETS 9.
[894] European Court of Human Rights, Guide on Article 13 of the European Convention on Human Rights. Right to an effective remedy, Strasbourg 2022, par. 37.

remedy could be, for example, depending on the case, the annulment, withdrawal or amendment of an act breaching the Convention, an investigation, reparation, or sanctions imposed on the person responsible for the act[895].

The Court in its judgment may also, stating that there had been a violation of a right set forth in the Convention, award reparations. According to Article 41 of the Convention, if the Court finds that there has been a violation of the Convention or the Protocols, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court may "afford just satisfaction to the injured party"[896]. The "just satisfaction", granted in the form of money, may be afforded under Article 41 in respect to three types of loss: pecuniary damage, non-pecuniary damage, and costs and expenses[897] and these awards fill the gap that occurs when national law does not allow for *restitution in integrum*[898].

However, the Court has another remedy in its toolkit, namely the so-called consequential orders, under Article 46 ECHR[899]. These measures aim at ending Convention violations, and the Court indicates them, rather rarely, to assist States in fulfilling their Article 46 compliance obligations. Once a judgment finding a violation is issued, the Court transmits the file to the Committee of Ministers of the Council of Europe, which confers with the responded State and the department responsible for the execution of judgments to decide how the judgment should be executed and how to prevent similar violations of the Convention in the future. According to its Rules,

> When supervising the execution of a judgment by the High Contracting Party concerned, pursuant to Article 46, paragraph 2, of the Convention, the Committee of Ministers shall examine:
> a. whether any just satisfaction awarded by the Court has been paid, including as the case may be, default interest; and
> b. if required, and taking into account the discretion of the High Contracting Party concerned to choose the means necessary to comply with the judgment, whether:
> i. individual measures have been taken to ensure that the violation has ceased and that the injured party is put, as far as possible, in the same situation as that party enjoyed

[895] European Court of Human Rights, *Guide on Article 13*, *op. cit.*, par. 57
[896] European Convention, Article 41.
[897] S. Altwicker-Hamori, T. Altwicker, A. Peters, *Measuring Violations of Human Rights: An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage Under the European Convention on Human Rights*, "Heidelberg Journal of International Law" 2016, Vol. 76, p. 6.
[898] H. Keller, C. Heri, R. Piskóty, *Something Ventured, Nothing Gained?—Remedies before the ECtHR and Their Potential for Climate Change Cases*, "Human Rights Law Review" 2022, Vol. 22, Issue 1, p. 2.
[899] Ibidem, p. 17.

prior to the violation of the Convention;

ii. general measures have been adopted, preventing new violations similar to that or those found or putting an end to continuing violations[900].

The individual measures may include, for example, striking out of an unjustified criminal conviction from the criminal records, the granting of a residence permit or the reopening of impugned domestic proceedings or restoration of contacts (subject to the best interest of the child) between children and parents unduly separated from them. The general measures, on the other hand, may include, legislative or regulatory amendments, changes of case law or administrative practice or publication of the Court's judgment in the language of the respondent state and its dissemination to the authorities concerned[901].

In case a responded State refuses to implement a judgment, the Committee of Ministers can apply multilateral peer-pressure or bilateral pressure from neighboring States[902]. Although, all these forms of pressure are only "soft measures", they nevertheless hold a certain persuasive power.

However, over the past few years the Court has developed a new procedure and as such, with a certain intensity of similar complaints, a pilot judgment may be issued, indicating general measures that the State should take. The procedure consists of examining one or more applications of this kind, whilst the examination of similar cases is adjourned. When the Court delivers its judgment in a pilot case, it calls on the Government concerned to bring the domestic legislation into line with the Convention and indicates the general measures to be taken[903].

The Court can hear complaints concerning various Arctic Indigenous Peoples: the Inuit from Danish Greenland, the Saami in Norway, Finland, Sweden. Until 2022 the Court could have also heard complaints from Indigenous Peoples in the Russian Federation, however on 16 March 2022, the Committee of Ministers adopted a decision by which the Russian Federation ceased to be a member of the Council of Europe, with regard to Russia having committed grave violations of the Council of

[900] Council of Europe, Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies, Appendix 4, Item 4.4, Rule 6, par 2.
[901] Ibidem.
[902] Europe's Human Rights Watchdog, Supervision of the Execution of Judgments, https://www.europewatchdog.info/en/court/supervision-execution-judgments/ [last accessed: 12.06.2023].
[903] European Court of Human Rights, Pilot Judgments, Press Release, March 2023, https://www.echr.coe.int/documents/fs_pilot_judgments_eng.pdf [12.06.2023].

Europe Statute, incompatible with the status of a Council of Europe member State[904]. As such, the analysis of the ECHR case law starts with the analysis of the cases submitted by the Indigenous Peoples of the Arctic Region.

5.4.2.1. Indigenous Peoples' claims

The European Court of Human Rights' jurisprudence concerning Indigenous Peoples is rather scarce, especially as compared to the case law of the Inter-American Court of Human Rights. Although the first complaint was lodged in 1983, since the very beginning Indigenous Peoples have had limited success in obtaining *in merito* judgments when appearing before the organs of the European Convention of Human Rights. Timo Koivurova groups the cases into three broad categories: the disputes in which modern economic activity has been permitted by State in an area where members of an Indigenous Peoples practice their traditional livelihoods; the disputes involving forced relocation of Indigenous Peoples; and the disputes in which the Indigenous complaints have primarily had to show or argue for their immemorial usage rights to traditional areas where the mainstream society has challenged these[905]. While agreeing with the Timo Koivurova's division, in my opinion the third group of cases could also be labelled as cultural rights, as all the cases involve violation of the right to traditional cultural activity of Indigenous Peoples (whether fishing, winter grazing or reindeer herding). As there is no such right enshrined in the European Convention, in most of the cases the applicants argued the violation of Article 1 of Protocol 1 to the Convention (protection of property). Moreover, to the above-mentioned categories, I add a fourth group, namely cases concerning State activity against Indigenous human rights defenders and NGOs.

The first category includes the first ever case brought before the European Commission on Human Rights[906], by the Saami (in those times referred to as "Lapps") in

[904] Council of Europe, „Exclusion of the Russian Federation from the Council of Europe and suspension of all relations with Belarus", 17 March 2022, https://www.coe.int/en/web/ccpe/-/the-russian-federation-is-excluded-from-the-council-of-europe [last accessed: 12.06.2023].

[905] See T. Koivurova, *Jurisprudence of the European Court of Human Rights regarding Indigenous Peoples: Retrospect and Prospect*, in: M. Fitzmaurice, P. Merkouris, *The Interpretation and Application of the European Convention of Human Rights. Legal and Practical Implications*, Nijhoff, Leiden-Boston 2013, pp. 217-257.

[906] The European Commission of Human Rights was a body of the Council of Europe, which role was to consider if a petition was admissible to the Court. The Commission became obsolete in 1998 with the restructuring of the European Court of Human Rights. See UNHCR, Council of Europe: European Commission on Human Rights, https://www.refworld.org/publisher/COECOMMHR.html [last accessed: 12.06.2023]

Norway, in 1983. In the case *G. & E. Against Norway*[907], the Saami alleged that the construction of the Alta Hydroelectric Power Station, authorized by the Norwegian government, violated their property rights because it would have resulted in the loss of traditional territories used for herding and fishing – activities that the Saami claimed were essential to their way of life[908]. Prior to initiation of the case, members of the Saami held political demonstrations before the Norwegian Parliament, and were forcibly removed by the police and imposed to pay a fine of 1000 Norwegian Crowns[909]. They stated that "very few people understand the language of the Lapps. They wanted to protest against the Norwegian Government taking away their land, but since nobody has listened to the Lapps for years, they state that they had no other choice but to demonstrate outside the Parliament (Stortinget) by putting up the tent in front of it"[910]. As such, in the applicants' view, it constituted a violation of the right to freedom of expression, guaranteed by Article 10 of the Convention. Moreover, the applicants submitted that they had no effective remedy under Norwegian law, in contravention of Article 13 of the Convention. Additionally they raised the violation of Article 14 of the Convention, stating that if "the basis of the Lapps' existence is taken away, it also means that they will have to be incorporated into a society which they do not understand, and which does not understand them. It is a society where, according to the applicants, they have met little understanding, but much discrimination"[911]. They maintained that they would not only lose the land, but even more importantly – their identity.

The Commission considered that the applicants' complaints must also be examined under Article 8 of the Convention, which guarantees the right to respect for private and family. The Commission stated that, under Article 8, a minority group is, in principle, entitled to claim the right to respect for the particular life style it may lead as being "private life", "family life" or "home". In respect of the project in the Altariver, the Commission noted that the applicants did not appear to have any "property rights" to this area in the traditional sense of that concept. The Commission agreed that the consequences, arising for the applicants from the construction of the hydroelectric plant, constitute an interference with their private life, as members of a minority, who move

[907] European Commission of Human Rights, *G. & E. v. Norway*, App. No. 9278/81, 35, Dec. & Rep. 30, 1983.
[908] Ibidem, pp. 31-32.
[909] Ibidem, p. 32.
[910] Ibidem, p. 34.
[911] Ibidem, pp. 34-35.

their herds and deer around over a considerable distance, as some part of the area would be covered by water and the environment would be affected[912]. Nevertheless, the Commission was of the view that "it is only a comparatively small area which will be lost for the applicants"[913], as compared to the vast areas in northern Norway which are used for reindeer breeding and fishing. Ultimately, the Commission decided that the Altariver project was necessary from the economic well-being of the country and that this part of the applications was manifestly ill-founded, within the meaning of Article 27.2 of the Convention.

Concerning the protection of property and the discrimination, the Commission denied the complaint as lacking sufficient evidence. The Commission also found that the arrest and the subsequent conviction were lawful under Norwegian law, and that they were based on the aim of maintaining public order, and that the applicants had an effective remedy within the meaning of Article 13 of the Convention. As such, the Commission declared the application inadmissible.

The second group of cases includes the dispute involving forced relocation of Indigenous Peoples, namely the case – *Hingitaq 53 and others v. Denmark*[914]. In that case, in the summer of 1953 members of an Inuit tribe of Greenland had been displaced and re-settled a few kilometers away from their native village in the district of Thulé because of an agreement between the United Sates and Denmark to build an airbase. A compensation program was adopted in 1985 by the Danish government, whereby the Thule tribe and the individual members of the relevant Inuit community were given monetary and material damages[915]. Interestingly, the government's damages determination took into consideration the fact that the tribe traditionally lived not only by fishing, but also by hunting narwhals, seals, and foxes[916].

The Inuit alleged that as a result of the relocation they suffered violations of following rights: they been deprived of their homeland and hunting territories and denied the opportunity to use, peacefully enjoy, develop and control their land (Article 1 of Protocol No. 1 to the Convention); the right to respect for private and family life (Article 8 of the Convention) as their family houses in Uummannaq had been burned down and the old church had been removed without any prior consultation; the right to a fair trial

[912] Ibidem, p. 36.
[913] Ibidem.
[914] European Court of Human Rights, HINGITAQ 53 v. Denmark, App. No. 18584/04, 2006.
[915] Ibidem, pp. 4-6.
[916] Ibidem, p. 5.

(Article 6 of the Convention); their freedom of movement (Article 2 of Protocol No. 4 to the Convention); the right to an effective remedy (Article 13 of the Convention), as for more than a decade after the beginning of the interferences, the Inuit had been barred from access to judicial and political means of protecting their rights under the Convention. Further on, they raised the violation of Article 14 of the Convention (prohibition of discrimination); Article 17 of the Convention (prohibition of abuse of rights) and Article 2 of Protocol No. 1 (right to education); and Article 3 of Protocol No. 1 to the Convention (right to free elections).

Regarding the alleged violation of the Article 1 of Protocol No. 1 to the Convention, the Court stated that it fell outside the Court's jurisdiction *ratione temporis* because the facts in dispute had taken place prior to the coming into force in Denmark of the European Convention (September 3, 1953) and Protocol 1 to the Convention (May 18, 1954). With regard to other claims, the Court declared that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols and again declared the application inadmissible.

The third group of the cases, namely the ones which concern the traditional way of life, is the largest group of cases brought by Indigenous Peoples, as it includes following cases: *O.B. and Others against Norway*[917], *Könkäma and 38 Other Saami Villages against Sweden*[918], *Halvar From against Sweden*[919], *Johtti Sapmelaccat RY and Others against Finland* [920], *The Muonio Saami Village against Sweden*[921] and *Handölsdalen Sami Village v. Sweden*[922].

The *O.B. and Others against Norway* dispute arose from the arrival of non-Saami peoples to the traditional grazing territories of the Skolte Saami. The Skolte Saami, a distinct geographic group within the Saami communities of Norway, follow a traditional way of life that includes fishing, hunting, and reindeer herding[923]. The Skolte Saami were concerned that the new settlers, having acquired property rights, would interfere with their use of traditional reindeer grazing lands, and subsequently filed a request with the local

[917] European Commission on Human Rights, *O.B. & Others v. Norway*, App. No. 15997/90, , Dec. & Rep. 1993.
[918] European Commission on Human Rights, *Könkäma & 38 Other Saami Villages v. Sweden*, App. No. 27033/95, H.R. Dec. & Rep., 1996.
[919] European Commission on Human Rights, *Halvar From v. Sweden*, App. No. 34776/97, Dec. & Rep.
[920] European Court of Human Rights, *Johtti Sapmelaccat RY v. Finland*, App. No. 42969/98, 2005.
[921] European Court of Human Rights, *The Muonio Saami Village v. Sweden*, App. No. 28222/95, 2000.
[922] European Court of Human Rights, *Handölsdalen Sami Village v. Sweden*, App. No. 39013/04, 49 2010.
[923] O.B. & Others v. Norway, *op. cit.*, pp. 1-2.

administration to grant them "an exclusive right to reindeer husbandry on the basis of immemorial usage"[924]. The local administration instead registered the new inhabitants and then rejected the Saami's counterclaim, stating that it was a legal dispute belonging to the judiciary. Following a lengthy litigation process, the Saami lost their case before both the District Court and on appeal to the High Court; the Supreme Court of Norway did not grant leave to the appeal[925].

Before the European Commission on Human Rights, the Saami argued violation of Article 6 in conjunction with Article 14 of the Convention. They submitted that they "are discriminated [against] in relation to other Laps and to the Norwegian population both because of their association with a national minority and because of their special traditional form of property"[926]. Under Article 1 of Protocol No. 1 to the Convention the applicants complained that their right to keep reindeer in the Neiden district is not respected by the Norwegian authorities and that others have the right to keep reindeer in the area where they have had an exclusive right over centuries[927].

The Commission rejected as unsubstantiated the Saami's claims contesting the fairness of the home trial and considered the four year legal process to be a reasonable length[928]. As far as the violation of the right to property was concerned, the Commission noted that the Saami "indeed have a right — although not an exclusive one — to reindeer husbandry and it does not appear that this right has been interfered with or controlled in a way not acceptable under Article 1 para. 2 of Protocol No. 1 (P1-1-2) the Convention"[929]. The parts of the complaint based on Articles 6 and 14 were also rejected[930]. As such, although the Commission recognized that the Saami have some rights to property to conduct their traditional way of life, it decided not to grant the protection against the alleged violations.

Similarly, in the case *Könkäma and 38 Other Saami Villages against Sweden* the Commission stated that the hunting and fishing rights claimed by the Saami "can be regarded as possessions within the meaning of Article 1 of Protocol No. 1"[931]. In the case, the Saami villages challenged the Swedish authority's granting of hunting and fishing

[924] Ibidem, p. 2.
[925] Ibidem, p. 4-7.
[926] Ibidem, p. 12.
[927] Ibidem, p. 8.
[928] Ibidem, 10-11.
[929] Ibidem, p. 11.
[930] Ibidem, p. 12.
[931] *Könkäma and 38 Other Saami Villages against Sweden, op. cit.,* p. 7.

licenses to the entire population on reindeer grazing lands where the Saami claimed to hold exclusive hunting and fishing rights. These rights, they argued, while not recognized under Swedish law, flowed from their ancestral use of these lands. In the view of the Saami, authorizing hunting and fishing on the claimed lands constituted a violation of their rights under Article 1 of Protocol No. 1 to the Convention. Importantly, the Commission recognized that the applicant Saami villages are to be regarded as non-governmental organizations within the meaning of Article 25 of the Convention[932]. However, as the applicants had failed to exhaust all domestic remedies and to file the application before the Commission within the prescribed six months following the final national decision, the Commission found the application inadmissible[933].

Contrary to all the previous cases, in *Halvar From against Sweden* it was a non-Saami Swedish citizen, who sought protection of his land from hunting by the Saami, whose State-defined territorial boundaries overlapped with his own land. The County Administrative Board registered elk-hunting area for the Saami village of Ran. As the applicant also held a license to hunt elk on his property, the result was a double registration of hunting licenses[934]. The applicant complained that the registration of his property as part of the elk-hunting area of the relevant Saami village violated his property rights, including his right of ownership and his hunting right[935].

It was one of the very few instances that the Commission was inclined to grant protection to the Indigenous Peoples and ultimately held in the Sami's favor. As noted by the Commission, the Saami's right to hunt, which the Commission analogized to their right to herd reindeer, in the areas of northern Sweden where the applicant's property was located, was based on "custom from time immemorial"[936] and therefore trumped the applicant's claims. Moreover, the Commission found it to be "in the general interest that the special culture and way of life of the Sami be respected"[937] and that "reindeer herding and hunting are important parts of [Sami] culture and way of life"[938]. Thus, the Commission clearly recognized the relationship between traditional husbandry and Sami cultural identity.

In the next case, *Johtti Sapmelaccat RY and Others against Finland*, the Court did

[932] Ibidem.
[933] Ibidem, p. 8.
[934] *Halvar FROM v. Sweden, op. cit.*, p. 1.
[935] Ibidem, p. 2.
[936] Ibidem.
[937] Ibidem, p. 3
[938] Ibidem.

not grant one of the applicants status of a victim – the Johtti Sapmelaccat r.y., an association promoting Saami culture – stating that it was not responsible for fishing within its respective area[939]. However, contrary information can be found in the section "A. The circumstances of the case", where it is noted that "the definition of culture includes their traditional sources of livelihood, that is to say reindeer herding, fishing and hunting"[940]. Not representing its members in such matters, in for example administrative proceedings, should not exclude fishing from the scope of cultural activities of the organization.

The applicants complained that the 1997 amendment of the Fishing Act violated their right to the peaceful enjoyment of their possessions as the property rights of Saami who were not landowners were not taken into account in the relevant legislation even though their right to fish had earlier been clearly established by the Finnish Committee for Constitutional Law. Moreover, the Fishing Act had extended the fishing rights of the local people, weakening the legal position of the landless Saami with the result that their fishing rights no longer enjoyed the constitutional protection of property. Also fees charged for a fishing license in the area had changed from being on a household basis to a personal basis, adding to the applicants' fishing expenses[941].

Additionally to the violation of Article 1 of Protocol 1 to the Convention, the applicants claimed violation of Article 6, Article 8, Article 13, and Article 14 read alone or in conjunction with Articles 6 and 8 of the Convention. However, the Court found the complaint manifestly ill-founded and declared inadmissible.

Although the next case, *the Muonio Saami Village against Sweden*, concerning non-Saami Peoples being granted a license for reindeer herding in a Saami village, while at the same time, the license was denied for five Saami individuals living in the traditional territory, was found admissible, the Court again did not have a chance to comment on the merits of the case, as the parties reached a friendly settlement and the case was struck out of the list[942].

The last case in this category is the case *Handölsdalen Sami Village v. Sweden*, which is the first case brought by Indigenous Peoples before the ECHR that resulted in a judgment, moreover in favor of the Indigenous Peoples. However, the Court ruled only

[939] *Johtti Sapmelaccat RY and Others against Finland, op. cit.,* p. 12.
[940] Ibidem, p. 2.
[941] Ibidem, p. 11.
[942] *The Muonio Saami Village, op. cit.,* par. 12-14.

regarding the violation of Article 6 of the Convention, while declaring inadmissible the complaint under Article 1 of Additional Protocol No. 1 of the Convention[943].

In the case *Handölsdalen Sami Village v. Sweden*, it was private landowners that first took Indigenous Peoples to a domestic court. The landowners wanted to impose local geographical limits on reindeer herding and a declaratory judgement from the national court that the Saami villages had no right to graze reindeer on the their land without a valid contract between the two parties. The villages, instead, claimed that they had the right to winter grazing within their respective areas based on prescription from time immemorial (*urminnes hävd*); the provisions of the applicable reindeer husbandry act; custom; and public international law in the form of Article 27 of the ICCPR[944]. The Saami requested the Court to declare that the limitations regarding the Saami villages' rights to winter grazing following from the domestic procedures did not meet the requirement in Article 1 Protocol No. 1 to the European Convention and that the limitations were not proportionate to the aim sought. The Saami applicants complained on the basis of Article 6 of the Convention, emphasizing the high procedural costs of the legal proceedings, the duty to pay damages in case of a procedural loss, and the fact that only individuals were entitled to legal aid while a legal entity, such as a Sami village, was not[945]. The Court issued its decision on the admissibility of the application on 17 February 2009, holding it admissible only with regard to the claim of lack of access to court, given the high costs and the unreasonable length of the proceedings[946]. In this respect, the Court stated that the overall duration – thirteen years and seven months – indicated that the proceedings were too lengthy. For this reason, the Court held that although there had been no violation of Article 6 § 1 of the Convention in regard to effective access to court, there had been a violation of Article 6 § 1 of the Convention in regard to the length of the proceedings. As to the reparation of the violation, the Court stated that Sweden was to pay the applicants: twenty five thousand euros in respect of pecuniary damage; fourteen thousand euros in respect of non-pecuniary damage; and fifteen thousand euros in respect of costs and expenses[947].

[943] See D. Zimmermann, „Sami Land Rights – The ECtHR Judgment in the Case of Handölsdalen Sami Village and Others v. Sweden", International Law Observer, June 21, 2010, https://internationallawobserver.eu/sami-land-rights-the-ecthr-judgment-in-the-case-of-handolsdalen-sami-village-and-others-v-sweden [last accessed 13.06.2023].
[944] T. Koivurova, *op. cit.*, p.
[945] *Handölsdalen Sami Village v. Sweden, op. cit.*, par. 49.
[946] D. Zimmermann, *op. cit.*
[947] Ibidem, par. 74.

However, probably the most important part of the judgement is the dissenting opinion of the Judge Ziemele, who seemed to concern herself with the specific situation of Indigenous Peoples. She referred to the developments in international law, and particularly Articles 26 and 27 of the UNDRIP[948]. She argued that the Court's approach "excluded considerations relating to the specific context of the situation and rights of indigenous peoples"[949]. She also pointed out that according to Swedish law, Saami villages are not entitled to legal aid and that "it is the Kingdom of Sweden that has imposed this model of Sami villages, without considering its consequences, for example with regard to legal-aid issues"[950], which is in line with Indigenous Peoples' calls for decolonization. She also recalled the concluding observations of the CERD regarding the periodic reports of Sweden, in which the Committee stated that it was "concerned about *de facto* discrimination against the Sami in legal disputes, as the burden of proof for land ownership rests exclusively with the Sami, and about the lack of legal aid provided to Sami villages as litigants"[951]. In her opinion, the Handölsdalen Sami Village case should have been seen as a case of ineffective access to court, especially as one party appeared to have been "obviously disadvantaged"[952] and the entire approach to land disputes should be revised so as to take account of the rights and particular circumstances of Indigenous Peoples.

The fourth group – the cases concerning State activity against Indigenous human rights defenders and NGOs – includes the case *Ecodefence and Others v. Russia*[953] from 2022. The cases concerned restrictions on the freedom of expression and association of Russian NGOs, which have been categorized as "foreign agents" funded by "foreign sources" and exercising "political activity"[954]. Seventy-three NGOs brought their cases before the ECHR on the grounds that the Foreign Agents Act violated their freedoms of expression and association, protected by Articles 10 and 11 of the Convention. The Court decided to hear all the matters jointly.

One of the organizations was the Indigenous Peoples' Centre, which mission was to assist the Indigenous Peoples of the North in Russia. According to the Russian

[948] Ibidem, Partly Dissenting Opinion of Judge Ziemele, par. 2-3.
[949] Ibidem, par. 5.
[950] Ibidem, par. 6.
[951] CERD, Consideration of Reports Submitted by States Parties under Article of the Convention, 21 August 2008 UN Doc. CERD/C/SWE/CO/18, par. 20.
[952] Partly Dissenting Opinion of Judge Ziemele, *op. cit.*, p. 22, 8.
[953] European Court of Human Rights, *Ecodefence and Others v. Russia,* App. No. 9988/13, 2022.
[954] Ibidem, par. 1.

authorities, the "political activities" of this NGO consisted of: supporting democratic initiatives of the Indigenous Peoples of the North, Siberia and the Far East of Russia, and organizing discussions on mining operations on Indigenous Peoples' land; advising Indigenous Peoples on how to combat the negative impact of climate change; organizing discussions, seminars and congresses; publishing a magazine on Indigenous Peoples in the Arctic; and preparing recommendations for Russian authorities and the international community[955]. In 2015 the organization was included on the Ministry of Justice's register of foreign agents and in March 2020 it was liquidated[956].

In its reasoning, the Court stressed that "burdensome requirements which have the effect of inhibiting an organisation's activities may, in themselves, amount to an interference with the right to freedom of association"[957]. The Court found that the organizations had been "directly affected by a combination of inspections, new registration requirements, sanctions and restrictions on sources of funding and the nature of the activities which were imposed by the Foreign Agents Act"[958] and that there had been an interference with their rights under Article 11, read with Article 10. The Court stated that the cumulative effect of the restrictions stipulated in the Foreign Agents Act placed a significant "chilling effect" on the choice to seek or accept any amount of foreign funding[959]. It held that the Foreign Agents Act provisions were not necessary in a democratic society and as such violated Article 11 of the Convention, read with Article 10. Regarding the reparations, the Court awarded the applicant four thousand two hundred and ninety euros in respect of pecuniary damage; ten thousand euros in respect of non-pecuniary damage, and one thousand and fifty euros in respect of costs and expenses, which is exactly the amount claimed by the Indigenous Peoples' Centre.

As to the execution of the judgments, in the case *Handölsdalen Sami Village v. Sweden,* the responded State paid the applicants awarded amount in terms of just satisfaction. As to the general measures, the Swedish Government claimed to publish and disseminate the judgment. Moreover, the report containing a summary of the judgment in Swedish, with copies of the judgment as well as the decision attached, has been sent to relevant domestic courts and authorities including the courts directly involved in the case. The judgment in English and a summary of it in Swedish has also been published on the

[955] Ibidem, par. 416.
[956] Ibidem, par. 417.
[957] Ibidem, par. 83.
[958] Ibidem, par. 87.
[959] Ibidem, par. 186.

Swedish National Courts Administration's website and the Government's human rights website[960]. Interestingly, the judgment has not been translated into the Saami language.

In relation to the status of execution of the judgment in the case *Ecodefence and Others v. Russia*, the Committee of Ministers still awaits the action report to be submitted by the Government[961], which, considering the exclusion of Russia from the Council of Europe, is problematic.

The above analysis of the cases concerning Indigenous Peoples' claims submitted to the ECHR, shows that so far the Court has not offered them an effective protection. In the two cases that Indigenous Peoples succeeded in obtaining an *in merito* judgment, the Court did not take into account their specific situation and their traditional way of life. It is disappointing that in any of the cases the Court made a reference to the Council of Europe Framework Convention for the Protection of National Minorities[962], which *inter alia* obliges the Parties in Article 5 to "undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage"[963].

Also the remedies at the disposal of the Court are quite limited, especially as compared to the Inter-American Court of Human Rights. However, as it will be shown in the next subchapter, the Court's existing case-law offers some potential of accommodating Indigenous Peoples' future claims.

5.4.2.2. Cultural rights and vulnerable groups

As demonstrated in the previous subchapter, Indigenous Peoples were not successful in obtaining *in merito* judgements before the ECHR. Therefore, the following paragraphs indicate that what should have been done in the Indigenous Peoples' cases, has been done concerning other minorities, and particularly Roma and Traveller people.

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[960] Secretariat of the Committee of Ministers, Communication from Sweden concerning the case Handölsdalen Sami village and others against Sweden, 27 May 2013, https://hudoc.exec.coe.int/ENG#{%22EXECIdentifier%22:[%22DH-DD(2013)589E%22]}[last accessed: 13.06.2023].

[961] Department for the Execution of Judgments of the ECHR, *Ecodefence and Others v. Russia* https://hudoc.exec.coe.int/eng#{%22fulltext%22:[%22ecodefence%22],%22EXECDocumentTypeCollection%22:[%22CEC%22],%22EXECIdentifier%22:[%22004-61690%22]} [last accessed: 13.06.2023].

[962] Council of Europe, *Framework Convention for the Protection of National Minorities*, 1 February 1995, ETS 157.

[963] Ibidem, Article 5.

The subchapter begins with a brief overview of the ECHR's case-law concerning cultural rights, to later introduce the concept of vulnerable groups, and establish whether such concept could be employed in the Indigenous Peoples' cases.

Although neither the Convention, nor its counterpart – European Social Charter[964] – explicitly recognize the right to culture or the right to take part in cultural life[965], the Court's case-law provides interesting examples of how some rights falling under the notion of cultural rights in a broad sense can be protected under core civil rights[966], such as the right to respect for private and family life (Article 8 of the Convention), freedom of thought, conscience and religion (Article 9), the right to freedom of expression (Article 10) and the right to education (Article 2 of Protocol No. 1). Cultural rights in the Court's case-law may be grouped into areas such as artistic expression, linguistic rights, historical truth and academic freedom, education, access to culture (including access to cultural heritage), and cultural identity[967] or "a way of life".

Under the issue of artistic expression the Court dealt with cases concerning for example visual arts, as in the case *Müller and Others v. Switzerland*[968] or *Wingrove v. United Kingdom*[969]. In both of the cases, however, the Court decided that the neither the conviction of the artist, nor a complete ban on a movie considered as blasphemous did infringe Article 10 and as such the national authorities did not overstep their margin of appreciation. In the case *Vereinigung Bildender Künstler v. Austria*[970], which concerned an injunction against the exhibition of a painting considered to be indecent, the Court expressed itself in favor of the satire and its social role: "the Court finds that such portrayal amounted to a caricature of the persons concerned using satirical elements. It notes that satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's right to such expression must be examined with particular care"[971] and held that there had been a violation of Article 10 of the

[964] Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163.
[965] Which corroborates the argument from Chapter 2 stating that cultural rights are a neglected category of human rights.
[966] European Court of Human Rights, Cultural rights in the case-law of the European Court of Human Rights, Strasbourg 2017, p. 3.
[967] A. Jakubowski, *Cultural Heritage and the Collective Dimension of Cultural Rights in the Jurisprudence of the European Court of Human Rights,* in: A. Jakubowski (ed.), Cultural Rights As Collective Rights : An International Law Perspective, BRILL 2016, p. 159.
[968] European Court of Human Rights, *Müller and Others v. Switzerland* , App. No. 10737/84, 1988.
[969] European Court of Human Rights, *Wingrove v. United Kingdom*, App. No. 17419/90, 1996.
[970] European Court of Human Rights, *Vereinigung Bildender Künstler v. Austria,* App. No. 68354/01, 2007.
[971] Ibidem, par. 33

Convention.

The Court dealt with linguistic rights *inter alia* in the case *Güzel Erdagöz v. Turkey*[972], *Catan and Others v. Moldova and Russia*[973], or *Mehmet Nuri Özen and Others v. Turkey*[974], which concerned the right of prisoners to freedom of correspondence in their own language. However, the Court has had a rather restrictive approach in this field, granting a wide margin of appreciation to the Contracting States in view of the existence of a multitude of factors of an historical, linguistic, religious and cultural nature in each country and the absence of a European common denominator[975].

According to the Court, the freedom of expression includes also the right to seek historical truth and academic freedom. In the case *Kenedi v. Hungary*[976] this two rights are strongly interrelated, as the case involved the refusal to grant a historian access to documents concerning the communist era in Hungary on the functioning of the Hungarian State Security Service. In this case, the Court emphasized that access to original documentary sources for legitimate historical research is an essential element of the exercise of the right to freedom of expression.

The only cultural right *expressis verbis* recognized in the Convention and its Protocols is the right to education. In the considerable amount of cases the Court was asked to deal with balancing the religious beliefs and the right to education, as for example in *Hasan and Eylem Zengin v. Turkey*[977] or *Folgerø and Others v. Norway*[978]. In these cases the Court was of the view that the State, in fulfilling the functions assumed by it in regard to education and teaching, must ensure that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. If this is not the case, the State authorities are under an obligation to grant children full exemption from the lessons in accordance with the parents' religious or philosophical convictions[979].

The next group includes cases dealing with access to culture. The access to culture can be understood in a traditional way, as an access to tangible heritage, but can include also access through Internet and television. The latter is exemplified by the case *Ahmet*

[972] European Court of Human Rights, *Güzel Erdagöz v. Turkey*,*App.* No. 37483/02, 2008.
[973] European Court of Human Rights, *Catan and Others v. Moldova and Russia, App. No, 43370/04, 8252/05, and 18454/06*, 2012.
[974] European Court of Human Rights, *Mehmet Nuri Özen and Others v. Turkey,* App. No. 15672/08, 2011.
[975] European Court of Human Rights, *Cultural rights…, op. cit*., p. 23.
[976] European Court of Human Rights, *Kenedi v. Hungary,* App. No. 31475/05, 2009.
[977] European Court of Human Rights, *Hasan and Eylem Zengin v. Turkey,* App. No. 1448/04, 2007.
[978] European Court of Human Rights, *Folgerø and Others v. Norway*, App. No. 15472/02, 2007.
[979] European Court of Human Rights, *Cultural rights… op. cit.,* p. 30.

Yıldırım v. Turkey[980], in which the applicant alleged violation of his right to freedom of expression as the authorities had blocked access to certain websites. The Court underlined that such a restriction on Internet access had rendered large amounts of information inaccessible, thus substantially restricting the rights of internet users and had a significant collateral effect[981].

A vast majority of cases on the access to heritage was dealt under the Article 1 of Protocol 1. These cases have been further labelled by Andrzej Jakubowski, having regard to their collective character, as dealing with "the right to freely dispose of one's property and art market restrictions"[982], "the right to the use of property and other restrictions"[983], and "the right to property and expropriation"[984]. However, the Court has also discussed the cases concerning access to cultural heritage under the right to respect for private and family life. One such example is the case *Sargsyan v. Azerbaijan*[985]. The applicant complained that he had been denied the right to access his property and home located in a village near Nagorno-Karabakh, a disputed area between Armenia and Azerbaijan. In considering whether Article 8 was applicable, the Court explained that the applicant "developed most of his social ties there. Consequently, his inability to return to the village also affects his 'private life'"[986] and that "in the circumstances of the case, the applicant's cultural and religious attachment to his late relatives' graves in Gulistan may also fall within the notion of 'private and family life'"[987]. It found a "continuing breach of the applicant's rights under Article 8 of the Convention", because of "the impossibility for the applicant to have access to his home and to his relatives' graves in Gulistan without the Government taking any measures in order to address his rights or to provide him at least with compensation for the loss of their enjoyment, placed and continues to place a disproportionate burden on him"[988]. Interestingly, in the case *Hingitaq 53 and others v. Denmark,* discussed in the previous subchapter, the Inuit also claimed that leaving behind *inter alia* their graveyard during the forced relocation, augmented to the violation of Article 8 of the Convention. Regrettably, in their case, the Court did not consider the merits of the case and declared it inadmissible.

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[980] European Court of Human Rights, *Ahmet Yıldırım v. Turkey,* App. No. 3111/10, 2012.
[981] Ibidem, par. 66
[982] See A. Jakubowski, *Cultural Heritage and the Collective Dimension…, op. cit.,* pp. 164-168.
[983] See Ibidem, pp. 168-172.
[984] See Ibidem, pp. 172-177.
[985] European Court of Human Rights, *Sargsyan v. Azerbaijan,* App. No. 40167/06, 2015.
[986] Ibidem, par. 257.
[987] Ibidem.
[988] Ibidem, par. 260-261.

The last group of cases under the scope of cultural rights, being at the same time the most important in the context of Indigenous Peoples, is the group of cases relating to cultural identity or the "way of life". This group consist mostly of the cases concerning Roma and Traveller people. The idea of a "Gypsy way of life" has evolved through a number of cases – mostly against the United Kingdom and France – dealing with evictions or threats of eviction of nomadic and sedentary Roma and Travellers who lived in caravans stationed in contravention of land-use regulations[989]. In the case *Chapman v. the United Kingdom*[990], the applicant alleged a violation of her right to private life as she was refused planning permission to station caravans on her land, and in respect of enforcement measures implemented as a consequence of the occupation of her land. The applicant's argument was that the UK government prevented her from pursuing a lifestyle that she viewed as central to her cultural tradition: living and travelling in a caravan. Although the Court ruled in favor of the State, it noted that "the applicant's occupation of her caravan is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling"[991] and that Roma are to be considered a "minority with a traditional lifestyle different from that of the majority"[992]. Although virtually the same could be observed about Indigenous Peoples, their claims have never been viewed from this standpoint by the Court. The distinctive cultural identity of Roma led the Court to another important conclusion. In the case *Chapman v. the United Kingdom,* the Court, although already indicating this approach in *Buckley v. the United Kingdom*, used the concept of vulnerability in relation to the Roma's situation: "the vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle"[993]. Later on, this approach resulted in the concept of vulnerable groups in the case-law of the ECHR.

In the years following Chapman, the Court has broadened and developed the concept's content and scope. The case *D.H. and others v. Czech Republic*[994] concerned discrimination of Roma children in the education system – when the case was brought, Roma children in the Czech Republic were twenty-seven times more likely to be placed

[989] V. David, *Cultural Difference and Economic Disadvantage in Regional Human Rights Courts: An Integrated View*, Intersentia 2020, p. 95.
[990] European Court of Human Rights, *Chapman v. the United Kingdom,* App. No. 27238/95, 2001.
[991] Ibidem, par. 73.
[992] Ibidem, par. 96
[993] Ibidem, par. 96.
[994] European Court of Human Rights, *D.H. and others v. Czech Republic*, App. No. 57325/00, 2007.

in "special schools" for the mentally disabled than non-Roma children[995]. While referring to the Chapman's case, the Court stated that "that there could be said to be an emerging international consensus among the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community[996]". Moreover, the Court stated that "as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority". Again, the same could have been said about Indigenous Peoples, and especially the Inuit in the case *Hingitaq 53 and others v. Denmark,* which particularly concerned the "uprooting" of the Inuit.

In other cases concerning non-dominant groups, the Court has similarly grounded its vulnerability assessment on historical prejudice, as for example in the case *Alajos Kiss v. Hungary*[997], which dealt with the blanket disenfranchisement of people with mental disabilities in Hungary[998]. The Court has also extended the list of "vulnerable groups" to include people living with HIV (*Kiyutin v. Russia*[999]) and asylum seekers (*M.S.S. v. Belgium and Greece*[1000]). According to Lourdes Peroni and Alexandra Timmer, the concept of vulnerable groups, as used by the Court, has three characteristics: it is relational, because it views the vulnerability of certain groups as shaped by social, historical, and institutional forces; it is particular, as the Court's vulnerable subject is a group member whose vulnerability is shaped by specific group-based experiences; and it is harm-based, and especially the harm of "misrecognition" as indicated by the references to the history of prejudices and stigmatization in the judgements of the Court[1001]. Although the concept of vulnerable groups may poses inherent risks, as it may reinforce the vulnerability of certain groups[1002], it allows to view the alleged violation of applicant's rights in a more systemic manner and in relation to other social factors, such as for example the domination of the other social groups. According to Lourdes Peroni and Alexandra Timmer, recognizing Roma as vulnerable means that

[995] Ibidem, par. 18.
[996] Ibidem, par. 181.
[997] European Court of Human Rights, *Alajos Kiss v. Hungary,* App. No. 38832/06, 2010.
[998] L. Peroni, A. Timmer, *Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law,* "*International Journal of Constitutional Law*" 2013, Vol. 11, Issue 4, p. 1066.
[999] European Court of Human Rights, *Kiyutin v. Russia*, App. No. 2700/10, 2011.
[1000] European Court of Human Rights, *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 2011.
[1001] L. Peroni, A. Timmer, *op. cit.*, pp. 1064-1065.
[1002] Ibidem, p. 1070.

States are to a certain extent under the procedural obligation to facilitate their lifestyle – "it requires that state authorities show they have taken into account the Roma's cultural situation both in policy-making and judicial interpretation"[1003].

It is important to underline that "vulnerability does not fall from the sky"[1004] and is socially constructed. As such, the focus should be placed on the various circumstances that render certain groups vulnerable. As it has been mentioned throughout this thesis, there is no doubt that Indigenous Peoples of the Artic region are vulnerable and the climate change further intensifies their vulnerability[1005]. According to Julinda Beqiraj the vulnerability of Indigenous Peoples is reflected in the lack of legal, social or political mechanism guaranteeing full compliance with their cultural rights[1006]. The lack of effective remedies in case of violation of their rights further, exemplified by the almost complete lack of *in merito* judgements before the ECHR, exacerbates their vulnerability. This, coupled with climate change, being now the most pervasive source of vulnerability, leaves Indigenous Peoples in a precarious situation. Therefore, again, it is disappointing that the European Court did not include in its reasoning the broader social and cultural context of Indigenous Peoples' lives and did not regard them as a "vulnerable group".

5.4.2.3. Climate change before European Court of Human Rights

Although the European Convention does not include right to a healthy environment *per se*, one of the central features of the European Court of Human Rights' case law is considering the Convention as a "living instrument"[1007], which entails its interpretation according to present-day conditions. As such the Court has been called upon to develop its case-law in environmental matters on account of the fact that the exercise of certain Convention rights may be undermined by the existence of harm to the environment and exposure to environmental risks. Recently, the Court faced another challenge, namely the first climate change applications. As in the time of the writing the

[1003] Ibidem, p. 1077.
[1004] See J. Ribot, *op. cit.*
[1005]See for example C. Furgal, J. Seguin, *Climate Change, Health, and Vulnerability in Canadian Northern Aboriginal Communities*, "Environmental Health Perspectives" 2006, Vol. 114, No. 12, pp. 1964-1970.
[1006] J. Beqiraj, *Indigenous Peoples' Cultural Identity under EU Law and the ECHR: A Non-trade Interest or a Human Right?,* in: F. Ippolito, S. Iglesias Snchez, *Protecting Vulnerable Groups : The European Human Rights Framework,* Hart Publishing 2015, p. 161.
[1007] The Court first acknowledged it in the judgment of Tyrer v. United Kingdom, delivered in 1978; Tyrer v. United Kingdom, (Appl No. 5856/72) Judgment of 25 April 1978, par. 31.

applications in climate change cases are still pending, the following review of the landmark cases of the ECHR regarding the environment, together with the climate change applications, aims at examining whether the ECHR could potentially adjudicate cases arose from large-scale and international problems such as climate change.

The first submission of a case under the allegation of environmental rights was brought before the Commission as early as in 1976. In the case *X and Y v. Federal Republic of Germany*[1008], the applicants have complained under environmental aspects of the use for military purposes of parts of a certain marshland situated in the same region as the villages in which they live and argued violation of Article 2 (right to life), Article 3 (prohibition of torture) and Article 5 (right to liberty and security). The Commission declared the case inadmissible, for incompatibility *rationae materiae* with the Convention, stating that "no right to nature conservation is, as such guaranteed by the Convention"[1009].

Since that time the ECHR organs have examined over 270 applications related to the protection or the degradation of the natural environment[1010]. In her research, Natalia Kobylarz grouped the cases into five thematic categories. According to her, the largest group of the environment-related judgments and decisions delivered by the ECHR organs concerns the balancing of States' ecologically sound policies with individuals' rights to the peaceful enjoyment of property (Article 1 of the Protocol 1 of the Convention) or respect for home and private and family life (Article 8 of the Convention). Cases in this group include measures such as the expropriation of private land or the demolition of dwellings in areas of protected coastline in Turkey[1011], or in areas designated for reforestation in Greece[1012]. In both of the cases the Court held that there had been a violation of Article 1 of Protocol No. 1 to the Convention. The cases also concern restrictions put in place by the governments of various European States to ensure a sustainable use of natural resources[1013] or the protection of endangered species[1014] and

[1008] European Commission of Human Rights, *X and Y v. Federal Republic of Germany*, Appl No. 7407/76, Decision of 13 May 1976 on the admissibility of the application.
[1009] Ibidem, p. 1.
[1010] N. Kobylarz, *The European Court of Human Rights: An Underrated Forum for Environmental Litigation*, in: H. T. Anker, B. E. Olsen (eds), *Sustainable Management of Natural Resources: Legal Instruments and Approaches*, Intersentia, Cambridge 2018, p. 99.
[1011] European Court of Human Rights, *N.A. and Others v. Turkey*, App. No. 37451/97, 2005.
[1012] European Court of Human Rights, *Papastavrou and Others* v. *Greece*, App. No. 46372/99, 2003.
[1013] European Court of Human Rights, *Pindstrup Mosebrug A/S v. Denmark* (dec.), App. No. 34943/06, 2008.
[1014] European Court of Human Rights, *Paratlieristikos Oikodomikos Synetairismos Stegaseos Ypallilon Trapezis Tis Ellados v. Greece*, App. No. 2998/08, 2011.

biological diversity, like the case *Valle Pierimpie Societa Agricoh S.P.A v. Italy*[1015], which involved a "fishing valley" situated on a lagoon in the province of Venice.

The other large group of cases regards operations and urban development resulting in pollution, environmental disasters, occupational illnesses or nuisance, in so far as they may threaten the right to life or the right to a respect for home and private and family life. Thus, the Court has ruled for example in respect of the toxic emissions caused by the operation of nuclear plants and power stations, like in the case *Balmer-Schafroth e.a* v. *Switzerland*[1016], in which the applicants lived close to a nuclear power plant which had applied for an extension of its operating period and also an increase in production.

One of the landmark cases of the Court in respect to factories and smelters is the case *Fadeyeva v. Russia*[1017], in which the applicant alleged that the operation of a steel plant in close proximity to her home endangered her health and well-being. She claimed that the concentration of toxic elements, the noise levels and the environmental situation in the zone around the plant was hazardous for humans. The Court held that there had been a violation of Article 8 of the Convention, finding that Russia had failed to strike a fair balance between the interests of the community and the applicant's effective enjoyment of her right to respect for her home and her private life. The Court noted in particular that the Russian authorities had authorized the operation of a polluting enterprise in the middle of a densely populated town. Since the toxic emissions from that enterprise exceeded the safe limits established by domestic legislation and might have endangered the health of those living nearby, the authorities had established that a certain territory around the plant should be free of any dwelling. However, those legislative measures had not been implemented in practice. The Court, nonetheless, by stating that "it would be going too far to state that the State or the polluting enterprise were under an obligation to provide the applicant with free housing, and, in any event, it was not the Court's role to dictate precise measures which should be adopted by the Contracting States in order to comply with their positive duties under Article 8 of the Convention"[1018], pronounced itself in favor of the State wide margin of appreciation. However, in this case the State has failed to strike a fair balance between the interests of the community and the applicant's effective enjoyment of her right to respect for her home and her private life,

[1015] European Court of Human Rights, *Valle Pierimpie Societa Agricola S.P.A v. Italy,* App. No. 46154/11, 2014.
[1016] European Court of Human Rights, *Balmer-Schafroth e.a* v. *Switzerland,* App. No. 22110/93, 1997.
[1017] European Court of Human Rights, *Fadeyeva v. Russia,* App. No. 55723/00, 2005.
[1018]Ibidem, par.133.

as the State did not design or apply effective measures which would take into account the interests of the local population, affected by the pollution, and which would be capable of reducing the industrial pollution to acceptable levels.

This group includes also cases of waste-treatment plants or dumpsters, like in the landmark case *Lôpez Ostra* v. *Spain*[1019]. In this case, the applicant lived in a town with a heavy concentration of leather industries. She complained that the municipal authorities have been inactive in respect of the nuisance, such as smells, noise and polluting fumes caused by a waste-treatment plant situated a few meters away from her home. In her view, the Spanish authorities were responsible, as they had adopted a passive attitude[1020]. The Court ruled in favor of the applicant and held that there had been a violation of Article 8 of the Convention, finding that the Spanish State had not succeeded in striking a fair balance between the interest of the town's economic well-being – that of having a waste-treatment plant – and the applicant's effective enjoyment of her right to respect for her home and her private and family life. However, the Court further held that there had been no violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention, finding that the conditions in which the applicant and her family had lived for a number of years were certainly very difficult but did not amount to degrading treatment[1021].

The third thematic group of cases concerns applications brought by people who claimed to be the victims of nuclear or military gas tests[1022] or who worked with hazardous substances, like in the case *Brincat and Others* v. *Malta*[1023]. This case concerned ship-yard repair workers who were exposed to asbestos for a number of decades beginning in the 1950s to the early 2000s which led to them suffering from asbestos related conditions. The Court held that there had been a violation of Article 2 and a violation of Article 8 of the Convention. It found in particular that, in view of the seriousness of the threat posed by asbestos, and despite the State's margin of appreciation to decide how to manage such risks, the Maltese Government had failed to satisfy their positive obligations under the Convention, to legislate or take other practical measures to ensure that the applicants were adequately protected and informed of the risk to their

[1019] European Court of Human Rights, *Lôpez Ostra* v. *Spain,* App. No. 16798/909, 1994.
[1020] Ibidem, par. 10.
[1021] Ibidem, par. 60.
[1022] European Court of Human Rights, Judgement, *Roche* v. *the United Kingdom,* App. No. 32555/96, 19 October 2005.
[1023] European Court of Human Rights, *Brincat and Others* v. *Malta,* App. No. 60908/11, 62110/11, 62129/11, 62312/11, 62338/11, 2014.

health and lives[1024].

The forth group of cases concerns nuisance (mainly noise, smell or general disturbance) resulting from urban development, like the large-scale airport traffic in the case *Hatton and Others v. the United Kingdom*[1025], concerning Heathrow airport. In this case, the Court recognized that it is possible to establish a human rights violation due to the presence of factors that make the environment inhospitable or impossible for normal living[1026]. This group includes also the case of the operation of private night bars in residential areas in Spain. In the case *Moreno Gómez v. Spain*[1027], the applicant had suffered a serious infringement of her right to respect for her home as a result of the authorities' failure to take action to deal with the night-time disturbances, and as a result the Court held that Spain had failed to discharge its positive obligation to guarantee her right to respect for her home and her private life, in breach of Article 8 of the Convention.

The last group of over forty judgments and decisions concerns various forms of ecological activism. These were mainly argued under the right to exercise free speech, or freedom of assembly or under procedural rights to obtain information or judicial review of policies threatening the environment. One of the most recent judgments in this group of cases was delivered in the case *Bumbeș v. Romania*[1028], which concerned fining of the applicant, a known activist, for taking part in a protest against proposed gold and silver-mining activity in the Roșia Montană area. The Court held that there had been a violation of Article 10 (freedom of expression) interpreted in the light of Article 11 (freedom of assembly and association) of the Convention, finding that the interference with the applicant's right to freedom of expression had not been necessary in a democratic society. Moreover, the resulting fine had had a chilling effect on such speech.

Different approach to the classification of the Court's case-law relating to the environmental law has been taken by Hellen Keller, Corina Heri, and Réka Piskóty. In their research, they grouped the cases into three broad categories: a) pollution (by noise, toxic waste, chemicals, dangerous industrial activities and industrial emissions, noxious smells, etc.); b) cases concerning the risks of harm from environmental hazards, natural

[1024] European Court of Human Rights "Malta failed to protect ship-yard workers from exposure to asbestos", Press Release, July 24, 2014, https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id =003-4832368-5895 060&filename=003-4832368-5895060.pdf, p. 1.
[1025] European Court of Human Rights, *Hatton and Others v. the United Kingdom*, App. No. 36022/97, Judgement, 8 July 2003.
[1026] Ibidem, par. 96.
[1027] European Court of Human Rights,*Moreno Gómez v. Spain, App. No. 4143/02*, Judgement, 16 November 2004.
[1028] European Court of Human Rights, *Bumbeș v. Romania*, App. No. 18079/15, Judgement, 03 May 2022.

disasters and environmentally significant projects such as dams, nuclear power; c) cases concerning interferences with the right to property due to environmental hazards, waste and pollution, and development projects. stations and waste treatment centers[1029].

As a result, after excluding cases brought against measures to protect the environment, as well as cases where environmental protection was only indirectly involved, they obtained 85 cases in which a violation of Articles 2, 3, 6, 8, 10 or 13, alone or in combination with Article 14 of the Convention (i.e. the right to life, the prohibition of torture, and the rights to a fair trial, respect for private and family life, freedom of speech, an effective remedy and non-discrimination) had been found by the Court, as well as cases concerning the right to property in Article 1 of Protocol No.1 to the Convention[1030]. As such, on eighty five occasions the Court recognized that the deterioration of the environment may have detrimental effect on the enjoyment of human rights.

One of the most recent cases in this respect is the case *Pavlov and Others v. Russia*[1031], which became final in January 2023. In this case, twenty two applicants had complained to the Court about the failure of the Russian Federation to take protective measures against the effects of industrial air pollution. They alleged this interfered with their right to respect for private life under Article 8 of the Convention. The applicants, who lived several kilometers away from "large industrial undertakings"[1032] in Lipetsk, claimed that the concentration of harmful substances in the atmospheric air and drinking water in the city of Lipetsk had consistently exceeded Maximum Permissible Levels. This had previously been confirmed at the domestic level, with the District Court stating that "the evidence presented before the court demonstrates that the level of air pollution in Lipetsk is high"[1033]. Despite the domestic authorities' awareness of the serious environmental situation in Lipetsk, no sanitary protection zone had been erected to protect the citizens of the city[1034]. Although the applicants in this case lived at considerable distances from the polluting sites, and had not supplied evidence indicating a significant risk to their health, the Court considered that the case material supported the applicants'

[1029] H. Keller, C. Heri, R. Piskóty, *Something Ventured, Nothing Gained?—Remedies before the ECtHR and Their Potential for Climate Change Cases*, "Human Rights Law Review", Vol. 22, Issue 1, March 2022, p. 10.
[1030] Ibidem.
[1031] European Court of Human Rights, *Pavlov and Others v. Russia*, App. no. 31612/09, Judgement, 11 October 2022.
[1032] Ibidem, par. 5.
[1033] Ibidem, par. 10.
[1034] Ibidem, par. 8.

allegations that the levels of pollution experienced by them for more than twenty years in the course of their everyday lives were not negligible and went beyond the environmental hazards inherent in life in every modern city and that the pollution emanating from the industrial undertakings in Lipetsk has affected, adversely and to a sufficient extent, their private lives during that period[1035]. Based on the aforementioned considerations, the Court found a violation of Article 8 of the Convention. Consequently, the applicants were awarded non-pecuniary damages of 2,500 euro each.

The separate concurring opinion of Judge Serghides deserve particular attention, especially in the context of climate change cases pending before the ECHR. While underlying the interrelatedness and interdependence of human rights and the environment, he notes that "a healthy environment is a 'precondition' for the full enjoyment of the right to respect for one's private life, as is the case for almost any other substantive right protected by the Convention"[1036]. Further on, he observes that although the Convention does not recognize explicitly or autonomously the right to a healthy environment, "healthy environment could and should, however, be secured through the protection of the right to private life and other Convention rights in an indirect way"[1037]. He argues that Article 8 of the Convention "necessitates and entails the implicit sub-right to a healthy environment which is indispensable for the exercise and enjoyment of the right to respect for one's private life"[1038]. Nonetheless, he stipulates that "there is a need for the inclusion of a substantive right to a healthy, clean, safe and sustainable environment in the Convention, by a way of a new protocol"[1039].

The case *Pavlov and Others v. Russia* is often referred to in the context of climate change cases as an important bridge for climate change cases[1040]. Although scholars are pointing out possible grounds on which the climate change cases may be rejected, such as victim status, the non-exhaustion of domestic remedies, or the issue of extraterritorial

[1035] Ibidem, par. 71.
[1036] *Pavlov and Others v. Russia, op. cit.,* Concurring Opinion of Judge Serghides, par. 4.
[1037] Ibidem, par. 6.
[1038] Ibidem, par. 11.
[1039] Ibidem, par. 19.
[1040] See O. W Pedersen, "Climate Change hearings and the ECtHR", EJIL: Talk! Blog of the European Journal of International Law, April 4, 2023, https://www.ejiltalk.org/climate-change-hearings-and-the-ecthr/ [last accessed: 15.06.2023]; N. Schuldt, "Pavlov v Russia: Welcoming the Court's proactive shift in its handling of environmental complaints, including their evidentiary challenges", Strasbourg Observers, November 15, 2022, https://strasbourgobservers.com/2022/11/15/pavlov-v-russia-welcoming-the-courts-proactive-shift-in-its-handling-of-environmental-complaints-including-their-evidentiary-challenges/ [last accessed: 15.06.2023].

jurisdiction[1041], there are currently three cases pending before the Court's Grand Chamber, while the examination of six cases has been adjourned until the Grand Chamber has ruled in the climate change cases before it[1042]. On 29 March 2023 the Court held a Grand Chamber hearing in the case *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*[1043] and *Carême v. France*[1044], while the hearing in the case *Duarte Agostinho and Others v. Portugal and 32 Others*[1045] will be held before the same composition of the Grand Chamber at a later stage.

The case *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* was brought before the Court by an association of senior women as well as four individual women over the age of eighty[1046]. In their application, they argue that increasing temperatures owed to climate change result in severe health risks and increased mortality, especially for older women, including the applicants. They further describe adverse effects on their health and private and family life, i.e. losing consciousness or being confined to their homes during heatwaves[1047]. The applicants argue that Switzerland is failing to fulfil its positive obligations under the ECHR, since the State is not doing everything in its power to prevent a global temperature rise of more than 1.5°C and thereby is also failing to effectively protect the applicants[1048]. The applicants claim that Switzerland 2020 and 2030 climate targets fail to meet the Paris Agreement 1.5°C limit, while staying within the Paris Agreement limit would significantly reduce the risk of heat related excess mortality and morbidity[1049]. As the Swiss courts rejected their case on the basis of lack of admissibility without examining the merits, the applicants also claim violations of their rights to effective access to a court (Article 6.1) and to an effective remedy (Article 13 in conjunction with Article 2 and 8 of the Convention)[1050]. However, according to Helen Arling and Hani Taghavi, a meticulous decision regarding

[1041] H. Keller, C. Heri, *The Future is Now: Climate Cases Before the ECtHR,* "Nordic Journal of Human Rights" 2022, Vol. 40, No. 1, pp. 153-174.
[1042] European Court of Human Rights, Factsheet: Climate change, March 2023, https://www.echr.coe.int/Documents/FS_Climate_change_ENG.pdf [last accessed; 15.06.2023].
[1043] *Verein Klimaseniorinnen Schweiz and Others v. Switzerland,* App. No. 53600/20.
[1044] *Carême v. France,* App. No. 7189/21.
[1045] *Duarte Agostinho and Others v. Portugal and 32 Others*, App. No. 39371/20.
[1046] KlimaSeniorinnen v Switzerland, Application to the European Court of Human Rights, http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20201126_Application-no.-5360020_application-1.pdf [last accessed; 15.06.2023].
[1047] Ibidem, Additional Submission, pp. 2-3.
[1048] Ibidem, pp. 5-6.
[1049] Ibidem.
[1050] Ibidem, Statement of alleged violation(s) of the Convention and/or Protocols, and relevant arguments, p. 8.

Switzerland's obligations for emissions reduction is unlikely[1051]. During the hearing it became evident that there are certain difficulties with calculating Switzerland's remaining emissions budget and corresponding obligations for reduction, taking into consideration international law principles such as common but differentiated responsibilities. The other issue lies in the future role of ECHR and whether it would take a detailed stand on States' obligations relating to climate change.

The same doubts arise in the case *Duarte Agostinho and Others v. Portugal and 32 Others*, which concerns the polluting greenhouse gas emissions from thirty three member States which, in the view of the applicants – Portuguese nationals aged between 10 and 23 – contribute to the global warming, resulting, among other things, in heatwaves affecting the applicants' living conditions and health[1052]. They claim *inter alia* that 2017 wildfires came very close to their houses, which put the applicants under severe stress, and that because of the wildfires they were not able to attend school[1053]. The applicants complain in particular that the States concerned are failing to comply with their positive obligations under Articles 2 (right to life) and 8 (right to respect for private and family life) of the Convention, read in the light of their undertakings under the 2015 Paris Agreement on climate change (COP 21). They also allege a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 2 and/or Article 8 of the Convention, arguing that global warming affects their generation particularly and that, given their age, the interference with their rights is greater than in the case of older generations.

As to the applicants' victim status, they claim that the effects of climate change at its current level and trajectory expose them to harm and risk to their lives, to their health, to their family lives, and to their privacy, now and/or in the future[1054]. Although this case is less likely to succeed before the ECHR than the *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, the submission of these two cases exemplifies well that the effects of climate change are cross-cutting and impact different groups of society.

The last climate change case before the Grand Chamber is the case *Carême v.*

[1051] H. Arling, H. Taghavi, "KlimaSeniorinnen v. Switzerland – A New Era for Climate Change Protection or Proceeding with the Status Quo?", EJIL: Talk! Blog of the European Journal of International Law, April 6, 2023, https://www.ejiltalk.org/klimaseniorinnen-v-switzerland-a-new-era-for-climate-change-protection-or-proceeding-with-the-status-quo/ [last accessed: 15.06.2023].
[1052] *Duarte Agostinho and Others v. Portugal and 32 Others,* Application to the European Court of Human Rights,http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200902_3937120_complaint.pdf [last accessed: 15.06.2023].
[1053] Ibidem, p. 7.
[1054] Ibidem.

France. The application was submitted by the former mayor of the city of Grande-Synthe in France. In 2019 the municipality of Grande-Synthe, which is located in an area considered at very high risk of exposure to climate risks, and the applicant, acting in his capacity of Grande-Synthe Mayor and of a private resident, asked the Council of State to cancel the Government's refusal to take additional measures to meet the Paris Agreement objective of reducing GHG emissions by 40% by 2030[1055]. The applicant complained that the Council of State erred in rejecting his action on the ground that he had no interest in the proceedings, even though he was clearly exposed to climate risk caused by insufficient government action. The applicant submitted that the failure of the authorities to take all appropriate measures to enable France to comply with the maximum levels of GHG that it has set itself constitutes a violation of the obligation to guarantee the right to life, enshrined in Article 2 of the Convention, and to guarantee the "right to a normal private and family life", under Article 8 of the Convention[1056]. He submitted that he is directly affected by the Government's failure to take sufficient steps in the combat against climate change, since this failure increases the risk that his home might be affected in the years to come, and in any event by 2030, and that it is already affecting the conditions in which he occupies his property, in particular by not allowing him to plan his life peacefully there. He adds that the extent of the risks to his home will depend in particular on the results obtained by the French Government in the prevention of climate change[1057]. He also requests that his case be joined with the *Duarte Agostinho and Others v. Portugal and 32 Other*[1058].

Although the Court is yet to rule on the implications of climate change for the enjoyment of the rights enshrined in the European Convention of Human Rights, speculations about the Court's response are growing, and many questions remain to be answered, as what the Court decides will likely have important implications for other rights-based climate change litigation and the right to a healthy environment. In relation to remedies that ECHR can award, however, according to Hellen Keller, Corina Heri, and Réka Piskóty "the payment of small financial awards without other changes —for

[1055] Sabin Center for Climate Change Law, *Carême v. France*, http://climatecasechart.com/non-us-case/careme-v-france/ [last accessed: 15.06.2023].
[1056] European Court of Human Rights, "Grand Chamber to examine complaint that France's action to prevent climate change has been insufficient", Press Release, 07 June 2022, http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2022/20220607_Application-no.-718921_press-release-1.pdf [last accessed: 15.06.2023].
[1057] Ibidem.
[1058] Sabin Center for Climate Change Law, *Carême v. France*, *op. cit.*

example to prevent future violations or remedy underlying situations— is hardly conducive to respect for human rights"[1059] and "monetizing human rights allows States to simply set aside a budget for compensating victims of violations, without addressing the underlying causes of the violations concerned or ensuring non-repetition"[1060]. Although it is true that "financial awards may simply work better — in terms of securing State compliance —than other types of remedies"[1061], and as also follows from the supervision of the compliance with the judgments of the IACHR, they are the "easiest" and the fastest implemented reparations, in the case of climate change, the monetary compensation is not going to be sufficient, especially for Indigenous Peoples, whose whole existence preserved since the time immemorial, and being strongly related to cultural dimensions of environment, is at risk.

5.5. Universal quasi-judicial measures

As has been demonstrated in the previous subchapters, the regional systems of human rights protection centered around two Courts, although having some potential, do not guarantee effective remedies to the Arctic Indigenous Peoples. However, Indigenous Peoples can also bring their grievances to the universal system of human rights protection and its quasi-judicial bodies. Therefore, it is necessary to analyze whether said system could offer any possibilities of effective remedies for the Indigenous Peoples of the Arctic region in the context of climate change. The following paragraphs focus of the jurisprudence of treaty bodies, namely the Human Rights Committee (HRC), Committee on Economic, Social and Cultural Rights (CESCR), Committee on the Elimination of Racial Discrimination (CERD), Committee on the Elimination of Discrimination against Women (CEDAW) and the Committee on the Rights of the Child (CRC). The Committees have been chosen under the criteria of dealing with Indigenous Peoples' cultural rights and/or climate change, their role as quasi-judicial bodies, and the ratification status of the Arctic States concerned. Therefore, following paragraphs focus on the latest jurisprudence of the treaty bodies in relation to Indigenous Peoples, with a special emphasis on the Indigenous Peoples from the Arctic States. As the Human Rights Committee is so far the only treaty body that has decided both on communications

[1059] H. Keller, C. Heri, R. Piskóty, *op. cit.*, p. 20.
[1060] Ibidem.
[1061] Ibidem, p. 24.

brought by Indigenous Peoples and communications concerning climate change, much more attention will be given to this quasi-judicial body.

5.5.1. Individual communications to treaty bodies

The universal system of human rights protection has successfully generated a wide-ranging series of international instruments dealing with the establishment of standards and norms of human rights protection[1062].

The human rights treaty bodies are the Committees of independent experts in charge of monitoring the implementation by State Parties of the rights protected in international human rights treaties[1063]. There are nine core international human rights treaties[1064] and their application is monitored by the Committees[1065], whose main functions are to examine periodic reports submitted by State Parties, adopt concluding observations, general comments or recommendations, and most importantly – consider individual communications.

According to Katarzyna Sękowska-Kozłowska, the UN system of human rights protection based on the work of treaty bodies has a complex structure[1066] and the individual communication procedure is the second most important instrument of control, next to the State reporting system, used by almost all treaty bodies[1067].

As to the legal status of the decisions of the Committees', Rosanne van Alebeek and Andre Nollkaemper point out that although the issue has become the bone of contention among States, as the treaty obligations themselves are legally binding, and the international expert body established by the treaty is the most authoritative interpreter of the treaty in question, a finding of a violation by a UN human rights treaty body may be understood as an indication of the State party being under a legal obligation to remedy

[1062] M. Shaw, *op. cit.*, p. 231.
[1063] See R. Wieruszewski (ed.), *Mechanizmy Ochrony Praw Człowieka w Ramach ONZ. Analiza Systemowa*, C.H. Beck, 2017, p. XIX.
[1064] United Nations Human Rights Office of the High Commissioner, UN Treaty Body Database, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Home.aspx [last accessed: 8.07.2023].
[1065] United Nations Human Rights Office of the High Commissioner, *The United Nations Human Rights Treaty System. Fact Sheet No. 30/Rev.1*, New York-Geneva 2012, p. 19-20.
[1066] K. Sękowska-Kozłowska, *Concluding Observations of the UN Human Rights Treaty Bodies in the Field of Equality and Non-discrimination. Does a Common Standard Exist and is it Implemented? Example of Poland*, "Polish Review of International and European Law" 2019, Vol. 8, Issue 1, p. 66.
[1067] K. Sękowska-Kozłowska, *The Role of Non-governmental Organisations in Individual Communication Procedures before the UN Human Rights Treaty Bodies*, "Czech Yearbook of International Law" 2014, Vol. V, p. 369.

the situation[1068]. This corresponds with the HRC General Comment No. 33., in which the Committee stated that

> By becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognised in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views[1069]

In the so-called *Diallo* case from 2010, the International Court of Justice ruled that in particular the views of the Human Rights Committee in individual complaints and General Comments must be given "great weight"[1070]. Accordingly, individual communications under one of the above-mentioned treaties can be brought only against a State that has recognized the competence of the Committee established under the relevant treaty or which is party to the relevant optional protocols. So again, as it is in the case of regional human rights bodies, the possibilities of redress for human rights violations depend on the willingness of the State to ratify a particular treaty. This creates an important obstacle best exemplified by the Optional Protocol to the ICESCR, adopted in 2008 – from all the Artic States inhabited by Indigenous Peoples, only Finland ratified the Optional Protocol, in 2014[1071]. Therefore, there are only two communications currently pending before the CESCR concerning Arctic Indigenous Peoples: one of them related to the impact of mining exploration on reindeer husbandry by Sami Peoples (Communication No. 251/2022) and the mining explorations in the reservation area of

[1068] R. van Alebeek, A. Nollkaemper, *The legal status of decisions by human rights treaty bodies in national law*, in: H. Keller, G. Ulfstein (eds.), *UN Human Rights Treaty Bodies. Law and Legitimacy,* Cambridge University Press, Cambridge 2012, p. 384.
[1069] UN Human Rights Committee, General Comment no. 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights, 25 June 2009, CCPR/C/GC/33, para. 14.
[1070] Intenational Court of Justice, Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010, par. 66.
[1071] OHCHR,, "Ratification Status for CESCR-OP - Optional protocol to the International Covenant on Economic, Social and Cultural Rights", https://tbinternet.ohchr.org/_layouts/15/TreatyBody External/Treaty.aspx?Treaty=CESCR-OP [last accessed: 08.07.2023].

Indigenous People (Communication No. 289/2022)[1072].

Although it is difficult to predict the outcome of the cases pending before the CESCR, in 2020 Committee on the Elimination of Racial Discrimination adopted an opinion in similar case in the context of the mining concessions on the Swedish Saami's traditional territory. In the case *Lars-Anders Ågren et al. v. Sweden*[1073], the petitioners claimed that the State Party, by granting, without their free, prior and informed consent the concession of three open-pit mines within their traditional territory where they pursue a traditional livelihood, breached their right to property as enshrined in article 5 (d) (v) of the Convention on the Elimination of All Forms of Racial Discrimination[1074]. Sweden granted exploitation concessions to a private mining company in the community's traditional territory with pasture areas of fundamental importance to the Vapsten community's reindeer herding cycle. Each mine would have an associated industrial area, and a road system would connect the three mining sites. Not only would the mining system result in dust spreading about 15 km from the mining sites in all directions, damaging lichen pasture, which is a crucial part of the reindeer's nutrition, but it would also cut off the migration routes between various seasonal pasture areas, resulting in serious negative effects on reindeer herding[1075]. The petitioners additionally claimed that the State party breached their right to effective protection and remedies, enshrined in Article 6 of the Convention, by denying them the right to bring to a court the specific issue of their traditional property rights[1076]. Importantly, the petitioners added "that monetary compensation cannot adequately provide for the loss of reindeer pasture land, which is indispensable to the community's reindeer herding, as an element of its cultural identity and traditional livelihood"[1077]. In consideration of the merits, the Committee made a reference to its General Recommendation No. 23[1078], in which it called upon State parties to recognize and protect the rights of Indigenous Peoples to own, develop, control and use their communal lands, territories and resources and, to take steps to return those lands and territories in case they have been taken without their free and informed

[1072] OHCHR, Individual communications. Committee on Economic, Social and Cultural Rights. Table of pending cases, https://www.ohchr.org/en/treaty-bodies/cescr/individual-communications [last accessed: 08.07.2023].
[1073] CERD, Opinion adopted by the Committee under article 14 of the Convention, concerning communication No. 54/2013, CERD/C/102/D/54/2013, 18 December 2020 [hereinafter: Lars-Anders Ågren et al. v. Sweden].
[1074] Ibidem, par. 1.2.
[1075] Ibidem.
[1076] Ibidem, par. 3.8.
[1077] Ibidem, par. 1.2.
[1078] CERD, General Recommendation No. 23. Indigenous Peoples, 18 August 1997.

consent[1079]; and to recognize respect Indigenous "distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation, which has been and still is jeopardized"[1080].

The Committee recognized that Indigenous Peoples' land rights differ from the common understanding of civil law property rights and considered that reindeer herding is not an "outdoor recreational exercise" as qualified in the Chief Mining Inspector's decision in the domestic proceedings, but it is rather a central element of the petitioners' cultural identity and traditional livelihood[1081]. While the right to property is not absolute States parties must respect the principle of proportionality when limiting or regulating Indigenous Peoples' land rights, taking into account their distinctive status, so as "not to endanger the very survival of the community and its members"[1082]. Moreover, the Committee underlined that the lack of appropriate consultation with Indigenous Peoples may constitute a form of racial discrimination and could fall under the scope of the Convention[1083] and that development and exploitation of natural resources, as a legitimate public interest, does not absolve States parties from their obligation not to discriminate against an Indigenous community[1084]. Therefore, the Committee arrived to a conclusion that Sweden violated Saami's right to property and the right to effective protection and remedies[1085]. As to the remedies, CERD recommended: 1. that the State party provide an effective remedy to the Sami reindeer herding community by effectively revising the mining concessions after an adequate process of free, prior and informed consent; 2. that the State party amend its legislation to reflect the status of the Sami as Indigenous Peoples in national legislation regarding land and resources and to enshrine the international standard of free, prior and informed consent; and 3. to widely disseminate the Committee's opinion, both in Swedish and in the petitioners' language[1086].

One of the most recent cases before CERD is the case *Anne Nuorgam et al. v. Finland*[1087], which concerns interference in the 2015 Sámi Parliament elections when Finland's Supreme Administrative Court ruled that dozens of people who identified

[1079] Ibidem, par. 5.
[1080] Ibidem, par. 3.
[1081] *Lars-Anders Ågren et al. v. Sweden*, *op. cit.,* par. 6.14.
[1082] Ibidem, par. 6.10.
[1083] Ibidem, par. 6.16.
[1084] Ibidem, par. 6.20.
[1085] Ibidem, par. 7.
[1086] Ibidem, par. 8.
[1087] CERD, Opinion adopted by the Committee under article 14 of the Convention, concerning communication No. 59/2016, CERD/C/106/D/59/2016, 14 April 2023 [hereinafter: Anne Nuorgam et al. v. Finland].

themselves as Saami should be added to the electoral roll and therefore be eligible to vote in the elections that year. The petitioners alleged that the State party has violated their right to equal treatment before the tribunals due to the arbitrary nature of the rulings; intervened in the right of the Saami Peoples to freely determine the composition of their representative organ and thereby impaired the recognition, enjoyment and exercise by the petitioners and other Saami persons in Finland of their human rights and fundamental freedoms in the political, economic, social, cultural and other fields of public life; violated the right of the petitioners and other Saami persons to political participation by compromising and delegitimizing the representativeness of the elected Saami Parliament; and caused, through the weakening of the authority of the elected Saami Parliament, adverse effects upon the exercise and enjoyment of the economic, social and cultural, including linguistic, rights of the petitioners and other Saami persons[1088]. The Committee stated that the realization of the right to practice and revitalize Indigenous cultural traditions and customs and to preserve and to practice their languages requires the establishment of a separate body representing the interests and positions of the members of the Indigenous community and underlined the importance of the right to political participation for the enjoyment and full realization of other rights of Indigenous communities, in particular their economic, social and cultural rights[1089]. In relation to the electoral process for the Sami Parliament, the Committee stated that it must ensure the effective participation of those concerned, in accordance with the traditions and customs of the community or nation concerned, "both as a guarantee for the continued viability and welfare of the Indigenous community as a whole and their effective protection from discrimination"[1090]. The Committee found that the rulings of the Finland's Supreme Administrative Court had the capacity to artificially modify the electoral constituency of the Sami Parliament, affecting its capacity to truly represent the Saami and their interests[1091] and that Finland has violated the Saami's political rights. Therefore, the Committee recommended the State party to "provide an effective remedy to the petitioners by urgently initiating a genuine negotiation for the review of section 3 of the Act on the Sami Parliament with a view to ensuring that the criteria for eligibility to vote in Sami Parliament elections are defined in a manner that respects the right of the Sami

[1088] Ibidem, par. 9.2.
[1089] Ibidem, par. 9.4.
[1090] Ibidem, par. 9.5.
[1091] Ibidem, par. 9.14.

people to provide their free, prior and informed consent on matters relating to their own membership and their political participation for the enjoyment and full realization of the other rights of Indigenous communities, in particular their economic, social and cultural rights"[1092]. As in the case *Lars-Anders Ågren et al. v. Sweden,* the State party was also requested to give wide publicity Committee's opinion and to translate it into Finnish and the petitioners' language[1093]. In 2022, the Committee on the Elimination of Discrimination against Women (CEDAW) adopted views in the case concerning discrimination against descendants of Indigenous women in Canada[1094]. The case concerns entitlement to Indian status as a First Nations descendants in the maternal line. The petitioner's grandmother was a member of the Squamish First Nation. Upon marrying a non-Indigenous man, she lost her Indian status. For this reason, the petitioner lost her Indian status and therefore could not apply for federal government support and lost the right to live in Indigenous communities and the right to traditional hunting and fishing granted them by birthright. As it has been already mentioned, the Indian Act is the legislative regime that has been imposed on First Nations to regulate their relationship with the Government, under which, the federal Government maintains a status list of persons identified as a "status Indian". Such status confers the ability to transmit it to one's children, as well as a sense of acceptance within Indigenous communities[1095]. Although the provisions of the Indian Act were amended in response to views adopted by the HRC in the case *Lovelace v. Canada*, which will be analyzed in the next subchapter, the amendments failed to fully remedy the discriminatory situation. Although women would no longer lose their status because of whom they married, the new provisions created an unequal ability to pass status on to descendants, as under the new rules, children with only one status parent had a different form of status from that of children with two status parents. As a result of that unilateral determination by the State party as to who was a status Indian, thousands of Indigenous women and their children were excluded from registration and denied their right to determine their own identity. The petitioner claimed that the law was discriminatory against women, as the same rules did not apply to Indigenous men[1096].

[1092] Ibidem, par. 11.
[1093] Ibidem.
[1094] CEDAW, Views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning communication No. 68/2014, CEDAW/C/81/D/68/2014, 11 March 2022, [hereinafter: Jeremy Eugene Matson v. Canada].
[1095] Ibidem, par. 2.2.
[1096] Ibidem, par. 2.4.

Firstly, the Committee considered that Indigenous Peoples do have the fundamental right to be recognized as such, as a consequence of the fundamental self-identification criterion established in international law[1097]. Secondly, it stated that Indigenous Peoples have the right not to be subjected to forced assimilation or destruction of their culture, and, as a consequence, States must provide effective mechanisms for the prevention of, and redress for, any action which has the aim or effect of depriving them of their integrity as distinct Peoples, or of their cultural values or ethnic identities[1098]. Thirdly, the Committee considered that the new rules of registration, even if not currently based on the gender of the descendants themselves, perpetuate in practice the differential treatment of descendants of previously disenfranchised Indigenous women. As a result of the disenfranchisement of his maternal ancestor, the author cannot freely transmit his Indigenous status, and his Indigenous identity, to his children and, as a consequence, his children will not be able to transmit freely their status to their own children. Therefore, the Committee was of the view that the State party had failed to fulfil its obligations under the Convention and had violated the rights of the author and his children under Articles 1, 2 and 3 of the Convention[1099]. Therefore, the Committee recommended two types of remedies: concerning the author and guarantees of non-repetition. The former includes providing appropriate reparation to the author and his descendants, including recognizing them as Indigenous Peoples with full legal capacity, without any conditions, to transmit their Indigenous status and identity to their descendants[1100], while the latter includes amendments to the legislation after an adequate process of free, prior and informed consultation, to address fully the adverse effects of the historical gender inequality in the Indian Act and to enshrine the fundamental criterion of self-identification, and taking all other measures necessary to provide registration to all matrilineal descendants on an equal basis to patrilineal descendants; and to allocate sufficient resources for the implementation of the amendments of the law[1101].

The most important decision in the context of climate change is the latest decision of the Committee on the Rights of the Child, which have had an opportunity to enunciate about the impact of climate change on the children due to the a complaint introduced by sixteen children, including three Indigenous children from Alaska, the Marshall Islands

[1097] Ibidem, par. 18.4.
[1098] Ibidem.
[1099] Ibidem, par. 19.
[1100] Ibidem, par. 20(a).
[1101] Ibidem, par. 20(b)(i) and (i).

and Sweden. In *Sacchi et al. v. Argentina, Brazil, France, Germany & Turkey*[1102], the authors claimed that, by causing and perpetuating climate change, the State parties has failed to take the necessary preventive and precautionary measures to respect, protect and fulfil the authors' rights to life, health and culture. They claimed that the 1.1°C rise in global average temperature is currently causing devastating heatwaves, forest fires, extreme weather patterns, floods and sea level rise, and fostering the spread of infectious diseases, infringing on the human rights of millions of people globally. The authors argued that given that children are among the most vulnerable, physiologically and mentally, to these life-threatening impacts, they will bear a far heavier burden and for far longer than adults[1103].

The Saami petitioner from Sweden stated that while she is learning the reindeer herding traditions of the Sami People passed down from millennia, the climate change is destroying the reindeers' food sources[1104]. She specified that "it is not only about the economic value of a reindeer, it's the whole culture. The value is in the culture of living with reindeer and in nature—all of which is being threatened for the first time in thousands of years"[1105]. The petitioner from Alaska, argued that although he learned to hunt and fish from the elders of the Yupiaq tribe, the salmon population on which they rely has been dying from heat stress in record numbers, and the warming temperatures have prevented his tribe from accessing traditional hunting grounds[1106] and that "it is scary because if I have kids, I want them to live like I did—to hunt, fish, gather. I want to teach them but I'm scared because there might not be any more subsistence. There will be less fish and there won't be any more ice in the winter, and it will be warm, and it might not be the same. I feel scared, like we'll have to adapt to climate change, and teach them a different way"[1107].

The authors requested that the Committee finds: (a) that climate change is a

[1102] CRC, Decision adopted under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning Communication No. 104/2019, CRC/C/88/D/104/2019, 22 September 2021 [hereinafter: Chiara Sacchi et al. v. Argentina];
[1103] Chiara Sacchi et al. v. Argentina, par. 2.
[1104] Sabin Center for Climate Change Law, Communication to the Committee on the Rights of the Child, In the case of Chiara Sacchi; Catarina Lorenzo; Iris Duquesne; Raina Ivanova; Ridhima Pandey; David Ackley III, Ranton Anjain and Litokne Kabua; Deborah Adegbile; Carlos Manuel; Ayakha Melithafa; Greta Thunberg and Ellen-Anne; Raslen Jbeili; and Carl Smith and Alexandria Villaseñor, v. Argentina, Brazil, France, Germany and Turkey, http://climatecasechart.com/non-us-case/sacchi-et-al-v-argentina-et-al/ [last accessed: 09.07.2023], par. 10.
[1105] Ibidem, par. 140.
[1106] Ibidem, par. 10.
[1107] Ibidem, par. 150.

children's rights crisis; (b) that the State party, along with other States, has caused and is perpetuating the climate crisis by knowingly acting in disregard of the available scientific evidence regarding the measures needed to prevent and mitigate climate change; and (c) that, by perpetuating life-threatening climate change, the State party is violating the authors' rights to life, health and the prioritization of the best interests of the child, as well as the cultural rights of the authors from Indigenous communities[1108].

As to the remedies, the authors further requested that the Committee recommends: (a) that the State parties review and, where necessary, amend their laws and policies to ensure that mitigation and adaptation efforts are accelerated to the maximum extent of available resources and on the basis of the best available scientific evidence; (b) that the State parties initiate cooperative international action to establish binding and enforceable measures to mitigate the climate crisis, prevent further harm to the authors and other children, and secure their inalienable rights; and (c) the State parties ensure the child's right to be heard and to express his or her views freely, in all international, national and subnational efforts to mitigate or adapt to the climate crisis and in all efforts taken in response to the authors' communication[1109].

Brazil, France and Germany responded to the petition, arguing that it was not admissible on three grounds: 1. the Committee lacks jurisdiction; 2. the petition is manifestly ill-founded or unsubstantiated; and 3. petitioners have not exhausted domestic remedies[1110]. On the jurisdiction, the Committee noted that it is generally accepted and corroborated by scientific evidence that the carbon emissions originating in the State parties contribute to the worsening of climate change, and that climate change has an adverse effect on the enjoyment of rights by individuals both within and beyond the territory of the State party and given their ability to regulate activities that are the source of these emissions and to enforce such regulations, the State parties have effective control over the emissions[1111]. Moreover, the Committee stated that "the collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location"[1112]. Following this reasoning, the

[1108] Chiara Sacchi et al. v. Argentina, par. 3.7.
[1109] Ibidem, par. 3.8.
[1110] Sabin Center for Climate Change Law, Sacchi, et al. v. Argentina, et al., http://climatecasechart.com/non-us-case/sacchi-et-al-v-argentina-et-al/ [last accessed: 09.07.2023].
[1111] Chiara Sacchi et al. v. Argentina, par. 10.9.
[1112] Ibidem, par. 10.10.

Committee found that the complaint satisfied the jurisdiction requirement.

As to the victim status, the Committee concluded the authors have established that they have personally experienced real and significant harm[1113]. Yet, the Committee found the communication inadmissible for failure to exhaust domestic remedies[1114]. However, according to Mariam Ibrahim, there are several positives which can be drawn from the Committee's decision, as it expanded the understanding of jurisdiction by recognizing that States have extraterritorial obligations with regards to climate change and, by granting the authors the victim status, "the Committee held that states can now be held accountable for the negative impact of their carbon emissions on children's rights"[1115].

Although the case *Sacchi et al. v. Argentina, Brazil, France, Germany & Turkey* can be regarded as a partial success, until now the only treaty body that decided on the merits in the climate change case is the Human Rights Committee.

5.5.2. Indigenous cultural rights and climate change before the Human Rights Committee

According to Valeska David, the Human Rights Committee "holds the highest status within the UN treaty body system and has the broadest subject-matter jurisdiction at the global level"[1116], as since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications. Although the system by which the HRC can receive and consider complaints from individuals who allege that their human rights have been violated was set out by the first Optional Protocol to the Covenant, which came into force on 23 March 1976, not all the Arctic States concerned became party to the Optional Protocol. As the United States of America did not become party to the Optional Protocol, the Indigenous Peoples inhabiting the USA, including Alaska Natives, are not able to bring communications to the HRC.

When the Committee finds that an individual communication reveals violations

[1113] Ibidem, par. 10.14.
[1114] Ibidem, par. 10.21.
[1115] M. Ibrahim, „Sacchi Et Al V Argentina And Four Similar Cases: The Impact Of Climate Change On Children's Rights", Human Rights Pulse, January 12, 2022, https://www.humanrightspulse.com/mastercontentblog/sacchi-et-al-v-argentina-and-four-similar-cases-the-impact-of-climate-change-on-childrens-rights [last accessed: 09.07.2023].
[1116] V. David, *Reparations at the Human Rights Committee: Legal Basis, Practice and Challenges*, „Netherlands Quarterly of Human Rights" 2014, Vol. 32, No. 1, p. 11.

of Covenant rights, it sets out measures designed to make full reparation to the victims. Since 1979 the HRC shaped the duty to provide effective remedies by specifying that they should include compensation and the adoption of steps to ensure that similar violations do not occur again in the future[1117]. In the guidelines adopted in 2016, the HRC enumerated following measures it may recommend to the State to make full reparation to the victims: restitution (e.g. victim's reinstatement in employment that was lost as a result of the violation committed or request the person's release in cases of deprivation of liberty[1118]), rehabilitation (e.g. provide the victim or his or her family with medical or psychological treatment, or the funds to pay for such treatment[1119]), compensation (the Committee, however, does not specify sums of money[1120]), measures of satisfaction (e.g. the HRC may request States parties to: provide information on the burial site of persons who were sentenced to death and executed[1121], commute, reduce or not enforce a sentence[1122], issue a public apology[1123] or the possibility of having a monument built, putting up a commemorative plaque or changing the name of a street or other public place in cases involving grave or systematic violations[1124]; similarly to the IACHR, the Committee may indicate that the fact that it declared that a violation of the Covenant has occurred constitutes in and of itself a form of reparation[1125]). The Committee may also recommend measures aimed at preventing the reoccurrence of similar violations in the future (guarantees of non-repetition), such as repeal or amendment of laws and regulations that are found to not be in accordance with the Covenant[1126], improvements in conditions in places of detention[1127], changes in official procedures and practices[1128] or training and raising the awareness of the authorities responsible for the violations, including law enforcement officers, members of the judiciary and medical and administrative personnel[1129]. When deciding on which measures of reparation are appropriate, the Committee should take into account the specific circumstances of the

[1117] Ibidem, p. 19.
[1118] HRC, Guidelines on measures of reparation under the Optional Protocol to the International Covenant on Civil and Political Rights, CCPR/C/158, 30 November 2016, par. 6-7.
[1119] Ibidem, par. 8.
[1120] Ibidem, par. 9.
[1121] Ibidem, par. 11(d).
[1122] Ibidem, par. 11(c).
[1123] Ibidem, par. 11(e).
[1124] Ibidem, par. 11(f).
[1125] Ibidem, par. 11(a).
[1126] Ibidem, par. 13(a).
[1127] Ibidem, par. 13(b).
[1128] Ibidem, par. 13(c).
[1129] Ibidem, par. 13(d).

communication, which includes "the world view of an indigenous group"[1130]. After the adoption of views, the case is taken up by the Committee's Special Rapporteur on Follow-up to Views, who communicates with the parties with a view to achieving a satisfactory resolution to the case in the light of the Committee's views[1131].

As it has been already mentioned in Chapter 2, the Covenant in Article 27 stipulates that "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language" and therefore this Article has become the basis for Indigenous Peoples' claims brought before the HRC. However, it is not the only Article invoked by them. As Timo Koivurova points out, the HRC practice with respect to Indigenous Peoples' rights under the Covenant could be divided into two stages: from early 80' to late 90', when the basis for the claims was mainly Article 27, and from 1999 onwards, when the Committee adopted concluding observations on the periodic report of Canada in 1999, in which it urged the State to report on the situation of its Indigenous Peoples in its next periodic report under Article 1 of the Covenant. Therefore, the Committee views Indigenous Peoples as not only covered by Article 27, but also as "peoples" in the meaning of Article 1.

The HRC has produced significant jurisprudence that refers to Indigenous Peoples. It is important to analyze these cases to investigate what is the Committee's approach to Indigenous Peoples from the Arctic States concerned in order to establish, whether the Committee could to answer Indigenous Peoples grievances in the context of climate change.

One of the first cases regarding Indigenous Peoples was the already mentioned case *Lovelace v. Canada*[1132]. The author of the communication was born and registered as "Maliseet Indian" but has lost her rights and status in accordance with the Indian Act, after having married a non-Indian[1133]. Losing her Indian status also meant a loss of access to federal programs for Indians in education, housing and social assistance, as well as losing the right to own a home or live on a reserve; to borrow funds from the Band Council

[1130] Ibidem, par. 5.
[1131] OHCHR, *Civil and Political Rights: The Human Rights Committee*, Fact Sheet No. 15 (Rev.1), Geneva 2005, p. 27.
[1132] HRC, Sandra Lovelace v. Canada, Communication No. 24/1977, U.N. Doc. CCPR/C/OP/1 at 83, 1984 [hereinafter: Lovelace v. Canada].
[1133] Ibidem, par. 1.

for housing; to traditional hunting and fishing rights; however, "the major loss to a person ceasing to be an Indian is the loss of the cultural benefits of living in an Indian community, the emotional ties to home, family, friends and neighbors, and the loss of identity"[1134]. Although the author claimed violations of Articles 2(1), 3, 23(1) and (4), 26 and 27 of the ICCPR, the Committee considered that the one which was most directly applicable to her complaint was Article 27. The Committee was of the opinion that the right of Sandra Lovelace to access to her native culture and language "in community with the other members" of her group, had been interfered with, "because there is no place outside the Tobique Reserve where such a community exists"[1135], and that this interference was not reasonable or necessary to preserve the identity of the tribe[1136]. Therefore, the Committee concluded that to prevent her recognition as belonging to the band was an unjustifiable denial of her rights under Article 27 of the Covenant. Although the Committee's views did not include any recommendation on the remedy, the Committee's views led to the Indian Act being amended with the intention of restoring Indian status to women who had been disenfranchised for marrying non-indigenous men[1137]. However, as previously discussed in the case *Jeremy Eugene Matson v. Canada* those amendments failed to remedy fully the legacy of discrimination and in fact perpetuated further discrimination against the descendants of women who had lost their status. Both, the Lovelace and Jeremy Eugene Matson cases are an interesting example of imposition of Western laws and Western legal traditions, often rooted in patriarchy, contrasting with Indigenous Peoples' traditions and their needs.

In the second case concerning Indigenous Peoples, *Kitok v. Sweden*[1138], the HRC also dealt with the Indigenous status and the membership in an Indigenous community. The author of the communication belonged to a Saami family which has been active in reindeer breeding for over 100 years[1139]. However, due to his long absence from living in the Saami village, he lost his Saami status. According to Reindeer Husbandry Act, the legal rights to traditional hunting, fishing and reindeer herding activities applied to the Saami living in the Saami villages only. As a result, the author of the communication was considered as a "half-Sami", and although he was allowed to engage in such traditional

[1134] Ibidem, par. 9.9(9).
[1135] Ibidem, par. 15.
[1136] Ibidem, par. 17.
[1137] *Jeremy Eugene Matson v. Canada*, op. cit., par. 2.4.
[1138] HRC, Communication No. 197/1985, Kitok v. Sweden, Views adopted on 27 July 1988 at the thirty-third session [hereinafter: Kitok v. Sweden].
[1139] Ibidem, par. 1.

activities, he had to pay a fee in accordance with the legislation. The Swedish law only allowed for re-admittance in Saami villages based on a special permissions granted by the Saami community and therefore, the applicant claimed he had been arbitrarily denied his immemorial Saami right to reindeer husbandry[1140]. The matter to be considered was whether Swedish legislation and Swedish court decisions have resulted in Ivan Kitok being deprived of his right to carry out reindeer husbandry and, whether this implied violation of Article 27 of the Covenant[1141].

In consideration of the merits, the Committee noted that although the regulation of an economic activity is normally a matter for the State alone, "where that activity is an essential element in the culture of an ethnic community its application to an individual may fall under article 27 of the Covenant"[1142]. In this case, it is important to refer to the State's submission as well, considering that the State acknowledged that "a special circumstance here is that reindeer husbandry is so closely connected to the Saami culture that it must be considered part of the Saami culture itself"[1143] and that "it is for the Saami community to decide whether a person is to be allowed membership or not. It is only when the community denies membership that the matter can become a case for the Courts"[1144].

Although the Committee has been concerned that the lack of objective ethnic criteria in determining membership of a minority may have been disproportionate to the legitimate ends sought by the legislation[1145], it nonetheless stated that the method selected by the State party to secure the preservation and well-being of the Saami minority, including the restriction on the number of reindeer breeders, were reasonable and consistent with Article 27 of the Covenant[1146]. As such, the Committee was of the view that Sweden had not violated the author's right. Although the cases *Lovelace v. Canada* and *Kitok v. Sweden,* may appear to be similar, and therefore the Committee's views may be seen as inconsistent, the major difference between this two cases lies in the approach of the community: while in the Lovelace's, the community supported the author and she was able to remain on the reserve because "members of the tribe who support her cause have threatened to resort to physical violence in her defense should the authorities attempt

[1140] Ibidem, par. 2.
[1141] Ibidem, par. 4.2.
[1142] Ibidem, par. 9.2.
[1143] Ibidem, par. 4.3.
[1144] Ibidem.
[1145] Ibidem, par. 9.7.
[1146] Ibidem, par. 9.5.

to remove her"[1147], it seems that in the Kitok's case it was the community who opposed his re-admittance as a member of a Saami village. Therefore, the Committee's views seems to be coherent with the principle that it is the Indigenous community that should first and foremost decide about the status of its members.

In the next case before the HRC, the leader of a Cree Indian Band living in Alberta, Canada argued that the State expropriated their land for commercial reasons despite the recognition that they had the right to continue their traditional way of life in the Indian Act of 1970 and the so-called Treaty 8 of 1899[1148]. The land at the center of the dispute was part of a broad oil-rich land that stretches across northern Alberta. In the early 1970s, the provincial government initiated a massive program of oil extraction throughout the region, including the construction of a road into the hunting and trapping territory of the Lubicon[1149]. The author of the communication explained *inter alia* that the Band's loss of its economic base and the breakdown of its social institutions, including the transition from a way of life based on trapping and hunting to a sedentary lifestyle, has led to a deterioration in the health of the Band members: "the diet of the people has undergone dramatic changes with the loss of their game, their reliance on less nutritious processed foods, and the spectre of alcoholism, previously unheard of in this community and which is now overwhelming it"[1150]. These changes connote the changes that are now happening to Indigenous Peoples in the Arctic due to climate change. Therefore, the Committee was faced with two questions: whether the Band could be treated as "people" within the meaning of Article 1 of the Covenant, and whether the subsistence rights of the Band belong to cultural rights under Article 27 of the Covenant[1151].

The Committee decided in 1987 that the communication was admissible "in so far as it may raise issues under Article 27 or other articles of the Covenant" and in view of the seriousness of the author's allegations that the Lubicon Lake Band was at the verge of extinction, the Committee requested the State party "to take interim measures of protection to avoid irreparable damage to [the author of the communication] and other

[1147] Lovelace v. Canada, par. 9.7.
[1148] HRC, Communication No. 167/1984, Chief Bernard Ominayak of Lubicon Lake Band v. Canada, Views adopted on 10 May 1990 at the thirty-eighth session, CCPR/C/38/D/167/1984 [hereinafter: Lubicon Lake Band v. Canada].
[1149] Amnesty International, "'Time is wasting': Respect for the land rights of the Lubicon Cree long overdue," April 2003, p. 2, http://www.amnesty.ca/canada/AMR200103.pdf [last accessed: 20.07.2023].
[1150] Lubicon Lake Band v. Canada, par. 23.2.
[1151] K. Hossain, *The human rights committee on traditional cultural rights: the case of the Arctic indigenous peoples*, in: T. Veintie, & P. K. Virtanen (eds.), *Local and global encounters : norms, identities and representations in formation*, Renvall Institute, Helsinki 2009, p. 33.

members of the Lubicon Lake Band"[1152]. Despite this request, resource extraction on the disputed land continued to accelerate and in 1989, the Alberta government gave a Canadian subsidiary of Daishowa Paper Manufacturing Company Limited of Japan logging rights throughout much of the disputed territory[1153].

In 1990, the Committee concluded that "historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue"[1154], without however having a say on the applicability of Article 1 of the Covenant. The views do not include a recommendation on the remedy, as this part of the views is only limited to the State's proposal to "rectify the situation by a remedy that the Committee deems appropriate within the meaning of article 2 of the Covenant"[1155]. The Fourth periodic report of States parties due in 1995 concerning Canada, mentioned that "the Committee also stated that the settlement offer made by the Government of Canada to the Lubicon Lake Band constituted an appropriate remedy within the terms of article 2 of the Covenant. This offer was not accepted by the Band, and after prolonged negotiations with the Band, in 1994, the Government of Canada announced that it would appoint a negotiator to assist in the resolution of the dispute"[1156]. However, it has not been until 2018 that the Lubicon Lake band signed a land claim settlement[1157].

In a series of three *Länsman et al. vs. Finland* cases[1158], which concerned the adverse impacts of various enterprises, such as quarrying stones and logging activities, on the traditional Saami territory, although the Committee did not held that there had been a violation of Article 27 of the Covenant, it nonetheless confirmed that "the State party must bear in mind when taking steps affecting the rights under article 27, that though

[1152] Lubicon Lake Band v. Canada, par. 29.3.
[1153] After the adoption of the Committee's view, in 1994 Canada gave permission to another corporation to build a sour gas plant just four kilometers upstream and upwind from the site where the Lubicon had proposed building their new community and the plant was built without the consent of the Lubicon and before a regulatory hearing was held; Amnesty International, *"'Time is wasting'"... op. cit.,* p. 5.
[1154] Lubicon Lake Band v. Canada, par. 33.
[1155] Ibidem.
[1156] HRC, Consideration of Reports Submitted by State Parties under Article 40 of the Covenant, Fourth periodic reports of States parties due in 1995, Canada, CCPR/C/103/Add.5, 15 October 1997, p. 66.
[1157] E. Stolte, "The fight is over. Now the Lubicon band must decide what's next", Edmonton Journal, 7 December 2018, https://edmontonjournal.com/news/local-news/our-band-is-stronger-than-ever-the-fight-is-over-now-the-lubicon-nation-must-decide-whats-next [last accessed: 20.07.2023].
[1158] HRC, Communication No. 511/1992, Länsman et al. v. Finland, Views adopted on 26 October 1994 at fifty-second session, CCPR/C/52/D/511/1992 [hereinafter: first Länsman case]; HRC, Communication No. 671/1995, Jouni E. Länsman et al. v. Finland, Views adopted on 30 October 1996, CCPR/C/58/D/671/1995 [hereinafter: second Länsman case]; HRC, Communication No. 1023/2001, Jouni Länsman et al. v. Finland, Views adopted on 17 March 2005 at eighty-third session, CCPR/C/83/D/1023/2001 [third Länsman case].

different activities in themselves may not constitute a violation of this article, such activities, taken together, may erode the rights of Sami people to enjoy their own culture"[1159]. Moreover, the Committee pointed out that Article 27 "does not only protect traditional means of livelihood of national minorities, as indicated in the State party's submission. Therefore, that the authors may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking article 27 of the Covenant"[1160]. The Committee, however, arrived to a conclusion that the quarrying stones on the slopes of the Mountain Riutusvaara had only very limited impact with regard to Article 27, and the planned logging activities would not amount to long term impact and as a result, there was no adverse effect in the traditional activities as such.

The Committee's case law is by no means limited to the Arctic States, as for example in 2009, in the case *Poma Poma v. Peru*[1161], the HRC held that Peru had violated the right to enjoy the author's culture because of the withdrawal of water from Indigenous land. The author claimed that the diversion of groundwater from her land has destroyed the ecosystem and caused the degradation of the land and the drying out of the wetlands, resulting in the death of the alpaca and llamas livestock – community's only means of survival. The Committee stated that the enjoyment of the rights enshrined in the Article 27 of the Covenant "may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them. The protection of these rights is directed to ensure the survival and continued development of cultural identity, thus enriching the fabric of society as a whole"[1162]. Although States may legitimately take steps to promote their economic development, it may not undermine the rights protected by Article 27[1163]. The Committee pointed out that the question of violation of Article 27 depends, among other things, on whether the members of the affected community had had the opportunity to participate in the decision-making processes in an effective manner and whether they will continue to benefit from their traditional economy [1164], which is coherent with the principle of free, prior and informed consent. In addition, the States' economic endeavors must respect the principle

[1159] Second Länsman case, *op. cit.*, par. 10.7.
[1160] First Länsman case, *op. cit.*, par. 9.3.
[1161] HRC, Communication No. 1457/2006, Ángela Poma Poma v. Peru, Views adopted on 27 March 2009 at ninety-fifth session, CCPR/C/95/D/1457/2006.
[1162] Ibidem, par. 7.2.
[1163] Ibidem, par. 7.4.
[1164] Ibidem, par. 7.6.

of proportionality so as not to endanger the very survival of the community and its members.

As to the reparations, the Committee in a general way stated that the State party is required to "provide the author an effective remedy and reparation measures that are commensurate with the harm sustained. The State party has an obligation to take the necessary measures to ensure that similar violations do not occur in future"[1165]. In the Follow-up Progress Report of the Human Rights Committee on Individual Communications from 2010 the State submitted that "measures have been taken to preserve the Community bogs, and to distribute water evenly among the Peasant Community of Ancomarca" [1166] and that "a Commission has visited the highest part of the basin where the wells are located, verifying the proper hydraulic allocations of each well in conformity with administrative resolutions issued recently"[1167]. With regard to measures aimed at preventing the reoccurrence of similar violations in the future, the State party submitted that it adopted a law on Water Resources with the aim of regulating the use and exploitation of water resources in a sustainable way[1168]. According to this law, access to water resources is a fundamental right and remains a priority even in times of shortage and the State party assured the respect of the traditions of Indigenous communities and their right to exploit the water resources in their lands. However, the individual reparations to the author of the communication have not been mentioned.

In 2022, the Committee dealt with a case concerning crop fumigation with agrochemicals and its effects on an Indigenous community. In the case Campo Agua'ẽ v. Paraguay[1169], the authors complained that fumigation carried out without State oversight had caused the death of their chickens and ducks, the loss of their subsistence crops and fruit trees, the disappearance of hunting, fishing and foraging resources and the contamination of waterways, as well as harm to their health; and that all of this had led to the disintegration of the community undermined the group's cultural integrity. With regard to the violation of Article 27 of the Covenant, the authors detailed the impact of environmental damage on their cultural life: 1) the disappearance of the natural resources

[1165] Ibidem, par. 9.
[1166] HRC, Follow-up Progress Report of the Human Rights Committee on Individual Communications, adopted on 21 May 2010 at ninety-eighth session, CCPR/C/98/3, p. 16.
[1167] Ibidem.
[1168] Ibidem.
[1169] HRC, Communication No. 2552/2015, Campo Agua'ẽ indigenous community of the Ava Guarani people v. Paraguay, Views adopted on 14 July 2021 at one hundred thirty-two session, CCPR/C/132/D/2552/2015.

threatened their ancestral practices in the areas of hunting, fishing, woodland foraging and Guarani agroecology, thus leading to the loss of traditional knowledge; 2) the ceremonial aspects of baptism (*mitãkarai*) were no longer practiced owing to the disappearance of the materials from the forest needed to build the dance houses (*jerokyha*), of the *avati para* variety of corn with which they made the liquor (*kagüi*) that constitutes a fundamental sacred ritual in the ceremony and of the wax used to make the ceremonial candles due to the mass extinction of forest bees (*jatei*); 3) the loss of this ceremony has left children without a rite crucial to strengthening their cultural identity, and the last religious leaders (*oporaiva*) have been left without apprentices, which threatens the preservation of the community's cultural identity; 4) the community structure was being eroded as families were forced to leave the community[1170].

By recalling its General Comment No.23, the Committee underlined that Indigenous Peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity[1171]. As a result of interpreting Article 27 of the Covenant in conjunction with the UNDRIP, the Committee underlined that it enshrines the inalienable right of Indigenous Peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and cultural identity[1172] and that the State parties should be guided by the principle of free, prior and informed consent[1173].

The Committee stated that Paraguay did not adequately monitor the illegal activities at the source of the contamination and by doing so, the State party failed to prevent the contamination. According to the Committee, the failure in its duty to provide protection made it possible for the large-scale, illegal fumigation, including with banned agrochemicals, to continue for many years, not only causing health problems among community members – including children, as the fumigation was carried out mere meters from the school during school hours – but also contaminating the community's waterways, destroying its subsistence crops, killing its livestock and triggering the mass extinction of fish and bees[1174], all basic components of the Indigenous Peoples' private,

[1170] Ibidem, par. 3.10.
[1171] Ibidem, par. 8.6.
[1172] Ibidem.
[1173] Ibidem, par. 8.7.
[1174] Ibidem, 8.4.

family and cultural life. Therefore, the Committee held that the State party violated Articles 17 and 27 of the Covenant, read alone and in conjunction with article 2 (3)[1175] and as a consequence should provide following remedies: (a) conduct an effective and exhaustive investigation of the facts, keeping the authors appropriately informed; (b) initiate criminal and administrative proceedings against the alleged perpetrators and, if they are found guilty, impose appropriate penalties; (c) make full reparation to the authors and other members of the community for the harm caused, including appropriate compensation and reimbursement of legal costs; and (d) take all necessary measures, in close consultation with the community, to repair the environmental damage. The State party is also under an obligation to take steps to prevent similar violations from occurring in the future[1176]. Comparing these recommendations with the ones in the case *Poma Poma v. Peru,* it could be observed that the range of remedies recommended by the Committee has become more developed and detailed.

As it has been already mentioned, until now the HRC is the only treaty body that have decided on the merits in a climate change case or rather two cases. The first case before the Committee concerning climate change was the case *Ioane Teitiota v. New Zealand*[1177]. In 2013, Ioane Teitiota, a national of the small Pacific island nation of Kiribati, applied for refugee status in New Zealand on the basis that the risks to his life posed by climate change forced him to leave Kiribati. The Immigration and Protection Tribunal rejected his application and this decision was upheld on appeal to the High Court, Court of Appeal and Supreme Court. In his communication he claimed that New Zealand violated his right to life by returning him to Kiribati[1178], as the sea level rise in Kiribati has resulted in: (a) the scarcity of habitable space, which has in turn caused violent land disputes that endanger the author's life; and (b) environmental degradation, including saltwater contamination of the freshwater supply[1179].

The Committee noted that the author's claims relating to conditions on Tarawa at the time of his removal do not concern a hypothetical future harm, but a real predicament[1180]. The Committee reiterated that the right to life includes the right of individuals to enjoy a life with dignity and to be free from acts or omissions that would

[1175] Ibidem, par. 9.
[1176] Ibidem, par. 10.
[1177] HRC, Communication No. 2728/2016, *Ioane Teitiota v. New Zealand,* Views adopted on 24 October 2019 at the one hundred twenty-seventh session, CCPR/C/127/D/2728/2016.
[1178] Ibidem, par. 1.1.
[1179] Ibidem, par. 3.
[1180] Ibidem, par. 8.5.

cause their unnatural or premature death and that "environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life"[1181].

The Committee, however, found that the State party's courts provided the author with an individualized assessment of his need for protection and took note of all of the elements provided by the author when evaluating the risk he faced when the State party removed him to the Republic of Kiribati in 2015, therefore, the conduct of the judicial proceedings in the author's case was not arbitrary or did not amount to a manifest error or denial of justice, or that the courts otherwise violated their obligation of independence and impartiality[1182]. As such, the Committee was of the view that the author's removal to the Republic of Kiribati did not amount to a violation his rights under article 6 (1) of the Covenant[1183]. However, the Committee underlined also the "continuing responsibility of the State party to take into account in future deportation cases the situation at the time in the Republic of Kiribati and new and updated data on the effects of climate change and rising sea-levels"[1184]. The ruling has nevertheless been lauded as "landmark', as according to Adaena Sinclair-Blakemore, the HRC accepted that States have an obligation not to forcibly return individuals to places where climate changes poses a real risk to their right to life and in this sense the decision "represents a significant jurisprudential development in the protection of climate refugees under international human rights law"[1185].

An indisputably landmark decision of the Human Rights Committee, concerning both climate change and Indigenous Peoples, is *Billy et al. v. Australia*[1186] from 2022, in which the Committee for the first time held that climate change can violate cultural rights of Indigenous Peoples. The authors of the communication belong to the Indigenous minority group of the Torres Strait Islands and live on the four islands of Boigu, Masig, Warraber and Poruma. As the authors reside in low-lying islands, are among the most vulnerable populations to the impact of climate change[1187]. The authors claimed that the

[1181] Ibidem, par. 9.4.
[1182] Ibidem, par. 9.13.
[1183] Ibidem, par. 10.
[1184] Ibidem, par. 9.14.
[1185] A. Sinclair-Blakemore, "Teitiota v New Zealand: A Step Forward in the Protection of Climate Refugees under International Human Rights Law?", Oxford Human Rights Hub, January 28, 2020, https://ohrh.law.ox.ac.uk/teitiota-v-new-zealand-a-step-forward-in-the-protection-of-climate-refugees-under-international-human-rights-law, [last accessed: 20.07.2023].
[1186] HRC, Communication No. 3624/2019, Daniel Billy et al. v. Australia, Views adopted on 21 July 2022 at one hundred thirty-fifth session, CCPR/C/135/D/3624/2019, [hereinafter: Billy et al. v. Australia].
[1187] Ibidem, par. 2.1.

State party had violated their rights under Articles 2, read alone and in conjunction with articles 6, 17 and 27 of the Covenant; and Articles 6, 17 and 27, each read alone[1188]. They argued that the State party has failed both on the adaptation and on the mitigation level, as it did not provide infrastructure to protect the authors' lives, way of life, homes and culture against the impacts of climate change, especially sea level rise, and to reduce greenhouse gas emissions and cease the promotion of fossil fuel extraction and use[1189]. In 2017, Australia's per capita greenhouse gas emissions were the second highest in the world. Those emissions increased by 30.72% between 1990 and 2016. The State party ranked 43rd out of 45 developed countries in reducing its greenhouse gas emissions during that period[1190]. Moreover, Australia was the world's second largest exporter of thermal coal, with exports reaching an all-time high in 2019[1191]. Additionally, the High Court of Australia has ruled that state organs do not owe a duty of care for failing to regulate environmental harm[1192].

In relation to the right to enjoy their culture, the authors claimed that their culture depends on the continued existence and habitability of their islands and on the ecological health of the surrounding seas and climate change already compromises the authors' traditional way of life and threatens to displace them from their islands[1193]. Such displacement would result in irreparable harm to their ability to enjoy their culture. As to the impacts of climate change on their traditional way of life, they pointed out that: 1) sea level rise has caused saltwater to intrude into soil of the islands, such that areas previously used for traditional gardening can no longer be cultivated; 2) rising sea level has caused coconut trees to become diseased, such that they do not produce fruits or coconut water, which are part of the authors' traditional diet; 3) such changes make the authors reliant on expensive imported goods that they often cannot afford; 4) patterns of seasons and winds play a key role in ensuring the authors' livelihoods and subsistence but are no longer predictable; 5) precipitation, temperature and monsoon seasons have changed, making it harder for the authors to pass on their traditional ecological knowledge[1194]; 6)

[1188] Ibidem, par. 3.1.
[1189] Ibidem.
[1190] Ibidem, par. 2.8.
[1191] Special Rapporteurs on Human Rights and the Environment Amici Curiae Brief of Special Rapporteurs on Human Rights and the Environment, D. R Boyd., J. H. Knox, 23 September 2022, https://www.ohchr.org/sites/default/files/documents/issues/ environment/srenvironment/activities/2022-09-23/BoydKnox-Third-party-submission-Comm-No-36242019.pdf, par. 7 [last accessed: 23.07.2023].
[1192] *Billy et al. v. Australia, op. cit.,* par. 7.3.
[1193] Ibidem, par. 3.5.
[1194] Ibidem, par. 2.5.

loss by erosion of their traditional lands; 7) reduced ability to practice their traditional culture and pass it on to the next generation, as the most important ceremonies (such as coming-of-age and initiation ceremonies) are only culturally meaningful if performed on the native lands of the community whose ceremony it is[1195].

The authors' situation regarding impacts of climate change is analogous to the situation of Arctic Indigenous Peoples, especially concerning last five points: expensive and imported food, lack of weather predictability, loss of traditional ecological knowledge, loss of traditional territory and inability to perform culturally significant practices. With relation to the first two points, in the Arctic it is not so much for the sea water, but rather thawing permafrost and rising temperatures that result in disappearing flora and fauna used for subsistence since the time immemorial.

Although the Committee stated that the it is not in a position to conclude that the adaptation measures taken by the State party would be insufficient so as to represent a direct threat to the authors' right to life with dignity and as such it decided that the information before it does not disclose a violation by the State party of the authors' rights under article 6 of the Covenant[1196], it did held that the State party violated the authors' rights under Article 17 and 27 of the Covenant[1197]. While the Committee welcomed the new construction of seawalls on the four islands at issue, it observed that the State party has not explained the delay in seawall construction with respect to the islands where the authors live. The Committee considered that "when climate change impacts – including environmental degradation on traditional [indigenous] lands in communities where subsistence is highly dependent on available natural resources and where alternative means of subsistence and humanitarian aid are unavailable – have direct repercussions on the right to one's home, and the adverse consequences of those impacts are serious because of their intensity or duration and the physical or mental harm that they cause, then the degradation of the environment may adversely affect the well-being of individuals and constitute foreseeable and serious violations of private and family life and the home"[1198].

In relation to the right to enjoy Indigenous culture, the Committee noted that the State party has not refuted the authors' arguments that they could not practice their culture

[1195] Ibidem, par. 5.2.
[1196] Ibidem, par. 8.7
[1197] Ibidem, par. 9.
[1198] Ibidem, par. 8.12.

on mainland Australia, where they would not have land that would allow them to maintain their traditional way of life[1199]. Moreover, the Committee considered that the climate impacts mentioned by the authors represent a threat that could have reasonably been foreseen by the State party, as the authors' community members began raising the issue in the 1990s and that it was the delay in initiating these projects that indicated an inadequate response by the State party to the threat faced by the authors[1200]. Therefore, the State party's failure to adopt timely adequate adaptation measures to protect the authors' collective ability to maintain their traditional way of life, to transmit to their children and future generations their culture and traditions and use of land and sea resources constitutes a violation of the State party's positive obligation to protect the authors' right to enjoy their minority culture. Therefore, the Committee considered that the facts before it amounted to a violation of rights under article 27 of the Covenant.

As to the remedies, the State party is obligated "to provide adequate compensation, to the authors for the harm that they have suffered; engage in meaningful consultations with the authors' communities in order to conduct needs assessments; continue its implementation of measures necessary to secure the communities' continued safe existence on their respective islands; and monitor and review the effectiveness of the measures implemented and resolve any deficiencies as soon as practicable"[1201]. The Committee also obliged the State party to take steps to prevent similar violations in the future.

5.6. Alternative mechanisms

It is important to mention, however, that the individual complaints procedures before the previously deliberated quasi-judicial bodies are by no means the only mechanism of human rights protection. Therefore, the following paragraphs briefly discuss the potential of alternative mechanisms of holding States accountable.

The United Nations Special Procedures, although not considered as quasi-judicial bodies and not vested with the power to decide whether there has been a violation[1202] and therefore to award remedies, can help to raise awareness about human rights violations in

[1199] Ibidem, par. 8.14.
[1200] Ibidem.
[1201] Ibidem, par. 11.
[1202] See A. Hernandez-Połczyńska, *Procedury Specjalne Rady Praw Człowieka ONZ,* Instytut Nauk Prawnych PAN, Warszawa 2019, p. 113.

general, and violations of Indigenous Peoples' rights in particular. Such is the case of for example Special Rapporteur in the field of cultural rights, Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment and most significantly Special Rapporteur on the rights of Indigenous Peoples, whose reports, communications or urgent appeal letters are an important source of information about Indigenous Peoples' human rights violations and can effectively influence the actions of governments. In 2015, twenty-seven UN Special Procedures, including Special Rapporteur on the rights of Indigenous Peoples and Special Rapporteur in the field of cultural rights, issued a joint statement concerning climate change, in which they underlined that "climate change is one of the greatest human rights challenges of our generation, and it is our generation that must meet it"[1203] and that "bringing a human rights perspective to climate change not only clarifies what is at stake; it also helps to ensure that responses are coherent, effective and responsive to the concerns of those most affected"[1204].

Similarly, the Universal Periodic Review, a procedure started in 2008 under the auspices of the Human Rights Council, which involves a review of the human rights obligations of all UN Member States[1205], contributes to ensuring that all human rights commitments of States are implemented and put into action. For example, in Finland's last Universal Periodic Review a large group of States recommended it to ratify the ILO Convention No. 169 and to renew the Sami Parliament Act in dialogue with the Sami people and in accordance with the right of Indigenous Peoples to self-determination[1206], while in 2021 Fiji recommended Denmark to ensure the meaningful participation of women, children, persons with disabilities and Inuit communities in the development and implementation of climate change and disaster risk reduction frameworks[1207]. Much work in rising awareness about Indigenous Peoples' rights has also been done under the auspices of the Permanent Forum on Indigenous Issues, an advisory body to the Economic and Social Council, established in 2000 and by the Expert Mechanism on the Rights of Indigenous Peoples, a subsidiary body of the Human Rights Council, established in 2007.

[1203] Joint statement by UN Special Procedures on the occasion of World Environment Day, 5 June 2015, https://www.ohchr.org/en/statements/2015/06/joint-statement-un-special-procedures-occasion-world-environment-day-5-june-2015 [last accessed 1.08.2023].
[1204] Ibidem.
[1205] Ibidem, 26.
[1206] See Human Rights Council, Report of the Working Group on the Universal Periodic Review. Finland, A/HRC/52/9, 5 January 2023.
[1207] Human Rights Council, Report of the Working Group on the Universal Periodic Review. Denmark, A/HRC/48/10, 14 July 2021, par. 60.112.

Especially the latter has a potential to foster Indigenous Peoples' rights, in view of its latest success in the negotiations concerning repatriation of Indigenous Peoples' cultural artifacts[1208]. As such, although these procedures are not considered as offering remedies to Indigenous Peoples, contrary to the UN quasi-judicial mechanisms, they do help to hold States accountable.

Considering that the only binding treaty on Indigenous Peoples' rights is the ILO Convention No. 169, also the ILO instruments should be taken into account. According to the ILO Constitution, the implementation of ILO conventions and recommendations is subject to multi-level control by the organization. There are to mechanisms: representation and complaints procedure. The representation procedure is set out in Articles 24-25 of the ILO Constitution[1209]. Under this procedure an industrial association of employers or of workers has the right to present to the ILO Governing Body a representation against any member State which, in its view, "has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party"[1210].

The complaint procedure is governed by Articles 26-34 of the ILO Constitution, under which a complaint may be filed against a member State for not complying with a ratified Convention by another member State which has ratified the same Convention, a delegate to the International Labour Conference or the Governing Body of its own motion. If a State refuses to fulfill the recommendations of a Commission of Inquiry, the Governing Body can take action under Article 33 of the ILO Constitution, which provides that: "[i]n the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith"[1211]. However, as it has been mentioned throughout this thesis, none of the Artic States concerned has ratified the ILO Indigenous and Tribal Peoples Convention. Therefore, the potential of this mechanism for Indigenous Peoples of the Arctic is rather limited.

[1208] See K. Prażmowska-Marcinowska, *Repatriation of Indigenous Peoples'…*, *op. cit.*
[1209] ILO, Constitution of the International Labour Organisation, 1 April 1919, https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO [last accessed: 1.08.2023].
[1210] ILO, Representations, https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/representations/lang--en/index.htm [last accessed: 1.08.2023].
[1211] ILO, "Constitution…", *op. cit.,* Article 33.

For a long time, the UNESCO procedure allowing individuals and NGOs to submit communications concerning alleged violations of human rights within UNESCO's field of competence has been the only procedure directly dealing with violations of economic, social and cultural rights[1212]. UNESCO has a specific system for the protection of human rights that is not based on treaties. The sui generis complaint procedure was established by the 104 EX/Decision of the Executive Board of 1978. According to Yvonne Donders, however, the effectiveness of this procedure has been questioned due to its main characteristics: the procedure is carried out by a supervisory body composed of States' representatives; it is confidential; and its main aim is to reach a friendly settlement with the State concerned, instead of coming to an explicit conclusion whether human rights were violated[1213]. Therefore, its potential in remedying the Indigenous Peoples' human rights violation caused by anthropogenic climate change is rather limited.

5.7. Concluding remarks

As it has been discussed in this chapter, accountability has three dimensions: responsibility, answerability and enforceability. The latter requires putting mechanisms in place that monitor the degree to which public officials and institutions comply with established standards, and ensure that appropriate corrective and remedial action is taken when this is not the case. The most used legal dimension of human rights accountability has materialized in the international and regional accountability system through the individual complaints procedure and the rights-based climate change litigation serves as an innovative way of holding governments accountable in the absence of strong, easily enforceable international commitments within the UNFCCC.

As it has been demonstrated, the two regimes – climate change regime and human rights regime – are no longer detached, but closely connected. The rationale behind the human rights approach to climate change litigation is that as human rights treaties require States to take measures to protect human rights, and as climate change hinders the enjoyment of various human rights, the human rights treaties may imply an obligation for

[1212] See Y. Donders, *UNESCO's Communications Procedure on Human Rights*, "Amsterdam Law School Legal Studies" Research Paper No 2018-25, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247583 [last accessed: 1.08.2023].
[1213] Ibidem.

States to mitigate climate change. For this reason, climate litigants increasingly rely on various sources of law, including human rights law and remedies, in order to bridge these accountability and enforcement gaps. As it follows from the analysis conducted in the chapter, the Inuit were at the forefront of human rights approach to climate change litigation, as already in 2005 they filled a petition to Inter-American Commission of Human Rights.

The right to remedy is a necessary element of the human rights framework, as it is essential in providing effective recourse where there has been an allegation of a human rights violation. In this sense, the right to remedy is a twofold right: on one hand, it is a basic human right in and of itself, and on the other it is a means to protect other human rights. The concept of "remedy" includes two separate elements: procedural and substantive. The procedural aspect of remedy denotes access to justice, while substantive redress concerns the result of that process: the actual relief granted to the victim of a human rights violation (reparation). Reparation may include all of the acts which also serve to redress individual harm from human rights violations: restitution, compensation, satisfaction, and guarantees of non-repetition.

Although the individual's access to international justice remains exceptional and based on specific treaty arrangements, both universal and regional systems of human rights protection offer possibilities of seeking the redress for harm suffered. As follows from the analysis, Indigenous Peoples from Canada and the US are only able to bring their claims to the Inter-American Commission, contrary to the Indigenous Peoples from the majority of South American States, who are able to submit (through the Commission) their cases to the Court and obtain a binding judgement in case their rights have been violated. This is a major obstacle for Arctic Indigenous Peoples, especially concerning the leading role that the Court has played in recognition of Indigenous Peoples' rights.

In the case *Mary and Carrie Dann v. United States*, the Commission unequivocally resolved that it is competent to determine allegations against the United States. However, both petitions filled by Indigenous Peoples of the Arctic region have had little success in the Inter-American Commission. The first petition brought by the Inuit was dismissed without substantiation, while the second petition was brought by the Athabaskan Peoples in 2013 and for the last ten years is being reviewed for the admission.

The Inter-American Court of Human Rights, on the other hand, on many

occasions proved to be a good venue for Indigenous Peoples' attempts in obtaining remedy. The Court's case-law regarding Indigenous Peoples' rights is extensive and the Court is taking into account Indigenous Peoples' perspective and the cultural dimensions of their rights. In the case *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, for example, the Court acknowledged the link between cultural integrity and Indigenous communities' lands and recognized that their relation to land is not merely a matter of possession but a spiritual element which they must fully enjoy to preserve their cultural legacy and transmit it to future generations. Moreover, in the case *Sawhoyamaxa Indigenous Community vs. Paraguay*, the Court observed that the special meaning that the lands have for Indigenous Peoples implies that the denial of those rights over land involves a detriment to values that are highly significant to the members of those communities, who are at risk of losing or suffering irreparable damage to their lives and identities, and to the cultural heritage of future generations.

In one of the latest landmark cases before the Inter-American Court of Human Rights, *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, the Court set out some important principles: 1) the changes in cultural patterns and activities do not deprive Indigenous Peoples of their status, as culture is in itself dynamic; 2) the changes to the culture, although inevitable, should be undertaken by the Indigenous Peoples themselves, without the outside pressure; 3) there is a major difference between "adapting" their ways of life as a result of internal decisions and in accordance with Indigenous values, and the "adaptation" or rather "assimilation" imposed from the outside. Moreover, the judgment in the Lhaka Honhat case brings the recognition of the seriousness of the current ecological crisis to the Inter-American system.

The European Court of Human Rights' jurisprudence concerning Indigenous Peoples is rather scarce, especially as compared to the case law of the Inter-American Court of Human Rights. Although the first complaint was lodged in 1983, since the very beginning Indigenous Peoples have had limited success in obtaining *in merito* judgments when appearing before the organs of the European Convention of Human Rights. The only two cases brought by the Indigenous Peoples before the ECHR that resulted in a judgment are the *Handölsdalen Sami Village v. Sweden* and *Ecodefence and Others v. Russia.* Although the Court ruled in favor of the Indigenous Peoples, it did not take into account their particular situation, nor their traditional way of life and cultural dimension of their claims.

Although neither the European Convention on Human Rights, nor its counterpart – the European Social Charter – explicitly recognize the right to culture or the right to take part in cultural life, the Court's case-law provides interesting examples of how some rights falling under the notion of cultural rights in a broad sense can be protected by the Court. The group of cases relating to cultural identity consist mostly of the cases concerning Roma and Traveller people. In the case *Chapman v. the United Kingdom,* the Court used the concept of vulnerability in relation to the Roma's situation and this approach resulted in the concept of vulnerable groups in the case-law of the ECHR. This approach allows the Court to take into account the difficult history of certain groups and give consideration to their needs and different ways of life, and to view the alleged violation of applicant's rights in a more systemic manner and in relation to other social factors, such as for example the domination of the other social groups. Comparison between the judgements under the scope of "vulnerable groups" with the claims brought by the Indigenous Peoples, indicates what should have been done in the Indigenous Peoples' cases, has been done concerning other minorities, and particularly Roma and Traveller people.

The analysis of the cases relating to environment shows that in principle, the Court is well equipped to rule on the first climate change cases as so far on eighty five occasions the Court recognized that the deterioration of the environment may have detrimental effect on the enjoyment of human rights. In the case *Hatton and Others v. the United Kingdom*, for example, the Court recognized that it is possible to establish a human rights violation due to the presence of factors that make the environment inhospitable or impossible for normal living, while in the case *Fadeyeva v. Russia,* the Court acknowledged that the State has failed to strike a fair balance between the interests of the community, as it did not apply effective measures which would be capable of reducing the industrial pollution to acceptable levels.

Although the climate change applications are still pending, the question of appropriate and effective reparations emerges, especially in the context of Indigenous Peoples. Comparison of the catalogue of reparation measures awarded by the two regional human rights court, allows to draw a conclusion that a monetary compensation may not be satisfactory in the cases of human rights violations caused by the anthropogenic climate change. While the ECHR approach to reparation measures is rather general, and usually limited to "just satisfaction", granted in a form of money, or the general measures, which may include legislative or regulatory amendments, or publication of the Court's

judgment, the practice of the IACHR shows that its approach is far more detailed and as such suits better the needs of Indigenous Peoples. Moreover, contrary to the European system, in which the monitoring of the compliance with the judgments is under the supervision of the Committee of Ministers, in the Inter-American system, the Court itself is tasked with monitoring the States' compliance with the judgments and it periodically supervises compliance with the provisions relating to remedies set forth in its judgments, also by undertaking on-site visits.

As the regional systems of human rights protection centered around two Courts, although having some potential, do not guarantee effective remedies to the Arctic Indigenous Peoples, the universal system of human rights protection and its quasi-judicial bodies has been analyzed. The Committee on the Rights of the Child in the case *Sacchi et al. v. Argentina, Brazil, France, Germany & Turkey*, recognized that the collective nature of the causation of climate change does not absolve the State party of its individual responsibility. Although the Committee found the communication inadmissible for failure to exhaust domestic remedies, it expanded the understanding of jurisdiction by recognizing that States have extraterritorial obligations with regards to climate change and, and held that States can now be held accountable for the negative impact of their carbon emissions on children's rights.

As the Human Rights Committee has issued a significant jurisprudence on Indigenous Peoples, the cases have been analyzed with a view to establish, what is the Committee's approach to Indigenous Peoples from the Arctic. As follows from the analysis, the HRC has for a long time decided in favor of Indigenous Peoples and took into account their cultural perspective and traditional ways of life.

There is no doubt that the decision in *Billy et al. v. Australia* is a long-awaited victory of Indigenous Peoples and can further contribute to the protection of their rights. Considering all its case-law on Indigenous Peoples' rights, the Committee provides a suitable venue for addressing Indigenous Peoples grievances, also in the context of climate change. However, the Committee's views can also leave one with a feeling of dissatisfaction. This has been noted by the Committee Member Gentian Zyberi, who in an individual opinion pointed out that the Committee "should have linked the State obligation to 'protect the authors' collective ability to maintain their traditional way of life, to transmit to their children and future generations their culture and traditions and use of land and sea resources' more clearly to mitigation measures, based on national commitments and international cooperation – as it is mitigation actions which are aimed

at addressing the root cause of the problem and not just remedy the effects"[1214]. However, as it has been mentioned at the beginning of this chapter, the cases concerning adaptation are easier translated into the human rights framework as they do not require establishing the extent to which particular State is actually contributing to climate change. With this stipulation in mind, the Committee's views in the case *Billy et al. v. Australia* are pioneering at the international law level. Bearing in mind similarities between the situation of the Indigenous Peoples from the Torre Strait Islands and the Arctic region in the context of violation of their human rights as a consequence of climate change, the views can also positively influence the case-law of other international judicial and quasi-judicial bodies, such as the European Court of Human Rights, which is about to decide on the admissibility of its first climate change cases, and the Inter-American Commission on Human Rights in the case of Athabaskan Peoples' petition.

The alternative mechanisms of protection, such as the UN Special Procedures or the Universal Periodic Review, although not considered as quasi-judicial bodies and not vested with the power to decide whether there has been a violation and therefore to award remedies, can help to close the gap of holding States accountable by exerting pressure to ratify international instrument allowing for the protection of Indigenous Peoples' rights.

[1214] *Billy et al. v. Australia, op. cit.,*, Annex II, Individual opinion by Committee Member Gentian Zyberi (concurring), par. 6.

Final remarks

The research conducted for the purpose of the dissertation confirms the main hypothesis and allows to conclude that there is a gap in international law, as a result of which current mechanisms do not provide the possibility of an effective remedy for the Indigenous Peoples in the Arctic in the case of violation of their cultural rights arose from the climate change induced deterioration of the environment.

This is due to the fact that international law is State-centric, and the fate and future of Indigenous Peoples depend on the States' willingness to be bound by certain obligations. At the moment, neither human rights law nor climate change law are able to force States to effectively take care of the Indigenous Peoples of the Arctic region due to the paradox that they are States that create the international law.

As each chapter included final conclusions, the final remarks were gathered in points. Particularly, it has been established that:

1. Being aware of the cultural and economic differences among the Indigenous Peoples of the Arctic region, the conclusion can be drawn that Indigenous Peoples possess some characteristics that distinguish them from other social groups. Indigenous Peoples can be characterized as those who have priority in time, with respect to the occupation and use of a specific territory; voluntarily perpetuate cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions; self-identify, as well as are recognized by other groups, or by State authorities, as a distinct collectivity; and have the experience of subjugation, marginalization, dispossession, exclusion or discrimination. Due to colonization, Indigenous Peoples have lost their sovereign status and although, depending on the settler State, they were able to re-gain some levels of autonomy and self-governance, they are not independent and cannot be regarded as States in the traditional meaning of international law. This prevents them from fully participating in the international climate change regime.

2. Culture and cultural rights are not “Cinderella rights” for Indigenous Peoples but rather principal rights, encompassing the enjoyment of all other rights. Indigenous Peoples view culture as holistic and all-inclusive, such that each and every human rights topic includes a cultural dimension. It has been reflected in the United Nations Declaration on the Rights

of Indigenous Peoples, which refers to cultural rights in at least seventeen out of the forty-six articles. The essential element of Indigenous Peoples' enjoyment of their human rights and human dignity is the international recognition and respect for their own customs, rules and practices for transmitting their heritage to future generations. For Indigenous Peoples, their culture is the essence of who they are, who they belong to, where they come from, and how they relate to one another. Culture permeates all aspects of their life, such as family relations, health, education, language, and connections to the land and the life-sustaining resources of the land and is essential to the overall well-being of Indigenous communities and individuals. Ensuring the preservation of Indigenous communities' cultural identity assures their very cultural and physical survival and forms part of the obligations resulting from the right to take part in cultural life.

3. Cultural rights are human rights that aim at assuring the enjoyment of culture and its elements in conditions of equality, human dignity and non-discrimination. They are rights related to such themes as access to culture, participation in cultural life, cultural and artistic production, language, cultural heritage and intellectual property rights. In the context of the right to take part in cultural life, the CESCR established that the obligation to respect requires States Parties to refrain from interfering, directly or indirectly, with the enjoyment of the right to take part in cultural life, while the obligation to protect requires States Parties to take steps to prevent third parties from interfering in the right to take part in cultural life, and the obligation to fulfil, being the most pro-active part of the States' obligations, requires States Parties to take appropriate legislative, administrative, judicial, budgetary, promotional and other measures aimed at the full realization of the right to participate in cultural life. According to the CESCR, one of the minimum core obligations in the context of the right to participate in cultural life is to obtain free and informed consent of Indigenous Peoples when drafting and implementing the laws that may infringe upon their cultural rights, which also applies to the regulations related to climate change, e.g. in the case of large scale mitigation projects.

4. Cultural rights are enforceable and justiciable. Refusing cultural rights the element of justiciability would be contrary to the doctrine of universality, indivisibility, interdependency and interrelatedness of human rights. Moreover, it would drastically limit the capacity of the courts to protect the rights of the most marginalized groups, including Indigenous Peoples. The justiciability of cultural rights has been acknowledged

by the adoption of the Optional Protocol to the ICESCR and in numerous judgments and decisions issued by human rights courts and quasi-judicial bodies. However, the justiciability of cultural rights is only a potential and not a practice, as States are not willing to be bound by certain obligations in this area, as evidenced by the low number of ratifications of the Optional Protocol to the ICESCR.

5. The anthropogenic climate change threatens the enjoyment of a wide range of cultural rights of the Indigenous Peoples of the Arctic region. The right to access intangible and tangible cultural heritage, the right to land and self-determination, the right to adequate housing and adequate food, the right to water and the right to health are all at risk because of the various environmental changes occurring as a consequence of climate change. As follows from the analysis, these rights are interdependent and often overlapping, and a breach of one right usually implies infringement of another right. For example, changes in migration patterns of caribou lead to a decline in Indigenous hunting activities (right to take part in cultural life), which results not only in lack of access to traditional and culturally appropriate foods (right to adequate food) but also deprives Indigenous Peoples of the opportunity to pass their traditional knowledge about animals and plant species or weather forecasting (right to education), which may lead to disappearance of certain words or even Indigenous languages (also right to take part in cultural life). Although most human rights are affected by climate change, cultural rights are particularly affected as they risk being wiped out.

6. International climate change law hardly provides accountability mechanisms, and as such, Indigenous Peoples cannot hold States accountable for their current contribution to climate change through international climate change law. The general law of State responsibility also presents some shortcomings, as the prospects of one State invoking the breach of another State's obligations in the context of climate change based on the UNFCCC regime are hardly perceptible. Moreover, the law of State responsibility applies only to breaches of international law by or attributable to a State and operates only when responsibility can be invoked by other States. As Indigenous Peoples lost their status as sovereign nations, they cannot invoke the law on State responsibility, which involves only State-to-State relations. Furthermore, although some of the international climate change regime instruments refer to Indigenous Peoples, the general framework does not see the particular needs of Indigenous Peoples and their close cultural relation with the

environment.

7. Indigenous Peoples should participate in creating the climate change framework. According to the Paris Agreement, adaptation measures should take into consideration vulnerable groups, communities and ecosystems, and more importantly, should be based on and guided by *inter alia* knowledge of Indigenous Peoples. Non-recognition and non-inclusion of Indigenous perspectives and lack of culturally-specific approaches to adaptation to climate change can seriously hamper Indigenous Peoples' possibilities of adaptation. The disregard for Indigenous Peoples' culture should be identified as one of the obstacles to the successful adaptation. At the same time, culture can serve as an empowering tool and foster Indigenous Peoples' adaptation to climate change.

8. The human rights approach could help to hold the States accountable for climate change. Accountability is a cornerstone of the human rights framework as for the effective realization of human rights, there must be mechanisms that can be used while the violation of human rights occurs – in other words, to hold accountable the duty-bearer while he is not adhering to the standards. The rationale behind the human rights approach to climate change litigation is that as human rights treaties require States to take measures to protect human rights, and as climate change hinders the enjoyment of various human rights, a human rights-based approach to climate change offers an avenue for claims to be brought to enforce those rights. The most used legal dimension of human rights accountability – in the sense of invoking and determining responsibility – has materialized in the international and regional accountability system through the individual complaints procedure. Therefore, litigation can serve to deliver on a key promise embedded in human rights law and discourse: victim's access to effective remedies for human rights violations.

9. The concept of "remedy" includes procedural and substantive elements. The procedural aspect of remedy denotes access to justice, while the substantive redress concerns reparation. The remedy is considered effective when it is capable of redressing the harm that was inflicted. Reparation may include all acts that redress individual harm from human rights violations: restitution, compensation, satisfaction, and guarantees of non-repetition. While for the Western world, the most common form of reparation is monetary compensation, for Indigenous Peoples the most appropriate form of reparation is

restitution, e.g. in the case of damage to the lands, territories, and resources which they have traditionally owned. This is because, in most cases, no form of monetary compensation could adequately compensate for loss of the deep spiritual significance that the nature, environment, and territory have for the cultural identity and the physical existence of Indigenous Peoples. This approach has been reflected in the provisions of the UNDRIP, which indicate that in the case of Indigenous Peoples, the substantive element of remedy – reparation – should be understood broadly, and when restitution is not possible, the catalog of remedies should include all the possible measures, such as satisfaction, guarantees of non-repetition and compensation. This approach should be taken into account by the States and judiciary while adjudicating the cases involving Indigenous Peoples.

10. The human rights approach to climate change allows to hold the States accountable for climate change through human rights courts and quasi-judicial bodies. As follows from the comparison of the case-laws of the two regional human rights courts, both are well-equipped to adjudicate first climate change cases. However, the two regional human rights courts do not provide the possibility of an effective remedy for the Indigenous Peoples in the Arctic, yet for different reasons. The prospects of the European Court of Human Rights ruling in favor of the Indigenous Peoples of the Arctic – Saami – are rather limited. The European Court has a significant jurisprudence on vulnerable groups; however, it did not apply this concept to the Indigenous Peoples. Moreover, in none of the analyzed cases the Court took into account the traditional way of life of the Indigenous Peoples, nor the cultural dimension of their rights. Additionally, the Court's approach to reparation measures is usually limited to monetary compensation or general measures, including legislative or regulatory amendments, which may not be enough in the case of Indigenous Peoples and climate change.

11. The Inter-American Court of Human Rights case law, on the other hand, provides a holistic view of Indigenous Peoples' rights while recognizing that Indigenous Peoples' lives are woven around their territory and environment. Moreover, the wide variety of remedies granted by the Court suits better the interests of Indigenous Peoples than the sole monetary compensation and is in line with the provisions of the UNDRIP. Therefore, the case law of the Inter-American Court proves that the regional human rights tribunal could, in principle, effectively protect the Arctic Indigenous Peoples' rights. However,

due to the lack of the Court's jurisdiction over the Arctic Indigenous Peoples caused by the unwillingness of the United States and Canada to ratify the American Convention on Human Rights, the Arctic Indigenous Peoples do not have access to the Court, and as follows – effective access to justice. Although they can submit petitions to the Inter-American Commission, their attempts to seek justice through this quasi-judicial body have been so far ineffective as the Inuit Petition has been dismissed, and the Athabaskan Petition celebrates in 2023 a tenth anniversary of being halted in the Commission, without any further decision, even a one regarding admissibility. Although it is understandable that the proceedings before international human rights bodies are lengthy, ten years is definitely excessive when it comes to climate change.

12. Conversely, the treaty bodies, and especially the Human Rights Committee, do have the potential to provide remedies to Indigenous Peoples of the Arctic region. The analysis of the HRC's views proves that the Committee, for a long time, decided in favor of Indigenous Peoples and took into account their cultural perspective and traditional ways of life. In the landmark case *Billy et al. v. Australia*, the Committee recognized that the State party's failure to adopt timely adequate adaptation measures to protect the authors' collective ability to maintain their traditional way of life, to transmit to their children and future generations their culture and traditions and use of land and sea resources constitutes a violation of the State party's positive obligation to protect the authors' right to enjoy their culture. Therefore, the Committee's views can serve as a benchmark for States and indicate the scope of positive obligations toward ensuring the enjoyment of Indigenous Peoples' rights, especially with regard to cultural rights. Since the situation of the applicants in the case *Billy et al. v. Australia* is analogous to the situation of the Indigenous Peoples of the Arctic region, the Human Rights Committee is a well-suited body to answer Indigenous Peoples' grievances in the context of climate change. Also, the reparations recommended by the Committee are in line with the provisions of the UNDRIP. However, again, the issue of ratification arises, as the United States did not become a party to the Optional Protocol to the Covenant on Civil and Political Rights and as such, the Indigenous Peoples inhabiting the USA, including Alaska Natives, are not able to bring communications to the HRC.

13. To conclude, although some of the current international human rights mechanisms have the potential of providing an effective remedy for the Indigenous Peoples in the

Arctic in the case of violation of their cultural rights arising from the climate change-induced deterioration of the environment, the major obstacle is the issue of States' ratification of instruments creating these mechanisms. As the States' consent in creating international law still plays a primary role in adopting controlling mechanisms, it is sometimes a primary barrier to addressing significant social issues.

14. Therefore, there is a gap in international law as a result of which the Indigenous Peoples of the Arctic region do not have access to effective remedies in case their cultural rights are violated as a consequence of human-induced climate change. As the issue of ratifying already existing instruments has been recognized as a major obstacle, creating a new instrument, a convention on Indigenous Peoples' rights, is not a solution. This is especially exemplified by the low number of ratifications of the ILO Convention No. 169 and the Optional Protocol to the ICESCR or by the lengthy process that led to the adoption of the UNDRIP.

15. At the same time, a review of alternative human rights mechanisms, such as the United Nations Special Procedures and the Universal Periodic Review, indicates that they have a great potential to raise awareness of governments and societies on the rights of Indigenous Peoples. Therefore, together with Indigenous Peoples' activists, they should continue to exert pressure on States to fulfill their human rights obligation in providing the right to remedy, also to marginalized groups, such as Indigenous Peoples. In this context, international law can play a significant educative role, with a leading example of the Expert Mechanism on the Rights of Indigenous Peoples.

16. Recognition of Indigenous Peoples is critical in and of itself. However, it also paves the way for the fulfilment of the entire array of collective and individual rights, including self-determination, rights to lands, territories and resources, and cultural rights. As such, the States should be encouraged to recognize the particular position of Indigenous Peoples and, in any case, respect the principle of free, prior and informed consent of Indigenous Peoples and their right to internal self-determination.

17. The human rights approach to climate change should be strengthened to include cultural rights. Climate change and culture share a clear nexus as both culture and environment are often place-based. Culture and the exercise of cultural rights can serve

as critical tools in responding to climate change emergency, as only culturally appropriate measures have a chance to succeed, especially in the case of Indigenous Peoples. As such, cultural dimensions should not be overlooked, but rather included into national, regional and international polices regarding climate change.

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