Where to next? Advancing Indigenous cultural rights within a 'universal' human rights framework

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1. Introduction

International law underwent a major shift when the second World War ended; the creation of the United Nations (UN) led to a system based upon human rights. The UN Charter, which affirmed support for equal rights and self-determination,[1] was adopted in 1945,[2] followed by the Universal Declaration of Human Rights (UDHR) in 1948. A number of binding treaties were ratified in the years that followed, most notably the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) in 1966.[3] This shift, together with the first explicit endorsement of self-determination, [4] (defined as the freedom of a group of people to choose a political status and pursue development[5]) led to the demise of colonial powers dominating entire peoples and the creation of a number of new states. Indigenous peoples, effectively trapped within the borders laid down by their colonial oppressors, were largely left out of this. [6]

Indigenous peoples, broadly defined as tribal groups that have been somewhat engulfed by settler states,[7] have often been left at a severe disadvantage by this subjugation.[8] They make up about 5% of the world population but 15% of them exist in extreme poverty.[9] The human rights of Indigenous peoples had long been treated as a domestic matter for the states in which their territory fell.[10] This often had disastrous consequences, particularly in terms of their

[1] United Nations, Charter of the United Nations (24 October 1945) 1 UNTS XVI, Article 1(2)
[2] Helen Keller and Geir Ulfstein, *UN Human Rights Treaty Bodies: Law and Legitimacy: Studies on Human Rights Conventions* (Cambridge University Press, 2012), 1
[3] Ibid
[4] Ana Filipa Vrdoljak, 'Self-Determination and Cultural Rights' in Francesco Francioni and Martin Scheinin (eds), *Cultural Human Rights* (Brill, 2008), 51
[5] Ibid 52
[6] S James Anaya, *Indigenous Peoples in International Law* (OUP 1996), 43
[7] Ibid 3
[8] Ibid
[9] S J Rombouts, 'The Evolution of Indigenous Peoples' Consultation Rights under the ILO and U.N. Regimes' (2017) 53 *Stan J Int'l L* 169, 171
[10] Siegfried Wiessner, 'Indigenous self-determination, culture, and land: a reassessment in light of the 2007 UN Declaration on the Rights of Indigenous Peoples' in Elvira Pulitano (ed), *Indigenous Rights in the Age of the UN* Declaration (Cambridge University Press, 2012), 38

culture and socio-cultural human rights. Forcible attempts were made to assimilate Indigenous peoples in Canada, for example, through the state-sponsored residential school system, in which children were separated from their families, and housed in inhumane conditions. They were 'educated' as a means to stamping out Indigenous culture, whilst transferring the children onto the lower rungs of the economy.[11] This practice continued for over a century[12] and, along with other government policies, has been termed a cultural genocide.[13]

An international Indigenous rights system has developed during that time frame, however. There are now a number of international agreements and treaties that concern Indigenous peoples, most notably the UN's Universal Declaration on the Rights of Indigenous Peoples (UNDRIP).[14] Whilst this has brought necessary attention to the plight of Indigenous peoples, it is not regarded as a fix-all solution. General Assembly President Sheikha Haya Rashed Al Khalifa has warned that 'even with this progress, Indigenous peoples still face marginalization, extreme poverty and other human rights violations. They are often dragged into conflicts and land disputes that threaten their way of life and very survival.'[15] This article argues that these clashes have, to an extent, undermined the protections of Indigenous rights, and whilst Indigenous peoples are now recognized by the international human rights regime, they continue to be marginalized. There are fundamental disagreements between several states, not least Canada, and the international Indigenous rights regime. Some of these are ideological, owing to the nature of Indigenous cultural rights themselves and to their uncomfortable fit within the international, 'universal' human rights regime that has been prominent since 1945. Other problems are more practical, stemming from the profound clashes between Indigenous cultural beliefs and the more Eurocentric values that tend to underpin modern, Western political and economic systems.

A critical examination of the international Indigenous rights system is presented here, with Canada used as a case study. The background and development of the international Indigenous right system is outlined and explained, and its evident strengths and weaknesses briefly

[11] David B MacDonald and Graham Hudson, 'The Genocide Question and Indian Residential Schools in Canada' (2012) 45(2) *Canadian Journal of Political Science* 427, 431-432
[12] Ibid
[13] Ibid 445
[14] United Nations General Assembly, '*United Nations Declaration on the Rights of Indigenous Peoples'* (2 October 2007) UN Doc A/RES/61/295 (UNDRIP)
[15] United Nations, '*United Nations adopts Declaration on Rights of Indigenous Peoples'* (UN News, 13 September 2007) <https://news.un.org/en/story/2007/09/231062-united-nations-adopts-declaration-rights-indigenous-peoples> Accessed 17 May 2020

described. The article then examines ideological clashes between Western conceptions of human rights and Indigenous rights: self-determination, cultural, and land rights, as well as the collective nature of Indigenous rights. The practical incompatibilities between Indigenous peoples in Canada, and Canada as a sovereign settler state are then evaluated. This will point to the conclusion that the cause of Indigenous peoples has been only marginally advanced by the international Indigenous right system and that the future is not particularly promising.

2. The International Indigenous Rights System

Indigenous peoples were not (explicitly) assisted by the renewed fixation on human rights in the aftermath of the second World War. As set out in the preamble to the UDHR, the international human rights system is based upon 'equal and unalienable' rights for all 'members of the human family.' Indigenous peoples do not wish to be assimilated into the 'human family' however: they would prefer to be allowed to be free to live as they have lived for generations without outside interferences with their unique culture. The International Labour Organisation (ILO)'s Convention 107 of 1957 expressly included Indigenous peoples, but the main aim of that Convention was to integrate them into the labour force, and to offer little help for the protection or promotion of Indigenous culture.[16] There are currently two notable international documents based upon Indigenous rights. The most widely ratified of these is the UNDRIP. The UNDRIP was the result of twenty years of drafting by the UN Working Group on Indigenous Populations and its fraught negotiations were beset by antagonistic lobbying by several uncooperative states.[17] It was eventually passed in 2007 by a resolution from the UN General Assembly with 144 votes in favour and four voting against it: namely, the United States, New Zealand, Australia, and Canada. All four eventually endorsed the declaration,[18] rhetorically if not substantively. The UNDRIP enshrines the right to self-determination,[19]

[16] n 9, 179
[17] Karen Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights'(2011) 22(1) *Journal of International Law* 141, 143-144
[18] n 10, 40
[19] Article 3

cultural traditions and customs,[20] self-government,[21] the right to participate - and be consulted[22] - in relevant decision-making,[23] and the right to hold traditional lands and resources.[24]

The other major Indigenous rights covenant is the ILO's Convention 169, which replaced Convention 109 in 1989.[25] There are only 23 signatories to Convention 169.[26] most of whom are in Latin or South America. Self-Determination was not mentioned explicitly by Convention 169, although the preamble asserts the aim of enabling Indigenous peoples to 'exercise control over their own institutions, ways of life and economic development.'[27] This seems to be an implicit invocation of self-determination as Rombouts has noted.[28] Anaya further points out that Article 4 - which compels signatories to adopt special measures to safeguard Indigenous institutions, property, labour, and culture - also seems to hint at self-determination.[29] Convention 169 also gives Indigenous peoples rights to traditional land[30] and resources, [31] the right to be consulted with where interests are affected,[32] and the right to respect for cultural and spiritual values, and institutions.[33] It should be noted that both the UNDRIP and Convention 169 may be a reflection of customary international Indigenous rights law to some extent. Anaya (writing a decade before the UNDRIP was adopted) was of the opinion that Indigenous cultural integrity,[34] traditional land and resources,[35] and self-government (though not self-determination) had become normative.[36] Even those four states that opposed the UNDRIP accepted that many of the rights it ascribes to are indeed indicative of customary

[20] Article 11
[21] Article 4
[22] Article 19
[23] Article 18
[24] Article 26
[25] n 6, 48
[26] ILO, '*Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)*' (International Labour Organisation, 2017) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314> Accessed 7 May 2020
[27] International Labour Organisation Indigenous and Tribal Peoples Convention, 1989 (No. 169) (adopted 27 Jun 1989, entry into force: 05 Sep 1991) (1989) 76th ILC session, Geneva
[28] n 9, 183
[29] n 6, 87
[30] Article 14
[31] Article 15
[32] Article 6
[33] Article 5
[34] n 6, 100
[35] n 6, 104
[36] n 6, 109

law.[37] Other rights, notably self-determination,[38] caused disagreement and led to opposition from those states (discussed more fully, below).

The biggest difference between the UNDRIP and the Convention 169 is that the Convention 169 is legally binding on its signatories.[39] The UNDRIP, on the other hand, is largely dependent upon states taking it upon themselves to incorporate the rights espoused into their domestic legal systems. This can be demonstrated by the attempt to invoke the UNDRIP in reference to an application for judicial review against the Canadian federal government's deliberate underfunding of the Indigenous child welfare system. The government answered that the UNDRIP only imposed political, not legal, obligations.[40] The court decided the case against the government on other grounds, [41] but the government is appealing against this decision as well as an order to compensate victims.[42] There have been several other attempts to use the UNDRIP in courts; notable amongst these is *Ktunaxa Nation v. British Columbia,* [43] where the Canadian Supreme Court declined to update its jurisprudence on Indigenous land claims to accord with UNDRIP standards.[44]

The UN has however created supervisory mechanisms for the UNDRIP. The UN Permanent Forum on Indigenous Issues, which is made up of state government and Indigenous reps, provides advice and information to the UN and raises awareness of Indigenous issues.[45] The Expert Mechanism on the Rights of Indigenous Peoples researches and reports on Indigenous issues.[46] Finally, the UN will send Rapporteurs to states to investigate and report on the Indigenous rights situation on the ground, using UNDRIP as the standard of evaluation.[47] In 2013, several years after Canada had dropped its opposition to UNDRIP, a UN Rapporteur penned a damning report on indigenous affairs, noting no improvements in resolving the

[37] Kirsty Gover, 'Settler–State Political Theory, 'CANZUS' and the UN Declaration on the Rights of Indigenous Peoples' (2015) 26(2) *The European Journal of International Law* 345, 359
[38] Ibid
[39] n 9, 182
[40] Fiona MacDonald and Ben Wood, 'Potential through paradox: indigenous rights as human rights' (2016) 20(6-7) *Citizenship Studies* 710, 717
[41] Ibid 718
[42] Leyland Cecco, 'Trudeau appeal could block billions in compensation to Indigenous children' *The Guardian* (London, 4 October 2019)
[43] [2017] 2 SCR 386
[44] Andrew M. Robinson (2020): Governments must not wait on courts to implement UNDRIP rights concerning Indigenous sacred sites: lessons from Canada and *Ktunaxa Nation v. British Columbia*, [2020] *The International Journal of Human Rights* 1, 18
[45] n 9, 203
[46] n 9, 204
[47] n 10, 43

inequalities between Indigenous and non-Indigenous peoples in regard to health care, education, welfare, social security, and housing (mentioned in an earlier critical UN report in 2004). There had been little government effort to rectify the situation.[48] Recent developments show little if any improvement: Indigenous peoples make up 30% of Canada's prison population despite representing 5% of the country's population and this is expected to increase.[49] Over half of Indigenous children live in poverty,[50] about 25% of indigenous peoples live in overcrowded housing, and about 37% have no reliable access to uncontaminated water despite Canada having more freshwater than any other state.[51]

This is not to say that the international Indigenous human rights system has not had *any* effect, nor does this mean that the UNDRIP is useless. It is desirable for the UN to visit countries like Canada and shed light on these issues, and to be able to evaluate compliance with the universal standards of the UNDRIP. However, given that the UNDRIP was largely the result of much disagreement and compromise, and that opposition was not limited to the four states who would later oppose its adoption - and that even the version that resulted from compromise was still not palatable to those four states[52]- it is not clear as to exactly how an effective enforcement mechanism could ever have been agreed upon. The likely future impacts of the UNDRIP will be limited to the extent that each signatory allows.

3. Ideological Conflicts and the Nature of Indigenous Rights

It is worth noting here what makes Indigenous rights, especially cultural rights, unique. Indigenous culture cannot be covered by the likes of Article 15 of the ICESCR (right to take part in cultural life);[53] Indigenous peoples have long linked the protection and survival of their

[48] S James Anaya, 'Report of the Special Rapporteur on the Rights of Indigenous Peoples in the Situation of Indigenous Peoples in Canada' (2015) 32 *Ariz J Int'l & Comp L* 143, 148
[49] Marie-France Kingsley, 'Indigenous People in Federal Custody Surpasses 30%: Correctional Investigator Issues Statement and Challenge' (*Office of the Correctional Investigator*, 21 January 2020) <https://www.oci-bec.gc.ca/cnt/comm/press/press20200121-eng.aspx> Accessed 3 August 2020
[50] Natasha Beedie, David Macdonald and Daniel Wilson, '*Towards Justice: Tackling Indigenous Child Poverty in Canada'* (2019) Assembly of First Nations, Canadian Centre for Policy Alternatives, and Upstream, 9
[51] United Nations General Assembly, '*Adequate housing as a component of the right to an adequate standard of living, and the right to non-discrimination in this context'* (17 July 2019) UN Doc A/74/183, 8
[52] n 48, 149
[53] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171, Article 15(1)

culture to self-determination[54] to the point that the two have become effectively inseparable.[55] Anaya has explained that this has made self-determination fundamental to the Indigenous cause; it is both the ultimate goal (the 'raison d'etre' [56]) of Indigenous rights and the chosen method for securing all other Indigenous rights.[57] For this reason, when the term 'Indigenous cultural rights' is used, it will refer to all of the unique rights that Indigenous peoples aim to achieve through self-determination, up to and including self-determination itself.

Self-Determination has long been treated with suspicion in international law. It was espoused by US President Woodrow Wilson and Soviet leader Vladimir Lenin after the First World War, when the East-West divide was already evident. Wilson did not agree with Lenin in thinking that self-determination extended to secession and independent statehood, by any means necessary.[58] This disagreement led to self-determination being excluded from the League of Nations framework,[59] and although it was included without definition in the Charter of the UN[60] - which replaced the League - it was not recorded in the UDHR.[61] All of this, including the lack of definition in the UN Charter, seems to have been the result of state resistance to providing a definition that may encourage those with cause to invoke it.[62] This indicates that self-determination is in itself a controversial concept. Opposition to self-determination for Indigenous peoples is based also upon the role self-determination played in the post-World War II era of decolonization, where the term was invoked in support of post-colonial independence.[63] The worry on the part of some states is evident in the UNDRIP; the article 3 right to self-determination was originally drafted to allow Indigenous peoples control over their cultures, economic interests and development, and their traditional land and resources, amongst other things.[64] Opposition, especially from Canada, US, Australia, and New Zealand, watered this provision down.[65] In the final version, the vague articulation of self-determination in article 3 is qualified by article 4, which suggests that self-determination is to be exercised through

[54] Avigail Eisenberg, 'Indigenous Cultural Rights and Identity Politics in Canada' (2013) 18 *Review of Constitutional Studies* 89, 96
[55] Ibid 98
[56] n 10, 47
[57] n 6, 75
[58] n 4, 43
[59] n 4, 44
[60] n 4, 51
[61] n 4, 52
[62] n 62
[63] n 6, 86
[64] n 18, 145
[65] Ibid

autonomous self-government[66] and by Article 46(1) which emphasizes that the rights found in the UNDRIP cannot be used to violate the territorial integrity or sovereignty of existing states.[67]

Whilst it has been established that self-determination can have an internal dimension, in allowing groups to choose their internal political status within a state (self-government)[68], Anaya believes that this misunderstands the demands for self-determination by Indigenous peoples. His conception of self-determination is broadly based upon being governed in accordance with the will of the people and being able to pursue development under that governance.[69] He argues that secession or self-government are simply remedies to be demanded when his conditions for self-determination are denied,[70] and that Indigenous peoples (who, after all, are not a uniform group of people) would be satisfied by the lesser – as compared with secession - remedy of self-government, provided that they are in genuine control of their own interests.[71]

It was mentioned earlier that self-government is regarded as a norm of Indigenous rights law. Even Canada, the US, Australia, and New Zealand have incorporated some level of Indigenous self-government into their domestic arrangements.[72] It is less clear whether Indigenous self-determination has become a norm; Vrdoljak notes that acceptance has increased, but the content of self-determination, in terms of controlling interests and development, beyond the existence of self-government, remains contested.[73] This lack of clarity appears to have been caused by the lobbying of those four states that opposed the UNDRIP, and article 3 read alongside articles 4 and 46(1) have only caused more disagreement and confusion. MacDonald and Wood suggest that this lack of clarity has not only failed to advance Indigenous control over their own interests,[74] but has also prevented further advances by legitimating a status quo that allows self-determination to be satisfied by the bare existence of self-government[75] without

[66] n 14, article 4
[67] n 14, article 46(1)
[68] Kalana Senaratne, 'Internal Self-Determination in International Law: A Critical Third-World Perspective' (2013) 3 *Asian Journal of International Law* 305, 311.
[69] n 6, 81
[70] n 6, 85
[71] n 6, 87
[72] n 4, 76
[73] n 4, 75
[74] n 41, 713
[75] n 41, 714

affording Indigenous people legitimate control over their interests. If true, this is a disappointing development.

There is another fundamental aspect of self-determination for Indigenous peoples; self-determination is also regarded as inter-connected with control of traditionally occupied lands and the resources found on, around, or submerged beneath those lands.[76] Although Indigenous peoples are made up of a litany of disparate groups that sometimes have different goals, this connection generally unifies these groups.[77] There is certainly an economic element to this,[78] as being in control of development - an aspect of self-determination - encompasses economic development. Indigenous peoples enjoy a special relationship with the land they occupy, however. This is a mutual relationship of stewardship[79] that is based upon the idea that their culture and way of life is inseparable from their traditionally occupied land.[80] Indigenous peoples therefore not only see their self-determination as necessarily connected to the protection of their culture and their land, but also see their culture as inseparable from the lands upon which that culture had been developed.

It has been mentioned that the right to traditional land and resources seems to have become a norm of international customary law, and the right to consult, found in both the UNDRIP and Convention 169, seems to have developed into a norm as a means of respecting the right to traditional land. What remains unclear is what international Indigenous rights law requires of states to fulfil this right. The UNDRIP instructs states to consult 'in good faith' in order to obtain 'free, prior, and informed' consent before taking any action that may affect Indigenous interests,[81] whilst Convention 169 compels signatories to consult with the aim of agreement or consent.[82] The Inter-American Court established a number of conditions that consultation must meet[83] as well as a sliding scale that requires deeper consultation for more significant impacts upon Indigenous affairs,[84] largely because the respondent (Ecuador) had ratified Convention

[76] n 9, 175
[77] n 9, 174
[78] n 6, 105
[79] Kathleen J. Martin 'Traditional responsibility and spiritual relatives: protection of indigenous rights to land and sacred places' in Elvira Pulitano (ed) *Indigenous Rights in the Age of the UN Declaration* (Cambridge University Press, 2012), 207
[80] Ibid
[81] n 14, art19
[82] n 33
[83] n 9, 219-220
[84] n 9, 217

169.[85] (Canada's approach to the duty to consult in practice will be analysed in the next section).

In terms of collective rights, the inseparability of Indigenous rights to culture, property, and self-determination helps to explain why the universal human rights system – as found in the likes of the ICCPR and ICESCR – may be of little interest to Indigenous peoples. Culture, property, and self-determination, as Indigenous peoples understand them, are collective rights, whilst universal human rights tend to be individually focused.[86] Broadly, the individual focus of universal human rights, under which minorities would access rights individually and be protected by a prohibition on discrimination,[87] aims to adhere to the principle of equality.[88] Affording special treatment to Indigenous peoples has been framed as offending the principle of equality,[89] which may be true to some extent, but Indigenous self-determination cannot truly be reconciled with the notion of equality, given that Indigenous peoples do not wish to be 'equal.' Michael Ilg argues further that singling out Indigenous peoples as groups enshrines past differences,[90] and that treating their rights as collective will serve to deny some members of Indigenous groups the 'potential' of assimilation.[91] This is deeply insulting, considering the long, violent history of attempts to assimilate Indigenous peoples into the predominant culture: it ignores the fact that assimilation is fundamentally opposed to self-determination. Indigenous peoples wish to collectively exercise their own unique culture outside of the colonial culture of their state and enjoy their own special relationship with their traditional lands. Being treated equally to everyone else would in this sense be self-defeating. In sum, Indigenous rights and values are complex and often extremely difficult to reconcile within the frameworks established by Western cultures, for example, those seen in Canada.

4. Practical Conflicts

The Canadian Constitution contains some degree of recognition of Indigenous rights. Section 35 states that existing Indigenous rights will not be affected by the enacting of the constitution

[85] Ibid
[86] Ulf Johansson Dahre, 'The Politics of Human Rights: Indigenous Peoples and the Conflict on Collective Human Rights' (2008) 12(1) *International Journal of Human Rights* 41, 43
[87] n 18, 158
[88] n 38, 346
[89] Ibid
[90] Michael Ilg, 'Culture and Competitive Resource Regulation: A Liberal Economic Alternative to Sui Generis Aboriginal Rights' (2012) 62(3) *The University of Toronto Law Journal* 403, 405
[91] Ibid 417-418

and that they will continue to be recognized.[92] Canada's legal relationship with Indigenous peoples are also governed by the Indian Act 1876 and a number of treaties concluded with individual Indigenous communities at different points in history.[93] Those treaties, upon which Canada would prefer to base its relations with Indigenous tribes, [94] were usually negotiated in conditions where power was significantly imbalanced, and stacked against the Indigenous tribes.[95] The uncomfortable relationship between Indigenous rights and values, and those of the sovereign states - like Canada - has often had an unfortunate effect on Indigenous affairs: as Anaya has argued, Canada has created the illusion of trying to improve Indigenous affairs whilst not actually effecting any meaningful changes. [96] Leaving aside accusations of bad faith on the part of the Canadian government, [97] there have been two notable areas of conflict. The first of these is lack of understanding over the central role that culture and property play within Indigenous self-determination. This can be demonstrated by the way in which s.35 protection has been interpreted by the courts and the reaction to these decisions by the Canadian government.

In terms of s.35 and cultural rights, *R v Sparrow* [98] is a key case. Here, s. 35 was invoked by a member of the Musqueam First Nations in respect of the right to hold an Indigenous licence to catch salmon, which clashed with the Canadian laws limiting an allowable catch. The Canadian Supreme Court based its approach on the understanding that s35 protection of Indigenous rights was to be interpreted in favour of Indigenous peoples.[99] Where indigenous rights might be extinguished by statute,[100] any such measure must be proportionate and necessary.[101] The standard had clearly not been met in this case. This decision, the first major case after the adoption of the Constitution, was identified by Jonathan Rudin as being generous towards the rights of Indigenous peoples, possibly in the hopes of encouraging a new era of treaty negotiations between Indigenous tribes and the government.[102] However, the Canadian

[92] Canada Act, 1982
[93] n 50, 146
[94] n 38, 367
[95] n 6, 131
[96] n 50, 165
[97] n 50, 148-158
[98] [1990] 1 SCR 1075, (*Sparrow*)
[99] Ibid 1106
[100] Ibid 1111
[101] Ibid 1119
[102] Jonathan Rudin, 'One Step forward, Two Steps Back - The Political and Institutional Dynamics behind the Supreme Court of Canada's Decisions in *R. v. Sparrow*, *R v. Van der Peet* and *Delgamuukw v. British Columbia' (1998) 13 Journal of Law and Social Policy 67, 87*

government largely ignored the decision,[103] which may have impacted on the next major case concerning s35 to reach the court.

R v Van der Peet[104] concerned criminal proceedings against a woman who was said to be selling salmon illegally despite such sales being a regular practice of her tribe. The appellant argued that the law prohibiting her from selling salmon extinguished her s35 rights. The Supreme Court took a less generous approach; it was decided that for salmon trading to be a right protected by s35, it must have been developed before Indigenous contact with European settlers occurred.[105] Leaving aside the logical difficulties of proving such a thing - and the fact that Indigenous tribes made contact with Europeans at different times, in different places - this was a completely arbitrary restriction, [106] as Rudin and Justice L'Heureux-Dube (in dissent) noted. As Rudin further points out, the decision treats Indigenous culture as something that ceased to evolve upon contact with Europeans.[107] Eisenberg argued that this decision - which she sees as a major limitation of the impact of both *Sparrow* and s35 in general[108] - seems to have severed the link between Indigenous self-determination and cultural protection.[109] The two concepts are inseparable for Indigenous peoples, however. Self-determination depends upon Indigenous peoples being in control of their own development (including cultural development); significantly restricting the ability of an Indigenous tribe to determine for itself what is or isn't a cultural practice – in addition to having them prove whether the practice existed before Europeans arrived - restricts cultural development and self-determination. Moreover, allowing *Sparrow* to stand (having been decided prior to the UNDRIP's existence) is a remarkably narrow interpretation of article 11 of the UNDRIP: the right to 'practise and revitalise their cultural traditions and customs.'

The UN's Human Rights Council - the treaty body of the ICCPR[110] - has similarly severed the link between self-determination and culture. Their refusal to award standing to individuals under the article 1 right to self-determination, whilst also refusing to award standing to groups

[103] Ibid 88
[104] [1996] 2 SCR 507
[105] Ibid 548
[106] Ibid, 74-75
[107] Ibid, 76
[108] n 54, 99
[109] Ibid 108
[110] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

under the article 27 right to culture,[111] ensures that the two rights cannot be claimed simultaneously. This is further evidence that various aspects of international human rights law are often incompatible with the rights claims of Indigenous peoples.

5. Section 35 rights: Indigenous Lands, Canadian Resources?

It is now generally accepted that Indigenous property rights are unique, or 'sui generis.'[112] This is in alignment with article 25 of the UNDRIP, which ascribes the right to a spiritual relationship with traditional lands. This was recognised in Canada by *Delgamuukw v British Columbia*[113] where it was also confirmed that Indigenous land rights, under s35, were also inalienable, except by acts of the executive branch of the government (ie 'the Crown').[114] This was understandably initially heralded as a significant step forward for Indigenous peoples.[115] However, with hindsight, the effect of the decision may have been somewhat overstated, and not simply because the court later ordered a retrial:[116] those same Indigenous peoples (the Wet'suwet'en) remain locked in a heated dispute with the Canadian province of British Columbia over the subsequent construction of an oil pipeline on their land.[117] The court placed a significant burden[118] on Indigenous claimants, requiring them to prove that they had continuously[119] and exclusively[120] occupied their land since the assertion of Crown sovereignty (1856).[121] It was noted that this was a more certain date than the vague reference to 'contact with Europeans' seen in *R v* Van *der Peet.*[122] There are several difficulties with this decision. Firstly, the requirement that occupation be continuous offers little help to those who have been displaced.[123] Secondly, the use of terms like 'exclusive' and 'occupation' suggests that the Supreme Court has merged Western-influenced property law principles with those of

[111] n 18, 155
[112] Catherine E Bell and Robert K Paterson, 'Aboriginal Rights to Cultural Property in Canada' (1999) 8(1) *International Journal of Cultural Property* 167, 171
[113] [1997] 3 SCR 1010 (*Delgamuukw)*
[114] Ibid [113]
[115] Alice Diver, 'A Just War: Protecting Indigenous Cultural Property" [2004] 6(4) *Indigenous Law Bulletin* 7, 8
[116] n 112, [208]
[117] Nadine Yousif, Marie-Danielle Smith, 'What the Wet'suwet'en want' (2020) 133(4) *MacLean's* 54
[118] n 113, 176
[119] Ibid [151]
[120] Ibid [155]
[121] n 113, [145]
[122] Ibid
[123] n 104, 94

Indigenous customary norms, ignoring its spiritual relationship with land,[124] within which such terms have little meaning. Additionally, the main proof offered of existing occupation, as is common with Indigenous peoples, is the use of oral histories passed down through generations.[125] The Supreme Court in *Delgamuukw* did not exclude oral evidence, but did confirm that occupation was to be evaluated via the narrow test from *R v Van der Peet* (of being unquestionably established pre-contact).[126] The courts have long been suspicious of oral evidence;[127] such testimony is often ill-suited for use in a courtroom, given the tendency for mythological elements.[128] Facts may vary too, as the stories are retold at different times by different storytellers over the years.[129] It should therefore not be surprising that, as Anaya noted, *Delgamuukw* has never yet been successfully used to establish a claim for land.[130]

The only other way to establish Indigenous land claims has been through the specific claims procedure that involves negotiation with government, but this offers little respite for Indigenous peoples. Anaya reported that these negotiations often consist in, like *Delgamuukw*, the placing of similarly onerous burdens of proof upon Indigenous groups: they are often conducted in bad faith.[131] The government prefers to settle claims via financial compensation,[132] which, given the sacred nature of the Indigenous relationship with tribal lands, could hardly ever be framed as adequate. Whilst it is clear that Canada now recognises that Indigenous land rights are 'sui generis,' they are still a long way from truly fulfilling the article 26 right to recognition of traditional lands found in the UNDRIP. In respect of resource extraction and the duty to consult, Indigenous rights also arise. Many natural resources are located on or around Indigenous lands, but are also central to Canada's economic development, accounting directly for 17% of their Gross Domestic Product.[133]Anaya lamented the stark contradictions between the poor living conditions of Indigenous peoples in Canada and the abundance of natural resources located on Indigenous territories; these peoples are subject to

[124] n 117
[125] n 113, [13]
[126] Ibid [107]
[127] Hope M. Babcock, '[This] I Know from My Grandfather": The Battle for Admissibility of Indigenous Oral History as Proof of Tribal Land Claims' (2012) 37(1) *American Indian Law Review* 19, 38
[128] Ibid 41-42
[129] Ibid 44
[130] n 50, 146
[131] n 50, 160-161
[132] n 50, 160
[133] National Resources Canada, '10 Key Facts on Canada's Natural Resources' (Government of Canada, 2019) <https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/emmc/pdf/2019/2019-KFF-EN.pdf> Accessed 23 May 2020

all the health and safety risks of unregulated resource extraction but entitled to few of the economic benefits.[134] Large-scale resource extraction is also inconsistent with the Indigenous co-dependent relationship with land in general.[135] Problems with a lack of consultation have largely caused this state of affairs.[136]

The duty to consult was established by the Supreme Court in *Haida Nation v. British Columbia (Minister of Forests),*[137] compelling the government (or private companies whose projects have been approved by the government) to hold consultations with Indigenous groups when a resource project may affect a right protected by s35 of the constitution.[138] In *Taku River Tlingit First Nation v. B.C. (Project Assessment Director)*[139] *t*he Supreme Court noted with approval a number of steps taken in the consultation process,[140] but provided little guidance, focusing mainly on the process, rather than substance, of consultation.[141] This is out of step with the spirit of the UNDRIP: Article 19 instructs states to consult 'in good faith,' and to obtain 'free, prior, and informed consent.' Anaya noted further that Indigenous communities are often consulted at too late a stage (in the project preparatory stages) for their input to be of any real use.[142] Clearly, 'prior' consent is not being sought. Often, unreasonable burdens are placed upon Indigenous leaders, for example too-onerous levels of paperwork. Keeping Indigenous groups out of the process puts considerable pressure on Indigenous people to provide consent to avoid their being painted as deterrent to economic development that would impact a significant amount of people.[143] The notion of free, informed consent is compromised by such actions, [144] and also casts Indigenous persons in an adverse light, as some media reports confirm. [145] This adversarial relationship is not particularly suggestive of a meaningful consultation that has been undertaken in good faith.

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[134] n 48, 162
[135] Deborah Curran, Eugene Kung, and Ǧáǧvi Marilyn Slett, 'Ǧvilás and Snəwayəɬ: Indigenous Laws, Economies, and Relationships with Place Speaking to State Extractions' (2020) 119(2) *The South Atlantic Quarterly* 215, 219
[136] n 6, 162-164
[137] [2004] 3 S.C.R. 511
[138] Laura S Lynes, 'The Rights of Nature and the duty to consult in Canada' (2009) 37(3) *Journal of Energy & Natural Resources Law* 353, 357
[139] [2004] 3 S.C.R. 550
[140] Anthony Knox and Thomas Isaac, 'Judicial Deference and the Significance of the Supreme Court of Canada's Decisions in Haida and Taku River' (2006) 64 *Advocate (Vancouver*) 487, 494-495
[141] n 139, 219-220
[142] n 48, 162
[143] Ibid 164-165
[144] Ibid 158
[145] n 41, 721

The limitations of the duty to consult can be demonstrated by recent and ongoing processes to expand the Trans Mountain Pipeline (TMX). The TMX was opposed by the Tsleil-Waututh Nation, based upon their Indigenous values and principles, and on an expert scientific analysis of the risks of the project to the environment.[146] The consultation process contained serious procedural failings[147] and did not engage with Indigenous opposition: the decision to approve the project was quashed by the Court of Appeal.[148] However, the federal government purchased the pipeline from the private company who had been approved to build it and re-approved it after correcting the procedural failings, with the intention of building the pipeline itself.[149] This effectively ignored the continued Indigenous opposition and environmental concerns, and made no effort to acquire free, prior, and informed consent. This state of affairs was made worse by a subsequent decision of the Supreme Court, which confirmed that the duty to consult with Indigenous peoples does not apply to an act of the legislature; rather, it only applies when the government exercises its prerogative powers or where a private company is concerned.[150] This directly contravenes article 19 of the UNDRIP, which explicitly mentions legislative measures that affect Indigenous affairs. It appears that Canada's interpretation of the duty to consult is too weak to address the imbalances between Indigenous rights and the extractive nature of Canada's economy.

Canada appears to have a long way to go in terms of achieving compliance with International Indigenous rights law. There are suggestions that the Canadian government will move to incorporate the UNDRIP into domestic federal law[151], but it would most likely be overly optimistic to expect meaningful change given the ways in which Indigenous interests clash with those of Canada. It has been noted also that the current Canadian Prime Minister appears to believe that the Canadian Constitution largely already accords with the UNDRIP.[152] This may suggest that the proposed legislative reforms will not be particularly transformative. It is also worth mentioning that British Colombia is the only Canadian province to implement the UNDRIP in provincial law,[153] but as mentioned above, this has not stopped British Colombia

[146] n 139, 230-231
[147] n 142
[148] n 139, 232
[149] Ibid 233
[150] *Mikisew Cree First Nation v Canada (Governor General in Council*) [2018] 2 SCR 765, [171]
[151] Jorge Barrera, 'Trudeau government moving forward on UNDRIP legislation, says minister' (*CBC,* 4 December 2019) <https://www.cbc.ca/news/indigenous/trudeau-undrip-bill-1.5383755> Accessed 4 August 2020
[152] n 45, 11
[153] Declaration on the Rights of Indigenous Peoples Act [SBC 2019]

from engaging in constant battles with the Wet'suwet'en in respect of pipeline-building on or through Indigenous lands. [154]

6. Conclusion

Indigenous peoples have come a long way in terms of international human rights law, from effectively being almost entirely excluded to now having several notable documents and a number of norms of customary law devoted to their interests. The conditions surrounding Indigenous rights have not developed to a point anywhere near past injustices. The situation detailed here in respect of Canada is by no means exclusive to that jurisdiction: recent welfare reforms in Australia appear to have similarly and disproportionately affected Aboriginal peoples.[155] Indigenous poverty rates in Australia have made slight improvements in the past decade but have increased outside of the major cities, areas where Indigenous peoples are more likely to live, and perhaps going as high as 53% in particularly remote locations.[156] Assuming that there is no meaningful prospect of the UNDRIP being outfitted with stronger powers of enforcement, it will largely be left up to individual signatory states - who have contributed to the suffering of Indigenous peoples in the past – to consider changing their tack. It has been mentioned that bad faith has played a part (as Anaya's confirmed); as such, the failure to protect the rights of Indigenous peoples has not come about by accident.

Canada's current prime minister is often publicly supportive of Indigenous rights, and apparently keen to undertake the rebuilding of the relationship between colonial usurpers and Indigenous peoples. His actions in private often tell a different story however, not least the refusal to fully implement the UNDRIP within Canadian law.[157] It is to be hoped that Canadian courts are able to make inroads in future. As Anaya has suggested, by using the UNDRIP and

[154] City News, 'Six Nations demonstrators return to site of land dispute after clash, arrests' (*City News*, 6 August 2020) <https://toronto.citynews.ca/2020/08/06/six-nations-demonstrators-return-to-site-of-land-dispute-after-clash-arrests/> Accessed 9 August 2020

[155] Shelley Bielefeld, 'Indigenous Peoples, neoliberalism and the state: A retreat from rights to 'responsibilisation' via the cashless welfare card' in Howard-Wagner D, Bargh M and Altamirano-Jiménez I (eds), *The Neoliberal State, Recognition, and Indigenous Rights: New Paternalism to New Imaginings* (Australian National University Press, 2018)

[156] Francis Markham and Nicholas Biddle, '*Income, Poverty and Inequality'* (2018) Centre for Aboriginal Economic Policy Research 2016 Census Paper <https://caepr.cass.anu.edu.au/sites/default/files/docs/CAEPR_Census_Paper_2.pdf>, 15

[157] Luke Savage, 'The End of Trudeaumania' (2019) 1(1) *Jacobin Magazine* <https://jacobinmag.com/2019/10/justin-trudeau-jagmeet-singh-canadian-election> Accessed 11 May 2020

international norms in interpretation, as Brennan J did in *Mabo v Queensland*,[158] progress might be made. Until this occurs, Indigenous rights will in all likelihood remain largely unfulfilled aspirations.

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[158] n 6, 138-139

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