Beyond the Nation-State Paradigm: Inuit Self-Determination and International Law in the Northwest Passage

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This article examines how the nation-State paradigm of international relations and international law in the Arctic conflicts with Inuit self-determination in the Northwest Passage. This evaluation is made through the lens of four Indigenous rights which are relevant to the Northwest Passage: the right to self-determination, the right to traditional territories and resources, the right to culture, and rights to consultation and free, prior, and informed consent. This article makes three submissions, namely: (1) doctrinal reduction of sovereignty to the nation-state paradigm in international law functions to exclude Indigenous peoples from participation in international law and decision-making; (2) Inuit participation in the international politics of the Northwest Passage is a vehicle for the expression of their right to self-determination as enshrined in the United Nations Declaration on the Rights of Indigenous Peoples; (3) the inclusion of the Inuit as international legal actors as demonstrated by their historical transnational advocacy will be a necessary step for the international community to take in order to uphold the Inuit's right to self-determination, especially in relation to the future of the Northwest Passage if the transit passage regime is deemed to apply in the future. Ultimately, this article adopts a pluralist and decolonial perspective to critically challenge the traditional notion of sovereignty as understood from a Westphalian perspective, and advocates for the imperative recognition of Indigenous peoples and inclusion of them as transnational legal actors.

Introduction

Adopting a pluralist (Davies, 2010: 805) and decolonial (Mignolo, 2017) perspective, this article evaluates how the nation-state paradigm of Arctic international relations interacts and conflicts with Inuit self-determination in the Northwest Passage (NWP). These tensions are examined through the lens of four Indigenous rights applicable to the NWP: the rights to self-determination, culture, traditional territories and resources, consultation and free, prior, informed consent (FPIC). These rights of Indigenous peoples (IPs), laid down in the United Nations Declaration on Indigenous Peoples (UNDRIP), overlap in scope with nation-state centered legal regimes applicable to the NWP, like the UN Convention on the Law of the Sea (UNCLOS).

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The Inuit Canadian domestic context remains the focus of this article, while the greater Inuit polity[1] is referenced to in relation to Inuit transnationalism. Utilizing the doctrinal method, deductive analysis is developed on the basis of existing decolonial, political, and legal scholarship, referencing legal texts, and Inuit representative statements. The author clarifies her positionality as non-Indigenous, and she does not claim to define the Inuit experience nor to be an expert in Indigeneity.

This article proceeds by placing the development of international law in its historical context to demonstrate the disconnect between international law and Indigenous dispossession. This historical context circumscribes Indigenous advocacy in the twenty-first century, and illuminates the limitations imposed by nation-state sovereignty doctrine on Indigenous recognition. This article sets out the domestic legal context in Canada applicable to the NWP, exploring the comprehensive Land Claims Agreements (LCAs) negotiated by Inuit, and legal pluralism, demonstrating overlapping sovereignties in the NWP.

Next, this article lays out the applicability of human and Indigenous rights to the NWP. These rights are then elaborated in the context of their overlap with State-centered legal regimes in the NWP, and the NWP dispute. The nexus of these conflicting notions of sovereignty lies in the overlap in territorial scope between LCAs, UNDRIP, and UNCLOS.

Indigenous dispossession

IPs were first conceptualised as non-sovereigns in Franciscus de Vitoria's sixteenth century lectures concerning the colonial encounter in the West Indies, (Anghie, 2005)[2] through which sovereignty doctrine emerged, where 'Indians' were deemed non-sovereign because their 'cultural practices' conflicted with natural law.[3] Following the transition from divine to natural law, the Peace of Westphalia in 1648 reconfigured political structures (Lesaffer, 2004) giving rise to a nation-State framework of international relations, whereby positivism replaced natural law (Shaw, 2003). As Empires expanded through colonization, the law of nations "…became less universalist in conception and more...a reflection of European values" (Shaw, 2003: 27).

Positivism became the framework which reconstructed "the entire system of international law based on the...new version of sovereignty doctrine" (Anghie, 2005: 41) through a 'racialised scientific lexicon'[4] excluding non-Europeans, and non-Christians, from international law, as, "it would be impossible for a nomadic tribe...to come under" the provisions of international law (Lawrence, 1895: 136).

Recognition doctrine, purporting that States entered the community of nations upon recognition by other sovereigns, allowed property rights to be "derived from natives...even before European sovereignty has existed over the spot" (Anghie, 2005: 80),[5] preventing IPs from deriving sovereign rights (Anghie, 2005). Sovereignty over Indigenous territories was established by application of doctrines, including the discovery doctrine which characterised Indigenous territories as legally unoccupied, or *terra nullius,* and, "represented the legal conclusion that Indigenous peoples possessed no international legal existence" (Macklem, 2008: 184). Sovereignty doctrine dispossessed IPs because legal personality was only bestowed to enable transfer of title to colonial powers (Anghie, 2005). The application of this framework led to acquisition of sovereignty over adjacent traditional marine spaces of IPs (Hamilton, 2019).

In the twentieth century, international institutions materialised in parallel to the decolonisation process (Anghie, 2005). The emergence of the right to self-determination was perceived as a violation of the obligation to maintain 'territorial integrity', (UNGA Res. 15/14 XV, 1960),

prompting a 1970 United Nations General Assembly (UNGA) Declaration, from which the 'blue water doctrine' limited pursuit of sovereign independence to colonized populations "separated by water from their parent colonial State" (UNGA Res. 26/25 XXV, 1970: 9). This doctrine has arguably had the greatest impact on the right to self-determination, as it limited legal capacity by the geographic location of IPs' traditional territories (Macklem, 2008).

Thus, international law became the tool by which IPs were dispossessed from their traditional territories and excluded from participation in international relations. Within this historical context, IPs are excluded from legal frameworks qualified on Statehood which are applicable to their traditional territories and through which they must advocate for their rights.

Crown sovereignty and *Inuit Nunangat*

Inuit have lived along the NWP long before the imposition of Crown sovereignty (ICC, CIDSA, 2009, para. 1.2). European nations claimed sovereignty over North America by application of the *terra nullius* doctrine (Macklem, 2001).[6] No single event marks establishment of Crown sovereignty over *Inuit Nunangat* (Morrison, 2021),[7] but 'exploration' of the NWP facilitated acceptance of *de facto* and *de jure* Crown sovereignty over the Canadian Arctic. In 1670, the Hudson's Bay Company Charter granted the company legal title to about half of present-day Canadian territory, (Hudson's Bay Company Charter, 1670) initiating Crown acquisition of sovereignty over the Canadian Arctic (Morrison, 2021). Remaining present-day Northwest Territories, and Southern Nunavut were annexed into the Charter in 1821, and in 1870, Hudson's Bay Company transferred title of its lands to Canada, which included all but the Arctic archipelago (Morrison, 2021).

Crown sovereignty over the remaining archipelago was strengthened during the cartographic process of the Arctic (Morrison, 2021). Canada advanced sovereignty claims most successfully through military occupation of Inuit territory. State police organs were established in new Arctic outposts, coinciding with Inuit relocations to Grise Fiord and Resolute Bay in the 1950s (Morrison, 2021; Kunuk 2008). Since then, the motive behind these relocations have been thoroughly debated in the literature, in official reports, and at different government fora.[8]

Although a narrative has emerged claiming that Inuit were used as 'human flagpoles' to further Canadian sovereignty, archival records, and Inuit oral histories suggest that the relocations were not primarily motivated by sovereignty claims (Lackenbauer, 2020: xv). As Lackenbauer points out, the crux of the matter is that the relocations inflicted trauma on relocated Inuit communities. Crucially, Inuit's longstanding use and occupancy of the Arctic is the basis for Canada's Arctic sovereignty, as laid out in the LCAs, regardless of whether they were used as 'human flagpoles' or not (Lackenbauer, 2020: xv).

In 1985, Secretary of State for External Affairs Joe Clark stated in the House of Commons that, "From time immemorial Canada's Inuit people have used and occupied the ice as they have used and occupied the land" (Joe Clark, 1985). Ultimately, the accumulation of events in which Canada asserted sovereignty supplemented by historic Inuit occupancy eventually contributed to the crystallisation of Canadian sovereignty over the Arctic. Nevertheless, the NWP is not universally recognised as Canadian territorial waters, as the US contends that the NWP is an international strait (NSPD-66/HSPD-25, 2009; National Strategy for the Arctic Region, 2013).

Legal pluralism

The existence of legal pluralism in Canada was confirmed in the *Haida Nation* (*Haida Nation v. British Columbia,* 2004) and *Taku River Tlingit First Nation* (*Taku River Tlingit First Nation v. British*

Columbia, 2004) cases in which the Canadian Supreme Court acknowledged 'pre-existing Aboriginal sovereignty'. The Court characterised Crown sovereignty in the present as *de facto,* (*Haida Nation v British Columbia,* 2004: para. 32) asserting that overlapping Indigenous and Crown sovereignty claims must be reconciled through treaties (*Haida Nation v British Columbia,* 2004, para. 17).

Canada has appropriated pre-existing Aboriginal sovereignty to advance Arctic sovereignty claims (Nicol, 2017) through unrequited agreements with Inuit, as it is argued that Canada maintains Inuit in a situation of disenfranchisement and State dependency (NTI, 2006).

Land Claims Agreements

Inuit have negotiated five 'comprehensive land claims agreements' with Canada (Policy Options, 2007). While all five treaties[9] have scope in the NWP, two are explored here: the 1984 Inuvialuit Final Agreement (IFA) (IFA, 2005) and the 1993 Nunavut Land Claims Agreement (NLCA) (NLCA, 1993). In 1973, the Canadian Supreme Court held that IPs hold aboriginal title to historically occupied territories (*Calder v British Columbia,* 1973: 394). Following *Calder*, the government announced a policy to negotiate land claims with IPs who could prove aboriginal title on the basis of historic occupation (Crowe, 2019). In 1982, the Canadian Constitution was amended to recognise rights of IPs (*Constitution Act,* 1982: § 35 (2)), including treaty rights (*Constitution Act,* 1982: § 35 (1) jo. 35 (3)).

Inuit negotiated their 1984 IFA on the basis of the 1977 *Inuit Land Use and Occupancy Project* report demonstrating historic use and occupancy of land, water, and sea ice. (IFA, 2005; Milton Freeman Research Limited, 1976). This report, commissioned by the Department of Indian and Northern Affairs, demonstrated Inuit use and occupancy of land ice including in the NWP (Milton Freeman Research Limited, 1976; Lajeunesse, 2016: 265) Inuvialuit Inuit ceded aboriginal title and rights to Canada (IFA, 2005: para. para. 3.(4) jo. para. 3. (5)) in exchange for rights and privileges (IFA, 2005: para. 3.(4) jo. para. 3. (11)) including rights of consultation, title to approximately 95,000 km^2 in traditional lands, (IFA, 2005: para. 7.(a)-(b) jo. 7.(2) jo. 7.(3)) limited autonomy, and oil royalties (IFA, 2005: para. 7.52 jo. 7.53 jo. 7.54). The 1993 NLCA required cession of aboriginal title in exchange for title to approximately 350,000 km^2 in traditional lands, (NLCA, 1993: para. 19.1.1-19.5.1), the right to establish a semi-autonomous Territorial Government, (NLCA, 1993: para. 2.10.4) and marine management rights (NLCA, 1993: para. 15).

Notwithstanding, "all Aboriginal peoples with modern treaties report that the Government of Canada fails to carry out various treaty obligations" (Policy Options, 2007). Through the LCAs, Canada's NWP sovereignty was strengthened on the basis of Inuit occupancy yet corresponding rights laid down in the NLCA have failed to be implemented by Canada (Fenge & Quassa, 2009; Nunavut Settlement Agreement, 2015). This failure of implementation is well documented in reports documenting its implementation status (Nunavut Implementation Panel, 2000; 2004; 2008; 2011). Nunavut Tunngavik Incorporated (NTI), tasked to implement the NLCA, sought litigation in 2006 to enforce the NLCA (NTI, 2006). This culminated in a 2015 out-of-court settlement agreement. (Nunavut Settlement Agreement, 2015). Canada opposed the adoption of UNDRIP in 2007, citing Section 35 of the *Constitution Act of 1982* as evidence that it protected the IP rights (Campbell, 2015). Ironically, this was only a year after NTI initiated proceedings against Canada for failing to implement the NLCA. In 2016, Canada signaled its intention to adopt and implement UNDRIP (*Government of Canada,* 2021). In June 2021, Bill C-15 codifying UNDRIP received royal assent and entered into force (Bill C-15, 2020-2021; UNDRIP Act, 2021).

Canada's distorted perception of Indigenous rights has served the interests of advancing Canadian Arctic sovereignty. Unlike UNDRIP, the NLCA constructs a unique relationship between State sovereignty and Indigenous self-determination, limits the exercise of self-determination by allowing "continuous assertion of sovereignty by the State government over lands and waters within Canada's Arctic" (Nicol, 2017: 804).

The LCA process may reflect a state strategy to dispossess IPs of traditional territories (Samson, 2016). The LCA process extinguished aboriginal title rights and concluded assertion of State sovereignty over *Inuit Nunangat*. Nicol argues that UNDRIP conflicts with the IFA and NLCA, as UNDRIP self-determination standards do not support negotiation of rights in exchange for cession of aboriginal title (Nicol, 2017), as aboriginal title recognition is necessary to the realization of self-determination. Inuit contend that LCAs reflect an understanding of shared jurisdiction of traditional territories (ICC, 2019). Now that UNDRIP has been codified into Canadian law, a new framework must emerge to understand how UNDRIP standards will interact with LCAs, Inuit sovereignty, UNCLOS, and Canada's Arctic sovereignty.

Arctic Waters Pollution Prevention Act (AWPPA)

In 1969, the *SS Manhattan,* an American oil-tanker became the largest commercial vessel to sail the NWP (Policy Options, 2007). In response, Canada adopted the AWPPA, citing 'Canada's responsibility' to Inuit welfare as reason to enact environmental protection in the 'internal waters of Canada.' (AWPPA, 1985: Art. 2(2)). Even though the AWPPA had an environmental rationale for its adoption, coinciding with the growing environmentalist movement of the 1970s, and a rationale to protect Inuit, it also reaffirmed Canadian territorial sovereignty in the Arctic by establishing a jurisdiction to enforce anti-pollution laws in its territorial waters (Government of Canada, 2017). In 2009, Canada adjusted the application of this act from 100 to 200 nautical miles (An Act to amend the Arctic Waters Pollution Prevention Act, 2009; Art. 234 UNCLOS).

Arctic narratives

While Inuit lead Arctic narratives in the Canadian context, global Arctic narratives still center around the eight Arctic States and their interests, economic and political. These narratives overlook the sempiternal existence of IPs, "communities...whose lives, cultures, histories, and societies predate the imposition of the nation-State on them, people who have lived on the northern cap of the globe for thousands of years" (Christie, 2011: 329) These narratives reinforce State-centered conceptions of Arctic sovereignty, and inform legal culture and policy. Ultimately, these narratives limit the legal imagination of a sovereignty practice not circumscribed by the nation-State paradigm, which the author describes as State-centered international relations.[10] Hence, two points must be made; the first being that Inuit have conceptualised an expression of sovereignty and self-determination outside of secession (CIDSA, 2009: para. 1.6). Secondly, most Inuit proudly acknowledge their multifaceted identities as both Inuit and Canadians, and support Canadian sovereignty in the NWP (ICC, 2019). However, this does not excuse Canada from implementing LCAs, or from fulfilling UNDRIP's standards.

Inuit continue to demand treatment by Canada in compliance with LCAs and human rights, primarily through calls for inclusion in NWP decision-making, especially as it involves international actors in traditional territories. Accordingly, exercise of Inuit self-determination means inclusion in decision-making processes that impact their traditional territories, and resources at national and international level (Christie, 2011: 343). Inuit seek greater participation in decision-making at international level on environmental regulations, shipping regulations, and

advocate for recognition of Indigenous human rights at international level (CIDSA, 2009: para. 3.4-3.5) At national level, Inuit seek adequate implementation of LCAs, implementation of UNDRIP, consultation on issues of Arctic tourism, and equitable access to water and healthcare infrastructure (ITK, 2021).

International human rights and Indigenous rights

Indigenous rights have been contentious since their emergence in international law. Whether Indigenous rights exist within the general human rights framework, or whether they occupy a separate legal sphere, and whom this framework applies to remains debated (Chen, 2014). This section outlines Indigenous rights in international law, and evaluates the status of four rights applicable to the NWP.

Legal protection is qualified upon fulfillment of criteria identifying the right-holder and thereafter attaching protection. Scholars have attempted to define 'Indigenous peoples' to develop the Indigenous rights regime. However, "historically speaking, indigenous peoples have suffered from definitions imposed by others" (Daes, 1995: para. 6). This sentiment is echoed by Indigenous representatives (Simpson, 1997). The author acknowledges historical oppression faced by IPs by way of imposition of legal definitions. Accordingly, this article adopts Anaya's (1996) definition of IPs as, "living descendants of pre-invasion inhabitants of lands now dominated by others" (3).

Within the general human rights framework, Indigenous peoples are protected by the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), all enjoying near universal ratification. UN human rights committees have evolved to interpret their conventions[11] in light of the rights of IPs (ILA, 2010). UNDRIP was adopted by the UNGA in 2007, with four votes against it from States containing significant IP populations, including Canada. All four States now endorse UNDRIP (Chircop et al., 2019).

UNDRIP is the most articulate international human rights framework pertaining to IPs. UNDRIP weaves individual human rights (UNDRIP, 2007: Art. 1) along with rights carved out by the Indigenous rights regime. As a UNGA resolution, UNDRIP is not strictly binding under international law. Nevertheless, many contend[12] that some provisions of UNDRIP codify customary international law (CIL), regionally or internationally, or reflect general principles of international law (Barnabas, 2017). An ILA report asserted that human rights committees now demonstrate reliance on UNDRIP in interpreting widely-ratified human rights conventions (ILA, 2010), and that although UNDRIP as a whole does not yet reflect CIL, specific provisions do (ILA, 2012).

At its minimum, UNDRIP illuminates available protections within the international human rights framework (Barnabas, 2007: 244), and must be interpreted through this framework (UNDRIP, 2007: Preamble). It must also be interpreted in recognition of collective rights, as IPs maintain that a unique framework of Indigenous rights separate from the general human rights regime (Wiessner, 1999) is necessary "to secure their cultural survival" (Chen, 2014) amidst systemic oppression faced by virtue of their Indigeneity. This mutually symbiotic relationship of individual and collective protection on the basis of human and Indigenous rights is reflected in UNDRIP, as "UNDRIP recognises and affirms...IPs as a collective or as individuals" (UNDRIP, 2007: Art. 2). Additionally, Inuit affirm their unique status as IPs in the Arctic (CIDSA, 2009: para. 1.8).

Applicability of human rights to the Northwest Passage

The principle that human rights are applicable within a State's territory (VCLT, 1980: Art. 29) or in a space subject to State jurisdiction, is reflected in human rights conventions (ICCPR, 1966: Art. 2(1); ECHR, 1953: Art. 1; ACHR, 1969: Art. 1(1)). As State territory includes not only internal waters, but also territorial sea and archipelagic waters, (UNCLOS, 1982: Art. 2(1) jo. Art. 49) human rights law is applicable therein (Enyew, 2019). Similarly, as States maintain jurisdiction through effective control (UNHRC, General Comment 31, 2004: para. 3; *Case Concerning Armed Activities on the Territory of the Congo,* 2005: para. 216; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* 2004: para. 107-113) over their exclusive economic zone (EEZ), human rights law is also applicable there (Enyew, 2019). Thus, Indigenous and human rights overlap in geographic scope with UNCLOS.

Right to self-determination

The right to self-determination is regarded as the cornerstone of the Indigenous rights regime, but remains heavily debated. Indigenous peoples maintain that the collective right to self-determination and its recognition is "essential for their survival and development" (Eide, 1982: para. 70). The right is grounded in the UN Charter (UN Charter 1945: Art. 1(2)) and Common Art. 1 ICCPR and ICESCR, defining the right to self-determination as the right to "...freely determine their political status and freely pursue their economic, social, and cultural development." Art. 3 UNDRIP articulates the right to self-determination, mirroring Common Art. 1 ICCPR and ICESCR. The International Court of Justice (ICJ) has established the right of nomadic peoples to self-determination (*Western Sahara,* 1975: para. 70, 80), and characterised the right as *erga omnes* (*Case concerning East Timor*, 1995: para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* 2004: para. 88).

The right to self-determination has an internal and external dimension. The external dimension is characterised by freedom of a group to independently choose its 'international status' without interference, while the internal dimension entails rights to autonomously design a government within the territorial boundaries of a nation-State (Wiessner, 1999). Exercise of external self-determination is limited by Art. 46 (1) UNDRIP, prohibiting "any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States." States associate the right to self-determination with secessionist movements and perceive it as a threat to territorial integrity and State sovereignty (Urrutia, 1996). This is further impacted by the *uti possidetis juris* principle*,* which aims "to achieve the stability of territorial boundaries by preserving the former administrative or colonial boundaries of a State." (Zyberi, 2009: 449; *Case concerning the Frontier Dispute,* 1986: para. 26). Conversely, scholars question "whether the right to self-determination can be really exercised if it can only be implemented following borders...settled by colonizing states" (Chen, 2014: 6).

Chen (2014) describes the right to self-determination in UNDRIP envisioning "full participation of Indigenous peoples in decisions concerning them...or having some form of territorial autonomy" (6). Accordingly, the author suggests that Inuit are already exercising external self-determination, through their transnational advocacy for inclusion in State-centered regimes applicable to the NWP. Accordingly, without full Inuit inclusion in commercial, political, and legal processes of the NWP their right to self-determination as IPs is hindered.

Right to traditional territories and resources

The right to traditional territories and resources entails, "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…" (UNDRIP, 2007: Art. 25). Art. 26 UNDRIP asserts this relationship as a property right, and IPs are entitled to "own, use, develop, and control" these spaces, by which States must recognise their "customs, traditions, and land tenure systems." This right has also been applied by regional human rights bodies[13] and arguably represents at least regional customary international law (ILA, 2010; Anaya & Williams, 2001; Wiessner, 1999).

Although Art. 25 and 26 UNDRIP specify traditional 'waters and coastal seas', human rights bodies have not adequately applied this norm to marine spaces (Enyew, 2019). Nevertheless, the definition for traditional lands in ILO Convention no. 169[14] has been extended to include marine spaces traditionally occupied and used by Indigenous peoples. (ILO 169, 1991: Art. 13 (2)). Similarly, a UN study on Indigenous peoples found rights to traditional territories applicable to oceans and seabeds (Toki, 2016: 3). Indigenous peoples maintain that these rights are applicable to marine spaces including sea-ice (ILO, 1989: 4).

Inuit have used and occupied NWP sea-ice and waters for 'time immemorial' (ICC, 2009: para. 1.2), as evidenced in the *Inuit Land Use and Occupancy Project* report commissioned by the Canadian Government (Milton Freeman Research Limited, 1976) and in the *Sea Ice is Our Highway* report demonstrating traditional occupancy of sea-ice (ICC, 2008: ii). Importantly, the latter report elaborates that, "Inuit do not distinguish between the ground upon which our communities are built and the sea ice upon which we travel, hunt, and build igloos...Land is anywhere our feet, dog teams, or snowmobiles can take us" (ICC, 2008: para. 1.2.2). As NWP sea-ice and its resources are the traditional territory and resources of Inuit, Inuit are entitled to all rights arising therefrom.

Right to culture

The right of IPs to their culture is enumerated in several human rights frameworks, including Art. 27 ICCPR, Art. 15 (1) ICESCR, and in Art. 11-13, 15 and 34 UNDRIP. Importantly, the scope of the right to culture in relation to IPs has been clarified by the UN Human Rights Committee (UNHRC): "[C]ulture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of Indigenous peoples. That right may include such traditional activities as fishing or hunting…" (UNHRC, General Comment 23, 1994: para. 7).

The UNHRC has applied this notion in Art. 27 cases.[15] The Committee on Economic, Social and Cultural Rights (UNCESCR) asserts that, "the strong communal dimension of Indigenous peoples" cultural life...includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired" (UNCESCR, General Comment 21, 2009: para. 36). Thus, the right to traditional territories, and resources is inextricably linked to the right to culture.

The right to culture has been interpreted in the context of marine spaces, and as Enyew (2019) argues, this right is "equally applicable to marine spaces and resources" (53). In the *Apirana Mahuika* case concerning Maori fishing rights, UNHRC found that, "economic activities may come within the ambit of article 27 [ICCPR], if they are an essential element of the culture of a community." (*Apirana Mahuika et al v New Zealand,* 2000: para. 9.3). As Inuit in the NWP practice

their culture by means of hunting, fishing, and associated activities (ITK, 2018), their cultural practice is dependent on their distinct spiritual and economic relationship with the NWP.

Rights to consultation, and FPIC

Although the right to consultation in decision-making is a tenet of the right to self-determination, consultation and FPIC are also recognised in UNDRIP as procedural rights giving effect to self-determination (UNDRIP, 2007: Art. 3, 19, 29(2), 32(2)). Art. 19 UNDRIP affirms that "States shall consult and cooperate in good faith" with IPs to obtain "free, prior, and informed consent before adopting and implementing legislative or administrative measures that may affect them." Furthermore, FPIC of IPs must be acquired if projects impact traditional marine spaces (UNDRIP, 2007: Art. 32 (2)), and projects involving "storage or disposal of hazardous materials" in traditional territories (UNDRIP, 2007: Art. 29(2)).

The Expert Mechanism on the Rights of Indigenous Peoples, asserts that FPIC must be acquired in "matters of fundamental importance for their rights, survival, dignity and well-being" (UNHRC, UN Doc A/HRC/18/42, 2011: para. 22). The UNHRC and Inter-American Court of Human Rights have applied a standard of 'major impact' and 'substantial interference' to situations in which FPIC of IPs must be acquired (UNHRC, *Ángela Poma Poma v Peru,* 2006: para. 7.6; IACtHR, *Saramaka People v Suriname,* 2007: para. 134, 137; Enyew, 2019).

An issue therefore arises as to how Inuit agency can be advanced if commercial or legal processes, occur on the broader international scale, where Inuit lack standing. Furthermore, State-centered regimes like UNCLOS have high normative value in international law. As the Indigenous rights regime is still developing higher normative status, legal regimes which qualify participation on Statehood have the potential to supersede Indigenous rights in marine spaces with overlapping scope.

Inuit transnationalism

In 2008, Denmark, Canada, the US, Russia and Norway issued the Ilulissat Declaration, deeming UNCLOS as the principal legal framework applicable to the Arctic Ocean (Ilulissat Declaration, 2008). Khan (2019) argues that the declaration "brought to the forefront the exclusion of Arctic Indigenous peoples in intergovernmental deliberations over Arctic resources and sovereignty disputes" (682). In response, Inuit Circumpolar Council (ICC), a transnational organization representing Inuit across the US, Canada, Russia, and Greenland issued the Circumpolar Inuit Declaration on Sovereignty in the Arctic (CIDSA) asserting that the Ilulissat Declaration "neglected to include Inuit in Arctic sovereignty discussions in a manner comparable to Arctic Council deliberations" (CIDSA, 2009: para. 2.6).

CIDSA states, "the inextricable linkages between issues of sovereignty and sovereign rights in the Arctic and Inuit self-determination...require states to accept the presence and role of the Inuit as partners in the conduct of international relations" (ICC, CIDSA, 2009: para.3.3). Inuit envision exercise of self-determination as participation and recognition beyond the limitations of the nation-state paradigm of international relations (ICC, CIDSA, 2009: para. 1.4, 3.3). As UNCLOS is a state-centered conception of maritime sovereignty, Inuit can only subvert this paradigm through exercise of self-determination via recognition "as a legitimate actor in global politics" (Shadian, 2010: 493). Through CIDSA, Inuit have challenged the Westphalian construction of sovereignty in the Ilulissat Declaration.

Inuit transnationalism coincides with the changing dynamic of international law. As Shadian (2014) explains, "instead of [international law] being created and controlled by states…[it] now includes a wide range of new stakeholders, who are creating, interpreting, and enforcing new informal rules and normative behaviours" (129). Since 1977, the Inuit Circumpolar Council has contributed to the evolution of international law, relating to human rights, sustainable development and have advocated for recognition 'as subjects of international law' (Shadian, 2014: 124). At the ICC's founding, ICC President Hopson explained that "We must elevate our [Inupiat] Arctic claims to the status of an international effort to secure equal justice all across the North American Arctic" (Hopson, 1977).

Furthermore, the ICC has elaborated that, "In order to achieve greater recognition and protection of Inuit rights by states, it is beneficial to also seek endorsement and support for Inuit rights at international level." (ICC, 1992 (as cited in) Shadian, 2014: 124). Recognition as international legal subjects would directly benefit Inuit, as it would incorporate sharing of traditional knowledge in the development of international policy and law which directly impacts their traditional territories. This would represent a practice of self-determination not only at regional level, but at international level.

In the present, Inuit continue their transnational advocacy and denounce their exclusion from international relations, as evidenced by CIDSA (ICC, 2009), their participation in the Arctic Council, and their advocacy at the International Maritime Organization (IMO). The ICC has specifically denounced their exclusion from the drafting of shipping regulations at the IMO which apply to the NWP, and called for inclusion of traditional knowledge in maritime policy-making (ICC, 2018). Inuit participation in the Arctic Council provides an important example of what an Indigenous inclusive intergovernmental Arctic governance framework can look like, as it involves the eight Arctic States and six permanent participants representing Arctic IPs. Although all Permanent Participants have "full consultation rights in all aspects of the Council's work," (Khan, 2019: 681) they lack formal voting rights. Nevertheless, Permanent Participants provide "extraordinary influence over all issues for consideration due to the consensus decision making approach of the Arctic Council" (Dorough, 2017: 82). The Arctic Council has produced three binding agreements bringing together States and IPs 'sitting at the same table' (Khan, 2019: 690).

Through their transnational advocacy, Inuit exercise external self-determination, as Inuit continue to seek greater inclusion in international relations and policy-making which impacts their traditional territories. Similarly, Indigenous rights to FPIC, consultation, and self-determination established by the Indigenous rights regime are disregarded through legal frameworks which are qualified on Statehood, reinforcing colonial power matrices. Accordingly, inclusion and recognition of Inuit and other IPs as international legal actors, specifically as it relates to the application of UNCLOS in the NWP will be a necessary step for the international community to take to uphold Indigenous rights, because state-centered regimes like UNCLOS do not account for IP rights or historic use and occupation of maritime territories like the NWP.

While Inuit have negotiated extensive local governance powers through their LCAs, they still lack recognition as international legal subjects. As Khan notes, "despite many overlapping dimension of state and indigenous sovereignty" over natural resources, the "consistent refusal to recognize Indigenous peoples as 'sovereign legal actors' has been one of the primordial and enduring injustices of international law, since the time of early colonial encounters and treaty-making between Indigenous peoples and Europeans" (Khan, 2019: 676-677).

Although the NWP is subject to an extensive framework of Canadian anti-pollution shipping regulations (Art. 234 UNCLOS; Pharand, 2007: 41) Inuit seek consultative status at the IMO, to promote international action on the regulation of Heavy Fuel Oil (HFOs), black carbon, greenhouse gas emissions, noise and air pollution, issues which already impact Indigenous rights in the NWP and which are not yet adequately addressed by national and international environmental regulations (ICC, 2021). Additionally, international advocacy is vital to ensure protection against the unique human rights impacts that IPs face in the wake of climate change are addressed at international level.[16]

As Khan points out, "In the case of the Arctic, Indigenous transnational activism introduces an Indigenous sovereignty in international relations that is different from, and cannot be subsumed under, state sovereignty or state-determined conceptions of self-determination" (Khan, 2019: 677). These overlapping sovereignties point to a need for Canada to include Inuit in decision-making involving international actors concerning the NWP, to meet UNDRIP's and its own constitutional standards.

Northwest Passage dispute

UNCLOS holds high normative status in international law, representing "a monumental achievement of the international community, second only to the charter of the United Nations." (Koh, 1982). Yet UNCLOS, UNDRIP, and the human rights regime overlap in scope (Chircop et al., 2019). Under UNCLOS, "navigation rights are arguably the international community rights that have received the strongest possible level of protection in all ocean spaces" (Chircop et al., 2019: 103-104). While UNCLOS accounts for interaction with 'generally accepted international rules and standards', (UNCLOS, 1982: Art. 21(1)) it does not acknowledge Inuit customary laws of ocean stewardship. UNCLOS's fundamental mandate is to protect nation-State sovereignty over maritime spaces (UNCLOS, 1982).

The status of the NWP has been disputed for over seven decades. The primary actors involved in this dispute are Canada, and the US. Both positions of the dispute have been hashed out in the literature,[17] and whether it is or isn't an international strait falls outside of the scope of this article. Nevertheless, it must be noted that if the NWP is not already an international strait, it may potentially be deemed to fall under the transit passage regime in the future due to climate change. Warming temperatures melt sea-ice, making it possible for more international ships to sail the NWP.

To be considered an international strait, a waterway must fulfill a geographic and a functional criterion. The geographic criterion entails a strait connecting "one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone" (UNCLOS, 1982: Art. 37; *The Corfu Channel Case,* 1949: 28). The ICJ has also emphasized the decisive criterion as being the geographic one (*Corfu Channel Case,* 1949: 28). The functional criterion requires the strait to be a useful route in the sense that it should be in use as a waterway for international navigation, and mere possibility of navigation does not satisfy the functional criterion if not accompanied by historic and present use (Pharand, 2007: 35). Additionally, Pharand has stressed that the functional criteria will not apply if the 'strait' was considered to be internal waters prior to the ratification of UNCLOS, as Canada only ratified UNCLOS in 2003, after their declaration of straight baselines around the Arctic archipelago in 1985 (Joe Clark, 1985; Pharand, 2007: 59).

Part III UNCLOS dictates international straits falling under the transit passage regime (UNCLOS, 1982: Art. 37), and those under the innocent passage regime (UNCLOS, 1982: Art. 38 (1) jo. Art. 45 (1) (a); and Art. 45 (1) (b)). The US has asserted that the NWP is an international strait falling under the transit passage regime. An international strait falling under the transit regime connects one part of the high seas or EEZ to another part of the high seas or EEZ through the territorial sea (UNCLOS, 1982: Art. 37). If the NWP were deemed an international strait, the transit passage regime may apply because geographically, the NWP can be characterised as several waterways connecting the Atlantic Ocean or Canadian EEZ to the Pacific Ocean or Canadian EEZ through Canadian territorial seas.

As the geographic criterion is already fulfilled, and as the dispute centers around the functional criterion, the improved navigability from sea-ice melt could potentially lead to increased shipping in the NWP which may eventually be permitted through a transit passage regime. It is also difficult to foreshadow which dispute settlement procedure would apply, and whether it would involve Inuit, and thus, the discussion is limited to the consequences of the NWP being deemed a strait falling under transit passage. Although transit passage navigation is subject to stringent international regulations concerning maritime safety (UNCLOS, 1982: Art. 39 (2) (a); SOLAS, 1980), and pollution (UNCLOS, 1982: Art. 234) it is still understood as a more liberal regime than innocent passage. Strait States must not suspend transit passage, unless the ship acts contrary to Part [III] UNCLOS (Rothwell, 2018).

Although the NWP is subject to robust marine pollution regulations domestically, and internationally, Inuit have only been involved in the drafting of binding Arctic Council-negotiated agreements. Inuit contend that these regulations are not sufficient to protect the NWP (ICC, 2018). Arctic marine ecosystems are fragile (UNGA Res. 68/70, 2014), as climate change enhances sea-ice melt. Increase in sea-ice melt, specifically in the NWP, may contribute to a potential ruling of the NWP falling under a regime of transit passage, but results would be uncertain if sent to an international tribunal. In this scenario, climate change and subsequent imposition of a transit passage regime will facilitate an increase in shipping activity in the Northwest Passage. Increased shipping activity is already intensifying incidental waste and noise pollution in the NWP, which is of great concern to the Inuit (ITK, 2018).

Inuit self-determination

Recalling that the right to self-determination in UNDRIP envisions "full participation of indigenous peoples in decisions concerning them," (Chen, 2014: 6) this conflicts with Inuit exclusion from UNCLOS and IMO regulatory processes. As Nicol (2017) explains, "based upon Westphalian understanding of State sovereignty, UNCLOS remains the framework for State claims to maritime spaces. It allows that States, and only States, have the right to claim maritime territory." (806). Accordingly, lacking statehood, Inuit have no standing before international tribunals, leaving Inuit interests systematically unaccounted for. Inuit have thus advocated for inclusion in UNCLOS (Nunatsiaq News, 2013) and IMO processes, and for incorporation of traditional knowledge into regulatory processes (ICC, 2018).

Sonic pollution from shipping impacts marine life in the NWP (Hauser et al., 2018). Ice-breaking activity affects the exercise of the right to culture, as Inuit have been known 'to get stuck' while out hunting on sea-ice (Carter et al., 2018). Because Inuit are excluded from the UNCLOS regime and IMO regulatory processes, their right to self-determination is hindered, as those regimes are applicable in the NWP. While Inuit have extensive local governance powers, as negotiated through

the LCAs, and political representation in Canada, their recognition as international legal subjects is imperative for the fulfillment of UNDRIP rights, including the right to self-determination.

Conclusion

This article has illuminated how the nation-state paradigm of international relations potentially hinders the exercise of Inuit self-determination, as it relates to the NWP. This analysis began by illuminating the disconnect between international law, and dispossession of IPs. Canada recognises aboriginal title of IPs by virtue of historical occupancy and use of traditional territories, but Canada has required cession of aboriginal title through LCAs in exchange for rights and privileges that Inuit are entitled to under UNDRIP. LCAs thus conflict with UNDRIP, and both are still not fully implemented in Canada.

Transnational Indigenous advocacy has advanced the Indigenous rights regime, and UNDRIP continues to gain greater normative status. Indigenous rights are recognised on a collective and individual level, through a mutually symbiotic relationship with the general international human rights law framework. Because the Indigenous rights regime recognises the right to and of management of traditional marine spaces, and because human rights law is applicable to marine spaces, both regimes are applicable to the NWP. Furthermore, if the NWP is deemed to be a strait subject to transit passage, increased shipping will impact the exercise of rights laid down in UNDRIP, which has now been transposed into Canadian law and received royal assent.

Inuit view self-determination as inclusion in NWP decision-making at both domestic and international level. Most importantly, Inuit seek recognition as international legal subjects in order to meaningfully practice their right to self-determination. Through for example, the Arctic Council, Arctic decision-making processes are moving beyond the nation-State paradigm, and thus, international law must evolve to recognise and include Inuit as subjects of international law to secure their rights to self-determination, to manage their traditional territories and resources, to practice their culture, and to ensure that FPIC is provided.

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Notes

1. The greater Inuit polity encompasses Inuit living across Canada, the United States, the Russian Federation, and Greenland. See also Shadian J., (2014). *The Politics of Arctic Sovereignty: Oil, Ice and Inuit Governanc*e. Routledge, Ch. 1.
2. In this context, Anghie broadly defines sovereignty doctrine as 'the complex of rules deciding what entities are sovereign', in Anghie A., (2005). *Imperialism, Sovereignty, and the*

Making of International Law. Cambridge University Press, 16; See also Vitoria F., (1917/1532). *De Indis et de Ivre Belli Relectiones*. (Nys E. (ed.), Bate J. P. (trans.)), Carnegie Institution of Washington.

3. Natural law was referred to as *jus gentium* by Vitoria, in F Vitoria, *De Indis et de Ivre Belli Relectiones* (Ernest Nys ed., John Pawley Bate trans., Carnegie Institution of Washington 1917), 127 (as cited in) Anghie A., (2005). *Imperialism, Sovereignty, and the Making of International Law*. Cambridge University Press, 20.

4. See also Lorimer J., (1883). *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (first published 1883, 2005 ed.). The Lawbook Exchange, Ltd, 156; Lawrence T.J., (1895). *The Principles of International Law*. D. C. Heath & Co., Publishers, 136; Wheaton H., (1866). *Elements of International Law* (8th edn.). Sampson Low, Son and Company, 17.

5. Westlake references *Johnson v. McIntosh* 121 U.S. (8 Wheat.) 543 (1823), in which the Supreme Court of the United States held that in line with the discovery doctrine, right of occupancy of Indigenous peoples is 'extinguished' upon 'discovery' and that subsequently no title is held by Indigenous occupants; Westlake J., (1904). *International Law Part I – Peace* (1st edn.). Cambridge: At the University Press, as cited in Anghie A., (2005). *Imperialism, Sovereignty, and the Making of International Law*. Cambridge University Press, 80.

6. See also Hall W.E., (1924). *A Treatise on International Law,* (8th edn). Oxford University Press, 47; Oppenheim L., (1905). *International Law: A Treatise.* Longmans, Green and Company, 126.

7. *Inuit Nunangat* refers to the traditional Inuit territories, lands, and waters of the North American Arctic. (see ITK, or CIDSA)'*Inuit Nunangat* is the Inuit homeland in Canada, encompassing the land claims regions of Nunavut, Nunavik in Northern Quebec, Nunatsiavut in Northern Labrador and the Inuvialuit Settlement Region of the Northwest Territories. It is inclusive of land, water and ice, and describes an area encompassing 35 percent of Canada's landmass and 50 percent of its coastline', in Inuit Tapiriit Kanatami, (2019). *Inuit Nunangat Map.* https://www.itk.ca/inuit-nunangat-map/.

8. For an extensive overview of this issue in the literature, official reports, and government communications, see Lackenbauer P., (2020). Human Flagpoles or Humanitarian Action? Discerning Government Motives behind the Inuit Relocations to the High Arctic, 1953-1960. *Documents on Canadian Arctic Sovereignty and Security (DCASS)* 16.

9. James Bay and Northern Quebec Native Claims Settlement Act, S.C.,1976-77, c 32, (Can.); *Labrador Inuit Land Claims Agreement Act*, S.C. 2005, c 27, (Can.); Nunavut Land Claims Agreement Act, S.C. 1993, c 29 (Can.); Nunavik Inuit Land Claims Agreement Act, S.C. 2008, c 2 (Can.); Western Arctic (Inuvialuit) Claims Settlement Act, S.C. 1984, c 24 (Can.).

10. See also Christie G., (2011). Indigeneity and Sovereignty in Canada's Far North: The Arctic and Inuit Sovereignty. *The South Atlantic Quarterly* 110(2), 329-346, 329, 333, 339, 342, 344.

11. See for example, General Comment No. 36 on Art. 6: the Right to Life, U.N.H.R.C., on Its 124th Session, U.N. Doc. CCPR/C/GC/36 (Sep. 3, 2019), 5 para. 23, 6 para. 26, and 13 para. 61; General Comment no. 21 on the Right of everyone to take part in cultural life, (Art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), U.N.C.E.S.C.R., on Its Forty-Third Session, U.N. Doc. E/C.12/GC/21, (Dec. 21,

2009), 2 para.3, para. 7, 5 para. 16(e), 7 para. 27, 9-10 para. 36-37, 12 para. 49(d), 13 para 50c, 14 para. 53, 18 para. 73; General Recommendation XXIII on the Rights of Indigenous Peoples, U.N.C.E.R.D., on Its Fifty-First Session, U.N. Doc. A/52/18, (Dec. 26, 1997), Annex V, para. 1; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, (1989), Art. 30; Convention for the Protection and Promotion of the Diversity of Cultural Expressions, (Oct. 20, 2005) 2440 U.N.T.S. 311 (2005), Art. 7 (1) (a).

12. See also International Law Association, (2010). *Report of the Hague Conference* (The Hague). https://www.ila-hq.org/index.php/committees, 43-44; Wiessner S., (1999). Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis. *Harvard Human Rights Journal* 12, 57-128, 109; Anaya S.J., (2005). Divergent Discourses in International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend. *Colorado Journal of International Environmental Law & Policy* 16(2), 237-258.

13. See for example Mayagna (Sumo) Awas Tingni Community v Nicaragua, Merits, Reparations, Costs, Judgment,Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001), para. 148; Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations, Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005), para. 137 and 143; Saramaka People v Suriname, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007), para. 95; African Commission on Human and Peoples' Rights v. Republic of Kenya, Judgment, App. No. 006/2012, African Court on Human and Peoples' Rights [Afr. Ct. H. P. R.], (May 26, 2021), https://www.escrnet.org/sites/default/files/caselaw/ogiek_case_full_judgment.pdf, para. 128; Endorois Welfare Council v Kenya, Comm. 276/03, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], (Nov. 25, 2009), https://www.achpr.org/sessions/descions?id=193, para. 196; Maya Indigenous Communities of the Toledo District v. Belize, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/2004, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 (2004).

14. International Labour Organization, Convention on Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, C169 1650 UNTS 383, (entered into force 5 September 1991). Although this convention is one of the only binding treaties concerning Indigenous rights, it is not yet widely ratified, and is not ratified by Canada.

15. See Ivan Kitok v Sweden, U.N.H.R.C. Comm. No. 197/1985, July 27, 1998, U.N. Doc.CCPR/C/33/D/197/1985, para. 9.2; Ominayak v Canada, U.N.H.R.C. Comm. No. 167/1984, Mar. 26, 1990, U.N. Doc. CCPR/C/38/D/167/1984, para. 32.2 and 33; Ilmari Länsman et al v. Finland, U.N.H.R.C. Comm. No. 511/1992, Oct. 26, 1994, U.N. Doc. CCPR/C/52/D/511/1992 (1994), para. 9.2; Jouni E Länsman et al v. Finland, U.N.H.R.C. Comm. No. 671/1995, Oct. 30 1996, U.N. Doc. CCPR/C/58/D/671/1995, para. 10.2; Apirana Mahuika et al v New Zealand, U.N.H.R.C. Comm. No. 547/1933, Oct. 27, 2000, U.N. Doc. CCPR/C/70/D/547/1993 (2000), para. 9.3; Ángela Poma Poma v. Peru, U.N.H.R.C. Comm. no. 1457/2006, Mar. 27, 2009, U.N. Doc CCPR/C/95/D/1457/2006 (2009), para. 7.2, 7.3.

16. On the unique human rights impacts of climate change on Indigenous peoples, see International Council on Human Rights Policy, (2008). *Climate Change and Human Rights: A Rough Guide* [Report]. < https://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/136_report.p

df>; Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104, Preamble.

17. See also Pharand D., (1988). Legal Status of the Northwest Passage. In Pharand D., *Canada's Arctic Waters in International Law*. Cambridge University Press; Rothwell D., (1993). The Canadian-U.S. Northwest Passage Dispute: A Reassessment. *Cornell International Law Journal* 26 (2), 331-370; Lalonde S., & Byers M., (2006). Who Controls the Northwest Passage? *Vanderbilt Journal of Transnational Law* 42, 1133-1210; Kraska J., (2007). The Law of the Sea Convention and the Northwest Passage. (2007) *The International Journal of Marine and Coastal Law*, 22 (2), 257-281; Byers M., (2013). *International Law and the Arctic*. Cambridge University Press.

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