THE ENDURING LEGACY OF THE DOCTRINE OF DISCOVERY: A COMPARATIVE CRITIQUE OF THE DAKOTA ACCESS PIPELINE IN THE USA, THE SITE-C DAM IN CANADA AND THE ADANI MINE IN AUSTRALIA

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Statement of the Candidate

This work has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

(Signed)__Sheikh Salauddin_____ Date: ____1 May 2020_____

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Abstract

This thesis is based on the premise that the Doctrine of Discovery explicitly and tacitly underpinned the colonisation of the USA, Canada and Australia. Elements of the Doctrine, including first discovery, civilisation, Christianity, pre-emption, native title, limited sovereign and commercial rights, and conquest, have been used recurrently by the Crown and by subsequent governments to extinguish Indigenous rights and cultures, dispossess them of their lands and undermine their sovereignty, self-determination and systems of government. Some of these elements continue to be used by governments and their agencies to acquire Indigenous lands and to exploit their resources. Indigenous lands are still prime lands for the development of mines, highways, dams, pipelines and many other projects, for which Indigenous rights are ignored. This thesis draws on Indigenous perspectives that identify the continuing application of the Doctrine in the dispossession of their lands. Most notably, the rise of neoliberalism and globalisation has resulted in further dispossession through the expansion of global markets and a corresponding increase in government support for multinational corporations that seek to extract natural resources and construct mega infrastructure projects on Indigenous lands. This thesis argues that these developments have given rise to a new era, in which a Doctrine of Neo-Discovery now prevails.

To exemplify the enduring legacy of the Doctrine, this thesis examines three recent case studies in detail: the Dakota Access Pipeline in the USA, the Site-C dam in Canada and the Adani mine in Australia. While these development projects have lacked the 'free, prior and informed' consent and Indigenous peoples continued to struggle to have their rights recognised, the governments in these countries have different approaches towards Indigenous peoples. The differences in each government's approach may be traced to differences in government structures, histories of dispossession and ill treatment of Indigenous peoples in each nation. Despite these differences, the outcomes for Indigenous peoples appear to be largely the same. In each case, government supported economic development in line with neoliberal and globalisation trends. While attempts have been made to challenge these developments in the courts, their power to circumvent these developments is limited either by common law precedents or by laws enacted by parliament. Further, international legal developments have not served to address the continuing negative effects of the Doctrine. In view of the limitations of current national and international legal regimes to protect and safeguard Indigenous rights, this thesis presents recommendations that could temper the enduring effects of the Doctrine across national and international levels.

Contents

List of Abbreviations

BCUC	British Columbia Utility Commission
CBD	Convention of Biological Diversity
CERD	Committee on the Elimination of Racial Discrimination
CLCA	Comprehensive Land Claim Agreements
CSIRO	Commonwealth Scientific and Industrial Research Organisation
DAPL	Dakota Access Pipeline
EIA	Environmental Impact Assessment
EIS	Environmental Impact Statement
GDEMP	Groundwater Dependent Ecosystem Management Plan
GMMP	Groundwater Management and Monitoring Plan
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
ILUA	Indigenous Land Use Agreement
JRP	Joint Review Panel
NABALCO	North Australian Bauxite and Alumina Company
NNTT	National Native Title Tribunal
NSW	New South Wales
PAD	Peace-Athabasca Delta
PCN	Pre-Construction Notices
QLC	Queensland Land Court

RCAP	Royal Commission on Aboriginal People
TRC	Truth and Reconciliation Commission
TRTFN	Taku River Tlingit First Nations
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UNPFII	UN Permanent Forum on Indigenous Issues
W&J	Wangan and Jagalingou
WHC	World Heritage Convention

List of Maps

Chapter 1: Introduction

For several centuries, European colonial powers have applied the Doctrine of Discovery ('the Doctrine') to occupy and use Indigenous lands in violation of Indigenous peoples' rights.[1] According to Maori Scholar Professor Linda Smith:

> It angers us when practices linked to the last century, and the centuries before that, are still employed to deny the validity of indigenous peoples' claim to existence, to land and territories, to the right of self-determination, to the survival of our languages and forms of cultural knowledge, to our natural resources and systems for living within our environments.[2]

Almost all Indigenous lands of the world have been occupied by foreigners. These lands have become central to settlement and the extraction of valuable natural resources. Indigenous lands are prime lands for the development of mines, highways, dams, farmlands and many other projects. There are examples of Indigenous peoples engaging in development projects that have been beneficial to them.[3] However, there are notable examples of Indigenous peoples opposing development projects that are in violation of their rights. This research is focused on three examples, each of which are currently opposed by Indigenous peoples: the Dakota Access Pipeline ('DAPL') in the USA, the Site-C dam in Canada and the Carmichael ('Adani') mine in Australia.

1.1 Research Question

For centuries, governments and judicial systems around the world have used elements of the Doctrine—first discovery, actual occupancy, pre-emption, native title, Christianity, civilisation, limited sovereign and commercial rights of Indigenous peoples, and conquest—to justify the invasion of settlers on Indigenous lands.[4] This thesis examines the extent to which the Doctrine continues to buttress development projects on Indigenous lands in the USA, Canada and Australia. This discussion draws on critical Indigenous perspectives that identify the continuing application of the Doctrine in the dispossession of their lands.[5] To the extent the concept continues to be applicable, the thesis considers ways in which the law could change to promote

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[1] See Robert J Miller et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2012) 1-3; For the purpose of this thesis the Indigenous peoples in the USA are referred as American Indians, both Indigenous peoples in Canada and the Aboriginal and Torres Strait Islander peoples in Australia are referred as Indigenous peoples; Linda Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books, 2013) 6. According to Linda Smith 'the word indigenous is a way of including the many diverse communities, language groups and nations, each with their own identification within a single grouping'.

[2] Smith (n 1) 30-31.

[3] Ciaran O'Faircheallaigh and Tony Corbett, 'Indigenous Participation in Environmental Management of Mining Projects: The Role of Negotiated Agreements' (2005) 14(5) *Environmental Politics* 629, 636, 643.

[4] See Miller et al (n 1) 8-11. Detailed discussion of the elements of the Doctrine is in Section 2.2.

[5] Ibid.

the rights of Indigenous peoples. This discussion builds on Indigenous perspectives enshrined in such instruments as the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP') to provide the framework for the protection of Indigenous peoples' rights to their lands. For the purpose of this research, I considered several development-related projects in the world that affected Indigenous peoples: the Site-C Clean Energy Project ('Site-C dam'), the Trans-Mountain pipeline and the Prosperity Gold-Copper project in Canada; the Keystone XL Pipeline, the DAPL and the South Mountain Freeway Loop 202 in the USA; the Carmichael ('Adani') mine in Australia; and the declaration of the Kermadec Ocean Sanctuary in New Zealand. Given the available time and resources, it was not possible to investigate all cases. Of these projects, I decided to focus on the DAPL—including some discussion of the Keystone XL Pipeline where relevant with DAPL—the Site-C dam and the Adani mine on the basis that these projects were examples of national and multinational companies seeking to use Indigenous lands for commercial gain that have significant impacts on Indigenous peoples' lands and cultures.

For a development project to produce positive outcomes for affected Indigenous peoples and their communities, at a minimum, it would need to be carried out in accordance with the principles of self-determination and 'free, prior and informed' consent.[6] While some Indigenous peoples may be averse to development, not all Indigenous peoples are.[7] As UN Special Rapporteur of the Rights of Indigenous Peoples James Anaya claimed, 'indigenous peoples are open to discussion about extraction of natural resources from their territories in ways beneficial to them and respectful of their rights'.[8] Proceeds from development projects could be used for Indigenous recognition, employment, education, training, environmental management, cultural heritage and community assistance programs (e.g., health, sports and recreations).[9] In examining the three respective developments projects in the USA, Canada and Australia, it was evident that the Indigenous communities affected by these projects were opposed to them because they violated their rights to their culture and connection to their lands. Notably, while Indigenous peoples living near the DAPL and Site-C unanimously opposed these development projects, some of the native title holders supported the proposed Adani mine. A law—*Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth)—passed by the Commonwealth government made it possible for the Adani mine to proceed (see Section 4.4.4). This example

[6] Tara Ward, 'The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law' (2011) 10(2) *Northwestern Journal of International Human Rights* 54, 54-5; see generally Carla F Fredericks, 'Operationalizing Free, Prior, and Informed Consent' (2016-2017) 80(2) *Albany Law Review* 429.
[7] James Anaya, *Extractive Industries and Indigenous Peoples: Report of the Special Rapporteur of the Rights of Indigenous Peoples*, UN Doc A/HRC/24/41(2013).
[8] Ibid 3 [2].
[9] Native Title Research Unit, *Native Title Payments & Benefits: Literature Review* (Australian Institute of Aboriginal and Torres Strait Islander Studies, August 2008) <www.aiatsis.gov.au/sites/default/files/docs/ research-and-guides/native-title-research/taxlitreview.pdf>.

reveals that while Indigenous peoples may favour development, not all do, and as claimed by the thesis development proceeded in all three cases on implied assumptions based on the Doctrine.

The USA, Canadian and Australian examples illustrate common themes against a background of differences in the histories of the treatment of Indigenous peoples. The USA and Canada are nations for which treaties formed the basis of Indigenous and non-Indigenous relations, whereas Australia has no such history of treaty-making. This difference has been used to criticise Australia.[10] However, while the absence of a treaty system in Australia needs rectification, the operation of the treaty system in the USA and Canada has been far from ideal. Despite these differences in their histories, the treatment of Indigenous peoples in the USA, Canada and Australia share many similarities. Notably, the colonisation of the three nations was grounded in elements of the Doctrine. My thesis examines the extent to which elements of the Doctrine, especially pre-emption, native title, Christianity, civilisation, limited sovereign and commercial rights of Indigenous peoples, and conquest continue to inform the development of Indigenous lands. In the case of the USA, this is evident in the complete disregard of the treaties entered by the Standing Rock Sioux Nation, which have been violated by the construction of DAPL in North Dakota. In Canada, this is evident by the construction of the Site-C dam, which violates Treaty 8 and demonstrates the limited protection of Aboriginal treaty rights under the *Constitution Act 1982*. In Australia, this is evident in the limited protections offered by the Indigenous Land Use Agreement ('ILUA') process involving the Wangan and Jagalingou ('W&J') traditional owners in negotiations over the proposed Adani mine in Queensland. While the ILUA got majority support from the claimants' group, it could be argued that they were left with no alternatives but to support the ILUA or otherwise lose everything (see the discussion in Section 5.4.2.2). The three development projects have lacked the 'free, prior and informed' consent of Indigenous peoples who opposed those development projects, which is unacceptable under international standards.[11] The government through its laws and policies should not create an environment where Indigenous peoples are forced to give consent, such as the case of Adani (see Section 5.4.2.2). Like the early colonial settlers, present governments have disregarded the rights of Indigenous peoples by developing their lands without their express consent as recognised in international law.[12] In approaching these case studies in this way, the thesis establishes a framework for critique of the development of Indigenous lands, which could inform discussion

[10] Jens Korff, 'Would a treaty help Aboriginal self-determination' *Creative Spirits* (Web Page, 9 January 2020) <https://www.creativespitirs.info/aboriginalculture/selfdetermination/would-a-treaty-help-aboriginal-selfdetermination>; 'Why doesn't Australia have an Indigenous treaty' *BBC* (Web Page, 24 May 2017) <www.bbc.com/news/world-australia-40024622>.

[11] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/61/295 (2 October 2007, adopted 13 September 2007) ('UNDRIP') arts 10, 18.

[12] Ibid.

of similar cases in other jurisdictions. It is an approach that is grounded in Indigenous scholarship on the ongoing colonisation process in countries such as the USA, Canada and Australia.[13]

Another reason for focusing on these case studies was that it was clearer to discern the direction of law and policy in the USA, Canada and Australia because these three projects were heavily backed by government. For example, immediately after he assumed office, US President Donald Trump took decisive action to ensure that the work on the DAPL was completed. In Canada, the Trudeau government opposed the Site-C dam before it was elected but decided to proceed with the development following its election in 2015. In Australia, the Turnbull government took steps to ensure the Adani mine proceeded.[14] While different approaches were adopted, which are worthy of comparison, Indigenous peoples have struggled to have their rights recognised in the three cases. The differences in each government's approach may be traced to differences in government structures. They might also be traced to the different histories of dispossession of each nation. Despite these differences, the outcomes for Indigenous peoples appear to be largely the same. The thesis explores this issue by examining the legacy of the Doctrine in the USA, Canada and Australia.

This thesis also focuses on governments' decision-making that is influenced by neoliberal and globalisation trends. The concepts of neoliberalism and globalisation support the expansion of global markets, which include natural resource extraction and the construction of mega infrastructure projects. These projects often encroach on Indigenous lands and result in their dispossession.[15] The rationale for such projects is that they will benefit the broader population, although in supporting these projects, governments have invariably delegated their responsibilities to national and multinational corporations to provide essential services to citizens. The development projects that are examined in this thesis are examples of development projects undertaken by Crown, national and multinational corporations, which are backed by respective governments. In the case of DAPL it was undertaken by Energy Transfer a multinational corporation and was supported by the US Army Corps of Engineers (the federal agency responsible for permitting DAPL), the Site-C in Canada is being undertaken by BC

[13] See generally Paul Havemann, 'Denial, Modernity and Exclusion: Indigenous Placelessness in Australia' (2005) 5 *Macquarie Law Journal* 57, 57-9; Evelyn Nakano Glenn, 'Settler Colonialism as Structure: A Framework for Comparative Studies of U.S. Race and Gender Formation' (2015) 1(1) *Sociology and Race and Ethnicity* 54, 54-5; Janice GAE Switlo, 'Modern Day Colonialism- Canada's Continuing Attempts to Conquer Aboriginal Peoples' (2002) 9 *International Journal on Minority and Group Rights* 103, 103-4.

[14] *Native Title Amendment (Indigenous Land Use Agreements) Act 2017*(Cth) was enacted so that the ILUA could pass.

[15] See generally Isabel Altamirano-Jimenez, *Indigenous Encounters with Neoliberalism: Place, Women and the Environment in Canada and Mexico* (UBC Press, Vancouver-Toronto, 2013) 5-6; see also James V Fenelon, 'Revitalization and Indigenous Resistance to Globalization and Neoliberalism' (2008) 51(12) *American Behavioural Scientist* 1867.

Hydro a Crown corporation and third largest electricity producer in Canada and the Adani mine in Australia is being undertaken by Adani Mining a multinational corporation based in India and is supported by federal and state governments laws and support package (all discussed in Chapter 5). In all three cases the Indigenous peoples have sought redress from the judicial system but in the case of DAPL and Site-C the court favoured non-Indigenous interests over Indigenous rights and in the case of Adani the court depended on a flawed ILUA that was possible due to the federal government's amendment of the law and the desperation of Indigenous claimants who signed the ILUA out of fear of missing out (see Chapter 5).

In the name of economic development, governments allow these corporations to encroach on Indigenous lands. This is because these countries prioritise wealth creation over public spending. The latest 2019 figures from the Organisation for Economic Co-operation and Development ('OECD') shows that countries such as the USA, Canada and Australia spend around 16-18 percent of total Gross Domestic Product ('GDP') on social spending whereas countries such as Germany, Denmark, Italy and France spent around 25-30 percent of their GDP on social spending.[16] The data shows in the last decade these countries (the USA, Canada and Australia) never spent more than 20 percent of their GDP on social spending.[17] Even during the havoc caused by the COVID-19 where more than 250,000 peoples (as of December 2020) died in the USA the government refused to close down the country because it would reduce the economic activities and reduce total wealth. Contrary to reducing social spending these governments are spending more on economic stimulus activities that support neoliberal ideology of wealth creation.

Through examination of these projects, this thesis explores how neoliberal globalisation has become another element of the Doctrine to provide evidence of a new phase, that of the Doctrine of Neo-Discovery, which is marked by a withdrawal of government spending on welfare and increased investment on development, which invariably involves development on Indigenous lands. During early colonisation, the Doctrine helped the colonisers to dispossess Indigenous peoples of their lands. Contemporary economic growth pursued through the principles of neoliberalism and globalisation continues this process of dispossessing Indigenous peoples from their remaining lands.

[16] 'Social Spending' *OECD* (Webpage, 11 November 2020) <https://data.oecd.org/socialexp/social-spending.htm>.
[17] Ibid.

1.2 Aims of the Research

The aim of this thesis is to explore the lingering effects of elements of the Doctrine as they continue to dispossess Indigenous peoples of their lands through development. The focus of the thesis is on three case studies in the USA, Canada and Australia. The three cases are considered to be controversial and represent an attack on Indigenous rights to land, for which Indigenous peoples have looked to political and legal systems for redress. In this thesis, I examine how politicians and courts have responded to these challenges. Another aim of my research is to consider whether there is a continuing relationship between the past and present application of the Doctrine. I analyse past laws and policies of governments informed by the Doctrine and draw on present laws, policies and decision-making processes of governments related to the development projects to identify the extent of the lingering effects of the Doctrine in contemporary times.

My analysis traces the application of the Doctrine in the laws, policies and decision-making processes of governments. It is apparent from recent judicial decisions that judgments have been based on the Doctrine. For example, it can be traced in the 2005 US case of *City of Sherrill v Oneida Indian Nations of NY*,[18] in which the Court accepted the argument of *Oneida Indian Nations of NY v County of Oneida*.[19] In this case, the Court accepted that under the Doctrine, 'fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original states and the United States'.[20] The Court also accepted 'the pre-emptive right to purchase from the Indians, was in the state'.[21] In relation to Canada, the Supreme Court in *Tsilhqot'in Nation* accepted that the Doctrine of terra nullius never applied in Canada, although it has been found to have tacitly applied to subject the Aboriginal peoples to Canadian law and sovereignty.[22] According to many scholars, the Doctrine justified the assertion of Canadian sovereignty within Canadian law.[23] The land rights of Indigenous peoples in Australia is based on native title, which is an element of the Doctrine. By rejecting terra nullius element of the Doctrine, Australia accepted native title, which gives Indigenous peoples only limited rights over their lands.

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[18] 544 US 197 (2005).
[19] 414 US 661 (1974) ('*Oneida Indian Nations of NY*').
[20] Ibid 667.
[21] Ibid 670.
[22] *Tsilhqot'in Nation v British Columbia* [2014] SCC 44. Lindberg has argued that 'Ignoring Indigenous legal orders and governmental authorities results in a constructive legislative *terra nullius*- where Indigenous sovereignty, governmental autonomy, and legal orders are supposed to be non-existent'. Tracy Lindberg, 'The doctrine of Discovery in Canada' in Robert J Miller et al (eds), *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2012) 116.
[23] Karen Drake, 'The Impact of St Catherine's Milling' (2018) *Articles and Book Chapters* 2682: 1-22 <https://digitalcommons.osgoode. yorku.ca/scholarly_works/2682>.

This thesis also aims to analyse the effects of neoliberalism and globalisation on Indigenous land rights. Influenced by these developments, governments have retracted spending to generate greater economic gains. Many mega development projects on Indigenous lands such as DAPL and Site-C proceed without the 'free, prior and informed' consent of the Indigenous peoples and are undertaken by national and multinational corporations, which are backed by the governments. Similarly, development project such as Adani that has 'consent' from part of the native title holders is proceeding because it has complete support from the government and majority of the native title holders approved it out of fear of missing out and future implications, such as future determination of native title claim (see Section 5.4.2.2). Through analysis of the three development projects in the USA, Canada and Australia, this thesis establishes neoliberal globalisation as an element of the Doctrine. Because neoliberal ideology encourages the government to privatise government activities and reduce spending on social programs, and at the same time encourages the government to spent on wealth creation through activities such as mining, pipeline and power production, which can result in Indigenous peoples being displaced from their lands.

In response to these developments, the thesis considers how the law could better protect Indigenous lands and cultures by identifying appropriate legal principles that can safeguard the lands and cultures of Indigenous peoples. In developing this reform agenda, I draw on Indigenous perspectives regarding developments and terms to which they are amenable. In particular, I draw on International Labour Organization ('ILO') conventions, the UNDRIP and the *Universal Declaration of Human Rights* ('UDHR'). These instruments reflect the aspirations of Indigenous peoples for rights protections against a history of rights violations. Based on the principles contained in such instruments, I develop a principled approach to enshrine the rights of Indigenous peoples as recognised by these instruments.

The USA, Canada and Australia were three of the four countries that initially refused to endorse the UNDRIP because they claimed it would undermine national sovereignty, especially in the matter of land disputes and natural resources extraction.[24] These countries have subsequently endorsed the UNDRIP, although they have no legal obligations to uphold its provisions. At the time of its endorsement by Australia, the Minister for Indigenous Affairs of Australia, Jenny Macklin, summarised the position of Australia on the UNDRIP, claiming that 'while it is non-binding and does not affect existing Australian law, it sets important international principles for

[24] Erin Hanson, 'UN Declaration on the Rights of Indigenous Peoples' *Indigenous foundations* (Web Page) <www.indigenousfoundations.arts.ubc.ca/un_declaration_on_the_rights_of_indigenous_peoples>.

nations to aspire to'.[25] Even as a non-binding instrument, the UNDRIP has moral force, which could subject nation-states to moral condemnation for their treatment of Indigenous peoples. However, it is also possible for the UNDRIP to become part of international customary law and domestic law if it is incorporated. Former US President, Barack Obama was optimistic about the UNDRIP in this way. According to him, 'what matters far more than words, what matters far more than any resolution or declaration, are actions to match those words'.[26] Now that the USA, Canada and Australia have endorsed the UNDRIP, they could enact laws and adopt policies that respect the lands and cultures of Indigenous peoples and restrict development on Indigenous lands. A country does not need to be a signatory to any international instrument to enact laws that protect the rights of Indigenous peoples, although they need the political will to acknowledge that Indigenous peoples have rights to their lands and cultures and act accordingly to protect these connections. While Canada endeavoured to enact the *United Nations Declaration on the Rights of Indigenous Peoples Act* (Bill C-262) in 2016,[27] the USA and Australian governments are yet to take any such measures to give effect to the UNDRIP.[28]

My analysis considers binding international treaties such as the *International Covenant on Civil and Political Rights* ('ICCPR') and the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR'), under which Indigenous peoples fall within the definition of 'all people' who have rights to self-determination.[29] Signatory countries need to ensure that the rights provided under these instruments are reflected through national laws and policies. While individuals have limited scope to seek international redress, the Optional Protocol to the ICCPR increased the scope of international monitoring and allowed individuals to bring their complaint to the committee on the condition that the individual exhausted all available domestic avenues.[30] These instruments are important for the protection of human rights, which is why the UDHR along with the ICCPR (including optional protocols) and the ICESCR are collectively known as the International Bill of Human Rights. However, the UN Charter, the UDHR, the ICCPR and

[25] Jenny Macklin, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Speech, Parliament House Canberra, 3 April 2009).
[26] Office of the Press Secretary (The White House), 'Remarks made by the President at the White House Tribal Nations Conference' (Media Release, 16 December 2010) <http: www.whitehouse.gov/the-pressoffice/2010/12/16/remarks-president-white-house-tribal-nations-conference>.
[27] This private-members bill was introduced in 2016 and passed the House of Commons in 2018 but failed in the Senate in June 2019.
[28] Further discussed in Chapter 6.
[29] Article 1 of ICCPR and ICESCR. While the ICCPR was ratified by the USA, Canada and Australia, the ICESCR was ratified by only Canada and Australia, the USA signed but did not ratify it.
[30] *Optional Protocol to the International Covenant on Civil and Political Rights*, GA Res 2200A(XXI) 16 December 1966 (enter into force 23 March 1976). According to art 2 of the Optional Protocol, '…individuals who claim that any of their rights enumerate in the covenant have been violated and who have exhausted all available domestic remedies may submit a written commination to the Committee for consideration'; see also Christopher J Fromherz, 'Indigenous Peoples' Courts: Egalitarian Judicial Pluralism, Self-Determination, and the United Nations Declaration on the Rights of Indigenous Peoples' (2008) 156(5) *University of Pennsylvania Law Review* 1341.

the ICESCR contain rights that apply to all human beings; not specifically to Indigenous peoples. In this thesis, I analyse the strengths and weaknesses of these instruments and also instruments such as the *International Convention on the Elimination of All Forms of Racial Discrimination 1965* ('ICERD') and the *Convention on the Prevention and Punishment of Crime of Genocide 1948* and how they could assist in the realisation of Indigenous peoples' rights to their lands and cultures.

1.3 Contribution to the Literature

The Doctrine was based on the notion of racial superiority and supported the stance of dominance adopted by European Christian nations with respect to Indigenous peoples. My research investigates the extent to which the Doctrine informs the present mindset of settler-colonised states. In 1823 Marshall CJ articulated ten elements of the Doctrine, first discovery—first European country to discover any new land gains property and sovereign rights against other European country; actual occupancy—first European country to occupy newly discovered land gets complete title; pre-emption—first discovering country gets sole right to buy or make agreements with the Indigenous peoples; native title—it is presumed that Indigenous peoples lost their full property rights and only retained occupancy and use rights; limited sovereign and commercial rights—Indigenous peoples were thought to lose their sovereignty and right to free trade and diplomatic relations with nations except the nation that discovered them; contiguity—European settlers could claim lands adjacent to their settlement; terra nullius—it means lands occupied by no one, albeit under this element the European nations could claim the land of Indigenous peoples who did not follow a European legal system; Christianity—followers of Christianity were considered to be superior and non-followers were considered to be inferior; civilisation—Indigenous peoples were considered to be uncivilised and it was the religious duty of Europeans to civilise and educate them; and conquest—under the term 'just and necessary war', European nations used military power to claim Indigenous lands.[31] These elements are set out in full in Section 2.2. This research examines in particular how elements of the Doctrine—pre-emption, native title, Christianity, civilisation, limited sovereign and commercial rights of Indigenous peoples, and conquest—play a significant role in the contemporary development of Indigenous lands in the USA, Canada and Australia. First, the thesis provides an overview of the history of the laws and policies informed by the Doctrine in each nation, which is followed by an examination of current laws and policies relating to the DAPL (also Keystone XL Pipeline where relevant) in the USA, the Site-C dam in Canada and the Adani coal mine in Australia. In response to the challenges posed by these developments to affected Indigenous communities in

[31] Miller et al (n 1) 3.

these nations, this thesis identifies relevant international laws that bind these countries to uphold the rights of Indigenous peoples and the principles of international laws endorsed by Indigenous peoples to protect their lands and cultures. In particular, I explore the right of Indigenous peoples to self-determination, including to what extent this right can be exercised in the context of development projects undertaken by corporations with the support of national governments. In adopting this approach, I use a human rights framework to develop a principled approach to enshrine the rights of Indigenous peoples as being recognised by the UNDRIP. While this document is far from perfect—and continues to reflect aspects of the Doctrine in protecting the territorial integrity of states (art 46)— it represents the range of rights of Indigenous peoples that have been violated and should be upheld. In this regard, their implementation could help to support what Indigenous peoples would find acceptable.

This thesis contributes to the research literature by arguing that several elements of the Doctrine continue to support governments and multinational companies to further diminish Indigenous rights. By examining three development projects, this thesis further contributes to the literature by contending that neoliberal globalisation is a new element of the Doctrine, which has emerged as the Doctrine of Neo-Discovery. Neoliberal globalisation contributes to the dispossession of Indigenous peoples from their lands as did the elements of the Doctrine during the early colonisation. This will be demonstrated throughout this thesis by examining three development projects.

1.3.1 The USA—DAPL

Since the election of Donald Trump, the situation of American Indian peoples has become more precarious. President Trump allowed the DAPL in North Dakota to be completed, even though former President Barack Obama decided to not issue the final easement to the project.[32] Trump's approval follows the same trend of disregard for Indigenous peoples' rights as has been the case since early colonisation. The project never had 'free, prior and informed' consent of the traditional owners of the land, who resented the idea of the pipeline because it would destroy their ancestral lands, burial grounds and watercourses. The Doctrine enabled British settlers to acquire Indigenous lands without their informed consent. Similarly, the current government is acquiring Indigenous lands for project construction without seeking the consent of affected Indigenous peoples.

[32] In October 2016, the Department of the Interior and Justice along with the Army Corps issued a stop work order after the court denied a legal request to stop the construction. Eric Wolff, 'Obama administration blocks Dakota pipeline, angering Trump allies' *Politico* (Web Page, 4 December 2016) <https://www.politico.com/story/2016/12/us-army-corps-blocks-dakota-access-pipeline-232171>.

Planned in 2014, the DAPL is a USD 3.7 billion, 1172-mile project owned by Energy Transfer and Sunoco, which stretches from North Dakota to Illinois.[33] The pipeline cuts through the northmost section of Sioux territory over which the tribe has invoked its authority under the Fort Laramie Treaty of 1851 and 1868[34] in protest against the construction of the pipeline. In January 2017, President Trump issued an executive order so that the construction of the DAPL could recommence (see Chapter 5).[35] Immediately after Trump gave his approval, the Army Corps of Engineers approved the project and construction of the pipeline was finished and become operational in June 2017. Throughout this time, the American Indian peoples challenged the construction of the pipeline and claimed it was a huge threat to their sovereignty over the land, their way of life, sacred lands and access to their precious waters and resources.[36] There is a high risk that the pipeline will cause water pollution from leaks and forest destructions. The pipeline passes through the land that is protected under the Fort Laramie Treaties of 1851 and 1868.[37] After the pipeline was approved, the local Standing Rock Sioux Tribes went to the Federal Court to stop the pipeline from becoming operational.[38] In June 2017, a Federal Court judge found that the US Army Corps of Engineers had failed to perform an adequate study regarding 'the impacts of an oil spill on fishing rights, hunting rights, or environmental justice' and a temporary injunction was granted (see Section 5.2.3).[39] After the post-judgement briefing was submitted by the parties, the Court, on 11 October 2017 decided that the errors identified in the prior case were not 'fundamental or incurable' flaws and pipeline was allowed to operate.[40] The American Indian

[33] Bradley Olson and Austen Hufford, 'Sunoco Logistics to Buy Energy Transfer Partners' *The Wall Street Journal* (online at 21 November 2016) < https://www.wsj.com/articles/sunoco-logistics-to-buy-energy-transfer-owners-of-dakota-access-pipeline-1479742796>; 'Dakota Pipeline: What's behind the controversy' *BBC News* (Web Site, 7 February 2017) <https://www.bbc.com/news/world-us-canada-37863955>; Moving America's Energy: the Dakota Access Pipeline' *Energy Transfer* (Web Site) <https://daplpipelinefacts.com/>; *Standing Rock Sioux Tribe v US Army Corps of Engineers (Standing Rock I)*, 205 F Supp 3d 4 (2016) [7]. See also Stephen Young, 'The Sioux's Suits: Global Law and the Dakota Access Pipeline' (2017) 6(1) *American Indian Law Journal* 173, 188.

[34] 205 F Supp 3d 4 (2016) [7]. On the other hand, the Keystone XL pipeline was planned by TransCanada Corporation to link the Canadian oil sands to the US refiners on the Gulf Coast of Texas. It is a 1179 mile (1897 km) long pipeline that goes from Canada and through the USA from north to south. The Keystone XL pipeline is a duplicate of the original Keystone pipeline (phase 1). 'Keystone XL pipeline, About the Project' *TransCanada archive* (Web Page) <https://keystone-xl.com/about/the-project/>.

[35] See generally Young (n 33); The proposed Keystone XL pipeline was approved by both houses of the parliament but in 2015 President Obama refused to sign the approval due to its effects on the environment and the Native Americans.

[36] See generally Robert N Diotalevi and Susan Burhoe, 'Native American Lands and the Keystone Pipeline Expansion: A Legal Analysis' (2016) 27(2) *Indigenous Policy Journal* 1.

[37] Robinson Meyer, 'The Legal Case for Locking the Dakota Access Pipeline' *The Atlantic* (Web Page, 9 September 2016) <https://www.theatlantic.com/technology/archive/2016/09/dapl-dakota-sitting-rock-sioux/ 99178>.

[38] *Standing Rock Sioux Tribe v US Army Corps of Engineers,* (*Standing Rock IV*), 282 F Supp 3d 91 (DDC 2017).

[39] Ibid 96; Robinson Meyer, 'The Standing Rock Sioux Claim "Victory and Vindication" in Court' *The Atlantic* (Web Page, 14 June 2017) <https://www.theatlantic.com/science/archive/2017/06/dakota-access-standing-rock-sioux-victory-court/530427/>.

[40] *Standing Rock IV* (n 38) 94.

people now fear that it is a matter of time before a big spill will destroy their water sources and sacred burial grounds for good.[41]

The approval and completion of the DAPL demonstrates that the government would do anything, including destroying remaining Indigenous rights, for the economic benefit of the non-Indigenous population. Four hundred years ago, European settlers used the Doctrine to colonise Indigenous peoples, destroy their cultural and religious institutions and take their lands. Now, the Doctrine is assisting the government to take away remaining Indigenous rights, including their rights affirmed by treaty. Like the early colonial invaders, the present government has total disregard for Indigenous peoples and their remaining rights. This is apparent from the fact that Indigenous peoples lack the right to self-determination and only have usufructuary rights over the disputed land. This demonstrates that the elements of limited sovereignty and native title prevail. Moreover, by denying Indigenous peoples ownership rights, the land remains under control of the government to dispose of it as it deems fits, which reflects the pre-emption elements of the Doctrine. However, in the current climate, pre-emption favours the corporations seeking to develop Indigenous lands at the expense of Indigenous rights—sometimes big corporations act as the subsidiary of the government or have support of the government that holds the pre-emptive right. Arguments in defence of the project point to its potential benefits for Indigenous peoples such as jobs creation and other social advances, including education and lifestyle. The civilisation element of the Doctrine does the same by providing a Westernised education, jobs and lifestyle, which directs Indigenous peoples towards European-style modernisation. It appears that the neoliberal government is using 'the greater economic benefit' cause to disregard Indigenous land and water rights. Focusing on the DAPL, my thesis elaborates on current government laws and policies that undermine the interests of Indigenous peoples, which can be traced to the Doctrine.

1.3.2 Canada—Site-C Clean Energy Project

Site-C Clean Energy Project ('Site-C dam') is a hydroelectric dam in Canada, which was proposed by the British Columbia Hydro and Power Authority ('BC Hydro').[42] With the capacity of 1100 MW (5100 GW/h per year), length of 1050 metres and height of 60 metres, the Site-C

[41] Already in its first six months of operation there have been at least five small leaks in different parts of Dakota Access pipeline and biggest was 168 gallons near DAPL's endpoint in Patoka, Illinois. See Allen Brown, 'Five Spills, Six Months in Operation: Dakota Access Track Record Highlights Unavoidable Reality- Pipeline Leak' *The Intercept* (Web Page, 10 January 2018 <https://theintercept.com/2018/01/09/dakota-accesspipeline-leak-energy-transfer-partners>; 'Keystone pipeline leaks estimated 210000 gallons of oil in South Dakota' *The Guardian* (online at 17 Nov 2017) <https://www.theguardian.com/us-news/2017/nov/16/keystone-pipeline-leaks-estimated-210000-gallons-oilsouth-dakota>.

[42] *Report of the Joint Review Panel: Site C Clean Energy Project* (Report, 1 May 2014); BC Hydro is a Crown Corporation owned by the government.

dam is the biggest hydropower project planned in Canada during the past 30-year period.[43] Under the provisions of the *Canadian Environmental Assessment Act 2012*, a Joint Review Panel ('JRP') was established by provincial and federal governments to conduct a cooperative environmental assessment ('EA') to determine 'adverse environmental, economic, social, health and heritage' effects of the project (see Section 5.3.1).[44] According to the Environmental Impact Assessment, 29 Indigenous groups (e.g., Métis, Treaty 8 and other First Nations) asserted their treaty rights at different stages of the impact assessment and claimed that they would be adversely affected by the project and their traditional rights to hunting, fishing and trapping and that their customary laws and ways of life connected to the land would be destroyed if the dam was constructed (see Section 5.3.1).

Ignoring the recommendations of the JRP and without proper consultation with Indigenous peoples and pending the assessment review, the Site-C project was granted conditional environmental approval by the British Columbia and federal governments. Without providing any reasons, the British Columbia Minister of the Environment issued the environmental certificate for the Site-C project on 14 October 2014.[45] Similar to the DAPL, this project never had the 'free, prior and informed' consent of the Indigenous peoples; following centuries-old colonial practices, the government arbitrarily decided against the interests of Indigenous peoples. The government argued that the project would create jobs, educate people, provide electricity and increase modern facilities such as roads and infrastructure. However, the government did not focus on the protection of Indigenous lands and cultures, which was what the Indigenous peoples wanted. The Indigenous peoples in Canada lost most of their land rights and sovereignty through Numbered Treaties, whereas in return they got limited sovereignty and Aboriginal title. The Site-C dam is a classic example of how Indigenous peoples' limited sovereignty, Aboriginal title, civilisation and pre-emption—elements of the Doctrine—continue to play a significant role in the development of Indigenous lands. Disregarding the objections of Indigenous peoples and without mitigating the concerns raised by the JRP, the BC Hydro commenced construction of the CAD 8.8 billion project after the government exempted it from regulatory review by the British Columbia Utility Commission ('BCUC').[46] This process did not pass the test set in the *Taku River Tlingit First Nations* case, in which McLachlin CJ found that consultation needed to

[43] Bradley Jeffery et al, '*Dam It! The Site C Dam on the Peace River*' (Student Research, University of British Columbia, 2015); *West Moberly First Nations v British Columbia* [2018] BCSC 1835, [26]-[28].
[44] Ibid 1.
[45] Rachel Gutman, 'The Stories We Tell: Site C, Treaty 8, and the Duty to consult and Accommodate' (2018) 23 *Appeal* 3, 14.
[46] Justine Hunter, 'Head of review panel repeats call for delay to BC Hydro's Site C' *The Globe and Mail* (Web Page, 12 May 2018) <https://www.theglobeandmail.com/news/british-columbia/head-of-review-panel-repeats-call-for-delay-to-bc-hydros-site-c/article23399470/>.

be meaningful.[47] There are avenues like Environmental Impact Assessments and judicial reviews through which Indigenous peoples can voice their concerns, although it is the government who makes the final decision. It is evident that after more than 300 years of 'civilisation' and 'assimilation', the colonisation process continues. The government thinks it knows what is best for Indigenous peoples and decides accordingly without their consent.[48] As such, the Doctrine continues to apply to maintain settler-colonised relations in Canada.

1.3.3 Australia—Adani Coal Mine

The Adani mine in Australia is a AUD 16.5 billion proposed open-cut thermal coal mine in the Galilee Basin in Queensland, which will be developed by the Adani Group of India. The mine has been controversial for its potential effects on the climate, environment and Indigenous traditional landowners. According to the traditional owners opposed to the mine, it will destroy their ancestral lands and waters, totemic animals and plants and cultural heritage.[49] Under the *Native Title Act 1993* (Cth), the project must be approved by native title holders by entering into an Indigenous Land Use Agreement ('ILUA'), but after seven years of negotiations, the W&J peoples—the traditional owners of the land—were evenly split over the deal. Following intense negotiation in 2012 and 2014, the W&J peoples declined to sign the agreement.[50] However, Adani managed to gain support from 7 out of 12 representatives of the native title holders in 2016.

In the meantime, to bypass the ILUA, the Adani group launched legal action in the National Native Title Tribunal ('NNTT') in an attempt to enable the Queensland government to compulsorily acquire the land for the mine.[51] The Tribunal found in favour of the plaintiff and determined that the grant of mining lease could go ahead.[52] Despite the setback, the situation appeared to turn in favour of the W&J peoples opposed to the mine with the Federal Court decision in *McGlade*, which found that all native title claimants must agree to an ILUA.[53]

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[47] *Taku River Tlingit First Nation v British Columbia (Project Assessment Board)* [2004] 3 SCR 550 [2].

[48] Tye Dubrule, D L Dee Patriquin and Glynnis A Hood, 'A Question of Inclusion: BC Hydro's Site C Dam Indigenous Consultation Process' (2018) 20(2) *Journal of Environmental Assessment Policy and Management* 1; Sarah Cox, 'B C under "enamours pressures" to cancel Site-C dam: First Nations Chief' *The Narwhal* (Web Page, 27 February 2019) <https://thenarwhal.ca/b-c-under-enormous-pressure-to-cancel-site-c-dam-first-nations-chief/>.

[49] Lisa Cox, 'Native title battle shaping up over Adani coal mine' *The Sydney Morning Herald* (online at 12 October 2018) <https://www.smh.com.au/politics/federal/native-title-battle-shaping-up-over-adani-coal-mine-20150326-1m8esn.html>.

[50] Josh Robertson, 'Adani's compensation for traditional owners' well below industry standard, report finds' *ABC News* (Web Page, 1 December 2017) <www.abc.net.au/news/2017-12-01/adani-compensation-well-belowindustry-standardreport-finds/9212058>.

[51] *Adani Mining Pty Ltd v Burragubba* [2015] NNTTA 16.

[52] Ibid.

[53] *McGlade v Native Title Registrar* (2017) FCAFC 10. In June 2015, the Western Australia government signed a $1.3 billion deal with the Noongar people to surrender native title rights over 200,000 sq km area spanning from north of Perth to the Goldfields-Esperance region. This deal was concluded with South East Aboriginal Land and

However, their potential victory would only be short-lived because the federal government moved to legislate against the *McGlade* decision so that only a majority of native title claimants must agree to an ILUA. The traditional owners went so far to challenge the mine at the international level and urged the UN's Special Rapporteur on the Rights of Indigenous Peoples to protect the rights of the traditional owners on the grounds that the mine was a clear violation of the right to 'free, prior and informed consent'. In this case, they asserted their right to give or withhold consent to the development of significant extractive industries on the land.[54] They claimed the mine that would destroy their country and did not have their consent.[55] Ultimately, by enacting the *Native Title Amendment (Indigenous Land Use Agreement) Act 2017*, the federal government has made it easy for the ILUA to pass (see Section 4.4.4).[56]

The ILUA regarding Adani was registered in the NNTT on 8 December 2017, while there was legal action pending in the Federal Court.[57] The W&J opponents declined to abide by the ILUA because they did not consent to this process and filed an application in the Federal Court for an injunction against Adani and the Queensland Government to prevent them from using the registered ILUA to extinguish their native title, which was rejected.[58] Besides taking action in the courts, they continue with their advocacy and prosecution of their cause at international,

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Sea Council who represented the claimant groups. The deal was in the form of six ILUAs, but many Noongar people declined to accept the agreement. Section 24CD of the Native Title Act sets out the requirements for registration of the agreement. It was argued that, the land use agreement cannot be registered until all the individuals who jointly comprise the native title claimant or claimants have signed the agreement. At first the legal action was initiated in the High Court but later the case was transferred to the Federal court. The Full Bench of the Federal Court agreed with the claimants and found that the agreement between Noongar people and the Barnet Government cannot legally be registered because under the Native Title Act the ILUA must be signed by all claimants in a group. This ruling overturned a 2010 decision known as the Bygrave decision, which decided that an ILUA could proceed with a majority number of signatures. The federal government reacted to the decision of *McGlade* case and in 22 June 2017 passed the *Native Title Amendment (Indigenous Land Use Agreements) Act* to counter the decisions of similar cases – such as those affecting Adani; Department of Parliamentary Services (Cth), *Bills Digest* (Digest No. 70 of 2016-17, 7 March 2017)

[54] Lisa Cox, 'Indigenous Groups take Adani Carmichael mine battle to the United Nations' *The Sydney Morning Herald* (online at 6 October 2017) <https://www.smh.com.au/federal-political-news/indigenous-groups-take-adanicarmichael-mine-battle-to-the-united-nations-20151002-gjzzh6.html>

[55] Maria Giannacopoulos, 'Blood money: Why mining giants are backing an Indigenous voice to Parliament' *ABC Religion and Ethics* (Web Page, 30 May 2019) <https://www.abc.net.au/religion/why-mining-giants-are-backing-an-indigenous-voice-to-parliament/10815008>.

[56] James Bennett, 'Adani: Prime Minister Malcolm Turnbull meets with chairman, reiterates support for mine' *ABC News* (Web Page, 11 April 2017) <www.abc.net.au/news/2017-04-11/turnbull-meets-with-adani-chairman-duringindia-visit/8432938>; *Native Title Amendment (Indigenous Land Use Agreement) Act 2017* (Cth).

[57] Josh Robertson, 'Adani accused of paying people to stack its meeting on crucial mine deal' *ABC News* (Web Page, 2 December 2017) < www.abc.net.au/news/2017-12-02/adani-accused-of-paying-people-to-stack-itsmeeting-on-crucial-mine-deal/9218246>; Ella Archibald-Binge, 'Traditional Owners lodge appeal after court dismisses injunction against Adani' *NITV* (Web Page, 6 February 2018) <https://www.sbs.com.au/nitv/nitvnews/article/2018/02/05/traditional-owner-lodge-appeal-after-court-dismisses-appeal-against-adani>; 'Register of Indigenous Land Use Agreements Details: QI2016/015 - Wangan & Jagalingou People and Adani Mining Carmichael Project ILUA' *National Native Title Tribunal* (Web Page) <http://www.nntt.gov.au/searchRegApps/NativeTitleRegisters/Pages/ILUA_details.aspx?NNTT_Fileno=QI2016/015 >; *Kemppi v Adani Mining Pty Ltd (No 4)* [2018] FCA 1245.

[58] See Archibald-Binge (n 57).

federal and state levels.[59] For the government, the dispute has been settled with the registration of the ILUA, but for the W&J people, it is an ongoing process to reclaim their lands. Despite the unresolved Indigenous and environmental issues (e.g., threats to ground water and native wildlife), on 9 April 2019 the federal government and on 13 June 2019 the Queensland state government gave their final environmental approvals to the mine.[60]

An ILUA grants Indigenous peoples limited decision-making power over the development projects on their lands. Before the introduction of ILUAs, there was no meaningful agreement-making process in the native title context. However, such agreements are limited to those who meet the legal criteria. Following the 2017 amendments, dissent among the claimant group can be quashed to ensure that development projects proceed according to the ILUA. This chain of events demonstrates the continuing legacy of the Doctrine in Australia, where Indigenous peoples have limited rights. The government can change the law according to their or their corporate partner's need and they do not need to consult Indigenous peoples even if the law is going to significantly affect Indigenous rights. The colonial settlers disregarded the existence of Indigenous peoples through the tacit application of the Doctrine of terra nullius, which was rejected and native title recognised in *Mabo v Queensland [No 2]*.[61] However, this concept is an element of the Doctrine because it does not amount to a proprietary interest in the land, but relates to usufructuary rights (perform tribal ceremonies, hunt and fish), commonly referred to as a 'bundle of rights', albeit in limited cases the court can grant exclusive possession—right to possess and occupy to the exclusion of all others and in some cases perform commercial activities.[62] In *Akiba v Commonwealth* the High Court decided that fishing legislation did not extinguish commercial native title and upheld the decision of Federal court (*Akiba v Queensland [No 2]*) where it was decided by Finn J that Indigenous peoples had commercial native title over the seas of the Torres Strait and had rights to take marine resource for trading or commercial

[59] UN Human Rights Office of the High Commissioner, *Communication from Chair of the Committee on the Elimination of Racial Discrimination to Permanent Representative of Australia to the United Nations office*, UN Doc CERD/EWUAP/Australia/2018/JP/ks (14 December 2018). In this letter to the government, the Committee on the Elimination of Racial Discrimination (CERD) requested the government to suspend Carmichael Coal Mine and Rail Project until free, prior and informed consent is obtained from all indigenous people.

[60] This thesis will not conduct an in-depth analysis of the environmental issues, only to the extent that impact Indigenous rights; 'Adani mine gets final environmental approval for Carmichael mine' *ABC News* (Web Page, 13 June 2019 <https://www.abc.net.au/2019-06-13/adani-carmichael-coal-mine-approved-water-managementt-galilee/11203208>.

[61] (1992) 175 CLR 1.

[62] *Western Australia v Ward* [2002] HCA 28. In some cases, native title rights to exclusive possession can be recognised on unallocated or vacant Crown land, or certain areas held by Indigenous peoples. In the case of *Warrie v Western Australia* (*Yindjibarndi No 2*) [2017] FCA 803, the plaintiffs were able to establish their rights to exclusive possession over certain land in the Pilbara district of Western Australia through exclusive native title rights and interests. See discussion in Richard Bartlett, 'Native Title Rights to Exclusive Possession, Use and Enjoyment and the Yindjibarndi' (2018) 43(1) *The University of Western Australia Law Review* 92; 'Native title: an overview' *National Native Title Tribunal* (Web Page) <www.nntt.gov.au/information%20Publications/Native%20Title%20an%overview.pdf>.

purposes.[63] Whereas native title related to Adani mine is not such kind of native title, that is why cases such as the Adani mine demonstrate the fragility of the native title regime insofar as laws such as the *Native Title Amendment (Indigenous Land Use Agreements) Act* can be enacted without meaningful consultation with native title holders and with detrimental impact on their native title rights, which is illustrated by the Adani mine case study.

Similar to the DAPL and Site-C dam, the Adani mine is an example of governments disregarding the rights of Indigenous peoples in favour of economic gain. Through powers gained through the Doctrine and now backed by global neoliberal trends, governments support multinational corporations and blatantly ignore the rights of Indigenous peoples. In addition to the Doctrine elements of limited sovereign and commercial rights, pre-emption, civilisation and native title, the pursuit of economic gain through the advancement of neoliberal globalisation has become another norm, which enables the continuing process of colonisation. This thesis demonstrates how these three development projects are living examples of the continuing application of the Doctrine and represent its evolution into the Doctrine of Neo-Discovery.

1.3.4 Development Projects and International Norms and Principles

In view of the continuing obstacles faced by Indigenous peoples, the thesis considers the principles that could support their claims. The Doctrine is one of the earliest examples of international law that was developed by the European countries to expropriate Indigenous lands around the world. This Doctrine, originally reflecting Christian tenets, was introduced to justify the confiscation of non-Christian lands in non-European territories.[64] Contemporary international law distances itself from the Doctrine because it was based on the presumption of the 'racial superiority of Christian Europeans' and is now considered to be 'racist, scientifically false, legally invalid, morally condemnable and socially unjust'.[65] Further, it is claimed that the Doctrine is incompatible with democracy and works against transparent and accountable governance.[66] Along with the Doctrine of Conquest and European racial superiority, the Doctrine was used to legitimise injustices committed against Indigenous peoples around the world, including the USA, Canada and Australia. Despite its rejection by many international and domestic bodies, the Doctrine continues to pervade many colonial cultures and state laws and

[63] *Akiba v Commonwealth* [2013] HCA 33 [75]; *Commonwealth v Akiba* [2012] FCAFC 25; *Akiba v Queensland (No 2)* [2010] FCA 643 [847].
[64] Miller et al (n 1) 9.
[65] Edward John, *Study on the Impacts of the Doctrine of Discovery on Indigenous Peoples, including Mechanisms, Processes and Instruments of Redress*, UNPFII, 13th sess, UN doc E/C.19/2014/3 (12-23 May 2014); *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) Preamble.
[66] Edward (n 65) 2 [3]-[4].

policies and its impact is 'devastating, far-reaching and intergenerational'.[67] To some extent, the international community has acknowledged the impact of the Doctrine on Indigenous peoples and has acted accordingly through international declarations and conventions.

Most of the international initiatives that sought to address these issues were introduced during the mid- and late-twentieth century, although they have shortcomings. Established in 1920, the League of Nations did nothing to address or advance the rights of Indigenous peoples and was replaced by the United Nations ('UN') in 1946. The ILO adopted the *Indigenous and Tribal Populations Convention 1957* (No 107) with the provisions of freedom and dignity, economic security and equal opportunity for Indigenous peoples.[68] However, by encouraging assimilation and integration of Indigenous peoples into nation-states, this convention implicitly promoted the civilisation element of the Doctrine.[69] Subsequently, the convention was revised and renamed the *Indigenous and Tribal Peoples Convention 1989* (ILO Convention 169), which streamlined and represented the views of Indigenous peoples concerning their rights to self-determination within nation-states.[70] Many countries have not signed this convention because of its strong stance on Indigenous self-determination.[71] The USA, Canada and Australia have not ratified this convention.[72]

An international instrument that has had the most impact on Indigenous peoples rights worldwide is the UNDRIP. [73] Under the Doctrine, the Europeans considered themselves to be superior to

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[67] Ibid.

[68] *Indigenous and Tribal Populations Convention, 1957* (No. 107) adopted 26 June 1957 (entry into force 2 Jun 1959) ('*ILO Convention C-107*') preamble <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB :12100:0::NO::P12100_ILO_CODE:C107>. Also known as *Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, now closed for ratification, total 27 countries ratified it, later 9 countries denounced it and now it applies to 18 countries; Joshua Cooper, '25 Years of ILO Convention 169' *Cultural Survival* (Web Page, March 2015), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/25-years-ilo-convention-169>; Andy Gargett and Katie Kiss, *The United Nations Declaration of the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions* (Asia Pacific Forum of National Human Rights Institutions and the Office of the United Nations High Commissioner for Human Rights, August 2013); 'Indigenous and tribal peoples' *International Labour Organisation* (Web Page) <https://www.ilo.org/ global/topics/indigenous-tribal/lang--en/index.htm>.

[69] *ILO Convention C-107* (n 68) preamble, arts 2(1), 4.

[70] *ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No 169),* adopted 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991) ('*ILO Convention 169*'); Erin Hanson, 'ILO Convention 169' *Indigenous Foundations* (Web Page) <https://indigenousfoundations. arts.ubc.ca/ilo_convention_169/>.

[71] Ibid.

[72] Catherine J Iorns, 'Australian Ratification of International Labour Organisation Convention No. 169' (1993) 1(1) *Murdoch University Electronic Journal of Law* (Web Page) <http://www5.austlii.edu.au/au/journals/ MurUEJL/1993/ 1.html>.

[73] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/61/295 (2 October 2007, adopted 13 September 2007) ('UNDRIP'). The initial work of drafting the Declaration started in 1982 and it took 25 years to finally adopt the declaration. The Declaration was adopted in 13 September 2007 indicating that the international community was ready to protect the rights of Indigenous peoples. During its adoption 144 countries were in favour, 11 abstained and 4 countries voted against (Australia, Canada, New Zealand and the USA). Later all four opposing countries endorsed it.

Indigenous peoples and this Doctrine of Superiority has been denounced by the UNDRIP.[74] It specifically provides that 'Indigenous peoples have rights to self-determination' and have the right to 'autonomy and self-government' in their internal and local affairs.[75] Most importantly, it refers to the need of Indigenous peoples to have control over development on their lands.[76] The development projects examined in this thesis are in clear violation of the rights listed in the UNDRIP. By disintegrating and displacing Indigenous societies and taking away their traditional lands, these projects destroy Indigenous cultural institutions, their rights to belong to Indigenous communities and are obstacles in the way of Indigenous peoples practicing and revitalising their traditions and customs and transmitting the same to future generations.[77] The main goal of these projects is economic development by forced assimilation of Indigenous communities to non-Indigenous societies, which goes against Indigenous peoples' 'rights not to be subjected to forced assimilation or destruction of their culture'.[78] Once displaced, it is difficult for Indigenous peoples to 'maintain, control, protect and develop' their cultural heritage and traditional knowledge in environments where they have no connection to the land.[79]

The UNDRIP is a non-binding soft law with 'aspirational' and 'persuasive' attributes.[80] Barelli has argued that the soft law nature of the UNDRIP does not prevent it from having 'important legal effect' because its contents are already recognised under the international human rights regime and it represents the first step 'toward the establishment of a future treaty'.[81] Some aspects of the UNDRIP have become part of customary international law.[82] However, being non-binding can undermine its effectiveness. All three nations, the USA, Canada and Australia have endorsed the UNDRIP with the intention of adhering to international norms and principles regarding the rights of Indigenous peoples.[83] However, only Canada has attempted (albeit unsuccessfully) to incorporate the UNDRIP into law, whereas the USA and Australia have not (see Chapter 6).

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[74] The Preamble of the UNDRIP affirms that '[a]ll doctrines, policies and practices based on or advocating superiority of peoples or individual on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust'.
[75] UNDRIP (n 73) arts 3, 4.
[76] Ibid.
[77] Ibid arts 5, 9,11.
[78] Ibid art 8(1).
[79] Ibid art 31.
[80] Megan Davis, 'To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 *Australian International Law Journal* 17, 36; see generally Gargett (n 68).
[81] Mauro Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58(4) *International and Comparative Law Quarterly* 957, 966-7
[82] Gargett (n 68) 3-4.
[83] See generally Kevin Crow, 'Does UNDRIP Matter: Indian Law in the United States & the International Right to Self-Determination' (2014) 13 *Hibernian Law Journal* 119, 119-20.

International law has endeavoured to distance itself from the Doctrine of Superiority, although this thesis illustrates that there are aspects that reflect certain elements of Doctrine, such as pre-emption, limited sovereignty, native title and civilisation. Moreover, international instruments do not address the impact of neoliberal globalisation on Indigenous peoples. There is not a single provision in the current instruments that can be used to veto development of Indigenous lands for 'economic gain' of non-Indigenous peoples or a neoliberal nation-state. Apart from the UNDRIP and ILO Conventions (C-107 and C-169), which are Indigenous specific, other international instruments include Indigenous peoples within the definition of 'all people', which does not necessarily promote Indigenous rights. By generalising and advocating for equal rights, international instruments promote assimilation and civilisation, which are elements of the Doctrine. This thesis presents a detailed analysis of the international instruments related to Indigenous peoples. The protections offered by international instruments are limited in many ways, but within them there are provisions that could serve to uphold and protect the rights of Indigenous peoples. It is these provisions that will provide a roadmap for change in this thesis.

1.4 Methodology

My research methodology includes cross comparative analysis of case studies that relate to the development of Indigenous lands in the USA, Canada and Australia. Although the three countries have different laws and policies, their treatment of Indigenous peoples has been similar. According to Lee and Greenwood, comparative research can observe multiple societies with varying characteristics to determine patterns that 'hang together [because] comparing societies is the only way of observing variation in the characteristics of societies and ascertaining how these characteristics affect the behaviours of their members'.[84] Comparative research can be cross-cultural, cross-societal or cross-national.[85] My comparative approach focuses on case-based and cross-national Indigenous issues in the USA, Canada and Australia. Lee and Greenwood have argued that '[c]omparative research is much more useful if it begins with a good theory' and 'theory predicts what will be discovered if certain observations are made'.[86] In my research, I commenced with the theory that certain elements of the Doctrine continue to be used by government to acquire and develop Indigenous lands in the USA, Canada and Australia. My theory was supported by observations and reasoning, which provided the rationale for the comparison.

[84] Gary R Lee and Nancy Greenwood, *Comparative Research Methodology' Global and Multicultural Perspective* (Sage Publications, 2nd ed, 2006) 25.
[85] Ibid 26.
[86] Ibid 33.

N J Smelser described case-based cross-national comparative research as being the closest to the comparative method approach.[87] Similarly, R K Yin described this as a multiple case study approach.[88] This case-based comparative cross-national approach 'seek[s] to understand elements of a country (case) within the context of the whole case'.[89] Moreover according to David de Vaus, countries are selected for comparative cross-national design because they are similar to each other or because they differ from each other.[90] In the case of developing Indigenous lands in the US, Canada and Australia, there are similarities and differences. The similarities stem from the process of colonisation based on either the explicit or tacit application of the Doctrine, the inhuman treatment of Indigenous peoples and the ultimate loss of Indigenous lands to the colonisers. The differences can be identified in terms of the legal identities of Indigenous peoples in the nations and the laws and policies that were applied to them, for example, whether there were treaties and the effects of these treaties. The limitation of a case-based comparison is that this design frequently compares two or three countries and results in too few cases.[91] Nevertheless, as de Vaus has claimed, 'a small number of cases still allows for generalization based on the logic of replication—the same basis that is employed with most experiments', which have similar strengths and weaknesses of any case-based method.[92] He also emphasised the strengths of case-based comparative methods, which 'seek to understand the specific within the context of the whole case'.[93]

My research methodology also includes the critical analysis of elements of the Doctrine used to develop Indigenous lands. The Doctrine was formulated in the fifteenth and sixteenth centuries in international law and continues to shape the affairs of Indigenous peoples in the USA, Canada and Australia.[94] Supported by the notion of religious superiority, colonial powers used this principle to take control of Indigenous peoples and their lands.[95] Since then, the colonisers have maintained control over the cultural, religious, governmental, political and commercial rights of Indigenous peoples.[96] The United Nations Permanent Forum on Indigenous Issues ('UNPFII') in its 11th session specifically discussed the implications of the Doctrine on Indigenous lands

[87] N J Smelser, 'The Methodology of Comparative Studies' in D P Warwick and S Osherson (eds), *Comparative Research Methods* (Englewood Cliffs, NJ, Prentice Hall, 1972) 41-86; see also David de Vaus, 'Comparative and Cross-national Designs' in Pertti Alasuutari, Lseonard Bickman and Julia Brannen (eds), *The SAGE Handbook of Social Research Methods* (SAGE Publications, London, 2008) 251, 256.
[88] Robert K Yin, *Case Study Research: Design and Methods* (Sage Publications, 3rd ed, 2003) 14.
[89] Vaus (n 87) 252.
[90] Ibid.
[91] See A Lijphart, 'Comparative Politics and the Comparative Method' (1971) 65(3) *American Political Science Review* 682, 685-92.
[92] Vaus (n 87) 256.
[93] Ibid 262.
[94] Miller et al (n 1) 2.
[95] Ibid; *Johnson v M'Intosh* 21 US (8 Wheat) 543 (1823).
[96] Miller et al (n 1) 2.

around the world.[97] In this session, Robert Williams, Professor of Native American Studies of University of Arizona, asked the council to denounce this Doctrine and make it clear to nation-states that the Doctrine could no longer be used to claim Indigenous lands, territories or natural resources.[98] My research examines the elements of the Doctrine that continue to pervade government policies and laws. The governments in power continue to fail to acknowledge its effects. As Indigenous legal academic Professor Robert J Miller claimed, countries like the USA, Canada and Australia 'have struggled with questions regarding the Doctrine of Discovery, native ownership of land, and native rights and governance issues'.[99]

In examining these issues, my methodology aligns with Indigenous methodologies and practices. According to Maori Scholar Professor Linda Smith:

> Indigenous methodologies tend to approach cultural protocols, values and behaviours as an integral part of methodology. They are 'factors' to be built into research explicitly, to be thought about reflexively, to be declared openly as part of the research design, to be discussed as part of the final results of a study and to be disseminated back to the people in culturally appropriate ways and in a language that can be understood.[100]

Indigenous scholar Margaret Kovach has described Indigenous methodology as a 'process by which Indigenous knowledges are generated' and that 'respect Indigenous cultural knowings'.[101] Professor Marie Battiste has pointed out that the most critical aspect of Indigenous methodology is to ensure that Indigenous peoples and their knowledges are not exploited.[102] It safeguards the Indigenous community and their knowledges as a response to past exploitations faced by the Indigenous communities at the hands of unscrupulous researchers.[103]

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[97] '"Doctrine of Discovery", Used for Centuries to Justify Seizure of Indigenous Land, Subjugate Peoples, Must Be Repudiated by United Nations, (Press Release, HR/5088, UNPFII, 8 May 2012).
[98] Ibid.
[99] Miller et al (n 1) 2.
[100] Smith (n 1) 15.
[101] Margaret Kovach, 'Conversational Method in Indigenous Research' (2010) 5(1) *First Peoples Child and Family Review* 40, 43; see Margaret Kovach, *Indigenous Methodologies: Characteristics, Conversations, and Contexts* (University of Toronto Press, 2010); Ella Bennett, 'Reviews: Indigenous Methodologies: Characteristics, Conversations, and Contexts by Margaret Kovach' (2012) 56(2) *The Canadian Geographer* 292, 293. In determining the methodology of my research I can relate with Ella Bennett, a Dalhousie University student, who rightfully stated that 'non-Indigenous researchers (like myself) should not claim to be using Indigenous methodology (lacking a tribal epistemic centre), we can be informed by Indigenous knowledges and approaches to inquiry, so as to honour the communities we work with'.
[102] Marie Battiste, 'Research Ethics for Protecting Indigenous Knowledge and Heritage: Institutional and Researcher Responsibilities' in Norman K Denzin, Yvonna S Lincoln and Linda Tuhiwai Smith (eds), *Handbook of Critical and Indigenous Methodologies* (Sage Publications, 2008) ch 25, 497-509.
[103] Smith (n 1) 24-25. Linda Smith described this situation very appropriately and observed 'Researchers enter communities armed with goodwill in their front pockets and patents in their back pockets, they bring medicine into villages and extract blood for genetic analysis'.

However, Margaret Kovach has argued that 'not all research in Indigenous contexts will require an Indigenous methodological approach'.[104] My research has upheld Indigenous values and protocols where necessary.[105] Indigenous methodology follows a mix of approaches and theories that are grounded entirely on Indigenous and/or decolonisation principles.[106] My thesis contributes to this process by drawing on critical Indigenous perspectives—who opposed these developments on Indigenous lands—in the identification of pertinent issues they face and how they might be overcome. I undertook this research as a non-Indigenous PhD student who migrated to Australia 18 years ago. As a non-Indigenous person, I reflected on the approach to take in collaboration with Dr Leanne Holt, who is an Indigenous scholar (Worimi and Biripai), the Macquarie University Pro-Vice Chancellor (Indigenous Strategy) and my associate supervisor. Together, we came to the conclusion that because this is a thesis in the discipline of law that does not explore the cultures of affected communities, the focus will be on the role of law has played in creating the issues and what role law can play in overcoming them. Indigenous legal scholars have broadly identified the continuing influence of the Doctrine in the dispossession of Indigenous peoples.[107] My thesis builds on this analysis with respect to the three case analyses. My critique of law and policy draws on critical Indigenous peoples' perspectives and understanding of how Indigenous peoples' rights to land could be upheld in the future. In particular, I draw on international legal norms such as the UNDRIP and UDHR, which reflect Indigenous peoples' aspirations for rights protection, to compile recommendations that could be used as a framework to uphold the rights of Indigenous peoples.

1.5 Structure of the Thesis

This thesis contains seven chapters. Chapter 1 is the introductory chapter, which sets out the structure of the thesis, the research question, aims, methodology and overall argument of the thesis. This chapter also outlines the contribution the thesis makes to the field of Indigenous land rights through a critique of the continuing application of the Doctrine in the development of Indigenous lands in the USA, Canada and Australia and identifies possible responses using an international legal framework.

Chapter 2 reviews existing literature on the Doctrine, including the history of its impact on Indigenous sovereignty and self-determination. The chapter identifies how the Doctrine underpins the development of Indigenous lands by national and multinational corporations in the

[104] Kovach '*Indigenous Methodologies*' (n 98) 37.
[105] See Smith (n 1) 15.
[106] Lana Ray, 'Deciphering the 'Indigenous' in Indigenous Methodologies' (2012) 8(1) *AlterNative: An International Journal of Indigenous Peoples* 85, 26; see also Ibid 143.
[107] See especially Miller et al (n 1).

current world order, which is shaped by globalisation and neoliberalism. Chapter 2 also considers the inadequate responses of the international community to combat the profound effects of the Doctrine on Indigenous peoples.

Chapter 3 examines the early history of Doctrine in the US, Canada and Australia, including how the laws and policies of the colonisers were based on the Doctrine. Some of the elements of the Doctrine—first discovery, Christianity, limited sovereign and commercial rights, native title, terra nullius and pre-emption—were used by the European invaders to take control of Indigenous lands in the USA, Canada and Australia. In the USA, these elements are evident in the creation of domestic dependent nations, treaty-making and the expression of tribal sovereignty. The section on Canada discusses treaty rights, including the 11 Numbered Treaties, comprehensive land claims agreements, the Royal Proclamation of 1763 and related history. As Australia never recognised the treaty rights of Indigenous peoples, the discussion of Australia includes the early period of colonisation, the concept of terra nullius, the enactment of land rights legislation and the common law recognition of native title.

Chapter 4 focuses on more recent applications of the Doctrine in law and policy relating to Indigenous peoples in the USA, Canada and Australia. The discussion includes measures adopted by different governments to recognise Indigenous rights, particularly after World War II, including actions taken to amend the inhumane situations resulted from the residential schools or stolen generations. The chapter also discusses the judicial decisions that have recognised or failed to recognise Indigenous rights in the USA, Canada and Australia.

Chapter 5 presents critical analyses of the three case studies—the DAPL in the USA, the Site-C dam in Canada and the Adani mine in Australia—and the continuing prevalence of the Doctrine in these nations is exposed. The chapter discusses how in proceeding with these projects, these nations undermined Indigenous land rights, self-government and rights to effective consultation. The affected Indigenous peoples remain opposed to these projects and the chapter examines their legal battles against these projects. The second part of Chapter 5 identifies how elements of the Doctrine pervade these projects. The analysis demonstrates how elements of the Doctrine are reflected in the neoliberal logic currently driving government policy, which affects the lives of Indigenous peoples and supports the development of Indigenous lands in the USA, Canada and Australia. The thesis conceptualises these developments as an expression of the Doctrine of Neo-Discovery.

Chapter 6 discusses international initiatives such as international declarations and conventions that support the recognition and establishment of Indigenous rights. The focus is on the ILO Conventions, the UNDRIP and other important international initiatives that have been endorsed

by nation-states to recognise Indigenous rights. The chapter also considers how Indigenous communities affected by the development projects approached international forums to seek redress and to force the governments to stop the development projects. Chapter 6 includes a critical analysis of the legal enforceability or legally binding status of international declarations and conventions.

Chapter 7 concludes the thesis by identifying principles and policies that governments could adopt to protect the land rights of Indigenous peoples. This will require governments to repudiate the Doctrine and initiate reforms to effectively protect Indigenous rights, sovereignty and self-government through effective consultation. Chapter 7 also articulates how governments and international communities need to acknowledge 'economic gain through global neoliberalism' as the Doctrine of Neo-Discovery, which has significant impacts on Indigenous rights. This chapter also identifies potential future studies that could be conducted to further Indigenous rights by repudiating the Doctrine.

1.6 Conclusion

The Doctrine was the international legal principle used by European countries to colonise Indigenous lands in the USA, Canada and Australia. It played a central role in the decimation of Indigenous societies, destruction of Indigenous cultures and values and the displacement of Indigenous peoples from their lands. The Doctrine combined with global neoliberal policy-making, continues to enable nation-states to develop Indigenous lands for the greater benefits of non-Indigenous peoples without the express consent of Indigenous peoples. This thesis presents analyses of three development projects in the USA, Canada and Australia, which have proceeded without 'free, prior and informed consent' of the respective Indigenous peoples. By identifying the research questions, aim of the research, methodology and structure of the thesis, this chapter specified the contribution this thesis makes to the literature. The following chapters present in-depth analyses of the ongoing application of the Doctrine, demonstrate how global neoliberalism is evolving as a new manifestation of the Doctrine and examine how international communities could challenge the continuing effects of the Doctrine on Indigenous peoples in the USA, Canada and Australia.

Chapter 2: Literature Review

2.1 Introduction

The world is home to approximately 370 million Indigenous peoples who belong to 5000 different groups in 90 countries and speak about 4000 different languages.[1] They have unique traditions, distinct cultures and different practices with respect to their lands, ways of living and religions.[2] Unfortunately, the conditions of Indigenous peoples in many parts of the world is critical and their numbers and cultures are in decline due to mega infrastructure projects like dams and highways, urbanisation, mining, logging and other development projects. This chapter provides a general conceptual overview of the situation faced by Indigenous peoples as a result of the ongoing colonisation process through the application of Doctrine of Discovery ('the Doctrine') and the pursuit of neoliberal globalisation. This is followed by a more specific overview of the situation in the USA, Canada and Australia. By reviewing literature regarding the Doctrine, sovereignty, self-determination, neoliberalism and globalisation, this chapter will determine gaps in the literature and identify how this thesis will address those gaps.

The development of Indigenous lands in the USA, Canada and Australia began immediately after these lands were 'discovered' by the European colonisers. The European nations used the Doctrine to justify their invasion and settlement of Indigenous lands. Indigenous peoples' struggles to regain their lands and cultures continues to the present day. In some countries, Indigenous peoples went from sovereign nations to become dependent nations; in others, Indigenous peoples lost their sovereignty and status as citizens of their land. Whether Indigenous sovereignty will ever be accepted is a vexed question, although they could assert their right to self-determination to their social, cultural and economic rights entrenched in law and policy. With the recent adoption of the UNDRIP in international law, states have a moral obligation to ensure that Indigenous peoples retain their unique cultures and can exercise their right of self-determination. However, current policies of governments that are informed by neoliberal ideas present impediments for Indigenous peoples to achieve their goals. The ongoing development of Indigenous land means that Indigenous peoples continue to lose their lands, so their cultures and connection to the lands continue to be disrupted. In this chapter, I examine the reasons and consequences of the development of Indigenous lands through the application of the Doctrine. I also analyse how the Doctrine forms a part of state decision-making processes at the expense of the self-determination rights of Indigenous peoples. Moreover, my analysis establishes how

[1] Department of Economic and Social Affairs, *State of the World's Indigenous Peoples*, UN Doc ST/ESA/328 (2009).
[2] Y K Sabharwal, 'Plenary Session: Rights of Indigenous Peoples' (Speech, International Law Association, Toronto, 4 August 2006).

economic gains through neoliberalism and globalisation have manifested into the Neo-Discovery Doctrine.

2.2 The Doctrine of Discovery—History and Definition

> [T]o find, discover and investigate whatsoever islands, countries, regions or provinces of heathens and infidels, in whatsoever part of the world placed, which before this time were unknown to all Christians.[3]

For hundreds of years, Indigenous lands have been invaded and occupied by foreigners. In international law, the Doctrine was the primary legal precedent formulated in the fifteenth and sixteenth centuries to justify the occupation of Indigenous lands and the control of their affairs.[4] This ethnocentric religious ideology was based on European and Christian superiority to rule and claim legal authority over the other races and religions of the world. According to Robert J Miller, this Doctrine remains an international law, evident in the way it was evoked by Russia to claim oil and gas in the Arctic Ocean and by China to extend its control over the South China Sea.[5]

The earliest idea of the Doctrine can be traced back to writings of Pope Innocent IV, who was the head of the Catholic Church from 1243 to 1254. Pope Innocent IV's writing was interpreted in 1414 by the Council of Constance, which was called to resolve the conflict between Poland and the Teutonic Knights regarding the control of pagan Lithuania.[6] The Council agreed that while the infidels had the same sovereign and property rights as the Christians, the Pope still had 'the authority to order invasions to punish violation of natural law or to spread the gospel'.[7] More aggressive approaches were introduced in 1455 by Pope Nicholas V, who issued a Bull *Romanus Pontifex*, directing King Alfonso V of Portugal to 'invade, search out, capture, vanquish and subdue' the enemies of Christ and 'take away all their possessions and property, both movable and immovable'.[8] In 1493, Pope Alexander VI issued another Papal Bull *Inter caetera divinai*, which sought to spread Catholicism by granting Spain the title of all discovered land.[9] During 1493, the Pope issued three Papal Bulls, which established the Doctrine under which 'the newly

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[3] Joseph J Heath, 'The Doctrine of Christian Discovery: Its Fundamental Importance in United States Indian Law and the Need for its Repudiation and Removal' (2017) 10 *Albany Government Law Review* 112, 119. In 1496 King Henry VII issued a patent to John Cabot and his sons granting them 'full and free authority' to sail under flag of England and conquer, occupy and possess towns, castles, cities and islands discovered by them in the name of King of England.

[4] Robert J Miller et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2012) 1.

[5] Robert J Miller, 'American Indians, the Doctrine of Discovery, and Manifest Destiny' (2011) 11(2) *Wyoming Law Review* 329, 330.

[6] Miller et al, '*Discovering Indigenous Lands'* (n 4) 10.

[7] Ibid.

[8] Ibid 11; Heath (n 3) 120.

[9] Heath (n 3) 121; Miller et al, '*Discovering Indigenous Lands'* (n 4) 10.

discovered lands and sovereign and commercial rights over Indigenous peoples due to first discovery' was considered international law to Europeans.[10] In early 1500, it was accepted that Indigenous peoples had natural legal rights and the European invasions could not affect these rights, although this protection was overridden by the understanding that the violations of European natural law principles justified Christian conquest over Indigenous nations.[11]

Since the early 1800s, the judiciaries of the USA, Canada and Australia have relied, either explicitly or impliedly, on elements of the Doctrine in deciding disputes related to Indigenous sovereignty, self-determination and land rights. As early as 1810, the US Supreme Court in *Fletcher v Peck*, described natives as being 'rude and uncivilized' and having 'no idea of property in the soil but a right of occupation'.[12] The decision of this case was delivered by Marshall CJ, in which some elements of the Doctrine such as first discovery, native title, pre-emption and conquest were discussed.[13] According to the Court, the Europeans claimed the land through conquest and '[a]ll the treaties with Indians were the effect of conquest'.[14] 'The title of the land was in the Crown' and the states had no power to transfer of land with Indian title because the Crown had the right of pre-emption.[15] It was in the 1823 US Supreme Court case of *Johnson v M'Intosh*[16] that Marshall CJ fully articulated the elements of the Doctrine and laid the foundation of US Indian law and laws elsewhere to legitimise the subordination of Indigenous peoples to the laws and policies of the nation-state.[17]

The ten elements of the Doctrine can be summarised as follows:[18]

> First discovery—first European country to discover any new land unknown to other Europeans gains property and sovereign rights over that land against other European country. Without physical possession, this element created an incomplete title. While Australia was first discovered by the Dutch, they did not show intention to physically occupy this land, whereas the British came with the intention to colonise this land.
>
> Actual occupancy—first European country to occupy and possess newly discovered land gets complete title. This could be achieved by erecting buildings, forts or settlements. To

[10] Miller et al, '*Discovering Indigenous Lands'* (n 4) 12.
[11] Lectures of Franciscus de Victoria who was the Spanish King's lead advisor and first chair of Theology at the University of Salamanca; ibid.
[12] *Fletcher v Peck*, 10 US 87 (1810) ('*Fletcher*') [122].
[13] Ibid.
[14] Ibid.
[15] Ibid [124].
[16] 21 US (8 Wheat) 543 (1823) ('the *Johnson* case*'*).
[17] Miller et al, '*Discovering Indigenous Lands'* (n 4) 3.
[18] Ibid 6-9, 22.

create a complete title, the actual occupancy or physical possession had to occur within a reasonable length of time after the first discovery.

Pre-emption/European title—the first discovering country gets sole right to buy or make agreements with the Indigenous peoples. The country that held the pre-emption rights could prevent other countries or individuals buying lands from the native owners and prevented the natives from doing the same. After acquisition of sovereignty, the British prevented Indigenous peoples in the USA, Canada and Australia from exercising their ownership rights over Indigenous lands. While the Indigenous peoples in the USA and Canada could negotiate treaties only with the British Crown, the Indigenous peoples in Australia were not recognised as the true owners and occupiers of the land.

Native title—under this element, it is presumed that Indigenous peoples lost their full property rights and ownership over their lands and only retained occupancy and use rights. This is also considered to be a limited ownership right. The Indigenous peoples could hold these rights indefinitely unless they consented to terminate these rights in favour of the Crown who holds pre-emptive rights.

Indigenous nations limited sovereign and commercial rights—Indigenous peoples were thought to lose their sovereignty and right to free trade and diplomatic relations with other nations except the nation that discovered them.

Contiguity—European settlers could claim lands adjacent to their settlement (e.g., occupying the mouth of the river gives claim over all the lands drained by the river).

Terra Nullius—although it means lands occupied by no one, under this element the European nations could claim the land of Indigenous people who did not follow a European legal system. Lands owned, occupied and used by Indigenous peoples were considered vacant and available for claims by Europeans because those lands were not used according to European laws and cultures. In fact England and France developed two definitions that could favour them in capturing Indigenous lands, first—lands without actual occupancy and possessions when the explorers arrived, second—lands were considered vacant and available for taking if those were used and occupied by Indigenous peoples.

Christianity—followers of Christianity were considered to be superior and non-followers were considered to be inferior and did not enjoy same rights, sovereignty and self-determination as Christians. It gave Christian Europeans rights to impose Christian laws, cultures and values upon Indigenous peoples.

> Civilisation—Indigenous peoples were considered to be uncivilised and it was the religious duty of Europeans to civilise and educate them. According to this element, God had directed the Europeans to exercise paternalism and guardianship powers over Indigenous peoples. In that regard, efforts to Christianise were synonymous with civilising them according to Western norms and cultural practices. This element was responsible for the respective Boarding Schools and Residential Schools systems in the USA and Canada and stolen generations in Australia that decimated Indigenous societies by disconnecting children from their families.
>
> Conquest—under the term 'just and necessary war', European nations used military power to claim Indigenous lands. It could also mean the transfer of property rights to European countries automatically and immediately after the first discovery.[19]

The US cases such as the *Fletcher* and the *Johnson* made it clear that the Doctrine was the primary legal principle that legalised the occupation of Indigenous lands by European countries, irrespective of the elements that were used. Further, in *Martin v Lessee of Waddell,*[20] the US Supreme Court observed:

> The English possessions in America were not claimed by right of conquest, but by right of discovery … [T]he Indian tribes in the new world were regarded as mere temporary occupants of the soil; and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered … The territory they occupied was disposed of by the governments of Europe, at their pleasure, as if it had been found without inhabitants.[21]

Irrespective of which element of the Doctrine was used, according to the *Johnson* case, the Doctrine was regarded as the 'principle of universal law' of occupation.[22] In Australia, the *Johnson* case was cited in 1836 to invalidate private purchase of Aboriginal lands (i.e., the Batman treaty, see Chapter 3) and in Canada it was relied on extensively to determine the scope of Aboriginal title during 1880s (see Chapter 3).[23] It is also evident that different—and in some cases common—elements of the Doctrine were used by European nations to colonise Indigenous nations.

After the acquisition of sovereignty some elements of the Doctrine continue to have significance in diminishing Indigenous land and cultural rights. This thesis demonstrates through examination

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[19] Ibid 7-9; Miller, 'American Indians' (n 5) 332-5.
[20] 41 US 367 (1842)
[21] Ibid [409], quoted in Heath (n 3) 129.
[22] See generally Miller et al, '*Discovering Indigenous Lands'* (n 4); see generally Heath (n 3).
[23] Blake A Watson, 'The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand' (2011) 34(507) *Seattle University Law Review* 507, 508-9.

of three development projects in the USA, Canada and Australia that the elements of the Doctrine—pre-emption, native title, Christianity, civilisation, limited sovereign and commercial rights of Indigenous peoples and conquest—still play a significant role in undermining Indigenous sovereignty and self-determination. Indigenous peoples opposing these development projects lack rights that would allow them to sell their remaining land rights to a third party without approval from the government that holds pre-emptive rights. Here the remaining rights point to rights to use and enjoy as categorised by native title or Aboriginal title. Moreover, under limited sovereign and commercial rights, Indigenous peoples have very little negotiating power and often in many cases this can be overturned by the sovereign power. The proponents of these projects often argue that these projects would create jobs and growth for Indigenous peoples, as well as improve their lifestyle and education opportunities. But inadvertently it promotes westernised Christian civilisation as perceived by westernised ideology. It might be argued that after the acquisition of sovereignty the Doctrine has lost its relevance, whereas according to Robert J Miller the countries such as the USA, Canada and Australia 'need to carefully examine their continuing use of Discovery against their native citizens and nations' and the Doctrine 'needs to be addressed and eliminated from the modern day life and law'.[24] In next chapters this thesis explores how the elements of the Doctrine still have bearing that affect Indigenous self-determination and sovereignty.

2.3 The Doctrine of Discovery—Historical Overview and Present Applications in the USA, Canada and Australia

The Doctrine was the international construct that legitimised the invasion of Indigenous lands by European countries. The foundation of present North America (i.e., the USA and Canada) and Australia was based on the Doctrine. While different elements were used to colonise each of these countries, some overlapping elements—discovery, native title, pre-emption, limited sovereignty, Christianity and civilisations—were used for all three countries during and after colonisation. The Doctrine was applied many years ago to colonise Indigenous lands and might appear to be an obsolete concept in contemporary times. However, in this thesis, I examine the cases in the USA, Canada and Australian to expose the ways in which elements of the Doctrine continue to be applicable (see Chapter 5).

Through his decisions in the *Johnson*, the *Cherokee Nation* and the *Worchester* cases, Marshal CJ legitimised the occupation of Indigenous lands by the colonial powers and acknowledged certain rights and status to Indigenous peoples, such as Aboriginal title, which included all rights

[24] Miller et al, '*Discovering Indigenous Lands'* (n 4) 24.

except rights to transfer title.[25] Marshal CJ considered Indian nations to be domestic dependent nations under which they had sovereignty and Indian title over their lands and the government had the right to pre-emption because it was the only authority that could buy Indian land. Marshal CJ's decisions give Indigenous peoples limited rights, and Indigenous peoples in the USA, Canada and Australia struggle to retain even those limited rights because the governments have powers to override them. However, most of the literature related to the Doctrine explores the historic application of the Doctrine in judicial decision-making and the relevance of the *Johnson* case in other jurisdictions such as Australia, Canada and New Zealand.[26] Robert J Miller has demonstrated in his writing how the Doctrine was used by US leaders like George Washington, Benjamin Franklin and Thomas Jefferson to justify claims over native property and political dominance over Native Indians and how the Doctrine was used to justify the expansion of the US from its original 13 colonies.[27] In the USA, some elements of the Doctrine remain in federal laws and are used by the government to limit Indigenous sovereignty and to exploit their lands and resources.[28] The remnant of Indigenous sovereignty exists in the form of tribal sovereignty. However, this right has diminished over time. Subdued by sovereign power, the notion of tribal sovereignty appears to be a novelty rather than a reality. In its analysis of the DAPL this thesis examines the ongoing application of the Doctrine, evident in the way that state laws and policies enable the exploration of Indigenous lands and their resources.

While the USA and Canada have similar colonial histories, Aboriginal title in Canada gives Indigenous peoples limited rights over their lands, while the government controls the development of Indigenous peoples' lands. The Crown gained control over Indigenous peoples' lands and resources through the *Royal Proclamation 1763* and the 11 Numbered Treaties. Some of the Numbered Treaties have been disputed by Indigenous peoples because provisions of those treaties were ambiguous, verbal and not written in native languages. In many cases, these treaties were overlooked by the government during the development of Indigenous lands. With respect to the application of the Doctrine in Canada, Tracy Lindberg—a Cree citizen (Neheyiwak) and Professor of Indigenous Studies— has argued that some provisions of the *Indian Act 1985* (an amended form of the original *Indian Act 1876)* resonated with elements of the Doctrine.[29] For example, s 35(1) authorises the appropriation of reserve land by federal, provincial or other

[25] The *Johnson* case (n 16); *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831) ('the *Cherokee Nation* case'); *Worcester v Georgia*, 31 US (6 Pet) 515 (1832) ('the *Worcester case*'); see also Michael C. Blumm, 'Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and their Significance to Treaty-Making and Modern natural Resources Policy in Indian country' (2004) 28 *Vermont Law Review* 713.
[26] See generally Miller. 'American Indians' (n 5). Watson (n 22). Heath (n 3). Blumm (n 25).
[27] Miller, 'American Indians' (n 5) 336.
[28] Ibid.
[29] Tracy Lindberg, 'Contemporary Canadian Resonance of an Imperial Doctrine' in Robert J Miller et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2012) 144-5.

authority without taking into consideration the 'rights, needs and historic relationship' of Indian peoples with their homelands.[30] Lindberg has also identified more recent legal provisions and judicial decisions in which the Doctrine has applied.[31] Regarding the development of Indigenous lands and resources, Lindberg has argued:

> Canada continues to privilege business and corporate interests in and above Indigenous territories … [T]he taking of natural resources from Indigenous territories through Canadian legal means and without Indigenous peoples' assent (as consultation is not consent) can be said to be just further positioning on the continuum of colonization.[32]

This thesis further strengthens Lindberg's claims by analysing the construction of the Site-C dam on Indigenous lands to demonstrate the continued relevance of the Doctrine in the legitimisation of government power over Indigenous peoples and their lands.

In *Reconciling Sovereignties: Aboriginal Nations and Canada*, Felix Hoehn argued that the Supreme Court of Canada has abandoned the Doctrine and moved towards acceptance of the pre-existing sovereignty and self-government of Indigenous peoples.[33] This argument was supported by Kent McNeil, who observed that the Supreme Court has become 'increasingly uncomfortable with the doctrine'.[34] It is also true that there have been notable decisions made in favour of Indigenous claimants.[35] Despite these claims, the Doctrine remains entrenched in government power and is the basis of its sovereignty over Indigenous peoples. The government enacts laws and makes policies related to Indigenous peoples, and with very little representation of Indigenous peoples in government, these laws and policies are created and enforced to serve the interests of the broader mainstream population as the Site-C dam examined in this thesis clearly illustrates.

In the Australian context, Larissa Behrendt—a Eualeyai/Gamillaroi woman and Professor of Law—has demonstrated how the concept of terra nullius, as an aspect of the Doctrine, was used

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[30] Ibid 145.
[31] See Ibid 148.
[32] Ibid 167.
[33] Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (University of Saskatchewan Native Law Centre, 2012); see also Mark D Walters, '"Looking for a knot in the bulrush": Reflections on Law, Sovereignty, and Aboriginal Rights' in Patrick Macklem and Douglas Sanderson (eds), *From Recognition to Reconciliation: Essays on the Constitutional Entrancement of Aboriginal and Treaty Rights* (University of Toronto Press, 2016) 39.
[34] Kent McNeil, 'The Doctrine of Discovery Reconsidered: Reflecting on Discovering Indigenous lands: The Doctrine of Discovery in the English Colonies, by Robert J Miller, Jacinta Ruru, Larissa Behrendt, and Tracey Lindberg, and Reconciling Sovereignties: Aboriginal Nations and Canada, by Felix Hoehn' (2016) 53(2) *Osgoode Hall Law Journal* 699, 715.
[35] *Calder v British Columbia (Attorney General)* [1973] SCR 313; *R v Sparrow* [1990] 1 SCR 1075; *Delgamuukw v British Columbia* [1997] 3 SCR 1010; *Tsilhqot'in Nations v British Columbia*, 2014 SCC 44; detailed discussion on these cases in later chapter 4 and 5.

by the British colonisers to deny Indigenous peoples' land and cultural rights.[36] In her analysis she refers to the way that *Mabo [No 2]* overturned the concept of terra nullius and other cases such as the *Wik Peoples*, *Yanner*, *Yarmirr* and *Yorta Yorta*, which further strengthened and recognised Aboriginal rights in Australia.[37] Nevertheless, she is cognizant of other contexts, such as the Northern Territory Intervention during which government reasserted control over Aboriginal people and their rights. As she was writing in 2012, her discussion could not canvass more recent applications of the Doctrine in Australia. In contrast, this thesis analyses how Australian laws and policies continue to be shaped by the Doctrine in Australia, which is evident in the political and legal responses to the Adani mine and which continue to undermine Indigenous sovereignty, self-determination and land rights.

2.4 The Doctrine of Discovery—Denial of Indigenous Sovereignty and Right to Self-Determination

> State reliance on the Doctrine of Discovery and the denial of indigenous sovereignty and self-determination are incompatible with the principle of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith, which are the core principles for interpreting and applying indigenous peoples' rights.[38]

The Doctrine was applied to deny Indigenous sovereignty and self-determination. Prior to European invasion, Indigenous peoples exercised their sovereignty over the land they occupied.[39] Following invasion, Indigenous peoples' ability 'to establish and enforce norms of conduct within the political or territorial community'[40] was subordinated to the sovereignty of the nation-state. The concepts of sovereignty and self-determination have different meanings in international, national and Indigenous contexts. According to Steinberger, 'sovereignty in the sense of contemporary public international law denotes the basic international legal status of a state that is not subject, within it territorial jurisdiction, to the governmental, executive, legislative or judicial jurisdiction of a foreign state or to foreign law other than public international law'.[41] According to art 1 of the *Montevideo Convention on the Rights and Duties of States* (1933), the state as a person of international law should have four characteristics: a

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[36] Larissa Behrendt, 'The Doctrine of Discovery in Australia' in Robert J Miller et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2012) 171.
[37] Ibid; *Mabo v Queensland* (No-2) (1992) 175 CLR 1 ('*Mabo [No 2]*'); *Wik Peoples v Queensland* (1996)187 CLR 96 ('*Wik*'); *Yanner v Eaton* (1999) 210 CLR 351; *Commonwealth v Yarmirr* (2001) 184 ALR 113; *Member of the Yorta Yorta Aboriginal Community v Victoria* (2002) HCA 58 ('*Yorta Yorta*').
[38] John Edward, *Study on the Impacts of the Doctrine of Discovery on Indigenous Peoples, Including Mechanisms, Processes and Instruments of Redress*, UNPFII, 13th sess, UN doc E/C 19/2014/3 (12-23 May 2014) [8].
[39] Kevin J Worthen, 'The Grand Experiment: Evaluating Indian Law in the "New World"' (1998) 5 *Tulsa Journal of Comparative & International Law* 299, 304.
[40] Ibid 305.
[41] H Steinberg '*Sovereignty*', in Max Planck Institute for Comparative Public Law and International Law, *Encyclopedia for Public International Law* (North Holland, Amsterdam, 1987) Vol 10, 414.

permanent population, defined territory, its own government and capacity to enter into relations with other states.[42] In the context of national law, sovereignty can be defined as the 'power in a state to which none other is superior'.[43] However, in the USA, Canada and Australia, sovereignty is not concentrated in one body or institution. In Australia, legislative power is divided between the Commonwealth and the states in a federal system of government as set out by the Australian *Constitution*, in which the parliaments of each are duly elected by the Australian people. Sovereignty in Canada and the USA are similarly divided between federal, state or provincial governments. In the USA, the Articles of Confederation ratified by the 13 original states of the USA on 1 March 1781 preserved the independence and sovereignty of individual states.[44] This convention was replaced by the US *Constitution* on 13 September 1788, of which art VI confers supreme authority to the provision of the Constitution. Any law and treaties made in pursuance of the Constitution shall be the supreme law of the land and the judges in every state must follow it.[45] The senators, members of the House of Representatives, members of state legislatures and all US and state executives and judicial officers shall be bound by the Constitution.[46] Conversely, s 4 of art IV states that '[t]he United States shall guarantee to every state in this Union a Republican Form of government'. As such, the republic government has its own form of sovereignty vested in people and exercised by people. [47]

Indigenous sovereignty has different meanings. Prior to colonial invasion, most Indigenous communities had the characteristics of a modern state, but their position as sovereign entities has changed post-invasion. The cause of this depravation was well summarised by Miguel Alfonso Martinez in his final report for the UN Sub-Commission of Prevention of Discrimination and Protection of Minorities in 1999. According to Martinez, the Indigenous peoples:

> [H]ave been deprived of (or saw greatly reduced) three of the four essential attributes on which their original status as sovereign nations [was] grounded, namely their territory, their recognized

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[42] *Montevideo Convention on the Rights and Duties of States,* 26 December 1933, 165 LNTS 19 (enter into force 26 December 1934) art 1.
[43] *Jowitt's Dictionary of English Law* (2nd ed, Vol 2, 1977) 1678, quoted in Gbenga Oduntan, *International Law and Boundary Disputes in Africa* (Routledge, 2015) 24.
[44] *Articles of Confederations* art 2. 'The Articles of Confederations' *The Federalist Papers Project* (Web Page) 8 <http://constitutionnet.org/sites/default/files/the-articles-of-confederation_0.pdf>. See also Merrill Jensen, *The Articles of Confederation: An Interpretation of the Social-Constitutional History of the American Revolution, 1774-1781* (University of Wisconsin Press,1959).
[45] Article 6 of the US *Constitution* states that: 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding. The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this constitution; but no religious Test shall ever be required as Qualification to any office of Public Trust under the United States'.
[46] *Constriction of the United States of America* art 6.
[47] 'What is a Sovereign? What form of government does the United States have?' *Health Freedom Info* (Web Page) <www.helathfreedon.info/what_is _a_sovereign.htm>.

> capacity to enter into international agreements and their specific forms of government … Not to mention the substantial reduction of their respective population in many countries around the world, due to a number of factors including, assimilation policies.[48]

In the USA, Canada and Australia, Indigenous peoples' rights to sovereignty and self-determination were affected by the elements of the Doctrine. During invasion, colonial forces treated Australia as terra nullius, which resulted in the loss of sovereignty and self-determination rights for Indigenous peoples.[49] The *Mabo [No 2]* decision recognised the continuing connection to the land of Indigenous peoples, although the question of Indigenous sovereignty was not resolved by parliament or the legal system because 'all attempts to recognise Aboriginal sovereignty to date have seen the courts declare it non-justiciable or not within the competence of the Court or its Jurisdiction'.[50] However, it could be argued that Indigenous peoples in Australia enjoy limited sovereignty over their land because they can negotiate the use of their land. The *Native Title Act 1993* (Cth) codified native title and it now includes provisions for Indigenous Land Use Agreement, which enable native title holders to enter into agreements with non-Indigenous entities regarding the use of their land. Nevertheless, the existence of these Agreements depends on Parliament. Moreover, native title holders do not enjoy absolute proprietary rights because they cannot dispose of their lands as they wish; they only enjoy certain usufructuary rights over the lands.

The acceptance of Indigenous sovereignty is formally absent from the Australian politico-legal landscape. The limited scope of Indigenous peoples' political power in Australia is further evidenced by their continuing lack of statutory or constitutionally enshrined representation in parliament.[51] They also do not have any treaty rights or recognition in the Constitution. Their right to self-determination is also not recognised by statute or the Constitution. Many non-Indigenous people and politicians still consider Aboriginal sovereignty to be a threat to national integrity and their way of life.[52] There are many factors contributing to Indigenous peoples' diminished status, but among them is the continuing influence of the elements of the Doctrine. The recognition of native title as a substitution for terra nullius effectively replaced one element

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[48] H McRae at el, *Indigenous Legal Issues, Commentary and Materials* (Lawbook co, 4th ed, 2009) 149.
[49] In the Australian legal context, the concept of terra nullius was first implied in *R v Murrell* [1836] NSWSupC 35.
[50] William Jonas, 'Recognising Aboriginal Sovereignty- Implications for the Treaty Process' (Speech, ATSIC National Treaty Conference, 27 August 2002) <https://www.humanrigths.gov.au/news/speeches/recognising-aboriginal-sovereignty-implications-treaty-process-2002>.
[51] On 27 October 2017 the Australian government rejected the 'Uluru Statement from the Heart' that called for the establishment of an indigenous representative body in parliament. The aim of such a body would be to ensure Aboriginal and Torres Strait Islander voices or views are heard in parliament on matters that will affect their interests; Gabrielle Appleby 'Malcolm Turnbull's announcement misunderstands Uluru, and should be rejected' *UNSW Newsroom* (Web Page, 27 October 2017) <https://newsroom.unsw.edu.au/news/business-law/malcolm-turnbull's-announcemnt-misunderstands-uluru-and-should-be-rejected>.
[52] Ibid.

of the Doctrine with another. While native title is an improvement on terra nullius, the fact remains that as an element of the Doctrine it provides limited rights to land and has compounded the diminished sovereignty and self-determination of Australian Indigenous peoples.

In contrast to Australia, the sovereignty of Indigenous peoples in the USA and Canada were recognised during colonial invasion for the purpose of 'signing treaties and surrendering land'.[53] However, such recognition served to dispossess Indigenous peoples of their lands and resources. The colonists signed treaties with Indigenous peoples to restrict their sovereign rights over their lands. In the USA, these treaties had a dual objective: first to restrict the American Indians from using or disposing of their lands as they wished; and second, to exclude other invading forces from making treaties with the Indigenous people, which is also known as pre-emption under the Doctrine. Ultimately, the aim was to obtain complete control of Indigenous lands. One of the first examples of the application of the Doctrine was in 1638, when the Maryland colony enacted a law that made the King the 'lord and possessor' of Maryland, which was based on the 'right of first discovery'.[54] Other elements such as pre-emption, native title, limited sovereign and commercial rights, Christianity and civilisation later played a vital role in the demise of American Indian peoples' sovereign rights. Under art 1, s 8 of the US *Constitution*, Congress shall have the power to 'regulate commerce with foreign Nations and among the several States and with the Indian Tribes'. Through this power Congress can enter into treaties with American Indian tribes. The effect has been to create the status of 'Domestic Dependent Nations', which have tribal sovereignty and certain rights to manage their internal affairs.[55] Nevertheless, the tribes remain under the absolute sovereignty of Federal government and subject to the legislation enacted by Congress.[56]

While treaty-making for Indigenous peoples is viewed as confirmation of their sovereignty, for the colonial powers it was a mechanism through which Indigenous sovereignty and self-determination could be erased. In Canada, if there was any doubt, it was clarified by the *Royal Proclamation* of 1763, under which the Crown assumed pre-emptive rights over Indigenous Nations lands to effectively undermine their sovereign rights.[57] This was confirmed by the Supreme Court of Canada in *St Catherine's Milling* case by deciding that, while the Crown retained title, the Indigenous Nations only retained usufructuary rights of their lands.[58] Section

[53] See Ralph W Johnson, 'Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians' (1991) 66 *Washington Law Review* 643, 709.
[54] Miller et al, '*Discovering Indigenous Lands'* (n 4) 28.
[55] See below chapter 3.2.1- Discuss on the evolution of 'Domestic Dependent Nations' and related case laws.
[56] *Worcester v Georgia*, 31 US (6 Pet) 515 (1832) ('the *Worcester* case'); *United States v Candelaria*, 271 US 432, 440 (1926); *United States v Kagama*, 118 US 375, 381 (1886) ('*Kagama*').
[57] See below chapter 3.3.2.1, discussion on the Royal Proclamation.
[58] *St Catherine's Milling and Lumber Company v the Queen* (1888) 14 A.C. 46 ('*St Catherine's Milling*').

35(1) of the *Constitution Act 1982* now recognises and affirms 'the existing aboriginal and treaty rights of the aboriginal peoples of Canada', although the Supreme Court's treatment of these rights is variable,[59] and it is yet to determine whether it includes the right of self-government. By contrast, the *Indian Act* provided some limited sovereignty to the Tribal Band Councils with authority over minor matters, although this fell short of recognition of their of inherent sovereignty.[60] Some scholars believe that 'neither Parliament nor the Canadian Supreme Court have definitely closed the door on the possibility that First Nations might still possess some form of inherent sovereignty'.[61] Indeed, the government adopted a policy of self-government in 1995, which has resulted in some notable agreements, although not without criticisms that this policy is an expression of state sovereignty and is not recognition of Indigenous sovereignty (see Chapter 4).

As an alternative to the notion of sovereignty that depends on control over territory, there is the notion of self-determination, which can be defined as a communal right rather than an individual right.[62] The ICCPR and ICESCR have described the right to self-determination as a right belonging to all peoples to allow them to 'freely determine their political status and freely pursue their economic, social and cultural development'.[63] The UNDRIP preamble acknowledges the right to self-determination as determined under ICCPR and ICESCR. Article 3 of UNDRIP specifically mentions that 'Indigenous peoples have the right to self-determination'. The US, Canadian and Australian governments have recently endorsed the UNDRIP, which gives rise to a moral obligation to implement those provisions in their domestic laws. Self-determination is not about creating separate states for Indigenous peoples; it is an 'ongoing process of choice'.[64] It is the acknowledgment of the unique cultures, laws and customs of the Indigenous peoples that will enable them to meet their social, cultural and economic needs. A rights-based model such as the UNDRIP requires a state-based process of endorsement and enforcement. In the past, this has been difficult to achieve due the paramountcy of state sovereignty, which is a fundamental tenet of international law.

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[59] Jennifer Reid, 'The Doctrine of Discovery and Canadian Law' (2010) 30(2) *The Canadian Journal of Native Studies* 335, 337.
[60] See Worthen (n 40) 308, 316-18.
[61] Ibid 308. In Chapters 3 and 4 there is more discussion of Canadian case law on the extent of First Nations sovereignty and self-determination.
[62] 'Right to self-determination' *Australian Human Rights Commission* (Web Page) <https://humanrigths.gov.au/right-self-determination>
[63] ICCPR art 1; ICESCR art 1.
[64] *Social justice and human rights for Aboriginal and Torres Strait Islander Peoples* (Report, Australian Human Rights, 2003); 'Right to self-determination' (n 61).

2.5 The Doctrine of Discovery—Manifestation in the Global Neoliberal Context in the USA, Canada and Australia

> When the word globalization is substituted for the word imperialism, or when the prefix 'post' is attached to colonial, we are no longer talking simply about historical formations which are still lingering in our consciousness. Globalisation and conceptions of a new world order represent different sorts of challenges for indigenous peoples. While being on the margins of the world has had dire consequences, being incorporated within the world's marketplace has different implications and in turn requires the mounting of new forms of resistance.[65]

In recent times, the pressures of globalisation and rise of neoliberalism have seen nation-states seek out and support new markets. These developments now pose the greatest threat to Indigenous sovereignty and self-determination. [66] Globalisation and neoliberalism inform contemporary government policies in the Western world, which is evident in the USA, Canada and Australia.[67] According to Professor John Quiggin, globalisation is the process by which the 'world economy transcends national boundaries in a way that reduces or eliminates the scope of national governments to influence economic outcomes' and is the result of the 'general shift towards market-oriented neoliberalism and away from social-democratic intervention'.[68] Neoliberalism supports globalisation through the extension of market mechanisms into government structures. Its main approaches are to promote free trade and the mobility of capital, privatisation, deregulation, decreased public expenditure on social services and overall reduced role of governments.[69] Neoliberalism also involves the transfer of wealth and resources from the public to private sector,[70] and can be regarded as a modern form of economic imperialism, which has given rise to inequalities in diverse types of cultural, economic, environmental, social and political capital.[71] While development activities are carried out by private corporations, they seek to promote the interests of their shareholders rather than looking after the welfare of citizens. With their focus on the economic benefits of development, these corporations care little about environmental degradation and loss of Indigenous traditional lands and cultures. The governments and corporations argue that the industrial and economic development projects are

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[65] Linda Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books, 2013) 24.
[66] Kerry Arabena, 'Securing the Ground: The Australian Neoliberal Project and Indigenous Affairs' (2007) 11 (SE) *Australian Indigenous Law Review* 29 <http:/www.austlii.edu.au/au/journals/AILRev/2007/98.pdf>.
[67] See generally John Quiggin, 'Globalisation, neoliberalism and inequality in Australia' 10(2) *The Economic and Labour Relations Review* 240.
[68] Ibid 241, 249.
[69] Cathy Howlett et al, 'Neoliberalism, Mineral Development and Indigenous People: A Framework for Analysis of Convergences and Divergences in Canada and Australia' (2011) 42(3) *Australian Geographer* 309, 312.
[70] Ibid.
[71] Ibid; See also Jamie Peck, 'Geography and public policy: constructions of neoliberalism' (2004) 28(3) *Progress in Human Geography* 392, 398.

for the greater good. They do not accept that for Indigenous peoples any projects for social and economic development must start from Indigenous people's definitions and on their terms.[72]

As newly formed states, the USA, Canada and Australia forced Indigenous peoples to abandon their cultures and lifestyles through violence and persuasion, and to adopt mainstream national values. In liberal socio-contact theory, individuals voluntarily accept to become citizens of a state for the protection of their liberty and security.[73] Under the Doctrine, the Indigenous peoples in the USA, Canada and Australia were considered to be uncivilised and inferior to their European counterparts. Elements of the Doctrine such as Christianity and civilisation were used by the colonial forces to assimilate them into the mainstream society—often by violence and displacement—to abandon their unique laws and cultures and adopt European values. In most cases, they delegated their powers to state authorities or the churches, who forced Indigenous peoples off their ancestral lands and cut their family ties by forcefully removing children from their parents and communities.[74] With the rise of neoliberalism, state activities and responsibilities were increasingly diverted to non-government organisations or corporations. Corporations have been increasingly interested in development, the effect of which has been to further displace Indigenous peoples from their lands. Further, the rise of neoliberal economic and corporate power and the belief that the market should be the organising principle for social, political and economic decision-making has resulted in policy makers promoting the privatisation of state activities that undermine efforts towards sustainable development.[75]

The relationships between Indigenous peoples and their lands are multilayered. While Indigenous peoples see land as a cultural asset,[76] in neoliberal thought—as in classical liberalism—land is considered to be commercial asset.[77] However, the welfare state and the promise of citizenship rights, which characterised liberal democracies during the twentieth century has been jilted in favour of the neoliberal approach. With respect to development, it is usual for such projects to be pursued by multinational corporations with the support of governments. There is evidence that mining activities rarely provide equitable benefits to the Indigenous owners of the land; instead, the activities negatively affect the livelihoods and cultures of Indigenous communities.[78] Mining companies argue that mining activities create jobs

[72] UNDRIP arts 32(1), 32(2).
[73] Jeanne W Simon and Claudio Gonzalez-Parra, 'Rethinking Indigenous Resistance to Globalization' (2013-2014) 41/42 *ARENA Journal* 220, 224.
[74] In Australia the Indigenous peoples' Social welfare, education, health and overall control of their lives were delegated to the churches, whereas it should be the state's responsibility to look after its own citizens.
[75] See especially Howlett et al (n 69) 311-13.
[76] Howlett et al (n 68) 315; see also Jon Altman, 'Indigenous Communities, Miners and the State' in J Altman and D Martin (eds), *Powers, Cultures, Economy: Indigenous Australians and Mining* (Australian National University Press, 2009) 43.
[77] Altman (n 76) 43.
[78] Howlett et al (n 69) 317.

and opportunities will reduce long-term welfare dependency. However, the money available to Indigenous peoples through such enterprises can vary. While a few might receive a huge amount, most get very little. The economy is not sustainable because connection with the land and culture can be lost in the process.

The current world population is almost about 7.5 billion people. To sustain this massive population, the world needs food, energy and infrastructure, and this need increases each day. Any attempt to meet the needs of the world's population would create a common victim, which is the land. More land is required to grow more food, for oil and gas exploration and massive infrastructure such as dams, pipelines, roads and highways. Land is also an integrated part of Indigenous peoples' lives, cultures, religions and livelihoods. Indigenous peoples form the largest group of human victims of modernisation, globalisation and urbanisation. Indigenous peoples represent 5 per cent of world population, yet they represent 15 per cent of the world's poorest people.[79]

Regarding Indigenous control of development projects, there is a new concept known as 'Neoliberal Aboriginal Governance', which sets 'state-crafter responses to Indigenous demands that are part of a broader governmental strategy of neoliberalism'.[80] On the surface, it appears that this concept upholds Indigenous self-government, yet it promotes neoliberal state agendas that undermine 'meaningful autonomy' for Indigenous peoples.[81] Under this concept, Indigenous peoples are conferred rights as a 'tactics of neoliberal governance'.[82] These tactics allow Indigenous peoples to gain certain recognitions, but in exchange they usually must accept the constraints of neoliberal government.[83] This Indigenous self-government or autonomy is catered by the government and its agencies that provide Indigenous peoples with greater responsibilities without giving them true decision-making powers.[84] Accordingly, neoliberalism informs government decision-making and determines the extent of Indigenous peoples' rights. Neoliberal governance is not based on Indigenous rights, but on 'calculations of cost-effectiveness'.[85] That is why MacDonald argued that in the absence of 'a national treaty or a political commitment to self-determinations', Indigenous peoples are vulnerable to the impacts of neoliberalism.[86]

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[79] 'Poverty and exclusion among Indigenous Peoples: The global evidence' *The World Bank* (Blog post, 9 August 2016) <https://blogs.worldbank.org/voices/poverty-and-exclusion-among-indigenous-peoples-global-evidence>.
[80] Fiona MacDonald, 'Indigenous Peoples and Neoliberal "Privatization" in Canada: Opportunities, Cautions and Constraints' (2011) 44(2) *Canadian Journal of Political Science* 257, 257.
[81] Ibid
[82] Marjo Lindroth, 'Indigenous Rights as Tactics of Neoliberal Governance: Practices of Expertise in the United Nations' (2014) 23(3) *Social & Legal Studies* 341, 345.
[83] Ibid.
[84] MacDonald (n 80) 257.
[85] Lindroth (n 82) 349.
[86] Lindsey Te Ata O Tu MacDonald and Paul Muldoon, 'Globalisation, neo-liberalism and the struggle for indigenous citizenship' (2006) 41(2) *Australian Journal of Political Science* 209, 218; also quoted in Howlett et al (n 69) 315.

However, it is contended in this thesis, based on the analyses of the three case studies, that even where there are treaties, such as in the USA and Canada, developments on Indigenous lands are underway and neoliberalism is the driving force behind those developments.

Privatisation is another aspect of the global neoliberalism, by which many countries have outsourced basic public services—social protection, education, health, criminal justice system, public transport, roads, electricity—with serious impacts on the human rights of extremely poor—in many cases Indigenous peoples.[87] In last three decades the state welfare system has undergone severe transformation in most western world whereby the governments have reduced welfare, restricted eligibility, increased surveillance and tied welfare to work participation, and depend on private sectors for service delivery.[88] The USA, Canada and Australia have privatisation processes by which essential services—health, education, criminal and juvenile justice systems, public transport, electricity—have been transferred to private hands.[89] One of the main causes of privatisation of service delivery is to create 'efficient, centralized system which would potentially off-load some of the state's responsibility for the poor onto the private market' but it does not necessarily improve efficiency.[90] Privatisation reduces the role of government but less government is not always better and not necessarily beneficial, because in the democratic system the public want their government to be responsible for their actions. According to Paul Starr 'democratic politics is a process for articulating, criticizing, and adopting preferences in a context where individuals need to make a case for interests larger than their own. Privatization diminishes the sphere of public information, deliberation, and accountability—elements of democracy whose value is not reducible to efficiency'.[91] Moreover, neoliberalism may have resulted in 'less government' due to a retraction of the welfare state, but this has not reduced the power of the state which, in the context of this thesis, is evident in the state infrastructure invested in development, whether through economic, political or legal channels.

Neoliberalism and globalisation have emerged as the biggest threats to Indigenous land rights, which is why this thesis does not agree with Slowey that 'neoliberal globalization may be a

[87] General Assembly, 'World Altered by 'Neoliberal' Outsourcing of Public Services to Private Sector, third Committee Experts Stress, amid Calls for Better Rights Protection' (Meeting coverage, UN Doc GA/SHC/4239, 19 October 2018); see also David M Lawrence, 'Private Exercise of Governmental Power' (1986) 61 *Indiana Law Journal* 647.
[88] Krystle Maki, 'Neoliberal Deviants and Surveillance: Welfare Recipients Under the Watchful Eye of Ontario Works' (2011) 9(1/2) *Surveillance & Society* 47, 47.
[89] See generally John B Goodman and Gary W Loveman, 'Does Privatization Serve the Public Interest?' *Harvard Business Review* (Web Page) <https://hbr.org/1991/does-privatization-serve-the-public-interest>.
[90] Maki (n 88) 48; Goodman (n 89).
[91] Paul Starr, 'The Limits of Privatization' (1987) 36(3) *Proceedings of the Academy of Political Science* 124, 132; see also Goodman (n 89).

remedy to First Nations dispossession, marginalization and desperations'.[92] On the contrary, this thesis agrees with his initial observation:

> Neoliberal globalization is generally assumed to be a destructive force. That is, it could ultimately threaten the well-being of First Nations communities through its restructuring of market-state-First Nations relations and its reduction of the welfare state upon which so many First Nations rely.[93]

It is contended that neoliberal globalisation enables governments and multinational corporations to encroach on Indigenous lands. This thesis contributes to the literature by identifying the global neoliberal turn as a new manifestation of the Doctrine—the Doctrine of Neo-Discovery—which is demonstrated through the analyses of the USA, Canadian and Australian case studies.

2.6 The Doctrine of Discovery in International Law

> You go stand over there, close your eyes and pray while we take your land.[94]

The Doctrine is considered to be the 'historical root of ongoing violations of Indigenous peoples' human rights'.[95] The Doctrine was a part of international law (as seen by the Europeans), which allowed European nations to occupy Indigenous lands around the world since the early fifteenth century. This Doctrine only favoured the colonisers and did not consider the sovereignty, land and cultural rights of Indigenous peoples and never considered the general human rights of Indigenous peoples. Following the formation of the UN in 1945, the international community worked in concert to recognise the general human rights of human beings, which were codified in the UDHR in 1948.[96] Unfortunately, there was no mention of Indigenous peoples or their distinct rights. Until then, the international community pursued the civilisation and assimilation of Indigenous peoples with the aim of absorbing them into the mainstream social fabric. That was why all human rights were general and not specific to Indigenous peoples. This approach was also reflected in the *ILO Convention 107*, which advocated integration of Indigenous societies into nation-states (see Chapter 6).[97] Regrettably, during the negotiation of the UNDRIP, the application and effects of the Doctrine was never considered.

A report by Tonya Gonnella Frichner—a citizen of Onondaga Nation of the Haudenosaunee (Iroquois) Confederacy and was the North American Regional Representative to the UNPFII—

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[92] Gabrielle Slowey, *Navigating Neoliberalism: Self-Determination and the Mikisew Cree First Nations* (UBC Press, Vancouver- Toronto, 2008) xiv.
[93] Ibid.
[94] Permanent Forum on Indigenous Issues 'Preliminary Study shows "Doctrine of Discovery" Legal Construct Historical Root for Ongoing Violations of Indigenous Peoples' (Press Release No HR/5019, Economic and Social Council, 27 April 2010) <https://www.un.org/press/en/2010/hrs5019.doc.htm>.
[95] Ibid.
[96] *Universal Declaration of Human Rights*, GA Res 217 A (III), UN GAOR, UN Doc A/810 (10 December 1948).
[97] *Indigenous and Tribal Populations Convention (No. 107)* adopted 26 June 1957 (entry into force 2 June 1959).

on the 'impact on Indigenous peoples of the international legal construct known as the Doctrine of Discovery' was submitted before the UNPFII in 2009, highlighting that the international community was not serious about the impact of the Doctrine.[98] Frichner agreed that her preliminary study was 'the first step towards resolving root problems' faced by the Indigenous peoples, which the UNDRIP sought to address.[99] She also argued that it was time for the UN to examine the Doctrine, which had violated the human rights of Indigenous peoples.[100] It is surprising that it took the international community 25 years of negotiations to come to an agreement regarding Indigenous peoples rights, but they never properly considered the impact of the Doctrine on Indigenous peoples rights during the drafting of the UNDRIP.

Indigenous peoples seek assistance and redress from the international community for the problems they face, as a result of the violation of their rights. The spirit of the UNDRIP was to redress the violations of Indigenous rights, through recognition of the rights which have been violated (see Chapter 6).[101] However, as it does not go so far to address the effects of the Doctrine, the UNPFII appointed Edward John, a member of the UNPFII to conduct 'a study on the impact of the Doctrine of Discovery on Indigenous peoples, including mechanisms, processes and instruments of redress' with reference to the UNDRIP and arts 26–28 and 32–40 to be submitted in 12th session of the UNPFII[102] The findings of John Edward were submitted before the UNPFII at its 13th session in May 2014. In his report, he reiterated that the Doctrine was used to 'dehumanize, exploit, enslave and subjugate' Indigenous peoples, dispossess them from their 'lands and resources' and take away their basic rights, laws and spirituality.[103] He agreed that, although the Doctrine was rejected by some international and domestic bodies, it 'continues to have life'.[104] My thesis recapitulates this fact by analysing three development projects in the USA, Canada Australia.

The fundamental basis of international law relies on the application of the Doctrine. International law is based on the notion that all nation-states are sovereign and their sovereignty cannot be interfered with. If any country finds that any international instrument interferes with their sovereignty and political integrity, they do not become party to that instrument, which is why most international treaties—including the UNDRIP—have sovereignty clauses, which affirm the

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[98] Tonya Gonnella Frichner, Special Rapporteur, *Preliminary Study of the Impact on Indigenous Peoples of the International Legal Construct Known as the Doctrine of Discovery,* UN Doc E/C. 19/2010/13 (4 February 2010); Tonya Gonnella Frichner, 'The "Preliminary Study" on the Doctrine of Discovery' (2010) 28 *Pace Environmental Review* 339.
[99] Frichner, '*Preliminary Study*' (n 98) 340-41.
[100] Ibid.
[101] Ibid.
[102] *Permanent Forum on Indigenous Issues: Report on the eleventh session*, UN ECOSOC, 11th sess, UN doc E/2012/43-E/C.19/2012/13 (7-18 May 2012).
[103] Edward, *Study on the impacts of the Doctrine of Discovery* (n 38) 2 [2].
[104] '*Permanent Forum on Indigenous Issues*' (n 102).

'territorial integrity and political unity of sovereign independent states'.[105] In most cases, these clauses are used by nation-states to disregard provision of international law regarding Indigenous peoples' sovereignty and self-determination.

Over the past decade, the UNPFII has undertaken studies into the 'impact on Indigenous Peoples of the international legal construct known as the Doctrine of Discovery' and determined that provisions such as arts 28 and 37 of the UNDRIP provide some redress against the effects of the Doctrine. While neoliberalism and globalisation are becoming more threatening to Indigenous land rights, there is nothing being done by the international community that could help Indigenous peoples against this global aggression. Therefore, this thesis (see Chapter 6) presents an in-depth analysis of international laws and principles regarding Indigenous peoples to determine how the international community could address the effects of the Doctrine on Indigenous peoples and failed to provide adequate an remedy against the global neoliberal invasion.

2.7 Conclusion

The Doctrine is a late-medieval period concept, which continues to impede the rights of Indigenous peoples. It manifests in various ways to inform the laws and policies of nation-states, which undermine Indigenous peoples' rights to sovereignty and self-determination. Coupled with the recent advent of globalisation and neoliberalism, the Doctrine continues to serve the dispossession of Indigenous lands and support resource development projects for the benefit of non-Indigenous peoples. According to Robert A Williams:

> [T]his blatantly racist European colonial-era legal doctrine continues to be used by courts and policy makers in the West's most advanced nation-states to deny indigenous peoples their basic human rights guaranteed under principles of modern international law.[106]

The political autonomy, institutions, cultures and land rights of Indigenous peoples were fundamentally changed or abolished by the application of the Doctrine. Therefore, this thesis identifies neoliberalism and globalisation as being modern manifestations of the Doctrine and an examination of the three case studies demonstrates the ongoing application of the Doctrine. Since 2010, international institutions regarding Indigenous issues came to a realisation that some elements of the Doctrine continue to have adverse effects on Indigenous peoples. While nation-states continue to develop Indigenous lands by disregarding Indigenous rights, the international community will have to develop stronger measures and principles to redress historical and

[105] UNDRIP art 46(1).
[106] Robert A Williams, *Savage Anxieties: The Invention of Western Civilization* (Palgrave Macmillan, New York, 2012) 228; also quoted in Edward, *Study on the Impacts of the Doctrine of Discovery* (n 38) 3-4 [7].

current political contexts of the Doctrine. Apart from solving historic and current problems related to the Doctrine, states will require the political will to adhere by the rights conferred under the UNDRIP.

Chapter 3: Early Applications of the Doctrine of Discovery in the USA, Canada and Australia

3.1 Introduction

The evolution of laws and policies related to Indigenous peoples in the USA, Canada and Australia were historically different. In the USA and Canada, they were initially informed by the understanding that Indigenous peoples owned and could trade their lands. In Australia, colonisation was underpinned by the concept of terra nullius. There was no treaty or agreement; Indigenous lands were occupied by forceful dispossession. Throughout history, Indigenous lands have been used for non-Indigenous settlements, mega infrastructure projects, mining, farming and other development projects, which has benefited the greater population. Development projects such as the Dakota Access Pipeline ('DAPL') in the USA and the Site-C dam in Canada reveal how governments are in a position whereby they can completely disregard Indigenous interests and their treaty rights. Similarly, it can be observed in Australia that any laws that might stand in the way of development can be easily changed to ensure development on Indigenous lands.

In this chapter, I examine the early historical treatment of Indigenous peoples and development of their lands in the USA, Canada and Australia**.** It is not possible to delve into every aspect of the history of colonisation in these countries. The focus in the following sections is on providing an outline of relevant backgrounds that contextualise recent developments related to the DAPL, Site-C dam and Adani coal mine case studies, which are discussed in detail in Chapter 5. The focus in this chapter is on early colonial interventions, including judicial decisions and relevant legislations that shaped current Indigenous land rights in the USA, Canada and Australia. The history of Indigenous land development in these countries is a testimony of the colonial invasion by the Europeans and their inhumane treatment of Indigenous peoples. Ultimately, the discussion in this chapter of the early chronology of events illustrates the powerful influence of the Doctrine of Discovery ('the Doctrine'), which led to the destruction of their lands and cultural rights.

3.2 The USA—Historical Overview of the Laws and Policies Impacting on Indigenous Peoples

America was first 'discovered' by Christopher Columbus in 1492 with the support of Spanish King Ferdinand and Queen Isabella.[1] It came to be known as the 'new world'. Columbus's initial interactions with Indigenous peoples were friendly, but soon they discovered that their ways of life were under threat by the invasion of the Europeans.[2] The ill treatment of the Indigenous peoples was evident when Columbus, in his later voyage in 1495 enslaved 550 people and sent them to Spain to serve Queen Isabella.[3] The queen did not support the idea of keeping the Indigenous peoples as slaves and by a royal decree dated 20 June 1500, the king ordered that the slaves be freed and returned to their homeland.[4] However, by this time most of them had died due to exposure to different illnesses.[5] In the meantime, many Indigenous peoples in the US were captured and forced to accept Christianity and became slaves in their own country. The thinking of the time, which was consistent with the Doctrine, was that the American Indians were part of the land and whenever any land grants were made to the settlers, the inhabitants became property of the landowners.[6]

The British colony was founded almost 100 years after the Spanish occupation, although the British colony was in North America, where the Indigenous peoples were more resilient than those in the Caribbean who had a high mortality rate.[7] The first British colony was established in the US in 1607 with the approval of King James I. In April 1607, three British ships sailed into Chesapeake Bay, up a broad waterway that they named James River in honour of their king. They also called their settlement Jamestown and named the territory honouring England's late virgin queen as 'Virginia'.[8] The British did not have many successes in converting the

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[1] Andrés Reséndez, *The Other Slavery: The Uncovered Story of Indian Enslavement in America* (Houghton Mifflin Harcourt, New York, 2016) 18; see also 'Christopher Columbus (1451-1506)' *BBC UK* (Web Page, 2014) <www.bbc.co.uk/history/historic_figurees/ columbus_christoper.shtml>.

[2] Ibid.

[3] Reséndez (n 1) 24. Early in his second voyage to America, Columbus sent (with first returning ship) dozens of Carib Indians for King Ferdinand and Queen Isabell of Spain. In his letter to the King and the Queen he wrote '[m]ay your highnesses judge whether they ought to be captured, for I believe we could take many of the males every year and an infinite number of women'. According to him each of these male slave worth more than three black slaves in 'strength and ingenuity'. In the later voyage, out of 550 of those captured about 200 of them died because 'they were no used to cold weather'; see also Christine Gibson, 'Christopher Columbus, Failure' *American Heritage* (Web Journal) <www.americanheritage.com/node/132691>; Edward T Stone, 'Columbus and Genocide' (1975) 26(6) *American Heritage* <https://www.americanheritage.com/columbus-and-genocide>.

[4] Reséndez (n 1) 26, 28. While Columbus was insisting on bringing more slaves, Queen Isabella became exasperated and freed many of them so that they could go back to New World.

[5] Stone (n 3).

[6] 'Native Americans, Treatment of (Spain Vs. England) (Issue)' *Gale Encyclopedia of Economic History* (Web Page, 9 November 2017) https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/native-americans-treatment-spain-vs-england-issue>.

[7] Ibid.

[8] 'History of British Colonial America' *History World* (Web Page) <www.historyworld.net/wrldhis/ plaintexthistoriesresponsive.asp?historyid=aa80>.

Indigenous peoples into slaves or Christians. Moreover, the relationship between them was vexed because the Indigenous peoples did not like the British occupation of their lands. However, trade relations were established and the British traded firearms and blankets for furs. In later years, the number of fur-bearing animals declined and the settlers' frequent attempts to buy the Indigenous lands caused conflicts. Generally, the Indigenous peoples liked to live away from the settlers due to sicknesses caused by European diseases such as smallpox.[9] A significant difference between the Spanish and British settlers regarded interracial marriage. The Spanish engaged in widespread interracial marriage, whereas it was almost absent among the British settlers.

The USA gained independence on 4 July 1776 after 13 North American states declared independence from the British government and an independent USA was created by the *Treaty of Paris*.[10] After the War of Independence, the US government adopted the civilisation policy under which American Indians were forced to adopt a European lifestyle. During the presidency of Thomas Jefferson, his government not only imposed civilisation policies upon the Native Americans but also actively pursued acquisition of Indian lands through persuasion, bribery and intimidation, and was responsible for the 'dispossession and decimation of the First Americans'.[11] From the beginning of the invasion, the Indian lands in the USA were used for mining, farming and mega infrastructure projects such as railways and dams. A striking example was the First Transcontinental Railroad, a 3077-km railway constructed between 1863 and 1869, which had devastating consequences for many Indian communities, their water sources and ancestral burial grounds.[12]

The Cherokee Nation—the largest American Indian Nation in the United States—adopted its US style Constitution in 1827—with the Legislative, the Executive and the Judicial departments (art II, s 1)— that defined the Nations boundary (art 1, s 1) and also declared its absolute sovereignty and jurisdiction over the land (art 1, s 2). [13] This move was heavily criticised and rejected by the government because the land was rich with gold and the government wanted to extract the gold or grant mining leases to third parties. President Andrew Jackson asked the Cherokee people to

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[9] Ibid.

[10] Jeffrey J Cole, 'Canadian Discord Over the Charlottetown Accord: The Constitutional War to Win Quebec' (1993) 11(3) *Dickinson Journal of International Law* 627, 630; see also 'American Revolution History' *History channel* (Web Page, 2009) <www.history.com/topic/american-revolution/american-revolution-history>

[11] Mary Young, 'Indian Policy in the Age of Jefferson' (2000) 20(2) *Journal of the Early Republic* 297, 298 reviewing Anthony F C Wallace, *Jefferson and the Indians: The Tragic Fate of the First Americans* (Cambridge: The Belknap Press of Harvard University Press, 1999).

[12] 'Cultural Impact of Building the Transcontinental Railroad' *Linda Hall Library* (online 21 June 2018) <www.railroad.lindahall.ogr/essays/cultural-impacts.htmal>.

[13] Eric Lemont, 'Developing Effective Processes of American Indian Constitutional and Governmental Reform: Lessons from the Cherokee Nation of Oklahoma, Hualapai Nation, Navajo Nation, and Northern Cheyenne Tribe' (2001/2002) 26(2) *American Indian Law Review* 147, 156; *Constitution of the Cherokee Nation 1827*; American Revolution History (n 10).

move to another place, but they declined. The *Indian Removal Act* was introduced and signed by the President on 28 May 1830.[14] This Act permitted the President to negotiate with the American Indian tribes for their removal and relocation to federal territory west of the Mississippi River. When they declined the President's offer to relocate, the Cherokee people were forcibly removed from their lands. The actions of the government embody the conquest element of the Doctrine—under the term 'just and necessary war'—the colonisers captured Indigenous land. During the relocation, as many as 3500 Indian men, women and children lost their lives due to extreme cold and starvation. This was one of the darkest times in US history, which became known as the 'Trail of Tears'.[15]

The dreadful and appalling treatment of Indian tribes was bequeathed to successive federal and state governments. Their political status was reduced to that of Domestic Dependent Nations, which was supported by the Constitution and different pieces of legislation from Congress. This continues to define the relationship between the Indian and non-Indian peoples in contemporary times. Domestic Dependent Nations serves as an acknowledgement of American Indian tribal sovereignty and of their rights to self-determination and self-government, although in a diminished form. As Domestic Dependent Nations, the American Indian peoples lost many sovereign rights, especially those related to their lands and territories, thus giving them limited sovereign and commercial rights—an element of the Doctrine. The federal government and Congress have absolute sovereign power over their lands and can legislate against the interests of the American Indian peoples. In the next section, I analyse the concept of Domestic Dependent Nations, which provides some self-governing rights, but also curtails significant portions of their inherent rights to their lands. It is not possible to discuss every aspect within the scope of this thesis, which is why my discussion is limited to the treaty system and the right of self-government (tribal sovereignty), which was supported by significant cases in the Supreme court.

3.2.1 Domestic Dependent Nations

It was undisputed that the American Indian peoples were sovereign nations with unique cultural and political structures long before the colonisation of the USA. Since colonisation, the scope of their sovereign powers has become subject to the external control of US lawmakers and politicians. In the *Johnson* case, Marshall CJ defined the elements of the Doctrine and in the *Cherokee Nation v Georgia,*[16] he applied aspects of the Doctrine—especially the elements like

[14] Robert J Miller et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2012) 81-82.
[15] Lemont (n 13) 157; *Rise: Trail of Tears* (SBS documentary, 2017).
[16] *Cherokee Nation v Georgia,* 30 US 5 Pet 1 1 (1831) ('the *Cherokee Nation* case').

pre-emption, native title, limited sovereignty, limited commercial rights and conquest—to reduce the rights of Indigenous nations to the term Domestic Dependent Nations. The *Cherokee Nation* case described the American Indian tribes as Domestic Dependent Nations because they were not foreign nations or states as constituted under art III of the Constitution. In a later case of *Worcester v Georgia,*[17] the US Supreme Court decided that the American Indians constituted a nation holding distinct sovereign power and that the states had no rights to impose regulations on American Indian land. As such, any Georgian laws regarding Cherokee Nations were unconstitutional and void. In the *Worcester* case, Marshall CJ observed:

> The Cherokee Nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves, or in conformity with treaties and with the acts of congress. The whole intercourse between the United States and this Nation, is, by our Constitution and laws, vested in the government of the United States.[18]

The concept of Domestic Dependent Nation is peculiar and complex because it does not confer nation status, although it allows Indigenous nations to have control over their own lands and members. Nevertheless, although they have control over their lands, it is owned by the federal government, [19] and the nations are under the permanent sovereignty of the federal government.[20] This represents many the attributes of the elements of the Doctrine. The members of Domestic Dependent Nations have native title over their territories because they have possession of the land and can decide how it is used, but they cannot dispose of it without a congressional order. Moreover, Domestic Dependent Nations are bound by the pre-emption principle as described in the *Johnson* case, in which it was decided that private individuals could not purchase lands from the American Indians; only the Federal government could. Although American Indian tribes have lost significant sovereign power post-colonisation, not all powers were extinguished by the invasion. They still have limited sovereignty over their people, cultures and lands. This retained internal sovereign powers of self-government gave them the identity of Domestic Dependent Nations. Nevertheless, after the colonial invasion, the tribes lost many sovereign powers. Therefore, as Domestic Dependent Nations, American Indian tribes do not possess the rights of independent nations such as the power to make war or treaty with foreign nations, criminal jurisdiction over non-Indians and the power to dispose of lands without the consent of the USA.[21]

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[17] *Worcester v Georgia*, 31 US (6 Pet) 515 (1832) ('the *Worcester* case').
[18] Ibid 561.
[19] *United States v Candelaria*, 271 US 432 (1926) 440.
[20] *United States v Kagama*, 118 US 375 (1886) ('*Kagama*') 381.
[21] See generally Michalyn Steele, 'Congressional Power and Sovereignty in Indian Affairs' (2018) 2(2) *Utah Law Review* 307; 'What is Tribal Sovereignty' *North Dakota Studies* (Web Page, 02 April 2018) <https://www.ndstudies.gov/ content/what-tribal-sovereignty>.

The concept of Domestic Dependent Nations evolved from the concept of tribal sovereignty. In the *Worcester* case, the American Indians were declared as being separate, distinct, independent sovereign nations with a legitimate title to their national territories, which represented most characteristics of tribal sovereignty.[22] At the same time, tribal sovereignty was not permanent in the sense that its elements could be limited or even extinguished by congressional orders. There are many precedents and pieces of legislation that acknowledge tribal sovereignty by limiting its scope, which are discussed later in this chapter. Over the past 400 years, the policies that determined relations between the colonisers and American Indians have changed many times. This relationship began with a treaty system, but later moved between eradication, removal, assimilation and self-government. Irrespective of this relationship, tribal sovereignty has two traditional theoretical foundations: one from various treaties negotiated between the American Indian tribes and the federal government and the other from the inherent authority of the American Indian tribes to self-govern.[23]

3.2.1.1 Treaties and American Indian peoples

> Almost every president of the United States has promised at same time during his term, that he would uphold the Indian treaties, and none has fulfilled the promise when decisions had to be made.[24]

Through negotiating treaties, the colonial settlers acknowledged tribal sovereignty. Treaties were documents that defined the relationship between the colonisers and Indigenous peoples by establishing federal jurisdiction and physical boundaries of tribal reservations, fishing and hunting rights.[25] Treaties were also used to resolve disputes and keep the peace between the tribes and non-tribes. One of the first treaties was between the British settlers (Plymouth pilgrims) and the Wampanoags tribe, which was made on 22 March 1621 in Massachusetts and is known as the *Pilgrim-Wampanoag Peace Treaty*.[26] Under this peace treaty, both parties

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[22] Hope M Babcock, 'A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-Envisioned, Reinvigorated, and Re-Empowered' (2005) *Utah Law Review* 443, 478-82 <https://scholarship.law.georgetown.edu/facpub/952/>; See also Steele (n 21); Tim Alan Garrison, 'Worcester v Georgia (1832)' *New Georgia Encyclopedia* (Web Page, 23 April 2018) <https://www.georgiaencyclopedia.org/articles/government-politics/worcester-v-georgia-1832>.

[23] Ibid.

[24] Vine Deloria and Raymond J Demallie, *Documents of American Indian Diplomacy: Treaties, Agreements, and Conventions, 1775-1979* (University of Oklahoma Press, Norman, 1999) Vol 1, 6.

[25] Along with the French and British who adopted the Indian format for making treaties and agreements, the Spanish also made treaties with Indians. While most Indians had enough military strength to defend themselves, the Spanish tried conquest and conversion to subdue smaller Indian groups that could not mount a defence against them. Ibid 103; see generally Babcock (n 22).

[26] Sharon Venne, 'Treaty Indigenous Peoples and the Charlottetown Accord: The Message in the Breeze' (1993) 4(2) *Constitutional Forum* 43, 44-45; Jon Parmenter, 'The Meaning of *Kaswentha* and the Two Row Wampum Belt in Haudenosaunee (Iroquois) History: Can Indigenous Oral Tradition be Reconciled with the Documentary

promised to keep the peace and to not hurt each other (art 1). Further, if the colonists broke the treaty, they would be sent to Wampanoags for punishment and vice-versa for the Wampanoags peoples (art II).[27]

Soon after the establishment of the English colony in the early seventeenth century, treaty-making became common between the Indigenous peoples and the colonisers. It is estimated that from the early period of colonisation until 1871 there were more than 600 treaties.[28] It was first assumed that the Indigenous peoples owned the land and were able to trade it.[29] However, this assumption was changed by the *Royal Proclamation* of 1763, under which only the imperial government was permitted to buy American Indian land.[30] This proclamation abolished the American Indian tribes absolute control over their lands by limiting their rights to dispose of their lands as they wished. This was one of the first nails in the coffin of American Indian peoples' absolute sovereignty rights. The proclamation stated:

> We do, with the Advice of Our Privy Council, strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those Parts of Our Colonies where we have thought proper to allow Settlement; but that if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, the same shall be purchased only for Us, in Our Name.[31]

This limited right followed the pre-emption element of the Doctrine, under which the Indigenous peoples could not sell their land to any private person other than the Crown. Subsequently, following independence, the same idea was adopted by the *Intercourse Act* of 1790 and later confirmed by the Supreme Court.[32] As was made clear in the *Cherokee Nation* case, treaties protected their occupancy and not their proprietary interests to the land:

Record?' (2013) 3 *Journal of Early American History* 82, 86; In 1613 there was an early treaty signed between the Dutch and the five Nations of Iroquois named Two Row Wampum treaty. It was believed that this treaty was an early example of respect and reciprocity with basic features to ensure each other's independence and sovereignty and the non-interference in each other's affairs. Venne (n 26) 44-5.

[27] John Booss, 'Survival of the Pilgrims: A Revaluation of the Lethal Epidemic Among the Wampanoag' (2019) 47(1) *Historical Journal of Massachusetts* 109, 113-14; 'The Pilgrim-Wampanoag Peace Treaty' *History Channel* (Web Page), <www.history.com/this-day-in-histoy/the-pilgrim-wampanoag-peace-treaty>.

[28] Arthur Spirling, 'US Treaty Making with American Indians: Institutional Change and Relative Power, 1784-1911' (2012) 56(1) *American Journal of Political Science* 84, 85; see also Gibson, 'Christopher Columbus' (n 4).

[29] Ibid.

[30] *Royal Proclamation of 1763* was declared on 7 October 1763 by the King George the III.

[31] '250th Anniversary of the Royal Proclamation of 1763' *Indigenous and Northern Affairs, Canada* (online 12 August 2018) <https://www.aadnc-aandc.gc.ca/eng/1370355181092/1370355203645>; 'The Royal Proclamation – October 7, 1763' *Lillian Goldman Law Library* <https://avalon.law.yale.edu/18th_century/proc1763.asp>.

[32] The Royal Proclamation' (n 29).

> [T]he Cherokee Nations of Indians have, by virtue of these treaties, an exclusive right of occupancy of the lands in question and that the United States are bound under their guarantee to protect the Nation in the enjoyment of such occupancy.[33]

Under s 8 of art 1 of the US *Constitution*, Congress has the power to make treaties with American Indian nations. After the War of Independence, the *Pike Treaty* of 1805—named after Lieutenant Zebulon Pike who signed the treaty—was the first treaty between the USA and Dakota Indians under which the USA acquired tribal lands within the state's current boundaries.[34] Between the War of Independence and 1869, the US Senate ratified more than 365 Indian treaties in pursuit of Indigenous lands and other resources.[35] However, while the American Indian peoples might have entered into treaties in recognition of their sovereignty and rights and sought protection against settler incursions on these lands, the motivation of the European colonisers in establishing a treaty system was because it was the most effective instrument for land acquisition while minimising loss of white non-Indigenous lives. The objective of the US government remained the same after Independence,[36] and by the turn of twentieth century nearly two million square miles of land was transferred from the possession of the American Indian peoples to the USA.[37] The US government enacted many laws to regulate and fund negotiations between the US authorities and the American Indian peoples. Until 1871, the President had the treaty power, although this power was removed by Congress because, even if the President could negotiate the treaties, funding of these negotiations had to be authorised by Congress.[38] Further, the treaty-making power was viewed as an obstacle to achieving the official policy of assimilation of American Indians into mainstream culture. After 1871, treaties were replaced by agreements and the frameworks for negotiations were legislated by Congress and under this system, agreements were placed before both houses of Congress and subsequently ratified as statutes. In the twentieth century, agreements between the American Indian tribes and the US government and individual states became the new process to regulate relationships between them.[39] The various agreements

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[33] 30 US 5 Pet 1 1 (1831) ('the *Cherokee Nation* case') 74.

[34] During this time, Lieutenant Zebulon Pike was sent to explore northern reaches, and Lewis and Clark were sent to the Western reaches. This Pike treaty was concluded by Zebulon Pike and under the agreement the Dakota Indians ceded about 100,000 acres of land at the intersection of the Mississippi and Minnesota River. See, 'Contact Period: An Overview of Contact Period Archaeology in Minnesota (1650-1837)' *Minnesota Department of Administration* (Web Page) <https://mn.gov/admin/archaeologist/the-public/ma-archaeology/contact-period/>; 'Treaty Making in America' *Why Treaties Matter* (Web Page) <http://treatiesmatter.org/exhibit/welcome/ treaty-making-in-america>

[35] Donald L Fixico (ed), *Treaties with American Indians: An encyclopedia of Rights, conflicts and Sovereignty* (ABC-CLIO, California, 2008) 13; According to Vine Deloria and Raymond J Demallie, the generally accepted number of treaties during this timeframe was 369. Deloria (n 24) 181.

[36] Fixico (n 35) 13.

[37] Spirling (n 28) 84; see also Gibson, 'Christopher Columbus' (n 4).

[38] Ibid.

[39] The treaty language continued to be used when dealing with American Indians and government officials still believed they were making treaties when negotiating sale of surplus lands on the reservations: Deloria (n 24) 233. See especially Spirling (n 28) 87; see also 'The United States Government's Relationship with Native Americans'

enacted through legislation created the policies to deal with the general or specific groups of American Indian peoples and created agencies responsible for carrying out these policies. However, the laws and policies were largely influenced by the developments in American society and not by the American Indian peoples. In an era of assimilation, the various pieces of legislation followed this trend and tended to streamline laws so that they applied to all citizens.[40] One example was the *Transfer Act of 1954*, under which the American Indian health services were transferred from the Bureau of Indian Affairs to the Public Health Service in the Department of Health, Education and Welfare.[41]

In addition to Congress control over funding treaty negotiations, there were other reasons for the abandonment of the treaty system. It was believed that there was no need to treat the American Indian peoples differently because they lived within US territory and were under its jurisdiction. There was also a racist assumption that they were not mature enough to comprehend the nature of treaties and could not productively give their consent.[42] The US government could also force the American Indians into treaties and later into agreements with its military force and move them from one place to another. The motivation behind this was to facilitate the exploration of valuable natural resources such as gold, oil and diamonds. Whenever any valuable natural resources were discovered in tribal lands, Indigenous peoples were moved to other places so that the non-Indigenous people could move in to explore these resources. By these treaties, the American Indians were promised that in the new land they would be allowed to continue their cultures and ways of life and to enjoy political autonomy without the influence of the dominant colonial culture. The rights negotiated under the treaties were collective or group rights, which provided a form of tribal sovereignty.[43] However, there were many examples in which the government coerced the American Indians to accept treaties and agreements. For example, the discovery of gold in the Black Hills of Dakota Territory forced the Sioux people to accept the Sioux Agreement of 1876. Under this agreement, the mineral-bearing hills of the Great Sioux Reservations were excluded from the reservation for exploration and white settlement.[44] Similarly, following the discovery of gold and silver in the Ute reservation in 1879, the Ute peoples of Colorado were removed from their lands against their will and heavy protests.[45]

National Geographic (Web Page, 11 December 2019) < https://www.nationalgeographic.org/article/united-states-governments-relationship-native-americans/>.

[40] See especially Spirling (n 28) 84. Legislations such as the *Indian Removal Act 1830* also aided the removal of American Indians from their land.

[41] *The Indian Health Service (IHS): An Overview* (CSR Report, R 43330, Congressional Research Service, 12 January 2016) 17; *Transfer Act*, 25 USC § 444-449 (1954).

[42] Gibson, 'Christopher Columbus' (n 4).

[43] Robert N Clinton, 'The Rights of Indigenous Peoples as Collective Group Rights' (1990) 32(4) *Arizona Law Review* 739, 745.

[44] Spirling (n 28) 95.

[45] Ibid. The DAPL is a recent example of this trend. See Chapter 5.

The treaty system eventually lost its significance because the US government broke many treaty commitments without consequences.[46] By the 1850s, almost all American Indian tribes were moved away from their own lands to smaller reservations and by 1871, the treaty system was abolished in favour of the assimilation of the American Indian peoples into the mainstream culture. [47] In contemporary times, countries like Australia consider the introduction of a treaty system to define the relations between the Indigenous and non-Indigenous peoples,[48] although in the USA, the importance of the treaty system has lost its initial significance and now provides little support to the concept of tribal sovereignty as Indigenous peoples may understand that concept. According to Professor Babcock:

> Today, the unfortunate reality is that federal Indian treaties are little more than interesting historical records, ceremonial touchstones, or starting points for legal argumentation. Primarily a legal convenience to enable white settlers to take Indian land with minimal bloodshed, treaties lacked true legal or moral significance. This enabled the federal government to breach its nominal binding authority on the nontribal signatories easily—breaches that the court would later justify.[49]

The Indigenous peoples' land rights were recognised in the USA through treaty negotiations. In Canada, they were recognised first through treaty and then through Comprehensive Land Claim Agreements ('CLCAs'). However, the treaty system was adopted by the colonial settlers to restrict Indigenous sovereignty and capture Indigenous lands. It was a deliberate tactic, facilitated by elements of the Doctrine to provide Indigenous peoples with limited sovereignty (discussed below). In the absence of a treaty system in Australia, the land rights of Indigenous peoples were recognised through the native title system, which is part of the Doctrine and gives them very limited rights over the lands (discussed below).

3.2.1.2 Limited sovereignty and the Inherent Right to Self-Government

The inherent right to self-govern is another distinctive right of Indigenous communities. Under the limited sovereign rights element of the Doctrine, many American Indian communities in the USA retained their own institutions of autonomous governance, which are rooted in their historical social and political arrangements.[50] Over the centuries, these Indian communities have well-developed customary laws that govern many aspects of their society, maintain law and order

[46] Spirling (n 28) 94-5.
[47] Babcock (n 22) 461.
[48] A three days National Constitutional Convention in 2017 of Indigenous leaders across Australia resulted in the 'Uluru Statement from the Heart' that supported the idea of Indigenous representative body and treaty making process.
[49] Babcock (n 22) 468.
[50] James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, New York, 1996) 110.

and help to resolve disputes. Many American Indian customary laws and autonomous institutions are recognised by the US legal system. The political autonomy of the American Indian peoples is recognised on the understanding that they were sovereign prior to colonisation and retained their sovereignty, which continues to the present day.[51] Self-government is an inherent right, which was never extinguished by colonial settlement.[52] This inherent power was best articulated by the Office of the Solicitor in 1934 in an 'Opinion of the Solicitor for the Department of the Interior on Powers of Indian Tribes':

> [T]hose powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of congress, but rather inherent powers of a sovereignty which have never been extinguished.[53]

The *Johnson, Cherokee Nation* and *Worcester* cases (also known as the Marshall trilogy) reaffirmed the political and legal status of American Indian peoples, their tribal sovereignty and their right to self-govern. Although the *Indian Appropriations Act 1871* ended the treaty era by declaring that the Indian nations shall not be acknowledged or recognised as independent nations, tribes, or powers by the USA,[54] the native tribes did not lose their inherent power to self-govern. Almost 50 years after the Marshall trilogy, it was affirmed in the *United States v Kagama*[55] that the USA 'have recognized in the Indians a possessory right to the soil over which they roamed and hunted and established occasional villages'.[56] This case also found that the tribes preserved their tribal relations from a semi-independent position 'as a separate people, with the power of regulating their internal and social relations'.[57] Apart from declaring the tribes to be semi-independent nations, *Kagama* followed the decision in the *Cherokee Nation* case that the USA was bound to physically protect American Indians and to ensure their enjoyment of their inherent rights under tribal sovereignty. The tribes were declared to be the wards of the nation because they depended on the federal government for daily food, political rights and protection.

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[51] *Worcester v Georgia*, 31 US (6 Pet) 515 (1832); Keith M. Werhan, 'Sovereignty of Indian Tribes: A Reaffirmation and Strengthening in the 1970's' (1975) 54(5) *Notre Dame Law Review* 5, 17-18. According to Federal Indian Law scholar Felix S. Cohen, federal Indian laws are based on three principles (1) Indian tribes had all the sovereign powers before the colonial settlement (2) the colonial conquest terminated tribes external powers of sovereignty but retained internal sovereignty (3) power of local government remain vested in tribal government unless expressly qualified by treaty or Congress.

[52] Babcock (n 22) 469.

[53] Charles J Keppler, *Indian Affairs: Laws and Treaties* (United States Government Printing Office, Washington, 1941) Vol 5, 780; also quoted in Felix S. Cohen, *Handbook of Federal Indian Law* (University of New Mexico Press, 1971); also quoted in Werhan (n 51) 18.

[54] Act of March 3, 1871 embodied in section 2079 of the revised Statues states that: 'No Indian nation or tribe, within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United states may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired'.

[55] 118 US 375, 381 (1886) ('*Kagama*') [381].

[56] Ibid.

[57] Ibid [381]-[382].

Additionally, because the people of the separate states were considered to be their deadliest enemies, the states were found to have no role to play in the administration of Indian affairs.[58] In recognising tribal sovereignty, the Supreme Court refunded the taxes collected by the State of Arizona from a Navajo woman whose income was wholly derived from reservation sources.[59]

Under the Doctrine, the American Indian peoples only retained limited sovereign powers following colonial invasion. There is a clear distinction between the tribes' internal and external sovereign powers. Prior to invasion, they were nations with absolute sovereignty, although subsequently they lost external powers to the Congress, because after the end of the treaty era, only Congress retained the power to make laws regarding Indian tribes, whereas the tribes lost the power to dispose of their lands. However, for the purpose of internal affairs, they were always considered to be autonomous bodies, especially in matters of criminal jurisdiction for which they were considered as sovereign. In *Ex Parte Crow Dog*,[60] the American Indian petitioner challenged the jurisdiction of the District Court of the Territory of Dakota, which convicted him of murder and sentenced him to death for killing another American Indian. In deciding this case, Matthews J held that US courts lacked the jurisdiction to try criminal offences committed on the reservations and crimes committed by Indians against 'each other were left to be dealt with by each tribe for itself according to its local customs'.[61] Further, in *Talton v Mayes*, [62] the Supreme Court considered the Marshall trilogy and *Kagama* and affirmed that the tribes existed as autonomous bodies and possessed the attributes of local self-government while exercising their tribal functions subject to the supreme legislative authority of the USA.[63] The American Indian tribes were unique and their tribal sovereignty was inherent because they were not created by the constitution or by the federal government. Only 'their independence and sovereignty were limited, but not destroyed, by discovery and conquest'.[64]

To protect tribal self-government, tribes were given immunity from suit as normally enjoyed by sovereign powers.[65] In *Oklahoma Tax Commission v Citizen Band Potawatomi Indian Tribe of Oklahoma*,[66] the Supreme Court held that under the sovereign immunity principle, the State of Oklahoma could not enforce or collect cigarette taxes from the tribes through litigation. This is one aspect of tribal self-government that has been constantly challenged, although upheld by the

[58] Ibid [383]-[384]; see also Blue Clark, *Lone Wolf v Hitchcock: Treaty Rights and Indian Law at the End of the Nineteenth Century* (University of Nebraska Press, Lincoln and London, 1994).
[59] *McClanahan v Arizona Tax Commission*, 411 US 164 (1973).
[60] *Ex Parte Crow Dog*, 109 US 556 (1883).
[61] Ibid 571-572.
[62] *Talton v Mayes*, 163 US 376 (1894).
[63] Ibid [380], [384].
[64] Werhan, 'Sovereignty of Indian Tribes' (n 52).
[65] See A R Blackshield and George Williams, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (The Federation Press Annandale NSW, 5th ed. Abridged, 2010).
[66] 498 US 505 (1991).

Supreme Court in many decisions. In the recent 2014 case, *Michigan v Bay Mills Indian Community et al*,[67] the Supreme Court held that 'Michigan's suit against Bay Mills is barred by tribal sovereign immunity'.[68] In this case, the Supreme Court reaffirmed that the tribe was immune from suits by state authorities and that they were immune from suits originating from commercial activities outside Indian territories. In deciding the second point, the Court heavily relied on *Kiowa Tribe of Oklahoma v Manufacturing Technologies, Inc.*,[69] in which the Court decided that it was the job of Congress to determine the limits of tribal immunity and the 'Court cannot reverse itself now simply because some may think Congress's conclusion wrong'.[70]

Multiple cases during the twentieth century reaffirmed the concept of tribal sovereignty as articulated by Marshall CJ in the *Worcester* case.[71] However, whenever the Marshall cases were cited, it was to affirm the limited rights of American Indian peoples based on the Doctrine. For example, in *Williams v Lee*,[72] the Court declined to allow the exercise of state jurisdiction in the reservation's affairs because it would undermine the authority of the tribal courts and 'would infringe on the right of the Indians to govern themselves'.[73] Cases like *Mazurie*,[74] *Martinez*,[75] *Wheeler*[76] and *Oliphant*[77] supported the same principle that the American Indian tribes would always have an inherent right to self-government. *Mazurie* recognised tribal sovereignty over their members and territories and *Wheeler* acknowledged that the American Indian tribes had undisputed power to enforce their criminal laws against tribal members and reaffirmed *Kagama* that the tribal people were 'a separate people, with the power of regulating their internal and social relations'.[78] However, American Indian criminal jurisdiction has never extended over non-Indians. *Oliphant* made it clear that the inherent right to self-government did not give the American Indians criminal jurisdiction to try and punish non-Indians. Again, in the more recent case of *Duro v Reina,* [79] the tribal jurisdiction was made more limited and the court decided that,

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[67] 134 S Ct 2024 (2014) ('*Bay Mills*').
[68] Ibid syllabus.
[69] 523 US 7541 (1998).
[70] *Bay Mills* (n 67) syllabus.
[71] Ibid [22].
[72] 358 US 217 (1959) 223.
[73] Ibid.
[74] *United States v Mazurie*, 419 US 544 (1975) ('*Mazurie*'). This case affirmed that 'Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory'.
[75] *Santa Clara Pueblo v Martinez*, 436 US 49 (1978) ('*Martinez*'). In this case the Court acknowledged that the tribes are sovereign and capable of governing themselves and recognised that '[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community'
[76] *United States v Wheeler*, 435 US 313 (1978) ('*Wheeler'*).
[77] *Oliphant v Suquamish Indian Tribe*, 435 US 191 (1978) ('*Oliphant*'). The Indian tribal courts do not have inherent criminal jurisdiction to try and to punish non-Indians. This decision was based on the principle that the tribal jurisdiction is not based on Congressional power or treaty but rather on their inherent power to self-govern on their territory.
[78] Ibid [322].
[79] 495 US 676 (1990).

under the retained power of tribal sovereignty, the tribes had the political and social power to govern their own affairs, but 'an Indian tribe may not assert criminal jurisdiction over non-member Indian'. Therefore, a tribe does not have jurisdiction over non-Indian, nor does it have jurisdiction over an Indian who is not a member of their tribe. However, this assumption was later reversed by *25 USC § 1301(2)*, under which tribal courts could 'exercise criminal jurisdiction over all Indians'.[80]

3.2.2 The Treaty of Fort Laramie 1851 and 1868

The status as Domestic Dependent Nations defined the American Indian tribes' relationships with the federal government and non-Indians through treaties. In terms of the discussion in this thesis, the *Treaties of Fort Laramie* of 1851 and 1868 (see Map 1) were the most relevant to the construction of the DAPL. The participating tribes were the Sioux, Arapaho and Cheyenne, Crow, Assiniboine, Arikara, Hidatsa and Mandan in the territories now known as Montana, Wyoming, Nebraska and North and South Dakota.[81] The treaties were signed to demarcate and preserve Indian lands and to establish rights and obligations between American Indian Nations and the US government.[82] Besides specifying the geographical territory of American Indian Nations, these treaties ensured that they could enjoy the protection of the US government in the performance of their inherent right to self-government and the practice of their cultural rights, including traditional hunting and fishing. These two treaties were among 370 ratified treaties that defined the relation between the federal government and Indian nations and among those treaties that were broken by the government.[83] The recent construction of the DAPL is one of a lengthy list of actions that have undermined the exercise of tribal sovereignty through the destruction of tribal lands, ancestral burial grounds and waterways. Moreover, this project poses a huge threat to the native environment through the contamination of waters traditionally used by the tribes. According to the Standing Rock Sioux Tribes and opponents of Dakota Access Pipeline, it is another example of the federal government breaching the provisions of the *Fort Laramie Treaties* of 1851 and 1868.

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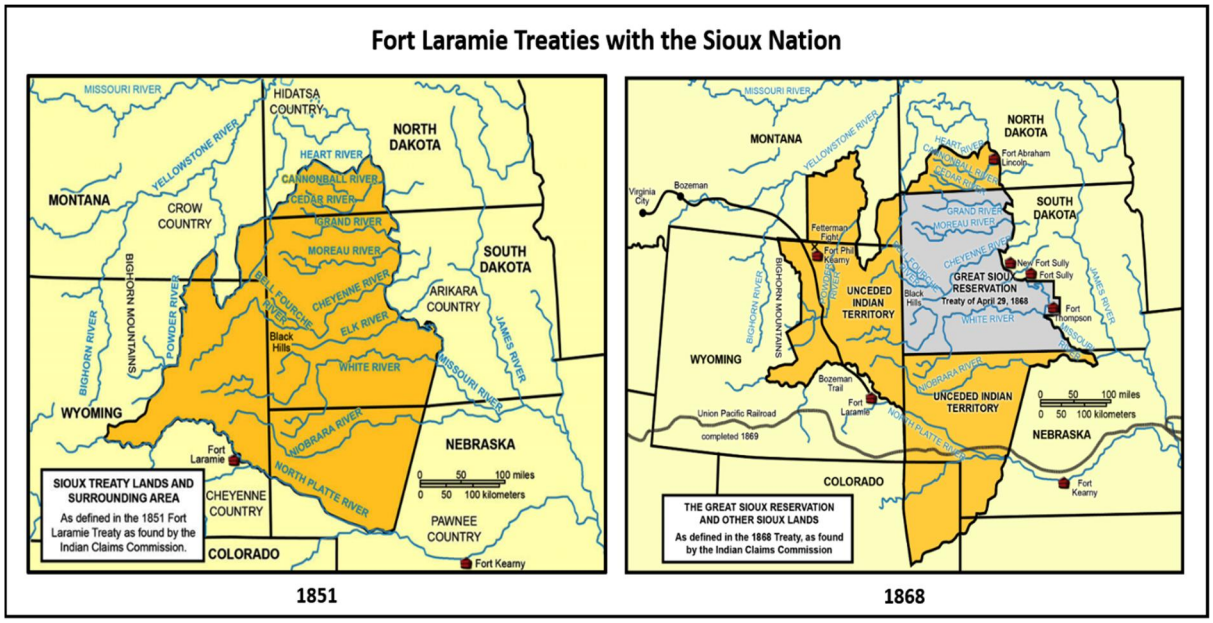
[80] *25 USC §1301(2)* states that: 'Powers of self-government means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribe, hereby recognised and affirmed, to exercise criminal jurisdiction over all Indians.

[81] *Fort Laramie Treaty 1851* preamble and *Fort Laramie Treaty 1868* arts I, XVII.

[82] *Fort Laramie Treaty 1851* art V and *Fort Laramie Treaty 1868* art II.

[83] Hansi Lo Wang, 'Broken Promises on Display at Native American Treaties Exhibit' *National Public Radio* (Web Page, 18 January 2015) <https://www.npr.org/sections/codeswith/2015/01/18/368559990/broken-promises-on-display-at-native-american-treaties-exhibit>.

Map 1. Fort Laramie Treaties with the Sioux Nation



Source: North Dakota Studies website (official portal of North Dakota State Government)[84]

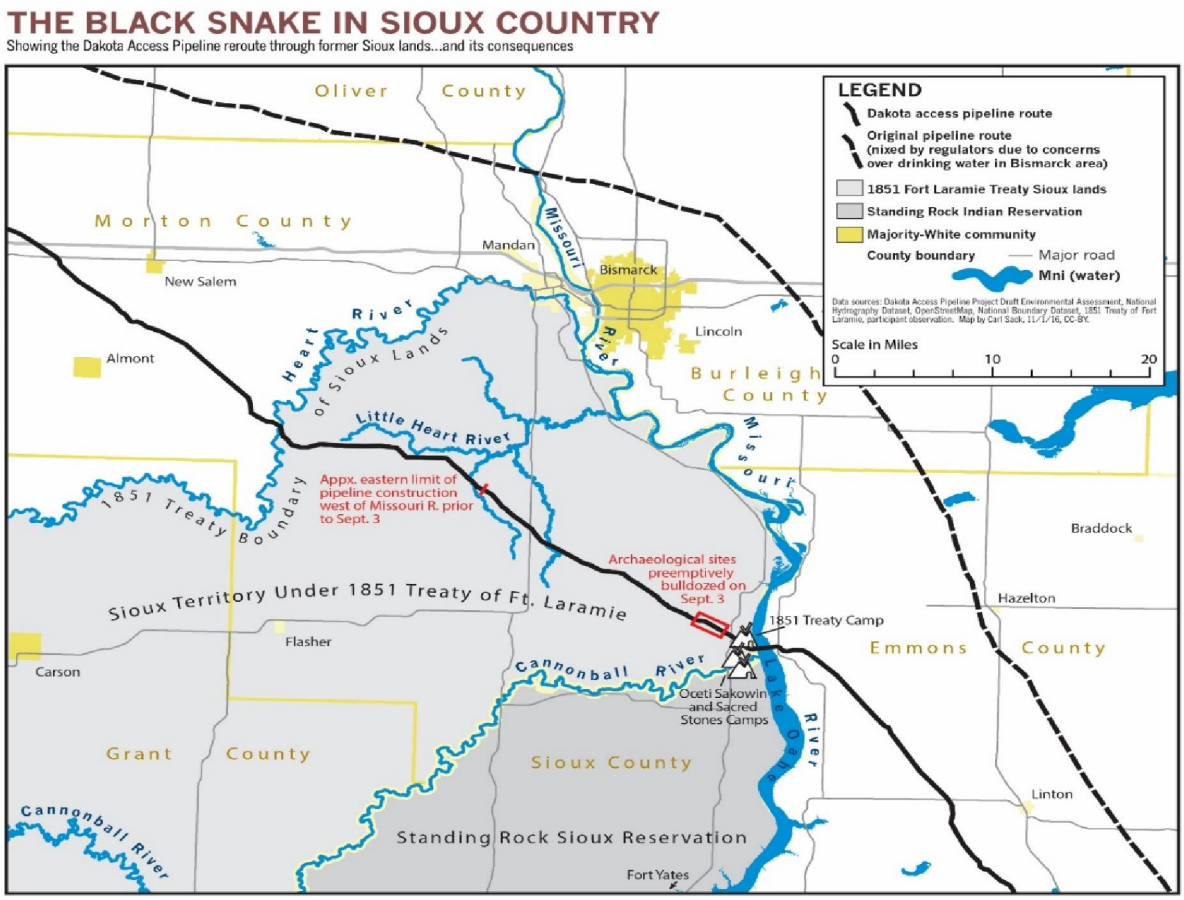
Until the 1870s, the American Indians engaged in many wars and conflicts with the colonisers to retain control of the lands they had occupied for generations.[85] It had become a no-win situation for both parties. The Indian tribes defended their lands by killing intruders and the colonisers invaded the tribal lands by killing any tribal members who attempted to defend their lands.[86] The US government expanded railway lines, trade routes, communication corridors and army posts across the country and they required traditional tribal lands to succeed in these purposes.[87] The colonisers also invaded the tribal lands in search of valuable natural resources such as oil, gold and diamonds. In the absence of treaties between the Indian nations and the government, there was a regular occurrence of wars, killings and the displacement of American Indian peoples. To bring an end to this problem, the first *Treaty of Fort Laramie* of 1851 included provisions for peace and protection.

The 1851 Treaty did not establish reservations, although it defined the territories of the Great Sioux or Dahcotah, Gros Ventre, Mandans, Arrickaras, Assinaboin, Blackfoot, Crow, Cheyennes and Arrapahoes Nations.[88] The DAPL falls within this defined territory (see Map 2). Under this treaty, the parties agreed to establish peaceful relations, including to abstain from future

[84] 'The Treaties of Fort Laramie, 1851 & 1868' *North Dakota Studies* (Web Page) <https://www.ndstudies.gov/gr8/content/unit-iii-waves-development-1861-1920/lesson-4-alliances-and-conflicts/topic-2-sitting-bull-people/section-3-treaties-fort-laramie-1851-1868>
[85] Wayne G Sanstead, *The History and Culture of the Standing Rock Oyate* (North Dakota Department of Public Instruction, 1995) 6; see also Andrew R Graybill, 'Rangers, Mounties, and the Subjugation of Indigenous Peoples, 1870-1885' (2004) *Great Plains Quarterly* 73, 73.
[86] Ibid 86-7.
[87] See generally, Deloria (n 24) 514-15.
[88] *Treaty of Fort Laramie 1851* art 5.

hostilities and to maintain faith and friendship.[89] The Indian nations agreed to the establishment of roads, military and other posts,[90] in exchange for the US government's promise to protect the American Indian Nations from incursions by the colonisers.[91] The US government also agreed to pay the American Indian Nations $50,000 per year for 50 years—subsequently reduced to 10 years—to maintain and improve the moral and social customs of Indian nations and for any other damages caused by the government in the pursuit of the provisions of the treaty.[92]

Map 2. The Black Snake in Sioux Country



Source: http://tribalbusinessjournal.com/news/treaty-fort-laramie/

The 1851 Treaty was never overturned by a subsequent treaty, so its provisions are still valid. While it could be argued that the *Treaty of Fort Laramie* of 1868 made the 1851 Treaty null and void, there is no express provision in the 1868 Treaty that repealed the 1851 Treaty, nor has it been repealed by Congress. In *Minnesota v Mille Lacs Band of Chippewa Indians*,[93] the Supreme

[89] Ibid art 1.
[90] Ibid art 2 states that: 'The aforesaid Nations do hereby recognize the right of the United States Government to establish roads, military and other posts, within their respective territories'.
[91] Ibid art 3 states that: 'In consideration of the rights and privileges acknowledged in the preceding article the United States bind themselves to protect the aforesaid Indian nations against the commission of all depredations by the people of the said United States, after the ratification of this treaty'.
[92] Ibid art 7.
[93] 526 US 172 (1999) ('*Mille Lacs Band*').

Court made it clear that the Mille Lacs Band of Chippewa nation retained its treaty rights and privileges of hunting, fishing and gathering of wild rice under the *Treaty of St. Peters* of 1837. In this case, the state argued that there was an Executive Order in 1850 that terminated the usufructuary rights guaranteed under the 1837 Treaty, although the Court rejected this argument on the ground that '[t]he President's power to issue an order must stem either from an act of Congress or from the Constitution itself'. [94] The State also argued that a subsequent treaty in 1855—to which the Mille Lacs Band was not a signatory—abrogated these usufructuary rights. The Court also rejected this view on the ground that 'the entire 1855 Treaty is devoid of any language expressly mentioning usufructuary rights or providing money for abrogation of those rights'.[95] On the basis of the reasoning in the *Mille Lacs Band* case, the rights and privileges of the Indian tribes under the 1851 Treaty are still intact and can be enforced. As the Supreme Court observed in the *Mille Lacs Band* case, 'Congress must clearly express an intent to abrogate Indian treaty rights' which has not been done in the case of 1851 treaty.[96] The decisions in *Mille Lacs Band* is significant in the present context because it maintains the American Indian Nations usufructuary treaty rights, even if the treaty was signed hundreds of years ago, so long as the treaty has not been repealed nor the rights of the Indian tribes abrogated by Congress. Moreover, the tribes are considered separate nations—because they are separate from the states and can only deal with the federal government—and, in international law, a treaty can be terminated by a later treaty—relating to the same subject matter—only if all parties agree.[97] However, there are no provisions in the 1868 Treaty that voice the intention of the parties to repeal the old treaty in favour of the new treaty.

The *Treaty of Fort Laramie* of 1868 was negotiated to establish the Great Sioux Reservation and the tribes living inside the reservation signed this treaty in return for money, food and clothing. The reservation system also promoted federal policy of 'christianizing and civilizing the savages' by encouraging Indians to abandon their spiritual tradition, cultural values and lifeways in favour of white man's way.[98] However, three quarters of the Sioux Nations male did not sign the treaty,

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[94] Ibid [172]-[173]; 'Minnesota v Mille Lacs Band' *The United States Department of Justice* (Web Page, 21 October 2014) <https://www.justice.gov/enrd/minnesota-v-mille-lacs-band>.
[95] *Mille Lacs Band* (n 93) 173.
[96] Ibid; It must be noted here that in the Chinese Exclusion cases in the 1880s—*Chae Chan Ping v United States*, 130 US 581 (1889), *United States v Wong Kim Ark*, 169 US 649 (1898)—the US Supreme Court held that Congress can abrogate terms of International treaty at any time and these case were used later to support the statement that Congress can abrogate Indian treaties too. See, Polly J Price, 'A "Chinese Wall" at the Nation's Borders: Justice Stephen Field and The Chinese Exclusion Case' (2018) 43(1) *Journal of Supreme Court History* 7.
[97] *Vienna Convention on the Law of Treaties 1969*, adopted 23 May 1969, 1155 UNTS 331 (enter into force 27 January 1980); According to art 59 (1) A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and: (a) It appears from the later treaty or is otherwise establish that the parties intend that the matter should be governed by that treaty; or (b) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.
[98] *Treaty of Fort Laramie 1868* art X; see also Sanstead (n 85) 14.

and especially many tribes living outside the reservation refused to sign and move onto the reservation.[99] For example, Sitting Bull and his band of Hunkpapas notably refused to sign the treaty and continued their traditional hunting north of the reservation covered under the 1851 treaty.[100] The 1868 treaty provided that the American Indian Nations were entitled to enjoy their customary rights without any external interference. According to art 2 of the treaty, the reservation was for 'absolute and undisturbed use and occupation' of the tribes and 'no persons, except those herein designated and authorized … shall ever be permitted to pass over, settle upon, or reside in the territory described in this article'. This 'use and occupation' rights under the treaty not only cover land rights but also the tribes' water rights to the rivers, including the Missouri River which criss-crosses the DAPL, because on-reservation water rights are essentially related to land rights.[101] Apart from establishing the Great Sioux Reservation, the 1868 treaty kept most of the land under the 1851 Treaty—part of Wyoming, Nebraska and Dakota territory—as unceded lands, which were reserved for hunting.[102] According to art XVI of the 1868 Treaty, 'no white person or persons shall be permitted to settle upon or occupy any portion of the same; or without the consent of the Indians' in unceded lands. The DAPL passes through this unceded land (see Map 2) where the Tribes have hunting rights and under the 1868 Treaty, construction of the pipeline would only be permissible if the Tribes concede their rights by a document 'signed by three-fourths of the adult male Indians occupying or interested in the same'.[103] Therefore, the 1851 and 1868 treaties made any development without the consent of the Indian tribes illegal.

In 1874, six years after the treaty was signed, it was violated by the federal government.[104] The government sent a team of geologists with the support of General George A. Custer and his 7th Cavalry to explore gold in the Black Hills situated inside the reservation.[105] After the gold was discovered, white miners poured into the Black Hills in breach of the 1868 Treaty. Rather than protecting the American Indian tribes, the government offered to change the terms of the treaty and buy the land, but the proposal was refused by the Sioux people.[106] Despite being signed by

[99] Sanstead (n 85) 13.
[100] 'The Treaties of Fort Laramie' (n 84).
[101] In the *Winters v United States* ('Winters case'), the Supreme Court decided that the Fort Belknap Treaty of 1888 reserved water rights to the Tribes by implication. According to the Court, it was inconceivable that the Tribes ceded millions of acres of lands to take up agriculture as the primary source of income without intending to reserve sufficient water to survive. *Winters v United States*, 207 US 564 (1908) 576. See, Rachael Paschal Osborn, 'Native American Winters Doctrine and Stevens Treaty Water rights: Recognition, Quantification, Management' (2013) 2(1) *American Indian Law Journal* 76, 80.
[102] 'The Treaties of Fort Laramie' (n 84).
[103] *Treaty of Fort Laramie 1868* art XII.
[104] Sanstead (n 85) 14.
[105] Ibid 16
[106] Sanstead (n 85) 14; 'Establishment of the Great Sioux Reservations' *North Dakota Studies* (Web Page) <httpss://www.ndstudies.gov/content/establishment-great-sioux-reservation>.

only 10 per cent of the adult tribal male members (art XII of the 1868 Treaty required a three-fourths majority from the adult tribal male members), the government forced the Indian tribes to accept the new agreement of 1876, under which the Black Hills were excluded from the reservation and Congress unilaterally ratified the Sioux Agreement of 1876 in February 1877.[107] Congress did not have any mechanism under which the tribes could seek redress until 1920 when the *Special Jurisdictional Act* was passed.[108] Almost 150 years later, in *United States v Sioux Nation of Indian*, the Supreme Court acknowledged the injustices done and the 'pattern of duress' brought upon the Sioux Nations under the agreement of 1876.[109] The Court also acknowledged that art XII of the *Fort Laramie Treaty* of 1868 was breached because the taking of the Black Hills was not 'executed and signed by at least three-fourths of the adult male Sioux population'.[110] However, the Court did not challenge the power of Congress to appropriate the land and instead of making orders of restitution, it awarded compensation to the Sioux people.[111]

In the meantime, by an executive order, the northern boundary of the reservation was extended to the Cannonball River in 1875 (see Map 2) and in 1889, Congress divided the Great Sioux Reservation into six separate reservations. The Standing Rock Reservation is one of those reservations, which has the Cannonball River as one of its boundaries and is only a few hundred metres from the DAPL (see Map 2). The 1889 boundary of the reservation remains the same and is governed by the Constitution approved by the Tribal Council of Standing Rock Sioux Tribe in 1959. Under this Constitution, the tribes are self-governing and have usufructuary rights over the waterways.[112] The 1908 case of *Winters v United States*[113] (also known as Winters Doctrine) points to the intention of Congress when creating a reservation. According to the Court, when creating a reservation Congress implicitly reserves the water rights of the people living on the reservation and implicitly guarantees American Indian rights to sufficient quality and quantity of the water to sustain their lifestyle.[114] Oil spill caused by the DAPL will certainly harm the water rights of the Sioux Tribe as the water will become contaminated and unusable for a considerable amount of time. I discuss these issues further in Chapter 5.

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[107] *United States v Sioux Nation of Indian*, 448 US 371 (1980) 371, 382; See also Sanstead (n 85) 13.
[108] Ibid 425. The *Special Jurisdictional Act*, ch 222, 41 Stat 738, was passed to authorizing the Sioux Tribe to submit any legal or equitable claim against the United States to the Court of Claims.
[109] Ibid 388, 425.
[110] Ibid 410.
[111] Ibid 372, 426.
[112] 'History' *Standing Rock Sioux Tribe* (web Page) <https://www.standingrock.org/content/history>.
[113] *Winter v United States*, 207 US 564 (1908).
[114] Cynthia Brougher, *Indian Reserved Water Rights Under the Winter Doctrine: An Overview* (Report, Congressional Research Service, 8 June 2011); <www.nationalaglawcenter.org/wp-content/uploads/assets/crs/RL32198.pdf>.

3.3 Canada—Historical Overview of the Laws and Policies Impacting on Indigenous Peoples

In this section, I consider the development of Indigenous lands in Canada through the application of the Doctrine. In 2016, Canada had about 750,000 Indigenous inhabitants in 600 Indian bands, about 45 per cent of whom were living on 3100 reserves,[115] with each Indian band asserting independent and autonomous status.[116] Canada has a similar Aboriginal history to the USA, although the evolution of Aboriginal right recognitions and treatment of Aboriginal peoples are significantly different. In Canada, the Indigenous cultures and traditions survived the French and British invasions and the Indigenous peoples managed to retain some of their Aboriginal rights and land territories through agreements and treaties. Nonetheless, the Indigenous peoples from Canada also face the threat of cultural extinction and destruction of their ancestral lands from development projects such as hydroelectric projects, trans-national pipelines, mining and other development projects. In Canada elements of the Doctrine have played a key role in government laws and policies throughout the history of Canada. The Doctrine helped to shape the non-Indigenous state of Canada, which has contemporary implications. According to Tracey Lindberg:

> Canada continues to privilege business and corporate interests in and above Indigenous territories. The unlawful (in an Indigenous legal context, at least) taking of land was one means of applying the Doctrine in the 'New World'. In this even 'Newer World', the taking of natural resources from Indigenous territories through Canadian legal means and without Indigenous' assent (as consultation not consent) can be said to be just further positioning on the continuum of colonization.[117]

In this section, I outline the history of Indigenous peoples' interactions with the French and British. Basing my analysis on elements of the Doctrine, I focus on to the way that law and policy have disadvantaged Indigenous peoples and their attempt to assert their rights in the Canadian courts.

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[115] Harvey A Mccue, 'Reserves' *The Canadian Encyclopedia* (Web Page, 12 July 2018) <https://www.thecanadianencyclopedia.ca/en.article/aboriginal-reserves>; 'First Nation community' refer to a relatively small group of Aboriginal people residing in a single locality and forming part of a larger Aboriginal nation or people. *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back* (Final report, October 1996) Vol 1, iii.

[116] Thomas J Courchene, *Aboriginal Self-Government in Canada* (Papers on Parliament No 21, Parliament of Australia, December 1993) <https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/~/~/link.aspx?_id=2720D6736F174A0CAA2474FAD79B4FB9&_z=z>.

[117] Tracy Lindberg, 'The doctrine of Discovery in Canada' in Robert J Miller et al (eds), *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2012) 167.

3.3.1 Early History

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws, It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the land they occupied.[118]

The understanding of Indigenous rights in Canada is closely related to French and British colonial invasion. North America was inhibited by Indigenous peoples well before European settlement. They had their own societies with established legal systems, social structures and governments. Similarly, Canada was home to many Indigenous peoples before French explorer Jacques Cartier 'discovered' the Atlantic shore of Canada for the European settlers in 1534. The Name 'Canada' came from Huron-Iroquois word 'kanata', which meant village or settlement.[119] Cartier used the word 'Canada' to identify an entire area controlled by Chief Donnacona of Stadacona, although later the entire area came to be known as New France.[120] Cartier and his people faced heavy opposition from the Chief Donnacona and 10–12 additional chiefs in the area.[121] When Cartier failed to find gold they abandoned their quest to occupy Canada. About 70 years later in the early seventeenth century, France came back to claim the land.[122] In 1608, Samuel de Champlain arrived in the St Lawrence basin and constructed a fort in the Lower Town of Quebec City.[123] This time the French came to stay and built New France.

The European colonisers used the Doctrine to claim Indigenous lands around the world. North America was no exception. The French colonial force used a similar principle to claim Canada. According to the Doctrine, the colonial authorities discovered Canada and considered Indigenous peoples to be 'inferior to European nations'. This racist assumption enabled them to disregard Indigenous sovereignty and self-government.[124] A mere settlement was enough to assert sovereignty over Indigenous peoples, whereas conquest of territory (inhabitants) was required to assert sovereignty over other non-Aboriginal territories.[125] According to Macklem:

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[118] *Worcester v Georgia*, 31 US (6 Pet) 515 (1832) (Marshal J); also quoted in *Connolly v Woolrich,* (1867) 17 RJRQ 75 (Quebec Superior Court).
[119] 'Origin of the name "Canada"' *Government of Canada* (Web Page, 11 August 2017) <https://www.canada.ca/en/canadian-heritage/services/origin-name-canada.html>.
[120] 'Origin of the names of Canada and its provinces and territories' *Natural Resources Canada* (Web Page, 11 September 2019) <https://www.nrcan.gc.ca/earth-sciences/geography/place-names/origins-georgaphical-names./9224>.
[121] Lindberg (n 117) 98.
[122] Cole (n 10) 628-9.
[123] Marcel Trudel, 'Champlain, Samuel de' in *Dictionary of Canadian Biography* (University of Toronto, 2003) Vol 1 <htttp://www.biographi.ca/en/bio/champlain_ samuel_de_1E.html>
[124] Patrick Macklem, 'Normative Dimensions of an Aboriginal Right of Self-Government' (1995) 21 *Queens's Law Journal* 173, 187.
[125] Ibid 186.

> It is true that British sovereignty over Quebec was acquired by conquest, whereas British and French sovereignty over Aboriginal people, in the eyes of international law, was acquired by the mere fact of settlement.[126]

After 1608 and during the early years of colonisation, the settlers started to trade furs, minerals and other useful commodities, and started converting the Indigenous peoples to Christianity.[127] Initially, the settlers adhered to Indigenous laws in governing the settlements but over time, using the Doctrine, they began to claim lands by building larger settlements with their economic and military powers.[128] During their two hundred years of existence in Canada, the French settlers heavily depended on the Indigenous peoples because they were well acquainted and better suited to their territories. However, while they had trade and military alliances, they never formed any formal land treaties with them. [129] The French eventually started to claim Aboriginal lands according to elements of the Doctrine and began to assimilate Indigenous peoples into French societies.[130] France's unofficial recognition of Indigenous peoples made them allies and partners in business and trade. During the French and British conflict in the Seven Years War (1756–63), the British colonial forces faced resistance from the Indigenous peoples. To pacify the resistance, the British recognised the Indigenous peoples in the Royal Proclamation of 1763, which became the source of modern Canadian laws and still defines the relationship between Indigenous peoples and the Canadian state.

By the middle of the seventeenth century, French colonial forces occupied New France and British colonial forces occupied the USA. At the same time, the British Crown adopted 'aggressive colonialism' to get hold of new territories around the world.[131] To acquire the entire of North America from Florida in the south to New France in the north, the British built massive naval forces. As a result, from 1689 until 1763 there were many Anglo–Franco wars, which resulted in the British acquisition of New France in 1763. The *Royal Proclamation* of 1763 declared territories between the Alleghenies and the Mississippi as Indian territory and out of reach of colonial settlement until new arrangements could be made with the Indigenous Nations.[132] In the meantime, British control of New France remained divided between French- and English-speaking areas because of their respective Catholic and Protestant faiths.[133] To

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[126] Ibid 188.
[127] John Leonard Taylor, 'Indigenous Peoples and Government Policy in Canada' *The Canadian Encyclopedia* (Web Page, 15 April 2016) <https://www.thecanadianencyclopedia.ca/en/article/
[128] See especially Lindberg (n 117) 90-101.
[129] Ibid.
[130] Ibid.
[131] Cole (n 10) 629.
[132] 'Early British rule, 1763-91' *Encyclopedia Britannica* (Web Page) <https://www.britannica.com/place/Canada/Early-British-rule-1763-91>.
[133] Cole (n 10) 630-31.

resolve this problem, the *Constitutional Act of 1791* (also known as the *Canada Act 1791*)[134] was enacted by the British parliament under which the Province of Canada was divided into Upper Canada (now Ontario) and Lower Canada (now Quebec) with their own representative governments.[135] Lower Canada was predominantly French-speaking Catholic. It was believed that ultimately the French Canadians would be absorbed with the Anglican Canadians.[136] However, the opposite happened and the 'French Canadian nationalism' movement continued to grow and the tensions between French Canadians and Anglo Canadians rose to a point at which armed rebellion broke out in 1837, which was immediately neutralised by the British.[137] The *British North America Act* was enacted to end the deadlock by introducing the new Dominion of Canada, under which Canada was divided into four provinces—Nova Scotia, New Brunswick, Ontario and Quebec—to give it a new start. Quebec reluctantly joined the new arrangement for the greater good.[138]

While the newly formed Canada experienced conflict between the French and British settlements, the Indigenous peoples struggled for their inherent sovereign rights and self-government. Most British policies were directed towards promoting non-Indigenous interests, while Indigenous peoples were pushed to live on reserves. The shadow of the Doctrine worked behind the scenes to 'civilise' the so-called uncivilised.[139] Indeed, unlike the French, the British forces were ruthless and did not use any legal theory to acquire Canada. According to Sanders:

> Canadian law has never used either 'discovery' or 'terra nullius'. Our legal tradition has been so self-confident, so arrogant, that it felt no need to have any legal theory justifying British colonialism.[140]

Nevertheless, the treaty system that was eventually introduced to define relations between Indigenous peoples and the state of Canada accorded with elements of the Doctrine. By ceding lands through treaty, the Indigenous peoples gained land reserves, cash and other services. From the point of the view of the colonisers, it was believed that the inherent land rights of the Indigenous peoples were terminated by laws enacted before confederation and that the Crown held complete and original title of the land after that.[141] Subsequent laws and precedents disputed

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[134] In 1791 New France was officially named Canada.
[135] Cole (n 10) 630.
[136] Ibid.
[137] Ibid.
[138] Cole (n 10) 632. According to Cole, Quebec joined the new arrangement to keep its distinct society intact and safe from the expanding force of United States.
[139] See generally Lindberg (n 117).
[140] Douglas Sanders, "The Supreme Court of Canada and the 'Legal And Political Struggle' Over Indigenous Rights" (1990) 22(3) *Canadian Ethnic Studies* 122, 122, quoted in Lindberg (n 117) 97.
[141] Brian Slattery, 'First Nations and the Constitution: A Question of Trust' (1992) 71(2) *The Canadian Bar Review* 261, 288. According to Proclamation No. 13 of 1859 'All the lands in British Columbia, and all the mines and minerals therein, belong to the Crown in fee'.

this view and confirmed that the Crown's ultimate title and 'Aboriginal rights' of Indigenous peoples could co-exist, but even so, the hold of the Doctrine in Canada has not been shaken even by these developments.[142]

3.3.2 Indigenous Peoples' Treaty Rights

> What I do understand is that we were to share the land with other people who were the white people. That was the purpose of the treaty, I think, since there were going to be more white people, to share the land with them.[143]

Treaty-making and diplomacy were traditional practices between Indigenous peoples on a nation-to-nation basis for many years prior to European invasion. These traditions continued after the arrival of colonisers and until contemporary times.[144] As the first settlers, the French formed trade and military alliances with the Indigenous peoples in Canada, although they never had any formal treaty with them (France had some involvement in the *Montreal Peace Treaty* of 1701). In contrast, the British had signed treaties with Indigenous peoples as early as 1701 because the British Crown had a process of treaty negotiation with Indigenous peoples in other parts of the world. The early treaties were mostly diplomatic treaties that developed economic and military relations between Indigenous peoples and the British Crown. Initially, the French and then the British used those trade alliances to obtain access to remote areas and, with the assistance of Indigenous hunters, the colonial traders built lucrative fur trade businesses.[145] Subsequently, the escalation in the conflict between the French and British to increase their territorial share of North America resulted in both sides initiating military alliances with different Indigenous groups.[146] Predominantly, the treaty-making process supported the recognition of Indigenous peoples' independent self-governing status by the Crown from the earliest time.[147]

Treaty-making between groups served as acknowledgment of each other's sovereignty, although with respect to Indigenous treaty-making, it was not based on equality but was imposed. Most Indigenous peoples never understood the full implications of treaty-making, so the assumption of 'free consent and equality' was specious.[148] Some of the first recognised treaties were the

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[142] Ibid.
[143] Francis Bruno, an Aboriginal elder, quoted in R Daniel, 'The Spirit and Terms of Treaty Eight' in R Price (ed) *The Spirit of the Alberta Indian Treaties* (Institute of Research on Public Policy, Montreal, 1980), also cited in Patrick Macklem, 'Normative Dimensions of an Aboriginal Right of Self-Government' (1995) 21 *Queen's Law Journal* 173, 191.
[144] 'A History of Treaty-Making in Canada' *Indian and Northern Affairs Canada* (Web Page, 4 June 2013), <https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/ap_htmc_treatliv_1314921040169_eng.pdf>.
[145] Ibid.
[146] Ibid.
[147] Macklem (n 143) 191, 218.
[148] George F G Stanley, *The Birth of Western Canada: The History of the Riel Rebellions* (University of Toronto Press, Toronto, 1960) 213.

treaties of Montreal and Albany in 1701 that were concluded by five Nations—Mohawk, Oneida, Onondaga, Cayuga and Seneca—of the Iroquois with the British, New France and their Indigenous allies—Huron, Algonquins, Montagnais and Abenaki. Prior to these treaties, the Iroquois had no access to the fur trade between the French and their Indigenous allies near the Great Lakes Region. As a result, they initiated trade alliances, first with Dutch and then with British traders. Later, this trade alliance became a military alliance between the British and the Iroquois and they fought together against the French forces in the colonial wars.[149] With British powers behind them, the Iroquois attained control of the fur trade and by the end of seventeenth century, there was unrest between the Iroquois and other native allies with the French. To end the native tribal wars, the Iroquois signed the Treaty of 'Great Peace', which was also known as the Montreal Treaty with France's native allies. The Iroquois also signed the *Treaty of Albany* with the British Crown, under which they ensured their sovereignty around vast tracks of land near the Great Lakes and ensured their hunting rights over that area. By these treaties, the Iroquois managed to secure peace by ending the war with New France and its native allies and gained recognition from the British, French and their native allies.[150]

During the early years of British colonisation, the 'Peace and Friendship' treaties were signed between Indigenous peoples and the Crown to secure military and trade alliance. Notably, by the *Treaty of Utrecht*—signed between France and England—in 1713, the French ceded the North American territory of Hudson Bay, Newfoundland and Acadia to Great Britain. Even though Indigenous peoples had nothing to do with this treaty, it was devastating news for Indigenous Nations such as the Mi'kmaq, Maliseet and Acadians, because the British claimed sovereignty over their lands, even though they had never ceded their lands to the French by any treaty or agreement.[151] These Indigenous Nations never recognised the *Treaty of Utrecht* nor the sovereignty of British King and this conflicting situation lasted until the Seven Years War.

While the British Crown extended its territory, it had constant conflicts with the French and their Indigenous allies. To break the alliances between Indigenous Nations and the French and to calm down Indigenous hostility, the British concluded a series of peace and friendship treaties between 1725 to 1779 with Indigenous Nations (Mi'kmaq and Maliseet).[152] These treaties did not relate to land cession but to peace and assurance to the Indigenous Nations that they had uninterrupted

[149] 'A History of Treaty-Making in Canada' (n 144).
[150] J A Brandao and William A Starna, 'The Treaties of 1701: A Triumph of Iroquois Diplomacy' (1996) 43(2) *Ethnohistory* 209, 228-32.
[151] W Stewart Wallace (ed), *The Encyclopedia of Canada* (University Associates of Canada, Toronto, 1948) Vol-VI, 224; 'Treaty of Utrecht, Section XV, April 11, 1713' *Danilenpaul* (Web Page) <http://www.danielnpaul.com/TreatyOfUtrecht-1713.html>.
[152] 'A History of Treaty-Making in Canada' (n 144).

rights to observe their traditions and religious practices.[153] To gain support from the Iroquois Confederacy, the British created the Indian Department in 1755, with the mandate to stop colonial fraud and abuses of Indigenous peoples and their lands.[154] In the meantime, the Seven Year War began in 1756 between the British and the French and by 1760, the French had lost all of its territories except Montreal.[155] In 1760, the Indigenous allies of France concluded the *Treaty of Swegatchy* and the Huron-Wendate nation concluded the *Murray Treaty* with the British forces, which brought to an end the 150-year relationship between France and Indigenous peoples.[156] During the last stages of the Seven Years War, the Indigenous Nations remained neutral and in 1763, France lost the war. Following the war, the Indigenous and the British relationship was regulated by the *Royal Proclamation* of 1763. The *Royal Proclamation* was drafted by the colonial power and there was confusion about Indigenous peoples' autonomy and jurisdiction. [157] Subsequently, the *Treaty of Niagara 1764* was signed between 24 First Nations and the representative of the Crown, in which the terms of the *Royal Proclamation* were clarified and the nation-to-nation relationship was renewed with the understanding that no nation gave up their sovereignty.[158] The *Treaty of Niagara* reinforced that only the Crown could deal with the Indigenous peoples regarding their land which is consistent with the pre-emption element of Doctrine.[159] The *Royal Proclamation* and *Treaty of Niagara* set the foundation for future treaties between Indigenous peoples and the Crown.

3.3.2.1 The *Royal Proclamation* of 1763

The *Royal Proclamation* of 1763 ('the Proclamation' also known as 'the Indians' Magna Carta') was adopted to deal with the situation arising after the end of Seven Years War and the cession of the French Colony to the British Crown.[160] The Proclamation covered part of North America, including 13 British colonies and the colony of New France. The Proclamation's distinctive

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[153] Ibid.
[154] Ibid.
[155] 'Treaties of Peace and Neutrality (1701-1760)' *Indian and Northern Affairs Canada* (Web Page, 4 June 2013), <https://www.aadnc-aandc.gc.ca/eng/1360866174787/1360866233050>.
[156] Ibid.
[157] John Borrows, 'Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government' in Michael Asch (ed), *Aboriginal and Treaty Rights in Canada* (UBC Press, Vancouver 1997) 155, 161.
[158] Ibid; The Treaty of Niagara was attended by about twenty thousand chiefs from 24 nations (Mohawks, Tuscaroras, Cayugaes, Coghnawageys, Nanticokes, Mohicanders, Nipissengs, Oneidaes, Onondagaes, Senecas, Ganughsadageys, Canoys, Algonkins, Chippawaes, Menomineys, Outagamies (Fox), Chirstineaux (Cree), Toughkamiwons, Ottawaes, Sakis, Puans, Hurons, Reynards).
[159] See Borrows (n 157) 161-165.
[160] Brian Slattery, 'The Royal Proclamation of 1763 and the Aboriginal Constitution' in Terry Fenge and Jim Aldridge (eds) *Keeping Promises: The Royal Proclamation of 1763, Aboriginal Rights and Treaties in Canada* (McGill-Queen's University Press, 2015) 16; Brian Slattery, 'The Royal Proclamation of 1763: Roots and Branches' (Conference Paper, LCAC Creating Canada Symposium, 7 October 2013) <https://www.landclaimscoalition.ca/assets/Brian_Slattery.pdf>; J R Miller, 'The Royal Proclamation- "the Indians' Magna Carta"' *Active History* (web Page, 30 September 2013) <http://activehistory.ca/2013/09/the-royal-proclamation-the-indians-magna-carta/>.

features included the creation of several colonies, set boundaries, allotment of land grants to disbanded soldiers and land rights for Indigenous peoples. It was ingenious for the British Crown to include Indigenous peoples' rights in the Proclamation because the French used elements of the Doctrine such as first discovery, terra nullius, civilisation, Christianity and conquest to establish permanent settlements, although they never enacted any law that bound Indigenous peoples, whereas the British enacted the Proclamation to legally validate their dominance over the First Nations. According to Monk J in *Connolly v Woolrich*:[161]

> Neither the French Government, nor any of its colonists or their trading associations, ever attempted, during an intercourse of over two hundred years, to subvert or modify the laws and usage of the aboriginal tribes, except where they had established colonies and permanent settlements and, then only by persuasion.[162]

The relationships between Indigenous peoples and the settlers were always complex. These complex relationships and land rights of Indigenous peoples were defined in the final part of Royal Proclamation. It can be concluded that, by including Indigenous peoples' land rights and their self-government, the British Crown avoided many further conflicts. It actually acknowledged Indigenous peoples limited sovereign and commercial rights—Indigenous peoples were thought to lose their sovereignty and commercial rights after the acquisition of sovereignty by the British—to ensure its acquisition of sovereignty, By ensuring absolute sovereignty of the Crown, the Proclamation laid down rules for Aboriginal land rights and self-government:

> [W]hereas it is just and reasonable, and essential to our interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with who We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not have been ceded to or purchased by Us, are reserved to them. or any of them, as their Hunting Grounds—We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure that no Governor or Commander in Chief in any of our Colonies … do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments.[163]

The Proclamation emphasised that it was 'essential to our interest and Security of our Colonies' in making the relationship statement with Indigenous peoples. It was also evident from the wording of the Proclamation that the Crown asserted its dominant power and strength. The

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[161] (1867) 17 RJRQ 75 (Quebec Superior Court).
[162] Slattery, 'The Royal Proclamation of 1763: Roots and Branches' (n 160) 3.
[163] 'The Royal Proclamation' *James Smith Cree Nation* (Web Page) <http://www.jamessmithcreenation.com/downloads/ROYAL%20PROCLAMATION%201763.pdf>; see also Slattery, 'The Royal Proclamation of 1763 and the Aboriginal Constitution' (n 152) 23.

Proclamation was an imperial instrument, which was designed to fulfil the ambitions of the British Crown.[164] Like a sovereign nation, the Crown promised Indigenous peoples to live under its protection and let them enjoy their inherent autonomous laws and customs in their own territories. The Proclamation recognised that Indigenous peoples would enjoy legal rights and possession of their lands unless 'ceded to or purchased' by the Crown. It also required private settlers to remove themselves from all the lands that were not ceded or purchased by the Crown.

> We do Further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described or upon any other Lands which, not have been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.[165]

The Proclamation also encompassed the pre-emption element of the Discovery—first discovering country gets sole right to buy or make agreements with the Indigenous peoples—under which the Crown laid down the ground rules for transfer of land between Indigenous peoples and the settlers. The Proclamation wanted to reserve vast areas of lands for the 'use of the said Indians' under the Crown's sovereignty and forbid its subjects to make any 'Purchase or Settlement' without its permission.[166] Under the pre-emption principle, only the Crown was allowed to purchase land or make treaty with the Indigenous peoples. According to the Proclamation:

> We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved without our special leave and Licence for that Purpose first obtained.[167]

The Proclamation acknowledged that there were historic frauds and abuses regarding the purchase of Indigenous lands, which prejudiced Indigenous peoples and the Crown. As a result, Indigenous peoples had lack of trust about the processes followed by the Crown. To regain their trust, the Proclamation made provisions that allowed Indigenous peoples to make decisions regarding the transfer of their traditional lands. It also made provisions for land transfers between Indigenous peoples and the Crown. By prohibiting private persons from purchasing Indian lands, the Proclamation ensured there would be a process of treaty-making, but only between representatives of the Crown and Indigenous peoples. To stop abuses of the process, it was also

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[164] Slattery, 'The Royal Proclamation of 1763: Roots and Branches' (n 160) 2.
[165] 'The Royal Proclamation' (n 163).
[166] 'The Royal Proclamation' (n 163). The Proclamation also states: 'We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay company, as also all the Lands and Territories lying to the Westward of the Source of the Rivers which fall into the sea from the West and North West as aforesaid'.
[167] 'The Royal Proclamation' (n 163).

required that the decision to dispose of Indigenous lands be made at public meetings or assembly of Indigenous peoples. The Proclamation provided that:

> Whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests and to the great Dissatisfaction of the said Indians: In order, therefore, to prevent such Irregularities for the future and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do with the Advice of our Privy Council strictly enjoin and require that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians … if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians.[168]

The provision for a public meeting and assembly was further clarified by many 'directions and instructions' to the colonial officials.[169] The *Dorchester Regulation of 1794* was one of those regulations, which administered the land acquisition policy during early nineteenth century. Under this regulation, colonial officers were to ensure that land transfers were carried out in ceremonies 'according to the ancient usages and customs of the Indians'.[170]

The Proclamation prohibited private settlers from making agreements with Indigenous peoples regarding Indigenous lands, although it did not prohibit them from conducting trade and business with Indigenous peoples. It provided that 'the Trade with the said Indians shall be free and open to all our Subjects whatever, provided that every Person who may incline to Trade with the said Indians do take out a Licence'.[171] It was clear that the Crown wanted Indigenous peoples to participate and play a significant role in the settlers' economy. The Royal Proclamation was drafted to maintain perpetual control and dominance of the British Crown over North America. In contrast, Indigenous peoples interpreted the Proclamation as an acknowledgement of their inherent and sovereign rights over their lands.[172]

Following the Proclamation, a process was established to acquire Indigenous land through treaty negotiations, although it was the understanding of Indigenous peoples that their territories would remain free from European settlement.[173] However, the settlers outnumbered Indigenous peoples and the settlers sought more land for economic expansions and resource development. As a

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[168] Ibid.
[169] James Morrison, 'The Robinson Treaties of 1850: A Case Study' (Report, Prepared for The Royal Commission of Aboriginal Peoples, 31 March 1993) [7.1].
[170] Ibid; the *Dorchester Regulations 1794* art 3.
[171] 'The Royal Proclamation' (n 163).
[172] Lindberg (n 117) 105.
[173] Brenda L Gunn, 'Exploring the International Character of Treaties 1-11 and the Legal Consequences' (Paper No 5, Canada in International Law at 150 and Beyond, Centre for International Governance Innovation, 2018) 2.

result, the Crown negotiated treaties with Indigenous peoples to expand its territories and in return established reserves, paid cash and provided services to the treaty parties.[174] It was a constant struggle for the Indigenous Nations to maintain their control over their ancestral lands. This struggle received another massive blow during the US War of Independence in 1783. Many Indigenous allies of the British were dispossessed from their land, including the Six Nations of the Iroquois confederacy.[175] The Indigenous peoples signed a series of treaties to surrender their lands so that the non-Indigenous British loyalists could be resettled and Indigenous peoples were confined to two reserves near the Bay of Quinte and along Grand River.[176] Subsequent treaties were signed until the creation of the Canadian Confederation in 1867.[177] After 1867, the Crown had exclusive legislative authority over 'Indians and Lands reserved for the Indians',[178] and it shifted its tactic in treaty-making to land grabbing rather than establishing peace and friendship.[179] The settlers numbers increased at an alarming rate. For example, in 1856 the Indigenous population of British Columbia was 62,000 and the non-Indigenous population was only 1000, but within 50 years, the Indigenous population was outnumbered by the non-Indigenous population.[180] According to the 1901 Canada census, the Indigenous population was reduced to 25,488 and non-Indigenous population had increased to 153,169.[181] The increasing non-Indigenous population required further land for settlements, agriculture, social facilities and resource development, so the government signed a series of land transfer treaties with Indigenous Nations. The Eleven Numbered Treaties were one of those treaty series, signed after the formation of the Canadian Confederation, under which the government took control of large tracts of Indigenous land in the belief that Indigenous peoples would maintain peaceful relations with the government and surrender the land and gain some usufructuary rights—occupancy, fishing and hunting rights—over the land and water. These usufructuary rights represent native title element of the Doctrine—Indigenous peoples lost their full property rights and only retained occupancy and use rights.

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[174] Ibid 3.
[175] 'A History of Treaty-Making in Canada' (n 144).
[176] Ibid.
[177] Under Canadian Confederation three colonies were reformed under four provinces (Ontario, Quebec, New Brunswick and Nova Scotia), other provinces entered the Confederation in later dates.
[178] *Constitution Act 1867* s 91(24).
[179] During the same period the Douglas Treaties of 1850-1854 (total 14 treaties) were signed by Colonial Governor James Douglas to acquire Coastal Salish lands for settlement and in return gave them payments, goods and assurance about continuing rights to hunt and fish. 'A History of Treaty-Making in Canada' (n 144); see also Gunn (n 173) 3.
[180] John Sutton Lutz, *Makuk: A New History of Aboriginal-White Relations* (UBC Press, 2008) 166; see also John Lutz, 'After the fur trade: the aboriginal labouring class of British Columbia 1849-1890' (1992) *Journal of the Canadian Historical Association* 69, 71-3.
[181] Lutz, '*Makuk: A New History*' (n 180) 166.

3.3.2.2 The Eleven Numbered Treaties

Canada was created by the *British North America Act 1867*, which subordinated Canada to the British Parliament and all treaties with Indigenous Nations were concluded in the Crown's name because Canada had no authority to enter into a treaty until the *Statute of Westminster of 1931*.[182] The provisions of the *British North America Act* were consistent with the Doctrine, under which the Crown alone claimed the legal authority over land occupied by Indigenous peoples and assumed legislative and administrative authority of Indigenous peoples. The Eleven Numbered Treaties were signed by the Crown to gain almost all Indigenous lands in Canada, while in return Indigenous peoples received land reserves, annual allowances, Westernised facilities and, in some cases, retained their customary rights of hunting and fishing in their own territories.

The Eleven Numbered Treaties were based on the Robinson Treaties of 1850 (now known as Robinson-Huron and Robinson Superior Treaties).[183] One of the special features of the Robinson Treaties was to negotiate the transfer of Indigenous lands in return for 'annuities, reserves for the Indians and liberty to hunt and fish on the unconceded domain of the Crown', and this feature was incorporated in the post-confederation treaties.[184] However, it is also true that the Robinson Treaties were not fair treaties because they encouraged mineral exploration and land development on the shores of Lakes Huron and Superior, which resulted in conflicts between the natives and the settlers.[185] The Eleven Numbered Treaties were signed between 1871 and 1921 between Indigenous peoples and the Crown, which covered northern and western Canada, including the provinces of Manitoba, Saskatchewan and Alberta and parts of Ontario, British Columbia and the Northwest Territories.[186]

The Numbered Treaties achieved different goals for the Crown. In a nutshell, the treaties were concluded to bring Indigenous peoples within the Canadian legal system, to civilise them through Western education and assimilation, acquire their land for explorations of natural resources and agriculture and to free enormous tracts of land for settlement.[187] While the treaties had land transfer and allocation clauses, the treaties numbered 1 to 7 (1871–1877) were used by the Department of Indian Affairs to increase non-Aboriginal settlement in the South, increase agriculture, construct a railway between British Columbia and Ontario and implement assimilation policies in the northwest. These treaties gave Canada territorial jurisdiction and

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[182] Venne (n 26) 45.
[183] Morrison (n 169) 2 [2]. Robinson Treaties were named after Commissioner William Benjamin Robinson.
[184] Ibid 2 [2.1].
[185] Ibid 2-3 [2.2].
[186] Gunn (n 173) 3.
[187] Gretchen Albers, 'Treaties 1 and 2' *the Canadian Encyclopedia* (Web Page, 12 November 2015) <https://thecanadianencyclopedia.ca/en/article/treaties-1-and-2>; see also J Melling, 'Recent Developments in Official Policy towards Canadian Indians and Eskimos' (1966) 7(4) *Race* 379.

sovereign power over the lands on the northern border of the USA. The treaties numbered 8 to 11 (1899–1921) were signed to gain access to valuable natural resources in northern Canada.[188] In Miller's view, the numbered treaties were 'land surrender agreements in which the Indians gave up their claims to occupancy and use in return for gifts and annual payments'.[189]

It is evident from the first seven treaties that civilisation through assimilation of Indigenous peoples was an integral part of government policy at that time. Under the Doctrine, the European nations used 'civilisation' to infiltrate Indigenous societies and treaties to acquire their lands by establishing Indian reserves, providing security, small land grants, money and other facilities. Under Treaties 1 and 2, the Crown wanted 'to open up to settlement and immigration a tract of country' in return for yearly allowances.[190] Two years later, Treaty 3 was signed to gain access to 55,000 square miles of Indigenous land, for which they received money and retained their hunting and fishing rights.[191] This treaty had provisions for the establishment of schools and restricted 'intoxicating liquor' within the boundary of the reserves.[192] Further, Indigenous peoples were to surrender 'tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada'.[193] In the same way, Treaties 4, 5, 6 and 7 compelled the Indigenous peoples to surrender their lands for settlement and immigration.[194] It is evident from the first seven treaties that it was a planned invasion of Indigenous land by the Crown.

Treaties numbered 8 to 11 were concluded by the Crown to gain access to lands for mining in the north of Canada, which were also known as Northern Treaties. Treaty 8 of 1899 required Indigenous peoples to 'cede, release, surrender and yield … all their rights, title and privileges whatsoever' of their lands for '[s]ettlement, mining, lumbering, trading or other purposes'.[195] Signed in 1905, Treaty 9 had the same provisions with the goal of acquiring lands in Ontario North (Cree and Ojibwa people) for natural resource development. Treaty 10 was the third of the Northern Treaties signed in 1906, which covered approximately an area of 85,800 square miles

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[188] 'Eleven Numbered Treaties (1871-1921)' *Indigenous and Northern Affairs Canada* (Web Page, 4 June 2013) <https://www.aadnc-aandc.gc.ca/eng/1360948213124/1360948312708>.
[189] J R Miller, *Lethal Legacy: Current Native Controversies in Canada* (McClelland & Stewart, Toronto, 2004) 164-5.
[190] 'Treaties 1 and 2 Between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions' *Treaty Relation Commission of Manitoba* (Web Page) <http://www.trcm.ca/wp-content/uploads/PDFsTreaties/Treaties%201%20and%202%20text.pdf>; Both treaties were signed in August 1871.
[191] 'Treaty 3 Between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle of the Lake of the Wood with Adhesions' *Treaty Relation Commission of Manitoba* (Web Page) <http://www.trcm.ca/wp-content/uploads/PDFsTreaties/Treaty%203%20Text%20and%20Adhesions.pdf>.
[192] Ibid.
[193] Ibid.
[194] Richard Bartlett, 'The Different Approach to Native Title in Canada' (2001) 9(1) *Australian Law Librarian* 32, 34.
[195] 'Treaty Texts - Treaty No. 8' *Indigenous and Northern Affairs Canada* (Web Page, 30 August 2013), <https://www.aadnc-aandc.gc.ca/eng/1100100028813/1100100028853>.

in the province of Saskatchewan and Alberta.[196] Of the many objectives of Treaty 10, the most important was the 'future development and settlement' of Saskatchewan.[197] The final treaty of the Numbered Treaties was Treaty 11. Signed in 1921, Treaty 11 covered more than 950,000 square kilometres of Yukon, Northwest Territories and Nunavut.[198] This treaty was signed after the Geological Survey of Canada discovered mineral (i.e., oil and gas) potential in the Mackenzie region and like other previous numbered treaties, Indigenous peoples were promised reserves, money, clothing, tools and other daily supplies.[199] The Northern Treaties were concluded by the government to meet non-Indigenous priorities by opening up areas for future natural resource development and to accommodate increased immigration to Canada.

Elements of the Doctrine such as civilisation, native title (e.g., only occupancy, fishing and hunting rights), pre-emption (i.e., government took control of the land), limited sovereignty and conquest played an integral part in these treaties. The Eleven Numbered Treaties ceded almost all Indigenous land to the Crown and in 1923, the historic final land cession treaties were signed. The Williams Treaties transferred 20,000 square kilometres of Indigenous land in Southcentral Ontario to the Crown, for which the Indigenous peoples received money and assurances that the they would retain their customary rights to hunt and fish in the territory. However, questions remained about the interpretation and implementation of these treaties. The Indigenous Nations (i.e., Chippewa and Mississauga peoples) believed that the terms of the treaty maintained their customary rights to hunt and fish in the territory, but the government thought otherwise, which resulted in many court cases.[200] In March 2017, seven Williams Treaties First Nations and the government of Ontario decided to reconcile and commence a formal negotiations process to resolve the treaty-related disputes.[201] The governments of Canada and Ontario recognised the pre-existing rights of Williams Treaties First Nations to hunt, trap, fish and congregate for social and ceremonial purposes.[202]

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[196] Treaty 10 territory included area east of Treaty Eight and to the north of Treaties Five, Six and the addition to Treaty. Roger Duhamel (ed), *Treaty No. 10 and Reports of Commissioners* (Queens Printers and Controller of Stationary, Ottawa, 1966) <http://www.otc.ca/public/uploads/resource_photo/Treaty10.pdf>.

[197] Kenneth S Coates and William R Morrison, *Treaty Research Report - Treaty No. 10 (1906*) (Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986) <https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/tre10_1100100028871_eng.pdf>.

[198] Alex Tesar, 'Treaty 11' *The Canadian Encyclopaedia* (Web Page, 4 October 2016), <https://www.thecanadianencyclopedia.ca/en/article/treaty-11>.

[199] Kenneth S Coates and William R Morrison, *Treaty Research Report - Treaty No. 11 (1921)* (Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986).

[200] *Alderville Indian Band v. Her Majesty the Queen,* [2015] FC 920 (CanLII)**;** *R v Howard* [1994] 2 SCR 299.

[201] 'Canada, Ontario and Williams Treaties First Nations Take First Step Towards a Negotiation Resolution of Alderville Litigation' (Press Release, Crown-Indigenous Relations and Northern Affairs Canada, 13 September 2018).

[202] Ibid.

3.3.2.3 Comprehensive Land Claim Agreements ('CLCAs')

Historic treaties only covered portions of Indigenous lands in Canada. CLCAs or modern treaties were concluded to deal with the lands over which Indigenous peoples had claims but were not addressed through historic treaties. The CLCA process was established after Aboriginal title (in common law) was recognised in the *Calder v BC Attorney-General*.[203] In 1973, the federal government issued the Aboriginal Claims policy, under which the government demonstrated its willingness to negotiate with Indigenous peoples when they had traditional interests on the land.[204] It was in the interest of the government to clarify the status of non-treaty Indigenous peoples lands through CLCAs, to give the government control over remaining Indigenous lands, and in exchange Indigenous peoples would receive Aboriginal title (otherwise known as native title) and limited sovereignty and self-government. These agreements provided substantial monetary benefits to be used for social and economic development.[205] First through treaties and then through CLCAs, Indigenous lands were transferred to non-Indigenous hands.

The first CLCA was signed in 1975 between the governments of Quebec and Canada, the James Bay Crees and the Inuit of Northern Quebec, which covered almost 410,000 square miles of territory.[206] In 1981, the government defined its Comprehensive Claims Policy through a publication entitled 'In all fairness: A native claims policy: Comprehensive Claims'.[207] The introduction of s 35 of the *Constitution 1982* also affirmed Aboriginal treaty rights and strengthened land claims agreements. In 1986, amendments were made to the Comprehensive Land Claims Policy to ensure 'greater flexibility in land tenure and better definition of subjects for negotiation'. [208] Subsequently, through the Inherent Right Policy adopted in 1995, the government decided that the self-government arrangements may be simultaneously negotiated as a part of CLCAs and in January 1998, the government affirmed that historic and contemporary treaties would be the foundation of the relationships between Aboriginal peoples and the government.[209] In January 2015, Canada had signed 26 comprehensive land claims (18 include provisions of self-government) and 3 self-government agreements with 95 different Indigenous

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[203] [1973] SCR 313, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/5113/index.do>.
[204] Bartlett, 'The Different Approach' (n 194) 35. The 1973 Claims policy had Comprehensive and Specific claims processes. Specific claims process dealt with historic grievances arising from historic treaties and settlements reached via negotiations or binding decision of Specific Claims Tribunal.
[205] Bartlett, 'The Different Approach' (n 194) 40-41.
[206]Government of Québec, *James Bay and Northern Québec Agreement and complementary Agreements* (Les Publication, Québec, 1998)
[207] Bartlett, 'The Different Approach' (n 194) 35; *In All Fairness: A Native Claims Policy: Comprehensive Claims* (Indian and Northern Affairs Canada, Ottawa, 1981).
[208] 'Comprehensive Land Claims Policy- 1973' *ATNS* (Web Page, 14 September 2006) <https://www.atns.net.au/agreement.asp?EntityID=2257>; '*In All Fairness*' (n 199).
[209] Bartlett, 'The Different Approach' (n 194) 35-6. *Gathering Strength: Canada's Aboriginal Action Plan* (Department of Indian Affairs and Northern Development, Ottawa, 1997).

groups, which cover approximately 40 per cent of Canada and an approximate further 100 similar agreements are on the table for negotiation.[210]

While there are 'benefits' of CLCA, many believe these agreements work as 'mechanisms for removing Indigenous peoples from their lands so that the lands can be exploited by non-Indigenous peoples'.[211] Not only that, these agreements also deprive future generations from enjoying benefits from their ancestral lands by extinguishing 'Indigenous peoples interests in their lands in exchange for a lesser interest over a fraction of their territory'.[212] It is evident from the Nisga'a Final Agreement—large tracts of traditional land were surrendered to the government and according to Nisga'a hereditary chief James Robinson (also known as Sganisim Sinngaut or Chief Mountain) almost 92 percent hereditary Nisga'a land were surrendered under this agreement.[213] By allowing self-determination and self-government on a small portion of land the government is capturing large tracts of land so that the land could be used for future development projects such as the Site-C dam. Another example is the Innu Tshash Petapen (New Dawn) Agreement of 2008. According to Colin Samson the intention of the agreement is 'not to recognise rights or to reconcile in the true sense of those words; its objective is to dispossess' and the dispossession operates through (1) undemocratic social and political contexts in which agreement is elicited, (2) depleting Aboriginal rights of Indigenous party, (3) depleting Indigenous lands, and (4) influencing the character and outcomes of the process by the creation of wealth and debt.[214] In other words, these agreements not just give limited sovereign and commercial rights over small portion of land but also extinguish Aboriginal rights over large tracts of land.

3.3.2.4 International Recognition of Indigenous Treaties

The application of the Doctrine diminished Indigenous sovereignty and imperilled them under the sovereign power of colonial government. As Indigenous peoples are under the territorial jurisdiction of nation-states, international law does not consider Indigenous peoples to be

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[210] James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, on the Situation of Indigenous Peoples in Canada*, UN Doc A/HRC/27/52/Add.2 (4 July 2014) 15-16 [59]; Keith Crowe, 'Comprehensive Land Claims: Modern Treaties' *The Canadian Encyclopedia* (Web Page, 11 July 2019), <https://www.thecanadianencyclopedia.ca/en/article/comprehensive-land-claims-modern-treaties>.

[211] Bruce McIvor, *First Peoples Law: Essays on Canadian Law and Decolonization* (First Peoples Law Corporation, Canada, 2018) 3rd ed, 141.

[212] Ibid 142.

[213] Mark Hume, 'Nisga'a Dissidents Challenge Landmark Treaty' *The Globe and Mail* (Online at 4 October 2010) <https://www.theglobeandmail.com/news/british-columbia/nisgaa-dissidents-challenge-landmark-treaty/article4389898/>.

[214] Colin Samson, 'Canada's Strategy of Dispossession: Aboriginal Land and Rights Cessions in Comprehensive Land Claims' (2016) 31(1) *Canadian Journal of Law & Society* 87, 90-99. This article was also published online by Cambridge University Press in 25 April 2016.

sovereign states.[215] As a result, the treaties between Indigenous peoples and the British Crown were never considered to be international treaties. According to international legal doctrine, a treaty made between a state and a tribe (represented by a chief) cannot be considered to be an international treaty and can have no international legal consequences.[216] A UNESCO report indicated that the legal establishment and scholarly literature do not consider treaties signed by Indigenous peoples to be international treaties because: first, 'Indigenous peoples are not peoples according to the meaning of the term in international law'; second, 'treaties involving Indigenous peoples are not treaties in the present conventional sense of the term'; and third, 'those legal instruments have simply been superseded by the realities of life as reflected in the domestic legislation of States'.[217] The report also referred to the specialised literature, state administrative and domestic courts decisions that considered treaties involving Indigenous peoples as a domestic issue, which were 'implemented and adjudicated via existing internal mechanisms, such as the courts and federal (and even local) authorities'.[218] Many Indigenous communities were opposed to this view because it worked against their inherent rights to self-determination. They argued that 'treaties concluded with European powers or their territorial successors overseas are, above all, treaties of peace and friendship, destined to organize coexistence'.[219]

The provisions of Indian treaties do not allow the parties to access international courts to adjudicate on claims arising out of the treaty, so domestic courts are the mechanism that adjudicates on Indian treaty-based rights.[220] Domestic court decisions also support the view that Indigenous treaties are not international treaties under International law. In the case of *Simon v The Queen*,[221] the Supreme Court of Canada found Indian treaties to be unique and cannot be judged under other developed theories of agreements, like international treaties.[222] According to Dickson CJ:

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[215] H Steinberger, 'Sovereignty' in R Bernhardt (ed), *Encyclopedia for Public International Law* (Max Planck Institute for Comparative Public Law and International Law, Amsterdam, 2000) Vol IV. Under international law, Sovereignty denotes the basic status of a state that is not subject, within its territorial jurisdiction, to the governmental, executive, legislative, or judicial jurisdiction of a foreign state or foreign law.
[216] Arnold Duncan McNair, *The Law of Treaties* (Clarendon Press, Oxford, UK, 1961) 52.
[217] Miguel Alfonso Martínez, Special Rapporteur, *Human Rights of Indigenous Peoples: Study on treaties, agreements and other constructive arrangements between States and indigenous populations*, UN Doc E/CN.4/Sub.2/1999/20 (22 June 1999) [115], <https://static1.squarespace.com/static/55229e9be4b034f30e89bc6e/t/5550f032e4b08ed65a25360d/1431367730158/Treaty+Study.pdf>.
[218] Ibid [116].
[219] Ibid [117].
[220] David Sloss, *The Role of Domestic Courts in Treaty Enforcement: A Comparative Analysis* (Cambridge University Press, 2009) 2.
[221] [1985] 2 SCR 387 ('*Simon*').
[222] Ibid 404. Diana Ginn 'Indian Hunting Rights: *Dick v. R.*, *Jack* and *Charlie v. R. and Simon v. R.*' (1986) 31 *McGill Law Journal* 527, 540.

> While it may be helpful in some instances to analogize the principles of international treaty law to Indian treaties, these principles are not determinative. An Indian treaty is unique; an agreement *sui generis* which is neither created nor terminated according to the rules of international law.[223]

However, international organisations and legal regimes have recently displayed strong interest regarding treaties between states and Indigenous peoples, especially the UNDRIP, which recognised that the rights of Indigenous peoples affirmed under the Indigenous treaties, agreements and other constructive arrangements are 'in some situations, matter of international concern, interest, responsibility and character'.[224] The *American Declaration on the Rights of Indigenous Peoples* recognised that the 'Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors'.[225] Further, according to art XXIV (2) of the *American Declaration on the Rights of Indigenous Peoples*, if states or Indigenous peoples fail to resolve disputes regarding treaties, agreements or other constructive arrangements, they should submit their complaints to regional and international 'competent bodies'. These are positive developments in a historical context in which treaties formed in the USA and Canada served to implement elements of the Doctrine. Nevertheless, the existence of these treaties serves as a reminder of the sovereignty that has never been ceded. In Australia, where no such treaties were formed resulted in a situation whereby Indigenous peoples' lands could be stolen without any legal recognition of their original ownership of the land.

3.4 Australia—Historical Overview of the Laws and Policies in Australia Impacting on Indigenous Peoples

Dutchman Willem Janszoon was the first European to set foot on the land now known as Australia in 1606 and was the first European to have contact with Aboriginal people.[226] He was followed by other Dutchmen—Dirk Hartog (1616) and Abel Tasman (1642)—who named the newfound land 'New Holland'.[227] Captain James Cook 'discovered' Australia for Great Britain in 1770, but for the purposes of settlement, the First Fleet arrived in 1788 under the leadership

[223] *Simon* (n 221) 404; Ginn (n 222) 540.
[224] UNDRIP preamble.
[225] *American Declaration on the Rights of Indigenous Peoples*, adopted at the plenary session, 15 June 2016, AG/RES 2888 (XLVI-O/16) (2016), art XXIV (1).
[226] Andre M N Renzaho, 'Migration and the healthy migrant effect in Australia: current knowledge, gaps and opportunity for future research' in Andre M N Renzaho (ed), *Globalisation, Migration and Health: Challenges and Opportunities* (Imperial College Press, 2016) 365; '1600s-1700s: The Dutch, the West and Van Diemen's Land' *Migration Heritage Centre, NSW* (Web Page) <www.migrationheritage.nsw.gov.au/exhibition/objectsthroughtime-history/1600s-1700s/index.html>; 'Indigenous Australian Timeline- 1500 to 1900' *Australian Museum* (online 15 Nov 2017) <https://ausralianmuseum.net.au/indigenous-australia-timeline-1500-to-1900>.
[227] Larissa Behrendt, 'The Doctrine of Discovery in Australia' in Robert J Miller et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2012) 171; '1600s-1700s: The Dutch, the West and Van Diemen's Land' (n 226); Renzaho (n 226) 365.

of Captain Arthur Phillip. King George III instructed Captain Phillip to establish settlement after securing themselves and then proceed to cultivate the land. The king also instructed Captain Phillip:

> [T]o endeavour, by every possible means, to open an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them. And if any of our subject shall wantonly destroy them, or give them any unnecessary interruption in the exercise of their several occupations, it is our will and pleasure that you do cause such offenders to be brought to punishment according to the degree of the offence.[228]

It is notable how in this passage, the king was not instructing Phillip to obtain 'consent of the natives' as had been Cook's instructions in 1770, when he was instructed to obtain 'consent of the natives to take possession of convenient situations in the country in the name of king'.[229] However, history shows they never obtained consent from the natives and Australia is yet to enter into treaty with Indigenous peoples.[230] As the law developed over time, it became evident that Australia would come to be treated as terra nullius, which meant 'nobody's land' or 'land belongs to no one'.[231] Terra nullius is the most extreme element of the Doctrine because it legitimises the dispossession of Indigenous lands by invading forces, with the effect of denying Indigenous peoples' rights over their land and culture. Similar to the USA, Canada and New Zealand, the British king wanted to settle the colony in Australia through treaty, but the first settlers failed to comply with the instructions of the king to conciliate with the natives.[232] As in North America, colonisation in Australia was resisted by Indigenous peoples, but unlike in North America the conflict was not resolved by treaties.[233] Conflict between the settlers and the natives began almost immediately after the arrival of the First Fleet. As early as 29 May 1788, two convicts were killed by Indigenous people while the settlers were exploring new land for settlement.[234] As history unfolded, Indigenous peoples would suffer the gravest losses. In these respects the history of colonisation of Australia was not much unlike in the USA and Canada. It

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[228] McRae et al, *Indigenous Legal Issues: Commentary and Materials* (Lawbook Co, 4th ed, 2009) 18; George B Barton, *History of New South Wales from the Records* (Charles Potter Government Printer, Sydney, 1889) Vol 1-Governor Phillips 1783-1789 <http://gutenberg.net.au/ebooks12/1204171h.html>.
[229] McRae et al (n 228) 17.
[230] Although in 1835, John Batman made a treaty with the Aboriginal peoples of Port Phillip Bay, Governor Bourke did not recognise the treaty and declared it void. This was the only attempt by a colonist to make treaty with Indigenous peoples in Australia. See Section 3.4.2.1 below.
[231] Patricia Seed, 'Three Treaty Nations Compared: Economic and Political Consequences for Indigenous People in Canada, the United States, and New Zealand' in P W De-Pasquale (ed), *Natives and Settlers, now and then: Historical Issues and Current Perspective on Treaties and Land Claims in Canada* (University of Alberta Press, 2007) 28. The word 'terra nullius' comes from Roman Justinian era word 'res nullius', res nullius was used for determining ownership of hunted animals. 'Nullius' means 'of no one' and 'terra nullius' means 'land of no one'.
[232] See generally McRae (n 228) 18, 21.
[233] Ronald Sackville, 'Indigenous Peoples of Australia and the Constitution' (Speech, *New South Wales Schools State Convention, Parliament House, 18 November 2002).*
[234]'Indigenous Australian Timeline- 1500 to 1900' *Australian Museum* (Web Page, 12 September 2016) <https://ausralianmuseum.net.au/indigenous-australia-timeline-1500-to-1900>

was characterised by dispossession, genocide and discrimination, in which the law played a crucial part in the protection of the interests of the colonisers in their quest to settle and develop Indigenous lands.

3.4.1 The Legal Status of Indigenous Peoples—Early History

In Australia, the existence of Indigenous peoples was ignored, which resulted in the lands and resources belonging to Indigenous peoples being taken without legal repercussions. When Indigenous people resisted, the settlers forcefully took their lands, attacked and killed them, abducted women, pulled water holes, destroyed animals and captured lands and cleared them for agriculture or other purposes. British law did not provide any support or protection to the Indigenous peoples and Australia became a frontier of lawlessness. Although the colonial system regarded Australia as terra nullius—that is, as occupied by no one or occupied by Indigenous peoples who did not follow a European legal system—Indigenous peoples were subject to the judicial system mostly as victims of violence and killing.[235] Until the establishment of the Supreme Courts in New South Wales ('NSW') and Van Diemen's Land (Tasmania) in 1824, criminal courts were presided over by Judge Advocates who had multiple capacities and worked as magistrate, public prosecutor and judge.[236] In most cases, the settlers who killed or assaulted Indigenous peoples were acquitted because Indigenous peoples were not allowed to give evidence and the settlers claimed self-defence or provocation.

There were only four reported cases against the settlers in the first 25 years of settlement.[237] In the first case of *R v Millar* (1797), the Judge Advocate Atkins acquitted the defendants for the murder of native Tom Rowley for lack of evidence.[238] Atkins was the first colonist who gave reasoning for inadmissibility of Indigenous person's evidence. According to him, 'the evidence of persons not bound by any moral or religious tie can never be considered or construed as legal evidence'.[239] In his remark, it is evident that the Indigenous peoples were considered to be inferior because they were not Christians. Christianity is an element of the Doctrine that was prevalent at that time and played a vital role in later years when Indigenous children were taken from their parents. The Indigenous peoples were considered to be inferior savages, which legitimated the denial of justice towards them.[240] Judge Advocates were colonists and biased towards the settlers and never allowed Indigenous peoples to be witnesses. The Indigenous

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[235] *R v Murrell* [1836] NSWSupC 35; Seed (n 231) 29.
[236] Brent Salter, '"For Want of Evidence": Initial Impressions of Indigenous Exchanges with the First Colonial Courts of Australia' (2008) 27(2) *University of Tasmania Law Review* 145, 146.
[237] *R v Millar (1797) Sel Cas (Kercher) 147* ('*Millar*'); *R v Hewitt (1799) NSW Sel Cas (Kercher) 154*; *R v Powell (1799) NSW Sel Cas (Kercher) 209*; *R v Luttrell (1810) NSW Sel Cas (Kercher) 419*; Salter (n 236) 147.
[238] (1797) Sel Cas (Kercher) 147 ('*Millar*'). Salter (n 236) 147.
[239] Salter (n 236)148.
[240] Ibid.

peoples had no hope of justice from Judge Advocates like Ellis Bent, who considered Indigenous peoples to be 'ugly savages' and the 'lowest in the scale of human existence, many of them little superior to baboons, tormenting beggars and expert thieves'.[241] John Kirby was the first recorded European person to be convicted and executed in Australia for the murder of an Aboriginal native chief in 1820.[242] He was convicted based on the evidence of fellow European people, not Indigenous peoples, and was convicted as a gesture to the Indigenous peoples that he breached protocols of diplomacy by killing an Aboriginal chief.[243] However, it was more an exception than the rule to make examples of white settlers in this way.

3.4.2 The Legal Status of Indigenous Peoples from 1824 to the Early Twentieth Century

In the early years of colonisation, Indigenous peoples never challenged the colonial government in the Supreme Court to regain their sovereignty over the country, although the question of Indigenous law and government came into question in several criminal cases in the Supreme Court. There were some early Supreme Court cases in which, in the defence of accused Indigenous peoples, the jurisdiction of colonial courts and Indigenous peoples' legal status as British subjects were challenged. These challenges to the jurisdiction of the colonial courts represented a challenge to the sovereignty of the Crown. *R v Ballard* (1829, also known as Dirty Dick's case)[244] was the earliest case in which the jurisdiction of the Supreme Court was questioned in a matter in which both plaintiff and defendant were Aboriginal.[245] In this case, the Attorney-General sought direction from the Court as to whether the Supreme Court had jurisdiction over an Aboriginal who murdered another Aboriginal. However, according to Forbes CJ, 'I know no principle of municipal or national law, which shall subject the inhabitants of a newly found country, to the operation of the laws of the finders, in matters of dispute, injury, or aggression between themselves'[246] and decided that the parties were entitled to their own laws and that the Supreme Court had no jurisdiction over the matter. The other judge in this case was Dowling J, who supported Forbes CJ in the observation that:

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[241] Ibid 156-7.

[242] *R v Kirby* [1820] NSWSupC 11. Before reporting of this case, it was thought that Myall Creek massacre case was the first case where British settlers were convicted of murder, in this case for mass murder of 28 Aboriginal people mostly children, women and elderly (National Museum of Australia). There were two trials for this massacre. In the first case *R v Kilmeister (No. 1)* [1838], all eleven accused were found not guilty, but with the persuasion of Attorney General of New South Wales John Hubert Plunkett and Governor George Gipps there was another trial for this massacre. In the second trial *R v Kilmeister* (No. 2) [1838], seven out of eleven accused were tried (four remained at large) and found guilty of murder and were hanged in Victoria Barracks Gaol. The remaining four were never tired and remained at large. *R v Kilmeister* (No. 1) [1838] NSWSupC 105; *R v Kilmeister* (No. 2) [1838] NSWSupC 110.

[243] Bruce Kercher, *Decision of the Superior Courts of New South Wales, 1788-1899* (Division of Law, Macquarie University, 2000) <www.law.edu.au/research/colonial_case_law/nsw/cases/case_index/1820/r_v_kirbi/>.

[244] *R v Ballard* [1829] NSWSupC 26.

[245] Bruce Kercher, 'R v Ballard, R v Murrell and R v Bonjon' (1998) 3(3) *Australian Indigenous Law Reporter* 410 <http://www.austlii.edu.au/au/journals/AILR/1998/27.html>.

[246] Ibid.

> [U]ntil the aboriginal native of this Country shall consent, either actually or by implication, to the interposition of our laws in the administration of justice for acts committed by themselves upon themselves, I know of no reason human, or divine, which ought to justify us in interfering with their institutions even if such and interference were practicable.[247]

The outcome of this case may be explained by the fact that the accused was an Aboriginal person who had killed another Aboriginal person. It signified acceptance that Indigenous peoples had jurisdiction to resolve their own disputes. The situation would have been different if he had murdered a settler. Prior to this case, it was decided that the Supreme Court had jurisdiction over Indigenous defendants when the plaintiffs were European settlers. In the first year of the establishment of the Supreme Court (1824), Musquito and Black Jack were charged with aiding and abetting in the wilful murder of William Hollyoak, which occurred on 15 November 1823.[248] Both were found guilty by the Supreme Court of Van Diemen's Land and were executed on 25 February 1825, with the case reported in the Hobart Town Gazette.[249]

A similar issue arose in *R v Lowe* in 1827, which according to legal historian, Bruce Kercher, was the first important case in Australia concerning Indigenous sovereignty.[250] In this case, Lieutenant Lowe was charged with the murder of Native Jacky and was defended by renowned defence barristers William Charles Wentworth and Robert Wardell in the NSW Supreme Court. Wardell argued that the Supreme Court had no jurisdiction to try this case because the murdered Indigenous man was not a British subject and there was ' no treaty, either expressed or understood, between his country and that of the British King'.[251] It was Wentworth, who in his deposition claimed that the Indigenous peoples of Australia constituted sovereign nations and the British Crown never assumed sovereignty over them and according to both Wentworth and Wardell, the extension of any kind of sovereignty over the Indigenous peoples was illegal by law, custom or practice.[252] However, Forbes CJ declined to accept their argument on the ground that the *New South Wales Act 1823* (UK) recognised English law and British sovereignty over this country,[253] and that his Court was not the appropriate place to determine the legality of

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[247] Ibid.
[248] *R v Musquito*, Hobart Town Gazette, 3 December 1824 (Supreme Court of Van Diemen's Land, Pedder CJ, 1 December 1824).
[249] Ibid; 'Decisions of the Nineteenth Century Tasmanian Superior Courts: R. v. Musquito and Black Jack [1824]' *Macquarie University* (Web Page) <www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1824/r_v_musquito_and_black_jack/>.
[250] Kelly K Chaves, 'A Solemn Judicial Farce, the Mere Mockery of a Trial: The Acquittal of Lieutenant Lowe, 1827' (2007) 31 *Aboriginal History* 122, 124; Kercher, 'R v Ballard' (n 245).
[251] *R v Lowe* [1827] NSWKR 4; [1827] NSWSupC 32 ('*Lowe*'); Chaves (n 250) 135.
[252] Chaves (n 250) 136.
[253] This *Act* repealed *New South Wales Courts Act* of 1787 and made way for the establishment of the Legislative Council and Supreme Courts of New South Wales and Van Diemen's Land; 'New South Wales Act 1823 (UK)' *Museum of Australian Democracy* (Web Page) <https://www.foundingdocs.gov.au/item-sdid-73.html>.

British occupation and sovereignty over this continent.[254] Another concurring judge, Stephen J, supported Forbes CJ and was of the view that the natives were within the protection of British law, so the trial must continue. Ultimately, Lieutenant Lowe was found not guilty by the jury, which was unsurprising considering that the jury was composed of seven military men.[255] This case could have been the cornerstone for the establishment of sovereignty of Indigenous peoples in Australia, if Forbes CJ had supported the argument of Wentworth and Wardell that the British never acquired sovereignty over the country and the Indigenous peoples.

In the meantime, the notion of terra nullius came to pervade the law in Australia. *R v Steele* (1834)[256] was one of the early cases in which the NSW Supreme Court decided a case in favour of the Crown against a private person (settler) on the notion that Australia was settled as terra nullius and title to the land was vested in the Crown. While putting the case before the jury, Forbes CJ referred to the legal status of the settlement: 'The right of the soil and of all lands in the colony, became vested immediately upon its settlement, in his majesty in right of his crown and as the representative of the British nation'.[257] He also made it clear to the jury that 'by the laws of England, the King, in virtue of his crown, is the possessor of all the unappropriated lands of the kingdom; and all his subjects are presumed to hold their lands, by original grant from the crown'.[258]

According to Bruce Kercher, *R v Murrell* (1836)[259] was the founding case for the application of Doctrine of terra nullius in Australia.[260] In this case, Jack Tongo Murrell, an Aboriginal man was charged with the murder of another Aboriginal man named Bill Jabingi (or Jabenguy). The defence counsel, Sydney Stephen, extensively argued about the applicability of British law in this case. He argued that Australia was not uninhabited during the occupation because it had a greater population than the people who arrived from England who possessed their own established laws and customs.[261] He also argued that Great Britain was never at war with the Indigenous inhabitants, so this country could not be called a conquered nor a ceded country. The British settlers were bound by the laws of their country because they were protected by their laws, whereas the natives were not protected by those laws and could not claim civil rights, receive compensation for lands taken away from them nor to act as witnesses in the courts of justice.[262] In his reply, the Attorney-General declined to accept Stephen's argument on the

[254] [1827] NSWSupC 32 ('*Lowe*'). Chaves (n 250) 136.
[255] Chaves (n 250) 136.
[256] (1839) 1 Legge 117; [1834] NSWSupC 111 ('*Steele*').
[257] Ibid. Kercher, *Decision of the Superior Courts* (n 243).
[258] [1834] NSWSupC 111 ('*Steele*').
[259] 1836) 1 Legge 72; [1836] NSWSupC 35.
[260] Kercher, 'R v Ballard' (n 245).
[261] Kercher, *Decision of the Superior Courts* (n 245).
[262] Ibid.

ground that 'the laws of Great Britain did not recognise any independent power to exist in a British territory, but what was recognised by law'.[263] The Court was presided over by Forbes CJ, Dowling and Burton JJ who, in their decision, agreed that the Court had jurisdiction over this matter. The Court agreed that the Aboriginal defendants had no sovereignty and could not be considered to be free and independent tribes due to their lack of strength in numbers and civilisation.[264] The Court also stressed that it had tried and executed many Aboriginal individuals for offences against the subjects of the king since its foundation in 1824 and it could see any distinction between British subjects and aliens living under the king's peace.[265]

It is evident from these cases that in the early years of Supreme Courts in NSW and Van Diemen's Land, the question of Indigenous sovereignty, their unique cultures and their legal institutions were contemplated by the Judges and lawyers. At the same time, when the US law recognised the tribal sovereignty and self-government powers of Indigenous peoples, in Australia, Indigenous peoples' rights were diminished and extinguished. Many early legal scholars argued for the recognition of Indigenous rights through treaties or other documented ways, although unfortunately that never happened. One attempt to enter a treaty by John Batman in 1835 was unsuccessful in its attempt to secure lands for the establishment of a new settlement in Melbourne. For many years, Indigenous peoples in Australia have sought treaty rights, although there is still no unified effort to make this happen. On 21 June 2018, the Victorian Parliament passed legislation to create an Indigenous treaty framework, which was the first of its kind in Australia. [266] More recently, the Northern Territory government signed a memorandum of understanding to initiate treaty with the traditional owners.[267]

3.4.2.1 The Batman Treaty

Apart from terra nullius, pre-emption is another element of the Doctrine that was used by the Crown to assert its dominance and sovereignty over Indigenous peoples in Australia. On 6 June 1835, John Batman,[268] who was a prominent member of the Port Phillip Association, negotiated a treaty with a group of Wurundjeri Elders to buy 600,000 acres of land around Port Philip near

[263] Ibid.
[264] Ibid.
[265] Kercher, 'R v Ballard' (n 245).
[266] Calla Wahlquist, 'Victoria Passes Historic Law to Create Indigenous Treaty Framework' *The Guardian* (online at 22 June 2018) <https://www.theguardin.com/australia-news/2018/jun/22/victoria-passes-historic-law-to-create-indigenous-treaty-framework>. On 21 June 2018 the Victorian parliament passed legislation to create a framework to negotiate treaty. The Advancing the Treaty Process with Aboriginal Victorians Bill 2018 will establish an Aboriginal Representative Body to establish a framework for negotiating treaties with the traditional owners of Victoria.
[267] Shahni Wellington, 'Indigenous Treaty a Step Closer after NT Government Makes Historic Pledge' *ABC News* (Web Page, 8 June 2018) < https://www.abc.net.au/news/2018-06-08/indigenous-treaty-a-step-closer-after-nt-government-pledge/9848856>.
[268] John Batman was the son of William Batman, a Christian missionary. John was born at Parramatta (NSW) in 1800 and moved to Van Diemen's land when he was 20 years old.

Melbourne.[269] The main reason for the purchase was to begin a new colonial settlement. In 1827, J T Gellibrand and John Batman wrote a letter to the NSW Governor General to establish a permanent settlement at Western Port and demonstrated that they had all the means to start a new settlement.[270] However, the Governor General informed them that with 'no determination having been come to with respect to the settlement of Western Port, it is not in my power to comply with the request'.[271] Despite the determination of the NSW Governor, John Batman had frequent conversations with Hobart Governor Colonel Sir George Arthur, who supported the idea of a new British colonial settlement near Port Philip. They did not apply to the NSW Governor again because some argued that his jurisdiction did not extend this far and others argued that he had no authority in this regard. To pursue their purpose, John Batman and some other prominent members of society formed an association called the Port Phillip Association and decided to conclude a treaty with local Indigenous land owners to buy 600,000 acres of land.[272] This is the only historical example in which a treaty was concluded between a colonist and an Aboriginal group. It is argued that the Aboriginal peoples did not understand the concept of sale or rental, although they agreed to give rite of passage to the settlers, for which they received 20 pairs of blankets, 30 knives, 10 looking-glasses, 12 tomahawks, 12 pairs of scissors, 50 handkerchiefs, 12 red shirts, four flannel jackets, four suits of clothes, 50 lbs of flour, yearly rent and other yearly benefits.[273] To receive approval from the Crown, John Batman and the Port Philip Association argued that the Aboriginal group were the 'real owners of the soil'[274] and were entitled to sign treaty with them. However, the Batman treaty was declared void by the NSW Governor, Richard Bourke, on 26 August 1835, who proclaimed that 'every such treaty, bargain and contract with the aboriginal natives … is void, as against the rights of the Crown and that all persons who shall be found in possession of any such lands … will be considered as trespassers'.[275]

Despite the decision of Governor Bourke, the Port Phillip Association did not back down, but instead sought opinions from renowned colonial law experts of that time, including William Burge, George Mercer, Thomas Pemberton and Sir William Follett.[276] Among the legal experts, William Burge presented a detailed legal opinion on the issue by citing several cases regarding

[269] *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (Report, January 2012).
[270] James Bonwick and William Westgarth, '*Discovery and Settlement of Port Phillip: Being a History of the Country Now Called Victoria, up to the Arrival of Superintendent Latrobe, in October 1839*' (Goodall and Demaine, publish for the author, by George Robertson, Melbourne 1856) 35.
[271] Ibid 35.
[272] Ibid 41.
[273] Ibid 71; Blake A Watson, 'The Impact of American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand' (2011) 34(2) *Seattle University Law Review* 507, 513.
[274] Bonwick (n 270) 71. Report submitted to Lt. Governor George Arthur on 25 June 1835.
[275] Bonwick (n 270) 76; see also Watson (n 273) 517.
[276] Bonwick (n 270) 77; see also Watson (n 273) 514-15.

English treaties with the American Indians, including the *Johnson* case. According to Burge, 'the Crown can legally oust the association from their possession', although given the respectable, equitable and judicious manner in which the association conducted itself, the Crown could confirm the purchase made by the Association.[277] This was likely the first time a reference was made to the *Johnson* case outside the USA.[278] William Burge's opinion was also supported by Pemberton and Follett, although Governor Bourke did not take the advice of the legal experts appointed by the Association. He received support from Colonial Secretary Lord Glenelg, who stated that 'the conduct of Mr. Batman towards that native has been such as to make me regret that I feel it my duty not to advise His Majesty to sanction the proceedings of that gentleman and his associates'.[279] Subsequently, Batman's treaty was made null and void and Governor Bourke's proclamation remained one of the important legal documents in Australian colonial legal history, although another example of colonial dominance, which reinforced pre-emption and the Doctrine of terra nullius under which British settlement in Australia was based.

In later years, the Batman Treaty and Governor Bourke's decision were cited in other Supreme Court cases. For example, in *R v Bonjon*,[280] Willis J mentioned the Batman Treaty and Governor Bourke's proclamation while deciding the legal status of Indigenous peoples and the jurisdiction of the Court to try the same. In this case, the defendant named Bonjon, an Aboriginal Wadora man, was charged with the murder of Yammowing, who was a member of the Aboriginal Colijon people from Geelong. The defendant was represented by Redmond Barry, who questioned the jurisdiction of the Supreme Court in Aboriginal matters and raised the question of whether Aboriginal people were subject to the law of England as were the colonists. According to him, NSW was not conquered or ceded, but rather was occupied by the British. Therefore, the British had rights over soil, although they had no authority over the Indigenous inhabitants unless there was a treaty or demonstration by Indigenous inhabitants to come under English law.[281] The Crown Prosecutor cited the decision of *R v Ballard* and *R v Murrell*, in which the question of jurisdiction was settled (*Murrell* overturned *Ballard*), although the presiding judge Willis J in his decision made it clear that he was not bound by the previous opinion of Forbes CJ, Burton J and Dowling CJ. It was Willis J who 'desired to see the state of the Aborigines of Australia improved … see them freed from the yoke of error … to see all due protection extended to this unhappy race—the protection of their rights by laws adapted to their capacity and suited to their

[277] Bonwick (n 270) 77-8.
[278] Ibid 515.
[279] Ibid 79.
[280] First reported in Port Phillip Patriot, 20 September 1841 and later reported by Bruce Kercher in 'R v Ballard, R v Murrell and R v Bonjon' (1998) 3(3) *Australian Indigenous Law Reporter* 410.
[281] Kercher, 'R v Ballard' (n 245).

wants'.[282] Justice Willis noted how NSW and Van Diemen's land were acquired by occupation according to the Doctrine, but the Indigenous peoples here never received the same treatment and status as the Indigenous peoples of other British colonies like New Zealand and the USA.[283] He discussed how Lieutenant-Governor of New Zealand, Captain Hobson concluded a treaty (*Treaty of Waitangi*) with chiefs of the Northern Island to recognise them as being separate and independent peoples. He recognised the Indigenous peoples as self-governing communities and believed that the relationship between Indigenous communities and the Crown should be defined by treaty. He did not believe in individual treaties, which is why he did not support John Batman's treaty and commended Governor Bourke for declining the treaty to protect the Aboriginals from exploitation by European settler. He also regretted that 'previously to the settlement of Port Philip by the Government no treaty was made with the Aborigines … no terms defined for their internal government, civilization and protection'.[284] However, Willis J's views on Indigenous sovereignty and their jurisdiction in internal matters was 'soon crushed by the weight of judicial and imperial authority'.[285] His conflict with fellow Judges of the Supreme Court (especially with Dowling CJ) and the Roman Catholic Church forced him to move to Victoria, where he faced numerous complaints from influential sections of the society and was dismissed from the office by Governor Gipps.[286]

In *Williams v Attorney General for New South Wales* (1913)[287] Isaac J supported the proclamation of Governor Richard Bourke in the Batman treaty decision by declaring it 'very practical application' of sovereign power in which the Crown had acquired entire legal and beneficial ownership of Australia.[288] Further, Isaacs J was of the view that 'when Governor Phillip received his first Commission from King George III. on 12th October 1786, the whole of lands of Australia were already in law the property of the Kind of England'.[289] Although later in *Mabo [No 2]*, Brennan J disputed Isaacs J and observed that 'with respect to Issacs J., that proposition is wholly unsupported'.[290]

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[282] Ibid.
[283] Kercher, *Decision of the Superior Courts* (n 243).
[284] Bruce Kercher, 'R v Ballard' (n 245). Willis J ordered the defendant to stand trial pending the decision regarding jurisdictional issue. He expressly reserved his decision and took further time to consider this matter. In the meantime, two Aboriginal people were speared under Aboriginal law for murder. Subsequently the Crown prosecutor did not proceed with the trial and the defendant was later discharged.
[285] Bruce Kercher, 'Recognition of Indigenous Legal Autonomy in Nineteenth Century New South Wales' (1998) 4(3) *Indigenous Law Bulletin* 7 (Web Page) <http://classic.austlii.edu.au/au/journals/IndigLawB/1998/54.html>.
[286] See B A Keon-Cohen, 'John Walpole Willis: First Resident Judge in Victoria' (1972) 8(4) *Melbourne University Law Review* 703, 712-13.
[287] *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404.
[288] *Recognising Aboriginal and Torres Strait Islander Peoples* (n 269).
[289] *Mabo v Queensland (No-2)* (1992) 175 CLR 1 [44].
[290] Ibid.

This discussion reveals that the elements of the Doctrine such as terra nullius, pre-emption, civilisation and Christianity played a role in the dispossession of the Indigenous peoples in Australia by taking away their lands, cultures and institutions. From the early days of colonisation, attempts were made in the courts to recognise Indigenous sovereignty and law, which never materialised. During the early colonial period, Indigenous people were legally recognised as British subjects, although during the establishment of the Commonwealth of Australia and the enactment of the *Constitution Act 1900*, Indigenous peoples were not recognised as citizens of Australia. Indigenous peoples in Australia never received recognition as the original occupants because the concept of terra nullius was imposed upon them. Since early colonisation to mid-twentieth century, the history of colonialism and its relations with the Indigenous peoples was represented by killing, dispossession, destruction of culture and loss of land.

3.5 Conclusion

> [W]hen settlers came, the Indians were there, organized in societies and occupying land as their forefathers had done for centuries … they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished.[291]

The Doctrine justified the colonial invasions of the USA, Canada and Australia and 'undergirds the taking of Indigenous lands'.[292] This international Doctrine allowed colonial forces to occupy and claim Indigenous lands and to preclude other countries from claiming these lands. The Doctrine subsequently enabled the colonial power to devise laws and policies to undermine Indigenous self-determination, institutions, land rights and human rights. The *Royal Proclamation* of 1763 had significant impacts on the Indigenous peoples of the USA and Canada, which codified some of their land rights, including the right to cede native lands to the Crown through treaties. The Proclamation did not create any new rights; it curtailed and codified existing Indigenous rights for the benefit of non-Indigenous peoples. It was done so that Indigenous peoples could only deal with the Crown. The judiciaries also supported the Crown by giving ultimate sovereignty to the Crown and limited rights to the Indigenous peoples. The Indigenous peoples in the USA and Canada received limited sovereignty through early recognition, whereas in Australia the Indigenous peoples never received that recognition. Whatever the forms or methods of colonisation, relationships between non-Indigenous and Indigenous peoples during the early years were represented by inhumane treatment, killing, genocide, dispossession and extinction.

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[291] *Calder v Attorney-General of British Columbia* [1973] SCR 313, 328.
[292] Robert J Miller et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2012) iii.

The Indigenous peoples of the USA, Canada and Australia asserted their sovereignty over their lands, although the early colonial forces used different tricks, tactics and European legal doctrines to undermine their sovereignty. Current assertions of superiority over Indigenous peoples is based on the early application of the Doctrine, which 'heavily influenced and still influences their treatment of Indigenous peoples and the rights and powers of Indigenous peoples and continue to control and mandate the modern day treatment of Native peoples and nations'.[293] In this chapter, I analysed the earliest application of the Doctrine in three jurisdictions that established European sovereignty over Indigenous peoples and lands and established a path for future laws and policies that annihilated Indigenous societies and cultures. In the next chapter, I analyse more recent applications of the Doctrine that assisted the colonisers to undermine Indigenous peoples' connection to their cultures and lands through civilisation and assimilation policies, and limited sovereign and commercial rights, pre-emption and Christianity, and which continue to shape current Indigenous relations, laws and policies.

[293] Ibid 1.

Chapter 4: Recent Applications of the Doctrine of Discovery in the Development of Laws and Policies in the USA, Canada and Australia

4.1 Introduction

The undermining of Indigenous peoples' connections to their lands, cultures and identities continued during the twentieth century. In all three countries, Indigenous peoples were considered to be culturally inferior and were subject to policies that sought the elimination of their distinct identities. The application of the elements of Doctrine of Discovery ('the Doctrine') such as Christianity, civilisation, limited sovereign and commercial rights, pre-emption and native title continued. Moreover, these elements continued to influence the development of laws and policies related to Indigenous peoples in the USA, Canada and Australia to uphold and maintain settler colonialism and to undermine Indigenous peoples' rights and cultures. While this is a large area to cover, this chapter is focused on the laws, policies and politics of governments that significantly undermined Indigenous rights as they developed from the late-nineteenth century to contemporary times. The analysis considers the elements of the Doctrine and how they pervade these laws and policies. This discussion will set up the analysis in the next chapter of the laws, policies and politics of governments related to the Dakota Access Pipeline ('DAPL'), the Site-C dam and the Adani mine development projects.[1]

4.2 American Indians in the Early to Mid-Twentieth Century

> Conventional wisdom holds that the US government's policy of dealing with American Indians runs in cycles. Every few decades, the federal government will pursue policies that recognise and support tribal sovereignty, followed by a few decades of antagonistic and hostile policies.[2]

Since the beginning of colonisation, American Indians have been subjected to many laws and policies, first by the Crown and later by the federal government. The underlying goals of those policies were to marginalise and eradicate, and ultimately to take the lands of the American Indians and destroy their cultures.[3] During the late-nineteenth and early twentieth centuries, the US government adopted many conflicting policies. In the following sections, some of the key policies and laws are examined, which is followed by a discussion of key court cases related to American Indians. The application of elements of the Doctrine such as limited sovereign and commercial rights meant that Indigenous peoples lost their sovereignty and commercial rights

[1] See bellow Chapter 5.
[2] Robert Odawi Porter, 'American Indians and the New Termination Era' (2007) 16(3) *Cornell Journal of Law and Public Policy* 473, 473.
[3] See above Chapter 3.

with the acquisition of sovereignty by the British. While Indigenous peoples have been given limited sovereign rights through limited self-government, in recent times the tribal peoples' limited right to self-government has been significantly weakened by acts of Congress and decisions of the Supreme Court.[4] In the Supreme Court the tribes' inherent right to self-government has been upheld in many cases, although in others the court has not upheld this right and treaty protections have also been undermined.[5]

An early piece of legislation that was designed to breakup American Indian societies was the *Dawes Severalty Act* of 1887.[6] This Act undermined tribal sovereignty as it sought to break up the traditional Indian societies into individual units by authorising the partition of native lands among individual tribal members.[7] It also enabled the colonists to settle within tribal territories by leasing or buying tribal land from the government. The Act marked the beginning of the assimilation policy and was described by President Theodore Roosevelt as 'a mighty pulverizing engine to break up the tribal mass'.[8] Later, this assimilation policy was abandoned and tribal sovereignty and self-determination was promoted by the *Indian Reorganization Act 1934,* although under this Act tribal sovereignty became subject of Congress and federal government.[9] The objective of promoting tribal sovereignty was eventually diminished by the termination policies of 1953–68, and during this period Congress terminated legal status of more than one hundred tribes. The termination era came to an end in 1968 when the *Indian Civil Rights Act 1968* was enacted. While it had a laudable intent, it played its part in the destruction of tribal traditions, tribal societies and tribal sovereignty by imposing a system of individual rights on traditional communal societies by inserting elements of the Bill of Rights, especially the equal protection clause as defined in the 14th Amendment.[10] In some cases this law was as destructive as the *Dawes Severalty Act* (and the *Indian Reorganization Act*) as it divided communal rights—which is a fundamental element of tribal sovereignty—into individual rights. The effect of these successive policies and laws has made tribal sovereignty more limited than it was in the early colonisation period. According to Babcock:

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[4]See Rudolph C Ryser, 'Resuming Self-Government in Indian Country: from Imposed Government to Self-Rule Inside and Outside the United States of America' (1995) 2(1) *Murdoch University Electronic Journal of Law* 12 <http://www5.austlii.edu.au/au/journals/MurUEJL/1995/12.html>.

[5] See below Chapter 4.2.5.

[6] Hope M Babcock, 'A Civic-Republican Vision of "Domestic Dependent Nations' in the Twenty-First Century: Tribal Sovereignty Re-Envisioned, Reinvigorated, and Re-Empowered" (2005) *Utah Law Review* 443, 494. This Act was named after Senator Henty Laurens Dawes and also known as the *General Allotment Act 1887*. It was amended in 1898 by the *Curtis Act* (which broke-up the tribal lands of Choctaw, Chickasaw, Muscogee, Cherokee and Seminole tribes who were excluded previously) and in 1906 by the *Burke Act*.

[7] Babcock (n 6) 494.

[8] Ibid 495.

[9] The *Indian Recognition Act 1934* s 2.

[10] Babcock (n 6) 496-7.

> [I]t is not hard to conclude that as a consequence of these policies, tribal sovereignty is substantially less today that it once was, and that Indian culture finds itself on the verge of extinction in much of our country.[11]

These developments are discussed in more detail in the following sections.

4.2.1 The Indian Allotment Policy

The Indian Allotment Policy of the 1890s was developed to destroy and eliminate tribal sovereignty and self-government. This policy revamped the relocation of Native Indian people by forcing them to assimilate into non-Indian societies. Thus, the civilisation element of the Doctrine was imposed on Indigenous peoples who were considered to be uncivilised, while the Europeans assumed it was their religious duty to civilise and educate them, and thus promote the European Christian lifestyle. The centrepiece legislation of this period was the *Dawes Severalty Act of 1887*, which divided the Indian reservations into smaller individual allotments. The government held the title in trust for 25 years, after which individual tribal members would be given fee simple patent and deed of ownership.[12] At the same time, the Indians were under guardianship of the federal government for 25 years, after which they gained citizenship.[13] To support this legislation, other laws were enacted during the same period. For example, the *Curtis Act 1898* that applied to 'Five Civilised Tribes'—Cherokees, Creeks, Seminoles, Choctaws and Chickasaws—of Oklahoma was enacted to weaken tribal governments by abolishing tribal courts and subjecting everybody living in the territory to federal laws.[14] The *Dawes Act* and *Curtis Act* gave Congress power to take control of Indian affairs and to assimilate the Indian population into the general population.[15]

The *Burke Act 1906* was another piece of legislation that was enacted to support the causes of *Dawes Act*. This piece of legislation authorised the Secretary of Interior to issue fee patents to Indians before the expiration of the 25 years limitation period. During the process, it supported the allotment policy by dividing the Indian lands, although much earlier than the stipulated period in the *Dawes Act*. It was believed that the fee patents would force the Indians to work and support

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[11] Ibid 492.
[12] Janet McDonnell, 'Competency Commissions and Indian Land Policy, 1913-1920' (1980) 11 *South Dakota History* 21, 21.
[13] M Kaye Tatro, 'Burke Act (1906)' *Oklahoma Historical Society* (Web Page) <www.okhistory.org/publications/enc/entry.php?entry=BU010>
[14] Ibid. Laws such as the *Major Crimes Act 1885* applied to Indian living in Indian territory. See Arrell M Gibson, 'Constitutional Experiences of the Five Civilized Tribes' (1974) 2(2) *American Indian Law Review* 17.
[15] The *Curtis Act* affected the lands of Cherokee, Creek, Choctaw, Chickasaw and Seminole nations by ending the tribal governments power to refuse allotments and mandating the allotment of tribal lands. Ironically the *Curtis Act* was introduced by Charles Curtis who was mixed blood Kansa Indian. This law was one of the many laws that were enacted to abolish tribal sovereignty and self-government powers.

themselves.[16] However, there was a racist argument that this process was potentially dangerous because the Indians could be released from guardianship much earlier, and before they were able to support themselves.[17] To accelerate the process under the *Burke Act*, the Competency Commission was established in 1910 to release Indians deemed 'competent' from government care before the end of the 25 year period. The work of the Competency Commission was devastating for American Indians, because in its lifetime it issued 20,000 patents covering one million acres of lands, although 'most of the patentees sold their land and became destitute'. The Commission contributed much to the 'general decline in the Indians estate between 1913 and 1920'.[18] These acts destroyed Indian self-government and facilitated the civilisation agendas of the government. On 30 November 1920, the Competency Commission was abolished.[19]

Another law during this period was the *Antiquities Act 1906*, which was enacted to protect the 'historic or prehistoric ruin or monument' in the land controlled or owned by the US government.[20] The problem was that affected American Indians were not consulted during the drafting of this legislation and there was no acknowledgement that they were the custodians of their cultural heritage. The permit system under this legislation allowed many scientific communities to enter and destroy Indian lands and ancient burial grounds without the consent of the original owners.[21] The aims of the laws of the Allotment Era were to diminish American Indian landholdings, undermine their sovereignty and sever their cultural and spiritual connections to their heritage.

4.2.2 The *Indian Reorganization Act 1934* (Wheeler–Howard Act)

The Allotment policy was designed to promote assimilation and civilisation by forcing tribes to adopt non-Indian values and to reduce their tribal sovereignty and political autonomy.[22] As a result of these policies, the federal government took control of most Indian affairs and began to assume the role as their guardian.[23] After World War I, to recognise the service of more than 12,000 American Indian service persons, Congress accelerated assimilation and civilisation policies to make them US citizens .[24] Subsequently, the Meriam Report of 1928 was produced,

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[16] McDonnell (n 12) 21. Franklin Knight Lane and Cato Sells (Commissioner of Indian Affairs) pushed for fee patents and believed that the process would make the Indians independent and free them from guardianship and help them assimilate into the white societies.
[17] McDonnell (n 12) 22.
[18] Ibid 34.
[19] Ibid.
[20] The *Antiquities Act 1906* s 1 <htpps://www.nps.gov/history/local-law/FHPL_AntiAct.pdf>.
[21] Ibid s 3.
[22] See Michael C Walch, 'Terminating the Indian Termination Policy' (1983) 35(6) *Stanford Law Review* 1181, 1197.
[23] Ibid 1182.
[24] '1917: American Indians volunteer for WWI' *Native voices* (Web Page) <https://www.nlm.nih.gov/timeline/650.html>. see also Thomas Morgan, 'Native Americans in World War II' (1995) 35 *Army History: The Professional Bulletin of Army History* 22, 22-27. While there was more attention towards Indian living conditions

which found shocking health and living conditions of American Indian peoples under the regime established through the Allotment policy, especially the *Dawes Severalty Act 1887*.[25] This report pointed to the fact that Indian-owned land had decreased from 137 million to 47 million acres and made the observation that:

> The economic basis of the primitive culture of the Indians has been largely destroyed by the encroachment of white civilization. The Indians can no longer make a living as they did in the past by hunting, fishing, gathering wild products, and the extremely limited practice of primitive agriculture.[26]

The reforms recommended by the Meriam Report were incorporated in the *Indian Reorganization Act 1934*. To enable the Indian tribes to exercise more self-government power, the *Indian Reorganization Act* recognised tribal government and encouraged the adoption of constitutional structures. It encouraged the tribes to manage their own affairs pursuant to s 16 of the *Indian Reorganization Act*, which stated that '[a]ny Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare and may adopt an appropriate constitution and bylaws'. It also empowered the Secretary of the Interior to 'restore to tribal ownership the remaining surplus lands of any Indian reservation'[27] and prohibited the allotment of tribal lands without their consent and extended the existing periods of trust placed upon Indian lands.[28] The *Indian Reorganization Act* also allocated funds for tribal land purchase, educational assistance and tribal organisations. The Congress adopted programs to improve health and education of tribes and raised social and economic status of tribes by increased economic opportunities.[29] During the same time, the Congress enacted the *Indian Arts and Crafts Act 1935* to revive Indian arts and crafts and for the expansion of markets for products of Indian art and craftsmanship.[30]

The *Indian Reorganization Act* and other similar pieces of legislation encouraged the preservation of tribal lands and cultures, although it was not without fault, because the underlying

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and health, during the World War II the 'federal government designated some Indians lands and even tribes themselves as essential natural resources, appropriating tribal minerals, lumber, and lands for the war effort. After the war, Native Americans discovered that their service for the war effort had depleted their resources without reward. Indian lands provided essential war materials such as oil, gas, lea, zinc, copper, vanadium, asbestos, gypsum, and coal.' In many cases the Indians lost their unique status because it was believed that 'World War II had completed the process of Indian integration into Mainstream American society'. Thus, the war not only destroyed Indian land resources but also accelerated assimilation and civilisation agendas of the government.

[25] 'Indian Reorganization Act' *Encyclopaedia Britannica* (Web Page) <https://www.britannica.com/ topic/Indian-Reorganization-Act>.

[26] Lewis Meriam et al, *The Problem of Indian Administration: Report of a survey made at the request of Honorable Hubert Work, Secretary of the Interior and submitted to him* (Survey Report, 1928) 6 <https://files.eric.ed.gov/fulltext/ ED087573.pdf>

[27] The *Indian Reorganization Act 1934* s 3.

[28] Ibid preamble, s 2.

[29] See Walch (n 22) 1183.

[30] The *Indian Arts and Crafts Act 1935* <https://www.doi.gov/iacb/indian-arts-and-crafts-act-1935>.

problems of assimilation and civilisation remained. The non-Indians still had control over the tribes, because the Secretary of the Interior and Bureau of Indian Affairs (established in 1824) had considerable influence and power over them. There were many instances when the Bureau of Indian Affairs imposed Westernised forms of government upon Indian tribes and refused to acknowledge traditional tribal forms.[31] As a result, many Indians along with non-Indians were dissatisfied with the *Indian Reorganization Act* and Congress reverted to termination and relocation policies to rapidly assimilate the Indians into non-Indian societies.

4.2.3 The Termination and Relocation Policies

The termination and relocation policies of the 1940s, 50s and 60s were a further assault on Indian sovereignty.[32] In 1943, the US Senate conducted a survey to determine the living conditions of American Indians on reservations, which revealed severe poverty and dreadful living conditions.[33] As a result, the federal government initiated the 'termination policy', under which the government decided that the Indian tribes no longer needed to exist as separate entities and did not require protection from the federal government. The intention was to force their assimilation into mainstream society. The termination policy had severe consequences for tribal sovereignty, self-government and the social and economic welfare of American Indian societies. Officially adopted on 1 August 1953, the House Concurrent Resolution 108 stated that in adopting this policy, the goal of Congress was:

> [A]s rapidly as possible … make Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States and to end their status as wards of the United States and to grant them all of the rights and prerogatives pertaining to American Citizenship.[34]

This resolution also stated that:

> [A]t the earliest possible time, all of the Indian tribes and the individual members thereof located within the States of California, Florida, New York and Texas and all of the following named Indian tribes and Individual members thereof, should be freed from Federal supervision and control.[35]

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[31] See Walch (n 22) 1184.
[32] David Kimelberg, 'Native Americans and the Economic Termination Era' *Huffington Post* (Web Page, 5 March 2012) <https://www.huffingtonpost/david-kimelberg/native-american-and-the-_b_1184268.html>.
[33] 'Termination Policy' *Juaneño Band of Mission Indians Acjachemen Nation* (Web Page) <www.juaneno.com/index.php/history/termination-policy-1953>.
[34] Indians freedom from federal supervision, HR Con Res 108, 83rd Congress, (1August 1953); 'Concurrent Resolution-Aug. 1, 1953' *US Government Publishing Office* (Web Page) <https://www.gpo.gov/fdsys/pkg/STAUTES-67/pdf/STATUE-67-PgB132-2.pdf>. See also Walch (n 22) 1185.
[35] Ibid. This statement relates to the Flathead Tribe of Montana, the Klamath Tribe of Oregon, the Menominee Tribe of Wisconsin, the Potowatamie Tribe of Kansas and Nebraska, and those members of the Chippewa Tribe who are on the Turtle Mountain Reservation, North Dakota.

At the same time, Congress decided to abolish the offices of the Bureau of Indian Affairs in the States of California, Florida, New York and Texas, whose primary purpose was to serve Indian tribes and individual Indians.[36] Laws like this aimed to assimilate American Indians into the mainstream. A further unstated aim, but a logical effect of such laws, was to erase tribal sovereignty and self-government from the American political landscape.

To reinforce the termination policy, *Public Law 280* was passed by Congress on 15 August 1953, which transferred extensive criminal and civil jurisdictions over tribal reservations from the federal government to state governments and imposed obstacles upon individual Indian nations in their development of tribal criminal justice system.[37] The Congress allowed six state governments to take control over Indian criminal justice systems and increased their role in civil matters and made provisions for other states to do so. [38] Instead of giving the Indian tribes more power to deal with issues facing Indian communities, Congress took away their powers and vested it to the states. As a result of this law, Indian tribes lost significant rights to administer civil and criminal matters according to their own laws and customs. However, *Public Law 280* attracted criticism from Indian tribes and state governments. The Indian tribes did not accept the law because it undermined their self-government and tribal sovereignty and it had no provision for consultation or their consent.[39] In contrast, the state governments were dissatisfied with the arrangement because the federal government did not allocate any funds to administer the process.[40]

When he signed *Public Law 280*, President Eisenhower expressed concern regarding the lack of tribal consent, although nothing was done for another 15 years.[41] A prominent expert of *Public Law 280*, Professor Carole Goldberg described the law as being 'the source of lawlessness on reservations', because it created jurisdictional issues or a 'legal vacuum' and increased the 'abuse of authority'.[42] It was amended in 1968, with provisions for consent and authorised states to handover jurisdiction to the federal government, although without any retrospective effect. The amended law had no mechanism under which the tribes could initiate return of jurisdiction. However, the *Tribal Law and Order Act,* which was enacted on 29 July 2010 (title II of Public Law 111–211) accepted that 'the United States has distinct legal, treaty and trust obligations to

[36] Ibid.
[37] Jerry Gardner and Pecos Melton, 'Public Law 280: Issues and Concerns for Victims of Crime in Indian Country' *Trial Court Clearinghouse* (Web Page) <www.tribal-institute.org/articles/gardner1.htm>.
[38] Initially Congress allowed five states – California, Minnesota, Nebraska, Oregon, and Wisconsin these powers and later Alaska was granted these powers upon its statehood.
[39] Gardner (n 37).
[40] Ibid.
[41] Ibid.
[42] Ibid.

provide for the public safety of Indian country',[43] and the complicated jurisdictional scheme had 'significant negative impact' on the safety of Indian communities.[44] As a result, this 2010 law amended s 401(a) of the *Indian Civil Rights Act of 1968* and made provisions for certain Indian tribes to request federal concurrent jurisdiction to prosecute violations of *General Crimes Act 1817* and *Major Crimes Act 1885* within that Indian country.[45]

The termination era of the 1950s and 60s severely tested tribal sovereignty. Self-government as tribal status for many American Indians was terminated and they were forced to leave their reservations to seek employment in the urban non-Indian centres.[46] From 1953 to 1964, approximately 110 tribes and bands in eight states were terminated and lost official recognition from the government. About 2,500,000 acres of land was removed from tribal status and 12,000 Indians lost their tribal affiliations.[47]

The *Transfer Act of 1954* was another piece of legislation of the termination era whereby the functions and duties of Indigenous health services was transferred from the Bureau of Indian Affairs to the Public Health Service in the Department of Health, Education and Welfare. The effect of the termination policy was felt by American Indians on every front. They lost their tribal recognition, state tax exemptions, benefits received from the federal government, extensive land holdings and special treatment from the government.[48] Termination resulted in the transfer of reservations to non-Indian hands and the relocation of many tribes from their own lands. Most of the advancements made with the *Indian Reorganization Act* were diminishing and the education, health and living conditions of the tribes was in decline. The termination policy was suppressed during the time of President Kennedy and officially terminated by President Nixon in 1969, who wanted to strengthen Indian autonomy without threatening their sense of community.[49] Although the termination policy was abandoned, the effects of the policy remained long after it was abolished. Many terminated tribes never got their status back.

4.2.4 The End of the Termination Era

The termination policy was abandoned in favour of a policy of self-determination, which started from 1968. Since the beginning of the self-determination era, American Indians got some of their

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[43] The *Tribal Law and Order Act 2010* s 202(a)(1) <https://www.gpo.gov/fdsys/pkg/PLAW-111publ211/html/Plaw-111publ211.htm>.
[44] Ibid s 202(a)(4)(A).
[45] Ibid ss 221(a), 221(b); *General Crimes Act 1817* (18 USC §1152) and *Major Crimes Act 1885* (18 USC §1153).
[46] See Gardner (n 37).
[47] 'Termination Policy 1953-1968' *Partnership with Native Americans* (Web Page) <http://www.nativepartnership.org/site/PageServer?pagename=PWNA_Native_History_terminationpolicyNP>; See also Walch (n 22) 1186.
[48] Walch (n 22) 1188-9.
[49] Ibid 1191.

self-government power back. One example of this power is the *Indian Gaming Regulatory Act 1988*, under which some Indian tribes were allowed to operate gaming operations or casinos to generate their own revenue, although this power is not without state or federal control.[50] This Act allowed three classes of gaming. Class 1 was defined as small scale traditional game for minimal value in tribal ceremonies or celebrations that was under the control of tribal government.[51] Class II gaming was classified as those like bingo (without electronic, computer aids) pull-tabs, lotto and tip jars, but did not include slot machines, banking card games or electronic facsimiles.[52] Class II gaming was regulated and operated by the tribes, but required permission by the state in which they were located.[53] Class III gaming was classified as casino-style gaming, which included slot machines, blackjack and roulette[54] and required approval from the Secretary of Interior. The federal government controlled many aspects of this licence like the approval of compacts between state and tribes, or management contracts.[55] Although this Act gave limited powers to the Native Indian licence holders, the most important aspects of the licence conditions remained in the control of the federal government, which represented the limited sovereign and commercial rights elements of the Doctrine.

Professor Porter has accused many Indians and Indian law scholars for blindly accepting the self-determination policy as being beneficial for the Indians, without any downsides.[56] He has argued that this misbelief might give rise to a 'neo-termination' policy. In the cases of *Oliphant* (1978) and *Duro* (1990), the Supreme Court recognised membership-based tribal sovereignty not territory-based sovereignty, which in Porter's view is very concerning.[57] Besides this trend of re-characterising American Indians, the government also took control of Indian resources, which were exploited and developed for the benefit of non-Indigenous population. Contrary to Professor Porter, others believe self-determination is beneficial for American Indians because it promotes government to government relations between tribes and other governments in the US system.[58] Moreover since 1960 the Tribes have gotten millions of acres of land back under this policy. Most notably, in November 2010 USD 3.4 billion Cobell Settlement was approved by Congress (*Claims Resolution Act 2010*) and was signed by President Barack Obama in December

[50] The *Indian Gaming Regulatory Act*, 25 USC § 2701 et seq (1988).
[51] Ibid §2703 (6).
[52] Ibid §2703 (7)(A) and (7)(B).
[53] Tribal gaming ordinances- 25 USC §2710 (a)(2).
[54] 25 US Code §2703 (8).
[55] Tribal gaming ordinances- 25 USC §2710(d); Management contracts- 25 USC §2711.
[56] Porter (n 2) 476.
[57] Ibid 477.
[58] Stephen Cornell and Joseph P Kalt, *American Indian Self-Determination: The Political Economy of Successful Policy* (Working Paper No 1, Native Nations Institute for Leadership, Management and Policy, and The Harvard Project, 2010) 16.

2010. The Cobell Settlement fund includes a 1.9 billion Trust Land Consolidation Fund for land buy-back program for Tribal Nations and 1.5 billion in direct payments to class members.[59]

4.2.5 The Judicial Response

The US Supreme Court never accepted the absolute sovereignty of the American Indian tribes. In the *Johnson* case, Marshall CJ accepted they had limited rights as ascribed by the Doctrine and since then, most cases have either followed the Marshall trilogy or have retracted Indian rights by qualifying their scope and giving non-Indian authorities more power. *Lone Wolf v Hitchcock* was one of the first cases in which the Court gave Congress unlimited power by declaring that it could unilaterally repeal a treaty between a tribe and the federal government.[60] In 1965, the plenary power of Congress over tribal reservations was reaffirmed in *Warren Trading Post v Arizona State Tax Commission*,[61] in which the Court decided that 'federal legislation has left the State with no duties or responsibilities respecting the reservation Indians'.[62] Similar findings were made in *White Mountain Apache Tribe v Bracker*, [63] in which the state's (i.e., Arizona) interest in raising revenue was declared insufficient by showing cause that the state authority was pre-empted by the federal law. In recent years, there have been many Supreme Court decisions that have restricted and reduced the extent of tribal sovereignty, especially tribal land rights regarding zoning laws (e.g., *Brendale v Confederate Tribes & Bands of the Yakima Nations*),[64] hunting and fishing on the tribal lands by non-Indians (e.g., *Montana v United States*)[65] and the jurisdiction of tribal courts (e.g., *Nevada v Hicks*)[66] to impose tax for business activities on reservations (e.g., *Atkinson Trading Co v Shirley*).[67] Over the years, tribal sovereignty has been subject to the authority of Congress, the effect of which has been to strip it of any meaningful authority to the point where only its skeleton remains.

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[59] 'Consultations on Cobell Trust Land Consolidation' *US Department of the Interior* (Web Page) <https://www.doi.gov/cobell>.

[60] In *Lone Wolf v Hitchcock*, 187 US 553 (1903), the Court held that the Congress could unilaterally abrogate a treaty between the Kiowa and Comanche Indians and the federal government. Till this day the Congress has unlimited power over the Native Indian tribes; see Babcock (n 6) 498.

[61] *Warren Trading Post Co. v Arizona State Tax Commission,* 380 US 685 (1965).

[62] Ibid 691.

[63] 448 US 136 (1980).

[64] *Brendale v Confederate Tribes & Bands of the Yakima Nations,* 492 US 408 (1989) held that a tribe's power to impose its zoning laws does not extend to lands own by non-Indians within the boundaries of reservation.

[65] *Montana v United States*, 450 US 544 (1981) supported the views that the Indian tribes have lost many attributes of their sovereignty and as such their inherent sovereignty cannot regulate non-Indian hunting and fishing on non-Indian lands within the reservations.

[66] *Nevada v Hicks*, 533 US 353 (2001) held that the tribal court has no jurisdiction over a State law enforcement officer who executed a search warrant in the reservation area for a crime committed by an Indian outside the reservation.

[67] *Atkinson Trading Co v Shirley*, 532 US 645 (2001) decided that the Navajo nation could not impose tax on the non-Indian owner of a hotel that is situated within the reservation, employed many Navajo people and was dependent on Navajo emergency services.

However, all is not lost. Although the areas where tribal sovereignty can be exercised have been limited by the plenary power of Congress and the decisions of the Supreme Court, it has not been extinguished and tribes continue to be actively engaged in cultural revival.[68] Many successive US presidents have reaffirmed their commitment to the preservation of tribal sovereignty and the Indigenous right of self-government. For example, President Barack Obama was a strong supporter of tribal self-determination and during the endorsement of the UNDRIP in 2011, his government recommitted to 'tribal self-determination, security and prosperity for all Native Americans'.[69] His predecessor President George W Bush was committed to preserve Indigenous freedoms, religion and cultures and wanted to 'work with tribal governments on a sovereign to sovereign basis'.[70] However, with the separation of power between the President and Congress, it has been difficult for presidential will to translate into reality. President Barack Obama faced a hostile Congress when he exercised his veto power in relation to the Keystone XL Pipeline and his attempt to stop the pipeline was swiftly brought to a halt by President Donald Trump when he came into office in 2017. Similar attitude was shown by the Trump administration to expedite approval process of the DAPL. Later in this thesis, I discuss how the approval of the DAPL is an example of neo-colonialism, which is underpinned by neoliberal market forces and continues a tradition of treaty violations and follows elements of the Doctrine to displace native tribes.[71] This thesis also demonstrates how globalisation and neoliberalism act as the Doctrine of Neo-Discovery, through which the American Indians continue to lose their land rights. In the present neoliberal political climate, it is a constant struggle for American Indians to retain the minimum level of tribal sovereignty they have, although it is also true that their centuries-old tribal cultures and political identity are not going to come to a complete end any time soon.

4.3 Indigenous Rights in Canada in the Nineteenth and Twentieth Centuries

Prior to the Royal Proclamation of 1763, there were no laws that regulated the relations between the colonisers and Indigenous peoples. Only treaties and mutual agreements defined their relationship. The Proclamation acknowledged Aboriginal title over non-ceded lands and the British Imperial Indian Department was delegated with the responsibility to deal with Indigenous peoples. The department negotiated on a nation-to-nation basis, which continued until the

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[68] Babcock (n 6) 516.

[69] 'Announcement of US Support for the United Nations Declaration on the Rights of Indigenous Peoples' *US Department of State* (Web Page, 12 January 2011) <https://2009-2017.state.gov/s/srgia/154553.htm>.

[70] George Williams, 'Does constitutional recognition negate Aboriginal sovereignty' (2012) 8(3) *Indigenous Law Bulletin* 11, 11 <http://www.austlii.edu.au/au/journals/ILB/2012/42.pdf >; See also George Bush, 'Proclamation 6230—National American Indian Heritage Month, 1990' *The American Presidency Project* (Web Page, 14 November 1990) <https://www.presidency.ucsb.edu/node/268413>.

[71] See bellow Chapter 5.

1850s.[72] The Proclamation gave Indigenous peoples special status. However, most of the subsequent laws were enacted to civilise and assimilate them into the Canadian societies and protect them as they were perceived to be wards of the state. In 1850, *An Act for the Better Protection of the Lands and Property of the Indians of Lower Canada* and *An Act for the Protection of the Indians in Upper Canada from Imposition and the Property Occupies or Enjoyed by them from Trespass and Injury* were passed to protect Indigenous lands in Upper and Lower Canada. Under both Acts (and in line with the pre-emption principle which gives the first discovering country the sole right to buy or make agreements with the Indigenous peoples), the settlers were prohibited from directly negotiating with Indigenous peoples with respect to their lands, and the Crown took over this role through the Indian Department. The Robinson Treaties of 1850 paved the way for increased control over Indigenous land by creating reservations and the 1850 laws determined who was eligible to live on the reservations. For the first time, these laws defined the term 'Indian', who would be permitted to live on the reserves and 'all persons of Indian blood as well as all those, male or female, married to such persons' were considered to be Indian.[73] In 1851, the definition of Indian was changed to exclude Indian women married to non-Indian men from holding Indian status.[74] Conversely, this rule was not applicable to Indian men who married non-Indian women.[75] This misogynistic rule continued to apply until 1985.[76] Prior to the new *Indian Act 1985* (outcome of Bill C-31), the discriminatory provisions relating to Indian women who married non-Indian men remained the same. This discriminatory provision was challenged by many Indian women in the national and international courts.[77] Ultimately, the 1985 Act reinstated the status of Indian women who had lost their status for marrying non-Indian men and at the same time s 11 gave the bands power to determine their own membership rule under which they could exclude such women from the band.[78] The *Indian Act* with its many amendments and discriminatory provisions remains in place.

After the 1850s, the government adopted stronger assimilation policies by abolishing the distinction between 'Indians' and 'non-Indians' and permitting 'Indians' to become citizens of

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[72] Bonita Lawrence, 'Gender, Race and the Regulation of Native Identity in Canada and the United States: An Overview' (2003) 18(2) *Hypatia* 3, 6-7.
[73] John Giokas, 'The Indian Act: Evolution, Overview and Options for Amendment and Transition (Final Report, 22 March 1995) 24 <http://publications.gc.ca/collections/ collection_2016/ bcp-pco/Z1-1991-1-41-130-eng.pdf>.
[74] Ibid 25.
[75] Ibid.
[76] Ibid.
[77] *AG Canada v Lavell* [1973] SCR. 282; *Lovelace v Canada*, Communication No. 24/1977: Canada 30/07/81, UN Doc CCPR/C/13/D/24/1977.
[78] Katrina Harry, *The Indian Act & Aboriginal Women's Empowerment: What Front Line Workers Need to Know* (Battered Women's Support Services, Vancouver, 2009) 24-7. One notable case regarding the status of Indian women is *McIvor v Canada (the Registrar, Indian and Northern Affairs)*, 2007 BCSC 26 (Statutory Appeal), 2007 BCSC 827 (Constitutional Case), 2007 BCSC 1732 (Trial Order), 2009 BCCA 153 (Appeal) where an Indian woman regained the Indian status under *Indian Act 1985* but her children were denied the same status (as a result they were denied housing, school and health benefits).

Canada. The *Gradual Civilisation Act of 1857* (also known as *An Act for the Gradual Civilization of the Indian Tribes in Canada*) was enacted with provisions to dismantle the reservations and give Indigenous peoples the opportunity to become citizens of Canada after the completion of certain requirements.[79] This indicated continuation of the civilisation element of the Doctrine—Indigenous peoples were considered to be uncivilised and it was the religious duty of Europeans to civilise and educate them—where the Indigenous peoples were forced to adopt European Christian ways of lifestyle. As the Canadian government was growing, it needed more revenue and one way it could generate revenue was by selling Indigenous nations lands to non-Indigenous settlers.[80] This Act permitted the allotment of Indigenous lands without formal surrender or compensation and without following the process as set by the Proclamation, with the effect that the land was taken out of the exclusive control of the tribe.[81] The *Gradual Civilisation Act* was also enacted to achieve the goal of cultural extinguishment by taking away the Indian status of an Indian Band member by enfranchisement. Under this Act, the successful candidate would receive 50 acres of land from the community held land in the reserves and they would be assimilated into the Canadian society through economic, social and political participation.[82] This law was a failure because Indigenous peoples were opposed to it and until the enactment of the *Indian Act 1876*, only one person applied to be enfranchised.[83] To strengthen the *Gradual Civilisation Act* and accelerate assimilation, the government enacted another *Gradual Enfranchisement Act* in 1869 (also known as *An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs and to Extent the Provision of the Act 31st Victoria, Chapter 42*) with provisions for the establishment of an Indian council modelled on the western system of government. According to Deputy Superintendent of Indian Affairs William Spragge, the Acts were designed:

> [T]o lead the Indian people by degrees to mingle with the white race in the ordinary avocations of life. It was intended to afford facilities for electing, for a limited period, members of bands to manage as a council, local matters—that intelligent and educated men, recognized as chiefs, should carry out the wished of the male members of mature years in each band, who should be fairly represented in the conduct of their internal affairs.[84]

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[79] Giokas (n 73) 27. To be eligible for Canadian citizenship the Indian had to be 21 years of age, with a reasonable education and the ability to read or write French or English, free of debt and good moral character declared by the Commission.

[80] Anthony J Hall, 'Gradual Civilization Act' *Canadian History* (Web Page) <https://canadianhistory.ca/natives/native-activism/1850s-1914/gradual-civilization-act>.

[81] Giokas (n 73) 28.

[82] Ibid 27

[83] Ibid 28; see also Hall (n 80).

[84] Wayne Daugherty and Dennis Madill, Department of Indian and Northern Affairs, *Indian government under Indian Act Legislation 1868-1951* (Report, 1980) Part One, 2 <http://publications.gc.ca/collections/collection_2017/aanc-inac/R5-183-1980-eng.pdf>; Giokas (n 73) 33.

This provision sought to move Indigenous peoples away from their traditional systems of self-government system and to accept the British system of municipal institutions with three-year elective period for chiefs and councillors, governed by the Superintendent-General of Indian Affairs[85]. It also encouraged them to accept an individual property holding system by subdividing the Indian reserves and made provisions for enfranchised Indigenous peoples to draw wills in favour of their children, although it excluded women.[86] Most of the provisions of *Gradual Enfranchisement Act* encouraged stronger assimilation and were later incorporated into the *Indian Act of 1876*.

Under the authority of s 91(24) of the *Constitution Act 1867*, the first *Indian Act of 1876* was enacted by parliament to consolidate most of the previous laws relating to Indigenous peoples into a single piece of legislation. This law became the basis for many more Indian Acts.[87] The general aims of this Act was 'to aid the red man in lifting himself out of his condition of tutelage and dependence … through education and other means, to prepare him for a higher civilization'.[88] It gave the Department of Indian Affairs immense power over Indigenous peoples all over Canada,[89] which included allocating lands, introducing a pass system to leave reserves, replacing Indigenous names with Western names for easier identification and controlling alcohol consumption, the sale of guns and ammunitions.[90] The underlying goal of this Act was to assimilate Indigenous peoples into the settler society by way of 'civilisation'. The assumption was to treat them either as 'minors or as white men',[91] although it did both by assigning the Department as their guardian and attempting to assimilate them into white society. By this Act, the Department took control of Indigenous peoples' lives by determining who was 'Indian', controlling their land, money and depriving women of Indian status based on their marital status. This Act never recognised Indigenous rights, especially their existing or potential treaty rights; it was enacted to regulate every aspect of their lives.

The *Indian Act 1876* adopted the three-year election system for Indian chiefs and councillors as had been provided by the *Gradual Enfranchisement Act*, although how many Indian bands adopted this system is unknown—there is only one historical reference to the adoption of this system by the Mississauga band in 1877.[92] The *Indian Act of 1880* amended the system by

[85]Under the *Indian Act 1868* (also known as *An Act Providing for the Organization of the Department of the Secretary of State of Canada and for the Management of Indian and Ordnance Lands*) the Superintendent-General of Indian Affairs had control over Indian Lands and Funds.
[86] Daugherty (n 84) 4; see also Giokas (n 73).
[87] Giokas (n 73) 35.
[88] Giokas (n 73) 36, citing 'Annual Report of the Department of the Interior, 1876'.
[89] Many provisions did not apply to some band of Indian living in the west; See generally Giokas (n 73) 36-38.
[90] Giokas (n 73) 38.
[91] David Laird, Minister of the Interior, during presentation of the Draft of *Indian Act*; Giokas (n 73) 35.
[92] Daugherty (n 84) 5.

revising the number of band representatives to a maximum of six chiefs and 12 second chiefs and councillors and eliminated or diminished the power of hereditary chiefs by prohibiting the exercise of the life-chiefs power.[93] The 1880 legislation also eliminated Indigenous peoples' access to money accumulated from the sale of lands or other resources and vested it to the Governor in Council ('GIC'). Another piece of legislation passed in 1886 was the *Indian Advancement Act* (also known as *An Act for conferring Certain Privileges on the more Advanced Bands of the Indians of Canada, with the view of Training them for the Exercise of Municipal Powers*), to force communities in the east to adopt the Westernised municipal system. In 1906, the *Indian Advancement Act* was consolidated into the *Indian Act*, which became pt II of the *Indian Act*.[94] Until 1951, there were many subsequent Indian Acts that truncated and eliminated Indigenous systems of government and advocated for stronger assimilation policies.[95]

Indigenous peoples made a huge contribution to World War II. As a result, following the war there was a huge outcry from the public (e.g., advocacy groups, churches and veterans' organisations) to end discrimination against them and there were calls for a Royal Commission to investigate the administration of Indigenous affairs, the dreadful conditions of Indigenous peoples on the reserves and to reform the *Indian Act*.[96] Instead of a Royal Commission, a Joint Committee of the Senate and House of Commons was created in 1946 to investigate the situation and make recommendations. During the submission, many Indigenous people argued that they were sovereign nations and demanded the abolition of the *Indian Act*. They also pointed to the deplorable and substandard conditions on reserves, inadequate land base, poor education and lack of respect for treaty rights.[97] Missionaries, teachers, doctors and others also made submissions in favour of Indigenous peoples. The Joint Committee released its recommendations in 1948 and subsequently, the *Indian Act 1951* was enacted, which adopted almost all the recommendations of the Joint Committee. The recommendations approved the previous assimilation policies of the government, although it disapproved of the methods used to achieve assimilation.[98] The Joint Committee also acknowledged that the process of 'civilisation' was almost complete. They found that Indigenous peoples could be given more financial assistance and self-government powers and there could be less government intervention in Indian affairs,

[93] Ibid.
[94] Ibid 7, 22.
[95] See generally Giokas (n 73) 42-52. The amendments in 1884 prohibited 'Potlatch' and 'Tamanawas' traditional dance which was a direct attack on Indigenous culture. These amendments also empowered the Superintendent to impose punishment for fraud or irregularity in an election. Amendments made in 1894 provided for the disposition of chiefs from office. More changes were made in 1895, 1898 and 1899 regarding the chief's office. Other changes made in the early twentieth century (1918, 1919, 1920, 1927, 1933, 1936 and 1938) gave the Superintendent-General and Governor in Council more power over Indians and Indian lands.
[96] Daugherty (n 84) pt 2.
[97] Giokas (n 73).
[98] Daugherty (n 84) pt 2, 67.

which would give them limited sovereign rights.[99] Under this legislation, they were allowed to practice their customary ceremonies, hire lawyers and Indigenous women were allowed to vote in band councils. However, the changes did not go far enough because the ultimate goal of 'civilisation' and 'assimilation' remained. According to Daugherty and Madill, 'the 1951 Act differed only slightly in tone from the *Indian Act* of 1876' because both 'provided for a cooperative approach between Government and Indian towards the goal of Indian "advancement" and assimilation'.[100] In 1969, Prime Minister Pierre Trudeau proposed a 'white paper', which called for greater equality by assimilation through the abolition of the Indian Act and the dismantling of the problematic Department of Indian Affairs. This policy was rejected by the Indigenous peoples on the same ground of 'assimilation' and because the white paper:

> [F]ailed to address the concerns raised by their leaders during the consultation process. It contained no provisions to recognize and honour First Nations' special rights, or to recognize and deal with historical grievances such as title to the land and Aboriginal and treaty rights, or to facilitate meaningful Indigenous participation in Canadian policy-making.[101]

The 'civilisation' element of the Doctrine played an important role in the development of laws and policies relating to Indigenous peoples in Canada. The Proclamation recognised their special status, but the *British North America Act* endowed the Crown with the power to make laws regarding Indigenous peoples and their territories. All subsequent laws consolidated under the Indian Acts point to the fact that the government actively pursued the 'civilisation' of Indigenous peoples through assimilation.[102] Moreover, many territorial and provincial laws, like rent regulation, marriage, gaming and tobacco control continued to apply to Indigenous peoples living on the reserves and regulated every aspect of their lives.[103] The *Constitution Act 1982* recognised and affirmed Aboriginal and treaty rights, but did not address that Indigenous peoples already lost most of their pre-colonial laws and customs through assimilation.[104]

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[99] Ibid 68.
[100] Ibid 73.
[101] 'The White Paper 1969' *Indigenous Foundations* (Web Page) <https://indigenousfoundations.arts.ubc.ca/the_white_paper_1969/>.
[102] The *Indian Act* made provisions for a singular system of government (municipal) but under the Inherent Rights of Self-Government Policy 1995 the government acknowledged that the First Nations are different communities and single system of government would not work in those communities. Therefore, self-government arrangements were introduced in recognition of the existence of the laws and cultures of different First Nations.
[103] See Harvey A Mccue, 'Reserves' *The Canadian Encyclopedia* (Web Page, 12 July 2018) <https://www.thecanadianencyclopedia.ca/en/article/aboriginal-reserves>.
[104] Julieta Uribe, *A Study on the Relationship between Canadian Aboriginal Peoples and the Canadian State* (Policy Paper FPP-06-04, Canadian Foundation for the Americas, March 2006) <https://www.focal.ca/pdf/Aboriginals_Uribe_Relationship%20Canadian%20Aboriginal%20Peoples%20and%20Canadian%20State_March%202006.pdf>.

4.3.1 The *Constitution Act 1982* and Indigenous Rights in the Courts

Since the colonial period until 1973, rights recognition of Indigenous peoples in law and policy was almost non-existent. In the 1889 case of *St Catharine's Milling and Lumber Company v The Queen*,[105] the Privy Council recognised Aboriginal title to the land, which was confined to 'a personal and usufructuary right, dependent upon the good will of the Sovereign',[106] and was consistent to the native title element of the Doctrine—that is, Indigenous peoples lost their full property rights and only retained occupancy and use rights. The end result favoured the province of Ontario and was based on notions that the original inhabitants belonged to an 'inferior race'.[107] The province of Ontario, through its adviser David Mills, was of the opinion that Indian title did not give Indigenous peoples title to the lands they occupied because under the Doctrine the Crown had full title of their lands.[108] This case addressed Indigenous land rights and treaty negotiation processes but did not lead to policy changes by the government.[109] The 1973 decision of the Canadian Supreme Court in *Calder v BC Attorney-General*[110] was the catalyst for Indigenous rights recognition in Canada. This case was filed by Frank Calder, the son of a Nisga'a chief, who claimed that Aboriginal title to the lands in Nass River Valley was never lawfully extinguished by consent or treaty and therefore they retained rights over their traditional lands declared by the Proclamation.[111] Although this case was lost in the Supreme Court of Canada on procedural issues,[112] it established that:

> [The claim that] after conquest or discovery the native peoples have no rights at all except those subsequently granted or recognized by the conqueror or discoverer was wholly wrong. There is a wealth of jurisprudence affirming common law recognition of aboriginal rights to possession and enjoyment of land of aborigines.[113]

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[105] [1888] UKPC 70 ('the *St Catharine's Milling* case') <https://www.casemine.com/judgement/uk/5b4dc23e2c94e07 cccd232ad>.
[106] Ibid 74 (Lord Watson).
[107] '1889- St Catherine's Milling v the Queen' *Canadian History* (Web Page) <https://canadianhistory.ca/natives/timeline/1880s/1889-st-catherine-s-milling-v-the-queen>. See Michael Jackson, 'The Articulation of Native Rights in Canadian Law' (1984) 18(2) *University of British Columbia Law Review* 255, 266-7.
[108] Guy Charlton and Xiang Gao, 'Constitutional conflict and the Development of Canadian Aboriginal Law' (2017) 19 *The University of Notre Dame Australia Law Review* 5: 1-29, 5 <https://researchonline.nd.edu.au/cgi/viewcontent.cgi?article=1023&context=undalr>.
[109] Neil J Sterritt, 'Aboriginal Rights Recognition in Public Policy: A Canadian Perspective' (2002) 1 *Journal of Indigenous Policy* 25, 29.
[110] [1973] SCR 313 ('the *Calder* case'), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/5113/index.do>.
[111] David A Cruickshank, 'Calder Case' *The Canadian Encyclopedia* (Web Page,1 June 2017) <https://www.thecanadianencyclopedia.ca/en/article/calder-case>.
[112] Out of seven judges three judges ruled against and three judges ruled in favour of the Nisga'a people and the seventh judge ruled against them on a procedural point.
[113] *Calder* (n 110) 315.

It was also established that Indigenous peoples had legal rights based on the occupation of traditional territories.[114] In citing the *Johnson v McIntosh*, Hall J made it clear that after 'discovery', Indigenous peoples lost their complete sovereignty but retained their traditional rights. According to Hall J:

> [O]n discovery or on conquest the aborigines of newly found lands were conceded to be the rightful occupants of the soil with a legal as well as a just claim to retain possession of it and to use it according to their own discretion, but their rights to complete sovereignty as independent nations were necessarily diminished and their power to dispose of the soil on their own will to whomsoever they pleased was denied by the original fundamental principle that discovery or conquest gave exclusive title to those who made it.[115]

The *Calder* case also influenced the inclusion of Indigenous rights in the Canadian *Constitution Act of 1982* through s 35. This case was also considered to be the foundation of Nisga'a Treaty of 2000, which restored the Nisga'a peoples' powers of self-government.[116] The Nisga'a Treaty paved the way for many future treaties to establish self-government of First Nations people.[117]

Although the current *Constitution Act* of Canada was adopted 1982, the *British North America Act* was adopted in 1867, which could only be amended by another Act of the Parliament of the United Kingdom. As a result, there was no mechanism to amend the *British North America Act* until the adoption of the current *Constitution Act* of 1982. [118] After many constitutional conferences, the current amendment mechanism was adopted, under which the British Parliament no longer has a role to play and the parliament of Canada and provincial legislatures are able to amend the Constitution.[119] Since 1867, there were three phases of constitutional change that led to the current position—the first phase spanned from 1870 to 1927 (compact of the provinces and people), the second phase from 1927 to 1970s (search for an amendment formula of the Constitution) and the third phase began in 1980 and remained in place until the proclamation of the *Constitution of Canada* in 1982.[120] The *British North America Act* and the

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[114] S Neyooxet, 'Calder v Attorney General of British Columbia; Aboriginal Case Law in an Ethnobiased Court' (2006) 26(1) *The Canadian Journal of Native Studies* 71, 72, 76. Scholars like Dr Neyooxet Greymorning believes that problems regarding First Nations rights will continue to exist as long as 'Eurocentric' cultures pass judgment over Indigenous cultures they don't understand.

[115] *Calder* (n 110), 383.

[116] The *Nisga'a Final Agreement Act*, RSBC 1999, c 2. It is the first modern day treaty that gave the First Nations right to self-government over 2019 square kilometre of lands in Nass River Valley.

[117] Ibid. See also Ross Hoffman and Andrew Robinson, 'Nisga'a Self-government: A New Journey Has Begun' (2010) 30(2) *The Canadian Journal of Native Studies* 387, 387-9.

[118] Daniel Dupras, 'The Constitution of Canada: A Brief History of Amending Procedure Discussions' (Working Paper, BP 283E, Law and Government Division, Government of Canada, January 1992) <https://www.publications.gc.ca/Collection-R/LoPBdP/BP/bp283-e.htm>.

[119] Ibid.

[120] Filippo Sabetti, 'The Historical Context of Constitutional Change in Canada' (1982) 45(4) *Law and Contemporary Problems* 11, 13.

Indian Act 1876 never recognised the inherent rights of Indigenous people and their self-government.

The *British North America Act* gave significant powers to the central government over the provincial governments and no power to either of them to amend the Constitution.[121] As a result, the provincial and central governments joined together by the 1870s to change the system. The provincial governments were given powers under s 92(1) of the *British North America Act* to amend the provincial constitutions but not the Act.[122] It was mainly the provincial governments who wanted to change the provisions of the Constitution so that they could exercise more power and authority and thereby increase their autonomy. It was first presented by the premier of Ontario to the Interprovincial Conference of 1887. While other provinces sought economic assistance, Ontario wanted greater autonomy.[123] The compact of the provinces ultimately forced the central government to recognise that they needed to consult with the provinces to devise a formula to amend the Constitution. In the federal–provincial conference of 1927, the Federal Minister for Justice, Ernest Lapointe, proposed that a simple majority of the provinces for 'ordinary' changes and a unanimous verdict for 'vital and fundamental' changes to the Constitution be adopted, although his proposal failed to get enough support.[124] Canada's autonomy was recognised by the *Statute of Westminster* in 1931 by the British Parliament, but it rejected the amendment procedure. Following the federal–provincial conference of 1931, another proposal—supported by the House of Commons and Senate—was sent to the British Parliament to exclude the Constitution Acts passed between 1867 and 1930 from the *Statute of Westminster*, but no resolution about the amendment procedure was passed by the British Parliament.[125] In 1949, the central government was given limited powers to amend the Constitution by incorporating s 91(1) in the *British North America (No 2) Act 1949*.[126] The amendment procedure was discussed in the federal–provincial conferences of 1931, 1933, 1935, 1936, 1941, 1945, 1950, 1955 and 1957, but no agreement was made.[127] Discussion continued and in 1971, a conference was held in Victoria, from which the 'Victoria charter' was proposed. This charter proposed that important changes to the Constitution could be made by resolution of the Senate, House of Commons and at least a majority of the provinces, which was different from the concurrent system of amending the Constitution.[128] However, the Victoria charter failed

[121] Ibid 16-17
[122] Section 92(1) was later repealed, and this power was incorporated in section 45 of the *Constitution Act 1982*.
[123] Sabetti (n 120) 18.
[124] Dupras (n 118).
[125] Ibid.
[126] Section 91(1) was later repealed and federal power to amend the Constitution was incorporated in pt V of the *Constitution Act 1982*.
[127] Sabetti (n 120) 23; see generally Dupras (n 118).
[128] Under existing system unanimous provincial consent needed for important changes to the constitution; see also Sabetti (n 120) 24-5.

to gain support from the province of Quebec because Quebec felt that this charter failed to address the question of power sharing between the provinces and the state of Canada.[129] Ultimately, a proposal similar to the Victoria charter was proposed by Prime Minister Trudeau and was incorporated in the *Constitution Act of 1982*.

There were many conferences and discussions regarding the amendment of the Constitution, but during this period little was mentioned about the inclusion of Indigenous peoples' inherent rights to sovereignty and self-government in the Constitution. Although s 91(24) of the *British North America Act* empowered the parliament of Canada to make laws related to 'Indians and Lands reserved for the Indians', it was never applied to recognise their unique cultures and laws. Ultimately, in *Calder* it was recognised that Indigenous peoples continued to possess the 'Aboriginal rights' that were not created by Canada but recognised under the common law of Canada.[130] Subsequently, the existing 'aboriginal and treaty rights' of Indigenous peoples were 'recognized and affirmed' under section 35(1) of the Canadian *Constitution Act* of 1982.

According to section 35 of the *Canadian Constitution Act 1982*:

> (1) The existing aboriginal and treaty rights of the aboriginal Peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal Peoples of Canada" includes the Indian, Inuit, and Metis Peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

The Constitution recognised the existing rights of Indigenous peoples that were not already extinguished. The effect of this provision was not to create new rights, but to give a constitutional form to the existing rights of Indigenous peoples. The provision extended to rights in existence at the time the provision came into force. Any rights that were extinguished within the intervening period could not be revived. Section 35 of the *Constitution Act 1982* has been subject to many court cases, in which the nature and scope of Indigenous rights were examined, including Canada's obligations and legal responsibilities towards Indigenous peoples. The most important case to test the scope of s 35 for the first time was *R v Sparrow*,[131] in which the

[129] Ibid.
[130] Brian Slattery, 'First Nations and the Constitution: A Question of Trust' (1992) 71(2) *The Canadian Bar Review* 261, 263.
[131] [1990] 1 SCR 1075 ('*Sparrow*') <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/ 609/index.do>.

Supreme Court shed light on the 'general principles of constitutional interpretation, principles relating to Aboriginal rights and purposes behind the constitutional provision itself'.[132] In deciding the appellant's (Ronald Edward Sparrow) existing Aboriginal rights to fishing as 'recognized and affirmed' by s 35(1) of the *Constitution*, the Court opined that 'Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also afforded Aboriginal peoples constitutional protection against provincial legislative power'.[133] The Court (Dickson CJ and La Forest J) confirmed that s 35 'gives a measure of control over government conduct and a strong check on legislative power' but 'does not promise immunity from government regulation'. [134] They argued that 'the government is required to bear the burden of justifying any legislation that has some negative effect on any Aboriginal right protected under s 35(1)'.[135] The Court also decided that 'the relationship between the government and aboriginals is trust-like' and as such under s 35, the Crown had 'fiduciary or trust-like' obligations towards them that could be enforced by the judicial system.[136] The decision also clearly set out the role of prior extinguishment in determining Aboriginal rights:[137]

> The *Sparrow* test deals with constitutional claims of infringement of aboriginal rights. This test involves three steps: (1) the assessment and definition of an existing aboriginal right (including extinguishment); (2) the establishment of a *prima facie* infringement of such right; and, (3) the justification of the infringement.[138]

There were some important cases before *Sparrow* that addressed Canada's obligation towards Indigenous peoples and provided valuable legal arguments in this regard.[139] For example, in *Guerin v The Queen*,[140] it was acknowledged (by Dickson, Beetz, Chouinard and Lamer JJ) that 'the Indians' interest in their land is a pre-existing legal right not created by the Proclamation, by s 18(1) of the *Indian Act*, or by any other executive order or legislative provision'[141] and the Crown had a fiduciary obligation regarding surrendered native land.[142] *Simon v The Queen*[143]

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[132] Ibid 1106.
[133] Ibid 1077.
[134] Ibid 1078, 1110. See also Maria Morellato and Mandell Pinder, 'Aboriginal Title and rights: Foundational Principles and Recent Developments' (Conference Paper, Constitutional & Human Rights Conference, Ottawa, Ontario, 19 June 2009) 18; see also Michael Asch and Patrick Macklem, 'Aboriginal Rights and Canadian Sovereignty: An Essay on R v Sparrow' (1991) 29(2) *Alberta Law Review* 498, 499-501.
[135] *Sparrow* (n 131) 1078.
[136] Slattery (n 130) 264.
[137] William Hipwell et al, 'Aboriginal Peoples and Mining in Canada: consultation, Participation and Prospects for Change' (Working Discussion Paper, North-South Institute, 2002). See also Asch and Macklem (n 133) 503.
[138] *R v Van der Peet*, [1996] 2 SCR 507 ('*Van der Peet*') [131] <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1407/index.do>
[139] Asch and Macklem (n 134) 499.
[140] [1984] 2 SCR 335 ('*Guerin*') <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2495/index.do>.
[141] Ibid 336.
[142] Asch and Macklem (n 134) 499.
[143] [1985] 2 SCR 387 ('*Simon*') <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/93/index.do>.

and *R v Sioui*[144] also dealt with the relationship between Indigenous peoples and the Crown. In *Simon*, the Court decided that it was not necessary to consider s 35 of the *Constitution* because s 88 of the *Indian Act* and art 4 of the Treaty of 1752—between the Crown and Micmac people—were enough to protect the appellants' rights to hunt in their traditional territory.[145] Similar to *Simon*, *R v Sioui* also relied on the treaty rights and s 88 of the *Indian Act* to uphold the traditional rights to cut down trees, camping and making fires. The Court observed:

> If the treaty gives the Hurons the right to carry on their customs and religion in the territory of the park, the existence of a provincial statute and subordinate legislations will not ordinarily affect that right. Finally, non-use of the treaty over a long period of time does not result in its extinguishment.[146]

The 'Sparrow Test' was substantially modified after six years in the case of *R v Van der Peet*,[147] although this time the threshold was higher. In *Sparrow*, the claimant needed to prove continuing Aboriginal activities and practices that were never properly extinguished.[148] However, under *Van der Peet*, the claimant needed to prove that the activities and practices existed in pre-colonial times and were 'compatible with Anglo–Canadian law as a whole'.[149] The Court claimed:

> A number of factors must be considered in applying the 'integral to a distinctive culture' test. The court must take into account the perspective of the aboriginal peoples, but that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure.[150]

The Court also argued that only those pre-colonial cultures that were compatible with Anglo–Canadian laws could be enjoyed as 'existing rights' as ensured under s 35 of the Constitution.[151] *Van der Peet* also differentiated between Aboriginal title and other free-standing Aboriginal rights such as fishing and hunting, which can exist independently from each other.[152]

In contrast, Indigenous rights were strengthened by the decision of *Delgamuukw v British Columbia*,[153] in which the Supreme Court of Canada decided that the Gitksan and Wet'suwet'en peoples had unextinguished non-exclusive Aboriginal rights derived from their historic

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[144] [1990] 1 S.C.R. 1025, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/608/index.do>.
[145] *Simon* (n 143) 24, 31, 36, 65.
[146] Ibid.
[147] *Van der Peet* (n 138).
[148] Russel Lawrence Barsh and James Youngblood Henderson, 'The Supreme Court's Van der Peet Trilogy: Naive Imperialism and Ropes of Sand' (1997) 42 *McGill Law Journal* 993, 998.
[149] Ibid.
[150] *Van der Peet* (n 138).
[151] Ibid. *Van der Peet* also relied on *Mabo-[No-2]* to discuss the existing Aboriginal rights.
[152] Kent McNeil, 'Aboriginal Title and Aboriginal Rights: What's the Connection?' (1997) 36(1) *Alberta Law Review* 117, 118-119.
[153] (1997) 3 SCR 1010 ('*Delgamuukw*'), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1569/index.do>.

occupation, use and possession of their tribal lands.[154] In the original British Columbia Supreme Court case,[155] the plaintiffs sought Aboriginal title over 58,000 square kilometres of land in the centre of British Columbia. The Crown claimed that the Aboriginal title of the plaintiffs did not survive following the Canadian Confederation in 1871. The plaintiff presented evidence that they had occupied the area for 3,000 to 6,000 years, which was supported by oral history known as 'adaawk and kungax' and represented by spiritual song, dance and rituals.[156] This evidence was admitted by McEachern CJ, but was given no independent weight during his deliberation. According to him:

> The pre-Confederation colonial enactments construed in their historic setting exhibit a clear and plain intention to extinguish aboriginal interests in order to give an unburdened title to settlers, and the Crown did extinguish rights to all the lands of the colony. The plaintiffs' claims for aboriginal rights are accordingly dismissed.[157]

Chief Justice McEachern also decided that:

> The right of Indians to use unoccupied, vacant Crown land is an (sic) not an exclusive right and it is subject to the general law of the province. The Crown has always allowed non-Indians also to use vacant Crown lands.[158]

An appeal was lodged against this decision to the British Columbia Court of Appeal, where the original decision was upheld.[159] The majority of the Appeal court (Lambert JA dissenting and Hutcheon JA partially dissenting) held that the Court could not adjudicate on Aboriginal jurisdiction, nor did it have the power to grant Aboriginal rights.[160] An application for leave to appeal to the Supreme Court of Canada was filed on October 1993.[161] Subsequently, the province of British Columbia signed an accord with the Gitksan and Wet'suwet'en peoples in 1994 to negotiate, but within a couple of years, the accord with Gitksan was suspended on the ground that they were pursuing an 'action on the land' campaign.[162] The case proceeded to the Supreme

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[154] Peter Grose, 'Developments in the Recognition of Indigenous Rights in Canada: Implications for Australia?' (1997) 4 *James Cook University Law Review* 68, 85-86. See also Mary C Hurley, 'Aboriginal Title: The Supreme Court of Canada Decision in *Delgamuukw v British Columbia'* (Background Paper, BP 459E, Law and Government Division, Library of Parliament, Canada, January 1998).
[155] *Delgamuukw v British Columbia* [1991] 3 WWR 97 (British Columbia Supreme Court) <https://www.canlii.org/en/bc/bcsc/doc/1991/1991canlii2372/1991canlii2372.html>.
[156] Maureen Tehan, 'Delgamuukw v British Columbia' (1998) 22(3) *Melbourne University Law Review* 763, 768.
[157] [1991] 3 WWR 97 (n 155), 113; see also Richard Bartlett, 'Aboriginal Land Rights at Common Law: The Likely Decisions of the High Court in Mabo v. Queensland' (1992) *Australian Mining and Petroleum Law Yearbook* 485, 502.
[158] [1991] 3 WWR 97 (n 154). Summary of findings and conclusions, [37].
[159] *Delgamuukw v British Columbia*, (1993) 104 DLR (4th) 470.
[160] Grose (n 154) 85.
[161] Ibid 86.
[162] Ibid.

Court of Canada for final hearing and the appeal was upheld by Lamer CJ (Cory and Major JJ concurring).[163]

During the appeal, the Supreme Court considered the oral history presented by the appellants and observed that the trial judge had 'erred when he discounted the "recollections of Aboriginal life" offered by various members of the appellant nations'.[164] Lamer CJ continued: 'If oral history cannot conclusively establish pre-sovereignty (after this decision) occupation of land, it may still be relevant to demonstrate that current occupation has its origins prior to sovereignty'.[165] This decision established the link between protection provided by Aboriginal title and Aboriginal rights pursuant to s 35(1) of the *Constitution Act 1982*.[166] Further, it re-determined how Aboriginal title may be proved and outlined the tests of infringement of Aboriginal title.[167] In determining the nature of Aboriginal title, the Court emphasised the terms of proof, prior and continuing occupation and usage of that particular land. According to the Court:

> One of the critical elements in the determination of whether a particular aboriginal group has aboriginal title to certain land is the matter of the occupancy of those lands. Occupancy is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group.[168]

In *Delgamuukw*, the Court also imposed some limitations on the activities that could be carried on the said land. Any lands held under Aboriginal title could not be alienated because that would end Aboriginal peoples' title to the lands. Aboriginal peoples should also surrender the lands if they decided to use the lands other than the way their Aboriginal title permits. The Court observed:

> [I]f occupation is established with reference to the use of the land as hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in

[163] Out of two main judgments Cory and Major JJ concurred with Lamer CJ and L'Heureux-Dude J concurred with La Forest J. La Forest J didn't agree with Lamer CJ 'on methodology he uses to prove that aboriginal peoples have a general right of occupation of certain lands'. McLachlin J concurred with Lamar CJ and was also in substantial agreement with La Forest J. Sopinka J did not take part in the judgment.
[164] *Delgamuukw* (n 153) [99]. Elihu Lauterpacht, CJ Greenwood and A G Oppenheimer (eds), *International Law Reports* (Cambridge University Press, 1999) Vol 115, 487.
[165] *Delgamuukw* (n 153) [101]. Lauterpacht (n 164) 488.
[166] See Hurley (n 154); see also Tehan (n 156) 763
[167] Lamer CJ directed that the Aboriginal groups must satisfy three criteria to probe Aboriginal title (1) occupation prior to sovereignty (2) continuity between present and pre-sovereignty occupancy and (3) that occupation is exclusive at sovereignty.
[168] *Delgamuukw* (n 153) [128]; Lauterpacht (n 164) 498.

such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).[169]

Therefore, *Delgamuukw* was important in characterising the nature of Aboriginal title and the conditions required to be satisfied for its recognition. The test was further developed in the *Tsilhqot'in v British Columbia,*[170] in which the Tsilhqot'in Nations (a semi-nomadic grouping of six bands) challenged a logging licence granted to a commercial operator by the government of British Colombia. In this case, the Court addressed three criteria for determining native title: '(i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation and (iii) at sovereignty, that occupation must have been exclusive'.[171] Aboriginal title based on occupation 'must be *sufficient*; it must be *continuous* (where present occupation is relied on); and it must be *exclusive*'.[172] *Tsilhqot'in* was significant because it was the first time in Canadian history that Aboriginal title was declared in favour of the Indigenous applicants outside of a reserve. The Court granted the Tsilhqot'in people ownership of more than 1,750 square km of land with the right to control and manage the land according to their laws and to reap the economic benefits from the land and its resources.[173] Further, they were given power to issue licences, permit or leases to any third party regarding the development of their lands.[174]The Court also reinforced the legal duties of the government to consult with the claimant group and obtain their consent to development projects.[175] However, this fell short of a veto power on development. The decision maintained the framework developed in earlier s 35 cases for a 'principled reconciliation of Aboriginal rights with the interests of all Canadians'.[176] This allowed for the infringement of Indigenous rights if a 'compelling and substantial purpose is established', but only if the incursion was 'consistent with the Crown's fiduciary duty towards Aboriginal people'.[177] This appeared to be an improvement on the position prior to the

[169] Ibid.
[170] (2014) 2 SCR 257 ('*Tsilhqot'in*') <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do>.
[171] *Delgamuukw* (n 153) (Lamer CJ) [143]; Lauterpacht (n 164) 504.
[172] *Tsilhqot'in* (n 170) 277 (McLachlin CJ) citing *Delgamuukw* test.
[173] 'Summary of the Tsilhqot'in Aboriginal title Case (William Case) Decision' *Tsilhqot'in National Government* (Web Page, 3 July 2014) <http://www.tsilhqotin.ca/Portals/0/PDFs/2014_07_03_Summary_SCC_Decision.pdf>.
[174] Heather L Treacy and Laura Easton, 'The Landmark Tsilhqot'in Nation Decision: What it Means for Project Developers in Canada' *CanLII Connects* (Web Page, 10 July 2014) <http://canliiconnects.org/en/commentaries/28101>.
[175] Tonda MacCharles, 'Supreme Court grants land title to B C First Nation in Landmark case', *The Toronto Star* (online at 26 June 2014) <https//www.thestar.com/news/Canada/2014/06/26/supreme_court_grants_land_title_to_bc_first_nation_in_landmark_case_html>. See also Treacy (n 175).
[176] *Tsilhqot'in* (n 170) 309, [125] (McLachlin CJ).
[177] *Tsilhqot'in* (n 170) 297-8, [84], [86], [87]). In this respect, the Court clarified the approach required in relation to Aboriginal title within the existing jurisprudence on s 35 of the *Constitution*: that resource development can only proceed with the consent of the title holders; development without consent demands demonstration of a compelling and substantial public interest; and that the fiduciary duties to consult and accommodate the interests of the title holders have been met in ways that will ensure future generations will enjoy the benefits of the land. If these requirements are not met a project may be cancelled and no retrospective legislation can validate a project. The

introduction of s 35 of the Constitution, whereby the federal parliament had exclusive jurisdiction over Indigenous peoples and exclusive power to extinguish Aboriginal title to lands.[178]

It would appear the judicial system of Canada can achieve positive results for Indigenous peoples and there have been times when the courts have gone beyond their territorial jurisdiction to allow the exercise of Indigenous rights. For example, a recent British Columbia Supreme Court case allowed First Nations people living in the USA to exercise their hunting rights beyond the USA border to Canada.[179] An appeal was brought before the Supreme Court against the ruling of the Provincial Court of British Columbia, in which it was decided that the defendant DeSautel, a member of the Sinixt First Nation, had rights to hunt in his traditional territory even though it extended beyond the border in the USA.[180] The Crown argued that the Sinixt First Nation was declared extinct in 1955 by the Canadian government and as such the defendant had no right under s 35(1) of the Canadian Constitution. However, referring to *R v Sparrow* and *R v Van der Peet*, Mrozinski J in the Provincial Court of British Columbia stated that 'to be an Aboriginal right, an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right'.[181] The Court acknowledged 'the overwhelming historical evidence is that the Sinixt continue to exist today as a group' and still have rights in Canada even if they were pushed inside the boundary of the USA a long time ago.[182] Justice Sewell of the Supreme Court of British Columbia agreed with the trial judge and observed that:

> Her findings of fact confirm the deep connection between the Sinixt and their traditional territory in Canada. The right asserted is based entirely on the use and practices carried out by the Sinixt prion to first contact on lands that are not incorporated into Canada and the continuity of the Lakes Tribe's practices with those of their ancestors'.[183]

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fiduciary duty includes ensuing that any incursions on Aboriginal title 'do not substantially deprive future generations of the benefit of the land'; 'the incursion is necessary to achieve the government's goal'; 'the government go no further than necessary to achieve [the goal]'; and 'the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest'. See Francesca Dominello, 'Settler colonialism and apologies to Indigenous Peoples: a critical analysis of the Rudd and Harper apologies' (PhD Thesis, University of New South Wales, 2018); Richard Bartlett, 'Indigenous rights in and control of resource development: The contrast between the Australian and Canadian law of native title' (2014) 33(3) *Australian Resource and Energy Law Journal* 311, 320.

[178] Dominello (n 177).

[179] *R v DeSautel* [2017] BCSC 2389 ('*DeSautel*') (British Columbia Supreme Court); Leyland Cecco, 'Land Fight Could Grant Thousands of Indigenous Americans New Rights in Canada' *The Guardian* (online at 21 February 2018) <https://www.theguardian.com/world/2018/feb/21/case-us-native-americans-land-rights-canada>.

[180] *R v DeSautel*, 2017 BCPC 84 (Provincial Court).

[181] *Van der Peet* (n 138) [46].

[182] Ashifa Kassam, "Sinixt First Nation wins recognition in Canada decades after 'extinction'" *The Guardian* (online at 30 March 2017) <https://www.theguardian.com/world/2017/mar/30/canada-sinixt-first-nation-extinct-recognition>.

[183] *DeSautel* (n 179) [90].

According to experts, this ruling may restore the hunting and fishing rights of thousands of Indigenous peoples who were separated and dispersed during the determination of the border between the USA and Canada.[184] Moreover, this ruling could have implications for development projects around the US–Canadian border. In relation to projects like oil and gas pipelines and water sharing of common rivers, Indigenous peoples could have more consultation and negotiation power. However, the outcomes are still uncertain because the Crown filed another appeal in this case.

Since the adoption of the Constitution in 1982, the Supreme Court has entertained many cases involving Indigenous parties that have affirmed their traditional and customary rights to hunt, fish and observe traditional ceremonies and have protected their civil rights to vote, defined their self-government rights and repealed discriminatory legislative provisions.[185] There are many other cases that have challenged the *Indian Act*, the arbitrary decisions of government to allow resource development projects and the lack of consultation and failure to obey treaty rights.[186] However, despite the positive outcomes in these cases, it is equally true that there have been many unsuccessful attempts to recognise and affirm Indigenous rights. In terms of the argument advanced in this thesis, it remains the case that the Supreme Court has not gone far enough to overturn the Doctrine which is tacit in the Crown's original assertion of sovereignty and to accept that Indigenous sovereignty has survived into present times.[187] Instead, the Court in these cases

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[184] Cecco (n 179).

[185] **Hunting and Fishing cases**: *R v Horseman* [1990] 1 SCR 901; *R v Badger* [1996] 1 SCR 771' *R v Lewis* [1996] 1 SCR 921; *R v Marshall* [1999] 3 SCR 456 (It was an important case regarding native fishing rights that allowed the Mi'kmaq and Maliseet First Nations to earn moderate living from fishing and hunting); *R v Morris* [2006] 2 SCR 915; *Lax Kw'alaams Indian Band v Canada (A.G.)* [2011] 3 SCR. 535.

[186] **Cases related to treaty rights**: *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2005] 3 SCR 388 (Treaty 8); *Ermineskin Indian Band and Nation v Canada* [2009] 1 SCR 222 (Treaty 6); *Grassy Narrows First Nation v Ontario (Natural Resources)* [2014] 2 SCR 447 (Treaty 3); R v Gladstone, [1996] 2 SCR 723 (Non-treaty Aboriginal rights); **Cases related to voting rights and *Indian Act***: *Corbiere v Canada*, [1999] (This case forced the government to change provisions of *Indian Act* regarding voting in the Band); *McIvor v Canada*, [2009] (Amend Indian Act regarding discrimination against Indian women and their children); **Cases related to Aboriginal consultation**: *Haida Nation v British Columbia (Minister of Forrest)* [2004] 3 SCR 511 (The government must consult the First Nations otherwise they can pursue remedies like, interlocutory injunctions, damages or proper complete consultation); *Taku River Tlingit First Nations v British Columbia (Project Assessment Director)*, [2004] 3 SCR 550 (Majority of Court of Appeal found that the Province had failed to consult and accommodate the TRTFN but was later overturned in the Supreme Court); *Clyde River (Hamlet) v Petroleum Geo-Services Inc.* [2017] 1 SCR 1069 (The Supreme Court quashed National Energy Board's authorisation due to inadequate consultation); *Chippewas of the Thames First Nation v Enbridge Pipeline Inc.* [2017] SCC 41 (Failure to adequately consult First Nations regarding pipeline in Ontario constructed by Enbridge Pipelines. The Supreme Court decided against the First Nations); **Self-Government case**: *R v Pamajewon* [1996] 2 SCR 821 (The court decided that gambling was not 'integral part of distinctive aboriginal culture' and 'Claims of self-government under s. 35(1) are no different from other claims to the enjoyment of aboriginal rights and must be measured against the same standard'). See also David T. McNab, 'A Brief History of the Denial of Indigenous Rights in Canada' in Janet Miron (ed), *A History of Human Rights in Canada: Essential Issues* (Canadian Scholars' Press Inc. Toronto, 2009).

[187] Moreover, political attempts to address Indigenous peoples' claims to sovereignty have been less than satisfactory. The Canadian government in 1995 adopted a policy of self-government in recognition of Aboriginal inherent right of self-government under s 35 of the *Constitution Act, 1982*. According to the Royal Commission on Aboriginal Peoples 1996 ('RCAP') 'the right of self-government is inherent in its source … within Aboriginal peoples … originally held as independent and sovereign nations'. The Aboriginal self-government is 'recognized by the Canadian legal system, under the constitutional common law of Canada and also under section 35(1).

maintains its superior position as protector, which leaves the Indigenous peoples in a subordinate position where they have to establish and defend their Aboriginal rights in the Canadian courts. Subsequently, the courts decide what rights can and cannot be recognised and what tests to apply to prove these rights.[188] If Indigenous peoples fail to satisfy the common law legal requirements, this will result in findings that their rights have been extinguished. However, even if they succeed, their rights can be infringed by the Crown, which was evident in the reasoning in *Tsilhqot'in*.

4.3.2 The Relationship Between the Indigenous Peoples and the Government Post-1982

The *Constitution Act 1982* recognised Indigenous peoples and their pre-colonial Aboriginal and treaty rights. However, questions remain regarding the extent of their self-government, the recognition of treaties and the scope of Indigenous rights in Canadian law. These issues are addressed by precedents and successive pieces of legislation. It is difficult to ignore the social differences between Aboriginal and non-Aboriginal peoples, which have created divisions and subsequent conflicts. Governments have attempted to address these issues many times by recognising that Indigenous peoples are different—even within Nations—and require different treatment. Next, I discuss some of these initiatives and achievements or lack thereof.

4.3.2.1 The Charlottetown Accord

In 1992, Prime Minister Brian Mulroney and 10 provincial premiers jointly proposed to amend the *Constitution Act* of 1982.[189] The proposal, which was known as the Charlottetown Accord, proposed 60 amendments to the Constitution, including recognition of Indigenous self-government.[190] The proposal in this Accord regarding recognition and affirmation of the inherent rights to self-government was considered to be the most promising. The aim was to amend the

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According to this justification the right of self-government can be understood as a remnant of Indigenous sovereignty which is now subject to Canadian law. This also coincided with the rise of agreement making between government and Indigenous Nations but failed to advance Indigenous peoples' claims to sovereignty and self-determination. In fact, in more recent times, agreement making has moved away from a rights-based view of self-government to the adoption and to a neoliberal conception that is based on the notion of 'good governance'. The policy has been dismissed by Indigenous critics as yet another form of colonial domination in attempting to assimilate Indigenous peoples within Western governance structures by applying Western values and ideas which are completely divorced from traditional Indigenous ways. *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship* (Final report, October 1996) Vol 2 (pt 1) 201, 202. Dominello (n 177). Martin Papillon, 'The Rise (and Fall?) of Aboriginal Self-Government' in Alain-G Gagnon and James Bickerton (eds), *Canadian Politics* (University of Toronto Press, Toronto, 2014) 113-25.

[188] *Sparrow* (n 131); *Van der Peet* (n 138). In *Grassy Narrows First Nation v Ontario (Natural Resources)* [2014] 2 SCR 447 the Supreme Court found that the province could infringe constitutionally protected treaty rights and take up lands across the entire territory in question and not just those lands which Grassy Narrows claimed had been assigned for early settlement and colonial expansion under the original Treaty No. 3.

[189] Gerald L Gall, 'Charlottetown Accord' The Canadian Encyclopedia (Web Page, 11 December 2014) <https://www.thecanadianencyclopedia.ca/en/article/the-charlottetown-accord>.

[190] Jeffrey J Cole, 'Canadian Discord Over the Charlottetown Accord: The Constitutional War to Win Quebec' (1993) 11(3) *Dickinson Journal of International Law* 627, 642-652.

Constitution by inserting s 35.1 to make provisions for a third order of government with a separate head of power for First Nations.[191] During negotiations of the Accord, Indigenous peoples were represented by the Assembly of First Nations (Ovide Mercredi), the Inuit Tapirisat Kanatami (Rosemary Kuptana), the Native Council of Canada and the Métis National Council.[192] Although it was a step forward, many treaty-based Indigenous peoples opposed it on the ground that the self-government structure under the Accord was created by the state rather than those recognised by the historic treaties negotiated on a nation-to-nation basis.[193] Some Indigenous peoples shared the view that the provinces of Canada did not have status (as proposed by the Accord) to enter into international treaties with the Indigenous nations.[194] As a result, there was no uniform Indigenous support for the Accord and it was ultimately rejected by Canadian voters in a referendum.[195] Some Indigenous peoples still believe it was a missed opportunity. The recognition of Indigenous self-government was delayed because the Charlottetown Accord unfairly packaged the issue of self-government with many other non-Indigenous issues and all of them failed together in the referendum.[196] According to Matthew Coon Come, the then Grand Chief of the Grand Council of the Crees in Quebec, 'the key features of the Charlottetown Accord, which now seems so extraordinary, even revolutionary, were logical and fundamentally correct'.[197] Some also believed that the Charlottetown process also represented 'a consensual, non-colonial model of Crown–Aboriginal relations'.[198]

4.3.2.2 The Royal Commission on Aboriginal Peoples

The Royal Commission on Aboriginal Peoples ('RCAP') was established in 1991 to 'restore justice to the relationship between Aboriginal and non-Aboriginal people in Canada'[199] following a 78-day armed standoff (also known as Oka Crisis) between Mohawk (Kanesatake),

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[191] See generally Christa Scholtz, 'Aboriginal Communities and the Charlottetown Accord: A Preliminary Analysis of Voting Returns' (Conference paper, Canadian Political Science Association Annual Meetings, Vancouver, British Columbia, June 2008); Julieta Uribe, *A Study on the Relationship between Canadian Aboriginal Peoples and the Canadian State* (Policy Paper FPP-06-04, Canadian Foundation for the Americas, March 2006) 5 <https://www.focal.ca/pdf/Aboriginals_Uribe_Relationship%20Canadian%20Aboriginal%20Peoples%20and%20Canadian%20State_March%202006.pdf>.

[192] Scholtz (n 191) 1.

[193] Uribe (n 191) 5.

[194] Sharon Venne, 'Treaty Indigenous Peoples and the Charlottetown Accord: the Message in the Breeze' (1992) 4(1) *Constitutional Forum* 43, 45.

[195] Scholtz (n 191) 1.

[196] Cole (n 190) 634, 642.

[197] Matthew Coon Come, 'Charlottetown and Aboriginal Rights: Delayed but Never Relinquished' *Policy Options* (Web Page, 1 December 2002) < http://policyoptions.irpp.org/magazines/kyoto/charlottetown-and-aboriginal-rights-delayed-but-never-relinquished/>.

[198] Ibid.

[199] 'Highlights from the Report of the Royal Commission on Aboriginal Peoples' *Government of Canada* (Web Page, 15 September 2010) <https://www.rcaanc-cirnac.gc.ca/eng/1100100014597/1572547985018>. See also *Final Report of The Royal Commission on Aboriginal Peoples* (Report, 1996).

the Surete du Quebec and the Canadian army.[200] The Commission held 178 public hearings, 96 community visits and commissioned many more expert reports including 1,200 specialised studies to produce a five-volume final report with the goal of establishing an improved relationship between Aboriginal and non-Aboriginal peoples.[201] The RCAP recognised that for the past 400 years, the Aboriginal and non-Aboriginal relationship in Canada was built on 'false premises', which resulted in the removal of Aboriginal people from their homelands, suppressed their government and undermined Aboriginal cultures.[202] It also acknowledged that Aboriginal peoples were the most neglected in Canada, which was evident in high rates of unemployment, ill health, lower life expectancy, increased domestic violence and substance use and lower education.[203]

The RCAP made 400 recommendations and pointed to three basic changes that needed to happen in Aboriginal societies to bring them out of their current status. First, they needed to take control of their own affairs as against the 'ruinous paternalism' of colonial Canadian government; second, they needed a larger land base; and third, they needed 'time, space and respect' from the rest of the society.[204] The standout recommendations were to reverse the long-standing assimilation policy and to establish a nation-to-nation relationship based on the treaty negotiation model. The RCAP report acknowledged that Indigenous 'lands and resources were taken from them by settler society and became the basis for the high standard of living enjoyed by other Canadians over the years'.[205] It found that Indigenous peoples required a larger self-governing land base that was legally protected, so that the federal and provincial governments would be required to consult and obtain consent before any land use.[206] According to the RCAP:

> [A]boriginal peoples need much more territory to become economically, culturally and politically self-sufficient. If they cannot obtain a greater share of the lands and resources in this country, their institutions of self-government will fail. Without adequate land and resources,

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[200] The conflict between the Mohawk and the police (with Army) began when a proposal was tabled to expand a golf course over a Mohawk burial ground. The conflict escalated after the death of police officer Corporal Marcel Lemay. Subsequently the tensions cooled down after the proposal was cancelled and the land was purchased by the federal government to preserve it. Tabitha Marshall 'Oka Crisis' *The Canadian encyclopedia* (Web Page, 28 January 2019) <https://www.thecanadianencyclopedia.ca/en/article/oka-crisis#>; Martha Troian, '20 years since Royal Commission on Aboriginal Peoples, still waiting for change' *CBC News* (Web Page, 4 March 2016) <https://www.cbc.ca/news/indigenous/20-year-anniversary-of-rcap-report-1.3469759>.

[201] Neil J Sterritt, 'Aboriginal Rights Recognition in Public Policy: A Canadian Perspective' (2002) 1 *Journal of Indigenous Policy* 25, 38.

[202] *Summary of the Final Report of The Royal Commission on Aboriginal Peoples* (Report, April 1997) 2 <https://iog.ca/docs/1997_April_rcapsum.pdf>.

[203] Ibid.

[204] See James Tully, 'A Fair and Just Relationship: The Vision of the Canadian Royal commission on Aboriginal Peoples' (1998) 57(1) *Meanjin* 146 (Web Page) <https://search.imformit.com.au/documentSummary;dm=030173448271181;res=IELLCC>.

[205] Andrew J Orkin, 'When the Law Breaks Down: Aboriginal Peoples in Canada and Governmental Defiance of the Rule of Law' (2003) 41(2) *Osgoode Hall Law Journal* 445, 448, citing RCAP.

[206] Ibid.

> Aboriginal nations will be unable to build their communities and structure the employment opportunities necessary to achieve self-sufficiency.[207]

The RCAP also emphasised the use of treaty negotiations to define the relationship between Aboriginal and non-Aboriginal Canadians and confirmed that the oral history of treaties transmitted from generation to generation among Indigenous peoples could be used to supplement the official interpretation of treaties based on the written document'[208] For the economic development of land and natural resources, the RCAP recommended the renegotiation of existing agreements to ensure that 'First Nations obtain full benefit of mineral and oil and gas resources on reserve'.[209]

Despite the immense resources used to produce the five volumed report, most of the RCAP recommendations regarding Indian treaties, Aboriginal land base and title, Métis land rights and Aboriginal self-government are yet to be implemented. Further, substantive recommendations of the RCAP were 'shelved' by the Jean Chrétien government in favour of the 'Gathering Strength' policies introduced in 1998, which emphasised a 'longer term vision of stronger people, community and economies', 'investment in healing and reconciliation' and partnership between Indigenous peoples and Canada regarding health and self-sufficiency.[210] The 'Gathering Strength' policies did not include many key Aboriginal issues and had no meaningful action plan.[211] The RCAP achieved some significant public awareness for Indigenous peoples, which was subsequently taken up by the Canadian Truth and Reconciliation Commission established in 2008 as part of the Settlement Agreement relating to the Indian Residential Schools System. Nevertheless, there were many other recommendations of the RCAP that were based on neoliberal ideology. Specifically those regarding land, resources and economic development issues, the RCAP believed in 'co-jurisdiction and co-management arrangements' in which the Crown is the supreme authority with fiduciary obligations towards Aboriginal people.[212] Land and natural resource development was seen as essential for the benefit of the population, which is why the RCAP recommended that the Aboriginal communities would achieve maximum

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[207] Matthew Coon Come, 'Cree Experience with Treaty Implementation' in Terry Fenge and Jim Aldridge (eds) *Keeping Promises: The Royal Proclamation of 1763, Aboriginal Rights and Treaties in Canada* (McGill Queen's Press 2015) 165.

[208] *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship* (Final report, October 1996) Vol 2, pt 1, 49 (Recommendation 2.2.2); Miguel Alfonso Martínez, *Human Rights of Indigenous Peoples: Study on treaties, agreements and other constructive arrangements between States and indigenous populations*, ECOSOC Sub-Commission on Prevention of Discrimination and Protection of Minorities, Final report, UN Doc E/CN.4/Sub.2/1999/20 (22 June 1999) 119, <https://static1.squarespace.com/static/ 55229e9be4b034f30e89bc6e /t/5550f032e4b08ed65a25360d/1431367730158/Treaty+Study.pdf>.

[209] *Summary of the Final Report* (n 202) 29.

[210] Sterritt (n 201) 39.

[211] see Thomas J Courchene, *Indigenous Nationals, Canadian Citizens: From First Contact to Canada 150 and Beyond* (McGill-Queen's University Press, Kingston, 2018)

[212] '*Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*' (n 208) 6, 549.

benefits through profit-sharing, employment, industry knowledge and education. However, such solutions were based in neoliberal market practices and replicated colonial processes.[213] Rather than discouraging destruction of land and natural resources, the RCAP urged:

> Provinces and companies to develop consultation mechanisms that encourage Aboriginal communities to participate in initial exploration, development and mining plans and provide non-technical information to the communities, so that they can fully appreciate the implications and play a real role in the planning process.[214]

Neoliberal colonialism was entrenched into Canadian government and some scholars have argued that the 'RCAP report "normalizes" pre-existing narratives regarding Aboriginal politics into a rigid hierarchy of claims'.[215]

Canada still practices its historic assimilation policies. The Government of Canada and the provinces continue to marginalise Aboriginal communities by extinguishing their rights as affirmed by the Constitution. The RCAP had a very complicated task that resulted in the recommendation of hundreds of measures, most of which are yet to be implemented by the government. Many Indigenous leaders and members of civil societies question the will of government to implement the recommendations of the RCAP because the report resulted in very few legislative and policy changes. However, despite the more beneficial recommendations, the RCAP never sought to challenge the Crown's sovereignty. Indigenous right to self-government remained subject to Canadian law and the constitutional framework.[216] In this case, international norms may prove more promising.[217] As former National Chief of the Assembly of First Nations Matthew Coon Come has claimed in his critique of the government's efforts to implement the RCAP:

> Nearly twenty years later, despite numerous condemnations by the international community of its failure towards Aboriginal peoples in Canada, and despite signing on to the United Nations Declaration on the Rights of Indigenous Peoples in 2010, Canada continues its unfair and illegal practice of dispossession and extinguishment of inherent rights and title. In continuing these practices and failing to adequately address the situation of Aboriginal peoples, Canada is failing to implement its international obligations.[218]

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[213] '*Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*' (n 208) 619. RCAP recommendations 2.4.51, 2.4.52 and 2.4.53.
[214] '*Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship'* (n 208) 620.
[215] Chris Anderson and Claude Denis, 'Urban Natives and the Nation: Before and After the Royal Commission on Aboriginal People' (2008) 40(4) *Canadian Review of Sociology and Anthropology* 373 <https://global-factiva-com.simsrad.net.ocs.mq.eud.au/ga/default.aspx>.
[216] '*Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship'* (n 108) 202.
[217] See chapter 6 bellow.
[218] Come, 'Cree Experience' (n 207) 165.

4.3.2.3 The Harper Decade

The RCAP made its recommendations to the Chrétien government, which failed to convert most of the recommendations into policies. His successor Paul Martin put the Indigenous agenda on the top of the list and began consultations with Indigenous communities and Provincial governments.[219] After 18 months of consultation, the parties agreed on the 'Strengthening Relationships and Closing the Gap' (also known as Kelowna Accord) policy, under which the parties would work to improve the living standard of Indigenous peoples through strengthening relationships and improved education, health, housing and economic opportunities.[220] However, within months of adopting this policy, Paul Martin was succeeded as Prime Minister by Stephen Harper who decided to ignore this policy. In opposition, Paul Martin attempted to revive it through a private member's bill (Bill C-292). His proposal won by 176–126, but a private members bill could not compel the government to allocate money.[221] As a result, the Harper government allocated less funding for Indigenous health, education and housing. Following Bill C-292, the *Kelowna Accord Implementation Act 2008* was passed and under this law the government, through the minister of Aboriginal Affairs and Northern Development, was required to submit annual progress reports for a five-year period. The government claimed that there were improvements for Indigenous peoples, but the Assembly of First Nations argued that the government did very little to address the issues identified in the Kelowna Accord.[222] Due to Harper government's reluctance and lack of funding, the Kelowna Accord never fully materialised.

Besides dishonouring the Kelowna Accord, Stephen Harper's government refused to launch a national inquiry into missing and murdered Aboriginal women and cut funding for the organisations and social groups working in this sector.[223] The Harper government came up with its own idea of Aboriginal rights by introducing Bill C-44, which was an Act to amend the *Canadian Human Rights Act 1977*. This bill was proposed to repeal s 67 of the *Canadian Human Rights Act*, under which the federal government and the Indigenous Nations governments were exempt from any action arising from complaints of discrimination relating to 'any provision of

[219] See Courchene (n 211).
[220] Ibid. With a commitment of CAD 5.08 billion the parties agreed on a timeframe of ten years, and that by 2016 the standard of living of Indigenous people would be at the same standard as other Canadians.
[221] Courtney Jung, 'Canada and the Legacy of the Indian Residential Schools: transitional justice for indigenous people in a non-transitional society' (2009) *Aboriginal Policy Research Consortium International* 295: 1-29, 4 <https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1149&context=aprci>
[222] Tabitha Marshall, 'Kelowna Accord' *the Canadian Encyclopedia* (Web Page, 16 December 2013) <https://www.thecanadianencyclopedia.ca/en/article/kelowna-accord>.
[223] Shaun Brabant, 'Where's Amanda?: The Indifference Given to Missing Indigenous Women' *Academia* (Web Page) <http://www.academia.edu/21598321/Wheres_Amanda_The_Indifference_Given_to_Missing_Indigenous_Women>.

the *Indian Act* or any provision made under or pursuant to that Act'.[224] For many years, Indigenous women married to non-Indigenous men had been denied Indian status under the *Indian Act* and Bill C-44 sought to address this.[225] However, the Canadian Human Rights Review Panel also acknowledged that s 67 of the *Canadian Human Rights Act* had significant implications for Aboriginal people and concluded that 'a blanket exception like section 67 is inappropriate'.[226] The Assembly of First Nations and the Native Women's Association of Canada held many reservations and wanted the government to consult with Indigenous Nations before proceeding with the bill.[227] Because of the lack of consultation, the Assembly of First Nations National Chief Phil Fontaine dubbed the bill as 'a recipe for ineffectiveness'.[228] Even some experts argued that Bill C-44 would dispossess 'hundreds of First Nation communities across Canada from their reserve lands'.[229] Some Indigenous Nations also argued that they already enjoyed general protection under the *Canadian Human Rights Act* and there was no need to repeal s 67. There was both support and opposition to the bill from many Indigenous Nations representatives. After long proceedings, the parliament decided to not continue with the bill in September 2007. Subsequently, the government introduced Bill C-21, which was similar to Bill C-44 and sought to repeal s 67. This was passed with support from the opposition party following significant amendments.[230]

Of most significance to Indigenous affairs during the Harper government was the resolution of a class action brought by Residential Schools Survivors against the government and the churches.[231] The Harper government also offered a formal apology to acknowledge the intergenerational damage caused to the former students of Indian Residential Schools, their families and communities. The apology was offered to establish a new relationship between the Indigenous peoples and rest of Canada. However, political scientist Courtney Jung has argued that the government used the apology 'to shutdown other Indigenous demands, offering

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[224] Mary C Hurley, 'Bill C-44: An Act to Amend the Canadian Human Rights Act' (Research Paper, Parliamentary Information and Research Service, Canada, 2007) 1 <http://publications.gc.ca/collections/ collection_2007/lop-bdp/ls/391-546-1E.pdf>.
[225] Ibid.
[226] Ibid.
[227] Ibid; The experts and Frist Nations argued that the bill should include, clauses to protect Aboriginal treaty rights, interpretive provision to guide the CHRC, courts and tribunals in balancing individual human rights and collective constitutional rights of First Nations, 36 months transition period, funding for First Nations government and independent First Nations institutions to consider complaints against First Nations government.
[228] Hurley (n 224) 13; see also Jung (n 221) 8.
[229] Jung (n 221) 5.
[230] Ibid; see also Hurley (n 224). It was agreed that the Bill C-21 'shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the First Nations peoples of Canada'.
[231] Discussed in Section 4.3.2.4.

transitional justice in exchange for quiescence on other issues'.[232] Further, Daniel Wilson[233] claimed that 'reconciliation between the Crown and First Nations even seemed a possibility, but in the end, as the policy record shows, it was only words' and Harper's apology was insincere because he was committed to a policy of assimilation.[234] Moreover, many subsequent government decisions, laws, policies and inactions failed to establish the desired relationship.[235] Among the failures of the Harper government was the de-funding of Aboriginal language and healing programs[236] and its failure to acknowledge national on-reserve housing crisis. It was notable for enacting many new laws regarding Aboriginal relations without equal partnership.[237]

Many Indigenous critics considered Stephen Harper to be racist and aggressive and who ultimately set the Aboriginal relationship back 100 years.[238] He repeatedly ignored the call to endorse the UNDRIP before signing it in 2010, but remained a permanent objector to the declaration.[239] In reality, the Harper government was driven by neoliberal ideology, which focused on economic and resource development on reserves without focusing on issues identified by Indigenous peoples.[240] It used Aboriginal housing and water crises to 'assert control over First Nations band councils and chiefs' and to 'integrate private property regimes into Aboriginal communities'.[241] The Harper government passed Bill C-21, offered the apology, established Truth and Reconciliation Commission ('TRC') and endorsed the UNDRIP, but its overall attitudes towards Indigenous rights, its attempts to reduce Aboriginal self-government and lack of consultation regarding resource development, earned little support inside Indigenous communities.

By introducing the *Federal Accountability Act 2006*, the Harper government attempted to control the finances of Indigenous Nations governments by suggesting that they were corrupt and

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[232] Jung (n 221) 9.
[233] Daniel Wilson is a research associate with the Canadian Centre for Policy Alternatives who worked in senior policy roles for the Assembly of First Nations and the Congress of Aboriginal Peoples. He also served 10 years as a diplomat in Canada's Foreign Service, working mainly with refugees in Africa and Southeast Asia.
[234] Daniel Wilson, 'Irreconcilable differences: First Nations and the Harper government's energy superpower agenda' in Teresa Healy and Stuart Trew (eds), *The Harper Record 2008-2015* (Canadian Centre for Policy Alternatives, Ottawa, 2015) 19, 25.
[235] Aboriginal people argue that laws like the *Specific Claims Tribunal Act 2008*, the *First Nations Financial Transparency Act 2013* (came into effect 1 April 2014), the *Safe Drinking Water for First Nations Act 2013,* and the *Family Homes on Reserve and Matrimonial Interests or rights Act 2013* disadvantaged them and their self-government.
[236] See James FitzGerald, 'Truth without reconciliation: The harper government and Aboriginal peoples after the apology' in Teresa Healy and Stuart Trew (eds), *The Harper Record 2008-2015* (Canadian Centre for Policy Alternatives, Ottawa, 2015) 246-7.
[237] Ibid.
[238] Pamela Palmater, 'Harper's 10 Year War on First Nations' *The Harper Decade* (Web Page, 16 July 2015) <http://www.theharperdecade.com/blog/2015/7/14/harpers-10-year-war-on-first-nations>.
[239] James Wilt, 'Implementing UNDRIP is a Big Deal for Canada. Here's What You Need to Know' *The Narwhal* (Web Page, 12 December 2017) <https://thenarwhal.ca/implementing-undrip-big-deal-canada-here-s-what-you-need-know/>.
[240] See Jung (n 221) 9.
[241] See FitzGerald (n 236) 251.

incompetent and it was 'the first of many attempts over the next eight years to paint First Nations governments as illegitimate'.[242] During his time in power, there were many Supreme Court cases that supported Indigenous nations rights, yet he declined to negotiate because he was 'inclined to dictate rather than negotiate'.[243] In 2014, a report by the Special Rapporteur on the Rights of Indigenous Peoples James Anaya claimed that 'the relationship between the federal Government and Indigenous peoples is strained, perhaps even more so than when the previous Special Rapporteur visited Canada in 2003'.[244]

Another key agenda of the Harper government was to increase investment in the resource development projects with the intention of making Canada an 'energy superpower'.[245] To this end, his government promoted resource development projects on Indigenous lands without proper consultation. Because of Harper's 'commitment to ignore the rights of Indigenous peoples and his 'dictate rather than negotiate' attitude, his government was in constant conflict and disagreement with Indigenous Nations.[246] During his 10 years in office, Harper's government promoted resource development on Indigenous lands including exploration and transmission of oil and gas, forestry and mining and his government approved the Site-C hydroelectric project without following proper consultation and regulatory processes.[247] The Harper government also changed environmental protection legislation and assessment processes for resource development projects, which greatly disadvantaged Indigenous peoples. The Bill C-45, also known as the *Jobs and Growth Act 2012* introduced by the Harper government, affected many laws, including the *Indian Act*, the *Navigable Waters Protection Act* and the *Environmental Assessment Act*, which negatively affected Indigenous peoples' rights.[248] As a result of the Harper government's actions, the 'Idle No More' movement gained momentum against the government, who argued that the Bill C-45 made it easier for the government and the corporations to progress with resource development projects on Aboriginal lands without strict environment assessment processes.[249] This movement ultimately gained national and international recognition and continued to advocate for Indigenous Nations rights. Subsequently, Harper was replaced by Justin Trudeau, who promised to be a friend of Aboriginal people.

[242] Wilson (n 234) 21.
[243] Ibid.
[244] James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, on the Situation of Indigenous Peoples in Canada*, UN Doc A/HRC/27/52/Add.2 (4 July 2014).
[245] Wilson (n 234) 29.
[246] Ibid.
[247] See the detailed discussion on Site-C dam in Chapter 5.
[248] Tabitha Marshall, 'Idle No More' *The Canadian Encyclopedia* (Web Page, 4 February 2019) <https://www.thecanadianencyclopedia.ca/en/article/idle-no-more>.
[249] Ibid.

4.3.2.4 The Residential Schools and the TRC's 94 Calls to Action

For centuries, most of the Indigenous policies in Canada were directed to dismantle Indigenous systems of government, ignore treaty rights and destroy Indigenous peoples' distinctive cultural, religious, social, ceremonial and legal institutions through assimilation.[250] The civilisation and Christianity elements of the Doctrine were central to the policies of the Canadian government and resulted in the establishment of residential schools for Indigenous children during the 1880s.[251] After the enactment of the *Indian Act 1876*, the federal government assumed responsibility for educating Indigenous children and with the cooperation of Roman Catholic and Protestant churches, established residential schools all over Canada. In 1883, the government established three large residential schools in western Canada and by 1930, 80 schools of this kind were in operation across the country. It is estimated that about 150,000 First Nations, Métis and Inuit children went through the mandatory residential schools system.[252] The motivation behind the policy was to eliminate the children's cultural identities by forcing them to give up their cultural traditions and adopt the white European way of life. According to Canada's first Prime Minister, Sir John A Macdonald (in office 1867–73 and 1878–91), parents of Indigenous children were 'savages' and an Indigenous child who went to a school on the reserve was 'simply a savage who can read and write'.[253] To address this, he thought that 'Indian children should be withdrawn as much as possible from the parental influence' and put 'in central training industrial schools where they will acquire the habits and modes of thought of white men'.[254] It has been accepted that through the residential schooling system, the government committed 'cultural genocide' because the system was deliberately devised to destroy social structures, cultural practices and 'political and social' institutions of Indigenous peoples.[255] The goal of the Canadian government was to 'continue until there is not a single Indian in Canada that has not been absorbed into the body politic'.[256]

Until 1969, the Government of Canada ran the residential schools in collaboration with the Roman Catholic, Anglican, United, Methodist and Presbyterian churches, who believed that assimilation was possible by 'twenty-four hours a day [exposure to] non-Indian Canadian culture through radio, television, public address system, movies, books, newspapers, group activities

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[250] *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Summary Report, 2015) <http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec_Summary_2015_05_31_web_o.pdf>.
[251] Ibid 3. In 1870s the Roman Catholic and Protestant missionaries already established small boarding schools for Aboriginal children across Prairies, in the North and in British Columbia.
[252] '*Honouring the Truth*' (n 250) 3.
[253] Ibid 2
[254] Ibid.
[255] Ibid 1. See the discussion on residential schools and cultural genocide in Section 6.6.
[256] Statement made by Deputy Minister of Indian Affairs Duncan Campbell Schott while outlining assimilation policy in 1920. '*Honouring the Truth*' (n 250) 3.

etc'.[257] Away from their parents and removed from their culture, the children were housed in substandard conditions and were subjected to harsh and cruel discipline, including physical and sexual abuse. The system was underfunded, the teachers had very little professional training or experience, many children went hungry due to food shortages and many students died due to weaknesses, malnutrition and diseases for which they had no natural immunities.[258] The residential schools attempted to extinguish the children's Indigenous identities, although they failed. Many abuse sufferers went public with their horrific stories, but faced opposition from the churches, institutions and the general Canadian public, who were in disbelief that the churches and residential schools could be so cruel.[259] Many stories of abuse from the former students, appalling conditions of the residential schools and public outcry forced the government to withdraw its support from the residential school system during the 1980s, with the last government funded residential school closing in 1996.[260] In the meantime, the RCAP in 1996 acknowledged the widespread and systematic institutional abuse of Indigenous children and recommended a national process of reconciliation, whereby civilisation and assimilation policies would be abandoned and a new foundation for Aboriginal and non-Aboriginal relations would be established. However, most of the RCAP recommendations were never implemented. Nevertheless, residential school survivors launched their own civil and criminal legal actions against the government and the churches for recognition of the institutional abuse of children over the past 100 years and compensation for the harms suffered. Ultimately, in the largest class action (12,000 individual litigants) in Canadian history, key Indigenous bodies managed to negotiate the Indian Residential Schools Settlement Agreements with provisions for a CAD 1.9 billion recovery fund.[261] There were five aspects to the Indian Residential Schools Settlement Agreements: a common experience payment for eligible former students; an independent assessment process; provisions for healing; the introduction of commemorative activities; and the establishment of the Canadian TRC.[262]

The TRC was established in 2008 to rebuild and renew the relationship between Aboriginal and non-Aboriginal Canadians through 'truth, healing and reconciliation' of the negative impacts

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[257] '*Honouring the Truth*' (n 250) 6.
[258] Bradford W Morse, 'Government Responses to the Indian Residential Schools Settlement in Canada: Implications for Australia' (2008) 12(1) *Australian Indigenous Law Review* 41, 44. Bryce Report by the Chief Medical Officer of Canada in 1907 found that the death rate was 24 percent while a survey was conducted among 1537 students in 15 residential schools; According to TRC an estimated 3200 children died from tuberculosis, malnutrition and other diseases related to poor living conditions in the residential schools..
[259] Morse (n 258) 45.
[260] '*Honouring the Truth*' (n 250) 3.
[261] Morse (n 261) 48-51; Jung (n 221) 26. CAD 1.9 billion dollars for 'common experience' payments to former students, individual payment between $5000 and $275000 for sexual and serious physical/phycological abuse sufferers, $125 million for Aboriginal healing foundation, $60 million for documentation and $209 million for commemorative projects and Schedule 'N' of the IRSSA mandated for the Truth and Reconciliation Commission.
[262] Jung (n 221) 9.

and consequences of the residential schools.[263] It was mandated to fully document the 'individual and collective' harms committed against the children and to honour the 'resilience and courage' shown by the students, their families and communities.[264] One of its main goals was to provide a safe setting—holistic and culturally appropriate—for the former students, their families and communities to share their past experiences.[265] The TRC was not mandated to hold formal hearings, public inquiries or conduct formal legal processes, but it could hold events, activities, public meetings, consultations and make public statements in performance of its duties.[266] Supported by Regional Liaison representatives and assisted by an Indian Residential School Survivors Committee, the TRC spent six years travelling across Canada and heard from more than 6,000 witnesses and considered 6,750 statements made by survivors, their families and other individuals.[267] In the process, the TRC conducted 96 separate interviews with former staff and their children and received statements from them, which formed part of the documents relating to residential schools. [268]

As a part of truth telling, the TRC acknowledged that Indigenous children suffered systematic discrimination and intense racism due to the governments civilisation and assimilations policies in its final report. It was reflected in every aspect of life, through the educational, social, health and income inequalities between the Aboriginal and non-Aboriginal peoples.[269] The TRC also attributed the current problems relating to the disproportionate imprisonment of Indigenous peoples and apprehension of Indigenous children by child welfare agencies to the residential schooling system because it denied multiple generations of Indigenous people from having a sense of identity and positive parenting role models.[270] The schooling system affected not only the students and survivors, but also their parents, partners, children, grandchildren, extended families and communities. Devoid of love and affection, many abuse survivors became abusers themselves, developed addictions and followed the path to prison. The TRC was optimistic in its recommendations and proposed reforms strategies based on recognition of Indigenous self-determination, Indigenous treaties and the UNDRIP. The TRC also called for a new proclamation to reaffirm the long-standing commitments between the Aboriginal people and Canada, which would include official disavowal of the Doctrine and terra nullius, which was used to justify

[263] 'Indian Residential Schools Settlement Agreement, Schedule N: Mandate for the Truth and Reconciliation Commission' Principles and Terms of reference 1(a) <http://www.residentialschoolsettlement.ca/SCHEDULE_N.pdf>.
[264] Ibid Principles.
[265] Ibid 1(b).
[266] Ibid 2(b) and 2(f).
[267] '*Honouring the Truth*' (n 250) v, 25; Ibid 6(d), 6(e) and 7.
[268] '*Honouring the Truth*' (n 250) 26.
[269] Ibid 135.
[270] Ibid.

European sovereignty over Indigenous peoples and their lands.[271] The TRC recommended 94 Calls to Action as a roadmap to redress the legacy of residential schools and to further the reconciliation process between Aboriginal and non-Aboriginal peoples and urged all levels of government, including Indigenous governance structures, and stakeholders (e.g., non-profit, business and education) to take action and introduce measures to achieve its Calls to Action.

The TRC's Calls to Action emphasised the historical, present and continuing issues that affected all aspects of life for Indigenous peoples. They were divided into two parts: part one was legacy (Calls to Action 1–42) and part two was reconciliation (Calls to Action 43–94).[272] The legacy part dealt with child welfare (1–5), education (6–12), language and cultures (13–17), health (18–24) and justice (25–42). The reconciliation part dealt with Canada's responsibility under the UNDRIP (43, 44, 48 and 49), the Proclamation and covenant of reconciliation (45–47), equality under the legal system (50–52), a national council for reconciliation (53–56), professional development of public servants (57), church apologies and reconciliation (58–61), education for reconciliation (62–65), youth programs (66), museums and achieves (67–70), missing children and burial information (71–76), the establishment of a national centre for truth and reconciliation (77–78), commemoration (79–83), media and reconciliation (84–86) sports and reconciliation (87–91), business and reconciliation (92) and newcomers to Canada (93–94). Prime Minister Justin Trudeau was present at the ceremony when the report was released and promised to implement the Calls to Action and begin a new relationship by launching an inquiry into missing Indigenous women and children. Over the past three years, the government along with many other organisations have taken steps to achieve reconciliation, although as of March 2018, only 10 out of 94 recommendations have been completed.[273] During the election, Trudeau promised to consult with Indigenous peoples regarding any development on Aboriginal lands, but he did nothing to stop the construction of Site-C dam after he was elected (see Chapter 5). Instead, his government approved more development projects on Indigenous lands.[274] Many problems continue to riddle Indigenous communities, especially youth crime and incarceration, youth suicide, unemployment and poor education. While organisations like the Canadian Bar Association have called on its members to work with the Canadian government to address the

[271] Truth and Reconciliation Commission's Calls to Action no. 49.
[272] "Truth and Reconciliation offers 94 'Calls to Action'" *CBC News* (Web Page, 16 December 2015) <https://www.cbc.ca/news/politics/truth-and-reconciliation-94-calls-to-action-1.3362258>.
[273] Donna Carreiro, 'Beyond 94: Where is Canada at with reconciliation?' *CBC News* (web Page, 19 March 2018) <https://www.cbc.ca/news/indigenous/beyond-94-truth-and-reconciliation-1.4574765>.
[274] Against the will of the Indigenous peoples the government also approved the expansion of Trans Mountain pipeline and Petronas Liquefied Natural Gas projects that could have devastating impacts on Indigenous peoples.

Calls to Action and achieve reconciliation with Canada's Aboriginal people, many other organisations have failed to do so.[275] According to Max FineDay:[276]

> It's not enough for Canadians to assign the role of reconciler to their MP, their PM or their government. We need individual Canadians in every sector to see their role in reconciliation. It would be easy to assign all blame to the prime minister, to place our rage at his feet. But that robs us of our responsibility to help transform this country.[277]

4.3.3 Indigenous Land and Natural Resource Development in Canada

Canada has an abundance of natural resources above and under the land. During the pre-colonial period, Indigenous peoples were involved in hunting for food and fur, fishing, agriculture and mining. Early European settlers turned fur trading into a lucrative business and after the end of fur trade, they turned to mining.[278] According to the Assembly of First Nations, the copper trade was in existence about 6,000 years ago near Lake Superior.[279] European prospecting in Canada began in the 1580s and the first mine developed by the Europeans was likely to have been the Great Lake coalmine in 1639.[280] Indigenous knowledge was used by the settlers to discover natural resources around Canada and Indigenous peoples had an important historic role in prospecting. Between the 1840s and 1880s, gold and coal became important commodities in the economy of the Pacific Northwest.[281] In the quest to safeguard their valuable gold, Indigenous peoples were often in conflict with the settlers. The finest gold reserve areas (Southern BC) were controlled by the Americans (large mining companies) who provoked conflicts between the whites and Indigenous peoples and ultimately sparked the Indian wars of Washington and Oregon.[282] In 1858, about 30,000 settler gold seekers surged into the Thomson and Fraser River Valley and overpowered the Indigenous inhabitants, which led to the Fraser River War (Canyon War or Fraser Canyon War) of 1858, with casualties on both sides.[283]

The Westernised capitalist economy transformed the occupations that Indigenous peoples had pursued for thousands of years. Until the late-nineteenth century, most Aboriginal peoples were

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[275] 'Responding to the Truth and Reconciliation Commission's Calls to Action' *Canadian Bar Association* (Web Page, March 2016) <http://www.cba.org/CMSPages/GetFile.aspx?guid=73c612c4-41d6-4a39-b2a6-db9e72b7100d>.
[276] Max FineDay is the executive director of Canadian Roots Exchange and sits as a member of the interim National Council on Reconciliation.
[277] Max FineDay, 'All Canadians must work towards reconciliation' *The Star* (online at 17 December 2018) <https://www.thestar.com/opinion/contributors/2018/12/17/all-canadians-must-work-toward-reconciliation.html>.
[278] Hipwell et al (n 137) 1-2.
[279] Ibid 2.
[280] Ibid.
[281] John Lutz, 'After the fur trade: the aboriginal labouring class of British Columbia 1849-1890' (1992) *Journal of the Canadian Historical Association* 69, 75.
[282] Daniel P Marshall, 'Fraser River Gold Rush' *The Canadian Encyclopedia* (Web Page, 9 August 2019) <https://www.thecanadianencyclopedia.ca/en/article/fraser-river-gold-rush>.
[283] Ibid; Lutz (n 281) 77.

hunters, gatherers, trappers and fishermen, but afterword most became labourers for wages.[284] Between the 1880s and 1920s, some Indigenous tribes signed treaties to share their lands with the European settlers on the condition that they would continue to exercise their laws and maintain their own institutions and self-government. The European settlers were to live and use certain portions of the land. In return, Indigenous people were given land reserves, housing, medicine and education.[285] However, the treaties did not include Indigenous decision-making in relation to resource development and the settlers arbitrarily used the land for resource development as if they owned the land. As a result, there were constant tensions between them. Until the 1960s, Indigenous peoples had very little decision-making power over resource development or mining activities on their lands. Since then, there have been legal and political developments that have given them some powers to decide resource development matters on their lands through consultations and consent. However, there is still a long way to go before their concerns are properly integrated into the decision-making process.[286] Judicial processes have made it clear that the government has a duty to consult in good faith with Indigenous communities whose land and cultural rights would be affected by land development, mining or industrial activities.[287] Increasingly in the neoliberal climate, this responsibility has been delegated to potential resource development companies. Under the *Canadian Environmental Assessment Act 2012*, the Aboriginal communities who would be affected by the development project must be involved in the impact assessment processes to obtain licences or approval for the project.[288] However, community based research regarding impact of development activity is limited due to lack of financial and technical support and in any case the concerns regarding cultural significance of the lands and views of Indigenous communities are ignored in favour of the economic interests of the corporations.[289]

> Since the industrialization of mining in Canada, Aboriginal people have had little say in decision-making regarding mining near or on their ancestral lands and have borne most of the costs and received non—or only negligible—benefits.[290]

Although the *Canadian Environmental Assessment Act 2012* requires authorities to consult with Indigenous peoples, the extent of this scope and accommodation of Indigenous views is questionable. The duty to consult and accommodate is immaterial when the economic interests of the non-Indigenous entities became material. In most cases, the decision-making regarding

[284] Lutz (n 281) 69.
[285] Hipwell et al (n 137) 4.
[286] Ibid 1.
[287] David C Natcher, 'Land use research and the duty to consult: a misrepresentation of the aboriginal landscape' (2001) 18(2) *Land Use Policy* 113, 113.
[288] Ibid 14.
[289] Ibid.
[290] Hipwell et al (n 137) 4.

development of Indigenous lands is based on mostly economic interests rather than the rights of Indigenous peoples.

4.3.3.1 The Development of Indigenous lands and Duty to Consult and Accommodate

The Supreme Court established that, it is the government's duty to consult with Indigenous people when their asserted or recognised rights could be affected by government action and where appropriate the government should accommodate those rights.[291] The duty to consult was also triggered when Aboriginal treaty rights were interfered with by any government decision or land use authorisation.[292] For example, in *Haida Nations v British Columbia (Minister of Forests)*,[293] the Supreme Court observed that 'the government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown'.[294] The Crown had a fiduciary duty towards Aboriginal people when the Crown assumed discretionary control over Aboriginal interests.[295] By referring to the *Van der Peet* and *Delgamuukw* decisions, the Court observed that the duty to consult is essential for balancing Aboriginal and other interests and it 'lies closer to the aim of reconciliation at the heart of Crown–Aboriginal relations'.[296] In deciding this case, the Court also referred to *R v Sparrow*, *R v Nikal* and *R v Gladstone*, in which the question of negotiations, consultation and accommodation of Aboriginal views was raised.[297] The consultation is a process of gathering and exchanging information, which obliges the government and its agencies to change the proposed actions or policies based on the information obtained through meaningful consultation.[298] When the consultation process suggests changes to

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[291] [2004] 3 SCR 511 ('*Haida Nation'*); *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2005] 3 SCR 388 ('*Mikisew Cree*'); *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* [2004] 3 SCR 550 ('.*Taku River Tlingit*').

[292] *Mikisew Cree* (n 294); Keith B Bergner, 'The Crown's Duty to Consult and Accommodate' (Conference paper, Canadian Institute's 2nd Annual conference on Aboriginal Consultation: Best Practice and Leading Edge Strategies for Managing Aboriginal Consultations, Vancouver, 2006) 44; Chris W Sanderson , Keith B Bergner and Michelle S Jones, 'The Crown's Duty to Consult Aboriginal Peoples: Towards an Understanding of the Source, Purpose, and Limits of the Duty' (2002) 49(4) *Alberta Law Review* 821, 829.

[293] *Haida Nation* (n 291).

[294] Ibid [16]; see also Sanderson (n 292) 823.

[295] *Haida Nation* (n 291) [18]; *Guerin v The Queen* [1984] 2 SCR 338 ('*Guerin*') 376. Justice Dickson in *Guerin* observed that 'the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation enforceable by the court, to deal the land for the benefit of the Indians. This obligation does not amount to trust in the private law sense, it is rather a fiduciary duty… the fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title'. He also observed that 'the Crown first took this responsibility upon itself in the Royal Proclamation of 1763'; see also Maria Morellato, 'The Crown's Fiduciary Obligation Toward Aboriginal Peoples' (Conference Paper, Pacific Business & Law Institute, 23-24 September 1999).

[296] *Haida Nation* (n 291) [14].

[297] *R v Sparrow* [1990] 1 SCR 1075. The honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims; *R v Nikal* [1996] 1 SCR 1013. Every reasonable efforts must be made to inform and consult the Aboriginal people regarding resource development; *R v Gladstone* [1996] 2 SCR 723. Court emphasised on the need for consultations, compensation and accommodation of different Aboriginal rights.

[298] *Haida Nation* (n 291) [46].

the proposed action, the duty to accommodate arises, which requires 'good faith efforts to understand each other's concerns and move to address them'.[299]

Concurrent with the *Haida Nations* decision, the Supreme Court addressed the question of the duty to consult and accommodate in the *Taku River Tlingit First Nations v British Columbia* case.[300] In this case, the Court acknowledged that the Taku River Tlingit First Nations' ('TRTFN') land claim was accepted by the Crown in 1984 and the province of British Columbia was aware of that claim. Based on the claim, the Court indicated that it was the duty of the province to consult and accommodate the TRTFN because the province's decision had the potential to negatively affect the TRTFN's asserted rights and title.[301] The Court decided that the TRTFN were entitled to something significantly deeper than minimum consultation under the circumstances and to a 'level of responsiveness to its concerns that can be characterized as accommodation'[302]. There were many other cases that dealt with the duty to consult and accommodate.[303] In 2014, while deciding the duties owed by the Crown before and after Aboriginal title to land was established, the Supreme Court in the *Tsilhqot'in* case decided that 'the honour of the Crown required that the Province consult them on uses of the lands and accommodate their interests'.[304] The Court made it clear that the government and individuals proposing to use or exploit land, obtain the consent of Aboriginal groups through consultation to avoid the 'charge of infringement'.[305]

In August 2018, the Federal Court of Appeal allowed an application for judicial review by six First Nations to stop the Trans-Mountain pipeline expansion (Phase III) on the ground that the government had failed short of its duty to consult and accommodate.[306] Dawson JA concluded that 'Canada did not fulfil its duty to consult with and, if necessary, accommodate the Indigenous applicants'.[307] The Court's decision was based mostly on the legal principles established in the *Haida Nations* case. According to Dawson JA, the duty to consult arose from the Crown's 'actual and constructive' knowledge of the potential existence of Indigenous rights and title and the scope and content of the duty is grounded in the honour of the Crown and protected by s 35(1) of the *Constitution Act, 1982*.[308] The duty to consult and accommodate (if required) formed part

[299] Ibid [47], [49].
[300] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* [2004] 3 SCR 550.
[301] Ibid [26], [28].
[302] Ibid [32].
[303] *Grassy Narrows First Nations v Ontario (Natural Resources)* [2014] 2 SCR 447, *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* 2005 SCC 69.
[304] *Tsilhqot'in* (n 170) [95].
[305] Ibid [97]
[306] *Tsleil-Waututh Nation v Canada (Attorney General)* [2018] FCA 153 <https://decisia.lexum.com/fca-caf/decisions/en/item/343511/index.do?r=AAAAAQAMMjAxOCBmY2EgMTUzAQ>.
[307] Ibid [767].
[308] Ibid [486]-[501].

of the 'process of reconciliation and fair dealing'.[309] The Court concluded that the framework of consultation was 'reasonable and sufficient', but Canada failed to properly execute it, so the Court directed the government to re-do its Phase III consultation.[310] The Court held that Canada failed to engage in 'dialogue meaningfully and grapple with the concerns expressed to it in good faith by the Indigenous applicants so as to explore possible accommodation of these concerns'.[311]

The duty to consult and accommodate relates to resource or land development on Aboriginal territory or it applies to 'executive conduct and conduct taken on behalf of the executive',[312] but what happens when the governments adopts a law or policy that affects the Aboriginal people? Does the duty to consult and accommodate apply to the government during the law-making process? In the *Mikisew Cree First Nations v Canada*,[313] the Supreme Court found (seven out of nine judges) that the duty to consult did not apply to the law-making process. According to Karakatsanis J (Wagner CJ and Gascon J concurring), the duty to consult does not apply to the law-making process—including the development, passage and enactment of legislation—because of 'two constitutional principles—the separation of powers and parliamentary sovereignty'.[314] She also characterised the duty to consult doctrine as being 'ill-suited to the law-making process' and observed that 'extending the duty of consult doctrine to legislative process would oblige the judiciary to step beyond the core of its institutional role and threaten the respectful balance between the tree pillars of our democracy'.[315] In her view, the duty to consult was not the only means to redress adverse effect of legislation, there were other doctrines to give protection of rights under s 35 and review enacted legislation to give full effect to the honour of the Crown.[316]

However, Abella J (Martin JJ concurring) disagreed with Karakatsanis J regarding the scope of the duty to consult. According to her, 'the enactment of legislation with the potential to adversely affect rights protected by s 35 of the *Constitution Act*, 1982 does give rise to a duty to consult and legislation enacted in breach of that duty may be challenged directly for relief'.[317] By citing *Haida Nation* and *Sparrow*, Abella J observed that the relationship between the Crown and the Aboriginal peoples was governed by the 'honour of the Crown' and the honour of the Crown

[309] Ibid [486].
[310] Ibid [753], [771].
[311] Ibid [754].
[312] *Mikisew Cree First Nation v Canada (Governor General in council)* [2018] 2 SCR 765 ('*Mikisew Cree First Nation*') [27].
[313] Ibid.
[314] Ibid [2], [32].
[315] Ibid [32].
[316] Ibid [45].
[317] Ibid [54]. Abella J (Martin JJ concurring) dismissed the appeal on the ground the 'judicial review under the *Federal Courts Act*, RSC 1985, c F-7 is not available for the actions of federal ministers in the parliamentary process'.

was 'always at stake in its dealing with Indigenous peoples, whether through the exercise of legislative power'.[318] Brown J did not agree with Karakatsanis J, but dismissed the appeal on separate grounds.[319] According to him, 'consultation during the legislative process, including the formulation of policy, is an important consideration in the justification analysis under s 35 … However, the absence or inadequacy of consultation may be considered only once the legislation at issue has been enacted'.[320]

Justice Rowe (Moldaver and Cote JJ concurring) was in agreement with Brown J, and observed that 'the fact that the duty to consult had not been recognized as a procedural requirement in the legislative process does not leave Aboriginal claimants without effective means to have their rights, which are protected under s. 35 of the *Constitution Act, 1982*, vindicated by the courts'.[321] Imposing the duty to consult doctrine during the preparation of legislation would offend the separation of power and rather than providing protection under s 35, it would 'offend foundational constitutional principles and create rather than resolve problems'.[322] The decision has raised fears among Indigenous communities that it will 'create immense uncertainty'. According to Professor Newman, 'this ruling has actually perpetuated uncertainties and possibly created new ones'.[323] In having four different sets of reasoning, the Supreme Court introduced uncertainties regarding the duty to consult doctrine, the law-making process and the honour of the Crown. Hypothetically, this decision may fuel new neoliberal policies and laws that would give land and resource development companies more advantages against the Indigenous communities in Canada. Once a law is enacted without consultation with Indigenous communities, it becomes difficult for them to challenge the law in the Supreme Court, which is a complicated, costly and time-consuming process.

This judgment reiterated 'the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources'.[324] The situation reinforces Indigenous peoples limited sovereign and commercial rights, as per the Doctrine, they do not have right to give opinion on proposed laws that will affect them and their communities. The Crown had absolute sovereignty over the Aboriginal peoples and consulting with them before legislation was passed would breach Crown sovereignty. This judgment was not only a setback for Aboriginal rights recognitions, but also contradicted the government's commitment to adhere to the UNDRIP in

[318] *Mikisew Cree First Nation* (n 312) [56].
[319] Ibid [105].
[320] Ibid [145].
[321] Ibid [148].
[322] Ibid [171].
[323] Dwight Newman, 'The Supreme Court's duty to consult ruling will create immense uncertainty' *The Globe and Mail* (Web Page, 15 October 2018) <https://www.theglobeandmail.com/opinion/article-the-supreme-courts-duty-to-consult-ruling-will-create-immense/>.
[324] *Mikisew Cree First Nation* (n 312) [21].

the Canadian legal system.[325] In 2016, the Government of Canada through Bill C-262 (private members bill) wanted to ensure that the laws of Canada were in harmony with the UNDRIP and declared that the Government of Canada, 'in consultation and cooperation with Indigenous peoples … must take all measures necessary' to ensure that the laws of Canada are consistent with the UNDRIP and develop and implement a national action plan to achieve the objective.[326] Unfortunately, this bill was defeated in the Senate in June 2019.[327] According to art 19 of the UNDRIP, the states should 'consult and cooperate in good faith with the Indigenous peoples concerned … in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them'. This article ensures that the government consult with Indigenous peoples prior to enacting a law that might affect them. However, *Mikisew Cree* exempted the government from consulting with Indigenous people on the basis of Crown sovereignty, which was clearly against the provisions of the UNDRIP. The decision also contradicted the self-determination provisions of the ICCPR, ICESCR and UNDRIP.[328]

This section on Canada has demonstrated how elements of the Doctrine such as limited sovereign and commercial rights, pre-emption, civilisation and native title played a significant role in determining the relationship between the government and Indigenous peoples of Canada during the twentieth century. Limited sovereign and commercial rights and Aboriginal title remain an impediment to Indigenous self-determination and self-government. Pre-emption restricts the Indigenous peoples from the enjoyment of full ownership of their ancestral lands. Continuing from the *Royal Proclamation* of 1763 until present day, the pre-emption element of the Doctrine has restricted Indigenous peoples from leasing or transferring their land through sale. This notion was supported in *Guerin* by Dickson J, who observed that 'an Indian Band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the Band's behalf '.[329] The Christian civilisation through residential schools turned out to be inhumane, brutal and discriminatory, but the government still has policies that follow civilisation elements, especially on-reserve child welfare system for which the Indigenous children faced continuing pain and

[325] Sarah Morales, 'Supreme Court of Canada should have recognized UNDRIP in Mikisew Cree Nation v Canada' *Canadian Lawyer* (Web Page, 29 October 2018) <https://www.canadianlawyermag.com/author/sarah-morales/supreme-court-of-canada-should-have-recognized-undrip-in-mikisew-cree-nation-v-canada-16410/>.
[326] Bill C-262 ss 4, 5.
[327] Justin Brake, 'Let us rise with more energy: Saganash responds to Senate Death of C-262 as Liberals promise, again to legislate UNDRIP' *APTN National News* (Web Page, 24 June 2019) <https://aptnnews.ca/ 2019/06/24/let-us-rise-with-more-energy-saganash-responds-to-senate-death-of-c-262-as-liberals-promise-again-to-legislate-undrip/>.
[328] ICCPR art 1; ICESCR art 1; UNDRIP art 3.
[329] *Guerin* (n 295) 376; more analysis before in chapter 3.3.2.1.

suffering of worst kind.[330] Projects such as the Site-C dam, which divert Indigenous peoples from their original occupations and relocate them from their lands follows civilisation trends. Moreover, such projects prioritise economic benefits over Indigenous rights and support government's neoliberal agendas. In Chapter 5, I analyse how the pursuit of economic gain framed by a neoliberal agenda is an expression of the Doctrine of Neo-Discovery, and as with other the other elements of the Doctrine apply to dispossess and undermine Indigenous cultural rights.

4.4 Indigenous Peoples in Australia During the Twentieth Century

White colonisation of Australia occurred without the recognition of Indigenous peoples, which continued throughout the twentieth century. The original inhabitants were perceived as uncivilised and not worthy of any kind of recognition. Even today, Indigenous Australians have not been accorded constitutional recognition or treaty rights.[331] Nevertheless, Indigenous peoples continue to assert their inherent rights to sovereignty and self-determination.[332] In 1992, the High Court recognised that native title had survived the acquisition of British sovereignty.[333] In extending common law recognition to a property title that had its genesis in Indigenous peoples' customary laws, the Court overturned the Doctrine of terra nullius, which up to that time had functioned discursively to deny Indigenous peoples' pre-existing rights to their lands. However, despite the appearance of being a radical departure, the decision aligned Australian law with developments elsewhere, particularly in the US, where native title had been recognised in 1873 in the case of *Johnson v McIntosh*.[334] At the moment at which the Court rejected terra nullius, it introduced the notion of native title, which is an element of the Doctrine and confers limited land rights to Indigenous peoples. In this section, I focus on the continuing use of elements of the Doctrine in the development of laws and policies in twentieth-century Australia.

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[330] *First Nations Child and Family Caring Society of Canada v Attorney General of Canada*, (2019) CHRT 39, [245] [248].
[331] Discussed above in Section 3.4.2 about treaty initiatives of Victoria and Norther Territory governments.
[332] 'Aboriginal nations declaring independence' *Creative Spirit* (Web Page) <https://www.creativespirits.info/aboriginalculture/selfdetermination/aboriginal-nations-declaring-independence>.
[333] *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo [No 2]*').
[334] Robert J Miller et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2012) 56.

4.4.1 The Continuing Application of the Doctrine of Terra Nullius

In *Cooper v Stuart*,[335] the Privy Council was of the view that Australia was not acquired by conquest or cession but was 'practically unoccupied', without 'settled inhabitants or law'.[336] The decision was delivered by Lord Watson, who observed that:

> There is a great deal of difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class … There was no land law or tenure existing in the Colony at the time of its annexation to the Crown.[337]

This view was reiterated almost 200 years later in *Milirrpum v Nabalco Pty Ltd* [338] and *Coe v Commonwealth*.[339] The *Milirrpum* case was brought by the Yolngu people in Yirrkala against Nabalco Pty Ltd to stop a bauxite mining lease from proceeding in the Gove Peninsula. They claimed that they had sovereign rights over the land and sought declarations to occupy the land free from interference pursuant to their native title rights..[340] In *Coe*, the plaintiff—a member of Wiradjeri Tribe—brought an action against the defendants, claiming that Australia was not terra nullius at the date of foundation of the British colony.[341] This case was the first in which the apparent foundation of Australia as terra nullius was directly challenged on the grounds that Australia was not peacefully acquired but by conquest by the British Crown. The statement of claim also articulated that the Aboriginal people in Australia were domestic dependent nations as was decided by Marshall CJ in the *Cherokee Nation* case.[342] In the High Court, Gibbs J rejected the claims and followed *Cooper v Stuart* to find that the 'Australian colonies became British possessions by settlement and not by conquest' and had 'no civilised inhabitants or settled law'.[343] Justice Murphy disagreed and found that:

> There is a wealth of historical material to support the claim that the Aboriginal people had occupied Australia for many thousands of years; that although they were nomadic, the various tribal groups were attached to defined areas of land over which they passed and stayed from time

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[335] *Cooper v Stuart* [1889] UKPC 1; Peter Sutton, *Native Title in Australia: An Ethnographic Perspective* (Cambridge University Press, 2003) 1-2. Although it is believed that Aboriginal peoples had concept of property. According to Gerald Wheeler 'Aboriginal territory was subdivided generally among undivided families, but there was some evidence also of private or personal ownership of land, specially where fishing rights were important'.
[336] [1889] UKPC 1 (n 335) [11].
[337] Ibid.
[338] (1971) 17 FLR 141 ('the *Milirrpum* case').
[339] [1978] HCA 68 ('*Coe*') <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1979/68.html>.
[340] More analysis of this case in the next topic 'Land rights legislations'.
[341] *Coe* (n 339).
[342] Ibid [12] (Gibbs J). *Cherokee Nation v. State of Georgia*, 30 US (5 Pet) 1 1 (1831).
[343] *Coe* (n 339) [13] (Gibbs J).

to time in an established pattern; that they had a complex social and political organisation; that their laws were settled and of great antiquity.[344]

Justice Murphy also declined to accept the view of the Privy Council in *Cooper v Stuart*, that Australia was peacefully annexed by the United Kingdom.[345] According to him, 'the Aborigines did not give up their lands peacefully; they were killed or removed forcibly from the lands by United Kingdom forces or the European colonists in what amounted to attempted (and in Tasmania almost complete) genocide'.[346] He also accepted that 'the plaintiff is entitled to endeavour to prove that the concept of terra nullius had no application to Australia'.[347]

Regarding the 'domestic dependent nation' question, Gibbs J declined to accept that the relationship between white settlers and the Aboriginal people was the same in Australia as the USA, and as such could be considered to be a 'distinct political society separated from others'.[348] He also made it clear that 'there is no Aboriginal nation, if by that expression is meant a people organised as a separate State or exercising any degree of sovereignty'.[349] There was a split decision in this case because Aickin J agreed with Gibbs J, who dismissed the appeal and Murphy J agreed with Jacobs J, who allowed the appeal.[350] Nevertheless, even if the Court accepted the 'domestic dependent nation' argument that would have aligned the status of Indigenous peoples in Australia with their counterparts in the USA, the result would have accorded Indigenous peoples with a limited form of sovereignty. While this would be an improvement on the status quo, as developments in the USA have shown, they would remain subordinate to the Crown.[351]

4.4.2 Aboriginal Protection Laws and Land Rights Legislation

Almost 30–60 per cent of the Indigenous population in Australia was wiped out between 1830 and 1910 due to mass killings and the spread of diseases like smallpox.[352] During the late-nineteenth and early twentieth centuries, the Aborigines Acts were passed in various Australian jurisdictions. These Acts gave white administrators of Indigenous affairs extensive control over many aspects of the lives of Aboriginal and Torres Strait Islander peoples. One of the most notorious aspects of these laws were the provisions that authorised the forcible removal of so-

[344] Ibid [6] (Murphy J).
[345] Ibid [8] (Murphy J)
[346] Ibid.
[347] Ibid [9] (Murphy J).
[348] Ibid [12] (Gibbs J).
[349] Ibid [22] (Gibbs J).
[350] The original judgment of Mason J to dismiss the appellant's application for leave to amend his statement of claim was upheld.
[351] See discussion above and Section 3.2.1.
[352] Heather McRae et al, *Indigenous Legal Issues, Commentary and Materials* (Lawbook co, 4th ed, 2009) 22.

called half-caste children from their families and communities.[353] The belief underpinning these laws was that 'the destiny of the natives of Aboriginal origin, but not of the full blood, lies in their ultimate absorption by the people of the Commonwealth'.[354] As for the so-called 'full blood', it was believed that they were a 'dying race' and would eventually die off in the face of white civilisation.[355] Therefore, Indigenous peoples were initially removed to missions and reserves, where it was thought they would eventually die out. When this did not happen and it was found their numbers were increasing due to the birth of so-called 'half-caste' children on reserves, attention turned to resolving 'the problem' of these 'half-caste' children. With the removal of Indigenous peoples to the reserves and the removal of their children to institutional homes, the next wave of dispossession began, which enabled more land to become available for white settlement and economic purposes. This history is not unlike the boarding schools in the USA and residential schools system in Canada, which were established around the end of the nineteenth century. Although the means were different, the objectives were similar: to reduce the number of Indigenous peoples by destroying the seeds of their culture; that is, the cultural identities of Indigenous children. A Parliamentary Select Committee report in 1837 clearly identified the goals of the Crown regarding native inhabitants living in British settlements:

> [T]o promote the spread of Civilization among them, and to lead them to the peaceful and voluntary reception of Christian Religion.[356]

Throughout the twentieth century, colonial governments enforced the civilisation element of the Doctrine through the Stolen Generations, with the goal of assimilation and extinction of Aboriginal peoples. The analysis in this section indicates that 'civilisation' played a significant role in the destruction of Indigenous families, cultures and their connection to the land. It also contributed to the continuing dysfunction in Indigenous communities and intergenerational trauma. Australian Indigenous children continue to experience the loss of their culture and connection with their family through out-of-home care arrangements run by state and territory governments. Indigenous children are 10 times more likely to face out-of-home care compared to their non-Indigenous counterparts.[357] Laws such as the *Children and Youth Persons (Care and Protection) Act 1998* (NSW) prioritise the permanent placement of the children rather than going through appropriate family conferencing and negotiation with their natural parents. Thus, the

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[353] See *Aboriginal Welfare- Initial Conference of Commonwealth and State Aboriginal Authorities* (Report, Commonwealth of Australia, Canberra, 1937) 8-9.
[354] Ibid 3.
[355] Ibid.
[356] *Report of the Parliamentary Select Committee on Aboriginal Tribes (British Settlement)* (Report, 1837) xii. See also Richard H Bartlett, *Native title in Australia* (LexisNexis Butterworths, 3rd ed, 2015) 127.
[357] See generally Larissa Behrendt et al, *Aboriginal and Torres Strait Islander Legal Relations* (Oxford University Press, 2nd ed, 2019) 54-60.

civilisation element of the Doctrine continues to permeate Indigenous peoples' life, disproportionately affecting vulnerable Indigenous children.

The Aboriginal peoples' struggle to retain possession of their lands began on the day the First Fleet arrived in Australia. Many Indigenous people were pushed away from their fertile lands and were slaughtered while trying to protect their lands. Until the 1960s, most of the protests from the Indigenous peoples were subdued by force and they did not have any chance against a well-trained police force with guns. During the 1960s, Indigenous peoples began to use legal means in the fight over their lands. The first major protest of this type came in 1963, when the government decided to grant permission to the North Australian Bauxite and Alumina Company (Nabalco)[358] to transform 300 km^2 of Indigenous reserve land into a bauxite mine.[359] The traditional owners of the land—the Yolngu people of Yirrkala in the Gove Peninsula of Arnhem land—protested against the proposed mine and demanded that their traditional land rights be respected. Work on the mine commenced without any consultation with the traditional owners of the land, so they lodged a petition written on tree bark (known as the bark petition) to the Commonwealth parliament, which voiced their concerns over the proposed mine. The parliament acknowledged the rights of the Yolngu people, but did nothing to stop the mine. Instead, the parliament passed the *Mining (Gove Peninsula Nabalco Agreement) Act 1968 (NT)*, which granted Nabalco a 42-year lease over the mining project.[360] As a result, the Yolngu leaders filed a case in the Supreme Court of the Northern Territory, which became known as the Gove Land Rights case (*Milirrpum v Nabalco Pty Ltd*).[361]

In the *Milirrpum* case, the Yolngu people sought a declaration that they were entitled to occupy the land free from outside interference in pursuant of their native title. [362] This case was the first to test whether the concept of native title existed in Australian law.[363] In deciding this case, Blackburn J observed:

> I have already shown, in my opinion no doctrine of communal native title had any place in any of them, except under express statutory provisions. I must inevitably therefore come to a conclusion that the doctrine does not form, and never has formed, part of the law of any part of Australia.[364]

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[358] Renamed to Alcan Gove Pty Ltd in 2002.
[359] 'Documenting a Democracy: Yirrkala bark petition 1963 (Cth)' *Museum of Australian Democracy* (Web Page) <https://www.foundingdocs.gov.au/item-did-104.htm>.
[360] McRae et al (n 352) 283.
[361] The *Milirrpum* case (n 338) 244-245; see also Simon Young, *The Trouble with Tradition: Native title and cultural change* (The Federation press, 2008) 14-15.
[362] The *Milirrpum* case (n 338) 244-245.
[363] John Hookey, 'The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?' (1972) 5(1) *Federal Law Review* 85, 85.
[364] The *Milirrpum* case (n 338) 244-245.

Although not explicitly stated, Blackburn J confirmed that terra nullius prevailed in Australia. This case also confirmed that the plaintiff's interests in the land did not correspond with common law proprietary rights to land.[365] The decision was not challenged in the High Court of Australia, although it attracted much international criticism.[366]

Following the decision, the Aboriginal land rights movement gained momentum in the Northern Territory. This movement was later supported by the Labor Prime Minister Gough Whitlam, who wanted to enact legislation to give land rights to Indigenous people in recognition of the denial of their rightful place in Australian society.[367] Nevertheless, Whitlam did not pursue national land rights legislation; rather he appointed Justice Woodward to find feasible ways to recognise Aboriginal land rights in the Northern Territory. Justice Woodward in his report acknowledged that land rights legislation would provide 'simple justice to a people who have been deprived of their land without their consent and without compensation'.[368] Following the recommendations of the Woodward report, a bill was presented in Parliament, but the Whitlam government was thrown out of power before passing the law. The new Liberal government drafted a new bill, which curtailed many benefits of the old bill in response to pressure from mining and pastoral industry groups.[369] Ultimately, with the support of both major parties, the bill was passed and the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) was enacted in December 1976. Although it has limitations, this Act is one of the most powerful in Australia and is considered to represent a high-water mark in land rights protection. There are many beneficial provisions for Indigenous peoples in this Act, including provisions for representative organisations to deal with Aboriginal issues. This Act also gives Aboriginal people stronger title to land, vital decision-making powers and strong financial arrangements.[370] Since the 1960s, most Australian states and territories have passed land rights legislation to reinstate land to Indigenous communities and to provide greater protection against incursions by non-Indigenous interests.[371] Although these laws have helped Indigenous peoples regain more of their lands than

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[365] Robert Van Krieken, 'From Milirrpum to Mabo: The High Court, Terra Nullius and Moral Entrepreneurship' (2000) 23(1) *University of New South Wales Law Journal* 63 (Web Page) <http://classic.austlii.edu.au/au/journals/UNSWLawJl/2000/3.html>.

[366] The Canadian Supreme Court declared the *Milirrpum* decision as 'wholly wrong' in *Calder v Attorney General for British Colombia* (1973) 34 DLR (3d) 145.

[367] 'History of Land Rights Act' *Central Land Council* (Web Page) <https://www.clc.org.a/index.php?/articles/info/hitory-of-the-land -rights-act>.

[368] Ibid.

[369] Ibid. After a national campaign from the land council some of the key elements were retained, but the need-based claims were removed, and NT Legislative Assembly were given legislative power regarding sacred site protection, sea closures and permits for access to aboriginal lands.

[370] McRae et al (n 352) 223-4.

[371] See generally Ibid 222-73. The *Aboriginal Land Trust Act 1966* (SA), the *Pitjantjatjara Land Rights Act 1981* (SA), the *Aboriginal Land Act 1970* (Vic), the *Aboriginal Land Rights Act 1983* (NSW), the *Aboriginal Land Grants (Jervis Bay Territory) Act 1986* (Cth), the *Aboriginal Land Act 1991* (Qld), the *Torres Strait Islander Land Act 1991* (Qld), *Aboriginal Land Act 1995* (Tas).

the subsequently enacted *Native Title Act*,[372] they are vulnerable to contemporary political pressures and subject to change, which reveals the effects of colonisation and the Doctrine on Indigenous peoples. In most cases, these land rights legislations can be changed by respective parliaments without consultation with Indigenous peoples.

Many elements of the Doctrine have dominated political and legal decision-making in Australia. Along with terra nullius, civilisation and limited sovereign and commercial rights, the pre-emption element has been in force since colonisation and prohibits Indigenous peoples to deal with their own lands. The Indigenous peoples of Australia have no effective self-determination or self-government, no constitutional recognition and no treaty recognition. While land rights legislations have given them some control over their lands, including the power to lease and manage the land, there are inconsistencies across states and territories. In contrast to the Northern Territory where Indigenous people hold 49 per cent of the land, in NSW, land held under land rights legislation is less than one per cent.[373] Moreover, the government controls many aspect of those lands, including licencing for large mining, sale of land and management of national parks.[374] Government control over land rights regimes in Australia represents elements of the Doctrine such as pre-emption and limited sovereign and commercial rights. The decision in *Mabo [No 2]* incorporates another element, native title.

4.4.3 *Mabo [No 2]* and the *Native Title Act*

> I fear, however, that in many cases because of the chasm between the common law and native title rights, the later, when recognised, will amount to little more than symbols.[375]

The question about whether native title formed part of the law of Australia was raised by Eddie Koiki Mabo and four others in an action against Queensland in the High Court for the recognition of the land rights of the Meriam people of the Murray Islands.[376] In a 6:1 majority, the Court upheld the plaintiffs' claim to native title over Murray Island and in doing so, overturned the concept of terra nullius in Australia.[377] In this case, the plaintiffs never challenged the Crown's

[372] McRae et al (n 352) 222.
[373] Heidi Norman, *Aboriginal Land Recovery in New South Wales: Historical Legacies and Opportunities for Change* (Aboriginal Affairs NSW, Sydney, 2017) 2.
[374] See generally McRae et al (n 352) 222-73.
[375] *Western Australia v Ward* [2002] HCA 28 ('*Ward*') [970].
[376] *Mabo [No 2]*' (n 333). These land rights are represented by native title that originated from the international doctrine of Acquired Rights. Under this doctrine these rights must be respected and 'change of sovereignty works no effect upon such rights'(O'Connel). Richard H Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 3rd ed, 2015) 144.
[377] *Mabo [No 2]*' (n 333) [2] (Mason CJ and McHugh J); Young (n 360) 17. While native title was recognised in Australia in 1992 (*Mabo [No-2]*) other comparative jurisdictions have recognised native title (through judiciary) long time ago, such as the USA (the *Johnson* case [1823]), Canada (*St Catharines Milling* case [1888]) and New Zealand (*R v Simonds* [1847] NZPCC 387).

sovereignty over Australia, but claimed that native title survived the Crown's acquisition.[378] The Court's order was specific:

> The Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands.[379]

The decision was an important recognition of Indigenous peoples' prior ownership of their lands and represented the rejection of racist assumptions regarding Indigenous peoples, which had impeded their claims to their lands. Nevertheless, the decision was conservative. At most, it aligned Australia with other nations such as the USA, which had recognised native title in 1823.[380] In this respect, the decision may have overturned the terra nullius doctrine, but developments in the area since revealed how the tacit existence of the Doctrine continues in Australia. This became immediately evident at the time of the *Mabo [No 2]* decision when, in response to conservative claims that *Mabo [No 2]* spelled the end of non-Indigenous land tenure in Australia, the *Native Title Act 1993 (Cth)* was enacted.

In enacting legislation, the government wanted to address three fundamental issues. First, to permit and validate past Acts and titles issued since 1975, which were thought to be invalid under the *Racial Discrimination Act 1975* (Cth). Second, to create a legislative process to facilitate mining and agriculture on native title land and third, to establish a mechanism to establish native title and identify the lands under native title.[381] Indigenous groups were actively involved in negotiating the terms of the legislation. As part of this process, some native title rights were lost, but Indigenous peoples were promised a Land Fund and a Social Justice Package (the latter of which never eventuated) in exchange. Native title claimants were also given a right to negotiate with respect to development and acquisition of their lands, which was entrenched in the Act. For Indigenous peoples, the legitimacy of the *Native Title Act* depended on the fact that it had been created through a negotiated process. However, the fragility of its provisions became evident when John Howard became Prime Minister.

In 1996, Liberal Prime Minister John Howard came to power with the mandate to amend the *Native Title Act*. In the meantime, the High Court in *Wik Peoples v Queensland*[382] decided that the grant of a pastoral lease under the Queensland Land Acts did not necessarily extinguish native title. The immediate reaction to *Wik* was explosive because pastoral leases covered 42 per cent of the Australian landmass. Up until that time, it had been assumed that leases extinguished

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[378] *Mabo [No 2]* (n 333) [83] (Brennan J).
[379] Ibid Order 2.
[380] *Johnson v M'Intosh* 21 US (8 Wheat) 543 (1823).

[381] 'Mabo Case' *Australian Institute of Aboriginal and Torres Strait Islander Studies* (Web Page, 23 Nov 2017) <https://aiatsis.gov.au/explore/articles/mabo-case>; McRae et al (n 352) 295.
[382] (1996) 187 CRL 1 ('*Wik*').

native title. However, *Wik* demonstrated this was not necessarily the case. Accordingly, the mining and pastoral industries became concerned with this decision, even more than the *Mabo (No 2)* decision. The Howard government proposed a 10-point plan to defuse the situation. According to Howard, 'the *Wik* decision pushed the pendulum too far in the Aboriginal direction. The 10-point plan will return the pendulum to the centre'.[383] As a result, the *Native Title Amendment Act 1998* (Cth) was passed.

The *Wik* decision also demonstrated a clear distinction between the Canadian and Australian approaches. In the *Wik* case, majority of the bench (i.e., Toohey, Gaudron, Gummow and Kirby JJ) of the High Court of Australia determined that pastoral leases did not necessarily extinguish all incidents of native title,[384] so under some circumstances the native title and other non-Aboriginal interests could co-exist. However, under *Delgamuukw*, non-Aboriginal interest would extinguish Aboriginal title.[385] Further, under *Delgamuukw*, not only non-Aboriginal interests but also any non-traditional activities by Aboriginal peoples would render the Aboriginal title extinguished.[386]

The *Native Title Amendment Act* placed new barriers in the way of Indigenous rights recognition. Under this new regime, claimants must satisfy a 'stringent—and retrospective—new registration test' before exercising their 'right to negotiate' in relation to mining activities proposed by the government.[387] While this law gave increased power to the states and territories, it made the claim process difficult and legalistic for the claimants. Among its various provisions, the Act required native title claims to pass a registration test and only those that passed the test could exercise the right to negotiate. The Act also allowed the states and territories to reduce the scope of the right to negotiate through their own legislation. To facilitate this process, the Act introduced Indigenous Land Use Agreements ('ILUAs').

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[383] McRae et al (n 352) 311.

[384] Brian Stevenson, 'The Wik Decision and After' (Research Paper, Research Bulletin No 4/97 Queensland Parliament Library, Brisbane, 1996) <https://www.parliament.qld.go.au/documents/explore/Research Publications/researchbulletin/ rb0497bs.pdf>; see also Richard Ogden, 'Wik Peoples v State of Queensland: Extinguishment of Native Title' (1999) 28(2) *Victoria University of Wellington Law Review* 341 (Web Page) <www.nzlii.org/nz/journals/VUWLawRw/1998/16 .html>.

[385] The *Wik* decision did not change the notion that the Crown had the power to extinguish native title through legislation (must be clear and plain) or executive action (empowered by legislation) and also a grant of fee simple title would extinguish all incidents of native title. Inconsistencies of rights would end native title but *Wik* shifted the burden of proof on the entity holding the Crown grant and decided that a higher degree of co-existence is possible until native title is extinguished through inconsistencies or Crown legislation; see also McRae et al (n 352) 311-12.

[386] In *Delgamuukw*, Lambert JA observed that legislative schemes enacted by sovereign power acting legislatively is not only inconsistent with Aboriginal rights but also makes it clear and plain by necessary implication that the legislative scheme prevails and the Aboriginal right extinguished. Darren Dick, 'Comprehending "The Genius of the Common Law"- Native Title in Australia and Canada Compared Post-Delgamuukw' (1999) 5(1) *Australian Journal of Human Rights* 79.

[387] McRae et al (n 352) 312.

Besides the *Wik* decision, the *Yorta Yorta v Victoria* and *Western Australia v Ward* were also important post-Mabo cases because they prescribed the requirements for proving native title.[388] In *Yorta Yorta*, it was held that the claimant group must prove continuity of their society and continuity of their normative system of laws and customs since the acquisition of British sovereignty.[389] In the context of Australia, proving continuity is difficult because of the effects of colonisation, dispossession and intergenerational trauma. Ultimately, in *Yorta Yorta*, the claimant group could not satisfy this test. The High Court in *Ward* further undermined the scope for native title recognition in finding that native title was a 'bundle of rights' and does not necessarily gave claimants full title to their lands. As a bundle of rights, a claimant group needs to prove continuity with respect to each right claimed (e.g., hunting or fishing rights), which means that native title can be subject to partial extinguishment. This means that non-Indigenous legal interests may not wholly extinguish native title rights and interests.[390] At the same time, extinguishment is a foreign concept in Indigenous customary law and is not a concept that applies to non-Indigenous property interests. It is a concept that functions to legitimise colonisation by sanitising the violence by which Indigenous peoples were dispossessed and have continued to be dispossessed through the application of stringent 'continuity' tests and the diminishment of their land rights as a 'bundle of rights'. Similar observations can be made with respect to the role that the federal government played in curtailing the scope of native title through, for example, the *Native Title Amendment Act 1998* (Cth). A more recent example is the enactment of the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth), under which it was made easy to register the ILUA related to the Adani coal mine.

4.4.4 The *Native Title Act* and ILUAs

An ILUA is an instrument made under the *Native Title Act*, which is used by government and mining, agriculture and exploration industries to come to an agreement with native title holders to determine the terms of references of the use and management of land and water. Entering into an ILUA is voluntary. It can be registered under the *Native Title Act* and once registered, becomes binding between all parties and has the same status as a legal contract.[391] ILUAs are flexible and can include clauses for monetary compensation, extinguishment, environmental and cultural

[388] (2002) 214 CLR 422 ('*Yorta Yorta*'); *Ward* (n 375).
[389] *Yorta Yorta* (n 386) [92]. See also Henriss-Andersen Diana, 'Members of the Yorta Yorta Community v Victoria [2002] HCA 58 (12 December 2002)- Case Note' (2002/2003) 9 *James Cook University Law Review* 331.
[390] Larissa Behrendt et al, *Aboriginal and Torres Strait Islander Legal Relations* (Oxford University Press, second edition, 2019) 182; The *Commonwealth v Yarmirr* (2001) 208 CLR 1 is another case where the High Court established for the first time that non-exclusive native title can extend to the sea and seabed up to and beyond the low water mark.
[391] Graeme Neate, 'Indigenous Land Use Agreements: An Overview' (1999) 4(21) *Indigenous Law Bulletin* 11 (Web Page) <http://classic.austlii.edu.au/au/journals/IndigLawB/1999/41.html>.

heritage protection and even employment and training opportunities for parties.[392] It is recommended that ILUAs should be entered and registered if the proposed future acts on the land are inconsistent with native title rights or will change the interests in the land or the existence of native title because of the existence of other people's legal rights.[393]

The *Native Title Act* specifies three types of ILUAs:[394]

1. Body corporate agreements (ss 24BB–24BE): These agreements are made for the areas where native title has been established.
2. Areas agreements (ss 24CB–24CE): These agreements deal with a range of future acts and are used for the areas where there are no registered native title bodies corporate for the whole area but there are claimants.
3. Alternative procedure agreements (ss 24DB–24DF): Where there are no registered native title bodies corporate, this process provides a framework for making alternative agreements about matters regarding native title rights and interests. Generally, it includes large-scale areas.

The ILUA provisions also set guidelines regarding what kinds of activities should be included. ILUAs should be undertaken in the case of any future acts or classes of acts, withdrawing, amending or changing anything related to native title, compensation for past or future acts, or determining the relationship between native title rights and other interests in the area. It is recommended that before any kind of negotiation, the parties should advertise the matter so that any group or person who considers that they should be a party to the ILUA can come forward. If sufficient action is not taken to include all interested parties, any person or group can successfully object to the agreement and frustrate future outcomes.[395]

According to the old s 24CD (1), 'all persons in the native title group (see subsection (2) or (3)) in relation to the area must be parties to the agreements'. However, this section was changed by the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth) after the Full Federal Court of Australia in *McGlade v Native Title Registrar* (2017)[396] decided unanimously that all individual persons comprising the registered native title claimant must sign an ILUA

[392] 'Indigenous land use agreements (ILUAs)' *Business Queensland* (Web Page, 6 January 2020) <htpps://business.qld.gov.au/industries/minig-energy-water/resources/land-environment/native-title/ilua>.
[393] Ibid.
[394] *Native Title Act 1993* ('NTA'), ss 24BB-24BE, 24CB-24CE and 24DB-24DF; 'About Indigenous Land Use Agreements (ILUAs)' *National Native Title Tribunal* (Web Page) <www.nntt.gov.au/informations%20Publications/1.About% 20Indigenous%20Land%20Use%20Agreementspdf>
[395] Neate (n 391).
[396] *McGlade v Native Title Registrar* (2017) FCAFC 10 ('*McGlade*').

made under *Native Title Act*.[397] Under this new Act, any ILUA can be signed by a 'person or persons nominated or determined under subsection 252 A(2) by the native title claim group concerned to be party to the agreement—that person or those persons' or 'if no persons have been nominated or determined under subsection 251 A(2) by the native title claim group concerned to be a party to the agreement—a majority of the persons who comprise the registered native title claimant'.[398] In both cases, the agreement is binding upon all the members of the native title claimant group concerned.[399] If the parties do not want the ILUA or fail to come to an agreement, the *Native Title Act* has other provisions that allow the land use and management to proceed.

The introduction of ILUAs has seen increased agreement-making between claimant groups, government and other non-Indigenous stakeholders, whereas in earlier times there were no meaningful agreements made between Indigenous and non-Indigenous peoples in Australia. However, such agreements are limited to those who meet the legal criteria. There is no veto power vested in a claimant group's right to negotiate and economic leverage usually favours non-Indigenous parties. With the 2017 amendments, any dissent among the claimant group can be quashed to ensure that development projects proceed according to the ILUA. In reality, mining legislations in Australia put native title holders in a disadvantaged position.[400]

4.4.4.1 Benefits and Drawbacks of ILUAs

According to UN Special Rapporteur of the Rights of Indigenous Peoples James Anaya, 'indigenous peoples are open to discussion about extraction of natural resources from their territories in ways beneficial to them and respectful of their rights'.[401] Like every independent nation in the world, Indigenous Nations want to prosper. For Indigenous peoples, prosperity can be defined in many ways. It can mean maintaining connections with the land, resisting dispossession and disconnection, retaining language and heritage and improving education and living standards. Prosperity may also be achieved through the sustainable use of their land and mineral resources. ILUAs can be a mechanism by which to achieve this because they provide scope to be involved in managing development activities, which can minimise the adverse effects of development to protect their lands and environments.[402] ILUAs can also lead to better

[397] Australian Parliament House, 'Native Title Amendment (Indigenous Land Use Agreements) Bill 2017' *Bills Digest* (Digest No 70, 2016-17, 7 March 2017).
[398] *Native Title Amendment (Indigenous Land Use Agreement) Act 2017* sch 1, pt 1; NTA s 24CD (2)(a).
[399] NTA s 24 EA (1)(b).
[400] Bartlett, '*Native Title in Australia*' (n 376) 617.
[401] James Anaya, *Extractive Industries and Indigenous peoples: Report of the Special Rapporteur of the Rights of Indigenous Peoples*, UN Doc A/HRC/24/41 (2013) 3 [2].
[402] Marcia Langton and Odette Mazel, 'Poverty in the midst of plenty: aboriginal people the 'resource curse' and Australia's mining boom' (2008) 26 (1) *Journal of Energy and Natural Resources Law* 31, 40.

economic outcomes for Indigenous peoples. They can be used to pay compensation and other payments and can facilitate service delivery and promote business in Indigenous communities. Their purposes are multifaceted. They can be used for recognition, employment, education, training, environmental management, cultural heritage and community assistance programs like health, sports and recreations.[403] Apart from ILUAs, under the *Native Title Act*, Indigenous peoples can become parties to other agreements via commercial or joint ventures, framework agreements, funding agreements, Indigenous partnerships, joint management, land transfers, leases, memorandums of understanding, shared responsibility agreements, statements of commitment and regional partnership agreements. [404]

Indigenous peoples prefer negotiated agreements because they can share the benefits associated with the resource development, which helps to avoid conflict with developers.[405] At the same time, they want respect for their involvement in the decision-making processes and for the development of their natural resources to be respectful of their cultures and traditions.[406] In this regard, they seek to uphold their rights to self-determination and to freely participate in the process thorough 'free, prior and informed' consent. Indigenous peoples often claim that they 'must be in a position to make decisions about what options are best suited to their particular needs'.[407] Therefore, it is important that they arm themselves with all the information about the project to extract the maximum benefits possible, because in most cases, development companies have better access to financial resources and project information. It is also important that Indigenous peoples understand the terms and conditions of the ILUA, including obligations and privileges vested upon them. In most cases, ILUAs are written in English and the terms used, especially legal terms, may be difficult to understand. One solution could be to adopt the US approach to Indian treaty interpretation, which is known as the 'Indian Canon of Construction'. This principle was first laid down in the case of *Worcester v Georgia*, in which M'Lean J observed that 'the language used in treaties with the Indians should never be constructed to their prejudice'. [408] Adoption of this rule could force developers to make ILUAs more understandable

[403] Native Title Research Unit, *Native Title Payments & Benefits: Literature Review* (Australian Institute of Aboriginal and Torres Strait Islander Studies, August 2008) 10 <www.aiatsis.gov.au/sites/default/ files/docs/research-and-guides/native-title-research/ taxlitreview.pdf>; According to ATNS (Agreements, Treaties and Negotiated Settlements Project) as of August 2008, there were 72 ILUAs regarding Recognition, 49 regarding compensation and other payments, 13 regarding employment and education and training, 100 regarding environmental management and cultural heritage, 7 regarding community assistance programs.
[404] Native Title Research Unit, '*Native Title Payments & Benefits*' (n 403) 9-19.
[405] Ibid 5. See also Ciaran O'Faircheallaigh, 'Financial Models for Agreements between Indigenous Peoples and Mining Companies: Focusing on Outcome for Indigenous Peoples' (Research Paper, No 12, Aboriginal Politics and Public Sector Management, Griffith University, January 2003).
[406] Anaya (n 401) 6 [17].
[407] Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission 2009.
[408] 31 US 6 Pet 515 (1832) ('*Worcester*').

to Indigenous people during the negotiation process because any ambiguous provision will be read in favour of the Indigenous peoples.

In the negotiation of ILUAs regarding exploration and mining activities, the recognition of native title is of primary importance to Indigenous parties.[409] Besides native title, compensation and financial payments are other major components of negotiation. The value of compensation and financial benefits depend on the terms of the agreements and can be paid in various ways, such as a sum of money, lump sum payment, individual payments for heritage surveys and clearance, soft loans, rent and lease payments, royalties equivalents, equity in companies, land transfer or financial assistance for the administration of native title corporations.[410]

Professor Ciaran O'Faircheallaigh categorised the financial payments into six basic financial models: single upfront payments, fixed annual payments, royalties based on output, royalties based on the value of mineral output, profit-based royalties and equity participation or shareholding.[411] A single upfront payment is a one-off payment made to the Indigenous community at the commencement of the project and the community receives this amount irrespective of the success or failure of the project. Under the 'fixed annual payments' method, the Indigenous community is paid an annual fixed amount for the life of the project or until production ceases.[412] The other royalty-based payments and equity participation systems are progressive systems, whereby Indigenous peoples have greater involvement and community understanding of the projects, which creates opportunities for close partnerships between the parties. In these cases, the interests of Indigenous communities depend on the success of the projects and in the process, they receive little or no payments if the project fails. In the 'royalties based on output' system, the Indigenous communities receive royalties based on unit of production, not the value, whereas in the 'royalties based on the value of mineral output' system, the Indigenous communities receive royalties based on the value of the production, not the unit. In the first system, if the unit of the production decreases the royalties decline, whereas in the second system, if the values of the mineral drops then the royalties goes down. In the 'profit-based royalties' model, Indigenous communities receive royalties from the final revenue or profit of the company. Profit is calculated after the cost of production, which can vary from year to year and if the company makes no profit, the community receives nothing. The 'equity participation or shareholding' model gives Indigenous communities the opportunity to own a

[409] Native Title Research Unit, '*Native Title Payments & Benefits*' (n 403) 10. See generally Jon Altman, 'Land rights and aboriginal economic development: lessons from the northern territory' (1995) 2(3) *Agenda* 291.
[410] Ibid.
[411] Native Title Research Unit, '*Native Title Payments & Benefits*' (n 403) 20; O'Faircheallaigh, 'Financial Models for Agreements' (n 405) 16.
[412] Native Title Research Unit, '*Native Title Payments & Benefits*' (n 403) 11-12.

part of the company through shares, which give them potential future benefits through dividends and capital gains. Under this system, the shares or equity of the company is given to the Indigenous communities on a concession or free of charge.[413]

The need for education, training and employment is a top priority for remote Indigenous communities around Australia. Although it is the responsibility of the government to provide basic education and training to its citizens, mining companies often incorporate in their agreements with Indigenous communities, provisions for education, training, employment and business opportunities. Due to the remoteness of some communities, sometimes governments initiate joint ventures with the mining companies in the form of regional partnership agreements to provide basic needs to Indigenous communities.[414] Regional partnership agreements can also cover a range of issues, including mentoring, apprenticeships, driving licensing, child care, drug, alcohol and youth issues, housing, literacy and numeracy.[415] Mining is essential not only for national and regional growth, but also for improving local Indigenous education, wages and employment growth. Mining companies help to establish and operate Indigenous business by supplying capital, training, expertise, and competitive advantages. Such business can range from mining, labour supply, reclaim work, cleaning, cooking, fencing and other diverse jobs. In 2008, BHP Billiton awarded a AUD300 million project to an Aboriginal corporation named Ngarda to run the operation of Yarrie mine. Since then, the corporation has employed more than 2,000 Aboriginal people in their operation.[416]

Despite the positives, Indigenous peoples can be deprived of their proper share of the wealth due to the lack of good will of the companies and shrewd wordings of the agreements, which mean that Indigenous communities miss out of the benefits of mining booms.[417] Moreover, the mining industry pushes the price of living through high income employment and creates challenging environments for Indigenous communities to remain in the community by lifting the cost of living through house prices and rents. Some employment targets set out in the provisions of the agreements have not been achieved because of the lack of clear implementation plans and due to

[413] Ibid 14-15, 20.
[414] In 2005, the Mineral Council of Australia signed a Memorandum of Understanding ('MOU') with the federal government to provided social, employment and business opportunities to the Indigenous communities.
[415] Minerals Council of Australia, 'Minerals council of Australia policies and programs of indigenous employment and leadership' (Paper, Mining, Petroleum, Oil and Gas Symposium: Indigenous participation in the resource and extraction industries, Broome, 2007)
[416] Gian De Poloni, 'Indigenous worker numbers skyrocket in mining' *ABC News* (Web Page, 1 August 2012) <www.abc.net.au/news/2012-07-31/indigenous-nubers-increase-in-minning-industry/4167230>.
[417] See Langton (n 403) 63-4; see especially Ciaran O'Faircheallaigh, 'Evaluating agreements between Indigenous Peoples and resource development' in M Langton, L Palmer, M Tehan and K Shain (eds), *Honours Among Nations?: Treaties and Agreements with Indigenous Peoples* (Melbourne University Press, Melbourne, 2004)

inadequate education, training and work readiness programs.[418] Further, in the case of a downturn in the mining industries, the benefits that come with the boom diminish and problems like welfare dependency, alcoholism, dropouts from the schools and domestic violence increase.

While the *Native Title Act* and ILUAs give Indigenous peoples some decision-making powers, they also represent the continuing application of elements of the Doctrine, including native title, pre-emption and limited sovereign and commercial rights. This setup is underpinned by neoliberal development and the imposition of the market model on Indigenous peoples. Within the setup, Indigenous peoples may exercise limited self-determination power over their ancestral lands, but as mining booms and busts show the benefits they reap are subject to market forces that they have little power to control. Ultimately, this approach may give the appearance that Indigenous peoples' demands are being met, but in reality it may be another form of 'Neoliberal Aboriginal Governance' which enables non-Indigenous entities to largely maintain control (see Section 2.5 above). This is reflected in the native title regime where the right to negotiate does not give native title holder a veto power. Their limited power is further illustrated by the role of parliament in determining the conditions for making a valid ILUA.

4.4.4.2 The *McGlade* case

In June 2015, the Western Australia government signed a AUD 1.3 billion deal with the Noongar people to surrender native title rights over 200,000 km^2 area spanning from the north of Perth to the Goldfields–Esperance region.[419] This deal was concluded with the South-West Aboriginal Land and Sea Council who represented the claimant groups. The deal was in the form of six ILUAs, although many Noongar people declined to accept the agreement. Section 24CD of the *Native Title Act* sets out the requirements for registration of the agreement. The aggrieved Noongar people filed a lawsuit in the Federal Court arguing that the ILUA could not be registered until all the individuals who jointly comprised the native title claimant or claimants signed the agreement.[420] At first, the legal action was initiated by Mingli Wanjurri McGlade and three others in the High Court, but later the case was transferred to the Federal Court. The Full Federal Court agreed with the claimants and found that the agreement between the Noongar people and the Barnet Government could not legally be registered because under the *Native Title Act*, the

[418] See generally 'Native Title Report 2006' *Australian Human Rights Commission* (Web Page) <https://www.humanrights.gov.au/our-work/native-title-report-2006-chapter-1-indigenous-perspectives-land-and-land-use>.
[419] 'Record $1.3 billion native title deal backed in WA' *News Corp Australia* (Web Page, 12 September 2018) <http://www.perthnow.com.au/news/western-australia/record-13-billion-native-title-deal-backed-in-wa/news-story>.
[420] Wendy Caccetta, 'Shock court ruling scuttles historic $1.3b WA native title agreement' *National Indigenous Times* (Web Page, 2 February 2017) <http://nit.com.au/shock-court-ruling-scuttles-historic-1-3b-noongar-agreement/>.

ILUA must be signed by all claimants in a group. This ruling overturned a 2010 decision known as the Bygrave decision,[421] in which it was decided that an ILUA could proceed with a majority number of signatures.[422] The federal government reacted to the decision in the *McGlade* case and in 22 June 2017, passed the *Native Title Amendment (Indigenous Land Use Agreements) Act* to counter the effect of the *McGlade* decision in similar cases involving ILUAs that were not supported by all the members of a native title group—such as in the case of the Adani mine (see Chapter 5). Through this legislation the government implemented westernised democratic system among the native title claimants and left Indigenous communities vulnerable to fractions and divisions. This system also diminishes communal spirit among Indigenous peoples. In effect the government has institutionalised a 'divide and conquer' mindset to destabilise Indigenous societies and when native title holders fail to come to a decision, the lands can still be used for stipulated projects. Rather than uniting Indigenous societies, the government has prioritised corporate interests to make it easy for resource development projects such as the Adani mine to proceed (see Chapter 5).

4.5 Conclusion

In the process of colonisation, the Doctrine served as the foundation for the making of laws and policies that were in violation of the rights of Indigenous peoples.[423] The Doctrine supported nation-states such as the USA, Canada and Australia to assert superior title over Indigenous lands, territories and resources.[424] Subsequently, Western laws and policies were imposed upon Indigenous peoples to assimilate them into mainstream non-Indigenous societies, dismantle their institutions and limit their self-determination so that they would have no other choice but to abandon their cultures, religions and social rituals. However, the colonisers' agenda was to capture fertile Indigenous lands and mineral-laden resources. During the early years of colonisation in the USA and Canada, the treaty system was used by the Crown to access Indigenous lands. This process is now administered through law and policy. Conversely, Indigenous lands were stolen in Australia without any attempts to placate them through treaties or other legal mechanisms. Only belatedly has Australian law recognised Indigenous peoples' pre-existing title to their lands.[425] It is undeniable that the assertion of state sovereignty over

[421] *QGC Pty Ltd v Bygrave (No 2)* (2010) 189 FCR 412.
[422] Babs McHugh, 'Lawyer debunks claims MP amending Native Title to help Adani build coal mine' *ABC News* (Web Page, 12 April 2017) <https://www.abc.net.au/news/rural/2017-04-12/lawyer-debunks-claims-pm-amending-native-title/8435462>.
[423] Tonya Gonnella Frichner, *Impact on Indigenous Peoples of the International Legal Construct Known as the Doctrine of Discovery, which has Served as the Foundation of the Violation of their Human Rights,* UN PFII, ECOSOC, 9th sess, UN Doc E/C.19/2010/13 (19 - 30 April 2010) 3 [1].
[424] Ibid.
[425] *Council for Aboriginal Reconciliation Act 1991* (Cth).

Indigenous lands is based on the Doctrine, which is used by states to exploit and develop Indigenous lands by denying their rights.

In this chapter, I demonstrated that the twentieth century political, legal and judicial developments in the USA, Canada and Australia were based on elements of the Doctrine that mainly benefited non-Indigenous interests. In the next chapter, I analyse three current development projects in the USA, Canada and Australia to demonstrate that government decision-making prioritises global neoliberal ideals, which seriously undermine Indigenous rights. It also reveals how economic development, globalisation and neoliberalism have become a manifestation of the Doctrine of Neo-Discovery to displace more Indigenous peoples from their ancestral land by disregarding their land, cultural and human rights.

Chapter 5: Contemporary Applications of the Doctrine of Discovery in the USA, Canada and Australia

5.1 Introduction

This chapter focuses on current development projects in the USA, Canada and Australia that are progressing against the will of Indigenous peoples who opposed these developments. By focusing on individual case studies, my research identifies the ways in which the Doctrine of Discovery ('the Doctrine') continues to apply and legitimise these projects. These include elements such as first discovery, actual occupancy, native title (limited ownership rights), limited sovereign and commercial rights, terra nullius, Christianity and European-style civilisation. In this chapter, I discuss the background of each development, the opposition posed by Indigenous peoples and the struggles they face because of these developments. Through these case studies, I examine the rights of Indigenous peoples to self-determination and their sovereignty and to what extent these rights are exercisable within the context of development. In the current climate, it is evident that neoliberalism and globalisation trends have infiltrated government decision-making to undermine the rights of Indigenous peoples. In particular, these trends lead to further dismantling of Indigenous land rights. Moreover, all three projects that are the focus of this thesis enjoy strong support from the government, in fact, the Site-C dam is undertaken by government corporation and other two—DAPL and Adani mine—got governments support through regulatory authority approvals, laws and monetary support. Sometimes it is hard to differentiate the interest because both governments and corporations substitute each other, such as, in the USA the Army Corps of Engineers (government regulatory authority) supported Energy Transfer (corporation) in gaining approvals and in Australia the federal government helped Adani by passing favourable law. These developments are supported by claims that they are needed to meet the needs of the growing population. However, the economic benefits that national and multinational corporations receive and the flow-on benefits to governments who support them cannot be ignored. These developments may be seen as extending the elements of the Doctrine to encompass the element of neoliberalism, which in this chapter is referred to as the Doctrine of Neo-Discovery.

The focus of my analysis is on Indigenous peoples' struggles and legal challenges related to these development projects. Since the discovery of Indigenous lands by the European colonisers, Indigenous peoples have lost their lands, livelihoods and cultures at a rapid rate. As the population of the world has increased, the need for food, minerals and infrastructures has also increased. The response has been to engage in more development such as building dams, highways, pipelines, urban living areas, farmlands and harvesting minerals from mines. At the

same time, these projects are seen as being necessary to maintain economic growth and to create jobs and other market opportunities. However, what is often ignored is that these projects need vast areas of land, most of which is Indigenous lands. Although the land rights of Indigenous peoples (and native title more specifically) is recognised by countries such as the USA, Canada and Australia, these measures do not constitute an absolute right over the land. Some countries have laws that regulate native title, such as Australia, which has the *Native Title Act 1993* (Cth). Such provisions recognise the land rights of Indigenous peoples, but they can be changed or amended by the parliament, which happened under former Prime Minister John Howard in 1998 (see Section 4.4.3). We see this repeated with respect to each project discussed in this chapter, in which the governments of the USA, Canada and Australia ignored Indigenous rights by approving development projects on Indigenous lands. In the USA, President Donald Trump approved the Dakota Access Pipeline ('DAPL') for the benefit of multinational corporations Energy Transfer and Sunoco.[1] In Australia, the enactment of the *Native Title Amendment (Indigenous Land Use Agreement) Act 2017* (Cth) assisted the Adani Group through the approval process for the Adani mine and in Canada, the Trudeau government ultimately supported the construction of Site-C dam by BC Hydro and Power Authority (a Provincial Crown Corporation). Under the neoliberal ideology many state actions are performed by private organisations but that does not mean the state necessarily stands back to allow market forces dictate the outcome. On the contrary, the state maintains an interest, and usually to ensure the outcome maximises private wealth. With respect to Indigenous peoples, this approach appears to be creating mutually beneficial outcomes for all concerned (Indigenous peoples, business and government), but it is when Indigenous peoples oppose the commercialisation of their resources that the effects of the element of the Doctrine come into view In recent years, there have been examples where Indigenous peoples have agreed to development on their lands; but equally, there have been examples where Indigenous peoples are opposed, or divided on the issue. It is when Indigenous peoples are opposed to development that their rights are usually infringed. In this chapter, I critically analyse three case studies from the USA, Canada and Australia.

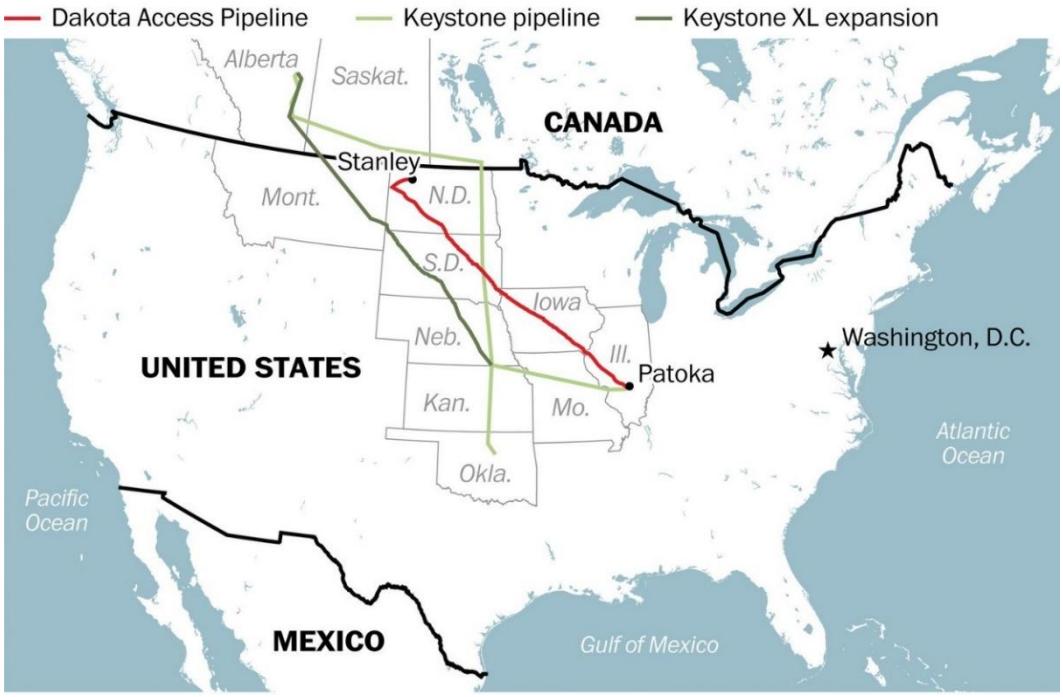
5.2 The DAPL and Indigenous Rights in the USA

Since the election of Donald Trump as the President of the USA, the situation for the American Indians has worsened. Along with the Keystone XL pipeline ('XL pipeline'), Trump allowed the DAPL in North Dakota to be completed, even though former President Barack Obama declined

[1] Energy Transfer is one of America's largest energy company overing 38 states and international office in Beijing. Sunoco is one of the largest oil distribution company in the USA that has oil refinery, storage and exploration facilities in other countries.

to issue the final easement for the DAPL and had vetoed against the completion of XL pipeline.[2] DAPL is a 1,172-mile (1,897-km) pipeline owned by Energy Transfer and Sunoco, which stretches from North Dakota (Bakken region) to Patoka, Illinois (see Map 3).[3] Since its completion in 2017, the USD 3.7 billion pipeline transfers 570,000 barrels of crude oil per day from north to south.[4] While about 99 per cent of the DAPL is situated on private lands, the remaining one per cent is situated on federal lands, and required permission from the US Army Corps of Engineers (the federal agency responsible for permitting DAPL).[5] The pipeline cuts through the northmost section of Sioux territory, over which the tribe invoked their authority under the Fort Laramie Treaties of 1851 and 1868.[6]

Map 3. Dakota Access and Keystone XL Pipeline.



Source: TransCanada, Energy Transfer Partners. The Washington Post.[7]

[2] 'Trump administration defends Keystone XL pipeline in court' *The Associated Press* (Web Page, 24 May 2018) <https://www.cbc.ca/news/business/keystone-court-montana-1.4676412>. The Keystone XL pipeline is a duplicate of the original Keystone pipeline (phase 1) that runs between Hardisty in Alberta, Canada and Steele City in Nebraska, USA (Ref. map-3). The proposed Keystone XL pipeline had been approved by both houses of the parliament, however in 2015 President Obama refused to sign the approval due to its effects on the environment and the American Indians.

[3] 'Dakota Pipeline: What's behind the controversy' *BBC News* (Web Site, 7 February 2017) <https://www.bbc.com/news/world-us-canada-37863955>.

[4] Moving America's Energy: the Dakota Access Pipeline' *Energy Transfer* (Web Site) <https://daplpipelinefacts.com/>.

[5] *Standing Rock Sioux Tribe v US Army Corps of Engineers (Standing Rock I)*, 205 F Supp 3d 4 (2016) 7. See also Stephen Young, 'The Sioux's Suits: Global Law and the Dakota Access Pipeline' (2017) 6(1) *American Indian Law Journal* 173, 188.

[6] Ibid.

[7] Juliet Eilperin and Brady Dennis, 'Trump administration to approve final permit for Dakota Access pipeline' *The Washington Post* (online at 19 February 2020) <https://www.washingtonpost.com/news/energy-environment/wp/2017/02/07/trump-administration-to-approve-final-permit-for-dakota-access-pipeline/>.

After the DAPL was proposed in 2014, it faced strong opposition from the Standing Rock Sioux and Cheyenne River Sioux Tribes. As a result, President Obama ordered the US Army Corps of Engineers ('Army Corps') to complete an Environmental Impact Statement ('EIA') to explore an alternative route for the DAPL.[8] On 24 January 2017, President Trump issued an executive order reversing Obama's decision, which meant that construction of the DAPL could recommence. [9] In a memorandum to the Secretary of the Army, President Trump ordered the Secretary to expedite approval of the DAPL. According to the President:

> By the authority vested in me as President by the Constitution and the laws of the United States of America, I hereby direct … to take all actions necessary and appropriate to:
>
> (i) review and approve in an expedited manner, to the extent permitted by law and as warranted and with such conditions as are necessary or appropriate, requests for approvals to construct and operate the DAPL, including easements or rights-of-way to cross Federal areas under section 28 of the Mineral Leasing Act…
>
> (ii) consider, to the extent permitted by law and as warranted, whether to rescind or modify the memorandum by the Assistant Secretary of the Army for Civil Works dated December 4, 2016 (Proposed Dakota Access Pipeline Crossing at Lake Oahe, North Dakota) and whether to withdraw the Notice of Intent to prepare an Environmental Impact Statement in connection with Dakota Access.[10]

The President's memorandum requested for the 'waivers of notice periods arising form or related to USACE [US Army Corps of Engineers] real estate policies and regulations'.[11] Immediately after Trump gave his approval, the Army Corps approved the project without an Environmental Impact Assessment and construction of the pipeline was finished and became operational in June 2017. This was a big blow for the American Indians and the environmentalists who had challenged this project since its inception.

5.2.1 The DAPL's effect on American Indians

During the planning, approval and construction processes, the DAPL was challenged by American Indian nations, who claimed it was a huge threat to their sovereignty, treaty rights,

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[8] David Blackmon, 'Trump's Pipeline Executive Orders: Proceed with Caution' *Forbes* (Web Page) <https://www.forbes.com/sites/davidblackmon/2017/01/25/trump-executive-orders-on-dapl-and-keysone-proceed-with-caution/#40f4cc1a3ef4>.

[9] *Construction of the Dakota Access Pipeline* (Memorandum for the Secretary of the Army, the White House, 24 January 2017); see also 'Donald Trump Greenlights Keystone XL Pipeline, But Obstacles Loom' *NDTV* (online 25 March 2017) <http://www.ndtv.com/world-news/donald-trump-greenlights-keystone-xl-pipeline-but-obstacles-loom-1673257>.

[10] '*Construction of the Dakota Access Pipeline*' (n 9).

[11] Ibid.

ways of life, sacred lands and access to their precious water resources.[12] It was recognised by a US District Court that the DAPL poses risk to the land of Standing Rock Sioux and Cheyenne River Sioux Tribe, who claimed that the construction of the pipeline would cause irreversible damage and would destroy sites of cultural and religious importance.[13] These tribes also claimed that the pipeline would destroy tribal burial grounds and stone structures that were directly on the path of the pipeline or nearby. They claimed that not only the cultural heritage and burial grounds would be destroyed by the pipeline, but it would also destroy important water sources, especially the Missouri River and Lake Oahe in North and South Dakota, which are essential for the practice of tribal religion. There is a potential high risk that the pipeline will cause forest destruction and water pollution from leaks. A big leak or accident would be environmentally catastrophic for the surrounding areas.[14] According to the American Indian nations, the pipeline breaches their treaty rights, including land, water, hunting and fishing rights as ensured under the Fort Laramie Treaties of 1851 and 1868. American Indian peoples hunting, fishing and water (Winters doctrine- see Section 3.2.2) rights are usufructuary rights characterised under native title element of the Doctrine—it is presumed that Indigenous peoples lost their full property rights and only retained occupancy and use rights. The 1868 Treaty stipulates that the government should obtain consent from 'at least three-fourths of all the adult male Indians occupying and interested' to abrogate any article or cession of any portion or part of the reservation.[15] Moreover, art II of the Treaty identifies and protects unceded Indian lands[16] and sets them 'apart for the absolute and undisturbed use and occupation of the Indians'.[17] The American Indians claimed that these treaty provisions were ignored during construction of the DAPL.

5.2.2 American Indian Protests and Human Rights Violations by the US Authorities

From the beginning of the proposed DAPL, the American Indians and their supporters initiated national and international campaigns against the project. The campaigners highlighted the fact that the project started without proper consultation and in contravention to international human

[12] See generally Robert N Diotalevi and Susan Burhoe, 'Native American Lands and the Keystone Pipeline Expansion: A Legal Analysis' (2016) 7(2) *Indigenous Policy Journal* 1.
[13] *Standing Rock Sioux Tribe v US Army Corps of Engineers*, 280 F Supp 3d 187 (DDC 2017). Haydee J Dijkstal, 'The Dakota Access Pipeline and the Destruction of Cultural Heritage: Apply the Crime Against Humanity of Persecution Before the ICC' (2019) 28(1) *Minnesota Journal of International Law* 157, 157, 158.
[14] Kyle Whyte, 'The Dakota Access Pipeline, Environmental Injustice, and U.S. Colonialism' (2017) 19(1) *Red Ink: An International Journal of Indigenous Literature, Arts & Humanities* 154, 155-6.
[15] Fort Laramie Treaty 1868 art XII; Young (n 5) 189.
[16] Lauren Kimmel, 'Does the Dakota Access Pipeline Violate Treaty Law?' (2017) 38 *Michigan Journal of International Law* (Web Page) <http://www.mjilonline.org/does-the-dakota-access-pipeline-violate-treaty-law/>.
[17] Fort Laramie Treaty 1868 art II.

rights standards and principles such as self-determination and 'free, prior and informed' consent. Standing Rock Indian Reservation Chairman David Archambault II criticised the government for approving the project without any meaningful consultation and for fast tracking the project by exempting it from environmental reviews required under the *Clean Water Act* and the *National Environmental Policy Act*.[18] He also alleged that the state and county governments acted as 'the armed enforcement for corporate interests'.[19] The campaigners requested the UN to support their cause by pursuing the US government to cease the project. In response to their request, the UN Special Rapporteur and representatives from the UNPFII visited the area and sent letters to the government requesting that they stop the construction of the project until a meaningful resolution was achieved.[20] The US government ignored the advice of the UN representatives and proceeded with the project.

In 2016, thousands of protesters gathered near the Standing Rock Reservation to protest the construction of the DAPL. Protesters belonging to hundreds of Indigenous Nations from every state in the USA and from around the world (e.g., Tibet, Sweden, Guatemala and Brazil) joined the 'water protectors' to voice their opposition by camping near the site and through tribal ceremony and prayer.[21] On 27 October, hundreds of National Guards, police, state troopers and private security personnel with body armour, batons, beanbag shotguns, pepper spray and assault rifles raided the camp to evict the water protectors.[22] This strike of force was supported by military Humvees, armoured carriers and helicopters. During these raids, unjustified force was used.[23] The security forces used pepper spray, rubber bullets, attack dogs and drenched the protesters with cold water in the freezing winter weather.[24] However, it was the protesters who were arrested and about 400 people were detained in 'inhumane and degrading conditions'.[25]

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[18] *Clean Water Act,* 33 USC § 1251 et seq. (1972); *National Environmental Policy Act,* 42 USC § 4321 et seq (1969); David Archambault, 'Taking a Stand at Standing Rock' *The New York Times* (online at 12 November 2019) <https://www.nytimes.com/2016/08/25/opinion/taking-a-stand-at-standing-rock.html>.

[19] Ibid.

[20] 'UN Experts back call to halt pipeline construction in North Dakota, citing rights abuses of protestors' *UN News* (Web Page, 15 November 2016) <https://news.un.org/en/story/2016/11/545392-un-experts-back-call-halt-pipeline-construction-north-dakota-citing-rights>.

[21] Saul Elbein, 'These Are the Defiant "Water Protestors" of Standing Rock' *National Geographic* (Web Page, 26 January 2017) <https://www.nationalgeographic.com/news/2017/01/tribes-standing-rock-dakota-access-pipeline-advancement>; Bill McKibben, 'A Pipeline Fight and America's Dark Past' *The New Yorker* (Web Page, 6 September 2016) <https://www.newyorker.com/news/daily-comment/a-pipeline-fight-and-americans-dark-past>.

[22] Joseph Bullington, 'A Dakota Access Pipeline Water Protector is Sentenced to Prison in North Dakota' *The Progressive* (Web Page, 6 June 2018) <https://progressive.org/dispatches/a-dakota-access-pipeline-water-protector-is-sentenced-180606/>.

[23] 'UN experts back call to halt pipeline construction in North Dakota, citing rights abuses of protestors' *UN News* (Web Page, 15 November 2016) <https://news.un.org/en/story/2016/11/545392-un-experts-back-call-halt-pipeline-construction-north-dakota-citing-rights>.

[24] Kyle Powys Whyte, 'The Dakota Access Pipeline, environmental Injustice, and US colonialism' (2017) 19(1) *Red Ink* 154, 156-7.

[25] 'UN experts back call to halt pipeline construction in North Dakota, citing rights abuses of protestors' *UN News* (Web Page, 15 November 2016) <https://news.un.org/en/story/2016/11/545392-un-experts-back-call-halt-pipeline-construction-north-dakota-citing-rights>.

Michael 'Little Feather' Giron, a member of Chumash Nation, was sentenced for 36 months to a federal prison for protesting against the DAPL.[26] Besides the federal felony cases, the water protesters also faced numerous criminal cases in the North Dakota criminal courts.[27] The situation in the Standing Rock resembled the early colonial invasion, in which the American Indians in defence of their lands were met by unrelenting colonial forces determined to conquer and take their lands. This use of force represents the continuing application of the conquest element of the Doctrine, under which the 'European claimed to acquire [Indigenous lands] by winning military victory over Indigenous peoples'.[28]

With the continuing protest from the water protectors and increasing pressure from the national and international organisations, the US Army Corps of Engineers agreed to conduct an Environmental Impact Statement ('EIS') under the *National Environmental Policy Act 1969* to consider viable alternative routes for the pipeline.[29] However, after the election of Donald Trump, this process was fast tracked. No alternative routes were considered, and construction was completed within a few weeks of approval.

5.2.3 Legal Challenges by American Indian Peoples

Concerned American Indian nations were against the DAPL from the very beginning for many reasons. The pipeline passes directly upstream of the Standing Rock Reservation and through unceded Great Sioux Nation lands, which are protected under the Fort Laramie Treaty of 1851.[30] Besides breaching treaty rights, the pipeline was a significant threat to Indian land and waters. As a result, it sparked multiple legal challenges from American Indian nations such as the Standing Rock Sioux, Cheyenne River Sioux, Yankton Sioux and Oglala Sioux Tribes.[31] One of the first legal challenges from the Standing Rock Sioux Tribe was in 2016, when the tribe alleged that by permitting the construction of the DAPL across a section of the Missouri River, the Army Corps violated the *Clean Water Act 1972*, the *Rivers and Harbours Act 1899*, the *National*

[26] Bullington (n 22).
[27] Ibid. North Dakota brought 835 criminal cases against the protesters, out of which 352 were dismissed or acquitted and 235 are ongoing.
[28] Robert J Miller et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2012) 8.
[29] Young (n 5) 197.
[30] Ellen Moore, *Journalism, Politics, and the Dakota Access Pipeline: Standing Rock and the Framing of Injustice* (Routledge, 2019) 1, 6; Robinson Meyer, 'The Legal Case for Locking the Dakota Access Pipeline' *The Atlantic* (online 9 September 2016) <https://www.theatlantic.com/technology/archive/2016/09/dapl-dakota-sitting-rock-sioux/99178>.
[31] *Standing Rock I* (n 5); *Standing Rock Sioux Tribe v US Army Corps of Engineers* ('*Standing Rock II*'), 239 F Supp 3d 77 (DDC 2017); *Standing Rock Sioux Tribe v US Army Corps of Engineers* ('*Standing Rock III*'), 255 F Supp 3d 101 (DDC 2017); *Yankton Sioux Tribe v US Army Corps of Engineers,* No. 16–1796, 2016 WL 4706774 (DDC, filed Sept. 8, 2016); *Oglala Sioux Tribe v US Army Corps of Engineers*, No. 17–267 (DDC 2017).

Environmental Policy Act and the *National Historic Preservation Act 1966*.[32] It was claimed that these violations would inevitably result in irreparable harm to sites with cultural and historical significance.[33] The *Standing Rock Sioux Tribe v US Army Corps of Engineers* ('*Standing Rock I*') was filed by the Standing Rock Sioux to enjoin (prohibit) the Army Corps of Engineers from permitting construction of DAPL and alongside this action, the Tribe filed a Motion for Preliminary Injunction to stop construction from continuing.[34] During the motion hearing, the Court heard the details of the consultation process undertaken by the Army Corps and the Dakota Access and argument from the applicants for the injunction.

According to the Army Corps, in 2014, while planning the pipeline, the company devised the DAPL route by using past cultural surveys to avoid sites that had already been identified as potentially eligible for or listed on the National Register of Historic Places. It also found that only 3 per cent of the work needed to build the pipeline would require federal approval and only 1 per cent of the pipeline was set to affect US waterways.[35] Additionally, in response to intensive Class III Cultural Surveys that revealed previously unidentified historic or cultural resources that might be affected by the pipeline, the company mostly chose to reroute.[36] In North Dakota, the cultural surveys found 149 potentially eligible sites, 91 of which had stone features and the pipeline was modified 140 times to avoid cultural resources.[37] Ultimately, the modified pipeline avoided all 91 of these stone features and all but 9 of the other potentially eligible sites. Further, additional plans were put in place to mitigate any potential effects on the other 9 sites through coordination with the North Dakota State Historic Preservation Officer.

Around the time the cultural survey work began, Dakota Access took its plan public. On 30 September 2014, the authority met with the Standing Rock Sioux Tribal Council to present the pipeline project as part of a larger community outreach effort. While discussions between Dakota Access and the Army Corps were ongoing, the Army Corps sent a letter to the Tribe's Historic Preservation Officer, Waste'Win Young informing her that it was considering 55 Pre-construction Notices ('PCN') and verification requests across its offices for the DAPL.[38] The Army Corps requested the Tribe to inform them 'any knowledge or concerns regarding cultural resources' that the Army Corps would need to consider and asked whether the Tribe wanted to

[32] Young (n 5) 190. The *Clean Water Act,* 33 USC § 1251 et seq (1972); the *Rivers and Harbours Act*,33 USC § 403 (1899); the *National Environmental Policy Act,* 42 USC § 4321 et seq (1969)*;* the *National Historic Preservation Act,* 54 USC § 470 et seq. (1966).
[33] *Standing Rock I* (n 5) 7.
[34] Ibid.
[35] Ibid 13.
[36] Ibid.
[37] Ibid 14.
[38] Ibid 17.

be consulted on the project.[39] Young informed the Army Corps that the Tribe opposed 'any kind of oil pipeline construction through [their] ancestral lands' in part because the potential dredging would take place where human remains of relatives of current tribal members were present and reiterated that the Tribe 'look[ed] forward to participation in a full tribal consultation process' once it commenced.[40] In August 2015, Young again reiterated that the s 106 *National Historic Preservation Act* consultation run by the Army Corps had failed to respond to concerns raised by the Tribe and expressed her frustration in being excluded from the Dakota Access surveying despite company promises to include tribal monitors.[41] She also reiterated her concern that sites might be overlooked or damaged unless the Standing Rock Sioux participated in surveying and wanted to play a primary role in the survey work and monitoring.[42]

On 8 December 2015, the Army Corps released a draft environmental assessment for the project, which contained a request for comment by 8 January 2016.[43] The Tribe provided timely and extensive comments to the draft environmental assessment in letters on 8 January and 24 March, in which Standing Rock Indian Reservation Chairman David Archambault asserted that the Army Corps had failed to consult on the identification of cultural sites important to the Tribe and asserted that the Army Corps violated its own policy to hold 'an active and respectful dialogue' before decisions were made.[44] He also claimed that the bore testing violated the *National Historic Preservation Act* because the Army Corps did not include the Tribe in decision-making processes and the Army Corps relied on old surveys conducted before 1992 Amendments to the *National Historic Preservation Act*.[45] From January to May 2016, there were no fewer than seven meetings between the Tribes and the Army Corps. In one of the meetings, the Tribe expressed specific concerns about tribal burial sites at the James River crossing.[46] Based on the information provided, the Army Corps verified the presence of cultural resources at the site and successfully instructed Dakota Access to move the pipeline alignment to avoid them.[47]

During this consultation process, Colonel Henderson from the Army Corps attended several meetings, during which Chairman Archambault pointed out areas of concern—identifying new stones, graves, burial sites and earthen lodges that needed to be considered by the Army Corps—and explained the Tribe's issues with the pipeline project.[48] The Army Corps worked with

[39] Ibid.
[40] Ibid.
[41] Ibid 18.
[42] Ibid.
[43] Ibid 20.
[44] Ibid.
[45] Ibid.
[46] Ibid 21.
[47] Ibid.
[48] Ibid.

Dakota Access to offer consulting tribes an opportunity to conduct cultural surveys at some of the PCN locations. While other Tribes participated in the consultation process, the Standing Rock Sioux declined to participate in the surveys because of their limited scope.[49] Instead, it requested the Army Corps to redefine the area of potential effect to include the entire pipeline and asserted that the Tribe would not send experts to help identify cultural resources until this occurred.[50] In response, the Army Corps expressed its regret that the Tribe would not participate and welcomed any knowledge or information regarding historic properties that it was still willing to provide.[51] In the meantime, Chairman Archambault and the Army Corps had a disagreement about the determination that 'one of the sites identified … was "not eligible" for listing and the project overall had "no historic properties subject to effect"'.[52] The Chairman formally objected to the determination by stating that none of their 'request for consultation or Class III Cultural Surveys has been honored'.[53] Nonetheless, on 25 July 2016, the Army Corps issued an environmental assessment finding of 'no significant impact' and verified all 204 PCN locations under Nationwide Permit 12.[54] Through the environmental assessment, they instituted a 'Tribal Monitoring Plan', which required the Dakota Access authority to allow tribal monitors at all PCN sites during the construction period. Without delay, the Dakota Access immediately notified the tribes of its intent to begin construction within five to seven days.[55]

Two days after the Army Corps issued the PCN authorisations, on 4 August 2016, the Standing Rock Sioux Tribe filed a suit along with a Motion for Preliminary Injunction against the Army Corps under the *Administrative Procedure Act 1946* in the US District Court, District of Columbia, asserting that:

> a. the Corps violated the *NHPA* [*National Historic Preservation Act*] when it promulgated NWP 12 without a Section 106 of process.
>
> b. the Corps violated the *NHPA* by permitting DAPL-related activities at some federally regulated waters without a Section 106 determination.

[49] *Standing Rock I* (n 5) 22. Three tribes took the opportunity. The Upper Sioux Community identified areas of tribal concern at three PCN sites, and Dakota Access agreed to additional avoidance measures at all of them. The Osage Tribe identified areas through their surveys that they wished to monitor during construction, and the company granted that request too.
[50] *Standing Rock I* (n 5) 22.
[51] The Tribe did engage in two more visits to Lake Oahe with the Corps around this time and identified areas of potential cultural significance but several of the sites they identified were in areas that the Corps had determined were well outside the area of potential impact for the project. The group also toured the Cannonball Village site and pointed out a sacred stone in the area that is still used for prayer. The Corps nevertheless ultimately determined that the Cannonball Village site was not in the area that would be affected by DAPL-related construction work.
[52] *Standing Rock I* (n 5) 23.
[53] Ibid.
[54] Ibid 24.
[55] Ibid.

c. the Corps unlawfully narrowed the scope of its review to only those areas around the permitted activity, as opposed to the entire pipeline.

d. the Section 106 process at the PCN sites was inadequate because the quality of the consultations was deficient.[56]

After consideration of all the facts of the case, the Court decided that:

a. the Corps' decision to promulgate NWP 12 after the effort to consult that it made was reasonable.

b. the Corps gave the Tribe a reasonable and good faith opportunity to identify sites of importance.

c. the Tribe has failed to meet its burden to show that DAPL-related work is likely to cause damage. The previously undiscovered resources that were discovered during the processes are located away from the activity required for the DAPL construction.

d. any temporary disturbance to the atmospherics around the site will not be irreparable as they will be removed once the construction is complete. Moreover, there are several protective measures in place to assure that the Tribe and others will be able to monitor the construction activity to protect any previously unidentified resources.[57]

For the above reasons, the Court concluded that the Tribe failed to demonstrate that an injunction was warranted and denied the Tribe's Motion for Preliminary Injunction.[58]

In early 2017, President Donald Trump signed an Executive Order approving the pipeline and on 8 February 2017, the Army Corps issued an easement permitting Dakota Access to drill under the Lake Oahe, which is a federally regulated waterway and forms part of the Missouri River and overlaps North and South Dakota.[59] Fearing irreparable harm from the pipeline under the Lake Oahe, the Cheyenne River Sioux filed another Motion for Preliminary Injunction in the US District Court, District of Columbia, in which they argued that the easement to drill under the lake violated the *Religious Freedom Restoration Act 1993*.[60] In this lawsuit (*Standing Rock II*), the Tribe argued that 'the presence of oil in the pipeline under Lake Oahe would desecrate sacred waters and make it impossible for the Tribes to freely exercise their religious beliefs, thus violating the Religious Freedom Restoration Act'[61] and requested the Court to enjoin the easement.[62] In deciding this case, the Court focused on three factors for preliminary injunction:

[56] Ibid 27-37; *Administrative Procedure Act* 5 USC § 551 et seq (1946).
[57] See *Standing Rock I* (n 5) 27-37.
[58] Ibid 37.
[59] *Standing Rock II* (n 31).
[60] *Religious Freedom Restoration Act* 42 USC § 2000bb (1993).
[61] *Standing Rock II* (n 31) 81.
[62] Ibid.

irreparable harm, balance of equities and public interest.[63] After considering the factors, the Court concluded that 'the extraordinary relief requested is not appropriate in light of both the equitable doctrine of laches and the Tribe's unlikelihood of success on the merits' and as a result, the motion for preliminary injunction was denied.[64]

After their unsuccessful attempts in the *Standing Rock I* and *Standing Rock II* claims, the Standing Rock Sioux and Cheyenne River Sioux Tribes took 'their third shot, this time zeroing in DAPL's environmental impact' to stop the construction from continuing (*Standing Rock III*).[65] The tribes claimed that the Army Corps failed to 'sufficiently consider the pipeline's environmental effects' before granting permits to construct and operate the DAPL under the Lake Oahe and as a result the Army Corps failed to comply with the *National Environmental Policy Act*.[66] They also argued that the agency did not consider and assess the risk of spill under the lake and as such failed to abide by the 'hard look' requirement of the *National Environmental Policy Act*,[67] for which the agency must 'adequately identify and evaluate' the adverse environmental effects of proposed developments.[68] It was stressed that the environmental assessment failed to acknowledge the failure rate of spill-detection systems and while the pipeline was 90 feet underground, there was 'no way to discover a low leak until the oil sheen appears on the surface of the water'.[69] The tribes also pointed to the matters related to alternatives, cumulative risk, treaty rights and environmental justice. After considering the submissions from both sides, the United States District Court for the District of Columbia found that 'the agency failed to adequately consider the impacts of an oil spill on Standing Rock's fishing and hunting rights and on environmental justice'.[70] While the Court rejected the Tribe's claims under the *Clean Water Act* and the *Mineral Leasing Act*, it granted the tribe's motion regarding the flaws in the Army Corp's environmental analysis and remanded these issues to the Army Corps for further analysis (*Standing Rock IV*).[71] However, the Court did not vacate DAPL's permits and easement, which according to the Court's vacatur is the 'standard remedy'

[63] Ibid 84.
[64] Ibid 81, 85. In the *Standing Rock II* the 'Laches' was described as an equitable defense 'designed to promote diligence and prevent enforcement of stale claims' by those who have 'slumber[ed] on their rights'. It applies 'where there is (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense'.
[65] *Standing Rock III* (n 31) 112.
[66] Ibid 113.
[67] Ibid 124.
[68] Ibid.
[69] Ibid 126.
[70] Ibid 148.
[71] *Standing Rock Sioux Tribe v US Army Corps of Engineers,* (*Standing Rock IV*), 282 F Supp 3d 91 (DDC 2017) 96. The Court found that Corps insufficiently addressed, (1) the degree to which the project's fishing and hunting rights; (2) the consequences of a spill for the Tribes' fishing and hunting rights; (3) the environmental justice impacts of the project.

for a violation of the *National Environmental Policy Act*.[72] Instead, the Court asked the parties to submit a post-judgment briefing on whether the pipeline should operate considering the deficiencies identified and any 'disruptive consequences that would result given the current stage of the pipeline's operations'.[73]

The parties submitted their post-judgment briefing before the Court and on 11 October 2017 it decided on the point of 'seriousness of the deficiencies in the agency action' that the errors identified in the prior case were not 'fundamental or incurable' flaws, which were enough for them to avoid vacatur.[74] While the Court found in favour of the defendants, it asked them to give 'serious consideration to the errors identified in this Court's prior opinion' and warned the Army Corps not to reduce the *National Environmental Policy Act* compliance into a 'bureaucratic formality' and 'not to treat remand as an exercise in filling out the proper paperwork *post hoc'*.[75] In a nutshell, the Court decided that oil could continue to flow through the pipeline while the Army Corps conducted further environmental analyses.[76] The Court came to this determination because stopping oil from flowing under Lake Oahe for six months 'could cause significant harms to numerous people and entities'.[77] This signalled the Court's preference to protect economic interests over Indigenous rights.

Following this setback, the Standing Rock Sioux and the Cheyenne River Sioux Tribes sought a series of interim measures to monitor the ongoing operation of the pipeline while the defendants argued that the tribes had failed to demonstrate a need for injunctive relief and their proposed measures were unnecessary.[78] Subsequently, in response to an incident in which the Keystone Pipeline leaked 210,000 gallons of oil in Marshall County, the Court made it clear that there was an ongoing need for monitoring because there was an 'inherent risk' with any pipeline.[79] In this case, the Tribes requested three specific conditions during the remand period:

> (1) the finalization and implementation of oil spill response plans at Lake Oahe

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[72] *Standing Rock III* (n 31) 148. The court in *Standing Rock III* referred to cases such as *Public Employees for Environmental Responsibility v US Fish & Wildlife Serv*, 189 F Supp 3d 1, 2 (DDC 2016), *Human Society of US v Johanns*, 520 F Supp 2d 8, 37 (DDC 2007) and *Realty Income Tr v Eckerd*, 564 F 2d 447, 456 (DC Cir 1977) to define '**vacatur**' as 'when an action is being undertaken in violation of NEPA, there is a presumption that injunctive relief should be granted against continuation of the action until the agency beings itself into compliance'.
[73] *Standing Rock III* (n 31) 148-149; Robinson Meyer, "The Standing Rock Sioux Claim 'Victory and Vindication' in Court" *The Atlantic* (Web Page, 14 June 2017) <https://www.heatlantic.com/science/archive/2017/06/dakot-access-standing-rock-sioux-victory-court/530427>.
[74] *Standing Rock IV* (n 71) 94.
[75] Ibid 109.
[76] Ibid; *Standing Rock Sioux Tribe v US Army Corps of Engineers*, 280 F Supp 3d 187 (DDC 2017). To come to a determination the court can 'remand' the matter back to either parties. In this case the Court 'remanded' the matter back to Army Corps of Engineers for further study.
[77] *Standing Rock IV* (n 71) 109.
[78] 280 F Supp 3d 187 (DDC 2017) (n 76) 188.
[79] Ibid 190.

(2) completion of a third-party compliance audit

(3) public reporting of information regarding pipeline operations.[80]

The Court agreed with the Tribes and ordered that:

(1) the Corps, Dakota Access, and the Tribes coordinate to finalise spill response plans at Lake Oahe, and that file such plans with the Court by April 1, 2018
(2) the Dakota Access select an independent, third-party auditor in consultation with the Tribes to keep the Court informed of the circumstances at Lake Oahe pending remand and the results of this audit process be filed with the Court by April 1, 2018
(3) the Dakota Access file bi-monthly reports of any repairs or incidents occurring at the segment of the pipeline crossing Lake Oahe.[81]

As per directions made in *Standing Rock III*, the Army Corps completed the remand process on 31 August 2018.[82] In this process, the Army Corps stood by its prior conclusion and argued that formal reconsideration of the environmental assessment and Finding of No Significant Impact, or the preparation of supplementary *National Environmental Policy Act* documentation was not required.[83] After the completion of the remand process, the Tribes submitted their First Supplemental Complaint on 1 November 2018, arguing that the Army Corps ignored much of the information provided by the Tribes and 'treated the remand as a *post hoc* effort to justify its unlawful decision to circumvent an adequate review of the pipeline and its impact of the Tribe and Tribe's rights'.[84] The Tribes alleged that the Army Corps failed to give 'serious consideration' and produced a one sided analysis without 'fair and transparent' review.[85] According to the Tribes, the Army Corps also relied on a flawed worst-case discharge analysis

[80] Ibid 191.
[81] Ibid 191, 192.
[82] Before the completion of 'remand' the Yankton Sioux Tribe and Robert Flying Hawk, the Chairman of the Tribe's Business and Claims Committee challenged the construction and operation of the Dakota Access Pipeline under the National Historic Preservation Act, the National Environmental Protection Act, and the 1851 Treaty of Laramie. They claimed that the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service violated the NHPA by failing to adequately consult with the Tribe regarding historical and cultural sites, violated NEPA by unlawfully segmenting their analyses of the pipeline's environmental impacts, and violated the 1851 Treaty by granting approvals for the pipeline without first obtaining the Tribe's consent. In 19 March 2018 United States District Judge Boasberg rejected the claims and Tribe's petition for summary judgment failed; *Standing Rock Sioux Tribe v US Army Corps of Engineers*, 301 F Supp 3d 50 (2018).
[83] 301 F Supp 3d 50 (2018) (n 82).
[84] First Supplemental Complaint, *Standing Rock Sioux Tribe v US Army Corps of Engineers*, Case No 1:16-cv-1534-JEB (and Consolidated Case Nos. 16-cv-1796 and 17-cv-267) [3].
[85] Ibid.

in their oil spill response planning. Considering the flaws of the remand process, the Tribes requested the Court to vacate the remand analysis.[86]

On 16 August 2019, the Standing Rock Sioux Tribe lodged a Motion for Summary Judgment, requesting the Court to resolve the Tribe's legal challenges to federal permits. The Tribe asked the Court to set aside the remand decision, order the Army Corps to prepare a full EIS and vacate the easement for the pipeline.[87] The memorandum submitted in support of the motion claimed that the remand was a 'sham from its inception', which never engaged the Tribe or its technical support and never shared critical information or addressed the Tribe's concerns.[88] This memorandum reiterated concerns about the pipeline that the Army Corps and Dakota Access failed to address on previous occasions. The Tribe asked for summary judgment in favour of them for the following grounds:

I. The remand relied on a flowed worst-case discharge.
II. The risk assessment on remand is arbitrary.
III. The Corps arbitrarily dismissed environmental justice impacts.
IV. The remand process violated the *National Environmental Policy Act* and consultation policies.
V. The Corps' *National Historic Preservation Act* analysis was unlawful.[89]

The litigation has reached the stage where the Court has allowed the Army Corps and the Dakota Access to submit their own briefing and then it will allow the Tribe to respond on those briefings.[90] Due to the escalating Coronavirus (COVID-19) situation, the Court is closed to the public and conducted the hearing by telephone on 18 March 2020.[91] On 25 March 2020, District Judge Boasberg ordered the Army Corps to conduct a full EIS, which gave the Standing Rock a significant victory over the Army Corps and the hope that a full EIS will address most of their concerns.[92] According to Judge Boasberg:

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[86] Ibid. The plaintiffs wanted the Court to declare the remand analysis arbitrary, capricious and in violation of the NEPA and *Administrative Procedure Act* (APA); vacate the remand analysis; direct the Corps to resume the EIS process initiated in November 2016 and provide the tribe with all technical document related to oil spill and impact.
[87] Memorandum in Support of Standing Rock Sioux Tribe's Motion for Summary Judgment on Remand, Document 433-2, Case No. 1:16-cv-1534-JEB (and Consolidated Case Nos. 16-cv-1796 and 17-cv-267) 9 <https://earthjustice.org/sites/default/files/files/SRST-Remand-brief.pdf>.
[88] Ibid.
[89] Ibid.
[90] Jan Hasselman, 'DAPL Update: Tribe Asks Court to Shut Down DAPL Due to Failed Remand; Massive Pipeline Expansion Planned' *Earthjustice* (online 29 August 2019) <https://earthjustice.org/features/dakota-access-pipeline-legal-explainer-remand>.
[91] Tony Webster, 'Standing Rock Sioux Tribe Returns to Court in Legal Challenge to DAPL' *EarthJustice* (Web Page, 17 March 2020) <https://earthjustice.org/news/press/2020/standing-rock-sioux-tribe-returns-to-court-in-legal-challenge-to-dapl>.
[92] *Standing Rock v US Army Corps of Engineers*, Civil Action No 16-1534 (JEB)

> [T]oo many questions remained unanswered. Unrebutted expert critiques regarding leak-detection systems, operator safety records, adverse conditions, and worst-case discharge mean that the easement approval remains 'highly controversial' under NEPA [*National Environmental Policy Act*]. As the court thus cannot find that the Corps has adequately discharged its duties under the statute, it will remand the matter to the agency to prepare an Environmental Impact Statement.[93]

5.2.4 The Current Status of the DAPL

There are many instances where oil pipelines leak after they are built. Since the Keystone Pipeline (phase 1), Keystone-Cushing extension (phase II) and Gulf Coast extension (phase III) came into operation, there have been several leaks and spills. In May 2011, valve failure caused a spill of 14,000 gallons of oil in south-eastern North Dakota near the South Dakota border and in April 2016 there was a leak of 17,000 gallons on private land in south-eastern South Dakota.[94] One of the largest spills occurred on 16 November 2017, when over 210,000 gallons of crude oil spilled in north-eastern South Dakota near Lake Traverse Reservation, which is home of the Sisseton Wahpeton Oyate Tribe.[95] This incident highlights the 'potential impact of pipeline incidents on tribal lands'.[96] This was anticipated in *Standing Rock IV*, in which the Court observed that 'there is no doubt that allowing oil to flow through the pipeline during remand risks the potentially disruptive effect about which the Tribes are most concerned—a spill under Lake Oahe'.[97] The Court further noted 'the potential to wreak havoc on nearby communities and ecosystems'.[98] Nevertheless, despite these observations, the pipeline was allowed to proceed. After the completion of the DAPL, there continue to be fears among affected American Indian tribes that it is a matter of time before a big spill destroys their water sources and native burial grounds. Already in its first six months of operation, there have been at least five small leaks in

[93] Ibid memorandum opinion.
[94] Robinson Meyer, 'The Standing Rock Sioux Claim 'Victory and Vindication' in Court' *The Atlantic* (online 14 June 2017) <https://www.heatlantic.com/science/archive/2017/06/dakot-access-standing-rock-sioux-victory-court/530427>.
[95] 280 F Supp 3d 187 (DDC 2017) (n 76) 190. Also reported, 'Keystone pipeline leaks estimated 210000 gallons of oil in South Dakota' *The Guardian* (online at 17 Nov 2017) <https://www.theguardian.com/us-news/2017/nov/16/keystone-pipeline-leaks-estimated-210000-gallons-oil-south-dakota>; Mitch Smith and Julie Bosman, 'Keystone Pipeline Leaks 210,000 Gallons of Oil in South Dakota' *The New York Times* (online at 12 August 2019) <https://www.nytimes.com/2017/11/16/us/keystone-pipeline-leaks-south-dakota.htm>.
[96] 280 F Supp 3d 187 (DDC 2017) (n 76) 190.
[97] *Standing Rock IV* (n 71) 105. Also quoted in 280 F. Supp. 3d 187 (DDC 2017) (n 76) 191.
[98] 280 F Supp 3d 187 (DDC 2017) (n 76) 191.

different parts of the DAPL, with the biggest 168 gallons near DAPL's endpoint in Patoka, Illinois.[99]

The DAPL is a classic example of a multinational corporation, with the support of government, is pursuing a development project that disregards the rights of American Indian nations to achieve economic gains for itself and benefits for the wider dominant society. This case demonstrates that during the development timeline, treaty rights, self-determination and cultural rights were sidelined by the legal and political processes. It demonstrates how the elements of the Doctrine such as limited sovereign and commercial rights, pre-emption and native title continue to inform government policies, in which governments continue to be in a position where they can dictate to American Indians as they have been doing for past 500 years. Because of the pre-emptive rights of the government and limited sovereignty of American Indians living near the DAPL, the tribes who would be affected by the development failed to stop the project. Their rights under limited sovereignty and treaty rights were not strong enough for the court to stop the development project even though the court accepted that an oil spill will have severe impacts on Standing Rock's fishing, hunting and water rights. The Standing Rock Sioux have treaty rights to enjoy the benefits of the land including water rights (Winters doctrine) but these rights are inferior to the rights of non-Indigenous entities who will be disadvantaged if the project is halted or discontinued. Sioux nation's right to consultation was supressed by the President with a stroke of a pen. He wanted the Army Corps to approve the DAPL in an 'expedited manner' because it 'represents a substantial, multi-billion-dollar private investment'.[100] On the same day (24 January 2017), he signed another Executive Order for 'Expediting Environmental Review and Approvals for High Priority Infrastructure Projects', in which he highlighted that 'infrastructure investment strengthens our economic platform, makes America more competitive, creates millions of jobs, increases wages for American workers and reduces the costs of goods and services for American families and consumers'.[101] This statement is self-explanatory in that it prioritises economic growth over Indigenous rights. The policies and laws of the government are informed by neoliberalism and globalisation, which prioritise economic growth. The claim is that such developments are economically necessary and required to meet the needs of a growing population. However, this is at the expense of the rights of American Indian nations, their cultures and environments, which are affected by such projects. In this current climate, economic development backed by global neoliberal ideals has become new norm

[99] Allen Brown, 'Five Spills, Six Months in Operation: Dakota Access Track Record Highlights Unavoidable Reality- Pipeline Leak' *The Intercept* (Web Page, 10 January 2018) <https://theintercept.com/2018/01/09/dakota-access-pipeline-leak-energy-transfer-partners>.
[100] '*Construction of the Dakota Access Pipeline*' (n 9).
[101] *Expediting Environmental Review and Approvals for High Priority Infrastructure Projects* (Executive Order, the White House, 24 January 2017) s 1 (purpose).

and working as the Doctrine of Neo-Discovery to disregard American Indians' inherent rights to their land and cultures. This is further exemplified by the Site-C dam development in Canada, which is examined next.

5.3 Hydroelectric Dams and Indigenous Rights in Canada

> More and more rivers in Canada no longer run freely and cleanly. And no identifiable group in our society has been more disadvantaged by this transformation than Native people, whose traditional dependence upon the natural water regime is increasingly jeopardized by publicly-supported corporate resource exploitation.[102]

Indigenous peoples' rights in Canada have been severely affected by large development projects such as hydroelectric dams. In 1950, hydropower represented 90 per cent of Canada's electricity and at present, it represents 60 per cent of the total electricity produced, including 97 per cent of total renewable electricity.[103] Ottawa Electric Light Company at Chaudieres Falls was the first hydroelectric project in Canada, which was built in 1881 to produce electricity to power street lights and local mills. Within a few years, hydroelectric dams in Montmorency Falls, Lachine rapids and DeCew Falls were built to power lights in Quebec (Terrasse Dufferin), Montreal and Ontario (Hamilton). [104] As of 2007, Canada had 475 hydroelectric generating plants with an average production of 355 terawatts per hour, the second largest producer of hydropower after China.[105] The Government of Canada considers hydropower to be a key solution to air pollution and an important tool for mitigating climate change effects by reducing greenhouse gas emission. For these reasons, the government has worked with corporations that believe economic water usage should take precedence and that traditional uses and riparian minorities can be displaced by projects that serve the common good.[106] As a result, the government is planning to construct more hydroelectric dams in Canada, one of which is the Site-C Clean Energy Project in British Columbia, which is the subject of my research analysis.

The Hydropower Association of Canada acknowledges that the reservoir created by a hydroelectric dam modifies the natural habitat of the area, but over time adaptations occur and the reservoir becomes a feeding point for birds and waterfowls and increases fish populations. It

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[102] Frank Quinn, 'As Long as the Rivers Run: The Impacts of Corporate Water Development on Native Communities in Canada' (1991) 11(1) *The Canadian Journal of Natural Studies* 137, 138.
[103] *Hydropower in Canada: Past Present and Future* (Brochure, Canadian Hydropower Association, 2008) 5 <https://canadahydro.ca/wp-content/uploads/2015/09/2008-hydropower-past-present-future-en.pdf>, extract of this Brochure can also be found in Canadian Hydropower Association 'Hydropower in Canada: Past Present and Future' (2009) 28(7) *Hydro Review* 24.
[104] '*Hydropower in Canada*' (n 103) 1.
[105] Ibid.
[106] Quinn (n 102) 147-8.

also acknowledges that careful planning can minimise but not eliminate the harmful environmental footprint, although in some cases the impacts cannot be mitigated.[107] However, the Association has failed to recognise that the dams disrupt the migratory patterns of fishes, floods the habitats and feeding grounds of many animals, so they become extinct. Further, it fails to acknowledge the effect of dams on Indigenous cultures and practices. While the industries argue that the dams improve Indigenous peoples' quality of life through revenue and increases in employment and business opportunities, they do not acknowledge that the projects destroy Indigenous lands and make it difficult for Indigenous peoples to practice their cultures. The suggestion that the dams improve Indigenous life support the long-standing government policy of civilisation, which diverts traditional lifestyles of Indigenous peoples to something that is dictated by the government. This is also possible because of Indigenous peoples limited sovereign and commercial rights cause by government actions. The dams, in flooding Indigenous lands, thwart their traditional cultural practices, including hunting, fishing, unique customs and ceremonies, which are intrinsically tied to the land and funnels them into mainstream jobs to become 'civilised'. Assimilation into the mainstream society is not on their own terms, but by the forceful and intentional destruction of their traditional lands, cultures and ceremonies.

5.3.1 The Site-C Clean Energy Project

> Construction of the Site-C dam illustrates the persistent gap between rhetoric and reality when it comes to the rights of Indigenous peoples through the Americas.[108]

The Site-C Clean Energy Project ('Site-C dam') is a hydroelectric dam proposed by the British Columbia Hydro and Power Authority '(BC Hydro'), which is a Crown corporation owned by the Province of British Columbia and incorporated under the *Hydro and Power Authority Act [RSBC 1996] Chapter 212*.[109] The Site-C project was one of the five hydroelectric development

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[107] '*Hydropower in Canada*' (n 103) 19.

[108] Erika Guevara-Rosas, 'Massive Hydroelectric Dam Threatens Indigenous Communities in Canada' *Amnesty International* (Web Page, 8 August 2016) <https://www.amnestyusa.org/press-releases/massive-hydroelectric-dam-threatens-indigenous-communities-in-canada/>.

[109] *Report of the Joint Review Panel: Site C Clean Energy Project* (Report, 1 May 2014) 1; BC Hydro is a Crown corporation, and the Province of British Columbia is the owner and sole shareholder. With the goal of providing a 'reasonable opportunity to shareholder (Province of BC) to earn a fair return on its invested capital' it has a mandate to generate, manufacture, conserve, supply, acquire and dispose of power. BC Hydro's model of business follows corporate structure with executive team consists of President and CEO and leaders from lines of business and corporate service groups. Its revenue is growing every year and for the fiscal year 2019 its revenue was CAD 6.58 billion. BC Hydro entered into a partnership with Accenture (a global service delivery corporation)—Accenture Business Services of British Columbia Limited Partnership ('ABSBCLP')—and signed a Master Services Agreement on 1 April 2003 (came into effect on 1 April 2006) to provide services to BC Hydro. Under this agreement the BC Hydro privatised their customer care service (art 4, att A), information technology Service and infrastructure (art 4, att B), network services, building and office services (art 4, att C), Human Resources (art 4, att D), Finance Systems (art 4, att E) and Purchasing (art 4, att F).

sites identified during 1950s for the construction of a third dam on the Peace River and in 1978 it was selected as the preferred site for the dam (see Map 4).[110] In 1980, BC Hydro submitted an application to the provincial government for an Energy Project Certificate. The application was referred to the British Columbia Utilities Commission ('BCUC') for review. The BCUC accepted the project but wanted BC Hydro to invest more time and effort on finding alternatives to the project. After several studies during 2001 to 2006, BC Hydro finalised Site-C as the third hydroelectric project and a comprehensive study from 2009 to 2011 finalised the project with some design changes.[111] BC Hydro submitted a detailed project design and description to British Columbia Environmental Assessment Office in May 2011 which, under s 10(1)(a) of the *British Columbia Environmental Assessment Act (SBC 2002, Chapter 43)*, initiated a provincial environmental assessment process.[112] As the project had potential for significant adverse social and environmental effects within the federal jurisdiction, it also required an environmental assessment from the Canadian Environmental Assessment Agency under the *Canadian Environmental Assessment Act*, SC 2012, c 37. To avoid duplication, both provincial and federal governments established a Joint Review Panel ('JRP') to conduct a cooperative environmental assessment to determine 'whether the project was likely to cause significant adverse environmental, economic, social, health and heritage effects, taking into account the implementation of mitigation measures that are technically and economically feasible'.[113] However, under the terms of reference of the environmental assessment, the JRP was not allowed to make recommendations or findings about the nature and scope of Aboriginal or treaty rights or about potential infringement of the Treaty 8 rights.[114]

It also runs its business through subsidiary corporations, such as Powerex Corp, Powertech Labs Inc and British Columbia Transmission Corporation. Powerex Corp is involved in wholesale power and gas marketing and has customers across the Western Electric Coordinating Council ('WECC') region—WECC extends to 14 Western North America states including Alberta and British Columbia in Canada, Western states in the USA and northern part of Baja California in Mexico. Powertech Labs Inc is specialised in clean energy consulting, testing and systems integration and have clients in six continents to help them with advance power utilities and grid operations. British Columbia Transmission Corporation ('BCTC') manages electricity substations and transmission lines. 'Governance & mandate' *BC Hydro* (Webpage, 11 November 2020) <https://www.bchydro.com/ toolbar/about.html>. Amended and Restated Master Service Agreement; 'Accenture Contract' *BC Hydro* (Webpage, 11 November 2020) <https://bchydro.com/toobar/about/accountability_reorts/spenness_accountability/ accenture_contract.htm

[110] Ibid 8, 9.

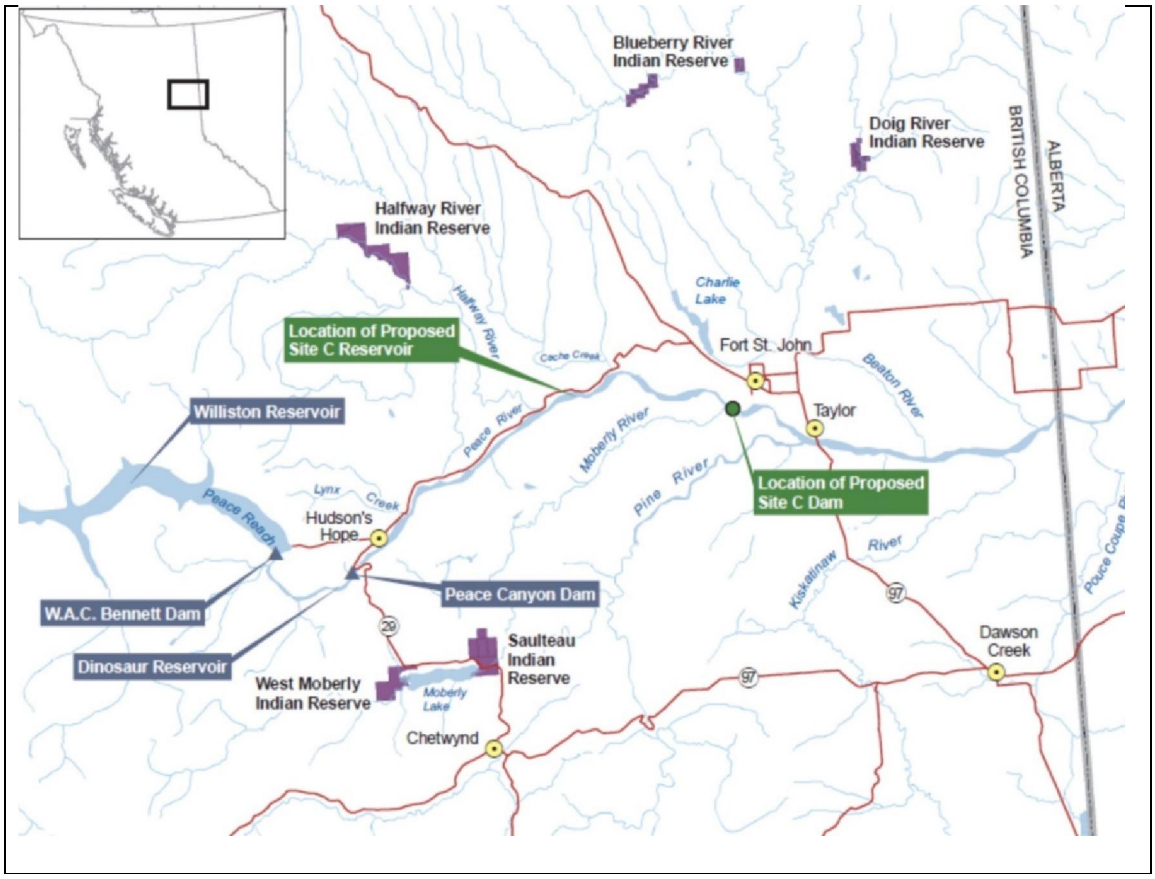
[111] Ibid 10, 11.

[112] Ibid 1.

[113] Ibid.

[114] Site-C dam is situation within Treaty 8 First Nations territory; Rachel Gutman, 'The Stories We Tell: Site C, Treaty 8, and the Duty to consult and Accommodate' (2018) 23 *Appeal* 3, 13.

Map 4. Proposed Site-C dam and Reservoir location



Source: Report of the JRP: Site-C Clean Energy Project, (https://www.ceaa-acee.gc.ca/050/documents/p63919/99173E.pdf)

With the capacity of 1,100 megawatts (5,100 Gigawatts/h per year), 1,050 metres long and 60 metres high, Site-C dam is an earth-filled dam and the biggest hydropower project ever planned in Canada over the past 30-year period. It is expected to be finished in 2024 and will provide electricity for the next 100 years. Situated in north-eastern British Columbia, the dam would be the third hydroelectric facility—the WAC Bennett Dam and Peace Canyon Dam are the other two—to be built over the Peace River, near Fort St John, and its social and environmental effects would be significant. [115] Canada's Ministry of Environment and BC Minister of Environment have argued that the dam will provide many advantages and benefits to the region, including significant economic benefits for the consumers of British Colombia.[116] During its eight year construction phase, the dam would create 10,000 person-years of direct employment with approximately 800 workers per year and would require 1,700 workers during the final year.[117] Once completed, the project would provide electricity to 450,000 homes and create an 83-kilometre-long reservoir along the Peace River. However, with a surface area of

[115] *West Moberly First Nations v British Columbia*, 2018 BCSC 1835 [26]-[28].
[116] The Canadian Press 'BC First Nations seeking injunction against Site C dam say ending project is only thing that will preserve way of life' *The Globe and Mail* (Web Page, 23 July 2018) <https://www.theglobeandmail.com/canada/article-bc-first-nations-seeking-injunction-against-site-c-dam-say-ending/>.
[117] '*Report of the Joint Review Panel*' (n 109) 15.

9,330 hectares, the dam would flood approximately 5,500 hectares (13,500 acres) of land, of which at least 3,800 hectares is agricultural.[118] To make the dam functional, it would also require clearing approximately 2,918 hectares of forest along the Peace River for the construction of generating stations, spillways and reservoir shoreline protection. The construction of an additional 30 kilometres of highway, 29 realignments and access roads would also be required.

According to the EIA, 29 Indigenous groups (e.g., Métis, Treaty 8 and other First Nations) would be adversely affected by the project. At different stages of the impact assessment process, they have asserted their treaty rights and expressed their concerns about the potential negative impacts of the project. In the process, 21 First Nations identified themselves as Treaty 8 First Nations and declared their rights under s 35(1) of the *Constitution Act 1982*.[119] Referring to many cases,[120] the Treaty 8 First Nations argued that the treaty ensured their traditional rights to hunting, fishing and trapping and that their customary laws and ways of life were related to the land and would be destroyed if the dam was constructed. These rights represent native title element of the Doctrine—Indigenous peoples lost their full property rights and only retained occupancy and use rights—that are integral part of Indigenous life. They also argued that the dam would inundate land they used for hunting, gathering medicinal plants, inundate refuge islands and sever access and migration routes of preferred species, introduce less desirable fish species and increase mercury contamination of the fish.[121] The dam would also dry out the Peace-Athabasca Delta, which would give access to other nations to compete for traditional lands.[122] Other non-Treaty First Nations (Kwadacha and Tsay Keh Dene) displayed similar concerns regarding the project, including their rights to be consulted on the construction and operational decision-making.[123] The Kwadacha First Nations emphasised that the changing situation would hinder the rights to pass on traditional knowledge to future generations.[124]

According to West Moberly First Nations Chief Roland Wilson, the reservoir created by the dam would introduce 'mercury-laden fish into Moberly Lake and disrupt the longest freshwater fish migration in North America'.[125] Moreover, the dam would violate the constitutionally protected treaty rights of the First Nations (e.g., West Moberly and Prophet River) by flooding parts of

[118] Bradley Jeffery et al, 'Dam It! The Site C Dam on the Peace River' (Student Research, The University of British Columbia, 2015).
[119] Ibid 124-5. According to Treaty 8 the First Nations have the rights 'to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described'.
[120] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, *West Moberly First Nations v B.C. (Chief Inspector of Mines)*, 2011 BCCA 247 and *Simon v The Queen*, [1985] 2 SCR 387.
[121] '*Report of the Joint Review Panel*' (n 109) 125-6.
[122] Ibid 126.
[123] Ibid.
[124] Ibid.
[125] The Canadian Press (n 116).

Peace River valley.[126] The Indigenous Nations also stressed that their lifestyle and environment (exemplified by the displaced caribou population) have already been disrupted by the WAC Bennett Dam, which is the largest hydroelectric dam on the Peace River.[127] The flooding due to the dam would cause massive loss or alteration of the ecosystem, including significant loss of species such as grizzly bear, lynx, fisher, wolf, wolverine and woodland caribou.[128] The Indigenous Nations and the local people have expressed fears that the environmental impact of the dam will be irreversible and destroy the traditional practices and cultures of the tribes. The Mikisew Cree First Nations in Alberta also fear that the project would also dry out the Wood Buffalo National Park, which is a UNESCO listed World Heritage site.[129] These fears were supported by more than 200 of Canada's leading scholars, who stressed that Site-C dam would have more significant adverse environmental effects in the history of Canada's *Environmental Assessment Act* than any project ever examined.[130]

After considering the social and environmental impacts of the project during six weeks of public consultations, the JRP submitted its final report on 1 May 2014 to the British Columbia Environmental Assessment Office and the Federal Minister for Environment for their further decision. The Panel accepted that:

> Replacing a portion of the Peace River with an 83-kilometre reservoir would cause significant adverse effects on fish and fish habitat, and a number of birds and bats, smaller vertebrate and invertebrate species, rare plants, and sensitive ecosystems. The Project would significantly affect the current use of land and resources for traditional purposes by Aboriginal peoples, and the effect of that on Aboriginal rights and treaty rights generally will have to be weighed by governments ... It would end agriculture on the Peace Valley bottom lands, and while that would not be significant in the context of BC or western Canadian agricultural production, it would highly impact the farmers who would bear the loss. The Project would inundate a number of valuable paleontological, archaeological, and historic sites.[131]

The Panel agreed that the environmental, social, economic, health and heritage costs of the project were very high and will have 'significant adverse residual effects', which had previously compelled other governments to delay or refuse licencing of similar kinds of projects. The panel

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[126] Ibid.
[127] Hillary Rosner, 'Pulling Canada's Caribou Back from the Brink' *The Atlantic* (Web Page, 17 December 2018) <https://www.theatlantic.com/science/archive/2018/12/heroic-meausres-for-canadas-caribou/577789>.
[128] Clayton Apps, 'Assessing Cumulative Impacts to Wide-Ranging Species Across the Peace Break Region of Northeastern British Columbia' (Summary Report, Yellowstone to Yukon Conservation Initiative, 2014) 6, 8.
[129] Larry Pynn, 'United Nations report expresses concern about Site C impact on Wood Buffalo National Park' *Vancouver Sun* (online at 7 July 2017) <https://vancouversun.com/news/local-news/united-nations-report-expresses-concern-about-site-c-impact-on-wood-buffalo-national-park/>.
[130] Sarah Cox, 'It's the Site C dam, not Trans Mountain, that should worry BC' *Edmonton Journal* (Web Page, 1 June 2018) <https://edmontonjournal.com/opinion/columnists/opinion-its-the-site-c-dam-not-trans-mountain-that-should-worry-b-c>.
[131] '*Report of the Joint Review Panel*' (n 109) iv, v.

disagreed with BC Hydro's assumption that the project would not affect the use of lands and resources by Indigenous peoples for traditional purposes. It concluded that 'the project would likely cause significant adverse cumulative effects on current use of lands and resources for traditional purposes',[132] and more specifically would cause non-mitigating significant adverse effects on hunting, non-tenured trapping, fishing opportunities and other traditional uses of the land and practices for the First Nations represented by Treaty 8, Saulteau and Blueberry River First Nations.[133] It found that the need for power must be weighed against the substantial environmental, social and other losses and this need must be set against the 'interests of First Nations and to the specific local interests'.[134] The Panel accepted that the Site-C project would be the least expensive of the alternatives and would have significant economic benefits, although it would result in 'significant environmental and social costs and the costs would not be borne by those who benefit'.[135] It is clear from the report that the dam would not bring significant benefits to Indigenous peoples, but rather it would sacrifice their constitutional and traditional rights for the benefit of others.

In its final report, the JRP recommended that the authority enter into discussions with affected Indigenous peoples to accommodate their critical community interests and protect their hunting, fishing and trapping rights ensured under s 35 of the *Constitution Act 1982*.[136] However, without proper discussion and pending the investment review, the Site-C project was granted conditional environmental approval by the BC and federal governments. Without giving any reasons, the British Columbia Minister of the Environment issued the Environmental Certificate to the Site-C project on 14 October 2014.[137] Following centuries-old colonial practices, the governments used their power derived from elements of the Doctrine such as civilisation, limited sovereign and commercial rights, pre-emption and native title to disregard Indigenous peoples' treaty rights and rights to 'free, prior and informed' consent. This case study illustrates the limited sovereign and commercial rights of Indigenous peoples—Indigenous peoples were thought to lose their sovereignty and commercial rights after the acquisition of sovereignty by the British—when compared to the power of government to pursue its own economic goals. While the authority argued that the project will provide more jobs and growth for the Indigenous communities, this can be seen as reflecting the civilisation element of the Doctrine—Indigenous peoples were considered to be uncivilised and it was the religious duty of Europeans to civilise and educate them—because by destroying traditional cultures and practices, the project is promoting the

[132] Ibid 120.
[133] Ibid 103, 109, 113.
[134] Ibid 308.
[135] Ibid 307.
[136] '*Report of the Joint Review Panel*' (n 109) 121. Recommendation 20.
[137] Gutman (n 114) 14.

Westernised way of life. As per the pre-emption element of the Doctrine—that is, the notion that the first discovering country gets sole right to buy or make agreements with the Indigenous peoples—the Indigenous peoples are not allowed to deal with their lands. It is the government who permits development projects, not Indigenous peoples.

Unsurprisingly, by disregarding the Indigenous peoples' objections and without mitigating the concerns raised by the JRP, the BC Hydro has commenced the construction of the CAD 8.8 billion project after the government exempted it from the regulatory review by the BCUC.[138] This process did not even pass the test set in the *Taku River Tlingit First Nations* case, in which McLachlin CJ found that the consultation needs to be meaningful.[139] The Chief of JRP, Harry Swain, argued that the construction of the Site-C dam should be delayed because the independent cost analysis of the project was not conducted by the government.[140] There are avenues like EIAs and judicial reviews for Indigenous peoples to voice their concerns, although it is the government who makes the final decision. It is an irony that after more than 300 years of 'civilisation' and 'assimilation', the process continues, and governments continue to believe that they know what is best for Indigenous nations and decide accordingly without seeking their consent.

5.3.2 Seeking Judicial Redress Against the Approval of the Site-C Project

After the Site-C dam was approved, the affected Indigenous Nations sought redress in the British Columbia Supreme Court to establish their Treaty 8 rights and protect their continuing traditions and ways of life as specified under s 35 of the *Constitution 1982*. As discussed in Chapter 4, s 35 gives protection to Aboriginal and treaty rights. These rights are not general rights, but rather are specific rights that need to be recognised either by the courts or through treaty negotiations.[141] In bringing their action to court, the Treaty 8 First Nations wanted to prove that mutual obligations under the treaty did not allow the government to acquire First Nations land if it would have severe impacts on the lives and cultures of First Nations, including their treaty rights to fish, trap and hunt.[142] Their claim was that the Site-C dam infringed their treaty rights. Not only had the government failed to uphold their obligations under Treaty 8, it also failed to follow the duty to consult and accommodate. Several Supreme Court cases such as *Haida Nations, Taku*

[138] Justine Hunter, 'Head of review panel repeats call for delay to BC Hydro's Site C' *The Globe and Mail* (Web Page, 12 May 2018) <https://www.theglobeandmail.com/news/british-columbia/head-of-review-panel-repeats-call-for-delay-to-bc-hydros-site-c/article23399470/>.
[139] *Taku River Tlingit First Nation v British Columbia (Project Assessment Board)* [2004] 3 SCR 550 ('*Taku River Tlingit First Nation*') [2].
[140] Hunter (n 138).
[141] Gutman (n 137) 7.
[142] Ibid.

River Tlingit First Nations, Van der Peet, Delgamuukw and *Tsilhqot'in* have had positive outcomes regarding duty to consult and accommodate (see Section 4.3.3.1).[143]

The infringement and extinguishment of Aboriginal and treaty rights are complex issues. Any Indigenous group that claims infringement must prove that the infringed activity was an 'element of practice, custom and tradition' integral to their distinctive cultures.[144] Conversely, the burden of proof of extinguishment falls on the government.[145] In *Sparrow*, the Supreme Court of Canada explored the scope of s 35(1) of the Constitution for the first time and examined the strengths of Aboriginal title.[146] Regarding infringement of Aboriginal title, Dickson CJ and La Forest J in *Sparrow* observed that the 'the onus of proving a *prima facie* inurnment lies on the individual or group' claiming the infringement and if *prima facie* infringement is found the government must justify the infringement through the *Sparrow* test (see Section 4.3.1).[147] In *R v Badger*, it was established by the Supreme Court that the 'Aboriginal rights may be overridden if the government is able to justify the infringement', but the infringement should pass against the criteria set in *Sparrow*, although under *Sparrow* the 'suggested criteria are neither exclusive nor exhaustive' (see Section 4.3.1).[148] Later in *Tsilhqot'in v British Columbia*,[149] the Supreme Court laid down more compelling criteria for determining native title (see Section 4.3.1). Also in *Mikisew Cree First Nation*, it was established that 'not every subsequent "taking up" by the Crown constituted an infringement of Treaty 8 that must be justified according to the test set out in *Sparrow*', because Treaty 8 only applies to land not 'required or taken up from time to time for settlement, mining, lumbering, trading or other purposes'.[150] However, the Court made it clear that Treaty 8 gives rise to procedural rights (e.g., duty to consult) and substantive rights (e.g., hunting, fishing and trapping) and proceeding with development without adequate consultation would be in violation of the Crown's '*procedural* obligations', which would breach the 'Crown's *substantive* treaty obligations as well'.[151] As a result, the Crown has not only the duty to consult but also to accommodate, because '[c]onsultation that excludes from the outset

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[143] *Haida Nation v British Columbia (Minister of Forrest)* [2004] 3 SCR 511 ('*Haida Nation*'); *Taku River Tlingit First Nation* (n 137); *R v Van der Peet* [1996] 2 SCR 507 ('*Van der Peet*'); *Delgamuukw v British Columbia* [1997] 3 SCR 1010 ('*Delgamuukw*'); *Tsilhqot'in Nation v British Columbia* (2014) 2 SCR 257 ('*Tsilhqot'in*').
[144] *Van der Peet* (n 143) [46], [55].
[145] *R v Sparrow* [1990] 1 SCR 1075 ('*Sparrow*') 1078.
[146] Ibid 1082, 1083.
[147] Ibid 1112.
[148] *R v Badger* [1996] 1 SCR 771 [73], [74].
[149] (2014) 2 SCR 257 ('*Tsilhqot'in*').
[150] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2005] 3 SCR 388 ('*Mikisew Cree First Nation*') [31]. It must be noted here that the Treaty 8 was drafted more than 100 years ago by the Canadian government officials and was not translated into the languages of First Nations signatories. Written treaty does not necessarily represent all the promises made to the First Nations by the Crown. There were many oral promises made between the First Nations and the Crown. On the other hand, the First Nations argue that their ancestors who signed the Treaty had limited understanding about western land ownership and transfer. Moreover, the Aboriginal traditional laws would not permit the ancestors to transfer traditional lands; Gutman (n 135) 5.
[151] *Mikisew Cree First Nation* (n 150) [57].

any form of accommodation would be meaningless'.[152] The issue for the Indigenous affected by the Site-C dam proposal was that while they were consulted through EIA process, their concerns were not accommodated in the subsequent approval process.

In 2010, the West Moberly First Nations signed an agreement with others 'to use all legal means to stop the Site-C dam from preceding'.[153] Several First Nations communities and land owners living around the Site-C dam including the Treaty 8 Tribal Association, the Athabasca Chipewyan First Nations, the Mikisew Cree First Nations and Peace Valley Landowners Association challenged the dam and filed applications for judicial review in the provincial and federal courts.[154] For example, the Prophet River First Nation and West Moberly First Nations—both members of Treaty 8 Tribal Association—applied in the Federal Court for a judicial review against the decision of the Governor-in-Council ('GIC') made under s 52(4) of the *Canadian Environmental Assessment Act 2012*, which found that the significant adverse environmental effects of Site-C project was 'justified in the circumstances'.[155] The applicants also filed an application for an interlocutory injunction in the British Columbia Supreme Court pending judicial review, which was refused.[156] The Federal Court dismissed the judicial review application on the ground that the GIC's decision was reasonable and the consultation with the First Nations was adequate. An appeal against this decision was also dismissed by the Federal Court of Appeal.[157] First Nations from the Prophet River and West Moberly filed another law suit[158] in the Supreme Court of British Columbia, in which they argued that the decision to grant the Environmental Assessment Certificate for the Site-C project would violate their constitutionally protected Treaty 8 rights and the federal cabinet should have determined if Site-C infringed treaty rights before issuing permits for the project.[159] On 18 September 2015, the Supreme Court of British Columbia decided that there had been adequate consultation with the

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[152] Ibid [54].
[153] *West Moberly First Nations v British Columbia* [2018] BCSC 1835 [43].
[154] Julie Abouchar and Nicole Petersen, 'Canada: First Nation Challenges To Hydroelectric Development- A Tale Of Two Provinces' *Willms & Shier Environmental Lawyers* (Web Page, 7 January 2015) <http://www.mondaq.com/canada/x/364858/Renewables/First+Nation+Challenges+to+Hydroelectric+Development+A+Tale+of+Two+Provinces>.
[155] *Prophet River First Nations v Canada (Attorney General)* [2015] FC 1030; *Prophet River First Nations v Canada (Attorney General)* [2017] FCA 15 [1]; More applications for judicial review by Peace Valley Landowner Association were also dismissed by the Federal Court and British Columbia Supreme Court, *Peace Valley Landowner Association v Canada (Attorney General)* [2015] FC 1027 and *Peace Valley Landowner Association v British Columbia (Minister of Environment)* [2015] BCSC 1129; Scott Kerwin, 'Supreme Court of Canada Will Not Hear "Site C" Appeal' *CanLII Connects* (Web Page, 10 July 2017) <https://www.canliiconnects.org/en/summaries/45937>.
[156] *Prophet River First Nations v British Columbia (Forest, Lands and Natural Resource Operations)* [2015] BCSC 2662.
[157] [2017] FCA 15 (n 155).
[158] *Prophet River First Nations v British Columbia (Environment)*, 2015 BCSC 1682.
[159] Andrew Kurjata, 'Federal court dismisses First Nations' challenge of Site C dam' *CBC News* (Web Page, 23 January 2017 <https://www.cbc.ca/news/canada/british-columbia/federal-court-dismisses-first-nations-challenge-of-site-c-dam-1.3948830>.

applicants and dismissed the application. Both First Nations appealed against this decision to the British Columbia Court of Appeal,[160] in which a panel of three judges (Lowey , Willcock and Savage JJ) again rejected the petition on 23 January 2017 on the basis that the cabinet does not have the expertise and is not equipped to determine the question of law and complex factual issues.[161] The ruling did not determine if the Site-C actually violated the treaty rights of Indigenous nations, but allowed the federal government to issue permits for projects like Site-C without determining the treaty rights of Indigenous Nations.[162] A leave to appeal application against this decision was later denied by the Supreme Court of Canada.[163]

More recently, the West Moberly First Nations sought another injunction (with an application for interlocutory injunction) in the BC Supreme Court to stop the Site-C construction. While the applicants argued that the project infringed their treaty rights, the BC Hydro and the provincial government claimed that the project was too far advanced to be stopped and has already cost billions of dollars.[164] In deciding the interlocutory injunction application, Milman J went deep into the merits of the case and agreed that the First Nations would 'suffer irreparable harm if an injunction is not granted', but rejected the application of injunction on the three grounds:

(a) That the applicants' chances to halt the project permanently were not strong.
(b) That the proposed injunction 'would likely cause significant and irreparable harm to BC Hydro, its ratepayers and the other stakeholders in the project' and that this 'outweighs the risk of harm to the West Moberly flowing from not granting an injunction'.
(c) That it was brought relatively late in the life of the project (two and half year after the commencement of construction).[165]

Justice Milman also observed that the 'West Moberly made out a serious question to be tried', but 'a permanent injunction to halt the project is not a particularly strong one on either the law or the evidence'.[166] In this case, Dr Harry Swain, the chief of JRP, was called as an expert witness for the First Nations but was struck out as he found to be not 'impartial, independent and absent of bias'.[167] The Court ordered the parties to arrange a case management conference between the end of 2018 and early 2019 to agree upon a schedule to conclude the original trial by mid-2023. Following six months of failed negotiations and confidential talks between the parties—West

[160] *Prophet River First Nation v British Columbia (Environment)*, 2017 BCCA 58.
[161] Ibid.
[162] Ibid.
[163] *Prophet River First Nation v British Columbia (Environment)*, [2017] SCCA 127; *Prophet River First Nation v Canada (Attorney General)* [2017] SCCA No. 115.
[164] *West Moberly First Nations v British Columbia* [2018] BCSC 1835.
[165] Ibid [8].
[166] Ibid [276].
[167] Ibid [144].

Moberly First Nations, BC government and BC Hydro— in August 2019 they declared that the court proceeding is expected to begin in March 2022, which will last about six months.[168]

5.3.3 Political Backlash

During the 2015 election, Prime Minister Justin Trudeau promised to improve the relationship with Indigenous peoples and implement the TRC's Calls to Action, including the provisions of the UNDRIP.[169] Trudeau also claimed that he was a friend to Indigenous peoples and he would not let anything happen to their lands. However, in a dramatic twist, the Trudeau government gave approval to proceed by granting the Site-C project two permits under the *Navigation Protection Act* and the *Fisheries Act*. The Grand Chief Stewart Philip of the Union of BC Indian Chiefs labelled the permits as 'an absolute betrayal' by Justin Trudeau, who once promised to uphold the principles of 'consult and consent' in relation to development on Indigenous lands.[170] Indigenous peoples have also charged Justin Trudeau's Federal Justice Minister Jody Wilso-Raybould—a Kwakwaka'wakw woman and previous Chief of the Assembly of First Nations—with hypocrisy because she had been opposed to the Site-C dam before coming to power in 2012, but now remains largely silent on the issue.[171] In August 2017, the UN Committee on the Elimination of Racial Discrimination conducted a review on Canada's compliance with the *International Convention on the Elimination of All Form of Racial Discrimination* and expressed its concern about the Site-C project by observing that the government preferred 'environmentally destructive decisions for resource development'.[172] Considering the dam's irreversible effect on Indigenous peoples' medicinal plants, wildlife, sacred lands and gravesites, the UN panel requested that the government halt the project and conduct a full review. Amnesty International has also expressed concerns about the construction of Site-C dam:

> Rights protected under an historic treaty, the Canadian Constitution and international human rights standards have been pushed aside in the name of a development project that has no clear

[168] Sarah Cox, '"We're going to court": B.C. First Nation to proceed with Site C dam "megatrial"' *The Narwhal* (Online at 27 August 2019) <https://thenarwhal.ca/were-going-court-b-c-first-nation-to-proceed-site-c-dam-megatrial/>.
[169] Heather Exner-Pirot, 'Friend or faux? Trudeau, Indigenous issues and Canada's brand' (2018) 24 *Canadian Foreign Policy Journal* 165, 176.
[170] Andrew Kurjata, 'Justin Trudeau accused of bulldozing Aboriginal rights with Site C' *CBC News* (Web Page, 23 September 2016) <http://www.cbc.ca/news/canada/british-columbia/justin-trudeau-accused-of-buldozing-aboriginal-rights-with-site-c-1.3776792>.
[171] Ibid. see also Exner-Pirot (n 168) 176.
[172] The Canadian Press, 'United Nations panel calls for holt of Site C dam project in B.C.' *CTV News* (Web Page, 28 August 2017) <https://bc.ctvnews.ca/mobile/united-nations-panel-calls-for-halt-of-site-c-cam-project-in-b-c-1.3565360>.

> purpose or rationale and that does not have the consent of the Indigenous nations that will suffer the consequences of its construction.[173]

Before the provincial election of 2017, the opposition New Democratic Party raised questions about the adequacy of the regulatory review undertaken for the Site-C project. After the New Democratic Party won the election, they asked the BCUC to review the advantages and disadvantages of the Site-C Project again by considering three scenarios: (a) carry on and complete the construction, (b) suspend construction temporarily and (c) terminate construction.[174] The BCUC submitted its final report on 1 November 2017 and concluded that suspending the operation would be the most 'expensive and risky' and did not make any determination about the other two scenarios.[175] Besides these scenarios, there was a question about the cost analysis of the project, although considering the factors the provincial government decided to continue with the construction of the project.

5.3.4 The Site-C Project and Aboriginal Water and Treaty Rights

> The survival of Indigenous peoples as unique and distinct members of the world community requires recognition of our relationship with and reliance upon the water of our territories.[176]

There is a deep connection between Indigenous peoples and water. Water related activities such as fishing, religious ceremonies, rituals and other traditional practices are an integral part of Indigenous cultures. Fresh water is a valuable resource and most developed countries like the USA, Canada and Australia have national water policies and laws to determine water management, including general, industrial and Indigenous usage of water. Most Indigenous water rights are based on the legal interpretation of national laws, which are enacted by non-Indigenous governments and in many cases, these Indigenous water rights are disregarded in favour of projects like the Site-C dam.[177] Indigenous peoples do not have inherent rights to water which limits their rights 'to develop [water] resources for economic purposes, but also to manage water in such a way that exercises traditional responsibilities and provides for future

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[173] 'Massive Hydroelectric Dam Threatens Indigenous Communities in Canada' *Amnesty International* (Web Page, 8 August 2016) <https://www.amnestyusa.org/press-releases/massive-hydroelectric-dam-threatens-indigenous-communities-in-canada/>.
[174] [2018] BCSC 1835 (n 164).
[175] Ibid.
[176] Ardith Walkem, *Indigenous Peoples Water Rights: Challenges and Opportunities in an Era of Increased North American Integration* (Canada and New American Empire, Canada and US Project, November 2004) 1-2 <http:///www.onwa.ca/upload/ doucments/water-rigths-canada.pdf>.
[177] According to Productivity Commission of Australia, water rights vary between jurisdictions and within jurisdiction. It also depends on different environmental sensitivities, hydrological conditions, consumer needs and community standards. Productivity Commission, 'Water Rights Arrangements in Australia and Overseas, Commissions Research Paper' (Research Paper, Commonwealth of Australia, 2003) 95.

generations'.[178] In the absence of traditional Indigenous knowledge, water is just a commodity that can be used for various purpose and can be diverted, polluted, contained or consumed.

In Canada, Indigenous water rights are based on historic Treaty provisions, which can be dishonoured by the government in the name of securing the benefit of the public.[179] It is the policy of the government to negotiate treaties on water rights, although in the absence of a treaty, Indigenous peoples must prove their continuing Aboriginal title or Aboriginal water rights through costly and time-consuming court processes. Indigenous peoples in Canada are not considered to be holders of independent water rights because of the assumption that these rights were assimilated into the state interests.[180] As a result, Indigenous water rights 'exist as merely a constituent part of the larger Canadian state and that Canadian governments have unilateral authority to enter agreements regarding water'.[181] The Site-C project was conceived by the government without consultation with Indigenous peoples affected by the project. Indigenous peoples were only consulted during the EIA process because they asserted their treaty rights. As a result, the JRP in its report acknowledged that the reservoir created by the proposed dam would destroy the fishing sites, preferred species, fishing opportunities and Indigenous peoples' cultural attachment to specific sites.[182] It would also significantly impede their capacity to transfer traditional knowledge and culture to future generations.[183] However, most of the recommendations of the JRP regarding Indigenous rights were ignored by the government and the project was given the green light to proceed.

Under s 35(1) of the *Constitution Act 1982*, the existing treaty rights of Indigenous peoples were 'recognized and affirmed'. Consequently, the government must justify any adverse effect or infringement of this constitutionally protected treaty rights. In the case of *West Moberly First Nations v British Columbia*,[184] the applicant claimed that the project was an 'unjustified infringement' of their Treaty 8 rights. Under this treaty, they had the rights to continue with their traditional ways of life, including hunting, fishing, trapping and conducting traditional, cultural and spiritual activities in the Peace region. They also argued that this project did not pass the *Sparrow* and *Tsilhqot'in Nations* tests (see Section 4.3.1) and as such, infringed their treaty rights. According to the Court, the Crown could defeat this argument by justifying the infringement, which it did by showing that the need for hydroelectric power was 'compelling

[178] Melanie Durette, 'A comparative approach to Indigenous legal rights of freshwater: key lessons for Australia from the United States, Canada and New Zealand' (2010) 27 *Environmental and Planning Law Journal* 296, 296.
[179] [2018] BCSC 1835 (n 164).
[180] Walkem (n 176) 3.
[181] Ibid.
[182] '*Report of the Joint Review Panel*' (n 106) 52-3, 56. JPR agreed that 'the Project would cause significant adverse effects on fish and fish habitat' and 'would result in significant adverse cumulative effects on fish'.
[183] '*Report of the Joint Review Panel*' (n 109) 436.
[184] [2018] BCSC 1835 (n 164).

and substantial public purpose'.[185] The Court also observed that, even if the Crown was unable to justify the infringement under the *Sparrow* test, there was no clear remedy to permanently halt the project.[186] Notably in this case, the Court did not address the Crown's fiduciary obligations to Indigenous peoples, which was contrary to *R v Gladstone*,[187] in which it was found that the government's infringement action must be consistent with its fiduciary duty towards Aboriginal people.

It appears that the lingering elements of the Doctrine—pre-emption, native title, Christianity, civilisation, limited sovereign and commercial rights—will prevail and the Site-C dam will proceed to permanently abolish the remaining rights of affected Indigenous peoples. In other cases, Indigenous peoples have been more successful. The case of *Peigan Indian Band v Alberta*—was settled out of court through Piikani Nations Settlement Agreements on 16 July 2002[188]. In this case, the government planned a hydro project over Oldman River and the applicants objected to the project by asserting their Treaty 7 rights to hold back water. Considered to be one of the most successful water rights case in Canada's history, the applicants successfully negotiated a payment of CAD 64.3 million (CAD 800,000 annual payment), assurance of reasonable quantity of water for current and future needs and participation in the Oldman River Dam Hydro project.[189] Another contemporary treaty, Nisga'a Treaty, was concluded between Nisga'a Nation, BC and the federal government under the *Nisga'a Final Agreement Act*, SC 2000, c. 7, which gave Nisga'a Nation significant control of water resources over 2,000 square kilometre of Crown land, including priority over other water licence holders and provisions to explore hydropower over rivers and streams.[190] Both the Piikani and Nisga'a Agreements are examples of the negotiation power of Indigenous peoples based on their traditional rights over the land and water. The *Nunavik Inuit Land Claims Agreement Act 1993* (SC 2008, c. 2) is another example, in which the largest land claim settlement in Canadian history was concluded to give the Inuit responsibility for the management and regulation of inland water in Nunavut through the Nunavut Water Board.[191] This kind of self-government can be understood to be a remnant of Indigenous sovereignty and emerged with the rise of agreement-making between governments and Indigenous Nations. However, in negotiating with government there is a danger that this will only compound Indigenous peoples limited sovereign

[185] Ibid [270], [273].
[186] Ibid [275].
[187] *R v Gladstone* [1996] 2 S.C.R. 723 [54]-[56], also cited in *Prophet River First Nation v British Columbia (Environment)*, 2017 BCCA 58.
[188] *Peigan Indian Band v Alberta,* [1998] AJ No 1108 (QB).
[189] Druette (n 177) 301; David Laidlaw and Monique Passelac-Ross, 'Water Rights and Water Stewardship: What About Aboriginal People' *University of Calgary Faculty of Law* (Blog Post, 8 July 2010) <https://ablawg.ca/2010/07/08/water-rights-and-water-stweardship-what-about-aboriginal-peoples/>.
[190] Druette (n 178) 301-302.
[191] Ibid.

and commercial rights as envisaged under the Doctrine. In more recent times, agreement-making has moved away from a rights-based view of self-government to the adoption of a neoliberal conception based on the notion of 'good governance' and economic gain, which may prove to be another colonising strategy to civilise and assimilate Indigenous peoples within Western governance structures by applying Western values (see Section 4.3.1).

There are many cases that have affirmed Aboriginal and treaty rights over thousands of square kilometres of land. Along with these cases, there are instances in which Indigenous peoples have managed to assert their rights against land and water development companies. In the case of *West Moberly First Nation v British Columbia* (2011),[192] the appellant claimed that their Treaty 8 rights to hunt caribou would be affected if the government allowed coal mining operations in the area. The British Columbia Court of Appeal found that the 'consultation was not meaningful and was therefore not reasonable' and that the government had failed to properly address the applicants' treaty rights regarding their traditional hunting practices as had been accepted by their ancestors and the Crown's treaty makers.[193] However, court decisions are not always favourable for Indigenous peoples. For example, in the *Taku River Tlingit First Nation* case, the Court found that if the consultation was meaningful there was no requirement for the authority to reach an agreement.[194]

It remains that in all these cases, it is the Canadian courts that decide the issues, which demonstrates that there is limited power—limited sovereign and commercial rights—in the hands of Indigenous peoples to assert their rights. Indigenous peoples would prefer to govern themselves and to make decisions according to the ethical frameworks of their philosophies.[195] At this point in time, the Site-C dam is another example where the project is proceeding, and the Indigenous groups affected are continuing to agitate to protect their rights. They have treaty rights that ensure their hunting, trapping and water rights, but these Aboriginal rights were not strong enough to stop the project and could easily be overlooked for the greater benefits of population at large. Moreover, these development projects advocate Christian civilisation under which the Indigenous peoples are promised westernised jobs, education and housing that make it difficult to maintain their traditional practices and professions. The approach of government that possesses pre-emptive rights has been to advance the interests of broader society at the expense of the rights of those Indigenous peoples affected by the project. The elements of the Doctrine are evident in every aspect of the decision-making process. Through the elements of

[192] *West Moberly First Nation v British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247.
[193] Ibid [154], [128].
[194] [2004] 3 SCR 550 (n 139) [2].
[195] Alfred Taiaiake and Jeff Corntassel, 'Being indigenous: resurgences against contemporary colonialism' (2005) 40(4) *Government and Opposition* 597, 614.

first discovery, pre-emption, limited sovereign and commercial rights, Christianity, civilisation and native title, the government took control of Indigenous lands and are now developing their lands and using their resources for non-Indigenous usages. The Site-C dam also exemplifies a tactic adopted by government corporation, not unlike what ultimately occurred in relation to the DAPL, in which they invested a significant sum of money in the project so that the courts would decide in their favour on the ground of economic loss or greater public benefit. The economic benefits of development for the total population—Indigenous and non-Indigenous—gives the government and its authorities another reason to dispossess Indigenous peoples and disregard their rights. Underpinned by neoliberal globalism we can see how these developments are shaping into the Doctrine of Neo-Discovery to extend the effects of the Doctrine into present times.

5.4 Natural Resource Development and Indigenous Rights in Australia

Natural resources are one the biggest contributors to the Australian economy. In 2018, Australia's resources and energy exports amounted to 58 per cent of the total goods and services exports and contributed 8.8 per cent of total GDP.[196] As of May 2019, this sector employed over 247,000 people and was the leading employer of Aboriginal and Torres Strait Islander people.[197] Besides contributing to the national economy, mining companies engage in local projects, including building roads, schools, water supplies, hospitals and other infrastructure. While this sector makes a substantial contribution to the economy, it also creates many land disputes with Aboriginal peoples when the land was not acquired with 'free, prior and informed' consent. For Indigenous peoples, these mines cause disruptions to their self-determination and land rights. Mines can cause severe adverse impacts on their communities, including disruption to their religion and traditional activities such as hunting and fishing, restriction of free movement, invasion from foreign cultures, forced assimilation and disrespect of their traditional practices.[198] This problem can also be attributed to the lack of recognition of Indigenous rights. For thousands of years, Indigenous peoples in Australia have lived on the world's most resourceful (mineral) lands. However, unlike other developed countries such as the USA and Canada, Indigenous peoples in Australia do not have constitutional recognition and treaty rights, and there was no ceding of sovereignty through negotiation. Although they have contributed much to the

[196] Office of the Chief Economist, Australian Government, *Resources and Energy Quarterly: June 2019* (Report, June 2019) <https://publications.industry.gov.au/publications/ resourcesandenergyquarterlyjune2019/documents/ Resources-and-Energy-Quarterly-June-2019.pdf>.
[197] Ibid. See also Department of Industry, Innovation and Science, Commonwealth of Australia, *National Resources Statement* (Report, February 2019) 41 <https://www.industry.gov.au/sites/default/files/2019-02/national-resources-statement.pdf>.
[198] Gavin Hilson, 'An overview of land use conflicts in mining communities' (2002) 19 *Land Use Policy* 65, 66.

Australian economy since early nineteenth century,[199] they only have limited legal recognition, which came into effect in the late twentieth century through legislation and case law.

Utilising natural resources in a sustainable way is important for the present and future prosperity of any country. Not all Indigenous peoples are opposed to development. For Indigenous peoples, sustainable development could provide pathways to secure the future for their next generations and to preserve their sacred lands, cultures and ways of life. To be successful, development on Indigenous lands would need to be with 'free, prior and informed' consent of the Indigenous owners. However, projects such as the DAPL, Site-C dam and Adani mine are proceeding without informed consent or proper consultation with the Indigenous peoples who opposed those developments. Through the pre-emption element of the Doctrine, governments have taken away most of the important land rights from the Indigenous peoples. Some rights retained under the native title—another element of the Doctrine—only provide limited land rights protections. Some argue that the development projects bring prosperity to Indigenous communities.[200] However, none of these ensures Aboriginal rights recognition, but rather may only embody the civilisation and assimilation policies of governments. The case of Adani mine clearly exemplifies the effects of the rise of global neoliberalism and of governments seeking to promote economic prosperity through development. However, for Indigenous peoples the neoliberal turn may only represent the next wave of dispossession and represent an extension of the Doctrine as the Doctrine of Neo-Discovery.

5.4.1 Indigenous Peoples' Legal Authority Over Resource Development

It was almost 200 years after the invasion before legislation was passed to give Indigenous peoples a degree of ownership over their traditional lands. The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) in the Northern Territory was the first piece of legislation that defined the landowners as a group of Aboriginal people who had primary spiritual responsibility over the lands, with the traditional right to hunt and gather on the land and were the key decision-makers for their lands.[201] The *Aboriginal Land Rights Act* laid down the ground rules for mining companies to pursue development activities on Indigenous lands and provided the local Aboriginal land councils (adults members living in a particular area) with the right to reserve

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[199] 'Stolen Wages' *Creative Spirits* (Web Page, 7 September 2019) <https://www.creativespirits.info/aboriginalculture/economy/stolen-wages/stolen-wages#Why_were_wages_"stolen"?>. Indigenous workers have been integral part of cattle farms and other outback industries from late nineteenth century. But until 1970 they never got direct wages from their employers, only some pock money. Most of their wages remained unpaid and in some cases were withheld as punishment. This is now referred to as 'stolen wages'.

[200] See generally Keri Phillips, '*The mining boom that changed Australia'* ABC (Web Page, 14 April 2016) <www.abc.net.au/radionational/programs/rearvision/the-mining-boom-that-changed-australia/7319586>; see also Stephen Letts, '*Mining industry to lose 50,000 more jobs as boom comes to an end: NAB*' *ABC News* (Web Page, 11 June 2016) <www.abc.net.au/news/2016-06-10/mining-boom-halfway-down-the-mining-cliff/7500700>.

[201] *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('ALRA') ss 3(1), 5, 7.

their consent. For any development to proceed, the land council must be satisfied that the traditional owners understand the nature and purpose of the proposed grant or application and the Indigenous communities that will be affected by the development have been consulted and given adequate opportunity to express their views.[202] This legislation also contains rules regarding the administration of royalty or land use money and established the Aboriginals Benefit Account.[203] All states and territories except Western Australia now have land rights legislation.[204] In Western Australia, the *Aborigines Act 1889* (WA) empowered the governor to set aside Crown lands for Aboriginal peoples, while the title remained in the Crown. Currently, the Aboriginal Land Trust in Western Australia holds 27 million hectares of reserved land.[205]

At the national level, the *Native Title Act 1993* (Cth) was passed by the federal parliament to recognise the pre-existing title of Indigenous peoples to their lands. Unlike land rights legislation, native title law recognises that Indigenous peoples' title to their lands survived the acquisition of sovereignty by the British Crown. The *Native Title Act* also provides guidelines for Indigenous land development and management. One of the main goals of the *Native Title Act* is to manage and control the development on Indigenous lands. This is particularly evident in the mining context. While native title holders have the right to negotiate with respect to such projects,[206] this is the result of legislative provisions and not any treaty-making powers. In the *Native Title Act*, this can be administered through ILUAs. The Adani mine development project illustrates the limitations of this process. The judicial and legislative developments in this case study demonstrate the ways in which the Australian native title system reflects the limited rights conferred by the native title element of the Doctrine.

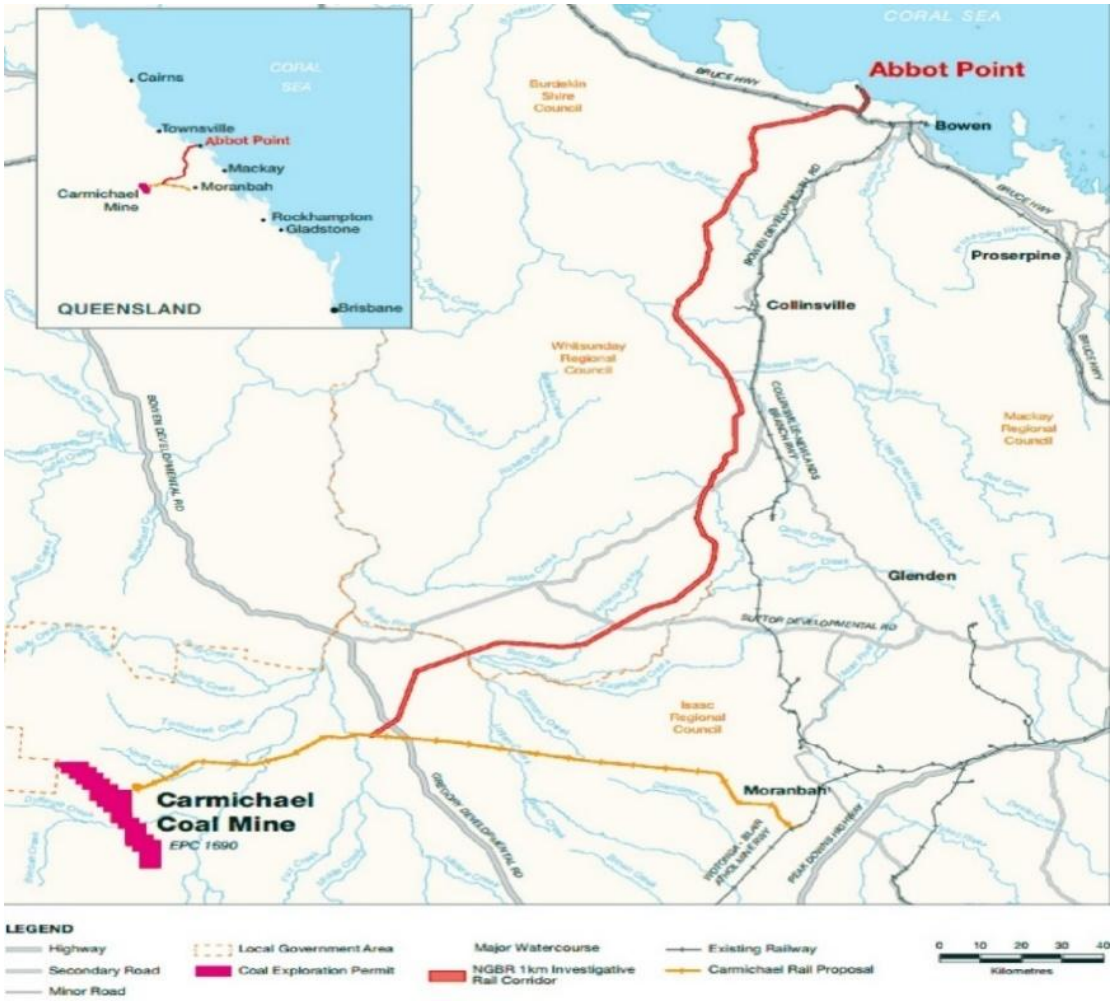
5.4.2 The Adani Mine

The native title rights of Indigenous peoples are relatively new in Australia. The *Native Title Act* was introduced in 1993 ostensibly to protect and recognise the native title of Indigenous peoples, but also to safeguard non-Indigenous interests like mining and agriculture. The political structure in Australia is complex because the various federal, state and territory jurisdictions have different laws regarding development on Indigenous lands. While Indigenous peoples are going to court to save their lands and cultures, federal and state governments are changing laws to enable multinational development of Indigenous lands. This seems most evident in the recent case

[202] Ibid ss 21, 48.
[203] Ibid pt VI.
[204] *Aboriginal Land Trust Act 1966* (SA); *Pitjantjatjara Land Rights Act 1981* (SA); *Aboriginal Land Act 1970* (Vic); *Aboriginal Land Rights Act 1983* (NSW); *Aboriginal Land Grants (Jervis Bay Territory) Act 1986* (Cth); *Aboriginal Land Act 1991* (Qld); *Torres Strait Islander Land Act 1991* (Qld); *Aboriginal Land Act 1995* (Tas).
[205] Australian Law Reform Commission, '*Connection to country: review of the Native Title Act 1993 (Cth)*' (Final Report No 126, April 2015) 95.
[206] Discussed before Section 4.4.4.

involving the Adani mine in Queensland. The Adani mine is a AUD16.5 billion proposed open-cut and underground thermal coal mine to be developed by Adani Mining Pty Ltd in the Galilee Basin in Queensland (see Map 5). This project includes the construction of the mine, a rail line that is 189 km long to transport the coal, an airport, an industrial area, a workers' accommodation village, five quarries and a water supply infrastructure.[207] At full capacity, the mine is expected to produce 60 million tonnes of coal per annum, inject AUD 2.97 billion annually into the Queensland economy, create 3,920 jobs in its operational phase (2,475 jobs during its construction phase) and will have a mine life of 150 years.[208] The project is expected to improve infrastructure in the region through road upgrades and the additional water supply, create direct and indirect local, regional and Indigenous employment opportunities and create construction and supply opportunities for small businesses.[209]

Map 5. Proposed Carmichael (Adani) Mine and Coal Transport Network (Railway Line)



Source: http://ieefa.org/carmichael-decline/

[207] The Coordinator-General, Queensland Government, *Carmichael Coal Mine and Rail Project: Coordinator-General's Evaluation Report on the Environmental Impact Statement* (Report, May 2014) 2.
[208] Ibid 14.
[209] Ibid.

5.4.2.1 Approval of the Adani Mine

The 'Initial Advice Statement' for the Carmichael Coal and Rail Project was submitted by Adani in October 2010.[210] Immediately after that, the Queensland Coordinator-General declared the Carmichael Coal Project to be a 'significant project' under the *State Development and Public Works Organisation Act 1971* (Qld).[211] As a 'significant project', Adani was required to prepare an Environmental Impact Statement ('EIS') under the *State Development and Public Works Organisation Act* and to submit that to the Coordinator-General for evaluation.[212] Adani did this and in May 2014, the Coordinator-General approved the project on the basis that 'the requirements of the *State Development and Public Works Organisation Act* have been met and that sufficient information has been provided to enable the necessary evaluation of the potential impacts and development of mitigation strategies and conditions of approval'.[213] Although it is one of the largest coal mines to ever be proposed in Australia and will have significant environmental and social impacts, the Commonwealth government did not require an additional EIS because it satisfied the Queensland's EIS process. In January 2011, the Commonwealth Minister for Sustainability, Environment, Water, Population and Communities (Minister for the Environment) determined the Adani mine to be a 'controlled action' under pt 8 of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth). Under a bilateral agreement between the Commonwealth and Queensland governments, a 'controlled action' is a 'significant project' (now known as 'coordinated project') for which an EIS is required under the *State Development and Public Works Organisation Act*—certain projects do not require an EIS under the *Environmental Protection and Biodiversity Conservation Act*.[214] Under this bilateral agreement, one EIS for the project satisfied the *Environmental Protection and Biodiversity Conservation Act* and the *State Development and Public Works Organisation Act*. Once approved by the Coordinator-General, the EIS was submitted to the Minister for the Environment for approval. The Minister approved the mine on 24 July 2014, but his decision was set aside by the Federal Court on 4 August 2015.[215] After reconsidering the application, the

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[210] Adani Mining Pty Ltd, 'Carmichael Coal Mine and Rail Project: Initial Advice Statement', *State Development, Manufacturing, Infrastructure and Planning, Queensland Government* (Web Page, 22 October 2010) <www.statedevelopment.qld.gov.au/resources/project/carmichael/initial-advice-statement.pdf>

[211] The Coordinator-General, '*Carmichael Coal Mine and Rail Project'* (n 207) 16, 585; *State Development and Public works Organisation Act 1971* (Qld) ('SDPWO Act') s 26(1)(b). After 21 December 2012 the 'significant project' is referred as 'coordinated project'.

[212] The Coordinator-General, '*Carmichael Coal Mine and Rail Project'* (n 207) 16; SDPWO Act s 26(1)(b).

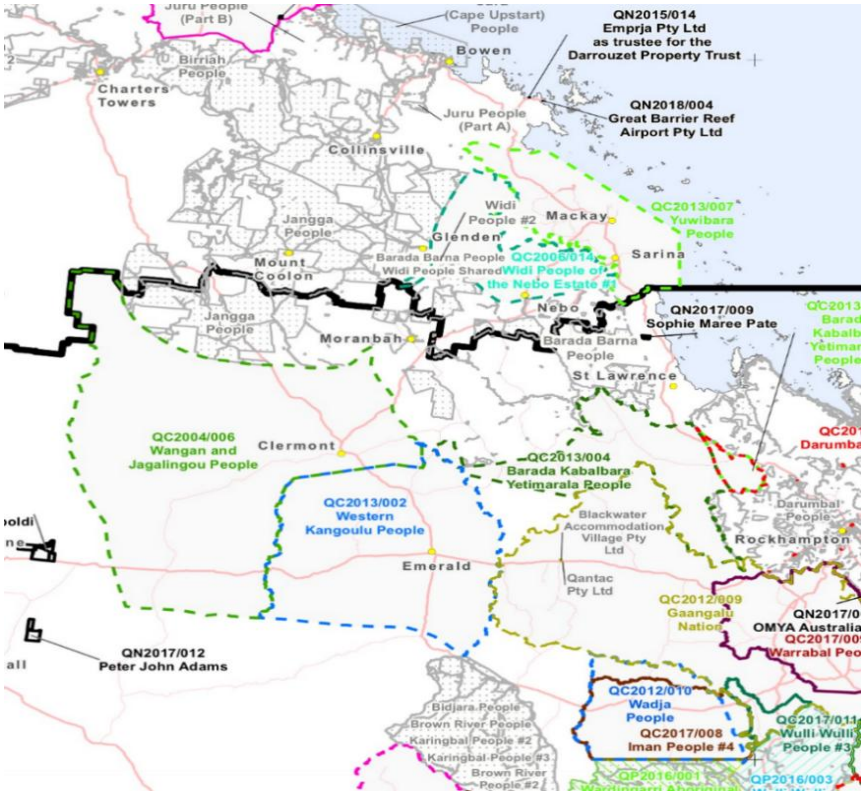
[213] The Coordinator-General, '*Carmichael Coal Mine and Rail Project'* (n 207) 348.

[214] Ibid 16, 583. The bilateral agreement between the Australian and Queensland governments that accredits the State of Queensland's EIS process allows the Commonwealth Minister for the Environment to rely on Specified environmental impact assessment processes of the state of Queensland in assessing actions under *the Environmental Protection and Biodiversity Conservation Act 1999* (Cth). EPBC Act chapter 3.

[215] *Mackay conservation Group Incorporated v Commonwealth,* NSD 33/2015. By consent of the parties the decision in review dated 24 July 2014 was set aside <https://elaw.org/system/files/150112_ originating_ application_sealed.pdf>.

Federal Minister for the Environment, Greg Hunt, approved the Adani mine on 14 October 2015 on the condition that the Minister obtain advice from the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development. Later, Adani submitted a Groundwater Dependent Ecosystem Management Plan ('GDEMP') and Groundwater Management and Monitoring Plan ('GMMP'), which were forwarded to Geoscience Australia and the Commonwealth Scientific and Industrial Research Organisation ('CSIRO') for expert technical advice. In February 2019, Geoscience Australia and the CSIRO produced their advice on Adani's GDEMP and GMMP and concluded that Adani's draft groundwater management plans required amendments to meet the conditions of approval.[216] Adani further submitted its amended GMMP and GDEMP in March 2019 and on 9 April 2019, the federal government gave their final approval to the mine. Subsequently, the Queensland state government gave their final environmental approval to the mine on 13 June 2019. Now the mine is ready to proceed unless it is stopped by any court proceedings.

Map 6. W&J People's Native Title Area Where the Proposed Carmichael (Adani) Mine is Situated



Source: www.nntt.go.au/Maps/QLD_NTDA_Schedule.pdf

[216] Geoscience Australia and CSIRO, *Carmichael Coal Mine: Advice on Groundwater Management and Monitoring and Groundwater Dependent Ecosystem Management Plans to the Department of the Environment and Energy'* (Report No D 2019-19528, February 2019).

5.4.2.2 Indigenous peoples' Opposition to the Mine

The proposed Adani mine project is situated within an area that is culturally significant for the local Aboriginal groups, the W&J peoples (see Map 6). As a result, the *Aboriginal Cultural Heritage Act 2003* (Qld) required Adani to sign a Cultural Heritage Management Plan with local Aboriginal groups. As per the evaluation report by the Coordinator-General, Adani signed a Cultural Heritage Management Plan with the Wangan and Jagalingou ('W&J') peoples (Registered native title claim area QUD85/2004, QC2004/006), who are the traditional owners of the mine site and 17 km of the rail component. Similar Cultural Heritage Management Plans were signed with the Jangga People (Native title determination area QUD6230/1998, QC 98/10), the Barna Kabalbara and Yetimarla People (Registered native title claim area QUD6023/01, QC 01/25) and the Barada Barna People (Registered native title claim area QUD380/2008, QC2008/011), who are traditional owners of the lands where the proposed rail project is situated.[217] At the time the Coordinator-General's released its report, Adani was in the process of signing four ILUAs and extinguishment assessments with the native title holders of the lands as required under s 29 of the *Native Title Act*.

The Adani mine has been controversial due to its potential effects on the climate, environment and Indigenous traditional lands. According to the traditional owners who opposed the development, the mine will destroy their ancestral lands and waters, totemic animals and plants and cultural heritage.[218] Under the *Native Title Act*, the project must be approved by native title holders by entering into an ILUA, but after seven years of negotiations the W&J peoples (see Map 6), the traditional owners of the land were evenly split over the deal. Even following intense negotiations in 2012 and 2014, a majority of the W&J peoples declined to sign the agreement.[219]

The Adani project has supporters inside the W&J peoples and Adani managed to gain support from 7 out of 12 representatives of the native title holders in 2016. The majority supporters of the mine inside the W&J peoples argued that they should take the offers from Adani because it will economically benefit their people and if they reject the agreement they risk losing everything. Whereas, according to Murray Meaton, the earning for the W&J peoples from the mine will be only 0.2 per cent of Adani's earning, which is almost half of the average industry

[217] The Coordinator-General, '*Carmichael Coal Mine and Rail Project'* (n 205) 222.
[218] Lisa Cox, 'Native title battle shaping up over Adani coal mine' *The Sydney Morning Herald* (online at 12 October 2018) <https://www.smh.com.au/politics/federal/native-title-battle-shaping-up-over-adani-coal-mine-20150326-1m8esn.html>.
[219] Josh Robertson, 'Adani's compensation for traditional owners' well below industry standard, report finds' *ABC News* (Web Page, 1 December 2017) <www.abc.net.au/news/2017-12-01/adani-compensation-well-below-industry-standardreport-finds/9212058>.

average.[220] According to the opposing representatives of the W&J peoples, the approval of the Adani mine breaches their rights to 'free, prior and informed' consent, which is explained below.

The Adani ILUA got majority support from the native title claimants. While that is true, there are Indigenous peoples who are vehemently opposed to the mine. There were several negotiation processes during the consultation period. In the first phase, the Indigenous claimants were mostly united against the mine but in the second phase there was greater division. In the second phase three people were authorised to act on behalf of native title claim—Irene White, Patrick Malone and Adrian Burragubba. Irene White supported the mine from the beginning, whereas Adrian Burragubba opposed it. While Patrick Malone was in favour of the mine, he initially preferred 'the mine to not go ahead'. Later he reluctantly agreed to it as be believed 'NNTT process was skewed too far in favour of miners and governments for his people to have a hope of winning and they were concerned any submission they made could be used against them in the future determination of their native title claim'.[221] So, he wanted to achieve best deal for his community.

It is obvious that Malone supported the mine out of desperation and to some extend due to realistic thinking. He believed that they were not only fighting against the Adani but also against the state and federal governments. He knew the limitations of their rights under native title regime. The state and federal authorities were behind the project from the inception and were passing laws and expediting approval processes so that the project would go ahead. Even the Queensland government indicated that it was ready to compulsorily acquire the land if the claimant failed to reach an agreement.[222] As a result, some claimants feared that if they failed to come to a beneficial agreement, they would lose everything. According to Malone, 'most knew it [Adani mine] would probably go ahead and it was best to take the opportunities for our people, to get jobs for the next generations'.[223]

In the second phase three authorised representatives failed to come to a consensus because Adrian Burragubba—representative of five claimants—was against the mine. When the negotiation failed second time Adani launched legal action (*Adani Mining Pty Ltd v Burragubba*) in the Native Title Tribunal ('NTT') to enable the Queensland government to compulsorily

[220] Ibid. Murray Meaton was awarded the Order of Australia in 2014 for his service to the mining industry. He is also the author of the report (prepared by the Economics consulting Services) commissioned by six W&J representatives about the economic benefits of the mine.
[221] Jorge Branco and Lisa Cox, 'Opposition to Adani mine from Indigenous locals' *The Brisbane Times* (online at 14 April 2015) <https://www.brisbanetimes.com.au/national/queensland/opposition-to-adani-mine-from-indigenous-locals-20150414-1ml4ld.html>.
[222] Alex Sadler and Divya Gupta, 'Evolution of Rights to Self-Determination of Aboriginal People: A Comparative Analysis of Land Rights Reforms in Australia' (2019) 29(3) *Indigenous Policy Journal* 1.
[223] Michael McKenna, 'Indigenous jobs fears as greens march in' *The Australian* (online at 21 August 2015) <https://www.theaustralian.com.au/national-affairs/indigenous/indigenous-job-fears-as-greens-march-in/news-story/10780449062e08709835ee550b0d417>.

acquire the land for the mine. Adani argued that the negotiating parties had failed to come to an agreement and the determination was not part of the ILUA. The Tribunal found in favour of the plaintiff and determined that the grant of mining lease could go ahead. While the native title itself is an element of the Doctrine, the leasing of land to Adani by Queensland government represents the pre-emption element of the Doctrine, because after the colonisation the government took control of the land and could lease it to a third party without consultation with Indigenous owners.

The process of negotiation, the government approvals and the NTT determination demonstrated that Indigenous peoples have extremely limited rights to negotiation and if they fail to come to an agreement, they stand to lose everything. While they had a short lived reprieve after the decision of *McGlade*, it soon became nightmare for the Indigenous peoples opposed the mine when federal government legislated *Native Title Amendment (Indigenous Land Use Agreement) Act 2017* (Cth) so that the ILUA could pass easily. On the top of that the Indigenous peoples knew that the native title is treated as lesser property rights and susceptible to extinguishment with almost no legislative protection.

The Adani mine has successfully managed to divide the Indigenous native title holders and diminished their communal land rights. On the top of that Indigenous scholars are also divided on this issue. While Indigenous scholar Marcia Langton supports Adani mine, Australia's first Indigenous senior counsel Tony McAvoy who assisted the Royal Commission into the Youth Detention in the Northern Territory opposed the mine saying 'Langton was "very poorly informed" on the Adani issue'.[224] It can be concluded that the decision to approve the ILUA by a portion of claimants was influenced by hundreds of years of colonisation, lack of protection of law, very weak native title rights, hostility from government authorities, monetary power of a multinational corporation and overall disadvantaged social condition of Indigenous peoples. While the ILUA went through due to amended law in 2017, the Indigenous peoples opposing the mine have promised to seek every avenue to fight against the mine.

5.4.2.3 Challenges to the Adani Mine in the Courts

While there was uncertainty about the ILUA, to bypass it, Adani launched legal action (*Adani Mining Pty Ltd v Burragubba*) in the Native Title Tribunal to enable the Queensland government to compulsorily acquire the land for the mine.[225] The plaintiff argued that the negotiating parties had failed to come to an agreement and the determination was not part of the ILUA. The Tribunal

[224] Joshua Robertson, 'Leading Indigenous Lawyer Hits Back at Marcia Langton Over Adani' *The Guardian* (Online at 9 June 2017) <https://www.theguradian.com/environment/2017/jun/09/leading-indigenous-lawyer-hits-back-at-marcia-langton-over-adani>.
[225] *Adani Mining Pty Ltd v Burragubba* [2015] NNTTA 16.

found in favour of the plaintiff and determined that the grant of mining lease could go ahead.[226] The Tribunal made its determination on 8 April 2015 and directed that 'the grant of mining leases 70505 and 70506 to Adani Mining Pty Ltd, may be done'.[227] The W&J peoples challenged the Tribunal's decision in the Federal Court (*Burragubba v Queensland*), in which the Court decided that the Tribunal 'did not fail to observe the rules of natural justice, or constructively fail to exercise its jurisdiction' and declared that none of the applicant's grounds of review had any merit.[228] Simultaneously with this federal challenge, Adani filed a case in the Queensland Land Court (QLC) against the Land Services of Coast and Country Inc, who objected to the grant of the mining lease because of the mine's impact on groundwater and groundwater dependent ecosystem, biodiversity, an endangered bird species, the black-throated finch, plant species and climate change.[229] On 15 December 2015, the QLC recommended that Adani's application for mining lease 70505 and 70506 be granted by the relevant minister and approved environmental authority subject to additional conditions related to the black-throated finch.[230]

Despite the setback, the situation seemed to turn in favour of the W&J peoples opposed to the mine with the Federal Court decision in *McGlade* (see Section 4.4.4.1).[231] However, their potential victory would only be short-lived because soon after the federal government moved to legislate against this decision. In April 2017, the federal government assured the senior executives of Adani that the native title situation would be fixed,[232] and by enacting the *Native Title Amendment (Indigenous Land Use Agreement) Act 2017*, the federal government made it easy for the ILUA to pass. Besides challenging the mine in the local courts, the W&J peoples challenged the mine in the international arena, in which they urged the UN's Special Rapporteur on the Rights of Indigenous peoples to protect their rights on the grounds that the mine will violate their cultural rights and is a clear violation of rights to 'free, prior and informed consent' and the right to give or withhold consent to the development of significant extractive industries

[226] Ibid.
[227] Ibid [121].
[228] *Burragubba v Queensland* [2016] FCA 984; *Adani Mining Pty Ltd v Land Services of Coast and Country Inc* [2015] QLC 48 [318], [321].
[229] [2015] QLC 48 (n 224) [15]; Under s 185 of the *Environmental Protection Act 1994* (Qld) and s 265 of the *Minerals Act* any objection against mining lease must be referred to the land court.
[230] [2015] QLC 48 (n 224) [626]; [2015] NNTTA 16 (n 221) [59]. A subsequent application by the Adani for cost was refused by QLC in *Adani Mining Pty Ltd v Land Services of Coast and Country Inc (No 2)* [2016] QLC 22.
[231] *McGlade v Native Title Registrar* (2017) FCAFC 10. It was found that under the *Native Title Act* 1993 the ILUA must be signed by all claimants in a group.
[232] James Bennett, 'Adani: Prime Minister Malcolm Turnbull meets with chairman, reiterates support for mine' *ABC News* (Web Page, 11 April 2017) <www.abc.net.au/news/2017-04-11/turnbull-meets-with-adani-chairman-during-india-visit/8432938>.

on the land.[233] The federal government rejected the claims, stating that the grant of mining lease depends on the state government.

In June 2017, questioning the meeting process to construct the deal, one member of the majority representatives Craig Dallen changed his mind and decided to go against the deal, which split the representatives evenly and sent the deal into deadlock.[234] Nevertheless, the ILUA regarding Adani was registered in the NNTT on 8 December 2017, while there was legal action pending in the Federal Court.[235] The W&J representatives opposed to the mine rejected the ILUA because they did not consent to this process and filed an application in the Federal Court for an injunction against Adani and the Queensland government to prevent them from using the registered ILUA to extinguish their native title.[236] An interlocutory injunction was granted in their favour in December 2017.[237] In the injunction hearing of 30 January 2018, Reeves J accepted that the damages were not an adequate remedy for extinguishment of native title but he did not accept that five W&J applicants acted on behalf of the entire claimant group because there were some W&J people who wanted the mine to proceed.[238] The W&J peoples have continued to oppose the mine. Recently, they secured funding to challenge the 'sham ILUA' in the Federal Court of Appeal [*Kemppi (No 2)*].[239] The applicant alleged that the authority failed to take into account relevant considerations and the Adani ILUA was not accompanied by a prescribed 'complete description', but on 12 July 2019 the Court rejected the applicants arguments and dismissed the appeal.[240] Following are some of the Federal Court cases related to Adani mine:

1. *Burragubba v Queensland* [2016] FCA 984: W&J peoples (represented by Burragubba) challenged the Native Title Tribunal's grant of mining lease (granted on 8 April 2015) to Adani on the ground (among others) that Adani misled the Tribunal about 'the economic

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[233] Lisa Cox, 'Indigenous Groups take Adani Carmichael mine battle to the United Nations' *The Sydney Morning Herald* (online at 6 October 2017) <https://www.smh.com.au/federal-political-news/indigenous-groups-take-adani-carmichael-mine-battle-to-the-united-nations-20151002-gjzzh6.html>.

[234] Josh Robertson, 'Adani accused of paying people to stack its meeting on crucial mine deal' *ABC News* (Web Page, 2 December 2017) <www.abc.net.au/news/2017-12-02/adani-accused-of-paying-people-to-stack-its-meeting-on-crucial-mine-deal/9218246>; Ella Archibald-Binge, 'Traditional Owners lodge appeal after court dismisses injunction against Adani' *NITV* (Web Page, 6 February 2018) <https://www.sbs.com.au/nitv/nitv-news/article/2018/02/05/traditional-owner-lodge-appeal-after-court-dismisses-appeal-against-adani>.

[235] Robertson, 'Adani accused' (n 234); Archibald-Binge, 'Traditional Owners' (n 229); 'Wangan & Jagalingou People and Adani Mining Carmichael Project ILUA- QI2016/015' *National Native Title Tribunal* (Web Page) <http://www.nntt.gov.au/searchRegApps/NativeTitleRegisters/Pages/ILUA_details.aspx?NNTT_Fileno=QI2016/015>.

[236] *Kemppi v Adani Mining Pty Ltd* [2017] FCA 715; *Burragubba v Queensland* [2017] FCAFC 133.

[237] 'NNTT registration of contested Adani land deal to be fought hard in Court by W&J' *Wangan & Jagalingou Family Council* (Web Page, 8 December 2017 <www.wanganjagalingou.com.au/nntt-registration-of-contested-adaniland-deal-to-be-fought-hard-in-court-by-wj/>.

[238] Archibald-Binge, 'Traditional Owners' (n 234).

[239] *Kemppi v Adani Mining Pty Ltd (No 2)* [2019] FCAFC 117; 'Traditional Owners continue to resist Adani's 'invasion' (Media release, Wangan & Jagalingou Family Council, 25 January 2019) <https://wanganjagalingou.com.au/traditional-owners-continue-to-resist-adanis-invasion/>.

[240] [2019] FCAFC 117 (n 235).

benefits that would flow from the project in terms of jobs and economic activity'.[241] According to Reeves J, Adani was not under any obligation to place the reports that 'qualified the validity' of economic material in the EIS before the Tribunal and the challenge was dismissed.[242]

2. *Burragubba v Queensland* [2016] FCA 1525: This resulted in a costs order in favour of Adani in [2016] FCA 984.
3. *Burragubba v Queensland* [2017] FCA 373: This was an application by certain members of W&J Group to replace existing four members of W&J Native Title Applicant with four others. The interlocutory application was dismissed.
4. *Kemppi v Adani Mining Pty Ltd* [2017] FCA 715: The applicants alleged that 60 per cent of those attending the authorisation meeting who asserted W&J identities were not recorded as having attended a previous meeting of the native title claim group and the second respondent (Queensland South Native Title Service Ltd) took no steps to identify members of the claimant group. The Court ordered expert evidence to establish the fact.[243]
5. *Kemppi v Adani Mining Pty Ltd* [2017] FCA 902: This was an application for leave to appeal against the determination of *Burragubba v Queensland* [2017] FCA 373, which was dismissed on 4 August 2017.
6. *Burragubba v Queensland* [2017] FCAFC 133: This was an appeal against the decision dismissing an application for judicial review of the decision by the NNTT ([2016] FCA 984). This appeal was brought by the appellant in his personal capacity not as a native title party and claimed ten grounds for which the appeal should be granted.[244] The appellant claimed that Adani committed fraud through misleading representations regarding the accuracy of the economic material in the EIS. The Court rejected all ten grounds of the appellant and the appeal was dismissed with cost.
7. *Kemppi v Adani Mining Pty Ltd (No 2)* [2017] FCA 1086: The applicant was given leave to file a further amended statement of claim.
8. *Kemppi v Adani Mining Pty Ltd (No 3)* [2017] FCA 40: Until further determination of these proceedings, the applicants sought an interlocutory injunction to restrain Adani from seeking and Queensland from granting approval under cl 9(b) of an ILUA made and registered under the provisions of the *Native Title Act* between Adani and W&J registered claimants.[245] The ILUA was registered on 8 December 2017 and a certificate was issued to Adani under s 203BE of the *Native Title Act*. Among the remedies sought by the applicant was a

[241] *Burragubba v Queensland* [2016] FCA 984 [6(a)].
[242] Ibid [228].
[243] *Kemppi v Adani Mining Pty Ltd* [2017] FCA 715 [7].
[244] *Burragubba v Queensland* [2017] FCAFC 133 [22].
[245] *Kemppi v Adani Mining Pty Ltd (No 3)* [2017] FCA 40 [1].

declaration that the ILUA certificate void and of no effect. According to Reeves J, 'the balance of convenience and justice in this application does not favour the grant of an injunction' and application for interlocutory injunction was dismissed on 2 February 2018.[246]

9. *Burragubba v Queensland (No 2)* [2018] FCAFC 65: The appellant was ordered to pay the costs of the appeal incurred by the respondents (Queensland and Adani).
10. *Kemppi v Adani Mining Pty Ltd (No 4)* [2018] FCA 1245: The applicants challenged the ILUA certificate. The goal of these proceedings was to set aside its registration. According to the applicants, the Queensland South Native Title Services acted 'unreasonably and thereby committed jurisdictional error' and 'failed to take account of a number of relevant considerations' and as such the Registrar's decision to register the ILUA was void.[247] Among other reasons, Reeves J highlighted the inconsistencies in evidence between two witnesses (Mr Esposito and Ms Ford),[248] and considered Ms Kemppi's 'unreasonableness' ground entirely devoid of merit. The case was dismissed with cost on 17 August 2018.
11. *Kemppi v Adani Mining Pty Ltd* [2018] FCA 2012: This resulted in a costs order regarding *Kemppi (No 4)*. The Court ordered that the appellants give security for the first respondent's (Adani) costs of the appeal in the sum of AUD 50,000 by 31 January 2019.
12. *Kemppi v Adani Mining Pty Ltd (No 5)* [2018] FCA 2104: The applicants challenged the costs awarded against them on the ground that the extinguishment of native title was at the centre of this proceeding and was a matter of 'singular public importance'.[249] They also contended that the proceedings were in the public interest and not their personal interest.[250] The Court rejected the arguments and awarded costs against them.
13. *Kemppi v Adani Mining Pty Ltd* [2019] FCAFC 94: Based on *Northern Land Council v Quall* [2019] FCAFC 77, the appellant sought through interlocutory proceedings to amend their notice of appeal, but this was dismissed with costs.
14. *Kemppi v Adani Mining Pty Ltd (No 2)* [2019] FCAFC 117: This case was the appeal against the decisions in *Kemppi (No 4)* and *Kemppi (No 5)*. The notice of appeal contained 14 grounds, of which grounds 1–11 contended that Queensland South Native Title Services acted 'unreasonably and failed to take into account relevant considerations' while registering the Adani ILUA under s 203BE of the *Native Title Act*.[251] They also alleged in grounds 12–14 that the application to register the Adani ILUA was not accompanied by a prescribed 'complete description' of the surrender area as defined in reg 5 of the *Native Title (Indigenous*

[246] Ibid [73].
[247] *Kemppi v Adani Mining Pty Ltd (No 4)* [2018] FCA 1245 [4].
[248] Ibid [63].
[249] *Kemppi v Adani Mining Pty Ltd (No 5)* [2018] FCA 2104 [1].
[250] Ibid.
[251] *Kemppi v Adani Mining Pty Ltd (No 2)* [2019] FCAFC 117 [109 (a)].

Land Use Agreements) Regulations 1999 (Cth).[252] The Full Court (Rares ACJ, Robertson and Perry JJ) rejected the arguments and dismissed the appeal on 12 July 2019.

The W&J representatives opposed to the mine used all legal avenues to stop Adani, but without success. Long-lasting legal costs and cost recovery by Adani bankrupted one of the most vocal opponents of the mine as well as W&J man Adrian Burragubba, who initiated many legal challenges against Adani.[253] Lengthy legal battles and other initiatives such as national and international advocacy demonstrated the Indigenous peoples' resilience and commitment to protecting their lands and their continuing fight against neoliberal governments and multinational corporations. Besides traditional owners, environmental activists and groups also fought in the Federal Court and on other fronts to stop Adani. Their concerns were mostly about Adani's impact on global climate change and native species of flora and fauna such as the black-throated finch, Yakka skink and Ornamental snake. For a short time, the Mackay Conservation Group succeeded in setting aside the federal minister's decision to approve the Adani mile.[254] The following are some federal challenges brought by environmental groups against Adani:

1. *Mackay Conservation Group Inc v Commonwealth*, NSD 33/2015 (unreported): The applicant sought a judicial review of the decision of the Federal Minister for the Environment to approve the Carmichael mine. The applicant alleged that the Minister failed to adequately consider the total impact of the greenhouse gas emissions from the mine, failed to consider the environmental record of the Adani group and failed to consider conservation advice regarding the Yakka Skink and the Ornamental Snake.[255] By consent of the parties, the decision in review dated 24 July 2014 was set aside.
2. *Australian Conservation Foundation Inc v Minister for the Environment* [2016] FCA 1042: This Application for judicial review challenged the federal minister's decision to approve the Carmichael mine. The applicant alleged that the government failed to apply ss 82 and 527E of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) in assessing the impact of combustion emissions and the failure to apply precautionary principle.[256] The application was dismissed.
3. *Australian Conservation Foundation Inc v Minister for the Environment* [2016] FCA 1095: Costs order made in favour of the Minister for the Environment and Adani.

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[252] Ibid [109 (b)].
[253] 'Adani bankrupts traditional owner in Queensland' *SBS News* (Web Page, 15 August 2019) <https://www.sbs.com.au/news/adani-bankrupts-traditional-owner-in-queensland>.
[254] *Mackay conservation Group Inc v Commonwealth*, NSD 33/2015.
[255] 'Mackay Conservation Group v Minister Hunt and Adani Mining Pty' *Mackay conservation Group* (Web Page, 11 November 2019) <Ltdhttps://d3n8a8pro7vhmx.cloudfront.net/dudgeonpointorg/pages/429/attachments/original/1443481178/Carmichael_case_backgrounder_August_2015.pdf?1443481178>.
[256] *Australian Conservation Foundation Incorporated v Minister for the Environment* [2016] FCA 1042 [66].

4. *Australian Conservation Foundation Inc v Minister for the Environment and Energy* [2017] FCAFC 134: This was an appeal against the decision in [2016] FCA 1042, in which the Court dismissed an application for judicial review that challenged the federal minister's decision to approve the Adani mine. The appeal was unsuccessful.
5. *Australian Conservation Foundation Inc v Minister for the Environment and Energy (No 2)* [2017] FCAFC 216: Costs were awarded against the appellant in favour of Adani.

Notwithstanding final approval from the government for the mine, environmental groups still conduct national protests to 'stop Adani'. The Indigenous peoples opposed to the mine continue with their advocacy and progress their cause at international, federal and state levels.[257] From the government's point of view, the dispute with the opposing Indigenous peoples was resolved through the amendment to the *Native Title Act*, which secured the registration of the ILUA.

The changes to the ILUA provisions in the *Native Title Act* and the approval processes of the mine represent several elements of the Doctrine, most notably pre-emption, native title, civilisation and limited sovereign and commercial rights. It is clear from the onset that the native title element of the Doctrine is entrenched into the Australian legal system since 1992 and Indigenous peoples living on the land where the Adani mine is situated enjoy rights conferred by native title regime. One aspect of this regime is the ILUA that lays down the terms of the agreement between Indigenous and non-Indigenous peoples regarding any development project on Indigenous land. However, in only providing native title holders with the right to negotiate and not a right to veto, the ILUA process reflects the limited legal protection provided to Indigenous peoples in asserting control over their lands. In other words, it represents limited sovereign and commercial rights according to which Indigenous peoples can exercise limited sovereign rights, and as the government holds pre-emptive rights over Indigenous lands the project ultimately needs approval from the government, not from the Indigenous claimants. Moreover, the developer of Adani mine and the government argue that the development project would create jobs and growth in the area, and subsequently improve Indigenous lifestyle. But in fact, this represents colonial civilisation agenda that promotes westernised values and gives less emphasis on Indigenous traditions and cultures. As discussed earlier, the ILUA process was easily amended by the government so that the development could proceed, and the way these amendments entrenched division among the native title holders, demonstrates the strong hold of Australian law on Indigenous peoples, their laws and practices. After the acquisition of

[257] UN Human Rights Office of the High Commissioner, *Communication from Chair of the Committee on the Elimination of Racial Discrimination to Permanent Representative of Australia to the United Nations office*, UN Doc CERD/EWUAP/Australia/2018/JP/ks (14 December 2018). In a letter to the government, the Committee on the Elimination of Racial Discrimination (CERD) requested the government to suspend Carmichael Coal Mine and Rail Project until free, prior and informed consent is obtained from all indigenous people.

sovereignty by the Crown, the Doctrine continues to apply to deny Indigenous peoples their inherent rights to the land which is apparent from the application the native title regime and their limited sovereign rights. While the government acquired pre-emptive rights, another element of the Doctrine—civilisation—is visible from governments policies related to Indigenous peoples. On the one hand, Adani has promised Indigenous peoples westernised mining jobs, education, housing and lifestyle change; on the other hand, it is going to extinguish land related traditional customs and activities.[258]

The Adani mine will proceed, which illustrates the ways that development on Indigenous lands can be approved without proper consultations—it was alleged in *Kemppi v Adani Mining Pty Ltd* that 60 per cent of those attending the authorisation meeting who asserted W&J identities were not recorded as having attended a previous meeting of the native title claim group and Adani discreetly paid thousands of dollars to Indigenous people to vote in favour of the mine—defeating the true spirit of consultation.[259] Aboriginal sovereignty is not a tenet of Australian law and these developments clearly reflect this. In this regard, pre-emption applies in the Australian context, whereby the land is subject to governmental control and can be transferred to third parties as the government deems appropriate. The ILUA process as it played out in this case study illustrates how the rights of native title holders can be abrogated through legal and political processes, which reflects the broader limitations of the native title regime in securing Indigenous peoples title to their lands. Through these processes, the development of Indigenous lands is heralded as being the most viable option for economic growth and prosperity for Indigenous and non-Indigenous peoples alike. In this way, the civilising drive of the colonising project continues to the benefit of national and multinational corporations in the current neoliberal age.

5.5 The DAPL, Site-C Dam and Adani—A New Manifestation of the Doctrine of Discovery

The Doctrine was the international legal principle that was used to legitimise the colonisation and settlement of the USA, Canada and Australia by the European monarchs. This legal principle legitimised the undermining of Indigenous nationhood despite that Indigenous peoples had settled laws, cultures, ceremonies and a defined land base. This thesis has demonstrated how the elements of the Doctrine continue to inform policies and laws of the government that have

[258] Those actions are supported by the government and aggregated by the fact that in certain areas the government is going to control social welfare through intensive surveillance through cashless debit cards, night curfew and control of alcohol. Dennis A Gray and Edward T Wilkes, 'Alcohol Restrictions in Indigenous communities: An Effective Strategy If Indigenous-led' (2011) 194(10) *The Medical Journal of Australia* 508; Lindy Kerin, 'Indigenous groups in the Northern Territory are calling on federal parliamentarians to block a proposed expansion of the Cashless Debit Card scheme' NITV (Webpage, 9 October 2020) <https://www.sbs.com.au/nitv/article/2020/10/09/new-intervention-indigenous-groups-slam-plans-expand-cashless-debit-card-scheme>.

[259] [2017] FCA 715 [7] n (243); Robertson (n 234),

adverse impacts on Indigenous rights (see Chapters 3 and 4). The Indigenous Nations belonging to these countries were discovered and dispossessed. When they resisted, they were forcefully conquered. They lost full property rights and ownership of their land and were given native title so that they could only occupy and use their lands. Their sovereignty was reduced to limited sovereign and commercial rights—although in some cases Indigenous peoples can engage in commercial activities such as tourism and adventure but they cannot sell the land or engage in large commercial mining activities (see Section 1.3.3). The asserted pre-emptive rights of the Crown prohibited them from dealing with third parties and Indigenous children were forcefully taken away to civilise them so that they could assimilate into European Christian cultures.

The events of the twentieth century contributed to the revival and recognition of Indigenous rights. However, these developments continued to be filtered through the lens of the Doctrine. The analysis of the three development projects in this chapter demonstrated how government decision-making were informed by the elements of the Doctrine to prioritise non-Indigenous and corporate interests over Indigenous rights. Approval of these projects demonstrate that Indigenous peoples do not have full property rights and ownership of their land (native title). They are not allowed to deal with third parties (e.g., developers) without intervention of the government (pre-emption and limited sovereignty). Moreover, governments argued that these projects would offer more jobs and growth for Indigenous peoples, which demonstrates the way Indigenous peoples are encouraged to abandon their traditional occupations or (any attempts to revitalise them) and take up employment offered by these projects (civilisation). While the protests against these development projects in Canada and Australia were relatively peaceful, the government's violent response in the USA shows that the government is ready to do anything to grab Indigenous lands (conquest). Similar to the early colonisers, the governments impose laws and policies on Indigenous peoples, which have resulted in loss of lands, cultures, institutions and self-government (limited sovereignty). The authoritarian mindset of government remains the same, as do elements of the Doctrine.

Above all, the underlying goal of contemporary governments is economic growth through neoliberal globalisation that encourage profiteering and the global movement of capital. Governments encourage national and multinational corporations to invest in projects such as the DAPL, Site-C and Adani. These projects demonstrate how economic growth prevails over Indigenous rights. Governments argue that these kinds of projects are in the national interest, and this is supported by the courts. In the case of the DAPL, President Trump issued an Executive Order to expedite the approval process because it was a multi-billion-dollar project that will

create jobs, increase wages and reduce the costs of goods and services for American families.[260] Even after significant problems with the approval processes and the chance of spills, the United States District Court for the District of Columbia did not halt the oil flow under the Lake Oahe (see Section 5.3.3).[261] Similarly, the Site-C dam was approved by the Trudeau government because there was significant investment behind this project. This proposition was supported by Milman J in *West Moberly First Nations v British Columbia*,[262] who accepted that the plaintiffs would 'suffer irreparable harm if an injunction is not granted', but rejected the application of injunction on the ground (among others) that injunction 'would likely cause significant and irreparable harm to BC Hydro, its ratepayers and the other stakeholders in the project'.[263] In Australia, the *Native Title Amendment (Indigenous Land Use Agreement) Act 2017* was enacted so that the ILUA could attract multi-billion-dollar investments from Adani. In these three cases, two matters are clear: all attracted significant investment for economic gain and all significantly impaired Indigenous peoples right to self-determination. From these examples, it can be argued that economic gains prevail over Indigenous rights. Economic gain backed by neoliberal ideals represents the evolution of the Doctrine into the Doctrine of Neo-Discovery to disregard Indigenous rights.

5.6 Conclusion

> [T]he legacies of a colonial history are by their very nature a continuing metamorphic challenge to a contemporary society.[264]

While Indigenous rights recognition is different in the USA, Canada and Australia, their social conditions and struggle for their rights are similar, especially their struggles for lands that are forcefully taken from them for the benefit of others. For Indigenous people in Australia, the scope for legal challenge is limited because of their lack of constitutional and treaty recognitions, whereas their counterparts in the USA and Canada can invoke constitutional and treaty rights to establish their land rights. While Indigenous peoples of these respective countries continue to assert their rights, the international communities are beginning to comprehend the effects of Doctrine on Indigenous peoples, which is why in its eighth session in May 2009, the United Nations Permanent Forum on Indigenous Issues ('UNPFII') appointed Ms Tonya Gonnella Frichner, a member of the UNPFII, as Special Rapporteur to conduct a preliminary study on the impact of the Doctrine on Indigenous peoples. She was to investigate violations of human rights

[260] '*Construction of the Dakota Access Pipeline*' (n 9); '*Expediting Environmental Review and Approvals*' (n 98).
[261] *Standing Rock III* (n 31) 148-9.
[262] [2018] BCSC 1835 (n 164).
[263] Ibid [8], [276].
[264] Simon Young, *The Trouble with Tradition: Native title and cultural change* (The Federation press, 2008) 17.

and to report to the UNPFII at its ninth session in 2010.[265] In her report submitted to the UNPFII, Ms Frichner argued:

> The Doctrine of Discovery has been institutionalized in law and policy, on national and international levels, and lies at the root of the violations of indigenous peoples' human rights, both individual and collective. This has resulted in state claims to and the mass appropriation of the lands, territories and resources of Indigenous peoples.[266]

In the next chapter, I analyse responses from the international community, especially the UN, to uphold Indigenous rights and demonstrate the effects of the Doctrine on international principles and policies.

[265] Tonya Gonnella Frichner, Special Rapporteur, *Preliminary Study of the Impact on Indigenous Peoples of the International Legal Construct Known as the Doctrine of Discovery,* UN Doc E/C. 19/2010/13 (4 February 2010).
[266] Ibid 1.

Chapter 6: International Interventions

6.1 Introduction

> International law is not rules. It is a normative system … Consent and sovereignty are constraining factors against which the prescribing, invoking and applying of international law norms must operate … [I]nternational law as a normative system, harnessed to the achievement of common values—values that speak to us all, whether we are rich or poor, black or white, of any religion or none, or come from countries that are industrialized or developing.[1]

Despite Indigenous peoples' protests, the three development projects in the USA, Canada and Australia were approved by government authorities. After the DAPL's approval process was expedited by President Trump, its construction was immediately completed and it became operational in June 2017. After the approval by relevant government authorities, the construction of the Site-C dam in Canada is underway and is expected to be completed by 2024. The Adani mine in Australia has already secured support and environmental clearance from the federal and Queensland governments to proceed. To secure their land rights, Indigenous groups have campaigned against these projects at the domestic and international fronts. In Chapters 3,4 and 5, I discussed Indigenous peoples' resistance against the state and corporate forces and assertion of their rights at the domestic level. In this chapter, I discuss a range of international norms and principles that uphold Indigenous peoples' rights and analyse a variety of international declarations, conventions and organisations that acknowledge and promote Indigenous self-determination, sovereignty and inherent land and cultural rights. By analysing these provisions and instruments, my discussion explores avenues of redress available to aggrieved Indigenous parties at the international level and how they have been utilised by Indigenous groups affected by the DAPL, the Site-C dam and the Adani mine. I also analyse different studies and reports conducted and presented by experts and special rapporteurs on the status of Indigenous peoples and the adherence to internationally recognised Indigenous rights by concerned countries.

My analysis includes a discussion of the drawbacks of the international system in maintaining the paramountcy of state sovereignty, which has posed obstacles in the way of the provision of adequate remedies and reparations for previous Indigenous rights violations. Moreover, international law at best provides standards for states to follow, although in most cases its enforcement mechanisms are very weak. The implementation of international law is 'based primarily on compliance, not enforcement'.[2] The enforcement mechanisms are an integral part

[1] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, Oxford, 1994) 1-2.
[2] Mary Ellen O'Connell, 'Enforcement and the Success of International Environmental Law' (1995) 3(1) *Indiana Journal of Global Legal Studies* 47, 47.

of domestic legal systems and in most cases, the absence of these enforcement mechanisms and subsequent sanctions make domestic laws useless. At the international level, institutions such as the Security Council, the International Court of Justice and the International Criminal Courts enforce international laws, although the jurisdiction of these institutions is limited. Most of the international laws relating to Indigenous rights are dependent on states to enforce them through domestic laws. However, many international instruments are ignored by nation-states on the grounds that states are 'sovereign entities and are not compelled to respond to UN recommendations'.[3]

The Doctrine of Discovery ('the Doctrine') is considered to be one of the earliest examples of international law that was developed by European nations to explore and take possession of Indigenous land around the world. It was used by colonial forces to assert their sovereignty over Indigenous lands and exclude other colonial forces from asserting sovereignty over same territories. The Doctrine was based on Christian teachings to spread Christianity across the globe and ultimately served to justify the confiscation of non-Christian lands in non-European territories.[4] Contemporary international law distances itself from the Doctrine because it was based on the presumption of 'racial superiority of Christian Europeans' and because it is 'racist, scientifically false, legally invalid, morally condemnable and socially unjust'.[5] Moreover, the Doctrine is incompatible with democracy and against transparent and accountable governance.[6] Along with the Doctrine of Conquest[7] and European racial superiority, the Doctrine was responsible for atrocities and injustices committed against Indigenous peoples around the world, including the USA, Canada and Australia. Nevertheless, despite its rejection by many international and domestic bodies, the Doctrine continues to exist through the practice of settler-coloniser cultures and the application of state laws and policies, from which its effects are 'devastating, far-reaching and intergenerational'.[8] As critical Indigenous scholar Robert J Miller

[3] Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Taylor & Francis, London, 2016) 147.
[4] Robert J Miller, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2012) 9.
[5] John Edward, *Study on the impacts of the Doctrine of Discovery on indigenous peoples, including mechanisms, processes and instruments of redress*, UNPFII, 13th sess, UN Doc E/C.19/2014/3 (12-23 May 2014); *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('ICERD') Preamble.
[6] ICERD (n 5) Preamble.
[7] *Charter of the United Nations*, adopted 26 June 1945, 1 UNTS 16 (entered into force 24 October 1945) art 2(4). The Doctrine of Conquest refers to the acquisition of territory through force, generally between two conflicting parties where one party defeats the other and acquires their territory. The modern-day international law distances itself from this Doctrine and international instruments such as the Charter of the United Nations has provisions where it states that 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations'.
[8] See Edward (n 5).

has surmised, the way that 'European countries and their colonies divided up the lands and assets of Indigenous peoples and nations in the distant past still determines national boundaries today'.[9]

6.2 Early International Initiatives

> While international norms concerning indigenous peoples are to be implemented by state actors through mostly local decision-making, international institutions monitor and promote that implementation through a series of specific procedures.[10]

Most international initiatives that could be applied to protect Indigenous rights began in the mid or late twentieth century. After the establishment of League of Nations in 1920, many Indigenous leaders from different countries sought to address the League to assert their self-determination rights, including cultural, religious and land rights. In 1923, Haudenosaunee Chief Deskaheh from Ontario Canada went to the League of Nations to advance his nation's rights to traditional laws, cultures, religions and land rights, but he was not allowed to speak.[11] Similarly, in 1925 Maori religious leader T W Ratana travelled to Geneva with a delegation to report breaches of the *Treaty of Waitangi* by the British Crown but was denied access.[12] During its 26-year existence, the League of Nations was ineffective in advancing the rights of Indigenous peoples. It was eventually replaced by the UN in 1946.

The UN adopted the *Universal Declaration of Human Rights* ('UDHR')[13] in 1948, which marked a watershed moment for the contemporary concept of human rights and fundamentally changed the way the world thought about international human rights law.[14] Article 1 of the UDHR denounced the Doctrine of Superiority by declaring that 'all human beings are born free and equal in dignity and rights'. The Doctrine of Superiority addresses many aspects, such as 'inborn differences between the classes of society' which can be referred as discrimination based on (but not limited to) race, religion or colour; it can also be attributed to differences caused by 'difference in environment and education'.[15] The Doctrine worked as the international legal principle that helped the colonisers to dispossess Indigenous peoples from their lands and

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[9] Robert J Miller, 'The Doctrine of Discovery: The International Law of Colonialism' (2019) 5(1) *The Indigenous Peoples' Journal of Law, Culture & Resistance* 35, 35.

[10] S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2nd ed, 2004) 9.

[11] Department of Economic and Social Affairs 'Indigenous Peoples at the UN' *United Nations* (Web Page) <https://www.un.org/development/desa/indigenouspeoples/about-us.html>.

[12] Ibid.

[13] *Universal Declaration of Human Rights*, GA Res 217 A (III), UN GAOR, UN Doc A/810 (10 December 1948) ('UDHR').

[14] See Christopher J Fromherz, 'Indigenous Peoples' Courts: Egalitarian Judicial Pluralism, Self-Determination, and the United Nations Declaration on the Rights of Indigenous Peoples' (2008) 156(5) *University of Pennsylvania Law Review* 1341, 1344.

[15] 'Believers in Theory of Superiority' *The Harvard Crimson* (Web Page, 6 March 1923) <https://www.thecrimson.com/artile/1923/3/6/believers-in-theory-of-superiority-psocial/>; see generally Ellsworth Faris, 'Remarks on Race Superiority' (1927) 1(1) *Social Service Review* 36.

continue to do so, which has been recently acknowledged by international organisations such as the United Nations Permanent Forum on Indigenous Issues ('UNPFII') (see Section 2.6).

The UDHR is not specific to Indigenous peoples. It provides a set of basic human rights, which are fundamental to achieve 'common standard' among human beings.[16] It upholds the human rights of individual human beings around the world. It acknowledges the rights that are important for the 'life, liberty and security of person' and includes political, economic and cultural rights.[17] Although the UDHR does not include the right of self-determination, it contains specific provisions that could be beneficial for Indigenous peoples to realise their cultural, religious and land rights.[18] Further, it has international customary law status that could provide guidelines for national laws to follow in relation to Indigenous peoples.

The human rights principles set in the UDHR were later used as the basis for the creation of the *International Covenant on Civil and Political Rights* ('ICCPR') and the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR').[19] The fundamental difference between these three instruments is that, while the UDHR has moral authority, the ICCPR and ICESCR have legal authority because of their international treaty status. The right of self-determination provision was incorporated in both treaties. According to art 1(1) of both treaties, '[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'. A similar provision had been previously incorporated in the *Charter of the United Nations* ('UN Charter') to provide for the 'equal rights and self-determination of peoples'.[20] Initially, the right of self-determination raised many questions among member states, especially regarding internal and external self-determination. While external self-determination applies to the independent status of a state, the internal self-determination relates to 'essential political rights' within the states.[21] Containing the right of self-determination to internal political matters avoids jeopardising the independent status of nation-states.

The UDHR, ICCPR and ICESCR promote the protection of civil, political, economic, social and cultural rights of human beings. These instruments are legally enforceable but because they

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[16] *Universal Declaration of Human Rights*, illustrated by Yacine Ait Kaci (United Nations, 2015) 3 <https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf>.
[17] UDHR (n 13) arts 3,18-21,22-26, 27.
[18] Ibid. Article 17(1): 'Everyone has the right to own property…'. Article 17(2): 'No one shall be arbitrarily deprived of his property'. Article 18: 'Everyone has the right to freedom of thought, conscience and religion'. Article 27: 'Everyone has the right to participate in the cultural life of the community'.
[19] *International Covenant on Civil and Political Rights,* 16 December 1966, 999 UNTS 171 (enter into force 23 March 1976) ('ICCPR'); *International Covenant on Economic, Social and Cultural Rights*, adopted 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR').
[20] Charter of the United Nations (n 7) art 1(2).
[21] See Fromherz (n 14) 1360.

depend on self-monitoring processes their enforcement mechanisms are very weak. Within one year of signing the treaties, the signatory countries are to submit reports on the measures they have adopted to ensure the rights upheld in these instruments have been recognised and after that, they are to submit reports if the committee requests.[22] The Optional Protocol to the ICCPR has increased the scope of international monitoring by allowing individuals to bring their complaint to the committee on the condition that they have exhausted all available domestic avenues.[23] These instruments are important for the protection of human rights, which is why the UDHR along with the ICCPR (including the optional protocols) and the ICESCR are collectively known as the International Bill of Human Rights.[24] However, the UN Charter, UDHR, ICCPR and ICESCR contain rights general to all human beings and are not specific to Indigenous peoples. Within its general provisions, the ICCPR has one provision that could favour Indigenous peoples. Article 27 of ICCPR states that:

> In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Apart from this provision, these instruments do not refer to Indigenous rights or their specific status. The effect is to normalise colonial power by generalising human rights, which supports assimilation practices. By generalising civil, political, economic and social rights, these instruments ignore Indigenous rights that are specific to Indigenous peoples. Indeed, they can be applied by state parties to deny the rights of Indigenous peoples and assimilate them into the non-Indigenous societies through non-specific health, education, economic and social welfare policies.

6.3 The International Labour Organisation Conventions

During the early 1920s, the International Labour Organisation ('ILO') was the first international organisation that indicated the need for international cooperation to address Indigenous and tribal issues.[25] However, it took more than 40 years for the ILO to adopt an international instrument that could help protect Indigenous peoples from oppression and discrimination. Under the

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[22] ICCPR (n 19) arts 40-42; ICESCR (n 19) arts 16-17.

[23] *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 302 (enter into force 23 March 1976); According to art 2 of the Optional Protocol, '…individuals who claim that any of their rights enumerate in the covenant have been violated and who have exhausted all available domestic remedies may submit a written commination to the Committee for consideration'; Fromherz (n 14) 1352-53.

[24] Fromherz (n 14) 1353.

[25] Andy Gargett and Katie Kiss, *The United Nations Declaration of the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions* (Asia Pacific Forum of National Human Rights Institutions and the Office of the United Nations High Commissioner for Human Rights, August 2013) 3-4; see also 'Indigenous and tribal peoples' *International Labour Organisation* (Web Page) <https://www.ilo.org/global/topics/ indigenous-tribal/lang--en/index.htm>.

umbrella of the UN, the ILO adopted the *Indigenous and Tribal Populations Convention 1957* ('(*ILO Convention 107*') with provisions for freedom and dignity, economic security and equal opportunity for Indigenous peoples.[26] For the first time, the Convention codified legally binding Indigenous rights in international law.[27] It also contained provisions that gave limited protections to Indigenous cultures and institutions, promoted Indigenous criminal justice systems and provisions for 'free consent' and compensation in the case of acquisition of Indigenous lands.[28] However, there was a fundamental problem with this Convention because it encouraged the assimilation and integration of Indigenous peoples into national communities. It advocated 'integration of indigenous and other tribal and semi-tribal populations in independent countries'.[29] The Convention promoted the civilisation element of Doctrine—Indigenous peoples were considered to be uncivilised and it was the religious duty of Europeans to civilise and educate them—because it acknowledged that the 'Indigenous and other tribal and semi-tribal populations which are not yet integrated into the national community' were disadvantaged. The Convention provided that it 'will facilitate action to assure the protection of populations concerned, their progressive integration into their respective national communities and the improvement of their living and working conditions'.[30] Under the Convention, Indigenous peoples were only allowed to retain their customs and institutions that were 'not incompatible with the national legal system or the objective of integration programmes'.[31] The national government could also acquire Indigenous lands without 'free consent' in cases of national security, in the interest of national economic development and in accordance with national laws.[32] Therefore, this Convention made it easy for national governments to acquire Indigenous lands for resource development projects on the grounds of national interest or economic development. Subsequently, the Convention was revised and renamed as the *Indigenous and Tribal Peoples Convention 1989* '(*ILO Convention 169*'),[33] which provides better protection for Indigenous peoples' right of self-determination within nation-states.[34]

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[26] *Indigenous and Tribal Populations Convention 1957 (No 107)* adopted 26 June 1957 (entry into force 02 Jun 1959) ('*ILO Convention 107*') preamble. Also known as the *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*. It is now closed for ratification, total 27 countries ratified it, later 9 countries denounced it and now it applies to 18 countries.

[27] Joshua Cooper, '25 Years of ILO Convention 169' *Cultural Survival* (Web Page, March 2019) <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/25-years-ilo-convention-169>.

[28] *ILO Convention 107* (n 26) arts 8, 10 (criminal justice system), 2 (free consent).

[29] Ibid preamble.

[30] Ibid preamble, arts 2(1), 4

[31] Ibid art 7(2).

[32] Ibid art 12.

[33] *ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No 169)* adopted 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991).

[34] Erin Hanson, 'ILO Convention 169' *Indigenous Foundations* (Web Page) <https://indigenousfoundationsarts.ubc.ca /ilo_convention_169/>.

The *ILO Convention 169* is a legally binding instrument, which holds ratifying states accountable for its actions against recognised Indigenous peoples' rights. Up to the beginning of 2020, only 23 countries have ratified this treaty, although it is remains open for ratification.[35] This revamped Convention respects Indigenous self-determination, their cultures and ways of life and recognises their right to land and natural resources. However, some self-determination rights are limited in the sense that the application of customary practices regarding offences committed by Indigenous members must be compatible with the national legal system and international recognised human rights.[36] It includes provisions relating to areas such as Indigenous employment, education, language, vocational training, health, customary laws and institutions, social security and cross-border cooperation.[37] It also provides for Indigenous consultation and participation in the matters that affect their societies and territories and seeks to overcome discriminatory practices by allowing Indigenous peoples to participate in the decision-making processes regarding development on Indigenous lands.[38] The ratifying governments must 'consult the peoples concerned, through appropriate procedures' and 'establish means by which these peoples can freely participate … at all levels of decision-making' in the case of development that may affect them directly.[39] According to art 7(1):

> The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the land they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.

Further, the consultation undertaken shall be in 'good faith and in a form appropriate to the circumstances'.[40] The government shall consult Indigenous communities in the case of exploration or exploitation of mineral and sub-surface resources and shall provide fair compensations for damages caused by such activities and shall obtain 'free and informed consent' prior to any relocation. [41]

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[35] 'Ratification of C169- Indigenous and Tribal Peoples Convention 1989 (No. 169)' *International Labour Organization* (Web Page) <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314>; Chris Swartz, 'After 30 years, only 23 Countries have ratified Indigenous and Tribal Peoples convention ILO 169' *Cultural Survival* (Web Page, 5 June 2019) <https://www.culturalsurvival.org/news/after-30-years-23-countries-have-ratified-indigenous-and-tribal-peoples-convention-ilo>; see also International Labour Office, '*Handbook for ILO Tripartite Constituents: Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169)*' (International Labour Organization, Geneva, 2013), <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_205225. pdf>.
[36] *ILO Convention 169* (n 33) art 9(1).
[37] Ibid arts 20-23 (employment), art 25 (health care), art 27 (education), art 28 (language), art 22 (vocational training), art 32 (cross boarder co-operation).
[38] Ibid.
[39] Ibid art 6(1).
[40] Ibid art 6(2).
[41] Ibid arts 15(2), 16(2).

However, taking this stance in the upholding of Indigenous self-determination rights has meant that many countries have not signed this Convention because they claim it is incompatible with their sovereignty and governance.[42] The *ILO Convention 169* contains some strong provisions that would protect Indigenous rights in the context of land and resource development, but this Convention does not apply to the USA, Canada or Australia because none of these countries have signed or ratified it. The provisions related to self-determination, consent and their perceived inability to enforce international instruments were some reasons among others given by the USA, Canada and Australia for not ratifying this Convention.[43]

6.4 The United Nations Declaration on the Rights of Indigenous Peoples ('the UNDRIP')

An international instrument that could have significant impact on Indigenous peoples' rights worldwide is the UNDRIP.[44] Adopted by the UN General Assembly in 2007, this instrument affirms that 'Indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different and to be respected as such'.[45] Under the Doctrine, the Europeans considered themselves to be superior to Indigenous peoples and the understanding, embodied in the Doctrine of Superiority, has been denounced by the UNDRIP. According to its preamble:

> [A]ll doctrines, policies and practices based on or advocating superiority of peoples or individual on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust.

The UNDRIP has some provisions that provide rights of redress for injustices suffered by Indigenous peoples, which could serve to address dispossession of their lands as a consequence of the application of the Doctrine. For example, art 28(1) acknowledges that Indigenous peoples have the right to redress or equitable compensation for the 'lands, territories and resources which they have traditionally owned or otherwise occupied or used and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent'.[46]

The seed of the UNDRIP was planted during the 1960s and 1970s, when the Indigenous rights movement gained momentum through the establishment of national and international non-government organisations, including Indigenous peoples' organisations, which shed light on the

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[42] Hanson (n 34).
[43] Catherine J Iorns, 'Australian Ratification of International Labour Organisation Convention No. 169' (1993) 1(1) *Murdoch University Electronic Journal of Law* 1 (Web Page) <classic.austlii.edu.au/au/journals/MurdochUeJiLaw/1993/1.html>.
[44] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/61/295 (2 October 2007, adopted 13 September 2007) ('UNDRIP').
[45] Ibid preamble.
[46] Ibid art 28(1). Article 37(1) also talks about recognition observance and enforcement of treaties, agreements and other constructive agreements.

discrimination experienced by Indigenous peoples and the violations of their human rights.[47] In 1971, Martinez Cobo—a member of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities—was appointed as Special Rapporteur to conduct a comprehensive study and recommend national and international measures to eliminate Indigenous discrimination.[48] The 'Martinez Cobo Study' laid the foundation for the development of the Indigenous international human rights system. Following his study, the initial work of drafting the UNDRIP began in 1982 when the Working Group on Indigenous Population was established under the Economic and Social Council resolution 1982/34, with the mandate 'to review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous peoples' and 'to give attention to the evolution of international standards concerning indigenous rights'.[49] After a time-consuming consultation process and informal negotiations with nation-states, the final draft was submitted to the Human Rights Council. The draft resolution (HRC Resolution 6/36) was adopted and the Expert Mechanism on the Rights of Indigenous Peoples was established in 2007 to provide thematic advice to the Human Rights Council.[50] Ultimately, the UNDRIP was adopted on 13 September 2007, which indicated that the international community was ready to protect the rights of Indigenous peoples. During its adoption, 144 countries voted in favour, 11 abstained and 4 countries voted against it—Australia, Canada, New Zealand and the USA.[51] Later, the four opposing countries endorsed it.

While draft and formation work on the UNDRIP was underway, the UN and its agencies adopted other measures to monitor, report and address Indigenous issues. For example, the UNPFII was established in 2000 as an advisory body to the Economic and Social Council (ECOSOC resolution 2000/22) to discuss and provide expert advice and recommendations to the Council and other programs and agencies regarding the various issues facing Indigenous peoples. This 16-member body was established to be an independent expert body with a mandate to work on Indigenous economic and social development, cultures, environment, education, health and human rights. Later, the UNPFII was given the role 'to promote respect for and full application of the provisions' of the UNDRIP and to follow up its effectiveness.[52] While working on the

[47] Gargett (n 25) 4.
[48] Ibid.
[49] Secretariat of the Working on Indigenous Populations, 'Mandate of the Working Group on Indigenous Populations' *Office of the High Commissioner for Human Rights* (Web Page) <https://www.ohchr.org/en/Issues/IPeoples/Pages/MandateWGIP.aspx>.
[50] Department of Economic and Social Affairs, 'Indigenous Peoples at the UN' *United Nations* (Web Page) <https://www.un.org/development/desa/indigenouspeoples/about-us.html>.
[51] Department of Economic and Social Affairs, 'United Nations Declaration on the Rights of Indigenous Peoples' United Nations (Web Page) <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.
[52] Department of Economic and Social Affairs (n 50), UNDRIP (n 44) art 42.

draft, the Commission on Human Rights also established the Special Rapporteur on the Rights of Indigenous Peoples (Commission on Human Rights resolution 2001/57) in 2001 with the mandate to 'gather, request, receive and exchange information and communications' from various sources on the violation of human rights and fundamental freedoms of Indigenous peoples.[53] The Special Rapporteur works to promote good practices to implement international standards through new laws and government programs and through agreements between governments and Indigenous peoples.[54] The Special Rapporteur can also report on specific violations of the rights of Indigenous peoples through communications with government.[55] The UNPFII, the Special Rapporteur and the Expert Mechanism on the Rights of Indigenous Peoples meet annually to discuss, share and coordinate their activities.[56]

The UNDRIP highlights most of the significant issues related to Indigenous peoples. It begins by acknowledging the historic injustices suffered by Indigenous peoples due to colonisation and dispossession from their lands, territories and resources.[57] It also recognises the need to respect and promote the inherent rights of Indigenous peoples related to their political, economic, cultural, spiritual traditions and rights related to their lands and territories.[58] It emphasises that 'Indigenous peoples have rights to self-determination' and have the right to 'autonomy and self-government' regarding their internal and local affairs.[59] The Indigenous rights codified in the UNDRIP can be grouped as: (1) the right to self-determination; (2) the rights to life, integrity and security; (3) the rights to cultural, religious, spiritual and linguistic identity; (4) the rights to education and public information; (5) the rights to participatory rights; (6) the rights to land and resources; and (7) the right to exercise self-determination.[60] Most importantly in the context of this thesis, it includes provisions to promote Indigenous peoples' control over development on their lands. Their control over land and resource development would promote development according to Indigenous peoples' needs and aspirations and enable them to 'maintain and strengthen their institutions, cultures and traditions'.[61] The UNDRIP provides clear direction to nation-states regarding land and resource development on Indigenous lands by highlighting the importance of Indigenous control over their own lands.

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[53] Gargett (n 25) 5, 136.
[54] 'Special Rapporteur on the Rights of Indigenous Peoples' *United Nations Human Rights Office of the High Commissioner* (Web Page) <https://www.ohchr.org/en/issues/ipeoples/srindigenouspeoples/pages/sripeoplesindex.aspx>.
[55] Ibid.
[56] Gargett (n 25) 5.
[57] UNDRIP (n 44) preamble.
[58] Ibid art 5.
[59] Ibid arts 3, 4.
[60] Megan Davis, 'To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 *Australian International Law Journal* 17, 26.
[61] Ibid.

6.4.1 The Right of Self-determination under the UNDRIP

> [A]t the heart of all the violations of our human rights has been the failure to respect our integrity, and the insistence in speaking for us, defining our needs and controlling our lives. Self-determination is the river in which all other rights swim.[62]

The right of self-determination can be described as the 'mother of all group rights'.[63] According to the UNDRIP, the right of self-determination gives Indigenous peoples the right to 'freely determine their political status and freely pursue their economic, social and cultural development',[64] and accordingly 'the right to autonomy or self-government in matters relating to their internal and local affairs'.[65] The operative word is 'internal', which relates to the exercise of internal self-determination as opposed to external self-determination. The current understanding of internal self-determination is based on Indigenous peoples' 'experiences of imperialism and colonialism', but is also limited by these experiences.[66] Indigenous peoples' rights to lands, natural resources and respect for cultural integrity form a part of the right to self-determination.[67] This is a pre-existing right and is consistent with existing human rights law. In a general sense, internal self-determination entitles people to 'choose their political allegiance, to influence the political order in which they live and to preserve their cultural, ethnic, historical or territorial identity'.[68] This provides Indigenous peoples with 'free choice', although that does not necessarily include 'the rights to secede from the State in which they may live'.[69] In this respect, the scope of this right is similar to how it applies to non-Indigenous peoples.

Other international instruments such as the ICCPR and ICESCR have similar provisions related to self-determination. If self-determination is compared under these two instruments with the self-determination right under the UNDRIP, the provisions are identical. The three articles (art 1 of the ICCPR and ICESCR and art 3 of UNDRIP) have the same content, except the term 'all peoples' in the ICCPR and ICESCR was replaced by 'Indigenous peoples' in the UNDRIP. Therefore, this is not a right that is special to Indigenous peoples; it is the same right of self-determination that belongs to all people. In this sense, the ICCPR and ICESCR could achieve

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[62] Ravi De Costa, *A Higher Authority: Indigenous Transnationalism and Australia* (UNSW Press, 2006) 137, quoting Mick Dodson.
[63] S James Anaya, 'Superpower Attitudes Toward Indigenous Peoples and Group Rights' (1999) 93 *American Society of International Law Proceedings* 251, 257.
[64] UNDRIP (n 44) art 3.
[65] Ibid art 4.
[66] Costa (n 62) 139.
[67] Anna Cowan, 'UNDRIP and the Intervention: Indigenous Self-Determination, Participation and Racial Discrimination in the Northern Territory of Australia' (2013) 22(2) *Pacific Rim Law & Policy Journal* 247, 257.
[68] Erica-Irene Daes, 'Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples' UN Doc E/CN.4/Sub.2/1993/26/Add.1 (1993) [19]; Also quoted in Cowan (n 67) 258.
[69] Costa (n 62) 138, quoting Martinez-Cobo.

more for Indigenous peoples than the UNDRIP because they are binding treaties, whereas the UNDRIP is non-binding and 'aspirational'. A broader aspect of the UNDRIP seeks to achieve equality for Indigenous peoples with the acknowledgement of their rights to self-determination, which includes their unique cultural and distinct communal rights.

The UNDRIP acknowledges many rights of Indigenous peoples, including the right to self-determination, but these rights are subject to art 46(1). In the absence of this article, most countries would have never ratified this declaration. While art 46(1) ensures sovereignty and the independent status of nation-states, it limits the extent of Indigenous peoples right to self-determination:

> Nothing in this Declaration may be interpreted as implying for any State, people. group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent state.[70]

This article makes it clear that any kind of external self-determination is out of the question for Indigenous peoples because external self-determination would allow Indigenous peoples the right to secession and as a result, the 'territorial integrity or political unity' of a sovereign and independent state would come under challenge. However, this article also provides state parties arbitrary power to disregard claims made by Indigenous peoples that are contrary to the interests of non-Indigenous peoples as being a threat to state sovereignty. For example, the governments in the USA and Australia have a tendency to ignore Indigenous rights and for them, art 46(1) is the perfect tool to ignore Indigenous self-determination. As Indigenous critical scholar, Irene Watson, put it: 'the UNDRIP enables business as usual, the power of states to do as they wish with our lands, resources, lives and laws'.[71]

For generations, the Doctrine enabled the colonial powers to disregard the rights of Indigenous peoples and deny their basic human rights. Indigenous peoples were deprived of their lands and their life-sustaining resources, their political and cultural institutions were suppressed, the integrity of their cultures and comprehensiveness of their societies were damaged.[72] The effects have been devastating, with Indigenous peoples often found on 'the lowest rung of the socio-economic ladder and they exist at the margins of power'.[73] Therefore, the goal of the UNDRIP is to remediate the negative effects of colonial intervention. However, this must be compatible

[70] UNDRIP (n 44) art 46(1).
[71] Watson (n 3) 148.
[72] S James Anaya, 'The Evolution of the Concept of Indigenous Peoples and Its Contemporary Dimensions' in Solomon Dresso (ed), *Perspective on the Rights of Minorities and Indigenous Peoples in Africa* (Pretoria University Law Press, 2010) 39-41.
[73] Ibid 38.

with the interests of the state; otherwise the state can invoke its right under art 46(1). The UNDRIP provides scope for Indigenous political decision-making within the scope of state power. Ironically, the spirit of the Doctrine lives on in art 46(1) because it protects the political integrity of nation-states that were established through the same principle. If nation-states do not respect Indigenous peoples and continuously ignore their rights and advocate their assimilation through national policies, there is nothing in the UNDRIP that can compel them to follow its provisions. Many scholars have considered the extent of Indigenous self-government and in most cases, have concluded that Indigenous peoples have rights to self-determination that cannot interfere with the authority and independent status of the state. According to Irene Watson, an international Indigenous instrument like UNDRIP is 'no more than a pragmatic and empty gesture, which has altered nothing in the world of First Nations and colonial state relations'.[74] These are important observations to consider when assessing the potential of the UNDRIP to promote the rights of Indigenous peoples. However, despite its limitations, the UNDRIP promotes the right of self-determination as an international customary norm, which had previously been ignored by the colonial settlers. In this regard, it has been an important step. As James Anaya, former Special Rapporteur on the Rights of Indigenous Peoples observed, self-determination and other human rights principles have the potential 'to build a future in which Indigenous peoples may survive and develop as distinct communities in coexistence with others'.[75]

6.4.2 Free, Prior and Informed Consent

The UNDRIP has more than 20 provisions regarding Indigenous peoples' rights to participate in decision-making process and provides for nation-states to 'consult and cooperate' with Indigenous peoples and accommodate their views in the development of Indigenous lands and resources. It is well established that Indigenous land acquisition and subsequent relocation occurs due to land and resource developments on Indigenous lands by governments and corporations working in consort for the benefit of non-Indigenous populations. However, according to the UNDRIP, no such development and relocation shall take place 'without the free, prior and informed consent of the Indigenous peoples concerned' and when development takes place with their consent, there must be 'just and fair compensation and, where possible, with the option of return'.[76] States must also 'consult and cooperate in good faith' to obtain Indigenous peoples' free and informed consent before approving development projects that affect their land, territories and resources, and special attention must be given to 'development, utilization or

[74] Watson (n 3) 4.
[75] Anaya, 'The Evolution of the Concept' (n 72) 38.
[76] UNDRIP (n 44) art 10.

exploitation of mineral, water or other resources'.[77] Article 10 of the UNDRIP specifically provides that 'Indigenous peoples shall not be forcibly removed from their lands or territories'. Further, it is up to Indigenous peoples to determine the priorities and strategies for the development of their lands, territories or other resources.[78] States must also provide measures of redress and mechanisms against actions that are intended to dispossess Indigenous peoples' 'land, territories and resources'.[79] States shall also provide effective mechanisms against forced population transfer, forced assimilation and integration.[80]

The development projects examined in this thesis (see Chapters 4 and 5) were clear violations of the rights contained in UNDRIP because there was no 'free, prior and informed consent' by the Indigenous peoples affected by these projects. Although in the case of Adani there was consent from a portion of native title holders, there were other native title holders who had no other alternatives but the approve the ILUA because the law, authority and system were against them and they could lose everything if they failed to consent. Backed by law, each state exercised its supreme authority derived from the Doctrine to force Indigenous peoples to accept the consequences of these projects. By displacing affected Indigenous communities and violating their lands, these projects form part of a larger and longer process, which has seen Indigenous cultural institutions undermined, their rights to belong to Indigenous communities according to their customs infringed and has made it difficult to practice and revitalise their traditions and customs and to transmit the same to future generations.[81] The main goal of these projects was economic development, although in the form of the capitalist market economy, which in the current global neoliberal age is another form of assimilation of Indigenous peoples. The message is that the economic development of their lands will promote economic prosperity and be the answer to their social disadvantage. However, not mentioned in the rhetoric of development is that if Indigenous peoples are socioeconomically disadvantaged in the current market economy it is because of the effects of colonisation. In this way, the proponents of development (e.g., state authorities and corporations) do not mention reparations for the effects of past injustices because this will come at a cost to them. However, in the pursuit of development on Indigenous lands, injustices continue. The development process is a direct violation of Indigenous peoples 'rights not be subjected to forced assimilation or destruction of their culture'.[82] Once displaced, it becomes difficult for Indigenous peoples to 'maintain, control, protect and develop' their cultural

[77] Ibid arts 19, 32(2).
[78] Ibid art 32(1).
[79] Ibid arts 8(2)(b), 32(3).
[80] Ibid arts 8(2)(c), 8(2)(d).
[81] Ibid arts 5, 9, 11.
[82] Ibid art 8(1).

heritage and traditional knowledge in a different environment where they have no connection to the land.[83]

6.4.3 The Legal Standing of the UNDRIP

The UNDRIP has provided a unified approach towards Indigenous rights recognition. The contents of the UNDRIP are not new but are a codified version of existing Indigenous rights. Founded upon various sources of international human rights and based on *ILO Convention 169* and other relevant instruments and processes, the UNDRIP 'represents an authoritative common understanding'.[84] According to Anaya:

> The Declaration does not attempt to bestow Indigenous peoples with a set of special or new human rights, but rather provides a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of Indigenous peoples.[85]

However, the UNDRIP is non-binding and has only 'aspirational' and 'persuasive' attributes.[86] Unlike *ILO Convention 169*, the UNDRIP is soft international law, which is not legally binding and cannot force governments to follow its provisions. It seeks 'consultation and cooperation' between Indigenous peoples and states to take legislative measures to achieve its stipulated goals.[87] As a result, states need to be proactive and ready to listen and negotiate with Indigenous peoples to achieve Indigenous rights through legislation. According to Anaya:

> [T]o be fully operative, States must pursue a range of affirmative, special measures that engage the various institutions of law-making and public administration. This involves a complex process of legal and institutional reform, judicial action, specific policies, and special reparations procedures. It is a process that requires States' full political engagement and financial commitment, and which is not free from obstacles and difficulties of all sorts.[88]

Nevertheless, the provisions of the UNDRIP could become incorporated as customary international law, which is a source of state laws. Many prefer that it remain a soft law because any move towards a binding international treaty may not attract enough signatures to become an effective international instrument, such as happened in the case of the *ILO Convention 169*.[89] According to Barelli:

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[83] Ibid art 31.
[84] S James Anaya, Special Rapporteur, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development*, UN Doc A/HRC/9/9 (11 August 2008) [85].
[85] Ibid [86].
[86] Davis (n 60) 36.
[87] UNDRIP (n 44) art 38.
[88] Anaya, '*Promotion and Protection*' (n 84) [87].
[89] Davis (n 60) 38-9.

> It is evident that a soft law document is to be preferred to no document at all and, similarly, a soft law document represents a better outcome than a treaty whose value is substantially impaired by a poor number of ratifications, or by rather ambiguous or diluted provisions.[90]

Moreover, because of its soft law status, nation-states allowed more non-state actors like Indigenous groups to participate in the 'crucial stages of negotiations and the conclusion of the text'.[91] It is believed that the content of the UNDRIP would have been significantly 'less progressive and challenging' if Indigenous groups were excluded from the process.[92] Supported by most countries, the UNDRIP involved direct participation from large number of Indigenous groups and was one of the most discussed and negotiated texts in world history.[93] Barelli claims that the soft law nature of UNDRIP does not prevent it from having 'important legal effect' because its contents are recognised under the international human rights regime and it represents the first step 'toward the establishment of a future treaty'.[94] Increasingly, some aspects of the UNDRIP form part of customary international law.[95] Conversely, many legal scholars believe that the soft law approach allows states to interpret the UNDRIP 'within the bars of the state', which benefits the state.[96] According to Kathy Bowrey, 'soft international law maintains the state monopoly on violence by confining the interpretation of the UNDRIP within the bars of the state'. The soft law approach indicates:

> A degree of indeterminacy as to the authority of any Indigenous interpretative community that seeks to assert rights under the instrument. This allows the state to maintain itself as the primary authority over its legal order, reducing Indigenous difference to a complaint about the particular content of laws and policies, rather than about the exercise of power itself.[97]

The effectiveness of the UNDRIP depends on the application of its provisions by nation-states. To this end, it would be most effectively used to replace existing laws, policies and practices that negatively impact on Indigenous peoples with new laws and policies that promote the rights of Indigenous peoples. The UNDRIP has mechanisms to oversee its application and effectiveness and along with nation-states, this responsibility extends to numerous entities, including 'the UN, its bodies, including the Permanent Forum on Indigenous Issues and specialized agencies'.[98] The

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[90] Mauro Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58(4) *International and Comparative Law Quarterly* 957, 964; see generally Erica-Irene A Daes, *Indigenous Peoples: Keepers of Our Past, Custodians of Our Future* (International Work Group for Indigenous Affairs, Copenhagen, 2008).
[91] Barelli (n 90) 965.
[92] Ibid 966.
[93] Gargett (n 25) 4; See generally Barelli (n 90) 964-6.
[94] See Barelli (n 90) 966-7.
[95] See Gargett (n 25) 3-4.
[96] Kathy Bowrey, 'Law and its confinement: Reflections on Trevor Nickolls Brush with the Lore' (2011) 20 *Griffith Law Review* 729, 744.
[97] Ibid.
[98] UNDRIP (n 44) art 42.

UNPFII is the main body that promotes an integrated approach towards achieving the goals of the UNDRIP and it also monitors compliance with its implementation. Besides this forum, the Special Rapporteur is mandated to make recommendations regarding Indigenous issues by visiting countries and meeting with Indigenous peoples, government officials and civil societies. These reports are important because they highlight the actions or inactions of governments and include recommendations to advance and promote the rights of Indigenous peoples.

To discharge its duties, the UNPFII has a mandate to visit nations where the rights of Indigenous peoples are in danger from resource development projects or other state actions. The Chairman of the Standing Rock Sioux Tribe, David Archambault, invited the UNPFII to visit communities in North Dakota to experience firsthand the gross violation of human rights of Indigenous peoples caused by the construction of the DAPL and subsequent brutal actions of the government. Chief Edward John, Expert Member of the UNPFII along with UN Special Rapporteur on Human Rights and Hazardous Substances and Wastes, representatives from Amnesty International and the International Indian Treaty Council, visited the communities in North Dakota from 29–31 October 2016.[99] A report compiled by Chief Edward John highlighted that the pipeline would 'adversely impact the Standing Rock Sioux and their waters specifically, as well as cultural, spiritual, sacred and ancient village sites on their lands in their territory' and violate the Indigenous land and constitutional rights recognised through treaties, agreements and other constructive arrangements.[100] It was mentioned to him by Chairman Archambault that 380 cultural and sacred sites were already destroyed by the pipeline. According to a Sioux Elder and cultural leader, 'they want to take our footprints off the land, so they could take us off the land'.[101]

In his report, Chief Edward John stressed that the original pipeline was re-routed to save the water sources of non-Indigenous peoples, but it did not take Indigenous rights to water and land into consideration. The lives of resident Indigenous peoples were constantly disrupted by the drones, airplanes, helicopters and on-the-ground surveillance. The peaceful protest and prayer by the 'water protectors' near the Sacred Stone Spirit camp was tackled by the local and neighbouring state police, national guards and DAPL's private security guards in a heavy-handed manner, which resulted in 412 arrests.[102] There were gross violations of human rights through physical and mental trauma caused by the security forces and their actions have 'directly

[99] Edward John, Expert Member of the United Nations Permanent Forum on Indigenous Issues, *Firsthand observations of conditions surrounding the Dakota Access Pipeline (North Dakota, USA)* (Report and Statement, 1 November 2016).
[100] Ibid 2.
[101] Ibid 3.
[102] Ibid 6.

contributed to a "war zone" atmosphere and intensified levels of scrutiny'.[103] Considering the situation of the Indigenous peoples affected by the DAPL and responses of the US government, Chief Edward John concluded that 'the United States is far from alignment with the Indigenous human rights affirmed in the UN Declaration on the Rights of Indigenous Peoples'.[104] He noted that the US government and its political subdivisions at state and local levels violated numerous provisions of the ICCPR. He requested the respective Special Rapporteurs to raise this matter with the US government to take 'concrete action on an urgent basis'.[105] He further recommended the UN Committee on Elimination of Racial Discrimination to undertake 'Early Warning and Urgent Actions' on this matter.

Another report from the Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, highlighted the shortcomings of the US policy of consultation regarding the construction of the DAPL.[106] The US government did not engage in meaningful consultation and failed to adhere to the 'consult and cooperate in good faith' and 'free, prior and informed consent' provisions of the UNDRIP.[107] This report highlighted that the non-violent and peaceful protest to uphold the rights to land, water and tribal sovereignty 'has been a militarized, at times violent, escalation of force by local law enforcement and private security forces'.[108] She expressed her deep concerns regarding the Presidential memorandum of 24 January 2017, which resulted in granting the necessary approval to begin construction of the DAPL and the Notice of Termination of the 'Intent to Prepare an Environmental Impact Statement'.[109] She recommended that the US government incorporate the UNDRIP into domestic law through statutes and regulations,[110] 'reinstate the Environmental Impact Statement process for the Dakota Access Pipeline, in close cooperation with tribes, [and] to fully consider the environmental, economic, social and cultural impacts to Indigenous peoples'.[111] Unfortunately, recent developments show that the USA has disregarded these reports and completed the construction of the pipeline.

6.4.4 The Endorsement of the UNDRIP by the USA, Canada and Australia

Statements made in Australia, Canada and USA at the time they endorsed the UNDRIP provide valuable insights into their attitudes towards protecting the rights of Indigenous peoples. Australia endorsed the UNDRIP on 3 April 2009 on the basis that the document was non-binding

[103] Ibid 4.
[104] Ibid 7.
[105] Ibid.
[106] *Report of the Special Rapporteur on the Rights of Indigenous Peoples on her Mission to the United States of America*, UN Doc A/HRC/36/46/Add.1 (9 August 2017).
[107] Ibid [25]-[26], [63]-[74].
[108] Ibid [72].
[109] Ibid [74].
[110] Ibid [86 (d)], [87].
[111] Ibid [88 (g)].

and did not affect existing Australian laws, but rather it provided 'important international principles for nations to aspire to' and it would help to build understanding and trust between the Indigenous and non-Indigenous peoples.[112] Canada in its 'Statement of Support' dated 12 November 2010, noted that the UNDRIP was non-legally binding and that it did not 'reflect customary international law nor change Canadian laws'.[113] Canada had concerns regarding three specific areas: the provisions on 'lands, territories and resources', the provisions on 'free, prior and informed consent when used as veto' and 'dissatisfaction with the process'.[114] Canada also made the point that it was up to the Canadian government to interpret the UNDRIP in a manner consistent with their 'Constitution and legal framework'. Canada reserved its right to interpret the UNDRIP as it deemed appropriate.[115] Following Australia and Canada, the USA endorsed the UNDRIP on 15 December 2010 on the understanding that the UNDRIP had moral and political force but was not legally binding and was not a statement of current international law.[116] In the USA, it was treated as aspirational for improving relations between Indigenous peoples and the USA within the structure of the US *Constitution*, laws and international obligations.[117] The USA, Canada and Australia agreed that the UNDRIP was not legally binding, while the USA and Canada were also evidently of the view that the UNDRIP did not form a part of customary international law.[118] It is also significant that the three counties endorsed the UNDRIP with aspirations to adhere to international norms and principles regarding the rights of Indigenous peoples.[119]

Now that the USA, Canada and Australia have endorsed the UNDRIP, how have they responded in their domestic laws and policies to acknowledge and protect Indigenous rights? The Canadian response was to introduce Bill C-262 (Private Member's Bill) to enact the UNDRIP, which requires the Government of Canada to take all measures necessary to ensure that the laws of Canada are in harmony with the UNDRIP.[120] This bill was introduced by Romeo Saganash

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[112] Jenny Macklin, 'Federal Government Formally Endorses the Declaration on the Rights of Indigenous Peoples' (2009) 7(11) *Indigenous Law Bulletin* 6 (Web Page) <http://www5.austlii.edu.au/au/journals/IndigLawB/2009/10.html>.

[113] 'Canada's Statement of Support on the United Nations Declaration on the Rights on Indigenous peoples' *Indigenous and Northern Affairs, Canada* (Web Page, 12 November 2010) <https://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>.

[114] Fromherz (n 14) 1345.

[115] Ibid.

[116] 'Announcement of US Support for the United Nations Declaration on the Rights of Indigenous Peoples' *US Department of State* (Web Page, 12 January 2011) <https://2009-2017.state.gov/s/srgia/154553.htm>.

[117] Ibid.

[118] See Kevin Crow, 'Does UNDRIP Matter: Indian Law in the United States & the International Right to Self-Determination' (2014) 13 *Hibernian Law Journal* 119.

[119] Ibid.

[120] Justin Brake, 'Let us rise with more energy: Saganash responds to Senate Death of C-262 as Liberals promise, again to legislate UNDRIP' *APTN National News* (Web Page, 24 June 2019) <https://aptnnews.ca/2019/06/24/let-us-rise-with-more-energy-saganash-responds-to-senate-death-of-c-262-as-liberals-promise-again-to-legislate-undrip/>

(Member of House of Commons) in 2016 and twice passed House of Commons, but failed in the Senate in June 2019.[121] Although it did not become law, the Trudeau government has promised to move forward with propose legislation to make it law by the end of 2020.[122] While the Canadian government has expressed a positive attitude towards enacting the legislation, by contrast, the governments in the USA and Australia are yet to take any such measures. The developments in Canada can be explained by the fact that in the TRC's 94 Calls to Action contained in its 2012 report, the TRC called upon the federal, provincial, territorial and municipal governments to fully adopt and implement the UNDRIP and to develop a 'national action plan, strategies and other concrete measures' to achieve the goals under the UNDRIP.[123] However, as developments in Canada reveal, the process is going through hurdles and legislation to implement the UNDRIP will only be effective once Indigenous peoples in Canada can fully exercise their right of self-determination and decide what kinds of development they want on their lands. Considering the example of Site-C dam, it seems they are far from achieving this goal. It is inefficacious to have international instruments that uphold the rights of Indigenous peoples if nation-states do not adhere to them. In the absence of effective implementation mechanisms, it is unlikely that nation-states would adopt such measures to give Indigenous communities self-determination powers that would enable them to reject the resource development plans of government.

6.5 The International Convention on the Elimination of All Forms of Racial Discrimination

There are two approaches whereby Indigenous rights may be protected at the international level. The first is a specific approach, which is dedicated to the protection of Indigenous rights and includes the ILO Conventions and the UNDRIP.[124] The second is a universal approach based on universal human rights standards, which apply to all human beings, including Indigenous peoples.[125] Of these universal international instruments, the one that has achieved most for Indigenous peoples worldwide is the International Convention on the Elimination of All Forms

[121] 'Bill C-262 (Historical)' *Open Parliament* (Web Page) <https://openparliament.ca/bills/42-1/C-262/>.
[122] Jorge Barrera, 'Trudeau government moving forward on UNDRIP legislation, says minister' *CBC News* (Web Page, 4 December 2019) <https://www.cbc.ca/news/indigenous/trudeau-undrip-bill-1.5383755>.
[123] TRC Calls to Action no 43 and 44. The TRC also recommended other social, educational, professional and government departments to adopt the provisions of the Declaration, Calls to Action 24 (medical and nurse), 27 (lawyers), 28 (law students), 42 (Aboriginal justice system), 43-44 (the governments), 46(iii) (parties to Residential Schools Settlement Agreement), 48 (faith groups), 57 (public servants), 67 (museums and archives), 86 (media) and 92 (corporate sectors).
[124] Jeremie Gilbert, 'CERD's Contribution to the Development of the Rights of Indigenous Peoples under International Law' in David Keane and Annapuran Waughray (eds), *Fifty Years of the International convention on the Elimination of All Forms of Racial Discrimination: A Living Instrument* (Manchester University Press, 2017) 91-2.
[125] Ibid.

of Racial Discrimination ('ICERD').[126] Consisting of 18 experts, the Committee on the Elimination of Racial Discrimination ('CERD'), which was established under the ICERD, is focused on the rights of Indigenous peoples and acknowledges that 'the situation of Indigenous peoples has always been a matter of close attention and concern … Discrimination against Indigenous peoples falls under the scope of the Convention and that all appropriate means must be taken to combat and eliminate such discrimination'.[127] The USA, Canada and Australia are ratified parties to this Convention and they have each adopted national legislation to combat racial discrimination.[128]

The Doctrine supports the racist assumption that Indigenous peoples are inferior to European settlers. This Doctrine of Superiority was once again denounced by ICERD, stating that '[s]tates Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin'.[129] If states are 'organisations', the USA, Canada and Australia should be condemned for using the Doctrine to assert their dominance over Indigenous peoples based on understandings of themselves as superior. Although the ICERD does not contain specific provisions regarding the rights of Indigenous peoples, it has provisions that 'guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin … to own property' and 'the right to inherit', including the right to religion.[130] Based on these rights, the CERD in its General Recommendations on Indigenous peoples called upon state parties to:

> [R]ecognize and protect the rights of indigenous peoples to own, develop and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.[131]

Further, the CERD called on state parties to take steps to return those lands and territories that were taken without their consent. Where it is not possible to return the lands for 'factual reasons',

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[126] *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('ICERD').
[127] Ibid art 8; Committee on the Elimination of Racial Discrimination ('CERD'), General Recommendations XXIII: Indigenous Peoples, (General comments) CERD, UN Doc A/52/18, annex V. [1]; Committee on Elimination of Racial Discrimination, general recommendation XXIII (51), UN DocCERD/C/51/Misc.13/Rev.4 (1997).
[128] Canada (signed 4 October 1966 and ratified 14 October 1970), Australia (signed 13 October 1966 and ratified 30 September 1975) and the USA (signed 28 September 1966 and ratified 21 October 1994). The USA already had similar legislation that banned racial discrimination the *Civil Rights Act 1964*, Australia followed the ICERD by adopting the *Racial Discrimination Act 1975* and Canada followed by adopting the *Canadian Human Rights Act 1977*.
[129] ICERD (n 126) art 4.
[130] Ibid arts 5, 5(d)(v), 5(d)(vi), 5(d)(vii).
[131] General Recommendations XXIII: Indigenous Peoples, (General comments) CERD, UN Doc A/52/18, annex V. para 5.

Indigenous peoples should receive 'just, fair and prompt compensation'.[132] This is a systematic approach by the CERD, which considers non-recognition of Indigenous land rights as racial discrimination.[133]

The CERD has also emphasised Indigenous peoples' rights to effective participation and consent regarding development projects on their lands. It asserted that 'no decision directly relating to their rights and interests [should be] taken without their informed consent'.[134] In its latest reports, the CERD expressed its concerns about non-compliance with Indigenous peoples' right to 'free, prior and informed consent' by state parties, including the USA, Canada and Australia. In the 'Concluding Observations on the combined seventh to ninth periodic report of the United States of America', the CERD observed that the USA failed to demonstrate any concrete progress 'to guarantee, in law and practice, the free, prior and informed consent of indigenous peoples in policy-making and decisions that affect them'.[135] The CERD's recommendation to 'adopt concrete measures to effectively protect the sacred sites of indigenous peoples in the context of the State party's development … and exploitation of natural resources'. were ignored by the government.[136] This is evident from the decision of the government regarding the DAPL, which destroyed Indigenous lands, including their sacred sites, graveyards and water sources.

The Concluding Observations on Canada specifically expressed concerns about the permission given to commence the Site-C dam.[137] It acknowledged Indigenous peoples' concerns that the project would result in irreversible damage to their lands and destroy medicinal plants, wildlife, sacred lands and gravesites and reiterated the finding of the Joint Review Panel ('JRP') that the impact of the dam on Indigenous peoples would be 'permanent, extensive and irreversible'.[138] Issuing construction permits allowed damage to Indigenous lands and the only remedy left to Indigenous peoples was 'time-consuming and ineffective litigation'.[139] The CERD also indicated that the Government of Canada failed to adhere to the Indigenous peoples' rights to 'free, prior and informed consent' which resulted in breaches of treaty obligations and international human rights laws.[140] The CERD recommended that the Canadian government:

[132] Ibid. The term 'factual reasons' was not defined in this document.
[133] Gilbert (n 124) 97-98.
[134] General Recommendations XXIII (n 131) [4(d)].
[135] *Concluding observations on the combined seventh to ninth periodic report of the United States of America*, UN Doc CERD/C/USA/CO/7-9 (25 September 2014).
[136] Ibid [24(c)].
[137] *Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada*, UN Doc CERD/C/CAN/CO/21-23 (13 September 2017).
[138] Ibid [19(d)].
[139] Ibid [19(b)].
[140] Ibid [19(a)], [19(c)].

> Immediately suspend all permits and approvals for the construction of the Site-C dam. Conduct a full review in collaboration with indigenous peoples of the violations of the right to free, prior and informed consent, of treaty obligations and of international human rights law from the building of this dam and identify alternatives to irreversible destruction of indigenous lands and subsistence, which will be caused by this project.[141]

Nevertheless, the Government of Canada decided to ignore this recommendation and proceeded with the construction of the dam despite protests from affected Indigenous communities and contrary to the provisions of the international human rights regime. It is the superiority of government, gained through the Doctrine, that enables the rights of Indigenous peoples and the recommendations of international legal institutions to be ignored.

Similar to the USA and Canada, the CERD in its 'Concluding Observations on the eighteenth to twentieth periodic reports of Australia' expressed concerns about the 'extractive and development' projects carried out on the lands owned or traditionally used by Indigenous peoples without their 'prior free and informed consent'.[142] It recommended that the federal government 'move urgently' to protect Indigenous peoples' land rights. In a separate letter to the government dated 14 December 2018, the CERD expressed its serious concerns about the prospect of Adani coal mine and rail project and its impact on the W&J peoples.[143] The Chair of the CERD expressed his concerns regarding the allegations that the ILUA for the mine and the rail project was not conducted in good faith. Citing the *McGlade* decision, he raised the issue that the mine and rail project did not have the 'free, prior and informed consent' of all eligible Indigenous representatives and the enactment of the *Native Title Amendment (Indigenous Land Use Agreement) Act 2017* (Cth) by the federal government directly contradicted the *McGlade* case.[144] The CERD requested the government to suspend the project until free, prior and informed consent was obtained from all Indigenous land owners and encouraged the government to consider the Expert Mechanism on the Rights of Indigenous Peoples to provide technical advice to facilitate dialogue between the state, Indigenous peoples and the private sectors.[145] The CERD also requested the government to submit a response before 8 April 2019. The response of the Federal Resources Minister Matt Canavan demonstrated how nation-states can completely disregard the international system through assertions of state sovereignty. According to him, it was the UN that 'clearly does not understand' the matter and should 'respect the Australian legal

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[141] Ibid [20(e)].
[142] *Concluding Observations on the Eighteenth to Twentieth Periodic Reports of Australia,* UN Doc CERD/C/AUS/CO/18-20 (26 December 2017).
[143] UN Human Rights Office of the High Commissioner, *Communication from Chair of the Committee on the Elimination of Racial Discrimination to Permanent Representative of Australia to the United Nations office*, UN Doc CERD/EWUAP/Australia/2018/JP/ks (14 December 2018).
[144] Ibid 1; *McGlade v Native Title Registrar* (2017) FCAFC 101 ('*McGlade*').
[145] UN Human Rights Office of the High Commissioner (n 143) 2.

system'.[146] Indeed, in flagrant disregard of the CERD's request, the federal government gave its final environmental approval to the mine on 9 April 2019.[147]

The CERD, through its proceedings and reporting mechanisms, has signalled that infringements of Indigenous rights constitute racial discrimination. Within the constraints of international law, the CERD appears to establish Indigenous rights within the broader international human rights framework by raising 'concerns about the treatment of indigenous peoples in all regions of the world where people self-identify as such'.[148] Unlike the UNDRIP, the ICERD has achieved much more for Indigenous peoples around the world because it is a legally binding treaty. In fact, the *Mabo [No 2]* decision would not be possible if *Mabo [No 1]* was unsuccessful.[149] *Mabo[No 1]* found that the *Queensland Coast Islands Declaratory Act 1985* (Qld), which was enacted to retrospectively adjoin the Torres Strait Islands to Queensland and abolish any existing native title in Queensland, was racially discriminatory and contrary to the *Racial Discrimination Act 1975* (Cth) ('the *RDA*'). Under s 109 of the Australian Constitution, any state legislation that is inconsistent with federal legislation is unconstitutional. The *RDA* had been enacted by the federal government to give effect to its obligation under the ICERD. The CERD now displays great interest and routinely addresses Indigenous rights and 'does so with a degree of detail that far surpasses the other UN treaty bodies responsible for monitoring the implementation of human rights instruments'.[150]

The ICERD is also endorsed by the Inter-American System for the protection of human rights. Consisting of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights created by the Organisation of American States the Inter-American System works for the protection and promotion of human rights in the Americas.[151] In deciding individual or collective human rights violations, the Inter-American System often cites the

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[146] Josh Robertson, 'Adani coal mine should be suspended, UN says, until all traditional owners support the project' *ABC News* (Web Page, 25 January 2019) <https://www.abc.net.au/news/2019-01-25/adani-mine-should-be-suspended-un-traditional-owners/10686132>; Wangan & Jagalingou Family Council, 'Senator Canavan's appropriation of our peoples' struggle is 'the height of disrespect and arrogance'' (Media release, 12 February 2019).
[147] Wangan & Jagalingou Family Council, 'Federal Coalition Govt corrupts Adani water approval under political pressure from QLD LNP' (Media release, 9 April 2019).
[148] Fergus Mackay, 'Indigenous Peoples' Rights and the UN Committee on the Elimination of Racial Discrimination', in Solomon Dresso (ed). *Perspectives on the rights of minorities and indigenous peoples in Africa* (Pretoria University Law Press, 2010) 202.
[149] *Mabo v Queensland [No 1]* [1988] HCA 69; In *Mabo [No 2]*, the RDA played a very pivotal role. According to Brennan J '[t]he power of alienation and the power of appropriation vested in the Crown in right of a state also subject to the valid to laws of the Commonwealth, including the Racial Discrimination Act. Where a power has purportedly been exercised as a progressive power, the validity of the exercise depends on the scope of the prerogative and authority of the purported repository in the particular case'. *Mabo [No 2]* [84] (Brennan J).
[150] Mackay (n 148) 202; also mentioned in Gilbert (n 124).
[151] Lisa J Reinsberg, *Preventing and Remedying Human Rights Violations through the International Framework: Advocacy before the Intern-American System: A Manual for Attorneys and Advocates* (International Justice Resource Center, March 2014) 5 <https://ijrcenter.org/wp-content/uploads/2014/03/Manual-Advocacy-before-the-Intern-American-System-2014.pdf>.

General Recommendations 23 to highlight that 'the failure of state authorities to recognise customary Indigenous forms of land possession and use' demonstrates racial discrimination.[152] The Inter-American Commission on Human Rights in their different proceedings has recognised that Indigenous peoples have their own rights and allows non-state actors such as witnesses, experts or the testimonies of other persons to assist it to carry out its functions, although it has no jurisdiction to hear disputes related to boundary or territory. [153] The Inter-American Court of Human Rights has recognised that Indigenous peoples have rights to 'restitution of their traditionally owned lands, territories and resources'.[154] Unfortunately, the US and Canada have not ratified any regional human rights treaties and are not current parties to the Inter-American Court of Human Rights.[155]

6.6 International Laws Relating to Genocide and Cultural Genocide

There were mass killings of Indigenous peoples during the early periods of colonisation in the USA, Canada and Australia. During this process, many Indigenous societies were extinguished from the face of the earth along with their unique cultures. However, the 'primary motivation for elimination [was] not race … but access to territory'.[156] This deliberate destruction of Indigenous peoples and their cultures constituted genocide. The genocide of Indigenous peoples continues through forced land development and the assimilation of Indigenous societies into non-Indigenous societies. The word 'genocide' was first introduced by Raphael Lemkin, according to whom 'genocide' meant 'the destruction of a nation or of an ethnic group'.[157] He further elaborated on this concept:

> [G]enocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institution, of culture, language, national feelings, religion and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity and even the lives of the individuals belonging to such

[152] Mackay (n 148) 190.
[153] See Reinsberg (n 151); See Anaya, 'Superpower Attitudes (n 63); see also *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/ Rev.1 (29 July 1994); Committee on Elimination of Racial Discrimination, general recommendation XXIII (51), UN Doc CERD/C/51/Misc13/Rev4 (1997); *Report on Ecuador*, Inter-American Commission on Human Rights, Doc no OEA/Ser.L/V/II.96 (1997).
[154] Mackay (n 148) 190.
[155] Reinsberg (n 151) 12.
[156] Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8(4) *Journal of Genocide Research* 387, 388.
[157] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government - Proposals for Redress* (Carnegie Endowment for International Peace, Washington, 1944) 79. Raphael Lemkin introduced this word coined from the ancient Greek word *genos* (race, tribe) and the Latin word *cide* (killing).

> groups. Genocide is directed against the individual group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as member of the national group.[158]

According to Lemkin, genocide has two phases: first the 'destruction of the national pattern of the oppressed group' and then the 'imposition of the national pattern of the oppressor'.[159] While Lemkin's book *Axis Rule in Occupied Europe* was about the German occupation of various European countries, his concept applies to most Indigenous peoples in the world. The process of genocide occurs through the imposition of the political pattern of oppressor over the oppressed group through the abolition of local laws and institutions, the destruction of religion, cultures and cultural activities, including local languages and the destruction of the 'foundation of the economic existence'.[160] In the case of Indigenous peoples, their political, legal, social and economic systems continue to be affronted by these patterns of oppression.

However, international communities have accepted this understanding of genocide with reservation. The *Charter of International Military Tribunal* established under the *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* considered the word 'genocide' during the drafting process, but later used the term 'crimes against humanity' instead.[161] While the jurisdiction of the International Military Tribunal included crimes against peace, war crimes and crimes against humanity 'before and during the war', it failed to address the matter of 'peacetime genocide'.[162] According to Lemkin, 'genocide is a problem not only of war but also of peace'.[163]

To address this matter, the UN through the General Assembly resolution 96(1) acknowledged that: '[m]any instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part. The punishment of the crime of genocide is a matter of international concern'.[164] This resolution invited the member states of the UN to enact legislation for the prevention and punishment of genocide and requested the Economic and Social Council ('ECOSOC') to conduct a study for the purpose of drafting a

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[158] Lemkin, '*Axis Rule in Occupied Europe*' (n 157) 79.
[159] Ibid.
[160] Ibid 82-86.
[161] *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis,* 82 UNTS 280 (entered into force 8 August 1945); *Charter of the International Military Tribunal- Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis,* (entered into force 8 August 1945) art 6(c); William A Schabas, 'Convention for the Prevention and Punishment of the Crime of Genocide' *United Nations Audio-visual Library of International Law* (Web Page) <https://www.legal.un.org/avl/pdf/ha/cppcg/cppcg_e.pdf>.
[162] *Charter of the International Military Tribunal* (n 161) art 6.
[163] Lemkin (n 157) 93.
[164] *The Crime of Genocide*, UN GA Res 96(1), 55th plen mtg, UN Doc A/RES/96 (11 December 1946).

convention on genocide.[165] Subsequently, the *Convention of the Prevention and Punishment of the Crime of Genocide 1948* ('Genocide Convention') was adopted to acknowledge that 'genocide, whether committed in time of peace or in time of war, is a crime under international law' and made it punishable under international law.[166] As of May 2019, the Genocide Convention has been ratified by 151 countries, including the USA, Canada and Australia.[167]

The Genocide Convention is an important binding treaty, which works for the prevention of physical and biological genocide. However, the scope of the convention is limited and does not include cultural genocide, except in relation to the forcible transfer of children of one group to another group 'with intent to destroy'.[168] During the drafting of the Convention, physical genocide (e.g., mass killing of members of a targeted group), biological genocide (e.g., birth control) and cultural genocide were considered but later, the Sixth Committee voted against the inclusion of cultural genocide.[169] This was because of the strong defensive responses from those nation-states with histories of Indigenous colonisation.[170] Significantly, the USA, Canada and Australia were among the countries that argued that minority rights would be better protected under the UDHR and other specific instruments.[171]

The Genocide Convention accepted the term 'genocide' invented by Lemkin, but it did not encompass his full conceptualisation of 'genocide' because it did not include cultural genocide within its scope. In the later stages of Lemkin's life, he regretted that he failed to persuade the relevant UN committee to include an article on cultural genocide in the Genocide Convention.[172] This failure to include cultural genocide has had consequences for Indigenous peoples for some of their most recent experiences of genocide related to assimilation policies and practices, which could come within the ambit of the Genocide Convention—which came into effect in 1948—did not fit within the definition in the Convention. According to John Docker, 'Lemkin's concept of

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[165] Ibid.
[166] *Convention of the Prevention and Punishment of the Crime of Genocide*, adopted 9 December 1948, 78 UNTS 277 (enter into force 12 January 1951) ('*Genocide Convention*') art 1.
[167] 'The Genocide Convention' *United Nations Office on Genocide Prevention and the Responsibility to Protect* (Web Page) <https://www.un.org/en/genocideprevention/genocide-convention.shtml>.
[168] *Genocide Convention* (n 166) arts II, II(e).
[169] Schabas (n 161). According to the Convention physical genocide occurs through killing, causing serious bodily or mental harm or deliberately inflicting on the group conditions of life with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. Biological genocide occurs by '[i]mposing measures intended to prevent birth within the group'. Mass killing of members of a targeted group such as mass murder of members of Jews communities by German Nazis is physical genocide. The biological genocide could occur through involuntary sterilisation, force abortion, prohibition of marriage, long term segregation of men and women and programs that prevent procreation.
[170] Damien Short, 'Cultural Genocide and Indigenous Peoples: A Sociological Approach' (2010) 14(6) *The International Journal of Human Rights* 831, 837-9.
[171] Andrew Woolford, 'Unsettling Genocide and Transforming Group Relations in Canada' (2016) *Directions* 44, 47-8.
[172] Ibid.

genocide links settler-colonies and genocide in a constitutive and inherent relationship',[173] although this link remains unrecognised in the convention's current definition of genocide. Further, while the Genocide Convention asked its members to enact appropriate national legislation to punish genocide, the Convention lacks any monitoring mechanism.[174]

In 1998, the *Rome Statute of the International Criminal Court* was adopted to establish the International Criminal Court ('ICC'), with the powers to 'exercise its jurisdiction over persons for the most serious crimes of international concern'.[175] The Rome Statute followed Article II of the Genocide Convention and adopted the similar definition of 'genocide' without reference to 'cultural genocide'.[176] Under this definition, the forcible removal of Indigenous children in the USA, Canada and Australia into the broader non-Indigenous societies 'with intent to destroy, in whole or in part' were acts of genocide. However, the boarding schools for Indigenous children in the USA closed in 1970, while in Canada the last residential school closed in 1996. In Australia, all legislation authorising the forced removal of Indigenous children had been repealed by the 1970s.[177] There would be evidentiary issues in bringing such claims to the ICC today, particularly in proving intent. For example, in the case of the 'stolen generations' in Australia, the Howard government rejected the notion that removal policies amounted to genocide, because there was no intention to destroy, but rather the policy reflected accepted child welfare policy of the time.[178] Moreover, in *Nulyarimma v Thomson*,[179] Wilcox J held that, even if the appellants could 'demonstrate genocidal intent', in the absence of appropriate legislation, the crime of genocide was not cognisable in an Australian court.[180] There would also be procedural issues.

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[173] John Docker, 'Raphael Lemkin's History of Genocide and Colonialism' (Paper, United States Holocaust Memorial Museum, Washington DC, 26 February 2004) 3.
[174] See Schabas (n 161).
[175] *Rome Statute of the International Criminal Court*, adopted 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('Rome Statute') art 1.
[176] Rome Statute (n 175) art 6. Under both the Genocide Convention and the Rome Statute the forceable transfer of children from a national, ethnical, racial and religious group to another group is considered to be genocide; Rome Statute (n 175) art 7(2)(d.). Under the Rome Statute the 'forcible transfer of population' (art 7) also constitutes a crime against humanity. The forcible transfer of population means 'forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law'.
[177] Antonio Buti, 'The Removal of Aboriginal Children: Canada and Australia Compared' (2002) 6(1) *University of Western Sydney Law Review* 26 (Web Page) <www.austlii.edu.au/au/journals/UWSLRev/2002/2.html>; The *Indian Child Welfare Act 1978* in the USA was enacted to end forced assimilation of Indian children.
[178] Julie Cassidy, 'Unhelpful and Inappropriate?: The Question of Genocide and the Stolen Generations' (2009) 13(1) *Australian Indigenous Law Review* 114, 119.
[179] [1999] FCA 1192.
[180] Ibid [17]. Although Wilcox J observed that: 'it is possible to make a case that there has been conduct by non-indigenous people towards Australian indigenes that falls within at least four of the categories of behaviour mentioned in the convention definition of 'genocide': killing members of the group; causing serious bodily harm or mental harm to members the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and forcibly transferring children of the group to another group'. Ibid [7]; see especially Sean Peters 'The Genocide Case: Nulyarimma v Thompson' (1999) *Australian International Law Journal* 233; see also Douglas Guilfoyle 'Nulyarimma v Thompson: Is Genocide a Crime at Common Law in Australia?' (2001) 29(1) *Federal Law Review* 1.

Government policies and laws authorising the forcible removal of Indigenous children from their families were in place before the ICC was established. It would be difficult to seek redress in the ICC because it adheres to the principle of non-retroactivity, which ensures that 'individuals have fair notice of the consequences of committing a crime'.[181]

The Genocide Convention took a narrow approach towards 'genocide', which does not accommodate the destruction of Indigenous peoples through acts of 'cultural genocide'.[182] The USA ratified this Convention with reservations in 1988, almost 40 years after it was adopted.[183] The *Genocide Convention Implementation Act 1988* (*the Proxmire Act*) was enacted by the government to implement provisions of the Genocide Convention. Similar to the Genocide Convention, this Act defines genocide as physical and biological, not cultural. There is no doubt that the settler-colonisers committed physical, biological and cultural genocide in the USA. However, this Act does not give retrospective effect to these offences and there have not been any successful claims of genocide against Indigenous people made under this Act.[184]

Canada ratified the Genocide Convection in 1952, but it did not fully integrate the provisions of the Convention into national law until 2000. This was the result of the Report of the Special Committee on Hate Crimes in Canada 1966, Chaired by Professor Maxwell Cohen.[185] Following this report, the Criminal Code was amended in 11 June 1970 via Bill C-3 (*An Act to amend the Criminal Code*) to include advocating and promoting 'genocide' as an indictable offence.[186] However, under the *Criminal Code*, the definition of 'genocide' was limited to only include physical genocide, not biological and cultural genocide.[187] Most importantly, it did not acknowledge the forcible transfer of children of one group to another group as being an act of

[181] Talita de Souza Dias, 'The Retroactive Application of the Rome Stature in Cases of Security Council Referrals and Ad hoc Declarations' (2018) 16 *Journal of International Criminal Justice* 65, 66.
[182] Lindsey Kingston, 'The Destruction of Identity: Cultural Genocide and Indigenous Peoples' (2015) 14(1) *Journal of Human Rights* 63, 64.
[183] Lindsay Glauner, 'The Need for Accountability and Reparations: 1830-1976 the United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide against Native Americans' (2002) 51(3) *DePaul Law Review* 911, 925. The USA had been reluctant to ratify it because they saw the Convention as a possible invasion of state sovereignty and feared that the existence of discriminatory legislation and policies might be seen as promoting genocide; 'Reservation' allows the state to become a party to a treaty by allowing the state to exclude or alter legal effect of certain provisions.
[184] Glauner (n 183) 927.
[185] W Gunther Plaut, 'Book Review: The Report of the Special Committee on Hate Propaganda in Canada' (1967) 5(2) *Osgoode Hall Law Journal* 313, 313; see also Jennifer Lynch, *Special Report to Parliament: Freedom of Expression and Freedom from Hate in the Internet Age* (Canadian Human Rights Commission, June 2009); see also Maxwell Cohen 'The Hate Propaganda Amendments: Reflections on A Controversy' (1970) 9 *Alberta Law Review* 103.
[186] Julian Walker, 'Hate Speech and Freedom of Expression: Legal Boundaries in Canada' (Background Paper, Publication no. 2018-25-E, Library of Parliament, Ottawa, Canada, 29 June 2018) 3-4; Cohen (n 185) 110-11; the Criminal Code, RSC, 1985, c. C-46, s 318(1) makes it punishable with imprisonment for a term not exceeding five years.
[187] *Criminal Code* RSC 1985 c. C-46, s 318(2). The Criminal Code included only 'killing members of the group' and 'deliberately inflicting on the group conditions of life calculated to being about its physical destruction' under the definition of genocide'.

genocide.[188] It was not until the enactment of the *Crimes Against Humanities and War Crimes Act 2000*, that Canada fully integrated the Genocide Convection and the Rome Statute in its national law.[189] However, this law does not acknowledge cultural genocide and no charges of genocide could be initiated against a person who allegedly committed the crime prior to 17 July 1998.[190] Even the courts took similar views.[191] For example, in *Malboeuf v Saskatchewan*, the Court refused to apply the provisions of Genocide Convention to the abuses suffered by Indigenous children as a result of their forcible removal to residential schools because the alleged abuses occurred before 1948.[192]

More recently, the TRC in its report *Honouring the Truth, Reconciling for the Future*, found that the residential schools system amounted to cultural genocide:

> *Cultural genocide* is the destruction of those structures and practices that allow the group to continue as a group. States that engage in cultural genocide set out to destroy the political and social institutions of the targeted group. Land is seized, and populations are forcibly transferred and their movement is restricted. Languages are banned. Spiritual leaders are persecuted, spiritual practices are forbidden, and objects of spiritual value are confiscated and destroyed. And, most significantly to the issue at hand, families are disrupted to prevent the transmission of cultural values and identity from one generation to the next.
>
> In its dealing with Aboriginal people, Canada did all these things.[193]

As previously discussed (see Section 4.3.2.4), Canada failed to implement most of the recommendations of the RCAP. It remains to be seen how present government reacts to the TRC's 94 'Calls to Action'.

Australia ratified the Genocide Convention through the *Genocide Convention Act 1949*, but it took more than half a century to enact a national law that made genocide a crime in Australia.[194] It was the opinion of the Commonwealth Government that the Australian legal system already provided substantial punishment for the classes of crimes described in the Genocide

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[188] It was because the 1966 Cohen report found that the mass transfer of children of one group to another was unknown in Canada and some provisions of the Genocide Convention were 'intended to cover certain historical incidents in Europe that have little essential relevance to Canada'. See Cohen (n 184); see generally David B MacDonald and Graham Hudson, 'The Genocide Question and Indian Residential Schools in Canada' (2012) 45(2) *Canadian Journal of Political Science* 427.
[189] *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24, ('*War Crimes Act*') ss 4(1), 4(3).
[190] Rome Statute (n 175); *War Crimes Act* (n 189) s 4(4).
[191] MacDonald (n 188) 430; *Raubach v The Attorney General of Canada*, [2005] 1 WWR 334; *R v Francis*, (2005); 85 OR (3d) 45; *R v Yellowhorn* (2006), ABQB 307.
[192] *Malboeuf v Saskatchewan* (2005) 273 Sask R 265 [11]; MacDonald (n 187) 437.
[193] *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Summary Report, 2015) 1.
[194] Shirley Scott, 'Why Wasn't Genocide A Crime in Australia? Accounting for the Half-century Delay in Australia Implementing the Genocide Convention' (2004) 10(1) *Australian Journal of Human Rights* 159, 168-169. There was talk about additional legislation but overtime it was put in the 'too hard' basket.

Convention.[195] Nothing was done until the Australian government ratified the *Rome Statute of the International Criminal Court 1998* ('Rome Statute') on 1 July 2002.[196] Following the ratification, Australia amended the *Criminal Code Act 1995* (Cth) to make genocide a crime against humanity and war crimes punishable under Australian law and adopted the definitions of genocide under the Genocide Convention and the Rome Statute.[197] At the same time, the government enacted the *International Criminal Court Act 2002* (Cth), to lay down provisions to comply with international obligations under the Rome Statute.[198] However, like the USA and Canada, the Australian government has not adopted the concept of cultural genocide.

The Australian Human Rights and Equal Opportunity Commission's 1997 report entitled *Bringing them Home*,[199] found that the removal of Indigenous children from their families amounted to genocide as understood under the Convention. [200] According to the report:

> The Australian practice of Indigenous child removal involved both systematic racial discrimination and genocide as defined by international law. Yet it continued to be practised as official policy long after being clearly prohibited by treaties to which Australia had voluntarily subscribed.[201]

However, such claims were subsequently rejected in the Australian courts. In *Kruger*, Brennan CJ observed:

> The Convention has not at any time formed part of Australian domestic law… Where such provisions have not been incorporated they cannot operate as a direct source of individual rights and obligations.[202]

At present, physical or biological genocide is the subject matter of the Genocide Convention. These instruments would be more effective if cultural genocide was included to redress Indigenous peoples' grievances. Some scholars have argued that the ICC has potential scope to

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[195] Ibid 169; *A Review of Australia's Efforts to Promote and Protect Human Rights* (Report, Joint Committee on Foreign Affairs, Defence and Trade, 1992).
[196] Rome Statute (n 175).
[197] *Criminal Code 1995* ch-8, Div-268, Sub-div-B (Genocide). But this legislation was not retrospective, and as a result previous acts of genocide committed against Indigenous Australians could not be prosecuted. This legislation also makes sure that any person accused of genocide is prosecuted in Australia and is not surrendered to the ICC. Because under the Complementarity principle the ICC would only investigate and prosecute those international crimes for which the national jurisdiction is not sufficient, or the national jurisdiction is unable or unwilling to prosecute those crimes.
[198] *International Criminal Court Act 2002* (Cth) s 7. This Act provides for the authority in Australia to assist with the 'arrest and surrender to the ICC, of a person in relation to whom the ICC has issued a warrant of arrest or a judgment of conviction'.
[199] *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children form Their Families* (Final Report, 1997).
[200] Robert van Krieken, 'Rethinking Cultural Genocide: Aboriginal Child Removal and Settler-Colonial State Formation' (2004) 75(2) *Oceania* 125, 128-9.
[201] '*Bringing Them Home*' (n 200).
[202] *Kruger v Commonwealth* [1997] HCA 27.

include some aspects of 'cultural genocide' within its jurisdiction.[203] In regards to both the Genocide Convention and the Rome Statue, the scope of 'genocide' should have been extended to include forced removal of Indigenous peoples from their ancestral lands, prohibition of cultural practices and religions, destruction of Indigenous institutions and ecological destruction of Indigenous territories.[204] Conversely, considering the mass destruction of Indigenous cultures around the world for the extraction of natural resources and economic benefits of population in general, it might be time to adopt a specific international instrument that targets 'cultural genocide'. Specific international instruments related to Indigenous rights such as the UNDRIP and the *ILO Convention 169* describe the cultural rights of Indigenous peoples, although none have any provisions related to 'cultural genocide'.

6.7 International Environmental Laws and the Rights of Indigenous Peoples

For thousands of years, Indigenous peoples have maintained biological diversity across the world though their knowledge of country, lands, trees, animals and waters. With settler colonisation, the natural environment and ecological balance are being destroyed because of unsustainable resource usage by non-Indigenous mainstream neoliberal societies and because 'others think they have the right to take, commodity and even destroy those systems' based on the dehumanisation and domination of the Doctrine.[205] There is no doubt that taking away the management of natural resources from the hands of Indigenous peoples contributed to this situation. In this section, I consider whether the environmental protections available in the international legal regime could help to minimise these effects.

International environment law is not a 'separate or self-contained field of law', but rather is 'a part of international law as a whole'.[206] This part of international law is continually developing to acknowledge the interrelationships between the natural environment, sustainable development and the wellbeing of Indigenous peoples,[207] although none of these instruments directly promote or acknowledge the rights of Indigenous peoples. Since the establishment of the UN, there have been growing global concerns about the general degradation of the natural environment. Specifically, the UN through its various agencies has raised concerns about the pollution of atmospheric, marine and freshwater environment, the over-exploitation of living and natural resources and has attempted to address these issues on a global scale. The UN in its 23rd session

[203] Kingston (n 182) 76.
[204] Andrew Woolford, 'Unsettling Genocide and Transforming Group Relations in Canada' (2016) *Directions* 44, 51.
[205] Tonya Gonnella Frichner, 'The "Preliminary Study" on the Doctrine of Discovery' (2010) 28 *Pace Environmental Review* 339, 341.
[206] Patricia Birnie and Alan Boyle, *International Law and the Environment* (Oxford University Press, 2nd ed, 2002) 1, 79.
[207] Ibid 579.

of the General Assembly acknowledged 'the continuing and accelerating impairment of the quality of the human environment caused by such factors as air and water pollution … soil degradation, waste, noise … increasing population and accelerating urbanization' and there was 'an urgent need for intensified action, at national and international level to limit and where possible, to eliminate the impairment of the human environment'.[208]

In 1972, the UN Conference on the Human Environment sought international cooperation and agreement to address the problems related to the human environment. This conference emphasised the 'need to regulate the *use* of the planet's resources', although it failed to adopt a clear means by which to do so.[209] Subsequently, the UN Conference on Environment and Development 1992 ('UNCED') (also known as the Rio conference) adopted five instruments to tackle this issue.[210] Out of these five, the *Convention of Biological Diversity* ('CBD') and *Agenda 21* recognised the relationship between Indigenous peoples and the natural environment, but they fell short of accepting Indigenous peoples' specific rights related to the natural environment. The CBD acknowledged that 'environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'.[211] Sustainable development under this Convention advocates the sustainable utilisation and conservation of natural resources, intergenerational equity and integrated approach towards environmental protection and economic development.[212] However, the preamble of the CBD only acknowledges the 'traditional dependence' of many Indigenous and local communities on biological resources and importance of their 'traditional knowledge, innovation and practice' for the conservation of biological diversity.[213] Article 8(j) of the CBD provides that:

> Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and

[208] United Nations General Assembly Res. 2398 (XXIII) (1968)- Problems of the human environment; Birnie (n 206) 38.
[209] Birnie (n 206) 38
[210] Five instruments are the *Rio Declaration on Environment and Development*, the *Agenda 21,* the *Framework Convention on Climate Change*, the *Convention on Biological Diversity* and the *Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests.*
[211] *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79 (enter into force 29 December 1993) ('the CBD') art 4.
[212] See specially Birnie (n 206) 84-90.
[213] The Preamble of the CBD says: 'The close and traditional dependence of many indigenous and local communities embodying traditional lifestyle on biological resources and the desirability of sharing equitable benefits arising from the use of traditional knowledge, innovation and practice relevant to the conservation of biological diversity and the sustainable use of its component'.

encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

According to Birnie and Boyle, the preamble and art 8(j) of the CBD not only avoids using the terms 'rights' and 'peoples', but also does not define 'Indigenous communities'.[214] They argue that the ambiguous languages in the CBD can be attributed to the fact that at the time of adopting the CBD, international law on Indigenous peoples and protection of Indigenous peoples' environment were controversial issues. Conversely, the CBD requires state parties to introduce appropriate Environmental Impact Assessment ('EIA') procedures for projects that would have significant adverse effects on biological diversity.[215] It is likely that the three development projects examined in my research will have significant adverse effects on biodiversity in each respective area. Despite the threats of contamination of the ground water, the DAPL received environmental clearance from the Army Corps of Engineers. In the Australian case, the federal government exempted the Adani project from a full EIA despite the serious threat it poses to underground water sources.[216] This project received approval for its Ground Dependent Ecosystem Management Plan despite concerns from the CSIRO and Geoscience Australia.[217] Similarly, without addressing the concerns of the JRP, the federal government in Canada gave environmental approval to the Site-C dam. In these three cases, the respective governments disregarded their commitments towards the environment and Indigenous peoples and opted to promote the economic benefits of others.

The *Agenda 21*, adopted during the Rio Earth Summit, is a global action plan for sustainable development, which recognises that Indigenous people and their communities are the descendants of the original inhabitants of such lands and over many generations they have developed 'a holistic traditional scientific knowledge of their lands, natural resources and environment'.[218] It acknowledges that Indigenous peoples shall enjoy general human rights and fundamental freedoms without discrimination and have a role to play in sustainable development practices on their lands. It wants nation-states to work with Indigenous communities by recognising that the 'lands of indigenous people and their communities should be protected from activities that are environmentally unsound or that the indigenous people concerned consider to

[214] Birnie (n 206) 580.
[215] The CBD (n 211) art 14(1)(a).
[216] Penny Timms and Michael Slezak, 'Adani water project bypasses full environmental impact assessment against advice' *ABC News* (Web Page, 7 November 2018) <https://www.abc.net.au/news/2018-11-07/adani-water-project-bypassed-full-assessment-against-advice/10457670>.
[217] Michael Slezak, 'Adani water plan ticked off within hours despite lack of detail, internal CSIRO emails revel' *ABC News* (Web Page, 14 May 2019) <https://www.abc.net.au/news/2019-05-14/adani-csiro-emails-foi-melissa-price/11107276>.
[218] The *Agenda 21*, United Nations Conference on Environment and Development, 1992, ch 26 (1).

be socially and culturally inappropriate'.[219] The *Agenda 21* acknowledges that Indigenous communities require 'in accordance with national legislation, greater control over their lands, self-government of their resources, [and] participation in development decisions affecting them'.[220] It promotes the participation of Indigenous peoples in resource management and conservation strategies. [221] The USA, Canada and Australia are signatories to *Agenda 21*, but as a non-legally binding international instrument it has no legal authority over nation-states. The development projects examined in my research have serious implications for Indigenous peoples and their surrounding environments, but the nation-states have ignored the recommendations made under *Agenda 21* by providing formal approval to these projects on Indigenous lands.

The Rio Earth Summit also adopted the *Rio Declaration on Environment and Development 1992* ('the Rio Declaration'), which sets out 27 principles for the protection of the global environment and sustainable development. This Declaration provides signatory nations guidance in shaping their own environmental laws according to global standards. It does not intervene with states' rights to exploit their own natural resources, but seeks to ensure that states do not cause damage to the environment within and beyond their own jurisdiction.[222] Like the CBD, this declaration only refers to the importance of Indigenous peoples in 'environmental management and development because of their knowledge and traditional practices' and seeks to ensure that states enable effective participation of Indigenous peoples in sustainable development.[223] While Indigenous peoples are equipped with experience that goes back thousands of years to manage and protect the natural environment, the *Rio Declaration* does not make any reference about the rights of Indigenous peoples over their natural resources. The *United Nations Framework Convention on Climate Change* ('UNFCCC') was also adopted during the Rio Earth Summit to acknowledge and fight the effect of global warming.[224] While it addressed the effects of global warming on the natural ecosystem and humankind more broadly, it (including the *Kyoto Protocol*) did not draw attention to the fact that Indigenous peoples would be significantly disadvantaged by the same phenomenon. The subsequent *Paris Agreement* in its preamble, reiterated the states' obligations to 'respect, promote and consider' the rights of Indigenous peoples while addressing climate change and to adopt measures taking into consideration 'traditional knowledge, knowledge of Indigenous peoples and local knowledge system'.[225] The

[219] Ibid ch 26.3(a)(ii).
[220] Ibid ch 26.4.
[221] Ibid ch 26.5(d).
[222] *Rio Declaration on Environment and Development,* UN Doc A/CONF 151/26 (vol I), 31 ILM 874 (1992) ('*Rio Declaration*') principle 2.
[223] Ibid principle 22.
[224] *United Nations Framework Convention on Climate Change,* adopted 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994) ('UNFCCC').
[225] *Paris Agreement*, opened for signature 12 December 2015, UN Doc FCCC/CP/2015/10/Add.1 (entered into force 4 November 2016) art 7(5); in June 2017 President Donald Trump's administration delivered official notice to

international climate change agreements only acknowledge Indigenous peoples' connection to the natural environment, whereas none of them specifically mention any rights of Indigenous peoples.

6.8 International Law and Natural and Cultural Heritage

The *Convention Concerning the Protection of the World Cultural and Natural Heritage 1972* (also known as the *World Heritage Convention* ['WHC']) was adopted by the United Nations Educational, Scientific and Cultural Organisation ('UNESCO') to ensure that 'effective and active measures' are taken by nation states for the 'protection, conservation and preservation of the cultural and natural heritage' situated within the states' territory .[226] The WHC aims to protect all the sites with cultural and natural heritage of outstanding value and does not expressly distinguish between Indigenous or non-Indigenous sites. But some criteria like 'exceptional testimony to a cultural tradition' or 'outstanding example of a traditional human settlement, land use or sea-use' for the declaration of natural and cultural heritage is possible only through continuing existence of earlier Indigenous societies.[227] Since the WHC was adopted it has played a very significant role in protecting sites that are naturally and culturally important for Indigenous peoples.

In North America there are many world-heritage sites that are culturally significant for Indigenous peoples. The Taos Bueblo, Papahânaumokuâkea and Chaco Canyon in the USA and the Head-Smashed-In Buffalo Jump in Canada are a few of the culturally significant sites in these nations.[228] In Australia, the Kakadu National Park, Uluru-Kata Tjuta National Park, the Willandra Lakes region and the Tasmanian Wilderness are 4 out of 19 world heritage sites that have deep rooted connections with Aboriginal peoples. The WHC requires the state parties to submit to the World Heritage Committee 'an inventory of property forming part of their cultural and natural heritage' situated within their territory.[229] Most importantly the WHC makes it clear that any property belonging to cultural and natural heritage not included in the list 'shall in no way be construed to mean that it does not have an outstanding universal values for purposes other than those resulting from inclusion in these lists'.[230] The USA, Canada and Australia have

withdraw from this agreement, but according to art 28 of *Paris Agreement* notice of withdrawal cannot be given any time before three years from the date in which the agreement came into force.

[226] *Convention Concerning the Protection of the World Cultural and Natural Heritage*, adopted 16 November 1972, 1037 UNTS 151 (came into force 17 December 1975) ('*World Heritage Convention'*) arts 4, 5.

[227] *World Heritage Paper No 42: Human Origin Sites and the World Heritage Convention in the Americans* (UNESCO, 2015) Heads 5, Vol 1 <https://whc.unesco.org/document/142605>.

[228] *World Heritage Report Series No 43: Understanding World Heritage in Europe and North America: Final Report on the Second Cycle of Periodic Reporting 2012-2015* (UNESCO 2016), <https://whc.unesco.org/document/141605>.

[229] *World Heritage Convention* (n 227) art 11(1).

[230] Ibid art 12.

large geographic areas and there is potential for more Indigenous sites to be included in the world heritage list so that they can be protected from future destruction or development.

During the construction of DAPL, the Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribes argued that the pipeline would destroy important historical and religious sites including stone structures, grave sites and burial grounds. Through the public consultation processes these tribes provided legal and technical documents to support the fact that the construction of the pipeline would damage and destroy the sites that have substantial historical significance and importance for their cultural and religious existence.[231] Even if the sites around the DAPL are not listed in the world heritage list, these sites have potential to become world heritage property in the future. But damage to these sites due to the construction of the DAPL and future leaks or accidents would cause irreversible damage to them and it would not be possible to restore them to their original state.

The Site-C dam has the potential to cause significant damage to the Peace-Athabasca Delta ('PAD') (part of Wood Buffalo National Park) which is a protected world heritage site. The PAD was also designated as a wetland of international importance under the *Ramsar Convection*.[232] The UNESCO in its 2016 report disagreed with the JRP's observation that the Site-C dam's impact on the PAD would be 'negligible' and 'the Project would not have any measurable effect on the Peace-Athabasca Delta'.[233] This report respectfully disagreed with the environmental assessment and pointed to the fact that '2/3 of the changes in the Peace River ice-jam flood frequency in the PAD has been attributable to river regulation, mainly by the Bennett Dam'.[234] The report also criticised the government for failing to involve Indigenous peoples in the decision making processes and for failing to uphold its obligations under the UNDRIP. In response to this report the state responded by stating that 'no irreversible decision will be taken as regards to hydroelectric … projects that may impact the property prior to the completion of SEA [Strategic Environmental Assessment]'.[235] Relying on the UNESCO report and the state's response, the World Heritage Committee indicated that the water infrastructure projects like Site-C dam affects the Outstanding Universal Value ('OUV') of Wood Buffalo National Park and requested the government of Canada to make every effort to assess and understand the potential impact of Site-

[231] Haydee J Dijkstal, 'The Dakota Access Pipeline and the Destruction of Cultural Heritage: Apply the Crime Against Humanity of Persecution Before the ICC' (2019) 28(1) *Minnesota Journal of International Law* 157, 158.
[232] *Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat*, signed 2 February 1971, 996 UNTS 245 (came into force 21 December 1975).
[233] *Report of the Joint WHC/IUCN Reactive Monitoring Mission to Wood Buffalo National Park, Canada (25 September- 4 October 2016),* UNESCO World Heritage Committee, 41st sess (2017) <https://whc.unesco.org/document/156893>.
[234] Ibid. Quoting research from the Environment and Climate Research Scientists and Study Leader of Ecosystem and Climate Impacts of Extreme River Ice Jams and Floods.
[235] *Reports on the State of Conservation of Properties Inscribe on the World Heritage List*, UNESCO, UN Doc WHC/17/41.COM/7B.Add (2 June 2017) 10 <https://whc.unesco.org/archive/2017/whc17-41com-7BAdd-en.pdf>.

C dam on the OUV of the PAD and ensure application of best practice at all stages of the project.[236] However, the authority did not conduct any additional environmental flow assessment to identify the water flows needed to sustain the ecological functions of the PAD and gave approval to proceed with the construction.

While the Adani mine is not situated on a world heritage site, there are two world heritage sites near it: the Wet Tropics World Heritage Area ('the WTWHA') and the Great Barrier Reef World Heritage Area ('the Great Barrier Reef'). The WTWHA is about 272 km north of the project and there is no direct terrestrial or aquatic links between it and the project area, as such it was excluded from the evaluation.[237] The Great Barrier Reef is located over 200 km east and approximately 320 km upstream of the project.[238] The project authority has concluded that due to the significant distance between the project area and the coast, the construction and the operations of the mine is unlikely to have any direct impact on the outstanding universal values of the Great Barrier Reef.[239] However, it also found there were three potential sources of indirect impact that could occur through the river system; firstly, the release of mine affected water contaminated by hydrocarbons, metals and waste materials, secondly, stormwater run-off and increased flow velocity that could mobilise sediments leading to higher levels of sedimentation and contamination of downstream water, and thirdly, reduction of downstream flow of water from extraction of water sources leading to potentially increased concentration of contaminants in downstream waters.[240] Considering four criteria (among others) specified in the Operational Guideline for the Implementation of the WHC, the Coordinator-General concluded that no unacceptable impacts to the outstanding universal value of the Great Barrier Reef will occur due to the project.[241]

Notwithstanding these claims, a subsidiary company of Adani has already been prosecuted for releasing coal-laden water near the Great Barrier Reef.[242] Moreover, supporters of the Great

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[236] Ibid.
[237] The Coordinator-General, Queensland Government, *Carmichael Coal Mine and Rail Project: Coordinator-General's Evaluation Report on the Environmental Impact Statement* (Report, May 2014) 222.
[238] Ibid 134.
[239] Ibid 135.
[240] Ibid.
[241] Ibid 141-2. Four (among others) criteria are: Criterion vii: contain superlative natural phenomena or areas of exceptional natural beauty and aesthetic importance, Criterion viii: be outstanding examples representing major stages of earth's history, including the record of life, significant on-going geological processes in the development of landforms, or significant geomorphic or physiographic features, Criterion ix: be outstanding examples representing significant on-going ecological and biological processes in the evolution and development of terrestrial, fresh water, coastal and marine ecosystems and communities or plants and animals, Criterion x: contain the most important and significant natural habitats for in-situ conversation of biological diversity, including those containing threatened species of outstanding universal value from the point of view of science or conservation.
[242] Allyson Horn, 'Adani prosecuted over release of coal-laden water near Great Barrier Reef' *ABC News* (Web Page, September 2018) <https://www.abc.net.au/2018-09-05/adani-prosecuted-over-release-of-sediment-near-barrier-reef/10204374>.

Barrier Reef argue that the mine would contribute to the climate change and indirectly affect the health of the reef over the mine's expected lifetime of 60 years.[243] In the absence of any measures to mitigate the potential adverse effects of the Adani mine on the reef, it is only a matter of time until the actual effects are realised. The WHC was successfully used by the federal government to stop the construction of the Franklin Dam in Tasmania through the enactment of the *World Heritage Properties Conservation Act 1983* (Cth). Subsequently, the WHC and the legislation were the subject of a constitutional challenge between the Tasmanian government and the federal government in the *Tasmanian Dam case*.[244] Following this case, there were other cases in which the WHC and the Commonwealth legislation supporting it were used in constitutional challenges in the High Court, such as *Queensland v Commonwealth*, which helped to protect the Wet Tropical Rainforests of North-East Australia.[245] There is no question that the federal government could use its power to save the Great Barrier Reef from the potential effects of Adani mine and climate change by using its existing world heritage legislation.

6.8.1 The UNESCO Declaration Concerning the International Destruction of Cultural Heritage 2003

The lands on and around these development projects are of natural and cultural significance for Indigenous peoples and are in imminent danger of destruction from these projects. The *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954* ('the CCP') was adopted for the protection of 'movable or immovable property of great importance to the cultural heritage of a people' during armed conflicts.[246] The projects that were the subject matter of my examination were undertaken during peace time and within state jurisdictions. Therefore, the application of the CCP and its Protocols are far-reaching. Instead, the *UNESCO Declaration Concerning the International Destruction of Cultural Heritage 2003* is most relevant in this matter.[247] This declaration covers the 'intentional destruction of cultural heritage including cultural heritage linked to a natural site' occurring outside wartime within the territory of states.[248] It obliges states to take appropriate measures to 'prevent, avoid, stop and suppress' any act of 'intentional destruction' of cultural heritage located within state territory.[249] This

[243] 'Carmichael Coal (Adani) Mine Cases in Queensland courts' *Environmental Law Australia* (Web Page) <https://www.envlaw.com.au/carmichael-coal-mine-case/>.
[244] *Commonwealth v Tasmania* [1983] HCA 21 ('the *Tasmanian Dam case*').
[245] *Queensland v Commonwealth* (1989) 167 CLR 232; Garfield Barwick, 'The External Affairs Power of the Commonwealth and the Protection of World Heritage' (1995) 25 *Western Australia Law Review* 133, 236.
[246] *Hague Convention for the Protection of Cultural Property in the Event of Armen Conflict 1954,* adopted 14 May 1954, 249 UNTS 240 (entered into force 7 August 1956) art 1.
[247] *UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage*, adopted 17 October 2003, 2368 UNTS 3 (enter into force 20 April 2006) ('*2003 UNESCO Declaration*').
[248] Ibid art II; see generally Ana Filipa Vrdoljak, 'The Criminalisation of the Intentional Destruction of Cultural Heritage' in M Orlando and T Bergin, *Forging a Socio-Legal Approach to Environmental Harm: Global Perspective* (Routledge, London, 2016) <https://works.bepress.com/ana_filipa_vrdoljak/38/>.
[249] *2003 UNESCO Declaration* (n 248) art III.

declaration seeks to ensure that states conduct 'peacetime activities' in a manner that protects cultural heritage and does not destroy it.[250] It also holds states and individuals responsible for 'intentional destruction' of cultural heritage. Article VI states:

> A State that intentionally destroys or intentionally fails to take appropriate measures to prohibit, prevent, stop, and punish any intentional destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organization, bears the responsibility for such destruction, to the extent provided for by international law.

This instrument seeks to ensure that states take appropriate measures against individuals (individual criminal responsibility) who commit similar acts.[251] Similar to other international natural and cultural heritage conventions, this one does not distinguish between Indigenous and non-Indigenous heritages. Likewise, there is nothing in these conventions that prevents states from using these conventions to prevent the intentional destruction of Indigenous natural and cultural sites. As a signatory to the UNESCO conventions, the USA, Canada and Australia should align themselves with international obligations by preserving Indigenous lands and cultures and prosecute those who destroy them. However, the situation presented in the three case studies is that the destroyers are the states themselves, against whom the international laws are ineffective, because the states insist that these are internal matters over which they have state sovereignty rights.

6.9 Conclusion

> No human rights instrument to date, either domestic or international has adequately dealt with the specific human rights of Indigenous Peoples.[252]

There are many international instruments that advocate the human rights of 'all people', including Indigenous peoples. Apart from the instruments and organisations mentioned in this chapter, there are other international instruments—including the *Convention on the Elimination of All Forms of Discrimination Against Women* (including the optional protocol), the *Convention of Rights of the Child*, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the *Convention on the Rights of Persons with Disabilities*—that could be helpful in upholding more specific rights of Indigenous peoples.[253] The international legal structure has norms and principles that could be adopted by nation-states for the protection

[250] Ibid art IV.
[251] Ibid art VII.
[252] Costa (n 62) 137, quoting Mick Dodson.
[253] 'Factsheet: Scope of International Obligations' *Australian Human Rights Commission* (Web Page) <https://www.humanrights.gov.au/sites/default/files/1.%20Scope%20of%20international%20obligations%20Final_1.pdf>.

of Indigenous peoples. However, it is apparent that despite the presence of international customary laws and interventions from the international community, the DAPL has become operational, the Site-C dam is under construction and the Adani mine has reached the end of its approval process.

While many countries treat the UNDRIP as aspirational in achieving Indigenous rights protections, the UNDRIP recognises that the rights contained within it 'constitute the minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world'.[254] While the UNDRIP upholds minimum standards for Indigenous peoples, there is not a single international instrument that acknowledges 'cultural genocide'. More work is needed by the international community to include 'cultural genocide' within the Genocide Convention or develop a new convention to address 'cultural genocide'. Of course, there is nothing that can prevent a country from acknowledging Indigenous rights, including reinstating their cultural and religious institutions and ceasing the destruction their lands. A starting point would be to accord respect to Indigenous peoples and their cultures and a willingness to adhere to international norms such as 'free, prior and informed' consent of Indigenous peoples in the development of Indigenous lands. The 'free, prior and informed' consent must be in the form that does not divide Indigenous community such as it did in the case of Adani.

The international community has distanced itself from the Doctrine of Superiority,[255] but the damage has already been done. It is impossible to return to pre-colonial times due to the irreversible damage caused to Indigenous societies by centuries of colonialism, land and resource exploration, non-Indigenous settlement, ethnic cleansing, assimilation, civilisation and the transformation of Indigenous societies through colonial education, laws and policies. I have examined some of the international measures that could function to promote and protect Indigenous rights. However, while states continue to violate the rights of Indigenous peoples and the international instruments lack effective enforcement mechanisms to respond to these violations, effective remedies at the international level continue to be out of reach for Indigenous peoples—and so too is the protections of their rights. Moreover, Indigenous peoples who oppose these development projects are under the jurisdiction of state laws, and as a result, they are not allowed to seek justice via international adjudication. Under the 'principle of complementarity', international courts such as the ICC can only exercise jurisdiction when national legal systems fail to prosecute crimes, including 'where they [states] purport to act but in reality are unwilling or unable to genuinely carry out proceedings'.[256] Non-state actors play an important role in

[254] UNDRIP (n 44) art 43.
[255] See above Section 6.2.
[256] The Principle of Complementarity in Practice (Informal expert paper, ICC-OTP, 2003).

international adjudication processes, but the rules of international adjudication and the state-based structure of formal international law have made it difficult for non-state actors to engage in the system.[257] International adjudication processes require mechanisms to enable aggrieved individuals to bypass state actors and seek redress. The states support corporations by allowing them to develop Indigenous lands and, in most cases, are biased against Indigenous peoples. Conversely, the local courts are bound by the laws of parliament. For this reason, the international courts need jurisdiction over cases brought by individuals. While it is too late for the three projects examined in this thesis, it is not too late for international communities to act to safeguard Indigenous peoples and their rights in relation to future projects.

[257] W Michael Reisman, 'Protecting Indigenous Rights in International Adjudication' (1995) *Faculty Scholarship Series* 885.

Chapter 7: Reflections and Conclusion

7.1 Introduction

> [O]ur struggle is largely one and the same. We don't want our lands, our rights, or our people to be sidelined and destroyed by irresponsible development.[1]

The foundation of the USA, Canada and Australia was based on Doctrine of Discovery ('the Doctrine'), which facilitated the one-way transfer of land from Indigenous to non-Indigenous hands. The discussion and analysis in the previous chapters highlighted that the Doctrine has been recurrently used first by the Crown and then by subsequent governments to extinguish Indigenous rights and cultures and dispossess them of their lands. In most Indigenous-related laws, policies and decision-making by governments there are traces of elements of the Doctrine. More recently, these governments have adopted neoliberalism and globalisation as new avenues to generate revenue through mining and infrastructure projects on Indigenous lands. The impacts of the Doctrine continue to be 'devastating, far-reaching and intergenerational',[2] which has contributed to:

> Ongoing usurpation of indigenous peoples' lands, territories, resources, the destruction of indigenous political and legal institutions, discriminatory practise aimed at destroying indigenous cultures; failure to honour treaties, agreements and other constructive arrangement with indigenous peoples and nations; genocide, the loss of food sovereignty and crimes against humanity.[3]

As in other nations, the Doctrine continues to be the cornerstone for Indigenous laws and policies in the USA, Canada and Australia. Some of the lingering effects were identified by Edward John in his report to the United Nations Permanent Forum on Indigenous Issues and included:

> [H]ealth; psychological and social well-being; denial of rights and titles to land, resources and medicines; conceptual and behavioural forms of violence against indigenous women; youth suicide; and the hopelessness that many indigenous peoples experience, in particular indigenous youth.[4]

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[1] Allan Adam, Chief of the Athabasca Chipewyan Frist Nations; Allan Adam, 'Gateway pipeline threatens our way of life' *Climate and Capitalism* (Web Page, 8 May 2012) <https://climateandcapitalism.com/2012/05/08/gateway-pipeline-threatens-our-way-of-life/>; also quoted in Isabel Altamirano-Jimenez, *Indigenous Encounters with Neoliberalism: Place, Women and the Environment in Canada and Mexico* (UBC Press, Vancouver-Toronto, 2013) 1.

[2] Edward John, *Study on the Impacts of the Doctrine of Discovery on Indigenous Peoples, including Mechanisms, Processes and Instruments of Redress*, Report to UNPFII, 13th sess, UN doc E/C.19/2014/3 (12-23 May 2014) 4 [10].

[3] Ibid 5 [12].

[4] Ibid 4-5 [11].

7.2 Reflections

This thesis has examined how elements of the Doctrine buttress development projects on Indigenous lands in the USA, Canada and Australia and enable the continuing dispossession of Indigenous lands. The rise of neoliberalism and globalisation has resulted in the expansion of global markets and a corresponding increase in governments enacting laws and adopting policies in favour of corporations that are seeking to extract natural resources and construct mega infrastructure projects. In focusing on development taking place on Indigenous lands in this global neoliberal climate, the thesis has argued that the Doctrine of Discovery has morphed into the Doctrine of Neo-Discovery whereby Indigenous peoples are expected to forsake their rights and engage with the global market economy. In these developments we can see how the elements such as pre-emption, Indigenous peoples limited sovereignty, land and commercial rights, combined with the element of civilisation, work in tandem to sideline the rights of Indigenous peoples. While attempts have been made to challenge these developments in the court system, it is evident that the power of the courts to circumvent these developments is limited either by precedents set by common law or by laws enacted by parliaments which favour the developers. There are international instruments that could be used to better protect the rights of Indigenous peoples, but the influence of the Doctrine in protecting state sovereignty continues to trump Indigenous rights protection.

This thesis was divided into seven chapters. Chapter 1 articulated the research questions and aims of the research. Chapter 2 examined the gaps in the literature relating to the continuing application of the Doctrine in nations such as the USA, Canada and Australia. While the existing literature explores the historical use of the Doctrine, it does not articulate its present day application, especially by governments that continue to seize Indigenous lands to enrich national and multinational corporations in the name of the common good. This thesis has endeavoured to address these gaps. This thesis also pointed to the unexplored idea that neoliberalism and globalisation have evolved to such a level that governments formulate Indigenous policies and laws based on these concepts. They are so entrenched in government decision-making that they may be understood as new elements of the Doctrine. The elements defined by Marshal CJ in the 1800s were used by the colonisers to entrench their rule over Indigenous lands, whereas the successors of those colonisers are now using these modern concepts to extend their access to Indigenous lands and resources.

Chapter 3 analysed the early dispossession of Indigenous peoples from their lands facilitated by the Doctrine. This chapter focused on colonial invasion and its aftermath, which devastated and decimated Indigenous communities through newly introduced colonial laws and policies. In its

analysis of the historical development of policy and law in the USA, Canada and Australia, Chapter 3 focused on elements of the Doctrine, including terra nullius, pre-emption, civilisation, Christianity and limited sovereign and commercial rights. In the section related to the USA, the focus was on the notion of domestic dependent nations, including treaty rights and the inherent right of self-determination. The discussion also focused on the Treaties of Fort Laramie 1851 and 1868 because of their relevance to the more recent protests of the people of Standing Rock who are opposed to the DAPL. In the section on Canada, the focus was on treaty rights, especially on the Eleven Numbered Treaties and CLCA. The discussion also included analysis on the *Royal Proclamation* of 1763 because it defined the relationship between First Nations and the colonists. The Proclamation also set rules related to land rights of Indigenous Nations in Canada and American Indians in the USA. While the Proclamation remains law in Canada, it was law in the USA for 13 years before Independence.[5] Unlike Indigenous peoples in the USA and Canada who have treaty rights, the Aboriginal and Torres Strait peoples in Australia still have no treaty recognition. As a result, the discussion related to Australia was focused on the legal status of Indigenous peoples since early colonisation, the failed attempts to recognise Indigenous sovereignty in the early Supreme Court of NSW and to enforce treaties such as the Batman Treaty by government, and the underlying influence of elements of the Doctrine such as terra nullius and pre-emption in shaping these developments.

Chapter 4 analysed more recent applications of the Doctrine in the USA, Canada and Australia. By analysing the history of dispossession, this thesis established a continuing link between early colonial rule and contemporary laws and policies. While discussing and analysing more recent applications of the Doctrine in the USA, this thesis focused on the Indian Allotment policy, the *Indian Reorganization Act 1934* (Wheeler–Howard Act), the termination and relocation policy, the end of the termination era and decisions of the Supreme Court related to American Indian peoples. During this period, American Indian people experienced ups and downs in the recognition of their rights reflecting the subjugation of their tribal sovereignty to the authority of Congress and interpretation of the courts. Similar to the USA, in Canada, governments pursued assimilation and civilisation policies by enacting laws such as the *Indian Act* and the *Gradual Enfranchisement Act*. The *Constitution Act 1982* that recognised existing Aboriginal and treaty rights of Indigenous peoples has resulted in some positive outcomes but has not overcome the legacies of the early treaties used to assert Crown control over Indigenous lands. More recently, attempts have been made to improve the relationship between Indigenous and non-Indigenous peoples through initiatives such as the Charlottetown Accord, the RCAP, the TRC's 94 calls to

[5] Robert J Miller, 'The INTERNATIONAL Law Doctrine of Discovery' (Speech, International Seminar on the Doctrine of Discovery, Thompson Rivers University, 21-22 September 2012).

action and the ten *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*.[6] Unfortunately, most of these initiatives and recommendations remain unfinished and unimplemented. In Australia, the dominance of the Doctrine had and continues to have, significant impacts on Indigenous peoples. Although the concept of terra nullius was overturned in 1992, it was replaced by native title, which is an element of the Doctrine. The *Native Title Act 1993* (Cth) was passed to protect native title, although with minimal impacts on non-Indigenous interests, such as mining. Subsequently, ILUA provisions were introduced to give native title holders limited decision-making power over resource development on their lands. However, laws related to ILUAs can and have been changed by government to benefit national and multinational corporations. Chapter 4 focused on recent laws, policies and decision-making of the governments influenced by the Doctrine, colonialism and neoliberal approaches. Rather than recognising Indigenous self-determination and land rights, these laws and policies followed assimilation and civilisation agendas to further diminish remaining Indigenous rights and advance non-Indigenous interests.

To exemplify the analysis made in Chapters 2, 3 and 4, Chapter 5 analysed three development projects in the USA, Canada and Australia. The example from the USA was the DAPL, which became operational in June 2017. Before it was approved by President Trump, President Obama had declined to give it easement considering its effects on American Indians and the environment.[7] The Standing Rock Sioux continued their opposition through onsite protest and judicial intervention. Although the pipeline became operational, the opposition never ceased.

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[6] Department of Justice, 'Principles Respecting the Government of Canada's Relationship with Indigenous Peoples' *Government of Canada* (Web Page, 14 February 2018) <https://www.justice.gc.ca/eng/csj-sjc/principles.pdf>. The Ten Principles are: 1. The Government of Canada recognizes that all relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government, 2. The Government of Canada recognizes that reconciliation is a fundamental purpose of section 35 of the *Constitution Act, 1982,* 3. The Government of Canada recognizes that the honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous peoples, 4. The Government of Canada recognizes that Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government, 5. The Government of Canada recognizes that treaties, agreements, and other constructive arrangements between Indigenous peoples and the Crown have been and are intended to be acts of reconciliation based on mutual recognition and respect, 6. The Government of Canada recognizes that meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources, 7. The Government of Canada recognizes that respecting and implementing rights is essential and that any infringement of section 35 rights must by law meet a high threshold of justification which includes Indigenous perspectives and satisfies the Crown's fiduciary obligations, 8. The Government of Canada recognizes that reconciliation and self-government require a renewed fiscal relationship, developed in collaboration with Indigenous nations, that promotes a mutually supportive climate for economic partnership and resource development, 9. The Government of Canada recognizes that reconciliation is an ongoing process that occurs in the context of evolving Indigenous-Crown relationships. 10. The Government of Canada recognizes that a distinctions-based approach is needed to ensure that the unique rights, interests and circumstances of the First Nations, the Métis Nation and Inuit are acknowledged, affirmed, and implemented.

[7] Julia Carrie Wong, 'Dakota Access Pipeline: US denies key permit, a win for Standing Rock protestors' *The Guardian* (Online at 5 December 2016) <https://www.theguardian.com/us-news/2016/dec/04/dakota-access-pipeline-permit-denied-standing-rock>; See also Robert N Diotalevi and Susan Burhoe, 'Native American Lands and the Keystone Pipeline Expansion: A Legal Analysis' (2016) 27(2) *Indigenous Policy Journal* 1.

Following multiple legal battles, the Standing Rock Sioux managed to get the decision in their favour. On 25 March 2020, Army Corps of Engineers were ordered to conduct a full Environmental Impact Statement because of the pipeline's faulty 'leak-detection systems, operator safety records, adverse conditions and worst-case discharge'.[8]

The thesis analysed the Site-C dam in Canada, which received all clearances from the present Trudeau government. Prior to the election, Prime Minister Trudeau promised that he would uphold Indigenous peoples rights and renew the nation-to-nation relationship based on recognition, respect and partnership.[9] However, following his election, government authorities such as the Transport Canada and Department Fisheries and Oceans gave approvals for the dam to proceed and Trudeau remained unresponsive to the demands of Indigenous peoples to cease the construction. While his government has supported the enactment of the UNDRIP in Canadian law and promised the implementation of 94 'calls to action', his government has also prioritised non-Indigenous interests and neoliberal ideals by giving construction permits to the Site-C dam.[10]

In Australia, the multi-billion-dollar Adani coal mine was approved by federal and state governments at the expense of Indigenous peoples' land rights and for the benefit of the multinational company, Adani. The federal government, by enacting the *Native Title Amendment (Indigenous Land Use Agreement) Act 2017* (Cth), overcame disagreement among the native title holders by enabling the registration of the ILUA without their full approval. The government restricted safeguards to protect native title under the ILUA and curtailed their self-determination power by approving the mine. The three development projects demonstrate the power of the authority gained through the application of the elements of the Doctrine, including how the present pursuit of neoliberalism and globalisation has had the effect of further dispossessing Indigenous peoples from their lands.

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[8] *Standing Rock v US Army Corps of Engineers*, Civil Action No 16-1534 (JEB) memorandum opinion.

[9] Hilary Beaumont, 'Trudeau Accused of Betraying First Nations After Permits Granted for Controversial Site C Dam' *Vice* (online 17 June 2017) <https://www.vice.com/en_ca/article/8ge7na/trudeau-accused-of-betraying-first-nations-after-permits-granted-for-controversial-sit-c-dam>.

[10] *First Nations Child and Family Caring Society of Canada v Attorney General of Canada*, 2019 CHRT 39, [245] [248]. Apart from the Site-C dam the Trudeau government also approved other developments, such as, the Petronas Liquefied Natural Gas project owned by a Malaysian company, against the will of the First Nations. The Trudeau government is also challenging the landmark decision of the Canadian Human Rights Tribunal that ordered the federal government to pay maximum $20,000 (CAD) to each First Nations child who experienced pain and suffering of the worst kind because they were removed from their homes and communities by on-reserve child welfare system from 1 January 2006 to date. The Tribunal also ordered the federal government to pay $20,000 (CAD) to each parent and grandparent of a First Nation child removed from its home, family and community; Andrea Ross, 'Tsleil-Waututh to appeal Trans Mountain expansion once again' *CBC* (online 25 June 2019) <https://www.cbc.ca/news/canada/british-columbia/tsleil-waututh-to-appeal-tmx-decision-1.5180743>. The Trudeau government also approved the expansion of the controversial Trans Mountain pipeline that could have devastating impacts on the First Nations and environment. The First Nations such as the Tsleil-Waututh fears that any spill from the pipeline would bring devastating consequences for traditional lands and waters.

Despite the protests of Indigenous peoples, the three development projects received approvals from government. The Indigenous peoples exhausted all possible national avenues of redress and sought international assistance. Unfortunately, there is a lack of international redress mechanisms; and the available assistance was not enough to stop the development projects. Chapter 6 analysed the scope of available international instruments and organisations to protect Indigenous rights around the world. While international instruments such as the ICCPR and the ICESCR uphold self-determination as a human right, only the ILO Conventions and the UNDRIP are specific to Indigenous peoples. These instruments provide nation-states with legal principles to recognise Indigenous rights in domestic settings. Unfortunately, none of the international instruments address the profound impact of the Doctrine on Indigenous peoples. The UNPFII has accepted that 'the Doctrine had been used for centuries to expropriate Indigenous lands and facilitate their transfer to colonizing or dominating nations',[11] but the response from international institutions such as the UN to denounce the effects and continuing application of the Doctrine is slow or non-existent. Although it is argued that art 28 and 37 of the UNDRIP covers some of the impacts of the Doctrine and codified some of the 'rights to redress' provisions,[12] in no way does the UNDRIP cover the past and present fundamental problems created by the Doctrine for Indigenous peoples around the world, including loss of lands and cultural rights. The argument is that the UNDRIP only sets legal principles that can be adopted by national governments; it does not provide redress mechanisms of its own and depends on national redress mechanisms.[13] When the national government disregards Indigenous rights, there is very little hope for Indigenous peoples to get redress through national mechanisms. To be effective, the UNDRIP 'requires that the power of the state—and its courts—to unilaterally determine which rights are owed protection and which are merely asserted must no longer be assumed'.[14] Moreover, provisions such as art 46(1) of the UNDRIP protect the territorial integrity of nation-states and thus tacitly import the Doctrine and provide nation-states with an excuse to ignore international principles that uphold Indigenous rights.

Overall, the study undertaken by this thesis has demonstrated:

[11] '"Doctrine of Discovery", Used for Centuries to Justify Seizure of Indigenous Land, Subjugate Peoples, Must Be Repudiated by United Nations, (Press Release, HR/5088, UNPFII, 8 May 2012).
[12] Tonya Gonnella Frichner, 'The "Preliminary Study" on the Doctrine of Discovery' (2010) 28 *Pace Environmental Law Review* 339, 344.
[13] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/61/295 (2 October 2007, adopted 13 September 2007) ('UNDRIP') arts 8(2), 11(2), 28(1).
[14] Robert Hamilton, 'Asserted vs. Established Rights and the Promise of UNDRIP' in Oonagh Fitzgerald and Risa Schwartz (eds), *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws* (Centre for International Governance Innovation, 2018) 106.

- Certain elements of the Doctrine, such as the first discovery, civilisation, pre-emption, native title, limited sovereign and commercial rights and conquest continue to inform government decision-making.
- Some elements of the Doctrine are still used by governments and their agencies to acquire and develop Indigenous lands, territories and resources.
- Neoliberalism and globalisation underpin governments' economic policies to support resource extraction and the construction of mega infrastructures on the Indigenous lands. These developments may be understood as forming elements of a Doctrine of Neo-Discovery and function to dispossess Indigenous peoples from their remaining lands.
- International organisations and bodies are beginning to realise the profound impacts of the Doctrine and the need to repudiate its lingering effects through appropriate instruments.

7.3 Further Steps and Recommendations to Repudiate the Doctrine of Discovery

> Doctrine of Discovery is rooted in some archaic thought, but it is very much alive in a contemporary sense.[15]

This thesis has demonstrated that some elements of the Doctrine continue to inform government decision-making with severe impacts on Indigenous self-determination and land rights. While governments in the USA, Canada and Australia have attempted to address the inequalities between Indigenous and non-Indigenous peoples related to living conditions, law and order, poverty, housing and education, none of these governments have attempted to address the profound impacts of the Doctrine on Indigenous peoples since colonisation. Repudiation of the Doctrine could be an essential step in the recognition and reconciliation process; nevertheless, these countries resist active initiatives to denounce the Doctrine. This is highlighted in the following discussion, which also includes possible avenues for change.

7.3.1 The Doctrine of Discovery and Recognition of Indigenous Sovereignty, Self-Determination and Self-Government

> Tribal sovereignty is not just a legal fact; it is the lifeblood of Indian nations.[16]

In the USA and Canada, Indigenous peoples' limited sovereignty is recognised and protected by respective Constitutions, treaties and legal precedents, whereas in Australia, there is no constitutional or treaty recognition. Recognition of self-determination gives Indigenous peoples

[15] Ibid.
[16] Joseph P Kalt and Joseph William Singer, 'Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-rule' (KSG Working Paper No. RWP04-16, Native Issues Research Symposium, Harvard University, 4-5 December 2003) 4 <https://scholar.harvard.edu/files/jsinger/files/myths_realities.pdf>.

a sense of identity, which could be expressed through self-government. The American Indians in the USA and Indigenous peoples in Canada concluded treaties with the British Crown to ascertain their self-determination and self-government, but current governments ignore those rights and breach treaties for economic gains. According to art VI of the US *Constitution*, 'all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land'.[17] Therefore, hundreds of treaties concluded with the American Indian tribes are the supreme law of the land. In 1871, Congress abolished the President's power to conclude treaties with American Indians, but they could still negotiate agreements, which are equivalent to treaties. Similarly, art 35 of the Canadian Constitution protects Indigenous peoples treaty rights. However, the discussion and analysis in the previous chapters demonstrated that treaties have been broken numerous times in the USA and Canada for the benefit of non-Indigenous interests, and in many cases, judicial systems have failed to uphold these constitutionally entrenched rights. Honouring the promises made through those treaties would be an important step in righting these broken promises. In 1989, the US Congress published '*A Report of the Special Committee on Investigations of the Select Committee on Indian Affairs*' where the Congress accepted that 'Congress has never fully rejected the paternalism' and 'maintains a stifling bureaucratic presence in Indian country'[18]. The report recommended the empowerment of tribal self-government through 'formal, voluntary agreements' and mutual acceptance of four indispensable conditions:

1. The federal government must relinquish its current paternalistic controls over tribal affairs; in turn, the tribes must assume the full responsibilities of self-government.
2. Federal assets and annual appropriations must be transferred *in toto* to the tribes.
3. Formal agreements must be negotiated by tribal governments with written constitutions that have been democratically approved by each tribe; and
4. Tribal governmental officials must be held fully accountable and subject to fundamental federal laws against corruption.[19]

While the first three conditions give almost full self-governing power to the tribes through mutual acceptance, the fourth condition keeps the tribes under federal jurisdiction in cases of corruption. The intention was that 'Indians are not deprived of the honest services of tribal

[17] This clause is also known as the 'Supremacy Clause'. See also Angela R Riley, 'Native Nations and the Constitution: An Inquiry into "Extra-Constitutionality"' (2017) 130(6) *Harvard Law Review Forum* 173, 179.
[18] Senate Select Committee on Indian Affairs, *A Report of the Special Committee on Investigations of the Select Committee on Indian Affairs* (Report no- Senate-R-101-216, United States Congress, 20 November 1989) Document Resume, 1 <https://files.eric.ed.govfulltext/ED325263.pdf>.
[19] Ibid 17.

officials by improper payments of gratuities, conflicts of interest, concealment of records and other wrongdoing'.[20]

The first major inquiry into condition facing Indigenous peoples in Canada was the RCAP. It acknowledged that Canada 'was not terra nullius at the time of contact and that the newcomers did not "discover" it in any meaningful sense'.[21] The RCAP recognised that the future relationship between Aboriginal and non-Aboriginal people in Canada should be based on treaty and the inherent right of Aboriginal peoples to self-government. It also advocated for 'equitable and just allocation of lands and resources' for the effective operation of Aboriginal self-government. The RCAP observed that the 'long-held and totally misconceived ideas about the doctrines of discovery and *terra nullius* underpin the concept that Aboriginal title is a mere cloud or burden upon the Crown's underlying title'.[22] Although the recommendations and observations of RCAP contained directions and aspirations for the future Aboriginal and non-Aboriginal relationships, most of those never materialised. The Government of Canada needs to revisit those recommendations to repudiate the Doctrine. More recently, the TRC in its 94 Calls to Action urged the federal, provincial, territorial and municipal governments to 'repudiate concepts used to justify European sovereignty over Indigenous peoples and lands, such as the Doctrine and terra nullius and to reform those laws, government policies and litigation strategies that continue to rely on such concepts'.[23] Instead of supporting the corporate actions that take away Indigenous Nations lands, the governments need to support Indigenous Nations' self-determination, self-government and treaty rights.

In Australia, the land rights movement is relatively new and while Indigenous peoples have called for government recognition of their 'self-determination and self-management' and freedom to pursue their own 'economic, social, religious and cultural development', these have largely been ignored.[24] More recently, the National Constitution Convention adopted the 'Uluru Statement from the Heart', in which Indigenous leaders called for the 'establishment of a First Nations Voice enshrined in the Constitution' and 'a Makarrata Commission to supervise a process of agreement-making between governments and First Nations'. Although the ruling and

[20] Ibid 20.
[21] *Report of the Royal Commission on Aboriginal Peoples, Volume 2: Restructuring the Relationship'* (Final Report, October 1996).
[22] Ibid 545.
[23] Truth and Reconciliation Commission's Calls to Action no. 47.
[24] 'Barunga Statement' *Australian Institute of Aboriginal and Torres Strait Islander Studies* (Webpage, 17 December 2019) <https://aiatsis.gov.au/barunga-statement>.

opposition parties have rejected the idea, Indigenous peoples continue to advocate for change at different levels.[25]

These developments highlight the need for more government acceptance of Indigenous sovereignty as a notion that 'does not abandon legal authority, but spreads it out'.[26] Moreover, governments need to rethink the effects of neoliberalism and globalisation on Indigenous lands. Governments are there to serve the people, not to exploit them and their lands. The exploitation of Indigenous lands by national and multinational corporations has endured for a long time and it is time that governments put an end to it by upholding Indigenous land rights. In 1907, the US Secretary of Interior wrote to President Roosevelt about the reckless behaviours and exploitation of Indian natural resources by oil companies and the failure of the government to serve American Indians. He wanted the government to 'put a stop to the monopolistic greed and commercial tyranny' of certain oil companies on Indian land and negotiate agreements with the tribes to abolish paternalism and allow tribal government to 'stand free—independent, responsible and accountable'.[27]

It is time that governments prioritise Indigenous peoples' land rights by adhering to the rights of self-determination and self-government. Governments also need to temper the effects of neoliberalism and globalisation by setting into effect a process of decolonisation. The process of decolonisation could begin through the recognition of Indigenous self-determination. The right to self-determination encompasses the distinct status of Indigenous peoples and gives them control over their own affairs. This will ensure that they have more bargaining power in relation to the development of their lands for resource extraction and infrastructure projects.

7.3.2 Overcoming Negative Perceptions of Indigenous Peoples and Recognition of Their Rights to Land

There are common misconceptions that Indigenous peoples live in a 'pre-political state of nature and [are] at an early (backward) stage of political development, living a subsistence lifestyle and without an established system of property'.[28] Moreover, most decisions made by governments reflect the understanding that Indigenous peoples would be better off if they embraced the

[25] Michelle Grattan, 'Proposed Indigenous "voice" will be to government rather than to parliament' *The Conversation* (online at 10 January 2020) <https://theconversation.com/proposed-indigenous-voice-will-be-to-government-rather-than-to-parliament-126031>. Through the persuasion of Indigenous communities and groups the government declared a committee to develop a process for Indigenous 'Voice to Parliament'. But it is understood that the committee is working towards a 'Voice to Government' rather than 'Voice to Parliament'.
[26] Perry Dane, 'The Maps of Sovereignty: A Meditation' (1991) 12 *Cardozo Law Review* 959, 966.
[27] Senate Select Committee on Indian Affairs (n 18) 15, 16.
[28] Nigel Bankes, 'Recognising Property Interests of Indigenous Peoples within Settlers Societies: Some Different Conceptual Approaches' in Nigel Banks and Timo Koivurova (eds), *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights* (Hart Publishing, 2013) 35.

Western mode of civilisation. While it was observed almost 200 years ago in the *Worchester* case[29] that Indigenous peoples were organised into societies with their own norms and institutions and had a concept of property rights prior to colonial settlement, most government decisions do not reflect this understanding. Governments continue to decide the fate of Indigenous peoples, including the acquisition of Indigenous lands for non-Indigenous uses. To overcome this situation, Indigenous peoples' need power to exercise their inherent rights over the land and to use the land according to their traditions, cultures and needs.

7.3.3 Indigenous Peoples, Resource Development and the Right to Free, Prior and Informed Consent

Development is an essential part of life, which is why nation-states and international organisations have adopted human rights approaches in planning, implementing and evaluating development programs.[30] Indigenous land rights activist Noel Pearson considers the right to development to be a 'true right'. According to Pearson, '[a] right to development is a freedom. It is the freedom of property. It is the notion of property as a human right'.[31] However, as the case studies examined in this thesis show is that Indigenous peoples also seek to protect their land rights. For development to occur it would have to be on their own terms and according to their right to 'free, prior and informed consent'.

It is the duty and obligation of the governments to take initiatives to introduce laws that adhere to international principles that safeguard Indigenous lands, territories and institutions. Moreover, governments should adopt policies that do not privilege non-Indigenous interests or economic benefits as the deciding factors in the acquisition of Indigenous lands for development purposes. It is nationally and internationally recognised that Indigenous peoples should be consulted in matters that affect them.[32] Increased decision-making power over resource development and land utilisation ensures sustainable economic development, which will benefit Indigenous and non-Indigenous entities. Indigenous peoples possess 'quite sophisticated environmental knowledge and are frequently excellent resource managers' and they can make significant contributions to

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[29] *Worcester v Georgia*, 31 US (6 Pet) 515 (1832) 542; see also Julie Cassidy, 'The Impact of the Conquered/Settled Distinction regarding the Acquisition of Sovereignty in Australia, (2004) 8 *Southern Cross University Law Review* 1, 44.

[30] Helen Quane, 'The Rights of Indigenous Peoples and the Development Process' (2005) 27 *Human Rights Quarterly* 652, 652-3. The World bank, European Union and Asian Development Bank are now developing policies and implementing development programs that gives greater consideration to Indigenous rights.

[31] Noel Pearson is from the Guugu Yimithirr Aboriginal community at Hope Vale, Cape York Peninsula and is an Australian lawyer and land rights activist who co-founded the Cape York Land Council in 1990; Jon Altman, 'The "Right to Development" on Indigenous Lands' *New Matilda* (Web Page, 9 August 2015 <https://newmatilda.com/2015/08/09/right-development-indigenous-lands/>.

[32] James Anaya, 'Indigenous Peoples' Participatory Rights in Relations to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples have in Lands and Resources' (2005) 22(1) *Arizona Journal of International & Comparative Law* 7, 7; See generally UNDRIP (n 13) and ILO Convention 169.

development projects if they are consulted and not displaced from their ancestral lands.[33] The right to informed consent should extend across governments' legislative powers and could have significant impacts on Indigenous self-determination and other rights.

While the USA and Australian governments are falling behind in the development of policies and enactment of legislation that denounces the Doctrine, in July 2017, the Canadian government renewed its commitment to achieve reconciliation with First Nations based on recognition of rights, respect and cooperation.[34] The government pledged that it would continue the process of decolonisation by reviewing laws and policies guided by ten *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*. These principles are rooted in s 35 of the Constitution, guided by the UNDRIP, informed by the report of the RCAP and the TRC 94 calls to action and have supporters among First Nations peoples.[35] Of the 10 principles,[36] number 6 emphasises 'free, prior and informed' consent:

> The Government of Canada recognizes that meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources.

While it appears, at least on paper, that the government has the goodwill to reconcile with Indigenous Nations, the government's actions say otherwise. The approval of the Site-C dam and other projects on Indigenous lands demonstrates that the government still prioritises economic benefits over Indigenous peoples' rights. As such, the government needs to follow up on its promises with visible actions.

7.3.4 Implementation of International Principles in Domestic Legislation

The UNDRIP is a minimum standard document. However, none of the three countries have incorporated it into domestic law. The UNDRIP provides a new legal framework for Indigenous rights recognition, which follows justice, non-discrimination, equality, good faith and rights described under the UDHR. While the USA and Australia have not taken any initiative to implement provisions of the UNDRIP in domestic law, the Canadian government attempted to implement the UNDRIP through Bill C-262. Although this bill was defeated in the Senate, the present government is adamant to implement the UNDRIP in Canadian law. Nevertheless, it has proven that it is not ready to consult with Indigenous peoples regarding the enactment of

[33] Shelton H Davis (ed), *Indigenous Views of Land and the Environment* (World Bank, 1993) forward, iii.
[34] Department of Justice, 'Principles respecting the Government of Canada's Relationship with Indigenous peoples' *Government of Canada* (online 11 November 2019) <https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>.
[35] Ibid. See also Hayden King and Shiri Pasternak, *Canada's Emerging Indigenous Rights Framework: A Critical Analysis* (Special Report, Yellowhead Institute, 2018) 8.
[36] Ten Principles (n 6).

legislation that affects them and it has support of the Supreme Court in this regard. In 2018, the Supreme Court of Canada in *Mikisew Cree First Nation v Canada* held that the federal government was not required to consult with the Indigenous peoples during the passage of laws that affect them.[37] Although this decision is at odds with the 'free, prior and informed consent' provision in the UNDRIP and right to self-determination provisions in the UNDRIP, ICCPR and ICESCR, the Court held that there was no constitutional requirement to consult before enacting legislation.[38]

The UNDRIP upholds Indigenous peoples' rights to participate in the decision-making process, to consult and cooperate with them and accommodate their views when developing their lands and resources. However, there is no point in having consultation if Indigenous views are not considered during the enactment of laws that affect them. Governments need to demonstrate constructive and visible efforts to implement these provisions in domestic legal settings. Unfortunately, the Australian government still has doubts regarding the application of the provisions in domestic legislation,[39] and according to the US State Department, the 'free, prior and informed consent' provision of the UNDRIP is important but not mandatory.[40]

7.3.5 International Legal Principles and the Doctrine of Discovery

While the UNDRIP provides legal principles for nation-states to follow, it fails to address the historical and continuing effects of the Doctrine on Indigenous peoples. In its preamble, it condemned doctrines that advocated superiority based on race, religion or ethnic identity, yet there is no express provision that condemns the Doctrine. In 2009, the UNPFII appointed Special Rapporteur Tonya Gonnella Frichner to conduct a preliminary study on the impact of the Doctrine on Indigenous peoples. Her report concluded that 'the critical problems and human rights violations faced by Indigenous peoples could be traced to the Doctrine'.[41] She also recommended an expert group meeting and a comprehensive study on mandated areas of the UNPFII related to human rights, social and economic development, women and children, environment, culture and education through the lens of the Doctrine.[42] As per the

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[37] *Mikisew Cree First Nation v Canada (Governor General in Council)* [2018] 2 SCR 765 [35], [36].
[38] Ibid; see generally Isabelle Brideau, 'The Duty to Consult Indigenous Peoples' (Background Paper, Publication No 2019-17-E, Library of Parliament, Ottawa, Canada, 2019) 7-8.
[39] Marie Lamensch, 'Australia's slow progress on Indigenous rights' *Opencanada.org* (Online 11 November 2019) <https://www.opencanada.org/features/australias-slow-progress-on-indigenous-rights/>.
[40] Madison Kavanaugh, 'UNDRIP Drop: How Canada and the United States are Failing to Meet Their International Obligations to Tribes' (2018) 40 *Michigan Journal of International Law* (Web Page) <http://www.mjilonline.org/undrip-drop-how-canada-and-the-united-states-are-failing-to-meet-their-international-obligations-to-tribes/>.
[41] Permanent Forum on Indigenous Issues 'Preliminary Study Shows "Doctrine of Discovery" Legal Construct Historical Root for Ongoing Violations of Indigenous Peoples' Rights, Permanent Forum Told' (Press Release, HR/5019, Economic and Social Council, 9th sess, 27 April 2010).
[42] Frichner, 'The Preliminary Study on the Doctrine of Discovery' (n 12) 344.

recommendations of the Special Rapporteur, the UNPFII dedicated its eleventh session to discuss the enduring impact of the Doctrine and the right to redress for past conquests. Among other matters, the UNPFII accepted that the Doctrine 'extinguished' the rights of Indigenous peoples to their lands, territories and resources and continues to deny Indigenous peoples their rights and title to land and resources.[43] The UNPFII claimed that the UNDRIP 'provides a strong human rights framework and standards for the redress of such false doctrines' and recommended the introduction of additional measures such as education and a voluntary international mechanism to receive and consider commutations from Indigenous peoples.[44] Regrettably, the UNPFII failed to display strong international leadership to repudiate the continuing effects of the Doctrine. Rather than referring to current provisions of the UNDRIP, the UNPFII should have taken measures to adopt stronger international mechanisms to reject decisions made by nation-states that reflected elements of the Doctrine and the current effects of neoliberalism and globalisation in dispossessing Indigenous peoples of their lands for the benefit of non-Indigenous interests and economic gain.

7.3.6 National and International Activism to Address Indigenous Rights

There is a lack of collective national and international activism to denounce the Doctrine. The problem is that national and international political and social activism is now centred towards climate change, so that people forget about Indigenous rights and how Indigenous peoples can be the true protectors of the environment, which they have proven to be for thousands of years. The international campaign against climate change is forcing governments and corporations to change their practices to save the earth, but there is little talk about the role that Indigenous rights protection could have in this process. National campaigns such as 'stop Adani' are focused on saving the environment and especially the Great Barrier Reef. However, there is limited focus on lands and self-determination rights of Indigenous peoples.

It is hypocritical for national and international climate change protesters to ignore the climate change effects on Indigenous peoples and the value of Indigenous knowledges in fighting global climate change. The global effects of climate change have significant impacts on Indigenous peoples' right to land and water. Irregular weather patterns such as prolonged droughts, less rainfall and colder winters have resulted in less vegetation on the land and reduced water flow in the rivers. As a result, Indigenous peoples are suffering on multiple fronts, including their hunting and fishing rights, cultural and spiritual ceremonies, which are based on land and water and their overall livelihoods. Indigenous peoples have lived on the land for thousands of years

[43] Report on the eleventh session, Permanent Forum on Indigenous Issues, Economic and Social Council, Supplement No 23, UN Doc- E/2012/43-E/C.19/2012/13 (2012) 3 [6].
[44] Ibid 3 [8].

and possess knowledge regarding how to sustainably manage their lands and environments. It is acknowledged that Indigenous peoples':

> [S]uccessful struggles against deforestation, against mineral, oil and gas extraction in their ancestral territories, and against future expansion of monocrop plantation, as well as their sustainable production and consumption systems and their effective stewardship over the world's biodiversity, have kept significant amounts of carbon under the ground and in the trees.[45]

Although Indigenous peoples live in 'sensitive zones where effects of climate change are most devastating' and they could make a significant contribution towards mitigating the impacts of climate change, they were not consulted during the creation of the United Nations Framework Convention on Climate Change nor the negotiations on the Kyoto Protocol.[46] It is regrettable that while the protection of the environment and climate change are at the forefront of the sustainable development agenda, the rights of Indigenous peoples are falling behind. In contemporary times, Indigenous peoples continue to be treated as though they are at the bottom of the ladder.[47] There needs to be greater national and international awareness of the continuing impacts of the Doctrine that affect Indigenous rights, including their cultures, lands, languages, religions, social practices, ceremonies and institutions. In recognition of their rights, Indigenous peoples require effective participation in development, protection of their cultural heritage and knowledge, involvement in environmental management and respect for their decision-making processes.

7.4 Further Study and Areas for Research

While this thesis has analysed the development of Indigenous lands through the lens of Indigenous peoples who opposed these developments, the three examples discussed above are related to Indigenous peoples' water rights as well. While there was discussion on Indigenous peoples' water rights specifically related to these development projects, this thesis has limited scope to discuss Indigenous peoples water rights in general. In the USA, most treaties related to American Indian peoples do not contain clauses on water right but through the Winters doctrine (discussed in Section 3.2.2) the US Supreme Court vested some water rights to American Indian peoples. In Canada, Indigenous peoples' water rights are based on historic treaty provisions but they are not considered to be holders of independent water rights because of the assumption that

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[45] Victoria Tauli-Corpuz and Aqqaluk Lynge, *Impact of Climate Change Mitigation Measures on Indigenous Peoples and on Their Territories and Lands*, UNFPII, 7th sess, UN Doc E/C.19/2008/10 (21 April-2 May 2008) 11 [17].
[46] Ibid 16 [27].
[47] Tonya Gonnella Frichner 'The impact on Indigenous peoples of North America from the international legal construct known as the Doctrine of Discovery and consequently the leadership of Indigenous Peoples in the development of the United Nations Declaration on the Rights of Indigenous Peoples' (Speech, International Seminar on the Doctrine of Discovery, Thompsons Rivers University, 21-22 September 2012).

these rights were assimilated with state interests (see Section 5.3.4). Similarly, in Australia the Indigenous peoples have rights under the *Native Title Act 1993* (Cth) to use water for domestic and personal purposes but beyond this Indigenous peoples' rights to water have been largely excluded from water planning and management regimes.[48] While the Indigenous peoples opposing the DAPL and Site-C dam asserted their water rights, the Indigenous peoples opposing the Adani mine also feared that their valuable water sources would be lost if the mine construction proceeded. Water, waterways and water resources have played a very important role in Indigenous life, but as an effect of colonisation 'the statutory regimes now explicitly or effectively vest ownership of water in the Crown. Indigenous interests in water now compete against other "water rights" as constructed by the legal systems in these countries'.[49] While Indigenous peoples have certain rights to use water under their native title rights, in most cases, the government controls water through licences, permits or allocations. Even if Indigenous peoples had water rights with respect to each of the three cases, their rights were disregarded in favour of non-Indigenous national and multinational corporations. While the scope of this thesis did not extend to water rights (but see Section 5.3.4), there is scope for further research of the effects of the Doctrine on the water rights of Indigenous peoples. Moreover, following the power vested by the Doctrine, an in-depth analysis could be undertaken as to how governments and corporations have commodified water, the use of which is an inherent right of Indigenous peoples.

For Australia, most Indigenous groups advocate for treaty rights. However, the discussion above did not paint a positive picture for Indigenous peoples in the USA and Canada, who possess treaty rights. Treaties were introduced to acquire Indigenous lands, for which Indigenous peoples retained usufructuary rights over the lands, including fishing and hunting rights. However, governments continue to breach those rights in the name of economic benefits without consequences. There is an opportunity to further analyse the effects of the Doctrine on treaty rights, including how the Doctrine facilitated treaties and supported their violation.

7.5 Conclusion

The Doctrine continues to shape Indigenous lives around the world and define their customary, social, political and land rights. The effect has been to sideline Indigenous interests in favour of non-Indigenous economic interests. The concern is that the laws and policies of neoliberal

[48] 'Recognising Indigenous Water Interests in Water Law: A Submission by the National Native Title Council to the 2014 Review of the Water Act 2007' *National Native Title Council* (Web Page) <https://www.agriculture.gov.au/sites/default/files/sitecollectiondocuments/water/63-national-native-title-council.pdf>.

[49] Melanie Durette, 'A Comparative Approach to Indigenous Legal Rights to Freshwater: Key Lessons for Australia from the United States, Canada and New Zealand' (2010) 27 *EPLJ* 296, 297-8.

governments are designed not to benefit Indigenous peoples, but to benefit industries and private interests:

> Statutory law, passed with the interests of the majority society in mind, typically ignores unique tribal concerns. But even apart from that, statutory law has become dysfunctional in its own right, no longer carried out to benefit even the majority society. The protection it once offered has withered as a result of relentless political pressure mounted by industry and private interests seeking to influence agency decisions.[50]

Under the thesis of presumed continuity, in which one sovereign acquires territory of another sovereign, the property rights of the original inhabitants continues unless the new sovereign lawfully extinguishes those property rights.[51] Methods such as conquest (force) and cession (treaties) were used by settlers to acquire Indigenous lands in the USA and Canada. Through these methods, Indigenous peoples were dispossessed of their lands, although these methods recognised the prior sovereignty of Indigenous peoples.[52] Conversely, in Australia, British settlement was based on terra nullius, a legal fiction which was later overturned. Nevertheless, it cannot be denied that the ghost of this fiction lurks in contemporary laws and policies because the prior sovereignty of Indigenous peoples is yet to be recognised in the Australian Constitution or by treaty.

> The dark laws facilitated by the Doctrine still rules the lives of Indian Tribes in the USA.[53]

In the USA, many American Indians live on reservations that are entirely tribally owned land and individual American Indian also own trust lands,[54] although they can only sell the land with the approval of Secretary of the Interior or their representatives.[55] Under the Doctrine, the USA became the legal owner of native lands, whereas the American Indians became beneficial owners and lost their rights to sell, lease or develop their lands without the approval of the Secretary.[56] Limited sovereign and commercial rights also prohibited American Indians from conducting diplomacy and trade with others. One of the earliest laws passed in the USA was the *Indian*

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[50]Mary Christina Wood, 'Tribal Trustees in Climate Crisis' (2014) 2(2) *American Indian Law Journal* 518, 520; see also Mary Christina Wood, *Nature's Trust: Environmental Law for a New Ecological Age* (Cambridge University Press, New York, 2014).
[51] Bankes (n 28) 26.
[52] Ibid.
[53] Walter Echo-Hawk, A Pawnee Native American speaker and author. See also Walter Echo Hawk 'Johnson v M'Intosh and the doctrine of Discovery in the United States: Impacts upon Federal Indian Law: and the Future of the Doctrine under the united Nations Declaration on the Rights of Indigenous Peoples' (Speech, International Seminar on the Doctrine of Discovery, Thompson Rivers University, 21-22 September 2012).
[54] There are over 300 reservations still owned by American Indian nations.
[55] Coral Dow and John Gardiner-Garden, 'Indigenous Affairs in Australia, New Zealand, Canada, United States of America, Norway and Sweden' (Background Paper 15 1997-98, Parliament of Australia, 6 April 1998) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/Background_Papers/bp9798/98Bp15>.
[56] Miller, 'The INTERNATIONAL Law Doctrine of Discovery' (n 5).

Trade and Intercourse Act 1790, which is codified under *25 USC Section 177* and remains in effect.[57] This Act was underpinned by the pre-emption element, which was evident in its prohibition of conveyances of American Indian tribal interests in the land unless negotiated in the presence of a federal commissioner and ratified by Congress.[58] It provided that the natives cannot sell their lands without the permission of the USA. Since then, most of the federal Indian policy has been directed to acquire the lands and assets of American Indians.[59] In some cases in which they own the land, they had to follow Westernised corporate structures rather than tribal land management systems. One example of Westernised corporate systems infiltrating Indigenous land management is the *Alaska Native Claims Settlement Act 1971*, under which the Alaska Native regional and village corporations received freehold (fee simple) land title. However, by extinguishing Indigenous native title rights, this Act established corporate structures—regional and village corporations—to manage the land and settlement money.[60]

In Canada, Indigenous rights recognition changed after the Constitution recognised their Aboriginal and treaty rights in 1982. Unfortunately, the *Indian Act*, first passed in 1876, largely remains in its original form, which was aimed at assimilation. Moreover, the *Royal Proclamation* of 1763, which was largely informed by the Doctrine (see Chapter 3) was never overturned by another law, so it remains law in Canada. There have been more recent laws enacted by the Canadian government that support the neoliberal agenda over Indigenous rights, such as the Bill C-38 passed in 2012 (also known as the *Jobs, Growth and Long-Term Prosperity Act, SC 2012*). Under this law, the federal government may decide to not conduct an environmental assessment of a designated project (e.g., the Site-C dam) on the ground that the environmental assessment has been conducted by a provincial government or its agencies.[61] It is the ideology of the government to prioritise the 'exploration of resources in the name of economic growth regardless of what that means for Indigenous people'.[62]

After the *McGlade* decision in Australia that found that all native title claimants must agree to an ILUA for it to be effected, the interested groups including the Western Australian government and other groups did not sit with the Indigenous groups to negotiate; instead, they lobbied to the

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[57] This law came into effect on 22 July 1790

[58] 'Congress Passes the First Indian Trade and Intercourse Act' *The United States Department of Justice* (Webpage, 12 November 2019) <https://www.justice.gov/enrd/timeline-event/congress-passes-first-indian-trade-and-intercourse-act>.

[59] Miller, 'The INTERNATIONAL Law Doctrine of Discovery' (n 5).

[60] *Alaska Native Claims Settlement Act*, 43 USC §1601 (1971) extinguished Aboriginal title including Aboriginal hunting and fishing rights (§1603), established Regional corporations (§1606) and Village corporations (§1607).

[61] Brenda Heelan Powell, 'An Overview of Bill C- 38: The Budget Bill that Transformed Canada's Federal Environmental Laws' *Environmental Law Centre* (Webpage, 10 August 2019) <http://elc.ab.ca/Content_Files/Files/Bill38AnalysisArticlefinal.pdf>.

[62] Louise Mandell, 'The Tsilhqot'in Case and Doctrine of Discovery' (Speech, International Seminar on the Doctrine of Discovery, Thompson Rivers University, 21-22 September 2012).

federal government to change the *Native Title Act*.[63] They did not go to the High Court because there was a possibility that the High Court would uphold the Federal Court's decision. According to Mervyn Eades, a Noongar representative and winner of Eddie Mabo Social Justice Award, instead of going to the superior court, the government changed their 'own rule book'.[64] Subsequently, the federal government enacted the *Native Title Amendment (Indigenous Land Use Agreement) Act 2017* (Cth), which fundamentally changed the ILUA process and had wider implications for Indigenous consultation and negotiation processes. This law also had significant effects on the negotiations of the Adani ILUA with the Wangan and Jagalingou peoples. This law provides another example of ongoing colonisation process. When the concept of terra nullius was overturned by *Mabo [No 2]*, the colonisers imposed native title upon the Indigenous peoples, which was another element of the Doctrine. The ILUA introduced under the native title regime is another form of Westernised processes, which Indigenous peoples need to follow to ascertain their rights to negotiation. In the context of Australia, the *Native Title Amendment (Indigenous Land Use Agreement) Act* is a 'contemporary example of how Aboriginal legal rights are able to be readily subsumed by wider commercial and largely non-Indigenous interests'.[65]

Under the Public Trust Doctrine, the government must serve the people, not private interests. This trust doctrine ensures that government does not exceed its powers and becomes a dictatorship.[66] It is the judicial system that ensures that the government does not breach the trust of the people, which created the trust obligation to 'hold government to certain moral and legal obligations in protecting the tribal way of life and property'.[67] However, the courts are institutions of the sovereign, which is why they have limits regarding how far they can recognise Indigenous land rights. The system is inclined to recognise Indigenous rights in line with the history of British settlement and 'without disturbing the current political and economic power structure'.[68]

It is evident from the judicial decisions in the USA, Canada and Australia that the success rate is very low for Indigenous peoples when they seek to have their rights recognised by the courts. Marshal CJ's decision in the *Johnson* case struck a blow to the rights of Indigenous peoples by limiting them through his definition of the elements of the Doctrine. This decision was never

[63] Georgatos, Gerry, Submission No 4 to Parliament of Australia, *Native Title Amendment (Indigenous Land Use Agreement) Bill* (February 2017) <https://www.aph.gov.au/DocumentStore.ashx?id=a20c2c55-b389-416c-b97d-4a179ce6e54b&subId=464267>.
[64] Ibid.
[65] Hannah McGlade, 'The McGlade Case: A Noongar History of Land, Social Justice and Activism' (2017) 43(2) *Australian Feminist Law Journal* 185, 210.
[66] Mary Christina Wood, 'Tribal Trustees in Climate Crisis' (2014) 2(2) *American Indian Law Journal* 518, 535.
[67] Ibid 536
[68] Kent McNeil, 'The Vulnerability of Indigenous Land Rights in Australia and Canada' (2004) 42(2) *Osgoode Hall Law Journal* 271, 301.

overturned by any other decision in the Supreme Court and the principles set by this case are still legally enforceable in the USA. Since then, there have been numerous court decisions that significantly condensed the rights of Indigenous peoples with few exceptions. During 1990 to 2015, American Indians lost 76.5 per cent of cases in the Supreme Court and between 1990 and 2000 the rate was 82 per cent.[69] This situation deteriorated following the appointment of John Roberts CJ in 2005. Between 2005 and 2014, only 2 out of 11 cases were successful.[70] After 2016, there was a change in pattern because in that year out of four cases the complainants won two, lost one and the court was evenly split in another.[71] In 2019, there was a significant victory in *Herrera v Wyoming*,[72] in which the Supreme Court decided that the Crow Tribe's hunting rights under the 1868 Treaty of Fort Laramie did not expire upon Wyoming's statehood.[73] The Court observed:

> [T]here is no suggestion in the text of the 1868 Treaty with the Crow Tribe that the parties intended the hunting right to expire at statehood. The treaty identifies four situations that would terminate the right: (1) the lands are no longer "unoccupied"; (2) the lands no longer belong to the United States; (3) game can no longer "be found thereon"; and (4) the Tribe and non-Indians are no longer at "peace . . . on the borders of the hunting districts."... Wyoming's statehood does not appear in this list. Nor is there any hint in the treaty that any of these conditions would necessarily be satisfied at statehood.[74]

This case was decided by a 5:4 majority, in which John Roberts CJ was one of the dissenting judges. This was a significant case for American Indians because the Supreme Court reaffirmed limited tribal sovereignty including their treaty rights. Although through treaties they ceded most of their lands, they retained their hunting and fishing rights. It is encouraging to see that the Court uphold these rights, which can have larger implications for the rights of American Indians.

Since *Mabo [No 2]*, there have been many judicial decisions that worked in favour and against the interests of Indigenous peoples. Every time a decision goes in favour of the Indigenous

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[69] See Bethany R Berger, 'Hope for Indian Tribes in the US Supreme Court?: Menominee, Nebraska v. Parker, Bryant, Dollar General…and Beyond' (2017) 2017 (5) *University of Illinois Law Review* 1901, 1904, 1907. This dismal record prompted the Native American Rights Fund and the National Congress of American Indians to initiate the Tribal Supreme Court Project in 2002 to advise litigants and represent them through expert Supreme Court counsel. This project had some initial success but the hope soon faded away after the appointment of John Roberts as the Chief Justice of the Supreme Court.

[70] Berger (n 69) 1910.

[71] Ibid 1901.

[72] *Herrera v Wyoming*, No. 17-532, 587 US (2019) ('*Herrera*') <https://www.supremecourt.gov/opinions/1pdf/17-532_q86b.pdf>. Similarly, in *Washington State Department of Licensing v Cougar Den, Inc*. No 16-1498, (2019) the Supreme Court also upheld treaty rights of American Indians and found that the 1855 treaty guarantees the members of the tribes to move their goods, including fuel. To and from market freely.

[73] *Herrera* (n 72) 1. This case also trashed the decision of *Ward v Race Horse*, 163 US 504 (1896) where it was decided that Wyoming statehood extinguished the Shoshone-Bannock Treaty rights and silently voided tribal hunting rights and the statehood put them in 'equal footing' with other states.

[74] *Herrera* (n 72) [II] C.

peoples, the federal government enacts legislation or adopts policies to move the pendulum against Indigenous peoples. This is evident in the *Wik Peoples* decision, in which the High Court decided that the pastoral lease did not necessarily extinguish native title rights. The Howard government's response to the *Wik* decision was the 'ten-point plan', which undermined the rights of Indigenous peoples and benefited pastoralists and other non-Indigenous interests. Similarly, the decision of *McGlade* was neutralised by enactment of the *Native Title Amendment (Indigenous Land Use Agreement) Act*. There has been a tug of war between governments and the judiciary regarding the recognition of Indigenous peoples' rights. Each time the judiciary finds in favour of Indigenous peoples, the government neutralises the effect by enacting legislation that support resource development on Indigenous lands.

The governments in the USA, Canada and Australia have ongoing processes that recognise Indigenous land rights, although in most cases, they serve as a smoke screen to hide the fact that the government needs Indigenous lands for economic gains, even if that means disregarding their rights. Government decision-making is informed by the Doctrine, which in present times prioritises neoliberalism and globalisation to increase economic benefits. Indigenous peoples are always in a disadvantaged position because not only are the rich and powerful national and multinational companies against them, but governments also work against their interests. According to Anaya, due to the resource development on Indigenous lands, they 'face the highest risks to their health, economy and cultural identity from any associated environmental degradation'.[75] He also emphasised:

> Perhaps more importantly, indigenous nations' efforts to protect their long-term interests in lands and resources often fit uneasily into the efforts by private non-indigenous companies, with the backing of the federal and provincial governments, to move forward with natural resource projects.[76]

The enduring legacy of the Doctrine and its neoliberal manifestation as the Doctrine of Neo-Discovery have contributed to the greatest loss of Indigenous lands in contemporary times and have contributed to a significant decline in Indigenous self-determination and self-government.[77] It is remarkable that Indigenous peoples are imperilled to the extinguishment of their rights, whereas no other peoples in the world are pressured to have their rights extinguished.[78] That is why it is important for Indigenous and non-Indigenous peoples to stand together and oppose the

[75] James Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, on the situation of indigenous peoples in Canada*, UN Doc- A/HRC/27/52/Add.2 (4 July 2014) 17 [69].
[76] Ibid.
[77] Report on the eleventh session (n 43) 3 [6].
[78] Ibid.

Doctrine and its evolving elements, which 'continues to have devastating consequences for Indigenous peoples worldwide'.[79]

[79] 'Dismantling the Doctrine of Discovery' *Assembly of First Nations* (Web Page, 22 January 2018) <https://www.afn.ca/wp-content/uploads/2018/02/18-01-22-Dismantling-the-Doctrine-of-Discovery-EN.pdf>.

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