Lessons on Ocean Governance through the Historic Management of Indigenous Coastal Territories:
The Short Comings of Modern Maritime Legislation in the Search for an Equitable Ocean Future

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Abstract

The oceans cover a 70% of our planet and play a key role in environmental, economic, and cultural activities for communities around the world. However, access to ocean resources is not equitable. It is often small, minority communities that are excluded from the decision-making processes that impact them the most. Among the most vulnerable stakeholders in the face of ocean change are coastal indigenous communities. Given recent initiatives to promote global ocean equity, this study investigated the impacts of the United Nations Convention on the Law of the Sea (UNCLOS) on narratives of maritime indigenous governance around the world. A comparative case-study analysis of indigenous legislation in international straits in Australia and Canada aimed to determine whether future ocean equity initiatives should take a bottom-up approach to indigenous maritime rights or whether reformation of international legislation is necessary. Study findings demonstrated that while Australian and Canadian approaches to indigenous governance varied, UNCLOS uniformly hindered the ability of indigenous communities to take part in governance of coastal space. With a state centric approach to ocean governance, UNCLOS consistently supported the omission of indigenous stakeholders from the decision-making process. As a result, this study recommends the amendment of UNCLOS to recognize and empower indigenous peoples to take control of their traditional lands. Additionally, this study encourages the reinforcement of regional governance infrastructure in international straits to promote the implementation tailored management strategies for these vulnerable coastal areas.

Acknowledgements

This project is dedicated to the people who consider the oceans their home. It is through the oceans, and by sharing the stories and knowledge we have of them, that we may pursue an equitable and sustainable ocean future.

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Chapter 1: Purpose of the Study

The oceans cover 71% of our planet and make up 95% of Earth's water.[1] Their importance spans beyond their spatial coverage: oceans are a key component in our global climate system, are essential to

[1] Martin Visbeck, "Ocean Science Research Is Key for a Sustainable Future," *Nature Communications* 9, no. 1 (December 2018): 690, https://doi.org/10.1038/s41467-018-03158-3.

international trade and transportation and contain vast amounts of living and non-living resources.[2] Ocean industries represent some of the largest economic sectors globally: 80% of all cargo is transported via container vessels while fisheries provide 3.3 billion people with over 20% of their animal protein.[3] These demands are projected to continue increasing with the marine economy representing US $3 trillion dollars in the global economy by 2030.[4] Rich marine coastal ecosystems have historically attracted high densities of human population: presently, over 50% of the global population living within 50km of the ocean. In short, it is undeniable that the oceans and the ocean-atmosphere- cryosphere system have shaped where we are today and will be a central part of our ability to flourish moving forward. However, we are now so many and so powerful that we have become a force that impacts the dynamics of large-scale systems.[5] For this reason, many academics refer to this present period in our planet's history as the Anthropocene.[6] As we observe the increasingly dramatic impacts our society has on our marine environment, it is becoming increasingly apparent that not only are ocean ecosystems under pressure, but ocean resources are not equally distributed.[7] What's more, studies like that of Boyce et al. suggest that declining marine living resource biomass only threaten to increase the socioeconomic equity gaps that already exist.[8] In fact, in 2021,

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[2] Visbeck.
[3] Zuzanna Kosowska-Stamirowska, "Network Effects Govern the Evolution of Maritime Trade," *Proceedings of the National Academy of Sciences* 117, no. 23 (June 9, 2020): 12719–28, https://doi.org/10.1073/pnas.1906670117.
[4] Nathan J. Bennett et al., "Towards a Sustainable and Equitable Blue Economy," *Nature Sustainability* 2, no. 11 (November 2019): 991–93, https://doi.org/10.1038/s41893-019-0404-1.
[5] Visbeck, "Ocean Science Research Is Key for a Sustainable Future"; Kate Wright, "Rhythms of Law: Aboriginal Jurisprudence and the Anthropocene," *Law and Critique* 31, no. 3 (November 2020): 293–308, https://doi.org/10.1007/s10978-020-09279-3.
[6] Yuval Noaḥ Harari, *Sapiens: A Brief History of Humankind*, 1. U.S. edition (New York, NY: Harper, 2015).
[7] Visbeck, "Ocean Science Research Is Key for a Sustainable Future"; Andrew Merrie et al., "An Ocean of Surprises – Trends in Human Use, Unexpected Dynamics and Governance Challenges in Areas beyond National Jurisdiction," *Global Environmental Change* 27 (July 2014): 19–31, https://doi.org/10.1016/j.gloenvcha.2014.04.012.
[8] Daniel G. Boyce et al., "Future Ocean Biomass Losses May Widen Socioeconomic Equity Gaps," *Nature Communications* 11, no. 1 (December 2020): 2235, https://doi.org/10.1038/s41467-020-15708-9.

"inequitable distribution of access to and benefits from marine ecosystem services" was identified as one of three greatest threats to the future of ocean ecosystems.[9]

With increasing disparities in ocean accessibility, recent literature addressing these social concerns has raised questions regarding the nature of the way we divide and manage our oceans. In 2020, the United Nations declared the period from 2021 to 2030 as the United Nations (U.N.) Decades for Ocean Science and Sustainable Development in hopes of galvanizing efforts to support sustainable use of marine resources and equitable access to ocean resources. Modelled from green economy initiatives, a central focus of the U.N. decade is the development of blue economies or marine economic initiatives that see social equity and environmental sustainability as their highest priorities.[10] Given these parallels the term "ocean equity" was coined in the 2020 report of the Panel on the Sustainable Ocean Economy titled 'Towards Ocean Equity' to highlight ocean-specific issues in this realm.[11] Given the ocean equity idea, the term and the research associated with it continues to evolve. Broadly, equity and justice indicate the fair and right treatment of people. In "Mainstreaming Equity and Justice in the Ocean," Nathan Bennett acknowledges the breadth of dimensions to social equity, and ocean equity as a result. Rather than providing a single definition, Bennett lists the following six dimensions of ocean equity:

"a. Recognitional equity: the acknowledgement and consideration of local rights, values, visions, knowledge, needs and livelihoods in policy and practice;

b. Procedural equity: the level of inclusiveness and participation in decision-making, and the embodiment of good governance principles (e.g., transparency, accountability, responsiveness, consensus orientation and efficiency);

c. Distributional equity: the degree of fairness in the allocation of benefits, and the minimization of harms to local populations and among groups;

d. Management equity: the extent of local capacity for, leadership in, and authority over management activities;

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[9] Bianca Haas et al., "The Future of Ocean Governance," *Reviews in Fish Biology and Fisheries* 32, no. 1 (March 2022): 253–70, https://doi.org/10.1007/s11160-020-09631-x.
[10] Bennett et al., "Towards a Sustainable and Equitable Blue Economy."
[11] Henrik Österblom, Colette C.C. Wabnitz, and Dire Tladi, "Towards Ocean Equity," *World Resources Institute*, 2020; Nathan J. Bennett, "Mainstreaming Equity and Justice in the Ocean," *Frontiers in Marine Science* 9 (April 20, 2022): 873572, https://doi.org/10.3389/fmars.2022.873572.

e. Environmental equity: the safeguarding and maintenance of local environmental quality, sustainability, and nature's benefits to people; and,

f. Contextual equity: the extent to which broader contextual factors (e.g., economic, governance, social structures, climate change, environmental conditions, rule of law) enable or undermine local social equity and the advancement of equity in policy and practice " [12]

Bennett then argues that stakeholders and policy makers must strive to address as many of these dimensions as possible in new policies to truly achieve equitable ocean use.

Approaches to remedy disparities in ocean equity around the world include. Research suggests socio-environmental modeling, blue economy policy implementation or collaborative regional governance of resources as just a few novel methods among many others to address existing inequalities. However, Osterblom et al. at the World Resources Institute demonstrate that "insufficient consideration or inclusion of developing states or local populations in decision-making processes related to ocean development is a substantial concern.".[13] These authors go on to show that communities that are impacted the most by policy decisions are excluded from the process which occurs "behind closed doors" among stakeholders who have the power to exploit marine resources and exert sovereignty by force. Such results suggest that, rather than struggling to find new approaches towards solutions, the system within which ocean policies are developed and implemented remains flawed. This is not a new challenge: since the moment humans could travel the seas, the vast size and dynamic characteristic of this body of water have made oceans difficult to monitor, manage and govern. Due to this, resources often fell to those who had the means to control ocean space rather than those with the greatest need for access. These players then shaped the narratives embodied in modern ocean legislation. Such observations suggest that while new knowledge on ocean accessibility may be necessary, the existing legal infrastructure that governs how marine resources are distributed may be equally problematic. However, some work? has been undertaken to investigate the impacts of existing

[12] Bennett, "Mainstreaming Equity and Justice in the Ocean," 2.
[13] Österblom, Wabnitz, and Tladi, "Towards Ocean Equity."

international ocean legislation on issues of equitable access and distribution of marine resources in marginalized communities.

Understanding who should have access to our ocean resources, how this has been decided and what efforts exist to change those patterns is essential in creating a sustainable path for global ocean environments. At present, who governs the oceans and by what right is dictated by the United Nations Convention on the Law of the Sea (UNCLOS). Through its framework and governing bodies, the international agreement promises to provide fair and equal access to ocean space to coastal states and peaceful resolution of international conflict. While unprecedented in its global scope and overall participation (168 ratifying countries), UNCLOS remains a treaty rooted in historic traditions of ocean sovereignty pioneered by major imperial and naval powers. The history of development of the maritime legislation preceding UNCLOS went hand in hand with concepts like terra nullius and the Doctrine of Discovery, each claiming the right of western Empires to newly discovered lands, resources, and peoples. Focused on justifying ownership, early maritime legislation focused on the "why" of sovereignty rather than its implementation. As a result, modern ocean legislation continues to echo narratives of discovery, domination, and displacement by imperial powers.

Given the role of "discovery", exploration, and conquest in the law of the sea, it is important to distinguish between sovereignty and governance: while both terms pertain to the use of ocean resources, ocean sovereignty systematically undermines efforts at ocean governance. Ocean governance, as defined by Blythe et al, is *"a broad-stroke term that combines governing structures, processes, rules, and norms that shape how relevant actors make decisions, share power, assign responsibility, and pursue accountability in the use and management of the marine environment."*.[14] Ocean governance assumes cooperation and coordination among coastal states. In contrast, sovereignty stems from the French word

[14] Jessica L. Blythe et al., "The Politics of Ocean Governance Transformations," *Frontiers in Marine Science* 8 (July 2, 2021): 634718, https://doi.org/10.3389/fmars.2021.634718.

"souverain" and is commonly described as absolute power and supreme authority.[15] Absolute power, in the case of sovereignty, pertains to sole authority of a state and independence from all other influences over territory, law and citizens. Ocean sovereignty, as defined by UNCLOS, provides a coastal state with sole power over any land, water or air space associated within its territorial waters.[16]

UNCLOS aims to maintain the maritime rights of sovereign States of coastal areas.[17] However, given the importance of oceans in trade, transport and exploration, the historic legal traditions that make up the foundation of UNCLOS emerged from the interests of imperial nations aiming to colonize new lands.[18] As such, UNCLOS remains grounded in concepts of Westphalian sovereignty and the Law of Nations with its earliest roots linking to concepts from the Doctrine of Discovery.[19] Given this background, the ability UNCLOS to support effective and just management of resources based on the needs of coastal communities is less clear. Indigenous peoples represent some of the most vulnerable communities in the face of climate change.[20] Although presently no official definition for the term "indigenous" exists, the United Nations Permanent Forum on Indigenous Issues has developed an understanding of the term based on the following attributes:

- *Self-identification as indigenous peoples at the individual level and accepted by the community as their member.*
- *Historical continuity with pre-colonial and/or pre-settler societies*

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[15] Francis Lassa Oppenheim, *International Law. A Treatise. Volume I (of 2) Peace.*, 2nd ed., vol. 1, 2 vols. (Longmans, Green and Co., 1912); Arie Afriansyah, Dila Paruna, and Rania Andiani, "(Un)Blurred Concept of Sovereign Rights at Sea : Implementation Context," *Universitas Diponegoro Law Reform: Jurnal Pembaharuan Hukum* 16, no. 1 (2020): 127–48.

[16] United Nations, *United Nations Convention on the Law of the Sea* (New York: Nova Science Publishers, 2009).

[17] Po-Yi Hung and Yu-Hsiu Lien, "Maritime Borders: A Reconsideration of State Power and Territorialities over the Ocean," *Progress in Human Geography* 46, no. 3 (June 2022): 870–89, https://doi.org/10.1177/03091325221074698.

[18] Thomas McMahon, "The Great Commission, Papal Bulls and the Doctrine of Discovery: From the 4th Century to Current Law," *SSRN Electronic Journal*, 2021, https://doi.org/10.2139/ssrn.3911636.

[19] Lawrence Juda, *International Law and Ocean Use Management*, 0 ed. (Routledge, 2013), https://doi.org/10.4324/9780203428207.

[20] Jamie Donatuto et al., "Indigenous Community Health and Climate Change: Integrating Biophysical and Social Science Indicators," *Coastal Management* 42, no. 4 (July 4, 2014): 355–73, https://doi.org/10.1080/08920753.2014.923140; Michael Y. Brubaker et al., "Climate Change Health Assessment: A Novel Approach for Alaska Native Communities," *International Journal of Circumpolar Health* 70, no. 3 (February 18, 2011): 266–73, https://doi.org/10.3402/ijch.v70i3.17820.

- *Strong link to territories and surrounding natural resources*
- *Distinct social, economic or political systems*
- *Distinct language, culture and beliefs*
- *Form non-dominant groups of society*
- *Resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.* [21]

These criteria make it clear that territory and natural resources represent a core part of indigenous identity. The cultural ties of these groups to land and water along with their dependence on coastal resources for subsistence make the loss of species and environment a major threat going forward. However, ocean resources and space are divided between a few, powerful stakeholders while the damages from development and exploitation weigh most heavily on the most vulnerable.[22] UNCLOS omits any mention of indigenous peoples regarding sovereignty of territories or ocean governance.

Indigenous law, or the recognition of indigenous status or land and water rights, remains recent. In the case of Australia, indigenous land rights were first recognized in 1992.[23] Although Canada recognized land rights and indigenous status much sooner, this recognition did not pertain to all Canadian indigenous populations: Inuit were only recognized as Canadian indigenous peoples in 2004.[24] Not only is indigenous legislation new, but the field also remains vague and confusing as western governments grapple with the status of these communities that maintained sovereignty the land before the arrival of colonial settler. If nations struggle to define who is considered "indigenous", defining indigenous rights is even more obscure. On an international level, while indigenous rights may be recognized by the 2009 United Nations Declaration on Rights of Indigenous Peoples (UNDRIP), little is done to implement promises and

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[21] United Nations Permanent Forum on Indigenous Issues, "Factsheet: Who Are Indigenous Peoples?" (United Nations, 2006), https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf; Arctice Centre University of Lapland, "General Definition of Indigenous Peoples," Arctice Centre at the University of Lapland, accessed August 3, 2022, https://www.arcticcentre.org/EN/arcticregion/Arctic-Indigenous-Peoples/Definitions.
[22] Österblom, Wabnitz, and Tladi, "Towards Ocean Equity."
[23] Colin Scott and Monica Mulrennan, "Land and Sea Tenure at Erub, Torres Strait: Property, Sovereignty and the Adjudication of Cultural Continuity," *Oceania* 70, no. 2 (September 1999): 146–76, https://doi.org/10.1002/j.1834-4461.1999.tb02998.x.
[24] Sarah Bonesteel and Erik Anderson, *Canada's Relationship with Inuit: A History of Policy and Program Development* (Ottawa: Indian and Northern Affairs Canada, 2008).

legislation that empower indigenous communities as sovereigns of their lands. In most cases, recognition of indigenous sovereignty and self-governance remain symbolic.[25] If indigenous rights were recognized recently, little to no legislation pertains directly to indigenous ocean rights. Additionally, many states echo principles within the law of the sea to argue that since indigenous communities cannot demonstrate control of terrestrial or marine space, they cannot claim ownership.[26] In the 2000 edition of Indigenous Peoples in International Law where James Anaya defines indigenous peoples as "the living descendants of preinvasion inhabitants of lands now dominated by others. Indigenous peoples, nations, or communities are culturally distinctive groups that find themselves engulfed by settler societies born of the forces of empire and conquest.".[27] Unfortunately, that definition and the concepts of western domination and conquest remain true today, especially in the case of coastal governance. Exploring the evolution of regional, national, and international dialogues surrounding the recognition of indigenous rights and the legal framework that governs co-management of marine spaces is important to determining the future of ocean equity.

This study aims to investigate the challenges to equitable access to ocean resources by indigenous coastal communities given the backdrop of historic narratives of ocean sovereignty. Who rightfully governs a part of the ocean is often a matter of perspective. A narrative policy framework is used to identify how stakeholders use historic and cultural references to justify present governance systems. Investigating the management of these marine areas with overlapping indigenous, national, and international jurisdictions will serve to highlight successful examples of cooperation in ocean governance as well as the shortcomings of a framework of competing jurisdictions. A comparative case study analysis will determine whether varying cultural and historical narratives have impacts on how coastal stakeholders navigate governance of

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[25] Elvira Pulitano, *Indigenous Rights in the Age of the UN Declaration.* (Cambridge: Cambridge University Press, 2012), https://doi.org/10.1017/CBO9781139136723.

[26] Lauren Butterly, "Before the High Court - Clear Choices in Murky Waters: Leo Akiba on Behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia," *Sydney Law Review* 35, no. 237 (2013); Aldo Chircop, Timo Koivurova, and Krittika Singh, "Is There a Relationship between UNDRIP and UNCLOS?," *Ocean Yearbook Online* 33, no. 1 (May 7, 2019): 90–130, https://doi.org/10.1163/9789004395633_005.

[27] S. James Anaya, *Indigenous Peoples in International Law* (New York; Oxford: Oxford University Press, 2000), 3, http://site.ebrary.com/id/10278259.

international waters or if the universal presence of the UNCLOS treaty results in similar outcomes and the entrenchment of disparity. Within this broader research objective, this analysis will aim to address the following questions:

- Does UNCLOS support a path towards equitable ocean use or does it serve the interests of major powers and entrench existing disparities?
- How are maritime spaces of competing jurisdictions managed? In situations where there is uneven power distribution between stakeholders, how can equitable use be ensured?
- Is it possible to efficiently move towards an equitable ocean future through a bottom-up approach or does the fundamental underpinning (UNCLOS) for how we govern our oceans need to be revised first?

To answer the above questions, this capstone will explore whether the United Nations Convention on the Law of the Sea supports or hinders the resolution of conflicting jurisdictions in international straits and supports the equitable access of all stakeholders involved. Through two case studies of straits in ex-British colonies, the Torres Strait in Northern Australia and the Northwest Passage in Nunavut in Canada, this capstone will explore the role that international maritime law has played in the attempts at equitable governance of these international straits. In each situation, a sovereign state must navigate co-management of marine resource with the historic owners, indigenous peoples (IP), all while operating within the framework of the international legislation of UNCLOS. The results of case law analysis for each case study will help inform whether the current pursuit of bottom-up approaches to ocean policy for an equitable future is the most effective means to attain goals of the U.N. Decade for Ocean Science or whether a top-down approach through the reformation of UNCLOS is necessary to attain the objectives of the U.N. Decade by 2030.

Chapter 2: Review of Relevant Literature

Overview

Efforts to move towards sustainable and equitable use of oceans face many challenges. Understanding who shapes narratives of ocean governance and how these perspectives define the use of marine space and resources will serve to outline the current framework of ocean governance. To achieve this, an interdisciplinary approach at the intersections of history, analysis of legislation and an understanding of environmental justice must be undertaken. The following three sections summarize the current state of literature and research in the three separate areas of ocean law, maritime history, and ocean equity to identify where more investigation is necessary. First, broad trends in historic literature on ocean sovereignty and legislation are analyzed. This section is followed by analysis of themes in current ocean policy and legislation to compare the present state of governance with past systems. The background provided by conclusions in both sections is used to inform the discussion of remnants of colonialism and ocean "dominion" in legal frameworks. The final component of this literature review discusses issues in indigenous governance of coastal space and the equitable access of these communities to ocean resources while relating them to previous sections of the literature review.

Historical Narratives of Global Ocean Governance

Since the moment humans were able to travel across the ocean, the legal status of this body of water has played a problematic role in for coastal nations and law makers. In *A Search for Sovereignty: Law and Geography in European Empires*, on the topic of maritime sovereignty and ocean exploration, author Lauren Benton states "Territorial control [of oceans] was, in many places, an incidental aim of imperial expansion.".[28] This narrative of ownership and control, played out against a backdrop of constant

[28] Lauren A. Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400--1900* (Cambridge; New York: Cambridge University Press, 2010).

movement, trade and interconnectedness. Tightly linked with economic incentives, Benton describes oceans as a patchwork of heavily controlled lanes and coastal settlements surrounded by lawless open ocean.[29] Oceans allowed for the transportations of goods and people between powerful empires. However, unlike land, we cannot assert control over maritime space by occupying it. When we are not present, who will enforce jurisdiction? Benton demonstrates that while oceans symbolize expansion and a means for control, they are also a lawless space, where very little can be enforced.[30] Ships sailed between nations, under foreign flags and with crews that brought together cultures from around the world.[31] This diversity resulted in the general behaviors being observed on all ships rather than a set of codified rules: the seas were governed through tradition and customary law. In *A World at Sea*, Benton and Perl-Rosenthal explore the challenges of vague ocean legislation and governance and document their resolution through case studies. In Chapter 8, Catherine Phipps demonstrates the nature of ocean sovereignty in international straits through the history of Japan.[32] The example of Japan serves to establish the longstanding (and current) solution to maintaining control of ocean space given inconsistent legal frameworks: military power. In areas with vague jurisdiction where coastal states may declare freedom of the seas or rite of passage (international straits) remain some of the most poorly managed marine spaces on our planet. The contrasting themes of lawlessness and hard, military control remain at the core of historic literature focused on ocean sovereignty and management issues.

Treaties and declarations spanning from the Papal Bull Inter Caetera (1481) that divided the world between Spain and Portugal to the Treaty of Tordesillas aimed to justify sovereignty of imperial states to

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[29] Lauren Benton, "Legal Spaces of Empire: Piracy and the Origins of Ocean Regionalism," *Comparative Studies in Society and History* 47, no. 4 (October 2005): 700–724, https://doi.org/10.1017/S0010417505000320.
[30] Benton, *A Search for Sovereignty*.
[31] Lauren A. Benton and Nathan Perl-Rosenthal, eds., *A World at Sea: Maritime Practices and Global History*, First edition, The Early Modern Americas (Philadelphia: University of Pennsylvania Press, 2020).
[32] Phipps, Catherine, "Chapter 8: Sovereignty at the Water's Edge: Japan's Opening as Coastal Encounter," in *A World at Sea Maritime Practices and Global History*, ed. Lauren Benton and Nathan Perl-Rosenthal, 2020.

coastlines overseas.[33] Maritime law up to the 1500s took on the form of religious declarations, royal treaties or simply traditions focus on establishing control of ocean space. Legal historians mark Mare Liberum or "The Freedom of the Seas" by Hugo Grotius in 1609 as the beginning of the codification process of international and maritime law as well as a transition to ocean governance rather than sovereignty.[34] Through this piece of writing, Grotius declared oceans as a "common heritage of mankind" suggesting that all coastal states had rights to resources in this space resolving the issue of enforcing imperial rule on the open ocean.[35] His arguments faced critique from other legal scholars at the time and was primarily challenged by John Selden's Mare Clausum which argued that all ocean space could and should be claimed by sovereign states.[36] Grotius and Selden were not in complete disagreement: both acknowledge coastal sovereignty of territorial seas which remained within miliary control (cannon shot distance) of that state.[37] In 1982, this philosophy would be ingrained in the foundations of the United Nations Convention on the Law of the Sea (UNCLOS) with ocean sovereignty being divided into territorial waters, exclusive economic zones (EEZs) and the high seas.[38] Territorial waters dictate complete control of space by a sovereignty state while EEZs provide rights to economic resources. High seas, representing 60% of the world's ocean, remain rooted in the writings of Grotius and are considered the commons of humankind. Their resources can be used by anyone. In the past decade, this final delimitation of the international treaty has come under fire for

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[33] Lilian del Castillo and Hugo Caminos, eds., *Law of the Sea: From Grotius to the International Tribunal for the Law of the Sea: Liber Amicorum Judge Hugo Caminos* (Leiden: Brill Nijhoff, 2015).
[34] Juda, *International Law and Ocean Use Management*.
[35] Hugo Grotius et al., *The Free Sea*, Natural Law and Enlightenment Classics (Indianapolis, Ind: Liberty Fund, 2004); Castillo and Caminos, *Law of the Sea*.
[36] Selden, John, *Of the Dominion, or, Ownership of the Sea Two Books. In the First Is Shew'd, That the Sea, by the Law of Nature or Nations, Is Not Common to All Men, but Capable of Private Dominion or Proprietie, as Well as the Land. In the Second Is Proved, That the Dominion of the British Sea, or That Which Incompasseth the Isle of Great Britain, Is, and Ever Hath Been, a Part or Appendant of the Empire of That Island.*, trans. Nedham, Marchamont (William-DuGard, 1652); Martine Julia van Ittersum, "Debating the Free Sea in London, Paris, The Hague and Venice: The Publication of John Selden's Mare Clausum (1635) and Its Diplomatic Repercussions in Western Europe," *History of European Ideas* 47, no. 8 (November 17, 2021): 1193–1210, https://doi.org/10.1080/01916599.2021.1871930.
[37] van Ittersum, "Debating the Free Sea in London, Paris, The Hague and Venice."
[38] Juda, *International Law and Ocean Use Management*; Castillo and Caminos, *Law of the Sea*.

its vague and fragmented approach to ocean governance which primarily benefits those who have the financial and technological means to exploit marine resources.[39]

Legal Narratives in Current Ocean Governance

Since the entry in to force of UNCLOS in 1982, and the creation of the International Seabed Authority (ISA) several years later, maritime law has remained relatively unchanged. The current state of ocean governance is composed of over a dozen legal bodies, each with a series of treaties, rights, rules, and agreements that identify a specific role related to living and non-living resource management. While UNCLOS addresses fishing and mining jurisdiction, it does not acknowledge the remainder of legislation related to a range of issues from biodiversity to shipping and dumping to human rights at sea. The result is a complex body of legislation with limited scope and poor communication between separate governing bodies. The inefficiency of our current approach to ocean governance is not for a lack of trying. In a collection of essays, *The Future of Ocean Governance and Capacity Development*, Watson-Wright and Valdés summarize "the current framework for ocean governance is not effective enough to ensure sustainable management of the ocean, not because the framework itself is wrong, but because signed agreements are often not implemented, and there is a lack of co-ordination.".[40] In following sections, other authors to go on to highlight the causes for these issues. Ratana Chuenpagdee demonstrates the problematic nature of effective governing a transdisciplinary space "full of the "unknown" and the "unknowable".[41] She goes on to show that ocean governance relies on trying to understand and control the known components

[39] Elodie Fache, Pierre-Yves Le Meur, and Estienne Rodary, "Introduction: The New Scramble for the Pacific: A Frontier Approach," *Pacific Affairs* 94, no. 1 (March 1, 2021): 57–76, https://doi.org/10.5509/202194157.
[40] Watson-Wright, Wendy and Valdés, J. Luis, "Fragmented Governance of Our One Global Ocean," in *The Future of Ocean Governance and Capacity Development: Essays in Honor of Elisabeth Mann Borgese (1918-2002)* (Leiden, The Netherlands ; Boston: Brill Nijhoff, 2018).
[41] Chuenpagdee, Ratana, "Transdisciplinary Perspectives on Ocean Governance," in *The Future of Ocean Governance and Capacity Development: Essays in Honor of Elisabeth Mann Borgese (1918-2002)* (Leiden, The Netherlands ; Boston: Brill Nijhoff, 2018).

of the ocean and transposes terrestrial law to these areas. All other territory is considered "free seas", open to virtually any activity.

This approach supports a fragmented and incomplete image of the global ocean as it designates all unknown factors as beyond an arbitrary "frontier" and ungovernable as a result. Merrie et al. warn against the pitfalls of this approach as it supports the appearance of "surprises" or major loopholes in management with unexpected consequences.[42] Merrie et al. and Chuenpagdee call for smarter, transdisciplinary governance that accounts for unknowns rather than fragmented approach that avoids unknowns altogether. Mitchell and Owsiak show that while bodies like ITLOS provide a means to denounce breaches of the agreement and protect countries who may not have the means to enforce sovereignty, this process remains lengthy, difficult, and expensive. What's more, even if resolved, ITLOS has no means to enforce its ruling. As a result, countries often resort to bargains and solutions outside of the legal scope of UNCLOS.[43] This process strongly favors countries that already have substantial maritime power and the means to carry out their claims over desired resources.[44] The gaps in UNCLOS result in the exploitation of people and resources by a select few and powerful stakeholders ultimately leading to destructive results.[45]

In summary, the ocean remains a heavily unsupervised space governed by an interwoven pool of vague legislation and confliction jurisdictions.[46] At present, this vast body of water continues to be considered by scholars as the "last frontier" or the legal "wild west" of our planet.[47] Policy makers attempt to tackle and

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[42] Merrie et al., "An Ocean of Surprises – Trends in Human Use, Unexpected Dynamics and Governance Challenges in Areas beyond National Jurisdiction."
[43] Sara McLaughlin Mitchell and Andrew P. Owsiak, "Judicialization of the Sea: Bargaining in the Shadow of UNCLOS," *American Journal of International Law* 115, no. 4 (October 2021): 579–621, https://doi.org/10.1017/ajil.2021.26.
[44] Mitchell and Owsiak.
[45] Ian Urbina, *The Outlaw Ocean: Journeys across the Last Untamed Frontier*, First edition (New York: Alfred A. Knopf, 2019).
[46] Robert L. Stephenson et al., "The Quilt of Sustainable Ocean Governance: Patterns for Practitioners," *Frontiers in Marine Science* 8 (March 5, 2021): 630547, https://doi.org/10.3389/fmars.2021.630547.
[47] Merrie et al., "An Ocean of Surprises – Trends in Human Use, Unexpected Dynamics and Governance Challenges in Areas beyond National Jurisdiction."

resolve the confliction jurisdictions of legal bodies and countries around the world in efforts to reach a sustainable, profitable, and equitable use of our oceans. UNCLOS is an incredible feat of international collaboration and a step towards acknowledging the need for global governance. However, authors like Watson-Wright & Valdés often conclude that much has remained the same since the first declarations on the use of our oceans on Hugo Grotius or the entry in to function of the UNCLOS treaty in 1982: *"we have a regime that is fragmented, some would say fractured, lacking unity, cohesion, and overall direction"*.[48] Beyond waters directly within the military control of a coastal state the ocean remains largely ungoverned, free for large, powerful countries to exert sovereignty at will.[49]

Legal and Historical Perspectives on Entrenchment of Colonial Injustice in Ocean Governance

As previously mentioned, the rise of early maritime legislation went hand in hand with a need to justify claims to overseas territories.[50] Not only did imperial powers require evidence to repel competing nations, but they were also faced with the dilemma of newly discovered lands being inhabited by indigenous peoples.[51] In Indigenous Peoples in International Law, James Anaya documents the evolution of indigenous peoples' rights throughout global history. Anaya's summary of the history of indigenous law summarizes trends of conquest by force, dispossession, exploitation, and discrimination again indigenous groups worldwide.[52] Beginning with the Doctrine of Discovery in the 1400s, western powers repeatedly created religious and legal justifications for the conquest and colonization of "newly discovered" lands. What's more, most legal bodies engaged in international law and global ocean governance have developed

[48] Watson-Wright, Wendy and Valdés, J. Luis, "Fragmented Governance of Our One Global Ocean."
[49] Andrés M. Cisneros-Montemayor et al., "Enabling Conditions for an Equitable and Sustainable Blue Economy," *Nature* 591, no. 7850 (March 18, 2021): 396–401, https://doi.org/10.1038/s41586-021-03327-3.
[50] Benton, *A Search for Sovereignty*.
[51] Joy H. Greenberg, "The Doctrine of Discovery as a Doctrine of Domination," *Journal for the Study of Religion, Nature and Culture* 10, no. 2 (May 23, 2016): 236–44, https://doi.org/10.1558/jsrnc.v10i2.28942.
[52] S. James Anaya, *Indigenous Peoples in International Law*, 2nd ed (Oxford ; New York: Oxford University Press, 2004).

in North America and Europe.[53] Legal scholars who lay the foundations for principles of natural law (Franscico de Vitoria and Hugo Grotius) and the Law of Nations (Emmerich de Vattel) were also among those who used this legal reasoning to maintain control of western colonies.[54] As a result, the policies stemming from these groups cater to the needs of privileged leaders of the most developed countries as these nations have the means to enforce them.[55] As David Wilson summarizes, *"Unequal recourse to law was one method utilised by colonisers and Indigenous groups to advance or maintain their authority, but this occurred as part of (and not separate from) violent attempts to impose colonial rule over Indigenous bodies"*.[56]

In *The Politics of Ocean Governance Transformations*, Blythe et al, define ocean governance as *"a broad-stroke term that combines governing structures, processes, rules, and norms that shape how relevant actors make decisions, share power, assign responsibility, and pursue accountability in the use and management of the marine environment"*.[57] Although Ocean governance implies the sharing of power and jurisdiction between all stakeholders, the reality of ocean governance is very different. Grounded in the writings of Hugo Grotius from 1625, the Law of the Sea is one of the oldest branches of international law.[58] Many of the ideas that Hugo Grotius puts forward in his work *Mare Liberum* regarding territorial powers of coastal states echo his ideas on the "total control" and "sovereignty" of imperial powers over discovered lands in *On the Law of War and Peace*.[59] These origins, paired with later developments of Westphalian sovereignty in 1648 and the Law of Nations in 1760, have supported the development of a State-centric to

[53] David Wilson, "European Colonisation, Law, and Indigenous Marine Dispossession: Historical Perspectives on the Construction and Entrenchment of Unequal Marine Governance," *Maritime Studies* 20, no. 4 (December 2021): 387–407, https://doi.org/10.1007/s40152-021-00233-2.
[54] McMahon, "The Great Commission, Papal Bulls and the Doctrine of Discovery."
[55] Watson-Wright, Wendy and Valdés, J. Luis, "Fragmented Governance of Our One Global Ocean."
[56] Wilson, "European Colonisation, Law, and Indigenous Marine Dispossession," 391.
[57] Blythe et al., "The Politics of Ocean Governance Transformations," 2.
[58] Tullio Treves, "Human Rights and the Law of the Sea," *Berkley Journal of International Law* 28, no. 1 (2010).
[59] McMahon, "The Great Commission, Papal Bulls and the Doctrine of Discovery."

global ocean governance system in UNCLOS.[60] In *Maritime borders: A reconsideration of state power and territorialities over the ocean,* Hung & Lien summarize the problematic nature of this approach: "This global normative framework [of UNCLOS] not only extends over the ocean a field of maritime borders that corresponds to a land-based Westphalian concept of nation-state sovereignty, but also orders the extraction of marine resources and protection of marine environments.".[61]

Presently, the scramble for ocean sovereignty and dominance of limited resources is far from over. Increasing demand for renewal living resources in the oceans and placing increasing demands on open ocean fisheries and raising concerns for the survival of the populations.[62] Additionally, the technological boom of the late 1960s has significantly increased the demand for precious ores and minerals.[63] With terrestrial resources being depleted, major global powers are turning to the seabed to pursue seafloor mining initiatives. International Seabed Authority (ISA) as a governing body tasked with ensuring just and equal access to seabed resources. [64] However, given the duality of ocean space as a space of total control (territorial seas) or no control (high seas), the ISA continues to fall short in its ability to manage increasingly aggressive attempts of coastal-States to claim open ocean seabed. The process has been coined ocean grabbing or *"dispossession or appropriation of use, control or access to ocean space or resources from prior resource users, rights holders or inhabitants"*.[65] The action can be performed by both government and private bodies and serves to undermine human security and coastal livelihoods of smaller ocean

[60] Sabaa Ahmad Khan, "Rebalancing State and Indigenous Sovereignties in International Law: An Arctic Lens on Trajectories for Global Governance," *Leiden Journal of International Law* 32, no. 4 (December 2019): 675–93, https://doi.org/10.1017/S0922156519000487.
[61] Hung and Lien, "Maritime Borders," 872.
[62] Marjo K. Vierros et al., "Considering Indigenous Peoples and Local Communities in Governance of the Global Ocean Commons," *Marine Policy* 119 (September 2020): 104039, https://doi.org/10.1016/j.marpol.2020.104039.
[63] Global Ocean Commission, "From Decline to Recovery: A Rescue Package for the Global Ocean.," 2014.
[64] Global Ocean Commission.
[65] Nathan James Bennett, Hugh Govan, and Terre Satterfield, "Ocean Grabbing," *Marine Policy* 57 (July 2015): 61–68, https://doi.org/10.1016/j.marpol.2015.03.026.

stakeholders.[66] The description of ocean grabbing comes from the equivalent terrestrial term of land grabbing, often characteristic of colonization and conquest efforts of western nations.[67] In the 2014 report of the status of ocean resources, The Global Ocean Commission identified this increase in resource demand together with weak ocean governance as two of the top five threats to ocean sustainability.[68] Scholars around the world have acknowledged the gaps in the ocean governance system, suggesting that *"Transformation to a thriving ocean system requires changes in governance across sectors and scales, with effective and inclusive participation by multiple actors".*[69] Literature goes on to suggest that the most beneficial structure of management would be polycentric ocean governance which maximizes the diversity of participating actors.[70]While these goals are well-meaning, they are also ambitious and difficult to implement. The importance of seabed resources is so great several coastal states (like the US) have refused sign the UNCLOS treaty because of ISA's authority. By not adhering to the treaty, they are free to do as they please. The issue has highlighted the fragility of the UNCLOS treaty and has made policy makers question whether we have made any progress regarding ocean governance or whether UNCLOS is just a case of "old wine in new bottles". Have we moved away from the times of imperial powers dominating oceans and lands by force? Is our ocean governance fairer or are the doctrine of discovery and concepts of ocean dominion alive and well?

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[66] Bennett, Govan, and Satterfield; Paul Foley and Charles Mather, "Ocean Grabbing, Terraqueous Territoriality and Social Development," *Territory, Politics, Governance* 7, no. 3 (July 3, 2019): 297–315, https://doi.org/10.1080/21622671.2018.1442245.

[67] Bennett, Govan, and Satterfield, "Ocean Grabbing"; Wilson, "European Colonisation, Law, and Indigenous Marine Dispossession."

[68] Global Ocean Commission, "From Decline to Recovery: A Rescue Package for the Global Ocean."

[69] Tanya Brodie Rudolph et al., "A Transition to Sustainable Ocean Governance," *Nature Communications* 11, no. 1 (December 2020): 3600, https://doi.org/10.1038/s41467-020-17410-2.

[70] Brodie Rudolph et al.; Vierros et al., "Considering Indigenous Peoples and Local Communities in Governance of the Global Ocean Commons."

Policy Perspectives on Ocean Equity and Indigenous Governance

In 2020, the United Nations declared 2021 to 2030 as the decade for Ocean Science and Sustainable Development. For the first time, a major component of an international initiative included "equitable ocean economy".[71] The push from this focus comes from the recognition that oceans play a key role in our climate and underpin global economies. This period will serve to boost all efforts to understand ocean systems, evaluate the state of resources and (most importantly) implement initiatives that will support and sustainable and equitable ocean. Ocean equity consists of ensuring that all social groups are granted (and guaranteed) the appropriate access to ocean resources based on their economic, historic, and cultural rights.[72] In addition, ocean equity and sustainability go hand in hand. Studies have found that unequal access to ocean resources often results in overexploitation and/or poor management of marine space.[73] In contrast, including local populations in coastal decision-making processes and management has proved beneficial for the successful conservation of maritime environments.[74]

Coastal indigenous communities around the world are characterized by their deep cultural ties to coastal spaces and marine resources. This close relationship is perhaps best captured by the approach of indigenous communities to their interactions with and the management of ocean space and resources coined Traditional Ecological Knowledge (TEK). TEK is considered "holistic in outlook and adaptive by nature,

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[71] Antonio Guterres, "Secretary-General, Launching Ocean Science Decade, Says Making Peace with Nature Key to Delivering Prosperous, Equitable World | UN Press," United Nations, February 3, 2021, https://press.un.org/en/2021/sgsm20564.doc.htm; Bennett, "Mainstreaming Equity and Justice in the Ocean."
[72] Intergovernmental Oceanographic Commission, "The Science We Need for the Ocean We Want: The United Nations Decade of Ocean Science for Sustainable Development (2021-2030)," 2020, 19, https://unesdoc.unesco.org/ark:/48223/pf0000265198.locale=en.
[73] A.B.M. Vadrot, A. Langlet, and I. Tessnow-von Wysocki, "Who Owns Marine Biodiversity? Contesting the World Order through the 'Common Heritage of Humankind' Principle," *Environmental Politics* 31, no. 2 (February 23, 2022): 226–50, https://doi.org/10.1080/09644016.2021.1911442; Andrés M. Cisneros-Montemayor, Katherine M. Crosman, and Yoshitaka Ota, "A Green New Deal for the Oceans Must Prioritize Social Justice beyond Infrastructure," *Conservation Letters* 13, no. 5 (September 2020), https://doi.org/10.1111/conl.12751.
[74] Stuart Fulton et al., "Marine Conservation Outcomes Are More Likely When Fishers Participate as Citizen Scientists: Case Studies from the Mexican Mesoamerican Reef," *Citizen Science: Theory and Practice* 3, no. 1 (June 5, 2018): 7, https://doi.org/10.5334/cstp.118.

gathered over generations by observers whose lives depended on this information and its use.".[75] This knowledge is often abstract and captured by myth, legends, rituals, and other traditional practices.[76]The importance of natural space and resources to these communities goes beyond their traditions: indigenous peoples much more heavily on marine renewable living resources than other populations.[77] While initial efforts to create equitable use and access of ocean resources focused on coastal environments, it is becoming clear that indigenous communities must be included in discussions regarding the management of global ocean commons. The fluid, interconnect nature of oceans results in the movement of migratory coastal species across vast spaces. This is where species crucial to the survival of indigenous communities are most vulnerable.[78] Given the "lagging governance and limited biological knowledge" of the high seas, living resource are at the mercy of those who have the power, technology, and economic means to exploit them, often with disastrous results.[79] Cisneros-Montmayor et al. call for the need for the recognition of a "[The ocean and coast] as a holistic biocultural seascape, which extends beyond the immediate fishing grounds of in- dividual communities to distant ocean spaces beyond.".[80]

Identifying issues is an initial step, but finding the causes, solutions, and their implementation within the web of nested jurisdictions has proven much more difficult. Cisneros et al. have found that while

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[75] Fikret Berkes, Johan Colding, and Carl Folke, "REDISCOVERY OF TRADITIONAL ECOLOGICAL KNOWLEDGE AS ADAPTIVE MANAGEMENT," *Ecological Applications* 10, no. 5 (October 2000): 1252, https://doi.org/10.1890/1051-0761(2000)010[1251:ROTEKA]2.0.CO;2.

[76] Berkes, Colding, and Folke, "REDISCOVERY OF TRADITIONAL ECOLOGICAL KNOWLEDGE AS ADAPTIVE MANAGEMENT"; Marjo Vierros and Yoshitaka Ota, "Integration of Traditional Knowledge in Policy for Climate Adaptation, Displacement and Migration in the Pacific," in *Predicting Future Oceans* (Elsevier, 2019), 305–16, https://doi.org/10.1016/B978-0-12-817945-1.00031-9.

[77] Andrés M. Cisneros-Montemayor et al., "A Global Estimate of Seafood Consumption by Coastal Indigenous Peoples," ed. Timothy Darren Clark, *PLOS ONE* 11, no. 12 (December 5, 2016): e0166681, https://doi.org/10.1371/journal.pone.0166681.

[78] Vierros et al., "Considering Indigenous Peoples and Local Communities in Governance of the Global Ocean Commons."

[79] Merrie et al., "An Ocean of Surprises – Trends in Human Use, Unexpected Dynamics and Governance Challenges in Areas beyond National Jurisdiction."

[80] Vierros et al., "Considering Indigenous Peoples and Local Communities in Governance of the Global Ocean Commons," 8.

countries may have the means to implement sustainable policies, rarely do they choose to do so.[81] Rather than being limited by their ability to access resources, it is "enabling factors" such a social equity, environmental sustainability and economic viability that are lacking.[82] The unboundedness of maritime space adds additional challenges to an equitable ocean future.[83] Even if States are favorable to empowering small, coastal stakeholders, the need to create a global and inclusive governance system seems imperative. What's more, as examined in earlier sections, the history of ocean legislation favors a State-centric approach, further entrenching the exclusion of small, coastal stakeholders who often rely most heavily on the resources claimed by the powerful few.

Chapter 3 – Methodology

Overview

This study aims to examine the evolution of narratives in ocean legislation, and their impacts on the present state of governance in coastal areas with competing jurisdictions. Given the significant role of oceans throughout the history of western exploration and colonization, this research is dedicated to evaluating whether present ocean legislation and narratives within maritime governance undermine regional efforts to increase equitable access of indigenous communities to ocean resources. By examining the role of international legislation, specifically the United Nations Convention on the Law of the Sea (UNCLOS), in governance of indigenous territories, this study hopes to reach conclusions on the impacts of the existing legal framework on efforts to promote ocean equity and sustainable development going forward. Legislation surrounding ocean access and ocean governance is rooted in tradition. What's more, indigenous communities rely heavily on trans-generational stories to define their legal and social narratives.

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[81] Andrés M. Cisneros-Montemayor et al., "Enabling Conditions for an Equitable and Sustainable Blue Economy," *Nature* 591, no. 7850 (March 18, 2021): 396–401, https://doi.org/10.1038/s41586-021-03327-3.
[82] Cisneros-Montemayor et al.; Cisneros-Montemayor, Crosman, and Ota, "A Green New Deal for the Oceans Must Prioritize Social Justice beyond Infrastructure."
[83] the

Given these trends, this study takes a Narrative Policy Framework (NPF) approach to analyze the evolution of narratives used by stakeholders to justify use of ocean space. The use of two case studies allows for comparison of the evolution of regional narratives within a broader framework of international legislation.

Historic Approaches and Comparative Case Studies for Competing Narratives

This study combines historical research methods with a comparative case study methodology to analyze the evolution of narratives across the fields of maritime law and indigenous governance. The goal of this study is to inform future ocean equity initiatives. Historical approaches to policy research differ from other qualitative analysis methods. In Understanding Policy Change as a Historical Problem, Jeremy Rayner characterizes History as *"a sequence of problems and solutions, each element in the sequence being linked to a former round of problem solving and bequeathing a distinctive set of problems and opportunities to the next round in the sequence."*[84] Looking in to the past, historians know the outcomes of past interactions. With this in mind, they must use evidence to reconstruct past events to the best of their ability and infer impacts on their present as a result. This is not unlike certain fields in natural sciences like geology or paleontology: historians cannot run an experiment but rather are presented with the data (archives, artifacts, memories) and must deduce the processes that created these results.[85] While this approach comes with many pitfalls (an inability to truly assess the validity of a source, inherent susceptibility to personal interpretation by each historian, etc.…), historical approaches are unique in their ability to use past events to inform present decisions and understand future outcomes. John Gaddis summarizes this with the phrase: *"We know the future only by the past we project into it.".*[86] This implies that no policy decision is independent of the past events, or the history associated with its stakeholders, their actions and the narratives

[84] Jeremy Rayner, "Understanding Policy Change as a Historical Problem," *Journal of Comparative Policy Analysis: Research and Practice* 11, no. 1 (March 2009): 85, https://doi.org/10.1080/13876980802648326.
[85] John Lewis Gaddis, *The Landscape of History: How Historians Map the Past*, First issued as an Oxford Univ. Press paperback (Oxford: Oxford Univ. Press, 2004), 41.
[86] Gaddis, 3.

that evolve as a result. Given the definition of History by Rayner, the present is just a piece of the sequence of events and decisions that will make up future History. As a result, historical analysis lends itself as an effective method to address the future of ocean equity given the novelty of this policy approach and its interdisciplinary nature. Ocean equity represents the intersection of maritime law and human rights in international law. Both are legal field with a long and complicated history and has been treated independently in the past. As a novel approach, ocean equity policies are faced with many unknowns. How can effective ocean equity policies be put in place if we do not know how these two fields and their stakeholders interact? What's more, how might new policies best fit in to this complex system to ensure they appropriately integrate or revise existing legislation Given the lack of interdisciplinary analysis in this area, the historical approach will allow for this study to understand exactly how narratives in maritime law and indigenous rights have evolved and interacted to evaluate how this historical context will impact future legislation.

Independently, maritime history and the history of indigenous rights are vast and complex areas of research. Attempting to summarize all legislative narratives that contributed to the evolution of these legal fields is beyond the manageable scope of this study. While a comprehensive investigation into all facets of these issues is too ambitious, it is possible to generalize the observations made for one or more specific areas within the field using a qualitative analysis method called a comparative case study approach. Kaarbo & Beasley broadly define the comparative case study as *"the systematic comparison of two or more data points ("cases") obtained through use of the case study method."*.[87] As a result, this study will compare data points pertaining to two different countries with indigenous rights legislation and coastal territories that adhere to the UNCLOS agreement. In <u>*Case Study Research*</u>, Robert Yin provides additional clarity to the requirements of an effective case study design as an *"inquiry that: investigates a contemporary*

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87 Juliet Kaarbo and Ryan K. Beasley, "A Practical Guide to the Comparative Case Study Method in Political Psychology." 20, no. 2 (1999): 372.

phenomenon within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident; and . . . [that] relies on multiple sources of evidence".[88] Given the diversity and complexity of the historical narratives and legislation surrounding the contemporary issues in ocean equity, an approach that directly accounts for such conditions. Additionally, knowing the importance of cultural interactions and exchange between European settlers, western legal systems and indigenous communities, this study addresses blurred boundaries between events and context.

The definition of the comparative case study is clear. However, it is equally important to identify the purpose of the case study when considering research design. This will also determine criteria for case selection. Given the novelty of the ocean equity approach, this study will take on an exploratory case study design. The objective of an exploratory case study is to synthesize knowledge, often from different fields or perspectives, with the purpose of laying the groundwork for further research or policy action.[89] Although it is important to bring together diverse perspectives, it is important to avoid losing focus due to high variability in data. In *Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options*, Seawright & Gerring present and define seven different approaches for case selection. One approach defines the use of Most Similar Cases or instances where *"Cases (two or more) are similar on specified variables other than X and/or Y" (with X being the independent variables of interest and Y the resulting outcome).*[90] In short, the two cases have been selected to be as identical as possible outside of the main variables of interest.[91] The reason for this is that *"Most similar cases that are broadly representative of the population will provide the strongest basis for generalization."*.[92] If most similar cases are not the

[88] Robert K. Yin, *Applications of Case Study Research*, Applied Social Research Methods Series, v. 34 (Newbury Park, Calif: SAGE Publications, 1993), 13.
[89] Yin, *Applications of Case Study Research*.
[90] Jason Seawright and John Gerring, "Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options," *Political Research Quarterly* 61, no. 2 (June 2008): 298, https://doi.org/10.1177/1065912907313077.
[91] Seawright and Gerring, 304.
[92] Seawright and Gerring, 298.

exceptions to a phenomenon, selecting two scenarios that have similar conditions outside of the variables of interest will allow for more reliable generalization given that most circumstances are standardized. Given that a primary objective of this study is to investigate the impacts of UNCLOS on indigenous maritime governance and future ocean equity policies, the selection of most similar cases for a comparative case study allows for in-depth analysis of two specific systems with room to reach general conclusions. This case study design will allow for this study to distinguish which themes are unique to cultures and geographic regions and which themes are present at all scales.

To allow for effective cross-comparison between two countries and maintain focus on ocean legislation, it is necessary to standardize as many variables as possible. Given the focus of this study on the interaction between maritime legislation and indigenous communities, the following three initial requirements were made for candidates: the case study country must (1) adhere to (i.e., have signed and ratified) the UNCLOS treaty, (2) have access to coastal territory that is traditionally owned by indigenous peoples and, given the focus ocean equity internationally, this coastal territory must require international access under the Law of the Sea. The first requirement ensures that national legislation interacts with UNCLOS while the second ensures that a country's national legislation must address the rights of indigenous peoples. The final requirement for case study candidates ensures that indigenous rights to marine space interact with international maritime law and State interests. There are few coastal territories that satisfy this third requirement for case study candidates, one such type of territory are international straits. International straits are narrow passages that connect two major ocean bodies. Under UNCLOS, such straits remain under the control of coastal states, however, given their connecting role, they sovereign States are required to allow unimpeded international transit through the passage.[93] This requirement adds an element of international decision-making to areas with regional and national jurisdictions.

[93] United Nations, *United Nations Convention on the Law of the Sea*, pt. 3.

The choice of case study subjects was also dependent on similarities in indigenous communities and histories of indigenous legislation. As of 2021, there are an estimated 476 million indigenous people in the world with communities spread across 90 countries.[94] Countries have diverse histories, varying legal systems and different relationships with indigenous communities. To allow for effective and accurate cross-comparison, case study candidates were selected based on similarities in these aspects. Between the 16th and 18th centuries, the British Empire rose to become the largest global, colonial superpower in world history.[95] The immense wealth and influence of the regime rested largely on trade and exploitation of colonies and dominions established around the world which it acquired over the course of four centuries.[96] At its peak, the British empire was referred to as the "empire on which the sun never sets" and encompassed a quarter of the world's population and area.[97] With such sprawling and long-lasting influence, the British Empire has left legal and cultural legacies around the world. These impacts are particularly visible in the four past British colonies: Australia, Canada, the United States and New Zealand.[98] Upon the arrival of western settlers, each territory was already inhabited by indigenous communities: Aboriginal and Torres Strait Islander Peoples in Australia, First Nations Métis and Inuit in Canada, Native Americans in the U.S., and the Māori in New Zealand. All communities were colonized and exploited by the British Empire.[99] Colonization was justified using concepts such as terra nullius and the Doctrine of Discovery.[100] Given the governance of these territories by the British Crown, all four countries have governments grounded in British common law. What's more, each country has taken steps to begin recognizing the rights of its

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[94] United Nations Development Programe, "10 Things to Know about Indigenous Peoples - United Nations Development Programme | UNDP," United Nations Development Programe, July 29, 2021, https://stories.undp.org/10-things-we-all-should-know-about-indigenous-people.
[95] Ashley Jackson, *The British Empire: A Very Short Introduction*, 2013, http://public.ebookcentral.proquest.com/choice/publicfullrecord.aspx?p=1192553.
[96] Jackson, 19; Niall Ferguson, *Empire: The Rise and Demise of the British World Order and the Lessons for Global Power*, 2008, http://www.myilibrary.com?id=307291&ref=toc.
[97] Ferguson, *Empire*.
[98] Wilson, "European Colonisation, Law, and Indigenous Marine Dispossession."
[99] Jackson, *The British Empire*.
[100] McMahon, "The Great Commission, Papal Bulls and the Doctrine of Discovery."

indigenous communities. Although no country has recognized indigenous rights explicitly related to sea and seabed, all have legislation that recognizes indigenous rights to land and water. Given such similar historical and legal backgrounds, these four countries lend themselves to case study comparison. Ultimately, the United States and New Zealand were eliminated as candidates. New Zealand, being an island country, lacks an international strait while the U.S. has yet to ratify the UNCLOS treaty.

Canada and Australia have proven to be ideal candidates for a comparative case study using most similar cases. Both have populations of indigenous peoples, colonized at similar times and colonization is justified via terra nullius and Doctrine of Discovery. Both have signed and ratified the UNCLOS treat and have international straits, the Torres Strait, and the Northwest Passage (NWP), that require, or may require, unimpeded international transit. These international straits also represent the traditional lands of indigenous peoples with the NWP being part of the Inuit Nunangat while the Torres Strait is home to the Torres Strait Islander Peoples. Not only do these cases lend themselves due to their similarities but there are also differences that allow for analysis of impacts of UNCLOS on different cultural and legal narratives. Canada recognized aboriginal right immediately upon its creation while Australia has done so much more recently, in 1992.[101] Countries have also taken different to address indigenous claims. Australia does not recognize indigenous sovereignty and self-determination. For this reason, it refuses to sign treaties with any indigenous community as it does not consider them a nation. Canada has a treaty system and recognizes, at least in writing, rights to self-governance. Given these regional and national differences, each country must navigate discussions surrounding UNCLOS and its international strait differently. How does this affect narratives in regional, national, and international legislation? What lessons might be learned from these evolutions and interactions?

[101] George Barrie, "International Law and Indigenous People: Self-Determination, Development, Consent and Co-Management," *Comparative and International Law Journal of Southern Africa* 51, no. 2171–184 (2018); King George III of England, "Royal Proclamation," October 7, 1763; High Court of Australia, Mabo and Others v Queensland (No. 2) (High Court of Australia 1992).

Narrative Policy Framework (NPF) and Narrative Policy Analysis (NPA)

In The Science of Stories, Jones et al. make the proposition that humans as a species a fundamentally story tellers. We use stories, whether real or fictional to gain understanding of our world and our place in it. This makes *homo narrans* or the storytelling human, a central character in our society.[102] Jones et al. use this idea to make the case that it is by studying the evolution of stories that we can better understand ourselves and the policy process. As a result, the Narrative Policy Framework or NPF is an *"an attempt to apply objective methodological approaches (i.e., science) to subjective social reality (i.e., policy narratives)".*[103] In short, the NPF method, also called Narrative Policy Analysis (NPA) does not claim to identify a single, objective truth but instead highlights the competing realities of stakeholders to gain a better understanding of the present impacts of a policy and the positions held by those involved. The focus on contrasting "truths" makes NPF beneficial to analyze interactions of belief systems or competing strategies in the policy process.[104] Emery Roe, in *Introduction to Narrative Policy Analysis* identifies these characteristics as the strengths of the NPA approach to tackle issues in the policy process that evade empirical methods due to high levels of uncertainty, complexity and polarization.[105] The NPF thrives in situations where the "truth" of different pieces of evidence is difficult to evaluate.

The NPF suggests that participants of the policy process tell stories that capture policy conflict through a *"combination of a setting, characters (heroes, victims, and villains), plots, and a moral of the story (policy solution).".*[106] Setting is synonymous to context. This might include geographic setting, specific demographic groups, historical background, etc. Characters are major figures that play a role in the

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[102] Michael D. Jones, Elizabeth A. Shanahan, and Mark K. McBeth, eds., "Introducing The Narrative Policy Framework," in *The Science of Stories* (New York: Palgrave Macmillan US, 2014), 235–46.
[103] Jones, Shanahan, and McBeth.
[104] Thomas A. Birkland, *An Introduction to the Policy Process: Theories, Concepts, and Models of Public Policy Making*, Fifth edition (New York London: Routledge, 2020).
[105] "Introduction to Narrative Policy Analysis: Why It Is, What It Is, and How It Is," in *Narrative Policy Analysis*, by Emery Roe (Duke University Press, 1994), 1–19, https://doi.org/10.1215/9780822381891-001.
[106] Jones, Shanahan, and McBeth, "Narrative Policy Framework," 240.

evolution of the story. They can be real on anthropomorphic (ex: the ocean is suffering) and a typically divided into active players (heroes and villains) and subjects or victims. Finally, the NPF assumes that each policy even or conflict has a beginning, middle and conclusion followed by a moral of the story. Morals may vary based on the position of stakeholders on the issue. Given the focus of this study on storytelling in the policy process, it is important to distinguish between stories and narratives. Although often used interchangeably, a story remains a subset of a narrative and *"describes a sequence of actions and experiences done or undergone by a certain number of people, whether real or imaginary"*.[107] In contrast, a narrative is more encompassing and highlights the collective themes observed over time. However, stories play an important role in the development of narratives and can individually illustrate a significant redirection of a narrative.[108]

The redirection or acceleration of narrative development is often caused by an uncontrolled, external event. Thomas Birkland identifies these occurrences as focusing events or moments in time where significant attention is directed to a particular policy issue due to an external occurrence (disaster, scandal, etc.) that changes or rapidly advances policy work in that area.[109] Focusing events play a significant role in determining the narratives that stakeholders will adopt and use to pursue their preferred outcome. This process of highlighting perspectives on an event contributes to the overall "agenda setting" surrounding that issue. Agenda setting refers to the way in which policy topics gain or lose public attention.[110] In Lessons of Disaster, Thomas Birkland explores the interplay of these two components of narratives in policy by analyzing the perception of human and natural "disasters" based on the language it is characterized with. Depending on the narrative that policy stakeholders wish to highlight and the agenda

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[107] M. S. Feldman, "Making Sense of Stories: A Rhetorical Approach to Narrative Analysis," *Journal of Public Administration Research and Theory* 14, no. 2 (April 1, 2004): 149, https://doi.org/10.1093/jopart/muh010.
[108] Feldman, "Making Sense of Stories"; Jones, Shanahan, and McBeth, "Narrative Policy Framework."
[109] Birkland, *An Introduction to the Policy Process*; Emery Roe, *Narrative Policy Analysis: Theory and Practice* (Durham: Duke University Press, 1994).
[110] Birkland, *An Introduction to the Policy Process*.

they are pursuing, an event may be called a crisis, disaster, catastrophe.[111] By capturing the policy evolution with these above elements, narrative policy analysis approaches hope to gain insight on major focusing events on the policy process and their impacts on agenda setting for different players. This study will adopt this approach to capture impacts of primary sources on regional policies and within the broader context of ocean policy and governance.

Importance of Narrative Analysis in Indigenous History and Policy

The NPF lends itself to analysis on complex policy scenarios where belief systems, agenda setting, and historical context play a significant role in determining the outcome of conflict.[112] These characteristics make NPF a powerful tool to analyze the evolution of ocean legislation and equitable access to ocean resources by indigenous peoples. Indigenous communities rely on stories and oral traditions to conserve and pass down knowledge.[113] This includes legal traditions, social rules, treaties, and the extent of tribal governance. Often, to put down principles in writing is considered disrespectful and destructive to the culture of the community. The lack of written evidence in indigenous communities and the importance of stories to define tribal governing structures makes it difficult to collect empirical evidence on the long-term impacts of policy decisions. This makes western documentation of narratives and current oral histories of modern indigenous peoples the single pieces of current evidence for analysis of the evolution of indigenous perspectives on governance of ocean space.

Second, in contrast to indigenous communities, western legal systems rely on meticulous documentation and material evidence to resolve conflict. This fundamental difference in systems of knowledge transfer leads to re-occurring conflict and miscommunication. In Journeying North: Reflections

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[111] Thomas A Birkland, *Lessons of Disaster: Policy Change after Catastrophic Events* (Washington, D.C.: Georgetown University Press, 2006), http://site.ebrary.com/id/10236730.
[112] Roe, *Narrative Policy Analysis*; Jones, Shanahan, and McBeth, "Narrative Policy Framework"; Birkland, *An Introduction to the Policy Process*.
[113] John Borrows, *Law's Indigenous Ethics* (Toronto ; Buffalo ; London: University of Toronto Press, 2019).

on Inuit Stories as Law, regarding land rights of the Inuit, Mariano Aupilaarjuk states: *"We are told today that Inuit never had laws […] Why? They say because they are not written on paper. When I think of paper, I think you can tear it up, and the laws are gone.* The laws of the Inuit are not on paper.".[114] Already in this statement, the role of history and the strategic use of narratives by stakeholders come into play. Similarly, aboriginal peoples in Australia sing, dance or even "live" the law to keep it alive.[115] Although presently courts recognize the existence of laws and the autonomy of indigenous communities in governance of their lands, the lack of written evidence and fundamentally different legal structures and concepts results in a mismatch governance approaches.

Oral traditions and legal structures are not the only gap stakeholders must bridge. Western and indigenous societies have different belief systems, ways of knowing and perspectives on the meaning of legislation. In Aboriginal Peoples, Colonialism and International Law, Irene Watson demonstrates this difference through the perceptions wester and indigenous peoples have of law and property. The author determines that western law relies on possessive individualism or the need to claim objects and land as exclusively ours do use as we please.[116] Indigenous communities typically take on a relational philosophy characterized by the phrase "knowledge belongs to the people and people belong to the land".[117] These fundamentally different worldviews lead to competing concepts of property, ownerships, decision making and time measurement. In the case of time measurement, indigenous groups like those in Australia, believe in "ownership" since the beginning of time: those who were present there since the beginning have rights to the land. Western systems believe in the concept of discovery as the beginning of the "time of ownership" as demonstrated by the concept of terra nullius in the Doctrine of Discovery. Where western societies see

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[114] Lori Groft and Rebecca Johnson, "Journeying North: Reflections on Inuit Stories as Law" (Commissioned by Indigenous Bar Association-Accessing Justice and Reconciliation Project, 2014), 4.
[115] Irene Watson and Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law*, 2015.
[116] Watson and Watson.
[117] Watson and Watson; F. David Peat, *Blackfoot Physics: A Journey into the Native American Worldview* (Grand Rapids, Mich: Phanes Press, 2002), 63.

land ownership, an indigenous community may see an obligation towards land renewal. What's more, Watson points out contrasts in determining truths: western societies adhere to hierarchy and linear thinking while an indigenous community relies on consensus and may follow a lateral thought process.

Such diverging approaches to ownership, result in complicated dialogues. In Quebec, Canada, this occurs through cases of entangled territorialities. Here, to demonstrate rights to public land, indigenous communities must show proof of ownership while also providing clear delimitations to their territories using maps.[118] The result is a translation of knowledge from one belief system to another. The challenges are twofold. First, western fishing communities already see this land as "theirs". Here we can observe the competing visions of "time" which results in dispute. Second, indigenous groups do not have strict boundaries to territory and often rely longstanding agreements to manage overlapping territories between tribes. The necessity to divide these loosely "claimed" spaces leads to conflict as well. Given these fundamental and re-occurring issues in efforts to reach agreement on co-management due to different belief systems, the NPF approach lends itself to facilitate a inclusive comparison of competing legal systems that might not be possible others

Data

Primary sources in this study consist of international, national, and local legislation related to indigenous rights and ocean governance. Primary evidence includes treaties, court rulings and legal literature dating from 533 AD, when first written maritime legislation was identified, to present day. Given the large period of focus, primary sources will be selected in relation to significant focusing events or changes in narrative observed during preliminary research. Primary sources will be selected from open access government databases and archives in the United States, Canada, and Australia. Secondary sources

[118] Benoit Éthier, "Analyzing Entangled Territorialities and Indigenous Use of Maps: Atikamekw Nehirowisiwok (Quebec, Canada) Dynamics of Territorial Negotiations, Frictions, and Creativity," *The Canadian Geographer / Le Géographe Canadien* 64, no. 1 (March 2020): 32–48, https://doi.org/10.1111/cag.12603.

will be used to provide context for narrative shifts observed in primary literature and identify causes and consequences. Given the focus of this study on the impacts of international legislation on regional governance, an analysis at the global level will be carried out with a focus on (1) narratives of sovereignty and ownership in ocean legislation and (2) narratives of discovery and dominance in legal literature. Secondary sources were selected from academic databases. With these parallel, global dialogues in place, a comparative case study approach was used to evaluate the impacts of these broad themes on local settings in the Australian Torres Strait and Canadian Northwest Passage.

Study Significance

Understanding the origins of legislation and the philosophies of those who lay the groundwork is essential to move towards a fair future in ocean governance. At present, substantial disparities exist in which communities have access to ocean resources. While the United Nations Decade for Ocean Science has resulted in an increase in attention to the issue of ocean equity, no or little effort has been made to evaluate whether the present legal infrastructure related to ocean governance supports the entrenchment of disparities. If efforts to support equity in ocean access and management are to be successful, it is essential to evaluate the existing legal framework and its role in promoting or hindering the initiative. While previous literature has separately explored the origins of ocean legislation, the inequitable access of coastal communities to resources and the evolution of the status and rights of indigenous peoples, little has been done to investigate the relationships between these topics. This study aims to bridge the gap between these fields and identify potential connections that may inform effective policy action going forward. Given the role of historic narratives in ocean legislation and storytelling in indigenous governance, taking a NPF approach allows for this study to investigate the transfer of themes throughout these fields. The use of case studies allows for the cross-comparison of the evolution of narratives in different environments and how national stories are woven into an international dialogue. The existence of parallel themes in narratives provides insight into the most pressing issues that must be addressed going forward. In contrast, divergent

narratives suggest different approaches to policy issues at the intersection of indigenous rights and maritime governance.

Study Limitations

In Historical Texts as Literary Artifacts, Hayden White writes *"histories ought never to be read as unambiguous signs of the events they report, but rather as symbolic structures, extended metaphors, that "liken" the events reported […] to some form with which we have already become familiar in our literature"*.[119] No matter how rooted in empirical evidence, historical accounts are inherently colored by their author's perspectives. White goes on to suggest that history, as it occurs, does not have tragic, comic, or heroic aspects but rather it is those that document these events (whether living them or providing commentary in retrospect) that weave stories that suit their world view. What's more, as time goes on histories change as they continue to be retold. The fluid nature of histories and historical narratives proves to be problematic when attempting to identify "historic truth". In Truth of Historical Narratives, Behan McCullagh tackles this issue of truth by setting parameters of fair representation to help historians separate true statements from those which may contain selective truths while choosing to omit details to support vested interests.[120] He suggests a series of parameters to reduce bias contained in historical documents. From these guidelines, this paper aims to reduce bias in the claims of primary sources by (1) seeking out multiple primary sources to illustrate each focusing event and (2) by including external perspectives from historic and contemporary secondary literature to validate or question evidence. While these steps do not eliminate the limitation of historic bias, they create a tool to at least identify discrepancies where they exist.

Identifying the objective truth of statements of primary sources presents a significant limitation to the NPF approach. An additional challenge exists in accurately capturing the evolution of events in the past,

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[119] Hayden V. White, "The Historical Text as Literary Artifact," in *Tropics of Discourse: Essays in Cultural Criticism*, 10. print (Baltimore: Johns Hopkins Univ. Pr, 2003).
[120] C. Behan McCullagh, "The Truth of Historical Narratives," *History and Theory* 26, no. 4 (December 1987): 30, https://doi.org/10.2307/2505043.

especially regarding implementation of governance of a vast space like the ocean. As demonstrated in the literature review, much of maritime legislation remains rooted in tradition and customary law. How perspectives on governance evolved between written evidence produced by focusing events is difficult to determine. What's more, when this study identifies primary sources of historic legislation and court cases, it is difficult to determine how such decisions were realistically implemented across oceans and territories. For example, according to legislation, ships were expected to follow maritime codes based on their flag nationality. In practice, even today, captains often represent sole authority at sea and interpreted the law individually.[121] There are ways to address such discrepancies. Presently, many policy research initiatives rely on empirical evidence to support or challenge claims made in legislation. However, given the large temporal scope of research, this study chose not to include any empirical evidence to support claims made by primary sources.

A similar limitation pertains to the comparative analysis of two international straits. One focus of this study is to determine the impacts of long-lasting narratives of power and dominance on present disparities in participation of marginalized stakeholders in governance. As a result, it is important to acknowledge the inherent western bias of the primary evidence used in this study resulting in potentially skewed perspectives on conflict and its resolution. Indigenous communities do not rely on written laws and documentation but rather use oral traditions to keep knowledge "alive". Although present day courts recognize indigenous laws and governance structures, any written evidence of indigenous governance has likely undergone translation and interpretation by a western author.[122] What's more, concepts or language may be poorly transcribed into court documents resulting in misconception of intentions and actions. This study attempts to reduce the bias of western perspectives as much as possible by seeking out diverse sources of evidence and commentary but also acknowledges that while sources are many, they do not objectively represent the views of all stakeholders involved in the issue of ocean governance. Future studies

[121] Benton, "Legal Spaces of Empire."
[122] Borrows, *Law's Indigenous Ethics*.

investigating the impacts of conflicting ocean legislation on equitable access to ocean resources may consider taking a more "hands-on" approach through survey and interview data collection to provide "equal footing" to indigenous perspectives when understanding competing narratives of ocean governance.

Finally, the author wishes to acknowledge that as a white, western female the views and conclusions expressed in this study in no way represent the voices of Indigenous peoples in the territories analyzed in the following sections. The author aims, from a historical policy perspective, to determine whether legal narratives used to justify rights to ownership of ocean space hinder an equitable ocean future. In no way does this study attempt to communicate potential intentions or perspectives held by the indigenous communities tied to these coastal areas.

Chapter 4 – History of Ocean Governance and Legislation

Overview

Our global ocean covers 72% of our planet and average a depth of 4500 meters.[123] Given the immensity of this body of water, it is unsurprising the marine world has remained a source of fascination and a daunting challenge for humans for centuries. We still understand little about our ocean even today with only 20% of the seafloor being mapped in 2021. In short, we know less about our oceans than the surface of the moon While they are a daunting challenge to seafarers, scientists and explorers, oceans have also become notorious due to the variety of problems they pose to law makers. How can we claim something that moves? If nobody occupies a space permanently, can it be governed? If this becomes possible, who has the right to do so and how far does this authority extend? Throughout the history of efforts to establish a clear legal framework regarding ocean space, law makers and political leaders have oscillated between systems based on ocean conquest and control or, to manage the space through its historic definition as "the commons of

[123] Juda, *International Law and Ocean Use Management*.

mankind". With vague laws, no standardized approach to enforce these regulations and inconsistent knowledge about the space, the oceans are still considered the last frontier on our planet.[124]

As a result of this problematic status, the most important characteristic of ocean governance and law is that oceans have never had and still lack a clear and effective rulebook. Simultaneously, while they have never been clearly defined, from the moment humans have taken to the seas, there have been a series of unanimously observed "customs" that were followed by mariners. Today, while we are closer to a universal set of rules, a large majority of behavior at sea remains based on history and traditions dating as far as ancient Greece. As with any tradition, rules quickly become guidelines subject to individual interpretation, assumptions, and varying approaches of different countries to ocean space.

The following sections follow the pivotal points of the history of ocean governance culminating in the first international agreement on the use of global ocean space: the Third United Nations Convention on the Law of the Sea or UNCLOS (III). Although countries around the world have rich histories of maritime exploration, naval power, and commerce exist around the world, the desire to claims and control oceans came from western cultures.[125] As a result, the components incorporated into this international treaty carry with them the histories of European naval powers and their conquests around the world. First, we will explore the evolution of maritime customs and code in the Mediterranean under Greek and Roman law and trade. Next, the 15th and 16th century provide a perspective on the development of control and sovereignty by means of maritime law through efforts to divide up the world via treaties and declarations. As more empires joined the race to conquer territory in the 1600s and 1700s, both locally and internationally, the need for unified ocean governance systems by which ocean space was divided led to several philosophies on the ownership of oceans from "freedom of the seas" to "ocean dominion". These debates on how to manage a large space grew as the world became more connected globally. Centuries of these discussions

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[124] Anna Zalik, "Mining the Seabed, Enclosing the Area: Ocean Grabbing, Proprietary Knowledge and the Geopolitics of the Extractive Frontier beyond National Jurisdiction," *International Social Science Journal* 68, no. 229–230 (September 2018): 343–59, https://doi.org/10.1111/issj.12159.
[125] Benton, *A Search for Sovereignty*.

lead to a series of international conferences and treaties between the mid 19th century and 1982. Through two world wars and countless global conflicts, political leaders, law makers and negotiators came together and produce the first global system for ocean governance: the United Nations Convention on the Law of the Sea. The final section of this paper will cover the successes of this revolutionary effort but also assess how such a broad effort has fallen short to govern on

Early Ocean Customs in the Roman Mediterranean: Lex Rhodia and the Justinian Digest

The origins of maritime law can be traced back to Ancient Greece and Rome. While national maritime laws existed prior to 533 AD, the era is credited with the first effort to codify the use of ocean space and trade and marks an initial milestone in the history of maritime law. The need to put law in writing regarding ships, captains and deckhands came from the large expanse of the Roman Empire as it began to sprawl across the Mediterranean basin. With an intricate network of trade routes, ports and cultures interacting, roman law quickly adopted a series of legal practices to make sure trade was efficient and conflict minimized.

The island of Rhodes was known for its skilled merchants and dominated Mediterranean trade.[126] While the series of laws on maritime commerce produced by this culture, was lost, the remains traced by historians in the 17th century provide peeks into what *Lex Rhodia*, or Rhodian Sea Law, focused on. Lex Rhodia is mentioned in the Digest of Justinian of 533AD and is built upon by the Byzantine Emperor Justinian I.[127] Firstly, this demonstrates that customs and rules travelled with trade. Broadly observed maritime customs came largely from a need to exchange goods quickly and efficiently between coastal countries. As the Roman Empire engulfed the Mediterranean basin, the rich maritime trading culture impacted Roman law. In the Digest, *Lex Rhodia* provided information on the types of seafarers that travelled the Mediterranean and the difficult relationships between them: *"By wish of the captain and crew who*

[126] Raffety, Matthew Taylor, "'The Law Is the Lord of the Sea': Maritime Law as Global Maritime History," in *A World at Sea: Maritime Practices and Global History*, ed. Lauren A. Benton and Nathan Perl-Rosenthal, First edition, The Early Modern Americas (Philadelphia: University of Pennsylvania Press, 2020).
[127] Benton, *A Search for Sovereignty*.

slacken sail, the ship goes into a place or on a beach against the wish of the merchant. […] The merchant is to suffer no harm from the loss of the ship since he did not wish to go into that place. If while the ship is in full sail, the merchant says to the captain 'I want to go into this place', and the place is not comprised in the charter-party, and'it happens that the ship is lost while the goods are saved, let the captain have his ship made good by the merchant.".[128] The statement hints at the struggle between terrestrial and maritime jurisdiction: while a merchant may have authority in port, at sea, ultimately, the decisions lie with the captain and his crew while at sea.

The sea space is also treated as an area outside of standard terrestrial law. Although the sea is often associated with notions of freedom and liberty, the Digest of Justinian says otherwise.[129] Similarly, to the absolute authority of the captain on the ship, *"If a sailor hires himself out, let him know that he is a slave and has sold himself, and that he is to execute every commission.". Freedom on land meant little once a ship was at sea.* This unfortunate reality is still true today with forced labor, withholding of wages and unlivable conditions existing throughout fishing vessels on the high seas.[130] At sea, those who were free on land could lose their rights, but the opposite also applied. In the Digest of Justinian I, the Roman law declares that no matter the citizen status of the individual the person appointed by the owner of the ship as captain, including women and slaves, is to remain and be respected as such. Already, when this document at the time of its publishing, laws which applied on land were left behind once a ship set sail. While any merchant could sue the owner for this action, Justinian I underlines that any individual can become a captain and manage a vessel. This mentality aligns with statements preceding these sections such as *"Almost all rivers and harbors are public property."*[3] and is by this famous statement, repeated for following centuries*:*

[128] Ashburner, Walter, "Translation and Commentary," in *Nomos Rodiōn Nautikos: The Rhodian Sea-Law* (Oxford : Clarendon Press, 1909).
[129] Urbina, *The Outlaw Ocean*.
[130] Urbina.

"I [Justinian I] am, indeed, the lord of the World, but the law is the lord of the sea.".[131] In short, the oceans remained a realm beyond terrestrial jurisdiction entirely dependent on their own codes and customs.

The statements made by the Byzantine emperor resemble what is stated in the remains of Rhodian maritime law, however, Lex Rhodia is explicitly mentioned only in the second section of Chapter 14, The Rhodian Law of Jettison. The Justinian Digest does not bother going into detail about the Rhodian practice of jettison, assuming it is known and understood by the reader, but simply states: *"The Rhodian law provides that if cargo has been jettisoned in order to lighten a ship, the sacrifice for the common good must be made good by common contribution"*[3]. The section itself remains insignificant for the evolution of maritime law but the reference demonstrates the practice of citing regional traditions when codifying behaviors of sailors.

Dividing and Dominating the World: The Doctrine of Discovery with Papal Bull Inter Caetera and the Treaties of Tordesillas and Zaragoza

Up until the 1400s, the crude maritime laws and codes that were put in place were largely aimed at accelerating and streamlining commerce between coastal communities. With the discoveries of distant territories likes North America, India and Brazil, the purpose of maritime law changed with the interest of the countries that had the power to dictate it. The colonial aspirations of explorers and their kingdoms marked an acceleration in the development of maritime law mostly out of necessity to justify their claims to new terrestrial and maritime territories. In her book *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900*, Lauren Benton underlines the close relationship between geography and ocean governance: how could one claim a space they did not know existed or had a thorough understanding of? As a result, while empires staked their claims to entire oceans, the reality resembled a series of heavily travelled patches of coastal waters connected by strings of heavily trafficked merchant ship highways. As knowledge of oceans and foreign territories grew so did the legislation surrounding their sovereignty.

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[131] Benton and Perl-Rosenthal, *A World at Sea*.

When Christopher Columbus returned to Europe in 1493 and reported his discovery of a new world across the Atlantic, the new geographic knowledge raised many questions, notably: who will own it? Although individual kingdoms were in competition, religion remained the most important factor of alliance. As a result, the Portuguese and Spanish monarchies agreed to submit the issue of jurisdiction to Pope Alexander I to secure that all discovered lands remained under Catholic rule. The Papal Bull is the first instance of colonial powers dividing up the world. In this case, Portugal and Castille divided it in half. In the document Bull Inter Caetera, the pope declares Castille to be sovereign of *"all islands and mainlands found and to be found […] west and south, by drawing a line from the Arctic pole, namely the North, to the Antarctic pole, namely the South"*.[132] The kingdom of Portugal received sovereignty of all other lands, such as India (Figure 1). Under penalty of excommunication, the pope *"strictly forbid all persons of whatsoever rank […] to go for the purpose of trade or any other reason to the islands or mainlands"*. [6] However, King John of Portugal was not satisfied with the terms of the Papal Bull and convinced Castille to agree to move the demarcation line another *"370 leagues west of the Cape Verde Islands"* to give Portugal ownership of Brazil. [133] The agreement, signed in 1494, was knowns as the Treaty of Tordesillas. However, treaty had one fundamental flaw: under the assumption the world was flat and that oceans did not connect, the single line between two poles in the Western Hemisphere was the only border that divided Spanish and Portuguese sovereignty. As a result, it was only a matter of time until passage through the Eastern Hemisphere led to conflict. This happened in the early 1500s when in 1512 Portuguese explorers discovered the Moluccas islands (also known as the Spice Islands) in the Indian Ocean.[134] Later, in 1529, Ferdinand Magellan came across the islands and claimed them for the Spanish crown. To resolve the dispute over these valuable Spice Islands, the Spanish monarchy called for a commission of mathematicians to find the corresponding line to

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[132] Henry Steele Commager, "2. Papal Bull INTER CAETERA. May 4, 1493," in *Documents of American History. 4*, 4th ed., Commager, Henry Steele vols. (Appleton-Century-Crofts, 1948), 1.
[133] Henry Steele Commager, "3. Treaty of Tordesillas, June 7th, 1494," in *Documents of American History. 4*, 4th ed., Commager, Henry Steele vols. (Appleton-Century-Crofts, 1948), 2.
[134] Hollis Micheal Tarver Denova and Emily Slape, eds., *The Spanish Empire: A Historical Encyclopedia*, Empires of the World (Santa Barbara, California: ABC-CLIO, 2016).

that of the Treaty of Tordesillas. The establishment of this new line was solidified through the Treaty of Zaragoza in 1529. However, although originally intended to be even, Charles I, needed to maintain peace with Portugal and so willingly gave Portugal control over the islands. As a result, Portugal received approximately 191° of the globe while Spain only controlled 169°.

Stemming from an effort to clearly divide the world between them, the series of Spanish and Portuguese treaties results in a, once again, vague, and contentious final document. What's more, the issues related to the exact locations of the lines that divided the world, which reiterates the statements made by Lauren Benton regarding the tight knit relationship between ocean sovereignty and geographic (or navigational) knowledge. An example of the importance of geography and perceptions of space in early ocean governance are the terms used to "divide the world in half". Given their view of the map of discoveries territories and the overall conviction that the world was flat, the demarcation lines did not even encircle the entire globe as they went from the top of the world to the bottom or from "pole to pole" leading to conflict and further agreements to mitigate them.

Designating the Status of Ocean Space (17th and 18th centuries): Grotian Mare Liberum and Selden's Mare Clausum

In the early 15th century, empires took to the seas to claim the world both through sovereign power, exploration, and privateering. With the progress of technology, the increase of international trading routes between empires and colonies as well as the growth of offshore fisheries, coastal European powers were faced with new issues. Knowledge of oceans and foreign territories was no longer a problem, and neither were ocean laws. In fact, the latter was becoming a new problem altogether: countries each followed a different code of maritime law while staking their claims and defending exclusive use of the ocean. Regional variations in addition to interpretations within colonies resulting from indigenous interactions and the distance between their conquered lands made for a frustrating mixture of laws and treaties. Empires

needed a new strategy that was 1) broad and all-encompassing of all ocean aspects from trade to piracy to fishing, and 2) universally accepted by other maritime powers.

With Grotius, the history of the law of the sea begins to follow a parallel path to that of international law. One potential cause may be the frustrating status of ocean space. Uninhabitable, with no landmarks to divide it with, the ocean created a legal arena to test treaties, legal systems, and natural law itself[135]. The vigorous debates that ensued after Grotius's publications on ocean use and ownership would continue until present day.

Hugo Grotius (1583-1645) was a Dutch lawyer and diplomat recognized for his contributions to the beginnings of international law through his work on the "rules" of war, *De jure belli ac pacis* (On the Law of War and Peace) and his work *Mare Liberum* (Freedom of the seas) which challenged the broadly accepted closed seas or ocean dominion.[136] Grotius's philosophy on the free seas was not without interest: his publication pertained directly to the limitations on Dutch navigation and maritime travel by Spain and Portugal which asserted sovereignty over the major ocean basins. In Mare Liberum (1635), Grotius distinguishes between resources which can be depleted and those that "although serving one person still suffices for the common use of all persons".[137] He defines the sea as the latter category. In addition, he adds a distinction between bodies of water that can be claimed and those that cannot: "A nation can take possession of a river, as it is enclosed within their boundaries; with the sea, they cannot do so".[138] The scholar also argues that in this sense, navigation cannot harm the sea and represents danger only to the navigator himself. This early rule of "liberty of navigation" would become the precedent for innocent passage, a right still used today: if the vessel and its crew are not conducting any illegal or harmful activities, a ship has the right to travel the seas freely. Although Grotius was in the favor of freedom of the seas and

[135] Benton, *A Search for Sovereignty*.
[136] Juda, *International Law and Ocean Use Management*.
[137] Grotius et al., *The Free Sea*.
[138] Grotius et al.

in direct opposition to the popular trend of dominion and sovereignty, he did admit that coastal states could have sovereignty over coastal areas and distinguished between "inner" and "outer" seas. Later in his work, he dwells on this issue of the "limits of coastal sovereignty".[139] Upon publication, this debate would draw in scholars across Europe and would only be partially resolved centuries later at the UNCLOS meetings.

In a world where countries were racing to fund exploration and expand empires, Grotius's ideas did not go unnoticed. Historians like Gabriela Frei call the publication of the work as the beginning of the "battle of the books" and the long, still ongoing, debate on ocean governance.[140] Shortly after the publication, of Mare Liberum, John Selden, a British scholar issues a sharp response with his work Mare Clausum (1635) or "the closed sea", which rebutted the justification of ocean space as "human commons" and asserted it could be possessed and controlled.[141] Just like Grotius, Selden did not act without motive, Selden's writing funded my James I of England and aimed to validate sovereignty of the British Empire over exclusive rights to English fishing grounds.[142] Selden argued "The sea, by the law of nature or nations, is not common to all men, but capable of private dominion or proprietie as well as the land.".[143] Interestingly however, Selden's view showed an evolution from the times of the Papal Bull. Selden claimed that Portugal and Spain did not have dominion over the two halves of the globe because they lacked the means to enforce

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[139] Grotius et al.

[140] Gabriela A. Frei, "The Sea as a Legal and Strategic Space," in *Great Britain, International Law, and the Evolution of Maritime Strategic Thought, 1856–1914*, by Gabriela A. Frei (Oxford University Press, 2020), 12–29, https://doi.org/10.1093/oso/9780198859932.003.0002.

[141] Selden, John, *Of the Dominion, or, Ownership of the Sea Two Books. In the First Is Shew'd, That the Sea, by the Law of Nature or Nations, Is Not Common to All Men, but Capable of Private Dominion or Proprietie, as Well as the Land. In the Second Is Proved, That the Dominion of the British Sea, or That Which Incompasseth the Isle of Great Britain, Is, and Ever Hath Been, a Part or Appendant of the Empire of That Island.*; van Ittersum, "Debating the Free Sea in London, Paris, The Hague and Venice."

[142] van Ittersum, "Debating the Free Sea in London, Paris, The Hague and Venice."

[143] Selden, John, *Of the Dominion, or, Ownership of the Sea Two Books. In the First Is Shew'd, That the Sea, by the Law of Nature or Nations, Is Not Common to All Men, but Capable of Private Dominion or Proprietie, as Well as the Land. In the Second Is Proved, That the Dominion of the British Sea, or That Which Incompasseth the Isle of Great Britain, Is, and Ever Hath Been, a Part or Appendant of the Empire of That Island.*

their claims.[144] As a result, Selden's definition of dominion or ocean sovereignty relied on a countries ability to control the oceans.[145]

Overall, the 'battle of the books' illustrated that there was a limitation to the ownership of the sea. For Grotius and Selden, the sea was a space which was generally free to use, particularly the part of known as the high seas or any distant, open ocean space. [146.] Although Grotius and Selden disagreed on virtually everything regarding maritime law beyond this point, they both cited the same source to support their claims: the Roman empire and its dominance in the Mediterranean. Here, both scholars demonstrated a tradition in law of the sea that continues to endure going forward. Although countries, politicians, writers, and mariner did not always agree on what maritime law should become, they each root their new systems in centuries of customs and traditions.[147]

1800 – 1958: The Age of Codification of Maritime Law - International Conflict as Proof of Maritime Globalization

Over the next two centuries disputes and debate would continue regarding ocean sovereignty but with little legal ramification. The single most important event in that time was a general observation that coastal states could maintain total jurisdiction over their territorial waters, traditionally within cannon shot distance or 3 nautical miles.[148] It wasn't until the 1850s that several problems began to escalate to a point where these customs required modification. The history of maritime law and ocean governance goes hand in hand with globalization: capitalist expansion and technologic innovation is coupled with the "telescoping" of space and time, made the world seem smaller, distant places more accessible and resources

[144] Selden, John.
[145] Frei, "The Sea as a Legal and Strategic Space."
[146] Frei.
[147] Raffety, Matthew Taylor, "'The Law Is the Lord of the Sea': Maritime Law as Global Maritime History."
[148] H. S. K. Kent, "The Historical Origins of the Three-Mile Limit," *American Journal of International Law* 48, no. 4 (October 1954): 537–53, https://doi.org/10.2307/2195021.

scarce.[149] In the Arctic, extensive whaling, and the booming fur seal industry in the Bering Sea (250,000 individuals taken in the summer of 1868 alone) had depleted species populations to a point of collapse and in some cases, extinction.[150] Large marine mammals were not the only point of concern: in the 1930s, over exploitation of salmon by the U.S. and Japan in Alaska Bay led to similar consequences.[151] Finally, the new demand for oil as fuel in the 1900s pushed two concerns globally: who had rights to the petroleum reserves on continental shelves and what were concerns associated with increasingly polluted harbors. These events came with a realization that resources were exhaustible and that our world was more and more interconnected. An increasingly militarized world pushed countries to reevaluate the status quo in fear that ocean governance would become a matter of frequent violent conflict established by a select few naval powers.

As the world recovered from decades of international conflict, codification of international maritime law was inevitable to follow that of airspace and laws regarding war and via events like the Hague Codification Conference of 1930.[152] The tipping point came with the Truman Proclamations of 1945: *The Proclamation by The President with Respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf* and *The Proclamation by The President with Respect to Fisheries in Certain Areas of the High Seas*. The first proclamation declared that the United States extended its claims to the exclusive use of resources of the continental shelf given *"long range world-wide need for new sources of petroleum and other minerals*".[153] The second pertained to coastal fisheries outside of the territorial seas and went on to *"establish explicitly bounded conservation zones in which fishing activities shall be subject to the*

[149] Benton, *A Search for Sovereignty*.
[150] Juda, *International Law and Ocean Use Management*.
[151] Juda.
[152] Castillo and Caminos, *Law of the Sea*.
[153] Harry S. Truman, "Proclamation by the President with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf," *American Journal of International Law* 40, no. S1 (January 1946): 45–46, https://doi.org/10.2307/2214063.

regulation and control of the United States".[154] President Truman justified U.S. rights over fisheries given their importance to his country and even reminded that it is *"the right of any State to establish conservation zones off its shores in accordance with the above principles"* if the freedom of navigation was conserved.[155]

The Truman proclamations were a focusing event in two aspects. Firstly, they demonstrated that international law could be created via domino effect: upon declaring sovereignty over the continental shelf, countries around the world raced to establish similar claims on their own coastlines. Other countries with large fisheries, like Peru and Chile, were quick to follow the U.S. example and published their own proclamations. Second, Truman changed the legal perception of oceans. Since the 1650s, Grotian theory had established a two-dimensional image of maritime space seeing it are a means for transportation and fishing. However, the U.S. lay claims to the seabed while clarifying *"The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected."*.[156] With the Truman proclamations it became clear there was a valuable third dimension in ocean governance separate from the surface ocean and the water column: the seafloor.[157]

The Truman proclamation distilled the notion of "ocean rights" rather than sovereignty. However, while no country could claim absolute sovereignty the events of 1945 would solicit calls for an international convention on maritime law. With conflicts around the world surrounding fisheries and ocean jurisdiction, the International Law Commission (ILC) of the United Nations, a body of experts tasked with codifying international law, took it upon itself to begin to codify a series of guidelines to dictate rights to fisheries and high seas beyond the 12-mile limit.[158] The discussions surrounding expansion of jurisdiction to the continental shelf inherently lead to the question of: who presides over the high seas? To ensure the

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[154] Truman.
[155] Truman.
[156] Truman.
[157] Juda, *International Law and Ocean Use Management*.
[158] Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, "Statute of the International Tribunal on the Law of the Sea" (United Nations, 1982).

preservation of the freedom of the seas and in interest of continued access to this space, the U.S. called for an international conference that would lay the groundwork for a system to sustainable manage fisheries.

As countries joined the call for an international agreement it became a question of creating a framework of international ocean governance. In December 1954, the United Nations General Assembly agreed to convene an international conference in Rome to address the issues raised by coastal states. The results of the conference were to be communicated to the ILC for consideration.[159] However, to the disappointment of states with major ocean economies, the ILC conference focused on conservation issues and gaps in scientific knowledge.[160] One of the only major conclusions of the conference regarding sovereignty was the extension of the rights of coastal states beyond territorial waters if they had *"special interest in the maintenance of the productivity of the living resources"* via a "contiguous zone" .[161] Although they had power to influence how the space was used, they could not ban foreign fishing activity: the "new" decision made little headway in resolving the situation. Seeing the frustrating, clumsy process demonstrated by the ILC to reach a conclusion, countries became increasingly concerned about a return to an ocean sovereignty regime given the various claims to ocean space following their own proclamations.[162] The 1955 Conference resolved little in terms of ocean rights but provided the final push needed for a unanimous call to standardize ocean governance via a global agreement. This time, the meeting would be led by representatives of coastal states and marked the beginning of 30 years disputes, accusations and negotiations surrounding claims to ocean use and its resources.

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[159] Castillo and Caminos, *Law of the Sea*.
[160] William W. Bishop, "The 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas," *Columbia Law Review* 62, no. 7 (November 1962): 1206, https://doi.org/10.2307/1120368.
[161] United Nations, Issuing Body, *Report of the International Technical Conference on the Conservation of the Living Resources of the Sea : 18 April to 10 May 1955, Rome.* (New York: United Nations, 1955).
[162] Castillo and Caminos, *Law of the Sea*.

1958-1982: Three United Nations Conventions on the Law of the Sea UNCLOS I & II (1958-60) and UNCLOS III (1973-1982)

Vested national interests played a central role in pushing for an international agreement on ocean governance largely from countries determined to their own interests in maintaining exclusive control over its own coastal waters while also having right to the high seas. Based on the desires of countries to claim ocean space, the focus of the first UNCLOS was to *"examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem and to embody the results of its work in one or more international conventions".*[163] Diplomats from 86 countries participated in the conference in Geneva. The conference started in February and lasted 3 months. Given the scope of the UNCLOS I, work was divided among five committees that produce 4 different agreements each pertaining to a different part of the ocean. First, *The Convention on the Continental Shelf* which codified the Truman proclamations through its definition of the continental shelf as *"the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas".*[164] An important aspect of this definition was the focus on the limitations of technology to the definition of the extent of the continental shelf. This would become a significant issue as technology evolved over the next several decades to exploit virtually every part of the ocean's seabed.[165] Second, UNCLOS I addressed the issue of the freedom of the seas in the *Convention on the High Seas.* Defined as the area beyond the contiguous zone, the high seas were open for use by coastal and non-coastal states could exercise: (*1)Freedom of navigation; (2)Freedom of fishing; (3)Freedom to lay*

[163] United Nations, "Resolution 1105 (XI) of the General Assembly of the United Nations Convening the Conference," 1958.
[164] International Law Commission, "Convention on the Continental Shelf" (United Nations & International Law Commission, 1958).
[165] Castillo and Caminos, *Law of the Sea*.

submarine cables and pipelines;(4)Freedom to fly over the high seas".[166] In addition to this, the convention highlights, although vaguely, the rights for arrest, seizure of property and defines specific rules regarding piracy, pollution, and violent conflict of warships. The sister convention of the agreement on the high seas pertained to fishing: *the Convention on Fishing and Conservation of the Living Resources of the High Seas*. Shorter than the others, this treaty briefly outlines those states are entitled to fish on the high seas if they are not in violation of any other treaty or disregarding scientific evidence that would indicate environmental harm was being done.[167] The document also provides a rough framework for the settlement of disputes regarding fishing rights. Although the *Convention on the Territorial Sea and the Contiguous Zone* would prove to be the most problematic of the 1958 treaties, the issue of living resources on the high seas would become a growing problem and remains to be addressed presently.

Finally, and most importantly, the *Convention on the Territorial Sea and the Contiguous Zone* designated the extent and terms of coastal state sovereignty. The territorial sea was a space where coastal states exercised complete control over the pelagic and benthic resources following the rules of international law.[168] Jurisdiction also extended to airspace. The single exception to this control was bypassed only vessels exercising their right of innocent passage which allowed them to transit through the space peacefully if they performed no other actions but passage.[169] An important component of innocent passage required submarines to surface and display their flag. The contiguous zone was the second element of this convention and echoed the decisions of the ILC in 1955: *"a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to: "(a)Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea; (b)Punish infringement of the*

[166] International Law Commission, "Convention on the High Seas" (United Nations and International Law Commission, 1958).
[167] International Law Commission, "Convention on Fishing and Conservation of the Living Resources of the High Seas" (United Nations & International Law Commission, 1958).
[168] International Law Commission, "Convention on the Territorial Sea and the Contiguous Zone" (United Nations and International Law Commission, 1958).
[169] International Law Commission.

above regulations committed within its territory or territorial sea.".[170] A final condition clarified that this limit could only extend 12 nautical miles from shore. However, this convention failed to reach agreement on an important factor: the extent of the territorial sea. While most states observed the 3-mile limit, proposals ranged from 3-12 miles. Larger, naval powers proposed narrower territorial limits largely due to their ability to exercise sovereignty while smaller states tried to extend their power as much as possible.[171] The result was a frustrating stalemate that evaded a conclusion.

The four parts of UNCLOS I entered into force between 1962 and 1966. The slow process was due to a brief and unsuccessful UNCLOS II meeting. The conference had a narrow focus: resolve the two inconclusive issues of the extent of territorial seas and the lack of decision regarding exclusive fisheries zones.[172] Once again, states could not reach an agreement on the extent of territorial seas and the United States came under fire for its conservative proposals on extent of sovereignty. Even after compromising on a more generous limit with the Canadians, the US-Canadian solution failed to pass by one vote. The U.S. was unable to obtain approval to continue negotiations, the meeting concluded after only six weeks and reached no new conclusions.

Following UNCLOS II there was little incentive to reach a global agreement regarding coastal ocean sovereignty and exclusive fisheries rights. This did not stop the cascading consequences of the Truman proclamations: coastal states continued to assert and expand claims to territorial waters and exclusive fisheries zones. Regional agreements also became frequent. For example, the Declaration of Santo between Latin American and Caribbean states extended claims fishing rights to 200 miles.[173] These expansions were especially concerning regarding territorial seas where states held full sovereignty. This

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[170] International Law Commission.
[171] Liam Campling and Alejandro Colás, "Capitalism and the Sea: Sovereignty, Territory and Appropriation in the Global Ocean," *Environment and Planning D: Society and Space* 36, no. 4 (August 2018): 776–94, https://doi.org/10.1177/0263775817737319.
[172] United Nations, "Final Act of the Second United Nations Conference on the Law of the Sea," 1960.
[173] Juda, *International Law and Ocean Use Management*.

meant that any foreign flagged vessel had announce its presence, fly its flag, and request innocent passage.[174] UNCLOS I had attempted to reduce the clutter of varying claims to ocean space but a decade after the treaty entered into force, competing regional declarations, jurisdictions and varying perspectives on maritime law were once again a concern. Disputes came to a head in 1973 when there was another universal call to revise the law of the sea convention.

Compared to its two predecessors, UNCLOS III was a monumental event in both scope and in its effectiveness. The conference brought together representatives of 150 countries and demonstrated that the law of the sea could evolve based on the observed pitfalls and voids in its present state. Most importantly, taking note from the Hague Codification Conference of 1930 and tribunals like the International Court of Justice created post World War II, UNCLOS III created unbiased bodies to resolve conflicting interests and regulate ocean use.[175] However, the successful drafting and refining of all terms came at a price: UNCLOS III required nine years of continuous negation before its completion in 1982.

The Components of UNCLOS III

With 17 parts, 320 articles and nine annexes, UNCLOS is a sprawling body of work considered as the sum of all three conventions and negotiations between 1958 and 1982.[176] Large and complex the focus of UNCLOS can be summarized as the legal body that determines the governance of coastal ocean space and the high seas. Other issues pertaining beyond the surface ocean and the water column are distributed among the supporting bodies of the system. The International Tribunal for the Law of the Sea (ITLOS) is tasked with peaceful resolution of international conflict. The International Seabed Authority (ISA) is responsible with the assessment and generation of permits for the exploration and exploitation of the seabed

[174] Castillo and Caminos, *Law of the Sea*; Frei, "The Sea as a Legal and Strategic Space."
[175] Castillo and Caminos, *Law of the Sea*.
[176] Castillo and Caminos; Juda, *International Law and Ocean Use Management*; United Nations, *United Nations Convention on the Law of the Sea*.

on the abyssal plains in the high seas or simply "the Area" beyond the continental shelf. Finally, the Commission on the Limits of the Continental Shelf (CLCS) is focused on the evaluation of the claims to related to the expansion of ocean sovereignty based on the nature of the seafloor. Although UNCLOS carries the name of the United Nations, the UN does not have any major functional role in the execution of the treaty. Instead, UNCLOS exists independently and largely depends on the three legal bodies established with its foundation. Beyond this, it straddles a space between the jurisdiction of the OLC and the Office of Legal Affairs (OLA), subsets of the United Nations system.

The primary focus of UNCLOS III was to address the problematic codification of rules on the sovereignty of ocean space. At its core, the treaty consolidates all four of the treaties of UNCLOS I under a single agreement while adding a significant number of details to each to ensure better enforcement. Broadly, of the seventeen parts of the agreement, half are dedicated to the different ocean zones and the rights of states to their use and their resources. These zones can be divided in to two types: (1) control of the water column and (2) control and access to the seabed.

The two major evolutions concern the areas where the second convention on the law of the sea fell short. By the time of the third convention on the law of the sea, most coastal states had adopted a 12-mile territorial sea. As a result, the addition of Article 3 in Part 2, Territorial Seas, of UNCLOS III codified this general trend finally establishing a universal territorial sea limit at 12 nautical miles from short (Figure 2). The next significant evolution was the specification of the extent of claims on economic resources, i.e., fisheries and the continental shelf.[177] First, the continental shelf was defined as *"the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baseline"*.[178] Then, drawing heavily on the issues regarding fisheries as well as *The Convention on Fishing and Conservation of the Living Resources of the High Seas* of 1958, Part V of the treaty established the

[177] United Nations, *United Nations Convention on the Law of the Sea*.
[178] United Nations.

Exclusive Economic Zone (EEZ). Through Article 57, the EEZ of each coastal state *"shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured."* (Figure 2). [179] Both limits followed the precedent set by the Declaration of Santo regarding fisheries and were intensely supported by the United States which sought to protect exclusive access to both its benthic and pelagic resources..[180] Part V provided states with *"sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living".*[181] Beyond these limits, the remainder of the oceans are governed by the freedom of the seas and considered the "common heritage of humankind". This space is divided into the pelagic space, the high seas, and the benthic space, the abyssal plains also referred to as "the Area" (Figure 2). The governance of the high seas evolved little from 1958, leaving regulations vague. The Area was a response to the developing technologies for deep sea exploration and exploitation of valuable metals and minerals beyond the continental shelf. Unlike the high seas, the Area received it's an independent council to oversee and approve use.

The third convention on the Law of the Sea made another significant step forward in ocean governance compared to its predecessors: the convention established two independent councils to interpret, evaluation and enforce the law of the sea. These legislative bodies were established specifically to administer the law of the sea and regulate the use of benthic space. First, and most important, created by Annex VI, the International Tribunal on the Law of the Sea (ITLOS). Situated in Hamburg, ITLOS is *"composed of a body of 21 independent members, elected from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea.".*[182] A series of articles is dedicated to ensuring this body remains as unbiased and diverse as possible to ensure fair judgement. The jurisdiction of the tribunal regards *"The jurisdiction of the Tribunal comprises all*

[179] United Nations.
[180] Juda, *International Law and Ocean Use Management*.
[181] United Nations, *United Nations Convention on the Law of the Sea*.
[182] United Nations.

disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.".[183] Following the acceptance of an application, the tribunal presides over a series of hearings and then proceeds to decide by majority vote. In short, UNCLOS III provided a means resolve international ocean conflict in a peaceful, fair, and neutral way.[184] The second and more surprising component is the foundation of The International Seabed Authority (ISA or the Authority) was created through Section 4 of Part XI of UNCLOS III and tasked with the management of the use of the Area. The establishment of the Authority and its governance of the deep seabed is both the longest and the most notorious section of the UNCLOS document. The Authority has absolute governance over the entire abyssal seabed space: it may initiate research and investigations into the state of the resources, issue regulations and recommendations, supervise the activities of countries and all activities in the Area must be subject to its approval via permit.[185] The organization is complex, functions globally and entirely independent. The large power instated in the Authority led to the refusal of the United States and other states to sign UNCLOS III as it was seen as a violation of the freedom of the seas.[186] Part XI became the only part of UNCLOS III to be amended in 1994 (after another 10 years of debate) and decreased the extent of its power. Regardless, the United States remains opposed UNCLOS on this basis as it deems it a threat to its economic pursuits in deep sea mining. Finally, although not as significant, Annex II of UNCLOS III created another body concerned with the seabed. The Commission on the Limits of the Continental Shelf (CLCS) is composed of *"21 members who shall be experts in the field of geology, geophysics or hydrography […] having due regard to the need to ensure equitable geographical representation"*.[187] The commission has two functions: firstly, to evaluate claims to the extended

[183] United Nations.
[184] International Tribunal for the Law of the Sea, "Digest of Jurisprudence of the International Tribunal for the Law of the Sea" (United Nations & International Law Commission, 2021).
[185] International Seabed Authority, "Consolidated Regulations and Recommendations on Prospecting and Exploration" (United Nations, 2001); United Nations, *United Nations Convention on the Law of the Sea*.
[186] Juda, *International Law and Ocean Use Management*; Castillo and Caminos, *Law of the Sea*.
[187] United Nations, *United Nations Convention on the Law of the Sea*.

continental shelf and evaluate their validity and second to provide support (if requested) to a coastal state applying to extend its claim. The commission also has the right to provide recommendations regarding the management of shelf space if there is evidence for concern from recent scientific publications.[188]

1982-present: The Successes and Failures of Global Ocean Governance

From its signing in 1982, UNCLOS has served to govern and manage global ocean space for almost 40 years. In this time, it has been put to the test on multiple occasions and has also shown where it falls short in its goal to provide equitable and sustainable use of the oceans. Built on a culmination of maritime customs existing since before 533 AD, the treaty was able to seamlessly consolidate and clarify generally accepted notions such as the limits of territorial sea or the right to innocent passage.[189] In addition, it went a step further and provided a framework to resolve and mitigate various disagreements and contending claims to coastal space through ITLOS. The judicial body is now credited the for preventing a series of violent conflicts such as regional naval wars. The creation of the IAS also demonstrated the ability of the convention to evolve over the course of several meetings to address jurisdiction issues. However, in recent years, UNCLOS has also come under fire for its sprawling array of failures.

The first and perhaps greatest of the issues in UNCLOS concerns the high seas. The high seas are still managed following a freedom of the sea's mentality where there are no limits on access, amounts of resources or behavior. This was not a problem when resources were plentiful, and access (due to lack of knowledge and technology) was a limiting factor. Today, it is one of the most damaging loopholes to the global ocean regarding illegal fishing, human rights and trafficking and piracy. Since it does not fall under the jurisdiction of any country, the high seas make it virtually impossible to apprehend criminals in the grey space that makes up. 60% of the oceans.[190] In addition, while UNCLOS designates a country's claims on

[188] Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, "Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf" (United Nations, 1999); United Nations, *United Nations Convention on the Law of the Sea*.
[189] Benton and Perl-Rosenthal, *A World at Sea*.
[190] Urbina, *The Outlaw Ocean*.

coastal waters via EEZs, territorial waters and the continental shelf, it remains only as effective and powerful as the country that enforces it. This echoes one of John Selden's core statements of "*Mare Clausum*". Does the law of the sea matter for a country that has no means to enforce it within its waters? For a country like Palau that "*consists of only about 177 square miles of land (roughly the size of New York City), its sovereignty extends across 230,000 square miles of wide-open seas (nearly the size of Texas)".*[191] Surrounded by countries with some of the largest fishing fleets in the world (China, Japan, Taiwan, etc.) a single patrol vessel is responsible for enforcing this jurisdiction of the area. The colonial traditions of control and ocean sovereignty remain prominent today as international law wrestles with solutions that do not rely on the individual naval and economic capabilities of a country. If the USA navy takes on the role of a global ocean police, is this a matter of greater good or a display of maritime dominance?

Second, an issue that was a touched on by the ILC even before the convention at the time of the Truman proclamations: how can global ocean governance be successful is participation is optional? [192] This is a central and frustrating issue several international agreements (such as the International Whaling Commission) have experienced with countries leaving and joining at will when it is convenient. Unfortunately, the same is true for UNCLOS. At present, one of the world's largest naval powers is not part of the agreement: the United States. Due to its interests in seafloor resources and its large continental shelf (i.e., Part IX of UNCLOS III), the United States has neither signed nor ratified the convention. If the U.S. is not part of the agreement, should it follow UNCLOS guidelines regarding conflict? What about countries that find themselves in conflict with the nation?

However, a lack of adherence can be observed among signatories as well. In 2016, the Philippines took a dispute on the territorial claims of China in the South China Sea to ITLOS for resolution.[193] Using the "claim of the nine-dash line, China lay claims to most of the marginal sea based on historic use. The

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[191] Urbina.
[192] Castillo and Caminos, *Law of the Sea*.
[193] International Tribunal for the Law of the Sea, "Digest of Jurisprudence of the International Tribunal for the Law of the Sea."

Philippines took this as a violation of the law of the sea given the 200-nautical mile limits of EEZs.[194] Both signatories of UNCLOS, the ruling of ITLOS should have resolved the dispute. When the tribunal ruled in favor of the Philippines, China publicly announced it will not accept the tribunals ruling as ITLOS did not have proper jurisdiction in the matter. As a result, the Philippines received little more than a moral victory while geopolitically, given China's imposing presence, little happened to pressure the country in to accepting the ruling.[195] Globally, other UNCLOS signatories seemed indifferent to the result and no state could take direct action regionally to challenge the states sovereignty.[196] In short, the event demonstrated that while the rules may be written, it is an entirely different matter to follow them.

Finally, while based on prior agreements, UNCLOS remains fundamentally based on terrestrial law. Maritime law continues to assume that the ocean is stagnant be it in resources, or in the delimitations of ocean space established by coastal countries. However, with climate change and increasing anthropogenic pressures marine ecosystems are changing. We are beginning to see that laws once put in place are not effective in addressing these changes or anticipating them. An example of this is the Arctic. As sea ice extent decreases due to increased emissions of greenhouse gases, the Arctic is opening to new economic activities such as oil-drilling and international shipping. In the past, the region has been divided between eight member countries of the Arctic treaty with a small, seasonally accessible space of high seas at the center of the region.[197] However, with new economic potential, states are beginning to discuss claims to the region due to factors such a "arctic proximity" or the seabed falling under the "commons of humankind". Just as Pope Alexander I designated Portugal and Spain as sovereigns of all territories "found

[194] International Tribunal for the Law of the Sea; Congressional Research Service, "Arbitration Case Between the Philippines and China Under the United Nations Convention on the Law of the Sea (UNCLOS)," 2016.
[195] Suisheng Zhao, "China and the South China Sea Arbitration: Geopolitics Versus International Law," *Journal of Contemporary China* 27, no. 109 (January 2, 2018): 1–15, https://doi.org/10.1080/10670564.2017.1363012.
[196] Zhao.
[197] Xueping Li, "Arctic Governance and China's First Arctic Policy: An UNCLOS Perspective," *The Yearbook of Polar Law Online* 10, no. 1 (2019): 357–85, https://doi.org/10.1163/22116427_010010016.

and to be found", should such precautions be incorporated in to UNCLOS given the changing state of our oceans? [198]

Summary: The Future of UNCLOS

With 169 signatories, the United Nations Convention on the Law of the Sea is an incredible achievement in international law and global cooperation. The president of the Third Convention on the Law of the Sea celebrated it as a victory in the "rule of law and the peaceful settlement of disputes" and a symbol of "human solidarity and the reality of interdependence".[199] He goes on to summarize UNCLOS as the constitution for the oceans.

While UNCLOS was revolutionary in many aspects, it reiterated what others had already established. The treaty did not make any radical changes or improvements to address gaps that existed (piracy, human rights, flagging, etc.) and remain a problem up until today. With some of its first documents over 50 years old, the convention has yet to see any major additions or reforms to address pressing issues such as gaps in jurisdiction, climate change or technological advances. Upon closer analysis, the shortcomings of the agreement become frustrating and beg the question: although codified, have we improved in our approach to the management of marine space? Does this approach support equitable ocean use or simply empower dominant coastal states? UNCLOS oscillates between this heavily colonialist approach and the radical opposite resembling Grotian principles of "freedom of the seas". The state-centric approach focused on absolute sovereignty of territorial waters allows little room for the consideration of coastal cultures and traditional users. Conversely, the problematic status of the high seas demonstrates the pitfalls of this alternative. Generally vague, the laws governing the high seas allow for loopholes that are exploited by organizations around the world from illegal fishing to the abuse of human rights.

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[198] Commager, "2. Papal Bull INTER CAETERA. May 4, 1493."
[199] Koh, Tommy T. B., "A Constitution for the Oceans: Remarks by Tommy T. B. Koh, of Singapore. President of the Third United Nations Conference on the Law of the Sea." (United Nations, October 12, 1982).

In summary, UNCLOS carries on the longstanding tradition of ocean governance and maritime law: vague, varied and inherently dependent on citing other predecessor agreements that maintain the same flaws. A culmination of the centuries of local maritime traditions and international treaties, the system also carries the burden of the flaws of these predecessors. In addition to its archaic nature, UNCLOS is beginning to face new threats alien to those who designed the treaties that it built on: climate change and rapid development of powerful technologies such as satellite, and artificial intelligence.

The global ocean has been synonymous with its vastness. We are reaching a turning point whereby our heavy use, growing demands and lack of monitoring, its ecosystems are changing and resources dwindling.[200] The "commons of humankind" can no longer be treated as an open and endless resource as they are described in the United Nations Convention on Law of the Sea. While we still do not entirely understand them, we are racing to conquer them. The same mentality that has long motivated countries to define treaties and codes to demonstrate their sovereignty of ocean space now pushes commercial and political bodies to attempt to divide up the last frontier on our planet. International Seabed Authority and recent claims on seabed space are proof of this. Looking into the future, we must consider how we will adapt and inform this complex international system used to govern our global ocean to ensure we use our ocean fairly and sustainably.

Chapter 5 – The Place of Indigenous Peoples in International Law

Overview

The history of maritime law and UNCLOS may seem removed from the history of the rights of indigenous peoples. However, given the importance of oceans in exploration and colonization, the issue of indigenous peoples in newly "discovered" lands and discussions surrounding maritime sovereignty, the history of the law of the sea and indigenous rights go hand in hand. In some cases, the same key figures

[200] Gemma Andreone, ed., *The Future of the Law of the Sea* (Cham: Springer International Publishing, 2017), https://doi.org/10.1007/978-3-319-51274-7.

that played deciding roles in the turning points of the law of the sea contributed to the legislation used to justify to occupation and colonization of lands occupied by indigenous communities. The following sections will examine archival legal documents supported by secondary historical literature to analyze the evolution of narratives surrounding indigenous status, self-determination, and governance in international law. International law is a vast field. Together with Chapter 4, this chapter will serve to provide global background for national and regional narratives explored in the case studies of the Northwest Passage in Canada and the Torres Strait in Australia. As a result, the following sections will focus only on pivotal decisions in international law pertaining directly to the issues of indigenous status and sovereignty related to the case study topics.

Laying Foundations of Discovery and Dominance

The narrative of indigenous rights in international law began with and continues to be shaped by legislation dating back to the 15th century. Similarly, to the Law of the Sea, the history of indigenous law is tightly bound with the "discovery" of new lands and the need to conquer them. Beginning in 1436 and concluding in 1493, a series of papal bulls justified European explorers in their conquest of new territories. The concepts contained within these papal bulls have come to be known as the "Doctrine of Discovery" and have defined discussions in human rights and international law going forward.

The papal bulls that make up the Doctrine of Discovery originate from the traditions of crusades. Although confined to the 13th century, the legal arguments that justified Christian expeditions to conquer and convert populations of "heathen and infidel" peoples in the Middle East lay the foundations for the reasoning behind colonization and conquest of Africa, North and South America.[201] The central role of the pope and the Catholic church demonstrates the importance of religion in all international legislation concerning "discovery" and colonization of new territories. The early 1400s marked the beginning of an

[201] Robert J. Miller et al., *Discovering Indigenous Lands* (Oxford University Press, 2010), https://doi.org/10.1093/acprof:oso/9780199579815.001.0001; David H. Getches et al., eds., *Cases and Materials on Federal Indian Law*, 6th ed, American Casebook Series (St. Paul, MN: Thomson/West, 2011).

era of disputes over overseas claims between the Christian kingdoms of Portugal and Spain (Castile). Initially, conflict sparked over claims to Northern Africa as well as the strategically placed Canary Islands both of which were desirable for resources like gold and slaves. In 1436, King Duarte of Portugal requested that papal permission to conquer the territories. While pope Eugenius IV responded with the papal bull Rex Regnum supporting the European presence in the Canary Islands, his stance on the sovereignty of the two countries remained neutral.[202] Rex Regnum remained crucial in shaping the way Wester society justified colonization: while the Church acknowledge the right of indigenous peoples to property and sovereignty, the need for colonization was justified as necessary through a need to lead indigenous communities to civilization and religious conversion.[203] The conflict between Portugal and Spain over African territories would come a head in the 1450s with the two papal bulls of Nicholas V: Dum Diversas and Romanus Pontifex. Given the close relationship of Nicholas V to the Portugese crown, both documents would favor King Alfonso of Portugal. However, each document dealt with a separate perspective of colonization. In 1452, with papal bull Dum Diversas (in Latin, "until different") Pope Nicholas V took a stance on the issue of the indigenous communities encountered by Portugese settlers. The legal edict stated that "we grant to you full and free power, through the Apostolic authority by this edict, to invade, conquer, fight, subjugate the Saracens [Muslims] and pagans, and other infidels […], and wherever established their […] dominions, lands, places, […] any other possessions, mobile and immobile goods found in all these places". Shortly after, Nicholas V issued the papal bull Romanus Pontifex, this time drawing upon themes in Dum Diversas, explicitly stating that "to invade, search out, capture, vanquish, and subdue all Saracens and pagans whatsoever, and other enemies of Christ […] and to reduce their persons to perpetual slavery, and to apply and appropriate to himself and his successors the kingdoms […] goods, and to convert them to his and their use and profit". The document bound all Christian monarchs to acknowledge Portugal's exclusive claims

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[202] Frances Davenport, "Bull Romanus Pontifex (Nicholas V.). January 8, 1455, The Document," in *European Treaties Bearing on the History of the United States and Its Dependencies to 1648*, ed. Charles Oscar Paullin (Carnegie Institution of Washington, 1917); Getches et al., *Cases and Materials on Federal Indian Law*.
[203] Miller et al., *Discovering Indigenous Lands*.

to the islands and all of Africa with the threat of excommunication if this claim was contested.[204] Romanus Pontifex echoed the reasoning of crusades as it laid out colonization and conquest of new territories as work supporting the greater good of Christianity. The clear statement of "perpetual slavery" and "appropriation" lay the foundations for the language and mentalities of Western legal systems towards indigenous communities going forward.

The bull Romanus Pontifex played a key role in justifying conquest and colonization and continued to do so when in 1492 when Christopher Columbus claimed North America in the name of the Spanish crown. Romanus Pontifex gave Portugal exclusive claims to all African territories and "undiscovered lands". However, the reasoning of "converting infidels" and "pagans" for the good of the Church in previous papal bulls was used by King Ferdinand and Queen Isabella to procure Bull *Intercaetera Divinae* from Pope Alexander VI in 1493. While examined as a foundational document in the history of the Law of the Sea, the papal bull all marked the first application of the Doctrine of Discovery to the North America. The document begins stating that the goal of the Spanish crown and Columbus's expedition is "to seek out and discover certain islands and mainlands remote and unknown and not hitherto discovered by others, to the end that you might bring […] the profession of the Catholic faith their residents and inhabitants". Seemingly contradictory, the statement demonstrates a fundamental concept of the Doctrine of Discovery: while the Church recognizes indigenous peoples as nations, their claims to land are unjustified if they are not Catholic. As a result, lands they inhabit are considered undiscovered. This principle will continue to appear for centuries to come. Given the claims of the Bull Intercaetera to all lands West of the Azores, the bull was followed by the final legal edict of the Doctrine of Discovery. The Treaty of Tordesillas of 1494 clarified the claims of "newly discovered lands" of Spain and Portugal while also dividing the world in half between the two monarchies, providing them exclusive sovereignty to these territories. The Treaty of Tordesillas is

[204] Miller et al., *Discovering Indigenous Lands*; S. James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996).

considered the first piece of legislation addressing the Law of Nations in any way.[205] In Discovering Indigenous Lands, Robert Miller summarizes the principles contained in the bulls and treaty of the 1400s: firstly, the Church had the right to grant political and secular rights to sovereignty to Christian states over any lands unclaimed by a European power, second exploration and colonization were justified as they helped exercise "necessary" Christian guardianship over "infidels" and finally through Spain and Portugal's claims in the Treaty of Tordesillas, the western world declared it's symbolic possession of all "new lands".[206]

Colonial Narratives in International Law and Governance

Legislation from the 1400s justified the conquest of new lands by European explorers and settlers and their purpose. However, the Doctrine of Discovery remained vague on the fate of indigenous peoples and their treatment upon conquest. Beginning in the early 1500s, the following two centuries would document the evolution of moral and legal narrative surrounding indigenous rights and treatment. Intiial discussions would evolve into the early principles of international law leading up to the Law of Nations and the definition of Westphalian sovereignty.

The bull Intercaetera Divinae provided Spain with a secure title to the territories encountered by Christopher Columbus. The period that followed was characterized by rapid Spanish colonization of North American territories with grim consequences for indigenous cultures. The extensive reduction of indigenous populations through war and disease led to additional legislation justifying and supporting the actions of Spanish conquistadors: The Requerimiento (Requirement) of 1513[207]. A piece of colonial legislation, the Requerimento was considered a charter of conquest and was required to be read to any indigenous community upon encounter. The charter stated that, the Pope of Rome "was to be the head of the entire

[205] McMahon, "The Great Commission, Papal Bulls and the Doctrine of Discovery."
[206] Miller et al., *Discovering Indigenous Lands*.
[207] Getches et al., *Cases and Materials on Federal Indian Law*; McMahon, "The Great Commission, Papal Bulls and the Doctrine of Discovery."

human race, wherever men might exist" and that "Their Highnesses as such Kings and Lords, and have served, and serve, them as their subjects as they should, and must, do, with good will and without offering any resistance. You are constrained and obliged to do the same as they".[208] If the indigenous peoples refused or objected in anyway, the Requerimiento promised the following: "we will enter your land against you with force and will make war in every place and by every means we can and are able, and we will then subject you to the yoke and authority of the Church and Their Highnesses. We will take you and your wives and children and make them slaves, and as such we will sell them, and will dispose of you and them as Their Highnesses order. And we will take your property and will do to you all the harm and evil we can". Spanish lawmakers considered that with this announcement having been read to an indigenous group, the listeners were now legally aware of the consequences of their actions and as such made the case for the waging of "just war" on the part of Spain. No effort was made to ensure any understanding of the Latin document on the part of the listeners making the systematic killing and enslavement of indigenous peoples no different from systematic genocide [209].

The behavior towards indigenous peoples did not go unnoticed or unquestioned. The initial, "sensible" justifications for conquest of new territories became an issue as well: the deliberations of scholars like Bartolomé de las Casas and especially Francisco de Vittoria demonstrated a dilemma regarding the place of indigenous peoples in Western law and society. Bartolomé de las Casas was a Dominican priest who first criticized the behavior and defended indigenous rights. In *A Short History of the Destruction of the Indies(1527-1561)*, las Casas documented the atrocities committed by Spanish conquistadors during his time in the New World. In *Apologética historia sumaria,* Las Casas went on to acknowledge indigenous communities as legitimate societies and dismissed any violence again indigenous peoples arguing that the violent conquest must stop, and religious conversion should be peaceful, voluntary process.[210] He was

[208] Indigenous Values Initiative, "Requerimiento," Doctrine of Discovery, July 24, 2018, https://doctrineofdiscovery.org/requerimiento/.
[209] McMahon, "The Great Commission, Papal Bulls and the Doctrine of Discovery."
[210] McMahon.

particularly critical of the Spanish encomienda system which sold off indigenous lands to settlers along with rights to indigenous labor to work these lands.[211] For his strong stance on the treatment of indigenous peoples Las Casas was given the official position of the "Protector of Indians". However, beyond his accounts dismissing the behavior of Spanish colonists, de las Casas supported the African slave trade and did not oppose Spanish claims to the Americas.[212] Similarly to the reasoning put forward by papal bulls, Las Casas viewed colonization as the work of God to save indigenous peoples from eternal damnation through their conversion. While in no way revolutionary in his thinking, Las Casas's writings began conversation regarding the rights of indigenous peoples and their status in western legal systems. Shortly after Bartolomé de las Casas took on the issues of injustices against indigenous peoples in the New World, Francisco de Vitoria, a professor of theology at the University of Salamanca, would address the legislative aspects of colonization through a series of lectures called De Indis or On Indians Lately Discovered.[213] Although religious himself, the concepts developed by Vitoria would mark the early secularization of principles related to the status of indigenous peoples and the groundwork of natural law. For Francisco de Vitoria, the Christian justifications for Spanish occupation of indigenous territories were insufficient. He rejected ideas that suggested the pope as the ruler of the world and held that indigenous peoples rightful owners of their lands given that ""This is clear, because there is a certain method in their affairs; they have polities which are carefully arranged and they have definite marriage and magistrates, overlords, laws, and workshops, and a system of exchange, all of which call for the use of reason; they also have a kind of religion.".[214] What's more, he highlighted the illegitimate nature of the doctrine of discovery stating that claims to indigenous lands were not valid "any more than if they had discovered us".[215] Although he

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[211] Anaya, *Indigenous Peoples in International Law*, 2004.
[212] McMahon, "The Great Commission, Papal Bulls and the Doctrine of Discovery."
[213] {Citation}
[214] Francisco de Vitoria et al., *Francisci de Victoria, De Indis et De Ivre Belli Relectiones.* (Washington: Carnegie Institution of Washington, 1917), 127.
[215] Vitoria et al., 139.

recognized indigenous peoples as societies sovereign of their lands this did not mean they were considered equal to western settlers: Vitoria persistently referred to indigenous peopels as "barbarians".[216] While Francisco de Vitoria rejected the religious justifications to colonization and recognized indigenous communities as sovereigns of these lands, he justified invasion, occupation and western sovereignty of the new world approaches to colonization through new principles derived from the Law of Nations and roman law. [217] Vitoria found that the violent treatment and occupation of the New World by Spanish conquistadors was justified by the concept of "just war". By citing the Old and New Testament, Franscico de Vitoria argued that it was a requirement for sovereign nations to accept foreigner into their lands.[218] This requirement extended to transit, occupation, and peaceful economic activities.[219] If there is violation of these rights, this is a cause for "just war": *"When the Indians deny the Spaniards their rights under the law of nations then they do them a wrong. Therefore, if it is necessary, in order to preserve their right, that they should go to war, then they may lawfully do so".*[220] Vitoria also introduced the notion of "civilized guardianship" which suggested that a western nation might take on the governance of a culture for the positive gains of this population.[221] Given his perception of indigenous peoples as barbarians and being "unintelligent and stupid […] who differ little from brutes", Vitoria saw colonization as justified when it involved the civilization and education of indigenous peoples.[222] The arguments put forward by Vitoria became the new foundations for western justification of colonial endeavors. Some nations chose to continue their arguments of religious conversion (Spain, Portugal) while other took on the arguments of peaceful

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[216] Vitoria et al., 135.
[217] McMahon, "The Great Commission, Papal Bulls and the Doctrine of Discovery"; Anaya, *Indigenous Peoples in International Law*, 2004.
[218] David H. Getches, Charles F. Wilkinson, and Robert A. Williams, *Cases and Materials on Federal Indian Law*, 5th ed, American Casebook Series (St. Paul, MN: Thomson/West, 2005).
[219] Vitoria et al., *Francisci de Victoria, De Indis et De Ivre Belli Relectiones.*, 154; Getches, Wilkinson, and Williams, *Cases and Materials on Federal Indian Law*.
[220] Vitoria et al., *Francisci de Victoria, De Indis et De Ivre Belli Relectiones.*, 154.
[221] Vitoria et al., 154.
[222] Vitoria et al., 127; Anaya, *Indigenous Peoples in International Law*, 2004; McMahon, "The Great Commission, Papal Bulls and the Doctrine of Discovery."

economic activities and the need for "civilized nation's guardianship" (English, Dutch, French). Regardless of the reason, each nation benefited from the new reasoning to wage "just war.".[223]

The next major step in the development of principals of international law related to indigenous rights would come in 1625 with the publication of De Jure Belli ac Pacis or On the Law of War and Peace by Hugo Grotius. Considered the father of international law, Grotius was significantly influenced by Vitoria. In Chapter 4, historic legislation demonstrated the key role played by Hugo Grotius in defining the freedom of the seas and the extend of sovereignty of coastal states. The role of Grotius in defining the groundwork of international law and the place of indigenous peoples within it was equally significant. What's more, with his reasoning based on the writings of Greek philosophers, the work of Grotius marked the secularization of the European legal system. In *On the Law of War and Peace*, Hugo Grotius builds on many concepts put forward by Vitoria (property, war, and natural law) but also takes new steps to address issues such as the definition of sovereignty. Similarly, to Vitoria, Grotius rejected the doctrine of discovery stating that "There is no less injustice in setting up claims, under the pretence of newly discovered titles, to what belongs to another. Neither can the wickedness, and impiety, nor any other incapacity of the original owner justify such a claim. For the title and right by discovery can apply only to countries and places, that have no owner".[224] He believed that rather than adhering to religious doctrine to justify war or claim property, all humans followed the secular law of nature (based on Roman law). The groundwork laid by Grotius regarding the recognition of ownership of the New World by indigenous groups would be reflected through the pattern of treaty making and lands claims agreements between western powers and traditional owners.[225] When discussing property and disputes surrounding claims to possession, Hugo Grotius endorsed what he coined "justifiable war" and stated that "The grounds of war are as numerous as those of

[223] McMahon, "The Great Commission, Papal Bulls and the Doctrine of Discovery."
[224] Hugo Grotius and Archibald Colin Campbell, "On the Law of War and Peace" (Batoche Books, 2001), 228.
[225] Anaya, *Indigenous Peoples in International Law*, 2004.

judicial actions. For where the power of law ceases, there war begins.".[226] From the perspective of the author, war is simply an extension of the natural law, where peaceful negotiation can no longer be carried out. Grotius goes on to identify the reasons necessary to enter "just" violent conflict: "The justifiable causes generally assigned for war are three, defence, indemnity, and punishment".[227] Just like Vitoria, and echoing his thoughts from Mare Liberum, Grotius endorsed that under natural law " foundation of common right, that a free passage through countries, rivers, or over any part of the sea, which belongs to some particular people, ought to be allowed to those, who require it for the necessary occasions of life; whether those occasions be in quest of settlements, after being driven from their own country, or to trade with a remote nation, or to recover by just war their lost possessions".[228] Inhibiting a nation in such actions would result in a cause for just war on the basis of punishment of a crime. The framework laid out by Grotius provided abundant justification for the violent colonization and control of indigenous lands and communities.[229] It is important to note that Hugo Grotius scholars often highlight the position of Grotius as a hire of the Dutch crown, writing to justify the claims and activities of the Dutch East India Company.[230]

Grotius also addressed the issue of sovereignty defining "the acts of the sovereign executive power of a directly public kind are the making of peace and war and treaties, and the imposition of taxes, and other similar exercises of authority over the persons and property of its subjects".[231] Grotius is clear about certain particularities of sovereignty. For example, sovereignty is reserved to states and their leaders while for individuals, total control merely results in property.[232] The totality of this control suggests that sovereignty

[226] Grotius and Campbell, "On the Law of War and Peace," 61.
[227] Grotius and Campbell, 62.
[228] Grotius and Campbell, 81.
[229] Anaya, *Indigenous Peoples in International Law*, 2004.
[230] McMahon, "The Great Commission, Papal Bulls and the Doctrine of Discovery."
[231] Grotius and Campbell, "On the Law of War and Peace," 48.
[232] Grotius and Campbell, 88.

is indivisible: either a State is sovereign, or it is not, there is no such thing as limited sovereign.[233] Given the unique status of indigenous peoples, these statements pushed these communities out of the scope of sovereignty given their inability to exercises such absolute control over their territories and their lack of recognition as sovereign nations.[234] Shortly after On the Law of War and Peace, the Treaty of Westphalia or the Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies of 1648 would refine the definition of sovereignty. Marking the end of the Thirty Years War as well as the all-encompassing rule of the Roman Catholic Church over Europe, the Treaty of Westphalia took on the issues of absolute control of space, territories, and the people. Presently, Westphalian sovereignty is defined as "an institutional arrangement for organizing political life that is based on two principles: territoriality and the exclusion of external factors from domestic authority structures".[235] The treaty of Westphalia marked the beginning of the era of the independent territorial state.[236]

In the years following the Peace of Westphalia, regional and international legislation continued to adopt more state-centric approaches to governance and slowly developing a new area of law called the "law of nations". The ideas evolving from the treaty would be distilled into the treatise of Swiss diplomat Emerich de Vattel called The Law of Nations, or the Principles of Natural Law (1758). In the treaties, Vattel defines the meaning of a sovereign nation, the nature of interactions between states and the rules by which these states resolve conflict and claim territory. According to the Swiss diplomat a "Every nation that governs itself, under what form soever, without dependence on any foreign power, is a sovereign state.".[237] Vattel goes on to describe the law of nations in relation to these bodies: "The law of nations is the law of

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[233] David A. Lake, "The New Sovereignty in International Relations," *International Studies Review* 5, no. 3 (September 2003): 303–23, https://doi.org/10.1046/j.1079-1760.2003.00503001.x.
[234] McMahon, "The Great Commission, Papal Bulls and the Doctrine of Discovery."
[235] Lake, "The New Sovereignty in International Relations," 309.
[236] Anaya, *Indigenous Peoples in International Law*, 2004.
[237] Emer de Vattel, Bela Kapossy, and Richard Whatmore, *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (Indianapolis: Liberty Fund, 2008), 83.

sovereigns: free and independent states are moral persons, whose rights and obligations we are to establish in this treatise."[238] Based on this definition, indigenous peoples should be recognized as a Nation or a sovereign State. In Species of Sovereignty: Native Nationhood, the United States, and International Law, 1783–1795, Gregory Ablavsky remarks on the dual nature of Vattel's treatise and explores its ability to empower the autonomy of certain States while also entrenching subordination of colonized societies.[239] Ablavsky goes on to demonstrate the detrimental impacts of Vattel's theories on the rights of indigenous peoples in two aspects. First, the Swiss author's treatise endorsed the notion that the colonization of indigenous lands was a lawful practice given the inability of these societies to cultivate the lands which they claimed: "Those nations […] who inhabit fertile countries, but disdain to cultivate their lands, and chuse rather to live by plunder, are wanting to themselves, are injurious to all their neighbours, and deserve to be extirpated as savage and pernicious beasts.".[240] This first justification could be addressed and disputed, however, Vattel's second argument, closer to the core ideas of his treatise indicated that once a state was dominated by another, it lost all autonomy and was absorbed in to the new sovereign state. This second stance would be referred to going forward when justifying a lack of indigenous rights.[241] While clear on the "lawfulness" of the colonization to indigenous groups, Vattel struggled with the ambiguity of the status of societies falling under the rule of other sovereign States. On one hand, Vattel states "a people that has passed under the dominion of another is no longer a state, and can no longer avail itself directly of the law of nations.".[242] However, simultaneously, when elaborating the definition of s sovereign state, Vattel

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[238] Vattel, Kapossy, and Whatmore, 85.
[239] Gregory Ablavsky, "Species of Sovereignty: Native Nationhood, the United States, and International Law, 1783–1795," *Journal of American History* 106, no. 3 (December 1, 2019): 591–613, https://doi.org/10.1093/jahist/jaz503.
[240] Vattel, Kapossy, and Whatmore, *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, 129; Ablavsky, "Species of Sovereignty."
[241] Ablavsky, "Species of Sovereignty."
[242] Vattel, Kapossy, and Whatmore, *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, 85.

indicates “To give a nation a right to make an immediate figure in this grand society, it is sufficient that it be really sovereign and independent, that is, that it govern itself by its own authority and laws.”[243] Vattel’s struggle with the status of sovereign nations under the control of another nation-state are highlighted in his treatement of colonization of indigenous communities. When comparing South American colonization, the author states “Thus, though the conquest of the civilised empires of Peru and Mexico was a notorious usurpation, the establishment of many colonies on the continent of North America might, on their confining themselves within just bounds, be extremely lawful. The people of those extensive tracts rather ranged through than inhabited them.”.[244] Vattel demonstrates double standards in his definitions, justifications of war, as well as a tendency to favor values behind European political and economic systems.[245] Because empires such as the Maya and Inca demonstrated systems like those of western settlers, they were to be respected. Indigenous peoples of North America, given their differing social and legal systems were not granted the same consideration. This narrative launched by Vattel continues to persist today: indigenous groups struggle to have their legal systems recognized due to their non-conformation to western legal systems.[246]

Indigenous Peoples in International Law

The discussions surrounding the justification of war and competing State sovereignties in the 17th and 18th centuries did not always pertain directly to the rights of indigenous communities. However, the narratives developed through natural law principles and Vattel’s Law of Nations are essential to the arguments laid out in landmark cases of indigenous rights. The American legal system directly applies these international legal narratives to national discussions of indigenous rights and self-governance. In the historical case of 1823, Johnson v. Mc’Intosh, the United States incorporated and defined the Doctrine of

[243] Vattel, Kapossy, and Whatmore, 83.
[244] Vattel, Kapossy, and Whatmore, 130.
[245] Anaya, *Indigenous Peoples in International Law*, 2004.
[246] Watson and Watson, *Aboriginal Peoples, Colonialism and International Law*.

Discovery within the modern legal system. The 1823 case was the first of a series of three cases, presently referred to as the "Marshall trilogy" that distilled the opinions of the Supreme Court on the status and rights of indigenous peoples in the United States. Through this series of court cases, the U.S. began to set the precedent for the treatment of indigenous communities around the world. Presently, United States (U.S.) has not ratified UNCLOS. As a result, the U.S. is not included in this comparative case study of indigenous governance and the law of the sea. However, due to the recognition and use of the Doctrine of Discovery in court cases, the United States has played a central role in the development of indigenous rights and their recognition. The following section examines these three landmark legal cases in the United States and their global repercussions on the evolution of narratives of indigenous governance on an international scale.

Perhaps the most important legal cases in the history of indigenous rights is the 1823 Johnson v. Mc'Intosh case. Taken to the Supreme Court and chaired by Chief Justice Marshall, the case took on the question of the validity of transfers of land of indigenous peoples prior to the American Revolution. Land acquisitions were a common practice in the U.S., not only on part of the federal government but also by states, corporations, and even private individuals.[247] The Non-Intercourse Act of 1790 made all such practices (except for transactions between the federal government and indigenous groups). Additionally, the Royal Proclamation of 1763 by King George of England, that declared the possession of land possible only by state or by indigenous groups, made the purchase of lands west of the Appalachian Mountains illegal.[248] The lag between these pieces of legislation and the settlement of the New World gave rise to competing claims to land by private landowners and the federal government. In this case, the U.S. government sold lands to William McIntosh. The validity of the sale was challenged by a heir to William Johnson who had acquired the lands through a pre-Revolutionary purchase[249]. The issue came down to the question of sovereignty: if tribes were sovereigns of their lands, they should have the power to sell to

[247] Frank Pommersheim, *Broken Landscape: Indians, Indian Tribes, and the Constitution*, 2015, 87–88.
[248] Pommersheim, *Broken Landscape*; King George III of England, "Royal Proclamation."
[249] Getches, Wilkinson, and Williams, *Cases and Materials on Federal Indian Law*.

whomever they saw fit. The court framed the primary question of the case as follows: "The inquiry, therefore, is in a great measure confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the courts of this country."[250] To answer the question, Chief Justice Marshall chose to call on the Doctrine of Discovery. His arguments can be divided in to internal (domestic) and external (international) interpretations and implications. [251] On a global scale, Marshall briefly reiterated the principles of the Doctrine of Discovery. First, he claimed that "On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire."[252] Then, Justice Marshall continued to clarify "[D]iscovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession."[253] A finally used examples of other colonial powers and their rights to "discovered lands": *"The history of America from its discovery to the present day proves, we think, the universal recognition of these principles. Spain did not rest her title solely on the grant of the Pope. Her discussions respecting boundary, with France, with Great Britain, and with the United States all show that she placed in on the rights given by discovery. Portugal sustained her claim to the Brazils by the same title. France also founded her title to the vast territories […] she still asserted her right of dominion over a great extent of country [...] and her exclusive right to acquire and dispose of the soil which remained in the occupation of Indians"*.[254] The reasoning of Chief Justice Marshall demonstrated the universal recognition of the Doctrine of Discovery by the U.S. government and beyond. The Supreme Court dedicated significant space to the detailed discussion and elaboration of the history of colonization and the conditions of conquest. Among these were concepts were implications of discovery

[250] United States Supreme Court, Johnson & Graham's Lessee v. McIntosh, 21 543 (United States Supreme Court 1823).
[251] Pommersheim, *Broken Landscape*.
[252] United States Supreme Court, Johnson & Graham's Lessee v. McIntosh, 21 at 572.
[253] United States Supreme Court, 21 at 573.
[254] United States Supreme Court, 21 at 575–76.

for domestic relations between State and it's indigenous populations. First, was the consequences of conquest for relations which dictated the loss of all sovereign status of the conquered nation: *"The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. […] When the conquest is complete and the conquered inhabitants can be blended with the conquerors".*[255] Marshall made it clear that indigenous groups were certainly not sovereigns of their lands and even denied the recognition of their unique status as traditional owners. As a result, the sales to any private individuals were not valid. Marshall again justified this through the Doctrine of Discovery stating that *" In the establishment of these relations, the rights of the original inhabitants were in no instance entirely disregarded, but were necessarily to a considerable extent impaired.".*[256] While the rights to use and occupy land were preserved, and the indigenous sovereignty existed at a certain point in time,*" rights to complete sovereignty as independent nations were necessarily diminished, and their power to dispose of the soil at their own will to whomsoever they pleased was denied by the original fundamental principle that discovery gave exclusive title to those who made it.".*[257] The groundwork laid by Marshall would be quoted by courts around the world. Both landmark cases in Australia and Canada, Mabo v. Queensland (No.2) and Guerin v. The Queen respectively, focused on the recognition of aboriginal title would go on to cite Marshall's reasoning.[258]

Almost ten years later, the two cases, Cherokee Nation v. Georgia (1831) and Worcester v. Georgia (1832) elaborated on the ruling of Johnson v. Mc'Intosh and the denial of the recognition of sovereignty of indigenous peoples in the U.S. Both cases were presided by Chief Justice Marshall and pertained to the jurisdiction and authority of the Cherokee Nation. The Cherokee Nation v. Georgia case arose from the increasingly aggressive efforts of States to occupy and expel indigenous occupants following the Johnson

[255] United States Supreme Court, 21 at 590.
[256] United States Supreme Court, 21 at 575.
[257] United States Supreme Court, 21 at 575.
[258] High Court of Australia, Mabo v. Queensland (High Court of Australia 1988); Supreme Court of Canada, Guerin v. The Queen (1984).

v. Mc'Intosh ruling.[259] Among the most persistent in these efforts was the state of Georgia. In the 1831 case, the Cherokee Nation accused the state of Georgia and the federal government of violating their rights to their land based on the recognition of the Cherokee Nation as a "foreign State" by Article III of the U.S. constitution given their treaties with and recognition by the federal government.[260] Given this recognition, the Cherokee Nation demanded it maintain control of its lands and receive protection of this right from the government. What made this case significant was no so much the question of the control of land by the tribe but rather the discussion of the position of this group withing the U.S. legal system and its relationship to the government. Additionally, the ruling of the court was unique in it's fragmented nature: much like Vattel's ambiguous treatment of the "extremely legal" colonization of indigenous peoples, Justice Marshall demonstrated oscillating opinions on the recognition of indigenous peoples as sovereign states. First, Marshall states *" The Cherokees are a State. They have been uniformly treated as a State since the settlement of our country. The numerous treaties made with them by the United States recognise them as a people capable of maintaining the relations of peace and war […] Laws have been enacted in the spirit of these treaties. The acts of our Government plainly recognise the Cherokee Nation as a State, and the Courts are bound by those acts.".*[261] However, this argument is turned around shortly after, as the Chief Justice clarifies that the tribe cannot be recognized as a "foreign state". Instead, they are given a new status since *"It may well be doubted whether those tribes [..] be denominated foreign nations. They may more correctly, perhaps, be denominated domestic dependent nations.".*[262] This status is justified given the relationship of tribes of the government to *"resemble that of a ward to his guardian." or as a relationship of "pupilage".*[263] *Because of this position, the Cherokee Nation "look to our Government for protection, rely upon its*

[259] Pommersheim, *Broken Landscape*.
[260] United States Supreme Court, Cherokee Nation v. Georgia, 30 1 (United States Supreme Court 1831); Matthew L. M. Fletcher, "The Iron Cold of the Marshall Trilogy," *North Dakota Law Review* 82, no. 3 (2006): 627–96.
[261] United States Supreme Court, Cherokee Nation v. Georgia, 30 at 2–3.
[262] United States Supreme Court, 30 at 3.
[263] United States Supreme Court, 30 at 3.

kindness and its power, appeal to it for relief to their wants, and address the President as their Great Father.".[264] Once again, Marshall chose to walk a fine line, using dichotomous arguments to enforce colonial legal traditions on indigenous people and diminish their rights. While he indicated that the court might be in favor of Cherokee claims to lands, he refused to provide a ruling given the fact that the Cherokee nation sued as a "foreign nation", which he had decided it was not.[265] Once again, the ruling and reasoning of Chief Justice Marshall would have a ripple effect throughout the world. Going forward, many States would go on to designate similar relationships between government and indigenous populations.

The Worcester v. Georgia of 1832 case followed shortly after and in many ways continued the conversation started in Cherokee Nation v. Georgia, extending to the issue of indigenous self-governance. The case focused on the arrest of Samuel A. Worcester and other missionaries by the state of Georgia for entering Cherokee territory without a license from the governor of Georgia, a requirement under the state's law. [266] However, Worcester had been invited on to these lands by Cherokee peoples and argued that " the State of Georgia ought not to maintain the prosecution, as several treaties had been entered into by the United States with the Cherokee Nation by which that Nation was acknowledged to be a sovereign nation, and by which the territory occupied by them was guaranteed to them by the United States; Georgia did not apply.".[267] He maintained that "the laws of Georgia under which the plaintiff in error was indicted are repugnant to the treaties, and unconstitutional and void".[268] In short, because the Cherokees were sovereigns of their lands, the laws of Georgia did not apply. Given this claim which stood upon the definition of the tribe as a domestic dependent nation, Chief Justice Marshall was pushed to elaborate the extent of indigenous sovereignty. He took the stance that "the Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights as the undisputed

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[264] United States Supreme Court, 30 at 3.
[265] Fletcher, "The Iron Cold of the Marshall Trilogy."
[266] Getches et al., *Cases and Materials on Federal Indian Law*, 115.
[267] United States Supreme Court, Worcester v. Georgia, 31 515 (United States Supreme Court 1832).
[268] United States Supreme Court, 31 at 516.

possessors of the soil.".[269] Marshall supported this position given the language used to refer to indigenous groups: "The very term "nation," so generally applied to them, means "a people distinct from others." The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, […] consequently admits their rank among the powers who are capable of making treaties.".[270] Although Cherokees were not a sovereign independent nation, Marshall claimed that "The Cherokees acknowledge themselves to be under the protection of the United States, and of no other power. Protection does not imply the destruction of the protected.".[271] While they may be in a position of "pupilage" in regards to the federal government, "The Cherokee Nation, then, is a distinct community occupying its own territory […]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.".[272] Marshall's decision clarified the notion of a domestic dependent nation: while not sovereigns of their lands, the self-governance of indigenous peoples was recognized and could only be affected by the highest power of jurisdiction of the United States given the exclusive relationship between the two groups. As a result, the Supreme Court ultimately ruled in favor of the Cherokee Nation, stating that the laws of Georgia had no effect in Cherokee territory given their status as a self-governing nation of their lands. However, the state of Georgia and President Andrew Jackson vehemently opposed the decision and refused to obey the order.[273] Ultimately, it became clear that while Marshall could make rulings, States and the President were those who enforced it. Ultimately, the struggle between the Cherokee nation and the state of Georgia ended in 1838 with the forced removal of over 16,000 Cherokees to "Indian Territory" in the

[269] United States Supreme Court, 31 at 520.
[270] United States Supreme Court, 31 at 520.
[271] United States Supreme Court, 31 at 553.
[272] United States Supreme Court, 31 at 562.
[273] Getches et al., *Cases and Materials on Federal Indian Law*, 115.

state of Oklahoma.[274] The expulsion of the Cherokees would come be called the Trail of Tears and resulted in the death of over 4,000 indigenous people over the course of the journey.[275]

The Marshall trilogy established a narrative that would echo through legislation across all ex-British colonies. The notions of "justified occupation due to discovery", "limited sovereignty" and "exclusive relationship with the government" are present across case law in Australia, Canada, and New Zealand. The narratives presented by Marshall, built upon the justifications put forth by diplomats and legal scholars in Europe, would be used to systematically chip away at the rights of indigenous communities to their traditional lands. The Marshall trilogy may seem like "fossil" of legal history, outdated and archaic in its reasoning. However, recent cases demonstrate otherwise. Marshall's reasoning and his summary of the Doctrine of Discovery continue to live in indigenous rights debates of the Supreme Court. The 2005 City of Sherrill v. Oneida Indian Nation of New York case took on the issue of indigenous sovereignty of lands that had been sold and repurchased could be considered part of the Oneida Indian Reservation. The court denied the claims to the land, stating no other concept than that "Under the "doctrine of discovery," County of Oneida v. Oneida Indian Nation of N. Y., 470 U. S. 226, 234 (1985) (Oneida II), "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,".[276] Additionally, the Court continued to echo the ruling of Johnson v. Mc'Intosh by quoting the Non-Intercourse Act of 1790. Which saw all purchases made by and from indigenous peoples as void.[277] This last case demonstrates that while many consider the Doctrine of Discovery to be legislation of the past, it is alive and well. The Marshall trilogy

[274] Getches et al., 126.
[275] J. David Hacker and Michael R. Haines, "American Indian Mortality in the Late Nineteenth Century: the Impact of Federal Assimilation Policies on a Vulnerable Population," *Annales de démographie historique* 110, no. 2 (2005): 17, https://doi.org/10.3917/adh.110.0017.
[276] United States Supreme Court, City of Sherrill v. Oneida Indian Nation of N. Y., 544 197 (United States Supreme Court 2005).
[277] United States Supreme Court, 544 note 2.

continues to play a key role in the way decisions regarding status, land rights and self-governance are recognized and respected around the world.

Rising Narratives of Indigenous Sovereignty

The rulings of the U.S. Supreme Court would have global repercussions for indigenous populations around the world and would significantly influence the legal narratives of ex-British colonies. However, global discussions focused on the rights of indigenous people and international recognition of these rights have only recently begun. What's more, so far, such recognition has been largely symbolic. The most fundamental piece of international legislation pertaining to the status of indigenous peoples globally is the United Nations Declaration on the Rights of Indigenous peoples. It's entry in to force in 2006 marked a turning point for indigenous peoples around the world as it provides ground for them to stake their claims and complaints against governments. The following section will focus on the contents and language of this piece of international legislation as well as several preceding statements to capture to stance of international organizations on the status and rights of indigenous communities on a global scale.

The 20th century marks the transition of indigenous peoples from objects of conversations regarding their status and rights to being major actors and leaders in the push for recognition of First Nations around the world.[278] Paired with international movements to decolonize societies around the world and protect human rights, indigenous peoples formed Non-Government Organizations (NGO) and Councils to make their voices heard at all scales. Together, these efforts lead to two Conventions of the International Labor Organization (ILO). Founded in 1919, the ILO promotes social justice through the protection of labor rights around the world.[279] ILO was among the first international agency to take up the issue of indigenous rights

[278] Anaya, *Indigenous Peoples in International Law*, 2004.
[279] Christophe Gironde and Gilles Carbonnier, eds., *The ILO @ 100: Addressing the Past and Future of Work and Social Protection*, International Development Policy, volume 11 (Leiden ; Boston: Brill/Nijhoff, 2019).

on a global scale.[280] Since it's foundation, the issue of rights of indigenous peoples was on the agenda of the organization. Between 1926 and 1939, the agency adopted a series of conventions all dedicated to "forced labor of so called native populations in colonies".[281] In 1957, the ILO called the Indigenous and Tribal Populations Convention. Also known as ILO Convention 107 (C107), the goal of the document was "the adoption of certain proposals with regard to the protection and integration of indigenous and other tribal and semi-tribal populations in independent countries".[282] C107 was ratified by 27 states with 14 being in the Americas and the Caribbean.[283] The convention was composed of eight parts which together attempted to define indigenous populations and address their rights to land, labor, and education. .[284] Each of these components represented a major step towards the recognition of indigenous peoples in a global context. C107 addressed discrimination, segregation, and racism, holding all signatories to commitments to protect the customary laws and traditions of these groups.[285] The convention took on bold provisions to land rights stating that *"The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised."*.[286]

C107 was the first international step in the recognition of indigenous rights. Although perhaps well meaning, C107 was denounced by many countries and criticized for the language it used to refer to indigenous peoples. The government of Sweden refused to ratify the convention based on the paternalistic attitude it adopted to indigenous communities.[287] C107 addressed potential processes developing "co-

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[280] Athanasios Yupsanis, "ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989–2009: An Overview," *Nordic Journal of International Law* 79, no. 3 (2010): 433–56, https://doi.org/10.1163/157181010X512576.
[281] Patrick Thornberry, "ILO Standards I," in *Indigenous Peoples and Human Rights*, Melland Schill Studies in International Law (New York: Juris Pub. ; Manchester, UK : Manchester University Press, 2002), 320.
[282] Internationa Labour Organization, "Indigenous and Tribal Populations Convention (No. 107)" (International Labour Organization, 1957), pt. Preamble.
[283] Thornberry, "ILO Standards I," 326.
[284] Thornberry, "ILO Standards I."
[285] Internationa Labour Organization, "Indigenous and Tribal Populations Convention (No. 107)," pt. 1.
[286] Internationa Labour Organization, art. 11.
[287] Thornberry, "ILO Standards I," 338.

ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries.".[288] Given this approach, the ILO C107 demonstrated that while it made progress in the path towards indigenous recognition, it could not quite shake narratives like that of Chief Justice Marshall: indigenous communities remained problematic, inferior, and less developed communities compared to other nations, requiring supervision if not being extinguished entirely. Not only was the condescending language problematic, but the focus of the convention on this final point, the "integration" of indigenous peoples, caused outrage. Again, this approach suggested inferiority of indigenous culture to the national cultures of sovereign States. Furthermore, integration also implied that to effectively participate in the future of these countries, indigenous groups would benefit from the extinction of their ways of life given their divergence from the dominant ways of life of the country.[289] While the ILO wanted to help, it demonstrated that colonial narratives were alive and will in the realm of international law.

For over 30 years, the ILO Convention 107 would represent the only legally binding international agreement that focused on the rights of indigenous peoples. While it marked a step forward for the recognition of indigenous rights, C107 remained broad and modest in the commitments it required of its signatories. In 1989 the ILO would meet again to produce the Indigenous and Tribal Peoples Convention or the ILO Convention 169 (C169). Much bolder than C107, the new convention declares that *"Considering that the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards, and [r]recognizing the aspirations of these peoples to exercise control over their own*

[288] Internationa Labour Organization, "Indigenous and Tribal Populations Convention (No. 107)," art. 2.
[289] Thornberry, "ILO Standards I," 338.

institutions".[290] C169 lived up to its promise by altering it language and overall approach to the position of indigenous peoples in international law. Article 2 was amended to read *"Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity".* [291] Rather than trying to intergrate indigenous groups, C169 required that *"Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.".*[292] Compared to C107, C169 also made long term commitments.[293] C107 only promised that the protection of indigenous peoples "will be continued only so long as there is need for special protection and only to the extent that such protection is necessary".[294] The Indigenous and Tribal Peoples Convention of 1989 would take two more major steps. First, C169 incorporates the requirement for signatories to consult indigenous groups and their representatives: *"governments shall consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly".*[295] What's more, *"The consultations […] shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.".*[296] It is important to note that while this provision requires consultation it does not go as far as requiring consent only suggesting that the "objectives" of discussion should be that of potential

[290] Internationa Labour Organization, "Indigenous and Tribal Peoples Convention (No. 169)" (International Labour Organization, 1989), pt. Preamble.
[291] Internationa Labour Organization, art. 2.
[292] Internationa Labour Organization, art. 4.
[293] Peter Bille Larsen, "Contextualising Ratification and Implementation: A Critical Appraisal of ILO Convention 169 from a Social Justice Perspective," *The International Journal of Human Rights* 24, no. 2–3 (February 7, 2020): 94–111, https://doi.org/10.1080/13642987.2019.1677613.
[294] Internationa Labour Organization, "Indigenous and Tribal Populations Convention (No. 107)," art. 3(b).
[295] Internationa Labour Organization, "Indigenous and Tribal Peoples Convention (No. 169)," art. 6.1(a).
[296] Internationa Labour Organization, art. 6.2.

consent.[297] In this way , C169 continues the tradition of western legal bodies of creating commitments to indigenous communities that remain vague and open to interpretation. The second major evolution represented by C169 pertained to land rights.[298] C107 took steps to respect indigenous ownership of land. C169 built on this in several ways. Signatories of C169 were now required to "take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.".[299] This commitment implies the demarcation of clear limits to indigenous territories. Additionally, the convention of 1989 gave more power to indigenous ownership by suggesting more exclusive ownership. Governments were prohibited from removing indigenous communities from their traditional lands.[300] Additionally, signatories were required to safeguard indigenous rights to resources on their lands and had to ensure that "Adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands". [301] Unfortunately, although progressive compared to C107, C169 was met with a lukewarm reception. When it entered in to force in 1989 together with the Convention on the Rights of the Child, C169 received only 23 ratifications compared to the virtually universal acceptance of the Convention on the Rights of the Child by ILO member states.[302] What's more, according to the provisions of C169, C107 remains in force unless a state ratifies C169.[303] As a result, C107 remains in place for 17 countries.[304]

Further major developments on the stage of international indigenous rights would take place in the early 2000s. Although narrow in their scope, C107 and C169 lay the foundations for The United Nations

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[297] Patrick Thornberry, "ILO Standards II: Convention 169," in *Indigenous Peoples and Human Rights*, Melland Schill Studies in International Law (New York: Juris Pub. ; Manchester, UK : Manchester University Press, 2002), 339–68; Larsen, "Contextualising Ratification and Implementation."
[298] Larsen, "Contextualising Ratification and Implementation."
[299] Internationa Labour Organization, "Indigenous and Tribal Peoples Convention (No. 169)," art. 14.2.
[300] Internationa Labour Organization, art. 16.
[301] Internationa Labour Organization, art. 15; Internationa Labour Organization, art. 18.
[302] Larsen, "Contextualising Ratification and Implementation."
[303] Internationa Labour Organization, "Indigenous and Tribal Peoples Convention (No. 169)," art. 43.
[304] Larsen, "Contextualising Ratification and Implementation."

Declaration of Rights of Indigenous Peoples (UNDRIP) of 2007. Considered a milestone in global indigenous rights, represents the first comprehensive legislation focused on the recognition, protection, and empowerment of indigenous peoples around the world. However, an important pitfall of UNDRIP is its status as a non-binding agreement compared to ILO C169 which is legally binding. Although frustrating in this regarding, unlike C169, UNDRIP has been widely ratified with 147 signatories to the 46-article document.[305] Many of the major steps taken by UNDRIP are already present in its preamble. While it does not explicitly name doctrines and documents, the declaration openly delegitimizes notions of conquest, superiority and this ideas of the Doctrine of Discovery and terra nullius.[306] The General Assembly of the United Nations declares that "all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid morally condemnable and socially unjust".[307] The General Assembly also recognizes *"indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development".*[308] Next, UNDRIP is novel in its recognition of the rights self-determination of indigenous peoples which ensures *"the right to determine their political status and freely pursue their economic, social and cultural development.".*[309] The right to self-determination guarantees *"the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.".*[310] Following sections continue to expand on provisions of C169, creating protection for the cultural practices, lands and legal structures of indigenous communities. UNDRIP also recognizes the importance of environmental

[305] Chircop, Koivurova, and Singh, "Is There a Relationship between UNDRIP and UNCLOS?"
[306] United Nations, "United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)" (United Nations & International Law Commission, 2007), pt. Preamble.
[307] United Nations, pt. Preamble.
[308] United Nations, pt. Preamble.
[309] United Nations, art. 3.
[310] United Nations, art. 4.

protection to the survival of indigenous cultures indicating their right to *"the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination."*.[311] While the does not specifically address marine areas and resources, expansive interpretation of Articles 20, 23 and 32 clearly provide grounds for maritime governance given the broad scope of the commitments. UNDRIP takes the C169 commitments to guarantee indigenous communities their "lands" further by expanding indigenous claims to all traditional territories In the instance of management of indigenous resources, territories and conservation of species, the declaration of 2007 also takes a step further in the authority of indigenous groups to determine the fate of their traditional spaces stating that *"Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources"*.[312] UNDRIP provides indigenous stakeholders with an active role in determining their future. Finally, unlike C169 which indicates that governments need to maintain the "intention" of consulting with and obtaining consent from indigenous communities, UNDRIP requires both. Article 19 states *"States shall consult and cooperate in good faith with the indigenous peoples […] to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."*.[313]. A final, and important provision of UNDRIP is Article 36 which ensures that communities *"divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders."*.[314] This statement is particularly important for groups like the Inuit Nunaat who represent a single indigenous community divided between several Arctic nations.

[311] United Nations, art. 29.
[312] United Nations, art. 32.
[313] United Nations, art. 19.
[314] United Nations, art. 36.1.

Although non-binding, UNDRIP represents a tool for indigenous communities around the world to demand recognition and justice. Since 2007, UNDRIP has empowered indigenous communities to begin or continue to pursue the recognition of their status and rights. The international agreement has stimulated other smaller scale commitments such as the American Declaration on Rights of Indigenous Peoples of 2016. Although provided little commitments and also legally non-binding, the agreement served to reiterate commitments to the UNDRIP agreement by nations of North and South America and push these governments to implement corresponding measures: The United States reiterates its longstanding belief that implementation of the United Nations Declaration on the Rights of Indigenous Peoples ("UN Declaration") should remain the focus of the OAS and its member states.".[315] NGOs and indigenous representatives have also benefited from the agreement.

Summary

The history of indigenous rights in international law documents a frustrating, uphill battle towards the recognition of the status and rights of communities who have been subject to conquest, dispossession, and discrimination by western powers since the early 1400s. Early narratives in western legislation demonstrated justifications for these actions based on religious doctrine to claim newly "discovered" lands as terra nullius and "civilize" the inhabitants. However, later evolutions show the problematic nature of this approach, and the struggle of law makers in the 1600s and 1800s to determine the place of indigenous communities in western legal systems. Over the course of over 200 years, legal narratives show striking similarity: from Franscisco de Vitoria to Chief Justice Marshall, indigenous peoples are recognized as sovereign nations up until a certain point when these rights are taken away due to their "inferior" social and political development. Western powers see themselves a "ward" of people who are incapable of governing themselves all while being subjects of a nation who has acquired their lands by force and may give and take their rights when it sees fit. In the 1900s, paired with human rights movements and a push for global

[315] Organization of American States et al., *American Declaration on the Rights of Indigenous Peoples*, 2016, pt. Footnotes, https://www.oas.org/en/sare/documents/DecAmIND.pdf.

decolonization, narratives in international law finally take a turn to recognize the rights of indigenous peoples. However, legislation like C107 carries with it the underlying themes of western superiority and the need to "resolve" the problematic nature of indigenous communities existing independently within a sovereign state. While developments like C169 and UNDRIP provide major a silver lining to the history of indigenous rights and recognition in international law, the fight for indigenous rights is far from over. Globally, the necessary steps are being taken to provide indigenous communities with rightful recognition, but all such legal action continues to stall when it comes to its implementation. Additionally, as demonstrated by the City of Sherril v. Oneida Indian Nation of N. Y. in 2005 (and following, the Doctrine of Discovery, a series of legal edicts from the 1400s, is alive and well. Presently, the Doctrine of Discovery remains to be revoked. In 2022, Pope Francis took a pilgrimage of penance across Canada to provide apologies for the behavior of the Catholic Church and its residentials school programs towards Canadian indigenous peoples.[316] Although residential schools were the focus of the visit, and Pope Francis provided extensive apologies, numerous public appearances were interrupted by protests demanding the Pope address the papal bulls of Pope Alexander VI.[317] Some international organizations believe that the Doctrine has already been rescinded by various international actions, however, international non-profit organizations representing indigenous communities and their interests are adamant that a clear and committing rescindment is necessary.[318] So far, Pope Francis has refused to address these demands and has not revoked the doctrine. This recent conflict highlights an important and unfortunate trend in indigenous legislation globally: although action is being taken to provide rights and recognition, western law makers refuse to revoke and address legislation that is already in place. The persistence of the Doctrine of Discovery and its

[316] Anna Mehler Paperny, "Protest over 15th-Century Land Grab Doctrine Interrupts Papal Mass in Canada," *Reuters*, July 28, 2022, sec. Americas, https://www.reuters.com/world/americas/banner-against-indigenous-doctrine-unfurled-papal-mass-2022-07-28/.
[317] "Explainer: Could Pope Francis Revoke the 15th-Century 'Doctrine of Discovery' Used to Justify Colonizing Indigenous Peoples?," America Magazine, July 28, 2022, https://www.americamagazine.org/politics-society/2022/07/28/dontrine-discovery-pope-francis-243435.
[318] "Explainer."

concepts serves as proof of the relatively "symbolic" nature of new legislation recognizing indigenous rights. What's more, declarations and agreements often remain legally non-binding, resulting in little more than verbal commitments to a better future rather than action. Given the existence of these developments and discussion surrounding present day legislation, it is important to ask the question: are narratives in indigenous case law evolving or does the unwillingness of western leaders and lawmakers to make clear commitments demonstrate that new legislation is just an example of "Old wine, new bottles"?

Chapter 6 – Case Study: Canadian Indigenous Peoples, Inuit Nunavut, and the Northwest Passage

Overview

Canada's legal system is a combination of common law and civil law. Originally a French colony (thus following civil law system based on the Napoleonic Code), the territory fell under British rule following the Battle of Quebec in 1759 thus adopting a code law system in all provinces except for Quebec.[319] Given this duality, Canada continues to have a fully bilingual government. Presently, it is both a constitutional monarchy and federal parliamentary democracy. The country was created as a "self-governing colony" by the British Parliament in the British North America Act (or Constitution Act) of 1867 and united the British colonies of Canada, Nova Scotia, and New Brunswick. Although the reigning monarch of England (currently Queen Elizabeth II) is deemed the head of state, the role remains entirely ceremonial, and the head of Canada's. Following the "Sovereign", Canada's executive power is divided between federal government and provincial governments. The executive branch of the federal government sees the Governor General, who represents interests of the Crown and is responsible for naming the prime minister, as its head. The ten provinces, each have their distinct provincial governments. The three

[319] Canada, *Canada's System of Justice* (Place of publication not identified: Department of Justice Canada, 2015), http://publications.gc.ca/collections/collection_2015/jus/J2-32-2015-eng.pdf.

territories (the Northwest Territories, Nunavut, and Yukon) also have their respective governments but demonstrate less autonomy as they are supervised by the federal government. The highest authority of the judicial branch is the Supreme Court of Canada (SCC) followed by each of the provincial courts.

Indigenous peoples have rights to Aboriginal Title and self-governance through agreements with the federal government. These rights are protected under the Constitution Act.[320] On a global scale, Canada is unique in its piecemeal treatment of indigenous rights, aboriginal titles, and self-governance.[321] At the federal level, recognition of indigenous rights and recognition of land sovereignty are treated separately. Additionally, concerning land sovereignty, the use of natural and living resources is considered separate as well.[322] In the case of Canada's indigenous rights legislation, rarely are historical legal cases and rights directly focused on indigenous sea and seabed rights and management. Often, such legislation is incorporated into broader statements about indigenous title and land rights. When mentioned, statements concerning sea and seabed remain broad. As a result, the following sections will focus broadly on the development of narratives indigenous legal status in Canada and the future of indigenous governance going forward on both national and international. In all cases, special attention will be paid to mention of rights to sea and seabed scales. Regional, federal, and international narratives related to indigenous rights will then be used to put these rights in to context.

To better understand the present state of indigenous governance in the Northwest Passage, the following chapter will be divided in to three parts each providing a different perspective on the evolution of the narratives surrounding the rights of indigenous peoples in Canada. The chapter will begin with a focus on the history of Canadian indigenous land rights and surrounding narratives on a federal scale before continuing to analyze the implications of these broader discussions on the regional affairs of the Nunavut Territory and Inuit peoples in the Northern most parts of the country. These two perspectives will provide

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[320] Canada.
[321] Lisa Ford and Tim Rowse, eds., *Between Indigenous and Settler Governance*, 0 ed. (Routledge, 2012), https://doi.org/10.4324/9780203085028.
[322] Ford and Rowse.

context for the final section of this chapter where the issue of sovereignty of the Northwest Passage, a strait in Canadian territorial waters and on Inuit land, will allow for the evaluation of the future of indigenous governance and equitable ocean access on an international scale.

Prior to evaluating the evolution of historical narratives in Canada, it is important to establish the vocabulary used to refer to Canadian indigenous peoples and its context. Given the complicated history of indigenous communities with the Crown and the federal government, many terms have colonial context that may be considered offensive when used outside of the legal framework. According to the official website of the government of British Columbia, the terms indigenous and aboriginal are used interchangeably in Canada and designate all persons that identify as First Nations peoples, Métis, and Inuit. The term aboriginal is a legal term defined in Section 35 of the Canadian Constitution. The term First Nations was created as a replacement for the term "Indian" which in everyday speech is considered derogatory. First Nation term that designates any indigenous person who is part of a "band" or "reserve community" but does not identify as Métis or Inuit.[323] The term Métis is used to identify persons of mixed ethnic identities resulting from unions between Aboriginal peoples and people of European (or other) ethnicity in Canada. [324] Inuit is a term used to define indigenous peoples living in the far north. [325] These communities are not considered "Indians" under Canadian law. The term "Indian" is perhaps the most problematic of all above definitions. Indian is an official, legal term defined by the Indian Act of 1876 to designate any indigenous person part of the 630 First Nation communities. [326] However, given its past negative colonial connotation, unless used by an indigenous person to self-identify themselves, the term is considered insulting. In following sections these terms will be used to refer to previous legislation titled in such a way or the rights stemming from documents that refer to indigenous peoples as such.

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[323] Government of Canada, "Constitution Act 1982" (Government of Canada, 1982), sec. 35.
[324] Government of Canada, sec. 35.
[325] Government of Canada, sec. 35.
[326] Government of Canada, sec. 35.

A Brief History of Indigenous Land Rights in Canada

The legal history of indigenous land rights begins in with the Royal Proclamation of 1763. This is not because sovereignty of indigenous communities was not recognized prior to this but rather that it was not put in writing and negotiated on a case-by-case basis. King George III's Royal Proclamation of 1763 lay the groundwork for aboriginal title and the process of ceding or purchasing indigenous lands. The proclamation stated that *"Nations or Tribes of Indians, with whom 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 having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds".*[327] It is important to note that the Crown distinguishes First Nations from its subjects and designates them as under the protection of the government. What's more, the proclamation declares the right to purchase land from indigenous communities is exclusive to the Crown: *"We do hereby strictly forbid, […] Subjects from making any Purchases or Settlements whatever or taking Possession of any of the Lands above reserved, without Our especial Leave and License for that Purpose first obtained".*[328] While individuals can negotiate and purchase lands, this must be done with the consent of the Crown or in the name of the King. These terms and rights remain embedded in all future legislation making the government the sole entity able initiate and complete negotiations or resolve conflict regarding land use. The document goes on to set the conditions for transactions between state and First Nations indicating that indigenous communities must be present at a public assembly or meeting to approve of the terms and the transaction. Under French sovereignty, French officials were comfortable creating oral agreements with indigenous communities, while British officials leaned on western written agreements.

Outside of continuing additional regional treaties, no significant overarching legislation pertaining to First Nations rights was passed until 1857 when the Gradual Civilization Act attempted to assimilate

[327] King George III of England, "Royal Proclamation."
[328] King George III of England.

indigenous peoples into western society as "citizens".[329] Incredibly problematic and unsuccessful, the act was a demonstration to the flawed narrative of status of First Nations in Canada: much like the Royal Proclamation of 1763, indigenous communities were not considered subjects or citizens like western settlers but had to be included in the western legal system. This issue and the regional variation in treaties and agreements pushed the Parliament of Canada to pass the Indian Act in 1876 under the provision of Section 91 (24) of the 1867 Constitution Act.[330] Section 91 (24) provides that *"the exclusive Legislative Authority of the Parliament of Canada extends to all Matters"* related to *"Indians, and Lands reserved for the Indians."*.[331] This short statement remains the only mention of indigenous status and rights within the Constitution Act otherwise relying entirely on the Royal Proclamation of 1763 to provide guidelines for aboriginal rights. Nine years later, Indian Act sought to codify the vague terms of the Royal Proclamation of 1763 and consolidate the promises made in the various regional treaties since the proclamation while also carrying the undertones of the narratives of "problematic" indigenous status and the necessity of assimilation.

Unlike a treaty, the act was passed and imposed without consultation with the First Nations it affected and marked the transition of aboriginal rights and affairs from local and regional levels to a purely federal responsibility. The act was met with resistance from indigenous communities and marks a significant increase in government authority over indigenous rights and freedoms going forward. Some of the landmark statements of the act were: the definition of "Indian status", the consolidation of "Indian bands" under a single band council, the loss of status of women upon marriage to non-Indian men (*"Any Indian woman marrying any other Indian or a non-treaty Indian shall cease to be an Indian in any respect within the meaning of this Act")* and the illegal status of cultural practices and traditions.[332]

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[329] Ford and Rowse, *Between Indigenous and Settler Governance*.
[330] Government of Canada, "Indian Act" (Government of Canada, 1876).
[331] Government of Canada, sec. 91(24).
[332] Government of Canada, 56.

The Indian Act marked the beginning of an era of efforts that would focus on the assimilation of indigenous peoples in Canada and culminated under Prime Minister Trudeau Liberal government. In 1969, Trudeau's minister of Indian Affairs, Jean Chrétien, published a white paper titled Statement of the Government of Canada on Indian policy. The paper represented the government's stance on the future of the Indian Act, or rather, proposed to repeal the Act and fully assimilate all indigenous peoples as Canadian citizens. Chrétien viewed this as movement towards "true equality" which "presupposes that the Indian people have the right to full and equal participation in the cultural, social, economic and political life of Canada.". The white paper goes on to determine that while the Indian Act *"has saved for the Indian people places they can call home"*, the existence of separate legislation and administration *"has carried with it serious human and physical as well as administrative disabilities."*.[333] What's more, Trudeau's government saw the existence of indigenous peoples in rural areas and their traditions as hindrances to the well-being people of these communities stating that *"Indians remained largely a rural people, lacking both education and opportunity."* even labelling reserves as *"islands of poverty"*.[334] According to the White Paper, the Indian Act is a discriminatory piece of legislation that intentionally alienated aboriginal communities from Canadian society.[335] While in many aspects the act enforced discriminatory measures it also recognized the unique status, identity, and history of these peoples. The repeal of the Indian Act would result in a loss of rights, protections and exemptions related to indigenous identity as well as the loss rights to land through the transition of reserves to private property.

The reaction from First Nations was outrage. In 1970, Harold Cardinal responded to the White Paper on behalf of the Alberta Indian Association with his "Red Paper" titled "Citizens Plus". Cardinal's fiery letter captured both the frustration of First Nations but also the divide in the narratives of Canadian Government and the First Nations regarding land rights. Firstly, Cardinal denounced the government for

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[333] Government of Canada and Jean Chrétien, "Statement of the Government of Canada on Indian Policy" (Government of Canada, 1969), 8.
[334] Government of Canada and Chrétien, 9.
[335] Government of Canada and Chrétien, "Statement of the Government of Canada on Indian Policy."

the lack of consultation with First Nations about their status and the inherent damage of "stripping" Indians of their identity. Cardinal found the Canadian Government's concept of Indian identity as discriminatory insulting stating that *"most Indians prefer to remain Indians. We believe that to be a good useful Canadian we must first be a good, happy, and productive Indian."*.[336] In other words, indigenous peoples must be citizens while also having special rights that reflect the agreements signed by their ancestors. While the main question addressed in the Red and White papers is the problematic status of Indian identity, the debate sparked a new episode in the evolution of indigenous rights in Canada: the aboriginal title. The Red Paper then goes on to state that *"The Government must admit its mistakes and recognize that treaties are historic, moral, and legal obligations. The redmen signed them in good faith, and lived up to the treaties. The treaties were solemn agreements."*.[337] What's more, the document goes on to demonstrate that *"The Government wrongly thinks that Indian Reserve lands are owned by the Crown. [..] These lands are held in trust by the Crown but they are Indian lands."*.[338] This final component of the response to Jean Chrétien's publication, marks a significant change in narratives surrounding aboriginal rights and title in Canada, influencing cases from Calder v Attorney of British Columbia to Delgamuukw v British Columbia. Going forward, there is no longer a question of assimilation but rather a struggle to flesh out the exact definitions and guidelines of indigenous rights. While still in force today, the Indian Act has undergone significant amendment to appropriately respect and protect aboriginal rights in Canada.

The Calder v. Attorney of British Columbia case of 1973 followed shortly after the tumultuous discussions surrounding the White Paper and the Indian Act's future. Presently, the case is still considered a landmark of international indigenous rights around the world and cited in cases in Australia and New Zealand[339]. While disputes surrounding treaty conditions and land rights of indigenous communities were

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[336] Harold Cardinal and Indian Chiefs of Alberta, "Citizens Plus" (Indian Association of Alberta, 1970), 193.
[337] Cardinal and Indian Chiefs of Alberta, 196.
[338] Cardinal and Indian Chiefs of Alberta, 197.
[339] Michael Asch, "From Calder to Van Der Peet: Aboriginal Rights and Canadian Law, 1973-96.," in *Indigenous Peoples' Rights in Australia, Canada, & New Zealand*, ed. Paul Havemann (Oxford University Press, 1999), 428–45.

addressed and resolved prior to Calder v. Attorney of British Columbia, the case marked the first instance of recognition of aboriginal title (AT) by the Supreme Court of Canada. The case was concerned with the Nishga Tribe's claims to their land stating that *"the Naas River Nishga Indians possessed, occupied and […] exercised all the privileges of free men in the tribal territory. The Nishgas have never ceded or extinguished their aboriginal title within this territory".*[340] As a result, the case became a question of the existence and the validity of aboriginal title in Canada. While the court was split three to three in deciding whether the claim of the Nishga Tribe was valid, the Supreme Court Justices unanimously agreed that aboriginal title existed. Chief Justice Judson stated *"the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries.".*[341] Justice Hall (of the opposing opinion) concurred stating that the appellants *were " asserting an interest in the lands which their ancestors occupied since time immemorial".*[342] However, the point of dispute became the question of the extinguishment of the AT. Justices Hall, Spence and Laskin JJ supported the AT claim. They stated that the Royal Proclamation of 1973 translated aboriginal title and established it within common law and had since protected it. As such, these Justices claimed that *"once aboriginal title is established, it is presumed to continue until the contrary is proven. […] It being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation. There was no surrender by the Nishgas or […] enacted legislation specifically purporting to extinguish the Indian title.".*[343] The opposing argument in the Calder case was supported by Justices Martland, Hudson, and Ritchie who, citing Chief Justice Marshalls rulings in McIntosh v Johnson opposed the appellants claims stating that *"their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they*

[340] Supreme Court of Canada, Calder et al. v. Attorney-General of British Columbia (1973).
[341] Supreme Court of Canada, at 328.
[342] Supreme Court of Canada, at 345.
[343] Supreme Court of Canada, at 402.

pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.".[344] As such, Judson et al. supported the claim that while aboriginal title had once existed it was extinguished upon the arrival of European settlers and could not exist under "dominion" of a sovereign nation. The Nishga Nation ultimately lost the case on separate grounds of having been omitted from the initial proclamation of 1973.[345] However, the act of recognizing the existence of aboriginal title, whether extinguished or still in force, paved the way for future conversations regarding the precise nature of AT and its application in common law. Most importantly, following further claims and complaints from other tribal communities, the Canadian government enacted the Canadian Constitution Act of 1982 which contains the Canadian Charter of Rights and Freedoms. Section 35, titled the "Rights of Aboriginal Peoples of Canada", recognizes, and reaffirms all "existing aboriginal and treaty rights" while also committing to include aboriginal peoples in discussions of items related to them.[346] Although Section 35 failed to define terms, statements and guidelines related to AT, these rights remain officially recognized going forward.

Following the enactment of Section 35, the evolution of aboriginal title in Canadian legal history shifted from recognition to a struggled for definition. While the Section recognized AT, little was said about the extent of the title or the nature of interactions between government and aboriginal communities. In 1984, Guerin v. The Queen brought in to question the nature of the relationship of the state and aboriginal peoples. The case arose from a complaint made by the Musqueam Indian band regarding the lack of communication of terms of an agreement by the government regarding an agreement between the government and Shaughnessy Heights Golf Club to lease Musqueam land. A major source of conflict became the potential guilt of the Crown regarding the breach of trust with the band regarding the agreement. This issue brough in to question the nature of indigenous ownership. The Supreme Court found that *"Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown.*

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[344] Supreme Court of Canada, at 382.
[345] Supreme Court of Canada, at 314.
[346] Government of Canada, "Constitution Act 1982," sec. 35.

While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right.".[347] Given this unusual ownership, the Court characterized Aboriginal title as a ***sui generis*** right or "of its own kind. Justices going to elaborate that *"The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading."*.[348] This second component of the relationship became essential for the ruling of the Supreme Court in favor of the appellants. The court found that given the disparity in power between the Crown and indigenous peoples, *"relative legal positions are such that one party is at the mercy of the other's discretion."* resulting in a "fiduciary duty" of the government towards these peoples.[349] This fiduciary obligation requires, upon the surrender of land or any other legal agreement, that the Crown to act within the best interest of indigenous peoples. Given the lack of communication of terms of the agreement, the Crown violated this responsibility and was found guilty. The outcomes of Guerin v. the Queen were twofold. First, going forward, fiduciary duty on behalf of the Crown in dealing with aboriginal right became an integral assumption of Section 35 of the Constitution Act of 1928. Second, the status of aboriginal rights as sui generis or in a class of their own, further pushed legislators to recognize the unique status of indigenous rights in Canada.

The Calder and Guerin cases established aboriginal title as a right that could not be extinguished and that remained unique given the singular status of indigenous peoples. With such a framework in place, the scope of the "power" of the AT came into question. In the 1990s, a series of cases began to tackle what rights fell under the AT and the extent of these rights in relation to land a resource. It was during this time that the federal government took a new approach to indigenous rights: unlike any other country, Canada

[347] Supreme Court of Canada, Guerin v. The Queen at 382.
[348] Supreme Court of Canada, at 383.
[349] Supreme Court of Canada, at 384.

separates titles related to land and rights related to fishing and subsistence hunting. The Sparrow v. The Queen case of 1990 made was the first in a series of several cases to begin acknowledging this distinction and begin placing limits on the scope of aboriginal title. The case concerned indigenous fishing rights and whether these practices fell under the protection of Section 35 of the Constitution Act. The Sparrow case resulted in the Sparrow test or a three-step process to determine whether a tradition or custom was protected under AT. First the court must determine whether the custom or tradition falls under the protection of the aboriginal title stating that "The inquiry begins with a reference to the characteristics or incidents of the right at stake.".[350] What's more, the court states the necessity of considering both sui generis nature of aboriginal rights as well as fiduciary duty. Next, it is necessary to verify whether a "prima facie infringement lies on the individual or group challenging the legislation". [351] This includes determining whether unnecessary hardship or unreasonable limitation in traditions results in application of the legislation in question. If this step is true, then a final question must be asked to determine whether the reasons behind the legislation can be justified.

The Sparrow test became the basis for determining the validity of an aboriginal title when contested by government. Six years later, Van Der Peet v. the Queen built on the issues addressed in Sparrow v. The Queen. Although the case also focused on fishing rights, this time the issue of sale of fish caught under aboriginal title. The court found that the sale of fish did not constitute an "integral" aboriginal right as original First Nations peoples did not exchange goods for money. The case resulted in the development of the ten step "Integral to a Distinctive Culture Test" to determine whether a right was protected by Section 35. The decision was met with critique by scholars and indigenous representatives. In Recovering Canada: The Resurgence of Indigenous Law, John Borrows summarizes the risks of such decisions stating that the tests deem that "Aboriginal is retrospective. It is about what was, 'once upon a time,' central to the survival of a community, not necessarily about what is central, significant, and distinctive to the survival of these

[350] Supreme Court of Canada, Sparrow v. The Queen (1990).
[351] Supreme Court of Canada, at 1078.

communities today. His test has the potential to reinforce troubling stereotypes about Indians.". In short, the court, much like Prime Minister Trudeau's government, continued to view aboriginal title as a series of laws commemorating an extinct way of life rather than protecting living traditions that would evolve over time.

Narratives surrounding land rights under aboriginal title followed a similar progression of definition and limitation by Canadian government. In 1997, a First Nations claim to 58, 000 acres in British Columbia resulted in Delgamuukw v. British Columbia. Appellants lay claim to the land based on aboriginal title as demonstrated by myths and dances of the Gitksan and Wet'suwet'en people. The discussion surrounding the validity of these claims resulted in the first detailed definition of aboriginal title. According to the Supreme Court, AT is defined in two parts. Firstly, given that aboriginal title arose with the sovereignty of the Crown and the Royal Proclamation of 1763, *"aboriginal group asserting the claim must establish that it occupied the lands in question at the time at which the Crown asserted sovereignty over the land subject to the title."*.[352] The case goes on to elaborate that *"Under common law, the act of occupation or possession is sufficient to ground aboriginal title and it is not necessary to prove that the land was a distinctive or integral part of the aboriginal society before the arrival of Europeans."*.[353] Secondly, the Delgamuukw v. British Columbia marked an end to disputes such as that of the Van Der Peet case by adding to the definition of aboriginal title that *"aboriginal title does not raise the problem of distinguishing between distinctive, integral aboriginal practices, customs and traditions and those influenced or introduced by European contact."*.[354] As such, aboriginal title was characterized as living right rather than an extinct tradition. The definition presented in the Delgamuukw case remains the current definition and interpretation of AT in Canada. Recently, in 2014, a new nuance has been added to the interpretation of Section 35. The 1982 Constitution Act promises to consult indigenous peoples when

[352] Supreme Court of Canada, Delgamuukw v. British Columbia (1997).
[353] Supreme Court of Canada, at 1017.
[354] Supreme Court of Canada, at 1017.

making decisions concerning items of interest. However, the Tsilhqot'in Nation v British Columbia of 2014 established that "The level of consultation and accommodation required varies with the strength of the Aboriginal group's claim to the land and the seriousness of the potentially adverse effect upon the interest claimed.".[355] Similarly, to the narrative of Indian status and the Supreme Court cases related to fishing rights, the Canadian government demonstrated an initial willingness to recognize indigenous title and governance before retreating towards nuance and ambiguity regarding the power obtained with such title.

This brief history of the evolution of the definition of aboriginal title in Canadian legislation through archival documents demonstrates the fundamental pillar of narratives surrounding indigenous rights in Canada. Firstly, as shown through cases like Calder v. British Columbia and the Constitution Act of 1982, the Canadian government does not recognize indigenous customary law unless it is transposed into the common law system. This attitude that aboriginal title arose only with the Royal Proclamation of 1763 is confirmed in Delgamuukw v. British Columbia and continue to be viewed as such presently. Next, following the addition of Section 35 to the Canadian Constitution, lawmakers have struggled to define the nature and application of aboriginal rights. To this day, as seen in 2014 in Tsilhqot'in Nation v British Columbia, the Royal Proclamation of 1763 continues to be referenced when laying the groundwork for interpreting aboriginal title. As such it continues to serve as the most detailed document on the terms of AT. While progress has been made in defining the term through various cases, the federal government continues to struggle with the status of indigenous governance and the extent of independence of aboriginal bands in Canada. This is demonstrated by terms such as "sui generis" or "fiduciary duty" used to describe the nature and relationship of this specific group of laws. In addition, while AT title is recognized, it's extent continues to be challenged and questioned (ex: Sparrow v. The Queen). How can a sovereign state acknowledge the rights and independence of a people without relinquishing its own authority entirely? This

[355] Supreme Court of Canada, Tsilhqot'in Nation v. British Columbia (2014).

is a question the Canadian government has yet to answer. The dilemma has shaped the outcomes of conflict throughout the country and beyond, notably in Inuit Nunavut.

The Inuit Nunangat and Inuit Sovereignty in Nunavut

The Inuit Nunangat or "lands, waters and ices of the [Inuit] people" is a series of territories that represent the Northern most areas of Canada, extending far into the Arctic. These areas have been valuable to Canada throughout its history due to fur trade, ore deposit, oil reserves as well as its strategic value in the Arctic.[356] The region of Nunangat is composed of 4 separate territories, Inuvialuit Settlement Region, Nunavut, Nunavik, and Nunatsiavut.[357] These territories remain unique given the delayed recognition of their indigenous communities (exclusively labelled as distinct from First Nations and Métis) and rights to land and self-government that only occurred in the late 1990s and early 2000s. What's more, while communities are small and isolated, 86% of Nunangat's population identifies as indigenous with 83% identifying as Inuit making this the region with the highest indigenous population in Canada .[358] Given the focus of this case study on the indigenous sovereignty on an international scale, this section will focus on the region of Nunavut given its role in the international dispute over navigation in the Northwest Passage. The following section will serve to tie narratives in federal legislation and history of Nunavut as well as to explore these regional narratives through the analysis of archival legal documents and secondary historical sources.

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[356] Bonesteel and Anderson, *Canada's Relationship with Inuit*.
[357] Warren Bernauer, "Land Rights and Resource Conflicts in Nunavut," *Polar Geography* 42, no. 4 (October 2, 2019): 253–66, https://doi.org/10.1080/1088937X.2019.1648582.
[358] Statistics Canada Government of Canada, "Aboriginal Population Profile, 2016 Census - Inuvialuit Region [Inuit Region], Northwest Territories," June 21, 2018, https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/abpopprof/details/page.cfm?Lang=E&Geo1=AB&Code1=2016C1005086&Data=Count&SearchText=Inuvialuit%20region&SearchType=Begins&B1=All&GeoLevel=PR&GeoCode=2016C1005086&SEX_ID=1&AGE_ID=1&RESGEO_ID=1.

Records of early interactions between Inuit and European explorers date back as far as the early 1500s with the first properly documented record of contact dating to 1576 during Martin Frobisher's expedition to find the Northwest Passage .[359] Proper mainland contact was established in 1610 with the James Bay Cree .[360] However, given the hostile conditions in the Arctic, outside of trading posts, very little European expansion into the region occurred and Inuit interacted with settlers only to trade. Until 1870, all land between Quebec and British Columbia was owned by the Hudson Bay Company (HBC), a fur trade company. As such, Inuit were not included in the 1763 Royal Proclamation, and little was known about the size and number of communities. In 1870, HBC sold all lands under its "ownership" to the Dominion of Canada through the Rupert Land's and Northwestern Territory Order and the 1870 Deed of Surrender. The first document stated the Crown's consent to the transaction between HBC and Canada while the Deed of Surrender specified the terms. Perhaps the most important component of these documents for the future of Inuit communities was Term 14 of the Deed of Surrender which stated the transfer of responsibility all indigenous negotiations to Canada: *"Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government [...] and the Company shall be relieved of all responsibility in respect of them".*[361] In 1880, the Crown additionally transferred the British Arctic Islands to the sovereignty of Canada thus renouncing to all Arctic and North American claims. The transaction between HBC and Canada occurred without consultation with First Nation or Inuit peoples resulting in outrage and unrest in southern communities. The transfer of 1870 marked the beginning the negotiation of a series of land settlement agreements called the Numbered Treaties which would conclude in 1921. However, once again, Inuit peoples given their remote location of northern territories were not included in these negotiations or any aboriginal rights legislation.

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[359] Glyndwr Williams, *Arctic Labyrinth: The Quest for the Northwest Passage*, 1st University of California Press ed (Berkeley: University of California Press, 2010).
[360] Bonesteel and Anderson, *Canada's Relationship with Inuit*.
[361] Government of Canada, "Rupert's Land and North-Western Territory - Enactment No. 3," June 23, 1870, sec. 14.

Only in 1939 was the question of Inuit rights and status recognized. Due to dwindling fur trade and lack of subsistence hunting resources, Inuit communities faced widespread starvation and relied heavily on relief programs provided by the federal government to First Nations.[362] However, it became clear that various levels of government were uncertain of the status of Inuit given their omission from the 1763 Royal Proclamation and The Constitution Act of 1867. The question was posed to the Supreme Court. Following examination of historical documents from fur trade posts, pronounced their judgement via Re Eskimo stating that it is *"indisputable that [...] "esquimaux""* fall under the general designation "Indians" and that, indeed, in these documents, "Indians" is used as synonymous with "aborigines." " and as such *"Eskimo inhabitants of the province of Quebec are "Indians" within the contemplation of head no. 24 ("Indians and Lands Reserved for Indians") of section 91 of the British North America Act."*.[363] Here, British North America Act is used interchangeably with the Constitution Act of 1867. Through this decision, the Supreme Court of Canada brough about the amendment of the Constitution Act to include Inuit alongside First Nation and Métis people. The decision marked the inclusion of Inuit in the Indian Act and future legislation related to aboriginal title. Through their recognition as aboriginal peoples, Inuit communities began to officially engage with the Canadian government. In 1969, Jean Chrétien's White Paper threatened this status by suggesting repeal of the Indian Act and assimilation of all indigenous peoples as Canadian citizens, the need to create an organized political group tasked with voicing and pushing Inuit interests became apparent.

In 1971 Inuit Tapiriit Kanatami (ITK), formerly Inuit Tapirisat of Canada, a non-profit organization representing all Inuit peoples in Nunangat and Canada was formed. Inuit Tapiriit Kanatami translates to "Inuit are united in Canada" in Inuktitut. Immediately, the group took on some of the most pressing issues facing their community: negotiating a land claims agreement for all the Nunangat, spanning from Northern Quebec to the western Arctic. However, complications in negotiations as well as looming development

[362] Bonesteel and Anderson, *Canada's Relationship with Inuit*.
[363] Supreme Court of Canada, Re Eskimo: Reference as to whether "Indians" includes in s. 91 (24) of the B.N.A. Act includes Eskimo in habitants of the Province of Quebec (1939).

projects from oil and gas companies pushed the ITK and other political organizations to split the Nunangat Agreement in to four smaller, independent land settlement agreements: The James Bay and Northern Quebec Agreement settled in 1975 concerned with Northern Quebec or Nunavik , the Inuvialuit Final Agreement, of 1984 concerned with the Northwestern Territories, The Nunavut Land Claims Agreement settled in 1999 and the Labrador Inuit Land Claims Agreement settled in 2005. The latter two claims resulted in a lengthy and difficult negotiation process. In the case of Nunavut, the ITC submitted its first working draft for a Nunavut Lands Claims Agreement in 1976. Negotiations and re-drafting would last until 1990 followed by the recognition of Nunavut as a territory in 1999.[364]

The Nunavut Land Claims Agreement (NLCA) and along with its three sister agreements provide Inuit communities with rights to land and self-governance. While primarily focused on land rights, agreements recognize the importance of the Arctic marine and coastal environments in Nunangat. In the case of NLCA, the aboriginal right of Inuit extends to *"their traditional and current use and occupation of the lands, waters, and land-fast ice"*.[365] In addition to use, the governance and management of ocean resources is also addressed through the *"rights for Inuit to participate in decision-making concerning the use, management and conservation of land, water and resources, including the offshore"*.[366] For all Nunangat lands claims agreements, the term marine areas is defined as *"part of Canada's internal waters or territorial sea, whether open or ice-covered, lying within […] Settlement Area, but does not include inland waters. For greater certainty, the reference to internal waters or territorial sea includes the seabed and subsoil below those internal waters or territorial sea"*.[367]

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[364] Bonesteel and Anderson, *Canada's Relationship with Inuit*; Bernauer, "Land Rights and Resource Conflicts in Nunavut."
[365] Government of Canada, "Nunavut Land Claims Agreement," 1993, 1.
[366] Government of Canada, 130.
[367] Government of Canada, "Nunavut Land Claims Agreement."

This definition of territorial sea is consistent with the definition provided by Article 2 of Part II of UNCLOS suggesting Inuit governance of this component of Canadian territory.[368] According to Article 15.1.1. of the NLCA, *"the Inuit are traditional and current users of certain marine areas, especially the land-fast ice zones"* and *"the legal rights of Inuit in marine areas […] are based on traditional and current use".*[369] The NLCA implies that Inuit rights and governance extend beyond the land-fast ice zones to the water column and seabed deemed territorial waters under UNCLOS. The NLCA provides detailed definitions of territorial claims but remains rudimentary in some of its provisions. In contrast, the more recent Labrador Inuit Land Claims Agreement provides specific provisions to 48,690 square kilometers of tidal waters together with rights to the seabed within the treaty area. The last of the four agreements, the 2006 Nunavik Land Claims Agreement, provides significant focus on offshore marine areas and islands.[370]

Inuit Sovereignty on a Global Scale: The Fight for the Northwest Passage

Presently, Inuit communities in Nunavut face a myriad of challenges for the future of their livelihoods and their cultural practices. Inuit have a tight bond with the sea ice and marine ecosystems. Communities rely on the land-ice boundary year-round for transportation, subsistence hunting and the relationship of indigenous peoples with sea ice and marine fauna represents an integral part of their culture. With Canada's Northern coastline representing over 70% of Canadian coastal territory, the remote communities that live within the Nunangat have found themselves at the center of the Arctic's international disputes and negotiations regarding ocean sovereignty.[371] As global temperatures rise, decreasing sea ice

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[368] United Nations, *United Nations Convention on the Law of the Sea*.
[369] Government of Canada, "Nunavut Land Claims Agreement," 130.
[370] Thomas F. Thornton and Shonil A. Bhagwat, eds., *The Routledge Handbook of Indigenous Environmental Knowledge*, 1st ed. (Abingdon, Oxon ; New York, NY : Routledge, 2021.: Routledge, 2020), 211, https://doi.org/10.4324/9781315270845.
[371] James D. Ford, Trevor Bell, and Nicole Couture, "Perspectives on Canada's North Coast Region; in Canada's Marine Coasts in a Changing Climate" (Government of Canada, 2016).

extent in the summers is creating new opportunities for vessel transit, shipping, and tourism in the Arctic. This change has resulted in renewed interest in the passage with Arctic states suggesting it status should be changed to that of an international strait while Canada maintains its jurisdiction as a sovereign state of territorial waters. However, under the NLCA, this region is primary under the governance of the Nunavut Government and Inuit communities. As a result, the dispute surrounding the sovereignty and future management of the Northwest Passage provides insight into the interactions of UNCLOS, international law and indigenous rights on both federal and global scales. The case of the NWP amplifies global issues regarding the involvement of indigenous peoples in maritime law.

On an international scale, negotiations and claims related to marine space and seabed in the Arctic are divided between all countries with sovereign lands within the Arctic circle. These countries are Canada, Denmark, Norway, Finland, Sweden, Iceland, The Russian Federation, and the United States of America. All countries are members of the Arctic Council, which was founded in 1996 via the Ottawa Declaration. The document states that the Arctic Council is *"an important milestone in [countries'] commitments to enhance cooperation in the circumpolar North. The Council will provide a mechanism for addressing the common concerns and challenges faced by their governments and the people of the Arctic […] particularly to the protection of the Arctic environment and sustainable development as a means of improving the economic, social, and cultural well-being in the North."*.[372] The Ottawa Declaration also states that *"noted that the indigenous people of the Arctic have played an important role in the negotiations to create the Arctic Council. The Declaration provides for their full consultation and involvement in the Arctic Council."*. [373] As a result, eight organizations representing indigenous people's interests chair the council together with sovereign states. One such organization is the Inuit Circumpolar Council (ICC) which

[372] Arctic Council, "Ottawa Declaration," 1996, 3.
[373] Arctic Council, 3.

represents the needs and rights of transnational Inuit throughout the Inuit Nunaat or the collective of all Inuit and the territories they consider their traditional territory.[374]

The recognition of the interests and necessity for involvement of traditional users of the Arctic is an incredible step towards the equitable use of ocean space. While the Arctic Council serves as a medium for cooperation between Arctic stakeholders, it is not a legal agreement to Arctic co-governance: no binding treaty, like the Antarctic Treaty at the South Pole, exists to manage the area. In this regard, the Ilulissat Declaration of 2008 is the closest statement representing a commitment to co-governance. Pushed by Denmark, the Ilulissat Declaration addressed the numerous disputes over coastal space and seabed in the Arctic. An agreement between only five states (Denmark, U.S.A., The Russian Federation, Norway, and Canada), the declaration serves to outline a commitment to use UNCLOS to justly assign boundaries to maritime space. The document states that *"the law of the sea provides for important rights and obligations concerning the delineation of the outer limits of the continental shelf, the protection of the marine environment, including ice-covered areas, freedom of navigation, marine scientific research, and other uses of the sea. We remain committed to this legal framework and to the orderly settlement of any possible overlapping claims."*.[375]

From the standpoint of maritime law, the Ilulissat Declaration is a promising statement for international maritime cooperation. However, the declaration is also problematic. Firstly, it excludes the remaining four Arctic states and undermines incentives for cooperation and bodies like the Arctic Council as a result. Second, while the Arctic Council recognizes rights of indigenous peoples, this treaty focused on maritime governance omits any commitment to consultation regarding delineation of limits of territorial seas and beyond. The statement hints at the nature of negotiations but makes it clear these issues will remain state centric. Although the Ottawa Declaration moves towards a new narrative of indigenous rights

[374] Gary Wilson and Heather Smith, "The Inuit Circumpolar Council in an Era of Global and Local Change.","
Internationa Journal 66, no. 4 (2011).
[375] Arctic Council, "Ilulissat Declaration," 2008, 1.

recognition in the Arctic, the Isulissat Declaration entrenches past traditions of Westphalian sovereignty and reinforces a state-centric approach towards Arctic governance.[376] Both approaches to Arctic governance and dispute settlement are essential in the evolving narratives surrounding the Northwest Passage and Inuit sovereignty in the Arctic.

In the early 1500s, the European demand for exotic goods of the Far East (salt, silks spices) drove explorers and navigators to search for a short and secure sea route through the Arctic.[377] However, the hazardous conditions, unreliable and harsh weather, poor geographic knowledge, and a lack of fresh food would make this effort last almost 400 years. Over a dozen expeditions would attempt to find a route through the maze of passages in the Arctic Archipelago. Most voyages concluded in tragedy with either loss of lives, shipwreck, or disappearance of the entire expedition. Among the most famous is the British expedition of 1845. Led by Sir John Franklin with two ships, HMS Erebus and Terror, the expedition is known for its mysterious disappearance and the slow death of the entire crew once the ships got trapped in the ice. Although he perished in the effort Sir Franklin and his crew are often credited with the discovery of the Northwest Passage (NWP) or the first navigable route through the Arctic Archipelago.[378] Roald Amundsen, a Norwegian explorer would become the first to successfully navigate the passage from the Atlantic to the Pacific Ocean between 1903-1906.[379] While other navigable straits have been identified, the Northwest Passage remains the primary "highway" through the archipelago. The Northwest Passage (NWP) is defined as "the sea route linking the North Atlantic Ocean with the North Pacific Ocean. It extends from Baffin Bay (between West Greenland and Baffin Island) to Bering Strait (between Alaska and Siberia),

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[376] Ahmad Khan, "Rebalancing State and Indigenous Sovereignties in International Law"; Heather N. Nicol, "From Territory to Rights: New Foundations for Conceptualising Indigenous Sovereignty," *Geopolitics* 22, no. 4 (October 2, 2017): 794–814, https://doi.org/10.1080/14650045.2016.1264055.
[377] Alan Day, *Historical Dictionary of the Discovery and Exploration of the Northwest Passage* (Lanham, Md: Scarecrow Press, 2010), https://search.ebscohost.com/login.aspx?direct=true&scope=site&db=nlebk&db=nlabk&AN=246380.
[378] Day; Williams, *Arctic Labyrinth*.
[379] Day, *Historical Dictionary of the Discovery and Exploration of the Northwest Passage*.

through the Canadian Arctic Archipelago.''[380] Presently, the NWP remains notorious for being narrow, difficult to navigate and, until recently, primarily ice-covered year-round. Due to rising global temperatures, the passage route was recorded as entirely "ice-free" for the first time in the summer of 2007 allowing for unhindered vessel transit.[381] As the impacts of ocean and climate change continue to accentuate, the duration of this ice-free period is predicted to increase. With the prospects of the short and secure sea route between the Atlantic and Pacific oceans becoming a reality, Arctic countries are looking at the NWP as a potential alternative to the current, lengthier shipping routes.[382] The potential status of the NWP as an international strait that requires unimpeded international navigation only increases the heated discussions surrounding its sovereignty.[383]

Thus far, Canada maintains claims the NWP based on Article 234 of UNCLOS which states that *"Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone".*[384] Historic Inuit occupation of the Nunavut is at the core this standing Canadian claim to the NWP. The Nunavut Land Claims Agreement identifies "the contributions of Inuit to Canada's Arctic waters as Inuit homeland history, identity, and sovereignty in the Arctic." Additionally, Article 15 of the NLCA explicitly states that "Canada's sovereignty over the waters of the Arctic Archipelago is supported by Inuit use and occupancy.". The claim continues contested by other countries like the United States which claims that the article was created to ensure environmental protection rather

[380] Day, xxxiii; Ann Savours, *The Search for the North West Passage* (London: Chatham, 1999).
[381] V. C. Khon et al., "Perspectives of Northern Sea Route and Northwest Passage in the Twenty-First Century," *Climatic Change* 100, no. 3–4 (June 2010): 757–68, https://doi.org/10.1007/s10584-009-9683-2.
[382] Jan Pawelski, *Scientific Journals Zeszyty Naukowe of the Maritime University of Szczecin* 70, no. 142 (2022).
[383] Uchechukwu Okoye, "What Is the Status of the Northwest Passage in the Arctic Under International Law of the Sea?," *Social Science Research Network*, 2022.
[384] United Nations, *United Nations Convention on the Law of the Sea*.

than to enforce sovereignty.[385] The dispute has lasted over 50 years. However, there are no provisions in UNCLOS stating what happens to ice-covered marine space if ice melts. Article 234 states that to be considered ice-covered and area must have "ice covering such areas for most of the year".[386] As the Arctic Sea ice extent decreases, it is possible the NWP will we ice free for most of the year if not year-round. Given its potential to connect two major oceans, countries are arguing that the NWP should gain the status of an international strait or, as defined by Article 37, "straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone".[387]

Inuit are central to Canada's claims over the NWP, whether as territorial waters, an EEZ or an international strait. On a federal scale, the Canadian Government maintains a consistent narrative of indigenous governance and claims of the Northwest Passage. Article 17 of the Nunavut Lands Claim Agreement states that "The primary purpose of Inuit Owned Lands shall be to provide Inuit with rights in land that promote economic self-sufficiency of Inuit through time, in a manner consistent with Inuit social and culture needs and aspirations.".[388] Regarding marine space, the document states that "there is a need for Inuit involvement in aspects of Arctic marine management, including research.".[389]However, simultaneously, Canada maintains jurisdictional authority over all ships transiting through the territory given the status of the marine area as territorial waters.[390] In addition, while the government of Canada promises consultation with Inuit regarding any activities within their territories, in the 1994 White Paper on Defense and later the 2010 Report by the Standing Committee on Defense the government omits mention

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[385] Susan Lalonde, "The U.S.-Canada Northwest Passage Disagreement: Why Agreeing to Disagree Is More Important Than Ever," in *The Arctic and World Order*, ed. Kristina Spohr, Daniel S. Hamilton, and Jason Moyer (Brookings Institution Press, 2021), 267–93.
[386] United Nations, *United Nations Convention on the Law of the Sea*.
[387] United Nations.
[388] Government of Canada, "Nunavut Land Claims Agreement," art. 17.
[389] Government of Canada, art. 15.
[390] Breanna Bishop et al., "How Icebreaking Governance Interacts with Inuit Rights and Livelihoods in Nunavut: A Policy Review," *Marine Policy* 137 (March 2022): 104957, https://doi.org/10.1016/j.marpol.2022.104957.

of Inuit sovereign rights.[391] Consistent with the behavior of other sovereign states on an international scale as in the case of the Ilulissat Declaration, indigenous rights are only recognized at the leisure of a state and rescinded or omitted in the case of strategic value, defense, or the need to assert Westphalian sovereignty over a space. If the NWP is recognized as an international strait rather than territorial waters, it is the livelihoods of the indigenous communities that will bear the brunt of the impacts of increased traffic and pollution.[392] Ironically, it is specifically these communities that are omitted from discussions related to the marine sovereignty and defense. Such behaviors on a federal and international level beg the question: are indigenous rights be considered recognized and respected if they are given and taken when it best suits a sovereign nation? In response to such questions and frustrations, the Inuit Circumpolar Council (ICC) published the in the 2009 Circumpolar Inuit Declaration on Sovereignty in the Arctic (CIDSA).

The CIDSA was a direct reply to the exclusion of indigenous peoples from the Ilulissat Declaration but also addressed additional growing frustrations stemming from disputes such as that of the NWP. TheICC states that self-determination is central to Inuit rights as people clarifying that "It is our right to freely determine our political status, freely pursue our economic, social, cultural and linguistic development, and freely dispose of our natural wealth and resources.".[393] The document goes on to highlight these rights as supported by UNDRIP as well as under various international human rights agreements. While the issue of sovereignty is present throughout the document, Section 3.3. demonstrates the repercussions of omission from sovereignty decisions for Inuit peoples: "The inextricable linkages between issues of sovereignty and sovereign rights in the Arctic and Inuit self-determination […] require states to accept the presence and role of Inuit as partners in the conduct of international relations in the Arctic.".[394] Here the ICC demonstrates the perspective that omission of Inuit from sovereignty and management decisions represents the erasure of Inuit as an Arctic peoples.

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[391] Bonesteel and Anderson, *Canada's Relationship with Inuit*.
[392] Bishop et al., "How Icebreaking Governance Interacts with Inuit Rights and Livelihoods in Nunavut."
[393] Inuit Circumpolar Council, "A Circumpolar Inuit Declaration on Arctic Sovereignty," April 28, 2009, sec. 1.4.
[394] Inuit Circumpolar Council, sec. 3.3.

In a final statement, in Section 4.1., the CIDSA notes the aspect of the exclusive nature of the Ilulissat Declaration noting that "ministers representing the five coastal Arctic states did not go far enough in affirming the rights Inuit have gained through international law, land claims and self-government processes.".[395] There is no explicit statement in the CIDSA about consequences of this action but rather a call for the "development of international institutions in the Arctic, such as multi-level governance systems and indigenous peoples' organizations, must transcend Arctic states' agendas on sovereignty and sovereign rights and the traditional monopoly claimed by states in the area of foreign affairs." in Section 4. 2.. Through its direct response to the exclusion of indigenous peoples from yet another Arctic sovereignty decision, the CIDSA document opened the official dialogue of the necessity for Inuit sovereignty in the NWP.

Summary

The initial section of this chapter provided a summary of the evolution of narratives of aboriginal rights and governance in Canada. Early legislation demonstrated the road to the recognition of indigenous peoples as "unique" due to their heritage and their access to certain rights as a result. Landmark cases like that of Calder v. British Columbia promoted the evolution of narratives of recognition leading up to the formal acceptance of aboriginal title as a right in the Constitutional Act of 1982. However, while formally recognized and respected, the terms of aboriginal rights remained vague. The result is a winding series of dialogues that continues to slowly flesh out what it means to have aboriginal rights under Canadian law. In this latter section of federal indigenous rights history, it becomes clear that western legal systems struggle with the unique aspects of indigenous culture and community. As a result, Canada recognizes aboriginal rights as sui generis or in a category of their own, unable to be characterized in western law. While this provides indigenous communities with the latitude to fight for further recognitions and rights to self-governance, the ability of indigenous groups to act as stewards of their traditional lands and resources remains overshadowed by common law legislation.

[395] Inuit Circumpolar Council, sec. 4.1.

The case of the Inuit Nunangat provides insight into the complexities of governance of coastal space. Although the remote territory has Inuit government bodies and non-profit organizations to facilitate the management of the Arctic Archipelago, the Canadian government has shown to be willing to ignore these provisions to limited independence when economic or strategic interests arise. What's more, while oceans space is mentioned in the NLCA, the provisions to Inuit control are limited and promptly ignored when government use of space becomes necessary. The dispute surrounding the use and sovereignty of the NWP only highlights existing issues. Although the Arctic Council incorporates indigenous communities in its decision-making process, Arctic states have shown a willingness to ignore or bypass the Council (and its provisions) through agreements like the Ilulissat Declaration for the sake of peacefully dividing up the Arctic among themselves.

In *Indigenous Recognition in International Law: Theoretical Observations*, Paul Macklem summarizes the situation by acknowledging that international indigenous rights "speak to injustices produced by the way in which the international legal order conceives of sovereignty as a legal entitlement that it distributes among collectivities that it recognizes as States".[396] Legislation that affects indigenous communities that rely on maritime space but does not recognize them as stakeholders ultimately hinders any efforts at indigenous participation in governance. In the case of the Northwest Passage, the UNCLOS agreement is providing grounds for the unlimited international use of Inuit lands without consultation with these communities and empowers the Canadian government in its efforts to dominate the space rather than to recognize indigenous claims. Although groups like the Inuit Circompolar Council have made head way in making their voices heard on the issue to Arctic states and the world, this piece of legislation presents a significant roadblock to indigenous efforts of Arctic governance.

[396] Patrick Macklem, "Indigenous Recognition in International Law: Theoretical Observations.," *Michigan Journal of International Law* 30, no. 1 (2008): 209.

Chapter 7 – Case Study: Land Rights of Australian Indigenous Peoples and the Torres Strait

Overview

The Torres Strait Islands are a series of over 100 islands and archipelagoes located at the northern most tip of Australia. The islands are in a 150km wide strait, the Torres Strait, that spans between the Australian land mass and Papua New Guinea.[397] While the Torres Strait is not a focal point of international debates of maritime sovereignty and human rights like the Northwest Passage and Inuit Lands in the Arctic, the strait and its indigenous communities play a key role in the history of Australian indigenous rights on land and in the oceans. The story of the Torres Islander peoples, the indigenous community native to the archipelago, provides new perspectives on the evolving narratives surrounding the position of indigenous peoples in questions on ocean sovereignty, jurisdiction of international straits and management of marine areas.

To better understand the present state of sovereignty and ocean management in the Torres Strait, the following chapter will be divided in to three parts to explore the evolution of narratives surrounding the status of aboriginal peoples in Australia. The first section will be focus on the history of rights of aboriginal peoples in Australia up until present day. This section will provide the national framework in which the rights of coastal aboriginal peoples have evolved. Given the important role played by the Torres Strait Islander peoples in negotiations surrounding aboriginal peoples' rights and title at the national level, the story of Aboriginal peoples' rights in Australia is also that of the Torres Strait Islander peoples. The second section of this chapter will cover a few cases central to aboriginal rights history that pertain directly to the Torres Strait Islander peoples and shape the evolving legal narratives of indigenous governance of maritime space in the Torres Strait. The final section in this chapter will shift focus to the evolution of narratives of ocean sovereignty within the Torres Strait on an international scale. This analysis will examine the role of

[397] Richard Davis and Australian Institute of Aboriginal and Torres Strait Islander Studies, eds., *Woven Histories, Dancing Lives: Torres Strait Islander Identity, Culture and History* (Canberra: Aboriginal Studies Press for the Australian Institute of Aboriginal and Torres Strait Islander Studies, 2004).

UNCLOS, UNDRIP and Aboriginal peoples' rights in negotiations regarding the evolving narrative surrounding the use and status of the international strait.

Presently, Australia is a parliamentary democracy as established by the Commonwealth of Australia Constitution Act or the Australian Constitution (AC) of 1901. The AC states that Australia is a "self-governing colony" and distributes power between the national government of "the Commonwealth" and the six "Original states" (New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia) each previously considered independent colonies[398]. There are also three self-governing territories which operate almost indistinguishably from States with the exception that they do not create their own legislation but rather rely on the federal government for approval and enforcement of law.[399] Given its origin as a British Colony, Australia's legal system is grounded in common law. Law is created via rulings in legal cases and legislation. Unlike other self-governing British colonies, the Australian Constitution does not mention aboriginal peoples or recognize their rights in any aspect

Prior to analyzing narratives in legal documents and secondary historical sources, it is important to establish the appropriate vocabulary with which aboriginal peoples in Australia are addressed. Unlike Canada and the United States, the word "Indian" does not apply to aboriginal peoples of Australia and is considered disrespectful. The same is true for the words "aborigine" or "half caste" which may be found in early legislation but are considered disrespectful in modern language due to negative historic connotations[400]. Indigenous peoples in Australia are primarily referred to as Aboriginal and Torres Strait Islander Peoples. Broadly, "indigenous" and "aboriginal" may be used to refer to these communities[401]. They may also be referenced as First Nations or First People of Australia.

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[398] Federal Register of Legislation, "Commonwealth of Australia Constitution Act," 1901, 2.
[399] Brian Head, K Crowley, and International Comparative Policy Analysis Forum, *Policy Analysis in Australia*, 2016, https://doi.org/10.1332/policypress/9781447310273.001.0001.
[400] Gulanga Program, "Preferences in Terminology When Referring to Aboriginal and/or Torres Strait Islander Peoples" (Australian Capital Territory Social Services Council, December 2016).
[401] Gulanga Program.

A Brief History of Indigenous Land Rights in Australia

The history of the struggle for recognition of aboriginal rights in Australia begins in 1770 when James Cook first claimed British sovereignty over the eastern part of Australia at Possession Island[402]. The first mention of aboriginal rights in any form in the history of Australia appears in the 1836 Letters Patent of King William 4th. The Letters Patent was a document submitted to and signed by the monarch to establish and settle the Province of South Australia. The document states *"nothing in our Letters Patent contained shall affect or be construed to affect the rights of any Aboriginal Natives of the said Province to the actual occupation or enjoyment in their own Persons or in the Persons of their Descendants of any Lands therein now actually occupied or enjoyed by such Natives"*[403]. Although the document promises occupation and enjoyment of lands, it does not promise sovereignty or ownership of this space. Regardless, this initial promise to the First Australians was effectively ignored in all future legislation and settler behavior for the next 130 years[404]. As such, aboriginal peoples were dispossessed of their lands. The legal narrative of aboriginal rights in Australia would remain stagnant until 1966 when a series of regional discussions in legislation and case law would set the stage for the landmark Mabo v. Queensland case of 1992 and the Coe v. Commonwealth (Coe (No. 2) dismissal of 1993.

The first in this series was the South Australian Lands Trust Act of 1966: the first ever act to recognize Aboriginal land rights. Part 4 of the act dictates "Provisions with respect to Aboriginal lands" with Section 16 stating that "The vesting of land in the Trust does not extinguish or affect native title in the land." [405]. The document was an initial nod to the promises of the Letters Patent of 1836 by establishing a land trust to manage reserves in Australia for the benefit of aboriginal peoples. While no progress is made

[402] Richard Broome, *Aboriginal Australians: A History since 1788*, 5th ed (Crows Nest: Allen & Unwin, 2019).
[403] King William IV, "Letters Patent Establishing the Province of South Australia," February 19, 1836.
[404] Broome, *Aboriginal Australians*.
[405] Parliament of South Australia, "South Australia Aboriginal Lands Trust Act," 1966, 8.

in respect to self-governance, this act opened the discussion of aboriginal people's status in Australia. From the perspective of Australian government, the South Australian Lands Trust Act may have been a step forward but from the perspective of aboriginal peoples the narrative was different as demonstrated by the 1972 Larrakia Petition or "Gwalwa Daraniki! This is Our Land". Signed by people from all Australian mainland states, the petition was an effort to publicize and vocalize the struggle of aboriginal peoples and stated *"The British settlers took our land. No treaties were signed with the tribes. Today we are REFUGEES. Refugees in the country of our ancestors. We live in REFUGEE CAMPS – without land, without employment, without justice. The British Crown signed TREATIES with the MAORIS in New Zealand and the Indians in North America. We appeal to the Queen to help us, the Aboriginal people of Australia. We need land rights and political representation now."*[406]. The petition is not only a vocalization of frustration but also provides a clear summary of the situation of aboriginal peoples in the 1970s. What's more, it highlights the unjust. Treatment of Australian aboriginal peoples in comparison to IPs in other ex-British colonies. The universal outrage expressed in the Larrakia Petition would fuel the claims to sovereignty and land rights discussed in three key cases between 1979 and 1993, leading to the Native Title Act of 1993.

In 1979, the Coe v. Commonwealth (Coe (No. 1) case would launch the debate about indigenous sovereignty and aboriginal title in Australia. The dialogue would conclude with the Native Title Act of 1993. While the 1992 Mabo v. Commonwealth case is considered a major landmark decision in the history of Australian aboriginal rights, the surrounding Coe (No.1) and Coe (No.2) provide nuance to the success of decision concerning the future of the sovereignty of aboriginal peoples. Coe (No.1) saw Paul Thomas Coe of the Wiradjuri Tribe challenging the Commonwealth to recognize the sovereignty of his people and other aboriginal communities over the lands of Australia. Paragraph 11 of the case states that Coe's primary claims were: There is an aboriginal nation which, before European settlement "enjoyed exclusive

[406] 1000 Larrakia community members and Office of Aboriginal Affairs, "Larrakia Petition," 1972.

sovereignty over the whole of Australia, and which still has sovereignty", "Captain Cook wrongly proclaimed sovereignty and dominion over the east coast of Australia", *"Australia was acquired by the British Crown by conquest"*[407]. The Court recognized 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 they had a complex social and political organization" and as a result that *"Independent tribes [..] may exercise a de facto authority which prevents the territory being "terra nullius""*[408]. However, simultaneous Justice Gibbs ruled that it was not possible to recognize aboriginal peoples of Australia *"distinct political society separated from others"* so sovereignty could not be recognized [409]. The case was additionally dismissed based on poorly structured evidence and conclusions that the issue of Australian conquest was beyond national jurisdiction. While dismissed, the case pushed the High Court of Australia to take a stance on the notion of sovereignty, demonstrating the willingness of the Australian legal system to oppose the concept of terra nullius.

The issue would re-emerge in 1992 in the Mabo v Queensland case (i.e., Mabo case or Mabo (No. 2)). The Mabo case was the second of two High Court cases pertaining to Torres Strait Islander People's rights. The first case is discussed in the second section of this chapter. In Mabo No.2, Eddie Koiki Mabo and others placed a legal claim to the ownership of lands on the Island of Mer in the Torres Strait by the Merriam people. The case addressed two major questions: first, whether the Merriam people possessed traditional rights to the land and second, whether Australia's legal system would accept and protect these rights. The case stretched almost 10 years. Over the course of this process, the Merriam people provided extensive evidence to their traditional use and claims to the island. A central issue to the case became the concept of "terra nullius" which, according to international law, justified the colonization of "discovered lands". In 1992, the court ruled that *"The common law of this country would perpetuate injustice if it were*

[407] High Court of Australia, Coe v. Commonwealth (Coe (No. 1)) (High Court of Australia 1979).
[408] High Court of Australia.
[409] High Court of Australia.

to continue to embrace the enlarged notion of terra nullius and to persist in characterizing the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land." The High Court goes on to declare that all previous cases leaning on the terra nullius concept are thus overruled.

On several occasions, the Mabo case also cites the equally prolific Calder v. British Columbia ruling discussed in Chapter 5 to support its decision. Ultimately, Mabo v. Queensland, recognized that "the land in the Murray Islands is not Crown land" and *"Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands".* The ruling goes on to establish native title on the basis that *"The dispossession of the indigenous inhabitants of Australia was not worked by a transfer of beneficial ownership when sovereignty was acquired by the Crown, but by the recurrent exercise of a paramount power to exclude the indigenous inhabitants from their traditional lands"* P63. P63 goes on to state that "the nature and incidents of the native title which, surviving the Crown's acquisition of sovereignty, burdens the Crown's radical title."[410]. A final, yet important detail of the Court ruling was like that of Canada's Guerin v. the Queen: how can native title fit into a common law system when it is unique. Paragraph 65 outlines Australia's approach that *"Native title, though recognized by the common law, is not an institution of the common law and is not alienable by the common law.".* As a result, *"The general principle that the common law will recognize a customary title only if it be consistent with the common law is subject to an exception in favor of traditional native title."* [411]. Through this statement, the notion that oral traditions and custom are proof of rights to native title were establish. This ruling contrasts with the approach of Canada where oral traditions have been considered inadequate proof of aboriginal title.

The 1992 Mabo (No. 2) ruling is considered the beginning of modern aboriginal people's rights in Australia. It was swiftly followed by two decisions in 1993: the ruling on the second Coe v. Commonwealth

[410] High Court of Australia, Mabo and Others v Queensland (No. 2).
[411] High Court of Australia.

case (Coe (No. 2)) and the enactment of the Native Title Act (NTA). The Native Title Act, through Section 12, codified native title into common law. As part of this process, the NTA defined the official designation of "Australian Aboriginal Peoples and Torres Strait Islanders" for all individuals identifying as aboriginal peoples. It re-affirmed the rejection of the terra nullius principle, classified aboriginal peoples as the "most disadvantaged in Australian society" and promised "to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire."[412]. The act also served to lay the groundwork for future claims to native title and the extent of rights and legal powers granted by the title (Section 3). One such provision was defining native title itself as: "communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where […] the rights and interests are recognized by the common law of Australia". Through its use of "rights and interests" this definition of native title provided an open-ended interpretation as to the extent of aboriginal rights over territories in Australia. How far could rights of traditional owners extend? Were sovereignty or self-governance and self-determination an option? The dismissal of Coe (No. 2) served to clarify this definition.

When the case was revisited in 1993, it varied from its first iteration in 1979 as it requested internal sovereignty rather than sovereignty outside of the Crown's authority. Wiradjuri representative stated that *"the Wiradjuri are a domestic dependent nation, entitled to self-government and full rights over their traditional lands, save only the right to alienate them to whoever they please."*.[413] The request, following the Mabo case and the NTA, showed the extent to which the Commonwealth government was willing to uphold its extensive promises of "the full recognition and status within the Australian nation" [414]. However, the case was dismissed on the grounds that Mabo (No.2) is entirely at odds with the notion that sovereignty

[412] Commonwealth of Australia, "Native Title Act," 1993.
[413] High Court of Australia, Coe v Commonwealth (Coe (No. 2)) (High Court of Australia 1993).
[414] Commonwealth of Australia, "Native Title Act."

adverse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are "a domestic dependent nation" entitled to self-government and full rights [..] or that as a free and independent people they are entitled to any rights and interests other than those created or recognized by the laws of the Commonwealth".[415] The Court added that "Mabo (No.2) recognized that land in the Murray Islands was held by means of native title under the paramount sovereignty of the Crown." before deeming the request of the Wiradjuri as unreasonable.[416] The Coe (No. 2) case provided placed a disappointing shadow on the promising NTA. It became clear that while the NTA was a step forward, the Commonwealth government and High Court were firm on their position regarding sovereignty and self-determination of aboriginal peoples. While they had rights to land and could partake in management, the recognition of self-governance was not an option

Since the enactment of the NTA and the Mabo (No. 2) case, several additional High Court cases have provided further nuance to the definition and requirements of the native title in Australia. However, given the focus of this chapter on the Torres Strait and indigenous sovereignty of maritime spaces, analysis of these cases is not pertinent to the section. However, unlike Canada, in Australian legislation, sea and sea-bed rights play an important role in federal cases surrounding aboriginal rights legislation. Although Australian aboriginal peoples are not considered "sovereign" of their lands they retain rights to use and manage them and any waters bordering them. As stated by Section 6 of the NTA: "This Act extends to each external Territory, to the coastal sea of Australia and of each external Territory, and to any waters over which Australia asserts sovereign rights under the Seas and Submerged Lands Act 1973."[417]

Given the focus of this capstone on indigenous maritime rights, it is necessary to examine the two pivotal cases that further clarified the meaning and extent of these rights: the 1998 Yarmirr v. Northern

[415] High Court of Australia, Coe v Commonwealth (Coe (No. 2)).
[416] High Court of Australia.
[417] Commonwealth of Australia, "Native Title Act."

Territory Case and the 2008 Northern Territory of Australia v Arnhem Land Aboriginal Land Trust (Blue Mud Bay Sea rights Case). Prior to ratifying and signing the UNCLOS treaty of 1982, Australia also enacted the Sea and Submerged lands act of 1973. Much like the provisions of UNCOS the Act stated Australia's sovereignty of territorial waters. In the 1998 Yarmir v Norther Territory case, the aboriginal peoples of Northern Territory sought to determine whether they had exclusive rights to the territorial seas and seabed of the territory, more specifically regarding fisheries. Although Australian territories are seemingly identical to States in their legal and governmental systems, they are distinct in their rights to self-governance.[418] As a result, it was not clear whether native title applied to this region. While the High Court acknowledge the existence of native title of sea and seabed in Northern Territory it was with the caveat that this right was non-exclusive: "The native title rights and interests do not confer possession, occupation, use and enjoyment of the sea and sea-bed within the claimed area to the exclusion of all others"[419]. Aboriginal peoples could use maritime space for transport and traditional use, their native title was not deemed to extend to the control of fisheries in the area. However, use of land is exclusive under native title. The reasons for recognizing only non-exclusive title begin to hint at some of the many issues of aboriginal maritime sovereignty. The High Court ruled that title could not by exclusive as aboriginal peoples could not enforce their claims to territorial seas. Justice Kirby criticized this reasoning stating "it would not be reasonable for a court to place undue weight on methods of enforcement of Aboriginal rights against non-Aboriginal persons. How, it might be asked, were the forebears of the claimants expected to assert and uphold their rights to their sea country when the balanda [white people] enjoyed indisputable superiority of weapons, and […] incontestable superiority of legal rights?"[420]. The decision demonstrated the Court's perspective of Aboriginal rights as "non-commercial": if traditional users could not exercise the same economic behavior and enforcement as fishermen, there was no justification for exclusive control of the

[418] Head, Crowley, and International Comparative Policy Analysis Forum, *Policy Analysis in Australia*.
[419] High Court of Australia, Yarmirr v Northern Territory of Australia (High Court of Australia 1998).
[420] High Court of Australia.

space. What's more, traditional users had to obtain a commercial fishing license from the government to practice fishing traditions.

While the Yamirr case demonstrated an unwillingness of the Commonwealth government to recognize aboriginal peoples' as exclusive users of sea and seabed, the 2008 Northern Territory of Australia v Arnhem Land Aboriginal Land Trust (Blue Mud Bay Sea Rights Case, BLMSR) explored the nuances of the extent of exclusive native title. The Blue Mud Bay Sea Rights case addressed the request of Aboriginal traditional owners seeing to exclude fisherman (and all other commercial users) from their intertidal lands (i.e., affected by ebb and flow of tides). Through Yamirr v. Commonwealth it was clear the court was unfavorable to native title providing exclusive rights to sea and seabed, the BLMSR case demonstrated a different attitude towards the intertidal zone. The High Court found that traditional owners were entitled to exclusive rights of the intertidal zone. As a result of the ruling, commercial fishing licenses needed to be issued by the Aboriginal Land Council rather that the Northern Territory government. The BLMSR case affected over 5,000km or over 80% of Northern Territory coastline[421]. The case was a landmark decision nationally due to the granting of executive power over resources in the intertidal zone suggesting that rights to marine space were possible. The case also took a clear stance on the issue of rights to sea and seabed: given direct conflict with common law public rights to fish and navigate, indigenous peoples could not claim rights to exclusive use of open sea space[422]

The struggle for recognition by Aboriginal and Torres Strait Islander Peoples in Australia continues today. In 2013, the Parliament of the Commonwealth Government enacted the Aboriginal and Torres Strait Islander Peoples Recognition Act. The act promised that the "The Parliament is committed to placing before the Australian people at a referendum a proposal for constitutional recognition of Aboriginal and Torres Strait Islander peoples".[423] The act amended the preamble of the Australian constitution to recognize

[421] John Altman, "Understanding the Blue Mud Bay Decision," *Journal of Indigenous Policy* 49, no. 14 (2013).
[422] Altman.
[423] Parliament of Australia, "Aboriginal and Torres Strait Islander Peoples Recognition Act," 2013.

Aboriginal and Torres Islander peoples. While a small step forward, the preamble has no legal consequences for the Australian federal government. The act was met with frustration on behalf of Aboriginal and Torres Strait Islander Peoples: once again the federal government had sidestepped an opportunity to provide and implement proper recognition of First Peoples of Australia but instead chose to remain the in symbolic realm of lofty, written promises. Unlike the United States or Canada, Australia continues to avoid entering into agreements directly with aboriginal communities via treaties and refuses to recognize them an independent, self-governing communities. In 2017, the Aboriginal Leaders of Australia published the Uluru Statement from the Heart. The petition called for significant amendment of the Australian constitution to create space for indigenous voices and recognize their sovereignty of indigenous lands. The document states: *"the ancestral tie between the land […] is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished and co-exists with the sovereignty of the Crown."*[424]. The petition goes on to call for "fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.".[425] While legislation is in place to acknowledge aboriginal rights to land and resources, these rights remain limited and are rarely exclusive to aboriginal peoples[426]. Unfortunately, the petition echoes the words of claimants in Coe (No. 1) in 1979. Australia continues to lag behind countries like Canada or the United States in its unwillingness to recognize aboriginal rights to self-governance or self-determination.[427] In Australia, aboriginal peoples are considered Australia citizens first and considered equal in all legal realms along with a few additional rights. Without

[424] First Nations National Constitutional Convention, "Uluru Statement of the Heart" (First Nations National Constitutional Convention, 2017).
[425] First Nations National Constitutional Convention.
[426] Kirsty Gover, "The Honour of the Crowns: State-Indigenous Fiduciary Relationships and Australian Exceptionalism," *Sydney Law School Review* 38, no. 3 (2016).
[427] Gover.

the acknowledgement of fiduciary relationship, such a system makes the uphill battle for aboriginal rights and recognition even more difficult.[428]

Torres Strait Islander Peoples Rights in Australia

The Torres Strait Islander Peoples (TSIP) are group of aboriginal communities located in the Northern most region of Australia's state of Queensland. Throughout the history of Australia, these communities have played a central role in the landmark cases of Australian aboriginal rights law while also highlighting aboriginal rights issues on an international scale. The first western navigator credited with contact the Torres Strait Islands is the Spaniard, Luis Vaez de Torres, who sailed through the Strait in 1606.[429] Unlike parts of mainland Australia, following initial western contact, the Torres Strait Islands remained isolated with little interaction with settlers. The indigenous communities of the islands are unique both in their heavy reliance on ocean space for transportation and its resources. Additionally, due to the wetter climate of the archipelago, the Torres Strait Islander Peoples also developed traditions related to subsistence gardeners. As such, the islands and the sea constitute and integral part of the culture and history of indigenous communities. Given the vast amounts of space, the area often dubbed "Sea Country" and the people that rely on it, the Saltwater peoples.[430] The Torres Strait Islands were annexed in 1879 by Queensland, becoming part of the British colony of Queensland. After 1901, the Islands became part of the Australian State of Queensland.[431] The following section examines legal documents and cases as well as

[428] Nicolas Peterson, "Common Law, Statutory Law, and the Political Economy of the Recognition of Indigenous Australian Rights in Land," in *Aboriginal Title and Indigenous Peoples : Canada, Australia, and New Zealand*, ed. Louis A. Knafla and Haijo Westr (University of British Columbia Press, 2011); Gover, "The Honour of the Crowns: State-Indigenous Fiduciary Relationships and Australian Exceptionalism."
[429] Scott and Mulrennan, "Land and Sea Tenure at Erub, Torres Strait," September 1999.
[430] Lee Godden, "Chapter 5. The Evolving Governance of Aboriginal Peoples and Torres Strait Islanders in Marine Areas in Australia," in *The Rights of Indigenous Peoples in Marine Areas*, by Stephen Allen, ed. Nigel Bankes and Øyvind Ravna (Hart Publishing, 2019), 123–48, https://doi.org/10.5040/9781509928675.
[431] Broome, *Aboriginal Australians*; Colin Scott and Monica Mulrennan, "Land and Sea Tenure at Erub, Torres Strait: Property, Sovereignty and the Adjudication of Cultural Continuity," *Oceania* 70, no. 2 (September 1999): 146–76, https://doi.org/10.1002/j.1834-4461.1999.tb02998.x.

secondary historical literature to determine the evolution of the narratives concerning indigenous maritime rights within the regional context of the Torres Strait.

Given the late recognition of aboriginal title in Australia, the history of aboriginal rights of Torres Strait Islander peoples begins in 1982 with the Mabo v. Queensland (No.1) or Mabo (No.1) case. Like the Mabo (No. 2), claimants were indigenous peoples of the Mer islands in the Torres Strait who asserted their rights to ownership of their lands through have "a system of laws, customs, traditions and practices of their own for determining questions concerning ownership of, and dealings with, land, seas, seabeds and reefs.".[432] While case was ongoing, Queensland attempted to retrospectively extinguish the any aboriginal rights to land within the Torres Strait archipelago by enacting the Queensland Coast Islands Declaratory Act in 1985. The document stated that, upon annexation, "the islands were vested in the Crown in right of Queensland freed from all other rights, interests and claims of any kind whatsoever".[433] The act went on to state that the islands fell under the same legal provisions as all other land and aboriginal peoples were not entitled to any compensation whatsoever.[434] The High Court found that Section 10 of the Racial Discrimination Act "clothes the holders of traditional native title who are of the native ethnic group with the same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the community. A State law which, by purporting to extinguish native title, would limit that immunity in the case of the native group".[435] As a result, the Queensland Coast Islands Declaratory Act was overturned. While not as significant as the Mabo (No. 2) case on a national scale, Mabo (No. 1) case was central to the story of rights of TSIPs. Firstly, the decision demonstrated a willingness of the federal court to recognize aboriginal rights by means of traditional use and culture and second, the refusal to retrospectively extinguish native title in any new legislation. Both positions would be

[432] High Court of Australia, Mabo v. Queensland.
[433] Parliament of Queensland, "Queensland Coast Islands Declaratory Act" (Parliament of Queensland, April 15, 1985).
[434] Parliament of Queensland, 2–3.
[435] High Court of Australia, Mabo v. Queensland.

fundamental in the Native Title Act of 1993. The Mabo (No.1) case also had a final broader implication for the future aboriginal rights in Australia on a national scale: it demonstrated the reliance of aboriginal rights and title on the Racial Discrimination Act. This distinguishes the status of indigenous peoples in Australia from countries like Canada where indigenous laws and title a strictly separated given the status of indigenous peoples as indigenous first and Canadian second (see "Citizens Plus" in Chapter 6).[436] This distinction has ramifications for the legal claims made by Aboriginal peoples and TSIPs as it demonstrates that Australian citizenship is treated as the primary legal identity of these communities.

Shortly after the Mabo (No. 1) case, the Parliament of Queensland enacted the Torres Strait Islander Land Act of 1991. The act recognized the failure of previous policies regarding aboriginal rights and promised to "consequences of past injustices" through "the adequate and appropriate recognition of the interests and responsibilities of Torres Strait Islanders in relation to land and thereby to foster the capacity for self-development, and the self-reliance and cultural integrity, of Torres Strait Islanders.".[437] The Mabo (No.1) case discussed claims to land and sea and seabed. However, the detailed sections of the Torres Strait Land Act make it clear that rights extend only to land and tidal zones with sea and seabed being considered "not available State land".[438] The next step in TSIPs rights would come in 2005 with the Aboriginal and Torres Strait Islander Act. Unlike the Torres Strait Land Act, this document focused on increasing the autonomy and representation of TSIPs within the region with the primary goal of "to establish structures to represent Aboriginal persons and Torres Strait Islanders to ensure maximum participation of Aboriginal persons and Torres Strait Islanders in the formulation and implementation of programs and to provide them with an effective voice within the Australian Government".[439] With such aspirations, the act established the Torres Strait Regional Authority (TSRA), the Indigenous Land and Sea Corporation and Indigenous

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[436] Peterson, "Common Law, Statutory Law, and the Political Economy of the Recognition of Indigenous Australian Rights in Land."
[437] Parliament of Queensland, "Torres Strait Islanders Land Act" (Parliament of Queensland, 1991), 11–12.
[438] Parliament of Queensland, "Torres Strait Islanders Land Act."
[439] Parliament of Queensland, "Aboriginal and Torres Strait Islander Act" (Parliament of Queensland, 2005).

Business Australia. Each government group was designed to support TSIPs politically, economically, or socially. The TSRA is a government body of 20 elected officials that represent Torres Strait Islander Peoples.

Legislation in the 1990s and early 2000s focused on establishing recognition of aboriginal rights and title. However, while recognized in writing, many issues regarding access and protection of traditional practices persisted. With over 120 islands in the Torres Strait region, the Saltwater people's close bond with maritime space for transportation and fishing, many of these issues revolved around fishing rights and exclusive use of marine resources.[440] The Akiba on behalf of the Torres Strait Regional Seas Claim Group v. Commonwealth of Australia (also known as Akiba v. Commonwealth, Akiba or The Torres Strait Sea Claim) case of 2013 highlighted these tensions. Considered a landmark case due to its focus on the interactions of native title and common law as well as the discussion of indigenous use of sea space and resources, the case tackled the question of indigenous commercial fishing rights and that of "reciprocal rights". The Court considered three main issues in the Akiba case: (1) did the Torres Islander Peoples have rights to native title, (2) if valid, how far did native title rights extend over marine space (3) were these rights threatened or extinguished by commercial fishing regulations.[441] These three issues were initially tackled at the regional level in Akiba on Behalf of the Torres Strait Regional Sea Claim Group v State of Queensland in 2010. Here, the focus of Justice Finn of the Federal Court was the potential existence of native title over the "waters" of the Torres Strait. According to Section 253 of the Native Title act of 1993, waters include "sea, a river, a lake, a tidal inlet, a bay, an estuary, a harbour or subterranean waters […] the

[440] Annie Lalancette and Monica Mulrennan, "Competing Voices: Indigenous Rights in the Shadow of Conventional Fisheries Management in the Tropical Rock Lobster Fishery in Torres Strait, Australia," *Maritime Studies* 21, no. 2 (June 2022): 255–77, https://doi.org/10.1007/s40152-022-00263-4; Nicole Watson and Heather Douglas, *Indigenous Legal Judgments Bringing Indigenous Voices into Judicial Decision Making.* (Milton, UNITED KINGDOM: Routledge, 2021), https://go.openathens.net/redirector/umoncton.ca?url=https%3A%2F%2Febookcentral.proquest.com%2Flib%2Fumoncton-ebooks%2Fdetail.action%3FdocID%3D6606348.

[441] Federal Court of Australia, "Akiba on Behalf of the Torres Strait Islanders of the Regional Seas Claim Group V Queensland (No 2)," *Australian Indigenous Law Review* 14, no. 2 (2010): 120–21.

bed or subsoil under water [...] or the shore […] between high water and low water".[442] It is important to note that unlike the Yarmirr v Commonwealth, in the Akiba v Commonwealth case, the focus was not on the potential existence of exclusive native title in sea space. The stance on the High Court was clear on this issue: exclusive rights clashed directly with the common law public rights to fish and navigate sea and seabed.[443] With extensive documentation of the history and traditions of the Torres Strait Islander Peoples, Justice Finn recognized that given the TSIP "society's traditional laws acknowledged and traditional customs observed, the claim group in aggregate holds native title rights and interests in the waters of Torres Strait".[444] In a landmark statement, Justice Finn also acknowledges that this title extends "will be recognised by the common law beyond Australia's territorial seas in its Exclusive Economic Zone.".[445] This is the first time native title is recognized beyond the intertidal zone. The decision opened the door for "sea claims' within the Australian common law system. While native title is acknowledged, Justice Finn makes it clear that this title is non-exclusive and rejects reciprocal rights or "rights based upon reciprocal personal relationships with persons who have native title rights in their own land and marine territories.".[446] As such, the TSIPs have native title rights to the Torres Strait as a society rather than as individuals. Given that these rights are non-exclusive, they do not threaten the UNCLOS condition of rights to innocent passage. However, this is where the issue of extinguishment of native title by existing commercial fishing legislation comes in to play resulting in the consideration of the case by the High Court of Australia in a new case, Akiba on behalf of the Torres Strait Regional Seas Claim Group v. Commonwealth of Australia, 2013.

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[442] Commonwealth of Australia, "Native Title Act," sec. 253.
[443] Butterly, "Before the High Court - Clear Choices in Murky Waters: Leo Akiba on Behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia"; High Court of Australia, Yarmirr v Northern Territory of Australia.
[444] Federal Court of Australia, "Akiba on Behalf of the Torres Strait Islanders of the Regional Seas Claim Group V Queensland (No 2)," para. 12.
[445] Federal Court of Australia, para. 15.
[446] Federal Court of Australia, para. 14.

In the 2013 Akiba case, claimants appealed that while their rights were non-exclusive, given the traditional dependence of TSIPs on commercial fishing, the restriction of commercial fishing under legislation such as the regional Fisheries Act 1994 and the Fisheries Regulation 2008 or the Commonwealth the Torres Strait Fisheries Act 1984 and the Fisheries Management Act 1991 represented extinguishment of the native title. [447] Already in 2010, Justice Finn had concluded that since the legislation was regulatory rather than prohibitory it did not represent extinguishment of rights. What's more, his Honor added that no fisheries legislation had "clear and plain intent to extinguish native title".[448] In 2013, the High Court upheld Justice Finn's ruling stating that "Such extinguishment of rights in whole or in part is not a logical consequence of a legislative constraint upon their exercise for a particular purpose, unless the legislation, properly construed, has that effect."[449]. As a result, TSIPs are required to follow the same commercial licensing procedures as any individual interesting in fishing in the Torres Strait. Any other action might threaten public rights to sea space. Although short and straight forward at a glance, the many scholars attribute the brevity of the Torres Strait Sea Claim case to the "murky waters" surrounding the interpretation of legislation as having "clear and plain intent to extinguish native title".[450] The ruling highlights a plethora of issues surrounding the way Australia defines native title and recognizes indigenous governance. Though its repercussions are not that of the Mabo (No. 2) case, the Akiba v. Commonwealth case is considered a milestone in the dialogue of the nature and place of native title in Australia. Similarly, to the process in Canada, Australia is faced with vague definitions of native title, rights and indigenous governance resulting in contrasting interpretations between courts, indigenous communities and even individuals. One such

[447] High Court of Australia, Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia (High Court of Australia August 7, 2013); Butterly, "Before the High Court - Clear Choices in Murky Waters: Leo Akiba on Behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia."
[448] Federal Court of Australia, "Akiba on Behalf of the Torres Strait Islanders of the Regional Seas Claim Group V Queensland (No 2)," para. 850.
[449] High Court of Australia, Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia paragraph 24.
[450] Butterly, "Before the High Court - Clear Choices in Murky Waters: Leo Akiba on Behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia."

example is the lack of clarity between regulation and partial extinguishment of native rights by fisheries legislation. By recognizing that native rights can be regulated, the courts acknowledged the commercial aspects of native rights (traditional activities can include for-profit actions) but does the regulation of native rights inherently imply partial extinguishment? In *Competing voices: Indigenous rights in the shadow of conventional fisheries management in the tropical rock lobster fishery in Torres Strait, Australia*, Anne Lalancette addresses just some of the concerns related to western regulation of indigenous practices such as conflicting world view or management outcomes that contradict and threaten indigenous ways of life.[451] These are conversations that need to be held going forward. What's more, while Mabo (No. 2) established the recognition of native title, the Akiba case is considered the first comprehensive dialogue surrounding Sea Claims in Australia. Additionally, the Torres Strait Sea Claim case demonstrated the need to clarify the position of aboriginal rights within Australian common law: can aboriginal rights coexist with common law or is there inherent conflict given the rights and needs of aboriginal communities? What's more, Akiba v. Commonwealth showed progress on behalf of the High Court towards recognizing the weight of the native title as legislation rather than written recognition of the First Peoples.

The same year of High Court ruling on the Akiba case, the Parliament of Australia enacted the Aboriginal and Torres Strait Islander Peoples Recognition Act. This demonstrated an additional willingness at the national level to hold the conversations that had been initiated in the Akiba case. The act showed initiative to recognize the rights of aboriginal peoples, however, the legislation echoed the decisions made in the Akiba case. Although native title was recognized, this recognition remained at the written level rather than trickle down to physical implementation. In the Akiba case, while native rights were recognized and extended as far as the territorial sea limit, their recognition was subject to regulation by common law and previous resource management legislation. Going forward, the struggles faced by the Torres Strait Islanders People are illustrative of national issues regarding native rights in Australia. Given the vast expanse and

[451] Lalancette and Mulrennan, "Competing Voices."

unique nature of sea space, many issues faced by aboriginal peoples in Australia at a national level are accentuated in the Torres Strait.

International Ocean Sovereignty of Torres Strait Islander Peoples

Frustratingly, the history of the Torres Strait Islander Peoples is one of written recognition rather than implemented empowerment and a road towards independence. Narratives in case law recognize TSIPs on paper, rulings like that of Akiba v. Commonwealth demonstrate an unwillingness on behalf of the Australian government to provide aboriginal communities with the rights and means to govern and manage the resources that are essential to their survival. This issue is only accentuated in the case of maritime rights. The need for legal recognition of the rights of Torres Strait Islander peoples as traditional owners with sovereign rights to the space becomes more acute at the international level. Presently, TSIPs are virtually omitted from discussions regarding the future of territorial seas and the Torres Strait. To make matters worse, the complexity of the status of the Torres Strait and its management through interactions of different stakeholders have led scholars to label the area as a "jurisdictional patchwork" of maritime legislation. In an interview, Professor Stuart Kaye, Director at the University of Wollongong's Australian National Centre for Ocean Resources and Security, compared the strait's legal complexity to the South China Sea stating that ""What is unique is not only the split jurisdiction between Papua New Guinea and Australia, but also between state and federal governments overlaid with Native Title as well and the Torres Strait Treaty, which was formed by 14 pieces of legislation.".[452] With the support of secondary historical sources, the following section will examine the interests of stakeholders through national and international legal documents relating to jurisdiction of the Torres Strait.

The earliest document concerning the status of sea and seabed of the Torres Strait on an international level addresses the delicate issue of sovereignty of the Torres Strait. The Torres Strait is

[452] Aaron Smith, "Sovereignty and Lobsters: Torres Strait Islanders Battle to Own Their Fisheries," NITV, September 11, 2018, https://www.sbs.com.au/nitv/nitv-news/article/2018/09/11/sovereignty-and-lobsters-torres-strait-islanders-battle-own-their-fisheries.

exceptional in several aspects both on a national and international scale. First, the strait represents the only segment of Australian territorial waters that borders sovereign waters of another country: the Papua New Guinean coastline[453]. As a result, the 1985 Treaty between Australia and the Independent State of Papua New Guinea (PNG) sought to lay out the framework for cooperation of the two countries going forward. Australia had already received international recognition to sovereignty over its territorial waters through the Seas and Submerged Lands Act of 1973. The Sea and Submerged Lands Act established, at a national level, Australian sovereignty of territorial seas and seabed as well as the 300-mile Exclusive Economic Zone under the United Nations Convention on the Continental Shelf and Contiguous Zone and Convention on Territorial Seas. Given the claims to sovereignty enacted and recognized nationally and internationally, the 1985 Treaty make several important provisions related to cooperation between two sovereign states, environmental protection and the recognition of aboriginal rights and traditional practices. In the Preamble, the two countries agreed "to cooperate with one another in that area in the conservation, management and sharing of fisheries resources and in regulating the exploration and exploitation of seabed mineral resource"[454]. Consequently, the two states divided the strait equally (Part 2) while maintaining freedom of navigation and overflight throughout the area (Part 3). In Part 4, treaty also established the "the Protected Zone" or an area "to acknowledge and protect the traditional way of life and livelihood of the traditional inhabitants including their traditional fishing and free movement." and "protect and preserve the marine environment and indigenous fauna and flora" [455]. The Protected Zone encompasses all northern Australian islands and most of the PNG archipelago[456]. The protections concerning aboriginal communities included

[453] Stuart B. Kaye, *The Torres Strait*, International Straits of the World 12 (The Hague ; Boston : Cambridge, MA: M. Nijhoff Publishers ; Sold and distributed in the U.S.A. and Canada by Kluwer Law International, 1997).
[454] Australia and Papua New Guinea, "Treaty between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area between the Two Countries, Including the Area Known as Torres Strait, and Related Matters" (Australian Department of Foreign Affairs, 1985).
[455] Australia and Papua New Guinea.
[456] Australia and Papua New Guinea; Stuart B. Kaye, "Jurisdictional Patchwork: Law of the Sea and Native Title Issues in the Torres Strait," *Melbourne Journal of International Law*, 2001.

the free movement throughout the area, traditional fishing rights and the right to exercise any traditional practices.

Finally, Article 19 established the Torres Strait Join Advisory Council which would facilitate the resolution of disputes or lead negotiations. The Council was required to have representative from both countries but also required "at least three members representing the traditional inhabitants"[457]. In a time where Torres Islander peoples were fighting for recognition of aboriginal title in Mabo (No.1) the treaty seemed promising in recognizing the importance of indigenous participation in management of marine space. However, while provisions seemed simple on paper, the implementation of the treaty was less straight forward. States had to cooperate both on implementation of fisheries regulations and protective measures for fauna and flora in the region. What's more, while the treaty allows for free movement of indigenous peoples, the Protected Zone is not a "customs free" space requiring a system to address these exceptions. The result is a messy patchwork of federal legislations interacting through a series of joint organizations and agreements[458].

The complexities of the Torres Strait do not end with the interactions of Australia and PNG. Under the UNCLOS treaty, the Torres Strait is considered an international strait given the definition in Article 37 as "straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone"[459]. As a result, international traffic must be guaranteed the right of innocent passage through the strait under Part 2, Article 3 of UNCLOS. The UNCLOS agreement does not recognize indigenous rights given that indigenous communities are not considered sovereign States or Nations. While PNG and Australia have attempted to establish the Protected Zone both to protect the fragile ecological integrity of the strait and the traditions of

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[457] Australia and Papua New Guinea, "Treaty between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area between the Two Countries, Including the Area Known as Torres Strait, and Related Matters."
[458] Kaye, "Jurisdictional Patchwork: Law of the Sea and Native Title Issues in the Torres Strait."
[459] United Nations, *United Nations Convention on the Law of the Sea*.

indigenous peoples, international vessel traffic must continue to transit through the strait under the treaty. The impacts of traffic are detrimental through noise pollution, oil spills and risk of introduction of invasive species via ballast water contamination.[460] Additionally, the international strait poses navigational hazards. The Torres Strait is characterized by its shallow bathymetry (most open sea area is less than 40m deep), low lying sandy islands and abundant reefs[461]. The two main channels used by international commercial ships are narrow (800m wide) and unusually shallow with depths as low as 10m.[462] Additionally, with its eastern entrance protected by the northern tip of the Great Barrier Reef, the strait is regularly subject to strong tidal currents and poor visibility during the "wet" season.[463] Tides result in periodic flooding of some low-lying islands and present dangers for ships navigating the strait. As a result, international traffic faces severe risk of running aground on reefs or spits resulting in environmental and safety concerns. Given the vulnerability the Torres Strait ecosystem to pollution damage and loss of cultural heritage of Australian and Guinean indigenous communities tied to the space, the requirement of unimpeded international transit has led to conflict. Australia has proven to be assertive in its demands for compulsory pilotage to preserve the marine environment and continues to push for overall control of strait transit. These actions directly oppose UNCLOS requirements.

Compulsory pilotage is the requirement for any ship transiting through a protected space to use a local pilot with thorough knowledge of the area. However, pilotage is typically only enforced in territorial seas where coastal States have full sovereignty.[464] With similar concerns to the Torres Strait, Australia

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[460] Sam Bateman and Michael White, "Compulsory Pilotage in the Torres Strait: Overcoming Unacceptable Risks to a Sensitive Marine Environment," *Ocean Development & International Law* 40, no. 2 (May 13, 2009): 184–203, https://doi.org/10.1080/00908320902864797.
[461] TSRA and Torres Strait Regional Authority, "Land and Sea Management Strategy for Torres Strait 2016-2036," Text (Torres Strait Regional Authority, April 27, 2017), https://www.tsra.gov.au/news-and-resources/publications/land-and-sea-management-strategy-for-torres-strait-2016-2036.
[462] Bateman and White, "Compulsory Pilotage in the Torres Strait."
[463] Bateman and White; Stuart B. Kaye, "Regulation of Navigation in the Torres Strait: Law of the Sea Issues," in *Navigational Rights and Freedoms and the New Law of the Sea*, ed. Donald R. Rothwell and Sam Bateman (Brill | Nijhoff, 2000), 119–35, https://doi.org/10.1163/9789004482661_015.
[464] Bateman and White, "Compulsory Pilotage in the Torres Strait"; Kaye, *The Torres Strait*.

requires compulsory pilotage through the Inner Route within the Great Barrier Reef under Part VIIA of the Great Barrier Reef Marine Park Act of 1975.[465] This legislation is supported by the International Maritime Organization through a management tool called Particularly Sensitive Sea Areas (PSSA). If a coastal ecosystem qualifies as vulnerable to damage by international maritime traffic and the IMO deems that this damage can be avoided or minimized through additional regulatory legislation, it will support the implementation of such measures within the boundaries of the PSSA. The Great Barrier Reef was recognized as a PSSA in 1991 a quickly followed by amendments to the Great Barrier Reef Marine Park Act requiring pilots to navigate particularly vulnerable areas of the reef.[466] While possible within the Great Barrier Reef, the Torres Strait as an international strait that is held to the standard that "The laws and regulations adopted by states bordering international straits should not in their application have the practical effect of denying, hampering or impairing the right of transit passage".[467] Compulsory pilotage was seen to violate this provision by other signatories of UNCLOS and IMO members. Following extensive debate, the IMO adopted Resolution MEPC 133(53) in July of 2005. The Resolution designated the Torres Strait as an extension of the Great Barrier Reef PSSA area, qualifying it for the same protective measures of compulsory pilotage.[468] The Resolution stated that "ships flying their flags […] should act in accordance with Australia's system of pilotage for merchant ships 70 m in length and over or oil tankers, chemical tankers, and gas carriers, irrespective of size when navigating".[469] The decision was met with stark protest, particularly from the U.S. and Singapore who denounced the decision as a violation of UNCLOS via

[465] Kaye, "Regulation of Navigation in the Torres Strait," 125.
[466] Robert C. Beckman, "PSSAs and Transit Passage—Australia's Pilotage System in the Torres Strait Challenges the IMO and UNCLOS," *Ocean Development & International Law* 38, no. 4 (November 2, 2007): 325–57, https://doi.org/10.1080/00908320701641552; Parliament of Australia, "Great Barrier Reef Marine Park Act" (Parliament of Australia, 1975), sec. 59L.
[467] United Nations, *United Nations Convention on the Law of the Sea*, art. 42.
[468] Marine Environmental Protection Committee, "MEPC.133(53) - Designation of the Torres Strait as an Extension of the Great Barrier Reef Particularly Sensitive Sea Area" (International Maritime Organization, July 22, 2005).
[469] Marine Environmental Protection Committee, paras. 1–2.

diplomatic notes the following year. [470] Regardless of criticism and concerns about the future of innocent passage through international straits, Australia has stood by its requirement for compulsory pilotage following up we addition legislation. In the Navigational Act of 2012 clarified the definition of compulsory pilotage and linked the requirement to the Great Barrier Reef Act of 1975.[471] In 2014, the Australian Government amended the Navigation Act with Marine Order 54 focused on compulsory pilotage. Section 7 of the amendment explicitly states the Torres Strait as a compulsory pilotage area.[472] Although the legislation remains in place, there are many questions surrounding it's enforcement and whether compulsory pilotage is a necessary measure or simply a violation of Article 42 of UNCLOS.

With interests of regional and international stakeholders at play and participation in decision making that is limited to an advisory position, the voices of Torres Strait Islander peoples remain largely unheard. Ultimately, the situation of the TSIPs in the Torres Strait is escalating to an international human rights issue. In 2009 Australia gave its formal support to UNDRIP and committed to undertake initiatives consistent with the human rights standards contained in the declaration.[473] With a changing climate, TSIPs are facing increasing threats from sea level rise and decreasing stocks of living resources. With little to no power (outside of their advisory position on councils) to act on a national scale, in 2019, the Torres Strait Eight (eight Aboriginal leaders representing the interests of their community), took the issue to the United Nations citing the International Covenant on Civil and Political Rights (ICCPR).[474] The petition represents the first human rights legal action filed to the United Nations against a national government concerning

[470] Beckman, "PSSAs and Transit Passage—Australia's Pilotage System in the Torres Strait Challenges the IMO and UNCLOS."
[471] Parliament of Australia, "Navigation Act," 2012, pt. 2.
[472] Parliament of Australia, "Marine Order 54 (Coastal Pilotage)," n.d., sec. 7.
[473] Jessie Dorfmann, "Undermining Paternalism: UNDRIP and Aboriginal Rights in Australia," *Harvard International Review* 37, no. 1 (2015): 13–14.
[474] Matthew Rimmer, "The Torres Strait Eight: Climate Litigation, Biodiversity, Human Rights, and Indigenous Intellectual Property," *SSRN Electronic Journal*, 2022, https://doi.org/10.2139/ssrn.3985831.

climate change.[475] The Torres Eight ground their complaint on three articles of the ICCPR: Article 6, Article 17, and Article 27. Article 6 protects the rights to life stating "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.".[476] Article 17 protects individuals from "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence" while Article 27 "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."[477] .

The complaint cites the heaviest abuses to Article 6 and Article 17 given the risks associated with the loss of environment and cultural heritage due to rising sea level, increasing storms and coral reef bleaching events [478]. The complaint also cites the UNDRIP where Article 25 states that *"Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."*[479]. The reference to "responsibilities to future generations" once again supports the claims to negligence of human and indigenous rights in the Torres Strait due to ignorance of climate change risks. For example, rising sea levels have already begun to wash away traditional burial grounds of Torres Islander Peoples resulting in emergency relocation of these sites[480] . So far, the Australian has denied responsibility for any of the claims of the Torres Eight. In August 13 of 2020, the Australian Government requested that the UN dismiss the

[475] Teisha Cloos, "Government Denies Responsibility for Climate Change in Reply to Torres Strait Eight," National Indigenous Times, September 29, 2021, https://www.nit.com.au/government-denies-responsibility-for-climate-change-in-reply-to-torres-strait-eight/.
[476] United Nations, "International Covenant on Civil and Political Rights" (United Nations & International Law Commission, 1966), sec. 6.
[477] United Nations, sec. 17; United Nations, sec. 27.
[478] Rimmer, "The Torres Strait Eight."
[479] United Nations, "United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)," 19.
[480] Rimmer, "The Torres Strait Eight."

claim as it concerned future issues rather that present challenges, adding that "The Government is confident its policies regarding climate change are consistent with its international human rights obligations"[481]. Additionally, the Australian government has stated that climate change is a global problem and not the sole responsibility of Australia.[482] While climate change is a global problem, the voices, and desires of TSIPs have not been fairly considered in decisions-making processes about the future of the strait. The ICCPR case demonstrates, similarly to the Arctic, how national governments continue to refuse to take a clear, supportive stance on issues related to indigenous rights pushing these communities to seek the protection and support of international organizations. The claim of the Torres Eight against the Australian Government is still ongoing as of 2022.

Summary

This chapter focused on the analysis of narrative evolution in historical Australian legislation related to indigenous rights and maritime space. Australia stands apart with its recent recognition of indigenous title and status starting with the Native Title Act of 1993. In addition to lagging behind other ex-British territories, Australia does not recognize Aboriginal and Torres Strait Islander Peoples as domestic sovereign nations. As a result, no treaties or lands claims agreements have been signed. Finally, given this approach, the primary legal identity of indigenous peoples in Australia is that of Australian citizens with all additional rights being secondary. This status makes the negotiation and progress towards full legal recognition of Aboriginal rights even more difficult. The result is written recognition of indigenous status and rights with little visible implementation.

Unlike Canada, Australia recognizes indigenous title to sea and seabed. However, discussions in cases brought before the High Court of Australia demonstrate that this title remains limited if not secondary to legislation pertaining to public rights. This is visible in cases such as the Blue Mud Bay Sea Rights case where public rights take precedence over indigenous claims to traditional ownership of land, water and

[481] Rimmer; Cloos, "Government Denies Responsibility for Climate Change in Reply to Torres Strait Eight."
[482] Rimmer, "The Torres Strait Eight."

living resources. Nationally, Aboriginal and Torres Strait Islander Peoples continue to hold non-exclusive rights to land and sea space and maintain advisory roles rather than being included in decision making processes surrounding the future of their land and culture. The Torres Strait Islander Peoples have played a key role in pushing the recognition of native claims exclusively focused on sea and seabed. With the Akiba v. Commonwealth case, the Torres Strait Islander Peoples communities were able to push the government to take a clear stance on the extent of aboriginal title to sea and seabed.

On an international scale, Australia has demonstrated the ability to successfully co-manage coastal spaces between sovereign States in its joint governance of the Torres Strait with PNG. Additionally, the determination of the Australian government to maintain control of international traffic surrounding regulation all while being a signatory of UNCLOS, demonstrates the ability of regional and national organizations participating in management of international maritime space. The status of the Torres Strait as a PSSA is crucial in preserving the fragile environment and the cultural heritage of the Torres Strait Islander Peoples. Such an approach could be the solution for straits like the Northwest Passage where international transit will have grim consequences for the environment. While Australia's approach to implementing regional control over international space is promising, indigenous peoples are entirely excluded from the decision-making processes in the Torres Strait. This approach entrenches the colonial approaches to governance of ocean space implemented by western maritime powers. With rising sea level and increasingly severe storms due to climate change, the exclusion of Torres Strait Islander Peoples from decision making processes is become a human rights issue as these communities witness the loss of their traditional lands.

Chapter 8 – Discussion: Bringing Together Stories of Ocean Sovereignty and Indigenous Governance

This capstone aims to examine the role of ocean legislation, specifically UNCLOS, in the future of indigenous governance. Through examination of historic legal documents and secondary historic sources,

Chapters 4 and 5 provided a broad overview of turning points in the history of ocean governance and the history of indigenous right in international law respectively. These chapters served to demonstrate the concerning parallels between key players and fundamental notions in historic legislation. Understanding the historic ideological interactions behind the present-day international agreements of UNDRIP and UNCLOS provides the necessary background to assess the evolution of narratives of indigenous rights and title in two ex-British Colonies. Chapters 6 and 7 focused on the analysis of the evolution of discussions surrounding indigenous rights in Canada and Australia respectively. In each case, narratives in historic legislation were examined at a federal level before focusing in on the regional cases of the Canadian territory of Nunavut and the northern archipelago of the Torres Strait in Canada. Finally, each regional dialogue was assessed from the perspective of international law and the law of the sea. The following section serves discuss the findings of case studies, evaluate observed trends in data (i.e., legal documents as primary historical sources) and consolidate them with the broader discussion of the future of ocean equity on a global scale.

Comparing Approaches to Indigenous Title in Australia and Canada

This comparative case study of legislation in two self-governing colonies on a regional, national and international level allowed for the observation of similar trends and highlighted major differences in narratives surrounding indigenous rights. An important narrative present throughout evidence examined for both Australian and Canadian legislation was the status of indigenous rights in the common law system. Both countries struggle with the position of indigenous communities especially following the rejection of terra nullius in landmark cases like Guerin v. The Queen and Mabo v. Commonwealth (No.2). In each case the pivotal change in narrative from the rejection of notions of the Doctrine of the Discovery such as “terra nullius” to (at least partial) recognition of indigenous claims to traditional territories. However, this recognition leads to problematic discussions regarding the authority that indigenous communities will have within the legal system of a sovereign state. In each case, such issues are addressed differently. When it

comes to the status of indigenous rights within national legislation, both countries take the approach of recognizing indigenous rights as unique within the common law system. In Canada, in Guerin v. The Queen, the Supreme Court identifies indigenous rights as sui generis or in a category of their own, unable to be characterized by common law concepts and systems until they have been recorded and thus translated into western law. As a result, Canada does not recognize traditional indigenous systems of governance but requires that they be transcribed into common law to be validated. In contrast, the Australian High Court, in Mabo v. Commonwealth (No.2), takes the perspective that aboriginal rights are inalienable by common law and recognizes them even though they are not consistent with western legal notions. In short, while both countries see indigenous rights as unique, Canada required the translation of these rights into common law legislation (although it recognizes them as unique) while Australia recognizes these rights as customary law that is simply being recorded into case law.

In discussions surrounding the place of indigenous rights in the legal sphere, Australia's narrative demonstrates the country is more open recognition these rights. However, when concerned with the recognition of land rights and indigenous communities as self-governing Nations, Australia demonstrates a reluctant to recognize Aboriginal Peoples and Torres Strait Islander peoples as anything but Australian citizens. Cases justify this through the lack of a coherent political system across indigenous communities (Coe v. Commonwealth (No.1)) or the ability to exert exclusive control over a space to demonstrate sovereignty (Yarmirr v. Northern Territory). As a result, Australia refuses to set up a treaty system or enter into any direct agreements with indigenous communities. This approach makes efforts of indigenous communities to regain their rights and recognition even more difficult. For example, when recognizing rights to sea and seabed, rights are determined as non-exclusive as to prevent threating public rights and use of the space. Legally, indigenous peoples are Australian citizens first and all other identities are considered secondary. This status makes the struggle for recognition and governance of traditional land and resources difficult if not impossible. The recognition of indigenous rights in Australia continues to remain largely symbolic making the country lag behinds other ex-British colonies like Canada. Although Canada does not recognize indigenous peoples as domestic, dependent, sovereign nations" like the U.S., the

Canadian government acknowledges indigenous communities as the traditional owners of lands and resources since the Royal Proclamation of 1763. Broadly, this is seen through numerous treaties and land agreements between the Crown and indigenous bands throughout the history of the country. Further recognition of rights to self-governance and limited independence is seen distinctly in the case of the Nunavut Land Claims Agreement of 1999 which established a regional Inuit government. Although more willing to recognize the autonomy of indigenous communities, Canada oscillates in its choice to respect these provisions. In the case of Nunavut, particularly with regards to sea and seabed, Canada is only willing to respect indigenous governance until a space demonstrates economic or strategic value. This is seen in the case of the Northwest Passage. While Canada's claims to sovereignty are justified by historic Inuit presence, the country continues to ignore local communities in international decision-making processes.

A final fundamental difference was observed in narratives and legislation surrounding the relationship between federal government and indigenous rights: the fiduciary duty of a State towards indigenous populations. Fiduciary duty arises when there is a significant different in legal power between two parties, in this case the Crown and indigenous peoples. Given this position of vulnerability, fiduciary duty requires the Crown to act within the best interest of indigenous peoples. Not only this, but this duty requires an exclusive or unique relationship with the Crown. This language demonstrates that indigenous groups are seen as unique from other citizens. Legally, fiduciary duty empowers indigenous communities in their struggle to gain recognition. The commitment serves as a tool to seek justice when government seeks to threaten indigenous rights to land and resources with its superior power. Australia has no provision of fiduciary duty and rests much of its legal protection of Aboriginal and Torres Strait Peoples' rights on the Racial Discrimination Act. Through this, the Commonwealth shows a willingness to promote cultural coexistences rather than recognition. Once again, indigenous communities can fight for their rights as Australian citizens rather than being recognized as a unique culture living within a common law system.

The evolution of land rights narratives in both countries follow a similarly tumultuous path. First, a key piece of legislation is enacted via a historic case followed by lofty promises of recognition of rights, but definitions and terms remain vague. Next, the murky environment makes for room for interpretation and

stalls implementation allowing for the federal government to sidestep commitments. Additionally, states and territories immediately begin to force definition of various aspects by challenging new legislation. While case studies show progress towards recognition and empowerment of indigenous peoples, legislation related to indigenous rights remains vague and confusing (often intentionally) resulting in a slow and tedious process of rights recognition. While Australia demonstrates a less controlling approach to the recognition process of indigenous rights, it fails to recognize indigenous communities as self-governing. While the intial approach is promising, the inability of the Commonwealth to enter into agreements with indigenous communities begs the question whether indigenous rights were ever recognized. Aboriginal and Torres Strait Islander Peoples are primarily viewed as Australian citizens before their rights as indigenous peoples are considered. In contrast, Canada has recognized, in some extent, the claims and rights of indigenous communities to traditional lands and resources since the Royal Proclamation of 1763. The country has evolved to recognize indigenous status, rights to land and living resources as well as rights to self-governance. Not only does Canada recognize First Nations, Métis and Inuit peoples as rightful owners of their lands, but the recognition of fiduciary duty also provides indigenous communities with a tool to hold the government responsible for actions that undermine indigenous title. However, Canada continues to struggle with these commitments, often relying on vague definitions to sidestep agreements or violate their terms when government interests become involved. In both cases, Indigenous peoples are still fighting for their rightful sovereignty of land and marine space.

Marine Sovereignty of IPs in Australia and Canada

Just as Australia and Canada differ in their approaches to the recognition of indigenous title, there are significant differences in the approaches of both countries to the international strait within their jurisdiction. As signatories of UNCLOS, case study countries are required to permit "unimpeded traffic" through these narrow passages that connect to large areas of open ocean. In both cases, these areas accentuate conflict between indigenous communities and sovereign nations given additional international

pressure. In the case of Australia, the Torres Strait represents a fragile environmental area, the traditional lands of the Torres Strait Islander Peoples and must be jointly managed together with Papua New Guinea. Australia has remained adamant in maintaining control of traffic through the Torres Strait due to the shallow bathymetry of the area as well as the delicate environment of the island archipelago. Through collaboration with the International Maritime Organization, Australia has been able to gain international recognition of the Torres Strait as a PSSA and now requires compulsory pilotage through the strait. These measures have allowed for the country to maintain control over traffic volume and minimize environmental damage.

In the Canadian Arctic, the onset of climate change threatens to make the Northwest Passage a short and ice-free sea route in the near future. Such conditions would make the narrow passage an international strait resulting in heavy international traffic. Presently, Canada's claims to the NWP as territorial waters are rooted in the historic Inuit occupation of the area. These claims continue to be disputed by Arctic states like the U.S. and Russia who continue to push for the status of the area as an international strait. Nationally, Canada recognizes the self-governance of Inuit Nunavut and defers management of sea and seabed to Inuit government. However, in the case of the NWP, and the Arctic in general, Inuit continue to be omitted from decision making processes. The Arctic Council includes indigenous non-profits in decision making and governance. However, beyond this, Arctic states demonstrate a willingness to ignore indigenous communities in conversations surrounding governance and management. This is demonstrated by agreements such as the Ilullisat Declaration. Such actions show that on an international scale, nations continue to defer to notions of Westphalian sovereignty and refuse to fully acknowledge indigenous communities as the rightful owners of sea and seabed. Inuit communities have been vocal in their outrage with this behavior nationally and internationally. Through declarations, conferences and publications, the Inuit Nunaat and the Inuit Circumpolar Council have made their position clear: indigenous communities deserve to have control and rights to the traditional lands they have occupied since time immemorial.

Observation of approaches to indigenous ocean governance in Australia and Canada demonstrated similar trends in duality towards recognition of indigenous rights towards sea and seabed. In both cases, nationally, each country has acknowledged indigenous claims to sea space and, in the case of the Inuit,

entered into an agreement to support indigenous governance of the space. However, internationally, countries are quick to abandon this narrative and ignore or omit indigenous groups from decision making processes. However, lessons can be learned from each case individually. The case of Australia has demonstrated the ability of a nation to maintain control of a space that requires unimpeded international use by demonstrating a need for protection. Although denounced by other signatories of UNCLOS, the legislation like the PSSA may be a future solution for areas of contested jurisdiction to ensure minimal damage occurs to native species and indigenous traditions. What's more, Australia has demonstrated the merits of addressing environmental and indigenous concerns early on in an international setting. By laying the groundwork together with PNG, both stakeholders have been able to maintain a joint, consistent position on the management of its international strait. At a first glance, Australia's successful regulation and preservation of the Torres Strait is commendable. However, the agreement excludes Torres Strait Islander Peoples entirely from decision making processes, limiting representatives to advisory roles. As such, no measures have been taken to address increasing sea level and high intensity storms that threaten the low-lying islands of the Torres Strait. The Torres Strait Indigenous Peoples have been pushed to take the issue to the United Nations as a human rights violation case given that their own country refuses to hear their concerns. Canada's situation in the Northwest Passage may seem complicated given competing narratives regarding transit, indigenous governance and international co-management compared to the straightforward position of Australia on the Torres Strait. However, the dispute demonstrates the primary shortcoming of Australia: although threatened by Westphalian approaches to sovereignty, Inuit voices are being heard nationally and internationally in the Arctic. The Inuit Nunaat has been provided with enough infrastructure to produce declarations and publications to begin a dialogue regarding the status of the NWP as an international passage on traditional Inuit land. What's more, although at the international level, the Arctic Council includes Inuit in decision making processes. This marks the first step towards recognition of the Inuit as a nation by Arctic states. This infrastructure is severely lacking in the Torres Strait where indigenous communities must take issues to the highest level (the United Nations) to make their voices heard.

The Role of UNCLOS in Indigenous Maritime Governance

The UNCLOS agreement identifies its role to be the peaceful resolution of international maritime conflict and the successful governance of ocean spaces. As examined in Chapter 4, UNCLOS is grounded in legislation that promoted the interests of imperial powers aiming to colonized new lands. Additionally, UNCLOS represents a codification of many ideas of Hugo Grotius who also played a key role in the foundations of international law and discussions surrounding indigenous rights. As such, UNCLOS takes on a State-centric approach to ocean sovereignty and governance, promoting State interests and State sovereignty rather than those of coastal communities. Coincidentally, it is the coastal communities, such as indigenous peoples, who are most vulnerable in the face of ocean change. The detrimental effects of this approach are demonstrated in the case studies of the NWP and the Torres Strait. While Canada and Australia diverge in their treatment of indigenous rights to maritime space, UNCLOS hinders indigenous governance equally in both cases. UNCLOS omits any mention of indigenous peoples and their rights to governance of sea and seabed. Simultaneously, the agreement requires that countries with international straits must ensure transit to international traffic. There is no mention of the impacts of this traffic on coastal populations that rely most heavily on these areas. The consequences of international transit are clear: increased traffic causes damage to marine environment as species threatening traditional practices of indigenous peoples. As a result, this approach provides national governments with grounds to deny or dismiss indigenous rights further. In the case of the NWP, the UNCLOS agreement requires international transit through the traditional lands of Inuit peoples without including them in the decision-making process. The Inuit are struggling at all scales to gain recognition of rights to self-governance and have made significant progress through their participation in the Arctic Council. UNCLOS goes directly against this progress by recognizing only Canada as sovereign of the Arctic Archipelago and thus making it the only State that can control transit. With such legislation in place at an international scale, how can Inuit communities hope for full recognition? Similarly, Australia has been able to impose compulsory pilotage in the Torres Strait due to its position as a sovereign country of the international strait. While this may have been done with

indigenous interests in mind, UNCLOS and the IMO encourage Australia to continue to omit the Torres Strait Islander Peoples from ocean governance as it has done in the past.

The analysis of case studies demonstrate that indigenous rights and the rights of coastal communities need to be included in international legislation. Just as federal governments are struggling to decide upon the status of indigenous peoples in their legal systems, international law mirrors the same ambiguity. Although dialogues surrounding international indigenous rights are emerging, legislation like UNCLOS remains unamended and implemented world-wide. As demonstrated in Chapter 6, outside of UNDRIP, no legislation directly addresses the status indigenous peoples in international governance of land, oceans or living resources. While not designed to do so, UNCLOS remains grounded in concepts of Westphalian sovereignty and take on a State-centric approach. Given the close connection of ocean legislation with that of international legislation justifying colonial conquest, it is unsurprising that UNCLOS omits and thus silences indigenous voices in discussions surrounding ocean governance. These characteristics of the agreement directly undermine maritime governance initiatives of indigenous peoples at all scales. Globally, policy makers must take steps to empower these communities to rightful self-government and decision-making at all scales. Each case study outcome shows the importance of international legislation, such as UNDRIP, to empower, support and protect the rights and interests of indigenous peoples. The similar role played by UNCLOS in the case studies of Australian and Canadian international straits additionally demonstrates the power of an international approach to ocean governance. It is by recognizing and tackling issues of indigenous rights on a global scale that national problems related to indigenous rights might be addressed going forward.

Chapter 9 – Conclusion and Recommendations: Insights on Ocean Governance through the Historic Management of Indigenous Coastal Territories

This study sought to explore the impacts of present ocean legislation on the future of ocean equity initiatives through the analysis of indigenous peoples' rights in ex-British colonies. A Narrative Policy

Framework (NPF) was used to examine evidence composed of primary sources historic legal documents and cases supported by secondary historical sources to provide further context. Chapter 1, identified the following three research questions to guide the analysis of historic legislation surrounding indigenous rights and ocean governance:

(1) Does UNCLOS support a path towards equitable ocean use, or does it serve the interests of major powers and entrench existing disparities?
(2) How are maritime spaces of competing jurisdictions managed? In situations where there is uneven power distribution between stakeholders, how can equitable use be ensured?
(3) Is it possible to efficiently move towards an equitable ocean future through a bottom-up approach or does the fundamental underpinning (UNCLOS) for how we govern our oceans need to be revised first?

The following section will summarize findings according to the research questions identified in Chapter 1 and identify recommendations for future policy action accordingly.

Does UNCLOS support a path towards equitable ocean use, or does it serve the interests of major powers and entrench existing disparities?

The UNCLOS treaty, enacted in 1982, represents the leading body of legislation presently regulating and managing ocean governance. Chapters 4 and 5 demonstrated that the history of UNCLOS is steeped in legal traditions supporting the interests of imperial powers. What's more, the same key figures involved in the foundations of legal traditions justifying colonization shaped the way we currently govern ocean space. UNCLOS takes on a State-centric approach, only recognizing and supporting interests of coastal countries. What's more, narratives of Westphalian sovereignty in coastal waters juxtaposed with notions of lawless on open seas support those stakeholders that have the financial and technological means to exploit space and resources. Un-amended since 1982, UNCLOS is overdue for a significant update to adhere to changes in legal and social perspectives on ocean governance. In comparison to the narratives of Australia and Canada, UNCLOS came into force at a time when Australian territories were still seeking to

extinguish aboriginal title and Canada had just recognized the rights of indigenous peoples in its constitution. Many scholars analyzing histories of federal legislation regarding indigenous rights often criticize judicial systems for the entrenchment of colonial perspectives and reasoning. Unfortunately, much of this reasoning aligns with that of UNCLOS. For example, the regime of high seas operates similarly to the objections made to exclusive use of sea space in Yamirr v Northern Territory: if stakeholders cannot their sovereignty, rights to that space are not recognized. As a result, narrative analysis of historical evidence demonstrates that while not intentionally designed undermine the rights and recognition of indigenous peoples, through its ignorance of the rights coastal peoples UNCLOS does just that. UNCLOS entrenches existing disparities in ocean governance and supports colonial approaches to management of indigenous territories. If indigenous peoples cannot fit in to the "box" prescribed by UNCLOS to recognize them, they are silenced.

The outdated nature of UNCLOS has become even more apparent since the entry in to force of UNDRIP. The cases of indigenous people around the world demonstrate that sovereignty of ocean space is a human rights issue. Not only are these communities heavily dependent on marine environments and resources for their cultural and subsistence practices, but this position makes them some of the most vulnerable in the face of climate change and destruction of natural resources. What's more, vulnerability of indigenous peoples without rights to recognition and self-determination goes beyond the immediate destruction of lands and coastline under national jurisdiction. Vierros et al. highlight the risks facing indigenous communities who rely of migratory marine species for subsistence hunting[483]. With movement patterns that span thousands of miles, the species essential to the culture coastal indigenous communities spend much of their lives on the high seas, a space subject only to UNCLOS regulation. Given the present state-centric focus of UNCLOS and underlying narratives of Westphalian sovereignty within the treaty,

[483] Vierros et al., "Considering Indigenous Peoples and Local Communities in Governance of the Global Ocean Commons."

how can indigenous communities hope to participate in ocean governance if they do not "qualify" to be part of the discussion?

How are maritime spaces of competing jurisdictions managed? In situations where there is uneven power distribution between stakeholders, how can equitable use be ensured?

When it comes to maritime spaces of competing jurisdictions, international straits represent the melting pot of regional, national, and international legislation. Case studies in Chapter 6 and 7 demonstrate that countries take varied approaches to governance of coastal areas. Canada chooses to recognize indigenous title through treaties and agreements but separates rights to land and water or sea and seabed. This piecemeal approach to indigenous rights in Canada results in scattered discussions surrounding the extent of each line of legislation making it difficult to clearly define the extent of aboriginal rights. In contrast, Australia refuses to perceive Aboriginal and Torres Strait Islander Peoples as unique (legally) from other citizens and as such will not enter into agreement directly with indigenous communities. However, Australian common law views aboriginal land rights as encompassing of rights to sea and seabed (although it views these rights as non-exclusive). Even though Australia provides a more inclusive definition of aboriginal title, it's failure to recognize indigenous groups rights to self-recognition and governance makes Australian legislation very limited and largely symbolic. In both cases, there is uneven power distribution between stakeholders. A major difference is the recognition of fiduciary duty of the Crown towards indigenous people given this imbalance. The provision gives indigenous communities a legal tool to question actions of the government that threaten efforts of indigenous recognition and governance. These approaches observations demonstrate that indigenous communities require clear, enforceable legislation to lay the groundwork for rights to self-governance and control of resources. Agreements directly between national governments and IPs, such as fiduciary duty represent key steps towards a more level, legal playing field.

When these national approaches are transferred to areas of competing international jurisdiction, there are several major trends. Firstly, in all cases, the federal government demonstrates inconsistency in

its willingness to uphold provisions made in legislation related to recognition of indigenous rights. In Canada, this is demonstrated by the decision to create an Inuit governance system for the Nunavut Territory all while proceeding to negotiate without the presence of this community at the international level. In Australia, while Torres Islander Peoples have had claims to sea and seabed recognized, they are omitted from decision making processes on an international level. What's more, across the board, UNCLOS supports the sovereign States in their efforts exclusively control all coastal space and act as the sole stakeholder in negotiations regarding use of territory. As a result, indigenous communities in the Torres Strait and NWP face an additional roadblock on an international level, when already fighting to be heard nationally. In both case studies, indigenous peoples must bypass the provisions of UNCLOS to raise their concerns. In the Torres Strait, this has taken the form of a complaint to the United Nations citing the ICCPR. In the Arctic, the Inuit Circumpolar Council continues to push for recognition as an Arctic nation through its position on the Arctic council and through declarations and publications focused on Inuit sovereignty of the Arctic Archipelago. While a power imbalance already exists between indigenous groups and national governments, UNCLOS serves to entrench these disparities at the international level. The entry in to force of UNDRIP in 2006 provides support for international recognition of IPs but does not directly address issues related to maritime sovereignty and governance of resources. UNDRIP focuses on the recognition of indigenous rights and communities while UNCLOS focuses on the control of territory, maritime space, and resources. Given this gap in legislation, it is necessary for international agreements to open discussions surrounding global recognition of indigenous sovereignty of land, sea and seabed.

Is it possible to efficiently move towards an equitable ocean future through a bottom-up approach or does the fundamental underpinning (UNCLOS) for how we govern our oceans need to be revised first?

The comparative case-study approach taken to the histories of narratives in aboriginal rights legislation have demonstrated the divergent approaches to recognition of indigenous peoples in common

law. In the case of Australia, the country does not recognize the right to self-government [484]. As a result, the Commonwealth government refuses to enter any binding treaties with aboriginal communities as it does not recognize them as "nations". Rather, Australia promotes cultural and economic coexistence between indigenous interests and common law public rights. Indigenous rights often are limited, non-exclusive and there is no recognized fiduciary duty of the Crown to address the apparent power imbalances in legal cases and the overall relationship between government and IPs. However, Australian legislation does extend aboriginal title claims to sea and seabed, noting there is no distinction between land and water when it comes to these rights. Unfortunately, even if Australian IPs were to take issues to an international level, the UNCLOS treaty does not recognize them as a State so they cannot have a voice in international ocean governance. Ironically, it is exactly IPs that face the greatest losses in traditions, culture and livelihoods with the destruction and mismanagement of marine ecosystems. From a Canadian perspective, Inuit peoples are recognized as a self-governing nation and closer to recognition and participation in governance and ocean management. However, Canada is specific through its piecemeal treatment of indigenous rights legislation. By separating indigenous status from land rights as well as living and non-living resources within land rights, the Canadian system is difficult to navigate, stalling any potential progress. Although Inuit peoples can have their voice heard within the Arctic community, UNCLOS undermines their sovereignty just as much. While they can be recognized by other Arctic stakeholders as an indigenous nation with rights to self-determination and self-governance, UNCLOS once again will not recognize them as they are not considered a state. These are just two of many countries around the world that must navigate the complexities of recognizing indigenous communities. Their diverging approaches, timelines and conditions for recognition demonstrate the inefficiency of a bottom-up approach to ocean equity efforts. However, in each case, UNCLOS plays the same role in hindering indigenous interests by supporting the interests of States rather than the rights traditional owners of a territory. In each case, the UNCLOS treaty

[484] High Court of Australia, Mabo and Others v Queensland (No. 2); Peterson, "Common Law, Statutory Law, and the Political Economy of the Recognition of Indigenous Australian Rights in Land."

provides additional grounds for national governments to dismiss or deny rights and claims of indigenous peoples. As a result, it is safe to conclude that a top-down approach that involves reforming international legislation and pushing nations to sign binding agreements concerning recognition of IPs is more productive. This has already been demonstrated by UNDRIP. With UNDRIP in force and countries like Canada and Australia as its signatories, indigenous communities can exert pressure on their respective national governments through international organizations. However, these observations do not dismiss the power of regional approaches towards ocean equity. The example of the compulsory pilotage system in the Torres Strait highlights the success of regional control over international areas to preserve traditional territories of indigenous peoples. It is important to note that this regional control is underpinned by a strong international framework from the IMO. Although the requirement is seen as a threat to the authority of UNCLOS, returning to a regional scale when considering the management of coastal areas (with international legislation in place to support large-scale governance) may be necessary to improve ocean equity globally.

Recommendations

In summary, the two case studies as well as supporting historic legal documents on indigenous rights and maritime law suggest that while UNCLOS does not directly seek to hinder indigenous peoples in attaining recognition, its present structure supports decision making systems that undermine efforts to include and empower indigenous peoples in international policy processes. By recognizing only coastal State interests, UNCLOS is ultimately failing at its objective of peaceful and just resolution of maritime issues. Ironically, the UNCLOS preamble states the mission of the agreement as " all issues relating to the law of the sea and ... be an important contribution to the maintenance of peace, justice and progress for all peoples of the world" and "which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of

their living resources, and the study, protection and preservation of the marine environment.".[485] While amendment to recognize indigenous peoples in ocean governance is imperative, uniform action is necessary at a national level as well. States like Canada need to take a clear stance on indigenous rights rather than recognizing some but not all rights (Australia recognizes aboriginal status but not self-governance). What's more, recent animosity, or ambiguity towards international agreements like UNDRIP in the case of Canada or dismissal in the case of the ICCPR Torres Islander People's claim demonstrate potential insincerity in the lofty promises of governments to recognize indigenous peoples. For this reason, is important to take a top-down approach toward international indigenous maritime governance to provide a framework that empowers indigenous people to have a say in the governance of their traditional lands. The similarities in the role of UNCLOS for both case studies show the power of a unified international approach. Systems like the Torres Strait PSSA and compulsory pilotage requirement demonstrate the importance of maintaining regional control to ensure protection of traditional lands. Given these conclusions, this study provides the following recommendations.

First, given the universal role of UNCLOS in hindering the recognition of IP rights on an international scale, UNCLOS needs to be amended to recognize indigenous peoples' rights and interests. The cases of international straits demonstrate that even if federal governments were to recognize indigenous governance of these areas, they would still not be able to regulate traffic and use due to the treaty's focus on sovereign state rights rather than those of coastal populations. Presently, UNDRIP represents the only international legislation that addresses the rights of IPs on a global scale. Although resources and territory are mentioned, no explicit statements are made regarding indigenous sovereignty of terrestrial and marine territories. Given the objectives of UNCLOS to create a "just and equitable international economic order which takes into account the interests and needs of mankind as a whole", this legislation provides the perfect opportunity to take steps to create a space to acknowledge indigenous sovereignty of traditional lands. There are two paths

[485] {Citation}

that UNCLOS could take to recognize IPs. Given the objective to address the needs of mankind, UNCLOS could include indigenous communities as a unique type of stakeholder in the agreement. This would mirror the path of Canada and Australia who each categories indigenous rights as unique within the common law system. An alternative approach would be that similar to the actions of Inuit in the Arctic: the recognition of IPs as a unique form of State or sovereign Nation with rights to maritime sovereignty.

Second, this study recommends a top-down approach to indigenous ocean governance all while supporting regional initiatives that allow local communities to tailor management strategies. Nations with indigenous peoples need to include these populations in the co-management of traditional lands, sea and seabed. Not only do indigenous peoples have thorough knowledge of the space but they also represent communities that will be most dramatically impacted with the onset of climate change. The present approach, a bottom-up approach (i.e. each nation support the rights of their populations), has shown to be vague and ineffective. Taking the power out of hand of individual nations and addressing the treatment of indigenous populations at an international level is the only effective solution. This has already been demonstrated by UNDRIP and ICCPR case in Australia. In both cases, international legislation or an international body was involved to create a reaction from a sovereign nation regarding and indigenous rights issue. National governments will not take the necessary action without outside pressure. International legislation is required to provide a framework for indigenous communities to gain the rights necessary to govern their traditional lands and sea space. In scenarios with multiple stakeholders such as international straits, indigenous communities need to be ensured the same representation and authority as other stakeholders. In both case studies, these minorities have been faced with reduced representation and reduced power (usually limited to an advisory role) making their uphill battle for rightful sovereignty even more difficult. While Inuit and Torres Strait Islander Peoples communities have voiced their frustration with these double standards, both have received written recognition of their status (nationally) rather than implemented changes to the system of co-management. Both have had to resort to international organizations for support as result.

Finally, while international legislation is important to underpin broad issues, regional approaches have proven effective through their tailored approach to the management of fragile environmental spaces. Ensuring that a regional governance system is in place is essential to tailor legislation to the specific needs of each coastal area. The importance of this approach has been demonstrated by the PSSA status of the Torres Strait and the enforcement of compulsory pilotage in the area. Although the legislation of the Torres Strait excludes indigenous peoples from negotiations, similar legislation that supports IP governance and promotes the interests of these coastal communities would allow for tailored management of international straits. In the case of the Arctic, a PSSA designation could help mitigate the detrimental impacts of future international traffic. What's more, given the status of the Arctic Archipelago as part of Inuit Nunavut, a PSSA designation would allow for increased Inuit sovereignty of the space on an international scale tailored to the needs of local communities. Although many signatory states of UNCLOS view compulsory pilotage of the Torres Strait as a threat to the agreement, such action may be essential to provide coastal communities that are most vulnerable to ocean change with the framework to protect their interests.

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