

The New Canadian Defence: The Impact of UNDRIP Article 30 on Canadian Domestic Defence Strategy

*Preston Jordan Lim**

Article 30 of the United Nations Declaration on the Rights of Indigenous Peoples articulates a general ban on military activities that take place on Indigenous territory. Despite the potentially significant consequences of article 30 for Canadian defence policy, few scholars have devoted serious attention to the article. This article will fill that gap by discussing the meaning of article 30 and suggesting approaches to implementation that the Canadian state ought to adopt. This article argues that, far from constraining Canadian defence strategy, article 30 may well serve as a catalyst, encouraging Canadian defence planners to take a more community-based approach towards defence, particularly in Canada's North.

* Preston Jordan Lim is an Assistant Professor at Villanova University's Charles Widger School of Law. He is grateful to Justice Lorne Sossin, Justice Grant Huscroft, Nicole Spadotto, Saambavi Mano, and the anonymous peer reviewers for their comments on earlier versions of this paper. Copyright © 2023 by Preston Jordan Lim

Introduction

I. Interpreting Article 30

A. *A Purposive and Contextual Reading of Article 30*

B. *Article 30: A General Ban on Military Activities*

C. *Defining “Military Activities”*

D. *Defining “Prior and Effective Consultation”*

II. Parliament and the Implementation of Article 30

III. Canadian Courts and the Implementation of Article 30

IV. The Canadian Executive and the Implementation of Article 30

A. *Canada’s Northern Defence Strategy and the Need for a Cooperative Approach*

B. *Crafting Status-of-Forces Agreements with Indigenous Peoples*

C. *Article 30 and Allied Military Activities*

V. Article 30 and Self-Determination

Introduction

On June 21, 2021, the *United Nations Declaration on the Rights of Indigenous Peoples Act (UNDRIP Act)* became law in Canada.¹ The grant of Royal Assent to the *UNDRIP Act* marked a milestone in the Crown’s relationship with Indigenous peoples across Canada. Although Indigenous groups in Canada pushed for the Canadian government to actively participate in the international development and passage of the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*,² the Conservative government voted against the United Nations General Assembly’s adoption of UNDRIP in 2007.³ Assembly of First Nations Chief Phil Fontaine characterized the government’s “No” vote as a “stain on Canada’s reputation internationally”.⁴ The Conservative government endorsed UNDRIP in 2010, but clarified that it only viewed the Declaration as an aspirational document.⁵ In 2016, the new Liberal government announced its formal adoption of UNDRIP, but has struggled to implement it into domestic law. With the long-awaited enactment of the *UNDRIP Act*, Canada has finally set off down the road of domestic implementation.

1. SC 2021, c 14 [*UNDRIP Act*].

2. UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) GA Res 295, art 30 [*UNDRIP*].

3. “Canada votes ‘no’ as UN native rights declaration passes” *CBC News* (13 September 2007), online: <cbc.ca> [perma.cc/Z94R-6P9V].

4. *Ibid.*

5. James A Green, “Pipelines and persistent objection: Indigenous rights in Justin Trudeau’s Canada” (12 December 2016), online (blog): <blog.oup.com> [perma.cc/9BKY-G8JC].

The *UNDRIP Act* does not directly implement UNDRIP and instead articulates a gradual implementation process. Section 6 of the *UNDRIP Act* requires the Minister designated by the federal Cabinet to “prepare and implement an action plan to achieve the objectives of the Declaration”.⁶ The federal government released its action plan on June 21, 2023.⁷ The Act also equips Parliament with various oversight mechanisms; for example, the Minister is to table an annual report in each house of Parliament that addresses, among other issues, the implementation of the action plan.⁸ The *UNDRIP Act* also requires the Government of Canada to “take all measures necessary to ensure that the laws of Canada are consistent with the Declaration . . . in consultation and cooperation with Indigenous peoples”.⁹

Due to Canada’s federal system, both federal and provincial governments share responsibility over the implementation of UNDRIP because UNDRIP engages subject matters that alternatively fall under federal or provincial competencies. British Columbia passed its *Declaration on the Rights of Indigenous Peoples Act* into law in late 2019.¹⁰ Much like the federal *UNDRIP Act*, the provincial Act requires the BC government to develop an action plan to meet the objectives of UNDRIP. In June 2021, BC Minister of Indigenous Relations and Reconciliation Murray Rankin published a draft action plan, which addressed implementation of those aspects of UNDRIP that fall within provincial jurisdiction under section 92 of the *Constitution Act, 1867*.¹¹ The BC government then published a full action plan on March 30, 2022.¹² Robert Hamilton has pointed out that there are “four subject-matters in *UNDRIP* that deal with areas that are clearly provincial jurisdiction under the Canadian Constitution: education, labour, health, and lands and natural resources”.¹³

6. *Supra* note 1, s 6(1).

7. Stephanie Taylor, “Ottawa releases action plan to implement UNDRIP, despite calls for more consultation”, *CBC News* (21 June 2023), online: <cbc.ca> [perma.cc/NG6S-KA6E].

8. *Supra* note 1, s 7.

9. *Ibid*, ss 5–6(1).

10. SBC 2019, c 44.

11. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*]. See Bryn Gray & Alana Robert, “BC Proposes Extensive Changes in Draft Action Plan to Implement UNDRIP” (20 July 2021), online (blog): <mccarthy.ca> [perma.cc/5H8M-FUFZ].

12. Bhinder Sajan, “Global first: B.C. government unveils Indigenous action plan”, *CTV News* (31 March 2022), online: <bc.ctvnews.ca> [perma.cc/B7CB-39S9].

13. Robert Hamilton, “The United Nations Declaration on the Rights of Indigenous Peoples and the Division of Powers: Considering Federal and Provincial Authority in Implementation” (2021) 53:4 UBC L Rev 1097 at 1108.

Even though provinces have the jurisdiction to implement key aspects of UNDRIP, Hamilton nonetheless notes that there is plenty of room for federal involvement.¹⁴ For example, the federal government will take the lead in implementing those aspects of UNDRIP that come within exclusive federal jurisdiction. Moreover, under the double aspect doctrine, both the federal and provincial governments may pass “legislation in relation to the same subject matter so long as that subject has aspects that are related to enumerated heads of power of both levels of government”.¹⁵

Defence is one area that clearly falls within federal, rather than provincial, jurisdiction. Section 91(7) of the *Constitution Act, 1867* grants the Parliament of Canada “exclusive Legislative Authority” over the militia, military and naval service, and defence.¹⁶ In practice, the federal executive, rather than Parliament, exerts primary control over defence matters, partly through the exercise of the Crown prerogative and partly through the delegation of powers by Parliament. The point is that the federal—and not the provincial—order of government has the jurisdiction to implement those articles of UNDRIP that trench exclusively on defence matters. In implementing UNDRIP, the federal order of government must pay close attention to how UNDRIP potentially places limits on Canadian defence policy.

Article 30 is the principal UNDRIP provision that bears on defence and military issues.¹⁷ Of course, other UNDRIP articles might also apply to military activities in certain circumstances. Article 10, for example, stipulates that “Indigenous peoples shall not be forcibly removed from their lands or territories.”¹⁸ Article 10 would ban an operation such as the Canadian government’s 1953 relocation of Inuit families from Northern Quebec to the High Arctic.¹⁹ If Canadian defence planners sought once again to forcibly relocate Indigenous families to better stake out Canada’s claims to territorial sovereignty, they would be acting in direct contravention of article 10. Yet article 30 is unique in that it is the only UNDRIP provision that refers explicitly to military activities.

14. *Ibid* at 1130.

15. *Ibid* at 1132. See also *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161 at 181–82, 1982 CanLII 55 (SCC).

16. *Supra* note 11, s 91(7).

17. *UNDRIP*, *supra* note 2.

18. *Ibid*, art 10.

19. See Samia Madwar, “Inuit High Arctic Relocations in Canada” (25 July 2018), online: <thecanadianencyclopedia.ca> [perma.cc/GE7H-DWKJ].

Article 30 states:

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.
2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.²⁰

Article 30 is revolutionary, for it advances language that limits a state's ability to engage in *carte blanche* military activities. Indeed, at first glance, the article seemingly places sharp constraints on military activities on Indigenous land. Could article 30 place limits on Canada's ability to craft and deliver an effective domestic defence policy? Might article 30 prevent Canadian Armed Forces assets from operating in key areas of the Arctic?

Despite article 30's potential consequences for Canadian defence activities, scholars have paid virtually no attention to the domestic implementation of the article. I fill that gap by focusing on the impact of article 30 on Canada's domestic defence strategy and suggesting implementation approaches that the legislative, judicial, and executive branches ought to adopt. Far from constraining Canadian defence strategy, article 30 may well serve as a catalyst and encourage Canadian defence planners to take a more collaborative approach towards defence, particularly in Canada's North. In the long run, article 30 is likely to act as a boon rather than a straitjacket.

I first focus on the meaning and interpretation of article 30, arguing that article 30 allows for certain military activities to occur on Indigenous land or territories, so long as the federal government has first consulted with Indigenous peoples. Article 30 articulates a general—and not a blanket—ban on military activities upon Indigenous territory. Next, I examine how the Canadian state will and should implement article 30 domestically. Parliament should give full force and effect to article 30 by implementing it through enabling legislation. In turn, Canadian courts will be able to fit even a robust interpretation of article 30 into the existing legal framework. As for the executive branch, I suggest that Canadian defence planners should proactively implement article 30 by crafting status-of-forces agreements with Indigenous peoples and ensuring that allied military activities that take place on Canadian soil conform to article 30.

20. *UNDRIP*, *supra* note 2, art 30.

I. Interpreting Article 30

Article 30 is unprecedented. As Stefania Errico notes, UNDRIP is the “first instrument on Indigenous peoples’ rights which devotes a specific Article” to the subject of military activities.²¹ Not even the earlier International Labour Organization (ILO) Convention 169, which addressed national states’ relations with their “Indigenous and tribal peoples”, covered military activities.²² Due to article 30’s novelty, it remains to be seen how courts and international bodies will interpret certain aspects of article 30. Given the nascent principle that article 30 promulgates, it is too early to provide a comprehensive explanation of article 30, although UN bodies have slowly begun to refer to and interpret the provision.

Caveat aside, in this section, I sketch out the main contours of article 30. First, I argue that it is necessary to read article 30 in light of certain other provisions within UNDRIP as well as the framers’ purposes. Next, I argue that article 30 does not contemplate a blanket ban on military activities on Indigenous land, but instead provides that such military activities can occur in three contexts so long as the national state has conducted prior consultations with the relevant Indigenous peoples. Finally, I identify two vague concepts within article 30—the definitions of “military activity” and of “prior and effective consultation”—and suggest interpretations that might guide courts and international bodies in their future applications of the article.

A. *A Purposive and Contextual Reading of Article 30*

It would be futile to interpret article 30 without first discussing the applicable norms of interpretation, related provisions and concepts within UNDRIP’s scheme, and the broader purposes that underlie the Declaration. First, drawing on the work of Dwight Newman, I argue that the principles of treaty interpretation apply to UNDRIP, despite the fact that UNDRIP is a declaration rather than a treaty.²³ Second, I note that it is necessary to read article 30 in light of certain other UNDRIP provisions—specifically, those that

21. Stefania Errico, “Control over Natural Resources and Protection of the Environment of Indigenous Territories: Articles 29, 30, and 32” in Jessie Hohmann & Marc Weller, eds, *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford: Oxford University Press, 2018) 425 at 454.

22. See *International Labour Organization (ILO) Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 28 ILM 1382 [ILO Convention 169].

23. Dwight Newman, “Interpreting FPIC in UNDRIP” (2019) 27:2 *Intl J Minority Rights* 233 at 248 [Newman, “Interpreting FPIC in UNDRIP”].

discuss (1) Indigenous peoples and (2) lands and territories. Third, I suggest that an interpreter must read article 30 in light of UNDRIP's broader purpose of ensuring cooperative relations between Indigenous peoples and the state.

What principles of interpretation should a court or lawyer adopt in approaching UNDRIP? Newman has argued that the principles of treaty interpretation should structure any analysis of UNDRIP.²⁴ It would be misleading, Newman suggests, to focus merely on UNDRIP's status as soft law or as a declaration.²⁵ Rather, it is critical to take a functional approach to UNDRIP's text. Newman notes that the final adoption of UNDRIP in 2007 followed a decades-long negotiation process. The negotiations on UNDRIP were "treaty-like" and the final text constituted a "complex interface of state interests and Indigenous interests".²⁶ Thus, Newman concludes that the *Vienna Convention on the Law of Treaties (Vienna Convention)* "would seem generally appropriate in relation to UNDRIP".²⁷ I agree with Newman's functional approach and would similarly apply the *Vienna Convention's* interpretive approach to UNDRIP. I would caution, however, that the *Vienna Convention* does not grant an interpreter license to ignore the ordinary meaning of a treaty term. Article 31(1) of the *Vienna Convention* states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."²⁸ The interpreter must still look to the text of a provision, while simultaneously reading that text in light of context and purpose.

By adopting a contextual and purposive reading, a reader can articulate a much fuller understanding of article 30. In particular, article 30 draws life from the other provisions of UNDRIP that also employ the phrases (1) Indigenous peoples and/or (2) lands and territories. While a comprehensive discussion of either concept is beyond the scope of this paper, I hope that the elucidations below will help the reader understand how UNDRIP's scheme informs interpretation of article 30.

Almost every article of UNDRIP employs the term "Indigenous peoples". Yet no provision within UNDRIP clearly defines that term. Kerry Wilkins has suggested that "[t]he decision to leave this term undefined may well have been deliberate".²⁹ After all, as Erica-Irene Daes—the former Chairperson-Rapporteur of the Working Group on Indigenous Populations—has pointed

24. *Ibid* at 245.

25. *Ibid* at 234–35.

26. *Ibid* at 248.

27. *Ibid*. See *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) [*Vienna Convention*].

28. *Ibid*, art 31(1).

29. Kerry Wilkins, "So You Want to Implement UNDRIP . . ." (2021) 53:4 UBC L Rev 1237 at 1249.

out, “historically speaking, indigenous peoples have suffered from definitions imposed by others.”³⁰

While UNDRIP leaves the term undefined, the majority of commentators have concluded that “Indigenous peoples” carries a fairly definite meaning under international law. The International Law Association (the Association) has noted that there exists a modern understanding of the term “Indigenous peoples”, which focuses upon the following characteristics: self-identification, historical continuity, a special relationship with ancestral lands, distinctiveness, non-dominance, and perpetuation.³¹ The Association has cautioned that not all the criteria “must be indispensably met by a community to be considered indigenous”.³² Joshua Castellino and Cathal Doyle have similarly pointed to a customary understanding of the term “Indigenous peoples”, arguing that the precise meaning of the term has to be determined not by national governments, but by self-determining peoples themselves.³³ They adopt a multifactor definition fairly similar to that proffered by the International Law Association, but add that “acceptance of groups as Indigenous peoples by other Indigenous peoples” has emerged as a “crucial subjective factor in the definition”.³⁴ Thus, while the term “Indigenous peoples” might initially seem indefinite or abstract, a contextual reading of UNDRIP and other international law sources sheds light on the term’s meaning.

Similarly, multiple UNDRIP provisions refer to Indigenous peoples’ lands, territories, and/or resources. As with the term “Indigenous peoples”, the Declaration does not clearly define lands, territories, or resources. The International Law Association notes that “there is no accepted definition of indigenous peoples’ lands, territories and resources in international law”.³⁵ Yet, the Association goes on to conclude that “international and domestic jurisprudence evidences a trend to include indigenous peoples’ relationships with lands, territories and resources as ‘property’ under international and

30. Erica-Irene Daes, *Note by the Chairperson-Rapporteur of the Working Group on Indigenous Populations, Ms. Erica-Irene Daes, on criteria which might be applied when considering the concept of indigenous peoples*, UNECOSOC, UN Doc E/CN.4/Sub.2/AC.4/1995/3 (1995) at para 6.

31. Catherine J Iorns Magallanes, “ILA Interim Report on a Commentary on the Declaration of the Rights of Indigenous Peoples”, Victoria University of Wellington, Legal Research Paper No 50/2012 (14 November 2012) at 7–8, online (pdf): <papers.ssrn.com> [perma.cc/7HP4-ZSGV].

32. *Ibid* at 8.

33. Joshua Castellino & Cathal Doyle, “Who Are ‘Indigenous Peoples’?: An Examination of Concepts Concerning Group Membership in the UNDRIP” in Hohmann & Weller, *supra* note 21, 7 at 35.

34. *Ibid* at 19.

35. Magallanes, *supra* note 31 at 20.

domestic law”.³⁶ In addition, the modern interpreter must read the terms “lands”, “territories”, and “resources” broadly as well as consistently with Indigenous peoples’ own understandings.³⁷ A broad interpretation accords with article 13(2) of ILO Convention 169,³⁸ which constitutes persuasive—though not definitive—proof of the meaning of “Indigenous lands” under international law. Article 13(2) defines “lands” to include “the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use”.³⁹

Moreover, Indigenous peoples do not only have rights over lands, territories, and resources that they currently own, but also “have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired”.⁴⁰ Claire Charters has concluded that Indigenous peoples’ rights to lands, territories, and resources that third parties now hold falls between access—which implies a spiritual relationship with the lands, territories, and resources—and ownership, use, development, and control.⁴¹ In other words, there exists a sliding scale of rights; Indigenous peoples’ rights are the strongest when they possess or own the land or territory in question. In keeping with the sliding scale, a court might decide that the article 30 prohibition on military activities only applies with full force where Indigenous peoples can demonstrate ownership of the lands or territories in question. A court might decide that in cases of unresolved Aboriginal title, the state must still undertake consultations with the Indigenous peoples concerned before undertaking military activity, but that the article 30 prohibition applies with somewhat less force. So long as the state does not through its military activity impair or deleteriously affect the Indigenous peoples’ claim to title, a court might find that the state can undertake that activity without hewing strictly to the conditions of article 30(1).

One question that flows from article 30’s use of the term “lands or territories” is whether the article is meant to capture the national state’s use of airspace. Might article 30 prevent Royal Canadian Air Force assets from flying over Indigenous territory? The short answer is probably not. Under a broad and purposive reading, a court might well determine that the term “territories” includes airspace. Under international law, however, a state holds “complete

36. *Ibid* at 20–21.

37. *Ibid* at 21.

38. *Supra* note 22, art 13(2).

39. Claire Charters, “Indigenous Peoples’ Rights to Lands, Territories, and Resources in the UNDRIP: Articles 10, 25, 26, and 27” in Hohmann & Weller, *supra* note 21, 395 at 413.

40. *UNDRIP*, *supra* note 2, art 26. See also Charters, *supra* note 39 at 395.

41. *Ibid* at 415.

and exclusive sovereignty over the airspace above its territories”.⁴² Of course, states can delegate responsibility “for the performance of functional responsibilities” and in the future, the Canadian government may decide to hand off functional responsibilities for air operations over certain Indigenous land to an Indigenous people.⁴³ But UNDRIP does not override—and indeed affirms—the principle of state sovereignty.⁴⁴ Thus, given the lack of more explicit language within UNDRIP, it is unlikely that a court would hold that UNDRIP displaces state sovereignty over airspace.

A convincing counterargument is that UNDRIP places weak limits on the state’s ability to conduct air operations. UNDRIP article 25, for example, affirms 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”.⁴⁵ If an Indigenous people hold a distinctive spiritual relationship with the air, a court might find that the state has a responsibility to ensure the Indigenous people’s right of access to the airspace in question. As Claire Charters has argued, Indigenous peoples enjoy a right of access to the lands, territories, and resources with which they hold a spiritual relationship.⁴⁶ Thus, even if a court were to agree with such a counterargument, the remedy would not result in the full displacement of state sovereignty over airspace.

Finally, it is important to read article 30 in light of the broader purposes underlying UNDRIP. As Newman has noted, a “purposive approach to interpretation gives rise to significant potential variation in meaning, dependent upon how one reads the purposes”.⁴⁷ A declaration, like any legal text, can have multiple purposes.⁴⁸ Certainly one of the drafters’ purposes was to establish that Indigenous peoples enjoy the right to self-determination. The Preamble of the Declaration states that, “nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law”.⁴⁹ Furthermore, article 3 proclaims that “Indigenous peoples have the right to self-determination.”⁵⁰ The article 30 prohibition on military activities, like every other article in UNDRIP, constitutes an example or component of the right to self-determination.

42. “Airspace Sovereignty” (2013) International Civil Aviation Organization, Working Paper No 80, online: <icao.int> [perma.cc/B8UN-ZL2N].

43. *Ibid.*

44. See *supra* note 2, art 46(1).

45. *Ibid.*, art 25.

46. *Supra* note 39 at 415.

47. Newman, “Interpreting FPIC in UNDRIP”, *supra* note 23 at 242.

48. See *Voltage Pictures LLC v John Doe*, 2017 FCA 97 at para 10.

49. *Supra* note 2, Preamble.

50. *Ibid.*, art 3.

Yet the affirmation of self-determination is not UNDRIP's only purpose. Quoting the Preamble of the Declaration, Mauro Barelli has suggested that the "spirit of the Declaration . . . is to 'enhance harmonious and cooperative relations between the State and Indigenous peoples'".⁵¹ This purpose shines through not only in the Preamble of UNDRIP but also in article 46. Article 46(1) states that nothing in the Declaration may be taken as implying that any State, people, group, or person can engage in or authorize an act which would "dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States".⁵² Marc Weller has argued that without the adoption of this clause, "it is unlikely that the Declaration could have been adopted with a significant majority, if at all".⁵³ The drafting history reveals that national states placed great weight on article 46's affirmation of territorial integrity.⁵⁴ In the end, the "understanding of self-determination . . . moved away from the vision of the representatives and supporters of Indigenous groups".⁵⁵ Consequently, a court cannot advance an extreme reading of article 30 that would impair the territorial integrity or political unity of the state.

B. Article 30: A General Ban on Military Activities

How far does article 30 go in limiting military activities on Indigenous land or territories? The Preamble to UNDRIP emphasizes the "contribution of the demilitarization of the lands and territories of Indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world".⁵⁶ Yet article 30 takes a measured approach to demilitarization. A faithful reading of article 30 reveals that military activities on Indigenous land are generally prohibited (the activity "shall not take place"), with certain broad exceptions.⁵⁷ Critically, due to these large exceptions, article 30 does not articulate a blanket ban on military activities on Indigenous land.

Article 30(1) allows for military activities to occur on Indigenous land in three situations: (1) where justified by a relevant public interest, (2) where the

51. Mauro Barelli, "The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples" (2009) 58:4 ICLQ 957 at 963.

52. *Supra* note 2, art 46(1).

53. Marc Weller, "Self-Determination of Indigenous Peoples: Articles 3, 4, 5, 18, 23, and 46(1)" in Hohmann & Weller, *supra* note 21, 115 at 148.

54. *Ibid* at 136–38.

55. *Ibid* at 138.

56. *Supra* note 2, Preamble.

57. *Ibid*, art 30(1).

relevant Indigenous people freely agree with the military activities, or (3) where the Indigenous people request the military activities. Errico notes that these three exceptions are “conditional upon the realization of prior consultations with the Indigenous peoples concerned ‘through appropriate procedures and in particular through their representative institutions’” as per article 30(2).⁵⁸ Moreover, Errico suggests that the term “relevant public interest” does not impose a high bar; a previous draft of article 30 specified that only “‘significant threats’ to public interest would justify a military presence in Indigenous territories”, but the drafters ultimately removed that stringent language.⁵⁹ The drafting change from “significant threat” to “relevant public interest” is unsurprising. Representatives from national states would not have agreed to a version of article 30 that prevented a national military from responding to a national security threat that crystallized or took place in whole or in part on Indigenous territory. One could foresee, for example, a situation where the state would need to respond quickly to a national security threat without having the requisite time or evidence to justify the threat as a significant one. Article 30, just like the rest of UNDRIP, balances Indigenous peoples’ right of self-determination with the state’s legitimate interests—in this case, the preservation of the state’s national security.

Few UN bodies have had the opportunity to comment upon and interpret article 30. Yet references by the Committee on the Elimination of Racial Discrimination (CERD) and by the Committee on the Rights of the Child (CRC) indicate that UN bodies have not treated, and likely will not treat, article 30 as imposing a blanket ban on military activities on Indigenous land. In 2009, the CRC released *General Comment No 11*, which addressed “Indigenous children and their rights under the Convention”.⁶⁰ The CRC interpreted article 30 to mean that “[m]ilitary activities on indigenous territories should be avoided to the extent possible.”⁶¹ Clearly, under the CRC’s approach, military activities can proceed on Indigenous land in certain contexts.

The CERD has had at least two opportunities to comment on article 30. In March 2010, Anwar Kemal, then the Chairman of the CERD, addressed a letter to the Laotian government, expressing concern about Laotian military operations that targeted the Hmong people in the Phou Bia Mountain area.⁶² He implicitly drew upon article 30 by stating that “military activities shall not take place in the lands or territories of Indigenous peoples.”⁶³ Kemal’s 2010

58. *Supra* note 21 at 455.

59. *Ibid.*

60. *General Comment No. 11 (2009), Indigenous Children and their rights under the Convention [on the Rights of the Child], UNCRC, 50th Sess., UN Doc CRC/C/GC/11 (2009)*.

61. *Ibid.* at para 66.

62. Letter from Anwar Kemal to HE Mr. Yong Chanthalangsy (12 March 2010), online: <ohchr.org> [perma.cc/2DXN-XQ6G].

63. *Ibid.*

letter effectively painted article 30 as imposing a blanket ban. There are two reasons why international lawyers should not read much into Kemal's 2010 letter. First, it is important to note that the activities in question—Laotian military operations targeting the Hmong people—would not be covered by the exceptions listed in article 30. That is, the Laotian government action in question almost certainly constituted a breach of article 30, and it is possible that Kemal advanced a stringent reading of the article with the hopes of encouraging the Laotian government's compliance.

Moreover, in a September 2011 letter to the Colombian government, Kemal adopted a more flexible interpretation of article 30.⁶⁴ In the September 2011 letter, Kemal took note of the fact that the Colombian government had previously conducted military operations for the purposes of protecting the Embera Katio people, but reiterated that "any intervention must be in agreement with the people concerned and in full respect of their rights".⁶⁵ The 2011 Colombia letter does not envision article 30 as a blanket ban on military activities. International lawyers should not view the March 2010 letter as dispositive, especially since the CERD has since walked back its language on article 30. It is likely that in the future, UN bodies will continue to interpret article 30 as the CRC and CERD have—that is, as a flexible provision that allows for military operations to occur on Indigenous land in limited contexts, so long as the national state has ensured prior consultations with the affected Indigenous people. This flexible approach accords fully with the plain meaning, context, and purpose of article 30.

C. Defining "Military Activities"

Of course, given the novel nature of article 30, it will fall to national and regional courts as well as UN bodies to sketch out the contours of the provision. There are at least two concepts within article 30 that are vague—"military activities" and "prior and effective consultation". A broad reading of either concept would necessarily reduce a national state's room for maneuver in executing military operations on Indigenous lands. I close by suggesting how both concepts ought to be defined.

Article 30(1) articulates a general ban on "military activities" that take place on the lands or territories of Indigenous peoples. What activities count as military activities? In its most recent defence white paper, entitled *Strong, Secure, Engaged: Canada's Defence Policy*, the Canadian government emphasized the need to take a whole-of-government approach to multiple defence issues, including the issue

64. Letter from Anwar Kemal to HE Mme. Alicia Victoria Arango Olmos (2 September 2011), online: <ohchr.org> [perma.cc/ZPC4-JQJ2].

65. *Ibid.*

of Northern defence.⁶⁶ A successful approach to Northern defence does not only mean deploying more Canadian Armed Forces assets to the North or building more military infrastructure, but also means coordinating with other executive branch agencies and departments, from Transport Canada to the Canadian Coast Guard. This whole-of-government approach begs the question of what activities, which may engage executive branch organizations besides the Canadian Armed Forces, count as military activities. Does a search-and-rescue operation, executed in conjunction by the Canadian Coast Guard and the Royal Canadian Air Force, constitute a military activity? When Canadian Rangers, who operate throughout the North as part of the Canadian Armed Forces reserve, train other Canadian soldiers in wilderness survival, are they conducting a military activity? Or take the Royal Canadian Mounted Police (RCMP), which, though separate from the Canadian Armed Forces, plays a “critical role in providing first response to civil emergencies and national security threats” in the Arctic.⁶⁷ When RCMP personnel respond first to an emerging national security threat in the Arctic, are they conducting a military operation?

Of note is that there is no universal definition of “military activities” under international law. The International Committee of the Red Cross, for example, does not define “military activities” in its customary international humanitarian law database, though it does define the terms “military operations” and “armed forces”.⁶⁸

Still, international law jurisprudence proves helpful in defining “military activities”. International legal documents have employed the term “military activities” before and thus provide a frame of reference for defining “military activities” under article 30 of UNDRIP. Notably, the International Tribunal on the Law of the Sea (ITLOS) has discussed the term “military activities”. Article 298(1)(b) of ITLOS authorizes states to except from compulsory jurisdiction those disputes concerning military activities, “including military activities by government vessels and aircraft engaged in non-commercial service”.⁶⁹ As

66. See Canada, Department of National Defence, *Strong, Secure, Engaged: Canada's Defence Policy* (Ottawa: National Defence, 2017) at 34, online: <dgpaapp.forces.gc.ca> [perma.cc/LZA6-HB78] [*Strong, Secure, Engaged*].

67. Canada, Crown-Indigenous Relations and Northern Affairs, *Canada's Arctic and Northern Policy Framework* (Ottawa: Government of Canada, 2019) at 84, online: <rcaanc-cirnac.gc.ca> [perma.cc/842V-9EQD] [*Arctic and Northern Policy Framework*].

68. See Jean-Marie Henckaerts and Louise Doswald-Beck, eds, *Customary International Humanitarian Law*, vol 2 (Cambridge: Cambridge University Press, 2005) at 86, 181.

69. *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3 art 298(1)(b) (entered into force 16 November 1994).

Yurika Ishii notes, while ITLOS has not provided a “settled definition of ‘military activities’”, it has sketched out the contours of the concept through case law.⁷⁰

In the 2019 *Case Concerning the Detention of Three Ukrainian Naval Vessels*, ITLOS adopted an understanding of “military activities” that prioritized function over form. Ukraine brought its case after Russian authorities arrested and detained three Ukrainian naval vessels and their twenty-four naval personnel.⁷¹ ITLOS held that the dispute at hand did not constitute a military activity under article 298(1)(b) and ordered Russia to immediately release and return the Ukrainian naval vessels as well as the detained crewmembers. Ishii argues that the Tribunal read the article 298(1)(b) military exception narrowly.⁷² The Tribunal implied that the inquiry into whether an activity is a military activity is highly fact-dependent.⁷³ Simply because naval vessels, rather than law enforcement vessels, are involved in a dispute does not mean that the activity in question is a military activity. In other words, the passage of naval ships does not per se amount to a military activity.⁷⁴ Even as ITLOS read the article 298(1)(b) exception narrowly, it simultaneously prioritized function over form. The mere presence of military units does not transform an activity into a military activity; instead, the inquiry should be “based primarily on an objective evaluation of the nature of the activities in question, taking into account the relevant circumstances in each case”.⁷⁵

The Canadian government has also had occasion to define “military activities” before. In its regulations implementing UN Resolution 2206, which authorized targeted sanctions on South Sudanese individuals and entities,⁷⁶ the Canadian government defined military activities as “any activities conducted by state armed forces, non-state armed forces or armed mercenaries and any activities that support the operational capabilities of an armed group”.⁷⁷ Such

70. Yurika Ishii, “The Distinction between Military and Law Enforcement Activities: Comments on Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Provisional Measures Order” (31 May 2019), online (blog): <ejiltalk.org> [perma.cc/BU74-26J7].

71. *Case concerning the detention of three Ukrainian naval vessels (Ukraine v Russian Federation), Provisional Measures* (2019), ITLOS Case No 26 at 283 (International Tribunal for the Law of the Sea) (Arbitrators: Jin-Hyun Paik et al) [*ITLOS Order*].

72. Ishii, *supra* note 70.

73. *ITLOS Order*, *supra* note 71 at 300.

74. *Ibid.*

75. *Ibid.*

76. *Security Council Resolution on the Situation in South Sudan*, UNSC, 70th Sess, UN Doc S/RES/2206 (2015) SC Res 2206.

77. *Regulations Implementing the United Nations Resolution on South Sudan*, SOR/2015-165, s 1.

a definition prioritizes form rather than function. By including “any activities conducted by state armed forces” within the definition of “military activities”, the Canadian government has read the term relatively broadly but also in a formalistic way.⁷⁸ A search-and-rescue operation undertaken by elements of a state’s armed forces would come within the Canadian government’s definition.

How then should Canadian courts and the government read “military activities” under article 30? Should they prioritize form or function? Should they take a narrow or broad reading of the term? What approach best keeps with UNDRIP’s aims and functions? I propose that, to align with the aims of UNDRIP, Canadian courts and the government should give the term a functional and broad definition. Military activities might be defined as those activities undertaken by state entities or personnel that have as their object the preservation of national security.

The definition poses two advantages. First, it would encompass not just activities by Canadian Armed Forces personnel, but also activities by other executive branch agencies and departments. RCMP personnel who are the first to respond in Northern Canada to an emerging national security threat would come within the definition, even if they are not functioning under the command of the Canadian Armed Forces. This interpretation is broader than the Canadian government’s definition of military activities, which covers activities conducted by “state armed forces” and “activities that support the operational capabilities of an armed group”.⁷⁹ A broad interpretation of the actors who can conduct military activities interacts harmoniously with the aims of UNDRIP. Article 30 would be a dead letter if state parties could merely circumvent the proscription on military activities by deploying national gendarmes instead of members of the state’s official armed forces on Indigenous land.

Second, the definition would encompass only those activities by state entities or personnel that have a national security objective. Tracking by Transport Canada assets of a foreign naval vessel, for example, would come under this definition. A search-and-rescue operation by the Canadian Coast Guard and the Canadian Armed Forces would not. Of course, critics might point out that the very term “national security” is inexact. The point is that Canadian courts and the government should distinguish between operations taken for a national security objective and those taken for a public safety objective. Responses to marine oil spills, environmental catastrophes, and resource shortages would fall under the latter. The interdiction of a foreign naval vessel or the positioning of a surface-to-air missile battery would fall under the former. Ultimately, it will fall to courts to delineate the demarcation between public safety and national security. Courts conducting inquiries into specific activities will likely find such inquiries to be highly fact-dependent, as ITLOS counselled.⁸⁰

78. *Ibid.*

79. *Ibid.*

80. *ITLOS Order, supra* note 71 at 300.

To take a specific example, would article 30 of UNDRIP prevent RCMP assets from removing, arresting, and jailing Wet'suwet'en people who block access to pipeline drill sites?⁸¹ In my view, not under the proposed definition, though a court could well find that the RCMP's arrest, removal, and jailing of Wet'suwet'en people violate other provisions of UNDRIP. As a preliminary matter, it would matter little that the RCMP, rather than the Canadian Armed Forces, had undertaken the activity in question. The more difficult question is whether such RCMP operations have a national security objective. A court could decide either way based on the specific factual matrix, but I suggest that operations to keep supply routes open or to allow for construction to proceed are not aimed at national security, but are instead aimed at public safety. Alternatively, a court might disagree and hold that the true objective of such RCMP operations is to enforce national security. The inquiry would then focus on whether the RCMP operations are justified by a relevant public interest and whether prior and effective consultation has occurred.

Even if a court were to agree that article 30 does not constrain such RCMP activity, other articles of UNDRIP could bind the RCMP. For example, the Gidimt'en Land Defenders—all of whom are Wet'suwet'en—argued in their submission to the Expert Mechanism on the Rights of Indigenous Peoples that Canada has violated the Wet'suwet'en people's right to their traditional territories (article 26); to life, liberty, and security (article 7); to govern their territories and to free, prior, and informed consent (articles 19 and 32); to protect and conserve their lands (article 29); to not be forcibly removed from their lands or territories (article 10); and to determine their own development priorities (article 23).⁸² Lawyers who argue that the Canadian state has not complied with UNDRIP must not solely focus on isolated provisions but must read UNDRIP as a whole to ground their arguments.

D. Defining “Prior and Effective Consultation”

The second vague concept in article 30 is that of prior and effective consultation. Article 30(2) requires states to consult with the relevant Indigenous people when the state carries out military activities on Indigenous land under one of the three exceptions listed in article 30(1)—that is, because of a relevant public interest, with the agreement of the Indigenous people, or at the request

81. See Jorge Barrera, “RCMP arrest 14, clear road on Wet'suwet'en territory in ongoing dispute over land rights, pipeline”, *CBC News* (18 November 2021), online: <cbc.ca> [perma.cc/5F3F-8V4U].

82. Dinī ze' Woos (Frank Alec), Sleydo' (Molly Wickham) & Jen Wickham, “Militarization of Wet'suwet'en Lands And Canada's Ongoing Violations” (Submission to the Human Rights Council, 51st Sess, 7 February 2022) [unpublished] online: <lrcw.org> [perma.cc/S8F7-LMDB].

of the Indigenous people.⁸³ Article 30(2) stipulates that consultation must be “prior and effective”. What does such consultation entail? Articles 10, 11, 19, 28, and 29 of UNDRIP impose a duty on states to obtain the “free, prior, and informed consent” (FPIC) of the Indigenous peoples concerned.⁸⁴ Does prior and effective consultation mean the same thing as FPIC? Does prior and effective consultation provide Indigenous peoples with a veto power over state action?

Few concepts within UNDRIP have attracted as much commentary and debate as FPIC.⁸⁵ For example, Dominique Leydet, writing about the “standard grammar” of consent, suggests that consent logically implies a veto right.⁸⁶ While a veto right is not absolute, rare will be the case in which the Crown should override an Indigenous people’s refusal to consent.⁸⁷ After articulating a standard grammar of consent, Leydet critiques the current Canadian legal framework, concluding that “Aboriginal peoples still exercise next to no control over a process that remains essentially ‘Crown-centric’”.⁸⁸ Leydet does not focus on foreign and regional jurisprudence; after all, in her mind, the standard grammar of consent constitutes the appropriate standard against which to measure the health of Crown-Indigenous affairs.

Some commentators, who similarly avoid deep discussion of foreign and regional court jurisprudence, have even suggested that FPIC is “best approached less as a legal notion endowed with immanent meaning than as a contested principle that will be given persuasive force (including in the legal field) through its mobilization as a political resource”.⁸⁹ There is no doubt that FPIC partially derives its relevance from its status as a “political resource” and its meaning from the logic of Leydet’s “standard grammar”. Yet it is also true that courts and UN bodies have had to apply FPIC to discrete situations in the meantime. In the process, they have developed a body of case law marked more by common trends than discord. In applying FPIC, Canadian courts are likely to discuss and draw upon this body of jurisprudence. In sum, FPIC has evolved

83. *UNDRIP*, *supra* note 2, art 30.

84. *Ibid*, arts 10, 11, 19, 28, 29.

85. See e.g. Dominique Leydet, “The Power to Consent: Indigenous Peoples, States and Development Projects” (2019) 69:3 *UTLJ* 371; Brenda L. Gunn, “Overcoming Obstacles to Implementing the UN Declaration on the Rights of Indigenous Peoples in Canada” (2013) 31:1 *Windsor YB Access Just* 147.

86. Leydet, *supra* note 85 at 372–73, 377.

87. *Ibid* at 381.

88. *Ibid* at 387.

89. Martin Papillon, Jean Leclair & Dominique Leydet, “Free, Prior and Informed Consent: Between Legal Ambiguity and Political Agency” (2020) 27:2 *Intl J Minority & Group Rights* 223 at 224.

into a meaningful legal notion, even if commentators continue to debate its logic, bounds, and contours.

One key lesson that has emerged from the jurisprudence is that FPIC does not grant Indigenous peoples a veto in all circumstances. Mauro Barelli has argued that the “drafting history of the Declaration and the relevant practice of judicial and quasi-judicial bodies suggest that FPIC does not confer on Indigenous peoples an overarching right to veto with regard to all decisions affecting them”.⁹⁰ Instead, those bodies that have discussed FPIC have generally adopted a sliding-scale approach, “whereby the degree of participation of Indigenous peoples in decision-making processes depends on the nature and implications of the proposed measures”.⁹¹ Barelli cautions, however, that while FPIC does not confer an “overreaching right to veto on Indigenous peoples”, it is critical to read the concept “in such a way that guarantees the effective protection of Indigenous peoples’ fundamental rights”.⁹²

The Inter-American Court of Human Rights (IACtHR) has on multiple occasions described and applied the concept of FPIC. International bodies and other courts have hewed closely to the IACtHR’s elucidation of FPIC in its 2007 *Case of the Saramaka People v Suriname (Saramaka)*.⁹³ That case arose because Suriname granted concessions to various mining and logging companies, which then allegedly encroached upon the Saramaka people’s right to the use and enjoyment of their territory. The IACtHR found, *inter alia*, that Suriname had committed various violations of the American Convention on Human Rights and that Suriname had failed to provide the Saramaka people with the right to effective access to justice. In considering FPIC, the Court held “large-scale development or investment projects that would have a major impact” within Indigenous territory attract a duty on the state’s part not only to consult with the Indigenous people but also to “obtain their free, prior and informed consent”.⁹⁴ Furthermore, the Court implied that some measure of consultation is always required when the state is “planning development or investment projects within traditional [Indigenous] territory”.⁹⁵ Thus, a state does not have a duty to obtain the consent of an Indigenous people in every

90. Mauro Barelli, “Free, Prior, and Informed Consent in the UNDRIP: Articles 10, 19, 29(2), and 32(2)” in Hohmann & Weller, *supra* note 21, 247 at 268 [Barelli, “FPIC in UNDRIP”].

91. *Ibid* at 269.

92. *Ibid* at 254.

93. *Case of the Saramaka People (Suriname) (2007)*, Inter-Am Ct HR (Ser C) No 172, *Annual Report of the Inter-American Court of Human Rights: 2007*, OEA/Ser.L/V/III.77/doc.1 (2008) 9 [Saramaka].

94. *Ibid* at para 134.

95. *Ibid* at para 137.

instance where it authorizes or carries out activities on Indigenous territory, though the state does have an ever-present duty to consult.

The key question is whether article 30's requirement of prior and effective consultation is synonymous with FPIC. Several commentators have concluded that UNDRIP "requires FPIC" for military activities.⁹⁶ There are two reasons, however, why a court would be unlikely to interpret the two concepts as synonymous. The first argument is a textual one. The drafters of UNDRIP explicitly used the term FPIC to describe a state's duties under various provisions of the Declaration.⁹⁷ It stands to reason that had the drafters of UNDRIP intended to apply FPIC to article 30(2), they simply would have employed the words "free, prior, and informed consent" rather than the concept of prior and effective consent.

Second, courts and UN bodies have differentiated between the concepts of consultation and FPIC. To interpret the two concepts as synonymous would cut against established and convincing jurisprudence. In *Saramaka*, the IACtHR stated that the duty to consult applies in a much wider set of circumstances than the duty to obtain FPIC; the latter duty applies only in cases of serious infringements upon Indigenous rights.⁹⁸ Similarly, in the case of *Poma Poma v Peru*, the Human Rights Committee differentiated between "mere consultation" and the "free, prior and informed consent of the members of the community".⁹⁹ Those measures which "substantially compromise or interfere with the culturally significant economic activities of a[n] . . . indigenous community" attract the duty to obtain FPIC.¹⁰⁰ Clearly, regional and international jurisprudence distinguishes between consultation and FPIC. Therefore, courts and governments, in applying the reference in article 30(2) to prior and effective consultation, should take care to differentiate the concept from FPIC. Courts might differentiate between the two concepts, for example, by holding that while FPIC can in certain circumstances give rise to a duty to obtain consent—that is, a veto power—prior and effective consultation cannot.

Of course, article 30(2) refers not simply to a duty of consultation, but instead to a duty of prior and effective consultation. In interpreting article 30(2), foreign states might draw upon and apply the Supreme Court of Canada's guidance on the duty of good-faith consultation.¹⁰¹ In consulting with

96. Terry Mitchell et al, "Towards an Indigenous-Informed Relational Approach to Free, Prior, and Informed Consent (FPIC)" (2019) 10:4 Intl Indigenous Pol'y J 1 at 1.

97. See *supra* note 2, arts 10, 11, 19, 28, 29.

98. *Saramaka*, *supra* note 93 at para 137.

99. UNHRC, 95th Sess, Annex, UN Doc CCPR/C/95/D/1457/2006 (2009) at para 7.6.

100. *Ibid.*

101. See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*].

Indigenous peoples about proposed defence activities, state authorities must act in good faith to meet the requirement of effective consultation.¹⁰² They must allow the relevant Indigenous people to express their concerns and complaints and must undertake consultation with the intention of substantially addressing the Indigenous people's concerns.¹⁰³ State authorities cannot simply consult with an Indigenous people after they have carried out the military activity, but must instead ensure prior consultation. This is a significant requirement. The Canadian government cannot cite the rapid emergence of a national security threat as an excuse to ignore the consultation requirement. The language of article 30(2) clearly stipulates that the state must first consult with the Indigenous people before executing a proposed military activity.

II. Parliament and the Implementation of Article 30

All branches of the Canadian state have a role to play in implementing UNDRIP. The legislative branch will play a particularly important role since the manner in which Parliament decides to implement article 30 will affect how the judicial and executive branches engage with the article. In this section, I recommend that Parliament introduce enabling legislation to directly implement article 30 into domestic law. First, I discuss article 30's current status in domestic law. While Canadian courts can already rely on article 30 to interpret the common law, statutes, and the Constitution, they can only treat article 30 as a persuasive—rather than as a definitive—interpretive tool. Second, I argue that Parliament can best instantiate the vision and promise of UNDRIP if it implements article 30 through clear enabling legislation.

The *UNDRIP Act* does not directly implement UNDRIP into Canadian law. Kerry Wilkins summarily concludes that the “federal *UNDRIP Act* does not give enforceable legal effect to the rights and obligations in *UNDRIP*”.¹⁰⁴ In determining the legal effect of BC's analogous *UNDRIP Act*, Nigel Banks conducts a somewhat fuller analysis but comes to the same conclusion. Simply put, the BC legislation “does not establish the *Declaration* as part of the law of BC”; in support of his view, Banks argues that the BC legislature would have employed explicit and specific language had it intended to directly implement the Declaration.¹⁰⁵ The same argument applies to the federal *UNDRIP Act*,

102. *Ibid* at para 40.

103. *Ibid*.

104. *Supra* note 29 at 1244.

105. Nigel Banks, “Implementing UNDRIP: An Analysis of British Columbia's Declaration on the Rights of Indigenous Peoples Act” (2021) 53:4 UBC L Rev 971 at 995–97.

which does not state that UNDRIP is “valid and has the force of law”.¹⁰⁶ Thus, the *UNDRIP Act* does not directly implement UNDRIP into Canadian domestic law. Despite the lack of domestic implementation, however, UNDRIP still has legal effect in Canada.¹⁰⁷ As Brenda Gunn points out, there exist two potential avenues for the domestic application of UNDRIP.

First, Canadian courts are bound to treat those aspects of UNDRIP that represent customary international law as an automatic part of Canadian law. In the 2020 case *Nevsun Resources Ltd v Araya*, the Supreme Court of Canada affirmed that customary international law is part of Canadian law and can thus furnish a direct remedy.¹⁰⁸ Customary international law automatically becomes part of Canadian law absent legislation to the contrary.¹⁰⁹ There are two requirements for a principle to be considered a norm of customary international law: (1) general but not necessarily universal practice and (2) *opinio juris*, which refers to the belief on the part of states that the practice in question amounts to a legal obligation.¹¹⁰

Does article 30 constitute a norm of customary international law? The International Law Association has determined which provisions of UNDRIP constitute norms of customary international law. It does not list the article 30 prohibition as a rule of customary international law. The Association does, however, characterize as rules of customary international law the “right [of Indigenous peoples] to be consulted with respect to any project that may affect them as well as the related right that projects suitable to significantly impact their rights and ways of life are not carried out without their [FPIC]”.¹¹¹

Thus, a Canadian court could justifiably hold that the article 30(2) duty of consultation represents a rule of customary international law that compels the government to consult Indigenous peoples before conducting military activities on their lands or territories. Yet article 30(1)’s general ban on military activities does not yet represent a customary international law rule. Given the novelty of article 30, a court would be unlikely to find that states had already transformed article 30(1) into a norm of customary international law. It would be premature to speak of general state practice in support of article 30(1). This might change in the next decades, however, if states comply with article 30(1) and begin to treat the ban on military activities as a legal obligation. In sum, article 30(1) has not automatically become part of Canadian law.

106. *Ibid* at 995. See also *UNDRIP Act*, *supra* note 1.

107. Brenda L Gunn, “Legislation and Beyond: Implementing and Interpreting the UN Declaration on the Rights of Indigenous Peoples” (2021) 53:4 UBC L Rev 1065 at 1072 [Gunn, “Legislation and Beyond”].

108. 2020 SCC 5 at para 132.

109. *Ibid* at para 128.

110. *Ibid* at para 77.

111. Magallanes, *supra* note 31 at 51–52.

Second, according to the presumption of conformity, Canadian courts must interpret Canadian law in a manner that is consistent with Canada's international obligations, absent clear legislation to the contrary.¹¹² As Gunn specifies, where an "ambiguity exists or clarification is needed in domestic law . . . the presumption of conformity demands that international standards, such as those articulated within the UN *Declaration*, be used to interpret Canadian law".¹¹³ Recent jurisprudence confirms that at least some Canadian courts will interpret Canadian law in light of UNDRIP. In *TA v Alberta (Children's Services)*, the plaintiffs argued, *inter alia*, that various purported infringements of UNDRIP by the provincial Ministry of Children's Services gave rise to a cause of action.¹¹⁴ Although the trial judge concluded that UNDRIP had not been "implemented into domestic legislation", he also noted that a court could use UNDRIP to "interpret statutory and common law obligations that exist independently".¹¹⁵ Similarly, in *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc*, the trial judge implied that UNDRIP might affect courts' interpretation of the common law, though he left it to the Supreme Court of Canada to determine the precise effect of UNDRIP on the common law.¹¹⁶

Gunn does not account for the Supreme Court of Canada's recent guidance in *Quebec (Attorney General) v 9147-0732 Quebec inc (Quebec (AG))*.¹¹⁷ In *Quebec (AG)*, the Court clarified the role that international law plays in constitutional interpretation. The majority stipulated that "binding instruments necessarily carry more weight in the analysis than non-binding instruments".¹¹⁸ Accordingly, Canadian courts are to treat non-binding international law sources as "relevant and persuasive, but not determinative, interpretive tools".¹¹⁹ Furthermore, the majority characterized international law instruments according to whether they pre- or post-date the enactment of the *Charter*.¹²⁰ Those instruments that post-date the *Charter* and that do not bind Canada carry "much less interpretive weight" than those that bind Canada "and/or contributed to the development of the of the *Charter*".¹²¹ Consequently, under the *Quebec (AG)* framework, Canadian courts can only treat UNDRIP—a non-binding instrument that post-dates

112. Gunn, "Legislation and Beyond", *supra* note 107 at 1080.

113. *Ibid* at 1081.

114. 2020 ABQB 97.

115. *Ibid* at paras 79–80.

116. 2022 BCSC 15 at para 212.

117. 2020 SCC 32 [*Quebec (AG)*].

118. *Ibid* at para 38.

119. *Ibid* at para 35.

120. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11 [*Charter*].

121. *Ibid* at para 42.

the *Charter*—as a relevant and persuasive interpretive tool within the process of constitutional interpretation. It should be emphasized that *Quebec (AG)* focuses on the role of international law in constitutional interpretation, but not on its role in statutory or common law interpretation. Still, there remains the risk that even in the common law or statutory context, courts will accord little or no weight to UNDRIP as a result of its non-binding nature.¹²²

Of all the cases to have considered UNDRIP's interaction with the Canadian legal order, perhaps the most useful is the Court of Appeal of Quebec's *Reference in relation with the Act respecting First Nations, Inuit and Métis children, youth and families (Reference re FNIM Act)*.¹²³ The reference is useful because the Court of Appeal for Quebec applied the Supreme Court of Canada's pronouncements in *Quebec (AG)* to a discrete situation. The Government of Quebec asked the Court of Appeal to determine the constitutionality of the *FNIM Act*, which envisions the gradual transfer of control over child and family services to Indigenous peoples. The Court of Appeal deemed unconstitutional those provisions of the *FNIM Act* that rendered Indigenous laws paramount over federal and provincial laws, but found that Indigenous peoples have the right to self-government and jurisdiction over child and family services.¹²⁴

The Court discussed UNDRIP's relationship with the Canadian legal order. The *FNIM Act* explicitly refers to UNDRIP and declares that one of Parliament's legislative purposes is to "contribute to the implementation of [UNDRIP]".¹²⁵ In considering the interpretive weight of UNDRIP, the Court held that the Declaration was "non-binding internationally, but [had] been implemented as part of the federal normative order".¹²⁶ The Court canvassed various provisions of UNDRIP that refer to self-government and relied on UNDRIP to affirm its conclusion that section 35 of the *Constitution Act, 1982* includes, "within the existing Aboriginal rights recognized and affirmed by that section, the right of Aboriginal peoples to regulate child and family services".¹²⁷ The Court thus complied with the Supreme Court of Canada's direction in *Quebec (AG)* that non-binding international law can only support or confirm "the result

122. See *Sackaney et al v R*, 2013 TCC 303 at para 35.

123. *Renvoi à la Cour d'appel du Québec relative à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 [*Reference re FNIM Act*].

124. *Ibid* at para 64.

125. *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24, s 8(c) [*FNIM Act*].

126. *Reference re FNIM Act*, *supra* note 123 at para 512.

127. *Ibid* at para 513.

reached by a court through purposive interpretation”.¹²⁸ Therefore, UNDRIP serves as an important interpretive tool upon which courts habitually rely; at the same time, however, UNDRIP’s non-binding status has placed restrictions on the extent to which courts can rely upon UNDRIP.

In sum, Gunn correctly points out that (i) those provisions of UNDRIP that constitute customary international law automatically become part of Canadian law, and that (ii) Canadian courts can use the presumption of conformity to read the Constitution, statutes, and common law in light of UNDRIP. Yet her argument lacks weight in the context of article 30. First, article 30(1) does not currently represent a norm of customary international law. Second, given the Supreme Court of Canada’s pronouncements in *Quebec (AG)*, a Canadian court that reads a constitutional concept in light of UNDRIP article 30 will at most treat the latter provision as relevant and persuasive.

In light of the limitations on article 30’s operation within Canadian law, I recommend that Parliament directly implement the provision through enabling legislation. Jeffery Hewitt has recommended that Canada “implement legislation mirroring each article of UNDRIP in order to fully implement UNDRIP into Canadian law”.¹²⁹ Conference attendees at the Indian Residential School History and Dialogue Centre’s virtual dialogue on the federal *UNDRIP Act* similarly emphasized that “additional legislation will be needed for the work of recognizing and implementing Indigenous Peoples rights to fully advance”.¹³⁰ Through direct implementation, Parliament would compel courts to give full force and effect to article 30. Courts would no longer be able to question whether or the extent to which article 30 affects Canadian law. Direct implementation would allow Parliament to comply with its pledge in the *UNDRIP Act* to implement the Declaration domestically, as well as with the spirit of UNDRIP itself.

Kerry Wilkins has convincingly argued that Parliament should protect against several vulnerabilities if it articulates an implementation statute. First, Parliament should include a provision binding both the provincial and

128. *Ibid* at para 510. It should be noted that the Supreme Court of Canada heard the appeal of the Court of Appeal of Quebec’s decision in December 2022 and may well come to a different conclusion on UNDRIP’s interaction with Canadian law. At the time of publication, the Supreme Court of Canada had not released its decision in this case.

129. Jeffery G Hewitt, “Options for Implementing UNDRIP without Creating Another Empty Box” in Oonagh Fitzgerald & Risa Schwartz, eds, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Law* (Waterloo, ON: Centre for International Governance Innovation, 2017), 56 at 60.

130. Indian Residential School History & Dialogue Centre, “Summary Report: Implementing the *United Nations Declaration on the Rights of Indigenous Peoples* through Federal Government Legislation” (4 February 2021) at 4, online (pdf): <irshdc.ubc.ca> [perma.cc/7JFR-L5DX].

federal Crowns so that courts will enforce UNDRIP rights and obligations comprehensively throughout the country.¹³¹ Second, Parliament should grant UNDRIP “explicit priority over all, or all but certain specified, other federal legislation”.¹³² Such a clause would protect against the “erosion or dilution within Canadian law of UNDRIP’s rights and obligations”.¹³³ Finally, Parliament should include manner and form requirements in the implementation statute, which would mandate consultation with Indigenous peoples if Parliament intends to amend the statute.¹³⁴ While Parliament cannot bind its own hands, it can make the amendment or repeal of particular statutes “somewhat more difficult”.¹³⁵ Through a robust implementation statute, Parliament can reduce confusion in the judicial system about the effect of UNDRIP and translate article 30 into a binding legal obligation.

III. Canadian Courts and the Implementation of Article 30

If Parliament implements article 30 into domestic law through enabling legislation, Canadian courts will be able to successfully fit article 30 into the existing framework on Aboriginal rights and title. It will fall to Canadian courts to fill in various aspects of article 30. Canadian courts may not choose to ascribe bright-line definitions to various terms in article 30, but will nonetheless gain expertise in interpreting and applying phrases such as “relevant public interest” and “representative institutions”.¹³⁶ I do not purport to provide comprehensive guidance on how Canadian courts can apply article 30 to domestic law. Such an exercise would be futile, as courts will apply article 30 to highly fact-specific contexts. Instead, I argue that Canadian courts will be able to comfortably fit article 30’s duty of prior and effective consultation into the national legal framework. In particular, there are two aspects of the domestic legal framework that would interact with article 30: (i) the procedural duty to consult, and (ii) the Supreme Court of Canada’s guidance on Crown infringement of established Aboriginal title.

Given my earlier argument that courts should employ norms of treaty interpretation in applying article 30 and UNDRIP more generally, why is it at all necessary to look to the practice of Canadian courts and the existing

131. See Wilkins, *supra* note 29 at 1292.

132. *Ibid* at 1294.

133. *Ibid*.

134. *Ibid* at 1300.

135. *Ibid*.

136. *UNDRIP*, *supra* note 2, art 30.

Canadian framework on Aboriginal law? To the extent that the Canadian legal framework differs from UNDRIP, would the Canadian state not be bound to adopt the conception of rights and protections articulated in UNDRIP itself?¹³⁷ The response is as follows: the federal government has affirmed that it will implement UNDRIP through the lens of Canada's existing section 35 jurisprudence.¹³⁸ Where UNDRIP does not track the section 35 jurisprudence, Canadian courts may adapt the Canadian legal framework to better reflect the standards contained in UNDRIP. But as a practical matter, even though it is important to highlight the ways in which UNDRIP departs from the protections contained in section 35, it is impossible to discuss the implementation of UNDRIP without focusing upon the existing section 35 jurisprudence. In implementing UNDRIP, the Canadian state will not jettison section 35.

The Supreme Court of Canada has expanded upon the first relevant concept—its duty-to-consult framework—in a series of cases.¹³⁹ Newman defines the duty to consult as follows: “The duty to consult Aboriginal communities concerning potential impacts on their rights from government decisions is a proactive duty applying prior to a government taking action that may have those impacts.”¹⁴⁰ This procedural duty does not only apply in the context of established rights but also “arises prior to proof of an Aboriginal rights or title claim”.¹⁴¹ As the Supreme Court of Canada put it in *Haida Nation v British Columbia (Minister of Forests)*, the duty to consult applies when the Crown “has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it”.¹⁴²

137. For example, the Supreme Court of Canada has recognized that in “interpreting legislation which has been enacted with a view towards implementing international obligations . . . it is reasonable for a tribunal to examine the domestic law in the context of the relevant [international] agreement to clarify any uncertainty”: *National Corn Growers Assn v Canada (Import Tribunal)*, [1990] 2 SCR 1324 at 1371, 1990 CanLII 49 (SCC) [*National Corn Growers Assn*]. If Parliament were to enact article 30 through direct, enabling legislation, a court would, under a faithful reading of *National Corn Growers Assn*, read article 30 in light of UNDRIP's purposes, context, and drafting history. Yet even in such a situation, a Canadian court would likely read article 30 in light of the existing section 35 jurisprudence.

138. Indigenous Watchdog, “Is the UN Declaration dead or more to the point – has it ever been alive?” (23 September 2020), online (blog): <indigenouwatchdog.org> [perma.cc/8K3X-DGF4].

139. See especially *Haida Nation*, *supra* note 101; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69.

140. Dwight G Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Publishing, 2014) at 15 [Newman, *Revisiting the Duty to Consult Aboriginal Peoples*].

141. *Ibid* at 26.

142. *Supra* note 101 at para 35.

As for its content, the duty to consult constitutes a spectrum “ranging from limited to deep consultation, depending upon the strength of the Aboriginal claim, and the seriousness of the potential impact on the right”.¹⁴³ The duty to consult thus varies according to the circumstances. Where the Aboriginal claimant group has a strong prima facie case for their claim and the consequences of the government’s proposed decision would adversely affect the claim, the Crown is bound not only by a duty to consult but also by a duty to accommodate.¹⁴⁴ Accordingly, the Crown may have to take interim arrangements to “avoid irreparable effects on Aboriginal interests” or “minimize harm to Aboriginal interests”.¹⁴⁵

Additionally, the Crown may in certain contexts be required to obtain the consent of the relevant Indigenous community for proposed activities. In *Delgamuukw v British Columbia (Delgamuukw)*, a case that dealt with the context of established claims, Lamer CJ noted that while certain breaches give rise only to a duty of consultation, more serious breaches may require the “full consent of an aboriginal nation”.¹⁴⁶ Chief Justice McLachlin noted in *Haida Nation* that *Delgamuukw*’s reference to consent applies “only in cases of established rights, and then by no means in every case”.¹⁴⁷ Indigenous peoples do not enjoy “a veto over what can be done with land pending final proof of [their] claim”.¹⁴⁸

Under the second relevant concept, in cases where the Crown has infringed established Aboriginal rights or title, it must justify its infringement under the test set forth in *R v Sparrow (Sparrow)*.¹⁴⁹ The leading case on infringement of Aboriginal title remains *Tsilhqot’in Nation v British Columbia*.¹⁵⁰ The Supreme Court of Canada held that where an Aboriginal claimant group has not yet proven Aboriginal title, the Crown owes a procedural duty to consult and, if appropriate, to “accommodate the unproven Aboriginal interest”.¹⁵¹ But where the claimant group has established title, then the Crown must not only comply with its procedural duties but must also justify any incursion through the *Sparrow* framework.¹⁵² Under the *Sparrow* test, the Crown must demonstrate both a compelling and substantial government objective and that the proposed incursion on the Aboriginal right is consistent with the Crown’s fiduciary

143. *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 20.

144. *Haida Nation*, *supra* note 101 at para 47.

145. Newman, *Revisiting the Duty to Consult Aboriginal Peoples*, *supra* note 140 at 104.

146. 1997 CanLII 302 at para 168 (SCC) [*Delgamuukw*].

147. *Supra* note 101 at para 48.

148. *Ibid.*

149. 1990 CanLII 104 (SCC) [*Sparrow*].

150. 2014 SCC 44.

151. *Ibid* at para 80.

152. *Ibid.*

duty toward Aboriginal peoples.¹⁵³ Practically speaking, this means that once Aboriginal title has been established, the Crown must either seek the consent of the title-holding Aboriginal group for a proposed intrusion or else justify its intrusion under the *Sparrow* test.¹⁵⁴ The *Sparrow* test represents a “high bar of justification”¹⁵⁵ and thus the Crown is more likely to seek the title-holding group’s consent for a proposed infringement.

Several commentators have argued that the domestic Canadian framework does not match UNDRIP’s duty of FPIC. Sarah Morales, for example, has argued that the Canadian duty to consult “has not developed in a manner that recognizes the right to self-determination”.¹⁵⁶ In contrast, FPIC envisions a consultation procedure “in which Indigenous peoples’ own institutions of representation and decision making are fully respected”.¹⁵⁷ Similarly, Nigel Bankes has argued that FPIC differs from Canadian legal approaches in at least two germane respects. First, the *Sparrow* test, which applies when the Crown has to justify an infringement upon established Aboriginal title, is less stringent than the approach entailed by UNDRIP and “too heavily weighted in favour of settler society’s ideas of the public interest to meet the international standard”.¹⁵⁸ Second, Bankes notes that the Canadian duty to consult is not “directly aimed at securing FPIC”.¹⁵⁹ Bankes and Morales are correct to point out that the domestic Canadian approach does not exactly track the emerging jurisprudence on UNDRIP. Neither author envisions, however, a wholesale repudiation of the Canadian domestic framework.¹⁶⁰

In certain ways, the Canadian framework might prove a model for other countries keen to implement FPIC. Dwight Newman, who notes that FPIC does not imply an overreaching veto on the part of Indigenous peoples, has suggested that the “Canadian legal requirements on duty to consult – and the role of consent in the context of established claims – already meets or exceeds UNDRIP’s requirements on FPIC”.¹⁶¹ For example, the “Canadian

153. *Ibid* at para 84.

154. *Ibid* at para 90.

155. Christopher Alcantara & Michael Morden, “Aboriginal title one year after Tsilhqot’in”, *Policy Options* (4 May 2015), online: <policyoptions.irpp.org> [perma.cc/E5V4-P2V6].

156. Sarah Morales, “Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult” in Fitzgerald & Schwartz, *supra* note 129, 63 at 69.

157. *Ibid* at 72.

158. Bankes, *supra* note 105 at 1011.

159. *Ibid*.

160. *Ibid* at 1014; Morales, *supra* note 156 at 77.

161. Dwight Newman, *Political Rhetoric Meets Legal Reality: How to Move Forward on Free, Prior and Informed Consent in Canada* (Ottawa: MacDonald-Laurier Institute, 2017) at 14, online (pdf): <macdonaldlaurier.ca> [perma.cc/3E4F-U24P].

system provides for consent as the standard in circumstances where article 32 of UNDRIP refers to consent”.¹⁶² Similarly, in his discussion of FPIC, Mauro Barelli refers favourably to the Supreme Court of Canada’s jurisprudence, writing that the Court has “developed an important jurisprudence on the Crown’s duty to consult Indigenous peoples”.¹⁶³ Indeed, Canada’s legal framework on the duty to consult and the infringement of Aboriginal title and/or rights adopts the same flexible, sliding-scale approach that national and regional courts, as well as international bodies, have adopted in their interpretations of FPIC.¹⁶⁴

If Canada’s legal framework is flexible enough to address UNDRIP’s duty of FPIC, then the article 30 duty of prior and effective consultation—which places less stringent requirements on states than does FPIC—would necessarily harmonize with the Canadian framework too. Even if Canadian courts were to interpret the duty of prior and effective consultation as synonymous with the duty of FPIC, courts would still be able to fit article 30 into Canada’s domestic Aboriginal rights framework.

To faithfully implement article 30, Canadian courts need not require an Indigenous people’s consent in each discrete situation involving a Crown military activity on Indigenous territory. Take a situation in which a covert Chinese team was inserted into the Yukon and was traversing territory to which an Indigenous people had claimed title. In such a situation, if the Canadian government notified the relevant Indigenous people’s government before deploying troops on that land and the Indigenous people still expressed complete disapproval of the Canadian deployment, it would defy the logic of article 30 and UNDRIP more broadly for a reviewing court to find a veto right. Even if Canadian courts—erroneously, in my opinion—equate “prior and effective consultation” with FPIC, it is only in rare situations that a Crown military activity on Indigenous territory will engage a potential Indigenous veto. In the above example, where the Indigenous people do not have an established claim, it would be unnecessary to employ the *Sparrow* test.

Arguably, Canadian courts are already bound by domestic law to evaluate Crown behaviour if a Canadian military activity takes place on Indigenous territory, even without the implementation of article 30 into

162. *Ibid.*

163. Barelli, “FPIC in UNDRIP”, *supra* note 90 at 267.

164. See e.g. *Sarstoon Temash Institute for Indigenous Management et al v Attorney General et al* (2013), Claim No 394 of 2013 (SC Belize); Constitutional Court of Colombia, Decision T-769/09, s 5; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya*, African Commission on Human and Peoples’ Rights, Appl no 276/2003 (2010) at para 291, online: <achpr.org> [perma.cc/R3PB-MWLZ]; James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples: Extractive Industries and Indigenous Peoples*, UNCHROR, 24th session, UN Doc A/HRC/24/41 (2013).

domestic law. Where an Aboriginal claimant group has not yet established title over land, the Crown's duty to consult and accommodate will apply. Where an Aboriginal claimant group has successfully established title over land, the Crown would have to obtain the Aboriginal people's consent to the proposed military activity or else justify the activity under the *Sparrow* test. The domestic enactment of article 30 would introduce some change into Canadian law, however, by specifying that military activities cannot take place on Indigenous land unless there is a relevant public interest, Indigenous consent, or Indigenous request for the military activity.

IV. The Canadian Executive and the Implementation of Article 30

The executive branch should also play a key role in implementing and interpreting article 30. Certain members of the executive may fear that article 30 will impose sharp, impractical restrictions on the Canadian military's ability to conduct domestic defence. Defence planners, for example, may fear that article 30's general ban on military activities on Indigenous territory will constrain Canadian troop operations.

I argue that the Canadian executive's implementation of article 30 may well catalyze a more successful domestic defence policy. Focusing on Canadian defence strategy in the North and the Arctic, I suggest that a defence strategy that treats Indigenous peoples as equal partners is likely to furnish tangible benefits for the Canadian state. I advance two recommendations. First, the Canadian executive should proactively consult with Indigenous peoples in the North and forge agreements that preauthorize and set conditions upon Canadian military deployments into the lands or territories of those Indigenous peoples. Second, given the need for Canada to collaborate with foreign allies in the Arctic, the Canadian military must ensure that any allied operations that take place on Indigenous territories in Canada comply with article 30's requirements.

A. Canada's Northern Defence Strategy and the Need for a Cooperative Approach

Over the past decades, Canadian defence planners have increasingly viewed the North and Arctic as a vital area of operations.¹⁶⁵ Russia's belligerent foreign policy, recently exemplified by its invasion of Ukraine, has raised

165. Geographically, the terms "North" and "Arctic" denote different areas. The North, for the purposes of this article, refers to the three Northern territories. The Arctic refers to those portions of the Arctic Circle that belong to Canada.

fears that the Canadian state has not done enough to safeguard sovereignty in the Arctic.¹⁶⁶ Canada's most recent defence white paper, *Strong, Secure, Engaged*, warns that “[c]limate change, combined with advancements in technology, is leading to an increasingly accessible Arctic . . . Today, state and commercial actors from around the world seek to share in the longer term benefits of an accessible Arctic.”¹⁶⁷ In turn, this increased activity will bring “increased safety and security demands . . . to which Canada must be ready to respond”.¹⁶⁸ Canadian defence planners recognize the need to prioritize Arctic security and have recommended that the Canadian military increase its security presence both in the North and the Arctic. For example, the Royal Canadian Navy has acquired Arctic and Offshore Patrol Ships, which can conduct armed presence and surveillance operations in the Arctic. These ships can operate in the Arctic between July and October and navigate “first-year ice of 120-centimeter thickness”.¹⁶⁹ They can sustain operations for up to four months.¹⁷⁰ Moreover, the long-delayed Nanisivik Naval Facility on Baffin Island is set to open in 2024.¹⁷¹ Among other functions, the facility will supply marine diesel to Royal Canadian Navy and Canadian Coast Guard vessels during the summer shipping season.¹⁷²

The Canadian military suffers from a capability gap in the North, however. Canada is a defence laggard and spends only 1.39% of its GDP on defence, which is well below the 2% target that the North Atlantic Treaty Organization has articulated.¹⁷³ Simply put, the Canadian military is not yet fully prepared to assert sovereignty in the North and Arctic, although *Strong, Secure, Engaged* articulates important targets and guiding principles. To take the example of the Nanisivik Naval Facility, Lieutenant-Commander Ryan

166. Sidney Cohen, “As Russia escalates assault on Ukraine, N.W.T. MLA asks for assurances about Arctic security”, *CBC News* (4 March 2022), online: <cbc.ca> [perma.cc/7NTP-QRCP].

167. *Strong, Secure, Engaged*, *supra* note 66 at 51.

168. *Ibid.*

169. Canada, Department of National Defence, “Arctic and offshore patrol ships” (last modified 8 February 2023), online: <canada.ca> [perma.cc/M9KK-5SB5].

170. *Ibid.*

171. “Arctic naval refuelling station set to open in 2024, 9 years behind schedule”, *CBC News* (19 January 2023), online: <cbc.ca> [perma.cc/AQM3-BQDY].

172. Ryan Bunt, “Long-Term Feasibility of the Nanisivik Naval Facility”, *Canadian Forces College* (2021) at 8, online (pdf): <cfc.forces.gc.ca> [perma.cc/UWP8-L8XD] [Bunt].

173. Murray Brewster, “Canada increasingly isolated as allies pledge more military funding in response to Ukraine invasion”, *CBC News* (8 March 2022), online: <cbc.ca> [perma.cc/4VML-E75C]. See North Atlantic Treaty Organization, “Funding NATO” (last modified 27 September 2023), online: <nato.int> [perma.cc/M6ZP-L695].

Bunt has argued that the facility poses several drawbacks.¹⁷⁴ The facility does not offer benefits to the regional economy. The lack of a jet-capable runway at the facility “limits the ability to support short notice delivery” of supplies.¹⁷⁵ Bunt argues that the facility should only be considered a “short-term solution” to the Canadian Armed Forces’ supply woes and that the facility should function as a “node in a much larger port infrastructure network”.¹⁷⁶ A better long-term solution, Bunt concludes, would involve adding a ship-refueling capability to the port in Iqaluit, “leveraging” the port in Churchill, and/or funding a new port on Tuktoyaktuk.¹⁷⁷ The Canadian Armed Forces have a long way to go in ensuring a robust and meaningful presence in the North and Arctic.

In strengthening Arctic and Northern defence, the Canadian executive branch will have to work closely with Indigenous peoples. Given the capability gap in the North, Canadian defence planners have little choice but to take a cooperative approach to Northern defence that leverages Indigenous know-how and actively engages Indigenous peoples. Indeed, the Canadian government has already highlighted the need for collaborative defence. The government’s *Arctic and Northern Policy Framework*, which articulates the Canadian government’s desire to take a “new” approach towards the region, states that the “Canadian Armed Forces will . . . continue to deepen its extensive relationships with Indigenous governments, organizations and Northern communities”.¹⁷⁸ Other executive branch organizations, from Environment and Climate Change Canada to the Department of Fisheries and Oceans, will continue to work with “Indigenous governments to build partnerships to collaboratively manage shipping in the Arctic and the North”.¹⁷⁹

Strong, Secure, Engaged, which approaches the North from a narrower, defence perspective, also places a premium on collaboration with Indigenous peoples. The white paper states: “As Indigenous communities are at the heart of Canada’s North, we will also work to expand and deepen our extensive relationships with these communities” by, for example, “engaging local populations as part of routine operations and exercises”.¹⁸⁰ Article 30(2)’s requirement of prior and effective consultation is thus consistent not only with the Canadian legal system’s duty-to-consult framework but also with the aims of the Canadian government in the North. Article 30(2) harmonizes with the Canadian government’s desire and plan to take a new, consultative approach to Northern defence.

174. Bunt, *supra* note 172 at 9.

175. *Ibid.*

176. *Ibid.*

177. *Ibid* at 14.

178. See *Arctic and Northern Policy Framework*, *supra* note 67 at 76. See also *ibid* at 4.

179. *Ibid* at 77.

180. *Strong, Secure, Engaged*, *supra* note 66 at 80.

B. Crafting Status-of-Forces Agreements with Indigenous Peoples

How can the Canadian government best ensure compliance with the spirit and letter of article 30? Rather than wait for court challenges to mount, the Canadian government should take a proactive approach towards article 30, faithfully implementing and in some cases exceeding its requirements. First, the Canadian government should closely consult with Indigenous peoples in the North and articulate agreements that pre-authorize and set limits upon military activities on Indigenous land or territory. Agreements between the Crown and Indigenous peoples regarding military activities would closely resemble status-of-forces agreements (SOFAs). SOFAs are international agreements and can be multilateral or bilateral in scope; they set out the conditions under which military personnel deployed in foreign countries operate and often set out the legal regime that applies to military personnel serving overseas.¹⁸¹ Canadian defence planners already have experience in crafting SOFAs and would not face much trouble in adapting such agreements to the Indigenous context. Canada's duty to consult in good faith under the honour of the Crown will also ensure that the terms of SOFAs will not be detrimental to Indigenous peoples.

On several occasions, the Canadian government has already had to negotiate the conditions under which military activities can occur on Indigenous land. Various modern treaties between the Crown and Indigenous peoples specify the terms of defence access to Indigenous land.¹⁸² The *Nisga'a Final Agreement (Nisga'a Agreement)* is a good example.¹⁸³ The *Nisga'a Agreement* stipulates that Canadian Armed Forces personnel, police officers appointed under federal or provincial legislation, and other agents of "Canada or British Columbia" may "enter, cross, and stay temporarily on Nisga'a Lands to deliver and manage programs and services, to carry out inspections under law, to enforce laws, to carry out

181. See e.g. Exchange of Notes Between Canada and the United States of America Constituting an Agreement Relating to the Application of the NATO Status of Forces Agreement of June 19, 1951, to the United States Forces in Canada Including Those at the Leased Bases in Newfoundland and at Goose Bay, 28 April 1952, CTS 1952 No 14.

182. See e.g. *Nunavik Inuit Land Claims Agreement*, 1 December 2006, ss 5.3.30.1, 12.3.8, online (pdf): <rcaanc-cirnac.gc.ca> [perma.cc/RMH3-NAEU], enacted by the *Nunavik Inuit Land Claims Agreement Act*, SC 2008, c 2; the *Inuvialuit Final Agreement*, 5 June 1984, enacted by the *Western Arctic (Inuvialuit) Claims Settlement Act*, SC 1984, c 24; and the *Labrador Inuit Land Claims Agreement*, 22 January 2005, enacted by the *Labrador Inuit Land Claims Agreement Act*, SC 2005, c 27.

183. *Nisga'a Final Agreement*, May 4 1999, online (pdf): <nkn.ca> [perma.cc/K6G6-9AQ5] (signed by British Columbia and the Nisga'a Nation on 27 April 1999, and by Canada on 4 May 1999, and as enacted by the *Nisga'a Final Agreement Act*, SBC 1999, c 2, and the *Nisga'a Final Agreement Act*, SC 2000, c 7).

the terms of this Agreement, and to respond to emergencies”.¹⁸⁴ In addition, the *Nisga'a Agreement* does not “limit the authority of Canada or the Minister of National Defence to carry out activities related to national defence and security, in accordance with federal laws of general application”.¹⁸⁵ In either situation, the relevant state authority will give reasonable notice of entry “before the entry if it is practicable to do so” or “in any event, as soon as practicable after the entry”.¹⁸⁶

The *Nisga'a Agreement* terms do not accord fully with article 30. Article 30(2) requires prior consultation, whereas the *Nisga'a Agreement* allows reasonable notice after the entry of state personnel onto Indigenous territory. Moreover, article 30(1) establishes a general ban on military activity upon Indigenous territory, whereas the *Nisga'a Agreement* allows defence activities for a broader set of reasons. Despite the differences between the *Nisga'a Agreement* and the article 30 standard, it must be emphasized that the *Nisga'a Agreement* constitutes an example of self-determination in action. Article 30(1) states that military activities are not to take place in the lands or territories of Indigenous peoples unless justified by a relevant public interest or otherwise freely agreed to or requested by the Indigenous peoples concerned. The *Nisga'a Agreement* represents the Nisga'a people's free agreement under article 30(1). The Nisga'a are free to articulate limitations on Crown military activity on their lands that are less stringent than those articulated in article 30. In addition, the *Nisga'a Agreement* example demonstrates that the Canadian government already has extensive experience in negotiating the conditions under which military activities can occur on Indigenous territory. Thus, it would be neither disruptive nor impossible for the Crown to forge SOFAs with Indigenous peoples.

To implement article 30, the Crown should proactively draw up SOFAs with Indigenous peoples who live in the North and place parameters on military activities on Indigenous land. For example, the Crown and an Indigenous people might agree that in the case of a rapidly crystallizing security threat, deep consultation is not required and instead the government need only make a good-faith effort to appraise the local community of the situation and to incorporate any concerns that the local community raises. Or, an Indigenous community might decide to pre-approve future Canadian Armed Forces training exercises on its territory, so long as Canadian troops avoid certain cultural sites on Indigenous land and employ blank rounds rather than live ammunition. While courts might not treat such agreements as dispositive if an Indigenous community launches an article 30 challenge, they would interpret

184. *Nisga'a Final Agreement*, *supra* note 183, ch 6, s 15.

185. *Ibid.*, ch 6, s 17.

186. *Ibid.*, ch 6, s 16.

these agreements as persuasive authority, as the agreements set out the aims and expectations of “well-resourced and sophisticated parties”.¹⁸⁷

In crafting these SOFAs, Crown officials must treat Indigenous peoples as equal partners. Given the diversity of Indigenous peoples in Canada, it is inevitable that different Indigenous peoples will express different “conceptions of security”; as one observer has noted, there is not “a single northern or Indigenous conception of what security means”.¹⁸⁸ The Inuit-Crown Partnership Committee provides a good example of how the Crown and Indigenous people can maintain an ongoing conversation on shared security priorities. In April 2022, the Department of National Defence formally joined the Committee.¹⁸⁹ Since then, the Committee has “initiated a work plan for its newly established priority area on sovereignty, defence, and security”. Officials from the Canadian Armed Forces and Department of National Defence regularly meet with officials from the Inuit Tapiriit Kanatami, the national Inuit advocacy organization.¹⁹⁰ The extent to which the Crown will listen to and cooperate with its Inuit partners remains to be seen. In the meantime, however, Indigenous peoples might draw organizational lessons from the Committee as they advance their security priorities with the Crown.

This pan-Northern consultation process would undoubtedly lead to closer engagement between the Crown and Indigenous peoples over military matters. By canvassing various Indigenous peoples’ complaints and recommendations, the Canadian government would gain a better sense of how to conduct military operations in the North and of how to best leverage the collective knowledge and experience of Indigenous peoples. Canadian defence

187. The Supreme Court of Canada has distinguished between modern comprehensive treaties and historic treaties, noting that the former are products of “lengthy negotiations between well-resourced and sophisticated parties”: *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 9. A court might analogize a status-of-forces agreement between the Crown and an Indigenous community to a modern comprehensive treaty.

188. Will Greaves, “Security Challenges of Climate Change for Northern Indigenous Communities & Resolving Boundary Issues in the Arctic” (7 November 2022), online: <cdainstitute.ca> [perma.cc/D67W-LLCZ].

189. Canada, Department of National Defence, “Indigenous Relations” (6 June 2022), online: <canada.ca> [perma.cc/2B6P-ZJLP].

190. P Whitney Lackenbauer & Ryan Dean, “‘Cooperation in the Age of Competition’: The Arctic and North American Defence in 2022” (12 December 2022) at 2, online (pdf): <naadsn.ca> [perma.cc/3XWL-RAQR].

planners could well find in the case of certain Indigenous peoples that talks ought to occur regularly, rather than as a one-off event.¹⁹¹

One potential difficulty for the Crown lies in determining the identity of the relevant Indigenous peoples. With whom should the Crown enter into SOFAs? As previously discussed, UNDRIP speaks of Indigenous peoples without clearly defining the term.¹⁹² Thankfully, multiple scholars have studied the issue of identification or delineation from a Canadian perspective. Karen Drake has noted the difficulty of delineating the relevant rights-holding collective; she writes that the “manner of identifying the proper rights-holder can differ between different Indigenous peoples” and that “[e]ven within a single Indigenous people, the identity of the rights-holder can vary according to context and shift over time.”¹⁹³ Paul Chartrand suggests that the “recognition of distinct nations—whether foreign nations or domestic Aboriginal nations—has always been an exercise of the royal prerogative exercised by the executive arm of government, not by the judiciary.”¹⁹⁴ In delineating the identity of the relevant Indigenous people, the executive branch must not act unilaterally.¹⁹⁵ Drake suggests that one factor that will aid the executive branch in determining the identity of an Indigenous people is whether the Indigenous people in question already enjoy the recognition of other Indigenous peoples.¹⁹⁶ In articulating SOFAs with Indigenous peoples, the Crown must not employ divide-and-conquer tactics, but must instead ensure that it is negotiating with the appropriate collective.

C. Article 30 and Allied Military Activities

Finally, Canadian defence planners cannot sidestep article 30's requirements by launching allied military activities on Indigenous land. Due to the integration of Canadian and American defence and the operation of the North American Aerospace Defence Command, American military personnel regularly deploy to the Canadian North. Furthermore, Canada hosts allied

191. The Supreme Court of Canada has expressed a preference for a process of ongoing consultation: “As the post-*Haida Nation* case law confirms, consultation is ‘[c]oncerned with an ethic of ongoing relationships’ and seeks to further an ongoing process of reconciliation by articulating a preference for remedies ‘that promote ongoing negotiations’”: *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 38 [footnotes omitted].

192. See e.g. *UNDRIP*, *supra* note 2, art 1.

193. Karen Drake, “A Right Without a Rights-Holder is Hollow: Introduction to OHLJ’s Special Issue on Identifying Rights-Bearing Aboriginal Peoples” (2020) 57:1 Osgoode Hall LJ iii at v.

194. Paul Chartrand, “Rethinking the Doctrine of Aboriginal Rights: The Métis Cases” (2020) 57:1 Osgoode Hall LJ 173 at 175.

195. Drake, *supra* note 193 at xxxiv.

196. *Ibid* at xxxv.

training exercises involving not just the United States, but also other liberal democratic allies. *Strong, Secure, Engaged* highlights Canada's need to closely collaborate with "select Arctic partners, including the United States, Norway and Denmark, to increase surveillance and monitoring of the broader Arctic region".¹⁹⁷ In 2020, for example, Danish, French, and American naval vessels joined Canadian ships for Operation Nanook, the Canadian military's annual northern sovereignty exercise.¹⁹⁸ Canada cannot go it alone in the Arctic, largely because of the capability issues highlighted above, and will continue to collaborate closely with its allies. As such, allied military exercises may occur on Indigenous land. Indeed, it would be wise to hold training exercises on Indigenous land; Canadian defence planners need practice in collaborating with Indigenous peoples during a simulated security crisis. This is because, in an actual security crisis, successful coordination and collaboration between government authorities and Indigenous peoples may be the key to success.

Critically, however, Canadian defence planners must ensure that allied military activities comply with article 30. In advance of and during an allied training exercise that takes place on Indigenous land, the Canadian Armed Forces must ensure that allied troops comply with article 30. Canadian defence planners must ensure that the entire military activity—and not just the Canadian force element of the military operation—conforms to article 30(1)'s restrictions and article 30(2)'s consultation requirements. The Crown should inform the affected Indigenous people that foreign troops plan to operate on Indigenous land and discuss potential complications and concerns. In addition, the Crown might decide, when crafting a SOFA with a strategically situated Indigenous people, to discuss the potential for future allied training exercises on that people's territory.

V. Article 30 and Self-Determination

I have argued that article 30 is unlikely to bind the Canadian state tightly and may well catalyze a more collaborative and successful national defence strategy. Under international law, article 30 constitutes a general, rather than a blanket, ban on state military activities on Indigenous land. There are three exceptions to the article 30(1) general ban: where a relevant public interest exists, the Indigenous people have requested the operation, or the Indigenous people have agreed to the operation. Article 30(2) holds that states must undertake prior and effective consultation with the relevant Indigenous people before availing themselves of the exceptions under article 30(1). Given

197. *Strong, Secure, Engaged*, *supra* note 66 at 90.

198. Murray Brewster, "Allies testing naval readiness in Canada's Arctic", *CBC News* (4 August 2020), online: <cbc.ca> [perma.cc/LQ83-NY8B].

the lack of jurisprudence on article 30, it will fall to national and regional courts as well as international bodies to fill out article 30's meaning. In the Canadian context, I have argued that Parliament should implement article 30 through enabling legislation. Second, once implementation occurs, Canadian courts will be able to fit article 30 into the domestic legal order. Third, the executive branch should take a proactive approach to article 30 implementation, by forging SOFA-like agreements with Indigenous peoples and ensuring that allied military activities on Canadian Indigenous territory comply with article 30. This will proactively buttress the Canadian government's "new" approach to the North and foster a more collaborative defence strategy.¹⁹⁹

Like the rest of UNDRIP, article 30 treats Indigenous peoples not as servants of a central state government, but as sophisticated partners in the national project. UNDRIP affirms that Indigenous peoples enjoy the right to self-determination and articulates the concrete ways in which national states can respect that right. Ultimately, "[s]elf determination is the river in which all other rights swim."²⁰⁰ At the same time, UNDRIP cautions that no state, people, group, or person can authorize or engage in action which would dismember or impair the territorial integrity or political unity of sovereign and independent states.²⁰¹ Article 30 exemplifies this finely-tuned balance. Although article 30 does not completely ban the national state from undertaking military activities upon Indigenous land or territories, article 30 does envision Indigenous peoples as capable of self-government and as partners with whom the Crown must consult in good faith. If Canada hews to the text of and purposes underlying article 30, it will not only forge a more robust defence strategy, but also usher in a new and more productive era of Crown-Indigenous relations.

199. See *Arctic and Northern Policy Framework*, *supra* note 67, Foreward.

200. See Craig Scott, "Indigenous Self-Determination and Decolonization of the International Imagination: A Plea" (1996) 18:4 *Hum Rts Q* 814 at 814.

201. See *UNDRIP supra* note 2, art 46(1).