The Potential Implications of United Nations Declarations on the Rights of Indigenous People (UNDRIP): A Case Study of the *Tsilhqot'in* Nation and the Indigenous People of Biafra

by

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LLB (Hons), Chukwuemeka Odumegwu Ojukwu University (2017)

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We acknowledge with respect the lək̓ʷəŋən peoples on whose traditional territory the university stands and the Songhees, Esquimalt and W̱SÁNEĆ peoples whose historical relationships with the land continue to this day.

Supervisory Committee

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Abstract

This thesis explores the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and its implications for resolving Indigenous issues. This thesis focuses on Aboriginal title issues in British Columbia and the self-determination issues in Nigeria to consider the application of UNDRIP in different political and geographic contexts. It is important to look at both jurisdictions because of the historical similarities they share as well as the distinctions between them. Each nation has a particular history and experience with British colonization that has shaped how they interact with Indigenous nations. Yet Canada and Nigeria have responded differently to their own colonial histories. Interestingly, in 1969, Canada sent aid to provide food for the Biafrans in Nigeria during the Nigerian Civil War of 1967 – 1970. The incident will be discussed in-depth in this thesis. Furthermore, in this thesis, I argue that the application of UNDRIP can enable for the elimination of the aboriginal title test to which Indigenous peoples in Canada are subjected in Canadian courts. I argue that the courts should apply UNDRIP principles in resolving aboriginal title claims. I also argue that Nigeria should adopt and implement UNDRIP to enable the Indigenous People of Biafra (IPOB) to exercise their right to self-determination. UNDRIP provides a form of recognition for Indigenous nations that leaves state territorial integrity in place. As such, IPOB exercise of the right to self-determination will not threaten Nigeria's territorial integrity in accord with article 46 of UNDRIP.

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I wouldn't have been able to strongly engage with the stories of the Indigenous peoples in Canada if I didn't take the summer course "Indigenous Methodology, Law and Practice" which was taught by Professors Val Napoleon, Rebecca Johnson, and Hadley Friedland under the Indigenous Law Research Unit (ILRU). I also want to thank Professor Sara Ramshaw for her constant support, and her insights when teaching a full course so relevant to my research. I am glad to have been taught by these 4 powerful women.

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I want to thank my parents, for their undying love, prayers, and encouragement to ensure that I got the best. Family is very important in our lives, and this is why I would not fail to mention my siblings, Karen, Chelsea, Ralli, and Mc.Anthony for keeping me company despite the distance. To Aunt Cordelle, your love and motivation kept me going. Finally, to Ezra, thank you for believing in me and being my safe space.

Preface

This dissertation is original, unpublished, independent work by the author, Summer Somtochukwu Okibe.

Dedication

This thesis is dedicated to God for his undivided grace, love, and mercy upon my life.

Self-location and Background

Figure I: The Biafran Flag (photo uploaded by Chizoba Ikenwa)

The symbol of the flag of the Republic of Biafra signifies resilience. The red colour on the flag represents the blood of the Igbos/Biafrans who were massacred in Northern Nigeria and during the Nigeria-Biafra War of 1967. While the black colour represents the mourning and remembrance of the fallen heroes during the Nigeria-Biafran War, green reflects prosperity. Finally, the yellow/gold sun stands for a glorious future. The 11 rays of the sun represent the provinces in Biafra. I am proud to come from one of the provinces in Biafra.

My full name is Summer Somtochukwu Okibe. I am Igbo and my native name; Somtochukwu means Praise God with me. I am from Awgu Local Government Area, Imeama

village in Mgbowo Town in Enugu state. When Biafra was alive, Enugu was the Capital. The Igbos are the most prosperous but most discriminated tribe[1] in Nigeria.[2] In the 1960s, the Igbos who were living in the North were massacred. One million Igbos died as a result. A few months later, Chukwuemeka Odumegwu Ojukwu (an Army Colonel and leader of Biafra) declared the Eastern part of Nigeria (Igbos) separate from Nigeria. It was called the "Republic of Biafra." This country existed for three years, from 1967 – 1970. This is because Nigeria waged war against the Biafrans and ended up killing close to three million Biafrans. After the war came to an end in 1970, the Igbos lost their lands, properties, and natural resources. I only heard about the war from my grandfather when I was 12 years old. It was not taught in school. I assumed I would be taught when I finished high school.

While I was in high school, I realized I wanted to be a Lawyer and advocate for the rights of the Indigenous People of Biafra in order to ensure that the Nigerian government acknowledges and respects my ancestors and my people. My dad wanted me to be a doctor because he felt fighting for Biafra was a dead end cause, but I persisted. I finally wrote an entrance exam and gained admission to study Law at Chukwuemeka Odumegwu Ojukwu University with the hope of achieving my goal of advocating for Indigenous People of Biafra and increasing my knowledge of the events that occurred during the war. When I got to the university to study Law, I realized that Indigenous Law was not taught in any university in Nigeria. The tragic incidents that occurred 55 years ago were never taught in schools. Veterans involved during the war, survivors and stories

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[1] In Nigeria, tribes are referred to the identity of a group of people. They are identified by their language and traditions. In most cases, tribes and ethnic groups are used interchangeably. There are 3 major tribes in Nigeria – Igbo, Hausa, and Yoruba. For more information, see <https://theculturetrip.com/africa/nigeria/articles/a-guide-to-the-indigenous-people-of-nigeria/> [perma.cc/Q96F-5BH4]

[2] Lawrence Okwuosa, Chinyere T Nwaoga & Favour Uroko, "The post-war era in Nigeria and the resilience of Igbo communal system" (2021) 13:1 Jàmbá Journal of Disaster Risk Studies, online: <http://www.jamba.org.za/index.php/JAMBA/article/view/867> [perma.cc/U9ML-5SSX]

of the Igbos were not made available in any archive. To make matters worse, my school was still practicing the traditional methods of assigning a project topic to students.

I was unable to write on the issues of Biafra. I thought all that would change when I got to the Nigerian Law School to get licensed to practice law in Nigeria. I was still disappointed. After my Nigerian Law School experience, I got a job as a legal officer at the Economic of West African States (ECOWAS) Parliament. I was charged with the responsibility of researching terrorism attacks in Mali and other African countries. I was not satisfied with my role in the office because I could not study the Indigenous issues in South Africa that I am so passionate about. Therefore, I decided to work in a law firm that encouraged its lawyers to conduct research and publish articles during their own time. Though this firm provided the space for its lawyers to conduct research freely, they did not enable me to publish on topics of my own choosing. Instead, the founding partner of the law firm provided topics for me. Unsurprisingly, none were related to Indigenous issues. The reason was clear; not many people care about the Indigenous People of Biafra in Nigeria.

As a result of this gap in our education system in Nigeria, I started reading about Indigenous Law and issues in other countries, particularly Canada. When I tell my Nigerian Professors and friends that I am researching Indigenous Law, some are shocked while some make mocking statements. Some have asked me how and why I decided to write on something I have no educational background about from Nigeria? But I insisted on following my dreams and applied to the Faculty of Law at the University of Victoria for a master's research on Indigenous Law. This work has enabled me to study Indigenous legal issues in Canada. I decided to take up an analysis of the ground-breaking *Tsilhqot'in* case in British Columbia in order to determine if this case could help illuminate pathways for the Indigenous People of Biafra in Nigeria.

I started taking short online courses such as "*Indigenous Canada*" and "*Worldview of Indigenous Education*" to begin to grasp a bit more about the experiences and history of Indigenous peoples in Canada. Every passing day I have this constant urge to read and engage with the stories of Indigenous peoples. Due to my undying zeal, during the summer 2021, I decided to take the Indigenous Law Method and Practice course taught at the Indigenous Law Research Unit at the University of Victoria. I learned many things from three renowned professors – Rebecca Johnson, Val Napoleon, and Hadley Friedland. One of the things I learned was how to record stories told by Indigenous peoples, which made me ponder how I could conduct interviews in Indigenous communities without angering Indigenous peoples.

As I mentioned, I am of Igbo and English descent. I take pride in the fact that my grandfather was a believer of the Indigenous People of Biafra before he died. I understand that my experience and worldview are very different from those of Indigenous peoples and I expect to be challenged. One of the challenges I faced occurred in the Indigenous Methodology class I took during summer 2021. I was worried that I might say the wrong things regarding Indigenous peoples. Thankfully, Professor Val Napoleon encouraged us that no one can say they are fully knowledgeable on Indigenous issues. This was such a relief as I am new to learning about Indigenous laws in Canada and Nigeria. This thesis is a record of part of my own journey in thinking through the revitalization of Indigenous law in these two nations.

CHAPTER ONE

HISTORY OF UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (UNDRIP)

Introduction

The Indigenous peoples in Canada have made tremendous steps in fighting for their rights before they were recognized and respected under the United Nations Declaration on the Rights of the Indigenous People (UNDRIP). Yet the relationship between Indigenous nations and the state is not fully repaired. The Canadian government committed many harms against Indigenous peoples that have not been addressed and healed. Some positive steps have been taken to reform relations with Indigenous peoples in Canada, including: (i) the Truth and Reconciliation Commission (TRC) that revealed many of the past harms by the Canadian government against Indigenous peoples, (ii) the adoption of UNDRIP in Canada in 2016, (iii) the adoption and implementation of UNDRIP into the laws of British Columbia in 2019, and (iv) the implementation of UNDRIP into the Canadian legal system in 2021. In the case of Nigeria, it is doubtful that the Nigerian government will take steps to recognize and respect the Igbos in my lifetime . Nigeria was one of the countries that were absent in 2007 to vote for or against the adoption of UNDRIP.[3] Since 2007, Nigeria has not adopted nor implemented UNDRIP into its laws. While Canada initially refused to sign on to UNDRIP unconditionally, public will shift their position. It is my hope that the same can be true for Nigeria in the future.

By looking at Canada and Nigeria in a comparative frame enables us on the one hand to see the gap in the Canadian judicial system and how UNDRIP can help fill up the gap. On the

[3] United Nations et al, "*State of the world's indigenous peoples: implementing the United Nations declaration on the rights of indigenous peoples"* (2019) vol. 4 at 3. Online: Social UN <https://social.un.org/unpfii/sowip-vol4-web.pdf> [perma.cc/X9VY-C9ZN]

other hand, by looking at the innovations and steps that Canada took in resolving self-determination issues and understand how UNDRIP can resolve the self-determination issues in Nigeria. This is because the colonial history of Nigeria differs in numerous ways from how colonialism and the subjugation of Indigenous nations has occurred in other parts of the world such as Canada, New Zealand, Australia, and the United States.

The Nigerian government has not attempted to reconcile with the Igbos/Biafra; instead, the Igbos are continuously oppressed and deprived of making political decisions. Recently, the federal government of Nigeria tagged the Indigenous People of Biafra (IPOB) as a terrorist group simply because the Biafrans disagree with how they are being treated in their country.[4]

In order to address these issues stated above, my thesis poses the following questions:

- Can DRIPA remove a barrier in Indigenous self-determination by enabling Indigenous nations to overcome the need to prove Aboriginal title in courts, as was necessary in the *Tsilhqot'in* decision?
- How can UNDRIP address the IPOB's self-determination issues in Nigeria?

Before these questions can be answered, this thesis will discuss the potential impacts of UNDRIP for Indigenous nations. Then, I will consider the Tsilhqot'in decision because this landmark Supreme Court decision was the first time a nation-state made an official declaration of aboriginal title. It is also important that the Tsilhqot'in case is examined because it is considered the most progressive in Canada and across the globe thereby making it a great case study in how

[4] Emmanuel S. Nwofe, "The Internet and Activists' Digital Media Practices: A case of the Indigenous People of Biafra Movement in Nigeria" (2019) at 26, online (pdf) *IAFOR J Media Commun Film*. <http://iafor.org/archives/journals/iafor-journal-of-media-communication-and-film/10.22492.ijmcf.6.1.02.pdf> [perma.cc/4C3A-L4PR]

current structures enable (or don't enable) a recognition of Indigenous political authority and territorial rights.

A. History of UNDRIP

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is an international instrument adopted by the United Nations on September 13, 2007,[5] to enshrine (according to Article 43)[6] the rights that "constitute the minimal requirements for the survival, dignity and well-being of the indigenous peoples of the world." The Declaration is the product of nearly 25 years of deliberation by the U.N. member states and Indigenous groups. The UNDRIP protects collective rights that may be ignored in other human rights charters that emphasize and safeguards the individual rights of Indigenous people.[7] It is also crucial that emphasis is laid on what I call the 'legal backing' of the rights of Indigenous peoples. I am of the opinion that the Indigenous peoples' rights should not be restricted to a particular right because the provisions of UNDRIP cut across the many vital rights of Indigenous peoples. This is why the adoption of UNDRIP in 2007[8] is a breakthrough for the Indigenous peoples.

The 46 articles of UNDRIP[9] declares that "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law." The Declaration goes on to guarantee the rights of Indigenous peoples to enjoy and freely practice their cultures, religions, and languages. As a result, it will

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[5] UN Declaration, supra note 3.
[6] *Ibid*, UN Declaration art. 43.
[7] Sheryl R Lightfoot, *Global indigenous politics: a subtle revolution* (2016).
[8] UN Declaration, supra note 3.
[9] *Ibid*, art. 46.

develop and strengthen their economic, social, and political institutions. UNDRIP acknowledges that Indigenous peoples have the right to be free from discrimination and the right to a national identity.

Significantly, in Article 3, the UNDRIP[10] acknowledges and respects Indigenous peoples' right to self-determination. The right to self-determination includes the right "to freely determine their political status and freely pursue their economic, social and cultural development." Article 4 affirms Indigenous peoples' right "to autonomy or self-government in matters relating to their internal and local affairs,"[11] and Article 5 protects their right "to maintain and strengthen their distinct political, legal, economic, social and cultural institutions."[12] Article 26[13] states that "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired," and it directs states to give legal recognition to these territories. The Declaration does not override the rights of Indigenous peoples contained in their treaties and agreements with individual states, and it commands these states to observe and enforce the agreements.

In 1982, the UN Special Rapporteur of the Sub-commission on the Prevention of Discrimination and Protection of Minorities, José R. Martinez Cobo, released a study about the systemic discrimination faced by Indigenous peoples worldwide. His findings were released as the "Study of the Problem of Discrimination against Indigenous Populations."[14] The UN Economic and Social Council (UNECOSOC) responded to these findings by creating the Working Group on Indigenous Populations (WGIP), which was comprised of five independent experts as well as

[10] UN Declaration, supra note 3, art. 3.
[11] *Ibid*, art. 4.
[12] *Ibid*, art. 5.
[13] *Ibid*, art. 26.
[14] To read and track the reports submitted by the UN Special Rapporteur, see <www.un.org/development/desa/indigenouspeoples/publications/2014/09/martinez-cobo-study/> [perma.cc/6GXS-HCYU]

Indigenous advisors, in order to focus exclusively on Indigenous issues worldwide. The role of WGIP was to make recommendations to the Commission of Human Rights through the Sub-commission.[15]

The representatives of Indigenous peoples worldwide were consulted, and the WGIP began to draft a declaration of Indigenous Rights in 1985. The initial draft was developed over eight years. It was submitted in 1993 to the Sub-commission on the Prevention of Discrimination and Protection of Minorities (now known as the Sub-commission on the Promotion and Protection of Human Rights), who approved it in 1994. Upon its approval, the draft declaration was sent to the Commission of Human Rights, which established another working group consisting of human rights experts and over 100 Indigenous organizations.[16] The draft declaration was subject to a series of reviews to assure U.N. member states that it remained consistent with established human rights and did not contradict nor override them.

The UNDRIP deals with a wide spectrum of Indigenous rights, a consideration much debated during initial discussions. Due to presumed competing interests, there was increased tension between U.N. member states and Indigenous peoples' representatives during the drafting. Many U.N. member states worried that accepting the UNDRIP as drafted would undermine their own political autonomy. Of particular concern were the articles affirming Indigenous peoples' right to self-determination. However, many Indigenous representatives refused to change the draft, arguing that the document simply extended to Indigenous peoples the rights already guaranteed to colonialists.[17] The authors of the UN Declaration sought to break free of this colonial mindset, not

[15] James Sa'ke'j Youngblood Henderson, "Indigenous Diplomacy, and the Rights of Peoples: Achieving U.N. Recognition," (Saskatoon: Purich Publishing, 2008), at 119.
[16] United Nations, "History (brief)." <www.un.org/development/desa/indigenouspeoples/unpfii-sessions-2.html> [perma.cc/897K-N6LX]
[17] Henderson, supra note 15 at 70.

reinforce it. As human rights lawyer James Sa'ke'j Youngblood Henderson observes, "(Member states] worried about the implications of Indigenous rights, refusing to acknowledge the privileges they had appropriated for themselves."[18] The Working Group's final draft represented a compromise between UN member states and Indigenous representatives (see, for example, Article 46, which, among other things, protects the political unity of an existing state). In 2006, the draft was accepted by the UN Human Rights Council, and the following year, it was adopted by a majority of the UN. General Assembly.

The UNDRIP was adopted by 144 countries, with 4 countries voting against it and 11 absentees. The four countries that balloted against the adoption of UNDRIP were Canada, the USA, New Zealand, and Australia. Each nation argued that the level of autonomy recognized for Indigenous peoples in the UNDRIP was problematic and would undermine the sovereignty of their own states, particularly in the context of land disputes and natural resource extraction. Some governments claimed that the UNDRIP might override existing human rights obligations, even though the document itself explicitly gives precedence to international human rights.[19]

Canada, the United States, Australia, and New Zealand all made connections to their track records in upholding human rights, including the recognition of Indigenous rights within their own national governance systems, as a justification for their reluctance to endorse the UNDRIP. Canada has long before now upheld that section 35 of the Constitution Act[20] protects Aboriginal rights. However, many agreed that much work needs to be done internationally to protect the rights of Indigenous peoples. To this end, critics questioned the four nations' claims to fulfill international standards. In their defence, they stated that many nations that voted and signed the UNDRIP do

[18] *Ibid*.
[19] UN Declaration, supra note 3, art. 46.
[20] The Constitution Act, 1982, being schedule B to the Canada Act 1982 (UK), 1982, c 11 s 35.

not uphold these minimum standards. For instance, someone like Ojibwe political scientist Sheryl Lightfoot observed and narrated that such compliance is often concentrated in "soft rights," such as rights to language and culture, while systematically denying "hard rights," such as rights to land.[21]

Since 2009, Australia and New Zealand[22] have reversed their positions and supported the Declaration. , Furthermore, the United States and Canada[23] also eventually revised their positions. For example, in November 2009, President Obama signed a presidential memorandum to begin consultations with tribal leaders, non-governmental organizations, and government representatives on how the UNDRIP may be effectively implemented in the United States. In April 2010, the United States announced that it would hold a formal review of the UNDRIP. After several months of consultations and deliberations, President Obama in December 2010 announced that the US fully endorsed the UNDRIP into their laws. While President Obama emphasized the document as aspirational, he also stated: "I want to be clear: what matters far more than words, what matters far more than any resolution or declaration, are actions to match those words."[24] Lightfoot has drawn our attention to the official announcements made by these governments referring to UNDRIP as "aspirational" or "non-binding." She warned that the governments were trying to exempt themselves from the legal responsibilities of UNDRIP.[25] Ultimately, Canada also reversed their position and adopted UNDRIP in 2016.

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[21] Sheryl Lightfoot, "Emerging International Indigenous Rights Norms and 'Over-compliance' in New Zealand and Canada," Political Science vol. 62, no. 1 (2010) at 96.
[22] See the Historical Overview of the United Nations Declaration on the Rights of Indigenous Peoples, <www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples/historical-overview.html> [perma.cc/GEW8-JZ27]
[23] *Ibid*.
[24] United States of America Government, Office of the Press Secretary, "Remarks made by the President at the White House Tribal Nations Conference." December 16, 2010. <http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference> [perma.cc/PF6T-4MJ4]
[25] Sheryl Lightfoot, "A Sea Change on the U.N. Declaration—Or Is It?" Indian Country Today, May 3, 2010. <https://indiancountrytoday.com/archive/a-sea-change-on-the-un-declaration-or-is-it> [perma.cc/77JK-LX4L]

B. History of UNDRIP in Canada

The previous section of this chapter dealt with the history of UNDRIP and how countries voted for and against the adoption of UNDRIP. Having discussed the adoption of UNDRIP by over 111 countries, the section delved into the reasons the 4 countries – Australia, Canada, New Zealand, and the USA- voted against the adoption of UNDRIP as well as covered how they subsequently reversed their positions and adopted UNDRIP. The first section aimed to draw out the historical background of UNDRIP, its importance and its relevance. This section is focused on the history of UNDRIP in Canada in particular. I will then turn to looking at the application of UNDRIP in British Columbia.

As noted, in 2007, Canada was one of the four countries that voted against UNDRIP on the grounds that the Declaration was incompatible with Canada's Constitution.[26] They further stated that the Declaration affirms only the collective rights of Indigenous peoples and fails to balance individual and collective rights or the rights of Indigenous and non-Indigenous peoples. They also argued that there was no credible legal rationale provided to substantiate these extraordinary and erroneous claims provided under UNDRIP.[27] Chuck Strahl, the then Minister of Indian Affairs, expatiated that Canada already respects Indigenous rights, as laid down in the Charter of Rights and Freedoms and the Constitution, which he said reflects a much more tangible commitment than the "aspirational" UNDRIP.[28] In March 2010, Governor General Michaëlle Jean announced that the Canadian government "will take steps to endorse this aspirational document in a manner fully consistent with Canada's Constitution and laws." The government constantly referred to UNDRIP

[26] The Constitution Act, supra note 20.
[27] "Open Letter—UN Declaration on the Rights of Indigenous Peoples Canada Needs to Implement This New Human Rights Instrument," NationTalk, May 1, 2008 <https://nationtalk.ca/story/open-letter-un-declaration-on-the-rights-of-indigenous-peoples-canada-needs-to-implement-this-new-human-rights-instrument> [perma.cc/R8TJ-DNW4]
[28] Claudia Parsons, "Canada Slammed at UN over Indigenous Rights," (May 1, 2008), online: Reuters <http://ca.reuters.com/article/domesticNews/idCAN0134751220080501> [perma.cc/QB9S-V5SY]

as an aspirational document, and this was what Lightfoot drew our attention to.[29] In the same vein, Grand Chief Stewart Philip of the Union B.C. Indian Chiefs referred to the announcement as just an illusion of support.[30]

9 years after failing to ratify UNDRIP, the Indigenous and Northern Affairs Minister Carolyn Bennett addressed the Permanent Forum Indigenous Issues at the United Nations and officially endorsed UNDRIP. Bennett did not refer to the government's qualifications, which considered UNDRIP aspirational and non-binding.[31] This announcement sparked many questions and uncertainties regarding how the federal government intends to adopt and implement UNDRIP.[32] However, this announcement by the Minister had no effect on the legal relevance of UNDRIP in Canada; the government only stated that Canada might be on a path toward reconciling with Indigenous peoples.[33] It is safe to say that Canada only adopted UNDRIP so as not to be labelled as the country that refused to stand with the Indigenous peoples. I agree with Professor Borrows, who called this an act of "political will."[34]

Canada's adoption of UNDRIP is also in line with the Truth and Reconciliation Commission's Calls to Action[35] in an attempt to reconcile with the Indigenous peoples. The TRC Call to Action 45 urges the Government of Canada to jointly develop with Aboriginal peoples a

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[29] See Lightfoot, supra note 25.
[30] See the First Nations and Indigenous Studies Program (2009) <https://indigenousfoundations.arts.ubc.ca/un_declaration_on_the_rights_of_indigenous_peoples/>
[31] John Borrows et al, eds, *Braiding legal orders: implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo, ON, Canada: Centre for International Governance Innovation, 2019) at 56.
[32] *Ibid*.
[33] *Ibid*.
[34] *Ibid*.
[35] Truth and Reconciliation Commission of Canada, Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada (Winnipeg, 2015), online: <http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf> [TRC Final Report].

Royal Proclamation of Reconciliation to be issued by the Crown. It called on the Government of Canada to:

- Adopt the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which the Government did in 2016, and implement the Declaration as the framework for reconciliation.

- Repudiate concepts used to justify European sovereignty over Indigenous lands and peoples, such as the Doctrine of Discovery and *terra nullius*.

- Renew or establish Treaty relationships based on the principles of mutual recognition, mutual respect, and shared responsibility for maintaining those relationships into the future.

- Reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements. [36]

It took Canada another 2 years to take steps in implementing UNDRIP into their laws. In 2018, a member of Parliament, Romeo Saganash, introduced Bill C-262 to implement UNDRIP into Canadian law. The bill proceeded to the Senate and passed its first reading.[37] Surprisingly, Bill C-262 ultimately died in the order paper in the senate before the 2019 federal election.[38] In December 2020, Bill C-15 was proposed to acknowledge and respect the rights of the Indigenous Peoples by implementing UNDRIP into their laws. When I started researching for my thesis, I found out that between February 2021 and April 2021, the House of Commons was still at the

[36] *Ibid* at 237.
[37] *Ibid* at xi.
[38] *Ibid*.

Introduction and First reading stage.[39] They had been unable to move forward to other stages to debate and deliberate on implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) into the Canadian legal system.

While reviewing Bill C-262 and C-15 to decipher the difference and consider whether Bill C-15 would be fruitful, I found that Bill C-15 did not explain how the government would implement all the provisions of UNDRIP. It only gave a 3-year window to implement the action plan. The implication is that the federal, provincial, territorial, and municipal governments have until December 2023 to develop an action plan that addresses injustice, combats, and eliminates all forms of violence and discrimination against Indigenous peoples, elders, youths, children, women, men, and persons with disabilities.

On June 16, 2021, the Senate voted to pass Bill C-15 into law, and on June 21, 2021, bill C-15 received Royal Assent.[40] Although many scholars see this act as a historic milestone, I refuse to applaud the government for doing what ought to have been done over 14 years ago. In the next section, I discuss the steps taken by the government of British Columbia in implementing UNDRIP into their laws. In doing so, I uncover the masquerade behind these action's mask.

I. UNDRIP in British Columbia

As I mentioned in the previous section, in British Columbia Indigenous land issues are very heated. Interestingly, British Columbia was the first province to implement UNDRIP into its law.[41] In 2019, the government of British Columbia proposed Bill C-41, the *Declaration on the Rights of*

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[39] The first reading of the Bill can be found here - "LEGISinfo - House Government Bill C-15 (43-2)", <https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=11007812>

[40] "Federal UNDRIP Bill Becomes Law." Mondaq Business Briefing, 25 June 2021, p. NA. Gale OneFile: Business, <go-gale-com.ezproxy.library.uvic.ca/ps/i.do?p=ITBC&u=uvictoria&id=GALE|A666422469&v=2.1&it=r&sid=summon>; see also, the progress report of Bill C-15 <www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=11007812>

[41] Bill C-41, *An Act to Declare the Rights of Indigenous Peoples British Columbia*, 4th Session, 41st Leg, British Columbia, 2019 (assented to 28 November 2019).

Indigenous Peoples Act (DRIPA). DRIPA is an Act to acknowledge and respect the rights of Indigenous Peoples in the province. The Legislative Assembly of the Province of British Columbia met on October 24, 2019, to deliberate on the Declaration of the Rights of Indigenous Peoples (DRIPA) into their law. After several debates and deliberations, Bill C-41 was granted Royal Assent,[42] enshrining Indigenous peoples' human rights into law on November 28, 2019. However, Bill C-41 did not create any new laws; it merely recognized the rights of Indigenous peoples provided under the U.N. Declaration within Canadian law, within the *Constitution Act* and British Columbia law.

In chapter two, I will discuss what Aboriginal title claims and proof of title were like in the province before DRIPA was enacted. However, it is important to note that to date, there has been no significant progress in relation to Aboriginal title claims and/or any compliance with Article 26 (1) of UNDRIP,[43] which provided that the Indigenous peoples have the right to the lands, territories, and resources which they have "traditionally" owned, occupied, or otherwise used or acquired. Furthermore, Article 26 (2)[44] clearly stated that Indigenous peoples have the right to own, use, "develop and control the lands, territories and resources" that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. In the same vein, Article 26 (3)[45] urged the States to give legal recognition and protection to these lands, territories, and resources.

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[42] "4th Session, 41st Parliament – Progress of Bills with Hansard Debates", online: <https://www.bclaws.gov.bc.ca/civix/document/id/bills/billsprevious/4th41st_progress-of-bills_government>

[43] UN Declaration, supra note 3, art. 26(1).

[44] UN Declaration, supra note 3, art. 26(2).

[45] UN Declaration, supra note 3, art. 26(3).

Despite UNDRIP's provisions, the government of BC has signed only a few lands claims agreements with Indigenous peoples.[46] Could it be that the government adopted and implemented UNDRIP to calm the nerves of Indigenous peoples and remove the international eye from them? I believe so. This is why we need to remove the mask from the masquerade of seeming to recognize Indigenous rights while doing very little to positively facilitate them. From my understanding, I think the government of BC is aware of their actions. They know very well that the wealth of the province depends mainly on the lands and natural resources owned by the Indigenous peoples and that British Columbia has not properly consulted Indigenous peoples on most occasions.[47] BC has stated that the adoption and implementation of UNDRIP is a form of reconciliation[48] which is a fundamental purpose of s. 35 of the Constitution Act.[49] Obviously, the government of BC has concluded that giving the Indigenous peoples complete control over their lands and natural resources would handicap the government.[50] This takes us back to the fears of Canada when they refused to adopt UNDRIP.[51] The minister of Indian Affairs asserted that the Canadian government

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[46] Christopher Alcantara, "To Treaty or Not to Treaty? Aboriginal Peoples and Comprehensive Land Claims Negotiations in Canada" (2008) Publius 38 (2): 343-369. See also <www.welcomebc.ca/Start-Your-Life-in-B-C/Understanding-B-C-s-Culture-Systems> [perma.cc/X877-JRYP]

[47] John Borrows et al, supra note 31 at 64.

[48] Draft Principles of that Guide the Province of British Columbia's Relationship with Indigenous Peoples (2017) at 2, online (pdf): Government of British Columbia <https://www2.gov.bc.ca/assets/gov/careers/about-the-bc-public-service/diversity-inclusion-respect/draft_principles.pdf>

[49] The Constitution Act, supra note 20.

[50] This statement was premediated on the fact that in the BC's Draft Action Plan that was released (June 11, 2021), the government as usual stated that the First Nations have the right to own, use, develop and control their lands. However, when the issue of Aboriginal title disputes and agreements was raised, the Action Plan did not detail the contents on how the Indigenous peoples would not be subjected to the test of Aboriginal title. See John Olynyk & Mitchell Horkoff, The B.C. Government's Draft Action Plan to Implement UNDRIP (September 3, 2021), online (blog) Lawson Lundell <https://www.lawsonlundell.com/project-law-blog/the-b-c-governments-draft-action-plan> [perma.cc/FDS5-LXP9]

[51] Stephen Harper refused to adopt UNDRIP because it is an "aspirational" and "non-legally binding document" that does not reflect the common international law nor change the Canadian laws. See Tom Flanagan, *Squaring the Circle: Adopting UNDRIP in Canada* (2020) at 4; John Borrows et al, eds, *Braiding legal orders: implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo, ON, Canada: Centre for International Governance Innovation, 2019) at 56; Gloria Galloway, "Canada drops opposition to UN indigenous rights declaration" The Globe & Mail (9 May 2016), online: <https://www.theglobeandmail.com/news/politics/canada-drops-objector-status-on-un-indigenous-rights-declaration/article29946223/> [perma.cc/W3P9-L2BP]

refused to vote for UNDRIP to be adopted because it lacked clear guidance for implementation and was in conflict with the existing Canadian Charter of Rights and Freedoms, which the government believed already protected the rights of aboriginal people.[52] The annual report given in 2020 shows that efforts were made by the government in other issues involving Indigenous peoples but that there has been no tangible decision in relation to Aboriginal title issues.[53]

C. UNDRIP in Nigeria

As mentioned, Nigeria was one of the countries that were absent the day UNDRIP was voted to recognize and acknowledge the rights of Indigenous peoples. Nigeria has neither adopted UNDRIP nor implemented UNDRIP into its laws to date. The question is why Nigeria avoiding the application of UNDRIP in its entirety? Due to the historic event that occurred in 1966 against the Indigenous People of Biafra (IPOB), there has been a rift between the Nigerian government and IPOB. Before delving into what possible reasons for the delay by the Nigerian government, I discuss the Nigerian governments' actions during the vote in 2007. A key issue is; why is Nigeria avoiding the adoption of UNDRIP? Are they threatened by the provisions of UNDRIP and the positive impacts it would have on the IPOB?

Like Canada and British Columbia, the Nigerian government has also failed to recognize Indigenous peoples in any meaningful way. The Nigeria government is also engaged in a charade in their actions involving the IPOB. They always fail to make decisions that would be beneficial to the IPOB. It seems that the government gives preferential treatment to a certain group of people, increasing IPOB's agitation to break out of Nigeria. For instance, there have been several terrorism

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[52] Canada votes 'no' as UN native rights declaration passes, September 13, 2007, online: Canada Broadcasting Corporation <www.cbc.ca/news/canada/canada-votes-no-as-un-native-rights-declaration-passes-1.632160> [perma.cc/8CF5-FJYG]

[53] "Declaration on the Rights of Indigenous Peoples Act 2020 Annual Report" Annu Rep 18 at 6. See <http://www.llbc.leg.bc.ca/public/PubDocs/bcdocs2020/715076/715076_dripa_annual_report_2020.pdf>

attacks by Boko Haram, Fulani Herdsmen[54] and "unknown gunmen" in Nigeria, which we purported to be carried out by the Northerners. The Northerners receive preferential treatment from the government to the detriment of IPOB. During these attacks, the President, Muhammed Buhari, assured its citizens that security and peace would be restored in the country. The government went as far as negotiating with these terrorists, but still, the killings and kidnappings continued. Parents of the victims resorted to paying huge sums of money to these kidnappers as ransom in exchange for their loved ones.[55] Some people were lucky to get their loved ones back in good condition, while some received the dead bodies of their loved ones—a very tragic and terrifying result. Recently, the government proposed passing a bill (Terrorism Prevention (Amendment) Bill 2021) prohibiting and criminalizing ransom payment to kidnappers.[56] Though it may seem like I have departed from the main point of this thesis which is how UNDRIP can help resolve the self-determination issues in Nigeria, I must discuss some critical factors that led to the unrest of the IPOB to constantly seek for their own governance.

The government has on many occasions labelled IPOB a terrorist group, which occurred when the IPOB started protesting and questioning the government's actions.[57] Several people have

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[54] For a full history of Boko Haram in Nigeria and the mastermind behind Boko Haram, see <www.britannica.com/topic/Boko-Haram>; for a detailed information on Boko Haram and the violent attacks caused in the country, see also Christian Chima Chukwu and Anyaoha Okechukwu, "Terrorism, Fulani herdsmen and the forced migration of Christians and Igbo Indigenes from Northern Nigeria: The revalidation of Biafra?" (2018) 5:10 Rev Bras Gest Amb Sustent 429–450.

[55] For stories involving kidnapping and ransoms paid by families, see "More than 200 children remain abducted in Nigeria amid 'kidnap epidemic," (10 August 2021), online: Guardian <www.theguardian.com/world/2021/aug/10/more-than-200-children-remain-abducted-in-nigeria-amid-kidnap-epidemic> [perma.cc/M2DJ-LMCG]; "N800m Ransom: Parents Of Kidnapped Kaduna Uni Students Seek FG's Assistance" (24 April 2021), online: YouTube <www.youtube.com/watch?v=KotWE50kvyk> [perma.cc/3REQ-JRQE]; "[Journalists' Hangout], Kidnappers Demand 800Million To Release Abducted Students In Kaduna" (22 April 2021), online: YouTube <www.youtube.com/watch?v=Mjee_HIBkuk> [perma.cc/8JJE-AMJF]; Jibrin Ibrahim, "Kidnapping for ransom: Can Nigeria survive the *third wave*?" (6 August 2021), online: Premium Times <www.premiumtimesng.com/opinion/477805-kidnapping-for-ransom-can-nigeria-survive-the-third-wave-by-jibrin-ibrahim.html> [perma.cc/ZRN9-XHPG].

[56] "Criminalising Ransom Payment" (30 May 2021), online: Vanguard Nigeria <www.vanguardngr.com/2021/05/criminalising-ransom-payment/> [perma.cc/6NL4-GJ8J].

[57] Clifford Ndujihe, FG explains why it labelled IPOB a terrorist group, (September 29, 2017), online: Vanguard Nigeria <www.vanguardngr.com/2017/09/fg-explains-labelled-ipob-terrorist-group/> [perma.cc/769K-SBRA]

asked the government to stop labelling IPOB as a terrorist group.[58] A major setback was when the court upheld the labelling of IPOB as a terrorist group.[59] The court's decision was based on the fact that the Nigerian President issued a presidential proclamation asking that IPOB be declared a terrorist group accordance with the procedure established by the *Terrorism (Prevention) Act* 2011 as amended by the *Terrorism (Prevention) (Amendment) Act*, 2013.[60]

The President of Nigeria posted a hateful statement on his Twitter page that raised many questions on May 29, 2021.[61] The president's tweet is as follows – "Many of those misbehaving today are too young to be aware of the destruction and loss of lives that occurred during the Nigerian Civil War. Those of us in the fields for 30 months, who went through the war, will treat them in the language they understand."

IPOB started protesting on Twitter, asking Jack Dorsey, the owner of Twitter, to take down the hateful post because it was against the Twitter policy. In less than 24 hours, Twitter pulled

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[58] Evelyn Okakwu, Top Catholic cardinal criticizes Nigerian govt for labelling IPOB terrorist organisation (September 25, 2017) online: Premium Times Nigeria <www.premiumtimesng.com/news/top-news/244139-top-catholic-cardinal-criticises-nigerian-govt-labelling-ipob-terrorist-organisation.html> [perma.cc/SMD9-BL84]; Vincent Ujumadu, Remove terrorist label on IPOB, Ohaneze tells FG, (December 19, 2020) online: Vanguard Nigeria <www.vanguardngr.com/2020/12/remove-terrorist-label-on-ipob-ohaneze-tells-fg/> [perma.cc/55UQ-KY3R]

[59] Federal Court in Abuja declares Indigenous People of Biafra (IPOB) pro-secessionist group a terrorist organization, (September 12, 2018) online: Crisis24 <https://crisis24.garda.com/insights-intelligence/intelligence/risk-alerts/3doqkdbirirw2awcp/nigeria-court-upholds-ipob-terrorist-label-january-18> [perma.cc/N6GX-3TC2]

[60] 8 Sections 2(1), (2) and (3) of the Terrorism (Prevention) Act 2011, outlined the procedure for obtaining a declaration proscribing an entity as a terrorist organization, describe the necessary steps as follows: (i) The President must give approval by way of a presidential proclamation that an organization or entity be declared a proscribed organization; (ii) Based upon the approval of the president, as contained in the presidential proclamation, the Attorney-General of the Federation, National Security Adviser or Inspector-General of Police may apply to the Judge in Chambers by way of ex-parte application for an order declaring a specified entity a proscribed organization. (iii) Where the court is satisfied with the affidavit evidence placed before it in support of the ex-parte application, it may grant the application declaring the specified entity a proscribed organization;(iv) An Order made under section 2(1) (c) of the Act is required to be published in the Official Gazette of the Federal Government and in two national newspapers.

[61] For the screenshot of the President's already deleted tweet, see <www.premiumtimesng.com/news/headlines/465254-just-in-nigerian-govt-reacts-to-twitter-deleting-buharis-tweet.html> [perma.cc/87RC-92KG]

down the post of the President of Nigeria.[62] When this was done, every nock and cranny of the political system in Nigeria immediately sprang into action. In less than 5 days, the government banned Twitter in Nigeria.[63] What this means is that no one in Nigeria can use Twitter. Rumour had it that the Inspector General of Police instructed the Nigerian police to stop and search every individual to ensure they were not violating the government's order.[64] I have several reservations about the Twitter ban in the country. Still, one thing is for sure; it was a way to prevent the Nigerian citizens, particularly the IPOB, from exposing the illicit actions of the government to the world. We can see how the government tried to suppress the voice of IPOB and other concerned people in the country. I used the word 'tried' because Nigerians living in Nigeria started using a virtual private network (VPN) to access the app and tweet their opinions about many malicious activities in the country.[65] It is a reasonable conclusion to say that the government's actions towards avoiding the adoption of UNDRIP are intentional.

Coming back to the question asked earlier in this section – why is the Nigerian government delaying adopting and implementing UNDRIP into their laws? While a few authors have written about UNDRIP and Nigeria; unfortunately, none has addressed the self-determination issues of

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62 "Twitter deletes Nigerian President's 'abusive' Biafra Tweet" 2 June 2021, online: The Guardian <www.theguardian.com/world/2021/jun/02/twitter-deletes-nigerian-presidents-abusive-biafra-tweet> [perma.cc/HU7S-MXEB].

63 "Nigeria says it suspends Twitter days after president's post removed" 5 June 2021, online: Reuters <www.reuters.com/technology/nigeria-indefinitely-suspends-twitter-operations-information-minister-2021-06-04/> [perma.cc/PZY5-AS4J]; "Nigeria's Twitter Ban Follows Pattern of Repression" (7 June 2021), online: Human Rights Watch <www.hrw.org/news/2021/06/07/nigerias-twitter-ban-follows-pattern-repression> [perma.cc/VDN9-4YM7].

64 Chris Ewokor, Nigeria's Twitter ban: The people risking arrest to tweet, (June 8, 2021), online: BBC News <www.bbc.com/news/world-africa-57402349> [perma.cc/6S3M-GRG2]; Danielle Paquette, Nigerians could get arrested for tweeting, they're protesting on Twitter anyway, (June 7, 2021) online: (blog) WashingtonPost <www.washingtonpost.com/world/2021/06/07/nigeria-twitter-ban-buhari-lawsuit/> [perma.cc/5MGN-C78S]

65 Kehinde Abdulsalam, How Nigerians are Accessing Tweeter despite FG Ban, (June 5, 2021), online: Daily Trust Nigeria <https://dailytrust.com/revealed-how-nigerians-are-accessing-twitter-despite-fg-ban> [perma.cc/UM9Q-CC8W]; Jemilat Nasiru, VPN to the Rescue (July 5, 2021) online: The Cable Nigeria <www.thecable.ng/vpn-to-the-rescue-fg-ports-to-koo-one-month-of-twitter-ban-in-nigeria> [perma.cc/9AKW-KKX4]; Jean le Roux and Hans Hanley, Nigerian Twitter users flock to VPNs amid dubious legal threats, (June 24, 2021), online: Medium <https://medium.com/dfrlab/nigerian-twitter-users-flock-to-vpns-amid-dubious-legal-threats-395101f95cd3>.

IPOB and UNDRIP.[66] This is one of the gaps this thesis seeks to close. As I wrote earlier in this thesis, the Biafrans wanted to break out of Nigeria and form their own country, as far back as 1966. Their action resulted in the massacre that caused the deaths of over 80,000 Biafrans who were living and carrying on their businesses in the North.[67] It is also important to note that this massacre resulted from an act of coup revenge by the Northerners for the death of Ahmadu Bello, leader of the Northern People's Congress, the Prime Minister of the Nigerian Federation (a Northerner) and six senior northern military officers.[68] During this coup, the prominent Igbo political leaders[69] survived the coup, giving it the image of an Igbo coup. To worsen the situation, General Aguinyi Ironsi, an Igbo, emerged as head of the military government.[70] The federal structure of governance in favour of a unitary structure was abolished.[71] These factors convinced the Northerners of the existence of a "grand Igbo design" to rule Nigeria.[72]

After an attempt to reach a consensus, as stated in the Aburi Accord, the federal government failed to comply with the terms illustrated in Chapter 3 of this thesis.[73] It came down to the point where Ojukwu couldn't bear the deaths of his people, my people – he declared the Igbos independent from Nigeria and formed their own country known as "*The Republic of*

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[66] Derek Inman, Dorothee Cambou & Stefaan Smis, "Evolving Legal Protection for Indigenous Peoples in Africa: Some Post-UNDRIP Reflections" (2018) 26:3 Afr J Int'l & Comp L 339; Barnabas, Sylvanus Gbendazhi, "Abuja Peoples of Nigeria as Indigenous Peoples in International Law, International Journal on Minority and Group Rights," Vol. 25, Issue 3 (2018), pp. 431-457; Rhuks Temitope Ako & Olubayo Oluduro, "Identifying Beneficiaries of the Un-Indigenous Peoples' Partnership (UNIPP): The Case for the Indigenes of Nigeria's Delta Region" (2014) 22:3 Afr J Int'l & Comp L 369; Remigius N Nwabueze, "The Dynamics and Genius of Nigeria's Indigenous Legal Order" (2002) 1 Indigenous LJ 153 and P Ehi Oshio, "Indigenous Land Tenure and Nationalisation of Land in Nigeria" (1990) 5:2 J Land Use & Envtl L 685.

[67] G.N. Uzoigwe "The Igbo Genoicide, 1966: Where is the outrage?" <http://www.untref.edu.ar/documentos/ceg/25%20G%20N%20UZOIGWE.pdf> [perma.cc/W5H9-KZD7]

[68] Chima J Korieh, "Biafra and the discourse on the Igbo Genocide" (2013) 48:6 Journal of Asian and African Studies 727–740 at 737.

[69] Nnamdi Azikiwe and the Premier of the Eastern Region, Dr. MI Okpara.

[70] Korieh, supra note 71 at 737.

[71] *Ibid*.

[72] *Ibid*.

[73] BIAFRA: The Aburi accord, Official record of the minutes of the meeting of Nigeria's military leaders held at Aburi, Ghana on January 4 & 5 1967. (December 10, 2011), online: Biafra <https://biafran.org/implementation-of-aburi-agreements/> [perma.cc/X93N-B6RG]

Biafra."[74] With the influence of the British, the Nigerian government was also not comfortable with the decision of the Biafrans. The best way to destroy the country, Republic of Biafra, was to wage an 'unexpected' war against the Biafrans. I use the word 'unexpected' because the Biafrans were not expecting the war; they would have come prepared if they did. This thesis has familiarized us with the tragic events that occurred during the Nigerian Civil War of 1967 and how many lives were lost. I have also narrated that only the Igbos respect and acknowledge the anniversary of their loved ones. No holidays were dedicated to the memory of the fallen heroes during the Nigerian Civil War of 1967 by the federal government.[75] The government goes on with their daily activities. The 3.5 million lives lost during the war meant nothing to history and the Igbos (Indigenous People of Biafra).

Putting all these things together, there is one trail we all can understand. This trail shows how unremorseful the government has been and how happy they are in apportioning blame in issues involving IPOB.[76] It is safe to say that the government intentionally failed to show up for the voting and adoption of UNDRIP into law.[77] We should ask why. From the stories gathered in chapter 2 of this thesis and the recent incidents happening in the eastern part of Nigeria, which

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[74] "Biafra: Proclamation of the Republic of Biafra." International Legal Materials, vol. 6, no. 4, 1967, pp. 665–680 at 15 <www.jstor.org/stable/20690240>; "Biafran Declaration of Independence," online: (blog) American Historical Association <www.historians.org/teaching-and-learning/teaching-resources-for-historians/teaching-and-learning-in-the-digital-age/through-the-lens-of-history-biafra-nigeria-the-west-and-the-world/the-republic-of-biafra/biafran-declaration-of-independence> [perma.cc/FRQ3-XGBS]

[75] "IPOB declares public holiday, total lockdown" (3 May 2021) online: (blog) Ripples Nigeria <www.ripplesnigeria.com/ipob-declares-public-holiday-total-lock-down/> [perma.cc/DDY9-4L95]; Emmanuel Uzodinma, "Biafra: Declare May 30 public holiday – Ohanaeze youths to FG" (31 May 2021) online: (blog) Daily Post <www.dailypost.ng/2021/05/31/biafra-declare-may-30-public-holiday-ohanaeze-youths-to-fg/> [perma.cc/2L9W-VNQF]

[76] A summary of the illicit actions done on IPOB, which shows that the government has been unremorseful. See, Nigeria: 'Bullets Were Raining Everywhere' Deadly Repression of Pro-Biafra Activists, (2016) online: (pdf) Amnesty International <www.amnesty.org/en/wp-content/uploads/2021/05/AFR4452112016ENGLISH.pdf> [perma.cc/X8F3-PKPR]; Nigeria: Resolving the so-called 'Igbo Problem, (June 8, 2021), online: The Africa Report <www.theafricareport.com/95288/nigeria-resolving-the-so-called-igbo-problem/> [perma.cc/NWX3-BEMC]; see also part 5: "State Response and Treatment" of the Immigration and Refugee Board of Canada, (November 10, 2016), online: <https://irb.gc.ca/en/country-information/rir/Pages/index.aspx?doc=456766>.

[77] Abdullahi Shuaibu, Ogoni: Nigeria Opposes Indigenous Rights Declaration, (May 28, 2007), online: United Press International <https://unpo.org/article/6763> [perma.cc/ARM8-VKBN]

affects IPOB,[78] it is evident that the Nigerian government does not want the IPOB to break out of the country.

Due to the Nigerian government's delay in adopting and implementing UNDRIP, there have been foreseen and unforeseen effects. These effects revolve around the rising agitations by IPOB to break out of Nigeria.[79] The intention of the Nigerian government is to prevent IPOB from exercising Article 3 of the UNDRIP, which gives IPOB the power to make their own laws without the influence of the government. The issue of self-determination in Nigeria is something that should not be overlooked. The IPOB have consistently fought against oppression and discrimination from the federal government, which I have narrated in this thesis. The adoption and implementation of UNDRIP in Nigeria would enable the IPOB to prevent the ongoing oppression from the Northerners and prevent the reoccurrence of the massacre of over 80,000 IPOB residents in the North, which occurred in 1966 and the death of over 3.5 million IPOB which happened during the Nigerian Civil War in 1967 – 1970. The Nigerian government has turned a deaf ear to the proposals of IPOB and the adoption and implementation of UNDRIP; this has become a problem that should not be overlooked. The agitations, protests, increase in insecurities and threats

[78] Nigeria: At least 115 people killed by security forces in four months in country's Southeast, (August 5, 2021), online: Amnesty International <www.amnesty.org/en/latest/news/2021/08/nigeria-at-least-115-people-killed-by-security-forces-in-four-months-in-countrys-southeast/> [perma.cc/EDC2-XEZZ]; Nigeria accused of 'ruthless' crackdown in restive southeast, (August 5, 2021), online: Aljazeera <www.aljazeera.com/news/2021/8/5/nigeria-accused-ruthless-crackdown-restive-southeast> [[perma.cc/2L7H-JPDN]; Several killed in attack at Shell facility in Nigeria's southeast, (August 18, 2021), online: Aljazeera <www.aljazeera.com/news/2021/8/18/seven-killed-in-attack-at-shell-facility-in-nigerias-southeast> [perma.cc/9KUX-9D7A]

[79] Dulue Mbachu, Why support for secession is growing in southeast Nigeria, (September 14, 2021), online: (blog) The New Humanitarian <www.thenewhumanitarian.org/analysis/2021/9/14/why-support-for-secession-is-growing-in-southeast-Nigeria> [perma.cc/BCN5-AYTE]; Nigeria's president threatens rebels amid rising violence in southeast, (June 2, 2021), online: Reuters <www.reuters.com/world/africa/nigerias-president-threatens-rebels-amid-rising-violence-southeast-2021-06-01/>; Dulue Mbachu, Nigeria's unhappy union: How growing insecurity threatens the country's future, (April 8, 2021), online (blog): The New Humanitarian <www.thenewhumanitarian.org/Analysis/2021/4/8/how-growing-insecurity-threatens-nigerias-future> [perma.cc/RMA6-UKDX]; Timothy Obiezu, "In Nigeria, Rising Insecurity Leads to Growing Separatist Calls" (May 25, 2021), online: VOA News <www.voanews.com/africa/nigeria-rising-insecurity-leads-growing-separatist-calls> [perma.cc/4VM7-ST9Z]

to human life and property can be minimized if the Nigerian government adopts UNDRIP into their laws, thereby giving IPOB the power to exercise their right to self-determination.[80]

The discussions surrounding the history of UNDRIP in Nigeria in the previous section laid the foundation for the next section of this thesis. The next section of this thesis will delve into the aboriginal title issues in Canada. In doing so, I seek to highlight the historical overview of aboriginal title in Canada and by doing this, I am laying foundation to answer how UNDRIP may provide a resolution for the Indigenous peoples in Canada in achieving proof of aboriginal title.

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[80] UN Declaration, supra note 3, art. 3.

CHAPTER TWO

CONSTITUTIONAL BATTLES OF ABORIGINAL TITLE IN BRITISH COLUMBIA

Introduction

The Indigenous Peoples in Canada have continuously fought for their lands in the wake of colonization because their identities and histories are tied to that land. Firstly, this chapter discusses the legal protection of Indigenous peoples' right to Aboriginal title in British Columbia. I take this focus because of the ways in which assertion of aboriginal title has been tied to Indigenous peoples' connection to their land. Next, it closely examines the defects and legal vacuum in the constitution and judicial decisions concerning Aboriginal title in British Columbia. Finally, it focuses on the government of British Columbia's approaches regarding Aboriginal title in the province and how it affects Indigenous Peoples. In order to thoroughly discuss the legal protection of Indigenous peoples' right to Aboriginal title in Canada, we need to start from the roots. What is the root?: The existence of Indigenous peoples before the arrival of Europeans. This is the focus of the next section.

A. Historical Review of Indigenous Peoples in Canada

I. The Doctrine of Discovery and *Terra Nullius*:

Q: What did Indigenous Peoples call this land before Europeans arrived?

A: "OURS"

- Will Falk[81]

It would be improper to talk about the connection of Indigenous peoples to their lands without referring to the doctrine of *Terra Nullis*. Terra nullius means empty land which is how

[81] John Borrows, "Aboriginal Title and Private Property." (The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 71) 2015 at 1.

Canada regarded Indigenous land in British Columbia – as being devoid of law giving rise to Indigenous protected land rights The historical review of Indigenous peoples when Europeans arrived show they acted as if Indigenous peoples had few land rights. Indigenous peoples occupied and assumed sovereignty over the land long before the arrival of the European settlers.

The Doctrine of Discovery is a critical and sad doctrine through which the Europeans claimed sovereignty over the lands they claimed to have discovered.[82] The Truth and Reconciliation Commission issued Calls to Action, which asked the government to repudiate concepts that justify this doctrine.[83] This is needed because colonial powers claimed pre-emptive rights while recognizing only restricted title to Indigenous nations.[84]

As noted, *Terra nullius* (/ˈtɛrə nʌˈlaɪəs/, plural *terrae nullius*) is a Latin expression meaning "nobody's land."[85] It is a principle used in international law to justify claims that territory may be acquired by a state's occupation of it.[86] *Terra nullius* is discriminatory. In John Borrows' book "*Canada's Indigenous Constitution*," he highlighted that long before the arrival of the Europeans, the Indigenous peoples discovered and exercised jurisdiction over most territories in Canada.[87] He argues that the doctrine of discovery should not be accepted as a means of diminishing the existence of Indigenous laws.[88] We might ask: How is it possible that any Pope, King or Queen, or explorers from Europe could "discover" empty lands; if Indigenous Peoples were already occupying such lands, according to our laws and legal orders?

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[82] Robert J. Miller, Jacinta Ruru, Larissa Behrendt, and Tracey Lindberg. "Discovering indigenous lands: The doctrine of discovery in the English colonies" (Oxford University Press; 2010).
[83] Call to Action, No. 47, Truth and Reconciliation Commission, 2015 <www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/calls_to_action_english2.pdf>
[84] Jennifer Reid, "The Doctrine of Discovery and Canadian Law," 2010 online: (pdf) <http://www3.brandonu.ca/cjns/30.2/06reid.pdf> [perma.cc/7YMC-QANY]
[85] Yan Kin, "Terra Nullius", (2013) online: *Hector Llanquín* <www.hectorllanquin.com/item/pupusas/> [perma.cc/7A37-6GRC]
[86] *Ibid*.
[87] John Borrows, *Canada's Indigenous constitution* (2010) at 17.
[88] *Ibid*.

This, to me, is one of the injustices suffered by Indigenous peoples in Canada. They have to continuously prove ownership of their lands to the Canadian judicial system, the federal and provincial governments. For instance, the court in *St. Catherine's Milling and Lumber Company v The Queen*[89] relied on the U.S. Supreme Court cases such as *Johnson v McIntosh*,[90] a claim that relied on the doctrine of discovery. Robert Williams brilliantly critiqued the doctrine of discovery in his book "*The American Indian in Western Legal Thought*." He bluntly called out Chief Justice John Marshall and the other justices of the U.S. Supreme Court for being fully aware of the historical paternity of this illegitimate doctrine of discovery.[91]

As noted, one of the unsettled issues in aboriginal title cases is the need for Indigenous peoples to prove aboriginal title in courts. The aboriginal evidence format is oral, which in many cases has been held to be inadmissible. Even the significant case of *Tsilhqot'in Nation v. British Columbia*[92] suffers from this uncertainty. As Reid rightly said, the principle of discovery forced Aboriginal peoples to rely solely on colonial governments and courts to recognize rights that Aboriginals take for granted.[93] The reason for Reid's submission is simple. When a territory was discovered, the doctrine held that Indigenous peoples could not claim ownership of their land, but only rights of occupation and use.[94]

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[89] *St. Catherine's Milling and Lumber Company v. The Queen*, (1887) 13 SCR 577.
[90] *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823). See also; <www.afn.ca/wp-content/uploads/2018/02/18-01-22-Dismantling-the-Doctrine-of-Discovery-EN.pdf> [perma.cc/N5PA-ZXJ9] at 2.
[91] Robert A Williams, *The American Indian in western legal thought: the discourses of conquest* (New York: Oxford University Press, 1990).
[92] *Tsilhqot'in Nation v British Columbia*, (2014) SCC 44.
[93] See Reid, supra note 87 at 336.
[94] *Ibid*.

The Hul'qumi'num Treaty Group who deals with Indigenous Peoples' title to land, intervened in the landmark *Tsilhqot'in Nation* case.[95] They urged the Supreme Court of Canada to repudiate the doctrine of discovery outrightly:

> "Finally, the "principle of discovery" cannot be relied upon in formulating an approach to Aboriginal title and must be firmly rejected. The principle of discovery is a "continuation of colonialism" that amounts to a "violation of the Charter of the United Nations ... and the principles of international law."[96]

While the unanimous ruling did not name discovery directly, the court addressed the related doctrine of *terra nullius*. In referring to the "pre-existing" land rights of Indigenous Peoples, the Supreme Court ruled: "The doctrine of *terra nullius* (that no one owned the land before European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation (1763).*"[97] This fails however to account for how the government has long assumed they could treat Indigenous lands as legally vacant despite the Royal Proclamation. The Royal Proclamation of 1763 is a document that has largely been interpreted to recognize Aboriginal title in half-hearted ways. The Proclamation proclaimed British dominion over North America. Still, this proclamation recognized that Aboriginal title exists and can only be extinguished by a treaty with the Crown. John Borrows stipulated that the genesis of the principles of the Proclamation can be traced in the relationships between First Nations and colonial governments.[98] The development of these

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[95] For the views of this group also see, Canada: Amicus Curiae: Case of The *Hul'qumi'num Treaty Group V. Canada*: Submitted Before the Inter-American Commission on Human Rights. <https://www.amnesty.org/en/documents/amr20/001/2011/en/> perma.cc/GY8Q-PLCA]

[96] Assembly of First Nations, "Dismantling the Doctrine of Discovery" (2018) <www.afn.ca/wp-content/uploads/2018/02/18-01-22-Dismantling-the-Doctrine-of-Discovery-EN.pdf> [perma.cc/7CLP-8QJ5]

[97] *Ibid*.

[98] John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian legal history, and self-government." (1997): 155-172.

principles was a result of war, experience, and negotiation.[99] One of the important incidents that gave room for the affirmation of the Proclamation by treaties with First Nations was the promulgation of the Royal Proclamation of 1763 and the associated Treaty of Niagara.[100]

Before the Proclamation, there had been a rising wave of threat by European settlement over the First Nation land in the Ohio valley. First Nation living in other regions like southern Great Lakes started feeling the pressure to leave their homeland and resettle in the west of the Mississippi River.[101] The Proclamation further specified that Aboriginal land could only be sold or ceded to the Crown, not directly to settlers. Thus, in the strict sense, the Doctrine of Discovery has a legal effect on the Europeans restricting any individual who wanted to buy Indigenous land.

Indigenous peoples generally believe that land is born for humans and, in return, for the human to assume responsibility and take care of the land.[102] Irrespective of their belief, in the 1880s through to today, the Crown representatives and leaders of Aboriginal communities signed treaties throughout many places in Canada to resolve outstanding Aboriginal title issues and to also enable Canada to acquire territory. These treaties set out the relationship between the Crown and Indigenous nations that today is largely articulated by the courts through a language of Aboriginal rights and title. The next section lays out Indigenous fights for recognition of their land rights and will also show Indigenous peoples' resilience. It could encourage Indigenous peoples in other countries to stand firm and never give up their laws and land.

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[99] *Ibid*.
[100] Borrows, supra note 98.
[101] *Ibid*.
[102] Heather Sullivan, "Robin Wall Kimmerer. *Braiding Sweetgrass: Indigenous Wisdom, Scientific Knowledge and the Teachings of Plants*" (2019) 55:4 Seminar: A Journal of Germanic Studies 425–427 at 425.

II. The Quest for Identity:

"Your lives are dark, nasty, brutish and short; the Europeans did you all a favour." [103]

Nigel Warburton wrote the above quote. I still have a heavy heart when I remember why such a discriminatory statement was made in the first place. It made me wonder, are Indigenous peoples regarded as not being human? Or who had the right to determine the kind of people are right or wrong? Did Indigenous peoples chose to be "indigenous?" These and many more questions run through my mind like a train moves on the railway. I am not yet over Hobbes's statement. And then suddenly, on June 11, 2008, Stephen Harper, the former Prime Minister of Canada, offered a formal apology to all former students at residential schools and asked for their forgiveness for their suffering and its impact on Indigenous cultures, heritage, and languages.[104] In his historic speech, he expatiated and expressed deep regrets for the suffering of individual students and their families experienced because of these schools.[105] The government also acknowledged the harm that residential schools and assimilation policies had done to Aboriginal people's cultures, languages and heritage. The apology also clarified the government's commitment to addressing residential schools' legacy through continuing measures, including the Truth and Reconciliation Commission's work.[106]

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[103] Thomas Hobbes quoted by Nigel Warburton in "A Little History of Philosophy" Nigel Warburton, *A little history of philosophy*, paperback edition ed (New Haven: Yale Univ. Press, 2012) at 1. See also, "Thomas Hobbes: 'Solitary, poor, nasty, brutish, and short", (5 April 2013), online: *Yale Univ Press Lond Blog* <https://yalebooksblog.co.uk/2013/04/05/thomas-hobbes-solitary-poor-nasty-brutish-and-short/>

[104] *Statement of apology to former students of Indian Residential Schools* (2008), <www.rcaanc-cirnac.gc.ca/eng/1100100015644/1571589171655> [perma.cc/3XT4-KTT7]

[105] Rebecca Johnson, "Justice and the Colonial Collision: Reflections on Stories of Intercultural Encounter in Law, Literature, Sculpture and Film" (2012) 9 *NoFo* 68-96.

[106] TRC Final Report, supra note 35.

This is in contrast with another statement by former Prime Minister Stephen Harper, "Colonialism does not exist in Canada"; this statement shows that there is a story of denial of Indigenous peoples and governance in this land.[107]

As discussed earlier in this section, the promulgation of the Royal Proclamation of 1763 and the associated Treaty of Niagara was signed by the First Nations – it shows Indigenous land rights should be recognized. That was not the only Treaty the First Nations signed. They signed several historic treaties between 1701 and 1923 in Canada.[108] In the same vein, Miller James Rodger explained that one of the anomalies of Canadian history is the Treaties that exist between the Crown and Aboriginal peoples.[109] Rodger further explored that Treaties provide a framework to enable non-indigenous people and the Indigenous peoples to share the land the Indigenous peoples have traditionally occupied.[110]

One of Canada's most prolonged unresolved issues is the historical and present-day failure of the government to recognize treaties made between Indigenous peoples and the Crown.[111] The Government of Canada has signed 70 historic treaties with the Indigenous peoples between 1701 and 1923.[112] These treaties include Treaties of Peace Neutrality (1701-1760), Peace and Friendship Treaties (1725-1779), Upper Canada Land Surrenders and the Williams Treaties (1764-1862/1923), Robinson Treaties and Douglas Treaties (1850-1854) and the Numbered Treaties (1871-1921).[113] Decades ago, the government of Canada had an agreement with the Indigenous

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[107] *Ibid*. See also, Borrows at supra note 98.
[108] See <www.bctreaty.ca> [perma.cc/J4MK-WC2V]
[109] James Rodger Miller, *Compact, contract, covenant: Aboriginal treaty-making in Canada* (Toronto: University of Toronto Press, 2009) at 1.
[110] *Ibid*. See also <www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231> [perma.cc/2TS4-RNW7]
[111] See Miller, supra note 109 at 1.
[112] Government of Canada; Indigenous and Northern Affairs Canada; Communications Branch, "Treaties and agreements", (3 November 2008), online: <https://www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231?wbdisable=true> [perma.cc/226T-8PTP]
[113] *Ibid*.

peoples to acknowledge their rights in Canada. However, unknown to the Indigenous peoples, Canada was preparing the *Indian Act*[114] which would subject First Nations to strict colonial oversight and rule. While it might seem that creating agreements between Indigenous peoples and the Canadian government is a step towards recognizing and respecting the rights of Indigenous peoples, the *Indian Act* deprived Indigenous peoples of their rights and status. The *Act* is excessively regressive and paternalistic, and the government introduced residential schools after it was passed, which the Indian Truth and Reconciliation Commission called cultural genocide. The *Act* also created reserves and expropriated portions of reserves without First Nations consent. This is against the rule of seeking the consent of the First Nations before transacting over their land. It is also important that we see treaties as an alternative to the doctrine of discovery. This is because they require the consent of the First Nations.

During my research, I realized that there were little or no treaties or agreements regarding aboriginal title between the Indigenous peoples and the Crown in British Columbia. During an interview with Alan Hanna, a professor at the University of Victoria, I asked why no treaty existed between Indigenous peoples and the Crown with issues revolving around aboriginal title. His response was blunt. The government of British Columbia is playing a game, which I call – 'The Chess.' They are the king and the Queen at the same time. The government of British Columbia has been and is still in control of the land and natural resources of the Indigenous peoples in the province. They are aware that land claim agreements would reduce their political power.

As a result of the uncertainty regarding aboriginal title in British Columbia, there have been series of lawsuits instituted by several indigenous nations against the government of British

[114] Indian Act, R.S.C., 1985, c. I-5.

Columbia. Some of these cases are *Calder v British Columbia*,[115] *Delgamuukw v British Columbia*,[116] *Haida Nation v British Columbia*[117] and *Tsilhqot'in Nation v British Columbia*.[118] These cases have one thing in common – "the quest for identity and a collective recognition of their laws and governance, culture and spirituality – and of course their land."[119] The Indigenous peoples have, for several years, fought for their identity, and that identity is linked to their land. It is simple, even though the Canadian government and the government of British Columbia failed to realize the connection of the Indigenous peoples to their lands. I believe that every human is connected to their land. In his book "Aboriginal Peoples and Politics The Indian Land Question in British Columbia, 1849-1989," Paul Tennant presented a detailed and comprehensive treatment of the land in British Columbia.[120] It is said, and I believe it to be accurate, that the aboriginal past is closer in British Columbia than almost anywhere on the continent.

Interestingly, Europeans started dominating the province in the 1850s.[121] Their existence in the land affected all Indigenous peoples in British Columbia.[122] Tennant implied that the whites taking Indian land was forceful and caused rapid change in the province. Despite this devastating change, the aboriginal past was not cut off. The Indigenous peoples did not resort to any armed

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[115] *Calder v British Columbia*, (1973) S.C.R 313. See also Let Right Be Done Aboriginal Title, the *Calder* Case, and the Future of Indigenous Rights (2007).
[116] *Delgamuukw v British Columbia* (1997) 3 S.C.R. 1010. See also Aboriginal Title in British Columbia: *Delgamuukw V. the Queen*: Proceedings of a Conference Held September 10 & 11, 1991. Canada: Oolichan Books, 1992.
[117] *Haida Nation v British Columbia* (Minister of Forests) (2004) 3 S.C.R. 510. Dowie, Mark. The Haida Gwaii Lesson: A Strategic Playbook for Indigenous Sovereignty. United States: Inkshares, 2017.
[118] *Tsilhqot'in Nation*, supra note 95.
[119] Taiaiake Alfred & Jeff Corntassel, "Being Indigenous: Resurgences against Contemporary Colonialism" (2005) 40:4 Gov & oppos 597–614 at 599.
[120] Paul Tennant, *Aboriginal peoples and politics: the Indian land question in British Columbia, 1849-1989* (Vancouver: University of British Columbia Press, 1990) <www.ubcpress.ca/aboriginal-peoples-and-politics> [perma.cc/5HNJ-SKMW].
[121] *Ibid*.
[122] *Ibid*.

conquest, nor were their villages widely displaced.[123] This is one of the things I love about the Indigenous peoples in British Columbia; they stand firm no matter the storm. When the Europeans arrived in BC, over 30 separate aboriginal groups existed and had different but unique identities.[124] Although some of the groups died at the time, the majority stood firm. I know I have been singing their praises without receipts, and this is why the next section is focused on one of the significant moves made by the people of the *Tsilhqot'in* Nation in BC. Their bravery is commendable.

III. *Tsilhqot'in Nation*: their connection to the land

Figure II: *Tsilhqot'in* - aboriginal-blankets at ceremony (photo uploaded by Fraser Institute)

[123] *Ibid*.
[124] See Tennant, supra note 120.

In Canada, listening to the stories and legends told by the people of *Tsilhqot'in* Nation, they refer to themselves as the land because there is no separation between them and the land. One of the origin stories recalls *Lhin Desch'osh,* who travels with his sons throughout the *Tsilhqox* area. According to Russell Samuel Myers Ross and Helen Haig-Brown,[125] the story of *Lhin Desch'osh* names the places; our ancient ancestors walked the path of this country. They narrated how the people of *Tsilhqot'in* still walk and follow the stories within their territory. The *Tsilhqot'in* believe that they belong to this place by virtue of the language, ancestry, stories, and culture – these elements of common unity persist even despite colonization. As their families still stand upon their homeland, they remain *Tsilhqot'in*. The written and oral descriptive accounts of the Canadian government and the Europeans describe how the *Tsilhqot'in* stood firm. This is despite the many atrocities committed by the Europeans in their quest to have total control over Indigenous lands in Canada and Nigeria. One of the stories about the fight against the Europeans occurred in 1864. The *Tsilhqot'in* fought and stood strong against the invading white settlers who tried to take full control over their lands. In the face of genocide committed by the Canadian government in relation to the reserves and residential schools, the *Tsilhqot'in* have un-dividedly remained strong.

For several years, there have been longstanding and unresolved issues over Aboriginal title with respect to the majority of British Columbia territory. This can be traced in many cases filed by the Indigenous peoples against the government of British Columbia. However, in recent years, Canadians now see the government of British Columbia as a flag bearer of the rights of Indigenous peoples where Aboriginal title can no longer be ignored, either politically or legally.[126]

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[125] Russell Samuel Myers Ross and Helen Haig-Brown, *Tsilhqot'in* Reflection of Justice Concerning the Prosperity Mine Proposal (2009), <https://iaac-aeic.gc.ca/050/documents/35332/35332E.pdf>

[126] Patricia Burke Wood & David A Rossiter, "Unstable properties: British Columbia, aboriginal title, and the 'new relationship': Unstable properties" (2011) 55:4 The Canadian Geographer / Le Géographe canadien 407–425 at 407. Also, although, the proposal of British Columbia's Recognition Act (RRA) collapsed before it was fully drafted in 2009, the Liberal government of B.C. tried to use the RRA to recognize Aboriginal title and the geography of

IV. The Violent and Traumatic Tsilhqot'in Nation War:

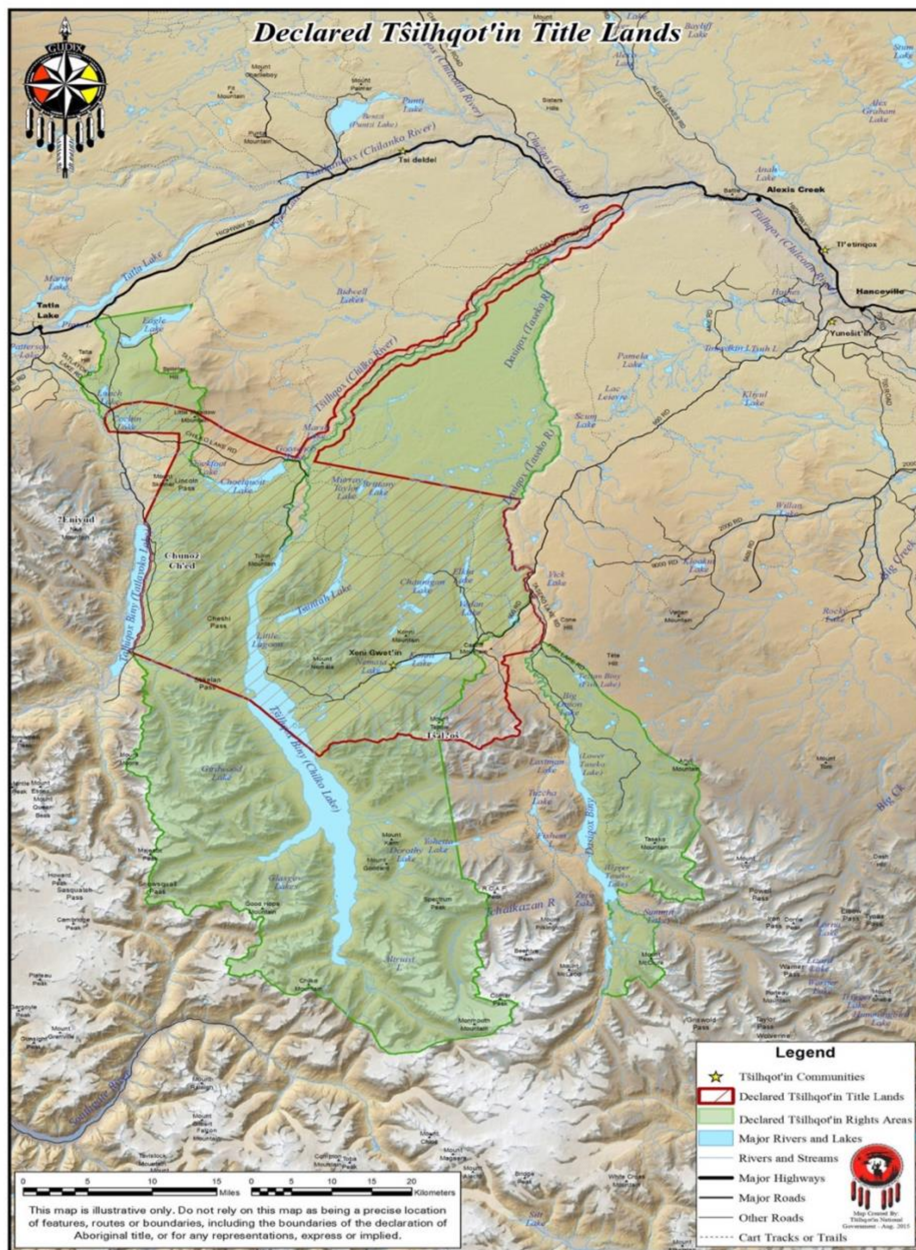

Figure I: **Map of the *Tsilhqot'in* Communities (uploaded by Willams Lake Tribune)**

Indigenous governance structures within the province. Furthermore, Gordon Campbell was the last man standing in favor of the RRA. His position came as a shock because 10 years ago, Campbell was against the legislature of BC and even filed a court case to challenge the Nisga'a Treaty. He went from being slandered by the Native leaders to being celebrated by the Grand Chief Stewart Philip in 2006.

The *Tsilhqot'in Nation's* War of 1864 is a clear example of how the people of Tsilhqot'in Nation fought for their lands. I decided to refer to the resilience of the Tsilhqot'in people in 1864 because it lays foundation as to how the Indigenous peoples in Canada have consistently fought for their lands. For a better context of what occurred, during my interview with Professor Hanna, he explained the situation that occurred in Tsilhqot'in territory in 1864. He stated that the *Tsilhqot'in Nation* had laws on how they entertained non-Tsilhqot'in people's visiting their lands.[127] According to the *Tsilhqot'in Nation* law, they expected a certain kind of relationship under the principle of reciprocity, allowing people to come into the land but providing something in return to Tsilhqot'in Nation.

The *Tsilhqot'in Nation* believed mutual gain should characterize their relationships. The land developers were racists who came from stratified gentry in England and working class hierarchies in the United States and they saw Indigenous people as inferior. They frowned at Indigenous peoples' demands on the ground that they own the lands the Indigenous peoples were claiming title over. They went further to state that they could provide labour for the Indigenous Peoples to work when constructing and developing the roads, and the land commences.

As a result, tensions boiled over; the *Tsilhqot'in Nation* waged war against the invading white colonists. They ensured that every single white colonist was driven away from their territory. Their actions caused the deaths of 19 European settlers. Six chiefs were executed by the colonial authorities due to the *Tsilhqot'in Nation's* actions. They handed themselves over to the colonial authorities under what they were promised - a 'diplomatic treaty.' They were promised protection since the chiefs acted in the *Tsilhqot'in* people's interest; yet they were hanged to death when they turned themselves in. The *Tsilhqot'in* never denied that they had killed whites but maintained that

[127] See <www.woodwardandcompany.com/wp-content/uploads/pdfs/Appendix4.pdf> [perma.cc/RSH9-EQRY]

they were killed as an act of war. The steps taken by the *Tsilhqot'in* Nation show that they resorted to physical force, and as Professor Hanna said, they realized that the only way their voices could be heard was to go to court. When the missionary R.C. Lundin tried to point the men towards the commandment "thou shalt not kill," he was met with the famous reply, "we meant war, not murder."[128]

The *Tsilhqot'in Nation v British Columbia*[129] case is the first to recognize aboriginal title rights in Canada. This decision acknowledged the existence of Aboriginal titles in Canada. To a certain extent, it has been argued that aboriginal rights have been protected explicitly since 1982. The significant case brought both the nature of and the test for Aboriginal title into question. However, the trial judge concluded that Aboriginal title could be proven based on territorial occupation and was factually made out over large tracts of the Tsilhqot'in's traditional territory.

John Borrows clearly explained the Supreme Court of Canada's findings - *Tsilhqot'in Nation* was recognized as holding "ownership rights similar to those associated with fee simple. They include the right to decide how the land will be used, the right to enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to use and manage the land pro-actively."[130] Then again, as noted, the provincial Crown's overriding sovereignty and the underlying title was strengthened in relation to Indigenous peoples without effectively justifying the reason for this conclusion.[131]

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[128] Tom Swanky, The True Story of Canada's "War" of Extermination on the Pacific-Plus the *Tsilhqot'in* and other First Nations Resistance, (Lulu Press, Inc, 2013). See also, Tristin Hopper, “What really happened in the Chilcotin War, the 1864 conflict that just prompted an exoneration from Trudeau?”, (27 March 2018), online: *Natl Post Online* <www.proquest.com/docview/2018977014/fulltext/B7FCE5BDBD14577PQ/1?accountid=14846> [perma.cc/CFY3-84TY]
[129] *Tsilhqot’in Nation*, supra note 92.
[130] John Borrows, "The durability of terra nullius: *Tsilhqot'in Nation v. British Columbia*." 2015 (University of British Columbia Law Review), vol. 48, no. 3, p. 701+. Gale OneFile: CPI.Q,
[131] *Ibid*.

To communicate the connections to land of the Indigenous peoples in Canada, it was important that the historical overview of the Indigenous peoples was discussed. With the brief overview on the Indigenous peoples' resilience in fighting for their rights, this thesis has laid the foundation for the subsequent issues addressed later in this thesis.

B. Aboriginal Title Problems

I. **Constitutional Battles**:

This section builds on the previous section. This section discusses the constitutional battles regarding the right of Indigenous peoples in Canada. This is to ensure that there is a clear understanding of why Aboriginal title is still an unresolved issue in Canada and particularly, British Columbia.

For years, land ownership has been claimed by the provincial government despite Indigenous peoples' efforts to ensure that their voices were heard. The government of Canada claimed that they had put in place several laws to recognize the rights of the Indigenous peoples in Canada. One of the laws was section 35(1) of the *Constitution Act 1982*. The Act made provision for Aboriginal rights of the Indigenous peoples, which has not gone far enough to protect the rights of Indigenous peoples.[132]

So many observations and questions have been travelling through my mind. First, it is appalling Indigenous peoples have to prove to non-indigenous judges that they have Aboriginal title over their own land. The second was how the Canadian government took a whole population of people on a national scale and told them that they could not possess lands they inherited from their ancestors. I could only imagine how oppressed and harassed the Indigenous peoples felt with

[132] Box of Treasures Or Empty Box? Twenty Years of Section 35. Canada: Theytus Books, 2003.

such treatment—tracing it back to the stories narrated by my grandfather about my home country, Nigeria. The Eastern part of Nigeria is dominated by the Igbo culture, which had existed long before the colonization by the British.

During the Nigerian Civil War of 1967, the Nigerian state prevented the Indigenous People of Biafra from controlling their lands and natural resources.[133] After the war, those lands were taken away from the southeasterners. Strangers occupied those lands and were seen as the new and original owners of the land.[134] The only significant difference between the Indigenous Peoples in Canada and the Indigenous People of Biafra is that the former never gave up their lands no matter the laws or strategies of the government. Instead, the latter surrendered their rights to the Nigerian state after three years of protest and war.[135] I do not intend to blame the people of Biafra for seceding to the Nigerian state because the war was a thorn on their flesh. The war was in different forms: battlefield and starvation. This is similar to the implications of the *Indian Act* in Canada. We might have looked at the *Indian Act* differently, but Bob Joseph highlighted and exposed 21 things we did not know about the *Indian Act*. First, the *Indian Act* created reserves preventing the Indigenous peoples from owning lands where they reside.[136] Second, Joseph explains how the federal government introduced the *Indian Act* in 1876 to delegitimize Indigenous laws and impose new governance structures to control Indigenous peoples through its Indian Affairs bureaucracy. He also outlined many amendments the government made to the *Indian Act*. Some were to facilitate colonialism and nation-building, including banning Indigenous cultural practices, outlawing

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[133] Theodore Okonkwo & Kato Gogo Kingston, "An Assessment of the Rights of Indigenous Peoples of Biafra to Self-Determination under International Law" (2016) 6 Sjhr Vol 6 Number 1 at 89.
[134] Samuel Fury Childs Daly, A History of the Republic of Biafra: Law, Crime, and the Nigerian Civil War. India: Cambridge University Press, 2020.
[135] LeVan, A. Carl, The Oxford Handbook of Nigerian Politics. United Kingdom: Oxford University Press, 2018.
[136] Sean Carleton, "21 Things You May Not Know About the Indian Act: Helping Canadians Make Reconciliation with Indigenous Peoples a Reality", by Bob Joseph, and: Talking Back to the Indian Act: Critical Readings in Settler Colonial Histories" (The Canadian Historical Review, vol. 101 no. 4, 2020), at 648. <https://muse.jhu.edu/article/777499> [perma.cc/UQP6-LA84]

Indigenous political organizing, creating attendance at residential schools mandatory, and imposing and defending paternalistic and patriarchal policies that discriminated against Indigenous women. [137]

In Canadian law, Aboriginal title is *sui generis* (which means of its own kind or unique), in the sense that the land title originates in an Indigenous group's occupation of its ancestral land before the European assertion of sovereignty.[138] Most Indigenous peoples define Aboriginal title somewhat differently than the Canadian government. In their understanding, the Creator provided the land to them, and it belongs to them, their past and future generations.[139] For this reason, Indigenous peoples have argued that they retain inherent land rights to traditional territories. In addition, it is different from other property rights because it is a communal right belonging to specific Indigenous communities. However, Canadian law only recognized and affirmed existing Aboriginal title and treaty rights by subsection 35(1) of the Constitution Act.[140]

Section 35, together with the related s. 25 of the Constitution Act,[141] including the amendments made by the Constitution Amendment Proclamation, 1983, provided thus:

> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed to abrogate or derogate from any aboriginal, Treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada, including:
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

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[137] *Ibid* at 139.
[138] Erin Hanson, "Aboriginal Title", online: <https://indigenousfoundations.arts.ubc.ca/aboriginal_title/> [perma.cc/HWY8-UKQ9]
[139] *Ibid*.
[140] The Constitution Act, supra note 20, s 35.
[141] *Ibid* at s 25.

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

As noted earlier, in 1763, during the European settlement of what is now Canada, the British Crown issued the *Royal Proclamation*, a document that recognized Aboriginal title.[142] The Proclamation provided that ownership over North America should be given to King George III, but the Aboriginal title exists and can only be extinguished by the Crown through treaty.[143] The Proclamation further specifies that Aboriginal land can only be sold or ceded to the Crown, not directly to settlers.[144]

In *Delgamuukw v British Columbia,*[145] the Supreme Court's decision further identified constitutional principles related to Aboriginal title. It held that the Crown holds underlying title to lands and Aboriginal title represents a burden on this underlying title. It means that the Crown has the responsibility to negotiate terms with the Aboriginal titleholders should a third party be interested in the land. As a result, a few First Nations have entered into agreements directly with third-party interests to create an equitable relationship between business and local Aboriginal peoples.[146] In 1993, in order to negotiate the un-extinguished Indigenous rights with British Columbia's First Nations, the British Columbia Treaty Process (BCTP) was established.[147]

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[142] Hanson, supra note 138.
[143] "Aboriginal Title" online: Energy BC <www.energybc.ca/cache/northerngateway/indigenousfoundations.arts.ubc.ca/home/land-rights/aboriginal-title.html> [perma.cc/RNB2-8FBT]
[144] Colin G. Calloway, "The Scratch of a Pen: 1763 and the Transformation of North America" (United Kingdom: Oxford University Press, 2007).
[145] *Delgamuukw v British Columbia* (1997) 3 S.C.R. 1010.
[146] Morgan, Vanessa Sloan, Heather Castleden, and Huu-ay-aht First Nations. "This Is Going to Affect Our Lives": Exploring Huu-ay-aht First Nations, the Government of Canada and British Columbia's New Relationship Through the Implementation of the Maa-nulth Treaty." Canadian Journal of Law and Society 33, no. 3 (2018): 309-334. <https://muse.jhu.edu/article/715516> [perma.cc/7TCA-2QZA]. See also, <https://fns.bc.ca/wp-content/uploads/2016/06/FNS-Submission-to-Fed-Wkg-Grp-of-Ministers-Status-of-FN-Crown-Treaty-Negs-in-BC-Secure.pdf>
[147] The British Columbia Treaty Process has 6 stages of negotiation and treaty agreement. For more information on how the First Nations can file their statement of intent to the commission, see, <https://www.bctreaty.ca/negotiation-processes> [perma.cc/MHY9-KC2L]

St. Catherine's Milling and Lumber Co. v the Queen[148] was a court case that prevailed as the dominant guide for defining Aboriginal title for over one-hundred years. The Court ruled that Aboriginal title only existed at the Crown's pleasure and that it could be extinguished at any time.[149] As history would have it, in 1973, the Supreme Court of Canada recognized for the first time that Aboriginal title was justiciable in Canadian law. In 1997, the Court held the most comprehensive decision in the *Delgamuukw* case about the Aboriginal title. *Delgamuukw* set out a test to determine if Aboriginal title still existed and, if so, how the Crown might justifiably infringe upon it. The Court further ruled that Aboriginal title is different from merely land use and occupation. It had previously defined and incorporated Aboriginal jurisdictional authority over its use. *Delgamuukw* also acknowledged Aboriginal collective ownership of the land that includes a cultural relationship.

As noted earlier, section 35 of the *Constitution Act, 1982*, states that "existing aboriginal and treaty rights of the aboriginal peoples of Canada are as a result of this recognition and affirmation." After 1982, the impact of section 35 was felt across British Columbia, with growing unrest and uncertainty about Indigenous land rights. Since coming into force, section 35 of the *Constitution Act* has given rise to a wealth of commentary.[150] The courts have identified its aims. They have articulated and applied substantive tests to determine its protected rights and assess interference with the same. Explanations abound that these rights are communal and not individual. Notably, though, a considered discussion of the particular communities captured by the provision is missing. The Supreme Court has not outlined precisely which groups' rights are recognized and

[148] *Catherine*, supra note 89.
[149] Kent McNeil, "Flawed Precedent: The St. Catherine's Case and Aboriginal Title" (Canada: UBC Press, 2019).
[150] It is unusual to speak of the recognition of Indigenous peoples' rights as provided by s.35 of the Constitution Act, says Jeremy Webber. For more commentaries, see Patrick Macklem, Douglas Sanderson, "From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights" (United Kingdom: University of Toronto Press, 2016).

affirmed by section 35?[151] By the express terms of section 35(2), the Aboriginal peoples of Canada to whom the constitutional promise is made "includes the Indian, Inuit and Metis peoples of Canada."[152] It is also important we discuss the relationship between section 35 (1) of the Constitution Act 1982 and section 91 (24) of the Constitution Act 1867. There was a massive transformation because the latter provided that the federal government has exclusive authority over "Indians and lands reserved for Indians."[153]

According to Brent Olthuis:

> "Under section 91(24) of the Constitution Act, 1867, the term 'Indian' includes the Inuit and the Metis people. However, there is no clear explanation on how the Inuit can be identified as a people under Canadian law. In these circumstances, it is crystal clear that all groups categorized under section 35 must be Aboriginal. What is the definition in the context of the Canadian constitution? How can we recognize the groups categorized under section 91(24) of the Constitution Act as holders of certain rights and distinguish them from non-aboriginal people?"[154]

He further adds that, since section 35 recognizes and affirms their rights in the historical context, it can be inferred that "Aboriginal" means a group of people who survived and remained in existence after the Europeans colonized Canada. He, however, sees this statement as misleading on the ground that Aboriginals cannot be defined without referring to some fundamental propositions concerning the origins and functioning of the doctrine of Aboriginal rights.[155]

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[151] Brent Olthuis, "The constitution's peoples: approaching community in the context of section 35 of the Constitution Act, 1982." (*McGill Law Journal*, vol. 54, no. 1, 2009) at 1.
[152] The Constitution Act, supra note 20, s 35 (2).
[153] Joshua Nichols, A Reconciliation Without Recollection? An Investigation of the Foundations of Aboriginal Law in Canada. United Kingdom: University of Toronto Press, 2019. See also <www.dgwlaw.ca/wp-content/uploads/2015/06/Conference-Paper-Withering-of-Section-9124.pdf> [perma.cc/EM6S-ASXB]
[154] Olthuis, supra note 151 at 2.
[155] *Ibid*.

II. **Judicial Problems**

In many cases, the definition of Aboriginal rights, issues of Aboriginal title and the requirements for proving the title have been considered. There have also been several dissenting judgments, views and comments concerning Aboriginal title in Canada.[156] Generally, in litigating Aboriginal title cases, documents are the most common and accepted type of evidence.[157] In the *Delgamuukw* case, the Supreme Court of Canada accommodated the oral evidence of Indigenous Peoples, and ever since, courts have tried to follow their footprints. Although, as time went by, courts find it hard to accommodate the oral narratives of Indigenous people.[158] Little weight is attached to the oral evidence tendered in court by the Indigenous peoples.[159] From what I gathered from the recent court cases like the *Tsilhqot'in Nation*, when there is a conflict between the written records and the oral evidence of Indigenous peoples, written records are much more persuasive. This is why proof of aboriginal title is still a problem.

As Indigenous peoples invoke section 35 of the constitution as recognition of their aboriginal and treaty rights, the justice system is continually faced with accepting the oral evidence tendered in courts by the Indigenous peoples. This form of evidence can cause problems in common law courts, which have long been dependent on textual evidence for probative value.[160] The Supreme Court of Canada in *Delgamuukw v. British Columbia* raised three tests that the

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[156] In *Delgamuukw v. British Columbia*, Chief Justice Antonio Lamer disagreed with both parties' characterization of Aboriginal title, that of the Gitxsan and Wet'suwet'en for being too broad, that of the province for being too narrow. In his view, the content of Aboriginal title "lies somewhere in between" (par. 111).
[157] Arthur J. Ray, "Telling it to the Judge: Taking Native History to Court" (United Kingdom: McGill-Queen's University Press, 2011). See also, Ron Delisle et al, Evidence: Principles and problems, 12th ed (Toronto: Thomson Reuters 2018) at 825.
[158] Nepia Mahuika, "Rethinking Oral History and Tradition: An Indigenous Perspective" (United States: Oxford University Press, 2019).
[159] Miller, Bruce Granville, "Oral History on Trial: Recognizing Aboriginal Narratives in the Courts" (Canada: UBC Press, 2011).
[160] See https://go-gale-com.ezproxy.library.uvic.ca/ps/i.do?p=ITBC&u=uvictoria&id=GALE%7CA666422469&v=2.1&it=r&sid=summon

Indigenous peoples must prove over Aboriginal title. The tests stipulated in the case were: (a) The land for which title is claimed must have been occupied before the assertion of sovereignty. (b) If present occupation is relied on as proof of occupation pre-sovereignty, there must be continuity between present and pre-sovereignty occupation. (c) At sovereignty, that occupation must have been exclusive.[161]

The Supreme Court of Canada's decision in *Tsilhqot'in Nation v. British Columbia*[162] appears to have left many issues concerning Aboriginal title, which is a component of Aboriginal right[163] uncertain. John Borrows unveiled the hidden actions of British Columbia in a panel "Aboriginal Title and Provincial Regulation: The Impact of *Tsilhqot'in Nation v BC*."[164] The issues raised by Professor Borrows are troubling and need to be addressed to avoid the uncertainties that have been dumped on the Indigenous Peoples and non-aboriginal people. These issues stem from the opinion of the Supreme Court of Canada that the doctrine of *terra nullis* never occurred in Canada. The court also went ahead to state that the Crown acquired an underlined title over lands in Canada. The implication of this decision is that no one has title over any land in Canada. In line with the uncertainties revolving around Aboriginal title issues, Dwight Newman highlighted the potential effects of the United Nations on the Rights of Indigenous Peoples on Aboriginal Title in

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[161] Robert Hudson, "The failure of the Delgamuukw test for proof of aboriginal title." (University of British Columbia Law Review), vol. 48, no. 2, 2015, p. 361+. Gale OneFile: LegalTrac, <https://go-gale-com.ezproxy.library.uvic.ca/ps/i.do?p=LT&u=uvictoria&id=GALE%7CA428998387&v=2.1&it=r&sid=summon>

[162] See *Tsilhqot'in Nation* supra note 92.

[163] Article 26 (1) of UNDRIP provides that Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired, (2) Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired, and (3) States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

[164] UVic Law "John Borrows - Aboriginal Title and Provincial Regulation: The Impact of Tsilhqot'in Nation v BC" (September 30, 2014), 00h:57m:30s, online (video): *YouTube* <https://www.youtube.com/watch?v=zJybIpM7hEw> [perma.cc/BP4P-CDL9]

Canada. This thesis will examine the potential implications of the extended land rights provisions under the UNDRIP on Aboriginal title.[165]

III. **Proof of Aboriginal Title**

Borrowing the words of John Borrows, Aboriginal title is a wide range of rights which means it is territorial and not just a 'postage stamp-like' small plot of land interest.'[166] According to Jay Nelson, Aboriginal title includes the rights to control the land and decide how it will be used, use the land for traditional and modern purposes and reap the economic fruits of the land.[167] As highlighted by several scholars like John Borrows and Alan Hanna, proof of Aboriginal title is one of the issues that pose a judicial problem.[168]

Interestingly, in 1990, the Supreme Court in the case of *R. v Sparrow*[169] did not follow any test for proof of rights before declaring that the Musqueam Nation in British Columbia had the right to fish for food and ceremonial purposes.[170] One of the salient but important points made in the *Sparrow* case is the uncertainty of the constitutional protection provided in 1982.[171] There would be governmental influence wherein the government can infringe upon the rights of the Indigenous peoples.[172] The ability of government to reduce Aboriginal rights is problematic. The rights of Indigenous Peoples have constantly been infringed upon and a subject of negotiation. The *Sparrow* case did not answer the following question - how can Aboriginal rights be defined and

[165] For some of the uncertainties following *Tsilhqot'in Nation* see Dwight Newman, "The Top Ten Uncertainties of Aboriginal Title after Tsilhqot'in" (2017) Online: *Fraser Institute*. <www.fraserinstitute.org/sites/default/files/top-ten-uncertainties-of-aboriginal-title-after-tsilhqotin.pdf> [perma.cc/U8TM-QZZL] Newman explored what he characterized as 'the top ten uncertainties of Aboriginal title after *Tsilhqot'in.*"
[166] See supra note 164 at 00h:58m:52s.
[167] *Ibid* at 00h:24m:17s.
[168] Kent McNeil, "The onus of proof of aboriginal title. Osgoode Hall LJ 37 (1999): 775.
[169] *R. v. Sparrow* (1990), 1 S.C.R. 1075.
[170] McNeil, supra note 168 at 318.
[171] Jim Reynolds, From Wardship to Rights: The Guerin Case and Aboriginal Law. (Canada: UBC Press, 2020).
[172] *Ibid*.

identified? The Supreme Court in 1996 responded to the question in the *Van der Peet* trilogy case.[173] Antonio Lamer, the Chief Justice of Canada, laid the foundation for the test in identifying and defining Aboriginal rights.[174] In Lamer's words, "to be an aboriginal right, an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."[175] Lamer's statement implied that Aboriginal rights could only exist if they can be demonstrated to have been in existence long before colonization. Lamer does not see any practice, tradition, and culture after colonization as an "aboriginal right."[176] Although other justices consented to Lamer's test, there were two solid dissenting judgments by the two women at the Supreme Court at the time.[177]

In Justice McLachlin's dissenting judgment, she highlighted that practice is integral to an Aboriginal culture if it "is part of the unity of practices which together make up that culture.[178] As you might guess, I agree with the dissenting judgement of L'Heureux-Dubé. In this case, she was a rebel.[179] She described Lamer's precontact requirement and definition of Aboriginal rights as a "Frozen Rights" approach geared towards making the proof of burden practically impossible for the Indigenous people.[180] Lamer's definition of Aboriginal rights was tied to Aboriginal title to land, which was uncertain. The significance of Aboriginal title in Canada cannot be overemphasized. One striking thing in *Delgamuukw* is that the Supreme Court laid down various principles to guide the trial judges in Aboriginal title cases.[181]

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[173] *R. v. Sparrow* (1990), 1 S.C.R. 1075.
[174] McNeil, supra note 168 at 319.
[175] *Ibid.*
[176] *Ibid*.
[177] *Ibid*. Justices McLachlin and L'Heureux-Dubé were the only women at the Supreme Court of Canada in 1996.
[178] See McNeil, supra note 168 at 319.
[179] Claire L'Heureux-Dubé, "A Life" by Constance Backhouse <https://www.ubcpress.ca/claire-lheureux-dube> [perma.cc/5U6S-5S5B]
[180] *Ibid* at 320.
[181] *Ibid* at 323.

Aboriginal evidence is often oral. This has proved to be an evidentiary challenge for the Indigenous peoples to lay claims to their lands.[182] The implication of this is that if the evidence of the Indigenous peoples are solely oral, it cannot be entered into evidence.[183] The Supreme Court of Canada, in several cases like *Calder v British Columbia,*[184] *Delgamuukw v British Columbia*,[185] *Guerin v the Queen*,[186] and so many others, held that evidence tendered by Aboriginal claimants should not be disregarded and undervalued. Despite its many flaws, it would be unfair not to acknowledge that the Supreme Court of Canada played a vital role in advancing Aboriginal rights and Aboriginal Title's understanding and substance. Four years before the Supreme Court of Canada's decision in *Calder*,[187] the 15th prime minister of Canada, Pierre Elliot Trudeau, rejected the notion that the Aboriginal peoples had different rights from those accorded to other Canadian citizens.[188] The *Calder* case was and is still a legacy of its own. It changed the Canadian prime minister's mindset – the federal governments started the long process of negotiating comprehensive aboriginal title settlements. Thus, in 2014, the Supreme Court of Canada in *Tsilhqot'in Nation v*

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[182] Alexandra Potamianos, The Challenges of Indigenous Oral History Since *Mitchell v. Minister of National Revenue*, 2021 26 Appeal: Review of Current Law and Law Reform 3, 2021 CanLIIDocs 671, <https://canlii.ca/t/t2l1> [perma.cc/463E-2HPB]

[183] Bruce Granville Miller, "Introduction" in Oral History on Trial: Recognizing Aboriginal Narratives in the Courts (Vancouver: UBC Press, 2011) 1 at 2-3.

[184] See generally David Milward, "Doubting What the Elders Have to Say: A Critical Examination of Canadian Judicial Treatment of Aboriginal Oral History Evidence" (2010) 14 Intl J Evidence & Proof 287 [Milward]; Karen Drake, "Indigenous Oral Traditions in Court: Hearsay or Foreign Law?" in Karen Drake & Brenda L Gunn, eds, Renewing Relationships: Indigenous Peoples and Canada (Saskatoon: Wiyasiwewin Mikiwahp Native Law Centre, University of Saskatchewan, 2019) [Drake]; David Laidlaw, "The Challenges in Using Aboriginal Traditional Knowledge in the Courts" in Allan E Ingelson, ed, Environment in the Courtroom (Calgary: University of Calgary Press, 2019) 606; Drew Mildon, "A Bad Connection: First Nations Oral Histories in the Canadian Courts" in Renate Eigenbrod & Renée Hulan, eds, Aboriginal Oral Traditions: Theory, Practice, Ethics (Blackpoint, NS: Fernwood, 2008).

[185] Olthuis, supra note 151 at 2.

[186] *Guerin v The Queen* (1984) 2 S.C.R., 335.

[187] *Calder v British Columbia*, (1973) S.C.R 313.

[188] Sally M. Weaver, "Making Canadian Indian Policy: The Hidden Agenda 1968-70" (United Kingdom: University of Toronto Press, 1981). See also, "The White Paper, 1969 | The Canadian Encyclopedia", online: <www.thecanadianencyclopedia.ca/en/article/the-white-paper-1969> [perma.cc/U9NY-Q3TZ]

British Columbia[189] provided a declaration of Aboriginal Title in Canada. In this case, Aboriginal Title was declared for more than just intensively used specific sites but also for a territory.

In *Delgamuukw*, the Supreme Court declared that the trial judge had mistakenly excluded evidence from aboriginal leaders in the form of songs and oral narratives that did not fit Western notions of historical accounts.[190] The trial judge's error was not just a legal error but an act of racism.[191] A quick look at the British Columbia Supreme Court's decision in *Delgamuukw's* case, it can be interpreted as Chief Justice McEachern disregarded the evidence of *adaawk*. *Adaawk* is the Gitksan's land ownership which Gwans, a Gitksan witness, presented.[192] The reason behind this conclusion is simple. It is to reiterate the fact that the format of aboriginal title used by the Indigenous people is mostly declared as "error and inadmissible."[193] With this, we can assume why it seemed impossible for the Indigenous people to comfortably tell their stories in court without the judge ruling their evidence as "insufficient."[194]

Jimmy Peterson explained some of the facts stressed by the court in recent cases. He stated that any deviation from the principles of evidence that cannot be checked for its accuracy is inadmissible because it is hearsay.[195] Chief Justice Lamer highlighted the difficulties in attaching full weight to oral histories. He stated that "they are tangential to the ultimate purpose of the fact-finding process at trial," and they "largely consist of out-of-court statements, passed on through

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[189] *Tsilhqot'in Nation*, supra note 92.
[190] Mariana Valverde, "The Crown in a Multicultural Age: The Changing Epistemology of (Post)colonial Sovereignty" (2012) 21:1 Social & Legal Studies 3–21 at 11.
[191] Val Napoleon, "Delgamuukw: A Legal Straightjacket for Oral Histories?" (2005), Canadian Journal of Law and Society, 20:2, 123-155. doi:10.1353/jls.2006.0025
[192] *Ibid*, at 123.
[193] *Ibid*.
[194] The judge in *Haida Nation v British Columbia* implied that Chief Augustine being the only witness could have been influenced by his own literacy or by his forebears. See para. 65.
[195] Jimmy Peterson, "Judicial Treatment of Aboriginal Peoples' Oral History Evidence: More Room for Reconciliation." (Dalhousie Law Journal, 2019) vol. 42, no. 2, 483 - 503. ProQuest, <http://search.proquest.com.ezproxy.library.uvic.ca/scholarly-journals/judicial-treatment-aboriginal-peoples-oral/docview/2424116125/se-2?accountid=14846>.

an unbroken chain across the generations," which conflicts with the general rule against the admissibility of hearsay.[196] Consequently, their admissibility is assessed on a case-by-case basis.[197] In 2001, the court in *Mitchell v. MNR*[198] expanded on *Delgamuukw* and established a 3-part admissibility test for oral history: first, it must be useful to prove a relevant fact; second, it is reasonably reliable; and third, its probative value is not overshadowed by its prejudicial effects.[199]

As John Borrows rightfully stated, the test of the Aboriginal title – continuity, sufficiency and exclusivity of occupation is only required to be proven by Aboriginal peoples.[200] Yet, the Crown does not go through the same legal test. The implication of this is that the burden of proof is only on the Indigenous peoples; the Crown is assumed to own land without proving how they received it. Indigenous peoples have to go to great expense to prove land ownership. It makes me question why the Indigenous peoples have to prove their title over lands to visitors.

During my interview with Professor Hanna, he shared his thoughts about Aboriginal title problems in *Tsilhqot'in Nation's* case. He said that he is very encouraged that Canada finally recognized at law, something that England recognized - that the Indians have some sort of title to the land. Canada claims title to own all the lands. Canada also tries to carve out some kind of recognition that already existed. For instance, the Peace and French Agreement and the Number Treaties existed because there was legal recognition of Aboriginal title and underlined its power. However, the west coast of British Columbia never acknowledged Aboriginal title. It is also important that I stress that the court while relying on the decision of the Australian High Court,[201] came out with a magical test. This test entails that the Indigenous peoples have to prove at law

[196] *Ibid* at 487 – 488.
[197] *Ibid*.
[198] *Mitchell v. MNR*, 2001 SCC 33 at para 30.
[199] See Peterson, supra note 195 at 488.
[200] See supra note 164 at 01h:05m:47s.
[201] *Western Australia v. Ward*, (2002) 213 CLR 1 (AusHC).

through evidence that they have a title.[202] One of the tests was that the Indigenous peoples used and occupied the land without a break in continuity.[203]

However, as Professor Hanna notes, this can be an impossible test because there was war and trading during these periods. It is impracticable for the Indigenous peoples to come up with evidence from something that occurred 100 years ago to someone who officially claims the land. He suggested that the court should have done better in delivering their decisions in *Calder*, *Delgamuukw* and *Tsilhqot'in* by recognizing that the judgment was one-sided. There was no way that the judges would understand aboriginal title and evidence because they were not trained to grapple with that perspective. He also stated that the court ought to have ensured that the onus to prove land claims was on the government and not on the Indigenous peoples who lived on those lands long before the European settlers arrived in Canada. He went further to expound on the implications of the UNDRIP on the government and the court. He said that it depends on what the courts and provincial governments see as their roles and responsibilities under UNDRIP. The British Columbia bill respecting Indigenous peoples' rights as prescribed under UNDRIP shows how weak and ineffective mechanisms to implement UNDRIP are. He also acknowledged that there had been some changes in the province. At least, the province has tried to settle with the First Nations over land claims.

Finally, Professor Hanna concluded with the uncertainties that resulted from the *Tsilhqot'in Nation* case. One of them was that it seemed like *Tsilhqot'in Nation* would not mind that the government tells them what kinds of projects can occur on their lands so long as the government can justify the infringement. However, it is tough to balance considering some spiritual

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[202] *Tsilhqot'in Nation*, supra note 92, para 24; also available at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do> [perma.cc/SE5H-5HZ7]
[203] *Ibid* at para 46.

connections to the land. Professor Hanna finally connected the uncertainties to the questions asked by the non-indigenous people regarding private properties - whether their fee simple interest in the land was at stake.? His response to the question was that the Indigenous people see fee simple as justified and rarely fight against such claims.

It is worthy to note that equitable principles in the Royal Proclamation have been applied throughout Canada since its creation, except in British Columbia and portions of Quebec. These principles are designed to prevent any unjust and discriminatory doctrines.[204] However, the *Tsilhqot'in Nation v British Columbia* case held that the Proclamation confirms that the principle of *terra nullius* never applied in Canada.[205] The court further stated that the doctrine of discovery and *terra nullius* is inconsistent with the constitutional principle to uphold the Crown's honour.[206] This principle requires the Canadian and provincial governments to act in good faith and integrity when dealing with Indigenous peoples.[207] Let us assume the decision of the court was that the doctrine of discovery and *terra nullius* (that no one owned the land prior to European assertion of sovereignty) applied in Canada. It would have been a violation of treating the Indigenous peoples fairly and in good faith. Also, it would have also been asserted that terra nullius was a valid move. It is the Crown's responsibility to demonstrate on what basis it can validly claim Crown sovereignty and where such sovereignty would apply. Such claims must be consistent with the United Nations

[204] See also *Delgamuukw*, supra note 145 para. 200 (reasons of La Forest and L'Heureux-Dubé JJ. were delivered by La Forest): "In essence, the rights set out in the Proclamation … were applied in principle to aboriginal peoples across the country". Human Rights Council, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Addendum: The situation of indigenous peoples in Canada, UN Doc. A/HRC/27/52/Add.2 (4 July 2014), para. 1: "The history of indigenous peoples' relationship with Europeans and Canada has positive aspects, such as … policies of coexistence, the Royal Proclamation of 1763 and the related policy of the British Crown of seeking formal permission and treaty relationships with indigenous peoples before permitting settlement in their territories."
[205] *Tsilhqot'in Nation*, supra note 92, para 69.
[206] *Ibid*.
[207] *Ibid.*

Declaration on the Rights of Indigenous Peoples (UNDRIP) and other international human rights laws because Canada adopted UNDRIP and have implemented it into their laws.[208]

The big question remains: how did the Crown obtain title, and how does the Crown continue to assert sovereignty? As John Borrows reminds us, "Canadian law will remain problematic for Indigenous peoples as long as it continues to assume away the underlying title and overarching governance powers that First Nations possess."[209]

In the same vein, Professor Hanna suggests that it is up to Canada to prove that they have the right to access authority to land or ownership they claim. He also stressed how the entire test in *Tsilhqot'in Nation* is problematic and backward. He stated that the only good thing that resulted from the case was acknowledging aboriginal title in British Columbia. He, however, observed that it was absurd that the court can decide where the aboriginal title exists and doesn't - such distinctions should not exist. Instead, such aboriginal claims should be settled through negotiations. Notably, he mentioned that another problem is that provincial or federal authorities can still override the title even if justified. Even if the title is proven and declared upon, it can still be infringed upon by the government. He observed that the steps taken by the *Tsilhqot'in Nation* during the 1886 war show that they resorted to physical force. The people of *Tsilhqot'in Nation* realized that the only way their voices could be heard was to go to court. However, Professor Hanna expressed his concerns. He wondered what guarantees the people of *Tsilhqot'in Nation* had that the colonial authorities would not condescend to their claims and resort to war? That would have been a total destruction of lives and properties in the *Tsilhqot'in Nation*. As a result, it has

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[208] Canada recently passed Bill C-15 into law – United Nations Declaration on the Rights of Indigenous Peoples Act; while in 2019, British Columbia adopted and implemented UNDRIP into their laws – Declaration on the Rights of Indigenous Peoples Act. See John Borrows et al, eds, *Braiding legal orders: implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo, ON, Canada: Centre for International Governance Innovation, 2019).
[209] Borrows, supra note 130.

forced the provincial authority to negotiate with the *Tsilhqot'in Nation* on the land. The trajectory of these mechanisms between the provincial authority and *Tsilhqot'in Nation* is physical violence, legal status, and negotiations. He did not fail to draw the connection between the Supreme Court of Canada's decision in *Calder v British Columbia*[210] and *Delgamuukw v British Columbia*.[211] The two cases laid the foundation for the *Tsilhqot'in* Nation case regarding aboriginal title in Canada. He mentioned that one striking thing in the cases is that the court does not want to be the pioneer of the change, not to upset the provincial authorities.

C. British Columbia's Approaches to Aboriginal Title

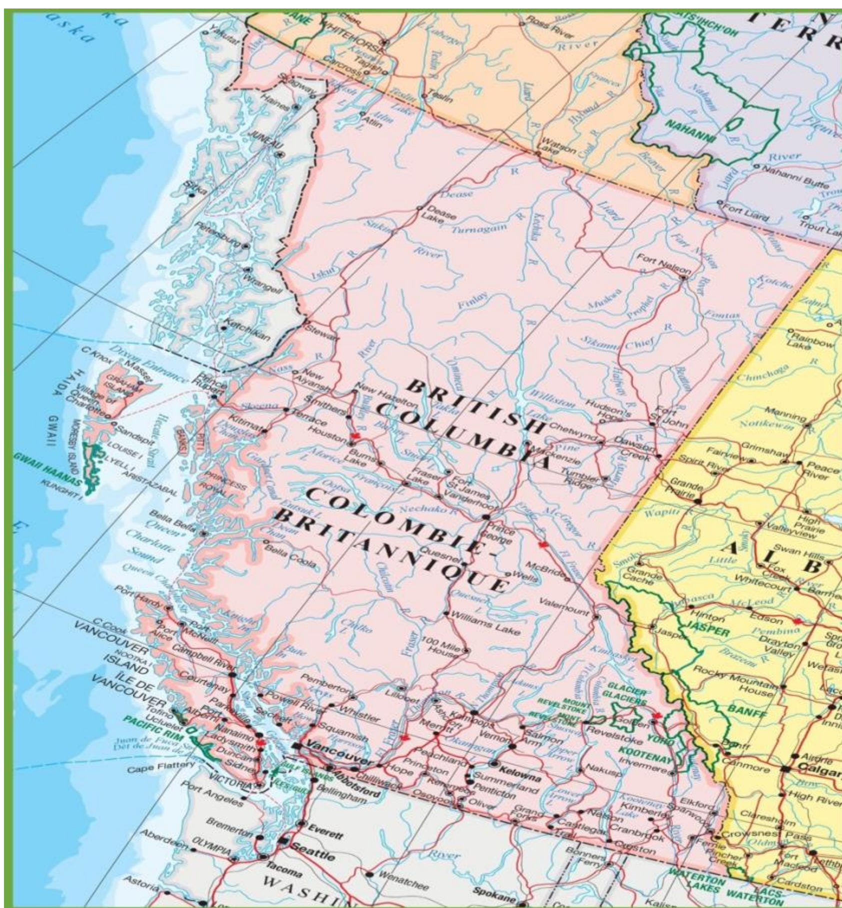

Figure II: **Map of British Columbia (retrieved from world map)**

[210] *Calder*, supra note 187.
[211] *Delgamuukw*, supra note 145.

Most Aboriginal title claims instituted in courts by the Indigenous peoples are against the government of British Columbia. This is why this section is important. It not only discusses the steps taken by the government of BC in relation to Aboriginal title, but it develops context for the third chapter of this thesis which recommends how the Declaration of the Rights of Indigenous Peoples overcomes the need for Indigenous peoples to prove aboriginal title.

British Columbia has a larger aboriginal population than most provinces and has, over the years, played a vital role in marginalizing Indigenous peoples regarding decisions taken on their rights to traditional hunting and fishing.[212] In British Columbia, lands that were not set aside for reserve and were not protected by treaties were treated as provincial government property.[213] As a result, it is safe to say that this is why most Aboriginal title cases are instituted against the government of British Columbia.[214] Despite the horrible history of land-grabbing, political oppression, and cultural genocide – the Honour of the Crown remains unsullied.[215]

The Legislative Assembly of British Columbia met on October 24, 2019, to deliberate on how to implement the Declaration of the Rights of Indigenous Peoples Act (DRIPA) into their law.[216] After several debates and deliberations, Bill C-41 was granted Royal Assent,[217] thereby enshrining Indigenous peoples' human rights into law on November 28, 2019. After a careful review of Bill C-41, I conclude that the Bill did not bestow any new laws. It merely recognized

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[212] See Valverde, supra note 190 at 5.
[213] Cole R. Harris, "Making Native Space: Colonialism, Resistance, and Reserves in British Columbia" (Canada: UBC Press, 2011). See also, Cole Harris, "The Resettlement of British Columbia: Essays on Colonialism and Geographical Change" (United States: UBC Press, 1997).
[214] *Ibid* at 5.
[215] See Valverde, supra note 190 at 7.
[216] Bill C-41, *An Act to amend the Declaration on the Rights of Indigenous Peoples*, 2nd reading, *British Columbia, Legislative Assembly Debates*, 41-4, No 44 (30, 31 October 2019) at 286 (Hon Scott Fraser).
[217] "4th Session, 41st Parliament – Progress of Bills with Hansard Debates," online: <www.bclaws.gov.bc.ca/civix/document/id/bills/billsprevious/4th41st_progress-of-bills_government>

the rights of Indigenous peoples provided under the United Nations Declaration within Canadian law, within the constitution and British Columbia law.

In an attempt to implement DRIPA into their laws, salient steps were taken by the government of British Columbia. Under the Declaration Act,[218] the government of B.C. stated that:

1. (1) Each year, the minister must prepare a report for the 12 months ending on March 31.

   (2) The report must be prepared in consultation and cooperation with the Indigenous peoples in British Columbia.

   (3) In the report under subsection (1), the minister must report on the progress made towards implementing the measures referred to in section 3 and achieving the goals in the action plan.

   (4) On or before June 30 in each year, the minister must

   (a) lay the report prepared for the 12 months ending on March 31 in that year before the Legislative Assembly, if the Legislative Assembly is then sitting, or

   (b) file the report prepared for the 12 months ending on March 31 in that year with the Legislative Assembly's Clerk, if the Legislative Assembly is not sitting.

The government is expected to report annually on progress towards alignment of provincial laws with the U.N. Declaration and develop an action plan to achieve the U.N. Declaration's objectives.[219] In line with the above provision, an annual report was delivered by the B.C. government. This first annual report outlined the progress made towards implementation for the period from which the Declaration Act was brought into force on November 28, 2019, until the

[218] Declaration on the Rights of Indigenous Peoples Act, 2019, s. 5.
[219] *Ibid* at 9.

end of the fiscal year 2019/20 on March 31, 2020.[220] This report proposed method and content, which was discussed over May and June with the First Nations Leadership Council, Alliance of B.C. Modern Treaty Nations, and First Nations directly, including shared tables (Treaty, non-treaty, and government-to-government). Indigenous peoples, wherever they reside, have critically important voices for our work to implement the Declaration Act, and we are working towards more effective and inclusive approaches to engagement.[221]

At the first reading of the Bill, the government referred to the ongoing first-ever Indigenous program at the University of Victoria. The UVic program was not just the first in the province, nor is it just the first in the country, but it is also the first in the world.[222] The Indigenous Law Research Unit was established at the University of Victoria in 2018. On January 1, 2020, the Federal Act respecting First Nations, Inuit and Métis children, youth, and families came into force. Through practice changes and amendments to the Child, Family and Community Service Act, B.C. was working to improve Indigenous children and families' lives. In addition, over the past two years, the Province and the Government of Canada have entered into separate tripartite agreements with the Cowichan Tribes, Wet'suwet'en Nation, and Secwépemc Nation.[223] From the preceding, it is evident that the government of British Columbia has taken tremendous steps in implementing UNDRIP into its laws.

Despite these recent changes, Professor Hanna explained that the government of British Columbia has had very few land agreements with the Indigenous peoples since the creation of Canada. To date, British Columbia has refused to come into a land claims agreement with the

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[220] "Declaration on the Rights of Indigenous Peoples Act 2020 Annual Report" Annu Rep 18 at 6. See <https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/dripa_annual_report_2020.pdf>
[221] *Ibid*.
[222] The transcript of the first reading can be found here <https://www.leg.bc.ca/documents-data/debate-transcripts/41st-parliament/4th-session/20191024am-Hansard-n280#bill41-1R>
[223] See supra note 220 at 10.

Indigenous peoples except in a few instances like the Nisga'a Agreement. For this reason, I wonder if the government of British Columbia's Bills are not just a charade to avoid signing land claim agreements, which could give the Indigenous peoples absolute rights over their lands in the province. The government of British Columbia still reserves the right and power over the lands and natural resources claimed by the Indigenous peoples. During the Building Organization and Sector Sustainability (BOSS) Conference 2021, I volunteered as a Note Taker in the Indigenous Peoples Caucus Group. I found that the government of British Columbia only seeks money and revenue in the province, and in this case, land and natural resources are on the top list.

According to the facilitator, Rocky James,[224] the government greatly profits from the Indigenous peoples' lands. He also hinted that this is the reason why the government has failed to understand how the Indigenous peoples are connected to the land. Furthermore the co-facilitator, Sherry Small, believed that the government of British Columbia is steadily outsmarting the Indigenous peoples in the province. She elaborated that the government readily signed an agreement with the Indigenous people over self-determination but has drawn back to a reasonable negotiation regarding land agreements. In her words, she describes the government of British Columbia as "power-hungry, selfish and deadly colonizers."

D. Conclusion

This chapter discussed the legal protection of the Indigenous peoples in Canada, particularly in British Columbia. It briefly addressed several significant issues concerning Aboriginal title in British Columbia. In the wake of the historical wrongs such as the residential schools and the implications of the *Indian Act*, amongst other things, Canadian society, particularly

[224] Rocky James was the facilitator at the Building Organization and Sector Sustainability (BOSS) Conference 2021 under the Indigenous Caucus group.

the government of British Columbia, must re-examine its assumptions about its history and foster a long-lasting relationship with First Nations peoples by signing a land claim agreement. From all that has been discussed in this chapter, it is evident that the government of British Columbia is not ready to enter into any reasonable and feasible land claim agreements with the Indigenous peoples. True reconciliation would see them sign agreements with the First Nations, giving them complete control over their land. To slow the critique of Indigenous peoples over land claim agreements, the government provides various action plans to respect and recognize the rights of the Indigenous Peoples as provided by the United Nations General Assembly in the United Nations Declaration on the Rights of Indigenous People (UNDRIP). The entirety of this thesis has laid the foundation to address the following problem: "Can the Declaration on the Rights of Indigenous Peoples Act (DRIPA) overcome the need to prove aboriginal title in courts, as was necessary for the *Tsilhqot'in* decision?" This analysis will conclude with thoughts on how the gap in DRIPA may be bridged.

CHAPTER THREE

INDIGENOUS PEOPLE OF BIAFRA AND THEIR STRUGGLES IN NIGERIA

Introduction

This chapter seeks to gather threads on how UNDRIP can address the Indigenous People of Biafra's self-determination if Nigeria adopted and implemented UNDRIP into their legal system. In advancing issue of self-determination by the Indigenous People of Biafra in Nigeria this thesis will uncover the struggles of the Indigenous People of Biafra (IPOB) and as noted earlier, it will also offer solutions on how UNDRIP can address IPOB's quest to form their own country. The resurgence of Indigenous self-determination is necessary to overcome the legacy of Nigeria's colonialism. For close to three years, the south-east of Nigeria went to war. The war was fought to separate from Nigeria and form a sovereign country known as the '*Republic of Biafra*.' The Indigenous People of Biafra (IPOB) is a separatist organization representing Biafrans' social, political, and economic interests in Nigeria.[225] The IPOB are the remnants of people that survived the genocide of 1967 to 1970, where more than 3.5 million Biafrans were brutally slaughtered by the Nigerian State,[226] while some starved into defeat.[227] Even after 51 years since the civil war ended, the Igbos are still clamouring for their self-government. They believe that the only way forward is for the Indigenous Peoples of Biafra to be carved out of Nigeria to control their land, natural resources, and government.

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[225] "Indigenous People of Biafra Demand Action Be Taken in Nigeria." *PR Newswire*, (22 Oct. 2020), p. NA. Online: *Gale OneFile: Business*, <https://link.gale.com/apps/doc/A639113866/ITBC?u=uvictoria&sid=ITBC&xid=90d692aa> [perma.cc/86UA-U3KV]

[226] "Author Obi Ukwuoma's Newly Released 'The Case for Biafra Restoration' Is an Illuminating and Richly Detailed Work Describing the Tragic Modern History of an Ancient Land." *PR Newswire US*, (27 Sept. 2018). Online: *EBSCOhost*, <http://search.ebscohost.com.ezproxy.library.uvic.ca/login.aspx?direct=true&db=bwh&AN=201809270000PR.NEWS.USPR.UN19237&site=ehost-live&scope=site> [perma.cc/GU4G-CFCQ]

[227] *Ibid*.

A. *The Igbos*: their connection to the land

In Nigeria, the stories told by my grandfather, the veterans, and other people give a clear glimpse of how they saw themselves in the 1900s. They believed in living together, telling stories, and abiding by their laws which were made by their ancestors and gods. They narrated that their culture, tradition, and way of life were peaceful until the white man came. Everything changed. Some of the chiefs believed that the change was for good, while some felt that their values and traditions would be washed away from the earth's surface. One of the stories told by my grandparents that are still prevalent in the villages in the Igbo community was the sale of land. A sale of land is deemed valid and legal if a ceremony was organized and the owner publicly announces that the buyer is the new owner of his village house. This ceremony must be in the presence of community members. These ceremonies are recognized as the customary law in Biafra today and UNDRIP could help revitalize Indigenous peoples relationship with land in the Igbo territory today.

I. Indigenous People of Biafra (IPOB)

The Indigenous People of Biafra (IPOB) is a secessionist political organization that has sought to break out from Nigeria since 1967.[228] This organization may not be "Indigenous" in the context of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[229] discourse. The concept of indigeneity is complicated in the African context. As Dorothy Hodgson notes, African governments have argued that we are all "indigenous because over time indigenous

[228] Esther Ajiboye, "Polarisation and the Sustenance of Biafra Secessionist Discourses Online" (2020) 55:4 Journal of Asian and African Studies 475–491 at 3.
[229] UN Declaration, supra note 3.

rights movement has gained traction throughout the continent."[230] Although Hodgson's claim is correct to some extent, it is important to stress that in Nigeria's case, it is different. The Biafrans surrendered to the Nigerian state after they lost the war in 1970. This, I believe, might be the problem Nigerians would face when relying on UNDRIP. This is to say that, despite the international recognition of the rights of Indigenous people under UNDRIP, there might be implications for not falling under the provisions of UNDRIP.[231]

These implications would occur in different forms; first, the Biafrans might be unable to fight for self-determination to breakout from Nigeria. The unforgettable incidents that occurred in 1967 could resurface again. As a matter of fact, the major implication is that the IPOB may not assert any rights under UNDRIP despite suggestions otherwise in this thesis. This boils down to a big question; can the Indigenous people of Biafra (a secessionist group) claim to be indigenous under the definition in UNDRIP? Although this question is important, it is also necessary to state that there is no definition of Indigenous peoples within UNDRIP. The lack of a definition of "indigenous" was left out on purpose, to allow context and Indigenous peoples own different laws to guide definitions. However, there are several authors that made attempts to define the term "indigenous" which will help answer the question about whether the people of Biafran can be considered under UNDRIP.

Albert Barume stipulated that the definition of indigenous in the African context is related to colonialism. Barume's definition poses many questions – whether the definition of "indigenous" mean different things at different levels, the state, and the peoples. As Barume observed, most Africans considered themselves indigenous because of their decolonial victory and self-

[230] Matthew I Mitchell & Davis Yuzdepski, "Indigenous peoples, UNDRIP and land conflict: an African perspective" (2019) 23:8 The International Journal of Human Rights 1356–1377 at 1357.
[231] UN Declaration, supra note 3, art. 46.

determination.[232] According to James Anaya, he contends that the term "indigenous" refers to people who lived in a particular place prior to the invasion by the colonizers.[233] Anaya acknowledges that:

> "many of the minority or non-dominant tribal peoples of Africa and Asia are generally regarded, and regard themselves, as indigenous … because their ancestral roots are embedded in the lands in which they live or would like to live."[234]

Do the Biafrans consider themselves "indigenous" because of their decolonial victory? Partially. I make the claim that Biafrans are Indigenous because of the story my great-grandmother narrated to me about my roots as a Biafran. She stated that the main reasons why the name Biafrans came into existence was because the Igbos/Ibos (a group of people who spoke a common language) were constantly oppressed and deprived of being involved in political and economic matters in Nigeria. The battleline was drawn when over 1 million Igbos were unjustly killed by the Indigenous peoples of the Northern Nigeria in 1966. My great-grandmother rightly said that the Biafrans are the first inhabitants of the Southeast of Nigeria. Biafra is ours, she said. Biafra is freedom. Biafra is a spirit that lives in us. From the definition of indigenous in the African level by Barume and my great-grandmother, it is obvious that "indigenous" means different things at the African level and to the Indigenous peoples themselves. To further promote the understanding of Indigenous orders, I will follow how Indigenous peoples define themselves and, in this instance, I am referring to the Biafrans. Borrowing the words of Michael Levin, he stated that "the story of

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[232] Mitchell, supra note 230 at 1360.
[233] Sylvanus Barnabas, "Abuja Peoples of Nigeria as Indigenous Peoples in International Law" 2018, International Journal on Minority and Group Rights. 25. P. 431-457.
[234] S. J. Anaya, "Indigenous Rights Norms in Contemporary International Law," 8:1 (*Arizona Journal of International & Comparative Law* (1991) p 3.

the Igbos fit the definition of ethnonationalism; ethnic self-awareness and the idea of popular sovereignty, of being a people and legitimizing the desire to be a nation."[235]

It is also important to note that Nigeria was one of the countries that withheld their vote when UNDRIP was adopted.[236] My thesis is that the adoption and implementation of UNDRIP in Nigeria, would restore peace and tranquillity to the country. The adoption of UNDRIP would help the Nigerian state restore the rights and safety of the Biafrans. This would give Biafrans the power to apply Article 3 of UNDRIP to have their independent country. However, there is another challenge the Biafran's face in applying UNDRIP. Article 46 says:

1. Nothing in this Declaration may be interpreted as implying for any State, people, group, or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

While UNDRIP could help Biafrans gain the right to self-determination if recognized within UNDRIP, they could not secede from the country. I use the word "Biafrans" because it is the true identity of the southeastern people. The following States categorized as Easterners under the IPOB were Abia, Anambra, Ebonyi, Enugu, Imo, and Rivers. This organization developed because of the oppression and political marginalization of the Eastern part of Nigeria by the colonial heads and the Northerners' long-lasted oppressive power. From the story narrated by my great-grandmother, the Biafran people would be considered as Indigenous peoples within the

[235] Michael D Levin, ed, Ethnicity and aboriginality: case studies in ethnonationalism (Toronto ; Buffalo: University of Toronto Press, 1993) at 160.
[236] UN Declaration, supra note 3. See also <www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> [perma.cc/5ZSU-FNT4]

UNDRIP. This is also in line with the ordinary meaning of "peoples" – the men, women, and children (group of people) that are inhabit of a particular nation, or community.[237] However, I would like to stress that the term "peoples" have not been universally defined by the instruments that employ it.[238] Apparently, the IPOB seemingly falls under the purview of the ordinary definition. This would further be discussed in the next chapter when we have to consider how UNDRIP can help IPOB's fight for self-determination by virtue of Article 3.[239]

This chapter first considers the colonization and political marginalization of Biafra that occurred in Nigeria. Exploring the trajectory of the struggles of Indigenous People of Biafra enables me to connect to the issues of Aboriginal title in Canada as discussed in the last chapter. Aside from the fact that Canada and Nigeria were colonized by the British, there are differences in the experiences of Indigenous peoples in the two countries. For example, Indigenous peoples in Canada were not massacred like the Biafrans of Nigeria. Nevertheless, the Indigenous people of Canada suffered many of the same harms, such as the forcible removal of Indigenous children from their homes to residential schools.[240]

In this chapter, I will briefly examine the wars, starvation, killings, and defeat of the Biafran Indigenous peoples in Nigeria, from the 1960's until the present date. It is essential to discuss the effect of the British negative interference on the Biafrans during the Nigerian Civil War because their role affected the success of the Nigerian Civil War. The Nigerian state has failed to reconcile with the Biafrans by refusing to adopt and implement the United Nations Declaration on the Rights

[237] See https://dictionary.cambridge.org/dictionary/english/people
[238] Richard N Kiwanuka, "The Meaning of 'People' in the African Charter on Human and Peoples' Rights" (1988) 82:1 American Journal International Law 80–101 at 82. See also
[239] UN Declaration, supra note 3, art. 3.
[240] Eric Hanson, et al. "The Residential School System" (2020) Indigenous Foundations, First Nations, and Indigenous Studies UBC. See also J.R Miller, "Residential Schools in Canada" (2021) *The Canadian Encyclopedia*, *Historica Canada*. <www.thecanadianencyclopedia.ca/en/article/residential-schools> [perma.cc/K4HT-DJXH]

of Indigenous Peoples. The Canadian government has taken small steps in reconciling with the Indigenous people and Nigeria should start going down the same path.[241] As stated earlier, this chapter seeks to gather threads on how UNDRIP can address the Indigenous People of Biafra's self-determination if Nigeria adopted and implemented UNDRIP into their legal system. In order to neatly gather these threads, I first lay out the history of the Indigenous People of Biafra in Nigeria. Next, I discuss the British influence on the Nigerian state, which obstructed Biafran self-determination. As in the Canadian context, I will show how colonialism has prevented Indigenous peoples from exercising their self-determination and why UNDRIP is a key to decolonization.

B. Colonization and Political Marginalization

The Whiteman war never finishes

The Whiteman war is always big.

- King Koko of Nembe[242]

[241] The Truth and Reconciliation Commission (TRC) was a document established in 2008 to document the history and legacy of the residential schools which were in existence between the 1800s – 1990s. It is a sign of the Canadian government acknowledging the evil acts committed against the Indigenous peoples in their country and ways to reconcile and assimilate the Indigenous peoples into the Canadian society. The TRC provided 94 calls to action to redress those actions against the Indigenous peoples. This is one vital points this chapter seeks to embrace. The Biafrans cannot heal when the country has refused to acknowledge the killings of their children, parents, siblings, relations, and ancestors. The Nigerian government have failed to reconcile with the Biafrans and continues in the footsteps of the previous governments in killing and silencing the people.

[242] Toyin Falola, *Colonialism and violence in Nigeria* (Bloomington: Indiana University Press, 2009) at 1.

Figure 1: The Map of Biafra

The struggles of the Indigenous People of Biafra in Nigeria are unforgettable – it is unbearable and saddening. This section shares the crux of the sufferings of the Biafrans, which is the colonization and political marginalization that occurred in Nigeria. The Biafrans felt the heat of the colonization. The Biafrans were marginalized and deprived of their natural resources. No region in Africa was more attractive to the Europeans than Nigeria. This attraction existed long

before gold and diamonds were discovered in South Africa.[243] The Nigerian trade, which consisted of palm oil and palm kernels, was established, and enjoyed by the Europeans. It was the source of income and livelihood for the Igbo.[244] The Igbos refer themselves as "*Igbo enweghi eze*" (the Kingless people).[245] This presents a feasible political symbol of the Igbos – Indigenous and democratic.[246]

As noted earlier, the Europeans were attracted to the production of palm oil and palm kernels by the Nigerians. The resources of peanut and cocoa were also lucrative businesses that the colonial heads (British) could not overlook despite the massive profits the Europeans could make out of the sale of gold and diamonds in South Africa,[247] the Europeans saw that Nigeria was a great asset and could make more money from all regions. For instance, the River-Niger was to be explored, which the British regarded as a principal route to the rich Nigerian hinterlands.[248] The British came into Nigeria and threatened to go to war against the indigenes. Considering that Nigerians were not armed or fully equipped to fight the British, Nigeria surrendered to the whims and caprices of the British.[249] Nigerians (inclusive of the Biafrans) who at the time, had no plans of breaking out of the country were brave enough to go to war despite their foreseen defeat. There is a long list of incidents and losses.

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[243] *Ibid* at 1.
[244] For more information on the history of the Igbos are, see Ernest Emenyonu, *The literary history of the Igbo novel: African literature in African languages*, Routledge African studies 34 (London: Routledge Taylor & Francis Group, 2020).
[245] Toyin Falola & Raphael Chijioke Njoku, eds, *Igbo in the Atlantic world: African origins and diasporic destinations* (Bloomington: Indiana University Press, 2016) at 4.
[246] *Ibid*.
[247] *Ibid*.
[248] *Ibid*.
[249] *Ibid*.

For instance, King Jaja of Opobo was crushed and exiled in 1887 for opposing the British advance into the internal market.[250] The Ijebu was attacked and defeated in 1892.[251] King Nana Olumu of Itsekiri on the Benin River was attacked and removed from his fortified base at Ebrohimi in 1894.[252] The Oba Ovonramwen of Benin lost his throne and kingdom in 1897.[253] The Nupe and Ilorin were attacked and defeated in 1897.[254] King Ibaniduka of Okirika was removed from power and exiled in 1898.[255] Ologboshere, who wanted to regain Benin's Independence, was defeated and executed in 1899.[256] Each time a war was lost, a king was forcibly removed or killed. The British Empire was expanding, and Nigeria kept losing their independence.

Before I discuss how the British Empire was expanding, it is best we look at the cultures of the Biafrans (Igbos) that had great impact on their political, legal, and social orders. Many years ago, there was a group of people who lived in a particular community long before it was colonized by the British. This group of people were the Igbos – a language spoken, taught, and passed down for generations. As mentioned earlier in this thesis, I am Igbo, and I can speak and interact in my native language. The Igbos have a very interesting culture starting from how rules are made, to how they are enforced. Before the British came, the Igbos had Chiefs who made laws to govern the people. Any offender or person who violated the rules stipulated by the Chiefs committed an abomination. For instance, my father told me of how the Igbo community also came together to decide over issues that comes up. There are so many other rules made by the Chiefs which were obeyed by the Igbo community until the British arrived.

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[250] See Falola, supra note 242 at 1.
[251] *Ibid*.
[252] *Ibid*.
[253] *Ibid*.
[254] *Ibid*.
[255] *Ibid*.
[256] See Falola, supra note 242 at 1. This list was greatly and accurately compiled by Toyin Falola. For further readings about the history of violence that occurred in the Southern part of Nigeria; see <https://ebookcentral-proquest-com.ezproxy.library.uvic.ca/lib/uvic/reader.action?docID=474474>

When the British arrived, the Chiefs were no longer in charge of making rules in the Igbo community. The British invented the warrant Chiefs implemented an indirect rule system in Igboland. The warrant Chiefs stood as a King, also known as the traditional ruler. The warrant Chiefs had the power to make laws with or without the consultation of the Chiefs. The warrant Chiefs were only answerable to the British. The warrant Chiefs abused their powers to favour the British. One of the laws introduced by the British through the warrant Chiefs was the payment of tax. Prior to the arrival of British, the Igbos were not paying tax. There was no reason why they should. The warrant Chiefs also became the tax collectors which created riots amongst the Igbos and one of the prominent riots was the "Aba Women Riot" of 1929. As a growing child, my father's mother was so excited telling me about these courageous women who protested against the tax administration and invention of warrant Chiefs in the Igbo community. I was informed that these women got fed-up with the economic and socio-political oppression in Umuahia (a state in Biafra), and other territories in Igboland. This act is one amongst many that makes Igbos - Igbos. We are resilient. We do not succumb to any law made by the British to frustrate our people. We always fought back at the slightest form of oppression. As a result of the heated riot by the Aba women, the British dropped their plans to impose tax on the market women and curbed the power of the warrant Chiefs.[257] No doubt that the British had an impact on the Igbos in so many ways which would be discussed as we go further. Before I go into the effect of the colonial period on the Igbos, I will detail how the British Empire expanded.

As the British empire was expanding, they continued finding more ways to gain total domination over Nigeria. Nigeria became a British protectorate in 1901. However, in 1914, Sir Fredrick Lugard, who was the explorer of Africa and colonial administrator made

[257] For more information on the Aba Women's Riot, see <https://fee.org/articles/the-aba-women-s-riots-of-1929-africa-s-great-tax-revolt/> [perma.cc/Y3RU-YDNW]

recommendations for the Northern and Southern territories to be amalgamated to form the Colony and Protectorate of Nigeria.[258] I will explain the amalgamation process that occurred in Nigeria in the next section. I contend that the issue of the British constantly looking for ways to gain total control over a country is one of the many things that connect British Columbia and Nigeria. The British empire expanded and undermined Indigenous peoples through law, The only way for the British to gain total control over these lands was to undermine the rights of the Indigenous peoples. UNDRIP may hold important tools to enable the decolonization of these places so deeply impacted by colonialism.

Another way the British expanded their empire was through the Catholic missionaries. The Indigenous elders allowed the government and Catholic missionaries to educate and impart religious values in the Eastern part of Nigeria to eliminate the vernacular (Igbo language) spoken in that region.[259] This is another shared experience of colonization with Canadian Indigenous peoples.[260] The Catholic and other Christian missionaries in Canada forcibly took Indigenous children away from their homes to the residential schools. They were forced to speak and act like Victoria-era white men. The Indigenous children were robbed of their culture and values. The role the Christian churches and the Canadian government played was cultural genocide.[261] Something similar occurred in Biafra. The colonial heads saw the vernacular as evil and, at all costs, wanted the Indigenous peoples of Southeastern Nigeria to desist from speaking such an "evil" language.

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[258] See <www.britannica.com/place/Nigeria/Nigeria-as-a-colony> [perma.cc/E9A7-LVC9]

[259] Nicholas Omenka, "The Role of the Catholic Mission in the Development of Vernacular Literature in Eastern Nigeria" (1986) 16:2 J Relig Afr 121–137 at 121.

[260] TRC Final Report, supra note 35.

[261] TRC Final Report, supra note 35. See also, Cynthia Stirbys and Amelia McComber, "Indian Residential Schools: Acts of genocide, deceit and control by church and state" (June 15, 2021) online (website): The Conversation <https://theconversation.com/indian-residential-schools-acts-of-genocide-deceit-and-control-by-church-and-state-162145> [perma.cc/PNT8-QBRU]

Father J. Kirchner, who was one of the missionaries in the Southeastern part of Nigeria, painted a clear picture of the reason behind putting an end to vernacular when he wrote:

> To open an out-station or Catechist-post, and to establish a school, were the same thing. If a missionary entered a village that possessed no school, the first action was not to preach about the Kingdom of God. They endeavoured, first, to win the people over for the school. The missionary had to speak only about the school. People did not understand much about religion and the foundation of a Mission. Nor did they want to know anything about these things? But if he spoke to them about intelligent and educated people (like the Whites), about well brought up and neatly clothed school children who even understood and spoke the language of the whites, the whole crowd would send out an outburst of enthusiasm. It would say: "That is excellent! We, too, would want our children transformed in this way.[262]

Theoretically speaking, the purpose of colonial rule was to alter the customs, traditions, and institutions that the British deemed harmful to Nigerian progress. The British tampered with the existing political and social institutions in the country. These were in form of policies which made tremendous changes to Nigerian societies in many ways, particularly in Southern Nigeria, which suffered the most significant alterations to political institutions and economic orientation.[263] In a nutshell, the colonization of the Nigerian state affected the Southeasterners and, as such, led to the Northern part of Nigeria gaining dominance over other parts of the country. The following section discusses the framework on the country's division by the British and how the southeasterners

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[262] See Omenka, supra note 259 at 124.
[263] Toyin Falola & Matthew M Heaton, *A history of Nigeria* (Cambridge, UK; New York: Cambridge University Press, 2008) at 152.

suffered greatly and have ever since been oppressed and discriminated against by the Northerners in Nigeria.

I. The amalgamation of the Northern and Southern parts of Nigeria

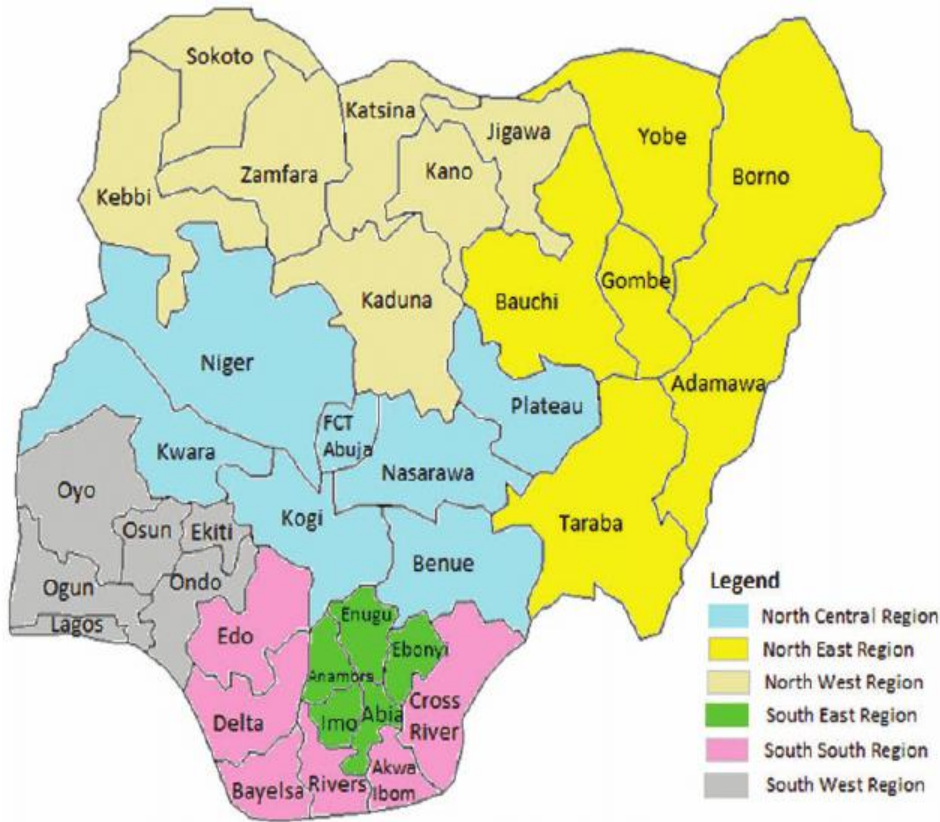

Figure 2: Map of Nigeria

It is important I lay out the impacts and damage the British caused to the Nigerians through colonization. By discussing this, I am laying the foundational problem. Earlier in this chapter, I mentioned how happy the Igbos were working and ruling themselves together as one without any king. I also highlighted the sudden change after the British colonized Nigeria. What I fairly

mentioned was that the damage was focused on a particular group of people – the Southeasterners.[264]

In 1906, the British government had control over the Protectorate of Lagos and the Niger Coast Protectorate.[265] The aim was to form a single Protectorate of Southern Nigeria.[266] Lord Lugard played a major role in the British Colonial History in East Africa, West Africa, and Hong Kong between 1888-1945.[267] He was also the first High Commissioner of the Northern Nigeria between 1900-1906.[268] He left Nigeria in 1906. However, he returned in 1912 and recommended that the southern and northern protectorates be amalgamated. Upon completion of the amalgamation in 1914, Lord Lugard became the first governor-general of the pre-colonial territory known as Nigeria for five years. The main goal of Lugard was control; as governor-general of Nigeria, he had unfettered powers. He wanted to centralize the administrative apparatus.[269] Lord Lugard never liked the organizational model that occurred in southern Nigeria. He objected to the direct rule of system which I discussed earlier. He believed that such a model would end up causing chaos because there was no hierarchy of power.[270] He also thought that the direct rule practiced in south Nigeria was "direct" and not "indirect."

As I stated earlier, the rule of law the Igbos were practicing before the arrival of the British was the direct rule – no judicial system and exclusive power given to the warrant chiefs. The Igbos made their laws through the Chiefs and judged anyone who was in violation of those laws through

[264] The Southeasterners are also referred to as the Igbos, Biafrans, Easterners. I use them interchangeably. The map of Biafra and Nigeria explains it better.
[265] See the arrival of the British <www.britannica.com/place/Nigeria/The-arrival-of-the-British> [perma.cc/8ECV-LGCT]
[266] Falola & Heaton, supra note 263 at 117.
[267] See <www.britannica.com/biography/Frederick-Lugard>
[268] See supra note 265.
[269] Falola & Heaton, supra note 263 at 117.
[270] *Ibid*.

punishments – banishment, excommunication and killing.[271] As a result of this, the British colonial officers had enough power to influence the affairs of the native courts and councils - they did this by restructuring the entire traditional administrative system practiced by the Biafrans (Igbos) and the northerners,[272] recruited warrant chiefs[273] and made emirs[274] (a Muslim military commander or local chief) respectively. Out of several southern kings and chiefs (I used the word "several" because the Igbo community is very large with many territories, and it is impossible to say how many southern kings and chiefs were involved in the governance systems in the 1900s because it was never documented).[275] The imposition of the indirect rule on the Igbos is somewhat like the effect of the imposition of the *Indian Act*[276] on the Indigenous peoples in Canada.[277]

Now, this is the dot I connected – the British was also keen to rob the Igbos of their identity. For instance, the Igbos had their own religious practice (gods known as Alusí, deities, spirits, and ancestors) which they believed in protecting their land and descendants before the British allowed

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[271] Abdulsalami Muyideen Deji, "Historical Background of Nigerian Politics, 1900-1960" IOSR Journal Of Humanities And Social Science vol. 16, issue 2 (Sep. – Oct. 2013), pp. 84-94 at 87. <www.iosrjournals.org/iosr-jhss/papers/Vol16-issue2/K01628494.pdf> [perma.cc/ET2Y-NJJJ]
[272] *Ibid* at 88 – 89.
[273] For more information about the Warrant Chiefs introduced by the British, see A. E. Afigbo, "The Warrant Chief System in Eastern Nigeria: Direct or Indirect Rule?" (1967), Journal of the Historical Society of Nigeria, vol. 3, no. 4, pp. 683–700, <www.jstor.org/stable/41856908>. See also, A. E. Afigbo, "Revolution and Reaction in Eastern Nigeria: 1900-1929: (The Background to the Women's Riot of 1929)," (1966) Journal of the Historical Society of Nigeria, vol. 3, no. 3, pp. 539–57, <www.jstor.org/stable/41856712>.
[274] For more information about the establishment of the Emirs in the Northern part of Nigeria, see Peter Kazenga Tibenderana, "The Role of the British Administration in the Appointment of the Emirs of Northern Nigeria, 1903-1931: The Case of Sokoto Province." The Journal of African History, vol. 28, no. 2, (Cambridge University Press, 1987), pp. 231–57 at 232.
[275] For more information on the traditional rulers in the Eastern Nigeria and Emirs in the Northern Nigeria, see Rotimi Ajayi, "Politics and Traditional Institutions in Nigeria: A Historical Overview," (1992), Trans African Journal of History, vol. 21, at 127 – 128. <www.jstor.org/stable/24520424>
[276] Indian Act, R.S.C., 1985, c. I-5.
[277] The *Indian Act* is the law that pertains to the Indians which the Canadian government uses to administer the management of reserve land. The *Indian Act* came into existence in 1876. Asides from the fact that the *Indian Act* was a clear indication of how the federal government exercised authority over the lands belonging to the Indigenous peoples, the *Act* also caused more harm on the Indigenous in several ways which I will discuss in the next paragraph. Previously, I asserted that the British imposition of indirect administrative system was similar to that of the *Indian Act* on the First Nations in Canada, and this is one of the reasons – the *Act* replaced the traditional structures of governance with band council elections. The *Act* also made it illegal for the First Nations peoples to practice their religious ceremonies. By looking at this, we can easily connect the dots. The removal of the First Nations peoples' culture and traditions damages their identity as the Indigenous peoples.

the Catholic church to come in. Before I go into the similarity with the Indigenous people in Canada, I point out that the Northerners did not succumb to the practice of Christianity introduced by the British, they stuck to their own practice as Muslims.

During my interview with Maazi Ogbonnaya Mark Okoro, he explained the reason for the amalgamation in the country. According to him:

> The unification was done for economic reasons rather than political. The Northern Nigeria Protectorate had a budget deficit, and the colonial administration sought to use the budget surpluses in Southern Nigeria to offset this deficit. Southern Nigeria was a British protectorate in the coastal areas of modern-day Nigeria formed in 1900 from the union of the Niger Coast Protectorate with territories chartered by the Royal Niger Company. The region was partitioned into Southern and Northern Protectorates. The British rule them independently. It was at that point that the British realized that the Northerners had nothing to offer. The Southerners were richer. For their economic interest, Fredrick Lugard forced both independent Protectorates together in 1914 and called it Nigeria.[278]

My thesis would be incomplete without mentioning the killings of over 3.5 million people between 1966-1970, most of whom were innocent children and civilians in the southeastern part of Nigeria. 3.5 million is not just a number; these are human beings, people's children, and ancestors. The recent findings of 215 Indigenous children's bodies in the residential school in Kamloops are an obvious exposure of the evil acts of the Canadian government on the Indigenous people.[279] From

[278] Maazi Ogbonnaya Mark Okoro is a Linguist Igbo language expert, a Sign Language Interpreter, and an author of over 58 Igbo books. He has a vast knowledge on the Biafran dream. I interviewed Maazi Ogbonnaya on October 13, 2021, via zoom. It was an engaging and fruitful interview session.

[279] Remains of 215 children found buried at former B.C. residential school, First Nation says, (27 May, 2021), online; (website) CBC <www.cbc.ca/news/canada/british-columbia/tk-eml%C3%BAps-te-secw%C3%A9pemc-215-children-former-kamloops-indian-residential-school-1.6043778> [perma.cc/A8R8-PGF5]

the foregoing, it is a similar though distinct experience The rate of killing in Nigeria is so much greater while in Canada there was no war. Indigenous people died through marginalization. The next section delves into the events leading up to the massacre of the Biafrans by the Nigerian government in 1967. This is important for my thesis because it seeks to answer whether the Biafrans fight for self-determination can fall under the UNDRIP discourse. I will answer that question by discussing the events that led to the fight for self-determination in the first place.

II. **Nigerian Biafran Pogrom**

The Nigerian Biafran Pogrom and massacre of Biafrans was deeply inhumane. If there were no massacre nor injustice experienced by the Biafrans, there would be no need to fight for self-determination. Sadly, the need is great. There was a continuous massacre of the Biafrans, which this section will briefly discuss. The Nigerian Biafran Pogrom is also known as the 1966 anti-Igbo pogrom. The massacres committed against the Igbos were residents carrying on business in the Northern part of Nigeria. This massacre started on May 1, 1966, and lasted until September 29, 1966.[280] As I wrote earlier, there were no similar massacres in Canada, but Indigenous people died in significant numbers. They were subjected to violence through the legacy of residential schools, government laws and colonial courts.[281] It is a constant struggle and horrible nightmare that the Indigenous peoples hope will soon end.

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[280] "1966 anti-Igbo pogrom" in *Wikipedia* (2021) Page Version ID: 1009891367 <https://en.wikipedia.org/wiki/1966_anti-Igbo_pogrom#:~:text=The%201966%20anti%2DIgbo%20pogrom,estimated%20to%20have%20been%20killed> [perma.cc/B6EK-W7WZ]

[281] This violence and victimization have been referred to as the "legacy" of the residential schools. The Aboriginal Healing Foundation describes its mission as supporting the healing needs from the "legacy of abuse" from the residential schools. Online: <www.ahf.ca/about-us/mission> [perma.cc/WCY4-P6CW]. Some theorists argue massive, intergenerational trauma goes beyond the residential schools themselves, and is part of the social upheaval caused deliberately or blindly by colonial mechanisms. See, for example, John Borrows "Crown and Aboriginal Occupations of Land: A History and Comparison." (2005) Research paper prepared for the Ipperwash Inquiry, Section 2: (57-76). Online:

The Biafran massacre occurred because the January 1966 Nigerian coup d'état was led by young Igbo army officers. The reason for the coup was to prevent the rivalry between the Igbos and the northerners from escalating since the amalgamation in the country. Two Igbo army officers, Aguyi-Ironsi and Chukwuemeka Odumegwu Ojukwu tried to stop the coup in Lagos and the North. Months after the coup, the Northerners felt threatened that the Igbos would take control of the country. The Northerners retaliated and carried out the July 1966 Nigerian counter-coup. That coup aimed to kill the Igbo civilians and military officers living in the Northern Nigeria. The rivalries between both the Northern Nigeria and the Southeastern (Igbos/Biafrans) increased, and it led to further massacres.[282] The Northerners succeeded in killing between 8,000 to 30,000 Igbos living in the North. The Igbos were brutally slaughtered. In retaliation, the Igbos killed some Northerners residing in Port Harcourt and other Eastern regions.[283] The next section discusses the steps the Biafrans took in reaching an agreement with the Nigerian government to prevent the escalation of the massacre.

III. The Aburi Accord

Between January 4th and 5th 1967, the members of Nigeria's then-ruling military government, the Supreme Military Council (SMC), met for the first time at Aburi in Ghana under the auspices of the Ghanaian Head of State: Lt-General Joe Ankrah. Following a second bloody army coup in July 1966, the Military Governor of the eastern region of Nigeria, Chukwuemeka Ojukwu, had refused to attend any SMC meeting outside the east part of Nigeria because of

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<www.ipperwashinquiry.ca/policy_part/research/pdf/History_of_Occupations_Borrows.pdf> and James B. Waldram, *Revenge of the Windigo: The Construction of the Mind and Mental Health of North American Aboriginal Peoples* (Toronto: University of Toronto Press, 2004) at 225.

[282] EC Ejiogu, "Chinua Achebe on Biafra: An Elaborate Deconstruction" (2013) J Asian Afr Stud at 3.

[283] Early Trumpet Media, *Tragedy of Nigeria unlearned lessons* (20 December 2020) at 00h: 3m: 54s, online (YouTube): <https://www.youtube.com/watch?v=-85_-xpsoOQ> [perma.cc/33DU-GPE8]. This YouTube video captures the events of the massacre of the Igbos living in the Northern part of Nigeria.

security concerns.[284] The Aburi Accord was an offer of peace from the military government. It also included agreements that ordinarily, the federal government of Nigeria would not have considered.[285] To ensure that all members adhered to the Aburi Accord, a clause was included in the agreement which stated:

> We, the members of the Supreme Military Council of Nigeria meeting at Accra on January 4, 1967, hereby solemnly and unequivocally: DECLARE that we renounce the use of force as a means of settling the present crisis in Nigeria and hold ourselves in honour bound by this declaration. REAFFIRM our faith in discussions and negotiation as the only peaceful way of resolving the Nigerian situation. AGREE to exchange information on the number of arms and ammunition in each army unit in each region and the number of new arms and ammunition in stock.[286]

All members signed the agreement. Surprisingly, the federal government could not fully implement the arrangements in the Aburi Accord[287] but produced a partial implementation of the Aburi Accord. As a result, Chukwuemeka Odumegwu Ojukwu rejected the federal government's promulgation of the Aburi agreement. In his view, the assumption of the 'emergency powers' (the

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[284] Otoabasi Akpan and Blessing J. Edet, "From 'Jaw-Jaw' to 'War-War': Aburi Accord and the Nigerian Civil War, 1967 – 1970" (2018) at 94, online (pdf): <https://jhms.academyjsekad.edu.ng/vol0401-4-JHMS.pdf> [perma.cc/RDP9-X3SK]

[285] The agreements that were included in the Aburi accord was (a) that the Army should be governed by the Supreme Military Council under a chairman to be known as Commander-in-Chief of the Armed Forces and Head of the Federal Military Government; (b) to establish a Military Headquarters comprising equal representation from the all Regions and headed by a Chief of Staff; (c) to create Area Commands corresponding to existing Regions and under the charge of Area Commanders; (d) for matters of policy, including appointments and promotions to top executive posts in the Armed Forces and the Police, to be dealt with by the Supreme Military Council; and €to establish the Ad Hoc Constitutional Conference to enable them to outline the future form of political association for Nigeria. For more, see <https://biafran.org/implementation-of-aburi-agreements/> [perma.cc/UQ96-VSD6]

[286] BIAFRA: The Aburi accord, Official record of the minutes of the meeting of Nigeria's military leaders held at Aburi, Ghana on January 4 & 5 1967. (December 10, 2011), online: Biafra <https://biafran.org/implementation-of-aburi-agreements/> [perma.cc/N6V9-JNKL]

[287] It was asserted that the reason the federal government could not implement the Aburi Accord that was unanimously agreed upon by all attendees was because of the head of the government – Lt. Colonel Gowon who was from the northern part of Nigeria. Gowon's total switch in reproducing a distorted version of the agreement is a sign of Gowon's bad faith, inconsistency, and lack of realism.

power to declare a state of emergency anywhere in Nigeria) on the Head of State was not part of the initial agreement. He knew that any emergency powers arrogated to the Head of State were a concentration of powers in the Head of State's hands.[288] This is similar to Josh Nichols's insight on how the Canadian law deals with Indigenous peoples functions on an almost constant emergency powers basis.[289]

Ojukwu, through the elders of Igbo land, declared their independence and called it the "Republic of Biafra." This brave step was to free the Igbos from the killings and oppressions by the Nigerian state. Nigeria declared war on the Igbos to weaken them and force their surrender. Sadly, the Nigerian state succeeded. They killed our army men on the battlefield, our women were raped, forced into marriage, and turned into slaves, our farmlands which were our means of livelihood were destroyed, and some died of hunger.[290] This section focused on the incidents that led to the Nigerian Civil War of 1967. The following section would further discuss the war itself, the distinctions in Canada and Nigeria and what UNDRIP would have done to salvage the horrific event.

C. The Struggle of Secession

I. Nigerian-Biafra War of 1967

"We went to that war with nothing; we went empty-handed.

Some held machetes; some had sticks. The Nigerian state had machine guns."

[288] See Akpan & Edet, supra note 284 at 96.
[289] Nichols Joshua Ben Davi". "Reconciliation in Canadian Jurisprude"ce". *A Reconciliation without Recollection?* (Toronto: University of Toronto Press, 2020), at 38-46. <https://doi-org.ezproxy.library.uvic.ca/10.3138/9781487514976-006>
[290] See Maazi Ogbonnaya, supra note 278.

- *Francis Njoku*[291]

"Both parties deprecated war, but one of them would make war rather than let the nation survive; the other would accept war rather than let it perish. And the war came. Neither party expected the war, the magnitude, or the duration, which it has already attained. Neither anticipated that the cause of the conflict might cease with or even before the conflict itself should cease. Each looked for an easier triumph and a result less fundamental and astounding. Both read the Bible and pray to the same God: and each invokes its aid against the other." [292]

The first quote above depicts how unprepared the Biafrans were for the war. In this chapter, I have discussed how the British funded the Nigerian government to wage war against the Biafrans. While the second quote, though not said in relation to the Biafran war, it can be presumed that the Biafrans were not expecting the war, and they perished as a result of the war. As we shall see in this section, various authors broadly narrated the tragic events during the Biafran war. After reviewing the work of the critical theorists in this area and the oral information shared in interviews for this project, I have concluded that it is vital to decipher how UNDRIP can help the Indigenous People of Biafra (IPOB). While this section broadly narrates the Nigerian Civil War, it gives us an insight into whether IPOB can claim the protection of their rights under UNDRIP. Doing this will

[291] "Nigeria treats us like slaves' - but is Biafra the answer?", *BBC News* (6 July 2017), online: <https://www.bbc.com/news/world-africa-40506251> [perma.cc/Y6BH-MZEQ]. Frank Njoku, who at the time was 69 years old, was a Biafran War veteran remembered and narrated the conflict 50 years on.
[292] Ntieyong Udo Akpan, "The Struggle for Secession, 1966-1970: a personal account of the Nigerian Civil War" (London: F. Cass, 1972) at 3.

also help us understand if there are consequences for relying on UNDRIP due to the length of time it took the IPOB to fight for their right to self-governance.

The Nigeria Civil War was spearheaded by General Yakubu Jack Gowon, who was the head of the state of Nigeria. This war was against the secessionist state of Biafra led by Lt. Colonel Chukwuemeka Odumegwu Ojukwu. The reason behind this cold war was because the Eastern part of Nigeria wanted to form their sovereign country known as the "*Republic of Biafra*."[293] The sudden hunger to start their own country resulted due to ethnic violence and anti-Igbo pogroms. The Biafra struggle is synonymous with the fight of the Igbos for equity, justice, and fairness within the Nigerian state.[294] There is a clear distinction between the fight by the Indigenous peoples in Canada and the Biafrans. This incident can be traced to the Tsilhqot'in Nation War of 1864. The Indigenous People in Canada were fighting against the disrespect and discrimination in their land. Their main aim was to ensure that the European settlers acknowledged that they were the first inhabitants of the country and deserved to have full control over their lands and natural resources.

In contrast, the Biafrans wanted to break out of Nigeria to prevent the control of the Nigerian government. I am more concerned about whether the provisions of UNDRIP can protect the Biafrans. Can the IPOB claim to be indigenous under UNDRIP? These are things I will discuss further in the next chapter.

To further portray my point on the British's role during the war, Harold Wilson, UK Labour Prime Minister (1964-1970), stated that; the dead bodies of half a million Biafrans would not force the British to change her policies concerning the Nigerian Civil War. From Wilson's statement concerning the Biafrans, it was evident that the British intended to let the Biafrans die and that he

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[293] Theodore Okonkwo & Kato Gogo Kingston, "An Assessment of the Rights of Indigenous Peoples of Biafra to Self-Determination under International Law" (2016) 6 Sjhr Vol 6 Number 1 at 89.
[294] *Ibid* at 3.

regarded the actions of Ojukwu as being justified. His government provided millions of rounds of ammunition, hundreds of machine guns and grenades, thousands of mortar and artillery bombs, aircraft and armoured personnel carriers to the Nigerian federal government that tightened the noose around Biafrans.[295] Despite the suffering of the Biafran children, there was no international aid to help stop the hunger and famine, until Daily Express camera operator David Cairns ran off with a score of rolls of film and took them to London. In the 1960s, the British public had never seen such heartrending images of starved and dying children. When the pictures hit the newsstands, the story exploded. There were headlines, questions in the House of Commons, demonstrations, and marches.[296] By implication, if Cairns had not taken the pictures to London for help, the Nigerian state would have wiped off the Biafrans from the surface of the earth.

Shortly after the images reached London, Red Cross found that more than 3 million Biafrans were in dire need of food and water. Wilson did not succumb to the growing public pressure. He went ahead to assure the Nigerian federal government that: "the British government would steadfastly maintain their policy of support for the Nigeria federal government and have resisted all suggestions in the Parliament and press for a change in the policy, regarding arms supplies."[297]

When the British failed to render any form of aid to the starving and dying Biafrans, Bruce Mayrock, a 20-year-old student at the School of General Studies and a photographer for the Spectator sports department, set himself on fire outside the United Nations (UN) building

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[295] "British interests, Nigerian tragedy", (23 October 2011), online: *The Independent* <https://www.independent.co.uk/voices/british-interests-nigerian-tragedy-1136684.html> [perma.cc/VL35-5VUJ]
[296] Frederick Forsyth, "Buried for 50 years: Britain's shameful role in the Biafran war | Frederick Forsyth", (21 January 2020), online: *the Guardian* <http://www.theguardian.com/commentisfree/2020/jan/21/buried-50-years-britain-shamesful-role-biafran-war-frederick-forsyth> [perma.cc/44XB-WHMD]
[297] Mark Curtis, "Declassified UK: How Britain's Labour government facilitated the massacre of Biafrans in Nigeria – to protect its oil interests", (29 April 2020), online: *Dly Maverick* <https://www.dailymaverick.co.za/article/2020-04-29-how-britains-labour-government-facilitated-the-massacre-of-biafrans-in-nigeria-to-protect-its-oil-interests/> [perma.cc/CES3-YPUS]

protesting against the killings of Biafrans.298 Guards found a large cardboard sign on the front lawn at the UN building, which said, "You must stop the genocide - please save 9 million Biafrans." At the bottom of the sign, a quotation read, "Peace is where there is an absence of fear of any kind." Bruce died in May 1970, and the war came to an end in July 1970. The Biafrans need no soothsayer to tell them that the war came to an end when the Nigerian federal government stopped receiving the support they were getting from the British.[299] This section carefully gave a rundown on the Biafran War of 1967. The next section would focus on the further steps the Nigerian government took to worsen the situation of the Biafrans after the war came to an end. The Nigerian government ensured that it was practically impossible for the Biafrans to return to the properties they abandoned during the war.

II. The Abandoned Property (Control and Management) Edict, 1969

This section is essential because it exposes how the federal government of Nigeria seized and sold the properties belonging to the Igbos (Biafrans) to other citizens. After the Abandoned Property (Control and Management) Edict was enacted, two groups emerged and had conflicting views. The first group believed that the Abandoned Property (Control and Management) Edict was a vicious act calculated to emasculate the 'falling' Igbos further and deny legitimate owners of properties their rights to properties located outside their states of origin.[300] The second group believes that the Edict was a noble venture in which the government's effort was to protect the unattended properties of non-residents during the Nigerian Civil War. The second group was to

[298] "Columbia Daily Spectator 3 June 1969 – Columbia Spectator," online: <http://spectatorarchive.library.columbia.edu/?a=d&d=cs19690603-01.2.8&> [perma.cc/F7J3-82T6]
[299] *Ibid*.
[300] Grace Akolokwu, A Review of the Abandoned Property Saga and the Constitutional Right to Own Property, 1 (Port Harcourt Law Journal, 2012) at 115.

ensure that they were not misused and dissipated and handed over the same to the actual owners at the cessation of hostilities.[301]

In Canada, there are several laws like the Abandoned Properties Act in Nigeria such as (i) The *Unclaimed Personal Property and Vested Property Act* applicable in the province of Alberta,[302] (ii) The *Unclaimed Property Act* applicable in the province of Quebec,[303] and (iii) *Unclaimed Property Act* applicable in British Columbia.[304] Although there are no specific unclaimed property laws in other jurisdictions in Canada, traces can be linked in other Acts regarding abandoned properties. For instance, in Manitoba, there is the *Escheats Act* and the *Vacant Property Act*.[305] As we all know, Land has been the essential question; the Indigenous peoples in Canada have claimed continuing ownership while the government has steadfastly denied the possibility.[306] However, there is a discussion regarding pre-emption acts which forbids Indigenous peoples in British Columbia from registering their land holdings in British Columbia land title systems.[307] This is a perfect comparison between what the Biafrans were subjected to after the war and what the Indigenous peoples in Canada had to undergo.

In Nigeria, the *Abandoned Property Edict, No 8* of Rivers State 1969, caused more harm than good. The Edict created the Abandoned Properties (Custody and Management Authority),

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[301] Ibid.
[302] The Unclaimed Personal Property and Vested Property Act, 2007, <www.qp.alberta.ca/documents/Acts/U01P5.pdf> [perma.cc/H46Z-3RZZ]
[303] The Unclaimed Property Act, 2011, <http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/B-5.1> [perma.cc/7BXH-UCL8]
[304] Unclaimed Property Act, SBC 1999, <www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/99048_01>
[305] Alena Levitz, "Where in the World do you Report?" see <cdn.ymaws.com/www.uppo.org/resource/resmgr/2015_AC_Presentations/Tuesday_230-330_-Color-_Wher.pdf> [perma.cc/477G-VS4Q]
[306] See Tennant, supra note 120.
[307] Daniel Marshalls, "The Peculiar Circumstances of British Columbia" (April 27, 2019) <https://theorca.ca/resident-pod/the-peculiar-circumstances-of-british-columbia/> [perma.cc/M2XD-V348]; see also Tennant, supra note 120.

which was charged with managing the property of non-indigenes left unattended during the war. It was also the role of the Authority to have a list of all the unoccupied properties. By the end of the war, the owners of the properties were asked to come forward with authentic documents to reclaim same. In a situation where the property in question has been compulsorily acquired, adequate compensation as provided in the law will be paid to the applicant. In addition, the Authority was saddled with the responsibility of managing developed properties and collating rents collected from the premises on behalf of the property owners who were no longer living in the state.[308]

From the preceding explanation, it is evident that the Rivers state government used these Edicts to gain complete control of lands to meet its needs and obligations as a government. Notably, Edict No 15 was used to cancel certain leases of State lands, after which the government either acquired the same or sold and re-conveyed to other persons. In P.N. Uddoh Trading Co. Ltd v Abere,[309] the plaintiff's lease was cancelled under the Edict No 15 of 1972 and re-conveyed to the first defendant Sunday Abere. The validity of the cancellation of the lease was raised by the appellant relying on the decision of the Supreme Court in the case of Peenok Investment Limited v Presidential Hotel Ltd declaring the Edict of 1972 invalid, Katsina-Aiu (JCA) as he then was, stated that the:

> The consequence of the declaration by the Supreme Court that the Edict of 1972 was null, void, and unconstitutional did not affect the previous operation of the Edict or anything done or suffered under the Edict. That declaration also did not affect any right, privilege, obligation, or liability accrued or incurred under the 1972

[308] See Akolokwu, supra note 300 at 121.
[309] *P.N. Uddoh Trading Co. Ltd v Abere* (1996) 8 NWLR, Pt. 479 at 492.

Edict. Put simply, the sale of the property in question under the Edict of 1972 remains valid.[310]

The claim that setting up the Abandoned Properties Authority was altruistic has been confirmed by the opinion of Craig J.S.C that the Abandoned Properties Edict of 1969 was not targeted at particular persons. However, from the definition given in the Edict, "was promulgated to protect the property of non-indigenes of Rivers State who have had to abandon their property during the civil war; that the Edict would therefore also apply to the indigenes of the State."[311] This section confirmed the illegal atrocities the Nigerian government committed against the Biafrans. How could the Biafrans recover their properties? Stories gathered during my interview showed that after the war, the Biafrans were given €20 to survive. How they survived and remained the wealthiest tribe in the country is a story for another project.[312] The next section would focus on the achievements of the Biafrans during the war. The Biafran war lasted for 3 years, and in those years, the Biafrans made tremendous growth. I can only imagine what the "Republic of Biafra" country would have looked like if they succeeded during the war.

III. The Biafrans Achievements

When the Nigerians violated our fundamental human rights and liberties, we decided reluctantly but bravely to be an independent state, to exercise our inalienable right to self-determination as our only remaining hope for survival as a people. This is another significant distinction between Canada and Nigeria. The former, most Indigenous peoples do not refer to self-determination in terms of being an independent state. Most Indigenous peoples in Canada refer to

[310] See Akolokwu, supra note 300 at 122.
[311] *Ibid* at 124.
[312] For more information, see <www.ncbi.nlm.nih.gov/pmc/articles/PMC8063533/> [perma.cc/N6VR-SWSD]

it in terms of "recognition."[313] They believe by doing this; they are protecting their culture, land, and language.[314] Whereas, in Nigeria, the southeasterners believed and argued that they were denied the opportunity to exercise the right to self-determination by independently forming their political and economic group, which they think is sacrosanct, but only to the white man.[315]

The Biafrans were able to achieve a lot within the space of three years of their quest for independence. Some of these notable achievements were narrated by Maazi Ogbonnaya. He expressly stated that:

> What Biafra achieved within a short period cannot be over-emphasized. They didn't prepare for war. Nigeria attacked them; they had to fight back to protect themselves. The first notable achievement was producing a missile and rocket called "ogbunigwe" by a team of undergraduate engineering students and practicing Engineers. Their group was called the Research and Production (RAP) unit of the Biafran Army. Biafra survived for 30-months thanks to the ingenuity of many individuals and groups. Many of the geniuses who worked for RAP are dead.[316]

D. Southeastern Stories and Engagements

"*People are dying every day. As we talk now somebody is dying*."

- Chinua Achebe[317]

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[313] Glen S Coulthard, Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada, 2007, Contemp Polit Theory 6, 437–460 <https://doi.org/10.1057/palgrave.cpt.9300307> [perma.cc/HH6X-QWFG]

[314] See <www.rcaanc-cirnac.gc.ca/eng/1100100032275/1529354547314> [perma.cc/3DVM-7CAM]

[315] *Ibid*.

[316] *Ibid*.

[317] Françoise Ugochukwu, "A Lingering Nightmare: Achebe, Ofoegbu, and Adichie on Biafra" (2011) 39:1 Matatu 253–272 at 261.

I. Memoirs of the Biafran War

Even though it seemed like the traumatic experience suffered by the Biafrans were unknown, some narrated their experiences by either discussing it with their friends who at the end wrote a book about what transpired in Biafra from 1967 – 1970. While some were interviewed, and transcripts published in some poems and academic journals. I shall be narrating the stories told by these persons who either witnessed the war or who were born after the war. In most cases, the exact words of the victims are used to tell the story. This is very important for my thesis as it gives insight and reveals the festering wounds experienced by the Igbos during the war. It is not a story to be forgotten. These stories are deep-rooted. They are history and should be reflected upon. After reading most of these stories alongside the ones that were told by my great-grandmother, my father and relatives who witnessed the war, I have refused to forget my roots. I have chosen to gather the stories to form a unified thread. By doing this, I am respecting the Biafran heroes that died during the Nigerian Civil War of 1967.

Chimamanda Adichie in one of her novels "Half of a Yellow Sun"[318] documented stories told by eyewitnesses about the war that caused the death of over 3.5 million Biafrans. One of the stories was told by a young Igbo couple who studied abroad, lived in Lagos state, visited family in Kano state, and settled in Nsukka, a town and Local Government Area in Enugu state, Nigeria was that:

> After Biafra loses its university town, they have to leave the University of Nigeria (UNN). We drove in a frenzied silence, past policemen in blood-spattered uniforms, past vultures perched by the roadside, past boys carrying looted radios. On the way, we met refugees, "more and more each day, new faces on the streets, at the public borehole, in

[318] Chimamanda Ngozi Adichie, Half of a Yellow Sun (London: Fourth Estate, 2006).

the market. Women knocked at the door often […]. They came with their thin, naked children."[319]

Another interesting set of stories was gathered by a Scottish-born girl, who spent 3 years gathering research on the roles of a Biafran wife, mother, and worker, and emerges from the war with "a treasure of memories happy and sad." Her book, "*Blow the Fire*"[320] revealed the roles women played during the Biafran war. It uncovered times when women were packing cars for evacuation, teaching, cooking, taking care of kids, staying all week in the village while their husbands work in town, trying hard to make ends meet.[321]

As a result of the seriousness of the Biafran war, many fled for their dear lives, while some remained with their families. The Scottish-born girl, Ofoegbu told her own experience about questions asked by her workmates regarding how intact her family was despite the insecurities, deaths, and starvation in Biafra. She writes:

> Why did I stay, I have often been asked? […] I stayed because I had a firm conviction that marriage is meant for better or worse, not so that in bad times you can opt out of your responsibilities. Len felt that he could never face his people if he took the easy way out by leaving the country on his wife's back.[322]

Still on the issue of the survival of families during the trying times in the society. Igbokwe … narrated his own story saying that:

> Every day, families go out around 10: 00 AM to 'take cover' because of the attack from 'enemy planes.' Persistent bombing usually signaled the approach of

[319] Ugochukwu, supra note 317 at 257.
[320] Leslie Jean Ofoegbu, "Blow the Fire" (Enugu: Tana, 1985).
[321] Ugochukwu supra note 317 at 260.
[322] *Ibid* at 262.

> federal troops. The flight to the bush would start. Suitcases on their heads and a mat and pots under their arms, the people would seek refuge in another part of the region. […] Children were given out as servants. A few teenage girls were tacitly encouraged to go to the soldiers' camp for a few days and bring back food for the family. Some married women found themselves doing this just for survival.[323]

Ofoegbu also recalled in her book how the Nigerian government tried everything possible to ensure the people of Biafra suffered during the war. One of the instances she gave was the currency change implemented by Nigeria in 1968 results in Biafrans being locked up and unable to import any goods, while faced with an internal financial crisis as the new Biafran currency is printed in Europe and brought in by arms planes, causing a restricted circulation of money.[324]

Rumor had it that the Biafran government alleged that the Nigerian government intentionally waged a genocidal war by depriving the Biafrans of food and water. Pictures of most Biafran women and children who looked malnourished and to have greatly suffered out of starvation indicate the dire conditions that faced the Biafrans.

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[323] Ugochukwu, supra note 317 at 261. For more information on Igbokwe's story, see Joe Igbokwe, Igbos: Twenty-Five Years After Biafra (Ikoyi: Advent Communications, 1995).
[324] Ugochukwu, supra note 317 at 265.

Figure 3: Starving Biafran Children (Photo taken by AFP)

Figure 4: Starving Biafran Children (Photo retrieved from Medium)

Figure 5: Starving mother and Biafran child (Photo by Don McCullin)

Figure 6: Starving Biafran Children

From figures 3 to 6, we can see how most of the Biafrans died. They died from starvation. As a result of the foregoing, the next 2 sections of this thesis are very important. I interviewed Maazi Ogbonnaya whose parents survived the Nigerian Civil War. These stories are of great impact to my thesis and serve as a way of remembrance of fallen heroes, some of whom were my uncles, aunties, grand-uncles, grand-aunts, relatives, and distant cousins. I was unable to meet them because the war took them away from me. These stories indeed give me the closure I need.

II. Zoom Interview

During my interview with Maazi Ogbonna,[325] one of the questions I asked him was to narrate all he knew about the Nigerian Civil War of 1967 that cost the lives of Biafrans. His direct words are essential for the need of closure and reconciliation. Although there are some documentaries regarding the tragic incidents of the Biafran war, victims and veterans of the war were never contacted to tell their stories. This interview helps uncover the buried evil committed against the Biafrans and why the urgent need to break out of Nigeria is still needed. In its discovery of the hidden truth, it gives an insight into one of the questions my thesis seeks to answer, which is "Whether UNDRIP can address the Indigenous People of Biafra's self-determination if Nigeria adopted UNDRIP?" His response would help me understand further whether UNDRIP can protect the Southeasterners under Article 3 that provides for self-determination despite the defeat and length of time it took the Southeasterners to carry out those movements. Join me as Maazi Ogbonnaya narrates his experience during the Biafran war of 1967.

> *My mother was a young girl when the war broke out in 1967. She was distilled with the responsibility of taking care of her other siblings who*

[325] Maazi Ogbonnaya, supra note 278.

were 7, 5, 3 and 1. According to her, when the Nigerian soldiers came across a bridge called "Esu Amenu" in Okposi, Ebonyi State, Nigeria. These soldiers broke into the bridge. The Esu Amenu bridge is connected to a pass way between her community and another community which was destroyed during the war. As a result of that breakout, her community became porous.

When they came into the community, they started killing people irrespective of their age, this includes children. Old people started running for their dear lives. Some ran into the bush and even the forest, just to get away from the Nigerian soldiers. Most parents were separated from their children. At a point, hunger strike started. There was no food to eat. Their farmlands were burnt down, and their water streams destroyed. The only thing they had access to was salt. The members of the Okposi community in Ebonyi state discovered this salt in a lake close to their community. The salt served the entire Igboland. Due to the constant intake of this salt, the people of Okposi community suffered from this disease called "Kwashiokwo."

It was my mother's household's turn for an uninvited visit. These soldiers came to kill and destroy but something happened. They looked at my mother and her siblings with so much pity. They immediately asked them to run as far as their legs could carry them. That if they saw

them again, they would be killed instantly. That was how my mother survived the war.

According to my mother, a lot of things happened during the war. One of these many things was rape. Women and children were raped. She shared how a 6-year-old girl was raped and left in the bush to bleed to the death. In her words, the killings were massive. It came in different shapes and form - starvation, rape, and slaughtering.

One faithful morning, I went over to my grandmother's house still curious about the Nigerian Biafran war and I am glad we had that conversation before she passed away. She died at 125 years. She told me that during the war, the federal troops fought and ensured that the women remained with them. How they were able to make this happen was by killing their husbands. Out of fear, some women volunteered to leave their husbands to marry these federal troops and even join the army. Also, these women had to go through this despicable path due to the resources the government had during the war.

She narrated that one of the ways she survived the war was selling the salt to the people of Enugu and Okigwe. She had to trek because that was the only means of getting around at the time. During those times, there were encounters. The scariest of them all was when they lined up

all the women trying to trek to various communities to sell and make ends meet. They started shooting them one after the day. Thankfully, my grandmother was able to escape by rolling her way down into the river.

My interview with Maazi Ogbonnaya was a fruitful and emotional one. What we see on the internet are primarily speculations regarding the events that took place during the war. While Maazi Ogbonnaya was narrating his mother's experience, we could feel the pain in his voice, the anger, and why he supports the Indigenous People of Biafra (IPOB) group in the current fight for their independence. This interview clearly shows the constant neglect and disrespect faced by the Southeasterners, and it is only but the tip of an iceberg. The federal government has failed to acknowledge and respect the fallen heroes of the war. For instance, every anniversary of the war, the IPOB always protests in the Eastern part of the country to ensure that day is respected.

It would interest you to know that the anniversary of the Biafra War is only dedicated as a public holiday in the Eastern part of Nigeria. Other jurisdictions in the country have no stay-at-home or public holiday order to acknowledge and respect the Biafran cause. Under the federal government's instructions, the police shoot innocent protesters in the East and other parts of the country supporting the fight for IPOB.

The Nigerian government is encouraged to take a look at the tremendous improvements made by Canada rather than resorting to violence and genocide. For instance, on June 1, there is the National Indigenous History Month to recognize the history, heritage and diversity of First Nations, Inuit, and Métis peoples in Canada. Also, June 21 is National Indigenous Peoples Day which reflects on the shameful role the Canadian government played in the existence of the Indigenous peoples in the country. Also, on June 3, 2021, the government passed Bill C-5

introducing September 30 as a National Holiday for the Truth and Reconciliation. It can be drawn from the preceding why the adoption and implementation of UNDRIP into the Nigerian laws is a top priority.

E. **Conclusion**

This chapter discussed significant issues that led to the suffering and anguish of the Indigenous People of Biafra. This chapter is a fruitful starting point. I say this because, with all that was discussed in this chapter, we can see that the invention of IPOB resulted from the historic event of the Biafran war of 1967. I am glad I was able to detail the struggles of the Biafrans, which, at some point, turned to hope, then was eventually erased from the Nigerian state but not from history. From the trajectory of the Indigenous People of Biafra that existed for three years, it is safe to state that no African country suffered a more tragic experience like Nigeria in the era of postcolonial Africa. Although, there have been several movements geared towards the reactivation of the erased Biafran legacy. For instance, the Movement for the Actualization of the Sovereign State of Biafra (MASSOB)326 occurred in the early 2000s, and subsequently, in 2012, the IPOB started gaining fame in the country. While the movement of Indigenous People of Biafra must be successful, it is pertinent to note that Nigeria is one of the countries that voted against the adoption of UNDRIP in 2007 and, to date, has refused to implement the UNDRIP.

This chapter laid a foundation on the history of Biafrans and the legality of IPOB in Nigeria. I was able to make analogies between the Indigenous peoples in Canada and Nigeria. It can be seen from the previous chapter and this chapter that the Indigenous peoples in Canada seem to have a better claim under UNDRIP because, despite the atrocities committed against them, the

[326] "Movement for the Actualization of the Sovereign State of Biafra (MASSOB)", at 1.

Indigenous peoples persevered until their rights were acknowledged and respected internationally. However, in the case of the Indigenous people of Biafra, their quest for self-determination seemingly came to an end in 1970 when they surrendered to the Nigerian government. IPOB became actively involved in 2012, and little progress has been made in ensuring that IPOB breaks out of Nigeria.

Given the integral role the British played in imposing colonial frameworks on the Biafrans, it is difficult to understand whether the IPOB can safely fight for their rights to self-determination under UNDRIP 51 years after the war. In the next chapter, I discuss this alongside various options IPOB has to form their government and prevent the occurrence of another war and to achieve this, I will explain how UNDRIP can address the IPOB's issue of self-determination if UNDRIP was adopted and implemented into the Nigerian legal system. I will also discuss whether DRIPA can overcome the need for Indigenous peoples in Canada to prove Aboriginal title in courts as was necessary in a plethora of cases.

CHAPTER FOUR

THE IMPLICATIONS OF THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (UNDRIP)

Introduction

The previous chapters have established two (2) facts. Firstly, that it is appalling that Indigenous peoples have to prove to non-indigenous Judges that they have Aboriginal title over their own land. Secondly, that the fight for self-determination in Nigeria is unfinished. To this end, the following thesis questions would be addressed in the next sections: Can DRIPA overcome the need for Indigenous peoples to prove Aboriginal title in courts, as was necessary in the *Tsilhqot'in* decision? How can UNDRIP help resolve the self-determination issues in Nigeria?

A. EDGE OF FRAMES (1)

How can the Declaration on the Rights of Indigenous Peoples Act (DRIPA) overcome the proof of Aboriginal Title in Courts?

To contextualize how DRIPA can overcome the proof of Aboriginal title in Courts in British Columbia, I first address the importance of British Columbia's relationships with Indigenous communities. This relationship must improve. Developing good relationships with the Indigenous peoples, Elders and communities require more than provincial and federal laws. It requires fostering genuine relationships. It goes beyond media presentations and apologies. It is also beyond the 2015's Truth and Reconciliation's Calls to Action.[327] The TRC told the stories of the Indian residential survivors and chronicled how Indian residential schools in Canada became

[327] Truth and Reconciliation Committee of Canada, Truth and Reconciliation Committee of Canada Calls to Action (Winnipeg, 2015), online: <http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf> [TRC Calls to Action].

"a tool of government oppression."[328] The TRC centered on the pains and negative experiences of the Indigenous peoples. Unfortunately, their traumatic experiences were consumed by the media and public while the government did not act.[329] Canada's avoidance of its responsibility makes me doubt if the TRC leads to reconciliation. Although uncertainties revolve around the true intentions of the government using TRC, it is a step forward in the right direction, recognizing that the Indigenous peoples were affected by the legacy of the Indian Residential Schools. This is one of the steps taken by Canada that I admire and wish Nigeria could adopt to acknowledge, respect, and reconcile with the Igbos that were affected directly or indirectly during the Nigerian Civil War of 1967. The Biafrans need to heal from the despicable trauma they went through and are still suffering from the Biafran war.

This context brings me to the reservations I have about aboriginal title issues. This problem developed many years ago. Since the *Indian Act* was enacted in 1876,[330] Indigenous peoples have been dispossessed of their lands and natural resources. The law was designed to assimilate Indigenous People into broader Canadian society over time – first by defining who qualified as an 'Indian' (through a registry of 'status Indians') and then by establishing the on-reserve band system that allows the Crown to control their movement, their economic activity, and their legal rights.

Despite the *Indian Act*, Indigenous peoples have fought for their lands and, in several cases, taken the government of BC to court to reclaim their lands. In an attempt to resolve aboriginal title issues, McEachern C.J. of the Supreme Court of British Columbia rejected the appellants' claim for ownership of and jurisdiction over the disputed territories. In *Delgamuukw v. British*

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[328] TRC Final Report, supra note 35 at 202.
[329] *Ibid* at 150.
[330] Indian Act, R.S.C., 1985.

Columbia,[331] he stated the appellants must satisfy the four-part test from *Baker Lake* for an aboriginal right:[332]

1. That they (the plaintiffs) and their ancestors were members of an organized society.
2. That the organized society occupied the specific territory over which they assert the aboriginal title.
3. That the occupation was to the exclusion of other organized societies.
4. That the occupation was an established fact at the time sovereignty was asserted by England.

This test shows how the proof of aboriginal title has been unfair to the Indigenous peoples, and the removal of the test would be made in favour of the Indigenous peoples. This is a key point in my thesis. The wording of the test makes it look like the Indigenous peoples are about to surrender to the government. Failing to recognize Indigenous oral stories and traditions as evidence prevents Indigenous peoples from establishing their claims. When the ancestral stories of the Indigenous peoples are rejected in courts, the implication is that they cannot legally lay claim over the land in question. This is where UNDRIP and DRIPA play a vital role in Canada and British Columbia, respectively. These Acts reference Article 26 of UNDRIP and DRIPA which states Indigenous peoples should be able to claim their lands without state interference or unjust tests:

a. Indigenous peoples have the right to the lands, territories, and resources which they have traditionally owned, occupied or otherwise used or acquired.
b. Indigenous peoples have the right to own, use, develop and control the lands, territories, and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

[331] *Delgamuukw,* supra note 145, at p. 193.
[332] *Ibid* at p. 388.

c. States shall give legal recognition and protection to these lands, territories, and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the Indigenous peoples concerned.

We are familiar with Article 26 (1 and 2); however, Article 26 (3) is often overlooked. The legal recognition referred to under (3) goes beyond the protection claim of Aboriginal rights under s. 35 of the Constitution Act.[333] The government and the Indigenous peoples need to negotiate and conclude a land claim agreement that allows the Indigenous peoples to have total control of their land. The Indigenous peoples' title over their land should not be put to a legal test. This leads to a relevant question:

"Imagine that a total stranger walks into your home and dictates laws you and your family must abide by; how would you feel? Oppressed? Harassed? Exhausted?"

While contemplating your answer, imagine how tiring it is for the Indigenous peoples to always resort to the courts, not just any court but the Canadian judicial system, to prove they have title over the land in dispute. This leads to another question:

"How would you feel if you enter a room full of people who were not in existence when your ancestors lived, created history in the home that was passed on from generation to generation and cannot understand the trajectory of your link to the said home? Defeated?"

Your answers to these questions might bring us closer to understanding how Indigenous peoples have constantly felt oppressed. The courts' decisions have weakened Indigenous peoples' legal status" However, Indigenous peoples in Canada are very resilient. They fight for their land can be seen in the *Tsilhqot'in* Nation War of 1864, which I narrated in the first chapter of this thesis.

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[333] The Constitution Act, supra note 20, s.35.

This brings me to another of this thesis' central questions– "How can Declaration on the Rights of Indigenous Peoples Act (DRIPA) overcome the proof of Aboriginal Title in Courts?" DRIPA has given room for the full recognition and respect of the traditions and customs of the Indigenous peoples as it relates to their land in BC.[334] What is lacking is the action by the government of BC to bring DRIPA to life. For emphasis, in current jurisprudence Indigenous peoples are subjected to 3 tests to prove they have title over land, and these tests, as articulated in the *Delgamuukw and Tsilhqot'in* cases are:

a. The land for which title is claimed must have been occupied prior to the assertion of sovereignty.

b. If the present occupation is relied on as proof of occupation pre-sovereignty, there must be continuity between present and pre-sovereignty occupation.

c. At sovereignty, that occupation must have been exclusive.

Chief Justice Lamer of the Supreme Court of Canada developed this test in *Delgamuukw*. The Gitksan and Wet'suwet'en people have to meet a high burden of proof with this test. What does it mean for an Aboriginal group to have "exclusive occupation" over a tract of land? Chief Justice Lamer explained in Delgamuukw's case:

> "*exclusive occupation can be demonstrated even if other aboriginal groups were present or frequented the claimed lands. Under those circumstances, exclusivity would be demonstrated by "the intention and capacity to retain exclusive control" [(quoting Kent McNeil)]. Thus, an act of trespass, if isolated, would not undermine a general finding of*

[334] DRIPA, Article 26 (3).

exclusivity, if aboriginal groups intended to and attempted to enforce their exclusive occupation."[335]

Despite the problematic nature of the *Delgamuukw* test, it has served as a guide in subsequent Aboriginal title decisions such as *R v Marshall*,[336] *R v Bernard*[337] and *William v British Columbia.*[338] Robert Hudson reviewed how the *Delgamuukw* test was applied in *Marshall, Bernard, and William*.[339] Hudson asked important questions while reviewing the test in the above cases - Why would it matter whether Aboriginal societies had, at sovereignty, laws governing land use?[340] His response is worthy of being discussed:

> Presumably, this is because what is sought today is a legal entitlement to land, and this is usefully demonstrated if an Aboriginal group, albeit in a different legal framework, already had a legal entitlement to land. However, we would not want the existence of a pre-sovereign, Aboriginal legal framework to be necessary for the recognition of Aboriginal title. Doing so would be regrettably Eurocentric, as though Aboriginal people needed to have legal systems analogous to European ones if they are to have their rights respected now.[341]

However, as a result of the doubts surrounding the usefulness of the exclusivity criteria, Hudson suggested the way forward from the test of "exclusivity" is to detach the issue of exclusiveness from that of regularity and retain the reference to "regular use" as the fundamental

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[335] *Delgamuukw*, supra note 145 at para 156, citing Kent McNeil, Common Law Aboriginal Tide (Oxford: Clarendon Press, 1989) at 204.
[336] *R. v. Marshall*, [1999] 3 S.C.R. 456.
[337] *R. v. Bernard*, [1988] 2 S.C.R. 833.
[338] *William v British Columbia*, 2012 BCCA 285, [2012] 3 CNLR 333.
[339] Hudson, supra note 161 at 361.
[340] *Ibid*.
[341] *Ibid*. See also, Kent McNeil, "The Sources and Content of Indigenous Land Rights in Australia and Canada: A Critical Comparison" in Louis A Knafla & Haijo Westra, eds, Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand (Vancouver: UBC Press, 2010) 146.

element in a test for Aboriginal title. The idea is that if an Aboriginal group made sufficient, regular use of an area of land at sovereignty and the group has (for the most part) continuously occupied this land since that time. The group is owed title to the land.[342] It is also important to note that proof of title would not be needed if there was UNDRIP recognition. While UNDRIP already been recognized and implemented into the Canadian laws[343] and B.C laws, Indigenous peoples still do not have possession of their lands.[344] This leads to the question does proof of title still exist in Canadian law? Unfortunately, the Supreme Court of Canada's unfair proof test still seems to prevail.

Professor Alan Hanna, during my interview regarding the importance proof of exclusivity, wondered how possible Indigenous peoples could prove exclusive occupation over their land during the invasion by the Europeans. As I have explained in chapter one of this thesis, Professor Hanna elaborated that it was practically impossible for the Indigenous peoples to pass the third test because some Indigenous peoples had to move for safety. At the same time, some remained and fought for their lands, and some died in the process. This brings us back to this thesis main issue – the 'impossibility' of the Indigenous peoples proving the aboriginal title test. This test must be eliminated from the Canadian legal system. This would implement DRIPA and illustrate how - subjecting the Indigenous peoples to this Supreme Court's proof test violates Article 26 of DRIPA. The test prevents the Indigenous peoples from exercising full control over their lands. DRIPA's implementation could also ensure that Indigenous peoples are not oppressed by the proof of aboriginal title test. . It is evident that the proof of aboriginal is one-sided. Indigenous peoples have

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[342] Hudson, supra note 161 at 365. The original source of Hudson's idea is that of Curran J, the trial judge in *R. v. Marshall* and *R. v. Bernard*. McLachlin CJC in *Marshall*; *Bernard* approvingly quoted from his lower court decision, commenting that he (as well as the trial judge for *Bernard*) had "applied the correct test to determine whether the respondents' claim to aboriginal title was established." See *Marshall* and *Bernard* at para 72.
[343] Bill C-15: United Nations Declaration on the Rights of Indigenous Peoples Act (UNDRIPA).
[344] Bill C-41: Declaration on the Rights of Indigenous Peoples Act (DRIPA).

been on their lands for over 500 years, even before the arrival of the Europeans in the country now known as Canada. They are subjected to an "impossible and unfair" test which must be proved to non-indigenous peoples who came into existence in Canada after colonization. How can Indigenous peoples explain to these "visitors" in their land that they have title over the land? My use of the word visitor relates to the earlier question I asked regarding a total stranger coming into your home to lay down rules you must obey. How practicable is the test of Aboriginal title? It has done more harm than good. The government of BC unjustly benefits from the test the Indigenous peoples must undergo before they can claim aboriginal title of their land?

All these questions bother me, and the only way to prevent the escalation of the harm is to ensure that DRIPA reflects the intention of UNDRIP by ensuring that the Indigenous peoples are recognized, protected, acknowledged and free from any States oppression.[345] Isn't it absurd that the government of BC who have not received permission from First Nations to govern first peoples need not prove aboriginal title?[346] It is no news that most evidence the Indigenous peoples rely on in order to prove their title is countered by the Crown's counsel.[347] This test has been unfair to the Indigenous peoples. All these 'peoples' have been subjected to this test; some were unsuccessful,[348] while some were successful to the point of acknowledging the existence of aboriginal title in

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[345] These rights have been oppressed by the government on many occasions because the government keeps making decisions that affects their lives with little or no input from the Indigenous peoples. For instance, the issue of the Crown's duty to consult has been a bone of contention because the court has acknowledged in *Haida Nation v British Columbia* that there is the 'duty to consult' does not extend to the creation of agreements with the Indigenous peoples. The implication of this acknowledgement was further explained by Sarah Morales in John Borrows et al, eds, *Braiding legal orders: implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo, ON, Canada: Centre for International Governance Innovation, 2019) at 67 - 68.

[346] Eugene Kung and Gavin Smith, Canada's "Prove it Approach" to Aboriginal title, (February 1, 2019), online: Policy Options <https://policyoptions.irpp.org/magazines/february-2019/canadas-prove-it-approach-to-aboriginal-title/> [perma.cc/E68T-D2KW]; "Certainty: Canada's Struggle To Extinguish Aboriginal Title" (1998), online: Union of BC Indian Chiefs <www.ubcic.bc.ca/certainty_canada_s_struggle_to_extinguish_aboriginal_title> [perma.cc/7Q3N-H2UX]; Also the government can override aboriginal title after the court has decided that the Indigenous peoples have title, see Ken Coates and Dwight Newman, "The End is Not Nigh: Reason Over Alarmism in Analyzing the *Tsilhqot'in* Decision" (2014), Macdonald-Laurier Institute for Public Policy, at 18.

[347] Valverde, supra note 190 at 15.

[348] *Delgamuukw*, supra note 145.

Canada.[349] In all aboriginal title cases, the government was never subjected to the test. BC does not have to prove its title. That is inequality. Moving forward, the Indigenous peoples have constantly provided evidence to prove and refute the arguments of the government of BC before non-indigenous judges. I must stress that the high possibility that the judges have no idea of the trajectory of the Indigenous peoples and their lands.

Since the establishment of the Supreme Court of Canada, there has never been an Indigenous judge with experience or schooled in Indigenous traditions, customs, and values.[350] In some cases, Indigenous peoples could not comfortably tell their stories and were advised to drop their regalia before entering the court.[351] The government of BC has tried to stop Indigenous peoples in proving their cases. Mariana Valverde believed that treating aboriginal elders and their evidence with respect, and disseminating aboriginal imagery in official venues, is not very difficult, but 'weighing' such evidence against a mass of governments is arguably impossible.[352] With all these irregularities, it is evident that the test has caused more harm than good. DRIPA can ensure that its provision is not a mere repetition of UNDRIP and the usual way of the government enacting and implementing laws without carrying out the provisions. On many occasions, when I'm having conversations with family, friends, and my Professors about the struggles of Indigenous peoples, I communicate that the government's actions are a charade.[353] Some people might not agree with my line of thoughts but I see the government's actions as a masquerade that only pretends to be performing at events to show the public that it cares. The Indigenous peoples are

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[349] *Tsilhqot'in Nation*, supra note 92.
[350] "Bilingualism requirement for SCC justices creates 'needless barrier' for Indigenous candidates, critics say" (31 March 2021) online: (blog) CBC <www.cbc.ca/news/politics/supreme-court-proposed-official-languages-reform-1.5969707> [perma.cc/G9RZ-LA5S]
[351] *Delgamuukw*, supra note 145.
[352] Valverde, supra note 190 at 13–14.
[353] Oliver Wilson, A new era for Indigenous rights in Canada? (April 13, 2021), online (website): Vancouver Island Human Rights Coalition <https://vihrc.com/blog/2021/4/13/a-new-era-for-indigenous-rights-in-canada> [perma.cc/D9DE-728F]

tired of the act. They need to have full control over their lands. Even though Article 26 of DRIPA affirms that the Indigenous peoples should have control over their lands, it isn't enough.

Suppose the action plan referred to by the government of BC in the DRIPA included a land claim agreement between the Indigenous peoples and the government of BC. It will eliminate the need for Indigenous peoples to prove aboriginal title, thereby acknowledging and respecting the rights of Indigenous peoples as required by UNDRIP. But instead, sections 4[354] and 5[355] of DRIPA provided that:

d. (1) The government must prepare and implement an action plan to achieve the objectives of the Declaration.

(2) The action plan must be prepared and implemented in consultation and cooperation with the Indigenous peoples in British Columbia.

(3) The action plan must contain the date on or before which the government must initiate a review of the action plan.

(4) After the action plan is prepared, the minister must, as soon as practicable,

(a) lay the action plan before the Legislative Assembly if the Legislative Assembly is then sitting, or

(b) file the action plan with the Clerk of the Legislative Assembly if the Legislative Assembly is not sitting.

(5) The government may prepare a new action plan in accordance with this section.

As I wrote in chapter 1 of this thesis, the action plan did not include the land claim agreements, which ought to be negotiated, prepared, and implemented with the consultation of the

[354] Declaration on the Rights of Indigenous Peoples Act (DRIPA), 2019, art. 4.
[355] *Ibid*, art. 5.

Indigenous peoples.[356] Even the first DRIPRA report released in March 2020 did not include any information regarding land claims agreement.[357] After carefully reviewing the second report released in March 2021, I did not see any land claim agreements between the First Nations and the government of BC. Instead, I saw the agreement between the government of BC and the First Nations in relation to self-determination as provided under Article 4 of UNDRIP.[358] Though it is a great step, the government of BC is still avoiding having a round table negotiation with the Indigenous peoples to trash out the issue of land control in the province, which is a provision in UNDRIP.[359] So by implication, you see why I say that the government of BC was playing an act for the public. Until the aboriginal title test issue is addressed, there will be continuous land claims in the court. To move forward, the government of BC, with the consultation of the First Nations, ought to prepare an action plan which would focus on the land claim agreement. Impressively, there are ongoing negotiations under the British Columbia Treaty Commission, which involves the Indigenous peoples. Some of these agreements are in the 4th and 5th stages.[360]

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356 DRIPA, art. 4(2).
357 "Declaration on the Rights of Indigenous Peoples Act 2020 Annual Report" Annu Rep 18 at 6. See <www.llbc.leg.bc.ca/public/PubDocs/bcdocs2020/715076/715076_dripa_annual_report_2020.pdf>
358 "Declaration on the Rights of Indigenous Peoples Act 2021 Annual Report" Annu Rep 2020/2021 at 21. See <https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/indigenous-relations-reconciliation/declaration_act_annual_report_2021.pdf>
359 UN Declaration, supra note 3, art. 26.
360 British Columbia, BC Treaty Commission, Annual Report (2020) at 36 - 48, online (pdf): BC Treaty Canada <www.bctreaty.ca/sites/default/files/BCTC_ANNUAL_REPORT_2020_FINAL.pdf> [perma.cc/XTD5-QCMS]

However, this has gone beyond the duty of consultation by the Crown[361] because even the Crown has constantly failed this duty.[362] On the issue of duty of consultation, the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*[363] held that consulting the Indigenous peoples before any actions are taken on their lands is a step in fostering reconciliation.[364] The federal and provincial governments were cautioned to consult the Indigenous peoples because failure to do so has a negative impact on them.[365] Land claim agreements should restore the Indigenous peoples' power to have total control over their land, which is also in line with UNDRIP.

Having identified aboriginal title issues and what the government of BC needs to consider in ensuring that the aboriginal title test is no longer a criterion for the Indigenous peoples. The next step is to focus on the second question revolving around Nigeria's Indigenous People of Biafra (IPOB) self-determination issues. In the next section, I will expound on the fact that Nigeria is one of the countries absent the day 111 countries adopted UNDRIP, and to date, nothing positive has

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[361] The courts recognized consultation as being part of the fiduciary duty of the Crown. See, for example, *Guerin v. The Queen*, [1984] 2 SCR 335; *R v. Sparrow*, [1990] 1 SCR 1075; and *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010.

The fiduciary duty to Indigenous peoples "requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake." See *Haida Nation v. British Columbia (Minister of Forests)*, para. 18. The case law surrounding the fiduciary duty of the Crown to Indigenous peoples was developed in five main cases: *Calder et al. v. Attorney-General of British Columbia*, [1973] SCR 313; *Guerin v. The Queen; R v. Sparrow*; *Haida Nation v. British Columbia (Minister of Forests)*; and *Tsilhqot'in Nation v. British Columbia*, [2014] SCC 44.

[362] The case of *Cheslatta Carrier Nation v. British Columbia* [1998] 3 C.N.L.R. I (B.C.S.C.). provides a useful example of where the Crown failed to meet its duty to consult. Insufficient information was possessed by the Government of British Columbia to assess adequately the potential impact on Aboriginal rights and, therefore, did not allow the *Cheslatta Carrier Nation* to mount a proper defence to the proposed action. This decision of the British Columbia Supreme Court was based primarily on a separately established statutory duty to consult outlined in British Columbia's Environmental Assessment Act, R.S.B.C. [1996], c. 119; *Liidlii Kue First Nation v. Canada*, [2002] 4 C.N.L.R. 123 (F.C.T.D.)., the Federal Court, Trial Division, considered an application by the *Liidlii Kue First Nation* seeking a declaration that the Crown breached its fiduciary duty to consult them prior to issuing a land use permit. To read more about the procedural errors in the Crown's duty to consult the Indigenous peoples, see Thomas Isaac and Anthony Knox, The Crown's Duty to Consult Aboriginal People, 2003 41-1 Alberta Law Review 49, 2003 CanLIIDocs 150, <https://canlii.ca/t/2d9b>.

[363] *Haida Nation*, supra note 117 at para. 32.

[364] *Ibid* at para. 32.

[365] *Ibid* at para. 35.

happened. To achieve this, I will be gathering the threads on why the Nigerian government has refused to adopt and implement UNDRIP into their laws and how UNDRIP can resolve the self-determination issues in the country. In my analysis, you will see many similarities regarding national state failures to recognize Indigenous rights, even as the particular contexts of Canada and Nigeria are different.

B. EDGE OF FRAMES (2)

How can UNDRIP address the IPOB's self-determination issues in Nigeria?

As I have reiterated in chapter two of this thesis, the IPOB issue in Nigeria is a fight for self-determination. It was asserted that the main indigenous claim today is the right to self-determination, which includes the rights of "self-government, autonomy, territorial integrity and exclusive enjoyment of their own lands and resources."[366] The indigenous movement tried and succeeded in achieving this goal through the Universal Declaration on the Rights of Indigenous Peoples in the human rights system of the United Nations.[367] The declaration took a long time to finalize because many governments (predominantly African and Asian) have proven unwilling to commit themselves to these kinds of protections for indigenous peoples' rights. For example, to date, the Nigerian government is still one of the governments that have willingly refused to adopt UNDRIP.[368]

One of the tricky questions asked in chapter three of this thesis is whether IPOB can fall under the purview of UNDRIP – is IPOB indigenous? Emphasis was laid on the definitions

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[366] Indigenous Peoples: Self-Determination Knowledge Indigeneity, edited by Henry Minde, Eburon Academic Publishers, 2008. ProQuest Ebook Central, <https://ebookcentral-proquest-com.ezproxy.library.uvic.ca/lib/uvic/detail.action?docID=3155063>
[367] *Ibid* at 178.
[368] *Ibid* at 178 – 179.

rendered by Barume[369] and Anaya.[370] From their definitions and the story my great-grandmother narrated to me about my roots as a Biafran (which I narrated earlier in chapter three); I would suggest that IPOB adopt this language and identify as indigenous in clear and explicit ways. With that in mind, IPOB can, as such, can fight for their rights of self-governance and self-determination as provided under Article 3 and 4 of UNDRIP.[371] The mention of the name "Biafrans" as far back as 1966 is evident enough that the people of Biafra wanted to exercise their right to self-determination. Due to the lack of explicit self-identification, it can be contested that the fact Igbos want to exercise self-determination does not mean they are indigenous.[372] Shortly, I will highlight statements that suggest that the fight for self-determination amounts to self-identity and, as such, is "Indigenous peoples."[373] This is why it is important to show what the understanding and criteria for being Indigenous are as argued by several people and, in the same vein, elaborate how they can apply to Biafra. According to Navanethem Pillay:

> Indigenous peoples are more likely to receive inadequate health services and poor education – if any at all. Economic development plans often bypass them or do not take into sufficient consideration their views and particular needs. Other decision-making processes are often equally contemptuous of or indifferent to their contribution. As a result, laws and policies designed by majorities with little regard

[369] Mitchell & Davis Yuzdepski, supra note 230 at 1360.
[370] Sylvanus Barnabas, "Abuja Peoples of Nigeria as Indigenous Peoples in International Law" 2018, International Journal on Minority and Group Rights. 25. P. 431-457; see also, S.J. Anaya, 'Indigenous Rights Norms in Contemporary International Law', 8:1 *Arizona Journal of International & Comparative Law* (1991) at 3.
[371] UN Declaration, supra note 3, art. 3 & 4. See my great-grandmother's story at page 63.
[372] Theodore Okonkwo and Kato Gogo Kingston, "An Assessment of the Rights of Indigenous Peoples of Biafra to Self-Determination Under International Law" (2016), 6.1 Sacha Journal of Human Rights (SJHR).
[373] Rashwet Shrinkhal, "'Indigenous sovereignty' and right to self-determination in international law: a critical appraisal" (2021) 17:1 AlterNative: An International Journal of Indigenous Peoples 71–82.

to indigenous concerns frequently lead to land disputes and conflicts over natural resources that threaten the way of life and the very survival of indigenous peoples.[374]

This situation describes the Indigenous Peoples of Biafra (IPOB). I must stress what was mentioned in chapter one of this thesis that there has been no formal definition of "Indigenous peoples" has been adopted in international law.[375] However, the Martinez Cobo Study provided the most widely cited "working definition" of indigenous peoples:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.[376]

It also notes that an indigenous person is:

> … one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group). This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.[377]

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[374] The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions, (2013), at v, online: (pdf) <www.ohchr.org/documents/issues/ipeoples/undripmanualfornhris.pdf> [perma.cc/V8FW-3P3A]. See also E/CN.4/Sub.2/1986/7/Add.4, para. 379.
[375] *Ibid* at 6.
[376] *Ibid* at 6, see also E/CN.4/Sub.2/1986/7/Add.4, para. 379.
[377] *Ibid*, paras. 381-382.

Again, these definitions apply to IPOB. Indigenous peoples are descendants of populations "which inhabited a country or geographical region during its conquest or colonization or the establishment of present state boundaries" and "retain some or all of their own social, economic, cultural and political institutions."[378]

Since there have been no formal definition of Indigenous peoples, the following factors that have been considered relevant to the understanding of the concept of "indigenous":[379]

(a) Priority in time, with respect to the occupation and use of a specific territory.[380]

(b) The voluntary perpetuation of cultural distinctiveness may include language, social organization, religion and spiritual values, modes of production, laws, and institutions.[381]

(c) Self-identification and recognition by other groups, or by State authorities, as a distinct collectivity.[382]

(d) An experience of subjugation, marginalization, dispossession, exclusion, or discrimination, whether or not these conditions persist.[383]

(e) Historical continuity with pre-colonial and/or pre-settler societies.[384]

(f) Strong link to territories and surrounding natural resources.[385]

These definitions bring me to the question - whether IPOB can still form their country as per Articles 3 and 4 of UNDRIP despite the non-adoption and non-implementation of UNDRIP in

[378] ILO Convention, No. 169, Article 1(1).
[379] 9 E/CN.4/Sub.2/AC.4/1996/2, para. 69.
[380] *Ibid*.
[381] *Ibid*.
[382] *Ibid*.
[383] *Ibid*.
[384] Identifying Approaches to Adopt and Implement the United Nations Declaration on the Rights of Indigenous Peoples, (November 29, 2019), online: (pdf) < https://www.mcmasterforum.org/docs/default-source/product-documents/rapid-responses/identifying-approaches-to-adopt-and-implement-the-united-nations-declaration-on-the-rights-of-indigenous-peoples.pdf?sfvrsn=5a3559d5_5> [perma.cc/85DH-GELT] at 6.
[385] *Ibid*.

Nigeria? In due time, I would highlight the caveat in UNDRIP that might prevent Biafra from exercising the rights prescribed under UNDRIP Article 46. Moving forward to the question I asked, borrowing the words of Marija Batistich, the concept of self-determination has been in existence as old as statehood and can be traced to the issues of decolonization.[386] Interestingly, the 1966 United Nations Covenants on Human Rights (UNCHR) commence with the phrase "all peoples have the right of self-determination."[387] As Batistich argued, the International Covenant on Civil and Political Rights (ICCPR)[388] extends the right of self-determination to citizens of independent states.

He further explained that Article 1 established self-determination as a participatory right, and Article 25 further defines the method of political participation required.[389] Violation of these standards would enable a "people" to assert denial of their right to self-determination, for only through political participation can "economic, social and cultural" institutions develop.[390] Has the federal government of Nigeria violated the standards as provided in UNCHR and ICCPR? From the foregoing, it is evident that the government has for a long time breached the rights of IPOB by preventing them directly or indirectly from exercising their rights to self-determination. Although self-determination can be traced to the concept of decolonization, as was highlighted in the African Charter on Human People's Rights (Banjul Charter) was adopted by the Organisation of African Unity ("the OAU") in 1981. The African Charter on Human Rights People's Rights (ACHPR), Self-determination was referred to as a political, economic, and social right.[391]

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[386] Marija Batistich, "The Right to Self-determination and International law."
[387] International Covenant on Economic, Social and Cultural Rights, Dec 16, 1966, 993 UNTS 3 <www.ohchr.org/en/professionalinterest/pages/cescr.aspx> [perma.cc/9S3V-MMQU]
[388] International Covenant on Civil and Political Rights, Dec 16, 1966, 999 UNTS 171. <www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [perma.cc/LJU3-4DPA]
[389] Batistich, supra note 386 at 1020.
[390] *Ibid*.
[391] African Charter on Human Peoples' Rights, June 27, 1981. OAU Doc CAB/LEG/67/3/Rev.5 (1981) <www.refworld.org/docid/3ae6b3630.html>

Article 20 ACHPR:

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.

3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic, or cultural.[392]

It is pertinent to note that throughout the ACHPR, great emphasis was laid on the Africans. However, the term "peoples" though with important rights as prescribed, but no definition was given in that regard. As I have reiterated in the previous paragraphs about the definition of "Indigenous peoples," the term "peoples" has been defined as a declaration of the value of community linkages within and among groups.[393] Though interrelated, the distinction between "Indigenous peoples" and "peoples" has a clear difference. Indigenous peoples are self-defined (they can manage their membership rules to Indigenous communities, which is a possible step toward Indigenous self-determination).[394] One of the points this thesis is trying to drive at is that IPOB has the power to define themselves even though UNDRIP does not explicitly define

[392] African Charter on Human Peoples' Rights, Article 20.
[393] S. J. Anaya, "A Contemporary Definition of the International Norm of Self-Determination" (1993), 3:1 Transnational Law & Contemporary Problems, 131–162.
[394] Ravi De Costa, "Descent, Culture, and Self-Determination: States and the Definition of Indigenous Peoples" (2014) 3:3 aps, online: <https://journals.library.ualberta.ca/aps/index.php/aps/article/view/22227> at 56.

"Indigenous." Just as this chapter has elaborated, there is no universally accepted definition of Indigenous peoples, and as such, the Indigenous peoples are allowed to define themselves.

In that same vein, since UNDRIP has asked Indigenous peoples to identify themselves, IPOB considers themselves "Indigenous" because of their distinct social, economic, political, culture and languages from those of dominant societies in which they live, which also falls in line with the understanding of the United Nations.[395] Other countries might prefer other terms which can be used interchangeably with Indigenous peoples.[396] As a result, The Igbos tribe is an ethnic group that consists of a community of people who speak the Igbo language.[397] Also, by the meaning of self-determination under international laws, it can be implied that IPOB falls under the equation, which means that IPOB can exercise their right to self-determination as provided for under UNDRIP.[398]

The next question is whether the IPOB can exercise their right to form their own government by virtue of Articles 3 and 4 of UNDRIP despite the federal government's intentional delay in adopting or implementing UNDRIP into their laws. I mentioned earlier that I was going to highlight the caveat in UNDRIP that might affect IPOB's chance of forming their country. It is no news that the birth of UNDRIP brought joy and a huge relief on the Indigenous peoples.[399] What this thesis have been trying to answer in relation to IPOB is whether UNDRIP can help them resolve their self-determination issues. However, it is pertinent for me to point that Article 46 of UNDRIP states that UNDRIP cannot be interpreted as implying for any State, people, group, or

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[395] See <www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf>
[396] *Ibid*, at 2. Other terms including tribes, first peoples/nations, aboriginals, ethnic groups, adivasi, janajati. Occupational and geographical terms like hunter-gatherers, nomads, peasants, hill people, etc., also exist and for all practical purposes can be used interchangeably with "indigenous peoples."
[397] Ikechukwu Anthony Kanu, "Igbo migration and the future of traditional paradigms," (2019), Journal of African Studies and Sustainable Development at 36.
[398] UN Declaration, supra note 3, art. 3.
[399] Felipe Gómez Isa, "The UNDRIP: an increasingly robust legal parameter" (2019) 23:1–2 The International Journal of Human Rights 7–21 at 10.

person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.[400] Bringing it down to the caveat – the state in this case is Nigeria. One question we have to answer is what happens to IPOB if they interpret and exercise their right to self-determination as provided in UNDRIP and it threatens the territorial integrity of Nigeria? This is a valid question which this thesis cannot ignore. Article 46 of UNDRIP is crystal clear – once IPOB actions threatens the political unity of Nigeria, it has violated the provisions of UNDRIP. In light of this, it is important for IPOB to be aware of this caveat while fighting for their right to self-determination as enshrined in UNDRIP.

Although Nigeria is yet to adopt and implement UNDRIP into their laws, Nigeria has ratified several international human rights instruments relating to the protection of Minorities and Indigenous peoples. These include the United Nations Declaration on the Rights of Minorities (UNDM), International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), Convention on the Rights of the Child, The Convention on the Prevention of Genocide, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights.

From the preceding, it is evident that the Martinez Cobo's formula and ILO Convention No. 169 concerning Indigenous Peoples definition both acknowledge self-identification and self-recognition as essential aspects in defining indigenous peoples because it is an exercise of self-determination.[401] This is what the IPOB is doing. The protests and advocacy initiated by the IPOB are over the same issue our great, great-grandparents wanted – "Self-determination." IPOB has

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[400] UN Declaration, supra note 3, art. 46.
[401] E/CN.4/Sub.2/AC.4/1996/2/Add.1, at 3. See also, supra note 14.

been protesting to break out of Nigeria to enable them to have total control over their lands, natural resources, and political affairs. The leader of IPOB, Nnamdi Kanu, was recently apprehended in Kenya, forcibly brought back to Nigeria, arrested, and charged to court.[402] Since his arrest, the IPOB members gave a sit-at-home order every Monday until Nnamdi Kanu was released.[403] This protest went beyond IPOB members resident in the east. IPOB members resident in other countries has also joined their voices to protest against the detention of Nnamdi Kanu.[404]

It can also be said that as a result of the preceding statements, and that there is no "universally" accepted definition of "Indigenous peoples," there is a considerable connection between Biafrans/Ibos/Igbos/easterners and UNDRIP. Thereby restating what was said in chapter 3 of this thesis that for peace and tranquility to be restored in Nigeria and for the prevention of the resurrection of the Nigerian Civil War of 1967, Nigeria has to implement UNDRIP. With UNDRIP, the federal government of Nigeria would be forced to acknowledge and respect the Biafran fallen heroes during the Nigerian Civil War of 1967. It pains me to use the word "forced" because we are not supposed to beg the government to respect and recognize our fallen heroes during the Nigerian Civil War. There has been no form of reconciliation or extension of peace or even an apology from the government to the people of Biafra. Instead, the continuous

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[402] Emmanuel Akintowu, Biafra separatist leader abducted by Nigeria from Kenya, say family, (July 9, 2021), online: The Guardian <www.theguardian.com/world/2021/jul/09/biafra-separatist-leader-abducted-nigeria-kenya-family-alleges-nnamdi-kanu>

[403] See the interview on the IPOB's sit-at-home order <https://www.youtube.com/watch?v=B7vBS_TQqq0> [perma.cc/R6VW-VAH4]

[404] IPOB members protesting in other countries <https://m.facebook.com/MaziSomtoOkonkwo/videos/ipob-israel-protesting-the-illegal-abduction-of-mazi-nnamdi-kanu-from-kenya-to-n/1963060657196574/?extid=SEO---->; 'Free Nnamdi Kanu' Protest Begins In London, Protesters Wave Biafra Flags, 1 July 2021, online: (blog) Sahara Reporters <http://saharareporters.com/2021/07/01/%E2%80%98free-nnamdi-kanu%E2%80%99-protest-begins-london-protesters-wave-biafra-flags> [perma.cc/GN5S-ZT73]

marginalization, oppression, and harassment of the Indigenous People of Biafra has been on the rise.[405] This is why IPOB members are angry and protesting.

This is one of the things I appreciated in the 2021 annual report as required by DRIPA is the fact that the government of BC signed several important agreements with First Nations in 2020/21 that support reconciliation, self-government and self-determination, and economic development:

- Lake Babine Nation, B.C. and Canada signed a landmark new reconciliation agreement in September 2020 that sets out a 20-year journey to implement and recognize Lake Babine Nation's section 35 rights and transform its relationship with B.C. and Canada. This innovative and exemplary Foundation Agreement outlines how all parties will work together to implement Lake Babine self-governance, Aboriginal title, and other rights, boost economic development, become true partners in major land and resource management, and promote community health and well-being. The Foundation Agreement also confirms this implementation work will be guided by the UN Declaration.[406]

- *Snuneymuxw* First Nation and the provincial government reached two agreements in September 2020 that foster economic development and support a strong and stable future for Snuneymuxw and its members. The reconciliation and land transfer agreements set out

[405] For more information, see Ikenna Mike Alumona, Stephen Nnaemeka Azom & Emeka Charles Iloh "The Nigerian State and the Resurgence of Separatist Agitations: The Case of Biafra" online: (blog) Africa Portal <https://media.africaportal.org/documents/The-Case-of-biafra.pdf> [perma.cc/E3TK-DF9U]; Jideofor Adibe, "Separatist agitations in Nigeria: The way forward. Africa Focus" (17 July 2017), online: (blog) Brookings <www.brookings.edu/blog/africa-in-focus/2017/07/17/separatist-agitations-in-nigeria-the-way-forward/> [perma.cc/L77S-SE5G]; "Nigeria: At least 150 peaceful pro-Biafra activists killed in chilling crackdown" (24 November 2016) online: Amnesty <www.amnesty.org/en/latest/news/2016/11/peaceful-pro-biafra-activists-killed-in-chilling-crackdown/> [perma.cc/KSJ9-UZ84]
[406] DRIPA 2021 Annu Report, supra note 361.

> a plan for strengthening government-to-government relations and provide clarity and predictability for people, businesses, and governments across Snuneymuxw territory.[407]

All of these would be achievable in resolving the issue of self-government and self-determination of IPOB if UNDRIP was adopted in Nigeria.

This thesis tried to establish the fact that whether or not UNDRIP is adopted in Nigeria, IPOB should be able to exercise the rights enshrined under UNDRIP. The next few paragraphs will explain why this is a possibility. Before I proceed, I would like to share some of the questions and feedback I got when I presented this part of my thesis at the Critical Legal Conference on September 2, 2021. My presentation was on the "*Monstrous Cover-ups on the Struggles of the Indigenous People of Biafra*." I shared my observations around how the Nigerian government has made no effort to reconcile with the Indigenous People of Biafra since the massacre of over 3.5 million Biafrans that occurred in 1967. I referred to the Truth and Reconciliation Commission (TRC) established in Canada. The TRC is a step to accepting the wrongs done against the Indigenous peoples with ways of reconciling with them. If the TRC were, in reality, truthful, then it would go a long way for the Indigenous People of Biafra (IPOB). I also raised the issue where the President of Nigeria referred to the IPOB as "terrorists" simply because the IPOB, without fear, are protesting for their right to form their own government with their laws. After my presentation, one of the attendees' questions, Paige Thombs,[408] asked was – "What difference would it make if UNDRIP was adopted in Nigeria?" … she continued, take Canada for instance, no impact! My response to Thompson's question was simple – the next paragraph would do justice to the question.

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[407] *Ibid*.
[408] Ph.D. student, Faculty of Law, University of Victoria (UVic).

While Canada's implementation of UNDRIP,[409] can be labelled a charade, the point is that the UN Declaration on the Rights of Indigenous People is not just a random document. It is an international document that represents the minds, rights, and well-being of the Indigenous peoples. The adoption and implementation of UNDRIP in Nigeria, in my own opinion, would make a lot of difference in Nigeria not just because the IPOB youths are agitating for this but also because it was high time for Nigeria to take the bold step. Once the bold steps are taken, IPOB can conveniently assert their rights to self-determination as provided by UNDRIP.[410] This would become possible because they already have international backing.[411] They do not wish the Nigerian Civil War of 1967 to come to light again.

I would like to repeat what I said at the United Nations Girl Up's first Solidarity Across Borders virtual panel discussion that was held on September 3, 2021. While I was talking about the Humanitarian crises happening in my country, Nigeria, I said, "when you're hungry, you get food to quench that hunger - when your rights or that of others have been violated, there is this hunger to discuss ways to prevent the continuous violation." Now, that is my point; the IPOB wants to break out of Nigeria because their rights have been constantly violated, and there is this hunger to stop it. The protests, the stay-at-home orders, the solidarity movements are the baby steps in ensuring that they finally exercise their right to self-determination. So back to Thompson, I ensured that I conveyed my message that the Indigenous People of Biafra do not have to wait until they are completely wiped off the earth's surface before the Nigerian government decides to finally implement UNDRIP.

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409 Sander Duncanson, Coleman Brinker, Kelly Twa, Maeve O'Neill Sanger "Federal UNDRIP Bill becomes Law" (22 June 2021) online: (website) Osler <www.osler.com/en/resources/regulations/2021/federal-undrip-bill-becomes-law> [perma.cc/4ZJ3-LZ3D]
410 UN Declaration, supra note 3, art. 3.
411 *Ibid*.

C. Conclusion

This chapter examined how the Declaration on the Rights of Indigenous Peoples Act (DRIPA) which was signed into law to acknowledge and respect the rights of Indigenous peoples as was enshrined in UNDRIP, can overcome the need for Indigenous peoples to prove Aboriginal title in courts. Emphasis was laid on how DRIPA can be different from UNDRIP and actually make an impact on the Indigenous peoples and the government of BC. This chapter discussed the importance of equality and fairness when dealing with not everyone, particularly in the aboriginal title issues in court. The action plan that the DRIPA proposed is important. However, it should include the erasure of the aboriginal test, which the Indigenous peoples must undergo to prove they have title over land. Supposing this is unachievable, then the government of BC should be subjected to undergo the same test for proof of title as the Indigenous peoples. This is because it is absurd for the Indigenous peoples whose ancestors lived in their land for over 400 years ago to partake in the aboriginal test in the presence of non-indigenous judges. Furthermore, the hitches and possibilities in achieving this were identified.

This chapter also discussed how UNDRIP could solve the Indigenous People of Biafra (IPOB) issues. From the preceding, it is evident that the main issue of IPOB was the fight for self-determination. It focused on the reason for the delay in the Nigerian government to adopt/ratify the UNDRIP into their laws. In the event to stipulate the inconsistencies in international laws like the African Charter on Human and Peoples' Rights (ACHPR) and the Nigerian Constitution, this chapter shared more light on how UNDRIP would be a game-changer for IPOB in Nigeria. In an attempt to expose the recent illicit actions on the IPOB, reference was made to video clips to

portray its point. This chapter pointed out that to prevent the dreadful incident that occurred over 51 years ago against IPOB, the Nigerian government should adopt and implement UNDRIP into law. The adoption and implementation of UNDRIP would be one step to curb the rising wave of economic and social setbacks and security imbalance in Nigeria.

CHAPTER FIVE

REFLECTIONS AND RECOMMENDATIONS

After spending 8 months researching the impact of the United Nations Declaration on the Right of Indigenous peoples (UNDRIP) in resolving Aboriginal title issues in British Columbia and the self-determination issues in Nigeria, I have been exposed to many things. I would like to share my reflections regarding my main conclusions.

At the onset of this thesis, I asked two questions. They were: "How can DRIPA overcome the need for Indigenous peoples to prove aboriginal title in courts" and "Whether UNDRIP can resolve Nigeria's self-determination issues." These questions formed the genesis and end of this thesis. In summary, this thesis stated that DRIPA can overcome the need for Indigenous peoples to prove aboriginal title in courts is by eliminating the aboriginal title test *Delgamuukw* and *Tsilhqot'in* cases. In responding to the second question, I stated that the Indigenous People of Biafra in Nigeria can rely on UNDRIP while fighting for their rights to self-determination.

Chapter two of this thesis discussed the history of Indigenous peoples in Canada, the doctrine of *terra nullius*,[412] which brings me to the impressive reflective journals submitted by constitutional law students from the University of Victoria while I was a Teaching Assistant. Some of them wrote about the early treaties signed by Indigenous peoples, such as the Douglas Treaties on southern Vancouver Island. Students expressed their concern about how Indigenous peoples signed the treaty. They wondered: Were they tricked into believing the treaty contained their interests and terms? Or did something else mislead them? Another issue they wrote about is the Royal Proclamation of 1763, where the ownership of lands in North America was assumed to be

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[412] Borrows, supra note 130.

given to King George III.[413] The Proclamation further provided that Aboriginal land could only be sold or ceded to the Crown.[414] The idea that the Crown could own Indigenous peoples land without Indigenous consent raises the question I discussed in chapter two - who is the Crown? I defined the Crown as "an invincible power controlled by the Canadian government." My thesis has argued that the Crown's unilateral assertions of power over Indigenous peoples are unjust.

Chapter two further highlighted how colonization by European settlers affected Indigenous peoples, and how Indigenous peoples have continuously fought for their lands and identity. For instance, you will remember the brave steps of the 6 Chiefs of the *Tsilhqot'in Nation* that waged war against the invading white colonists. They ensured that all invading white colonists were driven away from their territory. Their reason for the war is not farfetched. They wanted to ensure that the European settlers understood who was in charge. They wanted to show =who had total control over their lands? In as much as the war caused the deaths of 19 European settlers and in retaliation, the 6 chiefs were hung to death, but the bravery of the people of the *Tsilhqot'in Nation* is commendable and cannot be ignored. The people of *Tsilhqot'in Nation* outdid themselves because, after the war, the settlers understood that the territory of the *Tsilhqot'in Nation* was untouchable.

Essentially, chapter two discussed the constitutional battles of Aboriginal title in Canada. Through the *Constitution Act 1982*, the government of Canada[415] purported to recognize and affirm the claims that the aboriginal rights of Indigenous peoples.[416] This assertion was challenged and shown to be false in this thesis – the recognition of Aboriginal rights in Canada's constitution is a

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[413] "Aboriginal Title" online: Energy BC <www.energybc.ca/cache/northerngateway/indigenousfoundations.arts.ubc.ca/home/land-rights/aboriginal-title.html>
[414] Calloway, supra note 144.
[415] The Constitution Act, supra note 20, s 35.
[416] Box of Treasures Or Empty Box? Twenty Years of Section 35. Canada: Theytus Books, 2003.

mere charade.[417] It was also determined that the so-called aboriginal title is a significant judicial problem in Canada.[418] Emphasis was laid on several judicial cases revolving around aboriginal title issues;[419] some of these cases are *Calder v British Columbia*,[420] *Delgamuukw v British Columbia*,[421] *Haida Nation v British Columbia*[422] and *Tsilhqot'in Nation v British Columbia*, and the one-sidedness of the aboriginal title test.[423]

In most cases, the Indigenous peoples lost their lands because of the problematic aboriginal title test, developed in the case of *Delgamuukw*.[424] Furthermore, chapter two gave a clear insight on the issues surrounding the law of evidence and how oral evidence is rarely relied upon, thereby making it very difficult for Indigenous peoples to tell their stories in court.[425] This is despite the fact that the Court allowed evidence that cannot be verified, which otherwise would be called hearsay.[426]

To further portray my point, chapter two emphasized how the test for proof of aboriginal title is impracticable and unfair as Indigenous peoples are the only party who undergo the test.[427] The concluding part of chapter two highlighted British Columbia's approach to Aboriginal title. It was observed that land struggles and cultural genocide in Canada and British Columbia has greatly affected the country. Despite these injustices British Columbia also became the first jurisdiction in Canada to implement the United Nations Declaration on the Rights of Indigenous People

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[417] Wilson, supra note 353.
[418] Kent McNeil, "The onus of proof of aboriginal title." Osgoode Hall LJ 37 (1999): 775.
[419] See supra notes 143, 171, 183 and 186.
[420] *Calder*, supra note 191.
[421] *Delgamuukw,* supra note 145.
[422] *Haida Nation,* supra note 117.
[423] See supra note 164 at 01h:05:47s.
[424] *Delgamuukw*, supra note 145.
[425] Miller, Bruce Granville, "Oral History on Trial: Recognizing Aboriginal Narratives in the Courts" (Canada: UBC Press, 2011); Also, the judge in *Haida Nation v British Columbia* implied that Chief Augustine being the only witness could have been influenced by his own literacy or by his forebears. See para. 65.
[426] Peterson, supra note 195.
[427] See supra note 164 at 01h:05m:47s.

(UNDRIP) into their laws as the "*Declaration of the Rights of Indigenous Peoples Act* (DRIPA) in 2019,"[428] which is commendable.[429] It is a step in the right direction, but it is a woefully inadequate one, so far.

After discussing the history of Aboriginal title in Canada and British Columbia in chapter 2, chapter 3 focused on self-determination issues in Nigeria. To set the context for understanding the Indigenous Peoples of Biafra's current strive for self-determination, the history of colonization, marginalization, and amalgamation of Nigeria's Northern and Southern parts was discussed. Most importantly, I provided details about the Nigerian Civil War of 1967, which cost the lives of 3.5 million Biafrans. In discussing these issues, the chapter drew stories from incidents that occurred during the war. Some were from personal stories in Chimamanda Adichie's "Half of a Yellow Sun"[430] and Leslie Ofoegbu's "Blow the Fire."[431]

Recently, I was worried that my 108-year-old great-grandmother might not remember in detail what happened during the war. So, I called home. After asking how she was doing, she only expressed how excited she was to hear my voice. As the conversation continued, I said, "Mama, kedu ife imere oge mgbe ogwu Biafra?" This means, great-grandma, what did you do during the Biafran war?" The smile on her face was gone. She said, "udo adikwa?" meaning I hope all is well. I responded, Yes, mama. Instead of my great-grandmother narrating how she survived the war with her children, she kept on saying "ujo na atum" (I am afraid), "obi agbawala m" (my heart is broken), "ka anyi ko ife ozo" (let's discuss something else). As she struggled to talk about her experience, I understood was the pain and fear of losing her loved ones. I decided to imagine for

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[428] Bill C-41, *An Act to amend the Declaration on the Rights of Indigenous Peoples*, 2nd reading, *British Columbia, Legislative Assembly Debates*, 41-4, No 44 (30, 31 October 2019) at 286 (Hon Scott Fraser).
[429] Tom Flanagan, *Squaring the Circle: Adopting UNDRIP in Canada* (2020) at i.
[430] Adichie, supra note 318.
[431] Ofoegbu, supra note 320.

a few days what life was like for my family during the war. I kept on dreaming about the faces of dying, hungry children. I don't know where these thoughts came from, maybe from the pictures shared in chapter two of this thesis. I started feeling scared. What if the war repeats itself, and each time, I say "*Ozoemena,*" which means, let another not happen again.

Chapter three of the thesis focused on the fight for self-determination by Indigenous people of Biafra (IPOB) in Nigeria. A brief introduction was given to IPOB's history and the arguments surrounding the definition of "indigenous" in the African and Nigerian context. The definition of "indigenous" is contestable and has been contested because UNDRIP did not define it. Indigenous peoples are supposed to define themselves. In doing so, chapter three highlighted definitions as they apply to Africa.[432] Considering that the term "indigenous" may not apply to IPOB, reference was made to the story narrated by my great-grandmother about my roots as a Biafran. She stated that the Igbos/Ibos/Biafrans are a group of people who spoke a common language, were constantly oppressed, and deprived of being involved in political and economic matters in Nigeria. The story is a reaffirmation of the definition of "indigenous" by Barume.[433] My great-grandmother rightly said that the Biafrans were the first inhabitants of the Southeast of Nigeria. Biafra is ours, she said. Biafra is freedom. Biafra is a spirit that lives in us. The chapter also highlighted the similarity between the Nigerian Civil War of 1967 and the *Tsilhqot'in Nation* of 1864. Emphasis on the colonization, marginalization of the Biafrans was also considered alongside the amalgamation of Southern and Northern parts in Nigeria by the British.

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[432] Mitchell & Davis Yuzdepski, supra note 230 at 1357, Albert Barume stated that most Africans considered themselves indigenous because of their decolonial victory and self-determination (1360); James Anaya is of the opinion that the term "indigenous" refers to people who lived in a particular place prior to the invasion by the colonizers, see Sylvanus Barnabas, "Abuja Peoples of Nigeria as Indigenous Peoples in International Law" 2018, International Journal on Minority and Group Rights. 25. P. 431-457.
[433] Mitchell & Davis Yuzdepski, *ibid* at 1360.

Furthermore, in chapter three, the struggles of the Nigerian Biafran War were uncovered. We also discussed the imposition of the *Abandoned Property (Control and Management) Edict* was calculated to further hurt the 'falling' Igbos and deny legitimate property owners their rights to land located outside their states of origin.[434] In Chapter three's conclusion, the achievements of Biafra during the Nigerian Civil War of 1967 were highlighted. Another distinction was made between the Biafrans and the Indigenous peoples in Canada in relation to how they see themselves. I concluded that most Indigenous peoples in Canada do not refer to self-determination in terms of being an independent state. Most Indigenous peoples in Canada refer to it in terms of "recognition"[435] because by doing so, they are protecting their culture, land, and language.[436] This is in contrast with the Biafrans who believed and argued that they were denied the opportunity to exercise the right to self-determination by independently forming their political and economic group, which they think is sacrosanct, but only to the white man.[437]

As you will remember, at the outset of this thesis, I asked two primary questions; the first was: "How the Declaration on the Rights of Indigenous Peoples Act (DRIPA) can overcome the judicial requirement for Indigenous peoples to prove Aboriginal title?" "How can Indigenous peoples explain that they have title over the land? In other words, how practicable is the test of Aboriginal title as developed by the courts?"

In response, chapter four of this thesis explored how the Indigenous peoples are unfairly required to prove their title, whereas the government does not have to prove their claims to Indigenous peoples lands. I showed how the relationship between the government of British Columbia and the Indigenous peoples must improve in ways that go beyond the Truth and

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[434] Akolokwu, supra note 300 at 115.
[435] Coulthard, supra note 313.
[436] See <www.rcaanc-cirnac.gc.ca/eng/1100100032275/1529354547314>
[437] *Ibid*.

Reconciliation Commission's 94 Calls to Action. I observed that despite DRIPA's potential to recognize and respect of Indigenous peoples' rights to title,[438] the law is still unjust. The delay in bringing DRIPA to life is unconscionable. This is because, with the recognition of UNDRIP in BC, proof of title should not be a requirement for the Indigenous peoples. The government needs an action plan to erase the proof aboriginal title test. An action plan would involve the negotiations and agreements between the government of BC and the Indigenous peoples on a priority basis. I also highlighted how failure to develop an action plan addressing the erasure of the aboriginal title test would further increase the land disputes in BC.

The second question this thesis posed was, "how can UNDRIP help resolve self-determination issues in Nigeria?" [439] My main finding was that UNDRIP would greatly benefit the Indigenous People of Biafra (IPOB) if adopted in Nigeria. I concluded that the IPOB can exercise the right to self-determination as provided in articles 3 and 4 of UNDRIP. Despite these conclusions, I raised the caveat in UNDRIP, which prevents any form of threat to the State's territorial integrity when the Indigenous peoples exercise the rights under UNDRIP.[440] Thus, while the Indigenous People of Biafra are fighting for their rights to self-determination, they should be aware of this caveat. It can be argued that UNDRIP cannot protect IPOB if its actions threaten the integrity of Nigeria.

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[438] DRIPA, art. 26(3).
[439] Bill C-15: United Nations Declaration on the Rights of Indigenous Peoples Act (UNDRIP), art. 3 & 4.
[440] UNDRIP, supra note 3, art. 46.

Recommendations

As I reiterated earlier in this thesis, there are various ways to resolve Aboriginal title issues in British Columbia. I would like to reiterate my conclusions which support this aim:

(a) Eliminating the proof of aboriginal title test as developed in *Delgamuukw* and *Tsilhqot'in* cases. This objective is achievable through the action plan as provided by DRIPA.

(b) The courts should apply the principles of DRIPA when adjudicating Aboriginal title cases in British Columbia.[441]

(c) If the government or courts do not apply DRIPA, the government should have to prove its claims to Indigenous land in British Columbia on the same standard the courts require of Indigenous peoples.

To resolve self-determination issues in Nigeria, I recommended the following:

(a) The Nigerian government should negotiate with the IPOB to help resolve the self-determination issues in the country.

(b) Nigeria should adopt and implement UNDRIP into their laws.

(c) Reconciliation should be pursued in Nigeria because it is absent. For instance, Canada dedicated September 30 to the National Day for Truth and Reconciliation (remembering the sufferings of the Indigenous peoples at the residential school). Nigeria should imitate this action. It is an important step to recognize and commemorate the tragic history of the Nigerian Civil War of 1967.

[441] Flanagan, supra note 429 at 10.

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