

Development of an UNDRIP Compliance Assessment Tool: How a Performance Framework Could Improve State Compliance

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Résumé de l'article

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Abstract

Improving state compliance with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) can be supported by monitoring and measurement. Current approaches to monitoring state compliance with the UNDRIP are qualitative and non-standardized, which limits comparability across time and across geopolitical lines. In this article, we introduce a novel approach to monitoring compliance with the UNDRIP and human rights more generally. This work highlights the potential advantages of using a performance improvement framework to clearly identify gaps in compliance, monitor state compliance with the Declaration over time, and effectively assess and compare state compliance. We describe the development of a standardized UNDRIP compliance assessment tool and report the process and findings of a pilot test of the tool. The pilot assessment utilized the UN Special Rapporteur on the Rights of Indigenous Peoples' (SRRIP; Anaya, 2014) findings on the situation of Indigenous Peoples in Canada in three thematic areas: (a) self-government and self-governance; (b) consultation and free, prior, and informed consent (FPIC); and (c) land and natural resources. While insufficient for a fulsome assessment of Canada's compliance with the UNDRIP, we restricted ourselves to the report for two reasons: first, to test the applicability of the tool for quantifying qualitative data; and, second, to evaluate the degree to which the UN monitoring mechanism for Indigenous rights adheres to the Declaration's Articles for monitoring and reporting. We discuss implications and opportunities for improving human rights monitoring and state implementation efforts.

Keywords

human rights law, human rights compliance monitoring, Indigenous rights, measurement, performance improvement, United Nations Declaration on the Rights of Indigenous Peoples, UNDRIP, policy design, policy analysis, policy evaluation

Author Note

Jackson A. Smith is now at the University of Waterloo.

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Indigenous Peoples globally endure deprivations of their inherent rights, which result in social, economic, and health inequities relative to the non-Indigenous citizenry (Anaya, 2014; Canadian Human Rights Commission, 2013; Kirmayer et al., 2000; Mitchell & MacLeod, 2014; United Nations [UN] Permanent Forum on Indigenous Issues, 2009). Canada is an example of a high-income country in which Indigenous Peoples have been noted to be living in conditions akin to those found in low-income countries (Anaya, 2014; UN Committee on the Elimination of Racial Discrimination [CERD], 2017). Numerous rights conventions focus on mitigating racial discrimination, including the UN CERD (n.d.; established in 1962), the International Convention on the Elimination of All Forms of Racial Discrimination (1965), and the International Covenant on Civil and Political Rights (1966). The International Labour Organization's C107 (Indigenous and Tribal Populations Convention, 1957) and R104 (Indigenous and Tribal Populations Recommendation, 1957), implemented in 1959, were the first to recognize the unique rights of Indigenous Peoples (Belanger, 2011). However, due to the lack of explicit mention of Indigenous Peoples, by the late 1960s Indigenous people strengthened their demands for international recognition of their inherent rights. This led to the endorsement of the Working Group on Indigenous Peoples (WGIP) in 1982, the revision of ILO C107, which passed as C169—Indigenous and Tribal Peoples Convention (1989) in 1989, and the drafting of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP; UN, 2007), first tabled in 1993 (Belanger, 2011). In 2007, the UNDRIP became an official international standard of Indigenous rights, thereby establishing the recognition by the UN General Assembly of the need to advance Indigenous Peoples' rights and commitment to support member state compliance.

Canada was one of only four countries to oppose the passing of the UNDRIP in 2007 when it was officially passed by the UN General Assembly. The country remained in opposition to the UNDRIP until November 14, 2010, when the federal government released an official statement of endorsement of the UNDRIP. However, despite endorsing the Declaration the government maintained their reservations about compliance, asserting, “[t]he Declaration is an aspirational . . . non-legally binding document that does not reflect customary international law nor change Canadian laws . . .” (Aboriginal Affairs and Northern Development Canada, 2010a, paras. 3-4). Additionally, the statement indicates that the endorsement of the Declaration does not mean that the Government of Canada will make any amendments to domestic laws and policies in order to reflect the articles of the UNDRIP, particularly in the domains of self-government and self-governance; free, prior, and informed consent (FPIC); and land and natural resource rights (Aboriginal Affairs and Northern Development Canada, 2010a, 2010b). It is apropos to point out that suggesting a human rights document can be accepted as binding only insofar as it is consistent with established laws is contradictory. Part of the reason for the existence of human rights regimes is to identify aspects of domestic systems that are not in compliance with human rights responsibilities. If established laws are already in compliance, then the human rights document is redundant.

Although Canada and other states have characterized their endorsement of the UNDRIP as not obligating compliance due it being a declaration rather than a treaty, “soft law” instruments such as declarations can be considered sources of legal obligation through the establishment of norms and customary international law (Joffe, 2010; Jones, 2011; Shelton, 2006). Some legal scholars have asserted

that many aspects of the UNDRIP do indeed constitute customary international law, including the following rights: self-determination; autonomy or self-government; cultural rights and identity; land rights; and reparation, redress, and remedies (Barnabas, 2017; Boyer, 2014; Graham & Wiessner, 2011; Gunn, 2011a, 2011b; International Law Association, 2010; UN Permanent Forum on Indigenous Issues, 2014). Further, under the various human rights treaties Canada has signed and as a member of international organizations such as the UN and the Organization of American States, Canada has obligations to ensure its domestic institutions and legal structures are in conformity with the UNDRIP (Barnabas, 2017). As such, contrary to the government's assertion, the norms set out in the UNDRIP are binding articulations of human rights obligations with respect to Indigenous Peoples.

With the change in federal leadership in 2015, the discourse shifted. Prime Minister Justin Trudeau officially committed to the implementation of the UNDRIP, publicly and through mandating the Minister of Indigenous and Northern Affairs to implement the UNDRIP as her first priority (Trudeau, 2015). Additionally, the government of Canada formally shifted its position within the UN, declaring Canada's endorsement of the Declaration without reservations (Hill, 2016). In spite of the plethora of public promises and inspirational speeches about reconciliation since entering office, Prime Minister Trudeau has continued the legacy of violating the rights of Indigenous Peoples within the UNDRIP framework, particularly when the rights conflict with opportunities for the development or expansion of resource extraction projects. One such example is the issuing of permits to the Site C dam, allowing the construction of the BC Hydro project to continue despite ongoing legal challenges by two First Nations, even after the federal-provincial review panel found that the dam "will result in significant and irreversible adverse impacts on Treaty 8 First Nations" (Gilchrist, 2016, para. 2). Another notable contradiction is the purchasing of the Trans Mountain pipeline in August 2018, as indicated by the Federal Court of Appeal's ruling for *Tsleil-Waututh Nation v. Canada* (2018), which struck down the Government's approval of the pipeline expansion in part because "... Canada's execution of Phase III of the consultation process was unacceptably flawed and fell short of the standard prescribed by the jurisprudence of the Supreme Court. As such, the consultation process fell short of the required mark for reasonable consultation" (para. 557).

In order to facilitate compliance with the UNDRIP, it is important for the legitimacy and weight of the Declaration within constitutional law to be better understood on all levels so citizens, organizations, and legal bodies can enforce the rights. Additionally, there is a need for standardized methods to monitor compliance and provide specific feedback to support performance improvement.

Feedback, Compliance Monitoring, and Performance Improvement

Feedback has been used to inform and instigate behavioural and systems change in various sectors, including health care (Lambert et al., 2001), mental health (Kelly et al., 2009; Riemer & Bickman, 2011), and organizations and manufacturing (Ilgen et al., 1979; Taylor et al., 1984). A particularly useful method of feedback is negative feedback, where cognitive dissonance is created by exposing gaps between the commitments that individuals, organizations, businesses, communities, or governments make and their actual behaviours (Riemer & Bickman, 2011). Monitoring states' compliance with their human rights commitments is an important means for exposing where the gaps between the ideal and the reality lie—and publicly exposing these gaps can provide the impetus to make change by eliciting a sense of dissonance (within individuals or at a collective level) and/or tarnishing or threatening a public

reputation (Riemer & Bickman, 2011). This discrepancy, according to control theory, “. . . can trigger various reactions, including (a) increased effort to reduce or eliminate the gap to alter future feedback; (b) efforts to change the standard; and (c) rejection of the standard, among others” (Guerra-López & Hutchinson, 2013, p. 163).

In Canada, community-based, political, and legal pressure to comply has been mounting. Since 2012, Canada has seen the igniting of Idle No More, the National Inquiry into Missing and Murdered Indigenous Women and Girls, and the Truth and Reconciliation Commission of Canada’s Calls to Action, not to mention the community-level protests, blockades, and rallies across the country. There have been sustained demonstrations against the Trans Mountain Pipeline and a number of significant court rulings exposing inadequate consultation, including *Tsleil-Waututh Nation v. Canada* (2018), *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.* (2017), and *Eabametoong First Nation v. Minister of Northern Development and Mines* (2018; see Mitchell, 2019 for more examples). The Truth and Reconciliation Commission of Canada (2015), after a long process of revisiting and documenting the horrors of the Indian residential school system across the country calls for the UNDRIP to be the “framework for reconciliation in Canada” (p. 15), urging the government of Canada to follow through with their obligation to implement and respect the rights standards established in the UNDRIP. Additionally, a 2017 report of the United Nations Committee to Eliminate Racial Discrimination (UN CERD, 2017) indicated that the Committee was “deeply concerned” by Canada’s continuous violations of the land rights of Indigenous Peoples:

. . . in particular environmentally destructive decisions for resource development which affect their lives and territories continue to be undertaken without the free, prior and informed consent of the Indigenous peoples, resulting in breaches of treaty obligations and international human rights law. (Article 19a)

Within the same report, they recommend that Canada ratify ILO C169 (1989) concerning the Indigenous and Tribal Peoples Convention.

One challenge is the lack of governance mechanisms to monitor the implementation of the UNDRIP internationally and domestically. Such monitoring is necessary for pressuring states that “underperform” to conform to the rights norms by means of accountability measures and public “shaming” (Kelly & Simmons, 2015). Aside from monitoring and enforcement, feedback and monitoring can be useful mechanisms for “performance enhancement” (increased compliance) by states who are motivated to improve compliance and look at specific indicators to measure their performance over time and develop strategies for change. This is particularly important when states value their international reputation and image, which is certainly the case in the current era of globalization and international market interconnectedness (Romanow, 2010).

It is conceivable that taking a performance enhancement approach, which has been demonstrated as effective for motivating organizational change, would be effective for supporting state efforts to comply with human rights standards. From an organizational change perspective, identifying specific performance gaps based on high-quality data, as well as clear, measurable goals, is the core of any effective change process (Van Tiem et al., 2012). For example, Nutt (2008) compared the success of organizational decisions based on different forms of information and data and found that decisions

based on quantitative performance data were “significantly more successful than those decisions made on the basis of personal ‘hunches’ or feelings, or on the basis of consensus of opinions of others” (Guerra-López & Hutchinson, 2013, p. 163). This does not suggest that the two latter perspectives do not have their utility; rather, it suggests that they must be triangulated with independently verifiable performance data.

While there are some efforts underway to develop standardized and, in some cases, accessible tools for assessing state compliance with the UNDRIP, including by the Indigenous Navigator—a partnership of the Asia Indigenous Peoples Pact (AIPP), Forest Peoples Programme (FPP), ILO, International Work Group on Indigenous Affairs (IWGIA), Tebtebba Foundation, and Danish Institute for Human Rights, and the Indigenous Peoples Major Group for Sustainable Development (see Indigenous Navigator, n.d.) and the Expert Mechanism on the Rights of Indigenous Peoples, there is currently no quantified and standardized assessment of state compliance with the UNDRIP. Further, in the realm of human rights compliance assessment, the predominant approach to compliance assessment focuses on monitoring and enforcement, rather than performance improvement. As such, the current approach to measuring state compliance with the UNDRIP is inadequate for providing meaningful data to influence the behaviour of states. We present monitoring and assessment, therefore, as a complementary process in which state actors can improve their accountability through self-monitoring in alignment with international standards. This shift in reframing monitoring from solely an external human rights assessment to one also taken up inside the state could serve as a lever for change, precluding overcompliance (Lightfoot, 2010), and thereby increasing state accountability for Indigenous rights. In recognition of the need for a performance tool, we have constructed a UNDRIP compliance assessment tool to quantify compliance with the rights within the Declaration. This compliance assessment tool is informed by a managerial approach that provides regular and ongoing feedback mechanisms for self-monitoring to advance increasing success in the implementation of international Indigenous rights standards.

Method

UNDRIP Compliance Assessment Tool

The methodological tool we developed to assess compliance with the UNDRIP is based on international rights standards. In order to construct this monitoring tool, we took an indicator approach, which has been utilized by numerous subsidiary bodies within the United Nations Human Rights body (Fukuda-Parr, 2006; United Nations General Assembly, 2001; Welling, 2008). The tool is important for taking a snapshot of compliance at specific times and for measuring compliance with, and implementation of, the UNDRIP across time. In addition to its utility for evaluating compliance with the UNDRIP in single countries, we developed the metric with the intention of making regional and international comparisons of the situation of Indigenous Peoples in order to establish a ranking of countries. Such a comparison can provide important feedback for nation states and contribute to the pressure to comply. Further, this can be an appropriate tool beyond the level of the nation state. Organizations and communities who interact with Indigenous populations could also benefit from the use of the tool, as it would enable them to measure the fidelity of their policies and procedures to the rights standards set out in the UNDRIP and develop strategic plans for change based on specific indicators.

The evaluation metric consists of four designations ranging from 0 to 3 with the higher scores reflecting an increased level of compliance with the UNDRIP. A general provision of what each designation entails is as follows:

0. **An absence of compliance of the UNDRIP:** An active violation of Indigenous Peoples' rights. This can also reflect negative actions to reverse compliance efforts.
1. **Limited compliance or the beginning of uptake:** Some efforts are made by the government and/or third-party actors in order to comply with the UNDRIP. The efforts do not have a specific approach with Indigenous Peoples. No domestic laws are in place to enforce or reinforce the implementation of the UNDRIP.
2. **Partial compliance or evidence of gradual implementation:** State has made efforts to address Indigenous issues. State has legal frameworks related to Indigenous rights, but they do not comply with the standards set by the UNDRIP. Existing legal frameworks and Indigenous rights mechanisms are not employed in practice.
3. **Full compliance of the UNDRIP:** State has well-developed domestic legal frameworks that comply with international standards for the particular rights. Legal frameworks and Indigenous rights mechanisms are employed in practice. State demonstrates appropriate levels of partnership working in good faith with Indigenous Peoples towards the protection and exercising of their rights.

For instances where there is a lack of information to accurately assess compliance with a particular Article, the label *D/K* is used to indicate that we do not know.

In order to assess compliance according to this rating scale, we have begun to develop indicators for various thematic areas covered by the rights standards established in the UNDRIP. As a first step in the development of this tool, and in conformity with the areas of our research network, we have established specific indicators for the following themes: (a) self-government and self-governance, (b) consultation and free, prior, and informed consent (FPIC), and (c) land and natural resource rights (see Tables 1, 2, 3, 4, and 5). These indicators were defined based on a review of human rights assessment and performance improvement indicator best practice (Merry, 2011; UN Office of the High Commissioner for Human Rights, 2001) and the UNDRIP Articles themselves.

Table 1. Self-Government and Self-Governance Indicators

Score	Description of Indicator
0	Indigenous governments are not legally recognized. The government is in charge of defining and developing programs related to socioeconomic and cultural issues without the participation of the Indigenous Peoples they affect. Overall, Indigenous Peoples lack political representation.
1	Some Indigenous communities have been recognized by the government and have started strengthening their traditional structures. However, the government is in charge of defining and developing programs that affect Indigenous Peoples. The state has made efforts to incorporate Indigenous perspectives, but participation is limited. Programs in place are executed by government institutions and—in most cases—have inadequate funding and staff.
2	Indigenous Peoples enjoy self-government and self-governance rights in their territories and are responsible for designing their own programs related to their socioeconomic and cultural affairs. Indigenous Peoples participate in the political life of the state through their own representatives. However, the government intervenes in matters that are exclusively related to Indigenous Peoples or do not respect their decisions. Indigenous governments and institutions are inadequately funded by the state.
3	Indigenous Peoples enjoy self-government and self-governance rights in their traditional territories, design their own programs related to their socioeconomic and cultural affairs, and fully participate in the political life of the state through their own representatives. All decisions made by Indigenous Peoples are respected by the state and are incorporated into decision-making. Indigenous governments and institutions are adequately funded. The funding is administrated by Indigenous governments without intervention or conditions imposed on the funds by the state.
D/K	Insufficient information. Do not know.

Table 2. Consultation and Free, Prior, and Informed Consent Indicators

Score	Description of Indicator
0	No legal mechanisms exist to consult Indigenous Peoples in decision making in matters that affect them.
1	The government tries to incorporate Indigenous Peoples concerns through dialogue. These mechanisms are not permanent and do not constitute a formal consultation process. The right to consultation has not been incorporated into domestic law.
2	Governments have implemented a consultation process. Even though the consultation mechanism is regulated through domestic laws, the standards of the laws do not adequately meet the standards set by international documents.
3	The government, in cooperation with Indigenous Peoples, has defined a mechanism for consultation in order to obtain their free, prior, and informed consent. This consultation process has been incorporated into domestic law and complies with the international standards.
D/K	Insufficient information. Do not know.

Table 3. Duty to Consult Indicators

Score	Description of Indicator
0	In general terms, the state never consults Indigenous People in matters that can affect them.
1	Indigenous Peoples participate in some processes of decision-making through institutions that do not respect their traditional representation. The state has not developed a special mechanism designed for consulting with Indigenous Peoples.
2	Indigenous Peoples participate in decision-making through their traditional authorities. The consultation processes have been incorporated into domestic law but sometimes do not fulfill international standards for consultation.
3	Indigenous Peoples, through their traditional authorities, participate in all decision-making in matters that can affect them. The consultation processes have been defined in cooperation with Indigenous Peoples and meet all of the international standards. In the case of extractive projects, this consultation takes place before starting a project.
D/K	Insufficient information. Do not know.

Table 4. Land and Natural Resources: Access to Land and Natural Resources Indicators

Score	Description of Indicator
0	Indigenous Peoples lack adequate access to their traditional lands, and their right to the land is not legally recognized. There are no specific programs to address this issue and governments do not recognize lands that were traditionally occupied by Indigenous Peoples. There is no compensation or redress when Indigenous Peoples' lands are confiscated. In addition, Indigenous Peoples do not have the faculty to fully control or develop their lands and resources, and they struggle with issues such as invasion and illegal occupation, among others.
1	Indigenous Peoples lack adequate access to their traditional lands. The government has developed strategies focused on land delimitation and legal recognition of land, but there is no specific approach to Indigenous Peoples and lands that were traditionally occupied. There are mechanisms in place for redress and compensation, but these mechanisms do not have a specific approach to dealing with Indigenous Peoples' claims. In addition, even though the government has made efforts to address issues related to invasion, illegal occupation, and other issues, these actions are not effective. Indigenous Peoples do not control or develop their lands and resources.
2	There is a well-defined mechanism developed in cooperation with Indigenous Peoples to grant legal recognition of lands including those that were traditionally occupied. In some cases, the process is slow and during the process Indigenous Peoples struggle with issues such as the invasion and illegal occupation of their lands, among others. When the lands cannot be restored, there is compensation or redress but sometimes these measures do not fulfill Indigenous Peoples' cultural needs or are not fair. Even though Indigenous Peoples have control of their lands, they only partially control the resources on their lands.
3	There is a well-defined mechanism developed in cooperation with Indigenous Peoples to grant legal recognition of lands including those that were traditionally occupied. This process is fair and effective. Issues related to invasion and illegal occupation are resolved in an effective manner and, when the lands cannot be restored, the government applies adequate measures to compensate and redress Indigenous Peoples. Indigenous Peoples have full access and control of their lands and natural resources.
D/K	Insufficient information. Do not know.

Table 5. Land and Natural Resources: Environmental Protection, Restitution, Redress, and Consultation Regarding Extractive Policies Indicators

Score	Description of Indicator
0	The state has not developed any programs or measures to preserve and protect the environment. The government does not have any mechanisms in place to mitigate secondary effects in Indigenous communities caused by the approval of development projects or resource extraction. Indigenous Peoples do not participate in defining the strategies for managing and developing their lands and the state does not take into account Indigenous Peoples' concerns. There is no consultation.
1	The state has developed programs to preserve and protect the environment, but these programs do not have a specific approach to dealing with Indigenous Peoples and their lands. In some cases, the government has carried out activities to mitigate secondary effects in Indigenous communities caused by development projects or resource extraction, but there are no permanent mechanisms in place to remediate these effects. The government has started to engage in dialogue with Indigenous Peoples to address their concerns, but these efforts do not constitute a consultation process itself and, in some cases, this process is only carried out after a project or activity has already been initiated. In general, Indigenous Peoples do not participate in defining the strategies for managing and developing their lands.
2	The state has designed mechanisms to preserve and protect the environment with a specific approach to dealing with Indigenous Peoples and their lands. The state has designed mechanism to mitigate secondary effects in Indigenous communities caused by development projects and resource extraction activities in their territories. However, these mechanisms lack proper funding and full implementation. The government consults with Indigenous Peoples and has incorporated and regulated this process through domestic law but, in some occasions, this consultation process does not meet international standards. Indigenous Peoples have some participation in defining the strategies for managing and developing their lands.
3	The state has adequate mechanisms to preserve and protect the environment with a specific approach to Indigenous Peoples and their lands. The state has developed and put in place adequate mechanisms to mitigate secondary effects in Indigenous communities caused by development projects and resource extraction activities in their territories. The government consults with Indigenous Peoples in order to obtain their free, prior, and informed consent before approving any development project or resource extraction activity that can affect Indigenous Peoples. These processes have been incorporated into domestic law and comply with international standards.
D/K	Insufficient information. Do not know.

Piloting the Tool: Canadian Case Study

Through the pilot of the assessment tool, we sought to address the following question: How do Canada's laws, policies, and practices, as indicated by Special Rapporteur on the Rights of Indigenous Peoples (SRRIP) Anaya's (2014) Canada report, comply with the standards set out in the UNDRIP in the articles related to (a) consultation and free, prior, and informed consent; (b) self-governance and self-government; and (c) land and natural resource rights? Due to the breadth of Indigenous rights addressed in the UNDRIP, we chose to narrow the scope of the data and limit the pilot assessment to only those rights that are most important for Indigenous Peoples' ability to assert their land rights, their right to self-determination, and survival as Indigenous Peoples. Therefore, the data that we included were those that address the articles of the UNDRIP (UN, 2007) related to self-government and self-governance (Articles 3, 4, 5, and 20), consultation and FPIC (Articles 18 and 19), and land and natural resources (Articles 26, 27, 28, 29, and 32). We used the SRRIP's report on the situation of Indigenous Peoples in Canada as the source of data for the pilot. The SRRIP's report on its own is not an adequate basis for assessment of Canada's compliance due to the limited scope of the report and the aggregate nature of the data presented in the report. The limitations of using the SRRIP's report will be outlined in the discussion. Despite these limitations, we felt that the use of the report was appropriate for piloting the applicability to the assessment tool (i.e., to test the quantification of the qualitative data via the indicators) and to assess the fidelity of the UN's reporting mechanism to the Articles of the UNDRIP.

Coding and Analysis

We began by coding the content of Anaya's (2014) report based on the UNDRIP Articles. This involved combing through the content of the report to identify which information applied to each of the Articles within the purview of the pilot (i.e., the three thematic areas). We then analyzed the quotes relevant to each of the Articles and their sub-components using the indicators to determine scores. Rarely did all of the evidence for a particular Article clearly align with the indicators of one designation; as such, scores were assigned according to the general trend of the data (i.e., 4 out of 5 pieces of evidence point to a particular designation). In some cases, the evidence did not conform to the indicators of one particular designation but could be argued one way or the other (i.e., between either a score of 0 or 1). In these cases, the lower score was used as the default. Additionally, as a general rule established for this tool, whenever there was contradictory evidence for a particular Article (i.e., some positive examples of compliance and other examples of neglect and/or violation) the article could not be assigned a score higher than 2.

Validity and Reliability

Validity and reliability are essential for any assessment tool of merit. One way that a measure can be construed as valid is by anchoring it to a well-established set of concepts. With this particular measure, we have anchored it in the actual Articles of the UNDRIP—a broadly accepted Declaration that underwent over 30 years of development. This fact lends the tool validity because the concepts that the tool operationalizes have been well defined and elaborated by Indigenous and non-Indigenous experts from across the globe (see Gunn, 2011b; Inter-American Commission on Human Rights, 2009; Office of the High Commissioner for Human Rights and Asia Pacific Forum of National Human Rights Institutions, 2013; Xanthaki, 2007).

Reliability is another matter. In doing a content analysis, which utilizes the qualitative rather than quantitative data, it is best to think about this in terms of *trustworthiness* (Padgett, 2012). Trustworthiness is the degree to which the process of the results of a study are grounded in the data, and the availability of the rationale and “decision trail” that were used by the researcher when making conclusions based on the data (Padgett, 2012). Trustworthiness has four components: credibility (the degree to which the researcher’s description and interpretations reflects the respondents’ views), transferability and generalizability (the applicability of the study’s findings in other contexts), auditability and dependability (whether or not the researcher(s) documented the procedures using a sensible logic that can be traced by others), and confirmability (degree to which the findings are linked to the data; Padgett, 2012). A limitation to using trustworthiness is that it does not demonstrate the degree to which the methodology will consistently reproduce the same results when employed by different raters (i.e., inter-rater reliability). Inter-rater reliability testing will be important in the future for full-scale application of the UNDRIP compliance assessment tool with a more comprehensive dataset.

Pilot Assessment Results

The assessment of Indigenous rights in Canada on the identified themes of self-government and self-governance; consultation and FPIC; and land and natural resource rights based on an analysis of Anaya’s (2014) report on the situation of Indigenous Peoples in Canada indicates that Indigenous rights in Canada in 2013, despite strong legal frameworks, did not adequately approach the rights standards set out in the UNDRIP. Taken together, the assessment of Indigenous rights in Canada in the themes *self-government and self-governance; consultation and free, prior, and informed consent; and land and natural resource rights* was 13 out of 42 (30.95%). See Table 6 for scores for each Article organized by theme.

It is important to unpack this score. As described earlier, the scoring system used spanned from 0 to 3 for each of the articles, 0 being *an absence of compliance and active violation of the right*, 1 being *limited compliance and beginnings of implementation*, 2 being *partial compliance and evidence of gradual implementation*, and 3 being *complete compliance*. Applying this scoring framework to a percentage, 0% to 33.32% would reflect a score of 0 out of 3 on overall compliance with the UNDRIP, 33.33% to 66.65% would reflect a score of 1 out of 3, 66.66% to 99.99% would reflect a score of 2 out of 3, and 100% would reflect a score of 3 out of 3. Canada’s score applied to the compliance metric is 0.93 out of 3. Consequently, Canada’s final score indicates that Canada violates Indigenous Peoples’ rights established within the UNDRIP Articles assessed in this study, with some evidence of the beginning of uptake. This provides a stark contrast to the government’s interpretation of the SRRIP’s report.

Table 6. Pilot Assessment Results: Canada's Compliance Scores by Theme

Article	UNDRIP (2007) Article Statements	Score
Theme I: Consultation and Free, Prior, and Informed Consent		
Article 18	“Indigenous peoples participate in decision-making in matters which would affect their rights.”	1
	In decision-making matters, Indigenous peoples have their own “representatives chosen by themselves in accordance with their own procedures.”	D/K
	Indigenous peoples have the right to “maintain and develop their own Indigenous decision-making institutions.”	D/K
Article 19	The State “consult[s] and cooperate[s] in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”	1
Theme II: Self Government and Self-Governance		
Article 3	“Indigenous peoples have the right to self-determination.”	1
	Indigenous peoples “freely determine their political status.”	D/K
	Indigenous peoples “freely pursue their economic, social and cultural development.”	1
Article 4	“Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs.”	1
	Indigenous peoples have “ways and means for financing their autonomous functions.”	D/K
Article 5	“Indigenous peoples have the right to maintain and strengthen their distinct political, economic, and social systems or institutions.”	1
	Indigenous peoples have the right to “participate fully, if they so choose, in the political, economic, social and cultural life of the State.”	D/K
Article 20	“Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development and to engage freely in all their traditional and other economic activities.”	1
	“Indigenous Peoples deprived of their means of subsistence and development are entitled to just and fair redress.”	1

Table 6. Pilot Assessment Results: Canada's Compliance Scores by Theme (continued)

Article	UNDRIP (2007) Article Statements	Score
Theme III: Land and Natural Resources		
Article 26	“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.”	1
	The State gives “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.”	1
Article 27	“State has established and implemented, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of Indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used.”	D/K
	“Indigenous peoples . . . have the right to participate in this process.”	D/K
Article 28	“Indigenous peoples have the right to redress through restitution or compensation for land, territories and resources which they have traditionally owned, occupied or used and have been confiscated without their free, prior and informed consent.”	1
	“Unless otherwise freely agreed upon by the people concerned, compensation takes the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.”	D/K
Article 29	States “establish and implement assistance programmes for Indigenous Peoples for conservation and protection of the environment without discrimination.”	0
	States “take effective measures to ensure that no storage or disposal of hazardous materials . . . take place in the lands or territories of Indigenous Peoples without their free, prior and informed consent.”	D/K
	States “take effective measures to ensure . . . that programmes for monitoring, maintaining and restoring the health of Indigenous Peoples [are] developed and implemented by the peoples affected by such materials.”	D/K

Table 6. Pilot Assessment Results: Canada's Compliance Scores by Theme (continued)

Article	UNDRIP (2007) Article Statements	Score
Article 32	"Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources."	1
	The State "consult[s] and cooperate[s] in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."	1
	States "provide effective mechanisms for just and fair redress for any activities, and appropriate measures to mitigate adverse environmental, economic, social, cultural or spiritual impact."	D/K
Total Score		13 / 42* (30.95%)

Note. D/K = do not know.

* The denominator of the total score has been adjusted from 75 to 42 due to the 11 instances of D/K. Thus, the final reported score does not include the sub-Articles that could not be assessed with the data used for this pilot study.

The area of most concern for Canada pertains to consultation about resource extraction and development on Indigenous territories. This is not surprising given the central role resource extraction and development, domestically and extraterritorially, plays in the Canadian economy (Mitchell, 2019). Large improvements need to be made in the process of consulting with Indigenous Peoples with regards to proposed developments that may affect traditional lands. First and foremost, the most glaring insufficiency with the current duty to consult is the fact that Indigenous Peoples are not imbued with veto power; thus, governments and businesses do not have clear, consistent, or mandated processes for seeking consent. The fact that Indigenous communities' rights to FPIC continue to be violated indicates limitations to their self-determination, which is an important right set out in Articles 3 and 4 in the UNDRIP.

Consultation and Free, Prior, and Informed Consent

The results for the theme *consultation and free, prior, and informed consent* indicate that, within the Canadian context, Indigenous Peoples' rights to be consulted are continually being violated. Governments and development and resource extraction corporations proceed with policy changes and development and extraction projects without consulting with or obtaining the free, prior, and informed consent of the affected Indigenous Peoples (Anaya, 2014, paras. 47, 49, 73). These findings are consistent with the settler-colonial structure of Canadian society. Consulting with Indigenous Peoples and enabling them to have decision-making power is counter to the imposition of colonial rule—thus, it is not surprising that Indigenous communities report either being entirely excluded from decision

making processes or being inadequately heard. The subjugation of Indigenous Peoples continues to be present in Canadian society.

Self-Government and Self-Governance

An important element that arose from the results was the continued denial of Indigenous Peoples' rights to govern their own affairs. These rights to self-government and self-governance were particularly apparent with the limiting framework and dependency model imposed on First Nations through the Indian Act. Anaya's (2014) report reiterates over and over the limitations put on First Nations communities by the Indian Act structure (see paras. 13, 14, 42, 52, 55). Anaya's discussion of this touches on nearly all facets of life, with the consequences of community deviation from or resistance to the Indian Act being funding cuts—which, in already underfunded communities, is simply not an option. The coercive nature of this relationship embodies the tenets of settler-colonialism.

Land and Natural Resources

All of these rights are interconnected and overlap with one another. Thus, the rights to consultation and free, prior, and informed consent and to self-government and self-governance are intimately connected with Indigenous Peoples' rights to their lands and natural resources. The violation of Indigenous Peoples' rights to consultation and FPIC and the imposition of governance structures that limit Indigenous ownership and decision-making power hinders Indigenous communities' ability to assert their jurisdiction over their lands and resources.

The results confirm that much improvement needs to occur in order for Canada to be able to claim that Indigenous Peoples in Canada enjoy the rights set out in UNDRIP, in particular those rights related to Articles about consultation, self-governance, and land rights. The research question that we sought to address could not be adequately answered due to Anaya's report containing insufficient information and thus resulting in D/K or do not know for numerous Articles. The number of D/Ks is problematic for drawing concrete conclusions and reliable scores. As a result, the findings should be taken with considerable reservation as the metrics may be under or overstated based on limited sources.

Discussion

Development of the UNDRIP Assessment Tool

The development of this tool provides an important contribution to knowledge and practice by proposing a novel approach to monitoring and enabling continuous improvement in terms of compliance with the UNDRIP. This tool is an emerging metric for measuring state compliance with the UNDRIP and is critical for providing numeric assessments. The methodological tool can be useful for governments, domestic and international Human Rights organizations, and academics to aid in the realization of Article 38, which refers to the duty of the State to implement the rights set out in the Declaration. Likewise, this tool could be valuable for Indigenous communities and organizations to aid in their efforts towards the realization of their rights by providing a concrete and clear picture of the degree to which a community enjoys the rights set out in the Declaration.

As discussed earlier, feedback through constant evaluation is important for gaining awareness of progress and for identifying issues within a given system. Additionally, an important aspect when considering feedback is that in order for people to pay attention, the feedback needs to be seen as credible and valid (Riemer & Bickman, 2011). Reflecting on this makes clear the significance of this research. The utilization of metrics tied to key indicators can be used to inform how the evaluation of countries can be conducted and reported on in the future in order to hold more weight at all levels.

This work contributes to the development of an evaluation and reporting mechanism, which will make it more difficult for states to misrepresent the qualitative findings of state-level human rights reviews from domestic and international human rights institutions. For example, while the current analysis of the Anaya (2014) report does not establish a baseline for the comprehensive evaluation of a complete set of identified Articles within UNDRIP, the systematic review and efforts to quantify Canadian compliance with identified components of UNDRIP revealed significant deficits in compliance and a failed report card (13 out of 42; 33%) in contradiction to the official government representation of the country report. While the entire statement released by the Government of Canada is riddled with misrepresentation, the following text is illustrative:

The report published by the Special Rapporteur today acknowledges that, while many challenges remain, many positive steps have been taken to improve the overall well-being and prosperity of Aboriginal people in Canada.

Canada's diverse and multicultural society has been a leader on the world stage in the protection of human rights and, as acknowledged in the report, is one of the first countries in the modern era to extend constitutional protection to the rights of Aboriginal people.

Our numerous laws, policies and programs aimed at addressing Aboriginal peoples' concerns allow for a positive collaboration with Canada's Aboriginal and Northern communities as we work together on shared priorities and towards a renewed relationship built on reconciliation and trust.

As pointed out in the report, Canada's policies and processes to address historical grievances are an example to the world, and many of Canada's efforts provide important examples of reconciliation and accommodation. (Valcourt, 2014, paras. 2-4)

The review of relevant literature, development of the tool, and the piloting of the tool has provided important insights for the advancement of human rights assessment in general. To improve compliance monitoring, generally, we recommend the following: (a) use of a comprehensive and standardized reporting structure for state compliance assessments directly addressing the Articles within the UNDRIP, and (b) increase in transparency of assessment process by reporting in detail the data collection and analysis procedures.

First, we recommend that domestic and international human rights reviewers adopt a standardized format for evaluating and reporting on a state's compliance with the UNDRIP. Specifically, the recommendation is to adhere to a systematized structure to the monitoring and evaluation of adherence to each of the UNDRIP Articles, such as the approach described above. Use of a standardized approach would enable comparability between assessments conducted by domestic and international human

rights reviewers and across time. Such an approach can also be appropriate for exposing overcompliance, whereby a particular state (such as Canada) misrepresents the realities of their compliance efforts to preserve an undeserved reputation (Lightfoot, 2010). Additionally, the use of such an approach is important for clearly delineating the extent and ways in which compliance falls short and more readily supports strategic planning for improving compliance (Van Tiem et al., 2012).

Second, explicitly detailing the data collection and analysis procedures is important for increasing the transparency of the assessment process. One of the gaps that we encountered while reviewing Anaya's (2014) report was the lack of detail about the methods that the SRRIP and his team employed for gathering the data that informed his report. For instance, while Anaya mentions the duration of his visit to Canada and that he travelled across the country to speak to various Indigenous communities and non-Indigenous political actors, he did not include pertinent details, such as the number of communities he visited, how many politicians he spoke with, which parties they belonged to, et cetera. Moreover, he provides limited sources documenting the legislative and policy data that were reviewed. Outlining the data collection methods—as well as the data themselves—would increase the transparency of reporting and consequently enable the evaluation to hold more weight in effecting change in domestic policy and practice.

Pilot Assessment of Canadian Compliance

The intention of this pilot study was to demonstrate the utility of the quantitative UNDRIP compliance assessment tool as a supplementary method for looking at the situation of Indigenous rights within a given country and as a means of supporting accountability and performance improvement. This pilot demonstrates that greater accountability is needed regarding the implementation of the UNDRIP, particularly for those rights related to self-government and self-governance, FPIC, and natural resource rights. These rights were precisely those that led Canada to be one of four states to reject the Declaration when it was passed by the UN General Assembly in 2007 and to claim that the Declaration is merely an “aspirational” document upon becoming a signatory state in 2010. The lack of compliance indicates the need for renewed pressure on the state to comply with these standards. Monitoring the implementation of the Declaration will be critical for holding the government accountable. The systematic scoring procedure reveals a failing grade on Indigenous rights in Canada. The empirical metric developed for the UNDRIP compliance assessment tool contributes to a critical reflective discourse on Canada's relationship with Indigenous Peoples. Based on this initial analysis of Canada's level of compliance regarding, self-government and self-governance, consultation and FPIC, and land and natural resource rights, Canada received a failing report card. The score is indicative of the much disguised and discounted adversarial approach to persistent colonial relations with Indigenous Peoples in Canada. With this said, the pilot assessment of Canadian compliance has limitations.

Limitations of the Pilot

The primary reliance on the SRRIP's Canada report (Anaya, 2014) proved to limit the comprehensiveness of the UNDRIP compliance assessment tool pilot assessment due to the limited and aggregate nature of the data. This hinders the applicability of this study to be used as a baseline of compliance. A satisfactory baseline measurement would need to sufficiently evaluate compliance with all Articles and their sub-components. It is not within the SRRIP's mandate to comprehensively monitor

state compliance with the UNDRIP. As such, Anaya did not set out to provide a comprehensive review of compliance with the UNDRIP in Canada. Future use of the UNDRIP compliance assessment tool should include a much more extensive scope of document data, including legislation, case law, policies, government reports, industry reports, media reports, and scholarly articles.

The data limitations highlight the need for greater resourcing for more comprehensive compliance monitoring for signatory states to the Declaration. The SRRIP's report does not systematically address the state's compliance with the Articles of the UNDRIP but is constrained to the issues that are most salient during the SRRIP's visit. It is not surprising that, given the short amount of time that the SRRIP was in Canada, the report does not provide a detailed evaluation of Canada's compliance with all Articles of the UNDRIP, and thus it prioritized certain data to include in the report. With that said, effective monitoring is critical for establishing the grounds and evidence necessary for improving compliance as an internal change process and for enforcement (Nutt, 2008). And while the SRRIP is not mandated to monitor and enforce state compliance with the UNDRIP, the reports the office produces are important pieces of feedback. Consequently, uncovering the limitations of the SRRIP's reports can support the improvement of the reports or enable them to be more clearly positioned. This is important because this feedback can be construed as either praising the state or contributing to the impetus for change, as seen by the Government of Canada's response to the SRRIP's report.

Conclusion

The development of the UNDRIP assessment tool is important for providing a clear indication of the status of Indigenous rights in the form of a quantified measure of compliance. This can be utilized as a monitoring measure for nations as well as a comparative compliance metric for nation states. A quantitative score is necessary for preventing states from misrepresenting the findings presented in a qualitative compliance report to suit their agenda, as the Government of Canada did in their official response to the SRRIP's report (Global Affairs Canada, 2014). In this article, we identified some of the weaknesses and vulnerabilities of current UNDRIP monitoring mechanisms. The piloted UNDRIP compliance assessment tool demonstrates the utility of quantifying compliance with the potential of increased implementation of UNDRIP Articles in national policies, legislation, and institutions. A monitoring metric from a performance improvement perspective, such as the one described in this article, can be used as a framework to help monitor and guide the uptake and implementation of the Declaration and to hold Canada accountable to national commitments to Indigenous rights and reconciliation with Indigenous Peoples.

The political context is rapidly shifting, with attention from the public, public figures, organizations and businesses, news, and politicians increasingly being directed toward the unsustainable and inequitable relationship between non-Indigenous and Indigenous Peoples. Building on this pilot research, further conceptualization and development of a common compliance metric would advance the international implementation and state compliance monitoring of the Declaration. Such a tool can contribute to the mounting pressures being placed on states to protect and respect Indigenous rights as well as to enable states to clearly understand where there are gaps in compliance and how to move toward improved compliance. However, it is still a tool: one piece in a complex puzzle towards achieving rights-based coexistence. Individuals, communities, local, national, and transnational organizations, businesses, and Indigenous and non-Indigenous people alike need to continue to take action, to demand that Canada

fully implement and protect the rights set out in the UNDRIP, *with full guidance and consultation from Indigenous communities across Canada throughout the entire process.*

The 43rd Call to Action from the final report of the Truth and Reconciliation Commission of Canada calls upon “the federal, provincial, territorial, and municipal governments to fully endorse and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation” and the 44th Call to Action calls upon “the Government of Canada to develop a national action plan, strategies, and other concrete measures to achieve the goals of the United Nations Declaration on the Rights of Indigenous Peoples” (Truth and Reconciliation Commission of Canada, 2015, p. 4). The development of a compliance metric, as discussed in this article, can contribute to a concrete measure for assisting in the systematic self-monitoring of Canada’s steep climb towards fulfilling its international commitment to the UNDRIP and to the fulfillment of Canada’s national agenda for reconciliation.

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