

**Mobilizing for Indigenous Rights:
Revisiting the Debate on Canada's Participation in the
Inter-American Human Rights System**

Emma Bell-Scollan (7436777)
Graduate School of Public and International Affairs, University of Ottawa
Major research Paper Submission
November 2015

TABLE OF CONTENTS

ABSTRACT	2
I. INTRODUCTION.....	3
II. BACKGROUND: CANADA AND THE INTER-AMERICAN HUMAN RIGHTS SYSTEM....	6
III. INDIGENOUS RIGHTS IN CANADA: A DISCUSSION WORTH HAVING.....	11
A. VIOLATIONS AND ADVANCEMENTS IN INDIGENOUS RIGHTS IN CANADA.....	11
B. HUMAN RIGHTS LAW AND OPTIONS FOR RECOURSE	19
IV. THEORIZING COMPLIANCE	21
A. THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS LAW: COMMITMENT AND COMPLIANCE... 21	21
B. INTER-AMERICAN HUMAN RIGHTS SYSTEM AS A COMPLIANCE ENFORCEMENT MECHANISM.....	24
C. EXPLAINING COMPLIANCE: THEORETICAL PERSPECTIVES	27
D. REGIONAL HUMAN RIGHTS SYSTEMS AND COMPLIANCE	33
V. ANALYSIS: PROTECTING INDIGENOUS RIGHTS IN CANADA THROUGH THE INTER-AMERICAN HUMAN RIGHTS SYSTEM	37
A. WHAT RIGHTS WOULD BE PROTECTED?.....	39
B. HOW EFFECTIVE IS THE INTER-AMERICAN SYSTEM?	46
C. HOW EFFECTIVE WOULD THE INTER-AMERICAN SYSTEM BE IN CANADA?	48
VI. RESULTS: HYPOTHESIZING THE IMPLICATIONS	51
VII. CONCLUSION	57
WORKS CITED	60

ABSTRACT

Canada's reticence to ratify the American Convention on Human Rights and its decision not to recognize the jurisdiction of the Inter-American Human Rights System – a regional human rights regime – is at odds with its image as a global leader in the protection and promotion of human rights. The debate on ratification and participation has been largely dormant since 2003, when the Standing Senate Committee on Human Rights conducted an inquiry and released a report arguing in favour of Canada's full participation in the Inter-American system. This paper revisits this policy debate, arguing that bringing Canada under the jurisdiction of the Inter-American Court and Commission – the Inter-American system's adjudicative organs – would advance the protection and promotion of indigenous rights in Canada by supporting state behaviour that is compliant with its international human rights obligations. Exploring the nexus between international law, human rights and public policy, this paper works within an international law framework, drawing on both international relations theory and case law from the Inter-American and European Courts, to advance the argument that (1) Canadian policies and practices are failing to meet their indigenous rights obligations, meaning that violations continue; and (2) a commitment to participate in the Inter-American system would drive pro-rights mobilization in Canada, increasing the cost of violating indigenous rights and promoting compliance. Serious and systemic wellbeing gaps exist between indigenous and non-indigenous communities in Canada – socio-economic disparities that some experts argue have reached a crisis level. This situation, the outcome of Canada's persistent failure to meet its indigenous rights obligations, demands a comprehensive set of policy responses to end violations and address their harmful implications. I argue that Canada's participation in the Inter-American Human Rights System would both catalyze and reinforce domestic pro-rights mobilization in support of such an effective, rights-based policy response.

I. INTRODUCTION

Canada ratified the Charter of the Organization of American States (OAS) in early 1990; however, it has yet to ratify Inter-American Convention on Human Rights. The question of Canadian ratification has made it into the political and public debate on a number of occasions, most recently in 2003 when, following a two-year investigation by the Committee that sought input from experts from government and civil society who provided arguments on both sides of the debate, the Standing Senate Committee on Human Rights released a report on Canada's decision not to accede to the American Convention on Human Rights.

The Committee's conclusion was clear. They recommended that Canada: (1) take all necessary action to ratify the American Convention on Human Rights; (2) recognize the jurisdiction of the Inter-American Court of Human Rights on all matters relating to the interpretation and application of the Convention; (3) consider including the necessary caveats to address concerns with the Convention's interpretation of certain rights; and, (4) actively engage in promoting the Convention and the Inter-American system for the protection of human rights in Canada.¹ These recommendations were made in the spirit of Canada's oft-touted position as a leader in the protection and promotion of human rights both domestically and abroad, based on the understanding that ratification would increase human rights protection for Canadians. A range of civil society organizations – including

¹ Canada, Senate, Standing Senate Committee on Human Rights, *Enhancing Canada's Role in the OAS: Canadian Adherence to the American Convention on Human Rights*, Committee Report (May 2003) 3. <http://www.parl.gc.ca/content/sen/committee/372/huma/rep/rep04may03-e.htm#CHAIR'S FOREWORD>

the Canadian Rights and Democracy, the National Association of Women and Law, and Amnesty International – supported these recommendations.²

This paper will investigate the Senate Committee's argument that Canada's full participation in the Inter-American Human Rights System would increase the protection of human rights in Canada, using a theoretical framework to understand when and why states change their behaviour in order to comply with human rights obligations. More specifically, I will analyze the question of whether Canada's ratification of the American Convention on Human Rights as participation in the Inter-American System would shape state policies and practices in a way that advances indigenous rights in Canada. I will explore this question by drawing on theories of state behaviour as well as legal precedent and comparison cases. In doing so, I hope to bridge the fields of international relations theory and public policy analysis, an endeavour that is particularly relevant in the study of human rights, where lofty principles of human dignity intersect with concepts of law and state sovereignty to shape domestic public policy.

This paper will be divided into seven chapters. In the second chapter, I will provide a brief background on Canada's history with the Inter-American Human Rights System. The third chapter will contextualize the debate on ratification by advancing the position that current Canadian policies – through either action or inaction – have violated the human rights of indigenous peoples living in the country. Despite the frequent use of the Charter and Canadian courts to advance indigenous rights, and the notable success in defending indigenous rights through these mechanisms, there are limitations on the

² Standing Senate Committee on Human Rights, *Enhancing Canada's Role in the OAS: Canadian Adherence to the American Convention on Human Rights*, 63-64.

options that Canadians, and indigenous peoples in particular, have for recourse in the face of state-based violations. Similarly, there is room for improvement in strengthening the scope and effectiveness of existing recourse mechanisms. I will also provide a brief overview of the process through which international human rights law is incorporated into Canadian law and how indigenous rights have been defined and expanded in recent years in Canada through Charter litigation. The fourth chapter will review some of key academic interventions theorizing the relationship between human rights law and state behaviour. Here, I will endeavour to use a theoretical model to explain how the Inter-American human rights system, as a supranational legal regime, fits into this narrative of violation and compliance. Shifting from theory to practice, the fifth section will present the case study of indigenous rights in Canada, demonstrating in what ways the Inter-American system would advance the protection and promotion of indigenous rights in Canada. Finally, the sixth section will bring all these elements together, presenting two hypothetical outcomes of Canada's participation in the Inter-American Human Rights System: (1) that ratification and accepting the jurisdiction of the Inter-American Court would have no effect on indigenous rights protection; or (2) that it would advance indigenous rights in new ways, reducing the existing compliance gap. The merit of these two hypothetical outcomes will be measured based on the theoretical assumptions established in chapter four and the evidence presented in chapter five, coming to the ultimate conclusion that Canada's participation in the Inter-American system would likely strengthen or advance indigenous rights in Canada.

II. BACKGROUND: CANADA AND THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

The Inter-American human rights system is a regional human rights system, responsible for monitoring and advancing the implementation of the human rights guaranteed in the American Declaration on the Rights and Duties of Man (1948) and the American Convention on Human Rights (1969). The Inter-American System is composed of two central bodies, the Commission and the Court. Both can decide individual and state-level complaints alleging human rights violations. The Commission also serves monitoring and promotion functions and can issue advisory opinions on the interpretation of Inter-American instruments. While the Commission can monitor and both the Commission and the Court can provide advisory opinions to any OAS Member State, they only have the jurisdiction to rule on cases of alleged rights violations against states that have ratified the American Convention and formally accepted the jurisdiction of the Court.³

Within their report, the Senate Committee on Human Rights presented both sides of the debate on Canadian participation in the Inter-American human rights system. On one side, arguments supporting Canada's decision not to ratify the Convention were largely two-fold. First, some governmental and non-governmental witnesses attested that ratification and accepting the jurisdiction of the Court would have little effect on the advancement of human rights in Canada given the comprehensiveness of the country's existing human rights protection infrastructure, which derives its authority from the

³ Standing Senate Committee on Human Rights, *Enhancing Canada's Role in the OAS: Canadian Adherence to the American Convention on Human Rights*, 20, 23.

Charter of Rights and Freedoms and federal and provincial human rights legislation.⁴ Moreover, beyond this purported impotence, some argued that ratification could negatively affect the Canadian rights regime due to the incongruence of certain rights elaborated in the Convention with Canada's definition of these rights. Of particular concern to both governmental and non-governmental interlocutors was the Convention's interpretation of the right to life as being guaranteed "in general from the moment of conception."⁵ As a point of context, the American Convention came into force in 1969, at a time when abortion was illegal throughout the Americas, including Canada – where restrictions were relaxed for the first time in 1969. This interpretation clearly does not align with current Canadian legal standards on abortion (or lack of legal standards, as established through *R. v. Morgentaler*)⁶ and contradicts prevailing norms on the right to life and women's right to choose.

On the other hand, in responding to the rights-based arguments against ratification, the Senate Committee put forward the option –acknowledged as legitimate by human rights defenders and legal experts – of conditioning Canada's ratification by presenting an interpretive declaration or targeted reservations.⁷ In this way, Canada would be able to participate in the Inter-American system and mitigate many of the harmful implications of its continued non-ratification, while caveating its participation to align with Canadian rights and values. The Committee argued that this approach would

⁴ Standing Senate Committee on Human Rights, *Enhancing Canada's Role in the OAS: Canadian Adherence to the American Convention on Human Rights*, 40.

⁵ *American Convention on Human Rights*, Pact of San Jose, Costa Rica, B-32, November 1969, Organization of American States, Article 4 (1).

⁶ In *R v. Morgentaler* (1988) 1 S.C.R. 30, the Supreme Court of Canada declared existing provision in the Criminal Code on abortion to be unconstitutional. A new provision was never re-legislated we remain without any binding legislation on abortion, giving it a de-facto legal status.

⁷ Standing Senate Committee on Human Rights, *Enhancing Canada's Role in the OAS: Canadian Adherence to the American Convention on Human Rights*, 51-55.

be supported by international law and that there were several noteworthy positive outcomes of ratification, including strengthening the Inter-American system through Canada's support, increasing protection of human rights for Canadians, and increasing protection of women's rights writ large in the Americas.⁸ I will focus on the second outcome presented by the Commission throughout this research paper, exploring the claim that ratifying the American Convention and accepting the jurisdiction of the Inter-American Human Rights System in Canada would increase Canadians' (especially indigenous peoples') human rights protection in the face of a government that has and, to an extent, continues to violate human rights in a way that unduly burdens indigenous peoples. This discussion is especially pertinent when looking at the protection and promotion of the rights of indigenous peoples living in Canada, as this is an area where Canada has consistently been taken to task by the international community for its continued failure to meet its human rights obligations, as demonstrated by the substantial body of recent reporting.⁹

The Committee sums up their argument, while addressing the counterargument, stating:

It cannot be said that people have so much (human rights) protection that they don't need any more...ratification of international treaties and recognition of the jurisdiction of the bodies created to oversee their implementation give another level of protection not afforded by domestic courts, especially in Canada where the absence of legislation

⁸ Standing Senate Committee on Human Rights, *Enhancing Canada's Role in the OAS: Canadian Adherence to the American Convention on Human Rights*, 56.

⁹ CHRC, *Submission to the UN Human Rights Committee in Advance of Review of Canada's 6th Periodic Report* (June 2015); NWAC, *Briefing Paper for Thematic Hearing for the Inter-American Commission on Human Rights: Missing and Murdered Aboriginal Women and Girls in British Columbia* (March 28, 2012); CEDAW, *Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* (March 6 2015); HRC, *The Situation of indigenous peoples in Canada: Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya* (July 2014).

*implementing international treaties seriously limits the possibility of invoking them before the courts.*¹⁰

Breaking down this statement, there are several key elements worth noting. First, the statement underscores the role of extranational (international or supranational) human rights instruments in ensuring the protection of human rights within a state. Second, it demonstrates the centrality of international law as a tool for supporting human rights. Third, it highlights the limitations of Canada's domestic courts for adjudicating human rights violations and providing victims with options for recourse. And fourth, it advances the argument that there is not, at present, an oversaturation in the field of human rights protection in Canada. Each of these points will be addressed further in this paper.

With the intention of investigating the Senate Committee's claim that Canada's participation in the Inter-American Human Rights System would improve human rights protection domestically, I will continue to address the question in the context of an international law paradigm, measuring state violations and compliance based on human rights standards established through international human rights law. While international human rights law provides a useful framework for analyzing the relationship between the state and individuals or groups within it, there are clear analytical limitations to employing a rights-based analysis in a discussion on indigenous peoples. For one, Holder and Cornthassel argue that the western-liberal system of international human rights law overemphasizes individual needs and entitlements in a way that inadequately accounts for the collective nature of indigenous rights as group rights and that does not represent

¹⁰ Standing Senate Committee on Human Rights, *Enhancing Canada's Role in the OAS: Canadian Adherence to the American Convention on Human Rights*, 40.

indigenous conceptions of justice.¹¹ This incongruence becomes problematic when the recognition of group rights is tied to identity and livelihood in such a way the effective recognition of collective rights becomes essential to group survival. Ivison, Patton and Sanders specify the complicated and problematic relationship between indigenous rights, justice and the international human rights regime – firmly rooted in western political thought – arguing that, in the past, this system of belief was not only complicit in colonial expansion but also used to justify control over indigenous peoples and their lands based on paternalistic notions of civilization and guardianship.¹² Despite these limitations, I propose that human rights and international human rights law are relevant and useful in the debate on indigenous rights and state behaviour insofar as international human rights laws remain an effective metric for measuring state behaviour in order to make assessments of its legitimacy and justness. Further, the international human rights regime arguably remains an effective tool for holding the state to account when violations occur and for voicing grievances against the state in a manner that is both broadly understood and comparable across cases. Indigenous rights movements in Canada and abroad have equally signalled their acceptance of international human rights law as a valuable tool in their struggles – as is revealed by the early and ongoing participation of indigenous groups and activists in the drafting of the Universal Declaration on the Rights of Indigenous Peoples. Stamatopoulou notes that indigenous groups and organizations were actively engaged in the UN Working Group on Indigenous Populations from the beginning (as many as 400 groups participated in consultations on the drafting of the text

¹¹ Cindy Holder and Jeff J. Corntassel, “Indigenous People and Multicultural Citizenship,” *Human Rights Quarterly* vol. 24 (2002) 127.

¹² Duncan Ivison, Paul Patton and Will Sanders, *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press: 2000) 2.

from 1983-1993). Further, she argues that the text of the draft Declaration, which was drafted with the active participation of indigenous groups, clearly “opted for the supremacy of the universal human rights norms.”¹³

III. INDIGENOUS RIGHTS IN CANADA: A DISCUSSION WORTH HAVING

A. VIOLATIONS AND ADVANCEMENTS IN INDIGENOUS RIGHTS IN CANADA

In a 2014 report, the UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, states, “it is difficult to reconcile Canada’s well-developed legal framework and general prosperity with the human rights problems faced by indigenous peoples in Canada, which have reached crisis proportions in many respects.”¹⁴ His statement illustrates two important facts: indigenous peoples in Canada suffer serious and systemic violations of their human rights; and their situation represents an aberration from the standard for rights protection in Canada, a country with significant wealth and a well-established legal system. These two factors stand in stark contrast to one another, a contradiction is in part what makes it so important to engage in the discussion on indigenous rights and to try and understand what is behind Canada’s ongoing failure to adequately uphold and advance them.

While remaining a point of political and popular contention, the severity of the government’s failure to address what Anaya terms the ‘crisis’ of indigenous rights is underscored by numerous international human rights legal authorities, including the UN

¹³ Elsa Stamatopoulou, “Indigenous Peoples and the United Nations: Human Rights as a Developing Dynamic,” *Human Rights Quarterly* vol. 16, No. 1 (Feb., 1994) 77.

¹⁴ United Nations, Human Rights Council, *The Situation of indigenous peoples in Canada: Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, A/HRC/27/52/Ad.2* (July 2014) 6.

Human Rights Committee (the treaty-body monitoring adherence to the International Convention on Civil and Political Rights), the UN Committee on the Elimination of Discrimination against Women, the Inter-American Commission on Human Rights, and the Canadian Human Rights Commission, along with numerous national and international civil society organizations. Similar allegations of violations of indigenous rights are reflected across this reporting, divided into common thematic groupings that reflect many of the human rights enumerated in international human rights law. I have framed the alleged rights violations in four non-exhaustive categories to facilitate analysis: economic and social rights; discrimination in access to services; violence against women and girls and their limited access to justice; and land claims. I will also discuss some of the major advancements in indigenous rights protection in Canada.

Economic and Social Rights: In a report submitted on the occasion of Canada's review by the UN Human Rights Committee, the Canadian Human Rights Commission (CHRC) asserted that indigenous peoples in Canada continue to fall far behind other Canadians on all seven dimensions of wellbeing: life expectancy; income; unemployment; use of social assistance; housing; experience of abuse; subjection to violent crimes and incarceration which, from an equality rights perspective, the CHRC deemed to be critical.¹⁵ For example, the number of indigenous Canadians with low-income status (based on the Survey of Labour Income Dynamics low-income measure) is notably larger than the number of non-indigenous low income Canadians across age and sex, with the gap in low-income representation ranging from 8-22%.¹⁶ Similarly,

¹⁵ Canadian Human Rights Commission, *Submission to the UN Human Rights Committee in Advance of Review of Canada's 6th Periodic Report* (June 2015) 2.

¹⁶ Canadian Human Rights Commission, *Report on Equality Rights of Aboriginal People*, (2013) 17.

regardless of sex and age, employment rates are substantially lower among indigenous adults and the university enrolment rate for indigenous Canadians is 18.3%, compared to 40.2% for non-indigenous Canadians.¹⁷ Finally, the number of indigenous adults living in houses in need of major repair is more than three times that of non-indigenous Canadians living in such conditions, which are demonstrated to be positively correlated with health issues.¹⁸

The Special Rapporteur on the rights of indigenous peoples, James Anaya, also noted the significant wellbeing gap between indigenous and non-indigenous Canadians in a 2013 fact-finding mission, reporting that the most jarring manifestation of the indigenous rights crisis is the distressing socioeconomic conditions of indigenous peoples in such a highly developed country as Canada. He highlighted that, of the bottom 100 Canadian communities on the Community Wellbeing Index, 96 are First Nations, while only one of the top 100 communities are First Nations communities.¹⁹ Moreover, he points out that, although the previous Special Rapporteur recommended that Canada intensify measures to close the human development gap between indigenous and non-indigenous communities, there have been no subsequent measurable improvements to indigenous wellbeing. These persistent wellbeing gaps carry enduring, harmful implications, and the government's apparent failure to adequately address them represents a violation of the economic and social rights of indigenous Canadians.

Discrimination in access to services: In its 2015 report to the UN Human Rights Committee, the CHRC stated that, across the country, many indigenous communities

¹⁷ CHRC, *Report on Equality Rights of Aboriginal People*, 23, 35.

¹⁸ *Ibid.*, 41.

¹⁹ HRC, *Report of the Special Rapporteur on the rights of indigenous peoples* (July 2014) 7.

continue to live without adequate housing, safe drinking water, or access to an acceptable quality of education and other social services, in clear contrast to the majority of other Canadian communities.²⁰ The CHCR's report indicates that there exists in Canada systemic inequalities between how social support services are delivered in indigenous versus non-indigenous communities. In 2011, the Auditor General of Canada investigated reports of discrimination in access to services on reserve. He concluded that, despite government efforts since the previous audit in 2006 to improve service provision to indigenous Canadians, "the education gap between First Nations living on reserve and the Canadian population in general has widened, the shortage of adequate housing on reserves has increased, comparability of child and family services is not ensured, and the reporting requirements on First Nations remains a burden."²¹ The report indicates, according to 2011 data from the Department of Aboriginal Affairs, that more than half of drinking water systems on reserve continue to pose a risk to the people who use them, and that the Department was still not completing all required annual inspections or risk-evaluations of on-reserve water systems.²² Further, in June 2015, the CBC reported that Aboriginal Affairs and Northern Development Canada (AANDC) had held back more than \$1 billion in funding earmarked for social services in indigenous communities over the last five years (2011-2015).²³

²⁰ CHRC, *Submission to the UN Human Rights Committee in Advance of Review of Canada's 6th Periodic Report*, 3.

²¹ Office of the Auditor General, *Programs for First Nations on Reserves: Status Report of the Auditor General of Canada to the House of Commons* (2011) 8.

²² *Ibid.*, 17.

²³ Dean Beeby, "Aboriginal Affairs spending shortfall amounts to \$1B, internal document says," *CBC News Online* (June 5, 2015). <http://www.cbc.ca/news/politics/aboriginal-affairs-spending-shortfall-amounts-to-1b-internal-document-says-1.3100937>

Reports from the Auditor General, the CHRC and the Special Rapporteur demonstrate enduring inconsistencies in the government's provision of services when comparing indigenous and non-indigenous communities, a discrepancy that arguably amounts to discrimination. This argument is currently being advanced in the Canadian Human Rights Tribunal where the First Nations Child and Family Caring Society of Ottawa has filed a complaint alleging that the Government of Canada systematically discriminates against First Nations children on reserve. The case cites the fact that, although Aboriginal children make up approximately 7% of the total population of Canadian children, they account for 48.1% of all children in the welfare system.²⁴ At the same time, it is estimated that children on reserve receive 22% less funding per capita than other Canadian children.²⁵ The claimants attest that these statistics are indicative of a broad trend of discrimination against indigenous children by the Canadian government, which has enacted policies that violate Canada's commitments to non-discrimination and the Convention on the Rights of the Child.²⁶ The government has tried to avoid the discussion altogether by attempting to get the case dismissed based on arguments related to the Human Rights Tribunal's jurisdiction and the claim that discrimination has not been sufficiently established. A ruling by the Canadian Human Rights Tribunal is expected in 2015.

Violence against women and girls and their limited access to justice:

Indigenous women and girls in Canada are disproportionately victims of violent crime – a reality that has prompted at least 29 official inquiries and reports on the subject, which

²⁴ Cindy Blackstock, "The Canadian Human Rights Tribunal on First Nations Child Welfare: Why if Canada wins, equality and justice loose," *Children and Youth Services Review* vol. 33 (2011) 187.

²⁵ R. McDonald and P. Lad, *Joint national policy reviews of First Nations Children and family services* (Ottawa: Assembly of First Nations, 2000) 14.

²⁶ Blackstock, "The Canadian Human Rights Tribunal on First Nations Child Welfare," 191

have, in turn, resulted in more than 500 recommendations for action.²⁷ In March 2015, the UN Committee on the Elimination of the Discrimination Against Women (CEDAW) released a comprehensive report on violence against indigenous women in Canada that documents 1,100 cases of indigenous women who have been murdered or gone missing since 1980. The CEDAW determined that this shocking statistic figured into a broader pattern of violence and discrimination against indigenous women in Canada.²⁸ Based on its findings, the Committee found that Canada had failed to address or remedy the disadvantaged social and economic conditions in which indigenous women and girls live, and that it did not take sufficient measures to address the prevalence of violence against indigenous women and the difficulties they faced accessing justice.²⁹ This failure represented a violation of Canada's obligations under CEDAW and other international legal instruments.

Land Rights: Historically, human rights violations against indigenous peoples have been very severe in the area of property and land rights. This history of violation is embodied in the doctrine of *terra nullius*, the principle that no land ownership existed prior to European assertion of sovereignty, which continued to guide Canada's approach to indigenous land claims into the 21st century.³⁰ However, there have been significant advancements in recent years in the elaboration and protection of indigenous land rights.

Calder et al v. BC Attorney General (1973) and *Delgammukw v. British Columbia* (1997)

²⁷ HRC, *The Situation of indigenous peoples in Canada: Report of the Special Rapporteur on the rights of indigenous peoples*, pp 34.

²⁸ United Nations, Convention on the Elimination of all forms of discrimination against women, *Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/OP.8/CAN/1 (March 6 2015) pp. 172.

²⁹ *Ibid.*, pp. 210.

³⁰ Sean Fine, "Supreme Court expands land-title rights in unanimous rulings," *The Globe and Mail Online* (June 26, 2014). <http://www.theglobeandmail.com/news/national/supreme-court-expands-aboriginal-title-rights-in-unanimous-ruling/article19347252/>

each played an instrumental role in defining indigenous land rights, acknowledging that Aboriginal title predated the colonial period, and that this title entails a right to the land itself and not just the right to extract resources.³¹ More recently, in the groundbreaking resolution of *Tsilqhot'in Nation v. British Columbia* (2014), the Supreme Court recognized the existence of 'Aboriginal title.' In doing so, the court provided a clear and expansive definition of Aboriginal title: the control over ancestral lands and the rights to use them for modern economic purposes.³² However, in his 2014 report, Special Rapporteur Anaya attests that, despite these positive developments, land claims and treaty procedures continue to be mired in difficulties, resulting in many First Nations "all but giving up on them."³³ These burdensome procedures have been demonstrated to produce enormous costs for all parties. Anaya notes that comprehensive land claims negotiations have resulted in First Nations borrowing over \$700 million from government to participate the negotiation processes.³⁴

Positive developments: It would be both unfair and inaccurate to focus only on the negative in discussing indigenous rights in Canada. In reality, there exists a strong foundation for the protection of indigenous rights in Canadian law, and there have been several key developments in recent years in the scope of indigenous rights protected and promoted in Canadian law. These advancements have largely been driven by mobilization of adjudication of indigenous rights in Canadian courts based on progressive Charter interpretation. Furthermore, AANDC has asserted that Section 35 of Canada's

³¹ CBC News, "6 Landmark Rulings on Native Rights: Court cases that help define land, treaty and human rights for aboriginals in Canada," CBC News Online (January 8, 2013) <http://www.cbc.ca/news/canada/6-landmark-rulings-on-native-rights-1.1316961>

³² Fine, "Supreme Court expands land-title rights in unanimous rulings," The Globe and Mail Online.

³³ HRC, *The Situation of indigenous peoples in Canada: Report of the Special Rapporteur on the rights of indigenous peoples*, pp. 61.

³⁴ *Ibid.*, pp. 64.

Constitution Act (1982) recognizes indigenous people's inherent right of self-government, based on the view that indigenous peoples of Canada "have the right to govern themselves in relation to matters that are internal to their communities and integral to their unique cultures, identities, languages and institutions, and with respect to their special relationship to their land and their resources."³⁵ While stopping short of asserting a right to indigenous self-determination, the substantive definition and application of the "right to self-government" has been progressively realized through pivotal Charter cases over the last 30 years. These monumental cases have greatly advanced the scope of indigenous rights protected under the Canadian human rights regime.

However, in summing up his recommendations to the Canadian government in 2014, Anaya argues that, in order to address the significant gap between indigenous and other Canadian populations, a gap that is indicative of ongoing human rights violations of indigenous peoples in Canada, the government will have to fundamentally change its approach to addressing indigenous peoples and their rights. Anaya contends that the government must adopt a less adversarial position, as its current approach typically seeks the most restrictive interpretation of Aboriginal treaty and rights possible.³⁶ In a call for change, he urges the government to engage in a collaborative and constructive effort to address the ongoing violations of indigenous rights across the country.

³⁵ Aboriginal Affairs and Northern Development Canada, "The Government of Canada's Approach to Implementation of the Inherent Rights and the Negotiation of Aboriginal Self-Government," Government of Canada (September 2010) Part 1.

<http://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844#PartI>

³⁶ HRC, *The Situation of indigenous peoples in Canada: Report of the Special Rapporteur on the rights of indigenous peoples*, pp 96.

B. HUMAN RIGHTS LAW AND OPTIONS FOR RECOURSE

The effectiveness of options for recourse for indigenous peoples experiencing human rights violations are shaped by such factors as the status of international human rights law in Canadian courts and types of formal adjudication mechanisms available to arbitrate grievances. Canadian lawyer Gib Van Ert contends that there is a “lack of theoretical underpinnings guiding the reception of (international) law” in Canada, meaning that international human rights law continues to play an unclear and inconsistent role in Canadian courts. He notes that the consensus continues to shift between the conclusion that international human rights law is *relevant and persuasive* as a body of comparative law with no binding effect on Canadian courts, and the *presumption of minimum protection* – the conclusion that Charter interpretation should aim, at minimum, to protect human rights to the extent that they are protected through international human rights treaties.³⁷ Despite these ambiguities, what is clear is that there is no formal approach to incorporating Canada’s international human rights obligations into domestic law or applying them in domestic courts, which presents difficulties to individuals alleging human rights violations derived from international human rights treaties. Furthermore, demonstrating that a human rights violation has occurred becomes increasingly difficult in the context of a right that has not been adjudicated in Canadian courts, as this means that there is neither legislation formally enumerating the right in law nor a clear precedent for arguing the case.

Apart from Charter-based litigation within the Canadian court system, individuals or groups alleging human rights violations can launch a human rights complaint through

³⁷ Gib Van Ert, *Using International Law in Canadian Courts*, (Irwin Law: Toronto, 2008) 332, 343.

the Canadian Human Rights Commission (CHRC), which has the authority to receive, assess and adjudicate human rights cases. The Commission can also refer them to the Canadian Human Rights Tribunal for a full hearing. While the Canadian system is arguably robust – it received an ‘A’ ranking in the Office of the High Commission for Human Rights 2010 National Human Rights Institution report card³⁸ – it has two central weaknesses: the CHRC only accepts cases relating to equality rights and anti-discrimination, thus limiting the scope of cases that it can adjudicate;³⁹ and, until 2008, the Canadian Human Rights Act (CHRA) did not accept complaints of discrimination resulting from the application of the *Indian Act*, and the first case arbitrating grievances relating to the Act was not heard until 2011. Since then, the government has taken an adversarial approach to indigenous human rights complaints within the context of the CHRC, arguing that the CHRA cannot be used to allege discrimination in the funding it provides to indigenous communities for things such as education, welfare, and healthcare, as this form of funding provision cannot be considered a “good” or “service” as defined under the CHRA. (The CHRA has jurisdiction over cases relating to discrimination in the provision of a good, accommodation, or service.)⁴⁰ The CHRC reports that, if Canada is successful challenging the results of the child welfare case currently under review at the Human Rights Tribunal that was discussed in the previous chapter, the positive effects of the amendment to the CHRA to include arbitration in relation to the Indian Act could be diminished, along with indigenous peoples’ protection under the CHRA.⁴¹ Restrictions on

³⁸ Office of the United Nations High Commissioner for Human Rights, *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, HP/PT/4/Rev.1 (United Nations Publication: 2010) 169. Available from: http://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_en.pdf

³⁹ *Ibid.*, 32.

⁴⁰ Blackstock, “The Canadian Human Rights Tribunal on First Nations Child Welfare,” 190.

⁴¹ CHRC, *Submission to the UN Human Rights Committee in Advance of Review of Canada's 6th Periodic Report*, 7.

the rights that can be adjudicated by the Commission and the Tribunal, paired with the government's demonstrably adversarial approach to indigenous rights claims launched through the Commission, make this an imperfect option for adjudicating cases of indigenous rights violations. Finally, the fact that, in the reporting reviewed in the previous chapter, human rights experts have noted that violations of certain indigenous rights persist – and, in some cases, have worsened – between reporting periods, including with regard to the wellbeing gap, discrimination in service provision, and violence against Aboriginal women, demonstrates the limitations of existing recourse mechanisms for indigenous peoples in Canada. These concerning trends are exacerbated by the Department of Aboriginal Affairs' decision to enact funding cuts and its persistent under-spending in recent years.

IV. THEORIZING COMPLIANCE

A. THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS LAW: COMMITMENT AND COMPLIANCE

The human rights regime has evolved significantly over the last half-century. The modern process of producing international human rights law began in earnest in the post-war era with the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. The UDHR has also inspired a significant body of binding international human rights law, earning its status as the foundation of the international human rights regime. Central to this body of law are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant of Economic, Social and Cultural Rights (ICESCR), which expand on and enshrine the central human rights outlined in the

Declaration as well as the seven other core UN human rights instruments that focus on specific dimensions of human rights.

The expansion and universalization of the international human rights regime is demonstrable, at least in principle, by examining trends in ratification of the core UN human rights instruments over the last half-century. Building from the 48 UN member-states that voted to support the adoption of the UDHR in 1948, 168 states are now party to the ICCPR, 164 states are party to the ICESCR, and 157 states are now party to the Convention on the Rights of Persons with Disabilities, the most recent UN treaty, which entered into force May 2008. Moreover, the scope of countries publically signalling their support of and commitment to the human rights regime has also clearly expanded from the 48 states involved in the adoption of the UDHR to include the vast majority of countries spanning political and geographic divides. Consequently, there has been a clear diversification in human rights leadership, with a cross-regional group of countries taking central positions in procedures aimed at enhancing the protection and promotion human rights. For example, in the Third Committee of the 2015 UN General Assembly, which deals primarily with social, humanitarian and human rights issues, Latin American or Caribbean countries are the head sponsors in more than 25% of resolutions, and African or Asian countries are the lead sponsors in another 25% of resolutions.

While it may seem tangential, this overview of the evolution of the international human rights regime is critical to laying the foundation for discussion on how recognition of the jurisdiction of the IACHR, through ratification of the American Convention, would impact state policies and practices regarding indigenous rights in Canada. At its root, this is a question of how, why and when states will change their behaviour to conform to

international human rights law, specifically in a situation where the state has consistently not done so. As outlined above, the reach of the international legal bodies protecting human rights has increased over time as a result of the almost-universal state buy-in through formal commitments to human rights law, as signalled by treaty ratification, as well as through the signalling of support to other forms of non-binding human rights instruments. This baseline of commitment gives the international human rights regime the appearance of legitimacy. It also provides a generalizable metric for exposing and measuring instances where states violate human rights – provoking both academic and policy-based inquiry into the causes of this behaviour and how to change it.

I contend that the veracity of political, academic, and popular discussion on state behaviour as it relates to international human rights law – demonstrated by the use of rights discourse in political positioning, multilateral forums, and grass-roots mobilization – is linked to the ontology of the concept of human rights. As indicated by the term itself, human rights are afforded to individuals by virtue of being human. Donnelly therefore argues that individual human rights encapsulate the fundamental principles requisite to living a dignified life, to which humans are, by nature of their humanity, suited.⁴² With this definition in mind, the protection and promotion of human rights by the state can be understood as the steps states take to ensure that individuals within their borders are able to live with dignity and reach their full potential. Therefore, the systematic violation by a state of the human rights of its citizens implies that the state is, de-facto, denying the humanity of an individual, group or society as a whole and infringing on their ability to

⁴² Jack Donnelly, "Theories of Human Rights," *International Human Rights*, Second Edition (Westview Press: 1998) 21.

live up to their full potential as human beings. This conclusion underscores the gravity of widespread or enduring human rights violations by the state and provokes the question: what does it mean, in practice, when one group has been systematically denied their human rights for an extended period of time? The question can be partially satisfied by examining the current challenges faced by indigenous peoples in Canada. Here the legacies of historical and ongoing violations are reflected in conditions of low socio-economic status, disenfranchisement within Canada's justice and policy-making structures, and pervasive, gender-based violence. While an over-simplification, these outcomes not only necessitate the cessation of harmful policies on the part of the government but also demand a host of affirmative policy actions to remedy past wrongs and support the achievement of substantive progress toward equality and universal access to human rights domestically. The reporting referred to in the previous chapter makes the case that Canada's efforts to protect and promote indigenous rights continue to fall short of such comprehensive action. Thus, violations continue. Moreover, existing mobilization efforts and domestic recourse mechanisms seem, to an extent, to be insufficient to shift state behaviour from violation to compliance with international human rights law.

B. INTER-AMERICAN HUMAN RIGHTS SYSTEM AS A COMPLIANCE ENFORCEMENT MECHANISM

There are a number of hard and soft enforcement mechanisms within the international human rights system that attempt to increase the costs states incur for not complying with international human rights law – a means of dissuading them from continued violation of human rights. Hard mechanisms possess the 'teeth' to enforce

compliance in the face of state-based rights violations. They include the UN Security Council, the International Court of Justice (ICJ), the International Criminal Court (ICC), and regional human rights systems such as the European, Inter-American, and African Human Rights Systems. A number of soft enforcement mechanisms also exist to promote compliance through creation of norms, public shaming and setting of standards.

As one of the three regional human rights systems, the Inter-America Human Rights System derives authority from the American Declaration of the Rights and Duties of Man (1948) and the subsequent American Convention on Human Rights (1969). While the Convention has the legally binding properties of a treaty to state-parties, the Declaration has acquired the status of customary law through its repeated referencing within the Inter-American Human Rights Commission and Court – the two principal bodies of the Inter-American System. These two bodies have complementary roles. The Commission has the principal function of promoting the observance and protection of human rights within OAS states and providing consultation to the OAS on matters of the Charter.⁴³ Its functions are both judicial and non-judicial and include: monitoring human rights situations in all OAS countries; publishing thematic and country-specific reports; establishing special rapporteurships; receiving, analyzing and investigating alleged rights violations brought to its attention by countries, groups or individuals through the individual petition system; and processing claims on specific rights complaints. The Commission's reporting functions have expanded over the years to include comprehensive studies exploring situations that foster systemic human rights violations. For example, in October 2000, the Commission published an in-depth study of authorities

⁴³ Thomas Burgenthal, "The Evolving International Human Rights System," in *The American Journal of International Law* vol. 100 no. 4 (Oct 2006) 794.

and precedents relating the rights of indigenous peoples in OAS countries, looking at the systemic factors and state actions causing violations of indigenous rights.⁴⁴ A second thematic report was published in December 2009 investigating norm-formation and jurisprudence related to indigenous rights in the Inter-American System.⁴⁵ The Commission also has the important function of submitting cases to the Court for formal adjudication in instances where the country in question has accepted the jurisdiction of the Court but has not respected the ruling of the Commission. When this occurs, the commission may appear before the Court on behalf of the victim.

The Inter-American Court of Human Rights is a judicial body consisting of seven judges. The Court has two primary functions: (1) to preside over trials regarding allegations of violations of Inter-American human rights law submitted by the Commission; and (2) to hand down advisory opinions.⁴⁶ The Court's jurisdiction for the former, termed "contentious cases," extends only to those states who have ratified the American Convention and accepted the jurisdiction of the Court – something that Canada and nine other OAS member states have not yet done. (25 have ratified, with two subsequently denouncing the ratification.) Canada's status as a non-ratifying state makes the Court's contentious adjudication function especially important in the discussion regarding if and how Canada's participation in the Inter-American Human Rights System would impact the country's policies and practices regarding the rights of the indigenous peoples within its borders.

⁴⁴ Inter-American Commission on Human Rights, *The Human Rights Situation of Indigenous Peoples in the Americas*, OEA/Ser.L/II.108 Doc. 62 (October 20, 2000)

⁴⁵ Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' rights over their ancestral lands and natural resources*, OEA/Ser.L/V/II. Doc 56/9 (December 30, 2009)

⁴⁶ Lea Shaver, "The Inter-American Human Rights System: An Effective Institution For Regional Rights Protection?" *Washington University Global Studies Law Review* vol. 9 no. 4 (2010) 641.

Through the individual petitions system, any group or individual may petition the Inter-American Commission for redress based on allegations that the state has violated a recognized human right. The Commission may examine the case if it is determined that that it is admissible – because a violation has occurred and the petitioner has exhausted all available domestic remedies – and issue recommendations of a quasi-legal status with the aim of preventing future violations. States that have ratified any of the major international or regional human rights treaties are obliged to make every effort to comply with Commission recommendations.⁴⁷ In instances of non-compliance where the country in question has accepted the Court’s jurisdiction, the Commission may refer the case to the Court to initiate a formal legal proceeding. It is then up to the Court to make a final decision on whether the state has committed a human rights violation as per the American Convention and Declaration. If it is found that a violation has occurred, the Court will make binding recommendations to remedy the violations and resulting grievances. The Court has demonstrated its willingness to formulate innovative reparations that not only cover damages but also attempt to remedy systemic inequalities that perpetuate violations.⁴⁸

C. EXPLAINING COMPLIANCE: THEORETICAL PERSPECTIVES

The expansion of the international human rights regime and the legitimation of the regime through widespread ratification of international human rights instruments have spurred a body of academic work from across the theoretical spectrum, hypothesizing the relationship between the international human rights regime, states’ commitment to

⁴⁷ Standing Senate Committee on Human Rights, *Enhancing Canada’s Role in the OAS: Canadian Adherence to the American Convention on Human Rights*, 30.

⁴⁸ I/A Court HR, Case of González et al. (“Cotton Field”) v. Mexico, Judgment of Nov. 16, 2009, pp. 450.

international human rights law and their compliance with or violation of it. Defined by its poles, on one side of the spectrum, the realists (or skeptics) like Morgenthau hypothesize that pragmatic power calculations remain at the foundation of state behaviour. Commitment to and compliance with international human rights law, therefore, occur only on those fortuitous occasions where international human rights law and the requirements for compliance align with a state's unitary national interest.⁴⁹ Cardenas provides a more dynamic exploration of states' self-interested approach to human rights compliance. She argues that domestic characteristics, including security and economic concerns and the political cost of compliance, are the primary drivers of policy and practices related to human rights.⁵⁰ Focusing on the role of international regimes, Andrew Moravcsik's work suggest that state behaviour is shaped today by a prior convergence of domestic self-interest and the interests of international institutions, leading to the formation of a human rights regime that influences behaviour even after the initial alignment of interests ceases to exist.⁵¹

In contrast, Simmons operationalizes commitment as the key factor shaping state-behaviour regarding international human rights. She posits that a formal commitment to human rights, signalled by signing on to an international human rights treaty, acts as a focal point for executive, judicial and popular pressures to converge in support of pro-human rights behaviour.⁵² On the other side of the spectrum, proponents of the

⁴⁹ Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, 6th ed. (New York: Knopf, 1985) 299.

⁵⁰ Sonia Cardenas, *Conflict and Compliance: State Responses to International Human Rights Pressure* (University of Pennsylvania Press, August 2010) 28-31.

⁵¹ Andrew Moravcsik, "Taking Preferences Seriously: Liberal Theory of International Politics," *International Organizations* vol. 54 no. 1 (1997) 537.

⁵² Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (New York: Cambridge University Press, 2009) 126.

constructivist paradigm argue that state-behaviour is effectively shaped by international human rights norms and the mobilization of transnational networks behind these norms. Risse, Ropp and Sikkink argue that variations in levels of human rights compliance across states are explained by the extent to which human rights norms are internalized in a given state, further suggesting that transnational advocacy networks play a crucial role in promoting compliance by using states' public commitments to human rights to pressure them to align practices with promises.⁵³

While each of these perspectives has strengths and weaknesses, I will not go into a deeper analysis of them individually. My aim is to explain how Canada's acceptance of the jurisdiction of the Inter-American Court of Human Rights would impact the protection and promotion of indigenous rights domestically, in a context where violations of indigenous rights persist. Therefore, I have chosen to focus on one theory of compliance that I believe best suits this objective: Beth Simmons' theory of how states' formal legal commitments to human rights (through acts such as treaty ratification) shape state behaviour vis-à-vis policies and practices relating to human rights.

Simmons argues that "an official commitment to a specific body of international law helps domestic and transnational actors set priorities, define meaning, make rights demands and bargain from a position of greater strength than would have been the case in the absence of their government's commitment" to international human rights law.⁵⁴ This means that, by publically signalling a commitment to the international human rights regime, individuals, groups and elements of the state are empowered to advocate more

⁵³ Thomas Risse, Stephan C. Ropp, Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press: 1999) 3.

⁵⁴ Simmons, *Mobilizing for Human Rights*, 126.

effectively for the protection and promotion of human rights. Simmons' argument places commitment as the independent variable shaping state-behaviour, with executive, judicial and popular pressures acting as the dependent variables, all three of which converge in a "pro-rights coalition," mobilizing in support of state policies and practices that comply with the state's extranational or national human rights commitments.⁵⁵ The formation of this type of pro-rights coalition consolidates opposition to non-compliant state behaviour from within and without the state structure, with the important effect of diminishing the set of policy options that states have available to them by increasing the cost of continuing with violations.

There are three primary channels of mobilization that make up this "pro-rights coalition" that are catalyzed by a formal commitment to international human rights law. The first is executive mobilization. Signalling commitment to a specific group of rights or an expanded definition of a right has implications for the domestic policy agenda, increasing the salience of the rights in the political and public discourse and providing the executive with a clear proposal to discuss with the legislative branch of government.⁵⁶ Raising the salience of a set of human rights by placing them on the policy agenda forces all branches of government to, at a minimum, acknowledge the enumerated human rights and perhaps even make legislative change to formally incorporate these rights (the latter element does really pertain to common law countries like Canada). Once an issue is on the policy agenda, incongruence between the state's policies and practices and its

⁵⁵ Simmons, *Mobilizing for Human Rights*, 146.

⁵⁶ *Ibid.*, 127

international legal obligations becomes more visible, increasing the political cost of continued non-compliance.⁵⁷

The second is legal mobilization. Commitment to international human rights law will, to an extent, influence domestic litigation because, with the ratification of a treaty, the rights enumerated in the treaty become domestically enforceable obligations for the state. Litigation of human rights law in domestic courts creates of a body of “homegrown” pro-rights jurisprudence that can be invoked by individuals or groups, allowing them to use legal precedent to allege violations and hold the government accountable for their human rights behaviour.⁵⁸ Introducing international human rights law in domestic courts – in both monist and dualist systems – changes the relationship between the state and the people, providing individuals and groups with a framework for presenting their demands in terms of the government’s legal obligations. Bringing human rights demands into a legal framework also signals to states the possibility that these grievances could be adjudicated in court if it is perceived that they have not been adequately addressed and remedied, thus increasing the potential cost of status quo behaviour. For these reasons, legal mobilization behind human rights claims will alter governments’ calculations in making policy decisions regarding human rights.⁵⁹

Finally, commitments to international law can influence state behaviour by providing new ways for individuals and groups to conceive of their relationship with the government and with each other – as justiciable entities protected and guided by

⁵⁷ Simmons, *Mobilizing for Human Rights*, 128

⁵⁸ *Ibid.*, 130.

⁵⁹ *Ibid.*, 130.

international human rights law.⁶⁰ Introducing a new legal framework for understanding this relationship can spur popular mobilization, empowering groups to invoke legal arguments to increase the weight of their rights-based claims. Making human rights claims based on legal rights is an especially effective way of asserting a political or social demand because it grounds human rights “claims in the legitimacy of law, on which most governments claim that their own legitimacy is based.”⁶¹ By framing human rights as a legal issue, rights demanders are able to speak the language of the state. However, Simmons caveats the effect of commitment on popular human rights mobilization, arguing that domestic groups’ willingness to mobilize is a function of both the seriousness of existing violations or grievances (how much they have to gain from mobilization) and the likelihood of success (measured by strength of due process and rule of law in the state in question).⁶² Therefore, while the likelihood of success of a movement mobilized in support of human rights would be high in an advanced democracy like Canada, the overall human rights situation is quite favourable – meaning that, for most individuals and groups, there is little “value” in mobilization. In effect, mobilization will be highest in partially democratic and transitioning regimes (with increasing rule of law and due process safeguard but ongoing human rights violations) and will decrease toward the other pole of the spectrum – democracies and autocracies.⁶³

Even so, I would argue that legal and popular mobilization should be analyzed in tandem as they are highly interdependent and have a counter-balancing effect on each other. For instance, domestic rights demanders would be at sea without a body of

⁶⁰ Simmons, *Mobilizing for Human Rights*, 139.

⁶¹ *Ibid.*, 139.

⁶² *Ibid.*, 152.

⁶³ *Ibid.*, 513, Figure 4.2.

domestic human rights legal precedents from which to draw when advancing demands or airing human rights grievances. Similarly, an active, popular human rights movement is essential to building up the domestic human rights jurisprudence, as these groups often become the claimants in precedent-setting cases. This interdependence increases in a common law system where new human rights commitments are not codified in law but read into existing legislation and defined through progressive adjudication. Furthermore, it is conceivable that these two channels of mobilization balance out the effects of regime type on the strength of the pro-rights coalition. While the existing level of respect for human rights violations in a country will clearly determine the effectiveness of popular human rights mobilization, there is generally an inverse relationship between levels of domestic human rights violations and the strength and independence of the judiciary. Therefore, a well-established democracy like Canada will likely see more effective legal mobilization in support of pro-human rights behaviour.

D. REGIONAL HUMAN RIGHTS SYSTEMS AND COMPLIANCE

[Regional human rights systems] seek in one form or another to supplement human rights efforts of the United Nations (and other international human rights bodies) by providing protective mechanisms suited to their regions. In addition to guaranteeing many of the human rights that various UN instruments proclaim, each regional system also codifies those rights which the region attaches a particular importance because of its political and legal traditions, its history and culture.

Thomas Burgenthal⁶⁴

In this passage, former ICJ judge Thomas Burgenthal provides important insight into how regional human rights systems can supplement domestic and international regimes in supporting human rights generally as well as in strengthening human rights

⁶⁴ Thomas Buergenthal, "The Evolving International Human Rights System," *The American Journal of International Law* vol. 100 no. 4 (October 2006) 792.

coverage of regionally relevant rights for parties under their jurisdiction. This capacity will be further investigated in the following section using Simmons' model for understanding and promoting pro-human rights behaviour as the guiding paradigm. I contend that the Inter-American Human Rights System fits cleanly into Simmons' model, reinforcing the channels of pro-human rights mobilization she outlines. The historical debate on Canada's engagement with the Inter-American System is itself a debate about commitment: whether – and how – Canada should commit to participate in the Inter-American System by ratifying the American Convention, a piece of binding human rights law. Canada's full buy-in to the Inter-American System would also involve accepting the jurisdiction of the Commission and the Court. Ratification of the American Convention and acceptance of the jurisdiction of the Court are both two highly visible, formal commitments that Canada would have to undertake at the outset, signalling its intention to respect and uphold the range of rights protected under the American Convention and to adhere to the rulings of the Commission and the Court.

Similarly, it can be argued that both these initial commitments and the subsequent rulings handed down by the Commission and the Court, whether or not they are directly related to Canada, would serve an agenda-setting function, increasing the salience of adjudicated rights and driving executive, legal and popular mobilization. Cavallaro and Brewer address how the Inter-American System can and should support pro-rights mobilization, advancing an argument for “grounded jurisprudence.” They contend that, in order for regional human rights regimes to maximize their ability to protect and promote human rights, they should tailor their procedures and jurisprudence to build on a country's existing human rights agenda – the issues of relevance to movements working

to eliminate structural causes of human rights violations.⁶⁵ Because of budgetary and other constraints on the Inter-American Court and Commission, only a small fraction of grievances brought forward through the individual petitions process ever become part of a formal adjudication procedure in the Commission or Court. Moreover, even fewer claimants will ever experience the direct benefit of Court-sanctioned reparations for the human rights violations they have faced. Therefore, the Commission and Court must adopt a strategic approach across their litigation that supports the interests of human rights mobilizers and government projects aimed at addressing systemic human rights issues.⁶⁶ This allows national, sub-national and transnational actors – whether elements of government, domestic courts, or popular rights demanders – to use rulings from the Commission and the Court as focal points for mobilization, in effect leveraging the Inter-American System’s work in their efforts to support human rights and, in instances where violations occur, hold governments to account.

Cavallaro and Brewer’s argument also makes clear the importance of framing human rights as a legal issue – as is done when the Commission and the Court adjudicate cases through the individual petitions system. Advocates and individuals have the ability to make social and political demands that do not just ‘pull on the heart strings’ but are grounded in a binding legal framework, with both potential precedent for the resolution of similar rights-based claims and, if a violation is not remedied, the threat of a new round of prosecution exists.

⁶⁵ James L. Cavallaro and Stephanie Erin Brewer, “Reevaluating Regional Human Rights Litigation In The Twenty-First Century: The Case Of The Inter-American Court,” *American Journal of International Law* vol. 102 (2008) 770.

⁶⁶ Cavallaro and Brewer, “Reevaluating Regional Human Rights Litigation: The Inter-American Court,” 770.

Furthermore, like its European and African counterparts, the Inter-American Human Rights System is a supranational system. It is this feature that distinguishes regional legal regimes from domestic or international legal systems. Supranational legal systems challenge the notion of a unitary state by acknowledging and interacting with the panoply of non-state actors, including individuals, groups, corporations, and voluntary organizations, that operate in contingency with and independent of the state.⁶⁷ Helfer and Slaughter explain that supranational legal regimes (like the Inter-American Commission and Court) take on some legal functions typically reserved for the state, thus imposing greater limitations on national sovereignty than would a traditional international institution.⁶⁸ They have the capacity to make decisions that are legally binding not only on states but also upon entities and individuals within the state. While purely international legal bodies adjudicate cases on a state-to-state basis, supranational legal tribunals pierce the traditional border of the state and, in so doing, give legitimacy to subnational actors and the status of subjects of human rights law, with the capacity to mobilize in support of human rights.⁶⁹ The Inter-American Commission's individual petition system plays an important role in giving it this supranational quality, providing the Commission and the Court with a channel to engage directly with aggrieved individuals and groups, providing these entities with a mechanism for seeking restitution against the state for perceived rights violations.

Helfer and Slaughter note that, based on this capacity to engage with a diversity of actors at the national and subnational levels, supranational tribunals are able to bolster

⁶⁷ Laurence Helfer and Anne-Marie Slaughter, "Towards a Theory of Effective Supranational Adjudication," *The Yale Law Journal* vol. 107 (1997) 228.

⁶⁸ *Ibid.*, 287

⁶⁹ *Ibid.*, 287-8.

their capacity to enforce their own rulings.⁷⁰ These regimes have an increased ability to bind national governments to supranational rulings by harnessing elements of the government and non-state actors to support and enforce compliance domestically, much as commitment to a human rights treaty drives actors within government, the law and popular rights to mobilize in support of pro-rights behaviour. By empowering diverse actors to participate in the human rights regime, the Inter-American system strengthens its ability to enforce its rulings and mobilizes groups within to transcend the state and encourage its compliance.

V. ANALYSIS: PROTECTING INDIGENOUS RIGHTS IN CANADA THROUGH THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

As a result of their investigation, the Senate Committee on Foreign Affairs recommended that Canada ratify the American Convention on Human Rights; recognize the jurisdiction of the Inter-American Court of Human Rights; and actively engage in the promotion of the Convention and the Inter-American System domestically. Transitioning from theory to practice, I will now explore the merit of these conclusions in the Canadian context, where there have been widely supported allegations that the Government of Canada continues to allow violations of indigenous rights as a result of both problematic policies and a lack of sufficient action – positive and negative violations.

The aim of this chapter is to test the conclusion that the introduction of a regional human rights system in Canada would have an impact on the protection of indigenous rights. I will draw on comparative examples from both the Inter-American Court of

⁷⁰ Helfer and Slaughter, “Towards a Theory of Effective Supranational Adjudication,” 228.

Human Rights and the European Court of Human Rights. It will be divided into three sections, looking at the Inter-American System's experience elaborating and defining indigenous rights through the principles of the American Convention and case law. This will allow me to compare areas where indigenous rights violations are occurring in Canada with dimensions of indigenous rights that are clearly protected under the Inter-American System, as well as those dimensions that are not. Second, I will review existing research on the effectiveness of the Inter-American System, writ large, in promoting human rights – where effectiveness is measured by its capacity to shape state behaviour and enforce compliance with its rulings. Third, I will consider how effective the Inter-American System would be at protecting and promoting human rights in general, and indigenous rights specifically, in Canada by drawing on the experience of the European Court of Human Rights at ruling on cases of indigenous and minority rights and its capacity to hand down binding rulings. I will use these two key metrics – rights coverage and effectiveness – to measure the potential impact that the Inter-American System would have on indigenous rights protection in Canada, using the theoretical framework established in the previous chapter to guide my analysis. As this debate is largely hypothetical, my analysis will be based on assumptions rooted in this theoretical model and supported by comparison cases. Given the methodological weaknesses inherent in dealing in the hypothetical, in the next chapter I will address both potential outcomes that the introduction of a supranational human rights system could have on the protection and promotion of indigenous rights in Canada. One would be no effect on the protection of indigenous rights and violations would remain status quo; the other would be a

strengthening effect on the existing indigenous rights infrastructure aimed at protecting and promoting indigenous rights in Canada.

A. WHAT RIGHTS WOULD BE PROTECTED?

Burgenthal defines regional human rights systems by their ability to codify rights of particular political, legal, historical, or cultural significance to that region.⁷¹ This would seem to suggest that, given the significant population of indigenous peoples in the Americas and the unique struggles they face, the Inter-America system should have a well-elaborated and codified body of indigenous rights. While there is no formal instrument protecting indigenous rights in the Inter-American system, both the Commissions and the Court have taken steps to support a progressive reading of indigenous rights into the existing Inter-American human rights instrument, a process driven by the consensus that the American Convention be interpreted as a “living tree.”⁷² Moreover, the Inter-American system’s reliance on external sources of international law in its rulings has contributed to the creation of an expansive body of precedents regarding indigenous rights.⁷³ This approach also leaves open the possibility for future expansions or development in the range of indigenous rights protected through the American Convention and related protocols.

Returning to the substantive categories classifying violations of indigenous rights defined in chapter two – economic and social rights, discrimination in access to services,

⁷¹ Thomas Burgenthal, “The Evolving International Human Rights System,” 794

⁷² Lucas Lixinski, “Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law,” in *The European Journal of International Law* vol. 21, no. 3 (2010) 597.

⁷³ James Anaya and Robert A. Williams, “The Protection of Indigenous Peoples’ Rights over Land and Natural Resources Under the Inter-American Human Rights System,” *The Harvard Human Rights Journal* vol. 33 (Spring 2001) 5.

violence against women and limited access to justice and land rights – I will investigate if and how the Inter-American system has taken steps to enforce states’ obligations to protect these dimension of indigenous rights.

Economic and Social Rights: The American Convention codifies a series of rights that relate to wellbeing as a measurement for economic and social rights, including rights to life, preservation of health and physical integrity, protection of the family and freedom of movement and residence.⁷⁴ These rights establish positive obligations for the state to protect and promote individual or group wellbeing – reflecting the obligations that the Canadian Human Rights Commission claims have been violated for indigenous peoples in Canada.⁷⁵ The Inter-American Commission first explored states’ obligations to promote economic and social rights as they apply to indigenous rights claims in the 1985 case of *Brazil v. the Yanomami indigenous people*. Barelli explains that the Yanomami decision was one of the first cases that brought indigenous rights into the human rights discourse in the Inter-American system, creating the basis for the development of the body of protected indigenous rights.⁷⁶ In deciding the case, the Commission ruled that Brazil failed to take timely and effective policy actions, resulting in a violation of the Yanomami’s rights to the preservation of health and wellbeing, which, in turn, threatened the life, liberty and personal security of the Yanonmai people.⁷⁷ The case set an important precedent. It established that, under the principles of the American Convention, states have a positive obligation to take action to protect the collective economic and social

⁷⁴ *American Convention on Human Rights*, Article 1(1), Article 24.

⁷⁵ CHRC, *Report on Equality Rights of Aboriginal People*, 2.

⁷⁶ Mauro Barelli, “The Interplay Between Global and Regional Human Rights Systems in the Construction of the Indigenous Rights Regime,” *Human Rights Quarterly* vol. 32 no. 4 (November 2010) 962.

⁷⁷ Inter-American Commission on Human Rights, *Resolution No 12/85, Case No 7615 (Brazil: March 5, 1985)* p.7 (pp. 11), p. 8 (pp. 1). <http://www.cidh.org/annualrep/84.85eng/Brazil7615.htm>

rights of indigenous groups within its territory, while a failure to do so constitutes a violation.

Further, the 1972 IACHR Resolution on “Special Protection of Indigenous Populations” stipulates that the effective protection and promotion of indigenous rights requires the recognition of the “unique history, culture, economic situation and experience” of indigenous groups and the provision of special measures to compensate for their history of exploitation and discrimination, in effect, asserting that, for a state to comply with its obligations regarding indigenous rights, it must ensure that indigenous communities enjoy a substantively equal application of economics and social rights as compared to non-indigenous citizens.⁷⁸ This principle allows for, and even promotes, the unequal implementation of policy to achieve equal rights-based outcomes. The Commission’s ruling in the Yanomami case and their above analysis of the Convention with regard to substantive equality parallel many of the obligations and alleged violations outlined in non-binding rulings by UN and Canadian human rights instruments in response to the situation of indigenous peoples in Canada. These interpretations of state obligation to protect and promote indigenous peoples’ right to equal enjoyment of economic and social rights reflect and support the efforts of groups mobilized in support of the economic and social rights of indigenous peoples in Canada.

Discrimination in service provision: The American Charter establishes the principles of non-discrimination and equal protection under the law.⁷⁹ Many violations of indigenous rights in the Canadian context have focused on discrimination that indigenous

⁷⁸ IACHR, *Indigenous and Tribal Peoples’ Rights Over their Ancestral Lands and Natural Resources*, 23.

⁷⁹ *American Convention on Human Rights*, Article 1(1), Article 24.

peoples face in accessing services, including to health and healthcare, employment opportunities, education and other fundamental social services. The enumeration of the individual's rights and the state's obligations regarding discrimination in service provision is a relatively new field of jurisprudence in the Inter-American System. However, the Court and the Commission have repeatedly held that "there is an inseverable link between the obligation to respect and ensure human rights and the principle of equality and non-discrimination," and that states have an obligation to take positive measures to reverse or change discriminatory situations.⁸⁰ While not dealing with the rights of indigenous peoples specifically, in April 2014, the Court handed down an important ruling regarding states' obligations to avoid discrimination in the provision of services based on group membership or social status. In *Angel Alberto Duque concerning Colombia* the Court found that Colombia had violated Angel Alberto Duque's rights by restricting the provision of an essential social service (in this case, survivor's pension) based on his status as a same-sex partner of the deceased.⁸¹ In addition, the Court ruled that Colombia's treatment of the claimant did not adequately account for the multiple vulnerability factors Angel Alberto Duque faced, based on his sexual orientation, status as HIV positive, and his economic situation. The Court therefore contended that his right to humane treatment was also violated.⁸² In a communication released by the Inter-American Court of Human Rights in December 2014, the Court put forth that the ruling

⁸⁰ I/A Court of Human Rights, *Merits: Angel Alberto Duque Colombia, Case 12,841, Report No. 5/14*. (Colombia: April 2, 2014) pp.61.

⁸¹ I/A Court of Human Rights, "IACHR Takes Case involving Colombia to the Inter-American Court," Press Release 144/14 (December 1, 2014).

http://www.oas.org/en/iachr/media_center/PReleases/2014/144.asp

⁸² *Ibid.*

from this case would enable the development of case law regarding discrimination and access to social rights, such as social security and health.⁸³

The precedents established through the above-mentioned case, combined with the well-established principle that protecting and promoting the right to equality and non-discrimination as central to the mandate of the Inter-American Human Rights system, support the argument that Canada's participation in the Inter-American system would strengthen rights coverage in a key area where violations of indigenous rights continue. Moreover, the precedents established through cases like that of Angel Alberto Duque could be used in the course of legal and popular mobilization in support of ongoing movements fighting alleged discrimination of service provision in indigenous communities. Finally, if cases currently in Canadian courts challenging perceived discrimination in indigenous peoples' access to services do not come to a legally satisfactory outcome, claimants would have the opportunity of subsequently bringing their case to the Inter-American Commission –a threat that may in itself increase the cost of the state's non-compliance and thus promote a change in behaviour.

Violence against women and limited access to justice: The foundational *Yanomami* case and the case of *Paraguay v. the Ache People* (1997) both rule on the state's obligation to protect the life, liberty and security of the person as well as to preserve health and wellbeing and provide fair remuneration where violations occur. Violations of the right to life, liberty and security arguably represent an important dimension of the violations faced by missing and murdered Aboriginal women, who have systematically been deprived of the right to life, liberty and security based on their status

⁸³ I/A Court of Human Rights, "IACHR Takes Case involving Colombia to the Inter-American Court."

as indigenous and as women. Although the case does not involve indigenous or minority rights claims, the case of *Gonzales et al. v. Mexico* sets of number of notable precedents regarding states' obligations to address gender-based violence, uphold the right to life, liberty and security, and provide adequate recourse for victims. In the 2009 case, the Court found Mexico responsible for having failed to take the measures necessary to safeguard the rights of young girls who, as a result, were systematically victimized; the state was also found guilty of having failed to promptly and effectively investigate the women's disappearances.⁸⁴ Despite the fact that there was no evidence that the state itself had played a role in the violence, the Court found the state responsible for violating the rights of vulnerable women by failing to take sufficient measures to respond to a known risk.⁸⁵ Furthermore, the Court took an assertive approach in determining reparations, deciding that, "bearing in mind the context of structural discrimination in which the facts of this case occurred...the reparations must be designed to change this situation, so that their effect is not only restitution, but also rectification."⁸⁶ In effect, the Court endeavoured to hand down reparations that not only compensated victims but also targeted and transformed the inequitable structures that allowed the extreme violence against women to occur with impunity. The attribution of the state's obligations in this case is analogous to the allegations currently made against Canada regarding its insufficient response to the situation of missing and murdered Aboriginal women. As a result, if Canada were to accept the jurisdiction of the Inter-American Court, this and other related case rulings could provide opportunities for popular and legal mobilization,

⁸⁴ I/A Court HR, *Case of González et al. ("Cotton Field") v. Mexico*, op 4-5.

⁸⁵ Elizabeth Abi-Mershed, "Notes from the Inter-American System for the Panel Discussion on Reparations for Women Subjected to Violence," Office for the High Commission on Human Rights (June 2010) 6. http://www2.ohchr.org/english/issues/women/rapporteur/docs/side_event_june2010/ElizabethAbiMershed.pdf

⁸⁶ I/A Court HR, *Case of González et al. ("Cotton Field") v. Mexico*, pp. 450.

where established legal precedent could afford mobilizers new tools to leverage a change in state behaviour, with Canada's formal commitment to the American Convention acting as catalyst.

Indigenous land rights: The *Awás Tingni Case* from Nicaragua was the first case seen by the Court that directly addresses the territorial rights of indigenous communities. In 2001 the court ruled against Nicaragua and, in so doing, interpreted Article 21 of the Convention (property rights) as affirming the *collective land rights* of indigenous peoples to own ancestral lands.⁸⁷ The Commission has further clarified the scope of states' obligations related to indigenous land rights through reporting and rulings, which have repeatedly determined that the American Convention protects collective land rights⁸⁸ and which have reinforced the link between ancestral land rights and indigenous communities' rights to cultural identity and the survival of their communities⁸⁹ – a link that does not exist for individual property rights as they relate to non-indigenous citizens. The Commission has also affirmed that Article 21 of the Convention extends to natural resources and other development initiatives found within indigenous peoples' land.⁹⁰

When it comes to the restricting of these rights, the Commission has found that restrictions on land and resource rights are justifiable only in instances where restrictions are established by law, are deemed necessary and proportional, and have the aim of achieving a legitimate objective in a democratic society.⁹¹ Whether or not a case against

⁸⁷ Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press: August 2002) 15.

⁸⁸ Barelli, "The Interplay Between Global and Regional Human Rights Systems in the Construction of the Indigenous Rights Regime," 976.

⁸⁹ *Ibid.*, 977.

⁹⁰ *Ibid.*, 977.

⁹¹ *Ibid.*, 978.

Canada would be brought to the Inter-American Court to adjudicate an indigenous land claim, this jurisprudence could provide a focal point for legal and popular mobilization focused on indigenous land rights. The precedents established through the Inter-American System would support state behaviour that conforms with this progressive interpretation of collative property rights, reflecting and reinforcing existing rights-based mobilization within Canadian courts and in advocacy movements, and working to advance indigenous land claims through Canadian and multilateral rights systems.

B. HOW EFFECTIVE IS THE INTER-AMERICAN SYSTEM?

In order to hypothesize how effective the Inter-American System would be at protecting indigenous rights in Canada, I will first review research on the Court's effectiveness at handing down binding rulings and changing state behaviour in other countries where it has jurisdiction. Basch et al analyze levels of state-based compliance with the Inter-American Court's rulings, where compliance is measured by how comprehensively states implement remedies ordered by the Court across different types of cases. They find that, on average, total compliance is found in about 47% and partial compliance in approximately 13% of cases. Breaking these numbers down, Cavallaro and Brewer find that there is a significant discrepancy in compliance between types of reparations ordered. While states demonstrate some willingness to pay monetary reparations and make symbolic gestures, they are much less willing to make systemic changes, address impunity and investigate and punish violators.⁹² Basch et al calculate a 58% rate of compliance when remedies involved monetary reparations, as compared to a 10-14% compliance rate where reparations required the state either to investigate and

⁹² Cavallaro and Brewer "Reevaluating Regional Human Rights Litigation in the 21 c." 786.

punish those responsible or make legal reforms.⁹³ This superficial assessment of the effectiveness (or ineffectiveness) of the Inter-American system at shaping state behaviour demonstrates that the impact of Canada's decision to ratify the American Convention on the protection and promotion of indigenous rights would likely be tempered by systemic partial compliance with Court rulings. Even if the Court has jurisdiction in Canada, examples from other countries show that, more often than not, states will ignore, or partially ignore, its rulings.

However, I would argue that these cursory statistics do not show the whole picture. By invoking Simmons' theory, it could be argued that, even in instances where states are unable or unwilling to comply, the fact that a case is being tried at the Court or Commission with a resulting ruling could serve as a highly public focal point for mobilization. Moreover, a favourable ruling provides an important opportunity mobilizers can leverage to urge the state to change its behaviour – using legal arguments and the threat of further attempts to seek recourse through the supranational legal system. Furthermore, as will be discussed shortly, with the exception of the US, which has also not ratified the American Convention, Canada does not share its history as a mature democracy with a strong human rights record with any of the other countries in the Inter-American system. Therefore, making direct comparisons between Canada and the other OAS Member States in order to draw assumptions about Canada's compliance lacks analytical strength.

⁹³ Fernando Basch, Leonardo Filippini, Ana Alaya, Mariano Nino, Felicitas Rossi and Barbara Schreiber, "The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions," *SUR International Journal on Human Rights*, vol. 7 no. 12 (June 2010) 18-19.

Two more shortcomings the Court faces in shaping state behaviour are the length of the proceeding time and its capacity to take on cases. At this point, the average proceeding (adjudicated at the Commission and then the Court) takes more than seven years from petition to final decision. Furthermore, Cavallaro and Brewer note that the efforts made in the last ten years to streamline proceedings and, consequently, increase the rate of cases processed, risk weakening the relevance and resonance of the cases adjudicated through the Inter-American System.⁹⁴ As part of this streamlining process, the Court has reduced the use of public hearings, witness testimony and adversarial procedures. These reforms have the potential of reducing the Court's ability to produce strong reporting and to generate media and public pressure on human rights issues.⁹⁵ For example, by reducing public hearings and providing alternatives to adversarial adjudication procedures, there are fewer opportunities, Cavallaro and Brewer argue, for popular mobilizers to rally around cases and use rulings as a legal foundation to their advocacy efforts. The influence that popular mobilization around cases can have in shaping state behaviour was evident in the case against Brazil on allegations of violence in Urso Branco prison. In this instance, activist media used public hearings, eventually successfully, to generate pressure on the government to address the violence.⁹⁶

C. HOW EFFECTIVE WOULD THE INTER-AMERICAN SYSTEM BE IN CANADA?

Examining the experience of the European Court of Human Rights also provides insight into how the Inter-American system could impact Canadian policy and practice regarding indigenous rights. Despite the fact that there have been very few cases

⁹⁴ Cavallaro and Brewer "Reevaluating Regional Human Rights Litigation in the 21 c." 796.

⁹⁵ *Ibid.*, 795

⁹⁶ *Ibid.*, 802

adjudicating indigenous rights claims at the European Court of Human Rights, it is a useful comparison case for an analysis of Canada. Given the political similarities between Canada and many European countries, and based on the success the European system has had in defining and expanding minority rights, which, like indigenous rights, are often counter-majoritarian and collective in nature, the European Human Rights System provides an indication of how effectively the Inter-American human rights system would shape Canadian practices and policies. Helfer and Slaughter note that the rate at which states comply with the ECHR rulings is extremely high, describing ECHR judgments as being “as effective as those of any domestic court,” especially with cases brought by individuals against their respective national governments.⁹⁷ They outline the conditions that have led to the ECHR’s noteworthy and successful record. Two key factors that have contributed to the effectiveness of the Court are the nature of the violations occurring in Europe and the existence of autonomous domestic institutions committed to rule of law and responsive to citizens’ interests. First, they explain that human rights regimes and, especially, supranational legal systems, have proven to be most effective in states where violations are relatively few and less severe. In these instances, shifting from violation to compliance is easier because it does not threaten the status and structure of state authority.⁹⁸ Second, compliance is higher in liberal democracies with a strong commitment to rule of law. These types of states are generally more susceptible to pressure from individuals and interest groups through the electoral process, and they maintain institutional structures and a level of transparency that allows groups and individuals to hold their government to account through the legal systems and auditing

⁹⁷ Helfer and Slaughter, “Towards a Theory of Effective Supranational Adjudication,” 296.

⁹⁸ *Ibid.*, 329.

processes.⁹⁹ Both of these factors are noteworthy in the current discussion about Canada, a state perpetrating few human rights violations and with a strong and receptive liberal democracy. Helfer and Slaughter's analysis suggests that the Inter-American Court would be relatively effective in Canada (as compared to many other OAS countries) at promoting compliance based on the types of human rights violations committed by Canada and its domestic political structure, which is particularly conducive and receptive to pro-rights mobilization.

For example, the ECHR has been notably successful at elaborating and expanding minority rights protected by the European Charter. Gilbert speaks to the ECHR's body of minority rights jurisprudence, noting that, in interpreting violations of minority rights through the lens of discrimination, the Court has recognized that the state's obligation to protect and promote the right to non-discrimination extends to positive measures aimed at establishing "a level playing field" between minority groups and the majority – unequal application of policy to achieve equality.¹⁰⁰ Gilbert argues that the Court has succeeded in using its rulings to change the shape of domestic policy and law within European countries, protecting and promoting minority rights in the face of state-led violations of these rights. The ECHR's success in elaborating minority rights and its effectiveness in enforcing compliance both strengthen the case for Canadian ratification of the American Convention. The European example demonstrates that supranational human rights regimes can effectively shape state behaviour in compliance with counter-majoritarian

⁹⁹ Helfer and Slaughter, "Towards a Theory of Effective Supranational Adjudication," 333.

¹⁰⁰ Geoff Gilbert, "The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights," *The Human Rights Quarterly* vol. 24 (2002) 739, 750.

rights, especially in the context of liberal democracies, such as Canada with a strong tradition of rule of law.

VI. RESULTS: HYPOTHESIZING THE IMPLICATIONS

Based on the above analysis investigating the Inter-American Human Rights System's potential strengths and weaknesses in protecting indigenous rights in Canada, I will now lay out the two possible outcomes of bringing Canada under the jurisdiction of the Inter-American system: one, that this development would have no impact on rights protection in Canada; or, two, that it would improve rights protection. Although there is clearly a third possible outcome, that human rights protection would deteriorate if Canada were to accept the jurisdiction of the Inter-American Court, I do not believe that this is a credible argument. Based on the requirements for judging the admissibility of a case at the Commission or the Court, as outlined in the American Convention, a petition can only be lodged at the supranational level if all remedies under domestic law have been pursued and exhausted.¹⁰¹ Therefore, if cases arise where Canada has established a more comprehensive or activist definition of a right than the Inter-American System, it will likely never be adjudicated at the supranational level and thus would not be degraded by this alternative, less robust definition. Moreover, as previously discussed, several credible options exist for Canada to caveat its accession to the American Convention in instances where the Inter-American system's definition of a right does not align with Canadian perspectives.

In comparison to the above, the argument that bringing Canada under the

¹⁰¹ *American Convention on Human Rights*, Article 46 (1).

jurisdiction of the Inter-American Human Rights system would have little effect – positive or negative – on the protection of indigenous rights domestically has merit. For one, returning to the requirements for admissibility, Canadians living in an advanced democracy with a well-established domestic human rights regime have many domestic options for recourse in the face of human rights violations. Therefore, most human rights grievances would likely be settled domestically, leaving little need for the Court. Similarly, the structural weaknesses of the court (low case capacity and long procedure times), described by Cavallaro and Brewer and the observed low levels of compliance with its rulings, noted by Basch et al, suggest that the Inter-America system could have little impact on the situation of human rights in Canada.

Further, as noted by Simmons in her evaluation of when mobilization for human rights occurs, by virtue of Canada's domestic situation – where there are relatively few instances of state-led human rights violations – there would be little impetus for domestic mobilization in support of pro-human rights behaviour because the benefit of doing so would be low for the majority of Canadians.¹⁰² While ongoing violations of indigenous rights are grave, there is a strong argument that it would be difficult to establish a wider, pan-Canadian base of pro-rights mobilization in support of indigenous rights around ratification of the American Convention or rulings handed down by the Commission or Court, as the majority of Canadians are not affected by these violations. Finally, given the number of legal opinions, reporting, and non-binding recommendations on the issue of indigenous rights protection that call Canada to task for insufficient response to the

¹⁰² Simmons, *Mobilizing for Human Rights*, 151.

perceived crisis of indigenous rights in Canada,¹⁰³ it is possible that that we have reached a level of saturation where yet another legal opinion would be relatively ineffective.

Nonetheless, the argument that bringing Canada under the jurisdiction of the Inter-American Human Rights System would help address the current compliance deficit regarding indigenous rights is the most convincing. First, it is important to understand the substantive distinction between UN human rights instruments, like UN Special Rapporteurs or the Human Rights Commission, and special mechanisms like the Inter-American System. Although not the case with UN instruments, rulings by the Inter-American Court are binding under law. Moreover, as Helfer and Slaughter demonstrate by drawing on examples from the European Court of Human Rights, rulings from supranational regimes are highly effective – in liberal democracies (like Canada) with a well-developed rule of law – at binding state behaviour.¹⁰⁴ This is because, by increasing the cost of continued non-compliance, the supranational characteristics of the Inter-American System empower domestic actors to urge state compliance with Inter-American rulings.

Similarly, while there are other UN bodies monitoring human rights and indigenous rights in Canada, the Inter-American system is unique in providing individuals and groups with the opportunity to bring allegations of human rights violations against the state for adjudication through the individual petitions system.

¹⁰³ CHRC, *Submission to the UN Human Rights Committee in Advance of Review of Canada's 6th Periodic Report* (June 2015); NWAC, *Briefing Paper for Thematic Hearing for the Inter-American Commission on Human Rights: Missing and Murdered Aboriginal Women and Girls in British Columbia* (March 28, 2012); CEDAW, *Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* (March 6 2015); HRC, *The Situation of indigenous peoples in Canada: Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya* (July 2014).

¹⁰⁴ Helfer and Slaughter, "Towards a Theory of Effective Supranational Adjudication," 333.

Whether or not these cases make it to the Inter-American Court or if the ruling is favourable, the individual petitions system provides a unique avenue for pro-rights mobilization – where mobilizers can draw on legal rationale to leverage the state to change its non-compliant behaviour. In the same way, a case that does not directly involve Canada, but nonetheless adjudicates indigenous rights claims, could equally act as a focal point for mobilization.

Returning to the question of the likelihood of mobilization occurring, I contend that there is ample evidence that, if Canada decided to participate fully in the Inter-American Human Rights System, mobilization behind the protection and promotion of indigenous rights would follow. First, despite Canada not fully participating, indigenous groups in Canada already have a history of engagement and advocacy regarding indigenous rights within the Inter-American System. For example, the Native Women’s Association of Canada (NWAC) along with the Feminist Alliance for International Action (FAFIA) were granted the opportunity to provide two thematic briefings before the IACHR on the situation of missing and murdered Aboriginal women in British Columbia with the stated aim of “turning regional and international attention toward this critical rights issue in Canada,” and calling on the Commission to conduct an inquiry into the situation of Aboriginal women in the country (which the Commission did in 2014).¹⁰⁵ The Carrier Sekani Tribal Council of British Columbia has also filed a complaint at the Commission, asserting violations of their peoples’ rights to land and natural resources.¹⁰⁶

Outside engagement with the Inter-American System, indigenous groups and individuals

¹⁰⁵ Native Women’s Association of Canada, *Briefing Paper for Thematic Hearing for the Inter-American Commission on Human Rights: Missing and Murdered Aboriginal Women and Girls in British Columbia*, 114th Period of Sessions (March 28, 2012) 27, 29.

¹⁰⁶ Anaya and Williams, “The Protection of Indigenous Peoples’ Rights over Land and Natural Resources Under the Inter-American Human Rights System,” 5.

from Canada have been highly mobilized in multilateral indigenous rights efforts. Regional Chiefs from the Assembly of First Nations (AFN) participated in the inaugural World Conference on Indigenous Peoples in 2014, contributing to the creation and adoption of an action-oriented “Outcome Document” on the implementation of the rights of indigenous peoples and presented at the conference discussing actions required to implement UNDRIP in Canada.¹⁰⁷ This history of mobilization in support of indigenous rights in regional and multilateral fora has not been confined to indigenous rights groups but has garnered support from a cross-section of Canadian and international human rights groups, legal advocacy groups, and multilateral human rights mechanisms. There has also been significant mobilization in support of indigenous rights from elements within the Canadian government, including opposition parties and provincial governments.¹⁰⁸ While the above examples are not exhaustive, they are evidence that a clear precedent exists for mobilization in support of indigenous rights in Canada through national and extranational rights systems, supporting the argument that Canada’s participation in the Inter-American System would likely prompt mobilization in support of state policies and practices that align with Canada’s obligations to uphold indigenous rights.

Finally, the previous chapter demonstrated that there is a high degree of alignment between the most pertinent human rights violations experienced by indigenous peoples in Canada and the dimensions of indigenous rights protection that, to date, have been adjudicated in the Inter-American System. Therefore, bringing Canada under the

¹⁰⁷ Assembly of First Nations, “Assembly of First Nations Welcomes the Adoption of the World Conference on Indigenous Peoples Outcome Document Calls on Canada to Stop Trying to Obstruct and Deny Indigenous Rights,” Press Release (September 23, 2014) <http://www.afn.ca/en/news-media/latest-news/assembly-of-first-nations-welcomes-the-adoption-of-the-world-conferenc>

¹⁰⁸ Jason Fekete, “Frustrated Premieres call for inquiry into missing and murdered Aboriginal women,” The Globe and Mail Online (August 26, 2014). <http://news.nationalpost.com/news/canada/frustrated-premiers-call-for-national-public-inquiry-into-missing-and-murdered-aboriginal-women>

jurisdiction of the Inter-American system would likely increase the coverage of indigenous rights currently protected by Canadian human rights instruments such as the Charter. This action would also provide mobilizers with an expanded body of legal precedents to cite in advancing their indigenous rights claims, and it would increase the cost of non-compliance by providing an additional legally binding mechanism for seeking recourse against violations. The Court has also demonstrated its tendency to decree innovative remedies that address the underlying systemic inequalities that cause violations, which set out clear targets for state behaviour deemed necessary to overcoming future violations.¹⁰⁹

While there is no guarantee that domestic mobilization would occur as a result of Canada's accession to the Inter-American Human Rights System or that Canada would heed the rulings of the Court, on balance, there are stronger and more numerous arguments in support of the position that Canada's ratification of the American Convention and acceptance of the jurisdiction of the Inter-American Court would support the domestic protection and promotion of indigenous rights. This analysis supports the Senate Committee conclusion that, "the recognition of the jurisdiction of the bodies created to oversee the implementation (of human rights) gives another level of protection not afforded by domestic courts, especially in Canada where the absence of legislation implementing international treaties."¹¹⁰ In other words, that there is no such thing as too much protection.

¹⁰⁹ Cavallaro and Brewer "Reevaluating Regional Human Rights Litigation in the 21 c." 871.

¹¹⁰ Standing Senate Committee on Human Rights, *Enhancing Canada's Role in the OAS: Canadian Adherence to the American Convention on Human Rights*, 40.

VII. CONCLUSION

As a liberal democracy with a strong commitment to rule of law, Canada has a well-established domestic human rights regime. This means that human rights violations are rare and, when they occur, there is a relatively robust set of institutions through which individuals and groups can seek recourse. It does not mean that Canada's current record for protecting and promoting human rights is perfect or that Canadians would not benefit from gaining access to new mechanisms aimed at ensuring the state comply with its human rights obligations. The objective of this paper has been to explore how Canada's participation in the Inter-American Human Rights system – a supranational human rights regime – would affect the country's policies and practices regarding indigenous rights. To recap briefly: I have established that violations of indigenous rights remain systemic in Canada as the state fails to meet its positive obligations to protect the wide range of human rights afforded indigenous peoples. Despite numerous investigations and recommendations regarding the issue, violations persist. Moreover, there are limitations on avenues for domestic recourse for indigenous peoples experiencing human rights violations – a fact demonstrated by the ongoing – and, at times, worsening – nature of the violations.

I have argued that Simmons' theory on mobilizing for human rights provides an effective framework for analyzing under what circumstances states tend to comply with their human rights obligations and how forces of mobilization can coalesce to support changes in state behaviour from violation to compliance. Using this model, I have drawn conclusions about how the recognition of the jurisdiction of a supranational human rights regime would affect state behaviour regarding human rights, applying these theoretical

assumptions to the hypothetical debate on how Canada's accession to the American Convention would advance indigenous rights. More specifically, I have argued that, based on its supranational characteristics, the Inter-American System fits nicely into Simmons' model of compliance, where Court rulings (such as commitments) act as focal points for legal and popular mobilization and put human rights on the political agenda, providing mobilizers with an effective tool to advocate for pro-rights state behaviour.

Applying this model to the Canadian context, three central questions arise regarding if and how Canada's acknowledgment of the jurisdiction of the Court would advance indigenous rights domestically: Would the Inter-American System increase rights coverage? Would Canada comply with its rulings? And, would mobilization occur in light of Canada's participation? While none of these questions can be answered with certainty, the above analysis indicates that there is a strong likelihood that Canada's recognition of the jurisdiction of the Court would strengthen domestic coverage of indigenous rights, that Canada would comply with rulings handed down by the Commission and the Court, and that, as it has in the past, mobilization would occur in support of indigenous rights.

Returning to the etymology of human rights discussed in chapter three, the concept refers to those rights necessary for individuals to live a dignified life and reach their full potential. This definition underscores the severity of ongoing or systemic human rights violations by the state, which can be understood as policies and practices that impinge upon individuals' dignity and restrict them from reaching their full human potential. In Canada, the implications of persistent violations of indigenous rights are visible in what Anaya has termed the "crisis of indigenous rights" – an outcome that not

only necessitates the cessation of harmful policies on the part of the government but also demands a host of affirmative policy actions to rectify past wrongs and support substantive domestic equality. The reporting referenced throughout this paper makes the case that Canada's commitment to protect and promote indigenous rights continues to fall short of such comprehensive action. Thus, violations continue. In contrast, there is a strong case that Canada's participation in the Inter-American Human Rights System could serve to strengthen the protection and promotion of indigenous rights domestically, reducing the current compliance gap with the potential to mitigate some of the harmful implications of ongoing violations. It is, therefore, a policy option that should be revisited.

WORKS CITED

- Abi-Mershed, Elizabeth. "Notes from the Inter-American System for the Panel Discussion on Reparations for Women Subjected to Violence." Office for the High Commission on Human Rights (June 2010).
http://www2.ohchr.org/english/issues/women/rapporteur/docs/side_event_june2010/ElizabethAbiMershed.pdf
- Aboriginal Affairs and Northern Development Canada. "The Government of Canada's Approach to Implementation of the Inherent Rights and the Negotiation of Aboriginal Self-Government." Government of Canada (September 2010) Part 1.
<http://www.aadnc-aandc.gc.ca/eng/1405693409911/1405693617207>
- American Convention on Human Rights*. Pact of San Jose, Costa Rica B-32. Organization of American States (November 1969).
- Anaya, James and Robert A. Williams. "The Protection of Indigenous Peoples' Rights over Land and Natural Resources Under the Inter-American Human Rights System." *The Harvard Human Rights Journal* vol. 33 (Spring 2001).
- Assembly of First Nations. "Assembly of First Nations Welcomes the Adoption of the World Conference on Indigenous Peoples Outcome Document Calls on Canada to Stop Trying to Obstruct and Deny Indigenous Rights." Press Release (September 23, 2014) <http://www.afn.ca/en/news-media/latest-news/assembly-of-first-nations-welcomes-the-adoption-of-the-world-conferenc>
- Barelli, Mauro. "The Interplay Between Global and Regional Human Rights Systems in the Construction of the Indigenous Rights Regime." *Human Rights Quarterly* vol. 32 no. 4 (November 2010) 957-983.
- Basch, Fernando, Leonardo Filippini, Ana Alaya, Mariano Nino, Felicitas Rossi and Barbara Schreiber. "The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions." *SUR International Journal on Human Rights*. vol. 7 no. 12 (June 2010) 9-36.
- Beeby, Dean. "Aboriginal Affairs spending shortfall amounts to \$1B, internal document Says." *CBC News Online* (June 5, 2015).
<http://www.cbc.ca/news/politics/aboriginal-affairs-spending-shortfall-amounts-to-1b-internal-document-says-1.3100937>
- Blackstock, Cindy. "The Canadian Human Rights Tribunal on First Nations Child Welfare: Why if Canada wins, equality and justice loose." *Children and Youth Services Review* vol. 33 (2011) 187-194.

- Burgenthal, Thomas. "The Evolving International Human Rights System. (Centennial Essays: In Honor of the 100th Anniversary of the American Journal of International Law and the American Societies of International Law)." *The American Journal of International Law* vol. 100 no. 4 (Oct 2006) 783-807.
- Canadian Human Rights Commission. *Submission to the UN Human Rights Committee in Advance of Review of Canada's 6th Periodic Report* (June 2015) 1-20.
- Canadian Human Rights Commission. *Report on Equality Rights of Aboriginal People*, (2013) 1-78.
- Cavallaro James L. and Stephanie Erin Brewer. "Reevaluating Regional Human Rights Litigation In The Twenty-First Century: The Case Of The Inter-American Court." *American Journal of International Law* vol. 102 (2008) 768-827.
- CBC News. "6 Landmark Rulings on Native Rights: Court cases that help define land, treaty and human rights for aboriginals in Canada." CBC News Online (January 8, 2013) <http://www.cbc.ca/news/canada/6-landmark-rulings-on-native-rights-1.1316961>
- Donnelly, Jack. *International Human Rights*, 2nd ed. (Boulder, Colorado: Westview Press, 1998).
- Fekete, Jason. "Frustrated Premieres call for inquiry into missing and murdered Aboriginal women." *The Globe and Mail Online* (August 26, 2014). <http://news.nationalpost.com/news/canada/frustrated-premieres-call-for-national-public-inquiry-into-missing-and-murdered-aboriginal-women>
- Fine, Sean. "Supreme Court expands land-title rights in unanimous rulings." *The Globe and Mail Online* (June 26, 2014). <http://www.theglobeandmail.com/news/national/supreme-court-expands-aboriginal-title-rights-in-unanimous-ruling/article19347252/>
- Gilbert, Geoff. "The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights." *The Human Rights Quarterly* vol. 24 (2002) 736-780.
- Helfer, Laurence and Anne-Marie Slaughter. "Towards a Theory of Effective Supranational Adjudication." *The Yale Law Journal* vol. 107 (1997) 273-391.
- Holder, Cindy and Jeff J. Cornassel. "Indigenous People and Multicultural Citizenship." *Human Rights Quarterly* vol. 24 (2002) 126-151.
- Inter-American Commission on Human Rights. *The Human Rights Situation of Indigenous Peoples in the Americas*. OEA/Ser.L/II.108 Doc. 62 (October 20, 2000).
- Inter-American Commission on Human Rights. *Indigenous and Tribal Peoples' rights over their ancestral lands and natural resources*. OEA/Ser.L/V/II. Doc 56/9 (December 30, 2009).

- Inter-American Commission on Human Rights. *Resolution No 12/85. Case No 7615* (Brazil: March 5, 1985).
- Inter-American Court of Human Rights. *Case of González et al. ("Cotton Field") v. Mexico*. (Nov. 16, 2009).
- Inter-American Court of Human Rights. "IACHR Takes Case involving Colombia to the Inter-American Court." Press Release 144/14 (December 1, 2014).
- Inter-American Court of Human Rights. *Merits: Angel Alberto Duque Colombia. Case 12,84., Report No. 5/14*. (Colombia: April 2, 2014).
- Iverson, Duncan, Paul Patton and Will Sanders. *Political Theory and the Rights of Indigenous Peoples* (London; New York: Cambridge University Press, 2000).
- Lixinski, Lucas. "Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law." *The European Journal of International Law* vol. 21, no. 3 (2010) 585-604.
- McDonald, R. and P. Lad. *Joint national policy reviews of First Nations Children and family services* (Ottawa: Assembly of First Nations, 2000).
- Moravcsik, Andrew. "Taking Preferences Seriously: Liberal Theory of International Politics." *International Organizations* vol. 54 no. 1 (1997) 513-553.
- Morgenthau, Hans. *Politics Among Nations: The Struggle for Power and Peace*, 6th ed. (New York: Knopf, 1985).
- Native Women's Association of Canada. *Briefing Paper for Thematic Hearing for the Inter-American Commission on Human Rights: Missing and Murdered Aboriginal Women and Girls in British Columbia*. 114th Period of Sessions (March 28, 2012).
- Office of the Auditor General. *Programs for First Nations on Reserves: Status Report of the Auditor General of Canada to the House of Commons* (2011).
- Office of the United Nations High Commissioner for Human Rights. *National Human Rights Institutions: History, Principles, Roles and Responsibilities*. HP/PT/4/Rev.1 (United Nations Publication: 2010).
- R v. Morgentaler* (1988) 1 S.C.R 30, 1998 SCC 19556
- Risse, Thomas, Stephan C. Ropp, Kathryn Sikkink. *The Power of Human Rights: International Norms and Domestic Change* (London; New York: Cambridge University Press: 1999).
- Shaver, Lea. "The Inter-American Human Rights System: An Effective Institution For Regional Rights Protection?" *Washington University Global Studies Law Review* vol. 9 no. 4 (2010) 639-676.

Simmons, Beth. *Mobilizing for Human Rights: International Law in Domestic Politics* (London; New York: Cambridge University Press, 2009).

Stamatopoulou, Elsa. "Indigenous Peoples and the United Nations: Human Rights as a Developing Dynamic," *Human Rights Quarterly* vol. 16, No. 1 (Feb., 1994) 58-81.

Canada. Senate. Standing Senate Committee on Human Rights, *Enhancing Canada's Role in the OAS: Canadian Adherence to the American Convention on Human Rights*. Committee Report (May 2003).

Thornberry, Patrick. *Indigenous Peoples and Human Rights* (Manchester University Press, August 2002).

United Nations. Convention on the Elimination of all forms of discrimination against women. *Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*. CEDAW/C/OP.8/CAN/1 (March 6 2015).

United Nations. Human Rights Council. *The Situation of indigenous peoples in Canada: Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya*, A/HRC/27/52/Ad.2 (July 2014).

Van Ert, Gib. *Using International Law in Canadian Courts*, (Toronto: Irwin Law, 2008).