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Indigenous peoples' rights and the multicultural approach: For a twin-track dialogue between Canada and the Inter-American Human Rights System

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See table of contents

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Article abstract

This article addresses the importance of a twin-track dialogue between Canada and the Inter-American Human Rights System (IAHRS), particularly with regards to the rights of Indigenous peoples. It describes how Canada has engaged with the IAHRS as a major financial and diplomatic supporter, while at the same time resisting full adherence to *American Convention on Human Rights*, its protocols and other regional instruments. The article also examines the influence that Canada's multicultural approach of addressing national and ethnical differences has had in Latin America and in the IAHRS standards on the rights of Indigenous peoples. Finally, it maintains that the IAHRS has acknowledged states' obligations that could inspire Canadian efforts to implement the *United Nations Declaration on the Rights of Indigenous Peoples* and reconcile with Indigenous nations.

INDIGENOUS PEOPLES' RIGHTS AND THE MULTICULTURAL APPROACH: FOR A TWIN-TRACK DIALOGUE BETWEEN CANADA AND THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

Daniel Cerqueira[*]

This article addresses the importance of a twin-track dialogue between Canada and the Inter-American Human Rights System (IAHRS), particularly with regards to the rights of Indigenous peoples. It describes how Canada has engaged with the IAHRS as a major financial and diplomatic supporter, while at the same time resisting full adherence to *American Convention on Human Rights*, its protocols and other regional instruments. The article also examines the influence that Canada's multicultural approach of addressing national and ethnical differences has had in Latin America and in the IAHRS standards on the rights of Indigenous peoples. Finally, it maintains that the IAHRS has acknowledged states' obligations that could inspire Canadian efforts to implement the *United Nations Declaration on the Rights of Indigenous Peoples* and reconcile with Indigenous nations.

Cet article traite de l'importance d'un dialogue à deux voies entre le Canada et le Système interaméricain des droits humains (SIDH), particulièrement en ce qui concerne les droits des peuples autochtones. Il décrit comment le Canada s'est engagé auprès du SIDH en tant que principal soutien financier et diplomatique, tout en refusant d'adhérer pleinement à la *Convention américaine relative aux droits de l'Homme*, à ses protocoles et à d'autres instruments régionaux. L'article examine également l'influence que l'approche multiculturelle du Canada pour aborder les différences nationales et ethniques a eue en Amérique latine et dans les normes du SIDH sur les droits des peuples autochtones. Enfin, il soutient que le SIDH a reconnu les obligations des États qui pourraient inspirer les efforts canadiens pour mettre en œuvre la *Déclaration des Nations unies sur les droits des peuples autochtones* et se réconcilier avec les nations autochtones.

Este artículo aborda la importancia de un diálogo en vía doble entre Canadá y el Sistema Interamericano de Derechos Humanos (SIDH), particularmente en lo que respecta a los derechos de los pueblos indígenas. Describe cómo Canadá se ha comprometido con el SIDH como principal apoyo financiero y diplomático, mientras que al mismo tiempo se resiste a adherirse plenamente a la *Convención Americana sobre Derechos Humanos*, sus protocolos y otros instrumentos regionales. El artículo también examina la influencia que ha tenido el enfoque multicultural de Canadá para abordar las diferencias nacionales y étnicas en América Latina y en los estándares del SIDH sobre los derechos de los pueblos indígenas. Finalmente, sostiene que el SIDH ha reconocido las obligaciones de los Estados que podrían inspirar los esfuerzos canadienses para implementar la *Declaración de las Naciones Unidas sobre los Derechos de los Pueblos Indígenas* y reconciliarse con las naciones indígenas.

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Ever since Canada became a member of the Organization of American States (OAS) in 1990, its regional leadership has relied considerably on a foreign policy discourse that promotes democracy and human rights values. Canada has always championed the work of the Inter-American Human Rights System (IAHRS), though its image in the eyes of civil society organizations from or working in Latin America has been tainted by the abuses committed by Canadian extractive companies operating abroad.[1] Indeed, some of the concerns related to Canada's role in the abuses committed by Canadian mining companies in Latin America have been addressed in thematic hearings before the Inter-American Commission on Human Rights (IACHR).[2] Overall, the Canadian delegation has had a constructive dialogue with IACHR members and civil society petitioners in these hearings.[3]

Some authors[4] wonder if it would be more appropriate to call the Inter-American System the "Latin American Human Rights System" since Canada, the United States and most of the English-speaking Caribbean have not adhered to any instrument of the regional human rights system besides the *Charter of the Organization of American States*[5] (*OAS Charter*) and the *American Declaration on the Rights and Duties of Man* (*American Declaration*).[6]

Canada's hesitation to become a full player in the IAHRS is especially contradictory. On one hand, it has championed the work of IAHRS bodies when they endured reprisals by governments dissatisfied by their decisions. On the other hand, Canadian domestic authorities are barely familiar with or rely on the IAHRS' legal standards. This article examines how Canada could benefit from enhancing adherence to this regional human rights system and from using its standards as a parameter for improving policies regarding the rights of Indigenous peoples.

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1 Shin Imai, Leah Gardner & Sarah Weinberger, "The 'Canada Brand': Violence and Canadian Mining Companies in Latin America" (2017) Osgoode Legal Studies Research Paper No 17, online: <ssrn.com/abstract=2886584>. See also Daniel Cerqueira, "Making Canada again in the eyes of the international community", *Global Americans* (11 May 2016), online: <theglobalamericans.org/2016/05/making-canada-great-eyes-international-community/>.

2 FIAN-International and ETOS Consortium, "For Human Rights Beyond Borders: Handbook on how to hold States accountable for extraterritorial violations" (2017) at 42-43, online (pdf): *ETOs* <www.etoconsortium.org/nc/en/main-navigation/library/documents/detail/?tx_drblob_pi1%5BdownloadUid%5D=204>.

3 The thematic hearings regarding Canada can be accessed at the IACHR' YouTube channel: Comisión Interamericana de Derechos Humanos (last visited 22 March 2021), online: *Youtube* <www.youtube.com/user/ComisionIDH>.

4 For a detailed analysis of how the Latin American legal tradition has prevailed in the IAHRS' jurisprudence and the weaker adherence to the inter-American system by countries coming from a common law tradition, see Paolo Carozza, "The Anglo-Latin Divide and the Future of the Inter-American System of Human Rights" (2015) 5:1 Notre Dame J Intl & Comp L 153. See also Par Engstro & Courtney Hillebrecht, "Institutional change and the InterAmerican Human Rights System" (2018) 22:9 Intl JHR 1111.

5 *Charter of the Organization of American States*, 30 April 1948, 119 UNTS 1609 (entered into force 13 December 1951) [*OAS Charter*].

6 *American Declaration of the Rights and Duties of Man*, 2 May 1948, OAS Res. XXX, (1949) 43:S3 AJIL 133 [*American Declaration*].

The article makes it clear that the Canadian multicultural approach has influenced several Latin American countries' constitutional framework for addressing the relationship between the state and Indigenous peoples. The article does not delve into the question on whether or not multiculturalism was the proper model for ensuring Indigenous peoples' rights. Several scholars have already shown that the multilateral political enterprise of the sixties and seventies was a means of cultural assimilation and one of the underlying reasons why Indigenous self-determination has not been fully recognized in Canada or elsewhere.

Far from employing a revisionist view of the side effects of the multilateral approach, this article seeks to describe a few examples of how it influenced legal standards in Latin America and in the IAHRS, and how some of these standards evolved to build a more comprehensive set of states' obligations concerning Indigenous territorial rights and the right to Indigenous free, prior and informed consent, which the Canadian legal system has unpaired. Finally, it proposes a twin-track dialogue[7] whereby the most advanced IAHRS' standards on the rights of Indigenous peoples could have an added value in Canadian efforts to reconcile with Indigenous peoples and to review norms and policies that are not in line with the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*).[8]

I. Inter-American Human Rights System: Full adherence in Latin America, low engagement by the Caribbean, exceptionalism in Canada and the United States

References to human rights concerns in multilateral forums in the American continent have been present since the first Inter-American Conferences in the early 20th century.[9] These concerns inspired the April 1948 *OAS Charter*, which proclaims the fundamental rights of the individual as one of the pillars of regional integration.[10] The IAHRS was established as a by-product of the OAS, with the adoption of the *American Declaration*, also in April 1948.[11] It is composed of two organs, created several years later: the IACHR and the Inter-American Court of Human Rights (IACtHR), headquartered in Washington D.C. and San Jose, Costa Rica, respectively.

Established during the Fifth Meeting of Consultation of Ministers of Foreign Affairs, held in 1959 in Santiago, Chile, the IACHR is a principal institution of the OAS. It is comprised of seven members elected by the OAS General Assembly who perform

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7 This phrase aims to demonstrate the importance of incorporating and being influenced by the Inter-American standards on the rights of Indigenous peoples, just as some of these standards were developed under the influence of the Canadian historical and constitutional multicultural enterprise of the late seventies.

8 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61, UNGAOR, 61st Sess, UN Doc A/61/295 (2007) [*UNDRIP*].

9 Robert K. Goldman, "History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights" (2009) 31 Hum Rts Q 856 at 857-58.

10 *OAS Charter*, *supra* note 5 at preamble and art 3(l).

11 *American Declaration, supra* note 6.

their functions independently of any government. Its mandate is to promote respect for human rights in the Americas through the examination of individual complaints,[12] on-site visits, and thematic and country reports. It is also entitled to grant urgent precautionary measures and request provisional measures to the IACtHR, submit cases to this tribunal and serve the OAS as an advisory body regarding human rights.

Adopted in San Jose, Costa Rica, in 1969, the *American Convention on Human Rights*[13] *(ACHR)* is the most comprehensive Inter-American human rights instrument, containing a catalogue of 23 civil and political rights (Arts. 3 to 25) and one general clause on economic, social and cultural rights (Art. 26). The *ACHR* also deploys procedural and competence requirements for submitting individual complaints and creates the IACtHR, an autonomous judicial body whose purpose is to apply and interpret the *ACHR*.

The IACtHR is composed of seven judges elected by the states party to the *ACHR*. The judges perform their mandate independently of any government or state. The IACtHR is entitled to issue advisory opinions regarding the interpretation of the Convention and any other human rights instrument in the region when requested by any OAS member state or any organ listed in Chapter VIII of the *OAS Charter*.[14] At the IACHR's request or by its own motion, the Court can adopt provisional measures to prevent irreparable harm to the rights of persons in serious and extremely urgent situations. The Court can judge cases referred to it by the IACHR and inter-state communications[15] that deal with countries that have ratified the *ACHR* and accepted the tribunal's contentious jurisdiction.[16]

As of April 2021, 23 of 35 OAS member states had ratified the *ACHR*, 20 of which had accepted the IACtHR's jurisdiction. The Convention was denounced by Trinidad and Tobago in 1999[17] and by Venezuela in 2013.[18] With the exception of

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12 Upon adoption of the first Statute of the IACHR in 1959, OAS member States entrusted the IACHR with the mission of developing an awareness of human rights, making recommendations to governments regarding the adoption of progressive measures in favor of human rights, drafting studies, and serving as an advisory body to the OAS on this subject.

13 *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 123 at chap VII (entered into force 18 July 1978) [*ACHR*]. For an overview of the IACHR main functions from its creation to 2014, see Daniel Cerqueira & Katya Salazar, "The Functions of the Inter-American Commission on Human Rights Before, During, and After the Strengthening Process: Striking a Balance between the Desirable and the Possible" in Due Process of Law Foundation, *The Inter-American Human Rights System – changing times, ongoing challenges* (Washington, D.C.: Due Process of Law Foundation, 2016) 129.

14 These organs are the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, the Councils, the Inter-American Juridical Committee, the Inter-American Commission on Human Rights, the General Secretariat, the Specialized Conferences, and the Specialized Organizations.

15 Article 45(1) of the *American Convention* establishes that "[a]ny State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention": See *American Convention*, *supra* note 13, art 45(1).

16 *Ibid*, chap VIII.

17 Inter-American Commission on Human Rights (IACHR), Press Release, 10/98 (28 May 1998), online: *OAS* <www.cidh.org/Comunicados/English/1998/Press10-14.htm#10>.

18 IACHR, Press Release, 64/13, "IACHR Deeply Concerned over Result of Venezuela's Denunciation of the American Convention" (10 September 2013), online: *OAS* <www.oas.org/en/iachr/media_center/PReleases/2013/064.asp>.

Venezuela and Cuba, all Spanish-speaking countries in the region, along with Brazil, have ratified the Convention and accept the IACtHR' jurisdiction. Grenada, Jamaica and Dominica ratified the Convention but have not yet deposited the instrument of acceptance of the IACtHR's contentious jurisdiction. Suriname, Haiti and Barbados are the only Caribbean countries that adhere to the Convention and the court's jurisdiction.[19] As explained in the next paragraphs, Canada and the United States share a sort of "exceptionalism" towards the IAHRS. Both countries provide diplomatic shield and financial support to the IAHRS but resist ratifying the *ACHR* and other Inter-American instruments.

The term "exceptionalism" is commonly used in human rights handbooks to explain a country's tendency to criticize violations of international treaties by other nations, while its full adherence to these treaties is either pending or barred by domestic political and legal hindrances. In a broader sense, Canadian exceptionalism shares some tenets with the United States' tendency to speak out when other countries fail to comply with their international obligations, while their governments', judicial and legislative branches reject any source of authority beyond their own Constitutions.[20] The federalist limitations and the common law traditions that occasionally collide with civil law adjudicatory standards are also elements that explain, at least in part, why these two countries have not yet ratified any Inter-American instrument besides the *OAS Charter* and the *American Declaration*.[21] It should be noted that the collision between civil and common law adjudicatory standards is sometimes overstated by those who discourage the full adherence to the IAHRS. For decades, both legal traditions have been accommodated in said countries. Quebec (Canada), Louisiana (US) and Puerto Rico (US) have civil law systems that coexist with a common law adjudicatory structure of other provinces, local states and federal legal system.

Although Canadian and American exceptionalism concur in certain respects, there are important differences in how each country has engaged with international human rights systems overall and with the IAHRS. While US diplomats tend to justify the exceptionalism of their legal system by recalling the responsiveness of American political institutions to public appeals at a local level,[22] Canadian exceptionalism is

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19 "American Convention on Human Rights 'Pact of San Jose, Costa Rica' (B-32) - Signatories and Ratifications of the American Convention" (last visited 22 March 2021), online: *OAS* <www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm> [Signatories and Ratifications of the American Convention]. For a detailed description of the evolution and operation of the inter-American human rights organs, see James Cavallaro et al, *Doctrine, Practice and Advocacy in the Inter-American Human Rights System* (Oxford: Oxford University Press, 2019) at 19-77.

20 Paul W Kahn, "American Exceptionalism, Popular Sovereignty, and the Rule of Law" in Michael Ignatieff, ed, *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005) at 198-201.

21 Carozza, *supra* note 4.

22 Commenting on the United States' attachment to certain institutions banned a long time ago in other liberal democracies, Steiker recalls that "[a]s some Americans like to respond to our European detractors, it is not that Americans have different attitudes about capital punishment, it is that our political institutions are more responsive to the public will… This theory conveniently purports to explain both why the death penalty continues to flourish in the United States and how Western European nations managed to achieve universal abolition despite widespread popular support for capital punishment":

usually associated with historical contingencies and legal singularities.[23] From a historic perspective, US engagement goes back to 1948, during the adoption of the *OAS Charter* and the *American Declaration*, the founding instruments of the IAHRS. Canada is a much more recent player, as it deposited the instrument of ratification of the *OAS Charter* on 8 January 1990, 48 years after the organization was created. Only Guyana and Belize ratified the *OAS Charter* after Canada.[24]

Canada's exceptionalism also arises from the fact that its human rights situation is less turbulent than in Latin American and Caribbean countries. It is fair to say that the Canadian judicial system is more effective than the regional average. This explains, to some degree, why the Canadian legal community does not bring complaints or employ the mechanisms of the IAHRS as often as in other countries.[25] However, there has been a greater use of certain IACHR mechanisms, especially thematic hearings, in recent years to denounce Canada's failure to prevent and remedy abuses committed by its mining companies abroad. The IACHR has received extensive information that demonstrates that Canada provides political, legal and financial support to several mining companies involved in serious human rights violations in Latin America.[26]

On some occasions, Canada's fierce defense of Canadian mining companies' interests led Canada's diplomatic stance astray. After the 2009 Honduran *coup d'état*, for instance, former Prime Minister Stephen Harper was one of the few global leaders who did not condemn the illegal seizure of power and the gross human rights violations committed in subsequent months. The *de facto* government pushed forward several legal reforms that reduced social and environmental safeguards and decreased the transparency of extractive projects, many of which were licensed to Canadian companies.[27]

Nevertheless, since its incorporation in the OAS, Canada has backed the IACHR and the IACtHR on the several occasions that they were attacked by governments displeased with their decisions. It has also made regular and voluntary contributions to these organs and is surpassed only by the United States in this regard.[28] Changes in government have not shifted Canada's financial and diplomatic support to the IAHRS'

Carol Steiker, "Capital Punishment and American Exceptionalism" in Michael Ignatieff, ed, *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005) 57 at 73.

23 Peter Mckenna, *Canada and the OAS: from distance to full partner* (Ottawa: Carleton University Press, 1995).

24 Signatories and Ratifications of the American Convention, *supra* note 19.

25 For a more detailed explanation of why the Canadian legal community is less familiarized with the IAHRS, see Bernard Duhaime, "Ten Reasons Why Canada Should Join the American Convention on Human Rights" (2019) RGD 49 at 190 [Duhaime, "Ten Reasons Why"].

26 Daniel Cerqueira, "Case study 3.2 Prompting the ETOs Debate in the Inter-American Human Rights System" in FIAN-International and ETOS Consortium, *supra* note 2, 42.

27 Tyler Shipley, "The New Canadian Imperialism and the Military Coup in Honduras" (2013) 40:5 Latin American Perspectives 44 at 61. See also Todd Gordon, "Canada Backs Profits, not Human Rights, in Honduras", *Toronto Star* (16 August 2011), online: <www.thestar.com/opinion/editorialopinion/2011/08/16/canada_backs_profits_not_human_rights_in_honduras.html?rf>.

28 "Financial Resources" (last visited 16 May 2021), online: *IACHR* <oas.org/en/iachr/mandate/financial_resources.asp>.

organs.[29] Its role as a champion of the IAHRS, however, would be even more significant had it signed and ratified the instruments that comprise the regional human rights system.[30] Unfortunately, its prime ministers have made few commitments to do so.[31]

It is noteworthy that Canada is one of the very few countries in the Americas that has never nominated a candidate to the IACHR. The US signed the *American Convention* during the Jimmy Carter administration in 1977, but United States Senate has never taken serious steps to ratify this treaty.[32] Even so, 10 US nationals have been elected to the IACHR, more than any other country in the continent. Candidates from Caribbean countries that have not signed the American Convention have also been appointed to the IACHR by the OAS General Assembly (Antigua and Barbuda in 2001 and Saint Lucia in 2011),[33] making Canada an even more distant player.

English-speaking Caribbean countries, the United States and Canada's resistance to adhering to Inter-American human rights instruments is undoubtedly one of the main challenges for the effectiveness of the IAHRS.[34] Likewise, the United States and Canada's dual role as financial champions and ratification villains is a double-edged sword frequently wielded by governments confronting IAHRS organs. For instance, from 2011 to 2013, the IACHR experienced political turmoil spurred by some head of states – notably Dilma Rousseff in Brazil, Rafael Correa in Ecuador,[35] and Evo Morales in Bolivia. The diplomatic attacks these left-wing governments made, along with specific

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29 Bernard Duhaime, "Strengthening the Protection of Human Tights in the Americas: A Role for Canada?" in United Nations, *Human Rights Regimes in the Americas* (New York: United Nations, 2013) 84.

30 Bernard Duhaime, "Canada and the Inter-American Human Rights System: Time to Become a Full Player" (2012) 67:3 Intl J 639 at 644-53.

31 During the VIII Summit of the Americas, in April 2018, Prime Minister Justin Trudeau announced that Canada would begin the process of becoming a State party to the *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women* (*Belém do Pará Convention*). See OAS & MESECVI, "Committee of Experts celebrates political will of Canada to be part of the Belém do Pará Convention" (2018), online (pdf): *OAS* <www.oas.org/es/mesecvi/docs/CEVI-ComunicadoCanada-2018-EN.pdf>.

32 In November 1978, the Senate's Committee on Foreign Relations held four hearings on the possibility of ratifying the American Convention. No hearing has been held since. Except for Secretary of State Warren Christopher's address during the World Conference on Human Rights in Vienna in 1993, little effort has been made to ratify the Convention. Congress of the United States, "Senate Consideration of Treaty Document 95-21 American Convention on Human Rights" (last visited 22 March 2021), online: *Congress Gov* <www.congress.gov/treaty-document/95th-congress/21>. See also Elizabeth A. H. Abi-Mershed, "The United States and the Inter-American Court of Human Rights" in Cesare P. R. Romano, ed, *The Sword and the Scales – the United States and International Courts and Tribunals* (Cambridge: Cambridge University Press, 2009) 185 at 190.

33 IACHR, "Composition – Former IACHR Commissioners" (2021), online: *OAS* <oas.org/en/iachr/mandate/composition.asp>.

34 In its 2013 Annual Report, the IACHR made an analysis on the status of ratification of the Inter-American human rights instruments and recalled that "[f]or several years, the speeches delivered by the Chairs of the IACHR at the Summits of the Americas, the General Assemblies of the OAS, and the opening sessions of the IACHR periods of sessions have addressed the need for all States of the region to ratify and implement inter-American human rights treaties." See IACHR, "2013 Annual Report" (31 December 2013) at chap IV A, p 56-71, online: *OAS* <www.oas.org/en/iachr/docs/annual/2013/toc.asp>.

35 Daniel Cerqueira "Brazil, Ecuador and the Inter-American Human Rights System" *Americas Quarterly* (6 March 2015), online: <americasquarterly.org/blog/brazil-ecuador-and-the-inter-american-human-rights-system/>.

claims from governments of all political spectrums dissatisfied with the IACHR's decisions, pushed the institution to the brink.[36]

This environment gave rise to the creation of a working group at the OAS Permanent Council charged with making recommendations on "strengthening" the IAHRS.[37] Euphemistically called "strengthening process", this three-year long period witnessed a sort of diplomatic catharsis against the IACHR as members voiced their disdain for any Inter-American organ deemed to be spoiled by its northern funders: the United States and Canada. Although both countries played a crucial role in downplaying the attacks against the IACHR in OAS political bodies, the governments leading the offensive made clear that its northern peers lacked the political legitimacy to speak up in defense of a system with which they did not fully engage.[38]

Although most of the IACHR's left-wing detractors are no longer in power, OAS member states' coordinated strikes against the IAHRS are far from over. Recent anti-globalist paranoia has shaped a recent alliance of right-wing governments in the region, resulting in constant unilateral insults (many coming from the Donald Trump White House) and occasional multilateral criticism against international human rights bodies. Although these attacks are mostly directed at UN human rights bodies, in April of 2019, the IAHRS was criticized by five South American countries then led by right-wing governments: Argentina, Brazil, Chile, Colombia, and Paraguay.[39]

In this scenario, Canada's deeper engagement could help calm the stormy waters in which the IAHRS organs must sail. Although the election of Joe Biden as President of the United States brought calmer waters to human rights multilateralism, the rise of anti-globalist discourse on the US social and political landscape requires additional safe harbours if the tide becomes unstable again. Canada's ratification of the *ACHR* and deeper commitment to the IAHRS would be certainly helpful in this regard.

Bernard Duhaime's recent essay lists ten reasons why Canada should join the *ACHR* and fully participate in the IAHRS. The last of this list summarizes how timely and coherent with Canadian tradition this is:

> Finally, Canada should join the American Convention because it's the Canadian thing to do. Indeed, Canada has a rich history of being a supporter

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36 Douglas Cassel, "The Perfect Storm: Count and Balance" (2014) 7:19 Aportes DPLF 20 at 20-24.

37 Permanent Council of the Organization of American States, "Special Working Group to Reflect on the Workings of the IACHR with a view to Strengthening the IAHRS" (last visited 22 March 2021), online: *OAS* <oas.org/council/workgroups/Reflect%20on%20Ways%20to%20Strengthen.asp>.

38 In 2012, Rafael Correa managed to establish a short-lived "Conference of States Parties to the American Convention on Human Rights", excluding the United States, Canada and part of the Caribbean, as a forum for discussing the challenges faced by the bodies of the IAHRS. See Daniel Cerqueira, "The Conferences of States Parties to the American Convention on Human Rights: Form over Substance" (2014) 7:19 Aportes DPLF 61.

39 Daniel Cerqueira, "Impericia jurídica, insolencia histórica e incoherencia diplomática: a propósito del manotazo de cinco países de Sudamérica al Sistema Interamericano de Derechos Humanos" (3 May 2019), online (blog): *Blog DPLF – Justicia en las Américas* <dplfblog.com/2019/05/03/impericia-juridica-insolencia-historica-e-incoherencia-diplomatica-a-proposito-del-manotazo-de-cinco-paises-de-sudamerica-al-sistema-interamericano-de-derechos-humanos/>.

> of human rights. After all, the *Universal Declaration of Human Rights (UN)*[40] was drafted in part by a Canadian, John Humphrey, as many Canadian human rights defenders like to recall. This being said, can a State wishing to be a universal or regional champion for human rights not join its own region's basic human rights instruments? Asking the question is answering it: Canada should join the American Convention because it's 2018.[41]

This article does not intend to add to the list of benefits Canada's deeper engagement with the IAHRS would entail. Its goal is rather to share a brief account of how some legal doctrine forged under the influence of the Canadian multicultural approach either influenced or shared similar tenets with legal and political processes in Latin America in a concrete realm of the human rights agenda: Indigenous peoples' rights. This dialogue has been a one-track so far, as the legal standards developed by Latin American countries and the states' obligations on the rights of Indigenous peoples established by the IAHRS have not traveled the other way. This article maintains that a twin-track dialogue between Canada and the IAHRS could serve the recent efforts of the Canadian state to reconcile with its own Indigenous nations.

II. Multicultural constitutionalism and intercultural guarantees in criminal proceedings: the Canadian way and its influence in Latin America

From Canada to Chile, the Indigenous nations[42] that preceded the formation of the region's current sovereign states have endured centuries of genocide, discrimination, and many forms of land dispossession. Different states have tried to rebuild the relationship with Indigenous communities in different ways. This section addresses two specific aspects of these efforts within Canadian legal discourse and its

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40 *Universal Declaration on Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948).

41 Duhaime, "Ten Reasons Why", *supra* note 25 at 205.

42 The first inhabitants of what is now the Canadian territory are named by different terms by the country's legal system. This includes First Nations, Aboriginal peoples and Indigenous peoples. Section 35 of the Canadian Constitution recognizes three groups of Indigenous peoples: Indians, Métis and Inuits. Other Aboriginal peoples who are not ethnically Métis or Inuit are usually referred to as First Nations. For the purposes of this article, the term "Indigenous peoples" coincides with the criteria established in the *ILO Convention 169*. The objective criteria set forth in Art. 1(b) of this treaty establishes that Indigenous peoples are so defined "on the account of their descent from the populations which inhabited a given country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions". As for subjective criteria, Art. 2 asserts that "[s]elf-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply": *International Convention Concerning Indigenous and Tribal Peoples in Independent Countries No. 169*, 27 June 1989, ILC/76 No 169, art 1(a)(b) (entered into force: 5 September 1991) [*ILO 169*]. For a brief explanation on the terms conventionally used in Canada to refer to its different Indigenous nations, see *Missing and Murdered Indigenous Women in British Columbia*, *Canada,* (2014), Inter-Am Comm HR, No OEA/Ser.L/V/II. Doc. 30/14 at paras 22-25, online (pdf): *OAS* <www.oas.org/en/iachr/reports/pdfs/Indigenous-Women-BC-Canada-en.pdf>.

influence in Latin America, namely, multicultural constitutionalism as a model to accommodate ethnic differences and intercultural guarantees in criminal proceedings involving Indigenous defendants. These categories are just two examples Latin American countries have adopted.

As stated previously, this account of the multicultural influence in Latin America is purely descriptive. The multicultural approach has not been immune to criticism and has caused various institutional side effects for Indigenous peoples and national minorities in Canada,[43] Latin America,[44] and elsewhere.[45] But, rather than examining the adverse consequences of importing intellectual ventures into distinct domestic environments, this section briefly describes concrete examples of how Canada's handling of cultural diversity influenced Latin American countries in their efforts to reshape their constitutional frameworks. Likewise, it describes a few examples of intercultural guarantees acknowledged by the Canadian Supreme Court in criminal trials involving Indigenous defendants and its influence in the adjudication of emblematic cases judged by criminal chambers and high courts in Latin America.

A. Multicultural constitutionalism

In the early 19th Century, most of those tasked with drafting the new Latin American constitutions looked to the European and US constitutional processes for advice and inspiration. Instigated by the liberal model of "one nation, one state", the local ruling class sought to impose a single national identity on every person living under the laws of the new republics.[46] Overall, the Latin American republics limited the rights set forth in these first constitutions to a short list of individual freedoms and political rights, thus eliminating the possibility for Indigenous peoples to exercise their rights as a collective group.[47] The corollary of the liberal constitutional model was therefore the assimilation of Indigenous peoples and their conversion into citizens governed by one set of laws.[48]

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43 See, for instance, Chris Andersen, *Metis: Race, Recognition, and the Struggle for Indigenous Peoplehood* (Vancouver: University of British Columbia Press, 2014).

44 Donna Lee Van Cott, *The Friendly Liquidation of the Past: The Politics of Diversity in Latin America* (Pittsburgh: University of Pittsburgh Press, 2000).

45 See, for instance, Will Kymlicka & Magda Opalski, *Can Liberal Pluralism be Exported? Western Political Theory and Ethnic Relations in Eastern Europe* (Oxford: Oxford University Press, 2002); James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995); Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995).

46 One of the most prominent experts in the historical evolution of the term "nation", Eric Hobsbawm mocks the fact that the founding fathers of Italian unification had some clarity of what Italy meant as a state in 1871, but they were unable to define what Italians meant as a nation: Eric J. Hobsbawm, *Nations and Nationalism since 1780: programme, myth, reality* (Cambridge: Cambridge University Press, 1992) at 19.

47 José A. Aguilar, "Multiculturalism and Constitutionalism in Latin America" (2014) 4:1 Notre Dame J Intl & Comp L 19 at 24.

48 In Canada, one of the main expressions of the assimilationist paradigm is the *Indian Act* of 1876. The Royal Commission on Aboriginal Peoples (RCAP) concluded that this act was a major source of

In the second half of the 20th Century, the assimilationist paradigm started to be replaced in legal discourse by an integrationist one which recognized Indigenous peoples' cultural identity. States' policies and laws were based on two main assumptions in this new paradigm: i) Indigenous peoples tend to perish as a collective group since their social and cultural norms are unsuitable to the contemporary economic reality; and ii) governments must facilitate the integration process and ensure basic economic and social rights for Indigenous communities.[49] These assumptions prevailed not only in Latin America but also in other regions and influenced the approach of intergovernmental forums such as the International Labour Organization (ILO). Adopted in 1957, *ILO Convention 107* (*ILO 107*) clearly endorses the integrationist approach.[50] Three decades after its adoption, the international community reviewed its content. According to the ILO, the *ILO 107*:

> was based on the underlying assumption that the only possible future for indigenous peoples was integration into the larger society and that others should make decisions on their development. In 1986, an expert committee convened by the ILO Governing Body concluded that "the integrationist approach of the Convention was obsolete and that its application was detrimental in the modern world." Consequently, the ILO undertook a revision of Convention No. 107 and finally adopted ILO Convention No. 169 on indigenous and tribal peoples in 1989.[51]

Moving back to Latin America, it was not until the consolidation of the so-called "multicultural debate" of the sixties and seventies that cultural identity became the point of reference in states' relationship with Indigenous peoples. The expression "multicultural debate" is used here to describe the theoretical, legal, and political model initially implemented in the US and Canada to address each country's cultural and ethnic diversity.[52]

This debate strengthened acceptance of multicultural societies where some questions of cultural difference were settled by recognizing national and/or ethnic

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restriction of rights and deprivation of Indigenous cultural identity. The RCAP has also asserted that the *Indian Act* "[gives] the state powers that range from defining how one is born or naturalized into 'Indian' status to administering the estate of an Indian person after death. Conceived under the nineteenth century's assumptions about inferiority and incapacity and an assimilationist approach to the 'Indian question', the Indian Act produced gross disparities in legal rights." Government of Canada, Indian and Northern Affairs Canada, "Report of the Royal Commission on Aboriginal peoples" (2 November 2016) at vol 1, part 2, chapter 8.3, online: *Government of Canada* <www.collectionscanada.gc.ca/webarchives/20071115053257/http://www.aincinac.gc.ca/ch/rcap/sg/sgmm_e.html>.

49 Raquel Z. Yrigoyen F., "A los veinte años del Convenio 169 de la OIT: Balance y retos de implementación de los derechos de los pueblos indígenas en Latinoamérica" in Raquel Z. Yrigoyen F., ed, *Pueblos Indígenas: Constituciones y Reformas Políticas en América Latina* (Lima: Instituto Internacional de Derecho y Sociedad, 2010) at 18-23.

50 *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-tribal Populations in Independent Countries No. 107,* June 26 1957, ILC/40 No 107 (entered into force 2 June 1959) [*ILO 107*].

51 "Understanding the Indigenous and Tribal Peoples Convention" (19 February 2013) at 14, online (pdf): *International Labour Organization* <www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_205225.pdf>.

52 Kymlicka, *supra* note 45 at 10-33.

minorities' differentiated rights. This is what Young calls "differentiated citizenship", that is, the adoption of a legal framework based on cultural, ethnic and national differences.[53] In its constitutional dimension, this debate sought to equalize the current conditions of groups who had suffered from historical disadvantages in comparison to other social groups.

Plainly speaking, multiculturalism is an Anglo-American intellectual enterprise considerably based on the Canadian[54] view of the cultural mosaic. After a wave of biculturalism as the dominant discourse aimed at calming independentist impulses in Quebec, multiculturalism started to emerge in the sixties. It was embraced as the official government policy at the end of the seventies and then as law in the *Multiculturalism Act* of 1988.[55] This trend triggered the rearrangement of the Canadian constitution in 1982[56] and accommodated the recognition of ethnic and cultural differences with a liberal account of democratic deliberation.

The founding father of multiculturalism in Canadian political discourse (some would say of contemporary Canada as well),[57] Prime Minister Pierre Elliot Trudeau, proclaimed it as an official governmental policy in 1971. In response to the acute threat of Quebec nationalism and in an attempt to forge a unified Canadian identity despite national and cultural differences, Trudeau looked to multiculturalism and human rights. His commitment to a Canadian unity based on individual rights convinced him to force the *Constitutional Charter* through Parliament.[58]

The *Constitution Act* of 1982 addresses a broad range of issues related to the cultural differences of Canada's ethnic and Indigenous groups, including

> the relationship between English and French Canada; federalism more generally, including the status of Quebec; language rights; the status of Aboriginal peoples; Canada's immigration and integration strategies; constitutional guarantees for religious schools; affirmative action; and a general guarantee of equal protection to men and women all tell a complex story of diversity, embracing First Nations, settler communities, and new immigrants, and consolidated through a long and incremental period of constitution building.[59]

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53 Iris Marion Young, "Politics and Group Difference: A Critique of the Ideal of Universal Citizenship" (1989) 99:2 Ethics 250 at 258.

54 The most prominent theorists of multiculturalism, such as Taylor, Trully, and Kymlicka, are Canadian and teach in Canadian universities. See Amy Gutmann, ed, *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994).

55 Laurence Brosseau & Michael Dewing, *Canadian Multiculturalism*, No. 2009-20-E (Ottawa: 15 September 2009, revised 3 January 2018), online: *Library of Parliament* <lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/200920E>.

56 *Constitution Act*, RSC 1982, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

57 See, for instance, William Johnson "Founding father" *The Globe and Mail* (29 September 2000), online: <www.theglobeandmail.com/opinion/founding-father/article770056/>.

58 See, for instance, Andrew Lui, *Why Canada Cares: Human Rights and Foreign Policy in Theory and Practice* (Montreal: McGill-Queen's University Press, 2012).

59 Stephen Tierney, "Introduction: Constitution Building in a Multicultural State" in Stephen Tierney, ed, *Multiculturalism and the Canadian Constitution* (Vancouver: University of British Columbia Press, 2007) 3.

Inspired by the Canadian example, several Latin American countries in the eighties and nineties abandoned an integrationist paradigm and redefined their respective societies as multicultural[60] or pluricultural.[61] Guatemala (1985), Nicaragua (1987), Brazil (1988), Colombia (1991), Paraguay (1992), and Peru (1993) enacted new constitutions that incorporated aspects of the multicultural model. Other countries such as Mexico (1992), Argentina (1994) and, more recently, Costa Rica (2015) followed a similar path through constitutional reforms. Ecuador and Bolivia went even further in their embrace of multicultural constitutionalism. Adopted in 2008 and 2009, respectively, their new constitutions define the two states, and not the societies coexisting under the same legal system, as plurinational. [62] For some scholars, the Ecuadorian and Bolivian processes inaugurated a new paradigm – plurinational constitutionalism– in the relationship between states and Indigenous peoples.[63]

It should be noted that the period in which most Latin American countries redefined their societies as multicultural (eighties and nineties) is also the period when Canada expanded its relations with the region, especially in Central America. During Prime Minister Brian Mulroney's term (1984-1993), Canada became increasingly involved in the Central American crises, mainly supporting transitions to democracy, mediation, peacekeeping and peacebuilding.[64]

In general terms, Canada and the Latin American countries that embrace multicultural constitutionalism share the promotion of legal pluralism, for example, the acknowledgment of some degree of self-government for Indigenous peoples, such as the right to choose local authorities through autonomous electoral procedures (especially in Mexico and Guatemala); and the promotion of Indigenous languages

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60 While multiculturalism describes those societies in which a dominant cultural collective coexists with ethnical and/or cultural minorities under liberal principles of tolerance and diversity, plurinationalism refers to the interactions of multiple nations seeking to overcome colonial patterns. "In formal terms, the state in the first case is a reformed liberal state that recognizes minority rights for cultural communities; in the second case, the state is structurally transformed into a plurinational state that recognizes Indigenous nations and their territorial rights." See Roger Merino, "Reimagining the Nation-State: Indigenous Peoples and the Making of Plurinationalism in Latin America" (2018) 31:4 Leiden J Intl L 773.

61 Some authors make a distinction between multicultural approach - that defines the initial constitutional recognition of certain basic indigenous claims by countries such as Canada (1982), Guatemala (1985), and Brazil (1988) - and the pluricultural one - that characterizes a deeper acknowledgement of rights such as identity, multilingual education, cultural autonomy and judicial self-governance in the new charters of Colombia (1991), Paraguay (1992), and Peru (1993), or broad constitutional reforms, such as the one endured by Mexico in 1992. See, for instance, Raquel Z. Yrigoyen, "Pluralismo jurídico y jurisdicción indígena en el horizonte del constitucionalismo pluralista" in Cesar A Baldi, ed, *Aprender desde o sul: novas constitucionalidades, pluralismo jurídico e plurinacionalidade* (Belo Horizonte: Fórum, 2015) at 35.

62 Edwin Cruz, "Estado plurinacional, interculturalidad y autonomía indígena: una reflexión sobre los casos de Bolivia y Ecuador" (2013) Revista Via Iuris 14.

63 See, for instance, Roger Merino, *supra* note 61. See also Pascal Lupien, "The incorporation of indigenous concepts of plurinationality into the new constitutions of Ecuador and Bolivia" (2011) 18:3 Democratization J 774.

64 See, for instance, Peter McKenna, "Canada and Latin America: 150 years later" (2018) 24:1 Canadian Foreign Policy J 18.

and intercultural education systems.[65] But one particular legal tool that fits squarely in the multicultural approach has developed with Latin American influence rather than Canadian: the right to free, prior and informed consultation and consent (FPIC).

Conceived as a intercultural dialogue between the state and Indigenous peoples, FPIC is the result of decades of Indigenous organizing that bore fruit with the adoption of *ILO Convention 169 on Indigenous and Tribal Peoples* in June 1989 *(ILO 169)*.[66] This treaty formalizes the international commitment to preserve Indigenous cultures and recognizes their power to autonomously make decisions about their development priorities and participate directly in any state decisions that affect them.[67] FPIC and other states' obligations established in *ILO 169* have been amplified by a long list of decisions taken by the IAHRS organs,[68] some of which will be discussed in Section 3, below.

14 of the 23 countries that ratified *ILO 169* are Latin American.[69] The constitutions of Venezuela (1999), Ecuador (2008) and Bolivia (2009) contain specific provisions on FPIC. In most Latin American countries, courts have acknowledged FPIC as a component of other constitutional rights, such the right to collective property, participation, autonomy and self-determination.[70] Regardless of how FPIC has been protected, it is understood as a corollary of any multicultural constitutional framework in the region.

The content of states' obligations concerning FPIC has been expanded by supranational human rights bodies and several countries' high courts. Despite these developments, prior consultation processes have often meant the "proceduralization" of territorial dispossession to the detriment of Indigenous peoples' self-determination and autonomous governance of their territories. Indigenous communities often participate in consultation processes without a real capacity to change governmental decisions that affect them. In this sense, overreliance on FPIC and on other normative institutions embedded with the multicultural approach has compromised Indigenous emancipation from cultural and legal domination.[71]

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65 Giulia Parola et al, "Legal pluralism: an approach from the new Latin American constitutionalism and the jury of the indigenous court" (2019) 6:3 Revista de Investigações Constitucionais, 621, online: <https://doi.org/10.5380/rinc.v6i3.69579>.

66 *ILO 169*, *supra* note 42.

67 *Ibid*, arts 6, 7, 15, 16 and 17.

68 Due Process of Law Foundation & Oxfam, "Derecho a la Consulta y al consentimiento previo, libre e informado en América Latina" (2015) at 13-16, online (pdf): *DPLF* <www.dplf.org/sites/default/files/informe_consulta_previa_2015_web-2.pdf>.

69 These countries are Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru and Venezuela. Only five Latin American and Spanish speaking Caribbean countries have not ratified this instrument: Cuba, El Salvador, Panama, Dominican Republic and Uruguay.

70 Comisión Económica para América Latina, "Los pueblos indígenas en América Latina - avances en el último decenio y retos pendientes para la garantía de sus derechos" (2014) at 14-18, online (pdf): *CEPAL* <www.cepal.org/sites/default/files/publication/files/37050/S1420783_es.pdf>.

71 For a detailed description of how the subject status of Indigenous peoples, FPIC and other legal institutions emerged out of international law without constituting a genuine venue for decolonization, see Stephen Young, *Indigenous Peoples Consent and Rights: troubling subjects* (Londres: Routledge, 2020).

Regardless of its shortcomings, FPIC has played a fundamental role in overcoming the integrationist paradigm, the focus of *ILO 107*. On many occasions, it is the most important or even the sonly tool available to Indigenous communities to prevent or mitigate the misappropriation of their lands and natural resources.[72]

Although the Canadian Supreme Court (CSC) has a vast jurisprudence acknowledging the duty to consult,[73] Latin American courts and the organs of the IAHRS are the sources of the most comprehensive legal standards worldwide. The region is a sort of FPIC wonderland, at least in legal discourse and despite the lack of effectiveness in ensuring Indigenous peoples' self-determination. Paradoxically, while this status may have never been obtained without the influence of the multicultural debate, Canada has not signed *ILO 169* and objected to the approval of *UNDRIP* when it was being discussed by the UN General Assembly.[74] Adopted in 2007, *UNDRIP* is the second most important international document regarding Indigenous peoples' rights after *ILO 169*.

In 2010, the Harper administration revised Canada's objection to *UNDRIP*, but raised several caveats. These were ultimately lifted by Justin Trudeau in May 2016. In 2017, Trudeau's cabinet issued a statement titled "Principles respecting the Government of Canada's relationship with Indigenous Peoples".[75] This statement highlighted the government's commitment to implementing *UNDRIP* "through the review of laws and policies, as well as other collaborative initiatives and actions".[76] Proposed as a way to fulfill its commitments, *Bill C-262* was approved in the House of Commons in 2016 but ultimately did not pass into law, mostly due to the opposition's delaying tactics in the Senate.[77] The liberal government introduced *Bill C-15*, which is based to a large extent on *Bill C-262*, in Parliament in December 2020.[78]

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72 Cathal Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (Londres: Routledge, 2015). See also Daniel Cerqueira, "From the right to prior consultation to self-determination: reflections from the DPLF experience" (14 October 2020), online (blog): *Blog DPLF – Justicia en las Americas* <dplfblog.com/2020/10/14/from-the-right-to-prior-consultation-to-self-determination-reflections-from-the-dplf-experience/>.

73 Martin Papillon &Thierry Rodon, "From consultation to consent" in Claire Wright & Alexandra Tomaselli, eds, *The politics of Indigenous participatory rights in Canada: The Prior Consultation of Indigenous Peoples in Latin America Inside the Implementation Gap* (Londres: Routledge, 2019) 261 at 264-71.

74 *UNDRIP*, *supra* note 8.

75 Canada, Department of Justice, "Principles Respecting the Government of Canada's Relationship with Indigenous Peoples" (2018), online (pdf): *Government of Canada* <www.justice.gc.ca/eng/csj-sjc/principles.pdf>.

76 *Ibid* at 3.

77 Papillon & Rodon, *supra* note 77 at 261-64.

78 Titled "United Nations Declaration on the Rights of Indigenous Peoples Act", Bill C-15 seeks to "affirm the Declaration as a universal, international, human rights instrument with application in Canadian law and provide a framework for the Government of Canada's implementation of the Declaration." See Canada, Department of Justice, "Bill C-15 – United Nations Declaration on the Rights of Indigenous Peoples Act" (12 April 2021), online (pdf): *Government of Canada* <www.justice.gc.ca/eng/declaration/un_declaration_EN.pdf>. For a critical view of the text of this draft Bill, see Diabo Russ, "Indigenous Peoples Should Reject Canada's UNDRIP Bill C-15: It's not all That Meets the Eye" (2020) 31:3 Indigenous Policy J, online: <indigenouspolicy.org/index.php/ipj/article/view/723/689>.

In 2016, the OAS General Assembly followed the UN's lead and approved the *American Declaration on the Rights of Indigenous Peoples*.[79] Canada did not "take a position" on the declaration, adding another unfortunate chapter to its failure to adhere to the Inter-American human rights normative regime.[80] Indeed, it is another chapter in the long story of Canadian exceptionalism and discredits Canada's image as sponsor of human rights and multilateralism. The tense relationship with the UN bodies tasked with reviewing the integrationist approach embedded in the *ILO 107*, and the constant objection/abstention to endorsing international commitments on the rights of Indigenous peoples, are one of the most distinctive feature of this story.[81] In this regard, Thompson underscores that the "activities of the Working Group on Indigenous Populations had revealed a side of Canada at odds with its reputation as a defender of both human rights and the UN human rights system."[82]

B. Intercultural guarantees in criminal proceedings

This section focuses on two concrete legal standards the CSC developed to address interactions between the Canadian criminal justice system and Indigenous peoples. These standards were created in part as a response to the over-representation of Indigenous peoples in the Canadian correctional system,[83] but are also an expression of the legal pluralism at the heart of the multicultural approach.

In general terms, "legal pluralism refers to the idea that in any one geographical space defined by the conventional boundaries of a nation state, there is more than one law or legal system."[84] This concept also concerns the recognition of Indigenous peoples' own legal systems and the existence of differentiated rules for judicial authorities' interpretation of applicable norms.[85]

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79 OAS, General Assembly, 3rd Sess, *American Declaration on the rights of indigenous peoples,* OR AG/RES. 2888 (XLVI-O/16) (2016).

80 During approval of this Declaration, the Canadian delegation added the following note: "Canada reiterates its commitment to a renewed relationship with its Indigenous peoples, based on recognition of rights, respect, cooperation and partnership. Canada is now fully engaged, in full partnership with indigenous peoples in Canada, to move forward with the implementation of the United Nations Declaration on the Rights of Indigenous Peoples in accordance with Canada's Constitution. As Canada has not participated substantively in recent years in negotiations on the American Declaration on the Rights of Indigenous Peoples, it is not able at this time to take a position on the proposed text of the Declaration. Canada is committed to continue working with its partners in the OAS." *Ibid* at footnote 2.

81 Andrew S. Thompson, *On the Side of Angels: Canada and the United Nations Commission on Human Rights,* (Vancouver: UBC Press, 2017).

82 *Ibid* at 87.

83 Although Indigenous peoples account for less than 5 % of the general Canadian population, as of January 2020, they surpassed 30 % of the entire federal inmate population. See Government of Canada, Public Safety Canada, Press release, "Indigenous People in Federal Custody Surpasses 30% Correction Investigator Issues Statement and Challenge" (21 January 2020), online: *Government of Canada* <www.canada.ca/en/public-safety-canada/news/2020/01/indigenous-people-in-federal-custody-surpasses-30-correctional-investigator-issues-statement-and-challenge.html>.

84 Margaret Davies, "Legal pluralism" in Peter Cane & Herbert M. Kritzer, eds, *The Oxford handbook of empirical legal research* (Oxford: Oxford University Press, 2012) 805 at 805.

85 For a comprehensive study on legal pluralism in International Law, see Rudiger Wolfrum, "Legal Pluralism from the Perspective of International Law" in Matthias Kötter et al, eds, *Non-State Justice Institutions and the Law. Governance and Limited Statehood* (Londres: Palgrave Macmillan, 2015) 216.

Indigenous languages do not carry the status of official languages in Canada. Nevertheless, the access to an interpreter is a constitutionally protected right enshrined in Section 14 of the *Canadian Charter of Rights and Freedoms*.[86] In *R. v. Tran* (1994), the CSC concluded that an interpreter must be appointed when one or both of the following conditions are met:

> 1) it is clear to the judge that the defendant is having difficulty expressing him or herself or understanding the proceedings due to language barriers and 2) the defendant requests an interpreter and the judge deems it to be justified.[87] Pursuant to this judgment, the right to interpretation must be ensured from the first stages of the proceedings and meet a basic standard of "continuity, precision, impartiality, competency and contemporaneousness".[88]

In *R. v. Denny* (2014), the accused brought a motion for the services of a Mi'kmaq interpreter. Based on affidavit evidence, the Supreme Court of Nova Scotia was satisfied that the defendant needed an interpreter to have a trial where he could understand and be understood "at the level that a person who would be fully conversant in English."[89] In *R. v. Cheba* (1993), the trial judge declared a mistrial because of lack of interpretation services for the defendant, a native Chippewan speaker.[90] Though he did not claim an infringement of his Charter rights, the judicial authority noticed that the accused was unable to understand the proceedings. The court stated that the "fairness" of the trial called for judicial intervention and ordered a new trial.

In addition to the right to an interpreter, the Canadian legal system and case law protect other aspects of fair trial guarantees in criminal proceedings involving Indigenous peoples. One of these guarantees was developed through the interpretation of Section 718.2(e) of the *Canadian Criminal Code*, which reads as follows:

> A court that imposes a sentence shall also take into consideration the following principles:
>
> e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.[91]

Since *R. v. Gladue* (1999), the CSC has developed interpretative rules on the meaning of "take into consideration." This requires examining:

> a) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the

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86 *Canadian Charter of Rights and Freedoms*, s 14, Part I of the *Constitution Act*, *1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11, which affirms: "[a] party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter."

87 *R v Tran*, [1994] 2 SCR 951 at para 49, 117 DLR (4th) 7.

88 *Ibid* at para 44.

89 *R v Denny*, 2014 NSSC 324 at para 4, [2014] NSJ No 486.

90 *R v Cheba*, [1993] SJ No 17, 18 WCB (2d) 358.

91 *Criminal Code,* RSC 1985, c C-46, s 718(2)(e).

> circumstances for the offender because of his or her particular aboriginal heritage or connection. In order to undertake these considerations, the sentencing judge will require information pertaining to the accused. Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people, and of the priority given in aboriginal cultures to a restorative approach to sentencing. In the usual course of events, additional case-specific information will come from counsel and from a pre-sentence report which takes into account the systemic or background factors and the appropriate sentencing procedures and sanctions, which in turn may come from representations of the relevant aboriginal community.[92]

In more recent cases, the CSC pointed out lower courts' obligation to "take into consideration" an Indigenous defendant's "circumstances" in assessing the unlawfulness of his or her conduct. In *R. v. Ipeelee* (2012), the CSC instructed Canadian courts to abandon the presumption that all Indigenous persons and communities share the same cultural values and worldviews and required that "a reasonable justification based on defendant's particular circumstances" be taken into account.[93]

ILO 169,[94] *UNDRIP*,[95] and the *UN Convention on the Rights of the Children*[96] also acknowledge Indigenous peoples' right to an interpreter and to express themselves in their own language in judicial proceedings. The rules deployed by these instruments and the standards established by Canadian case law mentioned above share several aspects. In Latin America, the acknowledgment of the right to an interpreter coincided with or was reaffirmed by the production of norms following the adoption of multicultural constitutions. Most of the criminal proceeding codes adopted or amended thereafter echoed institutions inherent to the multicultural constitutional model, such as legal pluralism and the promotion of Indigenous languages in the region.

The rise of legal pluralism and certain judicial guarantees applicable to Indigenous peoples is a by product of the multiculturalist enterprise that goes beyond the Canadian experience. To be sure, this very experience and its impact in the Canadian legal system can be rooted in a broader trend that has also influenced the way other nations and intergovernmental bodies have addressed the relation between the state and Indigenous peoples. However, the concrete standards developed in Gladue and similar cases have had a direct influence in emblematic trials involving Indigenous peoples in Latin America.

In the most emblematic of these cases in Peru, for instance, the Transitional Criminal Chamber of Bagua (*Sala Penal Liquidadora Transitoria de Bagua*) conducted a trial related to the violent events that took place in the Devils Curve of a highway near the Amazonian city of Bagua on 5 June 2009. Thousands of Indigenous people had peacefully blocked the highway amid a nationwide strike in opposition to the United States and Peru Free Trade Agreement and the environmental impact it would have on

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92 *R v Gladue*, [1999] 1 SCR 688.
93 *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433.
94 *ILO 169*, *supra* note 42, art 12.
95 *UNDRIP*, *supra* note 8, art 13.2.
96 *Convention on the Rights of the Child*, 21 November 1989, 1577 UNTS 27531, art 40(2) (entered into force: 2 September 1990).

their traditional lands. An ill-conducted police operation aimed at breaking up the blockade pushed some demonstrators to respond violently.[97]

The clash between the Peruvian National Police and Indigenous peoples at the Devils Curve sparked several other violent events in the surrounding areas, resulting in the death of 24 police officers and 10 Indigenous civilians. The "Baguazo" is the most violent conflict Peru has experienced since the end of its internal armed conflict in the late nineties.[98] These events gave rise to six criminal probes, but so far the Devils Curve case is the only that has been heard by a District Court. The case reached the Peruvian Supreme Court in 2018. 53 people faced charges, 23 of whom belong to the awajún-wampis Indigenous groups. They were charged with both serious offenses, such as first-degree homicide and organized criminal activity, and minor crimes, such as unlawful blocking public thoroughfares and property damage.[99]

On 22 September 2016, the Criminal Chamber of Bagua acquitted all 53 defendants of the most serious charges due to a lack of sufficient evidence.[100] As for blocking highways and damaging public and private property, the chamber concluded that the defendants charged with these crimes had acted with the higher purpose of defending their traditional territories.[101] The judgment cites entire excerpts of the Gladue ruling and undertakes an intercultural interpretation of applicable Peruvian laws. It also relies on anthropological affidavits and expert witness evidence regarding defendants' understanding of the illegality of their actions *vis-a-vis* cultural norms and historical background.

The Criminal Chamber of Bagua concluded that, though the evidence in the case was enough to conclude beyond a reasonable doubt that the accused had burned down public and private property in the hours after the police raid, these actions could not be separated from the historical relationship between the awajún-wampis and the different groups that have tried to settle their territories, including Quechua tribes, Spanish envoys and the Peruvian state. Finally, the Chamber expressly quoted the *Gladue* principles to exempt the Indigenous defendants of criminal liability.[102]

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97 "Peru protest violence kills 22 police" *The Guardian* (7 June 2009), online: <www.theguardian.com/world/2009/jun/07/peru-violence#:~:text=The%20deaths%20brought%20to%2022,children%2C%20died%20in%20the%20clashes>.

98 North American Congress on Latin America (NACLA), Press Release "Blood at the Blockade: Peru's Indigenous Uprising" (8 June 2009), online: *NACLA* <nacla.org/news/blood-blockade-perus-indigenous-uprising>.

99 Amnesty International, Press Release "Peru: five years on from Bagua violence and still no justice for victims" (5 June 2014), online: *Amnesty International* <www.amnesty.org/en/latest/news/2014/06/peru-five-years-bagua-violence-and-still-no-justice-victims/#:~:text=Facebook-,Peru%3A%20Five%20years%20on%20from%20Bagua%20violence,still%20no%20justice%20for%20victims&text=The%20Peruvian%20authorities%20must%20ensure,which%20left%2033%20people%20dead>.

100 Sentencia (22 September 2016), Bagua 00194-2009 [0163-2013] (Corte Superior de Justicia de Amazonas, Sala Penal de Apelaciones Transitoria y Liquidadora de Bagua).

101 Survival International, Press Release "Indigenous protestors acquitted over the Bagua Massacre in Peru" (4 November 2016), online: *Survival International* <www.survivalinternational.org/news/11493>.

102 For a complation of essays on the intercultural criteria employed in the judment, see Coordinadora Nacional de Derechos Humanos del Perú, "La Sentencia Del Caso Baguazo y Sus Aportes a La Justicia

Other criminal courts in Latin America have either employed the *Gladue* principles or adopted very similar reasoning while assessing the liability and sentencing Indigenous defendants. A study of the UN Mechanism on the Rights of Indigenous Peoples named "Access to justice in the promotion and protection of the rights of Indigenous peoples" mentions the Peruvian Criminal Code and the "Gladue sentencing principles" as examples of initiatives that are in line with the guarantees set forth in *ILO 169* and that provide that Indigenous peoples "economic, social and cultural characteristics should be considered, and preference should be given to methods of rehabilitation other than prison."[103]

III. Indigenous peoples' rights over their ancestral territories: the IAHRS way and its relevance for Canada

Although Canada has neither signed the *ACHR* nor any other Inter-American human rights instruments, it is subject to the IACHR's jurisdiction for complaints alleging violations of the *American Declaration*. This instrument mirrors the *OAS Charter* and applies to all member States. Both organs of the IAHRS have affirmed the binding nature of the *American Declaration*.[104] Pursuant to Article 18 of its Statute, the IACHR has confirmed its competence to monitor the human rights situation in Canada.[105] Therefore, the IAHRS standards on Indigenous peoples' territorial rights described in the next section applies to Canada irrespective of whether domestic courts, Parliament or the federal government take them into consideration.

A. IAHRS standards on Indigenous peoples' territorial rights

The IACHR has highlighted the close relationship between Indigenous peoples' cultural identity and the enjoyment of their traditional territories.[106] This relation "extends beyond the settlement of specific villages to include lands that are used for agriculture, hunting, fishing, gathering, transportation, cultural and other

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Intercultural" (2017), online: *Red Internacional de Estudios Interculturales* <red.pucp.edu.pe/ridei/noticias/disponible-linea-publicacion-la-sentencia-del-caso-baguazo-aportes-la-justicia-intercultural/>.

103 UN Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples, "Access to justice in the promotion and protection of the rights of Indigenous peoples" UNHRCOR, 24th Sess, UN Doc A/HRC/24/50 (2013).

104 *Interpretation of the American Declaration of the Rights and Duties of Man within the framework of Article 64 of the American Convention on Human Rights (Republic of Colombia)* (1989), Advisory Opinion OC-10/89, Inter-Am Ct HR (Ser A) No 10 at 29-47.

105 IACHR, "Missing and Murdered Indigenous Women in British Columbia, *supra* note 42 at 21-22.

106 *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia* (2007), Inter-Am Comm HR, OEA/Ser.L/V/II, Doc. 34 at para 297, Recommendation 3, online (pdf): *Inter-American Commission on Human Rights* <cidh.org/pdf%20files/BOLIVIA.07.ENG.pdf>; *Maya Indigenous Communities of the Toledo District v. Belize Case* (2004), Inter-Am Comm HR, No 12.053 at para 155, *Annual Report of the Inter-American Commission on Human Rights: 2004*, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 727 [*Maya Indigenous Communities*].

purposes."[107] In a 1985 Merits report regarding the lack of demarcation of Yanomami territory in Brazil, the IACHR took note of Article 27 of the *International Covenant on Civil and Political Rights* (*ICCPR*), ratified by Canada in 1976.[108] The Commission recalled that this *ICCPR* provision "recognizes the right of ethnic groups to special protection on their use of their own language, for the practice of their own religion, and, in general, for all those characteristics necessary for the preservation of their cultural identity."[109]

Likewise, the IACtHR has asserted that, for Indigenous peoples, "the possession of their traditional territory is indelibly recorded in their historical memory, and their relationship with the land is such that severing that tie entails the certain risk of an irreparable ethnic and cultural loss, with the ensuing loss of diversity."[110] Both organs of the IAHRS have affirmed that Indigenous territories are protected by Article 21 of the *ACHR*; for states not party to the *ACHR*, they are protected by Article 23 of the *American Declaration*. Though their text mentions only private property, IAHRS institutions have stressed that "both the private property of individuals and communal property of the indigenous communities are protected under Article 21 of the *American Convention*"[111] and Article 23 of the *American Declaration*.[112]

According to Inter-American standards, Indigenous territorial rights derive from customary land tenure, rather than formal recognition.[113] In this sense, although states have an obligation to title and demarcate traditional territory to secure its use and enjoyment by Indigenous and tribal communities,[114] the exercise of property rights is not conditional on any formal recognition.[115]

The organs of the IAHRS have ruled that Article 21 of the *ACHR* was violated when third parties were authorized to develop economic activities in Indigenous territory and when the exercise of property rights was conditional on a title of ownership.[116] In these situations, the IACtHR ordered states to restore Indigenous possession over their traditional territory and to secure their right to property by means of a title or other formal recognition.[117]

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107 *Maya Indigenous Communities, supra note* 106 at para 129.

108 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force March 3 1976) [*ICCPR*].

109 *Brazil* (1985), Inter-Am Comm HR, No 7615 *Annual Report of the Inter-American Commission on Human Rights: 1984-1985*, 12/85 at para 7.

110 *Yakye Axa Indigenous Community v Paraguay* (2005), Inter-Am Ct HR (Ser C) No 125 at para 216.

111 *Ibid* at para 143.

112 *Mary and Carrie Dann v United States,* (2002), Inter-Am Ct HR No 11.140, Report 75/02 at paras 44-52.

113 *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001), Inter-Am Ct HR (Ser C) No 79 at para 140(a).

114 *Ibid* at para 113 and *Indigenous Community Yakye Axa v Paraguay*, *supra* note 110 at para 143.

115 *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, *supra* note 113 at para 153; *Yakye Axa Indigenous Community v Paraguay*, *supra* note 110 at para 215.

116 *Mayagna (Sumo) Awas Tingni Community v Nicaragua, supra* note 113 at para 140(j).

117 *Ibid* at paras 153(1), 164 and 173(3).

When an Indigenous people's property claims collide with private property acquired in good faith, the IACtHR has evaluated whether the restriction imposed by a given state meets the criteria of a balancing or proportionality test. While performing this test, the IACtHR has found that restricting private property may be necessary to achieve the legitimate aim of preserving an Indigenous communities' cultural identity. Likewise, it has affirmed that the proportionality of restriction on private property can be attained by compensating the affected party.[118]

In addition to the requirements commonly applied in restrictions on individual property (legality, necessity, suitability, and proportionality), Inter-American standards dictate that the restrictions derived from the concession of economic activities in Indigenous territory shall not endanger the community's cultural integrity or subsistence as an organized group.[119] To achieve this aim, states must conduct a free, prior and informed consultation in good faith, with the goal of obtaining the community's consent.

In line with Article 16(4) of *ILO 169*, the IACtHR has pointed out that when a state dully justifies the impossibility of restoring an Indigenous community's traditional territory, it has the obligation to compensate the community with lands equivalent in extension and quality. Furthermore, restoration must be performed with the approval of the peoples involved and "in accordance with their own mechanism of consultation, values, customs and customary law".[120]

The main aspects of the special safeguards of Indigenous territorial rights under the IAHRS's standards can be summarized as follows:

> i) Traditional tenure of a territory has the same effect as title
>
> ii) Traditional tenure entitles the Indigenous community to request official recognition and title over the land.
>
> iii) The members of Indigenous communities involuntarily displaced from their traditional land do not lose their property rights.
>
> iv) The acquisition of traditional land by third parties in good faith does not eliminate states' obligation to restore that land to the members of the Indigenous community.
>
> v) When the impossibility of restoring traditional land is justified, the Indigenous community has the right to obtain territory of a similar size and quality or choose another form of compensation.

The IACHR systematized these standards in the 2009 report, "Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources –Norms and Jurisprudence of the Inter-American Human Rights System".[121] States' obligations

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118 *Ibid* at para 148.

119 *Saramaka People v Suriname* (2007), Inter-Am Ct HR (Ser C) No 172 at para 128.

120 *Yakye Axa Indigenous Community v Paraguay*, *supra* note 110 at para 151.

121 *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources – Norms and Jurisprudence of the Inter-American Human Rights System,* (2009) Inter-Am Comm HR, No

described in this report derive both from the American Convention and Declaration, and so also apply to Canada. The following paragraphs comment on some aspects of Canadian jurisprudence that depart from the Inter-American standards previously mentioned.

B. Canada's legal framework for Indigenous peoples' territorial rights

As a preliminary note, it is important to stress that in the Canadian legal system the term "Indigenous title" refers to the formal act of recognition of Indigenous land through a treaty between the community and the Crown or any other official act recognizing Indigenous possession of traditional land. On the other hand, the term "title" can also mean the territorial right sought by Indigenous peoples who have not yet signed a treaty or obtained a formal act of recognition from the Canadian state. In the IAHRS, "title" refers only to the formal act of recognition in an official document issued by the state.

The CSC has established different evidentiary rules that must be met to discharge (the government) or demonstrate (the Indigenous plaintiff) the existence of a "valid title", i.e., the official act of recognition or the customary tenure related to the ancestral nature of the land in dispute. Over time, the CSC has increasingly laid the burden of proof of title on the Crown or Canadian government.[122] Even so, the highly procedural and lengthy nature of Indigenous title litigation presents insurmountable barriers for many communities with unproven title. In one of the most important Indigenous land claims ever decided by the CSC, the Tsilhqot'in Nation spent CAN$40 million over 25 years of litigation.[123]

In *Delgamuukw v. British Columbia* (1997), the CSC concluded that Crown sovereignty over contested land can be assumed until the Indigenous plaintiff proves their historical link to the territory in question.[124] This position shifted in Tsilhqot'in Nation (2014). In this case, the CSC recognized the validity of Indigenous title not only to the land where they carry out their traditional activities intensively, but also to those portions of the land where the plaintiff carried out economic activities. In brief, the Supreme Court dismissed British Columbia's contention that these portions do not fall under Indigenous title. This judgment acknowledges an Indigenous nation's right to decide how to use its lands either for traditional activities or modern economic purposes. The CSC stressed nonetheless that this discretion shall not be exercized in such a way that the Tsilhqot'in Nation's economic activities deprive future generations of the land's benefit.[125]

OEA/Ser.L/V/II Doc 56/09, online (pdf): *OAS* <www.oas.org/en/iachr/indigenous/docs/pdf/ancestrallands.pdf>.

122 Marjoleine Olwell, "El derecho a la consulta previa, libre e informada en el contexto legal canadiense". (2020) 22 AportesDPLF 22 at 23-25.

123 Raluca Hlevca et al., "Tsilhqot'in Nation v BC: Summary of Panel Discussions on the Supreme Court of Canada Decision" (October 2014), online: *Polis Water Sustainability Project* <poliswaterproject.org/polis-research-publication/tsilhqotin-nation-v-b-c-summary-panel-discussions-supreme-court-canada-decision/>.

124 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 145.

125 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257.

Although the Tsilhqot'in Nation case develops evidentiary rules less restrictive for Indigenous claimants than previous jurisprudence, the case raises a controversial tier system that lays out federal and provincial obligations to consult and obtain consent. To this effect, the CSC stated that:

> Where Aboriginal title is unproven, the Crown owes a procedural duty imposed by the honour of the Crown to consult and, if appropriate, accommodate the unproven Aboriginal interest. […] By contrast, where title has been established, governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government must establish that the proposed incursion on the land is justified under s. 35 of the Constitution Act, 1982.[126]

This paragraph falls short of both *UNDRIP* and Inter-American standards. The IACtHR's judgment in *Saramaka v. Surinam* (2007) states that, with respect to large-scale projects, not only is consultation mandatory, consent is as well.[127] In its 2015 report "Indigenous Peoples, Afro-Descendent Communities, and Natural Resources", the IACHR echoed Saramaka's standard and provided more precise guidelines on the meaning of "large-scale" with regard to the magnitude of the project (objective data on volume and intensity) and its human and social impact.[128]

The possibility of overlooking Indigenous peoples' objections also clashes with Inter-American standards that characterize consent as a right to self-government, especially with regards to states' decisions that potentially affect their territory. Once again, whereas the goal of any consultation process is obtaining the community's consent, when the consent is a mandatory obligation, the states party to the IAHRS must accept the decision expressed by the Indigenous community.

As the Canadian government has acknowledged, the CSC's criteria for the intensity of the FPIC obligation is not in line with international human rights standards. The Department of Justice's "Principles respecting the Government of Canada's relationship with Indigenous peoples", updated in February 2018, concedes that "the importance of free, prior, and informed consent, as identified in [UNDRIP], extends beyond title lands."[129] In this regard, every single FPIC contentious case decided by the Inter-American Court and Commission were related to Indigenous or tribal peoples who either lacked official recognition of their land or had it rejected by the authorities of their respective states. The case law developed by these organs entail the same states' obligations towards Indigenous peoples who hold or lack a valid title over their lands (i.e., officially recognized property rights).

Finally, the scope of Indigenous peoples' territorial rights set forth in the IAHRS are more comprehensive than the legal parameters currently established in the

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126 *Ibid* at para 76.

127 *Saramaka People v Suriname*, *supra* note 119 at para 134.

128 *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities* (2015), Inter-Am Comm HR, No OEA/Ser.L/V/II Doc 47/15 at paras 183-93.

129 "Principles Respecting the Government of Canada's Relationship with Indigenous Peoples", *supra* note 75, principle 6.

Canadian legal system, particularly the ones contained in the Tsilhqot'in Nation precedent, with regards to the obligation to consult communities holding unproven title. In this sense, Canada could, by taking IAHRS case law into account, rely on improved parameters in its efforts to review its own legal framework and better ensure the collective rights of Indigenous nations.

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This article seeks to highlight the importance of a twin-track dialogue between Canada and the IAHRS with regards to the rights of Indigenous peoples. Canada has been vocal in this dialogue in the past, and many Latin American countries listened while reshaping their constitutional framework to recognize cultural diversity.

Influenced by the Canadian politics of recognition, the boom in Latin American multicultural constitutions was followed by extensive jurisprudence –by high courts and the organs of the IAHRS– related to the right to free, prior and informed consultation and consent (FPIC). Inspired by the Canadian constitutional experience, many Latin American countries developed their own account of how to address Indigenous peoples' demands. The IAHRS's organs have been pivotal in this regard, and their rulings are the most advanced in the world on areas such as Indigenous peoples' rights over their territories and FPIC.

Canada should take advantage of what the IAHRS has to say in these matters and build up better legal solutions in its efforts to reconcile with Indigenous nations. Such a gesture would be a meaningful way of engaging with the Inter-American system and, at the same time, fill in some gaps in the Canadian Supreme Court's recent decisions that curtail the scope of FPIC. The embrace of Inter-American standards would also represent an act of gratitude towards the human rights system and the several Latin American countries that, influenced by Canadian multicultural experience, shaped their own legal institutions and states' obligations related to Indigenous peoples' rights over the past three decades.

By becoming a full player of the IAHRS, Canada could improve its legal community, lawyers and state officials' knowledge of Latin America and the IAHRS' own experience regarding the rights of Indigenous peoples. This would be particularly useful for a country struggling to reconcile with its own Indigenous nations and trying to review aspects of its legal framework that are not in line with the *United Nations Declaration on the Rights of Indigenous Peoples*.