AMICUS CURIAE
CASE OF THE HUL'QUMI'NUM TREATY GROUP V. CANADA

SUBMITTED BEFORE THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

AMNESTY INTERNATIONAL

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AI index: AMR 20/001/2011

August 2011

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1. INTRODUCTION

A. SUMMARY OF ARGUMENT

The Hul'qumi'num Treaty Group (HTG) is a political organization representing six Indigenous nations on Vancouver Island, British Columbia. On 10 May 2007, the HTG filed a human rights complaint before the Inter- American Commission on Human Rights alleging that the Government of Canada and the Province of British Columbia had violated their international human rights obligations by failing to provide any form of restitution for the expropriation and privatization – in the late 1800s – of the vast majority of lands traditionally occupied by these nations. The petitioners allege that the federal and provincial governments have violated Articles II (right to equality before the law), III (right to religious freedom and worship), XIII (right to benefits of culture), and XXIII (right to property) of the *American Declaration on the Rights and Duties of Man*.

The six Indigenous nations of the HTG have been in negotiation with the federal and provincial governments since 1994 under the British Columbia Treaty Process. In agreeing to hear the complaint, the Commission has ruled that the long, drawn-out and arbitrarily restrictive process of treaty negotiation as it currently exists is demonstrably "not an effective mechanism"[1] for protection of Indigenous peoples' human rights. The Commission also concluded that taking the matter to court "would not be effective under recognized general principles of international law" because Canadian courts have consistently turned questions of Indigenous land title back to governments to resolve through negotiation.[2]

The *amicus* argues that the HTG case is illustrative of a broad failing by the Government of Canada to uphold the land rights of Indigenous peoples and that this failing requires comprehensive reform in order to fulfill Canada's international human rights obligations. The elements of this argument are as follows: 1) international human rights standards establish specific state obligations to remedy the breach of Indigenous Peoples' rights to lands, territories and resources, and to provide effective interim protection pending full realization of this remedy; 2) while redress for the wrongful expropriation of Indigenous peoples' lands will require consideration of third party interests in those instances where the lands of Indigenous peoples are now in the hands of private landowners, the Inter-American system has developed principles for the resolution of competing claims consistent with the high priority given to restoration of Indigenous lands in international human rights laws and standards; and 3) systemic gaps in Canada's compliance with international human rights standards in respect to

[1] Inter-American Commission on Human Rights (IACHR). *Report No 105/09 on the admissibility of Petition 592-07, Hul'qumi'num Treaty Group, Canada*. October 30, 2009. Para. 37.

[2] IACHR. *Report No 105/09 on the admissibility of Petition 592-07, Hul'qumi'num Treaty Group, Canada*. October 30, 2009. Para. 39.

the rights of Indigenous Peoples underlines the importance of the case before the Commission and the need for a ruling directing the state to work toward the timely resolution of Indigenous land and resource disputes in a manner consistent with its human rights obligations.

B. INTEREST OF *AMICUS CURIAE*

Amnesty International is a global movement of more than three million supporters, members and activists who campaign for internationally recognized human rights to be respected and protected. As part of the organization's mission to conduct research and take action to prevent grave abuses of human rights, Amnesty International has a particular interest in the application of international human rights standards to the recognition and protection of the human rights of Indigenous peoples, who are typically among the most marginalized and frequently victimized sectors of society. Amnesty International is currently engaged in research and advocacy on these themes in collaboration with Indigenous peoples and Indigenous peoples' organizations in a number of countries throughout the Americas, including in Canada.

2. THE RIGHT TO REDRESS FOR WRONGFULLY EXPROPRIATED LANDS IS AN INTEGRAL PART OF INDIGENOUS PEOPLES' RIGHTS TO LANDS, TERRITORIES AND RESOURCES IN INTERNATIONAL LAW

A. INDIGENOUS PEOPLES' RIGHTS AND THE DEVELOPMENT OF INTERNATIONAL HUMAN RIGHTS NORMS AND STANDARDS

The *American Declaration of the Rights and Duties of Man* is considered a "source of international obligations" for the member states of the Organization of American States (OAS).[3] As a member of the OAS, Canada has explicitly agreed that the American Declaration defines the human rights obligations that it has undertaken as a party to the *OAS Charter*.[4]

Like other international human rights instruments, the *American Declaration* is understood to be a living document: its provisions must be interpreted and applied "in the light of developments in the field of international human rights law since the Declaration was first composed and with due regard to other relevant rules of international law applicable to member states."[5] These developments include the *American Convention on Human Rights* as well as other international human rights conventions and declarations, and the expert interpretations, recommendations and rulings brought forward by the Inter-American Commission on Human Rights (IACHR), the Inter-American Court of Human Rights (IACtHR) and the United Nations human rights treaty bodies.

This *amicus* draws extensively on relevant jurisprudence of the Inter-American Court. While Canada has yet to ratify the Inter-American Convention, the Commission

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[3] Inter-American Court of Human Rights (IACtHR). *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*, Advisory Opinion OC-10/89, July 14, 1989, (Ser. A) No. 10 (1989). Paras 41-43.

[4] OAS General Assembly Resolution No. 371/78, AG/RES (VIII- O/78), July 1st, 1978 (reaffirming Member States' commitment to promote compliance with the American Declaration on the Rights and Duties of Man). General Assembly Resolution No. 370/78, AG/Res. 370 (VIII- O/78), July 1st, 1978 (referring to Member States' international commitment to respect the rights recognized in the Declaration).

[5] IACHR. Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States),* December 27, 2002. Para. 96.

considers that in many instances the Convention "may be considered to represent an authoritative expression of the fundamental principles set forth in the *American Declaration*" and has previously applied the jurisprudence of the Inter-American Court in interpreting state obligations under the Declaration.[6] Furthermore, the Court's interpretation of the Indigenous rights protections needed to fulfil the obligations of the Convention is consistent with the way UN treaty bodies have interpreted the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *UN Convention on the Elimination of Racial Discrimination*, all of which Canada has ratified.

As will be addressed in greater detail below, bodies such as the Inter-American Commission and the Inter-American Court, the UN Human Rights Committee, the UN Committee on the Elimination of All Forms of Racial Discrimination and the UN Committee on Economic, Social and Cultural Rights[7], have consistently found that the human rights of Indigenous peoples include collective rights to their lands, territories and resources. Furthermore, these bodies have also consistently found that protection and fulfilment of these rights is necessary for Indigenous peoples' enjoyment of a wide-range of other rights, including, *inter alia*, the right to self-determination and subsistence, the right to livelihood, the right to health and the right to culture.[8] Prominent jurists consider Indigenous peoples' right to property to be a norm of customary international law, and the Commission has agreed with this position.[9] Accordingly, in situations where Indigenous peoples have been wrongfully deprived of ownership, use of and access to their lands and resources, the right to redress has been understood by international human rights bodies to include restoration of lands and resources or, when this remedy is not possible or desired by the peoples concerned, provision of alternate comparable lands or compensation for the loss of lands and resources.[10]

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[6] IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States),* December 27, 2002. Paras. 96-98. Cf. IACtR. 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, Advisory Opinion OC-10/89 of July 14, 1989. (Ser. A) Nº 10 (1989). Paras. 37-47.

[7] *Cf.* IACtHR. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs.* Judgment of August 31, 2001. IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States),* December 27, 2002. Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII concerning Indigenous Peoples*, CERD/C/51/Misc.13/Rev.4, (adopted by the Committee on August 18, 1997). UN Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UN Doc E/C.12/1/Add.31, (10 December 1998).

[8] *Cf.* IACtHR. *Case of the Indigenous Community Yakye Axa v. Paraguay, Final Decision.* Judgment of June 17, 2005. Inter-American Court of Human Rights. *Case of the Saramaka People v. Suriname.* Judgment of November 28, 2007. United Nations Human Rights Committee *Communication No. 167/1984: Canada.* 10/05/90. CCPR/C/38/D/167/1984.

[9] IACtHR. *Case of the Mayagna (Sumo) Awas Tingni community v. Nicaragua, Merits, Reparations and Costs*. Judgment of August 31, 2001. Series C No. 79. Para. 140(d).

[10] IACtHR. *Case of the Indigenous Community Yakye Axa v. Paraguay, Final Decision.* Judgment of June 17, 2005.

These norms and standards are highly relevant to the interpretation of the *American Declaration* in the context of Indigenous peoples. As the Commission stated in the case of *Mary and Carrie Dann v. United States*:

> in addressing complaints of violations of the American Declaration it is necessary for the Commission to consider those complaints in the context of the evolving rules and principles of human rights law in the Americas and in the international community more broadly, as reflected in treaties, custom and other sources of international law. Consistent with this approach, in determining the claims currently before it, the Commission considers that this broader corpus of international law includes the developing norms and principles governing the human rights of indigenous peoples…. In particular, a review of pertinent treaties, legislation and jurisprudence reveals the development over more than 80 years of particular human rights norms and principles… [which] are properly considered in interpreting and applying the provisions of the American Declaration in the context of indigenous peoples.[11]

The understanding of Indigenous land and resource rights that has emerged through the development of international human rights law has now been consolidated in the *UN Declaration on the Rights of Indigenous Peoples*. Although the *UN Declaration* is a relatively new instrument, it should be viewed as an expression of norms and standards established both before and during its long process of negotiation. The UN Special Rapporteur on the rights of indigenous peoples has said that the *UN Declaration*:

> represents an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law…. [T]he *Declaration* reflects and builds upon human rights norms of general applicability, as interpreted and applied by United Nations and regional treaty bodies…. The standards affirmed in the *Declaration* share an essentially remedial character, seeking to redress the systemic obstacles and discrimination that indigenous peoples have faced in their enjoyment of basic human rights. From this perspective, the standards of the *Declaration* connect to existing State obligations under other human rights instruments.[12]

The *Declaration* established minimum global standards for the protection of Indigenous rights from the time of its adoption by the UN General Assembly on 13 September 2007. Canada publicly endorsed the *UN Declaration* in November 2010.

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[11] IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States),* December 27, 2002. Paras. 97, 124.

[12] UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people,* S. James Anaya, 11 August 2008, U.N. Doc. A/HRC/9/9. Paras. 85, 86.

B. THE DUTY TO INTERPRET AND APPLY GENERAL HUMAN RIGHTS OBLIGATIONS IN A MANNER CONSISTENT WITH THE HISTORY AND CIRCUMSTANCES OF INDIGENOUS PEOPLES

The Inter-American human rights system has consistently found that general human rights instruments must be interpreted in a manner consistent with Indigenous peoples' specific situations and needs, bearing in mind the history of discrimination and dispossession they have experienced, the contemporary legacy of marginalization and impoverishment, and Indigenous peoples' own values, customs and systems of law. In the landmark *Yakye-Axa* case, the Inter-American Court stated:

> As regards indigenous peoples, it is essential for the States to grant effective protection that takes into account their specificities, their economic and social characteristics, as well as their situation of special vulnerability, their customary law, values, and customs.[13]

The Inter-American Commission has come to the same conclusion. In the case of *Mary and Carrie Dann v. United States*, the Commission wrote:

> ensuring the full and effective enjoyment of human rights by indigenous peoples requires consideration of their particular historical, cultural, social and economic situation and experience. In most instances, this has included identification of the need for special measures by states to compensate for the exploitation and discrimination to which these societies have been subjected at the hands of the non-indigenous.[14]

In its 9 August 2010 public statement, the IACHR noted that, by virtue of the right to equality and non-discrimination (Article II of the *American Declaration of the Rights and Duties of Man*),

> States are not only under the obligation of securing the full exercise of all human rights by indigenous persons on an equal footing with everyone else, but also under the obligation to adopt special measures of an affirmative nature, aimed at alleviating or eliminating the social and economic conditions that contribute to perpetuate the historical and structural discrimination borne by indigenous peoples, taking into account their circumstances of disadvantage, vulnerability and unprotectedness.[15]

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[13] IACtHR. *Case of the Indigenous Community Yakye Axa v. Paraguay, Final Decision.* Judgment of June 17, 2005. Para. 63.

[14] IACHR. Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States),* December 27, 2002. Paras. 124-125.

[15] IACHR. "IACHR calls for respecting, guaranteeing, and promoting the rights of Indigenous peoples." Press Release N° 79/10, 9 August 2010. Para. 3.

C. INDIGENOUS LAND RIGHTS AS AN OBLIGATION ARISING FROM GENERAL INTERNATIONAL HUMAN RIGHTS LAW INCLUDING THE RIGHT TO PROPERTY

The Inter-American Court has identified a number of characteristics that may distinguish Indigenous peoples' rights to land from the property rights of non-Indigenous peoples, including the fact that Indigenous rights are typically collective in nature, may include areas of non-exclusive use where the territory of one people overlaps with another, and may be grounded in pre-colonial traditions not recognized in national law or discriminated against in practice.[16] The court has concluded that the distinctiveness of Indigenous peoples' land rights must not preclude protection of the right to property affirmed in the *American Declaration* and the *American Convention*, as well as the *Universal Declaration of Human Rights*.[17]

In the *Awas Tingni* case, the Inter-American Court upheld the petitioners' argument that failure to protect Indigenous peoples' rights in respect to lands and resources was in fact a form of adverse discrimination and therefore prohibited under the *Convention* and the *Declaration*.[18] In the *Dann* case, the Commission called for legal recognition of Indigenous peoples' "varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property", regardless of whether Indigenous property rights are currently recognized in domestic law.[19]

As articulated in the decisions of the Commission and the Inter-American Court, state obligations regarding Indigenous peoples' land rights requires concrete action to protect these rights, including both a responsibility to identify and provide legal protection to the boundaries of Indigenous territories and a duty to refrain from actions that would disrupt their ownership and use of the land. In the *Yake-Axe* decision, the Inter-American Court clearly stated that "merely abstract or juridical recognition of indigenous lands, territories, or resources, is practically meaningless if the property is not physically delimited and established."[20] .

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[16] cf. IACtHR. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Judgment of August 31, 2001.

[17] IACtHR. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua.* Judgment of August 31, 2001.

[18] IACtHR. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Judgment of August 31, 2001. Para. 140(b).

[19] IACHR. Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States),* December 27, 2002. Para. 130.

[20] IACtHR. *Case of the Indigenous Community Yakye Axa v. Paraguay*, *Final Decision.* Judgment of June 17, 2005. Para 143.

The Inter-American system's jurisprudence on Indigenous rights has been widely used by other human rights bodies, a fact which underlines the universal character of the standards articulated by the IACHR and IACtHR. For example, the African Commission on Human and Peoples' Rights, in a decision that drew heavily on the jurisprudence of the IACtHR, concluded that traditional systems of land ownership and title must be protected in law, even when the rights holders are no longer in possession of that land:

> In the view of the African Commission, the following conclusions could be drawn: (1) traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title; (2) traditional possession entitles indigenous people to demand official recognition and registration of property title; (3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and (4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite condition for the existence of indigenous land restitution rights.[21]

The state's duty to provide effective legal recognition and protection to Indigenous peoples' land use has also been repeatedly affirmed by United Nations human rights treaty bodies and special mechanisms including the UN Special Rapporteur on the rights of indigenous peoples. In a 1997 General Recommendation, the expert committee responsible for the interpretation and oversight of the UN Convention on the Elimination of All Forms of Racial Discrimination called on states to:

> Recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.[22]

These duties have also been affirmed by the UN human rights treaty bodies in their recommendations to specific countries. For example, in its March 2009 *Concluding Observations on Suriname*, UNCERD recommended:

> The Committee urges the State Party to ensure legal acknowledgement of the collective rights of indigenous and tribal peoples … to own, develop, control and use their lands, resources and communal territories according to customary laws and traditional land tenure system and to participate in the exploitation,

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[21] African Commission on Human and Peoples' Rights. Decision 276 / 2003. *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya.* 4 February 2010. Para. 209.

[22] UN Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII concerning Indigenous Peoples*, CERD/C/51/Misc.13/Rev.4, (adopted by the Committee on August 18, 1997).

> management and conservation of the associated natural resources.[23]

The need to recognize and provide concrete protection for Indigenous peoples' land rights is reaffirmed in the *UN Declaration on the Rights of Indigenous Peoples*. The *Declaration* was adopted by the UN General Assembly on September 13, 2007, after more than two decades of negotiation between states and Indigenous peoples. Relevant provisions include Article 26, which states:

> Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
>
> Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
>
> States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.[24]

D. THE CRITICAL IMPORTANCE OF INDIGENOUS LAND RIGHTS TO THE FULFILMENT OF OTHER RIGHTS IN INTERNATIONAL LAW

The emphasis given in international law to protecting Indigenous peoples' ownership of, access to and control over their lands, territories and resources is consistent with the view that these are both rights in themselves and indispensible for the fulfilment of other rights protected in international law. In the *Yakye Axa* case, the Inter-American Court stated that:

> the close relationship of indigenous peoples with the land must be acknowledged and understood as the fundamental basis for their culture, spiritual life, wholeness, economic survival, and preservation and transmission to future generations.[25]

In the *Saramaka* case, the Inter-American court similarly noted that "the very physical

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[23] UN Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Suriname*, UN Doc. CERD/C/SUR/CO/12, 3 March 2009 (Advance unedited version). Para. 12.

[24] *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA Res. 61/295, 13 September 2007. Art. 26.

[25] IACtHR. *Case of the Indigenous Community Yakye Axa v. Paraguay*, *Final Decision.* Judgment of June 17, 2005. Para. 131.

and cultural survival" of Indigenous peoples is often at stake when their rights to their lands, territories and resources are not adequately protected. The court stated that: "due to the inextricable connection members of indigenous and tribal peoples have with their territory, the protection of their right to property over such territory, in accordance with Article 21 of the *Convention*, is necessary to guarantee their very survival."[26] Similarly, in the *Dann* case, the Commission emphasized:

> by interpreting the *American Declaration* so as to safeguard the integrity, livelihood and culture of indigenous peoples through the effective protection of their individual and collective human rights, the Commission is respecting the very purposes underlying the *Declaration* which, as expressed in its Preamble, include recognition that "[s]ince culture is the highest social and historical expression of that spiritual development, it is the duty of man to preserve, practice and foster culture by every means within his power."[27]

The importance of land and resource rights to the fulfilment of the right to the highest attainable standard of health was noted by the UN Committee on Economic, Social and Cultural Rights, which stated:

> The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.[28]

Ruling in the case of a complaint brought on behalf of the Lubicon Cree, an Indigenous people in Canada whose land has been subject to massive oil and gas exploitation despite the absence of a treaty or other agreement to recognize and protect their rights, the UN Human Rights Committee found that:

> Historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 [the right to culture] so long as they continue.[29]

Protection of the right to culture is itself frequently described as a fundamental value of the international system. The *Universal Declaration of Cultural Diversity* calls the

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[26] IACtHR. *Case of the Saramaka People v. Suriname*. Judgment of November 28, 2007. Paras. 120-2.

[27] IACHR. Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States),* December 27, 2002. Para. 131.

[28] UN Committee on Economic, Social and Cultural Rights, General Comment No. 14, *The right to the highest attainable standard of health*, UN Doc. E/C.12/2000/4 (11 May 2000). Para. 27

[29] UN Human Rights Committee. Communication no. 167/1984, *Decisions of the Human Rights Committee*, U.N. Doc. CCPR/C/38/D/167/1984 (26 March 1990). Para. 33.

defense of cultural diversity "an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and of indigenous peoples."[30]

The UN Human Rights Committee has also strongly emphasized the fact that the right to self-determination, articulated in common article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, includes the recognition that "All peoples may, for their own ends, freely dispose of their natural wealth and resources" and that "[i]n no case may a people be deprived of its own means of subsistence." In its 1999 Concluding Observations on Canada, the Committee applied this right to the situation of Indigenous land rights in Canada:

> With reference to the conclusion by RCAP [the Royal Commission on Aboriginal Peoples] that without a greater share of lands and resources institutions of aboriginal self-government will fail, the Committee emphasizes that the right to self-determination requires, *inter alia,* that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2). The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation.[31]

As the above examples suggest, Indigenous land rights can be seen as not only necessary for fulfilment of certain specific rights such as the right to culture, but also as a necessary condition for the enjoyment of all rights of Indigenous peoples, including the right to physical and cultural survival as a people. In her 2004 report to the UN Commission on Human Rights, Special Rapporteur Erica-Irene A. Daes wrote:

> Few if any limitations on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental of human rights: the rights to life, food and shelter, the right to self-determination, and the right to exist as a people.[32]

This is not to imply that Indigenous peoples' rights to lands, territories and resources deserve protection only when the violation of these rights threatens dire consequences for the enjoyment of other rights. No less than any other people, Indigenous peoples deserve recognition and protection of their rights from all threats and violations. At the same time, the potential for devastating and far-reaching impacts on the lives, well-

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[30] *Universal Declaration on Cultural Diversity*. Adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization, 2 November 2001.

[31] UN Human Rights Committee. *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/79/Add.105, 7 April 1999. Para. 8.

[32] UN Commission on Human Rights. Special Rapporteur Erica-Irene A. Daes, *Final Report on Indigenous peoples' permanent sovereignty over natural resources*, UN Doc. E/CN.4/Sub.2/2004/30, 13 July 2004.

being and cultural survival of Indigenous peoples clearly increases the onus for states to ensure effective protection of Indigenous land rights.

E. THE RIGHT TO EFFECTIVE REMEDY REQUIRES SPECIFIC REDRESS FOR LANDS WRONGFULLY TAKEN FROM INDIGENOUS PEOPLES

The right to an effective remedy is expressly provided for in a range of international human rights instruments, including the *American Convention on Human Rights*[33], the *International Covenant on Civil and Political Rights*[34] and the *American Declaration of the Rights and Duties of Man.*[35] In the *Yakye Axa* case, the Inter-American Court has stated that Article 63 (1) of the *American Convention on Human Rights* (the right to effective remedy or reparations) "reflects a customary rule that constitutes one of the basic principles of contemporary International Law regarding the responsibility of States."[36]

The Court also stated in this case that the duty of redress "requires, whenever possible, full restitution (*restitutio in integrum*), which consists of reestablishing the situation prior to the violation."[37] If full restitution is genuinely not possible, other measures may be taken to ensure respect for the rights that have been violated and to address the consequences of their infringement. In general, this may include elements such as public apology, financial compensation, rehabilitation of the victim, guarantees of non-repetition and changes in relevant laws and practices.[38]

As the Court noted in the *Yakye Axa* case, the determination of appropriate alternatives to full redress must always be determined by the goals of ensuring respect for the rights that were violated and redressing the consequences.[39] In the same decision, the Court also noted that this obligation, which is "regulated in all aspects" by international law, cannot be modified by the State on the basis of domestic law or policy.[40]

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[33] *American Convention on Human Rights*. 1144 U.N.T.S. 123 ("ACHR"), art. 63 (1).

[34] *International Covenant on Civil and Political Rights*. 999 U.N.T.S. 171 ("ICCPR"), Art. 2(3).

[35] *American Declaration of the Rights and Duties of Man Art*. Art. XXIV.

[36] IACtHR. *Case of the Indigenous Community Yakye Axa v. Paraguay, Final Decision.* Judgment of June 17, 2005. Para. 180.

[37] IACtHR. *Case of the Indigenous Community Yakye Axa v. Paraguay, Final Decision.* Judgment of June 17, 2005. Para. 181.

[38] *United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.* General Assembly resolution 60/147 of 16 December 2005, Principle 16.

[39] IACtHR. *Case of the Indigenous Community Yakye Axa v. Paraguay, Final Decision.* Judgment of June 17, 2005. Para. 181.

[40] IACtHR. *Case of the Indigenous Community Yakye Axa v. Paraguay, Final Decision.* Judgment of June 17, 2005. Para. 181.

Any remedy for human rights violations must be *effective*. Individuals or groups alleging violation of their rights must have practical and meaningful access to a procedure that is capable of ending and repairing the effects of the violation. Where a violation is established, the victims must then actually receive the appropriate relief needed to repair the harm. As the Inter-American Court stated in the *Saramaka* case, "the mere possibility of recognition of rights through a certain judicial process is no substitute for the actual recognition of such rights."[41]

An effective remedy must also be *timely*. A remedy that is available only after a long delay during which the rights of the victim continue to be denied is unacceptable. The Inter-American Commission has called timeliness "an essential element of effectiveness."[42]

As was argued above, secure access to, use and control of lands, territories and resources are indispensable to the fulfilment of a wide range of Indigenous peoples' rights. On this basis, international human rights standards have consistently affirmed that the preferred option to remedy violations of Indigenous peoples' land rights must be, wherever possible, the full restoration of Indigenous lands and their future protection. In the *Yakye Axa* case, the Court found that "The common basis of the human rights violations against the members of the Yakye Axa Community…is primarily the lack of materialization of the ancestral territorial rights of the members of the Community."[43] In addition to other forms of restitution to both the community as a whole and the individuals that make up the community, the Court ordered that "the State must identify said traditional territory and give it to the Yakye Axa Community free of cost."[44]

Noting that there may be "concrete and justified reasons" why the return of land is not always possible, the Court also stated that granting alternative forms of redress, "must be guided primarily by the meaning of the land" for the affected people.[45] The Court cited *ILO Convention 169* which states that when it is not possible to restore lands to

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[41] IACtHR. *Case of the Saramaka People v. Suriname*. Judgment of November 28, 2007. Para 105. *Cf. United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. General Assembly resolution 60/147 of 16 December 2005, Principle 11. UN Human Rights Committee, General Comment No. 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess., UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004). Para. 8.

[42] IACHR. Report Nº 40/04, Case 12.053, Merits, *Maya Indigenous Communities of the Toledo District, Belize,* October 12, 2004. Para. 176.

[43] IACtHR. *Case of the Indigenous Community Yakye Axa v. Paraguay, Final Decision.* Judgment of June 17, 2005. Para. 211.

[44] IACtHR. *Case of the Indigenous Community Yakye Axa v. Paraguay, Final Decision.* Judgment of June 17, 2005. Para. 217.

[45] IACtHR. *Case of the Indigenous Community Yakye Axa v. Paraguay, Final Decision.* Judgment of June 17, 2005. Para. 149.

Indigenous peoples, they

> shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.[46]

The Court went on to state:

> Selection and delivery of alternative lands, payment of fair compensation, or both, *are not subject to purely discretionary criteria of the State*, but rather, pursuant to a comprehensive interpretation of *ILO Convention No. 169* and of the *American Convention*, there must be a consensus with the peoples involved, in accordance with their own mechanism of consultation, values, customs and customary law [emphasis added].[47]

In respect to the Yakye Axa community, the Court ruled,

> If for objective and well-founded reasons the claim to ancestral territory of the members of the Yakye Axa Community is not possible, the State must grant them alternative land, chosen by means of a consensus with the community, in accordance with its own manner of consultation and decision-making, practices and customs. In either case, the area of land must be sufficient to ensure preservation and development of the Community's own manner of life.[48]

Similarly in the *Sawhoyamaxa* case, the Court, having noted that Indigenous peoples who have "unwillingly left their traditional lands, or lost possession thereof" still retain property rights "even though they lack legal title," ruled that "Indigenous peoples who have unwillingly lost possession of their lands, are entitled to restitution thereof."[49] The Court went on to state that:

> when a State is unable, on objective and reasoned grounds, to adopt measures aimed at returning traditional lands and communal resources to indigenous populations, it must surrender alternative lands of equal extent and quality, which will be chosen by agreement with the members of the indigenous peoples, according to their own consultation and decision procedures.[50]

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[46] *ILO Convention 169 (Indigenous and Tribal Peoples),* 1989, art. 16(4).

[47] IACtHR. *Case of the Indigenous Community Yakye Axa v. Paraguay, Final Decision.* Judgment of June 17, 2005. Para. 151.

[48] IACtHR. *Case of the Indigenous Community Yakye Axa v. Paraguay, Final Decision.* Judgment of June 17, 2005. Para. 217.

[49] IACtHR. *Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs*. Judgment of March 29, 2006. Para. 128.

[50] IACtHR. *Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs*. Judgment of March 29, 2006. Para. 135.

Thus the Court has clearly established that in respect to the land rights of Indigenous peoples: 1) return of lands is the preferred option for redress, 2) states cannot arbitrarily or unreasonably refuse to consider return of land as a form of redress, 3) other options are to be considered only if the affected people themselves wish it or if, for clear, objective and justifiable reasons, lands cannot be returned; and 4) the determination of alternative forms of redress should be decided not by the will of the state alone, but by the wishes of the affected people and by the purpose of ensuring their cultural integrity and well-being. In the *Dann* case, the Commission stated, the alternative lands granted as redress must have the "capacity for providing the resources which sustain life, and…the geographic space necessary for the cultural reproduction of the group."[51]

The same principles are affirmed in the *UN Declaration on the Rights of Indigenous Peoples*. The *Declaration* states:

> 1. Indigenous peoples have the right to redress, by means that can include restitution or, *when this is not possible*, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
>
> 2. *Unless otherwise freely agreed upon by the peoples concerned*, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress [emphasis added].[52]

F. THE RIGHT TO REMEDY REQUIRES EFFECTIVE INTERIM PROTECTIONS, EVEN WHILE INDIGENOUS TITLE REMAINS IN DISPUTE

Where full remedy cannot be achieved in a timely manner – due, for example, to the complexity of issues to be resolved – fulfillment of the right to effective remedy may require interim measures to prevent further harm to the victim and to preserve the conditions for their rights to be enjoyed in the future. Thus, Article 63(2) of the *American Convention* (right to effective remedy or reparations) states that "In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration."

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[51]IACHR. Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States),* December 27, 2002. Para. 128.

[52] *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA Res. 61/295, 13 September 2007, Art. 28.

In its general comment on the legal obligations of state parties to the International *Covenant on Civil and Political Rights*, the UN Human Rights Committee states:

> the right to an effective remedy may in certain circumstances require States Parties to provide for and implement provisional or interim measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations.[53]

Where the human rights violation requiring remedy involves the land rights of Indigenous Peoples, the Inter-American Commission and the Inter-American Court have consistently found that the state has an obligation, pending restoration of land or demarcation of title, to take effective interim measures to prevent any further erosion of Indigenous peoples' current and future ability to use the land. In the case of the *Maya Communities of Toledo District*, the Commission determined that the State was obliged to prevent any acts by "the State itself, or third parties acting with its acquiescence or its tolerance" that would "affect the existence, value, use or enjoyment of the property."[54] In the *Xákmok Kásek* case in Paraguay, the Court ruled that, pending demarcation and titling of lands:

> the State must guarantee that such territory will not be damaged by acts of the State itself or of private third parties. Thus, it must ensure that the area will not be deforested, that sites which are culturally important for the community will not be destroyed, that the lands will not be transferred and that the territory will not be exploited in such a manner as to cause irreparable harm to the area or to the natural resources present therein.[55]

Effective interim protection of Indigenous peoples' land rights necessarily includes Indigenous peoples' meaningful involvement in decisions over how that land will be used. In the *Saramaka* decision, the Court ruled that, as a safeguard "to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people" the State must "must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan… within Saramaka territory."[56]

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[53] UN Human Rights Committee, General Comment No. 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess., UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004). Para. 19.

[54] IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize),* October 12, 2004, par. 197 – Recommendation 2.

[55] IACtHR. *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214. Para. 291 [informal translation from Spanish found in IACHR. *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System.* OEA/Ser.L/V/II. Doc. 59/06. 2010, p. 73]. The Court reached a similar conclusion in the *Awas Tingi* case. Cf. IACtHR. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs.* Judgment of January 31, 2001. Series C No. 79. Para. 164.

[56] IACtHR. *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary*

The Court went on to state that:

> in addition to the consultation that is always required when planning development or investment projects within traditional Saramaka territory, the safeguard of effective participation that is necessary when dealing with major development or investment plans that may have a profound impact on the property rights of the members of the Saramaka people to a large part of their territory must be understood to additionally require the free, prior, and informed consent of the Saramakas, in accordance with their traditions and customs.[57]

In its decision, the Court cited a statement by the UN Special Rapporteur on the human rights and fundamental freedoms of indigenous people that when large-scale economic activities are carried out on the lands of Indigenous peoples, "it is likely that their communities will undergo profound social and economic changes *that are frequently not well understood, much less foreseen*, by the authorities in charge of promoting them [emphasis added]."[58] In this way, the duty to obtain free, prior and informed consent is identified as having a precautionary character, based not exclusively on the likelihood of harm to Indigenous peoples, but also on the potential for unforeseen harm, especially given the likelihood that authorities lack full understanding of the rights and interests at stake for Indigenous peoples.

The Inter-American Commission has similarly described the requirement of consent

> as a heightened safeguard for the rights of indigenous peoples, given its direct connection to the right to life, to cultural identity and other essential human rights, in relation to the execution of development or investment plans that affect the basic content of said rights.[59]

In the Maya Indigenous communities case, the Commission found that the State must not grant logging and oil concessions within the lands subject to demarcation and clarification of title except where there had been "effective consultations with and the informed consent of the [respective] people."[60] It should be noted that the Commission called for the standard of protection afforded by informed consent pending the resolution of the community's title to the land and the demarcation of the boundaries of

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Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185. Para. 129.

[57] IACtHR. *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185. Para. 137.

[58] UN Economic and Social Council. Human rights and indigenous issues: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65. E/CN.4/2003/90. 21 January 2003

[59] IACHR. *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System.* OEA/Ser.L/V/II. Doc. 59/06. 2010. Para. 333.

[60] IACHR. Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize),* October 12, 2004. Para. 194.

their territory. Again, this reinforces the understanding that free, prior and informed consent can serve as a precautionary measure to avoid potential harm.

Understanding the potential for harm to the rights of Indigenous peoples will often require a case-by-case assessment of their specific circumstances. However, the Commission has also suggested there are actions or interventions where, by their very nature, the free, prior and informed consent of the affected people must be mandatory. The Commission has identified these as including 1) permanent relocation of Indigenous peoples from their traditional lands; 2) activities that would deprive Indigenous peoples of "the capacity to use and enjoy their lands and other natural resources necessary for their subsistence"; and 3) storage or disposal of hazardous materials in Indigenous peoples' lands or territories.[61]

In the *Dann* case, the Commission found that Indigenous peoples' legal title to property and use of territories and resources can only be "changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property."[62]

The right of free, prior and informed consent is similarly well established within the UN human rights system. In a general recommendation interpreting the *UN Convention on the Elimination of All Forms of Discrimination*, the UN Committee on the Elimination of Racial Discrimination (UNCERD) has called on states to ensure that "no decisions directly relating" to the rights and interests of Indigenous peoples should be taken without their informed consent.[63] The Committee's recommendations, although not directly binding in themselves, are considered highly authoritative interpretations of the legal obligations of States Parties such as Canada.

The *UN Declaration on the Rights of Indigenous Peoples* states that free, prior and informed consent should be the precondition for state approval of "any project" affecting Indigenous peoples' lands, territories and resources:

> *Article 32(2):* States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

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[61] IACHR. *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System.* OEA/Ser.L/V/II. Doc. 59/06. 2010. Para. 334.

[62] IACHR. Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States),* December 27, 2002. Para. 130.

[63] UN Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII concerning Indigenous Peoples*, CERD/C/51/Misc.13/Rev.4, (adopted by the Committee on August 18, 1997).

The *UN Declaration* also affirms the right of free, prior and informed consent in a wide range of other contexts:

> *Article 10:* Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.
>
> Article 19: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Finally, the *Declaration* also requires redress for the failure to uphold the right of free, prior and informed consent in respect to expropriation of cultural, intellectual, religious and spiritual property and for the confiscation, occupation, use of, or damage to, their traditional territories:

> Article 11(2): States shall provide redress through effective mechanisms which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.
>
> *Article 28:* *1.* Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
> 2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

G. THIRD PARTY INTERESTS AND INDIGENOUS LAND RIGHTS

Due to patterns of customary Indigenous land use, and the history of dispossession of Indigenous land, the lands and resources claimed by Indigenous peoples are often subject to overlapping and competing claims from other Indigenous peoples and from private interests. In such circumstances, multiple parties may be able to claim rights protected under national and international law. These third parties may include small

and large landowners, private corporations and other communities. The state has obligations toward all these parties. This, however, is not an excuse for ignoring or arbitrarily denying all Indigenous claims to lands and resources now in the possession of third parties.

In the *Yakye Axa* case, the Inter-American Court noted that where more than one party has a legitimate claim to particular lands, territories and resources, resolution of this dispute inevitably requires some limitation or infringement of the rights of one or more of the claimants. The Court noted that any such infringement must be based in law, be strictly necessary, serve "a legitimate goal in a democratic society" and be proportional to that goal. This requires an assessment, "on a case by case basis, of the consequences that would result from recognizing one right over the other."[64]

Critically, the Court has affirmed that the rights of third parties should not be assumed to take precedence simply because the state has granted them a concession to the disputed land or because they are currently in possession of land from which the Indigenous claimant has been dispossessed:

> Otherwise, restitution rights become meaningless and would not entail an actual possibility of recovering traditional lands, as it would be exclusively limited to an expectation on the will of the current holders, forcing indigenous communities to accept alternative lands or economic compensations. In this respect, the Court has pointed out that, when there be conflicting interests in indigenous claims, it must assess in each case the legality, necessity, proportionality and fulfillment of a lawful purpose in a democratic society (public purposes and public benefit), to impose restrictions on the right to property, on the one hand, or the right to traditional lands, on the other.[65]

In the case of competing claims between Indigenous peoples and non-Indigenous third parties, the Court has said it may be appropriate to make a distinction between, on the one hand, the central importance of land rights to the physical and cultural survival of Indigenous peoples, and the rights of non-Indigenous claimants which might be adequately and appropriately addressed through standards of administrative fairness and appropriate compensation. In the *Yakye Axa* case, the Court provides the following example of considerations that must be taken into account in resolving conflicts between Indigenous peoples and private claimants.

> Thus, for example, the States must take into account that indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations. Property of the land ensures that the

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[64] IACtHR. *Case of the Indigenous Community Yakye Axa v. Paraguay*, *Final Decision.* Judgment of June 17, 2005. Paras. 144, 146.

[65] IACtHR. *Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs*. Judgment of March 29, 2006. Para. 138.

> members of the indigenous communities preserve their cultural heritage.
>
> Disregarding the ancestral right of the members of the indigenous communities to their territories could affect other basic rights, such as the right to cultural identity and to the very survival of the indigenous communities and their members.
>
> On the other hand, restriction of the right of private individuals to private property might be necessary to attain the collective objective of preserving cultural identities in a democratic and pluralist society, in the sense given to this by the *American Convention*; and it could be proportional, if fair compensation is paid to those affected pursuant to Article 21(2) of the *Convention*.[66]

The Inter-American Court has, in fact, ordered protective measures that would directly curtail the activities of private interests even while final resolution of a title dispute remained pending. As noted above, in the *Awas Tingni* case, the Inter- American Court ruled that until delimitation, demarcation, and titling had been carried out, the State was obligated to ensure that "third parties acting with its acquiescence or its tolerance" did not taken any action that would "affect the existence, value, use or enjoyment of the property located in the geographical area where the members of the Community live and carry out their activities".[67] In the *Saramaka* case, the Court added that with regard to concessions already granted within traditional Saramaka territory, "the State must review them, in light of the present Judgment and the Court's jurisprudence, in order to evaluate whether a modification of the rights of the concessionaires is necessary in order to preserve the survival of the Saramaka people."[68]

Resolution of competing claims to lands and resources requires an effective and transparent process of adjudication that is accessible to all concerned parties and capable of addressing the specific situation of Indigenous peoples. In the *Sawhoyamaxa* case, the Commission called on the State to establish "an effective and simple court remedy to protect the right of the Indigenous Peoples of Paraguay to claim and access their traditional territories."[69] The *UN Declaration on the Rights of Indigenous Peoples*, which as noted above affirms the right of Indigenous peoples to redress for lands and resources taken or damaged without their free, prior and informed consent, calls on States to:

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[66] IACtHR. *Case of the Indigenous Community Yakye Axa v. Paraguay*, *Final Decision.* Judgment of June 17, 2005. Paras. 146-148.

[67] IACtHR. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79. Para. 153(b).

[68] IACtHR. *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172. Para. 194(a).

[69] IACHR. Report No. 73/04, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, October 19, 2004, Recommendation 4. Cited in: IACtHR. *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Para. 8.

> establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.[70]

3. THE IMPORTANCE OF THE HUL'QUMI'NUM TREATY GROUP PETITION IN THE CONTEXT OF SYSTEMIC VIOLATIONS OF INDIGENOUS LANDS RIGHTS IN CANADA

A. THE HUMAN RIGHTS GAP FACING INDIGENOUS PEOPLES IN CANADA

Although Canada is a prosperous country with an overall high standard of living – according to the UN Development Programme, Canada has the second highest Human Development Index in the Americas and the eighth highest in the world[71] – Indigenous peoples in Canada experience widespread impoverishment and deprivation. International human rights bodies and mechanisms have repeatedly expressed concern over the persistent failure to substantially close the social and economic gap between Indigenous and non-Indigenous peoples.

In the report of his 2004 mission to Canada, the UN Special Rapporteur on the human rights and fundamental freedoms of Indigenous people noted that despite an "an impressive number of programmes and projects and considerable financial resources," there are still "unacceptable gaps" between Indigenous peoples and the rest of the population "in educational attainment, employment and access to basic social services." The Special Rapporteur wrote:

> Economic, social and human indicators of well-being, quality of life and development are consistently lower among Aboriginal people than other Canadians. Poverty, infant mortality, unemployment, morbidity, suicide, criminal detention, children on welfare, women victims of abuse, child prostitution, are all much higher among Aboriginal people than in any other sector of Canadian society, whereas educational attainment, health standards,

[70] *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA Res. 61/295, 13 September 2007. Art. 27.

[71] United Nations Development Programme. *Human Development Report 2010 —The Real Wealth of Nations: Pathways to Human Development.*

> housing conditions, family income, access to economic opportunity and to social services are generally lower.[72]

Similar concerns have been expressed by United Nations treaty bodies and other special mechanisms, including the UN Human Rights Committee, the UN Committee on the Elimination of Racial Discrimination, the UN Committee on the Elimination of Discrimination Against Women, the UN Committee on the Rights of the Child and the UN Special Rapporteur on adequate housing and the UN Special Rapporteur on the rights of indigenous peoples. The UN Committee on the Economic, Social and Cultural Rights has stated:

> The Committee is greatly concerned at the gross disparity between Aboriginal people and the majority of Canadians with respect to the enjoyment of Covenant rights. There has been little or no progress in the alleviation of social and economic deprivation among Aboriginal people. In particular, the Committee is deeply concerned at the shortage of adequate housing, the endemic mass unemployment and the high rate of suicide, especially among youth, in the Aboriginal communities. Another concern is the failure to provide safe and adequate drinking water to Aboriginal communities on reserves. The delegation of the State Party conceded that almost a quarter of Aboriginal household dwellings required major repairs and lacked basic amenities.[73]

The persistent human rights gap between Indigenous and non-Indigenous people in Canada is also confirmed by government studies and reports. A recent federal government analysis found a significant gap between Indigenous and non-Indigenous communities in four indicators of "community well-being": educational attainment, labour force participation, income, and housing. In the study period of 2001-2006, the report noted that "little or no progress" had been made toward narrowing this gap and that, in fact, a third of First Nations and Inuit communities experienced a decline in the selected indicators. The study found that 96 of the 100 lowest ranked communities in Canada were First Nations.[74]

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[72] UN Commission on Human Rights. *Human rights and indigenous issues: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, Addendum: Mission to Canada*, UN Doc. E/CN.4/2005/88/Add.3 (2 December 2004).

[73] UN Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UN Doc E/C.12/1/Add.31. Para.17. (10 December 1998); *cf.*, UN Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada.* UN Doc. CCPR/C/79/Add.105. (7 April 1999); UN Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada*, UN Doc. A/57/18 (1 November 2002); UN Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada,* UN Doc. CERD/C/CAN/CO/18 (25 May 2007); UN Committee on the Rights of the Child. *Concluding Observations of the UN Committee on the Rights of the Child. Canada,* UN Doc. CRC/C/15/Add.21. (17 October 2003); UN Human Rights Council. *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Miloon Kothari: Addendum: Mission to Canada (9 to 22 October 2007)*, A/HRC/10/7/Add.3 (17 February 2009).

[74] Indian and Northern Affairs Canada. *First Nation and Inuit Community Well-Being: Describing Historical Trends (1981-2006).* Strategic Research and Analysis Directorate, April 2010.

A particularly disturbing indicator of this gap is the high rate of infant mortality among Indigenous peoples in Canada. A 2004 provincial government study found that infant mortality among First Nations in British Columbia was more than twice as high as the general population. The study found that the majority of these deaths were preventable and that the "disadvantaged socioeconomic status" of First Nations people in the province "is an important risk factor."[75]

Government data also shows that there is an overall gap in life expectancy between Indigenous and non-Indigenous people in Canada and that this is only slowly narrowing. In 2000, life expectancy at birth for First Nations men was 8.1 years less than non-Indigenous men while the life expectancy for First Nations women was 5.5 years less than non-Indigenous women.[76] A more recent government study projected that by 2017 the gap in life expectancy will still be six years for First Nations men and five years for First Nations women.[77]

B. IMPORTANCE OF LAND RIGHTS TO CLOSING THE HUMAN RIGHTS GAP

There are numerous historic and contemporary factors contributing to the social and economic disparities between Indigenous and non-Indigenous peoples in Canada. Among these, the failure to adequately protect Indigenous peoples' land rights is critical. The lands currently protected for the use and benefit of Indigenous peoples are only a small fraction of their traditional territories. Historic treaties, which recognized a right to continued use and benefit of these territories, have been widely violated. The result has been to erode traditional sources of subsistence while denying many Indigenous peoples an alternative economic base to maintain or rebuild their economies. The harm done is compounded by other historic and ongoing injustices, including the underfunding of social services in Indigenous communities and the social strain and cultural loss caused by forced assimilation policies of the past such as the residential school program.[78]

The 1996 Canadian Royal Commission on Aboriginal Peoples (RCAP) estimated that the lands available for the use of Indigenous peoples had diminished by fully two-thirds since the creation of the Canadian state in 1867. RCAP concluded that:

> Aboriginal Peoples need much more territory to become economically,

[75] Zhong-Cheng Luo, et al. for the British Columbia Vital Statistics Agency. "Infant mortality among First Nations versus non-First Nations in British Columbia: Temporal trends in rural versus urban areas, 1981 to 2000". *International Journal of Epidemiology* 2004 33(6). Pp. 1252-1259.

[76] Indian and Northern Affairs Canada, 2001, Basic Departmental Data 2001, Catalogue no. R12-7/2000E.

[77] Statistics Canada, *Projections of the Aboriginal Populations, Canada, Provinces and Territories, 2001 to 2017.* June 28, 2005.

[78] Royal Commission on Aboriginal Peoples. *Final Report of the Royal Commission on Aboriginal Peoples.* 1996.

> culturally and politically self-sufficient. If they cannot obtain a greater share of the lands and resources in this country, their institutions of self-government will fail. Without adequate lands and resources, Aboriginal nations will be unable to build their communities, maintain their institutions of self-government, and or structure the employment opportunities necessary to achieve self-sufficiency. Currently, on the margins of Canadian society, they will be pushed to the edge of economic, cultural and political extinction. The government must act forcefully, generously and swiftly to assure the economic, cultural and political survival of Aboriginal nations.[79]

This conclusion has been supported by various UN treaty bodies, including the UNCESCR:

> The Committee views with concern the direct connection between Aboriginal economic marginalization and the ongoing dispossession of Aboriginal people from their lands, as recognized by RCAP.[80]

Government officials in Canada have also acknowledged the severe economic and social impact of inadequately protected land rights. In a Government of British Columbia document titled "Why we are negotiating treaties", the province states:

> The quality of life for Aboriginal people is well below that of other British Columbians. Aboriginal people generally die earlier, have poorer health, have lower education and have significantly lower employment and income levels than other British Columbians. This is directly related to the conditions that have evolved in Aboriginal communities, largely as a result of unresolved land and title issues, and an increasing reliance on federal support programs.[81]

C. SYSTEMIC BARRIERS TO RESTITUTION OF LAND AND RESOURCE RIGHTS

Unfortunately, as the IACHR concluded in its ruling on the admissibility of the Hul'qumi'num Treaty Group petition, the available mechanisms to recognize and restore Indigenous land rights in Canada have demonstrably failed to provide timely or adequate redress.[82] Canadian courts consistently have taken the position that civil

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[79] Royal Commission on Aboriginal Peoples. *Final Report of the Royal Commission on Aboriginal Peoples.* 1996.

[80] UN Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UN Doc E/C.12/1/Add.31, Para.17. (10 December 1998). Para.18.

[81] Province of British Colombia, Ministry of Aboriginal Relations and Reconciliation. http://www.gov.bc.ca/arr/treaty/negotiating/why.html. Accessed 16 August 2010.

[82] IACHR. *Report No 105/09 on the admissibility of Petition 592-07, Hul'qumi'num Treaty Group, Canada.* October 30, 2009. Para. 37.

litigation, due to its inherently adversarial nature, is not the appropriate forum to resolve issues of Indigenous title. In the Haida case, the Supreme Court of Canada stated:

> Aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts... While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests. [83]

An analysis by the Federal Government states that as a consequence of the Supreme Court's view that "negotiations are the best way to resolve issues associated with Aboriginal rights and title", the Canadian courts have "remained silent, for the most part, on the actual content of Aboriginal rights."[84] Indeed, as the Commission noted in its decision on the admissibility of the HTG petition, despite well-established legal recognition of the existence of Aboriginal title in Canada, there has yet to be a specific order by a Canadian court mandating the demarcation and recording of title.[85]

Unfortunately, negotiation processes as currently structured have failed to provide a less adversarial, let alone more timely, means to achieve recognition and redress of Indigenous rights. This amicus highlights three general barriers: 1) arbitrary state-imposed limits on the recognition and protection of rights in any final settlement; 2) the conflict of interest inherent in the state, as a party to the dispute, setting the terms for its resolution, and 3) the bureaucratic hurdles involved in reaching agreement with the state.

The federal government requires that, before reaching a final treaty settlement, Indigenous Peoples must agree to give up, or at least never assert, any Aboriginal rights that are not set out in that final agreement, even though the Canadian Constitution affirms and protects existing Aboriginal rights. In the first modern treaties negotiated after 1973, the federal government required the inclusion of clauses stating that all rights not enumerated in the agreement would be extinguished.[86] The language was later modified to offer other formulas, such as non-assertion of rights, with the same effect that entering into the agreement would mean giving up all future opportunity to exercise inherent rights whose meaning and implications are still evolving in domestic law.[87]

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[83] Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 SCR 511. Para 14.

[84] Indian and Northern Affairs Canada. *Resolving Aboriginal Claims: A Practical Guide to Canadian Experiences.* 2003. pp. 6-7.

[85] IACHR. *Report No 105/09 on the admissibility of Petition 592-07, Hul'qumi'num Treaty Group, Canada*. October 30, 2009. Para. 40.

[86] For example, the *James Bay and Northern Quebec Agreement* of 1975 states, "The federal legislation approving, giving effect to and declaring valid the Agreement shall extinguish all native claims, rights, title and interests of all Indians and all Inuit in and to the Territory and the native claims, rights, title and interests of the Inuit of Port Burwell in Canada, whatever they may be." *James Bay and Northern Quebec Agreement*, 1975. Para 2.6.

[87] Canada's Policy for the Settlement of Native Claims describes the objective of modern treaty negotiation as one of exchanging "undefined Aboriginal rights for a clearly defined package of rights and benefits codified in

The federal extinguishment policy and its variants have been repeatedly condemned by UN treaty bodies. The UN Committee on Economic, Social and Cultural Rights has said that "the extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued by the State Party."[88] In 1999, the UN Human Rights Committee recommended that "the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant."[89] In 2006, the UNHRC noted that the new "non-assertion" policies adopted by Canada to replace the extinguishment clauses "may in practice amount to extinguishment of aboriginal rights" and called on Canada to "re-examine its policy and practices to ensure they do not result in extinguishment of inherent aboriginal rights."[90] More broadly, the UN Committee on the Elimination of Racial Discrimination has called on Canada to "ensure that the new approaches taken to settle aboriginal land claims do not unduly restrict the progressive development of aboriginal rights."[91]

Numerous high level inquires have pointed out that governments in Canada, although obligated to promote the rights of all, are in a conflict of interest in respect to Indigenous claims that might jeopardize government power and revenue. A recent report by the Aboriginal Affairs Committee of the Canadian Senate on conflicts over modern treaties described the federal government department responsible for Indigenous rights as "a department which is steeped in a legacy of colonialism and paternalism." The Senate report concluded: "It is not surprising to find that [this department] cannot be a successful defender and promoter of the Crown's interests and simultaneously honourably defend and promote the interests of the Aboriginal peoples of Canada."[92] Similarly, the Royal Commission on Aboriginal Peoples stated that the government "considers itself the 'loser' when a claim is settled in favour of Aboriginal people."[93]

To reach just settlement of land and title disputes Indigenous peoples must also

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constitutionally protected settlement agreements." Department of Indian Affairs and Northern Development, *Federal Policy for the Settlement of Native Claims*, Ottawa, 1993, p. *i*.

[88] Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada,* UN Doc. E/C.12/1/Add.31 (10 December 1998). Para.18.

[89] UN Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada,* UN Doc. CCPR/C/79/Add.105, (7 April 1999). Para. 8.

[90] UN Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada,* UN Doc. CCPR/C/CAN/CO/5 (20 April 2006). Para. 8.

[91] UN Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada*, UN Doc. CERD/C/CAN/CO/18 (25 May 2007). Para. 22.

[92] Standing Senate Committee on Aboriginal Peoples. *Honouring the Spirit of Modern Treaties: Closing the Loopholes.* Interim Report: Special Study on the implementation of comprehensive land claims agreements in Canada. May 2008, p. viii.

[93] Royal Commission on Aboriginal Peoples. *People to People, Nation to Nation, Highlights from the Final Report of the Royal Commission on Aboriginal Peoples,* 1996. http://www.ainc-inac.gc.ca/ap/pubs/rpt/rpt-eng.asp.

overcome formidable, bureaucratic hurdles. According to a review of the treaty-making process in British Columbia carried out by the Auditor General of Canada, approximately 40 government departments and agencies may be involved in determining the government position. The Auditor General observed that, in practice, the individual priorities of these departments and agencies – most of which have no explicit mandate to promote Indigenous rights – often take priority over reaching a fair and timely treaty and land settlement.[94]

As a consequence, negotiation over Indigenous land rights has been lengthy and expensive, as well as a source of tension in the relations between Indigenous peoples and the State. Since 1973, when Canada first established a mechanism for negotiation of modern treaties where no historic treaty exists, only 22 such agreements have been concluded.[95] In British Columbia, forty-seven First Nations are currently in treaty negotiations. The Auditor General estimated in 2006 that the majority of these negotiations had stalled or were making little progress. In addition, approximately 40 per cent of eligible First Nations have chosen not to participate in negotiations for a variety of reasons including the costs, lack of faith in the process, and the restricted recognition of rights determined by government policy. Those First Nations that are participating have incurred massive debts by borrowing from the government to cover the cost of participating in the process. The Auditor General has estimated that some smaller First Nations have already incurred debts of between 44 and 64 percent of the value of any financial settlement they are likely to achieve.[96]

These unresolved treaty negotiations are in addition to a vast number of disputes over the interpretation and implementation of the terms of historic treaties and agreements. In March 2011, a federal government official told a parliamentary committee that there were 526 such "specific claims" currently being assessed or under negotiation and another 77 cases before the courts. Furthermore the official testified that any of the 265 claims previously rejected by the government could be appealed and that many of the 252 cases deemed closed by the government potentially could be re-opened if the First Nation desired to do so.[97]

It should also be noted that the successful conclusion of a treaty negotiation may offer Indigenous peoples little guarantee that the federal government will honour the commitments that it entails. In a review of implementation of the Inuvialuit Final

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[94] *Report of the Auditor General of Canada to the House of Commons.* Chapter 7: Federal Participation in the British Columbia Treaty Process—Indian and Northern Affairs Canada. November 2006. Para. 7.60.

[95] Indian and Northern Affairs Canada. *Instituting a Federal Framework for the Management of Modern Treaties (Implementation Management Framework).* March 11, 2011. http://www.ainc-inac.gc.ca/al/ldc/ccl/mmt/mmt-eng.asp

[96] *Report of the Auditor General of Canada to the House of Commons.* Chapter 7: Federal Participation in the British Columbia Treaty Process—Indian and Northern Affairs Canada. November 2006. Para. 7.72.

[97] The Standing Committee on Aboriginal Affairs and Northern Development. *Minutes of Proceedings.* 1 March 2010.
http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4999852&Language=E&Mode=1&Parl=40&Ses=3

Agreement, one of the first modern land rights treaties in Canada, the Auditor General noted that many of the significant federal commitments remained unimplemented more than two decades after the agreement was reached. The Auditor General concluded that the Department of Indian and Northern Affairs [INAC]:

> had not established a focused, strategic approach to ensure successful implementation of federal obligations. The Department had not identified and formally communicated federal obligations to other federal organizations, had not developed a plan for implementing federal obligations, and did not monitor or report the extent to which federal obligations were met. We also found that INAC had not identified performance indicators or monitored progress towards the achievement of the principles of the Agreement.
>
> Overall, we concluded that although the *Inuvialuit Final Agreement* has existed for 23 years, INAC has yet to demonstrate the leadership and the commitment necessary to meet federal obligations and achieve the objectives of the Agreement.[98]

D. FAILURE TO PROVIDE EFFECTIVE INTERIM PROTECTIONS

The extreme difficulty in achieving redress through a negotiated settlement is all the more concerning because of the failure of governments in Canada to protect Indigenous interests pending such a resolution.

In a landmark 1997 decision *Delgamuukw v. British Columbia*, concerning logging on land subject to a unresolved treaty negotiation in British Columbia, the Supreme Court of Canada ruled that the Crown's duty to deal "honourably" with the Indigenous peoples over whose lands and lives it has assumed jurisdiction requires good faith consultation "with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue."[99]

As defined by the courts, this duty of consultation and accommodation applies to every instance in which the state contemplates an action that could potentially affect the rights and interests of Indigenous peoples.[100] Critically, the duty – which includes the obligation to assess and address the potential for harm – applies even to those situations where Indigenous peoples' rights have not yet been established through negotiation or litigation.[101] In the Haida case, the Supreme Court found that "the duty

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[98] *Report of the Auditor General of Canada to the House of Commons*. Chapter 3—Inuvialuit Final Agreement. November 2007. Paras. 3.91, 3.92.

[99] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010. Para. 168.

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

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

arises when the Crown has knowledge, real or constructive, *of the potential existence of the Aboriginal right or title* and contemplates conduct that might adversely affect it [emphasis added.]"[102]

Despite the clear directions set by Canadian courts, Indigenous peoples in Canada are still routinely excluded from decisions with the potential for profound impact on their rights, including the licensing of mines, logging and oil and gas development on lands that are subject to unresolved negotiations. The government ministries granting such licenses typically have no specific mandate to protect Indigenous rights and interests and rely on the proponents of the projects such as private corporations to fulfill the duty of consultation and accommodation. Amnesty International knows of no instance where these processes are subject to adequate governmental oversight to ensure that information has been fully disclosed to the affected peoples and the appropriate degree of accommodation reached. Furthermore, Indigenous peoples typically do not have access to any specific recourse mechanism – apart from the expensive resort of taking a case to court – if the duty of consultation and accommodation has been not fulfilled. In a 2006 case over a mining dispute in Ontario, an Ontario Superior Court justice sharply rebuked government authorities for having abdicated their responsibility to ensure that their court-defined obligations of consultation and accommodation were upheld:

> …for the past 16 years, courts in Ontario and throughout Canada, have applied and expanded upon this principle, sending consistent and clear messages to the federal and provincial Crowns that their position as fiduciaries compels them to address this duty in all Crown decisions that affect the rights of Aboriginal peoples.
>
> Despite repeated judicial messages delivered over the course of 16 years, the evidentiary record available in this case sadly reveals that the provincial Crown has not heard or comprehended this message and has failed in fulfilling this obligation.[103]

Indigenous peoples' advocacy around this case was a key factor leading the Province of Ontario to adopt legislation amending the provincial Mining Act requiring consultation with Indigenous peoples. As of May 2011, however, provincial guidelines on how to carry out such consultation was still in draft form.

As the HTG petition highlights, governments in Canada have also been demonstrably resistant to protecting Indigenous peoples' interests in lands where third party interests, such as private land-owners or lease holders, are at stake.[104] This creates significant

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[102] *Haida Nation v. British Columbia (Minister of Forests),* [2004] SCC 73. Para 35.

[103] *Platinex Inc. v Kitchenuhmaykoosib Inninuwug First Nation.* Ontario Superior Court of Justice. 06-0271. July 28, 2006. Paras. 94-5.

[104] Amnesty International Canada examined the failure to protect Indigenous interests in privatized lands in the brief, *"I was never so frightened in my entire life": Excessive and dangerous police response during Mohawk land rights protests on the Culbertson Tract.* May 2011. http://www.amnesty.ca/files/canada-mohawk-land-rights.pdf

barriers to achieving adequate redress. Furthermore, whether the private interests are engaged in environmental destructive activities such as large-scale resource extraction, this can lead to a situation in which Indigenous peoples' ability to use the land to provide for their own economic and cultural needs may be severely undermined even if their rights to the land are eventually restored.

Canadian officials often define their responsibility as one of "balancing" Indigenous peoples' right with the interests of other sectors of society. In a 2009 letter to the Canadian Labour Congress and Amnesty International, the Canadian Minister for Aboriginal Affairs wrote, "Canada must negotiate within the parameters in place for the negotiation of land claims which ensure that settlements are fair to all parties, including other First Nations and Canadian taxpayers." While it is reasonable to expect that states will seek an appropriate balance between the rights of Indigenous and non-Indigenous peoples, the refusal to take any measures to protect Indigenous interests in privately owned land effectively disregards Indigenous rights entirely. Such an approach is inconsistent with the Constitutional affirmation of Indigenous rights in domestic law, the vital importance of Indigenous land and resource rights to the fulfilment of other rights recognized in international law, the historic debt of redress owed to Indigenous peoples, and the urgent need to address contemporary living conditions.[105]

4. CONCLUSIONS

Amnesty International has long been concerned by the failure of Canadian authorities to protect Indigenous land rights in manner consistent with international rights standards, and the consequences of this failure for the health and well-being of Indigenous peoples in Canada. Amnesty International has welcomed the decision of the Inter-American Commission to consider the petition filed by the Hul'qumi'num Treaty Group.

As we have shown in this submission, international human rights bodies including the Inter American Commission have consistently identified a state obligation to provide redress for the wrongful expropriation or destruction of Indigenous peoples lands and resources. While case by case consideration must be given to the balance of rights between Indigenous peoples and third parties, mechanisms or processes for providing redress must be consistent with international standards of justice and cannot exclude arbitrarily and unreasonably exclude the restoration of land as the preferred form of redress. Pending the fair resolution of any such disputes, states must ensure that Indigenous peoples' rights and interests are not eroded. Given the importance of lands and resources to the fulfilment of Indigenous peoples' human rights, a high standard of

[105] The Honourable Chuck Strahl, Minister of Indian Affairs and Northern Affairs, Letter to the Canadian Labour Congress and Amnesty International, 19 January 2009.

protection is required which in most cases will be that of free, prior and informed consent.

In makjng this argument, Amnesty International has drawn heavily on the jurisprudence of the Inter-American Court of Human Rights. As noted earlier, although Canada is not a party of the American Convention, the Court's application of the Convention is part of the broader evolution of the Inter-American human rights system, which helps shape the interpretation of the American Declaration which all members of the OAS are committed to uphold. Furthermore, we have seen how the Court's decisions are consistent with the work not only of the Commission but also of UN treaty bodies. The human rights standards outlined in this submission should therefore be understand as reflective of Canada's obligations as a member of the OAS, a party to key UN human rights treaties and an active participate in the continued elaboration of international human rights norms and standards on the international stage.

Amnesty International hopes that the Commission will be able provide recommendations that will assist the petitioner, Hul'qumi'num Treaty Group (HTG), achieve timely and effective protection and redress for the land and resource rights of the peoples it represents. Amnesty International also hopes that the Commission's recommendations will also have broader applicability in urging Canadian officials to address the systemic barriers to the resolution of Indigenous land disputes described in this brief and to advance policies and practices that are consistent with Canada's obligations in respect to international human rights law.

Toward that end, Amnesty International asks the Commission to urge Canada to acknowledge the relevance and applicability of international human rights standards, including the UN Declaration on the Rights of Indigenous Peoples, to the interpretation and fulfilment of its legal obligations toward Indigenous peoples. Accordingly, Canada should abandon policies that arbitrarily restrict the exercise of Indigenous peoples' rights under international law, including all variations of the federal extinguishment policy, or deny effective remedy for past violations, including the refusal to consider potential restitution or redress for lands now in private hands. Consistent with its obligations under international law, Canada should ensure mechanisms for the negotiated resolution of Indigenous land rights disputes are able to achieve the purpose of justly resolving claims in as expedient a manner as possible. Furthermore, Canada should ensure that Canadian Supreme Court-defined requirements for meaningful consultation, accommodation and consent are interpreted in a manner consistent with international human rights standards and given concrete, effective form through incorporation into the mandates of all relevant regulatory agencies and the creation of effective appeal mechanisms accessible to Indigenous peoples. Finally, given the vital importance of lands and resources to the fulfilment of a wide range of human rights, Amnesty International believes that Canada should establish other interim protections for lands, territories and resources acceptable to Indigenous peoples.