

*NGO in Special Consultative Status with the Economic and Social Council of the United Nations  
Promoting human rights by protecting those who defend them*

## **Canada's international human rights law obligations to suspend construction of the Coastal GasLink Pipeline and stop use of force against the Wet'suwet'en**

### **Canada ignores UN call to suspend three mega-projects in BC**

*Modern international human rights law is the phoenix that rose from the ashes of World War II and declared global war on human rights abuses. Its mandate was to prevent breaches of internationally accepted norms. Those norms were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities. Conduct that undermined the norms was to be identified and addressed.<sup>1</sup>*

#### **Introduction**

This paper examines the legal obligation of Canada and British Columbia (BC) to comply with the 19 December 2019 Decision of the United Nations (UN) Committee on the Elimination of Racial Discrimination (the Committee) calling upon Canada to urgently take a number of specific measures necessary to comply with obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* (the Convention or ICERD)<sup>2</sup> in order to prevent and remedy discrimination against Indigenous Peoples. The Committee directed Canada to, among other things, “immediately halt the construction of the Coastal GasLink pipeline in the traditional and unceded lands and territories of the Wet’suwet’en people, until they grant their free, prior and informed consent, following the full and adequate discharge of the duty to consult;” and to guarantee that no force will be used against the Wet’suwet’en.<sup>3</sup>

Canada and BC ignored and failed to comply with the Committee’s recommendations. Elected members of both Parliament and the Legislative Assembly of BC cited the “rule of law” and various injunctions prohibiting protests by and in support of the Wet’suwet’en as authority for both ignoring Canada’s IHRL obligations to Indigenous Peoples and violating the Committee’s recommendations.

The rights to equality and non-discrimination are guaranteed by both Canadian law and international human rights law (IHRL) binding on Canada. The rights to equality and non-discrimination are part of customary international law (CIL), and are also a peremptory norm or

---

<sup>1</sup> Justice Rosalie Abella, quoted in *Nevsun Resources Ltd. v. Araya*, The Supreme Court of Canada, 28 February 2020, [hereinafter *Nevsun*], available at: <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18169/index.do>.

<sup>2</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, GA Res. 2106(XX), UN GAOR, 20<sup>th</sup> Sess., Supp. No. 14, UN Doc. No. A/RES/2106(XX) A-B (1966), [hereinafter ICERD], available at: <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>.

<sup>3</sup> UN Committee on the Elimination of Racial Discrimination, including Early Warning and Urgent Action Procedure, Decision 1(100), Hundredth session. 25 November-13 December, 2019, [hereinafter CERD Decision 1(100)], available at: [https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/CAN/INT\\_CERD\\_EWU\\_CAN\\_9026\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/CAN/INT_CERD_EWU_CAN_9026_E.pdf).

*jus cogens*<sup>4</sup> from which no derogation is permitted even in times of national emergency. Canada is bound to respect and ensure rights to equality and non-discrimination by the Canadian *Charter of Rights and Freedoms*, CIL, the ICERD, and other IHRL treaties. The Committee periodically reviews the compliance of State Parties with Convention requirements. During its periodic reviews, the Committee identifies instances or areas of non-compliance and recommends the measures that the State party needs to take to prevent and remedy violations identified and ensure future compliance with Convention provisions. The Committee has defined the scope of the Convention's provisions as including protection of the rights of Indigenous Peoples and the measures needed to ensure remedies for violations.<sup>5</sup>

The UN definition of the rule of law principle requires that domestic statutes and court orders be interpreted and enforced consistently with Canada's IHRL obligations arising from treaties to which Canada is a State Party and from CIL, including peremptory norms. The Supreme Court of Canada recently emphasized the importance of IHRL as the underpinning of the rule of law.

This paper provides information about:

- I. The 13 December 2019 Decision of the Committee;<sup>6</sup>
- II. Canada's failure to comply with ICERD provisions and Committee recommendations to ensure equality and remedy discrimination against Indigenous Peoples;
- III. The UN definition of the rule of law;
- IV. Equality and non-discrimination: IHRL guarantees;
- V. Special State obligations owed to Indigenous Peoples to ensure equality and remedy discrimination;
- VI. Canada's duty to comply with IHRL obligations to ensure the equality and non-discrimination rights of Indigenous Peoples and comply with the Committee's Decision;
- VII. Summary and conclusions.

The paper concludes that Canada:

1. has acted inconsistently with the rule of law;
2. has persistently failed to comply with its IHRL obligations to respect, protect and fulfill the rights of Indigenous Peoples regarding their lands and territories; and,
3. is legally obligated to comply with the 13 December 2019 Decision of the Committee.

## **I. The 13 December 2019 Decision of the Committee**

On 13 December 2019, the Committee issued Decision 1(100) under the Early Warning and Urgent Action Procedure expressing concern about the continuation of large-scale projects without free, prior and informed consent of Indigenous Peoples and about disproportionate use of

---

<sup>4</sup> *Jus cogens* (Latin: compelling law; English: peremptory norm) refers to "certain fundamental, overriding principles of international law, from which no derogation is ever permitted." See Ian Brownlie, *Principles of Public International Law* (5th ed., Oxford, 1998). See Dire Tladi, Special Rapporteur, International Law Commission Seventy-first session Geneva, 29 April–7 June and 8 July–9 August 2019. Fourth report on peremptory norms of general international law (*jus cogens*), A/CN.4/727, 31 January 2019, p 42. See the International Law Commission's 2019 report at: <https://legal.un.org/ilc/reports/2019/english/chp5.pdf>.

<sup>5</sup> CERD Decision 1(100), *supra* note 3.

<sup>6</sup> *Ibid.*

force and intimidation against peaceful land defenders and other peaceful protesters. The Committee also expressed “alarm” at the escalating threat of violence against Indigenous Peoples and was “disturbed by forced removal, disproportionate use of force, harassment and intimidation by law enforcement officials against indigenous peoples who peacefully oppose large-scale development projects on their traditional territories.” The Committee called on Canada to immediately:

- suspend the construction of the Site C dam, until free, prior and informed consent is obtained from West Moberly and Prophet River Nations, following the full and adequate discharge of the duty to consult;
- halt the construction and suspend all permits and approvals for the construction of the Coastal GasLink pipeline in the traditional and unceded lands and territories of the Wet’suwet’en, until they grant their free, prior and informed consent, following the full and adequate discharge of the duty to consult;
- “freeze present and future approval of large-scale development projects affecting indigenous peoples that do not enjoy free, prior and informed consent from all indigenous peoples affected;”
- “cease forced eviction of Wet’suwet’en peoples;”
- “guarantee that no force will be used against...Wet’suwet’en peoples and that the Royal Canadian Mounted Police and associated security and policing services will be withdrawn from their traditional lands” (emphasis added);
- “prohibit the use of lethal weapons, notably by the Royal Canadian Mounted Police, against indigenous peoples.”

The Committee also urged Canada to incorporate free, prior and informed consent into its domestic legislation and encouraged Canada to seek technical advice from the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP).

## **II. Canada’s failure to comply with ICERD provisions and Committee recommendations to ensure equality and remedy discrimination against Indigenous Peoples**

### *The Convention*

Canada is a State Party to the ICERD, having ratified the Convention in 1970. The Convention requires Canada (and other States Parties) to condemn and eliminate racial discrimination and to take effective means to amend, rescind, or nullify laws, regulations, policies, or practices that create or perpetuate discrimination; to prohibit discrimination; and to encourage means of eliminating anything that strengthens racial division.

The Committee interprets ICERD provisions and monitors compliance. State Parties are obliged to submit periodic reports on how the provisions of the Convention are being implemented. The Committee conducts periodic reviews of the legislative, judicial, administrative, and other measures adopted by the State Party to implement and give effect to the rights protected by the Convention. During its reviews the Committee receives and considers reports from the State Party and other individuals and groups. The Committee identifies and expresses concern about

State laws, policies, actions, or inactions that violate or fail to comply with Convention requirements and recommends measures needed to bring the State Party into full compliance with the Convention.

***1997: General Recommendation No. 23 to all States Parties to the Convention***

In 1997, the Committee affirmed in its General Recommendation No. 23, that “discrimination against indigenous peoples falls under the scope of the Convention and that all appropriate means must be taken combat and eliminate such discrimination.”<sup>7</sup> In relation to the traditional lands of Indigenous Peoples the Committee identified specific obligations:

- to ensure that “no decision directly relating to the rights of indigenous peoples are made without their informed consent,”
- 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.<sup>8</sup>

***2012: “Concern” about Canada’s failure to implement the Convention***

In its 2012 combined review of Canada’s 19<sup>th</sup> and 20<sup>th</sup> periodic reports, the Committee expressed concern about three issues<sup>9</sup> in relation to land rights of Indigenous Peoples:

- limitations on or failure to fully apply the right to prior, free and informed consent to projects conducted on Indigenous lands or which affect Indigenous rights;
- failure to fully implement or honour treaties; and
- the heavy financial burden of litigation to resolve land disputes.

Recalling its 1997 observations, the Committee recommended that Canada, “in consultation with Aboriginal peoples,” take the following measures to comply with its Convention duties:

- (a) Implement in good faith the right to consultation and to free, prior and informed consent of Aboriginal peoples whenever their rights may be affected by projects carried out on their lands, as set forth in international standards and the State party’s legislation;
- (b) Continue to seek in good faith agreements with Aboriginal peoples with regard to their lands and resources claims under culturally sensitive judicial

---

<sup>7</sup> Committee on the Elimination of Racial Discrimination, General Recommendation No. 23: Indigenous Peoples: 18.08.1997. Gen. Rec. No. 23. (General Comments), Convention Abbreviation: CERD General Recommendation XXIII Indigenous Peoples (Fifty-first session 1997), para. 1, [hereinafter General Recommendation No. 23] at: <https://www.uio.no/studier/emner/jus/jus/JUS5710/h13/undervisningsmateriale/general%2Brecommendation%2Bno23.pdf>.

<sup>8</sup> *Ibid.*, para. 4 (d) and 5.

<sup>9</sup> Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of all Forms of Racism, Canada*, 4 April 2012, CERD/C/CAN/CO/19-20, at para. 20, available at: <https://www.refworld.org/publisher,CERD,CONCOBSERVATIONS,CAN,506183642,0.html>.

procedures, find means and ways to establish titles over their lands, and respect their treaty rights;<sup>10</sup>

***2017: “Deep concern” and a request for more information within a year***

In 2017, the Committee, on its combined review of Canada’s 21<sup>st</sup> to 23<sup>rd</sup> periodic reports, expressed “deep concern” with Canada’s continuing failure to comply with Convention duties in relation to the rights of Indigenous Peoples, stating that:

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

(b) Costly, time-consuming and ineffective litigation is often the only remedy, in place of seeking free, prior and informed consent — resulting in the State party continuing to issue permits which allow for damage to lands.<sup>11</sup>

With respect to the Site C hydroelectric project in northern British Columbia – which, like the Coastal GasLink project, is opposed by affected Indigenous Peoples – the Committee expressed concern that:

(c) According to information received, permits have been issued and construction has commenced at the Site C dam, despite the vigorous opposition of indigenous people affected by this project, which will result in irreversible damage due to flooding of their lands, leading to the elimination of plants, medicines, wildlife, sacred lands and gravesites.

(d) According to information received, the Site C dam project proceeded despite a joint environmental review for the federal and provincial governments, which reportedly concluded that the impact of the dam on indigenous peoples would be permanent, extensive and irreversible.

Recalling its General Recommendation No. 23 and its 2012 recommendations to Canada, the Committee recommended that Canada:

(a) Ensure the full implementation of General Recommendation No. 23 in a transparent manner with the full involvement of the First Nations, Inuit, Métis and other indigenous peoples and with their free, prior and informed consent on all matters concerning their land rights;

(b) Prohibit the environmentally destructive development of the territories of indigenous peoples, and allow indigenous peoples to conduct independent environmental impact studies;

---

<sup>10</sup> *Ibid*, para. 20.

<sup>11</sup> Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of all Forms of Racism, Canada*, 13 September 2017, CERD/C/CAN/CO/21-23, at para. 19, available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD/C/CAN/CO/21-23&Lang=En](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD/C/CAN/CO/21-23&Lang=En).

(c) End the substitution of costly legal challenges as post facto recourse in place of obtaining meaningful free, prior and informed consent of indigenous peoples;

(d) Incorporate the free, prior and informed consent principle in the Canadian regulatory system, and amend decision-making processes around the review and approval of large-scale resource development projects such as the Site C dam;

(e) Immediately suspend all permits and approvals for the construction of the Site C dam. Conduct a full review in collaboration with indigenous peoples of the violations of the right to free, prior and informed consent, of treaty obligations and of international human rights law from the building of this dam and identify alternatives to irreversible destruction of indigenous lands and subsistence, which will be caused by this project;<sup>12</sup>

### ***Canada ignores the Committee's recommendations***

The Committee also asked Canada to provide, within one year, information on the implementation of these 2017 recommendations.<sup>13</sup> Canada did not implement these recommendations and did not reply as requested.

Ignoring the recommendations, both Canada and BC approved Site C. The Government of BC also ignored facts and evidence-based opposition of many others. Hundreds of scientists cautioned against the project stating, “[t]he number and scope of significant adverse environmental effects arising from the Site C Project are...greater than for any project ever assessed.” A Resolution passed by the Union of BC Municipalities in September 2016 called for the immediate suspension of all work on Site C pending a full review. There was also opposition from environmentalists, agronomists, economists, accountants, hydrologists and others. Harry Swain, the Chair of the Joint Review Committee appointed to conduct a limited review of Site C, was also opposed to the project. The Joint Review Committee was prohibited from considering any impact on Indigenous Peoples’ treaty rights and from considering other issues relevant to the public interest. Thus, it was well established prior to approval by the federal and BC governments that Site C construction would cause permanent and irremediable environmental, economic, cultural, and social damage, and would violate the internationally protected rights of Treaty 8 members.

### ***December 2019 Urgent Action Procedure Decision: The Committee is “alarmed,” and “disturbed”***

On 20 November 2018 the Union of BC Indian Chiefs sent a letter to the Committee invoking its Early Warning and Urgent Action Procedure which allows the Committee to take preventive action on an urgent basis. In December 2018 the Committee sent a letter to Canada<sup>14</sup> expressing concern with the lack of measures to ensure the right to consultation and free, prior and informed

---

<sup>12</sup> *Ibid*, paras. 19 (c) (d) and 20 (a) to (e).

<sup>13</sup> *Ibid*, para. 40.

<sup>14</sup> See the Committee’s letter of 14 December 2018, CERD/EWUAP/Canada-Indigenous Framework/2018/JP/ks 14December 2018, available at: [https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/CAN/INT\\_CERD\\_ALE\\_CAN\\_8817\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/CAN/INT_CERD_ALE_CAN_8817_E.pdf). See other correspondence by scrolling down at: <https://www.ohchr.org/EN/HRBodies/CERD/Pages/EarlyWarningProcedure.aspx>.

consent. The Committee's letter also expressed concern that proceeding with Site C without free, prior and informed consent would "permanently affect the land rights of affected indigenous peoples in BC and infringe rights protected by the Convention." The Committee invited Canada to seek assistance from the UN EMRIP to get technical advice on the rights of Indigenous Peoples and to facilitate dialogue.

In April 2019, Canada sent a letter to the Committee saying it would provide a "fulsome" report on Site C in response to the Early Warning and Urgent Action Procedure. In May 2019, the Committee wrote a letter welcoming "the information provided by the State party on the Re-initiation of Phase III consultation on the Trans Mountain Pipeline Expansion Project, including with the Secwepemc indigenous peoples." The Committee added that it "remains concerned about the lack of consideration given to the Committee's General Recommendation No. 23 on the rights of indigenous peoples (1997) to ensure that no decisions directly relating to indigenous peoples' rights are taken without their free, prior and informed consent." The Committee also expressed concern about the "lack of information about the measures taken [by Canada] for obtaining free, prior and informed consent." The Committee reiterated its request for information "about the construction of the Site C dam."<sup>15</sup> In June 2019, Canada provided the Committee with a 10-page letter stating that Canada was complying with its legal duty to consult, was opposing further court challenges, and confirming that the court had refused to hear challenges based on treaty violations in a judicial review.<sup>16</sup> Canada argued that:

There is no duty to reach agreement, but there must be good faith efforts and a commitment to a meaningful process by both the government and the Indigenous group whose asserted or established rights may be adversely impacted. Where adequate consultation has occurred, and reasonable accommodation offered, a development may proceed without consent.<sup>17</sup>

On 13 December 2019 the Committee issued its decision, expressing concern at the continuation of large-scale projects without free, prior and informed consent, and the disproportionate use of force and intimidation against protesters. The Committee also expressed "alarm" at the escalating threat of violence against Indigenous Peoples and was "disturbed by forced removal, disproportionate use of force, harassment and intimidation by law enforcement officials against indigenous peoples who peacefully oppose large-scale development projects on their traditional territories." The Committee was concerned by Canada's "refusal to consider free, prior and informed consent as a requirement for any measure, such as large-scale development projects, that may cause irreparable harm to indigenous peoples' rights, culture, lands, territories and way of life" (emphasis added).<sup>18</sup>

---

<sup>15</sup> The Committee's letter of 10 May 2019 is found at CERD/EWUAP/98thsession/Canada (Trans Mountain Pipeline Project)/JP/ks 10 May 2019, available at: [https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/CAN/INT\\_CERD\\_ALE\\_CAN\\_8927\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/CAN/INT_CERD_ALE_CAN_8927_E.pdf).

<sup>16</sup> Canada's response to concerns raised by the Committee on the Elimination of Racial Discrimination under its Early Warning and Urgent Action Procedure: Site C dam, available at: <https://witnessforthepeace.ca/wp-content/uploads/2019/06/Canadas-response-to-CERD-EWUAP-Site-C-dam-FINAL-corrected.pdf>.

<sup>17</sup> *Ibid*, para. 13.

<sup>18</sup> CERD Decision 1(100), *supra* note 3, Preamble.

The Committee urged Canada to immediately:

- suspend the construction of the Site C dam, until free, prior and informed consent is obtained from West Moberly and Prophet River First Nations, following the full and adequate discharge of the duty to consult;
- halt the construction and suspend all permits and approvals for the construction of the Coastal GasLink pipeline in the traditional and unceded lands and territories of the Wet'suwet'en, until they grant their free, prior and informed consent, following the full and adequate discharge of the duty to consult;
- “freeze present and future approval of large-scale development projects affecting indigenous peoples that do not enjoy free, prior and informed consent from all indigenous peoples affected;”
- “cease forced eviction of Secwepemc and Wet'suwet'en peoples; guarantee that no force will be used against Secwepemc and Wet'suwet'en peoples and that the Royal Canadian Mounted Police and associated security and policing services will be withdrawn from their traditional lands” (emphasis added);
- “prohibit the use of lethal weapons, notably by the Royal Canadian Mounted Police, against indigenous peoples.”

The Committee also encouraged Canada to seek technical advice from the UN EMRIP.

### **III. The UN definition of the rule of law**

Canada and BC have been wrongly citing the term “rule of law”<sup>19</sup> to justify enforcement of laws and decisions that purport to override international human rights laws that protect the rights of both Indigenous Peoples and of Indigenous and non-Indigenous protesters.<sup>20</sup>

The 1948 *Universal Declaration of Human Rights* (UDHR)<sup>21</sup> describes the rule of law as necessary to protect rights and essential to avoid “recourse, as a last resort, to rebellion to against tyranny and oppression.”<sup>22</sup> The UN defines the rule of law as follows:

“The “rule of law” is a concept at the very heart of the [UN] mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are

---

<sup>19</sup> Laura Kane, Canadian Press, "Trudeau says government 'concerned with the rule of law' amid protests, rail disruptions," Global News, 13 February 2020, available at: <https://globalnews.ca/news/6545720/wetsuweten-pipeline-protests-day-8/>; Canadian Press, "Horgan says 'rule of law applies,' LNG pipeline will proceed despite protests," CBC, 13 January 2020, available at: <https://www.cbc.ca/news/canada/british-columbia/lng-pipeline-horgan-british-columbia-1.5425745>.

<sup>20</sup> Lawyers' Rights Watch Canada, "Canada and BC violate UN “injunction” while lawful protesters arrested and threatened with armed force," LRWC Press release, 12 February 2020, available at: <https://www.lrwc.org/canada-and-bc-violate-un-injunction/>; Kate Gunn and Bruce McIvor, "The Wet'suwet'en, Aboriginal Title, and the Rule of Law: An Explainer," First Peoples' Law, 13 February 2020, available at: <https://www.firstpeopleslaw.com/index/articles/438.php>.

<sup>21</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), [hereinafter UDHR], available at: <https://www.refworld.org/docid/3ae6b3712c.html>.

<sup>22</sup> *Ibid*, Preamble.

publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.<sup>23</sup>

The UN, the Organization of American States (OAS), the African Union (AU), and the European Union (EU) all accept the rule of law as a necessary foundation for rights-based and democratic governance and legal systems. Equality and non-discrimination are integral to the rule of law.

Canada, as a member of the UN since 1945, is bound by the *Charter of the United Nations* (UN Charter).<sup>24</sup> The UN Charter sets out the basic purposes of the UN, including the purpose to “develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples” and to promote and encourage “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” Canada has also been a member of the OAS since 1990 with binding treaty obligations under the OAS Inter-American human rights system, which are discussed below with reference to Canada’s obligations to Indigenous Peoples.

#### **IV. Equality, non-discrimination: IHRL guarantees**

##### ***IHRL obligations to guarantee the rights to equality and freedom from discrimination***

The guarantees of equality and non-discrimination are integral to the rule of law. Embedded in Art. 2 and 7 of the UDHR, these rights have been codified and incorporated into many international human rights law instruments binding on Canada, including the:

- *International Covenant on Civil and Political Rights*,<sup>25</sup> Art. 2(1), 3, 14 (1) and 26;
- *International Covenant on Economic, Social and Cultural Rights*,<sup>26</sup> Art. 2(2), 3;
- *Convention on the Elimination of all Forms of Discrimination against Women*,<sup>27</sup> Art. 2;
- ICERD,<sup>28</sup> Art. 5;
- *Convention on the Rights of the Child*,<sup>29</sup> Art. 2;
- *Charter of the Organization of American States*;<sup>30</sup> and

---

<sup>23</sup> The UN website cites this definition at <https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/>. UN Security Council. 2004, Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies, 23 August 2004, S/2004/616, para.6, available at: <https://www.un.org/ruleoflaw/files/2004%20report.pdf>.

<sup>24</sup> UN, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: <https://www.un.org/en/sections/un-charter/un-charter-full-text/>.

<sup>25</sup> *International Covenant on Civil and Political Rights*, GA Res. 2200A (XXI), UN GAOR, 21<sup>st</sup> Sess. (1966) (ICCPR) UN Treaty Series, vol. 999, at p. 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html>.

<sup>26</sup> *International Covenant on Economic, Social and Cultural Rights*, GA Res. 2200(XXI) A-C, UN GAOR, 21<sup>st</sup> Sess., UN Treaty Series, vol. 993, at p. 3, available at: <https://www.refworld.org/docid/3ae6b36c0.html>.

<sup>27</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, GA Res. 2263(XXII), UN GAOR, 34<sup>th</sup> Sess., UN Doc. A/RES/34/180 (1979), available at: <https://www.refworld.org/docid/3ae6b3970.html>.

<sup>28</sup> ICERD, *supra* note 2.

<sup>29</sup> *Convention on the Rights of the Child*, GA Res. 44/25, 44<sup>th</sup> Sess. UN Doc. No. A/RES/44/25 (1989), available at: <https://www.refworld.org/docid/3ae6b38f0.html>.

<sup>30</sup> *Charter of the Organization of American States*, 30 April 1948, 119 UNTS 3 at Preamble and Article 3(1): Appendix A, No 1 [hereinafter OAS Charter], available at: <https://www.refworld.org/docid/3ae6b3624.html>.

- *American Declaration on the Rights and Duties of Man*,<sup>31</sup> Art. II.

The duty of States to prevent and remedy all prohibited forms of discrimination by private and public agencies has been confirmed by a number of UN bodies, including the ICERD Committee and the:

- UN Human Rights Committee;<sup>32</sup>
- UN Committee on the Elimination of Discrimination against Women (CEDAW Committee);<sup>33</sup>
- UN Committee on Economic, Social and Cultural Rights (CESCR);<sup>34</sup> and
- UN Office of the High Commissioner of Human Rights (OHCHR).<sup>35</sup>

Together, equality and non-discrimination are so fundamental to international law that this principle has become a peremptory norm or *jus cogens*.<sup>36</sup> The *International Covenant on Civil and Political Rights* (ICCPR), Art 4.1, prohibits discrimination even in “time of public emergency which threatens the life of the nation.” The Inter-American Court of Human Rights (IACtHR) has stated that:

“... at the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the sphere of *jus cogens*. It constitutes the foundation for the legal framework of national and international public order and it permeate[s] the whole legal system.”<sup>37</sup>

States are obligated to provide formal or *de jure* equality by ensuring that their laws do not discriminate through distinctions, exclusions, restrictions, or preferences based on grounds such as race or national origin. States are further obligated to establish substantive equality<sup>38</sup> and reverse and eliminate all indirect discrimination that arises or has arisen when laws or policies have or have had unequal and adverse effects on particular individuals or groups.<sup>39</sup> The

<sup>31</sup> IACHR, *American Declaration of the Rights and Duties of Man*, 2 May 1948, [hereinafter *American Declaration*], available at: <https://www.refworld.org/docid/3ae6b3710.html>.

<sup>32</sup> *Nahlik v. Austria*, U.N. Doc. CCPR/C/57/D/608/1995 (1996), at para. 8.2. [hereinafter *Nahlik*], available at: <https://undocs.org/CCPR/C/57/D/608/1995>.

<sup>33</sup> *A. T. v. Hungary*, Communication No.: 2/2003, Views of CEDAW, adopted 26 January 2005, at the thirty-second session, at para. 9.2 [hereinafter *A.T. v. Hungary*], available at: <https://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/CEDAW%20Decision%20on%20AT%20vs%20Hungary%20English.pdf>.

<sup>34</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 20: Non-discrimination in economic, social and cultural rights (Art. 2, para. 2, of the *International Covenant on Economic, Social and Cultural Rights*), 2 July 2009, E/C.12/GC/20, para. 11, [hereinafter CESCR GC No. 20], available at: .

<sup>35</sup> UNHRC, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, UN HRC, 29<sup>th</sup> Sess., UN Doc. A/HRC/29/23 (2015), at paras. 16 and 41, [hereinafter UNHRC A/HRC/29/2300], available at:

[https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A\\_HRC\\_29\\_23\\_en.doc](https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A_HRC_29_23_en.doc).

<sup>36</sup> *Supra* note 4.

<sup>37</sup> IACtHR, *Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile*, Merits, Reparations and Costs, Judgment of May 29, 2014, Series C No. 279, para. 197, [hereinafter IACtHR, *Norín Catrimán*], available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_279\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_279_ing.pdf).

<sup>38</sup> CESCR GC No. 20, *supra*, note 34, at para. 11.

<sup>39</sup> IACtHR, *Xákmok Kásek Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment of August 4, 2010, Series C No. 214, para. 274, [hereinafter IACtHR, *Xákmok Kásek Indigenous Community*], available at:

[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_214\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_214_ing.pdf).

obligation to establish substantive equality requires States to institute ameliorative measures and extend special or preferential treatment to ensure the full exercise of all rights by groups that suffer from historic disadvantage or vulnerability.<sup>40</sup> Indigenous Peoples are recognized as being among such groups.<sup>41</sup>

## **V. Special State obligations owed to Indigenous Peoples to ensure equality and non-discrimination**

Canada has been a member of the OAS since 1990 and is legally bound by the *Charter of the Organization of American States* (OAS Charter).<sup>42</sup> A fundamental principle of the OAS Charter is that “[i]nternational order consists essentially of respect for the personality, sovereignty, and independence of States, and the faithful fulfillment of obligations derived from treaties and other sources of international law.”<sup>43</sup> The OAS Charter also created the Inter-American human rights system (IAHRS). The same year, the OAS adopted the *American Declaration on the Rights and Duties of Man* (American Declaration).<sup>44</sup> By the time Canada joined the OAS, the Inter-American Court of Human Rights (IACtHR) had confirmed that the American Declaration “was a source of legal obligations for all the member States of the OAS.”<sup>45</sup> Canada’s obligations under the American Declaration and other instruments and jurisprudence of the IAHRS are discussed below with reference to Canada’s State obligations to Indigenous Peoples.

The IAHRS has emphasized specific legal obligations of States in relation to Indigenous Peoples, based on the systemic historic discrimination, marginalized conditions, assimilation, dispossession, and exclusion they have suffered and continue to suffer across the hemisphere.<sup>46</sup> The IAHRS recognizes that special legal protection<sup>47</sup> is required in relation to Indigenous Peoples to ensure their effective and equal enjoyment of all their human rights, given their historical, cultural, social and economic situation and experiences, as historically excluded and marginalized groups.

---

<sup>40</sup> The IACtHR confirmed that States “must abstain from carrying out actions that are in any way directly or indirectly designed to create situations of *de jure* or *de facto* discrimination”: IACtHR, *Norín Catrimán*, *supra* note 37, para. 201. The IAHRS further confirmed that States are required to take affirmative action to reverse or change *de jure* or *de facto* situations of inequality and discrimination, on the basis that failing to do so can violate the rights to equality and non-discrimination: IACtHR, *Xákmok Kásek Indigenous Community*, *supra* note 39, para. 271; and see IACHR, Merits Report No. 26/09, Case 12.440. *Wallace de Almeida (Brazil)* (2009), para. 147, available at: <http://www.cidh.org/annualrep/2009eng/Brazil12440eng.htm>.

<sup>41</sup> IACHR Report, Indigenous Peoples, Afro-Descendant Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities: OEA/Ser.L/V/II.Doc. 47/1531 December 2015, para. 149, [hereinafter IACHR Report, Indigenous Peoples], available at: <http://www.oas.org/en/iachr/reports/pdfs/ExtractiveIndustries2016.pdf>.

<sup>42</sup> OAS Charter, *supra* note 30.

<sup>43</sup> *Ibid*, Article 2.

<sup>44</sup> *Supra* note 31.

<sup>45</sup> The Honourable Shirley Maheu, Chair, and the Honourable Eileen Rossiter, Vice Chair, Enhancing Canada's Role in the OAS: Canadian Adherence to the American Convention on Human Rights: Report of the Standing Senate Committee on Human Rights, Senate of Canada, May 2003, at note 33, available at: <https://sencanada.ca/Content/SEN/Committee/372/huma/rep/rep04may03-e.htm#1%20>, citing Inter-American Court of Human Rights, “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, Series A, No 10, 14 July, 1989.

<sup>46</sup> IACHR Report, Indigenous Peoples, 2015, *supra* note 41, para. 149.

<sup>47</sup> *Ibid*. and also see IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations and Costs. Judgment of January 31, 2001, Series C No. 79.

### ***Right to participate in decisions that affect them***

In addition to framing these realities in substantive equality rights terms, the Inter-American Commission on Human Rights (the IACHR) has determined that overcoming this situation requires Indigenous Peoples' participation in the decision-making processes of political, social, cultural and economic institutions that affect them.<sup>48</sup> The IACHR has further required that the participation be effective, and enacted through the right to consultation, and "when applicable," the right to free, prior and informed consent.<sup>49</sup>

### ***Right to consultation and the duty to obtain free, prior and informed consent: Specific guarantees in the context of proposed extractive or other activities in Indigenous Peoples' territories***

The IACHR conception of the duty to obtain free, prior and informed consent has focused on activities undertaken by States or under States' authorization that have an impact on Indigenous Peoples' use and enjoyment of their territories and natural resources. The following is a summary of the requirements:

- Indigenous Peoples' participation in decision making processes must be guaranteed and must be "meaningful and effective;"<sup>50</sup>
- Indigenous Peoples' right to property together with their rights to equality and non-discrimination are violated in instances where States grant concessions to third parties within lands that should have been delimited, demarcated and titled or otherwise clarified and protected, and without effective consultation and the free, prior and informed consent of the affected Indigenous people.<sup>51</sup> The right to (collective) property is thus also framed in terms of the rights to equality and non-discrimination.
- States have an obligation to consult and to provide adequate and effective mechanisms so as to obtain the free, prior and informed consent of Indigenous Peoples, in line with their customs and traditions, prior to launching activities that would affect their interests in and rights on their territories and their natural resources.<sup>52</sup>

The IACtHR has found that these requirements are consistent with the observations of the UN Human Rights Committee and various international instruments, including the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>53</sup>

---

<sup>48</sup> IACHR Report, Indigenous Peoples, 2015, *supra* note 41, para. 150.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*, para. 156, citing IACHR, Merits Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, Annual Report of the IACHR, para 140 [hereinafter IACHR *Dann*], available at: <http://cidh.org/annualrep/2002eng/USA.11140.htm>.

<sup>51</sup> IACHR, Merits Report No. 40/04, Case 12.053. *Maya Indigenous Community of the Toledo District (Belize)*, 12 October 2004, paras. 153 and 142 [hereinafter IACHR, *Maya Indigenous Community*], available at: <http://www.cidh.oas.org/annualrep/2004eng/Belize.12053eng.htm>.

<sup>52</sup> IACHR *Dann*, *supra* note 50; IACHR, *Maya Indigenous Community*, *supra* note 51, para 142.

<sup>53</sup> IACtHR, *Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, paras. 130-131 [hereinafter IACtHR, *Saramaka People*, 2007], available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_172\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf).

### *Elaborating on consultation and consent*

The IAHR has established that the objective of all consultation processes is to reach an agreement or obtain consent.<sup>54</sup> This means that the affected Indigenous people must be capable of having significant influence on the process and decisions taken therein, addressing any concerns they have.<sup>55</sup>

Going beyond the duty to consult, consent is required in the case of “large-scale development or investment projects that would have a major impact within [the Indigenous] territory.”<sup>56</sup> In its 2008 interpretive decision in *Saramaka People v. Suriname*, the IACtHR held that “when large-scale development or investment projects could affect the integrity of the Saramaka people’s lands and natural resources, the State has a duty not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent in accordance with their customs and traditions.”<sup>57</sup> The IACtHR has referenced statements of the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples to the effect that where large-scale projects that occur in areas occupied by 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. [...] The principal human rights effects of these projects... relate to loss of traditional territories and land, eviction, migration and eventual resettlement, depletion of resources necessary for physical and cultural survival, destruction and pollution of the traditional environment, social and community disorganization, long-term negative health and nutritional impacts as well as, in some cases, harassment and violence.<sup>58</sup>

The IACHR summarizes the basis for the system’s 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. The duty to obtain consent responds, therefore to a logic of proportionality in relation to the right indigenous property and other connected rights.<sup>59</sup>

---

<sup>54</sup> *Ibid*, para. 134.

<sup>55</sup> IACtHR, *Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012, Series C No. 245, para. 167.

<sup>56</sup> IACtHR, *Saramaka People*, 2007, *supra* note 53, para. 134.

<sup>57</sup> IACtHR, *Saramaka People v. Suriname*. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185, para 17, available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_185\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_185_ing.pdf).

<sup>58</sup> IACtHR, *Saramaka People*, 2007, *supra* note 53, para. 135.

<sup>59</sup> IACHR Report, *Indigenous and Tribal Peoples’ Rights to their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the IAHR*, OEA/Ser.L/V/II. Doc.56/0930. December 2009, para. 333, available at: <https://www.oas.org/en/iachr/indigenous/docs/pdf/AncestralLands.pdf>.

## VI. Canada's duty to comply with IHRL obligations

Consistent with IHRL, the *Canadian Charter of Rights and Freedoms* (Charter)<sup>60</sup> guarantees in Section 15 that,

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Section (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Supreme Court of Canada has consistently ruled that the Charter should be interpreted to provide at least as good protection as provided by the international treaties to which Canada is a State Party.

In 2007, the Supreme Court of Canada (SCC) affirmed in *R v. Hape* that, “[w]herever possible [the Court] has sought to ensure consistency between its interpretation of the *Charter*... and Canada’s [international human rights law] obligations...”<sup>61</sup> In 2013, the SCC affirmed in *Divito v. Canada (Public Safety and Emergency Preparedness)* that “the Charter should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified” (emphasis added).<sup>62</sup> These principles were reaffirmed in 2015 by the SCC in *Saskatchewan Federation of Labour v. Saskatchewan*.<sup>63</sup> In *R. v. Keegstra*, the SCC noted that, “... the international human rights obligations taken on by Canada reflect the values and principles of a free and democratic society, and thus those values and principles that underlie the Charter itself.”<sup>64</sup> The Charter “is founded on principles that recognize the supremacy of ...the rule of law.”<sup>65</sup> The Supreme Court of Canada has referred to the “rule of law” as a “‘fundamental postulate of our constitutional structure’ that lies ‘at the root of our system of government’.”<sup>66</sup>

The Supreme Court of Canada (SCC) recently affirmed two critical legal imperatives: the importance of IHRL as the underpinning of the rule of law, and that international human rights

---

<sup>60</sup> Canadian Charter of Rights and Freedoms, s 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, available at: <https://laws-lois.justice.gc.ca/eng/const/page-15.html>.

<sup>61</sup> *R v Hape*, 2007 SCC 26, [2013] 3 SCR 157, at para. 55, available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2364/index.do>.

<sup>62</sup> *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 SCR 157, at para. 23, available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13233/index.do>.

<sup>63</sup> *Saskatchewan Federation of Labour v. Saskatchewan* 2015 SCC 4, [2015] 1 SCR 245, at para. 64.

<sup>64</sup> *R v Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 SCR 697, at p. 750, available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/695/index.do>.

<sup>65</sup> Charter, Preamble, *supra* note 60

<sup>66</sup> *British Columbia v. Imperial Tobacco Canada Ltd.* 2005 SCC 49, [2005] 2 SCR 473, available at <https://www.canlii.org/en/ca/scc/doc/1998/1998canlii793/1998canlii793.html>, citing *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 70.

law norms are “not theoretical aspirations or legal luxuries, but moral imperatives and legal necessities.”<sup>67</sup>

The SCC also confirmed that “customary international law is automatically adopted into [Canadian] law without any need for legislative action”<sup>68</sup> and that peremptory or *jus cogens* norms are fundamental tenets of international law that are non-derogable.<sup>69</sup>

The duty of States to prevent discrimination on prohibited grounds by private and public agencies has been confirmed by a number of international bodies including the UN Human Rights Committee,<sup>70</sup> UN CEDAW Committee on,<sup>71</sup> the CESCR,<sup>72</sup> and the OHCHR.<sup>73</sup> When considering the applicability of CIL, the SCC in *Nevsun* confirmed that “[t] here is no reason, in principle, why ‘private actors’ excludes corporations.”<sup>74</sup>

## **VII. Summary and Conclusions**

The “rule of law” is a principal of governance in which all persons, including corporations and government, are equally bound by laws that are promulgated consistently with the IHRL principles of public participation and self-determination and independently interpreted consistently with Canada’s IHRL obligations, including the duty to ensure equality and non-discrimination. The rule of law emerged as necessary to ensure peaceful means of preventing and remedying the arbitrary exercise of State power and as a shield against tyranny and oppression. The rule of law does not authorize enforcement of laws and decisions that violate protected rights but rather ensures processes by which unlawful restrictions or violations of protected rights can be peacefully challenged, determined, prevented, and remedied. An international law understanding of the rule of law thus stands in direct contradiction to authoritarian constructions of “rule by law.” This report concludes that:

1. Canada is bound to respect the rule of law and IHRL, and to provide effective remedies for breaches of the law, by virtue of numerous binding treaties and instruments including the UN Charter, the UDHR, the ICCPR, the ICESCR, the ICERD, the Charter of the OAS, the American Declaration, and the *Charter*.
2. The SCC has confirmed that the *Charter* must be interpreted to provide at least as great a level of protection as is provided by the international treaties to which Canada is a State Party.
3. Canada has consistently failed to take appropriate measures to combat and eliminate all forms of discrimination against Indigenous Peoples, and in particular has repeatedly failed to honor and implement recommendations of the ICERD Committee.
4. Canada is obligated to respect and comply with the 13 December 2019 Decision of the Committee, which provides authoritative interpretation of States’ binding obligations under the ICERD. Therefore, Canada’s obligations under the ICERD, require Canada, including BC, to implement the Committee’s calls to:

---

<sup>67</sup> *Nevsun*, *supra* note 1, at Case in Brief & Para.1.

<sup>68</sup> *Ibid*, para. 47, quoting (Currie, *Public International Law*, at pp. 225-26; *Hape*, at paras. 36 and 39, citing *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529 (Eng. C.A.), per Lord Denning; Hersch Lauterpacht,

<sup>69</sup> *Ibid*, para. 83.

<sup>70</sup> *Nahlik supra* note 32.

<sup>71</sup> *A. T. v. Hungary*, para. 9.2, *supra* note 32.

<sup>72</sup> CESCR *GC No. 20*, *supra*, note 345, at para. 11.

<sup>73</sup> UNHRC A/HRC/29/23, *supra* note 35, paras. 16 and 41.

<sup>74</sup> *Nevsun*, *supra* note 1, at para. 111.

- a. “immediately halt the construction of the Coastal GasLink pipeline in the traditional and unceded lands and territories of the Wet’suwet’en..., until they grant their free, prior and informed consent, following the full and adequate discharge of the duty to consult;”<sup>75</sup>
- b. cease the forced eviction of the Wet’suwet’en from their traditional territories;
- c. guarantee that no force will be used against the Wet’suwet’en; and
- d. guarantee that the Royal Canadian Mounted Police and associated security and policing services will be withdrawn from their unceded traditional lands.

\* \* \* \*

### **Lawyers’ Right Watch Canada (LRWC), 17 March 2020**

Researched and written for LRWC by Gail Davidson and Heather Neun, and edited by Catherine Morris. Assistance was provided by Gavin Magrath and Helen Lau.

*LRWC is a volunteer-run committee of lawyers and other human rights defenders who promote international human rights, the rule of law, the integrity of legal systems, and advocacy rights around the world through advocacy, education and legal research. LRWC has Special Consultative Status with the UN Economic and Social Council.*

---

<sup>75</sup> CERD Decision 1(100), *supra*, note 3.