

CANADA

BRIEFING TO THE UN COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

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**AMNESTY
INTERNATIONAL**



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1. INTRODUCTION

Canada is a nation with enormous racial and ethnic diversity; and that diversity continues to grow. For instance, according to Canada's 2006 Census, Indigenous (or Aboriginal) peoples – the Inuit, First Nations and Métis peoples -- made up almost 1.2 million of Canada's overall population of 31.6 million. That constitutes 3.8 per cent of the population. Notably that was an increase of 20 per cent from the 2001 Census.¹ In that same Census, Canadians reported having more than 200 ethnic origins; the proportion of the population that was born outside the country was close to 20 per cent, the highest in 75 years; and over five million people identified themselves as members of a visible minority group.²

Canada has, for decades, put in place a wide range of laws, policies and institutions that recognize and protect the rights of diverse peoples and communities. Notably, the Canadian Constitution guarantees the rights of Aboriginal peoples and includes a Charter of Rights and Freedoms which enshrines a right to equality in section 15. Other provisions include federal, provincial and territorial human rights codes,³ each of which is overseen and enforced by various commissions and/or tribunals; as well as the Canadian Multiculturalism Act 1985.

Despite embracing this diversity and instituting numerous legal and policy provisions to protect the rights of diverse communities, racism has continued to be a serious human rights challenge for Canada. Recognizing that reality, the government launched a five-year Action Plan against Racism in 2005. A recent government evaluation of that Action Plan found that:

There is evidence to suggest that minorities are experiencing racism and discrimination and recent data show that groups most at risk of being victimized by hate and bias activity are racial/ethnic minorities and religious minorities. Evidence also suggests that Aboriginal people, visible minorities and immigrants are particularly vulnerable to unemployment, underemployment, lower incomes and social segregation.⁴

This brief builds on Amnesty International's previous submissions to the United Nations

¹ *Canada: Nineteenth and twentieth periodic reports of States parties due in 2009*, International Convention on the Elimination of All Forms of Racial Discrimination, UN Doc. CERD/C/CAN/19-20 (8 June 2011), para. 30; *Population and Dwelling Counts*, Statistics Canada, <http://www12.statcan.ca/census-recensement/2006/dp-pd/hlt/97-550/Index.cfm?TPL=P1C&Page=RETR&LANG=Eng&T=101>, accessed 28 October 2011.

² *Nineteenth and twentieth periodic reports*, paras. 21- 22.

³ *Canadian Human Rights Act*, RSC 1985, c H-6; Ontario: *Human Rights Code*, RSO 1990, c H.19; Yukon Territory: *Human Rights Act*, RSY 2002, c 116. Similar human rights statutes are in force in other Canadian provinces and territories.

⁴ *Evaluation of Canada's Action Plan Against Racism*, Citizenship and Immigration Canada, Evaluation Division, December 2010, pages iv and v.

Committee on the Elimination of Racial Discrimination (the Committee) at the time of its examination of periodic reports submitted by Canada in 2002⁵ and 2007.⁶ As has been the case with previous submissions, the brief focuses on concerns with respect to the rights of Indigenous peoples; refugees and migrants; and racial discrimination in the context of national security laws and practices.

As a preliminary point, Amnesty International repeats the recommendation the organization made in both 2002 and 2007 calling on Canada to make a declaration under Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (the Convention), recognizing the jurisdiction of this Committee to receive individual petitions alleging breaches of the Convention. Canada has accepted three other individual petition procedures within the UN human rights system, namely those recognizing the competences of the UN Human Rights Committee (CCPR), the UN Committee against Torture (CAT) and the UN Committee on the Elimination of Discrimination against Women (CEDAW) to consider cases. This Committee has repeatedly called on Canada to consider making a declaration under Article 14.⁷ Doing so would further strengthen protection of the right of all Canadians to be free from racial discrimination.

RECOMMENDATION:

Canada should make a declaration under Article 14 of the Convention, recognizing the jurisdiction of the Committee to receive individual petitions alleging breaches of the Convention.

2. INDIGENOUS PEOPLES

Although Canada is a prosperous country with an overall high standard of living⁸ Indigenous peoples in Canada – Inuit, Métis and First Nations -- experience widespread impoverishment and deprivation. United Nations treaty bodies and other Special Procedures, including this Committee, the CCPR, the CEDAW, UN Committee on the Rights of the Child (CRC), the UN Special Rapporteur on the right to adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, and the

⁵ *Without Discrimination: The Fundamental Right of All Canadians to Human Rights Protection*, Amnesty International Canada (July 2002).

⁶ Amnesty International, *Canada Human Rights for All: No Exceptions* (AMR 20/001/2007).

⁷ *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada*, UN Doc. CERD/C/CAN/CO/18 (25 May 2007), para. 28; *Report of the Committee on the Elimination of Racial Discrimination*, UN Doc. A/57/18, 2002, para. 340; *Report of the Committee on the Elimination of Racial Discrimination*, UN Doc. A/49/18, 1995, para. 304.

⁸ According to the UN Development Programme, Canada overall has the sixth highest Human Development Index in the world. United Nations Development Programme. *Human Development Report 2011 —Sustainability and Equity: A Better Future for All*, p. 126.

UN Special Rapporteur on the rights of Indigenous peoples, have expressed concern over the persistent failure to substantially close the social and economic gap between Indigenous and non-Indigenous peoples.⁹

In the report of his 2004 mission to Canada, the UN Special Rapporteur on the rights of Indigenous peoples noted:

*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, housing conditions, family income, access to economic opportunity and to social services are generally lower.*¹⁰

The Special Rapporteur also observed that the “unacceptable gaps” between Indigenous peoples and the rest of the population persist despite “an impressive number of programmes and projects and considerable financial resources.”¹¹ These sentiments were also reflected by the Committee on Economic, Social and Cultural Rights (CESCR) when it reviewed Canada in 2006.¹² A recent federal government analysis found not only a significant gap between Indigenous and non-Indigenous communities in four selected indicators of “community well-being” – educational attainment, labour force participation, income, and housing – but also concluded that “little or no progress” had been made toward narrowing this gap in the study period of 2001-2006 and that a third of First Nations and Inuit communities had

⁹ 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/CAN/CO/4-E/C.12/CAN/CO/5 (22 May 2006); UN Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc CCPR/C/CAN/CO/5 (20 April 2006); 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).

¹⁰ 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), p.2.

¹¹ 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), p.2.

¹² UN Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UN E/C.12/CAN/CO/4-E/C.12/CAN/CO/5 (22 May 2006), para.17; and E/C.12/1/Add.31 (10 December 1998), para. 17.

experienced a decline in the selected indicators.¹³ The Auditor General of Canada recently commented on both “a lack of progress in improving the lives and well-being” of people living in First Nations communities and the fact that services available in First Nations communities “are often not comparable to those provided [in primarily non-Indigenous communities] by provinces and municipalities.”¹⁴

In this submission, Amnesty International highlights six areas where Canada has failed to work collaboratively with Indigenous peoples to ensure their full and equitable enjoyment of internationally recognized human rights or, through its actions and policies, has contributed to the current inequalities. The six areas of concern are:

- a. Canada’s continued resistance to the full implementation of the UN Declaration on the Rights of Indigenous Peoples;
- b. the failure to respect and protect Indigenous peoples’ land rights;
- c. discrimination in the delivery of government services;
- d. the failure to ensure appropriate police response to Indigenous land rights protests;
- e. the failure to develop a comprehensive response to the high levels of violence facing Indigenous women; and
- f. the impact of Canadian trade policy and the overseas operations of Canadian companies on the rights of Indigenous peoples in other countries.

A. IMPLEMENTATION OF THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

While welcoming the fact that Canada officially endorsed the UN Declaration on the Rights of Indigenous Peoples (the Declaration) in November 2010, Amnesty International remains concerned both by the absence of a plan of action for its implementation and by continued government statements denying responsibility to ensure that policies and legislation live up to the minimum standards set out in this instrument. New guidelines for consultation with Indigenous peoples issued by the federal government in March 2011, not only fail to incorporate the Declaration’s numerous relevant provisions on consultation and Indigenous peoples’ right to participate in decision making, these provisions are not incorporated into the government guidelines. In addition, these guidelines assert that Canada “has concerns with some of the principles in the Declaration” including the right of free, prior and informed consent and that the Declaration “does not alter” Canada’s legal duties in respect to

¹³ Indian and Northern Affairs Canada, Strategic Research and Analysis Directorate, *First Nation and Inuit Community Well-Being: Describing Historical Trends (1981-2006)* (April 2010).

¹⁴ Auditor General of Canada, *2011 June Status Report*, available at: http://www.oag-bvg.gc.ca/internet/English/parl_oag_201106_04_e_35372.html.

consultation with Indigenous peoples.¹⁵

While no human rights declaration has the power to “alter” domestic laws, human rights declarations are intended as a source of interpretation of national laws and legal responsibilities and may reflect legal obligations already established in international law. The provisions of the Declaration reflect international human rights norms and many mirror protections already afforded under binding human rights treaties such as this Convention and their interpretation by various treaty bodies. For example, the right of free, prior and informed consent, which Canada specifically objects to in its guidelines, was affirmed in this Committee’s General Recommendation XXIII. In addition, implementation of the Declaration’s provisions provides a means to safeguard and fulfill a wide range of human rights, including rights to self-determination, lands and culture, that are well-established in international law and for which, because of a history of their violation in respect to Indigenous peoples in Canada, it is appropriate to seek additional protection through the application of international norms. Amnesty International agrees with the observation of the UN Special Rapporteur on the rights of indigenous peoples that:

*[T]he significance of the Declaration is not to be diminished by assertions of its technical status as a resolution that in itself has a non-legally binding character. Implementation of the Declaration should be regarded as a political, moral and, yes, legal imperative without qualification.*¹⁶

RECOMMENDATION:

Canada should, in collaboration with Indigenous peoples’ organizations, develop a plan of action for implementation of the Declaration, including the provisions on free, prior and informed consent. The government should report regularly to Parliament on the progress made in fulfilment of this plan of action.

B. FAILURE TO RESPECT AND PROTECT INDIGENOUS PEOPLES’ LAND AND RESOURCE RIGHTS

The lands currently protected for the use and benefit of Indigenous peoples are only a small fraction of their traditional territories. Historic treaties, which affirm 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.

Government officials in Canada have acknowledged the severe economic and social impact of

¹⁵ Aboriginal Affairs and Northern Development Canada. *Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfil the Duty to Consult - March 2011*, available at: <http://www.aadnc-aandc.gc.ca/eng/1100100014664>.

¹⁶ Report to the United Nations General Assembly by the Special Rapporteur on the rights of Indigenous peoples, James Anaya, UN Doc. A/65/264 (9 August 2010), para. 63.

inadequately protected land rights. In a Government of British Columbia document entitled “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.*¹⁷

Despite such acknowledgement, however, the available means to resolve land disputes and restore and protect Indigenous lands have proven inadequate to the task of achieving redress and fulfillment of Indigenous peoples’ human rights. Negotiation of Indigenous land claims typically drag on for years or even decades, at enormous costs to the affected communities. In British Columbia, 47 First Nations are currently in negotiations over land title and other rights. The Auditor General estimated in 2006 that the majority of these negotiations had stalled or were making little progress,¹⁸ a situation that continues today. First Nations 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 First Nations have already incurred debts of between 44 and 64 per cent of the value of any financial settlement they are likely to achieve.¹⁹

The failure to ensure fair and timely resolution of so many outstanding land and resource disputes is largely a consequence of government negotiating policies that seek to minimize any liability to the state and expressly constrain the recognition and protection of Aboriginal rights and title. In the first modern treaties negotiated after 1973, the federal government required the inclusion of clauses stating that all rights not specifically enumerated in the agreement would be extinguished.²⁰ The policy was later modified to offer other formulas that still have 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.²¹ This approach has been widely condemned by UN treaty bodies,²² including

¹⁷ Province of British Columbia, Ministry of Aboriginal Relations and Reconciliation, available at: <http://www.gov.bc.ca/arr/treaty/negotiating/why.html>.

¹⁸ *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).

¹⁹ *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.

²⁰ 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.

²¹ Canada’s Policy for the Settlement of Native Claims describes the objective of modern treaty

this Committee, which called on Canada during its 2007 review to “ensure that the new approaches taken to settle aboriginal land claims do not unduly restrict the progressive development of aboriginal rights.”²³

The available mechanisms to resolve land and resource disputes and the policies followed by the Canadian government have in fact compounded and contributed to the continuing erosion of Indigenous peoples’ rights. Negotiations over land rights typically drag for many years owing to tactics adopted by government officials, dramatically increasing costs for Indigenous peoples to participate. In large areas of Canada, particularly in British Columbia and in the east, there are still no agreements between the state and Indigenous peoples to resolve Indigenous peoples’ title to lands and resources. Where treaties exist, whether historic or modern, there are widespread disputes over their implementation. In March 2011, a federal government official told a parliamentary committee that there were 526 claims concerning historic treaties currently being assessed or under negotiation and another 77 cases before the courts.²⁴

I. HUL’QUMI’NUM TREATY GROUP CASE

In 2009, the Inter-American Commission on Human Rights (IACHR) agreed to hear a human rights complaint concerning the federal government’s refusal to negotiate fair redress for six Vancouver Island First Nations who have been dispossessed of most of their traditional territory without consent or compensation. The six First Nations of the Hul’qumi’num Treaty Group (HTG) have been in negotiation with the federal and provincial governments since 1994 under the comprehensive claims process in British Columbia. Participation in this process has already cost the First Nations (Canadian) \$20 million for research and other expenses, which will be deducted from any settlement.

The HTG alleges that Canada has violated international human rights norms by excluding from negotiations any possible restoration of land now held by private land owners, or adequate compensation for its loss, as well as by failing to protect Hul’qumi’num interests while the dispute remains unresolved. In agreeing to hear the complaint, the Inter-American Commission ruled that the available mechanisms to resolve this dispute in Canada, whether through litigation or the comprehensive claims process, are too onerous and constrained in

negotiation as one of exchanging “undefined Aboriginal rights for a clearly defined package of rights and benefits codified in constitutionally protected settlement agreements.” Department of Indian Affairs and Northern Development, *Federal Policy for the Settlement of Native Claims* (Ottawa, 1993), p. i.

²² 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. UN Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/CAN/CO/5 (20 April 2006), para. 8.

²³ 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.

²⁴ The Standing Committee on Aboriginal Affairs and Northern Development. *Minutes of Proceedings* (1 March 2010).

their protection of human rights to live up to the standards of international justice.²⁵

The failure to reach timely resolution of outstanding land disputes often has the consequence of depriving Indigenous peoples of access to an adequate land base on which to sustain their ways of life, pass traditions on to future generations, meet the immediate economic needs of their communities and rebuild their economies. These harms are compounded by the failure to provide effective interim protection for Indigenous land rights while disputes remain unresolved.

Large scale resource development on Indigenous lands, such as mining, oil sands extractions, oil and gas development and clear-cut logging, presents an inherent challenge to the integrity of Indigenous peoples' use of the land. Under international human rights standards, Indigenous peoples have a right to free, prior and informed consent; i.e. to make their own informed decision about whether such development should proceed. In practice, consultation with Indigenous peoples typically occurs after the decision to prioritize extractive development over other land uses has already taken place. Consequently consultation tends to be confined to the mitigation of adverse project impacts rather than to the more fundamental question of whether the project should proceed or whether the land should be protected for other uses. Furthermore, governments in Canada typically rely on project proponents, or on regulatory agencies with limited mandates in respect to Indigenous rights, to carry out such consultations. Indigenous peoples who determine that a proposed project is incompatible with their use of the land typically have little recourse to prevent it going ahead, short of a lengthy legal battle that most are unable to afford.

II. TRANSCANADA PIPELINE

On 15 August 2008, this Committee wrote to the Government of Canada, under the Early Warning Measures and Urgent Procedures, to express concern about the TransCanada pipeline, a massive natural gas pipeline being built across the land of the Lubicon Cree in northern Alberta. The Committee questioned whether the provincial government "may legitimately authorize the construction of a pipeline across Lubicon Territory without prior Lubicon consent."²⁶

In October 2008, the Alberta Utilities Commission – a provincial government agency -- allowed construction of this pipeline to go ahead despite unresolved objections from the Lubicon. In making its decision, the Commission refused to consider Lubicon concerns that the project had proceeded to the approval stage without prior Lubicon consent, ruling that the onus was on the Lubicon to demonstrate that the pipeline would cause harm to their use of the land.²⁷

²⁵ 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), paras. 37-9.

²⁶ http://www2.ohchr.org/english/bodies/cerd/docs/Canada_letter150808.pdf

²⁷ Alberta Utilities Commission, Decision on Prehearing Meeting, Decision 2008-035. April 24, 2008. http://www.lubicon.ca/lm/080424auc_prehearing.pdf, and Alberta Utilities Commission, Decision on Prehearing Meeting, Decision 2008-035. May 8, 2008. http://tao.ca/~fol/lm/080513auc_denial.pdf.

The construction of the TransCanada pipeline is just one example of the ongoing failure to recognize and protect Lubicon rights in respect to their traditional territory. Between 1979 and 2008, the Alberta government authorized the construction of more than 2680 wells and more than 2366 kilometres of pipeline on Lubicon land.²⁸ In a 1990 ruling, the CCPR concluded that “historical inequities... and certain more recent developments [referring here primarily to the scale and intensity of oil and gas development] threaten the way of life and culture of the Lubicon Lake Band and... so long as they continue” constitute a violation of the right to culture.²⁹

In a 2010 letter to Amnesty International, the Alberta Minister for Aboriginal Relations stated that “the province administers the lands in the Lubicon Lake region in the same manner as all other areas of Alberta” and that “Alberta has an obligation to administer these lands for the benefit of all Albertans.”³⁰ This approach ignores the standards set out in General Recommendation 23 and the Declaration, which both require the free, prior and informed consent of Indigenous peoples where activities will affect their rights or interests.³¹ The position taken by the Alberta government also ignores domestic legal standards, including the fact that the Lubicon have never entered into any agreement to surrender Aboriginal title to their traditional lands and that they unquestionably have ongoing land use rights as guaranteed to all Indigenous people under Canadian constitutional law, such as hunting and trapping rights.

In fact, the Lubicon have repeatedly sought a negotiated settlement of their land and resource rights. The last negotiations broke down in 2003 because, in the Lubicon view, the federal negotiators’ restricted mandate on key issues of redress and self-government was not adequate to address the community’s needs and ensure fulfillment of their rights.³²

On 29 April 2011, a leaking pipeline spilled an estimated 28,000 barrels – or 4.5 million litres – of crude oil into wetlands on Lubicon lands. It was the largest oil spill in Alberta since 1975 and led to the temporary closure of the school in the Lubicon community of Little Buffalo. The province allowed the pipeline to resume operation three months later. This decision was taken without Lubicon consent and without any meaningful consultation. The

²⁸ Amnesty International. *From Homeland to Oil Sands: The Impact of Oil and Gas Development on the Lubicon Cree of Canada*. June 2010. AI Index: 20/002/2010.

²⁹ United Nations Human Rights Committee Communication No. 167/1984: Canada. 10/05/90. CCPR/C/38/D/167/1984.

³⁰ Letter to Amnesty International, The Honourable Len Webber, Alberta Minister of Aboriginal Relations, 26 July 2010.

³¹ Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23: Indigenous Peoples* (1997), para. 4(d); UN Declaration on the rights of indigenous peoples, A/RES/61/295, article 19.

³² Lubicon Lake Indian Nation. Submission to the 36th Session of the United Nations Committee on Economic, Social and Cultural Rights on the Occasion of the Review of Canada’s 4th and 5th Periodic Reports (1 May 2006), p. 4-8, available at. <http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/lubiconlakeindian.pdf>.

province ignored a Lubicon request for an independent assessment of the causes of the leak, the likelihood of future leaks, and possible impact on the Lubicon.³³

III. NORTHERN GATEWAY PIPELINE

In May 2010, a Canadian pipeline company, Enbridge, filed an application to build two parallel pipelines connecting the Alberta oil sands to the British Columbia (BC) coast.³⁴ One of the pipelines is intended to carry a daily average of 525,000 barrels of bitumen, oil and the industrial condensates needed to allow bitumen transport, while the other is intended to bring a daily average of 193,000 barrels of these condensates to the oil sands. The project proposal also includes the construction of new facilities near Kitimat, BC so that tankers can export the oil and import the condensate.³⁵

The proposal has been publicly opposed by the majority of Indigenous peoples whose traditional lands would be crossed by the pipeline, as well as by First Nations concerned about the potential impact on the downstream rivers and the coastal waters on which they depend. In March 2010, nine First Nations in BC issued their own ban on tanker traffic in the coastal waters of their territories.³⁶ In December 2011, 61 First Nations with territory in the largest watershed on the proposed pipeline route issued a declaration denouncing the project as a "grave threat" to "our laws, traditions, values and our inherent rights as Indigenous peoples."³⁷

The proposal is now before a government-appointed review panel with the power to make non-binding recommendations on whether the government should or should not approve the project. On January 9, the day before the public hearings began, the federal Minister of Natural Resources issued an open letter in which he defined the export of oil to Asian markets as "an urgent matter of Canada's national interest" and stated that "[w]e do not want projects that are safe, generate thousands of new jobs and open up new export markets, to die in the approval phase due to unnecessary delays."³⁸

³³ CTV News. "Company able to operate again" (1 September 2011), available at: http://edmonton.ctv.ca/servlet/an/local/CTVNews/20110901/edm_rainbow_110901/20110901/

³⁴ Enbridge Northern Gateway LP. Enbridge Northern Gateway Project Sec 52 Application. Volume 1: Overview and General Information (May 2010).

³⁵ Enbridge Northern Gateway LP. Enbridge Northern Gateway Project Sec 52 Application. Volume 1: Overview and General Information (May 2010), p. 1.

³⁶ Coastal First Nations, *Coastal First Nations Declaration* (23 March 2010), available at: <http://dogwoodinitiative.org/no-tankers/downloadable-files/cfn-declaration-with-release-and-background/view>

³⁷ Save the Fraser Gathering of Nations. Save the Fraser Declaration (November 2011), available at: <http://www.savethefraser.ca/>.

³⁸ Natural Resources Canada. An open letter from the Honourable Joe Oliver, Minister of Natural Resources, on Canada's commitment to diversify our energy markets and the need to further streamline the regulatory process in order to advance Canada's national economic interest (9 January 2012),

The Minister's statement prompted First Nations organizations in BC to question the legitimacy of the review process.³⁹ In Amnesty International's view, the nature and timing of the Minister's statement raises serious questions about whether the federal government has already determined that the pipeline proposal will go ahead, despite the fact that affected First Nations have expressly not given consent.

RECOMMENDATIONS:

(1) Canada should publicly acknowledge its obligation to ensure fair and timely settlement of outstanding land and resource disputes in a manner consistent with international human rights norms and standards.

(2) Canada should take immediate action to remove barriers to the fair, adequate and timely resolution of outstanding land and resource disputes, including by reforming policies and practices that are inconsistent with international human rights standards, such as arbitrary limits on the negotiation of redress.

(3) Canada should enact laws and implement practices and policies that ensure that approval of resource extraction activities is contingent on formal, rigorous and meaningful consultation with Indigenous peoples and that development proceeds only with the free, prior and informed consent of those Indigenous peoples whose rights are affected. Consistent with international human rights standards, Indigenous peoples whose rights to lands and resources are the subject of as yet unresolved disputes should receive the same protections.

C. DISCRIMINATION IN THE DELIVERY OF SERVICES (ARTICLES 2(A), 5(A), (E)(IV))

I. CHILD PROTECTION

In a landmark case brought before the Canadian Human Rights Tribunal, the applicants - the First Nations Child and Family Caring Society (FNCFCS) and the Assembly of First Nations (AFN) - alleged that the federal government has discriminated against First Nations children living in reserve communities by failing to provide adequate funding necessary to ensure access to the same quality of child protection programs and services available to non-Aboriginal children.

On a per child basis, federal funding for First Nations child and family services has fallen to less than 80 per cent of the level provided by provincial and territorial governments for services in predominantly non-Aboriginal communities.⁴⁰ This is despite the higher costs of

available at: <http://www.nrcan.gc.ca/media-room/news-release/2012/1/3520>.

³⁹ British Columbia Assembly of First Nations, First Nations Summit, Union of British Columbia Indian Chiefs. Federal Government Comments Damaging to the Impartiality of the Review Process (10 January 2010), available at: http://www.ubcic.bc.ca/News_Releases/UBCICNews01101202.html.

⁴⁰ The First Nations Child and Family Caring Society of Canada. *Wen:de - We are coming to the light of day*. (October 2005), pp.14, 44; Department of Indian Affairs and Aboriginal Development and Assembly

delivering such services in small and remote First Nations communities and the greater need among many First Nations communities. As a consequence, the removal of children from their families and communities, a measure intended strictly as a last resort, has become a commonplace response when First Nations families on reserve face challenges in providing adequate care to their children.

The federal government has acknowledged that Indigenous children are four to six times more likely than non-Indigenous children to be removed from their families for reasons such as neglect.⁴¹ Additionally, a 2004 government briefing note obtained by the First Nations Child and Family Caring Society notes that the circumstances for First Nations children are "dire" and that "as a consequence of providing inadequate prevention resources, it is foreseeable that civil proceedings could be initiated against the Government of Canada as a result of neglect or abuse of children in care."⁴²

The federal government strongly opposed the Tribunal holding hearings into the case brought by the FNCFCS and the AFN. It argued firstly that the prohibition of discrimination in providing government services under the Canadian Human Rights Act does not apply to the funding decisions that determine the levels and quality of services that are available; and secondly that services delivered to First Nations under federal jurisdiction should not be compared to services delivered to the general population under provincial jurisdiction for the purposes of determining whether discrimination has occurred. The case is now before the Federal Court after the Tribunal rejected the case on the second of these two arguments.⁴³

The positions advanced by the Canadian government contravene Canada's obligations under international human rights standards which clearly do not allow for arbitrary distinctions between funding services and service delivery or between federal and provincial jurisdictions.⁴⁴ Amnesty International is concerned that if Canada's objections to the case are upheld, it will create a large gap in protections afforded under the Canadian Human Rights Act (CHRA) because similar arguments could be made in respect to virtually every aspect of federal services to First Nations. The result would be to deny First Nations people in Canada access to the protection of the CHRA on some of the most important aspects of government decision-making and action.

As Canada indicates in its report to this Committee, an amendment to the CHRA came into

of First Nations, First Nations Child and Family Services Joint National Policy Review (June 2000).

⁴¹ *Building a Brighter Future for Urban Aboriginal Children: Report of the Parliamentary Standing Committee on Human Resources Development and the Status of Persons with Disabilities* (June 2003), p.19.

⁴² First Nations Child and Family Caring Society and KAIROS; Canadian Ecumenical Justice Initiatives, *Honouring the Child, Shadow Report to the UN Committee on the Rights of the Child* (October 2011).

⁴³ *First Nations Child and Family Caring Society and Attorney General of Canada*, Federal Court File Number T-630-11.

⁴⁴ *First Nations Child and Family Caring Society and Attorney General of Canada*, Federal Court File Number T-630-11.

force in June 2008, eliminating a discriminatory exemption that had previously prevented the Canadian Human Rights Commission examining complaints of discrimination in respect to the Indian Act, which governs federal exercise of jurisdiction over First Nations reserves. A number of UN treaty bodies and Special Procedures had called for such an amendment including the Special Rapporteur on the rights of Indigenous peoples, the CCPR and the CESCR.⁴⁵ Amnesty International is concerned that the federal government has acted contrary to the spirit of these recommendations, and its own amendment to the CHRA, through its strenuous opposition to Indigenous peoples' efforts to avail themselves of the remedies and rights to redress available through the Canadian Human Rights Commission.

RECOMMENDATIONS:

(1) *Canada should withdraw its objection to the claim of discrimination lodged by the First Nations Child and Family Caring Society and the Assembly of First Nations.*

(2) *Canada should ensure that funding and other support to First Nations' children's services is adequate to meet their needs.*

(3) *Canada should take immediate steps to ensure that in law and practice, there is no discrimination or inequality in the provision of public services between Indigenous peoples and the rest of the population.*

II. SAFE DRINKING WATER

Similar gaps in the enjoyment of human rights persist in a number of other areas of federally-funded services in Indigenous communities. A federal government audit published in 2011 concludes that 39 per cent of all water systems in First Nations communities have major deficiencies that potentially threaten human health and the environment.⁴⁶ Overall, the review classified 73 per cent of drinking water systems and 65 per cent of waste water systems in First Nations communities as either medium or high risk.⁴⁷ The survey also found that 1,880 homes have no water service while another 15,451 (or 13.5 per cent of First

⁴⁵ *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, Addendum: Mission to Canada, E/CN.4/2005/88/Add.3, 2004, p. 24; United Nations, Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant – Concluding observations of the Human Rights Committee: Canada, CCPR/C/CAN/CO/5 (20 April 2006), para. 22; United Nations, Committee on Economic, Social and Cultural Rights, Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant – Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada (pdf, 41 pages), E/C.12/CAN/CO/5 (22 May 2006), para. 17, 45.*

⁴⁶ Neegan Burnside Ltd., *National Assessment of First Nations Water and Wastewater Systems. National Roll-Up Report. Department of Indian Affairs and Northern Development* (April 2011), p.ii, available at: <http://www.aadnc-aandc.gc.ca/eng/1313770257504>.

⁴⁷ Neegan Burnside Ltd., *National Assessment of First Nations Water and Wastewater Systems. National Roll-Up Report. Department of Indian Affairs and Northern Development* (April 2011), p.ii, available at: <http://www.aadnc-aandc.gc.ca/eng/1313770257504>.

Nations households), rely on trucked-in water.⁴⁸

In 2006, an expert panel appointed by the federal government concluded that drinking water problems in First Nations communities were primarily the result of the failure of the federal government to provide the resources necessary “to ensure that the quality of First Nations water and wastewater is at least as good as that in similar communities and that systems are properly run and maintained.”⁴⁹

While the federal government claims to have already made significant investment in First Nations water quality, the federal government’s response to the 2011 audit states that plans for investment in First Nations water systems from now until 2016 cover only 25 per cent of the highest risk water systems.⁵⁰

RECOMMENDATIONS:

(1) *Canada should immediately adopt measures, especially the provision of adequate resources, to ensure water and sanitation in First Nations communities meets the standards enjoyed by other people in Canada, including urgent measures to address the needs of those First Nations communities that have no potable water or sewage systems.*

(2) *Canada should ensure that any measures related to First Nations water and sanitation are taken in collaboration with the affected peoples and are consistent with international human rights standards.*

D. POLICING AND INDIGENOUS PROTESTS (ARTICLE 5(B)(C)(D)(VIII)AND (D)(XI))

In September 1995, the Ontario Provincial Police (OPP) deployed a force of approximately 200 officers, including snipers to respond to the occupation of Ipperwash Provincial Park by a small group of Indigenous protesters. The protest was meant to focus attention on the longstanding failure of the federal and provincial governments to restore Indigenous lands taken in the 1890s and 1930s. On the night of September 6, 1995, the situation escalated when police suddenly moved against the protesters. One Indigenous man was allegedly badly beaten by police and another, Dudley George, was fatally shot by a police sniper who was

⁴⁸ Neegan Burnside Ltd., *National Assessment of First Nations Water and Wastewater Systems. National Roll-Up Report. Department of Indian Affairs and Northern Development* (April 2011), p. i., available at: <http://www.aadnc-aandc.gc.ca/eng/1313770257504>.

⁴⁹ Harry Swain, Stan Louttit and Steve Hruddy, *Report of the Expert Panel on Safe Drinking Water for First Nations. Department of Indian Affairs and Northern Development* (November 2006), p. 50, available at: http://www.afn.ca/uploads/files/volume_1_e.pdf.

⁵⁰ Aboriginal Affairs and Northern Development Canada, *Fact Sheet - Risk Assessment of Water and Wastewater Systems in First Nations Communities*, available at <http://www.aainc-inac.gc.ca/enr/wtr/nawws/fsris-eng.asp>.

subsequently criminally charged and convicted.

After the tragic events at Ipperwash Provincial Park the OPP implemented a number of reforms, including a new framework for responding to such protests. The *Framework for Police Preparedness for Aboriginal Critical Incidents*, adopted by the OPP in 2000 and updated in 2005, recognizes that Indigenous land protests involve a variety of rights issues and affirms that “it is the role of the OPP and all of its employees to make every effort prior to a critical incident to understand the issues and to protect the rights of all involved parties throughout the cycle of conflict.”⁵¹ The stated purpose of the Framework includes promoting and developing “strategies that minimize the use of force to the fullest extent possible.”⁵²

In 2003, the Ontario provincial government instituted a public inquiry into the events at Ipperwash, following calls for such an inquiry by the CCPR.⁵³ The Inquiry report, released in 2007, points out that occupations such as the one that took place at Ipperwash, “occur when members of an Aboriginal community believe that governments are not respecting their treaty or Aboriginal rights, and that effective redress through political or legal means is not available. It is typical of these events that governments have failed to respect the rights at issue or to provide effective redress, for a very long time, and a deep sense of frustration has built up within the Aboriginal community.”⁵⁴

The Inquiry report called for the provincial government to adopt, “as soon as it is practical to do so,” a province-wide “peacekeeping” policy based largely on the OPP Framework, in order to “codify the lessons learned at Ipperwash and reassure both Aboriginal and non-Aboriginal Ontarians that peacekeeping is the goal of both police and government in this province, that treaty and Aboriginal rights will be respected, that negotiations will be attempted at every reasonable opportunity, and that the use of force must be the last resort.”⁵⁵

Despite a public commitment by the provincial government to fully implement the recommendations of the Ipperwash Inquiry, little progress has been made in the nearly five years since the Inquiry concluded. The province has yet to implement a provincial peacekeeping policy and the OPP framework has not been subjected to an independent review as called for by the Inquiry. The federal government, which chose not to participate in the Inquiry, has also not taken up its recommendations.

Furthermore, a case study carried out by Amnesty International suggests that the OPP has failed to fully implement its own framework for responding to Indigenous protests and that the provincial government is not holding the OPP accountable to this framework.⁵⁶ In

⁵¹ Ontario Provincial Police. *Framework for Police Preparedness for Aboriginal Critical Incidents*. p. 2.

⁵² Ontario Provincial Police. *Framework for Police Preparedness for Aboriginal Critical Incidents*. p. 2.

⁵³ UN Human Rights Committee. Concluding observations of the Human Rights Committee: Canada. 7 April 1999. CCPR/C/79/Add.105

⁵⁴ Province of Ontario, *Report of the Ipperwash Inquiry*, Vol. 2, p. 43.

⁵⁵ Province of Ontario, *Report of the Ipperwash Inquiry*, Vol. 2, p. 216.

⁵⁶ Amnesty International Canada. “I was never so frightened in my entire life”: *Excessive and dangerous*

separate incidents in June 2007 and April 2008, hundreds of OPP officers were deployed to surround and contain protesters from the Tyendinaga Mohawk Territory in Ontario. These forces included members of the Tactics and Rescue Unit, commonly known as the sniper squad and whose members are heavily armed. No credible evidence has ever been brought forward to show that the protesters were armed or represented a significant threat to public safety.⁵⁷ However, in an incident in April 2008 the situation escalated to the point that OPP officers, in response to a false report that a rifle had been sighted, drew handguns and levelled high powered assault rifles at unarmed activists and bystanders.⁵⁸ The provincial government has refused calls by Amnesty International for an independent probe of these incidents and the OPP has refused to confirm whether it has even conducted an internal review.

RECOMMENDATIONS:

(1) *Canada should ensure that all jurisdictions in the country adopt and implement binding policies publicly affirming that in responding to Indigenous occupations and protests, particularly within the context of land related resources disputes, security forces use lethal force only as a last resort and only when strictly necessary to protect life or ensuring the safety of others.*

(2) *Canada should press the government of the Province of Ontario to implement fully the recommendations of the Ipperwash Inquiry, including an independent review of the Framework for Police Preparedness for Aboriginal Critical Incidents, and conduct a specific probe into the OPP handling of incidents at Tyendinaga.*

E. VIOLENCE AGAINST INDIGENOUS WOMEN AND GIRLS (GENERAL RECOMMENDATION 25; ARTICLES 2(A), 5(A), (B), (E)(IV) AND 6)

Over the past seven years, Amnesty International has been raising concerns with the Government of Canada about the high rates of violence faced by Indigenous women and girls in Canada and their lack of access to justice.⁵⁹ Police in Canada do not consistently record or report whether the victims of violent crime are Indigenous. As a consequence there are no

police response during Mohawk land rights protests on the Culbertson Tract (May 2011). Available at: <http://www.amnesty.ca/files/canada-mohawk-land-rights.pdf>.

⁵⁷ Amnesty International Canada. *"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)*, available at: <http://www.amnesty.ca/files/canada-mohawk-land-rights.pdf>.

⁵⁸ Amnesty International Canada. *"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)*, available at: <http://www.amnesty.ca/files/canada-mohawk-land-rights.pdf>.

⁵⁹ *Amnesty International, Canada: Stolen Sisters: A Human Rights Response to Discrimination and Violence against Indigenous Women in Canada, 3 October 2004 (AMR 20/003/2004).*

reliable, disaggregated statistics on the rate of violence faced by Indigenous women.⁶⁰

However, in a 2004 Canadian government survey, Indigenous women reported rates of violence, including domestic violence and sexual assault, three and half times (3.5 times) higher than non-Indigenous women.⁶¹ A 2007 joint committee of government, Indigenous peoples, police and community groups in Saskatchewan reported that 60 per cent of the long-term cases of missing women in the province are Indigenous, although Indigenous women make up only 6 per cent of the population.⁶² As of March 2010, the Native Women's Association of Canada, with the support of the Government of Canada, had documented 582 cases of missing and murdered Indigenous women and girls, mostly from the past three decades.⁶³

The deep-rooted discrimination, marginalization and impoverishment experienced by Indigenous peoples in Canada is a critical, underlying factor leading both to the targeting of Indigenous women for extreme acts of racist and sexist violence and denying Indigenous women and their families appropriate support and protection by the state. Amnesty International's research, based on the testimonials of families who have sought police help when sisters and daughters have gone missing, indicates that police procedures and practices for responding to missing persons cases too often fail to take into account the pervasiveness and severity of threats faced by Indigenous women, resulting in a failure of police to take prompt and effective action.

This Committee has previously expressed concern about the fact that Indigenous women "constitute a disproportionate number of victims of violent death, rape and domestic violence" in Canada and called on Canada to strengthen services for victims of crime and ensure that police training takes into consideration "the specific vulnerability of aboriginal women and women belonging to racial/ethnic minority groups to gender-based violence."⁶⁴ The CEDAW requested concrete action by the Canadian government on the high rate of violence against Indigenous women and girls in Canada in its concluding observations to Canada's 2008 sixth and seventh periodic report.⁶⁵

⁶⁰ Statistics Canada, "Violent victimization of Aboriginal women in the Canadian provinces, 2009," Shannon Brennan, (17 May, 2011).

⁶¹ Jodi-Anne Brzozowski, Andrea Taylor-Butts and Sara Johnson, "Victimization and offending among the Aboriginal population in Canada", Juristat. Vol. 26, no. 3 (Canadian Centre for Justice Statistics, 2006).

⁶² Saskatchewan Provincial Partnership Committee on Missing Persons, Final Report (October 2007).

⁶³ Native Women's Association of Canada, *What their voices tell us: Research findings from the Sisters in Spirit Initiative* (31 March 2010), p. i., available at: http://www.nwac.ca/sites/default/files/reports/2010_NWAC_SIS_Report_EN.pdf.

⁶⁴ *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada*, UN Doc. CERD/C/CAN/CO/18 (25 May 2007), para. 20.

⁶⁵ CEDAW recommended that Canada "develop a specific and integrated plan for addressing the particular conditions affecting aboriginal women, both on and off reserves...including poverty, poor health, inadequate housing, low school-completion rates, low employment rates, low income and high

During the Universal Periodic Review of Canada in 2009, Canada stated that “[t]he issue of missing and murdered Aboriginal women is a pressing concern for Canada... Canada commits to identifying the causes of violence against Aboriginal women and developing appropriate responses in consultation with Aboriginal and civil society organizations.”⁶⁶ In 2010 and 2011, the House of Commons Standing Committee on the Status of Women held a series of hearings in which Indigenous women and other advocates presented their analysis and proposals for addressing the violence faced by Indigenous women. In March 2011, the all-party Committee released its interim report which stated that “[w]hat is required is a coordinated, holistic approach to violence against Aboriginal women.”⁶⁷

Amnesty International is concerned about reports that the current Minister of State for Status of Women, Rona Ambrose, has rejected this call for a national plan of action.⁶⁸

In its report to this Committee, Canada notes an October 2010 announcement of new programs and initiatives “to improve community safety and to ensure that the justice system and law enforcement agencies can better respond to cases of missing and murdered Aboriginal women.”⁶⁹ While many of these initiatives are welcome, the announcement continues a pattern of piecemeal responses that do not reflect an overall strategy and which fall short of the urgent action needed to address a problem of this severity and scale.

The government notes, for example, that it is introducing amendments to the Criminal Code to streamline the process of obtaining court orders or warrants for police wire taps. Amnesty International knows of no evidence, however, to suggest that difficulties in obtaining wiretaps is a factor hampering police response to cases of missing and murdered Indigenous women. While Canada plans to compile a national directory of policing “best practices”, it has made no commitment to ensure accurate and consistent recording of the Indigenous identity of victims of crime, something that is necessary to improve data collection and develop appropriate policing, legal and judicial responses to the high rates of violence.⁷⁰

rates of violence...”.

UN CEDAW, 42nd Session October 2008 “Concluding observations of the Committee on the Elimination of Discrimination against Women: Canada”, CEDAW/C/CAN/CO/7 para. 44.

⁶⁶ UN Human Rights Council, 11th Session, Agenda item 6. “Universal Periodic Review: Report of the Working Group on the Universal Periodic Review: Canada Addendum Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review,” (A/HRC/11/17/Add.1).

⁶⁷ Standing Committee on the Status of Women, 40th Parliament, 3rd Session, “Interim Report: Call into the night: An overview of violence against Aboriginal women (March 2011), page 9.

⁶⁸ The Canadian Press, “No action plan on missing aboriginal women,” 5 July 2011, <http://www.cbc.ca/news/politics/story/2011/07/05/pol-ambrose-women.html>.

⁶⁹ *Canada: Nineteenth and Twentieth Periodic Reports*, Submitted to the UN Committee on the Elimination of All Forms of Racial Discrimination, CERD/C/CAN/19-20 (8 June 2011), para. 46.

⁷⁰ Amnesty International *No More Stolen Sisters: The Need for a Comprehensive Response to Violence and Discrimination Against Indigenous Women*, September 2009 (AMR 20/012/2009).

RECOMMENDATION:

Canada should publicly commit to, and should immediately develop, a coordinated, comprehensive, national plan of action to end violence against Indigenous women and girls. This should include information about a timeline and budget towards achieving the creation of a national plan of action and ensuring its effective implementation. It should also include a clear and transparent plan for comprehensive consultation and collaboration with Indigenous women and representative organizations.

F. CONCERNS ABROAD: INDIGENOUS PEOPLES, CORPORATE ACTIVITIES AND TRADE POLICY (ARTICLE 2)

In 2007, this Committee called on Canada to “take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada.”⁷¹ In particular, the Committee “recommends that the State party explore ways to hold transnational corporations registered in Canada accountable.”⁷² The Committee also specifically requested that, for the purposes of this current review, Canada should provide “information on the effects of activities of transnational corporations registered in Canada on indigenous peoples abroad and on any measures taken in this regard.”⁷³ Unfortunately that information has not been provided in Canada’s nineteenth and twentieth periodic reports.

Since that time, proposed legislation brought by an opposition Member of Parliament, which would have codified a minimum legal framework for the human rights responsibilities of Canadian extractive companies operating outside Canada was narrowly defeated by six votes in an October 2010 parliamentary vote, and did not become law.⁷⁴ The bill, if passed into law, would have given the government authority to investigate allegations of human rights abuses against Canadian companies operating abroad and withhold public money. The government has adopted a new Corporate Social Responsibility (CSR) strategy, including a CSR Counsellor who has a mandate to help mediate disputes related to the overseas operations of Canadian extractive companies. However, the Office of the Extractive Sector CSR Counsellor has serious limitations in that it cannot compel companies to participate – if a company refuses to cooperate, the case can’t be investigated – and has no mandate to order corrective measures or provide a remedy or require redress.⁷⁵

⁷¹ *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada*, UN Doc. CERD/C/CAN/CO/18 (25 May 2007), para. 17.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ Bill C-300, *Corporate Accountability of Mining, Oil and Gas Corporations in Developing Countries Act*, 9 February 2009.

⁷⁵ The government’s CSR strategy was announced in March 2009, two years after the multi-stakeholder Advisory Group to the National Roundtables on Corporate Social Responsibility and the Extractive Sector

Similarly, Canada's National Contact Point (NCP) for the Organisation for Economic Co-operation and Development (OECD) has been ineffective in investigating specific instance complaints filed by affected (and Indigenous) communities. In the case of Guatemala, a specific instance complaint was submitted by Indigenous community organisations in San Miguel Ixtahuacan, San Marcos in 2009 regarding the activities of a Canadian gold mining company.⁷⁶ The complaint outlined allegations of harms and asked the NCP to investigate, make a site visit and issue a statement, including recommendations to the company, to ensure the company's compliance with the OECD Guidelines for Multinational Enterprises.⁷⁷ Ultimately, while the NCP accepted the complaint, it did not advance the case. Despite being told early in the process that dialogue with the company was not possible given the level of distrust felt by stakeholders, the NCP offered to facilitate a closed-door dialogue in Canada with the company. The offer was rejected by the petitioner.⁷⁸ Amnesty International believes that the NCP process in Canada merits substantive changes to ensure a more robust dispute resolution process.

As part of its CSR policy, Canadian diplomatic missions provide support to Canadian extractives companies to assist them in entering into overseas markets. Similarly, some training specific to Indigenous peoples has been provided through diplomatic missions to assist potentially affected communities understand the Canadian mining industry and establish positive relationships between communities and companies wanting to extract resources from within their territories.⁷⁹ However, little evidence exists that Canadian Embassies provide robust human rights training for companies regarding their responsibilities to respect internationally recognized human rights, including Indigenous rights, when operating abroad.⁸⁰

In August 2011 Canada and Colombia entered into a free trade agreement. Canadian

in Developing Countries reached unprecedented consensus and released a set of recommendations for government policy. The CSR strategy failed to adopt the Advisory Group's recommendations for binding standards and an enforcement framework. *Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector* (March 2009), available at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/csr-strategy-rse-strategie.aspx?view=d>.

⁷⁶ http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/specific-specifique.aspx?lang=eng&menu_id=7&view=d#ninth

⁷⁷ OECD Guidelines for Multinational Enterprises, 2011 Edition, <http://www.oecd.org/dataoecd/43/29/48004323.pdf>.

⁷⁸ Canadian National Contact Point for the OECD Guidelines for Multinational Enterprises; Final Statement of the Canadian National Contact Point on the Notification Concerning the Marlin mine in Guatemala, pursuant to the OECD Guidelines for Multinational Enterprises, May 2011, page 2.

⁷⁹ DFAIT supports CSR Projects Abroad, February 11, 2010, http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/fund_summary-resume_fonds.aspx?view=d

⁸⁰ http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/fund_summary-resume_fonds.aspx?view=d

resource companies operate widely in Colombia and are anticipated to increase their presence and level of investment now that the free trade deal between the two countries is in force. There are, however, serious human rights concerns associated with that agreement; including fears that increased extractive industry operations in areas of Colombia inhabited by Indigenous peoples and Afro-descendent communities might exacerbate human rights violations.⁸¹

Notably, Colombia's Constitutional Court has determined that at least 34 Indigenous nations in the country are on the verge of physical and cultural annihilation.⁸² The National Indigenous Organization of Colombia has indicated that the failure to protect Indigenous rights in the face of resource extraction is a critical factor putting Indigenous peoples in the country at risk.⁸³

Given these concerns, Amnesty International called for the agreement to be subject to an independent human rights impact assessment both before and after it came into force.⁸⁴ That recommendation was not accepted, instead the two governments agreed to prepare an annual report containing a general summary of all actions taken under the free trade agreement and an analysis of the impact of these actions on human rights in Canada and in Colombia. These reports are not prepared by an independent body, do not have any specific requirement with respect to the involvement of Indigenous peoples in the review process, and were not required in advance of the free trade agreement coming into force.

The first report on human rights impacts will be tabled in the Canadian and Colombian parliaments in 2012. It is critical that this report clearly indicate all preventative and remedial steps being taken to address potential and actual human rights impacts arising from the agreement. Findings should be publicly disclosed and reported and open to consultation. Indigenous peoples should be appropriately consulted in accordance with international standards. Without these aspects, the report will fall far short of an independent human rights impact assessment.

Amnesty International has raised concerns and made recommendations about the impact of

⁸¹ Testimony of Amnesty International before the House of Commons Standing Committee on International Trade, 30 April 2008, 26 November, 2009 and 6 May 2010.

⁸² Auto 004/09 Corte Constitucional de Colombia, found online at:
<http://www.corteconstitucional.gov.co/relatoria/autos/2009/a004-09.htm>

⁸³ Organización Nacional Indígena de Colombia (ONIC), *Informe, Palabra Dulce, Aire de Vida: Campaña para la pervivencia de los Pueblos Indígenas en Riesgo de Extinción en Colombia*, 2010; *Estado de los Derechos Humanos y Colectivos de los Pueblos Indígenas de Colombia: Etnocidio, Limpieza Étnica y Destierro, Informe al Relator Especial de la ONU para los derechos de los Pueblos Indígenas*, 2009.

⁸⁴ Letter from Amnesty International to Prime Minister Stephen Harper, 21 June, 2007; Letter from Amnesty International to Minister of International Trade David Emerson, 13 December, 2007; Bill C-2: Amnesty International's Concerns and Recommendations, Testimony of Alex Neve, Secretary General, Amnesty International Canada (English branch), House of Commons Standing Committee on International Trade, 6 May, 2010.

the operations of Canadian extractive companies on the protection of human rights, very often the rights of Indigenous peoples, in a number of other countries in addition to Canada, including the Democratic Republic of Congo, Ecuador, Guatemala, Mexico, Papua New Guinea, Peru, the Philippines and Sudan.⁸⁵

RECOMMENDATIONS:

- (1) Canada should, in consultation with Indigenous peoples organizations, establish and implement an effective regulatory framework for holding accountable companies registered, domiciled or operating in Canada for the human rights impact of their operations in Canada or abroad, including the impact on the rights of Indigenous peoples.*
- (2) Canada should ensure that victims of human rights violations associated with the activities of companies registered, domiciled or operating in Canada and/or abroad, have meaningful access to the regulatory mechanism and to effective remedies.*
- (3) Canada should also ensure access to domestic courts in such cases. Legal and administrative sanctioning provisions should be explored for Canadian companies that are found to have caused or contributed to human rights abuses abroad.*
- (4) Canada should implement binding laws and policies requiring companies registered, domiciled or operating in Canada and engaged in resource extraction in Canada or abroad to carry out and report periodically on human rights due-diligence throughout their global operations.*
- (5) Canada should ensure that free, prior and informed consent of Indigenous peoples forms the cornerstone of all negotiations over and/or use of land by provincial governments and the private sector. Canada should also monitor compliance with such policies before providing aid and support. Government agencies which provide funding and/or support to Canadian companies overseas should have human rights commitment policies in place, which are vigorously enforced, and should ensure robust human rights due diligence processes are carried out by potential clients before providing such support to companies.*
- (6) Canada should ensure meaningful participation of Indigenous peoples' organizations in Colombia and Canada in the review of the human rights impacts of the Canada-Colombia Free Trade Agreement and ensure that compliance with the UN Declaration on the Rights of Indigenous Peoples is one of the standards used in this review.*

⁸⁵ Amnesty International's brief in support of Bill C-300: An Act respecting Corporate Accountability for the activities of Canadian mining, oil or gas in Developing Countries. Presented to the House of Commons Standing Committee on Foreign Affairs and International Development, 2009.

3. REFUGEES AND MIGRANTS

Canada has been recognized and commended for its long and generous history of receiving refugees and migrants. Nevertheless, there are numerous human rights concerns associated with government laws, policies and practice with respect to the treatment of refugees, asylum seekers and migrants. Many of those issues have been highlighted by this Committee in past reviews of Canada's record. In its 2002 review of Canada, for example, the Committee called on Canada to give "greater attention to the possible discriminatory effect of Canadian immigration policies."⁸⁶ In this submission Amnesty International highlights four areas of concern: the treatment of individuals who are smuggled into Canada, *non refoulement*, migrant and temporary workers, and access to health care for undocumented migrants.

A. HUMAN SMUGGLING (ARTICLES 2(1)(C), 5(B) AND (D)(I))

The government has recently tabled proposed legislation, Bill C-4, aimed at cracking down on the practice of human smuggling, coming in the wake of the arrival of two boat loads of Tamil refugee claimants from Sri Lanka on Canada's west coast in 2009 and 2010.⁸⁷ The Bill had been previously introduced in October 2010 as well, but did not proceed because all opposition parties were against it and the government was in a minority position at the time. However, following a May 2011 general election the government now enjoys a majority and has reintroduced the legislation, now widely expected to pass.

Amnesty International is concerned that many provisions in the Bill violate the rights of refugees, asylum seekers and migrants who have been smuggled to Canada.

Under Bill C-4, migrants, refugees and asylum seekers, including children, who are designated by the Minister of Public Safety as an "irregular arrival", would be subject to mandatory detention for a minimum of one year or until they are recognized as Convention refugees.⁸⁸ This would not be based on an individual assessment of their case, but on the group with whom they arrived. The detention would therefore be arbitrary. The individuals so detained would not be granted access to statutorily mandated detention reviews during that time,⁸⁹ in contravention of international law provisions prohibiting arbitrary arrest and detention.⁹⁰ They would be subject to mandatory detention unless and until they are

⁸⁶ *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada*, 11/01/2002. A/57/18, para. 336.

⁸⁷ Bill C-4, *the Preventing Human Smugglers from Abusing Canada's Immigration System Act*, introduced by the Minister of Public Safety, 16 June 2011, available at: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5093718&File=24#1> [referred to hereafter as Bill C-4].

⁸⁸ Bill C-4, Clause 10(2) and 12.

⁸⁹ Bill C-4, Clause 10(2) and 12.

⁹⁰ *International Covenant on Civil and Political Rights*, Art. 9; *Convention on the Rights of the Child*, Art.

recognized as refugees under the 1951 Convention relating to the Status of Refugees.

Illegal entry into the country is a common and often necessary step for asylum seekers, who may have limited alternative options for reaching safe countries, because of passport and visa restrictions or for other reasons. However, under Bill C-4, even individuals whose claim for refugee status in Canada is accepted would be penalized and treated in a discriminatory fashion for entering Canada as part of a designated “irregular arrival”. Under the *Immigration and Refugee Protection Act*, an individual who is accepted as a refugee or a person in need of protection may apply for permanent residence from within Canada and may include, within the application, family members living in Canada and abroad so that they can join him or her as permanent residents in Canada. Under Bill C-4, refugees who arrive as part of a designated “human smuggling event” will be deprived of the right, for five years, to apply for permanent residence, and therefore for reunification with their families, including children.⁹¹

Deprivation of the right to apply for permanent residence also means that designated individuals would not be allowed to obtain travel documents and therefore travel outside of Canada during that time.⁹² This leads to further family hardship and may interfere with employment prospects, as employment opportunities may be restricted should they obtain a job in Canada which requires international travel.

Measures meant to target human smugglers must not violate the rights of individuals who turn to them in desperation. With respect to refugees, in particular, measures should not victimize individuals who have been already victimized two times, first by their persecutors and then by smugglers.

RECOMMENDATION:

The Canadian government should withdraw Bill C-4 and should only proceed with law reform dealing with human smuggling in a manner that conforms fully to Canada's international human rights obligations.

B. NON REFOULEMENT TO TORTURE OR OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (ARTICLE 5(B) AND GENERAL RECOMMENDATION XXX, PARA. 27)

Provisions in Canada's Immigration and Refugee Protection Act maintain the possibility that individuals who pose a security risk may be deported from Canada, even if there is a substantial risk that they will be subjected to torture or other cruel, inhuman or degrading treatment or punishment in the country to which they will be deported.⁹³ The Supreme

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⁹¹ Bill C-4, Clause 4 (1.1)(a)(b)(c).

⁹² Bill C-4, Clause 9.

⁹³ *Immigration and Refugee Protection Act*, s. 115(2): This section creates an exception to the principle of non-refoulement “in the case of a person who is inadmissible on grounds of (a) serious criminality and

Court of Canada has ruled that ordinarily no one should be deported to face a “serious risk of torture” but that “in exceptional circumstances, deportation to face torture might be justified.”⁹⁴

Under international law the ban on *refoulement* to a risk of torture or other cruel, inhuman or degrading treatment or punishment is absolute and can never be justified. The CCPR and the CAT have both repeatedly called on Canada to amend its laws to recognize the absolute nature of the ban on *refoulement* in cases involving a risk of torture or other cruel, inhuman or degrading treatment.⁹⁵ The failure to do so means that non-citizens in Canada may face a risk of torture or other cruel, inhuman or degrading treatment that Canadian citizens do not.

RECOMMENDATION:

Canada should amend the Immigration and Refugee Protection Act to implement the absolute ban on deporting, extraditing or in any way returning or transferring an individual to face a risk of torture or other cruel, inhuman or degrading treatment in another country.

C. MIGRANT AND TEMPORARY WORKERS (GENERAL RECOMMENDATION NO XXX, PARA. 35; ARTICLE 5 (E)(I))

Under Canada’s immigration laws, a number of categories of individuals are granted admission to Canada on the basis of temporary or provisional employment. Amnesty International has frequently highlighted concerns that the conditions of employment of certain categories of migrant workers or the legal provisions governing their employment sector put them at risk of human rights violations.⁹⁶ These concerns arise against a backdrop

who constitutes, in the opinion of the Minister, a danger to the public in Canada; or (b) security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.”

⁹⁴ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, paras. 78 and 129, available at: <http://scc.lexum.org/en/2002/2002scc1/2002scc1.html>.

⁹⁵ *Conclusions and recommendations of the Committee against Torture*, CAT/C/CR/34/CAN (7 July 2005), paras. 4(d) and 5(b); *Concluding Observations of the Committee against Torture: Canada*, 11/22/2000, A/56/44, 13-24 November 2000, para. 59(a) and (b); *Concluding Observations of the Human Rights Committee*, CCPR/C/CAN/CO/5, 20 (April 2006), para. 15.

⁹⁶ See for example, Amnesty International, *Canada Without Discrimination: The Fundamental Rights of All Canadians to Human Rights Protection*, 2007, available at <http://www2.ohchr.org/english/bodies/cerd/cerds70-ngos-canada.htm> and Amnesty International, *Canada Human Rights for All: No Exceptions*, 2007 (AMR 20/001/2007); Amnesty International, *It is a Matter of Rights: Improving the Protection of Economic, Social and Cultural Rights in Canada*, March 27, 2006, available at: <http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/amnesty.pdf>; Amnesty International, *Unequal Rights: Ongoing concerns about Discrimination against Women in Canada*, 2008 (AMR 20/008/2008), available at: http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/AI_Canada42.pdf; *Canada: Amnesty International Submission to the UN Universal Periodic Review: Fourth session of the UPR Working Group of the*

of Canada's continuing failure to ratify the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

For instance, the requirement associated with the Live-in Caregiver Program (LCP) that caregivers reside in their employer's home in order to maintain their immigration status increases the likelihood of exploitation and abuse. Live-in caregivers are eligible to apply for permanent residence upon completing 24 months of authorized full-time employment or a total of 3,900 hours within a four-year period. During this period they have temporary status and must live in the home of the employer whose name appears on their work permit. Since the implementation of the LCP in 1992, numerous reports and studies have indicated that this live-in requirement, together with temporary status, leaves caregivers in situations of isolation, powerlessness, invisibility and loneliness, and makes them especially vulnerable to physical, emotional and sexual abuse by employers.⁹⁷ Workers have described excessive hours of work, less than minimum wage rates, non-payment or under-payment for overtime work, added tasks and responsibilities that were not part of the employment agreement, degrading treatment and sexual harassment.⁹⁸ Many live-in caregivers state that they tolerate such exploitative conditions in order to avoid employers' reprisals and the disadvantages associated with a change of employer, such as paying fresh fees for a new work permit, losing access to government health coverage, and incurring delays in the processing of permanent residency which means prolonged separation from family abroad.⁹⁹

In April 2011, the government of Canada adopted changes to the LCP; however, the mandatory live-in requirement which sets the systemic context for the abuse and exploitation of some live-in caregivers remains intact.

Furthermore, live-in caregivers are not entitled to unionize under the laws of most provinces as provincial laws do not recognize the domestic sphere as a workplace.

Human Rights Council, February 2009 (AMR 20/004/2008), available at: <http://www.amnesty.org/en/library/info/AMR20/004/2008/en..>

⁹⁷ Sedef Arat-Koc and Fely Villasi, *Report and Recommendations on the Foreign Domestic Movement Program* (Toronto: Intercede, October 1990); Adelle Blackett *Making Domestic Work Visible: The Case for Specific Regulation* (International Labour Organization, Labour Law and Labour Relations Branch, 1998); Louise Langevin and Marie-Claire Belleau, *Trafficking in Women in Canada: A Critical Analysis of the Legal Framework Governing Immigrant Live-in Caregivers and Mail-Order Brides* (Status of Women Canada, October 2000).

⁹⁸ Sedef Arat-Koc, *Caregivers Break the Silence* (Toronto: Intercede, 2001); Geraldine Pratt, "Is this Canada-Domestic workers' experiences in Vancouver, BC" in *Gender, Migration and Domestic Service*, ed. Momsen, Janet (1999) at 23-42; Philippine Women's Centre of British Columbia, *Trapped: Holding onto the Knife's Edge, Economic Violence Against Filipino Migrant/Immigrant Women* (Vancouver, March 1997).

⁹⁹ "Investigation: Nanny Abuse", *Toronto Star*: <http://www.thestar.com/topic/Nannies>; Office of the Auditor General of Canada, *2009 Fall Report of the Auditor General – Chapter 2 Selecting Foreign Workers Under the Immigration Program*, available at: http://www.oag-bvg.gc.ca/internet/English/parl_oag_200911_02_e_33203.html#hd4e.

Agricultural migrant workers in Canada experience similar difficulties, including unpaid and underpaid wages, wage exploitation, heavy workload, excessively long work hours without rest, inadequate living and workplace conditions, and exclusion from most labour laws and employment standards. More than 28,000 migrant agricultural workers come to Canada each season under the Canadian Seasonal Agricultural Workers Program (CSAWP), and the Temporary Foreign Workers (TFW) Program for Occupations Requiring Lower Levels of Formal Training. These programs, which are facilitated by the federal government, match workers, who are mostly but not exclusively workers from Mexico and Caribbean countries, with Canadian farm employers in order to provide a reliable temporary workforce for the agricultural industry, which is viewed as an undesirable employment sector by most Canadian workers due to the low wages, hard physical labour and dangerous and seasonal nature of the work.

Provincial laws generally exclude agricultural workers from many labour provisions governing minimum wages, hours of work, vacations and vacation pay, holidays and holiday pay, rest periods and overtime.¹⁰⁰ In addition, Alberta and Ontario deny most agricultural workers the rights to form unions and bargain collectively, as well as the right to strike.¹⁰¹ In April 2011, the Supreme Court of Canada found that legislation that denies farm workers the same rights that most other workers possess to join unions and to bargain collectively does not violate the constitutional right to freedom of association or equality.¹⁰² The Supreme Court ruling came only five months after the International Labour Organisation had found that the federal and provincial Ontario governments were in violation of international conventions by failing to extend to farm workers meaningful union and collective bargaining rights.¹⁰³

Migrant workers also face serious workplace health and safety risks, and employment and legislative obstacles that effectively force them to choose between protecting their health and providing for their families. The province of Alberta continues to exclude all outdoor migrant

¹⁰⁰ Saskatchewan: *Labour Standards Act*, R.S.S. 1978, c. L-1, as amended, s. 4(3); Alberta: *Employment Standards Code*, S.A. 1996, c. E-10.3, as amended, s.2; Alberta: *Employment Standards Regulation*, A.R. 14/97, as amended, s. 1.1; New Brunswick: *Employment Standards Act*, S.N.B. 1982, c. E-7.2, as amended, s.5; Prince Edward Island: *Employment Standards Act*, S.P.E.I. 1992, c.18, as amended, s. 2(5); Ontario: *Exemptions, Special Rules and Establishment of Minimum Wage Regulation*, O. Reg. 285/0, s. 2; Nova Scotia: *Regulations pursuant to section 4(2) and 7 of the Labour Standards Code*, N.S. Reg. 290/90, as amended, ss. 1 and 2(3); Newfoundland: *Labour Standards Regulations*, Consolidated N. Reg. 781/96, as amended, s.9; Quebec: *Act Respecting Labour Standards*, S.Q. 1979, c. 45 (R.S.Q. c. N-1.1), as amended, ss. 39.1, 54 and 77; *Regulation Respecting Labour Standards*, R.R.Q. 1981, c.N-1.1 r.3, as amended, s. 2; British Columbia: *Employment Standards Regulation*, B.C. Reg. 396/95, s. 34.1, s. 18, s. 36.1.

¹⁰¹ *Alberta Labour Relations Code*, RSA 2000, c L-1, s. 4; *Ontario Labour Relations Act*, 1995, SO 1995, c 1, Sch A.

¹⁰² *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3.

¹⁰³ Complaint against the Government of Canada presented by the United Food and Commercial Workers Union Canada (UFCW Canada) supported by the Canadian Labour Congress and UNI Global Union Report No. 358, Case(s) No(s). 2704.

workers from protection under its health and safety legislation,¹⁰⁴ despite the fact that 170 migrant workers have reportedly died on Alberta farms since 1980.¹⁰⁵ The province of Ontario extended the Occupational Health and Safety Act in 2006 to cover migrant workers; however, many migrant agricultural workers remain fearful¹⁰⁶ of exercising their provincially legislated right to refuse to perform unsafe work because the federal regulations governing their immigration status do not provide express protection to a worker who refuses to perform unsafe work.¹⁰⁷

According to a 2010-2011 report prepared by the United Food and Commercial Workers Union of Canada, most farm workers do not receive health and safety training and in the 2009 season at least half of the workers ordered to work with chemicals and pesticides were not supplied such necessary protection as gloves, masks, and goggles. Only 24 per cent of workers injured on the job made claims to workers compensation with workers citing fear of being docked pay, repatriated, or being blacklisted from returning the next season as the reason behind not filing a claim.¹⁰⁸

Migrant workers may also be denied access to employment insurance under the Federal Employment Insurance Act despite having been required to make contributions. To be entitled to benefits under the Federal Employment Insurance Program a worker must have 910 hours of insurable work in the 52 weeks prior to making his or her first benefits claim or if he or she is re-entering the Canadian workforce after an absence of two or more years. For subsequent benefits claims, a worker must have between 420 and 700 hours of insurable employment, depending on the local unemployment rate, during the previous 52 weeks or since his or her last benefits claim, whichever is shorter.¹⁰⁹ Given the seasonal nature of the work that they do, some agricultural workers will not be able to meet these thresholds on the basis of agricultural work alone. Thus many migrant farm workers will not be eligible for Employment Insurance benefits even though they make contributions.

On April 1 2011 the Federal Government introduced regulatory changes to the Temporary Foreign Worker program, which includes sanctions on employers who are found to have violated the terms of their agreement with the worker;¹¹⁰ however, the mechanism for

¹⁰⁴ *Occupational Health and Safety Act*, RSA 2000, c O-2, s. 1(s)(i)

¹⁰⁵ United Food and Commercial Workers Canada, *The Status of Migrant Farm workers in Canada: 2010-2011* at 15, available at: http://www.ufcw.ca/templates/ufcwcanada/images/awa/publications/UFCW-Status_of_MF_Workers_2010-2011_EN.pdf.

¹⁰⁶ Interviews conducted by Amnesty International with organizations and advocates working with agricultural workers in the provinces of British Columbia and Ontario over the course of 2010-2012.

¹⁰⁷ Immigration and Refugee Protection Regulations, ss.200-201.

¹⁰⁸ United Food and Commercial Workers Canada, *The Status of Migrant Farm workers in Canada: 2010-2011* at 14, available at: http://www.ufcw.ca/templates/ufcwcanada/images/awa/publications/UFCW-Status_of_MF_Workers_2010-2011_EN.pdf.

¹⁰⁹ Employment Insurance Act, SC 1996, c 23, s. 7(2).

¹¹⁰ Immigration and Refugee Protection Regulations, s. 203(h).

monitoring employers is an entirely voluntary monitoring initiative launched by Human Resources and Skills Development Canada. The government has not taken effective steps to ensure implementation of the legislation.¹¹¹

With notable increases in the number of migrant workers arriving in Canada annually, serious concerns have also arisen about the conduct of certain agents, consultants and recruiters who deal with temporary workers. Some recruiters charge prospective foreign workers fees for work placement, which is illegal under several provincial laws. On average such fees range between \$2,000 and \$8,000, with some approaching \$20,000. Recruiters may also charge a fee to bring a worker to Canada for a job that never existed, no longer exists when the worker arrives, or exists for only a short time before the worker is laid off.¹¹² Regulation of recruitment agencies is a provincial matter, meaning there is no consistent set of rules across Canada. The lack of adequate mechanisms to monitor recruiters, agents and consultants are at the heart of a lawsuit in the province of British Columbia brought by 50 Filipino temporary foreign workers who charge that the company that hired them did not live up to the employment contract they signed and that they were each required to pay an additional fee of approximately \$6000 to a recruiting agency.¹¹³ In April 2009, the province of Manitoba implemented legislation that strictly prohibits charging fees to workers as part of the recruitment process. Through increased monitoring, the new legislation facilitates employers' worker recruitment activities in an ethical and orderly manner.¹¹⁴ The legislation provides a model for other provinces.

RECOMMENDATIONS:

(1) *Canada should ratify the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.*

(2) *Canada should ensure that migrant workers enjoy the right to join a union of their choice without discrimination.*

¹¹¹HRDC Monitoring Initiative Fact Sheet, available at:

http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/ercompreview/factsheet.shtml

¹¹² Nakache, Delphine and Paula J. Kinoshita. 2010. "The Canadian Temporary Foreign Worker Program: Do Short-

Term Economic Needs Prevail over Human Rights Concerns?" *IRPP Study*, No. 5, http://www.irpp.org/pubs/IRPPstudy/IRPP_Study_no5.pdf.

¹¹³ *Herminia Vergara Dominguez v. Northland Properties Corporation doing business as Denny's Restaurants, and Dencan Restaurants Inc* 2011 SCBC S-110095. A certification hearing was held in the British Columbia Supreme Court on August 29-30, 2011 before Madame Justice Fitzpatrick. It is expected that her decision on whether to certify the action as a class proceeding will be released in the coming months.

¹¹⁴ Nakache, Delphine and Paula J. Kinoshita "The Canadian Temporary Foreign Worker Program: Do Short-Term Economic Needs Prevail over Human Rights Concerns?" (2010) *IRPP Study*, No. 5, available at: http://www.irpp.org/pubs/IRPPstudy/IRPP_Study_no5.pdf.

(3) *Canada should review foreign worker programs that include a live-in or other place of residence requirement, such as the domestic caregivers and seasonal agricultural workers programs, and remove the restrictions with respect to place of residence.*

(4) *Canada should review all foreign worker programs and ensure that there is no discrimination with respect to labour standards protections or access to programs such as employment insurance.*

(5) *Canada should work with provincial and territorial governments to ensure that any bilateral agreements with source countries of temporary foreign workers include human rights protections.*

(6) *Canada should work with provincial and territorial governments to accredit, monitor and, if necessary, discipline both domestic and offshore recruiters of foreign workers.*

E. ACCESS TO HEALTH CARE FOR UNDOCUMENTED MIGRANTS (ARTICLE 5(E)(IV))

In 2007, this Committee recommended that Canada take action to ensure that undocumented migrants and stateless persons, particularly those whose application for refugee status has been rejected but who cannot be removed from Canada, are not excluded from eligibility for social security, healthcare and education.¹¹⁵ Since the 2007 review however, there has not been any progress towards meeting this recommendation in so far as the issue of access to health care is concerned.

The provision of publicly-funded health services is primarily the responsibility of the provinces and the territories in Canada, all of which currently exclude undocumented migrants from public health coverage because they do not meet the definition of “resident” in provincial health regulations.¹¹⁶ Undocumented migrants are equally excluded from the Interim Federal Health Program (IFH), a program funded by Citizenship and Immigration Canada for providing emergency and essential health care coverage to eligible individuals who do not qualify under provincial health insurance plans.¹¹⁷ At the moment, the only providers of health care to undocumented migrants are, therefore, a limited number of community health centres which exist only in some jurisdictions and lack the space,

¹¹⁵ *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada*, UN Doc. CERD/C/CAN/CO/18, 25 (May 2007), para. 23.

¹¹⁶ See *Health Insurance Act*, RSO 1990, c H.6. s. 11(1), and *Health Insurance Act* R.R.O. 1990, Regulation 552, s. 1.4

¹¹⁷ Citizenship and Immigration Canada has decided that the IFH coverage is only for refugee claimants, resettled refugees, persons detained under the Immigration and Refugee Protection Act and Victims of Trafficking in Persons: *Interim Federal Health Program*: <http://www.cic.gc.ca/english/refugees/outside/resettle-assist.asp>.

resources or policies to provide care for such individuals in a reliable and regular way.¹¹⁸

In some provinces, undocumented migrants can receive emergency medical treatment at hospitals due to provincial regulations that bar hospitals from denying treatment when to do so would endanger life.¹¹⁹ However, hospitals have complained about the costs involved and there are reports of some hospitals encouraging staff to refuse services to uninsured patients.¹²⁰ Some hospitals in Quebec have now posted signs advising that uninsured patients will have to pay for services received, thus actively discouraging some individuals from seeking medical assistance. As a result, many undocumented migrants present themselves at hospitals only at very late stages of illness or near death.¹²¹

Estimates of the number of undocumented migrants in Canada range from 20,000 to 500,000.¹²² It is difficult to assess the magnitude of the problems caused by the denial of health services to them due to the inherent challenges of conducting research within this population group. Nevertheless, current academic and community-based findings indicate that irregular migrants suffer from serious health care deficiencies including extreme delay in receiving medical treatment, shortcomings in treatment and poor follow-up for chronic conditions like hypertension, diabetes and HIV.¹²³ Among the numerous long-term, and

¹¹⁸ Lilian Magalhaes, et al, "Undocumented Migrants in Canada: A Scope Literature Review on Health, Access to Services, and Working Conditions"(2010) *Journal of Immigrant and Minority Health* 12, 132-151; Rousseau C, et al, "Health care access for refugees and immigrants with precarious status: public health and human right challenges" (2008) *Canadian Journal of Public Health* 99(4), 290-2; Bernhard JK, et al, "Living with precarious legal status in Canada: implications for the well-being of children and families" (2007) *Refuge* 24(2), 101-14.

¹¹⁹ See for example, *Ontario Public Hospitals Act*. R.S.O. 1990, c. P.40.

¹²⁰ Lewandowski R (2006) In *L'Actualité*, Vol. 1 September 2006.

¹²¹ Rousseau C, et al, "Health care access for refugees and immigrants with precarious status: public health and human right challenges" (2008) *Canadian Journal of Public Health* 99(4) at 291; Bernstein C, et al, *Access not fear: non-status immigrants & city services* (Ontario Council of Agencies Serving Immigrants, 2006).

¹²² Through the Back Door: Canada and the world backgrounder (Dec 2006) 72(3), 7-21; Jimenez M., "200,000 illegal immigrants toiling in Canada's underground economy" *The Globe and Mail* (15 Nov 2003) p. A1.

¹²³ See Lilian Magalhaes, et al, "Undocumented Migrants in Canada: A Scope Literature Review on Health, Access to Services, and Working Conditions"(2010) *Journal of Immigrant and Minority Health* 12, 132-151; Rousseau C, et al, "Health care access for refugees and immigrants with precarious status: public health and human right challenges" (2008) *Canadian Journal of Public Health* 99(4), 290-2; Simich L, Wu F, Nera S, "Status and health security: an exploratory study of irregular immigrants in Toronto" (2007) *Canadian Journal of Public Health* 98(5), 369-73; Bernhard JK, et al, "Living with precarious legal status in Canada: implications for the well-being of children and families" (2007) *Refuge* 24(2), 101-14; Caulford P, Vali Y., "Providing health care to medically uninsured immigrants and refugees" (2006) *Canadian Medical Association Journal* 174(9):1253-4; Access Alliance, *Radicalized Groups and Health Status: A literature review exploring poverty, housing, race-based discrimination and access to health care as determinants of health for radicalized groups* (Toronto:

potentially irreversible, negative health consequences of a delayed diagnosis are increased severity of illness, increased viral resistance, and worsening of mental health problems.¹²⁴ According to a 2007 study, there may be as many as 80 preventable deaths linked to immigration status in the Province of Quebec every year.¹²⁵

Of particular concern are undocumented pregnant women who do not receive pre-natal care and experience high risk pregnancies such as ectopic pregnancies, eclampsia and an increased need for C-sections.¹²⁶ A study of patients lacking regular immigration status at a health clinic in Scarborough found that 60 per cent of pregnant women who had come to the clinic had serious deficiencies in prior antenatal care.¹²⁷ In 2007, an undocumented migrant woman in Montreal died *en route* to the hospital because she had not received any prenatal care and her ectopic pregnancy had not been consequently detected.¹²⁸ Studies suggest that when undocumented pregnant women go into labour they face avoidable complications related to inadequate pain management, resulting in severe hemorrhaging, anemia and C-sections.¹²⁹ A clinician in Montreal who frequently works with undocumented pregnant women has noted that “providing adequate care during parturition can be a problem, as anesthesiologists often refuse to give an epidural to such patients free of charge, on the grounds that it is an unnecessary measure.”¹³⁰

Uninsured, undocumented migrant children, as well as Canadian-born children of uninsured parents, are also profoundly affected by the current health policies of Canadian governments.

Access Alliance Multicultural Community Health Centre, 2005).

¹²⁴ *Ibid.*

¹²⁵ Kuile, Sonia, et al, “The Universality of the Canadian Health Care System in Question: Barriers to Services for Immigrants and Refugees” (2007) *International Journal of Migration, Health and Social Care* 3(1) at 18.

¹²⁶ Caulford P, Vali Y., “Providing health care to medically uninsured immigrants and refugees” (2006) *Canadian Medical Association Journal* 174(9):1253-4; Rousseau C, et al, “Health care access for refugees and immigrants with precarious status: public health and human right challenges” (2008) *Canadian Journal of Public Health* 99(4), 290-2.

¹²⁷ Caulford P, Vali Y., “Providing health care to medically uninsured immigrants and refugees” (2006) *Canadian Medical Association Journal* 174(9):1253-4.

¹²⁸ Kuile, Sonia, et al, “The Universality of the Canadian Health Care System in Question: Barriers to Services for Immigrants and Refugees” (2007) *International Journal of Migration, Health and Social Care* 3(1) at 22.

¹²⁹ Lilian Magalhaes , et al, “Undocumented Migrants in Canada: A Scope Literature Review on Health, Access to Services, and Working Conditions”(2010) *Journal of Immigrant and Minority Health* 12, 132-151; Caulford P, Vali Y., “Providing health care to medically uninsured immigrants and refugees” (2006) *Canadian Medical Association Journal* 174(9):1253-4; Oxman-Martinez J, et al, “Intersection of Canadian policy parameters affecting women with precarious immigration status: a baseline for understanding barriers to health”(2005) *Journal of Immigrant Health* 7(4), 247-58.

¹³⁰ Kuile, Sonia, et al, “The Universality of the Canadian Health Care System in Question: Barriers to Services for Immigrants and Refugees” (2007) *International Journal of Migration, Health and Social Care* 3(1) at 22.

Among the consequences have been a prolonged lack of adequate care for acute mental health conditions like post-traumatic stress disorder and depression, unavailability of rehabilitation services and treatment for autism, and delayed surgical intervention.¹³¹

In a recent court case challenging the exclusion of undocumented immigrants from access to healthcare under sections 7 (life, liberty and security of the person) and 15 (non-discrimination) of the *Canadian Charter of Rights and Freedoms* the Canadian government argued that it is legitimate to deny health care necessary to life to undocumented migrants in order to discourage illegal immigration, and that this is in accordance with the principles of fundamental justice.¹³² The Federal Court of Appeal agreed with this argument and stated:

*At the root of the appellant's submission are assertions that the principles of fundamental justice under section 7 of the Charter require our governments to provide access to health care to everyone inside our borders, and that access cannot be denied, even to those defying our immigration laws, even if we wish to discourage defiance of our immigration laws. I reject these assertions. They are no part of our law or practice, and they never have been.*¹³³

The Federal Court of Appeal arrived at this conclusion even though it had accepted the lower-level Federal Court finding that the appellant “would be at very high risk of immediate death (due to recurrent blood clots and pulmonary embolism), severe medium-term complications (such as kidney failure and subsequent requirement for dialysis), and other long-term complications of poorly-controlled diabetes and hypertension (such as blindness, foot ulcers, leg amputations, heart attack, and stroke) ... [if] she were to not receive timely and appropriate health care and medications in the future.”¹³⁴ An application for leave to appeal this ruling to the Supreme Court of Canada is pending.

Enforcement of immigration rules does not justify violations of the right to health of undocumented migrants. As this Committee noted in its General Recommendation XXX, differential treatment based on immigration status should be only in pursuit of a legitimate aim, and be proportional to the achievement of that aim.¹³⁵

¹³¹ Rousseau C, et al, “Health care access for refugees and immigrants with precarious status: public health and human right challenges” (2008) *Canadian Journal of Public Health* 99(4), at 291; Kuile, Sonia, et al, “The Universality of the Canadian Health Care System in Question: Barriers to Services for Immigrants and Refugees” (2007) *International Journal of Migration, Health and Social Care* 3(1) at 22.

¹³² Respondent's Memorandum of Fact and Law, *Toussaint v. Canada (Attorney General)* FCA File No. A-362-10 available at: <http://www.socialrights.ca/litigation/toussaint/IFH%20APEAL/Respondent's%20memorandum%20of%20fact%20and%20law.pdf>.

¹³³ [Toussaint v. Canada \(Attorney General\) 2011 FCA 213 at para.74.](#)

¹³⁴ [Toussaint v. AG \(Canada\) 2010 FC Canada 810](#) at para. 91.

¹³⁵ *General Recommendation XXX on Discrimination against Non-Citizens*, HRI/GEN/1/Rev.7/Add.1, 4 May 2008, para. 4.

RECOMMENDATIONS:

- (1) *Canada should ensure that all individuals present in Canada have access to adequate and appropriate health care, regardless of their immigration status.*
- (2) *Canada should revise its laws and policies to ensure that all persons present in Canada enjoy at all times, in principle and in practice, the right to health and the right not to face unlawful discrimination in accessing, among other public services, health care.*

4. RACISM AND NATIONAL SECURITY

This Committee has monitored closely the concern that national security laws, policies and practices adopted by nations in the wake of the September 11 terrorist attacks in the United States would be rooted in or would fuel racism and discrimination. In the Committee's 2007 Concluding Observations, Canada was reminded of its "obligation to ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent or national or ethnic origin" and to specifically "ensure that individuals are not targeted on the ground of race or ethnicity."¹³⁶ The Committee was sufficiently concerned about this issue that it required Canada to provide information as to follow-up within one year.¹³⁷

In its follow up response, submitted in July 2009, the Canadian government stated that Canada's law enforcement and security intelligence professionals "do not target any community, group or faith."¹³⁸ Amnesty International considers, however, that concerns about racism and discrimination in Canada's national security practices persist in the areas of immigration security certificates, profiling, access to remedies and the need for strengthened review and oversight.

A. IMMIGRATION SECURITY CERTIFICATES (ARTICLE 5(A))

In its 2007 review of Canada this Committee expressed concern about the use of "security certificates under the Immigration and Refugee Protection Act which provides for indefinite detention without charge or trial of non-nationals who are suspected of terrorism-related

¹³⁶ *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada*, UN Doc. CERD/C/CAN/CO/18, 25 May 2007, para. 14.

¹³⁷ *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada*, UN Doc. CERD/C/CAN/CO/18, 25 May 2007, para. 32.

¹³⁸ Information provided by the Government Canada on the implementation of the concluding observations of the Committee on the Elimination of Racial Discrimination, CERD/C/CAN/CO/18/Add. 1, para. 2.

activities”¹³⁹ and took particular note of the Supreme Court of Canada’s February 2007 judgement in the case of *Charkaoui v. Canada*, dealing with the immigration security certificate system.¹⁴⁰ Since September 11 2001, immigration security certificates are known to have been actively pursued against at least nine men, overwhelmingly of Muslim and Arab background. Two of those men were German and Russian nationals. The other seven are all Muslim men from Egypt, Algeria, Morocco and Syria.

In the *Charkaoui* ruling the Supreme Court of Canada struck down the previous system, because it did not ensure individuals subject to certificates an adequate means to mount a defence. That is because they are denied access to the bulk of the evidence against them on grounds of national security and other grounds. They are not able to cross-examine individuals who are the source of that evidence. They are provided with only a summary of the evidence.¹⁴¹ The Court gave the government one year to reform the system.

In response to the ruling the government introduced a system of Special Advocates who are provided full access to the evidence and are expected to test that evidence with the interests of the person subject to the certificate in mind. However, once they have seen any “secret” evidence they are not allowed any further contact with the individual concerned, unless a judge specifically allows such contact.¹⁴² Amnesty International is concerned that the new system still falls short of what is required under international fair trial standards guaranteeing a right to choice of legal counsel and of an ability to mount a full and effective defence.

RECOMMENDATION:

To guarantee fair trials, Canada should amend the Immigration and Refugee Protection Act to allow legal counsel for individuals subject to immigration security certificates to have full access to all evidence in government files, subject to any necessary undertakings to protect national security or other considerations.

B. PROFILING (ARTICLES 2(1)(C), 5(A) AND (B))

Concerns about racial, ethnic and religious profiling for those targeted under national security measures persist. Individuals affected have overwhelmingly been Muslim and of North African, Middle Eastern or South Asian origin. Canadian authorities have steadfastly insisted that individuals and communities are not targeted because of their racial, ethnic or religious

¹³⁹ Until now, 97 per cent of the security certificates issued have been against Muslims and Arabs: “Ex-detainee backs Bloc: Suspected Al-Qa’ida sleeper agent Adil Charkaoui endorsed the Bloc Quebecois yesterday as Gilles Duceppe called for an overhaul of the federal government’s “McCarthyist” security certificate program”, *Montreal Gazette* (December 6, 2005), available at: <http://www.canada.com/montrealgazette/news/story.html?id=eccd68bb-0d01-4e7a-b24a-af47fa59ca77>.

¹⁴⁰ *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada*, UN Doc. CERD/C/CAN/CO/18, 25 (May 2007), para. 14.

¹⁴¹ *Charkaoui v. Canada (Citizenship and Immigration)* [2007] 1 S.C.R. 350, 2007 SCC 9 para 65, 138, 139, 140

¹⁴² *Immigration and Refugee Protection Act*, s. 85.4(2)(3).

identity.

These concerns were echoed in the course of two significant parliamentary reviews. In 2007, the Special Senate Committee on the Anti-Terrorism Act and the House of Commons Standing Committee on Public Safety and National Security's Subcommittee on the Review of the Anti-Terrorism Act both completed legislatively-mandated reviews of the 2001 Anti-Terrorism Act. Both Committees turned their attention to the issue of profiling.

The House of Commons Committee noted that "much more has to be done in consultation with the affected ethno-cultural communities to address these concerns [about racial and religious profiling.]"¹⁴³ The Senate Committee was deeply concerned about the issue of profiling and noted that one of the "primary concerns during the course of our study was the sense of marginalization and vulnerability felt by members of the Canadian Arab and Muslim communities, and certain other immigrant or visible minority groups, since 11 September 2001."¹⁴⁴ The Senate Committee made a number of recommendations, including removing the "political, religious or ideological" motive element from the definition of terrorist activities so as to reduce profiling, conducting sufficient monitoring, enforcement and training to ensure that racial profiling does not occur, and strengthening the role of the Cross-Cultural Roundtable on Security.¹⁴⁵ Amnesty International is of the view that the measures recommended by the Senate Committee should be implemented.

The issue of profiling also came up in the context of the judicial inquiry into the case of Maher Arar. Mr. Arar is a Canadian citizen, born in Syria, who was subject to extraordinary rendition from the United States to Syria, via Jordan, where he was detained unlawfully for one year. He experienced severe torture while in detention in Syria. Upon his release and return to Canada a Commission of Inquiry was established to examine what role Canadian officials had played in the case. The Commission documented numerous failings on the part of Canadian officials that led to the human rights violations he experienced. In 2007 he received compensation and an official apology from the Canadian government. In his report, Justice Dennis O'Connor, who conducted the Inquiry, made two recommendations with respect to profiling:

Recommendation 19: Canadian agencies conducting national security investigations ... should have clear written policies stating that such investigations must not be based on racial, religious or ethnic profiling.

Recommendation 20: Canadian agencies involved in anti-terrorism investigations ... should continue and expand on the training given to members and staff on issues of racial, religious and ethnic profiling and on interaction with Canada's Muslim and Arab

¹⁴³ *Rights, Limits, Security: A Comprehensive Review of the Anti-Terrorism Act and Related Issues*, Subcommittee on the Review of the Anti-Terrorism Act (March 2007), p. 10.

¹⁴⁴ Special Senate Committee on the Anti-Terrorism Act, *Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the Anti-Terrorism Act* (February 2007), p. 18.

¹⁴⁵ Special Senate Committee on the Anti-Terrorism Act, *Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the Anti-Terrorism Act* (February 2007), p. 18-29.

*communities.*¹⁴⁶

Finally, this Committee itself raised concerns about profiling and discrimination in the context of increased national security measures, particularly the Anti-Terrorism Act, and called on Canada to take steps to guard against that possibility including by reviewing current national security measures, undertaking sensitization campaigns and adding an explicit anti-discrimination clause to the Anti-Terrorism Act.¹⁴⁷

All of these concerns remain relevant. Amnesty International has noted two recent developments that have underscored the ongoing sense within affected communities that profiling plays a significant role in national security investigations.

The first came in the aftermath of the release of an Amnesty International report documenting harassment, intimidation and violence by individuals linked to the Syrian government against Syrian activists living abroad, including in Canada.¹⁴⁸ In meetings Amnesty International has had with law enforcement, security and political officials in Canada it has become clear that there is interest in taking action to address this problem. That would require close collaboration with the Syrian community in Canada. However, in conversations Amnesty International has had with members of the community, the reluctance to trust Canadian officials has been very palpable, rooted in their experiences of being targeted by those same officials as being suspicious or “of interest”.

The second came through a development in a case similar to that of Maher Arar. A second judicial inquiry, conducted by former Supreme Court of Canada Justice Frank Iacobucci and held over the course of 2007 and 2008, looked into the cases of Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin. These three Canadian citizens had all been arrested, imprisoned and tortured in Syria and additionally in the case of Mr. Abou-Elmaati, Egypt, at various points between 2001 and 2005. Like the Maher Arar Inquiry, this second inquiry had a mandate to look at the role played by Canadian officials in the human rights violations these three men, all Muslim and all originally from the Middle East or North Africa, had experienced. Commissioner Iacobucci documented numerous ways in which the actions of Canadian officials did indirectly contribute to the arbitrary arrest, unlawful detention and torture that they experienced. He noted that officials had repeatedly labeled them as being extremists, linked to Al-Qaeda and posing an imminent threat, despite there being no evidence to back up that characterization. That information was shared with other governments, including Syria and Egypt. The Commissioner termed this labeling to be “inflammatory, inaccurate and lacking investigative foundation.”¹⁴⁹ The government has

¹⁴⁶ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (September 2006), p. 369.

¹⁴⁷ *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada*, UN Doc. CERD/C/CAN/CO/18, 25 (May 2007), para. 14.

¹⁴⁸ Amnesty International, *The Long Reach of the Mukhabaraat: Violence and Harassment Against Syrians Abroad and their Relatives Back Home*, October 2011 (MDE 24/057/2011).

¹⁴⁹ The Honourable Frank Iacobucci, Q.C., Commissioner, *Internal Inquiry into the Actions of Canadian Officials in relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin* (October 2008),

refused to apologize or provide redress for the misconduct of Canadian officials.

There has been a recent further revelation relevant to this issue of unjustified labelling. On 25 October 2011 Abdullah Almalki released an internal Royal Canadian Mounted Police (RCMP) document obtained under Access to Information procedures. The document indicates that on 4 October 2001, the very day that RCMP officers were sharing the inaccurate information with Syrian officials, they recognized that they were “finding it difficult to establish anything on him other than the fact that he is an arab (*sic*) running around.”¹⁵⁰ The revelation is indicative of profiling at the time. The government has not apologized for this and did not respond publicly to the release of this RCMP document to demonstrate that steps have been taken to guard against this happening again.

RECOMMENDATION:

Canada should work with affected communities to develop a Plan of Action, complete with necessary legislative reform, policy development or changes in practices, to ensure that there is no racial, ethnic or religious profiling involved in Canadian national security activities and to counter any perception of profiling.

C. ACCESS TO REMEDIES (ARTICLE 5(A))

The number of individuals who have experienced human rights violations associated with Canadian national security laws and practices continues to grow. These laws and practices disproportionately impact on Muslims, Arabs and South Asians. In many cases, the responsibility, in part, of Canadian officials for those human rights violations has been authoritatively and independently documented.¹⁵¹ Yet, with the sole exception of Maher Arar, Muslim and Arab or South Asian individuals, many of whom are Canadian citizens, who have suffered such violations have received no redress by Canadian officials and have instead been forced to launch protracted and contentious legal proceedings to seek redress.

- The numerous ways that Canadian officials contributed to the illegal detention and torture of Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin was documented in the judicial inquiry into their case.¹⁵² The government has, however, refused to offer an

p. 400.

¹⁵⁰ *Almalki 'an Arab running around'; RCMP documents indicate terror case against Ottawa man unfounded, 'racist'*, Ottawa Citizen, 26 October 2011, p. 1, available at: <http://www.ottawacitizen.com/news/Almalki+Arab+running+around/5606164/story.html#ixzz1c6Uf3SaD>.

¹⁵¹ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (September 2006); *Internal Inquiry into the Actions of Canadian Officials in relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin* (October 2008).

¹⁵² *Internal Inquiry into the Actions of Canadian Officials in relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin* (October 2008).

apology or compensation. Their lawsuit seeking redress has been active before the courts for more than two years and is still only in early stages. Government lawyers have sought to limit the access that legal counsel for the three men can have to key documents.¹⁵³

■ On two occasions the Supreme Court of Canada has concluded that interrogations by Canadian officials conducted of Canadian citizen Omar Khadr, detained in Afghanistan in July 2002 when he was 15 years old and held at Guantánamo Bay since October 2002, violated both international human rights law and the Canadian Charter of Rights and Freedoms and that the violation was continuing.¹⁵⁴ The Court's January 2010 ruling required Canadian action to remedy that continuing violation. At the time of writing, no remedy has yet been provided. Omar Khadr pled guilty in proceedings before a Military Commission at Guantánamo Bay in October 2010 and was sentenced to an agreed eight year prison term. Under the terms of this plea agreement he was required to spend at least one year of his sentence in US custody, which he had completed as of 31 October 2011. He has made an application to be transferred to serve the remainder of his sentence in Canada. The Canadian government has not yet approved that request.

■ In 2009, the Federal Court of Canada ruled that Canadian intelligence agents were directly or indirectly responsible for the detention of Canadian citizen Abousfian Abdelrazik in Sudan.¹⁵⁵ The Court found that Abdelrazik was tortured in Sudanese custody and that, after his release, Canadian government officials blocked his efforts to return to Canada and reunite with his children. While the Court ordered Canada to transport Abdelrazik back to Canada and the government complied with that order, no apology or compensation has since been offered. On 30 November 2011, the UN Security Council Al-Qaida Sanction Committee removed his name from the Al-Qaida Sanctions List "after considering the Comprehensive Report of the Ombudsperson on this de-listing request."¹⁵⁶ Abousfian Abdelrazik's claim for damages in the Canadian courts remains frozen due to government objections to disclosing documents for national security reasons.

■ Benamar Benatta is an Algerian citizen who claimed refugee status at the Canadian border on September 5, 2001. Canadian officials detained him to confirm his identity and process his refugee claim. Following the September 11 terrorist attacks in the United States, Canadian border officials branded him as suspicious and in the middle of the night they drove him over the U.S. border and handed him over to the FBI for investigation. He was detained in the U.S. for nearly 5 years, including several months in the notorious Brooklyn Metropolitan Detention Centre, where he was seriously abused. After his release in 2006, he was returned to Canada, where his refugee claim was accepted. Canadian officials have refused to apologize to Benamar Benatta or provide him with any compensation.

¹⁵³ *Attorney General of Canada and Abdullah Almalki et al*, 2011 FCA 199, 13 June 2011.

¹⁵⁴ *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44, January 29, 2010; *Canada (Justice) v. Khadr*, [2008] 2 S.C.R. 125, May 23, 2008.

¹⁵⁵ *Abdelrazik v. Canada (Foreign Affairs)*, 2009 FC 580, June 4, 2009.

¹⁵⁶ *Security Council Al-Qaida Sanctions Committee deletes entry of Abu Sufian Al-Salamabi Muhammed Ahmed Abd Al-Razziq from its list*, UN Doc. SC/10467, 30 (November 2011).

RECOMMENDATION:

Canada should appoint an Independent Commissioner to review claims for redress brought by individuals who allege that they have experienced human rights violations associated with national security investigations or activities for which Canadian officials are alleged to have been partially or wholly responsible. The Independent Commissioner should be empowered to make recommendations for appropriate compensation.

D. REVIEW AND OVERSIGHT (ARTICLE 5(A))

Over the course of the past decade, complaints of Canadian wrongdoing in a range of national security cases have mounted. It has become clear that the mechanisms and processes in place for ensuring proper review and oversight of the various law enforcement, security and other government agencies involved in national security investigations and activities are largely ineffective and, in the case of some agencies, virtually nonexistent. For the most part, there has been nowhere for individuals, the overwhelming majority of whom are from Canada's Muslim, Arab and South Asian communities, to turn to make complaints. Existing bodies lack jurisdiction over the agency in question, have weak powers or are unable to review a case in an integrated fashion examining the role played by a range of government agencies and departments.¹⁵⁷ This has contributed to the sense of marginalization and discrimination felt by affected ethno-cultural and religious communities.

When the Canadian government established, in 2004, the Commission of Inquiry that looked into Maher Arar's case, discussed above, the Terms of Reference tasked the Commissioner with making recommendations for an independent, arm's-length review mechanism with respect to the RCMP's national security activities. In December 2006 Commissioner O'Connor released a lengthy report proposing a comprehensive model, with enhanced powers for review of the RCMP, jurisdiction extended to agencies and departments that had not previously been subject to review, mechanisms developed to ensure full integration among review bodies and the establishment of an Integrated National Security Review Coordinating Committee to oversee the entire process.¹⁵⁸

Five years after the release of Commissioner O'Connor's proposed model for comprehensive and integrated review of national security activities, the government has taken no action. There has, to date, been no official response to the proposal. There have been no changes made to any of the existing review bodies and no steps taken to institute review of agencies

¹⁵⁷ There is no independent review body, for example, with jurisdiction over the Canadian Border Services Agency (CBSA). CBSA agents frequently play a central role in national security cases that involve refugees, immigrants and other non-citizens. The Commission for Public Complaints against the RCMP lacks powers to compel participation, cooperation or compliance on the part of RCMP officers. Former Chairs of that Commission have spoken out publicly about how ineffectual that body's powers are. This has included Shirley Heafey, see: *Liberals tried to 'shut me up'*, Ottawa Citizen, 30 May 2006; and Paul Kennedy, see: *Tories drop RCMP Complaints Commissioner*, Toronto Star, 27 November 2009.

¹⁵⁸ *A New Review Mechanism for the RCMP's National Security Activities*, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, December 2006.

or departments currently not subject to independent review.

RECOMMENDATION:

Canada should implement the recommended model for comprehensive and integrated review of agencies and departments involved in national security activities proposed as part of the Commission of Inquiry into the case of Maher Arar.

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