

**amnesty international**

**IT IS A MATTER OF RIGHTS:**

**Improving the protection of economic,  
social and cultural rights in Canada**

**Briefing to the UN Committee on Economic, Social and Cultural Rights**

**on the occasion of the review of Canada's fourth and fifth periodic  
reports concerning rights referred in the International Covenant on  
Economic, Social and Cultural Rights.**

**Submitted March 27, 2006**

## OVERVIEW

Canada prides itself, with good reason, on its overall domestic record of protecting human rights generally, including economic, social and cultural rights, as well as its commitment to promoting stronger human rights protection abroad. Amnesty International recognizes that Canada has done much in both regards.

Over the last two decades Canada has set ambitious goals aimed at improving the lives of those most vulnerable, at home and around the world. But only limited progress has been made. For example, in 1989, the House of Commons unanimously agreed to eliminate child poverty by 2000. But since then poverty among children has increased by 21% and one in six children, or 1,139,000 children, still lives in poverty in Canada.<sup>1</sup> In 1995, Canada supported the platforms for action on the Beijing and Copenhagen commitments to reduce poverty and enhance women's equality. But since then, poverty has risen among many groups, most dramatically among recent immigrants, often women.<sup>2</sup>

The occasion of the review of Canada's 4th and 5th periodic reports concerning the rights referred to in articles 1-15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), provides an important reminder that there are a number of areas where improvements in Canada's human rights performance are needed. Some, such as the protection of the rights of indigenous peoples and migrants are areas where the failure of the state to adequately protect the rights of vulnerable groups have long been the subject of concern. There are also related and often overlapping concerns about the state's role in ensuring that private actors, including individuals and corporations, don't undermine the realization and enjoyment of economic, social and cultural rights. These shortfalls occur against a backdrop of Canada being reluctant to agree to strong domestic and international measures that would strengthen the legal enforceability of economic, social and cultural rights.

This submission highlights Amnesty International's concerns and recommendations for improvement in six principal areas. It is not an exhaustive review of concerns with respect to the protection of economic, social and cultural rights in Canada. Other important issues, such as ongoing concerns about levels of child poverty, are highlighted in submissions the Committee will receive from other organizations.

1. The economic, social and cultural rights of indigenous peoples
2. The rights of migrants
3. Trade, investment and development assistance
4. Private companies and the realization of economic, social and cultural rights
5. The ratification and implementation gap
6. Strengthening enforcement: key to effective protection of economic, social and cultural rights

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<sup>1</sup> Campaign 2000, [www.campaign2000.ca](http://www.campaign2000.ca)

<sup>2</sup> StatsCan, *The Daily*, Oct 8, 2003

## 1. THE RIGHTS OF INDIGENOUS PEOPLES - ICESCR ARTICLES 1,2,9,10,15

In the report of his 2004 mission to Canada, Rodolfo Stavenhagen, the UN Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people, noted “the unacceptable gap” between indigenous peoples and the rest of the population in the realization of their economic, social and cultural rights. The Special Rapporteur characterized the gap in this way:

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.<sup>3</sup>

Our submission highlights two areas where the Government of Canada has particularly failed to adequately address the systemic barriers to actually closing this gap in rights protection: the resolution of land disputes and the consistent and non-discriminatory delivery of social services.

- **Land and life**

Secure access to land and natural resources is essential for indigenous individuals, families, communities and societies to enjoy, within the context of their own values, traditions and knowledge-systems, their rights under the Covenant, including rights to health, to earn a living, to housing, education, cultural identity as well as all aspects of their right to self-determination. Ten years ago, the Canadian government’s Royal Commission on Aboriginal Peoples (RCAP) concluded that the state’s failure to prevent widespread illegal encroachment on and expropriation of indigenous peoples’ lands and resources had deprived indigenous communities throughout Canada of the means to enjoy these rights. The Royal Commission warned that:

Aboriginal nations need much more territory to become economically, culturally and politically self-sufficient. If they cannot obtain a greater share of the lands and resources in this country, their institutions of self-government will fail. Without adequate lands and resources, aboriginal nations will be unable to build their communities and structure the employment opportunities necessary to achieve self-sufficiency. Currently on the margins of Canadian society, they will be pushed to the edge of economic, cultural and political extinction. The government must act forcefully, generously and swiftly to assure the economic, cultural and political survival of aboriginal nations.<sup>4</sup>

In 1998, the Committee on Economic, Social and Cultural Rights called on the Canadian government “to take concrete and urgent steps to restore and respect an Aboriginal land and

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<sup>3</sup> *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. Summary p. 2. The Special Rapporteur also noted the “impressive number of programs and projects and considerable financial resources” that federal, provincial and territorial governments have committed to closing this gap.

<sup>4</sup> Canada, Royal Commission on Aboriginal Peoples, Final Report of the Royal Commission on Aboriginal Peoples, 1996, CD-ROM Version, Record 8380.

resource base adequate to achieve a sustainable Aboriginal economy and culture.”<sup>5</sup> Although Canada’s 2005 report to the Committee on Economic, Social and Cultural Rights cites several recent examples of successful land and treaty rights settlements, in the vast majority of cases indigenous peoples trying to secure an adequate resolution of land or resource disputes, either by entering into a treaty arrangement with the federal government or seeking enforcement of existing treaties and agreements, remain bogged down in lengthy and onerous negotiations and claims processes. The Royal Commission on Aboriginal Peoples identified a number of fundamental flaws in the existing process for addressing land claims including the prevailing assumption that it is indigenous peoples, not the states, that must prove title and the fact that the government of Canada “acts as a defender of the Crown’s interests and also as judge and jury on the claims”.<sup>6</sup>

### **The Lubicon Cree**

The Lubicon Cree is an indigenous nation of approximately 500 people living in northern Alberta. Like many indigenous peoples in Canada they have never entered into a treaty relationship with the state which now asserts control over their traditional lands and territories.

Only a generation ago, the Lubicon lived almost entirely off the land. In the early 1970s, the provincial government initiated a massive program of oil extraction throughout the region, including the construction of an all-weather road into the hunting and trapping territory of the Lubicon. In 1986, a special envoy appointed by the federal government to look into the Lubicon situation, concluded that the “weight of evidence” supported the testimony of Lubicon hunters and trappers that the activities of the oil companies had led to a "disastrous" decline in the local subsistence economy, even as "substantial revenue" was being extracted from the land.<sup>7</sup>

With the dramatic decline of their hunting and trapping economy, the number of Lubicon families dependent on government income assistance climbed sharply from one in ten when oil extraction began in 1979 to nine in ten by 1983.<sup>8</sup> In a communication to the Human Rights Committee, the Lubicon alleged “violations by the Government of Canada of the Lubicon Lake Band’s right of self-determination and by virtue of that right to determine freely its political status and pursue its economic, social and cultural development, as well as the right to dispose freely of its natural wealth and resources and not to be deprived of its own means of subsistence.”<sup>9</sup> The Lubicon told the Human Rights Committee that they did not have the money and other resources necessary to ensure employment and community infrastructure they suddenly needed when their old economy collapsed. The result, the Lubicon told the Committee, was severe strain on the health and social fabric of the community:

As a result of these drastic changes in the community's physical existence, the basic health and resistance to infection of community members has deteriorated dramatically. The lack of running water and sanitary facilities in the community, needed to replace the traditional systems of water and sanitary management ... is leading to the development of

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<sup>5</sup> *Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada*, para. 43.

<sup>6</sup> *People to People, Nation to Nation*. Nation to Nation: Highlights from the Report of the Royal Commission on Aboriginal Peoples. Minister of Supply and Service Canada, 1996. pp. 36-7.

<sup>7</sup> Honourable E. Davie Fulton. Lubicon Lake Indian Band – Inquiry, Discussion Paper, 1986.

<sup>8</sup> Ominyak, Bernard with Ed Bianchi, “The Lubicon Cree: Still No Settlement After All These Years.” Aboriginal Rights Coalition. 2001. in Bird, John et al. *Nation to Nation: Aboriginal Sovereignty and the Future of Canada*. Toronto: Irwin Publishing, 2002, pp 163-174.

<sup>9</sup> *Human Rights Committee Communication No. 167/1984: Canada*, (UN Doc. CCPR/C/38/D/167/1984), 10 May 1990, para. 2.

diseases associated with poverty and poor sanitary and health conditions. This situation is evidenced by the astonishing increase in the number of abnormal births and by the outbreak of tuberculosis, affecting approximately one third of the community.<sup>10</sup>

In 1990, the Human Rights Committee concluded that logging and oil and gas development taking place in the hunting and trapping territory of the Lubicon Cree without the community's consent constituted a violation of the Lubicon's right to maintain and practice their culture in accordance with Article 27 of the ICCPR.<sup>11</sup> At the time, the Canadian government assured the Committee that it was seeking a settlement that would protect the rights of the Lubicon people. To date, however, no such settlement has been reached. In November 2003, negotiations between the federal government and the Lubicon broke down principally over the issue of self-government. The Lubicon have since repeatedly called for the resumption under a mandate that includes recognition of Lubicon self-government powers consistent with the principle that the inherent aboriginal right of self-government under the Canadian constitution.<sup>12</sup> In November 2005 the Human Rights Committee renewed its call for Canada to make every effort to resume negotiations "with a view to finding a solution which respects the rights of the Band."<sup>13</sup> In the absence of a such a solution the culture and welfare of the Lubicon Cree remains in jeopardy.

### **Grassy Narrows**

Grassy Narrows or Asubpeeschoseewagong First Nation is a community of Anishnaabe indigenous people of approximately 700 people in northwestern Ontario. Hunting, trapping, fishing, and harvesting of wild plants such as wild rice and berries are central to their culture and economy.

Grassy Narrows falls within the territory covered by the 1873 treaty between the Canadian state and the Chiefs of the Salteaux Tribe of the Ojibway Indians. This treaty, known as Treaty 3, establishes that indigenous peoples have the "right to pursue their avocations of hunting and fishing throughout the tract." Despite this treaty right, the people of Grassy Narrows have lost access to an increasing part of their traditional resources as a consequence of developments permitted by the provincial government without the consent of the community.

In the 1950s, hydroelectric dams erected by the province flooded large parts of the territory wiping out many wild rice beds. In the 1970, community members learned that the local river system had become contaminated with mercury from an upstream pulp and paper mill. The contamination of the fish severely undermined the ability of the community to earn their living by fishing, according to their traditional practice. In 1986, the federal and provincial governments established compensation funds of more than \$16 million for the communities affected by the contamination of the river system, including Grassy Narrows, but contamination continues to restrict fishing as a source of livelihood and cultural life.<sup>14</sup>

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<sup>10</sup> *Ibid*, para. 23.2.

<sup>11</sup> *Ibid*, para. 33.

<sup>12</sup> Amnesty International, *Canada – "Time is wasting": Respect for the land rights of the Lubicon Cree long overdue*, (AI Index: AMR 20/001/2003), April 2003.

<sup>13</sup> *Human Rights Committee, Concluding observations: Canada*, (UN Doc. CCPR/C/CAN/CO/5), 2 November 2005, para. 9.

<sup>14</sup> Dr. Leanne Simpson and Dr. Trish Sellers, *Contaminants Study Year 2, Asubpeeschoseewagong Netum Anishinaabek and Wabauskang First Nation Community Report*, July 2004.

More recently, the provincial government has licensed large-scale logging in roughly 50 percent of the forest used by the community for hunting, trapping and gathering of wild food and medicinal plants. The Band Council and a wide range of organizations within the community have opposed the plans for such extensive logging. While logging company representatives have met with community members, as required by the province as a condition of their license, community members complain that they were never genuinely consulted because their values and interests have not been respected. In 2002, community members launched a series of blockades to prevent or slow down logging operations. Despite growing tensions, the federal government has refused to intervene, citing the provincial jurisdiction over natural resources. For its part, the provincial government has allowed logging to continue despite an apparently flawed consultation process and the fact that the community has clearly withheld its consent.

In its fourth periodic report to the Committee on Economic, Social and Cultural Rights, the Canadian government acknowledges an obligation to uphold the rights of indigenous peoples under article 1, the right to self-determination. However, as these two examples above illustrate, the substantive elements of the right to self-determination, the right of a people to control its own life and future, and the right of a people to freely dispose of their natural wealth and resources, are not being upheld resulting in denial of other rights guaranteed in Part III of the Covenant.

**The Canadian government should:**

- **Collaborate with indigenous peoples to establish effective remedies or approaches to the timely resolution of disputes over lands and territories. Such remedies or approaches should be guided by a clear commitment to uphold the human rights of indigenous peoples, including recognizing, respecting and protecting a land and resource base adequate to ensuring the full realization of their rights.**
- **In consultation with indigenous peoples, establish clear, written policies, to ensure that, consistent with emerging international standards for the protection of the human rights of indigenous peoples, no resource extraction activities that could impact on the rights of indigenous peoples will be licensed on land to which indigenous peoples have title or use rights, or where title and use rights have not been legally resolved, unless the indigenous peoples concerned give their free, prior informed consent.<sup>15</sup>**
- **Implement the recommendation of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people that “it should be clearly established in the text and spirit of any agreement between an aboriginal people and a government in Canada, and supported by relevant legislation, that no matter what is negotiated, the inherent and constitutional rights of aboriginal peoples are inalienable and cannot be relinquished, ceded or released, and that aboriginal peoples should not be requested to agree to such measures in whatever form or wording.”**

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<sup>15</sup> The standard of free prior informed consent has been recognised, *inter alia*, by the Committee on the Elimination of all forms of Racial Discrimination in its General Recommendation 23, on Indigenous Peoples: "4 (d) [The Committee calls upon States parties to] Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent" and "5. The Committee specially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, when they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation should as far as possible take the form of land and territories."

- **Consistent and non-discriminatory delivery of social services**

In its fifth periodic report, the Government of Canada states that “Federal, provincial and territorial governments have established numerous programs and supports for aboriginal people in the areas of employment, social security, child welfare and health.” While this is unquestionably true, it is also the case that the provision of social services is often poorly coordinated among federal departments and across government jurisdictions resulting in significant gaps in services for indigenous peoples - often falling below the standard of those available for the rest of the population.

The federal government is responsible for health and social services on reserve and in Inuit communities, while the provincial and territorial governments provide services elsewhere. This has led to a gap in services for the approximately 60 percent of indigenous women, men and children who don’t live on reserves. While indigenous people living off reserve have access to programs and services designed for the general population, these programs and services are not necessarily aligned to the specific needs of indigenous peoples, nor do they necessarily incorporate an understanding of the cultural practices and values of indigenous peoples and how this affects the delivery of services.

The federal government has increasingly recognized the need for programs and services specifically adapted for indigenous people living in predominantly non- communities. Funding, however, lags behind the growth in the urban indigenous population and the delivery of services through various government departments is often uncoordinated. The Federal Interlocutor for Métis and Non-Status Indians pointed out in 2003 that almost 90 percent of funding for programs designed for indigenous peoples is spent on reserve where only 40 percent of indigenous persons live, while off-reserve programs for indigenous people are delivered through 22 federal departments, as well as provincial and territorial agencies.<sup>16</sup> Responding to these comments, a federal subcommittee on indigenous child welfare described a “jurisdictional web” in which there is often little coordination or communication “within and between the municipal, provincial and federal levels of government.”<sup>17</sup>

Indigenous people have formed a wide range of service organizations to help address the needs of their communities on and off reserve, including employment counseling, addiction services, health centers and shelters for women and girls escaping violence. However, most, if not all, report that their work is jeopardized by chronic under funding and the failure of government to provide funding on a stable, multi-year basis. Being dependent on short-term funding diverts energy from vital services to fundraising, or to managing crises when funds don’t arrive. Without stable funding, long-term projects are difficult to plan and organizations fear they won’t be able to keep their commitments to the people they serve.

The November 2005 meeting in Kelowna, British Columbia between national indigenous peoples’ organizations, the Prime Minister, and ministers from the federal, provincial and territorial governments marked an important step forward in developing a comprehensive and coordinated strategy in the areas of health, education and social services. Amnesty International hopes that the newly elected federal government will continue to honour the agreements reached during that meeting. The federal government should expand this process to address other issues of

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<sup>16</sup> “Building a Brighter Future for Urban Aboriginal Children: Report of the Standing Committee on Human Resources Development and the Status of Persons with Disabilities,” June 2003, p. 6.

<sup>17</sup> *Ibid.* p. 7.

particular concern to indigenous communities in Canada.

### **Indigenous women**

In addition to the physical and mental suffering that is inflicted, violence against women serves to reinforce inequalities between women and men and to deprive women of the opportunity to enjoy their fundamental economic, social and cultural rights.

According to a 1996 Canadian government statistic, indigenous women between the ages of 25 and 44 with status under the federal Indian Act, are five times more likely than other women of the same age to die as the result of violence.<sup>18</sup> Indigenous women's organizations have long spoken out against violence against women and children within indigenous communities. More recently, a number of advocacy organizations, including the Native Women's Association of Canada (NWAC), have drawn attention to acts of racist violence perpetuated against women in predominantly non-indigenous communities.

Yet, despite the alarmingly high levels of violence and the efforts of indigenous women to focus attention on this violence, not enough is being done to ensure indigenous women's right to equality by providing adequate protection against such violence. In many indigenous communities, there are no emergency shelters for women and in some remote communities the nearest law enforcement officers may be hours away.

In a report released in October 2004,<sup>19</sup> Amnesty International drew attention to an additional concern, namely the persistent failure of police and public officials to respond adequately to this violence and highlighted the role of racism in fueling attacks on indigenous women living outside their own communities. The report also highlighted the vulnerability of the large numbers of indigenous women who, driven by desperation and lack of economic opportunity, have resorted to make a living in the commercial sex trade. Despite positive acknowledgement of the report by all levels of government, Amnesty International is concerned that there is still no coordinated response to these threats to indigenous women's lives and well-being.

### **Indigenous children**

The 1996 Royal Commission on Aboriginal Peoples recognized the disastrous consequences of past policies aimed at the destruction of indigenous cultures, including the forced removal of indigenous children from their families and communities to attend residential schools.<sup>20</sup> It has been estimated that there are now three times the number of indigenous children in state care than at the peak of the residential school era.<sup>21</sup> 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 and placed in the care of the state<sup>22</sup> while a recent independent study of three sample provinces found that First Nations children with status under the Indian Act were fifteen

<sup>18</sup> Aboriginal Women: A Demographic, Social and Economic Profile, Indian and Northern Affairs Canada, Summer 1996.

<sup>19</sup> Amnesty International, *Stolen Sisters: A human rights response to discrimination and violence against indigenous women in Canada*, (AI Index: AMR 20/003/2004) October 2004.

<sup>20</sup> Report of the Royal Commission on Aboriginal Peoples (RCAP), 1996.

<sup>21</sup> First Nations Child and Family Caring Society of Canada. UNCRC Day of General Discussion: Children without Parental Care - The Chance to Make a Difference for this Generation of Indigenous Children: Learning from the Lived Experience of First Nations Children in the Child Welfare System in Canada. 16 August 2005. [www.fncfcs.com](http://www.fncfcs.com)

<sup>22</sup> "Building a Brighter Future for Urban Aboriginal Children", footnote 16, p.17.

times more likely than other children to be removed from their families.<sup>23</sup>

While removal of children from their families is sometimes necessary to guarantee their health and safety, it is preferable, whenever possible, to ensure children's welfare within their culture and community to help foster the sense of identity, belonging and self-worth that is a vital part of growing up.<sup>24</sup> This is particularly important for indigenous children who may lose the opportunity to learn the traditions and values of their own culture if they are removed from their families for too long. Critically, the vast majority of indigenous children are removed from their families not because of abuse, but because of neglect, often resulting from poverty.<sup>25</sup>

In 2000, the federal government acknowledged that chronic underfunding of child and family services in indigenous communities means that indigenous communities were often denied access to services that could provide for indigenous children's welfare while keeping them within their families and communities.<sup>26</sup> Of particular concern was the lack of adequate funding for preventative and early intervention programs that could address emerging problems before the situation necessitated the removal of children from their families.

In 2000, the average federal funding for indigenous child and family services was 22% lower per child than what provincial governments provided for non-indigenous children. This is despite the higher costs of providing services in small and remote communities, the ongoing impacts of the residential school experience on the stability of indigenous communities, and the higher levels of poverty experienced by indigenous communities. Indigenous child welfare organizations believe the gap has grown even larger, due in part to the failure to adjust spending for inflation.<sup>27</sup>

Amnesty International is concerned that the federal government has not taken sufficient measures to address this gap. Amnesty International believes that the Canadian government must act immediately to end the disparity in funding for indigenous child welfare services and ensure that the best interests of indigenous children are protected by effective preventative and early intervention programs.

Amnesty International calls upon Canada to ensure that indigenous women, men and children in Canada have access to culturally appropriate health and other services necessary for the enjoyment of their human rights. In particular:

**The Canadian Government should act immediately to:**

- **ensure the collection and dissemination of accurate data on violent crime against indigenous women;**
- **in collaboration with indigenous peoples, establish a coordinated plan of action to address violence against indigenous women, including social and economic factors that**

<sup>23</sup> The First Nations Child and Family Caring Society of Canada. *Wen:de* - We are coming to the light of day. October 2005. p. 44. [www.fncfcs.com](http://www.fncfcs.com)

<sup>24</sup> Article 20 of the Convention on the Rights of the Child states: "A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State." Article 30 states: "In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language."

<sup>25</sup> *Wen:de*, footnote 23, p. 14.

<sup>26</sup> First Nations Child and Family Services Joint National Policy Review, June 2000.

<sup>27</sup> *Wen:de*, footnote 23, p. 45.

**place indigenous women in situations of heightened risk and the role of racism in perpetuating violence;**

**- ensure adequate, sustained, multi-year funding from all levels of government, for provision of culturally appropriate health and social services for indigenous persons living on and off reserve, including provision of shelters and counselling for women and girls escaping violence;**

**- end the disparity in funding for indigenous child and family services and ensure that the best interests of indigenous children are protected by effective preventative and early intervention programs;**

**- ensure that all levels of government adopt such measures as are necessary to ensure that indigenous peoples are consulted in the formulation and implementation of any policy that could affect their rights and well-being.**

## 2. THE RIGHTS OF MIGRANTS – ICESCR ARTICLES 2, 6, 7, 9, 10, 12

Foreign nationals are among the most vulnerable members of Canadian society. Refugees, immigrants, temporary workers, individuals living in Canada without any lawful immigration status, and other non-citizens face a number of significant human rights challenges, including with respect to the protection of basic economic, social and cultural rights.

- **Previous Concerns**

In 1998, this Committee highlighted two concerns with respect to the economic, social and cultural rights of refugees: (1) access to government loan programs for post-secondary education; and (2) the difficulties faced by recognized refugees who lack identity documents and therefore face obstacles to becoming permanent residents and citizens and in reuniting with their families.<sup>28</sup>

The Committee had urged that student loan programs not discriminate on the basis of “citizenship status.” In 2003 the federal government announced changes to the program, which had applied only to citizens and permanent residents, extending loans to individuals who have been recognized as “protected persons”<sup>29</sup> under the Immigration and Refugee Protection Act. Amnesty International welcomes this expansion of the student loan program and the resulting wider accessibility to post-secondary education for protected persons.

We remain concerned however about the plight of individuals who have been found to be refugees and granted protected persons status, but for a variety of reasons (including lack of identity documents) are not able to or are not permitted to obtain permanent resident status. Persons in this situation are restricted in their ability to travel outside of Canada, are unable to apply for reunification with immediate family members, and face limitations in accessing certain employment opportunities (described in further detail below).

- **Non-discrimination (article 2)**

In Canada, enjoyment of many key economic, social and cultural rights is dependent on immigration status. Persons with temporary status, or no status at all, may be wholly denied certain rights. Examples include:

- Some categories of non-residents, including refugee claimants and refused refugee claimants, suffer discrimination in terms of social assistance. Refugee claimants may not immediately be granted social assistance, because of requirements that they provide certain immigration documents, including in some cases a decision on the eligibility of the refugee claim (a process which can on occasion be delayed). Rates of welfare granted to refugee claimants are in some provinces below the standard rate. Difficulties may also arise when eligibility for a higher rate of welfare is conditional on good faith in seeking employment and when the person has no work permit to do so. Denying both the right to work and the right to social security (or restricting this in its exercise to benefits below the rate for citizens and even below the minimum rate guaranteed to citizens), leading to situations where it is difficult to survive, breach the right to an adequate standard of

<sup>28</sup> Concluding observations, footnote 5, paras. 37, 39, 49.

<sup>29</sup> Protected persons are those qualifying as Convention refugees as well as individuals who are determined to be at risk of torture or cruel or inhuman treatment or punishment but who do not meet the definition of a Convention refugee.

living in the ICESCR and may also breach the prohibition on degrading treatment in the International Covenant on Civil and Political Rights.<sup>30</sup>

- Temporary workers - including domestic workers, farm workers, exotic dancers, skilled trades in industry and construction, and professionals entering under the North American Free Trade Agreement (NAFTA) permits - come to Canada to fill a wide range of jobs. Many are employed in low wage work and are vulnerable to abuse and exploitation because of racism, lack of secure citizenship status and exclusion from labour laws.
- All non-residents have social insurance numbers that identify them as non-residents, whereas citizens do not. This can create a significant hurdle in obtaining employment since employers may view them as temporary and unreliable.
- Irregular migrants, non-citizens who do not have a lawful immigration status in Canada, are particularly vulnerable to a range of abuses. Many owe substantial debts to smugglers, forcing them to work in situations of indentured labour or debt bondage. Some women, girls and boys are trafficked and forced into prostitution or labour, often in slave-like conditions. Others are paid extremely low wages by employers and work in conditions that do not comply with normal health and safety standards, especially in the informal sector. Because of the lack of immigration status, these persons are at heightened risk of exploitation by their employers, as they may be reluctant to come forward to complain to the authorities as this may lead to their deportation or imprisonment. They are not eligible to obtain social security benefits should they be unemployed for a period, or health care (beyond emergency care) and educational services for themselves or their families.

**The Canadian government should carry out a review of legislation and practice to identify instances in which economic, social and cultural rights are denied or not equally guaranteed to individuals on the basis of discrimination because they are not Canadian citizens, and adopt changes necessary to ensure full compliance with the provisions of the ICESCR.**

- **Right to work, rights at work and rights to collective bargaining and to form trade unions and social security and insurance (articles 6 to 9)**

The temporary status of some categories of migrant workers in Canada, notably agricultural workers and live-in caregivers, places them at particular risk of exploitation and abuse by their employers. Because of their temporary immigration status, it is difficult for workers to come forward to complain about problems or difficulties at work. Should they do so, they may place themselves in jeopardy of being unfairly dismissed without recourse to the courts, repatriated to their home country, as well as not being requested back to Canada to work during subsequent seasons.

Canadian trade unions have reported instances where farm workers, admitted to Canada under the Seasonal Agricultural Workers Program, have been sent home for expressing concern over inadequate housing, not receiving the hours of work contracted for, and because they have

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<sup>30</sup> See decisions from the United Kingdom - *R (Limuela, Tesema and Adam) v. Sec'y of State for the Home Department*, [2005] UKHL 66.; and South Africa - *Minister of Home Affairs v. Watchenuka and another* (2004) 1 All SA 21 (SA SCA, 28 Nov.2003).

become ill or injured.<sup>31</sup> Agricultural work can be very dangerous. Yet migrant farm workers in Ontario are not covered under the province's *Occupational Health and Safety Act*. Furthermore, Ontario's *Agricultural Employees Protection Act* only allows farm workers to form employee associations, not trade unions, and denies them the right to bargain collectively. Farm workers do not, therefore, enjoy protections that might come from being a member of a trade union. At the same time, there is no independent process for a migrant farm worker to contest the possibility of repatriation. As a result, workers are reluctant to complain about unsafe working and living conditions.

Migrant farm workers are also denied access to federal employment insurance. They are admitted to Canada under temporary work permits that require them to return to their home countries when their visas expire. The fact that they are then no longer a resident in Canada deprives them of the right to claim basic employment insurance benefits during subsequent periods of unemployment. However, while employed they are required by law to pay the same employment insurance premiums as other workers in Canada.

Amnesty International has previously highlighted concerns about the plight of women employed under the federal Live-in Caregiver Program.<sup>32</sup> The program brings trained domestic workers to work in Canadian homes. Under the program, it is mandatory that caregivers live in the homes of their employers for 24 months within the first three years of entering Canada. This makes the workers vulnerable to exploitation, including by working excessive hours, inadequate pay and no overtime stipulation. It also places women at risk of violence, and due to their isolation, they are unlikely to be able to form trade unions or associations to collectively lobby for change to their conditions. The UN Special Rapporteur on the human rights of migrants has highlighted concerns associated with the caregiver program, particularly the requirement to live with the employer.<sup>33</sup>

**The Canadian government should take steps to protect migrant workers in Canada from human rights violations including by:**

- **amending the terms and conditions of the Seasonal Agricultural Workers program to include an impartial process of appeal, available to all workers before any decision to repatriate is made;**
- **ensuring that farm workers and other migrant workers are fully covered by minimum labour standards, including the right to form trade unions and bargain collectively, and ensure that their equal access to employment insurance; and**
- **reforming the Live-in Caregiver program, including by reconsidering the live-in requirement and measures to ensure that this is a “safe” place for women (including, for example, by instituting a system of monitoring visits, help-lines, or access to special centre for such women), to reduce the vulnerability of women to abuse and exploitation.**
- **In addition, visa conditions should not discourage temporary workers or others from coming forward to complain about work conditions, including by considering**

<sup>31</sup> United Food and Commercial Workers Canada, National Report on the Situation of Migrant Farm Workers in Canada, 2004.

<sup>32</sup> Amnesty International Canada, *Without Discrimination: The Fundamental Right of All Canadians to Human Rights Protection, A Brief to the U.N. Committee on the Elimination of Racial Discrimination on the Occasion of the Examination of the Thirteenth and Fourteenth Periodic Reports Submitted by Canada*, July 2002, pp. 11-12; Amnesty International Canada, *Equal Rights: A Brief to the U.N. Committee on the Elimination of Discrimination Against Women on the Occasion of the Examination of the Fifth Periodic Report Submitted by Canada*, December 2002, pp. 5-6.

<sup>33</sup> Visit to Canada, Report prepared by Ms. Gabriela Rodríguez Pizarro, Special Rapporteur on the human rights of migrants, E/CN.4/2001/83/Add.1.

**the possibility of untying visas from named employers, especially in the event of an allegation of unfair dismissal or abusive practices. Non-national workers should be given a period of grace (e.g. up to two months) in which they may seek alternative employment, in the same industry, should their contract be terminated. This grace period would also allow them to institute any proceedings before the appropriate body.**

- **Protection of the family (article 10)**

Refugees and other persons with humanitarian reasons for leaving their countries of origin or habitual residence often become separated from family members during their flight to safety or protection. Reuniting with close relatives is, therefore, often among the most pressing and important needs that refugees and others face. Various provisions in Canadian law and practice pose obstacles to such family reunification.

There are no provisions in Canadian law to allow minors recognized as refugees in Canada to reunite with their parents and siblings. The Immigration and Refugee Protection Act allows adult refugees to include spouses, common-law partners and children in their application for permanent residence, but child refugees can only apply for permanent residence for themselves and cannot sponsor any close family members.

As noted above, individuals who are recognized as refugees in Canada but who experience delays in subsequently obtaining permanent residence status also face delays in reuniting with family. Difficulties also arise for individuals who are not granted refugee status in Canada, but who are not deported because they are nationals of countries designated by the government to be facing generalized risk (commonly known as “moratorium countries”). While they are protected from deportation, they are not eligible to apply for permanent resident status and are therefore unable to sponsor and reunite with close family members.

**The Canadian government should reform immigration law and practice so as to remove obstacles to speedy family reunification for all refugees immediately upon recognition, including especially refugee minors, or otherwise reduce delays in obtaining permanent residency for such refugees, as well as for individuals coming from “moratorium countries”.**

- **Physical and mental health (article 12)**

While most people in Canada have access to health services through provincial health programs, persons without permanent status in Canada generally do not. Some (for example refugee claimants and recognized refugees who have not been granted permanent residence) are covered by the Interim Federal Health Program, which covers only essential health services, as defined by Citizenship and Immigration Canada.

Persons in immigration detention in theory have access to urgent or emergency health care, but in practice there are sometimes problems in gaining access in a timely manner. Amnesty International is particularly alarmed that detained refugee claimants and refugees who suffer from mental health problems associated with torture and other trauma, may suffer deterioration in their mental health during the course of their detention, without access to mental health care. This is particularly of concern for individuals who have been held in long-term immigration detention, which can be in excess of six months and, in the case of those held under immigration security certificates, who may be detained for an indefinite number of months and years. In the summer of 2005, Mohammad Mahjoub, who is detained under a security certificate, went on a hunger strike

in part to protest the denial of appropriate medical care for a number of conditions, including Hepatitis C.

**The Canadian government should ensure that:**

- **individuals in Canada, regardless of their immigration status, have equal access to adequate health care services; and**
- **all individuals in immigration detention have access to adequate physical and mental health care.**

### 3. CANADA'S RESPONSIBILITY TO UPHOLD ECONOMIC, SOCIAL AND CULTURAL RIGHTS ABROAD – ICESCR article 2

This Committee has underscored how crucial international assistance and cooperation is with respect to the realization of economic, social and cultural rights and has stated that it is an “obligation of all states.”<sup>34</sup>

Amnesty International is of the view that Canadian practice must both safeguard against causing or contributing to violations of economic, social and cultural rights outside Canada, and also contribute to the progressive realization of economic, social and cultural rights abroad, to the maximum extent possible. This is of particular importance when considering Canada's record with regard to two crucial areas: international development assistance, and foreign trade and investment.

- **Official Development Assistance**

It is clear that effective, well-resourced international development assistance provided bilaterally and multilaterally, is essential to the full realization of economic, social and cultural rights in developing countries. The UN has, therefore, for many years urged governments from developed countries to devote an amount of money to international development assistance equivalent to 0.7% of their Gross National Product (GNP). This was recently repeated at the UN's 2005 World Summit, within the context of reaffirming the important Millennium Development Goals that were developed following the adoption by world leaders of the Millennium Declaration in 2000.<sup>35</sup> This Committee has called on governments to take steps to reach the goal of 0.7% “as quickly as possible.”<sup>36</sup>

Five years ago, the Canadian government endorsed the Millennium Development Goals. But the reality is that funding for official development assistance (ODA) was cut from 0.45% of national income in the mid-1990s to 0.27 in 2004, a far cry from the 0.7% target set more than thirty-five years ago by former Prime Minister Lester B. Pearson.<sup>37</sup>

Canada's level of official development assistance falls far below this important international target, and is currently estimated to be about 0.33% of GNP.<sup>38</sup> The new Conservative government has pledged to increase assistance beyond current levels and to move towards the average level within the Organization for Economic, Cooperation and Development.<sup>39</sup>

**The Canadian government should take steps towards the fulfilment of its obligations of international cooperation and assistance, including through ensuring that its development cooperation respect, protect and fulfil its obligations under the ICESCR, bearing in mind**

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<sup>34</sup> Committee on Economic, Social and Cultural Rights, General Comment 3, on the nature of States parties obligations, 14 December 1990, para. 14.

<sup>35</sup> United Nations General Assembly, 2005 World Summit Outcome, para. 23.

<sup>36</sup> See for example, *Committee on Economic, Social and Cultural Rights, Concluding observations: Ireland*, (UN Doc. E/C/12/1/Add.77), 5 June 2002, para. 38.

<sup>37</sup> Make Poverty History Campaign, <http://www.makepovertyhistory.ca/e/aim3.html#aid>.

<sup>38</sup> Make Poverty History Campaign, <http://www.makepovertyhistory.ca/e/aim3.html#aid>. In 2004, Canadian development assistance stood at 0.27% of GNP: *Aid rising sharply, according to latest OECD figures*, Organization for Economic Cooperation and Development, 16 January 2006.

<sup>39</sup> *Stand up for Canada*, Conservative Party of Canada Federal Election Platform, January 2006. In 2004, the average level within the OECD was 0.42%.

**the internationally agreed consensus that industrialised countries should devote 0.7% of GDP to Official Development Assistance.**

- **Trade and Investment**

Development assistance funding is by no means the only avenue by which Canadian financial resources have an impact on the protection of economic, social and cultural rights abroad. Policies and practices with respect to foreign trade and investment are also of vital importance.

The Canadian government actively participates in important international financial institutions and world trading bodies, negotiates bilateral and multilateral trade deals, and provides a range of forms of financial and other assistance to Canadian companies doing business in other countries; all of which can dramatically affect the enjoyment of human rights, including economic, social and cultural rights. Responsible initiatives can enhance human rights protection, while irresponsible practices may be associated with grave violations.

Amnesty International has frequently called on the Canadian government to ensure that the country's human rights obligations are at the centre of Canada's foreign trade and investment policies and practices.<sup>40</sup> We remain concerned that is not the case.

The potential human rights impact of trade agreements is in fact not integrally taken into account in existing or proposed trade deals.<sup>41</sup> There is no requirement that human rights impact assessments be conducted. Without impact assessments which evaluate the *potential* future effects of trade agreements, particularly on the poor, vulnerable and otherwise disadvantaged in individual countries, measures are not taken to protect those whose rights may be infringed. Without further analysis of the *actual* human rights impact of the implementation of trade agreements the effects of such agreements remain largely unknown, and it is impossible to provide remedies to those whose human rights are violated. Amnesty International is of the view that comprehensive human rights impact assessments, that are public and participatory, can play a crucial role in enhancing human rights protection. The findings of such impact assessments should be explicitly raised and addressed in trade negotiations. They should also be used to evaluate existing trade deals in order to take appropriate measures when this evaluation shows that they are negatively affecting human rights. Presently, there is no reliable and consistent means of ensuring that Canada's foreign trade and investment is pursued in a manner that promotes rather than undermines human rights, particularly the rights of vulnerable members of society such as women, indigenous peoples and those living in poverty.

**The Canadian government should put the protection of economic, social and cultural rights at the heart of its foreign trade and investment policies and practices, including by:**

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<sup>40</sup> Amnesty International, *Our Call for Human Rights: A message from Amnesty International members in advance of the Fourth Summit of the Americas*, October 2005, pp. 3-4; Amnesty International Canada, *Above all Else: A Human Rights Agenda for Canada*, December 2004, pp. 11-13; Amnesty International Canada, *At Home and Abroad: Amnesty International's human rights agenda for Canada*, October 2003, pp. 6-7; Amnesty International Canada, *Real Security: A Human Rights Agenda for Canada*, May 2002, pp. 17-21.

<sup>41</sup> Such as the North American Free Trade Agreement, finalized among Canada, Mexico and the United States in 1994, which deals only with labour rights in a side agreement, rather than in the core text of the deal. That approach has been pursued as well with proposed agreements such as the Free Trade Area of the Americas, and a possible deal between Canada and four Central American countries.

- **conducting meaningful consultations with those likely to be affected by new trade rules, including women, people living in extreme poverty and other vulnerable populations;**
- **undertaking human rights impact assessments of trade rules both during the process of negotiations and after negotiations are concluded;**
- **improving information exchange about relevant human rights standards with national trade policy makers and negotiators, in order to ensure that decisions made about trade do not undermine the implementation of human rights policies;**
- **working to ensure that relevant UN agencies and organizations build on existing expertise and best practices worldwide in order to identify an effective model of human rights impact assessment, which will include the development of appropriate methodology and human rights indicators and benchmarks.**

#### **4. PRIVATE COMPANIES AND THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS - ICESCR ARTICLE 2**

Violations of economic, social and cultural rights can occur through the action or inaction of States, or other entities that are insufficiently regulated by States. The obligation of the state to protect human rights includes a responsibility to ensure that the operations of private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not result in denial of the economic, social and cultural rights of the population. States are responsible for violations of rights that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors.

Amnesty International is concerned that the government of Canada has fallen short of its obligation to ensure that the operations of Canadian companies, in Canada and abroad, do not interfere with the realization of human rights, including economic, social and cultural rights. The government has failed to institute effective regulation of the human rights impact of Canadian business operations and the availability of adequate remedies when those operations impair the enjoyment of fundamental human rights. Despite international recognition of the limitation of voluntary initiatives, the Canadian government continues to argue that the best approach is to encourage companies to adopt voluntary measures in the area of human rights, such as codes of conduct and other internal company policies.

Over the years some steps have been taken by the Canadian government to promote corporate social responsibility. Staff have been added within the departments of foreign affairs and international trade, responsible for advancing corporate social responsibility, and awareness-raising programs have been delivered to business leaders by those and other staff. The Canadian government also participates in the implementation of the OECD Guidelines for Multinational Enterprises through its National Contact Point.

To date, however, such infrastructure and voluntary initiatives have not been sufficient. Amnesty International believes that these approaches have been valuable in raising awareness of key issues among companies but is concerned they have failed to adequately ensure accountability for human rights in corporate activities and, most importantly, to reduce significantly the negative impact that some companies' activities have on human rights. There is a clear need for the Canadian government to adopt laws and policies which will require companies to respect human rights standards, whether they operate locally or abroad.

Amnesty International has been particularly concerned about the conduct and impact of Canadian companies in the extractive industries. Canadian petroleum and mining companies are very active internationally within the petroleum and mining industries and increasingly find themselves considering investments or operations in countries facing armed conflict or other widespread human rights violations.

For instance, in 2000 Amnesty International published a report on serious human rights concerns associated with oil exploration and production in southern Sudan which drew attention to the operations of a number of companies, including Canada's Talisman Energy.<sup>42</sup> Amnesty International was concerned that company operations were contributing to grave abuses in the region, including of economic, social and cultural rights, particularly in the context of the forcible displacement of local populations by security forces that was associated with oil exploration. Talisman has since sold its Sudan operation. Amnesty International has highlighted concerns

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<sup>42</sup> Amnesty International, *Sudan: The Human Price of Oil*, (AI Index: AFR 54/001/2000), 3 May 2000.

related to nickel mining concessions in Guatemala, where there are allegations that two Canadian mining companies – Inco and Skye Resources – may have failed to adequately consult with and take account of the human rights of those living in the vicinity.<sup>43</sup> Amnesty International has raised concerns regarding several other Canadian companies as well, including Ivanhoe Mines which operates a joint venture copper mine in partnership with the government of Myanmar, and Anvil Mining which has been accused of having provided logistical support to government forces in the Democratic Republic of Congo to conduct attacks resulting in human rights violations and violations of international humanitarian law.

Concerns about another Canadian mining company, TVI Pacific, which operates in the Philippines, led the House of Commons' Standing Committee on Foreign Affairs and International Trade to conduct a study, leading to a report which lays out important recommendations as to reforms needed to ensure that Canadian mining companies operate in a socially and environmentally responsible manner.<sup>44</sup> Amnesty International and other Canadian NGOs urged the government to implement the Committee's recommendations. Until this point in time, the government has chosen only to launch a series of consultative roundtables on the issue.

Amnesty International has repeatedly called on the Canadian government to develop strong standards at national level and support the development of international standards laying out the human rights responsibilities of companies. In Amnesty International's view, the UN Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights<sup>45</sup> (the UN Norms) are an important step towards development of legal norms and mechanisms which would form the basis of an effective international corporate accountability framework. The substantive principles contained in the UN Norms are currently the only existing attempt to articulate a comprehensive set of standards for business. Amnesty International therefore recommends that the UN Norms are considered a basis from which to develop a set of global standards for the human rights responsibilities of transnational corporations and other business enterprises. We have also called on the Canadian government to participate in the Voluntary Principles initiative on Security and Human Rights (VPs)<sup>46</sup> - which address the critical nexus between the security needs of companies and the human rights of surrounding communities and are considered a de facto set of standards – and to press Canadian businesses to incorporate those standards into their operations and monitor their implementation.

Amnesty International believes that, based on these existing and developing international standards, the Canadian government should also develop compatible national legislation to

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<sup>43</sup> Amnesty International, *Guatemala's Lethal Legacy: Past Impunity and Renewed Human Rights Violations*, (AI Index: AMR 34/001/2002), February 2002

<sup>44</sup> House of Commons Standing Committee on Foreign Affairs and International Trade, *Mining in Developing Countries and Corporate Social Responsibility*, June 2005.

<sup>45</sup> These norms were approved by the Sub-Commission on the Promotion and Protection of Human Rights at its 55<sup>th</sup> session in 2003 and transmitted to the Commission on Human Rights. At its 60<sup>th</sup> session, the Commission, through Decision 2004/116, confirmed the importance and priority of the question of the responsibility of transnational corporations and related business enterprises with regard to human rights and requested the OHCHR to report to the 61<sup>st</sup> session on the scope and legal status of existing initiatives and standards.

<sup>46</sup> The Voluntary Principles, recognizing the harm that may be caused by companies operating in conflict zones, were launched by the United Kingdom and United States governments in December 2000, who have been joined since by Norway and the Netherlands. Canada has been considering joining for several years, but has still made no decision: Department of Foreign Affairs and International Trade, *Mining in Developing Countries – Corporate Social Responsibility: The Government's Response to the Report of the Standing Committee on Foreign Affairs and International Trade*, October 2005, p.2.

regulate company operations. It is imperative that effective mechanisms for enforcement and accountability be established to ensure that transnational corporations and other business enterprises respect human rights.

**The Canadian government should adopt measures to ensure that the operations of Canadian companies do not contribute to violations of human rights, including economic, social and cultural rights, including by:**

- **developing national legal standards that establish the human rights responsibilities of Canadian companies using the UN Norms as a benchmark to ensure domestic legislation is adequate;**
- **becoming a participant and urging Canadian companies to become participants in the Voluntary Principles on Security and Human Rights, and urging Canadian companies to implement the Voluntary Principles in their policies and practices abroad and monitor their implementation;**
- **providing strong support for the development of UN-human rights standards applicable to companies, and an effective monitoring and implementation mechanism level norms regarding the responsibilities businesses carry with respect to human rights; and**
- **requiring Canadian companies to ensure that they conduct periodic evaluations**
- **concerning the impact of their own activities on human rights, and that before they take any action that may impact on the enjoyment of fundamental human rights there is opportunity for genuine consultation with those affected; timely and full disclosure of information on the proposed measures; reasonable notice of proposed actions; legal recourse and remedies for those affected; and legal assistance for obtaining legal remedies.**

## 5. THE RATIFICATION AND IMPLEMENTATION GAP – ICESCR ARTICLE 2

Amnesty International continues to have serious concerns about the lack of coordination among the federal, provincial and territorial governments in Canada when it comes both to the ratification of human rights treaties and the subsequent implementation of and compliance with international human rights obligations, including the provisions of the ICESCR. Amnesty International is also concerned that the processes in place with respect to ratification and implementation lack public transparency.

- **Development and Ratification of International Treaties**

Decisions with respect to Canada's position with respect to new, developing international standards as well as about ratification of treaties are made either entirely by the federal government or, when it is felt that the treaty touches on areas that fall within provincial level constitutional jurisdiction, consultations are launched within the Continuing Committee of Federal, Provincial and Territorial Officials on Human Rights, an inter-governmental group established in 1975. The committee meets behind closed doors and has not permitted civil society representatives to participate, observe or even make occasional limited submissions. Amnesty International has, on occasion, made requests to be able to make limited presentations to the Committee, but has been turned down.

More recently, with respect to matters which may implicate a number of different federal government ministries, a cross-departmental Deputy Minister process of occasional meetings has been initiated. Again the proceedings are not publicly accessible and it is not possible for civil society groups to attend or make submissions. Amnesty International is aware, for instance, that the Deputy Ministers have had a number of discussions regarding Canada's position with respect to the proposal to develop an individual complaints mechanism under the ICESCR. Civil society groups have not been allowed to attend any of those sessions.

Amnesty International recognizes that government officials may need opportunities to meet and discuss issues with respect to the ratification of human rights treaties in confidence. However, it is also important that discussions and decisions regarding treaty ratification be as broadly open and accessible to the public as possible. There is no other committee or governmental process charged with responsibility for treaty ratification that is open to the public. Against this backdrop of apparent secrecy it is notable that there has been no ministerial level meeting within Canada of federal, provincial and territorial ministers responsible for human rights since 1988. In November 2005 Canadian justice ministers announced that there will finally be a meeting of ministers responsible for human rights sometime in 2006.

- **Implementation**

These concerns about the lack of public transparency with regard to the development and ratification of human rights treaties apply equally to the crucial step of ensuring full implementation of and compliance with Canada's obligations, including the ICESCR. Contentious questions about divided federal/provincial jurisdiction or overlapping responsibility among various federal departments frequently arise when UN human rights treaty bodies issue Concluding Observations following the review of periodic reports from Canada, or publish their views regarding an individual petition brought against Canada. This is particularly acute with treaties like the ICESCR which deal with subject matter that falls largely within the constitutional jurisdiction of provincial governments. In such instances it is unclear which officials, if any, are

taking the lead in ensuring Canadian compliance. Discussions may occur within the Continuing Committee or among the Deputy Ministers, but are not in any way open to the public.

These significant shortcomings are well illustrated in the recent experience of Canadian organizations promoting the equality of women. Since early 2003 groups have made repeated approaches to the federal and provincial governments urging implementation of the recommendations made by the Committee on the Elimination of Discrimination against Women (CEDAW) in January of that year.<sup>47</sup> Those efforts have revealed that there is no coordinated means for implementing the CEDAW recommendations and have more generally made it clear that recommendations from UN bodies fall into an institutional vacuum. The Committee on the Rights of the Child has also expressed concern that there is no specific body that is entrusted with coordination and monitoring implementation of the Convention on the Rights of the Child.<sup>48</sup>

Civil society groups have suggested that once Concluding Observations have been issued by a treaty body, the government should prepare a public Plan of Action that outlines the steps to be taken to ensure compliance and specify which government departments bear responsibility. The need for such a process is particularly pressing in cases where there is a failure, sometimes longstanding, to comply with UN-level recommendations, but where there is no public reporting about the non-compliance. That is the case, for example, with respect to the recommendation made by this Committee and other UN treaty bodies for Canada to comply with the recommendations from the government's Royal Commission on Aboriginal Peoples, whose important 1996 report remains largely unimplemented.<sup>49</sup>

The lack of transparency in these processes is particularly problematic because the federal government has frequently asserted that even though it is responsible for ratification of and compliance with human rights treaties, it cannot ensure implementation when provincial level powers are implicated.<sup>50</sup> The Human Rights Committee has highlighted that a national level government cannot "point to the fact that an action incompatible with the provisions with the ICCPR was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility."<sup>51</sup> Given that such disputes between levels and departments of government within Canada often become obstacles to implementation and compliance, it is crucial that there be processes in place that are publicly accessible so as to ensure broad public understanding of and debate about these disputes.

- **A New Approach is Needed**

In December 2001, the Standing Committee on Human Rights of the Senate of Canada highlighted that "there appears to be a significant democratic deficit with respect to human rights in Canada, particularly in the area of the acceptance and implementation of Canada's international human rights commitments."<sup>52</sup> The report calls for a parliamentary human rights

<sup>47</sup> See, for example: Feminist Alliance for International Action (FAFIA), Open Letter to the Honourable Paul Martin, August 3, 2004. Amnesty International is an associate member of FAFIA.

<sup>48</sup> *Committee on the Rights of the Child, Concluding Observations: Canada*, (UN Doc.

CRC/C/15/Add.215), 27 October 2003, para. 10.

<sup>49</sup> *Concluding observations*, footnote 5, para. 43.

<sup>50</sup> This Committee heard this from Canadian representatives during its last review of Canada in 1998.

*Concluding observations*, footnote 5, para. 12.

<sup>51</sup> Human Rights Committee, General Comment No. 31, on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, (UN Doc. CCPR/C/21/Rev.1/Add.13), 26 May 2004, para. 4.

<sup>52</sup> *Promises to Keep: Implementing Canada's International Human Rights Obligations*, Report of the Standing Senate Committee on Human Rights, December 2001, p. 17.

committee to be established, with broad powers to oversee Canada's compliance with international human rights obligations. The Senate Committee reiterated this point in a recent report on children's rights, calling on the federal government to "establish a more effective means of negotiating, incorporating and implementing its international human rights obligations."<sup>53</sup>

In November 2005, the Human Rights Committee called on Canada to "establish procedures, by which oversight of the implementation of the Covenant is ensured, with a view, in particular to reporting publicly on any deficiencies." The Committee stated that these procedures should be "transparent and accountable, and guarantee the full participation of all levels of government and civil society, including peoples."<sup>54</sup> Other UN treaty bodies have made similar recommendations over the years.<sup>55</sup>

Decisions about ratifying human rights treaties and measures to ensure compliance with international human rights obligations are matters deserving of serious public consideration. Canada's approach at present is opaque and difficult for members of the public to understand. An improved approach would certainly stand to strengthen Canada's overall commitment to human rights protection and set a valuable model for other states to follow. Canada must strengthen coordination and public transparency regarding ratification of and compliance with international human rights treaties. The meeting of federal, provincial and territorial ministers with responsibility for human rights issues, anticipated for later in 2006, would provide a valuable forum for agreeing to a new approach.

**The Canadian government should ensure that the intended meeting of federal, provincial and territorial Ministers responsible for human rights goes ahead in the near future and that the meeting adopts a new coordinated, inter-governmental and publicly accountable approach to overseeing implementation of and compliance with Canada's international human rights obligations.**

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<sup>53</sup> Standing Senate Committee on Human Rights, *Who's in Charge Here? Effective Implementation of Canada's International Obligations with Respect to the Rights of Children*, Interim Report, November 2005, p. 82.

<sup>54</sup> *Concluding observations of the Human Rights Committee: Canada*, footnote 5, para. 6.

<sup>55</sup> *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada*, (UN Doc. A/57/18), 1 November 2002, para. 326; *Concluding observations of the Committee on the Elimination of Discrimination against Women: Canada*, (UN Doc. A/58/38), January 2003, paras. 349, 350; *Concluding observations of the Committee on the Rights of the Child: Canada*, (UN Doc. CRC/C/15/Add.215), 27 October 2003, paras. 10, 11.

## 6. STRENGTHENING ENFORCEMENT: KEY TO EFFECTIVE PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS – ICESCR article 2

One of the most significant challenges the international community faces with respect to the meaningful protection of universal human rights, including economic, social and cultural rights, lies in the enforcement of the obligations that governments have assumed through treaties such as the ICESCR. Eloquent norms and principles abound, but governments far too frequently fail to comply. This is a particular challenge when it comes to economic, social and cultural rights, where many governments – including Canada – often argue that the treaty provisions are of an aspirational nature, and that states cannot and should not be held to account for complying with these obligations in the same way as civil and political rights.

This Committee,<sup>56</sup> numerous UN human rights experts<sup>57</sup> and the UN High Commissioner for Human Rights have all frequently stressed that there is no basis for adopting different approaches to the accountability of governments for complying with economic, social and cultural rights on one hand, and civil and political rights on the other. The High Commissioner has noted the importance of:

... mov[ing] beyond simplistic categorization of rights towards an understanding of human rights that focuses on people – their security and development – and their capacity to claim the totality of their rights.<sup>58</sup>

Despite this, Amnesty International is concerned that Canadian policy and practice does not recognize economic, social and cultural rights as being enforceable and truly rights-based. This position has implications both nationally and internationally.

- **National enforcement**

The question of whether it is possible for Canadians to legally assert economic, social and cultural rights and rely on a court to enforce those rights was addressed by the Supreme Court of Canada in the 2002 Gosselin case.<sup>59</sup> At issue in the case was a Quebec law, no longer in force, which provided lower levels of welfare to individuals under the age of 30 who did not participate in designated work or education programs. Ms. Gosselin argued that the law violated two sections of the Canadian Charter of Rights and Freedoms: the section 7 guarantee of life, liberty and security of the person; and the section 15 protection against discrimination. She did not succeed in her appeal. The Court was narrowly divided, with only 5 of the 9 justices ruling against her.

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<sup>56</sup> *Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights*, (UN Doc. E/CN.4/2004), 15 March 2004, paras. 39-51; and *Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights*, (UN Doc. E/CN.4/2005/52), 10 February 2005, paras. 36-43.

<sup>57</sup> The views of the Special Rapporteurs on the right to food, education, health and adequate housing and others are summarized at: *Report of the open-ended working group*, 2004, *Ibid.*, paras. 28-38; and *Report of the open-ended working group*, 2005, *Ibid.*, paras. 20-25.

<sup>58</sup> *Statement by Ms. Louise Arbour, High Commissioner for Human Rights, to the third session of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights*, 6 February 2006.

<sup>59</sup> *Louise Gosselin v. The Attorney General of Quebec*, [2002] 4 S.C.R. 429.

The government of Quebec advanced a position before the Supreme Court that the right to life, liberty and security of the person under section 7 of the Charter did not involve any “positive obligation” on the part of the government to ensure that each person enjoys life, liberty or security of the person. The government argued and the Court agreed that section 7 is limited to “restricting the state’s ability to deprive people of these [rights].”<sup>60</sup> Judges in dissent, including the current High Commissioner for Human Rights (at that time a justice of the Supreme Court of Canada), rejected this distinction. Madame Justice Arbour (as she then was) stressed that:

... the rights at issue here are so intimately intertwined with considerations related to one’s basic health (and hence “security of the person”) – and, at the limit, even of one’s survival (and hence “life”) – that they can readily be accommodated under the s. 7 rights of “life, liberty and security of the person” ...<sup>61</sup>

Canadian law and the position of federal and provincial governments in Canada continue to be in line with the narrow ruling in *Gosselin*. As such, economic, social and cultural rights cannot, as a general rule, be enforced in Canadian courts within the framework of the Canadian Charter of Rights.

In 1998 this Committee expressed concern about the fact that provincial governments were urging courts to interpret the Charter in ways that would “deny any protection of ICESCR rights and consequently leave the complainants without the basic necessities of life and without any legal remedy.” The Committee was deeply concerned that courts have in fact “routinely opted for an interpretation of the Charter which excludes protection of the right to an adequate standard of living and other [ICESCR] rights.”<sup>62</sup>

**The Canadian government should ensure that federal and provincial laws fully recognize economic, social and cultural rights, including by:**

- **ensuring that ICESCR rights are fully incorporated into federal and provincial law; and**
- **providing effective remedies for the enforcement of those rights, including by administrative tribunals and courts.**

- **International Enforcement**

Recently much of the debate about the inadequacy of the commitment of governments to the meaningful enforcement of economic, social and cultural rights has revolved around the initiative within the Commission on Human Rights to develop an optional protocol to the ICESCR which would provide a mechanism for individuals and groups of individuals to lodge complaints against governments alleging violations of the economic, social and cultural rights guaranteed in the ICESCR. While such a remedy currently exists with respect to treaties dealing with civil and political rights, racial discrimination, the protection against torture, and discrimination against women (and may soon exist with respect to migrant workers) – it is not available to individuals who allege violation of an economic, social or cultural right unless these can be argued under an existing procedure.

Amnesty International considers the development of an individual complaint mechanism associated with the ICESCR to be a vital component of efforts to strengthen the means for

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<sup>60</sup> *Ibid.*, paras. 81, 82.

<sup>61</sup> *Ibid.*, para. 309.

<sup>62</sup> *Concluding observations*, footnote 5, paras. 14, 15.

enforcing the protection of economic, social and cultural rights at the national, regional and international levels. We have repeatedly called on Canada to lend its full support to this initiative. The Canadian government has, however, continued to adopt positions which question the added-value, utility or viability of such a complaints procedure. While recognizing that Canada has adapted its position, in the face of gathering international momentum for an Optional Protocol, Amnesty International remains concerned that Canada's current position of cautious support for an approach that would open up only a limited ability to lodge individual complaints, such as by restricting the mechanism to only a small number of rights in the ICESCR or only to violations of obligations to respect and protect, economic, social and cultural rights risks undermining the crucial effort to strengthen the effective protection of economic, social and cultural rights at the international level.

**The Canadian government should support the development and eventual adoption of an Optional Protocol to the ICESCR that will:**

- **address violations of all rights enshrined in the ICESCR;**
- **extend to violations of obligations to respect, protect and fulfill rights by recognizing states' obligations to refrain from action which interferes with the enjoyment of ICESCR rights, ensuring that other actors (including individuals and corporations) refrain from interfering with the enjoyment of ICESCR rights, and taking steps in line with the maximum available resources to achieve progressively the full realization of ICESCR rights;**
- **provide for a complaint and inquiry procedure;**
- **allow individuals and groups of individuals who claim to have been victims of violations to submit complaints or to have representatives do so on their behalf;**
- **provide for a monitoring body, upon receiving a complaint, to call for interim measures to avoid irreparable harm; and**
- **contain a provision to preclude states parties from making reservations to the protocol.**