CANADA

SUBMISSION TO THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

93RD SESSION, 31 JULY TO 25 AUGUST 2017

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1. INTRODUCTION

Amnesty International presents this submission to the United Nations (UN) Committee on the Elimination of Racial Discrimination (the Committee) on the occasion of the review of Canada's twenty-first to twenty-third periodic reports during the Committee's 93rd Session from 31 July 2017 to 25 August 2017. Although Canada has undertaken certain positive steps since the Committee's last review of Canada in 2012, many of the obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (the Convention) remain unimplemented. This briefing highlights concerns about Canada's implementation of the Convention in relation to Indigenous peoples and refugees and migrants.

2. INDIGENOUS PEOPLES

Despite certain promising steps, notably the 2016 launch of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Canada continues to fail to adequately respect, protect, and fulfil the rights of Indigenous peoples.

2.1 VIOLENCE AGAINST INDIGENOUS WOMEN AND GIRLS 1.1 (ARTICLES 2(A), 5(A), (B), (E)(IV) & 6)

First Nations, Inuit and Métis women and girls in Canada continue to face a significantly heightened risk of violence compared to other women and girls in the country, and many root problems remain unaddressed. In a positive step, on 1 September 2016, the National Inquiry into Missing and Murdered Indigenous Women and Girls commenced. The Inquiry's interim report is due in November 2017, and the Inquiry is set to conclude by the end of 2018.

Amnesty International and other civil society partners have long called for such an inquiry and welcomed its announcement. However, Amnesty International is concerned that there is no independent mechanism in place to re-examine cases where there is evidence of inadequate or biased police investigations, a concern echoed by the UN Committee on the Elimination of Discrimination against Women (CEDAW) in its 2016 periodic review of Canada.[1]

Of further concern to Amnesty International is the possibility that the Inquiry's schedule may not leave sufficient time to affected families to be heard and for expert organizations to provide input, as hearings have been delayed.[2] Indigenous leaders and activists have written to the Inquiry's Chief Commissioner to signal alarm at the delays, organizational problems, and inadequate

[1] CEDAW, 'Concluding observations on the combined eighth and ninth periodic reports of Canada,' CEDAW/C/CAN/CO/8-9, 25 November 2016, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/402/03/PDF/N1640203.pdf?OpenElement.

[2] Andrea Woo, 'Commissioner defends missing, murdered inquiry, as criticism mounts', *Globe and Mail*, 19 May 2017, https://www.theglobeandmail.com/news/national/missing-and-murdered-womens-inquiry-head-says-there-is-hope-for-the-commission-amid-delays/article35068891/ ('The inquiry has also been criticized for postponing hearings with families, which begin later this month and were expected to continue throughout the summer. Instead, only hearings scheduled in Whitehorse for the last week of May will proceed; expert panels will take place over the summer and the other family hearings will resume in the fall').

communication with families that in their opinion warrant an extension of the Inquiry's deadlines.[3] Responding to these concerns, the Commissioner has stated that the original deadlines "are no longer achievable,"[4] but at time of writing there was no clarity as to whether the timeframe for the inquiry would be adjusted.

Furthermore, concrete actions to end violence against First Nations, Inuit and Métis women and girls in Canada must not be delayed until the conclusion of the national inquiry. Recommendations from the British Columbia provincial inquiry, investigations by CEDAW and the Inter-American Commission on Human Rights, CEDAW's periodic review of Canada, and the federal government's own studies of the issue[5] have yet to be implemented and can form the basis for a plan of action to be implemented alongside the national inquiry. In announcing the Inquiry in August 2016, Canada's Indigenous and Northern Affairs Minister offered assurances that the government will not wait for the outcome of the Inquiry to take action to address known factors placing Indigenous women and girls at risk or denying them access to justice. To date there is no public indication of what actions the government intends to take.

Despite government acknowledgement of high rates of violence against Indigenous women and girls, Canada has failed to institute adequate data collection procedures to create a better understanding of the violence experienced by Indigenous women and girls, help inform allocation of government funding, and measure the impact of government programmes and policies. Until 2014 there were no official statistics on the number of missing and murdered Indigenous women and girls. There are still no national protocols and very little training to ensure police consistently and accurately record the Indigenous identity of murdered and missing women and other victims of violent crime. Although the Royal Canadian Mounted Police issued reports in 2014 and 2015 on numbers of murders and disappearances of Indigenous women and girls, this reporting was based on inconsistent police practices for recording such information. Statistics Canada has subsequently begun including police data on murders of First Nations, Inuit and Métis women and girls in its annual homicide report, but this excludes data on Indigenous women and girls who are missing, or whose deaths are considered suspicious.[6]

The vast majority of First Nations reserves across Canada does not have shelters for women escaping violence. To serve the 53 Inuit communities across the Arctic there are approximately 15 shelters and transitional shelters, many of which are only accessible by air.[7] At the time of writing, the federal government reported 41 federally funded shelters to serve the 634 recognized First Nations communities in Canada.[8] Since some of the federally funded shelters serve multiple First Nations, the federal government asserts that 55% of First Nations are served by federally-

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[3] John Paul Tasker, 'Missing and murdered inquiry needs extension and new approach, families and activists say', CBC, 15 May 2017, http://www.cbc.ca/news/politics/mmiwg-inquiry-letter-extension-1.4115681.

[4] Chief Commissioner Marion Buller, Response to Open Letter, 19 May 2017. www.mmiwg-ffada.ca/files/Fni-response-to-open-letter-en.pdf

[5] See, for example, 'INVISIBLE WOMEN: A CALL TO ACTION: A Report on Missing and Murdered Indigenous Women' in *Canada Report of the Special Committee on Violence Against Indigenous Women*, March 2014.

[6] Amnesty International Canada, *New statistics on violence against Aboriginal people released*, 25 November 2015, available at www.amnesty.ca/blog/new-statistics-violence-against-aboriginal-people-released

[7] Amnesty International Canada, 'Canada: Close the funding gap to ensure safety and support for Indigenous women and girls escaping violence', 1 December 2016, http://www.amnesty.ca/get-involved/take-action-now/canada-close-funding-gap-ensure-safety-and-support-indigenous-women-and.

[8] Indigenous and Northern Affairs Canada, 'Family Violence Prevention Program,' 10 March 2017, http://www.aadnc-aandc.gc.ca/eng/1100100035253/1100100035254.

funded shelters.[9] This claim is contested by First Nations, Inuit and Métis women's organizations. While Indigenous women may have access to shelters funded by the provincial and territorial governments, these shelters are often far from their home communities and many do not offer culturally-based programming for Indigenous women.[10]

Over many years, Amnesty International has worked alongside the Native Women's Association of Canada, affected families and many other organizations and activists, in calling for a comprehensive and coordinated national response that meets Canada's international human rights obligations through addressing all aspects of the prevention, investigation and prosecution of violence against First Nations, Inuit and Métis women and girls. In June 2017, the federal government announced its strategy on gender-based violence.[11] While the strategy includes funding for many welcome initiatives, it is not comprehensive and does not address many critical gaps such as the underfunding of shelters for Indigenous women. As part of the strategy, the government is creating a "Knowledge Centre" within government to coordinate better across departments and jurisdictions. As it stands, however, the strategy, which only consolidates existing and recently announced federal programmes and services, falls short of Canada's commitment under the UN Secretary-General's UNiTE initiative to enact a truly national plan of action covering areas under federal jurisdiction, as well as within the jurisdictions of Canada's provinces and territories.

RECOMMENDATIONS

Amnesty International recommends that the Canadian authorities:

- Develop a clear plan and timeline to implement the recommendations of previous investigations conducted by the federal and provincial governments, CEDAW, and the Inter-American Commission on Human Rights;
- Establish mechanisms to ensure independent review of unsolved cases of missing and murdered Indigenous women and girls where there is evidence that police have mishandled these investigations, whether through bias or error;
- Systematically collect data and publicly report on all forms of violence against First Nations, Inuit and Métis women and girls including missing persons cases and suspicious deaths;
- Work with Indigenous peoples to ensure substantive equality in access to all government services and programmes, including culturally relevant programmes to prevent violence, ensure the safety of First Nations, Inuit and Métis women and girls, and support violence survivors; and
- Enact a National Action Plan on Violence Against Women, covering federal, provincial and territorial jurisdictions, with special provisions addressing the disproportionate levels of violence experienced by Indigenous women and girls.

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[9] Indigenous and Northern Affairs Canada, 'Family Violence Prevention Program', 10 March 2017, http://www.aadnc-aandc.gc.ca/eng/1100100035253/1100100035254.

[10] Sara Beattie and Hope Hutchins, *Shelters for abused women in Canada, 2014*, Statistics Canada, 2015.

[11] Status of Women Canada, *It's Time: Canada's Strategy to Prevent and Address Gender-Based Violence,* 19 June 2017. http://www.swc-cfc.gc.ca/violence/strategy-strategie/index-en.html

2.2 IMPLEMENTATION OF THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (ARTICLES 1(4), 2(C), 5(D & E))

In 2012, this Committee recommended that Canada 'in consultation with indigenous peoples, consider elaborating and adopting a national plan of action in order to implement the United Nations Declaration on the Rights of Indigenous Peoples'.[12] Five years after that recommendation, and ten years after the Declaration was adopted by the UN General Assembly, setting out the "minimum standards" for the protection of Indigenous rights in all states, there is still no national strategy for implementation of the Declaration in Canada. [13] There have, however, been important commitments and initiatives that now urgently need to be consolidated into a lasting framework for comprehensive, coordinated and collaborative implementation.

In 2016, Canada made a formal commitment to the full implementation of the UN Declaration.[14] The government subsequently initiated a series of separate reviews of each of the laws that make up the legislative framework for review and approval of resource development projects. Consistency with the Declaration was one of the goals of this still ongoing process. In early 2017, the federal government also established a Ministerial working group to bring Canada's laws into compliance with Canada's obligations toward Indigenous peoples, including both the Constitutional protection of Indigenous rights and the UN Declaration.

In their own right, these are each important and welcome steps. However, there is also risk that such a piecemeal approach may lead to inconsistent and incomplete implementation. Amnesty International is among a wide range of Indigenous peoples' organizations and civil society groups that has called for the adaptation of implementation legislation that provide for the creation of a national action plan in collaboration with Indigenous peoples; reform of laws, policies and regulations; and regular reporting to Parliament on progress toward such implementation.[15] Such measures are set out in a private members bill, Bill C-262, that is expected to go to vote in Parliament in 2018.[16]

RECOMMENDATIONS

Amnesty International recommends that the Canadian authorities:

- In collaboration with Indigenous peoples adopt a legislative framework for implementing the UN Declaration on the Rights of Indigenous Peoples that includes requirements for the

[12] Concluding observations of the Committee on the Elimination of Racial Discrimination, 4 April 2012, CERD/C/CAN/CO/19-20, para 19(g).

[13] Assembly of First Nations et al., 'Joint statement on implementation of UN Declaration on the Rights of Indigenous Peoples', Presented to UN Permanent Forum on Indigenous Issues, Sixteenth Session, 25 April 2017, https://www.amnesty.ca/news/joint-statement-implementation-un-declaration-rights-indigenous-peoples.

[14] Indigenous and Northern Affairs Canada, 'Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples' (10 May 2016): http://news.gc.ca/web/article-en.do?nid=1063339.

[15] Amnesty International Canada, Assembly of First Nations, et al. "Bill C-262: An essential framework for implementation of the United Nations Declaration on the Rights of Indigenous Peoples,"4 May 2016.

[16] Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples,* First Reading 21 April 2016.

creation of a national action plan for implementation; comprehensive review and reform of national laws, policies and regulations; and periodic reporting to Parliament; and

- Within one year, inform this Committee of progress made toward implementation of the UN Declaration.

2.3 VIOLATIONS OF THE LAND RIGHTS OF INDIGENOUS PEOPLES (ARTICLES 1(4), 2(C), 5(D & E), 6)

In its 2012 Concluding Observations, this Committee took note of three fundamental failings in Canada's treatment of the land rights of Indigenous peoples: the failure to honour and implement Treaties and other legal protections for the rights of Indigenous peoples; the fact that decisions about the use of Indigenous lands are made without their free, prior and informed consent and often without even adequate consultation; and the obstruction of the fair resolution of outstanding disputes because governments in Canada take "rigidly adversarial positions" on Indigenous rights, particularly before the courts. [17] The federal government has recently made a number of important and welcome commitments to uphold the rights of Indigenous peoples including the rights set out in the UN Declaration on the Rights of Indigenous Peoples (See section 2.2 above). Despite such commitments, however, federal, provincial and territorial governments continue to violate the land rights of Indigenous peoples because of the same discriminatory policies and approaches identified by the Committee in 2012. The construction of the massive Site C dam in northern British Columbia is a particularly clear and compelling example of such violations.

The Site C dam

Indigenous peoples in northeast British Columbia have borne the social and environmental burden of more than three decades of extensive oil and gas development, mining, logging and other resource extraction in their traditional territories.[18] A report by Global Forest Watch Canada found that by 2012 more than 20% of land in the Peace River watershed was being used for some form of industrial development, including access roads, pipelines and other oil and gas infrastructure, and seismic exploration for oil and gas.[19] In 2016, a follow-up study found that almost three-quarters of the traditional territory of the Blueberry River First Nations, which overlaps with the traditional territories of a number of other First Nations, including West Moberly, Doig River, Halfway River, Prophet River, and Saulteau, was within 250 metres of some form of industrial development or land disturbance.[20] This includes almost 20,000 oil and gas wells, of which more than one-third were active,[21] more than 50,000 km of roads,[22] and more than 480

[17] Concluding observations of the Committee on the Elimination of Racial Discrimination, 4 April 2012, CERD/C/CAN/CO/19-20, para 20.

[18] Amnesty International, *Out of Sight, Out of Mind: Gender, Indigenous Rights and Energy Development in Northeast British Columbia, Canada*, November 2016, AMR20/4872/2016.

[19] Peter G. Lee and Matt Hanneman, *Atlas of land cover, industrial land uses and industrial-caused land change in the Peace Region of British Columbia (Report #4)*, Global Forest Watch Canada, 2012.

[20] EcoTrust Canada and David Suzuki Foundation, Atlas of Cumulative Landscape Disturbance, p. 73.

[21] EcoTrust Canada and David Suzuki Foundation, Atlas of Cumulative Landscape Disturbance, p. 39.

[22] EcoTrust Canada and David Suzuki Foundation, Atlas of Cumulative Landscape Disturbance, p. 32.

km of power transmission lines.[23] In this context, the few remaining areas of natural habitat have taken on an added importance for survival of Indigenous cultures, livelihoods and traditions.

The Site C dam would flood some of the last stretches of river valley that have so far been largely protected from industrial development. The 100 km of river valley that would be inundated by the Site C dam provide vital habitat for plants and animals on which the Dunne-Za and Cree people rely for subsistence, livelihood and the revitalization and transmission of their cultures and traditions.[24] A joint environmental review carried out on behalf of the federal and provincial governments concluded that the dam's impact on Indigenous peoples would be of high magnitude, permanent, and irreversible. These impacts include "severely" undermining the ability of Indigenous peoples to hunt, making fish in the river unsafe for at least a generation, and wiping out hundreds of cultural and historic sites, including grave sites.[25]

The dam was vigorously opposed throughout the review process by the Treaty 8 Tribal Association.[26] The public record is clear that the province of British Columbia has considered addressing First Nations concerns in only one way, through compensation and mitigation. The province has never seriously considered the alternative of finding other sources of energy so that the Valley can be preserved for the use of Indigenous peoples and local farmers. In a 2011 statement opposing the Site C dam, four of the Treaty 8 nations—Doig River, Halfway River, Prophet River, and West Moberly—called for an independent study of less harmful alternatives for meeting the province's future energy needs.[27] Such a study was never carried out.

Two of these nations, Prophet River and West Moberly, have continued to fight the dam through a judicial review process, focusing on the acknowledged fact that the federal government approved the dam, and subsequently issued construction licenses, without first considering whether doing so was compatible with its legal obligations under Treaty 8.[28] In response, the federal government has argued that it is only obligated to act to protect Treaty rights if the affected First Nations can conclusively prove that their Treaty rights may be infringed. Furthermore, the government has argued that the severe potential harms identified by its own environmental impact assessment process are not sufficient to meet the standard of "proof" required to compel the government to act. Instead the government has argued that the affected First Nations must launch an entirely new legal challenge in which evidence of how they use the land can be brought forward and challenged by the government.[29] Given the history of similar proceedings before Canadians courts, such a case could take a decade or longer to resolve, by which time the dam will have

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[23] EcoTrust Canada and David Suzuki Foundation, Atlas of Cumulative Landscape Disturbance, p. 36.

[24] Amnesty International, *Site C Dam and the Human Rights of Indigenous Peoples in the Peace Valley: Open Letter to Prime Minister Justin Trudeau and Premier Christy Clark from Amnesty International Secretary General Salil Shetty* (Index: TG AMR 20/2902/2015), 18 November 2015; and Amnesty International, *'The point of no return'- The human rights of Indigenous peoples in Canada threatened by the Site C dam* (Index: AMR 20/4281/2016), August 2016.

[25] Canadian Environmental Assessment Agency, *Report of the Joint Review Panel: Site C Clean Energy Project: BC Hydro*, 1 May 2014, available at www.ceaa-acee.gc.ca/050/documents/p63919/99173E.pdf.

[26] Treaty 8 Tribal Association, treaty8.bc.ca

[27] Doig River, Halfway River, Prophet River, and West Moberly First Nations, *Declaration Concerning the Proposed Site C Dam on the Peace River*, 17 September 2010.

[28] At time of writing, these efforts have been rejected by the Federal Court and Federal Court of Appeal. The First Nations have sought leave to appeal before the Supreme Court of Canada.

[29] *Prophet River First Nation And West Moberly First Nations v. Attorney General of Canada, Minister of the Environment, Minister of Fisheries and Oceans, Minister of Transport, and British Columbia Hydro and Power Authority*, 2016 FCA 15.

been completed and the severe, permanent and irreversible harms identified by the environmental assessment will have taken place.

Mount Polley gold and copper mine

The Mount Polley copper and gold mine is located in an interior rainforest in the province of British Columbia. In August, 2014 Mount Polley's earthen tailings dam, which contained mine waste rock and effluent, partially collapsed, sending 24 million cubic litres of water and mine tailings into Quesnel Lake. It was the largest environmental mining disaster in Canada's history. The tailings, which contain lead, arsenic, selenium, and other mining chemicals, cannot be removed from Quesnel Lake, leading to serious concerns about bioaccumulation of heavy metals.

Up to 25% of all salmon in British Columbia return to spawn in Quesnel Lake and its tributaries. The annual salmon return is of economic, social, cultural and nutritional significance to Indigenous peoples within the Secwepemc Nation, and other Indigenous peoples in the surrounding territories and downstream of Quesnel Lake. The disaster occurred at the start of the annual salmon fishery, which is vital to Indigenous peoples for subsistence as well as cultural and economic practices. The disaster raised fears about eating fish contaminated with toxic mine waste. Directly-affected and downstream Indigenous community leaders warned their members not to fish until more was known about the effects of the mine tailings on the salmon. Some communities, such as the Lhtako Dene, have not reopened their annual fishery. According to the First Nations Health Authority's study[30] on the health impacts of the disaster, 22 communities experienced emotional trauma, food insecurity, loss of cultural practices and customs and reduced financial security as a result.

The Mount Polley mine was initially approved without an environmental assessment process, consultation with or free, prior and informed consent from the potentially affected Indigenous peoples. An Independent Experts Engineering Panel established by the province to investigate the causes of the disaster concluded that the mine failed because it was built on unstable glacial silt which was unable to support increases to the dam wall carried out by the company over several years. The Panel report did not assign blame and neither the company nor anyone else was penalized, fined or charged for the disaster. The province allowed the company to partially re-start operations in 2015 and to resume full operations in 2016.

The BC Conservation Officer Service has carried out a criminal investigation into possible breaches of the federal Fisheries and Environmental Management Acts. On May 28, 2017, during its official country visit to Canada, the UN Working Group on Business and Human Rights[31] called on the Province to release the results of this investigation before the statute of limitations for charges under these Acts expires. First Nations are awaiting the results of the investigation and possible criminal charges.

RECOMMENDATIONS

Amnesty International recommends that the Canadian authorities:

- Take all reasonable measures to ensure that decisions made by the government do not violate Indigenous rights protected by Treaty, the Canadian Constitution and international

[30] First Nations Health Authority; *Mount Polley Mine Health Impact Assessment Screening and Scoping Phase Report*, January 2016.

[31] United Nations Human Rights Office of the High Commissioner, *Statement at the end of visit to Canada by the United Nations Working Group on Business and Human Rights*, June 1, 2017.

law and abandon any assertions that Indigenous peoples have the onus to conclusively prove infringement of their rights before government is obligated to act;

- Amend its decision-making processes around review and approval of large-scale resource development projects like the Site C dam to ensure that decisions are made only with the free, prior and informed consent of Indigenous peoples;
- Revise its litigation and negotiation positions on the rights of Indigenous peoples to ensure their consistency with Canadian domestic jurisprudence and with Canada's international human rights obligations;
- Immediately rescind all permits and approvals for the construction of the Site C dam; and
- Make public the results of any government studies of the Mount Polley disaster and crucially, the criminal investigation into the disaster, so that Indigenous peoples are better able to assess the human rights impacts and obtain fair remedy and reparations.

2.4 DISCRIMINATION AGAINST FIRST NATIONS CHILDREN (ARTICLES 1(4), 2(C), 5(A, D & E), 6)

In 2007, the First Nations Child and Family Caring Society and the Assembly of First Nations filed a complaint before the Canadian Human Rights Tribunal alleging that the chronic underfunding of family services in First Nations, among other barriers to First Nations children receiving necessary services, was a form of racial discrimination. Despite a landmark January 2016 Tribunal ruling upholding the complaint and ordering immediate action, discrimination in the provision of services to First Nations children has continued, resulting in three subsequent non-compliance orders from the Tribunal.[32]

The 2016 ruling concluded that the federal government, which is responsible for services to First Nations on reserves and in the Yukon, provides substantively less money per child than the provincial and territorial governments provided for children within their respective jurisdictions. Furthermore, the Tribunal found that the level of funding provided by the federal government was contrary to the principle of substantive equality because it was not in keeping with the actual and urgent needs of First Nations children and their families.

The Tribunal further concluded that the failure to provide sufficient funding to meet the real needs of First Nations children and families had created an incentive for child welfare agencies to remove First Nations children from their homes, communities, and cultures so that children could be provided for in the separately funded foster care system. The Tribunal decision also called for implementation of what is known as "Jordan's Principle", a standard adopted by the Canadian Parliament and requiring the federal government to ensure that jurisdictional disputes between different levels of government do not interfere with provision of needed care to First Nations children.[33]

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[32] Tim Fontaine, 'Advocates once again push federal government to comply with First Nations child welfare ruling', CBC News, 23 March 2017, http://www.cbc.ca/news/indigenous/blackstock-human-rights-tribunal-2017-1.4038595.

[33] Gloria Galloway, 'Indigenous Children's Health Care Still Lacking, Human Rights Tribunal Finds', The Globe And Mail, 26 May 2017, https://www.theglobeandmail.com/news/politics/indigenous-childrens-health-care-still-lacking-human-rights-tribunal-finds/article35137055/.

The long period that passed between the initial complaint and the January 2016 ruling was largely the result of the federal government's vigorous opposition to the Tribunal hearings. Throughout the process, the federal government repeatedly challenged whether the prohibition of discrimination in the Canadian Human Rights Act could be applied to this case.

When the Tribunal ruled in 2016, the federal government said it would not contest the findings. However, by failing to act quickly and effectively to fully implement the remedies ordered by the Tribunal, the government has continued to delay justice all the same. In June 2017, the federal government sought a judicial review of the most recent non-compliance in an effort have key provisions thrown out.[34]

RECOMMENDATIONS

Amnesty International recommends that the Canadian authorities:

- Act without further delay to fully implement ruling of the Canadian Human Rights Tribunal in respect to discrimination against First Nations children and families; and
- Implement judicial and other adjudicative decisions with respect to the rights of Indigenous peoples in a timely and comprehensive manner.

2.5 IMPACTS OF CANADIAN CORPORATIONS ON INDIGENOUS PEOPLES IN OTHER COUNTRIES (ARTICLE 6)

Canada has not adopted legislative nor other measures to ensure that the activities of Canadian transnational corporations operating outside of Canada do not negatively impact the enjoyment of Indigenous peoples' rights abroad and to hold these corporations liable for abuses, as recommended by this Committee in 2012.[35] Despite recent landmark judicial decisions allowing litigation against Canadian mining companies operating in Eritrea and Guatemala to proceed before Canadian courts,[36] transnational litigation still presents significant legal, financial, and logistical barriers to rights-holders. Existing non-judicial mechanisms, such as Canada's National Contact Point to the Organization for Economic Cooperation and Development and the Extractive Sector Corporate Social Responsibility Counsellor, rely on non-enforceable corporate social responsibility codes and are not empowered to directly sanction corporations or provide compensation to victims.[37]

UN human rights treaty bodies have repeatedly called upon Canada to establish an independent complaints mechanism, such as an extractive sector ombudsperson, to receive and investigate

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[34] Attorney General of Canada, *Notice of Application for Judicial Review, Attorney General of Canada and First Nations Child and Family Caring Society of Canada, Assembly of First Nations, Canadian Human Rights Commission, Chiefs of Ontario, Amnesty International and Nishnawbe Aski Nation*, T-918-17, 23 June 2017.

[35] Concluding observations of the Committee on the Elimination of Racial Discrimination, 4 April 2012, CERD/C/CAN/CO/19-20, para 14.

[36] *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856; *Garcia v. Tahoe Resources Inc.*, 2017 BCCA 39.

[37] Justice and Corporate Accountability Project, 'The "Canada Brand": Violence and Canadian Mining Companies in Latin America', 13:4 Osgood Hall Law School Legal Studies Research Paper Series, Research Paper No. 17, p. 5.

complaints,[38] and the Canadian Network on Corporate Accountability has proposed model enabling legislation for such a body.[39] Although in the course of the 2015 federal election campaign the Liberal Party of Canada committed to establishing an extractive sector ombudsperson,[40] the 2017 federal budget allocated no resources for its establishment.[41]

RECOMMENDATIONS

Amnesty International recommends that the Canadian authorities:

- Establish and implement, in consultation with Indigenous peoples and civil society experts in transnational corporate accountability, 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; and
- 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 judicial and non-judicial remedies.

3. REFUGEES AND MIGRANTS

There have been welcome developments under the current government with respect to improved regard for the rights of refugee claimants and refugees, including restoration of the federal program that provides funding for health care for refugee claimants and refugees. Measures are still needed to address remaining concerns, including with respect to immigration detention, health care for undocumented migrants, and the impact of the Canada/US Safe Third Country Refugee Agreement.

3.1 DETENTION OF REFUGEES AND MIGRANTS (ARTICLE 5)

Canada has not yet taken adequate measures to reform the immigration detention regime, which still contains insufficient safeguards against arbitrary detention and thereby discriminatorily

[38] Committee on Economic, Social, and Cultural Rights, Concluding observations on the sixth periodic report of Canada, 4 March 2016, E/C.12/CAN/CO/6, paras 15-16; Committee on the Elimination of Discrimination against Women, Concluding observations on the combined eighth and ninth periodic reports of Canada, 25 November 2016, CEDAW/C/CAN/CO/8-9, para 19(b).

[39] Canadian Network on Corporate Accountability, The Global Leadership in Business and Human Rights Act: An act to create an independent human rights ombudsperson for the international extractive sector Draft model legislation, 2 November 2016, http://cnca-rcrce.ca/wp-content/uploads/2016/03/The-Global-Leadership-in-Business-and-Human-Rights-Act-An-act-to-create-an-independent-human-rights-ombudsperson-for-the-international-extractive-sector-11022016.pdf.

[40] Canadian Network on Corporate Accountability, 'Corporate Accountability for Canada's Mining, Oil and Gas Sectors Abroad: Parliamentary Report Card', http://cnca-rcrce.ca/wp-content/uploads/2016/03/Parliamentary-Report-Card-Corporate-Accountability-for-Canadas-mining-oil-and-gas-sectors-sept-20151.pdf.

[41] Canadian Network on Corporate Accountability, 'Canadian Network expresses concern that Federal Budget does not mention Human Rights Ombudsperson', 22 March 2017, http://cnca-rcrce.ca/recent-works/press-release-canadian-network-expresses-concern-that-federal-budget-does-not-mention-human-rights-ombudsperson/.

subjects noncitizens to human rights abuses.[42] There remains no upper time limit for immigration detention[43] and individuals are sometimes held in detention for years. Despite the UN Working Group on Arbitrary Detention's finding in 2014 that subjecting Mr. Michael Mvogo to over seven years of immigration detention constituted arbitrary detention,[44] federal authorities have continued to defend similar practices in other instances.

Kashif Mohammed Ali was held for more than seven years because of the difficulties of deporting him to either Ghana or Nigeria due to his inability to prove citizenship of either state. Mr. Ali was finally released from detention in April, 2017 following a decision by the Ontario Superior Court of Justice in a *habeas corpus* review wherein the judge rejected the Attorney General of Canada's submission that the length of the detention was not 'exceptional.'[45] In his oral reasons for the decision, the judge observed that '[i]f it is typical for Canada to detain persons for seven or more years for immigration purposes, then this country has a much more serious problem with its immigration process than is currently understood.'[46]

On 15 May 2017, the Federal Court of Canada heard a constitutional challenge to legislative provisions allowing for indefinite immigration detention and, as of writing, the Court's decision had not yet been rendered.[47]

Canada continues to house children in immigration detention facilities, although numbers have recently declined.[48] Although the Immigration and Refugee Protection Act provides that 'a minor child shall be detained only as a measure of last resort'[49], many children in immigration detention facilities are not *de jure* detained, but are nonetheless housed in detention facilities because of their parents' detention. Previously the Immigration and Refugee Board considered that the best interests of these children were not a relevant factor in detention reviews of adults. This narrow interpretation of Canadian regulations was invalidated after a 2016 legal settlement.[50] However, it remains to be seen whether this legal development will effectively curb Canada's practice of

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[42]The Committee on the Elimination of Racial Discrimination, General recommendation XXX on discrimination against non-citizens, 65th Sess, 2005, s. I.4 ('Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim').

[43] Stephanie Silverman and Petra Molnar, 'Everyday Injustices: Barriers to Access to Justice for Immigration Detainees in Canada,' *Refugee Survey Quarterly* (Index: 35:1), 2016, p. 116.

[44] Working Group on Arbitrary Detention, *Opinions adopted by the Working Group on Arbitrary Detention at its sixty-ninth session (22 April–1 May 2014)* (Index: A/HRC/WGAD/2014/15), UN Human Rights Council, 2014, para. 25.

[45] *Ali v. Canada (Attorney General)*, 2017 ONSC 2660 at paras 18 & 19.

[46] *Ali v Canada (Attorney General)*, 2017 ONSC 2660 at para 19.

[47] Jackie Dunham, "Court hearing landmark challenge to indefinite immigration detention", CTV News, 15 May 2017, http://www.ctvnews.ca/canada/court-hearing-landmark-challenge-to-indefinite-immigration-detention-1.3414185.

[48] University of Toronto Human Rights Clinic, Invisible Citizens: Canadian Children in Immigration Detention, 2017, http://ihrp.law.utoronto.ca/utfl_file/count/PUBLICATIONS/Report-InvisibleCitizens.pdf.

[49] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 60.

[50] Following this settlement, a 24 August 2016 order on consent by the Federal Court confirmed that the best interest of children were a relevant factor in detention reviews of adults. See *B.B. and Justice for Children and Youth v. the Minister of Citizenship and Immigration*, 24 August 2016, Federal Court Docket IMM-5754-15, available at: http://ccrweb.ca/sites/ccrweb.ca/files/bbjfcyvmci-order-justice-hughes-august-2016.pdf. As part of the settlement, the CBSA has issued instructions to its hearing officers to bring this order on consent to the attention of Immigration and Refugee Board members during detention reviews. See "Instructions from CBSA to its Hearing Officers, Distributed by CBSA on 29 August 2016", available at: http://ccrweb.ca/sites/ccrweb.ca/files/bb-cbsa-instructions-aug-2016.pdf

routinely detaining women with their children in the absence of legislative amendments explicitly prioritizing the best interests of the child in decisions to detain parents.

Canada's immigration detention regime continues to have significant accountability gaps with often deadly consequences.[51] Since March 2016 alone, three people have died in circumstances that have raised concerns as to the adequacy of measures to ensure the health and safety of detainees, including mental health care.[52] This crisis has led to calls by human rights groups for increased oversight of Canada's immigration detention regime[53] and has provoked hunger strikes by detainees.[54] The Canada Border Services Agency is not subject to independent oversight, and although Canada's Minister of Public Safety and Emergency Preparedness has indicated in interviews a willingness to consider civil society proposals for a standalone accountability mechanism,[55] the federal government has not yet made any firm commitments in this regard.

In a positive development, in 2016 Canada's Minister of Public Safety and Emergency Preparedness announced a CDN$138 million overhaul of the immigration detention regime.[56] As part of this review of Canada's immigration detention, Canada has committed to reviewing detention policies and standards, focusing on:

- reducing the detention of minors and separation of families to the 'greatest extent possible';
- providing consistent and increased access to health services to detainees in immigration holding centres;
- 'exploring potential policy changes together with the use of ATDs [alternatives to detention] to reduce the length of detention for individuals that do not pose a danger to Canadian society and who collaborate with the government in completing their immigration processes'; and
- revising the National Detention Standards for immigration holding centres.[57]

Although Amnesty International welcomes the federal government's plans to reform immigration detention, it remains to be seen if these changes will fully address the problems associated with Canada's use of immigration detention and bring Canada's practices into conformity with international human rights obligations.

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[51] Faculty of Law, International Human Rights Program, *'We Have No Rights': Arbitrary imprisonment and cruel treatment of migrants with mental health issues in Canada*, University of Toronto, 2015, pp. 79-81.

[52] Nicholas Keung, 'Healthcare providers urge Ontario to end immigration detention,' The Toronto Star, 17 May 2016; and End Immigration Detention Network, *No justice for Abdurrahman, who died mysteriously in immigration detention*, 15 July 2016.

[53] British Columbia Civil Liberties Association, et al. 'Human rights groups react to news of another death in immigration detention', News Release, 8 March 2016.

[54] Colin Perkel, 'Ralph Goodale Shows No Signs of Meeting Immigration Detainees on Hunger Strike', *The Canadian Press*, 21 July 2016.

[55] CBC, The Current, Transcript for September 29, 2016, http://www.cbc.ca/radio/thecurrent/the-current-for-september-29-2016-1.3783556/september-29-2016-full-episode-transcript-1.3784874#segment3.

[56] Jim Bronskill, 'Government to rebuild immigration detention facilities in Vancouver, Laval', *The Globe and Mail*, 15 August 2016.

[57] CBSA's New National Immigration Detention Framework: A Summary Report of the Framework and Stakeholder Roundtable Discussions (August – December 2016), January 2017, http://www.cbsa-asfc.gc.ca/agency-agence/consult/consultations/nidf-cnmdi/menu-eng.html.

Amnesty International further remains concerned by the continued existence of the Designated Foreign National regime, which grants the Minister of Public Safety the discretion to designate groups of individuals based upon their mode of arrival in Canada. Designation under the regime incurs significant consequences that include mandatory detention with limited review rights, in addition to being barred access to the Refugee Appeal Division and, for at least five years, to permanent residence even in cases where refugee claims have been accepted.[58]

RECOMMENDATIONS

Amnesty International recommends that the Canadian authorities:

- Ensure that promised reforms to the immigration detention regime are undertaken swiftly and effectively guarantee that immigration detention is undertaken as a measure of last resort after fully considering alternative non-custodial measures and for limited periods of time only;
- Abolish the practice of holding minors in immigration detention as it is never in their best interest;
- Establish an independent review and oversight body for the Canadian Border Services Agency; and
- Amend the Immigration and Refugee Protection Act to eliminate the Designated Foreign National regime.

3.2 HEALTH CARE FOR UNDOCUMENTED MIGRANTS (ARTICLE 5)

Amnesty International welcomed the federal government's restoration of funding for the Interim Federal Health Program (IFHP), which had been cut dramatically by the previous government, leaving many refugee claimants and refugees with no or very little coverage for healthcare, or inconsistent coverage depending on the province or territory in which they resided.

The restoration of the IFHP does not, however, address a pre-existing gap in the provision of essential healthcare for undocumented migrants in the country. Individuals without documented immigration status are not covered under the IFHP or under provincial and territorial health programs, meaning they are denied access to necessary health care.

The Human Rights Committee[59] and the Committee on Economic, Social and Cultural Rights[60] have both recently called on Canada to take steps to ensure essential health care is available for undocumented migrants, noting that the lack of coverage raises concerns with respect to both the right to life and the right to health. The issue is also the subject of an individual petition currently before the UN Human Rights Committee in the case of Nell Toussaint, in which Amnesty

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[58] Canadian Association of Refugee Lawyers, *Reform Proposals for Canada's Inland Refugee Determination System and Other Aspects of the Immigration System*, July 2016, pp. 5-6, http://www.carl-acaadr.ca/sites/default/files/CARL%20brief%20FINAL_July2016.pdf.

[59] Human Rights Committee, *Concluding observations: Canada*, UN Doc. CCPR/C/CAN/CO/6, 13 August, 2015, para. 12.

[60] Committee on Economic, Social and Cultural Rights, *Concluding observations: Canada*, UN Doc. E/C.12/CAN/CO/6, 23 March 2016, para. 50.

International has provided a Legal Opinion in support of the petition.[61] Denying access to essential health care on the basis of immigration status is in itself discriminatory; and often has a further discriminatory impact on the basis of race, nationality or ethnicity given that some groups are more likely than others to be represented within the undocumented migrants community.

RECOMMENDATION

Amnesty International recommends that the Canadian authorities:

- Reform the Federal Interim Health Program, and ensure that all persons have access to the minimum, essential levels of the right to health regardless of immigration status and that there is no discrimination in access to health care.

3.3 CANADA/US SAFE THIRD COUNTRY AGREEMENT (ARTICLE 5)

In 2004 the Canadian and US government concluded a "Safe Third Country Agreement" governing refugee claims made at land ports of entry on the US/Canada border, under which refugee claimants travelling through one country on their way to the other, are denied access to refugee determination in the destination country and required instead to lodge their refugee claim in the "safe third" country through which they had first travelled. The impact of the agreement overwhelmingly affects refugee claimants travelling through the United States en-route to Canada who are deemed ineligible to make claims in Canada and returned to the United States to pursue asylum claims there. The agreement has exceptions, primarily for individuals who may already have close family members with status in Canada. It also does not apply to individuals who cross irregularly into Canada and then lodge refugee claims inside Canada; their claims are allowed to proceed.

Jointly with the Canadian Council for Refugees and the Canadian Council of Churches, Amnesty International launched a legal challenge to the Safe Third Country Agreement in 2005 which resulted in a 2007 Federal Court ruling[62] that numerous deficiencies in the US asylum system and immigration detention regime were such that the agreement should not be implemented. That ruling was reversed largely on procedural grounds by the Federal Court of Appeal in 2008.[63]

In the wake of various Executive Orders dealing with refugees, admission to the United States and immigration and border enforcement, issued by US President Donald Trump soon after he assumed office in January2017, Amnesty International renewed the organization's call[64] for the Safe Third Country Agreement to be rescinded or, at a minimum, temporarily suspended.[65] Amnesty International highlighted that the combined impact of the various Executive Orders had led to a rapid deterioration in inclusion of human rights in the US asylum and immigration

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[61] http://www.socialrightscura.ca/eng/legal-strategies-right-to-healthcare.html

[62] *Canadian Council for Refugees v. Canada*, 2007 FC 1262. Online at: https://www.canlii.org/en/ca/fct/doc/2007/2007fc1262/2007fc1262.pdf.

[63] *Canadian Council for Refugees v. Canada*, 2008 FCA 229. Online at: http://decisions.fca-caf.gc.ca/fca-caf/decisions/en/36041/1/document.do.

[64] http://www.amnesty.ca/news/amnesty-international-canada-must-strip-usa-%E2%80%9Csafe-third-country%E2%80%9D-designation-refugee-claimants.

[65] The terms of the Agreement allow either party to suspend its operation for a three month period, which can be extended.

system. Concerns include an attempt to impose discriminatory bans on entry into the United States and intensified detention and other enforcement measures, including along the US/Mexico border.[66]

On 19 May 2017, Amnesty International and the Canadian Council for Refugees submitted a lengthy brief[67] to the Canadian government detailing numerous concerns about US asylum and immigration enforcement measures violating international and Canadian legal requirements. The brief highlights a range of shortcomings in a number of different areas, including a bar on asylum claims by individuals who have been in the United States for more than one year; an expedited removal procedure which heightens the risk of *refoulement*; numerous concerns about immigration detention, including its punitive and arbitrary nature, extensive detention of children and families, prison-like and harsh conditions in many detention facilities, isolated locations of facilities making access to legal counsel difficult and psychological harm for many detainees; possibility of criminal prosecution of asylum seekers for crossing into the United States unlawfully; inconsistent recognition of gender-based asylum claims; and widely varying rates of recognition of asylum claims in different parts of the country raising concerns about arbitrary decisions.

On 19 June 2017, the Minister of Immigration, Refugees and Citizenship, Ahmed Hussen, responded to the submission, noting that the Canadian government considers that the "U.S.remains a safe country for asylum claimants to seek protection there" and that "the STCA remains in effect and is a key tool enabling Canada and the U.S. to work together on the orderly handling of refugee claims made in our countries." [68]

RECOMMENDATION

Amnesty International recommends that the Canadian authorities:

- Rescind the Safe Third Country Agreement with the United States or, at a minimum, suspend the agreement's operation for renewable periods of three months unless and until shortcomings in the US asylum process and immigration detention regime are brought into conformity with international standards.

[66] Amnesty International, *Facing Walls: USA and Mexico's violation of the rights of asylum seekers*, 15 June 2017. Available online at: https://www.amnesty.org/en/documents/amr01/6426/2017/en/

[67] Amnesty International Canada and the Canadian Council for Refugees, *Contesting the Designation of the US as a Safe Third Country*, 19 May 2019; http://www.amnesty.ca/sites/amnesty/files/Contesting%20the%20Designation%20of%20the%20US%20as%20a%20Safe%20Third%20Country.pdf

[68] Letter to Amnesty International and Canadian Council for Refugees from the Honourable Ahmed Hussen, Minister of Immigration, Refugees and Citizenship, 19 June 2017.

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CANADA

BRIEFING TO THE UN COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION,

93RD SESSION, 31 JULY TO 25 AUGUST 2017

Amnesty International presents this briefing to the UN Committee on the Elimination of Racial Discrimination to assist with the Committee's review of Canada's twenty-first to twenty-third periodic reports under the International Convention on the Elimination of All Forms of Racial Discrimination. Amnesty International highlights ongoing rights violations in relation to violence against Indigenous women and girls, implementation of the UN Declaration on the Rights of Indigenous Peoples, violations of the land rights of Indigenous peoples, discrimination against First Nations children, the impact of Canadian corporate activity on Indigenous peoples in other countries, the detention of refugees and migrants, discrimination in access to health care for undocumented migrants, and the impact of the Canada/US Safe Third Country Agreement with respect to refugee claims.

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