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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

1. INTRODUCTION

Throughout its decades of human rights work Amnesty International has consistently documented the degree to which racism and prejudice lie at the heart of human rights violations around the world. Almost inevitably, it is those members of society who are marginalized and face discrimination who are most likely to be tortured, mistreated, unjustly imprisoned or killed. Amnesty International considers the right be free from discrimination to be vital in its own right, but also a critical lynch-pin to the enjoyment of other basic rights. As long as discrimination flourishes, other violations are bound to continue.

Canada ratified the UN Convention on the Elimination of all forms of Racial Discrimination (the Convention) in 1970. As such Canada is committed to enacting laws and policies which will lead to the elimination of racial discrimination in the country, which the Convention defines as:

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

While Canada has been a party to the Convention for over three decades, it has not yet recognized the jurisdiction of the Committee on the Elimination of Racial Discrimination (the Committee), pursuant to article 14, to receive complaints from individuals alleging that their rights under the Convention have been violated. Canada has accepted the jurisdiction of the two other U.N. level bodies which have this power - the U.N. Human Rights Committee and the U.N. Committee against Torture. Making a declaration under article 14 recognizing the Committee's jurisdiction would enhance human rights protection in Canada and serve as a model to other countries which have similarly not yet made an article 14 declaration.

Amnesty International calls on the Canadian government:

- to make a declaration under article 14 of the Convention, accepting the jurisdiction of the Committee on the Elimination of Racial Discrimination to receive individual complaints alleging violations of the Convention.

Amnesty International welcomes the thirteenth and fourteenth periodic reports which the government of Canada has submitted to the Committee. The upcoming examination of those reports and other related matters by the Committee provides a valuable opportunity to consider areas where the federal and provincial/territorial governments can make further headway in efforts to confront, respond to and ultimately eliminate racial discrimination in Canada. In this report Amnesty International outlines a number of concerns about racial discrimination in Canada, with corresponding recommendations. The report considers four groups in Canada who experience the effects of discrimination: Aboriginal peoples, refugees, migrant workers, and communities which experience hate crimes.

2. ABORIGINAL PEOPLES

In its report to the Committee, the Canadian government has recognized that the status and treatment of Aboriginal peoples[1] in Canada gives rise to questions about Canada's record of compliance with the Convention. The report notes, for example, that "Aboriginal peoples are over-represented in the Canadian criminal justice system" and highlights also ongoing efforts to resolve such critical issues as land claims and self-government.

In recent years, Amnesty International has raised with the Canadian government and with various provincial governments, questions about government policies or about police conduct in individual cases which give rise to concerns that basic rights of Aboriginal peoples, including the right to life, the right to be free from torture and ill-treatment, and the right to self-determination, may have been undermined or violated. The following examples are illustrative of the concern that such policies and conduct may, at least in part, be reflective of discriminatory attitudes regarding Aboriginal peoples.

i) British Columbia Treaty Referendum Process

In 2002, a newly elected provincial government in the Province of British Columbia (B.C.) conducted a referendum on the principles to guide its negotiations of treaties with Aboriginal peoples. A tripartite treaty process involving the federal government, the provincial government and many of the Aboriginal peoples in B.C. had already been underway for ten years. Few treaties exist in B.C. and Aboriginal peoples have asserted their ownership of their traditional territories which cover most of British Columbia.

Voters in the referendum were asked to state "yes" or "no" to eight principles, framed in terms which many experts felt were biased towards the government's preferred outcomes. Aboriginal peoples boycotted the referendum, as did many high profile supporters, including the United Church. One of the most contentious principles confirmed the province's desire to negotiate "Aboriginal self-government" on the basis of a municipal government model, a position that offends Aboriginal peoples who view self-government as an inherent right to self-determination. Aboriginal peoples have asserted that the inherent right to self-government is protected by Canada's Constitution Act[2] and under international law (such as through well-entrenched provisions which affirm the basic right to self-determination[3]) and that limiting it to the model of municipal government does not allow for full development and expression of that right.

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[1] In this document the term Aboriginal peoples refers to Indigenous peoples in Canada, including First Nations, Metis and Inuit.

[2] The Constitution Act, 1982, s. 35, recognizing and affirming existing aboriginal and treaty rights and establishing that treaty rights includes rights that now exist by way of land claims agreements or may be so acquired; s. 25, establishing that other provisions in the Charter or Rights cannot abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples.

[3] Article 1 of the International Covenant on Economic, Social and Cultural Rights and Article 1 of the International Covenant on Civil and Political Rights, both of which specify that the right of self-determination includes the right of all peoples to determine their political status.

In May 2002, Amnesty International wrote to the B.C. government, reminding officials of the obligation to promote and uphold Aboriginal rights that are protected by international and domestic law, and underscoring that no process, including a referendum, can justify abrogating those rights.[4] On July 3, 2002 the government reported that about 36% of the electorate returned the mail-in ballots and that they will act on the results which strongly supported the principles proposed.

One of the very disturbing aspects of the referendum is the divisiveness it has generated in B.C., a divisiveness often reflected more widely within a segment of Canadian society that believes that Aboriginal and treaty rights are "special rights" that are contrary to the dominant ideological position in Canada that "everyone should be treated equally". This interpretation is pursued by some political parties, and it is a theme that cuts across many land and resource disputes involving Aboriginal peoples, for example, whether Aboriginal people should pay taxes and whether everyone should have equal access to the fishery. When Aboriginal peoples assert their Aboriginal and treaty rights, conflicts arise in which attitudes of racism and racial discrimination are evident. This occurs in numerous instances across Canada, including Burnt Church and Ipperwash (see subsequent references).

Numerous reports, including the Royal Commission on Aboriginal Peoples, have called for more public education to ground Canadians in deeper understanding and context. Efforts of change have been modest, in part because many Canadians gain their understanding of issues from the mass media. While much media coverage is outside of government influence, the federal government needs to take responsibility for its own actions and role in shaping public perceptions of Aboriginal issues.

Amnesty International urges the Canadian government:

- to express concern and remind provincial governments that initiatives that override or overlook international legal standards in the development and implementation of government policy with respect to Aboriginal peoples, including approaches taken to negotiating treaties, can lead to or exacerbate racial discrimination; and
- to work alongside provincial governments to adopt proactive public education programs, pursuant to article 7 of the Convention, regarding the internationally and nationally defined and protected rights of Aboriginal peoples, including in an effort to stem racial discrimination.

ii) Discriminatory attitudes and practices of police

In September 2001, two police Saskatoon City police officers, Ken Munson and Dan Hatchen, were convicted of the Criminal Code offence of unlawful confinement for forcibly abandoning an Aboriginal man, Darrell Night, on the outskirts of the city in freezing temperatures on a night in late January 2000. Darrell Night survived the incident. But his complaint against the Saskatoon City police casts suspicion on at least five deaths of Aboriginal men in Saskatoon over the past

[4] Amnesty International, Open Letter to Attorney General Geoff Plant, April 12, 2002.

decade. In the most recent cases, the frozen bodies of Rodney Naistus and Lawrence Wegner were found on January 29 and February 3, 2000, near the location where Night was abandoned. Royal Canadian Mounted Police (RCMP) investigations and coroner's inquests into these cases have been inconclusive.[5]

Amnesty International is deeply concerned by allegations that some Saskatoon City police officers have routinely dealt with Aboriginal people perceived as being intoxicated or troublesome by taking them into custody and then forcibly abandoning them outside the city without regard for their safety and well-being. The practice is allegedly so widespread that a euphemism, "the starlight tour," has been developed to describe it. Writing in a column about police life that appeared in the Saskatoon Sun in 1997, a city police officer described police officers abandoning an Aboriginal man at the power plant outside the city, the same location where two bodies were found in the winter of 2001. All this raises the possibility that the practice, even if restricted to a few officers, may have been at least tacitly condoned by colleagues and superiors. This also raises the concern that investigations into the freezing deaths may have been thwarted by solidarity within police ranks.

Amnesty International welcomed the announcement in the latter part of 2001 by the Saskatchewan government that a commission of inquiry will be established to look into issues of Aboriginal peoples and the justice system. It is our hope that this commission will provide an opportunity to reexamine the Saskatoon freezing deaths and the degree to which discrimination may have been a factor in those cases. Amnesty International also believes that the conviction of officers Munson and Hatchen, and the allegations of similar abuses that have been raised, point to an urgent need for human rights training for Canadian police officers, that should not wait for the outcome of the recent commission.

Amnesty International urges the Canadian government:

- to press the government of Saskatchewan to ensure that the Saskatoon freezing deaths are given full attention in the course of the current commission of inquiry, with particular attention to the possible role that discrimination may have played in those cases; and
- press for enhanced human rights training, including anti-discrimination training, for police forces across Canada.

iii) Police accountability

Dudley George, an Aboriginal man, was shot by police during a land claims protest on September 6, 1995. Ontario Provincial Police sniper Kenneth Deane was convicted of manslaughter for knowingly shooting an unarmed man. Despite repeated requests by the family of Dudley George and by other concerned organizations including Amnesty International,[6] the Ontario government has refused to either hold an inquiry or to convene a coroners inquest to examine the many

[5] Saskatchewan police must change attitude to natives: jury, November 4, 2001, CBC News; New evidence halts inquest into Saskatchewan freezing death, January 24, 2002, CBC News.

[6] Amnesty International Annual Reports, 1997, 2001, 2002.

unanswered questions about the incident. These questions pertain to the decision to deploy a heavily armed tactical response unit to police the demonstration -- despite clear evidence that the protestors were unarmed and presented little or no danger to public safety -- and the influence that political figures may have had in this decision.

In 1999, the UN Human Rights Committee urged that the federal government "establish a public inquiry into all aspects of this matter, including the role and responsibility of public officials."[7] To date, the federal government has refused to intervene in the case citing that because the provincial government has jurisdiction over its own police force, that only the provincial can initiate an inquiry. This leaves the decision of whether or not there will be a public inquiry solely in the hands of the provincial government, which is one of the parties accused of wrongdoing in this incident and which has steadfastly opposed public examination of the case. The federal government's refusal to intervene to ensure a full and fair public inquiry contradicts not only the federal government's specific obligations toward Aboriginal peoples under Canadian law, but also the government's obligation under international treaties to ensure that all levels of government comply with international human rights laws and standards.

Amnesty International urges the Canadian government:

- to ensure that an inquiry is convened at the provincial or federal level, with no further delay, into the 1995 killing of Dudley George and that such inquiry include an examination of the role of political figures and the degree to which discrimination may have impacted on the course of events leading to his death.

iv) Arbitrary application of the law

In August and September 2000, officers with the Federal Department of Fisheries and Oceans (DFO) carried out a series of enforcement actions against Aboriginal lobster fishers in the community of Burnt Church, New Brunswick. The actions including carrying out arrests on open waters, subduing boat crews with pepper spray, and allegedly ramming and attempting to swamp boats from the community.

The dispute between the community of Burnt Church and the federal government was catalyzed by a 1999 Supreme Court of Canada ruling that the Mi'qmak people living in Canada's Maritime provinces, have a treaty right to make a moderate income from the fishery.[8] In a clarification included in a subsequent judgement denying a request for a rehearing brought by an intervening party, the court stated that the federal government could impose limitations on the exercise of that right for "a pressing and substantial public purpose," provided that limitations went no further than required for that purpose, that there was consultation with the affected Aboriginal communities concerned and that their concerns and proposals were taken into account.[9]

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[7] Concluding observations of the Human Rights Committee with respect to Canada, CCPR/C/79/Add.105, April 7, 1999, paragraph 11.

[8] R. *v* Marshall, [1999] 3 S.C.R. 456.

[9] R. *v* Marshall, [1999] 3 S.C.R. 533.

After the court decision, the Federal Department of Fisheries and Oceans offered Mi'qmak bands a limited number of licenses within the existing regulatory framework for the East Coast lobster fishery plus financial and other assistance to exploit those licenses. The band council of Burnt Church felt that the terms offered by the federal government were too restrictive and instead developed their own management program to regulate lobster catches by the community.

When community members put their traps in the water, DFO officers confiscated the traps and charged the community members with infractions. In a statement to the press, Federal Fisheries Minister Herb Dhaliwal repeatedly characterized the DFO actions as being necessary to uphold the law and the interests of non-native fishers. On August 31, 2000 he stated that "[i]f the unauthorized traps are removed from the Bay, I will be happy to meet with Burnt Church First Nation immediately. Until that time, I must continue to uphold my commitment to an orderly and regulated fishery, and take all action within my power to curtail the unauthorized fishing activity."[10]

The government's actions raise a number of concerns. First, it is not apparent that the enforcement action by the DFO met international standards for minimal use of force. The efforts to seize traps and arrest fishers on open water, and the tactics reportedly used by the DFO officers, posed an inherent risk to the lives of the Mi'qmak fishers. This risk appears to be well out of proportion to the threat if any, that the fishers' defiance of federal regulations posed to lives or property.

Secondly, it has not been demonstrated that the native fishers were violating any law, as the government claimed, or were as they claimed, acting within the framework of rights recently recognized by the Supreme Court. Amnesty International's experience is that throughout the hemisphere one of the common circumstances where the lives and safety of Aboriginal people are endangered is in evictions and similar enforcement of property and resource rights. Therefore, we have consistently maintained that any such enforcement must only be carried out within a clear framework of law. Where there are significant differences of opinion over property and resources rights, enforcement actions should only take place through a court order, and only after the affected communities have had the opportunity to present their case.[11] Not only did the enforcement action at Burnt Church fall short of this standard, the Fisheries Minister's comments imply that political figures played a direct role in the enforcement decisions.

Finally, Amnesty International is concerned that the government's numerous statements depicting the fishers of Burnt Church as lawbreakers and as threats to the sustainability of the fisheries may have further enflamed public opinion and fueled discrimination. In a context in which Mi'qmak fishers had been threatened and assaulted by non-native fishers, the government's assertions had

[10] Updated on fisheries affected by the Supreme Court's Marshall decision, Statement by Herb Dhaliwal, Minister of Fisheries and Oceans, August 31, 2000.

[11] Amnesty International, The Americas - Human Rights Violations against Indigenous Peoples, AMR 01/08/92, October, 1992.

the potential to touch off further violence and hatred.

Amnesty International urges the Canadian government:

- to adopt a policy requiring that any enforcement action related to land or resources under dispute take place only with a court order and only after the concerned people have had a chance to make their case to the court. Such a policy would help alleviate the degree to which discrimination may interfere with law enforcement.

3. REFUGEES

Another group whose rights and basic security are often seriously affected by race discrimination is refugees. Refugees often flee their homes because of persecution based on race. The danger, difficulties and barriers refugees then face as they attempt to reach places of safety, including in Canada, also frequently give rise, directly or indirectly, to concerns about race discrimination. While Canadian refugee and immigration laws and policies are almost always race neutral on their face, they frequently have a racially discriminatory impact, be it intentional or not, or be it as result of government action or inaction.

i) The Stereotyping of Refugees and the Closing of Borders

In recent years, within Canada and around the world, Amnesty International has frequently pointed to the worrying trend on the part of some political figures, some media and significant portions of the general public, to stereotype refugees as being criminals, "terrorists," welfare-cheats and undesirables. The stereotypes exploit people's fears, leading to unjustified conclusions that all refugees and immigrants are of that ilk and should be excluded from countries of asylum. The effect of stereotyping has been a dramatic increase in discrimination against refugees. The consequences can ultimately be devastating, as increasing discrimination encourages governments to enact restrictive laws and policies which deny refugees access to the protection they require, exposing them to the risk of serious human rights violations.

This trend towards stereotyping has been particularly evident in Canada following the September 11th attacks in the United States. Numerous politicians and commentators on both sides of the Canada/U.S. border have made unsubstantiated allegations that Canadian refugee policy makes it easy for individuals involved in acts of "terrorism" to slip into Canada and then onwards into the United States. These allegations and perceptions led to a renewal of talks between the Canadian and U.S. government regarding an agreement that would limit the degree to which any refugee claimant passing through one country on the way to making a claim in the other, would be allowed to do so. Instead, claimants would be required to remain in their country of first arrival.

This agreement (which is expected to be finalized within the next few months) will overwhelmingly impact claimants passing through the United States on their way to Canada, a route which is unavoidable for many refugees (such as those coming overland from Latin America or those coming from parts of the world with no direct flights to Canada). Amnesty International has pointed to serious concerns that those claimants who are forced to remain in the United States

will very likely face arbitrary and lengthy detention, in harsh conditions;[12] as well as concern that refugee women making claims based on persecution at the hands of non-state actors (for instance domestic violence and honour killings)[13] are more likely to be denied protection in the United States than they would in Canada. In both of these instances, the distressing prospect is that large numbers of refugees will be treated in a discriminatory manner, leading to violations of their rights, and that the risk of being exposed to such treatment will almost inevitably be higher for certain racial and ethnic groups, depending upon their place of origin.

Amnesty International urges the Canadian government:

- to adopt a proactive and visible approach to combating myths and stereotypes about refugees and more assertively sensitizing the public to the realities faced by genuine refugees; and
- to proceed no further with the proposed "safe third country" agreement with the United States unless and until there are assurances that it will not expose refugees to human rights violations.

ii) Protection against Torture

For several years, one particularly vexing issue in Canadian refugee law has been the protection of individuals who are alleged to be security risks, but who face a substantial risk of being tortured or executed if removed from Canada. In January 2002 the Supreme Court of Canada, in the *Suresh* case, ruled that the Minister of Immigration "should generally decline to deport refugees where on the evidence there is a substantial risk of torture."[14] The decision leaves open the possibility that deportation could go ahead, in "exceptional circumstances." Amnesty International had urged the Court to recognize that the protection against torture is an absolute right, with no exceptions. In November 2000, the UN Committee against Torture reminded Canada that the Convention against Torture, ratified by Canada, includes absolute protection against deportation or extradition to a country where an individual faces a serious risk of torture.[15]

Since the ruling, Amnesty International has continued to underscore that there can be no exceptions when it comes to torture. Security and criminality concerns can and must be addressed through national and international justice systems, not by deporting individuals to situations where further human rights violations will occur. Furthermore, the current approach, which almost inevitably impacts more heavily on individuals from certain ethnic or racial communities, has a discriminatory effect in exposing those individuals to a risk of torture.

Amnesty International urges the Canadian government:

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[12] United States - Lost in the Labyrinth: Detention of Asylum-Seekers, AMR 51/051/1999.

[13] Stephen M, Knight, Seeking Asylum from Gender Persecution: Progress Amid Uncertainty, Interpreter Releases,Vol. 79, No. 20, pg. 689, May 13, 2002.

[14] Suresh *v* Canada (Minister of Citizenship and Immigration), 2002 SCC 1.

[15] Concluding observations of the Committee against Torture with respect to Canada, A/56/44, para.59(a), November 22, 2000.

- to amend the Immigration and Refugee Protection Act so as to fully implement Canada's absolute obligation under the UN Convention against Torture not to return individuals to a country where they face a serious risk of torture.

iii) Effective Procedures for Strong Protection

Lives are at stake in the decisions rendered in refugee claims. A meaningful appeal for rejected refugee claimants is a vital safeguard against mistakes that could have devastating consequences. The Immigration and Refugee Protection Act, passed by Parliament late last year, includes a long overdue improvement to Canada's refugee determination system. The Act introduces a full appeal for refugee claimants whose cases are turned down.[16] Previously, rejected claimants could only avail themselves of limited access to the Federal Court, or apply for administrative review processes within the department of immigration. However, on April 29, 2002, some two months before the new law was set to enter into force, the government announced an indefinite delay in implementation of the provisions which would lead to creation of the Refugee Appeal Division. The Minister of Citizenship and Immigration has since promised that the delay will last no longer than one year.

Failure to implement the new appeal process is a disappointing failure to ensure that Canada's refugee protection system is improved. Worse, it also significantly weakens the existing system. At present, refugee claimants have a right to a hearing in front of two decision-makers, only one of whom needs be convinced in order for a claim to be granted. The new Act removes this safeguard. Instead, hearings will be conducted by one decision-maker. Amnesty International, other organizations and a number of parliamentarians were concerned that this change removed an important procedural protection for refugee claimants, but considered that it would be at least partially offset by the introduction of a new appeal process. This change has a discriminatory impact and may contravene the Convention's assurance, in article 5, of equality before the law. Refugees, who are overwhelmingly made up of individuals from racialized communities, are denied one of the hallmarks of justice, a meaningful appeal, a basic procedural protection afforded to the wider Canadian population, including in circumstances where the decision at stake does not pose the same grave threat to fundamental human rights.

Amnesty International urges the Canadian government:

- to act immediately to establish the new Refugee Appeal Division of the Immigration and Refugee Board and provide adequate resources to ensure its effective functioning.

iv) Access to Legal Services

In its ongoing work with refugee claimants across Canada, Amnesty International has often been concerned that the difficulties faced by refugee communities in obtaining legal representation, pose a barrier to individuals effectively asserting their basic rights. Furthermore, with different approaches to legal aid at the provincial level, the scope and nature of legal assistance available to refugee claimants differs considerably across the country, again raising concerns under article 5 of the Convention. The Canadian Bar Association has noted that:

[16] Immigration and Refugee Protection Act, S.C. 2001, C. 27, ss. 110, 111.

> ... the deterioration in community legal aid funding across the country has a disproportionate impact on many people from racialized communities as they represent a disproportionate number of people living below the poverty line. It was repeatedly brought to our attention that both civil and criminal law legal aid services are badly underfunded, resulting in a denial of access to justice to many people...
>
> In immigration cases, immigrants, particularly refugee claimants, are disproportionately from racialized communities. The racial balance in immigration cases is therefore different from the racial balance in Canadian society and the unavailability of legal aid, or severe limits on access to legal aid, for immigrants and refugee claimants has a disproportionate effect on people from racialized communities. To eliminate discrimination, adequate legal aid services must be made available to immigrants and refugee claimants.[17]

Amnesty International urges the Canadian government:

- to ensure a consistent approach to legal aid across the country which ensures the provision of adequate legal services to refugee claimants.
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3. MIGRANT WORKERS

Canada is a destination for international labour migration. This migration encompasses a range of situations, from workers who are illegally trafficked to migrants who enter the country under specific programs established by the government. Whether in the both the formal or underground economy, many of these workers are vulnerable to abuses of their fundamental human rights. This vulnerability stems from their status as foreign nationals without permanent residence in Canada and their often extreme dependence on their employers. Where Canadian policy and practice fails is in the protection of migrants as potential and actual victims of human rights abuse. Amnesty International is particularly concerned about two groups of migrant workers, migrants who enter Canada through the government's Live-in Caregivers Program and migrants who are in the country illegally as part of the sex trade. In both cases, the vast majority of migrants are women and most come from Asia.

i) The Live-in Caregiver Programme

The Live-in Caregiver Programme, established in 1992, is the latest in series of government programs intended to address a shortage in live-in childcare, elder care and other domestic labour through labour migration. The program allows women and men to enter Canada who would not otherwise qualify under standard immigration criteria provided they meet a series of requirements specific to this program, including working and living in a private household for at least 24 out 36 months. During this time, the migrant must not work in any other field or take any course at the post-secondary education level. If they are dismissed from their job, they must find another live-in

[17] Canadian Bar Association, Racial Equality in the Canadian Legal Profession, February, 1999, pg. 31.

position. After three years, the migrant can apply for permanent residence. If the migrant fails to meet the requirements of the program, or is turned down for permanent residence after the end of three years, she or he is returned to the country of origin.

More than 2000 workers come to Canada each year under this program. Roughly 95 percent of workers who enter Canada under this program are women. Approximately three-quarters of these workers are from the Philippines.

Amnesty International is concerned that the requirement that workers must live in the home of the employer for at least two years as a condition of their stay in Canada creates a situation in which a group of workers, defined by their gender and country of origin, are placed in a situation in which they are highly vulnerable both to exploitation and to sexual harassment and violence. In effect, any worker who complains about treatment by their employer, or flees the employer's home for their home safety, risks being unable to meet the requirements to remain in Canada.

This concern has been noted by the Gabriela Rodríguez Pizarro, the UN Special Rapporteur on the human rights of migrants. During her visit to Canada in September 2000, the Special Rapporteur interviewed a number of women who entered Canada through the Live-in Caregiver Programme.

> They all recognized that they had the right to report abuses. However, in many cases they said that they could not do so in practice, since, if they lodged a complaint against their employer, they were afraid they would lose the possibility of finding work because their complaint would be mentioned on their immigrant file. In particular, they said that they needed references to find new employment and that, if they lodged a complaint, the bad references given by their former employer would prevent them finding a new job rapidly, which in many cases would prevent them from accumulating the working time necessary to claim permanent residence.[18]

The Special Rapporteur noted that while many live-in caregivers described decent work conditions and positive benefits from living in their employer's home, there were also complaints of abuse and "working conditions amounting to servitude."

Amnesty International notes that the live-in requirement contravenes Article 25.1 of the Migrant Workers Convention which states:

> Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and:

[18] Report prepared by Ms. Gabriela Rodríguez Pizarro, Special Rapporteur on the human rights of migrants, E/CN.4/2001/83/Add.1.

(a) Other conditions of work, that is to say, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by these terms;

(b) Other terms of employment, that is to say, minimum age of employment, restriction on home work and any other matters which, according to national law and practice, are considered a term of employment.

Although the Convention is not in force, and Canada has not ratified it, Amnesty International believes that the Convention indicates a standard for state obligations to protect migrants against violations of their fundamental rights.

Amnesty International urges the Canadian government:

- to ratify the UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and bring its laws into line with the requirements of the Convention; and
- enact reforms to its Live-in Caregiver Programme to reduce the women's vulnerability to abuse.

ii) Migrant women in the sex trade

In a series of raids in the Toronto area in 1997 and 1998, police arrested 76 women from Thailand, Malaysia, Korea, Vietnam and other countries in Asias on charges releated to prostitution. In contrast to its position on the international stage, where Canada has championed a response to the trafficking in women based in the defense of human rights and an understanding of violence against women, when it came to specific women, Canadian police and immigration officials not only treated them solely as criminals, but reportedly violated basic rights to which everyone is entitled.

Women arrested in the these operations, complained they were denied access to lawyers and to their consulates and interrogated without legal representation, of being tricked into signing statements they couldn't read, of being held in overcrowded cells or held in shackles. That would be in clear violation of the women's rights under the U.N.'s Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment as well as a contravention of article 36.1(b) of the Vienna Convention on Consular Relations.

The women had entered a form of indentured servitude and were then forced to work in the sex trade to pay off rapidly compounding debts. Some of the women may not have known that they would be required in the sex trade when they agreed to their contracts. During their service to their employers, the women had limited freedom of movement and little access to basic needs such as medical care. Although all of this was acknowledged by police, and formed the basis of prosecution of the women's employers, the police and the courts would not give the women any special consideration of victims of crime.

The UN Special Rapporteur on violence against women summarized the treatment of the women in this way:

> The women described situations of forced labour and sexual slavery and the traffickers were charged with forcible confinement. Nonetheless, law enforcement agents were hesitant to label the operation sexual slavery owing to the existence of 'contracts', under which the women's travel documents were confiscated, their movements restricted and they were forced to work off their debt by performing approximately 400-500 sex acts. Because some of the women had agreed to migrate to work in the sex trade, law enforcement agents concluded that "they knew exactly what they were getting into".[19]

Critically, the police, court and immigration system failed to provide the women with the help they needed to end their servitude.

The Toronto Network against Trafficking Women presented the story of one of the arrested women in a report prepared for Status of Women Canada.[20] The woman had come to Canada from Thailand only shortly before her arrest. She owed her employer $35,000 which meant she had to serve 450 customers to buy her freedom. She was arrested while working at a massage parlour. She was bailed out two months after her arrest but was still not still not released because she had entered Canada under a false passport and Immigration Canada would not release her until it had established her identity. She was finally released after four months and eight hearings.

The woman's bail had been paid by her employer and this was added to her debt. Following her release on bail, the woman resumed work in the sex trade to pay her now increased debt. She was rearrested, along with her employer. She applied for refugee status in order to escape her dependence on her employer but was rejected. After 10 more months in detention, she agreed to be deported to Thailand.

A growing number of international standards, including the European Parliament's 1997 resolution on the trafficking of women for the purpose of sexual exploitation, call on states to prioritize the protection of women who have been trafficked, even when they have knowingly and willingly broke the law. Such protections include legal assistance, safe houses and shelters and measures to encourage women and protect women in bringing complaints against their employers.

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[19] Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women, E/CN.4/2000/68, 29 February 2000, para. 45.

[20] *Trafficking in Women Including Thai Migrant Sex Workers in Canada*, the Toronto Network against Trafficking Women, the Multicultural History Society of Ontario, and the Metro Toronto Chinese and Southeast Asian Legal Clinic, June 2000.

Critically, the justice system, including immigration enforcement, must take account of the vulnerability and abuse experienced by the women, even when they have seemingly entered trafficking of their own will.

Amnesty International urges the Canadian government:

- to act on the recommendation of the UN Special Rapporteur on Violence against Women that measures to address trafficking must focus on the promotion of the human rights of the women concerned and must not further marginalize, criminalize, stigmatize or isolate them, thus making them more vulnerable to violence and abuse. Accordingly, police, judges and immigration officials should receive specific training in issues related to trafficking in women. The federal and provincial governments should consider establishing special investigative units with expertise in assisting women who have been trafficked and in identifying and prosecuting those profiting from their trafficking.

4. COMMUNITIES WHICH EXPERIENCE HATE CRIMES

The Convention, in article 4, obligates states party to enact legal provisions prohibiting propaganda that promotes racial superiority or racial hatred and discrimination in any form. Amnesty International is of the view that Canadian law in this area should be improved.

i) Fewer Defences for Hate Crimes

Three of the four Criminal Code defenses to the offence of wilful promotion of hatred are problematic. Two of those offences relate to truth. An accused can be acquitted under Canadian law if either the person "establishes that the statements communicated were true" or "if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he (the accused) believed them to be true".[21]

The Supreme Court of Canada has held that the offence of hate propaganda in the Criminal Code was constitutional and that the defense of truth was not necessary for the offence to remain constitutional:

> I find it difficult to accept that circumstances exist where factually accurate statements can be used for no other purpose than to stir up hatred against a social or religious group. It would seem to follow that there is no reason why the individual who intentionally employs such statements to achieve harmful ends must, under the Charter, be protected from criminal censure.[22]

The third problematic defense relates to religious beliefs, namely that the accused, in good faith,

[21] Criminal Code, R.S.C, c. C-34, s. 319(3)(a) and (c).

[22] R. v. Keegstra (1991) 61 C.C.C. (3d) 1 (S.C.C.).

"expressed or attempted to establish by argument an opinion on a religious subject."[23] A UN expert has pointed out that religion has all too often become a mask for prejudices which intrinsically have nothing to do with religion. Religion is not the cornerstone of the hatred. Rather, the conceptions of religion have been construed and twisted to condone prejudice. Conflicts often give rise to propaganda that use religious grounds to justify attacks.[24]

Amnesty International urges the Canadian government:

- to amend the Criminal Code hate crimes provisions by removing the two defences related to truth and the defense related to religious belief.

ii) Holocaust Denial

The Criminal Code offence needs an amendment to make clear that the offence encompasses Holocaust denial. The majority in the Zundel case at the Supreme Court of Canada, in the course of striking down the provision under which Ernst Zundel was convicted -- wilfully and knowingly spreading false news causing public injury -- referred to the German offence of Holocaust denial and said that it was "a much more finely tailored provision (than the Canadian Criminal Code's false news provision) to which different considerations might well apply."[25]

Amnesty International urges the Canadian government:

- to amend the Criminal Code and clearly establish Holocaust denial as a form of hate crime.

iii) Prosecuting Hate Criminals

The Criminal Code offence of public incitement to hatred should be a universal jurisdiction offence. The offence should be punishable in Canada no matter where it was committed, as long as the perpetrator is found in Canada. This should also be true of the crime of incitement to genocide, which is also in the Criminal Code, and also is punishable only if the offence is committed in Canada.[26]

The case of Leon Mugesera highlights the problem posed by limited jurisdiction. Mugesera was ordered deported from Canada for, amongst other reasons, having committed the offence of incitement to genocide against Rwandan Tutsis. Although he is deportable in Canada for such an offence, he is not, arguably, prosecutable for such an offence. The Canadian Crimes against Humanity and War Crimes Act makes genocide a universal jurisdiction offence, but not incitement to genocide.[27] This is so despite the fact that the Genocide Convention, article III(c), requires the prohibition of incitement to genocide as much as genocide itself.

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[23] Criminal Code, R.S.C, c. C-34, s. 319(3)(b).

[24] Elizabeth Odio Benito, Elimination of all forms of intolerance and discrimination based on religion or belief, UN Centre for Human Rights, Study series 2, 1989, page 40, paragraph 163.

[25] R. v. Zundel (1992) 2 S.C.R. 731.

[26] Criminal Code, R.S.C., c. C-24, s. 318.

[27] Crimes against Humanity and War Crimes Act, S.C. 2000, c. C-24.

Amnesty International urges the Canadian government:

- to amend Canadian law and establish universal jurisdiction for the offences of incitement to genocide and incitement to hatred.

iv) Greater Capacity to Prosecute

Prosecution for the Criminal Code offence requires the consent of the Attorney General.[28] As a result private prosecutions are impossible. Unless police forces have dedicated hate-crimes units, they are unlikely either to acquire the evidence or to be sensitive to the nature of the problem.

Amnesty International urges the Canadian government:

- to support the creation of specialized units within police forces across the country, dedicated to the investigation and prosecution of hate crimes.

v) Stronger Human Rights Laws

Most provincial human rights codes do not prohibit the publication of hate speech. Saskatchewan is an exception. The Saskatchewan Human Rights Code provides:

> No person shall publish or display, or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device, or in any printed matter or publication or by means of any other medium that the person owns, controls, distributes or sells, any representation, including any notice, sign, symbol, emblem, article, statement or other representation: ...
>
> (b) that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.[29]

The federal law on the scope of hate speech legislation needs expansion. The Saskatchewan prohibition on publication of incitement to hatred covers these prohibited grounds: religion, creed, marital status, family status, sex, sexual orientation, disability, age, colour, ancestry, nationality, place of origin, race or perceived race, and receipt of public assistance.[30] Federal criminal law with respect to hate propaganda covers the prohibited grounds of colour, race, religion or ethnic origin.[31] While race and ethnic origin are included, and are clearly the most relevant areas of concern with respect to Canada's compliance with its obligations under the Convention, Amnesty International is concerned that the limited nature of the grounds in the Criminal Code fails to

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[28] Criminal Code, R.S.C, c. C-34, s. 319 (6).

[29] Saskatchewan Human Rights Code, R.S.S. S-24.1, s. 14(1).

[30] *Ibid*, s.2(1)(m.01).

[31] Criminal Code, R.S.C., c. C-34, ss. 318(4) and 319 (7).

recognize the degree to which racially-motivated hate crimes may often be triggered by more than one ground of discrimination. For instance, individuals may face a greater risk of hate crimes due to the combined effect of their race and their gender, or their race and their sexual orientation.

Amnesty International urges the Canadian government:

- to ensure that provincial human rights laws uniformly prohibit the publication of hate speech; and
- to amend the Criminal Code so as to establish a list of prohibited grounds for hate propaganda similar to those found in broader provincial human rights laws, or similar to the equality protection found in section 15 of the Canadian Charter of Rights and Freedoms.

6. SUMMARY OF RECOMMENDATIONS

Amnesty International calls on the Canadian government to strengthen its support for the Convention on the Elimination of all Forms of Racial discrimination by:

- making a declaration under article 14 of the Convention, accepting the jurisdiction of the Committee on the Elimination of Racial Discrimination to receive individual complaints alleging violations of the Convention.

Amnesty International calls on the Canadian government to work towards the elimination of discrimination against Aboriginal peoples by:

- expressing concern and reminding provincial governments that initiatives that override or overlook international legal standards in the development and implementation of government policy with respect to Aboriginal peoples, including approaches taken to negotiating treaties, can lead to or exacerbate racial discrimination.
- working alongside provincial governments to adopt proactive public education programs, pursuant to article 7 of the Convention, regarding the internationally and nationally defined and protected rights of Aboriginal peoples, including in an effort to stem racial discrimination.
- pressing the government of Saskatchewan to ensure that the Saskatoon freezing deaths are given full attention in the course of the current commission of inquiry, with particular attention to the possible role that discrimination may have played in those cases.
- pressing for enhanced human rights training, including anti-discrimination training, for police forces across Canada.
- ensuring that an inquiry is convened at the provincial or federal level, with no further delay, into the 1995 killing of Dudley George and that such inquiry include an examination of the role of political figures and the degree to which discrimination may have impacted on the

course of events leading to his death.

- adopting a policy requiring that any enforcement action related to land or resources under dispute take place only with a court order and only after the concerned people have had a chance to make their case to the court. Such a policy would help alleviate the degree to which discrimination may interfere with law enforcement.

Amnesty International calls on the Canadian government to work towards the elimination of discrimination against refugees by:

- adopting a proactive and visible approach to combating myths and stereotypes about refugees and more assertively sensitizing the public to the realities faced by genuine refugees.
- proceeding no further with the proposed "safe third country" agreement with the United States unless and until there are assurances that it will not expose refugees to human rights violations.
- amending the Immigration and Refugee Protection Act so as to fully implement Canada's absolute obligation under the UN Convention against Torture not to return individuals to a country where they face a serious risk of torture.
- acting immediately to establish the new Refugee Appeal Division of the Immigration and Refugee Board and provide adequate resources to ensure its effective functioning.
- ensuring a consistent approach to legal aid across the country which ensures the provision of adequate legal services to refugee claimants.

Amnesty International calls on the Canadian government to work towards the elimination of discrimination against migrant workers by:

- ratifying the UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and bring its laws into line with the requirements of the Convention.
- enacting reforms to its Live-in Caregiver Programme to reduce the women's vulnerability to abuse.
- acting on the recommendation of the UN Special Rapporteur on Violence against Women that measures to address trafficking must focus on the promotion of the human rights of the women concerned and must not further marginalize, criminalize, stigmatize or isolate them, thus making them more vulnerable to violence and abuse. Accordingly, police, judges and immigration officials should receive specific training in issues related to trafficking in women. The federal and provincial governments should consider establishing special investigative units with expertise in assisting women who have been trafficked and in identifying and prosecuting those profiting from their trafficking.

Amnesty International calls on the Canadian government to work towards the elimination of discrimination against communities which experience hate crimes by:

- amending the Criminal Code hate crimes provisions by removing the two defences related to truth and the defense related to religious belief.
- amending the Criminal Code and clearly establish Holocaust denial as a form of hate crime.
- amending Canadian law to establish universal jurisdiction for the offences of incitement to genocide and incitement to hatred.

- supporting the creation of specialized units within police forces across the country, dedicated to the investigation and prosecution of hate crimes.
- ensuring that provincial human rights laws uniformly prohibit the publication of hate speech.
- amending the Criminal Code so as to establish a list of prohibited grounds for hate propaganda similar to those found in broader provincial human rights laws, or similar to the equality protection found in section 15 of the Canadian Charter of Rights and Freedoms.