CANADA

BRIEFING FOR THE UN COMMITTEE ON THE RIGHTS OF THE CHILD

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Amnesty International is a global movement of more than 3 million supporters, members and activists in more than 150 countries and territories who campaign to end grave abuses of human rights.

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1. INTRODUCTION

This brief has been prepared for the consideration of Canada's third and fourth periodic reports under the Convention on the Rights of the Child (the Convention). It outlines two issues that Amnesty International raised in submissions to the UN Committee on the Elimination of Racial Discrimination (CERD) and the UN Committee against Torture and Other, Cruel, Inhuman or Degrading Treatment or Punishment (CAT) when those committees considered the periodic reports of Canada earlier this year.[1] Concerns about the rights of indigenous children and in particular the widespread removal of First Nations children from their families, communities and cultures were raised in a submission to the CERD at the time of Canada's review in February 2012. Concerns about the case of Omar Khadr, who was fifteen years old when he was apprehended by US soldiers in the course of a military operation in Afghanistan, were raised with the CAT in May 2012.

2. INDIGENOUS CHILDREN

ARTICLE 2.1 (NON-DISCRIMINATION IN THE FULFILMENT OF THE CONVENTION), ARTICLE 5 (INTEGRITY OF THE FAMILY); ARTICLE 9.1 (PROHIBITION AGAINST REMOVAL OF CHILDREN FROM THEIR PARENTS EXCEPT AS NECESSARY FOR THE BEST INTERESTS OF THE CHILD), AND ARTICLE 30 (RIGHTS TO CULTURE, RELIGION AND LANGUAGE).

THE WIDESPREAD REMOVAL OF FIRST NATIONS CHILDREN FROM THEIR FAMILIES, COMMUNITIES AND CULTURES

In its 2003 Concluding Observations, the Committee on the Rights of the Child (the Committee) expressed concern over "the gap in life chances between Aboriginal and non-Aboriginal children."[2] For its 61st session, the Committee has received a number of substantial reports from Indigenous peoples' organizations and civil society groups detailing the widespread and persistent inequalities that Indigenous children -- First Nations, Inuit and Métis – continue to face in Canada. Amnesty International has worked alongside many of these organizations, including the First Nations Child and Family Caring Society (FNCFCS) and KAIROS: Canadian Ecumenical Justice Initiatives. Amnesty International supports their efforts to draw attention to these inequalities and the resulting failure to close the gap in Indigenous children's full enjoyment of the rights protected under the Convention.

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[1] Briefing to the UN Committee on the Elimination of Racial Discrimination on Canada, AI Index: AMR 20/001/2012, and Briefing to the UN Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, AI Index: AMR 20/004/2012.
[2] Canada, UN Committee on the Rights of the Child, 34th session, Concluding Observations, (October 2003), para. 59.

Amnesty International's submission focuses on one critical inequality that is highlighted in many of these submissions and with which Amnesty International has been particularly engaged: the federal government's longstanding under-funding of child and family services in First Nations communities and the resulting, unacceptable increase in the numbers of First Nations children being placed in state care, away from their families, communities and cultures. Our submission concerns violations of the following articles of the Conventions: Article 2.1 (Non-discrimination in the fulfilment of the Convention), Article 5 (integrity of the family), Article 9.1 (prohibition against removal of children from their parents except as necessary for the best interests of the child), and Article 30 (rights to culture, religion and language).

In its periodic report to the Committee, the Government of Canada notes the "disproportionately high number of Aboriginal children in state care."[3] The Auditor General of Canada has estimated that as of March 2007, approximately 8,300 children from First Nations communities were living in state care.[4] This amounted to five percent of children in First Nations communities or reserves, indicating a rate of child removal almost eight times higher than that of all other children in Canada.[5]

The most frequent reason for the removal of First Nations children is "neglect."[6] While the definition of neglect varies from jurisdiction to jurisdiction within Canada, the term "neglect" generally refers to a failure or inability of the family to meet children's basic needs such as food, shelter, clothing and medical care.[7] In its submission to the Committee, the FNCFCS notes that many of the causal factors, such as impoverishment and inadequate housing, are "often outside of parental control."[8]

In its General Comment 11 on Indigenous children and their rights under the Convention, the Committee noted that the removal of Indigenous children from their families and communities can result in loss of community and individual and collective loss of language and other key dimensions of cultural identity and called on states to implement effective measures "to safeguard the integrity of indigenous families and communities by assisting them in their child-rearing responsibilities."[9] The General Comment also recommends, "In States parties where indigenous children are overrepresented among children separated from

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[3] Canada, Third and Fourth Reports to the Committee on the Rights of the Child, Covering the period January 1998 – December 2007 (20 November 2009), p. 20.
[4] Auditor General of Canada. 2008 May Report, para 4.12. http://www.oag-bvg.gc.ca/internet/English/parl_oag_200805_e_30714.html
[5] Ibid.
[6] Building a Brighter Future for Urban Aboriginal Children: Report of the Parliamentary Standing Committee on Human Resources Development and the Status of Persons with Disabilities, (June 2003), p.19.
[7] Susan Sullivan, Child Neglect: Current Definitions and Models - A review of child neglect research, 1993–1998, Health Canada Family Violence Prevention Unit, Health Canada. (2000).
[8] First Nations Child and Family Caring Society. Shadow Report: Canada 3rd and 4th Periodic Report to the UNCRC, (January 28, 2011), p. 4.
[9] Committee on the Rights of the Child. General comment no. 11: Indigenous children and their rights under the Convention (2009), para. 46.

their family environment, specially targeted policy measures should be developed in consultation with indigenous communities in order to reduce the number of indigenous children in alternative care and prevent the loss of their cultural identity."[10]

In contrast to the direction set out in these recommendations, the actions by the Government of Canada have directly contributed to and further exacerbated the problem of widespread removal of First Nations children from their families. Although standards for child and family services are set by provincial and territorial authorities, uniquely in the case of First Nations communities, the funding to provide these services is determined by the federal government rather than its counterparts. The federal funding levels are not based on actual costs, but on a funding formula that, in 2008, the Auditor General of Canada found had not been significantly adjusted in 20 years.[11]

Federal funding for First Nations child and family services has fallen, on a per child basis, to less than 80 per cent of the level provided by provincial and territorial governments for services in predominantly non-Indigenous communities.[12] This is despite the higher costs of delivering such services in small and remote First Nations communities. This is also despite the greater need experienced many First Nations communities, as a result of the persistent impoverishment of those communities[13] and the consequence of the unresolved legacy of acknowledged historic wrongs such as the residential schools policy.[14]

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[10] Ibid., para. 48.
[11] Auditor General of Canada, 2008. Op cit, para. 4.51.
[12] The First Nations Child and Family Caring Society of Canada. Wen:de - We are coming to the light of day, (October 2005), pp..14, 44; Department of Indian Affairs and Aboriginal Development and Assembly of First Nations, First Nations Child and Family Services Joint National Policy Review (June 2000).
[13] A recent federal government analysis found not only a significant gap between Indigenous and non-Indigenous communities in four selected indicators of "community well-being" – educational attainment, labour force participation, income, and housing – but also concluded that "little or no progress" had been made toward narrowing this gap in the study period of 2001-2006 and that a third of First Nations and Inuit communities had experienced a decline in the selected indicators. Indian and Northern Affairs Canada, Strategic Research and Analysis Directorate, First Nation and Inuit Community Well-Being: Describing Historical Trends (1981-2006) (April 2010).
[14] For more than a century, the government removed Indigenous children from their homes to attend poorly funded and inadequately supervised schools, often far removed from their own communities. The residential school policy led to the widespread abuse of individual students and the undermining of Indigenous culture and identity. In a formal statement of apology that resulted from the long legal struggle by residential school survivors, the government stated, "Two primary objectives of the residential schools system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture. These objectives were based on the assumption aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some sought, as it was infamously said, 'to kill the Indian in the child.' Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country." Canada.

The Auditor General of Canada concluded that because of persistent funding inequities, many on-reserve First Nations children and families do not have access to the same kinds and quality of child welfare services that are available to other children.[15] The services that may be unavailable to First Nations children and their families include interventions and support programs that enable children's needs to be met by their families. As a result, in many instances, the removal of children from their families and communities, a measure intended strictly as a last resort, has become a commonplace response when First Nations families on reserve are unable to provide adequate care to their children.[16]

In 2007, the FNCFCS and the Assembly of First Nations (AFN) filed a complaint under the Canadian Human Rights Act alleging that the federal government has discriminated against First Nations children living in reserve communities by failing to provide adequate funding to ensure access to the same quality of child protection programs and services available to non-Aboriginal children. The federal government has strongly opposed the Canadian Human Rights Tribunal examining this case. The government argued firstly that under the Canadian Human Rights Act, the prohibition of discrimination in government services does not apply to the funding decisions that determine the levels and quality of services that are available; and secondly that the government could not be found to be discriminating against First Nations children because the federal government does not fund children's services to any other group.

The Tribunal initially rejected the case on the basis of the second of these two arguments.[17] In April 2012, the Federal Court overturned this decision and ordered that an evidentiary hearing be held.[18] Although the federal government has appealed the Federal Court decision, Tribunal hearings are expected to begin this year.

The positions advanced by the Canadian government, based on arbitrary and unfounded distinctions between government's role as a funder or direct provider of services and between federal or provincial jurisdictions, contravene the state's obligation to take all reasonable measures to respect, protect and uphold human rights standards. The government's vigorous opposition to the Tribunal process has had the effect of significantly delaying First Nations children's access to justice through this mechanism, contrary to paragraph 23 of General

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Statement of Apology to Former Residential School Students. 11 June 2008.

[15] Auditor General Op cit. para 4.92.

[16] First Nations Child and Family Caring Society. Shadow Report. Op. cit.

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

[18] Canada (Human Rights Commission) v Canada (Attorney General) 2012 FC 445, available at http://decisions.fct-cf.gc.ca/en/2012/2012fc445/2012fc445.html

Comment 11 which states that effective remedies to discrimination "should be timely and accessible."

Amnesty International is also concerned that if Canada's objections to the case are upheld, it will create a large gap in protections afforded under the Canadian Human Rights Act because similar arguments could be made in respect to virtually every aspect of federal services to First Nations children including in the areas of health and education. The result would be to deny First Nations people in Canada access to the protection of the Canadian Human Rights Act on some of the most important aspects of government decision-making and action.

RECOMMENDATIONS:

(1) The Government of Canada should ensure that funding and other support to First Nations' child welfare services is comparable in quality and accessibility to services provided to other children in Canada and is adequate to meet their needs.

(2) The Government of Canada should take immediate steps to ensure that in law and practice, First Nations children have full access to all government services, without discrimination.

(3) The Government of Canada should withdraw its objection to the claim of discrimination lodged by the First Nations Child and Family Caring Society and the Assembly of First Nations and allow the Canadian Human Rights Tribunal hearings into this complaint to proceed unhindered.

3. OMAR KHADR

ARTICLE 37 (TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT); ARTICLE 38 (CHILDREN AND ARMED CONFLICT); ARTICLE 39 (PHYSICAL AND PSYCHOLOGICAL RECOVERY AND SOCIAL INTEGRATION).

Canadian citizen Omar Khadr was apprehended by US forces in Afghanistan in July 2002 when he was 15 years old. He has been held in detention at Guantánamo Bay since October 2002. In October 2010 he was sentenced to an eight year prison term pursuant to a plea agreement. Under the terms of the plea deal he is required to serve at least one year of that sentence at Guantánamo Bay after which he is eligible for transfer to Canada. An application for transfer to Canada was submitted on his behalf in approximately May 2011. He has been eligible for return to Canada since 1 November 2011 but as of 28 August 2012 no decision on his transfer application has been reached. He remains in detention at Guantánamo Bay. The US government has indicated it is agreeable to its transfer. The Canadian government has given no indication as to when it will reach a decision. Omar Khadr has launched legal action in Canada seeking a judicial order requiring the Canadian government to reach a decision. No date has yet been set for hearings.

Omar Khadr has made credible allegations that he was tortured and/or ill-treated by US officials in both Afghanistan and Guantánamo Bay.[19] Those allegations have never been independently investigated. Additionally, US officials have consistently refused to acknowledge that Omar Khadr, who was only fifteen years old when he was apprehended by US soldiers in the course of a military operation in Afghanistan, was a child soldier and should be accorded the rights and appropriate treatment under international instruments dealing with child soldiers.[20]

The Canadian government maintained a position of not intervening in Omar Khadr's case throughout his years in detention. Canadian courts, including the Supreme Court of Canada, have ruled that Canadian officials were complicit in the violation of Omar Khadr's rights by virtue of a number of interrogation sessions he was subjected to by Canadian officials at Guantánamo Bay in circumstances where the ongoing violation of his rights there were allegedly apparent. In particular the Supreme Court was concerned about the fact that Canadian officials interrogated Omar Khadr at Guantánamo Bay, without counsel, knowing that he was young and had been subjected to extensive sleep deprivation in advance so as to make him more pliable. The Court found as follows:

The record suggests that the interviews conducted by the Canadian Security Intelligence Service (CSIS) and the Department of Foreign Affairs and International Trade (DFAIT) provided significant evidence in relation to these charges. During the February and September 2003 interrogations, CSIS officials repeatedly questioned Mr. Khadr about the central events at issue in his prosecution, extracting statements from him that could potentially prove inculpatory in the U.S. proceedings against him… Mr. Khadr's statements to Canadian officials are potentially admissible against him in the U.S. proceedings, notwithstanding the oppressive circumstances under which they were obtained… The above interrogations also provided the context for the March 2004 interrogation, when a DFAIT official, knowing that Mr. Khadr had been subjected to the "frequent flyer program" to make him less resistant to interrogations, nevertheless proceeded with the interrogation of Mr. Khadr.[21]

Following its consideration of the sixth periodic report of Canada, in June 2012 the CAT called on Canada to "promptly approve Omar Khadr's transfer application and ensure that he receives appropriate redress for human rights violations that the Canadian Supreme Court has

[19] The allegations are detailed in the Affidavit of Omar Ahmed Khadr, dated October 23, 2008, found at: http://www.mc.mil/CASES/MilitaryCommissions.aspx. The allegations were rejected by the Military Judge presiding over Omar Khadr's military commission trial because Omar Khadr did not submit to cross-examination on the allegations; see: http://www.defense.gov/news/D94-D111.pdf.

[20] Office of the Special Representative of the Secretary General for Children and Armed Conflict, "Statement of SRSG Ms. Radhika Coomaraswamy on the occasion of the trial of Omar Khadr before the Guantanamo Military Commission" (10 August 2010), online at: http://www.un.org/children/conflict/english/09-august-2010-trial-of-omar-khadr.html.

[21] Canada (Prime Minister) *v.* Khadr, 2010 SCC 3, [2010] 1 S.C.R. 44, para. 20; online at: http://scc.lexum.org/en/2010/2010scc3/2010scc3.html.

ruled he experienced."[22] On 27 July 2012, the Special Representative of the Secretary General on Children and Armed Conflict, Radhika Coomaraswamy released a public statement noting that:

Omar Khadr was a child soldier and our experience around the world clearly indicates that a system focusing on rehabilitation is far better suited for these children who have been exploited and abused by adults. Transferring him to Canada for proper reintegration is the right thing to do.[23]

RECOMMENDATIONS:

(1) The Government of Canada should promptly approve the application made by Omar Khadr to be returned to Canada.

(2) The Government of Canada should ensure that Omar Khadr is provided with an adequate remedy for the human rights violations that the Supreme Court of Canada has ruled he experienced.

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[22] Canada, Committee against Torture, 48th session, Concluding observations, June 2012 http://www2.ohchr.org/english/bodies/cat/cats48.htm

[23] Ibid.

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