SUBMISSION OF THE GOVERNMENT OF CANADA ON THE ADMISSIBILITY AND MERITS OF THE COMMUNICATION TO THE HUMAN RIGHTS COMMITTEE OF NELL TOUSSAINT

COMMUNICATION NO. 2348/2014

April 2, 2015

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EXECUTIVE SUMMARY

This communication concerns access to federally-funded health insurance in Canada by what the author terms "undocumented migrants", and who Canada considers to be foreign nationals without lawful residency in Canada. Canada provides emergency medical care and access to health insurance to its residents without discrimination on any prohibited ground. Nell Toussaint (the "author") is a citizen of Grenada who came to Canada as a visitor in 1999 and never left. She resided and worked in Canada unlawfully for more than a decade. When she became ill in 2008, she sought access to government health insurance coverage to pay for her health care needs. When she was determined to be ineligible to receive provincial health insurance coverage, the author applied for health insurance coverage under the federal Interim Federal Health Program (IFHP), a benefits scheme designed to provide temporary health care funding to protected persons, such as refugees. Since 2013, when her application to become a permanent resident in Canada was approved, the author's health care needs are being funded under the Ontario Health Insurance Plan (OHIP). Therefore, in her communication, the author does not seek health insurance coverage on her own behalf. Rather, she seeks compensation for the alleged violation of her rights flowing from her ineligibility to receive IFHP insurance coverage between 2009 and 2013. In addition, on behalf of other illegal immigrants who may also wish to seek access to this particular medical insurance scheme in the future, the author contends that the exclusion of "undocumented migrants" from accessing IFHP insurance coverage amounts to a violation of Articles 2(1), 2(3)(*a*), 6, 7, 9(1) and 26 of the *International Covenant on Civil and Political Rights*.

In this submission, Canada will establish that the author's communication is inadmissible on a number of grounds. Firstly, the author is not a victim whose rights have been violated, and her purported representation of other "undocumented migrants" is effectively an *actio popularis.* Secondly, the author's communication is moot on a personal level because she now receives

OHIP health insurance coverage, and on a general level because the IFHP has since 2012 included a broad discretionary provision authorizing the provision of federal health insurance to undocumented migrants. Thirdly, the author's communication is inadmissible for non-exhaustion of domestic remedies since at no time did she claim a right to monetary compensation in Canadian courts. Likewise, to the extent that she seeks to challenge the scope of IFHP coverage on behalf of other potential undocumented migrants, the current IFHP is the subject of ongoing litigation in Canadian courts. Finally, the author's allegations with respect to Articles 2, 6, 7 and 9(1) are inadmissible for incompatibility with the provisions of the *Covenant*. Article 2 cannot by itself give rise to a claim under the *Optional Protocol*, while Articles 6, 7 and 9(1) protect against intentional infliction of harm, but do not impose positive obligations to provide state-funded health insurance for all medical needs of undocumented migrants. The substance of the author's allegations is the right to health, a matter which is inadmissible *ratione materie*.

In the event that this communication is considered to be admissible, Canada will establish that it is entirely without merit. The evidence, as accepted by the Federal Court and Federal Court of Appeal, was that, while the author did experience some delays, she was in every important instance able to receive required medical care and medications, despite not having state-funded medical insurance or the ability to pay for the care herself. The crux of her complaint is that Canada did not cover all of her medical needs. The Courts also found that the author's own conduct - in particular, her delay in seeking to regularize her status in Canada - resulted in her delay in eligibility for state-funded health insurance. Articles 6, 7 and 9(1) of the *Covenant* do not entitle the author or other undocumented migrants to free, optimal medical care covering all possible health needs. Canadian law requires that emergency or urgent care be provided to persons in Canada irrespective of their immigration status, as evidenced by the author's own experience. That not all medical tests or possible treatments may have been provided to the author immediately and free of charge does not constitute a violation of the *Covenant*. Moreover, the broad discretionary provision in the current IFHP is considered to authorize the provision of federal health insurance coverage to undocumented migrants in exceptional and compelling circumstances.

With respect to the author's allegations that her exclusion from IFHP insurance coverage constituted discrimination in violation of Article 26 of the *Covenant*, on the basis of immigration status or citizenship, Canada will show that provincial health insurance coverage is provided to residents irrespective of citizenship and with a wide variety of immigration statuses. The only commonality amongst the various groups of eligible persons is that their residency is lawful. Canada takes the position that this differential treatment, based on legality of residence, is not a prohibited ground of discrimination and does not come within the meaning of "other status" to bring it within the scope of Article 26. In the alternative, the differential treatment is reasonable and objective and in pursuit of a legitimate aim. There is nothing unreasonable or arbitrary in expecting that undocumented migrants such as the author come forward and regularize their immigration status before claiming the benefits of lawful residence. Until their status is regularized, undocumented migrants have access to emergency and urgent medical care under

provincial law as well as *pro bono* care by medical practitioners, and may apply for discretionary insurance coverage under the current federal IFHP. This method of delivery of required medical care to undocumented migrants until they regularize their status is a legitimate, reasonable and proportionate policy choice that is owed significant deference by this Committee.

For all of these reasons, Canada requests that the author's communication be dismissed as inadmissible or considered to be wholly without merit.

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I. INTRODUCTION

1. By letter dated February 14, 2014, the Secretariat of the United Nations (Office of the High Commissioner for Human Rights) forwarded to Canada Communication No. 2348/2014 of Nell Toussaint (the "author") dated December 28, 2013, which had been submitted to the Human Rights Committee (the "Committee") for consideration under the *Optional Protocol to the International Covenant on Civil and Political Rights* (the "Optional Protocol").

2. The author is a Grenadian citizen who came to Canada as a visitor. When her visitor status expired after 6 months, she remained in Canada without status and resided and worked in Canada unlawfully for more than a decade. When she became ill in 2008, she began attempts to regularize her immigration status and, shortly thereafter, applied to the Ontario provincial government for health insurance coverage. When the author was informed of her ineligibility to receive provincial health insurance coverage, she applied to the federal government for federal health insurance coverage under the Interim Federal Health Program (the "IFHP"). The IFHP is a funding scheme designed to assist certain groups of protected persons in need, such as refugees, until they become eligible for provincially-funded health care. As the author is not a member of such an eligible group, her application for funding under that program was denied.

3. In her communication, the author claims that by denying her access to state-funded health insurance coverage under the IFHP between 2009 and 2013, Canada violated its obligations under the *International Covenant on Civil and Political Rights* (the "*Covenant*"). Specifically, she argues that Canada violated: the obligation to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the *Covenant* (Art. 2(1)); the obligation to ensure access to an effective remedy for violations of rights recognized by the *Covenant* (Art. 2(3)(*a*)); the right to life (Art. 6); the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Art. 7); the right to security of the person (Art. 9(1)); and the right to be equal before the law and to the equal protection of the law without discrimination (Art. 26).

4. As the author became a Canadian permanent resident in receipt of provincial health insurance coverage in 2013, she concedes that she is no longer in need of coverage and therefore no longer seeks coverage under the IFHP. Rather, the author asks that the Committee:

    (a) Recommend that Canada pay monetary compensation to the author for the "severe psychological stress, indignity and exposure to risk to life and to long term negative health consequences she suffered as result of the violation of her rights"; and
    (b) Call on Canada to provide access to IFHP coverage for necessary health care to individuals with irregular immigration status.[1]

[1] *Toussaint v. Canada*, HRC Communication No. 2348/2014 [*Toussaint* HRC] at para. 176.

5. On August 14, 2014, Canada made a Request for an Extension of Time for Filing and Submission on the Admissibility of the author's communication ("Canada's August 14, 2014 Submission"). In that submission, Canada argued that the author's communication is inadmissible for lack of standing, mootness and non-exhaustion of domestic remedies. Canada also requested that the time for filing its submission on the merits of the communication be extended until a reasonable time after a final determination by Canadian courts of the constitutional issues surrounding the IFHP scheme.

6. By letter dated December 1, 2014, this Committee informed Canada that it had decided to examine the admissibility of the communication together with its merits. It provided Canada with the author's observations on Canada's August 14, 2014 Submission, and requested Canada's observations on the merits of the communication before April 2, 2015.

7. In this submission, Canada will first address some of the points made in the author's observations on admissibility. Canada maintains its position that the author's communication is wholly inadmissible. Then, Canada will establish in the alternative, that the author's communication is wholly without merit. The facts demonstrate that the author did receive medical care required to safeguard her life and physical well-being; that it may not have been the most comprehensive medical care that could possibly be imagined does not violate her rights under the *Covenant*. Moreover, whatever her immigration status, she was never prevented from accessing medical care at her own expense, from purchasing private medical insurance, or from obtaining it from hospitals and medical professionals who treated her free of charge. The distinction in eligibility for provincially-funded medical care was based on the lawfulness of residence, which is not a prohibited ground of discrimination and does not come within the meaning of "other status" within the scope of Article 26.

8. It is Canada's position that the terms of the *Covenant* cannot be interpreted to include a positive obligation on States to provide comprehensive state-funded medical insurance to undocumented migrants without status; it is not in violation of the *Covenant* to expect undocumented migrants to come forward and regularize their status before claiming the benefits of lawful residence.

II. SUMMARY OF FACTS AND DOMESTIC PROCEEDINGS

Facts with respect to the author's request for personal compensation

9. Canada relies on the summary of facts and domestic proceedings contained in its August 14, 2014 Submission. Canada emphasizes that the author has conceded that she is now receiving state-funded medical care sufficient to meet all of her health care needs. Her sole personal interest in this communication is to obtain financial compensation for the denial of state-funded or paid medical care under the 1957 IFHP between 2009-2013.

Facts with request to access to IFHP funding for other potential "undocumented migrants"

10. As Canada more fully described in its August 14, 2014 Submission, the IFHP funding scheme was modified by an Order in Council in 2012 ("2012 IFHP"). Unlike the 1957 IFHP under which the author had sought coverage, and which did not provide for a discretionary grant of coverage, the 2012 IFHP incorporated a broad discretionary provision authorizing the Minister to pay the cost of certain medical care "in exceptional and compelling circumstances". The 2012 IFHP was declared unconstitutional by decision of the Federal Court on July 4, 2014, *Canadian Doctors for Refugee Care et al v. Canada* (hereinafter "*Canadian Doctors for Refugee Care*").[2] The declaration of invalidity was suspended for four months, to allow time for the federal government to implement another scheme.

11. On November 5, 2014, Canada implemented a new policy ("2014 Policy"), to temporarily provide funded medical care to certain categories of foreign nationals pending the disposition of the appeal to the Federal Court of Appeal. The Appeal is yet to be heard or determined. The 2014 Policy includes an even more broadly-worded discretionary provision, allowing for the Minister to grant a more comprehensive range of medical coverage "because of exceptional and compelling circumstances".[3]

12. While intended to be used only in exceptional or compelling cases, the discretionary provisions in both the 2012 IFHP and 2014 Policy were broadly-worded in order to have the widest possible application, and are considered to be available to provide state-funded health care to "undocumented migrants"; that is, foreign nationals with no legal status in

[2] *Canadian Doctors for Refugee Care et al. v. Canada (Attorney General and Minister of Citizenship and Immigration)*, 2014 FC 651, on appeal to the Federal Court of Appeal; available at: http://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/72437/index.do

[3] Details of the 2014 Policy are available here: http://www.cic.gc.ca/english/refugees/outside/summary-ifhp.asp

Canada. Indeed, Canada wishes to inform the Committee that internal governmental records show that, as of the date of this Submission, discretionary medical coverage has been applied for by at least three such migrants with no legal status in Canada, and granted in two of these cases.

13. Canada emphasizes that responsibility for medical care in Canada is primarily borne by the provinces and territories. The federal government's involvement in temporary funding of medical care for a small, defined group of foreign nationals who are primarily refugees or refugee claimants is on an entirely *ex gratia* basis. While Canada acknowledges that this nuance is not relevant for the purposes of its obligations under the *Covenant*, this jurisdictional detail is critical in assessing the author's failure to exhaust domestic remedies, as discussed further below.

III. INADMISSIBILITY OF THE AUTHOR'S COMMUNICATION

A. The author is not a victim of a violation by the State Party, nor the representative of such a person

14. Articles 1 and 2 of the Optional Protocol make clear that a communication alleging a violation of the rights contained in the *Covenant* may only be brought by an individual who claims to be a victim. Rule 96(*b*) of the Committee's Rules of Procedure further provides that a communication must be submitted by a victim of a violation by a State party on their own behalf or by that individual's representative.

Request for Personal Compensation

15. As noted, the author concedes that, with the approval of her first complete application for permanent residence, she has been in receipt of provincial health insurance coverage sufficient to meet all of her medical needs since April 2013. Prior to 2013, the author was unlawfully present in Canada and relied on *pro bono* health care. As will be more fully described in the discussion of the lack of merit of the author's communication, her rights under the *Covenant* have not been violated. There is therefore no basis upon which the author would be entitled to personal compensation.

Request for access to IFHP funding for other potential "undocumented migrants"

16. In its August 14, 2014 Submission, Canada took the position that the author's communication amounts to an *actio popularis* and is therefore inadmissible. Canada relied, and continues to rely, on this Committee's constant views that, "no individual can in the abstract, by way of an *actio popularis*, challenge a law or practice claimed to be contrary to the *Covenant*."[4] Moreover, "[t]he Committee considers that in the absence of specific claimants who can be individually identified, [an] author's communication

[4] *Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, HRC Communication No. 35/1978 (1981), para. 9.2; *E.P. et al. v. Colombia*, HRC Communication No. 318/1988 (1990), para. 8.2; *Raymond-Jacques Picq v France*, HRC Communication No. 1632/2007 (2008), para. 6.2.

amounts to an *actio popularis* and is therefore inadmissible under article 1 of the Optional Protocol".[5]

17. The author replied to this assertion by claiming that the communication is not an *actio popularis* because "the author herself experienced particular consequences of the impugned policy." Canada submits that if the author's personal rights were in any way violated – which is expressly denied – she would at most be entitled to a personal remedy. By seeking a remedy that would impose positive obligations on Canada to provide, on a forward-looking basis, a certain level of health care funding to an undefined class of unknown individuals termed "undocumented migrants", the author's communication passes from the personal to the abstract. Canada submits that the portion of the author's communication that concerns other undocumented migrants and seeks a forward-looking remedy is inadmissible pursuant to Articles 1 and 2 of the Optional Protocol and Rule 96(*b*) of the Rules of Procedure.

B. <u>The author's communication is moot</u>

18. Canada continues to rely on its August 14, 2014 Submission that the author's communication is moot. First, the author's own medical needs are being addressed as she is now entitled to provincial health care. Secondly, the 1957 IFHP which she challenges no longer exists. It has been replaced by the 2012 IFHP, which has been invalidated by order of the Federal Court in the *Canadian Doctors for Refugee Care* decision. There is currently in place a temporary measure, the 2014 Policy.

19. In reply, the author argues that there is no suggestion in Canada's submission that the 2012 IFHP remedied the situation of undocumented migrants. While Canada's August 14, 2014 Submission focused on the fact that the 1957 IFHP no longer exists, the fact is that both the 2012 IFHP and the 2014 Policy have incorporated broad discretionary provisions which are considered by the government to authorize the provision of state-funded health care to undocumented migrants such as the author. In fact, as of the date of this submission, at least three persons who can be considered "undocumented migrants" have applied for and two have been granted medical insurance coverage as a result of the exercise of this discretionary authority by the Minister.

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[5] *Peter Michael Queenan v. Canada*, HRC Communication No. 1379/2005 (2005), para. 4.2. See also the Individual opinion by Committee member Ms. Ruth Wedgwood, appended to the Committee's views, in which she elaborated on this principle in the following manner:

> "Under the complaint procedure of the First Optional Protocol of the International *Covenant* on Civil and Political Rights, the Human Rights Committee is empowered to receive communications from particular individuals who have suffered violations of the *Covenant* through state action. But, even in compelling circumstances, the Committee's procedural rules have not permitted the Committee to engage in a declaratory judgment, or to accept petitions on behalf of a general class of individuals. Unlike some other human rights procedures, such petitions are considered to be *actio popularis* that fall outside the limited terms of the Optional Protocol. See Manfred Nowak, U.N. *Covenant* on Civil and Political Rights: CCPR Commentary (2nd revised edition 2005), at pp. 829-837."

20. The alleged violation of the author's own rights has been remedied because she is now receiving the free health care that she had originally sought. The impugned 1957 IFHP no longer exists, and the 2014 Policy – or any policy or funding scheme that may replace it in the future, subsequent to the eventual ruling of the Federal Court of Appeal – is not before this Committee. In any event, the 2014 Policy includes a broad discretionary provision which is available to prevent serious health risks to other undocumented migrants. The author's communication must therefore be considered inadmissible.

C. <u>The author has not exhausted domestic remedies</u>

21. In its August 14, 2014 Submission, Canada argued that the author's communication is inadmissible for non-exhaustion of domestic remedies.

Request for Personal Compensation

22. Canada argued that the author's request for personal compensation was inadmissible because she never sought monetary compensation for any alleged stress or risk to her health in domestic courts. All that she did in her domestic proceedings was to seek a declaration that her constitutional rights were violated by her ineligibility to receive free health care under the 1957 IFHP.

23. In reply, the author asserts that, since her constitutional claim was unsuccessful, she could not have been granted damages as a remedy for the violation of her rights.

24. In fact, the author's constitutional claim failed because it was fundamentally ill-founded. Health care in Canada is primarily a responsibility of the provinces and territories. The author challenged the 1957 IFHP, which was an *ex gratia* federal funding scheme meant for certain categories of persons, primarily refugees, until they became eligible for provincial health insurance schemes.[6] Moreover, the 1957 IFHP did not include a broad discretionary provision which could possibly authorize the granting of coverage to the author, and was never intended to be a general medical insurance plan for non-citizens.

[6] The origins, development and interpretation of the 1957 IFHP are set out in the Federal Court's decision in *Toussaint v. Canada (Attorney General)*, 2010 FC 810, at paras. 29-51, available at: http://canlii.ca/t/2c43m

25. The author's domestic litigation would have been more properly brought against her ineligibility (at that time) for insured services under the provincial health care plan. Canada notes that, as set out in its August 14, 2014 Submission, the author inquired in June 2009 about coverage under the Ontario Health Insurance Plan (OHIP), but was told that she was not eligible. The author did not seek a formal decision regarding her eligibility or seek judicial review of that response.[7]

26. The author's choice to bring a constitutional challenge to her ineligibility under the federal 1957 IFHP instead of her ineligibility under the provincial plan was fatal to her constitutional claim. As was fully described by the Federal Court of Appeal in its decision:

> [68] It is incumbent on the appellant to establish that the failure of the Order in Council [1957 IFHP] to provide medical coverage to her is the operative cause of the injury to her rights to life and security of the person under section 7 of the Charter: *TrueHope Nutritional Support Limited v. Canada (A.G.)*, 2011 FCA 114 (CanLII) at paragraph 11.
>
> [69] The provision of public health coverage and the regulation of access to it is primarily the responsibility of the provinces and the territories, with the federal government playing a role in funding, the setting of standards under the *Canada Health Act*, R.S.C. 1985, c C-6 and, occasionally, regulation in specific areas under its criminal law power: *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 (CanLII), [2010] 3 S.C.R. 457.
>
> [70] If there is an operative cause of the appellant's difficulties, it is the fact that although she is getting some treatment under provincial law (see paragraph 59, above), that law does not go far enough to cover all of her medical needs.
>
> [71] The appellant has attempted to obtain coverage under the Ontario Health Insurance Plan. Ontario refused coverage because, as a person in Canada contrary to Canadian immigration law, the appellant is not a "resident" of Ontario under R.R.O. 1990, Regulation 552, section 1.4, enacted under the *Health Insurance Act*, R.S.O. 1990, c. H.6. She did not judicially review Ontario's refusal, nor did she argue that Ontario's eligibility requirements violate her rights under sections 7 and 15 of the Charter. Nor did she challenge the *Public Hospitals Act*, *supra*, and argue that it is constitutionally underinclusive or over restrictive. The record reveals no attempt by the appellant to assert section 7 or 15 of the Charter against provincial legislation that limits her access to health care.

[7] Although this is mentioned only in passing in the author's submissions, Canada notes that the author did make an ill-founded human rights complaint, alleging that her ineligibility for OHIP constituted impermissible discrimination on the basis of her citizenship status (specifically, her status as a non-citizen without legal status, as opposed to non-citizens with legal status). This complaint was dismissed: see *Toussaint v. Ontario (Health and Long Term Care)*, 2010 HRTO 2102, available at: http://canlii.ca/t/2d03; *Toussaint v. Ontario (Health and Long-Term Care)*, 2011 HRTO 760, available at: http://canlii.ca/t/fl3dk.

> [72] Further, and most fundamentally, the appellant by her own conduct – not the federal government by its Order in Council – has endangered her life and health. The appellant entered Canada as a visitor. She remained in Canada for many years, illegally. Had she acted legally and obtained legal immigration status in Canada, she would have been entitled to coverage under the Ontario Health Insurance Plan..[8] [emphasis added]

27. Canada submits that the author's exhaustion of the wrong remedy is not an excuse for the non-exhaustion of the appropriate remedy, and that this renders her communication inadmissible for non-exhaustion. Moreover, since the court reports indicate that she was represented by counsel throughout the proceedings, Canada relies on this Committee's consistent views that errors on the part of privately-retained counsel cannot be attributed to the State, and that a failure to pursue effective domestic remedies with due diligence renders the communication inadmissible.[9]

Request for access to IFHP funding for other potential "undocumented migrants"

28. The author also asks that the Committee request that Canada reform the suite of benefits provided to protected persons under the IFHP in order to extend access to health care funding to undocumented migrants.

29. As Canada argued in its August 14, 2014 Submission, the scope of the IFHP and the coverage afforded to foreign nationals under that program are issues that are currently before domestic courts in Canada. The 2012 IFHP was struck down as unconstitutional by the Federal Court in the *Canadian Doctors for Refugee Care* decision, which is being appealed to the Federal Court of Appeal.

30. In reply, the author argues that the litigation has nothing to do with undocumented migrants. Canada submits that this is an oversimplification. While the applicants in the *Canadian Doctors for Refugee Care* litigation were acting on behalf of refugee claimants and others seeking protection in Canada, the Federal Court's findings were much broader. In particular, the Federal Court found that "those seeking the protection of Canada are under immigration jurisdiction, and as such are effectively under the administrative control of the state." This triggered the application of s. 12 of the *Charter*, which protects everyone in Canada from "cruel and unusual treatment or punishment", and led to the Court finding that the 2012 IFHP was cruel and unusual treatment.

31. Canada notes that, if this decision is upheld by the Federal Court of Appeal, any applicant for any immigration status – which would include an undocumented migrant such as the author who was seeking permanent resident status – would be considered to be within the state's control for the purpose of the protection of s. 12 of the *Charter*. Canada asserts

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[8] *Toussaint v. Canada (Attorney General)*, 2011 FCA 213, available at: http://canlii.ca/t/fm4v6

[9] See for example *A.P.A. v. Spain*, HRC Communication No. 433/1990 (1994), at paras. 6.2-6.3.

that while the decision is under appeal, the situation of all foreign nationals who are not eligible for provincial health benefits, including undocumented migrants, is in a state of uncertainty and flux.

32. Moreover, as noted, the 2012 IFHP included a discretionary provision which authorized the Minister to pay the cost of certain medical expenses "in exceptional or compelling circumstances". This provision is considered by Canada to be available to prevent serious health risks to persons such as the author who can be termed "undocumented migrants". Therefore, the situation of undocumented migrants is directly at issue in the Federal Court of Appeal's consideration of the constitutional validity of the 2012 IFHP.

33. Finally, the question of whether "immigration status" or "alienage" should be recognized as a prohibited ground of discrimination under s. 15(1) of the *Charter* has been raised by the Respondents in their Cross-Appeal in the *Canadian Doctors for Refugee Care* case.[10] This of course parallels the author's allegations that her lack of access to paid health care constituted discrimination on the basis of "immigration status" which she alleges violates her rights under Article 26 of the *Covenant.*

34. In the circumstances, Canada asserts that the entitlement to a certain level of health insurance coverage for undocumented migrants is still before the courts. While this is not a case in which the author is personally involved, to the extent that she purports to seek a remedy in respect of other undocumented migrants, their situation has not yet been resolved by domestic courts and therefore cannot be considered by this Committee.

35. Canada requests, therefore, that this Committee declare that this communication is wholly inadmissible for non-exhaustion of domestic remedies, pursuant to Articles 2 and 5(2)(*b*) of the Optional Protocol and Rule 96(*f*) of the Rules of Procedure.

D. <u>The author's communication is incompatible with the provisions of the *Covenant*</u>

36. Finally, Canada asserts that the author's allegations with respect to Articles 2, 6, 7 and 9(1) are inadmissible on the grounds of being incompatible with the provisions of the *Covenant,* pursuant to Article 3 of the Optional Protocol and Rule 96(d) of the Committee's Rules of Procedure.

37. With respect to Article 2, Canada relies on the Committee's consistent views that the provisions of Article 2 lay down general obligations for States parties and cannot, by themselves and standing alone, give rise to a claim under the Optional Protocol.[11]

38. With respect to Article 6, it calls for the right to life to "be protected by law" and stipulates that "no one shall be arbitrarily deprived of his life". It is a negative right, prohibiting laws or actions that cause arbitrary deprivations of life. The interpretation of

[10] See Tab1: *Attorney General of Canada et al. v. Canadian Doctors for Refugee Care et al,* Court File No. A-407-14, Respondents' Memorandum of Fact and Law

[11] See *P.K. v. Canada*, HRC Communication No. 1234/2003 (2007), at para. 7.6; *Hamida v. Canada*, HRC Communication No. 1544/2007 (2010), at para. 7.3.

the scope of the right to life cannot extend so far as to impose a positive obligation on States to provide an optimal level of state-funded medical insurance to undocumented migrants.

39. Similarly, Article 7 is framed in negative terms, stipulating that: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment..." By its terms, Article 7 cannot be interpreted to impose a positive obligation to provide state funding for an optimal level of medical insurance.

40. With respect to Article 9(1), Canada submits that the scope of this right is generally limited to situations involving detention or other deprivations of liberty. While the Committee has in its *General Comment No. 35*[12] sought to expand its interpretation of the scope of the right to protection from "intentional infliction of bodily or mental injury, regardless of whether the victim is detained or non-detained", Canada observes that the focus has remained on the *infliction* of bodily or mental injury. The scope of Article 9 does not reach so far as to impose a positive obligation on States parties to provide an optimal level of state-funded health insurance to foreign nationals unlawfully present in the territory of the State.

41. Finally, Canada submits that the substance of the author's allegations with respect to Articles 6, 7 and 9(1) is that her ineligibility for state-funded health insurance has impaired her health. In this regard, Canada relies on this Committee's views in *Linder v. Finland* that "the right to health, as such, is not protected by the provisions of the *Covenant*".[13] Similarly, in *Cabal and Pasini Bertran v. Australia*, this Committee observed that "there is no such right protected specifically by the provisions of the *Covenant.*"[14] The author's allegations with respect to Articles 6, 7 and 9(1) are therefore inadmissible *ratione materie*, as incompatible with the provisions of the *Covenant*.

E. <u>The author's reliance on the OHCHR's September 21, 2011 letter</u>

42. At paragraphs 59 and 72, the author refers to a letter that her counsel received from the Chief of the Development and Economic and Social Issues Branch of the OHCHR, dated September 21, 2011.[15] In the letter, the OHCHR refers to "the protection of the rights of all migrants, regardless of their status, including the right to healthcare" as forming part of the OHCHR's mandate and as constituting "a thematic priority for our work". The OHCHR indicated that, should the author receive leave to appeal her case to the Supreme Court of Canada, the OHCHR would consider seeking leave to intervene in the case "in order to provide assistance" with the issues raised.

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[12] General Comment No. 35, Article 9 (Liberty and Security of the person), CCPR/C/GC35 (16 December 2014).

[13] HRC Communication No. 1420/2005 (2005), at para. 4.3.

[14] HRC Communication No. 1020/2001 (2003), at para. 7.7.

[15] Letter from Craig Mokhiber to Nathalie Des Rosiers, dated 21 September 2011, available online at: http://www.socialrights.ca/litigation/toussaint/IFH%20APEAL/ohchr%20letter.pdf

43. Canada questions on what basis this letter could possibly be relevant to this Committee's assessment of the admissibility of the author's communication. Canada emphasizes that the primary international convention dealing with the "right to health" does not impose an obligation on States to provide an optimal level of health care fully funded by the State; Article 12 of the *International Covenant on Economic and Social and Cultural Rights* calls for the "progressive realization" of the right to health, and that right has not been interpreted in the expansive way that the author is, in effect, advancing in this case. Whether or not other branches of the OHCHR consider the right to health care of undocumented migrants a priority, Canada emphasizes that the author's communication, alleging violations of Articles 6, 7, 9(1) and 26 of the *Covenant*, is not the appropriate forum for the realization of the right.

44. Canada therefore requests that the author's communication be determined to be wholly inadmissible.

IV. THE COMMUNICATION IS WITHOUT MERIT

45. In the alternative, Canada submits that the author's communication is entirely without merit.

A. Articles 6, 7 and 9(1) of the *Covenant*

46. In the event that this Committee considers that the author's allegations with respect to Articles 6, 7 and 9(1) of the *Covenant* are admissible, Canada suggests that the alleged violations may conveniently be considered together.

47. The author alleges that the denial of access to state-funded health care coverage put her life at risk, and constituted cruel, inhuman or degrading treatment or punishment as well as violating her right to security of the person. In support of her allegations, the author relies entirely upon the findings of fact of the Federal Court in her case.

48. It is Canada's position that, even if the Federal Court's findings are accepted at face value, they do not constitute a violation of the *Covenant*.

i) There has been no denial of access to medical care

49. Canada acknowledges that the Federal Court concluded in its assessment of the facts that:

> The evidence before the Court establishes both that the applicant has experienced extreme delay in receiving medical treatment and that she has suffered severe psychological stress resulting from the uncertainty surrounding whether she will receive the medical treatment she needs. More importantly, the record before the Court establishes that the applicant's exclusion from IFHP coverage has exposed her to a risk to her life as well as to long-term, and potentially irreversible, negative health consequences. The medical evidence before the Court establishes that

> [i]f she were to not receive timely and appropriate health care and medications in the future, she would be at very high risk of immediate death (due to recurrent blood clots and pulmonary embolism), severe medium-term complications (such as kidney failure and subsequent requirement for dialysis), and other long-term complications of poorly-controlled diabetes and hypertension (such as blindness, foot ulcers, leg amputation, heart attack, and stroke).[16]

50. However, a closer look at the facts presented show that, while the author did experience some delay in obtaining some medical care or medications, she was in every important instance able to receive it, despite not having state-funded medical insurance or the ability to pay for the care herself.

51. Canada refers this Committee to the Federal Court of Appeal's understanding of the facts:

> [63] The Federal Court reviewed the appellant's access to health care services and medication (at paragraphs 6 to 9). Before 2006, the appellant was able to work. She earned enough income to pay for the minor medical care and medication that she required. After 2006, her medical needs surpassed her ability to pay but she was still able to obtain some treatment. There is some evidence that she had had access to medical assistance at a community health centre. In 2008 she underwent an operation at Humber River Regional Hospital for the removal of uterine fibroids. She was billed for that surgery, but was unable to pay the bill. Later in 2008, the appellant was admitted to St. Michael's Hospital for ten days for uncontrolled hypertension. In 2009, she was admitted to St. Michael's Hospital for eight days during which a pulmonary embolism was found. She was unable to pay for the medication to treat that, but the hospital gave her a supply.
>
> [64] Evidence was before the Federal Court suggesting that the appellant's access to health care services and medication was impaired. While eventually the appellant did have her uterine fibroids surgically removed at Humber River Regional Hospital in 2006, at first she was denied service at Woman's College Hospital due to her lack of insurance coverage and her inability to pay. In 2008, while at St. Michael's Hospital, a test aimed at determining the cause of her nephritic syndrome could not be performed owing to her inability to pay for treatment and for the medicine that might be necessary if complications arose.

[16] *Toussaint v. Canada (Attorney General)*, 2010 FC 810, at para. 91.

52. Because of its deference to the Federal Court's findings of fact, the Federal Court of Appeal accepted that the author had been subjected to serious health risks.[17]

53. Even accepting that the author suffered serious health risks by the delays and uncertainty in obtaining the required care and medication, this was not as a result of any active deprivation or infliction of harm by the state. Canada emphasizes that, as mentioned by the Federal Court of Appeal, in the province of Ontario where the author lives, hospitals are prohibited by law from denying emergency medical treatment to anyone, when to do so would endanger their life.[18] Therefore, emergency treatment is provided to everyone, regardless of their immigration status. Moreover, Canada observes that the author received required surgery on one occasion (for which she was subsequently billed, and did not pay the bill), and was admitted to the hospital for treatment for 10 days in 2008 and for 8 days in 2009.

54. As further observed by the Federal Court of Appeal: "If there is an operative cause of [the author's] difficulties, it is the fact that although she is getting some treatment under provincial law...that law does not go far enough to cover all of her medical needs".[19]

55. Therefore, the author's communication is based entirely on the complaint that the law did not cover all of her medical needs. The facts, as found by the Federal Court and Federal Court of Appeal, do not support, and indeed directly refute, her allegation that she was "denied access to health care" because of her immigration status.

ii) There is no obligation to provide free, optimal medical care

56. Canada submits that the failure to provide, free of charge, all possible medical care to the author does not constitute a violation of her rights. Put another way, the *Covenant* does not impose a positive obligation on States to provide, and fully fund, an optimal or perfect level of health care and medications.

57. In this regard, Canada refers this Committee to the *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health*.[20] While Canada considers that the General Comment is not binding on States parties, and expressly denies that the General Comment is directly applicable in the present communication, Canada considers that the General Comment is useful in delineating the limits of States parties' obligations.

58. Canada observes that there is nothing in this General Comment that would suggest that a State is required to provide free health care to all persons within its territory. With regard to the "affordability" of health care, the General Comment stipulates that,

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[17] *Toussaint v. Canada (Attorney General)*, 2011 FCA 213, at para. 66.

[18] *Toussaint v. Canada (Attorney General)*, 2011 FCA 213, at para. 59.

[19] *Toussaint v. Canada (Attorney General)*, 2011 FCA 213, at para. 70.

[20] Document E/C.12/2000/4, adopted on 11 August 2000.

> …health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households.[21]

[21] *Ibid*., at para. 12.

59. With regard to those without financial means, the General Comment says that, "...States have a special obligation to provide those who do not have sufficient means with the necessary health insurance and health-care facilities, and to prevent any discrimination on internationally prohibited grounds in the provision of health care and health services, especially with respect to the core obligations of the right to health."[22]

60. Canada emphasizes that, in the author's case, and by her own admission at paragraph 37 of her December 28, 2013 communication, as soon as she applied for and was informed of her eligibility for permanent residence, she became eligible for coverage under the provincial health insurance plan. Canada submits that it was her own delay in regularizing her immigration status that caused the delay in her eligibility for provincial health insurance. In this regard, Canada relies on the finding of the Federal Court of Appeal:

> Further, and most fundamentally, the [author] by her own conduct – not the federal government by its Order in Council – has endangered her life and health. The [author] entered Canada as a visitor. She remained in Canada for many years, illegally. Had she acted legally and obtained legal immigration status in Canada, she would have been entitled to coverage under the Ontario Health Insurance Plan...[23]

61. In the circumstances, to the limited extent that it could be said that *CESCR General Comment No. 14* is relevant to the substance of the author's communication, at most it calls for the availability of health insurance to those who cannot afford it themselves, without discrimination on internationally prohibited grounds. Canada does provide such health insurance for its residents without discrimination; it was only the author's own delay in regularizing her immigration status that she was not entitled to provincial health insurance coverage years earlier. Canada emphasizes that it was the author's own choice not to regularize her status that delayed her access to health insurance.

62. Finally, Canada emphasizes that there is nothing in the General Comment which would imply an obligation on States to provide, free of charge, an optimal level of health insurance coverage. The author's complaint that not <u>all</u> of her medical needs were immediately provided is inconsistent with the progressive realization of the right to health as set out in the *International Covenant on Economic, Social and Cultural Rights* and with the scope of the right as understood in *CESCR General Comment No. 14*.

iii) The Committee's prior views do not support the author's allegations

63. In her communication, the author refers to a number of views of this Committee in other communications to support her position that the *Covenant* imposes obligations on States to protect health and well-being. Canada observes that the vast majority of the views mentioned by the author involved situations of detention. Canada does not dispute that it

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[22] *Ibid*., at para. 19.

[23] *Toussaint v. Canada (Attorney General)*, 2011 FCA 213, at para. 72.

may have different, heightened obligations towards persons who are in detention. In the *Fabrikant v. Canada*[24] communication cited by the author, Canada did not dispute that, in certain circumstances, the denial of medical treatment to a prison inmate in need of such treatment would likely constitute a violation of Articles 7 and 10(1) of the *Covenant*.

64. *Fabrikant* is clearly distinguishable from the author's case, as the author was neither detained nor was she "denied" medical treatment.

65. The author argues that the distinction between detained and non-detained persons when it comes to access to health care is "unreasonable".

66. Canada disagrees, and asserts that there are at least two primary reasons justifying the distinction. First, as a matter of law, Article 10(1) of the *Covenant* imposes particular obligations in regard to persons who are deprived of their liberty. These obligations in turn help inform the interpretation of the scope of Articles 6 and 7 as they relate to detained persons. Secondly, as a matter of fact, detained persons are by virtue of their detention unable to access health care themselves; they are particularly vulnerable and dependant on the State for all of their health care needs.

67. It follows that a deprivation of access of detained persons to required medical care may engage their rights under Articles 6 and 7. Unlike detained persons, the author was free to leave Canada at any time. She was free to apply to regularize her immigration status and become eligible for provincial health care coverage. She was free to access any medical care that she could afford or that would be provided to her *pro bono* by Canadian hospitals and medical professionals. Most importantly, she was not denied access to medical care by virtue of not being eligible for state-funded health insurance; she was only not provided <u>all</u> medical care immediately and free of charge.

68. The author relies on the views of this Committee in one case not involving a detained person, *L.M.R. v. Argentina*.[25] In that case, a hospital refused the author an abortion even though the Courts had agreed that the abortion would have been consistent with Argentine law in the case of the author, who was a mentally-disabled victim of rape. Canada observes that the situation in *L.M.R.* is readily distinguishable from that of the author in the present communication. In *L.M.R.*, the State was considered responsible for its failure to guarantee a procedure to which the author was lawfully entitled. In the case of the author of the present communication, there was no legal right to a particular medical procedure and no denial of access to a particular procedure to which she was lawfully entitled. That not all medical tests or possible treatments may have been provided to the author immediately and free of charge is not comparable to the denial of the medical procedure in *L.M.R.*

[24] *Fabrikant v. Canada*, HRC Communication No. 970/2001 (2003).

[25] HRC Communication No. 1608/2007 (2011).

69. Canada submits that the author's communication is more comparable to that of the author in *Linder v. Finland*.[26] In that case, the author, who was a Finish national, complained of Finland's failure to pay the medical expenses he incurred while in Germany. The facts indicated that the author would have been compensated by Finland for medical expenses in Germany had he provided proof that he was still a resident of Finland; otherwise, European Union citizens working abroad enjoy social security in the country of employment. This Committee wrote that "the author claims to be a victim of violations by Finland of his right to health, given the State party's failure to provide him with emergency medical assistance, and to cover his medical expenses in Germany, following his hospitalization there. The Committee observes that the right to health, as such, is not protected by the provisions of the *Covenant*" and considered the communication as inadmissible *ratione materie*, as incompatible with the provisions of the *Covenant*.[27]

70. The author's communication, while not expressly invoking a "right" to health care, is effectively making the same complaint as did the author in *Linder*; that is, that not all of her medical expenses were provided by the State. Canada submits that the author's communication is, in substance, a disguised attempt to invoke a right to health. What is more, the right she invokes is beyond the scope of how the right to the highest attainable standard of health is understood at international law. As such, it must be found to be inadmissible, or in the alternative, wholly unsubstantiated.

B. Article 26 of the *Covenant*

71. The author argues that her exclusion from IFHP coverage constituted discrimination on the basis of "immigration status" or "citizenship status". She submits that these should be recognized as prohibited grounds of discrimination under the *Covenant*.

72. Canada will explain that in the province where she resides, Ontario, health insurance coverage is provided to citizens and non-citizens, and foreign nationals with a wide variety of immigration statuses. The only reason for the exclusion of undocumented migrants such as the author is that they do not have lawful residence. Canada takes the position that legality of residence is a neutral, objective requirement that is not a prohibited ground of discrimination and does not come within the scope of "other status" under Article 26. The differential treatment on the basis of legality of residence is reasonable and objective and in pursuit of a legitimate aim. It is in no way violative of the *Covenant* to expect undocumented migrants such as the author to come forward and regularize their status before claiming the benefits of lawful residence.

i) The right to equality in Canada and its application to the author's case

73. Section 15 of the *Charter* protects the right to equality in Canada. It reads as follows:

[26] HRC Communication No. 1420/2005 (2005).

[27] *Ibid*., at para. 4.3.

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

74. In numerous cases, the Supreme Court of Canada has indicated that the list of enumerated grounds is not closed and has expanded it to include analogous grounds such as citizenship, marital status, sexual orientation and "aboriginality-residence".

75. The Supreme Court of Canada has established the principle that analogous grounds must be similar to the enumerated grounds in that they identify a basis for stereotypical decision-making concerning a group that has historically suffered discrimination based on a personal characteristic that is either immutable (cannot change) or constructively immutable (changeable only at unacceptable cost to personal identity).[28]

76. In the author's case, the Federal Court of Appeal rejected the author's argument that "immigration status" should be recognized as an analogous ground of discrimination. The Federal Court of Appeal considered that "immigration status" was not immutable, in that it was subject to change, and could be changed at no cost to personal identity. Moreover, immigration status – in the author's case, the status of being in Canada illegally – is a status that the government has a legitimate interest in expecting the person to change, the Federal Court of Appeal opined.[29]

77. Canada submits that this Committee ought to likewise consider that the discrimination alleged by the author does not fall within the scope of Article 26 of the *Covenant*, as it is not based on a prohibited ground.

ii) Differential treatment based on legality of residence not a prohibited ground of discrimination

78. Canada reminds the Committee that the author was considered to be excluded from the 1957 IFHP because she fell outside its intended scope, the IFHP being an *ex gratia* federal program directed primarily at refugees and others in need of international protection. Aside from this one *ex gratia* program, the primary providers of health insurance in Canada are the governments of the provinces and territories.

79. Foreign nationals who may be ineligible for temporary coverage provided by the federal government under the IFHP may qualify for provincial health insurance. Canada recalls that the author was initially found to be excluded from OHIP because she did not meet the definition of "resident" under the applicable regulations. The regulations which

[28] *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at paras. 13-15.

[29] *Toussaint v. Canada (Attorney General)*, 2011 FCA 213, at para. 99.

pertain to OHIP coverage list a number of different immigration categories as being eligible to meet the requirement of "residence" within the province. The pertinent categories are underlined for the Committee's convenience:

> **1.3** (1) Upon application to be an insured person, a person must meet the following requirements in order to be considered a resident, unless subsection (2) or another provision of this Regulation provides otherwise:
>
> 1. The person must possess an eligible status set out in section 1.4. A person who has an eligible status, then loses it, is no longer a resident, but may regain resident status at a later date by meeting the necessary requirements at that time.
>
> 2. The person's primary place of residence must be in Ontario. For this purpose, the General Manager will consider a child under 16 years old to have the primary place of residence of a person who has lawful custody of the child unless the General Manager has information to the contrary. O. Reg. 133/09, s. 2.
>
> (2) The following persons are residents, even if they do not meet the other requirements in this Regulation, and they are not affected by any of the other rules in this Regulation regarding recognition as a resident, other than the requirements under sections 3 and 4:
>
> 1. Inmates at a correctional institution that is established or designated under Part II of the *Ministry of Correctional Services Act*.
>
> 2. Children who are in the care of a children's aid society under the *Child and Family Services Act*.
>
> 3. Young persons who are detained in a place of temporary detention or committed to a place of secure or open custody under Part IV of the *Child and Family Services Act*.
>
> 4. People who are present in Ontario because they have a work permit issued under the program of the Government of Canada known as the "Seasonal Agricultural Worker Program". O. Reg. 133/09, s. 2; O. Reg. 253/09, s. 1.
>
> 1.4 A person cannot be recognized as a resident, unless the person has one of the following eligible statuses:
>
> 1. Being a Canadian citizen.
>
> 2. Being a landed immigrant under the former *Immigration Act* (Canada), or a permanent resident under the *Immigration and Refugee Protection Act* (Canada).
>
> 3. Being registered as an Indian under the *Indian Act* (Canada).
>
> 4. Being a "protected person", as that term is used in the *Immigration and Refugee Protection Act* (Canada).
>
> 5. Being a person who has submitted an application for permanent residence in Canada to the proper federal government authority, even if the application has not yet been approved, as long as Citizenship and Immigration Canada has confirmed that the person meets the eligibility requirements to apply for permanent residency in Canada, and the application has not yet been denied.
>
> 6. Being a person who holds a valid work permit or other document issued under the *Immigration and Refugee Protection Act* (Canada) that permits the person to work in Canada, if the person also has a formal agreement in place to work full-time for an employer in Ontario and is working under that agreement, and if the work permit or other document issued under that Act or a letter provided by the employer or other document provided by the employer,
>
> i. sets out the employer's name,
>
> ii. states the person's occupation with the employer, and

iii. states that the person will be working for the employer for no less than six consecutive months.

7. Being a person who holds a valid work permit or other document issued under the *Immigration and Refugee Protection Act* (Canada) that permits the person to work at an occupation in Canada while self-employed, if the person is self-employed full-time in that occupation in Ontario and will continue to be so for no less than six consecutive months.

8. Being a member of the clergy of a religious denomination, if the member has finalized an agreement to minister to a religious congregation or group in Ontario for at least six months, as long as the member is legally entitled to stay in Canada. The main duties of ministering to the congregation or group must be preaching doctrine, performing functions related to gatherings of the congregation or group or providing spiritual counselling.

9. Being the spouse or a dependant of a person who meets the requirements under paragraph 6 or 7 or of a member of the clergy who meets the requirements provided for in paragraph 8, as long as the spouse or dependant is legally entitled to stay in Canada.

10. Having a valid "temporary resident permit" under the *Immigration and Refugee Protection Act* (Canada), if the permit is for a member of an "inadmissible class", with a "case type" of 86, 87, 88, 89, 90, 91, 92, 93, 94 or 95, or, if the permit is issued for the purpose of adoption to a child mentioned in subsection 6 (2), (3) or (4), "case type 80".

11. Being a person who has submitted an application for Canadian citizenship under section 5.1 of the *Citizenship Act* (Canada) to the proper federal government authority, even if the application has not yet been approved, as long as Citizenship and Immigration Canada has confirmed that the person meets the eligibility requirements to apply for citizenship under that section and the application has not yet been denied.

12. Having a valid work permit under the Government of Canada program known as "Live-in Caregiver Program".

13. Being a child born out of country to a mother who is receiving insured services referred to in section 1.9, if at the time the mother left Ontario to receive those insured services she was pregnant with that child and if at the time of the child's birth the mother was receiving the insured services out of country. [30]

80. As is readily apparent from the list of eligible residents, a wide range of immigration statuses entitle persons to OHIP coverage. They can be a Canadian citizen, a permanent resident or an applicant for permanent residence who has been determined to be eligible for permanent residence, a protected person, a holder of a valid work permit, a live-in caregiver with a valid work permit, an applicant for citizenship who has been determined eligible for citizenship, a spouse or dependent of the holder of a valid work permit, and so on.

81. The only commonality between the different statuses is that they are all lawful. There is no distinction made between citizens and non-citizens, or between different categories of immigrants.

82. Persons such as the author who are "undocumented migrants" are not eligible for OHIP coverage for the simple reason that they are not lawfully present. The author entered Canada lawfully as a visitor, but then remained without lawful authorization. She worked for a number of years – but without a work permit. As soon as she properly applied for and was determined eligible for permanent residence, she became eligible for OHIP

[30] Regulation 550, R.R.O. 1990 to the *Health Insurance Act*, R.S.O. 1990, c. H.6.

coverage. Her previously "undocumented" status, which was in her power to change and which she did ultimately change, cannot be considered a prohibited ground of discrimination. The author made a choice as to whether and when she would apply to regularize her status. In that regard, Canada refers this Committee to its views in the case *Castell Ruiz et al. v. Spain*,[31] where it considered that a distinction in treatment based on an individual's choice (in that case, the choice of type of employment contract) did not constitute "discriminatory treatment in accordance with the individual attributes set forth in Article 26 of the *Covenant*."

83. Moreover, Canada submits that the requirement that a person have lawful residence in Canada is a neutral requirement that is not related to citizenship, color or national origin or any other prohibited ground of discrimination. Specifically, lawfulness of residence is not a prohibited ground of discrimination, and does not come within the meaning of "other status" within the scope of Article 26.

84. Canada relies on this Committee's views in the case *Shergill v. Canada*.[32] The authors in that communication claimed that the 10-year residency condition for eligibility for a certain type of pension imposed upon immigrants from countries with which Canada had a reciprocal social security agreement was discriminatory on the grounds of "other status". The Committee did not accept that the differential treatment was based on any of the grounds listed in Article 26 or on "other status" within the meaning of the Article. The Committee determined that the communication was inadmissible.

85. Canada submits that the residency requirements in *Shergill* and in the author's case are analogous. In *Shergill*, the length of residency did not constitute a distinction based on "other status"; the Committee ought to likewise find, in the author's case, that the legality of residency does not come within the scope of Article 26.

iii) Differential treatment is reasonable and objective in pursuit of a legitimate aim

86. In the alternative, Canada submits that if the legality of residence comes within the scope of "other status", then the differential treatment clearly does not amount to discrimination within the meaning of Article 26 of the *Covenant*.

87. The Committee has previously found that "its jurisprudence permits differential treatment only if the grounds therefor are reasonable and objective" [33] and that "not all differentiation constitutes discrimination if it is based on objective and reasonable criteria and the purpose sought is legitimate under the *Covenant*."[34]

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[31] HRC Communication No. 1164/2003 (2006), at para. 7.3.

[32] HRC Communication No. 1506/2006 (2008).

[33] *Sprenger v. The Netherlands*, HRC Communication No. 395/1990 (1992), at para. 7.4.

[34] *Gillot et al v. France*, HRC Communication No. 932/2000 (2002), at para. 13.5.

88. Canada submits that the differential treatment experienced by the author is clearly reasonable and objective and does not amount to prohibited discrimination within the meaning of article 26 of the *Covenant*.

89. In particular, Canada submits that it is reasonable to require that persons be lawfully resident to be eligible for state-funded health insurance coverage, such as the provincial OHIP. Canada recalls, as recognized by this Committee, that the *Covenant* does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory.[35] As a person without lawful authorization to remain in Canada, the author would not have been subjected to any of the criminal, security or medical screening that lawful immigrants undergo before they are permitted to remain in Canada. While hundreds of thousands of prospective immigrants apply each year and wait for approval for the privilege to enter and to work in Canada lawfully, the author simply remained without authorization and worked illegally for a number of years. As someone who did not have lawful status to remain in Canada and did not have a work permit to work in Canada, she would not have paid any income taxes out of her earnings. Unlike lawful immigrants with work permits who are eligible for OHIP coverage, she would not have made any contribution to the insurance scheme from which she sought to benefit.

90. In *Oulajin and Kaiss v. The Netherlands*, a case in which the Committee came to the view that there had been no violation in the allocation of child benefits, the Committee considered "that the scope of article 26 of the *Covenant* does not extend to differences resulting from the equal application of common rules in the allocation of benefits."[36]

91. In the case of the allocation of state-funded health insurance in Canada, such as OHIP, the same rules for eligibility are applied, regardless of citizenship or type of immigration status. There is nothing unreasonable or arbitrary in expecting that persons wishing to remain in Canada do so in compliance with objective and reasonable immigration laws. There is nothing unreasonable or arbitrary in encouraging undocumented migrants such as the author to come forward and regularize their status before claiming the benefits of lawful residence. Encouraging compliance with immigration laws is a legitimate aim.

92. Finally, Canada submits that due deference is owed to States in their determination of the allocation of scarce economic resources in light of competing societal interests. In *Oulajin and Kaiss*, members Herndl, Müllerson, N'Diaye and Sadi stated the following, in an appended opinion:

> It is obvious that while article 26 of the *Covenant* postulates an autonomous right to non-discrimination, the implementation of this right may take different forms, depending on the nature of the right to which the principle of non-discrimination is applied.

[35] *General Comment No. 15: The position of aliens under the Covenant* (1986).

[36] *Oulajin and Kaiss v. The Netherlands*, HRC Communication No. 426/1990 (1992), at para. 7.5.

> With regard to the application of article 26 of the *Covenant* in the field of economic and social rights, it is evident that social security legislation, which is intended to achieve aims of social justice, necessarily must make distinctions. It is for the legislature of each country, which best knows the socio-economic needs of the society concerned, to try to achieve social justice in the concrete context. Unless the distinctions made are manifestly discriminatory or arbitrary, it is not for the Committee to re-evaluate the complex socio-economic data and substitute its judgement for that of the legislatures of States parties.[37]

93. Canada reiterates that undocumented migrants such as the author are entitled to emergency or urgent medical care under provincial legislation, such as the Ontario *Hospitals Act*. Moreover, while there was no discretion provided for in the 1957 IFHP, both the 2012 IFHP and the 2014 Policy include a broad discretionary provision authorizing the Minister to provide free, state-funded medical insurance coverage to undocumented migrants such as the author in "exceptional or compelling circumstances". This method of delivering medical care to undocumented migrants in Canada is a legitimate, reasonable and proportionate policy choice made by Canada to which it is owed significant deference by this Committee.

94. In conclusion, Canada rejects any suggestion that it discriminates against non-citizens or immigrants. Canada takes pride in its identity as a country built by immigrants, a country that is welcoming to refugees, skilled workers and entrepreneurs alike, a country that relies on foreign workers to support its economic progress. It prides itself on its multicultural heritage and welcomes several hundred thousand new citizens each year. The volume of immigration applications and the imperatives of criminal, security and medical screening in order to ensure the safety of Canadian society all require that immigration to Canada proceed in an orderly, lawful fashion. Undocumented migrants who circumvent the laws and live and work in Canada without lawful authorization undermine these imperatives. While there is no doubt that undocumented migrants in need of health care are deserving of dignity and concern, and that emergency or life-saving medical care must be provided to them, it cannot be considered discriminatory within the meaning of Article 26 of the *Covenant* to not provide them with insurance coverage for <u>all</u> possible health care, free of charge, until they choose to come forward and regularize their status.

V. CONCLUSION

95. In conclusion, Canada requests that the Committee view the author's communication as inadmissible on the grounds that:
    - she is not a victim of a violation of rights and her purported representation of "undocumented migrants" is an *actio popularis*;
    - her communication is moot, because, on a personal level, she is now receiving provincial health insurance coverage for all of her health care needs. The communication is moot with respect to other "undocumented migrants" because

[37] *Oulajin and Kaiss v. The Netherlands*, *supra*, Appendix.

they are now eligible to apply for discretionary, federally-funded insurance coverage under the current IFHP;

● she has not exhausted domestic remedies, since she never sought financial compensation in domestic courts and in fact pursued the wrong remedy, an error that cannot be attributable to the State. Moreover, the scope of Canada's constitutional obligations to provide health insurance under the IFHP, including the discretionary provision that applies to other "undocumented migrants", is currently before the Federal Court of Appeal; and

● the allegations are incompatible with the provisions of the *Covenant*, which does not include a right to health and cannot be interpreted to include a positive obligation to provide comprehensive health insurance coverage to foreign nationals unlawfully present in the territory of a State.

96. In the alternative, Canada requests that the Committee view the author's communication to be wholly without merit. With respect to Articles 6, 7 and 9(1), as found by the Federal Court of Appeal, the substance of the author's claim is that although she did obtain medical treatment and medications prior to becoming eligible for state-funded health insurance, the law did "not go far enough to cover all of her medical needs". The *Covenant* does not impose a positive obligation to provide an undocumented migrant with all of her needs. Moreover, it was only the author's delay in regularizing her immigration status that caused the delay in her eligibility for provincial health insurance coverage. These facts do not support a finding that there has been any violation of Articles 6, 7 and 9(1).

97. In addition, the author has not substantiated her allegation that her exclusion from the 1957 IFHP constituted discrimination on the grounds of "immigration status" or "citizenship status" in violation of Article 26. In the province where she resides, Ontario, health insurance coverage is provided to citizens and non-citizens, and foreign nationals with a wide variety of immigration statuses. The only reason for the exclusion of undocumented migrants is that they do not have lawful residence. Legality of residence is a neutral, objective requirement that is not a prohibited ground of discrimination and does not come within the scope of "other status" under Article 26. The differential treatment on the basis of legality of residence is reasonable and objective and in pursuit of a legitimate aim. It is in no way violative of the *Covenant* to expect undocumented migrants such as the author to come forward and regularize their status before claiming the benefits of lawful residence.

Ottawa, Canada

April 2, 2015

Attachment:

Tab1: *Attorney General of Canada et al. v. Canadian Doctors for Refugee Care et al,* Court File No. A-407-14, Respondents' Memorandum of Fact and Law.