LEGAL OPINION SUBMITTED BEFORE THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

REGARDING ISSUES RAISED IN *NELL TOUSSAINT V CANADA*

COMMUNICATION NO. 2348/2014

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I. INTRODUCTION

A. Relevant expertise

1. Amnesty International Canada ("AI") has been asked by the author of the communication to provide brief submissions on issues of law raised in the present case. AI is pleased to present these submissions in the hope that they may be of assistance to the Human Rights Committee (the "Committee") in addressing issues of critical importance both in Canada and globally. AI's submissions have been prepared jointly by the International Secretariat and by Amnesty International Canada. The former has extensive experience and knowledge of relevant international and comparative human rights standards and their application to migrants.[1] The latter has extensive experience in the issues of domestic law raised in this case as well as in the application of international human rights law in Canada. AI has been granted standing before domestic courts in Canada in a number of cases dealing with the rights of refugees, asylum seekers and other migrants.[2] In all of these cases, AI has been recognized for its unique expertise on the domestic implementation of international human rights in Canada.

B. Summary of argument

2. Human rights are not reserved for citizens. The protections enshrined in the *International Covenant on Civil and Political Rights* (ICCPR) are owed to everyone on a State Party's territory or within its jurisdiction, whatever their circumstances or administrative status.[3] States may choose to admit, deny entry to, or return migrants, but they must respect human rights in the process. Migrants without legal immigration status ("irregular migrants") are among the most marginalized groups in the world. They often face specific health risks, such as those resulting from exploitative working conditions or precarious housing,[4] and experience systemic barriers to the right of access to justice.[5] AI submits that any policy that denies health care necessary for life to irregular migrants on the basis of their status is inconsistent with the ICCPR.

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1 For an overview of our work in this field, see Amnesty International, "People on the Move" (2015) online: <https://www.amnesty.org/en/what-we-do/people-on-the-move/>.

2 AI was recently granted standing by the Federal Court of Appeal as an intervener in upcoming appeal in the case of *Canadian Doctors for Refugee Health Care* which deals with the exclusion of some refugees and asylum seekers from the Interim Federal Health Programme (IFHP) and to which Canada makes frequent reference in its response to the present communication.

3 François Crépeau, "Mainstreaming a human rights-based approach to migration within the High Level Dialogue" (2013) online: <http://oppenheimer.mcgill.ca/IMG/pdf/Mainstreaming_a_Human_Rights-Based_Approach_to_Migration.pdf>.

4 European Union Agency for Fundamental Rights, "Migrants in an Irregular Situation: Access to Healthcare in 10 European Union Member States" (2011) online: <http://fra.europa.eu/en/publication/2012/migrants-irregular-situation-access-healthcare-10-european-union-member-states>.

5 *Supra* note 3.

3. AI makes no submissions on the facts as presented in the author's communication. For the purposes of these submissions, AI relies on the factual findings of the Federal Court of Canada (FC) which, on the basis of extensive evidence, found that the author was denied health care coverage under the Interim Federal Health Program (IFHP) because of her immigration status and that her exclusion from the program "exposed her to a risk to her life as well as to long-term, and potentially irreversible, negative health consequences."[6] These findings of fact were not disturbed by the Federal Court of Appeal (FCA).

4. AI advances four principal points in this submission: (i) the author's communication is admissible; (ii) differential treatment of irregular migrants amounts to unlawful discrimination on the basis of a ground captured by Article 26; (iii) States Parties are required to adopt positive measures to provide the necessities of life under Article 6; and (iv) Canadian law, when interpreted in line with the ICCPR, is capable of providing effective remedies for irregular migrants deprived of necessary health care. This communication also offers the opportunity for this Committee to affirm substantive equality for all migrants under international human rights law regardless of immigration status.

II. ADMISSIBILITY

A. Exhaustion of domestic remedies

5. AI submits that the author has exhausted her domestic remedies because leave to appeal the FCA's decision to the Supreme Court of Canada (the "Supreme Court") was denied, leaving her with no further domestic recourse to her challenge of the IFHP. The requirement to exhaust domestic remedies is satisfied when the author of a communication has brought his or her claim to "the attention of the relevant national authorities, up to the highest available instance in the State concerned."[7] The issue of exhaustion of domestic remedies is "intimately linked to the substantive issues."[8]

6. The federal government has the constitutional authority to provide health care to irregular migrants if it chooses to do so under the IFHP. For this reason, the author was under no obligation to challenge her ineligibility for insured coverage under the provincial health care system because the federal challenge was an effective means of raising the substance of the allegations before a court capable of addressing the rights violations at issue. Canada, however, argues that the author

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

7 Office of the United Nations High Commissioner for Human Rights ,"Human Rights Treaty Bodies – Individual Communications" online: <http://www.ohchr.org/>.

8 *Cedeno v Bolivarian Republic of Venezuela*, Communication No 1940/2010 at para 6.3.

has not exhausted all domestic remedies because the constitutional division of powers assigns primary or concurrent responsibility for health care to the provinces, requiring her to challenge her exclusion from provincial health coverage. AI submits that domestic remedies have been exhausted when a claim advanced under domestic law has raised the substance of the alleged violation and requested a remedy capable of redressing the violation. This determination must be made in the context of the State Party's existing programs and the assumed responsibilities of each level of government.

7. In AI's view, domestic remedies have been exhausted because challenging the exclusion of the author from the IFHP is the most effective means of securing access to necessary health care for irregular migrants in Canada. The Supreme Court of Canada has explained that, "with the exception of hospitals, which are the responsibility of the provinces by virtue of s. 92(7) of the *Constitution Act, 1867*, health is not a matter assigned solely to one level of government." [9] While provinces have responsibility for provincial Medicare programs, the federal government has primary responsibility for immigration matters and has, in practice, assumed responsibility for providing health care to migrants by way of the IFHP. Challenging the policy of the federal government to deny IFHP coverage to irregular migrants in order to encourage compliance with immigration laws is an effective means of raising the substance of the allegations related to violations of the right to life, security of the person and non-discrimination before domestic courts and ensuring that the State Party has been afforded the opportunity to remedy these violations.

8. It is generally agreed that where several potential remedies may exist to the same substantive violation, an alleged victim is only required to have used one of them in order to exhaust domestic remedies. Seeking another remedy which would serve the same purpose is not required. It is for the author to select the remedy that is most appropriate and provides the possibility of redress in his or her case.[10] For these reasons, this Committee should find that the author has exhausted her domestic remedies.

B. *Actio popularis*

9. The text of the *Optional Protocol to the International Covenant on Civil and Political Rights* (the "Optional Protocol") and this Committee's jurisprudence affirm that a violation need not be ongoing for a communication to be considered. Canada has argued that the author's communication is inadmissible as *actio popularis* because the violation of her right is not ongoing and because she is requesting a remedy requiring the State Party to change its policy in order to prevent similar violations from occurring to others. The Optional Protocol, however, states that

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[9] *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 24, citing *Schneider v The Queen*, [1982] 2 SCR 112, at pp 141-42.

[10] *Riad and Idiab v Belgium* at para 84; *Kozacıoğlu v Turkey* [GC] para 40 et seq; *Micallef v Malta* [GC] at para 58; *Jasinskis v Latvia* at para 50, 53-54.

communications may be submitted by or on behalf of "individuals who claim that any of their rights enumerated in the Covenant have been violated."[11] The victim does not need to be experiencing the violation at the time the communication is being considered.[12]

10. It is only in the context of an absence of specific claimants who can be individually identified as having had their rights violated that a communication amounts to an *actio popularis* and is inadmissible under Article 1 of the Optional Protocol.[13] Where an individual has been directly harmed by a violation of his or her rights, the victim has standing to submit a communication. The individual may also seek an effective remedy, including measures that ensure a State Party's policies are in compliance with the Covenant so that similar violations do not occur the future, pursuant to Article 2, paragraph 3(a) of the Covenant.

11. This Committee has recognized the standing of victims of violations who, because of changes to their personal circumstances, are no longer being directly affected to seek by way of remedy, measures to ensure that similar violations do not occur in the future. In *Karen Noelia Llantoy Huamán v Peru*, for example, the State Party was found to have failed to provide necessary medical care to protect the life of the author during the time of her pregnancy.[14] The author was no longer at risk, yet the communication was found to be admissible. The Committee held that "[t]he State party has an obligation to take steps to ensure that similar violations do not occur in the future."[15] For these reasons, Canada's argument that the author's communication is inadmissible as *actio popularis* is inconsistent with this Committee's jurisprudence.

III. THE RIGHT TO EQUALITY AND NON-DISCRIMINATION

12. The denial of access to necessary health care to irregular migrants by a State Party to the ICCPR amounts to unlawful discrimination. AI submits that: (i) the exclusion of irregular migrants from the IFHP constitutes unequal treatment based on a ground captured by Article 26; and that (ii) the unequal treatment is not based on reasonable and objective criteria and therefore cannot be justified.

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11 *Optional Protocol to the International Covenant on Civil and Political Rights*, art 2 [emphasis added].
12 *Van Duzen v Canada*, Communication No. 50/79, 7 April 1982.
13 *Peter Michael Queenan v Canada*, Communication No 1379/2005, UN Doc CCPR/C/84/D/1379/2005 (2005).
14 *Karen Noelia Llantoy Huamán v Peru*, Communication No 1153/2003, UN Doc CCPR/C/85/D/1153/2003 (2005).
15 *Ibid* at para 8.

A. Unequal treatment based on a ground captured by Article 26

13. AI submits that irregular migrants are included within Article 26's final enumerated ground on which discrimination is prohibited: "other status." Canada denied Ms. Toussaint access to necessary health care under the IFHP on the basis of her immigration status because it categorizes her as an "illegal" non-citizen, as opposed to one of four categories of immigrants identified for coverage the policy. This distinction, however, is inconsistent with international human rights law doctrine, and perpetuates stigma that further marginalizes migrants.

14. International human rights principles affirm that States must protect all non-citizens within their territory and under their jurisdiction from discrimination, including irregular migrants. While irregular migrants are not specifically enumerated as a protected group, it is well recognized in international law that non-citizens fall within the "other status" category of the non-discrimination provisions of those same treaties.[16] According to the Committee on Economic, Social and Cultural Rights, "[t]hese grounds are commonly recognised when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalisation."[17] This Committee has stressed that States Parties have the duty to protect the inherent right to life and security of the person of non-citizens, including migrants, who must "receive the benefit of the general requirement of non-discrimination."[18] This Committee has also asserted that "the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens."[19]

15. Similarly, the Committee on the Elimination of Racial Discrimination has noted that "xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism."[20] It has stated that States Parties to the

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16 Committee on the Rights of the Child, *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 39th Sess, UN Doc CRC/GC/2005/6 (1 September 2005) at paras 12, 18; Committee on the Rights of the Child, *Concluding Observations: Czech Republic*, 32nd Sess, UN Doc CRC/C/15/Add.201 (18 March 2003) at para 54; Committee on the Rights of the Child, *Concluding Observations: Jordan*, 43rd Sess, UN Doc CRC/C/JOR/CO/3 (29 September 2006) at para 23; Committee on the Rights of the Child, *Concluding Observations: Qatar*, 52nd Sess, UN Doc CRC/C/QAT/CO/2 (14 October 2009) at paras 25-25, 60-61; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland*, UN Doc E/C.12/1994/19 (21 December 1994) at para 28; Committee on Economic, Social and Cultural Rights, *Concluding Observations on the fifth periodic Report of Norway*, UN Doc E/C.12/NOR/CO/5 (13 December 2013) at para 21; Committee on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination: Canada*, 60th- 61st Sess, UN Doc A/57/18 at para 337; Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Norway*, 78th Sess, UN Doc CERD/C/NOR/CO/19-20 (8 April 2011) at para 9; Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Germany*, 73rd Sess, UN Doc CERD/C/DEU/CO/18 (22 September 2008) at para 29.

17 UN Committee on Economic, Social and Cultural Rights, *General Comment No 20: Non-discrimination in economic, social and cultural rights*, 42nd Sess, UN Doc E/C.12/GC/20 (2 July 2009) at para 27.

18 UN Human Rights Committee, *General Comment No 15: The position of aliens under the Covenant,* 27th Sess (30 September 1986) at paras 2, 7.

19 *Ibid* at para 2.

20 UN Committee on the Elimination of Racial Discrimination, *General Recommendation 30 on discrimination against non-citizens*, 65th Sess (19 August 2004), preamble [*General Recommendation 30*].

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) must "respect the right of non-citizens to an adequate standard of physical and mental health by, *inter alia*, refraining from denying or limiting their access to [...] health services."[21] Health care "must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination."[22] The inclusion of irregular migrants as a protected group from discrimination is also consistent with Canada's other obligations under the human rights instruments it has ratified, including the UN Charter,[23] the ICESCR,[24] the ICERD,[25] the Convention on the Rights of the Child,[26] and the CEDAW.[27]

16. Canada's categorization of irregular migrants as "illegal" does not waive its obligation to treat this group as one that is protected from discrimination under Article 26. The use of the term "illegal" is incorrect and inappropriate.[28] It reinforces negative stereotypes against migration and legitimates a discourse of the criminalization of migration.[29] The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families has stated that using "the term 'illegal' to describe migrant workers in an irregular situation is inappropriate and should be avoided as it tends to stigmatize them by associating them with criminality."[30] Regardless of terminology, all migrants, whether regular or irregular, are protected under, and entitled to, all international human rights, including the right to be free from discrimination.[31] The Committee on Economic, Social and Cultural Rights has also specified that States Parties to the ICESCR have an obligation to refrain from denying access to preventative, curative, and palliative health services to migrants in irregular situations.[32] AI submits that in keeping with this body of doctrine and jurisprudence this Committee should affirm that Article 26 extends to irregular migrants.

B. Unlawful discrimination against irregular migrants

17. Differential treatment of irregular migrants is prohibited under Article 26 where the criteria for differentiation are neither (i) reasonable nor objective, nor (ii) in pursuit of a legitimate aim. This

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21 *Ibid* at para 36.

22 UN Committee on Economic, Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, 22nd Sess, UN Doc E/C.12/2000/4 (11 August 2000) at para 12(b), see also paras 43(a), 43(f).

23 UN Charter arts 1(3), 55.

24 ICESCR art 2(2).

25 ICERD, preamble; see also art 5.

26 CRC, art 2

27 CEDAW art 12.

28 *Supra* note 3.

29 *Ibid*.

30 UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, *General Comment No 2 on the rights of migrant workers in an irregular situation and members of their families*, UN Doc CMW/C/GC/2 (28 August 2013) at para 4.

31 See International Commission of Jurists, *Migration and International Human Rights Law: A Practitioner's Guide* (Geneva: International Commission of Jurists, 2014) at 258.

32 *Supra* note 22 at para 34.

Committee has stated clearly that, where restrictions are made to international human rights, "States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights."[33]

(i) Reasonability and objectivity

18. Irregular migrants are entitled to the same treatment as other migrants unless the State Party to the ICCPR can establish that the criteria for treating them differently is reasonable and objective. Canada submits that even if this Committee finds undocumented migrants within the purview of Article 26, "it is reasonable to require that persons be lawfully resident to be eligible for state-funded health insurance coverage, such as the provincial OHIP."[34] AI submits that these criteria for differentiation are neither reasonable nor objective because they are based on an arbitrary distinction grounded in stereotypes and xenophobia, rather than on reliable evidence.

19. In arguing that the author did "not make any contribution to the insurance scheme from which she sought to benefit" and as a result was undeserving of access to necessary health care, Canada perpetuates the myth that irregular migrants are unfairly taking advantage of and overburdening health care systems.[35] This myth, as the Office of the High Commissioner for Human Rights has noted, has long been refuted through studies establishing the valuable contributions that migrants, regardless of their status, make to their host countries.[36] Irregular migrants, by definition, have yet to gain status in their host countries and are usually unable to make contributions to government-administered social programs, by way of income tax or other mechanism of collecting contributions. The other categories of migrants included within the ambit of IFHP coverage, such as victims of human trafficking, also cannot make contributions to government health insurance schemes at the time of their application to the program. It is neither reasonable nor objective to exclude irregular migrants from the IFHP on the basis of circumstances over which they have no control.

20. In recent years, a consensus has emerged among international human rights bodies that urgent action is required to affirm and protect the human rights of irregular migrants who regularly face discriminatory barriers to accessing necessary services. In 2008, the World Health Assembly recommended that States should promote migrant-sensitive health policies and non-

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33 UN Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) at para 6.

34 Canada Submission on Merits at paras 87-89.

35 Canada Submission on Merits at para 89.

36 UN Office of the High Commissioner for Human Rights, *The Economic, Social and Cultural Rights of Migrants in an Irregular Situation*, (Geneva: United Nations, 2014) at 11, citing IOM, *World Migration Report 2011: Communicating Effectively about Migration* (Geneva, 2011) at 27-29.

discriminatory access to health promotion, disease prevention and care for migrants.[37] In 2010, the Global Migration Group on the Human Rights of Migrants in Irregular Situations, an inter-agency body comprised of 16 UN agencies and bodies such as IOM and the World Bank, stated that "[m]igrants in an irregular situation are more likely to face discrimination, exclusion, exploitation and abuse at all stages of the migration process." The Group stressed that, although States have a legitimate interest in exercising immigration controls, "such concerns cannot, and indeed, as a matter of international law do not, trump the obligations of the State to respect the internationally guaranteed rights of all persons, to protect those rights against abuses, and to fulfill the rights necessary for them to enjoy a life of dignity and security."[38] For these reasons, the criteria for differentiation in this case cannot be reasonable and objective because they are inconsistent with international consensus on the need to protect the rights of irregular migrants in the face of pervasive discrimination.

(ii) Legitimacy and proportionality

21. AI submits that the criteria for differentiation Canada applied to the author do not further a legitimate aim. In the event that this Committee finds that encouraging compliance with immigration law constitutes a legitimate aim, AI submits that denying access to necessary health care constitutes a punitive measure that is not proportionate to the non-criminal, administrative nature of irregular migration. Under the ICERD, "differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation [...] are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim."[39]

22. Moreover, denying access to necessary health care is an arbitrary and ineffective means of encouraging compliance with immigration laws. The Special Rapporteur on the human rights of migrants, François Crépeau, has stated to the Human Rights Council that he has found no empirical evidence to support the argument that punitive measures deter irregular migration or increase adherence to immigration laws.[40] He observes that irregular migration has not decreased despite States' introduction of increasingly punitive policies over the past twenty years.[41] He has stated that "[p]olicies that restrict access to housing, basic welfare or health care amongst irregular migrants have not been associated with increased rates of independent departure or deterrence

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37 World Health Assembly, Health of migrants, document WHA61.17.

38 "Statement of the Global Migration Group on the Human Rights of Migrants in Irregular Situation" (30 September 2010) online: <http://www.ohchr.org/>.

39 *Supra* note 20 at para 4.

40 François Crépeau, "Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau" (2 April 2012) UN Doc A/HRC/20/24 at para 8.

41 *Ibid*.

outcomes, and should be avoided."[42] Thus, Canada's criteria for differentiation have not been shown to further a legitimate aim.

23. The criteria for differentiation do not meet the standard of proportionality where a State Party withholds the right to life as a punitive measure, which effectively criminalizes irregular migration. Special Rapporteur Crépeau has emphasized that "irregular entry or stay should never be considered criminal offences: they are not per se crimes against persons, property or national security."[43] The Working Group on Arbitrary Detention has held that "criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate irregular immigration and leads to unnecessary detention."[44] Likewise, the IFHP, a policy that Canada admits denied access to necessary health care to irregular migrants, is grossly disproportionate to its aim.

24. As a migrant in a particularly vulnerable situation, Canada had a duty to protect the author from discrimination, rather than deprive her of the care she needed. Reasons of immigration policy are insufficient to displace that duty and do not constitute a legitimate aim. Placing life and long term health at risk is grossly disproportionate to the aim of differential treatment.[45]

IV. THE RIGHT TO LIFE

25. This Committee has stated that Article 6 requires States Parties to adopt positive measures to protect the right to life.[46] It has also stated, in its Concluding Observations on its review of Canada, that the right to life requires States Parties to the ICCPR to ensure that some of the most vulnerable members of society have access to the necessities of life.[47] The right to life in international law has evolved to extend obligations upon States Parties "to the taking of steps to maintain an adequate standard of health."[48] For these reasons, AI submits that this Committee should recognize that

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42 *Ibid* at para 66.

43 *Ibid* at para 13.

44 UN Report of the Working Group on Arbitrary Detention, "Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development" (10 January 2008) A/HRC/7/4 at para 53.

45 *Supra* note 6 at para 91. See also *Regina v Secretary of State for the Home Department (Appellant) ex parte Limbuela (FC)* [2005] UKHL 66 at para 101.

46 Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982) UN Doc HRI/GEN/1/Rev.1 at 6 (1994).

47 Adequate Housing: UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Canada*, 65th Sess, UN Doc CCPR/C/79/Add.105 (7 April 1999) at para 12 [Concluding Observations on Canada 1999]; Food and nutrition: UN Human Rights Committee, *Concluding observations of the Human Rights Committee*, 72nd Sess, UN Doc CCPR/CO/72/PRK (27 August 2001) at para 16; Water and sanitation: Human Rights Committee, *Concluding Observations of the Human Rights Committee: Israel*, 99th Sess, UN Doc CCPR/C/ISR/CO/3 (3 September 2010); *Liliana Assenova Naidenova et al v Bulgaria*, Comm No. 2073/2011 (2011).

48 Sarah Joseph, Jenny Schultz & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford: Oxford University Press, 2004) at 183.

Canada's obligations under the ICCPR require it to take positive measures to protect the right to life.

26. This Committee's jurisprudence has established that although the ICCPR does not contain a self-standing "right to health" provision, Article 6 engages issues of access to health care.[49] The Committee has found that restricting "access to all basic and life-saving services such as food, health, electricity, water and sanitation" are inconsistent with the right to life under Article 6.[50] Access to necessary health care "is a fundamental human right indispensable for the exercise of other human rights", especially the right to a dignified life.[51] In addition, this Committee has discussed how certain groups facing tremendous disadvantage in accessing necessary health care require States Parties to take specific measures to ensure the realization of the right to life.

27. In particular, this Committee has expressed concern that "homelessness has led to serious health problems and even to death" and recommended that Canada "take positive measures required by Article 6 to address this serious problem."[52] It has also required States to take positive measures to protect other groups from health-related risks, such as women and girls at risk of pregnancy- and child-related deaths,[53] and prisoners requiring health care and medical treatment.[54] The link between the right to life and States Parties' duty to take positive measures to provide access to necessary health care has been confirmed by other UN Treaty Bodies[55] and Special Procedures.[56]

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49 UN Human Rights Committee, *Carlos Cabal and Mr. Marco Pasini Bertran v Australia, Communication No. 1020/2001*, 78th Sess, UN Doc CCPR/C/78/D/1020/2001 (2003) at para 7.7.

50 UN Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of Israel*, UN Doc CCPR/C/ISR/CO/4 (21 November 2014) at para 12.

51 *Supra* note 22 at para 1; UN General Assembly, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, 69th Sess, UN Doc A/69/299 (11 August 2014) at para 7.

52 Concluding Observations on Canada 1999, *supra* note 47 at para 12 [emphasis added].

53 See UN Human Rights Committee, *General Comment 28, Article 3* (The Equality of Rights between Men and Women), CCPR/C/21/Rev.1/Add.10, paras 10, 20.

54 UN Human Rights Committee, *Yekaterina Pavlovna Lantsova v The Russian Federation*, Communication No 763/1997, CCPR/C/74/D/173/1997, para 9.2; UN Human Rights Committee, *Carlos Cabal and Marco Pasini Bertran v Australia,* Communication No 1020/2001, CCPR/C/78/D/1020/2001, para 7.7; UN Human Rights Committee, *Titianhonjo v Cameroon*, Communication No 1186/2003, para 6.2; UN Human Rights Committee, *Fabrikant v Canada*, Communication No. 970/2001, para 9.3; UN Human Rights Committee, "Concluding Observations on Moldova" CCPR/CO/75/MDA, para 9.

55 For example, the Committee on Economic, Social and Cultural Rights has stressed that "[h]ealth is a fundamental human right indispensable for the exercise of other human rights", including—and especially—the right to a dignified life; UN Committee on Economic, Social and Cultural Rights, "General Comment 14: The Right to the Highest Attainable Standard of Health" E/C.12/2000/4, para 1. See also, Committee on the Rights of the Child, "General Comment 15: Right of the Child to the Highest Attainable Standard of Health (Art 24)" CRC/C/GC15, paras 16-18.

56 The Special Rapporteur on the right to physical and mental health has stated that access to health care is required for the full enjoyment of the right to life: "Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" (11 August 2014) A/69/299, para 2.

28. Foreign jurisdictions, including Argentina,[57] Brazil,[58] Bangladesh,[59] Colombia,[60] Ecuador,[61] El Salvador,[62] India,[63] Kenya,[64] Mexico,[65] Pakistan,[66] South Africa,[67] the United Kingdom,[68] and Venezuela,[69] have recognized the link between the right to life and access to necessary health care. In India, for example, courts have recognized that access to necessary health care forms "an inalienable component of the right to life" "which would include the right to access government (public) health facilities and receive a minimum standard of treatment and care."[70] Similar recognition of the connection between the right to life and the need to provide the basic necessities of life, including access to necessary health care, has been extended by regional bodies like the Inter-American Court of Human Rights[71] and the European Committee on Social Rights.[72]

29. Canada argues that the author's claim under Article 6 is inadmissible because "[t]he interpretation of the scope of the right to life cannot extend so far as to impose a positive obligation on States" to provide health care to irregular migrants.[73] This approach is inconsistent with the clear

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57 *Reynoso, Nida Noemí c/INSSJP/amparo*, R.638.XL (16 May 2006) online: Supreme Court of Argentina <http://www.globalhealthrights.org/>; See also *Campodonico de Beviacqua, Ana Carina v Ministerio de´ Salud y Banco de Drogas Neoplasicas´*, Supreme Court of Argentina (24 October 2000) as discussed in Christian Courtis, "Argentina: Some Promising Signs" in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) 163 at 172.

58 *Viera v Porto Alegre* (RE 271286 AgR/RS) (2000), as discussed in Flavia Piovesan, "Impact and Challenges of Social Rights in the Courts" in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) 182 at 185-187.

59 *Rabia Bhuiyan v Ministry of Local Government, Rural Development*, 59 DLR (AD) 176 (2007) online: <http://www.globalhealthrights.org/>; See also *Mohiuddin Farooque v Bangladesh* 48 DLR (1996) 438 (both cases discussed in Iain Byrne and Sara Hossein, "South Asia: Economic and Social Rights Case Law of Bangladesh, Nepal, Pakistan and Sri Lanka" in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) at 125 at 127, 134, 136 [Byrne and Hossein].

60 *Sala Segunda de Revisión, Sentencia T-760 (2008)* (Colombia). "Judgment T-760/08 (July 31, 2008) online: <http://www.globalhealthrights.org/wp-content/uploads/2013/08/English_summary_T-760.pdf>.

61 *Mendoza & Ors v Ministry of Public Health Resolution No 0749-2003-RA* (28 Jan 2004) (Constitutional Court of Ecuador).

62 *Jorge Odir Miranda Cortez vs la Directora del instituto Salvadoreño del Seguro Social*, File No 348-99 (4 April 2001) Constitutional Court of El Salvador, as discussed in Hans Hogerzeil, Melania Samson & Jaume Vidal Casanova, "Ruling for Access: Leading Court Cases in Developing Countries on Access to Essential Medicines as Part of the Fulfilment of the Right to Health" (World Health Organization Department of Essential Drugs and Medicines Policy, November 2004) online: <http://www.who.int/>.

63 *Laxmi Mandal v Deen Dayal Harinagar Hospital and Others*, WP(C) 8853/2008, judgment of 4 June 2010, High Court of Delhi at paras 20-21 [*Laxmi Mandal*]; *Francis Coralie Mullin v The Administrator, Union*, (1981) 1981AIR 746 at para 6.

64 *Patricia Asero Ochieng and 2 Others v the Attorney General & Another*, Petition No 409 of 2009, High Court of Kenya at Nairobi, online: <http://www.escr-net.org/>.

65 *Case "Special Care Unit 13" (Pabellón 13)* regarding patients with HIV-AIDS brought against the National Institute of Respiratory Diseases (INER) and other authorities (AR 378/2014).

66 Iain Byrne & Sara Hossein, "South Asia: Economic and Social Rights Case Law of Bangladesh, Nepal, Pakistan and Sri Lanka" in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) at 136.

67 *Minister of Health and Others v Treatment Action Campaign and Others (No 2)*, [2002] ZACC 15 at paras 26, 28.

68 *Burke, R (on the application of) v General Medical Council and Ors*, [2005] EWCA Civ 1003 at paras 39, 53.

69 *Cruz del Valle Bermúdez y otros v MSAS s/amparo. Expediente No 15.789. Sentencia No* 196, Supreme Court of Venezuela (15 May 1999) online <http://www.escr-net.org/>.

70 *Laxmi Mandal*, *supra* note 63 at paras 20-21.

71 *Yakye Axa Indigenous Community v Paraguay*, IACHR Series C no 125, IHRL 1509 (IACHR 2005), 17 June 2005, Inter-American Court of Human Rights at paras 161-163.

72 *FIDH v France*, European Committee on Social Rights at para 30; *DCI v Belgium,* European Committee on Social Rights at para 33.

73 Canada Submission on Merits at para 38.

recognition by this Committee, other treaty bodies and international experts, as well as domestic courts around the world including its own, that deprivations of necessary health care and other necessities of life engage the right to life, affirming that civil and political rights are indivisible from and interdependent with economic, social and cultural rights.

30. Canada's argument that it is under no positive obligation to provide necessary health care to irregular migrants reinforces a false dichotomy between positive and negative human rights and between civil and political and economic, social and cultural (ESC) rights which the international community, including this Committee, has long rejected. In 1993, States emphasized in the *Vienna Declaration of Human Rights* that "[a]ll human rights are universal, indivisible and interdependent and interrelated. Governments recognized that they must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis" and called for the development of an optional complaints procedure for the ICESCR.[74] In 1997, a group of more than thirty experts adopted the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* which affirmed that any persons or groups whose ESC rights are violated "should have access to effective judicial or other appropriate remedies at both national and international levels" and stressed that "[t]he fact that the full realization of most [ESC] rights can only be achieved progressively, which in fact also applies to most civil and political rights, does not alter the nature of the legal obligation of States[.]"[75]

31. States have an obligation to take positive measures to protect a wide range of internationally and constitutionally protected rights, including the rights to life, security of the person, non-discrimination, and to be free from ill-treatment.[76] As the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has stated, "[t]he division between both sets of rights is artificial, given that there is no intrinsic difference between them. Both may require positive actions, are resource-dependent and are justiciable."[77] Consequently, AI submits that this Committee should continue to follow its own jurisprudence, as well as precedents from other treaty bodies, and from domestic and regional courts, to recognize the inalienable connection between the protection of the right to life and the provision of necessary health care, particularly for vulnerable groups.

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74 World Conference on Human Rights, *Vienna Declaration and Programme of Action*, A/CONF/157/2 (12 July 1993) at paras 5, 75.

75 *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, at paras 8, 22.

76 *Supra* note 74; See also UN Committee on Economic, Social and Cultural Rights, *General Comment No 10: The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights*, 19th Sess, UN Doc E/C.12/1998/26 (10 December 1998); UN Committee on Economic, Social and Cultural Rights, *General Comment No 2: International Technical Assistance Measures*, 4th Sess, UN Doc E/1990/23 (2 February 1990) at para 6.

77 UN General Assembly, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, 69th Sess, UN Doc A/69/299 (11 August 2014) at para 7.

V. THE RIGHT TO AN EFFECTIVE REMEDY

32. An important issue raised in the present case is the obligations of the judicial branch of government in ensuring compliance with Article 2(3) in conjunction with other provisions of the ICCPR, including, in this case, Articles 6, 9 and 26. AI submits that if the *Canadian Charter of Rights and Freedoms* is interpreted in line with international human rights law ratified by Canada, then it is capable of providing effective remedies for irregular migrants deprived of necessary health care because of their immigration status.

33. Rather than directly incorporating human rights treaties, Canada has undertaken to implement international human rights obligations in domestic law by ensuring that domestic law conforms to international human rights law. Most recently, in reply to the List of Issues set by this Committee in relation to the sixth periodic report of Canada, the government of Canada stated the ICCPR is implemented through "a range of constitutional and statutory protections as well as legislative, administrative and other measures at the federal, provincial and territorial (FPT) levels, including the Canadian *Charter of Rights and Freedoms* (the *Charter*), section 35 of the *Constitution Act, 1982*, the *Canadian Bill of Rights* and FPT human rights legislation."[78] The Canadian government has represented to this Committee as well as to other treaty bodies that the *Charter* is the primary domestic instrument for ensuring conformity with the country's international human rights obligations. This is particularly the case in relation to the right to life, which relies on section 7 of the *Charter* for domestic implementation.

34. Canada has informed this Committee that it recognizes that the right to life in Article 6 requires protection against deprivations of basic necessities of life, including health care, and has assured treaty bodies that section 7 of the *Charter* provides such protection.[79] For instance, Canada has acknowledged before this Committee that Article 6 of the ICCPR "requires Canada to take the necessary legislative measures to protect the right to life [which] may relate to the protection of the health and social well-being of individuals."[80] The Supreme Court has also affirmed that a right does not necessarily need to be explicitly pronounced in the text of the *Charter* in order to attract

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78 UN Human Rights Committee, *Replies of Canada to the List of Issues,* 114th Sess, UN Doc CCPR/C/CAN/Q/6/Add.1 (9 June 2015). See also *Core document forming part of the reports of States parties: Canada*, UN Doc HRI/CORE/CAN/2013

79 *Victoria (City) v Adams*, 2008 BCSC 1363 at paras 98-99, 161-162; UN Committee on Economic, Social and Cultural Rights, *Responses to the Supplementary Questions Emitted by the United Nations Committee on Economic, Social and Cultural Rights (E/C.12/Q/CAN/1)* (November 1998) at paras 1, 53; UN Human Rights Committee, *initial reports of States parties due in 1977: Addendum – Canada* , UN Doc CCPR/C/1/Add.62 (15 September 1983) at 23; UN Committee on Economic, Social and Cultural Rights, *Summary Record of the 5th Meeting*, 8th Sess, UN Doc E/C.12/1993/SR.5 (25 May 1993) at para 21.

80 UN Human Rights Committee, *Initial Reports of States Parties Due in 1977: Addendum – Canada*, UN Doc CCPR/C/1/Add.62 (15 September 1983) at 23.

constitutional protection, and that international human rights inform the scope and content of *Charter* rights.[81]

35. Thus, international human rights law, Canada's own domestic jurisprudence, and the stance the country has taken before this Committee and other treaty bodies suggest that the right to life under the *Charter*, which implements the ICCPR, should be interpreted as imposing positive obligations upon Canada to ensure that all individuals within its territory or under its jurisdiction have access to the necessities of life, including necessary health care. As Louise Arbour stated during her tenure as High Commissioner for Human Rights, access to publicly funded health care is both "a cornerstone of Canadian values, a way of honouring [Canadians'] fundamental commitment to each other" and "a matter of obligation at law owing to a duty which goes to the core of the protection and promotion of human dignity."[82] It is pivotal to ensuring the right to a dignified life, and that right cannot be fulfilled in a manner which purposefully excludes vulnerable and marginalized groups, including irregular migrants.

36. In AI's view, discrimination on the grounds of immigration status should be recognized as a form of discrimination on the grounds of citizenship or citizenship status contrary to section 15 of the *Charter*. The Supreme Court has already established that non-citizens are protected from discrimination under the *Charter*. In one of Canada's first cases examining section 15 of the *Charter*, the Supreme Court established that "non-citizens are a group lacking in political power and as such as vulnerable to having their interests overlooked and their rights to equal concern and respect violated."[83] The Court found that non-citizens fall into an analogous category to those specifically enumerated in section 15, and emphasized that "this is a determination which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of [Canadian] society."[84] In AI's view, this jurisprudence from the Supreme Court of Canada provides courts with ample interpretive room to provide effective remedies under the *Charter* for those who experience discrimination because of their irregular immigration status.

37. The Court has also found that Canada has positive obligations under section 15 of the Canadian Charter and that it is possible to order positive measures as remedies for a breach of the right to equality under the *Charter*. In the case of *Eldrige v British Columbia*, the Court stated that "[t]he principle that non-discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely

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81 For example, the right to strike was recognized as protected under section 2(d) of the *Charter*, which protects the freedom of association, in *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245.

82 Louise Arbour, "'Freedom from Want': From Charity to Entitlement" (LaFontaine-Baldwin Lecture, 2005) online: <https://www.icc-icc.ca/en/lbs/docs/LouiseArbour2005EN.pdf>.

83 *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 152.

84 *Ibid*.

accepted in the human rights field."[85] It also stated that the principle underlying all of the Supreme Court cases on discrimination issues is that "a government may be required to take positive steps to ensure the equality of people or groups who come within the scope of section 15."[86] In that case, the Court held that the government of British Columbia's failure to provide funding for sign language interpretation for deaf patients in the province's hospitals violated section 15 of the *Charter*. The Court ordered, under section 24 of the *Charter*, that the government of British Columbia take positive measures to ensure that sign language interpreters be provided where necessary in the delivery of medical services in the province.[87] Courts in Canada therefore have authority to order positive measures to ensure access to publicly funded health care for migrants who would otherwise be unable to secure access to essential health services.

38. It is AI's position that effective remedies can be provided for violations of the right to life and security of the person and of non-discrimination of irregular migrants through an interpretation of the protection afforded by sections 7 and 15 of the Charter that is consistent with Canada's international human rights obligations. By failing to give proper weight and consideration to the author's rights under the ICCPR in their interpretation of comparable rights under the Canadian *Charter*, as is required for the effective domestic implementation of the Covenant in the Canadian legal context, the domestic courts deprived the author of access to an effective remedy. The Committee has stated that "the courts of States parties are under an obligation to protect individuals against discrimination."[88] In the context of Canada's reliance on interpretive consistency for the domestic implementation of the Covenant, the responsibility of courts to consider the Covenant in its interpretation of the Canadian *Charter* is critical. As the CESCR has noted, "neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations."[89]

VI. CONCLUSION

39. The ICCPR requires universal human rights to be extended equally to all migrants regardless of their status. The denial of access to necessary health care to individuals on the basis of their immigration status by a State Party to the Covenant constitutes unlawful discrimination, contrary to Article 26. It encourages the stigmatization of migrants and increases their vulnerability. Such a policy also interferes with the right to life enshrined in

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85 *Eldgridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 78.

86 *Ibid*.

87 *Ibid* at paras 95-96.

88 UN Human Rights Committee, *Franz Nahlik v Austria*, Communication No 608/1995 at para 8.2.

89 UN Committee on Economic, Social and Cultural Rights, *General Comment No 9: The Domestic Application of the Covenant*, 19th Sess, UN Doc E/C.12/1998/24 (3 December 1998) at para 14.

Article 6. The argument that the ICCPR imposes no positive obligation to provide access to necessary health care is inconsistent with this Committee's jurisprudence.

40. Beyond rejecting a narrowing of the human rights protections owed to irregular migrants under the Covenant, AI urges this Committee to clarify that punitive measures taken by a State Party to deprive irregular migrants of health care cannot be justified as a means of encouraging compliance with immigration laws. Such measures exacerbate the dangers that irregular migrants already endure and corrode the values of equality and dignity that are at the heart of international human rights.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21st DAY OF AUGUST 2015, BY:

Alex Neve
Secretary General
Amnesty International Canada

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