

# United Nations Human Rights Committee

## In the matter of *Toussaint v. Canada*, Communication No. 2348/2014

### Joint third-party submission to the follow-up procedure of the Human Rights Committee's Views

#### I. Introduction

1. ESCR-Net - International Network for Economic, Social and Cultural Rights, (“ESCR-Net”), and Amnesty International Canadian Section (English Speaking), (“Amnesty International Canada”), (collectively, “ESCR-Net and Amnesty”), present the following third-party submission with respect to the follow-up measures to the Human Rights Committee’s Views in *Toussaint v. Canada*, communication No. 2348/2014<sup>1</sup> (“Views”).
2. Nell Toussaint, the victim in this case and author of communication No. 2348/2014, tragically died on 9 January 2023. Ms. Toussaint passed away four-and-a-half years after the Human Rights Committee (“Committee”) adopted its Views, while still awaiting Canada’s implementation of them, including provision of compensation and the implementation of necessary measures to provide essential healthcare to people with irregular migration status<sup>2</sup> in Canada, ensuring the protection of the rights to life and non-discrimination, and non-repetition of violations.
3. After Canada indicated in a letter on 1 February 2019 that it would not take any measures to give effect to the Views, Ms. Toussaint initiated a claim before the Ontario Superior Court of Justice to seek an interpretation of Canadian law that gave due regard to the Views.
4. Though international human rights obligations bind all branches of the State, in its Follow-Up communications with the Committee, the Canadian executive failed to report on the judiciary’s engagement with the author’s efforts to further implement the Views through the recent domestic court action. The executive also failed to report how it sought to block the full merits consideration of the author’s claim and the Views in domestic court, arguing (unsuccessfully) for the claim to be struck at an early stage citing, among other claims, *res judicata*, despite the interceding Committee Views, and “that the views of the UN’s Human Rights Committee are non-binding and are not enforceable in this Court, and, therefore, Ms. Toussaint’s claims are doomed to fail and should be dismissed.”<sup>3</sup> Further, its blanket argument that the Views are non-binding should not end the proper consideration by all branches of the State of the appropriate legal effects. These arguments disrespect the due legal weight that the State Party must accord in good faith to a merit’s decision by the

---

<sup>1</sup> Human Rights Committee, *Toussaint v. Canada*, 30 August 2018, CCPR/C/123/2348/2014, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F123%2FD%2F2348%2F2014](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F123%2FD%2F2348%2F2014).

<sup>2</sup> The term “people with irregular migration status” is used in this letter as an alternative to “irregular migrants.”

<sup>3</sup> Ontario Superior Court of Justice, *Toussaint v. Canada (Attorney General)*, 2022 ONSC 4747, 17 August 2022, <https://canlii.ca/t/jrhjf>, para 190.

Committee, including facilitating access to justice during the implementation phase, so that its domestic legal effect may be appropriately determined by the Ontario Superior Court of Justice in this particular case. The executive's response to merely inform its disagreement with the Committee's Views and its unilateral decision not to implement them does not meet the duty of good faith implementation of the Optional Protocol or the Covenant which are legally binding treaties.

5. Ms. Toussaint's counsel informed ESCR-Net and Amnesty that Ann Toussaint, Nell Toussaint's mother, will continue her daughter's action before the Ontario Superior Court of Justice to have the Committee's Views implemented and enforced in Canada. With Ann Toussaint's direction, her counsel shared the Committee's correspondence of 23 January 2023 inviting submissions as a follow-up to Canada's latest response letter to the Committee indicating that Canada would not implement its Views.<sup>4</sup> As the Views include a systemic remedy to ensure non-repetition and rectify Canada's violation of its obligations under the Covenant, Ann Toussaint invited ESCR-Net and Amnesty to request and prepare third-party submissions for the Committee.
6. ESCR-Net and Amnesty submit that Canada's failure to implement the Committee's Views breaches its duty to perform treaty obligations in good faith and its duty to ensure non-repetition. We submit that by imposing its own interpretation of its obligations under the Covenant to essentially re-argue the case in its response letter, Canada's actions defeat the object and purpose of the Optional Protocol and significantly undermine the Committee's authoritative conclusions and jurisprudence and the rule of law.

## **II. Canada Has Failed to Implement the Committee's Recommendations, Allowing Violations of the Rights to Life and Non-Discrimination to Persist while it Insists on Trying to Relitigate the Case during the Follow-Up Process**

7. The Committee's Views found that Canada's refusal to provide Ms. Toussaint with essential healthcare coverage under the Interim Federal Health Program from 2009 to 2013 resulted in a violation of Ms. Toussaint's right to life, and right to equality and non-discrimination, under articles 6 and 26 of the ICCPR.<sup>5</sup> The Committee clearly affirmed that Canada has an obligation to provide Ms. Toussaint with an effective remedy, including individual compensation, and to implement a systemic remedy by taking all necessary steps to prevent recurrence of similar violations in the future, including by reviewing and amending national legislation to ensure people with irregular migration status "have access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life."<sup>6</sup>
8. Canada has refused, and indeed failed, to implement the remedies issued in the Views. Regarding the systemic remedy, persons with irregular migration status face the same situation as that recorded in the Committee's Follow Up to Concluding Observations report entry on Canada, where the Committee noted Amnesty International's statement that "health care coverage has not been extended to irregular migrants irrespective of status."<sup>7</sup> This

---

<sup>4</sup> OHCHR, "Follow-up to the Human Rights Committee's Views," 23 January 2023, G.SO 215/51 CAN (190) Follow up.

<sup>5</sup> Human Rights Committee Views, paras 11-12.

<sup>6</sup> Human Rights Committee Views, para 13.

<sup>7</sup> Human Rights Committee, "Report on follow-up to concluding observations of the Human Rights Committee", 11 December 2018, CCPR/C/123/2,

remains true, including as to the Interim Federal Health Program, the coverage from which Ms. Nell Toussaint was excluded on the basis of her irregular migration status in violation of her rights to life and non-discrimination.

9. Canada's 2019 response letter to the Committee's Views indicated that Canada "is unable to agree with the views of the Committee in respect of the facts and law in the communication and as such will not be taking any further measures to give effect to those views."<sup>8</sup> Canada's response effectively sought to re-argue the Committee's findings with its own interpretation of the facts and law, assert it was not in violation of its international legal obligations under the ICCPR and justify its failure to give effect to the Views.
10. In a follow-up letter dated 6 April 2022, Canada further maintained its disagreement and that it would not take further measures to give effect to the Views, requesting the Committee to consider the matter closed.<sup>9</sup>
11. Canada's 2019 and 2022 non-implementation notices to the Committee were transmitted by the executive branch and made no mention of any role of the Canadian judicial or legislative branches in considering the Views, despite the Committee calling for appropriate review and amendment of national legislation. Under Canadian law, the judiciary is not required to defer to the executive in matters of interpreting Canada's international treaty obligations.<sup>10</sup> Canadian courts have affirmed the *Canadian Charter of Rights and Freedoms* should be interpreted as presumed to provide guarantees at least as great as those contained in Canada's ratified international human rights treaties, a topic vital to the ongoing Ontario Superior Court proceedings and as a potential means to ensure implementation of the Committee's non-repetition remedy.<sup>11</sup> Canada continues to oppose efforts for a domestic court to interpret how the Views inform Canada's relevant international human rights treaty obligations.
12. Canada's refusal to give effect to the Committee's Views result in a violation of the right to an effective remedy for Ms. Toussaint, and in ongoing violations of the rights to life and non-discrimination for other people in Canada with irregular migration status who continue to be denied essential healthcare, contrary to the duty of non-repetition.

### **III. Canada Has Failed to Implement the ICCPR and the Optional Protocol in Good Faith**

---

[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F123%2F2&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F123%2F2&Lang=en), p. 13.

<sup>8</sup> Government of Canada, Response of The Government of Canada to the Views of the Human Rights Committee Concerning Communication No. 2348/2014 Submitted by Ms. Nell Toussaint, 1 February 2019, <https://www.socialrights.ca/2019/ToussaintReply2d.pdf>, para 4.

<sup>9</sup> Government of Canada, Reply of the Government of Canada to the Human Rights Committee's request for further information on follow-up to the Committee's Views in Communication no 2348/2014 submitted by Ms. Nell Toussaint, 6 April 2022.

<sup>10</sup> Gib Van Ert, "Canada", *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study*, ed. by David Sloss, 6 January 2010, <https://www.cambridge.org/core/books/abs/role-of-domestic-courts-in-treaty-enforcement/canada/1A7172F46BA6F3B7A6EDBFB5002DF2E1>, chapter available online at: <https://www.litigationchambers.com/pdf/vanErt-domestic-courts.pdf>.

<sup>11</sup> Ontario Superior Court of Justice, *Toussaint v. Canada (Attorney General)*, 2022 ONSC 4747, 17 August 2022, <https://canlii.ca/t/jrhjf>, paras 88(d) and 151, citing the Supreme Court of Canada, *Quebec (Attorney General) v. 9147-0732 Quebec inc.*, 5 November 2020, 2020 SCC 32, <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18529/index.do>, para 31.

13. Canada’s failure to give effect to the Committee’s Views is contrary to its duty to implement the ICCPR and the Optional Protocol in good faith.<sup>12</sup> *Pacta sunt servanda* – the obligation to perform binding treaty obligations in good faith – is “universally recognized”<sup>13</sup> as a general principle of international law, of “paramount importance”,<sup>14</sup> and has been recognized as a peremptory norm of customary international law that was codified under the *Vienna Convention on the Law of Treaties*.<sup>15</sup> Good faith performance applies to the whole process of interpreting a treaty obligation,<sup>16</sup> and encompasses the intention of signatory parties to perform treaty obligations reasonably and effectively in ways that favourably upholds the treaty rather than destroying it.<sup>17</sup>
14. ESCR-Net and Amnesty submit that the Committee decided the matter with finality. In accordance with *pacta sunt servanda*, Canada cannot simply disregard or redefine its international legal obligations as contained in treaties, like the ICCPR, and interpreted by authoritative treaty bodies, like the Committee.<sup>18</sup> When Canada ratified the Optional Protocol, it committed to giving due weight to the Committee’s Views, which are an “authoritative determination”<sup>19</sup> of the rights under the ICCPR and exhibit principal characteristics of a judicial decision. State duties upon being notified of such an authoritative determination are not met by a State party executive merely asserting its disagreement with the Committee and categorically refusing to implement associated remedies.
15. The Committee clearly provides that the purpose of the ICCPR would be defeated without the obligation to take measures to prevent the recurrence of violations.<sup>20</sup> As such, the ICCPR establishes the duty to provide effective remedies, beyond victim-specific measures, to prevent future violations.<sup>21</sup> Canada has failed to perform its treaty obligations in good faith by refusing to implement a systemic remedy to protect the rights to life and non-discrimination for people with irregular migration status, contrary to its duty to prevent recurrence of similar violations.

---

<sup>12</sup> Human Rights Committee, General Comment No. 3 no 1, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Adopted on 29 March 2004 (2187th meeting), CCPR/C/21/Rev.1/Add.1326, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F21%2FRev.1%2FAdd.13&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F21%2FRev.1%2FAdd.13&Lang=en), para 3.

<sup>13</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, Preamble.

<sup>14</sup> Steven Reinhold, “Good Faith in International Law”, 26 May 2013, *UCL Journal of Law and Jurisprudence*, Bonn Research Paper on Public International Law No. 2/2013, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2269746](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2269746), p. 19 [“Good Faith in International Law”].

<sup>15</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, para 4.

<sup>16</sup> Richard Gardiner, “Oxford Public International Law: Part II Interpretation Applying the Vienna Convention on the Law of Treaties, A The General Rule, 5 The General Rule: (1) The Treaty, its Terms, and their Ordinary Meaning”, *Treaty Interpretation* (2nd Edition), 01 June 2015, Oxford Scholarly Authorities on International Law, [https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2018\\_04585.PDF](https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2018_04585.PDF), p. 6, 44-45.

<sup>17</sup> Steven Reinhold, “Good Faith in International Law” (cited above), pp.19-20; Richard Gardiner, *ibid*, pp. 6, 13, 44-45.

<sup>18</sup> Human Rights Committee, General Comment No. 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights, 25 June 2009, 94th Sess., CCPR/C/GC/33, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FGC%2F33&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FGC%2F33&Lang=en), para. 13; Supreme Court of Canada, *Canada v. Alta Energy Luxembourg S.A.R.L.*, 26 November 2021, 2021 SCC 49, <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/19089/index.do>, para 59.

<sup>19</sup> *Ibid*.

<sup>20</sup> *Ibid*, para 17.

<sup>21</sup> *Ibid*, para 8.

16. Furthermore, Canada defeats the purpose of the Optional Protocol by undermining the legal and practical effects of the Committee's communications procedure. As explained by the Committee, "[t]he preamble to the Optional Protocol states that its purpose is 'further to achieve the purposes' of the Covenant by enabling the Human Rights Committee, established in Part IV of the Covenant, 'to receive and consider, as provided in the present Protocol, communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.'"<sup>22</sup> A State bound by the Optional Protocol cannot categorically disregard the communications procedure's result and claim to be upholding its obligations under that treaty in good faith.
17. To give effect to Canada's duty of good faith, both in the State Party's participation in the procedures under the Optional Protocol, and critically, in relation to the observance of the treaty obligations under the ICCPR, Canada must implement the Committee's Views.<sup>23</sup>

#### **IV. Canada's Non-Implementation of the Committee's Views Undermines Treaty Body Jurisprudence and the Rule of Law**

18. Canada's position that States have the prerogative to categorically reject and refuse to implement the Committee's Views enables the continuation of, and failure to remedy, human rights violations that were independently established through a fair, treaty-mandated adversarial process. This undermines United Nations treaty body jurisprudence and the system as a whole.
19. The United Nations treaty bodies are vital to the safeguarding of international human rights, and good faith implementation of their determinations serves the rule of law. Both domestically and internationally, a government's compliance with a neutral, competent and fair arbiter's legal determination of human rights is vital and may be most salient regarding issues about which it voices its most insistent disagreement.
20. Canada's discrimination and ill-treatment of non-citizens despite contrary Committee Views has been an area of repeated concern. For instance, in multiple cases in recent years, the Committee concluded deportation would lead to violations of the ICCPR, yet Canada rejected the Committee's Views and deported, nonetheless.
21. In 2012, Canada deported a Somalian man<sup>24</sup> who had lived in Canada since the age of two as a legal permanent resident, rejecting the Committee's Views that deporting him constituted violations of the right to life, right to freedom from cruel, inhuman and degrading punishment, the right to family life, and the right to remain in one's "own country".<sup>25</sup>
22. In October 2009,<sup>26</sup> Canada deported a Haitian national who had resided in Canada since the age of two as a legal permanent resident, in defiance of Committee Views adopted just a few months earlier in July 2009, finding that Canada should refrain from deporting him, as this would constitute a violation to his right to family life.<sup>27</sup>

---

<sup>22</sup> Ibid, para 3.

<sup>23</sup> Ibid, para 15.

<sup>24</sup> Andrew Stobo Sniderman, "Jama Warsame is a citizen of nowhere", MACLEANS, (10 Dec 2013), <https://macleans.ca/news/canada/jame-warsame-is-a-citizen-of-nowhere/>.

<sup>25</sup> Human Rights Committee, *Warsame v. Canada*, Communication No. 1959/2010, CCPR/C/102/D/1959/2010 (2011).

<sup>26</sup> CBC News, "Haitian man deported despite UN ruling", CBC NEWS (6 Oct 2009), <https://www.cbc.ca/news/canada/montreal/haitian-man-deported-despite-un-ruling-1.782202>.

<sup>27</sup> Human Rights Committee, *Dauphin v. Canada*, Communication No. 1792/2008, CCPR/C/96/D/1792/2008 (2009).

23. Canada's rejection of Committee Views in such cases points to the State Party's failure to fully guarantee the rights of non-citizens, which includes persons with irregular migration status.
24. Canada's non-implementation of Committee Views on access to essential healthcare required to safeguard the right to life and non-discrimination also sets a regrettable example to the rest of the world and bolsters discriminatory healthcare coverage systems that fail to safeguard the right to life in other jurisdictions. For instance, in the United States, persons with irregular migration status are excluded from many healthcare coverage schemes, even when they contribute to the funding of these systems through the payment of taxes.<sup>28</sup> Pursuing an ongoing dialogue with Canada to reconsider its position on this issue will help to promote compliance among other State Parties. One example of State Party compliance with articles 6 and 26 is Argentina's Migration Law, which provides "[u]nder no circumstances may access to the right to health, social assistance or health care be denied or restricted to all foreigners who require it, regardless of their migratory status."<sup>29</sup>

**V. Canada's Duty to Implement the Views in Nell Toussaint's Case Persists, and the Committee's Follow-Up Process Should Accordingly Remain Active**

25. Violations of the rights to life and non-discrimination of persons with irregular migration status in Canada continue due to Canada's rejection of the express Committee remedy in the Views.
26. Furthermore, the State never provided individual redress to the author or, following the author's death, to Ms. Toussaint's mother, the person communicated to us to be authorized by the family to carry the matter forward (Ms. Ann Toussaint's role in this regard is in line with international human rights principles, including the practice of the United Nations Committee against Torture in *B.N. and S.R. v. Burundi*).<sup>30</sup>
27. Under such circumstances, acceding to Canada's request to close the file would be detrimental to the right to an effective remedy, enable ongoing human rights violations, incentivize non-compliance, and condone the undermining of the United Nations treaty body system and the rule of law.
28. We respectfully ask the Committee to take this submission into account and that it ask Canada to answer how it intends to give due effect to the Views, as part of its good faith obligations under the Optional Protocol and the Covenant, including clarifying how it has and intends to engage with:
  - a. the judiciary's role within its State in applying domestic law in light of the judicial interpretation of the scope of Canada's international treaty obligations;
  - b. the executive's **Protocol for Follow-up to Recommendations from International Human Rights Bodies**,<sup>31</sup> and

<sup>28</sup> Alexia Fernández Campbell, "Undocumented immigrants pay taxes too. Here's how they do it." VOX, (17 Apr 2017), <https://www.vox.com/policy-and-politics/2017/4/17/15290950/undocumented-immigrants-file-tax-returns>.

<sup>29</sup> Ley de Migraciones, No. 25871, Decreto 616/2010, Art. 8, [http://www.migraciones.gov.ar/pdf\\_varios/campana\\_grafica/pdf/Libro\\_Ley\\_25.871.pdf](http://www.migraciones.gov.ar/pdf_varios/campana_grafica/pdf/Libro_Ley_25.871.pdf) (our translation).

<sup>30</sup> See *B.N. and S.R. v. Burundi*, Committee against Torture, Decision, 1 Sep. 2021, CAT/C/71/D/858/2018, para. 1.2.

<sup>31</sup> Government of Canada, Protocol for Follow-up to Recommendations from International Human Rights Bodies, <https://www.canada.ca/en/canadian-heritage/services/about-human-rights/protocol-follow-up-recommendations.htm>; Government of Canada, Engagement Strategy on Canada's International Human Rights Reporting Process,

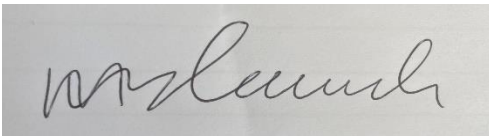
- c. the legislature's role in amending domestic legislation.
29. In addition, we respectfully ask the Committee to inquire what steps Canada has taken to consult with affected communities that remain without essential healthcare coverage due to its non-implementation of the Views, or whether it can inform how many--and in what circumstances--persons with irregular migration status are currently denied essential healthcare coverage necessary to safeguard their rights to life and non-discrimination pursuant to the Committee's Views.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 23rd DAY OF MARCH 2023, BY:



Chris Grove  
Executive Director  
ESCR-Net - International Network for Economic, Social and Cultural Rights  
[cgrove@escr-net.org](mailto:cgrove@escr-net.org)

AND



Mandivavarira Mudarikwa  
Head of Strategic Litigation  
Amnesty International, International Secretariat  
[mandi.mudarikwa@amnesty.org](mailto:mandi.mudarikwa@amnesty.org)

---

<https://www.canada.ca/en/canadian-heritage/services/about-human-rights/engagement-strategy-human-rights-reporting.html>.