

**IN THE SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

**BETWEEN:**

**JENNIFER TANUDJAJA, JANICE ARSENAULT, ANSAR MAHMOOD,  
BRIAN DUBOURDIEU and CENTRE FOR EQUALITY RIGHTS IN  
ACCOMMODATION**

**APPLICANTS**  
(Appellants)

-and-

**ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF  
ONTARIO**

**RESPONDENTS**  
(Respondents)

**AFFIDAVIT OF ALEX NEVE, O.C.**

I, Alex Neve, of the City of Ottawa, in the Province of Ontario, MAKE OATH AND SAY:

**Coalition**

1. I swear this affidavit on behalf of the coalition of Amnesty International, Canadian Section, English Branch (“AI Canada”) and the International Network for Economic Social and Cultural Rights (“ESCR-Net”) (collectively, the “Coalition”). I am the Secretary General of AI Canada, and, as such, have knowledge of the matters contained in this affidavit. Where information in this affidavit has been provided by others, I believe that information to be true.

**Amnesty International and ESCR-Net: The Organizations**

2. Amnesty International (“AI”) is a worldwide voluntary movement that works to prevent some of the gravest violations to people’s fundamental human rights. AI is impartial and independent of any government, political persuasion or religious creed. AI Canada is a corporation incorporated under the *Canada Not-For-Profit Corporations Act*, SC 2009, c 23. A

selected summary of AI's human rights work in Canada and abroad is attached as Exhibit "A" to this affidavit.

3. ESCR-Net is a collaborative initiative of groups and individuals from around the world working to secure economic and social justice through human rights. ESCR-Net has worked extensively on issues related to the right to adequate housing and access to justice in cases of violations of economic, social and cultural rights. A non-comprehensive summary of ESCR-Net's work in these areas is attached as Exhibit "B".

4. The Coalition was granted intervener status in this case at both the Superior Court of Justice and the Court of Appeal for Ontario, and will seek leave to intervene if the appellants are granted leave to appeal to this Court. I have read the Court of Appeal decision released December 1, 2014.

#### **Impact of Decision: The Coalition's Perspective**

5. The issues raised by the decisions of the motions judge and the Court of Appeal are of immediate significance to the Coalition's human rights work. The proposed appeal raises issues with respect to Canada's compliance with its international human rights obligations, the justiciability of *Charter* claims linked to economic and social rights, and the role of international and comparative law in informing the interpretation of *Charter* guarantees to life, security of the person, and equality. Should leave to appeal be granted, the Coalition will seek to provide its unique perspective and expertise in international law to assist this Court in determining the justiciability of the claims raised by the appellants.

6. The decisions in this case will affect the Coalition's longstanding efforts to ensure (a) that Canadian courts interpret domestic law consistently with this country's obligations under international human rights law, and (b) that the rights of the most vulnerable in our society – to life, security of the person, and equal protection and benefit of the law – are protected and enforced by the courts. Both AI and ESCR-Net have worked extensively in these areas by monitoring, reporting, and participating in judicial, legislative and United Nations proceedings on Canada's compliance with international human rights, the role of domestic courts, and the application of international obligations to domestic laws.

**Fundamental Issues**

7. The Court of Appeal's finding that an allegation of manifest non-compliance with international human rights obligations with respect to, *inter alia*, the rights to life and non-discrimination cannot be subject to a hearing on the evidence in Canadian courts under the *Charter* creates an unprecedented denial of access to justice. The United Nations Human Rights Committee has stated that positive measures to address homelessness, as sought by the appellants in this case, are required to comply with Canada's international obligations to protect the right to life. If allowed to stand, the Court of Appeal's decision would irrevocably sever the ongoing interpretation and application of the *Charter* from international human rights values, which are its historic foundation.

SWORN BEFORE ME at the City of  
Ottawa, in the Province of Ontario on  
January 26<sup>th</sup>, 2015

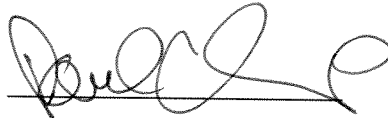


Commissioner for Taking Affidavits  
(or as may be)



Alex Neve

Exhibit "A" referred to in the  
affidavit of Alex Neve, sworn  
before me this 26<sup>th</sup> day of January,  
2015

A handwritten signature in black ink, appearing to be "Paul C. [unclear]", written over a horizontal line.

A commissioner, etc.

## **Amnesty International's Work to Promote Human Rights**

Amnesty International's work to protect human rights in Canada and abroad focuses on:

- (a) monitoring and reporting on human rights abuses;
- (b) participating in domestic judicial proceedings;
- (c) participating in national legislative processes and hearings; and
- (d) participating in international committee hearings and other international human rights processes.

### a) Monitoring and Reporting on Human Rights Abuses

8. AI's investigative work is carried out by human rights researchers who receive, cross-check and corroborate information from many sources, including prisoners and their families, lawyers, journalists, refugees, diplomats, religious groups and humanitarian and other human rights organizations. Researchers also obtain information through newspapers, web-sites and other media outlets. As well, AI sends about 130 fact-finding missions to some 70 countries each year to directly assess what is happening on the ground.

9. The organization uses its research to prepare reports, briefing papers, newsletters and campaigning materials. Among its publications is the annual Amnesty International Report on human rights conditions in countries around the world. AI Canada has participated in the preparation of these reports and has assisted in distributing them in Canada. AI's research is recognized around the world as accurate, unbiased, and credible, which is why its reports are widely consulted by governments, intergovernmental organizations, journalists and scholars.

10. The following judgments have emphasized the important evidentiary role of AI reports: *Mahjoub (Re)*, [2010] F.C.J. No. 900, 2010 FC 787; *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1503; *Thang v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 457; *Shabbir v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 480; *Ertuk v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1118; and *Suresh v. Canada (Minister of Citizenship and Immigration, et al)*, [2002] 1 S.C.R. 3.

b) Participation in Judicial Proceedings

11. Amnesty International has intervened on international human rights issues in a number of cases before the Supreme Court of Canada, including:

- (a) *Jesus Rodriguez Hernandez, B306, J.P. et al and Appulonappa et al v. Canada (Minister of Public Safety and Emergency Preparedness and the Queen)* (SCC Court File Nos. 35677, 35685, 35688, 35388, and 35958, to be heard February 2015, leave to intervene granted): arguing that the definition of “people smuggling” and “human smuggling” in the *Immigration and Refugee Protection Act* must be construed in accordance with Canada’s international human rights obligations.
- (b) *Febles v. Canada*, 2014 SCC 68: presented submissions with respect to the interpretation of the Article 1F(b) exclusion provision of the *Convention Related to the Status of Refugees*;
- (c) *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, 220 ACWS (3d) 313: presented submissions regarding the non-applicability of jurisdictional immunity under the *State Immunity Act* to state-sanctioned acts of torture;
- (d) *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, 241 ACWS (3d) 2: submitted that the test for aboriginal title must be developed in a manner that is consistent with international human rights law, and not arbitrarily or narrowly construed;
- (e) *Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness v. Harkat*, 2014 SCC 37, 24 Imm LR (4th) 1: regarding the revised security certificate system’s violations of international human rights norms;
- (f) *Rachidi Ekanza Ezokola v. Minister of Citizenship and Immigration*, 2013 SCC 40, [2013] 2 SCR 678: proposed guiding principles to help ensure that Canadian decision-makers’ application of Article 1F(a) of the *Refugee Convention* is consistent with international law;

- (g) *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 SCR 572: presented submissions with respect to the forum of necessity doctrine and international standards of jurisdiction and access to justice;
- (h) *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 SCR 44: intervened with respect to what triggers a Canadian's section 7 life, liberty, and security of the person interests, and the content of the principles of fundamental justice;
- (i) *Gavrila v. Canada (Justice)*, 2010 SCC 57, [2010] 3 SCR 342: presented submissions with respect to the interplay between extradition and refugee protection;
- (j) *Charkaoui v. Canada (Minister of Citizenship and Immigration) No. 2*, 2008 SCC 38, [2008], 2 SCR 326: intervened on whether the systematic destruction of interview notes and other information by the Canadian Security Intelligence Service in the context of security certificate proceedings violates international law and the constitutional principles of procedural fairness;
- (k) *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350: presented submissions on the constitutionality of the procedural protections in the *Immigration and Refugee Protection Act's* security certificate regime and on the arbitrary detention of foreign nationals under that regime;
- (l) *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3: presented submissions regarding the nature and scope of the international prohibitions against torture, and the mechanisms designed to prevent and prohibit its use, to which the Court referred.
- (m) *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 SCR 269: argued the right to the protection of mental integrity and to compensation for its violation has risen to the level of a peremptory norm of international law, which prevails over the doctrine of sovereign immunity;
- (n) *United States v. Burns*, 2001 SCC 7, [2001] 1 SCR 283: presented submissions regarding the international movement towards the abolition of capital punishment;

- (o) *Reference Re Ng Extradition (Can.)*, [1991] 2 SCR 858, 84 DLR (4th) 498: presented submissions regarding the international movement towards the abolition of capital punishment; and
- (p) *Kindler v. Canada (Minister of Justice)*, [1991] 2 SCR 779, 84 DLR (4th) 438: presented submissions regarding the international movement towards the abolition of capital punishment.

12. AI Canada has also appeared as an intervener or applicant in the following cases:

- (a) *Tanudjaja et al v. Attorney General of Canada and Attorney General of Ontario*, 2014 ONCA 852, 236 ACWS (3d) 610: presented submissions regarding the nature of Canada's international human rights obligations and the justiciability of social and economic rights;
- (b) *France v. Diab*, 2014 ONCA 374, 120 OR (3d) 174: submitted that Canada's obligations under international human rights law compel Canada to refuse extradition for anyone for whom there is a real risk of admission of evidence derived from torture at the trial following extradition;
- (c) *First Nations Child and Family Caring Society of Canada et. al. v. Canada* (Canadian Human Rights Tribunal File No. T1340/7008, judgment reserved): submitted that Canada's international obligations must be respected in the interpretation of the *Canadian Human Rights Act* in determining whether Canada has discriminated against First Nations children living on reserves;
- (d) *The Attorney General of Canada v. Pictou Landing Band Council and Maurina Beadle*, Court File No. A-158-13: (leave to intervene before the Federal Court of Appeal granted, but government discontinued the appeal): prepared submissions as Canada's international human rights obligations to ensure that the level of health care services and funding available to a First Nations child living on reserve is equal to that received by a child living off reserve;
- (e) *Tanudjaja et al v. Attorney General of Canada and Attorney General of Ontario*, 2013 ONSC 1878, 281 CRR (2d) 220: presented submissions regarding the nature



of Canada's international human rights obligations and the justiciability of social and economic rights;

- (f) *Canadian Human Rights Commission v. Attorney General of Canada*, 2013 FCA 75, 444 NR 120: argued that Canada's obligations under international human rights law were inconsistent with a narrow reading of section 5(b) of the *Canadian Human Rights Act*, which would have precluded a comparison between the child welfare services received by First Nations children living on reserves and children living off reserves; and
- (g) *Choc et al v. HudBay et al*, 2013 ONSC 1414, 116 OR (3d) 674: made arguments regarding corporate accountability for human rights abuses overseas;
- (h) *Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe v. Canada*, 2008 FCA 229, [2009] 3 FCR 136: intervened with respect to the validity of the US-Canada Safe Third Country Agreement, considering the United States' failure to comply with its international human rights obligations, particularly the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*;
- (i) *Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of the Defence Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada*, 2008 FCA 401, [2009] 4 FCR 149: submitted that Canada breached its obligations under the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* when it transferred Afghan detainees into the custody of Afghan officials, where they were at serious risk of torture or cruel, inhuman or degrading treatment;
- (j) *Bouzari v. Islamic Republic of Iran*, (2004) 71 OR (3d) 675, 243 DLR (4th) 406: intervened regarding the right of a torture victim to sue for compensation from the offending government; and
- (k) *Ahani v. Canada (Minister of Citizenship and Immigration)*, (2002) 58 OR (3d) 107, 208 DLR (4th) 66: presented submissions regarding Canada's international obligations in response to the UN Human Rights Committee's request that

Canada not deport the appellant pending consideration of his complaint to the Committee.

13. Further, AI Canada was granted intervener status at the *The Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* (“Arar Inquiry”), and *The Internal Inquiry into the Actions of Canadian officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin* (“Iacobucci Inquiry”). In those inquiries, AI Canada made submissions on the subject of security and human rights, including the prohibition against torture, prohibition against the use of information obtained through torture, and the presumption of innocence of Canadians detained abroad.

14. In other national and international judicial contexts, AI and its national sections have made submissions on a variety of matters. For example:

- (a) *Hirsi Jamaa and others v. Italy*, [2012] ECHR 27765/09 (European Court of Human Rights): presented submissions regarding Italy’s violation of its refugee protection and human rights obligations under the *European Convention on Human Rights* when it intercepted a boat of smuggled refugees seeking asylum and diverted them to Libya;
- (b) *Graham v. Florida*, 982 So. 2d 43 (2010) (United States Supreme Court): argued the relevance of international law to the question of whether a juvenile offender can be sentenced to life in prison without parole for a non-homicide crime;
- (c) *Boumediene v. Bush; Al Odah v. United States*, 128 S. Ct. 2229 (2008) (United States Supreme Court): argued that the *Military Commission Act* of 2006 is an unconstitutional suspension of *habeas corpus* under United States law and in violation of the United States’ international obligations;
- (d) *Al-Skeini and others v. the Secretary of State*, [2007] UKHL 26 (British House of Lords), an appeal concerning the applicability of the *European Convention on Human Rights* and the UK’s *Human Rights Act 1998* to the actions of British armed forces in Iraq;

- (e) *A and others v. Secretary of State for the Home Department (No. 2)*, [2005] UKHL 71 (British House of Lords): presented arguments regarding the inadmissibility of evidence obtained through torture;
- (f) *A and others v. Secretary of State for the Home Department*, [2005] 2 AC 68 (British House of Lords): made submissions regarding the indefinite detention of suspected terrorists under the *Anti-Terrorism, Crime and Security Act 2001*;
- (g) *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [2000] 1 AC 147 (UKHL) (British House of Lords): intervened with respect to exceptions for state immunity for international crimes; and
- (h) *Chahal v. United Kingdom*, (1997) 23 EHRR 413 (European Court of Human Rights): presented arguments regarding the absolute prohibition against returning an individual to face a risk of torture.

#### c) Participation in Legislative Proceedings

15. AI Canada has also sought to advance international human rights through the Canadian legislative process. On many occasions, the organization has provided written and oral submissions to government officials, legislators, and House and Senate committees. Submissions include:

- (a) *Brief in Support of Bill C-279* (brief to the Standing Senate Committee on Legal and Constitutional Affairs, supporting the inclusion of “gender identity” as a prohibited ground of discrimination under the *Canadian Human Rights Act*), October 2014;
- (b) *Accountability, Protection and Access to Justice: Amnesty International’s Concerns with respect to Bill C-43* (brief to the House of Commons’ Standing Committee on Citizenship and Immigration, outlining the ways in which Bill C-43 would lead to violations of Canada’s international obligations and the *Canadian Charter of Rights and Freedoms*), October 31, 2012;

- (c) *Unbalanced Reforms: Recommendations with respect to Bill C-31* (brief to the House of Commons' Standing Committee on Citizenship and Immigration, outlining the ways in which Bill C-31 violates Canada's international obligations towards refugees and asylum-seekers), May 7, 2012;
- (d) *Fast and Efficient but not Fair: Recommendations with respect to Bill C-11* (brief to the House of Commons' Standing Committee on Citizenship and Immigration, regarding recommendations with respect to changes brought to the refugee determination process by Bill C-11), May 11, 2010;
- (e) Submissions to the Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development, regarding the Universal Periodic Review and the need to strengthen Canada's implementation of its international human rights obligations, including the right to adequate housing, April 2010;
- (f) Submissions to the House of Commons Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities in support of Bill C-304, *An Act to Ensure Secure, Adequate, Accessible and Affordable Housing for Canadians*, November 2009;
- (g) Submissions to the Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development, regarding the Universal Periodic Review and the need to strengthen Canada's implementation of its international human rights obligations, including the right to adequate housing, May 2009.
- (h) Oral submissions before the Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development (regarding the repatriation of Omar Khadr), May 2008;
- (i) Oral submissions before the House of Commons' Public Safety Committee in December 2007 and the Senate Special Committee on Anti-Terrorism (regarding Bill C-3, the proposed amendment to the security certificate regime), February 2008;

- (j) Oral submissions before the House Defence Committee (regarding the transfer by Canadian troops of Afghan detainees in Afghanistan), December 2006;
- (k) Oral submissions before the House Committee on Citizenship and Immigration (regarding security certificates), November 2006;
- (l) Oral submissions before the Senate and House of Commons' *Anti-Terrorism Act* Review Committees, May and September 2005 (regarding security certificates);
- (m) *Security through Human Rights* (submissions regarding security certificates to the Special Senate Committee on the *Anti-Terrorism Act* and House of Commons' Sub-Committee on Public Safety and National Security, as part of the review of Canada's *Anti-Terrorism Act*), May 16, 2005;
- (n) Brief on Bill C-31 (*Immigration and Refugee Protection Act*) (expressed concern that the proposed legislation provided insufficient protection to persons seeking asylum in Canada interdicted by immigration control officers while *en route* to the country), March 2001; and
- (o) Oral submissions before the House of Commons' Standing Committee on Foreign Affairs and International Trade with respect to Bill C-19 (a bill to implement Canada's obligations under the *Rome Statute* of the International Criminal Court).

#### d) Participation with International Organizations

16. AI has consultative status with the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organization, and the Council of Europe; has working relations with the Organization of American States and the Organization of African Unity; and is registered as a civil society organization with the Inter-Parliamentary Union.

17. AI has made submissions to various international organizations regarding Canada's compliance with its international human rights obligations, including:

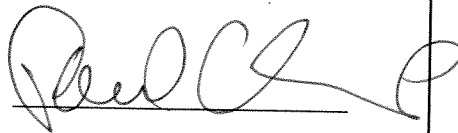
- (a) *Canada: Submission to the United Nations Human Rights Committee* (July 2014): AI's submissions to the UN Human Rights Committee regarding matters to raise in the List of Issues it adopted in November 2014 as a first step in the review of

Canada's compliance under the *International Covenant on Civil and Political Rights*;

- (b) *Canada: Human rights abuses prevalent among vulnerable groups* (April-May 2013): AI Submission to the Universal Periodic Review;
- (c) *Canada: Submission to the UN Universal Periodic Review* (October 2012): AI's submission to the second review of Canada's human rights record by the UN Human Rights Council;
- (d) *Amnesty International Submission to the UN Committee on the Rights of the Child* (September 2012): detailing concerns over the widespread removal of First Nations children from their families, communities, and cultures due to the systemic underfunding of child and family services for First Nations children living on reserves;
- (e) *Canada: Briefing to the UN Committee against Torture* (May 2012): AI's submission to the Committee's review of Canada, which highlighted, among other things, the failure to establish a comprehensive national action plan to address high rates of violence facing Indigenous women and girls and outstanding recommendations of the Ontario Ipperwash Inquiry with respect to police use of force during Indigenous land rights protests;
- (f) *Canada: Briefing to the UN Committee on the Elimination of Racial Discrimination* (February 2012): AI's submission to the Committee's review of Canada;
- (g) AI submission to the Inter-American Commission on Human Rights (acting as *amicus curiae* in the case of the *Hul'qumi'num Treaty Group v. Canada*, August 2011), detailing the nature of state obligations under international human rights standards to remedy the breach of Indigenous people's rights to lands, and applicable principles for the resolution of competing claims;
- (h) *Canada: Submission to the UN Universal Periodic Review* (February 2009): AI's submission to the first review of Canada's human rights record by the UN Human Rights Council;

- (i) *Human Rights for All: No Exceptions* (February 2007): AI's submission to the UN Committee on the Elimination of Racial Discrimination on the occasion of the examination of the 17th and 18th Periodic Reports submitted by Canada;
- (j) *It Is a Matter of Rights: Improving the Protection of Economic, Social and Cultural Rights in Canada* (March 2006): AI's submission to the UN Committee on Economic, Social and Cultural Rights on the occasion of the review of Canada's 4<sup>th</sup> and 5<sup>th</sup> periodic report;
- (k) *Protection Gap: Strengthening Canada's Compliance with its International Human Rights Obligations* (2005) AI's submission to the UN Human Rights Committee on the occasion of the consideration of the Fifth Periodic Report of Canada, 2005;
- (l) *Redoubling the Fight Against Torture: Amnesty International Canada's Brief to the UN Committee against Torture with respect to the Committee's Consideration of the Fourth Periodic Report for Canada* (October 8, 2004); and
- (m) *It's Time: Amnesty International's Briefing to the United Nations Committee against Torture with respect to the Third Report of Canada* (November 2000).

Exhibit "B" referred to in the  
affidavit of Alex Neve, sworn  
before me this 26<sup>th</sup> day of January,  
2015

A handwritten signature in black ink, appearing to read "Paul C. [unclear]", written over a horizontal line.

A commissioner, etc.



### **ESCR-Net's Work to Promote Human Rights**

18. ESCR-Net has an active Working Group on Adjudication, composed of human rights legal experts from around the world, focused on providing research and other strategic support for important national and international cases engaging ESCR. The Adjudication Working Group provides advice and assistance to organizations and governments attempting to develop effective implementation strategies for the right to adequate housing, and helps to establish links between human rights and governmental programs and policies.

19. Under the guidance of the Working Group on Adjudication, ESCR-Net has promoted improved adjudication and access to effective domestic remedies through a number of research, public education and advocacy initiatives.

20. Through research and other collaborative work overseen by the Adjudication Working Group, ESCR-Net plays a leadership role in advancing the substantive legal interpretation of the interconnections between social rights such as the right to adequate housing, the right to equality and nondiscrimination, and the right to life and security of the person. These issues and other issues related to the adjudication and enforcement of ESCR are addressed in forthcoming publications with Oxford University press and Pretoria University Law Press which have been initiated and coordinated by ESCR-Net's Working Group on Adjudication.

### **ESCR-Net's Caselaw Database**

21. ESCR-Net has produced and maintains the largest bilingual case law database on economic and social rights cases. Through its members and with the assistance of a number of universities, human rights centres and law schools, ESCR-Net conducts ongoing research into the adjudication of cases linked to ESCR in a wide range of countries. From this research, ESCR has developed and continues to expand an online database of cases related to ESCR. The database provides access not only to decisions in important cases but also to pleadings and legal argument, background research, academic commentary, information on claimants and assessments of longer term outcomes.

22. Many of the cases researched and included in the ESCR-Net Caselaw Database are those in which ESCR claims are brought forward under the rubric of rights to life, to security of the

person or the right to equality and non-discrimination, as in the present case. The database includes a number of Canadian cases brought, like the present application, under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*. The Canadian cases are seen as important internationally in establishing the interdependence between substantive rights to life, security of the person and equality – rights which are explicitly protected in most domestic constitutions – and rights recognized under international law such as the right to adequate housing.

23. Canadian cases in ESCR-Net's Caselaw Database include: *Victoria (City) v. Adams*, 2009 BCCA 563; 2008 BCSC 1363 (*Canadian Charter of Rights and Freedoms* section 7); *Sparks v. Dartmouth/Halifax County Regional Housing Authority*, (1993), 119 N.S.R. (2d) 91 (*Canadian Charter of Rights and Freedoms* section 15), *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (*Canadian Charter of Rights and Freedoms* section 15); *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 (*Canadian Charter of Rights and Freedoms* section 7); *Dunmore v. Ontario (Attorney-General)*, [2001] 3 S.C.R. 1016 (*Canadian Charter of Rights and Freedoms* sections 3 and 15); among others.

### **Promoting Adjudication of ESCR Claims Internationally**

24. ESCR-Net has conducted extensive research and advocacy on the issue of the justiciability of ESCR such as the right to housing in a range of legal and domestic contexts. This work was particularly important to ESCR-Net's research and advocacy in support of the work of a global NGO Coalition formed to promote the adoption of a complaints procedure for ESCR — the Optional Protocol to the *ICESCR (OP-ICESCR)*. With the support of ESCR-Net, the NGO Coalition for an OP-ICESCR advocated for an equivalent optional complaints procedure to provide access to international adjudication for rights under the *ICESCR* as had existed since 1976 for rights under the *International Covenant on Civil and Political Rights*. This campaign was ultimately successful, with the historic adoption of the *OP-ICESCR* on December 10, 2008 by the United Nations General Assembly.

25. As part of the NGO Coalition for the OP-ICESCR, ESCR-Net participated in the UN Working group mandated to draft the OP-ICESCR. Much of the research, consultation and public education conducted with respect to the drafting of the new complaints procedure for ESCR engaged issues of the interdependence of ESCR with civil and political rights and

justiciability of ESCR claims in different domestic legal systems, including in the majority of states which do not have explicit constitutional protections of ESCR such as the right to housing.

26. In the context of ongoing discussions of these issues within the United Nations and in the international community, members of ESCR-Net have frequently engaged with delegates of member states of the United Nations and attended expert meetings to consider and address concerns about the proper role of courts in relation to legislatures in the adjudication, remedy and enforcement of ESCR within different legal systems. ESCR-Net has conducted research into issues related to judicial competence, separation of powers, and judicial deference and engaged in extensive consultations on these issues.

27. In discussions on how ESCR such as the right to adequate housing may be protected by way of broadly framed rights to equality, life and security of the person, ESCR-Net has frequently studied the Canadian jurisprudence. The approach taken by Canadian courts to the issue of “reasonable limits” under section 1 of the *Charter* has also been widely discussed. During the discussions on the standard of review to be applied under the new complaints procedure in the OP-ICESCR, the Canadian delegation supported a standard of “reasonableness” derived from standards applied by courts in Canada, South Africa and other common law countries. This standard was eventually incorporated into the OP-ICESCR, and ESCR-Net has conducted extensive research into how a standard of reasonableness should be interpreted and applied under the OP-ICESCR and how this relates to standards applied in domestic constitutions. ESCR-Net is also overseeing the publication of an authoritative commentary on the OP-ICESCR, involving leading academic authorities and practitioners in the field of ESCR.

28. Subsequent to the adoption of the OP-ICESCR in 2008, ESCR-Net has assisted the NGO Coalition on the Optional Protocol to promote ratification of this new treaty, convening meetings and conducting public education in many countries on the importance of ensuring access to hearings and adjudication for ESCR. In all of this work, ESCR-Net is engaging with issues of how domestic legal systems which do not provide explicit protection of ESCR as directly justiciable rights, may nevertheless ensure access to hearings and effective remedies as required under international human rights law, particularly by way of broad constitutional protections of equality, dignity and security.

### **ESCR-Net's Strategic Litigation Initiative**

29. At ESCR-Net's Second General Assembly in Nairobi, providing support for strategic litigation of ESCR was identified as a key priority. A follow-up meeting of ESCR-Net members involved in litigating cases in a range of countries was subsequently held in New York in 2010 to consider how ESCR-Net could assist in promoting strategic litigation and improved adjudication of social rights claims. On the basis of this meeting, ESCR-Net's "Strategic Litigation Initiative" was launched to provide research, advice and support to advocates and stakeholders engaged in bringing forward important social rights claims.

30. Under ESCR-Net's Strategic Litigation Initiative, the Adjudication Working Group supports member organizations and others in advancing strategic cases related to economic and social rights under domestic, regional and international law. ESCR-Net has convened meetings of advocates and researchers in a number of regions. Research papers have been presented by members of the judiciary, academic researchers and practitioners on how ESCR can be better claimed, adjudicated and enforced in a variety of legal settings. By facilitating exchange of information among ESCR-Net members about important cases in different jurisdictions, documenting successes and failures, ESCR-Net has sought to ensure that this rapidly developing area is informed by high quality collaborative research, and creative thinking.

### **Participation in Domestic Cases**

31. Where appropriate, ESCR-Net seeks to intervene directly in important cases under the direction of the Adjudication Working Group.

32. ESCR-Net Adjudication Working Group members have participated in a considerable number of proceedings involving the right to housing and the guarantee to access to justice. For example:

- (a) The Socio-Economic Rights Institute of South Africa (SERI) has been involved in litigation directly or as *amicus curiae* in several cases in South Africa dealing with the right to housing, including:
  - (i) South African Informal Traders Forum v. City of Johannesburg and others before the Constitutional Court of South Africa;

- (ii) Gundwana v. Nedcor Bank and others (Gundwana) before the Constitutional Court of South Africa;
  - (iii) Blue Moonlight Properties v. Occupiers of Saratoga Avenue (Blue Moonlight) before the Supreme Court of Appeal of South Africa;
  - (iv) The Occupiers of Chung Hua v. Hoosein Mohamed and four others (Chung Hua), an appeal to a full-bench of the South Gauteng High Court (Johannesburg);
  - (v) Rand Leases Properties (Pty) Ltd v. the Occupiers of Vogelstruisfontein, the City of Johannesburg and Pickitup Johannesburg (Pty) Ltd (Marie Louise) before the South Gauteng High Court.
- (b) The Community Law Centre has been admitted as *amicus curiae* by various courts, including the Constitutional Court of South Africa. The cases in which it has been admitted as *amicus curiae* include:
- (i) Occupiers of 51 Olivia Road, Berea Township and Others v. City of Johannesburg and Others before the Constitutional Court of South Africa CCT 24/07;
  - (ii) The Government of South Africa and others v. Irene Grootboom before the Constitutional Court of South Africa CCT 11/00;
  - (iii) President of the Republic of South Africa and others v. Modderklip Boerdery before the Supreme Court of Appeal, South Africa (2005) SA 3(CC).
- (c) The Center for Economic and Social Rights (CESR) was a direct litigant in the groundbreaking *SERAC and CESR v. Nigeria* case before the African Commission on Human and Peoples' Rights on the right to housing.

33. In 2011, ESCR-Net, working through the Adjudication Working Group, was granted leave to intervene in a High Court case in Kenya. The case involved communities which had been forced to relocate to areas without adequate housing, no access to basic education for children or to other essential services. In a landmark ruling, the High Court interpreted the Constitution of Kenya in light of the right to adequate housing under international human rights

law ratified by Kenya, and ordered comprehensive remedies for the communities involved.

*(Ibrahim Sangor Osman V Minister of State for Provincial Administration & Internal Security*

eKLR [2011])