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CANADIAN YEARBOOK OF HUMAN RIGHTS

ANNUAIRE CANADIEN DES DROITS DE LA PERSONNE

VOL. III

About the Canadian Yearbook of Human Rights

The Canadian Yearbook of Human Rights (CYHR) is published by the University of Ottawa's Human Rights Research and Education Centre (HRREC). Submissions, addressing topics of human rights in Canada or international issues connected to or of relevance for Canada, are accepted in the English or French languages. Submissions are subject to peer-review and editing. The CYHR seeks to publish high quality scholarly work of contemporary significance and value for practitioners and academics alike.

The CYHR seeks to cover or reflect developments over one or more calendar years. The yearbook is composed of three sections. The first, general section is mainly comprised of unsolicited submissions, double-blind peer-reviewed articles. The second section addresses one or more specially selected topics and may include commissioned articles, sometimes primary in nature and may or may not be peer-reviewed as appropriate. The third section includes documentary material, such as conference reports.

For further information on the CYHR, including to submit an article for possible publication, and past Yearbooks (Volumes I and II), see the CYHR home-page at: https://www.uottawa.ca/research-innovation/hrrec/publications/canadian-yearbook-human-rights

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Ottawa, 2022

À propos de l'Annuaire canadien des droits de la personne

L'Annuaire canadien des droits de la personne (ACDP) est publié par le Centre de recherche et d'enseignement sur les droits de la personne (CREDP) de l'Université d'Ottawa. Les articles portant sur les droits de la personne au Canada ou sur des questions internationales liées ou pertinentes pour le Canada sont acceptés en anglais ou en français. Les articles sont soumis à un examen par les pairs et à une révision. L'Annuaire canadien des droits de la personne vise à publier des travaux savants de haute qualité, d'importance et de valeur contemporaines pour les praticiens et les universitaires.

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Ottawa, 2022

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EDITOR'S INTRODUCTION

John Packer

Volume III of the Canadian Yearbook of Human Rights (CYHR), covering a three-year period of 2019 through 2021, again comprises three parts: a General Section of individually submitted and peer-reviewed articles; two Special Sections addressing selected subjects on the basis of limited calls or specifically commissioned and edited contributions; and a third part with selected Documentation from the period holding particular significance for human rights in Canada.

The **General Section** includes six articles. The first five address various topics, implicating quite different human rights, and reflecting different approaches and perspectives about human rights and the underlying subject matters. Some are known yet still developing rights within the recognised corpus (like the right to water) while others are situational and inter-sectional as appears from the experiences and treatment of "activists-in-exile". A more orthodox treatment is provided to the governance of COVID-19 by decrees and Ministerial decisions of the Government of Quebec, and by a review and critique of international cultural heritage law and suggested reforms. In contrast, a fairly unorthodox perspective is brought through satirical political cartoons and the unique expression that they provide—inviting questions about the preoccupation with the phonetic alphabet as two-dimensional expression and "truth", the nature of rights and their treatment, and overall paradigm. Finally, we took the liberty of commissioning an article about the origin and development of the Human Rights Research and Education Centre (HRREC) at the University of Ottawa—celebrating its 40th anniversary as Canada's oldest university-based human rights institute (in fact, one of the oldest in the world) and its substantial contribution to elaboration of the Canadian Charter of Rights and Freedoms. Altogether, the General Section offers a rich and stimulating treatment of various issues and shows how human rights are important for so many aspects of contemporary life.

When work began on this issue of the CYHR, the term "Coronavirus" was hardly known—much less universally a defining element of our times. While arguably something like it should have been foreseen (and was by some[1]), we did not anticipate it. That was true of its immediate disruption and of its transformative effects. But it has been remarked that a crisis is an opportunity and sometimes an imperative for change. We chose to treat it as an opportunity for the highly relevant **first Special Section** of the CYHR. Indeed, we would have been remiss to leave COVID-19 unaddressed.

COVID-19 was certainly disruptive for the CYHR and, more generally, for the HRREC and the University of Ottawa and for all our associates, partners, and really everyone everywhere. One consequence was the delayed birth of this issue—Volume III of the CYHR. The implications of COVID-19 for human rights and, vice versa potentially, of human rights for the pandemic, became an imperative topic to address. To that end, a number of member institutions of the Canadian Association of Human Rights Institutes (CAHRI)[2] agreed to contribute analyses of selected topics. Newly liberated from his role as Secretary General of Amnesty International Canada (English Section)[3], we are honoured that Alex Neve agreed to serve as Guest Editor of this Special Section and to provide an overview. This followed from an unsuccessful initiative (to which Alex makes mention) to persuade the Government of Canada to adopt a human rights based approach—or at least to create an expert advisory committee to help inform the Government of implications, options and opportunities—in responding to the myriad challenges suddenly faced by Canadians and public authorities alike. Despite that disappointment, together the CAHRI contributors and CYHR here make a modest effort to show how human rights bear upon issues and, especially, the most vulnerable (notably, women, children, Indigenous peoples, people living in poverty, prisoners, people without regularized

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1 On this point generally, see, e.g., Stephen Maher, "Year One: The untold story of the pandemic in Canada; A comprehensive report on the country's mishandling of the crisis of the century", *MacLean's*, 24 March 2021: https://www.macleans.ca/longforms/covid-19-pandemic-canada-year-one/

2 For member, see: https://wp.stu.ca/ahrc/association-of-canadian-human-rights-institutes/

3 Announced in January 2020, with effect from end of June 2020, see: https://www.amnesty.ca/uncategorized/amnesty-international-canada-board-directors-announcement-alex-neve-stepping-down-secretary/

immigration status, and all those facing food insecurity) with recommendations for how policy, law, programmes and practices could and should be better formulated and applied in respecting, protecting and ensuring Canada's domestic and international human rights obligations and commitments.

Notwithstanding the glaring failure, so far, to apply a human rights based approach to the Coronavirus pandemic, the experience drew back the curtain on many long known (and often ignored) problems including blatant violations of human rights as well as less apparent and new violations resulting from the inequities of the pandemic and/or responses to it. Among these were (and sadly remain) ubiquitous homelessness and the national housing crisis, our treatment of the elderly and others in long-term care, widespread mental ill-health and inadequacy of care, the shortcomings of the Canadian "system" for overall health care provision (including staffing shortages and supply chains), inequities in the workplace and of social support, income inequality and precariousness, uncertainties of public or private mandates affecting fundamental freedoms and kinds of security, and much more beside. Unfortunately, instead of drawing from the large corpus of human rights norms, standards and known effective practices, including relevant jurisprudence, expertise and other tools, in general human rights were and remain hardly mentioned or simply ignored. Indeed, in some matters, and notably vis-à-vis "security", human rights have been set back, an increasingly common victim of "pushback" against human rights in an increasingly tough and unsympathetic world.

Not all has been gloomy. Many of the above-noted problems have been thrust into popular consciousness—like homelessness that could no longer simply be ignored for it posed a risk to the comfortable and to society as a whole. We shall see whether Canada's National Housing Strategy (promising a human rights based approach) will meet the enormous challenge. Similarly, we can no longer close our eyes as Canadians awoke to the persistent crisis in long-term care homes, their inadequate regulation, and the suffering which the pandemic exacerbated. More spectacularly, we learned that Canada is much richer than the federal treasury had allowed as, in shockingly short order, the Government of Canada found itself able to allocate hundreds of billions of Dollars (in effect, adding 50% to the accumulated national debt[4]) and still remain amongst the strongest of G-7 and OECD economies with a "good" debt-to-GDP ratio[5] and no currency collapse. Proving, thus, that large amounts of money can be spent if there is the political will, one wonders why visible problems like homelessness were not addressed long ago and in line with existing human rights obligations never mind sensible and moral public policy. In future, I for one no longer want to hear the argument "there's no money"; clearly, that is a matter of choice which is easily made if there is the political will. Moreover, to add insult to injury, all indications are that the pandemic has enormously enriched the already very wealthy[6]—with worrisome effects on income inequality (in fact a cavern which had been persistent for decades[7]) despite massive temporary State programmes.[8] That is also a matter of choice—a question of taxation in respect of which human rights are germane.

The **second Special Section** of Volume III of the CYHR offers an all too rare window into the lives, work and personalities of a selection of leading Canadian human rights activists. Sometimes referred to as a "movement", human rights have been advanced through the struggles of people—both as individuals and as groups. Human rights have been hard won and can be easily taken for granted; indeed, it is hoped that beneficiaries will not need to repeat the battles won and might enjoy the earlier gains, but Churchill's sober adage that "the price of freedom is eternal vigilance" compels us (not least during challenging times) to be alert and to learn from and follow the examples of those who have opened doors

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4 See: https://tradingeconomics.com/canada/government-debt

5 See, e.g., Jason Clemens and Milagros Palacios, "Caution Required When Comparing Canada's Debt to that of Other Countries", *Fraser Research Bulletin*, June 2021: https://www.fraserinstitute.org/sites/default/files/caution-required-when-comparing-canadas-debt-to-other-countries.pdf

6 See, e.g., Natasha Bulowski, "Ultra-rich families hold a quarter of Canada's wealth", *Canada's National Observer*, 10 December 2021: https://www.nationalobserver.com/2021/12/10/news/ultra-rich-familes-hold-quarter-canadas-wealth

7 See, notably, Sarah Burkinshaw, Yaz Terajima and Carolyn A. Wilkins, "Income Inequality in Canada", Staff Discussion Paper 2022-16, Bank of Canada, July 2022: https://www.bankofcanada.ca/wp-content/uploads/2022/07/sdp2022-16.pdf For an alternative pre-COVID19 analysis observing a greater disparity, see David A. Green, W. Craig Riddell and France St-Hilaire, "Income Inequality in Canada; Driving Forces, Outcomes and Policy", *Institute for Research on Public Policy*, 23 February 2017: https://irpp.org/research-studies/income-inequality-in-canada/

8 Of course, accumulated wealth and income are only two measures of well-being... and arguably not very helpful metrics for the most vulnerable who may have little or none of either. Real concerns were expressed about the overall inequality affecting the poor and vulnerable during the pandemic; see, e.g., Aaron Wherry, "One country, two pandemics: what COVID-19 reveals about inequality in Canada", *CBC News*, 13 June 2020: https://www.cbc.ca/news/politics/pandemic-covid-coronavirus-cerb-unemployment-1.5610404

and trod the path before us. To this end, a handful of profiles of remarkable Canadians are presented together with a brief look at Canadians having served as expert members of the supervisory body of the International Covenant on Civil and Political Rights (to which 173 States are party)[9] along with some critical analytical remarks of Canada's contribution.

The idea to profile Canadian human rights activists owes its origin to my own return to Canada in 2014 to take up the position of HRREC Director after almost 30 years working abroad for human rights in most parts of the world. I was struck by a number of recurrent experiences and observations. In terms of the former, I was and remain frequently asked by young people about possible careers in the field of human rights, the lack of apparent pathways, and the relative paucity of celebrated examples; of course, Canada is notoriously shy in advancing Canadians and, in addition, those who succeed (usually by their own means) tend to be modest. A possibly linked observation is that the human rights networks of advocates in Canada are, in significant measure, disconnected from international networks—perhaps also explaining, in part, the poor (compared with many or most other countries) treatment or use of international human rights norms, standards and recourses in Canada. Of course, this is not the case for everyone. Those profiled in this issue of the CYHR in fact straddle these "worlds" of human rights practice, domestically and internationally, and so are wonderful examples of rich and impactful careers: they are leading lights in the field. We are grateful for their contributions to this issue of the CYHR and we hope that their experiences, achievements and views, together with the challenges and opportunities they identify, will inspire others to follow in their foot-steps (although by no means are any of these Canadian human rights advocates close to hanging up their skates). It is also hoped that, in profiling such professionals, the varied and complex field of human rights may be more fully exposed and understood. Whether or not the Government of Canada will more actively engage in advancing human rights in a determined fashion (for example, by naming an Ambassador for Human Rights like many other countries have long ago done[10]) or establish meaningful institutions like used to exist (notably the International Centre for Human Rights and Democratic Development, 1988-2012[11]) or like exist in other countries (for example, the United States Institute for Peace[12] or the National Endowment for Democracy[13]), in fact many Canadians play important roles in the advancement of human rights at home and abroad either as individuals or through Canadian or international organisations. Indeed, it is sometimes recalled that one of the principal drafters of the Universal Declaration of Human Rights was Canadian John Peters Humphrey who was the first Director of the then United Nations Division of Human Rights within the UN Secretariat[14]; Humphrey was later instrumental in creating the Canadian Human Rights Foundation, subsequently renamed Equitas (as features in one of the profiles in this Special Section of the CYHR). In short, individuals can and do make a difference—sometimes profound and enduring. Knowing about such people is a requisite to understanding fully the work of human rights and building upon it. Thus, the movement may continue and grow.

Finally, in the **Documentation** part of this issue of the CYHR, two topics which merit special attention are highlighted by means of including, first, a synopsis of a conference held in January 2019 at the University of Manitoba on the human rights of Indigenous peoples and, second, proposals from a colloquium held at Dalhousie University on the pressing need to reform Canada's Extradition Act. The former subject has become increasingly an overarching matter for Canadian society affecting politico-legal arrangements and social relations given impetus especially from the 2015 final report of the Truth and Reconciliation Commission of Canada and its 94 Calls to Action.[15] The incorporation in

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[9] See: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights

[10] See, e.g., "Introducing the European Human Rights Ambassadors: A Joint Blog", Government of The Netherlands, 13 November 2020: https://www.government.nl/latest/news/2020/11/13/introducing-the-european-human-rights-ambassadors

[11] For the federal Act establishing the ICHRDD and its repeal, see: https://laws-lois.justice.gc.ca/eng/acts/I-17.3/index.html

[12] See: https://www.usip.org/

[13] See: https://www.ned.org/

[14] On his remarkable life and career, see: https://www.thecanadianencyclopedia.ca/en/article/john-peters-humphrey Specifically on his contribution to human rights at the UN, including the Universal Declaration of Human Rights, see his autobiographical account: John Thomas Peters Humphrey, *Human Rights and the United Nations: A Great Adventure* (New York: Transnational Publishers, 1983).

[15] For the background, final report and other official documents and materials of the Truth and Reconciliation Commission of Canada, see: https://www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525

2019 of the United Nations Declaration on the Rights of Indigenous Peoples into the law of British Columbia[16] and, subsequently, promulgation in 2021 of the federal United Nations Declaration on the Rights of Indigenous Peoples Act[17] portend broad and profound changes to the benefit of Indigenous peoples in Canada. Human rights are explicitly at the core of the foreseen changes.

Much less known are the problems of extradition—although, of course, it became a headline news item when Huawei CFO Meng Wanzhou was arrested in December 2018, while changing planes in Vancouver Airport pursuant to a US warrant and request for extradition from Canada, and, nine days later, China detained Canadians Michael Kovrig and Michael Spavor on spurious suspicion of "engaging in activities that threaten China's national security".[18] While President Donald Trump toyed with Canada suggesting the extradition request could be dropped if a satisfactory trade deal would be achieved between the USA and China[19], the Government of Canada insisted that the rule of law (notably Canada's Extradition Act and the Treaty on Extradition with USA[20]) would strictly apply and that there could be no "political interference".[21] The case ended in September 2021 when Meng reached a deal with US prosecutors[22]; upon Meng's release in Vancouver and return to China, within hours it was announced that the "two Michaels" were being released and returned to Canada[23].

While the celebrated cases of "the 3 Ms" or "the two Michaels" involved high politics of global significance, other important cases have held less attention or withered with time despite their egregious nature. Most notable amongst these is the ongoing case and travesty of justice experienced by Dr Hassan Diab.[24] Accused of involvement in the 1980 bombing of a synagogue in Paris, he was extradited to France, treated inhumanely, released after three years imprisonment and returned to Canada in the absence of a credible case against him and in light of exculpatory evidence... only thereafter, on appeal against him, to have the French Court of Cassation nonetheless order trial to proceed. Hence, Dr Diab remains vulnerable, again, to extradition despite public acknowledgement by then Minister of Justice Wilson-Raybould of evident problems with Canada's Extradition Act and her order for an external review which identified needed improvements[25]; importantly, Prime Minister Trudeau has signalled his intention of "standing up for [Canadian] citizens [...] also with our allies"[26],

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[16] For the British Columbia Act of 28 November 2019 and related materials, see: https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples

[17] For the federal Act promulgated 21 June 2021 and related materials, see: https://www.canada.ca/en/department-justice/news/2021/12/government-of-canada-advances-implementation-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples-act.html

[18] For the specific events and their sequence, see "The Meng Wanzhou Huawei saga: A timeline", *CBC News*, 24 September 2021: https://www.cbc.ca/news/meng-wanzhou-huawei-kovrig-spavor-1.6188472

[19] See, e.g., Andy Blatchford and Leah Nylen, "Trump's comments about Huawei exec's arrest to take center stage in extradition fight", *Politico*, 15 June 2020: https://www.politico.com/news/2020/06/15/trump-china-trade-deal-huawei-executive-extradition-319642

[20] For the full text of the "Treaty on Extradition Between the Government of Canada and the Government of the United States of America", E101323 – CTS 1976 No. 3, see online: https://www.treaty-accord.gc.ca/text-texte.aspx?id=101323

[21] The possibility of political action constituting "interference" became controversial at different times, notably when then Canada's Ambassador to China (and former Liberal Government Minister), John McCallum, expressed his view and intimated, for some, the prospect; see, e.g., Brian Platt, "Is Canada's extradition system free from political interference? Here's how the process works", *National Post*, 23 January 2019: https://nationalpost.com/news/politics/is-canadas-extradition-system-free-from-political-interference-heres-how-the-process-works

[22] See Julian Borger and Vincent Ni, "Meng Wanzhou flies back to China after deal with US prosecutors", *The Guardian*, 25 September 2021: https://www.theguardian.com/world/2021/sep/24/meng-wanzhou-huawei-deferred-prosecution-agreement

[23] See Stefania Palma, Edward White, Sun Yu and James Kynge, "Beijing frees Canadians after Huawei CFO reaches deal with US prosecutors", *The Financial Times*, 25 September 2021: https://www.ft.com/content/8d6cabf1-2683-45e1-a67f-19dd531b305d

[24] For a brief summary of the case, see Alex Neve, "The Hassan Diab Case: Injustice expands, need for redress and reform deepens", *PKI Global Justice Journal* (Queen's University), 1 February 2021: https://globaljustice.queenslaw.ca/news/the-hassan-diab-case-injustice-expands-need-for-redress-and-reform-deepens

[25] For the full text of the report produced by Murray Segal, see "Independent Review of the Extradition of Dr. Hassan Diab", 2 December 2021: https://www.justice.gc.ca/eng/rp-pr/cj-jp/ext/01/p1.html

[26] See Jim Bronskill, "Trudeau signals support for Hassan Diab as advocates demand intervention with France", *CTV News*, 3 March 2021: https://www.ctvnews.ca/politics/trudeau-signals-support-for-hassan-diab-as-advocates-demand-intervention-with-france-1.5332161?cache=kvcvaggfaak

but without pledging unequivocally not to extradite Dr Diab a second time. So far, it appears that such swords of Damocles hang over Canadians should any State with an extradition treaty with Canada so invoke it—irrespective the (in)validity of the allegations, the (in) adequacy (or worse) of protection of human rights in the requesting State, or the stipulations of the Canadian Charter of Rights and Freedoms. With a view to rectifying these obvious defects and the real risks attendant the increasingly rough and hostile international environment, in 2021 a group of experts adopted the Halifax Proposals for reform of the Canadian Extradition Act (which was adopted in 1999 in the much more hopeful post Cold War era). The needed reforms offer effective assurances for Canadians of respect for their human rights in this key matter of personal security, due process of law, and protection against abuses which may befall those extradited once beyond the effective protection of Canadian law and institutions especially in States that do not share the same Canadian or international standards.

Volume III of the CYHR presents a rich menu of subjects holding currency and importance for full lives in dignity and rights in Canada. Thirty-eight scholars and practitioners have combined to produce this issue of the CYHR which we hope will be widely disseminated and read. We hope it will inspire a range of actions and contribute to better scholarship, policy, law and practice in Canada and of Canada in an ever more interdependent and fragile world. In this we remain encouraged by Canada's last General Social Survey which reported that over 90% of Canadians view the Canadian Charter of Rights and Freedoms as the most important marker of Canadian identity—more than the Maple Leaf, the National Anthem, Ice Hockey or any of our favourite animals.[27] With such popular consciousness and high esteem, we believe it is possible to transform the promise of the idea of human rights into a lived reality for everyone—a challenge to which we here direct our efforts and invest our most earnest hope.

[27] See: https://www150.statcan.gc.ca/n1/pub/89-652-x/89-652-x2015005-eng.htm

INTRODUCTION DE L'ÉDITEUR

John Packer

Le volume III de l'Annuaire canadien des droits de la personne (ACDP), qui couvre une période de trois ans, de 2019 à 2021, comprend à nouveau trois parties : une section générale d'articles soumis individuellement et évalués par des pairs; deux sections spéciales traitant de sujets sélectionnés sur la base d'appels limités ou de contributions spécifiquement commandées et éditées; et une troisième partie comportant une sélection de documents de la période ayant une importance particulière pour les droits de la personne au Canada.

La **section générale** comprend six articles. Les cinq premiers traitent de divers sujets, impliquant des droits de la personne très différents, et reflétant différentes approches et perspectives des droits humains et des sujets sous-jacents. Certains sont des droits connus mais encore en développement au sein du corpus reconnu (comme le droit à l'eau), tandis que d'autres sont situationnels et intersectionnels, comme le montrent les expériences et le traitement des « activistes en exil ». Un traitement plus orthodoxe est appliqué à la gouvernance de la COVID-19 par des décrets et des décisions ministérielles du gouvernement du Québec, ainsi que par un examen critique du droit international du patrimoine culturel et des réformes proposées. En revanche, une perspective assez peu orthodoxe est présentée par le biais de bandes dessinées satiriques à caractère politiques et de l'expression unique qu'elles procurent—suscitant des questions sur la préoccupation à l'égard de l'alphabet phonétique comme expression bidimensionnelle et la « vérité », sur la nature des droits et leur traitement, et sur l'ensemble du paradigme. Enfin, nous avons pris la liberté de commander un article sur l'origine et le développement du Centre de recherche et d'enseignement sur les droits de la personne (CREDP) de l'Université d'Ottawa—célébrant son 40e anniversaire en tant que plus ancien institut universitaire des droits de la personne au Canada (en fait, l'un des plus anciens au monde) et sa contribution substantielle à l'élaboration de la Charte canadienne des droits et libertés. Dans l'ensemble, la Section générale offre un traitement riche et stimulant de diverses questions et montre l'importance des droits de la personne pour de nombreux aspects de la vie contemporaine.

Lorsque nous avons commencé à travailler sur ce numéro de l'ACDP, le terme « coronavirus » était à peine connu, et encore moins considéré universellement comme un élément déterminant de notre époque. Bien qu'un événement de ce type aurait dû être prévu (et l'a été par certains[1]), nous ne l'avons pas anticipé. Cela était vrai pour les perturbations immédiates qu'il a engendrées et pour ses effets transformateurs. Mais, il a été souligné qu'une crise est une opportunité et parfois un impératif de changement. Nous avons choisi de la traiter comme une opportunité pour la **première section spéciale** très pertinente de l'ACDP. En effet, nous aurions été négligents de ne pas traiter de la COVID-19.

La COVID-19 a certainement été perturbante pour l'ACDP et, plus généralement, pour le CREDP et l'Université d'Ottawa, ainsi que pour tous nos associés, partenaires et en réalité pour tout le monde. L'une des conséquences a été la parution tardive de ce numéro—le volume III de l'ACDP. Les implications de la COVID-19 pour les droits de la personne et, potentiellement, vice versa, des droits de la personne pour la pandémie, sont devenues un sujet impératif à traiter. À cette fin, un certain nombre d'institutions membres de l'Association canadienne des instituts des droits de la personne (ACIDP)[2] ont accepté de contribuer à l'analyse de certains sujets. Récemment libéré de son rôle de secrétaire général d'Amnesty International Canada (section anglaise)[3], nous sommes honorés qu'Alex Neve ait accepté d'être

[1] Sur ce point en général, voir, par exemple, Stephen Maher, « Year One : The untold story of the pandemic in Canada; A comprehensive report on the country's mishandling of the crisis of the century », *MacLean's*, 24 mars 2021 : https://www.macleans.ca/longforms/covid-19-pandemic-canada-year-one/.

[2] Pour les membres, voir : https://wp.stu.ca/ahrc/association-of-canadian-human-rights-institutes/.

[3] Annoncé en janvier 2020, avec effet à la fin du mois de juin 2020, voir : https://www.amnesty.ca/uncategorized/amnesty-international-canada-board-directors-announcement-alex-neve-stepping-down-secretary/.

le rédacteur en chef invité de ce chapitre spécial et d'en donner un aperçu. Cette initiative fait suite à une démarche infructueuse (dont Alex fait mention) visant à persuader le gouvernement du Canada d'adopter une approche fondée sur les droits de la personne—ou du moins de créer un comité consultatif d'experts qui aiderait à informer le gouvernement des implications, des options et des possibilités pour répondre à la myriade de défis auxquels sont soudainement confrontés les Canadiens et les autorités publiques. Malgré cette déception, les collaborateurs du CAHRI et de l'ACDP déploient ici un modeste effort pour montrer comment les droits de la personne se répercutent sur les questions et, en particulier, sur les plus vulnérables (notamment les femmes, les enfants, les peuples autochtones, les personnes vivant dans la pauvreté, les prisonniers, les personnes sans statut d'immigration régulier et tous ceux qui sont confrontés à l'insécurité alimentaire), en faisant des recommandations sur la façon dont les politiques, les lois, les programmes et les pratiques pourraient et devraient être mieux formulés et appliqués pour respecter, protéger et assurer les obligations et les engagements nationaux et internationaux du Canada en matière de droits de la personne.

Malgré l'échec manifeste, jusqu'à présent, de la mise en œuvre d'une approche fondée sur les droits de la personne dans le cadre de la pandémie de coronavirus, l'expérience a permis de lever le voile sur de nombreux problèmes connus depuis longtemps (et souvent ignorés), notamment des violations flagrantes des droits de la personne, ainsi que des violations moins apparentes et nouvelles résultant des inégalités de la pandémie et/ou des réponses à celle-ci. Parmi ces problèmes, il y avait (et il y a malheureusement toujours) la situation des personnes sans-abri et la crise du logement à l'échelle nationale, le traitement des personnes âgées et d'autres personnes nécessitant des soins de longue durée, le caractère généralisé de la mauvaise santé mentale et l'inadéquation des soins, les lacunes du « système » canadien de prestation des soins de santé en général (y compris les pénuries de personnel et les chaînes d'approvisionnement), les inégalités sur le lieu de travail et dans le soutien social, l'inégalité et la précarité des revenus, les incertitudes des mandats publics ou privés affectant les libertés fondamentales et les questions de sécurité, et bien d'autres choses encore. Malheureusement, au lieu de puiser dans le vaste corpus de normes, de standards et de pratiques efficaces connues en matière de droits de la personne, y compris la jurisprudence, l'expertise et les autres outils pertinents, les droits de la personne ont été et restent en général à peine mentionnés ou simplement ignorés. En effet, dans certains domaines, notamment en ce qui concerne la « sécurité », les droits de la personne ont été mis en retrait, victime de plus en plus fréquente du « repli » contre les droits de la personne dans un monde de plus en plus dur et antipathique.

Cependant, tout n'a pas été sombre. Bon nombre des problèmes mentionnés ci-dessus ont été propulsés dans la conscience populaire—comme la situation des personnes sans-abri qui ne pouvait plus être simplement ignorée car elle représentait un risque pour le confort et pour la société dans son ensemble. Nous verrons si la Stratégie nationale du logement au Canada (qui promet une approche fondée sur les droits de la personne) relèvera cet énorme défi. De même, nous ne pouvons plus fermer les yeux lorsque les Canadiens ont pris conscience de la crise persistante des foyers de soins de longue durée, de leur réglementation inadéquate et des souffrances que la pandémie a exacerbées. De façon plus spectaculaire, nous avons appris que le Canada est beaucoup plus riche que le trésor fédéral ne l'avait permis, car, en un temps record, le gouvernement du Canada s'est trouvé en mesure d'allouer des centaines de milliards de dollars (en fait, en ajoutant 50% à la dette nationale accumulée[4]) et de rester tout de même parmi les économies les plus fortes du G-7 et de l'OCDE avec un « bon » ratio dette/PIB[5] et sans effondrement monétaire. Cela prouve donc que de grandes quantités d'argent peuvent être dépensées si la volonté politique existe. On peut se demander alors pourquoi des problèmes visibles comme celui des personnes sans abri n'ont pas été résolus il y a longtemps et conformément aux obligations existantes en matière de droits humains, sans parler d'une politique publique sensée et morale. Pour ma part, je ne veux plus entendre, à l'avenir, l'argument « il n'y a pas d'argent »; il s'agit clairement d'une question de choix qui peut être facilement fait si la volonté politique existe. De plus, pour ajouter l'insulte à l'injure, tout indique que la pandémie a énormément enrichi les personnes déjà très riches[6]—avec des effets inquiétants sur l'inégalité des revenus (en fait une caverne qui persiste depuis

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[4] Voir : https://tradingeconomics.com/canada/government-debt.

[5] Voir, par exemple, Jason Clemens et Milagros Palacios, « Caution Required When Comparing Canada's Debt to that of Other Countries », *Fraser Research Bulletin*, juin 2021 : https://www.fraserinstitute.org/sites/default/files/caution-required-when-comparing-canadas-debt-to-other-countries.pdf.

[6] Voir, par exemple, Natasha Bulowski, « Ultra-rich families hold a quarter of Canada's wealth », *Canada's National Observer*, 10 décembre 2021 : https://www.nationalobserver.com/2021/12/10/news/ultra-rich-familes-hold-quarter-canadas-wealth.

des décennies[7]) malgré les programmes temporaires massifs de l'État.[8] Cela est aussi une question de choix—une question d'imposition pour laquelle les droits de la personne sont pertinents.

La **deuxième section spéciale** du volume III de la Revue canadienne des droits de la personne offre une fenêtre trop rare sur la vie, le travail et la personnalité d'une sélection d'éminents militants canadiens en matière de droits de la personne. Parfois qualifiés de « mouvement », les droits de la personne ont progressé grâce aux luttes menées par les gens, tant à titre individuel que collectif. Les droits de la personne ont été durement acquis et peuvent facilement être considérés comme allant de soi. En effet, on espère que les bénéficiaires n'auront pas à répéter les batailles gagnées et qu'ils pourront profiter des gains antérieurs. Mais, le sobre adage de Churchill selon lequel « le prix de la liberté est une vigilance éternelle » nous oblige (surtout en période difficile) à être vigilants et à apprendre et suivre les exemples de ceux qui ont ouvert les portes et emprunté le chemin avant nous. À cette fin, quelques profils de Canadiens remarquables sont présentés, ainsi qu›un bref aperçu des Canadiens ayant servi comme experts au sein de l›organe de surveillance du Pacte international relatif aux droits civils et politiques (auquel 173 États sont parties)[9], accompagné de quelques remarques analytiques critiques sur la contribution du Canada.

L'idée de dresser le profil des militants canadiens des droits de la personne doit son origine à mon propre retour au Canada en 2014 pour occuper le poste de directeur du CREDP, après près de 30 ans de travail à l'étranger pour les droits de la personne dans la plupart des régions du monde. J'ai été frappé par un certain nombre d'expériences et d'observations récurrentes. En ce qui concerne la première, j'ai été et je suis toujours fréquemment interrogé par les jeunes sur les carrières possibles dans le domaine des droits de la personne, sur le manque de voies apparentes et sur la relative rareté des exemples de réussites célèbres. Bien sûr, le Canada est notoirement timide dans la promotion des Canadiens et, en outre, ceux qui réussissent (généralement par leurs propres moyens) ont tendance à être modestes. Une observation qui y est peut-être liée est que les réseaux de défenseurs des droits de la personne au Canada sont, dans une large mesure, déconnectés des réseaux internationaux—ce qui explique peut-être aussi, en partie, le traitement ou l'utilisation médiocre (par rapport à la plupart des autres pays) des normes, standards et recours internationaux en matière de droits de la personne au Canada. Évidemment, ce n'est pas le cas pour tout le monde. Les personnes dont le profil est présenté dans ce numéro de la Revue canadienne des droits de la personne chevauchent en fait ces « mondes » de la pratique des droits de la personne, au pays et à l'étranger, et sont donc de merveilleux exemples de carrières riches et marquantes : ce sont des phares dans le domaine. Nous leur sommes reconnaissants pour leurs contributions à ce numéro de la Revue canadienne des droits de la personne et nous espérons que leurs expériences, leurs réalisations et leurs points de vue, ainsi que les défis et les possibilités qu'ils identifient, inspireront d'autres personnes à suivre leurs traces (même si aucun de ces défenseurs canadiens des droits de la personne n'est près de raccrocher ses patins). Nous espérons également qu'en dressant le profil de ces professionnels, le domaine varié et complexe des droits de la personne pourra être mieux exposé et compris. Que le gouvernement du Canada s'engage plus activement dans la promotion des droits de la personne de manière déterminée (par exemple, en nommant un ambassadeur des droits de la personne comme de nombreux autres pays l'ont fait depuis longtemps[10]) ou qu'il crée des institutions significatives comme il en existait autrefois (notamment le Centre international des droits de la personne et du développement démocratique, 1988-2012[11]) ou comme il en existe dans d'autres pays (par

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7 Voir, notamment, Sarah Burkinshaw, Yaz Terajima et Carolyn A. Wilkins,« Income Inequality in Canada », Staff Discussion Paper 2022-16, Banque du Canada, juillet 2022 : https://www.bankofcanada.ca/wp-content/uploads/2022/07/sdp2022-16.pdf. Pour une autre analyse antérieure à COVID19 observant une plus grande disparité, voir David A. Green, W. Craig Riddell et France St-Hilaire, « Income Inequality in Canada; Driving Forces, Outcomes and Policy », *Institut de recherche en politiques publiques*, 23 février 2017 : https://irpp.org/research-studies/income-inequality-in-canada/.

8 Bien sûr, la richesse et le revenu accumulés ne sont que deux mesures du bien-être… et on peut soutenir que ces mesures ne sont pas très utiles pour les plus vulnérables qui peuvent avoir peu ou pas du tout de ces deux éléments. De réelles inquiétudes ont été exprimées quant à l'inégalité globale affectant les pauvres et les personnes vulnérables pendant la pandémie; voir, par exemple, Aaron Wherry, « One country, two pandemics : what COVID-19 reveals about inequality in Canada », *CBC News*, 13 juin 2020 : https://www.cbc.ca/news/politics/pandemic-covid-coronavirus-cerb-unemployment-1.5610404.

9 Voir : https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights.

10 Voir, par exemple, « Introducing the European Human Rights Ambassadors: A Joint Blog », Gouvernement des Pays-Bas, 13 novembre 2020 : https://www.government.nl/latest/news/2020/11/13/introducing-the-european-human-rights-ambassadors.

11 Pour la Loi fédérale portant création du CIDPDD et son abrogation, voir : https://laws-lois.justice.gc.ca/eng/acts/I-17.3/index.html.

exemple, l'Institut pour la paix des États-Unis[12] ou la National Endowment for Democracy[13]). En fait, de nombreux Canadiens jouent un rôle important dans la promotion des droits de la personne dans leur pays et à l'étranger, soit à titre individuel, soit par l'intermédiaire d'organisations canadiennes ou internationales. En effet, on se souvient parfois que l'un des principaux rédacteurs de la Déclaration universelle des droits de l'homme était le Canadien John Peters Humphrey, qui a été le premier directeur de la Division des droits de l'homme du Secrétariat des Nations Unies de l'époque[14]; Humphrey a ensuite joué un rôle déterminant dans la création de la Fondation canadienne des droits de la personne, rebaptisée par la suite Equitas (comme l'indique l'un des profils de cette section spéciale de l'ACDP). En bref, les individus peuvent faire et font une différence, parfois profonde et durable. Il est indispensable de connaître ces personnes pour comprendre pleinement le travail des droits de la personne et le développer. Ainsi, le mouvement peut se poursuivre et se développer.

Enfin, dans la partie **Documentation** de ce numéro de l'ACDP, deux sujets qui méritent une attention particulière sont mis en avant en incluant, d'une part, le synopsis d'une conférence organisée en janvier 2019 à l›Université du Manitoba sur les droits humains des peuples autochtones et, d›autre part, les propositions de communication lors d'un colloque organisé à l'Université Dalhousie sur l'urgente nécessité de réformer la Loi canadienne sur l'extradition. Le premier sujet est devenu une question de plus en plus importante pour la société canadienne, affectant les dispositions politico-juridiques et les relations sociales, en particulier depuis le rapport final de 2015 de la Commission de vérité et de réconciliation du Canada et ses 94 appels à l'action.[15] L'incorporation en 2019 de la Déclaration des Nations Unies sur les droits des peuples autochtones dans le droit de la Colombie-Britannique[16] et, par la suite, la promulgation en 2021 de la Loi fédérale sur la Déclaration des Nations Unies sur les droits des peuples autochtones[17] laissent présager de vastes et profonds changements au profit des peuples autochtones du Canada. Les droits de la personne sont explicitement au cœur des changements envisagés.

Les problèmes d'extradition sont beaucoup moins connus—même si, bien sûr, ils ont fait la une des journaux lorsque la directrice financière de Huawei, Meng Wanzhou, a été arrêtée en décembre 2018, alors qu'elle changeait d'avion à l'aéroport de Vancouver, conformément à un mandat américain et à une demande d'extradition adressée au Canada, et que, neuf jours plus tard, la Chine a détenu les Canadiens Michael Kovrig et Michael Spavor en les soupçonnant de manière fallacieuse de « participer à des activités menaçant la sécurité nationale de la Chine ».[18] Alors que le président Donald Trump a laissé entendre que le Canada pourrait ne pas donner effet à la demande d'extradition si un accord commercial satisfaisant était conclu entre les États-Unis et la Chine[19], le gouvernement canadien a insisté sur le fait que la règle de droit (notamment la Loi canadienne sur l'extradition et le traité d'extradition avec les États-Unis[20]) s'appliquerait strictement et qu'il ne pourrait y avoir aucune « ingérence politique ».[21] L'affaire a pris fin en septembre 2021 lorsque Meng a conclu

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[12] Voir : https://www.usip.org/.

[13] Voir : https://www.ned.org/.

[14] Sur sa vie et sa carrière remarquables, voir : https://www.thecanadianencyclopedia.ca/en/article/john-peters-humphrey. Plus précisément, sur sa contribution aux droits de l'homme à l'ONU, notamment la Déclaration universelle des droits de l'homme, voir son récit autobiographique : John Thomas Peters Humphrey, *Human Rights and the United Nations : A Great Adventure* (New York : Transnational Publishers, 1983).

[15] Pour le contexte, le rapport final et d'autres documents et matériels officiels de la Commission de vérité et de réconciliation du Canada, voir : https://www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525.

[16] Pour la Loi de la Colombie-Britannique du 28 novembre 2019 et les documents connexes, voir : https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples.

[17] Pour la Loi fédérale promulguée le 21 juin 2021 et les documents connexes, voir : https://www.canada.ca/en/department-justice/news/2021/12/government-of-canada-advances-implementation-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples-act.html.

[18] Pour les événements spécifiques et leur séquence, voir « The Meng Wanzhou Huawei saga : A timeline », *CBC News*, 24 septembre 2021 : https://www.cbc.ca/news/meng-wanzhou-huawei-kovrig-spavor-1.6188472.

[19] Voir, par exemple, Andy Blatchford et Leah Nylen, « Trump›s comments about Huawei exec›s arrest to take center stage in extradition fight », Politico, 15 juin 2020 : https://www.politico.com/news/2020/06/15/trump-china-trade-deal-huawei-executive-extradition-319642.

[20] Pour le texte intégral du « Traité d'extradition entre le gouvernement du Canada et le gouvernement des États-Unis d'Amérique », E101323 - CTS 1976 No. 3, voir en ligne : https://www.treaty-accord.gc.ca/text-texte.aspx?id=101323.

[21] La possibilité qu'une action politique constitue une « ingérence » est devenue controversée à différents moments, notamment lorsque

un accord avec les procureurs américains.[22] Après la libération de Meng à Vancouver et son retour en Chine, il a été annoncé en quelques heures que les « deux Michael » étaient libérés et rentraient au Canada[23].

Alors que les célèbres affaires des « 3 M » ou des « 2 Michael » ont impliqué de hautes politiques d'importance mondiale, d'autres affaires importantes ont retenu moins l'attention ou se sont étiolées avec le temps malgré leur caractère choquant. La plus notable d'entre elles est l'affaire en cours et le simulacre de justice dont a été victime le Dr Hassan Diab.[24] Accusé d'avoir participé à l'attentat à la bombe de 1980 contre une synagogue à Paris, il a été extradé vers la France, traité de manière inhumaine, libéré après trois ans d'emprisonnement et renvoyé au Canada en l'absence de charges crédibles contre lui et à la lumière de preuves disculpatoires… pour ensuite, à la suite d'un appel contre lui, voir la Cour de cassation française ordonner néanmoins la poursuite du procès. Par conséquent, le Dr Diab reste vulnérable, une fois de plus, à l'extradition malgré la reconnaissance publique par la ministre de la Justice de l'époque, Mme Wilson-Raybould, des problèmes évidents de la Loi sur l'extradition du Canada et son ordonnance de procéder à un examen externe qui a identifié les améliorations nécessaires.[25] Le Premier ministre Trudeau a surtout signalé son intention de « défendre les citoyens [canadiens] […] également avec nos alliés »[26], mais sans s'engager sans équivoque à ne pas extrader le Dr Diab une deuxième fois. Jusqu'à présent, il semble que de telles épées de Damoclès soient suspendues au-dessus des Canadiens si un État ayant conclu un traité d'extradition avec le Canada l'invoque—indépendamment de la (in) validité des allégations, de la (in)adéquation (ou pire) de la protection des droits de la personne dans l'État requérant, ou des stipulations de la Charte canadienne des droits et libertés. Afin de remédier à ces défauts évidents et aux risques réels liés à l'environnement international de plus en plus rude et hostile, un groupe d'experts a adopté en 2021 les Propositions d'Halifax pour la réforme de la Loi canadienne sur l'extradition (qui a été adoptée en 1999 dans l'ère beaucoup plus prometteuse de l'après-guerre froide). Les réformes nécessaires offrent des garanties effectives aux Canadiens quant au respect de leurs droits humains sur cette question clé de sécurité personnelle, de l'application régulière de la loi et de la protection contre les abus qui peuvent frapper les personnes extradées une fois qu'elles ont échappé à la protection effective de la loi et des institutions canadiennes, en particulier dans les États qui ne partagent pas les mêmes normes canadiennes ou internationales.

Le volume III de la Revue canadienne des droits de la personne présente un riche menu de sujets d'actualité et d'importance pour une vie pleine de dignité et de droits au Canada. Trente-huit chercheurs et praticiens ont uni leurs efforts pour produire ce numéro de la Revue canadienne des droits de la personne qui, nous l'espérons, sera largement diffusé et lu. Nous espérons qu'il inspirera toute une gamme d'actions et contribuera à l'amélioration des connaissances, des politiques, des lois et des pratiques au Canada et du Canada dans un monde de plus en plus interdépendant et fragile. À cet égard, nous sommes encouragés par la dernière Enquête sociale générale du Canada, selon laquelle plus de 90 % des Canadiens considèrent la Charte canadienne des droits et libertés comme le plus important marqueur de l›identité canadienne—plus que la feuille d'érable, l'hymne national, le hockey sur glace ou n'importe lequel de nos animaux préférés.[27] Avec une telle conscience populaire et une telle estime, nous croyons qu'il est possible de transformer la promesse de l'idée des droits de la personne en une réalité vécue par tous—un défi auquel nous consacrons ici nos efforts et notre espoir le plus sincère.

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l'ambassadeur du Canada en Chine de l'époque (et ancien ministre du gouvernement libéral), John McCallum, a exprimé son point de vue et a laissé entrevoir, pour certains, cette perspective; voir, par exemple, Brian Platt, « Is Canada's extradition system free from political interference? Here's how the process works », *National Post*, 23 janvier 2019 : https://nationalpost.com/news/politics/is-canadas-extradition-system-free-from-political-interference-heres-how-the-process-works.

[22] Voir Julian Borger et Vincent Ni, « Meng Wanzhou flies back to China after deal with US prosecutors », *The Guardian*, 25 septembre 2021 : https://www.theguardian.com/world/2021/sep/24/meng-wanzhou-huawei-deferred-prosecution-agreement.

[23] Voir Stefania Palma, Edward White, Sun Yu et James Kynge, « Beijing frees Canadians after Huawei CFO reaches deal with US prosecutors », *The Financial Times*, 25 septembre 2021 : https://www.ft.com/content/8d6cabf1-2683-45e1-a67f-19dd531b305d.

[24] Pour un bref résumé de l'affaire, voir Alex Neve, « The Hassan Diab Case : Injustice expands, need for redress and reform deepens », *PKI Global Justice Journal* (Queen's University), 1er février 2021 : https://globaljustice.queenslaw.ca/news/the-hassan-diab-case-injustice-expands-need-for-redress-and-reform-deepens.

[25] Pour le texte intégral du rapport produit par Murray Segal, voir « Independent Review of the Extradition of Dr. Hassan Diab », 2 décembre 2021 : https://www.justice.gc.ca/eng/rp-pr/cj-jp/ext/01/p1.html.

[26] Voir Jim Bronskill, « Trudeau signals support for Hassan Diab as advocates demand intervention with France », *CTV News*, 3 mars 2021 : https://www.ctvnews.ca/politics/trudeau-signals-support-for-hassan-diab-as-advocates-demand-intervention-with-france-1.5332161?cache=kvcvaggfaak.

[27] Voir : https://www150.statcan.gc.ca/n1/pub/89-652-x/89-652-x2015005-eng.htm

GENERAL SECTION

STRUGGLE FOR SAFE WATER: RESPECTING HUMAN RIGHTS IN A DEVELOPED COUNTRY

Indira Boutier

INTRODUCTION

In December 2020, the single Christmas present a nine-year old from Canada's First Nations' Neskantanga community wished for, was "Clean water." Her rider, "I hope it comes true," reflected both the vital importance of the demand, and the troubling implication that it is still an unbelievable luxury. Coming from the third-richest nation in water resources, it mirrored the deep malaise around what is legally acknowledged as a fundamental right. The recent pandemic crisis has rendered this injustice completely acceptable. Particularly so, for Indigenous communities. International data on the impact of Covid-19 in these communities is still scanty. Some surveys and reports have focused largely on Asia, Latin America, or Africa.[28] They underline that Indigenous groups already suffering from significant gaps in access to appropriate health, livelihood or education, are clearly disproportionately impacted. They not only risk being left further behind, but their very cultures and modes of life are threatened. But what of the Indigenous groups in developed countries? In comparison to the protection of minority groups, which can be traced back to the Treaty of Westphalia in 1648 along with that of religious groups,[29] a legal recognition and protection of their rights is quite recent. While Indigenous people necessarily form part of minority groups, they also enjoy specific protection in international law since 1971, with the Economic and Social Council resolution 1982/34 and with the creation of a United Nations Working Group on Indigenous Population in 1982.

During the 2020 lockdown triggered by Covid-19, marginalized and vulnerable populations were those amongst the most affected and at-risk population groups.[30] Among these groups, Indigenous communities faced increasing discrimination on account of their origins when accessing health facilities, but equally, had more trouble in accessing food, water and other basic services. The United Nations Special Rapporteur on minority issues, Mr. de Varennes, pointed out the urgency of "firm actions by States and all of us to safeguard the human rights of the most vulnerable and marginalized, including minorities, Indigenous communities, and migrants...."[31] The statement highlighted the risks of overlooking human rights' violations of marginalized groups amidst the crisis of governance, or what the French philosopher Guillaume Le Blanc has diagnosed as the "*panique de l'Etat*."

In this paper, First Nations' human rights are examined through the prism of the right to water. It begins by reviewing the access of First Nations communities to this public good. Next, a survey is made of the measures taken by Canada during the recent pandemic in view of compliance to the right to water as affirmed by international human rights laws. A third section

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[28] The International Work Group for Indigenous Affairs, "The Impact of Covid-19 on Indigenous Communities: Insights from the Indigenous Navigator" (8 October 2020) at 11, online (pdf): *International Labour Organization* <www.ilo.org/gender/Informationresources/Publications/WCMS_757475/lang--en/index.htm> [IWGIA].

[29] Natan Lerner, *Group Rights and Discrimination in International Law* (London: Martinus Nijhoff Publishers 1990) at 22.

[30] United Nations Office on Drugs and Crime, "Global Humanitarian Response Plan COVID-19" (28 March 2020) online: *United Nations* <www.unodc.org/unodc/en/press/releases/2020/March/covid-19-global-humanitarian-response-plan.html>.

[31] UN News, "COVID-19 Stoking Xenophobia, Hate and Exclusion, Minority Rights Expert Warns" (30 March 2020) online: *UN News* <news.un.org/en/story/2020/03/1060602>.

scrutinizes the legal provisions provided by international human rights conventions and the United Nations human rights committee on the fundamental right to water. Finally, the last section evaluates Canada's actions with respect to these international legal requirements.

THREAT TO WATER SAFETY

Background

The Shoal Lake 40 - located in the southwest of Manitoba in Canada - provides all the drinking water for the city of Winnipeg, but First Nation people living there have long been under a boil water advisory while waiting for government installation of an adequate water treatment system. Although Canada is generously endowed with water and categorized as a freshwater-rich country, the regional distribution of this water is very uneven. At the bottom of the scale of access, lie Indigenous people.

Canada's policies towards Indigenous communities are often questioned at the national and international level.[32] Their assimilation policy of Indigenous groups under the Sixties Scoop between the 1950s and 1980s saw welfare agencies in Canada forcefully remove approximately 20,000 Indigenous children. Today, the discrimination in access to health care, safety, security, well-being, and justice, places a big question mark against Canada's compliance with human rights standards in its approach to the Indigenous communities.

Canada's article 35 of the Constitution recognizes three Indigenous groups: Metis, First Nations, and Inuit. Even if data collected on the propagation of the pandemic does not show the impact on different Indigenous communities, the Indigenous Services Canada reveals that from January 26, 2020 to January 23, 2021 the State has registered 240,364 Covid-19 cases, of which 13.5% (32,506) are Indigenous individuals.[33] Initially few cases of Covid-19 were traced in Indigenous communities, with British Columbia reporting only 90 cases among First Nations people in the first six months of 2020.[34] But, between January 15 and January 23, 2021, the number of Indigenous individuals contaminated by Covid-19, increased by three points. Around 4.9% (1.67 million) of the Canadian population self-identify as Indigenous peoples according to the 2016 census, which implies that nearly 1.94% of Indigenous people were affected by Covid-19.

On the one hand, water insecurity in Canada, especially among Indigenous communities, is difficult to quantify as no survey systems including all Indigenous groups exists.[35] On the other hand, there do exist some reports and investigations by Human Rights Watch[36], and other humanitarian bodies like Amnesty International.[37] They reveal that water remains difficult to access for these groups in Canada: rather than a basic, easily available public good, it contaminated either by chemical substances or faulty distribution system.[38] In short, rather than a public good, it is a commodity.[39] The problem is compounded by the fact that Canada's jurisdictions regulating water are multiple. They are fragmented amongst the federal government, the ten provincial governments, aboriginal self-governments, territorial governments, and municipalities. All these bodies exercise control over different aspects of water. Water is primarily regulated at the provincial level, but aboriginal rights can cross jurisdictional boundaries. It lies in the hands of provinces and territories to decide. This means that water considered acceptable on one reserve may not be acceptable outside. More specifically, the Constitution gives shared responsibilities over interprovincial water

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[32] Comisión Interamericana de Derechos Humanos, "Canadá: Mujeres Indígenas Asesinadas Desaparecidas" (2019) online (video): *Youtube* <www.youtube.com/watch?v=fkQ4G5iEnAI>.

[33] Government of Canada Indigenous Services, "Confirmed Cases of COVID-19" (28 August 2020) online: *Government of Canada* <www.sac-isc.gc.ca/eng/1598625105013/1598625167707>.

[34] Jolene Banning, "Why Are Indigenous Communities Seeing so Few Cases of COVID-19?" (24 August 2020) online: *CMAJ News* <www.cmaj.ca/content/192/34/E993>.

[35] Maura Hanrahan, "Water (in)Security in Canada: National Identity and the Exclusion of Indigenous Peoples" (2017) 30:1 British J Can Studies 69.

[36] Human Rights Watch, "Canada: Blind Eye to First Nation Water Crisis" (2 October 2019) online: *Human Rights Watch* <www.hrw.org/news/2019/10/02/canada-blind-eye-first-nation-water-crisis> [Blind Eye].

[37] Amnesty International Canada, "The Right to Water" (18 October 2012) online: *Amnesty International Canada* <www.amnesty.ca/our-work/issues/Indigenous-peoples/Indigenous-peoples-in-canada/the-right-to-water>.

[38] Jack Graham, "Evacuated amid COVID-19, Canadian First Nation Waits for Clean Water" (18 November 2020) online: *Reuters* <www.reuters.com/article/us-canada-Indigenous-water-idCAKBN27Y1AZ>.

[39] Itzchak E. Kornfeld, "Water: A Public Good or a Commodity?" (2012) Proceedings of the ASIL Annual Meeting 49.

issues to both the federal and provincial government. Key legislative powers give provinces the primary role in water management. These include amongst others jurisdiction over municipalities. This power gives the province regulatory authority over all municipalities, which includes the power to authorize and regulated municipal water including water standards and the qualifications for municipal employees engaged in water quality. Whilst the federal government's powers related to water are specific legislative powers that include federal works and undertakings, and more particularly, canals, harbors, rivers, lake improvements and Indians and lands reserved for Indians.[40]

For Indigenous people, water contamination impacts not only their drinking habits, but equally fishing or the conduct of traditional rituals, in particular.[41] The First Nations communities, 44% of whom live with Registered or Treaty Indian status, were relocated to areas where sustained resource extraction put pressure on drinking water sources, now make-do with water that is contaminated or hard to access or treated by faulty systems. Unequal access to water highlights the relationship between the Canadian state and Indigenous communities which remains marked by a colonial hangover.[42]

In the 1970's, the federal government investigated the water and wastewater situation in Indigenous reserves and made recommendations, as well as committed funds.[43] Drinking water advisories were set up to alert people not to drink water that proved to be unsafe, after water quality testing. Water advisories and boil-water advisories, two terms that are used interchangeably, signal different types of contaminations. Boiling removes bacteria, viruses, and parasites, but does not remove toxic metals. Emergency advisories are issued when there is a confirmed water quality risk, and precautionary advisories signal a technical problem making water unsafe. First Nations advisories are mainly precautionary, making up more than 90 % of Ontario advisories. This means that the majority are about operations and maintenance challenges, not an indicator of clean water as such.

This measure has become a permanent feature. In January 2018, the federal government reported that 91 First Nations were under long-term drinking water advisories. This figure did not include First Nations in British Columbia, where First Nations water systems fall under a different regulatory authority. Nor does it include First Nations without any drinking water system, or those that use household storage cisterns that fall outside the field of such advisories. Government of Canada website figures updated on January 26, 2021, emphasize that 99 long-term drinking water advisories have been lifted since November 2015. Still, 57 remain in effect in 39 communities. However, in the view of some commentators, long-term advisory statistics are more of a policy performance measure than a move toward effective water security.[44]

Studies conducted between 2002-2003, 2008-2010 and 2015-2016 in First Nations reserves showed that access to indoor water supply leads to 80% reduction in depression, kidney issues and gastrointestinal illness.[45] Contaminated water not only means an obligation to drink boiled water but imposes the need to constantly use safe water for body hygiene. The danger to health in the form of cancer, gastrointestinal disorders to skin diseases for instance, eczema or psoriasis have been well-established by health agencies.[46] Further, health risks more importantly affect vulnerable populations such as old people and children.[47]

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[40] Linda Nowlan, "Customary Water Laws and Practices in Canada" (2004) online: *United Nations Food and Agriculture Organization* <www.fao.org/fileadmin/templates/legal/docs/CaseStudy_Canada.pdf>.

[41] Human Rights Watch, "Canada's Water Crisis: Indigenous Families at Risk" (7 June 2016) online (video): *Youtube* <www.youtube.com/watch?v=Arnqpnm70Ng&feature=emb_title> at 3:48 [Water Crisis].

[42] Hanrahan, supra note 8 at 73.

[43] Hilary Beaumont, "What Would It Look Like to Take the First Nations Water Crisis Seriously?" (18 October 2019) online: *The Walrus* <thewalrus.ca/what-would-it-look-like-to-take-the-first-nations-water-crisis-seriously/>.

[44] Corinna Dally-Starna, "Water Crisis in First Nations Communities Runs Deeper than Long-Term Drinking Water Advisories" (26 November 2020) online: *The Conversation* <theconversation.com/water-crisis-in-first-nations-communities-runs-deeper-than-long-term-drinking-water-advisories-148977>.

[45] Melanie O'Gorman, "Mental and physical health impacts of water/sanitation infrastructure in First Nations communities in Canada: An analysis of the Regional Health Survey" (2021) 145 World Development 105517.

[46] Human Rights Watch, "Make It Safe" (7 June 2016) online: *Human Rights Watch* <www.hrw.org/report/2016/06/07/make-it-safe/canadas-obligation-end-first-nations-water-crisis> [Make it Safe].

[47] Human Rights Watch, "World Report 2021: Rights Trends in Canada" (17 December 2020) online: *Human Rights Watch* <www.hrw.org/world-report/2021/country-chapters/canada> [World Report].

Whilst the drinking water crisis for First Nations is not a new issue, the health emergency has rendered it dramatic. Currently, there are nearly 100 First Nations communities who do not have access to clean and safe water. In 2005, reports of the Assembly of First Nations revealed that 75% of the 740 water treatment systems posed a medium-to-high risk to drinking water.[48] In 2011 a report of the Auditor General of Canada, considered that more than half of the water system in Indigenous communities still posed a medium or high risk.[49] The situation in 2014 has shown no change, according to the former United Nations Special Rapporteur on the rights of Indigenous peoples, James Anaya.[50] To this must be added the fact that in 2012, Statistics Canada showed that 2% of households on First Nations reserves still had no water services at all.[51]

Discriminatory practices can, in general, be difficult to prove. Yet Canada's discriminatory practices and policies in accessing water were pinpointed in 2005 by the Canadian Commissioner of the Environment. His report concluded that First Nations communities do not have the same level of protection in regard to water as non-Indigenous populations.[52] In fact, Indigenous groups are ninety times more likely to have no water compared to non-Indigenous.[53] The problem is multiplied by lack of support for household water and wastewater systems, worsening conditions of running water, and lack of capacity and support for water operators. This inequality between Indigenous and non-Indigenous people's access to water persists as a permanent issue. It is partly linked to monetary and infrastructural investments, systemic under-funding, and arbitrary budgeting for water system costs, including capital, operation and maintenance costs.

Canada committed itself to eliminate all First Nations drinking water advisories by 2021, through repair and maintenance of water systems. Safe water and sanitation are considered indispensable to life and health and consequently are fundamental to the dignity of all individuals. Federal underfunding was identified as a main cause of drinking water problems in First Nations communicates by an expert panel in 2006. The government included an upgrade of water systems through the Investing in Canada Plan – $180 billion delivered to provide funding for projects in Canada[54] - starting in 2018 for the next twelve years. Yet, a critical issue remains an absence of binding legal regulations on water quality on First Nations reserves and punitive legal action.

COVID-19 Impact

In October 2020, the Neskantaga First Nation – an Indigenous community in remote North-Western Ontario, accessible only by plane or on winter roads – evacuated nearly the 300 residents of the community, when a pump failure spilled mineral oil into the community's local water reservoir. The community had to evacuate to Thunder Bay – 400 km from their place – putting themselves at risk by breaking an isolation process established during Covid-19.[55] The action highlighted the absence of sufficient and continuous water supply for Indigenous groups. Neskantaga is known to have the country's longest-standing on-reserve boil-water advisory. A water-treatment plant was built in 1993, but water was still unsafe and a boil-water advisory was set up in 1995. Since then, the community must use bottled water. The gravity of this situation stands out in the light of World Health Organization (WHO) criteria of individuals needing between 50 and 100 liters of water per day to ensure basic needs. None of the other criteria set forth by WHO are applicable, such as the fact that water must also be physically accessible, within safe reach, and affordable.

In 2020, the government of Canada announced $1.5 billion in new investments for clean drinking water in First Nations communities. But the pandemic interrupted

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[48] Jerry P. White, Laura Murphy, & Nicholas Spence, "Water and Indigenous Peoples: Canada's Paradox" (2012) 3:3 Intl Indigenous Policy J 1 at 6.

[49] Office of the Auditor General of Canada. "Chapter 4—Programs for First Nations on Reserves" (9 June 2011) online (pdf): *Office of the Auditor General of Canada* <www.oag-bvg.gc.ca/internet/english/parl_oag_201106_04_e_35372.html> at paras 4, 23 [OAG].

[50] James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples on the Situation of Indigenous Peoples in Canada*, UNHCR, 27th Sess, UN Doc A/HRC/27/52/Add.2 (2014) at para 24.

[51] Hanrahan, *supra* note 8 at 74.

[52] David R. Boyd, "No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada" (2011) 57:1 McGill LJ 81.

[53] Alasdair Morrison, Lori Bradford & Lalita Bharadwaj, "Quantifiable Progress of the First Nations Water Management Strategy, 2001–2013: Ready for Regulation?" (2015) 40:4 Can Water Resources J 352.

[54] Government of Canada, "Infrastructure Canada - Investing in Canada Plan – Building a Better Canada" (6 September 2018) online: *Government of Canada* <www.infrastructure.gc.ca//plan/about-invest-apropos-eng.html>.

[55] Graham, *supra* note 11.

the liberal government's deadlines to end all long-term boil water advisories on First Nations by March 2021. Although the Plan of Implementation of the 2002 World Summit on Sustainable Development mentions that cost-recovery does not have to be a barrier to access to water for poor people, timelines for financial investment in Canada appear to have collapsed.

Covid-19 has impacted the operation and fate of water advisory projects, or their maintenance. Some communities refused to let external contractors enter their areas to protect themselves from the virus. But the pandemic has equally revealed the flaws in the financial frameworks within which the community functions. While First Nation's Band Councils are responsible for bringing safe water to the community, finances are controlled by the federal government. This financial equation between the government and the Indigenous community is rooted in article 91 of the Constitution Act, 1867 ("Indians, and lands reserved for the Indians"), which grants the government power on most aspects of life on reserves, mainly, governance of the Indigenous community. While in practice, Indigenous chiefs are responsible for providing services such as water, in reality, due mainly to the Indian Act, 1876 the government remains a substantial source of revenue for Indigenous peoples.

One immediate aftermath of this health emergency has been class-action lawsuits filed on behalf of Indigenous communities of Canada in Manitoba's Court of Queen's Bench.

The lack of effective action by the federal and provincial governments on the issue of water has been highlighted by the Covid-19 crisis. Hydro-development through the 1970s in the Manitoba region guaranteed to provided clean drinking water to the Tataskweyak Cree nation in the 1977 Northern Flood Agreement, built a water treatment plant drawing from Split Lake in 1987 and expanded it in 2004. According to Indigenous Services Canada, more than $23,5 million investment has been made in water and wastewater upgrades since 2016. But access to safe water remains a promise for communities of Tataskweyak or Neskantaga. A national class-action litigation was initiated against the Attorney General of Canada in fall 2019 by First Nations, on grounds of failing to address prolonged drinking-water advisories on First Nations reserves across Canada.[56] It cites a breach in fiduciary duties to First Nations people as well as the Constitution Act and sections of the Charter of Rights and Freedoms. It has exposed the problems of prolonged use of boil-water advisories, poor maintenance, and neglect of infrastructure. It opens the door for many First Nations members across Canada to join in the lawsuit. While the Statistics Canadian website affirms its commitment to monitoring and providing information to shed light on the pandemic situation and provide high-quality data, it makes no mention of the question of access to water in its findings and data.

Studies have highlighted the extent to which First Nations people, Inuit and Métis may be more vulnerable to the socio-economic consequences of the Covid-19 pandemic.[57] Available data shows that the total number of First Nations people affected since the beginning of the pandemic (14,761 on January 15, 2021, out of 977,230 or 1,5%) is relatively lower, as against the percentage of Canadians affected (766,103 out of 37,4 million or 2%). It could be concluded that this population is comparatively little affected. However, if we examine the curve of the pandemic, we observe a low number of cases till the summer (780 cases at the end of September 2020) and an exponential progression from September 2020 onwards with 14,761 cases by January 23, 2021.[58] This explains the Indigenous Services minister Marc Miller's statement in November 2020 that their situation was alarming, even whilst he admits that the lack of data did not tell the full story, as they only had data for reserves.[59]

INTERNATIONAL AND REGIONAL LEGAL HUMAN RIGHTS FRAMEWORK

2020 marked ten years since the passage of the United Nations General Assembly Resolution 64/292 (August 3, 2010) recognizing clean drinking water and sanitation as essential to the realization of all human

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[56] *Tataskewyak Cree Nation et al v Canada (AG)*, (20 November 2019), Winnipeg CI-19-01-21661 (Man Ct QB), Statement of Claim Fresh as Further Amended at para. 2 [*Cree Nation*]: "The Plaintiffs and Class members are members of First Nations across Canada who have experienced drinking water advisories. The Defendant has failed to ensure that they have access to potable water of adequate quality in adequate quantity. As a result, Class members have suffered unacceptable hardships."

[57] Paula Arriagada, Tara Hahmann & Vivian O'Donnell, "Indigenous People in Urban Areas - Vulnerabilities to the Socioeconomic Impacts of COVID-19" (26 May 2020) online: *Statistics Canada* <www150.statcan.gc.ca/n1/pub/45-28-0001/2020001/article/00023-eng.htm>.

[58] CBC News, "COVID-19 in Indigenous Communities: What You Need to Know" (25 November 2020) online: *CBC News* <www.cbc.ca/news/Indigenous/Indigenous-covid-19-update-1.5814489>.

[59] Maan Alhmidi, "Feds Need Better Data on COVID-19 in Indigenous Communities, Marc Miller Says" (21 November 2020) online: *CBC News* <www.cbc.ca/news/canada/saskatchewan/federal-government-covid-19-data-Indigenous-communities-1.5811043>.

rights, thus making it a core human right.[60] In addition, scholars increasingly argue that this resulted in the right to water becoming part of international customary law after the 2010 resolution.[61] The WHO's 2008 report had summed it up in the slogan "Safe Water, Better Health." It concluded that improving water and sanitation can prevent 9.1% of the global disease and 6.3% of deaths.[62] Since then, the United Nations has consistently reinforced this position through several resolutions: Human Rights Council Resolution A/HRC/RES/15/9 in September 2010 affirms that the rights to water and sanitation are part of international law, and States are legally bound by this right. In April 2011 the same organ in its resolution A/HRC/RES/16/2 reinforced the point of the human right to safe drinking water and sanitation as part of the full realization of fundamental rights.

The Committee on Economic, Social and Cultural Rights (CESCR) also took up the lack of access to water in the context of discrimination against certain groups and their marginalization. It singled out Canada in its concern about "the gross disparity between Aboriginal people and a majority of Canadians"[63], regarding the provision of safe and adequate drinking water. The CESCR described the right to water as one of the most fundamental conditions for survival and clarified that states must prioritize access to water resources to prevent the spread of disease.

Such clarifications from the United Nations human rights organs compensate for the absence of the right to water in the core human rights convention such as the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Cultural Rights (1976), or the International Covenant on Civil and Political Rights (1976).

In fact, through interpretations of the Human Right Committee in 1982, the right to water was linked to the right to life, under article 6 of the International Covenant on Civil and Political Rights. Subsequently, in 2000, the CESCR underlined in its general comment No. 14, the extension of the right to health to safe drinking water and sanitation. In 2002, the CESCR went further with its General Comment No. 15, in defining water as a right for everyone: it should be safe, acceptable, physically accessible, and affordable, even in the absence of the right to water in the Covenant. Not only did the Committee underline the link between the right to water and the right to adequate standards of living, food, housing and clothing, and health but in addition, it provided the first step for discussion on the right to water. Subsequently, in 2006, the Sub-Commission on the Promotion and Protection of Human Rights adopted guidelines, which used the definition of the Committee on the right to water and affirmed the right to sanitation as a right for everyone to access adequate and safe sanitation, conducive to the protection of public health.

In parallel to these Conventions and general comments, the right to water is closely linked to freedom from discrimination protected in international human rights law[64] and a right to sustain life and health[65] as mentioned

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[60] During the United Nations Water Conference in 1977 - held in Argentina at Mar del Plata – water was recognized as a universal right. It was declared that all individuals "have the right to have access drinking water in quantities and of a quality equal to their basic needs," see *Report of the United Nations Water Conference*, UN Doc E/CONF.70/29 (1977).

[61] Karen Busby, "Troubling Waters: Recent Developments in Canada on International Law and the Right to Water and Sanitation" (2016) 5:1 Can J Human Rights 1 at 14; Rebecca Bates, "The Road to the Well: An Evaluation of the Customary Right to Water" Rev (2010) 19:3 European Comparative & Intl Environmental L 282 at 293; McGraw, George S. McGraw, "Defining and Defending the Right to Water and its Minimum Core: Legal Construction and the Role of National Jurisprudence" (2011) 8:2 Loy U Chicago LJ 127 at 137; Benjamin Mason Meier & Kim Yuna, "Human Rights Accountability through Treaty Bodies: Examining Human Rights Treaty Monitoring for Water and Sanitation" (2016) 26:1 Duke J Comp & Intl L 139 at 165.

[62] Anette Prüss-Üstün, et al, "Safe Water, Better Health: Costs, Benefits and Sustainability of Interventions to Protect and Promote Health" (2008) at 11, online (pdf): *World Health Organization* <whqlibdoc.who.int/publications/2008/9789241596435_eng.pdf>.

[63] *Consideration of Reports Submitted Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UNCESCR, UN Doc E/C.12/CAN/CO/5 (2006) at paras 3–4.

[64] *Universal Declaration of Human Rights*, GA Res 217A (III), UNGA, 3rd Sess, Supp No 13, UN Doc A/810 (1948) at art 2 [UDHR]; *International Covenant on Economic, Social and Cultural Rights*, 16 December 166, 993 UNTS 3 (entered into force 3 January 1976) at art 2 [CESCR]; *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) at arts 1–2, 26; *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, UNCHR Res 47/135, 54th Sess, UN Doc E/CN.4/RES/1998/19 (1992) at art 15 [DRPM]; *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) at art 2 [CRC]; *Convention on the Rights of Persons with Disabilities*, December 2006, 2515 UNTS 3 (entered into force 3 May 2008) [CRPD]; *Convention on the Elimination of All Forms of Discrimination against Women*, 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981, ratified by Canada 10 December 1981) [CEDAW]; *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) [CERD]; *American Declaration of the Rights and Duties of Man*, 2 May 1948, (adopted by the 9th International Conference of American States in Bogotá, Colombia).

[65] UDHR, *supra* note 37 at art 25; CERD, *supra* note 37 at art 12; CEDAW, *supra* note 37 at art 12; CRC, *supra* note 37 at art 3; CRPD, *supra* note 37 at art 25; DRPM, *supra* note 37 at art 21; *American Declaration of the Rights and Duties of Man*, 2 May 1948, (adopted by the 9th International Conference of American States in Bogotá, Colombia) at art XI.

in the general comment No. 15 of the CESCR. In essence, these resolutions confirm that discrimination and stigmatization lead in precise contexts to exclusion from safe water and sanitation.

On November 16, 2020, the Special Rapporteur on the human rights to safe drinking water and sanitation, Mr. Pedro Arrojo-Aguda, issued in a joint statement a reminder, to governments around the world to "implement or reinstate the policy of prohibiting water cuts [...] and to guarantee a minimum essential amount of water," and adds the "obligation to respect, protect and fulfil the human rights to water and sanitation, paying special attention to the individuals, families and communities in most vulnerable situations, including racially and ethnically marginalized groups."[66]

International human rights law lays down State's positive and negative obligations. States have two types of obligations: firstly, a positive obligation which is an obligation to act; and secondly a negative obligation which consists of an obligation to refrain from actions that hinder human rights. Under the positive obligation, States have the duty to take any necessary measures to guarantee the respect of human rights. Consequently, States have an obligation to act as soon as they become aware of a real and immediate risk of human rights violation. It must then provide for remedies and investigations. In addition to this positive obligation, States have the obligation of abstention, and thus not committing any illicit act. These positive and negative obligations when applied to the question of water, closely follow international human rights law: under article 14§2(h)[67] of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[68]; article 5 of the International Labour Organization Convention No. 161, Occupational Health Services; articles 24 and 27§3 of the Convention on the Rights of the Child (CRC); and article 28 of the Convention on the Rights of Persons with Disabilities. While these conventions focus on specific aspects of the right of water, they still establish a right to water. For instance, the CEDAW determines adequate living conditions for women and girls, on the contrary the CRC draws attention to children's right to health.

In terms of access to safe water and sanitation, these obligations translate into at least three levels of action. First, in the creation of an enabling environment for safe, clean water and sanitation through the guarantee of equal access to water for personal and domestic uses, without discrimination. This includes drinking water, and water for sanitation and hygiene. States must protect the quality of drinking water not only as a supply but also resources. Adequate sanitation is also a fundamental element of human dignity and privacy. The second level of action involves making water affordable, that is, treating it as a public good. The third level is in not preventing individuals from enjoying this fundamental element to their health. Canada is signatory to these International Conventions that make it obligatory to provide access to water.

At the regional level, Canada adheres to, even if it has not signed or ratified the American Convention on Human Rights. On the other hand, it has ratified the Organization of American States Charter (1951) in 1990. Consequently, it recognizes the international human rights obligations resulting not only from the Charter, but equally, from the American Declaration of the Rights and Duties of Man. Even if it has ratified only 14 of the 73 Inter-American treaties,[69] Canada comes under the jurisdiction of the Inter-American Commission. Consequently, as the American Declaration was considered binding by the Inter-American Commission in 1967, Canada has an obligation to implement the Commission's recommendations. Yet, from the number of petitions and cases presented to the Commission, it appears that this body does not serve to promote accountability. From February 22, 1996, to March 5, 2020, the Commission held sixteen hearings on the rights of Canada's Indigenous peoples. None dealt with the right to health or

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[66] United Nations, "Joint Statement by UN Special Procedures Mandate-Holders on World Toilet Day (19 November 2020)" (16 November 2020) online: *Office of the High Commissioner for Human Rights* <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26510&LangID=E>.

[67] It is interesting to note that Article 14 applies explicitly to rural women (Article 14§2 states: "States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas"). In fact, according to the scholar Inga T. Winkler, water not only poses issues for the respect and realization of other rights, mainly the right to education, but the explicit reference to rural women in Article 14 of the CEDAW is necessary as the issue is more important for rural women than women in urban areas, see Inga T. Winkler, *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (Portland: Hart Publisher 2012) at 61.

[68] The CEDAW does not create new rights, on the contrary it highlights rights that are already guaranteed by human rights. While the CEDAW is the first Convention to establish the right to water, it regards water as an element of the right to an adequate standard of living, see CESCR, *supra* note 37 at art 11. See also Doris König, "Die Durchsetzung Internationaler Menschenrechte – Neuere Entwicklungen Am Beispiel Des Übereinkommens Der Vereinten Nationen Zur Beseitigung Jeder Form Der Diskriminierung Der Frau" in Klaus Dicke et al, eds, *Weltinnenrecht – Liber Amicorum Jost Delbrück* (Berlin: Duncker & Humblot 2005) 401 at 414.

[69] Organization of American States, "Current Status of Signatures and Ratifications of the Inter-American Treaties by Canada" (23 December 2020) online: *OAS* <www.oas.org/dil/treaties_signatories_ratifications_member_states_canada.htm>.

access to water. From 2006 to 2019, out of 29787 pending petitions and cases before the Commission, only 87 were against Canada. This represents only 3 percent of the commission's docket.[70]

The Inter-American system played an important role in establishing parameters and measures which needed to be adopted during the pandemic, for the respect of human rights. Two core measures involved: (i) the establishment of guidelines for the management of the heath crises; (ii) and the hearing of complaints about human rights violations procedures.

On April 9, 2020, the Inter-American Court urged the importance of respecting the rule of law, but equally the inter-American instruments protection of human rights and the Court rulings. More significantly, on April 2020, it addressed the health crisis from a human rights perspective.[71] It declared that all measures adopted by States, which may restrict the enjoyment and exercise of human rights, must be limited in time, be lawful, and in accordance with objectives defined on the basis of scientific criteria, reasonable, strictly necessary and proportional.[72] Furthermore, the Court stated that economic, social, cultural and environmental rights must be guaranteed, along with respect of the right to freedom from discrimination.[73]

CANADA'S LEGAL OBLIGATIONS

The Canadian Charter of Rights and Freedoms in the section Legal rights sets down the right to life, liberty, and security of individuals in section 7:

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[74]

These rights, established in the Constitution Act, 1982, give a national legal recognition of the fundamental rights of all individuals, Indigenous and non-Indigenous, protected in international human rights convention. In parallel, article 35(1) of the Constitution Act,1982 safeguards fundamental Aboriginal rights in the country. Article 36 lays upon the federal and provincial governments to provide "essential public services of reasonable quality to all Canadians." The government's duty to consult Indigenous nations was established by the Supreme Court of Canada in 2004 in the case of Haida Nation v. B.C.[75]

Added to these, the federal government and all Canadian provinces and territories have human rights laws with specific agencies to enforce legislation, these include Human Rights Commissions and Tribunals. The Canadian Human Rights Act, a statute passed by the Parliament of Canada in 1977, with the purpose of extending the law to ensure equal opportunity to individuals who may be victims of discriminatory practices based on a set of prohibited grounds. These include the grounds of national or ethnic origins. The Act applies throughout Canada to federally regulated activities. Further, each province and territory has its own anti-discrimination laws that applies to activities that are not federally regulated.

Provinces, while having their own codes do not offer the same human rights protection. the Amongst these, the Ontario Human Rights Code (1962), the first in Canada, prohibits actions that discriminate against people based on a protected ground in a protected social area. Many of the protected areas and grounds in these codes feature employment, housing, or accommodation. A comparison of their provisions shows that the Ontario Human Rights Code specifies the creation and maintenance of a Human Rights Legal Support Centre to provide cost-effective and efficient support and legal services.

The problem of access to water can now be considered against the benchmark of Canada's Constitution and human rights codes. As the right to water has been linked to the right to life by the Human Right Committee in 1982, the continued water risks faced by Indigenous groups in Canada are in violation of article 7 of the Canadian Charter of Rights and Freedoms. In addition, as water has been considered a fundamental right, the State is violating

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[70] Inter-American Commission on Human Rights, "Statistics of the Inter-American Commission on Human Rights" (30 April 2020) online: *IACHR: Inter-American Commission on Human Rights* <www.oas.org/en/iachr/multimedia/statistics/statistics.html> [IACHR].

[71] Comunicado Corte Interamericana de Derechos Humanos: "Covid-19 y Derechos Humanos los problemas y desafíos que deben ser abordados con perspectiva de Derechos Humanos y respetando las obligaciones internacionales" (2020) online: *Democracia, Estado de Derecho y DDHH* <www.civilisac.org/democracia-estado-de-derecho-y-ddhh/comunicado-corte-idh-covid-19-y-derechos-humanos-los-problemas-y-desafios-que-deben-ser-abordados-con-perspectiva-de-derechos-humanos-y-respetando-las-obligaciones-internacionales>.

[72] *Ibid* at para 3.

[73] *Ibid* at para 5.

[74] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, s 7, being Schedule B to the Canada Act 1982 (UK), 1982 c 11.

[75] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73.

article 35 of the Constitution. Finally, water is a public service, and the absence of access to this good, breaches article 36 of the Constitution. The list could include the Indian Act that authorizes band councils to make bylaws governing the construction and regulation of the use of public wells, cisterns, reservoirs, and other water supplies.[76] Growing acknowledgement of the legal right to water can be noted. In 2007, the Legislative Assembly of the Northwest Territories passed a resolution recognizing this as a fundamental right.

According to international law, the positive obligation makes it Canada's duty to establish measures necessary to guarantee the respect of human rights, by providing for remedies, after due investigation. This could be understood to signify that Canada is expected to protect the quality of drinking water, not only as a supply but also as a resource. The government certainly undertook investigation, and made recommendations, followed by attributing funds through investment in the Canada Plan. In the 1980s the Neskantaga First Nation were relocated with the promise of better water and sanitarian conditions, and in 1995, a boil water advisory was put in place and maintained. The community could use its budget, but by doing so, it exposed itself to default status with Indigenous Services Canada.[77] This would lead to a third-party funding agreement management, and consequently the community would lose control over their budget.

In addition, Canada is also constrained to respect its negative obligations, which signifies an obligation of non-interference, where this implies a violation of human rights, and thus not committing an illicit act. This translates into not preventing individuals from enjoying their right to health. According to these two principal obligations, Canada is expected to ensure access to water without discrimination to all, across the urban and rural areas. This conforms to the legal provisions of article 14§2 of the CEDAW; article 5 of the International Labour Organization Convention No. 161, Occupational Health Services; articles 24 and 27§3 of the CRC; and article 28 of the Convention on the Rights of Persons with Disabilities.

It must finally be noted that Canada voted against the right to water and sanitation at the United Nations Commission on Human Rights in 2002. It was further held to have resisted a motion by Germany and Spain to officially recognize water as a human right at the United Nations Human Rights Council in March 2009. In fact, Canada not only publicly refused to recognize the right to water, but also worked behind the scenes to block the advancement of this right.[78] For instance, in 2008 Canada refused the establishment of a Special Rapporteur on water and sanitation and pushed for the creation of an Independent Expert.[79] The Special Rapporteurs have the power to conduct fact-finding missions and investigate human rights violations, while Independent Experts have a more limited power. The Experts can undertake studies, establish recommendations, and develop dialogues with states and international bodies. The 2011 General Assembly resolution on water and sanitation changed the position of the Independent Expert on water, Catarina de Albuquerque, to that of Special Rapporteur.

In the light of these legal systems and instruments, it is evident that Canada does not in any way lack the structure or the network to ensure water justice. A string of laws can be quoted that deal with Indigenous rights. Amongst them could be counted the Fisheries Act (1868), Department of Indian Affairs and Northern Development Act (1966), Canada Water Act (1970), Department of Health Act (1996), the Canadian Environmental Protection Act (1999), First Nations Lang Management Act (1999), the First Nations Commercial and Industrial Development Act (2005). However, the low number of court litigations concerning water either at any level, whether international, national, or regional, indicate that Indigenous people's access to legal platforms is very low. Amongst these can be counted the Four Alberta First Nations court action against the federal government.[80] This conforms to the idea advanced by anthropological studies that Indigenous groups actions privilege the symbolic and linguistic spaces to advance their claims, consequently creating tensions between international organizations and Indigenous people.[81] Clearly, even as a last bastion of fundamental rights, courts remain inaccessible to Indigenous groups.

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[76] Boyd, *supra* note 25 at 98.

[77] *Blind Eye, supra* note 9.

[78] Busby, *supra* note 34 at 19.

[79] Le Conseil des Canadiens, "UPDATE: Canada undermines the right to water and sanitation" (16 March 2012) online: *Le Conseil Des Canadiens* <conseildescanadiens.org/node/8347>.

[80] *Cree Nation, supra* note 29.

[81] Irène Bellier & Veronica González-González. "Peuples autochtones. La fabrique onusienne d'une identité symbolique" (2015) 108: 2 Mots Les langages politique 131.

CONCLUSION

Covid-19 has had tremendous media exposure, with academics and researchers debating the pandemic through the lens of politics[82], economy[83], environment[84], social sciences, law[85], or deepening inequalities[86], even speculating on a post-Covid-19 world. Nevertheless, this global blitz downplays the question of human rights violations during the pandemic and its impact on Indigenous groups. Canada's water problem showcases these forcefully. The Canadian Indigenous Services Minister, Marc Miller, confirmed in December 2020 the impossibility of the Government to meet its promise to lift long-term drinking water advisories in First Nations communities by March 2021. Its mosaic of federal and provincial laws on this vital, basic element, its lack of uniform, national standards for drinking water, malfunctioning regulatory structures, weak constitutional accountability, increase the vulnerability of its Indigenous groups in a health crisis. The sharply ascending curve of affected cases due to Covid-19 amongst First Nations since September 2020, but even more spectacularly at the end of January 2021, shows the dramatic consequences of non-respect of fundamental human rights. As developed nations reflect on best actions and practices to combat the pandemic, it is urgent that Canada meets the fundamental obligation to provide its Indigenous citizens access to safe water.

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[82] Merike Blofield et al, "Assessing the Political and Social Impact of the COVID-19 Crisis in Latin America, Vol. 3" (2020) online: *German Institute of Global and Area Studies* <www.giga-hamburg.de/en/publications/giga-focus/assessing-political-social-impact-covid-19-crisis-latin-america>; Olivier Rozenberg, "Post Pandemic Legislatures: Is Real Democracy Possible with Virtual Parliaments?" (2020) online: *European Liberal Forum* <spire.sciencespo.fr/hdl:/2441/mkuj64c2983lq5bffopbkpbj8/resources/2020-rozenberg-elf-discussionpaper-2-post-pandemiclegislatures02.pdf>ol.

[83] Maria Polyakova et al, "Initial Economic Damage from the COVID-19 Pandemic in the United States Is More Widespread across Ages and Geographies than Initial Mortality Impacts" (2020) 117:45 Proceedings National Academy Sciences 27934.

[84] Robert Newell & Ann Dale, "COVID-19 and Climate Change: An Integrated Perspective" (2020) Cities & Health 1; Jochen Markard & Daniel Rosenbloom. "A Tale of Two Crises: COVID-19 and Climate" (2020) 16:1 Sustainability Science Practice & Policy 53.

[85] Audrey Lebret, "COVID-19 Pandemic and Derogation to Human Rights" (2020) 7:1 JL & Biosciences.

[86] Clare Bambra et al, "The COVID-19 Pandemic and Health Inequalities" (2020) 74:11 J Epidemiol Community Health 964.

LA GOUVERNANCE DE LA COVID-19 PAR DÉCRETS ET ARRÊTÉS MINISTÉRIELS : LE CAS DU QUÉBEC

João Velloso et Véronique Fortin

L'année 2020 a commencé en état d'alerte internationale à cause d'une nouvelle maladie qui s'est répandue à travers le monde : la Covid-19. Initialement identifiée dans la ville de Wuhan en Chine en novembre 2019, elle s'est propagée notamment parmi les passagers de bateaux de croisière en janvier 2020, avec deux éclosions importantes et très médiatisées (le *Diamond Princess* et le *Westerdam*). L'Organisation mondiale de la santé (OMS) a prononcé l'état d'urgence de santé publique de portée internationale à la fin du mois de janvier 2020 et dès le 11 mars 2020 a qualifié la Covid-19 de pandémie. Ce niveau d'alerte demandait la mise en place de mesures de protection pour prévenir la saturation des services de santé, notamment les unités de soins intensifs, et pour renforcer l'hygiène préventive dans les espaces publics (de la restriction des contacts physiques à la mise en application de quarantaines). Les gouvernements n'ont pas tardé à agir, et ce même avant la reclassification de la Covid-19 comme une pandémie par l'OMS. En fait, dès la mi-janvier, la majorité des 11 millions d'habitants de la ville de Wuhan étaient strictement confinés par le gouvernement chinois. En Occident, les premières mesures plus restrictives sont apparues en Italie à la fin février et dès le 8 mars un décret présidentiel a créé une « zone rouge » (*zona rossa*) de quarantaine qui englobait presque tout le nord de l'Italie[1] et a mis environ 25% de la population du pays sous contrôle policier strict. Des mesures semblables aux mesures italiennes ont commencé à être adoptées partout en Europe et en Amérique du Nord après la déclaration de pandémie par l'OMS.

Notre objectif ici n'est pas d'évaluer l'efficacité des mesures restrictives dans le contexte de la gestion de la Covid-19, ni les éventuels cas de violations des droits de la personne liés aux mesures – même si nous mentionnerons quelques dérapages en ce sens. Nous ne remettons pas en doute non plus la menace grave que représente la Covid-19 ni l'urgence d'agir pour la contenir. Notre objectif est d'analyser le cas particulier du Québec, où le gouvernement a décidé d'adopter une gouvernance pandémique par décrets, renouvelés à chaque 10 jours. Résultat : l'état d'urgence sanitaire temporaire, d'une durée de dix jours en théorie, est devenu en quelque sorte permanent depuis le 13 mars 2020. Son caractère « permanent » découle ici de son renouvellement routinier tous les 10 jours pendant plus d'une année. En vertu de cet état d'urgence, il devient possible pour le gouvernement ou le ministre de la santé d'ordonner toute une série de mesures, par décrets et arrêtés ministériels « sans délai ni formalité (…) pour protéger la santé de la population »[2], et sans nécessairement se soumettre à un contrôle parlementaire. En parallèle à ces actions de la part du pouvoir exécutif, le premier ministre François Legault a réalisé des conférences de presse régulières pour informer la population des mesures adoptées, celles-ci étant énoncées dans des décrets et des arrêtés rendus publics subséquemment et loin d'être toujours clairs. Nous argumentons que la combinaison de ces deux stratégies (outils normatifs provenant de l'exécutif et communication des normes par le premier ministre) ont créé une certaine confusion sur le plan normatif et ont ouvert grande la porte à l'application très discrétionnaire des mesures sanitaires (qui tiraient leur source, dans les faits, davantage des conférences de presse et infographies gouvernementales[3] que des décrets et arrêtés[4]), en affectant notamment des populations en situation de vulnérabilité.

Le gouvernement du Québec était le premier au Canada à déclarer l'état d'urgence sanitaire à partir du *décret*

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[1] Le décret contient plus de 50 mesures restrictives et prévoit des peines d'emprisonnent d'une durée allant jusqu'à trois mois et des peines d'amende allant jusqu'à 206$ Euros (art. 650 du Code criminel Italien). *Decreto del Presidente del Consiglio dei Ministri 8 marzo 2020*, disponible sur : www.gazzettaufficiale.it/eli/id/2020/03/08/20A01522/sg; version en anglais disponible sur : www.esteri.it/mae/resource/doc/2020/03/decreto_del_presidente_del_consiglio_dei_ministri_8_marzo_2020_en_rev_1.pdf.

[2] Art. 123, *Loi sur la santé publique*, LRQ c. S-2.2, disponible sur : http://legisquebec.gouv.qc.ca/fr/showdoc/cs/s-2.2.

[3] Voir la liste de toutes les infographies en lien avec les annonces du premier ministre, Covid-19 : https://www.quebec.ca/premier-ministre/premier-ministre/versions-accessibles-annonces-premier-ministre-covid19/liste-toutes-infographies-annonces-premier-ministre-covid19.

[4] Voir par exemple Jules Richer, « La police de la Covid-19 est tolérante et parfois confuse », Journal de Montréal, 7 juin 2020, en ligne : https://www.journaldemontreal.com/2020/06/07/la-police-de-la-covid-19-est-tolerante-et-parfois-confuse.

177-2020 du 13 mars 2020[5], en mobilisant la *Loi sur la santé publique* (chapitre S-2.2)[6]. L'article 118 de la *Loi sur la santé publique* permet au gouvernement provincial de « déclarer un état d'urgence sanitaire dans tout ou partie du territoire québécois lorsqu'une menace grave à la santé de la population, réelle ou imminente, exige l'application immédiate de certaines mesures prévues à l'article 123 pour protéger la santé de la population ». Le gouvernement a ordonné en 2020 différentes mesures prévues dans les huit paragraphes de l'article 123, en signant des décrets et arrêtés ministériels à cette fin. L'article 119 de la même *Loi* prévoit la durée de l'état d'urgence sanitaire et le limite à « une période maximale de 10 jours à l'expiration de laquelle il peut être renouvelé pour d'autres périodes maximales de 10 jours ou, avec l'assentiment de l'Assemblée nationale, pour des périodes maximales de 30 jours ». Le gouvernement Legault a opté pour l'option ne requérant pas l'assentiment du pouvoir législatif, ce qui a en fait entraîné un renouvellement routinier de l'état d'urgence à partir d'une action exclusive de l'exécutif à chaque 10 jours depuis mars 2020. La *Loi sur la santé publique* permettait cette forme de gouvernance schmittienne (État d'exception)[7], mais la façon de gouverner indéfiniment dans l'état d'urgence proclamé par le Souverain et les stratégies de gouvernance adoptées relèvent d'un choix du gouvernement Legault. Avec le projet de loi 61, le gouvernement Legault a même cherché à prolonger l'état d'urgence sanitaire indéfiniment, en s'octroyant des pouvoirs exceptionnels élargis non seulement pour protéger la population (comme c'est prévu à l'article 123), « mais aussi pour prévenir ou atténuer toute conséquence découlant de la pandémie, c'est-à-dire à peu près tout état de fait survenant en cours d'urgence sanitaire qui apparaîtrait non souhaitable au gouvernement »[8]. Les trois partis de l'opposition ont toutefois refusé d'adopter le principe du projet de loi, causant son naufrage[9].

Le décret du 13 mars 2020 a été suivi par des arrêtés ministériels les 14, 15, 17 et 19 mars[10], avant le premier renouvellement de l'état d'urgence à partir du *Décret 222-2020* du 20 mars de 2020. Ces arrêtés portaient sur différents choses : élections partielles, fermeture des garderies et écoles, suspension des visites aux établissements de détention (sauf pour les avocats en visite à leurs clients), suspension des quelques types de décisions ou ordonnances rendus par la Cour du Québec ou la Régie du logement qu'impliquerait l'éviction des locataires ou les contacts en présence physique d'un enfant avec des membres de sa famille sans respecter les recommandations de la santé publique, modification de certains aspects des conventions collectives des employé. es de la fonction publique (notamment sur l'horaire de travail, la mobilité du personnel et la rémunération additionnelle). Et ce n'était que le début : plusieurs autres décrets et arrêtés ministériels ont été publiés tout au long de l'année 2020. Le gouvernement Legault a renouvelé l'état d'urgence déclaré dans le premier décret 41 fois en 2020 (et a par ailleurs continué à gouverner de la sorte en 2021). Le dernier renouvellement de 2020, le *Décret 1420-2020* du 30 décembre est assez explicite sur l'état d'urgence qu'on pourrait qualifier de temporairement permanent :

> « ATTENDU QUE l'état d'urgence sanitaire a été renouvelé jusqu'au 29 mars 2020 par le décret numéro 222-2020 du 20 mars 2020, jusqu'au 7 avril 2020 par le décret numéro 388-2020 du 29 mars 2020, jusqu'au 16 avril 2020 par le décret numéro 418-2020 du 7 avril 2020, jusqu'au 24 avril 2020 par le décret numéro 460-2020 du 15 avril 2020, jusqu'au 29 avril 2020 par le décret numéro 478-2020 du 22 avril 2020, jusqu'au 6 mai 2020 par le décret numéro 483-2020 du 29 avril 2020, jusqu'au 13 mai 2020 par le décret numéro 501-2020 du 6 mai 2020, jusqu'au 20 mai 2020 par le décret numéro 509-2020 du 13 mai 2020, jusqu'au 27 mai 2020 par le décret numéro 531-2020 du 20 mai 2020, jusqu'au 3 juin 2020 par

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[5] Décret 177-2020 déclarant l'état d'urgence sanitaire sur tout le territoire Québécois; disponible sur : https://cdn-contenu.quebec.ca/cdn-contenu/adm/min/sante-services-sociaux/publications-adm/lois-reglements/decret-177-2020.pdf?1584224223 .

[6] *Loi sur la santé publique, supra* note 2.

[7] Carl Schmitt, Théologie politique, Paris, Gallimard, 1988. Carl Schmitt, La dictature, Paris, Seuil, 2000. Voir aussi les critiques d'Agamben dans Homo Sacer I et II. Giorgio Agamben. Le pouvoir souverain et la vie nue. [HS I] Paris: Éditions du Seuil, 1997. Giorgio Agamben. État d'exception : Homo Sacer, II. Paris: Seuil, 2003. Grégoire Weber nous présente une excellente synthèse de cette conception d'État d'exception dans le contexte de la Covid-19; voir : Grégoire Weber, « The Duty to Govern and the Rule of Law in an Emergency », dans Colleen Flood et al. Vulnerable The Law, Policy and Ethics of COVID-19. Baltimore, Maryland: Project Muse, 2020; notamment p. 179-180; 182.

[8] Marie-Claude Prémont et Marie-Eve Couture-Ménard, « Le concept juridique de l'urgence sanitaire : une protection contre les virus biologiques et... politiques », École nationale d'administration publique, Bulletin A+, vol. 7, n. 2, juin 2020, en ligne : http://enap.ca/ENAP/docs/L_Universite/Bulletin_A_plus/juin_2020/MCPremont_61.pdf?utm_source=Openfield&utm_medium=email&utm_campaign=M728844.

[9] *Ibid*.

[10] Arrêtés numéros 2020-003, 2020-004, 2020-005 et 2020-006. Tous les décrets et arrêtés ministériels liés à la gestion de la Covid-19 par le gouvernement du Québec sont disponibles sur : https://www.quebec.ca/sante/problemes-de-sante/a-z/coronavirus-2019/mesures-prises-decrets-arretes-ministeriels .

le décret numéro 544-2020 du 27 mai 2020, jusqu'au 10 juin 2020 par le décret numéro 572-2020 du 3 juin 2020, jusqu'au 17 juin 2020 par le décret numéro 593-2020 du 10 juin 2020, jusqu'au 23 juin 2020 par le décret numéro 630-2020 du 17 juin 2020, jusqu'au 30 juin 2020 par le décret numéro 667-2020 du 23 juin 2020, jusqu'au 8 juillet 2020 par le décret numéro 690-2020 du 30 juin 2020, jusqu'au 15 juillet 2020 par le décret numéro 717-2020 du 8 juillet 2020, jusqu'au 22 juillet 2020 par le décret numéro 807-2020 du 15 juillet 2020, jusqu'au 29 juillet 2020 par le décret numéro 811-2020 du 22 juillet 2020, jusqu'au 5 août 2020 par le décret numéro 814-2020 du 29 juillet 2020, jusqu'au 12 août 2020 par le décret numéro 815-2020 du 5 août 2020, jusqu'au 19 août 2020 par le décret numéro 818-2020 du 12 août 2020, jusqu'au 26 août 2020 par le décret numéro 845-2020 du 19 août 2020, jusqu'au 2 septembre 2020 par le décret numéro 895-2020 du 26 août 2020, jusqu'au 9 septembre 2020 par le décret numéro 917-2020 du 2 septembre 2020, jusqu'au 16 septembre 2020 par le décret numéro 925-2020 du 9 septembre 2020, jusqu'au 23 septembre 2020 par le décret numéro 948-2020 du 16 septembre 2020, jusqu'au 30 septembre 2020 par le décret numéro 965-2020 du 23 septembre 2020, jusqu'au 7 octobre 2020 par le décret numéro 1000-2020 du 30 septembre 2020, jusqu'au 14 octobre 2020 par le décret numéro 1023-2020 du 7 octobre 2020, jusqu'au 21 octobre 2020 par le décret numéro 1051-2020 du 14 octobre 2020, jusqu'au 28 octobre 2020 par le décret numéro 1094-2020 du 21 octobre 2020, jusqu'au 4 novembre 2020 par le décret numéro 1113-2020 du 28 octobre 2020, jusqu'au 11 novembre 2020 par le décret numéro 1150-2020 du 4 novembre 2020, jusqu'au 18 novembre 2020 par le décret numéro 1168-2020 du 11 novembre 2020, jusqu'au 25 novembre 2020 par le décret numéro 1210-2020 du 18 novembre 2020, jusqu'au 2 décembre 2020 par le décret numéro 1242-2020 du 25 novembre 2020, jusqu'au 9 décembre 2020 par le décret numéro 1272-2020 du 2 décembre 2020, jusqu'au 18 décembre 2020 par le décret numéro 1308-2020 du 9 décembre 2020, jusqu'au 25 décembre 2020 par le décret numéro 1351-2020 du 16 décembre 2020 et jusqu'au 1er janvier 2021 par le décret numéro 1418-2020 du 23 décembre 2020; » (Décret 1420-2020)

Ce renouvellement de l'état d'urgence sanitaire est une façon d'éviter le débat à l'Assemblée nationale afin d'obtenir l'assentiment des parlementaires pour le renouvellement de l'état d'urgence tous les 30 jours[11]. Il nous semble que cette forme de gouvernance est la plus proche du totalitarisme, sans pour autant provoquer une rupture institutionnelle. En plus de ces 41 décrets renouvelant le premier décret de mars, le gouvernement Legault a adopté 15 autres décrets « concernant l'ordonnance de mesures visant à protéger la santé de la population » et 90 arrêtés ministériels du ou de la Ministre de la Santé et des Services sociaux avec toutes sorte de mesures – seulement entre la fin mars et le 30 décembre 2020. Des universitaires se sont rapidement mobilisés pour analyser les enjeux juridiques, politiques, éthiques et sociaux soulevés par la gestion par décrets de la pandémie de Covid-19[12]. Plusieurs spécialistes ont aussi entrepris d'essayer de les cataloguer. Par exemple, l'équipe du bureau d'avocats Mccarthy Tétrault a fait un inventaire très détaillé des mesures d'urgence adoptées par les différents gouvernements à travers le pays[13], mais il faut noter que leur recension n'inclut pas les arrêtés ministériels, qui sont au Québec une source importante de normes, mais une source encore plus obscure que les décrets.

Prenons par exemple l'arrêté ministériel numéro 2020105 du 17 décembre 2020. Après le paragraphe standard sur le renouvèlement de l'état d'urgence sanitaire, l'arrêté numéro 2020-105 précise :

> VU que le décret numéro 10202020 du 30 septembre 2020, modifié par les arrêtés numéros 2020-074 du 2 octobre 2020, 2020-077 du 8 octobre 2020, 2020079 du 15 octobre 2020, 2020080 du 21 octobre 2020, 2020081 du 22 octobre 2020, 2020084 du 27 octobre 2020, 2020085 du 28 octobre 2020, 2020086 du 1er novembre 2020, 2020087 du 4 novembre 2020, 2020090 du 11 novembre 2020, 2020091 du 13 novembre 2020, 2020093 du 17 novembre 2020 et 1042020 du 15 décembre 2020 et le décret numéro 10392020 du 7 octobre 2020, prévoit notamment, malgré toute disposition contraire d'un décret ou d'un arrêté ministériel pris en application de l'article 123 de la Loi sur la santé publique, certaines mesures particulières applicables sur certains territoires;
> VU que décret numéro 1346-2020 du 9 décembre

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[11] L'article 122 de la *Loi sur la santé publique* prévoit bien que l'Assemblée nationale peut désavouer l'état d'urgence sanitaire, mais celle-ci ne s'est à ce jour jamais prévalu de son contre-pouvoir. Voir notamment Marie-Claude Prémont, Marie-Eve Couture-Ménard et Geneviève Brisson, « L'état d'urgence sanitaire au Québec : un régime de guerre ou de santé publique? » (2021) 55 RJTUM 233.

[12] Un excellent exemple de cette mobilisation académique est l'impressionnant ouvrage collectif *Vulnerable*, 43 chapitres plus l'introduction (environ 650 pages) et 69 auteurs, produit en moins de huit semaines et publié en libre accès en juillet 2020. Colleen Flood at al. *Vulnerable The Law, Policy and Ethics of COVID-19*. Baltimore, Maryland: Project Muse, 2020; disponible sur : https://ruor.uottawa.ca/handle/10393/40726 .

[13] *COVID-19: Emergency Measures Tracker*; disponible sur : https://www.mccarthy.ca/en/insights/articles/covid-19-emergency-measures-tracker .

2020 prévoit notamment l'organisation et la fourniture, par les centres de services scolaires et les commissions scolaires, de services de garde aux enfants de l'éducation préscolaire et de l'enseignement primaire dont l'un des parents occupe un emploi ou exerce une fonction identifiée à ce décret;
VU que les décrets numéros 1020-2020 du 30 septembre 2020, tel que modifié, et 1346-2020 du 9 décembre 2020 prévoient que le ministre de la Santé et des Services sociaux est habilité à ordonner toute modification ou toute précision relative aux mesures prévues par ces décrets;
VU que le décret numéro 13512020 du 16 décembre 2020 habilite également le ministre de la Santé et des Services sociaux à prendre toute mesure prévue aux paragraphes 1° à 8° du premier alinéa de l'article 123 de la Loi sur la santé publique;

CONSIDÉRANT QU'il y a lieu d'ordonner certaines mesures pour protéger la santé de la population;

ARRÊTE CE QUI SUIT :

QUE le dixième alinéa du dispositif du décret numéro 1020-2020 du 30 septembre 2020, modifié par les arrêtés numéros 2020-074 du 2 octobre 2020, 2020-077 du 8 octobre 2020, 2020079 du 15 octobre 2020, 2020080 du 21 octobre 2020, 2020081 du 22 octobre 2020, 2020-084 du 27 octobre 2020, 2020085 du 28 octobre 2020, 2020086 du 1er novembre 2020, 2020087 du 4 novembre 2020, 2020090 du 11 novembre, 2020091 du 13 novembre 2020, 2020093 du 17 novembre 2020 et 2020104 du 15 décembre 2020 et le décret numéro 10392020 du 7 octobre 2020, soit de nouveau modifié :

1° dans le paragraphe 5° :

a) par l'ajout, à la fin du sous-paragraphe e, de « , sauf pour leurs activités réalisées à l'extérieur qui nécessitent que les participants soient en mouvement, tels que les activités sportives ou les parcours déambulatoires »;
b) par le remplacement du sous-paragraphe f, par le suivant :
« f) les arcades et, pour leurs activités intérieures, les sites thématiques, les centres et parcs d'attraction, les centres d'amusement, les centres récréatifs et les parcs aquatiques; »;
c) par le remplacement du sous-paragraphe l) par le suivant :
« l) tout lieu intérieur, autre qu'une résidence privée ou ce qui en tient lieu, dans les cas suivants :
i. lorsqu'il est utilisé aux fins d'y tenir une activité de nature événementielle ou sociale;
ii. lorsqu'il est utilisé pour la pratique de jeux de quilles, de fléchettes, de billard ou d'autres jeux de même nature; »;

2° par l'insertion, dans le paragraphe 21° et après le sousparagraphe b, des suivants :

« b.1) (...);

b.2) (...); »;

QUE le cinquième alinéa du dispositif du décret numéro 13462020 du 9 décembre 2020 soit modifié :

1° par l'ajout, à la fin du paragraphe 6°, du sous-paragraphe suivant :
« j) Commission des normes, de l'équité, de la santé et de la sécurité du travail; »;

2° par l'ajout, à la fin, des paragraphes suivants :
« 15° est une personne affectée au déneigement des trottoirs et des liens routiers;
16° est impliqué dans les travaux de développement ou de fabrication d'un vaccin contre la COVID-19 ou de ses composantes; »;[14]

Ce type de rédaction normative est une épreuve de haute voltige de compréhension de lecture et d'interprétation. Pourtant, elle est plutôt la norme dans les 90 arrêtés ministériels (et les 56 décrets!) adoptés en 2020. Le principe de légalité — qui veut que les lois soient publiées, claires et précises de sorte que les citoyen.nes puissent ajuster leur comportement en conséquence — semble mis à mal avec cette gouvernance pandémique.

Évidemment, les explications des multiples décrets et arrêtés via conférences de presse[15] ou réseaux sociaux ne signifient pas la clarification des normes juridiques. Avec les zones jaunes, oranges et rouges proclamées à partir de l'été 2020, et l'ajout ou le changement de nouvelles mesures, plusieurs personnes ont eu de la difficulté à comprendre les règles en vigueur au Québec, surtout en raison des techniques de communication du

[14] Arrêté ministériel numéro 2020-105, disponible sur : https://cdn-contenu.quebec.ca/cdn-contenu/adm/min/sante-services-sociaux/publications-adm/lois-reglements/AM_2020-105.pdf .

[15] Des auteures ont qualifié les points de presse quotidiens du premier ministre de « rituel quasi religieux de réconfort collectif où la population y puisait aussi ses instructions très précises et détaillées en vue de dompter la propagation du virus (...) » : Prémont et Couture-Ménard, *supra* note 8.

gouvernement qui font réagir parce qu'elles sont « toutes croches »[16]. Entre les gazouilli (*tweets*), les explications par émojis du ministre de la Santé et des Services sociaux Christian Dubé, les dires (et les gestes[17]) du directeur de la santé publique Dr. Horacio Arruda, qui sont par la suite corrigés ou précisés par d'autres décrets et arrêtés, nombreux sont ceux qui peinaient à suivre les annonces et à comprendre les règles. Prenons par exemple le fameux gazouillis du ministre Dubé expliquant les rassemblements avec des émojis[18] :

Les réactions sous ce gazouillis en disent long : « Si seulement on pouvait avoir des règles claires et simples », « bravo, une explication de professeur de maternelle », « directives trop compliquées, si vous voulez que les gens les suivent, soyez plus clair, des directives concrètes »[19]

Les impacts de ce type de communications vont au-delà de la confusion et frustration générale. Me Laurence Bich-Carrière, avocate au sein du cabinet Lavery à Montréal, a étudié les perceptions liées aux émojis et leur incidence en droit[20]. En entrevue avec Narcity, Me Bich-Carrière indique que les émojis dans le gazouillis du ministre de la Santé notamment ont plus servi à donner un exemple qu'à énoncer une norme juridique. « L'émoji, à certains égards, ça peut permettre de trouver une autre manière d'illustrer des propos à quelqu'un qui a des difficultés de lecture ou pour les gens plus visuels par exemple. On vient puiser dans un autre registre », affirme-t-elle. Me Bich-Carrière apporte un bémol : « La question à savoir c'est quoi la règle applicable, ce n'est pas dans le gazouillis du ministre qu'on va la trouver. Un gazouillis c'est certainement pas juridiquement contraignant. C'est pas une loi, c'est pas un règlement, c'est même pas un arrêté. »[21] Et comme nous en avons discuté précédemment, savoir quelle est la règle applicable n'est pas une tâche facile, surtout avec la durée de la pandémie et la nécessité continue de nouveaux décrets et arrêtés ministériels pour s'adapter aux nouvelles réalités épidémiologiques. Encore là, on voit le principe de la légalité en péril. Non seulement certains décrets et arrêtés ont été publiés sur le site web du gouvernement du Québec après leur entrée en vigueur, mais aussi, et assez souvent, les gazouillis du ministre et les conférences de presse télédiffusées du premier ministre devenaient la référence au lieu des décrets et arrêtés. La communication de la règle de droit par le pouvoir politique devenait en fait son énonciation, les mots du premier ministre devenaient en quelque sorte performatifs, comme s'il était le *démiurge* de la théorie des formes intelligibles de Platon[22].

Catherine Thibierge, avant la pandémie, dans un ouvrage collectif de 2014 sur la « densification normative », théorisait dans sa conclusion une dynamique très similaire à l'expérience québécoise de 2020 :

> « Il est alors question de *multiplication* des normes, d'*extension* de leur champ, d'*intensification* de leur force normative, de *cristallisation* de leur sens, d'*enrichissement* de leur contenu ou encore d'*accroissement* de leur précision, autant de signes d'une capacité évolutive et d'une adaptabilité du droit.

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[16] Benoît Dutrizac, « Zone rouge : Les communications du gouvernement Legault sont toutes croches », disponible sur : https://www.journaldequebec.com/2020/09/28/zone-rouge--les-communications-du-gouvernement-legault-sont-toutes-croches---benoit-dutrizac.

[17] On se rappellera de la gestuelle imagée du Dr Arruda qui mime ce que signifie aplatir la courbe. Voir la conférence de presse du 29 mars 2020, aux minutes 30 à 32 : https://www.youtube.com/watch?v=9u2uQA-C8FA.

[18] Disponible sur : https://twitter.com/cdube_sante/status/1308150572453855232 .

[19] Elizabeth Pouliot, « Christian Dubé donne des précisions sur les rassemblements privés à l'aide d'emojis », disponible sur : https://www.narcity.com/fr/quebec/rassemblements-privs-au-qubec-christian-dub-donne-des-prcisions-laide-demojis

[20] Bich-Carrière, Laurence. « 🗣, 📖, ⚖: que pensent les tribunaux des émojis, émoticônes et autres pictogrammes? » *McGill Law Journal / Revue de droit de McGill*, Volume 64, Number 1, September 2018, pp. 43–108.

[21] Ariane Fortin, « Les communications du gouvernement face à la COVID-19 laissent les Québécois confus », disponible sur : https://www.narcity.com/fr/covid19-les-techniques-de-communications-du-gouvernement-du-qubec-font-ragir .

[22] Martin, Thomas Henri, et Platon. *Études sur le Timée de Platon*. Paris: Vrin, 1981.

> Mais il peut venir un temps où le « plus » [des normes] se transforme en « trop ». La dynamique de densification entre alors en distorsion. Ce n'est plus ici de croissance de la normativité qu'il s'agit, mais bien plutôt d'excroissance. *Le processus devient pathologique*, et le vocabulaire pour le décrire mute avec lui : la multiplication des normes se transforme en *inflation* normative, l'extension de leur champ devient *prolifération*, l'intensification de leur force devient *pression* sinon oppression, l'enrichissement de leur contenu devient *alourdissement*, etc., si bien que la dynamique qui anime la densification normative se transforme en un « emballement de la machine normative » et que l'adaptabilité du droit cède le pas à son instabilité. »[23]

Il nous semble que la gouvernance de la pandémie au Québec a fait tomber le « plus » dans le « trop » assez vite et qu'avec cette densification, comme nous avons vu, vient une certaine opacité. Cette spirale d'inflation normative composée par un nombre exponentiel de normes, élaborées au Québec par et pour l'Exécutif, qui au fil du temps rendait encore plus opaques des règles déjà confuses, était déjà visible et questionnée à l'automne 2020. En septembre, plus de 60 organismes communautaires ont signé une lettre ouverte qui demandait l'amnistie des constats d'infraction en vertu de la *Loi sur la santé publique* remis dans le contexte de la pandémie[24], notamment parce que « les communautés marginalisées sont disproportionnellement ciblées par une approche policière répressive » de gestion de la pandémie et que le Québec était de loin la province avec l'approche la plus répressive au Canada. Selon le rapport *Stay off the grass: COVID-19 and law enforcement in Canada* (juin 2020)[25], de l'Association canadienne des libertés civiles (ACLC) et le Policing the Pandemic Mapping Project[26], le Québec a émis 6,600 de 10,000 contraventions au Canada entre le 1er avril et le 15 juin 2020, suivi de loin par l'Ontario avec ses 2853 contraventions. Leur 2e rapport, *COVID-19 and Law Enforcement in Canada: The Second Wave* (mai 2021)[27], indique la même tendance répressive au Québec pour le reste de l'année 2020, mais le nombre de constats d'infraction augmentent encore plus en 2021 à cause notamment du couvre-feu et d'autres mesures restrictives ordonnées à partir de janvier; ce dont nous ne traiterons pas dans cet article car la portée de notre étude est limitée à la fin de 2020. En octobre 2020, la Ligue des droits et libertés, qui depuis la déclaration de l'état d'urgence revendiquait une gestion de la pandémie respectueuse des droits de la personne et surveillait les impacts des décisions gouvernementales dans ce sens[28], a publié une lettre ouverte notamment sur le « besoin de transparence en temps de crise »[29], et qui reflète en partie les inquiétudes discutées ici.

Rétrospectivement, et pour conclure, il est possible d'argumenter que les mesures sanitaires de 2020 n'étaient pas les pires des mesures ordonnées au Québec, car le confinement total et le couvre-feu nocturne (de 20h à 5h) ont été ordonnés dans le contexte de la deuxième vague et seulement à partir de janvier 2021. Cependant, notre but ici était surtout de montrer comment les actions gouvernementales de 2020 ont mis en place une forme de gestion de la pandémie normativement confuse, voire même obscure. Bref, l'unique message à retenir pour monsieur et madame Tout-le-Monde — ce qui comprend aussi les agent.es des forces de l'ordre — semblait être le suivant : « écoutez le gouvernement ». En d'autres mots, dans ce contexte d'état d'urgence sanitaire, les allocutions du premier ministre du Québec ou du ou de la ministre de la Santé (ou un.e autre ministre) semblaient suffire pour donner force de loi aux mesures adoptées qui seraient détaillées plus tard dans des décrets ou des arrêtés ministériels tautologiques et autoréférentiels. Pour paraphraser la formulation célèbre de Carl Schmitt sur l'État d'exception dans sa *Théologie politique* :

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[23] Catherine Thibierge, « Conclusion: le processus de densification normative en droit et par-delà le droit » dans : C. Thibierge et al. *La densification normative – Découverte d'un processus* (Paris: Mare & Martin, 2013, 1204 p.), disponible sur : https://densinormative.sciencesconf.org/conference/densinormative/pages/CONCLUSION.pdf .

[24] Disponible sur : http://rapsim.org/wp-content/uploads/2020/09/20200904-Lettre-demande-damnistie-Site-web.pdf .

[25] Disponible sur : https://ccla.org/wp-content/uploads/2021/06/2020-06-24-Stay-Off-the-Grass-COVID19-and-Law-Enforcement-in-Canada1.pdf ; seulement en anglais.

[26] Leur site web est la principale base de données sur le constats d'infraction lié à la gestion de la pandémie au Canada. Disponible sur : www.policingthepandemic.ca ; seulement en anglais.

[27] Disponible sur : https://ccla.org/wp-content/uploads/2021/06/2021-05-13-COVID-19-and-Law-Enforcement-The-second-wave.pdf ; seulement en anglais.

[28] Voir par exemple la série de publications « Droits humains et Covid-19 », disponible sur : https://liguedesdroits.ca/dh-et-covid-19/ ; et notamment leur réaction dans le lendemain de la déclaration de l'État d'urgence sanitaire au Québec, « La métaphore guerrière ne sied pas à ce qu'on vise en ces temps de pandémie », disponible sur : https://liguedesdroits.ca/lettre-les-droits-de-la-personne-en-temps-de-pandemie/ .

[29] Disponible sur : https://liguedesdroits.ca/lettre-ouverte-du-besoin-de-transparence-en-temps-de-crise/ .

le souverain n'est pas seulement celui qui décide de la situation exceptionnelle, il est aussi celui qui explique à tous ce qu'un acte exécutif veut dire, même si l'acte n'existe pas encore.

Ainsi, cette forme de gouvernance autoritaire, obscure et populiste de la pandémie adoptée par le gouvernement Legault peut constituer une menace au respect des droits de la personne, et de l'état de droit. Les milliers de constats d'infraction émis au Québec en 2020, ou même le couvre-feu déclaré en 2021, ont certes affecté négativement des millions des personnes, mais ces mesures découlent justement d'une gouvernance dans l'urgence. Malgré le grand nombre de constats d'infraction liés à la pandémie au Québec, il nous semble que la population québécoise n'est pas nécessairement plus délinquante ou non conformiste que le reste de la population canadienne en matière de règles de santé publique. La surreprésentation des Québecois.es parmi les constats d'infraction remis au pays découle d'un choix politique : le gouvernement a choisi la répression, et ce à partir de règles normativement obscures et problématiques. En outre, la gouvernance de la Covid-19 par décrets et arrêtés ministériels (et conférences presses!) au Québec est pire qu'un « simple » état d'urgence sanitaire, ce qui est la norme dans plusieurs juridictions depuis mars 2020. Il s'agit d'un état d'urgence doublé d'une densification normative basée sur des actes exécutifs confus et obscurs (et encore plus opaques au fil du temps), où la personnification de l'Exécutif, tel un oracle ou un démiurge, proclame le droit d'une façon hypermédiatisée. Ce que nous soulignons, au final, c'est que non seulement les règles et leur application ont eu des effets néfastes disproportionnés sur les populations marginalisées, mais encore l'accès à ces règles, en raison de la densification et de l'opacité des normes et en raison du manque de transparence dans la gestion pandémique et du populisme hypermédiatisé du gouvernement, a aussi eu des effets inégaux et encore plus néfastes sur les populations vulnérables.

POLITICAL CARTOONS AND HUMAN RIGHTS: AN OBSERVATION OF HUMAN RIGHTS' BOUNDARIES

Omid Milani

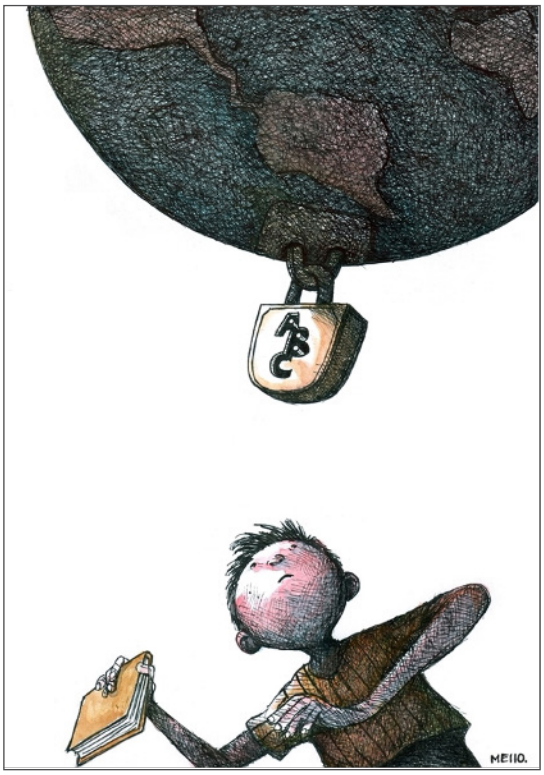

Figure 1: *Silvano Mello, Brazil. In Images of Justice 2nd ed. Children & Human Rights.*

THE PROBLEMATIC: THE MEDIUM OF TEXT AND HUMAN RIGHTS

Today in academic and professional domains of human rights 'phonetic alphabet'[1] is the mass medium, paradoxical to the universality of human rights. What 'human rights' are or mean, or rather, how 'human rights' look is neither communicable nor deliverable through the medium of phonetic alphabet. Alphabetic language is symbolic and static. It is symbolic since it invariably contains a process of translation and abstraction, with the purpose of describing, examining and thereby influencing the physical (that is the sensed and unsaid) reality. Its symbology is created through departing and fragmenting the reality, opening a dichotomous realm of consciousness, that is categorical unlike natural processes. Phonetic alphabet, or simply text, as a medium, attempts to translate the non-textual realities, whatever sensed or seen, into encrypted symbols, or what is linearly encoded and decoded. In simple terms, this process is meant to pinpoint a static symbol as *the* representative of fluid temporal realities through its 'ABCDarian' method, making this medium least suitable for communicating, let alone actualizing or promoting, any message to a 'universe' that is in flux, *i.e.*, in constant motion, and obviously, not symbolic.[2] As such, the current popular methodologies that view 'text' as a principal, formal means of symbolization in human rights, whether in declarations or constitutions, happen to be antithetical to the [notion of the] universal.

As a matter of course, the ever-constant flow of time always escapes symbolization. Time, seen with clarity and sincerity, cannot be subject to any symbol. All symbols are but too late to represent the time's multiple and ever-changing faces. What is said (in the past), through the backward exercise of reading and writing, simply cannot figure out time. Calculations and anything said are matters of the past. This indicates how the pursuit of universal through the medium of text renders a futile exercise. For one, should the concept of 'universal' include all times (and it must logically do so), then human rights' 'universal' must also include all times, but obviously alphabetic text gains and loses currency in certain temporal contexts. All meanings are contextual. The realities that alphabetic arrangements represent, *i.e.* the contexts of the words that make them meaningful, are ever-evolving. Therefore, any such expression, any written text, in time loses context and expires. Thus, human rights, by definition and logic, can*not* be limited to their phonetic realities.

In the light of an etymological analysis of the terms 'human' and 'right'[3] it becomes vivid that free from

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[1] For a critical comic introduction to McLuhan's view on the technology of alphabet, see Marshall McLuhan & Quentine Fiore, *The Medium Is the Massage: An Inventory of Effects* (Germany: Gingken Press, 2001) at 45–48.

[2] An unequivocal reference verbalizing this timeless observation (that everything is in motion) is Heraclitus' *πάντα ῥεῖ* "panta rhei" (English: "everything flows"). Clearly, no philosophical argument is needed to see the constant motion in the universe. This is a matter of seeing and not thinking, therefore in need of no symbol.

[3] The etymologies of the term 'right' demonstrate a commonality and a semantic affinity with the roots of the terms 'route' or 'road', indicating 'a way'. The significance of this kinship becomes apparent in the last section of this essay where human rights are seen as ways [of being or doing]. For etymologies of 'right' and 'road' see, respectively: M Kashani M. Aryanpuor, *Encyclopedia of Indo-European Roots of Farsi Language* (title translated from Farsi) (Esfahan: Jahad Daneshgahi 2005) at 298, 300.

certain textual manifestations, human rights have been inspiring individuals and communities throughout times in diverse fashions. In other words, human rights seen unbounded and undefined by textual forms could not be assumed to have been born or guaranteed in a certain declaration or document. The term hu + man, consisting of two parts, with their farthest Indo-European cognates in view,[4] means good mind or hand. *Hu* signifies a *hu*man perception of taste, qualification of good and bad, and the latter part refers to a universally shared hu*man* medium, that is our hand or intellect.[5] Our human capacity to qualify good and evil, *i.e.* our human taste and valuation, stands synonymous with who we are as humans and peoples.

> "Verily, men have given unto themselves all their good and bad. Verily, they took it not, they found it not, it came not unto them as a voice from heaven. Values did man only assign to things in order to maintain himself—he created only the significance of things, a human significance! Therefore, call he himself 'man', that is, the valuator."[6]

The act of valuation is the cornerstone of what a human is regardless of time. It marks the birth of human consciousness, that is an act of distinction. Thus, both parts of the term hu-man can be seen unrestricted within their textual appearances. Therefore, what the term 'human rights' represents is as old as human consciousness and in this sense this domain is not subject to, and cannot be defined in, any textual framework and discourse. Furthermore, writing and manipulation of phonetic alphabet's symbols invariably concern the past and, in this sense, is a backward exercise (a point to which we will return shortly). Hence, in the context of human rights, phonetic alphabet seems to have been misused—or abused—for actualizing the impossible task of rendering 'the seen' into 'the said' and *vice versa* "universally." Nevertheless, alphabetic language remains, to date, human rights' principal mode of intelligibility in various domains.

Text can be viewed as a "hot medium" in auditory cultures where authors of phonetic alphabet could exercise definitive authority to symbolize reality. Hot media, with their high degree of abstraction, leave little for participation in a communication field. As such, cool media have a different effect on their participants compared to the "explosive" alphabets.[7] The literate, through their use of alphabet, acquire an abstract capacity 'to call the game,' the dimensions thereof, as well as its objectives, through the absolute power of their medium. The heat channeled through the medium of text is meant to be 'to the point'. Alphabetic exercise stresses on precision. The hot and high-definition text therefore leaves no room for dialogical engagement and cocreation in the process of meaning-making. "High definition" media, such as text, invade the two-dimensional Euclidean space with its definitive authority, whereas "low definition" media, such as cartoons, leave space for participation in the creation of meaning. The absence of public participation in human rights discourse due to the overwhelming methodological limits of alphabetic language creates a single-minded and monological space, wherein certain images are imposed and dictated, and not communicated, to the rest. In fact, it is a self-evident characteristic of alphabetic language that the speakers thereof cannot, despite the hotness of their medium, ever attain certitude in their communication of symbols for truth, justice, and so forth. However, when this [impossibility of uttering the certain or the universal] is dismissed, and an ultimate universal righteousness is claimed, the medium will be weaponized and overused to 'print' a two-dimensional projection on the memory of every mind. Confusion and violence arise as static text becomes significant, and no longer representative or a signifier; and this grounds vague communication.[8]

Ambiguity of the ABCDarian realm in alphabetic cultures is manifest in religious establishments. The satirist's take on the abuse [and vagueness] of scripture is always a serious challenge for religious authorities; it exposes

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[4] For the etymology of "man" see George Hempel, "Etymologies" (1901) 22:4 American J Philology 426. The terms human and the Gathic Vohou-Manah appear to be cognates. Thus, human can be reworded as good mind or good hand. For *Vohu Manah* see Abtin Sassanfar, *Translation of Zarathustra's Gathas* (title trans. from Farsi) (Tehran: Behjat Publications 2010) at 64.

[5] In today's Farsi, a sister of the English language in terms of linguistics, the term *Bahman* (بهمن: یسرافب) is the evolved version of the Avestan, anglicized as *vohu manah*. The latter part of the term, referring to both hand and mind, is a coincidence of human doing (in the medium of hand) and being (in the sense of mind). The terms "manner," "manual," "mandate," and so forth are cognate with the term "man" in English. See Aryanpour, *supra* note 3 at 461–62, 480.

[6] Fredrich Nietzsche, *Thus Spake Zarathustra: A Book for All and None* (London: Arcturus Publishing 2019) at 58.

[7] Throughout this paper, McLuhan's take on media has enriched and inspired the content of my views on language and media. Expounding on hot and cool media, McLuhan maintains: "A cool medium like hieroglyphic or ideogrammic written characters has very different effects from the hot and explosive medium of the phonetic alphabet. The alphabet, when pushed to a high degree of abstract visual intensity, became typography." For McLuhan's categorization and explanation of "hot" and "cool" media, see Marshall McLuhan, *Understanding Media: Extensions of Man* (The MIT Press: Cambridge 1994) at 22–32.

[8] For McLuhan's "Reversal of the Overheated Medium", see McLuhan, *supra* note 7 at 33–40.

the deceit in so-claimed as total orders. Francisco de Goya's *Los Caprichos* (1796-98) are illustrating examples of satirical images' effects and presence in *realpolitik*, naturally questioning the monopoly of truth held under the authority of the Catholic Church in the last years of the Eighteenth Century in Spain.[9] Goya's treatment of images shakes and crumbles the text-based and linear authority of the Church through the public demonstration of what was then only available to the Church, *i.e.*, undisputable images of reality. The priestly knowledge considered exclusively the Church as privy to truth, justice, and so on. Today, this kind of comic allegations are oddly not debunked but exercised in different guises. Goya's work is a clear critique of religious stances upon truth and justice, where linearity establishes the foundation of popular myths. As his work demonstrates here, popular myths that brought about suffering for people of Spain are boldly and openly questioned in the works of Goya. The lineal alphabetic design, as observed in religious contexts, is the matrix of mythmaking,[10] a characteristic which makes this medium prone to unhealthy degrees of abstraction.

Comics and cartoons are different from text in the way they communicate meanings. Text as used in phonetic alphabets is physically detached from the temporal processes and oral/visual patterns that it represents. The patterns of alphabetic languages are not the sounds or the images of our natural environment. They are abstract symbolic codes. The link between the real world and the linguistic expressions of human rights is invariably an abstract, and to that effect a meta-physical or mythic link. High degrees of abstraction coincide with low relevance of text to universal matters. In this sense, the alphabetic language becomes a counterproductive means of realizing the promises of human rights. In communicating meanings, the linear language invariably reduces the unfragmented temporal experiences into fragmented and categorical symbols that are *not* heard *nor* seen in the real world. As such the alphabetic language becomes itself a prison wherein some advocates of freedoms and rights seek deliverance from other mythic and oppressive regimes. This degree of abstraction makes text a very "hot medium" but only in an auditory culture, where an

Figure 2: *Francisco de Goya, Capricho No. 39: Hasta su abuelo (And so was his grandfather).*

alphabetic arrest of meaning can be useful. Importantly, this kind of monopoly of truth is absent in the medium of cartoons as they open space to their readers to engage and create. This space is vital for dialogue and open communication in human rights.

Phonetic-alphabetic language as a linear method of communication is projection of non-linear lived experiences into a two-dimensional and symbolic space. Although static definitions provide materials for abstract exchange of concepts and entertainment of ideas, [pretending to be] removed from the constant river of time, this exercise can never itself yield what is desired in human rights. On the contrary, trapped in the "Flatland"[11] of points and lines, the linear discourse

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[9] For a critical and entertaining depiction of Goya's experiences inside and outside of the Spanish Royal Court in a biographical drama watch Miloš Forman's *Goya's Ghosts*. For an academic commentary on Goya's work see Voorhies, James, "Francisco de Goya (1746–1828) and the Spanish Enlightenment" (October 2003) online: *Met Museum* <www.metmuseum.org/toah/hd/goya/hd_goya.htm>. Also available in *Heilbrunn Timeline of Art History* (New York: The Metropolitan Museum of Art 2000).

[10] Although it could be said that both cartoons and phonetic alphabet are to some extent mythic in their communication of data, it must be observed that an image of, say, an editorial cartoon represent a typology by means of similarity and appealing to senses, while phonetic alphabet engages the eyes superficially for the purpose of decoding a symbol that is distinct from what it represents. In other words, the image is a continuation of data and text is an abstract twist in the stream of data translation. This separation makes phonetic alphabet an overwhelmingly mental domain, with little respect for bodily aspects of reality, a costly methodic dismissal which could contribute to the inflammation of sociopolitical life. For myth and phonetic language, see Marshall McLuhan, "Myth and Mass Media" in Michel A. Moos, ed, *Media Research Technology, Art* (New York: Routledge 2013) at 5–15.

[11] Flatland is the title of a fascinating English story on the significance of dimensions in the formation of our lives and patterns of our visual and intellectual perception. The story demonstrates eye-opening aspects and limits of linear consciousness in comparison with spatial perception by way of metaphor. See Edwin A. Abbott, Flatland (1884) (Oxford: Oxford University Press 2006).

deludes the eyes through arbitrary, poor, and skeleton-like but definitive verbalization of reality. In other words, to expect something further than the lexical morphemes themselves from the exercise of reading and writing is a metaphysical and religious hope, where symbols are prayed to transmute into the actual and scriptures into heavens. The code-based and secretive nature of phonetic alphabets is easily challenged by messages involving images that reveal their content, rather than symbolizing it. The mind and the body coincide in the image, whereas the body is postponed, hidden and absent, or only alluded to in the abecedary realm. McLuhan captures this as follows:

> "If the movie merges the mechanical and organic in a world of undulating forms, it also links with the technology of print. The reader in projecting words, as it were, has to follow the black and white sequences of stills that is typography, providing his own soundtrack. He tries to follow the contours of the author's mind, at varying speeds and with various illusions of understanding. It would be difficult to exaggerate the bond between print and movie in terms of their power to generate fantasy in the viewer or reader. Cervantes devoted his Don Quixote entirely to this aspect of the printed word and its power to create what James Joyce throughout Finnegans Wake designates as 'the ABCED-minded,' which can be taken as 'ab-said' or 'ab-sent,' or just alphabetically controlled."[12]

Figure 3: *Francisco de Goya, Capricho No. 70: Devota profesión (Devout profession).*

THE ANTITHESIS: A BREAKTHROUGH WITH THE COURT JESTER'S WISDOM

Images provide immediate [and momentary] deliverance from the constraints of the linear realm. By doing so, political cartoons become capable of creating an opportunity for remodeling power dynamics of sociopolitical orders. This freedom from the ambiguity and complexity of the phonetic text often coincides with the human gesture of laughter, if at times bitter, as a truthful expression of the sabbatical let-out offered through the recreation of meaning through humour. The sudden clarification in the light of freedom from the inherently bipolar[13] ABCDarian realm is the vital space that political cartoons offer, where participants (no longer merely audience) are invited to see the distance between seemingly irreconcilable opposites, taking part in the translation of data. The opposites, in humour, are contextual, but for an editorial cartoonist the politician's word *versus* their actions manifest dazzling contradictions that bring the satirist to images. The presence of the jester in the court, or the involvement of folly in politics, is thus not an altogether unwise juxtaposition but an inevitable phase of transformation of media and data, respecting the restless and ever progressive [nature of] time.

A key difference between cartoons and text, that ought to be of significance for human rights lawyers or advocates as a means of communication, is to be explored in the properties of seeing in comparison with thinking. Both seeing and thinking are human sources of—what is referred to as—knowledge[14]; the latter however is a linear mode of conceptualization, storage, and review of data. On the other hand, the act of seeing, in many ways, transcends the linearity of the medium of phonetic alphabet. Seeing requires human [eyes or] senses, which are universally shared in various fashions by humans who have a capacity of developing an image of any kind, fantastic or realistic, in dreams or on paper. Seeing is translation of heat (in the form of colours and shapes) into a human sense of any kind. Therefore, seeing

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[12] McLuhan, *supra* note 7 at 284–285.

[13] Qualifying phonetic alphabet as inherently bipolar is useful to remind the symbolic nature of this medium and that it is invariably distinct from what it represents which we vaguely categorize as the physical reality. The dual nature of alphabetic language is, for instance, different from the unified field that an image creates for communicating its message.

[14] In a practical and philosophical categorization, human knowledge appears to exist in at least two distinct fashions, namely apophatic and cataphatic. The latter is knowledge by means of analogy, today the most popular mode of intelligibility. The former is knowledge through clarity and discarding concepts. In *Theologio Mystica*, Saint Dionysus the Areopagite's (a 1st Century theologian, judge, and St. Paul's first convert), uses the opposite of cataphatic knowledge, *i.e.*, apophatic knowledge, to speak of God. The dark knowledge of God, acquired by negation (not analogy) is also what Hegel uses in parts of his *Phenomenology of Spirit*. See St. Dionysus, "Chapter IV: That He Who is the Pre-eminent Cause of Everything Sensibly Perceived Is Not Himself Any One of the Things Sensibly Perceived", in *Mystical Theology* (1st Century AC). NB a 14th Century Middle-English translation of this work, by an anonymous author, is published under the title of *The Cloud of Unknowing*. The attribution of the text to a certain author is not at issue; the content of the argument is. For Hegel's application of 'apophatic knowledge', see for instance and generally, Georg Wilhelm Friedrich Hegel, *The Phenomenology of Spirit (1807)*. A.V. Miller trans (Oxford: Oxford University Press 1977), where Hegel tries to portray an image of the Self and the Other in his dialectic, through a language akin to negation.

is significant where communication of any universal datum is intended. Nevertheless, our legal educational system, including and especially that of human rights, in the absence of respect for the humanly visible is, as a consequence of its textual preoccupation, stripped of universal means.

Figure 4: *Sébastien Brant, La nef des folz du monde; French trans., Lyon 1497 (see Martin Jay, "Must Justice Be Blind?" in Costas Douzinas & Lynda Nead, eds., Law and the Image: The Authority of Art and the Aesthetics of Law [Chicago: Chicago University Press 1999]) at 19.*

In the current academic discourse on human rights, since the *ABCDarian* text is the mass medium, what one could do with available symbols remains limited to thinking through entertaining abstract concepts for which fragmentation and compartmentalization of the world is needed. In seeing, however, the image is itself significant, and not a signifier, and hence unraveled by any linear account of reality. The satirist's cartoon comes to life by the meaning that the participant attributes to its [low] definition of the matter at issue by means of playing and adopting the account of reality depicted in the image. Seeing happens in a field of communication and is a continuation of an image's heat emission.[15] Reading, on the contrary, is a rapid exercise of guessing, *i.e.*, connecting lifeless symbols to the realities they—so, claim to—represent. Seeing that is perception of streams of heat in the physical reality is therefore not an imposition of meaning, but, rather, a way of exposure. In brief and by means of example, images of the sun are humanly recognizable, but, of course, the letters s-u-n- are decipherable only if they are exchanged within the context of the English alphabetic culture. Given this observation, the popularity of textual expressions in the field of human rights could be viewed as a form of corruption and self-contradiction, happening concurrently with the abandonment of seeing and images in the academy notably in law faculties.[16] Phonetic alphabet due to its lineal *ABCDarian* means of encoding is, by definition, a traditional and back-ward exercise. Sensibility in alphabetic languages occurs only *after* symbolization and encryption, whereas images require no tradition to be seen.[17] This gap between the 'humanly' sensed and the 'symbolically' sensible is where the failure [of human-rights inspired projects] is to be explored.

The court jester, a seeing and conscious observer of power dynamics, residing inside the personal space of and next to the most powerful political figures, does not only entertain new temporal angles but also frees the mind from frozen static symbols and stuck processes. The jester does so by showing a deconstruction of a dogma, *i.e.*, by demonstrating an end or the annihilation of a static and definitive account of reality, before the eyes of the sovereign and the public. The sensibility of the court jester today, as manifest in the art of political cartooning, is in exposing and satirizing the so-claimed as ultimate orders in various sociopolitical spheres. The jester is only interested in freedom (from dogmatic meanings for creating newer meanings) but the static sovereign desires an established reportage and review of freedoms and rights. The balance between these two approaches constitutes the art of governance, where lines are supposed to be drawn free from dogma and in harmony with nature. Natural temporal processes are in constant motion and are obviously neither backwardly nor linearly

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[15] See Walter Benjamin, "Doctrine of the Similar" (1979) 17:S New German Critique 65.

[16] The disrespect for seeing in legal human-rights academic fields appears in parallel with shaming of the human body in religious establishments. If seeing is direct engagement with senses and thinking is engaging with symbols, before senses, seeing is the materialization of what thinking processes are aiming to achieve. In this sense, and in the context of religion, showing images are often judged as blasphemous or obscene. Examples of this aniconic attitude towards images can be found in multiple religious traditions. For religious aniconism see Milette Gaifman, "Aniconism: Definitions, Examples and Comparative Perspectives" (2017) 47:3 Religion 335.

[17] The backhandedness of writing and reading is a characteristic of, metaphorically speaking and in the language of Nietzsche, a camel's spirit who finds "illusion and arbitrariness" in "the holiest things". See Nietzsche, *supra* note 6, at 28. Compare with his views on "Reading and Writing," *supra* note 6, at 40–42.

perceived. Therefore, a truthful depiction of reality ought to be dynamic, forward, ongoing, and nonlinear. In this sense, the State is interested in static means of symbolization, but the court jester sees the dynamics of power fluid and transitioning in time. Cartoon and court, not only alphabetically but semantically and spatially, are to be seen akin to one another, both referring to an enclosed space or a field of interaction or play (like a city).[18] However, cartoons enjoy a fluid mindset towards definitions, that is yet real in its communication of the message, but 'courts' are static, mythic, and cryptic in their most stern expressions. The court jester is in touch with an untimed (free from linear temporalities) realm that unveils the 'dogma' of the sovereign. The sovereign, be it king or law, has to hide a 'miraculous' element in order to continue its sovereignty and uphold its [purported] legitimacy. The miraculous in modern democracies and human rights is the act of writing and verbalization in phonetic icons. As such, political cartoonists show what is hidden in the ambiguous text of alphabetic cultures; they expose the failures of religious [and sacred] political agenda before the eyes of the public. In other words, the court jester is uninterested in 'keeping' a tradition but nonetheless contributes to the life and maturation of any tradition by providing space beyond mythic limits of the sovereign.

HUMAN RIGHTS IN A DYNAMIC FIELD OF INTERACTION

Textual manifestations of human rights are clearly foreseen to lose their remaining currency or see themselves transformed in the political life of humans, as any symbol expires in time. Today, in the heavy shadow of the light-speed means of propagation of data, in the electric/digital age, the alphabetic language falls short against light-based canons shooting data at human eyes through TV and smartphone screens. Without image-informed clarity and effectiveness, human rights lawyers and advocates risk being or becoming—in fact are already—incapable of fully engaging in the [universal] issues on which they write or speak. But breaking through the linearity of method in human rights is an unavoidable phase of [legal] consciousness as with any other universal concept that either matures into an artistic human doing, or else, expires in time. Through this translation of method human rights may evolve from their monistic and dogmatic mind and method to embrace multiplicity of truths and thereby engage with the actual (and not symbolic) life processes. In other words, an atemporal but human wisdom, or ways of seeing, that liberate us from the two-dimensional and polarized discourse could be seen as a contributor to the solution of otherwise insoluble conflicts—as an opening light. As such, political cartoons escape the dispensable static complexity and undesired ambiguity of ABCDarian language by providing a dynamic field of communication to entertain and animate different but humanly sensible images.

The court jester's wisdom not only clarifies the discourse (for the sovereign and the public), but also dynamizes and diversifies the representative images of sociopolitical communities. In other words, according to the current popular narrative of 'nation-State', accepted in various human rights' domains governed through linear methods, static and linear symbols are purported to represent (and at times report) the will of people. However, any truthful representation of the people's will ought to be diverse and dynamic. Thus, a State could be imagined to resemble in a perfectly clear fashion a mirror, rather than static images, reified in various statuses mass produced and periodically replaced by State-sponsored media. The mirror allegory also rules out the fallacious divisive culture of alphabetic language, pronounced in the design of nation-State that renders deceitful and self-refuting.[19] The mirror-like State is only useful with the presence of humans and functions to serve the will of people; in that sense no authority beyond human is recognized in this form of governance. A renaissance in human rights thus could be seen as a methodological and practical transformation after an over-textualization of the discourse into an engaging and powerful, however non-hierarchical, field of interaction.

The medium is in fact a way of channeling heat and energy. And the written versions of human rights, be it in the form of a most celebrated declaration or charter, are impoverished representatives of lights that humans emit. Wherever heat is [ab/used] is where human rights are exercised, not, for instance, in the articulation of a declaration where the impossible assertion of uttering the universal is still marketed and undebunked. Human rights therefore are, figuratively speaking, a matter of human lights, energy, and heat and one may reframe them simply as 'human lights' to let them shine free from their ABCD-minded yoke of phonetic language. In this sense, what one wears, eats, says and how one moves and so forth are obviously human rights matters. Housing

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[18] See Aryanpour, *supra* note 3 at 427 indicating the Indo-European hypothetical root of *Gher*, meaning to enclose, to draw, (build a) city, and so forth.

[19] "A state, is called the coldest of all cold monsters. Coldly, lieth it also; and this lie creepeth from its mouth: 'I, the State, am the People.' It is a lie!" See Nietzsche, *supra* note 6 at 48.

is a relevant and illustrating example. As a medium,[20] housing is a human way of sharing and translating heat and energy. So is clothing, with colours and shapes, and cooking with tastes, aromas, and flavours. Today it appears outmoded and counterintuitive to separate the mind and the body of human rights, which results in having to argue for the obvious matters such as that housing is a human right. Further, locating human rights departments and programmes outside of art schools can be framed as an attempt to manage *time* and *space* by means of separating the sensed from the thought. Without a dialogical field of communication, linear accounts remain unchallenged fetishes giving rise to people's suffering, as is today the case with our all-too-abstract but violent educational systems—aggressively professing ABCDarian translations of human rights.

"Confusion of language of good and evil; this sign I give unto you as the sign of the state. Verily, the will to death, indicateth this sign!"[21] As such, euphemism can be seen as a manifestation of political ambiguity, or lack of discursive transparency, in phonetic cultures. For instance, the current popular euphemism surrounding the so-called 'residential schools' begs clear satirical depiction of what those terms in fact hide. This essay comes to its conclusion with an editorial cartoon by Michael de Adder, as a vivid example of how cartoons could fluently communicate what the alphabetic discourse conceals—and violently dictates.

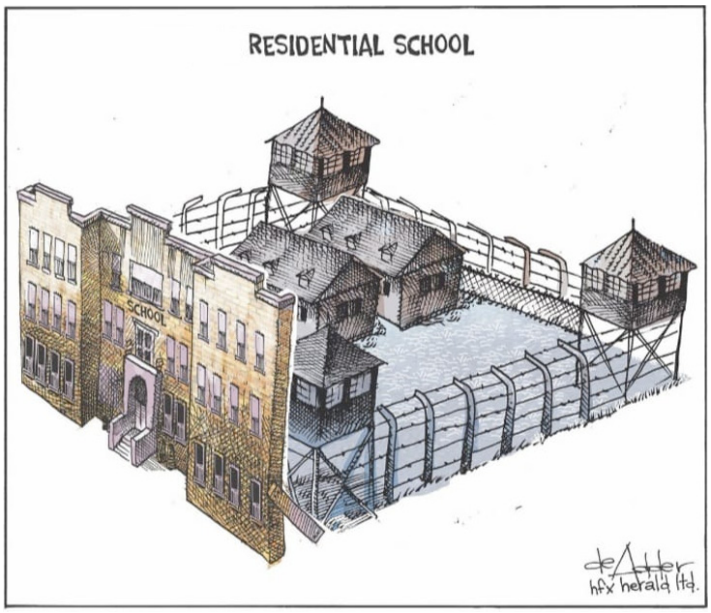

Figure 5: *Michael de Adder (Canada: Halifax Herald 2020).*

[20] McLuhan, *supra* note 7 at 123–130.

[21] Nietzsche, *supra* note 6 at 48.

INTERNATIONAL CULTURAL HERITAGE LAW AND SUGGESTIONS FOR REFORM

Murray Snider

INTRODUCTION

The importance of cultural heritage to humanity cannot be understated. Damage to "any cultural property" causes damage to the "cultural heritage of all humankind."[1] Notwithstanding this critical importance, the development of international cultural heritage law ("ICHL") has evolved sporadically and is in desperate need of update and reform. While states, institutions and individuals throughout modern history have condemned the destruction of cultural property, for the most part these condemnations and steps towards improving the international legal regime surrounding cultural heritage protection and preservation have been reactionary and occurring only after cultural heritage and cultural property has been destroyed and lost forever.

The failures of international law and the international community to protect against the intentional and wanton destruction of cultural property is equally true of late, where there is ample evidence of the international communities' muted responses to the destruction of cultural property and heritage in Syria, Iraq and Afghanistan, and Mali.[2] In this sense, while the extensive body of law surrounding cultural property under international law is *prima facie* indicative of a sophisticated and comprehensive legal regime, inclusive of numerous conventions and customary rules supported by international institutions and States, it is readily apparent that the regime currently in place is ill-adept and ill-equipped to perform its desired function and achieve its objectives. Thus, in spite of ongoing improvements and changes in the legal regime, there remains important issues unresolved, including *inter alia*, the lack of certainty surrounding core terms and definitions, the fragmentation of legal approaches to cultural heritage protection (amidst a myriad of conventions and a constellation of rules), a lack of implementation of enforcement mechanisms and the exclusion of important groups from participation.

In order to engage the important legal issues surrounding the future of the legal regime surrounding cultural heritage under international law the below will provide an overview of the existing legal regime and address those aforementioned unresolved issues, positing them as lacunae. Rather than simply addressing the lacunae, suggestions will also be made as to a direction for reform, including: activating a clear and uncomplicated set of principles addressing each of the core areas covered by the existing legal regime (protection in times of armed conflict, preservation during periods of non-conflict, and prevention from illegal acts); and exploring the suggestion that viewing cultural heritage through the lens of international human rights law ("IHRL") and as a human right will enhance the current legal regime through mutual support and cross-pollination.

HISTORICAL DEVELOPMENT OF THE LAWS OF CULTURAL HERITAGE

Classical Law

The classical law of warfare and armed conflict placed limited restrictions on the destruction and looting of an enemy's property.[3] Looting and the taking of war booty was commonplace during the Roman times and earlier. This was also true during the Middle Ages, when war booty served as a manner to compensate soldiers and military officers and finance further military campaigns.[4] During the Enlightenment, rather than object to the destruction of cultural property outright, jurists sought to

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1 Karima Bennoune, *Report of the Special Rapporteur in the field of cultural rights: Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms*, UNGAOR, 71st Sess, Agenda Item 69(b), UN Doc A/71/317 (2017) at para 8.

2 *Report on the Blue Shield on the situations where cultural property is at risk in the context of an armed conflict, including occupation, Committee for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO, 12th mtg, Item 6, Annex 1, C54/17/12.COM/6 (2017).

3 John Henry Merryman, "Cultural Property Internationalism" (2005) 12:1 Intl J Cultural Property 11 at 13.

4 Patty Gerstenblith, "From Bamiyan to Baghdad: warfare and the preservation of cultural heritage at the beginning of the 21st century" (2006) 37:2 Geo J Intl L 245 at 249-251 [Gerstenblith, "From Bamiyan to Baghdad"].

balance the military necessity of destruction of cultural property with the advantage achieved.[5] The emerging legal view was therefore that while destruction of an enemy's property was an inevitable part of warfare, necessity and restraint were to be favoured in and above all out destruction.[6]

The relatively unrestrained approach to the taking of an enemy's property meant that evolution of the laws surrounding the protection of cultural property went through a slow progression and was for the most part decided upon by the practice of States and not the consensus of international jurists and the international order. Vattel was perhaps the first legal scholar to place the protection and preservation of cultural property in the broader interests of "human society" and to argue in favour of the protection of art and architecture such as "temples, tombs, public buildings, and all works of remarkable beauty" during periods of armed conflict.[7] This early discourse in many ways also placed cultural property and the legal principles surrounding cultural property in the wider context of "cultural heritage." The Napoleonic Wars advanced further developments in the international legal approach to cultural heritage. During this period, Napoleon and the French removed important and valuable works of art and property from conquests in Europe and the Middle East (Egypt in particular). While such appropriations were accepted by many French, the appropriation of art and cultural property was also met with opposition.[8] Later, following Napoleon's final defeat at Waterloo a vast majority of these artistic works and stolen property were ordered to be repatriated. Thus the end of the Napoleonic Wars and the agreement to repatriate certain works of art and property can be viewed as the "clearest statement of the principle" that cultural property does not "belong to the victors."[9]

The Lieber Code

The first attempt to state provisions for the protection of cultural property during armed conflict and arguably the first codification of the laws of war is found in the *Instructions for the Governance of Armies of the United States in the Field* ("*Lieber Code*").[10] The *Lieber Code* was the first instance where a distinction was drawn between real and moveable property subject to appropriation during periods of armed conflict and other types of public property, including charitable institutions, collections, and works of art which could be secured against "avoidable injury."[11] Article 35 of the *Lieber Code* states:

> [c]lassical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.[12]

Article 34 of the *Lieber Code* states the general rule that objects and property defined as such should be treated as private property unless used for a military purpose.[13] Overall and importantly, the *Lieber Code* placed the protection of public property to be secured against avoidable injury mutually on the aggressor and the defender in periods of armed conflict.[14] As the first codification of the laws surrounding the protection of cultural property the *Lieber Code* in many ways reversed the presumption that all property, including cultural property, could legitimately be appropriated by an enemy as part of the spoils of war.

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5 Merryman, *supra* note 3 at 14.

6 Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge University Press, 2009) at 12 [O'Keefe, "Protection of Cultural Property in Armed Conflict"]

7 E. de. Vattel, *The Law of Nations: Or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, ed. by J. Chitty (Cambridge University Press, 2011) Ch 9, s 168.

8 Patty Gerstenblith, "Protecting Cultural Heritage in Armed Conflict: Looking Back, Looking Forward" (2009) 7:677 Cardozo Pub. L, Policy & Ethics J. 680 [Gerstenblith, "Protecting Cultural Heritage"]

9 Gerstenblith, "From Bamiyan to Baghdad", *supra* note 4 at 253.

10 *Instructions for the Government of Armies of the United States in the Field*, prepared by Francis Lieber, LL.D., Originally issued as General Orders No. 100, Adjutant General's Office, 1863, Washington 1898: Government Printing [Lieber Code]; Gerstenblith, supra note 8 at 681.

11 *Lieber Code*, arts 31, 34-36.

12 *Lieber Code*, art 25.

13 *Lieber Code*, art 34.

14 David Keane, "The Failure to Protect Cultural Property in Wartime" (2004) 14:1 De Paul J Art, Tech & Int Prop L 1 at 4.

1899 and 1907 Hague Regulations

The first binding obligations prohibiting the intentional destruction of cultural property emerged from a series of international conferences in 1899 and 1907. The adoption of the Hague Convention (II) with Respect to the laws and Customs of War on Land ("1899 Hague Convention") and the Hague Convention (IV) respecting the laws and Customs of War on Land ("1907 Hague Convention") (collectively, the "Hague Conventions")[15] "expanded the legal protection of cultural property."[16] The regulations annexed to the Hague Conventions have two key provisions. Article 27 states:

> [i]n sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or placed by distinctive and visible signs, which shall be notified to the enemy beforehand.[17]

Article 56 states:

> [t]he property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.[18]

Articles 27 and 56 of the Hague Conventions were "seminal" in articulating and laying the foundation for the fundamental principles regarding the protection of cultural property under international law.[19] Importantly, in the wake of WWII almost forty years later they were accepted by the International Military Tribunal ("IMT") at Nuremberg as forming part of customary international law and binding on States that had not ratified them.

Unfortunately, the Hague Conventions failed to protect cultural property during WWI, which witnessed numerous acts of the wanton destruction of cultural property, including the arson of the Louvain library and the bombardment of the cathedral at Reims in Belgium and France. These examples and others were testament to the ineffectiveness of the convention and other customary international law surrounding the protection of cultural property in periods of armed conflict.[20]

Overall, the Hague Conventions were utilized in the post-WWI period, as a means of forcing both restitution and repatriation of property.[21] The Treaty of Versailles bore at least some provisions that directed the restoration of cultural property to its pre-war state, but this was a limited aspect of the treaty itself. Moreover, the Treaty of Versailles that brought a formal end to WWI, condemned the destruction of cultural property but did evince any concrete steps towards the enforcement of the regulations or the promotion of the protection of cultural property at international law.

1954 Hague Convention

The loss and destruction of cultural property of WWI "paled in comparison" to the widespread systematic removal and organized plunder of public and private property throughout Europe during WWII.[22] WWII witnessed the "most extensive destruction, theft, and movement of cultural objects at any time in world history."[23] To this end, while providing for a basic level of protection for cultural property during periods of armed conflict, the Hague Conventions were unable to

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[15] *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 19 October 1907 [*Hague Conventions*].

[16] Keane, *supra* note 14 at 5.

[17] *1907 Hague Convention*, art 27.

[18] *1907 Hague Convention*, art 56.

[19] Report on the Blue Shield on the situations where cultural property is at risk in the context of an armed conflict, including occupation, Committee for the Protection of Cultural Property in the Event of Armed Conflict, UNESCO, 12th mtg (2017) C54/17/12.COM/6, 21.

[20] Roger O'Keefe, "Protection of Cultural Property under International Criminal Law" (2010) 11 Melb J Intl L 339 at 343[O'Keefe, "Protection of Cultural Property under International Criminal Law"]; Keane, *supra* note 14 at 6-7.

[21] Gerstenblith, "Protecting Cultural Heritage", *supra* note 8 at 683.

[22] O'Keefe, "Protection of Cultural Property under International Criminal Law", *supra* note 20 at 343; Keane, *supra* note 14 at 9.

[23] Gerstenblith, "From Bamiyan to Baghdad", *supra* note 4 at 257.

prevent or mitigate against the widespread destruction, appropriation and theft of cultural property and heritage.

The horrific experiences of the WWII led the international community to support establishment of the United Nations ("UN"), and adopt conventions relating to universal human rights in the Universal Declaration of Human Rights (1948) and international humanitarian law in the four Geneva Conventions (1949).[24] It was also the case that the experience of WWII and the IMT led the international community to establish and promote a specialized agency of the UN, the UN Educational, Scientific and Cultural Organization ("UNESCO") and a specialized treaty dealing exclusively with the protection of cultural property during periods of armed conflict in the *Convention for the Protection of Cultural Property in the Event of Armed Conflict* ("1954 Hague Convention").[25] The preamble to the 1954 Hague Convention underscores the critical importance of the protection of cultural property to humanity in light to the destruction and damage during WWII and states:.

> Recognizing that cultural property has suffered grave damage during recent armed conflicts and that, by reason of the developments in the technique of warfare, it is in increasing damage of destruction;
>
> Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;
>
> Considering that the preservation of the cultural heritage is of great importance for all people of the world and that it is important that this heritage should receive international protection;
>
> Guided by the principles concerning the protection of cultural property during armed conflict, as established in the Conventions of The Hague of 1899 and of 1907 and in the Washington Pact of 15 April 1935;[26]

Perhaps the most "outstanding element" of the 1954 Hague Convention is the fact that it was the first pronouncement by States that cultural property is of "utmost importance" to the cultural heritage of all mankind. This idea had found expression in the early legal writing of jurists and it was now for the first time reduced in writing in an international instrument.[27]

Article 1 of the 1954 Hague Convention defines 'cultural property' broadly, to include both moveable and immovable property of "great importance to the cultural heritage of every people" and includes a non-exhaustive list of what constitutes cultural property.[28] Articles 2, 3 and 4 of the 1954 Hague Convention defines what constitutes the protection, safeguarding and respect of cultural property.[29] Articles 18 and 19 of the 1954 Hague Convention expand the scope of the convention to both international armed conflicts and non-international armed conflicts.[30]

First Protocol

The First Protocol to the 1954 Hague Convention ("First Protocol") was drafted and opened for signature at the same time as the main convention.[31] The First Protocol applies to the status of moveable cultural objects and their import and export from an occupied territory and the systematic removal of cultural property, including artworks and antiquities from occupied countries.[32] The First Protocol therefore allows for the removal of cultural

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[24] Jiri Toman, "The road to the 1999 Second Protocol" in Protection Cultural Property in Armed Conflict: an insight into the 1999 second protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (2010) 29 *International Humanitarian Law Series* 1, 2; Gerstenblith, "From Bamiyan to Baghdad", supra note 8 at 684.

[25] *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 249 UNTS 240 (entered into force 7 August 1956) [*1954 Hague Convention*].

[26] *1954 Hague Convention*, preamble.

[27] Toshiyuki Kono and Stefan Wrbka, 'General Report' in *The Impact of Uniform Laws on the Protection of Cultural Heritage and the Preservation of Cultural Heritage in the 21st Century* (Martinus Nijhoff Publishers, 2010) 10, 19.

[28] *1954 Hague Convention*, art 1.

[29] *1954 Hague Convention*, arts 2-4.

[30] *1954 Hague Convention*, arts 18-19.

[31] *(First) Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954*, No. 3511, 249 UNTS 215 (entered into force May 14, 1954) [First Protocol]

[32] Gerstenblith, "From Bamiyan to Baghdad", *supra* note 8 at 684.

property from occupied territory during periods of armed conflict but insists upon the return when armed conflict has ceased. The First Protocol was brief and focussed on the exportation and importation of cultural property in occupied territory to avoid infringing upon the private law rights of ownership in their own jurisdictions. While the First Protocol was loosely drafted and somewhat less substantive than the main convention, the First Protocol has assumed increased significance in the years since its adoption, as there has been a dramatic shift from the post-WWII focus on the destruction of cultural property through ordnance, to the removal of cultural property during of armed conflict.[33] The First Protocol, unlike the 1954 Hague Convention, extended to both internal and international armed conflicts as a practical matter that the illegal export of cultural property could evidently occur in both contexts.

The Second Protocol

Notwithstanding the lofty aims of the 1954 Hague Convention and the First Protocol to define and secure the protection and safeguarding of cultural property worldwide, by the late twentieth century it became apparent that the 1954 Convention and the First Protocol required updating as they were suffering from "benign neglect."[34] Following the destruction of archaeological sites during two Gulf Wars and the destruction of historic sites in cities such as Sarajevo, Dubrovnik and Mostar during the conflict in the former Yugoslavia, the 1954 Hague Convention and the First Protocol were "widely, although not universally considered, a failure."[35] More than any other conflict, the armed conflict in the former Yugoslavia during the 1990s prompted the revamping of the 1954 Hague Convention and the First Protocol. During the conflict combatants deliberately targeted the cultural property of the opposing side and World Heritage listed sites. Just as the events of WWII prompted the creation of a specialized convention dedicated to the protection of cultural property, the events in the former Yugoslavia were a strong motivator behind the comprehensive review of the 1954 Hague Convention which resulted in the creation of the Second Protocol to the 1954 Hague Convention ("Second Protocol").[36]

The Second Protocol was adopted on 26 March 1999 and later entered into force on 9 March 2004. The Second Protocol introduced enhanced aspects of criminal responsibility and jurisdiction. In respect of individual criminal responsibility, article 15(1) of the Second Protocol as opposed to the 1954 Hague Convention, sets out a list of specific offences that give rise to sanctions. Article 15(1) states:

1. Any person commits an offence within the meaning of this Protocol if that personal intentionally and in violation of the Convention or this Protocol commits any of the following acts:

    (a) making cultural property under enhanced protection the object of attack;

    (b) using cultural property under enhanced protection or its immediate surroundings in support of military action;

    (c) extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;

    (d) making cultural property protected under the Convention and this Protocol the object of attack;

    (e) theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.[37]

In addition to introducing individual criminal responsibility for serious violations of the First Protocol and particular aspects of the 1954 Hague Convention, the Second Protocol also extended individual criminal responsibility to those directly responsible and those indirectly responsible for offences. Importantly, the Second Protocol introduced obligations on the part of signatory states to enact legislative measures and codify criminal offences for those offences in article 15 over both nationals and non-nationals of a respective state.[38] Finally, in cases where a party does not prosecute for the offences set out in article 15, it is obliged to extradite to a country where the

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[33] O'Keefe, "Protection of Cultural Property in Armed Conflict", *supra* note 6 at 196.

[34] *Ibid* at 236.

[35] Eric A. Posner, "The International Protection of Cultural Property: Some Skeptical Observations" (2007) 8:1 Chicago J Intl L 213 at 214

[36] *Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954* (adopted 26 March 1999, entered into force 9 March 2004) 38 ILM (1999) [Second Protocol]

[37] *Second Protocol*, art 15.

[38] *Second Protocol*, art 16.

minimum standards of international law are and will be met.[39]

The lasting effects of the Second Protocol have yet to be determined, however, what is clear at this time is that akin to the 1954 Hague Convention and the First Protocol, the Second Protocol has failed to prevent the destruction of cultural property in periods of armed conflict. One only has to look as far as the recent conflicts in Iraq, Syria, Afghanistan and Mali to observe the flagrant destruction of cultural and/or religious artifacts by non-state actors in contravention of the 1954 Hague Convention and the First and Second Protocols, and the respective States' failure to prosecute those individuals responsible for these offences. In sum, many States have not adhered to the enhanced standards set forth in the Second Protocol and it is also the case that even those States that are parties to the Second Protocol have failed to enact adequate legislation regarding the offences outlined in article 15(1) or fulfil their obligations.[40]

UNESCO Convention

The *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* ("UNESCO Convention") was the first international convention to deal exclusively with the trafficking of cultural property.[41] It has been held that the UNESCO Convention is by far the most "widely accepted convention" relating to the protection and preservation of cultural property at international law.[42] Article 2(1) of the UNESCO Convention makes clear that the convention is to prevent the "illicit import, export and transfer of ownership of cultural property" as this remains "one of the main causes of the impoverishment of cultural heritage of the countries of origin."

The UNESCO Convention and the definition of cultural property contained therein reflects the context and time in which it was developed. The UNESCO Convention put forward a "more comprehensive" effort to protect cultural property and control the transfer of cultural property under international law as between States.[43] While theft, trafficking and smuggling of cultural property had been a recurrent theme throughout the course of history, including during WWI and WWII, the illegal export of cultural property and heritage became acutely severe during the colonial period.[44] As a result, the UNESCO Convention is considered a "decisive advance in the international campaign" against illicit trafficking of cultural property.[45] The approach of the drafters of the UNESCO Convention reflected a "nationalist" approach where protecting the interests of each States' cultural property and cultural heritage was paramount. This was motivated in part by the sentiments of developing States who were concerned with the domination of developed nations over resources in the post-colonial period.[46] The UNESCO Convention emerged therefore as a multilateral agreement where implementation depends entirely on each individual States.[47] Where the 1954 Hague Convention provided for a singular definition of cultural property, the UNESCO Convention permits States to make a determination and adopt its own criteria and definition for what is to be considered subject to the convention.

Article 1 of the UNESCO Convention defines cultural property broadly and includes a general description of what cultural property is and an enumerated list of what is to be protected.[48] Again, this definition is very different from that given to cultural property within the 1954 Convention as no single definition of cultural property is provided and the interpretation left to States. Articles 3 and 11 of the UNESCO Convention define what

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[39] *Second Protocol*, arts 17-18.

[40] Bennoune, *supra* note 1 at para 58.

[41] *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 823 UNTS 231 (entered into force April 24, 1972) [UNESCO Convention]

[42] Kono and Wrbka, *supra* note 27 at 34.

[43] Jason C. Roberts, "The Protection of Indigenous Populations': Cultural Property in Peru, Mexico and United States" (1997) 4:2 Tulsa J Comp & Intl L 327 at 335.

[44] Kono and Wrbka, *supra* note 27 at 32; UNESCO Convention, art 7(a).

[45] Jiri Toman, "Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Paris, 14 November 1970); List of the 82 States Parties at 5 July 1995" in *The Protection of Cultural Property in the Event of Armed Conflict: Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol, Signed on 14 May 1954 in the Hague, and Other Instruments of International Law Concerning Such Protection* (Routledge, 2016) at 359.

[46] Janet Blake, "On Defining Cultural Heritage" (2000) 49:1 Intl Comp LQ 61, 62.

[47] Toman, *supra* note 45 at 359.

[48] *UNESCO Convention*, art 1.

constitutes illicit practices. Article 3 prohibits the "import, export or transfer of ownership of cultural property" contrary to the provision of the convention "adopted by states", thus defining illicit conduct in relation to domestic laws.[49] Article 11 prohibits the "export or transfer of ownership" of cultural property arising in situations of occupation, defining illicit conduct as occurring during occupation rather than in reference to domestic laws.[50] Articles 5, 6, and 7 provide preventative measures in respect of enacting domestic legislation, export and import controls respectively.

World Heritage Convention

The World Heritage Convention ("WHC") was adopted by the General Conference of UNESCO in 1972. The WHC was designed and based on the notion that cultural and natural heritage were increasingly threatened with destruction through both environmental as well as social and economic means.[51] Two major world events prompted the adoption of the WHC, specifically the United Arab Republic construction of the Aswan Dam (starting in 1954) and subsequent flooding of ancient monuments in Abu Simbel,[52] and the flooding of Venice and Florence in Italy in 1966.[53] Each of these incidents prompted cooperation from States involved and cooperation on restoration from the international community, however it also prompted calls for a systematic mechanism for formal cooperation.[54] The WHC is a highly specialized convention focussed exclusively on the world's cultural and natural heritage.

Article 1 of the WHC defines "cultural heritage" in a threefold manner to include: "monuments," "groups of buildings" and "sites."[55] Natural heritage is also described in a threefold manner to include: "natural features," geological and physiological formations" and "natural sites."[56] Article 3 and 4 of the WHC calls upon States to determine what properties should be classified under articles 1 and 2. In this sense, similar to the UNESCO Convention, defining cultural heritage ultimately lands with States that are party to the convention. While the WHC was adopted only shortly after the UNESCO Convention and is approximately the same age, the WHC is considered the most successful of the UNESCO instruments relating to cultural heritage.[57]

There are several reasons why the WHC is preferred, at least by some scholars and practitioners, to other conventions for the preservation and protection of cultural property and heritage.[58] First, the WHC has near universal adoption. 193 of the worlds 196 internationally recognized sovereign States have adopted the WHC.[59] Second, the WHC provides for the World Heritage Committee, which is responsible for the implementation of the WHC, the administration of the World Heritage Fund, any inscriptions on the World Heritage List, as well as the allocation of financial assistance to State parties.[60] Third, the WHC applies and covers situations of both armed conflict and non-conflict situations falling short of armed conflict. Unlike the 1954 Hague Convention and the UNESCO Convention which have fixed applications to conflict, non-conflict or occupation situations, the WHC transgresses and is bound by neither scopes of application.[61] Finally, the WHC does not contrast or

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[49] *UNESCO Convention*, art 3.

[50] *UNESCO Convention*, art 11.

[51] *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 1037 UNTS (entered into force December 17, 1975) preamble [WHC].

[52] Laura Kiniry, "Egypt's Exquisite Temples that had to be Moved" (10 April 2018), online: *BBC: Travel*, <www.bbc.com/travel/story/20180409-egypts-exquisite-temples-that-had-to-be-moved>.

[53] Matthew Wills, The Highest Flood in Italy this Century (2 December 2019), online: *JSTOR Daily*, <daily.jstor.org/the-highest-flood-in-italy-this-century/>.

[54] Marina Lostal, *International Cultural Heritage Law in Armed Conflict: Case-Studies of Syria, Libya, Mali, the Invasion of Iraq, and the Buddhas of Bamiyan* (Cambridge: Cambridge University Press, 2017) 70.

[55] *WHC*, art 1.

[56] *WHC*, art 2.

[57] Lostal, *supra* note 54 at 72.

[58] *Ibid* at 69-88.

[59] UNESCO, States Parties Ratification Status, <whc.unesco.org/en/statesparties/>.

[60] *WHC*, Part III.

[61] Lostal, *supra* note 54 at 81-82.

conflict with existing conventions and this allows for the contemporaneous application of the WHC with other conventions related to cultural property and cultural heritage.

UNIDROIT Convention

While the UNESCO Convention was drafted in order to address the illegal trafficking, import and export of cultural property and the restitution and return of same, the *Convention on Stolen or Illegally Exported Cultural Objects* ("UNIDROIT Convention")[62] emerged in response to criticism of the "vague language" in the UNESCO Convention, the proliferation of illicit trafficking in cultural property, and acknowledged gaps in the public law approach.[63] The UNIDROIT Convention was an attempt to put forward a unified code of "common, minimal rules for the restitution and return of cultural objects between Contracting Parties."[64] The convention was designed to address both institutional and individual conduct and address claims of the theft of stolen property through either restitution or return. The UNIDROIT Convention is concerned primarily with the restitution of stolen cultural objects and the return of cultural objects illegally exported.[65]

Article 2 of the convention defines cultural objects as those which, "on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science."[66] The convention further enumerates the categories of these cultural objects in its Annex which is identical to the list of cultural property listed in article 1 of the UNESCO Convention. The UNIDROIT Convention approaches the definition of cultural property in a less restrictive manner than that of the UNESCO Convention. Whereas the UNESCO Convention requires that cultural property is included in the list of enumerated items at article 1 and that they are similarly located in specific locations (museums, monuments, or similar institutions), the UNIDROIT Convention presents no such qualifications.[67]

The UNIDROIT Convention also integrates domestic and international civil remedies, unlike its public law equivalent, the UNESCO Convention. Articles 3 outlines the procedure for restitution and compensation in cases of the theft of stolen cultural property, and also sets out limitation periods for bringing any such claim.[68] Article 4 considers situations where innocent parties, exercising reasonable due diligence, have acquired and/or purchased stolen cultural property, allowing for compensation to be paid to those "possessors" who exercised reasonable diligence, and those same parties' ability to pursue remedies (including compensation) from with those they acquired stolen cultural property from.[69] Articles 5 to 7 set out the procedure for return of stolen cultural property, as well as compensation for "possessors" who acquired stolen cultural property.[70]

The UNIDROIT Convention should be considered an "important" international convention.[71] The UNIDROIT Convention ultimately complements the UNESCO Convention in "expanding the rights upon which return" of cultural property can be sought.[72] Notwithstanding the fact that at the time of writing it has been adopted by 48 States,[73] it has outlined a framework for a uniform code

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[62] *Convention on Stolen or Illegally Exported Cultural Objects*, 2421 UNTS (entered into force July 1, 1998) [*UNIDROIT Convention*].

[63] Kono and Wrbka, *supra* note 27 at 60.

[64] *UNIDROIT Convention*, preamble (4).

[65] *UNIDROIT Convention*, art 1.

[66] *UNIDROIT Convention*, art 2.

[67] *UNESCO Convention*, art 1.

[68] *UNIDROIT Convention*, art 3.

[69] *UNIDROIT Convention*, art 4.

[70] *UNIDROIT Convention*, arts 5 and 7.

[71] Kono and Wrbka, *supra* note 27 at 69.

[72] Zsuzanna Veres, "The Fight Against Illicit Trafficking of Cultural Property: The 1970 UNESCO Convention and the 1995 UNIDROIT Convention" (2014) 12:2 Santa Clara J Intl L 91 at 99.

[73] "Convention on Stolen or Illegally Exported Cultural Objects – Status", online: UNIDROIT, <www.unidroit.org/instruments/cultural-property/1995-convention/status/>.

addressing the theft of cultural property and the handling of claims for return and restitution.[74]

LACUNAE IN THE EXISTING REGIME

Defining Cultural Property

Establishing a definition of cultural property that is widely accepted is important to ICHL, as it can "significantly impact the effectiveness of a convention and what objects are protected by it."[75] Unfortunately, there is not necessarily one way of thinking of cultural property or heritage at international law and no "generally accepted definitions."[76] The evolutionary nature of the legal regime is reflected in expanding, inclusive and exclusive definitions of cultural property and heritage and the adoption of multiple UNESCO conventions (not all of which have been discussed here) on cultural property and cultural heritage spanning approximately 70 years. Each convention promotes its own definition that reflects the economic, social, and political climate in which it was adopted and builds upon past conventions to varying degrees. This approach has been rightly characterized as an "ad hoc" and ultimately contributing to the evolving definition of cultural property and heritage.[77] Definitions of cultural property and heritage are therefore "heterogeneous" and in many ways incapable of a concrete and precise definition at law.[78]

A concrete and substantive definition of cultural heritage and property is elusive, and this contributes to the lack of a comprehensive and systematic approach to the subject matter under international law. Categories of cultural property and heritage have been considered both "boundless" and "international" and extremely difficult to define.[79] Rather than define cultural property in tight prescriptive definitions, commonly adopted definitions have been used expansively and taken to include a wide variety of moveable/immoveable tangible/intangible property and heritage. In this sense, definitions remain relatively "vague"[80] and for these reasons and others, the definition of cultural property and heritage are one of the "most precarious problems" in international law.[81] Definitions that are overbroad and provide protections for a wide variety of cultural property and heritage are problematic. Over inclusive definitions weaken the notion of cultural property and heritage and the rules for protection.[82] It is also the case that States are reluctant to adopt overbroad definitions as they become difficult to enforce. Narrow and prescriptive definitions also suffer from certain dilemmas in that States are again reluctant to adopt definitions that may omit types of cultural property or heritage valued by specific regions.[83]

The 1954 Hague Convention was the first international convention to attempt to define cultural property. Article 1 includes a non-exhaustive list of what constitutes cultural property and the first legal definition of cultural property as:

> (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
>
> (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);

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[74] Kono and Wrbka, *supra* note 27 at 69-70.

[75] David N. Chang, 'Stealing Beauty: Stopping the Madness of Illicit Art Trafficking' (2006) 28:3 Houston J Intl L 829 at 833.

[76] Frank G. Fechner, "The Fundamental Aims of Cultural Property Law" (1998) 7:2 Intl J Cult Prop 376 at 377

[77] Craig Forrest, *International Law and the Protection of Cultural Heritage* (New York: Routledge, 2010) at 20.

[78] Merryman, *supra* note 3 at 11.

[79] *Ibid* at 12.

[80] Sigrid Van der Auwera, "International Law and the Protection of Cultural Property in the Event of Armed Conflict: Actual Problems and Challenges" (2013) 43:4 Arts Man L & Soc 175 at 178.

[81] *Ibid* at 178.

[82] Fechner, *supra* note 76 at 377.

[83] Veres, *supra* note 72 at 103.

(c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as centers containing monuments.[84]

Article 1 of the 1954 Hague Convention defines cultural property to include both moveable and immovable property of "great importance to the cultural heritage of every people." In the post-WWII era the definition of 'cultural property' was particularly focussed on damage to property during periods of armed conflict and the definition is therefore inclusive of property that could be damaged during war.[85] The definition is strictly for the purpose of the convention and the two protocols, and unlike other UNESCO conventions with similar definitions, is not cross-referable.[86]

The UNESCO Convention is the next most important statement on cultural property and heritage after the 1954 Hague Convention. The UNESCO Convention was responsive to the illicit trade and growing black market in cultural property that emerged during the 1970s. It was also an expression of the concerns of newly independent States to the return of cultural heritage during the periods of decolonization. Article 1 of the UNESCO Convention defines 'cultural property' more expansively than the 1954 Hague Convention as:

> For the purposes of this Convention, the term 'cultural property' means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:
>
> (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
>
> (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance;
>
> (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries ;
>
> (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
>
> (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
>
> (f) objects of ethnological interest;
>
> (g) property of artistic interest, such as:
>
> (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manu-factured articles decorated by hand);
>
> (ii) original works of statuary art and sculpture in any material;
>
> (iii) original engravings, prints and lithographs ;
>
> (iv) original artistic assemblages and montages in any material;
>
> (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
>
> (i) postage, revenue and similar stamps, singly or in collections;
>
> (j) archives, including sound, photographic and cinematographic archives;
>
> (k) articles of furniture more than one hundred years old and old musical instruments.[87]

The definition of 'cultural' contained within the UNESCO Convention is "extremely broad" and includes pretty much any object of cultural value in the future, past or present. Where the 1954 Hague Convention is prescriptive as to what 'cultural property' falls within the purview of the convention, the UNESCO Convention instead turns on States to "designate" (within the enumerated categories) what cultural property is of importance and worth of

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[84] *1954 Hague Convention*, art 1.

[85] Forrest, *supra* note 77 at 21.

[86] O'Keefe, "Protection of Cultural Property in Armed Conflict", *supra* note 6 at 101.

[87] *UNESCO Convention*, art 1.

protection.[88] Ultimately this expansive definition leads to "subjective definitions" and thus fails to provide a "framework that can be consistently applied."[89] Unsurprisingly, the WHC enshrines yet another definition of cultural property and cultural heritage. Article 1 of the WHC defines cultural heritage as:

> For the purpose of this Convention, the following shall be considered as "cultural heritage":
>
> monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
>
> groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
>
> sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.[90]

While the WHC is the first time that the phrase 'cultural heritage' was used to define a category of property, the definition is also limited to immoveable property such as monuments, buildings and sites. Still other sections of the WHC expand upon the definition of 'heritage' to suggest that they are inclusive of both tangible and intangible property. Overall, the WHC introduced the term cultural heritage and broadened the conception of cultural property under international law. This in many ways represented a shift in the conception of cultural property as tangible and rooted in the traditional concepts of ownership and value to that which is intangible and subject to other moral values and definitions.

The UNIDROIT Convention represents a further shift from the definition and conception of cultural property to cultural heritage. The UNIDROIT Convention uses and implements language similar to that of the UNESCO Convention. The tension aroused between a definition of cultural property and cultural heritage was in some ways resolved through the introduction of the term 'cultural object.' Article 2 of the UNIDROIT Convention states that "cultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention."[91] The Annex to the UNIDROIT Convention contains a list of categories of cultural property identical to article 1 of the UNESCO Convention.

While it may appear practical that each convention discussed above has adopted a separate or nuanced definition of cultural property or heritage to suit a particular aim and social, political, and economic context, this does not create a coherent definition and ultimately creates "uncertainty…over the exact nature" and "subject-matter" of ICHL. Rather, the evolution and development of the legal regime surrounding the protection of cultural property and heritage under international law has expanded and confused accepted definitions to the point that there exists no consensus at law and different definitions apply in different contexts and are subjectively applied by States and organizations. To further complicate matters, the definition of cultural property has expanded to include complicated dichotomies between property/heritage, tangible/intangible and moveable/immoveable. Arguably, the lack of coherence and clarity, plethora of legal instruments designed to deal with cultural property and cultural heritage, during non-conflict and conflict, as well as the lack of unanimity in States adopting these various definitions contribute to the failings of the legal regime surrounding cultural property and heritage.

Cultural Property or Cultural Heritage

All forms of cultural property are understood under both customary international law and the relevant conventions discussed in this paper as "part of the cultural heritage of humankind" and representing a "common interest."[92] Traditionally, cultural property was a term used to define property worthy of protection under the particular legal regime. When the 1954 Hague Convention was first adopted the term cultural property was the only term

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[88] *UNESCO Convention*, art 1.

[89] Veres, *supra* note 72 at 103.

[90] *WHC*, art 1.

[91] *UNIDROIT Convention*, art 2.

[92] Lostal, *supra* note 54 at 59.

used to denote property the subject protection. This limited definition of cultural property was also true of the UNESCO Convention, which was primarily concerned with the return of stolen cultural property and the illicit trafficking of same.

As more States adopted the 1954 Hague Convention and the UNESCO Convention gained increasing acceptance and usage, the definition of cultural property started to expand to place additional importance on the qualifier that cultural property was also that which imbued cultural significance and was important to the "cultural heritage"[93] of all people and States party to the conventions.

While at this time the term 'cultural heritage' had not reached common acceptance the noticeable expansion from 'cultural property' to the more inclusive 'cultural heritage' had begun to emerge.[94] The term 'cultural heritage' came into parlance and common usage during the period following the adoption of the UNESCO Convention and the WHC. This shift from preference for the term 'cultural property' to the term 'cultural heritage' represented the expanding notion of cultural property, as being defined by the States that adopted each respective convention, to cultural heritage of "universal value" being defined by the properties of importance to the international community and forming part of an "international system of protection."[95]

Over the course of approximately 70 years since the first convention relating to cultural property, the definition of cultural property has therefore evolved conceptually from 'cultural property' to 'cultural heritage.'[96] Given this evolution and notwithstanding semantic and methodological differences, cultural property and cultural heritage have become inextricably intertwined and ultimately interchangeable.[97] In this sense, cultural heritage has largely replaced 'property' as the "conceptual framework for considering the protection of cultural objects, places and practices."[98]

Notwithstanding the modern interchangeable nature of cultural property and cultural heritage, dissonance between cultural property and cultural heritage as defined and described under international law is still apparent. While drafters, scholars and practitioners alike have welcomed the gradual shift from cultural "property" to "heritage" it is clear that we are far from a coherent and substantive legal regime in international law that encompasses both principles. The state of the legal regime is therefore deficient as it has failed to join or adopt a concept of cultural property that is more "compatible with the broader philosophy" and the manner in which different cultures "look at culture."[99] This dissonance has problematized a universal definition under international law as well as a comprehensive legal regime. It has also highlighted the competing interests between States party to ICHL conventions and the interests of the broader international community.

Fragmentation Under International Law

The multiplicity of conventions, definitions, rules and guidelines for the protection of cultural heritage under international law is confusing and disorganized. It has been said by more than one scholar in this subject area that the international conventions would be effective if they were both adopted by a majority of States and followed by those who adopt them. Of course, States are frequently reluctant to adopt relevant conventions for fear that they will be held accountable for past transgressions, they will interfere with national and domestic laws, or the conventions themselves are conceivably unwieldable. Cultural heritage law as a whole can therefore be considered elusive and fragmented. Over the past two decades ICHL has expanded rapidly. Whereas, early on ICHL was driven by the 1954 Hague Convention (applying to situations of armed conflict) and the UNESCO Convention (applying in situations outside of armed conflict), the current legal regime has expanded to include a multiplicity of national and international legal instruments, conventions and legislation emerging from different branches of the law. While, for the most part this multiplicity of laws can be spoken of as a

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[93] *1954 Hague Convention*, art 1(a).

[94] Lostal, *supra* note 54 at 60.

[95] *Ibid* at 60.

[96] Forrest, *supra* note 77 at 20.

[97] Vladimar Tr. Hafstein and Martin Skrydstrup, "Heritage vs. Property: Contrasting Regimes and Rationalities in the Patrimonial Field" in Jane Anderson and Haidy Geismar, eds, *The Routledge Companion to Cultural Property* (London, UK: Routledge, 2017) 38 at 39

[98] Forrest, *supra* note 77 at 24.

[99] Anthanasios Yupsanis, "Cultural Property Aspects in International Law: The Case of the (Still) Inadequate Safeguarding of Indigenous Peoples (Tangible) Cultural Heritage" (2011) 58:3 Neth Intl LR 335 at 343.

coherent body and branch of the law, namely ICHL, if one looks below the surface it becomes obvious that the many functions of ICHL and the "plurality of its users" has led to a "complex and intricate" area of the law that is not easily or readily understood by users.[100] The "transnational, global character of cultural property" has further created a "multilayered and decentralized structure of the sources."[101] Overall, what can be said of the body of law that surrounds cultural heritage is that it has not yet been consolidated in a systematized approach devoid of fragmentation.

Lack of Enforcement

It is no secret that one of the biggest difficulties in international law is the ability of international organizations and States to enforce international treaties and conventions. It is routinely the case that States breach international conventions (including those relating to ICHL) without repercussions. Even more serious, it is also common for States who have adopted multilateral international conventions to breach their obligations without repercussions, rebuke from the international community or penalty. Under international law there are a series of accepted and escalating sanctions for breaches of international conventions and situations where States are in fact infringing obligations. Unfortunately, common enforcement mechanisms are routinely rendered ineffective in situations involving the destruction, theft or trafficking of cultural heritage for the following reasons.

Countermeasures

Countermeasures are one of the primary mechanisms for the enforcement of international obligations. States that are victims of the conduct of others are able to act on those contraventions of international obligations through countermeasures. Common countermeasures may be to legitimize committing a similar act and/or impose sanctions (including withdrawing or suspending financial assistance, diplomatic relations etc.). Unfortunately, these common countermeasures are incompatible with the purpose of the UNESCO Conventions and may in fact further jeopardize or place in harm's way cultural heritage.[102] According to at least one scholar, the only reliable and "less threatening sanction" to be imposed on a State for contravention(s) of ICHL is "condemnation" of a "wrongful act."[103] Condemnation of an illegal act however, while viable and easily deployable, is not effective. Not only can condemnation be easily ignored it is also reliant on the role of other parties such as NGOs, and international organizations rather than States, who will, more often than not, shy away from public condemnation for political reasons. By comparison the naming and shaming mechanisms deployed within the global human rights regime. Regardless of its relative ineffectiveness, public condemnation remains the most commonly deployed of countermeasures in response to contravention of the UNESCO conventions.

With the exception of State-to-State action and countermeasures in reply to contraventions of ICHL, there are also penal sanctions in the form of restitution, return and compensation. These penal sanctions are enshrined in the UNESCO conventions, specifically article 28 of the 1954 Hague Convention requires States to:

> undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.[104]

The UNESCO Convention also calls upon States to "impose penalties or administrative sanction on any person responsible for infringing the prohibitions" contained within the convention as it relates to theft and illegal exportation/importation.[105] The UNESCO Convention however imposes "non-self-executing" obligations requiring States that adopt the convention to implement legislation. In this sense, States are obliged to oppose the illicit import, export and transfer of ownership of cultural property and assist in reparation with whatever "means at their disposal"[106] but if a State does

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[100] Francesca Fiorentini, "A Legal Pluralist Approach to International Trade in Cultural Objects" in James A.R. Nafziger and Robert Kirkwood Paterson, eds, *Handbook on the Law of Cultural Heritage and International Trade* (Northampton, MA: Edward Elgar Publishing Ltd., 2014) 589 at 589-590.

[101] *Ibid* 590.

[102] Forrest, *supra* note 77 at 401.

[103] *Ibid* 402.

[104] *1954 Hague Convention*, art 28.

[105] *UNESCO Convention*, art 8.

[106] *UNESCO Convention*, art 2(2).

not implement such legislation the UNESCO Convention is toothless and ineffective.

Criminal Sanctions

Only recently have we observed criminal sanctions being meted out through international criminal law for the destruction of cultural heritage. In direct response, and in the wake of atrocities committed during the conflict in the former Yugoslavia, the United Nations created the International Criminal Tribunal for the Former Yugoslavia ("ICTY"). Article 3(d) of the ICTY Statute states that the ICTY shall have the power to prosecute persons for violations of the laws or customs of war, such as "[s]eizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science."[107] Unfortunately, the ICTY Statute did not go as far to define cultural heritage in any meaningful way and prosecutions at the ICTY only touched on ICHL "tangentially" and "indirectly"[108] by focussing on the targeting of educational and religious targets and overlooking other secular targets.[109] Thus while the ICTY's inclusion of charges addressing the intentional destruction of cultural property was a landmark development in the recognition of ICHL, the prosecutions of the ICTY failed in that no one was convicted of any offence solely relating to cultural property.

The Rome Statute of the International Criminal Court ("Rome Statute"), which established the International Criminal Court ("ICC") at The Hague encounters only the "most serious crimes of concern to the international community as a whole," namely, the crime of genocide, war crimes, crimes against humanity and the crime of aggression, when conditions for the exercise of the Court's jurisdiction are satisfied.[110] The armed conflict in the former Yugoslavia and the example of the ICTY Statute "inspired" the drafters of the Rome Statute to provide the ICC with the jurisdiction over the war crime of the international attack on cultural property in either international or non-international armed conflict.[111]

Article 8 of the Rome Statute provides the ICC with jurisdiction in respect of "war crimes when committed as part of a plan or policy or as part of large-scale commission."[112] Article 8(2)(b)(ix) of the Rome Statute states the following is considered a war crime:

> (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
>
> [...]
>
> (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;[113]

Article 8(2)(e)(iv) mirrors that of article 8(2)(b)(ix) except that it applies strictly to non-international armed conflict. Article 8(2)(e)(iv) states the following is considered a war crime:

> (e) Other serious violations of laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts
>
> [...]
>
> (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science, or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are no military objectives;[114]

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[107] *Statute of the International Criminal Tribunal for the Former Yugoslavia*, SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993), as amended, art 3(d) [*ICTY Statute*].

[108] Forrest, *supra* note 77 at 403.

[109] Hiraad Abtahi, "The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia" (2001) 14:1 Harvard Hum Rts J 1 at 2.

[110] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002), preamble [*Rome Statute*].

[111] O'Keefe, "Protection of Cultural Property under International Criminal Law", *supra* note 20 at 345; *ICTY Statute*, art 3(d).

[112] *Rome Statute*, art 8(1).

[113] *Rome Statute*, art 8(2)(b)(ix).

[114] *Rome Statute*, art 8(2)(e)(iv).

While article 8(2)(b)(ix) and article 8(2)(e)(iv) are important developments in cementing the legal protection of cultural property during periods of armed conflict, in addition to establishing clear authority for the intentional destruction of cultural property as a war crime, there are particular limitations that have been noted as deficiencies. The provisions with respect to cultural property contained in article 8 do not clearly define what is meant by destroying moveable cultural property, nor does it define with particular sufficiency under what circumstances there would be an exception from the provisions for military necessity.[115]

Prosecutor v Ahmad Al Faqi Al Mahdi

The recognition of the war crime of the intentional attack "against buildings dedicated to religion…[and] historic monuments"[116] during armed conflict was reinforced by the case of *Prosecutor v Ahmad Al Faqi Al Mahdi*.[117] *Al Mahdi* can be viewed as a landmark step in jurisprudence surrounding the protection of cultural property under international law and a "promising and timely development,"[118] however, *Al Mahdi* can also be viewed as a missed opportunity for the ICC to bring together the multiplicity of sources of law designed to protect cultural property in periods of armed conflict, highlight the inadequacies of the current legal regime and suggest improvement, or alternatively to refine the scope of the *Rome Statute's* provision for the protection of cultural property.[119]

An armed conflict erupted in Mali in January 2012 between several armed groups, including Al-Qaeda in the Islamic Maghreb ("AQIM"), Ansar Dine, and Malian armed forces. Three main regions of northern Mali fell under the control of armed groups who each imposed a strict application of sharia on the population.[120] By April of 2012 the Malian army withdrew from the capital of Timbuktu and Ansar Dine and AQIM took control of the city imposing their own version of Islamic law including an Islamic tribunal, police force, media commission and a morality brigade ("*Hesbah*") responsible for regulating the morality of the people of Timbuktu.[121]

Ahmad Al Faqi Al Mahdi ("Al Mahdi") was a native of Timbuktu, who provided support to armed groups, including Ansar Dine and AQIM.[122] In April 2012 Al Mahdi was asked to lead the *Hesbah*, which was entrusted with regulating the morality of the people of Timbuktu. The decision to attack cultural property in Timbuktu, including ten mausoleums and mosques, was made by Ansar Dine and AQIM leadership in late June 2012. Al Mahdi was ultimately responsible for deciding which sites would be attacked and destroyed[123] and supervised the operations, collected tools, provided instructions and moral support and physically participated in a number of the attacks.[124]

The attacks took place between June 30, 2012 and July 11, 2012 and ten of the most important sites in Timbuktu were attack and destroyed by Al Mahdi and others. Most, if not all of the targeted sites were "razed to the ground," "levelled," and ultimately "destroyed" with tools such as pickaxes, hammers, and bulldozers that were either brought by attackers or purchased by Al Mahdi himself using *Hesbah* funds.[125] All but one of these sites were UNESCO World Heritage sites and none were legitimate military objectives.[126]

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[115] Micaela Frulli, "The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency" (2011) 22:1 Eur J Intl L 203 at 212-214.

[116] *Rome Statute*, art 2(b)(ix) and 2(e)(iv).

[117] *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, Judgment and Sentence (27 September 2016) at para 31 (International Criminal Court) [*Al Mahdi*].

[118] Paige Casaly, "Al Mahdi before the ICC: Cultural Property and World Heritage in International Criminal Law", Recent Case, (2016) 14 J Intl Crim Just 1199 at 1200.

[119] Keane, *supra* note 14, 1; "Prosecutor v. Ahmad Al Faqi Al Mahdi: International Criminal Court Imposes First Sentence for War Crime of Attacking Cultural Heritage" 130:7 Harv LR 1978 at 1978-1979.

[120] *Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Mali*, UNHRC, 22nd Sess, Agenda Items 2 and 4, A/HRC/22/33 at 1.

[121] *Al Mahdi* at para 31.

[122] *Ibid* at paras 9 and 32.

[123] *Ibid* at para 37.

[124] *Ibid* at para 40.

[125] *Ibid* at para 38.

[126] *Ibid* at para 39.

On December 17, 2015, the Office of the Prosecutor filed a solitary charge against Al Mahdi alleging he had contravened article 8(2)(e)(iv) of the Rome Statute by "intentionally directing" attacks against ten buildings of "religious and historical character" in Timbuktu between June 30, 2012 and July 11, 2012.[127] The trial proceeded on August 22 to 24, 2016. Al Mahdi made an admission of guilt and oral submissions regarding judgment and sentencing were received. The Trial Chamber heard the *viva voce* testimony of only three witnesses.[128] The Chamber's judgment was issued on September 27, 2016.

The decision of the ICC Trial Chamber was the first conviction of the war crime of intentionally directing attacks on cultural objects or property. Writing jointly the majority of the Court a three judge panel found that the facts that had been adduced by the prosecution supported the conviction even without Al Mahdi's admission of guilt. The Court applied for the first time article 8(2)(e)(iv) of the *Rome Statute*. In addition to reviewing the elements of the offence the Court also reviewed a brief history of the special protection of cultural property in international law, going as far back as the 1907 Hague Conventions, making further note of the relevant provisions of the four Geneva Conventions, including Additional Protocols I and II, the 1954 Hague Conventions and the First and Second Protocols. While the Court did provide a brief overview of these instrumental documents it did not engage in any meaningful way with any of these instruments.[129]

Al Mahdi was a missed opportunity for the ICC and international jurisprudence. As a result of the limited trial and admission of guilt it has been observed that the Court was unable to engage with some of the "thorniest" questions that have been aroused surrounding article 8(2)(e)(iv) and its counterpart article 8(2)(b)(ix). Rather than engage with article 8(2)(e)(iv) head on the Court took a conservative approach to its first dealings with crimes surrounding cultural property, which has been characterized by some as an unfortunate example of "arrested jurisprudential development."[130] The Court also missed an opportunity to deal with some of the more contemporary legal issues surrounding ICHL including the status of non-state actors and terrorist groups, and the use of the destruction of cultural heritage as a tactic in non-international armed conflicts ("NIAC").

What is equally unfortunate is that the Court is not likely to try another case involving cultural property for years due to the fact that it has limited case load and it does not have jurisdiction over the modern armed conflicts relevant today where cultural property and heritage has been destroyed, such as Syria, Iraq and Afghanistan. These reasons may have emboldened non-state actors and terrorists who invoke the destruction of cultural property as a tactic for armed conflict, rather than serve as a deterrent. Overall, the Court's approach sets *Al Mahdi* in line with other developments in the legal regime surrounding the protection of cultural property at international law, wherein efforts are made after the fact to combat the destruction of cultural property, or changes and developments are made that do not go far enough. These reasons may have emboldened non-state actors and terrorists who invoke the destruction of cultural property as a tactic for armed conflict, rather than serve as a deterrent.

Exclusion from Participation

An unfortunate circumstance of the high-level development of ICHL is that the majority of the laws on this issue are related to States and international organizations. In this sense, the existing legal regime, and relevant and major legal instruments (including the aforementioned UNESCO conventions) have been viewed as taking an internationalist approach to ICHL where the specific claims, interests and particularity of non-traditional groups (such as Indigenous peoples) and armed non-state actors ("ANSAs") are often overlooked.

Armed Non-State Actors

The conventions adopted with respect to armed conflict and cultural heritage were drafted with an inter-state armed conflict model in mind.[131] Unfortunately, the traditional inter-state armed conflict model of international armed conflict ("IAC") does not properly account for the fact that the majority of armed conflicts taking place in the world today are "non-international

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[127] *Ibid* at paras 2 and 10.

[128] *Ibid* at paras 8.

[129] *Ibid* at para 14.

[130] "Prosecutor v. Ahmad Al Faqi Al Mahdi: International Criminal Court Imposes First Sentence for War Crime of Attacking Cultural Heritage" 130:7 Harv LR 1978 at 1981-1982.

[131] Marina Lostal, Kristin Hausler, Pascal Bongard, "Armed Non-State Actors and Cultural Heritage in Armed Conflict" (2017) 24: 4 Intl J Cult Prop 407 at 410.

in character."[132] It is also the case that the inter-state armed conflict model and legal regime surrounding ICHL does not properly account for the fact that most NIAC's involve ANSAs, whose status under international law itself remains "ambiguous."[133]

The term or label ANSA may refer to a number of different groups including rebels, insurgents, paramilitary groups, opposition and insurgent movements, liberation armies and criminal and terrorist organizations. International Humanitarian Law ("IHL") applies to all parties in armed conflict, however, as indicated above, given that the majority of the conventions relating to armed conflict and cultural heritage were drafted based on the inter-state armed conflict model, the obligations of ANSAs within NIACs have been "paid very little attention."[134] As a result, ANSAs can be said to have been excluded and not integrated in any meaningful way the development of ICHL.

The two most important conventions with respect to the protection of cultural heritage in situations of armed conflict are the 1954 Hague Convention and Second Protocol. The question of the relevance and applicability of the 1954 Hague Convention and the Second Protocol to ANSAs has grown exponentially in recent years with the prevalence of NIACs involving ANSAs. Articles 18 and 19 of the 1954 Hague Convention sets out the scope of application. Article 18(3) states that the convention will apply in situations of armed conflict, notwithstanding the fact that one or more of the States involved do not recognize the "state of war."[135] Article 19(1) states that the convention shall apply to armed conflict "not of an international character."[136] Article 19(3) further states that UNESCO may offer services to any party to the conflict (which would include ANSAs).[137] The Second Protocol, specifically article 22(1) expressly states that it "shall apply in the event of armed conflict not of an international character, occurring within one of the Parties."[138] Notwithstanding the application of the 1954 Hague Convention and Second Protocol to IAC and NIAC the question remains how they apply to ANSAs.

ANSAs have been excluded from participation and the development of the international law surrounding the protection of cultural heritage during armed conflict. ANSAs and non-state groups cannot be signatories to the cultural heritage treaties and States remain the highest authorities and protagonists. There is equally doubt as to whether the cultural heritage conventions can bind third parties and whether State parties to the 1954 Hague Convention and Second Protocol intended the treaties to apply to non-state parties involved in a NIAC. The apparent exclusion from participation of ANSAs from cultural heritage conventions, including the 1954 Hague Convention and the Second Protocol is concerning and problematic. Noticeably, this exclusion and lack of participation has been highlighted in recent years as cultural heritage has become the "direct target of systematic and deliberate attacks by ANSAs."[139] In these situations, it is more often the case that ANSAs themselves have acknowledged the importance of cultural heritage sites (usually inscribed on the World Heritage List) and deliberately target those sites. On the other hand, another noticeable trend amongst ANSAs involved in NIACs is that as opposed to the intentional destruction of cultural heritage, some ANSAs have acknowledged the importance of cultural heritage and intentionally bound themselves to respect cultural heritage through their own "internal regulations and codes of conduct" and to varying degrees adopted "measures…to safeguard and respect cultural heritage."[140]

Both circumstances, either the deliberate targeting of cultural heritage or the internal adoption of respect for cultural heritage demonstrate that ANSAs have engaged and had an impact on ICHL. Regardless of the aforementioned impact it remains the case that ANSAs are still reluctant or ambivalent towards the cultural heritage treaties, including those directly relating to NIACs. ANSAs lack the reliable ability to negotiate, become parties to and work within these treaties and often lack the requisite understanding and education regarding ICHL. ANSAs, which are an important group

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[132] *Ibid* at 409.

[133] Alessandro Chechi, "Non-State actors and Cultural Heritage: Friends or Foes?" (2015) 19 Anuario de la Facultad de Derecho de la Universidad Autonoma de Madrid 457 at 469.

[134] Lostal, Hausler, Bongard, *supra* note 131 at 410.

[135] *1954 Hague Convention*, art 18(3).

[136] *1954 Hague Convention*, art 19(1).

[137] *1954 Hague Convention*, art 19(3)

[138] *Second Protocol*, art 22(1).

[139] Lostal, Hausler, Bongard, *supra* note 131 xat 411.

[140] *Ibid* at 414 and 417.

involved in most modern NIACs, are therefore excluded from the development of ICHL. Thus, for the ICHL to be effective and protect cultural property and heritage, not only must the relevant conventions apply to ANSAs in NIACs but ANSAs must also be part of the discussion.[141]

Indigenous Peoples

ANSAs are not the only non-state actors that have been excluded from the legal regime surrounding cultural heritage. Indigenous Peoples have historically experienced widespread destruction and theft of cultural property and cultural heritage and thus share a common history and circumstances in that cultural property is often stored in museums and private collections as a result of colonialism and oppression.[142] The fact that Indigenous Peoples are generally excluded from joining international agreements and prevented from actively participating in the formation of effective mechanisms that protect cultural heritage has resulted in the distancing of Indigenous Peoples from ICHL. Indigenous Peoples have in this way been disadvantaged as non-state actors. While Indigenous Peoples have more recently engaged in discussions at the international level regarding ICHL and "gradually chipped away at the dominance of States and the lacunae they have created" the fact remains that they are not States with the ability to enter into the major conventions regarding ICHL and this status more than any other excludes Indigenous Peoples and prevents participation.[143]

It is evident that the manner in which Indigenous Peoples conceive of the notions of property and ownership as opposed to western concepts is drastically different. It is also the case that the legal regime that has developed surrounding cultural heritage has for the most part arrived at an "internationalist" perspective where cultural heritage is viewed as a "component of human culture" belonging to the "cultural heritage of all mankind"[144] or "mankind as a whole."[145] Under this framework there is limited place for a *sui generis* approach to cultural heritage, including the non-western view of cultural heritage espoused by Indigenous Peoples. As has been pointed out by a number of scholars in this area, consideration of internationalist goals with respect to ICHL overlooks the rights to cultural property of sub-groups within States such as Indigenous Peoples.[146]

While exclusion from participation presents a lacuna in the universal adoption of treaties and a comprehensive system of ICHL, Indigenous Peoples have taken steps towards integration. In many ways this integration has been achieved at the international level by "articulating" claims and raising legal issues through the prism of human rights.[147] The exclusion of Indigenous Peoples has thus been "gradually" addressed through the UN mandates on "human rights and racial discrimination."[148]

The clearest evidence of this participation and the integration of Indigenous Peoples into the international system is the adoption by the UN General Assembly ("GA") of the Declaration on the Rights of Indigenous Peoples ("UNDRIP").[149] While UNDRIP is considered non-binding international instrument the aspects of UNDRIP that deal with and relate to cultural property, heritage and cultural rights reflect customary international law and could therefore be considered binding. UNDRIP sets out the rights of Indigenous Peoples to cultural property and cultural property protection, as well as formulating an obligation on States to provide a mechanism for

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[141] Zoe Howe, "Can the 1954 Hague Convention Apply to Non-State Actors?: A Study of Iraq and Libya: (2012) 47:2 Tex Intl LJ 403 at 404; David MacDonald, ed, *Culture Under Fire: Armed Non-State Actors and Cultural Heritage in Wartime* (Geneva Call, October 2018).

[142] Maria Julia Ochoa Jimenez, "Conflict of Laws and the Return of Indigenous Peoples: Cultural Property: A Latin American Perspective" (2019) 26:4 Intl J Cultural Property 437 at 446; Karolina Kuprecht, *Indigenous Peoples' Cultural Property Claims: Repatriation and Beyond* (New York: Springer International Publishing, 2014) at 193.

[143] Anna Filipa Vrdoljak, "Indigenous Peoples, World Heritage, and Human Rights" (2018) 25:3 Intl J Cult Prop 245 at 250.

[144] *1954 Hague Convention*, preamble.

[145] *UNESCO Convention*, preamble.

[146] Yupsanis, *supra* note 99 at 346; Alexandra Xanthaki, *Indigenous Rights and United Nations Standards* (Cambridge: Cambridge University Press, 2007) at 348, 361 and 367; Joe Watkins, "Cultural Nationalists, Internationalists and "Intra-nationalists": Who's Right and Whose Right?" (2005) 12:1 Intl J Cult Prop 78 at 84.

[147] Vrdoljak, *supra* note 143 at 250.

[148] *Ibid* at 252.

[149] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No. 49, UN Doc A/RES/61/295 (13 September 2007) [UNDRIP].

redress for Indigenous Peoples' cultural property.[150] Article 11 of UNDRIP describes and makes a point to detail the *sui generis* right to restitution of cultural property for Indigenous Peoples.[151] Article 11 of UNDRIP states:

1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.[152]

Article 12 of UNDRIP states:

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

UNDRIP has had a profound impact on the international law surrounding the protection of indigenous cultural heritage, notwithstanding the fact that UNDRIP remains soft law and non-binding on signatory states.[153] While it has been opined by some scholars that UNDRIP does not go far enough for the purpose recognizing full ownership of cultural property and heritage, it does recognize Indigenous Peoples' right to "maintain, control, protect and develop their cultural heritage."[154]

While UNDRIP's adoption by the UN GA and the furtherance of the cultural heritage rights contained therein are a major step towards recognition of a *sui generis* system of cultural heritage and property law for Indigenous People, it remains the case that there is a lack of integration and exclusion from participation in ICHL. Indigenous Peoples remain non-state actors with limited representation and integration with the major treaties of ICHL, including the WHC, and UN bodies such as UNESCO and the World Heritage Committee.[155] It is because of this present exclusion and historic exclusions from state centric concepts of international law that Indigenous Peoples have heavily relied upon furthering their interests, including those relating to specific cultural heritage, through the IHRL rather than ICHL.

FILLING LACUNAE

While it is important to note that the 1954 Hague Convention, UNESCO Convention, WHC and UNIDROIT Convention have numerous overlapping terms and concepts, it is also important to understand that they each were drafted and designed for a specific purpose and with a particular problem in mind: the 1954 Hague Convention in response to the widespread destruction of cultural property during WWII; the UNESCO Convention in response to the developing concerns in protecting cultural heritage in era of decolonization; the WHC in response to pressing environmental and socio-political concerns; and finally the UNIDROIT in response to the problem of illicit trade and deficiencies in the UNESCO Convention. As a result, while practical in that each convention has been responsive to pressing concerns of the day and sharing the universal objective of protecting and preserving cultural heritage for humankind, the legal regime surrounding ICHL has developed into an *ad hoc* and multifaceted jumble of laws, rules, conventions, treaties and guidelines, in need of reform. Each time a new convention is adopted, in addition to being responsive to the social, political and economic

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[150] Kuprecht, *supra* note 142 at 76; UNDRIP, arts 11 and 18.

[151] Shea Esterling, "One Step Forward, Two Steps Back: The Restitution of Cultural Property in the United Nations Declaration of the Rights of Indigenous Peoples" (2013) 18:4 Art Ant & L 323 at 330.

[152] *UNDRIP*, art 2.

[153] Kuprecht, *supra* note 142 at 75-76.

[154] Yupsanis, *supra* note 99 at 360.

[155] Vrdoljak, *supra* note 143 at 247.

times of the day, it is designed to fill lacunae either in its predecessor convention or that which has become exposed through failings in the international legal regime.

Any overview of the legal regime surrounding the protection and preservation of cultural heritage under international law would therefore be remiss if it did not note that the existing legal regime has been subject to recurrent, repeated and present failings. Those failings are evident in the fact that cultural heritage is the subject of ongoing attack and destruction during armed conflict and each of the instruments referred to herein have been ineffective in preventing destruction or prosecuting individuals and groups for breaches. Specific examples of these failings have not been the focus of this discussion, but the destruction of cultural heritage in situations of armed conflict have been noted in Iraq, Afghanistan, Mali, and Syria most recently. The intentional destruction of cultural heritage is therefore proof of the fact that the current legal regime is failing and in need of revitalization.

How can IHRL help?

For years ICHL was seen as sitting outside the domain of human rights. The law surrounding this area was focussed on tangible property and concepts of property associated with exclusive ownership (as opposed to collective), preventing human (as opposed to environmental) threats, and traditional property rights (as opposed to moral rights). No human rights instrument expressly set out the right to cultural heritage and any suggestion that cultural heritage was in fact connected with human rights was subtle. As ICHL developed and expanded in the years following the adoption of the 1954 Hague Convention, cultural heritage started to be associated with cultural rights, which themselves were less developed than the first generation of human rights. The UN Special Rapporteur in the field of cultural rights, Karima Bennoune has summarized accurately the current state of the law and interrelationship between cultural heritage and human rights as follows:

> The right of access to and enjoyment of all forms of cultural heritage is guaranteed by international human rights law, including the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, deriving its legal basis, in particular, from the right to take part in cultural life, the right of members of minorities to enjoy their own culture and the right of indigenous peoples to self-determination and to maintain, control, protect and develop cultural heritage.[156]

Given this interrelationship and undeniable connection ICHL would benefit from a human rights' based approach rather than the existing "property framework."[157]

UDHR

The connection between human rights and cultural heritage emerged in the wake of WWII with the Universal Declaration of Human Rights ("UDHR").[158] The UDHR contains articles and provisions that indirectly and directly address the importance of cultural property as an integral human right and the "inextricable relationship" between the two.[159]

Article 17 of the UDHR states: "(1) Everyone has the right to own property along as well as in association with others. (2) No one shall be arbitrarily deprived of his property."[160] Article 17 does not make explicit reference to cultural property, however the article is "broad and comprehensive" and applies to both collective and individual forms of property. The nature of the article would therefore suggest that cultural heritage is included as a subset of property.[161]

Article 27 of the UDHR states:

> (1) Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
>
> (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific literary or artistic production which he is the author.[162]

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[156] Bennoune, *supra* note 1 at para 14.

[157] Kimberly Alderman, "The Human Right to Cultural Property" (2011) 20:1 MSU Intl LR 69 at 72-73,

[158] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) [UDHR].

[159] Suzanne I. Schairer, "Intersection of Human Rights and Cultural Property Issues Under International Law" (2001) 11:1 Italian YB Intl L 59 at 62.

[160] *UDHR*, art 17.

[161] Gudmundur Alfredsson and Asborn Eide, eds, *The University Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff Publishers, 1999) at 256-257.

[162] *UDHR*, art 27.

Article 27 prescribes the universal entitlement to the enjoyment of cultural rights and insists that all people have a right to the enjoyment and participation in all forms of cultural life. Article 27 of the UDHR is therefore said to "form the basis" for the concept and idea that all people have a right to access cultural material and property and that access to these materials and property is essential to a "meaningful participation in cultural life."[163] Article 27 of the UDHR is perhaps the most profound and direct provision of the UDHR as it pertains to cultural heritage in international law. Indeed, the article is said to have laid the foundation for the later recognition of the destruction of cultural property as a war crime in the Rome Statute.

Read together the UDHR, including Article 17 and 27 demonstrate a deep and undeniable connection between human rights and cultural heritage. While most of the articles as they relate to cultural property are not explicit, it is the case that the entitlement to rights towards cultural heritage, cultural material and life can be extended in most cases to the right to possess, retain, and enhance cultural property.

ICCPR

Rights to cultural heritage and the overlap between human rights and the protection of cultural property can also be found in certain provisions of the *International Covenant on Civil and Political Rights* ("ICCPR").[164] While the ICCPR is devoid of all direct references to cultural heritage, there are several indirect references that support or enhance cultural property protection through the right to participate in cultural life and full enjoyment of the right to self-determination.

Article 1 of the ICCPR states that all peoples have the right of self-determination, which includes the right to freely determine their own "cultural development."[165] Article 27 of the ICCPR covers cultural, religious and language rights of minorities and imposes "positive obligations" on States party to the ICCPR.[166] Article 27 states:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.[167]

While Article 27 applies specifically to minorities and the cultural rights of these minorities, the term "culture" contained therein has been interpreted broadly to include "customs, morals, traditions, rituals, types of housing, eating habits, as well as the arts, music, cultural organisations, literature and education.[168] Thus, while Article 27 is limited to minority rights, it contains an indirect and broad reference to "culture" and by expansion, cultural property.

ICESCR

As is the case with the ICCPR, the right to participate in cultural life and enjoy the benefits of cultural life would not be protected if cultural property itself were not protected. It is therefore an important and critical component in the protection of cultural heritage at international law and IHRL that the rights to cultural life is protected and enshrined in various human rights instruments. The *International Covenant on Economic, Social and Cultural Rights* ("ICESR")[169] is an example, along with the UDHR and ICCPR, of these human rights instruments.

The ICESCR, like the ICCPR states that all peoples have the right to "social and cultural development."[170] Article 6 of the ICESCR provides that States party to the convention must take steps to achieve steady, cultural development in the context of economic freedoms for

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[163] Alderman, *supra* note 157 at 73.

[164] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 23 March 1976) [ICCPR].

[165] *ICCPR*, art 1.

[166] UN Human Rights Committee, *General Comment No. 23: Article 27 (Rights of Minorities)* UN Doc. HRI/GEN/1/Rev.1, 28 (1994) paras 6.1, 6.2, and 9.

[167] *ICCPR*, art 27.

[168] Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, E/CN/4/Sub.2/384/Rev.1 (1977), 99-100.

[169] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) [ICESCR].

[170] *ICESCR*, art 1.

individuals.[171] Article 15 of the ICESCR provides that all States party to the covenant ensure and recognize the right of everyone to "cultural life" which includes the right "to benefit from the cultural heritage…of other individuals and communities" thus requiring the protection and preservation of tangible and intangible cultural heritage.[172] In this way the ICESCR, similar to the ICCPR, does not directly address the protection of cultural heritage, rather, the ICESCR indirectly supports and addresses the protection of cultural property through articles and provisions that support the right to cultural life and cultural development.

Treating Cultural Heritage as a Human Right

The benefits and basis for treating cultural heritage as a human right has been established above. The UDHR, ICCPR and ICESCR provide a foundation for this human rights' based approach which would serve to alleviate and fill lacunae existing in the current legal regime surrounding cultural heritage.

First, the human rights based approach to cultural heritage has the potential to shift the focus on cultural heritage as a strict issue relating to tangible, movable and immovable property, to that which emphasizes the "rights of individuals and groups" in relation to the intangible cultural heritage.[173] Above all other things, this human rights based approach focussing on the rights on individuals and groups alleviates to a certain extent the exclusion from participation of ANSAs and Indigenous Peoples. The human rights based approach therefore allows for the focus of ICHL to shift from the state centric model reliant upon States to fulfil their treaty obligations to one where the individual human rights are given increased relevance.

Second, emphasizing cultural heritage as a human right and enlisting support from the international instruments pertaining to human rights, including the UDHR, ICCPR and ICESCR, has the effect of buttressing what has been observed as a lack of adherence to the standards expressed in the various cultural heritage conventions. For example, the Second Protocol to the 1954 Hague Convention has a limited adoption by States and at this time only 82 parties have adopted the protocol, whereas the ICCPR has 173 parties and further 116 parties to the Optional Protocol to the ICCPR which sets out a complaints mechanism available to individuals and parties. If individuals, groups and/or states were to avail themselves of relying upon the ICCPR and the Optional Protocol and the cultural heritage provisions contained therein, in many ways this would support cultural heritage rights and alleviate some of the problems associated with States' failure to "enact adequate implementing legislation to fulfil obligations" under the various cultural heritage treaties they are party to.[174]

Third, a human rights' based approach to ICHL has been supported as an important complement to IHL.[175] It is accepted today that the fundamental distinction separating IHL and IHRL into two exclusive categories of international law has been abandoned and both branches of law apply in situations of armed conflict.[176] IHL and IHRL have thus been shown to provide "complementary and mutually reinforcing protection of economic, social and cultural rights in situations of armed conflict."[177] The International Court of Justice in the *Israeli Wall Advisory Opinion* had occasion to consider whether international human rights instruments, including *inter alia* the ICCPR and the ICESCR, applied in the occupied Palestinian territory.[178] All of this to say that the human rights based approach to ICHL in situations of armed conflict would also serve to supplement the protection and preservation of cultural heritage and the various international instruments that have designed for a similar purpose.

Revisionism

There is ultimately no shortage of analyses of the legal regime surrounding cultural heritage under international law. Of the plethora of legal treatises focussing on the subject of cultural heritage under international law, the majority of these provide a list of reasons why the legal regime has failed and should be improved from within, others suggest that the legal regime should be overhauled completely, and a new treaty or model law

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[171] *ICESCR*, art 6.

[172] *ICESCR*, art 15(a).

[173] Bennoune, *supra* note 1 at para 53.

[174] *Ibid* at para 21.

[175] *Ibid* at para 59.

[176] Ilia Maria Siatitsa et al, "Human Rights in Armed Conflict: Ten Years of Affirmative State Practice within United Nations Resolutions" (2012) 3 J Intl Human L Stud 233 at 234.

[177] Bennoune, *supra* note 1 at para 61.

[178] *Ibid* at para 106.

implemented. Whatever the reason for calls for a change to the existing legal regime they all have at their core the impression that successive and repeated failures in the destruction of cultural heritage are a cause for change.

The first trend in ICHL is labelled "revisionism." Revisionism is a view shared by scholars and practitioners in ICHL that the current legal regime is incapable of meeting the standards espoused by the supporting instruments and customary international law.[179] Revisionists propose that each time humanity undergoes a wave of destruction in cultural property, such as WWII, the conflict in the former Yugoslavia, and other conflicts in Iraq, Syria and Mali, new regulations and rules are required. The revisionist approach is therefore one that we can observe firsthand in the existing legal regime surrounding ICHL. For example, WWII called for a revised approach to cultural property protection in armed conflict, which was expressed in the 1954 Hague Convention and First Protocol. The period of post-colonial independence and decolonization in the 1970s prompted the UNESCO Convention. Human and environmental threats to cultural heritage prompted the adoption of the WHC. The conflict in the former Yugoslavia in the 1990s prompted the Second Protocol dedicated to NIACs. Finally, the UNIDROIT Convention a response to the ongoing problem of trafficking of cultural property by non-states.

It has been rightly stated by at least one scholar that revisionism is "not an abstract concern; it is intimately related to the history of lawmaking"[180] and therefore only a matter of time, given recent failings of ICHL in Iraq, Syria and Mali, before revisionist move for a new treaty or set of rules to improve upon past failings of the existing legal regime. While revisionism has been repeatedly been invoked to respond to the inefficacy of the legal regime surrounding cultural heritage, the recurrent invocation of revisionism has been counter effective. The invocation of revisionism and the expansion of treaties, rules and guidelines relating to cultural heritage has actually contributed to many of the lacunae described in this paper, including fragmentation, a lack of coherence in the definition of cultural heritage, and the exclusion from participation of non-state actors.[181]

Idealism

Idealism has been described as an approach to cultural heritage running counter to revisionism. Idealism is the approach to ICHL that relies heavily on the customary nature of ICHL and promotes the view that the current status of ICHL, at any given time, is representative of a "stage in its onward progress."[182] Idealists or at least those representing idealists believe ICHL has "attained sufficient maturity to represent an appropriate solution" to the problem of the protection and preservation of cultural property under international law.[183] In the context of armed conflict idealist are for obvious reasons invigorated by the approach taken by the ICC to the destruction of cultural property during wartime. Accordingly, the *Al-Mahdi* decision represents a watershed moment for idealists in that this decision of the ICC is the first conviction of any individual for the wanton destruction of cultural heritage during armed conflict. While decisions of the ICTY touched upon this issue, especially in the Appeals Chamber decision of *Prosecutor v. Tadic*,[184] the destruction of cultural heritage was dealt with as *obiter*. Contrary to the position taken by idealists, the decisions of the ICTY have not been taken to conclude that any of the treaties of ICHL reflect customary international law or should be considered *erga omnes* in nature. Overall, the idealist approach is in this author's opinion equally misplaced as the revisionists. The contention that ICHL and the various treaties surrounding the protection and preservation of cultural heritage have reached a threshold of customary international law or that they can be considered *erga omnes* obligations does not address the various lacunae or failings of ICHL.

The Middle Path

Given the extensive review and analysis contained within the herein paper, the author has come to the view that the lacunae in the international legal regime surrounding ICHL requires concrete steps to be taken towards improvement. The clear and unequivocal conclusion of any review of the existing principles, treaties, and other international instruments relevant to ICHL is that the body of law lacks any "single set of well-established principles" and no clear consensus on key principles

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[179] Lostal, *supra* note 54.

[180] *Ibid* at 19.

[181] *Ibid* at 9.

[182] *Ibid* at 9-10.

[183] *Ibid* at 37-38.

[184] *Prosecutor v Tadic*, Case No. IT-94-1-A, Judgment (15 July 1999) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber.

and definitions.[185] Improvement is therefore a necessity, whether one considers themselves as falling into a revisionist, idealist or any other camp.
Contrary to the revisionist approach, the answer is not to add to the existing law with an additional treaty, set of rules, or guidelines to fill lacunae or cure defects. This approach seems like a Band-Aid and misplaces the source of deficiencies which are rooted in both the underpinnings of the regime itself and the lack of any systemic or uniform approach to the protection and preservation of cultural heritage during times of armed conflict and non-conflict. Additional pronouncements and revisions to the legal regime have either simply "reproduced" and reiterated existing law and ultimately "weakened it."[186] In the same vein and contrary to the idealist approach that the notion that the existing legal regime is progressive and ultimately satisfactory is a narrow approach that "overlooks the bigger picture."[187]

The middle path between the revisionist and idealist approaches seems appropriate. There should not be a complete revision or introduction of a new treaty to fill ICHL's lacunae. New treaties and the introduction of additional declarations have proven inefficient. Rather than refining the constellation of legal definitions of cultural heritage or promoting the universal adoption of norms regarding ICHL, revisions have had the opposite effect, further complicating the pre-existing legal regime. Equally, one should not accept that existing treaties' and set of legal principles established in ICHL thus far is an adequate redress for dilemmas and lacunae that arise. A middle path should be advocated or adopted whereby practitioners and scholars work within the existing framework, amending the necessary treaties when required or prompted by international events and developments. The goal of the middle path should for obvious reasons be a clear set of principles that can be discerned from the conventions referred to in this paper and at least two others.[188]

Although ambitious, this distilling down of a clear set of principles can be accomplished through a universal or near universal adoption of the relevant UNESCO treaties by States. It may also be accomplished through the concretizing and systemizing the multiple dichotomies that surround the existing legal regime including armed conflict/non-conflict, criminal/civil sanctions, and heritage/property. That is, if the international community could arrive at a systemized definition of each of these the dissonance that arises in any discussion surrounding these terms would be resolved. Finally, it goes without saying that in order to accomplish any of these goals support from IHRL will be a necessary component and that rather than fill lacunae such as exclusion from participation, dissonance between cultural property and cultural heritage, lack of enforcement with new treaties or amendments to existing treaties, IHRL can be utilized to buttress and fill each of these deficiencies.

CONCLUSION

The foregoing has tracked the evolution and development of ICHL and made an effort to distill down a set of principles that can be viewed as a coherent body of law. The discussion has also focussed on exposing the lacunae in the existing legal regime that prevents and hinders its development and arriving at a precise set of principles that we can call ICHL. What is clear is that ICHL transgresses numerous boundaries and bodies of international law, including IHL, IHRL, as well as public and civil law and while this elasticity allows for an expansive definition of cultural heritage it also creates dilemmas in systemizing and consolidating ICHL into a set of principled laws. An examination has also taken place of the various conventions that make up the body of ICHL. Understandably each of these conventions is a product of its own time and reflective of the social, political, and economic climate in which it was adopted. While this purposeful approach is defensibly pragmatic, rather than refine ICHL and the common principles at international law relating to cultural heritage, each additional convention has instead added a layer of complexity to this body of law.

In response to these complexities it has been suggested that a preferred approach to ICHL and working towards a uniform set of principles may be to stop adding conventions and layer of complexity to ICHL and to work within the existing legal regime. This will not be to accept that the existing legal regime is adequate and fit for its purpose, rather it is to say that improvements are required but that improvements can take place from within. It has also been suggested that a human rights-based approach and an approach that furthers cultural heritage as a human right will serve to enhance and fill lacunae in the existing legal regime.

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[185] Blake, *supra* note 46, 62-63.

[186] Lyndell V. Prott, "UNESCO International Framework for the Protection of the Cultural Heritage" in James A.R. Nafziger and Ann M. Nicgorski, eds, *Cultural Heritage Issues: The Legacy of Conquest, Colonization and Commerce* (Leiden, The Netherlands: Martinus Nijhoff, 2009) at 278-279.

[187] Lostal, *supra* note 54 at 48.

[188] The UNESCO Convention on the Protection of Underwater Cultural Heritage [*2001 Underwater Convention*] and the 2003 UNESCO Convention and 2005 UNESCO Convention on the Protection of the Diversity of Cultural Expressions [*2005 Cultural Diversity Convention*].

ACTIVISTS-IN-EXILE IN CANADA

Philip Leech-Ngo, John Packer and Nadia Abu-Zahra

I. INTRODUCTION

> "We worked hard, alongside great partners, especially from civil society groups in Canada. And we were able to push for a motion, and the motion was passed unanimously in both the Senate and the House of Commons to declare genocide [as the term used for] the Rohingya case. And since then, we've pushed for the Canadian government to do more." – Yasmin Ullah, a Rohingya activist exiled in Canada.

In this quote she describes her role in influencing policy on the Rohingya crisis, culminating in a call for Canada to request the UN Security Council to refer Myanmar to the International Criminal Court[1] and, in a second Parliamentary motion, to revoke Aung San Suu Kyi's honorary Canadian citizenship.[2]

Yasmin Ullah is one of countless activists-in-exile, living and working in Canada to influence and improve the political situation in her country of origin. While Canada benefits from its role in providing a haven for refugees and asylum seekers, this self-image rests on outdated assumptions about the experiences of *de jure* or *de facto* refugees.

In this article, we make the case that the term 'Activists-in-Exile' represents a largely unseen but important community of foreign-born, Canada-based individuals who, like Yasmin, continue to work transnationally on issues such as peacebuilding, democracy promotion, anti-corruption, and the advancement of human rights. Moreover, while traditional international relations analyses tend to remain fixated on the role of State actors and make assumptions about the importance of national borders, these Activists-in-Exile inhabit a thoroughly globalized world with tangible and real-time transnational engagements. Both through the actions they take and the threats they face, they exist in a world where influence and power are truly transnational.

Those of us who work together in policy, social systems, and academia must awaken to this reality for several reasons. First, Activists-in-Exile based in Canada – as citizens, residents, or visitors – have the same rights to safety and protection as anyone else. The fact that many of us – wittingly or unwittingly – do not fully comprehend or acknowledge the actual nature of their condition, and the transnational threats they may face, means that they often are not afforded that protection.

Second, Activists-in-Exile are by-and-large courageous and resourceful individuals who have already overcome enormous challenges and continue to work towards goals that clearly align with the highest of values. Often, they have faced serious threats to themselves and others around them, which, crucially, gives concrete expression to struggles for human rights, peace, the environment, and social justice. Importantly, they often act despite prejudices, intersectional discrimination, ethnic persecution, and severe constraints on fundamental freedoms as well as a paucity of material or financial resources. Canadian structural systems in foreign policy, immigration, and society at large do not, at present, reflect an appreciation for these character traits. Ironically, it is *because* these activists are the very embodiment of the best of values, that they are denied the opportunity to benefit from them in their countries of origin and often in exile. This must be widely acknowledged and taken into account.

Third, Activists-in-Exile are usually highly skilled individuals, sometimes with decades of valuable experience working in their field. They are fluent in the languages, cultures, and political environments of their countries of origin and region and thus offer an enormous depth of knowledge and experience that should be highly valuable to Canada's domestic and foreign policy, intelligence analysis, human and community development practices, investment, and human rights advocacy, were the expertise of Activists -in-Exile duly recognized.

Thus, in this article, we make the case for Activists-in-Exile to be recognized as a distinct category of actors within a highly globalized world. We argue that existing approaches – such as those resting on the conceptual tool of 'Human Rights Defenders' or those emerging from within the academic discipline of Diaspora Studies – do not sufficiently engage or distinguish the phenomenon. To this we add two brief caveats and calls for further work: (1) we are not now arguing for defining new

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[1] Hansard. 2018. *House of Commons Debates*, Vol. 148, No. 322, 20 September 2018 ("Situation of the Rohingya People"), https://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-322/hansard

[2] Hansard. 2018. *House of Commons Debates*, Vol. 148, No. 327, 27 September 2018 ("Aung San Suu Kyi"), https://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-327/hansard

rights, and (2) we do not yet know precisely what kind of support is needed for Activists-in-Exile. What we seek to do, through our work, is to present a positive case for the concept, that is: not only do Activists-in-Exile not easily fit within existing definitions, but their work, the risks they face, and the positive potential impact they could have on Canada – were they to be properly acknowledged and supported – are also important enough to warrant a new approach altogether.

II. GLOBALIZATION AND RETHINKING ASYLUM IN CANADA

At the end of 2021, 89.3 million people worldwide were forcibly displaced because of persecution, conflict, violence, serious disturbances, or human rights violations, according to the United Nations High Commissioner for Refugees.[3] A combination of various other international emergencies and long-term existential issues – such as global heating and a general decline in global democracy – foretells a likely ongoing increase in global migration, already at 3.5 percent of the global population as of 2019.[4] When well-resourced, and with welcoming public policies, host countries stand to benefit most from these global mobilities. Newcomers bring and share their knowledge and expertise, buy goods and services, and invest with the same energy and enthusiasm that brought them (irrespective of cause) and with the more recently appreciated values of rich diversity and diasporic relations.

While anti-immigrant sentiment has risen to prominence across the United States and many European countries, in Canada, however, the issue has taken on a different kind of cultural and political salience. All three of Canada's major federal political parties tend to present as particularly welcoming towards migrants who demonstrate their economic usefulness to Canada or refugees who represent a severe humanitarian need for resettlement.[5] Nevertheless, this does not mean large numbers of newcomers. Since Canada is surrounded by three oceans and a vast Arctic, the only refugees arriving on foot are those who have come from or through the United States.[6] As other countries, mainly in the global South, have taken in millions, Canada filtered through, in cooperation with UNHCR, an annual average in the years 2000 to 2020 of only 30,400 refugees (in fact, far fewer without the one-time resettlement of ultimately some 55,000 Syrians)[7] – amounting to just 0.1 percent of the 2021 global refugee population.[8]

While once it may have been the case that the resettlement of refugees in a new homeland would allow for a more-or-less clean break from the trials and tribulations of the situation they had left behind, in today's highly globalized world, the picture is not so cut-and-dried. Asylum is amongst the oldest norms common to civilisation; it is supported by many religions,[9] and in the 20th century the prerogative of granting asylum was recast as a universal human right.[10] In this context – before the advent of technologies that reached across frontiers – physical refuge, once achieved, was widely considered synonymous with safety and security. Globalization and the ongoing technological revolution have changed this.

On the one hand, we see the positive: cultural and familial ties may be happily more easily maintained, beneficial economic relations are enhanced, and fleeing activists remain engaged in general and specific ways

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3 UNHCR – United Nations High Commissioner for Refugees. 2022. *Global Trends: Forced Displacement in 2021*. Geneva: UNHCR.

4 See Khadria Binod and Marie Mcauliffe, eds., *World Migration Report 2020* (Geneva: UN Migration, 2019), 19, https://publications.iom.int/system/files/pdf/wmr_2020.pdf.

5 Amelia Cheathman, "What Is Canada's Immigration Policy?," Council on Foreign Relations, 9 February 2022, https://www.cfr.org/backgrounder/what-canadas-immigration-policy.

6 IRCC – Immigration, Refugees, Citizenship Canada. 2022. *Refugee Claims By Year*. https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/asylum-claims.html.

7 Statista, "Number of Refugee Claimants in Canada 2020," Statista, 2022, https://www.statista.com/statistics/549323/number-of-refugee-claimants-canada/.

8 The 2021 global refugee population was 27.1 million; UNHCR, *supra* note 3.

9 See Anubhav Tiwari et al., "History of Asylum," Asylum Insight, 2016, https://www.asyluminsight.com/history-of-asylum.; Khadia Elmadmad, "Asylum in Islam and in Modern Refugee Law", *Refugee Survey Quarterly*, 27(2), 2008, 51-63; David Hollenbach, "Religion and Forced Migration," in Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, and Nando Sigona (eds.), *The Oxford Handbook of Refugee & Forced Migration Studies* (Oxford: Oxford University Press, 2014), 447-459.

10 This was first supported by the League of Nations and later expressed as a "right to seek and to enjoy in other countries asylum from persecution" stipulated in Article 14 of the Universal Declaration of Human Rights (United Nations, 1948), https://www.ohchr.org/en/human-rights/universal-declaration/translations/english.

in their countries of origin. For many, seeking and achieving asylum or refuge is no longer a matter of being "done with" or "out" of a situation. Instead, activism continues for human rights defenders, environmental or social justice campaigners, journalists, academics, peacebuilders and many others who very much remain "in" the situation.

On the other hand, this development has not been lost on authoritarians. Analyses produced by Canadian and international think tanks have identified the emerging trend toward "transnational repression," which, simply put, is where abusive regimes extend their tentacles beyond national borders to continue their pursuit and persecution of activists who might, in previous eras, have been considered safe (i.e. beyond reach) in exile abroad. Family members, associates, property, and mental health are targeted and affected. Thus, the complex interdependent world in which we live has become considerably more so.[11]

Yet, at national and international levels, policy and practice – concerning refugees, immigration, foreign policy, and other important matters – appear barely to have grasped (much less adequately responded to) the new realities. Only in July 2021 did Canada become one of the first countries to offer a dedicated pathway for resettlement of human rights defenders,[12] with as-yet unclarified courses for many others including an array of associated persons.[13] Moreover, not only are the promised numbers negligible (i.e., including their family members, a total of just 250 people a year from the whole world),[14] but once the human rights defenders arrive, they are treated as all other refugees. This ignores the reality that many are or will become "activists-in-exile," determined to maintain and actively pursue their relations with their countries of origin. Indeed, some even return – occasionally to positions of high office or responsibility.[15]

III. ACTIVISTS-IN-EXILE

The terms "activist" and "activism" are widely used in academic and non-academic contexts. While the kind of activities that count as social activism are broadly understood by most readers, however, only a few clear definitions are found in legal studies literature, necessitating drawing from the work of other disciplines.[16] At face value, Martin's narrow definition of activism as "action that goes beyond what is conventional or routine"[17] is appealing due to its directness and simplicity. Yet, given that Activists-in-Exile are individuals who have relocated internationally to Canada, their very existence in Canada represents a breach from what was conventional or routine in their lives beforehand (or compared to the lives of most Canadians) and is a principal distinction, regardless of whether (or not) they continue to advocate for change in their countries of origin. Instead, therefore, we draw from Saunders' broader conceptualization of activism as understood through the medium of social movements.[18]

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[11] See Noura Al-Jizawi et al., "Digital Transnational Repression in Canada" (Toronto: Citizen Lab, March 2021), https://tspace.library.utoronto.ca/bitstream/1807/120575/1/Report%23151--dtr_022822_lowres.pdf; and Nate Schenkkan and Isabel Linzer, "Out of Sight, Not Out of Reach: The Global Scale and Scope of Transnational Repression" (Freedom House, February 2021), https://freedomhouse.org/sites/default/files/2021-02/Complete_FH_TransnationalRepressionReport2021_rev020221.pdf.

[12] Refugees and Citizenship Canada Immigration, "Minister Mendicino Launches a Dedicated Refugee Stream for Human Rights Defenders," news releases, 16 July 2021, https://www.canada.ca/en/immigration-refugees-citizenship/news/2021/07/minister-mendicino-launches-a-dedicated-refugee-stream-for-human-rights-defenders.html.

[13] CBC Radio, "Canada Will Not Abandon Afghans in Need, Vows Immigration Minister," CBC, 31 August 2021, https://www.cbc.ca/radio/asithappens/as-it-happens-tuesday-edition-1.6159667/canada-will-not-abandon-afghans-in-need-vows-immigration-minister-1.6159823; and Immigration Refugees and Citizenship Canada, "Government of Canada Offers Refuge to Afghans Who Assisted Canada," news releases, 23 July 2021, https://www.canada.ca/en/immigration-refugees-citizenship/news/2021/07/government-of-canada-offers-refuge-to-afghans-who-assisted-canada.html.

[14] Immigration Refugees and Citizenship Canada, "Providing Protection to Human Rights Defenders at Risk," backgrounders, 16 July 2021, https://www.canada.ca/en/immigration-refugees-citizenship/news/2021/07/providing-protection-to-human-rights-defenders-at-risk.html.

[15] At one point, four Somali-Canadians were cabinet Ministers in a transitional government in Mogadishu; John Packer, Nadia Abu-Zahra and Phil Leech, "Global Migration, Activists-in-Exile, and Canada", *CIPS-CEPI Blog*, 8 November 2021, https://www.cips-cepi.ca/2021/11/08/global-migration-activists-in-exile-and-canada/

[16] Jennifer Reynolds, "The Activist Plus: Dispute Systems Design and Social Activism", *University of St. Thomas Law Journal*, 13(2), 2017, 334-353. Reynolds alludes to the legal literature's predominant association of the word activism with "judicial" or "investor" rather than "social" (p. 337).

[17] Brian Martin, "Activism, Social and Political," in *Encyclopedia of Activism and Social Justice*, ed. Gary L. Anderson and Kathryn Herr (Thousand Oaks, CA: SAGE, 2007), 19-27, https://www.bmartin.cc/pubs/07Anderson.html.

[18] Clare Saunders, "Activism," *The Wiley-Blackwell Encyclopedia of Social and Political Movements*, 2013.

Social movements are forms of political action distinguishable by the sustained nature of their campaigns. Critically, participants of social movements also demonstrate key qualities of "worthiness", "unity", "numbers", and "commitment".[19] For this research, then, activism is defined as sustained "action that movements [or individuals on behalf of movements] undertake in order to challenge some existing element of the social or political system and so help fulfil movements' aims".[20]

But what of the notion of "exile"? Although present in political discourse since antiquity and in more recent years tied to the concept of the State,[21] the definition of "exile" remains vague. Shain argues that there is no clear definition of "exile" within academic discussions of international law.[22] Yet, unlike the discussion of "activism" above, there is no obvious or uncontroversial definition of this term that we can simply borrow from another discipline.

Generally understood as a subset of diaspora, some of the most frequently cited texts on this issue have sought to distinguish exiles from other migrants by highlighting the critical factor of exigency as an impetus for their relocation.[23] The notion of exile implies some compulsion whether imposed directly (as in an order, like Napoleon Bonaparte was exiled to the island of Elba) or indirectly as a result of conditions including coercive measures and threats. In this last respect, the withdrawal of protections (notably by the State) could exacerbate vulnerabilities and motivate persons to seek safety and security elsewhere – into self-exile. Linked to this point has often been the assumption that relocation is intended to be in some way temporary while they "struggle to facilitate the conditions for their return"[24]. Some scholars[25] highlight a common link between exiles and their previous political or revolutionary activity, while others[26] typically focus on the political activities of individuals once they are in exile. Both are observable. Some scholarship, from further afield from international law, looks at exiles through the prism of psychology and identity issues[27] or the impact on cultural production[28]. Recognising the value of this interdisciplinary approach that brings out all aspects of exile and transnationalism, we do not therefore consider an ideal understanding of the phrase "Activists-in-Exile" to be in strictly legal terms, which are so far not fully available or, perhaps, appropriate.

Perhaps most closely linked to this topic is the literature from international relations that focuses on exiles' roles in foreign policy formation, mediation, and national identity formation.[29] Yet despite the plethora of approaches

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[19] Charles Tilly, *Social Movements, 1768-2004*, 1st edition (Boulder: Paradigm Publishers, 2004), 6-7.

[20] Saunders, *supra* note 23, 9.

[21] Christine Shaw, *The Politics of Exile in Renaissance Italy* (Cambridge: Cambridge University Press, 2000); Sara Forsdyke, *Exile, Ostracism, and Democracy* (Princeton: Princeton University Press, 2009). Black's Law Dictionary defines the condition of exile as "banishment" and an exile is defined as "the person banished" (p. 464); Henry Campbell Black, *Black's Law Dictionary*, 2nd Edition (Eagon, MN: West Publishing Company, 1910), Digitized by Umair Mirza. https://archive.org/details/blacks-law-dictionary-2nd-edition-1910/page/464/mode/2up?q=exile

[22] Yossi Shain, "Who Is a Political Exile? Defining a Field of Study for Political Science.," *International Migration* 26, No. 4 (1988): 387-400, https://doi.org/10.1111/j.1468-2435.1988.tb00659.x; Yossi Shain, *The Frontier of Loyalty: Political Exiles in the Age of the Nation-State* (Ann Arbor, MI: University of Michigan Press, 2005).

[23] William Petersen, "A General Typology of Migration," *American Sociological Review* 23, No. 3 (1958): 256-66, https://doi.org/10.2307/2089239; E. F. Kunz, "The Refugee in Flight: Kinetic Models and Forms of Displacement.," *The International Migration Review* 7, No. 2 (1973): 125-46, https://doi.org/10.2307/3002424; Shain, *The Frontier of Loyalty*.

[24] Yossi Shain and Aharon Barth, "Diasporas and International Relations Theory," *International Organization* 57, No. 3 (2003): 666.

[25] Michael Hughes, "Michael R. Marrus—The Unwanted. European Refugees in the Twentieth Century [OUP, 1985]," Book Review, *Histoire Sociale/Social History* 19, No. 38 (1986): 489-491; and Craig Etcheson, "Civil War and the Coalition Government of Democratic Kampuchea," *Third World Quarterly* 9, No. 1 (1987): 187-202.

[26] Shain, "Who Is a Political Exile?", *supra* note 27; Alicja Iwańska, *Exiled Governments: Spanish and Polish: An Essay in Political Sociology* (Rochester, VT: Schenkman Publishing Company, 1981).

[27] Kunz, "The Refugee in Flight", supra note 28; Maria De los Angeles Torres, *In the Land of Mirrors: Cuban Exile Politics in the United States* (Ann Arbor, MI: University of Michigan Press, 2001); Wendy Everett and Peter Wagstaff, *Cultures of Exile: Images of Displacement*, Vol. 7 (Oxford & Brooklyn, NY: Berghahn Books, 2004).

[28] Edward Said, "Reflections on Exile," *Said EW Reflections on Exile and Other Essays* (Cambridge, MA: Harvard University Press, 2000), 174; Jacqueline Adams, "Exiles, Art, and Political Activism: Fighting the Pinochet Regime from Afar," *Journal of Refugee Studies* 26, No. 3 (2013): 436-57.

[29] Yossi Shain and Martin Sherman, "Diasporic Transnational Financial Flows and Their Impact on National Identity," *Nationalism and Ethnic Politics* 7, No. 4 (2001): 1-36; Mario Sznajder and Luis Roniger, "Political Exile in Latin America," Latin American Perspectives 34, No. 4 (1 July 2007): 7-30, https://doi.org/10.1177/0094582X07302891; and Fiona B. Adamson and Madeleine Demetriou, "Remapping the Boundaries of 'State and 'National Identity': Incorporating Diasporas into IR Theorizing," *European Journal of International Relations* 13, No. 4 (2007): 489-526.

engaging with the concept of exile from across various disciplines, there has been no clear non-disciplinary specific theorization of exile.[30] This problem is a product of the inherently contestable nature of almost every case of exile. Exile is, after all, rarely an official policy of contemporary governments, as it is per se a violation of contemporary International Law.[31] Rather, exile *de facto* results from activists who flee persecution or repression. Thus, the status of exiles will always be open to an alternative definition by anyone with a motive to do so.[32]

In his excellent recent work on Egyptian Activists-in-Exile in England, McKeever seeks to rectify this by formulating a typology of exiles during the second half of the twentieth century.[33] This is a helpful and intriguing exercise but, by the author's own admission, it is merely a starting point. Ultimately, McKeever's most helpful contribution to this discussion is to tie together the two concepts of "exile" and "activist" and focus on identifying "activists-in-exile" as a distinct phenomenon. To do this, McKeever treats the concept of exile as the independent variable in his research design and activism as the dependent variable. He explains: "Exile, as the independent variable, lends itself excellently to a 'before-and-after' style comparison, facilitating within-case analysis … it retains a comparative element and logic by comparing activism before and after exile".[34]

It is here, then, that we can begin to sketch out our working definition: an individual who is an exile in Canada is someone who cannot literally or safely return—for whatever reason—to their country of origin. They are considered an 'activist-in-exile' when, from this state of displacement from their country of origin (irrespective formal status), they continue to try and effect change upon it. It is important to remember that exiles are subject to an array of conditions and constraints on their actions that others would not normally encounter—for example, domestic or international activist groups—and, as such, the status of exile (the independent variable) impacts and changes the nature of activism in ways that are unique.[35]

Two important clarifications are here required. First, regarding the notion "country-of-origin" or "home country", the phrase "activist-in-exile in Canada" appears to imply the existence of a relationship between an individual activist and two national or State identities: Canada, which is where they now live and work, and their country-of-origin which could be assumed to be the State that controls the territory where they were born, raised and from which they fled. However, the relationship may not be binary or linear. For many Activists-in-Exile, the path to relocation in Canada may be long and circuitous, often with periods spent in one or more third countries. For some Activists-in-Exile, the events, circumstances and adversities that created the conditions against which they campaign may have happened over generations and impacted their lives or caused the relocations of their families. In all such cases, the point is not that activists necessarily have a direct experience of living under the regime they campaign against but, rather, their presence in Canada is directly linked to it.[36]

Second, unlike in most of the literature on diaspora activism and a great deal of which has so far focused on Human Rights Defenders (defined and discussed below), Activists-in-Exile are not restricted to groups or individuals from any particular national or geographic sector nor the repression or impetus for exile (which vary). Understanding this allows us, instead, to focus on understanding, critiquing and engaging the Canadian context for Activists-in-Exile *per se*. Nonetheless, from a policy standpoint, a critical notion – and developed framework – which this paper (and our project) must engage is that of "Human Rights Defenders". It is to this discussion that we now turn.

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[30] David McKeever, "Rumour and Decertification in Exile Politics: Evidence from the Egyptian Case," *Globalizations* 16, No. 7 (2019): 18.

[31] Forcible exile (or banishment) was a punishment used in ancient times through to the Enlightenment when it became both morally and practically problematical, especially to expel from the State a national into another State. In the 20th Century, the human right to freedom of movement, notably return to one's own country has rendered exile/banishment unlawful. The Rome Statute of the International Criminal Court defines in Article 7(1)(d) widespread or systematic deportation and forcible transfer as crimes against humanity; Victoria Colvin and Phil Orchard, "A Forgotten History: Forcible Transfers and Deportations in International Criminal Law", *Criminal Law Forum*, 32 (2021), 51-95.

[32] Robert G. Caldwell, "Exile as an Institution," *Political Science Quarterly* 58, No. 2 (1943): 239.

[33] David McKeever, *Exiled Activism: Political Mobilization in Egypt and England* (Abingdon: Routledge, 2020), 21.

[34] *Ibid*., 23.

[35] *Ibid*.

[36] For example, one person who shared with us her work and experience is a Tibetan activist who was born in India and has not directly lived under Chinese rule, but her activism and her status in Canada resulted directly from China's occupation of Tibet. We believe that her experience and value as an Activist-in-Exile in Canada are essentially similar to and equally merited as that of others.

IV. HUMAN RIGHTS DEFENDERS

The term "Human Rights Defenders" (HRDs) has become a distinct aspect of international relations as a result of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms adopted by the UN General Assembly on 9 December 1998 (International Human Rights Day); the instrument is commonly called the Declaration on Human Rights Defenders.[37] While discussions around HRDs are important, and some elements of the academic literature on this topic are helpful and inform our understanding of Activists-in-Exile,[38] we contend that the concept is both too vague and too limited. Policies associated with HRDs are either too narrow or too focused on external policy to fully comprehend and engage with the localised situations and major potential contributions of Activists-in-Exile.

In our view, all foreign-born Canada-based HRDs who continue to work on the issues impacting their countries of origin would certainly qualify as Activists-in-Exile, but the inverse is not necessarily true. This is to say that not all Activists-in-Exile would fit within the narrower definition of Human Rights Defender. We predicate this conclusion on four concerns regarding the concept of HRDs.

First, the conception of Human Rights Defender, while being somewhat indefinite by design, excludes activists who may seek to improve conditions in their country of origin regarding subjects and through other means than "human rights," such as peacebuilders, journalists, anti-corruption advocates, development workers, environmental activists, artists, or social justice advocates. Although there may well be concerns with "human rights", and thus overlap with HRDs, there may not be (or not significantly so). Second, efforts to clarify the term, particularly the UN High Commissioner for Human Rights' Fact Sheet No. 29[39], have indirectly created issues of ambiguity (for example, regarding those who might be forced to prioritize the rights of some groups over others, or those who may be accused of, or indirectly cause, violence).

Third, the application of "Human Rights Defender" through government policies is too static and lacks the scope or elasticity to encompass a range of persons in varying contexts and dynamic circumstances who face essentially the same challenges. Currently, policies designed to support and protect HRDs inadequately capture or convey that activism can continue (albeit in a necessarily different form) when the activist relocates, even temporarily, to a third country. Instead, most policy tends to view HRDs as objects of the actions of others (typically either suppression by the regime or being saved/supported by foreign organizations or friendly governments). In our view, Activists-in-Exile can and should be seen primarily as agents, not as objects.

Finally, fourth, the term "Human Rights Defender" rests on the assumption that those activists working towards improving conditions in their countries of origin would self-define or accept the ascribed label and definition of HRD and its association with the particular normative framework articulated as "Human Rights". As discussed below, some Activists-in-Exile do not accept that definition – and some eschew the label.

To properly understand the significance of these distinctions between the concept of "Human Rights Defender" and what we mean by "Activist-in-Exile", and why those differences are important, it is useful to review the contested origins of the former.

Most of the literature that engages with the term "Human Rights Defender" starts with the UN General Assembly's adoption of resolution A/RES/53/144 in 1998. In so doing, the General Assembly created the first UN instrument designed to recognize the relevance and legality of activities undertaken by people who seek to protect the human rights of others. While this is undoubtedly important, especially as it also established a pathway for the then UN Human Rights Commission to create a mechanism for its protection in the form of the Special Representative of the Secretary-General on Human Rights Defenders (2000-8), subsequently (since 2008) downgraded (in UN terms) to a Special Rapporteur of the UN Human Rights Council, this is not the whole story. A more critical engagement with the term should note two important details relevant to our discussion. First, while A/RES/53/144 was adopted in 1998, its origins were rooted in the bipolar world of the Cold War era (which was still influential). Second, the instrument supported by the General Assembly in 1998 did not in fact present a definition of a Human Rights Defender.[40]

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[37] For the text of the Declaration, see UN doc. A/RES/53/144, available online at: https://www.ohchr.org/sites/default/files/Documents/Issues/Defenders/Declaration/declaration.pdf

[38] See, in particular, Kalam Shahed, "Sikh Diaspora Nationalism in Canada," *Studies in Ethnicity and Nationalism* 19, No. 3 (2019): 325-45; and, among others, see also Ethel Tungohan, "Intersectionality and Social Justice: Assessing Activists' Use of Intersectionality through Grassroots Migrants' Organizations in Canada," *Politics, Groups, and Identities* 4, No. 3 (2016): 347-62.

[39] United Nations High Commissioner for Human Rights, "Fact Sheet No. 29, Human Rights Defenders: Protecting the Right to Defend Human Rights," 2004, https://www.refworld.org/docid/479477470.html.

[40] Indeed, despite becoming known as the Declaration on Human Rights Defenders, A/RES/53/144's has a somewhat different title: "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms".

As Wille and Spannagel explain, the original idea behind such a declaration on the right to promote and defend human rights came from a Canadian sponsored resolution (1980/23) at the United Nations Commission on Human Rights in 1980 and should not be separated from its Cold War context.[41] Coming five years after the Helsinki Final Act (signed on 1 August 1975), which was considered an important diplomatic step in improving relations between the Soviet and Western blocs and also elevated the concept of human rights within the dynamics of that fraught relationship, the resolution built on the newly established links between dissidents within the Soviet bloc and Western NGOs.[42] With reference to the final two articles of the Universal Declaration of Human Rights (1948), which in effect limit States from restricting the exercise of human rights or from the "destruction of any of the rights and freedoms set forth [in the Declaration],"[43] the Canadian initiative appealed "to all Governments to encourage and support individuals and organs of society exercising their rights and responsibilities to promote the effective observance of human rights without prejudice to articles 29 and 30 of the Universal Declaration of Human Rights"[44]. In 1984, the UN Human Rights Commission followed up by presenting some guiding principles and establishing a working group open to all States that would be the locus for negotiations over the drafting process.

In the early stages, the principal concern held by the Soviet bloc and many of the still fairly recently decolonized and non-aligned States was that "the declaration should be short with no elaboration of new standards" and that it not "replace the rights and duties of States with those of individuals, groups and organs of society"[45]. In contrast, the Western bloc's goal was "international recognition of and protection for those individuals who seek to promote the enjoyment of fundamental, recognized human rights for themselves and others." Ultimately the draft that emerged from the working group a decade after the end of the Cold War was a compromise that still reflected this division. Western governments and NGOs were dissatisfied with the text's lack of ambition, while a letter submitted by Egypt on behalf of 26 countries emphasized their view that the "primary responsibility and duty to promote and protect all human rights and fundamental freedoms lie with the State" and that "[a]ny interpretation that creates rights and obligations not provided for by domestic laws does not correspond to our understanding."[46]

Thus, the legacy of the Cold War divisions, present throughout the entire drafting process, would ultimately manifest in the final Declaration through the lack of an unambiguous definition of a "Human Rights Defender". Indeed, the Declaration only defines persons protected under the instrument by their activities or "the valuable work of individuals, groups and associations in contributing to the effective elimination of all violations of human rights." Moreover, the Declaration does not articulate any new information regarding rights; rather, it simply reiterates the rights already granted in 1948 by the Universal Declaration of Human Rights.

In April 2004, the UN Office of the High Commissioner for Human Rights (OHCHR) took a step toward clarifying the definition of "Human Rights Defenders" with the publication of Fact Sheet No. 29. While reiterating that Human Rights Defenders are defined by their actions, this factsheet outlines a "minimum standard required of human rights defenders"[47] comprising three elements:

- "Accepting the universality of human rights",[48] that is, "A person cannot deny some human rights and yet claim to be a human rights

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[41] Peter Wille and Janika Spannagel, "The History of the UN Declaration on Human Rights Defenders: Its Genesis, Drafting and Adoption," *Universal Rights Group* (blog), 11 March 2019, https://www.universal-rights.org/blog/the-un-declaration-on-human-rights-defenders-its-history-and-drafting-process/; and UN Commission on Human Rights, "Report on the 36th Session, 4 February - 14 March 1980" (Geneva: UN, 1980), 184, https://digitallibrary.un.org/record/36236.

[42] Wille and Spannagel, *supra.*

[43] United Nations, "Universal Declaration of Human Rights," 217 A § (1948), https://www.un.org/en/about-us/universal-declaration-of-human-rights.

[44] See *supra*, note 41 "Commission on Human Rights," 184.

[45] The representative from the German Democratic Republic quoted in UN Commission on Human Rights, "Report of the Working Group on a Draft Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms" (Geneva: UN, 9 March 1987), 5, https://digitallibrary.un.org/record/225248.

[46] Algeria et al., "Letter Dated 98/11/18 from the Permanent Representative of Egypt to the United Nations Addressed to the President of the General Assembly," 18 November 1998, https://digitallibrary.un.org/record/264117.

[47] United Nations High Commissioner for Human Rights, "Fact Sheet No. 29", *supra*, note 44.

[48] *Ibid*.

defender because he or she is an advocate for others."[49]

- That the "the person is defending a human right" regardless of whether their actions may be considered "right or wrong" according to other standards (i.e. "It is not essential for a human rights defender to be correct in his or her arguments in order to be a genuine defender"[50]).

- That the "actions taken by human rights defenders must be peaceful."[51]

While these three criteria may have been intended to clarify who is and is not a "Human Rights Defender" (or, put another way, persons protected by the Declaration), as Eguren Fernández and Patel argue, this definition still "falls far short of what is needed to interpret who exactly is a defender and what they do."[52] Indeed, it is relatively simple to find numerous real-world examples of actions which, if judged by those minimum standards, would lead only to ambiguity and more questions. For example, as Eguren Fernández and Patel ask:

- "Assuming that most defenders are not in a position, nor have the resources, to work across all human rights in a fair and equitable manner, how exactly does a defender demonstrate universality in practice?"[53]

- If "defending a human right" is a minimum standard, then does it matter how often, or based on what motivation, such actions are undertaken?[54]

- By what standard are the actions of Human Rights Defenders deemed to be "peaceful"? If such actions are proscribed or described as violent by a hostile or authoritarian regime, do they still meet the minimum standard?[55]

Despite these important areas of conceptual ambiguity, the vast majority of academic, NGO literature and policy documents that engage with the concept of Human Rights Defender accept its definition at face value. Indeed, since 2013 the term enjoyed an upsurge in usage at the governmental level: that year, the G8[56] and the UN General Assembly[57] adopted resolutions that recognized the work of Women Human Rights Defenders, and the UN Human Rights Council adopted Resolution 22/6 on Protecting Human Rights Defenders. In 2014 the EU committed greater support for Human Rights Defenders, while the Organisation for Security and Cooperation in Europe issued their own guidelines.[58] In 2019, both

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[49] *Ibid*.

[50] *Ibid*.

[51] *Ibid*.

[52] Luis Enrique Eguren Fernández and Champa Patel, "Towards Developing a Critical and Ethical Approach for Better Recognising and Protecting Human Rights Defenders," *The International Journal of Human Rights* 19, No. 7 (2015): 896-907.

[53] *Ibid*., 901.

[54] As Eguren Fernández and Patel explain, it is therefore "conceivable that someone be actively understood as a human rights defender solely for a specific piece of work or action undertaken rather than the entirety of what they do", 897.

[55] For several real world examples, see Eguren Fernández and Patel, 897.

[56] G8 United Kingdom. 2013. *Declaration on Preventing Sexual Violence in Conflict*. G8 UK. https://www.un.org/ruleoflaw/files/G8%20Declaration%20Sexual%20Violence%20in%20Conflict%20-%20April%202013.pdf

[57] UNGA – United Nations General Assembly. 2013. *Resolution 61/181: Promotion of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms: protecting women human rights defenders.* https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/450/31/PDF/N1345031.pdf

[58] Karen Bennett, "European Union Guidelines on Human Rights Defenders: A Review of Policy and Practice towards Effective Implementation," *The International Journal of Human Rights* 19, No. 7 (2015): 908-34.

Switzerland[59] and the United Kingdom[60] published guidelines on the protection of Human Rights Defenders. In none of these cases was a more critical engagement with the term presented.

Canada's own guidelines, which were revised in 2016 ostensibly to reflect Canada's putative "feminist foreign policy"[61], similarly accept the status quo definition of Human Rights Defender without critical engagement. The term Human Rights Defenders (HRDs) refers to people who, individually or with others, act to promote or protect human rights through peaceful means, such as by documenting and calling attention to violations or abuses by governments, businesses, individuals, or groups.[62]

Upon scrutiny of the evolved concept and main articulation of the concept of HRDs, it is apparent that the focus is almost exclusively on Human Rights Defenders as an issue of external affairs. This is to say, the policy documents that discuss the protection and support for HRDs do so with an almost exclusive focus on their activities within their countries of origin – outside of Canada or "over there". Where the relocation of HRDs outside the borders of their country of origin is discussed, it is done so in extremely limited terms. For example, Canada's "Voices at Risk" guidelines describe in detail how Global Affairs Canada and others intend to support HRDs in place through various mechanisms, including funding, capacity building, consular support, bilateral and multi-lateral advocacy, and social media posts. However, only a few lines cover the issue of an "HRD seeking to urgently leave his or her home country temporarily."[63]

Further, in 2021 Canada acknowledged that "increasingly journalists and human rights defenders are compelled to leave their countries as a means of escaping the threats"[64] and, thus, established a new immigration stream for human rights defenders. This programme will allow the resettlement of up to a total of 250 people each year (including family members) to be resettled as Government-assisted refugees. While the announcement regarding the launch of the programme discussed providing such HRDs with "comprehensive settlement supports, as well as connections with Canadian civil society to help them pursue their work"[65] and also explained that their locations would be kept secret, there is no explicit acknowledgement that such individuals may wish to continue their work from their new home in Canada nor that they may face the unique threat of transnational repression.

It can certainly be argued that the introduction of the term Human Rights Defenders into international relations and law in 1998 had a profound impact: it has legitimized the right to defend the rights of others and created "an identity for a group of actors who are increasingly concerned with the protection and promotion of so-called 'human rights defenders' within the field of human rights."[66] We contend, however, that the concept still exhibits significant analytical shortcomings and does not adequately represent the constituency of Activists-in-Exile. Specifically, it remains too limited in scope and meaning to address the wider range of persons covered by "Activists-in-Exile" which also underlines the fundamental element and challenges of the phenomenon of exile.

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[59] FDFA – Federal Department of Foreign Affairs. 2019. *Swiss Guidelines on Human Rights Defenders.* FDFA. https://www.eda.admin.ch/eda/de/home/dienstleistungenundpublikationen/publikationen/alle-publikationen.html/content/publikationen/de/eda/menschenrechte-humanitaeres-migration/Leitlinien-zum-Schutz-von-HRD.html.

[60] Her Majesty's Government. 2019. *UK Support for Human Rights Defenders.* HM Government. https://www.gov.uk/government/publications/uk-support-for-human-rights-defenders

[61] The Government of Canada heralded a new "feminist foreign policy" in 2020, but at the time of publishing this article consultations were ongoing with regard to its content and no policy in fact has ever been specifically articulated or published. For the ongoing consultative process, see Feminist Foreign Policy Working Group. 2022. *Feminist Foreign Policy.*, https://www.amnesty.ca/what-we-do/feminist-foreign-policy/

[62] Global Affairs Canada, "Voices at Risk: Canada's Guidelines on Supporting Human Rights Defenders," GAC, 21 February 2017, https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/rights_defenders_guide_defenseurs_droits.aspx?lang=eng.

[63] Canada, 13.

[64] *Canada Announces New Refugee Stream for Human Rights Defenders, Including Journalists –July 16, 2021*, 2021, https://www.youtube.com/watch?v=XHLWmlmZhjE.

[65] Immigration Refugees and Citizenship Canada, "CIMM – Human Rights Defenders – June 2, 2021," 22 September 2021, https://www.canada.ca/en/immigration-refugees-citizenship/corporate/transparency/committees/cimm-jun-02-2021/human-rights-defenders.html.

[66] Janika Spannagel, "Declaration on Human Rights Defenders (1998)," Arbeitskreis Menschenrechte Im 20. Jahrhundert (blog), 2017, https://www.geschichte-menschenrechte.de/en/hauptnavigation/schluesseltexte/declaration-on-human-rights-defenders-1998/.

V. DIASPORA STUDIES

The other lens through which the activism of exiled individuals has traditionally been viewed is that of the academic discipline known as Diaspora Studies. However, this approach also has significant shortcomings, principally – and in contrast to the narrowness of the concept of Human Rights Defenders – Diaspora Studies offers too nebulous a definition or framework to be of much utility in this case. In addition, where Diaspora Studies does offer some clarity, much of the literature highlights the importance of group-based identities – for example, based on ethnicity, kinship or a common historical narrative – as a unit of analysis. This stands in stark contrast to the lens through which we see the actions, agency and identity of Activists-in-Exile who are often individuals working across identity lines (although some work with allies to maintain core identities against assimilation).

Robin Cohen, one of the most prominent theorists of Diaspora Studies, outlines the four phases in its development as an academic discipline. In short, these phases comprise the following:

1. A 'classical' period during which the term diaspora was used almost exclusively to describe the Jewish experience of dispersion and resettlement since antiquity. During the 1960s and 70s, this definition was "systematically extended" to include other ethnic groups, including Africans, Armenians and Irish.[67]

2. Following Safran, Cohen argues that during a second phase – emerging during the 1980s – the term became more commonly used to describe whole categories of people, "in much the same way that 'ghetto' has come to designate all kinds of crowded, constricted, and disprivileged urban environments, and 'holocaust' has come to be applied to all kinds of mass murder."[68]

3. During the 1990s, the term became the focus of social constructionist critiques, which "influenced by postmodernist readings" argued that diaspora identities (like all forms of identity) had become "deterritorialized and constructed and deconstructed in a flexible and situational way."[69]

4. Finally, since the turn of the century, the discussion of Diaspora Studies effectively came to a new phase of 'consolidation' wherein "social constructionist critiques were partially accommodated, but were seen as in danger of emptying the notion of diaspora of much of its analytical and descriptive power".[70]

Based on our reading of the contemporary literature in Diaspora Studies, phase four appears to be an enduring process. In other words, the 'consolidation' between social constructionist critiques and the more traditional view of diaspora (as a collective term for "expatriates, expellees, political refugees, alien residents, immigrants and ethnic and racial minorities *tout court*"[71]) is still ongoing. Of course, this debate has been joined by further strands of thought as trends in political science have changed. As Brubaker explains, "As the term has proliferated, its meaning has been stretched to accommodate the various intellectual, cultural and political agendas in the service of which it has been enlisted".[72]

This stretching has occurred particularly in terms of developing the constructionist critic. For example, Adamson and Demetriou seek to push constructionist thinking around diaspora even further, as a "useful tool for IR scholars to adopt as a means of analyzing changes in the relationship between states and collective identities and contemporary conditions of globalization".[73]

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[67] Robin Cohen, *Global Diasporas: An Introduction*, 2nd ed. (London: Routledge, 2008), 1, https://doi.org/10.4324/9780203928943.

[68] William Safran, "Diasporas in Modern Societies: Myths of Homeland and Return," *Diaspora (New York, N.Y.)* 1, No. 1 (1991): 83, https://doi.org/10.3138/diaspora.1.1.83.

[69] Cohen, *supra*, note 74 at 2.

[70] *Ibid*.

[71] Safran, *supra*, note 75 at 1.

[72] Rogers Brubaker, "The 'Diaspora' Diaspora," *Ethnic and Racial Studies* 28, No. 1 (2005): 1, https://doi.org/10.1080/0141987042000289997.

[73] Adamson and Demetriou, *supra*, note 34, 480.

Similarly, Kissau and Hunger[74] and Ho and McConnell[75] push the constructionist agenda by focusing principally on understanding diasporas as agents – for example, how they use the internet or engage in diplomacy – rather than describing what they are. While Cho seeks to bring the discussion to a position where diaspora agency is not at issue, but instead the focus is on how their existence is a product of colonization and ongoing injustice, "diaspora must be understood as a condition of subjectivity and not as an object of analysis".[76]

Yet even as the question of identifying or defining diaspora takes a back seat to the discussion of agency and/or subjectivity in a globalized world, the assumptions around this issue remain the principal reason why the literature around Diaspora Studies is a poor fit for understanding the contexts and actions of Activists-in-Exile. In short, virtually uniformly across Diaspora Studies literature are definitions that explain the phenomenon as "a social collectivity that exists across state borders"[77] or as "ethno-national groups whose members reside out of their home country".[78] Bringing these two themes together Carment and Sadjed suggest that the link between agency and group identity is integral to understanding what "diaspora" means. They argue that "Diasporic living is necessarily diasporic praxis. That is, in their everyday living diasporans explicitly or implicitly implicate, critique, expose, define, subvert, sometimes extend, the integrity and hegemony of both the nation-state and 'the diaspora'."[79]

But what of activists in a host third country who do not feel strongly associated with or concerned about the group identity of their broader diaspora? What if their activism runs contrary to the generally accepted norms within that diaspora? What if they are targeted or threatened by other members of the diaspora who oppose their activism either for normative reasons or because they are working directly or indirectly as agents of their country of origin or, more accurately, particular interests within it?[80] What if Activists-in-Exile share more in common with other activists from different parts of the world – in terms of experiences, values and interests – than they do with other members of their diaspora communities?

Evidence from our research[81] – that we will share in forthcoming publications – demonstrates conclusively that these activists are creating and influencing social change in unique ways and, therefore, their work and impact should not be overlooked or subsumed within existing but ill-fitting conceptual frameworks, categories or typologies. Diaspora Studies, by definition, cannot account fully or in important ways for Activists-in-Exile. It is, therefore, necessary and urgent for us to reconceptualize our ways of thinking and pay attention to these activists as agents within their true contexts.

VI. CONCLUSION

In recent decades, our world has grown smaller; complex interdependence has become more immediate, intimate, impactful, dynamic and increasingly visible. The consequences are especially manifest for activists-in-exile. Their situations and work merit recognition, understanding and appropriate responses.

In addition to our earlier work, [82] this first short scholarly piece is intended to carve out the distinctiveness of the

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[74] Kathrin Kissau and Uwe Hunger, "The Internet as a Means of Studying Transnationalism and Diaspora," in. Rainer Bauböck and Thomas Faist (eds.), *Diaspora and Transnationalism: Concepts, Theories and Methods* (Amsterdam: Amsterdam University Press, 2010), 245-66, http://www.jstor.org/stable/j.ctt46mz31.16.

[75] Elaine L. E. Ho and Fiona McConnell, "Conceptualizing 'Diaspora Diplomacy': Territory and Populations Betwixt the Domestic and Foreign," *Progress in Human Geography* 43, No. 2 (April 2019): 235-55, https://doi.org/10.1177/0309132517740217.

[76] Lily Cho, "The Turn to Diaspora," *TOPIA: Canadian Journal of Cultural Studies* 17 (April 2007): 11-30, https://doi.org/10.3138/topia.17.11.

[77] Ho and McConnell, *supra*, note 75, 491.

[78] Ewa Morawska, "'Diaspora' Diasporas' Representations of Their Homelands: Exploring the Polymorphs," *Ethnic and Racial Studies* 34, No. 6 (2011): 1030, https://doi.org/10.1080/01419870.2010.533783.

[79] David Carment and Ariane Sadjed (eds.), *Diaspora as Cultures of Cooperation* (Cham: Springer International Publishing, 2017), 9, https://doi.org/10.1007/978-3-319-32892-8.

[80] For examples, see Schenkkan and Linzer, *supra*, note 11; and Al-Jizawi et al., *supra*, note 11.

[81] For some individuals who shared their work and experience, see our initial web site featuring some profiles of AiEs: "Voices in Exile" [in Canada] online at: https://www.voicesinexile.me/

[82] John Packer, Nadia Abu-Zahra and Phil Leech, "Global Migration, Activists-in-Exile, and Canada", *CIPS-CEPI Blog*, 8 November 2021, https://www.cips-cepi.ca/2021/11/08/global-migration-activists-in-exile-and-canada/

idea responding to phenomena for which "refugee" and "HRD" appear insufficient, for the growing problem of transnational repression, and for the missed opportunity of value AiEs bring and constitute. We have identified a gap; there are people in Canada who do this activism who are not adequately supported or recognised (they fall outside existing definitions). There is a cost to this lack of recognition to them and to Canada. They do not always fit within existing categories, and we do not see how we can easily adapt "HRD" or "diaspora studies" to make them fit. Our alternative then is to suggest a third category: Activists-in-Exile.

In this piece, therefore, we tried only to examine established categories (like "diaspora") and set out the concept of AiEs, but we did not intend to advocate (and we did not specifically advocate) in concrete terms. In our ongoing work we plan to engage with AiEs together with policy-makers and others in conversations exploring the idea and its implications. We hope thereupon to have a clearer concept including policy-relevant conclusions and recommendations.

We think the idea of AiEs holds some added value, but we may be mistaken. And whether this entails "rights" is a separate question: not all policy or governance is about rights much less "human rights". For example, so far we observe that many AiEs are influential persons in our inter-connected world, and that offers some options which may be of interest to and utility for Canada (and hence merit support). But that is far different from asserting a right to any such support or a duty on anyone to provide it. Still, there may be good policy conclusions to be drawn (e.g. regarding democracy promotion or the putative Feminist Foreign Policy).

In this article we have shared our observations and set out an initial conceptualization of "activists-in-exile" in Canada. We have sought to distinguish the idea from related notions, in particular those of Human Rights Defenders and diasporas, which we contend are inadequate in scope or precision to address fully the phenomenon we observe. We also assert that the idea of activists-in-exile is both a crucial analytical concept and a context which merits further research and appropriate policy responses. To these ends, we are continuing our efforts and welcome others to engage. We imagine and hope for nuanced findings and tailored programmes ahead.

In the meantime, we recognize and applaud the work of the many (seen and unseen) activists-in-exile in Canada who we know to be doing remarkable, sometimes risky and typically thankless work both in Canada and in their countries of origin and beyond. We believe these persons, now part of our shared and transnational society, provide moral and material support that must be reciprocated. We are confident that the paths they are traveling will become more common as our world shifts and we hope that public policy will deliver the means for them to become increasingly effective, secure and appreciated. We believe that very many in Canada and around the world would benefit as a result.

BIBLIOGRAPHY

Adams, Jacqueline. "Exiles, Art, and Political Activism: Fighting the Pinochet Regime from Afar," *Journal of Refugee Studies* 26, No. 3 (2013): 436-57.

Adamson, Fiona B., and Madeleine Demetriou. "Remapping the Boundaries of 'State'and 'National Identity': Incorporating Diasporas into IR Theorizing," *European Journal of International Relations* 13, No. 4 (2007): 489–526.

Algeria, Bahrain, Benin, China, Cuba, Democratic People's Republic of Korea, Djibouti, et al. "Letter Dated 98/11/18 from the Permanent Representative of Egypt to the United Nations Addressed to the President of the General Assembly," 18 November 1998. https://digitallibrary.un.org/record/264117.

Al-Jizawi, Noura, Siena Anstis, Sophie Barnett, Sharly Chan, Niamh Leonard, Adam Senft, and Ron Deibert. "Digital Transnational Repression in Canada." Toronto: Citizen Lab, March 2021. https://tspace.library.utoronto.ca/bitstream/1807/120575/1/Report%23151--dtr_022822_lowres.pdf.

Bennett, Karen. "European Union Guidelines on Human Rights Defenders: A Review of Policy and Practice towards Effective Implementation," *The International Journal of Human Rights* 19, No. 7 (2015): 908–34.

Binod, Khadria, and Marie Mcauliffe, eds. *World Migration Report 2020*. Geneva: UN Migration, 2019. https://publications.iom.int/system/files/pdf/wmr_2020.pdf.

Black, Henry Campbell. *Black's Law Dictionary*, 2nd Edition. Eagon, MN: West Publishing Company, 1910. Digitized by Umair Mirza. https://archive.org/details/blacks-law-dictionary-2nd-edition-1910/page/464/mode/2up?q=exile

Brubaker, Rogers. "The 'Diaspora' Diaspora." *Ethnic and Racial Studies* 28, No. 1 (2005): 1–19. https://doi.org/10.1080/0141987042000289997.

Caldwell, Robert G. "Exile as an Institution," *Political Science Quarterly* 58, No. 2 (1943): 239–62.

Canada Announces New Refugee Stream for Human Rights Defenders, Including Journalists –July 16, 2021, 2021. https://www.youtube.com/watch?v=XHLWmlmZhjE.

Canada, Global Affairs. "Voices at Risk: Canada's Guidelines on Supporting Human Rights Defenders." GAC, 21 February 2017. https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/rights_defenders_guide_defenseurs_droits.aspx?lang=eng.

Carment, David, and Ariane Sadjed, eds. *Diaspora as Cultures of Cooperation*. Cham: Springer International Publishing, 2017. https://doi.org/10.1007/978-3-319-32892-8.

CBC Radio. "Canada Will Not Abandon Afghans in Need, Vows Immigration Minister." CBC, 31 August 2021. https://www.cbc.ca/radio/asithappens/as-it-happens-tuesday-edition-1.6159667/canada-will-not-abandon-afghans-in-need-vows-immigration-minister-1.6159823.

Cheathman, Amelia. "What Is Canada's Immigration Policy?" Council on Foreign Relations, 9 February 2022. https://www.cfr.org/backgrounder/what-canadas-immigration-policy.

Cho, Lily. "The Turn to Diaspora," *TOPIA: Canadian Journal of Cultural Studies* 17 (April 2007): 11–30. https://doi.org/10.3138/topia.17.11.

Cohen, Robin. *Global Diasporas: An Introduction*. 2nd ed. London: Routledge, 2008. https://doi.org/10.4324/9780203928943.

Colvin, Victoria and Orchard, Phil. "A Forgotten History: Forcible Transfers and Deportations in International Criminal Law", *Criminal Law Forum*, 32 (2021): 51-95.

De los Angeles Torres, Maria. *In the Land of Mirrors: Cuban Exile Politics in the United States*. Ann Arbor, MI: University of Michigan Press, 2001.

Eguren Fernández, Luis Enrique, and Champa Patel. "Towards Developing a Critical and Ethical Approach for Better Recognising and Protecting Human Rights Defenders," *The International Journal of Human Rights* 19, No. 7 (2015): 896–907.

Elmadmad, Khadija. "Asylum in Islam and in Modern Refugee Law", *Refugee Survey Quarterly*, 27(2) (2008): 51-63.

Etcheson, Craig. "Civil War and the Coalition Government of Democratic Kampuchea," *Third World Quarterly* 9, No. 1 (1987): 187–202.

Everett, Wendy, and Peter Wagstaff. *Cultures of Exile: Images of Displacement*. Vol. 7. Berghahn Books, 2004.

FDFA – Federal Department of Foreign Affairs. 2019. *Swiss Guidelines on Human Rights Defenders*. FDFA. https://www.eda.admin.ch/eda/de/home/dienstleistungenundpublikationen/publikationen/alle-publikationen.html/content/publikationen/de/eda/menschenrechte-humanitaeres-migration/Leitlinien-zum-Schutz-von-HRD.html.

Feminist Foreign Policy Working Group. 2022. *Feminist Foreign Policy*. https://www.amnesty.ca/what-we-do/feminist-foreign-policy/

Forsdyke, Sara. Exile, *Ostracism, and Democracy*. Princeton University Press, 2009.

G8 United Kingdom. 2013. *Declaration on Preventing Sexual Violence in Conflict*. G8 UK. https://www.un.org/ruleoflaw/files/G8%20Declaration%20Sexual%20Violence%20in%20Conflict%20-%20April%202013.pdf

Government of Canada, Statistics Canada. "150 Years of Immigration in Canada," 29 June 2016. https://www150.statcan.gc.ca/n1/pub/11-630-x/11-630-x2016006-eng.htm.

Hansard. *House of Commons Debates*, Vol. 148, No. 322, 20 September 2018 ("Situation of the Rohingya People"). https://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-322/hansard

Hansard. *House of Commons Debates*, Vol. 148, No. 327, 27 September 2018 ("Aung San Suu Kyi"). https://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-327/hansard

Her Majesty's Government. *UK Support for Human Rights Defenders*. HM Government. 2019, https://www.gov.uk/government/publications/uk-support-for-human-rights-defenders

Ho, Elaine L. E., and Fiona McConnell. "Conceptualizing 'Diaspora Diplomacy': Territory and Populations Betwixt the Domestic and Foreign." *Progress in Human Geography* 43, No. 2 (April 2019): 235–55. https://doi.org/10.1177/0309132517740217.

Hollenbach, David. "Religion and Forced Migration," in Fiddian-Qasmiyeh, Elena, Gil Loescher, Katy Long, and Nando Sigona (eds.), *The Oxford Handbook of Refugee & Forced Migration Studies*, Oxford: Oxford University Press, 2014: 447-459.

Hughes, Michael. "Michael R. Marrus—The Unwanted. European Refugees in the Twentieth Century [OUP, 1985]," Book Reviews, *Histoire Sociale/Social History* 19, No. 38 (1986): 489-491.

Immigration Refugees and Citizenship Canada. "CIMM - Human Rights Defenders - June 2, 2021," 22 September 2021. https://www.canada.ca/en/immigration-refugees-citizenship/corporate/transparency/committees/cimm-jun-02-2021/human-rights-defenders.html.

———. "Government of Canada Offers Refuge to Afghans Who Assisted Canada." News Releases, 23 July 2021. https://www.canada.ca/en/immigration-refugees-citizenship/news/2021/07/government-of-canada-offers-refuge-to-afghans-who-assisted-canada.html.

Immigration, Refugees and Citizenship Canada. "Minister Mendicino Launches a Dedicated Refugee Stream for Human Rights Defenders." News Releases, 16 July 2021. https://www.canada.ca/en/immigration-refugees-citizenship/news/2021/07/minister-mendicino-launches-a-dedicated-refugee-stream-for-human-rights-defenders.html.

Immigration Refugees and Citizenship Canada. "Providing Protection to Human Rights Defenders at Risk." Backgrounders, 16 July 2021. https://www.canada.ca/en/immigration-refugees-citizenship/news/2021/07/providing-protection-to-human-rights-defenders-at-risk.html.

IRCC – Immigration, Refugees, Citizenship Canada. *Refugee Claims By Year*, 2022. https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/asylum-claims.html.

Iwańska, Alicja. *Exiled Governments: Spanish and Polish : An Essay in Political Sociology*. Rochester, VT: Schenkman Publishing Company, 1981.

Kissau, Kathrin, and Uwe Hunger. "The Internet as a Means of Studying Transnationalism and Diaspora," in Rainer Bauböck and Thomas Faist (eds.), *Diaspora and Transnationalism: Concepts, Theories and Methods* (Amsterdam: Amsterdam University Press, 2010), 245-66. http://www.jstor.org/stable/j.ctt46mz31.16.

Kunz, E. F. "The Refugee in Flight: Kinetic Models and Forms of Displacement." *The International Migration Review* 7, No. 2 (1973): 125–46. https://doi.org/10.2307/3002424.

Martin, Brian. "Activism, Social and Political," in *Encyclopedia of Activism and Social Justice*, Gary L. Anderson and Kathryn Herr (eds.), (Thousand Oaks, CA: SAGE, 2007), 19-27 https://www.bmartin.cc/pubs/07Anderson.html.

McKeever, David. *Exiled Activism: Political Mobilization in Egypt and England*. Routledge, 2020.

———. "Rumour and Decertification in Exile Politics: Evidence from the Egyptian Case." *Globalizations* 16, No. 7 (2019): 1247–61.

Morawska, Ewa. "'Diaspora' Diasporas' Representations of Their Homelands: Exploring the Polymorphs." *Ethnic and Racial Studies* 34, No. 6 (2011): 1029–48. https://doi.org/10.1080/01419870.2010.533783.

Muhammed, Saifullah and John Packer, "Canada must support Rohingya activists-in-exile", *The Hill Times*, 18 November 2021, https://www.hilltimes.com/2021/11/18/canada-must-support-rohingya-activists-in-exile/328961

Packer, John, Nadia Abu-Zahra and Phil Leech. "Global Migration, Activists-in-Exile, and Canada", *CIPS-CEPI Blog*, 8 November 2021, https://www.cips-cepi.ca/2021/11/08/global-migration-activists-in-exile-and-canada/

Petersen, William. "A General Typology of Migration." *American Sociological Review* 23, No. 3 (1958): 256–66. https://doi.org/10.2307/2089239.

Reynolds, Jennifer W. "The Activist Plus: Dispute Systems Design and Social Activism," *University of St. Thomas Law Journal*, 13(2) (2017): 334-353.

Safran, William. "Diasporas in Modern Societies: Myths of Homeland and Return," *Diaspora (New York, N.Y.)* 1, No. 1 (1991): 83–99. https://doi.org/10.3138/diaspora.1.1.83.

Said, Edward. "Reflections on Exile," *Said EW Reflections on Exile and Other Essays*. (Cambridge, MA: Harvard University Press, 2000), 174.

Saunders, Clare. "Activism," *The Wiley-Blackwell Encyclopedia of Social and Political Movements*, 2013.

Schenkkan, Nate and Linzer, Isabel. "Out of Sight, Not Out of Reach: The Global Scale and Scope of Transnational Repression." Freedom House, February 2021. https://freedomhouse.org/sites/default/files/2021-02/Complete_FH_TransnationalRepressionReport2021_rev020221.pdf

Shahed, Kalam. "Sikh Diaspora Nationalism in Canada," *Studies in Ethnicity and Nationalism* 19, No. 3 (2019): 325–45.

Shain, Y. "Who Is a Political Exile? Defining a Field of Study for Political Science," *International Migration* 26, No. 4 (1988): 387–400. https://doi.org/10.1111/j.1468-2435.1988.tb00659.x.

Shain, Yossi. *The Frontier of Loyalty: Political Exiles in the Age of the Nation-State*. Ann Arbor: University of Michigan Press, 2005.

Shain, Yossi, and Aharon Barth. "Diasporas and International Relations Theory," *International Organization* 57, No. 3 (2003): 449–79.

Shain, Yossi, and Martin Sherman. "Diasporic Transnational Financial Flows and Their Impact on National Identity," *Nationalism and Ethnic Politics* 7, No. 4 (2001): 1–36.

Shaw, Christine. *The Politics of Exile in Renaissance Italy*. Cambridge: Cambridge University Press, 2000.

Spannagel, Janika. "Declaration on Human Rights Defenders (1998)." *Arbeitskreis Menschenrechte Im 20. Jahrhundert* (blog), 2017. https://www.geschichte-menschenrechte.de/en/hauptnavigation/schluesseltexte/declaration-on-human-rights-defenders-1998/.

Statista. "Number of Refugee Claimants in Canada 2020," Statista, 2022. https://www.statista.com/statistics/549323/number-of-refugee-claimants-canada/.

Sznajder, Mario, and Luis Roniger. "Political Exile in Latin America," *Latin American Perspectives* 34, No. 4 (1 July 2007): 7–30. https://doi.org/10.1177/0094582X07302891.

Tilly, Charles. *Social Movements*, 1768-2004. 1st edition. Boulder: Paradigm Publishers, 2004.

Tiwari, Anubhav, Ava Raku, Darcy Clarke, and Nikolas Feith Tan. "History of Asylum," *Asylum Insight*, 2016. https://www.asyluminsight.com/history-of-asylum.

Tungohan, Ethel. "Intersectionality and Social Justice: Assessing Activists' Use of Intersectionality through Grassroots Migrants' Organizations in Canada," *Politics, Groups, and Identities* 4, No. 3 (2016): 347–62.

UN Commission on Human Rights. "Report of the Working Group on a Draft Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms." Geneva: UN, 9 March 1987. https://digitallibrary.un.org/record/225248.

———. "Report on the 36th Session, 4 February-14 March 1980." Geneva: UN, 1980. https://digitallibrary.un.org/record/36236.

United Nations, "Universal Declaration of Human Rights," United Nations, 1948. https://www.ohchr.org/en/human-rights/universal-declaration/translations/english.

UNGA – United Nations General Assembly. 2013. *Resolution 61/181: Promotion of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms: protecting women human rights defenders.* https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/450/31/PDF/N1345031.pdf

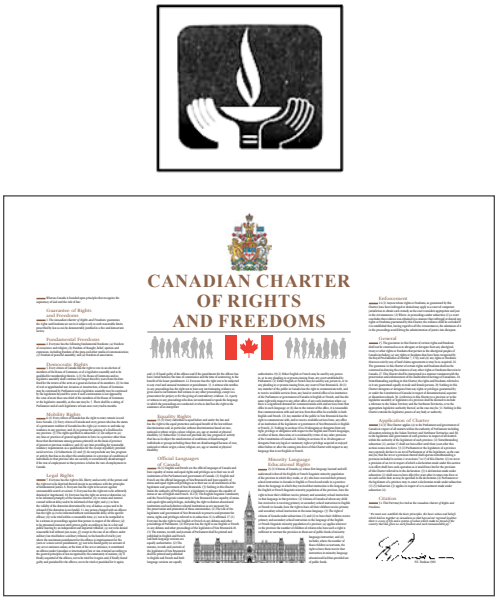
United Nations High Commissioner for Human Rights. "Fact Sheet No. 29, Human Rights Defenders: Protecting the Right to Defend Human Rights," 2004. https://www.refworld.org/docid/479477470.html.

UNHCR – United Nations High Commissioner for Refugees. *Global Trends: Forced Displacement in 2021*. Geneva: UNHCR, 2022.

Wille, Peter, and Janika Spannagel. "The History of the UN Declaration on Human Rights Defenders: Its Genesis, Drafting and Adoption," *Universal Rights Group* (blog), 11 March 2019. https://www.universal-rights.org/blog/the-un-declaration-on-human-rights-defenders-its-history-and-drafting-process/.

HUMAN RIGHTS IN CANADA AND THE WORLD: FORTY YEARS OF THE HUMAN RIGHTS RESEARCH AND EDUCATION CENTRE AND THE CANADIAN CHARTER

Karina Juma



Sources: *Walter Tarnopolsky and Gérald-A. Beaudoin (eds.), The Canadian Charter of Rights and Freedoms: Commentary (Ottawa; Carswell, 1982), vi; Government of Canada,* "Canadian Charter of Rights and Freedoms in various languages - Canadian Charter of Rights and Freedoms - English version (certificate format)".

INTRODUCTION

In April 2022, Canadians will commemorate the 40th anniversary of the *Canadian Charter of Rights and Freedoms* (Charter) which guarantees fundamental freedoms, democratic rights, mobility rights, legal rights, equality rights, the practice of two official languages across Canada, minority (official) language education rights, and the rights of Indigenous ("aboriginal") peoples. Alongside Parliament Hill, ice hockey, the Rocky Mountains, and the maple leaf, the Charter is emblematic of Canadian identity. Its entrenchment in the *Constitution Act, 1982* transformed Canada into a fully sovereign, mature and more representative democracy.

Celebrating a 40th anniversary milestone of its own is the University of Ottawa's Human Rights Research and Education Centre (HRREC). Housed in Fauteux Hall (the Faculty of Law Building), the HRREC has been a cornerstone of human rights thinking and advocacy since its launch in May 1981. The HRREC pioneered the collaboration between academia, government and civil society in the study and promotion of domestic and international human rights in Canada.

The Centre's establishment was motivated by the Charter and its potential, and their histories are interconnected beyond mere timing. "The Centre was a silent partner to the Charter," says Magda Seydegart, Executive Director of the HRREC from 1981 to 1993, "it was just so convergent." The Charter and the HRREC are both the products of visionaries — the Right Honourable Pierre Elliot Trudeau and Justice Walter S. Tarnopolsky, respectively — and those who supported them in bringing their visions to life.

This article traces the development of human rights legislation in Canada from the mid-1940s to the years immediately preceding the Charter, and discusses the spirit in which the Charter was drafted. Next, it examines how Walter Tarnopolsky, Magda Seydegart, Ivana Caccia, Ed Ratushny, Gérald-A. Beaudoin, and others played an instrumental role in activating the HRREC, and highlights the Centre's early achievements and impact with regard to the Charter and human rights. Finally, it reflects on the Charter's continued importance and contemporary challenges it faces, and how the HRREC is helping to overcome some of these issues.

CANADA'S "RIGHTS REVOLUTION" (1940s-1970s)[1]

On the heels of the First World War, the interwar period gave rise to various human rights associations, advocacy networks and activists around the world. However,

[1] For further reading see: Dominique Clément, *Canada's Rights Revolution: Social Movements and Social Change, 1937-82* (Vancouver: UBC Press, 2008); Christopher MacLennan, *Toward the Charter: Canadians and the Demands for a National Bill of Rights 1929-1960* (Montréal: McGill-Queen's University Press, 2003); Jennifer Tunnicliffe, *Resisting Rights: Canada and the International Bill of Rights, 1947-67* (Vancouver: UBC Press, 2019). Institutional spotlighting is one approach to human rights history. Historical contingencies and the grassroots development of human rights are central to understanding how human rights came to be embedded in Canadian governance, legislation and social norms; however, such analysis is beyond the scope of this paper.

"human rights" were not yet common parlance in Canada; instead, Canadians were understood as having "civil liberties" such as the freedom of speech and the freedom of assembly.[2]

As the Second World War neared its end, Canada's first human rights laws began taking shape. Ontario became the first province to pass anti-discrimination legislation, with the 1944 *Racial Discrimination Act*, which prohibited the publication or display of signs, symbols, or other representations expressing racial or religious discrimination.[3] In 1947, Saskatchewan enacted the *Saskatchewan Bill of Rights Act*, guaranteeing its residents fundamental freedoms and authorizing every person, regardless of their race, colour, creed, religion or nationality, *inter alia* the right to employment, to rent or purchase property, to receive a public education and to be given service in public places.[4]

Similar developments also took place on the international level. On 10 December 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR). The UDHR was engineered by an international committee including Canadian lawyer and Director of the then Division of Human Rights within the United Nations Secretariat, John Peters Humphrey. Canadian Prime Minister William Lyon Mackenzie King was hesitant about endorsing the UDHR, fearing that the public would use it in retaliation against him and his government for the internment of Japanese Canadians and other abuses committed under the auspices of the *War Measures Act*.[5] When the draft declaration was put to a preliminary vote on 7 December 1948, Canada abstained to the shock of its allies. Canada voted in favour of the declaration three days later after facing immense backlash and embarrassment for abstaining.[6]

The intensification of the Cold War between the Western and Eastern blocs, and changes in federal and provincial governments in the late 1940s and early 1950s, slowed the progression of human rights laws in Canada, although by then, most provinces had enacted some form of anti-discrimination legislation. In Québec, however, Premier Maurice Duplessis "waged a virtual war against unpopular minorities", targeting communists, Jehovah's Witnesses and others opposing the Catholic Church.[7] In 1951, Ontario passed the *Fair Employment Practices Act*, which prohibited discrimination in employment on the basis of race and religion. It was followed by the *Female Employees Fair Remuneration Act* in 1952 and the *Fair Accommodation Practices Act* in 1954, which, respectively, guaranteed women equal pay for equal work and prohibited discrimination in services, facilities and accommodations in public spaces. Following Ontario's lead, Manitoba, Nova Scotia, British Columbia and New Brunswick each adopted fair employment practices laws. Ottawa also followed suit with the *Canada Fair Employment Practices Act* in 1953 and the *Female Employees Equal Pay Act* in 1956.

The 1960s ushered in a wave of social and political movements including civil rights, often led by trade union activism in the early days, and then women's rights, anti-war protests and environmental concerns. This atmosphere of protest coincided with the federal government's first attempt at legislating rights under Prime Minister John Diefenbaker's leadership: the 1960 *Canadian Bill of Rights*.[8] Ed Ratushny, Director of the HHREC from 1983 to 1986, explained that "academics and lawyers had hoped that the courts, through their interpretation, would find ways to give it meaning, but it never really developed that way."[9] The *Bill of Rights* had limited effect because it was not a constitutional

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[2] Dominique Clément, "Rights Without the Sword are but Mere Words: The Limits of Canada's Rights Revolution," in Janet Miron (ed.) *A History of Human Rights in Canada: Essential Issues* (Toronto: Canadian Scholars' Press, 2009), 46; Dominique Clément, Will Silver and Daniel Trottier, "The Evolution of Human Rights in Canada," Canadian Human Rights Commission, 2012, 2, www.chrc-ccdp.gc.ca/sites/default/files/ehrc_edpc-eng.pdf

[3] Walter Tarnopolsky, "Discrimination in Canada: Our History and Our Legacy" (paper presented at the Canadian Institute for the Administration of Justice Seminar on Discrimination in the Law, Kananaskis, Alberta, 12 October 1989), 12.

[4] "70th Anniversary of the Saskatchewan Bill of Rights Act". Saskatchewan Human Rights Commission, https://saskatchewanhumanrights.ca/70th-anniversary-of-the-saskatchewan-bill-of-rights-act/

[5] The *War Measures Act* granted the federal government sweeping powers to maintain security and public order in times of war or civil unrest. Martin Morrow, "From outlier to champion: Canada's uneven record on human rights," *The Globe and Mail*, 23 October 2020, theglobeandmail.com/featured-reports/article-from-outlier-to-champion-canadas-uneven-record-on-human-rights/

[6] *Ibid*.

[7] Clément, *supra*, note 2, 49.

[8] "The Canadian Bill of Rights", Diefenbaker Canada Centre, https://diefenbaker.usask.ca/exhibits/online-exhibits-content/the-canadian-bill-of-rights.php#IamaCanadianafreeCanadian

[9] Attributed quotations are from interviews conducted by the author as indicated in the bibliography.

measure, but a statutory approach to rights protection.[10] The Honourable Barry Strayer, former Deputy Judge of the Federal Court of Canada, recently recalled that "those who were interested in the *Bill of Rights* had a lot of reservations. Even Diefenbaker himself knew that to make it a constitutional instrument would require the consent of the provinces. He didn't expect to get that, and he was right."

In 1962, Ontario became the first province in Canada to enact a *Human Rights Code* and to establish a human rights commission. The *Human Rights Code* prohibited discrimination on the basis of race, creed, colour, nationality, ancestry and place of origin in signs and notices, public accommodation, public services and facilities, employment, and trade union membership.[11] Interest in human rights continued to grow throughout the decade, with the United Nations General Assembly proclaiming 1968 as the International Year for Human Rights. To mark this occasion, Ottawa hosted a National Conference on Human Rights in December 1968 during which the now defunct Canadian Council for Human Rights was established.[12]

The 1970s were coloured with both setbacks and strides. In October 1970, members of the Front de libération du Québec (FLQ) abducted British diplomat James Cross and Deputy Premier of Québec Pierre Laporte. Cross was released, while Laporte was found dead – killed by FLQ members who were later tried and found guilty. Mass fear and panic ensued from these incidents and other FLQ attacks. The armed forces were deployed to Ottawa to protect government officials and buildings from harm, and to Québec to help police restore public order.[13] The federal government also invoked the *War Measures Act*, suspending civil liberties as police carried out hundreds of arrests; suspects were placed in custody for days without charges and were denied the right to legal counsel.[14] Even mentioning the FLQ in public bore risks. A high school teacher in Dawson Creek, British Columbia — far removed from the violence in Québec — was fired for speaking about the FLQ in the classroom.[15]

In June 1975, less than five years after the October Crisis, Québec adopted its *Charter of Human Rights and Freedoms*, guaranteeing Quebeckers civil, political, social and economic rights.[16] In 1976, Canada acceded to the International Covenant on Civil and Political Rights and ratified the International Covenant on Economic, Social and Cultural Rights. The following year, the federal government enacted the *Canadian Human Rights Act*, prohibiting discrimination on the grounds of race, national or ethnic origin, colour, religion, age, sex, marital status, family status, physical disability or pardoned conviction in federal jurisdiction.[17] The *Act* established the Canadian Human Rights Commission (CHRC) and the Canadian Human Rights Tribunal to promote the purposes of the CHRC and to resolve cases, either through findings, conciliation or adjudication.

Over the years, each province and territory developed its own set of human rights norms and principles, and, likewise, each had its own share of supporters and critics. The 1977 federal human rights legislation created an anti-discrimination framework for federal jurisdiction and set an example for provincial jurisdictions still developing anti-discrimination legislation, but a long road lay ahead to securing rights and freedoms for all. Although the Canadian human rights landscape was complex and ever-changing, the progress made between the 1940s and the 1970s laid the foundation for what ultimately became the *Canadian Charter of Rights and Freedoms*.

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[10] *Ibid*.

[11] "Teaching human rights in Ontario – A guide for Ontario schools", Ontario Human Rights Commission, www.ohrc.on.ca/en/teaching-human-rights-ontario-guide-ontario-schools/appendix-2-%E2%80%93-human-rights-historical-context

[12] John Hucker and Bruce McDonald, "Securing Human Rights in Canada", *McGill Law Journal* 15, No. 2 (1969): 243, https://lawjournal.mcgill.ca/wp-content/uploads/pdf/8692000-mcdonald.pdf

[13] William Tetley, *The October Crisis, 1970: an insider's view* (Montréal: McGill-Queen's University Press, 2006), 60-61.

[14] *Ibid*.

[15] Tom Hawthorn, "Former editor recalls frightening fight for liberty," *The Globe and Mail*, 27 October 2005, www.theglobeandmail.com/news/national/former-editor-recalls-frightening-fight-for-liberty/article988944/

[16] "Overview of Human Rights Codes by Province and Territory in Canada", Canadian Centre for Diversity and Inclusion, https://ccdi.ca/media/1414/20171102-publications-overview-of-hr-codes-by-province-final-en.pdf

[17] Clément, Silver and Trottier, *supra*, note 2, 25.

PATRIATION AND THE ORIGINS OF THE CHARTER

Canada's Constitutional Status[18]

The *British North America Act (BNA Act)*, known today as the *Constitution Act, 1867*, was an act of the British Parliament that created the Dominion of Canada in 1867. The *BNA Act* conferred upon Canada a constitutional system "similar in principle to that of the United Kingdom", meaning that executive power would be vested in the Queen and Canada would have a Parliament with elected and non-elected representatives.[19] The Canadian parliamentary system would have the distinctive feature – inexistent in the United Kingdom – of the division of powers between the federal and provincial jurisdictions. The *BNA Act* had a notable shortcoming: as an Act of the British Parliament, it did not provide for a potential amendment process by Canadian lawmakers. Any time Canada wished to amend its constitution, the Canadian government would have to rely on the British Parliament to introduce the sought-after changes.[20]

In 1931, the Statute of Westminster granted full autonomy to British Dominions such that they were legislatively equal in status to Britain except in legal areas of their choice.[21] Canadian federal and provincial politicians were unable to agree on a mechanism for constitutional amendment if this power was to be transferred from Britain. Canada requested the British Parliament to retain the amendment power until it reached agreement on an amending formula.

Numerous attempts were made to patriate, or transfer, the *BNA Act* to Canada as early as 1927; however, federal and provincial officials failed to reach agreement on the amendment question each time.[22] The task seemed impossible. Approaching the country's centennial, Prime Minister Diefenbaker convened a Conference of Attorneys-General of Canada and the Provinces on the topic of repatriation in October 1960. Three additional meetings were held in November 1960 and in January and September 1961, though yet again no agreement was reached.[23] Despite these setbacks, one person was determined to make patriation a reality: Pierre Elliot Trudeau.

Trudeau's Quest for Constitutional Reform

A budding politician, Pierre Elliot Trudeau ran for the Liberal Party of Canada and was elected to Parliament in November 1965. In January 1966, he was appointed Parliamentary Secretary to then-Prime Minister Lester B. Pearson, and in April 1967 he was named Minister of Justice and Attorney General of Canada. Trudeau quickly began spearheading the federal government's constitutional strategy.24 In September 1967, he announced his aspiration for constitutional reform in his keynote address to the annual meeting of the Canadian Bar Association in Québec City.25 In his speech, Trudeau remarked:

"I am thinking of a Bill of Rights that will be so designed as to limit the exercise of all governmental power, federal and provincial. It will not involve any gain by one jurisdiction at the expense of the other. There would be no transfer of power from the federal Parliament to the provincial Legislatures, or from the provincial Legislatures to the federal Parliament. Instead, the power of both the federal government and the provincial governments would be restrained in favour of the Canadian citizen who would, in consequence, be better protected in the exercise of his fundamental rights and freedoms."[26]

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[18] For further reading see: Barry Strayer, *Canada's Constitutional Revolution* (Edmonton: University of Alberta Press, 2013); Walter Tarnopolsky, "The Historical and Constitutional Context of the Proposed Canadian Charter of Rights and Freedoms", *Law and Contemporary Problems* 44, No. 3 (1981): 169-193, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3631&context=lcp; Marilou McPhedran, "A Truer Story: Constitutional Trialogue" in Graeme Mitchell et al. (eds.), *A Living Tree: The Legacy of 1982 in Canada's Political Evolution* (Markham: LexisNexis Canada, 2007), 101-136.

[19] *The Constitution Acts*, 1867 to 1982. https://laws-lois.justice.gc.ca/PDF/CONST_TRD.pdf

[20] "Patriation", Centre for Constitutional Studies, www.constitutionalstudies.ca/2019/07/patriation/

[21] Manley Hudson, "Notes on the Statute of Westminster, 1931", *Harvard Law Review* 46, no. 2 (1932): 261-264, https://www.jstor.org/stable/1332217

[22] "Patriation", Centre for Constitutional Studies.

[23] Barry Strayer, "The Constitution Act, 1982: the Foreseen and Unforeseen", *Constitutional Forum constitutionnel* 16, No. 2 (2007): 51, https://doi.org/10.21991/C9C09S

[24] Adam Dodek, *The Charter Debates: The Special Joint Committee on the Constitution, 1980-81, and the Making of the Canadian Charter of Rights and Freedoms* (Toronto: University of Toronto Press, 2018), 19.

[25] *Ibid*., 20.

[26] *Ibid*.

One person Trudeau enlisted for help on his constitutional reform project was Barry Strayer. At the time, Strayer was a full-time law professor at the University of Saskatchewan. "I studied the Constitution and recognized that there were problems with it such as the fact that it didn't have a focus on human rights and there was no amending formula," says Strayer. He was invited to Ottawa in the Summer of 1967 to help the government develop its position on constitutional reform.[27] He drafted a position paper, made public in February 1968, entitled "A Canadian Charter of Human Rights", proposing guaranteed political rights, legal rights, egalitarian rights, linguistic rights and economic rights.[28]

In April 1968, Pierre Trudeau became Prime Minister of Canada. In January 1970, a Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada was created. The Committee held public hearings and meetings across Canada, attracting 1,486 witnesses and 13,000 spectators.[29] Although the Committee engaged with Canadians, it was detached from federal-provincial constitutional negotiations, and, thus, did not have the impact it anticipated. Trudeau also experienced a major setback during the October Crisis later that year, having waived the same rights for which he claimed to be an ardent supporter by invoking the *War Measures Act*.

In June 1971, Trudeau met with provincial officials in Victoria in order to bring his constitutional reform project back on track. They reached a consensus on a scaled-down version of the 1968 position paper, consisting only of political and language rights.[30] However, this agreement was short-lived. Québec Premier Robert Bourassa revoked his support one week after the First Ministers' meeting after facing opposition from other political leaders in Québec.

Constitutional reform fell out of the spotlight for a few years, re-emerging in 1976 after the premiers responded favourably to a proposed draft proclamation by the House of Commons and the Senate jointly calling on the British Parliament to patriate the Constitution.[31] In June 1978, Trudeau published a white paper on constitutional reform called "A Time for Action". The paper outlined a two-stage plan for patriation. First, the federal government would unilaterally amend the parts of the Constitution that did not require provincial approval, and second, the federal and provincial governments would work together to reach an agreement on a constitutional amending formula.[32] The paper was then converted into Bill C-60, the Constitutional Amendment Bill. The bill sought to replace much of the *BNA Act* with new provisions, including replacing the Senate with a new federal Upper House called the House of the Federation.[33] Given the bill's contentious nature, Trudeau agreed to refer the question of the constitutionality of unilaterally altering the fundamental character of the Senate to the Supreme Court of Canada. The Court rejected the federal government's proposition in its December 1979 decision.[34]

In the meantime, Trudeau's Liberal Party lost the May 1979 election to the Progressive Conservative Party led by Joe Clark. Trudeau was prepared to throw in the towel and even announced his intention to step down as Liberal Party leader. However, in a turn of events, Trudeau returned to power after a snap election was held in February 1980. Thus began what Ed Ratushny calls "the final thrust for bringing home the Constitution and the Charter". At the First Ministers' meeting on June 9, 1980, Trudeau put forward a proposal called "Priorities for a New Canadian Constitution", including the entrenchment of a Charter of Rights. It was tabled in the House of Commons the next day and different drafts were produced throughout the summer.

At the end of August, a scandal erupted after a document known as the "Kirby Memorandum" was leaked. The Kirby Memorandum recommended that the federal government take unilateral action to achieve patriation in the face of unresolved provincial opposition.[35] The document seriously undermined the provinces' desire to

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[27] Government of Canada, "A Canadian Charter of Human Rights", 1968, https://primarydocuments.ca/wp-content/uploads/2018/04/CanChartHumRights1968-1.pdf; Strayer, *supra*, note 23, 51.

[28] Dodek, *supra*, note 24, 20-21.

[29] *Ibid*., 22.

[30] *Ibid*.

[31] *Ibid*., 23.

[32] *Ibid*., 24.

[33] *Ibid*.

[34] *Ibid*.; see *Re: Authority of Parliament in relation to the Upper House*, SCC judgment of 21 December 1979 [1980] 1 SCR 54.

[35] *Ibid*., 26.

reach an agreement with Ottawa. Tensions were high during a series of First Ministers' meetings in September 1980. Yet, Trudeau persisted, no longer seeking unanimity from his provincial counterparts.[36] In a televised address on 2 October 1980, Trudeau announced his government's plan to introduce a resolution in the House of Commons calling for patriation. According to this plan, the House and the Senate would refer the resolution to a joint committee for review and it would pass by January 1981, at which point it would be sent to the British Parliament. Trudeau was hopeful that Canada would have its *own* Constitution by Canada Day 1981. The turnaround time was ambitious, but the wheels were in motion.

The Special Joint Committee on the Constitution of Canada

The Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada, including a charter of rights and freedoms, was tabled in the House on 6 October 1980, and was referred to the Special Joint Committee on the Constitution of Canada chaired by Senator Harry Hays of Alberta and Member of Parliament Serge Joyal from Québec. Between November 1980 and February 1981, the Committee held 106 meetings, heard 104 representations and received over 1,000 written submissions.[37] It was the first parliamentary committee whose proceedings were televised, drawing in millions of viewers from across the country. The witnesses who testified before the Committee included Gordon Fairweather (Chief Commissioner of the Canadian Human Rights Commission), Doris Anderson (President of the Canadian Advisory Council on the Status of Women) and representatives of several major Indigenous organizations such as Marlene Pierre-Aggamaway (Native Women's Association of Canada), Louis "Smokey" Bruyère (Native Council of Canada), and Charlie Watt (Inuit Committee on National Issues). Advocates for women's rights, the rights of persons with disabilities, visible minorities and ethnic groups, minority language communities also appeared before the Committee.

Walter Tarnopolsky, through his testimony, "directly influenced the shaping of the contents of the Charter".[38] Barry Strayer remembers that "Walter gave [the drafters of the Charter] some advice at the beginning, but somewhere along the way he detached himself from the government and became a spokesman for the Canadian Civil Liberties Association". As Canada's leading expert on the *Canadian Bill of Rights*, it was no surprise that Tarnopolsky pointed out inadequacies in the draft Charter, especially with regard to sections 15(1)[39] and 15(2)[40] — the equality rights provisions — about which he was deeply passionate. The *Canadian Bill of Rights* guaranteed the right of the individual to equality before the law and protection of the law, but did not enumerate grounds for non-discrimination. The courts narrowly interpreted the meaning of equality, thereby resulting in little progress for equality-seekers.[41] If the Charter was to allow for broad judicial interpretation, section 15 needed to be as extensive as possible.

Committee members such as the Minister of Justice Jean Chrétien and Member of Parliament for Cambridge Chris Speyer took note of Tarnopolsky's concerns. On the topic of remedies for rights breaches, Speyer observed: "Mr. Tarnopolsky in his writing has said that one of the failures of the Diefenbaker Bill of Rights was that we, as legislators, did not give a sense of direction to the courts as to what we wanted the courts to do in the event that there was a violation of those rights."[42] The Committee listened to Tarnopolsky and others who had expressed similar views, and added the specific provisions to this effect as section 24(1)[43] of the draft Charter.

Certainly, the Charter was not conceived in a vacuum. There was much more for the drafters to draw on than existing legislation in Canada and witness testimony.

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[36] *Ibid*., 27.

[37] Strayer, *supra*, note 18, 153.

[38] Human Rights Research and Education Centre Annual Report 1984-86, 2.

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

[40] "Section (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

[41] Dodek, *supra*, note 24, 242. Also, confirmed in interviews with Barry Strayer, Ed Ratushny, Marilou McPhedran, and Julius Grey.

[42] Dodek, *supra*, note 24, 357.

[43] "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

There was a ready-made and exhaustive list of rights and freedoms in the UDHR, the two International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and all other human rights-related instruments generated by the United Nations. Indeed, as a Member of the UN Human Rights Committee established by the International Covenant on Civil and Political Rights notably to oversee application of the Covenant by States parties, Tarnopolsky was uniquely able to present to the Charter drafting Committee authoritative interpretations of Covenant provisions binding on Canada which should be harmonised with (if not the same as) the Charter provisions. The Committee presented its final report to Parliament on 13 February 1981 – a version of the Charter substantially different from the version tabled in the House months earlier.[44] The terms of the Charter were finalized by the end of April 1981.

In September 1981, the Supreme Court of Canada delivered its judgment on the *Patriation Reference*, ruling that the federal government could unilaterally request the British Parliament to patriate the Constitution, although "a sufficient measure of provincial consent" was needed to amend the text of the Constitution, per constitutional convention.[45] Accordingly, a First Ministers' conference was held in Ottawa in early November 1981 to seek sufficient provincial support for the federal government's proposed constitutional changes. All of the provinces except Québec accepted the constitutional package. Pressing ahead, the House of Commons and the Senate passed the Resolution Respecting the Constitution of Canada on 2 and 8 December 1981. The resolution was approved by the British Parliament in March 1982 as the *Canada Act 1982*, including in its Schedule B the *Constitution Act, 1982*, Part I being the *Canadian Charter of Rights and Freedoms*.[46]

One more step remained after receiving Britain's stamp of approval: an official patriation ceremony. On 16 April 1982, Queen Elizabeth II arrived in Canada aboard a Canadian Air Force jet. On 17 April 1982, sitting at a desk with Prime Minister Trudeau on Parliament Hill, the Queen signed the Proclamation of the Constitution Act, 1982, by which act the Charter officially became the law of the land.

Early Reactions to the Charter

The Charter, and especially its Sections 15 and 28[47], was a victory for women's rights and for the collectivity of women like Doris Anderson, Shelagh Day, Mary Eberts, Judy Erola, Marilou McPhedran and countless other voices who championed equal pay for work of equal value, marriage rights, safe access to abortion, and so much more.

Human rights advocates recognized that the Charter came into being with great difficulty. "The discourse of the day in the late 1970s and early 80s tilted very much away from there being a Charter", says Manitoba Senator Marilou McPhedran, who served as an advisor to the National Action Committee on the Status of Women at the time of patriation. There was talk of power being taken away from elected officials and placed in the hands of the courts. Commentators, largely from Western Canada, worried that a judicially dominated Charter interpretation and implementation would undermine Canada's democracy. Another criticism was the inclusion of collective rights in the Charter, considered by many at the time as a detriment to the protection of individual rights, regardless of any potential membership in a designated protected group.

Others remember the coming into force of the Charter differently. For Ed Ratushny, in the time leading up to the Charter "there was a strong sense of anticipation that it was going to be something special. There were a lot of people who were critical of it, but when it all came to pass, all of the excitement and focus was on how the Charter would be interpreted." According to Julius Grey, a professor and expert in constitutional and human rights law, "The courts were prepared to give real meaning to the Charter." Similarly, Barry Strayer recounts: "We were afraid that no one would pay attention to it, but the opposite happened. Every judge wanted to be the first kid on the block to have a Charter decision."

It is important to remember that legislative recognition of human rights existed before the Charter. The Charter did not create rights; rather, it formally identified them and enshrined them by constitutionalizing them. "When you think about the origin of the Charter, a large part of it was the societal movement of human rights, which was mostly about equality rights," says Ratushny. The entry

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[44] Dodek, *supra*, note 24, 70.

[45] Marilou McPhedran, Judith Erola and Loren Braul, "28 – Helluva Lot to Lose in 27 Days: The Ad Hoc Committee and Women's Constitutional Activism in the Era of Patriation" in Lois Harder and Steve Patten (eds.), *Patriation and Its Consequences* (Vancouver: UBC Press, 2015), 205; Strayer, *supra*, note 23, 52.

[46] Strayer, *supra*, note 23, 53.

[47] "Notwithstanding anything else in this Charter, the rights and freedoms in it are guaranteed equally to male and female persons."

into force of the equality rights provisions were delayed until April 1985 to allow the provinces to render their laws Charter-compliant. Civil society organizations like the newly formed Women's Legal Education and Action Fund (LEAF) and many individuals launched into identifying potential legislative and policy breaches to the equality provisions of the Charter during this three-year waiting period. When these provisions finally came into effect, civil society organizations were ready to test them – and the HRREC was firmly in place to help promote and make sense of them.

FOUNDING THE HRREC

Walter Tarnopolsky

Walter Tarnopolsky was born in Gronlid, Saskatchewan, in 1932. He received his BA (History) in 1953 and LLB in 1957 from the University of Saskatchewan, his MA (History) from Columbia University in 1955 and his LLM from the London School of Economics in 1962.[48] He was an expert in the field of human rights and civil liberties. He taught at several Canadian law schools including the University of Ottawa, and was involved in drafting federal and provincial human rights legislation such as the *Manitoba Bill of Rights* and the *Canadian Human Rights Act*. Tarnopolsky was regarded by many as Canada's chief authority on the *Canadian Bill of Rights*, having published a book by the same name in 1966 outlining in detail the rights it guaranteed and their implications. In addition to consultant work, he served as a Commissioner of the Ontario Human Rights Commission and chaired a number of boards of inquiry under the Commission from 1967 to 1978.[49] Tarnopolsky became the first Canadian representative on the United Nations Human Rights Committee (1977-1984). He was also President of the Canadian Civil Liberties Association (1977-1982) and one of the commissioners on the CHRC (1978-1983).[50] Tarnopolsky was appointed to the Court of Appeal for Ontario in 1983 and served on the Court until his death in 1993. He was an all-around human rights champion. Marilou McPhedran, a former student of Walter Tarnopolsky, remembers him pioneering the inclusion of human rights into law school curricula: "In the 1960s and 70s, human rights was not considered a topic of study in law school. The only possibility of learning anything about human rights was to take Tarnopolsky's course on International Law. For law students in the 1970s, studying with Tarnopolsky was their only access to that kind of information." Ed Ratushny, also Tarnopolsky's former student and colleague, praises his dedication to human rights, noting that "Walter was a really good, kind person. He really had a commitment to equality rights, and he felt very strongly about how unfortunate and even evil it was in society that people shouldn't be treated completely equally in terms of all aspects of life."

Given his background and expertise, Tarnopolsky had a dream to establish a centre at the University of Ottawa where legal experts and experts from other fields of research alike could act on advancing human rights. One person believed in his vision just as much as he did: Magda Seydegart.

Magda Seydegart

Magda Seydegart is a human rights education, gender equality and civil society specialist with a long history of community involvement and advocacy.[51] She is a founding partner of South House Exchange, a management consulting group for human rights, women's rights and non-governmental organization institution-building based in Ottawa. She was on the founding board of LEAF and has twice been a member of the Canadian Human Rights Tribunal. She worked for the Canadian Human Rights Commission (CHRC) and before that at the Canadian Association in Support of Native Peoples. Seydegart has also done consulting work for Amnesty International (Canadian Section), Global Affairs Canada, UNDP, UNESCO and other governmental and non-governmental agencies, with international assignments in Bosnia and Herzegovina, Bulgaria, the Gambia, Ghana, Kyrgyzstan, the Philippines, Taiwan, and Ukraine.[52]

While working for the CHRC in Community Outreach, Seydegart and Tarnopolsky traveled to Newfoundland and Labrador on a trip to meet with organizations in the region. The two of them were waiting for their return flight in the Happy Valley-Goose Bay airport when Walter told her about his plan to start a human rights institute at the University of Ottawa, where he was a law professor.

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[48] "About Walter Tarnopolsky", International Commission of Jurists Canada, https://www.icjcanada.org/index.php/en/about-us/tarnopolsky-award/about-walter-tarnopolsky.html

[49] *Ibid*.

[50] *Ibid*.

[51] "Magda Seydegart – Class of 1967", Jarvis Archives and Museum, https://jarvisarchives.ca/main/2020/05/18/magda-seydegart-class-of-1967/; "Team Bios", E.T. Jackson and Associates Ltd., http://etjackson.com/team-3/team-bios/.

[52] *Ibid*.

"He understood how important a human rights institute could be, situated in a university-based law faculty at a time when the Charter was coming into force and needed to be promoted, tested, advanced and made visible," says Seydegart. "I can hear his voice: national capital, bi-juridical, bilingual, independent research and education organization," she added. Seydegart helped Tarnopolsky with his proposal to the Donner Canadian Foundation, a philanthropic institution that provides grants to public policy initiatives across Canada and around the world. The proposal was accepted and afforded three years of funding.

Tarnopolsky called Seydegart right away to tell her the good news. "This is happening!" he exclaimed. "Come join me!" He invited Seydegart to come work for him and she agreed. The stars were aligned – "Walter understood that he had the research capacity, stature and the law behind him, and he was implicated in the Charter, while I had the community relations and outreach side of things," explains Magda. They worked well together. "He was the kind of guy that would follow through. If he worked with somebody on something, he would make sure they were involved," she recalls.

An unsung hero in her own right, Seydegart deserves credit for helping to set the HRREC into motion. "Magda was at the helm of making the Centre a credible presence," says Pearl Eliadis, a human rights lawyer and educator, and still a partner of the HRREC. Seydegart was the key point of contact when it came to outreach, planning, and administration. "While Walter was the founding father, she was the one who made it work," remarked Ed Ratushny, praising Magda's work ethic and dedication to the Centre. Ivana Caccia, the HRREC's librarian from 1983 to 1993, also speaks highly of Magda: "[She] was an excellent communicator and was heartfelt in her job. She was involved with a lot of educational work with the public at large to make them aware that they had the means to fight discrimination and injustice." A few years after she joined Tarnopolsky at the HRREC, Seydegart received a Master of Education with a specialization in Human Rights Curriculum Development and Training, with her thesis on running an advocacy organization out of a university. Together, Seydegart and Tarnopolsky made history.

A First for Canada

The HRREC officially launched in May 1981 as a bilingual and bi-juridical institution with Walter Tarnopolsky (from the Common Law Section) as Director, Gérald-A. Beaudoin (from the Civil Law Section) as Associate Director and Magda Seydegart as Executive Director. Beaudoin was a constitutional lawyer and former Dean of the Civil Law Section. "He had a charm in his relations with people. He was very kind [and] very respected," says his colleague, Ed Ratushny.

It was the first centre of its kind in Canada.[53] The HRREC was unique because it combined research with outreach, and it was housed in a university. There were similar centres in Denmark, the Netherlands, Switzerland and the United States, but none were linked to academia. The purpose of the Centre was to encourage research, education and the promotion of human rights through legal and interdisciplinary study and implementation in both official languages.[54] On the one hand, there was a focus on academic research, legal analysis, policy and domestic and international human rights thinking. On the other hand, they facilitated, convened and maximized the capacity of civil society organizations to advance claims, advocate for and exercise human rights. "With these two defined streams of our work, we provided a platform for all kinds of human rights-related research, policy development and action" says Seydegart. "We were not neutral because we were advocates for human rights, but we were not political."

A public event was held in Fall 1981 in the Gowlings Moot Court in Fauteux Hall to announce the existence of the Centre and to draw attention to human rights. The event featured a panel with Yvon Beaulne, Gordon Fairweather, Louis-Edmond Pettiti, Thomas Buergenthal, Gérald-A. Beaudoin and Walter Tarnopolsky.[55] The focus of the event was domestic and international – an orientation that the HRREC would sustain through its ongoing existence. At the time, Beaulne was Chairman of the United Nations Human Rights Commission. Beaulne and Tarnopolsky had discussed starting a human rights institute, but Beaulne was not in a position to implement it, though he was very supportive of Tarnopolsky's efforts. Fairweather, the first Chief Commissioner of the CHRC, "understood the value of having an independent research and education organization. He brought his pre-eminence to add legitimacy and value to the Centre," affirmed Seydegart. Pettiti was a French lawyer and a judge on the European Court of Human Rights (1980-1998). Buergenthal was an American scholar and a judge of the Inter-American Court of Human Rights (1979-1991) including its President (1985-1987); he subsequently was elected as a judge of the International

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[53] Julian Beltrame, "Human rights institute third on the continent", *The Ottawa Citizen*, 6 May 1981.

[54] "Reunion: Common Law History at the University of Ottawa", University of Ottawa Faculty of Law, https://commonlaw.uottawa.ca/sites/commonlaw.uottawa.ca/files/cguindon_uofo_common_law_eng_web.pdf, 52.

[55] *Ibid*.

Court of Justice (2000-2010). Over 300 people attended the launch event, including students, government officials, and representatives from faith groups and trade unions. It set the tone not only for the study of human rights, but also for the study of the Charter. Seydegart says, "Without diminishing the significant contributions of the panelists that day, today we cannot imagine a head table with only men talking about rights, and that is a very good thing too. Undoubtedly, the HRREC has contributed to that sea change too, in its many years of operation."

EARLY YEARS OF THE HRREC AND THE CHARTER

A Pan-Canadian Undertaking

The HRREC was at the forefront of Charter analysis in Canada. On 1 December 1982, *The Canadian Charter of Rights and Freedoms: Commentary*, edited by Walter Tarnopolsky and Gérald-A. Beaudoin, was published. The bilingual publication was funded by the Department of Justice and comprised a collection of essays by the following lawyers and constitutional scholars from across Canada: Clare F. Beckton, Pierre Blache, François Chevrette, Irwin Cotler, Patrice Garant, Dale Gibson, Peter W. Hogg, Kenneth M. Lysyk, Herbert Marx, André Morel, Ed Ratushny, Katherine E. Swinton, André G. Tremblay and of course Tarnopolsky and Beaudoin.

The editors knew that the volume was a needed resource, writing in the preface: "This Charter will have major repercussions in the years to come. It will influence both federal and provincial legislation. It will affect both those who have a role in the administration of justice, as well as the ordinary citizen and public interest groups. Sooner or later, everyone will have to consider the significance of an entrenched Charter of Rights."[56] The writers accordingly took on different topics of potential conflict or debate:

> "It will take time for the Supreme Court to determine the main lines of interpretation of the Charter. Meanwhile, in the light of existing case law and with some speculation about the meaning of the terms employed, the authors have tried to anticipate the Charter's impact on the law. It will be the first detailed analysis of the Charter's impact. As such, it should be useful to lawyers and political scientists, to students of law and public affairs, [and] to all those interested in human rights and fundamental freedoms."[57]

Having written a chapter on the rights of the accused in the criminal process, Ed Ratushny described the book as "an invaluable contribution by the Centre because it gave practitioners, government officials, lawyers, and prosecutors a real good start in all of the different sections of the Charter." A reviewer named Marvin A. Zucker, a judge on the Ontario Court of Justice, agreed, noting that "there is probably no better source than these sixteen chapters for the development of an important means of analysis... it is a great contribution to legal scholarship."[58] The book and its later editions went on to become a standard reference for lawyers across the country. "For almost everyone who had a Charter challenge, the book was the first place they would go," says Ratushny. It was also cited in numerous judicial decisions, including by the Supreme Court of Canada, which helped make the HRREC a trusted source of information and Charter interpretation early on in its existence.

A Committed Librarian

Ivana Caccia had been working in the field of international human rights for fifteen years and was a librarian at the Inter-Parliamentary Union in Geneva before relocating to Canada. Her background and her knowledge of international human rights attracted her to the HRREC. She volunteered her time for a few weeks before she was formally recruited to the team in early 1983. Magda Seydegart was certain that Caccia would be a useful partner to the Centre and Caccia understood that the work taking place at the HRREC and broader Charter developments needed to be recorded. By April 1983, the Centre's resource library and documentation centre was fully operational.

When Walter Tarnopolsky was appointed to the Ontario Court of Appeal in June 1983, he left behind an extensive collection of documents. "The Centre needed these materials to give substance to the Charter analysis taking place by its members," explained Caccia. She used these materials to build a bibliography on the Charter. By 1986, the documentation centre contained 6,000 books, articles and documents.[59] By 1993, the collection grew to between 15,000 to 20,000 documents and the entire catalogue was accessible online through the legal research database Quicklaw.[60]

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[56] Walter Tarnopolsky and Gérald-A. Beaudoin (eds.), *The Canadian Charter of Rights and Freedoms: Commentary* (Ottawa: Carswell, 1982), iii.

[57] *Ibid.*, iii-iv.

[58] Human Rights Research and Education Centre Annual Report 1982-83, 8.

[59] Human Rights Research and Education Centre Annual Report 1984-86, 4.

[60] Ivana Caccia, "Ten Years of Service: Facts about the Canadian Collection of the Human Rights Documentation Centre", University of Ottawa, 1993, 1.

There was heavy demand on the research facilities of the Centre with the coming into force of the Charter. At times, people would drop in to the HRREC and suggest topics for them to consider in their research. "We were spontaneous and were able to respond when the need arose," says Seydegart. Most times, however, the documentation centre was the starting place for Charter-related research. Caccia looks back on public interest in the Centre's Charter collection, explaining that "it was an exciting time because people were discovering how to use the Charter in all types of social activity." Also, the HRREC was known at the law school as being helpful to students to think in the way of rights instead of following standard legal procedure. "Because the Charter was a novelty, professors gave students assignments to explore and implicate the Charter into their papers," says Caccia. Students asked the Centre questions about children's rights, the environment, arbitrariness in some legal procedures, and more. The possibilities were endless.

A Dedicated Team

The HRREC attracted and benefited enormously from the work and commitment of talented staff members, special project leaders, students, volunteers, and academic colleagues. People came to the Centre because they wanted to work on human rights issues, and also because of the Centre's strong ethic of collaboration and shared decision-making. To name a few of the individuals who worked tirelessly on Centre programming: Douglas Williams, Victoria Berry, Irene Bujara, Jacqueline Pelletier, Carmen Pacquette, Bill Black, Bill Pentney, Ghislaine Chenier-Blais, Michelle Boivin, Tannis Gutnick, Allan McChesney, Lyse Côté-Bolanos, Gerri McCormick, Linda Gama Pinto, Ruth Grealis and many others.

A Change in Leadership

After Walter Tarnopolsky was appointed to the Court of Appeal, he urgently needed to find someone to take over as Director of the HRREC. He strongly urged Ed Ratushny to accept the position, believing that someone with similar values to his own should take the reins so as not to disrupt the dynamics of the Centre. Ratushny had been Walter's student at the University of Saskatchewan. They developed a close friendship over the years, working together as professors at the University of Windsor before joining the Faculty of Law at the University of Ottawa. Ratushny was a supporter of the HRREC since it first opened and his own research centered on the legal rights in the Charter, such as protections for accused persons and limitations on police powers. Upon giving it careful thought, he took up Tarnopolsky's offer and became the Centre's new Director in July 1983, knowing that Magda Seydegart was there to support him during his transition into the role. Gérald-A. Beaudoin continued as Co-Director, representing Civil Law.

"[Ed's] style was more hands-off compared to Walter, but he ensured that there was momentum," says Seydegart. Ratushny secured the funding for what would become the Gordon F. Henderson Chair in Human Rights[61] and cemented the idea of establishing a Council of Colleagues to provide advice to the work of the HRREC. This group of international and Canadian human rights advocates shared their enormous expertise, ideas and visibility in guiding the Centre's programming and direction. The distinguished group included the Honourable Rosalie Abella, a close personal friend of Ratushny, as well as Juanita Westmoreland-Traoré, Cesar Espiritu, Daniel G. Hill, and Rita Cadieux, to name just a few.

While he was Director, Ratushny also worked in his own capacity on the team formed by federal Cabinet Minister Lloyd Axworthy on reforming Canada's refugee determination system and improving accessibility rights for airline passengers with disabilities. Ratushny brought exposure to the HRREC through his external outreach. He remained as Director until 1986, at which time the baton was passed to Gérald-A. Beaudoin. Ratushny felt it was a good thing to have the position of Director alternate between the Common Law and Civil Law Sections of the faculty because the HRREC was a bilingual and bi-juridical organization, and its leadership should embody that same principle.

Charter-Related Achievements during the First Five Years

The nascent HRREC quickly immersed itself in Charter-related education and outreach. In 1982, at the request of the Department of Justice, the HRREC collaborated with the Canadian Institute for the Administration of Justice to conduct over forty seminars around the country to educate Canadian lawyers and the judiciary about the constitutional interpretation of the Charter.[62] "We were very conscious of the limited impact that the *Canadian Bill of Rights* of 1960 had had after its adoption. The bar had invoked it sparingly and the courts had construed it narrowly. We did not want the same thing to happen with the Charter," explained Barry Strayer.[63] "We did our best to inform the bar and the bench about the

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[61] See the holders of the Chair online at: https://www2.uottawa.ca/research-innovation/hrrec/research/gordon-henderson-chair The current Chair-holder, Professor Penelope Simons, was appointed in 2021 for a three-year term.

[62] Strayer, *supra*, note 18, 167.

[63] *Ibid*., 166.

Charter," he added. The HRREC also partnered with the Canadian Legal Information Council (CLIC) in 1982 to create an interim reporting service on Charter decisions.[64] The Centre briefed and filed all Charter-related cases forwarded to them by CLIC until April 1983, when legal publishing firms began reporting Charter decisions.

When the Charter came into effect, well before Sections 15 and 28 were activated, the federal government funded a programme to allow rights-seekers to prepare for and test the laws of the country against the new provisions of the Charter. This "Court Challenges Programme"[65] was an incredible initiative, independently administered as a non-governmental organization and sustained for many years, in different iterations. For several years, it was housed at the HRREC, where it continued to examine laws and policies that might be in contravention of the Charter, and to take test cases forward into the courts for clarification. The Women's Legal Education and Action Fund (LEAF) was a separate organization preparing such test cases on women's rights, and, together, the two initiatives studied hundreds, if not thousands, of laws and policies and won some major cases in the courts.[66] An important aspect of this movement was the fact that the federal government was willing to be challenged by independent operators, even while providing the financial means to do so. "It is difficult to imagine this type of initiative happening in so many 'democracies' in the world today," says Seydegart.

Associate Director Gérald-A. Beaudoin traveled across Canada and around the world attending human rights conferences and presenting papers on the Charter while on sabbatical in 1983.[67] In the Fall of 1983, the HRREC released the first edition of the *Canadian Human Rights Yearbook*, an annual publication featuring articles on a wide range of human rights topics from a variety of disciplinary perspectives.[68] The foreword, written by Walter Tarnopolsky and Gérald-A. Beaudoin, reads:

"Canadians are in the midst of experiencing the first effects of the Charter of Rights and Freedoms. This constitutional document is complemented by several provincial Charters and Bills of Rights, as well as anti-discrimination codes in all jurisdictions, and by numerous other individual laws affecting fundamental rights. It is for our Canadian courts to give real effect to these many instruments: our judiciary has a major responsibility for effective interpretation of these statutory beginnings."[69]

In December 1983, the HRREC celebrated the 35th Anniversary of the Universal Declaration of Human Rights (UDHR) by hosting a conference planned by a coalition of local and national non-governmental organizations chaired by Magda Seydegart and funded by the Department of Justice and the Secretary of State. The conference, which ran from 8 to 11 December, attracted close to 300 domestic and international attendees, and included dozens of workshops, plenary sessions, a human rights information fair, a vigil on Parliament Hill on Human Rights Day (10 December), and a special banquet.[70] Seydegart affirmed that the Charter was an important focus of discussion and study throughout the conference.

By 1984, "the Centre ha[d] established a solid reputation for research, education and promotion" and many groups "view[ed] the Centre as an important source of human rights expertise."[71] An example of the expanding impact of the HRREC is when the Honourable Brian Dickson, Chief Justice of the Supreme Court of Canada, requested a copy of the resource library's Charter bibliography. According to Iva Caccia, it was the only complete bibliography on the Charter, covering 400 items.[72] The bibliography was published in the *Canadian Human Rights Yearbook* in 1985.

In August 1985, the HRREC held its first Summer College in Human Rights, a two-week intensive, residential training programme for human rights advocates.[73] This

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[64] Human Rights Research and Education Centre Annual Report 1982-1983, 4.

[65] For the current iteration of the Court Challenges Programme, run by the University of Ottawa, see: https://pcjccp.ca/

[66] On the substantial work of LEAF, including its litigation, see: https://www.leaf.ca/

[67] Human Rights Research and Education Centre Annual Report 1983-1984, 2.

[68] *Ibid*., 8.

[69] Walter Tarnopolsky and Gérald-A. Beaudoin, "Foreword", Canadian Human Rights Yearbook (Toronto: Carswell, 1983), iii.

[70] Human Rights Research and Education Centre Annual Report 1983-1984, 12.

[71] *Ibid*., 3.

[72] Human Rights Research and Education Centre Annual Report 1984-1986, 4.

[73] *Ibid*., 6.

pilot project was a big success. "[The Summer College] was directly connected to the environment people were creating around the Charter. Individuals needed more training in order to understand the provisions of the Charter. It was a response to a perceived and heard need," says Seydegart, who spearheaded the project. The curriculum included topics such as the theory and practice of the Charter, rights as values in conflict, employment equity, affirmative action, racism and international human rights. Participants included teachers, trade union members, women's rights activists and advocates of various special interest groups such as disability rights and Indigenous rights. The diversity of participants was especially symbolic given that the equality rights provisions of the Charter had just come into force in April 1985.

After acquiring its first computer in March 1986, the documentation centre launched its electronic human rights database called HURICAN, short for Human Rights Canada.[74] "The Centre's role was not only to find, but to disseminate information about the Charter," notes Caccia. Students had been writing case summaries since the first Charter decisions began to appear, and the Centre wanted to make these summaries accessible outside of the university. The documentation centre had also compiled bibliographies on different Charter issues that could be useful to human rights groups and researchers domestically and abroad. The work the HRREC accomplished during its first five years of operation would have a lasting impact for years to come, not least through the shaping of a generation of advocates, scholars and judges.

THE CHARTER'S INFLUENCE ON HUMAN RIGHTS AND ON THE HRREC

In addition to creating a legal framework for the defence of human rights, the Charter represented a cultural shift.[75] The Charter impacted all areas of law and life from mobility rights to minority language educational rights to gender equality rights. If one thing is certain, it's that the Charter made the language of human rights itself more accessible. "[The Charter] led to a heightened awareness of human rights among the population and lawmakers, changes in law enforcement, and equality rights," says Barry Strayer. Likewise, Ed Ratushny commented that "while the common law did have some creativity in some areas of law, there weren't the overarching values that the Charter has." According to Magda Seydegart, "the people who cared about the Charter created an atmosphere of possibility that made the 1980s very dynamic because there was so much to talk about, so much to interpret, so much to contest and experiment with both legally through court challenges and through research, discussion and advocacy."

The Charter sparked an interest in human rights jurisprudence on the provincial as well as the federal level in conjunction with raising awareness about rights and freedoms. According to Marilou McPhedran, for the most part, this jurisprudence was unknown until the Charter came into effect. Seydegart eloquently captures both prongs of the Charter's footprint: "It was a game changer — both in jurisprudence, in creating a model of a positive people-oriented rights platform for policy and life in Canada, and for bringing hope to many different groups of people who had been traditionally disadvantaged."

The "living tree" doctrine is a helpful tool to reflect about how human rights issues from the time of the Charter are still relevant today. The "living tree" doctrine holds that the interpretation of the Constitution must evolve alongside society to account for new social, political and historical realities unimagined by its architects.[76] While progress has been made in many areas of human rights, regressive action has been taken in others, putting the robustness of the Charter's rights guarantees — and for *whom* exactly they are guaranteed — into question.

An example of a population on the receiving end of fragmented rights protections are Indigenous peoples. Until the 1951 amendments of the *Indian Act*, Indigenous customs and ceremonies were outlawed, Indigenous peoples were banned from hiring legal counsel and they could not gather in groups of more than three, among other restrictions.[77] The 1969 White Paper, proposed by the Trudeau government, sought to eliminate Indian legal status altogether in the name of equality among all Canadians, though it was abandoned after drawing fierce protest from Indigenous peoples from across the country who sought to maintain their special legal status.[78]

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[74] *Ibid*., 5.

[75] Clément, *supra*, note 2, 53.

[76] Allan Hutchinson, "Living Tree?", *Constitutional Forum constitutionnel* 3, No. 4 (1992): 97, https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1721&context=scholarly_works

[77] "The Indian Act", First Nations & Indigenous Studies: The University of British Columbia, https://indigenousfoundations.arts.ubc.ca/the_indian_act/

[78] *Ibid*.

Throughout this period, the residential schools system continued to remove children from their families and strip them of their identities. First Nations women were disenfranchised, losing their status if they married non-status men, until 1985. Despite landmark Supreme Court decisions reinforcing the Aboriginal rights guaranteed by Section 25[79] of the Charter and Section 35[80] of the *Constitution Act, 1982*, these rights and others are often neglected. The status of Indigenous rights today is still a highly complex and discouraging story. Many reserves still lack access to clean drinking water. Indigenous fishermen/women face opposition from non-Indigenous fishermen/women while trying to make their livelihoods. Thousands of Indigenous women and girls remain unaccounted for, and the recent discoveries of remains at former residential school sites are painful reminders of the ill-treatment of Indigenous peoples by churches and the State, barely even scratching the surface of rights abuses suffered as a result of colonization.

"Human rights have moving boundaries," says Pearl Eliadis, "In the broader population, we're only starting to understand the significance of what rights mean in a deep way for people who have not always had a voice. Racialized communities, Black and Indigenous peoples are asking us to take a different approach to how we've always seen rights. We all need to learn from those demands and evolve our own understandings."

Besides frustrations arising from the unequal protection of rights, there are other problems with the Charter. Julius Grey worries that society is losing focus on the individual, stating that "today, the Charter is far too concerned with collective rights and not enough with basic civil liberties." He also pointed to growing inequality both in terms of wealth and law enforcement powers: "If you look at today's world, you find that sentences are heavier [and] there is greater police control, so somehow, while the Charter [has done] certain good things, it wasn't enough to stop the slide toward control. Similarly, if we talk about equality, we live in a society in which the rich are richer and the poor are poorer than in 1982, so in that sense the Charter has not succeeded."

One can also turn to recent invocations of the notwithstanding clause, or Section 33[81] of the Charter, in Québec (Bill 21 – An Act respecting the laicity of the State and Bill 96 – An Act respecting French, the official and common language of Québec) and Ontario (Bill 307 – An Act to amend the Election Finances Act) as causes for concern. Despite its drawbacks, the Charter remains one of the most symbolically important elements of the Canadian polity due to Canadians' continued belief in and adherence to the values it represents. The rights contained therein are not unlimited; however, Charter protections set the baseline and offer hope and opportunity for further interpretation in the advance of human rights.

As for the HRREC, the history of the Centre is certainly a Charter story, but it is more than just a Charter story. At the time of its founding, the HRREC was different from other centres because it concentrated equally on domestic and international human rights. "We pushed the limits sometimes of what a university could do. People appreciated that because they saw that the Centre wasn't totally conventional or traditional in terms of its approach," says Magda Seydegart; "sometimes issues need a different take." The HRREC raised international awareness about the Charter in different capacities. The *Constitution Act, 1982* and the Charter were studied extensively in Eastern Europe, Zimbabwe, Senegal, and in South Africa, especially after the end of apartheid. The HRREC provided researchers, legislative drafters and rights-seekers from these countries with advice and access to materials on the Charter.

Human rights advocates are often written out of the mainstream history, but the work they do is invaluable. Marilou McPhedran advises conceiving of rights as a "trialogue" between the government, the judiciary and advocates, rather than as a dialogue limited to the government and the courts. Institutions like the HRREC witness how human rights issues directly affect peoples' day-to-day lives, and, therefore, have unique insight as to what ought to be changed or improved. There are now at least 18 university-based human rights and civil liberties research centres or programmes across Canada.[82] The HRREC paved the way for these institutions to exist within

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[79] "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including: a. any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and b. any rights or freedoms that now exist by way of land claim agreements or may be so acquired."

[80] "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

[81] "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter."

[82] "Canadian Association of Human Rights Institutes (CAHRI)", Atlantic Human Rights Centre, https://wp.stu.ca/ahrc/association-of-canadian-human-rights-institutes/; "Canadian Law Research Centres and Institutes", Canadian-Universities.net, www.canadian-universities.net/Law-Schools/Law_Centres_and_Institutes.html

and alongside academia. The Centre has played and continues to play an important role in creating a safe space for Charter issues and human rights issues more generally to be discussed, debated and explored.

Conclusion

It is generally agreed that, over the years, Canada has developed a reputation for being a human rights respecting and promoting country. A major development in Canadian human rights history was the entrenchment of the *Canadian Charter of Rights and Freedoms in the Constitution Act, 1982*, owing to individuals like Pierre Elliot Trudeau and Barry Strayer, and to the countless advocates who fought for constitutional protections for democratic rights, mobility rights, legal rights, equality rights, protection of official languages, minority education language rights, and the rights of Indigenous peoples. The HRREC came into being intentionally, just as the Charter was being elaborated and adopted, and played an instrumental role in helping the judiciary, academia, advocates and the public to understand the Charter, its values, content and potential. The significance of the Charter is beyond description — it was fundamental in 1982 and it remains vital today, nearly forty years later. Analogously, the HRREC has been a pillar for human rights research and education not only in Ottawa, but throughout Canada and internationally. Indeed, the imagination, energy, resources and relations of the HRREC from its founding and early years inspired those who followed to continue the work and to undertake new initiatives reaching to various corners of the world.[83] While that is a story yet to tell, as we celebrate the 40th anniversary of the HRREC, we remember that what once started as a dream of a bilingual, bi-juridical, independent research and education centre in the nation's capital has made an immense impact thanks to Walter Tarnopolsky, Magda Seydegart, Ivana Caccia, Ed Ratushny, Gérald-A. Beaudoin, and those who have carried on their legacy over the past forty years and for years to come.

Acknowledgements

The author is grateful to those interviewed for the generosity of their time and care, notably to Barry Strayer for his commentary on the development of the Charter and to Ed Ratushny, Ivana Caccia and Magda Seydegart for their oral histories and reflections on the early years of the HRREC, as well as to Julius Grey, Marilou McPhedran and Pearl Eliadis for their contributions.

[83] For those interested, accounts are available in the many Annual Reports on file with the HRREC as well as a decade of the Canadian Human Rights Yearbook (beginning 1983).

BIBLIOGRAPHY

PRIMARY SOURCES

Beltrame, Julian, "Human rights institute third on the continent", *The Ottawa Citizen*, 6 May 1981.

Caccia, Ivana, "Ten Years of Service: Facts about the Canadian Collection of the Human Rights Documentation Centre", University of Ottawa, 1993.

Government of Canada, "A Canadian Charter of Human Rights", 1968, http://primarydocuments.ca/wp-content/uploads/2018/04/CanChartHumRights1968-1.pdf

Human Rights Research and Education Centre, Annual Report 1982-83.

Human Rights Research and Education Centre, Annual Report 1983-84.

Human Rights Research and Education Centre, Annual Report 1984-86.

Interview with Barry Strayer, 15 June 2021.

Interview with Ed Ratushny, 21 April 2021.

Interview with Ed Ratushny, 4 June 2021.

Interview with Ivana Caccia, 17 May 2021.

Interview with Ivana Caccia, 14 June 2021.

Interview with Julius Grey, 14 June 2021.

Interview with Magda Seydegart, 19 April 2021.

Interview with Magda Seydegart, 11 June 2021.

Interview with Marilou McPhedran, 18 June 2021.

Interview with Pearl Eliadis, 16 June 2021.

The Constitution Acts, 1867 to 1982. https://laws-lois.justice.gc.ca/PDF/CONST_TRD.pdf

SECONDARY SOURCES

Atlantic Human Rights Centre, "Canadian Association of Human Rights Institutes (CAHRI)", https://wp.stu.ca/ahrc/association-of-canadian-human-rights-institutes/

Canadian Centre for Diversity and Inclusion, "Overview of Human Rights Codes by Province and Territory in Canada", https://ccdi.ca/media/1414/20171102-publications-overview-of-hr-codes-by-province-final-en.pdf

Canadian-Universities.net, "Canadian Law Research Centres and Institutes", www.canadian-universities.net/Law-Schools/Law_Centres_and_Institutes.html

Centre for Constitutional Studies, "Patriation", www.constitutionalstudies.ca/2019/07/patriation/

Clément, Dominique, "Rights Without the Sword are but Mere Words: The Limits of Canada's Rights Revolution," in Janet Miron (ed.), *A History of Human Rights in Canada: Essential Issues* (Toronto: Canadian Scholars' Press, 2009).

Clément, Dominique, Will Silver and Daniel Trottier, "The Evolution of Human Rights in Canada," Canadian Human Rights Commission, 2012, www.chrc-ccdp.gc.ca/sites/default/files/ehrc_edpc-eng.pdf

Diefenbaker Canada Centre, "The Canadian Bill of Rights", https://diefenbaker.usask.ca/exhibits/online-exhibits-content/the-canadian-bill-of-rights.php#IamaCanadianafreeCanadian

Dodek, Adam, *The Charter Debates: The Special Joint Committee on the Constitution, 1980-81, and the Making of the Canadian Charter of Rights and Freedoms* (Toronto: University of Toronto Press, 2018).

E.T. Jackson and Associates Ltd., "Team Bios", http://etjackson.com/team-3/team-bios/

First Nations & Indigenous Studies: The University of British Columbia, "The Indian Act", https://indigenousfoundations.arts.ubc.ca/the_indian_act/

Government of Canada, "Canadian Charter of Rights and Freedoms in various languages – Canadian Charter of Rights and Freedoms – English version (certificate format)", https://opencanada.blob.core.windows.net/opengovprod/resources/adf3e432-4076-435b-88fb-46f094bc1ac4/en3_canadian_charter_qc.pdf?sr=b&sp=r&sig=dKWE3C6HNpvZ5qmSTJ%2BIJWx2W7QAxAxrpOxIkE77oWE%3D&sv=2015-07-08&se=2021-09-13T05%3A04%3A49Z

Hawthorn, Tom, "Former editor recalls frightening fight for liberty," *The Globe and Mail*, 27 October 2005, www.theglobeandmail.com/news/national/former-editor-recalls-frightening-fight-for-liberty/article988944/

Hucker, John and Bruce McDonald, "Securing Human Rights in Canada", *McGill Law Journal* 15, No. 2 (1969): 220-243, https://lawjournal.mcgill.ca/wp-content/uploads/pdf/8692000-mcdonald.pdf

Hudson, Manley, "Notes on the Statute of Westminster, 1931", *Harvard Law Review* 46, No. 2 (1932): 261-289, https://www.jstor.org/stable/1332217

Hutchinson, Allan. "Living Tree?", *Constitutional Forum constitutionnel* 3, No. 4 (1992): 97-99, https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1721&context=scholarly_works

International Commission of Jurists Canada, "About Walter Tarnopolsky", https://www.icjcanada.org/index.php/en/about-us/tarnopolsky-award/about-walter-tarnopolsky.html

Jarvis Archives and Museum, "Magda Seydegart – Class of 1967", https://jarvisarchives.ca/main/2020/05/18/magda-seydegart-class-of-1967/

McPhedran, Marilou, Judith Erola and Loren Braul, "28 – Helluva Lot to Lose in 27 Days: The Ad Hoc Committee and Women's Constitutional Activism in the Era of Patriation" in Lois Harder and Steve Patten (eds.), *Patriation and Its Consequences* (Vancouver: UBC Press, 2015).

Morrow, Martin, "From outlier to champion: Canada's uneven record on human rights," *The Globe and Mail*, 23 October 2020, theglobeandmail.com/featured-reports/article-from-outlier-to-champion-canadas-uneven-record-on-human-rights/

Ontario Human Rights Commission, "Teaching human rights in Ontario – A guide for Ontario schools", www.ohrc.on.ca/en/teaching-human-rights-ontario-guide-ontario-schools/appendix-2-%E2%80%93-human-rights-historical-context

Saskatchewan Human Rights Commission, "70th Anniversary of the Saskatchewan Bill of Rights Act", https://saskatchewanhumanrights.ca/70th-anniversary-of-the-saskatchewan-bill-of-rights-act/

Strayer, Barry, *Canada's Constitutional Revolution* (Edmonton: University of Alberta Press, 2013).

Strayer, Barry, "The Constitution Act, 1982: the Foreseen and Unforeseen", *Constitutional Forum constitutionnel* 16, No. 2 (2007): 51-61, https://doi.org/10.21991/C9C09S

Tarnopolsky, Walter, "Discrimination in Canada: Our History and Our Legacy". Paper presented at the Canadian Institute for the Administration of Justice Seminar on Discrimination in the Law, Kananaskis, Alberta, 12 October 1989.

Tarnopolsky, Walter and Gérald-A. Beaudoin, "Foreword", *Canadian Human Rights Yearbook* (Toronto: Carswell, 1983).

Tarnopolsky, Walter and Gérald Beaudoin (eds.), *The Canadian Charter of Rights and Freedoms: Commentary* (Ottawa: Carswell, 1982).

Tetley, William, *The October Crisis, 1970: an insider's view* (Montréal: McGill-Queen's University Press, 2006).

University of Ottawa Faculty of Law, "Reunion: Common Law History at the University of Ottawa", https://commonlaw.uottawa.ca/sites/commonlaw.uottawa.ca/files/cguindon_uofo_common_law_eng_web.pdf

SPECIAL SECTION:
THE COVID-19 PANDEMIC AND HUMAN RIGHTS

EDITOR'S NOTE:

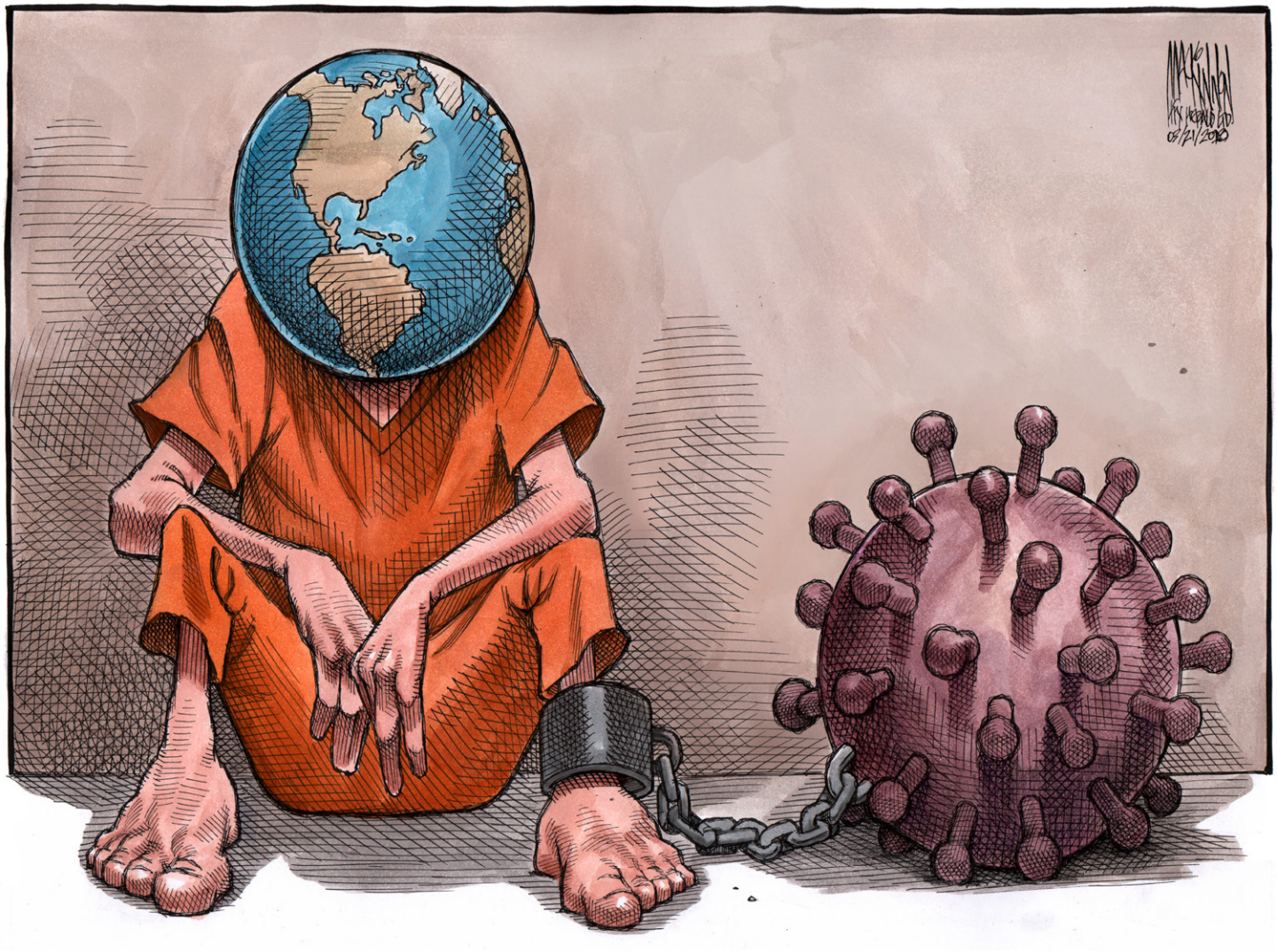
The following Special Section of the CYHR emerged in response to the sudden and far-reaching crisis brought to Canada in early 2020—within the period of this Yearbook. The eight articles were received from or through seven member entities of the 20-member Canadian Association of Human Rights Institutes—CAHRI (https://wp.stu.ca/ahrc/association-of-canadian-human-rights-institutes/) responding to an invitation from the Yearbook. A total of twenty scholars contributed. The topic for each article was chosen by its contributors in response to the invitation. As he stepped down from his role as Secretary General of Amnesty International Canada (English Section), Alex Neve agreed to contribute to the Special Section as Guest Editor and to provide an overview. The substantive contributions are preceded by two award-winning political cartoons from the 2020 competitive exhibition #COVICATURE (https://contekst.education/covicature) curated by Dr Omid Milani.

NOTE DE LA RÉDACTION :

La Section spéciale suivante de l'ACDP a vu le jour en réponse à la crise soudaine et de grande portée qui a frappé le Canada au début de 2020—pendant la période couverte par le présent Annuaire. Les huit articles ont été reçus de sept entités membres de l'Association canadienne des instituts des droits de la personne—ACIDP (https://wp.stu.ca/ahrc/association-of-canadian-human-rights-institutes/), qui compte 20 membres, en réponse à une invitation de l'Annuaire. Au total, vingt chercheurs y ont contribué. Le sujet de chaque article a été choisi par ses contributeurs en réponse à l'invitation. En quittant son poste de Secrétaire général d'Amnistie internationale Canada (Section anglaise), Alex Neve a accepté de contribuer à la Section spéciale en tant que rédacteur invité et de donner une vue d'ensemble. Les contributions substantielles sont précédées de deux caricatures politiques primées de l'exposition compétitive 2020 #COVICATURE (https://contekst.education/covicature) organisée par le Omid Milani, Ph.D.

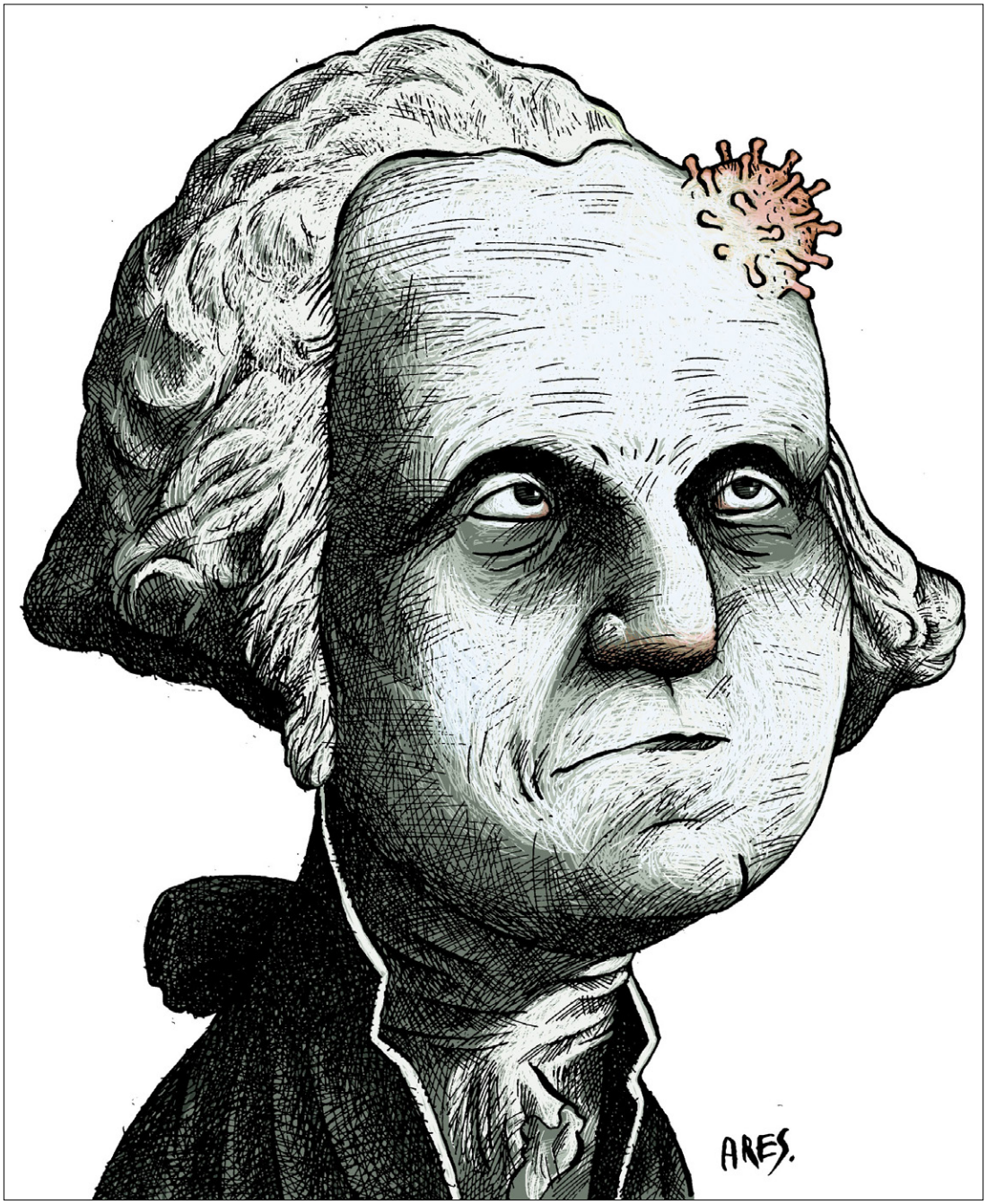
SELECTED POLITICAL CARTOONS

#Covicature: Our World amid Covid-19" (curated by Dr Omid Milani, HRREC & Contekst, 2020) – a showcase of satirical and comic cartoons on novel realities of our world impacted by the Covid-19 pandemic and broadly relating to human rights, justice, peace and well-being; for the gallery, see: https://contekst.education/covicature/



BRUCE MACKINNON, HALIFAX, NS, CANADA (2020).

For more than 30 years, Bruce MacKinnon (1961) has been the editorial cartoonist for the *Halifax Chronicle Herald*. Over his career he has won numerous regional, national and international awards. His work has been published and exhibited across the globe, and is part of the permanent collections of the National Archives of Canada, the U.S. Library of Congress and the Art Gallery of Nova Scotia among other galleries and institutions. He is a member of the Order of Nova Scotia and the Order of Canada.



ARÍSTIDES HERNÁNDEZ GUERRERO (ARES), HAVANA, CUBA (2020).

A self-taught artist, Ares (1963) is an M.D. specialized in Psychiatry. Ares currently works in Havana as a freelance artist working on cartoons, book illustrations, posters, paintings and tridimensional pieces. His works have been published since 1984 in prestigious Cuban publications and numerous media worldwide and has been exhibited around the world. He has published twenty-four books and has contributed to illustrating ninety other books. Ares has participated in the most important and diverse humour events worldwide, winning 102 national and more than 150 international awards, including the World Press Cartoon Grand Prix and The United Nations Ranan Lurie First Award. He was nominated in the international list of World Best Cartoonists in 1994 by Witty World International Cartoon magazine (United States), included in the Cuban Art Memory Book as one of the most relevant visual artists of Cuba in the 20th Century. In 2002 Ares was honoured with the National Award for Community Culture of Cuba.

PREFACE: COVID-19 – HUMAN RIGHTS MUST CHART THE WAY FORWARD

Alex Neve

> The virus threatens everyone. Human rights uplift everyone. By respecting human rights in this time of crisis, we will build more effective and inclusive solutions for the emergency of today and the recovery for tomorrow.[1]

How could this edition of the Canadian Yearbook of Human Rights not devote focused attention to COVID-19, which has dominated and shaped our lives and our world on an unprecedented scale since the spring of 2020? Particularly so given that critically, everything – absolutely everything – about the nature and consequences of the COVID-19 pandemic is entirely about human rights.

Most obviously and urgently, the virus itself represents a direct threat to two fundamental human rights, the right to health and the right to life. The global numbers are staggering and continue to rise daily. As of mid-July 2021, nearly 190 million people have contracted COVID-19 worldwide and more than 4 million people have died from the virus.[2]

As governments have scrambled to respond to this colossal crisis, the fallout has unleashed a cascading series of human rights challenges and debates about how far governments can and should go in limiting other human rights when an emergency compels action to combat a grave threat such as this pandemic.

The many necessary public health restrictions that have become so present and pervasive in all aspects of our lives, most centrally through the various lockdown and isolation measures that have been enacted around the world as a means of containing the spread of COVID, have directly, though generally justifiably, impacted negatively on numerous human rights. Those serious rights concerns include freedom of movement, livelihood rights, privacy considerations related to tracking and policing, and rights associated with accessing justice and education in the face of decisions to scale back and even temporarily close courts and schools. The fundamental freedoms of association, assembly and expression have been constrained because public meetings, rallies and other events have been prohibited or limited. Liberty rights are asserted by individuals who insist they should not be forced to comply with mask or physical-distancing regulations, scale back religious services, temporarily shutter their businesses or be required to be vaccinated.

The pandemic has also opportunistically been used as a pretext by authoritarian governments to extend the means by which they violate human rights, using fabricated or exaggerated public order and health accusations to target journalists, human rights defenders and opposition figures for harassment, threats, arrest and imprisonment. And some measures, even when generally defensible, have been overbroad in their reach, such as the ways that the right of refugees to seek asylum has suffered due to travel restrictions and border closures.

These are some of the clear ways that the pandemic and the response to it have affected human rights and given rise to violations. At the same time, COVID-19 has shone the light on longstanding and deeply entrenched human rights concerns that have been more visibly revealed and often exacerbated by the virus and the measures being taken to contain it. These are deeply entrenched realities of systemic racism, violence and discrimination against women and LGBTQI+ individuals, and inequalities faced by Indigenous peoples, people living with disabilities, people without regularized or permanent immigration status, older people, children and youth, people in detention, people facing inadequate housing and homelessness, people living in poverty, and other vulnerable populations.

The impact on these communities has been undeniably disproportionate and the availability of and ability equally and non-discriminatorily to access measures of mitigation and relief much more difficult. Governments themselves have certainly acknowledged and recognized these grave underlying systemic concerns, though their efforts meaningfully to address the associated inequalities have largely been lacking. Early in the pandemic, the President of the UN Human Rights Council referred to this reality in an official statement delivered on behalf of the Council:

> Deeply concerned that the COVID-19 pandemic perpetuates and exacerbates existing inequalities, and that those most at risk are persons in vulnerable and marginalized situations, including older persons, migrants, refugees, internally displaced persons, persons with disabilities, persons belonging to minorities, indigenous peoples, persons deprived of their liberty, homeless persons and persons living

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[1] UN Secretary General António Guterres, We are all in this Together: Human Rights and COVID-19 Response and Recovery, 23 April 2020, https://www.un.org/en/un-coronavirus-communications-team/we-are-all-together-human-rights-and-covid-19-response-and.

[2] World Health Organization, *WHO Coronavirus (COVID-19) Dashboard*, https://covid19.who.int/.

> in poverty, and recognizing the need to ensure non-discrimination and equality while stressing the importance of age- and gender-responsive and disability-sensitive measures in this regard...[3]

Crucially, access to essential health care to treat COVID and to reduce or prevent its contraction and transmission also centrally raises vital human rights considerations, most glaringly represented by the blatantly inequitable availability and distribution of vaccines around the world. Those inequities mirror concerns about racism, inequity and social and economic divisions in our world.

Of course, when it comes to considering the human rights aspects of the virus it is important not only to consider how past and existing concerns have worsened or to examine the ways in which COVID and COVID response measures have given rise to a wide range of new violations, it is also about the future. Amidst the talk about and also the emerging plans for recovering from and rebuilding after the pandemic, human rights must be front and centre. This must not be allowed to become a lost opportunity to address some of the notoriously well-known shortcomings of the international human rights system, including abysmally weak enforcement and compliance measures, the inadequacy of international solidarity in upholding human rights, and the consistent failure to accord economic, social and cultural rights full recognition and respect.

The eight thoughtful and thought-provoking articles in this special section of the Yearbook unpack and examine many of these COVID-related human rights concerns. Most do so by assessing the impact of the pandemic on vulnerable populations already experiencing serious and systemic human rights violations.

Looking at native people, women, people living in poverty, people without regularized immigration status, prisoners, children with additional educational needs and children more broadly, and our food security frameworks, the authors all compelling document and describe the associated human rights concerns and present recommendations for legal, policy, institutional and other actions and reforms to alleviate those concerns.

Craig Blacksmith, Stewart Hill, Trea Stormhunter, James Queskekapow and Shirley Thompson consider COVID's disproportionate impact on native people in Canada, convincingly demonstrating that to be in large part rooted in the legislated injustices, inequality and racism of the Indian Act which they powerfully assert must be repealed.
Christina Szurlej examines the ways that COVID has exacerbated existing inequalities and disadvantages faced by women, with a focus on employment, unpaid care work, and domestic violence, drawing out the intersectional dimensions of these concerns.

Sid Frankel asks whether poverty is a human rights violation, documents the many ways that people living in poverty have been differentially impacted by the pandemic and looks at the deficiencies in the responses of governments in Canada to that reality.

Anna Purkey turns to the border and highlights the situation of temporary foreign agricultural workers and asylum seekers in Canada, two groups for whom lack of regularized immigration status has led to increased risks of COVID and other human rights concerns.

Examining prisons both in and as a pandemic, Justin Piché, Sarah Speight and Kevin Walby lay out the failures to properly protect prisoners from the higher risks of COVID that inevitably arise in a crowded, institutional setting and make the case for a stronger drive for decarceration.

Two papers focus on challenges faced by children. Nadine Bartlett, Rebeca Heringer, Gee-ef Nkwenta and McKenzie Martens discuss the impact of COVID-related decisions to scale back schooling on children with additional educational needs and present a proposal for a rights-based approach to inclusive education.

Virginia Caputo and Landon Pearson examine the broader implications of the pandemic on children, including food security, social relationships, access to outdoor play spaces, and access to mental health support, and assess three initiatives in making the case for a rights-based approach to children's programming.

And finally, with the number of people in the world on the verge of starvation doubling during the pandemic and increased human rights violations faced by people involved in our food supply chains, Nandini Ramanujam and Sarah Berger Richardson argue for people-centred food security frameworks.

There are of course many ways that the responses of governments to the pandemic have protected human rights and alleviated human rights suffering through funding and programming. However, rarely has that resulted from intentionally taking an explicit human rights approach grounded in a clear human rights framework. In fact, early in the pandemic a widely endorsed call from over 300 civil society groups, Indigenous Peoples' organizations, experts and academics to put human

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[3] *Human rights implications of the COVID-19 pandemic*, Statement by H.E. Ambassador Elisabeth Tichy-Fisslberger, President of the UN Human Rights Council, UN Doc. A/HRC/PRST/43/1, 2 June 2020, https://undocs.org/en/A/HRC/PRST/43/1.

rights concretely at the core of COVID-19 responses was largely ignored.[4]

That in turn is reflective of long-established tepid government attitudes to human rights, ranging from frequent and blatant violations and disregard for rights obligations at worst, to lipservice marked by unmet promises or action when it is convenient and politically advantageous to do so at best.

The ugly human rights truths that COVID has laid bare and the unrelenting toll of the virus and COVID response measures on human rights have made it abundantly clear that human rights can no longer be treated as mere wishful aspirations, They are essential to our sustainable well-being at a foundational level both individually and collectively. No longer can they be pushed to the side or left for another day. Human rights must at last be brought to the fore.

[4] *A call for human rights oversight of government responses to the COVID-19 pandemic*, 15 April 2020, https://amnesty.ca/sites/default/files/COVID%20and%20human%20rights%20oversight%20public%20statement%20FINAL_0.pdf.

THE INDIAN ACT VIRUS: COVID-19 OUTCOMES FOR CANADA'S NATIVE PEOPLE

Craig Blacksmith, Shirley Thompson, Keshab Thapa, Stewart Hill and Trea Stormhunter

Abstract: Native people in Canada experienced higher rates of COVID-19 and worse outcomes than non-Native people. COVID-19 data shows that Native people have much higher hospitalization, death, and transmission rates than non-Native people. These inequalities incriminate Canada's failure to uphold sections 1 to 30 of the Universal Declaration of Human Rights and sections 1, 7, 12, 15 of the Canadian Charter of Rights. Discrimination against Native people in Canada is systemic and institutional. Inequality towards Native people is embedded in the Indian Act since 1867 to the present. enacting inhumane treatment of Native people as "wards of the state", which results in higher health risks, including COVID-19, for Native people. Socio-economic and structural inequities place Native people at higher risk for COVID-19. The Crown's role as the land trustee to Canada's Native people indicts them for underfunding, underdevelopment, and inadequate health care in Native communities. Most rural and remote Native communities in Canada lack hospitals, drinking water pipes, adequate housing, all-weather roads, and the bandwidth needed for distance education. The lack of bandwidth caused some Native communities to lose their 2020/21 school year under lockdown. These inequalities contravene the human right to education and a decent living standard. This chapter discusses how the Indian Act behaves like a virus to entrench marginalization, poverty and health risks for Native people. The Indian Act virus created the perfect storm for COVID-19 to cause maximum devastation to Native people's health, livelihoods and education. Removing the Crown trustee is needed to stop denying Native people's humanity and provide the vaccine needed to heal from the Indian Act virus and rebuild better in Native communities after COVID-19.

Keywords: Indian Act, COVID-19, Indigenous people, Native people, human rights

INTRODUCTION

Native people have elevated COVID-19 rates and deaths in Canada compared to non-Native people.[1] Vaccines were prioritized for Native people recognizing their higher COVID-19 risk without the infrastructure and services to cope.[2] These higher COVID-19 rates reflect worse infrastructure, services, and legal mechanisms, in "Indian" reserves than in non-Native communities.[3]

Most rural and fly-in Native communities throughout Canada have deficient infrastructure lacking: hospitals, safe drinking water, adequate safe housing, and the bandwidth needed for distance education.[4] This substandard infrastructure and services in communities contravene human rights to education and a decent living standard.[5]

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1 Indigenous Services Canada, "Confirmed cases of COVID-19" (20 August 2021) online: *Indigenous Services Canada* <https://www.sac-isc.gc.ca/eng/1598625105013/1598625167707> [*ISC COVID*]; Statistics Canada. (2021, November 25). *Statistics on Indigenous peoples*. Retrieved July 2, 2021, from https://www.statcan.gc.ca/eng/subjects-start/indigenous_peoples; Public Health Agency of Canada, "Guidance on the prioritization of initial doses of COVID-19 vaccine(s)" (2020) online: *Public Health Agency of Canada* <https://www.canada.ca/en/public-health/services/immunization/national-advisory-committee-on-immunization-naci/guidance-prioritization-initial-doses-covid-19-vaccines.html> [*PHAC Vaccines*]; Shirley Thompson, Marleny Bonnycastle, & Stewart Hill, "COVID-19, First Nations and Poor Housing" (2020) online (pdf): *Canadian Centre for Policy Alternatives* <https://www.policyalternatives.ca/sites/default/files/uploads/publications/Manitoba%20Office/2020/05/COVID%20FN%20Poor%20Housing.pdf> [Thompson, "Poor Housing"].

2 *PHAC Vaccines*, *supra* note 1.

3 Craig Blacksmith, "Abolish the Indian Act: Truth and Reconciliation" posted on *Mino Bimaadiziwin Partnership* (8 July 2021) online (video): *Facebook* <https://www.facebook.com/MinoBimaadiziwinPartnership/videos/319336476504961/>; Thompson, *supra* note 1.

4 Bryce Hoye, "Manitoba First Nations disproportionately hit by COVID-19 with 11 deaths, 625 cases in past week" (4 December 2020) online: *CBC News* <https://www.cbc.ca/news/canada/manitoba/manitoba-first-nations-covid19-update-december-12-1.5828906>; Pamela Palmater, "Priority pandemic response needed for First Nations" (20 March 2020) online: *Policy Options* <https://policyoptions.irpp.org/magazines/march-2020/priority-pandemic-response-needed-for-first-nations/>; First Nations Information Governance Centre, "RHS Statistics for Shaping a Response to COVID-19 in First Nations Communities" (2020) online (pdf): *First Nations Information Governance Centre* <https://fnigc.ca/wpcontent/uploads/2020/09/0ab2092ec4f6262599ed396de5db3cf0_FNIGC-RHS-Covid-19-Report1.pdf>; Statistics Canada. (2020, April 17). *First Nations people, Metis and Inuit and COVID-19: Health and social characteristics*. Retrieved from https://www150.statcan.gc.ca/n1/en/daily-quotidien/200417/dq200417b-eng.pdf?st=KEg5MiaX; Thompson, *supra* note 1.

5 Blacksmith, *supra* note 3; Robert Joseph et al, "The Treaty, Tikanga Māori, Ecosystem-Based Management, Mainstream Law and Power Sharing for Environmental Integrity in Aotearoa New Zealand–Possible Ways Forward" (2018) online (pdf): *Waikato Print & National Science Challenge Sustainable Seas* <www.sustainableseaschallenge.co.nz/>.

In Canada, the higher COVID-19 rates experienced by Native people than non-Natives incriminate Canada for failing to uphold fundamental human rights.[6] Higher COVID-19 rates for Native people indicate human rights contravention[7] of sections 1 to 30 of the Universal Declaration of Human Rights[8] and sections 1, 7, 12, and 15 of the Canadian Charter of Rights and Freedoms.[9] According to the Universal Declaration of Human Rights, each state/government must guarantee the right to freedom, security, recognition before the law, equality, access to public services, a standard of living for a healthy life, education, employment, and cultural life of an individual, irrespective of race, class, ethnicity, and nationality.[10]

The Canadian Charter reinforces universal human rights protection. However, Native people's rights have been undermined, including rights to life, liberty and security based on the principle of fundamental justice[11]; no cruel and unusual treatment or punishment[12]; and equal protection and benefit of the law without discrimination.[13]

This article explains how Canada's Indian Act behaves like a virus to exacerbate community transmission and worsen outcomes from COVID-19 through legislating inequality. We first explain our use of the term Native people, rather than Indigenous or Aboriginal, to decolonize terminology. We then review the Indian Act's role in denying human rights, land and resources to Native people in Canada by their designation as non-human "wards of the state." We look at how the denial of Native people's human rights undermined their livelihoods, language, health and culture. We explore how unequal rights resulted in substandard infrastructure, health care and services, which created higher risks for COVID-19. The higher COVID-19 rates and outcomes for Native people are discussed. Finally, we explain the need to eradicate the racist Indian Act and inhumane living conditions to create healthier Native communities resilient to pandemics, chronic illness, and contagious diseases.

DECOLONIZING TERMS

In this chapter, we use the terms Native people and Native reserves, avoiding the problematic terms of First Nation, Aboriginal and Indigenous. These problematic labels are imposed by governments heavily invested in the doctrine of discovery and are not the terms Native people call themselves. As a result, each of these colonial terms has its controversies.

First Nation also has no legal definition, unlike Indian reserve or Native band. First Nation is a confusing term as no Native bands have any nation-state powers under Canada's jurisdiction. Internationally, "First Nations" are not recognized as nations/states for speaking rights at the United Nations ("UN") unless sponsored by a nation-state endorsed under the European standards/definition of governments. The UN recognizes the colonial state government in Canada but not the Native people's governments in Canada[14], whose Native land the Canadian state occupies. Also, Native people in Canada do not have any seats at the UN.

The term "Indigenous" has prevailed as a generic term for many years. The UN's description of Indigenous is outdated, confusing, and offensive, stating: "In some countries, there may be a preference for other terms including tribes, first peoples/nations, aboriginals, ethnic groups, Adivasi, Janajati."[15] Occupational and

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[6] Stewart L. Hill, Marleny Bonnycastle & Shirley Thompson, "COVID-19 Policies Increase the Inequity in Northern Manitoba's Indigenous Communities" in Andrea Rounce & Karine Levasseur, eds, *COVID-19 in Manitoba: Public Policy Responses to the First Wave* (Winnipeg, University of Manitoba Press 2020) 98 [Hill, "COVID-19 Policies"]; Blacksmith, *supra* note 3.

[7] *Blacksmith*, *supra* note 3.

[8] *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 [*UDHR*].

[9] *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982 c 11 [*Charter*].

[10] *UDHR*, *supra* note 8.

[11] *Charter*, *supra* note 9 at s 7.

[12] *Ibid.* at s 12.

[13] *Ibid.* at s 15.

[14] Hayden King, "UNDRIP's fundamental flaw" (2 April 2019) online: *Open Canada* <opencanada.org/undrips-fundamental-flaw/> [King, "UNDRIP's Flaw"].

[15] United Nations Permanent Forum of Indigenous Peoples, "*Report on the Twentieth Session*" (2021) online (pdf): *United Nations* <https://undocs.org/E/2021/43>.

geographical terms like hunter-gatherers, nomads, peasants, hill people also exist and, for all practical purposes, can be used interchangeably with "Indigenous people."[16] Adivasi and Janajati are the terms to represent Indigenous people in India, Bangladesh, and Nepal. Adivasi translates closely to Aboriginal, and Janajati translates to Indigenous; however, these terms, and their criteria, are imposed by the nation states to create division among Native people who lived harmoniously for generations.[17]

Further, many terms, such as hunter-gatherer, nomads, hill people, are offensive and are not considered interchangeable with Native people. Native people in Canada typically define themselves by their language, for example, the Dakota, Nehiyew, Anishinaabe, Anishininniw, Haudenosaunee, Dene and Saulteaux. Thus, to use a blanket term, like Indigenous people or Aboriginal people, in a legal construct is a colonial and divisive approach. Thus, these terms are wholly rejected in this article. Alternatively, the term native is place based but has specificity when applied to Native language, Native people, and Native land without being divisive.

DOES UNDRIP CIRCUMVENT HUMAN RIGHTS? ABORIGINAL RIGHTS?

On December 10th, 1948, the United Nations adopted the Universal Declaration of Human Rights. In 2007, 144 countries adopted the United Nations Declaration on the Rights of Indigenous Peoples.[18] Parallel sets of rights beg the question—why the need for two separate sets of rights? Are Native people not human, under the Universal Declaration of Human Rights, and needing an enforceable right? While the Universal Declaration of Human Rights is enforceable, UNDRIP is not.[19] Although UNDRIP provides some moral levers for advocacy and international review, this declaration does not disqualify national laws, including the Indian Act which legalize inequity for Indigenous people.[20] Although, the claim is that UNDRIP deepens and expands on the rights of Native people, the reality is that human rights are substituted for UNDRIP regarding Native people's concerns, which allow human rights abuse for Native people to continue.

Despite UNDRIP's profile for recognizing Native people on the world's stage, Canada refused to endorse UNDRIP until 2016. Then, in implementing UNDRIP with Bill 15 in 2021, which some have termed CANDRIP, Canada's state law effectively domesticated Native people's issues by maintaining "the status quo in terms of policy, law and institutional structures."[21] Thus, the Indian Act land trust and other racist policies remain after CANDRIP.[22] CANDRIP is another attempt at extending a "right" to Native people based on the Crown being sovereign when only the Creator, not people, can grant rights.[23] Thus, CANDRIP is merely another layer of colonial policy.[24]

A parallel rights process to the UN occurs in Canada to deny human rights to Native people.[25] In 1982, Canada adopted the Canadian Charter of Rights and Freedoms and a separate charter of Aboriginal rights, section 35 in the Canadian Constitution. Section 36 of the Canadian Constitution states that "Parliament and the legislatures, together with the Government of Canada and the provincial governments, are committed to: (a) promoting equal opportunities for the well-being of Canadians; (b) furthering economic development to reduce disparity in opportunities, and (c) providing essential public services of reasonable quality to all Canadians."[26] The disparities in

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[16] *Ibid*.

[17] Blacksmith, *supra* note 3.

[18] *Declaration on the Rights of Indigenous Peoples*, 2 October 2007, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49 [*UNDRIP*].

[19] King, "UNDRIP's Flaw", *supra* note 14.

[20] United Nations Permanent Forum of Indigenous Peoples, "Indigenous Peoples, Indigenous Voices Factsheet" (2004) online (pdf): *United Nations* <https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf>.

[21] Sheryl Lightfoot in King, "UNDRIP's Flaw", *supra* note 14, para.23.

[22] Blacksmith, *supra* note 3; King, "UNDRIP's Flaw", *supra* note 14.

[23] Blacksmith, *supra* note 3.

[24] *Ibid*.

[25] *Ibid*.

[26] *Charter*, *supra* note 11 at s 36.

opportunities, economic development, and public services in Native communities compared to other Canadians show that this constitutional commitment does not apply to Native people, despite section 15. Section 15 of the Canadian Constitution states that "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[27]

Although Canada proclaims that human rights are the same for Native people, by creating two sets of "rights," in effect, Native people are not considered humans. This racist approach aligns with the Indian Act, which long defined humans as anyone but Native people.[28] If the Charter of Rights and Freedoms applies to "Indians," then Native people should have the same protections and benefits without discrimination and not be considered "wards of the state." Native people are always tried under Aboriginal rights in court, although in many cases public health human rights proceedings would be more effective, except for criminal cases.[29] Native people constrained to Aboriginal rights within Canadian courts have little power: "Aboriginal rights reinforce the State's monopoly on power. First Nations are radically constrained in negotiations for their rights."[30] This legal constraint shows how the Canadian Charter of Rights and Freedoms does not apply to Native people, as Native people are not human beings under the Indian Act.[31] Creating a separate Aboriginal right has acted as a diversion that fails to uphold the rights that claim to apply to everyone in Canada to apply to Native people.

THE INDIAN ACT VIRUS: A LEGAL FRAMEWORK FOR HUMAN RIGHTS ABUSE

The Indian Act continues to enact an uneven playing field for Native people in Canada by holding in trust Native lands and resources.[32] The basis of this land trust is the denial of Native people's human rights. The Indian Act does not consider "Indians" humans, having originally enshrined in law that, "A person means an individual other than an Indian."[33] This denial of the humanity of Native people in this legal definition, although expunged in later versions of the Indian Act, continues to be enacted in practice, as Native people remain "wards of the state." Canada clarified its paternalistic legal relationship with Native people in this text: "Our Indian legislation generally rests on the principle, that the aborigines are to be kept in a condition of tutelage and treated as wards or children of the State."[34] Today, the Canadian government continues to keep Native people in a "condition of tutelage."

The Indian Act constructed the legal category "Indian" for some Native people in a racialized and gendered process of enfranchisement and disenfranchisement.[35] The Indian Act is described more recently as a "paradoxical document that has enabled trauma, human rights violations and social and cultural disruption for generations of Indigenous peoples."[36] The Indian Act is a land trust to allow Canada to do business connected with Native land. According to Canada's 1969 White Paper: "It is a trust. As long as this trust exists, the government, as a trustee, must supervise the business connected with the land."[37]

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[27] *Ibid.* at s 15.

[28] House of Commons – Department of Interior, "Annual Report for the Year Ended June 30th, 1876" *Sessional Papers*, No 11 (1877) xiv at 14 [*Sessional Papers*]; *Cf Indian Act*, RSC 1985 c I-5, online (pdf): <https://laws-lois.justice.gc.ca/eng/acts/i-5/>.

[29] Blacksmith, *supra* note 3.

[30] Hayden King & Shiri Pasternak, "Canada's Emerging Indigenous Rights Framework: A Critical Analysis" (5 June 2018) at 13, online (pdf): *Yellowhead Institute* <yellowheadinstitute.org/wp-content/uploads/2018/06/yi-rights-report-june-2018-final-5.4.pdf> [King, "Emerging Rights"].

[31] Blacksmith, *supra* note 3.

[32] *Ibid*; Joseph, *supra* note 5; King, "UNDRIP's Flaw" *supra* note 14.

[33] *Cf Indian Act*, *supra* note 28.

[34] House of Commons Department of the Interior, *supra* note 28 at p. xiv.

[35] Martin Cannon, "Revisiting Histories of Legal Assimilation, Racialized Injustice, and the Future of Indian Status in Canada" (2007) online (pdf): *Aboriginal Policy Research Consortium International* <ir.lib.uwo.ca/aprci/97>.

[36] Zach Parrot, "*Indian Act*", The Canadian Encyclopedia, December 16, 2020, https://www.thecanadianencyclopedia.ca/en/article/indian-act. Para 1.

[37] Government of Canada, "Statement of the Government of Canada on Indian Policy" (1969) sec. 6 para 2, online (pdf): *Government of Canada* <publications.gc.ca/collections/collection_2014/aadnc-aandc/R32-2469-eng.pdf>.

The racist enactment of the doctrine of discovery led to British laws over-ruling Native laws to take Native land for the Crown.[38] An eleventh-century British law changed the land tenure system dramatically to rule that the Crown alone could "own" land. This medieval British law applies today to all of Canada: "British law could be universal here because no Indigenous law existed, according to the racist decree."[39] However, Native laws were previously recognized when the British signed the Peace and Friendship treaties. These Peace and Friendship treaties were not disqualified with the Indian Act.[40] Based on racist assumptions and British land tenure laws from medieval times, Canada's courts and government presume that the Crown holds underlying title to all lands today.[41] All Native lands are thus legislated Crown lands whether Native people signed a treaty or not.[42] Even where courts recognize unceded territory, the courts give the Crown title to these unceded lands. In the numbered treaties, the Crown claims the land was ceded[43], the same way they claim all the land for the Crown by disregarding the humanity of Native people. The written version of these numbered treaties provides a biased colonial story that denies the treaty's oral version to share some land.[44] Reportedly no land cessation was agreed to, despite duress from the scorched earth policies, Indian wars and disease.[45]

In denying Native peoples human rights and legal standing, the Crown claimed ownership of all Native land. This Crown claim remains in place today for 89% of Canada's land considered Crown land. The remaining 11% is fee-simple land, which the Crown rents in perpetuity to land "buyers," on which taxes are levied.[46] Lands reserved for Indians" held "in trust" by the federal government occupy below 0.02% of Canada's land, a tiny fraction of the 10 million square kilometres of mostly Crown land.[47] However, Native people's lands constitute 100% of Canada.[48]

The Crown demonstrates their control over land by continuously alienating Native people from Native land through expropriation, mining permits, forestry licenses, conservation zones, transmission corridors and fee simple lands. For example, the Dakota Oyate or Dakota Family group has never surrendered by treaty or recognized the Crown as a sovereign god.[49] In 1890 a small group of Dakota purchased land in Portage la Prairie and remained independent from the government for 21 years.[50] The government in 1911 used the Indian Act to economically sanction the Dakota people by expropriating their fee-simple land and removing the Dakota people to an Indian reserve.

The Crown, Canada's constitutional monarchy, gave itself judicial, legislative, and executive powers to enact laws and systems for self-benefit.[51] The Indian Act trustee erects a barrier for Native people to capitalize on their

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[38] Joseph, *supra* note 5.

[39] King, "Emerging Rights", *supra* note 29 at 24.

[40] King, "UNDRIP's Flaw" *supra* note 14.

[41] Joseph, *supra* note 5.

[42] King, "Emerging Rights", *supra* note 29.

[43] Joseph, *supra* note 5.

[44] Stewart L. Hill, "The Autoethnography of an Ininiw from God's Lake, Manitoba, Canada: First Nation Water Governance Flows from Sacred Indigenous Relationships, Responsibilities and Rights to Aski" (2020) online: *University of Manitoba Libraries* <hdl.handle.net/1993/35329> [Hill, "Water Governance"].

[45] Blacksmith, *supra* note 3; Hill "Water Governance" *supra* note 43.

[46] Blacksmith, *supra* note 3; Alex Wilson, "Becoming Intimate with the Land" (10 September 2019) online: *Briar Patch* <https://briarpatchmagazine.com/articles/view/becoming-intimate-with-the-land>.

[47] Wilson, *supra* note 45.

[48] Blacksmith, *supra* note 3.

[49] *Ibid*.

[50] *Ibid*.

[51] *Ibid*.

Native land and resource wealth.[52] Under this regime, Crown land is equally divided between provincial and federal lands.

The Crown trustee promotes industrial extraction and settler development, inconsiderate of Native people's consent: "Provincial and federal authorization for extraction and development on Indigenous territories take place without Indigenous consent."[53] Despite the benefactor named in the Indian Act land trust being solely Native people, the winner of court injunctions over land use is typically industry. Aboriginal rights within Canadian courts have little power compared to industry: "First Nations are radically constrained in negotiations for their rights and by the oppressive socio-economic structures of settler society, where industry interests often drive politics."[54]

Native people are typically losers in litigating for their homeland and water protection, with high legal costs. Oppositely, companies are granted injunctions for negligible risk of economic loss to permit extraction and pollution.[55] Approximately 82% of the 100 injunctions filed against corporations and the Canadian government were denied.[56] In contrast, "76% of injunctions filed against Native people by corporations were granted."[57] Recently, the BC Supreme Court granted an injunction to Coastal GasLink Ltd, barring members of Wet'suwet'en from preventing the construction of a pipeline in their homeland. This injunction violated both Wet'suwet'en law and UNDRIP Articles 26-2 and 19, which read: "Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess because of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired" and "States shall consult and cooperate in good faith with the Indigenous people concerned through their representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."[58]

Land, revenues, and resources are commandeered by the Crown, under the trustee clause of the Indian Act.[59] From the late 19th century to this day, the Crown usurped Native band money earned from the sale of land, timber, energy, gravel, gold and other resources.[60] For example, the Crown collected $50 million as the trustee from energy royalties earned from oil patch activity on Bearspaw Cree land. Chief of Bearspaw, Darcy Dixon, alleges the Crown mismanages Native money while alleging that Native communities cannot handle their own money: "We're not asking for handouts. All we're asking is to manage money that belongs to us."[61]

A few Native bands in Western Canada fought the Crown for decades in court to take past and future revenues into their trust fund.[62] Stephen Buffalo of the Samson Cree Band describes their legal struggle which they won in 2005: "The federal government fought tooth and nail. They spent millions and millions of dollars to prove that they were right and to really force the colonialism that we could not take care of our own money."[63] The Samson Cree Band had their $349 million transferred into Kisoniyaminaw Heritage Trust Fund from the Crown Trustee. At the beginning of 2017, the fund had a balance of $456 million, while $202 million was used for community building by the Samson Cree. Since then, two nearby Cree reserves, Ermineskin and Onion Lake, have both set up their trust funds after many years of delays.

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[52] Kyle Bakx, "Alberta's Bearspaw First Nation fighting federal government for right to manage own savings" (7 July 2021) online: *CBC News* <www.cbc.ca/news/canada/calgary/bakx-bearspaw-first-nation-government-savings-1.6117818>; Blacksmith, *supra* note 3; Hill, *supra* note 43; Joseph, *supra* note 5; King, "UNDRIP's Flaw" *supra* note 14; Thompson, "Poor Housing" *supra* note 1.

[53] King, "Emerging Rights" *supra* note 29 at 44.

[54] *Ibid.* at 13.

[55] *Ibid.* at 8.

[56] *Ibid.*

[57] *Ibid.* at 12.

[58] *UNDRIP*, *supra* note 8 at Articles 19, 26-2.

[59] Blacksmith, *supra* note 3; Bakx, *supra* note 51.

[60] Bakx, *supra* note 51.

[61] *Ibid.*

[62] *Ibid.*

[63] Stephen Buffalo in Bakx, para 18.

The wealth controlled by Native bands sponsors community development. The Ermineskin trust was established in 2011 with $123 million, earning $214 million more money than when under Ottawa's control. The fund's annualized rate of return would be 10% currently, compared to 2% if the Crown controlled the money. Onion Lake's fund began in 2016 with more than $44 million with an annualized rate of return of nearly 11%. The National Indigenous Economic Development Board recommends dismantling the legislative barriers that impede Native communities' control over Indian money, stating: "Indian money should be in the hands of First Nations, not the Government of Canada."[64] Crown control over Native band revenues is belittling: "The current financial arrangement with Ottawa is similar to having to ask your parents in advance for every dollar that you spend."[65]

The denial of Native people's human rights, intended and enabled by the Indian Act[66], was applied in Indian residential schools, child welfare, Indian registration rules, Native people's mass incarceration and the Sixties Scoop.[67] Over 150,000 Native children were forcibly removed from their families and taken to schools designed "to kill the Indian in the child."[68] The children suffered terribly during this systematic assimilation plan of the Federal Government, carried out by the churches and police. The number of children who died in Canadian Indian Residential Schools ("IRS") from starvation, disease and abuse away from their family, culture, and community is higher than 6,000 children.[69] Some of these children were found in a mass grave at the former Kamloops Indian Residential School in British Columbia in May 2021. Hundreds of others lie in unmarked graves. 6750 survivors and their families have provided documented formal statements about this genocide.[70]

The claims of many that IRSs provided an educational service goes against the Truth and Reconciliation Commission ("TRC") findings. The TRC found every manner of genocide in IRS, according to the United Nations definition: "genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."[71]

The Indian Act and these other policies are "slow-moving poison, like a virus that infects a host community."[72] The traumas created by the Indian Act, reserve system, residential school system and other colonial policies were debilitating at the individual, family, community, and nation levels. These harms caused both an acute and long-term impact on Native people's livelihoods, health, and economic development.[73] The colonial system curtailed Native people's food activities, economic development, and legal rights. The Indian Act prohibited

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[64] National Aboriginal Economic Development Board, "Recommendations on First Nations Access to Indian Moneys" (2017) at 3 online (pdf): *National Aboriginal Economic Development Board* <recommendations-on-first-nations-access-to-indian-moneys.PDF>.

[65] Bakx, *supra* note 51.

[66] *Indian Act*, *supra* note 27.

[67] Myra Parker Pearson et al, "Beyond the Belmont Principles: A Community-Based Approach to Developing an Indigenous Ethics Model and Curriculum for Training Health Researchers Working with American Indian and Alaska Native Communities" (2019) 64:1–2 American J Community Psychology 9.

[68] Stephen Harper (June 11, 2008) "Statement of Apology to former students of Indian Residential Schools", online (pdf): *Statement of Apology to former students of Indian Residential Schools* <https://www.rcaanc-cirnac.gc.ca/eng/1100100015644/1571589171655>

[69] Truth and Reconciliation Commission of Canada, "Canada's Residential Schools: The History, Part 2 1939 to 2000 (Vol. 1)" (2015) online (pdf): *Truth and Reconciliation Commission of Canada* <http://www.trc.ca/websites/trcinstitution/index.php?p=890>.

[70] Roxanne Dunbar-Ortiz, *An Indigenous Peoples' History of the United States* (Boston: Beacon Press 2014).

[71] *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) at Acticle 2.

[72] Kiera L. Ladner, "Political Genocide: Killing Nations through Legislation and Slow-Moving Poison" in Alexander L Hinton, Andrew Woolford & Jeff Benvenuto, eds, *Colonial Genocide in Indigenous North America* (Durham: Duke University Press, 2014) 226 at 226.

[73] James W. Daschuk (2013) *Clearing the Plains: Disease, Politics of Starvation and the Loss of Aboriginal Life* (Regina: 2013 University of Regina Press) 432; Francis D. Boateng & Isaac Nortley Darko, "Our Past: The Effect of Colonialism on Policing in Ghana" (2016) 18:1 Intl J Police Science & Management 13; Kristin Burnett, Travis Hay & Lori Chambers: "Settler Colonialism, Indigenous Peoples and Food: Federal Indian Policies and Nutrition Programs in the Canadian North Since 1945" (2016) 17:2 J Colonialism & Colonial History; Parker, *supra* note 65.

Native people to hire a lawyer, vote, or run in elections until the 1960s.[74] The Indian Act's denial of human rights keeps Native communities underdeveloped. As a result, Native reserves are at high risk for COVID-19 and many other diseases.[75]

LACK OF INFRASTRUCTURE IN NATIVE COMMUNITIES' INCREASES COVID-19 RISKS

Infrastructure and services differ significantly between Native and non-Native communities in Canada. Most rural and remote Native communities in Canada lack hospitals, drinking water pipes, adequate housing, all-weather roads, and the bandwidth needed for distance education.[76] The limited infrastructure available in Native communities contravenes rights to education, health, and a decent living standard. Structural inequities in Native communities include economic poverty, high unemployment and lower school funding resulting in higher risk and tremendous suffering under COVID-19.

Systemic racism explains why COVID-19 is hitting Native people harder, according to Kinew:

> Indigenous people are more likely to have poor housing, less likely to have access to a family doctor and less likely to have access to clean drinking water... The pandemic is now revealing how the lack of access to health care for First Nations people is a major issue that needs to be addressed.[77]

Although Native reserves have higher health care needs per person, reserves lack hospitals without doctors residing on reserves. Health services on reserve typically meet only basic needs.[78] People living on a Native reserve typically travel great distances for health and dental care, including giving birth or treating cavities. As a result, many Native people—one in ten in the preceding 12 months—residing on reserves live with unmet health care needs.[79] Due to pre-existing health conditions and weak immune systems, people on reserves face higher risks for developing COVID-19 complications.[80] Unequal health services compromise Native people's health and human rights.

Overcrowded housing is a crisis in many Native reserves, causing a health risk for many diseases, including COVID-19. In 2016, 8.5% of non-Canadians lived in unsuitable housing ("NOS"), amounting to roughly one-quarter of the 37% for Native people on.[81] In northern and remote communities, unsuitable housing rates can be more than six times higher than non-Native communities, for example, 53% for both Garden Hill and Wasagamack Reserves. The housing crisis on Native reserves is linked to elevated rates of contagious diseases, including a 50 times higher prevalence of tuberculosis ("TB") for Native people on reserves than other Canadians.[82] With COVID-19 being more contagious than TB, the overcrowded housing crisis on Native reserves poses unacceptable risks for COVID-19 transmission.[83]

Inequity and poverty amplify risk and harm from the COVID-19 pandemic. Worse outcomes apply to the disease as well as the experience of the restrictions and lockdown under COVID-19. Without bandwidth and computer access on reserve in remote and rural communities, no online schooling options were possible under lockdown on many reserves. Garden Hill and other Native communities reported that all children and youth must repeat their school year as limited educational programming could occur under lockdown.

People living on Native reserves have limited access to healthy food on reserve, particularly during COVID-19 lockdowns. Before COVID-19, food insecurity across

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[74] Indian Act, sec.141.

[75] Hill, "COVID-19 Policies" *supra* note 6; Thompson, "Poor Housing" *supra* note 1.

[76] Hoye, *supra* note 4; Palmater, *supra* note 4; Thompson, "Poor Housing" *supra* note 1.

[77] Hoye, *supra* note 4.

[78] First Nations Information Governance Centre, "National Report of the First Nations Regional Health Survey (Phase 3: Volume Two)" (2018) online (pdf): *First Nations Information Governance* <fnigc.ca/rhs3report> [*FNIGC Health Report*].

[79] FNIGC Health Report, *supra* note 76.

[80] Statistics Canada 2020.

[81] Statistics Canada 2016.

[82] Thompson, "Poor Housing", *supra* note 1.

[83] Statistics Canada, *supra* note 1.

Canada was six times higher at 51% for households in Native communities than other Canadians[84] and 75% in remote and rural Native communities.[85] As many other necessities are forgone before food, food insecurity indicates hardship across many areas of Native people's lives.[86] During COVID-19, the limited food infrastructure resulted in 100% of households in two fly-in Native communities having food insecurity during the pandemic.[87] During COVID-19, emergency funding for food and other crises through charities was restricted to reserves. The barrier was that food was flowing through charities but Native bands, unlike every other level of government, do not receive automatically eligible donee status under Canada's tax laws.[88] This meant most Native bands could not receive food charities through community food centres and other organizations directly, creating barriers for the neediest.

The inadequate infrastructure for roads, houses, health services, water and food is a recipe for disaster in a pandemic. Spinu and Wapaass criticized the lack of addressing the structural inequities of Native communities during the COVID-19 crisis:

> Important to look beyond the current [COVID-19] crisis and not lose sight of the broader socio-economic inequalities facing Indigenous communities—particularly remote communities. These include severe housing shortages, limited healthcare services and resources, and poverty—all of which disproportionately put Indigenous communities at risk. If we do not address these inequalities, we will continue to find ourselves treating the symptoms and not the causes of vulnerability to pandemics.[89]

The First Nations Regional Health Surveys[90] show negative health impacts in Indian Reserves across Canada from inadequate water/sanitation infrastructure, including the lack of indoor plumbing. Manitoba and Saskatchewan have many homes without piped water, relying on water trucks to deliver water to cisterns on most northern reserves. Cisterns provide an inferior water system to pipes, undermining water quality and quantity. A third of houses (31%) haul water from the water treatment plant by trucks to cisterns in Manitoba reserves—but this rate is much higher in northern Manitoba.[91] An additional 20% in many remote and rural northern Manitoba households have barrels with no water service. O-Pipon-Na-Piwin Cree Nation has one-third of its homes using 500-gallon barrels for all their water needs.[92] Cleaning hands is vital to stop disease transmission, including COVID-19, but rationing water undermines prevention. Higher rates of diseases on Native reserves are linked to water infrastructure issues.[93] Disproportionately high rates of and deaths from the H1N1 virus in Garden Hill Reserve are attributed to their lack of running water.[94] Barrels and cisterns are breeding

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[84] *FNIGC Health Report*, *supra* note 76.

[85] Shirley Thompson et al, "Community Development to Feed the Family in Northern Manitoba Communities: Evaluating Food Activities based on Their Food Sovereignty, Food Security, and Sustainable Livelihood Outcomes" (2012) 3:2 Can J Nonprofit & Soc Economy Research 43.

[86] Valerie Tasaruk, "Food Insecurity in Canada: Webinar on March 26, 2020" (26 March 2020) online (video): *PROOF Food Insecurity Policy Research* <proof.utoronto.ca/resources/webinar/>; Shirley Thompson & Pepper Pritty, "Damming Food Sovereignty of Indigenous Peoples: A Case study of Food Security at O-Pipon-NaPiwin Cree Nation" in Priscilla Settee & Shailesh Shuklah, eds, *Indigenous Food Systems: Concepts, Cases, and Conversations.* (Toronto: Canadian Scholars Press 2020) 195 [Thompson, "Food Sovereignty"].

[87] Babajide Oni, Shirley Thompson, Marleny Bonnycastle and Donna Martin. "Do Work Integration Social Enterprises show benefits during COVID--19? Comparing sustainable livelihood indicators before COVID--19 during training and after in Remote Indigenous communities". JANSER (2022, forthcoming September).

[88] Hill, "COVID-19 Policies" *supra* note 6.

[89] Oanu Spinu & Jordan Wapass, "Addressing the causes of Indigenous vulnerability to pandemic - not just the symptoms" (26 March 2020) online: *The Conference Board of Canada* www.conferenceboard.ca/insights/blogs/addressing-the-causes-of-indigenous-vulnerability-to-pandemics-not-just-the-symptoms/, para 2.

[90] *FNIGC Health Report*, *supra* note 76.

[91] Thompson, "Food Sovereignty" *supra* note 84.

[92] *Ibid.*

[93] Lori Bradford, Udona Okpalauwaekwe, Cheryl Waldner, Lalita Bharadwaj. "Drinking water quality in Indigenous communities in Canada and health outcomes: a scoping review". Int J Circumpolar Health. 2016 Jul 29:75: 32336. doi: 10.3402/ijch.v75.32336. PMID: 27478143; PMCID: PMC4967713. Ajarat Adegun & Shirley Thompson. "Higher COVID-19 rates in Manitoba's First Nations compared to non-First Nations linked to limited infrastructure on reserves." The Journal of Rural and Community Development, (2021) 16:4. ISSN: 1712-8277.

[94] Hill "Water Governance" *supra* note 43.

grounds for water-borne parasites, Hepatitis, *H. Pylori* and other bacteria.[95]

The infrastructure in Canada, with the exception of reserves, is funded through a combination of federal, provincial and municipal resources.[96] For water, this affords highly controlled and professionally monitored water systems, which pipe water to homes, regulated by provincial governments to ensure the highest water quality.[97] In contrast, Indigenous Services Canada ("ISC") funds capital costs for Native reserves only up to 80% of the total cost of operation and maintenance, deducted from the annual contribution agreements with Native bands.[98] This cost-sharing funding rate by the federal government caps at 80% but can be much lower at 50%.[99] Federal funding from ISC for capital and operating resources funds only the inferior cisterns in northern Manitoba communities rather than piped water systems.[100] Although cisterns have cheaper capital costs upfront, their operation and maintenance leads to higher health care costs resulting from their frequent contamination.[101] In summary, the underfunding of infrastructure including water and wastewater systems on Native reserves creates a high-risk situation for contracting the COVID-19 virus for Native people.[102]

INEQUITABLE COVID-19 OUTCOMES FOR NATIVE PEOPLE IN CANADA

Native people in Canada experienced higher rates of COVID-19 than non-Native people and worse outcomes.[103] In Manitoba, the significant difference of 18 years in the median age of death from COVID-19 for non-Native people at 83 years old compared to Native people at 65 years old signals a grave inequity.[104] Since the pandemic started in spring 2020 until August 8th, 2021, Native people living on reserves recorded 33,342 COVID-19 cases, 1,604 hospitalizations and 384 deaths.[105] Roughly one in ten Native people on reserve contracted COVID-19, which is 2.7 times the rate for the Canadian population.[106] Death rates from COVID-19 are 1.7 times higher for Native people on reserves than that of the Canadian population.[107] Higher COVID-19 rates for Native people were largely located in the western provinces.[108] Manitoba's Native people, compared to non-Native people, had three times higher COVID-19 cases, four times higher intensive care unit hospitalization, twice higher death rates and twice higher transmission rates.[109] These higher COVID-19 rates are blamed on poverty, overcrowded homes and lack of essential infrastructure.[110]

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[95] Gerald Y. Minuk & Julia Uhanova, "Viral Hepatitis in the Canadian Inuit and First Nations Populations" (2003) 17:12 Can J Gastroenterology 707.

[96] Hill "Water Governance" *supra* note 43.

[97] Stewart Hill, Marleny Bonnycastle & Shirley Thompson. COVID-19 Policies Increase the Inequity in Northern Manitoba's Indigenous Communities. In Rounce and Levasseur (Eds) (2021), "*COVID-19* in Manitoba: Public Policy Responses to the First Wave. Winnipeg, University of Manitoba Press.: https://uofmpress.ca/files/9780887559501_web.pdf

[98] Hill "Water Governance" *supra* note 43.

[99] *Ibid*.

[100] D.W. Smith et al, "Public Health Evaluation of Drinking Water Systems for First Nations Reserves in Alberta, Canada" (2006) 5 J Environmental Engineering & Science S1;

[101] Hill "Water Governance" *supra* note 43.

[102] Jerry P. White, Laura Murphy & Nicholas Spence, "Water and Indigenous Peoples: Canada's Paradox" (2012) 3:3 Intl Indigenous Policy J 1.

[103] Hoye, *supra* note 4; Lenard Monkman, "Lack of teachers, internet puts Garden Hill First Nation's school year at risk" (18 April 2021) online: *CBC News* <https://www.cbc.ca/news/indigenous/garden-hillschool-coronavirus-1.5547148>; ISC COVID, *supra* note 1.

[104] Statistics Canada, *supra* note 1.

[105] ISC COVID, *supra* note 1.

[106] *Ibid*.

[107] *Ibid*.

[108] *Ibid*.

[109] Thompson, *supra* note 1.

[110] Hoye, *supra* note 4

The highest rates of COVID-19 in Canada occurred in remote communities with overcrowded housing.[111] Overcrowded homes in Manitoba, which predominate in remote Native communities, are strongly and statistically significantly correlated with higher COVID-19 rates in Manitoba.[112] The housing crisis in Native communities was critical before COVID-19, but now is deadly.[113] To protect against COVID-19, many remote and isolated Native communities went under strict lockdown, which took an enormous toll on mental health, education delivery and employment.

The high risks for COVID-19 with Native people across Canada led to their prioritization for vaccines. The Public Health Agency of Canada (2020) reported that Native communities were prioritized for vaccines as infection results in disproportionate impacts with less access to healthcare and substandard infrastructure.[114]

CONCLUSION

The Indian Act overtly denies human rights to Native people in Canada. Very few other countries in the world have blatantly racist legislation similar to Canada's Indian Act to control specific peoples and justify genocide.[115] The inhumanity of the Indian Act is enacted every day through Crown policies and funding models, resulting in worse outcomes for COVID-19.[116]

The Indian Act entrenches the marginalization, poverty, and health risks for Native people in Canada, which results in higher COVID-19 rates and deaths.[117] Native people's status as "wards of the state" denies human rights and worsens health and livelihood outcomes.[118] Equality of human rights requires dismantling the Crown's systemic barriers, including the Indian Act. Removing the Indian Act trustee is needed to ensure equality, as outlined in Section 36(1) of the Canadian Constitution.

Whether Native people signed treaties is inconsequential to its Crown land status.[119] Regardless, the Crown claims to own all land in Canada due to medieval British law and govern it.[120] On treaty and non-treaty lands, Native bands are subject to Canadian law, including the Indian Act.[121] As the land trustee for Native people, the Crown is supposed to benefit Native people. The wealth from the natural resources in Native homelands should ensure healthy infrastructure to support healthy Native people.[122] Oppositely, the Crown compromises life on the land by sanctioning extraction and pollution against Native people's efforts to seek injunctions.[123] While profiting from the Native homeland, the Crown underfunds Native people's infrastructure and services.[124] Due to inferior infrastructure, health care services, and education supports, Native communities have suffered disproportionately from COVID-19 health and other impacts.

The Indian Act virus created the perfect storm for COVID-19 to cause maximum devastation to health,

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[111] *ISC COVID*, *supra* note 1.

[112] Adegun & Thompson (2021), *supra* note 93.

[113] Marie Saint-Girons at al, "Equity Concerns in the Context of COVID-19" (July 2020) online (pdf): *Canadian Child Welfare Research Portal* <cwrp.ca/sites/default/files/publications/COVID-19%20Equity%20Research%20Brief.pdf>.

[114] *PHAC Vaccines*, *supra* note 1.

[115] Blacksmith, *supra* note 3.

[116] *ISC COVID*, *supra* note 1.

[117] Hill, "COVID-19 Policies" *supra* note 6.

[118] Blacksmith, *supra* note 3.

[119] *Ibid*. King, "UNDRIP's Flaw", *supra* note 14.

[120] *Blacksmith*, *supra* note 3; King, "UNDRIP's Flaw", *supra* note 14.

[121] Hill, "Water Governance", *supra* note 43.

[122] *Ibid*. Shirley Thompson, Keshab Thapa & Norah Whiteway, "Sacred Harvest, Sacred Place: Mapping Harvesting Sites in Wasagamack First Nation" (2019) 9:1 *J Agriculture Food Systems & Community Development* 1.

[123] King, "UNDRIP's Flaw", *supra* note 14.

[124] Thompson, "Poor Housing", *supra* note 1.

livelihoods, and education to Native communities. The Indian Act and racist policies have undermined Native people's collective and individual well-being and agency.[125] A shift from colonial Government to Native people's self-governance of Native land and resources is needed. For the human rights of Native people, the removal of the Indian Act land trustee is needed to ensure that Native people have control and benefit from their land and resources. Abolishing the Indian Act is required to heal from the Indian Act virus and rebuild in Native communities after COVID-19.

The Indian Act trustee is the virus that the land back movement seeks to overcome. Longman and colleagues describe the land back movement as land protection, guardianship, and ancient Native knowledge systems validation.[126] The land back movement is "the demand to rightfully return colonized land – like that in so-called Canada – to Indigenous People. The Native people need the system, such as the land, to be recognized as alive to perpetuate itself and perpetuate us as an extension of itself. That is what we want back: our place in keeping land alive and spiritually connected."[127] Alex Wilson in Longman et al. state: "When we say 'Land Back,' we are acknowledging and invoking those ancient knowledge systems and calling for a validation of them in our contemporary times."[128] This Native land is and was all of Canada. With the land-back vaccine against the Indian Act virus, diseases should not cause inequitable outcomes for Native communities. By prioritizing human rights and land protection above the Crown and corporate greed, equitable resource sharing should improve services, infrastructure, and health for all Native and non-Native people on this Native land we call Canada.[129]

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Statistics Canada "Aboriginal Population Profile 2016 Census – Garden Hill and Wasagamack" (2016) online: Statistics Canada <www12.statcan.gc.ca/census-recensement/2016/dp-pd/abpopprof/details/page.cfm?Lang=E&Geo1=CSD&Code1=4622048&Data www12.statcan.gc.ca/census-recensement/2016/dp-pd/abpopprof/details/page.=Count&SearchText=&SearchType=Begins&B1=All&SEX_ID=1&AGE_ID=1&RESGEO_ID=1> [2016 GHW Census].

Statistics Canada "Community Profile Statistics Canada Catalogue no. 98-316- X2016001" (2016) online: *Statistics Canada* <www12.statcan.gc.ca/ census-recensement/2016/dp-pd/prof/index> [*Community Profile Statistics*].

Statistics Canada, "First Nations People, Metis and Inuit and COVID-19: Health and Social Characteristics" (2020) online: *Statistics Canada* <www150.statcan.gc.ca/n1/en/daily-quotidien/200417/dq200417b-eng.pdf?st=bcUx8XNE> [*Health and Social Characteristics*].

Statistics Canada, "Household Food Insecurity 2017/2018" (24 June 2020) online: *Statistics Canada* <www150.statcan.gc.ca/n1/pub/82-625-x/2020001/article/00001-eng.htm> [*Food Insecurity*].

[125] Jesse Thistle, "Reframing the Discussion: Indigenous Definition of Homelessness in Canada" (25 September 2017) online: *Homeless Hub* <https://homelesshub.ca/blog/reframing-discussion-indigenous-definition-homelessness>.

[126] Nickita Longman at al, "Land-Back is more than the sum of its parts: Letters from the Land Back editorial collective" (10 September 2020) online: *Briar Patch* <briarpatchmagazine.com/articles/view/land-back-is-more-than-the-sum-of-its-parts/>.

[127] *Ibid.* at para 2.

[128] *Ibid.* at para 4.

[129] Blacksmith, *supra* note 3.

ATLAS IS A WOMAN: EMPLOYMENT, UNPAID CARE WORK, AND DOMESTIC VIOLENCE DURING COVID-19

Christina Szurlej

Abstract: In late December 2019, the first known case of the Coronavirus disease 2019 (COVID-19) was reported in Wuhan, China. At the time of writing, the deadly virus has caused over 185 million cases and more than 4 million deaths globally, with Canada having experienced 1.42 million cases and over 26,300 deaths. Although vaccines present a beacon of hope, more contagious strains have emerged from South Africa, the United Kingdom, Brazil, and India. Focusing on the Canadian context, this article identifies the disproportionate impact the virus has on women in terms of employment, unpaid care work and domestic violence. Disparities widen when an intersectional lens is applied.

Keywords: Canada, Coronavirus, COVID-19, domestic violence, employment, gender inequality, unpaid care work, women

INTRODUCTION

COVID-19 has exacerbated existing disadvantages women face, including unemployment, unpaid care work, and domestic violence. Applying an intersectional lens, these challenges are compounded "by other social identities based on ethnicity, income, race, disability, indigeneity, education, and migration status."[1]

Given that Canada is a State Party to the *International Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), it has a duty to "ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men," particularly in the "political, social, economic and cultural fields."[2] Canada likewise has an obligation to "take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise."[3] These obligations will be discussed in the context of employment and unpaid care work.

In addition to being disproportionately affected by unemployment, underemployment, and unpaid care work during the pandemic, women have also faced a rise in domestic violence. Lockdowns and policies of social isolation can have the effect of exasperating existing tensions or catalyzing conflict in the domestic sphere, while in tandem making it more difficult for women to seek out support from friends and family or from protective services. Strategies to address these challenges will be addressed in the context of the pandemic.

UNEMPLOYMENT

Globally, it is more challenging for women to adapt to and recover from economic downturns due to "lower earnings, savings and job security" than men and because women "are over-represented in informal employment" and part-time work, especially in economically disadvantaged countries."[4] Other factors may include degree of work experience, level of education, and gender biases. These challenges extend to wealthier nations, such as Canada, as demonstrated by an examination of women's income and participation in the workforce. This is contrary to Canada's obligations under CEDAW to ensure the "right to equal remuneration, including benefits, and to equal treatment in respect of work for equal value, as well as equality of treatment in the evaluation of the quality of work."[5]

Recognizing disparities in income and employment levels between men and women existed prior to the pandemic,

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1 Mara Bolis et al, "Care in the Time of Coronavirus: Why Care Work Needs to Be at the Centre of a Post-COVID-19 Feminist Future" (25 June 2020) at 3, online (pdf): *Oxfam* <oxfamilibrary.openrepository.com/bitstream/handle/10546/621009/bp-care-crisis-time-for-global-reevaluation-care-250620-en.pdf>.

2 *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13 (entered in force 3 September 1981) at art 3 [*CEDAW*].

3 CEDAW, *supra* note 2 at art 2(e).

4 Government of Canada, "Pandemic Brings Crisis of Care for Women" (9 March 2021) online: *Government of Canada* <www.international.gc.ca/world-monde/stories-histoires/2021/women-care-crisis-crise-soins-femmes.aspx?lang=eng>.

5 *CEDAW*, *supra* note 2 at art 11(d).

the impact of COVID-19 is eroding decades of progress on women's earnings and overall participation in the workforce in Canada. Based on a comparison of wages earned by women and men aged 25 to 54 in 2018, Statistics Canada reported that "women earned $0.87 for every dollar earned by men" in 2018.[6] In other words, women earned approximately 13 per cent less than men right before the pandemic, representing a narrowing income gap when compared to 18.8 per cent in 1998.[7] This income gap is wider women who are Indigenous, racialized, newcomers and/or have a disability, as well as among women who have children. A 2016 Census revealed that Indigenous women earn 35 per cent less than men, racialized women earn 33 per cent less and newcomer women earn 29 per cent less.[8]

Addressing unemployment and underemployment inequalities highlights the need to combat gender stereotypes and gender discrimination in the workplace. "Given that women in Canada have surpassed men in educational attainment, diversified their fields of study at post-secondary institutions, and increased their representation in higher-status occupations, the persistence of gender-based wage inequality warrants continued attention."[9] With assistance from government, employers must ensure that their employment practices and basis for promotion applies standards based on merit, irrespective of gender or other social identities.

Not only has wage inequality increased during the pandemic, wage disparities have forced women out of the workforce.[10] Whereas Canada experienced an overall job loss of 640,000 in 2020, high paying jobs rose by 350,000. Women who earn less than $1200 per week were disproportionately affected among those who lost their jobs during the pandemic, nearly 200,000 of whom are now considered to be unemployed on a long-term basis. By December 2020, unemployment among women ages 25-54 rose by 2.3 per cent, compared to 1.8 per cent for men.[11] The Royal Bank of Canada explains that "because women represented a majority of industries most affected by virus-containment measures, [including hospitality, accommodation, food services and retail] they bore the brunt of job losses."[12]

From an intersectional perspective, women who are visible minorities or newcomers face higher levels of unemployment. Whereas 9.7 per cent of women overall are unemployed during the pandemic, Southeast Asian (11.8%) and Arab (13.8%) women face the highest rates of unemployment.[13] Here it should be noted that Desjardins and Freestone did not include Indigenous peoples in their dataset on who constitutes a visible minority. While newcomer women with a Bachelor's-level education experienced job loss overall, women born in Canada experienced overall job gains. Job loss among newcomer women with children under the age of 12, was "more than double the decline in employment (in percentage terms) of Canadian-born mothers."[14]

In contrast with nearly 100,000 women over 20 who have withdrawn from the workforce entirely, that holds true for only about 10,000 men.[15] A prolonged absence from the labour market can lead to skill erosion, hampering women's "ability to get rehired or to transition to different roles as the economy evolves."[16] Again, women who are members of additional social identities experience such discrimination in the workforce at a greater frequency and severity than women who are privileged. These social identities include but are not limited to Indigenous

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6 Dawn Desjardins & Carrie Freestone, "COVID Further Clouded the Outlook for Canadian Women at Risk of Disruption" (4 March 2021) online: *Royal Bank of Canada* <thoughtleadership.rbc.com/covid-further-clouded-the-outlook-for-canadian-women-at-risk-of-disruption/>.

7 Desjardins, *supra* note 6.

8 Canadian Women's Foundation, "The Facts about the Gender Pay Gap in Canada" (15 March 2022) online: *Canadian Women's Foundation* <canadianwomen.org/the-facts/the-gender-pay-gap/#:~:text=According%20to%20Statistics%20Canada%20(2022,of%20every%20dollar%20men%20make>.

9 Desjardins, *supra* note 6.

10 Nathan Griffiths, "COVID-19: Pay Inequalities Pushed Women Out of the Workforce during Pandemic" (21 June 2021) online: *Vancouver Sun* <vancouversun.com/news/covid-19-pay-inequities-pushed-women-out-of-the-workforce-during-pandemic>.

11 Desjardins, *supra* note 6.

12 *Ibid*.

13 *Ibid*.

14 *Ibid*.

15 *Ibid*.

16 *Ibid*.

women, racialized women, newcomers, transgender women, those who are gender non-binary, women with disabilities, and those who live in poverty.

Preventive initiatives should be advanced to train businesses to consistently adopt practices consistent with human rights standards. When qualifications for a government position are equal, the government prioritizes women and visible minorities in its employment practices. Businesses should be encouraged to adopt a similar model to help equalize inequalities in the name of equity. Further, the Government of Canada should work in partnership with Human Rights Commissions and provincial/ territorial/ federal Departments of Justice to launch education programs for women to know how and where to seek legal recourse when experiencing discrimination in the workplace. Removing barriers imposed by structural inequalities will empower women to break glass and concrete ceilings and assist them with withstanding the added pressure of living through a pandemic. This includes "accessible, affordable childcare, long-term care, health services, gender-based-violence services, education, and an employment insurance plan that's responsive to precarious work."[17]

Women exiting the workforce at a higher rate than men could be attributed, in part, to the disproportionate level of unpaid care they provide. Prior to the pandemic, "globally, 42% of women of working age said they were unable to do paid work because of their unpaid care and domestic work responsibilities—compared to just 6% of men."[18] In pre-pandemic Canada, women spent an average of 3.9 hours on unpaid care daily, compared to 2.4 hours among men.[19] During the pandemic, over 40 per cent of women and 36 per cent of men in Canada reported an increase in domestic work and unpaid care work.[20] Although the sense of increased unpaid work is felt in near uniform among women and men, the starting point was with women taking on twice as much unpaid care work in the household. For ethnic minorities and newcomer women, this figure rose to 54 per cent and 51 per cent respectively.[21]

Returning to the concept of the intersectional effect of social identities, 2020 Oxfam survey of 1500 Canadians found that

> ...respondents from racial minorities and minority ethnic backgrounds were more likely to have had to give up or reduce paid work than white respondents. Furthermore, very large proportions of Hispanic or Latino (29%) and Asian (24%) respondents reported having food and shelter concerns.[22]

In addition to experiencing food and shelter concerns, approximately 50 per cent of "Indigenous women and 55% of Black women reported struggling financially because of unpaid care work, compared to only 34% of white women."[23] Possible explanations include a lack of access to affordable childcare, a lack of access to time-saving technologies (e.g. dishwasher), and a lack of access to clean drinking water. As of April 2021, there are 52 long-term drinking water advisories in 33 First Nations communities in Canada, making sanitation and unpaid care work during a pandemic even more difficult and time consuming.[24]

UNPAID CARE WORK

Now let us turn to unpaid care work related to childcare. CEDAW's preamble recognizes that "...the upbringing of children requires a sharing of responsibility between men and women and society as a whole." It calls for a "change in the traditional role of men as well as the role of women in society and in the family is needed to

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[17] Paulette Senior, "The pay gap hurts moms, and the pandemic makes it worse" (7 April 2021) online: *iPolitics*, <www.ipolitics.ca/news/the-pay-gap-hurts-moms-and-the-pandemic-makes-it-worse>.

[18] Bolis, *supra* note 1 at 3.

[19] *Ibid* at 4.

[20] *Ibid* at 9–10.

[21] *Ibid* at 14.

[22] *Ibid* at 16.

[23] Alexandra Mae Jones, "7 out of 10 Canadian women experiencing anxiety due to unpaid care work during pandemic: survey" (18 June 2020) online: *CTV News* <https://www.ctvnews.ca/canada/7-out-of-10-canadian-women-experiencing-anxiety-due-to-unpaid-care-work-during-pandemic-survey-1.4990812>.

[24] Leyland Cecco, "Dozens of Canada's First Nations lack safe drinking water: Unacceptable in a country so rich" (30 April 2021) online: *The Guardian* <www.theguardian.com/world/2021/apr/30/canada-first-nations-justin-trudeau-drinking-water>; Alexandra Mae Jones, *supra* note 23.

achieve full equality between men and women."[25] To this end, how far along are we?

In the last year, "12 times as many mothers as fathers left their jobs to care for toddlers or school-aged children,"[26] a task made more difficult by school closures and the need for home schooling during the pandemic. This is in addition to doing laundry, making meals, washing dishes, household cleaning, ensuring children's safety, and engaging in leisure activities with them.[27]

Drawing on data from the *Canadian Perspectives Survey: Resuming Economic and Social Activities during COVID-19*, women reported being primary caregivers at a higher rate when employed (38%) than men who are unemployed (30%). When men are employed, they reported being the primary caregiver only 8 per cent of the time. Further, 59 per cent of women who are unemployed identified as the primary caregiver.[28]

Unequal division of unpaid care work can have negative physiological and psychological consequences, aggravating the existing strain of living through a pandemic. Oxfam found that "seven out of 10 Canadian women are experiencing more anxiety, depression, fatigue and isolation because of the increase in unpaid care work they are expected to perform during the COVID-19 pandemic."[29] The stress caused by increased unpaid care work is exacerbated by its link to economic security, job quality, workload, participation in the workforce, self-care and overall wellbeing.[30] These factors hamper progressive realization of Article 12 of the *International Covenant on Economic, Social and Cultural Rights* to protect the "right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[31]

Action for meeting this obligation should be preventive in nature, rather than reactionary, and address the root causes of women's disproportionate unpaid care work. Achieving equal wages for equal work and combating gender-based discrimination compounded by other social identities will help alleviate the pressure on women to undertake unpaid care work. Effective action must also address the inextricable links to the full realization of other human rights, including access to healthcare without discrimination, including mental health services; access to affordable housing; access to clean drinking water; and adequate sanitation in every household in Canada, prioritizing First Nations communities with long-term water advisories; and accessible, affordable child care.

In its 2021 budget, the Government of Canada introduced a Canada-wide Early Learning and Child Care Plan. This plan aims to reduce the cost of childcare by 50 per cent by the end of 2022 and provide adequate and accessible childcare for $10 per day by 2026.[32] Although these commitments represent a positive step forward, by 2022 women will have struggled with balancing high levels of unpaid care work for three years. As mentioned previously, a substantial number of women have exited the workforce entirely and the longer women are absent from the workforce, the more difficult it becomes to re-enter. As for the second commitment, there is no guarantee it will be implemented, as it hinges on Liberal leadership being re-elected in the 2023 federal election. To what extent will this benefit women with infants and small children now, given that those children will be old enough to attend school once (and whether) the program comes into effect? Swifter action needs to be advanced to ensure these programs benefit the hundreds of thousands of women who struggle to balance employment and unpaid care work—a challenge amplified by the pandemic.

DOMESTIC VIOLENCE

In addition to the challenges arising from a loss of income, women in Canada have endured higher levels of domestic violence due to a loss of access to services and the impact of social isolation. UN Women reports

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[25] CEDAW, *supra* note 2.

[26] Desjardins, *supra* note 6.

[27] Karine Leclerc, "Caring for their children: Impacts of COVID-19 on parents" (14 December 2020) online: *Statistics Canada* <https://www150.statcan.gc.ca/n1/pub/45-28-0001/2020001/article/00091-eng.htm>.

[28] *Ibid*.

[29] Jones, *supra* note 23.

[30] Leclerc, *supra* note 27 at 2.

[31] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

[32] Department of Finance Canada, "Budget 2021: A Canada-wide Early Learning and Child Care Plan" (15 May 2021) online: *Government of Canada* <www.canada.ca/en/department-finance/news/2021/04/budget-2021-a-canada-wide-early-learning-and-child-care-plan.html>.

that globally "an estimated 736 million women—almost one in three—have been subjected to intimate partner violence, non-partner sexual violence, or both at least once in their life (30 per cent of women aged 15 and older)."[33] Domestic violence against women has been on the rise during the pandemic, producing negative health consequences for women and their children.[34] Executive Director of UN Women refers to this global phenomenon as a "shadow pandemic."[35] Domestically, Statistics Canada reported that ten per cent of women reported being "very or extremely concerned about the possibility of violence in the home."[36]

Early on during the pandemic, Human Rights Watch expressed concern over how

> crises— and lockdowns—can trigger greater incidence of domestic violence for reasons including increased stress, cramped and difficult living conditions, and breakdowns in community support mechanisms. Crises can also often further limit women's options and ability to escape and achieve accountability for abuse, and place victims in an environment without appropriate access to services, such as safe shelters.[37]

Human Rights Watch further identified women particularly vulnerable to domestic violence as those who are transgender, gender non-binary, domestic workers, elderly women, women with disabilities, those without access to technology, women who work remotely, and those whose housing situation is precarious.[38] In other words, facing intersectional inequalities and discrimination are at a higher risk of experiencing domestic violence.

Canadian Minister for Women and Gender Equality, Maryam Monsef, acknowledged "the COVID-19 crisis had empowered perpetrators of domestic violence, citing a 20 to 30 per cent increase in rates of gender-based violence in some parts of Canada."[39] Because Canada is a federation, it appears as though data collection is inconsistent across provinces and territories, rendering it difficult to garner a statistically accurate portrayal of how this situation differs across the nation. What is apparent, however, is that essential services were inundated before the pandemic struck and now face greater challenges with accessing adequate funding, adapting to changing delivery methods, and maintaining shelters when capacity is lowered due to social distancing.[40]

According to Statistics Canada "calls related to domestic disturbances…rose by nearly 12 per cent between March and June of 2020 compared to the same four months in 2019."[41] As a specific example of how grave the situation can become, "The Battered Women's Support Services hotline, located in British Columbia, reported a 400% increase in calls between April and May 2020. 40% of those calls were from women isolated with their abuser."[42] Pandemic restrictions present a barrier for

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[33] UN Women, "Facts and Figures: Ending Violence against Women" (February 2022) online: *UN Women* <www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures>.

[34] World Health Organization, "Coronavirus disease (COVID-19): Violence against women" (15 April 2020) online: *World Health Organization* <www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/coronavirus-disease-covid-19-violence-against-women>.

[35] Women and Gender Equality Canada, "Snapshot: COVID-19 and gender-based violence" (16 April 2021) online (pdf): *Government of Canada* <women-gender-equality.canada.ca/en/gender-based-violence-knowledge-centre/snapshot-covid-19-gender-based-violence.html>.

[36] Statistics Canada, "Canadian Perspectives Survey Series 1: Impacts of COVID-19" (8 April 2020) online: *Statistics Canada*

[37] Human Rights Watch, "Submission to the UN Special Rapporteur on Violence against Women, its Causes and Consequences regarding COVID-19 and the increase of domestic violence against women" (3 July 2020) online: *Human Rights Watch* <www.hrw.org/news/2020/07/03/submission-un-special-rapporteur-violence-against-women-its-causes-and-consequences#>.

[38] *Ibid*.

[39] Raisa Patel, "Minister says COVID-19 is empowering domestic violence abusers as rates rise in parts of Canada" (27 April 2020) online: *CBC News* <www.cbc.ca/news/politics/domestic-violence-rates-rising-due-to-covid19-1.5545851>; Michelle Ghoussoub, "COVID-19 exacerbated violence against women. Frontline workers want essential service funding." (6 December 2020) online: *CBC News* <www.cbc.ca/news/canada/british-columbia/covid-intimate-partner-violence-1.5830614>.

[40] Amnesty International, "Canada: Submission to the UN Special Rapporteur on Violence against Women on COVID-19 and the Increase of Domestic Violence against Women" (25 June 2020) at 8 online (pdf): *Amnesty International* <www.amnesty.org/en/documents/amr20/2606/2020/en/>.

[41] Nicole Thompson, "Reports of domestic, intimate partner violence continue to rise during pandemic" (15 February 2021 online: *CBC News* <https://www.cbc.ca/news/canada/toronto/domestic-intimate-partner-violence-up-in-pandemic-1.5914344>.

[42] Women and Gender Equality Canada, *supra* note 35.

women who are experiencing domestic violence to access services that would otherwise be available to them, including health centres, sexual and reproductive health care access, crisis centres, shelters, protection services, and legal support.[43] In other cases, it could be a matter of inaccessibility altogether as a result of reduced capacity or closures. Further, women experiencing abuse have fewer opportunities to leave their homes to seek help due to lockdowns, social distancing, school closures and widespread loss of employment.

Despite these glaring aggravating factors, it should be acknowledged that the rise in violence against women is correlated to the pandemic but is not automatically a causal factor. Researchers from the Centre for Global Development warn that "simply showing population-based changes in VAW/C [violence against women and children] rates before, during and after a pandemic does not necessarily imply the pandemic is responsible for these changes (i.e. a direct causal relationship."[44] Additional research over longer periods of time involving larger study groups representative of variances across regions should be conducted to identify or rule out other causal factors for the rise in violence. A second obstacle to pinpointing the true scope of violence pre and post pandemic is that many instances of violence go unreported. When women are confined to their homes and have limited ability to access services, they may be less likely to report such abuse.[45] Essential services will need to adapt to this new reality by streamlining the process for women to report abuse and seek support.

The Government of Canada has committed to invest $50 million to over 1000 organizations providing services to women and girls with a focus on addressing increasing needs during the pandemic. Such organizations used this funding "to enhance cleaning and safety procedures, hire additional staff to manage additional workloads, and purchase equipment to help them deliver their services remotely." [46] The outcome of this investment, and whether it is adequate, remains to be seen, as is the case with the Government of Canada's commitment to launch national plans of action to address gender-based violence generally and violence against Indigenous women and girls specifically.

In 2015, the Canadian Network of Women's Shelters and Transition Houses expressed concern that "the level of violence that women and girls experience in Canada has changed little over the past two decades." [47] To address this concern, the Network produced guidance for the government of Canada on advancing a plan of action to counter gender-based violence. It was not until March 2021—two years into the pandemic— that the Government of Canada committed to advancing a National Action Plan to end gender-based violence. Perhaps women would not be in such a precarious situation today, compounded by the added burdens imposed by COVID-19, had the Government of Canada acted sooner.

A separate National Action Plan specifically addressing violence against Indigenous women and girls as a follow up on the Inquiry into Missing and Murdered Indigenous Women and Girls was released on June 3, 2021—two years after the Inquiry concluded and six year after the Inquiry was announced in 2015.[48] After all that time, consultation, investment, and resources, there is but a plan yet be acted upon. Not just that, but after the Inquiry recognized a genocide against Indigenous women and girls in Canada, only acknowledgement and an apology followed. Without justice, compensation, redress, or meaningful change, how can reconciliation follow? For the Native Women's Association of Canada (NWAC), their most pressing demand is ending the genocide. Rather than sign on to the Government of Canada's National Action Plan, NWAC published their own plan of action, focusing on culture and language, health and wellness, human security, justice, and public awareness.[49] The divergence between Canada's action plan and that of the NWAC's could have been avoided by welcoming members of the NWAC into leadership positions with

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[43] World Health Organization, *supra* note 34.

[44] Amber Peterman et al, "Pandemics and Violence against Women and Children" (1 April 2020) at 24, online (pdf): *The Centre for Global Development* <www.cgdev.org/publication/pandemics-and-violence-against-women-and-children>.

[45] *Ibid*.

[46] PRNewswire, "Government of Canada accelerates investments in shelters, transition housing and other organizations providing gender-based violence supports and services" (2 October 2020) online: *Benzinga*

[47] Canadian Network of Women's Shelters and Transition Houses, "A Blueprint for Canada's National Action Plan on Violence against Women and Girls" (2015) online (pdf): *Canadian Network of Women's Shelters and Transition Houses* <endvaw.ca/wp-content/uploads/2015/10/Blueprint-for-Canadas-NAP-on-VAW.pdf>.

[48] *Ibid*.

[49] Native Women's Association of Canada, "NWAC Action Plan: Our Calls, Our Actions" (2021) at 4, online (pdf): *Native Women's Association of Canada* <www.nwac.ca/wp-content/uploads/2021/06/NWAC-action-plan-FULL-ALL-EDITS.pdf>.

decision-making powers both during the Inquiry, the resultant Plan of Action, and implementation thereof. At a global level, the World Health Organization stresses that

> When we are able to prevent violence, or to support women survivors of violence, we help to safeguard women's human rights, and promote physical and mental health and well-being for women throughout their lives. This also helps to alleviate pressure on already stretched essential public services, including the health system.[50]

In order to meet this international standard, along with its obligations set out under the *International Convention on the Elimination of All Forms of Discrimination against Women,* the Government of Canada should adopt the following measures, while integrating an intersectional approach at every stage.

1. Invest in expanding the availability and accessibility of shelters, protection services, and access to justice to account for social distancing measures, including methods allowing for women to contact such services digitally, rather than in person, via phone or during virtual meetings. Training should be provided to inform women who are experiencing violence how to clear evidence of such communications to avoid alerting their abusers.

2. Consult with front line service providers and those affected, including Indigenous and racialized women, to determine specific provincial, territorial and federal needs to counter gender-based violence during a pandemic.

3. Develop more consistent documentation on the need for and use of essential services to better determine the needs of women facing domestic violence.

4. Produce accessible materials for women regarding resources and services available to them during the pandemic and ensure their availability in multiple languages to support the inclusion of already marginalized newcomer women.

5. Develop programs to provide accessible and affordable child care and housing earmarked for women seeking independence from their abusers who are transitioning from situations of domestic violence.

6. Follow-up on cases where domestic violence has been reported.

FORWARD LOOKING VISION

Throughout Canada's history, women have faced systemic discrimination—politically, economically, socially, and culturally. Let us not forget women were not legally considered persons in Canada until 1930.[51] And this only applied to white women at the time. It was not until 1948 that Black women gained the right to vote; twelve years later, Indigenous women were able to vote as well.[52] To this day, women, particularly those who are marginalized, are underrepresented in the decision-making process at every level. How can systemic discrimination linked to unemployment, unpaid care work, and domestic violence be challenged without adequate representation?

A disproportionate number of women continue to be underpaid, unemployed, underemployed, and take on the majority of unpaid care work, representing an unacceptable dynamic only worsened by the pandemic. Relegating women to informal, part-time work or creating circumstances that force them to make the difficult choice between employment or returning to the workforce based on the burden of unpaid care work poses a disadvantage not only to women but to society as a whole. Further, without a steady source of adequate income, social isolation, lockdowns, and changes to services during the pandemic limit women's ability to exit violent partnerships, contributing to a rise in domestic violence. Failing to address how the pandemic disproportionately affects women in the workforce and at home thwarts decades of progress. Now is marks the time for the Government of Canada to take action on its commitments and the aforementioned proposals to prevent further harm to women across the country in the private and public spheres.

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[50] *Ibid*.

[51] *Edwards v Canada (AG)*, [1930] AC 124, 1929 UKPC 86.

[52] Matthew McRae, "The chaotic story of the right to vote in Canada" (2020) online: *The Canadian Museum for Human Rights* <humanrights.ca/story/the-chaotic-story-of-the-right-to-vote-in-canada>.

POVERTY AS A HUMAN RIGHTS VIOLATION

Sid Frankel

Abstract: This chapter focuses on the pandemic, poverty and human rights. In doing so, it asks and answers three questions. The first section asks and answers the question, "in what sense are the production and maintenance of poverty a human rights violation? The second section deals with the question, "how have people living in poverty been differentially impacted by the pandemic?" and the third section addresses the question, "has the Canadian welfare state effectively ameliorated the human rights violation involved in poverty during the pandemic?" This third section also articulates recommendations to improve public policy in this regard.

INTRODUCTION

Human rights have become an important framework for describing, analyzing and ameliorating poverty in scholarly works[1], advocacy[2], and the media[3], although they are not the dominant framework in any of these domains. For example, regarding the media, Reddenfound in a 2008 study that mainstream print and on-line news coverage of poverty in Canada was dominated by a rationalizing frame, which presents poverty as an issue to be evaluated through quantification, calculation, and cost-benefit analysis.[4] The second most frequent frame in mainstream media was based on responsibilizing the poor for their poverty. A social justice frame, which presents poverty as a matter of rights in relation to equality of distribution, was far less frequent in mainstream media. However, this social justice frame was far more prominent in alternative news source coverage of poverty.

In relation to scholarship, Mancilla describes the right to subsistence as a basic human right and that its fulfillment ought to be protected and guaranteed by social institutions.[5] In addition, she argues that the existence of this right is no longer controversial, either among political or social theorists or in international law. She articulates four justifications for this right. First, the right to subsistence is justified because it is a requisite for the enjoyment of any other rights, and second, it is justified on the basis of moral consistency because subsistence is necessary for well-being, which, in turn, is a necessary condition for human action. Third, subsistence as a right is justified because material resources are necessary to protect personhood, which is a core human interest, which must be protected by human rights. Finally, the right to subsistence is justified because it provides the basis for a minimally decent human life.

Related to advocacy, Lister has examined how some anti-poverty activists in the United Kingdom and other advanced capitalist states were deploying a human rights discourse to agitate for empowerment and redistribution as antidotes to poverty.[6] She sees this human rights discourse as arising because of the neoliberal attack on the Marshallian[7] concept of social citizenship through responsibilizing the poor to fend for themselves, denigrating them as underserving, and defining the provision of public services as unjustifiable interference in the market.[8] Lister argues that this human rights discourse is based on two premises. The first is that all members of the political community are rights holders and the second is that states possess a corresponding duty to protect and fulfill rights. These advocates employ human rights language as a discursive resource to counter stigmatization and othering of the poor through

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1 Manfred Nowak, "A Human Rights Approach to Poverty" (2002) 8:1 Human Rights in Development Yearbook 15.

2 Nelson Mandela, "Campaign to End Poverty in the Developing World Speech" (Speech delivered at Trafalgar Square, London, United Kingdom, 3 February 2005) [unpublished].

3 Cormac Bryce, Michael Dowling & Amirhossein Sadoghi, "COVID-19, Poverty Traps, and Global Poverty Discourse" (2020) online (pdf): *Research Gate* <www.researchgate.net/profile/Michael-Dowling-7/publication/341782055_COVID-19_poverty_traps_and_global_poverty_discourse/links/5ed434654585152945278 61d/COVID-19-poverty-traps-and-global-poverty-discourse.pdf>.

4 Joanna Redden, "Poverty in the News: A Framing Analysis of Coverage in Canada and the UK" (2011) 14:6 Information Communication & Society 820.

5 Alejandra Mancilla, "The Human Right to Subsistence" (2019) 14:9 Philosophy Compass 1.

6 Ruth Lister, "'Power, Not Pity': Poverty and Human Rights" (2013) 7:2 Ethics & Soc Welfare 109.

7 Thomas Humphrey Marshall & Tom Bottomore, Citizenship and Social Class (London, United Kingdom: Pluto Press 1992).

8 Lister, *supra* note 6.

framing poverty in relational terms to expose these discriminatory practices and by including the poor in the community of rights holders. Thus, a politics based on securing charity through pity is replaced by a politics of recognition and redistribution.

Similarly, Nowak has articulated the potential impacts of a human rights approach on anti-poverty policymaking as follows:

> Once a human rights concept is introduced into the context of policy-making, the rationale of poverty reduction no longer derives merely from the fact that the poor have needs but also from the fact that they have rights - entitlements that give rise to legal obligations on the part of others. Poverty reduction then becomes more than charity, more than a moral obligation - it becomes a legal obligation. This recognition of the existence of legal entitlements of the poor and legal obligations of governments and the international community to respect, protect and fulfil these human rights of the poor is the first and decisive step towards their empowerment [9]

Pogge argues that severe poverty, and presumably all poverty to some extent, is a human rights violation based upon social justice criteria related to the exercise of or failure to exercise agency.[10] He identifies three related causes of this violation: acts or interactional harms, omissions, or interactional failures to alleviate and actions of social institutions which result in some lacking secure access to their economic human rights. Campbell agrees, but argues that humanity related to benevolence, altruism and caring is a more powerful basis for the designation of a human rights violation than justice related to fairness, desert, and merit. [11] His argument is based on the idea that humanity criteria would include an obligation to alleviate poverty even when agency cannot be easily attributed, as in the case of bad luck or some natural disasters. In addition, he argues that the invocation of humanity criteria broadens the range of responsibility for poverty eradication, potentially to all individuals, groups, organizations and institutions.

Beyond Lister's identification of human rights language as a discursive resource in advocacy, Campbell discerns some additional potential benefits of a human rights approach to poverty. He argues that such categorization of poverty as a human rights violation may raise the priority of poverty eradication as a political and economic goal, and that it emphasizes the parity and interconnection of basic social and economic rights with what are often seen as more important civil and political rights. This coupling of social and economic rights with civil and political rights may raise the status of the former. In addition, Campbell argues that framing poverty as a human rights issue may constitute a step towards the development of new mechanisms to bear on poverty eradication, such as United Nations monitoring of non-state actors, including corporations, and the involvement of human rights non-government organizations in poverty eradication. New legal remedies to empower the poor to secure their rights might also be catalyzed, and courts may be encouraged to act on these rights. Finally, Campbell sees the classification of poverty as a violation of human rights as a necessary, but not sufficient, condition for the development of a global tax to eradicate, or at least, alleviate, global poverty.

However, Yilmaz has recently found that three of the dominant paradigms for social policy formulation and analysis are inconsistent with a human rights approach.[12] These include new behaviourism, social investment, and new universalism. New behaviourism attributes poverty to the fallibility of the poor, which hampers their ability to make good decisions. This fallibility flows from their cognitive limitations as well as social programs (and other contextual features) that fail to activate the inner qualities that would help individuals to exit poverty. New behaviourism is inconsistent with a human rights approach to poverty in at least two ways. First, it does not acknowledge income or wealth inequality or worsening labour market conditions. Second, it does not contemplate the existence of a social security floor, a social minimum that no one is allowed to fall below regardless of behaviour. The social investment paradigm does not acknowledge poverty as a social problem but focuses on general economic and human capital development. It also is inconsistent with a human rights-based approach to poverty in two ways. First, the focus on employability may fail to offer

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[9] Nowak, *supra* note 1 at 27.

[10] Thomas Pogge, "Severe Poverty as a Human Rights Violation" in Thomas Pogge, ed, *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (Paris: United Nations Educational, Scientific, and Cultural Organization 2007) 11.

[11] Tom Campbell, "Poverty as a Violation of Human Rights: Inhumanity or Injustice?" In Thomas Pogge, ed, *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (Paris: United Nations Educational, Scientific, and Cultural Organization 2007) 55.

[12] Volkan Yilmaz, "A Human Rights Critique of Contemporary Social Policy Paradigms: New Behaviourism, Social Investment and New Universalism" in Martha F. Davis, Kjaerum Morten & Amanda Lyons, *Research Handbook on Human Rights and Poverty* (Cheltenham: Edward Elgar Publishing 2021) 370.

sufficient compensation for and protection from poverty in an age of declining labour share and decreasing global employment. Second, this paradigm contains an unfounded expectation that all individuals can and will successfully access the fruits of broader economic development objectives because of the preventive and capacity building human capital development opportunities offered. The new universalism initially appears consistent with a human rights approach to poverty in that it attributes the etiology of poverty to lack of resources, the unjust distribution of material resources and to unfair barriers which limit access to services and meeting basic needs. However, three factors limit its capacity to incorporate a human rights approach to poverty. First, it formulates the role of the state as one among many stakeholders, and this may water down the state's positive obligations. Second, the new universalism does not promote equality of outcomes, equal access to quality services or comprehensive protection from social risks, but instead favours bridging gaps to achieve systemic universalism. Third, sometimes invalid targets and indicators have been chosen to dilute controversial policy intents. Clearly, these paradigms must be displaced or transformed to allow space for a human rights approach.

At least three sources have been identified as potentially supporting freedom from poverty as a human right in Canada and elsewhere. First, Pogge (2007) has identified what he refers to as moral human rights, whose validity is independent of supernational, national and subnational bodies of law, the executives and legislatures which create them and the courts which interpret them.[13] He identifies freedom from poverty as one of a class of moral human rights which have come to be acknowledged in the aftermath of the second world war and argues that the fulfillment of resultant obligations is an important source of the legitimacy of governments. In his view these moral human rights have evolved from the conceptualization of natural human rights embodied in earlier conceptions of natural law.[14]

Second, international human rights laws, conventions and treaties to which Canada is signatory are often mentioned as the sources of human rights obligations to eradicate poverty by Canadian governments.[15] In this regard, Kwadrans (2016) has argued that Canada's international human rights obligations under the *International Covenant on Economic, Social and Cultural Rights*, and especially the basic minimum core, constitute useful interpretive and litigation tools with regard to Section 7 (Security of the Person) of the Canadian Charter of Rights and Freedoms.[16] The Covenant not only requires State parties to progressively realize economic and social rights, including those required to eradicate poverty, but also to guarantee, more or less immediately, a basic minimum core of these rights. She goes on to argue that Canadian courts have denied people living in poverty remedies under Section 7 based on a rigid, arbitrary, and outdated distinction between positive economic and social rights and negative political and civil rights and concerns regarding the justiciability of the former related to this distinction. She concludes that this stance of Canadian courts is inconsistent with international law.

This minimum core is defined as follows:

> The minimum core constitutes "minimum essential levels of each of the rights" that States Parties are required to satisfy immediately rather than to progressively realize, including "essential foodstuffs, essential primary health care, basic shelter and housing, or the most basic forms of education …."[17]

It constitutes a presumptive legal obligation which can be used in attempts to enforce a basic substantive level of economic and social rights as an immediate obligation.

The third source of human rights obligations to eradicate, or at least, ameliorate poverty is Section 7 of the Charter of Rights and Freedoms. As described above, thus far, this has not been an effective path to remedies for people living in poverty. Recently, Jackman (2019) has characterized the Canadian courts' reluctance to hear relevant cases, their adherence to pejorative stereotypes about the etiology of poverty and the characteristics of the poor, and their unequal treatment of Section 7

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[13] Pogge, *supra* note 10.

[14] Thomas Pogge & Winfried Menko, World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms, 2nd ed (Cambridge: Polity 2008).

[15] Tracy Smith-Carrier, "Rights-Based Approach Key to Alleviating Poverty" (2018) online: Policy Options <policyoptions.irpp.org/magazines/september-2018/rights-based-approach-key-alleviating-poverty/>.

[16] Ania Kwadrans, "Socioeconomic Rights Adjudication in Canada: Can the Minimum Core Help in Adjudicating the Rights to Life and Security of the Person Under the Canadian Charter of Rights and Freedoms" (2016) 25: J L & Soc Pol'y 78.

[17] *General Comment No. 1: Reporting by States Parties*, UNCESCR, 3rd Session, Annex III, UN Doc E/1989/22 (1989).

arguments from poor and non-poor litigants as a failure of constitutionalism. [18] The one bright spot she finds is that in the Gosselin case eight of nine Supreme Court justices rejected the argument that Section 7 could not be invoked in the absence of direct state action and could not be applied to impose positive obligations on governments to protect life, liberty and the security of the person. Nevertheless, the majority of the court found that despite extensive professional and personal evidence the appellants in the Gosselin case did not establish a Charter violation.

As suggested above, the United Nations has been prominent in establishing the intellectual basis for a human rights approach to poverty[19], through such documents as *Human Rights and Poverty Reduction: A Conceptual Framework*[20], and *Human Rights Dimension of Poverty*.[21] Based on Sen's capability approach[22], the former document (U.N. High Commissioner on Human Rights, 2004:9) characterizes poverty from a human rights perspective as follows:

> The capability approach defines poverty as the absence or inadequate realization of certain basic freedoms, such as the freedoms to avoid hunger, disease, illiteracy, and so on. Freedom here is conceived in a broad sense, to encompass both positive and negative freedoms.[23]

The latter document characterizes human rights abuses inherent in poverty in the following terms:

> Indeed, no social phenomenon is as comprehensive in its assault on human rights as poverty. Poverty erodes or nullifies economic and social rights such as the right to health, adequate housing, food and safe water, and the right to education. The same is true of civil and political rights, such as the right to a fair trial, political participation, and security of the person.[24]

Beyond this, the United Nations has taken significant action to implement this human rights approach. This includes appointment of a Special Rapporteur on Extreme Poverty and Human Rights by the UN Human Rights Council. Adler describes special rapporteurs as independent experts who examine, monitor, advise, and publicly report on human rights problems by investigating complaints and conducting fact-finding missions to countries to investigate allegations of human rights violations. [25] Their focus is on state policies and actions with the purpose of determining whether states are meeting their human rights obligations. According to the UN Office of the High Commission on Human Rights web page, as of September 2020 there were 55 active special rapporteur mandates. In addition to the Special Rapporteur on Extreme Poverty and Human Rights many mandates are highly related to poverty, such as the right to food, adequate housing as a component of the right to an adequate standard of living, and safe drinking water and sanitation. Other mandates focus on groups which are over-represented among those living in poverty such as persons with disabilities, Indigenous peoples, internally displaced persons, and migrants. Still other mandates deal with problems that are at least partially caused by poverty, such as human trafficking, the sale and exploitation of children, and slavery.

In addition, the range of human rights treaty committees at the United Nations has increasingly focused on poverty through implementation of this human rights approach. The primary committee in this regard is the Committee on Economic, Social and Cultural rights, which in its concluding observations on the sixth periodic report of Canada, expressed concern about Canada's high poverty rate and recommended adoption of a human rights based national anti-poverty strategy.[26] However

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[18] Matha Jackman, "One Step Forward and Two Steps Back: Poverty, the Charter and the Legacy of Gosselin" (2019) 39:1 NJCL 85.

[19] Suzanne Egan, "Introduction: Poverty and human rights-a multidimensional concept in search of multidimensional collaboration" Suzanne Egan & Anna Chadwick, eds, *Poverty and Human Rights* (Northampton: Edward Elgar Publishing 2021) 1.

[20] United Nations Office of the High Commissioner on Human Rights, "Human Rights and Poverty Reduction: A Conceptual Framework" (1 January 2003) online (pdf): *United Nations Human Rights Office of the High Commissioner* <www.ohchr.org/en/publications/policy-and-methodological-publications/human-rights-and-poverty-reduction-conceptual> [*UN Poverty Reduction*].

[21] United Nations Office of the High Commissioner on Human Rights, "OHCHR and the human rights dimension of poverty" (2021) online: *United Nations Human Rights Office of the High Commissioner* <www.ohchr.org/EN/Issues/Poverty/DimensionOfPoverty/Pages/Index.aspx> [*UN Rights Dimension*].

[22] Amartya Sen, *Inequality Reexamined* (New York: Russell Sage Foundation 1992).

[23] *UN Poverty Reduction*, *supra* note 20 at 9.

[24] *UN Rights Dimension*, *supra* note 21.

[25] Michael Adler, "The Alston Report on Extreme Poverty and Human Rights in the UK: A Review" (2020) 28:2 J Poverty & Soc Justice 28 265.

[26] United Nations Committee on Economic, Social and Cultural Rights, "Concluding observations on the sixth periodic report of Canada" (23 March 2016) online (pdf): *United Nations Digital Library* <digitallibrary.un.org/record/831868>.

other committees have exemplified a similar stance. For example, the Committee on the Elimination of Racial Discrimination, in its concluding observations on the combined twenty-first to twenty-third periodic reports of Canada recommended that poverty be eliminated as a root cause of both the over-representation of African Canadians and Indigenous people in the criminal justice system and of Indigenous children in foster care. [27]

DIFFERENTIAL IMPACTS OF THE PANDEMIC

The evidence for more severe economic, psychological and health effects experienced by those living in poverty is emergent, and both direct and indirect. Direct evidence focuses on those living in poverty and indirect evidence focuses on groups known to experience higher poverty rates. provide direct evidence of the differential effects of the pandemic on low-income workers in their study of changes in employment and aggregate hours between February 2020 and April 2020 for workers between the ages of 20 and 64.[28] Overall, there was a 15% decline in employment and a 32% decline in aggregate weekly work hours. However, workers in the bottom earnings quartile (44.0%) accounted for 10 times the job losses as those in the highest earnings quartile (4.4%). Similarly, workers in the lowest earnings quartile (36.6%) experienced more than 3.7 times the loss of work hours as those in the highest quartile (9.7%).

Regarding indirect evidence, Aboriginal (Indigenous) Canadians experience much higher poverty rates than non-Aboriginal Canadians (Statistics Canada, 2016).[29] In the 2016 census those of all ages with Aboriginal identity (23.6%) were found to have a poverty rate almost 10 percentage points higher than those with non-Aboriginal identity (13.8%) (Low Income Measure, After Tax). This excludes the territories and certain areas based on census subdivision type (such as Indian reserves), with Indian reserves known to have very high rates of poverty, at least for those under 18 years of age.[30] Using monthly data from the Labour Force Survey from March, 2020 to August, 2020 Bleakney, Masoud and Robertson found that while employment for Indigenous and non-Indigenous people initially declined by a similar share, employment among Indigenous people has been slower to recover.[31] Year-over-year, the employment rate from June, 2020 to August, 2020 was down 6.9 points among Indigenous people and only 5.0 points among non-Indigenous people. In the three months ending in May, 2020 the unemployment rate increased slightly more for Indigenous people living off reserve in the provinces (6.6 percentage points) than for non-Indigenous people (6.2 percentage points). However, this must be seen in the context of an unemployment rate that was 1.8 times higher for Indigenous people than for non-Indigenous people prior to the pandemic. In addition, it was found that Indigenous people are over-represented in occupations with larger pandemic-related employment decreases (trades, transport and equipment operators and related occupations, sales and service occupations and occupations in education, law and social, community and government services).

Regarding psychological effects, Jenkins, McAuliffe, Hirani, Richardson, Thomson, McGuinness, Morris, Kousoulis, and Gadermann have reported direct evidence from a nationally representative survey of the mental health impacts of the pandemic on 3,000 adults.[32] Data were collected in May 2020. The survey did not collect data based on a poverty measure per se, but did identify respondents living in low income circumstances, by determining those with annual gross household incomes of less than $25,000. Findings indicated that low income individuals reported a much higher prevalence of pandemic induced mental health deterioration than the sample as a whole (47.5% versus 38.2%). They were significantly more likely to report being lonely

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[27] United Nations Committee on the Elimination of All Forms of Racial Discrimination, "Concluding observations on the combined 21st to 23rd periodic reports of Canada" (13 September 2017) online: *United Nations Human Rights Office of the High Commissioner* <www.ohchr.org/en/documents/concluding-observations/cerdccanco21-23-committee-elimination-racial-discrimination>.

[28] Thomas Lemieux et al, "Initial Impacts of the COVID-19 Pandemic on the Canadian Labour Market" (2020) 46:S1 Can Pub Pol'y S55.

[29] Statistics Canada, "2016 Census of Population, Statistics Canada Catalogue no. 98-400-X2016173" online: *Statistics Canada* <www150.statcan.gc.ca/n1/en/catalogue/98-400-X2016173>.

[30] Leila Sarangi, "2020 Setting the Stage for a Poverty Free Canada" (24 January 2020) online (pdf): *Campaign 2000: 2019 Report on Child and Family Poverty in Canada* <campaign2000.ca/wp-content/uploads/2020/01/campaign-2000-report-setting-the-stage-for-a-poverty-free-canada-updated-january-24-2020.pdf>.

[31] Amanda Bleakney, Huda Masoud & Henry Robertson, "Labour Market Impacts of COVID-19 on Indigenous People: March to August 2020" (2 November 2020) online: *Statistics Canada* <www150.statcan.gc.ca/n1/pub/45-28-0001/2020001/article/00085-eng.htm>.

[32] Emily K. Jenkins et al, "A Portrait of the Early and Differential Mental Health Impacts of the COVID-19 Pandemic in Canada: Findings from the First Wave of a Nationally Representative Cross-Sectional Survey" (2021) 145 Preventive Medicine 106333.

or isolated (39% versus 31%), depressed (34% versus 23%) and panicked (12% versus 8%). Low income respondents were also a great deal more likely to report "not coping very well" or "not well at all" than the whole sample (24.9% versus 13.3%). In addition, low income respondents reported more than double the prevalence of experiencing suicidal thoughts/feelings than the sample as a whole (13.8% versus 6.4%).

Regarding differential morbidity, treatment, and mortality related to Covid-19, Canada's Chief Public Health Officer declared that "Covid-19 is not impacting Canadians equally," and presented a model in which socioeconomic position, including poverty, are described as a structural determinant of health.[33] She goes on to identify factors related to poverty which increase health risks for those living in poverty, including differential ability to physically distance based on material circumstances, differential ability to work from home for many low wage essential workers and differential treatment by the health care system based on low income status. City of Toronto Public Health provided direct evidence of the higher of risk of infection and hospitalization for people living in poverty.[34] They report that as of March 31, 2021, 46% of Covid-19 cases were living in low-income households, even though only 30% of the City of Toronto population were living in low income. Alarmingly, 55% of those hospitalized for Covid-19 were living in low income households.

Indirect evidence has been provided by the Province of Manitoba that between May 1, 2020 and December 31, 2020, 51% of people who have tested positive for COVID-19 in Manitoba self-identify as Black, Indigenous or People of Colour.[35] This is 1.5 times higher than expected, as 35 per cent of people in Manitoba belong to these groups. The over-representation of Indigenous people among those experiencing poverty is described above. In addition, Statistics Canada reports that 20.0% of visible minority Manitobans (persons, other than Aboriginal peoples, who are non-Caucasian in race or non-white in colour) are living in poverty as opposed to 14.3% of non-visible minority Manitobans (Low Income Measure, After Tax).[36]

It seems clear that poverty creates increased vulnerability of infection and hospitalization. In addition, those living in poverty more frequently experience negative mental health impacts as well as economic losses in the labour market.

However, we must restrain any inclination to essentialize the differential impacts of the pandemic on the poor as if the pandemic experience of all people living in poverty is identical. The concept of intersectionality allows us to understand the synergistic effect of categories of difference.[37] Manuel explains its implications for public policy formulation and analysis as follows:

> To say that we are using an intersectional lens is to say that we recognize that the distinguishing categories (such as race/ethnicity, gender, religion, sexual orientation, class, and other markers of identity and difference) do not function independently but, rather, act in tandem as interlocking or intersectional phenomena.[38]

Thus, we might expect that the pandemic impacts experienced by poor women are different and perhaps more damaging than those experienced by poor men, and, similarly, that the pandemic impacts experienced by the racialized poor are different and more damaging than those experienced by the non-racialized poor. The same might be expected for poor Indigenous people in comparison with the non-Indigenous poor and for the ethnic minority poor in comparison with poor ethnic majority people. In this vein poor people with disabilities can be expected to experience different impacts and more disadvantage than the non-disabled poor.

Incorporation of this intersectional perspective is important for public policy formulation, implementation,

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[33] Theresa Tam, "From Risk to Resilience: An Equity Approach to Covid-19: The Chief Public Health Officer of Canada's Report on, the State of Public Health in Canada 2020" (October 2020) online (pdf): *Government of Canada* <www.canada.ca/en/public-health/corporate/publications/chief-public-health-officer-reports-state-public-health-canada/from-risk-resilience-equity-approach-covid-19.html>.

[34] City of Toronto Public Health, "COVID 19: Ethno-Racial Identity & Income Share" (2022) online: *City of Toronto* <www.toronto.ca/home/covid-19/covid-19-latest-city-of-toronto-news/covid-19-pandemic-data/covid-19-ethno-racial-group-income-infection-data/>.

[35] Province of Manitoba, "COVID-19 Infections in Manitoba: Race, Ethnicity, and Indigeneity External Report" (1 March 2021) online (pdf): *Government of Manitoba* <www.gov.mb.ca/health/publichealth/surveillance/docs/rei_external.pdf>.

[36] Statistics Canada, "2016 Census of Population, Statistics Canada Catalogue no. 98-400-X2016211" online: *Statistics Canada* <www150.statcan.gc.ca/n1/en/catalogue/98-400-X2016211>.

[37] Canan Corus et al, "Transforming Poverty-Related Policy With Intersectionality" (2016) 35:2 J Public Policy & Marketing 211.

[38] Tiffany Manuel, "How Does One Live the Good Life? Assessing the State of Intersectionality in Public Policy" in Olena Hankivsky & Julia S. Jordan-Zachery, eds, *The Palgrave Handbook of Intersectionality in Public Policy* (Cham: Palgrave Macmillian 2019) 31 at 40.

and analysis.[39] In policy formulation intersectionality is necessary to ensure that the policy includes objectives and elements to respond to differential experiences within the group impacted by the problem and in policy implementation intersectionality is required to guide the allocation of resources among the various categories of persons within the affected population. In policy analysis, intersectionality indicates that the enactment of the policy must be assessed distinctively for each category of persons and that different indicators may be required for each category.

PANDEMIC PUBLIC POLICY

Canada has been characterized as a social liberal welfare state in that most social welfare programs remain residual and conditional, with the family and market remaining the primary institutions through which needs are met.[40] Overall, the distinction between the deserving (children, seniors, people with disabilities, the sick) and underserving (able-bodied adults expected to be attached to the labour market) poor is maintained. The social elements in the Canadian welfare state include universal primary, elementary and secondary education and physician and hospital services. This was the pattern maintained through public policy responses to the economic consequences of the pandemic.[41]

The federal government did not frame its policy response to the pandemic in terms of poverty prevention or in terms of reducing the predictably differential impacts of the pandemic on those already living in poverty. Rather its stated objectives were to provide support to workers to quarantine or who have been ordered to self-isolate and to help support employers and their workers who are experiencing a downturn in business due to COVID-19.[42] The prime minister's reassurances were clearly limited to workers and businesses and did not distinguish low-income workers for special concern: "our message to Canadians is clear: to every worker and business, in every province and territory, we have your back and we will get through this together."[43]

The prime minister's subsequent announcement of income support measures paired the health and safety of Canadians with employment as the stated intent of the measures was to "to protect our economy, and the health, safety, and jobs of all Canadians."[44]

If the federal government had responded to the economic and health impacts of the pandemic through a human rights approach to poverty reduction involving both poverty prevention and poverty amelioration, the policy goals and instruments employed would have been quite different than those actually implemented or continued and described below.[45] A human rights based policy response would have intentionally focused on empowering the poor through income support entitlements, rather than on maintaining conditional programs such as social assistance and treating those without sufficient labour market attachment as less deserving. A human rights-based approach would also have treated the international treaties that Canada has ratified as a normative framework to guide policy formulation. The emphasis would have been on fulfilling treaty obligations. Beyond this, a human rights approach would have implemented accountability mechanisms to ensure that policy goals are achieved and that human rights obligations are fulfilled. A human rights-based approach would have defined those living in poverty as a vulnerable group and would have purposefully focused on limiting their poverty-related elevated risk of infection and hospitalization based on norms of equality and non-discrimination. All pandemic policies and programs would have been assessed to determine if they were likely to be less accessible and/or less effective for those living in poverty. Finally, a human rights-based approach would have provided an opportunity for those living in poverty to participate in the formulation, implementation and monitoring of policies and programs. Given the

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[39] Corus, *supra* note 37.

[40] Gregg Matthew Olsen, *The Politics of the Welfare State: Canada, Sweden and the United States* (Don Mills, Ontario: Oxford University Press 2002).

[41] Scott M. Aquanno & Toba Bryant, "Situating the Pandemic: Welfare Capitalism and Canada's Liberal Regime" (2021) 51:4 Intl J Health Services 509.

[42] Justin Trudeau, "Prime Minister Outlines Canada's COVID-19 Response" (11 March 2020), online: *Government of Canada* <pm.gc.ca/en/news/news-releases/2020/03/11/prime-minister-outlines-canadas-covid-19-response>.

[43] *Ibid*.

[44] Justin Trudeau, "Prime Minister Announces More Support for Workers and Businesses Through Canada's COVID-19 Economic Response Plan" (18 March 2020) online: *Government of Canada* <pm.gc.ca/en/news/news-releases/2020/03/18/prime-minister-announces-more-support-workers-and-businesses-through>.

[45] UN Poverty Reduction, *supra* note 20.

requirement for timely action participation could have been arranged through collaboration with poor peoples' organizations, such as Canada Without Poverty.

How the federal government responded to the pandemic is quite different than what would be required by a human rights-based approach to poverty reduction. The Canada Emergency Response Benefit was established by the federal government for those with substantial labour market attachment (employed or self-employed) who had lost their job due to the pandemic and had not quit voluntarily. They had to have labour market income of at least $5,000 in 2019 or in the 12 months prior to their application to be eligible.[46] The benefit was a uniform $500 per week. This was clearly a program for the deserving poor with substantial labour market involvement.

This is far different than the experience for the undeserving poor on social assistance. In a sense, the federal government established $500 per week as the amount required for a single person to live at an acceptable level in Canada, at least during a pandemic, by setting this as the uniform amount paid to those eligible for the Canadian Emergency Response Benefit, without reference to household size. However, the highest amount a single recipient could receive from provincial or territorial social assistance and all other benefits for which she or he was eligible was $216.25 per week in Prince Edward Island. The lowest was $143.12 in Nova Scotia (Laidley and Aldridge, 2020).[47] The Prince Edward Island rate is only 51% of the Market Basket Measure poverty threshold and the New Brunswick rate is only 32% of it. Both Canada Emergency Response Benefit recipients and social assistance recipients would have experienced similar additional costs due to the pandemic. Canada Emergency Response Benefit recipients are more likely to have assets upon which to fall back, partially because of the asset eligibility limitations of provincial and territorial social assistance programs, and partially because 44.6% of federal pandemic transfers to households went to the highest two income quintiles, which are more likely to have savings and other assets.[48]

In addition, social assistance recipients are subjected to a range of behavioual rules and conditions, expenditure requirements and approvals and bureaucratic surveillance, which often results in stigmatization.[49] Beyond this 19.63% of social assistance recipients earned enough in the labour market to be eligible for the Canada Emergency Response Benefit.[50] However, the Canada Emergency Response Benefit was exempt income in determining social assistance eligibility and benefit levels only in British Columbia, Northwest Territories and Yukon. In all other provinces, social assistance benefits are taxed back at far higher rates than the income taxation rates that other Canada Emergency Response Benefit recipients experienced.[51]

Graefe and Ferdosi have reported on an online survey of 800 Ontarians, which clearly demonstrates the differences in outcomes for Canada Emergency Response Benefit and Ontario social assistance programs.[52] They found that a third of social assistance recipients often did not have enough to eat and half had days with no food. Sixty-three per cent bought nutritious food less often, and nearly a third made increased use of food charities. This compared with only one in ten Canada Emergency Response Benefit recipients going a day without food and one quarter buying nutritious food less often. Eighty percent of social assistance recipients reported having lost meaningful relationships during the pandemic, while this was experienced by only half of Canada Emergency Response Benefit recipients. Social assistance recipients reported that although their benefits did not increase during the pandemic their costs did and mutual aid strategies became less available under lockdown.

These differences in program structure, processes and outcomes between the Canada Emergency Response Benefit and provincial and territorial social assistance programs are not based on variations in material

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[46] Michelle M. Amri, & Dilani Logan, "Policy Responses to COVID-19 Present a Window of Opportunity for a Paradigm Shift in Global Health Policy: An Application of the Multiple Streams Framework as a Heuristic" (2021) 16:8–1 Global Public Health 1187.

[47] Jennifer Laidley & Hannah Aldridge, *Welfare in Canada* (Toronto: Maytree 2020).

[48] Erik Hertzberg, "Trudeau's Covid-19 Spending Was Tilted Toward High-Earning Canadians" (1 June 2021) online: *Bloomberg News* <www.bloomberg.com/news/articles/2021-06-01/trudeau-s-covid-19-spending-was-tilted-to-high-earning-canadians>.

[49] Hugh Segal, "Scrapping Welfare: The Case for Guaranteeing all Canadians an Income Above the Poverty Line" (2012) 20:10 Literary Rev Can 8; Jamie Swift & Elaine M. Power, *The Case for Basic Income: Freedom, Security, Justice* (Toronto: Between the Lines 2021).

[50] Gillian Petit & Lindsay M Tedds, "The Effect of Differences in Treatment of the Canada Emergency Response Benefit Across Provincial and Territorial Income Assistance Programs" (2020) 46:S1 Can Pub Pol'y 46 S29.

[51] Laidley, *supra* note 47.

[52] Peter Graefe & Mohammad Ferdosi, "CERB was luxurious compared to provincial social assistance" (3 May 2021) online: *McMaster University* <brighterworld.mcmaster.ca/articles/cerb-was-luxurious-compared-to-provincial-social-assistance/>.

circumstances or need among recipients, but on the moralistic binary of deserving and underserving[53] and stigmatic stereotypes related to it.[54] This discriminatory approach is clearly antithetical to a human rights approach to anti-poverty policy.

CONCLUSION

Poverty In Canada not only constitutes a human rights violation; but also creates vulnerability for those who experience it to infection, psychological and economic impacts. Poverty may also raise the risk of disease and infection for the non-poor in the context of a pandemic.[55] Canadian public policy aimed at reducing poverty is both inconsistent with a human rights approach and of limited effectiveness.[56] One means of transforming public policy to an effective human rights approach is the implementation of a basic income.[57] A basic income provides a stream of regular cash income to meet basic needs on a universal basis to all members of the political community without the requirement to meet any behavioural conditions or to spend the income in any particular way.[58] Since a basic income is designed to meet basic needs, it does not obviate the requirement for benefits to cover special needs, such as those related to disability or prescribed medication. Canadian basic income advocates also favour a robust offering of public services and reject the idea that a basic income can replace public services through marketization.[59] Adequate minimum wage and anti-discrimination policies are also seen as necessary.

Beyond this, those who favour a human rights approach to poverty eradication should consider action in three arenas. First, they should engage in public education to replace a moral discourse of personal failings of the poor and the need for charity with a discourse based on the poor as included in the right to subsistence. Second, they should act in the courts whenever possible to establish the Charter of Rights and Freedoms and international human rights law as instruments to defend the rights of the poor. Third, they should engage in vigorous policy advocacy to implement human rights-based poverty reduction policies.

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[53] Sandra Jeppesen "From the 'War on Poverty' to the 'War on the Poor': Knowledge, Power, and Subject Positions in Anti-Poverty Discourses" (2009) 34:3 Can J Communication 487; Alvin Finkel, *Compassion: A Global History of Social Policy* (London: Red Globe Press 2019).

[54] Lister, *supra* note 6; Amber Gazso et al, "The Generationing of Social Assistance Receipt and 'Welfare Dependency' in Ontario, Canada" (2020) 67:3 Soc Problems 67 585.

[55] Faheem Ahmad et al, "Why Inequality Could Spread COVID-19" (2020) 5:5 Lancet Public Health e240.

[56] Louise Potvin, "The need for political will to reduce poverty in Canada" (2019) 110:4 Can J Pub Health 383.

[57] Rolf Künnemann, "Basic Income: A State's Obligation Under the Human Right to Food"(Paper delivered at the Basic Income European Network Ninth International Congress, Geneva, Switzerland, 12–14 September 2002) [unpublished]; Philip Alston, "Universal Basic Income as a Social Rights-Based Antidote to Growing Economic Insecurity" (2017) New York University School of Law Public Law & Legal Theory Research Paper Series Working Paper No 17-51.

[58] James P. Mulvale & Sid Frankel, "Next Steps on the Road to Basic Income in Canada" (2016) 43:3 J Sociology & Soc Welfare 27.

[59] *Ibid*.

EXCLUSION IN THE TIME OF COVID-19: MIGRANT RIGHTS IN CANADA DURING THE PANDEMIC

Anna Purkey

In April 2020, the Secretary-General of the United Nations, Antonio Guterres, referred to the COVID-19 pandemic as a "once-in-a-lifetime pandemic"[1] and although he may be correct, the impact of the pandemic has followed a pattern familiar to societies that have lived through natural disaster, economic collapse, war, etc. While no part of society has escaped unscathed, the burden of this pandemic has fallen unevenly, weighing more heavily on those least able to cope: the marginalized and vulnerable including, though not limited to, migrants. As is often the case in situations of crisis, COVID-19 precipitated a turning-in by states and communities; a focus on looking after "our own" which resulted in an increase in mutual aid initiatives such as community fridges and food delivery for the elderly, as well as government policies aimed at providing social supports. But this emphasis on taking care of those who are "in" was frequently paired with a renewed emphasis on shutting others "out," both politically (by restricting benefits to certain groups) and literally (by closing borders). This exclusionary mentality and the surge of xenophobic sentiment that accompanied it certainly affected and continues to affect citizens as well, but its most serious impact has been on those with the least secure status and rights.

Around the world migrants immediately felt the effects of the pandemic. In India, sweeping lockdowns stranded millions of migrant workers without work or money, forcing many to walk hundreds of miles home. In other countries migrant workers were restricted to dormitories or were unable to work, thus severely impacting the remittances upon which millions of people depend.[2] Migrants and refugees also quickly began to be scapegoated for the spread of the virus in countries as diverse as Malaysia, Yemen, Bangladesh, Saudi Arabia, and China, and by far-right political parties in Europe and President Trump in the United States.[3]

The common characteristics of migrant communities, whether made up of forced or voluntary migrants, are exactly what puts them most at risk during the pandemic: high density, inadequate housing, low-wage employment in high-risk industries, inability to access state social supports and services (including health care), lack of political agency needed to claim their rights, and precarious legal status. Given these conditions of life, migrants are at greater risk of falling ill from COVID-19, as well as more vulnerable to the socio-economic and political effects of the pandemic.

An examination of the impact of COVID-19 on two particular communities of migrants in Canada, temporary foreign agricultural workers (TFAWs) and asylum-seekers, highlights the different ways in which the pandemic has disproportionately affected these already vulnerable groups and how Canada's responses have fallen short. The Canadian government has-implemented policies that are predominantly driven by self-interest and that fail to recognize the inherent and equal worth of those migrants affected. The following paragraphs will show how both groups have suffered infringements of fundamental rights as a result and will highlight the need for a radical shift in the government's approach to policy development with respect to them.

In the last decades, temporary foreign workers (TFWs) have played an increasingly important role in the Canadian labour market. They arrive in Canada through a variety of government programs most of which have as their guiding principle the idea that migrants will provide much-needed labour, often in low-wage jobs in a range of different industries (including health care, in-home care, agriculture, food processing, and construction) for a limited period of time and then return to their countries of origin. Unlike migrants who come to Canada to work in skilled occupations, most temporary foreign workers have no path to permanent residency or Canadian citizenship even though they return year after year, providing labour that is essential to many industries and a vital part of the Canadian economy.

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1 Antonio Guterres, "All hands on deck to fight a once-in-a-lifetime pandemic" (2020) online: *United Nations* <www.un.org/en/un-coronavirus-communications-team/all-hands-deck-fight-once-lifetime-pandemic>.

2 World Bank, "COVID-19 Remittance Flows to Shrink 14% by 2021" (29 October 2020) online: *World Bank* <www.worldbank.org/en/news/press-release/2020/10/29/covid-19-remittance-flows-to-shrink-14-by-2021>.

3 Emily Ding, "Malaysia's Coronavirus Scapegoats" (19 June 2020) online: *Foreign Policy*, <foreignpolicy.com/2020/06/19/malaysias-coronavirus-scapegoats/>; Gregory A. Maniatis, "Don't scapegoat migrants for the pandemic" (9 July 2020) online: *The New Arab* <english.alaraby.co.uk/english/Comment/2020/7/9/Dont-scapegoat-migrants-for-the-pandemic>; Diane Cole, "Why Scapegoating is a Typical Human Response to a Pandemic." (29 August 2020) online: *NPR: Goats and Soda*, <www.npr.org/sections/goatsandsoda/2020/08/29/906225199/why-scapegoating-is-a-typical-human-response-to-a-pandemic>.

While the overall number of TFWs may be relatively modest, they are over-represented in certain specific industries. In 2018, prior to the pandemic, temporary foreign workers filled nearly 55,000 jobs in the primary agriculture sector which amounted to 20% of the total employment in that sector.[4] Indeed, when the border closures were announced at the beginning of the pandemic, farmers immediately raised concerns that the agriculture sector would collapse without the temporary foreign workers.[5]

The problems with the system that brings temporary foreign agricultural workers to Canada, tying them to a particular employer, are well-documented. For years, advocates and the migrants themselves have raised concerns regarding the substandard employer-provided living conditions for migrants characterized by inadequate sanitation, overcrowding, poor ventilation, and even lack of access to drinkable water. Insufficient personal protective equipment, harassment and discrimination on the job, the absence of health and safety training, and poor working conditions (sometimes up to 12 hours per day, 7 days per week) are endemic in this sector.[6] These conditions are a function of the very design of the TFAW program. In addition to being subject to employer-tied contracts and often required to reside in employer-provided housing, agricultural workers in general, and TFAWs in particular, benefit from far fewer labour rights than many other groups, often exempt from hours of work, overtime pay and minimum wage requirements. More importantly however, by tying migrant workers' legal status in Canada to their employment, the TFW Program has manufactured a state of precarity which leaves migrants vulnerable to abuse and exploitation and denies them agency. Without the ability to freely change employers without endangering their legal status, migrants live under constant fear of dismissal and deportation and lack the ability to assert their rights and demand compliance with the labour and human rights standards. In recent years, the Federal government has made some efforts to address these concerns by, for instance, introducing a program to allow vulnerable workers to apply for open work permits. Nevertheless, the language and logistical barriers make this option difficult for many to access.[7]

Given these factors, the severe impact of the COVID-19 pandemic on migrant workers was entirely foreseeable. As noted earlier, the border closure on March 16, 2020, quickly led to lobbying by the agricultural sector, and by March 26th, an exemption for migrant workers was in place. Despite acknowledging these workers as essential, few precautions were taken to protect their health and safety. Migrants were transported to Canadian farms in groups, with little or no protective equipment or social distancing, often undergoing quarantine together despite having come from different countries and/or regions of the same country. By May 15, 2020, the advocacy group Migrant Workers Alliance for Change, had received complaints on behalf of over 1,100 workers. These complaints included documented reports of wage theft, lack of access to healthcare services, lack of healthcare information related to COVID-19, lack of protective equipment and social distancing, inadequate food and income during quarantine, inadequate housing, and increased mobility restrictions, intimidation, and surveillance by employers.[8]

These complaints and subsequent reports on living and working conditions for migrant workers reveal that the pandemic both highlighted existing weaknesses in the TFW program and exacerbated the vulnerability of migrant workers. In the context of a pandemic, inadequate employer-provided housing becomes not just an inconvenience but a serious threat to the lives of workers. Likewise, the failure of employers to observe COVID-related precautions such as providing personal protective equipment and ensuring social distancing, is merely the newest manifestation of an already existing pattern, noted in a pre-COVID-19 study in Quebec that reported that less than half of that province's farmers employing TFAWs were observing legal health and safety requirements.[9] Similarly, a 2016 study in Ontario found that 55% of migrant workers surveyed continued

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4 Statistics Canada. "COVID-19 Disruptions and Agriculture: Temporary Foreign Workers," (17 April 2020) online: *Statistics Canada* <www150.statcan.gc.ca/n1/pub/45-28-0001/2020001/article/00002-eng.htm>.

5 Bethany Hastie, "The coronavirus reveals the necessity of Canada's migrant workers" (12 May 2020) online: *The Conversation* <theconversation.com/the-coronavirus-reveals-the-necessity-of-canadas-migrant-workers-136360>.

6 Janet McLaughlin, "Backgrounder on Health and Safety for Migrant Farmworkers in Canada" (1 December 2010) online (pdf): *International Migration Research Centre* <scholars.wlu.ca/imrc/15/>.

7 CBC News, "'Important to set precedent': Migrant workers applying for open visas" (8 August 2019) online: *CBC News* <www.cbc.ca/news/canada/windsor/migrant-temporary-workers-open-visa-1.5236538>.

8 Migrant Workers Alliance for Change, "Unheeded Warnings: COVID-19 & Migrant Workers in Canada" (June 2020) online (pdf): *Migrant Workers Alliance* <migrantworkersalliance.org/wp-content/uploads/2020/06/Unheeded-Warnings-COVID19-and-Migrant-Workers.pdf> [*MWAC*, "Warnings"].

9 Leo McGrady, "Health Issues Under Canada-Sponsored Migrant Worker Indentureship" (2015) online: *McGrady Law* <mcgradylaw.ca/pdfs/Health%20Issues%20Under%20Canada-Sponsored%20Migrant%20Worker%20Indentureship(Oct%206-15).pdf>.

working despite illness or injury for fear that disclosure might jeopardize their employment and immigration status, and 20% did not even have a health card.[10] While unacceptable under any circumstances, the lack of healthcare-related information and the failure to seek and obtain medical care has especially severe consequences in the context of the pandemic. Numerous instances have been recounted of migrant workers being required to continue working despite displaying symptoms of COVID-19 until positive tests were returned or not being able to access testing until too late. At the same time, it has become increasingly difficult for migrant workers to access health care given that many providers have limited their services to existing patients.[11]

The pandemic has exacerbated the vulnerability of TFAWs in other less direct ways as well. As a result of pandemic-induced labour shortages, migrant workers have experienced an increase in their workload, working longer hours with fewer days off, without overtime pay. Migrant agricultural workers have also experienced increased isolation and vulnerability as employers have used the pretext of the pandemic to further restrict basic worker freedoms, including the freedom of assembly and mobility, even going so far as to implement curfews and post guards outside of migrant housing.[12] Prohibiting migrants from venturing into the general community, ostensibly to avoid importing COVID-19 back to the workplace, also impedes their access to information and services, to moral, psychological and religious supports, and to advocacy groups that might be able to provide legal support and information. The pandemic has further precipitated an increase in intimidation and racism, with workers being threatened with termination and/or deportation if they fail to abide by employer orders. Similarly, migrants have experienced increased incidents of racism outside of the workplace where they have been scapegoated as vectors for disease, even though many came from countries which had lower incidence of COVID-19 than Canada at the time.[13] In the end, the consequences of these failures have been unsurprising: outbreaks at numerous workplaces with 12% of migrant farm workers testing positive for COVID-19 in Ontario in 2020 and 3 deaths.[14]

From the very beginning of the pandemic, the government's actions have focused on mitigating the impact of COVID-19 on Canadian society and the economy, including the food supply chain, largely ignoring its impact on the temporary foreign agricultural workers that it has acknowledged as essential. Thus, government responses have been predominantly employer-focused band-aid solutions rather than structural reforms that ensure the health, safety, and rights of migrant workers. Among other initiatives, the Government allocated $58.6 million, ostensibly to strengthen the TFW Program. This money was earmarked for increasing the employer inspection regime and improving ways of addressing allegations of non-compliance, as well as for infrastructure to improve health and safety on farms and in living quarters.[15] Consultations on a national standard for employer-provided accommodations were also conducted, although the results of those consultations will not be implemented until 2022 and the consultations themselves only began at the end of October after many migrant workers had already left the country.[16] The majority of government initiatives have had as their objective ensuring that temporary foreign workers are able to arrive in Canada and defraying potential costs to employers, for instance by providing funding for the 14-day quarantine period, prioritizing the processing of Labor Market Impact Assessments, and exempting TFAWs from the 3-night stay in a Government Authorized Accommodation while awaiting COVID-19 testing.[17] What these measures fail to do is to address the underlying structures that create and perpetuate vulnerability and prevent migrants from

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[10] Jenna Hennebry, Janet McLaughlin & Kerry Preibisch. "Out of the Loop: (In)access to healthcare for migrant workers in Canada" 17 J Intl Migration & Integration 521

[11] MWAC, "Warnings", *supra* note 8 at 13.

[12] *Ibid*.

[13] Jenna Hennebry et al, "Coronavirus: Canada stigmatizes, jeopardizes essential migrant workers" (3 June 2020) online: *The Conversation* <theconversation.com/coronavirus-canada-stigmatizes-jeopardizes-essential-migrant-workers-138879>.

[14] Fay Faraday, "COVID-19's impact on migrant workers adds urgency to calls for permanent status" (24 February 2021) online: *The Conversation* <theconversation.com/covid-19s-impact-on-migrant-workers-adds-urgency-to-calls-for-permanent-status-148237>.

[15] Employment and Social Development Canada. "Government of Canada invests in measures to boost protections for Temporary Foreign Workers and Address COVID-19 Outbreaks on Farms" (31 July 2020) online: *Government of Canada* <www.canada.ca/en/employment-social-development/news/2020/07/government-of-canada-invests-in-measures-to-boost-protections-for-temporary-foreign-workers-and-address-covid-19-outbreaks-on-farms.html>.

[16] Migrant Workers Alliance for Change. "Migrant farmworkers Speak Out for dignified living conditions!" (2 December 2020) online: *Migrant Workers Alliance* <migrantworkersalliance.org/decent-dignified-housing-for-migrant-farmworkers/>.

[17] Employment and Social Development Canada, *supra* note 15.

claiming their rights, namely: employer-tied work permits and the absence of permanent status.
Although representing a single anecdotal account, one story recounted in a report by the Migrant Workers Alliance for Change puts into stark relief the attitudes that underpin the TFW program. At one horticulture-related workplace, migrant workers reported that when a shipment arrived from a US farm which was experiencing a COVID-19 outbreak, all citizen and permanent resident workers were sent home, while the migrant workers were required to unload and unpack the shipment. Within days, workers began reporting symptoms of COVID-19 but were still made to continue working and living under the same conditions while awaiting testing results.[18]
The differential treatment of the migrant workers in this case is an explicit manifestation of the reality that many Canadian industries rely upon a system of manufactured inequality and precarity. While Canada acknowledges that migrant workers are essential, we do not regard them as being equally worthy of respect for their fundamental rights.

In a positive development, in April 2021 the government announced the creation of a limited pathway to permanent status for temporary essential workers. Under this new program, TFAWs would be competing against other migrant workers for 30,000 places in the essential job category. Unfortunately, however, a survey conducted in May 2021 found that, of those eligible to apply for the Essential Workers Stream (including TFAWs), 45.4% of respondents were ineligible to apply due to program exclusions and requirements while a further 67% might be excluded solely due to the language requirements of the program.[19] Many of those excluded are likely to be TFAWs who are less likely to be proficient in either English or French. The implementation of this policy is a choice that was made partly in recognition of the fact that border closures and global travel restrictions will prevent the Government from reaching its target of 401,000 new permanent residents in 2021 through the traditional pathways of overseas recruitment.[20] In this light, it is hard to see in this program a genuine recognition of the impact and worth of those migrants who have been contributing to Canada for years. As Syed Hussan, executive director of Migrant's Rights Network noted, the pathway is a "time-limited and partial program" that maintains the current structure of temporariness which prevents thousands of migrants from asserting basic labour rights and accessing health care and income support.[21]

The only way to address the situation of TFAWs in a manner that fully recognizes their contribution to Canadian society and, more importantly, their fundamental human dignity, is at a minimum to end the system of employer-tied work permits and ideally grant permanent residency to all migrant workers. Employees should not be required to continue to work for employers who subject them to danger, nor struggle to overcome administrative hurdles of the current open permit for vulnerable workers programs. By maintaining this structure, the government is tacitly supporting a system of quasi-indentured labour that by its very nature disempowers workers and creates opportunities for exploitation. In the end, the pandemic has revealed that the failings with regard to workers' health, safety and rights are industry-wide and that the only way in which they can fully be addressed is if the workers themselves are able to hold their employers accountable without fear of reprisal or consequence. To truly achieve this end, migrant workers must not only be released from employer-tied contracts but given permanent status.

The prioritization of expediency over fundamental rights during the pandemic is equally on full display when we examine the treatment of asylum-seekers. Canada has long been highly regarded for its commitment to providing permanent status to those seeking international protection either through resettlement from overseas or through inland protection, whereby asylum seekers present themselves to Canadian authorities at the border or in Canada and request protection. Unsurprisingly, the pandemic has severely impacted Canada's resettlement program. As a result of government slow-downs, global travel restrictions, and temporary suspensions of resettlement travel by the International Organization for Migration and the United Nations High Commissioner for Refugees, Canada had

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[18] *MWAC*, "Warnings", *supra* note 8 at 14.

[19] Migrant Rights Network, "Exclusion Disappointment Chaos & Exploitation" (May 2021) online (pdf): *Migrant Rights* <migrantrights.ca/wp-content/uploads/2021/05/Final-Exclusion-Disappointment-Chaos-Exploitation-.pdf>.

[20] Immigration, Refugees, and Citizenship Canada, "Temporary public policy to facilitate the granting of permanent residence for foreign nationals in Canada, outside of Quebec, with recent Canadian work experience in essential occupations" (14 April 2021) online: *Government of Canada* <www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/public-policies/trpr-canadian-work-experience.html>.

[21] Ryan Patrick Jones, "Ottawa opens new pathway to permanent status for temporary essential workers and graduates" (14 April 2021) online: *CBC News* <www.cbc.ca/news/politics/pathway-permanent-residency-essential-workers-1.5987171>.

resettled only 6,000 refugees by mid-November, a fraction of the 2020 target of 32,000.[22]
While the resettlement slow-down may not have been the result of deliberate government policy, the reduction in inland asylum claims was. When the Canada-US border closure was announced on March 16th, the original intent was for asylum seekers to be screened for COVID-19 and isolated for a 14-day quarantine.[23] This short-lived plan was followed by an abrupt reversal only 4 days later with the announcement that Canada would implement an Order in Council denying entry and returning to the US any asylum-seekers crossing irregularly into Canada.[24] The Order in Council was authorized under the *Quarantine Act* which gives the Government the power to prohibit "the entry into Canada of any class of persons" if it is of the opinion that those persons might "introduce or contribute to the spread of the communicable disease in Canada" and "no reasonable alternatives to prevent the introduction or spread of the disease are available." (*Quarantine Act* s. 58) Given that temporary foreign workers, truck drivers and professional athletes, among others, were permitted to enter Canada under an exemption for "essential travel" during this time, the idea that there was no alternative to a denial of entry for asylum-seekers appears somewhat disingenuous. Indeed, this perception is reinforced by the fact that a limited number of asylum-seekers, those that fell into one of the exemptions under the Canada-US Safe Third Country agreement, were allowed to enter Canada in order to claim asylum.

To understand the rationale for the border closure and pushbacks, one must understand the pre-COVID-19 situation along the border. In recent years, Canada has seen a substantial increase in the number of people entering the country irregularly from the US in order to claim asylum. While the increase may have been largely due to the unwelcoming environment in the US, the irregular nature of these entries was due to the Canada-US Safe Third Country Agreement (STCA). In force since 2004, the STCA makes most individuals entering Canada at a land port of entry ineligible to claim refugee status. These asylum-seekers are then returned to the US on the (often false) assumption that they can and should seek and obtain protection there. As the STCA only applies at official border crossings, individuals already *in* Canada, even if they have arrived via the US, may apply for asylum without being subject to the STCA, thus incentivising protection-seekers to cross into Canada irregularly.

Until recently, irregular crossings were a mere trickle but, under the Trump administration, this number increased, reaching a peak in the summer of 2018 when 6,183 asylum claims were filed by irregular entrants between April and June.[25] Critically, while these protection-seekers entered Canada irregularly from a *legal* perspective, the vast majority of asylum-seekers crossed into Canada at relatively well-managed unofficial ports of entry.[26] Importantly, of the irregular arrivals who had their asylum claims adjudicated between 2017 and 2019, more than half were granted asylum in Canada.[27] Eventually, the Trudeau Government came under pressure by the NDP and human rights organizations to end the STCA because the US was demonstrably not safe for refugees, and by the Conservatives to extend the STCA to the entire border with the objective of halting what they misleadingly referred to as "illegal" border crossings.[28] In fact, on July 22, 2020, the Federal Court ruled that, as a result of the inhumane treatment of asylum-seekers in the US, sending them back to the US under the Safe Third Country Agreement violates their rights to liberty and security of the person as protected by s. 7 of the Canadian Charter of Rights and Freedoms.[29]

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[22] Kathleen Harris, "Refugee advocates say Canada must step up resettlement efforts despite pandemic" (12 November 2020 online: *CBC News* <www.cbc.ca/news/politics/refugees-canada-pandemic-mendicino-1.5797361>.

[23] Sean Rehaag, Janet Song & Alexander Toope, "Never Letting a Good Crisis Go to Waste: Canadian Interdiction of Asylum Seekers" (2020) 2 Frontiers in Human Dynamics 1.

[24] *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from the United States)*, PC 2020-0185 (2020) C Gaz I, Volume 154, 879.

[25] Immigration and Refugee Board of Canada, "Irregular border crosser statistics" (28 April 2021) online: *Immigration and Refugee Board of Canada* <irb-cisr.gc.ca/en/statistics/Pages/Irregular-border-crosser-statistics.aspx>.

[26] UNHCR Canada, "What to know about irregular border crossings" (August 2019) online (pdf): *UNHCR Canada* <www.unhcr.ca/wp-content/uploads/2019/09/what-to-know-about-irregular-border-crossings-Aug2019-en.pdf>

[27] UNHCR Canada, *supra* note 26.

[28] Brian Hill, "Where do major parties stand on the Safe Third Country Agreement?" (25 September 2019) online: *Global News* <globalnews.ca/news/5946062/where-do-major-parties-stand-safe-third-country-agreement/>; Teresa Wright, "Andrew Scheer vows to end 'illegal' border crossings as part of Conservative immigration plan" (28 May 2019) online: *Global News* <globalnews.ca/news/5327265/scheer-immigration-plan/>.

[29] *Canadian Council for Refugees v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 770. This decision was overturned by the

The COVID-19 pandemic offered the Government an opportunity to shut the door on asylum-seekers without appearing overtly anti-immigration. Although couching the measures in the language of public health and safety, the government prioritized political expediency over the human rights and well-being of asylum-seekers, as well as over its own international obligations. Refusing asylum-seekers entry to Canada is not necessary to protect the public health of the Canadian population if appropriate quarantine and precautionary measures are put in place, and it most assuredly does not protect the health and safety of the asylum-seekers themselves who are likely to end up in US immigration detention facilities where COVID-19 is widespread. In fact, closing the border has the potential to produce a public health crisis on its own, as it creates an incentive for asylum-seekers to enter Canada clandestinely and to not report to either immigration or public health authorities, thus increasing the likelihood that any COVID-19 cases will go undetected.

The government's decision to close the Canada-US border to asylum seekers also failed to meet international standards by exposing asylum-seekers to increased hardship and danger, including inhumane detention conditions in the US and the risk of refoulement.[30] In the context of the pandemic, UNHCR released a series of legal considerations intended to govern access to a state's territory for persons seeking international protection. Key among these was that while states may implement health screening, testing, quarantine and other measures, these measures "may not result in denying [asylum-seekers] an effective opportunity to seek asylum or result in refoulement"[31] understood as including rejection at the border or non-admission to the territory of a state. Indeed, UNHCR has stated that blanket border closures without exceptions for the admission of refugees or asylum-seekers, and "without evidence of a health risk and without measures to protect against refoulement, would be discriminatory and would not meet international standards."[32] In light of the well-documented problems with the US asylum system and the fact that the Department of Homeland Security indicated that it would continue to return "illegal immigrants" to their countries of origin, evidence of the deportation of vulnerable migrant children and the prevalence of COVID-19 in US detention facilities, the danger that asylum-seekers face in the US both to their lives and with regard to refoulement, is real and substantial.[33]

Beyond the impact that the border closure has had on individual asylum-seekers attempting to enter Canada, closing the border to asylum seekers sends a very problematic message to the international community at a time when refugee protection has never been more needed and more at risk. At the height of the pandemic, UNHCR reported that 168 countries fully or partially closed their borders with 90 making no exception for asylum-seekers.[34] COVID-related restrictions feed into a growing pre-pandemic climate of insularism and nativism in many countries and Canada's actions contribute to the creation of a permissive environment for states seeking to shirk their responsibilities. In the end, the Canadian government's actions must be evaluated based on their impact on the broader protection environment, as well as their impact on individuals actively seeking asylum in Canada. For this reason, Canada must recommit itself to the protection of asylum seekers and reopen the border.

Admittedly, the two examples provided here, temporary foreign agricultural workers and asylum-seekers at the Canada-US border, present very different challenges and require very different policy responses. What connects them is that in both instances, Canadian responses to the COVID-19 pandemic have prioritized political and economic interests over the human rights of marginalized and vulnerable individuals – seeking above all to address the concerns of political opponents, industry, and employers, even at the cost of the lives and health of individuals. Both cases also highlight a restrictive understanding of who is "in" and who is "out" and

Federal Court of Appeal in April 2021, see *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 72. However, in that ruling, the Court of Appeal decided on the basis of how the arguments were framed and did not rule substantively on the evidence concerning the rights violations of asylum-seekers returned to the US from Canada.

30 Jennifer Edmonds & Antoine Flahault, "Refugees in Canada During the First Wave of the COVID-19 Pandemic" (2020) 18:3 Intl J Environmental Research & Public Health 947.

31 UNHCR, "Key Legal Considerations on Access to Territory for persons in need of international protection in the context of the COVID 19 response" (16 March 2020) online (pdf): *UNHCR* <www.unhcr.org/cz/wp-content/uploads/sites/20/2020/04/UNHCR-Legal-Considerations-on-Access-to-Territory-in-the-Covid-19-Pandemic-March-2020.pdf>

32 *Ibid*.

33 Canadian Council for Refugees, "One year on: Refugees must be exempted from the pandemic travel and border bans!" (March 2021) online: *Canadian Council for Refugees* <ccrweb.ca/en/one-year-pandemic-travel-and-border-bans>.

34 UNHCR, "UNHCR's Gillian Triggs warns COVID-19 severely testing refugee protection" (7 October 2020) online: *UNHCR* www.unhcr.org/news/press/2020/10/5f7de2724/unhcrs-gillian-triggs-warns-covid-19-severely-testing-refugee-protection.html.

demonstrate an implicit hierarchy of worthiness whereby certain individuals are deemed to be more entitled to protection for their inherent dignity and rights than others. Canada is certainly not the only state in which these patterns can be seen, and it is far from the worst. In Spain, the Gestión Colectiva de las Contratacions en Origen (GECCO) programme recruits temporary foreign workers under conditions that are very similar to those in Canada. As in Canada, there were outbreaks of COVID-19 among migrant workers and reports have noted many of the same shortcomings (increased surveillance, lack of health and safety measures, substandard housing, difficulty claiming rights, etc.).[35] The situation is far worse in Singapore, where more than 300,000 migrant workers have been confined to dormitories and have faced stricter lockdowns and restrictions than the rest of Singapore's population. 47% of these workers have been infected by COVID-19.[36] Similarly, while a few countries such as Portugal have offered migrants and asylum seekers increased rights to allow for access to health services or certain social supports, around the world, from Italy to Malaysia, countries have used the pandemic to repackage and reinforce existing migration-control policies or implement new ones, often without any exemption made for those seeking asylum.[37]

However, not being the worst is no excuse for not doing better. If the Canadian government is truly committed to the protection of rights and to the creation of a global culture of human rights, then it needs to reconsider how it develops policy with respect to marginalized groups. Canadians must demand that their government move beyond short-sighted, reactive responses and adopt a rights-based framework for government action that puts the rights and dignity of individuals at the heart of policymaking. In the words of Prime Minister Trudeau himself: "Protecting and advancing human rights at home and around the world is our shared duty, and together there is still much work to be done."[38]

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[35] Berta Güell & Blanca Garcés-Mascareñas, "Agricultural seasonal workers in times of Covid-19 in Spain" (December 2020) online (pdf): *ADMIGOV* <http://admigov.eu/upload/Deliverable_D33_Guell_Garces_Temporary_and_Circular_Migration_Spain.pdf>; Aritz Parra, "Virus spike in Spain reveals plight of seasonal farm workers" (4 July 2020) online: *ABC News*, <abcnews.go.com/Health/wireStory/spain-locks-county-200000-people-due-outbreaks-71606760>.

[36] The Economist, "Singapore's migrant workers have endured interminable lockdowns" (19 June 2021) online: *The Economist* <www.economist.com/asia/2021/06/19/singapores-migrant-workers-have-endured-interminable-lockdowns>; Andreas Illmer, "Covid-19: Singapore migrant workers infections were three times higher" (16 December 2020) online: *BBC News* <www.bbc.com/news/world-asia-55314862>.

[37] Rebecca Root, "Around the world, migrants and refugees are stranded between closed borders" (29 April 2020) online: *DEVEX* <www.devex.com/news/around-the-world-migrants-and-refugees-are-stranded-between-closed-borders-97089>; See also Joanna Kakissis, "Asylum-Seekers Make Harrowing Journeys in Pandemic, Only to be Turned Back" (13 February 2021) online: *NPR* <www.npr.org/2021/02/13/949182773/the-harrowing-journeys-to-safety-of-asylum-seekers-during-a-pandemic>.

[38] Justin Trudeau, "Statement by the Prime Minister on Human Rights Day" (10 December 2020) online: *Office of the Prime Minister of Canada* <pm.gc.ca/en/news/statements/2020/12/10/statement-prime-minister-human-rights-day>.

THE PRISON IN/AS A PANDEMIC: HUMAN RIGHTS IMPLICATIONS OF CARCERAL 'SOLUTIONS' IN RESPONSE TO COVID-19 IN CANADA

Justin Piché, Sarah Speigh, and Kevin Walby

Abstract: Since the onset of the COVID-19 pandemic, congregate settings across Canada have been hard hit by infections among those living and working within them. Prisons have been no exception, with incarcerated people and staff members being infected at rates significantly higher than the general population. This paper examines the measures taken by federal penitentiary authorities to prevent and manage the spread of COVID-19. We highlight how torturous conditions involving lockdowns, isolation practices, and medical quarantine akin to segregation that deprive prisoners of access to social interaction and other basic necessities of life have been used in a failed attempt to create social distancing and prevent coronavirus transmission. In so doing, we examine the tendency of Correctional Service Canada management and staff to resort to carceral logics of institutional security and order in the face of this public health challenge. We conclude by noting that Canadian penitentiaries are incapable of meeting minimum standards for treatment of prisoners. As such, all alternatives to incarceration must be considered to limit the impact of COVID-19 and move beyond the prison pandemic plaguing the world, which undermines both public health and community safety.

Keywords: Imprisonment; human rights; public health; COVID-19; Canada

> It's not even humane, the conditions we're living in…They're trying to say 'you have to wear masks, you have to wipe stuff down', before they weren't doing anything to prevent [COVID-19]. They weren't providing us disinfectants, hand sanitizer, wipes, nothing. There's no end [to lockdowns] in sight. They're not telling us no plan… They're just keeping us in the dark, telling us 'we don't know when this is going to be'. People are just banging on the walls all day… All we're asking is to just take us off lockdown and let us have normal food.
>
> – Dalvir Sidhu, Drumheller Institution[1]

In January 2021, people incarcerated at Drumheller Institution – a federal penitentiary in Drumheller, Alberta – initiated a peaceful hunger strike in response to appalling conditions of confinement they had endured during the pandemic. In an interview with the *Calgary Herald*, Dalvir Sidhu, incarcerated at Drumheller, reported unlivable conditions at the medium-security institution. "Soggy" food, delayed and inconsistent compliance with COVID-19 safety measures, weeks of confinement involving isolation, lockdowns, and segregation, and a lack of communication by staff led to distress and isolation among prisoners, which took a serious toll on their mental health.[2]

The failure of the federal government to ramp-up the use of release mechanisms to significantly reduce its penitentiary population during the second wave of the pandemic contributed to one of the largest outbreaks across Correctional Service Canada (CSC) institutions.[3] The severity of this outbreak was also exacerbated by CSC's deficient provision of personal protective equipment and other preventative measures. By the end of the outbreak at Drumheller, 181 prisoners and at least 20 staff members had contracted COVID-19.[4] Drumheller was one of several institutions located within CSC's Prairie Region to experience a major COVID-19 outbreak during the pandemic's second wave. The number of cases among incarcerated people at Drumheller was surpassed only by Saskatchewan Penitentiary in Prince Albert, which reported 292 positive tests, and Stony Mountain Institution in Manitoba, which reported 371 cases amongst prisoners.[5] As a result of the outbreaks, COVID-19 cases among Indigenous prisoners rose

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1 Sammy Hudes, "'Like the walls are closing in': Drumheller inmates go on hunger strike to protest lockdown" (15 January 2021) online: *Calgary Herald* <calgaryherald.com/news/local-news/like-the-walls-are-closing-in-drumheller-inmates-stage-hunger-strike-to-protest-lockdown>.

2 *Ibid*.

3 See *Corrections and Conditional Release Act*, SC 1992 c 20, ss 116, 121 [CCRA].

4 Correctional Service Canada, "Testing of inmates in federal correctional institutions for COVID-19" (13 May 2021) online: *Correctional Service Canada* <www.canada.ca/en/correctional-service/campaigns/covid-19/inmate-testing.html> [*CSC Inmate Testing*].; Prison Pandemic Partnership, "COVID-19 cases linked to federal penitentiaries" (12 May 2021) online: *Criminalization and Punishment Education Project* <tpcp-canada.blogspot.com/2021/05/covid-19-cases-linked-to-federal.html>.

5 *CSC Inmate Testing*, *supra* note 4.

in the federal penitentiary system from 21.5% in the first wave to 57.1% in the second wave.[6] This ongoing settler violence and neglect reflects broader colonial patterns of insufficient healthcare endured by Indigenous communities in the face of preventable disease.[7]

Across Canada, the dire health and safety risks faced by Canadian federal prisoners are coupled with the reduced government oversight resulting from COVID-19 precautionary governance that has significantly curbed the entry of third parties into penitentiaries. Due to visitation restrictions, the Office of the Correctional Investigator (OCI) has had to conduct much of their business via phone or video visits. These complaint mechanisms pose barriers to institutional oversight by requiring prisoners to initiate contact by phone, rather than meeting with OCI staff during site visits. In the midst of real or suspected COVID-19 outbreaks, the phone access required to make such complaints is often limited due to frequent lockdowns with limited time out-of-cell. The requirement to file complaints by phone also raises concerns about confidentiality and reprisals by CSC staff and management.

Given the history of prisons as sites where communicable disease spreads unencumbered, it is no surprise that the COVID-19 infection rate among incarcerated people in Canada is more than five times that of the general population.[8] Many public health and penal system authorities recognized this risk and made efforts early on in the pandemic to depopulate sites of confinement to prevent the spread of COVID-19, particularly during the first wave of the pandemic.[9] For instance, from February to June 2020 the population of Ontario provincial custody settings was reduced by 30%. In contrast, CSC data reflects a meager 5% population decrease during the initial weeks of the pandemic.[10] This minimal decline reflects a reduction in the issuance of Warrants of Committal (WoC) and parole revocations, rather than an effort to release incarcerated individuals.[11] While the *CCRA* allows for the release of incarcerated people through medically necessary Unescorted Temporary Absences (UTAs)[12] and parole by exemption these mechanisms were and remain underutilized.[13] As COVID-19 spread behind prison walls during the second wave, prisoners were treated as if they were disposable.[14]

Examining how CSC responded to the pandemic, this paper assesses the Canadian government's failure to reduce the federally incarcerated population in accordance with public health expert's advice and in violation of their statutory obligations.[15] Instead, the Canadian government and CSC turned to their usual playbook of carceral 'solutions' that undermine public health and community safety. The use of 'safety' and 'order' as carceral logics led to heightened program and visitation restrictions, solitary confinement by other names, and neglect towards racialized prisoners that

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6 Ivan Zinger, "Third COVID-19 Status Update" (23 February 2021) online: *Office of the Correctional Investigator* <www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20210223-eng.pdf>.

7 Mary Jane McCallum, "Starvation, Experimentation, Segregation, and Trauma: Words For Reading Indigenous Health History." (2017) 98:1 Can Historical Rev 96.

8 Hillary Marland, Clare Anderson & William Murphy "Coronavirus: A history of pandemics in prison" (22 April 2020) online: *The Conversation*, <www.theconversation.com/coronavirus-a-history-of-pandemics-in-prison-136776>; Prison Pandemic Partnership, "CCLA sounds alarm as COVID in prisons reaches unprecedented levels" (12 January 2021) online: *Canadian Civil Liberties Association*, <ccla.org/ccla-covid-prisons/>.

9 It is worth noting that while most provinces and territories were significantly reducing their prison populations, "[t]he volume of police reported crime in the early months of the pandemic was far lower compared to the previous year" and in 2020 there were "about 195,000 fewer incidents than in 2019." See Greg Moreau, "Police-reported crime statistics in Canada, 2020" (27 July 2021) online: *Statistics Canada* <www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00013-eng.htm>. Such figures problematize the assumption that less imprisonment imperils community safety.

10 Statistics Canada, "After unprecedented decline early in the pandemic, the number of adults in custody rose steadily over the summer and fell again in December 2020" (8 July 2021) online: *Statistics Canada* <www150.statcan.gc.ca/n1/daily-quotidien/210708/dq210708a-eng.htm>; Prison Pandemic Partnership, "Carceral depopulation in Canada during the COVID-19 pandemic" (2 August 2021) online: *Criminalization and Punishment Education Project* <tpcp-canada.blogspot.com/2021/08/carceral-depopulation-in-canada-during.html>.

11 *Canadian Civil Liberties Association v Canada (AG)* (12 May 2020), Ottawa T-539-20 (Fed Ct) [CCLA].

12 *CCRA*, *supra* note 3, s 116).

13 *Ibid*, ss 116, 121.

14 Prison Pandemic Partnership, "CCLA sounds alarm as COVID in prisons reaches unprecedented levels" (12 January 2021) online: *Canadian Civil Liberties Association* <ccla.org/ccla-covid-prisons/>.

15 *Corrections and Conditional Release Act* (S.C. 1992, c. 20, s. 70, s. 86-87). Due to limited space, we do not examine the impact of COVID-19 on imprisonment at the provincial-territorial level in Canada or internationally here.

persisted during CSC's vaccine roll-out. The treatment of prisoners has long been an indicator of a jurisdiction's adherence or divergence from national and international human rights norms.[16] We argue the COVID-19 pandemic has exposed the archaic impulse of carceral entities and actors to resort to policies and practices they know to be unlawful and inhumane. In doing so, carceral entities reveal their underlying purposes of marginalization and exclusion – a prison pandemic spanning the globe. Conceiving of the prison as a pandemic itself that undermines public health, along with collective safety and well-being, we conclude it is necessary to work toward abolishing human caging during and beyond this crisis. This call is part of struggles to build a world in which freedom and the observance of human rights is a lived reality, rather than an unrealized legal abstraction.

COVID-19, CARCERAL "SOLUTIONS" AND HUMAN RIGHTS

Canada has a long history of subjecting incarcerated people to draconian conditions of confinement and violence despite its stated commitment to the rehabilitative ideal.[17] Praise for the national human rights record in prisons mischaracterizes the realities of Canadian penality by shrouding it with a "liberal veil" despite its "[t]herapeutic discourses" being punitive when enacted in practice.[18] According to these logics, prisoners "are not… free subjects… at liberty to make personal choices."[19] Characterizing Canadian penal policies and practices as humane and progressive also misses the mark by ignoring that "care" coexists alongside other imperatives of punishment in a "contradictory and volatile" manner. [20] In turn, elements of incarceration that may be experienced as beneficial by captives such as some programs are superseded by punitive logics of institutional order, security, discipline and risk management.[21]

In the context of the current pandemic, it is no surprise that most Canadian prison authorities turned to carceral 'solutions' that translated into subjecting prisoners to human rights violations once the pandemic was declared. These austere measures, which deepen the "pains of imprisonment" experienced by federally incarcerated people, are detailed below.[22] Despite the limits of human rights discourse we maintain that a human rights lens provides a valuable foundation for critiquing the practices that imprisonment and detention entail.[23] This is particularly true when animated by an abolitionist ethos that aims to reduce the use and harms of human caging in the short-term, while working towards its eradication as a long-term objective.[24]

RESTRICTING VISITATION AND PROGRAM ACCESS: THE "LIBERAL VEIL" OF CANADIAN PENALITY UNMASKED

> They're not allowing guys off the ranges, so picture you're talking to your loved one on the phone and he's got 10 other guys in the hallway screaming at the tower to open the doors or asking for things… We can't even hear each other…. You're certainly not opening up on how you're feeling, and it's been very difficult not having that contact with each other.

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[16] Howard Sapers, "The case for prison depopulation: prison health, public safety and the pandemic" (2020) 5:2 J Community Safety & Well-Being 79; *United Nations Standard Minimum Rules for the Treatment of Prisoners*, GA Res 70/175, 70th Sess, UN Doc A/RES/70/175 (17 December 2015).

[17] Claire Culhane, No Longer Barred from Prison (Montreal: Black Rose Books 1991).

[18] Dawn Moore & Kelly Hannah-Moffat, "The Liberal Veil: Revisiting Canadian Penalty" in John Pratt et al, eds, The New Punitiveness (London: Willan 2005) 85 at 86.

[19] *Ibid*.

[20] Pat O'Malley, "Volatile and Contradictory Punishment" (1999) 3:2 Theoretical Criminology 175 at 175.

[21] Thomas Mathiesen, Prison on Trial (London: Sage 1990).

[22] Gresham Sykes, The Society of Captives: A Study of a Maximum-Security Prison. (Princeton: Princeton University Press 2007) at 63.

[23] Eric Posner, The Twilight of Human Rights Law (Oxford: Oxford University Press 2014); Sarah Armstrong, "Securing Prison Through Human Rights: Unanticipated Implications of Rights Based Penal Governance" (2018) 57:3 How J Crim Justice 401.

[24] Souheil Benslimane et al, "The Jail Accountability & Information Line: Early Reflections on Praxis" (2020) JL & Soc Pol'y 111.

– Sandra Gajewski[25]

Prison visits contribute to the emotional well-being of incarcerated people in ways that maintain familial and community bonds which promote safe re-entry upon release.[26] After suspending visits early on in the pandemic, CSC reopened for visits in the summer of 2020 with added restrictions.[27] Initially, visitors had their temperature taken on arrival, were required to wear a mask and to wash their hands. Visitors were also required to sit two meters away from loved ones, physical contact was prohibited, and vending machines were made unavailable.[28] Visits were limited to 90 minutes, which posed a challenge for those accustomed to spending a full day visiting loved ones after travelling long distances to penitentiaries. CSC institutions began suspending in person visits again in the fall of 2020.[29] In September 2020, Quebec Region suspended visits at all institutions, with Ontario Region following in December 2020. Visitation was also suspended in British Columbia with the exception of William Head institution on Vancouver Island. Visits to most institutions in the Prairie Region were also suspended for much of the pandemic, while all facilities in CSC's Atlantic region remained open with restrictions during most of this period.[30] Visitations resumed in most CSC penitentiaries in the summer of 2021 following the vaccination of a significant portion of the federal prisoner population.[31]

A year into the pandemic the federal penitentiary authority, which promotes 'rehabilitation' and 'reintegration', had still not made alternatives such as video visitations and free calling widely available. The federal penitentiary authority only installed a fraction of the video kiosks required, although CSC did waive food, accommodation and telephone fees normally deducted from prisoner pay.[32] A man incarcerated at Saskatchewan Penitentiary remarked, "As I write this message in April [2020] Saskatchewan penitentiary has one video visitation monitor for over 500 prisoners to connect with loved ones."[33] Combined with the increased lockdowns limiting access to payphones, such scarcity put a strain on the use of an already prohibitive and costly prison phone system.[34]

More tellingly, in terms of CSC's commitment to 'rehabilitation' and 'reintegration', was the suspension of in-person programs behind the walls often deemed essential by parole authorities to obtain release that have yet to be replaced with alternative options at the federal level.[35] For some prisoners, this raises concerns regarding their eligibility for conditional release given the importance placed on the completion of programs to obtain parole.[36]

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[25] Ian McAlpine, "Too few visitation terminals available at prison, inmates partner says." (2 June 2020) online: *Kingston Whig Standard*, <www.thewhig.com/news/local-news/too-few-video-visitation-terminals-available-at-prison-inmates-partner-says>.

[26] Karen De Claire, Louise Dixon & Michael Larkin, "How Prisoners and their Partners Experience the Maintenance of their Relationship During a Prison Sentence" (2020) 20:3 Soc Psychology 293; Rachel Fayter & Sherry Payne "The Impact of the Conservative Punishment Agenda on Federally Sentenced Women and Priorities for Social Change." (2017) 26:1–2 J Prisoners on Prisons, 26 (1&2): 10-30.

[27] Correctional Service Canada, "Visiting an inmate at a CSC Institution during COVID-19" (7 July 2020) online: *Correctional Service Canada* <www.csc-scc.gc.ca/001/006/001006-1057-en.shtml> [*Visitation Rules*].

[28] Correctional Service Canada, "June 16, 2020: Message from the Commissioner" (16 June 2020) online: *Correctional Service Canada* <www.csc-scc.gc.ca/001/006/001006-1051-en.shtml> [*June Commissioner's Message*].

[29] *Ibid*.

[30] Correctional Service Canada, "Correctional Service Canada COVID-19 Vaccine Roll-out." (7 January 2021) online: *Correctional Service Canada* <www.canada.ca/en/correctional-service/news/2021/01/correctional-service-canada-covid-19-vaccine-roll-out.html> [*CSC Vaccine Roll-out*].

[31] Correctional Service Canada, "Vaccines administered to inmates in the federal correctional system" (28 July 2021) online: *Correctional Service Canada* <www.canada.ca/en/correctional-service/campaigns/covid-19/vaccine-csc/vaccine-table.html> [*CSC Vaccines Administered*].

[32] *June Commissioner's Message*, *supra* note 28.

[33] Anonymous from Saskatchewan Penitentiary, "COVID-19 and Prisoners." (2020) 29:1–2 J Prisoners on Prisons 130.

[34] *Ibid*.

[35] Carol Finlay, "COVID-19 and Canada's Prisons: We must treat inmates more humanely" (19 January 2021) online: *Ottawa Citizen* <www.ottawacitizen.com/opinion/finlay-covid-19-and-canadas-prisons-we-must-treat-inmates-more-humanely>.

[36] Luqman Osman, "Edmonton Max Reflections" (2020) 29:1–2 J Prisoners on Prisons, 131.

MEDICAL QUARANTINES AND ISOLATION: THE NEW FACE OF SEGREGATION

> A lack of oversight and the absence of checks and balances keeps people in prison at the mercy of a racist and oppressive institution during COVID-19. Segregation [was never] abolished within these walls. The entire population is frequently under 20-hour cell confinement with 1-hour outdoor recreation every second day…We have requested numerous concessions to help only to be met with firm demurral. Correctional Service Canada staff have gone as far as threatening complaints. All of us here are deeply concerned regarding our physical and mental health.
>
> – Anonymous Saskatchewan Penitentiary Prisoner[37]

In 2007, Ashley Smith died in segregation at the Grand Valley Institution for Women.[38] While in federal custody, Ashley spent most of her time in administrative segregation without shoes, a mattress, blankets or anything other than a smock to wear. During her incarceration, Ashley's self-injurious behaviour continued to intensify in tandem with the violence she experienced behind bars, culminating in her eventual death. At the inquest into Ashley's death the jury determined that her death was a homicide, as it resulted from inaction on the part of CSC.[39] In the years since Ashley's death, solitary confinement has been the focus of media scrutiny and litigation with calls to limit or abolish the use of segregation in penitentiaries.[40] Ten of the 104 recommendations returned by the jury at the inquest into the death of Ashley Smith were targeted towards the reduction of and prohibitions for segregation for certain populations throughout CSC penitentiaries.

Segregation-related recommendations resulting from the Ashley Smith inquest drew from the 2011 *United Nations Special Rapporteur's Interim Report on Solitary Confinement*, which called for a prohibition of administrative segregation placements exceeding fifteen days.[41] The Special Rapporteur justified this distinction on the grounds that beyond fifteen days the psychological harms associated with isolation may become permanent, thus constituting torture. The Ashley Smith inquest jury affirmed this, recommending that "CSC restricts the use of segregation and seclusion to 15 consecutive days."[42] CSC rejected this recommendation citing "undue risk" to institutional safety, security, and management.[43] A year later, the UN adopted the new *Mandela Rules* that recognized solitary confinement for a period of more than fifteen consecutive days as torture.[44] The UN Committee Against Torture affirmed this in their 2018 *Seventh Periodic Report of Canada* where the Committee opined that any period of segregation beyond 15 days should be subject to independent review.

In the years following the inquest into Ashley's death, the federal government introduced Structured Intervention Units (SIUs) that aimed to provide CSC prisoners who would otherwise be segregated with at least four hours of meaningful contact out of their cells per day. Other jurisdictions like Ontario sought to limit segregation placements to 15 consecutive days and 60 cumulative days in a calendar year, along with prohibitions around its use for youth and people deemed to be living with mental illnesses, in keeping with the *Mandela Rules*. While such federal and provincial efforts have fallen short of their objectives, during the pandemic Canadian

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[37] Anonymous from Saskatchewan Penitentiary, *supra* note 33 at 130.

[38] Office of the Chief Coroner for Ontario "Verdict of a Coroners Jury: Inquest touching the death of Ashley Smith" (19 December 2013) online: *Correctional Service Canada* <www.csc-scc.gc.ca/publications/005007-9009-eng.shtml> [*Smith Verdict*].

[39] *Ibid*.

[40] Jennifer Kilty & Rebecca Bromwich "Law, Vulnerability, and Segregation: What Have We Learned from Ashley Smith's Carceral Death?" (2017) CJLS, 32:2 157.

[41] Juan E. Mendez, *United Nations Special Rapporteur's Interim Report on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, UNHRC, 66th Session, 2011 UN Doc A/66/268 (2011).

[42] *Smith Verdict*, *supra* note 38. This was the 29th recommendation made by the Coroner's Jury.

[43] Correctional Service Canada, "Response to the Coroner's Inquest Touching the Death of Ashley Smith" (December 2014) online: *Correctional Service Canada* <www.csc-scc.gc.ca/publications/005007-9011-eng.shtml>.

[44] *United Nations Standard Minimum Rules for the Treatment of Prisoners*, GA Res 70/175, 70th Sess, UN Doc A/RES/70/175 (17 December 2015) [*Mandela Rules*]. Although the *Mandela Rules* set important international limits for the use of segregation, they are not binding and can be violated without consequence. That said, the Mandela Rules have been used as a foundation for Charter challenges which set precedent in Canadian law. In *Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen*, 2019 ONCA 342, the Court of Appeal for Ontario ruled that a period of segregation beyond the benchmark of 15 days set out by international regulation is cruel and unusual treatment in contravention of section 12 of the *Canadian Charter of Rights and Freedoms*. The court recognized that protracted segregation causes permanent, foreseeable harm.

prison authorities frequently turned to segregation-like conditions where prisoners were held in their cells for at least 23 hours per day in the name of preventing the spread of COVID-19.[45]

Despite claiming to have abolished segregation, in response to COVID-19 CSC has turned to 'medical quarantines' whereby newly admitted prisoners are held in isolation for 14 days with limited time-out-of-cell in a stated effort to reduce the risk of disease transmission. Throughout the pandemic, federally incarcerated people have also endured lockdowns for at least 23 hours per day spanning weeks to months on end in violation of section 7 and section 12 of the *Charter*, as well as several statutory obligations outlined in the *Corrections and Conditional Release Act*.[46] The stated purpose of such lockdowns is to prevent the spread of COVID-19 when outbreaks occurred or were suspected. Moreover, positive cases resulted in prisoners being placed in 'medical isolation' where they faced isolation akin to segregation for periods of time considered cruel and unusual under Canadian law. During the segregation stints by other names, prisoners reported having to decide between taking a shower, doing laundry or making a phone call during their short time out of cell.[47] Access to the basic necessities of life were restricted. The imposition of austere conditions of confinement in the name of health promotion again reveals the degree to which 'correctional' authorities are willing to cast aside the human rights of prisoners and pursue carceral 'solutions' that are unlawful when faced with threats to the 'normal' order of the institution.

On 12 May 2020, the Canadian Civil Liberties Association filed a constitutional challenge seeking declaration that COVID-19 lockdowns within CSC are "tantamount to segregation for indefinite periods of time" in contravention of *Charter* sections 7, 9, 12 and 15.[48] The Notice of Application submitted that CSC failed to meet their statutory obligations to "take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates and the working conditions of staff members are safe, healthful and free of practices that undermine a person's sense of personal dignity" under section 70 of the *CCRA*.[49] Further, the CCLA submitted that the failure of CSC to provide an adequate supply of personal protective equipment (PPE) constitutes another breach of CSC's statutory obligations under section 70 of the *CCRA*, as well as an additional breach of section 86 that mandates that CSC "take all reasonable steps to ensure the safety of every [prisoner]", which we further discuss below.[50]

PPE, HYGIENE AND CLEANING PRODUCT SHORTAGES: CARCERAL STATE NEGLECT

> We have complied with the mandated changes in order to avoid contracting the virus and prevent its spread within the institution. Commissioner Anne Kelly stated in a previous memo that soap and hand sanitizer would be provided. However, as I write this in the spring, we have yet to be offered either.
>
> – Anonymous Edmonton Institution Prisoner[51]

From the outset of the pandemic, Canadian federal penitentiary authorities claimed to be taking action to prevent the spread of COVID-19, including by providing incarcerated people access to PPE, as well as additional hygiene products like soap and cleaning supplies.[52] As is noted in the quote above, such policies often did not translate in practice. Although CSC handed down instructions to engage in frequent handwashing, federal prisoners reported that they often struggled to get their hands on bars of soap because frequent lockdowns

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[45] Anthony N. Doob & Jane B. Sprott, "Trudeau should not tolerate the torture of prisoners in Canada" (14 June 2021) online: *Ottawa Citizen* <www.csc-scc.gc.ca/publications/005007-9011-eng.shtml>; David P. Cole, "Final Report of the Independent Reviewer on the Ontario Ministry of the Solicitor General's Compliance with the 2013 'Jahn Settlement Agreement' and the Terms of the Consent Order of January 16, 2018 Issued by the Human Rights Tribunal of Ontario" (2020) online: *Ministry of the Solicitor General for Ontario* <www.mcscs.jus.gov.on.ca/english/Corrections/JahnSettlement/FinalReportIndependentReviewer.html#background>.

[46] Craig Desson, "Canada's prison watchdog calls out federal corrections for 'extreme' confinement as COVID-19 cases surge" (25 April 2020) online: *CBC News* <www.cbc.ca/news/canada/montreal/canada-prison-conditions-covid-19-human-rights-1.5545303>; Finlay, *supra* note 25.

[47] Zinger, *supra* note 6.

[48] *CCLA*, *supra* note 11.

[49] *Ibid* at para 34.

[50] *Ibid* at para (b).

[51] Anonymous from Edmonton Institution, "Edmonton Max" (2020) 29:1 J Prisoners on Prisons 134 at 134.

[52] *Visitation Rules*, *supra* note 27.

and a lack of supply made ordering hygiene products difficult for some and impossible for others. Similarly, while statements were made by CSC that hand sanitizer and masks were readily available to prisoners and staff, during the first wave of the pandemic the former reported they had yet to be offered these long after CSC claimed to be providing them.

An OCI COVID-19 status update affirmed such prisoner concerns, citing inconsistent compliance with mandatory mask wearing both among prisoners and staff, as well as extended delays healthcare access. The most frequent complaints made by federally sentenced people to the OCI during the pandemic were about a lack of information sharing on health and safety, limited access to sanitizer and PPE, and staff non-compliance with their requirement to wear PPE.[53] At Joyceville Institution in Kingston, Ontario prisoners wrote an open letter in December 2020 expressing concern with the lack of information they were provided and the unwillingness of staff to provide access to basic protections as required:

> Since the lockdown began, there's been no information coming from Correctional Service Canada…We've requested meetings with the warden and are not getting them. Whether it is good or bad, we just want information to get to us. We often can't wash our hands with hot water or take showers, and we've been in the middle of a pandemic for almost a year and now we're in the middle of a COVID outbreak. We don't have access to sanitizer. We don't have access to gloves. We've asked for cleaning supplies, but haven't been given any. There's bleach in the prison, but were not getting it (CPEP and TPRP 2020).[54]

The inconsistent observance of COVID-19 protocols reported at Canadian federal penitentiaries is best epitomized by the improper use of PPE and lack of social distancing in the cafeteria that contributed to the outbreak at the Mission Institution in British Columbia.[55] This resulted in the first COVID-19 death of a prisoner in the country.[56] CSC has neglected its legally bound duty of care to those deprived of their liberty in most facets of its pandemic management.

PRISONER VACCINATIONS: CONFRONTING THE PRINCIPLE OF LESS ELIGIBILITY, MANIFESTING SYSTEMIC RACISM

> As an inmate myself and turning 50 years old this year, I get a front row view of a sad and broken system. Add being a part of the LGBTQ community, and I may as well be subject to death row during this COVID-19 pandemic. Virus after virus, SARS, H1N1, the bird flu, men and women in jails, prisons, institutions, and shelters are always the last in line, the last in peoples' hearts and the last in peoples' thoughts. Not because we don't advocate for ourselves or have organizations that help – because our Canadian government does not care.
> – Mark Zammit[57]

Incarcerated people have been regularly subject to the principle of less eligibility throughout history, whereby they are to be afforded diminished rights and material goods, particularly in periods when resources are in short supply.[58] With the domestic capacity to produce vaccines having been dismantled and offshored in recent decades resulting in scarcity, the principle of less eligibility was invoked by a number of politicians to deny incarcerated people at higher risk of COVID-19 transmission access to inoculations in early phases of vaccination.[59]

Whereas CSC and the federal government had failed to reduce the penitentiary population and put in place measures to prevent the spread of COVID-19 for much of the pandemic, to their credit they defended early prisoner access to vaccinations citing a "duty of care" to imprisoned people despite criticism rooted in the principle

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[53] Zinger, *supra* note 6 at 13.

[54] Criminalization and Punishment Education Project and Toronto Prisoners' Rights Project, "People imprisoned at Joyceville Institution issue statement seeking access to information about CSC's outbreak plan and supplies to get through the crisis" (19 December 2020) online: *Criminalization and Punishment Education Project* <tpcp-canada.blogspot.com/2020/12/people-imprisoned-at-joyceville.html>.

[55] Patrick Penner, "Mission Institution: Voices from inside Canada's worst COVID-19 prison outbreak" (30 April 2020) online: *Abbotsford News* <www.abbynews.com/news/mission-institution-voices-from-inside-canadas-worst-covid-19-prison-outbreak/>.

[56] *Ibid*.

[57] Mark Zammit, "A Bleeding and Broken System." (2020) 29:1–2 J Prisoners on Prisons 77.

[58] Georg Rusch & Otto Kirchheimer, *Punishment and Social Structure*, (New York: Routledge 2017)

[59] Nathaniel Lipkus "Canadian access to coronavirus treatment is threatened by weak manufacturing capacity" (11 April 2021) online: *Osler LLP* <www.osler.com/en/about-us/press-room/2020/op-ed-canadian-access-to-coronavirus-treatment-is-threatened-by-weak-manufacturing-capacity>; Erin O'Toole, "Not one criminal should be vaccinated ahead of any vulnerable Canadian or front-line health worker" (5 January 2021 at 19:53) online: *Twitter* <twitter.com/erinotoole/status/1346620895125778438>.

of less eligibility.[60] Vaccines were provided to elderly prisoners in federal penitentiaries starting in January 2021 alongside other seniors in congregate settings such as long-term care homes in keeping with the guidance of public health experts.[61]

While there were initially few details conveyed to prisoners about the vaccine on offer, efficacy, side-effects and details about aftercare, CSC Commissioner Anne Kelly attempted to address early reports of vaccine information scarcity and related hesitancy by encouraging its community stakeholders and prisoners' loved ones to convey to incarcerated people that the Moderna vaccine was being offered and associated facts.[62] As of late-July, 75.6% of white men and 80.3% of white women imprisoned federally were fully vaccinated. Given CSC's history of systemic racism impacting Indigenous (OCI 2013) and Black (OCI 2014) prisoners, vaccination rates were lower for Indigenous men (70.7%) and women (74.8%), as well as men (55.7%) and women (66.7%) part of a "visible minority" (CSC 2021c).[63] CSC penitentiaries thus remain sites of inequitable health care outcomes and vulnerable to future outbreaks.

FUTURE DIRECTIONS FOR HUMAN RIGHTS: BEHIND AND BEYOND PRISON WALLS

During the pandemic, Canadian penitentiaries have once again proved incapable of upholding basic human rights with their penchant for carceral 'solutions' to problems carceral settings create. This is evident in decisions made to keep incarcerated people held in close quarters where they have often been subject to isolating conditions devoid of basic protections, frequent connections to the outside world, and ways to pass the time in ways that alleviate their suffering. Alternatives to human caging have been under-utilized, resulting in heightened prisoner exposure to COVID-19 and human rights violations.

Prior to the pandemic, custodial settings in Canada were sites of frequent human rights abuses, with such patterns intensifying during COVID-19 crisis. Efforts must be made to enact reforms such as restoring access to programs and visitation by conventional and virtual means. Solitary confinement in all its guises should be eliminated to ensure *Charter* compliance, while ensuring access to necessary physical and mental health supports for incarcerated people. Such measures have been demanded through prisoner hunger strikes and advocacy.[64] However, as is revealed by the historical development of imprisonment in Canada, such gains are easily subject to "carceral clawbacks", whereby rights and privileges are routinely set aside when carceral institutions and actors deem it necessary to preserve institutional order and security.[65]

Should the observance of human rights for all people be the objective, we must work toward the abolition of human caging now. This means ensuring rights to water and food, shelter, health and mental health care, education, and other basic necessities of life translate into their material provision. This means taking action to dismantle colonialism, capitalism, racism and white supremacy, patriarchy, cis-heteronormativity, ableism, ageism, and discriminatory structures that foster interpersonal, corporate, and state violence. We must "change everything," while enacting transformative ways of doing justice when we cannot prevent harms in ways that transform how we relate to one another to build truly safe and healthy communities.[66] The status quo will only continue to subject people to torturous carceral conditions endemic to the prison pandemic under a mythical façade of 'public safety'.

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[60] Kathleen Harris, "Conservatives slam vaccine rollout plan that prioritizes some federal prisoners" (6 January 2021) online: *CBC News* <www.cbc.ca/news/politics/covid19-vaccine-rollout-csc-prisoners-1.5863435>

[61] *CSC Vaccine Roll-out*, *supra* note 30; See also National Advisory Committee on Immunization, "An advisory committee statement: National Advisory Committee on Immunization Recommendations on the use of COVID-19 vaccines" (22 October 2021) online: *Public Health Agency of Canada* <www.canada.ca/content/dam/phac-aspc/documents/services/immunization/national-advisory-committee-on-immunization-naci/recommendations-use-covid-19-vaccines/recommendations-use-covid-19-vaccines-en.pdf>.

[62] Anne Kelly "COVID-19 update for correctional stakeholders" (17 May 2021) online: *Correctional Service Canada*, <www.canada.ca/en/correctional-service/campaigns/covid-19/stakeholders/2021-04-29.html>.

[63] *CSC Vaccines Administered*, *supra* note 31.

[64] Erica Brazeau, "Raw vs. The Law: Our Fight for Vegetables at the Ottawa-Carleton Detention Centre." (2020) 29:1 J Prisoners on Prisons 127; *Anonymous from Edmonton Institution*, *supra* note 51.

[65] Pat Carlen, Pat. 2002. "Carceral Clawback: The Case of Women's Imprisonment in Canada" (2002) 4:1 Punishment & Society 115.

[66] Ruth Gilmore, *Change Everything: Racial Capitalism and the Case for Abolition* (Chicago: Haymarket Books 2022); Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha, *Beyond Survival: Strategies and Stories from the Transformative Justice Movement* (Chico: AK Press 2020).

THE RIGHT TO AN INCLUSIVE EDUCATION IN CANADA DURING COVID-19 SCHOOL CLOSURES: PERSPECTIVES OF PARENTS OF CHILDREN WITH ADDITIONAL NEEDS

Nadine Bartlett, Rebeca Heringer, Gee-ef Nkwenta, McKenzie Martens

Abstract: After school closures due to COVID-19 in the spring of 2020, an online survey of 247 caregivers of children and youth with special educational needs (hereafter referred to as additional educational needs) was conducted in Canada. The purpose of the survey was to obtain caregivers' perspectives regarding their child's educational experiences during school closures and to determine the degree to which their children's Right to an Inclusive Education as outlined in the Convention on the Rights of Persons with Disabilities (CRPD) – Article 24 was upheld. Caregiver perspectives are examined by applying the 4 A Analytical Framework developed by the Special Rapporteur on the Right to Education, which includes the core dimensions of a right education: availability, accessibility, acceptability, and adaptability. Findings indicate embedded inequalities and exclusionary practices during school closures that contravene Article 24 including: (a) limited synchronous and direct instruction, (b) reductions and in some instances the elimination of critical 1-1 and specialized support, (c) inaccessible instruction, (d) a lack of implementation and monitoring of individualized education plans, and (e) limited adaptations to assignments, which severely disadvantaged students with additional education needs. Recommendations for a pan-Canadian commitment to implement and monitor adherence to Article 24 are proposed as well as immediate, corrective actions to redress the inequities identified by caregivers.

Keywords: Human rights, inclusive education, special education, disability, school closure, Canada, parents

INTRODUCTION

In March 2020, schools across Canada and around the world were required to close in an effort to contain the spread of the coronavirus. The sudden closure of schools affected approximately 1.5 billion students and 63 million primary and secondary teachers in 191 countries.[1] The impact of school closures has been detrimental for many students and has contributed to social isolation, academic learning loss, and adverse mental health outcomes.[2] However, the adverse effects of the COVID-19 pandemic have been disproportionately experienced by marginalized groups, including students with additional educational needs.[3]

During public health crisis like the COVID-19 pandemic, it is essential to ensure that the right to an equitable and inclusive education enshrined in the United Nations' Convention on the Rights of Persons with Disabilities (CRPD) – Article 24[4] are upheld. This core human rights convention mandates that "Persons with disabilities receive the support required, within the general education system, to facilitate their effective education" and that "Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion."[5] The central elements of Article 24 include a focus on non-discrimination and the provision of reasonable accommodations to ensure equality, access, and full participation in the general education system. Article 23[6] of the Convention on the Rights of the Child (CRC) also describes the rights of children with disabilities to receive special care, support, and access to resources in order to live full and independent lives, and affirms that

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1 United Nations, "COVID-19 and Human Rights, we are all in this together" (23 April 2020) online: *United Nations* <www.un.org/en/un-coronavirus-communications-team/we-are-all-together-human-rights-and-covid-19-response-and>.

2 Government of Ontario, "COVID-19 barriers for students with disabilities and recommendations" (24 July 2020) online: *Government of Ontario* <www.ontario.ca/page/covid-19-barriers-students-disabilities-and-recommendations#section-2>; Neeta Kantamneni, "The Impact of the COVID-19 Pandemic on Marginalized Populations in the United States: A Research Agenda" (2020) 119 J Vocational Behavior 103439; Jess Whitley & Trista Hollweck, "Inclusion and Equity in Education: Current Policy Reform in Nova Scotia, Canada", (2020) 49:3 Prospects 297.

3 Esther Crawley et al, "Wider Collateral Damage to Children in the UK Because of the Social Distancing Measures Designed to Reduce the Impact of COVID-19 in Adults" (2020) 4:1 British Medical J Pediatrics Open e000701.

4 *Convention on the Rights of Persons with Disabilities*, 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

5 *Ibid*.

6 *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

Canadian governments have binding obligations under international human rights law with respect to equity and inclusivity.

In 2010, Canada ratified the CRPD. As a legally binding and core human rights convention, there are several State obligations associated with this commitment including: (a) setting educational strategy; (b) determining and enforcing educational standards; (c) monitoring implementation of the strategy, and (d) putting into place corrective actions in the event they are required.[7]

Children and youth with additional educational needs are acutely at risk of adverse outcomes if their fundamental right to an inclusive and equitable education are not provided. The goal of the current paper is to examine caregivers' perspectives regarding their children's educational experiences during school closures, and to determine the degree to which their child's Right to an Inclusive Education as outlined in the CRPD – Article 24 were upheld. The examination is based on the results of an online survey conducted from June until September of 2020.

THE CURRENT STUDY

As each province declared a state of emergency during March 2020, schools across Canada were required to close and did not re-open until the fall. The autonomy of the provinces and territories with respect to education meant that each jurisdiction determined its response to the COVID-19 pandemic,[8] including determining when schools closed, expectations for teaching and learning, methods of remote learning, assessment practices, and key fiscal decisions regarding which supports would be provided and to what degree.[9]

Responding to this unprecedented health crisis, the Global Education Coalition emphasized the need for countries to invest resources in "scaling up their best distance learning practices" with a focus on "reaching children and youth who are most at risk".[10] However, in Canada, concerns were raised that the responses of provincial and territorial educational authorities neglected to consider students with additional educational needs.[11]

Building upon Canada's commitment to the CRPD, every educational jurisdiction in Canada has articulated a commitment to inclusive education in principle.[12] An inclusive educational philosophy is underpinned by a respect and appreciation of diversity and an acknowledgment of the right of *all* individuals to have equitable access to learning opportunities, and to be meaningfully engaged in both the academic and social life of schooling.[13] Furthermore, all governments in Canada are obligated to comply with and fulfill the UN's 2030 Sustainable Development Goals, including *Sustainable Development Goal 4: Ensuring Inclusive and Equitable Quality Education*.[14]

In spite of these commitments to inclusive education, vague guidelines regarding teaching expectations,

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[7] Nordic Trust Fund, "Desk review of the legal and regulatory framework of EAC countries and compliance with the convention on the rights of persons with disabilities" (2014) at 16, online (pdf): *Nordic Trust Fund* <www.globalforumljd.org/resources/desk-review-legal-and-regulatory-framework-eac-countries-and-compliance-convention-rights>.

[8] Emily Cameron-Blake et al, "Variation in the Canadian Provincial and Territorial responses to COVID-19" (2021) Blavatnik School of Government GSP-WP-2021/039.

[9] People for Education, "Tracking Canada's education systems' response to COVID-19 (5 October 2021) online: *People for Education* <peopleforeducation.ca/our-work/tracking-canadas-education-systems-response-to-covid-19/>.

[10] Global Education Coalition, "UNESCO rallies international organizations, civil society and private sector partners in a broad Coalition to ensure #LearningNeverStops" (3 March 2020) online: *UNESCO* <en.unesco.org/news/unesco-rallies-international-organizations-civil-society-and-private-sector-partners-broad>.

[11] Cathy Browne, "Parents of children with complex needs feel abandoned as B.C. students return to school" (21 September 2020) online: *CBC News* <www.cbc.ca/news/canada/british-columbia/parents-of-children-complex-needs-feel-abandoned-1.5733489>; Madi Cyr, "'We should be embarrassed:' Lack of plan for students with special needs raises concerns" (4 September 2020) online: *Healthy Debate* <healthydebate.ca/2020/09/topic/plan-for-special-needs-students/>.

[12] Nancy Lynn Hutchinson & Jacqueline Specht, Inclusion of Learners with Exceptionalities in Canadian Schools: A Practical Handbook for Teachers, 4th ed (Toronto: Pearson 2020); Whitley, supra note 2.

[13] Zana Marie Lutfiyya & Nadine A. Bartlett, "Inclusive Societies" in Umesh Sharma & Spencer Salend, eds, Oxford Research Encyclopedia of Education (Oxford: Oxford University Press 2020) 1; Gordon L. Porter & David Towell, "Advancing Inclusive Education: Keys to Transformational Change in Public Education Systems" (May 2017) online (pdf): *Inclusive Education Canada* <inclusiveeducation.ca/wp-content/uploads/sites/3/2013/07/Porter-and-Towell-Advancing-IE-2017-Online-FINAL.pdf>.

[14] Council for Ministers of Education, "Ensuring Inclusive and Equitable Quality Education: Sustainable Development Goal 4 in Canada" (19 March 2020) online (pdf): *CMEC* <www.cmec.ca/9/Publication.html?cat=15> [CMEC].

austerity measures including cuts to specialized services and supports were commonplace.[15] It is within this context that we examine the parental perspectives of students with additional educational needs during school closures in Canada.

METHODS

A purposive sample of 247 caregivers (a majority of whom identified as parents) of children and youth with additional educational needs were recruited through disability organizations and parent advocacy groups from across Canada to complete an anonymous online survey from June until September 2020. This instrument consisted of 30 questions that included quantitative, single answer and multiple answer options, as well as qualitative, open-ended questions along with opportunities to provide additional comments.

The following overarching areas were included in the survey: demographics (e.g., province/territory, caregiving role, additional educational needs of child, and age of child), pedagogy (e.g., contact time, specialized supports, individualized education planning [IEP], adaptations,), resources (e.g., technology, assistive technology), and perceived impact on children and caregivers. While data on the psychosocial impacts on children and caregivers were obtained, they will not be discussed in this paper in the interests of brevity.

Responses were received from all Canadian provinces and two out of the three territories, however, the response rates varied. Approximately 33% of respondents were from Ontario, 22% from Manitoba, 15% from British Columbia, 7% from Saskatchewan, 6% from Alberta, 6% from New Brunswick, and 6% from Newfoundland. The response rates from Prince Edward Island, Nova Scotia, Quebec, and the territories were low and comprised only 5% of the total number of respondents.

Caregivers could identify more than one additional educational need to describe their child. The most frequently reported additional educational needs included learning disabilities, autism spectrum disorder, attention deficit hyperactivity disorder, and intellectual disability. Approximately 58% of the caregivers reported that their children were between the ages of 7 and 12, 28% reported they were between the ages of 13 and 18, 9% between the ages of 4 and 6, and 5% between the ages of 19 and 21.

Responses were analyzed using an a priori template of codes approach[16] which consisted of the four dimensions of the 4 A Framework developed by the Special Rapporteur on the Right to Education.[17] The 4 A Framework combines human rights law and the right to education into the interconnected elements that are essential in the provision of education. More recently, it has been applied to assess adherence to Article 24 and the Right to an Inclusive Education for students with disabilities.[18]

In this study, the 4 A Framework as it relates the Right to an Inclusive Education was employed which includes the following guiding questions: Availability (is inclusive education provided?), Accessibility (are there barriers to access?), Acceptability (is the content of education adequate or inferior?), and Adaptability (are the needs of persons with disabilities taken into account?).[19] Building upon these guiding questions, the definitions of the 4 As were expanded to incorporate the experiences of children and youth with additional educational needs during school closures. In the next section, the expanded definitions of the 4 As are described and the findings relative to each dimension are presented.

FINDINGS
AVAILABILITY – IS INCLUSIVE EDUCATION PROVIDED?

In our analysis, availability of inclusive education refers to both quantitative and qualitative dimensions. Specifically, we examined the amount of time that students received

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[15] Dean Bennett, "Alberta education minister will not reverse decision on layoffs amid COVID-19 pandemic" (31 March 2020) online: *Global News* <globalnews.ca/news/6759218/alberta-coronavirus-education-layoffs/>; *CBC News*, "Speech pathologists at Calgary schools say they're 'heartbroken' after surprise layoffs" (11 April 2020) online: *CBC News* <www.cbc.ca/news/canada/calgary/colin-aitchison-alberta-education-calgary-board-education-1.5529572>; Devon McKendrick, "'These decisions are not being made lightly': Manitoba school divisions announce temporary layoffs" (17 April 2020) online: *CTV News* <winnipeg.ctvnews.ca/these-decisions-are-not-being-made-lightly-manitoba-school-divisions-announce-temporary-layoffs-1.4901390>.

[16] Benjamin F. Crabtree & William L. Miller, Doing Qualitative Research (Thousand Oaks, Sage 1999).

[17] Katrina Tomasevski, Preliminary Report of the Special Rapporteur on the Right to Education, UNCHR, 55th Session, UN Doc E/CN.4/1999/49 (1999).

[18] Nordic Trust Fund, *supra* note 7 at 17.

[19] *Ibid* at 20.

instruction, the modality of instruction (synchronous, asynchronous), and from whom (e.g., teacher, resource teacher, school counselor, educational assistant, speech, and language therapist, occupational therapist). Article 24 (2) (d) of the CRPD, requires that States guarantee, "persons with disabilities receive the support required, within the general education system, to facilitate their effective education."

The aforementioned elements were selected as indicators of an effective education because direct instruction is important for modeling and corrective feedback, which is critical for students with additional educational needs.[20] In spite of the importance of direct instruction, approximately 80% of caregivers reported that their child had not received daily instruction in any form either synchronous or asynchronous. Given the limited amount of daily instruction, most participants described instruction using a weekly metric (e.g., twice a week for 30 minutes).

Many caregivers also indicated that instruction was being conducted entirely asynchronously: "[we had] no daily or even regular contact with the teacher or class. We were on our own except resources posted on google classroom." The focus on asynchronous learning was also described as significantly reducing opportunities for social contact with peers. A caregiver said, "They are just cut off from their peers and forgot about. Even if they could do some online meetings with peers for socialization would have been nice."

In an exploration of a model of distance education for students with additional educational needs, Frederick and colleagues recommended that students with additional education needs receive "15 hours a week, or 3 hours a day, of one-on-one time with a teacher or an alternate trained staff member". [21] Using these guidelines as a benchmark, the support that was reported by caregivers fell significantly short of this standard and thus interfered with the right to an effective, quality, inclusive education. In the area of availability, *who* was available to provide support in addition to the classroom teacher was also examined. Students with additional educational needs require and benefit from the support of a collaborative, broad-based team often comprised of multiple-services providers.[22] Recognizing this need, the UN's General Comment No. 4 on Article 24 requires that States provide "sufficiently trained and supported teaching staff, school counsellors, psychologists and other relevant health and social service professionals", which may also include "a qualified learning support assistant, either on a shared or on a one-to-one basis, depending on the requirements of the student".[23]

Approximately 45% of caregivers indicated that their child needed additional support from the resource teacher or counselor, 34% indicated the need for additional support from an educational assistant, and 28% from specialists. Despite the importance of these vital service providers, parents reported marked reductions in their support.

In describing service shortfalls, a caregiver said that their child required "Equal support from the school as if she was in school. On a normal day, she has an EA 100%. Once we were home we were on our own." Contact with an educational assistant was also described as a critical, familiar social connection and many parents expressed concern that it had been reduced and, in many instances, eliminated due to lay-offs of staff. Similar comments were made about a lack of access to speech and language therapy, occupational therapy, and physiotherapy. A parent said, "He used to receive 3 days a week of SLP… since school closures he has received nothing".

Our findings are consistent with international research, which also reported marked reductions in specialist supports during school closures.[24] The austerity measures imposed in Canada reflect what has been referred to as "neoliberal-ableism"[25] or the promotion of "inclusion and diversity while cutting social programs and failing to address the material effects of these cuts on those who rely on these programs."[26]

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[20] Mary Beth Doyle and Michael Giangreco, "Guiding Principles for Including High School Students with Intellectual Disabilities in General Education Classes" (2013) 42:1 American Secondary Education 57; Satasha L. Green, *STEM Education: Strategies for Teaching Learners with Special Needs* (Hauppauge NY: Nova Science Publishers 2014).

[21] Janice K. Frederick, "A Model of Distance Special Education Support Services Amidst COVID-19" (2020) 13:4 Behaviour Analysis Practice 7.

[22] Lani Florian & Jennifer Spratt, "Enacting Inclusion: A Framework for Interrogating Inclusive Practice" (2013) 28:2 European J Special Needs Education 119.

[23] Committee on the Rights of Persons with Disabilities, "General comment No. 4 (2016) on the right to inclusive education" (2016) at 9, online: *United Nations Office of the High Commissioner for Human Rights* <www.ohchr.org/en/hrbodies/crpd/pages/gc.aspx> [CRPD].

[24] Crawley, supra note 3; Joyce Lee, "Mental Health Effects of School Closures During COVID-19" (2020) 4:6 Lancet Child & Adolescent Health 421; Han Zhang et al, "How Does COVID-19 Impact Students with Disabilities/Health Concerns?" (2020) arXiv preprint 2005.05438.

[25] Mary Jean Hande & Christine Kelly, "Organizing Survival and Resistance in Austere Times: Shifting Disability Activism and Care Politics in Ontario, Canada" (2015) 30:7 Disability & Society 961.

[26] Deborah Stienstra, "Canadian Disability Policies in a World of Inequalities" (2018) 8:2 Societies 5 at 5.

ACCESSIBILITY — ARE THERE BARRIERS TO ACCESS?

Accessibility encompasses both the built environment and the access to information. Since students were not accessing the built environment during school closures, accessibility refers to access to technology and assistive technology, and the degree to which instruction employed accessible formats to foster inclusion. General Comment No. 4 (22) indicates, "States parties must ensure that the rapid development of innovations and new technologies designed to enhance learning are accessible to all students, including those with disabilities".[27]

Ninety percent of caregivers reported that their child had sufficient access to technology and almost two-thirds of participants indicated that they were satisfied with the support their child had received to use technology. It is important to note that since this survey was online, the sample was limited to caregivers with access to technology, and therefore does not reflect the digital divide that exists in Canada, and as such is a limitation of this study.

While access to technology in this study was a reported as a strength, many parents provided examples where their child required more accessible instruction from their teacher. To illustrate, a parent said, "He is non-verbal and everyone wants him to talk on zoom. Well. He can't. He hates it". Another parent said, "[my child] did not understand the work yet had to formulate an email to explain what he didn't understand and then had to try to understand the written response." While the need for adaptations/accommodations will be discussed in a subsequent section, it is important to point out that several caregivers indicated that the instruction that teachers provided did not incorporate the use accessible formats and utilize the accessibility features of technology.

This finding is consistent with international research that has identified teachers challenges with integrating technology into the teaching and learning process,[28] and draws to the fore the need to increase teachers' technological competence in areas like Universal Instructional Design (UID) for technology.

ACCEPTABILITY — IS THE CONTENT OF EDUCATION ADEQUATE OR INFERIOR?

In the current study, acceptability refers to the extent to which students' individualized education plans (IEPs) were developed, implemented, and monitored during school closures, and parents' satisfaction with the individualized support provided. Article 24 (2) (e) requires States to provide "effective individualized support measures...consistent with the goal of full inclusion". General Comment No. 4 expands upon this requirement and specifically articulates the important the role of an IEP. It states, "The effectiveness of such plans should be regularly monitored and evaluated with the direct involvement of the learner concerned".[29]

Two-thirds of caregivers indicated that their child had not received an updated IEP directed toward at-home learning. Of the one third of caregivers whose children had received an updated IEP, approximately half indicated they were not satisfied with its implementation, and the majority (approximately 80%) indicated that it had not been reviewed. A caregiver said, "All IEP goals were abandoned." Another one said, "None of the accommodations on her IEP were addressed or delivered in a home learning environment."

This finding is consistent with the concerns raised by the Ontario Human Rights Commission in a letter to the minister of education and school leaders regarding the rights of children with additional educational needs during school closures. They too received numerous complaints regarding the lack of individualized supports. The letter states, "IEPs ensure vital supports and accommodations for students with additional educational needs, and it is unacceptable that they not be implemented".[30]

ADAPTABILITY — ARE THE NEEDS OF PERSONS WITH DISABILITIES TAKEN INTO ACCOUNT?

In our study, adaptability is associated with the degree to which instruction and assignments were differentiated

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[27] *CRPD*, *supra* note 23 at 7.

[28] Mmankoko Z. Ramorola, "Challenge of Effective Technology Integration into Teaching and Learning" (2013) 10:4 Africa Education Rev 654.

[29] *CRPD*, *supra* note 23 at 9.

[30] Raj Dhir, "Letter to the minister of education, school leaders on respecting the rights of students with disabilities" (14 July 2020) online: *Ontario Human Rights Commission* <www.ohrc.on.ca/en/news_centre/letter-minister-education-school-leaders-respecting-rights-students-disabilities>.

and adapted to meet students' needs. According to König and colleagues, providing adaptations is a key indicator of high-quality teaching.[31] Article 24 (2) (c) indicates that "States parties must provide reasonable accommodation to enable individual students to have access to education on an equal basis with others." General Comment No. 4 expands on the kinds of accommodations that should be provided and indicates that States should, "adopt the universal design for learning approach, which consists of a set of principles providing teachers and other staff with a structure for creating adaptable learning environments and developing instruction to meet the diverse needs of all learners".[32] The need for highly trained teachers in inclusive education is also underscored in General Comment No. 4. (36): "States parties must ensure that all teachers are trained in inclusive education and that that training is based on the human rights model of disability".[33]

Next to synchronous and direct instruction, the need for adaptations was identified as the second most significant unmet need by two-thirds of caregivers. As a participant said,

> I, as mom, had to change every activity to the level she was comfortable with. Teacher seemed happy with everything she did and applauded my ability to adapt. But if I had not done that she would not have been able to do any work.

Another caregiver commented, "All the same work was assigned to the class", and another, "There has been no accommodations considered for learning disabilities."

Describing the lack of adaptations to assigned work, some caregivers observed that they felt that their child's teacher was not aware of the adaptations their child required:

> Writing is physically challenging for my son and we kept getting lengthy writing assignments. I wrote to the teacher to ask what modifications I could make and the teacher was unable to tell me much about what modifications they make for my son.

Another participant indicated a similar concern when seeking support in adapting their child's work claiming that the teacher "was not trained in LD (learning disabilities)."

Our findings align with other Canadian research, which indicates that many teachers feel insufficiently prepared to teach students with diverse needs.[34] This study further highlights the urgent need to expand and strengthen pre-service and in-service teacher training in Universal Design[35] and Universal Design for Learning (UDL)[36] in order to support adherence to Article 24.

DISCUSSION AND RECOMMENDATIONS

This study revealed embedded inequalities and exclusionary practices during school closures due to COVID-19 that contravene Article 24 - The Right to an Inclusive Education including: (a) limited synchronous and direct instruction, (b) reductions and in some instances the elimination of critical 1-1 and specialized support, (c) inaccessible instruction, (d) a lack of implementation and monitoring of individualized education plans, and (e) limited adaptations, which severely disadvantaged students with additional education needs.

These findings support the United Nations' *Concluding Observations on the Initial Report of Canada,* which states that Canada has fallen short in several areas of its implementation of the CRPD, including education, and that it must enact a pan-Canadian action plan in collaboration with provincial and territorial governments, and individuals with disabilities to strengthen implementation in the future.[37]

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[31] Johannes König et al, "Pre–service Teachers' Generic and Subject-specific Lesson-planning Skills: On Learning Adaptive Teaching During Initial Teacher Education" (2020) 43:2 European J Teacher Education 131.

[32] *CRPD*, *supra* note 23 at 8.

[33] *CRPD*, *supra* note 23 at 11.

[34] Tim Loreman, "Essential Inclusive Education-related Outcomes for Alberta Preservice Teachers" (2010) 56:2 Alberta J Educational Research 124; Tim Loreman, Umesh Sharma & Chris Forlin, "Do Pre-service Teachers Feel Ready to Teach in Inclusive Classrooms? A Four Country Study of Teaching Self-efficacy" (2013) 38:1 Australian J Teacher Education 27.

[35] David H. Rose & Anne Meyer, *Teaching Every Student in the Digital Age: Universal Design for Learning* (Alexandria VA: Association for Supervision and Curriculum Development 2002).

[36] Jennifer Katz, "The Three Block Model of Universal Design for Learning (UDL): Engaging Students in Inclusive Education" (2013) 36:1 Can J Education 153.

[37] Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Canada*, UNOHCHR, 17th Sess, UN Doc CRPD/C/CAN/CO/1 at 2.

Our findings also corroborate the critique of inclusive education in Canada and other jurisdictions, which argues that while an ideological stance of inclusive education has been adopted, ableist polices, structures, and practices continue to exist within nominally inclusive schools.[38] For example, segregated classrooms and schools for students with additional educational needs continue to exist,[39] and deficit-based categorical models of funding continue to be employed in some jurisdictions.[40] Even though New Brunswick has been recognized by the CRPD for having one of the top 5 inclusive education policies, participants from that province indicated that in practice their child's right to an inclusive education was not upheld. To illustrate, 100% of respondents indicated that their child's IEP had not been reviewed during school closures.

It is widely agreed that unless there is advocacy and oversight regarding adherence to human rights commitments, they may not be prioritized.[41] One way to address this issue is for the Council of Ministers of Education Canada (CMEC), an inter-governmental body comprised of the ministers of education of all 13 provinces and territories, to establish pan-Canadian educational standards and oversight regarding Canada's implementation of Article 24, in collaboration with individuals with disabilities. CMEC is supporting Canada's responsibility to implement *Sustainable Development Goal 4: Ensuring Inclusive and Equitable Quality Education*[42] and committing to support and oversee the implementation of Article 24 is a logical extension of this work, and urgently required.

In this regard, the CMEC is well positioned to establish a "whole systems" approach whereby education ministries can unite to "ensure that all resources are invested in advancing inclusive education and in introducing and embedding the necessary changes in institutional culture, policies and practices".[43] While transformative inclusion may be a longer-term objective, in the immediate term CMEC should articulate a shared commitment to several key corrective actions to redress the human rights violations experienced by children and youth with additional education needs during school closures, and establish a timeline for compliance. The actions should include:

Availability:

1. Establish minimum standards regarding synchronous instructional time from a teacher and other support teachers that address the needs of the whole person (i.e., academic, social, emotional, and physical needs).

2. Guarantee the provision of specialized, individualized services and supports, affirming that these are not optional in times of crisis, but rather must be maximized in innovative ways during extraordinary circumstances.

Accessibility:

3. Ensure access to technology and assistive technology with a focus on increasing teachers' technological competencies to employ Universal Instructional Design (UID) for technology to address diverse needs in inclusive ways.

Acceptability:

4. Evaluate current IEP policies and mandates to ensure that they clearly explicate the right of individuals to receive an IEP and strengthen mandates and accountability mechanisms to ensure compliance with these requirements.

Adaptability:

5. Strengthen pre-service and in-service teacher training to ensure teachers develop the core values and competencies to employ inclusive approaches including Universal Design for Learning (UDL).

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[38] Nadine A. Bartlett and Trevi B. Freeze, "Assess, Sort, Classify: 'Othering' of Indigenous Students in Manitoba's Schools" (2019) 29:2 Exceptionality Education Intl 99; Roger Slee, "Belonging In An Age of Exclusion" (2019) 23:9 Intl J Inclusive Education 909.

[39] Bartlett, *supra* note 38; Jacqueline Specht et al, "Teaching in Inclusive Classrooms: Efficacy and Beliefs of Canadian Preservice Teachers" (2016) 20:1 Intl J Inclusive Education 1.

[40] Government of Alberta, "Additional educational coding criteria 2021/2022 early childhood services to grade 12" (31 March 2021) online: *Government of Alberta* <open.alberta.ca/publications/2368-3627>; Government of Manitoba, "Student Services: Special needs categorical funding criteria" (9 May 2022) online: *Government of Manitoba* <www.edu.gov.mb.ca/k12/specedu/funding/level2-3.html>.

[41] Stienstra, *supra* note 26.

[42] CMEC, *supra* note 14.

[43] *CRPD*, *supra* note 23 at 4.

CONCLUSION

There is a longstanding concern about the failure to ensure proper coordination in complying with international human rights obligations that engage areas of public policy and programming that fall within the constitutional jurisdiction of provincial and territorial governments. This tends to be the case particularly with economic, social, and cultural rights, such as the right to education, which are entrusted to provincial and territorial governments. Federal, provincial, and territorial governments have failed to put in place transparent and accountable mechanisms for ensuring full implementation and national coherence of such rights, a concern that has been exacerbated during the COVID-19 pandemic, and children with additional needs have been adversely impacted. The findings of our survey starkly demonstrate how important it is for national approaches to comply with international rights. In November 2020, federal, provincial, and territorial governments established a new Forum of Ministers on Human Rights. That body's full mandate and way of working is not yet clear, but it could perhaps play a role in helping address these disparities with respect to inclusive education.

While the expectation to pivot to remote learning during the COVID-19 pandemic occurred quickly and without preparation, the inequities that this global health crisis has illuminated are not new, but rather reflect longstanding barriers in the educational system for children with additional educational needs. A pan-Canadian response to disability policy has long been advocated for in order to mobilize leadership and promote a systemic response,[44] and the shared experiences of exclusion that were identified in this study underscore this need. As we continue to battle the COVID-19 pandemic, it is essential to acknowledge the human rights violations that have occurred and take corrective action to protect the human rights of vulnerable children and youth now and in the future.

[44] Alan Puttee, *Federalism, Democracy and Disability Policy in Canada* (Kingston: Queen's University, 2002); Stienstra, *supra* note 26.

THE CHALLENGES AND SUCCESSES OF WORKING WITH CHILDREN IN A TIME OF PANDEMIC USING A RIGHTS-BASED APPROACH

Virginia Caputo & Landon Pearson

Abstract: For Canadian children and young people, the COVID-19 pandemic has presented a series of disruptions in their lives. In view of social and structural inequalities and contexts marked by systematic and structural disempowerment, children and young people experienced these disruptions in different ways. These disruptions include school routines, food security, social relationships, access to outdoor play spaces, and access to mental health and wellbeing support systems, among others. Despite public assurances from adults making decisions in their best interests, children and young people have been largely excluded from this decision-making process despite the importance these decisions have for their ability to live their lives fully. While this exclusion is hardly surprising, in a time of pandemic, attending to children's social and structural exclusion and participatory decision-making is critical to designing appropriate, efficient, and sustainable responses. This paper argues that using a rights-based approach that is relational and contextual provides a productive and dynamic framing for post-pandemic actions on behalf of, and with, children. The paper draws on examples of programs and initiatives presented at the Child Rights Academic Network (CRAN) 2021 conference by practitioners working with children and youth who have implemented a rights-based approach. The paper offers examples of how this approach has made a considerable difference in outcomes for some young people and may offer a promising way to expand the conversation regarding rights-based approaches moving forward from this long COVID-19 moment.

Keywords: children's rights, participatory decision-making, pandemic

INTRODUCTION

In an address in February 2021 to the Canadian Child Rights Academic Network (CRAN) comprised of researchers, legal experts, advocates, practitioners, policymakers, and NGO and governmental representatives, the Hon. Landon Pearson posed a timely and important question based on her observations of, and reflections on, the current state of children's civil and political rights in a time of pandemic:

> When politicians and decision makers think about children and their rights, they tend to focus on their protection and provision rights –to safety, health, and education - rather than their rights to be heard, to freedom of expression, privacy, assembly and association, access to information, and to all the rights that are inserted into this convention to enable children and adolescents to participate in the civil and political life of society, without discrimination or repression. Why should this be so?

The emphasis on protection and provision rights rather than children's participation rights is hardly new in the scholarly.[1] As children's rights legal scholar Michael Freeman notes "it has always been to the advantage of the powerful to keep others out."[2] It is therefore not surprising that adults could wish to do this to children and are prepared to do so unless we can change their minds." Similarly, legal and children's rights scholar Anne McGillivray calls attention to the concept of "childism" arguing that the view of children lacking the capacity to be effective social actors fuels this protectionist approach.[3] Childism is a theoretical approach that goes beyond questions of children's and young people's participation that are focused primarily on voice and inclusion, to critically consider instead, the norms and assumptions that contextualize and uphold children's systemic exclusion from larger social systems.[4]

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[1] Mónica Ruiz-Casare et al, "Children's rights to participation and protection in international development and humanitarian interventions: nurturing a dialogue." (2017) 21:1 Intl JHR 21 1.

[2] Michael Freeman, *A Magna Carta for Children? Rethinking Children's Rights* (Cambridge: Cambridge University Press 2020) at 44.

[3] Anne McGillivray, *Personal Correspondence with The Honourable Landon Pearson*, (2020).

[4] Rachel Rosen & Katherine Twamley, "The Woman–Child Question: A Dialogue in the Borderlands" in Rachel Rosen & Katherine Twamley, eds, *Feminism and the Politics of Childhood. Friends or Foes?* (London: UCL Press 2018) 1.

Understanding these broader systems of exclusion tied to children's rights and participatory decision-making takes on renewed significance in the context of a pandemic. As organizations and institutions that serve children and young people contemplate a return to normal operations, it is timely to ask how a children's rights-respecting approach can inform not only how decisions are made on behalf of children but the process that attends to the unequal contexts in which children are situated that ultimately play a vital part in realizing these decisions in dynamic, responsive, and inclusive ways. Importantly, part of this process is to recognize children and young people as political citizens who are central to redesigning these systems rather than incidental to them. As we know from decades of decision-making on behalf of children and with the best adult intentions, without a relational and children's rights-respecting approach that recognizes children and young people as fully human and capable political actors, systems remain relatively intact. In meeting the challenges of a post-pandemic era, one issue will be to understand how to reconfigure and envision systems that impact, and are impacted by, children and young people in novel ways. Children's rights scholars would argue to proceed by including the vital insights and input that only children and young people can provide as collaborators with adult decision-makers and to attend carefully and critically to the contexts of children's and young people's lives that are social, cultural, and politically charged.

For Canadian children and young people who have endured over a year of disruptions in their lives, moving to normal routines later in 2021 will undoubtedly be a welcome change. Disruptions to schooling, food security, social relationships, access to outdoor play spaces, and support for mental health and wellbeing, among others, have taken a toll on children socially, psychologically, and emotionally, the repercussions of which have only begun to be understood. For children and young people living in contexts marked by inequalities according to gender, race, class, ability, sexuality and locality, and underscored by disparities that are emerging with intensity due to systematic and structural disempowerment, these disruptions have made clear the vulnerabilities and challenges that they experience on a daily basis. Moreover, despite a growing national conversation about the impact of the pandemic for children's and young people's social and psychological well-being, as well as public assurances from adults tasked with making decisions in children's best interests to address these disruptions, what is notable is that children continue to be excluded. Decisions that affect their lives are made largely without their input or experiences living in diverse and complex contexts.

Decisions regarding school closures are one example. Public discussions of school closures and decisions regarding whether and how to pivot to online learning have been made by government and school officials with limited input from parents and caregivers and overwhelmingly without consultation with children and young people who are the ones experiencing these changes firsthand.[5] While justification for this exclusion is framed in terms of the necessity to respond quickly to pandemic-related indicators such as case counts, virus variants and hospitalizations, the situation exposes, once again, how adult-centric processes can systematically exclude children and young people in determining what are appropriate, meaningful and sustainable responses. Not only does this situation deny children's inclusion and participation in decision-making that affects their lives and serves to flatten the diversity of children's experiences living in unequal contexts, but it also serves to uphold the status quo that keeps structures and systems intact and in place.

A children's rights-respecting approach may offer a novel way forward in a post-pandemic era. Not only does this type of approach view children as fully participating members of society, it also attends to the relational and contextual aspects of people's lives. That is, a rights-respecting approach views children entangled with adults and adult-led institutions, situated in complex contexts marked by inequalities, and capable of offering their lived experiences of these contexts and relationships. As Pearson goes on to argue in her CRAN address, "using a rights-based approach to frame these responses provides the best way to conceptualize actions on behalf of, and with, children." Reflecting on children's rights during this pandemic, she argues that using a children's human rights approach is important not only in the present situation but for the future as well:

> For those of us who care about children I have come to believe that there is a much stronger bulwark available for those who need it than any specific ideology, or belief system or indeed conspiracy theory and that is the universal human rights-based approach which defines every human being, young or old, as full of dignity and worthy of respect. It is an approach that is so fundamentally inclusive that anyone can feel at home in it.

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[5] Sydney Chapados, "As schools prepare to reopen in September, are the kids alright?" (12 August 2020) online: *The Conversation* <theconversation.com/as-schools-prepare-to-reopen-during-covid-19-are-the-kids-alright-142976>; Anne Levesque, "COVID-19: Provinces must respect children's rights to education whether or not schools reopen in September" (30 July 2020) online: The Conversation, (30 July 2020) <theconversation.com/covid-19-provinces-must-respect-childrens-rights-to-education-whether-or-not-schools-reopen-in-september-142802>.

A children's human rights-based approach recognizes the four general principles of the UN Convention on the Rights of the Child ratified by Canada in 1991.[6] These principles are: Non-discrimination (Article 2); The best interests of the child (Article 3); Right to life, survival and opportunities to develop to their full potential (Article 6); and the Right to be heard and for children's views to be taken into account in matters that affect them (Article 12). Moreover, children's human rights are universal, inalienable, indivisible and interdependent. Based on the UNCRC, children are defined as rights holders who are enabled to claim rights and to hold duty-bearers to account while adults as duty-bearers are expected to respect, protect and fulfill children's rights by ensuring that children can enjoy all of their rights whatever their gender, race, ethnicity, class, religion, language, ability or any other difference. Children as rights-holders do not have to 'earn' their rights based on a set of behaviours nor are rights tied to responsibilities. Rather, the approach advocated here is of a children's rights model that is less focused on an individual child and characterized by relationships where children are entangled with the lives of adults and are entitled to have their human rights respected and upheld as much as those of the adults around them. In practice this means that policies, practices as well as values held by an individual, organization or society involved in children's lives can draw guidance from the UNCRC given that it is an international human rights treaty created specifically for and about children in order to think communally and collectively about these rights. Importantly, the articles of the UNCRC ensure that children receive protection, are provided for, and have the opportunity to participate in, matters that affect them and to have their views taken seriously. Speaking to children's rights experts at the CRAN 2021 meeting, Pearson notes the value of having such an important document,

> I will also admit that the UN Convention on the Rights of the Child is not a perfect instrument yet I am increasingly convinced that the child rights-based approach that it embodies provides the best possible framework for actions with and on behalf of children because it corresponds so closely to the growing body of scientific knowledge about human development in childhood especially in what we are learning from evolutionary biology, epigenetics and neuroscience. This means that the case for children's rights is not only morally but also scientifically defensible and the task for child advocates like ourselves is to push for policies and practices that create the best possible circumstances for children to thrive and also be prepared to fund them.

Pearson's view that policies and practices that are framed using a children's human rights-based approach create opportunities to assist children in thriving and living their lives fully is seen in the following three examples. Each project or initiative was designed and carried out using a children's rights-based approach and demonstrates what difference this type of an approach can make in substantive ways for actual children's lives. The projects and initiatives are led by CRAN members: "More than Just Soup" from the Vanier Social Pediatric Hub in Ottawa, Ontario; a children's rights survey as part of the European Union's response to setting up a Children's Rights Strategy; and Families Canada initiatives during the pandemic drawing from results of surveys of children and adults living in marginalized families to understand how they are experiencing the pandemic. While at first glance a soup program or survey may not readily appear to be rights-based, it is the conceptual thought that frames these initiatives and guides how they are executed in practice that conveys the importance of employing a children's rights-based approach. Each of these projects is described in detail below.

THREE EXAMPLES OF CHILDREN'S RIGHTS-RESPECTING INITIATIVES

"More Than Just Soup" project is a collaboration between the Vanier Social Pediatric Hub and medical students at the Faculty of Medicine, University of Ottawa in Ottawa, Ontario.[7] Developed to respond to the needs of families living in an underserved neighbourhood in Ottawa during the pandemic crisis, the project is aimed at children and their families who receive health and social services at the Hub. "More Than Just Soup" employs a children's human rights-based approach in all interactions with children and their families and implements the principles of the UN Convention on the Rights of the Child in its governance structure.

The "More than Just Soup" idea sprang from circumstances created by pandemic public health restrictions that prohibited Hub staff from meeting face-to-face with children, youth and their families. The multilingual project used a unique approach to service delivery for over 70 high-needs families during the pandemic featuring a strength- and rights-based model of care. Families were divided into seven groups and assigned to medical students under CHEO (Children's Hospital of Eastern Ontario) pediatrician and children's rights advocate Dr. Sue Bennett's supervision. The medical students made weekly visits to family homes

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[6] *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990, ratified by Canada 13 December 1991).

[7] Vanier Community Services Centre, "Vanier Social Pediatric Hub" (9 May 2022) online: *Vanier Community Services Centre* <www.cscvanier.com/en/family/vanier-social-pediatric-hub>.

for an in-person and distanced "doorstep" visit with children and young people as well as their caregivers. The students also delivered food and resources, assessed and supported health, social and educational needs, and overall safety. Through these consistent home visits, the medical students formed relationships with the children, youth and their families and built trust over time.

To expand their ability to provide nutritious food on a regular basis, the "More than Just Soup" project partnered with local restaurants, supermarkets, and school breakfast programs to obtain fresh and frozen food as well as food vouchers. Each child received their own box of food filled with healthy child-friendly snacks. Weekly online discussions were held with Hub staff and local schools to ensure schoolteachers and school decision-makers were aware of any concerns that arose during the home visits; if necessary, teachers were able to offer non-intrusive online support to children to address their educational and mental health and safety needs.

Feedback gathered from families involved in the program confirmed that it was well received and appreciated. The participants in the program noted that they looked forward to the regular weekly home visits that helped to address feelings of isolation as well as receiving weekly fresh food and health, social and educational resources. The Hub responded to local families who had reported access to fresh food as their primary need, a need exacerbated with food banks closed for walk-in visits and with monthly appointments needing to be made as well have having restricted access to the school breakfast box program with school closures.

Despite minimal staffing at the Hub, the program allowed health and social care professionals to stay in close communication with their neighbourhood's children, youth, and families during a time of extreme vulnerability during the pandemic, mitigating the disruption to the integrated health and social support that had been already regularly offered to families in a community-based setting. For the medical students, it was an experiential learning opportunity that fulfilled their social accountability mandate to understand the complexity of health and wellbeing for children and youth living in an underserved community during a humanitarian crisis. The medical students had the opportunity to learn from and serve the children and their families in crisis, at a time of restricted access to hospital-based educational opportunities.

The second example highlights international children's rights advocate and scholar Gerison Lansdown's work with the European Union on their children's rights strategy. Her goal has been to infuse this work with a rights-based ethos and ensure that policies arising from the strategy respect children's rights. The EU has developed a 5-year strategy that, for the first time, consulted children as part of the process. Lansdown collaborated with child-serving organizations including Save the Children, UNICEF, World Vision, and Euro Child to develop a process and framework for this work. The aim was to construct a survey and focus group protocol in order to reach out to as many children as possible, given the constraints imposed by the COVID-19 pandemic. Recognizing that many of the most marginalized children were less likely to access an online survey, the team identified some of the most excluded groups of children and found partners who could reach out to them through online focus group discussions. The draft survey and protocol were reviewed through a consultation with a child and youth advisory group comprising 15 children that had been working together over the past three years. The youth advisory group reviewed the draft survey and focus group questions and offered feedback and revisions that were incorporated into the final version of the survey. One of the issues that emerged from consulting with the young people was that they wished to see a much stronger focus on mental health and mental illness. The final survey was circulated widely and received over 10,000 responses from children in countries in and outside of Europe. Findings from the survey have been drafted into a final report and submitted to the EU. The children and youth advisory group wrote the foreword to the report and had an opportunity to comment on the draft prior to submission. The overall results from this work were strongly influential in informing the final EU Strategy on the Rights of the Child.

In the third example, Families Canada, a national association of family support centres comprising a network of 500+ member agencies and thousands of frontline family service workers across Canada, launched an initiative at the start of the pandemic to keep children and their families connected with the network.[8] Families Canada addresses the needs of marginalized families using a child-centric, rights-based approach that informs the knowledge, resources and tools it offers to service providers. When children and young people's needs are assessed, Families Canada equally encourages rights-based considerations, for example, to protection from harm, neglect, and exploitation, to maintain their access to education, to be able to play, as well as to ensuring their right to participate in matters that affect their lives.

In early 2020, Families Canada began hosting a series of thirty-eight free virtual COVID-19 related events. The cross-Canada "Let's Talk" series offered a way to

8 Families Canada, "Families Canada" (9 May 2022) online: *Families Canada* <familiescanada.ca>.

connect service providers working in different parts of the country. Families Canada gathered feedback from its virtual events and began surveying members to check-in on how children and families were coping and importantly, learned from service providers where support was most needed. Surveys revealed that the pandemic had significantly stressed in-home relationships due to overcrowding, anxiety over school closures, work loss or from the need to continue working in a risky context. Moreover, with business pivoting online, those people lacking devices and data were being left behind. Some multi-generational newcomer households struggled to meet the varied technological needs of family members. In addition, surveys revealed that the pandemic had a weakening effect on parental coping skills sometimes resulting in conflict among household members. With respect to young children, the Families Canada's Early Child Development series pointed to the negative impact stress can have on developing brains and offered practical mitigation strategies that service providers could share with families. Moreover, for newcomer teens who may have acted as household managers in pre-pandemic times due to language, literacy, and their ability to navigate on-line and in-person services required by the family, the pandemic had expanded home responsibilities in ways that placed more demands on some young people that at times, conflicted with their ability to focus on online schooling.

Another important issue that arose from the surveys was the safety of women and children given the social, economic, and family dynamic pressures during the pandemic. Service provider feedback suggested a rise in domestic abuse with links to a woman's isolation in the same home and inability to escape their abusers. They noted that the situation impacted the children who were witnesses of the abuse as well because they were also confined to the home. The situation was complicated by the fact that emergency shelters for women and children were initially closed at the start of the pandemic although they have since become creative in finding ways to accept those who need urgent help. However, need still exceeds pandemic capacity.

Finally, food insecurity emerged as a major issue. Surveys and feedback indicated that loss of income combined with shuttered food banks and community kitchens along with lockdown restrictions for local groceries and small markets had created widespread food insecurity. While food banks had been trying to overcome these challenges, reaching families in need was difficult. The surveys and feedback confirmed the need for low-income families to have easy access to inexpensive basic food and pharmacy provisions that include sufficient fresh, healthy daily food servings to meet children's nutritional needs.

CONCLUSION

Each of the projects and initiatives noted above are framed by a concern for children's rights in their own way through their conceptual design, methodologies, and implementation strategies. What is common to all three of the projects is that employing a children's rights-based approach appears to make a considerable difference to actual children's lives because they begin from the position of respect for children and including their views and experiences that become part of discussions rather than peripheral to the concerns and experiences of adults, or in view of women's lives or families. Rather, a dynamic children's rights-based approach as evident in each of the projects views children as necessarily participating in society rather than merely vulnerable and dependent. The approach attends to children lives viewed through a lens of structural and social inequalities.

What these projects make clear is that learning more about how children and young people are experiencing the pandemic necessarily reframes the conversation regarding how to move forward in a productive way. The projects exemplify the importance to hear and understand how children and young people are enabled or challenged to respond, cope, and creatively accommodate disruptions in their lives. This knowledge is qualitatively different from approaches that take an adult-centric top-down view that typically emphasizes a rhetoric of vulnerability and dependency and that relies on a 'needs' framing that is firmly protectionist in nature. The three projects offered here exemplify the value and utility of using a children's rights-based approach in the kinds of policies and programs that adults create and implement for children and young people as we collectively move forward from the pandemic experience in ways that can be meaningful, productive, and effective.

In recollecting her work leading the Canadian delegation to the UN Special Session on Children in New York in 2002 at the CRAN 2021 conference, Landon Pearson recalled a group of young girls who were delegates there. They stood at the podium and addressed a room full of world leaders who had gathered to pledge their commitment to children. Pearson recalled their clear and emphatic message: "We are not the problem; we are the solution." This plea from the girls to become part of the solution to issues children and young people face in their daily lives aligns not only with their right to participation as set out in the UNCRC but also with envisioning a way forward with an approach that is collaborative, respectfully inclusive and conscious that we all live in a rapidly changing and globalized world. For those of us who work with children and young people and seek ways to move into a future shaped by what we have all learned from the COVID-19 pandemic, it is this emphasis on decision-making that is inclusive and participatory as well as an approach that attends to the social, cultural and political dimensions of children's and young people's lives in a rights-respecting way that will provide the best possible path forward for all of us to thrive in a post-pandemic era.

RECALIBRATING THE FOOD SECURITY PARADIGM: EXPLORING THE RELATIONAL DIMENSION

Nandini Ramanujam and Sarah Berger Richardson

INTRODUCTION

In April 2020, UN World Food Programme (WFP) Executive Director David Beasley warned the Security Council that alongside the coronavirus pandemic, the world was simultaneously facing a hunger pandemic of "biblical proportions".[1] One year later, the estimated global number of people on the verge of starvation has increased from 135 million, pre-Covid, to 270 million.[2] These numbers cannot be attributed to the pandemic alone. Rather, the economic impact of COVID-19 on the world's most vulnerable people, coupled with disruptions caused by armed conflict, land degradation, and drought has exacerbated existing frailties of the global food system.

As the High Level Panel of Experts on Food Security and Nutrition (HLPE) of the World Committee on Food Security recently noted, the world was already off-target meeting SDG 2 targets when the pandemic began.[3] After decades of steady decline, the prevalence of undernourishment began to rise in 2015 and has been rising annually ever since.[4] In 2019, the FAO reported that more than 820 million people in the world are still hungry, and that 2 billion people in the world experience moderate or severe food insecurity.[5] As global food prices and food price inflation rise to the highest reported levels in a decade, these numbers will only increase.[6]

Unlike the global food crisis of 2007/2008, the current joint public health/food crisis has drawn greater attention to the interconnectedness of *all* of the people who contribute to global food supply chains and of our collective dependence on their labour to feed ourselves. Despite all of the technological advances of the past century, the agri-food sector remains labour intensive. We rely on people to grow, raise, produce, harvest, process, transport, import, export, distribute, deliver, and cook the food we need to survive and thrive. Their well-being is thus essential to ensuring the realization of every person's right to adequate food.

The pandemic revealed many of the indignities workers face to get food from farm to fork: occupational health and safety hazards, inadequate housing, racial discrimination, poverty wages, negative health outcomes, precarious immigration status, and, ironically, food insecurity. And yet, while there is so much over which to despair, the pandemic has also created the intellectual space to radically rethink our relationship with the food we eat and the people who feed us.

CENTERING PEOPLE IN POST-PANDEMIC FOOD SYSTEMS

The theory of six degrees of separation tells us that we are six introductions away from anyone on the planet. The global disruptions to the food supply chain caused by lockdowns and border closures during the pandemic similarly illustrated how deeply we depend on people we have never met to feed ourselves and our families. Consider how, in the early months of the pandemic, farmers were instantaneously confronted with disappearing markets due to shifts in demand, as well as logistical barriers getting products from farm to fork. Exports of perishable goods such as fruits, vegetables, and fish are normally transported by plane but the grounding of passenger flights drastically diminished

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1 Peyvand Khorsandi, "WFP chief warns of 'hunger pandemic' as Global Food Crises Report launched" (22 April 2020) online: *World Food Programme* <www.wfp.org/stories/wfp-chief-warns-hunger-pandemic-global-food-crises-report-launched>.

2 World Food Programme, "WFP chief calls for urgent funds to avert famine" (11 March 2021) online: *World Food Programme* <www.wfp.org/news/wfp-chief-calls-urgent-funds-avert-famine>.

3 High Level Panel of Experts on Food Security and Nutrition, "Food Security and Nutrition: Building a Global Narrative Towards 2030" (2020) online (pdf): *Food and Agriculture Organization of the United Nations* <www.fao.org/3/ca9731en/ca9731en.pdf> [*HLPE*].

4 FAO, IFAD, UNICEF, WFP and WHO, "The State of Food Security and Nutrition in the World 2019: Safeguarding against economic slowdowns and downturns" (2019) online (pdf): *Food and Agriculture Organization of the United* <www.fao.org/3/ca5162en/ca5162en.pdf> [*FAO Partnership*].

5 *Ibid*.

6 Emiko Terazono & Judith Evans, "Global food prices post biggest jump in decade" (3 June 2021) online: *Financial* <www.ft.com/content/8b5f4b4d-cbf8-4269-af2c-c94063197bbb>.

cargo capacity for food.[7] Producers that relied on export markets for their products lost access to international markets, and lacked the storage capacity to redirect produce to local markets. At the same time, lockdowns and border closures to non-residents meant that migrant agricultural workers were either forced to return home or prevented from traveling to work. For households in low- and middle-income countries that rely on remittances to put food on the table, food insecurity was exacerbated by COVID-19 emergency responses that prevented individuals from seeking alternate sources of income to make up for this loss. Meanwhile, migrant workers who successfully crossed borders to work in the agri-food sector are increasingly speaking out about dangerous and exploitative living and working conditions.[8]

Beyond the ways the pandemic forced us to reckon with the interconnectedness of our food systems, it has also shone a light on the *people* who feed us. It is one thing to understand the degrees of separation between agricultural workers and consumers. It is another to see the dignity and humanity in each other. Nobel Peace Prize Winner and Archbishop Desmond Tutu famously proclaimed "my humanity is caught up and is inextricably bound up in yours."[9] This is the philosophy of Ubuntu and Tutu believed that it could be a force to facilitate reconciliation in Apartheid and post-Apartheid South Africa. His message, that we can only survive together, is equally instructive for food system governance.

For decades, civil society organizations have been advocating for human rights-based approaches to tackling food insecurity and fighting for greater recognition of the fundamental contributions of peasants, fisherfolk, shepherds, women, migrants, workers, young people, and Indigenous peoples to feed communities in a healthy, fair, and sustainable manner.[10] The significance of centering the contributions of individuals to the development of sustainable food systems cannot be overstated. Historically, global food security efforts have primarily been centered on tackling hunger and malnutrition. This approach, which may be appropriate to address humanitarian emergencies, is not aligned with a human rights based approach to food security, which sees people as rights holders, not merely as recipients of food. We already produce enough food to meet the dietary needs of everyone on the planet and yet hunger and malnutrition persists. Sustainable food security calls for a multi-dimensional understanding of food systems, as well as interdependent factors which impact its security. The pressing policy concern is not increasing global food production but reducing obstacles to securing adequate employment and income to purchase food and/or acquiring rights and access to resources necessary to produce food.[11]

The right to food is recognized directly in several instruments under public international law including the *Universal Declaration of Human Rights*, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *Convention on the Rights of the Child,* as well as the 2018 *Declaration on the Rights of Peasants and Other People Working in Rural Areas.* Indirect reference can also be found in both the *International Covenant on Civil and Political Rights* (ICCPR) and the ICESCR, which recognize the right to self-determination and, in so doing, recognize that a people may not be deprived of its own means of subsistence.[12] Article 3 of the *Declaration on the Rights of Indigenous Peoples* reaffirms the ICESCR's recognition of the right to self-

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[7] International Air Transport Association, "Air Cargo Essential to Fight Against COVID-19" (16 March 2020) online: *Internation Air Transport Association* <www.iata.org/en/pressroom/pr/2020-03-16-01/>.

[8] See Kate Dubinski, "Migrant worker wins labour board case after being fired for speaking out about unsafe conditions amid COVID-19" (12 November 2020) online: *CBC News* <www.cbc.ca/news/canada/london/migrant-worker-wins-labour-board-ruling-1.5799587>; Bonifacio Eugenio Romero, Rogelio Muñoz Santos & Juan Lopez Chaparro, "Decent Dignified Housing for Migrant Farmworkers" (2 December 2020) online: *Migrant Workers Alliance* <migrantworkersalliance.org/decent-dignified-housing-for-migrant-farmworkers/>; Natacha Lavigne & Emilie Robert, "La Face Cachéé des Tomates Demers" (31 May 2021) online: *Radio-Canada* <ici.radio-canada.ca/recit-numerique/2458/serres-demers-hebergement-travailleurs-etrangers-tomates>; Carmen Wong, "Migrant worker speaking out about farm conditions" (30 July 2020) online: *CTV News* <kitchener.ctvnews.ca/migrant-worker-speaking-out-about-farm-conditions-1.5046180>.

[9] Desmond Tutu, "Forward" in Dana Gluckstein, ed, *Dignity: In Honor of the Rights of Indigenous Peoples*, (Brooklyn, NY: PowerHouse Books 2010).

[10] Nyéléni Village, Selingue, Mali, "Declaration of Nyéléni" (27 February 2007) online: *La Via Campesina* <viacampesina.org/en/declaration-of-nyi/>.

[11] Nadia Lambek, Emily Mattheisen, & Denisse Cordova, "Civil Society Report on the Use and Implementation of the Right to Food Guidelines" (October 2018) at 12, online (pdf): *CSM Working Group on Monitoring* 2018 <www.fian.org/fileadmin/media/publications_2018/Reports_and_guidelines/EN-CSM-RtF-2018-compressed.pdf>.

[12] Olivier De Schutter, *Report of the Special Rapporteur on the right to food: Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights*, UNOHCHR, 13th Sess, UN Doc A/HRC/13/33/Add.2 (2009) at 12.

determination and specifically protects the right to food of indigenous peoples accordingly.[13]

Article 11 of the ICESCR is the most comprehensive articulation of the right to food.[14] It provides for the right of every person to an adequate standard of living, including adequate food, and the right of every person to be free from hunger. Governments are required to take appropriate steps to ensure the realization of these rights and, taking into account the needs of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need. A more detailed definition of the right to food can be found in the UN Committee on Economic, Social and Cultural Rights' *General Comment 12: The Right to Adequate Food*, which states: "[t]he right to adequate food is realized when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement."[15]

Upholding the right to food[16] and realizing the ambitious targets of SDG 2[17] requires critical paradigm shifts. COVID-19 has created an opening to see the agricultural sector for what it is: an essential service to meet our most fundamental needs, regardless of who we are or where we live. One way of conceiving such a paradigm shift is to resist the commodification of food systems and to adopt a "food as commons lens" that embraces the social, cultural, political, economic and moral dimensions of our relationship with the foods that sustain us.[18] Another is to challenge the binaries that permeate discussions around food security (e.g., North/South; rural/urban; producer/consumer; etc.). Thanks to economic globalization and unprecedented levels of mobility and migration, we are significantly more connected to each other and our relationships transcend these neat divisions.

A CAPABILITIES APPROACH TO THE FOOD SECURITY PARADIGM:

One could argue that Ubuntu philosophy[19] aligns well with the Human Development framework and the underpinnings of capabilities theory. The capabilities approach developed by Amartya Sen in the 90's[20] rests on a tripod consisting of interconnected and mutually reinforcing elements: capabilities, functionings, and agency.[21] The Human Development framework ushered in a multidimensional understanding of the idea of development. According to Sen "the real merit of the human development approach lies in the plural attention it brings to bear on developmental evaluation".[22] This pluralism is critical for re-conceptualizing food security.

Capabilities can be defined as the freedoms and abilities a person possesses to enjoy his or her life. Sen's theoretical exploration of capabilities acquired a more concrete elaboration in Martha Nussbaum's list of ten core capabilities.[23] The principle argument of this approach is that development should enlarge people's choices.[24] Extending this understanding to food security, policies and government strategies and initiatives should aim to create an enabling environment where people can

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[13] *United Nations Declaration on the Rights of Indigenous Peoples*, GA RES/61/295, 61st Sess (2007) at art 3 [*UNDRIP*].

[14] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 at art 11 (entered into force 3 January 1976) [*ICESCR*].

[15] *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, UNCESR, 20th Sess, Doc E/C.12/1999/5 (1999).

[16] *ICESCR*, *supra* note 14 at art 11.

[17] *Transforming our World: the 2030 Agenda for Sustainable Development*, GA Res A/RES/70/1, 70th Sess (2015) at 14, 35.

[18] See Tomaso Ferrando et al, "Commons and Commoning For a Just Agroecological Transition: The Importance of De-colonising and De-commodifying our Food Systems" in Chiara Tornaghi & Michiel Dehane, eds, *Resourcing an Agroecological Urbanism* (London: Routledge 2021) 61.

[19] Mogobe B. Ramose, *African Philosophy Through Ubuntu* (Harare: Mond Books 1999).

[20] Amartya Kumar Sen, *Inequality Reexamined* (Oxford: Oxford University Press 1995) [Sen, "Inequality"]

[21] Amartya Kumar Sen, "A Decade of Human Development" (2020) 1:1 J Human Development 17 [Sen, "Human Development"]; Sabina Alkire & Séverine Deneulin, "The Human Development and Capability Approach" in Séverine Deneulin & Lila Shahani, eds, *An Introduction to the Human Development and Capability Approach: Freedom and Agency* (Sterling, VA: Earthscan 2009) 22.

[22] Sen, "Human Development", *supra* note 21 at 22.

[23] Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press 2000): 78.

[24] Wolfgang Sachs, "Development: The Rise and Decline of an Ideal," (2020) online: *Wuppertal Institute for Climate, Environment and Energy* <nbn-resolving.de/urn:nbn:de:bsz:wup4-opus-10782> at 9, 14, 28.

exercise their agency to access culturally appropriate, nutritious, and sustainable food.

The capabilities approach recognizes human diversity which is manifested through physical, social, and economic capabilities. Recent developments in the capabilities approach additionally call for an encompassing principle of capability security, which is the certainty that capability-oriented policies will continue into the future.[25] For example, a refugee in a new country, or a person with a disability living in poverty, or an elderly individual living in a rural and remote community, or a person with precarious employment or experiencing homelessness may each have encountered specific challenges in accessing adequate and nutritious food during the pandemic based on their unique physical, social and economic capabilities. Ensuring the security of the realization of each individual's right to food in these examples can only be guaranteed through a coherent and inter-connected socio-economic policy framework. The development of such a comprehensive and responsive policy framework requires consultation with vulnerable individuals and groups with diverse capabilities.

Although the UN Committee on Economic, Social and Cultural Rights unpacked the abstract ideas of a rights-based approach to food security codified in article 11 of the IESCR in its general comment 12, more work is needed to translate this right in practice. The capabilities framework is well placed to guide advocates and policymakers in their efforts to advance a rights-based approach to food security.

The other two core elements of the capabilities approach consist of functionings—the values for being or doing—and agency - the ability to pursue functionings.[26] Both are crucial vis-à-vis food security.[27] Recently, the HLPE called for a more comprehensive interpretation of food security than what immediately followed the 1996 Rome Declaration on World Food Security. The Declaration states : "[f]ood security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life.".[28] Whereas this was initially understood to mean that food security had four pillars (availability, access, utilization and later stability), the HLPE has broadened its conception of food security to emphasize two more pillars: agency and sustainability.[29] The push for greater recognition of agency in particular acknowledges Sen's argument that people need to be perceived as active participants of their own development, not mere recipients of government programs.[30] Enhancing people's capabilities ought to be a core tenet of food security policy and initiatives, most of which are still have a singular focus on food and agriculture.

Martha Nussbaum eloquently highlights the role of agency by contrasting the deliberate act of fasting and the misery of starving.[31] Both the capability approach and the human rights-based approaches are premised on the primacy of voice and people's participation in the democratic process.[32] Without sustained guarantees of core elements of dignity,[33] informed participation by all stakeholders in the food paradigm, particularly the most vulnerable cross-section of the society would not be possible. Voice and participation are central to good governance;[34] in their absence, democratic legitimacy is undermined. The "PANTHER" framework developed by

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[25] Martha C. Nussbaum, "Creating Capabilities: The Human Development Approach and its Implementation" (2009) 24:3 Hypatia 211.

[26] David A. Crocker and Ingrid Robeyns, "Capability and Agency" in Christopher W. Morris, ed, *Amartya Sen* (Cambridge: Cambridge University Press 2010).

[27] Alkire, *supra* note 21 at 37.

[28] World Food Summit, "Rome Declaration on World Food Security" (November 1996) online: *Food and Agriculture Organization of the United Nations* at para 1, <www.fao.org/3/w3613e/w3613e00.htm>.

[29] *HLPE*, *supra* note 3 at xv.

[30] Amartya Sen, *Development as Freedom* (New York: Anchor Books 2011) at 60.

[31] Martha C. Nussbaum, "Capabilities and Social Justice" (2002) 4:2 Intl Studies Rev 132.

[32] Office of the High Commissioner for Human Rights, "A Human Rights-Based approach to data. Leaving no one behind in the 2030 agenda for sustainable development" (2018) at 3–6, online (pdf): *Peace Women* <www.peacewomen.org/sites/default/files/GuidanceNoteonApproachtoData-compressed.pdf>.

[33] Nussbaum, *supra* note 31 at 78–80; *ICESCR*, *supra* note 14, Preamble.

[34] Rachel M. Gisselquist, "Good Governance as a Concept, and Why This Matters for Development Policy" (2012) Helsinki UNU-WIDER, Working Paper 2012/030 at 12, 23–37.

the FAO (**P**articipation, **A**ccountability, **N**on-discrimination, **T**ransparency, **H**uman dignity, **E**mpowerment and **R**ule of law), also emphasizes the centrality of participation, which it defines as every person and all peoples' entitlement "to active, free and meaningful participation in and contribution to decision- making processes that affect them."[35] Sen's capabilities theory and his work on democracy and famine shed further light on the necessary preconditions for sustainable food security for all. [36] In one of his most cited article, Sen argues that democracy is the best deterrent for famine. Empirical evidence suggests that no famine has occurred in democracies; even countries with weak democracies managed to feed their populace when natural disasters struck.[37]

Creating an enabling environment which guarantees sustainable food security for all, particularly for vulnerable individuals and groups, is a complex endeavor, that calls resituating food security in the larger framework of human security.[38] By including agency as a new dimension of food security, the HLPE is paving the way for a recalibration of food security anchored in a capabilities approach. In an increasingly inter-connected world, enhancing agency and empowering all members of the human family is the only guarantee for our collective security and well-being, food and beyond.

CONCLUSION

The slogan of the Covax global vaccination initiative, "no one is safe unless everyone is safe"[39] has clear resonance with a human rights-based approach to food security. If we have learned anything from COVID-19, it is that our shared humanity must be at the heart of our efforts to rebuild a post-pandemic economic order, particularly as it relates to food. The pandemic highlighted the complex maze of local, provincial, national, and global factors which not only impact food security but our overall wellbeing.[40] Our experiences of panic buying and hoarding in the early months of the pandemic, and the experiences of the past year overall, have served as an important reminder that food is more than a commodity – it is what holds society together. In spite of timely and responsive intervention by our governments, images of empty shelves triggered deep-seated fears that pushed many of us to stock up with little regard for the needs of our neighbours. With hindsight, this can be explained. However, it is also behaviour that needs to be corrected.

The spirit of ubuntu invites us to see the well-being of others as a personal concern: my humanity is inextricably linked to yours. Now, as we are confronted with the stark realities of extreme food insecurity in Ethiopia[41] and Yemen[42] these conflict-led and man-made famines should serve as a call to action for the global community on two fronts. First, we must urgently respond to these emergency situations to take the necessary steps for all individuals to be free from hunger and to collectively meet SDG 2 targets. Second, the pandemic is a stark reminder that all states have an obligation to recalibrate national food security frameworks by centering people at their core.

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[35] Olivier De Schutter, "From Charity to Entitlement: Implementing the Right to Food in Southern and Eastern Africa," (June 2012) at 6, online (pdf): *Olivier De Schutter* <www.srfood.org/images/stories/pdf/otherdocuments/20120620_briefing_note_05_en.pdf>.

[36] Amartya Kumar Sen, "Democracy as a Universal Value" (1999) 10:3 J Democracy 3 [Sen, "Democracy"]; Sen, "Inequality", *supra* note 20 at 7–8.

[37] Sen, "Democracy", *supra* note 36.

[38] Richard Jolly & Deepayan Basu Ray, "NHDR Occasional Paper 5" (May 2006) at 4–5, online (pdf): *National Human Development Report Series* <hdr.undp.org/sites/default/files/nhdr_human_security_gn.pdf>.

[39] World Health Organization, "COVAX: Working for global equitable access to COVID-19 vaccines" (18 June 2021) online: *World Health Organization* <www.who.int/initiatives/act-accelerator/covax>.

[40] Evan Dyer, "The great PPE panic: How the pandemic caught Canada with its stockpiles down" (11 July 2020) online: *CBC News* <www.cbc.ca/news/politics/ppe-pandemic-covid-coronavirus-masks-1.5645120>.

[41] Rick Gladstone, "Famine Hits 350,000 in Ethiopia, Worst-Hit Country in a Decade" (10 June 2021) online: *New York Times* <www.nytimes.com/2021/06/10/world/africa/ethiopia-famine-tigray.html>.

[42] "'Hell' in Yemen, with millions 'knocking on the door of famine' WFP's Beasley warns" (10 March 2021) online: *UN News* <news.un.org/en/story/2021/03/1086932>.

SPECIAL SECTION:
SELECTED PROFILES AND REFLECTIONS OF CANADIAN HUMAN RIGHTS ACTIVISTS

EDITOR'S NOTE:

The following Special Section of the CYHR profiles four of Canada's leading human rights activists with impacts across Canada and internationally. The first two contributions were commissioned by the CYHR as the authors stepped down from long service to two of Canada's leading human rights non-governmental organisations, Equitas and Amnesty International Canada (English Section). The next two pieces are substantial interviews of activists invited by the CYHR with the assistance of independent young interviewers. A fifth contribution for the first time records and briefly describes the so far four Canadian members of the Human Rights Committee established under the International Covenant on Civil and Political Rights; each member serves in their personal capacity as independent experts but must be nominated by a State Party and is elected by vote of the Assembly of States Party. Nicole Barrett offers some critical commentary about the role, process and Canada's contribution so far.

NOTE DE LA RÉDACTION :

La Section spéciale suivante de l'ACDP dresse le portrait de quatre des principaux militants des droits de la personne du Canada qui ont subi des répercussions au Canada et à l'étranger. Les deux premières contributions ont été commandées par l'ACDP alors que les auteurs quittaient leurs longs services pour deux des principales organisations non gouvernementales de défense des droits de la personne du Canada, Equitas et Amnistie internationale Canada (Section anglaise). Les deux articles suivants sont des entrevues substantielles d'activistes invités par l'ACDP avec l'aide de jeunes intervieweurs indépendants. Une cinquième contribution enregistre et décrit brièvement les quatre membres canadiens du Comité des droits de l'homme établi en vertu du Pacte international relatif aux droits civils et politiques ; chaque membre siège à titre personnel en tant qu'expert indépendant, mais doit être nominé par un État Partie et est élu par un vote de l'Assemblée des États Parties. Nicole Barrett offre des commentaires critiques sur le rôle, le processus et la contribution du Canada jusqu'à présent.

REFLECTIONS ON A JOURNEY OF LEARNING ABOUT HUMAN RIGHTS

Ian Hamilton

After 23 years working with *Equitas*[1], I stepped down as Executive Director in June 2020 to make room for new leadership and to take on new challenges. It has been an incredible journey in human rights so far and I have been blessed to work alongside and learn from so many amazing human rights defenders in Canada and around the world. A lot has changed in the human rights world since I began this journey as a naïve volunteer at the International Centre for Human Rights and Democratic Development (Rights and Democracy)[2] three decades ago—some for the better, some for the worse. I was challenged every step of the way to grow in my understanding and practice of human rights and later on to learn how to manage a team and grow an effective human rights organization.

Compared to many graduates today, I had very little experience when I started. I am amazed when interviewing students and recent graduates by the amount of experience they have already: Masters degrees, internships, overseas experience, etc. If I was starting out now, I am not sure I would give myself a job! I graduated with a history degree from the University of Toronto where I had tried to select the courses which focused on the history of areas other than Canada, the US and Europe. If you looked closely, you could find courses on the history or political science of Latin America, Africa or Asia. It was around this time that I started to be attracted to the idea of an international career. I thought about the Foreign Service or working in the international development sector.

My father was a paediatrician and had a few contacts with NGOs from his involvement in the Board of a medical research centre in Bangladesh which he visited frequently. He was able to help me set up a meeting with an NGO in Ottawa. Soon after the meeting began, I explained I was studying history: I was told in no uncertain terms not to waste my time. According to this "expert", there were only opportunities for those with technical expertise, e.g. engineers and the like. I often wonder how many people this guy may have dissuaded. As such, whenever I have an opportunity, I have made a point to encourage and help anyone interested in getting involved in international development or social justice work of any kind. Thirty years down the road, I have concluded that human rights and social work require a wide range of skills and experience and the biggest indicator of success is not possession of degrees or certificates, but passion, empathy, commitment and hard work.

Luckily after I graduated, there were still plenty of opportunities to learn on the job, especially if you were willing to volunteer. After a not very distinguished academic career, I was offered an opportunity to do some volunteer work for a small engineering NGO (Engineers in Development) in Nairobi. It was an incredible four months and tremendous boost to my self-confidence, adapting to new surroundings and new responsibilities.

I came back to Montreal after my time in Kenya having had a great experience, but having no real plan. I could still hear that voice telling me that international work was not for me, but I wasn't sure what else I wanted to do. I ended up working temporary jobs (mostly data entry) for close to a year. Fortunately, I was in the right place at the right time in 1991 when the International Centre for Human Rights and Democratic Development (ICHRDD, known simply as "Rights & Democracy") was just being establishing itself in Montreal under the leadership of Ed Broadbent.[3] This unique institution, later shut down

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[1] Ian Hamilton was employed with *Equitas* from 1997 to 2020. For information on *Equitas* and its work, see: https://equitas.org/

[2] The **International Centre for Human Rights and Democratic Development (Rights & Democracy)** was created to be a non-partisan, independent Canadian institution. It was established by an act of the Canadian parliament in 1988 to «encourage and support the universal values of human rights and the promotion of democratic institutions and practices around the world.» It was shut down by the Stephen Harper Government in 2012.

[3] Ed Broadbent was leader of the Federal NDP from 1975-1989 and was the first President of Rights and Democracy from 1990-1996.

by the Harper Government in 2011[4], was created by an Act of Parliament[5] to promote human rights and democracy around the globe. When I submitted my CV, I was told I didn't possess the qualifications for a paid position, but they were looking for volunteers. I jumped on the opportunity and became a full-time volunteer for six months and so launched my career in human rights. I would stay at ICHRDD for four years, transitioning from volunteer to a contract and then full-time position and moving up from Program Assistant to finish as Asia Program Officer.

There was never any doubt that I had a tremendous amount to learn and, truth be told, I still do. This point was driven home when I undertook my first overseas mission after becoming Asia Program Officer at Rights & Democracy. I arrived in Lahore, Pakistan, late one evening in January 1995. It had been arranged that I would be met by a representative of our local partner organization, one of the leading national human rights NGOs. As I stepped nervously into the arrivals hall, I was relieved to see someone holding a sign with my name. When I approached my welcoming party to introduce myself, he couldn't contain his shock at seeing me. Before even saying hello he blurted out, "we expected someone much older". At the time and even more so when I look back, his appraisal of me was more than justified. What could I as a 28-year old from Canada offer to seasoned human rights activists in Pakistan?

After their initial surprise, my Pakistani hosts gave me a warm welcome and they treated me with nothing but respect and warm hospitality during my stay. They no doubt saw me for who I was, but were never patronizing. Rather, my lingering memories from this trip are the wonderful discussions I was privileged to have with leaders of the Human Rights Commission of Pakistan[6], one of the country's largest and most influential NGOs, Asma Jahangir[7], Hina Jilani[8], I.A. Rehman[9] and Aziz Siddiqui[10]. It was a Master class for me in human rights and a testimonial to these great leaders who were willing to share their experiences with me and help me learn. It was also not the last time that I had the opportunity to be schooled in leadership from some amazing human rights defenders.

My experience in Pakistan helped convince me I needed to do something to gain more practical experience if I was going to continue working in human rights. Within six months I had resigned from Rights & Democracy and taken up a role as a volunteer cooperant[11] with the Coordinating Committee of Human Rights Organizations of Thailand (CCHROT[12]) in Bangkok. It was a massive and sometimes intimidating change, but also an incredible experience. In addition to my own professional insecurities, I was adapting to a new culture and learning a new language. My wife and I had just been married and learned we were expecting a baby just a few weeks before we got on our plane.

In 1995, Thailand was transitioning from dictatorship towards democracy. There was a vibrant civil society and Bangkok, because of its relative freedoms in the region, was a hub for human rights activity in Southeast Asia. Bangkok was booming with construction, dust and traffic everywhere; as long as you showed up within an hour of a meeting's start time, you wouldn't be considered late! That was before the economic crash of 1998.

My Thai colleagues were working tirelessly to try to consolidate the human rights gains made after forcing the military regime to return to their barracks in 1992. These gains were fragile as they and others advocated for a democratic constitution which would include,

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4 https://www.thestar.com/news/canada/2012/04/03/john_baird_announces_plans_to_close_rights_and_democracy_group.html. Interestingly, current Foreign Minister Mélanie Joly's Mandate letter of December 2021 directs her to "establish a Canadian centre to expand the availability of Canadian expertise and assistance to those seeking to build peace, advance justice, promote human rights, inclusion and democracy, and deliver good governance" (https://pm.gc.ca/en/mandate-letters/2021/12/16/minister-foreign-affairs-mandate-letter).

5 https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-54-4th-supp/latest/rsc-1985-c-54-4th-supp.html

6 https://hrcp-web.org/hrcpweb/

7 https://rightlivelihood.org/the-change-makers/find-a-laureate/asma-jahangir/

8 https://theelders.org/profile/hina-jilani

9 https://www.washingtonpost.com/local/obituaries/ia-rehman-dead/2021/04/12/a3231cb8-9ba4-11eb-8005-bffc3a39f6d3_story.html

10 https://www.himalmag.com/boy-from-hyderabad-deccan/

11 The role was organized by CUSO which provided travel expenses and a modest living allowance.

12 The CCHROT brought together over a half a dozen of the leading human rights organizations in Thailand in the 1990s and early 2000s (but is no longer active) and played a leading role in the creation of the National Human Rights Commission established in 2001. (https://www.nhrc.or.th/Home.aspx?lang=en-US)

amongst other things, an independent national human rights commission. My role was to support this project through research and international networking and I was fortunate to be working with—and am forever grateful to—Somchai Homlaor, Songphorn Tajaroensuk, Phairoj Pholpet, Sarawut Pratoomraj and many others for their patience and mentorship. I learned so much from them about humility and the importance of diplomacy, patience and persistence in human rights advocacy.

CCHROT also shared its offices with the Asian Forum for Human Rights and Development (Forum-Asia) and I was able to participate in many of their regional advocacy campaigns. In this way, I was able to meet many amazing human rights defenders engaged in struggles in Burma, Indonesia, Timor Leste, Malaysia, The Philippines, India, Sri Lanka and Nepal.

Human Rights Facilitators workshop in Sri Lanka, 2015.

During this period in the region, I sensed a tremendous energy and spirit of optimism amongst human rights defenders in the region. A wave of democratization had followed the fall of the Berlin Wall and was still being felt in Asia. Notwithstanding the many challenges and threats that remained, there was considerable momentum in the movement in the aftermath of the mobilizations around the Vienna World Conference on Human Rights in 1993 and the Beijing World Conference on Women in 1995. At Rights & Democracy, we had provided funding to facilitate NGO preparations and participation in these important gatherings and now I was getting the chance to meet some of the people involved. These big conferences and all the preparatory events leading up to them provided some of the earliest opportunities for human rights defenders to gather in significant numbers at regional and global levels. Looking back, I think these events were the fuel which ignited the growth of the global human rights movement as we know it today. This impetus to global networking and solidarity also came with some important political advances that we sometimes take for granted today. It's hard to believe that before Vienna and Beijing, the notion that women's rights are human rights was controversial. Another important advance emerging from Vienna was the reaffirmation that civil and political rights were indivisible from economic, social and cultural rights. Vienna also resulted in a key advance for the rights of Indigenous Peoples, which all came down to a simple letter of the alphabet. The successful campaign to include the "s" in "Peoples" was an important breakthrough in recognizing the collective rights—including the right of self-determination—of the world's Indigenous Peoples. The fact that these milestone achievements were only possible as a result of the effective lobbying of human rights defenders reinforced a presumption that we were moving steadily towards a more democratic world that would respect and protect all human rights for everyone.

This optimistic feeling continued after my return to Canada and joined the Canadian Human Rights Foundation (CHRF, later to become *Equitas*) in early 1997 as the Director of its newly established National Institutions Program. At the time, the CHRF was already 30 years old and possessed a unique mission dedicated to human rights education and training in the world. Our flagship program, the annual International Human Rights Training Program (IHRTP), gathered over 100 human rights defenders in Montreal for three weeks every June. It was through my involvement in this amazing program that I had the privilege to meet and learn from thousands of human rights defenders from every region of the world.

With Equitas staff hosting former UN Special Rapporteur on Minority Issues, Rita Izsak-Ndiaye, 2019.

Many of these human rights defenders were leaving behind dangerous and traumatic experiences for three weeks of training at the bucolic west island suburb of Ste-Anne-de-Bellevue. I remember one participant from Indonesia in the late 90s who told us, after a long-day of training, that he would take the one-hour bus ride downtown to walk the streets of Montreal just to

experience what it was like to feel free[13]. We had to make sure to warn participants about the fireworks on the St-Jean and Canada Day holidays because, for some, the sound triggered traumatic memories. These and other experiences helped the IHRTP team learn that human rights education was about more than imparting knowledge and skills. It was equally important to create a safe learning environment and challenged us to design a holistic program focused on the learner as well as the content.

During my time at *Equitas*, I would guess I had the chance to meet over 2,000 participants in the IHRTP from close to 100 countries. Many of these courageous defenders became partners, colleagues and friends as CHRF/*Equitas* expanded its programming overseas and/or they returned to Montreal to be part of the training team in subsequent IHRTPs. Over time, I stayed in touch with many of these alumni and watched them as they progressed in their careers and took on leadership roles in their organizations and, in some cases, moved into key international positions[14]. I continue to value all the wonderful friendships I developed during my time at *Equitas* and it was these relationships which helped to sustain me when confronted with the daily challenges of human rights work.

While COVID disrupted the delivery of the IHRTP in 2020 and 2021, this training program has played an important role in strengthening the global human rights movement since its first session in 1980. In the early years, it often provided participants with their first exposure to international human rights principles as well as their first opportunity to meet and learn from activists outside their country.

Human rights education in action, IHRTP 2015.

In the early 1990s, the program welcomed hundreds of human rights defenders from the former Soviet Union. In the late 1990s after the fall of the Suharto regime, there was an influx from Indonesia and in the mid-2000s, the program started to welcome significant numbers from the Middle East. In addition to geographic shifts in participants, we also saw shifts in the types of issues the participants were working on. Mirroring the evolution of the movement's understanding of human rights, the early focus of participants on civil and political rights expanded to include issues related to economic, social and cultural rights, gender equality, children's rights, the environment, people living with disabilities, sexual orientation and gender identity.

As the movement grew and its needs evolved, the IHRTP also changed—adding content related to economic, social and cultural rights, women's rights, the rights of sexual minorities and the rights of Indigenous peoples. Of equal importance was the change in methodology (which had begun before I arrived). The 1995 switch from an expert model of "teaching" human rights to a participatory model of "learning" about human rights was spearheaded by Ruth Selwyn and Vincenza Nazzari. This change rooted the learning process in the experience of the participants who were already experts in their own context. The emphasis was on the learning opportunities offered by bringing together over one hundred human rights defenders from around the world. The result was an approach to learning based on human rights principles that focused on valuing what participants already knew and ensuring they were empowered to share and pass on their learning to others once they returned home.

When I joined CHRF/*Equitas*, I was also able to stay engaged in strengthening national human rights institutions in Asia through a series of capacity-building projects we delivered with partners regionally, in Indonesia, The Philippines, Malaysia, Cambodia and, of course, Thailand. This was a period when the idea of an independent institution to protect human rights was still new, but seen internationally as an important mechanism for States to follow through on their declarations in Vienna and Beijing and their long-standing human rights obligations.

[13] Indonesia had only just emerged from decades of dictatorship under Suharto in 1998.

[14] To read about some of the changes brought about by the IHRTP and other Equitas programs, visit: https://equitas.org/50-stories-of-change/

Training human rights defenders in Indonesia, 2010.

This work with National Human Rights Institutions (NHRIs)—that occupy a sometimes uncomfortable space between government and civil society—highlighted for me the role that a well-placed and well-meaning individual can play in bringing about human rights change. The reality about NHRIs in many if not most circumstances is that governments set them up for the positive publicity, often as a kind of window-dressing after they've been caught in a particularly egregious form of human rights violation[15]. However, despite such poor intentions of governments, in many cases these institutions have been able to play vital roles in advancing human rights because governments could not help but appoint one or two independent-minded members. I think of Asmara Nababan in Indonesia as well as Mercedes Contreras and Paulynn Sicam in The Philippines who, as Human Rights Commissioners working under severe constraints, managed over time to build the capacity of their institutions and, in the process, expand the space available in their countries for human rights defenders to work. In Thailand, Dr. Suthin Nophakhet was a lonely voice in Parliament for many years, championing the establishment of the National Human Rights Commission. From working with these and many other allies within government structures and the UN, I learned that change can be possible if you can identify champions within government and are willing to work with them on an incremental agenda to advance human rights.

The creation of NHRIs and the inclusion of other new players in the human rights movement are some of the very important and positive changes I've witnessed since I started my career. The number of organizations dedicated to advancing human rights has multiplied dramatically over the last three decades, demonstrating the universal appeal of human rights values and principles. In addition to the growth of the women's rights movement since Beijing, organizations dedicated to the rights of Indigenous peoples, people living with disabilities, gender diverse people, children, youth and many more have been added to the traditional human rights organizations working on civil and political rights. Many more organizations specializing in particular human rights issues have also emerged, e.g. housing, human rights education, freedom of expression, protection of human rights defenders, the environment and many more. While it may at times complicate the rules of engagement, the multiplicity of voices engaging in human rights debates is undoubtedly a good thing.

The emergence of these voices within the human rights movement has also changed the dynamics for the better. The human rights movement has been criticized over the years, sometimes justifiably, as being elitist. Increasingly, however, human rights activists and human rights organizations are recognizing that they need to work "with" and be accountable to the people they serve. While there is still work to be done, the principles of participation, accountability, equality and non-discrimination, transparency and empowerment are increasingly seen by human rights organizations as not only the desired outcomes of their work, but also essential principles to guide how they do their work. Integrating this human rights-based approach requires consistency and persistence and it is only fair that human rights defenders and organizations be challenged continuously to practice what they preach.

The types of organizations involved have also evolved. Whereas human rights used to be a struggle between governments and civil society, many more voices are now part of the dialogue. In addition to human rights commissions, we have seen a variety of models for independent institutions emerge around the world. We have also started to see some, but still not enough, engagement from the private sector, usually expressed through commitments to corporate social responsibility. In this regard, the ongoing work to implement the UN Guiding Principles for Business and Human rights[16] is incredibly important as we need to continue the efforts to expand the movement and find champions in positions of power and influence in the private sector while we also continue to strengthen mechanisms to hold business accountable.

The impressive growth of the movement has been accompanied by an expanding understanding of human rights.

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[15] An early example of this phenomenon was the creation of the National Commission on Human Rights in Indonesia (Komnas Ham) in 1993 after the UN expressed grave concerns about human rights violations.

[16] https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

Our modern understanding of human rights is rooted in the words of the Universal Declaration of Human Rights (UDHR). This amazing document created after the horrors of the Second World War has been translated into over 370 languages holding the Guinness record for being the document most translated in the world.[17] Despite its availability, still too little is understood about its contents. Everyone should read this inspirational document which starts with the words, "*Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world*". The full text of the UDHR articulates a bold agenda for making that world a reality. If there was only one thing we could do to improve the world, I would argue it would be to make sure the UDHR is part of learning in all school curricula around the world, starting in primary school. Why shouldn't children be learning about equality, dignity, freedom, justice and peace at the same time as they learn the words for house, cat and dog? All parents know that kids have an innate understanding of *fairness*.

The human rights principles and values in the UDHR and other human rights conventions are more than just words on paper. There are many examples from around the world which show how they can be used to empower individuals and groups that have experienced discrimination or been marginalized politically, economically, socially or culturally. Democracy is largely about the majority. Human rights are about protecting minorities, the less powerful and those who have been made more vulnerable as the result of colonial, patriarchal, homophobic and racist structures; human rights seek to ensure that they too can live in *dignity, justice, peace and freedom*.

The full vision of the UDHR will never be achieved without challenging the status quo. A discussion of human rights by definition should make us feel uncomfortable. It is not just about what others are doing, but should lead to introspection about our own role. How am I treating my family, my neighbours, my colleagues and strangers I meet in the street? In this regard, there are very few of us who can honestly say that they can't do better, that they don't ever slip.

Human rights activism is also about recognizing and challenging the stark power imbalances in the world and in our communities. The need for these honest reflections and discussions about privilege and power is at the root of current activism linked to the #MeToo, #BlackLivesMatter and the truth and reconciliation struggles in Canada and around the world. These current struggles build on the progress made in Vienna and Beijing and all the struggles which came before and after. As humans, we always need to be challenged to do better, to set aside our prejudices and build our relationships on the recognition of the inherent dignity of all of humanity.

The type of introspection that is needed at the personal level has also been a key feature of the human rights movement over the last three decades and has helped to broaden the movement and expand our understanding of human rights. Historically, the human rights discourse, despite the words of the UDHR, privileged certain rights over others and excluded certain groups. We are still struggling against the legacies of patriarchy, colonialism, anti-black and other forms of racism, ableism, homophobia and laissez-faire capitalism and all the *isms* that attack the dignity and worth of members of the human family. The ease with which hate groups were quickly able to sow the seeds of anti-Asian racism during the COVID-19 pandemic is another reminder that we also need to vaccinate our societies against all forms of discrimination, exclusion and hate.

While the human rights movement strives to do better, we must also defend ourselves from the concerted attacks of those afraid of losing their power and privilege. Today, the optimism I felt in the 90s is being replaced by pessimism about the direction we are headed. The start of the decline in human rights is often traced back to 2001 and the launch of the *War on Terrorism* after 9/11. The fear that was generated by the attacks and their aftermath led to the de-prioritization of human rights at the international and domestic levels. National security began to trump human rights in almost all countries and in almost all circumstances. In order to justify ongoing expenditures on security and increasing restrictions on civil liberties, politicians resorted to populist appeals and tried to instill a fear of the *other*. Human rights defenders who opposed these developments were often labelled as supporters of terrorism or sometimes even terrorists themselves. At the same time, governments had access to new surveillance technologies allowing them to assert increasing control and repression of dissent. Western governments which had traditionally (and often hypocritically) spoken out about repression and human rights abuses in other parts of the world were preoccupied with their own security concerns and muted their criticism, emboldening dictators and human rights violators.

There was a brief glimmer of hope in 2010 that the downward trend could be reversed when democratic upheavals spread across much of the Arab world.

[17] https://www.ohchr.org/en/human-rights/universal-declaration/new-record-translations-universal-declaration-human-rights-pass-500#:~:text=Guinness%20World%20Records%20declared%20the,when%20the%20number%20reached%20370.

However, this was short-lived. Libya, Yemen and Syria remain consumed in devastating civil wars and the military is back in power in Egypt, seemingly more entrenched and repressive than ever. Human rights defenders in Egypt are under grave threat these days and it is next to impossible for international organizations to provide meaningful support. Only in Tunisia have they been able to hold onto some of the gains of the revolution and continue efforts to consolidate a fragile democracy.

The global decline in human rights has been actively encouraged by social conservatives who have campaigned to deny reproductive rights, prevent comprehensive sexual education and deny equality rights to people of diverse sexual orientations and gender identities. Their ideology seems to have morphed into the anti-immigrant groups, leading to a frightening rise of hate speech and hate crimes targeted particularly at women and minorities of all kinds. These groups see their interests tied to maintaining patriarchal and neo-colonial structures and fear losing their privilege. These anti-human rights positions were further *legitimized* during the Trump presidency and their reach has grown exponentially through the technology of social media.

In my view, this rise of right wing, socially conservative populism represents the greatest threat to human rights today. They actively seek to create divisions and sow doubt in democratic structures. External actors sometimes facilitate their actions, but their roots are homegrown. We can't afford to be complacent. As we have seen recently, it would be a mistake for us to think our democratic institutions and a culture of human rights can survive without a strong response from all of us who believe in the *inherent dignity and of the equal and inalienable rights of all members of the human family*.

Fortunately, despite concerted efforts, human rights defenders around the world have not been silenced. New generations of defenders continue to emerge, reaffirming the universal appeal and relevance of human rights. Despite the fact that the struggle between States and defenders weighs heavily in favour of those controlling the levers of State security, new and very creative human rights advocacy campaigns continue to emerge and put pressure on governments to respect their human rights obligations. Unfortunately, this often requires great risks and courage and many human rights defenders and their families pay a heavy price. No matter how much effort is put into security, many human rights defenders live with the knowledge that they could be picked up, subjected to abuses or even disappeared if and whenever the government chooses.

While not everyone can be a full-time human rights defender, everyone can play their part. My work has taught me the critical importance of awareness and education. In this information age, there is no excuse for being unaware of what is happening. We make choices in the media we consume and there is no shortage of great content available in print, social media and various streaming services. However, it is not enough to consume information, we need to exercise our critical reflection and ask questions about what we are learning.-

This is where the formal education system comes in. We should expect our school boards, provinces and the federal government to ensure that human rights education is an essential part of the curriculum from kindergarten to the end of high school. This does not mean advocating for a separate subject of human rights to be added in curricula, but infusing human rights content and sensitivity into existing courses, including math and sciences. As part of this human rights education, young people should be learning the truth about their history (warts and all) and studying how the system of government works or doesn't. It also means putting a premium on building the competencies for democratic citizenship. In addition to critical reflection, this means learning to practice equality, respect and inclusion in our daily lives. This type of education requires a reordering of education as a priority as well as the priorities within education. The onus for such a dramatic change should not be put only on teachers and school administrators. Governments will need to reorient their emphasis on an education system that produces workers for a consumer economy to an education system that creates citizens who can build inclusive, resilient and rights-respecting communities.

Human rights education is a life-long process which should not end at graduation. Schools can set a solid foundation, but the principles of equality, participation, respect and inclusion need to be nurtured throughout our lives.

We also need leaders who are not afraid to defend human rights and who act as role models. And I am not only talking about elected leaders. We need CEOs, boards and senior company managers to care about human rights as well as profits. We need community leaders who are creating spaces for participation and dialogue. This kind of human rights leadership creates opportunities for people to empower themselves to participate in and contribute to community around them.

While leading *Equitas*, I was challenged to learn (often through trial and error) how to put the principles of human rights into practice inside the organization. I made some mistakes. Some of the most difficult conversations were around our efforts fully to address concerns related to gender equality, child participation, truth and reconciliation, anti-racism, sexual orientation and gender identity within our work. These discussions with partners and staff forced me to confront the gaps in my own understanding as well as past behaviours—a process of continuous learning.

Reinforcing accountability is also a key part of advancing human rights. In this respect, language is important. States have signed international treaties and accepted obligations to respect, protect and fulfill human rights. These are not policy options that governments are free to take or leave. People have inalienable rights simply by being human—by virtue of being part of the human family. To better hold governments accountable, we should think of and refer to the people in power in government as *duty-bearers* who are responsible to the population of *rights-holders*.

We also need to broaden the public perception of human rights, particularly in countries like Canada, to fully encompass all of the essential elements for living a dignified life. Education, healthcare, an adequate standard of living and adequate housing are all fundamental human rights and governments have duties to use the maximum available resources and all appropriate measures to ensure equitable access to and enjoyment of these essentials.[18]

I think part of the problem has been that human rights are often siloed. Many have viewed human rights "political" and/or the domain for lawyers and specialists. However, human rights should never be seen as a subject apart. Human rights principles and values should be at the heart of conversations about our daily lives and certainly major issues like the environment, climate change, peace, decolonization, anti-racism, etc. The human rights framework is not in competition with other frameworks. Understanding how to apply human rights principles can be an important tool for any activist trying to bring about social change.

Visiting Sri Lankan IHRTP alumni in Colombo, 2015.

My thirty years working for human rights has reinforced for me the importance of persistence. When successes occur, it is important to recognize and celebrate them, but not to presume that the battle is won. Similarly, it is essential not to lose hope when the news is dominated by new outrages and it seems the forces of hate and intolerance are winning. When times seem bad and people question the value of human rights, I tell them that it could always be a whole lot worse. I also think of the wise words I heard from Professor Peter Leuprecht[19] that have stuck with me. Speaking at the Opening Ceremony of the International Human Rights Training Program around twenty years ago, he told the hundreds assembled about the curse of Sisyphus; defending human rights, he told them, is akin to rolling a large boulder up a hill and, like Sisyphus, each time you get close to the top, the boulder rolls back down. However, the special responsibility of the human rights defender is to ensure that when the boulder rolls back down it does not roll down as far as the last time. In this way, while the challenge is mighty, if we persist, we will creep gradually closer and eventually make it to the top and create a world where everyone enjoys their human rights.

Over the last decade, it seems the boulder has been rolling back. Once again, we need to put all our energy to the task of reversing this backward momentum and resuming the struggle to reach our goal at the top of the mountain.

CODA: THE CHALLENGES OF MANAGING AN ORGANIZATION

In 2004, I was honoured to be appointed Executive Director of the CHRF. I was also a little terrified to be assuming such a huge responsibility. I had been the Director of Programs for three years, but had very little management experience. Fortunately, the organization was still relatively small (under twenty staff) and the Board of Directors was incredibly supportive.

Prior to this appointment, my experience and my strengths were in program design and delivery and I was about to embark into a whole new world. One of my first mandates was to come up with a new name for

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[18] Article 2(1) of the International Covenant on Economic, Social and Cultural Rights stipulates as follows: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

[19] Peter Leuprecht is an Associated Professor in the Department of Legal Sciences at UQAM and a retired professor of law and dean in the Faculty of Law at McGill University. In August 2000, he was appointed Special Representative of the United Nations Secretary-General for Human Rights in Cambodia; he also served as Director of Human Rights and then Deputy Secretary-General of the Council of Europe, and was a member of a committee of four "wise men" charged with preparing a human rights program for the European Union. On the universality of human dignity and unity, see his short book *Reason, Justice and Dignity; A Journey to Some Unexplored Sources of Human Rights* (Leiden: Martinus Nijhoff Publishers, 2012).

the organization. This test was fraught with dangers as Canadian Human Rights Foundation was then over thirty years old and a name can elicit strong attachments and emotions. I knew the tricky part would not be getting the Board's approval. It would be getting the buy-in from staff and our partners. Fortunately, we knew we had found a winner when the consultants helping us pro bono proposed "Equitas" as our new name. We would no longer be an acronym and since the word is Latin, we wouldn't need different names in French and English. When we wrote with some trepidation to key partners to consult them on the proposed name, the overwhelming response was: "It's about time!"

Having overcome this initial hurdle, the overwhelming and ongoing challenge managing an organization like Equitas was going to be fundraising. If you ask me what kept me awake at night, the answer was invariably where were we going to find the money for the programs and the people to deliver them. As we grew and became more successful in attracting support, the troubled sleep did not go away. There were always funding agreements coming to an end and the risk of losing programs and the staff assigned to them. And, as these programs grew, the more there was at stake when they came to an end. The stress was so bad in 2013 that I developed a case of the shingles. However, working with funding organizations taught me an important lesson. Funders need good projects almost as much as we need their money. This was critical for me in developing the confidence to negotiate agreements, particularly with our largest source of funding, the Government of Canada.

The unfortunate outcome of this funding cycle is the pressure it puts on everyone who should be focused on delivering the best possible programs to advance human rights. In addition to all the energy that must go into reporting requirements, the uncertainty of a three to five year funding agreement does not take into account the extended time-frame needed to bring about social change, particularly the shifts in behaviours and practices that lead to a better human rights situation.

The resources we were able to secure to deliver our programs were also the minimum needed to deliver the programs. This meant that staff and partners were called on to put in extraordinary efforts to deliver the results. While everyone understood that human rights work is not a 9-to-5 job, our staff were called on to make may sacrifices to get the job done. It was only towards the end of my term as Executive Director that I fully realized the toll this was taking on the team and our success helped us to secure additional resources needed to address some of these challenges.

I will always treasure the time I spent with the many amazing human rights defenders I worked with over the years. Despite the many challenges and the sometimes stressful environment, I never for a moment regretted my years with Equitas. During my time as Executive Director, the organization more than doubled in size of our staff and our budget. It was incredibly satisfying to be part of what we accomplished as a team, building an organization and strengthening the capacity of thousands of human rights educators and defenders across Canada and around the world. I am also very pleased and proud that this much-needed work continues under dynamic new leadership as Equitas continues to adapt to the ever-evolving challenge of making the vision of the Universal Declaration of Human Rights a reality for everyone around the world.

REFLECTIONS ON TWO DECADES OF DOING AND LEARNING ABOUT HUMAN RIGHTS

Alex Neve

Alex addresses an anti-racism rally outside the US Embassy in Ottawa, 23 August 2017.

(1) REFLECTIONS

2000-2020; having recently stepped down from serving as Secretary General of Amnesty International Canada after 20 years in the role offers a welcome opportunity for some human rights reflection.

Right away, my head and heart are awash in memories that bounce back and forth among elation, despair, triumph, and fear. I remember words and moments shared by survivors, human rights defenders, and community leaders across Canada and around the world. Each snippet captures a piece of the spirit of universal human rights.

If not me, who?

But I've left my country, I don't have any more rights.

Everyone cares about the diamonds, no one cares about us.

She will never be forgotten.

We've come so far, but there is a long journey still ahead.

We keep going, because we are not alone.

No one thought it was possible, but they did not count on our power.

Follow me while I follow you.

Isn't Canada supposed to be the land of human rights?

He lived, he mattered, he had a name.

There is no hope, there is only hope.

The settings and circumstances, in many ways could not have been more disparate: from Guantánamo Bay to eastern Chad; Zimbabwe to Mexico; Grassy Narrows First Nation to Rohingya refugee camps in Bangladesh. But each moment underscored how vital it is that we all come together in the universal human rights struggle; a collective responsibility that can never be set aside.

Obviously, though, that is precisely the responsibility that is set aside every day. Set aside by politicians, military and police officials, armed rebels, terrorist groups, business executives, religious leaders and others with the power to uphold and advance human rights, to prevent and redress human rights violations; but also the power to carry out terrible acts of violence, reinforce inequality, fuel racism, and make decisions with devastating impact on the lives and well-being of billions.

Sadly, though, set aside by millions upon millions of people everywhere who were perhaps never convinced or have lost confidence that human rights offer a solution to the hardships they face daily.

Set aside, yes, but over these past twenty years there has at the same time been an unprecedented explosion of people power, claiming and demanding that human rights be embraced. We see that in the tenacious advocacy of frontline human rights defenders, the courage of determined youth defying police and military repression, or the mobilization of millions, increasingly led by women, who have poured into streets and public squares, daring to dream of a brighter future.

Despair and hope. Determination and repression. As I sit down in mid-2021 to share these reflections it is abundantly clear that in many ways the world has never before been so urgently pulled in opposite directions when it comes to respecting and upholding human rights. Our challenge is to pull harder than ever in the direction promised 73 years ago when governments committed to the Universal Declaration of Human Rights, quite simply that "all human beings are born free and equal in dignity and rights."

Having taken up the Amnesty Canada Secretary General role on January 1, 2000, these past 20 years began with an impending sense of doom that the new millennium would launch with the so-called Y2K Bug, an anticipated information technology catastrophe which was feared might provoke economic and societal collapse. (It fortunately did not.) I have recently stepped down from the role, though, amidst a global crisis that has proven to be very real, the COVID-19 pandemic and its devastating impact on life, health, and livelihoods for billions of people around the world.

The two situations—a crisis entirely averted and a crisis of unprecedented scale that has been truly harrowing—could not be more different; except for the way that they uniquely brought the whole world together in shared focus and concern. That sense of worldwide connection is, unfortunately, otherwise often so very difficult to muster in the face of so many urgent realities that are wide sweeping in their global impact.

I am struck as well that these twenty years, more or less, were bookended by the Bush and Trump presidencies in the United States. I say so not to make a comparison between the two men or the administrations over which they presided; but rather that the combined twelve years of their times in office were marked by an assault, both direct and insidious, on the very foundations of universal human rights. Those years are a reminder that nothing can be taken for granted, there is no time or space for complacency in the global struggle for human rights, and progress can be so easily and suddenly lost, even with respect to principles that seemed to have been well settled.

Along the way there have been challenges and moments of enormous consequence during these two decades, setting back and advancing the cause of human rights. That has included the September 11th terrorist attacks

and the ensuing assault on human rights at the heart of the 'war on terror' that followed; the growing recognition of the enormity of the global climate crisis; the establishment of important new global institutions and laws like the International Criminal Court and the Arms Trade Treaty; and the incredible movements for change unleashed through Black Lives Matter, #MeToo, Idle No More, and the exhilarating and then shattered hope of the "Arab Spring."

(2) RIGHTS LEARNINGS

There are countless ways that I could frame and organize these reflections. I could offer highs and lows; attempt to offer a year-by-year assessment or tease out key trends and themes. Where I have settled is to share a number of broadly framed learnings I have experienced. Learnings that are in no way complete, nor should they be. Some have been more obvious than others and some more challenging than others. In some instances, the learning has been that there is much to unlearn.

Above all I have begun learning where to look and who to hear in understanding the essence of where the human rights journey must take us. For the greatest learnings are not to be found in the corridors of government, the lecture halls of universities, or United Nations conference rooms. The learnings that matter above all others arise at the frontlines of struggles for equality, freedom and dignity.

For me those learnings have been sixfold: to prioritize rights, embrace all rights, equalize rights, enforce rights, claim, and defend rights, and ultimately, to believe in rights.

(3) PRIORITIZE RIGHTS

When world leaders gathered in 1945 to adopt the Charter of the United Nations, they committed to four purposes for this new multilateral body, one of which talks of "international cooperation… in promoting and encouraging respect for human rights and for fundamental freedoms." Three years later they adopted the Universal Declaration of Human Rights whose stirring preamble begins by asserting that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."

It could not be clearer. Human rights are to be at the heart of our world order. Not something we raise with foes and ignore with friends; or expect of others but dismiss for ourselves. Not one choice among others. Not an aspiration for a later time. Yet the decades that have followed have been precisely that. So much of the human rights struggle seems to come down to grammar and, more specifically, conjunctions and prepositions, framing a set of choices between human rights and something else: *or* and *versus*, rather than *and* or *through*.

Do we put human rights at the fore, regardless of the relationships we have with different countries? When debating international justice, how do we understand that framing it as peace *or* human rights is a false dichotomy? In confronting a terrorist threat, why the reticence to acknowledge that an approach grounded in security *versus* human rights sets back both imperatives? And in pursuing economic growth, the failure to commit to a business *and* human rights agenda undermines the sense of sustainability that must be our collective long-term goal.

(a) Human Rights and "Friendship"

Perhaps one of the most frequent disguises for a failure or refusal to put human rights first is the mask of "friendship." Governments are quick to rush to criticism and condemnation when it comes to the human rights record of countries with whom relations are already strained or ruptured but much less enthusiastic or forceful when the violator is a close ally or trading partner. Canada, regardless of how much we profess to be a country that puts human rights first, is no exception. Like most other countries, Canada's global human rights diplomacy is rife with contradictions and even hypocrisy, certainly undermining any claim that we consistently prioritize human rights. The bottom line is that human rights often take a back seat to "friendship."

There is perhaps nowhere that this is more evident than with respect to the decades-old grave human rights crisis in Israel and the Occupied Palestinian Territories. In a conflict in which both sides bear responsibility for war crimes, crimes against humanity and other grave human rights violations, Canadian governments have consistently been clear and forthright in condemning Hamas and Palestinian armed groups for abuses, such as indiscriminate rocket attacks from Gaza, while showing nowhere near the same inclination when it comes to widespread violations committed by Israeli forces, including consistent grave breaches of their responsibilities under international law as an occupying power. Public statements instead refer generically to the violence and instability in the region, with frequent references to the close friendship between Canada and Israel. Notably, despite a clear evidentiary record over many years, no Canadian government has ever criticized the Israeli government for war crimes.[1]

[1] Alex Neve, *Israel, Palestine and Canada: The true measure of 'friendship'?*, 16 May 2021, https://www.alexneve.ca/blog/israel-palestine-and-canada-the-true-measure-of-friendship.

Friendship in the guise of strategic alliances has also served too often as a pretext for deprioritizing human rights. That is starkly evident in Canada's insistence to stick with a controversial multi-billion-dollar deal to sell armoured vehicles to Saudi Arabia despite that country's responsibility for extensive war crimes in neighbouring Yemen, a position that breaches Canada's obligations under the Arms Trade Treaty.[2] One of Canada's arguments for authorizing the arms deal is the close relationship between the two countries, noting that Saudi Arabia "is a strong security and intelligence partner to Canada's key defence and security allies."[3] Similarly, along with many other countries, Canada has been disappointingly constrained, to the point of near silence, in criticizing the continuing deterioration in the human rights situation in Egypt, another country seen to be a strategic ally in the Middle East.[4]

Canada's condemnation of human rights violations is reliable and consistent when the country concerned is not a close friend. For many years, Canada has led annually when it comes to the important UN General Assembly resolution regarding Iran's egregious human rights situation.[5] Canada has readily condemned Russia's abuses in Crimea,[6] the situation in Belarus,[7] and with respect to Myanmar has been critical of mass atrocities against the Rohingya population[8] and the recent military coup.[9]

Alex with AI research team in the Kutupalong Refugee Camp in Bangladesh, home to 700,000 Rohingya refugees, February 2019.

Most certainly Canada has been actively outspoken with respect to the human rights and humanitarian crisis in Venezuela, having cofounded the Lima Group of nations which is "committed to the return of democracy" in the country. However, Canada has not maintained that same degree of pressure and criticism with respect to the deeply troubling human rights records of partners within the Lima Group, including Brazil, Honduras, Guatemala, and Colombia.[10]

And of course, there is the most recent, close to home, example of the precipitous decline in human rights in the

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2 Steven Chase, *Trudeau urged to end arms exports to Saudi Arabia after Canada cited for fueling Yemen war*, Globe and Mail, 17 September 2020, https://www.theglobeandmail.com/politics/article-trudeau-urged-to-end-arms-exports-to-saudi-arabia-after-canada-cited/.

3 Global Affairs Canada, *Final report: Review of export permits to Saudi Arabia*, https://www.international.gc.ca/trade-commerce/controls-controles/memo/annex-a-ksa.aspx?lang=eng.

4 Ahmed Abdelkader Elpannann, *Why is Canada ignoring the horrendous human-rights violations in Egypt?*, National Post, 3 July 2018, *https://nationalpost.com/opinion/why-is-canada-ignoring-the-horrendous-human-rights-violations-in-egypt*.

5 Geoffrey Cameron, *Multilateralism holds Iran to account for human-rights abuses*, Policy Options, 7 December, 2020, https://policyoptions.irpp.org/magazines/december-2020/multilateralism-holds-iran-to-account-for-human-rights-abuses/.

6 Global Affairs Canada, *Canada imposes new sanctions on individuals and entities involved in illegal annexation of Crimea*, 29 March 2021, https://www.canada.ca/en/global-affairs/news/2021/03/canada-imposes-new-sanctions-on-individuals-and-entities-involved-in-illegal-annexation-of-crimea.html.

7 CBC News, *Trudeau considering further sanctions on Belarus as regime announces Ottawa embassy closure*, 25 May 2021, https://www.cbc.ca/news/politics/trudeau-belarus-sanctions-embassy-closure-1.6039743.

8 The Honourable Bob Rae, Special Envoy to Myanmar, *"Tell them we're human" What Canada and the world can do about the Rohingya crisis*, https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/response_conflict-reponse_conflits/crisis-crises/rep_sem-rap_esm.aspx?lang=eng.

9 Global Affairs *Canada, Canada imposes additional sanctions on individuals and entities affiliated with Armed Forces of Myanmar*, 17 May 2021, https://www.canada.ca/en/global-affairs/news/2021/05/canada-imposes-additional-sanctions-on-individuals-and-entities-affiliated-with-armed-forces-of-myanmar.html.

10 *Statement from the Lima Group*, 5 January 2021, https://www.international.gc.ca/world-monde/international_relations-relations_internationales/latin_america-amerique_latine/2021-01-05-lima_group-groupe_lima.aspx?lang=eng.

United States under the Trump Administration. Perhaps most significantly, the rapid assault on the rights of refugee and migrants was met with near silence from the Trudeau government, except for one infamous early tweet from the Prime Minister, just eight days after Donald Trump's inauguration. The tweet, while making no mention of the United States, was clearly a reaction to Donald Trump's early Executive Orders, particularly the Muslim Ban:

> To those fleeing persecution, terror & war, Canadians will welcome you, regardless of your faith. Diversity is our strength #WelcomeToCanada.[11]

The disingenuousness of that tweet became abundantly clear, however, when the Canadian government refused to lift the Safe Third Country Agreement blocking refugees from making claims for protection at land border posts and eventually went to court to energetically defend the US government's refugee rights record when that Agreement was challenged.[12]

Many will simply dismiss all of this as *realpolitik*, that of course a country will be harsher with enemies and gentler with friends be that with respect to human rights or any other matter. Be that as it may, it erodes the very notion of the universality of human rights.

(b) No Justice, No Peace

So often rights and justice are told to take a backseat to peace. Negotiations are underway to end a terrible conflict marked by mass atrocities and the warring parties will walk away, we are often told, if there is any suggestion that they will be held accountable for their horrendous war crimes and crimes against humanity.

I was haunted by that false dichotomy when I joined an Amnesty International research team in the southeast corner of Guinea, along the border with Sierra Leone, in 2001. Sierra Leone had, of course, been devastated by unspeakable human rights violations during the course of civil war between the government and the Revolutionary United Front (RUF) throughout the 1990's. Particularly wrenching was the extent to which atrocities committed in a war marked by extensive recruitment of child soldiers, were dominated by brutal crimes against children committed by traumatized children.

A 1999 peace accord[13] between the Sierra Leonean government and the RUF, brokered under the auspices of the Economic Community of West African States, assumed there could be peace without justice and provided a broad amnesty for human rights violations, specifically that the government would,

> "... grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives."[14]

All-encompassing to say the least. However, fighting and instability continued. A UN peacekeeping mission[15] was deployed but the situation was so volatile that 500 peacekeepers were captured and essentially held hostage by the RUF in May 2000. The security situation and human rights violations deteriorated sharply throughout the year.

It had become abundantly clear that not only was the amnesty provision a complete betrayal of justice, after ten years of unrelenting war crimes and crimes against humanity, neither did it bring peace. That is what we heard and witnessed at every turn as we travelled through that remote area of Guinea in March 2001, where refugees had fled from Sierra Leone in the face of renewed human rights violations as the peace accord unraveled. In fact, RUF fighters followed refugees across the border and committed further abuses in Guinea, which our team documented extensively. I will always recall one woman, responding to my standard question as to who she believed was responsible for the attacks against her family.

> It's the rebels, of course it's the rebels. They have never paid a price for what they did to us before, so why wouldn't they do it again and again?[16]

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[11] https://twitter.com/JustinTrudeau/status/825438460265762816

[12] See "Refugees, migrants and the borders of human rights" Section 5(c), *Infra*.

[13] *Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone*, concluded on 7 July 1999, UN Security Council Document S/1999/777. Available at: https://peacemaker.un.org/sites/peacemaker.un.org/files/SL_990707_LomePeaceAgreement.pdf.

[14] *Ibid*., article IX(2).

[15] United Nations Mission in Sierra Leone, established by the UN Security Council on 22 October 1999, https://peacekeeping.un.org/mission/past/unamsil/.

[16] Interview, Katkama Transit Camp, Guéckédou, Guinea, 24 March 2001.

The fallacy of achieving peace without justice had become clear to the Sierra Leonean government. A new ceasefire was negotiated under United Nations auspices in Nigeria in November 2000. This time there were no amnesty provisions. That eventually resulted in the establishment in January 2002 of a groundbreaking new court that was a hybrid international/national judicial body, the Special Court for Sierra Leone, which began to hear cases the following year and remained active until 2013. Most famously the Special Court tried and convicted former Liberian President Charles Taylor for the role he had played in supporting the RUF in full knowledge of the atrocities they were committing. One-time RUF leader Foday Sankoh was also arrested, but he died in detention before being brought to trial. In all the Court indicted 14 individuals, from the RUF and the military, reflective of those determined to be "most responsible" for war crimes and crimes against humanity.[17]

This time, peace held in Sierra Leone; grounded in justice.

And what a remarkable journey for international justice over these past twenty years. That has included groundbreaking work by country specific international criminal tribunals dealing with the former Yugoslavia, Rwanda, and Cambodia. And of course the International Criminal Court (ICC), agreed to in 1998, was officially established in July 2002 and now has an active caseload.

The ICC has faced enormous challenges and setbacks since and has both attracted and courted its fair share of controversy. That was inevitable and entirely foreseeable. Nonetheless there have been 30 cases before the Court, some involving more than one accused. Judges have issued 35 arrest warrants; 17 individuals have been taken into custody; and there have been 10 convictions and 4 acquittals. There are active cases, investigations, or preliminary examinations underway with respect to 20 countries.[18]

At the same time, a growing number of countries have opened their own national courts to international justice cases through the exercise of universal jurisdiction. Canada's efforts have faltered, however, with not much to show, particularly recently.[19] Two trials against Rwandan nationals were held in Canada, one leading to a conviction, the other to an acquittal.[20] And after a ten-year investigation, in 2015 the RCMP issued an arrest warrant for a Syrian military intelligence official charged with torturing Canadian citizen Maher Arar in a Syrian detention centre in 2002 and 2003, the first time a foreign national has faced charges under Canadian criminal law for torture that occurred outside Canada. The accused has not yet been located, arrested, and extradited to Canada.[21]

There is far to go in ensuring that international justice is reliably and consistently here to stay. And some of the steps to date may seem slow and incremental. But the sea-change has been immense. Certainly thirty years ago the very notion of international criminal tribunals and of national courts exercising universal jurisdiction over international crimes such as torture was laughable. No government was interested; too much interest in shoring up impunity, no appetite to advance justice and accountability. But survivors, families of victims, communities, human rights groups, lawyers, and legal academics did not relent in the demand for justice. And those walls of impunity have slowly begun to give way.

And perhaps today I would be able to assure the rightly dismayed Sierra Leonean refugee in Guinea that going forward there will be a price to pay for grave human rights violations, bringing an end to the cycle of "again and again."

(c) Human Rights and Security: Can't Have One Without the Other

The disastrous pitfalls of pushing human rights to the side in pursuit of some other objective became abundantly clear over the past twenty years in the realm of national security. That was particularly the case after the September 11th terrorist attacks in the United States in 2001 and the subsequent so-called 'war on terror' which truly became a full-out assault on human rights. The discourse quickly became about security *or* human rights, security *versus* human rights, as if the two were opposing imperatives with a zero-sum relationship in which more of one necessarily means less of the other.

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[17] Lansana Gberie, *The Special Court for Sierra Leone rests—for good*, April 2014, https://www.un.org/africarenewal/magazine/april-2014/special-court-sierra-leone-rests-%E2%80%93-good.

[18] *About the Court: facts and figures*, https://www.icc-cpi.int/about.

[19] Amnesty International, *Canada: End Impunity through Universal Jurisdiction*, AMR 20/2287/2020, June 2020, https://www.amnesty.ca/sites/default/files/AI%20No%20Safe%20Haven%20Report%20-%20FINAL.pdf.

[20] Désiré Munyaneza was sentenced to a life prison term in 2009 and Jacques Mungwarere was acquitted in 2013, https://www.justice.gc.ca/eng/cj-jp/wc-cdg/succ-real.html.

[21] *RCMP charges Syrian officer in Maher Arar torture case*, CBC News, 1 September 2015, https://www.cbc.ca/news/politics/maher-arar-rendition-development-rcmp-1.3211088.

Particularly acute and troubling has been the debate about torture and security. Years of campaigning and legal developments, propelled by human rights advocates and by governments has led to strong international laws against torture, with an absolute prohibition that can never be subject to derogation or limitation. The prohibition on torture is now widely recognized to be a *jus cogens* norm. While torture has continued to be commonplace, its unconditional ban as a matter of law was generally not contested. But that too changed after September 11th and from many corners, including governments that had been strong champions of the effort to eradicate torture, came suggestions that torture might in fact be justified in exceptional circumstances. Might be justified when national security required it.

With so much need to continue to advance greater human rights protection on so many fronts, human rights advocates now faced a rearguard challenge and had to scramble to hold and not lose ground.

And what was obviously and painfully clear is that this notion of there being a trade-off between security and human rights was precisely the opposite. Their relationship, one to the other, is integral. Insecurity does not stem from any illusory government propensity to go too far in protecting human rights and certainly not from stellar records of combating torture. Rather it reflects longstanding neglect for human rights and the resulting injustices and inequalities. And security simply cannot be shored up by distancing ourselves further from human rights. Security lies in embracing human rights like never before.

That has been proven out at every turn when security practices have ignored human rights over these twenty years. The real human cost of years and years of grave breaches of international human rights and humanitarian law during the "national security" wars in Afghanistan and Iraq is likely incalculable. And would anyone credibly assert that security has been enhanced through the extensive war crimes in both of those countries? Guantánamo Bay—the iconic poster child of human rights trampled into oblivion in the name of security—did nothing to avert terrorist attacks and likely only further deepened grievances and hostility through its deliberate and institutionalized dehumanization, racism, and cruelty.[22]

This is not at all limited to the chain of war and abuse in September 11th's trajectory, it long predates those attacks, and continues to be modeled by governments around the world. The Chinese government's unfounded rhetoric of security and terrorism has become the fig leaf excuse for a campaign of mass atrocities[23] and insidious repression against the Uyhgur people that is undeniably a genocide[24] playing out in real time, recognized as such by among others the Canadian House of Commons.[25] No security there.

And as I write, another chapter of violence, repression and retaliation has just played out between Palestinians and Israelis in Jerusalem and Gaza,[26] rooted in 54 years of military occupation marked by total disregard for the rights of Palestinians, which among other inescapable human rights realities constitutes the international crime of *apartheid*.[27] Decades of unrelenting war crimes, crimes against humanity and other grave human rights violations—seen and interpreted through an entrenched lens of terrorism and security—have been the source of devastating suffering for the Palestinian people and served only to keep the country and the region trapped in endless cycles of fear and violence for Palestinians and Israelis alike. An approach to security that has, for decades, been the very essence of insecurity.

What has particularly stayed with me is the Canadian dimension to this security and human rights reality. Maher Arar, Abdullah Almalki, Ahmad Abou-Elmaati, Muayyed Nureddin, Omar Khadr, Abousfian Abdelrazik, Hassan Diab, Mohamed Harkat, Adil Charkaoui, Hassan Almrei, Mohamed Mahjoub, Mahmoud Jaballah,

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[22] Guantánamo Bay's litany of human rights violations and degrading treatment is powerfully catalogued in numerous articles, memoirs, books and film, including from Mohamedou Ould Slahi's *Guantánamo Diary*, an account of his fifteen years of unlawful detention, extensive torture and other human rights abuse in Jordan, Afghanistan and Guantánamo Bay.

[23] Amnesty International, *"Like we were enemies in a war" China's Mass Internment, Torture and Persecution of Muslims in Xinjiang*, ASA 17/4137/2021, 10 June 2021, https://xinjiang.amnesty.org/wp-content/uploads/2021/06/ASA_17_4137-2021_Full_report_ENG.pdf.

24 Newlines Institute, *The Uyghur Genocide: An Examination of China's Breaches of the 1948 Genocide Convention*, 8 March, 2021, https://newlinesinstitute.org/uyghurs/the-uyghur-genocide-an-examination-of-chinas-breaches-of-the-1948-genocide-convention/.

[25] *Parliament declares China is conducting genocide against its Muslim minorities*, Globe and Mail, 22 February, 2021, https://www.theglobeandmail.com/politics/article-parliament-declares-china-is-conducting-genocide-against-its-muslim/.

[26] Amnesty International, *Israel/ OPT: End brutal repression of Palestinians protesting forced displacement in occupied East Jerusalem*, 10 May 2021, https://www.amnesty.ca/news/israel-opt-end-brutal-repression-palestinians-protesting-forced-displacement-occupied-east.

[27] Human Rights Watch, *A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution*, 27 April, 2021, https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution.

Benamar Benatta, prisoners apprehended on the battlefield in Afghanistan by the Canadian military, and Canadians and their families, alleged to have ISIS links, abandoned to the dangers and hardship of detention camps in NE Syria. In the aftermath of September 11th, with a narrative of security over human rights sweeping the world, Canada was not at all immune. But it was a wake-up for many Canadians, who found it hard to believe that our country could be implicated in an extra-legal world of torture, rendition, secretive deportations, unlawful arrests, illegal imprisonment, unfair trials, unjust extradition, solitary confinement and other injustices in Syria, Egypt, Jordan, Guantánamo Bay, Sudan, Afghanistan, the United States, France, and immigration detention in Canada.

Alex and Omar Khadr, Edmonton, June 2015; Alex observed the military commission trials against Omar Khadr at Guantanamo Bay on three occasions in 2010.

Canada and Canadians were indeed implicated, and it was not just an exceptional outlying case or two. It was so serious that two judicial inquiries were held,[28] an external review was conducted,[29] the Supreme Court of Canada ruled on six occasions,[30] a political crisis led to a Cabinet Minister being shuffled[31] and prorogation of Parliament,[32] UN human rights bodies and experts chastised Canada on numerous occasions over many years,[33] and financial settlements of various lawsuits seeking damages for the role of Canadian officials in these serious human rights violations have been reached, likely totaling in excess of $50 million and more still to come.[34]

Some of my most humbling moments of human rights work have come through working with these men and with their families. Their conviction to come forward and demand answers and justice—and to do so in the face of media leaks and other underhanded campaigns intent on smearing their reputations with inflamed accusations of involvement in terrorism—has been remarkable and nothing short of inspiring. Always it has been about their own right to redress but also their insistence that accountability would help prevent others from experiencing the same deep injustice.

I have learned so much. About courage. About prevailing against powerful forces and in the face of great odds. That strong messages about human rights can and do resonate even amidst the fearfulness and distorted narratives that accompany concerns about security. And that at the end of the day, human stories are the most powerful means to advance human rights change.

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[28] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, https://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/06-09-18/www.ararcommission.ca/eng/26.html; and Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, https://www.publicsafety.gc.ca/lbrr/archives/cn73612699-eng.pdf.

[29] Independent Review of the Extradition of Dr. Hassan Diab, https://www.justice.gc.ca/eng/rp-pr/cj-jp/ext/01/toc-tdm.html.

[30] The Supreme Court of Canada heard three separate appeals with respect to Omar Khadr, in 2008, 2010 and 2015; and three separate appeals dealing with immigration security certificates in the cases of Adil Charkaoui, Hassan Almrei and Mohamed Harkat.

[31] Minister of National Defence Gordon O'Connor was shuffled out of his post in August 2007, likely in large part due to controversy about his handling of the Afghan prisoner affair, which at one point had required him to apologize for misleading the House of Commons, https://www.cbc.ca/news/canada/mackay-named-new-defence-minister-in-cabinet-shuffle-1.635184.

[32] Prime Minister Stephen Harper's decision to prorogue Parliament for the first two months of 2010 was largely seen as an attempt to diffuse a growing constitutional crisis related to his government's handling of the Afghan prisoner situation, https://www.cbc.ca/news/politics/pm-shuts-down-parliament-until-march-1.829800.

[33] Serious concerns about Canada's laws, policies, practices, investigations, legal proceedings and complicity in overseas human rights violations with respect to these cases were taken up, sometimes on several different occasions, by among others, the UN's Human Rights Committee, Committee against Torture, Committee on the Rights of the Child, Committee on the Elimination of Racial Discrimination, Working Group on Arbitrary Detention, and Special Representative for Children and Armed Conflict.

[34] Settlements have been reached with respect to the cases of Maher Arar, Abdullah Almalki, Ahmad Abou-Elmaati, Muayyed Nureddin, Omar Khadr and Benamar Benatta. Lawsuits are still pending with respect to several other cases.

(d) Business and Human Rights

The human rights world, let alone the corporate world, was slow to recognize how essential it is to advance strong frameworks of human rights responsibility and accountability for business. When I took up the Secretary General post, Amnesty International had only very recently adopted its first set of human rights principles for companies.[35] Other human rights groups and the UN, including then Secretary-General Kofi Annan's Global Compact initiative,[36] were also similarly starting to grapple with the fact that corporate activity had enormous human rights impact around the world but was largely overlooked by the international human rights system.

Some of our earliest engagement and confrontation with Canadian companies was with the oil industry. There were some encouraging signs of emerging leadership, such as the International Code of Ethics for Canadian Business spearheaded in 1997 by Nexen Energy.[37] There were ample instances of grave concern as well, such as the involvement of Calgary-based Talisman Energy's operations in Sudan amidst allegations of contributing to civil war and massive human rights violations in that part of the country[38] and the growing presence of Canadian oil companies operating in conflict-ridden parts of Colombia.

Very frequently in those exchanges company officials would deny that this was in any way their affair. I can recall sitting across from one CEO who told me that if the country's human rights record was my preoccupation I should be talking with Canada's embassy, not with him. They seemed unaware and unconcerned that governments had long ago made it clear that "every organ of society," which certainly includes companies, must work towards securing "universal and effective recognition and observance" of the rights laid out in the Universal Declaration of Human Rights.[39]

That has moved on considerably. Very few companies would maintain the position that human rights are an irrelevant consideration in their operations. But that has perhaps brought even greater challenges, as now it is often about obfuscation, misinformation and secrecy; and about shutting down or obstructing avenues that might lead to redress and accountability.

The international human rights system has evolved. For instance, the Human Rights Council has adopted Guiding Principles on Business and Human Rights and has mandated a working group to work on developing a binding treaty. As well, the Council's Working Group on Business and Human Rights has brought expertise, impartiality and scrutiny to human rights abuses around the world that are linked to corporate activity. That Working Group has carried out a detailed examination of Canada's record on the business and human rights front.[40]

And there has been notable progress in Canada. Three court cases have significantly opened Canadian courts as an avenue for compensation for individuals and communities whose rights have been abused by Canadian companies operating abroad. Amnesty International intervened in those cases.[41] The courage and determination of the plaintiffs in all of these instances has been instrumental in achieving that progress.

But there is however, much smoke and many mirrors. An enormous campaigning initiative over ten years ago, promoting private member's legislation developed by then-opposition Liberal Member of Parliament John McKay, came close to establishing an ombudsperson to strengthen the overseas human rights accountability of Canadian mining companies. Bill C-300 was defeated in the House of Commons in 2010.[42]

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[35] Amnesty International, *Human Rights Principles for Companies*, AI Index: ACT 70/01/98, January 1998, https://www.amnesty.org/en/documents/act70/001/1998/en/.

[36] *Secretary-General proposes Global Compact on human rights, labour, environment, in address to World Economic Forum in Davos*, UN Press Release SG/SM/6881, 1 February 1999, https://www.un.org/press/en/1999/19990201.sgsm6881.html.

[37] https://www2.ohchr.org/english/issues/globalization/business/docs/nexen3.pdf.

[38] Amnesty International, *Sudan: The human price of oil*, AI Index: AFR 54/001/2000, 2 May 2000, https://www.amnesty.org/en/documents/afr54/001/2000/en/.

[39] *Universal Declaration of Human Rights*, 10 December 1948, final preambular paragraph.

[40] *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Canada*, UN Doc. A/HRC/38/48/Add.1, 23 April 2018, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/116/38/PDF/G1811638.pdf?OpenElement.

[41] *Nevsun Resources Ltd. v Araya*, 2020 SCC 5, https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18169/index.do; *Garcia v. Tahoe Resources Inc.*, 2017 BCCA 39, https://www.bccourts.ca/jdb-txt/ca/17/00/2017BCCA0039.htm; *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414, https://www.canlii.org/en/on/onsc/doc/2013/2013onsc1414/2013onsc1414.html.

[42] Bill C-300, *An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*, https://www.parl.ca/LegisInfo/BillDetails.aspx?Bill=C300&Language=E&Mode=1&Parl=40&Ses=3.

But the campaigning pressure did not relent. And in January 2018, responding to that insistence from civil society, led by the Canadian Network on Corporate Accountability, and from frontline communities impacted by Canadian mining companies, Justin Trudeau's government announced the establishment of the Canadian Ombudsperson for Responsible Enterprise, which would be empowered to carry out independent investigations into allegations of human rights abuse tied to the overseas operations of Canadian extractive and garment companies.[43] It promised to be a historic breakthrough. Over a year later the first Ombudsperson was appointed and, in early 2021, more than three years after the CORE was announced, her office indicated it was now ready to receive complaints.[44]

But what is largely overlooked is that over those three years the government moved away from its initial commitments about the CORE's mandate and powers. Instead of "investigations" into company conduct the CORE will simply conduct "reviews"; and promised powers to give the CORE the muscle needed to take on powerful companies, in particular to subpoena witnesses and force disclosure of documents, are no longer part of the plan. Smoke and mirrors indeed.

These concerns are reflected as well in the broader relationship between trade policy and human rights. In hope of boosting trade and investment, Canadian governments and business leaders have championed trade deals, and eagerly organized trade missions such as the many Team Canada delegations that traveled to China during the years of the Chrétien government which largely left human rights off the table.[45] Recommendations that it should become standard practice to subject all of Canada's bilateral and multilateral trade deals to regular independent human rights impact assessments have never been taken up by the federal government.

However, a requirement for an annual human rights report[46] was belatedly added to the Canada-Colombia Free Trade Agreement which entered into force in 2011. Successive annual reports[47] then miraculously found no human rights concerns associated with the trade deal, because of a narrow interpretation looking only for human rights violations directly linked to a specific tariff reduction.[48] Responding to that critique, the government has indicated that "future improvements to Canada's annual reports, potential modifications to the report's format and methodology remain under review."[49] What that will mean in practice remains to be seen.

And a minimal request to exempt goods and services from illegal Israeli settlements in Occupied Palestinian Territories from the benefits of the updated Canada-Israel Free Trade Agreement was rejected by the Canadian government and when implementing legislation for the new agreement was reviewed by Parliament.[50]

Some days I do not know whether I am more amazed or dismayed at the progress or lack of progress in the effort to secure a human rights-based approach to trade and business. It matters enormously. Trade policy, investment decisions and corporate activity exert enormous influence on all aspects of our lives, in every corner of the world. That has been made painfully clear amidst the COVID-19 pandemic, as the power of huge transnational

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[43] *The Government of Canada brings leadership to responsible business conduct abroad*, 17 January 2018, https://www.canada.ca/en/global-affairs/news/2018/01/the_government_ofcanadabringsleadershiptoresponsiblebusinesscond.html.

[44] *Canadian Human Rights Ombud launches online complaint process as key part of global mandate to protect rights*, 15 March 2021, https://core-ombuds.canada.ca/core_ombuds-ocre_ombuds/news-nouvelles/complaint_process-processus_de_plainte.aspx?lang=eng.

[45] Jeff Sallot, *Chrétien too timid on human rights, activists say*, Globe and Mail, 14 February 2001, https://www.theglobeandmail.com/news/national/chretien-too-timid-on-human-rights-activists-say/article1030171/.

[46] Agreement Concerning Annual Reports on Human Rights and Free Trade Between Canada and the Republic of Colombia, 27 May 2010, https://www.treaty-accord.gc.ca/text-texte.aspx?id=105278&_ga=2.67185745.1543474294.1622753244-907972199.1622753244.

[47] https://www.canadainternational.gc.ca/colombia-colombie/bilateral_relations_bilaterales/hrft-co_2012-dple.aspx?lang=eng.

[48] *Citing grave concerns, Amnesty International Canada withdraws from reporting process on Human Rights and Free Trade between Canada and Colombia*, 20 March, 2018, https://www.amnesty.ca/news/citing-grave-concerns-amnesty-international-canada-withdraws-reporting-process-human-rights-and

[49] *Annual Report Pursuant to the Agreement Concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia For the period January 1, 2019 to December 31, 2019*, https://www.canadainternational.gc.ca/colombia-colombie/bilateral_relations_bilaterales/rep-hrft-co_2019-dple-rapp.aspx?lang=eng.

[50] Michael Lynk and Alex Neve, *Canada's updated trade agreement with Israel violates international law*, 29 May 2019, https://theconversation.com/canadas-updated-trade-agreement-with-israel-violates-international-law-117547.

pharmaceutical companies has stood in the way of equitable worldwide access to COVID vaccines.[51] One study indicates that of the 100 largest economic entities in the world, only 31 are nations, the other 69 are transnational corporations.[52] The human rights dimension of that clout cannot be ignored.

(4) EMBRACE ALL RIGHTS

It is not enough to commit and recommit to prioritizing rights. It must be about embracing *all* rights. It defies understanding that we still struggle with outdated, politicized human rights ideologies that divide rights and relegate some rights to spheres of lesser importance than others. That is of course most obviously so when it comes to the false dichotomy that so many governments, including in Canada, draw between civil and political rights, and economic, social and cultural rights.

Governments' rhetoric assures us they agree that all rights are of equal importance—to be free from torture, to go to school, to enjoy freedom of expression, and to access healthcare. On paper at least that has been so from the very start, with no differentiation or distinctions drawn among the 30 articles of the Universal Declaration of Human Rights. That was also made explicitly clear when governments came together for the 1993 World Conference on Human Rights and affirmed that "all human rights are universal, indivisible and interdependent and interrelated."[53]

Yet actions speak louder than words. And governments have consistently acted in ways that treat economic, social and cultural rights as lesser rights, not deserving of the same degree of accountability and not susceptible to the same levels of enforcement.

Equally, there is an interminable tradition of governments at all levels in Canada selling short and selling out the rights of Indigenous peoples, particularly rights to land, territories and resources. Governments readily resort to the rhetoric of embracing Indigenous rights when it is relatively easy to do so, but that commitment quickly disappears when powerful economic interests are on the table.

(a) All Rights: Civil, Political, Economic, Social, and Cultural

There is no basis at all for the frequent assertions made by many governments around the world, particularly in the Global North, that the rights enshrined in the International Covenant on Economic, Social and Cultural Rights are rights of a different order than those laid out in the International Covenant on Civil and Political Rights. But that they do, constantly.

Governments in Canada certainly maintain that position which explains, in part, why vital economic, social and cultural rights to health, education, housing, food and water, among others, were not explicitly enshrined in the Canadian Charter of Rights and Freedoms. And federal and provincial governments have regularly argued in court, successfully unfortunately, that other Charter provisions, such as section 7's guarantee of life, liberty and security of the person, should not be interpreted to include life-saving health care,[54] or the security of safe and adequate housing.[55]

When the two Covenants were adopted by the United Nations in 1966, in separate treaties that reflected Cold War era politics, governments concluded an Optional Protocol providing aggrieved individuals with the prospect of making complaints about violations of civil and political rights. It was another four decades, however, before a similar Optional Protocol was developed for economic, social and cultural rights, in 2008. 116 governments have signed on to the OP for civil and political rights, but only 26 have done so for economic, social and cultural rights. Canada has been a party to the former since 1976, but more than 12 years after it was adopted, has made it abundantly clear that it has no intention to join the latter, dealing with economic, social and cultural rights.

And with one notable exception, that dismissive approach has not wavered, even as the importance and the fragility of economic, social and cultural rights has been made so apparent and laid so bare by COVID-19 and the associated economic crisis. In the early days of the pandemic, more than 300 organizations and experts launched a call to all governments in the country, urging them to put human rights at the heart of their COVID

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[51] Winnie Byanyima, UNAIDS Executive Director, *We must have a #PeoplesVaccine, not a profit vaccine*, 9 December 2020, https://www.unaids.org/en/resources/presscentre/featurestories/2020/december/20201209_we-must-have-a-peoples-vaccine.

[52] Global Justice Now, *69 of the richest 100 entities on the planet are corporations, not governments, figures show*, 17 October 2018, https://www.globaljustice.org.uk/news/69-richest-100-entities-planet-are-corporations-not-governments-figures-show/.

[53] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, 25 June 1993, para. 5: https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx.

[54] *Toussaint v. Canada (Attorney General)*, 2011 FCA 213, https://canlii.ca/t/fm4v6.

[55] *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852, https://canlii.ca/t/gffz5.

responses, with particular regard for economic, social and cultural rights.

> The fact that the human rights obligations are clear, however, is not an assurance they will be upheld. That is of particular concern with many of the key human rights obligations that are at stake in the COVID-19 pandemic, including with respect to health, housing, food, safe water and other basic needs. Governments across Canada have long asserted that those and other economic, social and cultural rights are not amenable to the same enforcement as other rights, leaving their protection to the more uncertain and arbitrary political realm. However, international human rights standards require that economic, social and cultural rights be equally subject to effective oversight and enforcement as other human rights. This is particularly important during the current crisis.[56]

No government—federal, provincial, territorial or municipal—committed to do so.

But there is indeed a notable exception. Only 7 years ago, government lawyers were before the Ontario Court of Appeal, strenuously opposing an effort to advance recognition of the *right* to adequate housing.[57] And the government's view prevailed in that litigation. But five years, and a change of government, later, Parliament adopted the *National Housing Strategy Act* in 2019, which enshrines the following declaration in Canadian law:

> 4. It is declared to be the housing policy of the Government of Canada to
>
> (a) recognize that the right to adequate housing is a fundamental human right affirmed in international law; .... and
>
> (d) further the progressive realization of the right to adequate housing as recognized in the International Covenant on Economic, Social and Cultural Rights.[58]

To have the words "right" and "housing" in the same sentence in a Canadian law was ground-breaking. To have a reference to the ICESCR enshrined in Canada law was unprecedented. Will it lead to more? That remains to be seen. Is it truly reflective of a shift in government thinking, at least at federal level, about the status and importance of economic, social and cultural rights? That too remains to be seen.

But make no mistake. This is not simply a matter of government rethinking policy. This is entirely the fruit of decades of mobilizing and advocacy, within communities facing poverty and by courageous housing activists. A campaign that did not relent no matter the setbacks; a campaign that has prevailed.

(b) The Human Rights of Indigenous Peoples

In Canada, for Canadians and for me personally, no human rights struggle and journey has been as fundamental as the journey to secure recognition of and commitment to the rights of Indigenous peoples.

I think of grave concerns that were brought to Amnesty International's attention by family members, Indigenous human rights defenders, First Nations leaders and lawyers early in these twenty years, including the campaign for accountability for the 1995 police killing of Dudley George,[59] the harrowing "starlight tour" freezing deaths of Indigenous men in Saskatchewan,[60] securing recognition of the land rights of the Lubicon Cree,[61] and the endemic crisis of violence and discrimination against Indigenous women and girls.[62]

One thing that all of those struggles had in common was the failure and refusal by government leaders, police

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[56] *A call for human rights oversight of government responses to the COVID-19 pandemic*, 14 April 2020, https://www.amnesty.ca/news/canada-301-organizations-academics-and-others-urge-governments-adopt-human-rights-oversight.

[57] *Tanudjaja*, *supra*, note 56.

[58] *National Housing Strategy Act*, S.C. 2019, c. 29, s. 313.

[59] Amnesty International, *Canada: Why there must be a public inquiry into the police killing of Dudley George*, AI Index: AMR 20/002/2003, September, 2003, https://www.amnesty.org/en/documents/amr20/002/2003/en/.

[60] CBC News, *Human rights group calls for Saskatoon police probe*, 10 June 2003, https://www.cbc.ca/news/canada/human-rights-group-calls-for-saskatoon-police-probe-1.405728.

[61] Amnesty International, *Canada: "Time is wasting": Respect for the land rights of the Lubicon Cree long overdue*, AI Index: AMR 20/001/2003, April 2003, https://www.amnesty.org/en/documents/amr20/001/2003/en/.

[62] Amnesty International, *Stolen Sisters: A human rights response to discrimination and violence against Indigenous women in Canada*, AI Index: AMR 20/003/2004, October 2004, https://www.amnesty.org/en/documents/amr20/003/2004/en/.

and even the courts to understand that in each instance fundamental international human rights obligations were at stake. Prime Minister Stephen Harper, for instance, famously rejected calls for a national inquiry into violence against Indigenous women noting that "we should not view this as sociological phenomenon. We should view it as crime. It is crime, against innocent people, and it needs to be addressed as such."[63]

That denial, however, did not mean that those struggles went away. Quite the contrary. Led by survivors, families, grassroots activists and Indigenous leadership, they continued, they grew, they transformed and the eventual consequences were enormous.

The government of Ontario eventually convened a judicial inquiry, the *Ipperwash Inquiry*, into the killing of Dudley George.[64] The deadly starlight tours conducted by Saskatoon police precipitated the establishment of the Commission on First Nations and Métis Peoples and Justice Reform in Saskatchewan.[65] The UN Human Rights Committee repeatedly took up the situation of the Lubicon Cree.[66] And the crisis of missing and murdered Indigenous women, girls and two-spirit people attracted major attention from the Inter-American Commission on Human Rights,[67] the UN Committee on the Elimination of Discrimination against Women[68] and, eventually, was the subject of a high-profile national inquiry,[69] which among other conclusions found that the pattern of violence and other human rights violations against Indigenous women and girls amounts to genocide.[70]

Alex listens as Bev Jacobs, President of the Native Women's Association of Canada, addresses a rally on Parliament Hill about missing and murdered Indigenous women and girls, October 2008.

No longer could governments evade their responsibilities, enshrined after all in the Canadian Constitution and in Treaties, as somehow not centrally being about human rights obligations. That was powerfully brought home through the work of the Truth and Reconciliation Commission which, in two prominent Calls to Action,[71] highlighted the UN Declaration on the Rights of Indigenous Peoples as providing the framework for reconciliation in Canada:

> 43) We call upon federal, provincial, territorial, and municipal governments to fully adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation.

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[63] Alex Boutilier, *Native teen's slaying a 'crime,' not a 'sociological phenomenon,' Stephen Harper says*, Toronto Star, 21 August 2014, https://www.thestar.com/news/canada/2014/08/21/native_teens_slaying_a_crime_not_a_sociological_phenomenon_stephen_harper_says.html.

[64] *Report of the Ipperwash Inquiry*, May 2007, http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/index.html.

[65] *Legacy of Hope: An Agenda for Change*, Final Report from the Commission on First Nations and Métis Peoples and Justice Reform, 21 June 2004, http://web.archive.org/web/20120507043247/http://www.justice.gov.sk.ca/justicereform/volume1.shtml.

[66] Amnesty International, Canada: 20 years' denial of recommendations made by the United Nations Human Rights Committee and the continuing impact on the Lubicon Cree, AI Index: AMR 20/003/2010, March 2010, https://www.amnesty.ca/sites/default/files/2010-03-17amr200032010en20yearsdeniallubicon.pdf.

[67] Inter-American Commission on Human Rights, *Missing and Murdered Indigenous Women in British Columbia, Canada*, 21 December, 2014, https://www.oas.org/en/iachr/reports/pdfs/indigenous-women-bc-canada-en.pdf.

[68] Committee on the Elimination of Discrimination against Women, *Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. CEDAW/C/OP.8/CAN/1, 30 March 2015, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fOP.8%2fCAN%2f1&Lang=en.

[69] *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, 3 June 2019, https://www.mmiwg-ffada.ca/final-report/.

[70] *A Legal Analysis of Genocide*, 3 June 2019, Supplementary Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Supplementary-Report_Genocide.pdf.

[71] *Honouring the Truth, Reconciling for the Future*, Summary of the Final Report of the Truth and Reconciliation Commission of Canada, 2 June 2015, http://www.trc.ca/assets/pdf/Executive_Summary_English_Web.pdf.

44) We call upon the Government of Canada to develop a national action plan, strategies, and other concrete measures to achieve the goals of the United Nations Declaration on the Rights of Indigenous Peoples.

Canada's journey with respect to the UN Declaration tells us much about how far we have come and how far we have not come with respect to genuine respect for the rights of Indigenous peoples. The effort to draft a Declaration, underway within the UN human rights system since 1982, finally started to gather steam as the new millennium got underway. Canada had at times been disinterested, mildly supportive and a spoiler in the protracted efforts to negotiate and agree to the text. Throughout 2005, under Paul Martin's government, Canada emerged as a generally constructive player, working positively to find compromise language acceptable to Indigenous peoples and recalcitrant governments alike. That changed abruptly when Stephen Harper became Prime Minister, with Canada voting against the Declaration at the UN Human Rights Council in 2006 and in the UN General Assembly in 2007, and maintaining stiff opposition until 2010, at which point his government quietly expressed highly qualified and certainly unconvincing support for the Declaration.[72]

There was a sharp u-turn after the Trudeau government was elected in October 2015, very quickly lending unequivocal support to the Declaration in statements made nationally and at the United Nations.[73] But were those stirring words consistent with government action?

Endorsing the Declaration did not give it any particular standing in Canadian law, and the Trudeau government did not rush to remedy that gap. That fell to NDP Member of Parliament Romeo Saganash, a Cree MP from Northern Quebec who introduced private member's legislation, Bill C-262,[74] which would have recognized the applicability of the Declaration in Canada. The Trudeau government did not lend its express support to Bill C-262 for another 19 months.[75] The Bill was eventually passed by the House of Commons on 30 May 2018 but did not make it through the Senate before Parliament was dissolved in advance of the 2019 federal election. Despite determined leadership from First Nations Senators Lilian Dyck and Murray Sinclair, a handful of Conservative Senators blocked and obstructed Bill C-262 from coming to a final vote in time—certainly one more shameful chapter in the history of Indigenous rights in Canada.

The Trudeau government promised they would bring it back as government legislation if re-elected. They were and they did, though it took more than a year after the election for that to get underway. Bill C-15 was tabled in the House of Commons on 3 December 2020[76] and received Royal Assent on 21 June 2021.

Encouraging, most certainly, but the back story is whether it truly matters. Already there are 70 legally-binding treaties between Indigenous peoples and the Crown, going back more than 300 years, which have been abrogated and ignored far more often than they have been respected and upheld. Furthermore, "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed" in section 35 of the Canadian Constitution. Yet across the country First Nations, Inuit and Métis peoples continue to face pipelines, hydroelectric projects, logging, mines, oilsands, fracking, oil and gas production, and other large-scale natural resource development projects in their lands and territories, without meaningful consultation, let alone free, prior and informed consent.

Existing legal protections are disregarded, so will more law make a difference? What Bill C-15 most significantly adds to the equation is the legal obligation to develop an implementation plan, within two years.

6 (1) The Minister must, in consultation and cooperation with Indigenous peoples and with other federal ministers, prepare and implement an action plan to achieve the objectives of the Declaration.

(2) The action plan must include

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[72] CBC News, *Canada endorses indigenous rights declaration*, 12 November 2010, https://www.cbc.ca/news/canada/canada-endorses-indigenous-rights-declaration-1.964779.

[73] Indigenous and Northern Affairs Canada, *Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples*, 10 May 2016, https://www.canada.ca/en/indigenous-northern-affairs/news/2016/05/canada-becomes-a-full-supporter-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples.html.

[74] Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, introduced in the House of Commons on 21 April 2016, https://parl.ca/DocumentViewer/en/42-1/bill/C-262/third-reading.

[75] CBC News, *Liberal government backs bill that demands full implementation of UN Indigenous rights declaration*, 21 November, 2017, https://www.cbc.ca/news/politics/wilson-raybould-backs-undrip-bill-1.4412037.

[76] Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=11007812.

(a) measures to

(i) address injustices, combat prejudice and eliminate all forms of violence, racism and discrimination, including systemic racism and discrimination, against Indigenous peoples and Indigenous elders, youth, children, women, men, persons with disabilities and gender-diverse persons and two-spirit persons, and

(ii) promote mutual respect and understanding as well as good relations, including through human rights education; and

(b) measures related to monitoring, oversight, recourse or remedy or other accountability measures with respect to the implementation of the Declaration.

(3) The action plan must also include measures related to monitoring the implementation of the plan and reviewing and amending the plan.

The necessary aspects to make a difference are all there, including that it be developed jointly with Indigenous peoples; address injustice, prejudice, systemic racism and violence; include human rights education; and incorporate oversight and accountability measures.

The rest, clearly, lies with all of us. For surely, in Canada, when it comes to the essential imperative to embrace all rights we all carry the responsibility to ensure that reconciliation is all about, at very long last, full and genuine respect for the rights, all of the rights, of Indigenous peoples.

And clearly that is the missing piece, that the consequences of centuries of genocide and widespread human rights violations rest now on the shoulders of all of us. As I write these reflections, that failure and the responsibility to chart a different course have been laid bare, once again, with news of the discovery of the unmarked graves of 215 Indigenous children on the grounds of a residential school in Kamloops, British Columbia. For days there has been an outpouring of grief, gestures of commemoration and words of solidarity. But will this be the catalyst for true change?[77]

One obvious measure of real change will be to see if the government at long last abandons the opposition, frequently aggressive, that has marked its response (across both Conservative and Liberal governments) to the important legal cases and advocacy campaign initiated by the First Nations Child and Family Caring Society, demanding equality for First Nations children.[78]

As Anishinaabe journalist Tanya Talaga has asked us all, "do you hear the sound of the drum, Canada?"[79]

(5) EQUALIZE RIGHTS

Over the course of these 20 years, two of the questions I was perhaps asked and declined to answer more often than any others were, first, which country is the best or the worst in the world when it comes to human rights and, second, which human rights are more important than others? I refused to answer the first, because there is no way to objectively measure human rights in such a way as to come up with any such ranking and, of greater concern, it distracts from the fundamental notion that human rights are universal and all violations in all countries matter.

I generally declined to answer the second question as well, because I passionately adhered to the principle that "all human rights are universal, indivisible and interdependent and interrelated" affirmed by governments at the 1993 World Conference on Human Rights.[80] Pulling out one, two or three rights and elevating them above the others, risks unravelling the whole and leaving the majority of rights behind in the dust. It certainly risks playing into the notion advanced by many governments that there is something secondary about economic, social and cultural rights.

But I have come to understand and, more importantly, to see how wrong that is. For there is truly a right that does and must stand above—or at least stand out differently

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[77] Alex Neve and Allan Rock, *215 reasons to make up for decades of failure toward Indigenous People*, 2 June 2021, https://ottawacitizen.com/opinion/neve-and-rock-215-reasons-for-transformative-change.

[78] Kristy Kirkup, *No indication Canada will withdraw application for judicial review of human-rights tribunal orders, says Cindy Blackstock*, Globe and Mail, 8 June 2021, https://www.theglobeandmail.com/politics/article-no-indication-canada-will-withdraw-application-for-judicial-review-of/. NOTE: before this article was published a landmark deal was reached to provide $40 billion in funds towards compensation and reform of the child welfare system. Carrie Tait, Kristy Kirkup and Menaka Raman-Wilms, *Ottawa reaches $40-billion deal with First Nations over child welfare*, Globe and Mail, 3 January 2022, https://www.theglobeandmail.com/canada/article-ottawa-reaches-40-billion-deal-with-first-nations-over-child-welfare/.

[79] Tanya Talaga, *It's time to bring our children home from the residential schools*, Globe and Mail, 31 May 2021, https://www.theglobeandmail.com/canada/article-survivors-of-residential-schools-share-their-stories-call-on-the/.

[80] Vienna Declaration, *supra*, note 54.

from—the others; the right to equality. And the Universal Declaration of Human Rights, crafted by governments let us not forget, makes that very clear, in the first sentence in the Declaration's first article: "All human beings are born free and equal in dignity and rights."

Governments did very much have it right in 1948. The very essence of human rights lies in equality. And we have very slowly, too slowly, been waking up to that reality. For if we do not secure that foundational promise of freedom and equality, nothing else will follow. Gender equality. Racial equality. Social equality. Equality, of all abilities. Full, intersectional equality. Without equality, free expression is meaningless, education an illusion, healthcare broken, and life, liberty and security of the person fragile and tenuous at best. Every time we sit down to respond to human rights violations, assess a human rights challenge or advance a human rights campaign; equality surely must be our starting point and our guiding star.

(a) Women's Human Rights and Gender Equality

Early in my time as Secretary General I was dismayed as to how prevalent disregard for women's human rights and gender equality was throughout the human rights community, including within Amnesty International. That was particularly so when it came to the violence and other grave abuses experienced by women and LGBTIQ2S+ people in the so-called 'private sphere', at the hands of spouses, relative, community members and complete strangers, abuses which the state ignored, tolerated or even encouraged.

Amnesty International recognized its own longstanding shortcomings in launching a global campaign to end violence against women in 2003.[81] And the next year, in Canada, we launched the *Stolen Sisters* report, adding Amnesty International's research and campaigning to the efforts of Indigenous women over many years to draw attention to the shockingly high levels of violence against First Nations, Inuit and Métis women and girls in Canada.[82]

It seems such an overstatement to say there has been enormous progress, because the gravity and range of concerns with respect to women's human rights continues to be immense. The reminders and examples—such as the horrific school bombing in Afghanistan in May 2021 in which scores of teenage girls were killed[83] or the disturbing rise in killings of women by their male partners in the province of Quebec during the pandemic[84]—are legion and are a devastating indictment of the ineffectiveness of efforts to address violence and discrimination against women and girls.

Yet progress has indeed been considerable. On the world stage the most courageous human rights leaders of the past twenty years have consistently been women and girls, including the women who have served as UN High Commissioners for Human Rights for three-quarters of that time, Mary Robinson, Louise Arbour, Navanethem Pillay and Michelle Bachelet, and iconic global activists such as Malala Yousafzai and Greta Thunberg.

Women have been the primary mobilizers behind the Black Lives Matter, Idle No More and certainly #MeToo movements. Women and young girls have been at the heart of protests in Tahir Square in 2011, Tehran in 2017, Khartoum in 2019 and Myanmar in 2021; and, of course, catalyzed the Women's Marches that followed Donald Trump's inauguration in 2017. In fact, women human rights defenders power resistance to injustice and demands for change the world over. The corollary, though, being that they face greater levels of violence and vilification for doing so.[85]

It is certainly dismal to say that it did not happen until 2010 but indeed in 2010 the United Nations significantly elevated the attention to and stature of the world body's efforts to advance women's equality in establishing UN Women.[86] And in adopting the UN's Sustainable Development Goals in 2015, which includes a specific Goal to "achieve gender equality and empower all women and girls,"[87] states recognized more widely that "realizing gender equality and the empowerment

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[81] Amnesty International, *Stop Violence against Women: 'It's in our hands'*, AI Index: ACT 77/001/2004, 5 March 2004, https://www.amnesty.org/en/documents/ACT77/001/2004/en/.

[82] *Supra*, note 63.

[83] *'Why Do We Deserve to Die?' Kabul's Hazaras Bury Their Daughters*, New York Times, 9 May 2021, https://www.nytimes.com/2021/05/09/world/europe/afghanistan-school-attack-hazaras.html.

[84] 10 Quebec women have been killed in 2021. *Shelters to get a $92M boost*, Montreal Gazette, 23 April 2021, https://montrealgazette.com/news/local-news/10-quebec-women-have-been-killed-in-2021-shelters-will-get-a-92m-funding-boost.

[85] UN Special Rapporteur on the situation of human rights defenders, *Situation of women human rights defenders*, A/HRC/40/60, 10 January 2019, https://undocs.org/A/HRC/40/60/

[86] https://www.unwomen.org/en.

[87] Sustainable Development Goal 5, https://sdgs.un.org/.

of women and girls will make a crucial contribution to progress across all the Goals and targets."[88]

And while hurdles and barriers, which often seem insurmountable, are everywhere, there has been significant change. I think of the incredible movements that have successfully challenged, reformed and overturned absolute abortion bans in Chile,[89] Ireland[90] and Argentina.[91]

Progress is encouraging though still uneven and incomplete. And there is still far to travel. In Canada, there is a federal strategy for addressing gender-based violence,[92] but though underway, not yet a sorely-needed national action plan.[93] There has at long last been a National Inquiry into Missing and Murdered Indigenous Women and Girls,[94] but two years later, the supposed national plan just announced to implement the inquiry's Calls to Justice has been decried by many as simply a plan to make a plan.[95] Recent federal commitment to a national childcare program,[96] long called for by women's equality organizations across the country,[97] is certainly a major breakthrough; far from where policy and thinking was in 2000. But the glaring sexism and ineptitude laid bare in the failure to address sexual harassment and abuse within the Canadian Armed Forces, including at the most senior levels of leadership, in 2021 is beyond disheartening.[98] A Feminist International Assistance Policy[99] and National Action Plan on Women, Peace and Security[100] are in place, and a wider Feminist Foreign Policy is being developed.[101]

Politically, the federal cabinet and composition of the Senate both hover around gender parity for the first time in Canadian history, and Chrystia Freeland has, at very long last, become the first woman to serve as federal Minister of Finance in Canadian history. Yet from a historic high-water point in 2013, when six of Canada's 13 provincial and territorial premiers were women, today only 1 of the 13 premiers is a woman. And only four of the 22 mayors of Canada's largest cities are women.[102] And even as the participation of women in politics has risen, albeit unevenly and insufficiently, so too has toxic abuse and violence against them, certainly within online and social media platforms.[103]

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[88] *Transforming our world: the 2030 Agenda for Sustainable Development*, UN General Assembly Resolution 70/1, A/RES/70/1, 21 October 2015, para. 20, https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E.

[89] Amnesty International, *Chile: Partial decriminalization of abortion, an important win for human rights*, 21 August 2017, https://www.amnesty.org/en/latest/news/2017/08/chile-partial-decriminalization-of-abortion-an-important-win-for-human-rights/.

[90] Amnesty International, *Ireland: One year since vote to end abortion ban*, 24 May 2019, https://www.amnesty.org/en/latest/news/2019/05/ireland-one-year-since-vote-to-end-abortion-ban/.

[91] Amnesty International, *Argentina: Legalization of abortion is an historic victory*, 30 December 2020, https://www.amnesty.org/en/latest/news/2020/12/argentina-legalization-abortion-historic-victory/.

[92] *It's Time: Canada's Strategy to Prevent and Address Gender-Based Violence*, June 2017, https://women-gender-equality.canada.ca/en/gender-based-violence-knowledge-centre/gender-based-violence-strategy.html.

[93] CBC News, *After decades of talk, national action plan to protect women finally in the works*, 3 February 2021, https://www.cbc.ca/news/canada/ottawa/agreement-to-develop-national-action-plan-end-violence-against-women-canada-1.5898226.

[94] *Supra*, note 70.

[95] Emerald Bensadoun, *'Half of a document': Advocates say long-awaited federal MMIWG action plan falls short*, 6 June 2021, https://globalnews.ca/news/7924432/mmiwg-action-plan-falls-short/.

[96] Department of Finance Canada, *Budget 2021: A Canada-wide Early Learning and Child Care Plan*, https://www.canada.ca/en/department-finance/news/2021/04/budget-2021-a-canada-wide-early-learning-and-child-care-plan.html.

[97] Child Care Now, https://timeforchildcare.ca/.

[98] Chatelaine Magazine, *The Canadian Military's Sexual Misconduct Crisis Explained*, 12 May 2021, https://www.chatelaine.com/news/sexual-misconduct-canadian-military/.

[99] https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/priorities-priorites/policy-politique.aspx?lang=eng

[100] https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/gender_equality-egalite_des_genres/cnap_wps-pnac_fps.aspx?lang=eng.

[101] https://www.amnesty.ca/our-work/issues/womens-human-rights/feminist-foreign-policy

[102] https://fcm.ca/en/about-fcm/big-city-mayors-caucus.

[103] Amnesty International, *Toxic Twitter—A toxic place for women*, 21 March 2018, https://www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-1/.

When it comes to recognition and protection of the rights of LGBTIQ2S+ individuals, these twenty years very clearly show us that there can be encouraging progress and formidable opposition at the same time.

In 2000 no country in the world had yet legalized same sex marriage, and only a handful recognized lesser variations such as civil unions and partnerships; but by 2020 same-sex marriages were recognized by law in 29 countries, with several more poised to take that step.[104] Canada was the fourth country to do so, when Parliament passed the *Civil Marriage Act* in 2005. That momentum has been steady and has been global, including at least one country now on every continent. However, in 2021 there are 71 countries in which consensual sexual activity in private between two people of the same sex is criminalized; including 11 countries in which the potential punishment extends to the death penalty.[105] Uneven progress indeed.

Progressing and regressing is certainly apparent when it comes to securing rights protection for transgender individuals. The past twenty years have seen encouraging steps forward in Canada, with all federal, provincial and territorial jurisdictions now enshrining prohibitions against discrimination on the basis of gender identity and all but two provinces extending that to gender expression in their human rights laws. Federal legislation to do so, brought forward by the Trudeau government in 2016 following earlier efforts to do so by NDP MPs through private member's legislation, met vociferous opposition from a number of Senators, but was adopted in 2017.[106] The courage and determination of individuals within the trans community across the country in advancing these vital legal reforms has been beyond inspirational.

Yet, discrimination and violence against transgender individuals remains a pressing human rights concern globally. Noting a continuing increase in yearly reports of killings of trans and gender-diverse people, Transgender Europe recorded 350 such killings worldwide in the 12 months leading up to the Trans Day of Remembrance in 2020.[107] During the Trump Administration a ban on transgender individuals serving in the US military was instituted.[108] And there have been a surge of legislative initiatives at state level across the United States in 2021 aimed at restricting the rights of transgender individuals, particularly in healthcare and sports.[109]

As such, efforts to consistently secure stronger recognition of the rights of LGBTIQ2S+ people within multilateral international human rights bodies continue to be contentious, with a number of governments objecting to the inclusion of any such language and voting against any such resolutions. Nonetheless, the Human Rights Council took the historic step of establishing an Independent Expert on Sexual Orientation and Gender Identity[110] in 2016, a clear outcome of untiring campaigning efforts by human rights defenders around the world. And Canada has shown leadership in being one of the principal conveners of the ground-breaking Equal Rights Coalition, which brings together "42 Member States dedicated to the protection of the rights of LGBTI persons."[111]

What endures for me, above all, however, is that over the course of these past twenty years, whether it has been at home or abroad, no matter the country and whatever the human rights issue in the spotlight, women, girls and LGBTIQ2S+ human rights defenders have invariably taught me the most and shown me the essence of courage and resilience.

(b) Anti-Black Racism

Racism pervades the denial of human rights. Wherever and however injustice rears its ugly head, the roots are so very often found in racism and racism fuels the ongoing repression and violence. Everywhere. Grounded in white

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[104] Human Rights Campaign, *Marriage Equality Around the World*, https://www.hrc.org/resources/marriage-equality-around-the-world.

[105] Human Dignity Trust, *Map of Countries that Criminalise LGBT People*, https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/.

[106] Phil Heidenreich, *Senate passes Bill C-16 which defends transgender rights*, 16 June 2017, https://globalnews.ca/news/3532824/senate-passes-bill-c-16-which-defends-transgender-rights/.

[107] *TMM Update Trans Day of Remembrance 2020*, 20 November 2020, https://transrespect.org/en/tmm-update-tdor-2020/.

[108] NBC News, *Trump's controversial transgender military policy goes into effect*, 12 April 2019, https://www.nbcnews.com/feature/nbc-out/trump-s-controversial-transgender-military-policy-goes-effect-n993826.

[109] ABC News, *Record number of state bills in 2021 impact transgender rights, advocacy group says*, 12 March 2021, https://abcnews.go.com/US/record-number-state-bills-2021-impact-transgender-rights/story?id=76401800.

[110] https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/Index.aspx.

[111] Equal Rights Coalition, https://equalrightscoalition.org/

supremacy, racism has devastating impact on all other races. That is universally so when it comes to anti-Black racism—long institutionalized, ingrained and insidious in every corner of the world. Anti-Black racism has been and continues to be at the heart of centuries of genocide,[112] slavery, colonialism, forced displacement, *apartheid*, sexual violence, political and social exclusion, segregation, profiling, police violence, over-incarceration, poverty, economic deprivation, stereotyping and violations of virtually all human rights; everywhere.

And has the human rights movement approached it as such? Clearly not. In fact, the international human rights system's own beginnings effectively embraced the racist global boundaries set by colonialism as acceptable limits. Geopolitics, governance models and global economic systems that should have been entirely rejected and prohibited as the very antithesis of universal human rights, that deprived the overwhelming majority of the world's peoples of the equality and freedom which define human rights, instead were allowed to thrive, and still do.

Only three sub-Saharan African nations were "independent" and at the table in 1948, when the Universal Declaration of Human Rights was adopted, one being *apartheid*-era South Africa. And those numbers did not significantly begin to shift until the 1960's. In so many ways the rules of the universal human rights game were set with only about 1/3 of the players on the field; with many of those players playing on the same colonial team.

There has been an urgency—so overdue and so necessary—to the movement to confront anti-Black racism in recent years, catalyzed by the courage and insistence of Black Lives Matter and fueled by unrelenting police killings and violence against Black people across the United States,[113] in Canada[114] and many other countries. That has intensified dramatically after the murder of George Floyd by Minneapolis police officer Derek Chauvin in May 2020. And it begs the question whether the human rights community has responded. Of course they have, we have. There are ample reports, press releases and petitions to show for it. But no, not truly; not as it merits.

Alex delivers a global petition to Amb. Luis Alfonso de Alba (Mexico), President of the UN Human Rights Council, in Geneva in May 2007, calling for the UN's Special Procedures system to be strengthened.

The rules of the game are so very often allowed to stand in the way. Human rights advocacy is not political, so confronting the political systems and power structures that benefit from and perpetuate anti-Black racism is seen as largely off limits. Human rights norms generally accept the state's power and prerogative to set and enforce criminal laws, so over-criminalization, over-policing, and over-incarceration never seem to be centrally in the frame. And legitimate demands that a human rights approach to the dismantling of colonialism must include serious consideration of substantial reparations for the devastating, multi-generational harms that have been perpetrated,[115] are generally dismissed as being unrealistic or about the past rather than the future.[116] Instead, the resources needed to address those deeply entrenched impacts in marginalized communities or in countries struggling with endemic poverty are seen through the lens of aid, assistance and charity rather than an obligation to provide and a right to receive redress for grave human rights violations that go back centuries.

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[112] BBC News, *Germany officially recognises colonial-era Namibia genocide*, 28 May 2021, https://www.bbc.com/news/world-europe-57279008.

[113] BBC News, *George Floyd: Timeline of black deaths and protests*, 22 April 2021, https://www.bbc.com/news/world-us-canada-52905408.

[114] Reuters, *Study: Black citizens "over-represented" in Toronto police arrests, shootings*, 10 August 2020, https://www.reuters.com/article/us-canada-race-police-idUSKCN2562SH.

[115] Anna Kirstine Schirrer, *Introduction: On Reparations for Slavery and Colonialism*, Journal of the Association for Political and Legal Anthropology, 31 July 2020, https://polarjournal.org/2020/07/31/reparations-for-slavery-and-colonialism/.

[116] "The people to whom reparations were owed are long dead; our duty is to the living, and to generations yet to come, and their interests are best served by liberty and prosperity, not by moral theater." Kevin Williamson, *The Case against Reparations*, National Review,

Importantly, this does not only invite reflection as to whether the human rights movement has taken up the right issues, at the right time, to address racism; it also means reflection on our relationships, ways of working and power structures. It necessitates acknowledging and addressing the systemic racism that has permeated the human rights community itself as well.

Among the most challenging and important pieces of my own human rights journey has been realizing that I too have far to go in confronting how I benefit from and perpetuate racism. Being a human rights activist by no means exempts me, nor any of us.[117]

(c) Refugees, Migrants, and the Borders of Human Rights

"But I've left my country, I don't have any more rights." Having fled fighting between government and armed opposition forces in N'Djamena, Chad, during which his wife was killed and he was separated from the rest of his family, those were the fatalistic words of a man in his 70's who I interviewed in a makeshift refugee camp in northern Cameroon in May 2008.[118] And although international law is replete with treaties that do indeed enshrine his rights, his words capture the lived reality of refugees and migrants across the world and certainly reflect the laws and policies of far too many governments and the crass politics of far too many xenophobic and racist leaders.

Over the course of these twenty years the public discourse about refugees and migrants has readily tended to breathless hyperbole. There is often talk of mass exoduses and sudden influxes, the burden on host countries, and borders being out of control. So often the headlines raise alarm about a "refugee crisis." The hyperbole gives way to bigotry with talk of "illegal" border-crossings and conflating refugees and migrants with criminality and terrorism. Increasingly, politicians of all stripes and on every continent have readily pandered to and fueled nativism and racism on the backs of refugees and migrants as a means of gaining votes and winning elections. That has of course been disgracefully on display in recent years with such notorious leaders as Donald Trump in the United States and Viktor Orbán in Hungary.

The numbers of people forcibly displaced around the world, as refugees and internally-displaced, has indeed risen considerably. UNHCR notes that the rate of displacement has close to doubled from 1 out of every 174 people worldwide in 2005, to 1 in 97 today.[119] In 2021, 80 million people have been forcibly displaced from their homes, including a staggering 6.6 million Syrians. If they made up their own nation, forcibly-displaced people would inhabit the 20th most populous country on earth.

Not surprising, therefore, that so many of the Amnesty International fact-finding teams I have joined have focused on the situation of refugees, migrants, and the internally displaced, including in Guinea, Ghana, Côte d'Ivoire, Bangladesh, Burundi, Tanzania, Sudan, South Sudan, Chad, Cameroon, South Africa, Colombia, Mexico and the United States. And that a great deal of the multilateral advocacy work I have been part of, at the UN Security Council, UN High Commissioner for Refugees, UN treaty bodies and Special Procedures, and the Inter-American Commission on Human Rights, has sought to stem erosion of and advance respect for the rights of refugees and migrants.

So, yes, it is an enormous challenge. But is it a crisis, at least in the ways that the word crisis is generally attached personally to refugees themselves? The crisis, and there is one, lies not with refugees but in the nature and impact of the cruel policies and enforcement measures enacted by governments around the world, which have made seeking refugee protection a deadly affair. Overloaded boats capsize and are turned back at sea. Disgraceful "cooperation" and return agreements are concluded with

24 May 2014, https://www.nationalreview.com/2014/05/case-against-reparations-kevin-d-williamson/.

[117] Alex Neve, *Being for human rights and against racism does not, an anti-racist make*, 18 May 2021, https://www.alexneve.ca/blog/being-for-human-rights-and-against-racism-does-not-an-anti-racist-make.

[118] Interview, Maltam Refugee Camp, Cameroon, 16 May 2008.

[119] UNHCR, *Global Trends: Forced displacement in 2019*, https://www.unhcr.org/globaltrends2019/.

countries such as Libya,[120] Turkey,[121] Sudan,[122] Mexico,[123] and Guatemala, El Salvador and Honduras,[124] which are blatantly motivated by refugee exclusion not protection. Border walls and barbed wire fences grow higher, wider and longer, enforced by more police, more soldiers, more cameras and more weaponry. Visas make it impossible for people from war torn countries to board planes. And refugee resettlement numbers never rise above the tiniest fraction of what is needed, even though the capacity to offer more clearly exists. That is the crisis.

Yet there are at the same time very many reminders, large and small, that compassion and solidarity can and do prevail. That was certainly the case in Germany in 2015, when the country's borders were opened to around one million refugees.[125] Countries in the Global South have demonstrated a remarkable level of welcome which, while certainly not at all perfect, would never be considered in the Global North, including to Rohingya refugees in Bangladesh, Syrian refugees in Lebanon, and South Sudanese refugees in Uganda. And Canadians nationwide joined together in a major Syrian refugee sponsorship program in 2016, leading to a record year for refugee resettlement to Canada.[126]

A reflection that lies deep for me, however, as a Canadian who has sought to advance refugee rights as a lawyer, activist, decision-maker and academic for well over 35 years is how easy a ride Canada has generally had on the world stage. It is repeated so often as to simply be taken as a given, that ours is a country devoted to welcoming and offering protection to refugees. And while there are certainly high-water moments, including the resettlement of Indochinese[127] and Syrian refugees, the truth is that we have simply never been tested and have never truly had to prove the depth and sincerity of those convictions.

There have been some blatantly disgraceful moments over these twenty years, such as when Stephen Harper's government stripped refugee claimants of access to federally-funded health care, as part of a strategy meant to curtail the arrival of refugees who his ministers frequently derisively referred to as "bogus."[128] That punitive measure was overturned by the Federal Court,[129] and was under appeal to the Federal Court of Appeal when it was reversed very soon after the Trudeau government was elected in 2015.[130]

What truly spotlights the disingenuous claim that Canada is the land of #RefugeesWelcomeHere is the approach to refugee protection at the Canada/US border and, in particular, the impact of the Safe Third Country Agreement (STCA) which effectively closes down access to refugee protection at official land border posts to most refugee claimants coming to Canada through the United States. Beginning with amendments to the Immigration Act in 1993 and the various chapters of negotiating, drafting, finalizing and defending the agreement in court,

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[120] Human Rights Watch, *EU: Time to review and remedy cooperation policies facilitating abuse of refugees and migrants in Libya*, 28 April 2020, https://www.hrw.org/news/2020/04/28/eu-time-review-and-remedy-cooperation-policies-facilitating-abuse-refugees-and.

[121] Kyilah Terry, *The EU-Turkey Deal, Five Years On: A Frayed and Controversial but Enduring Blueprint*, Migration Policy Institute, 8 April 2021, https://www.migrationpolicy.org/article/eu-turkey-deal-five-years-on.

[122] The Guardian, *EU urged to end cooperation with Sudan after refugees whipped and deported*, 27 February 2017, https://www.theguardian.com/global-development/2017/feb/27/eu-urged-to-end-cooperation-with-sudan-after-refugees-whipped-and-deported.

[123] Washington Post, *Deal with Mexico paves way for asylum overhaul at U.S. border*, 24 November 2018, https://www.washingtonpost.com/world/national-security/deal-with-mexico-paves-way-for-asylum-overhaul-at-us-border/2018/11/24/87b9570a-ef74-11e8-9236-bb94154151d2_story.html.

[124] Vox, *Trump's agreements in Central America are dismantling the asylum system as we know it*, 20 November 2019, https://www.vox.com/2019/9/26/20870768/trump-agreement-honduras-guatemala-el-salvador-explained.

[125] The Guardian, *Germany on course to accept one million refugees in 2015*, 8 December 2015, https://www.theguardian.com/world/2015/dec/08/germany-on-course-to-accept-one-million-refugees-in-2015.

[126] UNHCR, *Canada's 2016 record high level of resettlement praised by UNHCR*, 24 April 2017, https://www.unhcr.org/news/press/2017/4/58fe15464/canadas-2016-record-high-level-resettlement-praised-unhcr.html.

[127] Canadian Council for Refugees, *The Resettlement of Indochinese Refugees in Canada: Looking Back after Twenty Years*, https://ccrweb.ca/sites/ccrweb.ca/files/static-files/20thann.html.

[128] Alex Neve, *The Bogus Rhetoric about Bogus Refugees*, Slaw: Canada's Online Legal Magazine, 21 March 2014, http://www.slaw.ca/2014/03/21/the-bogus-rhetoric-about-bogus-refugees/

[129] *Canadian Doctors for Refugee Care v. Canada (Attorney general)*, 2014 FC 651, https://reports.fja-cmf.gc.ca/fja-cmf/j/en/item/332648/index.do.

[130] CBC News, *Liberal government fully restores refugee health care program*, 18 February 2016, https://www.cbc.ca/news/politics/mcallum-philpott-interim-federal-health-program-refugees-1.3453397

the governments of Brian Mulroney, Jean Chretien, Paul Martin, Stephen Harper, and Justin Trudeau all carry a piece of this shameful story—a truly nonpartisan betrayal of refugee rights.

Canada's obsession with making it more and more difficult for refugees to make protection claims at the Canada/US border is particularly pathetic when viewed globally. Pathetic given the serious and legitimate fears and concerns refugees have had, even before the full out assault under the Trump Administration, that their rights would be violated and disregarded in the US asylum system, particularly in light of atrocious US immigration detention practices and policies that make it very difficult for refugee women to have claims based on domestic violence accepted. Pathetic given the family and community links that often make Canada a more obvious destination. And pathetic given the small numbers at stake—even in years when refugee claims at the border have perhaps been as high as 25,000—which pale in a global context of what is expected and required of other countries faced with influxes of more than one million refugees. Given all those considerations it has been dismal to see the consistent insistence of consecutive federal governments to shut down that border to refugees.

Amnesty International joined with the Canadian Council for Refugees, the Canadian Council for Churches and individual refugee claimants in challenging the STCA in court; twice. Both times, Federal Court judges who heard the extensive evidence ruled that the Agreement violates the Charter and overturned it. Both times, the Federal Court of Appeal, on narrow legal grounds that barely touch on the merits of the case and the gravity of concerns on the ground in the United States at all, reversed those rulings. The Supreme Court declined to hear an appeal in the first challenge. It remains to be seen if they will grant leave this time.[131]

Rally outside Federal Court in Toronto, November 2019, protesting the Canada/US Safe Third Country Agreement.

Meanwhile, Canada's claims of generosity to refugees are belied by this dogged defence of an indefensible agreement, as is the credibility of our interventions with other governments, urging them to keep borders open in the face of influxes far greater than anything we have ever seen at the US border.

Refugees welcome here? We have far to go to prove we are truly worthy of that claim.

(d) A Canadian is a Canadian is a Canadian

In the 2015 federal election campaign Justin Trudeau famously criticized Prime Minister Stephen Harper for changes his government had made to the *Citizenship Act* making it possible to strip dual national Canadian citizens of their Canadian citizenship. Citizens who only had Canadian citizenship did not face that same risk. It was a clear instance of discrimination. In a televised debate Justin Trudeau passionately reminded Stephen Harper that, "a Canadian is a Canadian is a Canadian."[132] The Trudeau government did subsequently repeal those amendments.[133]

However, there has been a constant, disturbing undercurrent throughout these past twenty years that does point to differential treatment of Canadians with dual (or multiple) nationality and those with only

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[131] For an overview of the history of the Safe Third Country Agreement and links to Federal Court and Federal Court of Appeal rulings, see: Alex Neve, *Canada's Obsession with Shutting Down the 49th Parallel to Refugees*, (2021), 5 PKI Global Justice Journal 17, https://globaljustice.queenslaw.ca/news/canadas-obsession-with-shutting-down-the-49th-parallel-to-refugees. NOTE: The Supreme Court granted leave to appeal on 16 December 2021, Amnesty International, *Supreme Court decision to hear Safe Third Country Agreement appeal is a promising step for refugee rights*, 16 December, 2021, https://www.amnesty.ca/news/supreme-court-decision-to-hear-safe-third-country-agreement-appeal-is-a-promising-step-for-refugee-rights/.

[132] Globe and Mail, *Video: 'A Canadian is a Canadian is a Canadian': Harper, Trudeau spar over right to revoke citizenship*, 28 September 2015, https://www.theglobeandmail.com/canada/video-video-a-canadian-is-a-canadian-is-a-canadian-harper-trudeau-spar/.

[133] Immigration, Refugees and Citizenship Canada, *Changes to the Citizenship Act as a Result of Bill C-6*, https://www.canada.ca/en/immigration-refugees-citizenship/news/2017/10/changes_to_the_citizenshipactasaresultofbillc-6.html.

Canadian citizenship. It comes up repeatedly when Canadians are imprisoned abroad in situations where they face a serious risk of torture and other grave human rights violations. The inescapable further undercurrent? That white Canadians get more support than racialized, dual national Canadians.

As I share these reflections it is safe to assume that a high percentage of Canadians are aware of the "two Michaels." Michael Kovrig and Michael Spavor, who are both white and do not have dual nationality, have been cruelly and unjustly imprisoned in China since 10 December (ironically International Human Rights Day), 2018.[134] It is blatantly politically motivated, an effort by Chinese authorities to exert pressure on the Canadian government to deny the US request to extradite Meng Wanzhou, a senior executive with and daughter of the CEO of electronics giant Huawei. The Michaels have been arbitrarily arrested, held in solitary confinement, subject to other treatment and detention conditions that likely amounts to torture, faced a blatantly unfair trial, had very limited access to family communication, and frequently been denied consular visits.

Rightly, their situation is lodged at the highest levels of the Canadian government. There have been three Ministers of Foreign Affairs over the course of the 2 ½ years they have been imprisoned, and the plight of the two Michaels has consistently been a top priority for Ministers Freeland, Champagne and Garneau. They have raised the cases repeatedly with their US and Chinese counterparts. Minsters Champagne and Garneau pursued a multilateral effort to secure support for a *Declaration on Arbitrary Detention in State-to-State Relations*, now endorsed by 63 governments.[135] The Declaration is generic and does not single out a specific country, but it is widely known to be motivated by the case of the two Michaels. Similarly, Prime Minister Trudeau has discussed the two Michaels with Presidents Trump and Biden.[136] Canada's Ambassador to China's focus on securing their release is such that he spent three weeks in Washington in April 2021 for high-level talks.[137]

Compare all of this attention and activity to another Canadian imprisoned in China, Huseyin Celil.[138] Huseyin Celil was arrested in 2006 while visiting his wife's family in Uzbekistan. He was subsequently "deported" to China in circumstances that were so lacking in any degree of fairness as to truly be tantamount to an extraordinary rendition. He has been there ever since, 15 years now.

Huseyin Celil is a Uyghur man, an Imam and leader in the Uyghur community who had fled repression and persecution in China and was resettled to Canada as a refugee, subsequently becoming a Canadian citizen. While he had travelled to Uzbekistan on his Canadian passport and entirely considered himself to be Canadian, Chinese authorities refuse to recognize his Canadian citizenship and treat him as having only Chinese nationality.

Over the course of these 15 years Canadian officials have not been allowed to have one single consular visit with Huseyin. He has endured harsh prison conditions, almost certainly suffered extensive torture and ill-treatment, and was tried and convicted in a trial that did not come close to meeting minimal standards of fairness. For the past four years, amidst the massive crackdown and genocide against the Uyghur population in China, there is no word of his fate as there has been no further communication from his mother and sister, who had been allowed to visit him infrequently in prison and were the only channel for news of his well-being. The agony for his wife Kamila Telendibaeva, who has raised their four sons in Burlington, Ontario on her own, has been beyond belief.[139]

There was a short period of time, in the immediate aftermath of Huseyin Celil's arrest and imprisonment, during which Canadian authorities, including Prime Minister Harper, were demonstrably and publicly advocating for his release. That has not been so in more than a decade. And while there are often non-specific assurances that his case is a priority concern for the government, other signs indicate quite the opposite.

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[134] Following resolution of the Meng Wanzhou extradition case, Michael Kovrig and Michael Spavor were released from detention in China, and returned to Canada on 25 September 2021.

[135] https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/arbitrary_detention-detention_arbitraire.aspx?lang=eng.

[136] Hannah Jackson, *'Human beings are not bartering chips': Biden calls for China to release 2 Michaels*, Global News, 23 February 2021, https://globalnews.ca/news/7658174/biden-trudeau-1st-bilateral-meeting/.

[137] Robert Fife and Steven Chase, *Canada held secret U.S. talks in bid to free Kovrig, Spavor jailed in China*, Globe and Mail, 7 June 2021, https://www.theglobeandmail.com/politics/article-canada-held-secret-us-talks-in-bid-to-free-kovrig-spavor-jailed-in/

[138] Global National, *The case of Huseyin Celil, the Canadian man jailed in China for 15 years*, 7 May 2021, https://globalnews.ca/video/7844743/the-case-of-huseyin-celil-the-canadian-man-jailed-in-china-for-15-years.

[139] Josh Elliot, *Wife of Canadian citizen jailed 13 years in China fears he's been 'forgotten' amid Huawei crisis*, 24 January 2019, https://globalnews.ca/news/4874245/canadian-detained-china-huseyin-celil/.

In an appearance before a parliamentary committee in February 2020 Canada's Ambassador to China initially did not recognize Huseyin Celil's name and then when prodded quickly indicated erroneously that, "because he is not a Canadian citizenship holder, we are not able to get access to him on the consular service side."[140] He is, of course, a Canadian citizen and was travelling as such. Appearing before the same Special Committee on Canada-China Relations on 7 June 2021, the Deputy Minister of Foreign Affairs erroneously implied in her testimony that Huseyin Celil was travelling using Chinese documents.[141] Travelling seems an unfortunate way to describe the experience of what was essentially an abduction and rendition; and Huseyin Celil did not possess a Chinese passport, let alone use it for that particular family trip to Uzbekistan. Perhaps these errors around how he arrived in China, what passport he was using and what citizenship he holds would be understandable in the early months of a case; but after 15 years?

There have of course been other infamous examples of the two tiers of citizenship. Notoriously, Stephen Harper's government not only refused to take even minimal steps to safeguard the rights of Omar Khadr while he was detained in Guantánamo Bay, but he and other Ministers regularly vilified him in media statements and fundraising emails to Conservative Party supporters.[142]

Maher Arar, Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, whose cases have been the subject of two judicial inquiries, were not only unable to count on full Canadian government support while they were tortured and unlawfully imprisoned in Syria and additionally, in Mr. Elmaati's case, Egypt, but in fact Canadian law enforcement, security and diplomatic officials acted in ways that directly contributed to those grave human rights violations.[143] Even today, Abousfian Abdelrazik[144] and Hassan Diab,[145] who have each been through human rights nightmares in Sudan and France respectively, for which there is considerable Canadian responsibility, have not received apologies or redress.

Currently, this concern is blatantly evident in the Canadian government's refusal to provide assistance to an estimated 47 Canadian citizens—8 men, 13 women and 26 children—alleged to be linked to ISIS, who are detained in "overcrowded, filthy, and life-threatening conditions" in makeshift prisons and locked camps administered by Kurdish forces in NE Syria.[146]

There are exceptions. For instance, the Trudeau government engaged significantly in the successful effort to secure the release of Concordia University Professor Homa Hoodfar—a triple national of Canada, Iran and Ireland—from imprisonment in Iran; though the key strategy of involving the government of Oman as an interlocutor was primarily initiated by her family.[147] And in April 2018, after more than a decade of arbitrary arrest, an unfair trial and harsh prison conditions, Bashir Makhtal was released from imprisonment in Ethiopia. A year before he was released, Omar Alghabra, the Parliamentary Secretary responsible for consular affairs, had travelled to Ethiopia[148] to advocate directly on Mr. Makhtal's behalf, although at other times Canadian efforts were lacklustre and the pressure exerted on the

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[140] Robert Fife and Steven Chase, Foreign Minister corrects Canadian envoy to China on imprisoned citizen, Globe and Mail, 6 February 2020, https://www.theglobeandmail.com/politics/article-foreign-minister-corrects-canadian-envoy-to-china-on-imprisoned/.

[141] https://www.ourcommons.ca/DocumentViewer/en/43-2/CACN/meeting-28/evidence.

[142] Thomas Walkom, *Why Stephen Harper's Conservatives won't give Omar Khadr a break*, Toronto Star, 24 April 2015, https://www.thestar.com/news/canada/2015/04/24/why-stephen-harpers-conservatives-wont-give-omar-khadr-a-break-walkom.html.

[143] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, https://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/index.htm; Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, http://publications.gc.ca/collections/collection_2014/bcp-pco/CP32-90-2008-1-eng.pdf.

[144] Steven Chase, *Ottawa has spent $9.3-million fighting legal claims over Canadian's alleged torture in Sudan*, Globe and Mail, 15 February 2021, https://www.theglobeandmail.com/politics/article-ottawa-has-spent-93-million-fighting-legal-claims-over-canadians/.

[145] Alex Neve, *The Hassan Diab Case: Injustice expands, need for redress and reform deepens*, (2021), 5 PKI Global Justice Journal 4.

[146] Human Rights Watch, *"Bring Me Back to Canada": Plight of Canadians Held in Northeast Syria for Alleged ISIS Links*, 29 June 2021, https://www.hrw.org/report/2020/06/29/bring-me-back-canada/plight-canadians-held-northeast-syria-alleged-isis-links.

[147] CBC News, *Homa Hoodfar, Concordia professor, released from Tehran jail*, 26 September 2016, https://www.cbc.ca/news/canada/montreal/homa-hoodfar-released-evin-prison-1.3778874.

[148] David Child, *Canadians call for return of relative held in Ethiopia*, Al Jazeera, 23 February 2018, https://www.aljazeera.com/news/2018/2/23/canadians-call-for-return-of-relative-held-in-ethiopia.

Ethiopian government appeared to be minimal.[149]

All of this is often famously compared to the case of Brenda Martin, who is white and not a dual-national.[150] Jason Kenney, who was Secretary of State in the Harper government at the time, flew to Mexico in 2008 to advocate on her behalf and the government paid a fine related to her conviction on fraud charges. She subsequently returned to Canada on a government-chartered plane.

A Canadian is a Canadian is a Canadian? Not all the time.

(e) Decriminalizing Human Rights

Governments frequently remind us that they have what they would consider to be both a right and obligation to make use of criminal law as a means of providing public safety and enforcing norms of behaviour that have been agreed by society. And that is of course very much the case. It has often meant, however, that there are large swaths of government action that are somehow considered to be outside of legitimate human rights critique. It is an approach to human rights that leaves sizable sectors of the population beyond human rights protection and, not surprisingly, those are overwhelming groups that are most vulnerable to widespread and systematic human rights violations.

Historically the examples are horrendous, perhaps most notoriously the sinister web of laws that authorized and institutionalized slavery and later segregation in the United States or *apartheid* in southern Africa and criminalized all manner of actions seeking to protect individuals subject to those racist and violent practices and more widely to challenge and end those abhorrent laws.

It has continued to be a challenge, however, to expose and take on all of the ways in which criminalization essentially amounts to an attack on human rights. Clear and obvious when a criminal law prohibits a peaceful demonstration, shuts down independent media or bans political opposition groups. But what of the devastating impact on human rights of laws that ban all access to safe abortions, criminalize sex work, or make it illegal to possess even small quantities of drugs?

Admittedly the human rights community has been slow and frequently reluctant to take this on. But it is essential. Criminalization in these contexts has dramatically disproportionate impact on women, on racialized communities, LGBTQI2S+ people, people with disabilities, people living in poverty, and individuals facing addictions and mental and other health challenges.

It is no answer to simply say, it is the law. We are challenged to ask, does the law comply with human rights; and have far too often been remiss in failing to do so. I was in the room during difficult and important debates within Amnesty International over the past twenty years with respect to abortion rights, and decriminalization of sex work and drug possession. In the end, comprehensive new positions and policies have been adopted, powerfully making the case as to why human rights absolutely do implore us to oppose criminalization.[151] Those debates have now moved into other crucial realms, including laws with respect to immigration detention and border control, and the very nature of policing and law enforcement.

It is essential to recognize that so often it is uncritical acceptance of the legitimacy of criminal sanctions that may be one of the most significant factors lying at the heart of racism and discrimination.

(6) IMPLEMENT AND ENFORCE RIGHTS

I would not be able to begin to count the op-eds,[152]

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[149] Alex Ballingall, *Canadian freed after 11 years in an Ethiopian jail calls for inquiry into Ottawa's response*, 22 May 2018, https://www.thestar.com/news/canada/2018/05/22/canadian-freed-after-11-years-in-an-ethiopian-jail-calls-for-inquiry-into-ottawas-response.html.

[150] CBC News, *Brenda Martin returns to Canada*, 1 May 2008, https://www.cbc.ca/news/canada/brenda-martin-returns-to-canada-1.728326.

[151] *Amnesty International's Policy on Abortion*, https://www.amnesty.org/en/documents/pol30/2846/2020/en/; *Amnesty International's Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers*, https://www.amnesty.org/en/documents/pol30/4062/2016/en/; Amnesty International, *Human Rights and Drug Policy: A Paradigm Shift*, https://www.amnesty.org/download/Documents/POL3011302019ENGLISH.pdf.

[152] Alex Neve, *Closing Canada's International Human Rights Implementation Gap*, Slaw: Canada's Online Legal Magazine, 8 May 2013, http://www.slaw.ca/2013/05/08/closing-canadas-international-human-rights-implementation-gap/.

UN briefs,[153] reports,[154] media interviews, speeches, parliamentary submissions, and other materials and presentations I have written, delivered or contributed to over the past twenty years that have spotlighted the glaring enforcement and implementation gap that so directly and significantly undermines efforts to uphold international human rights.

Over that time span there have been great moments of celebration when ground-breaking new human rights instruments have been adopted, often after long and contentious negotiations, dealing with the arms trade, torture prevention, enforced disappearances, the rights of persons with disabilities, the human rights responsibilities of business, and the rights of Indigenous peoples, among other concerns. Now, while there are still of course important human rights issues that have not yet been adequately elaborated and enshrined in international instruments, for the most part the norms and standards exist—in fact they frequently exist in multiple treaties, declarations and resolutions—and the true challenge lies in holding states accountable to the great promises they have drafted and adopted.

In Canada and worldwide, that distance between human rights promise and human rights reality is considerable. In fact, at times, it seems to grow, not shrink. That is distressing most obviously because it means that human rights that should be respected and upheld are not. It is also troubling in that the disconnect between what states put to paper and how they act in many respects makes a mockery of the very notion of universal human rights, which serves only to erode public confidence and diminish hope.

(a) Global Enforcement

That said, there has indeed been progress, notably when it comes to international justice, discussed earlier in this article,[155] which has certainly toughened enforcement measures against individual perpetrators of the very worst human rights crimes. And the decision to dismantle the UN Commission on Human Rights and replace it with the UN Human Rights Council was, to some extent, a step in the right direction. The advent of the new Universal Periodic Review process at the Council does at least guarantee that every country's human rights record will be globally scrutinized at regular intervals.

There have been frequent debates and initiatives over these past twenty years about reforming the UN human rights treaty bodies, which are entrusted with the responsibility of overseeing implementation of and compliance with the respective covenants and conventions they supervise but have only the ability to make recommendations to states and no binding enforcement powers to back that up. Those initiatives have, however, often been motivated by efforts to curtail the effectiveness of the treaty bodies. Meanwhile, talk of creating a World Court of Human Rights, a global companion to regional human rights courts that exist in Europe, the Americas and Africa, attracts interest and enthusiastic discussion among academics and civil society groups[156] but there is clearly little or no appetite among states to take such a step.

Other UN reform efforts have pointed in the right direction, but are yet to make any concrete difference when it comes to enforcement and implementation, such as the adoption of the Responsibility to Protect doctrine, a framework for preventing and responding to mass atrocities that was championed by Canada and has been frequently invoked or referenced in UN Security Council, General Assembly, and Human Rights Council Resolutions.[157] Sadly, though, to very little avail in terms of making a substantial difference on the ground in the countries referenced, including Syria, Myanmar, South Sudan, North Korea or the Central African Republic.

Efforts to pursue reforms that would end the disgraceful deadlock at the Security Council, where veto bluster and politics take precedence over meaningful responses to human rights crises, has gone absolutely nowhere. Two similar proposals to at least curtail the use of vetoes by permanent members of the Security Council in resolutions dealing with mass atrocities have each been supported by over 100 countries, but have not been demonstrably taken up by China, Russia and the United

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[153] *Promise and Reality: Canada's international human rights implementation gap*, Joint NGO Submission to the United Nations Human Rights Council in relation to the February 2009 Universal Periodic Review of Canada, 8 September 2008, http://socialrightscura.ca/documents/UPR/JS1_CAN_UPR_S4_2009_SocialRightsAdvocacyCentre_Etal_JOINT.pdf.

[154] *Amnesty International, It is Time to Comply: Canada's record of unimplemented UN human rights recommendations*, 19 December 2005. Copy on file with author.

[155] See "No Justice, No Peace" Section 3(b), *supra*.

[156] Julia Kozma, Manfred Nowak and Martin Scheinin, *A World Court of Human Rights: Consolidated Draft Statute and Commentary*, May 2010, https://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Scheinin/ConsolidatedWorldCourtStatute.pdf.

[157] *What is R2P?*, Global Centre for the Responsibility to Protect, https://www.globalr2p.org/what-is-r2p/.

States.[158] Instead, vetoes, or the threat or expectation of a veto, have continued to thwart Security Council action in responding to some of the most egregious human rights crises the world faces.

I think of the frequent meetings I had with Security Council members between 2012 and 2015, following fact-finding trips to the Nuba Mountains of South Kordofan in Sudan, parts of which were sealed off from the outside world and experiencing unrelenting indiscriminate aerial bombardment by the Sudanese military.[159] There were so many concrete steps, including sanctions, that the Security Council could have taken. But always the response was the same, it will be vetoed.

(b) Federalism and Canada's Human Rights Implementation Deficit

That is the global stage. What about domestically? Canada after all has long positioned itself as an ardent champion of human rights. Surely our adherence to the country's international obligations is exemplary?

In December 2002, the UN adopted the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT), a long and cumbersome title for an important new treaty focused on preventing torture and ill-treatment through international and national inspections of detention centres. With a combined sense of certainty, optimism and perhaps naivety, I expected and assumed at the time that there would be early news of Canada being one of the first countries to ratify this important new treaty.

Having Canada join OPCAT would be of benefit both domestically and internationally. While torture is clearly not a major issue within Canadian prisons there is certainly longstanding concern about the widespread use of prolonged solitary confinement federally and provincially, which UN human rights experts have repeatedly concluded does amount to torture, particularly when it extends beyond 15 days.[160] That prohibition has now been enshrined in the UN's "Mandela Rules."[161] UN human rights bodies have repeatedly called on Canada to limit the use of solitary confinement, including the UN Committee against Torture in 2018:

> "[Canada] should ensure that solitary confinement, in both federal and provincial correctional facilities, is used only in exceptional cases as a last resort, for as short a time as possible (no more than 15 consecutive days) and subject to independent review, and only pursuant to the authorization by a competent authority."[162]

There is significant foreign policy benefit to Canada joining OPCAT as well. Torture remains a grim and harrowing human rights reality in countries around the world. Most of those countries have no meaningful domestic enforcement or oversight mechanisms to safeguard against torture and the prevention-focused inspections that come with OPCAT could be tremendously beneficial. However, Canada cannot credibly call on any of those countries to commit to a treaty which Canada itself has not joined.

Two compelling reasons to commit to OPCAT but instead, more than 18 years later, while 91 countries (including almost all of Canada's closest allies in Europe and Latin America) are now parties to the treaty, Canada has yet to take that obvious step. There have been numerous statements over the years indicating that the government was considering doing so. And in May 2016, at an event organized by Amnesty International, the Minister of Foreign Affairs at the time, Stephane Dion, indicated that OPCAT would no longer be "optional" for Canada and that consultations with provincial and territorial governments would go forward, towards Canadian accession to the treaty.[163]

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[158] *Code of conduct regarding Security Council action against genocide, crimes against humanity or war crimes*, UN Doc. A/70/621–S/2015/978, 14 December, 2015, https://undocs.org/A/70/621; and *Political Declaration on Suspension of Veto Powers in Cases of Mass Atrocities*, 1 August 2015, https://www.globalr2p.org/resources/list-of-supporters-of-the-political-declaration-on-suspension-of-veto/.

[159] Amnesty International, *Sudan: Don't we matter? Four years of unrelenting attacks against civilians in Sudan's South Kordofan state*, AFR 54/2162/2015, 18 August 2015, https://www.amnesty.org/en/documents/afr54/2162/2015/en/.

[160] *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/66/268, 5 August 2011, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/445/70/PDF/N1144570.pdf?OpenElement.

[161] *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, UN Doc. A/RES/70/175, 8 January 2016, Rules 43-45, https://undocs.org/A/RES/70/175.

[162] UN Committee against Torture, *Concluding observations on the seventh periodic report of Canada*, 21 December 2018, para. 15, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT/C/CAN/CO/7&Lang=En.

[163] *Amnesty International welcomes Canada's commitment to join torture prevention treaty*, 3 May 2016, https://www.amnesty.ca/news/amnesty-international-welcomes-canada%E2%80%99s-commitment-join-torture-prevention-treaty.

Alex and AI colleagues deliver petitions to Minister of Foreign Affairs Stéphane Dion, calling on Canada to accede to the Optional Protocol to the UN Convention against Torture, May 2016.

Yet more than five years after that encouraging announcement, OPCAT does indeed remain entirely optional, and there has been no public reporting providing an update or outcome of consultations, a timeline or any other relevant information. No government minister has repeated Minister Dion's earlier promise. Meanwhile, other countries are baffled by Canada's reticence. 27 governments—including close allies like the United Kingdom and Germany—raised their concern about Canada's failure to accede to OPCAT when Canada's human rights record was last examined under the UN Human Rights Council's Universal Periodic Review Process in 2018.[164]

This reluctance does not mean that Canada is opposed to preventing torture, of course not. What it primarily points to is that Canadian federalism so very often stands in the way of the concrete progress and implementation needed to ensure international human rights compliance in the country.

It begins within and across the federal government itself. When it comes to Canada's international human rights obligations, who is in charge? Which Minister bears primary responsibility? Where are the government's overarching international and national human rights action plans? The answers to those questions are: it is never clear, several do thus no one truly does, and they do not exist.

That is certainly not the case in many other countries, where there is much more clarity. I cannot remember how many times I have led Amnesty International meetings with government officials in countries around the world which have included sitting down with the Minister of Human Rights. Other countries have appointed roving global Ambassadors for Human Rights.[165] And there are numerous examples of countries which have adopted human rights action plans or strategies.[166]

The best description of Canada's approach to human rights at federal level is that it is sprinkled across government. The Minister of Foreign Affairs leads when it comes to engaging internationally; except when another Minister does. The Minister of Justice leads when it comes to human rights laws and human rights in court; except when another Minister does. Other Ministers, including Ministers of Indigenous Services, Crown-Indigenous Relations, Immigration, Refugees and Citizenship, Public Safety, Women and Gender Equality, International Trade, International Development, Families, Children and Social Development, Employment, Workforce Development and Disability Inclusion, Diversity and Inclusion and Youth… (you see my point), lead when it comes to human rights considerations relevant to their mandate; except when another Minister does.

And rather peculiarly and perhaps not intuitively, the Minister of Canadian Heritage leads when it comes to pulling all of the pieces together, bringing in provincial and territorial governments, engaging with civil society groups and Indigenous peoples' organizations, and coordinating Canada's engagement with and implementation of the country's international human rights obligations. An unusual choice, perhaps, for a Ministry more generally associated with arts, culture, media, the CBC and museums, but a role that ministry has nevertheless played for decades.[167]

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[164] *Report of the Working Group on the Universal Periodic Review: Canada*, UN Doc. A/HRC/39/11, 11 July 2018, paras. 142.8-142.20, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/210/82/PDF/G1821082.pdf?OpenElement.

[165] There are, for example, nine European Human Rights Ambassadors: Estonia, Finland, France, Germany, Luxemburg, the Netherlands, Spain, Sweden and the United Kingdom. *Introducing the European Human Rights Ambassadors: A Joint Blog*, 13 November 2020, https://www.government.nl/latest/news/2020/11/13/introducing-the-european-human-rights-ambassadors.

[166] Government of the Netherlands, *National Action Plan on Human Rights 2020*, https://www.government.nl/documents/publications/2020/05/31/national-action-plan-on-human-rights-2020; Government of New Zealand, *International Human Rights Action Plan 2019—2023*, https://www.mfat.govt.nz/en/peace-rights-and-security/human-rights/.

[167] Department of Canadian Heritage, *About Human Rights*, https://www.canada.ca/en/canadian-heritage/services/about-human-rights.html.

All of this is further complicated when provincial and territorial governments are factored in. Almost all matters arising from Canada's international human rights obligations touch in some way on areas that are constitutionally within the jurisdiction of provinces and territories. Therefore, while the federal government may be Canada's representative at the United Nations when those obligations are assumed and when they are scrutinized, very often the federal government does not have the powers to enact reforms or take necessary action to comply. And provincial and territorial governments at best show inconsistent and unpredictable interest in, let alone commitment to, the country's international human rights obligations. Brazenly, in November 2020, the government of Alberta made it explicitly clear, in fact, that the province did not see itself as bound by those obligations as they had not been assumed by the provincial government directly.[168]

So how does the nation come together in a shared endeavour to ensure that those international human rights obligations are respected, regardless of where the division of powers in sections 91 and 92 of the Constitution may assign authority? The answer? Barely.

In fact, there have been very few meetings of federal, provincial and territorial ministers to dig into this question of human rights implementation. Notoriously there was a 29-year gap between one such meeting in 1988 and two more recent meetings in 2017 and 2020.[169] Throughout those decades the only body bringing governments together was a committee of mid-ranking officials, known as the Continuing Committee of Officials on Human Rights, which does not meet or report publicly, and has no decision-making power. In fact, when I took up the role of Secretary General in 2000, I could not get any information as to the Continuing Committee's membership, agenda, or meeting outcomes and was most certainly not allowed to attend, even briefly to make a presentation.

Only half in jest I often commented that I found it easier to engage with the government on national security matters, even in the aftermath of September 11th, than to get clear information about implementation of human rights obligations. While that has improved in recent years, with several sessions that have included civil society groups and Indigenous peoples' organizations, the Continuing Committee's role as a body for effectively and accountably delivering human rights implementation remains limited.

Two new bodies have been established in the past several years. The Senior Officials Committee Responsible for Human Rights brings governments together at a more senior level of assistant deputy ministers. Deliberations, discussions and outcomes, however, are once again not public and the committee is not expressly empowered to make decisions. In 2020 ministers responsible for human rights at long last committed to meet regularly and have established the Ministerial Forum on Human Rights as a body to support those meetings and associated work. It remains to be seen whether that will lead to the effective, coordinated, transparent and accountable approach to international human rights implementation that is sorely needed in Canada and which could, possibly, serve as a model to other countries.[170]

Meanwhile uncertainty, confusion and secrecy prevail. It makes it impossible to understand what discussions, if any, are underway to advance accession to OPCAT. It also means that there is very little information available as to what steps governments are taking to act upon the important recommendations that come out of human rights reviews conducted by the seven UN treaty bodies that oversee treaties Canada has ratified,[171] UN Special Procedures experts such as the Special Rapporteur on the rights of Indigenous Peoples or the Working Group on Business and Human Rights following their visits to Canada, the UN's Universal Periodic Review carried out by other states, or recommendations from the Inter-American Commission on Human Rights, which has had jurisdiction over Canada since we joined the Organization of American States in 1990.

It remains to be seen whether the Forum of Ministers on Human Rights will at long last open the way to effective, coordinated, transparent and accountable international

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[168] "... While taking its human rights' obligations very seriously, as an equal and independent order of government reporting to its citizens, Alberta is not bound to report on international instruments/mechanisms to which it is not a Party." *Protocol for Follow-up to Recommendations from International Human Rights Bodies*, November 2020, https://www.canada.ca/en/canadian-heritage/services/about-human-rights/protocol-follow-up-recommendations.html.

[169] *From Promise to Reality: Amnesty International's Recommendations for the 2017 Federal/Provincial/Territorial Human Rights Meeting*, 7 December 2017, https://www.amnesty.ca/sites/default/files/From%20Promise%20to%20Reality%20-%20EN%20FINAL.PDF.

[170] Alex Neve, *Forum of Ministers on Human Rights: At long last, a chance to advance a national human rights agenda?*, 3 December 2020, https://www.alexneve.ca/blog/forum-of-ministers-on-human-rights-at-long-last-a-chance-to-advance-a-national-human-rights-agenda

[171] Human Rights Committee, Committee on Economic, Social and Cultural Rights, Committee on the Elimination of Racial Discrimination, Committee on the Elimination of Discrimination against Women, Committee against Torture, Committee on the Rights of the Child, and Committee on the Rights of Persons with Disabilities.

human rights implementation in Canada. That such an essential goal has remained elusive over these past twenty years is one of my greatest disappointments.

(7) CLAIM AND DEFEND RIGHTS

Rights exist, no matter what. They are inherent and inalienable. Rights truly soar when they are claimed and when they are defended. When people and communities claim their rights; change happens. And the companion to claiming rights is that we all have a shared responsibility and imperative to defend rights—which means all rights, for all people, at all times. Joining and witnessing the efforts of frontline, grassroots human rights movements and defenders have without a doubt been the most encouraging and humbling moments for me over these two decades.

Claiming and defending rights should of course be encouraged, welcomed and celebrated. And it often is; as the courage and power that propels human rights struggle is truly unstoppable. But the harsher reality is that as people and movements come forward to claim and defend rights they are vilified and attacked, more violently and with greater impunity in all corners of the world.

When I took up the Secretary General role, the world had recently adopted a new UN Declaration on Human Rights Defenders,[172] marking the 50th anniversary of the Universal Declaration of Human Rights in 1998 and, in 2000, created the new post of UN Special Rapporteur on the situation of human rights defenders.[173] While there was clearly a sense of very real concern about the challenges, threats and danger faced by human rights defenders, there was also a prevailing sense of optimism. The human rights movement had grown exponentially throughout the 1980's and 1990's in all corners of the world. The adoption of the Declaration and appointment of the Special Rapporteur brought recognition as to how essential that had become, recognition that as human rights defenders flourish, so to do human rights.

Yet twenty years later the grim reality is that human rights defenders are very much under siege, targeted by governments, armed groups and businesses throughout the world. The UN Special Rapporteur,[174] other UN human rights experts and bodies,[175] international human rights organizations,[176] journalists,[177] and human rights defenders themselves,[178] have increasingly raised the alarm that the situation of human rights defenders is rapidly becoming more dangerous. The dangers faced by women[179] and LGBTIQ+[180] human rights defenders, and by Indigenous, land and environmental human rights defenders[181] have become particularly acute. Perhaps it is an inevitable backlash from those whose abuse and misuse of power is challenged by human rights

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[172] *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, UN General Assembly Resolution 53/144, 9 December 1998, https://www.ohchr.org/EN/ProfessionalInterest/Pages/RightAndResponsibility.aspx.

[173] Special Rapporteur on the situation of human rights defenders, https://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/SRHRDefendersIndex.aspx.

[174] UN Special Rapporteur on the situation of human rights defenders, *Final warning: death threats and killings of human rights defenders*, UN Doc. A/HRC/46/35, 24 December 2020, https://undocs.org/en/A/HRC/46/35.

[175] UN Special Rapporteur on indigenous peoples, *Attacks against and criminalization of indigenous peoples defending their rights*, UN Doc. A/HRC/39/17, 10 August 2018, https://undocs.org/A/HRC/39/17.

[176] Front Line Defenders, *Global Analysis 2020*, 9 February 2021, https://www.frontlinedefenders.org/sites/default/files/fld_global_analysis_2020.pdf; Amnesty International, *Defenceless Defenders: Attacks on Afghanistan's Human Rights Community*, ASA 11/0844/2019, 28 August 2019, https://www.amnesty.org/en/latest/news/2019/08/afghanistan-human-rights-defenders-under-attack/.

[177] Nina Lakhani, *Berta Cáceres was exceptional. Her murder was all too commonplace*, The Guardian, 2 June 2020, https://www.theguardian.com/commentisfree/2020/jun/02/berta-caceres-was-exceptional-her-was-all-too-commonplace.

[178] Defend Defenders: East and Horn of Africa Human Rights Defenders Project, *Targeted but not Deterred: Human Rights Defenders Fighting for Justice and Peace in South Sudan*, 19 May 2020, https://defenddefenders.org/wp-content/uploads/2020/05/South-Sudan-report.pdf;

[179] UN Special Rapporteur on the situation of human rights defenders, *Situation of women human rights defenders*, UN Doc. A/HRC/40/60, 10 January 2019, https://undocs.org/A/HRC/40/60.

[180] Front Line Defenders, *LGBTIQ+ and Sex Worker Rights Defenders at Risk During COVID-19*, December 2020, https://www.frontlinedefenders.org/sites/default/files/front_line_defenders_covid-19.pdf.

[181] UN Special Rapporteur on the situation of human rights defenders, *Situation of environmental human rights Defenders*, UN Doc. A/71/281, 3 August 2016, https://undocs.org/A/71/281; Global Witness, *Defending Tomorrow: The climate crisis and threats against land and environmental defenders*, July 2020, https://www.globalwitness.org/en/campaigns/environmental-activists/defending-tomorrow/

defenders. It underscores how vital it is for all of us to bring solidarity to their frontline efforts, and an insistence that the space to defend human rights remain open and safe.

It is important to recognize that human rights defenders in Canada face challenges, and even danger, including violence, when they stand up for human rights. Human rights activists and organizations were targeted in a variety of ways by measures such as being singled out for audits related to charitable status, withdrawal of funding and public vilification during Stephen Harper's government. The situation had become so pervasive and troubling that a coalition of more than 200 organizations across the country, Voices-Voix, came together between 2010 and 2020 in response.[182]

Alex speaks outside the Prime Minister's Office at a rally organized by the Voices Coalition, April 2011.

Currently there are serious concerns about the treatment of Indigenous and environmental land defenders at the hands of the RCMP, in connection with protests in the traditional territory of the Wet'suwet'en people[183] and at Fairy Creek,[184] in British Columbia.

(a) To the Streets

There has probably been nothing as exhilarating and encouraging over these past two decades than the incredible people power that has spilled out into public squares, parks and city streets, at protest camps and barricades along logging and mining access roads, in front of parliaments, courthouses, prisons and police stations, outside corporate annual general meetings, at the United Nations, in refugee camps, and across the many platforms and channels of the digital world. Whether it has been a handful of land defenders on an isolated forest road in northern British Columbia, or well over a million demonstrators in the centre of Santiago, the impetus and the demand has been the same: respect human rights, now.

There have been so many tremendous times of mobilization, with electrifying sounds, slogans and images of protest that spread rapidly, often virally, around the world. There have been the incredible movements such as Black Lives Matter, the Arab "Spring," Idle No More, Climate Strikes and Women's Marches. There have been moments when streets were filled with people for as far as the eye could see for days on end in Hong Kong, Santiago, Cairo, Khartoum, Algiers, Port au Prince and Beirut.

Importantly, in so many of these protests, the demands for change have been led by women and young people and have been fueled both on the streets and over social media. In fact the battle lines are increasingly digital, with repressive governments curtailing internet access[185] and shutting down social media platforms.[186]

There has been unimaginable courage as demonstrators stood firm while police and military advanced and opened fire, in Tehran, Rangoon, Baghdad, Khartoum, Bangkok, Caracas, Cali, and Bujumbura, in Ferguson, Missouri, at farmers protests in India, and in Gaza and the West Bank. There has been immense sacrifice and suffering, and so very many lives lost.

And incredible change has been catalyzed. People power defeated a troubling new extradition law in Hong Kong, toppled Omar al-Bashir after three cruel

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[182] Voices-Voix, www.facebook.com/voices.voix.coalition/.

[183] Matt Simmons, *RCMP arrest journalists, matriarchs and land defenders following Gidimt'en eviction of Coastal GasLink*, The Narwhal, 20 November 2021, https://thenarwhal.ca/journalists-arrested-rcmp-wetsuweten/.

[184] Rochelle Baker, *Elders for old growth arrested as Fairy Creek blockade readies for winter*, 8 December 2021, https://www.thestar.com/news/canada/2021/12/08/elders-for-old-growth-arrested-as-fairy-creek-blockade-readies-for-winter.html.

[185] *Myanmar's internet shutdown: what's going on and will it crush dissent?*, The Guardian, 17 February 2021, https://www.theguardian.com/world/2021/feb/17/myanmars-internet-shutdown-whats-going-on-and-it-crush-dissent.

[186] Emmanuel Akinwotu, *Nigerian broadcasters ordered to stop using 'unpatriotic' Twitter*, The Guardian, 7 June 2021, https://www.theguardian.com/world/2021/jun/07/nigerian-government-tv-radio-broadcasters-suspend-twitter.

decades of rule in Sudan,[187] forced a national reckoning around anti-Black racism in the United States following the police murder of George Floyd, and unleashed a process that will hopefully deliver a new human rights-based constitution to the people of Chile. And across Canada protests led by traditional chiefs against pipeline construction in Wet'suwet'en Territory, sparked a wave of solidarity protests in February 2020 that had resulted in unprecedented economic and political pressure in early 2020 before being overtaken and subsumed by the consequences of the COVID-19 pandemic.

In fact, it is difficult to think of consequential human rights moments, times of transformation and hard-fought victories, which have not been fueled by the power of people, mobilizing, claiming rights and demanding change.

(b) The Defenders

No one has taught me more, led me further or inspired my own human rights work more than the tenacious, courageous and imaginative human rights defenders, across Canada and around the world with whom I have had such good fortune to work closely over these twenty years. Sometimes we were brought together over the course of an afternoon; other times it has spanned the full two decades. While inevitably leaving dozens, in fact hundreds, of names out; there is no more powerful way to lift up the central role and power of human rights defenders, than to share some of their names and work.

Soeur Marie fearlessly driving her 4X4 to reach villages cut off by conflict in Guinea's Parrots Beak region; Cindy, unrelenting in her demands for equality for First Nations children in Canada; Celine weaving anywhere and everywhere on her motorcycle bringing support to isolated women at risk of violence in N'Djamena, Chad; Clementine always ready to listen and meet the needs of displaced communities in western Cote d'Ivoire; Abdullah, Maher, Ahmad, Muayyed, Omar and Hassan, whose pursuit for justice for Canada's role in their torture and other human rights violations was propelled by their insistence it not happen to others; Judy steadfast in defending the land and the waters at Grassy Nations First Nation; Luis Fernando's tireless efforts to advance respect for the rights of Indigenous peoples in Colombia; and Leilani, Bruce, Shelagh and Kathy's determination to strengthen the protection of international human rights in Canada.

Violah continuing to champion labour rights even while she herself was forced into hiding in Zimbabwe; Pierre Claver firm and unshakeable in speaking the truth about human rights to any and all in power in Burundi; Mohamedou getting word out about torture and other abuses even while still detained in the lawlessness of Guantánamo Bay; Connie, Bev, Helen, Ellen, Viviane, Muriel, Pam, Giselle, Bridget, Darlene, Delilah, Melanie, Widia, Melissa, Brenda and countless other fierce Indigenous women who have raised awareness and pressed for an end to violence against Indigenous women and girls from all corners of Canada; Ruth, Anthony, Margaret and other lawyers working to confront anti-Black racism in the Canadian justice system; and Leila's eloquence in spearheading a campaign for justice for her husband and twelve other men disappeared in military custody in Mauritania.

Alfred, felled by ill-health but whose journalistic voice could not be silenced by either Sudanese or South Sudanese governments; Angel passionately defending the rights of the Garifuna people and the environment in Honduras;

Alex with Chadian women's human rights defender Céline Narmadji, N'Djamena, November 2013.

Alex and activists from across Canada at AI Canada's AGM in Halifax, May 2015, join Honduran human rights defender Angel Colon after his release from prison in Mexico.

[187] Currently, however, a Sudanese military coup has put those important democratic gains in jeopardy. Human Rights Watch, *Sudan is Backsliding Dangerously*, 18 November 2021, https://www.hrw.org/news/2021/11/18/sudan-backsliding-dangerously.

Marie still speaking out about human rights concerns in Chad after being forced to flee as a refugee into Cameroon; Brenda so tireless in the campaign for justice for her brother Hector and the tens of thousands of disappeared in Mexico; Maurice's courageous defence of LGBTQI+ rights in Jamaica, Canada and worldwide; Blaise turning to the radio airwaves to spread the word about rights and justice in Chad; Sr. Maudilia bringing together Indigenous rights, human rights and the environment in campaigning for mining justice in Guatemala; Steve and Bonnie's conviction in using international norms to advance disability rights in Canada; and Cathy taking the struggle against homelessness to the streets of Toronto.

Guillaume, the schoolteacher who said he was sure that "Amnesty would show up" and then provided us with names of dozens of people killed and injured in the remote village of Sago in Cote d'Ivoire; Chief Roland, so clear and unwavering in resisting the Site C dam and destruction of the territory of his West Moberly First Nation; Monia, a clarion voice for justice for her husband Maher and for the vital importance of human rights in the fearful days following September 11th; Angelica, Luis and others who valiantly pressed on in Canadian courts against mining companies responsible for abuses in Guatemala; Elsa, who always found the time and energy needed to defend the rights of Eritreans; Amanda and so many other activists' courage in bringing the campaign for trans rights to Parliament Hill; the tenacious women of Argentina, Ireland and Chile who have worked tirelessly to overturn full abortion bans; Nicole and the rest of the Al Otro Lado team so resolute in bringing human rights to the US/Mexico border; and Rashid rushing on his motorbike to document the impact of unrelenting aerial bombardment in the Nuba Mountains of Sudan.

Makeshift refugee camp in Matamoros, Mexico, at foot of bridge to Brownsville, Texas, where thousands of refugees were stranded due to restrictive asylum measures introduced by the Trump Administration.

Isabel's courage in exposing the widespread harms of the Canada-backed Hidroituango dam in Colombia; Paul, Justin, Michael, Dennis, Marlys, Barb, Chantal, Jamie, Laila, Sarah, Lorne, Andrew, Erin, Vanessa, Matt, Amanda and so many other Canadian lawyers who give their brilliance and their time to advancing human rights in court; Naser's passionate efforts to defend human rights in Bahrain and press for an end to torture even as his own health rapidly declined; Sister Helen's outrage and passion in working against the death penalty in the United States, one life at a time; Mohamed organizing a Rohingya rights organization in the refugee camps in Bangladesh for the simple reason that "we have rights"; and Chemi, Gloria, Mehmet, Cherie, Sheng, Xun, Sherap, Cheuk, Carole, Grace, Kayum, Avvy, Winnie, Rukiya and other defenders who persevere despite being targeted, in Canada, for daring to speak out about human rights concerns in China.

Alex and former prisoner of conscience Naser al-Raas, a Canadian who was detained in Bahrain in 2012, at a rally at the Saudi Arabian Embassy in Ottawa, January 2015. Naser passed away in September 2016.

You have carried the struggle for human rights on your shoulders. You have won great victories and so often paid such a terrible price. You have taught and inspired me immeasurably.

The Human Rights Defenders Declaration makes it abundantly clear:

> Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedom...[188]

Our collective responsibility lies in sparing no effort to uphold and safeguard that essential right at every turn.

(8) BELIEVE IN RIGHTS

Human rights have taken us far; taken us far certainly since 58 countries came together at the United Nations in 1948 to adopt the Universal Declaration of Human Rights and taken us far over the twenty years I served as Secretary General. And reinvigorated and reimagined, human rights will take us far yet. For there is certainly still so very far to go. In fact, the finish line (if there is such a thing in the struggle for human rights) often feels as if it keeps moving down the track.

Progress has come when states have overcome politics and self-interest and committed to some of the imperatives discussed in these reflections, for instance by prioritizing, embracing, equalizing and enforcing rights. Progress has certainly come through the momentum generated as individuals and communities claim rights and social movements and activists defend rights.

But in many ways, human rights achievements have been most meaningful when sustained by an unshakeable belief in human rights. I have witnessed and experienced that so many times, in personal exchanges or as I have been swept up in a campaign or a movement.

(a) Believing is Solidarity

Believing in rights is the essence of what human rights solidarity represents. In 2002 I was honoured to bring 17 colourful eye-catching quilts, made up of 1360 patches of beautiful artwork and heartfelt messages of rights and justice from people across Canada, to frontline human rights organizations in Colombia. The presentation of the quilts became the unexpected centrepiece of a major event in Colombia's palatial Congreso, with the Vice President and a phalanx of all national media outlets in attendance.[189]

But what truly mattered was not the glitz of the setting or the prestige of who was in attendance. It was the deep sense of connection and solidarity that came with each quilt. They were displayed prominently in the offices of human rights groups or homes of activists, not because they were stirring works of art (which they were) but because they were imbued with a sense of protection, which was all about the belief in human rights. Years later colleagues have returned to Canada from visits to Colombia sharing accounts of having seen one of these quilts, still having pride of place.

And in 2018, that same forceful connection across thousands of kilometres was carried by hundreds of paper butterflies, again festooned with captivating designs and beautiful human rights messages from across Canada. We brought the butterflies to Mexico (symbolic of the epic migration of the monarch butterfly between our two countries) and to families of the disappeared and organizations working to support their courageous campaign for answers and accountability.[190] Two years later a photograph made its way back to us from the Center for Women's Human Rights in Chihuahua,[191] with butterflies still taped to the wall, in full flight towards a vision of safety and equality, a flight clearly propelled by a belief in human rights.

Alex speaking at a rally in Mexico City, on Mother's Day in May 2018, bringing hundreds of paper butterflies from Canada in solidarity with families of the disappeared.

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[188] Human Rights Defenders Declaration, *supra*, note 173, article 1.

[189] Amnesty International, *Colombia: El derecho a defender los derechos humanos*, AMR 23/101/2002/s, 9 September 2002, https://www.amnesty.org/download/Documents/112000/amr231012002es.pdf.

[190] Amnesty International, *You are not alone*, 9 May 2018, https://www.amnesty.ca/blog/you-are-not-alone.

[191] https://cedehm.org.mx/es/.

(b) Believing in Words on Paper

How many times I have turned a corner, sat down to meet with a government minister, gathered around a table in a human rights organization's office, or sat down to talk in someone's home and looked up or looked around and seen the Universal Declaration pinned on a bulletin board or an Amnesty International report being passed around.

I remember a framed version of the Universal Declaration hanging beside the door of the room in which we were interviewing prisoners in Ruyigi, Burundi, and also taped to a sheet dividing the small space of a Rohingya refugee family's home in Bangladesh.

While travelling through conflict-ridden and isolated parts of eastern Chad in 2006 we came upon a group of elders, displaced from a village that had been attacked a few months earlier, who were sitting under a tree reading an Arabic translation of a recent Amnesty report describing that attack.[192] Similarly in Côte d'Ivoire in 2011, we had arrived with a box full of copies of the most recent Amnesty report documenting grave human rights violations associated with the country's volatile 2010 presidential election, which were distributed and shared so quickly and widely that we kept crossing paths with well-thumbed copies in every village we visited throughout the west of the country.[193]

On a subsequent trip to eastern Chad in 2010, I had a powerful and entirely unexpected reunion with Abakar Yusuf, who in 2006 had provided me with wrenching details of the attack on the village of Koloy, of which he was the chief. His wife had been killed in that attack, only days before I met Abakar. He and several hundred people from other villages in that area had been forced to flee and had taken shelter out in the open in Adé, the largest village in the area. Abakar's account was so compelling that along with his photo it was prominently included in the report we wrote at that time. That report became the basis for a number of subsequent trips I made to New York to meet with members of the UN Security Council in an effort to convince them to agree to deploy a peacekeeping mission to the region. I began every one of those meetings by sharing Abakar's story.

Alex and Abakar Yusuf, Eastern Chad, May 2010.

I had never thought I would encounter Abakar—who had no means of communication and certainly no home when we met in 2006—again. But four years later, we serendipitously found each other in an internally displaced persons camp in Koudigou.[194] I did not have a copy of the report[195] to give to him but had a version on my laptop that I could show him, and was also able to share accounts of the Security Council meetings which had, ultimately, been a key factor leading to the decision in September 2007 to establish MINURCAT (United Nations Mission in the Central African Republic and Chad),[196] meetings in which he figured prominently. I made arrangements with local UN officials to ensure Abakar received a paper copy of the report. Abakar's pride and satisfaction were evident. His parting words to

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[192] Amnesty International, *Chad: Thousands displaced by attacks from Sudan*, AFR 20/005/2006, 31 May 2006, https://www.amnesty.org/en/documents/afr20/005/2006/en/.

[193] Amnesty International, *Côte d'Ivoire: 'They looked at his identity card and shot him dead'; Six months of post-electoral violence*, AFR 31/002/2011, 25 May 2011, https://www.amnesty.org/en/documents/afr31/002/2011/en/.

[194] Alex Neve, *Still more for us to do in Chad*, 1 June 2010, https://www.amnestyusa.org/still-more-for-us-to-do-in-chad/.

[195] Amnesty International, *'Are we citizens of this country?'; Civilians in Chad unprotected from Janjawid attacks*, AFR 20/001/2007, 29 January 2007, p. 7, https://www.amnesty.org/en/documents/AFR20/001/2007/en/.

[196] UN Security Council, Resolution 1778, UN Doc. S/RES/1778 (2007), 25 September 2007, https://undocs.org/S/RES/1778(2007).

me were to note that we had been able to accomplish a great deal together, but that there was clearly still much more to do.

(c) Believing in names

Human rights work is enormous and all-encompassing, dominated by reports of hundreds, hundreds of thousands, and even millions of people experiencing grave human rights violations. Some of the most important moments for me have been the reminders that those millions of people experience those violations one person at a time.

In March 2001, at the end of a long day of interviews of refugees from Sierra Leone who had been displaced by attacks against them by Revolutionary United Front (RUF) forces who had crossed over into Guinea,[197] I met 60-year-old Mabinte Banguru. Three years earlier, she fled Sierra Leone after her husband was shot in the back by RUF fighters. A month earlier, having fled a besieged refugee camp in southeastern Guinea, she watched and wept helplessly as those same rebels abducted her 15-year-old daughter and mercilessly assaulted her 17-year-old son. She had had no news of her daughter, but feared the worse, knowing only too well the RUF's record of rape, mutilation, and murder.

Mabinte and Sorie Banguru at a refugee transit camp in Southeast Guinea, March 2001.

I asked Mabinte for the names of her family members. She readily gave me her children's names. She then paused and was silent. Obviously emotional, she exchanged words with our interpreter. He told me she was finding it difficult to say her husband's name, because she had not spoken it aloud for several years. And then she did.

Backarie Mambu. I felt that she had kept his name to herself so that she would not forget—but that she was now passing his name to me because she believed that would help ensure he would not be forgotten. Backarie Mambu.

In November 2006 our Amnesty International team in eastern Chad came upon the ruins of the village of Djorlo, which had been attacked and razed to the ground days before our arrival, forcing the hundreds of people for whom the village was home to flee. Two days later we came upon the survivors of that attack, around 100 kilometres from Djorlo, living precariously in an open field. We sat with the people of Djorlo as they provided details of the horrific attack, which had included several incidents of rape and of elderly people and children being burned alive in their huts. 40 people had died in the attack. I sat with village elders as they provided me with names and details of those who had been killed. My notebook filled quickly and we soon reached 39 names, and then we stopped.

I asked about the 40th name. There was a great deal of discussion and consultations with others who had not been part of our conversation. People reviewed the names in my notes and I was asked to read them out several times. There was a growing sense of agitation and distress, and I was certainly concerned that increased stress was the last thing that the people of Djorlo needed at such a difficult time. I verified if they were certain that 40 people had died in the attack; they were. I made it clear that it did not matter if we were missing one of the names; but that did not ease their anxiousness.

And then I was notified that the final name had been remembered. Rather than simply being told that name by whoever had remembered it, I was asked to reassemble with the elders, under the largest tree in the area. Only once we were all seated did one of the men speak his name: Haroon Yacoub.

And there was so much in that fleeting moment of Haroon Yacoub's name being spoken. It was not the fact that Haroon had been killed that was the point, but rather it was affirming that he had lived and would long be cherished and remembered for that life. And that his name was being spoken to me and through me and Amnesty, to the world, because they believed that would both lift him up and serve the people of Djorlo.

I have written Haroon Yacoub's name on a piece of paper that I quietly slip into the back of my new annual agenda every January 1st, which is then carried with me everywhere. It has become worn, faded and a bit smudged over the years since, but a very simple reminder of the essential truth that believing that every life lived matters, deeply, is the very core of universal human rights.

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[197] Amnesty International, *West Africa: Guinea and Sierra Leone, No place of refuge*, AFR 05/006/2001, 23 October 2001, https://www.amnesty.org/en/documents/afr05/006/2001/en/.

(d) Believing in the Future

If anything is clear as I wrap up these reflections it is the ups and downs and give and take of the human rights struggle over these twenty years. The same would almost certainly be said for any period of time. And despite the setbacks, disappointment and tragedies, a fundamental belief in both the potential and the power of human rights does prevail. That is so very evident when we consider the degree to which strong human rights movements have coalesced around the many overarching and urgent concerns we face globally today, such as the rise of hate and misinformation, the climate crisis, the challenges of new technology and the digital sphere, and the COVID-19 pandemic. Intuitively and often passionately, people look to human rights for solutions and frameworks that chart a path forward.

(i) Believe that we can overcome hate

In the face of hateful politics from leaders such as Donald Trump, Rodrigo Duterte and Jair Bolsonaro, the rapid rise of online hate and violence, often targeted at women, LGBTIQ+ individuals, and racialized communities, and the efforts of many public figures to vilify the media and promote misinformation, human rights groups have rallied.

But of course, hate extends far beyond the ugly political agendas of opportunistic and racist politicians, it permeates society. As I write, Canadians are confronting another wrenching instance of anti-Muslim hate. On 6 June 2021, five members of the Afzaal family were deliberated targeted in a racist and very likely terrorist attack in London, Ontario when a speeding truck was deliberately driven into them as they were out for an evening stroll. Four family members died and only their 9-year-old son survived. Four years earlier a gunman opened fire at a Quebec City Mosque, killing six worshippers and injuring five others. Hate is real in Canada, and it kills. We must believe that it can be overcome.

(ii) Believe that we can save the climate

Recognizing that the existential crisis posed by the climate crisis is entirely about human rights, in its origins, manifestations and impact, there has been an unprecedented mobilization bringing together environmental and human rights movements. After all, as the former global Secretary General of Amnesty International, Kumi Naidoo, frequently remarked, "there are no human rights on a dead planet."[198]

(iii) Believe that we can curtail technology's harms

Human rights groups and defenders have rapidly embraced the many tangible benefits that new information technologies, digital platforms and social media channels provide in human rights research, activism, mobilization and awareness-building. I certainly have. It has however been a fraught relationship, increasingly so. For every benefit, it often seems that an area of concern emerges. It has become abundantly clear that technology poses both direct and insidious risks to a wide range of human rights, including racism, sexism and discrimination, the right to life and protections against torture and ill-treatment, freedom of movement, free expression, and certainly privacy. Be it the direct risk of new automated weapons or the less visible but gravely serious impacts of facial recognition and other artificial intelligence innovations, human rights researchers and campaigners who draw upon the considerable benefits of technology in their work bring that energy and scrutiny to efforts to curtail technology's many human rights harms.[199]

(iv) Believe that we can build back for human rights

And now there is COVID-19. As the scale and implications of the pandemic became clear in early 2020, it was immediately evident that all aspects of the crisis—of both the public health and economic dimensions—were rooted in human rights. And equally, it was clear that the solutions, particularly the growing interest in ensuring that recovery from the pandemic would lead to transformative societal change, were human rights solutions. As such, there has been tremendous mobilization around initiatives focused on "building back better,"[200] a "green recovery,"[201] and a "people's vaccine."[202]

But leaders, even when pursuing commendable programs and announcing substantial funding, have failed deliberately and explicitly to ground their efforts

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[198] Inter Press Service News Agency, *Q&A: A New Leader with a Vision to Redefine Human Rights*, 21 August 2018, http://www.ipsnews.net/2018/08/qa-new-leader-vision-redefine-human-rights/.

[199] Amnesty Tech, https://www.amnesty.org/en/tech/.

[200] *#BuildBackBetter: Unifor's Road Map for a Fair, Inclusive and Resilient Economic Recovery*, https://buildbackbetter.unifor.org/.

[201] David Suzuki Foundation, *Green and Just Recovery*, https://davidsuzuki.org/project/green-and-just-recovery/.

[202] The People's Vaccine, https://peoplesvaccine.org/.

in the frameworks of equality and accountability that come with a human rights approach. And 18 months into the crisis, the inexcusable disparities laid bare in the inequalities and vulnerabilities from neighbourhood to neighbourhood and community to community in Canada, and from country to country and region to region globally, remain raw and grim. People believed that human rights must guide all aspects of responding to COVID-19. Governments unfortunately have so far failed to embrace that same belief, to our collective detriment.

(9) FINAL WORDS

I met Violah, a labour organizer and opposition politician, while she was in hiding during a volatile and fearful time in Zimbabwe in 2004. She was at great personal risk, and living apart from her family, simply because she was a determined human rights defender. But despite that peril, she was still determined to lend her support to others. I asked her why and how she found that determination, particularly given the very real dangers faced by her and her family.

Her response has stayed with me ever since: *if not me, who?*

Prior to these eventful twenty years, there was a momentous evening (for me at least), 36 years ago. I was in my first year of law school at Dalhousie University in Halifax and I saw an intriguing notice on a student bulletin board giving details about the monthly meeting of the Halifax Amnesty International group. I went, and never looked back. Two compelling impressions remain with me from that evening.

First, the inspiring and welcoming Amnesty members I met were of all ages, backgrounds and interests, and from many different corners of the world; but were all united in a common sense of purpose and possibility. It was the evening I first heard of the Universal Declaration of Human Rights and our shared responsibility to uphold it.

Second, as a young activist I was energized by Amnesty's "be the change" message. Yes, it is a world full of deeply entrenched cruelty and injustice (then as now), which can readily seem insurmountable (then as now). But here is one step to take, one letter to write - right now - to begin to make a difference. It was empowering in 1985 and certainly has powerful and necessary resonance in 2021. I wrote my first Amnesty letter that night, on behalf of a law student named Beatriz who had been forcibly disappeared in El Salvador.

And I come back to Violah's words, *if not me*, which readily extend to, *if not us, who*? That invites one final reflection, which is my profound appreciation and admiration for the incredible people who make up the Amnesty International movement, in Canada and everywhere. We have climbed upon each other's shoulders. We have followed in one another's footsteps. We have held hands. *If not us, who*?

These are not easy times for human rights. But just as I did at that first Amnesty International meeting 36 years ago; as I was reminded in Violah's words; and as was so apparent when the International Criminal Court was established and the Arms Trade Treaty adopted, when transgender rights were enshrined in Canadian law, when abortion bans were overturned in Argentina, Ireland and Chile, when MINURCAT was deployed in eastern Chad, when Bashir and Homa were freed in Ethiopia and Iran, when Derek Chauvin was convicted for murdering George Floyd, when Syrian refugees were welcomed in Germany and Canada, when Maher, Abdullah, Ahmad, Muayyed and Omar were compensated for Canada's role in their torture and other abuses, and when the courage and leadership of Indigenous peoples forced Canadians to confront who we are as a nation, I look around and see hope and possibility. And I know that my successor, Ketty Niyabandi, will provide the vision and leadership that is needed.

That collective determination will take us far. As it must. And it is all about human rights.

FROM SHELTER TO HOME: A CAREER ADVANCING THE RIGHT TO ADEQUATE HOUSING

Leilani Farha was interviewed by Paige Holland for CYHR.

Leilani Farha is a Canadian lawyer and human rights advocate. From May 2014 until April 2020, she served as the United Nations Special Rapporteur on the right to adequate housing, appointed by the UN Human Rights Council with a mandate focused on housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context.[1] During her two consecutive 3-year terms, Farha focused on the global housing crisis and treating housing as a human right instead of a commodity. Farha is currently the Global Director of The Shift[2], a non-governmental organization that focuses on housing issues and homelessness in Canada and around the world. In 2017, Farha founded The Shift with the UN Office of the High Commissioner for Human Rights and the global network United Cities and Local Governments[3]. Prior to her service at the UN, Farha worked for decades with Canadian and international NGOs, movements and networks advocating for housing rights and their effective realization. In the course of her work, Farha has contributed to the development of several guidelines and standards for a human rights-based approach to the housing crisis around the world and has worked with governments to develop new policies for adequate, affordable housing.

Canadian Yearbook of Human Rights (CYHR): Prior to taking up your mandate as UN Special Rapporteur, tell us about the work you did that prepared you for such a global responsibility.

Leilani Farha (LF): For better or for worse my entire working life has pretty much been devoted to seeing the right to housing and other social and economic rights implemented. In fact, my interest in the human right to housing started whilst I was doing a combined LLB/MSW at the University of Toronto. As part of that programme, I undertook a work placement at the Centre for Equality Rights in Accommodation (CERA) in Toronto and a summer internship in Palestine where I worked to develop a right to housing campaign with local organizations. After that I worked at the Centre on Housing Rights and Evictions, COHRE – an international NGO[4], and several years later I became the Executive Director of CERA and then Canada Without Poverty. In

On mission (September 1995) with COHRE in the aftermath of the earthquake in Kobe, Japan.

[1] For her appointment, mandate and work, see: https://www.ohchr.org/en/special-procedures/sr-housing/ms-leilani-farha-former-special-rapporteur-2014-2020#:~:text=Leilani%20Farha%20(Canada)%20served%20as,May%202014%20until%20April%202020.

[2] See: https://make-the-shift.org/

[3] See: https://www.uclg.org/

[4] For more on COHRE (1991-2014), see its permanent online archive at: https://issuu.com/cohre

all of those positions I used international human rights law and UN mechanisms as essential advocacy strategies and tools.

CYHR: In which personal work projects are you currently engaged?

LF: When I was UN Special Rapporteur I wrote a ground breaking report on the financialization of housing and human rights.[5] It was the first UN report to expose the ways in which institutional investors (e.g. private equity funds, pension funds and real estate investment trusts) are undermining the right to housing through their investments. Thanks to a fellowship with the Open Society Foundations, I am now in the process of developing that body of research into a set of legal directives on the financialization of housing. The intention is for the Directives to demonstrate why and how governments must address the uber-commodification of housing by protecting housing as a human right in line with their international human rights commitments.

I am also working alongside a group of academics and human rights advocates from around the world who have come together to form the Council on Urban Initiatives. It includes some of the world's leading urban thinkers like Mariana Mazzucato, an economist, Saskia Sassen, a sociologist, and several Mayors including from Sierra Leone and Turkey. It also includes UN Habitat, the UN agency focused on human settlements. The aim of the group is to highlight wicked problems confronted by cities and explore successful solutions to those problems and the barriers encountered along the way.[6] The Shift has also been working to create more action by governments to address homelessness in a manner that is consistent with human rights. I've also engaged with several groups focused on the privatization of public services and human rights. These groups are challenging old notions of capitalism.

CYHR: As the UN Special Rapporteur on the Right to Housing, what did the job entail and what did you accomplish?

LF: UN Special Rapporteurs are appointed by the Human Rights Council. That means that the Member States appoint individuals to act as experts in thematic and country specific areas. I was appointed in 2014 to be the third Rapporteur on the right to housing, a post that I held for six years. Some call Special Rapporteurs "global watchdogs". The post requires monitoring of governments – globally – to help ensure they are meeting their international human rights obligations with respect to housing. It also requires an understanding of experiences on the ground. As Special Rapporteur on the right to housing the main guiding questions are: are people enjoying the right housing – particularly vulnerable groups – and, if not, how and why is it being compromised? What are the structural issues causing housing disadvantage and resulting in violations of the right? Are there global patterns that are compromising the right to housing? As the expert, you're also responsible for assisting in developing better understandings of the meaning and application of the right to housing. As Special Rapporteur I was responsible for writing two thematic reports per year. I used that as an opportunity to cover a range of issues that required greater elucidation. The aim of these reports was to help States better understand their human rights obligations, but also to help the NGO sector, and individuals, as well as the private sector, to understand that the housing crisis is a human rights crisis and could be solved if the right to housing was taken seriously and effectively implemented.

Being interviewed in New York by Al-Jazeera.

For example, I wrote a report on Indigenous peoples and the right to housing.[7] This report focused on what the right to housing might mean for Indigenous peoples, and imagined a new framework marrying the right to housing with the United Nations Declaration on the Rights of Indigenous Peoples. I also wrote a report about the right

[5] See: https://www.ohchr.org/en/special-procedures/sr-housing/financialization-housing

[6] See: https://councilonurbaninitiatives.com/

[7] See: UNGA doc. A/74/183 of 17 July 2019, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/220/89/PDF/N1922089.pdf?OpenElement

to housing in the context of persons with disabilities.[8] As mentioned earlier, I also wrote a ground breaking report on the financialization of housing and the impact that's having on the right to housing globally. Other reports focused on homelessness, the connection between the right to housing and the right to life, and the human rights obligations of sub-national governments in the area of housing.[9] My swan song was a set of Guidelines for the Implementation of the Right to Housing intended mainly for governments and private actors.[10]

Beyond those accomplishments, I think what I was able to do most effectively was to ignite a global conversation and a kind of global energy on housing as a human right. I think I popularized the idea that housing is a human right and shouldn't just be treated like other commodities. There is a difference between gold and housing. Gold is not a human right whereas housing is and therefore when governments or private actors are engaged in housing, they have to consider what it means that housing is a human right. They have to alter their practices – they can't just treat it like they might gold, mining it for its value. Of course, having PUSH[11], the documentary film, made about this issue and my work has helped turn this into an issue that many governments are now aware of.

Filming PUSH–The Film (2019).

So, overall, what I tried to do as Special Rapporteur was to use that very, very privileged position in a responsible way. I viewed it as public service. I really tried to encourage government compliance, without chastising, but rather by trying to encourage governments to understand human rights as a carrot, rather than a stick. That human rights are a tool that would help governments deal with the housing crisis. At the same time, I felt my responsibility was to use my platform to amplify the voices of people on the ground. I spoke with people living in homelessness in informal settlements in India, and they don't have a voice with their government, or in Egypt or in The Philippines, or in Chile, Indonesia, Nigeria, or in Canada or the United States, and I felt my role was to act as that bridge to help bring those voices – not reinvent those voices – but really convey what people were telling me on the ground, by translating it into language they can hear and understand. The ultimate goal was to motivate governments to do more and to do better.

On mission in The Philippines.

CYHR: What was your general experience during your time as UN Special Rapporteur?

LF: It is a job of a lifetime. I mean, it's such a privileged position with so much potential. I felt that every day and I never took it for granted. It was probably the

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[8] See: UNGA doc. A/72/128 of 12 July 2017, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/212/20/PDF/N1721220.pdf?OpenElement For Leilani Farha's accompanying statement to the UNGA, delivered on 23 October 2017, see: https://www.ohchr.org/en/statements/2017/10/statement-ms-leilani-farha-special-rapporteur-adequate-housing-seventy-second?LangID=E&NewsID=22285

[9] The UN Special Rapporteur's reports are available online (in the UN's six official languages) at: https://www.ohchr.org/en/special-procedures/sr-housing/annual-thematic-reports

[10] See: UNHRC doc. A/HRC/43/43 of 26 December 2019, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/353/90/PDF/G1935390.pdf?OpenElement An accompanying Infographic is available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Housing/InfographicadequateHousing.pdf

[11] See: https://www.pushthefilm.com/

hardest six years of my life; I worked incredibly hard from early morning to late at night, pretty much every day of every week and I barely took any vacation, etc. There were definitely sacrifices, with my family bearing the brunt. However, I couldn't begrudge that because it is such a privileged position. It was also an eye-opening experience. It was through the role of Special Rapporteur that I saw the global patterns. Everywhere I went, no matter how affluent or how poor the nation was, there were affordability problems, evictions, forced evictions, homelessness … From that I was able to see and say unequivocally, there is a global housing crisis.

It was such a rich experience, so tiring, very stressful. It was also incredibly humbling. I found across the world that people are just so amazing and so resourceful. Unfortunately, the resilience of people is their downfall because governments know that people are resilient and will do anything to survive. And so, they abandon their own people, knowing that their resilience will keep them alive. It was very humbling to see how incredibly resilient people are in the face of extreme adversity.

CYHR: Is there anything that you'd like to achieve specifically during your career?

LF: Of course! I want to end global homelessness! Or at least have governments recognize it as a prima facie violation of the right to housing. Seriously. I definitely hope to see within my lifetime more progress by governments in terms of implementing the right to housing and I would like to see all governments adopt housing strategies that are based on human rights that really reflect an understanding of why housing is a human rights issue. Governments are still treating housing like something to drive and grow domestic economies and I'd like to see that shift.

At a tent encampment in Vancouver, British Columbia.

CYHR: A specific emphasis of your work has been the position of women and women's rights. What are the key elements of women's housing rights and what needs to be done to realize them?

LF: Women experience housing in very particular ways. We can be as feminist as we want to be, but the bottom line is that in most countries in the North and in the South, no matter how developed the economy is, women play a key role in housing and home. I think the pandemic exposed that, when push came to shove, women ended up picking up a lot of the household duties, responsibilities, childcare responsibilities, and are often the emotional center of the home. I think those generalizations are actually true. Because of that we have to understand the right to housing in relation to those experiences. What I love about human rights is that it is responsive to the individual experience while remedying the structural causes of violations. Where women are concerned with respect to housing, they're so rarely consulted in the development of any housing-related policy, in terms of the actual creation of housing. Housing structures might look very different if women were really, truly consulted, for example where children play in a household or within a community might be very different if women have a say.

Imagine girls hitting puberty and menstruation and not having access to water and sanitation. I mean it's humiliating and devastating in a way that men don't experience. When a woman is menstruating, we know that there are very real privacy issues and delicacies there. Imagine a young girl, hitting puberty and not having any privacy.

Of course, women also experience violence in the home; that deserves particular attention and must be understood as a violation of a number of rights – women's rights to non-discrimination and equality, rights to personal security and life, as well as the right to housing.

It's very important that a gendered lens be used when diagnosing violations of the right to housing and when figuring out what needs to be done to implement it.

We now also have an understanding that those who are transgender, those who are gay and lesbian, racialized communities, migrants and refugees all have very particular experiences of housing and particular experiences of discrimination in housing. There are a lot of groups who sit at the lowest end of the economic spectrum who really interact with housing in very particular ways and have very particular experiences. All of that needs to be addressed through the human rights lens. One of the central tenants of the right to housing is equality and non-discrimination. Actually, that was my role in the United Nations; my title actually was the Special Rapporteur on adequate housing and non-

discrimination in that context. This meant it was really important to understand the experiences of marginalized groups with respect to housing in order to then figure out what the remedies and solutions would be.

At the steps of the Parliament of Canada.

CYHR: What has been your own experience as a female human rights advocate?

LF: It's a gendered world; housing in particular is a very male dominated area. I situated a lot of my work at the nexus between housing and finance and there are probably no more men-focused bastions than those! I am also very casual in my approach – I think that provokes certain reactions and interactions. It's been really interesting to me to see how people interact with me, to see how government officials respond to me. It seems to run the gamut from taking me very seriously in light of my considerable expertise, to dismissing me as a light-weight! It's probably no different than any other woman's experience in male-dominated fields; human rights itself is not necessarily male-dominated, but the higher up you go, the more male-dominated it is. I did experience some difference between how male Special Rapporteurs are treated and how female Special Rapporteurs are treated by governments, as well as by the human rights system itself. That being said, overall, I feel that the good work I've done has been recognized by many. I know that there's sexism and maybe even misogyny out there and being used against me. It's not just that I'm a woman; I'm a racialized woman, and I operate in very white male-dominated areas. These days I try not to let my work be affected by that, even when it is injurious and hurtful on a personal level. I know I have something to say. I know that human rights is value-added in the conversation and I am just really committed to trying to help marginalized groups access decent housing.

CYHR: Given several of the current issues regarding Indigenous peoples in Canada, how has inadequate housing and homelessness specifically impacted this marginalized group?

LF: Indigenous peoples aren't just homeless, they're landless. They have been removed from the world – from their lands. There will be no addressing homelessness in Canada until there is reconciliation, genuine reconciliation with Indigenous peoples. As I read more and listen more to Indigenous peoples and Elders, I'm really trying to open myself up more to those conversations. We cannot underestimate the trauma caused by colonialism. On top of that, the residential schools aspect of colonialism is a very big part of the colonial history and ongoing legacy. It's ongoing history in Canada. And its very alive in Canada's housing system.

The way in which homelessness has been dealt with across the country is through a shelter system. Homeless people are expected to go into the shelter system. I have an increasing understanding that that's just a replication of the colonial structures that have damaged Indigenous peoples and have removed them of their self-determination and of their personhood. I think that our government systems need a wholly different approach to addressing homelessness, and one that embraces reconciliation in a meaningful way. Indigenous peoples themselves should be the ones to point the way, to tell how this should go forward. I've read too many real stories about the separation of Indigenous peoples from their lands and the damage that was done to them. To add to that has been their institutionalization. When you have homeless people living in parks across the country – disproportionately Indigenous peoples – you can't just evict them from the parks and put them in shelters; that is a complete replication of colonialism: removing them from their lands and placing them in institutions that are hostile to them. We need new ways and Indigenous peoples are the ones who will give that guidance. We have to be open to ceding privileged roles to Indigenous peoples. That includes me. This genocidal aspect of Canada is very serious and the discovery of these mass graves has really stopped me in my tracks, I have to say. I'm now evaluating this country as a genocidal country. My ancestors and relatives were colonized by the British and the French, so I have some understanding of colonization. I also understand that I am living in this country and that I pass as white, and have a lot of privilege. I own land! It's got me thinking about how to use my own position more constructively.

CYHR: How did your education prepare you for your subsequent professional life?

LF: I did an undergraduate degree at the University of Toronto in English literature. It's really interesting because I think there's some misunderstandings with English literature. English literature for me was very much about the social world. Whether I was reading Chaucer or Dickens or something more contemporary like Toni Morrison, all those authors are treated in their own social reality. I recently read that someone is doing this massive readathon of thousands of books because they believe that fiction is predictive. Anyway, that's what I did as my undergraduate study and then I had a summer job working to help students find jobs. I ended up working with some homeless youth who needed help finding jobs or encouragement to go back to school. That seemed like important work and I liked it. I realized that maybe I should do some graduate work to get some practical skills. Rather than just doing a law degree I decided to do a combined Social Work/Law degree which was new at the time. I was only the second person to have done that at the University of Toronto, but I think it really well-situated me in terms of the work I do now. Especially as Special Rapporteur – that training – how to talk to people, including those who have suffered trauma, was invaluable.

CYHR: During your time at university, what motivated you to become involved in the filed of human rights?

LF: When I decided to do the MSW/LLB program there was a work placement component. I am not exactly sure why, but I thought I should do something housing related. Maybe it was related to my father's family history of having been dispossessed of their lands and my father having to leave his home to come to Canada. In any event, I asked my supervisor if she thought I should try to get a placement at the Ontario government's Ministry of Housing. She laughed immediately and she said she didn't think I was really the government type and that maybe I would be interested in an NGO. I didn't even know what an NGO was at the time! She told me about the Center for Equality Rights in Accommodation (CERA) which is an NGO that still exists in Toronto (by another name) with a province-wide mandate dealing with discrimination and housing.[12] I'll never forget going into the interview because I just hit it off with everyone there. That's how I ended up in the whole housing world. From there I ended up doing an international human rights internship through the University of Toronto. I was the first student of that program to go to Palestine. That opportunity exposed how important and useful international human rights law can be in the struggle for human rights at the domestic level. And I've been doing that work ever since!

On the Sea Wall in Jakarta, Indonesia.

CYHR: In your opinion, besides homelessness, what is the current major human rights issue in the world?

LF: I think there's a global housing crisis and I think it's multi-dimensional; homelessness is definitely part of that, and the very cruel treatment of people living in homelessness who are criminalized, which is very common. The growth of informal settlements is alarming. People living in informal settlements are very rarely listened to. They're very rarely consulted. If marginalized groups had the agency to be a part of these decisions in housing, the decisions might be very different. There are also very weak tenant protections – especially when compared with the political power of those in the housing provision and finance systems. Of course, the domination of our economies by institutional investors and private equity in a very unregulated fashion, not just in housing, but in water and food and health care, is certainly the human rights issue of the day.

[12] See: https://www.equalityrights.org/

Another very big human rights problem is that human rights defenders are really under attack. This is true around the world, particularly for those defending land and housing rights. We see this time and again. I have a friend and a colleague, Omar Radi, who's a journalist in Morocco. He was looking into the possibly corrupt behavior of the Government of Morocco with respect to the purchasing of land forced evictions of households in order to build golf courses and luxury resorts. Omar is now in prison for a six-year prison term. Another colleague and friend in Spain, which is a part of the European Union, is a tenant organizer and was working with two tenants to prevent them from being evicted. He is now facing charges and has been held by the public prosecutor for "violent advocacy". We know that Indigenous land rights defenders have been killed in Honduras, in Guatemala and elsewhere. I take this as very serious because obviously human rights defense is absolutely necessary for equality and for well-being.

CYHR: How has the COVID-19 pandemic affected worldwide human rights issues?

LF: All of these human rights issues with respect to housing existed before COVID-19. However, the pandemic has certainly highlighted gross inequality in most societies. At first, everyone was saying "we're all in this together" and everyone is affected by the pandemic because we can all contract it. Then very quickly it became clear that BIPOC were contracting COVID-19 at higher rates, as well as low-income people living in informal settlements or in shelters. People with property, wealth, and white-collar jobs that can be done remotely fare much better and will come out winners. Billionaires in particular are coming in as huge winners; I think their wealth has increased by 54% in the last year, and a new billionaire was created every 17 hours during the first year of the pandemic.[13] In other words, some people have fared much better than others in all of this. I think the pandemic has also exposed the ability of governments to be responsive. I think a lot of governments responded to the pandemic very quickly and tried to do a lot of things that they hadn't been doing before. This suggests a nimbleness and liquidity of governments that is very important for the realization of human rights. But the pandemic has also exposed that governments aren't really committed to human rights at large. They haven't really seized this opportunity to ensure they create more equal societies for the long term.

CYHR: Do you anticipate those issues to be solved or improved upon in the near future?

LF: I read that pandemics and crises create a three-year window of opportunity. And if you don't seize the opportunity, that's it. You've got a three-year window. I am hoping that we see some major improvements in the next three years. There are conversations going on about a new capitalism, and a new social contract. I don't see enough integration of human rights in those conversations. I certainly don't see much government recognition that recovery will require addressing the inequalities being created and exacerbated by institutional investors in areas like housing, water and health care. For example, my sense is that little progress will be made unless the financialization of housing and the understanding that institutional investor practices are driving inequality in our society is integrated into discussions of a new economy or new social contract.

CYHR: What do you predict will be one of the leading human rights issues that will affect the most people in the coming future?

LF: I think the pandemic has exposed that addressing some aspects of the fallout of the pandemic, like the need for income assistance, can in fact result in worsening the housing crisis. That's what we are seeing in Canada, where the housing market has become completely unaffordable for most of the country's population. Institutional investors have moved in and they're purchasing apartment buildings and even single-family homes en masse as we sit here. Those institutional investors have a business model that requires them to constantly raise rents and to seek above-guideline increases to rents. I anticipate this as an ongoing problem, because I'm not seeing that governments are responding to it through policy or legal reform. I also think we're seeing that climate change interacts with the housing crisis in real ways. The people most affected by the heatwave in Western Canada are homeless people who have absolutely nowhere to shelter to stay cool. Without the government stepping in and providing those cooling centres, homeless people were at real risk. Climate change related disasters are causing housing precarity too: fires and floods destroy homes. And the solution to the housing crisis most often referenced – build more housing – will also contribute to CO2 emissions and contribute to the climate crisis unless done in a green way. The combination of a climate crisis with a housing crisis and a global pandemic is going to create a lot of negative consequences for a lot of people.

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[13] On the rise of inequality notably in terms of extreme wealth gained during the global pandemic, see, e.g.: https://inequality.org/great-divide/updates-billionaire-pandemic/ ; https://www.oxfam.org/en/press-releases/ten-richest-men-double-their-fortunes-pandemic-while-incomes-99-percent-humanity ; and https://www.theguardian.com/business/2020/oct/07/covid-19-crisis-boosts-the-fortunes-of-worlds-billionaires

All-season campaigning at Ottawa tent encampment.

CYHR: How do you anticipate the human rights field will evolve in the longer term in Canada and globally?

LF: I think there's going to be more integration. Yesterday I was on a call with global institutional investors, and folks who are working to figure out how to use our existing system to better provide affordable housing, whether it's through capitalism or through investment. I wouldn't necessarily have been in conversation with them a few years ago, but I now understand how necessary it is that even if we don't see eye-to-eye we do need to be talking and maybe, eventually, collaborating. Today I was on a call with the City of Toronto and we were all trying to work on the issue of encampments and homeless people living in the parks in Toronto. Realizing that we all have different strengths and different things to bring to the table – the City with resources, the doctors with an understanding of the health implications of homelessness, especially during the pandemic, and The Shift with an understanding of what a human rights-based approach to addressing homelessness in Toronto means. Unfortunately, there were no homeless people on the call. And we need Indigenous people in every conversation. It's only with this combination of expertise and skills that we will come up with real, long-lasting solutions. I do think that more and more people are realizing and experiencing in this world that we have to have a broader coming-together – that we can't do these things alone. I started The Shift for that reason. I think these new relationships that break down the us vs. them divide, these new conversations are what' s going to help move us forward.

CYHR: Given your own line of work, how do you expect the global housing crisis to evolve after the pandemic? Specifically in Canada, the housing market has become particularly expensive. How do you expect financial issues such as the housing market to play into the future of the housing crisis?

LF: I don't think things will get much better in the short term. Right now we have a problem between monetary and fiscal policy. Monetary policy has set low interest rates and quantitative easing, which has really fueled the financial actors to engage in housing because the low interest rates means money is cheap, so it's good conditions to buy assets. We need monetary and fiscal policy to speak to each other. Governments in Canada can curb the effects of monetary policy by ensuring through law that institutional investors don't undermine the right to housing through their investments, and, instead, help implement it! Unless and until governments around the world recognize that legislative and policy landscapes promoting housing as a commodity are fuelling the housing crisis, there will be no end to the escalation of housing costs and thus increasing housing precarity, informal settlements and homelessness.

INDEPENDENCE PERSONIFIED: WORKING FOR WOMEN'S HUMAN RIGHTS IN CANADA AND BEYOND

Marilou McPhedran with Brendan Keane and Zoë Mason

Marilou McPhedran, LL.D. h.c. University of Winnipeg (1992) at convocation ceremony in 2015

Marilou McPhedran was appointed to the Senate of Canada in 2016. Born and raised in rural Manitoba, she has blazed a trail for human rights across Canada and beyond, in particular the advancement of equality for women. In 1985, she was named a Member of the Order of Canada with the following commendation:

"A Toronto lawyer and civil rights activist, she was one of the most influential leaders of the 1980-81 Ad Hoc Committee of Canadian Women on the Constitution. This apparently instantaneous galvanization of women from across the country won a guarantee of equality between the sexes which was the greatest step forward for Canadian women since the Persons Case of 1929."

A lawyer (LLB Osgoode/York, 1976, and Bar of Ontario, 1978), she has been an indefatigable advocate and educator specialized in teaching and developing systemic and sustainable change mechanisms to promote equality and diversity, having co-founded several impactful organizations including the Women's Legal Education and Action Fund (LEAF—which has led constitutional equality test cases or contributed interventions for over 30 years), the Metropolitan Action Committee on Violence Against Women and Children (METRAC), and the Gerstein Crisis Centre for homeless discharged psychiatric patients. In 1998, she founded the International Women's Rights Project and, in 2009, she became the founding director of the Institute for International Women's Rights (based on her intergenerational models "evidence-based advocacy" and "lived rights") at the Global College at the University of Winnipeg where she was a Full Professor and Principal (Dean) 2008-2012.

An influential scholar-practitioner, Senator McPhedran has developed innovative human rights courses and programmes, chaired independent enquiries, led pioneering and influential research and advocacy to promote human rights through systemic reform in law, medicine, education and governance, and published in leading academic journals. Amongst her many roles, in 2006 she chaired the international Forum on Women's Activism in Constitutional Reform and in 2007 she held the Ariel F. Sallows Chair in Human Rights at the University of Saskatchewan College of Law, whereupon she was appointed Chief Commissioner of the Saskatchewan Human Rights Commission. She was also the creator and director of the annual 'Human Rights UniverCITY' summer institute based at the Canadian Museum for Human Rights (2011-2018).

In the 'red chamber', Senator McPhedran has continued her defence of human rights and advocacy for equality, for an effective second chamber of the Canadian Parliament and for good governance, as well as for the effective participation of youth in the enjoyment of political rights (notably by means of lowering to the age of 16 years the right to vote). She has also maintained her energetic commitment to a range of international human rights issues as this interview in part identifies.

CYHR: What type of initiatives are you working on right now? What does a typical week look like for you?

MARILOU MCPHEDRAN [MM]: Well, a typical week has no typical days. I've just flown all night. I left a conference in Victoria, B.C. last evening and I flew through the night and got into Ottawa about 9:30 this Monday morning. When you ask about a typical week, it really depends on what bills, queries, and motions are going to be coming up in the Senate. Has someone asked me to speak on a particular bill or an inquiry or motion? I almost always say yes if a colleague in the Senate asks me to speak to a bill, and then I also choose myself when I want to be the one speaking. Outside the Senate Chamber, my parliamentary agenda is much bigger and longer term. My work is mostly about moving multiple active human rights files, and pursuing our "long-game" strategy for moving my bill to lower the federal voting age to 16

that I've sponsored in three sessions of Parliament.[1] I'll never stop working on that because of my concern for our moribund democracy. I believe that after 50 years, the time is ripe to extend the right to register to become a voter to 14 and the right to vote to begin at age 16, instead of 18.

A lot of what someone with my title gets to do is participate in events, and I treat those occasions with respect as an opportunity to connect with people that may well be able to assist or influence on any one of my active files. As an example, in July [2021], I reached out to parliamentarians in the House of Commons and the Senate and put together a joint letter that went to the Canadian Government, to the cabinet, warning about what was clearly a big problem in Afghanistan and urging Canadian leadership under our "feminist foreign policy" and our National Action Plan on Women, Peace and Security.

I took that initiative because I've worked on women's and children's rights in Afghanistan for more than 20 years and I have a long working relationship with organizations like the Afghan Women's Organization as well as the Canadian Council of Muslim Women, to give just two examples. We were seeing and hearing warning signs, so we wrote a joint civil society/parliamentarian letter that urged the Government to get ready with interventions of support—to anticipate that there were going to have to be Canadian interventions. I can tell you nobody envisioned the chaos that occurred a few weeks later, in mid-August [2021]. The irony that Kabul fell on the same day that the Prime Minister of Canada announced a federal election created huge challenges, but also some opportunities. And so, in these kinds of situations, it's not a matter of me as a Senator having particular authority—that's not what I have. At best, I may have some influence and a lot of what I try to do on a range of human rights issues is figure out if I can leverage that influence based on the office that I hold, informed by almost 50 years of advocacy as a human rights lawyer, which helps me assess strategic opportunities, because I'm not humanly capable of saying "yes" to every request.

CYHR: How did your work with human rights law begin?

MM: I was 19 (1970) when I was elected the first woman student President[2] at the University of Winnipeg and the right for a woman to choose to have an abortion did not exist in Canada; that was probably the first time I connected the dots between my personal freedom and the law.

I also experienced some dramatic targeted sexism and ageism as a young woman in that elected position, so I gravitated intuitively toward human rights at the very beginning of my legal career in the 1970s, before there was a Canadian Charter of Rights and Freedoms. I cared deeply about women's rights, children's rights, disability rights, but we didn't have a constitutional framework for human rights lawyers back then. My first full-time job as a lawyer was actually at the Ombudsman of Ontario working on a whole range of complaints at the provincial level with a very strong emphasis on labour, conditions of work, and social disadvantage. That led to a completely unexpected job as the in-house lawyer for a CBC National television program called "The Ombudsman." That was a 1970s TV version of social media – an interesting model because at that time Canada did not have a national human rights commission or a Canadian Human Rights Act and many people brought their complaints about the government to this TV programme, which deployed teams of investigators paired with producers in response to real-life cases of discrimination. Going to a human rights commission hadn't really entered the Canadian consciousness, whereas in many provinces across Canada there were ombuds offices, all called at that time Ombudsmen—plus this Ombudsman TV show to which many people were responding. Out of that TV collaboration, in 1980 I became one of the co-founders of the "Canadian Human Rights Reporter" periodical, led principally by Kathleen Ruff, who was the Ombudsman show's host, followed by Shelagh Day until the last issue 40 years later. I think my work in TV so soon after becoming a lawyer, shaped my "plain language" communication style and years later, my teaching style, when my work shifted to university settings. Just after my TV time, I worked as a staff lawyer at the Toronto legal clinic known as "ARCH"—the Advocacy Resource Centre for the Handicapped—when into my life came a luminous being named Justin Clark who had been born with severe cerebral palsy and used a device known as a "Bliss board" to communicate. Due to my years as a camp counsellor for children with disabilities, I was the lawyer who could communicate best with Justin in preparing his affidavit to launch his lawsuit against his parents, challenging his forcible confinement in the residential care facility to which they had consigned him as an infant. After quite a long court battle, Justin won his freedom. We kept in touch and soon after I arrived in the Senate, about 35 years later, I was able to visit him in Ottawa.

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[1] Most recently as Bill S-201(44-1), "An Act to amend the Canada Elections Act and the Regulation Adapting the Canada Elections Act for the Purposes of a Referendum (voting age)".

[2] For a video with archival photos of Marilou McPhedran as student President, see: https://www.facebook.com/uwinnipeg/videos/student-voice-marilou-mcphedran/10155482818635733/

Senator McPhedran with Justin Clark in 2017

Prior to that, for a short intense time (2007-2008) I was fortunate to hold the Sallows Chair in Human Rights at the University of Saskatchewan College of Law and then to be named Chief Commissioner of the Saskatchewan Human Rights Commission. This was a period in my life when human rights investigations and human rights education merged in how I had come to see education and practical training in knowing, claiming and living rights as the bedrock of a functioning democracy.

With fellow Saskatchewan Human Rights Commissioners in 2007

By the time I returned to my home province of Manitoba, after my years in Saskatchewan (about 40 years after I left Manitoba to go to the University of Toronto and then Osgoode Hall Law School), I had become convinced that community-based learning was essential to a university education in human rights. So I was thrilled when then University of Winnipeg President Lloyd Axworthy encouraged me to "come home" to lead his creation, the University's Global College, just as the Canadian Museum for Human Rights (CMHR) was being launched in 2008. I was the first professor to teach a full course based at the CMHR (beginning in 2011), with civil society partners, CMHR curators and experts from the community who were guest faculty. On a sabbatical year, I was seconded to the UNFPA office in Geneva and was able to work on women's sexual and reproductive rights at the UN and in some specific countries. That experience helped me add more detailed and practical aspects of human rights multilateralism to my teaching.

At the UN Human Rights Council in Geneva, 2013, with the SG's Special Representative on Sexual Violence, Zainab Bangura, 2013

For a few years after becoming a senator, I returned in August as a volunteer professor to direct and teach in an intensive summer institute I designed for the Global College entitled: "The Human Rights UniverCITY" because while our main classroom was in the CMHR, the whole city was our human rights landscape.[3]

[3] https://humanrightsunivercity.com/2014-2/

UniverCITY 2015 class photo at the Canadian Museum for Human Rights in Winnipeg

CYHR: Going back in time for a minute, you were called to the Bar of Ontario in 1978, and only a few years later served as a point of contact between planning committees in Toronto and Ottawa that resulted in the Ad Hoc Committee of Canadian Women on the Constitution. Can you tell us about this committee's objectives? How did you get involved with the committee and what was your role within it?

MM: Well, it was truly ad hoc—not previously planned! The Latin term was applied to it because it popped up out of a very deep concern that the same wording as in the Canadian Bill of Rights (under which women had lost every case they brought to courts) was transported into the "final draft" being circulated of the Canadian Charter of Rights and Freedoms to be entrenched in the new Constitution Act. In those early days of "Ad Hoc" in January 1981, I was the only lawyer (and one of the youngest) on the hastily assembled conference committee. Remember, there was not a single law firm that existed in Canada at that point in time which had lawyers who were specialists in human rights. Now every law firm will take the Constitution and Charter very seriously. Then, the only explicit human rights cases were at the provincial level under human rights codes, and law firms did human rights by helping the people with money defend against the people making complaints. Now that's a gross simplification, but in my world as a young lawyer, that's what I saw. And so there was no employment opportunity because I wasn't going to do that work—it just didn't align with my values, as a lawyer or as a person. Maybe it was my independence growing up in rural Manitoba but I was raised to believe that my work had to align with my values, because my work defined me.

In November 1980, prior to the Ad Hoc Committee, I'd attended a study session at Toronto City Hall that was part of a cross-Canada tour by the federally appointed (and now long defunct) Canadian Advisory Council on the Status of Women (CACSW) then chaired by the journalist Doris Anderson. Also during this time, there was a special joint committee of senators and MPs on the constitution—the first in Canada's Parliament to be televised, with thousands of viewers, so there was a higher level of awareness across the country. Doris Anderson was a big deal to me, because of my mother. For her, in a small rural town in Manitoba (she never identified as a feminist but chafed at the social limits on her), reading *Chatelaine* magazine was the high information point as a 1950s housewife. She was of that post-World War II generation who did everything to support their soldier-husbands. So, leave your job. Stop earning your own money. Go into the home. The truth is, my mother supported my father and made his professional status possible. When he came back after the war, he hadn't even finished high school because he lied about his age and enlisted in the Air Force, and my mom supported my father all the way through finishing high school and becoming a veterinarian. And he almost never gave her fair credit for that. Growing up in the 1950s-60s, I saw a lot of this attitudinal diminishing of the importance of what women typically did. So, imagine the impact at that workshop in Toronto City Hall, in the same room with this iconic editor of *Chatelaine*, Doris Anderson- a heroine in our household—and Mary Eberts, already a heroine to newly minted feminist lawyers as one of the country's most brilliant constitutional lawyers. They were doing a workshop and I showed up for it, and it ignited my interest and it gave me an avenue. It wasn't a formal legal avenue, but it was an advocacy avenue, and it was bringing my fledgling legal skills to my longstanding civil society engagement—show up at meetings, do the readings, ask (not tell) how you can help. At that time I was making the trip back and forth between Toronto and Ottawa for my work week, staying with a friend of mine from law school. I asked at a Toronto meeting after that workshop, "Well, how can I help?" One of the older women at the meeting, another Canadian icon, Kay McPherson, turned to me and said, "Well, aren't you going to Ottawa?" And I said, "Yeah, I take the bus back and forth, and I'm heading down there on Monday." And she said, "Well, you know, there's this joint constitutional committee that's meeting in Parliament, and NAC [the National Action Committee on the Status of Women[4]] has to present but they don't have any lawyers working with them. So why don't you get on that bus early and go work with them?" I said, "Well, OK." I was very lucky to have studied constitutional law at Osgoode directly under Peter Hogg; both he and I were surprised when I got really good marks because most of what I did in law school was shit-disturb. They didn't really think of me as having much academic skill; I was student President on the Osgoode Senate, and always bugging

[4] https://riseupfeministarchive.ca/activism/organizations/national-action-committee-on-the-status-of-women-nac/

them about how legal education had to modernize. By no means was I an academic star, but I thought, "OK, well, I guess I'm the only lawyer." And so I got on the bus and I went to Ottawa early and Kay gave me the phone number of where the women from NAC were preparing their presentation to the joint parliamentary committee on the constitution. And I showed up in their hotel room, and I worked with them through the night. So that brought me into their women's rights vortex and about two months later those women were among the founders of the feisty Ad Hoc Committee of Canadian Women on the Constitution.[5]

The first Ad Hoc meeting was about two months later, at this funky little place called the "Cow Café" in Toronto, and the women there were saying "Well, the Government has cut us off. They've cancelled the conference that we were all counting on as being the place where we could really focus on the dangers of this draft Charter. We have to represent ourselves and get into this constitutional process." As a sidenote, my LL.M. thesis twenty years later challenged Hogg's "constitutional dialogue" between governments and courts as the model for constitution building, by documenting the "trialogue" of constitution building through ad hoc constitutional activism by grass roots women in Canada in the 1980s and South Africa in the 1990s, which resulted in stronger protections in their national constitutions.[6]

Women at the Cow Café were seasoned feminist activists, hyper-aware of the risks, partly because the American women's movement had been battling to get an equal rights amendment (ERA) into their constitution and it was pretty clear by then that they were on the brink of failing—yet again—after over 100 years of multiple attempts. So we were like, wow, if we don't get this done before it's in the constitution, what we're seeing in the United States is telling us that we're sunk—unless we make the change now. And I was very strongly persuaded by that, having been exposed, that weekend at Toronto City Hall, to Doris Anderson explaining why we had to act immediately.

It's one of the things I think is an accurate description of how I've worked for decades, and that is once I commit to trying to do something I generally do my utmost to follow through. And I also do a lot of volunteer work. I feel like I learned very early on, even before I became a lawyer, that if I waited to try to get a perfect job that was going to pay me well to do what I believed in, I would starve. It was not going to happen. I was not going to be that young, new, woman lawyer that some fancy law firm was going to hire. Not at all. My profile was already "[She's] trouble, we don't want her here." I was always trying to figure out how I could not contradict my core values and how I could use my legal knowledge simultaneously. The constitution-building gave me that. I mean, I was a baby lawyer; I'm not sure how much skill I had. But in making that presentation to the joint Senate/House of Commons committee on the constitution, I think I brought added value. I wrote bits and pieces of it as well—but the NAC executive did the lion's share of the work. A lot of the time, that's what human rights lawyers should be doing—we really should be the ones who are supporting, helping, and facilitating what civil society leaders need to do.

And I believe that some of what you see of the "Ad Hockers" present in Susan Bazilli's documentary film *Constitute*,[7] I contributed to that.

Susan Tanner, my longtime friend from law school, was my Ottawa housemate at the time of the Ad Hoc constitutional conference on February 14, 1981. It's funny because, at the conference I just attended this weekend, she told the story of how the morning of the 1981 conference I had the covers pulled over my head and I would not get out of bed, and I kept saying to her, "There's no one coming!" She yanked the covers off and she said, "Get up, we're going." Well, it was a massive turnout. - Over 1000 women on a Saturday showed up at the House of Commons, as Flora McDonald said in her speech (also in Constitute!). In many ways this was a political protest, because in the documentary you notice the MPs speaking were opposition parliamentarians. There was only one Liberal MP in that entire room for that entire day and he was there undercover, basically. It was Jim Peterson, and we became friends after that. He came up to me at the end of that day and said to me, "I have never seen anything like this co-leadership in my life." The truth is, the Ad Hoc planning group wasn't prepared for such a huge crowd... and then we were like, "Oh my, we've got to start. So who's gonna speak first?" That co-leadership was organic. I think it was actually five of us who were in and out of the chair all day long, into the evening. I didn't show up that morning with a script. I had put together the legal panel and they said "OK, well obviously you should chair it because you know who the lawyers are."

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[5] In Susan Bazilli's documentary "constitute", see NAC presenting to the joint parliamentary committee on the constitution (NB Marilou McPhedran is sitting behind the NAC presenters): http://www.constitute.ca/the-film/

[6] McPhedran, Marilou, "A Truer Story of Constitutional Trialogue", in: Ian Peach, Graeme Mitchell, David Smith and John Whyte (eds.), *A Living Tree: The Legacy of 1982 in Canada's Political Evolution* (LexisNexis, 2007).

[7] *Constitute* can be downloaded free of charge at: http://iwrp.org/news/constitute-on-youtube/#:~:text=go%20to%C2%A0https%3A//www.youtube.com/watch%3Fv%3DokL45WSJXXI%26feature%3Dyoutu.be and from www.constitute.ca

In 2006, twenty-five years later, I convened and co-chaired the retrospective "Ad Hoc" conference in the same Room 200 of the West Block on the same date—February 14th—and again over a thousand women turned up, but those were the days of Prime Minister Harper so we were forced to turn away hundreds and hundreds—it was heartbreaking!

Leaning in as Co-Chair of the Ad Hoc Women's Constitutional Committee, Room 200 of the Parliament Building, 1981

Again Co-Chairing an Ad Hoc conference exactly 25 years later in the same room, 2006

Back in 1981, the Ad Hoc conference was organized in just a few weeks, with no real authority and it had happened because none of the existing organizations in the system seemed prepared to create space, so we created it ourselves. Then it was like, whoa, OK, we survived that. We got it done. We got this very clear set of resolutions. And then it was, "What now?" So me, I'm like, "Well, I think I'm gonna get on the bus and go back and see my boyfriend and my dog." But a young woman named Patti, who was a staffer for NDP MP Margaret Mitchell, said, "Oh no, you're not. You have to be on Parliament Hill first thing tomorrow morning because this thing is in the news. You have got to ask to speak to the Prime Minister, the Attorney General, every caucus, the NDP, the Conservatives, and I will help you."

A few of us showed up the next morning; I was clutching the resolutions from the day before, with handwritten notations on them. Patti had secured appointments. I mean, we were top of the news, nobody expected this. So it was just responding to these opportunities. And Patti took the page of resolutions, put them in a nice folder and warned us: "Do not make the mistake of thinking that if you don't show up today, they're going to give you time tomorrow. You either show up today and grab this or it's gone."

That was a very powerful lesson—that's basically become a recurring theme in everything I do. It's like, "OK we got the words now. How do we match that up? How do we make something really substantial happen out of it?"

CYHR: What are some of your obligations as a Senator?

MM: Senators have scope in deciding their priorities and how they work on them. Chunks of my time are mostly spent on human rights advocacy with civil society, except for when the Senate is sitting and then it is my primary obligation to be participating as a Senator in all the deliberations, typically starting at 2:00 PM on a Tuesday, Wednesday, and Thursday with endpoints on those days often being deep into the evening. In addition to that, Senate committees meet when Senators are not deliberating in the Chamber and Senate committees are well known for thorough work—often referred to as "sober second thought". But in my experience the Senate is actually often the place of "first thought" because some really interesting laws have started on the Senate side. For example, Senators have been the leaders for over 30 years in trying to bring a basic livable income to Canada. I have served on the Human Rights Committee, Fisheries and Oceans Committee, Aboriginal Peoples Committee, and the Security and Defence Committee, to name a few. In my five years in this job, I have always served on a minimum of two committees—sometimes three, and during one period, four. I believe deeply in what Senate committees can do, sometimes examining issues more thoroughly, calling witnesses that perhaps weren't available when the House of Commons was trying to study something in committee. Many Members of Parliament do not get to sit on committees and there are many more MPs than there are seats on committees. We're much luckier in the Senate. So, such committee work will typically take place on mornings or evenings in a Monday to Thursday time frame for the committee meetings. It also involves preparation and follow-up and it often will involve drafting, working with other Senators or working with civil society leaders to try to strengthen a particular bill.

Gun control is a good example of that, because the civil society leaders are the ones with the most expertise (in

my opinion). For a long time now, even though there's commitment, stated by several Liberal governments whether under PM Justin Trudeau and before that under Paul Martin and Jean Chrétien, there have been numerous attempts to bring in more effective gun control legislation. The expert-advocates like the "Canadian Coalition for Gun Control" or "Poly Se Souvient" are the groups I work with most, which means that whenever there's a gun control issue that comes up, I'm one of the parliamentarians targeted by the anti-gun control lobby whose behavior can be unsavory. I still haven't figured out how they think sexist commentary on my genitalia is relevant to gun control legislation but clearly some of them think so, given the hateful messages I have received.

CYHR: What are some things that might surprise people about the Senate?

MM: The Senate is completely self-governing in a closed circuit controlled by a small number of Senators. The Canadian Charter of Rights and Freedoms does not apply to Senators in the Senate. They cannot claim their rights and freedoms under the Charter or labour laws as a Senator *qua Senator*. When I first started in 2016, none of the labour standards that operated across this country through law applied in the Senate of Canada to Senators. Now the legislation that applies in addition to the Parliament of Canada Act is the Canada Labour Code, as amended by Bill C-65, activated in 2021. That was the first time that parliamentarians (both in the Senate and in the House of Commons) clearly became liable for harassment of staff in the workplace. Even then, that was interpreted to apply primarily to employee/employer relations, but between Senators it was—and is—considered to remain a question of parliamentary privilege.[8]

If you've looked at my CV, you know that's been a very strong area of my practice for a very long time, with a particular emphasis on the sexual abuse of patients by regulated health professionals. But a lot of the concerns that operate in that power dynamic between a patient and a regulated professional are about power; they're not about whether you're in a hospital or a religious institution, or a school or the Senate. So as a Senator, I've been trying a range of ways to make my Senate workplace more accountable and more transparent and to have better, clearer standards of protection for everyone including Senators. I'm not alone in that goal but there is a big divide between what I believe is necessary and what the majority of Senators have decided they want. My professional experiences lead me to conclude that secrecy and silencing generally benefit perpetrators, but in opposing increased secrecy in the new Senate harassment prevention policy, I was in a minority among Senators and it was a factor in my quitting the Independent Senators Group to go it alone.[9] I think many Senate offices have become more complex work environments that need clear protections for staff, interns and Senators. A growing number of Senators have started to realize how much students can bring, and how their being well-informed by youth leaders provides a better pulse on what's happening inter-generationally in our country. I am deeply concerned about our Canadian democracy as well as the shrinking space for democracy in our world and I believe inter-generational co-leadership is vital.

CYHR: What are some initiatives you have taken to increase engagement with the Senate and Canadian democracy at large?

MM: Demystifying national and global governance was a priority for me as a professor specializing in human rights, focusing on how to engage my students, and now as a Senator, on how to facilitate young leaders engaging in the Senate and the United Nations system; finding ways to try to get young people to Ottawa and to the UN in New York for a range of the high-level meetings and conferences. We've had limited engagement during COVID and it's all been on Zoom but we continued our practice established in year one as a Senator to offer as many parliamentary internships as we can. Well over 50 students have worked with me in the past five years. We have a policy in my office: there either has to be compensation by way of an academic credit for interns, or we pay them. I don't think it is fair to ask young people to do their work for free with no form of compensation. Students, especially at law school, can ask to take a separate additional course and extend their time with me into a second term. A lot of what those interns are doing is essential for me. They're pulling together research on issues, drafting potential questions that I can be asking of the Government during Question Period, suggesting areas of inquiry, or raising current issues from youth perspectives. The students are working on requests coming from me and they are welcome to pose their own questions. A specific example coming from a student recently is, "Can I prepare a question on the difference between refugees from Afghanistan and how they're treated compared with other refugees?"

My office, unlike most Senators' offices, has a youth advisory council, the Canadian Council of Young

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[8] https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/421C65E

[9] https://www.theglobeandmail.com/politics/article-senator-mcphedran-resigns-as-part-of-the-isg-will-now-sit/; https://www.hilltimes.com/2021/10/17/why-i-resigned-from-the-isg-before-my-expulsion-hearing-senator-marilou-mcphedran/323092

Feminists.[10] I place substantive reliance on young people and the perspective of young people and part of how I interpret my job as a Senator is to educate and to create skill-building and learning opportunities. In terms of a typical schedule, my larger commitment is to introduce as many diverse young leaders as I possibly can to our constitutional democracy and how Parliament actually operates.

CYHR: How does your work with democratic engagement in the Senate run parallel to your concern with issues of human rights?

MM: Where you have shrinking democracy and diminishing access to resources, you have a very serious question about whether people can actually live their human rights. That's where, as a researcher and as a professor, I long ago coined the phrase "lived rights" and as the Dean of Global College, I initiated the "Lived Rights Guest Lecture Series" and developed my course material as a professor around this notion that a lot of what happens in academic programmes is theory—a knowing of rights. That's very different from getting to the place where you have the civic skills to claim your rights, to articulate your rights, and then another big jump to actually *living* your rights.
That's the human rights lens of "lived rights" that I bring to pretty much everything. What that comes down to is that I'm always looking for the implementation of the law or the policy, and looking for where that gap is. What that means is that I consider it part of my responsibility in committees, in chamber, to bring the voices of people who theoretically may well have rights and may well be trying to claim those rights, but they're not necessarily living those rights at all. It's all about the in-between. It's all about the little unwritten, undocumented ways in which systems grind down people's daily lives.

People working to support a particular system or institution don't have to get up in the morning with a bad intention in their mind that they're going to deny someone their rights. All they have to do is plug into the grinding of that system and, for example, let systemic discrimination take care of it. Technically, they just have to "do their job." This is one of the big challenges when making the transition from being a lawyer and a professor to a legislator and a lawmaker. It's very tempting every time you get passage of a bill that is going to become law, and you're thinking, "Oh good, done that!" No, that's just the beginning.
Typically, lawmakers are very bad at checking on implementation and actually cycling back through and reaching out to people who are directly affected by the law. An example of that would be medical assistance in dying when Bill C-7 was opposed by a small number of Senators, including myself, (although in principle I am not opposed to medical assistance in dying) on human rights grounds.[11]

CYHR: What are some human rights issues you've been working on as of late?

MM: I've long been concerned about nuclear disarmament and non-proliferation. The Government of Canada needs to pay closer attention to nuclear weapons and the existing international treaty, the UN Treaty on the Prohibition of Nuclear Weapons (TPNW). Together with other Parliamentarians and renowned former Senator and Ambassador for Disarmament Hon. Douglas Roche, we're calling out the Government on its non-involvement with the TPNW. I noted that Canada was not even in the room at the UN headquarters in New York—one of the easiest places to get to in the entire UN system for anyone from Ottawa—when the TPNW was negotiated a couple of years ago. We have been unquestioning, in lockstep: whatever NATO says, we do. It didn't used to be that way. This Prime Minister's father, former PM Pierre Trudeau, led Canada's advocacy in NATO to look much more closely at unquestioning support for nuclear weapons and to open up the NATO policy allowing member countries more nuance in concern over escalating nuclear arms.

Advocating in 2019 for signature of the TPNW

[10] https://www.ccyf-ccjf.com/

[11] https://biopoliticalphilosophy.com/2021/02/12/senator-mcphedran-and-bill-c-7-amendment/

With my research director I wrote a chapter entitled "Why Was Canada Not in the Room for the Nuclear Ban Treaty?" on those formative years leading up to the actual treaty which was activated in January 2021.[12] At that time of activation, I convened a webinar with three former Canadian ambassadors for disarmament (from the days when Canada had an ambassador for disarmament—which we haven't had for over 20 years). Canada is not paying attention to this issue in a substantive way. Although postponed several times due to COVID, Austria is hosting the First Meeting of State Parties that ratified this new UN treaty, to take place in Vienna in June 2022.[13]

At this point in time, despite the experiences over the last number of years with North Korea, there's no indication that the Government of Canada is sending anyone to Vienna. At minimum, we should send a delegation of parliamentarians and youth leaders as observers. You know, at least let's get in the room. What I tend to do is take that human rights lens and ask the question: "Where are we stalled? Where do we need movement? And what can I do as an individual Senator, bringing other Senators in, and often other parliamentarians?"

Another current project is the quite new Canadian Association of Feminist Parliamentarians. The truth is that parliamentarians are incredibly busy. And so when you found a new parliamentary organization, finding a space for it and finding resources for it is really challenging. What I often end up doing is just asking for a one-on-one meeting and building the relationships. It's also not typical for a Senator to go to the House of Commons, and I try to be the one who makes the effort to make the trip to the House.I have been working with Iqra Khalid, a Liberal Member of Parliament and a young Muslim woman lawyer. We've worked together on different issues; we've both been very dedicated to engaging women parliamentarians, across party lines and across Parliament. Iqra is a member and I'm a co-founder of the Canadian Association of Feminist Parliamentarians, and one of the reasons that we needed to look at a new inter-parliamentary association is because the existing Women's Caucus operates in the House of Commons with Members of Parliament. It's cross-party, which means that they don't touch the question of reproductive choice. One of the reasons that I was involved in designing and co-founding the Canadian Association of Feminist Parliamentarians is because if you sign on to be a member of the feminist parliamentarians, you're signing a clause that specifically endorses reproductive choice, including the right to abortion. With the likely reversal on reproductive choice by the US Supreme Court, this only makes this parliamentary group more relevant.

CYHR: You've been involved in a lot of women's health and sexual violence initiatives, committees, and projects. As a human rights professional, why has health been such a such a central focus in your career? Where, in your opinion, do health and human rights intersect?

MM: The short answer is because I'm a woman. Throughout my life as a lawyer, educator and legislator, if I started with a focus on human rights, I'd end up including health—and vice versa. Reproductive health and rights were big issues when I was a young woman because, when I went to university, I did not have the right to go to seek birth control or an abortion. Back then, there was not a legal birth control clinic allowed in the Province of Ontario, which is where I was going to university. Control over your own body is essential to realizing your full potential as a human being. But that wasn't our reality. We were being actively denied even getting information, let alone getting birth control. And so as a young woman that became a real focus of my advocacy, my activism.

And then I got to law school, in 1972. I finished law school in 1976, and I was called to the Ontario bar in 1978—still no Charter of Rights and Freedoms. By then it was clear that the law was essential to squelching us—it was the primary tool for the State to limit women's rights and therefore their lives. So, when I went into my first criminal law class, and I was older than most of the other students in my law school, I had already come out of several years at two universities. I had already been the first woman student president at my initial university when I wasn't quite 19. Sexism was an everyday reality. For example, I had found out that some men on my executive (all older than I was) where I was the president had been running a betting pool that entire year on who was going to be the one to have sex with me. And when none of them succeeded, they then started calling me the Virgin Queen.

So my lived reality was the sexism of stories. mean, that's the kind of stuff that really happened, and so I came to law school with an awareness that I think was probably more directly experiential than a lot of the younger women who were in my class, partly because I'd already been living on the edge, I'd already taken a leadership position that had never been held by a woman and I'd had all kinds of backlash. Yes, I was a white cis privileged woman but my privilege did not prevent my being sexualized—perhaps also because I was in those days stereotypically pretty; you know, I was slim etc.

In law school, when they started teaching the rape cases I went ballistic. I was terrified of law school. I'm a loquacious person, but I didn't say a word in most of

[12] Marilou McPhedran and David Hebb, "Why Was Canada Not in the Room for the Nuclear Ban Treaty?" in: Jonathan Black-Branch and Dieter Fleck (eds.),*Nuclear Non-Proliferation in International Law – Volume IV* (Springer & T.M.C. Asser Press, 2019).

[13] https://meetings.unoda.org/meeting/tpnw-msp-1-2022/

my classes of law school for weeks and weeks when we started, and then we got to the rape cases and I was openly furious in class right under the professor's nose because I sat in the front row and I'd be like this the whole time, "Oh my God, none of this makes sense to me."

Law school was a real turning point for me, because that was when the Toronto Rape Crisis Centre (TRCC)—one of the first in Canada—opened[14]; I was blessed to have one of the TRCC co-founders, a 3rd year law student at Osgoode named Barbara Betcherman, watching over me as a "femtor" and she encouraged me to volunteer. I took my dog and did the midnight shift in the very early days and as a law student I accompanied women to hospital and to court when there was a request for that. So I was right at that coalface as an individual young woman and law student, seeing up close the effectiveness of the criminal legal system and, I mean, trivialization isn't even the correct word—I saw the erasure of women as legal persons with rights.

Living of that reality as a young woman informed pretty much everything I tried to do after that. BIPOC people are the best experts on this kind of denial of lived rights. As student president in law school, I also focused a lot on trying to reform the way we were educated, because I saw it largely as a brainwashing exercise to teach us how to skillfully navigate and profit from the status quo.

CYHR: What's next for you? Are there any other initiatives for you on the horizon?

MM: Well, actually, my team and I have an ambitious agenda for both in and beyond the Senate Chamber. I often think back to that day in November 2016 when I took the senatorial oath, with Senator Murray Sinclair as my sponsor.

After swearing in the Senate with Senators Murray Sinclair (right) and Peter Harder (left)

I can give some examples here of work that has flowed from that oath.

Afghanistan: I work on cases of trying to get women out, then safely to Canada. There are a few other Senators who have been working hard for Afghans, but we tend to work individually. From what I have seen, these days the Canadian Government will not lift a finger to help anyone left inside the country, including women who were paid every day by Canada to work on promoting women's rights. If they're still in Afghanistan, the Canadian Government is like, "Good luck with that." With Laura Robinson, an amazing consultant on my Senate team, we have succeeded in getting a number of women human rights defenders who were at high risk out of Afghanistan and now many of them are stuck in a bureaucratic tangle trying to get to Canada. Much of the time we work with an international network of mostly volunteers. Working across time zones, Rumiko is in Japan, Susan is in Australia and Jason is in the USA. Laura seems to work all day long, all night long. I check in with the network in the mornings and again at night. The request that usually comes up is, "OK Senator. Now we need you to write or we need you to call now..." So I do the best I can and have been doing that since August 15th, when Kabul fell to the Taliban Conflict-Related Sexual Violence: I've been trying to focus on reports of sexualized violence. I asked maybe one of the very first questions in Question Period about that. And it's not because I expect an answer. You seldom get a substantive answer in Question Period, right? But you put it on the record. You try to get it on the radar so that at least someone inside the government is responding: "Oh, we didn't see that. Oh, maybe we should ask for more information to answer that Senator's question... Do we have a report on that?"

Vote16: A top priority for me is lowering the federal voting age to 16. I established three paid internships for youth leaders from Manitoba. I'm an independent Senator for Manitoba, so Manitoba youth are a priority. One of the Manitoba internships is for a youth liaison intern who focuses on high school engagement. I also have one internship with a focus on university age youth engagement, but not just at universities. The young woman just finishing up in our Indigenous internship has been doing a lot of work on what kind of research and engagement we need to be doing on "Vote 16" in Indigenous communities. With support from two Indigenous Senators, Senator Audette and Senator McCallum, we plan to engage in a discussion with the Assembly of First Nations and other Indigenous organizations about what kind of programming is possible.

[14] https://riseupfeministarchive.ca/culture/buttons/torontorapecrisiscentre/

I was the first Senator to ever introduce the vote16 bill, but numerous MPs over the years have tried. Our vote16 strategy is to work with like-minded MPs so that we have a bill in the House at the same time as we have a bill in the Senate. Nothing becomes law in Canada unless it crosses over into the other House. So we're focused on doing whatever we can wherever we can to move this along and to engage communities, especially communities that have not typically been engaged in extending the right to vote.[15]

Nuclear weapons: We are waiting to hear from the Government of Canada on whether a parliamentary delegation of observers will be sent to the UN's First Meeting of State Parties to the TPNW. I so wish that Canada would engage on this crucial issue but I'm not optimistic, so at our own expense, MP Elizabeth May and I are making plans to travel to Vienna and participate as much as possible as independent parliamentarians. I helped to obtain community support for one of my Manitoba interns to attend and we will be working together on getting the message out and back to concerned Canadians.

Civil society voices in the Senate: In my office, a typical question is: "Where do we need to pay attention? Where are voices not being heard on human rights and can I be of assistance potentially?" The example that I started to give, which I'll finish with now, is the debate on Bill C-7 to expand access to medical assistance in dying. Yes, the Senate Conservative caucus voted against that bill. But a small number of women Senators also voted against it. I support medical assistance in dying. That's not the issue. What I was doing was bringing forward the collective voice of a coalition of more than 100 disability rights organizations in this country who all agreed that the way in which disability was defined and the way in which disability became a *reason* for choosing to die was antithetical to the living of rights of disabled people.

So that was my theme. That was what I worked on, and I said what I said and did what I did out of both my own personal conviction, but also my primary responsibility as a parliamentarian with a voice in the Senate to give voice to the disability rights organizations that came together on grave concerns about the particular wording in Bill C-7.

Senate self-governance and the Senate Code of Ethics: This topic is likely the most daunting of the challenges that make up my parliamentary agenda and it may well be the most dangerous to pursue as a parliamentarian. On several occasions I have written open letters to the Senate ethics committee and I have started inquiries in the Senate to try to encourage thoughtful explorations of the wide latitude given to "parliamentary privilege" and given to Senators to earn substantial income in addition to their publicly funded Senate salary. I believe more thought and discussion needs to be given to whether such additional enrichment creates conflicts of interest that Senators are not currently required to disclose. One aspect of this issue is whether there is misuse of "NDAs"—non-disclosure agreements—required in certain Senate processes that are largely conducted in secret. Just now, the majority of Canadian Senators seem quite content with the status quo so I've shifted to working internationally with like-minded parliamentarians in Ireland, Australia, the UK, some States in the USA along with legislators in PEI (who've passed the first such law restricting NDAs in Canada). We're planning an international roundtable on the misuse of NDAs and I'm looking at a possible bill to address this issue more directly.

I'm turning 71 and retirement seems like a ridiculous idea, so if fate grants me a full term as a Senator to age 75, my parliamentary agenda will remain full and inspiring. This place has patriarchy deep in its DNA. When Prime Minister Trudeau called to ask if I would agree to be recommended for appointment to the Senate, I asked him what he thought I could contribute, and he said that he hoped I would help reform the Senate. I'm trying. Sometimes I say to my team: we're not here to coast or do the easy stuff; we're here to ask the tough questions and do the harder stuff that makes a real difference.

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[15] See: www.vote16.ca

FORTIFYING THE UNITED NATIONS TREATY BODIES: REFLECTIONS ON THE HUMAN RIGHTS COMMITTEE AND THE CONTRIBUTION OF CANADIANS

Nicole Barrett[1]

With the rise of authoritarianism in our globalized, interconnected world, Canada's involvement in international institutions, such as the United Nations, is now more important than ever to protect the human rights principles Canadians hold dear. On 17 June 2020, Canada lost a second bid for one of the rotating seats on the UN Security Council, following an initial loss ten years prior.[2] While Canada's influence at the Security Council would arguably be limited as a non-permanent member with only a two-year term, there is another branch of the UN system where Canadians could significantly and meaningfully support human rights and the rule of law: the United Nations treaty bodies.

Although lower profile than the Security Council, the UN treaty bodies play a pivotal role in defining, protecting and promoting human rights around the world.[3] The treaty bodies, called "Committees", not only supervise human rights treaty compliance by States party to their respective treaties, but they also contribute to the advancement and understanding of human rights law and its implementation through development of "General Comments," which provide authoritative guidance on the rights protected by the respective international human rights treaties.

Canada, like all States parties to an international human rights treaty, may nominate qualified Canadians to serve, for four-year renewable terms, as independent experts on treaty bodies to which Canada is party. Unlike independent experts appointed by the UN's Human Rights Council to serve as Special Procedures[4] mandate-holders — to which individuals may directly apply — treaty body candidates can only be nominated by a State party to the treaty. The nominated candidate must then win election against other States parties' nominated candidates. Thus, only with Canada's nomination and support will Canadians be elected to serve on the treaty bodies.

Canada has, however, made strikingly few nominations for treaty body membership. Many in the human rights field question why this is the case, as substantial human rights gains can be made in these positions, which have the added benefit of representing and promoting Canadian values on the global stage. This is particularly true as treaty body membership lasts from four to eight years, if members are reelected to a second term. Other democratic States actively pursue treaty body seats, recognising the opportunity and importance of ensuring highly-qualified Committee members carry out this consequential work. Alarmingly, in recent years, autocratic governments have increasingly secured seats on the treaty bodies, in attempt either to redefine human rights norms or to limit the application of existing norms from within.[5] Experts closely following the treaty bodies' work are concerned that a growing number of elected members appear unable to act independently from their governments.[6]

To further demonstrate the value of the treaty body positions, it is helpful to understand what a treaty body does and who sits on these bodies. I will consider the Human Rights Committee and its Canadian membership

[1] Thanks to Basia Walczak and Emma Smyth, who provided research assistance for this article.

[2] Mike Blanchfield, "Canada loses bid for seat on the United Nations Secutiry Council on first vote" (17 June 2020), online: *CTV News* <https://www.ctvnews.ca/politics/canada-loses-bid-for-seat-on-the-united-nations-security-council-on-first-vote-1.4988540>.

[3] Navanethem Pillay, "Strengthening the United Nations human rights treaty body system: A report by the United Nations High Commissioner for Human Rights" (June 2012), online (pdf): *United Nations Human Rights Officer of the High Commissioner* <https://www2.ohchr.org/english/bodies/HRTD/docs/HCReportTBStrengthening.pdf>.

[4] Unlike treaty bodies, Special Procedures are established pursuant to the UN Charter – typically by decisions of the UN Human Rights Council and/or General Assembly; as of October 2021, there are 45 mandates addressing thematic concerns and 13 mandates addressing "country" or territorially defined concerns. For more on the UN's Special Procedures, see: https://www.ohchr.org/en/special-procedures-human-rights-council

[5] See, e.g., Pittman Potter, *Exporting Virtue?: China's International Human Rights Activism in the Age of Xi Jinping*, (Vancouver: UBC Press, 2021).

[6] See, e.g., Louis Charbonneau, UN Elections Shouldn't Disparage Human Rights, Human Rights Watch (26 April 2021), online https://www.hrw.org/news/2021/04/26/un-elections-shouldnt-disparage-human-rights.

to provide insight and explain why Canada should shift its sights from the two-year non-renewable Secuity Council seat to supporting Canadians into the numerous human rights treaty body seats.[7]

THE HUMAN RIGHTS COMMITTEE: MONITORING CIVIL AND POLITICAL RIGHTS

Of the nine UN Committees that monitor the primary international human rights treaties, the Human Rights Committee (HRC) is the oldest and arguably the most influential, although each of the other nine Committees oversee application of important rights which States agree to uphold.[8] The HRC consists of eighteen independent experts tasked with monitoring State parties' compliance with the *International Covenant on Civil and Political Rights* (ICCPR or "the Covenant"), with assistance from the Office of the High Commissioner for Human Rights (OHCHR).[9] Most of the ICCPR provisions are familiar to Canadians as they overlap with, and indeed inspired, the Canadian Charter of Rights and Freedoms.[10] One of the core ICCPR provisions, for example, is the protection of gender equality, detailed in Articles 2 and 3 of the Covenant and further elaborated in the Committee's General Comment 28 (2000).[11]

The HRC has three main functions.[12] First, it reviews country compliance with the ICCPR through reports and constructive dialogues held in Geneva and New York with States that have ratified, or consented to be fully bound by the Covenant. These "State parties" submit reports detailing their implementation of Covenant rights approximately every four years and respond to concerns (called "List of Issues") identified by the HRC. After reviewing the State report and discussing the critical human rights issues raised, the HRC responds to the State reports with recommendations or "Concluding Observations" which offer constructive advice on how the State can improve its human rights record. A compliance review is mandatory if a State is party to the Covenant, which helps mobilize civil society organizations within the country to compile their own "shadow reports" to supplement or correct the government's report.

Second, the HRC considers individual complaints of violations of civil and political rights submitted by rights holders under the First Optional Protocol to the ICCPR ("the Protocol").[13] As its name suggests, this Protocol is not compulsory, but once a State becomes a party to it, anyone within the State party's jurisdiction can make a written complaint to the HRC once domestic remedies are exhausted. Articles 1, 2, 3, and 5 of the Protocol set out admissibility requirements, whereas Article 4 contains basic procedural requirements the complainant must meet to have their case heard by the HRC.[14] The HRC considers many significant cases that receive widespread

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7 Two other Canadians have been elected to UN treaty bodies aside from the UN Human Rights Committee: David Brent Parfitt, who served on the UN Committee on the Rights of the Child from 2005 to 2009; and Marie Caron, who served on the UN Committee on the Elimination of Discrimination against Women from 1982 to 1988. See, "Membership: Committee on the Rights of the Child", online: United Nations Human Rights Office of the High Commissioner <https://www.ohchr.org/en/treaty-bodies/crc/membership>; & "Membership: Committee on the Elimination of Discrimination against Women" (last accessed 25 August 2022), online: *United Nations Human Rights Office of the High Commissioner* <https://www.ohchr.org/en/treaty-bodies/cedaw/membership>.

8 The other Committees include those that oversee: the International Convention on the Elimination of All Forms of Racial Discrimination (1965); the International Covenant on Economic, Social and Cultural Rights (1966), the Convention on the Elimination of All Forms of Discrimination against Women (1979); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); the Convention on the Rights of the Child (1989); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990); the International Convention for the Protection of All Persons from Enforced Disappearance (2006); and the Convention on the Rights of Persons with Disabilities (2006). See, "The Core International Human Rights Instruments and their monitoring bodies", online: *United Nations Human Rights Office of the High Commissioner* <https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies>.

9 *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [*ICCPR*].

10 See Karina Juma, "Human Rights in Canada and the World: Forty Years of the Human Rights Research and Education Centre and the Canadian Charter" in this *Yearbook, supra,* pp. 75-92.

11 *Ibid.*, Articles 2 and 3; UNHRC, *General Comment No. 28: The equality of rights between men and women (Article 3)*, 68th Sess, UN Doc CCPR/C/21/Rev.1/Add.10 (29 March 2000).

12 "Human Rights – Civil and Political Rights: The Human Rights Committee, Fact Sheet No. 15 (Rev. 1)", online at 14-30: *United Nations Human Rights Office of the High Commissioner* <https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet15rev.1en.pdf>.

13 *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [Protocol].

14 *Ibid.*, Articles 1-5.

international attention, such as it's 2021 finding that Italy violated the right to life of more than 200 migrants when it allowed them to go down with a sinking ship outside its territorial waters, despite having a rescue boat nearby.[15] Significant climate change cases are increasingly making their way before the HRC as domestic courts refuse to find jurisdiction over climate change issues, often claiming the issues are political matters that cannot be resolved by the courts.

Finally, the HRC develops General Comments, which codify international law and offer best practices on topical human rights issues. These General Comments provide authoritative interpretations of specific rights, which help governments and civil society interpret treaty provisions. The HRC's most recent General Comment 37, adopted on 23 July 2020, considers the right to peaceful assembly and was released just as COVID-19 restrictions began restricting assembly rights around the world.16 The prior General Comment 36 on the right to life is wide-ranging and celebrated for specifying that environmental degradation, climate change and unsustainable development are "serious threats" to present and future generations' enjoyment of the right to life.17 Many countries recognize the advantage of having its citizen experts drafting these detailed statements of human rights law for the world to follow.

WHO IS QUALIFIED TO BE A HUMAN RIGHTS COMMITTEE MEMBER?

There are broad requirements for who can be a member of the HRC. Article 28 of the ICCPR sets these requirements, stating:

> 2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.[18]

HRC members are to serve impartially, as independent experts, rather than as representatives of their governments.[19] In 2014, the General Assembly passed Resolution 66/268, which concentrated on strengthening and enhancing the functioning of the human rights treaty body system.[20] Resolution 66/268 highlighted the critical importance of ensuring the independence and impartiality of treaty body members after it became apparent that some HRC members were following dictates from their government. On 7 July 2020, civil society organizations (CSO's) made a joint submission to the General Assembly reiterating that State parties to human rights treaties must vote only for those candidates who meet all of the criteria set out for membership.[21] This joint submission was brought in response to the not-uncommon practice of some countries nominating individuals without requisite expertise and independence from their respective governments to serve as treaty body experts. Likewise, the UN High Commissioner for Human Rights, Michelle Bachelet, has emphasized that expert members on the treaty bodies should meet the highest criteria of professionalism and independence.[22]

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[15] See *A.S. et al v Italy*, UN Doc CCPR/C/130/D/3042/2017 (27 January 2021).

[16] UNHRC, *General comment No. 37 (2020) on the right of peaceful assembly (Article 21)*, 129th Sess, UN Doc CCPR/C/GC/37 (24 July 2020).

[17] UNHRC, *General comment No. 36 (2018) on the right to life (Article 6)*, 124th Sess, UN Doc CCPR/C/GC/36 (30 October 2018).

[18] *ICCPR*, *supra* note 9, Article 28(2).

[19] *Supra* note 12 at 12-3.

[20] GA Res 68/268, UNGAOR, 68th Sess, 81 Plen Mtg, UN Doc A/RES/68/268 (9 April 2014).

[21] "Joint NGO submission to the co-facilitators of the General Assembly review of resolution 68/268 on the human rights treaty body system" (7 July 2020), online: *International Commission of Jurists* <https://www.icj.org/wp-content/uploads/2020/07/Universal-NGO-response-to-TBSP-cofacs-questions-Advocacy-non-legal-submissions-2020-ENG.pdf>.

[22] "Strengthening the Treaty Bodies, guardians of the world's human rights covenants and treaties" (2 June 2020), online: *United Nations Human Rights Office of the High Commissioner* <https://www.ohchr.org/en/statements/2020/06/strengthening-treaty-bodies-guardians-worlds-human-rights-covenants-and-treaties?LangID=E&NewsID=25917>.

The review of the treaty body process has underscored the importance of diversity amongst their membership.[23] It also encouraged States to consider gender distribution when they vote for and nominate experts.[24] The HRC did not have a female member until 1983.[25] Although recent studies indicate an upward trend in increasing gender parity on the treaty bodies, by the end of 2021 only seven out of 18 experts serving on the HRC were women.[26] The persistent gender imbalance of the UN's oldest human rights treaty body raises considerable concern, given that "gender mainstreaming" has long been championed by the United Nations, with promoting gender balance in governance a primary goal.[27]

The General Assembly has recently been reviewing the treaty body process given the challenges in the scope, complexity, and increasing workload of the various committees.[28] Resources allocated to the treaty bodies have not kept pace with their expansion and growing caseload. On 2 June 2020, in her opening remarks of the 2020 Treaty Body Review Process, the UN High Commissioner for Human Rights stated that the treaty bodies needed regular budget resources in order to meet their mandates.[29] Incredibly, these top-level international positions are unpaid, although travel costs are covered. Certainly, the pool of candidates could increase if Committee positions were compensated, which would also help address awkward equity and access questions presented by the current arrangement.

THE CANADIAN CONTRIBUTION TO THE HUMAN RIGHTS COMMITTEE: REFLECTING BACK

How have Canadians influenced the Human Rights Committee? Over the HRC's 46 years, four Canadians have served as members: Walter Tarnopolsky, Gisèle Côté-Harper, Max Yalden and Marcia Kran. Their varied life and professional experiences have made unique and significant contributions to the HRC's demanding mandate.

Walter Tarnopolsky (HRC member, 1977-1983)

Walter Tarnopolsky, born in 1932 in Gronlid, Saskatchewan, is considered a pioneer in the development of human rights and civil liberties in Canada and played a major role in drafting the Canadian Charter of Rights and Freedoms.[30] He worked as a judge, Dean and law professor, teaching law at the University of

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[23] Ivona Truscan, "Diversity in Membership of the UN Human Rights Treaty Bodies" (February 2018), online: *Geneva Academy* <https://www.geneva-academy.ch/joomlatools-files/docman-files/Diversity%20in%20Treaty%20Bodies%20Membership.pdf>.

[24] *Ibid*. For an overview of the electoral process, see "Electing treaty body members", online: *United Nations Human Rights Office of the High Commissioner* <https://www.ohchr.org/en/treaty-bodies/electing-treaty-body-members>.

[25] See "Membership: Human Rights Committee", online: *United Nations Human Rights Office of the High Commissioner* <https://www.ohchr.org/en/node/33623/membership>.

[26] *Ibid*. Truscan, *supra* note 23.

[27] See António Guterres, "Women and Power," remarks at the New School, New York (27 February 2020), online: https://www.un.org/sg/en/content/sg/speeches/2020-02-27/remarks-new-school-women-and-power

[28] "Treaty bodies: Leadership and innovation from Chairs needed to strengthen the system" (5 July 2017), online: *International Service for Human Rights* <https://ishr.ch/latest-updates/treaty-bodies-leadership-and-innovation-chairs-needed-strengthen-system/>.

[29] *Supra* note 22.

[30] "About Walter Tarnopolsky" (2017), online: *International Commission of Jurists Canada* <https://www.icjcanada.org/index.php/en/about-us/tarnopolsky-award.html>.

Saskatchewan, University of Windsor, Osgoode Hall Law School of York University, and the University of Ottawa. He served as Law Dean at the University of Windsor and Vice-President of York University. In 1983, one year before the end of his second term on the HRC, Tarnopolsky stepped down from the Committee. In 1985, he was appointed to the Court of Appeal for Ontario where he served until his untimely death in 1993.

Tarnopolsky was well aware of the HRC's influence and highlighted one of the major problems it faced: how to compare the human rights performance of countries with very different standards of economic development.[31] Tarnopolsky settled on the view that the same standard should apply to all States, regardless of wealth or development. Today, the prestigious Tarnopolsky Prize is awarded annually to a resident of Canada who has made an outstanding contribution to domestic or international human rights.[32]

Gisèle Côté-Harper (HRC member, November 1983-1984)

Gisèle Côté-Harper, a widely-respected human rights and criminal law professor, was elected to complete the final year of Walter Tarnopolsky's term.[33] A professor on Université Laval's Faculty of Law since 1970, Côté-Harper was the first Francophone woman to receive the Pearson Medal of Peace for her work as a human rights activist. She later contributed to the development of the international doctrine of the Responsibility to Protect.[34]

Max Yalden (HRC member, 1996-2004)

Max Yalden, born in 1930 in Toronto, Ontario, had a 50-year career in public service. Yalden served as a diplomat, including as Canada's Ambassador to Belgium, Commissioner of Official Languages (1977-1984), and Chief Commissioner of the Canadian Human Rights Commission (1987-1996).[35] He was an outspoken advocate for many human rights issues including Canada's treatment of Indigenous peoples.[36] A staunch protector of minority rights, Yalden worked tirelessly to ensure that the *Canadian Human Rights Act* created a "fence of protection" for minorities in Canada.[37] At age 79, Yalden

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[31] Walter S. Tarnopolsky, "The Canadian Experience with the International Covenant on Civil and Political Rights Seen from the Perspective of a Former Member of the Human Rights Committee", 20 Akron Law Review (1987) 611.

[32] "The Honourable Walter S. Tarnopolsky Award", online: *The Canadian Bar Association* <https://www.cba.org/Who-We-Are/About-us/Awards-and-Recognition/Search-Awards/Human-Rights/The-Honourable-Walter-S-Tarnopolsky-Award>. Some twenty Canadians have so far been awarded the Prize.

[33] UNHRC, *Election, in accordance with Part IV (articles 28 to 34) of the International Covenant on Civil and Political Rights, to fill a vacancy in the Human Rights Committee*, UN Doc CCPR/SP/22 (5 October 1983), online: https://digitallibrary.un.org/record/56753?ln=fr.; "Gisèle Côté-Harper," online: *Univeristé Laval* https://ete.ulaval.ca/notre-universite/prix-et-distinctions/emeritat/gisele-cote-harper.

[34] See "The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty", Ottawa, December 2001, online: https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/18432/IDL-18432.pdf?sequence=6&isAllowed=y The Commission was established by the then Minister for Foreign Affairs of Canada, the Hon. Lloyd Axworthy, and comprised twelve independent experts from eleven countries (including two Canadians) and from all continents; the Commission was Co-Chaired by Gareth Evans (of Australia) and Mohamed Sahnoun (of Algeria).

[35] Dylan Robertson, "Obituary: With a mix of wit and diplomacy, Max Yalden championed minorities" (11 February 2015) online: *Ottawa Citizen* <https://ottawacitizen.com/news/politics/obituary-with-a-mix-of-wit-and-diplomacy-max-yalden-championed-minorities>.

[36] *Ibid.*

[37] Bernie M. Farber, "Max Yalden championed human rights in Canada" (12 February 2015), online: *Toronto Star* <https://www.thestar.com/opinion/commentary/2015/02/12/max-yalden-championed-human-rights-in-canada.html>.

published *Transforming Rights: Reflections from the Front Lines*, chronicling Canada's human rights record.[38]

As a member of the HRC from 1996 to 2004, Yalden strongly advocated for the interdependence of human rights and embracing a broad range of rights, including civil and political rights as well as economic, social and cultural rights.[39] He encouraged a framework where these rights would reinforce one another, irrespective of the size, culture, or political outlook of States.

Marcia V.J. Kran (HRC member, 2017 – present)

For thirteen years, there was no Canadian member of the UN Human Rights Committee. In 2016, lawyer and former UN staff member Marcia V.J. Kran was elected to the HRC.

Kran, born in Morris, Manitoba, began her legal career as a Crown Attorney in her home province and then served at the Canadian Department of Justice in Ottawa, before being employed by the Open Society Justice Initiative in Budapest. Kran embarked on an impressive UN career as a senior official at the UN Development Programme and the UN Office of the High Commissioner for Human Rights. In 2005, she was awarded the Tarnopolsky Prize for being "a guiding force in the promotion of human rights and the rule of law on an international scale."[40]

Throughout her UN career, Kran has advocated for human rights and worked in and advised numerous countries on pragmatic reforms to apply human rights in law, policy and practice. Having lived and worked in many countries, Kran is uniquely placed to understand the reforms required to improve human rights protections on the ground. As a current HRC member (re-elected in 2020 for a second four-year term), she focuses on national implementation of Committee recommendations.[41] Kran currently serves as the Committee's Rapporteur on Follow-Up to Concluding Observations, leading the evaluation of the extent to which individuals are able to exercise their civil and political rights following State interaction with the Committee.[42]

LOOKING AHEAD

The UN is now in serious need of high-quality, independent experts – such as the distinguished Canadians mentioned above – to sit on its human rights treaty bodies. With authoritarianism gaining traction globally, particularly in large countries such as China, Russia, Brazil, and India, it is crucial the UN continue to provide real human rights leadership to ensure its integrity.[43] Social sciences studies have found that authoritarian regimes are less likely than their democratic counterparts to participate and co-operate with international institutions and comply with international law.[44] Authoritarian practices also undermine the rule of law, a concept of universal validity and recognition, by rejecting principles such as State accountability and

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[38] University of Toronto Press, 2009.

[39] "Human rights commissions: Future directions", online: *United Nations Human Rights Office of the High Commissioner* <https://www.ohrc.on.ca/vi/book/export/html/2463>.

[40] "Marcia Kran receives 2005 Tarnopolsky human rights award" (18 August 2005), online: *International Commission of Jurists* <https://www.icj.org/marcia-kran-receives-2005-tarnopolsky-human-rights-award/>.

[41] See, e.g., Marcia V.J. Kran, "Following up – the key to seeing states act on treaty body recommendations" (13 November 2019), online: *Open Global Rights* <https://www.openglobalrights.org/key-to-seeing-states-act-on-treaty-body-recommendations/>.

[42] See, e.g., "Human Rights Committee gives top grades for follow-up to give countries" (13 December 2019) online: *United Nations Human Rights Office of the High Commissioner* <https://www.ohchr.org/en/stories/2019/12/human-rights-committee-gives-top-grades-follow-five-countries>.

[43] See, e.g., "Freedom in the World 2021: Democracy Under Seige" (2021), online: *Freedom House* <https://freedomhouse.org/report/freedom-world/2021/democracy-under-siege>; Larry Diamond, "Democracy's Arc: From Resurgent to Imperiled," (January 2022) 33:1 *Journal of Democracy* 163-79.

[44] Wayne Sandholtz, "Resurgent Authoritarianism and the International Rule of Law" (27 November 2019), online (blog): *The Global* <https://theglobal.blog/2019/11/27/resurgent-authoritarianism-and-the-international-rule-of-law/l>.

rights-based limits on State power. With this in mind, the roles of respected international treaty-based bodies are pivotal not only for upholding and protecting core international human rights norms and standards but for international peace and security more generally.

In these times of global flux, it is vital for the General Assembly to elect independent professionals to international institutions who believe in and are able to uphold democratic principles and human rights values. Only impartial and independent committee members can provide an objective assessment of whether States are fulfilling their human rights obligations. Given the strong track record of the Canadian experts on the HRC, promoting qualified Canadian membership to the UN treaty bodies should be a top priority for the Canadian government. The world needs professional, independent and human rights-centered voices in our international institutions now more than ever.

DOCUMENTATION

KISKINOHAMATOWIN: CONFERENCE SYNOPSIS OF AN INTERNATIONAL ACADEMIC FORUM ON THE HUMAN RIGHTS OF INDIGENOUS PEOPLES

Prof. Brenda Gunn (Law, University of Manitoba) and Helen Fallding (Centre for Human Rights Research, University of Manitoba)

CONFERENCE SYNOPSIS

The Kiskinohamatowin (Cree for "teaching and learning with each other") International Academic Forum was attended by more than 100 Indigenous people, policymakers, advocates and academics. The forum was held at the University of Manitoba on 18-19 January 2019 and was designed to provide for the exchange of knowledge between experts and others interested in promoting implementation of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). The goal was to link Indigenous peoples, policy makers, advocates and academics by profiling existing research and how it can be built upon to accomplish state and Indigenous peoples' implementation of the UNDRIP. The Forum profiled research that can help states and Indigenous peoples implement the UNDRIP.

International speakers, including current and former members the UN Expert Mechanism on the Rights of Indigenous Peoples and the Permanent Forum on Indigenous Issues, and the Special Rapporteur on the Rights of Indigenous Peoples, presented case studies from their regions. The conference focused on the themes of international standards, norms, laws and mechanisms related to Indigenous peoples; the right to self-determination; rights related to lands, territories and resources, focusing on free, prior and informed consent (FPIC); economic, social, cultural and spiritual rights; civil and political rights; and equality and non-discrimination. The conference began with an overview of the four UN Indigenous-specific mechanisms: the United Nations Permanent Forum on Indigenous Issues (Permanent Forum), the Expert Mechanism, the United Nations special rapporteur on the rights of Indigenous peoples and the United Nations Voluntary Fund for Indigenous Peoples. There was also a presentation considering the use of courts to promote implementation of the UNDRIP. Participants were reminded that, while instruments such as the UN Declaration, International Labour Organization (ILO) Convention No. 169 and the American Declaration on the Rights of Indigenous Peoples (American Declaration) adopted by the Organization of American States set forth standards and norms, their use can be bolstered or complemented with existing international conventions or treaties as interpretive instruments. The Forum was a great opportunity to have these international experts available together in Canada to share their expertise with those interested in learning more about implementing the UNDRIP.

The outcome of the conference was a report that includes case studies from Brazil, New Zealand, the Philippines, Russia, Canada and the U.S. on implementing rights to land, sacred sites, justice, language, self-government and the rights of Indigenous children. The report includes a brief overview of ways in which the Indigenous-specific mechanisms advance the UN Declaration as well as other instruments that advance the rights of Indigenous peoples. It provides recommendations to implement the UNDRIP aimed at Indigenous peoples, governments,

UN bodies, civil society organizations and academic and human rights institutions. More than a typical conference report, the report is written like a handbook for engaging in the work of realizing Indigenous peoples' human rights.

LAND RIGHTS

Brazil

Lands traditionally occupied by Indians are those on which they live on a permanent basis, those used for their productive activities, those indispensable for the preservation of environmental resources necessary for their well-being and those necessary for their physical and cultural reproduction, according to their uses, customs and traditions. The lands traditionally occupied by Indians are destined for their permanent possession, and they shall be entitled to the exclusive usufruct of the riches of the soil, rivers and lakes existing thereon. (Constitution of Brazil, Article 231)

Brazil started to demarcate Indigenous peoples' land in 1992 and committed itself to constitutionally protecting that land in 1998 – almost a decade before adoption of the UN *Declaration on the Rights of Indigenous Peoples*. However, Indigenous peoples' land rights in Brazil have been framed as property rights rather than human rights and international human rights standards are not referenced in court cases. The Yanomami people in the northern Amazon are finding international human rights bodies helpful when a national government ignores its own commitments, explained Erika Yamada, a member of the UN's Expert Mechanism on the Rights of Indigenous Peoples.

The Yanomami are a voluntarily isolated group of about 40,000 people with territory in Venezuela and more than 96,000 square kilometres in Brazil. They continue to fight for the right to be left alone. Their first sustained contact with outsiders began in the mid-1900s. After a gold rush brought disease and murder, the Yanomami took a landmark case against Brazil to the Inter-American Commission on Human Rights in 1985. The Commission later recognized the 1993 massacre of Yanomami people by Brazilian gold miners as genocide and some perpetrators were convicted of genocide in a Brazilian court.

However, Yanomami territory is again being invaded by a wave of miners and more than 150 other Indigenous peoples await land demarcation by the Brazilian government. Appealing to the international community is again necessary, so in 2017, the Yanomami submitted a shadow report to the UN's Universal Periodic Review of Brazil. They also send representatives to UN meetings, despite their desire to remain apart. The case of Yanomami land demarcation illustrates how worldwide advocacy can effect change in land policies for Indigenous peoples, but also demonstrates how difficult and ongoing the struggle is to advance collective land rights.

SACRED SITES

North America

Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature. (Article 11, UNDRIP)

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. (Article 19, UNDRIP)

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard. (Article 25, UNDRIP)

Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. (Article 28, UNDRIP)

The UNDRIP recognizes and protects Indigenous peoples' sacred sites. Sacred sites are often connected to creation stories, are places of governance and, in many cases, give rise to understanding about living in today's world. Although these sites may have an inanimate existence for many non-Indigenous people, for many Indigenous peoples in North America, these sites are living things that hold great value in their cultures.

Sacred sites are often on land now controlled by governments, including as national forest in the U.S. and Crown land in Canada. The San Francisco peaks sacred to southwestern Indigenous peoples are home to the Arizona Snowbowl ski resort, which uses treated sewage water to make snow. The Navajo and Hopi argued in court against this desecration but lost. So did the Ktunaxa Nation in British Columbia, which fought a year-round ski resort in Jumbo Valley that it said would drive away the Grizzly Bear Spirit. Canada's Supreme Court

held in 2017 that religious freedom does not protect the focus of worship and that developments can proceed after consultation with affected Indigenous peoples even if they do not consent. Kristen Carpenter, director of the American Indian Law Program at the University of Colorado, says the UNDRIP offers a reform pathway for sacred sites law that has not benefitted Indigenous peoples.

Carpenter provided a few key arguments that can be made in future cases to better protect sacred sites in line with the provisions of the UNDRIP. The U.S. First Amendment on religious freedom should be interpreted consistently with UNDRIP articles 11 and 25. Agencies should administer spiritual sites consistent with UNDRIP article 19 on consent. Lands of spiritual value should be returned to Indigenous peoples. And finally, she recommended that co-management models should be engaged to ensure Indigenous peoples' right to participate in decision-making is fulfilled.

CIVIL AND POLITICAL RIGHTS

Asia

Indigenous Cultural Communities/Indigenous Peoples occupying a duly certified ancestral domain shall have the responsibility to maintain ecological balance and restore denuded areas. (Section 9, Indigenous Peoples' Rights Act of the Philippines)

Over much of Asia, Indigenous peoples are excluded from decision-making and are not regarded as self-determining peoples. In the Philippines, the *Indigenous Peoples' Rights Act* was adopted in 1997, recognizing rights to land and ancestral domain, and creating a National Commission for Indigenous Peoples. Edtami Mansayagan, a member of the UN Expert Mechanism on the Rights of Indigenous Peoples, served for six years on that commission. He explains that despite formal legal recognition, Indigenous peoples are still treated by the government as communities that host cultural performances rather than as distinct peoples who hold territory and have the right to self-determination, as the UNDRIP affirms. Much of the territory of more than 33 Indigenous nations in the Philippines is not recognized under the *Indigenous Peoples' Rights Act*. Mansayagan said Indigenous peoples in the Philippines designed a "one tribe, one territory, one governance" framework to express the right to self-determination based on their own Indigenous political structures. He encouraged Indigenous peoples' to (re)establish their own Indigenous governments.

LINGUISTIC AND CULTURAL RIGHTS

Russia

Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons. (Article 13, UNDRIP)

Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning. (Article 14, UNDRIP)

Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information. (Article 15, UNDRIP)

The Republic of Karelia, which borders Finland, is struggling to keep its Indigenous language as a state language because Karelian is written with the Latin alphabet rather than the Cyrillic script that the Russian government promotes. Aleksey Tsykarev, a member of the UN's Expert Mechanism on the Rights of Indigenous Peoples, says that the failure to recognize Indigenous languages impacts the ability participate in elections. Russian federal law states that Indigenous peoples, and all peoples, can use their own languages in federal elections. Unfortunately, Indigenous language rights are often seen not as human rights but simply as part of cultural heritage. The Russian government is more interested in using the language in festivals than in media, education and elections.

Indigenous people are actively working to keep the language alive. Karelia has a language house where people of all generations gather. It houses an immersive language nest for children modeled on language nests in New Zealand. The UN Declaration has been translated into Karelian. Tsykarev also connected linguistic and cultural rights to economic rights, questioning how to compensate Indigenous peoples for the loss of language related to government action. He advocated that impact assessments for resource projects should recommend compensation for loss of language and culture.

SOCIAL AND CULTURAL REPARATIONS

Aotearoa New Zealand

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. (Article 3, UNDRIP)

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights. (Article 40, UNDRIP)

The UNDRIP was key to the 2018 establishment of the Royal Commission of Inquiry into Abuse in Care, according to commissioner Andrew Erueti, a University of Auckland law professor. Indigenous peoples had made submissions to the UN Committee on the Elimination of Racial Discrimination and to the Human Rights Council, asking for an independent inquiry.
The inquiry is looking into what happened to children, young people and vulnerable adults in state and faith-based care from 1950-99. It is investigating the reasons children were taken into state care, how they were treated and the impacts on survivors, families and communities. The inquiry focuses on Māori, Pasefika and disabled people because of the disproportionate number of people from these communities in care. There are parallels to Canadian residential schools and the Sixties Scoop, when Indigenous children were removed from their homes and communities by child welfare authorities for adoption by non-Indigenous families.

Erueti said there is a correlation between overrepresentation of Māori in residential institutions and in the prison system. More than half of prisoners in New Zealand are Māori, although they make up only 15 per cent of the country's population. In Canada, the over-representation is even worse.

Erueti said the government should have followed the principles of UNDRIP article 40 by engaging with Māori on the commission's design.

CANADA

We call upon federal, provincial, territorial, and municipal governments to fully adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation. (Call to Action 43, Truth and Reconciliation Commission of Canada)

The UNDRIP is starting to weave its way into decision-making in Canada, partly through the attention drawn to the document by the Truth and Reconciliation Commission.

Fifteen of the commission's 94 calls to action published in 2015 reference the UNDRIP. The commissioners advised that law, medical, nursing and journalism students; lawyers; public servants; and business managers and staff should be educated about the declaration. They want its principles applied to redesign of Canada's justice system and museum practices and to making sure Indigenous people know the truth about human rights violations committed in residential schools. The commissioners called on the business community to obtain the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects, as outlined in the declaration.

Former commissioner Wilton Littlechild said Canadian judges now educate themselves on Indigenous law and how they can take these laws into consideration. Most resolutions debated by the Assembly of First Nations reference at least one article of the UN declaration and Littlechild recommends that those drafting or amending legislation for all levels of government consult the UNDRIP.
He stressed the importance of formally monitoring progress both on the calls to action and on UNDRIP implementation.

A former university hockey player, Littlechild demonstrated how to bring Indigenous language and cultural rights to the mainstream when he led a ceremonial puck drop in 2014 for the professional Edmonton Oilers hockey team after Indigenous women sang the Canadian anthem in Cree.

SELF-DETERMINATION

Canada

Indigenous peoples ... have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions. (Article 4, UNDRIP)

Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security. (Article 21, UNDRIP)

Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration. (Article 22, UNDRIP)

Child welfare services on reserve are delivered through a convoluted system with federal funding, provincial oversight and First Nation delivery. Naiomi Metallic's presentation noted that First Nations spend more time completing reporting requirements than delivering services. The First Nations Child and Family Caring Society, together with the Assembly of First Nations, filed a complaint against Ottawa with the Human Rights Commission in February 2007. On January 26, 2016, the Canadian Human Rights Tribunal issued a watershed decision stating that the federal government discriminates against First Nations children on reserves by underfunding and failing to provide the same level of child welfare services that exists off-reserve. The Canadian Human Rights Tribunal considered the UNDRIP in their decision. Even if per-child funding was raised to provincial levels, Metallic said Indigenous people still have the right to be different and to funding to meet different needs. Metallic presented different mechanisms through which Indigenous peoples can gain more control over child welfare services. She said the Canadian government needs to give up control because true Indigenous self-determination in child welfare services will have better outcomes for children than mere self-administration.

SAMPLE RECOMMENDATIONS:

The forum was designed to encourage participation and interaction between presenters and attendees. In addition to the time allowed for questions, breakout sessions after the panel discussions provided space to discuss key issues. Recommendations included in the final report are a result of these collaborations. While the recommendations are organized by different entities, participants agreed that there is considerable overlap. Below are a sample of the recommendations that emerged.

UN bodies

- UN bodies should visit Indigenous nations in addition to nation-states.
- The Expert Mechanism can play an important role in making states aware that domestic courts, which interpret the UN Declaration, operate within a larger international arena in interpretation of the UN Declaration.
- The UN Voluntary Fund for Indigenous Peoples should fund Indigenous participation in the UN Forum on Business and Human Rights and UN sessions on a binding instrument for transnational corporations.

Indigenous peoples

- Intertribal institutions are a way to build alliances, both traditionally and in modern times.
- In using the UN Declaration to promote Indigenous peoples' rights, it is important to bear in mind that there is a balance between rights and responsibilities.
- Indigenous peoples can articulate their own legal traditions, for example, by redesigning environmental governance processes. In many cases, stories are actually laws.
- Indigenous peoples can share programs, such as the Standing Tall program that the Metis adapted from a similar program started by the Māori.

Nation-states

- Nation-states need to acknowledge the history and imposition of colonial borders on Indigenous/Aboriginal territories and communities.
- Nation-states must recognize Indigenous legal traditions and law in community consultation processes.
- Nation-states need to address issues of federal versus provincial relationships with Indigenous peoples using the UN Declaration.

Academic institutions

- Academic institutions need to respect the value of Indigenous knowledge holders and treat them as other "experts" in academia.
- Move beyond silos to encourage cross-disciplinary, cross-cultural work.
- Study the relationships between Indigenous peoples and recent immigrants through the lens of the UN Declaration.

Civil society organizations

- Support direct participation of Indigenous peoples in international mechanisms.

See the full conference report by June Lorenzo for more details and references.

The Kiskinohamatowin International Academic Forum was supported by funding from the Indigenous Law Centre at the University of Saskatchewan, the Social Sciences and Humanities Research Council, the National Centre for Truth and Reconciliation and the University of Manitoba. Special thanks to conference co-organizer Celeste McKay.

CHANGING CANADA'S EXTRADITION LAWS: THE HALIFAX COLLOQUIUM'S PROPOSALS FOR LAW REFORM

October 2021

ACKNOWLEDGEMENTS AND ATTRIBUTION

Funding for the Halifax Colloquium on Extradition Law Reform was provided by the Canadian Partnership for International Justice (CPIJ), which is funded by a grant from the Social Sciences and Humanities Research Council of Canada (SSHRC). The Colloquium was hosted and hospitality was provided by the MacEachen Institute for Public Policy, Dalhousie University. The Human Rights Research and Education Centre (HRREC) at the University of Ottawa kindly arranged for translation of this document.

This document was prepared by Professor Robert J. Currie of the Schulich School of Law, Dalhousie University, and represents the consensus of the participants in the colloquium.

EXECUTIVE SUMMARY

Canada's laws on extradition are in need of reform.

Extradition is the legal process by which countries send individuals to face criminal prosecution and incarceration in foreign countries. In Canada, extradition proceedings are conducted by the International Assistance Group (IAG), a specialized office of Justice Canada, under the 1999 *Extradition Act*. Extradition is an important part of the global fight against transnational crime, and Canada's extradition system is administratively efficient; so far as publicly-available figures indicate, Canada fulfills most extradition requests from other countries, and individuals who are sought for extradition are almost always unsuccessful in challenging it.

But is this as it should be? Increasingly, Canadians are becoming dissatisfied with our extradition laws. The Meng Wanzhou case has raised questions about the government's conduct of extradition proceedings that have significant foreign policy implications. Canadians have also raised concerns about the wrongful extradition of Dr. Hassan Diab to France in 2014. Dr. Diab, a Canadian citizen, was held in solitary confinement in a French maximum-security prison for over three years. He was released without ever being committed for trial when it became apparent that the French case against him was nowhere near ready for trial and had been profoundly flawed from the start—indeed, was too unreliable even to justify a French trial—even though the IAG had aggressively pursued his extradition.

Upon Dr. Diab's return to Canada in 2018, Prime Minister Trudeau stated that the extradition should never have happened, and that his government would ensure that no case like it would ever happen again. However, an external review of the case found that all relevant laws and policies had been followed by the IAG and the Minister of Justice. The federal government has shown no interest in making any changes. Disturbingly, in 2021 the government of France re-instituted the prosecution against Dr. Diab, despite the acknowledgment by French courts that the evidence is completely inadequate to sustain the case.

The Prime Minister's promise, it seems, has been broken. In light of the *Diab* case, among others, it is clear that parts of our extradition process are also broken.

In September 2018 a group of academics, defence counsel and human rights organizations met at Dalhousie University for the *Halifax Colloquium on Extradition Law Reform*. In its deliberations this group identified a number of problems with the current system, including that:

- The "committal" process conducted by courts is inherently unfair and compromises the ability of the person sought to meaningfully challenge the foreign case against them. It reduces Canadian judges to "rubber stamps"; it permits extradition and deprivation of liberty on the basis of unreliable material;
- The "surrender" decision made by the Minister of Justice is the product of a process under which fundamentally legal issues are dealt with through a highly-discretionary and explicitly political process, which is also unfairly weighted toward extradition and against the rights of the person sought;
- The IAG is excessively adversarial in the way in which it conducts extradition proceedings, and acts without any separation between the litigators and the decision-makers; and
- Canada's international criminal cooperation processes are generally conducted under a veil of unnecessary secrecy, and lack of transparency is a serious problem.

The Halifax group has assembled this set of law reform proposals in order to spark a public discussion and, we hope, Parliamentary inquiry. We propose that:

1. The Extradition Act and related policies and protocols should be amended in accordance with three general principles: fundamental fairness, transparency and a re-balancing of roles, both between the courts and the government and between constitutional/Charter protection and administrative efficiency.

2. As the Diab case among others demonstrates so tragically, it should not be presumed in law that states with which Canada has extradition relations will act in good faith.

3. The committal process should incorporate the presumption of innocence, as well as some legal tools that would allow the person sought a meaningful opportunity to challenge the reliability of the case against them, including more use of first-person evidence and cross-examination. In particular, exculpatory evidence in the hands of either the requesting state or the Canadian government must be disclosed in a timely manner.

4. The Minister's surrender decisions should be subject to a more exacting standard of review, and the Act should be amended to re-allocate some legal questions to the courts.

5. Surrender should only be permitted if the requesting state is ready to take the case to trial.

6. Canada's obligations under international human rights law should be taken explicitly into account throughout the process.

7. If diplomatic assurances are used to facilitate surrender, they must be meaningful, transparent, monitored and legally enforceable.

8. The role of the IAG should be re-formulated so that its members work as traditional "ministers of Justice," seeking a fair and just result in each case rather than a litigation "win." This may involve breaking the office into different divisions to reflect their different roles.

9. There should be government/Parliamentary oversight of the activities of IAG, and the ability for meaningful public scrutiny of its activities and of the extradition process generally. This should involve appropriate transparency and publication of data and information.

10. In cases where Canadian citizens are sought for extradition but Canada could also prosecute, extradition should be barred in favour of a Canadian prosecution unless the government can prove that it is actually in the interests of justice to extradite. This would give meaning to s. 6 of the Canadian Charter of Rights and Freedoms.

11. All of Canada's extradition arrangements should be reviewed and subjected to public scrutiny, on an ongoing basis. As a starting presumption, Canada should not have extradition treaties with countries that have records of human rights abuse or have failed to ratify human rights treaties.

12. The government of Canada should dedicate more resources to investigating and extraditing alleged war criminals who are present on Canadian territory.

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INTRODUCTION

As an advanced industrialized G7 state with a globalized economy, Canada is both a transit point and a destination for individuals involved in "transnational" (i.e. touching more than one state) criminal activities. This is compounded by our long, undefended and easily-crossed border with the U.S.—a state with a large population, the largest national economy in the world, and significant crime and incarceration rates. Given the increasing globalization of crime it is necessary, from a policy point of view, that Canada be an effective participant in inter-state cooperation to address, suppress and deter transnational crime. Indeed, so much crime is transnational that any serious system of criminal justice must have strategies to address the inter-state aspects.

This includes the use of extradition. Extradition is the oldest and still one of the primary tools to accomplish the goal of inter-state cooperation, and one that Canada has used since the 18th century. It has been defined as follows:

> the formal rendition of a criminal fugitive from a state that has custody (the requested state) to a state that wishes either to prosecute or, if the fugitive has already been convicted of an offence, to enforce a penal sentence (the requesting state).[1]

Today, the procedures for extradition to and from Canada are set out in the *Extradition Act*,[2] brought in by the government of Canada in 1999. During the process of having the Act passed, the government of the day argued that Canada was seen as rather a weak partner in global extradition affairs, particularly in the extradition of individuals from Canada to requesting states. While extraditions from Canada were accomplished with reasonable facility among Commonwealth States (under the now-repealed *Fugitive Offenders Act*), states whose criminal justice systems stemmed from different legal traditions found accessing the Canadian system difficult. Moreover, the entire system was procedurally clunky, and cases took a long time to wend their way through. The goal of this "new" *Extradition Act* was to make the extradition process more streamlined and efficient, to get rid of delays and provide for easier access by a broader range of extradition partner states.[3]

Nearly two decades later, there is no doubt that this goal was accomplished. Canada's extradition process is, if nothing else, a model of administrative efficiency, looked to by other states which are considering reforming their own laws.[4] To the extent this can be ascertained in a fairly un-transparent system (see "Transparency and Accountability," below), the vast majority of individuals sought for extradition from Canada are, in fact, extradited.[5] As most people engaged in extradition affairs will know, the most common advice defence lawyers give when first consulted by a client facing extradition (particularly to the U.S.) is that they should immediately make contact with the prosecuting attorney in the foreign state and attempt to negotiate a plea bargain in exchange for not contesting extradition. Extradition is, mostly, inevitable under the 1999 Act.

It should be recalled at the outset of this discussion that, from a public policy standpoint: 1) a robust, efficient and effective international extradition system is a good thing, and it is in the interests of all Canadians that it be so, provided that it is fair and constitutionally sound; and 2) people sought for extradition are often accused of very serious crimes, and requesting states are entitled to expect that those allegations should be tried in a domestic court.

However, it has become increasingly clear that the mechanics built into the *Extradition Act* are heavily slanted towards the Crown's interest in efficiency and against the interests of individuals in receiving fair process. In particular, the law provides insufficient safeguards that might allow individuals to meaningfully challenge extradition in cases where the requesting state's case is weak or unreliable. Powered by the dynamics of the 1999 legislation, the Crown has successfully urged upon the courts the argument that Canada's commitment to its treaty partners to cooperate in the fight against transnational crime is, essentially, the primary interpretive principle for the legislation.

As Professor La Forest's prescient 2002 article pointed out,[6] the judicial role in the process has been mostly gutted, due to presumptions that remove the requesting state's evidence from meaningful scrutiny. The Supreme Court's attempt to reverse the conversion of the extradition judge to a "rubber stamp" in the *Ferras* case[7] was ultimately unsuccessful, and the Court appears to have doubled down on this in its recent judgments by making it virtually impossible for the individual sought to challenge the reliability of the requesting state's evidence.[8]

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1 Robert J. Currie & Joseph Rikhof, *International & Transnational Criminal Law*, 3rd ed (2020) at 531.

2 SC 1999, c 18.

3 The legislative process that gave birth to the 1999 Act is reviewed in detail in Maeve W McMahon, "The Problematically Low Threshold of Evidence in Canadian Extradition Law: An Inquiry Into Its Origins: and Repercussions in the Case of Hassan Diab" (2019) 42 Man LJ 303, where Professor McMahon points out that the evidentiary base for these arguments was questionable.

4 See, eg, New Zealand Law Commission, *Modernising New Zealand's Extradition and Mutual Legal Assistance Laws* (2016).

5 Lisa Laventure & David Cochrane, "Canada's high extradition rate spurs calls for reform," CBC News (May 30, 2018), online: https://www.cbc.ca/news/politics/extradition-arrest-canada-diab-1.4683289.

6 Anne W La Forest, "The Balance between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings" (2002) 28 Queen's LJ 95.

7 *United States v. Ferras*, 2006 SCC 33.

8 *MM v. United States of America*, 2015 SCC 62. For an extensive analysis of this point see Robert J. Currie, "Wrongful Extradition: Reforming the Committal Phase of Canada's Extradition Law" (2021) 44 Manitoba LJ (forthcoming), online: https://ssrn.com/abstract=3664754.

The role of the Minister of Justice was expanded enormously under the Act, the result of which is that the Minister makes a number of predominantly legal decisions based in part on decidedly non-legal goals (e.g. diplomatic relations), and enjoys what is probably the most deferential standard of review available in Canadian law in doing so.[9] The policy imperative on fulfilling extradition requests has led the Minister to seek or order surrender in cases where the individual sought stood a reasonable likelihood of facing double jeopardy,[10] indefinite civil detention post-sentence,[11] torture and mistreatment by out-of-control prison officials,[12] trial by a state already complicit in significant abuses of the individual's human rights,[13] sentencing regimes which do not take aboriginal status into account,[14] "life without parole" sentences,[15] and extreme disparities in sentence as between Canada and the requesting state.[16] Some of these were turned back by the courts, but many were not.

The Supreme Court has upheld (in *Fischbacher*[17]) the *Act*'s dilution of the "double criminality" requirement, under which the conduct for which the individual is sought by the requesting state must also be an offence in Canada. The result is that individuals can be *committed* for extradition on the basis that the evidence could sustain prosecution for a particular offence, only to be surrendered by the Minister for offences which are much more serious in the requesting state—to the point that the jeopardy to be faced in the requesting state barely resembles what might happen to the individual in Canada.

Judges have for the most part resolutely resisted defence attempts to have the requesting state disclose evidence, even where there is an air of reality to claims of unfairness or problems with the requesting state's case, on the (legally dubious) basis that our procedure cannot apply extraterritorially to the requesting state.

Moreover, the law is particularly un-protective of Canadian nationals, in stark contrast to many other states which do not even extradite their citizens or at least provide greater procedural protections.[18] The right of all Canadian citizens to remain in Canada under s. 6 of the *Charter* is dealt with via the *Cotroni*[19] analysis, which is essentially a meaningless exercise in formalism.

And current indications are that some Canadian Justice officials may have engaged in active efforts to "support" the extradition requests of foreign states via significant back-channel communication and activities (including the suppression of exculpatory evidence) that sought to actually undermine the ability of individuals to hold the state to a duty of fairness in proceedings.

Years of concern about extradition has gone unheard, and at times been actively combatted, by the federal Crown and in particular Justice Canada's International Assistance Group (IAG), which is charged with overseeing all extraditions. All of this came to a head with the case of Dr. Hassan Diab, extradited to France on the basis of dubious evidence after a hotly-contested multi-year extradition process, which saw the extradition judge describe the French case as "a weak case where a conviction seems unlikely;" a case dependent on opinion evidence he found to be "very problematic, very confusing, with conclusions that are suspect;" a case where he was caused to "wonder about the reliability" of the key evidence on which the French case relied; a case which he found to be "substantially undermined."

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[9] See *Lake v. Canada (Minister of Justice)*, 2008 SCC 23.

[10] *Bouarfa c. Canada (Ministre de la Justice)*, 2012 QCCA 1378; *United States v Qumsyeh*, 2015 ONCA 551.

[11] *Carroll v. Canada (Attorney General)*, 2017 NSCA 66.

[12] *India v. Badesha*, 2017 SCC 44.

[13] *United States v. Khadr*, 2011 ONCA 358

[14] *United States of America v. Leonard*, 2012 ONCA 622.

[15] *United States v. Muhammad 'Isa*, 2014 ABCA 256.

[16] *United States of America v. Johnstone*, 2013 BCCA 2; *United States v. Reumayr*, 2003 BCCA 375; *Gwynne v. Canada (Minister of Justice)* (1998), 103 B.C.A.C. 1 (BCCA).; *Doyle Fowler c. Canada (Ministre de la Justice)*, 2011 QCCA 1076; *Damgajian c. The Attorney General of Canada (United States of America)*, 2017 QCCA 621; *United States v. Hillis*, 2021 ONCA 447.

[17] See *Canada (Justice) v. Fischbacher*, 2009 SCC 46.

[18] Typically, states which have a civil law tradition (as opposed to Canada's common law tradition) do not extradite their citizens; examples include France, Switzerland, Germany and Brazil.

[19] *United States of America v. Cotroni*, [1989] 1 SCR 1469; *Sriskandarajah v. USA*, 2012 SCC 70.

The judge held that if Diab received a fair trial in France he would likely be acquitted.[20] Diab was imprisoned for over three years in solitary confinement in a maximum-security prison—only to eventually be released *without having been formally committed for trial* when it became clear to the French courts that there was no case. Media inquiries produced evidence of concerted IAG efforts to shore up the French case, which has shone a spotlight into the murky back-channel world of inter-state cooperation.

It is worth recalling that, when the *Extradition Act* was brought in, Parliament was assured by the Department of Justice that Canadians would not moulder away in foreign states awaiting trial, nor would extradition procedures be used to facilitate foreign investigation. Hassan Diab's case shows that neither of these promises is being taken seriously.

Both the Prime Minister and the Minister of Foreign Affairs expressed concern about what happened to Diab. Prime Minister Trudeau stated that "what happened to [Diab] should never have happened," and promised that the federal government would "make sure this never happens again."[21]. However, in the end, an external inquiry led by former Ontario Deputy Attorney General Murray Segal found that all laws were upheld and all relevant procedures followed. The only reservations expressed by Justice Canada officials about the case was that it had taken too long to go through the courts.[22]

Hassan Diab and his family are still living with the trauma of his wrongful extradition. Moreover, observers of the case have been scandalized by the reinstatement of the case by France's top court, despite that court's acknowledgment that the case against Dr. Diab is even weaker than it was before.[23] To date, there has been no public indication that the government is interested in extradition law reform. The Prime Minister's promise has been broken.

I. THE HALIFAX COLLOQUIUM

In the spring of 2018 Professor Rob Currie of the Schulich School of Law, Dalhousie University, proposed the convening of a closed-door meeting of a group of experts in extradition and human rights law. The goal of this session was to discuss a broad range of issues of concern arising from Canada's extradition law, and to formulate a preliminary set of principles and proposals that would serve as the basis for a broader extradition law reform conference to be held subsequently in Ottawa. With sponsorship and assistance from the Canadian Partnership for International Justice (CPIJ) and the MacEachen Institute for Public Policy at Dalhousie University, the *Halifax Colloquium on Extradition Law Reform* was held on September 21st, 2018 at the MacEachen Institute, chaired by Professor Currie and with doctoral student Laura Ellyson serving as rapporteur. In attendance were:

Don Bayne, Bayne Sellar Ertel Carter, Ottawa

Seth Weinstein, Greenspan Humphrey Weinstein, Toronto

Prof. Joanna Harrington, Faculty of Law, University of Alberta

Prof. James Turk, School of Journalism, Ryerson University

Anthony Moustacalis, Moustacalis & Associates, Toronto

Alex Neve, Secretary General, Amnesty International (Canada)

Josh Paterson, Executive Director, British Columbia Civil Liberties Association

Below are the proposals that were formulated at the Colloquium.[24] It is hoped that these will be useful in helping to frame the larger conversation about extradition law reform.

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[20] *France v. Diab*, 2011 ONSC 337 at para. 191.

[21] David Cochrane & Lisa Laventure, "Hassan Diab to boycott external review of 2014 extradition to France," *CBC News* (24 July 2018), online: https://www.cbc.ca/news/politics/hassan-diab-boycott-external-review-france-extradition-1.4758418.

[22] Murray D. Segal, *Independent Review of the Extradition of Dr. Hassan Diab* (Justice Canada, 2019), online: https://www.justice.gc.ca/eng/rp-pr/cj-jp/ext/01/review_extradition_hassan_diab.pdf

[23] David Cochrane, "Canadian academic Hassan Diab ordered to stand trial in French terrorism case," *CBC News* (19 May 2021), online: https://www.cbc.ca/news/politics/hassan-diab-france-trial-1.6032288.

[24] Michael Lacy of the firm Brauti Thorning, Toronto, provided written submissions towards the finalization of the Proposals.

II. THE HALIFAX PROPOSALS

1. Statement of Principles

In extradition proceedings, the liberty of the individual sought is at stake. This is no less true than in a domestic criminal proceeding. In fact, in a sense the stakes are even higher, since a criminal conviction in Canada can be overturned on appeal or otherwise dealt with legally, whereas an individual who is extradited is essentially at the mercy of a foreign state. The individual may, as in Hassan Diab's case, be sent to a foreign land where he/she must defend their liberty without speaking the local language or knowing of any counsel; they will certainly be deprived of the support of family, friends and community, both at trial and when serving any sentence imposed.

Accordingly, it is not appropriate for extradition law and process to be expeditious at the expense of due process, fundamental fairness and transparency. Summary proceedings of the kind currently in place are unacceptable. The wrongful extradition of Hassan Diab is the clearest evidence of this.

Canada's extradition laws and policies, and in particular the *Extradition Act*, should be re-visioned and amended in accordance with three general principles: 1) fundamental fairness; 2) transparency; and 3) a re-balancing of roles, both between the courts and the government and between constitutional/*Charter* protection and administrative efficiency.

What follows below is a set of proposals for changes to various aspects of extradition law and practice. Some are broad and policy-oriented, others are more specific and process-oriented. In our view, the principles of fairness and transparency are woven throughout the entire body of proposals. The principle of re-balancing roles between courts and government applies with more specificity, but forms an important pillar of the proposals.

2. Removing the Presumption of Good Faith

- It is presumed in Canadian extradition law that states with which Canada has extradition treaties: a) have criminal justice systems that are acceptable to Canada, from the point of view of protecting procedural rights and appropriate sentencing regimes; b) will act in accordance with any diplomatic assurances that are provided; and c) will act in good faith in prosecutions for which extradition is sought.

- This presumption, which cuts across both the committal and surrender phases of extradition cases, cannot be maintained. This has been amply demonstrated by the *Diab* case, among others. Beyond Canada's international legal duty to act in good faith in order to discharge its obligations under the extradition treaty, each extradition case must begin with a "clean slate." The individual sought should not have to overcome the presumption in order to have issues and challenges meaningfully considered in a case.

3. The Committal Phase

- The overall issue with the committal hearing as it is currently framed in the Extradition Act is that it is fundamentally unfair to the individual sought. Ultimately the Supreme Court of Canada's ruling in the 2006 *Ferras* case has not been complied with: the extradition judge does not have a meaningful ability to judge whether extradition can be legally sustained in a given case. The entire committal process is built to accommodate the requesting state and not to protect the individual's right to a fair extradition hearing.

- We recognize that an extradition hearing can be, in some sense, expeditious and should not be the equivalent of a criminal trial. Nonetheless, in its current formulation the Act creates a process that neuters the "principles of fundamental justice" pursuant to s. 7 of the *Charter*. Because Canada does not have ultimate control over the fairness of the process that the person sought will face in the requesting state, the hearing must be more robust than the preliminary inquiry model upon which it is based.

- The Act should specifically impose the presumption of innocence on the committal hearing, and this should inform all decisions that are made by the extradition judge. Extradition, after all, engages both Canadian and foreign criminal law.

- The "record of the case" approach should be abandoned or modified. In particular, the presumption of reliability for the requesting state's case should be removed. The Minister should have the burden of demonstrating that the requesting state's case is reliable, on either a balance of probabilities or beyond a reasonable doubt.

- Key witness evidence should be provided in the form of affidavits and the witnesses should be made available for cross-examination. The purpose of the cross-examination would be to explore whether the witness is fundamentally reliable and not for exploring credibility simpliciter. This is especially important if the witness has taken a plea deal. This can easily be accomplished by way of video or internet-based communication, to spare the expense, delay and administrative difficulties of bringing witnesses to Canada.

- The defence must have available to it meaningful disclosure from the foreign state, including correspondence between the requesting state

and Canada (subject to redaction on the basis of appropriate forms of privilege). This should include all exculpatory evidence in the hands of the requesting state; otherwise, the requesting state should be required to provide assurance that it has no exculpatory evidence in its possession.

- Any evidence that is in the hands of the Canadian government, whether independently gathered by Canadian officials or disclosed to them, should be disclosed to the defence, including all exculpatory evidence.

- Expert evidence should be the subject of specific reports or affidavits and not included as part of any summary of available evidence. It should be the subject of a separate admissibility inquiry during the committal hearing.

- The requesting state should not be permitted to rely on any unsourced intelligence or evidence derived from unsourced intelligence.

- Evidence regarding the existence of an excuse, defence or justification that would be available to the individual sought, under the law of either Canada or the requesting state, should be admissible at the instance of the individual sought. The requesting state should be entitled and required to respond. Careful consideration must be given to the threshold at which an applicable and substantiated excuse, defence or justification would actually bar extradition.

- On the issue of double criminality, the Act should be amended to re-introduce some version of the "alignment test" proposed by the British Columbia Court of Appeal—but rejected by the Supreme Court—in the Fischbacher decision. The extradition judge's assessment of double criminality must involve consideration of whether the individual faces fundamentally higher jeopardy in the requesting state than would be faced in Canada for the same conduct. This includes both substantive jeopardy and sentencing considerations.

4. The Surrender Decision

- While compliance with international human rights law is important for the entire extradition process, it is the surrender phase at which these standards are most central and should inform all decision-making.

- The Minister's surrender decision attracts what is probably the most deferential standard of review available in Canadian law.[25] This is said to be justified by the fact that the Minister is operating within the Crown prerogative over foreign affairs, regarding which the common law courts were historically submissive. In a country that has a constitutionalized set of human rights protections, this kind of deference is no longer appropriate. It has been said that, "What the Charter gives, administrative law takes away." This tendency must be guarded against in extradition proceedings.

- While it may have some international diplomatic texture, the Minister's surrender decision is ultimately a legal one, which should comply with the *Charter* and with Canada's international human rights law obligations. The standard of review should be one approaching "correctness."

- All of this should apply with particular stringency to the provisions of the Act that either require or allow the Minister to decline surrender. The deferential standard of review has resulted in case law which emphasizes Canada's obligations under the extradition treaties/arrangements (usually framed as "international comity") without meaningful counterbalance by human rights protections. Each of the grounds of refusal raises a distinct question of law and should be treated as such.

- Human rights protections, in particular, raise legal questions. Careful consideration should be given to whether certain grounds of refusal should be wholly judicialized and made part of the committal phase. Examples would be whether the individual sought would face double jeopardy, prosecution for a political crime, unfair trial, serious mistreatment including torture, cruel sentencing regimes, politicized criminal proceedings, or other unjust or oppressive treatment.

- Surrender should only be permitted where the requesting state is ready to take the case to trial. It should not be permitted for the purpose of allowing the requesting state to perfect its investigation and continue to prepare its case, regardless of the manner in which that state's procedure operates. This should be incorporated into extradition treaties and arrangements.

- In accordance with Canada's obligations under the *UN Convention on the Rights of the Child*, the "best interests of the child" should be an important consideration in any extradition case where children would be affected.

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[25] See *Lake, supra*.

5. Post-Surrender Considerations

- In some cases extradition is only permitted on the basis of "diplomatic assurances," under which the Minister of Justice concedes that there are concerns about the treatment of the individual in the requesting state, but allows extradition on the basis of assurances from the requesting state that the individual will not be mistreated and/or will receive necessary accommodation (e.g. medical).

- The use of diplomatic assurances is contentious internationally and was controversial among the members of the Halifax group. While assurances can facilitate extradition and protect the rights of the individual in some cases, some forms of assurance can be difficult to monitor and guarantee, particularly those regarding torture and mistreatment by state officials. This difficulty is compounded by the fact that, while the Minister has been willing to obtain assurances in some cases, there is less willingness to monitor whether they are being complied with in some cases.

- This situation is complicated further by the fact that the official position of the government appears to be that while the presence of assurances is the only thing that makes extradition constitutionally acceptable in some cases, the government is under no legal duty to monitor whether the assurances are being complied with.[26]

- To the extent there was consensus around assurances in Halifax, it was on the point that they must be meaningful and legally enforceable if they are to be used to facilitate extradition. Post-surrender monitoring should be the subject of a specific agreement between Canada and the requesting state, to which the individual sought must have input, and it must be both transparent and enforceable.

6. The Conduct of the International Assistance Group

- Justice Canada generally, and the International Assistance Group (IAG) in particular, exist at a tense nexus of the federal government in conducting extradition. They are responsible for advancing the interests of requesting states, but also have a fundamental and constitutional obligation to protect the rule of law and the interests of justice in the extradition process.

- The manner in which the IAG currently operates is skewed towards facilitating foreign state requests, and insufficiently protective of the fairness of the extradition process, particularly where Canadian citizens are involved. In short, the IAG and its delegate counsel are excessively adversarial in how they conduct extradition cases. This is suggested by Crown conduct in the Diab case, where the Crown was active in trying to shore up France's case while it was collapsing, and withheld exculpatory evidence from the defence, among other things.[27] It is also suggested by the most recent phase of the Badesha case, where the British Columbia Court of Appeal characterized the IAG's conduct as "subterfuge" and stated that it had "a very serious adverse impact on the integrity of the justice system."[28]

- Like other federal agencies, such as the Immigration and Refugee Board, the IAG should adopt an explicit mandate to the effect that it administers its duties "efficiently, fairly and in accordance with the law."[29]

- Whatever policies and practices govern the operations of the IAG should be made public and scrutinized, with a view to re-balancing the role of the Crown. "Extradition at nearly any cost" is not an appropriate policy driver for this government agency.

- It is worth considering whether a separate sub-division should be set up as counsel or advocates for requesting states.

7. The Cotroni Question and s. 6 of the Charter

- The current manner in which the Minister and the courts assess whether s. 6 will be breached (and not saved by s. 1) in extradition, called the "*Cotroni* question," is a meaningless exercise in formalism. The issue is a *fait accompli* for the Crown in virtually every case. This is not appropriate for a *Charter* right.

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[26] See *Boily v. Canada*, 2016 FC 899 and 2017 FC 1021.

[27] We acknowledge that Murray Segal's external inquiry report found that the Crown's conduct here was well within its current legal and ethical remit. We are suggesting that the parameters of this remit need to change.

[28] *India v. Badesha*, 2018 BCCA 470 at para 77.

[29] See the Board's website: https://irb-cisr.gc.ca/en/Pages/index.aspx.

- The Act should be amended to provide for a meaningful assessment of whether extradition of a citizen can be justified, or whether prosecution in Canada is to be preferred.

- Specifically, Canada should enact something like the "forum bar" rule that has been implemented in the U.K., under which in a case where Canada has jurisdiction to prosecute the individual, then extradition would be barred unless the state can prove that it is in the interests of justice to extradite.

- In some cases a meaningful forum bar would require Canada to exert broader extraterritorial jurisdiction than it currently does for the majority of offences. This is worth pursuing, since it is uncomplicated from an international law perspective and can be accomplished by way of amendments to the *Criminal Code* and other criminal legislation.

- Canada should also look at the option of a mandatory practice of temporary surrender of Canadian citizens, whereby they could be extradited to the requesting state for trial but be returned to Canada to serve any sentence imposed.

8. Transparency & Accountability

- For too long, the International Assistance Group has been very much a closed shop, with an unnecessary secrecy in place. As the *Diab* and *Badesha* cases, among others, have shown, this is no longer acceptable.

- As a governing principle, there should be government/Parliamentary oversight of the activities of this division, and the ability for meaningful public scrutiny of its activities, and of the extradition process generally.

- A significant amount of data about extradition cases, including statistics, should be published (subject to appropriate forms of confidentiality and privilege) on the Justice Canada website. This should include situations where diplomatic assurances are in place, as discussed above.

- The *Extradition Act* should be amended to require the filing of an annual or bi-annual report that would detail the activities of the IAG each year, including status of all active or concluded cases.

- Consideration should be given to whether the IAG requires a mandatory oversight process administered by Parliament or its delegate (a model might be found in the Security and Intelligence Review Committee (SIRC), which oversees CSIS and the CSE).

- In individual cases, Ministerial decisions regarding surrender and *Cotroni* assessments should be reported in the same manner as court decisions.

9. Treaty Practice

- All of Canada's current extradition treaties should be reviewed, with the goal of ensuring that they are up to date, fully reciprocal, and reflect the fairest possible procedures. A similar examination should be done for Canada's arrangements with the states appearing in the Schedule to the *Extradition Act*.

- A template of desirable treaty provisions should be made public, approved by Parliament, and serve as the basis for all future extradition treaty negotiations.

- All extradition arrangements should be reviewed, through a publicly accessible process, at regular intervals (e.g. every ten years).

- Canada should not have operative extradition treaties with states that have not ratified the UN Torture Convention and at least one of the major human rights conventions which protects civil/procedural rights (the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights, the OAS Convention, etc.).

- China is not a party to the ICCPR, the leading international human rights treaty to protect the right to a fair trial. Given the overall human rights record of China, Canada should suspend the current discussions regarding the negotiation of an extradition treaty with that state.

10. Extradition of Alleged War Criminals

- While this is a minor part of the overall reform agenda presented here, there have been calls over many years for Canada to expand its activities regarding the investigation and prosecution of alleged perpetrators of international crimes (genocide, crimes against humanity, war crimes, torture). Extradition is an important tool toward pursuing this policy goal.

- Canada should increase the budget dedicated to investigating alleged perpetrators who are present on Canadian soil, with a view to extraditing them to states willing to prosecute.

- Canada should also seek extradition of alleged perpetrators to Canada for trial, in cases where there is a reasonable national interest in conducting such trials.

MODIFIER LES LOIS D'EXTRADITION DU CANADA : LES PROPOSITIONS DU COLLOQUE DE HALIFAX POUR LA RÉFORME DU DROIT

Octobre 2021

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Ce document a été préparé par le professeur Robert J. Currie de la Schulich School of Law, Université Dalhousie, et représente le consensus des participants au colloque.

SOMMAIRE

Les lois canadiennes en matière d'extradition doivent être réformées.

L'extradition est la procédure judiciaire par laquelle un pays envoie un individu dans un autre pays pour qu'il y soit poursuivi au criminel et incarcéré. Au Canada, les procédures d'extradition sont menées par le Service d'entraide internationale (SEI), un bureau spécialisé de Justice Canada établi en vertu de la *Loi sur l'extradition* de 1999. L'extradition est un élément important de la lutte mondiale contre la criminalité transnationale, et le système d'extradition du Canada est efficace sur le plan administratif. Dans la mesure où les chiffres accessibles au public l'indiquent, le Canada répond à la plupart des demandes d'extradition soumises par d'autres pays, et les personnes dont l'extradition est demandée ne réussissent presque jamais à la contester.

Mais est-ce qu'il devrait en être ainsi? Les Canadiens sont de plus en plus insatisfaits de nos lois en matière d'extradition. L'affaire *Meng Wanzhou* a soulevé des questions sur la façon dont le gouvernement mène les procédures d'extradition, ces dernières ayant des répercussions importantes sur la politique étrangère. Les Canadiens ont également fait part de leurs inquiétudes concernant l'extradition injustifiée de M. Hassan Diab vers la France en 2014. M. Diab, citoyen canadien, a été détenu en isolement dans une prison française à sécurité maximale pendant plus de trois ans. Il a été libéré sans jamais être cité à procès, alors qu'il était devenu évident que le dossier français déposé contre lui était loin d'être prêt et qu'il était profondément entaché d'irrégularités — en fait, il était trop peu fiable pour justifier la tenue d'un procès en France — même si le SEI avait poursuivi son extradition de manière agressive.

Lors du retour de M. Diab au Canada en 2018, le premier ministre Trudeau a déclaré que l'extradition n'aurait jamais dû avoir lieu et que son gouvernement veillerait à ce qu'un tel cas ne se reproduise jamais. Toutefois, un examen externe de l'affaire a révélé que toutes les lois et politiques pertinentes avaient été respectées par le SEI et le ministre de la Justice. Le gouvernement fédéral n'a pas montré d'intérêt à apporter des changements. Il est inquiétant de constater qu'en 2021, le gouvernement français a réengagé des poursuites contre le M. Diab, bien que les tribunaux français aient reconnu que les preuves étaient totalement insuffisantes pour soutenir l'affaire.

Ainsi, il semble que la promesse du premier ministre n'a pas été tenue. À la lumière de l'affaire *Diab*, entre autres, il est clair que certaines parties de notre processus d'extradition sont également défectueuses.

En septembre 2018, un groupe d'universitaires, d'avocats de la défense et d'organismes de défense des droits de la personne se sont réunis à l'Université Dalhousie à l'occasion du *Colloque de Halifax pour la réforme du droit en matière d'extradition*. Au cours de ses délibérations, ce groupe a relevé un certain nombre de problèmes liés au système actuel, notamment :

- Le processus d'« incarcération » mené par les tribunaux est intrinsèquement injuste et compromet la capacité de la personne recherchée à contester de manière significative les accusations portées contre elle par une instance étrangère. Il réduit la tâche des juges canadiens au simple fait d'« entériner d'office » les demandes; il permet l'extradition et la privation de liberté sur la base de documents qui ne sont pas fiables;

- La décision que prend le ministre de la Justice relativement à la « remise » est le produit d'un processus dans le cadre duquel des questions fondamentalement juridiques sont traitées suivant un cheminement hautement discrétionnaire et explicitement politique, qui est également injustement pondéré en faveur de l'extradition et contre les droits de la personne recherchée;

- Le SEI est excessivement contradictoire dans la manière dont il mène les procédures d'extradition et il agit sans aucune distinction entre les plaideurs et les décideurs; et

- Les processus de coopération pénale internationale du Canada sont généralement menés sous le voile du secret, sans raison, et le manque de transparence constitue un grave problème.

Le groupe de Halifax a rassemblé cet ensemble de propositions de réforme du droit afin de susciter un débat public et, nous l'espérons, une enquête parlementaire. Voici ce que nous proposons :

1. La *Loi sur l'extradition* et les politiques et protocoles connexes devraient être modifiés conformément à trois principes généraux : l'équité fondamentale, la transparence et le rééquilibrage des rôles, tant entre les tribunaux et le gouvernement qu'entre la protection constitutionnelle/*Charte* et l'efficacité administrative.

2. Comme le montre si tragiquement l'affaire *Diab*, entre autres, il ne faut pas présumer en droit que les États avec lesquels le Canada entretient des relations d'extradition agiront de bonne foi.

3. La procédure d'incarcération devrait intégrer la présomption d'innocence, ainsi que certains outils juridiques qui permettraient à la personne recherchée de contester la fiabilité des accusations portées contre elle, notamment en recourant davantage au témoignage direct et au contre-interrogatoire. En particulier, les preuves disculpatoires qui se trouvent entre les mains de l'État requérant ou du gouvernement canadien doivent être divulguées sans délai.

4. Les décisions sur la remise que prend le ministre devraient être soumises à des normes de contrôle plus rigoureuses, et la *Loi* devrait être modifiée pour réattribuer certaines questions juridiques aux tribunaux.

5. La remise ne devrait être autorisée que si l'État requérant est prêt à porter l'affaire devant les tribunaux.

6. Les obligations du Canada en vertu du droit international en matière des droits de la personne devraient être explicitement prises en compte tout au long du processus.

7. S'il est question de recourir à des garanties diplomatiques pour faciliter la remise, celles-ci doivent être significatives, transparentes, contrôlées et juridiquement exécutoires.

8. Le rôle du SEI devrait être reformulé de manière à ce que ses membres travaillent comme des « ministres de la Justice » traditionnels, recherchant un résultat juste et équitable dans chaque cas plutôt qu'une « victoire » dans un litige. Cela pourrait nécessiter que l'on sépare le SEI en différentes divisions afin de refléter le rôle distinct de chacune.

9. Les activités du SEI devraient faire l'objet d'un contrôle par le gouvernement et le Parlement, et le public devrait avoir la possibilité d'examiner véritablement ses activités et le processus d'extradition en général. Pour ce faire, une transparence appropriée s'impose, de même que la publication de données et de renseignements.

10. Dans les cas où des citoyens canadiens sont recherchés en vue d'une extradition, mais que le Canada pourrait également poursuivre, l'extradition devrait être exclue au profit de poursuites canadiennes, à moins que le gouvernement ne puisse prouver que l'extradition est réellement dans l'intérêt de la justice. Cela donnerait un sens à l'article 6 de la *Charte canadienne des droits et libertés*.

11. Tous les accords d'extradition du Canada devraient être revus et soumis à l'examen du public, sur une base continue. A priori, le Canada ne devrait pas avoir de traités d'extradition avec des pays qui ont des antécédents de violation des droits de la personne ou qui n'ont pas ratifié les traités sur les droits de la personne.

12. Le gouvernement du Canada devrait consacrer plus de ressources aux enquêtes sur les criminels de guerre présumés qui sont présents sur le territoire canadien et à leur extradition.

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INTRODUCTION

En tant qu'État industrialisé avancé du G7, doté d'une économie mondialisée, le Canada est à la fois un point de transit et une destination pour les personnes impliquées dans des activités criminelles « transnationales » (c'est-à-dire touchant plus d'un État). À cela s'ajoute notre longue frontière, non défendue et facile à franchir, avec les États-Unis — un État très peuplé, dont l'économie nationale est la plus importante au monde, et dont les taux de criminalité et d'incarcération sont importants. Compte tenu de la mondialisation croissante de la criminalité, il est nécessaire, d'un point de vue politique, que le Canada participe efficacement à la coopération entre les États pour lutter contre la criminalité transnationale, la réprimer et la prévenir. En effet, il y a tant de crimes qui sont de nature transnationale que tout système sérieux de justice pénale doit disposer de stratégies pour traiter les aspects interétatiques.

Cela inclut le recours à l'extradition. L'extradition est le plus ancien et toujours l'un des principaux outils permettant d'atteindre l'objectif de coopération interétatique, et elle est utilisée par le Canada depuis le 18e siècle. Elle a été définie comme suit :

> La remise formelle d'un fugitif criminel d'un État qui en a la garde (la partie requise) vers un État qui souhaite soit le poursuivre, soit, si le fugitif a déjà été condamné pour une infraction, exécuter une peine pénale (l'État requérant)[1].

Aujourd'hui, les procédures d'extradition vers et depuis le Canada sont définies dans la *Loi sur l'extradition*[2], adoptée par le gouvernement du Canada en 1999. Au cours du processus d'adoption de cette Loi, le gouvernement de l'époque a fait valoir que le Canada était considéré comme un partenaire plutôt faible dans les affaires d'extradition mondiales, notamment en ce qui concerne l'extradition d'individus du Canada vers des États requérants. Si les extraditions du Canada ont été réalisées assez facilement dans les États du Commonwealth (en vertu de la *Loi sur les délinquants fugitifs*, aujourd'hui abrogée), les États dont les systèmes de justice pénale sont issus de traditions juridiques différentes ont éprouvé des difficultés à accéder au système canadien. En outre, le système tout entier était maladroit sur le plan de la procédure, et les dossiers mettaient beaucoup de temps à aboutir. L'objectif de cette « nouvelle » *Loi sur l'extradition* était de rendre le processus d'extradition plus rationnel et plus efficace, d'éliminer les retards et de faciliter l'accès à un plus grand nombre d'États partenaires en matière d'extradition[3].

Près de deux décennies plus tard, il ne fait aucun doute que cet objectif a été atteint. Le processus d'extradition du Canada est, à tout le moins, un modèle d'efficacité administrative, considéré par d'autres États qui envisagent de réformer leurs propres lois[4]. Dans la mesure où cela peut être vérifié dans un système assez peu transparent (voir « Transparence et responsabilité » ci-dessous), la grande majorité des personnes recherchées en vue d'une extradition du Canada sont, en fait, extradées[5]. Comme le savent la plupart des personnes engagées dans des affaires d'extradition, le conseil le plus fréquent que donnent les avocats de la défense lorsqu'ils sont consultés pour la première fois par un client menacé d'extradition (en particulier vers les États-Unis) est qu'ils doivent immédiatement prendre contact avec le procureur de l'État étranger et tenter de négocier un accord de plaidoyer en échange de la non-contestation de l'extradition. L'extradition est, pour l'essentiel, inévitable en vertu de la *Loi* de 1999.

Il convient de rappeler au début de cette discussion que, d'un point de vue de politique publique : 1) un système international d'extradition solide, efficient et efficace est une bonne chose, et il est dans l'intérêt de tous les Canadiens qu'il en soit ainsi, à condition qu'il soit équitable et constitutionnellement sain; et 2) les personnes faisant l'objet d'une demande d'extradition sont souvent accusées de crimes très graves et les États requérants sont en droit de s'attendre à ce que ces allégations soient entendues devant un tribunal national.

Cependant, il est devenu de plus en plus évident que

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1 Robert J. Currie et Joseph Rikhof, *International & Transnational Criminal Law*, 3e éd. (2020), à la p. 531.

2 L.C. 1999, ch 18.

3 Le processus législatif qui a donné naissance à la loi de 1999 est examiné en détail dans Maeve W McMahon, « The Problematically Low Threshold of Evidence in Canadian Extradition Law: An Inquiry Into Its Origins: and Repercussions in the Case of Hassan Diab » (2019) 42 Man LJ 303, où le professeur McMahon souligne que le fondement probatoire de ces arguments était douteux.

4 Voir, à titre d'exemple, New Zealand Law Commission, *Modernising New Zealand's Extradition and Mutual Legal Assistance Laws* (2016).

5 Lisa Laventure et David Cochrane, « Canada's high extradition rate spurs calls for reform », CBC News (30 mai 2018), en ligne : https://www.cbc.ca/news/politics/extradition-arrest-canada-diab-1.4683289.

les mécanismes intégrés dans la *Loi sur l'extradition* sont fortement orientés vers l'intérêt de la Couronne en matière d'efficacité et contre l'intérêt des individus à bénéficier d'une procédure équitable. Plus particulièrement, la loi ne prévoit pas de garanties suffisantes qui permettraient aux individus de contester efficacement l'extradition dans les cas où le dossier de l'État requérant est faible ou peu fiable. Forte de la dynamique de la législation de 1999, la Couronne a réussi à faire valoir devant les tribunaux l'argument selon lequel l'engagement du Canada envers ses partenaires de traités à coopérer dans la lutte contre la criminalité transnationale est, pour l'essentiel, le principe fondamental d'interprétation de la législation.

Comme l'a souligné la professeure La Forest dans son article de 2002[6], le rôle judiciaire dans le processus a été en grande partie vidé de sa substance, en raison des présomptions qui soustraient les preuves de l'État requérant à un examen sérieux. La tentative de la Cour suprême rétablir le rôle du juge d'extradition pour qu'il ne se limite plus au simple fait « d'entériner d'office » les demandes dans l'affaire *Ferras*[7] a finalement échoué, et la Cour semble avoir insisté sur ce résultat dans ses récents arrêts en rendant pratiquement impossible pour l'individu recherché de contester la fiabilité des preuves de l'État requérant[8].

Le rôle du ministre de la Justice a été considérablement élargi par la *Loi*, ce qui a eu pour conséquence que le ministre prend un certain nombre de décisions essentiellement juridiques fondées en partie sur des objectifs résolument non juridiques (p. ex. les relations diplomatiques), et bénéficie ce faisant de ce qui est probablement la norme de contrôle la plus rigoureuse qui existe dans le droit canadien[9]. L'impératif politique d'exécution des demandes d'extradition a conduit le ministre à demander ou à ordonner la remise dans les cas où l'individu recherché risquait vraisemblablement de recevoir une double peine[10], de faire l'objet d'une détention civile indéfinie après la condamnation[11], d'être victime de torture et de mauvais traitements de la part des responsables pénitentiaires hors de contrôle[12], d'être cité à procès par un État déjà complice de violations importantes des droits de la personne à son égard[13], d'être pris dans des régimes de condamnation qui ne tiennent pas compte du statut d'autochtone[14], d'être frappé de peines « à vie sans libération conditionnelle »[15], et d'être affecté par des disparités extrêmes dans les peines entre le Canada et l'État requérant[16]. Certains de ces cas ont été refusés par les tribunaux, mais bon nombre ont été accueillis.

La Cour suprême a confirmé (dans l'arrêt Fischbacher[17]) la dilution, dans la Loi, de l'exigence de « double incrimination », selon laquelle la conduite pour laquelle l'individu est recherché par l'État requérant doit également constituer une infraction au Canada. Par conséquent, un individu peut être incarcéré en vue d'une extradition, au motif que les éléments de preuve pourraient justifier des poursuites pour une infraction particulière, et faire ensuite l'objet d'une remise par le ministre pour des infractions beaucoup plus graves dans l'État requérant, à tel point que le danger encouru par l'individu dans l'État requérant ressemble à peine ce qui risquerait de lui arriver au Canada.

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6 Anne W. La Forest, « The Balance between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings » (2002) 28 Queen's LJ 95.

7 *États-Unis d'Amérique c. Ferras*; 2006 CSC 33.

8 *MM c. États-Unis d'Amérique*, 2015 CSC 62. Pour une analyse approfondie de ce point, voir Robert J. Currie, « Wrongful Extradition: Reforming the Committal Phase of Canada's Extradition Law » (2021) 44 *Manitoba LJ* (à paraître), en ligne https://ssrn.com/abstract=3664754

9 Voir *Lake c. Canada (ministre de la Justice)*, 2008 CSC 23.

10 *Bouarfa c. Canada (ministre de la Justice)*, 2012 QCCA 1378; *United States v Qumsyeh*, 2015 ONCA 551.

11 *Carroll c. Canada (Attorney General)*, 2017 NSCA 66.

12 *Inde c. Badesha*, 2017 SCC 44.

13 *United States v Khadr*, 2011 ONCA 358

14 *United States of America v Leonard*, 2012 ONCA 622.

15 *United States v. Muhammad 'Isa*, 2014 ABCA 256.

16 *United States of America v Johnstone*, 2013 BCCA 2; *United States v. Reumayr*, 2003 BCCA 375; *Gwynne c. Canada (ministre de la Justice)* (1998), 103 B.C.A.C. 1 (BCCA); *Doyle Fowler c. Canada (ministre de la Justice)*, 2011 QCCA 1076; *Damgajian c. The Attorney General of Canada (United States of America)*, 2017 QCCA 621; *United States v. Hillis*, 2021 ONCA 447.

17 *Voir Canada (Justice) c. Fischbacher*, 2009 CSC 46.

Les juges ont pour la plupart résolument résisté aux tentatives de la défense visant à obtenir de l'État requérant qu'il divulgue des éléments de preuve, même lorsque les allégations d'injustice ou de problèmes concernant le dossier de l'État requérant semblaient fondées, sur la base (juridiquement douteuse) que notre procédure ne peut s'appliquer de manière extraterritoriale à l'État requérant.

En outre, la loi est particulièrement peu protectrice des ressortissants canadiens, ce qui contraste fortement avec de nombreux autres États qui n'extradent même pas leurs citoyens ou qui, du moins, n'offrent pas de protection procédurale plus importante.[18]. Le droit de tous les citoyens canadiens de rester au Canada en vertu de l'article 6 de la Charte est abordé dans l'analyse Cotroni[19], laquelle constitue essentiellement un exercice de formalisme dénué de sens.

Et selon les indications actuelles, certains fonctionnaires du ministère de la Justice du Canada pourraient être intervenus activement pour « soutenir » les demandes d'extradition d'États étrangers par le biais d'importantes communications et activités officieuses (y compris la suppression de preuves disculpatoires) qui visaient en fait à miner la capacité des individus à faire respecter par l'État un devoir d'équité dans les procédures.

Pendant de nombreuses années, les préoccupations concernant l'extradition sont restées sans réponse, et ont parfois été activement repoussées par la Couronne fédérale et en particulier par le Service d'entraide internationale (SEI) de Justice Canada, qui est chargé de superviser toutes les extraditions. Tout cela a culminé avec le cas de M. Hassan Diab, extradé vers la France sur la base de preuves douteuses, après une procédure d'extradition très contestée qui a duré plusieurs années, au cours de laquelle le juge d'extradition a décrit le dossier français comme [Traduction] « un cas faible où une condamnation semble peu probable »; un cas dépendant de témoignages d'opinion qu'il a trouvé « très problématique, très confus, et dont les conclusions sont suspectes »; un cas où il a été amené à « s'interroger quant à la fiabilité » des preuves clés sur lesquelles le dossier français s'est appuyé; un cas qu'il a trouvé « considérablement affaibli ». Le juge a estimé que si M. Diab avait bénéficié d'un procès équitable en France, il aurait probablement été acquitté[20]. M. Diab a été emprisonné pendant plus de trois ans, en isolement, dans une prison à sécurité maximale, avant d'être finalement libéré *sans avoir été formellement incarcéré pour un procès*, lorsqu'il est apparu clairement aux tribunaux français qu'il n'y avait pas matière à procès. Les enquêtes des médias ont démontré que le SEI avait travaillé à consolider le dossier français, ce qui a mis en lumière le monde obscur de la coopération interétatique.

Il convient de rappeler que, lorsque la *Loi sur l'extradition* a été adoptée, le ministère de la Justice a assuré au Parlement que les Canadiens ne croupiraient pas dans des États étrangers en attente d'un procès, ni que les procédures d'extradition seraient utilisées pour faciliter les enquêtes à l'étranger. Le cas d'Hassan Diab montre qu'aucune de ces promesses n'est prise au sérieux.

Le premier ministre et le ministre des Affaires étrangères ont tous deux exprimé leur inquiétude quant à ce qui est arrivé à M. Diab. Le premier ministre Trudeau a déclaré que « ce qui est arrivé à [Diab] n'aurait jamais dû arriver », et il a promis que le gouvernement fédéral « ferait en sorte que cela ne se reproduise plus jamais »[21]. Cependant, au final, une enquête externe menée par l'ancien procureur général adjoint de l'Ontario, Murray Segal, a conclu que toutes les lois avaient été respectées et que toutes les procédures pertinentes avaient été suivies. Les seules réserves exprimées par les fonctionnaires de Justice Canada à propos de cette affaire étaient que trop de temps s'était écoulé avant qu'elle soit déposée devant les tribunaux[22].

Hassan Diab et sa famille demeurent marqués par son extradition injustifiée. De plus, les observateurs ont été scandalisés par le rétablissement de l'affaire par le plus tribunal de France, bien que ce tribunal ait reconnu que l'affaire contre M. Diab est encore plus faible qu'elle ne l'était avant[23]. À ce jour, rien n'a été annoncé pour

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[18] En règle générale, les États qui ont une tradition de droit civil (par opposition à la tradition de *common law* du Canada) n'extradent pas leurs citoyens; c'est le cas, par exemple, de la France, de la Suisse, de l'Allemagne et du Brésil.

[19] *États-Unis c. Cotroni*, [1989] 1 RCS 1469; *Sriskandarajah c. États-Unis d'Amérique*, 2012 CSC 70.

[20] France v Diab, 2011 ONSC 337 au para. 191.

[21] David Cochrane et Lisa Laventure, « Hassan Diab to boycott external review of 2014 extradition to France », *CBC News* (24 juillet 2018), en ligne : https://www.cbc.ca/news/politics/hassan-diab-boycott-external-review-france- extradition-1.4758418.

[22] Murray D. Segal, *Examen indépendant de l'extradition d'Hassan Diab, Ph. D.* (Justice Canada, 2019), en ligne https://www.justice.gc.ca/fra/pr-rp/jp-cj/ext/01/examen_extradition_hassan_diab.pdf

[23] David Cochrane, « Canadian academic Hassan Diab ordered to stand trial in French terrorism case », *CBC News* (19 mai 2021), en ligne : https://www.cbc.ca/news/politics/hassan-diab-france-trial-1.6032288.

indiquer que le gouvernement s'intéresse à une réforme du droit en matière d'extradition. La promesse du premier ministre n'a pas été tenue.

I. LE COLLOQUE DE HALIFAX

Au printemps 2018, le professeur Rob Currie de la Schulich School of Law de l'Université Dalhousie a proposé la convocation d'une réunion à huis clos d'un groupe d'experts en extradition et en droits de la personne. L'objectif de cette séance était de discuter d'un large éventail de questions préoccupantes découlant du droit canadien en matière d'extradition, et de formuler un ensemble préliminaire de principes et de propositions qui serviraient de base à une conférence plus large sur la réforme du droit de l'extradition qui se tiendrait ultérieurement à Ottawa. Avec le parrainage et l'aide du Partenariat canadien pour la justice internationale (PCJI) et du MacEachen Institute for Public Policy de l'Université Dalhousie, le *Colloque de Halifax pour la réforme du droit en matière d'extradition* s'est tenu le 21 septembre 2018 au MacEachen Institute for Public Policy, sous la présidence du professeur Currie et avec la participation de Laura Ellyson, doctorante, en tant que rapporteur. Les personnes présentes étaient :

Don Bayne, Bayne Sellar Ertel Carter, Ottawa

Seth Weinstein, Greenspan Humphrey Weinstein, Toronto; Professeure Joanna Harrington, Faculté de droit, Université de l'Alberta; Professeur James Turk, École de journalisme, Université Ryerson; Anthony Moustacalis, Moustacalis & Associates, Toronto

Alex Neve, Secrétaire général, Amnistie Internationale (Canada)

Josh Paterson, directeur administratif, British Columbia Civil Liberties Association

Vous trouverez ci-dessous les propositions qui ont été formulées lors du colloque[24]. On espère que ces documents seront utiles pour encadrer le débat plus général sur la réforme du droit en matière d'extradition.

II. LES PROPOSITIONS DE HALIFAX

1. Déclaration de principes

Dans une procédure d'extradition, la liberté de l'individu recherché est en jeu. Cela vaut autant que pour une procédure pénale nationale. En fait, en un sens, les enjeux sont encore plus grands, puisqu'une déclaration de culpabilité au Canada peut être infirmée en appel ou autrement traitée sur le plan juridique, alors qu'une personne extradée est essentiellement à la merci d'un État étranger. L'individu peut, comme dans le cas de Hassan Diab, être envoyé dans un pays étranger où il doit défendre sa liberté sans parler la langue locale ni connaître d'avocat; il sera certainement privé du soutien de sa famille, de ses amis et de la communauté, tant au procès que pendant l'exécution de la peine qui lui sera infligée.

En conséquence, il n'est pas approprié que les lois en matière d'extradition soient appliquées à la hâte et que la procédure d'extradition soit bousculée au détriment d'une procédure régulière, de l'équité fondamentale et de la transparence. Le type de procédures sommaires qui existent actuellement est inacceptable. L'extradition injustifiée d'Hassan Diab en est la preuve la plus évidente.

Les lois et politiques canadiennes en matière d'extradition, et en particulier la *Loi sur l'extradition*, devraient être révisées et modifiées conformément à trois principes généraux : 1) l'équité fondamentale; 2) la transparence; et 3) un rééquilibrage des rôles, tant entre les tribunaux et le gouvernement qu'entre la protection constitutionnelle/*Charte* et l'efficacité administrative.

Ce qui suit est un ensemble de propositions de changements à divers aspects des lois et des pratiques en matière d'extradition. Certaines sont générales et axées sur les politiques, d'autres sont plus spécifiques et axées sur les processus. Selon nous, les principes d'équité et de transparence sont imbriqués dans l'ensemble des propositions. Le principe du rééquilibrage des rôles entre les tribunaux et le gouvernement s'applique avec plus de spécificité, mais constitue un pilier important des propositions.

2. Retrait de la présomption de bonne foi

- La législation canadienne en matière d'extradition présume que les États avec lesquels le Canada a conclu des traités d'extradition : a) ont des systèmes de justice pénale acceptables pour le Canada, du point de vue de la protection des droits procéduraux et des régimes de détermination de la peine appropriés; b) agiront conformément aux garanties diplomatiques qui sont fournies; et c) agiront de bonne foi dans les poursuites pour lesquelles l'extradition est demandée.

- Cette présomption, qui traverse à la fois les phases d'incarcération et de remise des cas d'extradition, ne peut être maintenue. L'affaire *Diab*, entre autres,

[24] Michael Lacy du cabinet Brauti Thorning à Toronto, a fourni des observations écrites en vue de la finalisation des propositions.

l'a amplement démontré. Au-delà de l'obligation juridique internationale du Canada d'agir de bonne foi afin de s'acquitter de ses obligations en vertu du traité d'extradition, chaque cas d'extradition doit commencer par une « table rase ». La personne recherchée ne devrait pas avoir à surmonter la présomption pour que les questions et les contestations soient prises en compte de manière significative dans une affaire.

3. La phase d'incarcération

- Le problème général de l'audience relative à l'incarcération telle qu'elle est actuellement définie dans la *Loi sur l'extradition* est qu'elle est fondamentalement injuste pour l'individu recherché. En définitive, la décision de la Cour suprême du Canada dans l'affaire *Ferras* de 2006 n'a pas été respectée : le juge d'extradition n'a pas la capacité réelle de juger si l'extradition est bien fondée en droit dans un cas donné. L'ensemble de la procédure d'incarcération est conçue pour répondre aux besoins de l'État requérant et non pour protéger le droit qu'a l'individu à une audience d'extradition équitable.

- Nous reconnaissons par ailleurs qu'une audience d'extradition peut être expéditive et qu'elle ne devrait pas être aussi longue qu'un procès criminel. Néanmoins, dans sa formulation actuelle, la *Loi* crée un processus qui neutralise les « principes de justice fondamentale » conformément à l'article 7 de la *Charte*. Comme le Canada n'a pas le contrôle ultime sur l'équité du processus auquel la personne recherchée sera confrontée dans l'État requérant, l'audience doit être plus robuste que le modèle d'enquête préliminaire sur lequel elle est fondée.

- La *Loi* devrait expressément imposer la présomption d'innocence lors de l'audience relative à l'incarcération, et cela devrait éclairer toutes les décisions prises par le juge d'extradition. Après tout, l'extradition fait intervenir le droit pénal canadien et étranger.

- La manière de traiter le « dossier de l'affaire » devrait être abandonnée ou modifiée. En particulier, la présomption de fiabilité du dossier de l'État requérant devrait être supprimée. Il incombe au ministre de démontrer que le dossier de l'État requérant est fiable, soit selon la prépondérance des probabilités, soit au-delà de tout doute raisonnable.

- Les preuves des témoins clés doivent être fournies sous forme d'affidavits et les témoins doivent être disponibles pour un contre-interrogatoire. L'objectif du contre-interrogatoire serait d'examiner si le témoin est fondamentalement fiable et non d'explorer la crédibilité en soi, ce qui est particulièrement important si le témoin a accepté un arrangement. Le contre-interrogatoire peut facilement se faire par vidéo ou par Internet, afin d'éviter les dépenses, les retards et les difficultés administratives liés à la venue de témoins au Canada.

- La défense doit avoir accès à une divulgation utile de l'État étranger, y compris la correspondance entre l'État requérant et le Canada (pouvant être caviardée selon les formes de privilège indiquées). Cela devrait comprendre tous les éléments de preuve disculpatoires entre les mains de l'État requérant; autrement, ce dernier devrait être tenu de fournir l'assurance qu'il n'a pas de preuve disculpatoire en sa possession.

- Tout élément de preuve que possède le gouvernement canadien, qu'il ait été recueilli de manière indépendante par des fonctionnaires canadiens ou qu'il leur ait été communiqué, doit être transmis à la partie défenderesse, y compris tout élément de preuve disculpatoire.

- Les témoignages d'experts doivent faire l'objet de rapports ou d'affidavits spécifiques et ne doivent pas être inclus dans un résumé de la preuve disponible. Ils devraient faire l'objet d'un examen d'admissibilité distincte lors de l'audition relative à l'incarcération.

- L'État requérant ne devrait pas être autorisé à se fonder sur des renseignements de source inconnue ni sur des preuves découlant de tels renseignements.

- Les éléments de preuve démontrant l'existence d'une excuse, d'un moyen de défense ou d'une justification dont disposerait la personne recherchée, en vertu du droit du Canada ou de l'État requérant, devraient être admissibles à la demande de la personne recherchée. L'État requérant devrait être habilité à répondre et tenu de le faire. Il convient d'examiner attentivement le seuil à partir duquel une excuse, un moyen de défense ou une justification applicable et justifiée empêcherait effectivement l'extradition.

- Sur la question de la double incrimination, la *Loi* devrait être modifiée pour réintroduire une version du « critère de la discordance » proposé par la Cour d'appel de la Colombiebritannique — mais rejeté par la Cour suprême — dans l'arrêt *Fischbacher*. L'évaluation de la double incrimination par le juge d'extradition doit tenir compte du fait que l'individu est fondamentalement plus menacé dans l'État requérant qu'il ne le serait au Canada pour le même comportement. Cela comprend à la fois les risques substantiels et les considérations relatives à la détermination de la peine.

4. La décision sur la remise

- Si le respect du droit international en matière des droits de la personne est important pour l'ensemble du processus d'extradition, c'est lors de la phase de remise que ces normes sont les plus importantes et devraient éclairer toutes les décisions.

- La décision du ministre sur la remise fait l'objet de la norme de contrôle qui est probablement la plus rigoureuse qui existe dans le droit canadien[25]. Cela s'explique par le fait que le ministre agit dans le cadre de la prérogative de la Couronne en matière d'affaires étrangères, à laquelle les tribunaux de droit commun étaient historiquement soumis. Dans un pays qui dispose d'un ensemble constitutionnalisé de protections des droits de la personne, ce type de rigueur n'est plus approprié. Il a été dit que « ce que la *Charte* accorde, le droit administratif le reprend ». Dans les procédures d'extradition, il faut se protéger contre cette tendance.

- Bien qu'elle puisse avoir une certaine forme diplomatique internationale, la décision du ministre sur la remise est en fin de compte une décision juridique, qui doit être conforme à la *Charte* et aux obligations internationales du Canada en matière de droits de la personne. La norme de contrôle devrait en être une qui se rapproche de la norme du « bienfondé ».

- Tout cela devrait s'appliquer avec une rigueur particulière aux dispositions de la *Loi* qui soit exigent, soit permettent au ministre de refuser la remise. La norme rigoureuse d'examen a donné lieu à une jurisprudence qui souligne les obligations du Canada en vertu des traités/arrangements d'extradition (généralement désignés par l'expression « courtoisie internationale ») sans que les protections des droits de la personne ne fassent véritablement contrepoids. Chacun des motifs de refus soulève une question de droit distincte et doit être traité comme tel.

- Plus particulièrement, la protection des droits de la personne soulève des questions juridiques. Il convient de se pencher attentivement sur la question de savoir si certains motifs de refus devraient être entièrement judiciarisés et intégrés dans la phase d'incarcération. Par exemple, la personne recherchée pourrait faire face à une double condamnation, à des poursuites pour un crime politique, à un procès injuste, à de graves mauvais traitements, y compris la torture, à des régimes de peines cruelles, à des procédures criminelles politisées ou à d'autres traitements injustes ou oppressifs.

- La remise ne devrait être autorisée que lorsque l'État requérant est prêt à porter l'affaire devant les tribunaux. Elle ne devrait pas être autorisée dans le but de permettre à l'État requérant de parfaire son enquête et de continuer à préparer son dossier, quelle que soit la manière dont la procédure de cet État fonctionne. Ce principe devrait être intégré dans les traités et accords d'extradition.

- Conformément aux obligations du Canada en vertu de la *Convention relative aux droits de l'enfant des Nations Unies*, « l'intérêt supérieur de l'enfant » devrait être une considération importante dans toute affaire d'extradition où des enfants seraient concernés.

5. Considérations après la remise

- Dans certains cas, l'extradition n'est autorisée que sur la base de « garanties diplomatiques », en vertu desquelles le ministre de la Justice admet qu'il existe des inquiétudes quant au traitement de l'individu dans l'État requérant, mais autorise l'extradition sur la base de garanties de l'État requérant que l'individu ne sera pas maltraité et/ou bénéficiera de l'hébergement nécessaire (p. ex. médical).

- Le recours aux garanties diplomatiques est controversé sur la scène internationale et a fait l'objet de désaccords parmi les membres du groupe de Halifax. Si les garanties peuvent faciliter l'extradition et protéger les droits de l'individu dans certains cas, certaines formes de garanties peuvent être difficiles à contrôler et à assurer, notamment celles concernant la torture et les mauvais traitements infligés par des agents de l'État. Cette difficulté est aggravée par le fait que, même si le ministre était disposé à obtenir des garanties dans certains cas, la volonté de vérifier si elles sont respectées n'est pas aussi présente dans d'autres cas.

- Cette situation est compliquée davantage par la position officielle du gouvernement selon laquelle celui-ci n'aurait aucune obligation légale de vérifier si les garanties sont respectées, bien que la présence de garanties soit la seule chose qui rende l'extradition acceptable sur le plan constitutionnel dans certains cas[26].

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[25] Voir *Lake, supra*.

[26] Voir *Boily c. Canada*, 2016 CF 899 et 2017 CF 1021.

- Dans la mesure où il y avait un terrain d'entente au sujet des garanties à Halifax, ce consensus concernait le fait qu'elles doivent être valables et légalement exécutoires afin d'être utilisées pour faciliter l'extradition. Le suivi après la remise doit faire l'objet d'un accord spécifique entre le Canada et l'État requérant, auquel la personne recherchée doit pouvoir contribuer. Cet accord doit être à la fois transparent et exécutoire.

6. La conduite du Service d'entraide internationale

- Justice Canada en général, et le Service d'entraide internationale (SEI) en particulier, entretiennent une relation tendue avec le gouvernement fédéral en ce qui concerne l'extradition. Ils sont chargés de promouvoir les intérêts des États requérants, mais ont également l'obligation fondamentale et constitutionnelle de protéger l'État de droit et les intérêts de la justice dans le cadre du processus d'extradition.

- Le mode de fonctionnement actuel du SEI est orienté vers la facilitation des demandes des États étrangers et ne protège pas suffisamment l'équité du processus d'extradition, en particulier lorsque des citoyens canadiens sont concernés. En bref, le SEI et ses avocats délégués sont excessivement opposés quant à la manière dont ils mènent les affaires d'extradition. C'est ce que suggère le comportement de la Couronne dans l'affaire Diab, où elle a cherché activement à soutenir le dossier de la France alors celui-ci ne tenait presque plus, et a refusé de fournir des éléments de preuve disculpatoires à la défense, entre autres choses[27]. C'est ce que laisse entendre aussi la phase la plus récente de l'affaire Badesha, dans le cadre de laquelle la Cour d'appel de Colombie-Britannique a qualifié la conduite du SEI de « subterfuge » et a déclaré qu'elle avait « un impact négatif très grave sur l'intégrité du système judiciaire »[28].

- Comme d'autres agences fédérales, telles que la Commission de l'immigration et du statut de réfugié, le SEI devrait adopter un mandat explicite portant qu'il exécute ses fonctions « de manière efficace, équitable et conforme à la loi »[29].

- Les politiques et pratiques qui régissent les activités du SEI doivent être rendues publiques et examinées, en vue de rééquilibrer le rôle de l'État. « L'extradition à tout prix ou presque » n'est pas un moteur politique approprié pour cet organisme gouvernemental.

- Il convient de se demander si une subdivision distincte ne devrait pas être créée pour conseiller ou défendre les États requérants.

7. L'affaire Cotroni et l'article 6 de la Charte

- La façon dont le ministre et les tribunaux évaluent actuellement si l'art 6 sera violé (et non protégé par l'art 1) en matière d'extradition, ce que l'on appelle la « question Cotroni », est un exercice de formalisme dénué de sens. La question est un fait accompli pour la Couronne dans pratiquement tous les cas, ce qui n'est pas approprié pour un droit garanti par la Charte.

- La Loi devrait être modifiée de manière à prévoir une évaluation significative de la question de savoir si l'extradition d'un citoyen peut être justifiée ou si des poursuites au Canada doivent être privilégiées.

- Plus précisément, le Canada devrait adopter une règle similaire à la règle du « forum bar » qui a été mise en oeuvre au Royaume-Uni, en vertu de laquelle, dans un cas où le Canada a compétence pour poursuivre l'individu, l'extradition serait alors interdite à moins que l'État ne puisse prouver qu'il est dans l'intérêt de la justice d'extrader.

- Dans certains cas, un tribunal compétent exigerait que le Canada exerce une compétence extraterritoriale plus vaste que celle qu'il exerce actuellement pour la majorité des infractions. Cela vaut la peine d'être examiné davantage, puisqu'il s'agit d'une mesure simple du point de vue du droit international qui peut être mise en oeuvre au moyen de modifications au Code criminel et à d'autres lois pénales.

- Le Canada devrait également envisager la possibilité d'une pratique obligatoire de remise temporaire des citoyens canadiens, en vertu de laquelle ils pourraient être extradés vers l'État requérant pour subir leur procès, mais être renvoyés au Canada pour purger toute peine imposée.

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[27] Nous reconnaissons que le rapport d'enquête externe de Murray Segal a révélé que la conduite de la Couronne en l'espèce s'inscrit bien dans les limites de son mandat juridique et éthique actuelle. Nous suggérons que les paramètres de ce mandat doivent être modifiés.

[28] *Inde v. Badesha*, 2018 BCCA 470, au para 77.

[29] Voir le site Web de la Commission : https://irb-cisr.gc.ca/fr/Pages/index.aspx.

8. Transparence et responsabilité

- Pendant trop longtemps, le Service d'entraide internationale a travaillé en vase clos et a maintenu une atmosphère inutilement secrète. Comme l'ont montré les affaires *Diab* et *Badesha*, entre autres, cette façon de faire n'est plus acceptable.

- En tant que principe directeur, le gouvernement et le Parlement devraient surveiller les activités de cet organisme et permettre un examen public sérieux de ses activités et du processus d'extradition en général.

- Une quantité importante de données sur les cas d'extradition, y compris des statistiques, devrait être publiée (sous réserve des formes appropriées de confidentialité et de privilège) sur le site Web de Justice Canada. Cela devrait comprendre les situations où des garanties diplomatiques sont en place, comme il a été mentionné précédemment.

- La *Loi sur l'extradition* devrait être modifiée pour exiger le dépôt d'un rapport annuel ou semestriel qui détaillerait les activités du SEI chaque année, y compris l'état de toutes les affaires en cours ou réglées.

- Il faut déterminer si le SEI a besoin d'un processus de surveillance obligatoire administré par le Parlement ou son délégué (un modèle pourrait être obtenu auprès du Comité de surveillance des activités de renseignement de sécurité [CSARS], qui supervise le SCRS et le CST).

- Dans chaque cas, les décisions ministérielles concernant l'extradition et l'analyse *Cotroni* doivent être rapportées de la même manière que les décisions des tribunaux.

9. La pratique des traités

- Tous les traités d'extradition actuels du Canada devraient être examinés, dans le but de s'assurer qu'ils sont à jour, pleinement réciproques et qu'ils reflètent les procédures les plus équitables possible. Un examen similaire devrait être effectué pour les accords du Canada avec les États figurant à l'annexe de la *Loi sur l'extradition*.

- Un modèle de dispositions qu'il serait souhaitable d'intégrer au traité devrait être rendu public, approuvé par le Parlement et servir de base à toutes les négociations futures du traité d'extradition.

- Tous les accords d'extradition doivent être réexaminés, dans le cadre d'une procédure accessible au public, à intervalles réguliers (p. ex. tous les dix ans).

- Le Canada ne devrait pas avoir de traités d'extradition exécutoires avec des États qui n'ont pas ratifié la Convention des Nations Unies contre la torture et au moins l'une des principales conventions sur les droits de la personne qui protègent les droits civils et procéduraux (le Pacte international relatif aux droits civils et politiques [PIRDCP], la Convention européenne des droits de l'homme, la Convention de l'OEA, etc.).

- La Chine n'est pas partie au PIRDCP, le principal traité international relatif aux droits de la personne visant à protéger le droit à un procès équitable. Compte tenu du bilan global de la Chine en matière de droits de la personne, le Canada devrait suspendre les discussions en cours concernant la négociation d'un traité d'extradition avec cet État.

10. Extradition de présumés criminels de guerre

- Bien qu'il s'agisse d'une partie mineure du programme global de réforme présenté ici, on demande au Canada, et ce, depuis de nombreuses années, qu'il élargisse ses activités d'enquête et de poursuite des auteurs présumés de crimes internationaux (génocide, crimes contre l'humanité, crimes de guerre, torture). L'extradition est un outil important dans la poursuite de cet objectif politique.

- Le Canada devrait accroître le budget consacré aux enquêtes sur les auteurs présumés présents en sol canadien, en vue de leur extradition vers des États disposés à les poursuivre.

- Le Canada devrait également demander l'extradition des auteurs présumés de ces crimes vers le Canada pour y être jugés, dans les cas où il existe un intérêt national raisonnable à mener de tels procès.