

A Gathering of Wise Statesmen:

The Universal Periodic Review and Canada's human rights record

by

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Abstract

The Universal Periodic Review (UPR) is recent innovation of the principal United Nations human rights body, the Human Rights Council. It provides for the regular review of the human rights records of each member state of the United Nations approximately once every four years. In this paper, I argue that the UPR is not an effective mechanism for the promotion and protection of human rights in Canada. Through the lens of the rights of migrant workers as well as refugees and asylum seekers, I show that the UPR has little concrete influence on Canadian policy. I argue that this is due, in part, to flaws in the UPR mechanism itself, which privileges certain approaches to and conceptions of rights over others. Additionally, I argue that UPR's lack of effect is partly due to Canada's human rights "implementation gap": a lack of effective procedures to ensure domestic implementation of its international human rights commitments.

One: Introduction

In the lead-up to Canada's Universal Periodic Review (UPR) in February 2009, one of the three documents forming the basis of the review noted with concern the growing number of asylum-seekers who were detained upon arrival to Canada. Additionally, in the document, one of the United Nations human rights Treaty Bodies expressed anxiety over regulations in the Immigration and Refugee Protection Act which allow asylum seekers to be "remanded in custody, indefinitely", without a warrant, if their identity is deemed suspicious (Compilation 2008: 6). During the review itself, these concerns were raised by South Korea. What's more, Egypt recommended that Canada "launch a comprehensive review leading to legal and policy reforms which protect the rights of refugees..." (Working Group 2009: 13). Canada accepted this recommendation, stating that "there may be opportunities for improving established processes" (Addendum 2009: 3). Nevertheless, in late 2009 and 2010, 568 asylum seekers were detained due to their method of arrival; they were on boats - the *Ocean Lady* and the *MV Sun Sea* - and they were fleeing the Sri Lankan civil war. As of the beginning of 2012, only four refugee claims had been accepted (Bell 2012).

Between Canada's UPR and the arrival of the refugee claimants, no comprehensive review of the legal and policy measures to protect the rights of refugees took place, nor has any review taken place since. The policy changes which did take place have done little to protect the rights of refugees; in fact, they have mandated the type of action taken in 2009 and 2010, in which every claimant who has arrived as part of a 'group event', as designated by the Public Safety Minister, will be mandatorily imprisoned for up to one year (Showler 2012).

Human rights, for all their claims to universality, have a very specific historical genealogy tied to that of citizenship and conceptions of the modern nation-state. From the Declaration of Independence of 1776 and the *Déclaration des droits de l'homme et du citoyen* of 1789 to the Universal Declaration on the Rights of Indigenous Peoples of 2007, the discourse of human rights has grown exponentially. This history is not a singular trajectory of progress, however, as Arendt so eloquently describes in her account of the succumbing of human rights to their paradoxes during and after the two World Wars. The breakdown of human rights when they mattered most, when people were stripped of everything but their humanity, still reverberates in contemporary discussions of human rights. Today, the international project of human rights continues to snowball at critical speed, nowhere more briskly than in the halls of the United Nations (UN) in Geneva or New York. These halls are where human rights standards, norms, laws and resolutions are made and elaborated upon. In the following paper, I intend to elucidate one small aspect of this intricate human rights machinery.

In my major research paper, I will discuss the most significant reform of the UN human rights machinery of the last 50 years: the dissolution of the *de facto* principle body at the UN for human rights, the Commission on Human Rights (CHR) and its replacement with the newly-minted Human Rights Council (HRC) in 2006. It is not, however, my intention to discuss the history of this particular switch; rather, I wish to discuss a new mechanism for the oft-cited goal of the promotion and protection of human rights, the Universal Periodic Review (UPR). The UPR has been met with much fanfare as a unique tool with which to approach contemporary human rights issues, subjecting all UN-member states to ostensibly cooperative and constructive discussions of their particular human rights records. In terms of its country-specific focus and

attention, as well as the output of recommendations, the UPR can be thought of as an analogue of the Treaty Bodies, albeit one with two crucial differences: it is political - it is not based on the reflections of alleged 'experts' - and it is based on peer-review, so inter-state political relations are on the line. Like the Treaty Bodies, though, the UPR produces recommendations for states to follow to better promote and protect human rights. In this paper, I wish to make a preliminary attempt to discuss and critique the UPR on its efficacy and progress thus far.

The UPR, I suggest, is not meeting the expectations that stem from its inception: the UPR approach to human rights is not an effective one for a country such as Canada. It may, in fact, be a negative development, as the structure of the UPR values the vague notion of "constructive dialogue" over binding commitments and country-specific attention in the advancement human rights. The approach of the UPR is, in some ways, similar to the technocratic approach enshrined in the work of Treaty Bodies, and yet the UPR is wholly political, with recommendations made by states for states. Thus, the UPR's structure creates tension between the political (country-specific criticism) and the technocratic (non-binding recommendations to improve rights records with little weight) approaches to human rights. States can participate in this process in bad faith, not changing anything about their human rights practices, and still technically save face by accepting recommendations. In this way, the UPR contributes to the sterilization of the international human rights discourse, reifying the ineffectuality of many of the UN's efforts to promote and protect human rights.

In order for the UPR to fulfill its objective of holding all states to account, Canada should be subject to the same rigour of review as the worst violators in the international community. Moreover, the UPR should have some measure of effect on Canada just as it should any other

state. This is why I wish to evaluate the UPR based on its effect on Canada. Canada's national myth of being a historical human rights leader, renowned for its humanitarianism and generosity towards refugees, should not dull the criticism it receives. But Canada, like many other nations in the world, suffers from an implementation gap between the commitments and obligations it makes internationally and the concrete actions taken domestically; this implementation gap has long hampered Canada's fulfilment of its international human rights obligations.

I wish to look particularly at the subjects of migrant workers and refugees with regard to Canada's UPR. These groups are superficially related, in that both groups cross international boundaries. But, at the risk of making enormous generalizations, each group represents a significant case-study for the efficacy and extensiveness of human rights; being located away from their countries of origin or homes, they lack immediate citizenship rights and protections, and thus universal rights become relatively more important in their survival and welfare. The two groups differ widely, however, in terms of agency and choice; while the refugee has been forced to flee persecution or want, the migrant worker has made a deliberate choice to move elsewhere to improve the economic wellbeing of themselves, their family and friends, or their community.¹ More often than refugees, migrant workers also retain citizenship to their home country and their governments may advocate for and protect them. Nevertheless, for both of them, the universality of human rights becomes of utmost importance as soon as they cross an international boundary. It is for this reason that a human rights approach to migrant workers and refugees could be a more just one than the current system in place.

¹ This is not to discount the systemic factors and global inequalities that coerce migrant workers into crossing borders to make a living.

These two groups are also of particular importance with regards to Canada's human rights record. Despite a national history reliant on migrant labour, which has historically been of the permanent variety, Canada has increasingly turned to temporary foreign worker programs (TFWPs) to fulfill its labour needs: in particular, its short-term, low-skilled labour needs (Nakache and Kinoshita 2010). These programs, like the notorious guest-worker programs of postwar Europe, make foreign workers vulnerable to a variety of human rights abuses and risk creating an undesirable low-skilled class of workers who are ineligible for permanent residency in a two-tiered immigration system. These programs embody, to borrow a phrase from Lenard and Straehle, "legislated inequality" (2012). They have accordingly been the subject of an array of criticism internationally, from both the UN and civil society.

Canada's national myth is also constructed around a history of generosity to refugees that often obfuscates a less-than-ideal reality. There have been triumphs, of course, in the relocating of the boat-people from Indochina and the acceptance of Asian Ugandans after their expulsion was ordered by Idi Amin, to name some high-profile examples. But this is also the nation that said "None is too many" and turned around the St. Louis in the lead-up to World War II, sending a large number of Jewish refugees back to Europe and their death (Abella and Troper 1983). It is also a nation that, in 2009 and 2010, detained a number of asylum seekers fleeing the Sri Lankan civil war in a move widely criticized by NGOs (Bell 2012). Further to this, it passed legislation calling for the mandatory detention of asylum seekers based on their method of arrival - they were on boats - as well as granting the Minister of Citizenship and Immigration wide-ranging discretionary powers (Showler 2012).

On this latter issue, a note on timing: Canada's UPR took place in early 2009, while the arrival of the asylum seekers and the subsequent media storm took place in later 2009 and 2010. Evidently, this detainment does not feature into Canada's UPR. I feel that this does not reduce the value of my critique here: that a country such as Canada, which made certain commitments during their 2009 UPR which will be discussed below, should not have, in good faith, conducted itself toward the Tamil asylum seekers in the way that it did. There is, in Canada, a disconnect between the human rights commitments made internationally and domestic fulfilment or practice - something known in the Canadian human rights community as Canada's human rights 'implementation gap' - which contributes to the inability of the UPR to affect change on the ground. With regards to the rights of migrant workers and refugees, and human rights more generally, the UPR is not a valuable tool to bridge this gap. For the UPR to truly "revolutionize" the human rights discourse, as its cheerleaders claim it does, it needs to focus attention on overcoming this gap, not continuing to soften the human rights discourse at the UN.

Finally, a note on human rights - throughout this paper, I do not wish to take them at their face value. I wish to approach human rights discourse critically, discussing them for the tools that they are, and approach with skepticism their claims to universal morality and humanity. For the purposes of this paper, I depend on the critical human rights tradition of Arendt, Agamben, and, more recently, Douzinas. I believe these critiques elucidate some of the most crucial flaws of the new mechanism. To this end, I wish to present human rights fully for what they are and what they are not, and investigate their inherent paradoxes; in the words of Douzinas, human rights "have only paradoxes to offer" (Douzinas 2007: 33).

Following the introduction, this paper will unfold over four key sections. The second section will present a brief critical history of human rights, alongside an institutional history of the UN human rights machinery and the UPR itself. In this section I wish to lay the foundation of my critique to better inform my later analysis of Canada's UPR. The next section will analyze the current international governance of migrant workers, the experience of migrant workers in Canada, and recommendations relating to migrant workers at Canada's UPR. The fourth section will examine refugee issues, including the current framework governing international refugee treatment, Canada's experience within this framework, and the comments and recommendations relating to refugees and asylum seekers at Canada's UPR. The fifth section will conclude with general discussion on Canada's experience with the UN human rights machinery and the danger of depoliticization of human rights discourse.

Two: History

The rhetoric of human rights seems to have triumphed because it can be adopted by left and right, the north and the south, the state and the pulpit, the minister and the rebel. (Douzinas 2007: 33)

Human rights and their discontents

Since the Universal Declaration of Human Rights in 1948, modern human rights discourse has been exponentially expanded and elaborated upon, with the adoption of nine core human rights treaties by the General Assembly of the UN and a dizzying array of regional

mechanisms. Fukuyama's 'end of history' posited the end of ideological struggle and the victory of Western capitalism and liberal democracy. In the coming anarchy, he and his peers predicted, wars will be fought over resources, ethnicities, religions and territories, but not over ideology or political conflict. However, I would posit that human rights, over and above liberal democracy and capitalism, have become the dominant ideology of our time. For, as Douzinas states above, contemporary human rights unite the left and the right, the north and south, the west and the rest. When human rights are taken to their logical ideal conclusion, conflicts are apolitical and simply technical disputes to be resolved by experts and bureaucrats. Human rights have, in the words of Douzinas, become the only ideology in town: "the ideology at the end of history" (ibid.).

However, human rights, for all their universal and timeless appeals to peace, justice, and freedom, have had an uncertain recent past. The much-contested claim of human rights - that they are possessed by all people by virtue of being human - is a modern one, and the origin of universal human rights is tied closely with that of the nation-state. Human rights were, at their onset, linked to the revolutions of the late 18th century and the resulting understandings of the rights of the citizen.

An ambiguous, fluctuating concept, no single usage of the term 'human rights' exists. Douzinas, in his critical treatise on the subject, outlines at least six common employs of the term: as a category of legal rights with elevated status due to their normative character; as a pure moral claim by individuals; as a topic and source of jurisprudence; as a normative ideology; as an expression of desire; and as a strategy for "resisting the dictates of power and dissenting from the intolerance of public opinion" (2007: 12). Throughout these uses and meanings, human rights are inconsistent and contradictory; this apparent weakness, however, may in fact be their strength.

The professed source of human rights is, evidently, humanity itself - but this link is also a modern invention. As Arendt notes, *right* was initially linked to history: under slavery, some were born free and others in chains, and it was only historical accident that made it so (1973: 297). The emancipation brought by the American Declaration of Independence of 1776 and the French *Déclaration des droits de l'homme et du citoyen* of 1789 clearly linked the concept of *right* to that of nature, with vocabulary such as 'inalienable', 'given at birth' and 'natural right'. These documents, particularly *La Déclaration*, also served to link the new concept of *les droits de l'homme* with that of *la droit du citoyen*; this conflation of human rights and rights stemming from citizenship has important ramifications later on. Nevertheless, this link to nature was short lived, because twentieth-century man was "just as emancipated from nature as eighteenth-century man was from history" (Arendt 1973: 198). Thus, it would seem that right was ostensibly de-linked from the nation-state, and the source of this new conception of right was humanity itself, or what Agamben calls "bare life" (1998: 10).

However, the de-linking of right from the nation-state was never fully complete. Indeed, the conflation of 'man' and 'citizen' in the title of *la Déclaration* points to a link between human and citizen subject that Agamben refers to as the 'central concept' of modern political thought (ibid.). This link became essential when the first mass refugee crisis exploded in Europe after World War I, consisting of "a million and a half White Russians, seven hundred thousand Armenians, five hundred thousand Bulgarians, a million Greeks, and hundreds of thousands of Germans, Hungarians, and Romanians" (Agamben 1995: 114). For the first time, these masses of stateless people threw "the original fiction of sovereignty" into crisis by breaking the link between human and citizen (ibid.: 117). These were displaced people with no state to offer them

protection, and no state to accept them for fear of affronts to their territorial sovereignty. Thus the refugee, particularly in mass events, “unhinges the old trinity of state/nation/territory” and threatens the very foundations of our modern political order (ibid.). Agamben sees in the refugee and the stateless person the central concept in understanding our political reality. It is for this reason that the refugee, the asylum seeker, and the migrant worker are so significant in the construction of human rights discourse; they challenge the impenetrability of state sovereignty as well as test of the protection that human rights can offer in the absence of all else.

For Agamben, human rights, as linked to the concept of citizenship, put law and the state structure, as opposed to God, at the centre of the foundation of sovereignty. The declarations of rights of 1776 and 1789, in that they elaborate on state obligations and duties towards citizens, inscribe human life in “the juridico-political order of the nation-state” (Agamben 1998: 75). So, in Agamben’s view, the universality with which statesmen and the international community approach the discourse of human rights must be abandoned, and human rights must be considered in reference to their true historical purpose for the modern nation-state: as securing the passage from “divinely authorized royal sovereignty to national sovereignty”, and, as such, as the source of modern state legitimacy (ibid.).

Following Agamben, the de-linking of human and citizen which so troubled Europe during the inter-war period can also be connected to the contemporary custom of separating humanitarianism and politics. When rights are no longer linked to a particular sovereign nation-state, concerns over politics become irrelevant and conflict resolution becomes, simply, a technocratic exercise. In this vein, the UNHCR can judge its performance on humanitarian

grounds, such as the success rate of the provision of food to a refugee camp, without concern for political issues such as citizenship and repatriation.

But this abstract conception of human rights, as removed from the nation-state, was constructed by philosophers and jurists and disconnected from reality. The flaws of this conception revealed, to Arendt, the inherent contradiction of human rights:

No paradox of contemporary politics is filled with a more poignant irony than the discrepancy between the efforts of well-meaning idealists who stubbornly insist on regarding as "inalienable" those human rights, which are enjoyed only by citizens of the most prosperous and civilized countries, and the situation of the rightless themselves. (1973: 279)

The protections that human rights afforded to the masses of people rendered stateless by World War I were fragile and fleeting. Stripped of all connections to the nation-state, having lost all of their links to citizenship and the protections it offered, these people were only human. However, this humanness, the purported source of right, was worthless and these people, in the language of Arendt, were *rightless*. When human rights were the only protections on offer, they failed.

This early manifestation of human rights discourse may seem altogether simplistic now, a product of a different time. As Arendt aptly notes, the human rights defenders and societies of this time employed a language similar to societies for the prevention of cruelty to animals, a language of victimization in which human rights were a nearly shameful thing to rely on, and a sign that the bearer had nothing else left (*ibid.*). And while the understanding of human rights may have changed somewhat - in that they have lost their inherent shame in helplessness - human rights are still primarily used to appeal to our pity for the Other (Žižek 2005: 120). In the language of Wendy Brown, states remain the “crucial emblem of political belonging and protection,” and, as such political citizenship remains the most critical source of rights

guarantees and protections (2010: 67). Still, without citizenship, human rights lack an actor (the state) to enforce them, and - increasingly important in our time - an actor to hold to account. Thus the stateless, refugees, or those living and working in a place in which they do not have citizenship, migrant workers, are important cases in determining the limits of contemporary human rights protections.

It is this use of human rights which makes Žižek so critical of the so-called ‘humanitarian’ bombing and general Western involvement in the Balkans. It is this use of human rights - to cast a humanitarian organization or intervention as ‘apolitical’ or ‘neutral’ - that drives the common criticism levelled against these acts: that the choice to not take sides is never a truly neutral choice. It is the idea that, by presenting the crisis in Bosnia in the 90s as a humanitarian one, a political-military conflict was reformulated into ‘neutral’ humanitarian terms (Žižek 2005: 126). This formulation was based on an “eminently political choice” to take the Serb side in the conflict (ibid.).

This is the classic critique that the Left levels at human rights, and it is a compelling one: that despite the “pragmatist, moral, and antipolitical mantle of human rights discourse”, human rights have a political character (Brown 2010: 460). To borrow from the Marxist critique, human rights are a monopolizing ideology; while presented as eternal, they are creations of modernity. And while presented as universal, they are legal and social constructs which aim to depoliticize the economy (Douzinas 2000: 161). The project of human rights “converges neatly with the requisites of liberal imperialism and global free trade, and legitimates both as well”, allowing human rights to become the *lingua franca* of the neo-imperial state, to use the language of Douzinas (Brown 2010: 461). In this conception, the paradoxes of human rights have made them

impossibly corrupt, and the discourse is simply a legitimizing agent for the new *mission civilisatrice*, the universalization of global capitalism.

I wish to acknowledge the validity of this critique, but also to offer a glimmer of optimism. For, in light of all of their contradictions, I suggest that human rights still possess redeeming value. They are tools of state legitimation, undoubtedly, but they are still the tools of the oppressed *contra* state domination; they are still tools of resistance. This is possible because what happens in Geneva or New York is only one step in broader strategies to hold states to account with international human rights standards.

In Geneva, states agree to human rights obligations, conventions, and recommendations due to international pressure or to gain international political capital or clout, and, after the fact, civil society can then hold states to their commitments. In effect, the obligations and commitments come back to haunt states in the future. This has been shown in the research of Ropp, Sikkink and Risse on the subject of international norm socialization. In this model, states make human rights commitments initially for tactical reasons, and with the passage of time the commitment becomes habitualized and institutionalized with the pressure of civil society actors (Ropp et al. 1999: 5).

This research shows that international human rights discourse can and does make a difference in state behaviour, or in the parlance of human rights NGOs, a difference ‘on the ground.’ Ropp et al. show, however, that there are a few criteria that make this discourse the most effective; a strong domestic civil society, to be sure, and one that is successful at linking up with international groups to establish and maintain pressure at regional and international forums like the UN. Critically, though, countries that are most sensitive to pressure are those that care about

their international image; without this concern, the ‘worst-offending’ countries can remain as such for long periods of time, such as Guatemala in the 1970s, Haiti in the early 1990s, and North Korea today (ibid.: 37). So there is a subset of nations that international human rights norms, generally, can have some effect on. But what of the states with a strong civil society and a strong human rights record, but one with human rights issues that need addressing (as all states have)? What of states, like Canada, with a weakening concern for their international image and a human rights implementation gap? The UPR, I will show, does little to address the challenges of implementing human rights norms and commitments in Canada.

Additionally, as we shall see, the UPR cleverly plays to this capacity for international concern. As opposed to a body of experts in the Treaty Bodies, the UPR involves recommendations from other states, so there are political relationships on the line. But the ‘soft’ legal language of UPR recommendations, as well as the lack of any effective followup mechanism, critically handicaps the process in this regard. In its attempt to balance the political and the technical, to walk the line between the clinical expertise of the Treaty Bodies and the pointed criticism of (the often stagnant) debates of the CHR, the UPR falls short of its mandate and its goals.

The United Nations and the Universal Periodic Review

The Universal Declaration of Human Rights (UDHR) of 1948 is the most famous global proclamation of human rights, and it is the source from which all the other UN Covenants and

Conventions flow. The document was, at the time, understood by its drafters - including Mrs. Eleanor Roosevelt and the government of the United States - as a non-binding declaration of guiding principles, a lofty goal, something to reach for (Grayling 2008). Thus the UDHR was an expression of *oughts*, not of legal rights. Nevertheless, this document and the primary conventions that followed, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), held vital currency in post-war movements of decolonization and independence, and the UDHR is now recognized as a source of customary international law. These three documents are now collectively known as the International Bill of Human Rights.

Briefly, the International Bill of Human Rights extended to all people negative rights (what states should *not* do) such as the right to life, liberty, and freedom of association, as well as positive rights (what states should *provide*) such as a decent job, a fair wage and an education. The work of the UN human rights machinery during the Cold War was framed by the political and ideological east-west divide of the time. Broadly, the cleft between the positive and negative ones can be thought of as a political one, as representative of a rift between two grand political traditions: liberalism and socialism.

The documents making up the Bill of Rights represent what has become known as the first and second generation of rights (Douzinas 2000: 115). While these classifications are not unproblematic, they have some utility in laying out the historical trajectory of the development of the current human rights discourse.² The first generation, the so-called 'blue' rights, are civil and political negative rights, associated with the liberal tradition and embodied by claims to

² The simple division of the multitude of historical trajectories that led to the development of today's human rights standards into three neat 'generations' risks obscuring more than it clarifies, nevertheless I wish to use it here to illustrate the grand divisions that shaped human rights discourse during the Cold War and today.

individual freedom (ibid.). The second 'red' generation, positive rights, are economic, social and cultural rights associated with the socialist tradition, and these are embodied by claims to equality and guarantees of a minimum decent living standard (ibid.). The latest generation is the third generation of 'green' rights, which are group or national sovereignty rights associated with the decolonization process, embodied by claims to the right of self-determination and drawn on extensively by environmental movements (ibid.).

During the Cold War, the great divide between the political traditions of the east and the west was embodied in the struggle between two different conceptions of rights, a struggle that is still felt in the operation of the human rights machinery today. The first generation rights, most notably laid out in the ICCPR, are some of the least contentious - at least since the fall of the Soviet Union - and they give rights their primarily liberal, capitalist character. These rights play into the Marxist critique laid out above: that the promotion and protection of these civil and political rights depoliticize the economy, allowing proponents of human rights to debate freedom and expression while neglecting the underlying issues of distribution in the economy and society. But focussing on one type of rights is a critical debilitation of the project of human rights: the right to vote is essential but useless without the right to food, in other words, survival. This is why the promotion, protection, and implementation of the ICESCR, alongside the ICCPR, is so very important in the human rights machinery today.

The human rights machinery at the UN is vast, consisting of two broad threads: the Treaty system and the Charter-based system. The Treaty system refers to the nine core international human rights treaties, including the aforementioned Covenants - the ICCPR and the ICESCR - as well as the International Convention on the Elimination of All Forms of Racial

Discrimination (ICERD); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW); the International Convention for the Protection of All Persons from Enforced Disappearance (CPED); and the Convention on the Rights of Persons with Disabilities (CRPD). Each of these conventions has a Treaty Body: a committee of independent experts, to monitor state compliance with the rights set out in the convention.³

The other broad thread of the human rights machinery is the Charter-based system: a number of bodies based on, unsurprisingly, the UN Charter. Following World War II, with delegates unable to create a core body for human rights (which would have put human rights on the same footing as peace and security - embodied in the UN Security Council - as well as economic and social issues - embodied in the Economic and Social Council, ECOSOC), the Commission on Human Rights (CHR) was established in 1946 as subordinate to ECOSOC. The CHR was, for 40 years, the principle forum in the UN system concerned with the promotion and protection of human rights (Gutter 2007: 93). Unlike the Treaty Bodies, the CHR and its successor are political bodies, made up of UN member states.

Despite a long history with numerous substantial contributions to the field of human rights, the CHR became increasingly mired in controversy. There were two broad camps looking to reform the UN human rights system: those who wanted to hamper the CHR in its investigation of specific human rights situations - such as in the appointments of country-specific Special

³ There is an additional Treaty Body, the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) under the Optional Protocol of the Convention against Torture.

Procedures - and those who sought to strengthen the system. To these two groups, the reform catchwords of ‘enhancing’, ‘strengthening’ and ‘rationalization’ had completely different meanings (ibid.: 94). The opposing movements for reform - to strengthen the Charter-based UN human rights machinery on the one hand, and on the other, to weaken it - both criticized the CHR for being overly ‘politicized’. It was an ambiguous charge which expressed a number of different dissatisfactions with the current regime. As the late High Commissioner for Human Rights, Sérgio Vieira de Mello, aptly pointed out at the Commission:

Most of the people in this room work for governments. That is politics. For some people in this room to accuse others of being political is a bit like fish criticizing one another for being wet (Gaer 2007: 133).

‘Politicization’ had become a catch-all critique that, to a number of unsatisfied parties, encompassed all that was wrong with the Commission.

Bereft of all credibility, calls for reform of the CHR grew. The 2004 report of the Secretary-General’s High-level Panel on Threats, Challenges and Change, noted that “the Commission on Human Rights suffers from a legitimacy deficit that casts doubts on the overall reputation of the United Nations” (Panel 2004: 64). The report presented the CHR as an institutional weakness in the overall UN system in urgent need of reform. In Kofi Annan’s 2005 call for system-wide UN reform, *In Larger Freedom*, he criticized the Commission for its declining credibility and professionalism which was undermining its capacity to promote and protect human rights (Annan 2005: 45). He pointedly referred to the practice of states seeking membership on the CHR “not to strengthen human rights but to protect themselves against criticism or to criticize others” (ibid.). Finally, he called upon the member states to replace the

CHR with a smaller, standing Human Rights Council (HRC), either as a principal UN organ or as subsidiary body to the General Assembly (*ibid.*).

Thus, in 2006, the new UN Charter-based human rights mechanisms debuted. A number of changes took place in the switch from Commission to Council: the membership procedures of the Human Rights Council were improved upon so that the membership was shrunk from 53 to 47 states, and the human rights records of states are purportedly taken into account in membership, through pledging and elections (Callejon 2008: 329).⁴ Additionally, elections for membership are now done by secret ballot, decreasing the likelihood of regional or like-minded group pressure influencing election outcomes. Overall, though, the tensions between the two broad reform camps - to strengthen and weaken the mechanisms - generally led to a continuation of the status quo (*ibid.*: 328). The Special Procedures, for example, were for the most part preserved, despite the termination of some country-specific mandates.⁵ The Complaints Procedure was not made any more accessible. The Sub-Commission, the CHR's think tank, was not improved and arguably rendered even less effective (*ibid.*: 329).

Much of the 'politicization' of the CHR remains: the same duelling commitments - to human rights on the one hand and national sovereignty on the other - that allowed human rights to serve as a "football for ideological point-scoring, a rhetorical supplement and support for the geo-political priorities of the superpowers" during the Cold War persists (Douzinas 2007: 28).

⁴ This has not stopped the membership of, for example, China and Libya (although the latter's membership was suspended during the civil war).

⁵ Many country-specific mandates still exist, demonstrating the will of the HRC to continue to discuss directly specific human-rights violations: there are mandates on Belarus, Eritrea, the Democratic People's Republic of Korea, Iran and Myanmar under agenda item 4 (situations that require the Council's attention), generally meaning the state is uncooperative. There are also mandates on Cambodia, Côte d'Ivoire, Haiti, Somalia, and Sudan under agenda item 10 (technical assistance and capacity-building), meaning the state has requested help from the HRC. There are two additional country-specific mandates: one on Syria (established by special session, and Syria was most definitely uncooperative) and one on "the Palestinian territories occupied since 1967" (established under the CHR, and Israel is uncooperative).

Today, the Human Rights Council, although intended to be the de-politicized successor of the Commission, is full of ideological point-scoring between power blocs: the North and South, the Non-Aligned Movement and the West, the Organization of the Islamic Conference and the European Union. Much of the nominally “interactive dialogues” are reprisal digs at the human rights records of enemies, while the human rights records of friends are ignored or, often, praised.

However, one unique mechanism was borne out of the reforms of 2005: the Universal Periodic Review, or UPR. The UPR is a state-driven review process in which the human rights records of all 192 member states are reviewed every four-odd years. These reviews are based on three documents: a report prepared by the state, the National Report; a ‘Compilation of UN information’, which includes reports of the Treaty Bodies, agency reports, and the reports of the Special Procedures; and a ‘Summary of stakeholders’ information’, which contains information submitted from a wide variety of civil society, including NGOs, etc. After these reports are made public on the website of the Office of the High Commissioner for Human Rights (OHCHR) - which handles the secretariat duties of the UPR - a review takes place in which every state can make comments and recommendations on any human rights issue they wish during what is called an “interactive dialogue.” These are generally rather stuffy affairs, with delegates reading out carefully vetted interventions (comments and recommendations) to the state-under-review, which responds to the interventions in a clinical, censored way, if at all.

Following the interactive dialogue, a report, known as the Report of the Working Group, is prepared by the troika, a collection of three States that act as rapporteurs to the process. This report tabulates and collects all of the comments and recommendations made during the

interactive dialogue, and the state-under-review is then obligated to respond to all of these recommendations by accepting or rejecting them.⁶ Finally, during the adoption of the Report at the following session of the HRC, states and NGOs can make comments on the review session, including on the conduct of the state-under-review and the number and nature of recommendations accepted. Ideally, following the review the accepted recommendations are implemented and followed up on, creating, in a sense, a new form of human rights obligation to which the state-under-review has voluntarily committed itself.

It is this process that is meant to bring cooperation and constructive dialogue to the HRC, over previous confrontational approaches to human rights at the CHR. The UPR was an addition meant to depoliticize a political process: to walk the line between the point-scoring, pointed criticism of the CHR (the ‘overly political’, to some) and the dry and clinical appeals technical expertise of the Treaty Bodies. It did not replace anything, but was meant to enhance the human rights machinery at the UN by allowing every state to have its say, and to hold every state accountable to the obligations and commitments to which it is bound. This approach has weaknesses; unavoidably, the UPR is filled with ironic situations in which the worse human rights violators tell the states with the better human rights records what to do. But this approach also has its strengths: it is universal, removing the ‘why me?’ deflection of uncomfortable targets of international human rights attention, and by putting inter-state political relations on the line. States are less likely to turn down sincere human rights recommendations from their friends, and less likely still if those recommendations are coming from friends and enemies, from wide ranging sources. Notwithstanding international diplomatic capacity, this approach is most

⁶ Specific responses - acceptance or refusal - to all recommendations are the ideal, but in reality states find a number of ways to circumvent this: through ‘general responses’, which usually amount to deflections, or qualified acceptance, such as acceptance ‘in part’ or ‘in principle’.

effective when states are universal in their criticism, an approach which Canada had, until recently, admirably followed.⁷

Upon its foundation, the UPR was met with much fanfare and extraordinarily high expectations, with commentators claiming early on that the UPR “has revolutionized the human rights discourse” (de la Vega and Lewis 2011: 377). This is hyperbole, and the UPR has done no such thing. Nevertheless, the UPR may have some value to add to the human rights machinery at the UN in its role as what de la Vega and Lewis ambiguously call a “soft governance accountability mechanism” (ibid.). It is in this role, as a peer review mechanism, that it may have value; research on peer review structures in use at the WTO and in the EU have shown that such mechanisms are most effective when used with aim of harmonizing policies and identify best practices, to use the UN-speak. And certainly, a number of innovations have been identified from the first cycle of reviews: its role as a data collector and disseminator of the human rights records of each state is unprecedented; it offers new opportunity for civil society input into the recommendations put forward; and it has led to some transparent and voluntary improvements on human rights by states.

Critically, during the interactive dialogue of the review sessions, states have free reign to discuss whatever they wish. They can encourage other states to sign and ratify Conventions they have not, and they can discuss any and all rights-related issues. This places the UPR in an ideal position to speak to rights issues that might not be discussed in other UN forums. Theoretically, for example, it makes the UPR an ideal forum in which to discuss Canada’s human rights record with regards to migrant workers, refugees and asylum seekers. Many of these discussions have

⁷ The 13th session of the UPR - the first of the second cycle - was the first session in which Canada did not intervene on some of its European allies: Finland, Poland and the United Kingdom. Interestingly, Canada did intervene on the Netherlands.

never occurred in the same place, at the same time, and some of these discussions have never occurred at the UN at all.

As discussed above, the UPR is also the principle mechanism seeking to answer the charges of ‘politicization’ at the CHR (Sweeney and Saito 2009: 204). The peer review mechanism is aimed at objectivity, transparency and cooperation in state-to-state dealings on human rights. To this end, it seeks to de-politicize human rights by making them less about confrontation and more about dialogue. The universality of the UPR is paramount. This removes the essential charge of the states that felt they were getting picked on by the UN: the cry of ‘why me?’ Now, everyone must take part and appear on the world stage before their peers. The ‘universal’ in UPR is meant to trump the selectivity that marred the Commission, and to underscore the fact that human rights are universal and indivisible values. However, this approach to human rights also privileges the vague notion of “constructive dialogue” over political debate, thereby implicitly valuing the technical approach of the Treaty Bodies, with low-impact recommendations and non-binding observations, over country-specific attention and criticism. I will argue that this approach, the fine balance between the political and the technical aspects of the UN human rights machinery, is an ineffective tool for a country like Canada which suffers from what civil society organizations term a human rights ‘implementation gap.’

This gap in implementation refers to the disconnect that has long existed between international rhetoric and domestic action in Canada in fulfilling and upholding its human rights obligations. Canada is by no means the only country to suffer from this affliction, but Canada is notable due to the severity of its implementation gap and Canada’s history as a human rights leader. According to Alex Neve, the Secretary-General of Amnesty International Canada, the

implementation gap is a result of poor federal-provincial/territorial government coordination, a lack of formal processes to institutionalize human rights obligations and provide political accountability, a lack of public transparency on the actions Canada is taking to fulfill its human rights obligations and a lack of remedies available for the victims of human rights violations (personal communication, 2012).

These issues stem from a variety of factors and historical positions; for example, Canada's longstanding stance that economic, social and cultural rights are matters of policy and not of legal right has driven the government's refusal to ratify the OP-ICESCR (which allows for an individual complaint mechanism to hear cases of violations in Canada), making it difficult for victims of economic, social and cultural rights violations to seek recourse internationally. Additionally, the Canadian Human Rights Commission (CHRC), Canada's sole accredited National Human Rights Institution (NHRI), does not do justice to the guiding Paris Principles of NHRI accreditation. NHRIs, as stipulated in the Paris Principles, are permitted to investigate any human rights violation they decide to, and yet the CHRC is limited to cases involving discrimination (*ibid.*). This is a severe handicap, which, along with the political stance the government has taken on several international conventions, contributes to Canada's implementation gap.

Canada's implementation gap has long been an issue for civil society organizations working to promote and protect human rights domestically. The gap has hindered efforts to force the government to adhere to the concluding observations and recommendations of the Treaty Bodies. The gap has hindered efforts to enforce compliance to Covenants and Conventions by

implementing them in domestic law. And the existence of this gap does not bode well for the success of the UPR.

Three: Migrant Workers

Canada does not have a class of Migrant Workers per se. Any non-Canadian who is authorized to work in Canada is protected by the same employment standards legislation as Canadian workers, and has the same access to government programs and services for workers. As such, we have no immigration policies in this regard that are inconsistent with international human rights instruments and have no discriminatory policies and practices against migrants in our laws for us to remove. (Responses 2003)⁸

In Canada and the world

The ILO has, since its inception in 1919, been the main organization responsible for the protection of migrants, specifically migrant workers. Yet a number of conventions it has created on the rights have migrant workers have been, like the later International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), severely under-ratified. Part of this unpopularity is likely due to longstanding government distrust of an organization that gives equal voice to industry, unions and government - the UN, in its total privileging of state-state interaction, is a much more favourable forum for states in this respect.

⁸ This quote is a response to question on the subject of progress on the fight against racism and other topics. The link to the Heritage website is now broken, and it appears that this quote has been taken offline. However, it is reprinted in enough publications, including Goldring 2007, for me to be sure of its accuracy.

Canada's short history is one of colonization and labour immigration. Immigration built this country and, in contrast to many developed countries, public support for continued immigration remains high; there is little to be gained by the 'immigrants-taking-jobs' rhetoric in Canada which has so much currency in Europe. Labour immigration features heavily in Canada's nation-building mythos, which often obscures a history of exploitation and rights abuse.

Canada, along with most other industrial nations of the global north and West, has been reticent to approach labour migration from a rights perspective. One of the principal reasons for this is that international human rights standards (such as those in the under-ratified International Convention for the Protection of the Rights of Migrant Workers and Their Families, or ICRMW) would undermine what has recently become Canada's most popular mechanisms for tapping into a global supply of labour: temporary foreign worker programs (TFWPs).

Although labour migration is not a new global phenomenon, the idea of temporary labour migration is a creation of the 20th century (de Guerre 2009: 2). The notorious failure of the guest-worker program in Germany led to the popular adage 'there is nothing more permanent than a temporary worker.' Harald Bauder maintains that Canada's TFWP was initially set up to avoid labour migrants seeking, or being given, resident status, as was the case in Germany back in the 1950s (Bauder 2008). Canada's first TFWP, created in 1973, was designed specifically so that TFWs were tied to one employer, experienced restricted labour market entry, and were required to leave Canada to apply for subsequent work visas (Austin and Bauder 2010: 7). As Austin and Bauder state, "[The early TFWP] established a rotational system of migration whereby migrants repeatedly came and went, thus becoming 'permanently temporary'"(ibid.). Today, despite the continued criticism of workers' precarious working conditions and restricted

set of rights, the numbers of applicants and acceptances are on the rise (ibid.). Not only has there been a steady stream of applicants, the number of TFWs being admitted to Canada is actually on the rise. For the first time in 2007, and again in every year since Canada accepted more TFW applications than permanent resident applications (Nakache and Kinoshita 2010: 3).

In 2002, Canada extended its TFWPs to ease the entry of essentially all low-skilled workers, by introducing the Pilot Project for Occupations Requiring Lower Levels of Formal Training (the low-skill pilot project), which allowed migrants to apply for jobs usually requiring nothing more than a high school diploma or two years of work experience (ibid.). Furthermore, the process of hiring TFWs under the low-skill pilot project is easier than for other foreign worker programs. Since this shift from high- to low-skilled migrant programs, the numbers of low-skilled TFWs has been rising dramatically. These changes have significantly impacted the number of TFWs accepted into Canada, and although between 2002 and 2008 the number of TFWs has been rising in all sectors, “workers in lower-skilled occupations account for the largest percentage of the increase” (ibid.: 4). These low-skilled TFWPs are the most controversial; although all of these programs legislate inequality, to paraphrase Lenard and Straehle, these low-skilled programs are the sites of the most severe exploitation. Despite this exploitation, as indicated in the quotation introducing this chapter, the Government of Canada does not recognize a class of migrant workers in Canada, insisting instead that all workers enjoy the same rights regardless of immigration status. Furthermore, the Government maintains that there are “no discriminatory policies and practices against migrants” in Canadian law to be removed (Responses 2003).

A rights-based approach to migrant workers

A rights-based approach to migrant labour would undermine these programs because TFWPs are, by their very nature, designed to take advantage of the fewer rights afforded to temporary migrant workers. As Ruhs and Martin note, there exists “an inverse relationship between the number and rights of migrants employed in low-skilled jobs in high-income countries” (2008: 251). Commonly known as the number versus rights hypothesis, it posits that one of the reasons that low-skilled temporary labour is so desirable is because it is cheap, and it is cheap because these migrants lack rights. The more rights they are granted (or the more rights which are enforced and protected), the more expensive this pool of labour becomes, and the less of a deal it is for tar sands companies, agricultural companies and families looking for nannies to hire temporary foreign labour. In this way, the competitive advantage of temporary foreign labour over the domestic variety is its ease of exploitation.

The ICRMW would clash with Canada’s various TFWPs in a variety of ways, as TFWPs could be seen to violate the right to family reunification, the right of migrant workers to unionize, the right of migrant workers to equal treatment with local workers, the right of consultation and review in contract reevaluations or expulsion, and the right to receive wages for work done prior to expulsion, to name a few (Piché et al. 2006: 22). Additionally, the TFWPs at times have violated the workers rights to full and complete information on their rights and rights related to housing and recruitment practices (ibid.). Thus, when the government announces that the rights of migrant workers are maintained through a variety of other human rights mechanisms, or waxes on about the impracticalities of signing on to such a Convention, their

credibility is suspect. Canada has signed on to a number of Conventions aimed at certain vulnerable groups whose rights could arguably be viewed as protected through other instruments: the CEDAW, the CRC, the CEPRD, and the CERD. The idea behind these conventions is that these groups require additional rights protection, above and beyond what general human rights protections afford, such as those in the ICCPR or the ICESCR. To the other claim that rests on the feasibility of signing on to another Convention, one must only look at the large number of other international conventions to which Canada is a party: surely a number of them contained impracticalities at the time, which were overcome only with sufficient political will.

A human rights approach to migration, as embodied in the ICRMW, would contribute to overcoming the citizenship gap. The citizenship gap, as elucidated by Brysk and Shafir, refers to the gap in rights coverage that migrants face: while not eligible for protection from their state of origin, they lack rights in the states in which they reside or work as they are not citizens (2004: 3). A solution to this gap lies in the universalization of human rights through mechanisms such as the ICRMW - the disjoining of rights from citizenship, or membership in a political community, and the extension of rights to all by virtue of their common humanity.

A Canadian approach to migration that puts human rights at its core would undoubtedly reduce the vulnerability of migrants generally, and specifically migrant workers, to exploitation. But Canadian policy, as clearly stated, is resolutely against signing and ratifying the ICRMW. And this is unlikely to change in the short term given the under-ratification of the Convention among rich, West, northern and migrant-receiving states. So, barring the near-term ratification of the ICRMW, what does the newly-minted UPR offer in order to better promote and protect the rights of migrants in Canada? The answer, as explored below, appears to be very little.

Canada's UPR and the rights of migrant workers

In the lead-up to Canada's UPR in 2009, migrant rights were consistently raised in the documents used for the basis of the review. In the National Report prepared by the Government of Canada, two subsections of the 'Immigration and integration measures' section are worth noting here. The first subsection outlines the settlement services and general information provided for migrants, including language and skills development, as well as some of the province-specific supports provided for. The second subsection, entitled 'Migrant Workers', focuses on TFWs specifically. It specifies that TFWs are "expected to leave Canada once the contract has been fulfilled" (National Report 2009: 18). The report further notes that TFWs "enjoy the same labour-related rights, human rights and social protections that Canadians possess", without noting the obvious discrepancies as noted above (ibid.). This section goes on to note that the *Charter of Rights and Freedoms* applies to all individuals on Canadian soil, and that government ensures that TFWs are informed of their rights and recourse mechanisms through the TFWPs. The section finishes by outlining some of the provincial measures which have been enacted to ensure the rights of migrant workers.

Expectedly, the National Report presents a rather auspicious depiction of migrant worker rights in Canada without mentioning the significant controversy the temporary foreign programs have attracted, nor the numerous cases of rights abuses or exploitation that have been publicized. This is very much in line with the quotation introducing this chapter, in which the Government of Canada states it does not recognize a class of migrant workers. This is also not a surprise; the National Reports are written by the governments of the states under review, and states generally

do not wish to provide fodder to their peers, or make themselves vulnerable to criticism.

Nevertheless, a more balanced approach to the National Report would be a signal to the UPR and the world that Canada has nothing to hide and is participating in good faith.

The Compilation of UN information, from Treaty Bodies, agency reports and Special Procedures is more scathing. The Special Rapporteur on the rights of migrants sent a letter in 2006 voicing concerns over “structural flaws” in the Seasonal Agricultural Workers Program, which contribute to “exploitative” work and “inadequate” living conditions for many of its participants (Compilation 2008: 8). Specifically, the letter alleged that the lack of an appeals mechanism, inadequate monitoring and high rates of worker turnover leads to frequent abuse including long hours without overtime or holiday pay, denial of breaks, the use of dangerous chemicals without proper equipment or training, substandard and overcrowded housing, unfair paycheque deductions and “acute pay discrimination”, by which he means discrimination between migrant and non-migrant workforces (ibid.). Additionally, the CESCR urged Canada to eliminate exploitation and abuse of migrant domestic workers under the Live-in Caregiver Program (LCP), a TFWP that has received much criticism for its gendered approach to labour and vulnerability to exploitation - particularly in its stipulation that the caregiver must live in the residence in which they work (Compilation 2008: 10).⁹

Following up on these concerns and recommendations, in the Summary of stakeholders’ information, the *Ligue des Droits et Libertés* (LDL) noted that Canada “n’a pas pris les mesures nécessaires pour éliminer l’exploitation et la violence subies par les travailleurs” as recommended by the CESCR (Summary 2008: 6). Amnesty International focussed on the heavily

⁹ For criticism of the Live-in Caregiver Program, see for example: Brickner, Rachel and Christine Straehle, "The Missing Link: Gender, Immigration Policy and the Live-In Caregiver Program in Canada", *Policy and Society*, 29, 3 November, 2010, 309-320.

criticized requirement of the LCP that domestic caregivers live with their employers, a requirement that makes them vulnerable to abuse (ibid.). Amnesty also criticized the health and safety standards and working conditions resulting from the “variety of restrictions” on the labour rights of workers under the SAWP (ibid.). KAIROS, for its part, singled out the SAWP and the LCP provisions tying migrant workers to specific employers, which makes them highly vulnerable to abuse and exploitation (ibid.). The KAIROS submission specifically mentions long working hours as well as an inability to complain or unionize due to the risk of being sent back (ibid.). Amnesty also voiced concern over the abuse of migrant workers who have uncertain status at the hands of unscrupulous employers, or, in the case of the LCP, landlords (ibid.).

These three reports detail the current policies and problems surrounding migrant work in Canada. Tellingly, the criticisms from the Compilation of UN information as well as the stakeholder submissions focus on the uses and abuses of Canada’s TFWPs, which have attracted increasing criticism as their popularity grows among Canadian employers. The National Report, while not engaging directly with any of these critiques, simply states that the Charter applies to all people on Canadian soil, and that migrant workers enjoy the same labour rights as Canadian workers. This is blatantly untrue, as the Compilation and Stakeholders submission correctly point out. Unfortunately, as previously discussed, these documents are not what really matters during the UPR. The real substance of the UPR is the recommendations themselves and how Canada responds. The Compilation of UN information and the Summary of stakeholders’ information are important examples of data collection and dissemination, but the information within them is only truly valuable in the UPR process if it is raised during the interactive dialogue by a member state.

At Canada's UPR in 2009, by far the most popular recommendation on the subject of the rights of migrants was the ICRMW. A remarkable six states¹⁰ recommended that Canada accede, sign, or sign and ratify the ICRMW, to which Canada offered an expected rejection: that the recommendation "cannot currently be accepted", that Canada "is not considering becoming a party" to the treaty at present, and that this may be reviewed at a latter date (Addendum 2009: 2). This was the common response for recommendations to sign on to a slew of other international conventions: the OP-ICESCR, the CED, the ACHR and ILO Convention 169. The Philippines recommended that Canada hold open consultations with civil society on the matter, but this aspect of the recommendation was rejected. Interestingly, the Philippines also recommended that Canada increase efforts to enhance the protection of the human rights of migrants, which Canada accepted by "recognizing that there may be opportunities for improving established processes" (ibid.: 3).

Pakistan recommended that Canada accept the pending visit request of the Special Rapporteur on the human rights of migrants, which had been pending since 2006 (Working Group 2009: 17). To this, Canada replied that it had already accepted the visit, and that it maintains a standing invitation to all Special Rapporteurs (Addendum 2009: 2). The visit requested, however, never took place, presumably because of the 2011 passing of the mandate to a Canadian, François Crépeau (Country Visits 2012).

Turkey recommended that Canada "closely monitor the situation" of disadvantaged groups including "women migrant workers" (Working Group 2009: 17). Canada accepted this recommendation, referencing Canada's policies to ensure equal pay for equal work and stating

¹⁰ Algeria, Azerbaijan, Chile, Egypt, Syria and Mexico recommended that Canada accede/sign/ratify the ICRMW, while the Philippines recommended that Canada hold open consultations with civil society on the matter (Working Group 2009 - see Appendix).

that these groups are a focus when designing public policy (Addendum 2009: 5). Notably, this response was given in the “Disadvantaged Groups” section of the document, which lumps Aboriginal people, persons receiving employment assistance payments, persons with disabilities, older workers, recent immigrants, and some segments of youth together while not mentioning migrant workers, nor women migrant workers, specifically (ibid.). Thus Canada is able to accept a recommendation with a very specific, gendered focus - on women migrant workers, women prisoners and victims of trafficking - through sleight of hand, neglecting the specificities of the recommendation but adding it to the ‘accepted’ column. This is notwithstanding the fact that it is unclear what, exactly, the recommendation aims to accomplish by inviting Canada to “closely monitor” a situation.

These recommendations represent the extent of the UPR’s engagement with migrant worker issues in Canada. Any other time the term ‘migrant’ or ‘immigrant’ was raised, it was in the context of broad, generalized statements on the topic of discrimination or marginalization.¹¹ Beyond reference to the ICRMW, migrant labour was not discussed. This is striking, given the time and space devoted to the TFWPs in the documents used for the basis of the review.

There is little doubt that acceding to the ICRMW would force Canada to reform its temporary foreign worker programs in order to afford migrant workers better human rights protection. Stated Canadian policy is, however, that Canada does not have a class of migrant workers in need of extra rights protection. Is the hope that repeatedly being told to do something in a public international forum will produce enough ‘naming and shaming’ pressure to persuade Canada to change its policies, and sign on to the ICRMW? Perhaps for something as widely

¹¹ For example, see the following recommendation from Vietnam: “Continue policies and programmes aimed at reducing inequalities that still exist between the Aboriginal, recent immigrants and other Canadians” (Working Group 2009: 18).

ratified as the Universal Declaration on the Rights of Indigenous Peoples, international pressure through the UPR had some effect (indeed, Canada's UPR took place in 2009, and Canada endorsed the Declaration in 2010 despite refusing to do so during the UPR). However, for something as severely under-ratified as the ICRMW, the UPR is unlikely to produce a critical mass of pressure to precipitate a policy change. None of Canada's developed, migrant-receiving peers have ratified it, and when told to do so during UPR sessions, they have summarily rejected the recommendation.

It would therefore appear that the UPR falls short of improving the promotion and protection of migrant rights in Canada. It has value, in terms of the collection, compilation and public dissemination of Canada's human rights vulnerabilities, but as for the other strengths noted by de la Vega and Lewis - notably as a new forum for human rights discussions, and as a mechanism for constructive recommendations - the UPR demonstrates its weaknesses in the area of migrant rights with regards to Canada. There was little 'constructive' about the recommendations to sign and ratify the ICRMW; an informed observer could have easily guessed the response. Furthermore, little discussion on migrant rights took place. Finally, there is nothing to compel Canada to explain its rejection of the ICRMW, or to respond to the Treaty Bodies' claims of exploitation and abuse. The recommendation was made, Canada rejected it, and that was all; no discussion took place, and no groundwork was set.

In this case, Canada's domestic implementation gap had little to do with the ineffectiveness of the UPR, as Canada did not make any notable commitments. The structure of the UPR, which allows for civil society input but does not mandate that it comes to any use, created a situation in which this wealth of public information and critique was not echoed by

states in their interventions and recommendations. Undoubtedly this has to do with the priorities of the intervening states, and emphasizes the limitations of privileging only states to make interventions during the review. On the subject of migrant workers, nothing at the UPR occurred which NGOs could use to hold Canada to account in the future.

Four: Refugees and Asylum Seekers

The conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships - except that they were still human. The world found nothing sacred in the abstract nakedness of being human. (Arendt 1973: 299)

Refugees at the UN

How a country treats refugees is of paramount importance in revealing how it views its international human rights obligations; refugee policy is, in the words of Howard Adelman, “the litmus test of the concept of justice in a society” (Adelman 1991: 172). Canada has traditionally been seen as a safe haven for refugees, providing high-profile resettlements to the boat people from Indochina or the Asian Ugandans fleeing Idi Amin. This history obscures other, less proud acts: the denial of port to the *Komogatu Maru*, the turning around of the *St. Louis* in the lead-up to World War II and, more recently, the imprisonment of the asylum seekers fleeing Sri Lanka. The recently-passed legislation that calls for mandatory detention of people arriving in group events could be seen as part of a Canadian project to erect a system of *non-entrée*. In this project,

Canada is joining other developed nations around the world in the securitization of asylum seekers and refugee claimants. The recent legislation supports this claim. However, unlike the case of migrant workers, a global system of refugee protection exists, founded upon the 1951 Geneva Convention on the status of refugees and its 1967 Protocol. Its primary agent of enforcement, the UNHCR, works within countries around the world to lobby politically, fundraise, and provide humanitarian aid and assistance to its large number of refugee camps. However, the current refugee system is both structurally and institutionally unsound.

World War II and the decades of the Cold War that followed shaped the system as we know it today; the UNHCR of 1948 and the Geneva convention that followed were designed to protect the masses of people without protection, and to provide and protect the human rights of refugees when their home state - or any other state - neglected their duties. However, the UNHCR and the Convention were constructed with the impenetrability of state sovereignty as their starting point. The Convention was necessary from a state point of view not only from a humanitarian perspective but also because, as discussed above, the refugee threatened the trinity of nation/state/territory; their anomalous status in international law and their invisibility in national law required something, collectively, to be done about it (Holburn et al. 1975: 158).

And so the UNHCR got to work as an apolitical humanitarian organization in the grand tradition of the Red Cross. Apolitical neutrality in humanitarianism was an essential trait for UN organizations during the Cold War who had to attempt to bridge the divide between East-West. Nevertheless, the funding for the UNHCR was primarily from Western states, and the organization as well as the refugees to whom it provided protection became tools in the East-West conflict. Western governments opened their arms to refugees fleeing communism and they

had strategic geopolitical interests in supporting certain UNHCR camps that house anti-communist refugees (Loescher 2001: 41). Additionally, repatriation, or sending refugees back to their countries of origin, was unthinkable at the height of the ideological struggle of the Cold War. This left the UNHCR with two solutions for refugees: integration into an asylum country or resettlement to a third country (ibid.).

This changed in the 1980s and accelerated with the fall of the USSR; repatriation became the primary solution for a number of reasons. Fewer countries were willing to accept the growing number of refugees seeking protection, due to the resources it required and the threat to sovereignty it presented. Additionally, the growing number of refugees created a funding crisis for the UNHCR itself, and so it became interested in reducing expensive and increasingly numerous refugee camps (Barnett 2001: 256). This focus on repatriation inevitably led to reductions in the high threshold required for voluntary repatriation; the concept of ‘voluntariness’ was introduced, in which refugee consent was no longer necessary (ibid.: 261). This precipitated two important curtailments of refugee rights: there was no longer a requirement that the situation in their home country had improved appreciably, and refugees were no longer required to provide informed consent (ibid.). The move inevitably privileged the voice of the UNHCR over that of the refugee, with the agency deciding and telling refugees when they were to return home, even in less than ideal conditions, and even when the return still presented risks.

Additionally, the expansion of the operational mandate of the UNHCR led to increased attention focussed on the ‘root causes’ of refugee flight, as well as the increased provision of in-country support and protection to vulnerable populations (ibid.: 257). Rich UNHCR donor states have supported this shift due to decreasing political will to accept refugees accompanied by

increasingly restrictive immigration policies. As Barnett argues, this puts the UNHCR in a potential conflict-of-interest situation, and the provision of in-country support has, on a number of occasions, led to UNHCR officials discouraging individuals from fleeing and thereby exercising their rights as refugees (2001: 263).

Thus, the institutional expansion of the UNHCR has reduced its ability to protect the rights of refugees. Its focus on pragmatic and apolitical humanitarianism has decreased the importance of refugee rights - and by proxy human rights - in its protection activities. The UNHCR is, as a humanitarian organization, judged by humanitarian measures - such as its ability to provide food aid in difficult situations - over its ability to prevent human rights abuses (Loescher 2001: 50). Because of the organization's reliance on voluntary funding, it must closely guard its apolitical and humanitarian character and tread lightly around sensitive geopolitical issues, particularly those related to its important donors.

In addition to the institutional shortcomings of the UNHCR, the current global refugee governance regime contains structural shortcomings as well. Most of the refugees in the world flee countries in, and find asylum in, the global South, where the majority of the UNHCR program budget is spent (Global Report 2011). However, the industrial states of the global North spend billions of dollars annually to process the claims of a small minority of the global refugee population as well as to maintain systems of *non-entrée*: a variety of mechanisms to prevent refugees from reaching their borders and claiming asylum in the first place (Hathaway and Neve 1975: 120). The poorer countries of the global South are saddled with most of the responsibility while developed countries spend most of the resources in dealing with refugees.

Additionally, the UNHCR's funding model has made it dependent on short-term, unreliable voluntary donors which has curtailed its ability to carry out its mandate. This has made the organization vulnerable as a "breeding ground for the advocacy of national political interests" (Väyrynen 2001: 164). Donor governments can earmark funds for specific projects and sway the High Commissioner to allocate resources towards different ends, particularly due to a distrust on behalf of donors about the UNHCR's own objectives. This funding model is flawed, and in some cases it has led to an almost absurd use of funds, in which money cannot be moved to where it is needed most. Furthermore, it is not cost-effective, as earmarked funds do not take into account various administrative and research costs, and require significant reporting and oversight for the donor (ibid.). Still, the UNHCR is loathe to turn down such loans. Recent reforms to the UNHCR's budgetary process may address some of these issues, but research suggests they may not go far enough (ibid.).

This structural imbalance in the resources put towards refugee protection has led to calls for global, institutionalized refugee burden-sharing regimes (see, for example, the proposals of Hathaway and Neve as well as a similar proposal by Schuck). A number of these proposals are ambitious, with features more akin to a World Migration Organization than the UNHCR. They involve collectivized burden-sharing, in which some mechanism redistributes funds from the global North to the South in a manner that is more effective than the current system. These proposals also have the goal of improving the protection of refugee rights.

Human rights and refugees

As discussed at length in the introduction, refugees and asylum seekers present a critical test-case for the universality of human rights. In the introduction quotation of this chapter, Arendt eloquently describes the failure of human rights in the postwar refugee crisis. When nothing. The abstract nakedness of human beings was not sacred, it did not as such provide for the protections that the conception of human rights purported to supply. With no state or country to fill this gap, the postwar was refugee was definitively *rightless*. But, that was decades ago, and now humanitarian organizations exist to provide for refugees.

However, humanitarian organizations have traditionally focussed on the economic, social and cultural rights, through the provision of basic needs such as food aid, healthcare and clean drinking water, and this is an incomplete strategy for confronting the problems refugees and asylum seekers face. A human-rights based strategy would be a more holistic approach to these issues, balancing the aims of humanitarian aid (the protection of the economic, social and cultural rights) and equal consideration to civil and political human rights, such as the freedom from arbitrary detention and torture. An approach giving equal consideration to these different types of rights, for example, would have perhaps given the UNHCR pause in repatriating the Rohingyas to Burma in 1994-95, in which refugees were repatriated into an uncertain and unsafe situation while UNHCR officials dissuaded them from leaving again (Barnett 2001: 265). Such an approach would also give Western governments pause when they arbitrarily detain asylum seekers due to their method of arrival, such as with the case of the *MV Sun Sea* and *Ocean Lady* off the coast of BC in 2009 and 2010.

The difficulty of such an approach for an organization like the UNHCR is immediately apparent; increased focus on civil and political rights would necessitate a political stand on certain issues. This is antithetical to the very nature of the UNHCR that it has worked so hard to preserve: its apolitical and neutral brand of humanitarianism. This is the kind of “neutrality” that is so heavily critiqued by the likes of Žižek, Douzinas and Brown: human rights, when presented as apolitical, can monopolize political space to serve the interests of the neoliberal capitalism.

For the UNHCR there are undoubtedly advantages to this approach: quiet access to lobbying and negotiating activities, as well as funding, which would not be possible with a principled stand. Unveiled criticism of Western asylum procedures, for example, would require stepping on the toes of some of its most important donors: Japan and the United States, for instance. Until now the status quo has been to quietly disapprove of certain practices in backchannel negotiations, but never publicly. This has allowed the UNHCR to continue its pragmatic approach to confronting the issues that refugees face, succeeding in delivering aid and running camps while sidestepping broader issues and tough questions about the nature of asylum procedure and repatriation practices.

This is where the UPR has something to add. The UPR can provide a very public opportunity to criticize the civil and political rights violations of refugees. Furthermore, its universality is an important asset; crucially, it puts every state up on stage to have their turn, so allegations of bias and unfair attention have lost some of their currency. Thus a country such as Canada, instead of seeking refuge behind its long history and tradition of generosity toward refugees and asylum seekers, can be critiqued for its practices in front of the world. In addition, the UPR provides a number of opportunities for civil society to input information for the review,

allowing non-governmental actors to have a voice against the state. This could allow human rights to reclaim their original value: not as tools of state legitimation, but as tools of the oppressed against state power.

Canada's UPR and the rights of refugees and asylum seekers

In the lead-up to Canada's UPR review in 2009, the rights of refugees were consistently referenced in the three documents which formed the basis of the review. The National Report of Canada notes that the *Immigration and Refugee Protection Act* (IRPA) takes into account Canada's international obligations, including under the Refugee Convention as well as the ICCPR, the CAT, and the CRC (National Report 2009: 10). Notably absent in this respect is the ICESCR, perhaps betraying Canada's unbalanced approach to civil and political rights over economic, social and cultural rights.¹²

The National Report briefly lays out what is afforded to refugees under the IRPA, as well as what failed refugees can do by way of appeal (ibid.). It also notes the 2007 amendments to IRPA allowing for special advocates to represent the claimant in cases relating to national security involving confidential information. Finally, the National Report notes that health care is provided for refugee protection claimants - which has since been cut, with more cuts planned - and it generally outlines some of the integration outcomes afforded to refugees (ibid.: 17).

¹² Canada, alongside a number of other Western nations, has a longstanding attitude of approaching its obligations under the ICESCR as matters of policy as opposed to enacting legislation explicitly acknowledging the existence of these rights; thus, they are implicitly valued less than civil and political rights. See: Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada. 05/22/2006. E/C.12/CAN/CO/4, E/C.12/CAN/CO/5 for more information.

The Compilation of UN information makes reference to a 2007 UNHCR report noting the rising number of detained asylum-seekers. It also notes the concern raised by Committee on the Elimination of Racial Discrimination (CERD, the committee in charge of monitoring the ICERD) that asylum-seekers and non-citizens can be detained indefinitely without a warrant if they fail to produce valid identity documents (Compilation 2008: 6). CERD also expressed concern over the detention procedures laid out in Section 55 of IRPA (which lays out the modalities for detention without a warrant), because they may adversely affect stateless persons and asylum-seekers from countries where it is difficult to obtain identity documents (ibid.). CERD was also disturbed by the non-eligibility of stateless persons and undocumented migrants to social security, health care, and education for children; the Committee recommended that the IRPA be amended to include statelessness as a factor for humanitarian consideration (ibid.: 7). The Working Group on Arbitrary Detention was apprehensive over the “broad discretion” of immigration officers in detaining foreign nationals as well as the limited review of these decisions (ibid.: 6).

The Committee Against Torture (CAT, the monitoring body for the CAT) went on to recommend that Canada remove the exception to *non-refoulement* that IRPA contains for persons posing security or criminal risks, and that judicial review be provided in decisions to expel people where “substantial grounds” exist for believing they face the risk of torture (ibid.: 10). A number of UN agencies expressed concern over the issuance of ‘security certificates’ under IRPA, enabling the arrest, detention and expulsion of immigrants and refugees on the grounds of national security. Finally, the Human Rights Committee (CCPR, the monitoring body for the ICCPR) expressed concern over the mandatory detention of foreign nationals who are not yet

permanent residents, recommending that detention never be mandatory but instead decided on a case-by-case basis (ibid.: 11).

The Summary of stakeholders' information contained concerns from civil society over the marginalization of refugee children and the higher than average rates of poverty for refugees (Summary 2008: 4). A number of prominent NGOs, including Amnesty International and KAIROS, lamented the failure to create a Refugee Appeal Division, despite being legislated for in the 2002 IRPA (ibid.: 9). The refugee determination system was criticized for being too politicized to be independent due to the political appointment of members without regard for experience or expertise (ibid.). Additionally, KAIROS noted several obstacles to reunification for refugee families, stating that refugees "are sometimes forced to wait years to be reunited with their spouses and children overseas who often live in situations of danger and persecution" (ibid.: 10).

These three documents were publicized prior to the UPR session in February of 2009. As a result, there was much for states to build off of when constructing their recommendations; concerns over the possibility of *refoulement*, mandatory detention, refugee family reunification, politicization of asylum determination and family reunification. That all this was made public, to the world, in three concise documents is an accomplishment in and of itself, and it surely fits in with one of the primary strengths of the UPR system as noted by de la Vega and Lewis: that of comprehensive data collection and dissemination (2011: 377). While much of this information was previously publicly available in a variety of UN documentation and NGO research, this is the first time such a comprehensive collection has been presented all in the same place. And, the fact that such a collection of the human rights concerns of Canada is being disseminated and

discussed is another achievement in and of itself at the UPR. But these documents only form the basis of the review. States are compelled to respond the recommendations made during the review in the outcome: for the record, the interventions are what matter.

In terms of comments and concerns, the Ukraine took positive note of the broad-based policies to tackle the cultural and linguistic barriers that refugees face (Working Group 2009: 11). Iran, drawing directly on the submissions from Canadian NGOs,¹³ noted barriers to refugee family reunification, but did not opt to make any recommendations on this matter (ibid.). Argentina inquired about the procedures for refugees claimants in irregular situations. South Korea simply took note of the civil society and Treaty Body concerns regarding the lack of protection of refugees and asylum seekers but made no recommendations on the issues raised (ibid.: 14).

In terms of recommendations requiring responses, Malaysia recommended that Canada “consider taking more action to prevent and punish perpetrators of racially motivated acts of violence” against refugees and asylum-seekers, among other groups (ibid.: 9). Canada accepted this recommendation; how could it not? The response Canada gave to the recommendation is noteworthy, in that it does not actually commit to any action: “Canadian criminal law criminalizes violence, whether hate-motivated or not” (Addendum 2009: 6). This type of recommendation, and the non-action it requires in acceptance, is demonstrative of the ineffectiveness of current UPR practices. Malaysia makes a recommendation that is filed under minorities, refugees, asylum seekers, and discrimination, and Canada accepts it: everyone can

¹³ There are also unconfirmed rumours that Iran was directly lobbied by Canadian NGOs to include certain issues in their intervention and recommendations; while it is common practice for NGOs to lobby countries to raise their concerns during the review, choosing Iran, of all countries, to direct human rights criticism at Canada would seem to be a risky move indeed.

check a box boasting their own human rights commitments, and validating the UPR process, without any action being taken. It is recommendations like this which skew attempts to quantify the efficacy of the UPR.

Saudi Arabia recommended that Canada “implement all international human rights instruments” related to, among other groups, refugees (Working Group 2009: 12). Canada, in its response, accepted this recommendation as it relates to treaties to which it is a party (Addendum 2009: 5). Two countries, the Czech Republic and Brazil, made recommendations that Canada reconsider or review its legislation regarding exceptions to the principle of *non-refoulement* (Working Group 2009: 16, 19). Canada responded by rejecting the call to apply this principle without exceptions, as well as agreeing to reconsider the principles in domestic legislation (Addendum 2009: 6). Canada’s response further noted that the Constitution prohibits the *refoulement* of persons facing a substantial risk of torture, “except in exceptional circumstances” (ibid.).

Finally, in the most specific recommendation received on the topic, Egypt recommended that Canada “Launch a comprehensive review leading to legal and policy reforms which protect the rights of refugees and migrants, including rights to family reunification” (Working Group 2009: 21). Canada accepted (Addendum 2009: 6).¹⁴ In responding to this recommendation, Canada noted that “there may be opportunities for improving established processes” and that family reunification, while being an integral part of Canada’s refugee protection program, is not viewed as a “right” (ibid.).

¹⁴ Canada subsequently rejected the other half of the recommendation which called for the creation of an offence of racial violence.

And so, what is the final outcome of the Canada's UPR with regards to the rights of refugees and asylum seekers? It would appear very little progress was made. There was certainly a disconnect present between the concerns and violations noted in the Compilation of UN information and the Stakeholders' submission, on the one hand, and the comments and recommendations made by states, on the other. This is not to say the process was valueless; as was the case with migrant worker issues, a great amount of data was collected and presented in a digestible manner, all in one place. Moreover, constructive recommendations were made: to prohibit *non-refoulement* and to conduct a comprehensive policy and legal review on the rights of refugees and migrants.

But, like the treatment of migrant workers, the concerns over refugees held by civil society and the UN agencies were not echoed in the interactive dialogue. The valid concerns that were raised were simply rejected by Canada. The one recommendation that the Government accepted on this topic, made by Egypt, did not amount to anything. No comprehensive review took place.¹⁵ And the policy changes for asylum procedures that were recently enacted do little to enhance the protection of the rights of asylum seekers, and, in fact, are a step in the opposite direction.

The policy changes in Bill C-31 have been widely criticized for giving the claimant much less time to prepare their claim; for granting the Minister of Citizenship and Immigration broad

¹⁵ No followup reports have been published by the Government of Canada. Emails to the Department of Heritage (which is responsible for Canada's international human rights program, including engagement and implementation), the Department of Foreign Affairs and International Trade, and Citizenship and Immigration eventually led to an email directing me to the "News" section of the latter's website, containing news releases and backgrounders on the current controversial reforms taking place with no explanation. Interestingly, Heritage was initially given control over the human rights program because it was seen as the only Federal department with no eggs in the basket; in other words, no areas of responsibility that have anything to do with implementation of Canada's international human rights obligations. This was apparently preferable to the creation of an independent department responsible for human rights (personal communication with Alex Neve, 2012).

discretionary powers to designate safe third countries, for limiting the time allotted to claim and the chances of appeal; and for allowing refugees with permanent residency to be stripped of their refugee and permanent resident status if conditions in their home country are deemed sufficiently improved (Showler 2012). Most importantly, perhaps, these changes legislate the mandatory imprisonment, for up to one year, of all claimants who are deemed to have been part of a “group arrival”, a designation that is at the discretion of the Public Safety Minister (ibid.). Consequently, the actions of the Canadian Government toward the asylum seekers fleeing Sri Lanka in 2009 and 2010 are now legally mandatory. Thus, while the same flaws in the UPR were present in the discussion of migrant workers as well as that of refugees and asylum seekers - the wealth of information presented by the UN human rights machinery and civil society that made up the basis for the review were ignored - Canada’s implementation gap was also an insurmountable obstacle, in that the recommendations received and accepted were completely ignored.

Five: Conclusion - A Gathering of Wise Statesmen

Abolition of the Commission will not depoliticise either the United Nations or human rights, and the Council will not magically become a gathering of wise statesmen who base their decisions on objective truth or begin to act like non-governmental organisations. (Hannum 2007: 92)

A human rights-based approach to the protection of migrant workers as well as refugees and asylum seekers would likely be more just. Such an approach could undermine the exploitative nature of the temporary foreign worker programs, it could improve family reunification practices and fully prohibit *non-refoulement*, and it could disallow the kind of

actions - which are now law - that were taken in 2009 and 2010 against the asylum seekers that arrived on the *Ocean Lady* and the *MV Sun Sea*. Due to fact that, in the UPR, any rights-related issue is fair game for discussion and debate, the mechanism is in an ideal place to encourage this approach in Canada. However, an analysis of the outcome of Canada's 2009 review reveals several glaring flaws in the UPR mechanism, which, along with Canada's implementation gap, make the UPR a thoroughly ineffective tool with which to address shortcomings in the fulfillment of Canada's human rights commitments.

As alluded to in the quotation above, the shift from the CHR to the HRC did little to address former complaints of politicization, whatever these complaints were referring to. In the Plenary at the *Palais des Nations*, human rights still serve as, to paraphrase Douzinas, a football for political points scoring. The UPR may be a new approach for discussing human rights which values cooperation and constructive debate over ideological confrontation, but it does little to address the fact that states are still states, politics are still politics, and human rights will always be used for political ends by state actors. A glance at the states that presented recommendations to Canada on migration and refugees, in the Appendix, will leave little doubt that the decision to intervene or not is politically motivated; using the terms very loosely, there are many adversaries on the list and few allies.

The UPR's saving grace may prove to be its high-level participation, as it has seen the participation of numerous government delegations at the Minister-level. But if it continues to approach human rights with the same sterility as the Treaty Bodies, this level of participation will diminish as it becomes less worthwhile to send expensive delegations. Additionally, the UPR lessens the sting of country-specific attention at the UN: there are now fewer country-specific

Special Procedures mandates, and the violators that are subject to this attention can deflect this focus by citing duplication of work. This hinders the ability of country-specific Special Procedures to do their job as they are subject to increasing critical charges of overlap.

One of the exciting aspects of the UPR, on the other hand, was its potential to give new voice to non-state actors. Yet, the concerns of civil society were not echoed nor magnified by states during Canada's peer review. Though it provides new avenues for NGO participation, the UPR is fundamentally a state-to-state review mechanism which is meant for states to voice their concerns; they are not beholden to the comments and suggestions of civil society. The disconnect between the Summary of stakeholders information and the recommendations made during the review reveals a missing link between civil society and the intervening states. NGOs such as Amnesty International can and do lobby other states to use their recommendations for Canada during the review, but successful uptake depends on a myriad of factors such as state priorities, capacity and political leadership. This widespread ignorance towards the suggestions of civil society is regrettable as the UPR allows a great amount of NGO input from across the board, and the OHCHR makes this input public. This data collection, in and of itself, is a welcome development in UN human rights machinery; any mechanism that offers the potential to give further voice to civil society should be viewed as an improvement. Unfortunately this viewpoint is worthless if it is not expressed in state interventions during the review.

And even if this viewpoint was expressed, there is the question of whether the constructive dialogue at the UPR would have been effective in changing Canada's approach to the human rights of migrant workers, refugees and asylum seekers; this seems unlikely. One crucial reason for this is undoubtedly Canada's implementation gap which, along with an

increasingly hypocritical approach to human rights, continues to shape human rights discourse in Canada.

The implementation gap persists: there is no institutional mechanism with which to implement international human rights standards domestically, no mechanism to translate international conventions into domestic law, and no bureaucracy to oversee government-wide compliance and complaints. The Canadian Human Rights Commission, Canada's only OHCHR-approved National Human Rights Institution, does not do the certification body justice; it is only liable to investigate individual complaints in cases involving discrimination.¹⁶ Due to the implementation gap, the recommendations of the UPR are likely bound to the same fate as those of the Treaty Bodies. The concluding observations of the Treaty Bodies, even the successful complaints cases at Treaty Bodies such as the Cecilia Kell case at the CEDAW, have little impact on the ground.¹⁷ And Canada's increasingly hostile stance towards the UN, presumably to shore up political capital back home, is making what little value these recommendations do have increasingly worthless.

In fact, in the past nine months the government's relationship with the UN has soured in a way that consistently subverts the essential principle of universality in the application of human rights. The actions of the Conservative government towards the UN human rights machinery are not suited to a country that, a short time ago, prided itself on its human rights leadership. These

¹⁶ The International Coordinating Committee (ICC), under the auspices of the OHCHR, accredits National Human Rights Institutions (NHRIs) according to the extent to which they abide by the Paris Principles, which require, among other things, a broad mandate based on universal human rights norms; restriction to cases involving discrimination certainly goes against this spirit (ICC n.d.).

¹⁷ In April 2012, the CEDAW ruled against Canada in a discrimination case involving an indigenous woman, Cecilia Kell. The Committee recommended that Canada provide monetary and housing compensation, as well as review the Canadian legal system to ensure that indigenous women victims of domestic violence have effective access to justice (CEDAW 2012).

actions include: calling the concern expressed by James Anaya, the Special Rapporteur on the rights of indigenous peoples, over the housing crisis in the Attawapiskat First Nation a “publicity stunt”; personally insulting the Special Rapporteur on the right to food, Olivier de Schutter, for daring to waste taxpayers money by visiting Canada and criticizing Canada’s food insecurity; rebuking the Committee against Torture for wasting its time by holding its regular, periodic review of Canada’s record under the CAT instead of focussing on other countries; admonishing the High Commissioner for Human Rights, Navi Pillay, for mentioning Quebec in a speech; and dismissing the concerns of the Committee on the Rights of the Child’s over Canada’s compliance with the CRC because one of the members of the Committee is from Syria (Joint Submission 2012).

These actions all point to a ‘why me?’ philosophy toward human rights: that there should be no criticism of Canada when other countries do worse. This undermines not only the universality that is a central tenet of the UPR, but also the universality that is central to the very concept of human rights. It is contrary to the spirit of international human rights law and it shows Canada’s peers that an uncooperative and bullying approach to the UN human rights machinery can effectively deflect attention and garner domestic political capital (ibid.). It also critically devalues human rights protections for the victims of human rights violations in Canada like Cecilia Kell (ibid.).

The UPR does little to depoliticize human rights at the UN. This is perhaps because the oft-heard critique of the CHR, that it was too ‘politicized’, was misplaced. The point of the UPR is to hold Canada to the same rigour of review as Syria: every state in the world violates human rights, it is only a question of magnitude and extent. So the old charge of levelled at the CHR,

that it was corrupt because there were human rights violators among its members, is a false one. Human rights are meant to be an ideal, something to strive toward that can never be completely fulfilled. Which is why the High Commissioner for Human Rights was right to mention Canada alongside Syria and North Korea in her opening statement to the Council at the twentieth session (Pillay 2012). Human rights are political; they are political tools that can be used to by states to legitimate themselves and their actions, and to monopolize political space. But they can also be used by the repressed as tools against state power. When Pillay mentioned the Quebec student protests, she was siding with the young students against draconian laws put in place by a government overstepping its bounds (ibid.). And in doing so she was following the lead of the Special Procedures who claimed the laws violated the freedoms of association, assembly and expression (Canada 2012). The presence of Canada in that report was contentious, and it made Canada a target for Belarus and North Korea and the like. But it also caused the most frenzied reaction from the Government of Canada during the entire session of the HRC. It got the government engaged.

This is why depoliticization is a wrong-headed shift. For, the end result - technocratic bureaucracy - is as much a source of power as the political. Only, the UPR devalues human rights as tools against state legitimacy by acting as yet another uncontentious forum, like the Treaty Bodies, in which little gets done. And privileging this bureaucratic approach to human rights serves to make them banal and sterile tools of state legitimation. During the Cold War, part of the value of the UN was its political debates between the two grand traditions that wrought the first and second generation of human rights: it implicitly deemed political rights on the one hand and economic, social and cultural rights on the other, to be of equal value. The value of the UN

human rights machinery was in this political debate between liberalism and socialism; it allowed multiple conceptions and understandings of human rights to be debated and discussed.

Consequently, the UPR is not the revolutionary tool some have suggested it is. Commentators will give it various roles to fulfill - ‘soft governance accountability mechanism’ being one of the more ambiguous designations - but it does little to improve upon the model already in place. The privileging of the ambiguous notion of “constructive dialogue”, combined with Canada’s implementation gap, create an unworkable system with little power to change things, and Canada will continue to agree to low-impact recommendations while doing nothing on the ground. Indeed, since the UPR in 2009, nothing has changed in Canada. In conversations with the Secretary-General of Amnesty International, Alex Neve, he was hard pressed to think of a single thing the Government had changed since the review, save for a very minor adjustment to allow NGOs to attend the unimportant preliminary sessions of an unimportant meeting (personal communication 2012). And, despite agreeing to one, no ‘comprehensive policy review’ took place to better protect the rights of refugees and migrants.

This is not to say that the UPR is not a marginal improvement, that it is not allowing discussions to take place that would have been unthinkable beforehand, such as a public international discussion of Canada’s treatment of migrants and refugees. But if the UPR is meant to be truly innovative, it should, from the outset, be designed to better overcome the flaws of the Treaty Bodies. This would start with much better mechanisms to ensure implementation and followup, one that is not linked to the interventions of states in the second cycle of reviews. This process must allow the HRC and the OHCHR to truly hold states to account for the recommendations they accepted, and fully explain themselves for those they reject. As it stands,

for civil society and government in Canada, the UPR is worth little more than the Treaty Bodies. Granted, what happens in Geneva is part of a broader strategy by civil society to ensure human rights protections, but the language of the recommendations, like that of the concluding observations of the Treaty Bodies, is legally ‘soft’ and thus it is difficult to foresee these commitments coming back to haunt governments.¹⁸ Currently, there is little hope for meaningful followup in the second cycle.

In May 2012, I attended the 13th session of the UPR - the first of the second cycle - in my capacity as a Junior Policy Officer for the Government of Canada. I attended the reviews of Bahrain, Ecuador, Tunisia, Morocco, Indonesia, Finland, the United Kingdom, India, Brazil, the Philippines, Algeria, Poland, the Netherlands and South Africa, in that order. The reviews I witnessed did not give me hope for future followup: the worst offenders of the bunch continued to approach the UPR with what can only be described as bad faith - in one instance the government of Bahrain was publicly denounced by the President of the Human Rights Council, Laura Dupuy Lasserre, for threatening civil society over their participation in the process - while the countries with better records faced the same issues and recommendations as the first round. This was not history being made, nor was it a revolution in international human rights discourse. Rather, it felt like yet another UN exercise in futility.

The way in which the UPR approaches human rights matters; the UPR is one of many mechanisms that shapes and adapts international human rights discourse. By not contributing to the human rights machinery as it relates to Canada in a meaningful way, the UPR is contributing to the sterilization of the the discourse. And discourse matters; international human rights

¹⁸ This is in contrast to the binding international conventions that, as Ropp et al. have demonstrated, can slowly seep into national consciousness through the process of socialization; it is unlikely that UPR recommendations will have the same fate.

discourse, insofar as it is modified and changed by the UPR, matters practically. The value of human rights at UPR reflects upon the entirety of the discourse. For, as Derek Gregory reminds us, “representations are not mere mirrors of the world. They enter directly into its fabrication” (2004: 121). If the UPR acts as a ‘mutual praise society’ - as some detractors have called it - human rights will lose their sting, their currency. And the actions of Canada - continuing to freely accept UPR recommendations without any intention of followup, and continuing to leave human rights obligations and commitments unfulfilled with impunity - will only reify the valuelessness of human rights as universal protections based on our common humanity.

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Appendix: UPR Recommendations on Migrants and Refugees

Recommendation	From:	Response:
2. Accede to the OP- CAT and establish an effective National Preventive Mechanism and further adopt additional measures to ensure its full implementation without any exceptions of the principle of non-refoulement	Czech Republic	Accepted in part*
5. Accede to ICRMW	Algeria	Rejected
5. Sign and ratify ICRMW	Azerbaijan	Rejected
5. Sign ICRMW	Chile	Rejected
5. Sign ICRMW	Egypt	Rejected
5. Sign ICRMW	Mexico	Rejected
5. Sign ICRMW	Syria	Rejected
16. Closely monitor the situation of other disadvantaged groups such as women migrant workers, women prisoners and victims of trafficking	Turkey	Accepted
18. Accept the pending visit request of the Special Rapporteur on the human rights of migrants, which is pending since 2006	Pakistan	Accepted
20. Continue policies and programmes aimed at reducing inequalities that still exist between the Aboriginal, recent immigrants and other Canadians	Vietnam	Accepted
24. Consider taking more resolute action to prevent and punish perpetrators of racially motivated acts of violence against members of the Muslim and Arab communities, the indigenous population, Canadian citizens of foreign origin, foreign workers, refugees and asylum-seekers	Malaysia	Accepted
31. Re-consider the approach on the nature of prohibition of torture and to review the non-refoulement principles in its domestic legislation	Brazil	Accepted in part**
45. Integrate economic social and cultural rights in its poverty reduction strategies in a way that can benefit the most vulnerable groups in society, specially the Aborigines, afro-Canadians, migrants, persons with disabilities, youth, women with low incomes, and single mothers and adopt all necessary measures, including the full implementation of the United Nations Declaration on the Rights of Indigenous Peoples, to guarantee Aboriginals the full enjoyment of their rights including economic, social and cultural so that their standard of living was similar to that of the rest of the citizens in Canada	Cuba	Accepted
51. Implement all international human rights instruments related to Aboriginals, women, Arabs, Muslims and other religious minorities, migrants and refugees and enhance and protect their rights against violations	Saudi Arabia	Accepted
57. Increase efforts to enhance the protection of the human rights of migrants and hold open consultations with civil society on the ICRMW	Philippines	Accepted
58. Launch a comprehensive review leading to legal and policy reforms which protect the rights of refugees and migrants, including rights to family reunification and enact legislation creating an offence for racial violence, and design and implement training for judges and prosecutors on the nature of hate crimes on the basis of race	Egypt	Accepted

Recommendation	From:	Response:
59. Continue efforts to bring its system of security certificates concerning immigration into compliance with international human rights standards	Switzerland	Accepted
60. Make its immigration procedures more transparent and objective and take concrete measures to avoid the misuse of procedures to profile on the basis of race, religion and origin	Pakistan	Accepted

* Canada accepted the first part of the recommendation, stating that “it is conducting the required analysis of its domestic legislation and policies in considering the possible signature/ratification of the CRPD and the OP-CAT” (Working Group 2009: 2), however only had this to say about the end of the recommendation: “Canada does not accept the final component of recommendation 2 relating to non-refoulement” (ibid.: 6).

** Canada responded with the following: “With respect to Canada’s non-refoulement obligations, the application of immigration legislation in this regard is carefully monitored. Canada's Constitution prohibits, except in exceptional circumstances, the removal of persons to a substantial risk of torture. To date, Canada has not removed anyone that has been assessed as facing a substantial risk of torture” (ibid.: 6).