



INQUIRY & INSIGHT

FALL 2008

THE WATERLOO GRADUATE JOURNAL *of* POLITICAL SCIENCE

THE PILLARS
AND KERNAL OF
INDEPENDANCE
OF NATIONAL
HUMAN RIGHTS
INSTITUTIONS

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AND SHIELD?

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Forward:

Welcome to the first issue of *Inquiry and Insight*, *The Waterloo Graduate Journal of Political Science*, a wholly student-operated and student-directed publication in the discipline of political science and related fields. With the rapid growth of graduate political science programs in Ontario and elsewhere in Canada, the need for a peer-reviewed student journal which addresses contemporary issues in the discipline has never been greater. The Department of Political Science at the University of Waterloo is pleased to support this endeavour and would like to thank our graduate students for their tremendous accomplishment. Given the difficulties aspiring young scholars face getting their research into print, graduate and undergraduate students now have a forum to voice their ideas to the broader academic community. For this we need to thank the 2007-08 graduate class in political science at the University of Waterloo. They alone are responsible for the success of this first edition.

While several students took various roles in the production of this issue, the first editor of this journal, Michael Middleton, deserves special mention. Michael guided the journal throughout its development and publication, including heading the peer review process, designing the final product and managing budgetary matters. This first edition is testament to his dedication and diligence.

The purpose of the journal is to provide students with a forum for political debate on pressing contemporary concerns. *Inquiry and Insight* is your journal now and we hope it attracts contributions that challenge conventional ideas and approaches current in the discipline, and that it provokes students to think more critically about national and international political issues. Contributions from all areas of the discipline and related fields, including peace and conflict studies, global governance and normative theory, are welcome. We trust that students will take this opportunity and help build the journal into Canada's leading voice for student opinion.

On behalf of my colleagues in political science at the University of Waterloo, I would like to congratulate our students for a task well done.

Richard Nutbrown
Chair - Department of Political Science
University of Waterloo

From the Editor:

As this is the inaugural issue of *Inquiry & Insight*, I feel it is only appropriate that this year's forward focus on the journal itself, rather than any particular political issue. When the idea of establishing a journal was first presented to students at the University of Waterloo, there was a great deal of uncertainty surrounding our ability to accurately reflect the incredible energy within the graduate community. After months of hard work and generous departmental support, I believe that we have accomplished our goal. True to form, the articles contained within this year's edition are as varied as they are innovative. While some authors have chosen to examine relatively recent developments within the field, others have brought fresh ideas and new approaches to old problems. Unlike most journals which have been created around a specific issue or debate, the theme of our journal is not the content of the articles, but the authors who have written them.

Inquiry & Insight is a peer reviewed, student run, academic journal which addresses contemporary issues within the field of political science. The purpose of this journal is to give voice to the many graduate and undergraduate students who often go unheard within the broader academic community. The student culture within political science is both dynamic and enthusiastic. *Inquiry & Insight* seeks to channel that energy and provide an outlet for the many students who are brimming with new and exciting ideas. The broad scope of this journal reflects our desire to connect with students from a variety of fields including, but not limited to; International Relations, Peace and Conflict Studies, Political Theory, Canadian Politics, Public Policy and Political Economy. History is littered with examples of academics who put forth groundbreaking ideas which, while less refined, were first formulated during their time as a student. *Inquiry & Insight* allows students of political science to engage the academic community with novel approaches and new ideas. At its heart, this journal represents a discussion between students and their academic colleagues, both of whom are striving to understand the same questions. *Inquiry & Insight* provides an exciting opportunity for both students and academics alike to engage with bright young minds that will continue to shape the field of political science for years to come.

Michael Middleton



Editor-in-Chief

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The Pillars and Kernel of Independence of National Human Rights Institutions: A Comparative Analysis of Canada, Ghana and South Africa Human Rights Commissions

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We are in the era of rights.¹ The postwar global human rights regime is so strong that no state and no developed political entity can afford to eschew its language or its values.² Liberty, equality and respect for human dignity have acquired global acceptance.³ Understandably, our primary concern is not how to justify rights, but how to protect them. With this in mind, blind faith in the international human rights regimes will not suffice.⁴ States must show some internal commitments to the noble task of human rights protection. Among the most effective mechanisms states can employ to actualise this aim are national human rights institutions.⁵ Canada, Ghana and South Africa have partly indicated their commitment to this noble endeavour by establishing national human rights commissions (HRCs). However, it must be said that the desire for these institutions does not end with their mere creation, as they must also be independent and impartial. This is imperative not only to gain the required legitimacy for their effective and efficient functioning but also to encourage potential rights claimants to come

¹ See Lorraine E. Weinrib, "The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights under Canada's Constitution," *The Canadian Bar Review* 80 (2001): 88 and Charles R. Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (Chicago: Chicago University Press, 1999)

² Lorraine *supra* note 1.

³ In this desired discourse and positive ambition, Canada Ghana and South Africa are not left out. Human Rights Acts and Liberal constitutions entrenching human rights have been adopted. Ghana's 1992 Fourth Republican Constitution, South Africa's 1996 Final Constitution and the 1977 Canadian Human Rights Act (CHRA) and the 1982 Canadian Constitution Act, with an entrenched Charter of Rights and Freedoms

⁴ See Obiora C. Okafor and Shedrack C. Agbakwa, "Legalism, Popular Agency and 'Voices of Suffering': the Nigeria National Human Rights Commission in Context," *Human Rights Quarterly* 24.3 (2002): 663 and Nsogurua J. Udombana, "Toward the Africa Court on Human and Peoples' Rights: Better Late Than Never," *Yale Human Rights and Development Law Journal* 3 (2000): 50

⁵ See Chinedu Okafor *supra* note 4

forward and to prevent the human rights legislation from lapsing into mere political rhetoric.⁶ The principal purpose of this paper is to conduct a comparative examination of the independence of these institutions, the focal points being the *Canadian, Ghanaian and South African Human Rights Commissions* (hereinafter referred to as CHRC, CHRAJ and SAHRC respectively).⁷

This paper argues that despite the different jurisdictional settings of these three commissions, all enjoy formal independence. They have also proven to be useful alternatives to the courts for rights enforcement, and good mechanisms for fostering the culture of liberty and equality. However, the analyses here are situated within the literature on judicial independence and human rights with a focus on laws that established the commissions and the international standards used to measure the operation and independence of institutions like these.⁸ It is useful though, to point out that this paper does not advocate absolute independence as it recognises the utility of positive interplay between state institutions in the interest of responsible and responsive governance. Indeed, meaningful independence does not require the hermetic sealing off of one institution from the other.⁹ Courts, or in this case HRCs, function under laws enacted and executed by other branches of government. Commissions often entertain questions or investigate claims framed by other branches. Independence then, does not require commissions to be removed from the world around them.¹⁰ To a significant extent, it does require that their decisions be unaffected by the strength of partisan positions among members of the other branches.¹¹

The paper is organised into five parts: (I) Justification for the Comparative Choice, (II) General Reasons for the Independence of HRCs, (III) Legal and Operational Independence, (IV) Independence through Appointment and Dismissal Procedures, (V) Financial Independence, and (VI) Independence through Composition.

Justification for the Comparative Choice

The reason the three commissions were chosen is due to the peculiar circumstances of the countries involved and the demonstrated commonality of interest to promote and protect human rights. Indeed, Canada as an established democracy, Ghana an emerging democracy in sub-Saharan Africa from a long period of military dictatorship, and South Africa in a new phase of political governance after several decades of institutionalised racism against the majority, are

⁶ Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: Chicago University Press, 1981) 14

⁷ Canadian Human Rights Commission (CHRC), Commission on Human Rights and Administrative Justice (CHRAJ) and South Africa Human Rights Commission (SAHRC).

⁸ UN, *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights* (New York: UN Centre for Human Rights, 1995), HR/PT/4 Paris Principles Annex (Composition and guarantees if independence and pluralism).

⁹ See Anne Smith, "The Unique Position of National Human Rights Institutions: a mixed blessing?," *Human Rights Quarterly* 28 (2006): 904-946

¹⁰ Ibid

¹¹ Ibid

bound by the common need to foster a culture of rights. In particular, Ghana and South Africa share a checkered political history: egregious violations of human rights occasioned by relatively harsh military rule in the case of Ghana,¹² and repressive and debilitating apartheid rule in South Africa.¹³ Between 1981 and 1992, Ghana was ruled by the military under Jerry John Rawlings's Provisional National Defence Council (PNDC). Under this regime, the 1979 constitution was suspended, parliament was declared unlawful to operate and all ministers were dismissed from office. Indeed, the government in power prior to the military takeover was effectively disbanded. The military led by the PNDC, ruled with an iron fist and gained notoriety for human rights abuses. There were countless incidents of torture, harassments, extrajudicial killings, abductions and disappearances of actual and imagined opponents of the regime.¹⁴ In 1992, the PNDC government bowed to a combined force of domestic and international pressures to return the country to a democracy. As part of the transition, CHRAJ was formed to help foster the democratisation process and consolidate the desired human rights regime entrenched in Chapter Five of Ghana's Fourth Republican Constitution (1992).

Similarly, in South Africa, until April 1994, the benefits of universal suffrage eluded the majority of the population.¹⁵ Racial discrimination against the majority blacks in areas of political and civil rights was prevalent. South African blacks were segregated into separate impoverished townships and ethnic homelands (Bantustans). This was occasioned by an apartheid government which defied all calls to respect international standards for human rights. In addition, police brutality, detention without trial, torture, extrajudicial killings, and unwarranted harassments were daily occurrences. In 1993, when multiparty constitutional democracy was achieved through an international negotiated settlement, the SAHRC was made part of the package. Conceivably, the reason was to precipitate the consolidation of state institutions, support constitutional democracy and engender the growth of the culture of liberty and equality. Another crucial rationale for establishing HRCs in Ghana and South Africa was the necessity to preserve their nascent democracies,¹⁶ given the fact that most post-colonial democracies in other African countries¹⁷ lapsed into dictatorships, with human rights treated with contempt and disdain and democracy strangled by strings of regrettable political conflicts and wars.

¹² See Report on Ghana, (Amnesty International, December 18th 1991), 20 and Mike Oquye, "Human Rights and the Transition to Democracy Under the PNDC in Ghana," Human Rights Quarterly 17.3 (1995): 556-573

¹³ See Protectors or Pretenders? Government Human Rights Commissions in Africa, (Human Rights Watch, 2001), <http://www.hrw.org/reports/2001/africa/southafrica/southafrica.html>

¹⁴ Oquye, "Human Rights and the Transition to Democracy Under the PNDC in Ghana," 559

¹⁵ For an excellent discussion see the following: Antjie Krog, Country of My Skull: Guilt Sorrow and the Limits of Forgiveness in the New South Africa (New York: Three Rivers Press SA, 2000); Elisabeth Jean Wood, Forging Democracy from Below: Insurgent Transitions in South Africa and El Salvador (Cambridge: Cambridge University Press, 2000); Roger Southall and Kristina Bentley, African Peace Process: Mandela, South Africa and Burundi (Cape Town: Human Sciences Research Council Press, 2005); and Heinz Klug, Constituting Democracy: Law Globalism and South Africa's Political Reconstruction (Cambridge: Cambridge University Press, 2000).

¹⁶ See J. Matsheka, "Toothless Bulldogs? The Human Rights Commissions of Uganda and South Africa: A Comparative Study of Independence," Africa Human Rights L.J. 2 (2002).

¹⁷ Others include Nigeria, Togo, Cote d' Ivoire, Sudan, Somalia, Mauritania, and Congo DR and Zimbabwe.

In contrast, the CHRC was created in 1977 by a well-established liberal democracy. The appetite for its establishment was engendered by a prolonged human rights debate in Canada encompassing gender and racial discrimination in many aspects of life, particularly concerning aboriginals and other visible minorities.¹⁸ Its application across broad areas of federal jurisdiction underscores Canada's concern for upholding a culture of liberty and equality and to show its political commitment to respect international human rights standards.¹⁹ It is also to foster, consolidate and maintain impeccable domestic human rights and democratic credentials. The commission is empowered by the *Canadian Human Rights Act* (CHRA) to settle complaints of discrimination in employment and in the provision of services under federal jurisdiction. Under the *Employment Equity Act*, the commission ensures that federally regulated employers provide equal opportunities for employment to women, Aboriginal peoples, persons with disabilities and members of visible minorities. The commission's core focus includes discrimination prevention by providing information to the public; investigating systemic issues that impact specific groups of people or the human rights regime as a whole; and addressing key human rights concerns.²⁰ Against these backgrounds, CHRC, CHRAJ and SAHRC were thus established to show strong government commitment to a culture of respect, protection, and promotion of human rights. They were also mandated to foster national unity, constitutionalism and democracy. Their independence from elected governments was therefore crucial for this assignment.

General Reasons for the Independence of Human Rights Commissions

Like courts, HRCs are the by-products of formal constitutional provisions or statutory creations.²¹ Indeed, the well-founded obligation to protect and promote human rights in today's global context cannot be undertaken by the courts alone. A complementary hand is desired which has been offered by these commissions to facilitate the achievement of such a goal. It also mends the deficiencies of the traditional distinction between private and public laws to which the courts have largely taken to the former. Suffice to note that in both legal and political jurisprudence, it is common knowledge that a dispute between two parties should be resolved by a neutral third party. HRCs around the world perform the role of this third party in resolving conflicts between individuals and governments or individuals and private organisations, as they seek to enforce guaranteed rights. This type of arrangement is what Shapiro refers to as triadic conflict

¹⁸ See Rainer Knopff and Thomas Flanagan, *Human Rights and Social Technology* (Ottawa: Carleton University Press, 1989) 35-64

¹⁹ Ibid 60

²⁰ See Sections 2 & 27 of the *Canadian Human Rights Act*.

²¹ See Linda C. Reif, "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection," *Harvard Human Rights Journal* 13 (2000): 1-70 and Smith, "The Unique Position of National Human Rights Institutions: a mixed blessing?," 904-946.

resolution, as it animates the necessity of independence.²² The legal mandate and jurisdiction of such commissions therefore necessitates clear independence like the courts. Understandably, it has been argued that for these institutions to achieve their desired goals, their independence should be beyond reproach.²³ Quintessentially, the independence of these institutions is vital and is often cited as a precondition for their effective operations.²⁴

Given the important role of commissions in building a culture of rights, an independent commission is crucial for the maintenance of human rights and democracy.²⁵ Commissions become protectors of constitutional entitlements – institutional bulwarks of the citizenry against serious invasions of fundamental rights and freedoms. Independence offers the commissions the capacity to meaningfully insert themselves between citizens and the government and to stand up against the intimidations of all “outsiders”.²⁶ This makes independence a means to an end and not an end in itself.²⁷ In fact, independence is fundamental not only to serve justice in any one particular case, but also to individual and public confidence in the administration of justice.²⁸ Without such confidence the system cannot command the public respect and acceptance that are essential to its effective operation. Moreover, independence allows the commissions to avoid the harmful prejudice and short-sightedness to which elected officials sometimes succumb.²⁹ Independence also emboldens HRCs to uphold rights where democratic majorities are paralysed by prejudice or other more compelling political considerations.

With an open jurisdiction to the public, the commissions present a better, broader and non-adversarial process for the resolution of rights claims. Shapiro notes that “true adversary proceedings by the courts culminating in a dichotomous verdict” destroys future relations between parties.³⁰ In contrast, the commissions’ usual conciliatory and mediatory style of settlement of rights claims ensures continuous relations between parties. Moreover, unlike traditional courts, commissions are not constrained by common law rules of standing and their procedures are simpler thereby reducing “overhead cost”.³¹ In this case, the *Paris Principles*³²,

²² Shapiro, *Courts: A Comparative and Political Analysis* 19 and Linda C. Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Boston: Martinus Nijhoff Publishers, 2004).

²³ *National Human Rights Institutions: Manual*, (London: Commonwealth Secretariat Human Rights Unit, 1998), 15 and *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, (New York and Geneva: UN, Centre for Human Rights 1995), HR/PT/4

²⁴ *Ibid*

²⁵ See Charles M. Cameron, “Judicial Independence: How Can Tell It When You See It? And, Who Cares?,” *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, eds. Stephen B. Burbank and Barry Friedman (Thousand Oaks, CA: Sage Publications, 2002) 134-144.

²⁶ See *Beauregard v. Canada*, *S.C.R.* 56, (1986) Para. 21(per Dickson C.J.)

²⁷ See Patricia F. Hughes, “Judicial Independence: Contemporary Pressures and Appropriate Responses,” *Canadian Bar Review* 80 (2001): 182

²⁸ See *Vanente v. The Queen*, *2 S.C.R.* 673, (1985)

²⁹ Gerald N. Rosenberg, “Judicial Independence and the Reality of Political Power,” *The Review of Politics* 54.3 (1992): 370

³⁰ Shapiro, *Courts: A Comparative and Political Analysis* 14

³¹ *Ibid* 5

³² The UN General Assembly has endorsed these principles. See Annex to UNGA Res.48/134, 20 Dec. 1993.

adopted in 1991 at the urging of the United Nations (UN) to give formal impetus for the establishment of national human rights institutions, exhort nations to make the compositions of HRCs representative of all social forces in order to engender trust, confidence, legitimacy, and increase efficiency. This boosts the independence of such institutions.

Legal and Operational Independence

The CHRC

A common dominator since 1945 of national human rights institutions is that they are products of constitutions or subordinate legislation like parliamentary acts.³³ Thus, they grant the institutions formal statutory independence³⁴ and prevent arbitrary variation of their powers by the executive. The CHRC was created by section 26 of the CHRA and its operational powers were put beyond doubt in sections 2 and 27. Similar to the CHRAJ and the SAHRC, the statutory scope of duties of the CHRC include review, investigative, regulatory and educative functions, all within the context of fostering adherence to the values of human rights.³⁵ However, the Act does not explicitly mandate the legal and operational independence of the commission. Unlike the cases of the CHRAJ and the SAHRC, provisions relative to the creation, structure, composition and powers of the CHRC are not entrenched. This raises the question as to whether mere legislative provisions for the creation of the commission can sufficiently speak for its legal independence. In the broader context, entrenchment of these provisions is the required legal deed.³⁶ This makes it materially and procedurally expensive for possible careless or ill-considered changes.

However, it should be noted that with reference to Canada's constitutional amending formulae,³⁷ it would be misplaced for one to argue that the CHRC provisions should be entrenched. Indeed, the benefits of entrenchment are extremely dubious. Except for the institutions outlined in sections 41 and 42 (including the Supreme Court of Canada), amendment of purely federal institutions such as the CHRC is possible simply by a majority vote of both houses of parliament (s. 44). The constitution's general amending formula — parliamentary approval plus two-thirds of the provincial legislatures representing at least half the population—

³³ See John Hatchard, "The Human Rights Commission Act, 1998 (Malawi)," *Journal of African Law* 43.2 (1999): 253-257, Reif, "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection," and Smith, "The Unique Position of National Human Rights Institutions: a mixed blessing?,"

³⁴ See Smith, "The Unique Position of National Human Rights Institutions," 905-13.

³⁵ See *Human Rights Act*, Sec 2.

³⁶ Recent general literature on judicial or quasi-judicial independence point to the desirability of entrenched constitutional provisions regarding the independence of these institutions as best. See: Roy A. Schotland, "Judicial Independence and Democratic Accountability in the Highest State Courts: Comment," *Law and Contemporary Problems* 61.3 (1998).

³⁷ See Canada, *Constitution Act*. (Ottawa: Government of Canada, 1982). Sec. 38 to 45.

would provide greater protection, but is politically unfeasible as it would give provinces a say over a federal institution which does not in any way have jurisdiction over provincial government actions or laws. Nonetheless, the current peculiar position of the CHRC provisions is lamentable as they could be unilaterally repealed by parliament.³⁸ This provides a recipe for political interference, as the commission's powers and functions are subject to variation by parliament.³⁹

The apparent lameness of this constitutional design also begs the question as to whether or not the absence of entrenched provision for the creation of the commission necessarily compromises its operational autonomy. Operational independence is viewed as having the open latitude to function or conduct its statutory business free from adverse governmental interference.⁴⁰ This ranges from competency and capacity to investigate complaints, to the ability to conduct research and compel answers to questions.⁴¹ With regard to the CHRC, this freedom is desirable given the fact that the commission has a legal obligation to investigate complaints of discrimination and employment inequities in both the private and public sectors. This makes government amenable to investigations as it provides employment to members of the public.

Under section 27 (e) and (g) of the CHRA, the commission has the duty and power to consider not only matters concerning human rights and freedoms but also to review rules, orders, regulations and bye-laws made pursuant to an Act of parliament with the view to determining their appropriateness in respect of protected rights. Understandably, the political nature of such acts necessarily brings the commission face to face with the departments, agencies and institutions of the government. It is possible therefore that the operational independence of the CHRC could be compromised by the vicissitudes of political intentions, actions and debates. But, is this the case? A close examination of the annual reports of the commission does not give an affirmative answer to this question.

The commission demonstrated boldness and sincerity in its work. It criticized the government for its failure to fulfill the terms of the Employment Equity Act.⁴² A federal government department paid \$18,000 in general damages plus more than \$70,000 in early retirement, severance, and pension refund payments to an employee after the CHRC investigation showed that other employees made racially offensive remarks and subjected the

³⁸ This is what is referred to in Constitutional Theory as a "soft" amendable process, which only requires simple parliamentary majority. See Walter Dellinger, "The Amending Process in Canada and the United States: A Comparative Perspective," *Law and Contemporary Problems* 45.4 (1982) and John O. McGinnis and Michael B. Rappaport, "Symmetric Entrenchment: A Constitutional and Normative Theory," *Virginia Law Review* 89.2 (2003).

³⁹ See Jeffrey D. Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, 2001); Peter Hogg, *Constitutional Law of Canada*, 4th ed. (Scarborough, Ontario: Carswell, 1997) and see "Reference re Secession of Québec", [1998] 2 S.C.R. 217 where the Supreme Court made reference to Section 101 of the Constitution Act, 1867 acknowledging parliament's supreme authority in all legislation.

⁴⁰ Smith, "The Unique Position of National Human Rights Institutions: a mixed blessing?," 921.

⁴¹ Ibid

⁴² In its 2005-2006 Performance Report, CHRC said at page 10 that government has not met the goals it set in endorsing the action plan from the report of the Task Force on the Participation of Visible Minorities in the Federal Public Service released in 2000.

employee and other black personnel to racially motivated behavior.⁴³ The commission also made several appearances before the Parliamentary Select Committee, where it made trenchant comments on pending bills and policies in areas such as terrorism, pay equity, same-sex unions and AIDS.⁴⁴ The commission consistently urged government officials to encourage implementation of the commission's recommendations regarding the repeal of section 67 of the CHRA.⁴⁵ Section 67 denies First Nations access to the same human rights complaint redress system available to other people in Canada. In response, the Government of Canada introduced legislation to repeal section 67 in December 2006.⁴⁶ The CHRC has also been a party to a number of legal disputes in court where it challenged certain claims of government or government institutions⁴⁷ in furtherance of its statutory responsibility. In its operations, the commission showed integrity and independence yet it remains limited in terms of its effectiveness regarding issues of accessibility of public infrastructure for persons with disabilities and the discriminatory impact of over-qualification on highly trained visible minority immigrants when applying for jobs.⁴⁸

The CHRAJ

Constitutional protection for CHRAJ is trenchant as the 1992 constitution expressly sanctioned its independence.⁴⁹ It invests CHRAJ with duties and powers subject to no external control or direction.⁵⁰ The relevant provision reads: "Except as provided for by this constitution or any other law, not inconsistent with this constitution, the commission and the commissioners shall in the performance of their functions, not be subject to the direction or control of any person or authority." It is legitimate, in theory, to posit that there is a strong constitutional foundation for the independence of CHRAJ. No law can derogate from this position unless it is held to be consistent with the values enshrined in the constitution.⁵¹ Nonetheless, a fairly general

⁴³ *Race, Colour, National or Ethnic Origin Anti-Discrimination Casebook*, (Ottawa: Canadian Human Rights Commission, Minister of Public Works and Government Services 2001), 13-14.

⁴⁴ These include the submission of the CHRC to the Standing Committee on Justice and Human Rights Study on Marriage and legal recognition of same-sex unions in 2004 and the *Report and Recommendations to the House of Commons Standing Committee on Human Resources Development and the Status of persons with Disabilities – Employment Equity* in 2004.

⁴⁵ See CHRC *Annual Report* (Ottawa: Canadian Human Rights Commission, 2006) 4.

⁴⁶ *Ibid.*

⁴⁷ *Canada (Attorney General) v. Canadian Human Rights Commission*, FC 373, (2003), UN, UN Resolution 1645. (New York: UN, 2005)., *Canadian Human Rights Commission v. Attorney General of Canada*, FCA 154, (2005) and *Canada (Canadian Human Rights Commission) v. Canada (Canadian Armed Forces)*, F.C. 653 (T.D.), (1999).

⁴⁸ See Rachel Lea Heide, Trista Grant and Christopher Ankersen, *Defining the National Interest: New Directions for Canadian Foreign Policy* (Ottawa: Centre for Security and Defence Studies, 2004), 13.

⁴⁹ See *The Fourth Republican Constitution of Ghana*, (Government of Ghana, 1992), Ch 18.

⁵⁰ See Article 225. Also see Emile Francis Short, "The Development and Growth of Human Rights Commissions in Africa: The Ghanaian Experience " *Human Rights Commissions and Ombudsman Offices: National Experiences Throughout the World* ed. Kamal Hossain (Leiden, The Netherlands: Kluwer Law International, 2000)

⁵¹ The principle of constitutional supremacy in Ghana allows the Supreme Court to strike down any law made by parliament that infringes upon the fundamental human rights of the people or the values enunciated in the constitution. See *The Fourth Republican Constitution of Ghana*, Article 2 and for an elaborate discussion see C.E.K.

question to address is how CHRAJ can, in practice, validate this constitutional position in the discharge of its functions.⁵² This facilitates the determination of the extent to which CHRAJ asserts its functional independence. At best, what value, if any, has the commission been able to accord to the relevant constitutional provision relative to its functional autonomy?

First of all, CHRAJ has been forceful in using its investigative jurisdiction to deal with people with sufficient political clout. Again, it recurrently issues biting criticisms against the government for actions responsible for the deepening of corruption in the public sector and violations of constitutionally guaranteed rights.⁵³ A number of these instances are worth highlighting. During the National Democratic Congress (NDC) era, it conducted investigations into alleged corruption exposed by the private media against key government officials⁵⁴ that occurred under the Provisional National Defence Council (PNDC). Adverse findings were made against two of them and this was hailed as a victory for constitutional democracy. Under the New Patriotic Party (NPP) led administration, the commission investigated allegations against the President for having accepted a monetary offer of 41 million cedis from a farmer for the renovation of his private residence in Accra. The contention was that it opened the President's office to private influence. It was also alleged that part of the money came from state coffers, and therefore questioned whether it was right for state funds to be used for the renovation of the President's private residence. The case however, was closed due to unwillingness on the part of the complainant proceed with the case.⁵⁵ This exposes the extent of the constitutional ineptitude in the CHRAJ's investigative powers. It also underscores, regrettably, the hollow concern of the public to assist the commission in legitimately fighting corruption. Indeed, Ghana's desire, as demonstrated in the liberal constitutional provisions, - to foster the realization of equality, liberty and the rule of law- is genuine. Thus, there must be sustained public efforts in assisting the commission to realize its objectives.

Besides these open criticisms, the commission underscores its operational autonomy, through some cases that have generated public controversy. One relevant case brought to the notice of CHRAJ by the media included allegations of corruption, conflict of interest and abuse of power against Dr. Richard Anane, a Minister of State. Upon the completion of an investigation in September, 2006, the commission found Dr Anane guilty on some of the allegations. As a result, Dr. Anane resigned from his post in accordance with the commission's recommendation to the government. It could be said that the institutional courage exhibited by the commission in the investigative process enhanced its credibility and institutional

Kumado, "Judicial Review of Legislation in Ghana since Independence," *Review of Ghana Law* 12 (1980) and E.V.O. Dankwa and C. Flinterman, "Judicial Review in Ghana," *University of Ghana Law Journal* 14.1 (1976).

⁵² The commission functions are set out in article 218 of the 1992 constitution and section 7 of Act 456, 1993, Ghana.

⁵³ See *CHRAJ Annual Reports 1997-2006*, *CHRAJ Annual Reports* (Accra, Ghana: Commission on Human Rights and Administrative Justice, 2006).

⁵⁴ They include the then de facto Prime Minister, P.O. Obeng, Col. (Rtd) E.M. Osie-Wusu, Dr. I. K. Adjei-Marfo, and Mr. Ibrahim Adam.

⁵⁵ "CHRAJ dismisses Case for lack of prosecution," *Graphic GhanaWeb* January 20th 2004 <http://www.ghanaweb.com/GhanaHomePage/education/artikel.php?ID=50298>. (accessed on 25th. Oct. 2007).

independence. However, it is fair to note that the said Minister through appeal to the supervisory jurisdiction of the High Court successfully reversed the decision of CHRAJ for procedural impropriety.⁵⁶ The High Court ruled that CHRAJ in conducting an investigation should have received a formal complaint bearing both name and signature of a complainant.⁵⁷ This was deemed to be a precondition without which the commission should not have proceeded to investigate. In this regard, the Court held that CHRAJ erred in law by conducting its own investigations against the former Minister without a complaint emanating from a complainant. It must be said that the decision was based on a question of law and not on the material facts relating to the alleged misconduct – whether or not CHRAJ findings against the Minister were correct. On the whole, CHRAJ acted independently of the government and has managed to contribute towards the creation of a culture of respect for human rights in Ghana.

Regardless of the scope and content of these institutional feats, the commission has been deficient in investigating the private sector where most of the egregious violations of human rights have taken place. It has also been for the most part ineffective in the defense of socio-economic rights and workplace discrimination. At any rate, the positive character of these rights is not a sufficient justification to pay little attention to them. The CHRAJ must encourage and enforce greater respect to these rights in order to establish desirable and comprehensive rights jurisprudence for the advancement of constitutional democracy in Ghana. The conspicuous abject poverty amongst the larger population stands to frustrate the full realization of the rule of law. Invidious gender discrimination in the workplace is also a threat to the ideals of gender equality. It obfuscates national goals to attain unity, peace and meaningful development. The CHRAJ can be improved by educating the general public through – seminars and lectures, and placing direct pressure on the ruling government.

The SAHRC

Like the case of the CHRAJ, the SARHC's institutional independence is deeply entrenched by South African's constitution.⁵⁸ It is only subject to the constitution in the performance of its functions.⁵⁹ Other state organs have a constitutional directive not to interfere with its functions.⁶⁰ The commission is somewhat absolved from textual difficulties relative to its independence.⁶¹ Similar to the CHRAJ, the SAHRC has not shirked from its responsibilities. In

⁵⁶ Upon appeal by CHRAJ to the Supreme Court, the High Court decision was affirmed.

⁵⁷ See *Commission for Human Rights and Administrative Justice Act*, (Ghana, 1993), Act 456

⁵⁸ Section 181 (2) of the Constitution of the Republic of South Africa; Act 108 of 1996 (the final constitution). It should be noted that the SAHRC was established under sections 115-118 of the interim constitution and the human rights commission Act 54 of 1994 was passed by this constitution.

⁵⁹ Section 181 (3) of the final constitution makes the commission subject only to the constitution, and other organs of state are obliged through legislative and other measures to assist and protect the commission to ensure its independence, impartiality, dignity and effectiveness.

⁶⁰ Section 181 (4) of final constitution

⁶¹ However, Matshekga, made the point that 'politicians seemed resentful about the extent of its independence from state institutions.' Matshekga, "Toothless Bulldogs? The Human Rights Commissions of Uganda and South Africa: A Comparative Study of Independence," For insightful discussions on SAHRC See: B. Pityana, "National

fact, it has intervened in court cases against the government for the enforcement of rights. Significant among them is when it acted as *amicus curiae* in the celebrated *Grootboom* case that dealt with the right to housing.⁶² The commission also initiated proceedings in the Constitutional Court in the matter of *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SAHRC and Another v President of the RSA and Another* 2005 (1) BCLR 1 (CC) where it successfully challenged the constitutionality of certain provisions of the Black Administration Act and Intestate Succession Act which upheld and guaranteed the rules of primogeniture. Additionally, it has engendered effective and productive partnership with civil society organisations in promoting human rights in the country.⁶³ Within this context, one may be excused to note that the commission favourably responded to its task and validated the utility of the constitutional protection of its independence. Yet the commission has been deficient in matters relating to alleviating chronic poverty and the misery of millions of landless South Africans.⁶⁴ Its initiatives to promote the desired legislation on these fundamental issues are bereft of acceptable social wisdom and political consensus. In this regard, well designed educational programmes and campaigns are recommended

Independence through Appointment and Dismissal Procedures

The CHRC

Regulatory mechanisms in these processes are undeniably crucial to guarantee the independence of a commission. It is useful for the constitution or parliamentary act to clearly set out the terms for the appointment, tenure of office and dismissal process of commissioners, including reasonable safeguards against capricious dismissal. Section 26 of the CHRA contained the relevant statutory provisions relating to appointment and dismissal of members of the CHRC. Section 26 (1) states that commissioners are appointed by the Governor in Council. Tenure of office varies and depends on the status of each individual commissioner. Full-time commissioners may be appointed for a term not exceeding seven years and part-time members

Institutions at Work: the case of South African Human rights Commission," *Human Rights Commissions and Ombudsman Offices: National Experiences Throughout the World*, ed. Kamal Hossain (Leiden: Kluwer Law International, 2000) and Jeremy Sarkin, "The Role of National Human Rights Institutions in Post-Apartheid in South Africa," *Human Rights, the Citizen and the State: South African and Irish Approaches*, eds. Jeremy Sarkin and W. Binchy (Dublin: Round Hall, 2001).

⁶² See also *S v. Twala*, 1 BCLR 106, (2000) and *Minister of Justice v. Ntuli*, 3 SA 772 (CC), (1997).

⁶³ It initiated such programmes as national action plan and strategy to combat racism; roll back xenophobia campaign; social economic rights campaign; and investigations into racism in the media. For a detailed discussion of the commission's activities, see *Human Rights Watch* (2001), pp. 297-303. See also J. Matshega, "Toothless Bulldogs? Even the commission uses its powers of subpoena under section 9 (1) (c) of the Human Rights Act to subpoena prominent government officials to appear before it. According to Matshega, these officials include the MEC for health in Mpumalanga, Ms. Sibongile Manana and the premier of the Northern Cape, Mr. Manne Dipico.

⁶⁴ See *Economic and Social Rights Annual Reports*, (Johannesburg: South African Human Rights Commission, 1997-2006), No. 1-6

may be appointed for a term not exceeding three years.⁶⁵ Indeed, each member of the CHRC holds office during good behaviour but may be removed by the Governor in Council on address of both the Senate and House of Commons.⁶⁶ Eligibility for re-appointment is established by Section 26 (5) of the CHRA. A legitimate question asks: how do these statutory provisions guarantee the independence of the CHRC in the areas of appointment and dismissal procedures? First, section 26 (1) only states that commissioners are to be appointed by the Governor in Council. Nowhere in this statutory provision could one reasonably or dimly infer the involvement of the legislature or a requirement for the consultation of civil society in the appointment process.⁶⁷ In essence, the appointment of commissioners is the sole legal duty and prerogative of the Governor in Council. Worst of all, subsection 5 of section 26 of the CHRA opens the statutory window for a renewal of tenure by the Governor in Council. This leaves the appointment process less secure. In fact, rigorous examination of the suitability of nominees may be absent. The benefits of interplay of civil society and parliament in the selection process are remarkably lacking. Besides, commissioners faced with the temptation for re-appointment might compromise their independence by serving at the beck and call of the Governor in Council.⁶⁸

But statutory protection is available under section 26 (4) of the CHRA to cure the loose process of appointment. Thus, commissioners hold office on good behaviour and can only be removed from office on grounds of misconduct. Though this might appear as an amorphous provision with the potential to pose danger to the commission's independence, its meaning is established within the Canadian legal regime.⁶⁹ Indeed, "on good behaviour" has a narrow meaning in Canadian and English common law. It is a term used in the 1867 constitution for judges, and generally refers to misconduct, ethical breaches or incapacity.⁷⁰ Understandably, commissioners cannot be removed at the pleasure of the Governor in Council, as the process does not begin and end with the Governor in Council like the case of the appointment. A case for the dismissal of a commissioner for reasons of misconduct must have the blessings of the two houses of the legislature. This requires a just cause as any removal process predicated on bad faith or ill-considered grounds may fail to achieve parliamentary approval. It is thus possible for

⁶⁵ Section 26 (3) of the *Human Rights Act*, Canada.

⁶⁶ Section 26 (4) of the *Human Rights Act*, Canada.

⁶⁷ This necessarily contravenes the content of the Paris Principles and the UN Handbook on National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion. Also see Kristine Yirgen, "Guarantees of Independence of National Human Rights Institutions: Appointments and Dismissal Procedures of Leading Members," *National Human Rights Institutions: Articles and Working Papers*, eds. Birgit Lindsnaes, Lone Lindholt and Kristine Yiger (Copenhagen: Danish Centre for Human Rights, 2000).

⁶⁸ Section 26 (5) of the *Human Rights Act*, makes it possible for commissioners to be re-appointed. This possibility indeed serves as a conduit for temptation to commissioners who desired to be re-appointed to largely respect the whims of the appointing authority in the course of service. A fixed tenure would have been better.

⁶⁹ See Trembley v. Quebec (Commission des affaires sociales), 1 S.C.R. 952, (1992), R. v. Herbert, 2 S.C.R. 151, (1990), Imperial Oil Ltd. v. Quebec (Minister of the Environment), S.C.R. 624, (2003) and R v. Rodgers, 1 S.C.R. 554, (2006).

⁷⁰ See Martin Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995) 15-19.

the commissioners to be independent, as they could ignore the temptation for re-appointment and demonstrate true commitment to uphold the values of human rights.

Nonetheless, it is unlikely that commissioners would deal with re-appointment. Another possibility is one political party controlling the two Houses with a large majority, which may make approval of such decisions a mere formality. This premised on the presupposition that the Governor in Council would want to influence the commissioners. These possibilities presented by the loose statutory provisions in relation to dismissal of commissioners, does lessen the potential positive effects of the procedural checks and balances provided by section 26 (4). On the whole, the appointment process is not safe enough to guarantee independence of the commission. The involvement of civil society and parliament is a necessity.⁷¹ It would invest the commission with some amount of legitimacy and provide wider society with the benefits of an open consultation regarding the suitability of nominees.⁷² To sidestep these stakeholders is to ignore the fact that the commission occupies a vital position between civil society and the government. Human rights advocates demand an unequivocal demonstration from governments of serious rights protection measures. These individuals who are largely found within civil society are of considerable relevance to the appointment process. The involvement of parliament is to prevent patronage in the selection process as various political parties would be involved in the consideration of the nominees.⁷³ The exclusive control of the appointment process by the Governor in Council may reduce the overall importance of the input both civil society and parliament would have added to the appointment process.

The CHRAJ

The 1992 Constitution of Ghana provides for the appointment of the commissioners of the CHRAJ by the President in consultation with the Council of State.⁷⁴ The Council of State is a non-partisan body made up of elderly statesmen and women acting as an advisory body to the President.⁷⁵ But their opinion is hortatory, and thus does not bind the President. Yet, the consultation with the Council is a legal or constitutional requirement in order to validate the appointment. The commission is composed of three commissioners, who must qualify for appointment to the Superior Court of Judicature. They enjoy similar conditions of services as justices of the Superior Court of Judicature. Each of the commissioners holds office during good behavior and good health⁷⁶ and can be terminated at retirement. Any petitions for the removal of

⁷¹ See Reif, "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection," 5-13 and Smith, "The Unique Position of National Human Rights Institutions: a mixed blessing?," 915-930

⁷² See Amando Rivka, "Checks, Balances, and Appointments in the Public Service: Israeli Experience in Comparative Perspective," *Public Administration Review* 61.5 (2001).

⁷³ See Smith, "The Unique Position of National Human Rights Institutions: a mixed blessing?," 941.

⁷⁴ Provided for by both articles 70 and 217 of the 1992 constitution.

⁷⁵ Short, "The Development and Growth of Human Rights Commissions in Africa: The Ghanaian Experience " 601-603

⁷⁶ See articles 150 and 221 of the 1992 constitution.

a commissioner must be lodged with the President, who shall refer them to the Chief Justice to determine whether or not there is a *prima facie* case.⁷⁷ Where the Chief Justice reaches a conclusion that there is a *prima facie* case, he shall set up a committee of five persons to investigate the complaint and then make recommendations to the President.⁷⁸

By this detailed appointment and dismissal process, it is legitimate to assert that a crucial element of independence is met. The constitution guarantees the commissioners certainty and predictability regarding security of tenure. Like the cases of the CHRC and the SAHRC, members of the CHRAJ cannot be merely removed from office because of an unfounded allegation. The investigative process installed by the constitution ensures the application of due process of law in removing a commissioner from office. Indeed, the constitution clearly frowns upon self-motivated dismissals of commissioners. The main challenge is only the President has the final say in the appointment process since the outcome of the Council of State consultation does not have any legal binding effect on the President. Worst of all, there is no explicitly constitutional guaranteed avenue for the participation of civil society in the appointment process. Like the CHRC, civil society is utterly excluded from the exercise. It must be emphasized that the participation of civil society and its organs in the consultative process is imperative as Matshekga correctly observes, "it grounds these entities within the context of common people" thereby augmenting their credibility and independence.⁷⁹ As public institutions with open jurisdiction to all and adopting conciliatory, mediatory and non-adversarial methods for adjudication, civil society involvement in the appointment process is imperative for legitimate and efficient work.

The SAHRC

Unlike the cases of Canada and Ghana, the legislature in South Africa participates in the appointment of the members of the SAHRC. Section 193 of the constitution empowers the President to appoint the commissioners on the recommendation of the National Assembly.⁸⁰ Contrary to the CHRAJ position, members of the SAHRC hold office for a fixed term of seven years, which may be renewed once.⁸¹ The President has the power⁸² to terminate the appointment of the commissioners on grounds of misconduct, incapacity or incompetence, articulated in findings.⁸³ Such a process must be initiated at the request of a Joint Committee of

⁷⁷ Article 146 (3).

⁷⁸ Article 146 (4).

⁷⁹ Matshekga, "Toothless Bulldogs? The Human Rights Commissions of Uganda and South Africa: A Comparative Study of Independence."

⁸⁰ The marked distinction among the appointment procedures of the CHRC, CHRAJ and the SAHRC should be noted. For the CHRC, appointment is done by the Prime Minister. In the case of the CHRAJ, it is the President who makes the appointment in consultation with the Council of State, whereas in the case of SAHRC, the President makes the appointment on the recommendations of the National Assembly.

⁸¹ Section 3 Human Rights Commission Act 54, 1994

⁸² Ibid.

⁸³ Section 194 (1) (a) – (c) of final constitution 1996, SA

Parliament, and the findings must be approved of by a resolution in Parliament, with at least, 75 percent majority of members present and voting. Though it could be said that this is a rigorous process and sufficient enough to protect the commissioners from unwarranted governmental interference, it is lamentable that the character of this process is exclusively political, as an overwhelming majority in Parliament following party discipline could reduce the value of such a process. The absence of civil society, as in the cases of Canada and Ghana in the appointment as well as the removal processes, is disconcerting. Public and civil society participation in these processes engenders trust, confidence and institutional legitimacy in the commission. Moreover, unlike Ghana but like Canada, the absence of the judiciary in the investigative process to ascertain whether or not there is a *prima facie* case for removal increases the potential for political interference. The pure political nature of these appointments or removal processes may be negative. But granted that these exercises are done in accordance with the laid down constitutional provisions and in good faith, there is little need to fret about their legitimacy and legality.

Financial Independence

Financial independence of national human rights institutions implies the ability to have access to funds reasonably required to perform constitutional obligations.⁸⁴ Adequate funding sets the commissions free from undue influence and unethical conduct that would compromise the efficiency and legitimacy of their works. Besides, financial security in terms of adequate and guaranteed salary is to prevent bribery and check the government against punishing, threatening, and enticing commissioners through financial inducements. The independence of an institution could be hugely compromised if this is lacking

THE CHRC

Section 30 of the CHRA sanctions the salaries of full-time members. Any amount to be paid in the view of this provision shall be fixed by the Governor in Council save for travelling allowances which are to be determined through the commission's own by-law. A textual reading of section 26 (2) of the CHRA suggests that only the Chief and the deputy commissioners are the full-time members of the commission. The rest may be appointed as either part-time or full-time members. An exhaustive reading of section 30 represents to us the view that salaries of all part-time members of the commission are to be determined by a bye-law of the commission. Though serious issues like pensions and allowance are conspicuously absent from this Act, we are by section 38 of the CHRA referred to the *Public Service Superannuation Act*, *Government Employee Compensation Act* and *Aeronautics Act* for such matters. Of the three Acts, the most

⁸⁴ Hugh Corder, Saras Jagwanth and F. Soltau, Report on Parliamentary Oversight and Accountability (Pretoria, South Africa: Parliament House, Parliament House 1999), 88.

useful provisions are section 5 of *Public Service Superannuation Act* and section 4 of *Government Employee Compensation Act* which provides adequate pension benefits and compensation respectively to the commissioners. This appears forward-looking and might not have the immediate impact on the lives of commissioners, but is nonetheless an important element of financial security.

Nonetheless, the statutory protection of financial freedom of the CHRC as offered by the CHRA presents some analytical problems. A potential legal ramification with section 30 is that it is a mere substantive provision without any detailed procedural outline as to how the Cabinet shall arrive at the salaries of the commissioners. At best, it is a tenuous provision as far as commissioners' individual financial independence is concerned. It is no question that the Governor in Council has the supreme power to determine the remunerations of the commissioners. Being part of the executive, it is certain that this would be in every respect an executive exercise, subject to no external scrutiny. In fact, there are no known checks and balances in the process. It is respectfully submitted that such a legal arrangement could have adverse consequences on the individual fiscal independence of commissioners. The state of which the Governor in Council symbolically represents is an actor in the political space of the country and a potential rights violator for that matter. Holding the fiscal fate of commissioners could be problematic. However, the Governor in Council shall act in accordance with the laws of Canada, which includes the duty to act reasonably and responsibly in respect of the legitimate expectations of the people. Be this as it may, the contention is not necessarily the fact that the Governor in Council might act capriciously but the absence of enough procedural checks such as parliamentary approval in the salary determination process, could prove to be problematic for fiscal independence.⁸⁵ It would be best, if the salaries of commissioners, like the case of the CHRAJ, were determined not only by both the executive and the legislature but also are charged on the Consolidated Fund.⁸⁶ This would provide checks and balances in the salary determination process and guarantee a source of funding.⁸⁷

The CHRAJ

The 1992 Ghana Constitution states that the administrative expenses of the CHRAJ must be charged on the country's Consolidated Fund.⁸⁸ This guarantees funding for the commission.

⁸⁵ On the part of the part-time members, Section 30 of the Human Rights Act provides that their remuneration be self-determined by the commission pursuant to a by-law made by it in which the prescribed salaries are subject to approval by the Treasury Board. Note that a by-law could be varied without the usual desirable rigorous parliamentary debates that accompanied constitutional amendments cases or bills.

⁸⁶ Consolidated Fund or the Consolidated Revenue Fund is the term used for the main bank account of the government into which all government revenue is paid. Certain expenditure is by law charged directly to the Consolidated Fund and is not subject to Parliament's annual budget process, ensuring a degree of independence of the government. Services funded in this way are known as Consolidated Fund Services and include, judges' salaries

⁸⁷ Nevertheless, it should be said that allowing salaries to be set by the CHRC and the Treasury Board, without the intervention of the Justice Minister is probably the best way to hold at bay the possible chilling intrusions of both the executive and the legislature, as dictated by their respective traditional governmental powers.

⁸⁸ The Fourth Republican Constitution of Ghana, Article 227

However, there are some notable procedural and practical difficulties. Though the commission prepares its own budget, it is subject to both scrutiny and approval by the Ministry of Finance and parliament respectively.⁸⁹ The relative fragile nature of the economy poses a significant threat to any conception of adequate and prompt release of funds. Indeed, funding largely depends on the ability of government to raise revenue in the domestic economy and donor grants. Thus, it is arguable that the CHRAJ financial freedom is guaranteed beyond doubt. In fact, the commission does not operate in a social and economic milieu different from the country. It could be affected by whatever economic vicissitudes happen to befall the country; nonetheless, it should not be construed to mean that constitutional protection of the financial autonomy of the commission is patently deficient. The curious danger though for me is the scrutiny of the CHRAJ's budget by the Ministry of Finance. It is unclear as to the extent of the value of such an exercise as parliament has the obligation to examine and approve of the budget. The Ministry's involvement provokes legitimate feelings of executive interference. Even if the Ministry's intervenes to check unrealistic financial estimates, it does not resolve the contention that parliament can do a better job.

The SAHRC

The financial freedom of the SAHRC is provided for by section 16 (3) of the SAHRC Act 54 of 1994. Government is invested with the duty to resource the commission and adequately remunerate the commissioners. However, unlike the CHRAJ, the SAHRC does not have an independent budget. It depends on the Ministry of Justice for funds.⁹⁰ By implication, the commission does not enjoy the benefits of a self-drawn budget. At best, its participation in drawing its budget has been observed to be ineffective.⁹¹ Thus, the commission's budget ineluctably is the estimates of the Ministry of Justice. Obviously, it entangles the commission with all the potential vicissitudes of bureaucratic inertia and executive control.⁹² Furthermore, it is undesirable to make the financial fortunes of the commission to depend on departments that it is required by the constitution to monitor.⁹³ The absence of parliament in determining the commission's budget, at best, augments the scope of its financial vulnerability. Also, it is desirable, as in the CHRAJ, for the administrative expenses of the SAHRC to have been charged on the consolidated funds.

However, section 181 of the constitution guarantees the commission's independence, impartiality, dignity and effectiveness through assistance from other state organs. It could be argued that the Ministry of Justice falls within the contemplated scope of these "other" state

⁸⁹ Ibid.

⁹⁰ Matshekga, "Toothless Bulldogs? The Human Rights Commissions of Uganda and South Africa: A Comparative Study of Independence,"

⁹¹ See Pityana, "National Institutions at Work: the case of South African Human rights Commission,"

⁹² Matshekga, "Toothless Bulldogs? The Human Rights Commissions of Uganda and South Africa: A Comparative Study of Independence,"

⁹³ Corder, Jagwanth and Soltau, Report on Parliamentary Oversight and Accountability.

organs and thus owes the commission an obligation to sufficiently fund it. Derogation from this constitutional responsibility is only permitted on grounds allowed by the constitution.

Notwithstanding this optimistic outlook founded on section 181 of the constitution, a better constitutional design for the financial freedom of the commission should encapsulate parliamentary intervention in its budget approval. Perhaps it bears wisdom, however minuscule its value, to insulate the commission from imaginable executive bullying.

Independence through Composition

The composition of national human rights institutions relative to their independence cannot be over-emphasized. The *Paris Principles* recommends that pluralism in composition is necessary to minimally ensure the independence of national human rights institutions.⁹⁴ Thus, the principles suggest the representation of all social forces involved in the protection and promotion of human rights.⁹⁵ Similarly, it is argued that to keep with their independent nature, national human rights commissions are to be composed of members with diverse interests, expertise or experience in the field of human rights.⁹⁶ The quintessence of this is for the accommodation of differences and ensures the benefits of multiple opinions premised on geography and socio-economic factors.⁹⁷

The CHRC

According to section 26 of the CHRA, the CHRC consists of up to eight members. In fact, the section in question presents the possibility for a minimum of five commissioners and a maximum of eight. Unlike the case of the CHRAJ and like the SAHRC, members of the CHRC do not need to be qualified as lawyers in order to be appointed. Thus, members may have backgrounds in social work, NGOs, academia, and so forth. At present, the commission has six members. These are two full-time members in the fulfilment of section 26 (2) of the CHRA and four part-time commissioners. It is important to observe that the Chief Commissioner had prior to her appointment over 30 years of combined practice and experience of law and human rights-related work with the UN. Three of the Commissioners are lawyers with human rights expertise. One commissioner has an advanced degree in industrial relations. It is interesting to note that one of the commissioners has expertise in anthropology and Sports science. In terms of gender, the commission has a fairly even representation (four men, two women). The diversity of the

⁹⁴ The *Paris Principles* were adopted by the UN as guidelines with regard to the composition and guarantees of independence and pluralism of national institutions for the promotion and protection of human rights.

⁹⁵ See *Paris Principles* "Composition and Guarantees of Independence and Pluralism"

⁹⁶ *Fact Sheet No. 19*, (New York: United Nations, National Institutions for the Promotion and Protection of Human Rights 2006), 5

⁹⁷ Matshekga, "Toothless Bulldogs? The Human Rights Commissions of Uganda and South Africa: A Comparative Study of Independence,"

backgrounds of the commissioners ranging from legal practitioners, human rights experts, business managers, anthropologists, sports scientists to conflict managers is apt for the required versatile composition. Though it fails to be geographically representative in composition, it is imperative to observe that the commission, in its current shape, does have ethnic diversity: it has one Aboriginal, and at least two non-Caucasian commissioners.

The CHRAJ

Article 216 of Ghana's Constitution governs the composition of the CHRAJ. It is comprised of three commissioners: the commissioner and two deputy commissioners.⁹⁸ Only a legal practitioner could be appointed as a commissioner. It is interesting to observe that the three commissioners prior to their appointments had distinguished themselves as legal practitioners.⁹⁹ In fact, the commissioner took office with over 15 years experience of legal practice, and currently on government secondment, serves as one of the Justices of the War Crime Tribunals (WCT), Arusha, Tanzania.

The main problem is that the CHRAJ's composition is not broadly representative. The quintessence of pluralism and representation as advocated by the *Paris Principles* is often overlooked. The imperative nature of a representative body lies in its potential benefits to the general public from the interplay of diverse backgrounds, expertise and experience in the field of human rights. It should be understood that a pragmatic solutions to human rights abuses is not the sole domain of the legal profession. The inclusion of multiple social forces, as suggested by the *Paris Principles*, is imperative. The evident absence of diversity from the commission may frustrate and stultify the potential benefits associated with the multiplicity of opinions and expertise.

The SAHRC:

In contrast to the CHRC and the CHRAJ, the SAHRC reflects a composition that is truly representative of all social forces of South African society.¹⁰⁰ There are eleven commissioners,¹⁰¹ of which six are lawyers (unfortunately indicating the dominance of the Bar at the commission). Additionally, there is one theologian, one psychologist, one academic and one social worker.¹⁰² Four of the commissioners are women, which is important because women's rights and a greater sensitivity towards gender issues in general are often lacking in most government institutions.

⁹⁸ Short, "The Development and Growth of Human Rights Commissions in Africa: The Ghanaian Experience " 611-613.

⁹⁹ It is not clear whether the commissioners' areas of legal expertise were essentially and exclusively human rights law.

¹⁰⁰ Matshekga, "Toothless Bulldogs? The Human Rights Commissions of Uganda and South Africa: A Comparative Study of Independence,"

¹⁰¹ Ibid

¹⁰² Ibid

South Africa's example is worthy of emulation as it seriously deals with issues of gender and poor women's rights, and recognizes their enduring utility in the broader human rights protection and promotion project. There exists a diversity of experiences and expertise in the SAHRC. This brings credibility and respect to the commission. As demonstrated by the previous exposition, it is clear that the SAHRC like the CHRC and unlike the CHRAJ complies with the conditions laid down by the *Paris Principles* for a composition that ensures the pluralist representation of the social forces involved in the promotion and protection of human rights. This composition enhances the commission's efficiency, legitimacy and independence.

Conclusion

To protect and promote human rights within the domestic legal regime, strong and independent institutions like the HRCs are needed. Merely creating them without the necessary statutory regime to facilitate their independence and efficiency, would amount to an empty political gesture. This paper demonstrates the necessity of this statutory regime. It argues that the CHRC, the CHRAJ and the SAHRC enjoy formal independence from the statutes that created them. However, there are some differences among these commissions as far as the concept of independence is concerned. This could be explained with due recourse to the marked distinctions in the legislative and constitutional configuration of the countries involved. Though Canada and South Africa are federal states and extremely large in terms of landscape, with diverse cultural and ethnic composition, there is a variation in the legal framework establishing their commissions. Notably, the CHRC was established under the non-entrenched CHRA. There is no allusion to it by the parent Constitution of Canada regarding either its creation or operation. In contrast, both the Constitution and Human Rights Act of South Africa covered the creation, operation and independence of the SAHRC. This is also the case in Ghana but unlike South Africa and Canada, it possesses a centralised state. This legal framework makes the case of formal constitutional and statutory protection of independence in Ghana and South Africa much stronger than in the case of Canada.

For financial independence, it is apparent from the discussion that the position of the CHRAJ regarding statutory protection is worth emulating. The funds are not only charged on the Consolidated Fund but there are also elaborate procedural checks regarding the determination of salaries. The CHRC and the SAHRC could benefit from the nature and character of the CHRAJ financial arrangements. It is desirable in the case of the CHRC that the salaries of all commissioners be holistically determined not only by the executive and the legislature, but also charged on the Consolidated Fund. This will provide for checks and balances in the salary determination process and guarantee a source of funding. In the case of the SAHRC, a separate budget is appropriate like in the case of the CHRAJ. This will allow the commission to stand as a fully-fledged, independent institution.

In the appointment process, it is useful for parliament, as the representative body of the people, to play a role. Both the CHRC and the CHRAJ could benefit from the experience of the SAHRC, where members are appointed with the involvement of the executive and parliament. The CHRC's appointments are mainly done by the executive without any external input. In the case of Ghana, the Council of State cannot effectively oversee the actions of the president since its role typically is hortatory. It is strongly recommended that parliament and civil society be included in the appointment processes in order to ensure proper and balanced scrutiny of candidates. This may avert the dangers associated with uncritical consideration of nominees by the executive and ensure the legitimacy and independence of the commission.

Moreover, both the CHRAJ and the SAHRC have elaborate and reasonable requirements to warrant dismissal or removal from office. These include misbehaviour, incompetence or grounds of inability to perform functions of their office arising from infirmity of body or mind. In the case of the CHRC, "bad behaviour" is the only grounds to legitimate removal from office. While this has traditionally included the factors indicated for Ghana's and South Africa's commissions, the CHRA should be clarified to specify those grounds. The three commissions have satisfactory dismissal procedures, but the CHRAJ position is preferable. The investigative process installed by the constitution with the involvement of the Judiciary is the surest means to ensure proper due process of law before the commissioners could excusably and legally be asked to leave office. Likewise, the CHRC and the SAHRC should consider judicial involvement (or peer review by other commissioners) in determining whether or not a particular commissioner be removed from office in order to guarantee procedural fairness.

With regard to security of tenure in general, all commissions have good statutory positions in respect to fixed terms and clearly stated grounds for termination of appointment. However, the possibility of tenure renewal for commissioners associated with the statutory provisions of both the CHRC and the SAHRC presents some difficulties. That is, commissioners might defer to the government to secure reappointment. This could potentially compromise commissioners' deliberative independence. The CHRAJ's tenure (or longer, non-renewable terms, as with some European High Courts) might avert such difficulties, especially given the potentially short terms of the CHRC. Again, the CHRC and the CHRAJ could learn a useful lesson from the SARHC's pluralistic composition. The CHRAJ's three commissioners with a compulsory legal background does not compare favourably with the pluralistic character of the larger the SARHC. As women constitute only one-third of the membership of all three commissions, none of the commissions currently reflect gender parity. Among the three commissions, it is the CHRC and the SAHRC that have a composition of membership with diverse backgrounds of expertise. The CHRAJ is too legalistic as it relies solely on lawyers. Further, it is essential that the membership of the CHRAJ be increased to nine, not only to satisfy the element of pluralism, but also to make it more representative of the Ghanaian population.

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Who Wields the Sword and Shield? The military dilemma in the birth of the Swiss Federation

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In his work, *Federalism: Origin, Operation, Significance*, William H. Riker brought into academic scrutiny the role that defence and security play in the formation of modern federations. According to his understanding of the origins of American federalism, Riker argued that two groups of political entrepreneurs in distinct sovereign constituent units seek to unite in order to: (a) expand their territories so they can address an internal threat and (b) to protect themselves from an external threat.¹ He went even further by asserting that these two conditions are indispensable for the creation of any federal system.² However, this tenet of federal formation was received by more detractors than supporters in the academic community. Numerous scholars have made contemptuous arguments that were intended to prove how Riker's military conditions are not the paramount component needed for the creation of each single federation. For instance, W. S. Livingstone and Geoffrey Sawyer described Riker's argument as being "excessive" and "overstressed."³ Furthermore, academics such as A.H. Birch and R. D. Dikshit have suggested that there were alternative major conditions responsible for the federal formation of Nigeria, the German Federal Republic and Austria.⁴

It seems that the competing paradigms have shown that a federal union is rather dependent on the economic, social or historical circumstances in which the constituent states find themselves at the time prior to federation. Paradoxically, these alternative explanations have undermined the fact that, indeed, there is an underlying component required for the establishment of any federal design. Although Riker's approach was somewhat ambitious and

¹ William H. Riker, *Federalism: Origin, Operation, Significance* (Boston: Little Brown Publishing, 1964) 12-13.

² Riker being quoted in - Preston King, *Federalism and Federations* (London: Croom Helm Publishing, 1982) 82.

³ W. S. Livingstone and Geoffrey Sawyer being quoted in - R. D. Dikshit, "Military Interpretation of Federal Constitutions: A Critique," *The Journal of Politics* 33.1 (1971): 181.

⁴ Ibid, 183-184, 186-188

quite Americo-centric, he was able to point out the right direction when he stressed the relevance of military force in the establishment of a sustainable federation. In fact, if we adopt a zero-sum model based on Max Weber's tenets it becomes conspicuously evident that military force has been significant in the development of federalism. In this context, it will be sustained that in order for a federation to be formed, it is necessary for a confederal institution –or a proto-federal association- to usurp the capacity to use coercive force from the associated sovereign states - which will later become in the constituent units- regardless on the existence of any potential or present threat. Moreover, it will be argued that if this condition is not met, the most likely outcome will be the *status quo* of competition among the associated states. This can include armed struggle as it becomes a viable option for these states to protect their sovereignty and pursue their own (conflicting) interests.

When studying the birth of most modern federations several scholars tend to disregard this requisite, since many cases show that it has already been satisfied prior to the process of economic and political integration. For example, the Australian and Canadian colonies' defence forces ultimately responded to a supranational authority, the British Empire. Hence, by the time these Commonwealth colonies federated there was a gradual transfer of this function from the War Office to the new federal governments.⁵ Similarly, prior to the formation of the German Empire in the late 19th century, an intergovernmental institution dubbed as the "Black Committee" slowly seized the coercive force function from the kingdoms, principalities and free cities of the old Confederation.⁶ Thus, by 1871 the German Imperial government was the sole authority that could decide when and how to use military force.⁷ Even in a more contemporary federation, such as the German Federal Republic, we can see how the function of coercive force was transferred from the Allied occupation authorities directly to the federal government of Germany, with the *Länder* having no significant role in this process.

While most of these examples do not reflect the extent to which the allocation of coercive force is decisive in the birth of a federation, it is possible to find cases that expose just the opposite; as it is the new Swiss Confederation. The purpose of this piece is to emphasize how the forceful transfer of coercive power helped define the current federal shape of the existing *Confoederatio Helvetica*. In order to accomplish this, the paper will be divided in two comprehensive sections: the first section will include in depth analysis of the paradigms regarding states, federalism and coercive force; the second section will apply the findings of the first section to the events surrounding the Sonderbund War of 1848 and the development of the latest Swiss constitution; and finally, the conclusion will revise the major arguments of the piece.

⁵ Brian Stoddart, "Sport, Cultural Imperialism, and Colonial Response in the British Empire," *Studies in Society and History* 30.4 (1988): 650.

⁶ Frederick K Lister, *The Later Security Confederations: The American, "New" Swiss and German Unions*. (London: Greenwood Publishing Group, 2001) 163.

⁷ For further reference see Section XI from the Constitution of the German Empire available online at: (http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=1826)

Validating a theoretical approach:

To better evaluate the discourse on coercive force and federalism it is important to reassess the notions that link these concepts with the process of institutional development. To accomplish this, we will put into context the relationship that exists between states, the association in which they find themselves and the outcome which this interaction brings. To begin with, the state has been traditionally regarded as a "political organization whose rule is territorially ordered and which is able to mobilize the means of violence to sustain that rule."⁸ Clearly, this definition makes a profound causal inference between the act of governing and the capability to use force in order to maintain this function. Certainly, the chores of the state are more complex than just administering violence as it plays crucial organizational and socio-economic part; however, as Hobbes and Thucyclides pointed out in their works, the state came about as a premier device for human self-preservation and security.⁹ Nonetheless, going back to the definition given above, it can be said that its conception is heavily subjective compared to Max Weber's views, in which he claims that the state is characterized by: (a) an administrative bureaucratic body, (b) which has the ability to command force and (c) and the ability to exercise the use of force within a given territory.¹⁰ As it turns out, these parameters are actually quite useful when looking into the state as an actor in relation to a proto-federal government since both share similar characteristics.

It is common wisdom that the state's "bureaucratic body" aspect clearly alludes to the intricate system of institutions that comprise the notion of government. Indeed, for the purpose of this piece, we will consider this same system as the major engine responsible for the state's behaviour as a rational actor. This argument runs contrary to Riker's perspective of approaching the politicians or individual members of the political elite as the main actors responsible for federal bargaining, and thus, a federal union.¹¹ Hence, as Weber argues, a state's bureaucracy has the technical knowledge, expertise and experience that no other political actor has within the state.¹² Furthermore, the German scholar delineates that this expertise is not only needed by politicians but also gives the bureaucracy the autonomy to influence and shape policy making according to its own interests.¹³ Besides this, the second and third caveats are also relevant as they reflect the fact that the state is a rational actor that strives to survive and maintain power over its geographical jurisdiction. In fact, we can safely assume that a state will oppose by all means any other authority – especially from other states-- that will challenge its political primacy within its territory. Therefore, states are concerned mainly concerned with protecting their sovereignty and maximizing power in order to achieve this.

⁸ Anthony Giddens, *The Nation-State and Violence* (Berkeley, LA.: University of California Press, 1981) 21.

⁹ Peter J. Ahrens Dorf, "The Fear of Death and the Longing for Immortality: Hobbes and Thucydides on Human Nature and the Problem of Anarchy," *The American Political Science Review* 94.3 (2000): 579-580.

¹⁰ Giddens, *The Nation-State and Violence* 18.

¹¹ Mikhail Filippov, "Riker and Federalism," *Constitutional Political Economy* 16.2 (2005): 95-96.

¹² H. Gerth and Wright C. Mills, *From Max Weber: Essays in Sociology* (New York: Oxford University Press, 1978) 233.

¹³ Ibid.

So the question now is what kind of interaction can integrate states such as the ones described above? As history has shown, the development of confederations has been the response of choice whenever states feel they need to enter a “marriage of convenience”. This type of arrangement may seem similar to an alliance from the perspective that it is created in order to address a potential military threat, or in other words, to develop a collective security system. However, in order for the states to work in cohesion a set of institutions such as an intergovernmental forum, a binding treaty, and a variety of offices are developed. These institutions help the different political units to align their policy making.¹⁴ Certainly, it is important to note that this system does not infringe on the sovereignty of its units as these ultimately decide to apply any decisions agreed in the intergovernmental forum.¹⁵ Furthermore, in most cases the units retain the capability to use coercive force in the form of local militias, gendarmeries and other military bodies. Because of this, we have seen how in some confederations the constituent states used violence against one another as a way of enforcing interest-oriented policy. In actuality, this phenomenon has even been present in the form of rival alliances within a confederal system. Examples of this are evident during the conflict between the religious leagues of the Holy Roman Empire in the 16th Century, the Swiss Cantonal Leagues of the Kappel Wars and the Confederate and Union States during the American Civil War.¹⁶

The fact that states are capable of implementing coercive force within a confederal arrangement clearly exposes a predicament that exists between the constituent units’ sovereignty and the confederation’s ability to integrate them. However, it is feasible to argue that once confederal institutions are created it becomes the *finalité politique* of these to develop a strong interstate government that will be capable of arbitrating any quarrel between its units and overseeing their behaviour by appropriating certain sovereign powers from them. Furthermore, we can apply Weber’s argument on “bureaucratic bodies” to these institutions as these not only try to gain autonomy from the constituent units but also try to exercise power over them. Therefore, in order to fulfill their goal, the confederal institutions exploit their ability as an organization that sets common “norms and values” among the states and their subjects in order to persuade them of allocating certain powers -and more significantly military force- at the interstate level.¹⁷ Once a significant number of constituent units are persuaded, it becomes easy to keep swaying the rest or co-opting them through the use of force. Ultimately, the final outcome of this process will be the creation of new institutions in which the unit states and their subjects will be involved in the decision-making process so the novel arrangement can maintain functionality, legitimacy and stability.

¹⁴ Frederick K Lister, The European Union, the United Nations and the Revival of Confederal Governance (London: Greenwood Publishing Group, 1996) 22.

¹⁵ Lister, The Later Security Confederations: The American, “New” Swiss and German Unions, 3-4.

¹⁶ John M. Owen IV, “When Do Ideologies Produce Alliances? The Holy Roman Empire 1517-1555,” International Studies Quarterly 49.1 (2005): 84-86. and J. W. Baker, “The Covenantal Basis for the Development of Swiss Political Federalism: 1291-1848,” Publius: The Journal of Federalism 23.2 (1993): 23-24.

¹⁷ Based on the premise that social organizations are influential in the development of normative structures in Michael Foucault, Discipline and Punish: The Birth of the Prison (New York: Random House, 1977) 27.

An empirical case: the *Sonderbundkrieg* and the birth of the modern Swiss Con(Federation)

The notions described above depict quite accurately the transformation of the Swiss Confederation into a more distinctive federal union. Initially, the Swiss cantons started a process of confederal association through the signature of different multilateral treaties in 1291.¹⁸ The main goal behind this union was to create a collective security system that could protect the cantons against the two main regional powers: Austria and the Holy Roman Empire.¹⁹ Although at the beginning there were only three of them, by the 16th century more or less the same twenty six cantons that exist today would be part of the confederation. At a political level, the Diet was the prime confederal institution; however, any law made by it could only be enforced through the willingness of the cantonal governments.²⁰ Furthermore, at certain instances such as the Kappel and Villmergen Wars, the Diet proved to be futile as a mechanism that could eliminate conflict among the cantons. In fact, the cantons had their own individual armies and as any sovereign political entity they could use them accordingly against any external enemy or even other cantons regardless of the confederal arrangement.

For more than five hundred years Switzerland stayed as this “bundle of states,” with a weak central government. This would change dramatically in 1789 when Napoleon invaded the Swiss Confederation and instead established the Helvetic Republic, which was a satellite state modelled after post-revolution France.²¹ This venture only lasted as long as the Napoleonic Empire, and thus, by 1815 the Swiss were able to reconstruct their confederation. Subsequently, a new federal pact in the form of a constitution was made in which a common currency, weights and measurements were set up. The new confederal treaty did not stop the cantons from having the right to raise their own militias, or even worse, from pursuing their own interests before the interests of the union.²² By this time new ideologies became prevalent in the cantons’ governments. Many of their leaders and populations reflected adherence to either the radicalism of the French revolution, the liberalism from the Enlightenment or the conservatism that replicated the traditional religious and cultural values of each canton.²³ Not surprisingly, at an interstate level both the radicals and liberals were able to establish themselves in confederal offices.

The political tension between the confederal government and the more conservative cantons – which were zealous on their sovereignty – was blatant during the first half of the 19th century. As the radical and liberal elements within the confederation pushed for a stronger

¹⁸ Murray Luck, *History of Switzerland* (Palo Alto, CA: Society for the Promotion of Science and Scholarship, 1985) 56-57, 62-64.

¹⁹ Baker, "The Covenantal Basis for the Development of Swiss Political Federalism: 1291-1848," 21.

²⁰ Luck, *History of Switzerland* 139-140.

²¹ Joachim Remak, *A Very Civil War: The Swiss Sonderbund War of 1847* (Boulder, CO: Westview Press, 1993) 12.

²² Luck, *History of Switzerland* 344-346. and J. R. Salis, *Switzerland & Europe* (London: Oswald Wolff, 1971) 33.

²³ Thomas Maissen, "Fighting for Faith? Experiences of the Sonderbund War," *Switzerland at War* eds. Joy Charnley and Malcolm Pender (Bern: European Academic Publishers, 1999) 14, 18.

central union, the conservative cantons did as much as they could to protect their autonomy and political identity. Hence, it was just a matter of time before this political discord erupted into conflict between these cantons and their institutional nemesis. In 1841 an edict was promulgated ordering the expulsion of the Jesuits as it was believed they were promoting secession from the confederation. The Valais and Lucerne decided to not comply offering protection to the religious order in their cantonal constitutions.²⁴ As a response to this, a group of radical partisans decided to take action against Lucerne, however, they were miserably defeated by the better trained militias from the canton.²⁵ The final result of this whole incident was the creation of the *Sonderbund* in 1845 which was a league of seven Catholic-conservative cantons that felt threatened by radical elements within Switzerland.²⁶

As expected, the response from the Diet was particularly negative. Apart from excluding the allied cantons from the forum itself, the Diet held two key votes regarding the expulsion of the Jesuits and the dismantling of the *Sonderbund*, to which the other twelve cantons agreed favourably without the Catholic league's consensus.²⁷ As a matter of fact, the Diet was able to assemble a federal force of fifty thousand men in a few days, in order to forcibly co-opt the *Sonderbund* back into Switzerland.²⁸ Evidently, the confederal government was rather influential in the majority of cantons which opposed the Catholic league. In the end, the campaign was not as dramatic as other armed struggles from the time as it lasted only twenty five days with a mere one hundred and fifty lives lost.²⁹ Nonetheless, the political aftermath would be pivotal in the construction of a Swiss federation.

The *Sonderbund* war clearly demonstrated the fact that the confederal system, to which Switzerland had adhered since the 13th century, was rather ineffective when maintaining national cohesion. This gave the perfect opportunity for the radical and liberal elements within the confederal government to transform this Alpine "bundle of states" into a centralist federation that would reflect their ideological and normative interests.³⁰ Less than six months after the war had ended a new constitution was proposed, promising to re-design the political structure of Switzerland. For instance, the powers of the federal government would be more extensive and exclusive with regard to defence and military affairs. As well, the right of secession would be completely outlawed, clearly reflecting that fact that sovereignty would lie within the federation and not the cantons.³¹ Structurally, the government would be composed of upper and lower houses based on the American model.³² This would give the federation all the legitimacy it needed as cantonal and popular support would be crucial in any decision making process. As expected, the constitution and its reforms were approved by a substantial majority of fifteen and

²⁴ Luck, *History of Switzerland* 358-359.

²⁵ Remak, *A Very Civil War: The Swiss Sonderbund War of 1847* 43.

²⁶ Lister, *The European Union, the United Nations and the Revival of Confederal Governance* 114.

²⁷ Luck, *History of Switzerland* 361.

²⁸ Ibid.

²⁹ Lister, *The Later Security Confederations: The American, "New" Swiss and German Unions*. 115.

³⁰ Luck, *History of Switzerland* 365.

³¹ Remak, *A Very Civil War: The Swiss Sonderbund War of 1847* 170.

³² Ibid.

a half cantons against six and a half cantons.³³ As a result, Switzerland transformed itself from a quasi-anarchic confederation into a federal union where the distribution of specific powers among cantonal and federal institutions created an atmosphere of cohesion which has transcended for the last one hundred and fifty years.

Conclusion:

It is evident when we look at both unitary states and federations that there is a correlation between the legitimate administration of coercive force and sovereignty. However, in order to see the creation of the latter, the coercive force variable has to be usurped from the associated sovereign states and allocated in a confederal institutional system. The failure to do so weakens federal institutions and makes them appear irrelevant, as it turned out in many of the old European confederations. In the case of Switzerland, we are able to see how the confederal institutions were capable of persuading and co-opting the cantons to make this allocation possible. Initially, the centralism and republicanism brought on by the French Empire gained extensive validity among most of the confederal institutions, and thus, it was not difficult to gain support for a stronger union from the cantons that were under a similar normative framework. On the other hand, more conservative cantons that jealously protected their sovereignty were overpowered through the use of military means in quick and relatively bloodless armed conflicts. This final defeat made it possible for the confederal institutions to evolve into a more centralist and powerful entity that gave birth to the modern Swiss model.

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³³ Lister, The Later Security Confederations: The American, "New" Swiss and German Unions. 116.

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The People Paradox: Human Security and US Counterinsurgency in Afghanistan

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Located at an historic trade crossroads along the ancient Silk Road, Afghanistan exists at the intersection of several distinct conceptual and doctrinal crossroads as well. Alternately described as nation-building, war-fighting, military intervention, and counterinsurgency, the international mission in Afghanistan, irreducibly led by the United States, is at once all these things yet not entirely any. After more than six years of conflict, the two arms of international military effort in Afghanistan, the NATO-led International Security Assistance Force (ISAF) and the American Operation Enduring Freedom (OEF), have increasingly drawn parallel conclusions regarding the prospects of achieving their respective strategic objectives. These two distinct military operations, although sharing substantial contingents of American troops, have often pursued disparate objectives within Afghanistan. ISAF has primarily been concerned with the provision of public security and the establishment of an effective Afghan state, whereas OEF has been a more focused military operation concerned with the elimination of terrorist networks and the killing or capture of high-value terrorist targets.

However, in the wake of increasing violence targeting both NATO troops and Afghan civilians, it has become clear that ISAF cannot provide security and establish durable structures of governance without actively combating those terrorist and insurgent elements which view it as an occupying force. Likewise, the United States cannot eliminate the Taliban and associated terrorist networks without also seeking to establish a viable Afghan state. As put by one observer, “the US and its allies approached [Afghanistan] as [an] exercise in counterterrorism or defeating a conventional enemy, and failed to properly

assess the costs and risks of what were really exercises in armed nation building . . . The result has been a set of self-inflicted wounds”.¹

The strategic implications of these two conclusions, and the practical changes necessary to repair the damage of previous policy directions, are far from clear. The United States and its allies currently find themselves struggling to achieve sweeping societal change through largely military means, and attempting to build the institutions of a functioning state in an environment of endemic uncertainty punctuated by frequent, unpredictable, and increasing levels of violence. The United States, in particular, is finding that the tactics which it has employed, indeed, the fundamental way of war to which it has become accustomed, may ultimately be counter-productive to the successful realization of its strategic objectives in Afghanistan. A re-evaluation of American military efforts has become necessary, and with it, a dramatic reorientation of the manner in which the United States is prosecuting the war in Afghanistan. As described by a recent high profile panel on the conflict, “the [US] military finds success in a virtually unbroken line of tactical achievements . . . [but] officials worry about a looming strategic failure”.² If indeed the US has thus far been winning the battles but losing the war, new strategies are needed by which the United States can more effectively pursue its objectives and redress the alienation and attenuation of support among the Afghan people which is the essential component for victory in this conflict.

One solution is the application of the principles of human security to American military efforts in Afghanistan, particularly counterinsurgency (COIN). The nature of US combat operations thus far has been enemy-centric and focused upon the elimination of the Taliban and terrorist threat.³ By contrast, application of the human security doctrine would re-orient the American military towards protection of the civilian population and the development of a security bubble within which the socio-economic structures needed for long-term strategic success in Afghanistan can be developed. Human security has the potential to dramatically improve the efficacy of American counterinsurgency and nation-building efforts in Afghanistan, but nevertheless presents an entirely different means of waging war than the one which the United States has pursued since its defeat in Vietnam. While human security is possibly the only way by which the US and its allies can achieve victory in Afghanistan, it remains to be seen whether the costs and compromises required for its application will be politically and publicly acceptable to an America impatient with the slow pace of nation-building and intolerant of casualties inflicted on behalf of distant and alien peoples.

This paper will first examine the concept of human security, its growing prominence within international relations, and the manner in which its principles have been applied in

¹ Anthony H. Cordesman, *Afghanistan, Iraq, and Self-Inflicted Wounds: The Strategic Lessons of Armed Nation Building* (Washington, DC: Center for Strategic and International Studies, 2007) 3

² *Afghanistan Study Group Report: Revitalizing Our Efforts, Rethinking Our Strategies*, (Washington DC: Center for the Study of the Presidency, Afghanistan Study Group 2008), 23

³ Cordesman, *Afghanistan, Iraq, and Self-Inflicted Wounds: The Strategic Lessons of Armed Nation Building*

other conflicts. Secondly, it will explore American counter-insurgency in Afghanistan, and outline the manner in which it has failed to either stem the insurgency or provide adequate security for the Afghan people. These failings will be demonstrated as resulting largely from an inappropriate, and in some ways anachronistic, American military doctrine that must be revised to achieve strategic success in Afghanistan. Lastly, the paper will detail the way in which the principles of human security and the application of the human security doctrine provide a conceptual bridge by which American military tactics can more effectively contribute towards the realization of American strategic objectives.

Human Security in Concept

Before any discussion of the application of human security in Afghanistan is possible, it is first necessary to define the concept and outline the dramatic shift that has taken place in the discourse surrounding the very notion of 'security'. Whereas nuclear bipolarity during the Cold War ensured that states took primacy in most examinations of security, the collapse of the Soviet Union allowed a slackening of the conceptual bonds that had restricted the study of security over the previous forty years.⁴ Not only were non-military threats to the security of states explored for the first time as legitimate sources of insecurity, the place of the state itself as the sole referent of security studies became increasingly challenged. Societies, human collectivities, and individuals, taken for granted as having their security synonymous with and contingent upon the security of their respective states, emerged as autonomous referent objects within security discourse. These two processes, the 'widening' of the security field to include non-military threats and its 'deepening' to examine threats to units of analysis other than the state, arose at a time when even traditional security scholars "accepted the need to look more widely at non-military causes of conflict in the international system and made little explicit attempt to defend the centrality of the state in security analysis".⁵ Even today, when the place of non-military threats and non-state actors within the field of security studies has been broadly established, there is widespread disagreement over which threats are appropriate to study, which actors are legitimate referents, and even the nature of 'security' and 'insecurity' within a changed global environment and discordant academic discourse.⁶

Human security embodies and exacerbates all of these disagreements. To some it is clear that people are the ultimate object of security, and that threats to them can originate from any sector of security analysis. To others, human security exemplifies the conceptual dangers of securitizing too many threats towards too specific a unit of analysis, resulting in

⁴ For an overview see Barry Buzan, *People, States and Fear: An Agenda for International Security Studies in the Post-Cold War Era* (Boulder, CO: Lynne Rienner Publishing, 1991)

⁵ Barry Buzan, Ole Waever and Jaap De Wilde, *Security: A New Framework for Analysis* (Boulder, CO: Lynne Rienner Publishing, 1998) 3

⁶ For examples see Vol. 35.3. of *Security Dialogue* devoted to the academic debate over human security.

“human security [seemingly] capable of supporting virtually any hypothesis – along with its opposite – depending on the prejudices and interests of the researcher”.⁷ The resulting split within human security thought has led to the development of two distinct intellectual schools. The ‘broad’ school of human security thought understands it to be about “more than safety from violent threats,”⁸ and addresses security hazards stemming from an array of socio-political phenomena. Some ‘broad’ proponents assert that security means “the absence of threats”⁹ and that as the freedom of people from physical constraints upon their human agency, “Emancipation, not power or order, produces true security. Emancipation, theoretically, is security”.¹⁰ This interpretation suggests that human security can only be achieved through a sweeping process of alleviating the many different sources of oppression and constraint existent within a given society. It encompasses the broad array of threats to people contained within the military, political, economic, societal, and environmental spheres, a panoply of insecurity which includes: murder, physical injury, mental health, homelessness, bankruptcy, access to essential services, and ecological degradation.

This understanding also operates within a framework that accepts that while the state is often the most effective instrument for safeguarding human security, it is also a frequent culprit in the violation of that same security. If “the security of individuals is locked into an unbreakable paradox in which it is partly dependent on, and partly threatened by the state,”¹¹ the instruments of the state cannot be relied upon to safeguard the people’s security if they are complicit in the constitution of that threat. The broad interpretation of human security poses clear challenges to the conceptualization of security and the actualization of policies designed to protect it.

The value of the individual as a referent for analysis has also been embraced within more traditional, or ‘narrow’, interpretations of security concerned with violence as constituting the major source of threat. As the conceptual descendent of the strategic studies discourse of the Cold War, this school of thought has widened the traditional strategic focus from state-based threats to the existence of other states to include precipitous and existential threats of violence to individuals and human collectivities. These three factors are the central elements of a narrow interpretation of human security, and constitute the defining characteristics of the definition of human security that is employed in this paper.

Violence is an essential characteristic to human insecurity because, particularly in the case of Afghanistan, it is the most pressing source of threat which individuals face and which the international military forces in the country are charged with alleviating. While Afghans may indeed be faced with a broad array of threats to their livelihoods and quality of life, the most urgent source of insecurity and the one most intimately linked with the actions

⁷ Roland Paris, “Human Security – Paradigm Shift or Hot Air?,” *International Security* 26.2 (2001): 93

⁸ Taylor Owen, “Human Security – Conflict, Critique, and Consensus: Colloquium Remarks and a Proposal for a Threshold-Based Definition,” *Security Dialogue* 35.3 (2004): 375

⁹ Ken Booth, “Security and Emancipation,” *Review of International Studies* 17 (1991): 319

¹⁰ Ibid

¹¹ Buzan, *People, States and Fear: An Agenda for International Security Studies in the Post-Cold War Era* 364

of American and NATO troops is the persistent threat of violence at the hands of the Taliban or other illegitimate purveyors of violence. The threat of violence must, however, be *existential* to the individual or human collectivity involved, lest any and all violence, no matter how minor, be construed as a threat to security. At its root, "security is about survival. It is when an issue is presented as posing an existential threat to a designated referent object"¹² that a threat to that object's security can be said to exist. The threat need not necessarily result in death, but must credibly threaten life. This line of reasoning is evident within the domestic sphere in the context of judicial systems which regard acts of self-defence in the preservation of one's existence as being reasonable grounds for the use of exceptional force, all in the interest of protecting one's own security. Lastly, the threat must be *precipitous*, or any action involving violence that eventually leads to injury or death could be considered a threat to security. Temporal considerations also contribute to conceptual coherence by narrowing the scope of security threats and removing from security analysis phenomena such as long-term health, access to medical care, and similar social phenomena.¹³ These factors might ultimately threaten human life, but they cannot be considered threats to human security without exposing the concept to a deluge of socio-economic ills that effectively strip the notion of 'security' of any analytic value, rendering it "a loose synonym for 'bad things that can happen'" (Krause 367).

Although strong arguments have been put forward for a broad understanding of threats to human security,¹⁴ the nature of the conflict in Afghanistan strongly suggests the suitability of a more restricted definition. While the provision of essential services is of obvious importance to Afghanistan's long-term viability, and the vulnerability of Afghans to threats in the societal, economic, and environmental sectors is certainly prevalent, the establishment of a socio-political environment free from threats of physical violence is a requirement for the resolution of security threats in all others sectors. Broad understandings of human security often involve calls for development rather than militarized responses such combat operations. As described repeatedly by various expert actors, however, in Afghanistan, "security is an essential condition of good governance and lasting development".¹⁵ Accordingly, for the purposes of this paper, human security is defined as the condition of individuals being free from violent threats to their lives and physical well-being. This definition is appropriate because it allows for an examination of American strategic and tactical decisions or practices which undermine or threaten this condition of being free from violent threats, both through direct action and deliberate inaction.

¹² Buzan, Waever and De Wilde, *Security: A New Framework for Analysis* 21

¹³ For detailed analysis see: Andrew Mack. "A Signifier of Shared Values." *Security Dialogue*. 35.3. (2004); and S. Neil MacFarlane. "A Useful Concept that Risks Losing Its Political Significance." *Security Dialogue*. 35.3. (2004).

¹⁴ For examples see: Booth, "Security and Emancipation," , Owen, "Human Security – Conflict, Critique, and Consensus: Colloquium Remarks and a Proposal for a Threshold-Based Definition," and Commission on Human Security 2003.

¹⁵ *Report of the Independent Panel on Canada's Future Role in Afghanistan*. (Government of Canada, Independent Panel on Canada's Future Role in Afghanistan 2008), 11

Unlike some other countries, the United States does not itself have an official policy with respect to human security. However, the security and well-being of individuals is a recurring theme within American policy documents, as in the 2002 and 2006 National Security Strategies, which indicated that, in order to ensure its own security, “America must stand firmly for the nonnegotiable demands of human dignity”.¹⁶ The definitions of human security employed by other states, including some actively involved in the Afghan conflict, also suggest the suitability of the above definition and a narrow interpretation of human security. For example, in *Freedom from Fear: Canada’s Foreign Policy for Human Security*, the concept is defined as “freedom from pervasive threats to people’s rights, safety, or lives,”¹⁷ and in more recent official documents, as “freedom from *violent* [emphasis added] threats to people’s rights, safety, or lives”.¹⁸ It is possible to extract from other American policy documents, as well as those of its allies and partners in the war in Afghanistan, that a narrow understanding of human security as being primarily threatened by violence is the most appropriate for an analysis of military practice in Afghanistan.

Human Security in Application

It is important to emphasize that human security is more than a conceptual or academic abstraction, but rather a well-established principle within contemporary international politics. The 1990s and early years of the 21st century saw extraordinary progress in the application of human-centric considerations to security policies in both the domestic and international spheres. The first time which human security was enunciated within a policy document was in the opening line of the 1994 UN *Human Development Report*, which categorically stated that: “the world can never be at peace unless people have security in their daily lives”.¹⁹ This report laid the foundation for the elevation of human security to a major component within the formulation of the international security agenda, culminating in the 2003 report of the UN Commission on Human Security, *Human Security Now*.

Perhaps the most important incorporation of human security into international policy, however, was the adoption at the 2005 World Summit of the doctrine of the responsibility to protect. This responsibility – of all states to protect people from war crimes, genocide, and crimes against humanity – is articulated in the eponymous final report of the International

¹⁶ National Security Strategy of the United States of America, (Washington DC: United States of America, The White House 2002), 3

¹⁷ DFAIT, Freedom From Fear: Canada’s Foreign Policy for Human Security (Ottawa: Government of Canada, Department of Foreign Affairs and International Trade 2002), 3

¹⁸ DFAIT, Human Security > Cities: Freedom From Fear in Urban Spaces - Leaflet (Ottawa: Government of Canada, Department of Foreign Affairs and International Trade 2006).

¹⁹ UNDP, Human Development Report: New Dimensions of Human Security (New York: United Nations, United Nations Development Program 1994), 1

Commission on Intervention and State Sovereignty (ICISS). The mandate of the ICISS was to investigate “when, if ever, it is appropriate for states to take coercive – and in particular military – action, against another state for the purpose of protecting people at risk in that other state”.²⁰ Its conclusion was that such action is appropriate in situations when the human security of a population is unacceptably threatened by the actions or omissions of its government, particularly in times of violent crisis or war. In effect, human security has become a legitimate *casus belli* for the international community to take military action against a state, a fact that marks a considerable erosion of the once inviolable principle of state sovereignty. Put another way, human security, narrowly defined, has been determined by the international community and *accepted* by states as a principle of equal or greater value to sovereignty itself.

This can be seen with respect to American policy as well, as the United States has increasingly sought to frame its foreign policy decisions in the context of the preservation of individuals’ freedoms and the preservation of their security. This rationale is evident with respect to the American invasion of Iraq, as well as, *post ipso facto*, the international military intervention in Afghanistan. Although the specific phrase is rarely used, the language of human security is prevalent as part of the more commonplace discourse on humanitarianism. This has led to controversy when the language of human security has been employed in official rhetoric while policies on the ground have failed to be consistent with human security principles. For instance, “the reckless use of humanitarian arguments to justify the war in Iraq has deepened scepticism among many . . . observers. Having failed to find weapons of mass destruction in post-war Iraq, the USA has attempted to legitimise the war *ex-post* on humanitarian grounds”.²¹ Despite the paucity of explicit references to human security within American policy documents, it has nevertheless become a central principle in the justification of foreign policy and the public moral defence of military action.²²

Considering the degree to which human security has become a foundational principle of contemporary international relations, especially following the promulgation of the responsibility to protect, it is appropriate to speak no longer of a human security principle, but the human security doctrine. While there is no question that protecting human security is an ideal which the international community has failed to live up to, nevertheless “it is currently considered an overarching concept and functional framework for peacemaking, peacekeeping, and peacebuilding, and despite the fact that it is contested, it projects a paradigmatic shift”.²³ The concept has been internalized by the policies, if not yet practices,

²⁰ ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001), vii

²¹ Roberto Belloni, “The Tragedy of Darfur and the Limits of the ‘Responsibility to Protect’,” *Ethnopolitics* 5.4 (2006): 341

²² See for example: *National Security Strategy of the United States of America*,

²³ Miltiadis Sarigiannidis, “Legal discourses on peacemaking/peacekeeping/ peacebuilding,” *International Journal* 62.3 (2007): 523

of states to such a degree that it has taken on the shape of a doctrine capable of governing the future direction of state action. Moreover, human security is indivisibly melded to other concepts central to the acceptable conduct of international politics. Lloyd Axworthy, a renowned proponent of such a doctrine, has described human security policy as,

*"..an effort to construct a global society where the safety of the individual is at the centre of international priorities and a motivating force for international action; where international human standards and the rule of law are advanced and woven into a coherent web protecting the individual; where those who violate these standards are held fully accountable; and where our global, regional and bilateral institutions – present and future – are built and equipped to enhance and enforce these standards."*²⁴

In this respect, the human security doctrine is a composite formed from the foundational elements of a human-centric security framework, universal human rights, and international humanitarian law. For the purposes of this paper, the human security doctrine will be referred to with reference to these foundational elements and the legal and moral onus on states to take action, or limit their actions, with respect to human security.

Afghanistan and the American Counterinsurgency

American COIN doctrine in Afghanistan has proven to be ineffective in two distinct ways: first, it has failed to prevent gross acts of violence directed against Afghan civilians by the Taliban and other elements of the insurgency, and second, it has directly resulted in unacceptably high rates of Afghan casualties which have critically undermined Afghan support for the international military presence in their country. Until recently, American doctrine had failed to adequately internalize the reality that success in counterinsurgency requires the military focus to be less upon eliminating the enemy and more upon securing the civilian. Unlike other types of conflict, in counterinsurgency "the civilian population is the center of gravity – the deciding factor in the struggle . . . The real battle is for civilian support for, or acquiescence to, the counterinsurgents and host nation government".²⁵ Civilian and military planners in the US operated under the belief that societal security would flow from the physical elimination of the insurgency, rather than understanding that support for the insurgency would wither upon the provision of security for individuals. As a result, American efforts have been focused upon narrowly defined tactical successes aimed

²⁴ Lloyd Axworthy, "Introduction," Human Security and the New Diplomacy: Protecting People, Promoting Peace, eds. Rob McRae and Don Hubert (Montreal: McGill-Queen's University Press, 2001)

²⁵ Sarah Sewell, "Introduction - A Radical Field Manual," The U.S. Army/Marine Corps Counterinsurgency Field Manual (Chicago, IL: University of Chicago Press, 2007) xxv

at the elimination of enemy combatants that have not necessarily been conducive to the achievement of broader strategic victory in the Afghan conflict.

At the beginning of 2008, there was little question that American and international forces had failed to adequately protect Afghan civilians from the threat posed to them by the Taliban and affiliated terrorist groups. This is manifest in the fact that the security situation across Afghanistan has been steadily degrading since the American-led invasion in 2001, to the point that "arguably, most Afghans were less secure in 2006 than they were under Taliban rule".²⁶ Worse still, the rates of violence in Afghanistan have only increased, with the average number of insurgent-caused violent incidents involving civilians risen to 548 per month in 2007 compared to 425 per month in 2006.²⁷ It is now clear that this steady decrease in Afghan security is a result of "an intensifying Taliban-led insurgency that increasingly relies on suicide bombing and other terrorist tactics".²⁸

The insurgency has resulted in greater civilian casualties as a result of increasingly deadly tactics that both deliberately and collaterally harm civilians. Not only are the "Taliban relying more on direct attacks against civilian targets and improvised explosive devices, but they are also increasingly using civilians as human shields".²⁹ The upsurge in violence and the increasing deadliness of insurgent attacks suggests that despite more than six years of conflict coalition military efforts have been unsuccessful in limiting the violence-creation capacity of the Taliban and its allies. Notwithstanding counter-insurgency efforts by NATO and the US, "with more than seventy suicide attacks in 2006 . . . the resurgent Taliban have become more radical, more brutal, and more sophisticated than when US-led forces ousted them".³⁰ Whereas only the southern provinces of Kandahar, Helmand, Uruzgan, and Zabul were significantly affected by the insurgency when it began, the violence "is also spreading geographically to the west and north and getting closer to Kabul," to the point that "almost half of Afghanistan is now affected by fighting involving the Taliban, government forces, and NATO's International Security Assistance Force".³¹

Exacerbating the impact of the increasingly severe and widespread insurgency are insufficient numbers of international troops to effectively capture, retain, and police the entire country. By June 2008, the international troop commitment in Afghanistan had reached some 52,000 under ISAF command,³² with an additional 19,000 soldiers remaining

²⁶ Robert I. Rotberg, "Renewing the Afghan State," *Building a New Afghanistan*, ed. Robert I. Rotberg (Washington, DC: Brookings Institute Press, 2007) 3

²⁷ Ban Ki-Moon, *Report of the Secretary-General: The situation in Afghanistan and its Implications for International Peace and Security* (New York: UN, 2007), A/62/345-S/2007/555.

²⁸ *Ibid.*, 1

²⁹ Christina Caan and Scott Worden, *Rebuilding Civil Society in Afghanistan: Fragile Progress and Formidable Obstacles* (United States Institute of Peace, 2007), www.usip.org/pubs/usipeace_briefings

³⁰ Ali A. Jalali, "The Legacy of War and the Challenge of Peace Building," *Building a New Afghanistan*, ed. Robert I. Rotberg (Washington, DC: Brookings Institute Press, 2007) 41

³¹ *Peace in Afghanistan – Made in Canada, Peace Talks Simulation Game Afghanistan: A Way Out of War?* (Ottawa: Senlis Council, 2007), 17 http://www.senliscouncil.net/modules/publications/026_publication

³² NATO International Security Assistance Force. <http://www.nato.int/ISAF/index.html>

under the command of the American-led Operation Enduring Freedom.³³ By contrast, NATO deployed a force of approximately 60,000 to Bosnia-Herzegovina, a country one-thirteenth the size and one-sixth the population of Afghanistan, following the resolution of that country's civil war.³⁴ Current troop numbers have clearly proven to be insufficient to effectively combat the Taliban, provide security, and allow reconstruction to take place, the three basic elements of the American strategy to clear, hold, and build upon captured territory. Moreover, the continuing failure of NATO member states to provide adequate numbers of troops has simultaneously diminished the security of Afghan civilians and increased the challenge to NATO and OEF of effectively securing the country. Whereas in the winter of 2001/2002 Taliban forces were scattered and weakened, and combat operations were more traditional in nature, "the war in Afghanistan is [now] a counterinsurgency war which has become unnecessarily protracted because of the insufficient commitments of some NATO countries".³⁵ This has increased the threat of violence and death to Afghans by extending the length of time during which they have been forced to endure the trauma of war and conflict. Thus, while "security at the personal level is critical and among the fundamental determinants of nation-state effectiveness, so far personal security throughout the [Afghan] proto-nation remains a rhetorical aspiration".³⁶

The failure of the United States, both as the dominant troop contributor to ISAF and under its own aegis in Operation Enduring Freedom, to adequately suppress the insurgent threat and effectively protect the civilian population is in large part a result of adherence to standard American military doctrine ill-suited for counterinsurgency operations. Since the Vietnam War, reinforced by the American experience in Somalia, the US military has taken as the *sine qua non* of combat operations that American casualties are to be avoided even at the expense of collateral civilian casualties. This has resulted in an "American style of waging war centred primarily on the idea of achieving a crushing military victory over an opponent"³⁷ encapsulated in the Weinberger-Powell Doctrine of limited national security objectives achieved through the application of overwhelming conventional force. As a result, in Afghanistan the American military has relied heavily upon air power and an enemy-centric operational focus that has only peripherally concerned itself with either direct civilian casualties or enemy retaliation against civilians. Force protection and the minimization of threat to *Americans* necessitated a concomitant increase in threat to Afghans, and as a result, "there is growing evidence that Afghans increasingly resent US and NATO military activity".³⁸ Given that Afghan popular sentiment is the ultimate prize

³³ US Department of State. <http://www.state.gov/r/pa/prs/ps/2006/60083.htm>

³⁴ NATO Stabilization Force in Bosnia and Herzegovina. <http://www.nato.int/SFOR/index.htm>

³⁵ *Peace in Afghanistan – Made in Canada*, 13

³⁶ Rotberg, "Renewing the Afghan State," 3

³⁷ Antullio J. II. Echevarria, *Toward an American Way of War* (Strategic Studies Institute, 2004), <http://www.carlisle.army.mil/ssi>

³⁸ Anthony H. Cordesman, *The Uncertain 'Metrics' of Afghanistan (and Iraq)* (Washington, DC: Center for Strategic and International Studies, 2007) 2

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³⁵ *Peace in Afghanistan – Made in Canada*, 13

³⁶ Rotberg, "Renewing the Afghan State," 3

³⁷ Antullio J. II. Echevarria, *Toward an American Way of War* (Strategic Studies Institute, 2004), <http://www.carlisle.army.mil/ssi>

³⁸ Anthony H. Cordesman, *The Uncertain 'Metrics' of Afghanistan (and Iraq)* (Washington, DC: Center for Strategic and International Studies, 2007) 2

over which insurgents and counterinsurgents find themselves competing, that American tactics have resulted in the alienation of public support severely undermines to the likely success of American strategy. Nowhere is this negative impact of tactic upon strategy more evident than in the near doubling in the period between November 2006 and May 2007 of the number of Afghans favouring a return to power by the Taliban.³⁹

The second way in which current American COIN doctrine has failed, and even proven counterproductive, is in the increasing number of civilian casualties occurring as a direct result of American military tactics. The past year has seen a growing furor over the number of civilians killed by international forces, a number which in 2006 “surpassed the death toll of the September 11 attacks. Nearly 3,800 Afghan civilians have died since the conflict began”⁴⁰ at the hands of international military forces. The number of civilians killed has severely weakened support for the international military presence in the eyes of the Afghan public, simultaneously eroding gains in the fields of governance and the economy and fuelling an increase in support for the Taliban.

One of the greatest advantages enjoyed by international troops in Afghanistan following the 2001 overthrow of the Taliban was the fact that the majority of Afghans accepted the necessity of their presence and expressed optimism that the future would bring improvement to the quality of their lives.⁴¹ However, the tactics employed by international military forces, especially the United States, have resulted in “increased incidents involving civilian casualties, primarily in bombing raids, [which] have predictably proven to be detrimental to winning the support and trust of the Afghan people”.⁴² The principle of force protection, consistent with American preferences in modern combat, has led the US to rely heavily upon aerial bombing as a means of reducing the risk to its own soldiers. The same tactics, however, have taken a substantial toll upon the security of Afghan civilians caught in the midst of conflict. These questionable aspects of American strategy “have resulted in the death or injury of large numbers of non-combatants, and the frequency of such incidents continues to rise,”⁴³ including more than 400 civilians killed between January 1 and August 31, 2007.⁴⁴

Examples of coalition-caused casualties abound. During a ten-day period in the middle of June 2007, over 90 civilians were killed by air strikes and artillery fire targeting insurgent positions.⁴⁵ An incident in October 2006 resulted in as many as 80 civilians

³⁹ Greg Bruno, *Daily Analysis: Afghan Soul Searching* (Council on Foreign Relations, October 25th 2007).

⁴⁰ Hekmat Karzai, “Strengthening Security in Contemporary Afghanistan: Coping with the Taliban,” *Building a New Afghanistan*, ed. Robert I. Rotberg (Washington DC: Brookings Institute Press, 2007) 72

⁴¹ For detailed information on Afghan public opinion post-2001 See: CSIS, *Breaking Point: Measuring Progress in Afghanistan. A Report of the Post-Conflict Reconstruction Project Center for Strategic and International Studies* (Washington DC: Center for Strategic and International Studies, 2007),

⁴² *Peace in Afghanistan – Made in Canada*, 14

⁴³ Ki-Moon, *Report of the Secretary-General: The situation in Afghanistan and its Implications for International Peace and Security* 13

⁴⁴ *Ibid*,

⁴⁵ “More forces killed by foreign forces than by insurgents in 2007: report,” *CBC News* June 24th 2007 <http://www.cbc.ca/world/story/2007/06/24/afghanistan.html>.

reported by Afghan authorities to have been killed by ISAF artillery and aerial bombing.⁴⁶ Estimates place the total number of civilians killed by international forces in the first half of 2007 at 360, surpassing the number killed by insurgents during the same period, a circumstance leading Afghan President Hamid Karzai to decry what he described as “careless operations” by international forces.⁴⁷ While some of these incidents result from the use of civilians as human shields by the Taliban, ultimate responsibility still lies with the international forces demonstrating their frequent inability to not *not* do anything if the occasion demands. As put by former Italian Foreign Minister Massimo D’Alema, the scale of coalition-caused civilian casualties in Afghanistan is “not acceptable on a moral level . . . [and] disastrous on a political level”.⁴⁸

The high levels of civilian casualties are not only a direct indication of human insecurity in Afghanistan, but also an unsettling predictor of further violence to come. Perhaps the greatest impact of US and NATO-caused civilian casualties is as a multiplier upon the number of recruits available to the very insurgency which they are involved in fighting. Putting aside the fact that the “foot soldiers” of the insurgency are normal Afghans, not ideologically-driven Taliban, whose deaths are in themselves detrimental to social stability and American interests,⁴⁹ the deaths of non-combatants present a serious issue in a tribal society with a well established ethos of honour and revenge. In such an environment, “if one innocent civilian is killed it diminishes the goodwill of a whole family, a community, and a tribe,”⁵⁰ and further alienates the very people upon whom international military success is entirely dependent. The death of a single civilian will drive others to join the insurgent cause, and these new recruits to the insurgency will contribute to further attacks upon both civilians and military targets, prompting the US and NATO to respond and ultimately contributing to the cyclical nature of violent exchange. Accordingly, “in this context killing the civilian is no longer just collateral damage. The harm cannot be easily dismissed as unintended. Civilian casualties tangibly undermine the counterinsurgent’s goals”.⁵¹

Although the deaths of civilians is incredibly damaging to the prospects of international military success, the US has been extremely slow to adjust its tactics to provide greater protection to civilians. Instead “NATO and the United States’ ‘big army’ military operations and emphasis on [Taliban] foot soldier ‘kills’ are doing more damage than good.

⁴⁶ “At least 60 civilians killed in NATO operation: Afghan officials,” *CBC News* October 26th 2006 <http://www.cbc.ca/world/story/2006/10/26/civilian-deaths.html>.

⁴⁷ “Karzai Decries Civilian Deaths,” *Washington Post* June 24th 2007 <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/23/AR2007062300355>.

⁴⁸ “NATO mulls ‘smaller Afghan bombs,’” *BBC News Online* July 30th 2007 http://news.bbc.co.uk/2/hi/south_asia/6921713.stm.

⁴⁹ Kofi Annan, *Report of the Secretary-General on the Situation in Afghanistan and its Implications for Peace and Security* (New York: UN, 2006),

<http://www.daccessdds.un.org/doc/UNDOC/GEN/N06/492/46/PDF/N0649246.pdf?OpenEment> Pg. 3

⁵⁰ Karzai, “Strengthening Security in Contemporary Afghanistan: Coping with the Taliban,” 78

⁵¹ Sewell, “Introduction - A Radical Field Manual,” xxv

The ensuing collateral damage in a culture that emphasizes revenge has created ‘10 enemies out of one’.”⁵² Even allowing for a degree of hyperbole, the prospect of every civilian casualty acting as a multiplier of three, four, or five upon the number of recruits replenishing the insurgency clearly suggests that the disregard for human security exhibited by the present allied tactics in Afghanistan is fomenting a conflict which the counterinsurgents cannot win. Thus far, American military tactics in Afghanistan have operated in defiance of the counterinsurgency maxim that asserts: “killing insurgents . . . by itself cannot defeat an insurgency”.⁵³

COIN and Human Security

Human security provides the conceptual bridge capable of linking military tactics with the broader strategic objectives being pursued by the United States and its NATO allies in Afghanistan. Application of the principles of human security is a means by which the deficiencies of past military practice may be redressed, with the ultimate goal of winning the support of the Afghan people and limiting their cooperation with and toleration of the Taliban-led insurgency. The importance of human security to the future of the international mission in Afghanistan is demonstrated by the fact that the new counterinsurgency doctrine being adopted by the United States draws heavily upon classical counterinsurgency thought which takes as both start and end point the understanding that the preservation of civilian life is paramount to ultimate success. In seeking to redress the shortcomings of previous American COIN doctrine, the recently published *U.S. Army/Marine Corps Counterinsurgency Field Manual* unequivocally states that: “the cornerstone of any COIN effort is establishing security for the civilian populace. Without a secure environment, no permanent reforms can be implemented and disorder spreads”.⁵⁴ Clear in its valuation of individual well-being and the prospect for human security principles to improve the efficacy of US counterinsurgency in Afghanistan, the *Field Manual* nevertheless raises serious issues for the United States, the greatest of which is how to determine a satisfactory balance between protection of Afghan civilian life and exposure of American soldiers to threat.

The reality of effective COIN, as demonstrated by the lessons of history and contained within the new US *Field Manual*, is that the most effective way to conduct it is contrary to the risk-averse tactics that America has used to fight its recent wars. In its post-Vietnam military engagements, the American “style of warfare reflected a decided aversion to casualties, typified by a greater preference for precision bombing and greater standoff”.⁵⁵

⁵² CSIS, *Breaking Point: Measuring Progress in Afghanistan*. A Report of the Post-Conflict Reconstruction Project Center for Strategic and International Studies, 69

⁵³ *The US Army/Marine Corps Counterinsurgency Field Manual*, (Chicago, IL: University of Chicago Press, United States Department of the Army 2007), 5

⁵⁴ *Ibid*, 42

⁵⁵ Echevarria, *Toward an American Way of War*, 9

This style of warfare was conducive to the pursuit of military objectives which were non-essential to the maintenance of national security, and for much of the 1990s in particular, allowed the United States to engage in military action against its enemies without risking domestic discontent by engaging in close combat which risked American lives. The post-9/11 American invasions of Afghanistan and Iraq altered this way of war by committing the U.S. to the extensive use of ground forces for close combat and COIN operations, but political considerations and resilient casualty-aversion have permeated American military conduct on the ground.

The bedrock principle of force protection has actually proven to be counter-productive to American counterinsurgency efforts and the campaign to ‘win hearts and minds’, since “if military forces remain in their compounds, they lose touch with the people, appear to be running scared, and cede the initiative to the insurgents”.⁵⁶ In this way, the establishment of security for the civilian population will likely require that the counterinsurgents accept a heightened level of insecurity for themselves by engaging in activities such as foot patrols, establishing forward operating and listening posts, and participating in constructive community engagement. In a departure from thirty years of military doctrine, “the field manual tells American troops something they may not want to hear: in order to win, they must assume more risk”.⁵⁷ The paradox of this civilian/counterinsurgent security/insecurity dichotomy is well summarized in the new field manual by the maxim: “sometimes, the more you protect your force, the less secure you may be”.⁵⁸ The US military has yet to reconcile the most effective means of achieving the ultimate objectives of its mission in Afghanistan with the manner in which it is used to fighting the nation’s wars.

One way in which the new counterinsurgency doctrine is being applied is in the emphasis upon developing the security capabilities of native Afghan troops. This is consistent with one of the central aspects of the *Field Manual* which emphasizes the necessity of counterinsurgents working to build domestic security capacity and operate as much as possible in a supporting role to native forces. The difficulty becomes, however, balancing the need to develop sustainable Afghan security forces with the temptation to transfer primary responsibility for security into Afghan hands before those forces are adequately prepared. One significant result of the insufficient number of international troops has been an over-reliance upon Afghan domestic security structures that are inadequately developed to perform their responsibilities. Not only do the Afghan National Army (ANA) and the Afghan National Police (ANP) have questionable and competing allegiances between the elected government in Kabul and regional and tribal elements, they are also categorically unprepared to take on the roles that the international community is increasingly eager for them to play.

⁵⁶ *The US Army/Marine Corps Counterinsurgency Field Manual*, 48

⁵⁷ Sewell, “Introduction - A Radical Field Manual,” xxvi

⁵⁸ *The US Army/Marine Corps Counterinsurgency Field Manual*, 48

While there have been positive strides made by the ANA, “the strain of continual commitment to the intense pace of operations continues to contribute to desertions”.⁵⁹ In fact, although the Afghan government boasts of the recruitment and training of over 40,000 soldiers, “after taking into account desertion, ghost names, and the incompetence of many, the total is likely to be half that number”.⁶⁰ The ANA remains under-equipped and cannot operate without substantial support from international forces, and it has been observed that recruitment and training rates provide poor indicators of success in the security sector. In fact, “the least important metric is how many people in each service have been trained and equipped . . . [since] success consists of having actual forces active in the field”.⁶¹ Ultimately, what matters more than the number of soldiers trained is the number that appears when called to duty and stand their ground when challenged. By this measure, the prospects of the ANA undertaking independent or autonomous responsibility for security in Afghanistan remain highly unlikely.

The situation within the ANP, meanwhile, is universally recognized to be substantially worse than within the ANA. Core requirements for an effective security force such as “respect for authority and elementary discipline have not yet been instilled, and the actions of the police within communities often inspire more fear than confidence in the people”.⁶² Although over 50,000 police officers have been recruited, they have received only limited training, and remain highly unreliable in their operational capabilities and loyalty to the central government in Kabul.⁶³ Even where the ANP is functional, it “has insufficient presence in rural districts, and those that are patrolling are perceived to be corrupt, abusive, and lacking discipline”.⁶⁴ As often an agent of insecurity as effective protection for the population, the ANP is in all categories failing to meet the expectations of the international community, and is categorically unable to satisfy the need for effective policing and maintenance of order in the countryside. This is particularly the case given the weak governance control that exist outside of Kabul, a vacuum which has resulted in the establishment of parallel government functions by elements of the Taliban that are certainly beyond the capacity of the Afghan domestic security architecture to effectively subdue.

Despite the desire of the United States and NATO to move towards greater Afghanization of the security sector, the rush to do so is simply not commensurate with the reality on the ground. In order for the move towards reliance upon Afghan security forces to be consistent with the human security doctrine, those security forces must be able to reliably and effectively demonstrate their capacity to assume responsibility for providing human

⁵⁹ Ki-Moon, Report of the Secretary-General: The situation in Afghanistan and its Implications for International Peace and Security 7

⁶⁰ CSIS, Breaking Point: Measuring Progress in Afghanistan. A Report of the Post-Conflict Reconstruction Project Center for Strategic and International Studies, 34

⁶¹ Cordesman, The Uncertain ‘Metrics’ of Afghanistan (and Iraq) 6

⁶² Rotberg, “Renewing the Afghan State,” 3

⁶³ Cordesman, The Uncertain ‘Metrics’ of Afghanistan (and Iraq)

⁶⁴ CSIS, Breaking Point: Measuring Progress in Afghanistan. A Report of the Post-Conflict Reconstruction Project Center for Strategic and International Studies, 36

security. While the *Field Manual* stresses the importance of building native security capacity, it also emphasizes that: “if the host nation cannot perform tolerably, counterinsurgents supporting it have to act”.⁶⁵ In other words, if native forces cannot perform operations to a sufficient standard, it is preferable for the counterinsurgents to retain primacy in the provision of security. In particular, the ANP constitute an area of concern, given that “in parts of the country the police are seen as a greater cause of insecurity than the Taliban”.⁶⁶ Considering that successful counterinsurgency requires the provision of basic societal security and the nurturing of effective normalcy for the civilian population as much as it does combat in the field, the deficiency of capable domestic police is a major concern for the effectiveness of American COIN in the medium and long terms.

While the goal of fostering independent Afghan security institutions is essential to the long-term viability of the Afghan state, it is clearly unattainable within the rapid timeframe being pursued by the United States and NATO. The reality remains that “there is no chance that the training of the Afghan army and police will produce a military force able to defend itself against a resurgent Taliban and a conglomerate of jihadist terrorists,”⁶⁷ let alone satisfactorily provide for the security needs of the general population. This assessment has been confirmed by senior officials of other NATO combatant-states in Afghanistan, such as outgoing Canadian Chief of the Defence Staff General Rick Hillier who stated that “it’s going to take ten years or so just to work through and build an army . . . and make them more professional and let them meet their security demands”.⁶⁸ Between now and the eventual establishment of an effective Afghan security architecture there will continue to exist a gap in security capacity which has negative implications for effective American counterinsurgency. This gap, in turn, will continue to confound the realization of increased human security for the general Afghan populace, further reducing already limited quantities of Afghan goodwill and threatening the success of the entire Afghan nation-building project.

Increasingly, it is apparent that successful US counterinsurgency requires the pursuit of broad-based human security for the Afghan people. This is evident in the new American COIN doctrine, which draws heavily upon the principles of human security. While the two are not synonymous, they are synchronous, meaning that the successful application of one will likely result in advancements or satisfaction of the other. Where tensions arise between counterinsurgency and the provision of human security they must be recognized, understood, and addressed, as with the latent tension between transferral of security responsibility to Afghan forces before they are adequately prepared and capable of operating professionally and independent of foreign assistance. In this way, the mindset behind

⁶⁵ The US Army/Marine Corps Counterinsurgency Field Manual, 22

⁶⁶ Afghanistan Study Group Report: Revitalizing Our Efforts, Rethinking Our Strategies, 24

⁶⁷ Joshua Walker, *NATO’s Litmus Test: Prioritizing Afghanistan* *Calgary Papers in Military and Strategic Studies* (Calgary: Centre for Military and Strategic Studies, 2007), 71

⁶⁸ “Afghans years away from taking over own security: Hillier,” *CBC News* October 25th 2007 <http://www.cbc.ca/world/story/2007/10/25/hillier-afghan-mission.html>.

American involvement must be adjusted, and the focus upon “the ‘light footprint’ in Afghanistan . . . be replaced with the ‘right footprint’ by the U.S. and its allies”.⁶⁹ Strategies in any sector that improve human security will contribute towards the efficacy of American counterinsurgency. Similarly, effective COIN will result in improved human security for the Afghan people. When combined, the application of human security principles to the execution of counterinsurgency will result in the most likely satisfaction of the objectives of both.

Conclusion

Human security has never been as prominent an element of American foreign policy as it has been in other official and military circles. Indeed, to some it has been associated with the kind of ‘window-washing’ that they believe is categorically beneath the dignity of the United States military to engage itself in. Alas, such attitudes are out of sync with the realities of the Afghan conflict in which the US finds itself embroiled. As stated at the beginning of this paper, this fundamental misunderstanding of the war in Afghanistan constitutes one of the many “self-inflicted wounds”⁷⁰ that the US and its allies have forced upon themselves. The result was that “the U.S. not only was unprepared for the aftermath of its initial military intervention, [but] it lacks the tools and skill sets to understand the sheer scale of the effort required, how long a successful intervention would take, and the level of resources that would be required”.⁷¹ As such, the manner in which the war was initially waged was in line with the post-Vietnam preference for American war-fighting, the emphasis being on aerial bombing and brute force with a high tolerance for civilian casualties as the short term cost of ultimate success. The failure of this manner of warfare to result in success, or even foster conditions conducive to success, has today become glaringly apparent. As a result, the United States and its allies in Afghanistan have begun to shift their focus towards a more holistic, restrained, and human-focussed set of tactics.

At the heart of this shift are changes being made to American counterinsurgency doctrine, as laid out in the new *Army/Marine Corps Counterinsurgency Field Manual*. Internalizing the fact that “good intentions have never been a substitute for competence,”⁷² the *Field Manual* purposefully reorients the doctrinal underpinnings of American COIN from an enemy-centric focus with a heavy emphasis on combat and number of enemies killed towards a civilian-focus which takes as its core objective the preservation of human security for non-combatants. This dramatic shift in military doctrine underscores the reality that counterinsurgency operations can only be successful if they take as their premise the

⁶⁹ Afghanistan Study Group Report: *Revitalizing Our Efforts, Rethinking Our Strategies*, 5

⁷⁰ Cordesman, *Afghanistan, Iraq, and Self-Inflicted Wounds: The Strategic Lessons of Armed Nation Building*

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⁷¹ Ibid

⁷² Ibid 4

valuation of the individual, and acknowledge that risk must be shared more equitably between civilians and counterinsurgents for an insurgency to be denied popular support. In this way, the principles of human security that underpin the new COIN doctrine provide a conceptual bridge capable of satisfying American strategic objectives through its chosen tactical means. The new counterinsurgency doctrine demonstrates the practical relevance of human security to military operations, and provides a crucial furtherance of the acceptance of the human security doctrine within international political and military decision-making processes.

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Of Identity and Foreign Policy Decisions- Israel and the Bombing of Osirak

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On June 7, 1981 the government of Israel under Prime Minister Menachem Begin launched a military raid to destroy the Osirak nuclear reactor near Baghdad, Iraq. In a secret mission sixteen military planes flew deep into Arab territory to attack Iraq, a country that does not share border with Israel. Why did the government of Israel decide to do this? In this essay I will argue that Israel's decision to bomb the Osirak nuclear reactor was deeply rooted in Israeli identity; an identity constructed around a history of persecution. Identity has led Israel to adopt an ideology that is meant to guarantee the state's survival at all costs. The objective of this essay is to explore the impact of Jewish identity on this foreign policy decision by analyzing the attack through the lens of Social Identity Theory. I will set the stage by explaining Israel's foreign policy decision, and by summarizing Social Identity Theory. I will then elaborate on how this theory applies to "Operation Babylon", and evaluate whether or not using it as an analytical tool helps explain the outcome of the decision at hand. Ultimately this will prove that Israeli identity based on Jewish history significantly impacted the decision to launch an attack on the Osirak nuclear plant.

Whether or not to militarily destroy Osirak was a deep concern of the Israeli leadership throughout the late 1970s when Iraq made an effort to advance their nuclear program. In 1976 Iraq signed an agreement with France that allowed the dictatorship under Saddam Hussein to purchase an extremely powerful nuclear research centre, including Osirak, a 70MW Osiris-type reactor.¹ The reactor was suited primarily for research, rather than energy production, thus its purchase was judged unusual by many experts.² Although the reactor was subject to IAEA inspections its development was watched apprehensively by the Israeli Prime Minister Menachem Begin who suspected that the reactor would be the missing link to Saddam Hussein's ability to produce a nuclear weapon.³ In 1978, Prime Minister

¹ Isreal, *The Iraqi Nuclear Threat: Why Isreal Had to Act* (Jerusalem: The Government of Isreal, 1981), 9-10.

² Shia Feldman, "The Bombing of Osiraq Revisited," *International Security* 7.2 (1982): 116.

³ Avi Shlaim, *The Iron Wall: Isreal and the Arab World* (New York: W.W. Norton & Company Inc., 2000) 385.

Menachem Begin proposed a military raid on Osirak in a meeting of Israeli senior ministers and experts but the majority of attendants opposed a precipitated action.⁴ It was not until the Iranian attack on Osirak in 1980 -which lightly damaged the reactor- that Begin was able to win over the majority of ministers on the basis of a report that predicted an early reopening of the facility.⁵ Though the true capacities of the facility were still unclear, as it was yet to become operational, and international condemnation seemed a likely consequence to the attack, the ministers present voted for the attack. In making this foreign policy decision Israel made an unconventional move to terminate the advance of Iraq's nuclear program.⁶

To provide context for the following assessment of how identity plays into this foreign policy decision it is necessary to explain Social Identity Theory. According to the article "Identity Theory and Social Identity Theory" by Jan E. Stets and Peter J. Burke; Social Identity Theory is based around three main principles: "self-categorization", "depersonalization", and "self-evaluation". "Self-categorization" explains how an identity is formed, given that "the self is reflexive in that it can take itself as an object and can categorize, classify, or name itself in particular ways in relation to other social categories or classifications".⁷ This suggests that actors compare and categorize themselves to form an "in-group" in relation to an opposing "out-group". Actors emphasise or adopt certain features to form a *self* in relation to an *other* that embraces contrasting features. "Depersonalization" describes the cognitive process of "seeing the self as an embodiment of the in-group prototype rather than as a unique individual".⁸ Actors define themselves as members of the group representing its characteristics, whereas the intensity of this association with the group, called "salience", varies by circumstance.⁹ Finally, "Self-evaluation" describes group members' desire "to enhance the evaluation of the in-group relative to the out-group and thereby to enhance their own self-evaluation as group members".¹⁰ This means that members of an in-group, for example a state, seek to distance themselves from the Other, namely another state, or a state's priory abolished Self in order to strengthen its identity. Social Identity Theory seeks to explain how social identities are formed and how they behave toward each other. It is an essential tool in evaluating how identity impacts Israel's decision to bomb the Osirak nuclear plant near Baghdad, Iraq.

Israeli identity is constructed around their history of persecution, whereas the accentuation of remembrance has led to strong identification of the Jewish people with the State of Israel. Jewish history over the past two thousand years was driven by suffering that ranged from discrimination and economic disadvantages to ghettoization and ethnic cleansing. Persecution of European Jews peaked in the tragic events of the Holocaust; a period that ultimately became a symbol for Jewish victimization. After the end of World War II the State of Israel maintained these memories vivid in the minds of Jewish refugees who largely made up Israel's population. This was the period of Israel's "self-categorization". In

⁴ Ibid 386.

⁵ Ibid 386-387.

⁶ Shimon Peres, *Battling for Peace* (Toronto: Random House Canada Limited, 1995) 184.

⁷ Jan E. Stets and Peter J. Burke, "Identity Theory and Social Identity Theory," *Social Psychology Quarterly* 63.3 (2000): 224.

⁸ Ibid: 231.

⁹ Ibid: 229.

¹⁰ Ibid: 232.

accordance with Social Identity Theory, the State of Israel formed its social identity by emphasizing Jewish persecution in history. The Jews' role in recent history functioned as the "out-group", and a notion of "Never again" grew in the minds of many Israelis. The state solidified this idea by creating reminders of the Jewish past. As Michael Barnett writes in his article, "[m]emorials such as Yad Vashem, Holocaust Remembrance Day, and a host of other symbols deeply embed the Holocaust in Israel's national identity".¹¹ Consequentially, the "depersonalization" of the Israeli Jews was drastically intensified. Since they were constantly reminded of the Jewish past, their identification with the State of Israel was on a constant high. Jewish prosecution is a predominant element in the foundations of Israeli identity. Through the preservation of Jewish history as a catalyst for Israeli "self-categorization" and "depersonalization", identity has become a strong element in Israeli society.

The Israeli decision to bomb Osirak stands in contrast with the Jewish past defined by persecution, yet this identity had a bearing on the decision. In 1981, thirty-three years after the establishment of the State of Israel, the state had developed a strong identity defined by the notion of preventing danger to the Jewish people of Israel at all costs. According to the Social Identity Theory principle of "self-evaluation" a group member, for example a state leader, constantly desires to ensure that the in-group continues to distinguish itself from the out-group. Israeli Prime Minister Menachem Begin's decision to destroy Osirak is a product of this. It is evidenced in a letter to U.S. President Ronald Reagan in which the Israeli leader responds to U.S. condemnation of the attack. In the letter Begin writes that "a million and a half children were poisoned by the Ziklon gas during the Holocaust. Now Israel's children were about to be poisoned by radioactivity. ... This would have been a new Holocaust".¹² Begin harshly rejects any criticism by reminding the global community that there can be no more Holocausts. Begin's reaction shows that Israel's behaviour in 1981 was a product of its leader's urge to continue on the state's path away from its prior Self; away from Jewish victimization and weakness. This is proof of the impact of Israeli identity on the state's decision to launch a pre-emptive attack on Iraq's nuclear program.

Israel's identity provided a framework to the Israeli leadership's decision making process. According to Michael Barnett in his article "Israeli Identity and the Peace Process", Social Identity Theory's "cultural foundations make possible and desirable certain actions".¹³ Given that Israel's cultural foundations are based around persecution, the state's options and preferences of foreign policy decisions are identified in the context of their past. According to Avi Shlaim in *The Iron Wall*, Prime Minister Menachem Begin opened the October 1980 meeting by saying that Israel had the choice of "either bombing the Iraqi reactor and risking hostile reactions from Egypt and the rest of the world or sitting with folded arms and allowing Iraq to continue its efforts to produce nuclear weapons".¹⁴ Although this statement is a clear implication of Begin's answer to the problem, its importance lies in what it omits. A possibility of negotiation is entirely ruled out. Israel fundamentally refuses to do what to its leadership might have seemed like appeasement of a hostile dictatorship ruled by the openly

¹¹ Michael Barnett, "The Israeli Identity and the Peace Process" *Identity and Foreign Policy in the Middle East*, eds. Telhami Shibley and Michael Barnett (New York: Cornell University Press, 2002) 64.

¹² Shlaim, *The Iron Wall: Israel and the Arab World* 387.

¹³ Barnett, "The Israeli Identity and the Peace Process" 81.

¹⁴ Shlaim, *The Iron Wall: Israel and the Arab World* 386.

anti-Semitic Saddam Hussein. Referring back to Social Identity Theory, negotiating with an anti-Jewish dictator would have constituted an inconsistency with the principle of "self-evaluation". Negotiation would ultimately mean bargaining, and thus granting the dictator results that suit him too. Given the Jewish memory of the appeasement of Adolf Hitler, which arguably led to Jewish persecution, such a move would hardly be an enhancement from the out-group. "[S]itting with folded arms and allowing Iraq to continue its efforts to produce nuclear weapons"¹⁵ was not an option for the same reasons. Therefore the only option possible and desirable, given Israeli identity, was to launch an attack on the Iraqi nuclear plant. Indeed, Israeli identity provided a decision making framework that dictated the outcome.

Nevertheless, it is important to address some potential inconsistencies in Israeli behaviour in relation to the Social Identity theory. As outlined by Shlaim, Israeli Prime Minister Menachem Begin has been accused of having used the raid on Osirak as a means to turn "boost the flagging fortunes of his party".¹⁶ In his memoirs "Battling for Peace", Shimon Peres writes that "he knew there was not much time [until Begin would launch the raid]: Begin wanted to bomb the reactor before the Israeli elections, which were only a few weeks away".¹⁷ Clearly, Begin used the attack, quite successfully, to save his re-election. However, this merely implies that the upcoming election had an impact on the timing of the raid, not so on the actual decision to order the bombing. Moreover, Begin's reasoning displayed in the 1978 meeting and the meetings months before the attack suggests that his motivation for the raid was honest fear of another Holocaust.¹⁸ Although complete proof of Begin's sincerity in this matter can not be provided, the negative consequences of the attack for Israel suggest that Menachem Begin genuinely feared the possibility of a nuclear Holocaust of Saddam Hussein's making.

Likely the most convincing evidence of the influence of identity on Israel's decision to launch the raid is the fact that the attack did not bear any positive outcomes for the state, other than the certainty of Osirak's destruction. Although the attack turned the tide of the upcoming federal election in favour of Begin's Likud party, it constituted a fatal blow to the Arab-Israeli peace process and Israel's reputation on the world stage.¹⁹ The Osirak attack triggered a wave of condemnation from the UN, and the International Atomic Energy Agency, and the United States.²⁰ The sole positive result for Israel was the fact that Osirak was no longer a threat; a development in line with Israeli "self-evaluation", because it further distanced the state from victimization that was part of Israel's historical self. The weight of Osirak's destruction on Israel's decision making indicates that identity played into the process.

Nonetheless, it could be argued that any other state would have decided like the Israeli leadership in the same situation. This, however, was not the case. As Amos Perlmutter mentions in the introduction to his book *Two minutes over Baghdad* among other countries

¹⁵ Ibid.

¹⁶ Ibid 385.

¹⁷ Peres, *Battling for Peace* 184.

¹⁸ Shlaim, *The Iron Wall: Israel and the Arab World* 385-387.

¹⁹ Ibid 387.

²⁰ Feldman, "The Bombing of Osirak Revisited," 136.

“[n]o doubt Pakistan and India have... considered the possibility of launching a pre-emptive attack on each other’s nuclear research centres and facilities to destroy each other’s capacity to develop nuclear weapons”.²¹ This plausible and fitting example shows two countries in the same situation as Israel in 1981. Both India and Pakistan were potential targets to each other’s nuclear capabilities. Additionally, the two countries share a border, were at war and, unlike Iraq, none of them were signatories to the nuclear Non-Proliferation Treaty. A pre-emptive strike of Osirak nature seems more likely here than in the case of Israel. Another example would be the United States whose nuclear weapons, to this day, target Russia. No attack was ever launched. The fact that these states have never attacked each other’s nuclear plants shows that the case of Israel is specific to the state’s identity and fear of extermination. Israel’s military raid on Osirak is a product of the state’s unique identity.

Social Identity Theory is a valid analytical tool to explain Israel’s decision to launch “Operation Babylon”. The principles of “self-categorization”, which outlines how social identity is formed, “depersonalization”, which explains individuals’ relation to the in- and out-group, and “self-evaluation”, which elucidates the strategy of group-members based on the group’s relation to the Other, are outstanding rationalizations of what led Israel to bomb the Osirak nuclear plant. Not only does the theory explicate the outcomes of this event in Israeli history but it illustrates everything Israel has done since its establishment. From the pre-emptive attack on Egypt in 1967, to the occupation of Palestine to control its citizens; all can be explained by Social Identity Theory, because all have the same motive: to distance Israeli identity from the other, namely to prevent Jewish victimization from ever happening again. Indeed Social Identity Theory is an excellent tool to analyse and explain Israeli behaviour in 1981 and in general.

Israel’s decision to bomb the Osirak nuclear reactor was deeply rooted in Israeli identity; an identity that is constructed relative to the Jewish historical Self that was defined by victimization and persecution. In this essay I analysed the foreign policy decision through the analytical lens of Social Identity Theory, and, based on its main assumptions and tenets, provided evidence that showed that identity was the leading force in Israel’s decision making process. Social Identity Theory is an excellent analytical lens for the analysis of this theory because it explains plausibly the establishment of Israeli identity and the decision making process that led up to the attack on Iraq’s advancing nuclear program on June 7, 1981. In fact, social identity is a powerful influence, and its bearing on a state’s foreign policy can be momentous.

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²¹ Amos Perlmutter, Michael Handel and Uri Bar-Joseph, *Two Minutes over Baghdad* (Cornwall: Robert Hartnoll Ltd., 1982) 12.

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The Lord's Resistance Army and the Irrationality of Peace

Phil Ricard

For twenty-one years, the Lord's Resistance Army (LRA), under the command of Joseph Kony, has terrorized Northern Uganda. While thousands of combatants have been killed, the real victims have been the innocent, as Kony's primary tactic is the pillaging of villages for goods, the wanton execution and torture of villagers, and the mass kidnapping of children to serve either as soldiers, porters or concubines. As of late 2006, it was estimated that a staggering 25,000 children had been forced into the LRA.¹ Government forces are allegedly only marginally better, as they have resorted to brutal counter-insurgency tactics including the creation of 'protected villages' or internally displaced person (IDP) camps; little more than glorified internment camps. Additionally, the government has encouraged the creation of civil defense groups, whose ranks are commonly filled with child soldiers armed with primitive weapons in contrast to the rebels equipped with automatic rifles, rocket propelled grenades and land mines.² Over a million civilians have been internally displaced, disrupting the already marginal economic activity of the region.³ When military costs and other externalities were compiled, it was estimated that as of 2002, the war had already cost Uganda 1.33 billion USD.⁴ The total cost in human lives is difficult to gauge due to government depreciation of the numbers, and increasingly the inexistence of basic state services such as statistics. Arguably, for an entire generation untold numbers of Ugandan children have been born outside the aegis of the state, thus their deaths may

¹ ICG, *Peace in Northern Uganda? Crisis Group Africa Briefing No. 41* (International Crisis Group, 2006), 7

² R. Doom and K. Vlassenroot, "Kony's Message: A New Koyné? The LRA in Northern Uganda," *African Affairs* 99.390 (1999): 31

³ As of the end of 2003, 1,200,000 civilians have been reported internally displaced. F. Van Acker, "Uganda & the LRA: The New Order No One Ordered," *Ibid* 103.412 (2004): 336

⁴ J. Dorsey and S. Opeitum, *The Net Economic Cost of the Conflict in the Acholiland Sub-Region of Uganda* (Kampala: Civil Society Organizations for Peace in Northern Uganda, 2002) 2-3

be unrecorded. Estimates vary from tens of thousands to millions; one source estimates that in 2002 alone, upwards of 400,000 had died as a result of the war.⁵

The continuation of this brutal conflict for over twenty years without any successful peace initiatives is puzzling. Why do the combatants still seek the escalation of brutality which occurs intermittently? The answer is simple; war in this region is more profitable than peace. As long as the two main actors in this conflict continue to profit from it, peace does not have a chance. This paper investigates the roots of the conflict, including the motivations of both the government under President Yoweri Museveni and the LRA under Joseph Kony, and then illustrates the findings in a game theory model of the war. The results provide significant policy prescriptions for any agents of peace hoping for a way out of the LRA quagmire.

A secondary objective can be accomplished through this analysis. Scholars have often questioned Kony's sanity or the coherence of his political motivations.⁶ In official discourse, he has been painted as "bizarre" and "as simply insane, the latest manifestation of incomprehensible African violence."⁷ Every goal he has professed to seek or principle he has expressed has run contrary to of his diplomatic overtures, strategies and tactics. He has terrorized the people he claims to champion, compromised his avowed Christian ideology with Muslim principles in exchange for Khartoum's support,⁸ and slaughtered nuns and infants while preaching peace. All the while he has refused to surrender amid clear evidence that neither he nor his people will gain anything from the war. However, this official assessment of Kony is flawed. Kony may appear erratic, and is by any ethical standard a heinous aberration, but he is nevertheless guiding the LRA with clear intentions and calculated strategy.

Fractured History; Forgotten Hope

While the purpose of this work is not historical, and as such the complex and lengthy societal convulsions which led to the present conflict will not be covered in detail, it is nevertheless necessary to briefly revisit Uganda's history to draw conclusions about the motives

⁵ The deaths are particularly due to starvation, AIDS, and lack of basic services; Lukwiya Ochola, The Acholi Religious Leaders' Peace Initiative in the Battlefield of Northern Uganda: An Example of integral, inculturated and ecumenical Approach to Pastoral Work in a War Situation (Diss: Leopold-Franzens-Universität Innsbruck, 2006)

⁶ For instance, Doom & Vlassenroot find it difficult to see any political motive emerging from Kony's leadership, other than the significance brought exogenously from his environment. Akhavan discusses the ideological incoherence of the LRA and Van Acker suggests that Kony is a Millenarian fanatic whose goals cannot be separated from Acholi desperation – leading to a loss of clear rationality; Doom and Vlassenroot, "Kony's Message: A New Konye? The LRA in Northern Uganda," 403-421 and F. Van Acker, "Uganda & the LRA: The New Order No One Ordered," *African Affairs* 103.412 (2004): 336

⁷ A. Branch, "Neither Peace nor Justice: Political Violence and the Peasantry in Northern Uganda, 1986-1998," *African Studies Quarterly: The Online Journal of African Studies* 8.2 (2005): 2

⁸ Examples include praying towards Mecca, forbidding the keeping of pigs, and respecting Friday as a holy day; The Scars of Death: Children Abducted by the Lord's Resistance Army in Uganda, (New York: Human Rights Watch, 1997), 86. This is not to mention agreeing to serving as a proxy force against one of Sudan's own revolutionary groups, which is Christian and fights partly to gain freedom from that government's Islamic intolerance; Doom & Vlassenroot, 28.

of the warring parties and many of the misconceptions surrounding the war. Three historical divides are related to the present conflict. The first is North/South and the second is tribal, both of which can be analyzed together. The third is religious. All of these find their roots in British colonial rule.

These historic animosities matter because the primary victims of the present conflict are residents of the Northern areas, primarily of Acholi descent, who since the time of British colonialization have been marginalized by the privileged and developed South.⁹ Consequently, the Acholi and other Northern tribes eventually became reservoirs of uneducated, unskilled labor for use in the South. The primary venue in which a Northerner could find work was in Uganda's colonial army. As Uganda gained independence after World War II, Acholi society perpetuated this trend in the face of institutionalized poverty and marginalization, thus forming what one author called a "military ethnocracy."¹⁰ Tribal animosities against the Acholi only increased when the military was used in perpetual repression and cyclical elite revolution, as the power vacuum left by the British after independence was never filled by any stable and legitimate authority. One strongman after another held office, each time ignoring the rule of law and decimating his opposition. These convulsions followed tribal lines, and could be likened to a game of 'king of the hill,' where one struggles to get to the top and arrives exhausted, only to be put down by the next contender.¹¹ In the present manifestation of the state, the Acholi are once again marginalized and reviled by the population and the state itself, which cannot be distinguished from the ruling party.¹²

While religion provides the structure and mythos of the LRA, religion itself is not truly salient in the conflict. Understanding Uganda's past helps to explain why the LRA chooses to identify itself on religious grounds despite its tribal makeup. Since pre-colonialism, Protestant and Catholic missionaries fought for the souls of Uganda.¹³ They did this while mutually attacking Uganda's traditional religions. In fact, a more formal British presence was in part due to the request of Protestant missionaries for help against Catholics.¹⁴ From that moment, all politics within Uganda took on a heavy religious overtone, though political actors were rather secular in reality. Thus, the LRA may appear Christian, but does not embrace Christianity. In truth, Kony has adopted a variety of religious tenets; some from Christianity, others from Islam,

⁹ The South of Uganda was colonized first, and so it became the seat of government. From there, the periphery of Uganda, including the North, was colonized with the express purpose of supporting the South; Doom and Vlassenroot, "Kony's Message: A New Koyne? The LRA in Northern Uganda," 7-10

¹⁰ Ibid: 8

¹¹ On average, from independence in 1962 to Museveni's coup in 1983, an executive would remain in power for only 25 months, usually to be deposed in a bloody battle for state power. For a list of Uganda's leaders See: Ochola, The Acholi Religious Leaders' Peace Initiative in the Battlefield of Northern Uganda: An Example of integral, inculturated and ecumenical Approach to Pastoral Work in a War Situation 65-66

¹² So much so that those Acholi fortunate enough to find work in other districts of Uganda usually change their names to avoid persecution; Ibid 3, 71

¹³ S. R. Karugire, A Political History of Uganda (Nairobi: Heinemann, 1980) 65

¹⁴ For an extensive discussion of early religious machinations in Uganda, by Catholics, Protestants and Muslims alike, See Ibid Karugire, 49-97.

and many more from traditional Acholi spirituality.¹⁵ This is quite possibly a tactic to garner popular support from a spiritually diverse populace. One interesting treatment of the conflict corroborates this notion; Van Acker outlines that the Acholi, who have long been suffering in abject misery, have largely turned away from material politics in the hopes of finding spiritual salvation.¹⁶ Consequently, political actors in Acholiland have increasingly promised this salvation to their followers.¹⁷ The blaring contradictions between Kony's 'desire' to create a Christian theocracy and his deliberate targeting of Catholic institutions are therefore not surprising.¹⁸ Religion is thus discounted as an honest motive for the perpetuation of war by the LRA; it is a political artifact, not a genuine conviction.

Kony and the Lord's Resistance Army

Kony's tale is a bizarre one. Much speculation adorns his pre-guerilla days.¹⁹ What is certain is that he was born and raised in an environment of perpetual warfare. With few prospects, he turned to the Uganda People's Defense Army (UPDA) as a 'spiritual mobilizer.' When the UPDA signed a peace accord with Museveni, Kony left for Sudan along with a portion of the UPDA which refused to surrender. As most in Acholiland feared possible government retribution after the UPDA's surrender, many opted to join the rebels in Sudan rather than face the government's army.²⁰ What followed was a succession of rebel groups who fought the government. When one was defeated, its remnants regrouped and became the next one. The LRA is the latest incarnation of this phenomenon. Under Kony, it claimed to fight for Christian governance founded on the Ten Commandments and the emancipation of its Acholi kinsmen.²¹ As the conflict progressed with no sign of imminent victory or abatement, however, a vicious circle of violence developed. Despite clear signs that the LRA was losing popular support (and consequently fertile recruiting grounds), surrender meant probable death at the hands of the

¹⁵ For a detailed explanation of the intermingling of Christian and tribal spirituality in the LRA's projected and self-image, See: Van Acker, "Uganda & the LRA: The New Order No One Ordered," 348-351

¹⁶ Millenarian tendencies, where religious salvation is seen as imminent for the group, and in some ways rationalize the use of terror and violence, are explained in detail in Van Acker, 346.

¹⁷ Another example is the Holy Spirit Mobile Forces (HSMF), the LRA's predecessor revolutionary group who sought to purify Acholiland and the rest of Uganda through a combination of guerilla violence and religious ritual; Van Acker, 346.

¹⁸ For instance, Kony reportedly once ordered his commanders to kill all priests in Northern Uganda; HURIPEC, The Hidden War: Forgotten People - War in Acholiland and its Ramifications for Peace and Security in Uganda (Kampala Makerere University, Human Rights and Peace Center 2003), 1

¹⁹ One article suggests that he was a small-time gang leader. Most agree that he was a school drop-out and an altar boy in service of the church. He was the cousin of Alice Lakwena, an Acholi revolutionary leader who founded the HSMF. After her defeat, her father took on the mantle of Acholi revolutionary leadership, only to be himself defeated, leaving the path to power open to Kony; Doom and Vlassenroot, "Kony's Message: A New Koyne? The LRA in Northern Uganda," 21

²⁰ Many instances of NRM abuses against the Acholi have exacerbated this concern; The Scars of Death: Children Abducted by the Lord's Resistance Army in Uganda, 73-74

²¹ Doom and Vlassenroot, "Kony's Message: A New Koyne? The LRA in Northern Uganda," 20-22

government. Thus, Kony instead opted to become both an enemy of the state and of his people, relying on mass abductions for recruits and terror tactics for perpetuating the myth of his cause.²²

Over time, the LRA became a plague for Acholiland. It has delegitimized the Acholi's credible political grievances. It has demonstrated that its Christian motive is defunct. An analysis of the LRA's targets during its incessant attacks also counter the claim that the LRA fights for the emancipation of the Acholi as a whole, or of the removal of the current Uganda administration under Museveni. If that were the case, Kony's primary targets would be government personnel and installations. He would also arguably never attack the Acholi themselves, or at most only those that were deemed sympathizers of the government. Counter intuitively, the LRA now 'specializes' in terrorizing Acholi civilians, NGOs and Catholic institutions.²³ Such a pattern clearly suggests that the LRA no longer fights for the Acholi.

Who, or what, then, does the LRA fight for? Two mutually reinforcing motivations guide Kony and his LRA. Firstly, the violence demonstrated by the LRA necessitates further violence, trapping its leaders in a vicious circle.²⁴ Kony and the LRA brass are wanted men. Surrender would mean a very bleak future. Additionally, the Government of Uganda has requested and received international condemnation of the LRA's actions. The International Criminal Court (ICC) has issued arrest warrants for Kony and his top aides.²⁵ While this seems to be a step in the right direction, these warrants have not been supported by any real international action to put an end to the conflict.²⁶ Consequently, any promise of amnesty given by the government in negotiations must be viewed by Kony as a promise which cannot be kept. The government therefore has no leverage for Kony's surrender.

This lack of incentive for surrender is compounded by a second motive; LRA commanders enjoy a very high standard of living which they could not hope to attain otherwise.²⁷ The LRA's operations have become self-sufficient in terms of wealth and recruiting, thus it has become a "self-sustaining war machine."²⁸ Through raids on villages and 'protected' camps, they loot supplies and kidnap children for the purpose of filling their ranks. Excess goods are sold back to the black market in Northern Uganda and Sudan, generating wealth for LRA

²² F. Van Acker, "Uganda & the LRA: The New Order No One Ordered," Ibid 103.412 (2004): 351, Doom and Vlassenroot, "Kony's Message: A New Koyné? The LRA in Northern Uganda," 25

²³ The LRA actually avoids confrontation with government forces, as it is more costly to fight an armed opponent. Countless examples of the LRA's terrorist tactics are listed throughout the literature. A particularly poignant rendition is given in Human Rights Watch's report on the conflict which focuses on the civilian trauma, and more particularly the experiences of Acholi children; The Scars of Death: Children Abducted by the Lord's Resistance Army in Uganda,

²⁴ Doom & Vlassenroot touch on this notion, branding Kony a 'Mad Max,' but do not draw out the implications; Doom and Vlassenroot, "Kony's Message: A New Koyné? The LRA in Northern Uganda," 26

²⁵ The court's website contains data from the court's perspective; ICC, International Criminal Court: Uganda (Uganda: ICC, 2007), <http://www.icc-cpi.int/cases/UGD.html> An outsider's review of ICC involvement is offered by Akhavan.

²⁶ ICG, Peace in Northern Uganda?, 15

²⁷ It is important to consider Kony's position, a man who went from choirboy to general, or that of his top aides, ex UPDA commanders who have been fighting for their entire lives, and could not exactly hope for a change of career.

²⁸ ICG, Northern Uganda: Understanding and Solving the Conflict *Crisis Group Africa Briefing No. 77* (International Crisis Group, 2004), 4

commanders.²⁹ Kony and his proven warriors also take multiple 'wives' from the kidnapped girls.³⁰ The Sudan connection is also important, as Sudan has repeatedly funded and armed the LRA in exchange for two pillars of its own defense strategy; destabilizing Uganda and creating a proxy force to act as a hedge against its own internal insurgency, the Sudan People's Liberation Army (SPLA).³¹ Even in recent years, where the SPLA insurgency against Khartoum has been kept relatively quiet by agreements towards peace, it is rumored that Khartoum quietly supports the LRA in case of a collapse of the peace process. And should that war resume, Kony can expect an increase in funds, food and weaponry. In the meantime, the LRA is also benefiting from food, other survival goods and even money provided by the international community in exchange for nominally taking part in peace negotiations.³² Kony and his generals thus have a very simple, very rational calculus in mind when choosing war over peace. Even when the LRA demonstrates a tendency towards peace if feasible,³³ they know that peace means death or imprisonment. War means spoils, slaves and rent from Khartoum. This information is a very crucial component of any formula for peace. Kony's rebels may be a product of Uganda's politics, but they certainly are not, of themselves, political actors. They are modern day pirates, whose political claims are meant, just as their spiritual claims, only as thinly veiled propaganda in their desperate attempt at legitimacy and popular support.

Museveni and the Government of Uganda

Museveni has been hailed by the West as one of Africa's 'new breed of leaders', the democratic elite bringing about economic development and social reforms across the continent.³⁴ This compliment is a far cry from the truth. Museveni himself became President of Uganda only after waging a vicious guerilla war. Lukwiya Ochola lists a variety of sources that corroborate the fact that Museveni was drunk for power. When he lost a national election, he started a war to become President; "What he couldn't achieve by the ballot, he has gained by the bullet."³⁵ Arguably, it could be said that Museveni had to forcefully wrest power from dictators before creating democratic institutions. However, anyone who hails Museveni's democratic leadership should also find a way to explain why he has been in power for over two decades. When his

²⁹ Ibid, 5

³⁰ For a focused account of this practice and the treatment of girl abductees, See: Abducted and Abused: Renewed Conflict in Northern Uganda, (New York: Human Rights Watch, 2003), 28-31

³¹ For more on the Sudan connection, See: Van Acker, "Uganda & the LRA: The New Order No One Ordered," 352

³² ICG, Northern Uganda Peace Process: The Need to Maintain Momentum *Crisis Group Africa Briefing No. 46* (International Crisis Group, 2007), 1-6

³³ Vincent Otti, the LRA's second in command, declared as a demand in peace negotiations after 20 years of fighting that "we want to go home." This also points to motive for the insurgency, which is apolitical; ICG, Peace in Northern Uganda?, 9

³⁴ J. Oloka-Onyango, "New-Breed Leadership, Conflict, and Reconstruction in the Great Lakes Region of Africa: A Sociopolitical Biography of Uganda's Yoweri Kaguta Museveni," Africa Today 50.3 (2004): 30

³⁵ Ochola, The Acholi Religious Leaders' Peace Initiative in the Battlefield of Northern Uganda: An Example of integral, inculturated and ecumenical Approach to Pastoral Work in a War Situation 34

National Resistance Movement (NRM) defeated the previous national military (which was composed largely of Acholi), it was transformed into the new national army. From that moment on, the Acholi were nearly entirely barred from national power and resources.

It is important to see Museveni and the government's actions in light of Uganda's history. While the LRA is not an agent of the Acholi, neither is the government. Precisely because of the tribal animosities that direct politics, the LRA will never truly be considered a priority so long as it remains an Acholi problem.³⁶ In reality, the LRA has pursued a course of action which ironically coincides with government interests: the weakening and marginalizing of Acholi society.³⁷ This has served a dual purpose. First, the Acholi have been too occupied fighting an internal war to seek national power. Second, Museveni has ample excuses to withhold developmental assistance to the North, pillage its resources further, and concentrate executive power away from democratic mechanisms.³⁸ All of this makes morbid sense in light of the government's track record regarding the LRA.

For example, the long-standing government strategy of herding the Acholi into IDP camps to deny the LRA access to the population means that the displaced have had to leave behind most of their belongings and lands. Once in the camps, they have very limited assistance in terms of food, water and supplies. Conditions in these sites are more reminiscent of Nazi concentration camps than of protected camps. Sanitary conditions, the lack of supplies, inadequate health services and nonexistent latrines, has resulted in catastrophic casualties among the Acholi – worse than those inflicted by the LRA outside the camps.³⁹ While horrible, these conditions might be rationalized if the Acholi were free to enter and leave the camps. But contrary to an offer for assistance, the IDP camps are in fact an imposed measure. The Acholi have been denied access to their land, cattle and other forms of livelihood outside the camps.⁴⁰ Once in the camps and stripped of all independence, the Acholi are severely mistreated by the soldiers who are supposed to protect them. One disturbing example is provided by Lukwiya Ochola:

³⁶ An example of this government tendency is found in the fact that Museveni has so far held back from disarming the Karamojong tribe and stopping them from raiding Acholi cattle *en masse* (it must be stressed that cattle is the primary means of accumulating capital and status in the north). This failure has been linked to the fact that while the Acholi vote strongly against Museveni in national elections, the neighboring Karamojong tribe vote overwhelmingly in his favor; Doom and Vlassenroot, "Kony's Message: A New Koyne? The LRA in Northern Uganda," 12-13

³⁷ HURIPAC, The Hidden War: Forgotten People - War in Acholiland and its Ramifications for Peace and Security in Uganda, 31

³⁸ Van Acker, "Uganda & the LRA: The New Order No One Ordered," 342-344

³⁹ For a vivid description of these camps, See: The Scars of Death: Children Abducted by the Lord's Resistance Army in Uganda, 62-64

⁴⁰ Ochola, The Acholi Religious Leaders' Peace Initiative in the Battlefield of Northern Uganda: An Example of integral, inculturated and ecumenical Approach to Pastoral Work in a War Situation 63

*"Rape and generalized sexual exploitation, especially by soldiers, have become 'entirely normal.' In Uganda, HIV/AIDS has become a deliberate weapon of mass destruction. Soldiers who have tested HIV-positive are then especially deployed to the north, with the mission to commit maximum havoc on the local girls and women. Thus from almost zero base, the rates of HIV infection among these rural communities have galloped to dramatic levels [...] The average HIV/Aids prevalence in IDP camps is at 35 percent, six times higher than the national average."*⁴¹

Meanwhile, as the Acholi are displaced, accusations have been made that the government is selling off large swaths of their lands to foreign buyers. Some redrawing of district boundaries has also occurred at the detriment of the absentee Acholi,⁴² as the settlements were given to neighboring tribes for immediate use. The obvious question then becomes; if it is safe enough for other tribes to be on Acholi soil, why is it not safe enough for the Acholi themselves? Similarly, large amounts of cattle have been redistributed to the South while Northern farmers are away from their herds.⁴³ The conflict's economic cost must therefore not be seen as a net loss to Uganda. To properly understand the dynamics of the war, it must be seen as a reallocation of wealth. While it is true that Uganda is losing millions every year that the war continues, it gains more through foreign assistance,⁴⁴ and the losses are further buffeted for those not immediately in the conflict zone by the pillage and redistribution of Acholi resources. Meanwhile, what Lukwiya Ochola and HURIPEC describe as genocide is slowly, quietly occurring in open view of a complacent international community.⁴⁵

Rather than help, foreign actors provide further incentives for the continuance of war. The US provides military assistance to Uganda in its efforts against the LRA.⁴⁶ The US may view this as part of the 'War on Terror' as Museveni is an ally against Islamic Sudan, yet it is likely that Museveni sees this as an incentive for protracted war, since military assistance might end in the absence of war. Moreover, Museveni's government has at times funded the SPLA in its war against Khartoum. Hence Sudan's financial backing of the LRA can be understood as direct retaliation for this fact rather than as unjust meddling.⁴⁷ If the Government of Uganda

⁴¹ Ibid

⁴² Such as land sales to Colonel Gaddafi; HURIPEC, *The Hidden War: Forgotten People - War in Acholiland and its Ramifications for Peace and Security in Uganda*, 95

⁴³ Ochola, *The Acholi Religious Leaders' Peace Initiative in the Battlefield of Northern Uganda: An Example of integral, inculturated and ecumenical Approach to Pastoral Work in a War Situation* 63

⁴⁴ Over 50 percent of Uganda's budget is provided by donors; ICG, *Northern Uganda: Understanding and Solving the Conflict*, 12

⁴⁵ HURIPEC explains that the 'divide and rule' policies of the British Empire are still at play in Ugandan political structures, and have paved the way for "conditions of genocide all round;" 30. Lukwiya Ochola goes further and claims this to be an unqualified and deliberate case of genocide on the part of the Government of Uganda, 61-62.

⁴⁶ A detailed description of US involvement, such as a 3 billion USD military aid package provided by the US in 2003, is found in HURIPEC, *The Hidden War: Forgotten People - War in Acholiland and its Ramifications for Peace and Security in Uganda*, 82-87

⁴⁷ Ibid, 80

desired peace, it could agree with Khartoum to a cessation of proxy hostilities. But this would run counter to US interests and consequently could have dire effects. The ICC warrants are also evidence of Museveni's intent. Much political capital was gained by bringing a case to the Court. It legitimized Museveni's public desire to bring Kony to justice, but actually damaged peace efforts. Having carefully thought ahead, no actor serious about peace would have made this request of the ICC. The warrants, rather than a move towards peace and justice, could easily be seen as an ingenious strategy to lock Kony in a mutually profitable war; a guarantee on Museveni's investment.

Another incentive for war is the accumulation of benefits for officers who serve in the field.⁴⁸ In laymen's terms, they make money by fighting, not by staying in the barracks. It is an incentive for the Uganda high command to perpetuate war, since they are themselves at little risk of physical harm,⁴⁹ and the Acholi are in any case their old enemies from their own days as revolutionaries. Further evidence of this motive can be found in the government's reluctance to strike a killing blow to Kony. In 'Operation Iron Fist,' for instance, the Ugandan army chased the LRA into Sudan, denying them sanctuary and forcing them to do battle. Massive casualties were inflicted. The operation was an acclaimed success. Nevertheless, its momentum was cut before complete victory could be claimed.⁵⁰

The question is consequently not whether there is something to be gained from war, but whether there is something to be gained from peace. Uganda is a country where there is little difference between the ruling party and the state.⁵¹ These parties are founded on tribal lines. The state apparatus has never since independence served all of its constituents. Rather, it has always oppressed a portion of the population; in this case, the Acholi. Thus the government has no moral impetus for ceasing the war, which does not harm the 'ruling' constituencies of the South. The benefits of peace would include a safer environment for foreign investment, but the South is already safe and under development. Another benefit would be a secure political environment, but this would possibly entail power-sharing with Northern tribes. Museveni would also have a better image abroad, but he is already hailed as an African hero and nominated for future developmental assistance. The only cries of bewilderment heard are those of non-governmental organizations (NGOs), who seem to have little effect.

⁴⁸ Not only are there danger benefits to serving in the field against the LRA, but officers also collect extra pay from bloating their rosters with 'ghost soldiers' and collecting their pay; ICG, Northern Uganda: Understanding and Solving the Conflict, 15.

⁴⁹ Ironically, the army uses tactics similar to Kony's by enlisting the aid of civil defense groups, mostly composed of youths. While regular army units are given command positions away from the fighting, it is these poorly armed Acholi children which do the brunt of the fighting against their abducted brothers; HURIPEC, The Hidden War: Forgotten People - War in Acholiland and its Ramifications for Peace and Security in Uganda, 49.

⁵⁰ ICG, Northern Uganda: Understanding and Solving the Conflict, 15.

⁵¹ Party here is meant to refer to the group of elites who rule, not an actual political party as in the Western conception of the term. In fact, Museveni for a long time abolished parties and ran a 'no-party democracy.'

Modeling the Conflict: Strategic Form Games and Variable Sums

This vicious guerilla war has continued for two decades, with peace brokers coming up empty handed at every negotiation. Each time, at least one of the two belligerent groups breaks off negotiations or worse, remains at the table while taking advantage of ceasefires to gain a tactical upper hand before fighting resumes. Peace brokers do not take into consideration the fact that neither of the warring parties actually wants the war to stop. Game theory can help to elucidate this conflict and the reasons for its persistence. The negotiating deadlock can be interpreted easily with a strategic form variable-sum game. Additionally, the question of Kony's apparent insanity will inevitably be resolved through these proceedings, as his rationality is not in question when one realizes that his actions are in accordance with his goals.

Game theory, broadly, is a method of analyzing politics in which a conflict can be distilled into its crucial factors and then mathematically solved.⁵² This is done by assigning numeric values to the various possible outcomes of a conflict, which represent the payoff of such an outcome to political actors (a higher number signifies a higher utility). This determines which course of action rational actors would embark upon given a particular set of choices. A 'game' in game theoretic jargon is a representation of a single conflict, usually implicating two or more 'players,' the interaction of which will produce the end-scenario. A strategic form game is a particular way to represent a scenario, whereby actors must select their strategies independently of one another, but it is only through interaction of the players' strategies that an outcome is produced. Consequently, it is fundamental to either player's strategy to try and understand their opponent's strategy. Figure 1 below illustrates an outcome matrix of a sample strategic form game.

Fig. 1: Strategic Form Games

		Player 2	
		a	b
Player 1	A	1,1	2,2
	B	2,2	3,3

The numbers in the boxes are the expected utilities of outcomes for each player. The value before the comma indicates the expected utility of such an outcome to Player 1. The value after the comma indicates the expected utility of such an outcome to Player 2. The term variable-sum indicates that the payoffs for both actors are not taken from a zero-sum pool. In other words, a gain for one player is not necessarily a loss of the other player.

⁵² J. D. Morrow, *Game Theory for Political Scientists* (Princeton: Princeton University Press, 1994) 7 All game theoretic concepts utilized in this work can be found and explained further in Morrow, chapters 2-4.

In Figure 1, Player 1 would either get 1 or 2 from playing strategy A, depending on Player 2's chosen strategy. Conversely, with strategy B, he risks gaining either 2 or 3, again depending on which strategy Player 2 utilizes. Player 2 is in an identical situation. Which strategy should Player 1 adopt? The answer is B, since irrespective of Player 2's own strategy, Player 1 is certain to gain more. This is termed a dominant strategy. Similarly, it is expected that Player 2 will play strategy b, thus concluding that the outcome of the game would rationally be the intersection of strategies B and b, yielding payoffs of 3, 3. This type of outcome is termed a Nash equilibrium, because no player would benefit from unilateral defection to another strategy.

Strategic form variable-sum games can increase in complexity significantly. However, the above knowledge is all that is required for this analysis, other than a brief explanation of preference ordering. Ranking preferences with cardinal values, where variables are measured precisely, is not necessary for this analysis, as ordinal values, which assume that $1 < 2 < 3 < 4$ are more useful here. From these preferences the numerical payoff of each outcome for each player, for the sake of modeling, can be inferred. In a classic variable-sum game such as the one in Figure 1, there are four possible outcomes. The preference ordering for both players in Figure 1 would be $Aa < Ab = Ba < Bb$ (note that the preference orderings of both players are only identical because the payoffs are identical, as a different game could have different orderings).

Kony vs. Museveni: Determining Payoffs

Fig. 2: Kony vs. Museveni

		Museveni	
		war (w)	peace (p)
Kony	War (W)	?, ?	?, ?
	Peace (P)	?, ?	?, ?

The following section is dedicated to modeling the conflict in the manner presented above, utilizing conclusions produced in the previous sections as groundwork for producing preferences and payoffs for the two actors. The model necessitates a fundamental assumption about the conflict, that both Kony and Museveni have an effective grip on power in their respective organizations. As such, the two actors can be modeled as unitary and rational. This is a safe assessment considering the manner in which these adversaries have behaved throughout the conflict and the duration of their reigns.

This work previously clarified what the real preferences of both parties are, based on historical analysis and their choices so far in the conflict. These preferences will now be assigned numerical values and placed within the model. Kony has the following motivations for perpetuating the conflict while Museveni does the same (Ww); fear of loss of material wealth,

social status and freedom, and the knowledge that he can generate, through the war itself, enough resources to indeterminately sustain a protracted conflict. This is tempered by any military pressure – or attrition, which Museveni exerts on him. If Museveni decides to opt for peace while Kony wages war (Wp), the payoffs remain the same, minus attrition from Museveni. Conversely, if Kony seeks to negotiate a peace while Museveni wages war (Pw), then Kony retains his status, but incurs some loss of resources from not actively pillaging the North and raiding the SPLA for rent. Kony also faces attrition from Museveni, which is accrued by the tactical disadvantage of fighting defensively (since a political move towards peace must be accompanied by military actions of good faith, thus the lack of offensive operations). The major fear here is that this outcome could result in military defeat, which is worse than surrender. If both Kony and Museveni choose peace (Pp), then a peace settlement is reached and Kony gains whatever incentives were provided for in the peace plan (but relinquishes all independent status and resources). Remembering that amnesty for Kony's litany of crimes against humanity is no longer a credible commitment on the part of Museveni, any incentives are unlikely to be very attractive. The payoffs are listed below:

- Ww: Resources + Status – Attrition
- Wp: Resources + Status
- Pw: Status – (Attrition x Tactical disadvantage)
- Pp: Incentives provided by peace plan

From this listing a rank ordering for Kony's preferences can be inferred, which would become $Wp > Ww > Pp > Pw$. Thus, Kony's ordinal payoff attached to each outcome is as follows: $Wp = 4$, $Ww = 3$, $Pp = 2$, $Pw = 1$

Museveni's own motivations for fighting Kony head-on (Ww) are foreign aid from the US, lucrative employment for his officers, a pretext for concentrating executive power, and the further marginalization of the North. These can also be subsumed as resources and status minus the attrition suffered. If Museveni opts for aggressive military action while Kony seeks peace (Pw), Museveni maintains his status and resources, but does not suffer attrition. If Museveni seeks peace while Kony wages war (Wp), Museveni retains his status but loses resources he would otherwise gain from exploiting the North, and still faces attrition from Kony, which is accrued by the tactical disadvantage of fighting defensively. If both Museveni and Kony seek peace (Pp), Museveni retains his status as President, but loses resources and whatever he gave up as incentive during the peace plan. The payoffs are listed below:

- Ww: Resources + Status – Attrition
- Pw: Resources + Status
- Wp: Status – (Attrition x Tactical disadvantage)
- Pp: S - Incentives provided by peace plan

From this listing a rank ordering for Museveni's preferences can be inferred, which would become $P_w > W_w > W_p > P_p$. Thus, Kony's ordinal payoff attached to each outcome is as follows: $W_p = 4$, $W_w = 3$, $P_p = 2$, $P_w = 1$. If these ordinal payoffs are inserted in an outcome matrix, the results are seen in Figure 3. Figure 4 provides a descriptive matrix of the same event, using the following legend (capital letters indicate Kony's variables, while lower case letters indicate those associated with Museveni):

R/r: Resources gained from war

S/s: Status/Position in society

A/a: Attrition from fighting an aggressive opponent

T/a: Tactical disadvantage of fighting defensively against an aggressive opponent

I/i: Incentives of peace agreement

Fig. 3: Kony vs. Museveni
Ordinal Payoffs

		Museveni	
		war(w)	peace(p)
Kony	War (W)	3,3	4,2
	Peace (P)	1,4	2,1

Fig. 4: Kony vs. Museveni
Descriptive Payoffs

		Museveni	
		war(w)	peace(p)
Kony	War (W)	$R+S-A / r+s-a$	$R+S / s-(a*t)$
	Peace (P)	$S-(A*T) / r+s$	$I / s-i$

Kony vs. Museveni: Implications of the Model

With the incentives of both political actors in this conflict determined, the strategies that they are likely to adopt can be derived. Indeed, the result is a clear prognosis for war. Both Kony and Museveni have intersecting dominant strategies, which lead to the Nash equilibrium of (Ww). If either Kony or Museveni moves away from this equilibrium without first having a guarantee that the other will reciprocate, they will respectively cost their organization severe losses and allow their opponent to reap the rewards of this error. Peace only becomes appealing when compared to fighting at a tactical disadvantage, and only for Kony. However, even this fear is mitigated by the fact that Museveni does not seek the complete destruction of the LRA; only perhaps its occasional weakening to ensure it can be kept in check and not truly threaten the incumbent administration.

With this model, Kony's apparent irrationality becomes an untenable proposal. It only serves to muddle the situation further and is counter-productive to any peace effort. Academics and policymakers alike should abandon this notion and focus on what Kony and Museveni's motives may truly be, rather than assuming that their actions do not make sense when compared with the motives which they claim to uphold. Both Kony and Museveni claim to have different

motives than those which their actions account for, precisely because they are trying to hide their true intentions. For Museveni, this serves a dual purpose. Most importantly, it serves as a political smokescreen domestically and internationally. If he was brutally honest about his intentions in the North, he would most likely face an equally brutal popular uprising and the withdrawal of foreign aid. It also serves the purpose of confusing Kony into believing the government wishes to end the conflict (which by all indications has not worked thus far). This ruse would be useful to Museveni because if Kony changes his strategy, thinking that Museveni will reciprocate, the payoffs will be altered in the government's favor. Similarly, Kony's claims that he seeks negotiations and a peaceful resolution only serves to gain popular support in the North (which is failing) and confuse Museveni into changing strategies (which is also failing).

Paving the Road to Peace: Altering Payoffs

The ironic and unfortunate outcome of this work is that it demonstrates the irrationality of peace in Northern Uganda. Both players, Kony and Museveni, stand to gain from protracted war. The real losers of the conflict, the Acholi people, do not have any political voice to oppose the war, even less to end it. Nevertheless, this model shows how incentives could be crafted to arrive at a formula for peace. Clear moves towards ending Khartoum's support for the LRA would cut off its safe havens in South Sudan and access to new arms and ammunition. This would make the LRA suffer unsustainable attrition with every enemy contact, eventually becoming unable to keep up and reducing all payoffs associated with resources. Increasing the tempo of military operations against the LRA would also have a similar effect. Conversely, guaranteeing amnesty for Kony's rebels through a third party would increase the payoff of a peace initiative, since the primary hurdle here is the lack of plausible commitment by the government. All of these factors could together create an environment where Kony's payoff structure, and consequently his preferences, would shift towards peace.

Yet, the model dictates that there is a fundamental problem with all of these initiatives; the Government of Uganda is not willing to end the war. Consequently Museveni's payoffs must also be altered for peace to have a chance. This could be done by raising the awareness of US decision makers towards the conflict. Does Washington realize that its foreign aid to Uganda is being used to line corrupt politicians and generals' pockets and indirectly assist in destroying Acholi lives - and this with no apparent benefits to speak of? If Washington makes its aid to Museveni conditional on swift resolution of the conflict, or freezes aid payments until a peace agreement is reached, then this may reduce the payoffs of war for the government. A second, less likely scenario is a greater democratization of Uganda. While the country claims to be democratic, Museveni has been in power since 1986, and countless allegations of abuse of executive authority have been made against him. True democratization might allow for greater Acholi agency in the government, thus ensuring that legitimate Acholi issues are addressed. Similarly, giving greater equality of opportunity to Acholi men wishing to serve in the military,

particularly as officers, might realign the military's interests in the region. These last two propositions, however, are rather idealist for Uganda at this time. It is likely that Museveni's payoff structure, in the short term, will have to be influenced primarily through US aid or the lack thereof.

One solid conclusion which can be drawn is that this conflict will not be solved by Ugandans alone. This war desperately needs the international community's attention, as foreign actors are likely to see the war differently than Kony and Museveni. NGOs and the Acholi Diaspora should work harder to publicize the war, and more importantly heighten awareness of the war's real issues. Academics and the media have a similar duty. Governments such as the US and perhaps Britain (who has historic ties as colonial protector), could also throw their weight in the negotiations in terms of hard economic and military potential.

Conclusion

The history of Uganda's civil war and the motivations of both Kony's LRA and Museveni's national government have been surveyed. A game theoretic interpretation of the struggle has led to the conclusion that the calculus undertaken by the main political actors of this conflict, rather than being indicative of insanity, has been frighteningly rational. More positively, a set of carrots and sticks has been suggested which can be employed by foreign peace brokers to reduce the payoffs of both parties in the case of continued conflict, while increasing the payoffs of both parties in the case of a peace settlement. Use of these tools would shift the reasoning for both players towards a decision for peace, as war would soon become unsustainable. Further research undertaken on this issue should reconsider the normal assumption that all actors, including governments, want peace within their borders. Policy makers should also heed this warning if they wish to find a solution which is not founded on erroneous beliefs.

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China-US Rivalry: Ideological or Strategic?

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In his triumphalist paper, 'The End of History', Francis Fukuyama argued that with the collapse of the Soviet Union, the world had seen the elimination of the last coherent ideological alternative to the liberal-democratic political and economic organizations of the West. The bankruptcy of alternative ideologies was further evidenced by the fact that modern China, born of a Communist revolution, seemed to be adopting the liberal economic model, and would "no longer act as a beacon for illiberal forces around the world".¹

Twenty years ago, around the time that Fukuyama wrote his paper, China was still a fairly economically underdeveloped country. In many ways, it still is, but its meteoric economic rise in recent years has contributed to its emergence as an actor on the world scene. From Central Asia to Latin America to Africa, China and the United States are now jockeying for position and influence. That these two powers are, at least to some extent, rivals is hard to dispute (as will be shown by several examples further on in this paper). The question, from the point of view of the 'end of history' analysis, is the extent to which China represents an *ideological alternative* to the US, and to what extent this ideological difference positions China as an *ideological rival* to the US in international politics, as opposed to a *strategic rival*.²

¹ Francis Fukuyama, "The End of History?," *The National Interest* 16 (1989): 10

² Fukuyama stated his thesis as follows: "Have we in fact reached the end of history? Are there, in other words, any fundamental 'contradictions' in human life that cannot be resolved in the context of modern liberalism, that would be resolvable by an alternative political-economic structure? If we accept the idealist premises laid out above, we must seek an answer to this question in the realm of ideology and consciousness. Our task is not to answer exhaustively the challenges to liberalism promoted by every crackpot messiah around the world, but only those that are embodied in important social or political forces and movements, and which are therefore part of world history. For our purposes, it matters very little what strange thoughts occur to people in Albania or Burkina Faso, for we are interested in what one could in some sense call the common ideological heritage of mankind." See Fukuyama, 5

US Ideology and Foreign Policy

Before answering the question of whether or not China represents an ideological alternative to the US and if this ideological difference suggests an ideological rivalry, it is important to define what, if any, is the ideological basis of US foreign policy. If US foreign policy is not, at least to some extent, defined by ideology, then the question of whether or not China is an ideological rival to the US is moot to a certain degree.

The ideological current which Fukuyama and others attribute to the US is that of 'liberal democracy'. The foundations of this conception of 'liberal democracy' are the free market, liberal institutions and free elections. These elements are considered to be interdependent, and the interplay between them is considered to be systematically reinforcing: "the free market fosters democracy because private property...is itself a form of liberty".³

Internationally, American foreign policy often seems have this ideological framework at its core. Economically, this ideology takes the form of the so-called 'Washington Consensus', a name derived from the policies advocated (and at times, imposed in various ways) by the US government and by certain international organizations (such as the IMF) as the best way for poorer countries to develop their economies. Broadly speaking, the Washington Consensus is based on a belief in the optimality of market self-regulation and minimalist government intervention in the economy.⁴ Politically, the ideological influence in US foreign policy been manifested in the numerous democratization projects that the US has undertaken in the 20th century.⁵

There is, of course, also a pragmatic aspect to US foreign policy, which may trump ideological considerations. This has resulted, at various times, in contradictory behaviour, with the US advocating democracy abroad and yet politically and economically lending its support to oppressive dictatorial regimes, especially in oil producing regions. Thus, while "[American] rhetoric and policy ... embraced Wilsonian axioms about the march of democracy, US policy vis-à-vis the Persian Gulf remains firmly anchored in realpolitik. Thanks to its 'emirates' strategy, the US continues to rely on friendly autocrats in the Gulf while pressuring its enemies to democratize".⁶ In addition, US foreign policies which have a broad range of motives are often couched in terms of 'democratization', to make them more saleable to the public and to liberal elites domestically.⁷ Drawing a line between US ideological and pragmatic motives for specific foreign policies is further complicated by the emergence of the neo-conservative world outlook in the current administration, which has made "democracy promotion a central aim of US policy".⁸ In addition, there is a longstanding notion in America which holds that "US national

³ M. Mandelbaum, "Democracy Without America," *Foreign Affairs* 86.5 (2007): 121

⁴ Joshua Ramo, *The Beijing Consensus* (London: The Foreign Policy Centre, 2004), 28-30

⁵ J. Kurth, "America's Democratization Projects Abroad: The Success Versus the Failure," *American Spectator* 39.8 (2006): 40

⁶ M. O'Reilly, "Evolving Empire: America's 'Emirates' Strategy in the Persian Gulf," *International Studies Perspectives* 8.2 (2007): 147

⁷ Kurth, "America's Democratization Projects Abroad: The Success Versus the Failure," 46

⁸ Mandelbaum, "Democracy Without America," 119

interests are...best served and advanced when other states become established liberal democracies".⁹

For this paper, it is not necessary to study at length to precisely what extent US foreign policy is ideologically motivated, but it is enough to say that there is a definite ideological component to at least some US actions abroad. Whether or not US attempts to spread free markets and democracy abroad are born of genuine benevolence, it is sufficient here to say that the US has a definable and defined ideology, and that US foreign policy is, at least to a certain extent, based on the spread of this ideology.

China's Economic Ideology

There is no question that the policies currently shaping China's economic transformation represent a substantive departure from doctrinaire Marxism-Leninism, which remains the official state ideology. The question which must be addressed, however, is whether or not this departure is indicative of the adoption by the Chinese state of liberal economic policies.

For Fukuyama, the emergence of a market economy in China was posited as a triumph of liberal economics, and this sentiment is echoed by numerous other analysts. A US congressional research service paper from 2006 attributes China's economic successes to the introduction of the free market, stating that "China's decentralization of the economy led to the rise of non-state enterprises, which tended to pursue more productive activities than the centrally controlled state owned enterprises. Additionally, a greater share of the economy... was exposed to competitive forces".¹⁰ James Kurth, writing in 2007, labels China a "liberal un-democracy"; that is, a kind of authoritarian market economy that has adopted Western economic liberalism without the complementary democratization.¹¹ While arguing against theories that Chinese capitalism is culturally differentiated from other capitalist constructs, Arif Dirlik goes further and suggests that China's culture is in fact becoming westernized, writing that "...the appropriations of such [market oriented, capitalistic] values ... represents no less than an assimilation of Chinese traditions to the values of European capitalism".¹² These analyses, however, seem to ignore some very important differences between the operation of the market economy in China, and the kind of laissez-faire capitalism advocated by the Washington Consensus.

Neo-liberal economic dogma is largely based on the assumption that the market is too complex an institution to be effectively or beneficially regulated by the state. In the Chinese administration, however, there is the perception that it is possible to know and understand what

⁹ Kurth, "America's Democratization Projects Abroad: The Success Versus the Failure," 46

¹⁰ W. Morrison, *China's Economic Conditions* (Washington, DC: Library of Congress, Congressional Research Service 2006), IB98014 Pg. 7

¹¹ Kurth, "America's Democratization Projects Abroad: The Success Versus the Failure," 46

¹² A. Dirlik, "Critical Reflections on "Chinese Capitalism" as Paradigm," *Identities* 3.3 (1997): 313

is being governed.¹³ In the case of economic policy, this translates into a belief in government's ability to steer and channel market forces. Rather than representing a radical departure from étatism, the use of market liberalization by the "techno-scientific-administrative party-state" governing China today can be seen as the state wielding a new tool to "govern through the desires of individual whether as consumers, property owners, jobseekers...".¹⁴ Thus, the 'socialist market economy' is characterized by a degree of market autonomy, but always within the confines of techno-scientific administrative regulation. An oft cited metaphor for China's market reforms is that of someone crossing a muddy river by grasping for stones; in other words, slowly and carefully, and with the possibility of reversing course if necessary.¹⁵ Thus, the state's role in China's economy, even those aspects of the economy which are liberalized, is always paramount, as it *always retains the ability and the right to reverse policy directions which prove counter-productive to achieving its goals.*

This is in stark contrast with the Washington consensus view that minimalist government is optimal. Gordon White's comment, from 1996, that "...the way in which [China's economic success] has been achieved, through a combination of economic liberalization managed by state intervention and supervised by a pervasively authoritarian political apparatus, presents a developmental pattern which flies in the face of currently hegemonic liberal notions of how transitional economies, indeed all economies, should seek development success"¹⁶ still holds today. The role of the state in China's economy is also markedly different from the redistributive role the state plays in other so-called 'hybrid systems', for example those of the Nordic countries.¹⁷ In China, "... the relationship between state and economy in China cannot be seen in the conventional dichotomous and largely zero-sum terms envisaged by conventional economic theory. The state-economy divide is blurred and there is a large intermediate terrain of hybrid activity which is hard to capture in terms of the usual 'state-market' characterizations".¹⁸ Thus, while the state is often seen as having 'facilitated' the introduction of market forces into China, the Chinese "entrepreneurial state"¹⁹ is also an active participant in the market and plays a forceful economic role quite different from that normally ascribed to the state in a capitalist economy.

This dirigiste tendency in China and the important role of the state can be seen in a number of areas.²⁰ For example, "the state's control over capital flows has made it possible to

¹³ G. Sigley, "Chinese Governmentalities: Government, Governance and the Socialist Market Economy," *Economy and Society* 35.4 (2006): 494

¹⁴ Ibid

¹⁵ Ramo, *The Beijing Consensus*, 4,70

¹⁶ G. White, "The Chinese Development Model: A Virtuous Paradigm?," *Oxford Development Studies* 24.2 (1996): 170

¹⁷ The role of the state in the Nordic countries' national innovation systems is an important one, but it is generally the redistributive aspect of the state to which people refer when commenting on European welfare state economic models.

¹⁸ White, "The Chinese Development Model: A Virtuous Paradigm?," 173

¹⁹ Ibid

²⁰ There is some suggestion that, even as the National government has liberalized and relaxed its direct influence over the market, that this role has been delegated to local governments (Morrison 3; White 4). This may be

attract targeted direct investments while avoiding an inflow of short-term capital..."²¹ Thus, by being able to exercise sovereignty over capital flows and be selective about foreign investment, China has avoided the risks of volatile capital flows, while nonetheless benefiting from the availability of foreign capital through global financial markets. Even for foreign direct investments into China, there are a number of regulatory policies and restrictions in place. While FDI into China is often credited with being a major contributor to increased productivity in the country, China's FDI restrictiveness index (a measure of regulatory constraints governing foreign investments into the national economy) remains far higher than that of any developed market economy.²² Capital outflows from China are also guided by state policies. For example, China's Commerce Ministry and National Development and Reform Commission have published lists of countries and resources in which investment by Chinese companies is eligible for state subsidy.²³

Nationalist sentiments and tendencies in China are strong, and growing.²⁴ While the country's development is in no small part due to export generated growth and an influx of capital, China's authorities have nonetheless sought to maintain independence and self-reliance.²⁵ Economically, this nationalism can be seen manifested, for example, in recently passed legislation designed to make it harder for foreign companies to acquire "well known Chinese brands, protecting how foreign investors can take control of Chinese household [brand] names".²⁶ Politically, this growing nationalism may have important implications for the future development of China's foreign policy, a subject that will be touched upon below.

Finally, a focus on the important role of policy and technological innovation is a key component of China's economic ideological direction.²⁷ Technological sophistication is recognized as a driving force for economic development, and China's government is adept at leveraging access to its massive domestic market as a means of securing technology transfer

particularly relevant when considering China's accession to the WTO and its obligations as a member of the organization. While some of the national government's legal ability to intervene in the economy may have been ceded, this does not necessarily hold for local or regional governments (indeed, this is the case in some Western constituencies as well). Consequently, the actual reduction in the role of 'the state' as an economic actor may be over-estimated, the examples to the contrary in this paper notwithstanding. This is a subject, perhaps, for further investigation.

²¹ David M. Kotz, "The Role of the State in Economic Transformation: Comparing the Transition Experiences of Russia and China," (Amherst: University of Massachusetts, 2005), vol. 10

²² Takeshi Koyama and Stephen Golub, *OECD's FDI Regulatory Restrictiveness Index: Revision and Extension to More Economies* (Paris: OCED, Investment Division 2006), 2006/4 Pg. 10 It is worth noting that in his paper *The Chinese Path of Economic Reform and its Implications*, He Li argues that much of the FDI into China comes from the Chinese diaspora, notably in Hong Kong and Taiwan. This has implications when considering actual levels of 'openness' of the Chinese economy See: H. Li, "The Chinese Path of Economic Reform and its Implications," *Asian Affairs: An American Review* 31.4 (2005): 206

²³ D. Zweig, "China's Global Hunt for Energy," *Foreign Affairs* 84.5 (2005): 26

²⁴ F. Wang, "Preservation Prosperity and Power: What Motivates China's Foreign Policy?," *Contemporary China* 14.45 (2005): 673

²⁵ Z. Bijian, "China's 'Peaceful Rise' to Great Power Status," *Foreign Affairs* 84.5 (2005): 21-22

²⁶ V. Arora, "M&A Rejig Holds Lawyers In Suspense," *The Lawyer* September 25th 2006

²⁷ Ramo, *The Beijing Consensus*, 12, 14, 34

from foreign firms, through high-value investments in China and research joint ventures with indigenous firms.²⁸

In summation, it is overly simplistic to say that China's governing economic paradigm amounts to an adoption of liberal market economics. Rather than, as the Washington Consensus posits is optimal, letting unfettered market forces dominate, the Chinese government has used a variety of policy measures to channel these forces into the achievement of its national goals and priorities.

China's Ideological Appeal

In an article that appeared in the Fall 2007 edition of *Foreign Affairs*, Michael Mandelbaum had this to say about the appeal and spread of free markets and democracy:

*"The worldwide demand for democratic government in the modern era arose due to the success of the countries practicing it. The United Kingdom in the nineteenth century and the United States in the twentieth became militarily the most powerful and economically the most prosperous sovereign states. The two belonged to the winning coalition in each of the three global conflicts of the twentieth century: the two world wars and the Cold War. Their success made an impression on others. Countries, like individuals, learn from what they observe. For countries, as for individuals, success inspires imitation."*²⁹

Using similar logic to Mandelbaum, Joshua Ramo's paper "The Beijing Consensus", argued that China's model of economic development was emerging as an alternative development path for countries disillusioned with the failures of the Washington Consensus:

*"China is marking a path for other nations around the world who are trying to figure out not simply how to develop their countries, but also how to fit into the international order in a way that allows them to be truly independent [in the face of US preponderance] ... All around Asia, and increasingly around the world, you stumble on anecdotes of nations examining China's rise and trying to see what pieces of this miracle they might make manifest in their own land ... China's emerging power is based on the example of their own model, the strength of their economic position and their rigid defense of the Westphalian system of national sovereignty."*³⁰

Attempts (both nominal and genuine) at emulation of China's economic model are manifold. Uzbekistan, for example, has noted the success of China's model of liberalization compared to

²⁸ Li, "The Chinese Path of Economic Reform and its Implications," 207

²⁹ Mandelbaum, "Democracy Without America," 121

³⁰ Ramo, *The Beijing Consensus*, 3

the relative failure of liberalization in Russia, and has followed China's more gradualist and dirigiste approach.³¹ The Chavez government in Venezuela and the Morales government in Bolivia have both voiced their support for China and their favourable opinion of China's economic development paradigm as has the Lula government in Brazil.³² The Iranian government has also endorsed a piecemeal adoption of Chinese-influenced controlled economic openness.³³ Cuban officials have reportedly expressed desires to follow the Chinese model and even Zimbabwe's Mugabe has expressed a desire to emulate China's success.³⁴ Whether or not this last is to be taken seriously is another discussion altogether.

While China may not be actively seeking to export its ideology internationally as it did in the past with Marxism-Leninism and Maoism, the appeal of its economic success has spawned numerous attempts at imitation of 'the China model'. As such, China's example may provide an alternative to Washington's free-market ideology. *Consequently, China's economic paradigm can be seen to be an ideological rival to neo-liberalist economics, without China actually being an ideological rival to the United States.*

Politically, China's insistence on the inviolability of state sovereignty is appealing to many so-called 'rogue' states that may have next to nothing in common with China economically. While they downplay the economic dimension of China's ideological paradigm (calling China an example of 'illiberal capitalism'), Barma and Ratner argue that this willingness by China to accommodate and legitimize dictatorial regimes under the aegis of 'non-interference' constitutes an "ideological threat" to America that is "more of a security threat than any military imbalance or trade deficit".³⁵

The argument can be made that China does indeed try to promote its insistence on the autonomy of states and the absoluteness of state sovereignty over domestic affairs, through its insistence on these principles in international venues. This position is better explained through the lens of pragmatism rather than ideology, however. For China, it does not matter if its international partners are democratic or dictatorial, theistic or secular, enshrine social mobility or are rigidly feudalistic. China's willingness to overlook human rights records, repression and authoritarianism are no more ideologically motivated than is the willingness of the US to overlook these same attributes of foreign regimes when it is expedient. China's economic rise puts it increasingly in a position of rivalry to the US. This rivalry is, and will likely continue to be based on purely pragmatic economic and strategic considerations. China's foreign policy,

³¹ Kotz, "The Role of the State in Economic Transformation: Comparing the Transition Experiences of Russia and China," vol., 10.

³² See: Naanzeen Barma and Ely Ratner, "China's Illiberal Challenge," *Democracy Journal* 2 (2006): 62 and L. Rohter, "China Widens Economic Role in Latin America," *New York Times*, November 20th 2004 <http://www.nytimes.com/2004/11/20/international/asia/20china.html>.

³³ A. Molavi, "Buying Time in Tehran," *Foreign Affairs* 83.6 (2004): 9,11

³⁴ See: Li, "The Chinese Path of Economic Reform and its Implications," 197 and M. Wines, "Zimbabwe's Future: Made in China," *International Herald Tribune*, July 25th 2005 <http://www.iht.com/articles/2005/07/24/news/zimbabwe.php>.

³⁵ Barma and Ratner, "China's Illiberal Challenge," 57

which is currently largely built around securing resource and energy supplies, reflects a strong strategic tendency.

China's Pragmatic Foreign Policy and Strategic Rivalry with the US

As China's economy has grown, so too has its requirement for energy and raw materials. China lacks the domestic capacity to supply more than a small fraction of its resource and energy requirements, and thus is largely dependent on imports to supply its growing demand. Most of China's current energy imports come from the Middle East; however, China's wariness of American power and America's perceived dominance of the Middle East have contributed to a sense of vulnerability over energy supplies.³⁶ China's foreign policy is largely driven by this need to secure stable sources of energy supply, and China has been trying to find other sources of oil and other resources, most notably in Latin America, Central Asia, Africa, and in South-East Asia.³⁷

To gain influence in Central Asia (largely for energy, but also for security purposes), China's government has been extending economic support such as low interest loans and preferential access to China's market for Shanghai Co-operation Organization member states.³⁸ In Africa, such largesse is disbursed to energy producing nations to cement relationships which are in many cases already cordial, owing to China's previous ideological support for African national liberation movements.³⁹

China seems to have little interest in exporting its economic model or ideology outside its own borders, other than its insistence on the inviolability of national sovereignty. This nominally ideological opposition to interference in domestic affairs can be seen both as a reaction to foreign criticism of China's own human rights record, but it also serves as a convenient cover for China's dealings with states that the West finds unpalatable.

As with US support for dictatorial regimes in the Middle East, China's support for regimes shunned by the West is driven largely by its growing need for energy and resource imports to fuel its economic growth. US support for such regimes draws accusations of hypocrisy abroad and criticism at home, but for China, "... the principle of non-interference in other countries' internal affairs confers an advantage in [the] search for reliable energy suppliers, while Western industrial democracies, most notably the US, often find their stated policies at odds with authoritarian, repressive oil producers".⁴⁰ Thus, pressure from human rights groups at home and abroad led to the imposition of US sanctions and a withdrawal of Western oil

³⁶ C. Ziegler, "The Energy Factor in China's Foreign Policy," *Journal of Chinese Political Science* 11.1 (2006): 4, 5, 8

³⁷ Zweig, "China's Global Hunt for Energy," 26-29

³⁸ C. Chung, "The Shanghai Co-operation Organization: China's Changing Influence in Central Asia," *The China Quarterly* 180 (2004): 1007-1009

³⁹ B. Gill, C. Huang and J. Morrison, "Assessing China's Growing Influence in Africa," *China Security* 3.3 (2007): 4

⁴⁰ Ziegler, "The Energy Factor in China's Foreign Policy," 4

companies from Sudan, giving Chinese oil companies a chance to establish an investment foothold, complemented by Chinese government infrastructure development assistance.⁴¹

A similar pattern can be seen in the contrast between Chinese and American interactions with Indonesia. "In 2002, Beijing and Jakarta concluded several memoranda of understanding that enhanced energy cooperation...Beijing's diplomatic approach to Jakarta in recent years has been skilful".⁴² By contrast, the US approach, which attempted to coerce Indonesia over human rights abuses in East Timor, alienated the country from US influence. Consequently, "in Southeast Asia, China is increasingly viewed as a positive force".⁴³

China's policy towards unsavory regimes is a source of frustration to the United States. Inasmuch as democratization and institution building is a stated pillar in American counter-terrorism strategy, China's tacit support of these regimes may grow to be seen as antithetical to American security interests.⁴⁴ However, American wariness about China's rise is also shaped by a strategic interest in remaining the world's sole superpower. Shortly after the collapse of the Soviet Union "...officials in the Defence Department became preoccupied with the plan of preventing the re-emergence of a rival state that might challenge American interest and position in global politics".⁴⁵ Such worries about China's growing power and assertiveness have likely been exacerbated by the articulation, in 2003, of China's 'peaceful rise' doctrine. While it was explicitly pacifist in its phrasing, the overall timbre of the doctrine is that China's foreign policy would no longer be that of a developing country primarily concerned with its own domestic affairs, but would now be "one that declared China's potential as a regional and global power".⁴⁶

Analysts from the liberal school of international relations, however, believe these worries about China's rise posing a threat to the US, strategically or otherwise, are greatly overblown. Such analysts often point to China's active participation in multi-national and intergovernmental organizations as evidence of an emerging liberal tendency in Chinese foreign policy. As Zheng Bijian put it in the paper "China's Peaceful Rise to Great Power Status"

"China does not seek hegemony or predominance in world affairs. It advocates a new international political and economic order, one that can be achieved through incremental reforms and the democratization of international relations. China's development depends on world peace- a peace that its development will in turn reinforce".⁴⁷

⁴¹ Ibid: 40

⁴² Ibid: 13

⁴³ Ibid

⁴⁴ Y Li, "Contending with the Western Influence, China Broadening Its Road to Africa," The Washington Observer November 1st 2006: Pg. 4 <http://www.washingtonobserver.org/en/document.cfm?documentid=73&charid=3>.

⁴⁵ M. Nuruzzaman, "Beyond Realist Theories: Neo-Conservative Realism and the American Invasion of Iraq," International Studies Perspectives 7.3 (2006): 250

⁴⁶ Elizabeth Economy, "China's Rise in Southeast Asia: implications for the United States," Contemporary China 14.44 (2005): 412

⁴⁷ Bijian, "China's 'Peaceful Rise' to Great Power Status," 24

China's participation in international liberal institutions can still be seen as a strategic move to reinforce its geopolitical position, given that China itself is aware that, compared to the United States, it is relatively weak.⁴⁸ International organizations may provide China with the opportunity to counter US military and (though this is diminishing) economic preponderance. For example, China's establishment of the Shanghai Co-operation Organization (SCO), an intergovernmental organization whose members include the Central Asian states and those who share their borders, is in many ways a means of balancing US influence in the region.⁴⁹ It is worth noting that, unlike the European Union, which makes membership contingent on adherence to a number of legal and political norms, the SCO has as one of its founding principles the opposition to the "use of humanitarianism or human rights excuses to interfere in states' internal affairs".⁵⁰ Instances of direct China-US cooperation, particularly over nuclear disarmament of North Korea, are also motivated to an extent by China's desire to offset America's power: by positioning itself as a needed partner for American objectives in North-East Asia, China has limited America's ability to use coercive pressure against it on other issues.⁵¹ China's recent incremental withdrawal of support from the Sudanese government is sometimes cited as an example of China's growing liberal institutionalism and willingness to accede to international norms in foreign policy, yet even this seemingly benevolent action may have been motivated by a careful weighing of the benefits of continued support for Khartoum versus the costs of alienating allies in Sub-Saharan Africa.⁵²

Others argue that China's liberalism is genuine and motivated by more than a desire to buttress China's position internationally and vis-à-vis the US. Justin Hempson-Jones, for example, argues that realist interpretations of China's foreign policy are shown to be invalid, since the two prime realist criteria are violated by China's participation in IGOs. These criteria are, first, that relative gains should be pursued over absolute gains; and secondly, that cooperation must not be found to undermine state sovereignty or greatly constrict China's autonomy and freedom of action.⁵³

In the case of the first criterion, the counter-argument could be made that pursuit of relative gains is meaningless until a base level of economic development and power has been achieved. For China, the only way to achieve technological advancement and a prominent economic position has been participation in intergovernmental organizations, such as the WTO, which have given it access to foreign markets and technology. As China's economy develops, participation and adherence to the dictates of these organizations may well become less relevant to China's calculations. The case could also be made that pursuit of absolute gains with its less

⁴⁸ K. Mahbubani, K. "Understanding China", 51-53

⁴⁹ Chung, "The Shanghai Co-operation Organization: China's Changing Influence in Central Asia," 993

⁵⁰ Ibid: 992 This is not to draw direct comparisons between the SCO and the EU, but rather, to highlight some fundamental differences in the approaches these two organizations have to national sovereignty and human rights.

⁵¹ K. Mahbubani, "Understanding China," *Foreign Affairs* 84.5 (2005): 58-59

⁵² Gill, Huang and Morrison, "Assessing China's Growing Influence in Africa," 13

⁵³ J. Hempson-Jones, "The Evolution of China's Engagement with International Governmental Organizations: Towards a Liberal Foreign policy?," *Asian Survey* 45.5 (2005): 703-706

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⁵¹ K. Mahbubani, "Understanding China," *Foreign Affairs* 84.5 (2005): 58-59

⁵² Gill, Huang and Morrison, "Assessing China's Growing Influence in Africa," 13

⁵³ J. Hempson-Jones, "The Evolution of China's Engagement with International Governmental Organizations: Towards a Liberal Foreign policy?," *Asian Survey* 45.5 (2005): 703-706

powerful neighbours (such as the Central Asian republics or the 'pariah' states in Africa) is also a pursuit of relative power compared to the United States, as has been suggested above.

In the case of the second criteria, Hempson-Jones argues that China's participation in the WTO has eroded China's autonomy and freedom of action in economic matters.⁵⁴ This contention is debatable, but taking it as a given, the argument that this represents an adoption by China of neo-liberal institutionalism should be tempered by consideration of China's domestic economic policies. In its domestic economic transformation, China's actions have been guided by a the philosophy of 'crossing the river by grasping for stones', which suggests that the government is willing and must be able to reverse its decisions and policies if they prove counter-productive, and which explicitly rejects dogmatic adherence to ideology in favour of a pragmatic embrace of whatever works at the time. If this philosophical current could be used to turn away from both state-centered socialism and market-oriented capitalism to find a third way, it seems reasonable to assume that it could also underlie a future Chinese rejection of multilateralism, if and when this should prove expedient.

China's current nod to liberal institutionalism may be transient for a number of reasons. Growing economic power has led to the development of strongly articulated nationalist sentiments at home. These sentiments are often fanned and used by the ruling Communist Party, for example, to emphasize the government's displeasure with other countries' policies through stone-throwing demonstrations at foreign embassies. However, nationalist aspirations are at times frustrated by what is seen by some as China's reluctance to take its rightful place as a world power that projects its influence abroad. There is thus the possibility that China's foreign policy may succumb to domestic pressures to be more assertive to maintain its legitimacy in the eyes of its people.⁵⁵ The need of the government to maintain legitimacy in the eyes of nationalists at home is at the root of China's hard line position on Taiwan, and should not be taken lightly.⁵⁶

Further cause for pessimism about China's continued institutionalist leanings in foreign policy can be found in China's military buildup and the overhaul of China's naval strategy, which has been shifted from coastal defence to more far-reaching oceanic defence. This shift is partly to protect energy interests and shipping lanes, but there is evidence that this shift in strategy is also one designed to serve "broad security objectives".⁵⁷ While China's conventional military is technologically behind that of the US, and likely will remain so for the foreseeable future, China's military strategy is in part based on theories of asymmetric warfare and Maoist doctrine of a people's war which have been upgraded for the 21st century. These include, for example, the targeting of enemy information systems through large-scale hacker attacks, the development of obfuscation technologies, and the targeting of enemy communication and spy

⁵⁴ Ibid: 709

⁵⁵ Wang, "Preservation Prosperity and Power: What Motivates China's Foreign Policy?," 669-673

⁵⁶ Mahbubani, "Understanding China," 56-58

⁵⁷ Zweig, D. "China's Global Hunt for Energy", 32

satellites.⁵⁸ Estimates based on conventional measures may thus understate China's true military capability.

Despite this, war seems unlikely. China's economy and that of the US are too interdependent at the moment, and China will most likely seek to avoid any confrontation, military or otherwise, which could jeopardize access to US markets, on which its export led economy is still reliant. Similarly, many US firms have interests in China, and these companies would stand to lose significant investments in the event of a serious confrontation.⁵⁹ This situation, however, is changing. China's domestic demand is already strong, and helped mitigate the impact on China's economy of the Asian currency crisis in the late nineties.⁶⁰ Furthermore, as China continues to develop economically, its economic output is increasingly going towards satisfying domestic consumption.⁶¹ As incomes rise and domestic demand gradually displaces foreign demand, at least in terms of relative importance, China's reliance on the US as an export market will substantively diminish.

As China's economic capacity reaches a critical mass where it is self-sustaining, with one fifth of the world's population within its borders, there will be considerable room for continued economic growth which is entirely generated, and met, domestically. However, unlike consumer demand and productive capacity, which can be generated domestically, China will continue to rely on imports of foreign resources and energy. As the relative importance of the US to China's economy decreases, China will have significantly more autonomy to pursue its national interest without having to worry about the economic repercussions from across the Pacific. Sino-American competition over energy, in particular, is likely to become more aggressive and acute.

China currently holds massive amounts of US debt and has enormous foreign currency reserves of US dollars. As it stands, it is in China's interests that the US dollar maintains its high value relative to the Renminbi, so that the US retains its ability to purchase Chinese exports. However, as Chinese economic capacity and domestic demand continue grow, this incentive to keep the dollar's value afloat decreases. China could greatly enhance its position in a contest with the US over foreign oil sources through a strategic devaluation of the US dollar. This could significantly reduce the ability of the United States to import oil, while the relative rise in the value of the Renminbi would have the opposite effect for China. Thus, China would be able to secure its energy supplies without the need for any kind of military action.

Conclusion

Contrary to Fukuyama's assertion that the lack of conflicting global ideologies signaled the end of history, China's economic model provides an ideological alternative to the neo-liberal

⁵⁸ Ramo, *The Beijing Consensus*, 49

⁵⁹ W. Jisi, "China's Search for Stability with America," *Foreign Affairs* 84.5 (2005): 47-48

⁶⁰ Li, "The Chinese Path of Economic Reform and its Implications," 207

⁶¹ "America Drops, Asia Shops," *The Economist* 381 (2006): 11

economic ideology supported by US foreign policy. However, since China does not actively seek to export its economic ideology, China itself cannot be considered to be an ideological rival to the US, in the way that Cuba was or Al-Qaeda is, except indirectly through the appeal of its model to other countries. However, China is a strategic rival to the US. As China's economic rise continues, rivalry with the US over energy supplies is likely to escalate and may lead to strategic economic conflicts in which China's position will become stronger over time. Outright war, however, is unlikely, at least in the immediate to mid-term future.

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Organized Labour, the Supreme Court, and the Canadian Charter of Rights and Freedoms: Implications for Canada's Working Class

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The advent of the *Canadian Charter of Rights and Freedoms* in 1982 fundamentally altered the political landscape in Canada. The *Charter* contains constitutionally entrenched rights and freedoms that are designed to protect Canadians from government action that infringes upon basic civil liberties. Attempting to define these rights and freedoms is a problematic task as the Charter itself is a vague and loosely worded document largely open to interpretation. As a result of this lack of clarity, the judiciary has played an increased role in Canadian politics since 1982, serving as the primary arbitrator of disputes over the meaning and scope of these constitutionally entrenched rights. At the pinnacle of the judiciary is the Supreme Court of Canada. To varying degrees of success, individuals and groups- including the Canadian labour movement- have invoked the Charter to protect or further their interests. The Charter has gained much legitimacy as an increasing portion of society speaks in *rights discourse*, that is, they view basic elements of justice as a *right* that cannot simply be legislated away. The Supreme Court has been the institution that these individuals and groups have relied upon to protect their constitutional rights.

This paper will explore the relationship between the *Charter of Rights and Freedoms*, the Supreme Court of Canada, and organized labour. In referring to organized labour, this paper will include the various trade unions that operate as legally certified bargaining agents for Canadian workers under both provincial and federal labour law. Although expansive, this conception of organized labour allows for the inclusion of the various trade unions that represent Canadian workers. Since 1982, a number of cases have made their way to the Supreme Court in which many of these trade unions have claimed that certain routine activities are in fact constitutional rights and deserve protection under the Charter. The first part of this paper will examine the cases heard in the first era of labour appeals after the Charter, between 1982 to the late 1990s- a

period marked by a number of constitutional challenges and an almost equal number of judicial rulings against the unions. The second part of this paper will examine trade union appeals under the Charter in the current era of labour appeals, which began in the later 1990s. In contrast to the early years of jurisprudence, the labour movement has recently seen the court rule in its favour on a number of occasions. In many instances, the court departed from its earlier rulings and overturned earlier decisions. The final part of the paper will attempt to contextualize this turn around on the part of the Supreme Court and analyze whether appeals under the Charter are the most effective means for organized labour to further its cause.

While the recent rulings illustrate that organized labour is capable of making gains under the Charter, the courts have historically proven to be an institution under which organized labour has not fared well as they have been hesitant to provide an expanded vision of collective rights for trade unions. Indeed, many legal limitations have been attached to labour's recent 'victories' at the Supreme Court, suggesting that a court ruling may not be sufficient to protect the interests of Canadian workers. This paper will argue that while the legal system can be used to further the cause of organized labour, and in some instances should be used for this purpose, the labour movement cannot rely solely on the legal system for protection. For organized labour, the main challenge is not legal, but predominantly political. As such, this paper argues that organize labour must instead work to build a working-class consciousness amongst its members and cannot move away from traditional political lobbying and militant workplace action. A combination of a well-developed sense of class consciousness, a capacity for political lobbying, a willingness to engage in workplace action and- in some cases- a reliance on the judiciary, will ultimately provide Canadian workers with a complex strategy that will be beneficial for furthering the interests of workers in both the short-term and long-term.

There has been considerable debate regarding labour's interest in obtaining the Charter. Michael Mandel has argued that labour "fell asleep at the switch"¹ during the process of hearing and Committees that led to the entrenchment of Charter. Joseph Weiler contended that organized labour was preoccupied with fighting unemployment at the time and felt constitutional reform to be "arcane".² Larry Savage has more recently argued that while labour was well aware of the relevance of a the passage of a Charter, its absence from the patriation process was a deliberate strategy in an attempt not to alienate the sovereignist Québec Federation of Labour or create further division within the New Democratic Party (2007). Regardless of which of these views is correct, on 19 April 1982, the *Canadian Charter of Rights and Freedoms* was brought into effect, becoming entrenched as a part of the Canadian constitution. Faced with the prospect that for better or worse the Charter was firmly in place, trade unions in Canada had two possible courses of action: they could either ignore the Charter altogether or use it in an attempt to make important gains for its members.

¹ Michael Mandel, *The Charter of Rights and the Legalization of Politics, Revised Edition* (Toronto: Thompson Educational Publishing Inc, 1994) 261

² Joseph M. Weiler, "The Regulation of Picketing Under the Charter," *Litigating the Values of the Nation: The Charter of Rights and Freedoms*, ed. Robin M. Elliot (Toronto: Caswell Publishing, 1986) 213

While the former was a potential course of action for the Canadian trade unions- as they had a historical mistrust of the courts- it was overshadowed by the latter. In many instances, a number of trade unions chose the legal route, believing that the Charter could be used to better the lives of working-class Canadians. Two rights in which organized labour had long fought for and were increasingly coming under attack were the right to bargain collectively and the right to strike.³ Thus, it is not surprising that the first cases that organized labour made appeals under the Charter sought constitutional recognition of both the right to bargain collectively and the right to strike. Despite playing little to no role in the creation of the Charter, the labour movement found an element of legitimacy in the document. Mandel noted that when faced with anti-labour legislation in the immediate post-Charter era, labour's fight-back strategy had changed considerably from the pre-Charter era. "No mass protests of the sort that had greeted the Anti-Inflation Act of 1976 were organized this time..." but rather, he continued, "...labour went straight to court, clutching the Charter and claiming that it protected the 'right to strike'".⁴

The increasing reliance on a legalistic strategy is problematic in that the Charter specifically, and the Canadian legal system more generally, are constructed largely around the supremacy of the individual, thus creating an environment that is not necessarily conducive to the advancement of collective rights. For example, Charter rights under sections 2, 7 through 10, sections 12 and 17 apply to "everyone", while they apply to "every citizen of Canada" under sections 3 and 6. Furthermore, under section 11, rights apply to "any person," while under section 15 they apply to "every individual."⁵ No where in the Charter are rights granted to "every trade union" or "the labour movement," or even to "every collective entity" for that matter. With the exception of Aboriginal rights, minority education rights, and linguistic minority rights, the Charter makes little mention of any sort of group rights. As such, the supremacy of the individual and individual rights are guaranteed under the law, largely to the exclusion of the rights of collective groups as a whole. Naturally a conflict occurs when the labour movement seeks constitutional protection of collective bargaining and striking, which can only be realized by an organized group. In this sense, the deck was, and is, largely stacked against organized labour seeking the protection of collective-based constitutional rights.

Furthermore, the Charter focuses almost exclusively on political rights, and by extension is silent on economic rights. It provides no basis for equality of economic conditions or class structure. While trade unions certainly have some non-materialist goals, their *raison d'être*- collective bargaining- is inherently economic in nature. In this respect, the economic nature of the labour movement provides little room for appeals to the Charter. As Harry Glasbeek maintains:

³ Leo Panitch and Donald Swartz, From Consent to Coercion: The Assault on Trade Union Freedoms, 3rd ed. (Aurora, ON: Garamond Press, 2003) Ch. 3-9

⁴ Mandel, The Charter of Rights and the Legalization of Politics, Revised Edition 262

⁵ For full text, See Canadian Charter of Rights and Freedoms. (Ottawa: Government of Canada, 1982) Schedule B to Canada Act, C. 11.

*"The role of courts in liberal-capitalist democracies has always been to maintain a distinction between the political and economic sphere...From this perspective, any advantage an owner of private wealth may have over wealth-less individuals is not objectionable...What the Charter of Rights and Freedoms did was to cement this belief."*⁶

Under such a legal system, organized labour faced a significant barrier.

As such, a clash occurs when a collective entity challenging the laissez-faire nature of the Canadian economy appeals to a law designed to uphold it. The Law Reform Commission of Canada's widely cited 1976 study argued that law in Canada "should be defined narrowly, only encompassing that conduct that presents a danger to...Canada's liberal-capitalist democracy".⁷ Inherent to a liberal-capitalist democratic system is the protection of private property. In instances in which organized labour seeks constitutional protection of issues such as picketing, which challenges private property, the legal system provides yet another barrier to overcome. As Glasbeek notes of the Law Reform Commission, "... [it] went on to say that in all capitalist countries, including Canada, the protection of private property is the most important function of criminal law".⁸ As a result of the individualist and property bias of the Charter, it seemed natural that it would pose a significant barrier to the interests of organized labour.

The First Era of Charter Cases

While a number of unions claimed to be protected by various Charter rights shortly after its passage in a handful of cases at provincial courts, the first major case involving organized labour at the Supreme Court level occurred in 1986. The issue at hand in *RWDSU v. Dolphin Delivery Ltd.* surrounded secondary picketing, which involves picketing at a place other than the primary worksite. The union felt secondary picketing was an important issue because it exposed and publicized the workers' struggle and placed increased pressure on management to come to a settlement. During a lockout by Purolator Courier of its unionized employees, the company began contracting out their work to smaller delivery companies, including Dolphin Delivery. The union wanted to extend their picketing to Dolphin Delivery's premises, as it was performing the work of the locked out workers and by extension limiting the pressure that the union could place upon the employer.⁹ However, the *Canada Labour Code* was silent on the legality of secondary picketing. Nevertheless, the company was eventually granted an injunction by a lower court barring picketing by the locked-out workers at Dolphin Delivery's premises.

⁶ Harry Glasbeek, *Wealth by Stealth: Corporate Crime, Corporate Law, and the Perversion of Democracy* (Toronto: Between the Lines, 2002) 106-107

⁷ Quoted in Glasbeek, 151

⁸ Glasbeek, *Wealth by Stealth: Corporate Crime, Corporate Law, and the Perversion of Democracy* 152

⁹ See: *RWDSU v. Dolphin Delivery Ltd.*, 2 S.C.R. 573, (1986) Para 2

The union appealed the case to the Supreme Court, arguing that secondary picketing was protected by freedom of expression under section 2(b) of the Charter.¹⁰ In a unanimous decision, the union's appeal was dismissed by the Supreme Court. Writing for the majority, Dickson C.J. wrote that "since the picket line was not intended to promote dialogue or discourse...it cannot qualify for protection under the Charter".¹¹ Furthermore, they noted that the Charter only applies to government action and the court did not believe that a court injunction was equated with government action.¹²

This ruling is questionable because the judiciary is, in fact, a level of government. As former Justice Bertha Wilson has remarked, "the judiciary is the third branch of government, along with the legislature and the executive".¹³ Ironically in the same year that she remarked this of the court, it ruled against the RWDSU, claiming that the Charter did not apply in said case because the lower court's ruling did not constitute government action. Furthermore, the court put forward a very narrow definition of freedom of expression in regards to a trade union, noting that "...it must be observed at once that in any form of picketing there is involved at least some element of expression. The picketers would be conveying a message which at a very minimum would be classed as persuasion, aimed at deterring customers and prospective customers from doing business with the respondent,"¹⁴ but that:

*"The respect accorded to picket lines by trade unionists is such that the result of the picketing would be to damage seriously the operation of the employer, not to communicate any information. Therefore, since the picket line was not intended to promote dialogue or discourse (as would be the case where its purpose was the exercise of freedom of expression), it cannot qualify for protection under the Charter."*¹⁵

The court effectively ruled that since trade unionists are often unwilling to cross a picket line, that it was a form of expression undeserving of constitutional protection. This, of course, seemingly ignores the fact that the picketing did serve to publicize the struggle of the striking workers and convey their dissatisfaction with their employer's decision to contact out their work during the strike, which suggests that the promotion of considerable dialogue and discourse was at least one of goals of the picketers. At the same time, the ruling privileged the economic interests of the corporation over the economic and principled interests of the locked out workers.

The court in *Dolphin Delivery* failed to provide the labour movement with any positive protection of freedom of expression, including an explicit right to strike or picket a secondary

¹⁰ Section 2 states that "Everyone has the following fundamental freedoms...(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."

¹¹ RWDSU v. Dolphin Delivery Ltd., Para 19

¹² Ibid Para 34-35

¹³ Bertha Wilson, "Decision-Making in the Supreme Court," *University of Toronto Law Journal* 36 (1986): 231

¹⁴ RWDSU v. Dolphin Delivery Ltd., Para 17

¹⁵ Ibid Para 19

location.¹⁶ More importantly the Supreme Court's unwillingness to subject itself and lower courts to Charter scrutiny was a significant setback for the labour movement. Employers involved in labour disputes often turn to the courts for a variety of injunctions and legal rulings.¹⁷ By excluding these lower court rulings from Charter scrutiny, the interests of the employer were awarded a significant victory at the expense of organized labour. Such rulings were a continuous sign of what was to come.

A year later, three separate cases- known effectively as the 'Labour Trilogy'- reached the Supreme Court. All three cases dealt with freedom of association rights under section 2(d) of the Charter.¹⁸ At this point in time, it was unclear if freedom of association included the right to bargain collectively and the right to strike, as the Charter did not speak directly to either one of these activities. According to Leo Panitch and Donald Swartz, this vagueness is precisely what the documents framers had intended. They maintain that "...the coinage of liberal-democratic constitutional discourse uses a universal language of rights that obscures the class nature of capitalist societies".¹⁹ As such, the judiciary was left to decide what sort of collective rights the Charter contained.

Reference Re Public Service Employee Relations Act (Alta.) was sent to the Supreme Court prior to the passage of three different statutes that sought to prohibit strikes in various job classifications in the public sector and limit the scope of collective bargaining. The reference case sought to clarify if the legislation in question was consistent with the Charter and could legally be passed without being subject to a constitutional challenge.²⁰ *RWDSU v. Saskatchewan* made its way to the Supreme Court following unsuccessful contract negotiations between a number of unions representing the province's dairy workers and their employers. The union had served strike notices to the employer, but before the rotating strikes were to begin, the employer served the unions with a lockout notice applying to all of the province's dairy plants. In response, the provincial government passed legislation which temporarily prohibited both strikes and lockouts in the dairy industry. The appeal to the Supreme Court was to determine whether or not the provincial legislation violated the dairy workers freedom of association rights under section 2(d) of the Charter.²¹ *PSAC v. Canada* was a legal challenge of federal legislation that

¹⁶ A negative right or freedom allows for action to occur in that it explicitly prevents the government from infringing upon it, while a positive right or freedom forces some action upon the government in order for the right or freedom to be realized. The Charter is made up predominantly of negative rights and freedoms. For example, freedom of conscience under section 2(a) is realized when the government refrains from infringing upon it. In contrast, section 18, which sees that statutes of parliament are printed in both French and English is only realized when the government actually prints the statutes in both languages.

¹⁷ Recent examples of a court injunction ruling against a labour union include the United Steelworkers at Voisey's Bay, Newfoundland and the Canadian Autoworkers in Oshawa, Ontario. See "Voisey's Bay Wins Court Injunction to Halt Blockade," CBC News (15 September 2006) <http://www.cbc.ca/canada/newfoundland-labrador/story/2006/09/15/voiseys-court.html> and "This fight is far from over: CAW leader on end of GM blockade." (16 June 2008) <http://www.cbc.ca/money/story/2008/06/16/gm-protest.html>. For a discussion on the legal system, corporate interests and private property, see Glassbeek, 152.

¹⁸ Section 2 states that everyone has a fundamental right to freedom of association.

¹⁹ Panitch and Swartz, *From Consent to Coercion: The Assault on Trade Union Freedoms* 52

²⁰ *Reference Re Public Service Employee Relations Act (Alta.)*, 1 S.C.R. 573, (1987) Para 2-13

²¹ *RWDSU v. Saskatchewan*, 1 S.C.R. 573, (1987) Para 2-6

unilaterally extended collective agreements in the federal public service for two additional years and included fixed wage increases for the two year period. The act also limited the collective bargaining process for non-compensatory issues. The union sought to have the legislation deemed unconstitutional for being in violation of section 2(d).²² In all three cases, the Supreme Court ruled against the unions.

The *Alberta Reference* was the first verdict delivered and was used to form the precedent to support the two other verdicts. The court applied the guarantee of freedom of association in a very narrow sense, denying the labour movement of any constitutional protection in regards to collective bargaining. This approach voided the labour movement of its *raison d'être*. The Supreme Court ruled that the constitutional guarantee of freedom of association in s. 2(d) of the Charter does not include a guarantee of the right to bargain collectively and the right to strike.²³ Furthermore, the court was hesitant to declare that freedom of association involved any rights for groups and applied an entirely individualistic outlook on associational rights. For example, McIntyre J. posited that:

*"Freedom of association under the Charter means the freedom to engage collectively in those activities which are constitutionally protected for each individual...Freedom of association, however, does not vest independent rights in the group. People cannot, merely by combining together, create an entity which has greater constitutional rights and freedoms than they, as individuals, possess."*²⁴

The court had effectively ruled that while individuals had the freedom to join a trade union, the union itself could not exercise any freedoms of behalf of its members. Furthermore, it prevented the individuals encompassing the organization from undertaking certain collective actions. This ignored the fact that the ability to bargain collectively with an employer is one of the main purposes of a trade union and that the threat of a strike, or a strike itself, is intimately related to the collective bargaining process. Nevertheless, the thought of a collective entity such as a trade union having associational rights protected by the Charter was anathema to the court.

The rationale in the latter two cases was consistent with the *Alberta Reference*, as it was quickly applied as legal precedent. Consequently, the Court's overall opinions in *RWDSU v. Saskatchewan* and *PSAC v. Canada* echoed the individualistic approach taken in the *Alberta Reference*, which made trade unions rather hollow organizations in the eyes of the Court. The Court reaffirmed their opinions from the earlier case, and offered no additional rationale. However, the one-sided nature of the courts deliberative process is especially evident in *RWDSU v. Saskatchewan*. At face value, the legislation was prompted to promote labour stability in the province and ensure a continued supply of milk. However, the employer's decision to lock out the employees did much more to jeopardize both labour stability and supply than did the union's

²² *PSAC v. Canada*, 1 S.C.R. 424, (1987) Para 4-10

²³ *Reference Re Public Service Employee Relations Act (Alta.)*, Para 117

²⁴ *Ibid* Para 161

threat of rotating strikes. Yet the Supreme Court decision dealt not with the employer's decision to lock out, but only the union's decision to strike.

Despite the fact that organized labour was unsuccessful in the Labour Trilogy, it is necessary to examine exactly what, if anything, organized labour lost in the process. Thomas McIntosh has argued that, "...the unions involved in the Supreme Court trilogy lost what they never had in the past- constitutional protection for their activities".²⁵ This is an important distinction. In fact, these cases simply upheld the status quo that existed prior to the implementation of the Charter. Although *Dolphin Delivery* and the Labour Trilogy were bitter defeats, organized labour was no worse off than what it had been before the passage of the Charter. What these cases illustrated was the Court and the Charter were tools that seemed to be incapable of expanding the rights held by trade unions. While the status quo was hardly acceptable to organized labour, the situation could have become worse if individual rights were used to undermine the few collective rights that unions held. It remained to be seen if an instance would come to the court in which labour would lose legislative rights that it previously enjoyed before the Charter.

The first era after the passage of the Charter saw organized labour gain only one victory at the Supreme Court. While under normal circumstances a victory would include gaining a right or the recognition of a right that was not previously held, this instance was unique in that the union was not the appellant, but rather, the respondent. Thus, labour's 'victory' must be qualified in that the union did not win anything new, but simply did not lose any rights it had previously enjoyed. In *Lavigne v. Ontario Public Service Employees Union*, a case heard in 1991, college professor Merv Lavigne challenged the union's decision to spend his union dues on a variety of causes he deemed to be objectionable. These union dues were mandatory and were automatically taken off his weekly pay. Lavigne's legal challenge, financed by National Citizens Coalition, did not challenge the mandatory dues check off *per se*, but instead challenged the fact that the union was spending his dues on issues not related to collective bargaining. Lavigne and the NCC were particularly opposed to the union's financial support of the New Democratic Party, striking mine workers in the Great Britain, the Palestinian Liberation Organization, and other left-wing and socially-liberal issues. These expenditures, however, were democratically voted on by the union's membership. Lavigne claimed that his freedom of association rights under section 2(d) were being violated as a result of these expenditures.²⁶ Specifically he believed that the Charter possessed him with a positive freedom *from* association. A victory for Lavigne in this case would have, according to the Canadian Labour Congress, "render[ed] the labour movement absolutely impotent".²⁷ Without the ability to spend union dues on the causes of its choice, the union would no longer have the political clout that it once did and could no longer advocate on behalf of various issues outside the scope of collective bargaining.

²⁵ Thomas A. McIntosh, *Labouring Under the Charter: Trade Unions and the Recovery of the Canadian Labour Regime* (Kingston, ON: Industrial Relations Centre - Queens University, 1989) 89

²⁶ *Lavigne v. Ontario Public Service Employees Union*, 2 S.C.R. 211, (1991) Para 1

²⁷ Unknown, *Globe and Mail*, December 18th 1985

There was originally some question of whether or not the Charter would apply in this case because the union was a private organization spending its own money and the collective agreement which allowed for the mandatory dues check off clause was an agreement between a union and employer. The court in *Lavigne* ruled that because the very notion of mandatory dues check off- also known as the Rand Formula- was accepted in most all cases by the government as a normal aspect of labour relations, the Charter would necessarily apply.²⁸ Furthermore, the employer was a Crown funded agency that represented Ontario's colleges and thus fell under the scope of 'government' as defined by section 32 of the Charter. The court unanimously dismissed Lavigne's appeal, although issued four concurrent opinions in the process. Three of the seven justices believed that Lavigne's rights had been violated because the Rand Formula violated the right to be free from compelled association, but that such action was reasonable. However, the other four judges believed that no rights violation had occurred.

Wilson and L'Heureux-Dubé J.J., in their concurring majority opinion, stated that the purpose of s. 2(d) is to protect association for the collective pursuit of common goals and should not be expanded to protect a right not to associate, while McLachlin J. maintained that a rights violation did not occur because the payments did not impose ideological conformity on Mr. Lavigne or make him associate with ideas and values to which he did not otherwise support.²⁹ The decision in *Lavigne* must rightfully be viewed as an important defensive victory for organized labour. Indeed, Wilson J., the strongest dissenter in the court's ruling on the labour trilogy, noted that it would be hypocritical if the court had ruled against the union in this case. In the past they had refused to grant the objectives of trade unionism constitutional protection under section 2 (d). A victory for Lavigne would have permitted an individual to use those same constitutional rights to destabilize trade unionism.³⁰ Wilson J. also noted that, since s. 2(d) protects both individuals and collectives, if the objects of an association could not be invoked to advance the constitutional claims of unions, they could not be invoked in order to undermine them.³¹ Ensuring that the same rights that had been denied to organized labour could not be used to undermine it was important, although served more of a last ditch defense of trade unionism than an expansion of it. At this point, the court had yet to illustrate that they could be relied upon to provide an expanded vision of collective rights for trade unions. However, they had illustrated that they would be willing- in certain situations- to protect what few collective rights were already held by organized labour.

Following the defeat of the labour trilogy, organized labour avoided the Supreme Court in almost all situations. The labour movement had seemingly learned a bitter lesson in the late 1980s: the courts and the Charter were not the institutions under which organized labour could gain expanded rights. However, by the late 1990s, neo-liberalism had become the dominant

²⁸ Mandatory dues check-off, also known as the Rand Formula, is an element of union security that sees the employer take off appropriate union dues from the gross pay of all workers employed in the bargaining unit. The money collected is in turn given to the union representing those workers.

²⁹ *Lavigne v. Ontario Public Service Employees Union*, 1991

³⁰ Panitch and Swartz, *From Consent to Coercion: The Assault on Trade Union Freedoms* 79

³¹ *Lavigne v. Ontario Public Service Employees Union*, 1991

political ideology, the union movement's social democratic allies were doing little to protect and further it, union density began to decrease, the language of 'rights speak' became increasingly popular in popular discourse, and many of organized labour's allies- feminist groups, gay and lesbian rights organizations, Aboriginal groups and ethno-cultural organizations- have successfully used the Charter to gain rights and alter government action.³² The combination of these factors led to the resurgence of Supreme Court appeals on behalf of trade unions and their members, and unlike the late 1980s, the labour movement began to win these cases. In fact, some of these cases directly would overturn precedent set in earlier cases.³³

The Second Era of Charter Cases

The first of these cases, *U.F.C.W v. KMart*, made its way to the Supreme Court following a labour dispute at two British Columbia KMart stores. The locked out unionized staff- consisting mostly of part-time female workers- began handing out information leaflets at additional area stores detailing the alleged unfair labour practices of KMart and urging customers to shop elsewhere. The activity, which was carried out in a peaceful manner, did not impede access to the stores, but was nevertheless legally halted by a court injunction at management's request.³⁴ The B.C. Labour Relations Board then dismissed the union's claim that the province's definition of picketing was unconstitutional and the case was appealed by the UFCW to the Supreme Court. In a unanimous decision, the court ruled that leafleting was constitutionally protected, stating that the British Columbia *Labour Relations Code* has the effect of restricting consumer leafleting and thus infringes the union's freedom of expression. The court concluded that the infringement of freedom of expression could not be justified under s. 1 of the Charter.³⁵ This represented the first major gain made by organized labour under the Charter.

While the Court's recognition that consumer leafleting was a valid expression of freedom of expression and protected by the Charter, the decision still illustrated a mistrust of organized labour and must be viewed instead as a qualified victory. While the Court ruled that consumer leafleting was constitutionally protected, it juxtaposed this form of expression with a legal picket, which it argued "...impedes public access to goods or services, employees' access to their workplace, and suppliers' access to the site of deliveries".³⁶ The protection of private property, which was legally afforded no constitutional protection, was placed at the centre of the court's decision making process. In this case, the protection of private property and the free mobility of

³² Panitch and Swartz, *From Consent to Coercion: The Assault on Trade Union Freedoms* Ch. 4-9 Both authors rightly note, however, that in addition to many of labour's allies, business and capital have also made significant gains under the court.

³³ Larry Savage, "Organized Labour and the Canadian Charter of Rights and Freedoms," *The Supreme Court Law Review* 36.2 (2007): 192-194

³⁴ *U.F.C.W. Local 1518 v. KMart Canada*, 2 S.C.R. 1083, (1999) Para 2-4

³⁵ *Ibid* Para 33

³⁶ *Ibid* Para 40

goods were placed above organized labour's ability to picket secondary workplaces. The court expanded this argument, stating that "Leafleting does not trigger the "signal" effect inherent in picket lines and it certainly does not have the same coercive component. It does not in any significant manner impede access to or egress from premises".³⁷

The court had drawn clear distinctions between leafleting and picketing, which was still afforded no constitutional protection. Nevertheless, the decision to provide constitutional protection for leafleting must be viewed as a gain for organized labour and provided unions with an additional tool to use during labour disputes. Lastly, this decision must be contrasted with the earlier *Dolphin Delivery* case in which a secondary picket was stripped any protection of free expression, despite the fact that expression was inherent in the actions of the picketers.

Despite both the Court's seemingly clear decision in *KMart* regarding the legality of secondary picketing and the past jurisprudence of *Dolphin Delivery*, organized labour appealed another case to the Supreme Court seeking constitutional protection for secondary picketing. During a lawful strike and lockout at a Pepsi-Cola plant in Alberta, picketing had spread from the site of the workplace to secondary locations, including retail outlets that continued to order deliveries from Pepsi, a hotel where the company's hired replacement workers were staying, and the homes of management personnel.³⁸ The Court in *R.W.D.S.U. v. Pepsi-Cola* was confronted with the task of determining whether secondary picketing was legal at common law. In a unanimous decision, the Court employed the 'wrongful action model' and determined that "Secondary picketing is generally lawful unless it involves tortuous or criminal conduct".³⁹ The wrongful action model, the Court argued:

*"...best balances the interests at stake in a way that conforms to the fundamental values reflected in the Canadian Charter of Rights and Freedoms. It allows for a proper balance between traditional common law rights and Charter values and falls in line with the core principles of collective bargaining put in place in [Canada] in the years following the Second World War."*⁴⁰

However, the model also ensured that "Picketing which breaches criminal law or one of the specific torts will be impermissible, regardless of where it occurs".⁴¹ This case represented a substantive victory for organized labour as it ensured that a worker's collective ability to picket at a secondary location was a right deserving of constitutional protection.

The union's somewhat bold decision to move the previous case to the Supreme Court was perhaps aided to by other court cases- both victories- that occurred a year prior. The first case, *R. v. Advance Cutting and Corring Ltd.*, was similar to *Lavigne* in that it involved the freedom

³⁷ The 'signal' effect, the court reasoned, sent a message to unionized workers and members of the general public to not cross the picket line under any circumstances. Ibid Para 43

³⁸ *RWDSU Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 1 S.C.R. 156, (558) Para 4

³⁹ Ibid Para 66

⁴⁰ Ibid

⁴¹ Ibid Para 77

from compulsory association. However, this case was brought to the Court by a number of contractors, real estate promoters and non-unionized workers, led by the ownership of Advance Cutting & Coring. The appellants were opposed to the Québec government's requirement that all workers employed in the construction industry hold competency certificates and be a member of one of five construction unions. The appellants claimed that such a requirement was in violation of section 2(d) of the Charter. In a 5-4 split decision, the Court ruled that Québec's law of mandatory unionization was consistent with the Charter. While the labour movement did not gain any additional rights in this case, the Court once again protected the legislative rights held by organized labour regarding provisions for a closed-shop workplace. This decision also furthered denied the existence of a constitutional right to freedom *from* association.⁴²

The majority posited that "the law allows any construction worker to change his or her union affiliation, at the appropriate time [and] does not impose on construction workers much more than the bare obligation to belong to a union. It does not create any mechanism to enforce ideological conformity".⁴³ However, the Court suggested that it was not the best equipped institution to deal with such questions. Instead, it stated that "the jurisprudence acknowledges that legislative policy-making in the domain of labour relations is better left to the political process, as a general rule".⁴⁴ While the judicial restraint illustrated in this case proved to be a benefit to organized labour, it left the potential for legislation to be passed that was counteractive to the interest of organized labour and for the courts to then argue that they were not suited to deal with legislation of a political nature. This decision further illustrates that organized labour's struggle is innately political.

Another important victory for organized labour also occurred in 2001 in *Dunmore v. Ontario (Attorney General)*. Under the provincial New Democratic Party (NDP) government, Ontario's agricultural workers were given the ability to join trade unions for the first time under the *Agricultural Labour Relations Act, 1994 (ALRA)*. The *ALRA* also allowed these workers to bargain collectively. Many unions, including the United Food and Commercial Workers began organizing agricultural workplaces in Ontario and won certification orders for these worksites. However, the *ALRA* was repealed following the defeat of the NDP government and the subsequent election of the Progressive Conservative Party. The new government quickly passed the *Labour Relations and Employment Statute Law Amendment Act, 1995 (LRESLAA)*, an omnibus bill which, among other things, repealed all provisions of the *ALRA*. This effectively excluded agricultural workers from joining trade unions and terminated all certification orders and collective agreements that had been negotiated under the *ALRA*. The appellants maintained that the repeal of the *ALRA* and passage of the *LRESLAA* was a violation of their rights under sections 2(d) and 15(1) of the Charter. In an 8-1 decision, the Supreme Court overruled the

⁴² R. v. Advance Cutting & Coring Ltd, 3, S.C.R. 209, SCC 70, (2001) Para 291

⁴³ Ibid Para 218

⁴⁴ Ibid Para 257

decision of the Ontario Court of Appeal and ruled that the legislation in question was indeed unconstitutional.⁴⁵

The *Dunmore* decision was an important case to the labour movement because it illustrated a willingness on the part of the court to extend collective rights. Specifically, it confirmed that a positive freedom of association right existed for trade unions. The decision also indicated that certain rights that could not be realized by the individual could be awarded to the collective. In a progressive move away from earlier narrow readings of freedom of association, the court now maintained that:

*"[Trade unions] assume a life of [their] own and develop needs and priorities that differ from those of its individual members...because trade unions develop needs and priorities that are distinct from those of their members individually, they cannot function if the law protects exclusively what might be "the lawful activities of individuals". Rather, the law must recognize that certain union activities -- making collective representations to an employer, adopting a majority political platform, federating with other unions -- may be central to freedom of association even though they are inconceivable on the individual level."*⁴⁶

Furthermore, the suggestions that certain union activities could be constitutionally protected even though they were inconceivable on the individual level opened the door to further Charter challenges, notably challenges regarding the right to bargain collectively and strike. However, in its decision, the court once again noted that "this is not to say that all such activities are protected by s. 2(d), nor that all collectivities are worthy of constitutional protection; indeed, this Court has repeatedly excluded the right to strike and collectively bargain from the protected ambit of s. 2(d)".⁴⁷ Nevertheless, collective rights that were earlier hollowed out under the Charter were now beginning to take shape as trade unions were beginning to challenge earlier jurisprudence that limited their operation.

In an unfortunate twist of events for the labour movement, the Ontario legislature modified the *Labour Relations Act* to provide agricultural workers with the right to join a union, but continued to deny these workers the right to bargain collectively and the right to strike. While the court allowed for a potentially expansive view of collective rights in the *Dunmore* decision, the Ontario government decided to apply the decision as narrowly as possible. As the Court did not speak directly to collective bargaining or the right to strike, the issue was trampled by the government of the day. Ontario's agricultural employees have yet to challenge the constitutionality of the new legislation, and as such, it remains legal. This illustrates that a legalistic victory on the part of organized labour does not necessarily mean that the rights of workers will be protected. The institution most able to effect the status of organized labour, the

⁴⁵ *Dunmore v. Ontario (Attorney General)*, 3 S.C.R. 1016, SCC 94, (2001) Para 206-207

⁴⁶ *Ibid* Para 17

⁴⁷ *Ibid*

legislature, is innately political. As such, the strategy of organized labour must be political as well.

Perhaps the most important and overarching Charter challenge by organized labour came in 2007 by a number of trade unions representing hospital workers in British Columbia. The appeal was launched in response to the provincial government's *Health and Social Services Delivery Act*. The *Act* effectively eroded the rights held by the unions under the collective agreements and allowed the government increased flexibility in dealing with the unionized staff in a way that was inconsistent with the previously negotiated collective agreements. Additionally, there was no meaningful consultation with the unions before the enactment of the legislation. The foundation of the health care unions' claim was that the government had a positive obligation to bargain with the union and that the unwillingness to do so by the government represented a violation of their freedom of association rights.⁴⁸ Much like the *Pepsi-Cola* case in which a clear precedent was established, the union illustrated a willingness to launch a Charter challenge, even though the court had already ruled on the right to bargain collectively in the labour trilogy. Again, much like the decision in *Pepsi-Cola*, the Supreme Court's 6-1 decision effectively overruled the previously established precedent and provided a constitutionally protected right to the procedure of collective bargaining under the Charter. Indeed, the right to bargain collectively was one of the 'certain union activities' that could be constitutionally protected as the Court had alluded to earlier in *Dunmore*.

The majority decision, written by McLachlin C.J. and supported by five other justices began by stating that freedom of association guaranteed by s. 2(d) of the Charter includes a procedural right to collective bargaining and continued that "the general purpose of the Charter guarantees and the broad language of s. 2(d) are consistent with a measure of protection for collective bargaining".⁴⁹ The court expanded on this rationale, and even spoke to labour history—a rarity for the court—and to international labour accords to which Canada is a signatory. While this was without a doubt a major victory for the labour movement, it must be qualified like many other victories. The procedural right to bargain collectively did have its limitations as there is no necessity for the government employers to come to an amicable agreement with the unions.

The only right that was awarded in this case was a procedural right to collective bargaining. As the court stated, "section 2(d) imposes corresponding duties on government employers on government employers to agree to meet and discuss with [unions]".⁵⁰ Thus, the government is only constitutionally required to engage the union in good faith negotiations. Indeed, and in the court's own words, "the right to collective bargaining thus conceived is a limited right".⁵¹ The case was concerned more with procedure and less with results. This is not to suggest that the scope of the ruling was necessary inappropriate, but rather, to highlight the

⁴⁸ *Health Services and Support- Facilities Subsector Bargaining Association v. British Columbia*, SCC 27, (2007) Para 3

⁴⁹ *Ibid* Para 39

⁵⁰ *Ibid* Para 89

⁵¹ *Ibid* Para 91

limitations of the court as a vehicle for creating the economic change that unions and union members would like to see.

As a result of the ruling, governments are free to deregulate, contract out, and privatize services that are provided by unionized public servants to non-unionized, private sector, for-profit companies, so long as they first enter into discussions with the affected unions. At best, the decision may be seen as a stop-gap measure in public sector unions' fight against privatization of government services, but ultimately not an end to it. Not only does this further illustrate the political nature of organized labour's struggle, it also illustrative of the limited protection that the legal system and constitutional rights can provide. While the duty on the part of government to negotiate with its unionized employees should be viewed as an important victory for organized labour, it may simply end up slowing down privatization and contracting out in the public service.

As Charles Smith has noted, while this decision should be used as broadly as possible by the labour movement, it also has real limitations. He argues "...the actions of the BC government were unconstitutional because [they] ran roughshod over the duty to negotiate, not that it decided to contract out public services".⁵² While the procedural right to collective bargaining should rightfully offer some hope to public sector unions, the government is under no obligation to settle an agreement with these unions. In fact, providing they are willing to sit down and bargain with the unions beforehand, the government is potentially free to enact whatever legislation it desires. Smith notes that "In this regard, the court seems to have left the door open for governments to continue to utilize back-to-work legislation in order to end public sector strikes, but can only do so after 'good faith' negotiations".⁵³

Contextualizing the Turnaround

Regardless of the possibility of regressive, anti-labour legislation being passed through the back door, the Court's change of opinion in many of its recent rulings is nothing short of remarkable. What, it must be asked, accounts for the Supreme Court's turnaround in decisions involving claims brought forward by labour unions in recent years? Joel Bakan has argued that:

*"...the majority of judges are conservative individuals, social and professionally members of the elite, involved in a fundamentally conservative enterprise. They, and the legal profession in general, are about the last group we should expect to act as agents of progressive social change."*⁵⁴

⁵² Charles Smith, "Supreme Court Shifts on Right to Bargain," *Relay: A Socialist Review Project* 18 (2007): 31

⁵³ Ibid

⁵⁴ Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997)

Is the simple answer that the socio-economic class of the Supreme Court has changed significantly since Bakan's (1997) analysis to the point that it has now become an agent of progressive social and economic change? No, the answer must lay deeper than that. Granted more progressive-minded female justices now sit on the bench, but the Court's demographics alone do not account for the change as well-established jurisprudence has been set aside. Indeed, it seems that a more plausible explanation of the turnaround is that the court's opinion of the relative power and strength of the labour movement has changed significantly.

In the Labour Trilogy decision and throughout the early years of the Charter as a whole, there existed a view amongst the Supreme Court that trade unions were sufficiently strong enough to protect their members from employers and government and that the court should not involve itself in that struggle. This notion is best exemplified by McIntyre J., who, in the *Alberta Reference*, posited that:

*"Labour law...is a fundamentally important as well as an extremely sensitive subject. It is based upon a political and economic compromise between organized labour- a very powerful socio-economic force- on the one hand, and the employers of labour- an equally powerful socio-economic force- on the other. The balance between the two forces is delicate...Our experience with labour relations has shown that the courts, as a general rule, are not the best arbiters of disputes which arise from time to time....Judges do not have the expert knowledge always helpful and sometimes necessary in the resolution of labour problems..."*⁵⁵

While the actual validity of this statement is open to question because it can be argued that labour and capital were never of equal strength, the substance of McIntyre's statement was based largely upon notions of corporatism or tripartite relations in the post-war era. This view of labour relations saw a balance between organized labour, capital, and the state. It was assumed by the Court that the prevailing laws upheld this balance and were neutral in their outlook toward both labour and capital and that the state was an impartial moderator. Each institution had a positive and equally important role to play in the political and economic landscape. While this viewpoint may have been dominant amongst the Court in the early years of the Charter, it had all but disappeared by the late 1990s.

In more recent jurisprudence, the Court has not only illustrated a willingness to involve itself in the field of labour law, it seemingly no longer views labour and capital as equally powerful socio-economic forces. This realization could be either the result of the coalescence of political actors around a neoliberal ideology and the rise of globalization or the realization that such a balance never existed in the first place. Regardless of which view is correct, there is little debate that the court has fundamentally shifted its opinion on the relative power and strength of organized labour. For example, the court's unanimous ruling in *KMart* took into account "...the

⁵⁵ Reference Re Public Service Employee Relations Act (Alta.), Para 182-183

vulnerability of individual employees, particularly retail workers, and their inherent inequality in their relationship with management,”⁵⁶ while L’Heureux-Dubé J., in the *Dunmore* decision, remarked that “Agricultural workers generally suffer from disadvantage and the effect on the distinction made by their exclusion from the *LRA* is to devalue and marginalize them within Canadian society”.⁵⁷ The Court, in recent years, has seemingly concluded that the socio-economic status of labour and capital is no longer equal, as evidence by their viewing of workers as vulnerable and disadvantaged. It seems as if the Court has recognized that the delicate balance between labour and capital no longer exists in the new economy. Therefore, they seem to be taking activist steps in an attempt to restore that balance to some degree.

Conclusion

Over the past twenty-five years, organized labour has suffered both major setbacks and gained certain rights under the *Charter of Rights and Freedoms*. While cases heard by the Court during the first decade after the advent of the Charter were generally decided against the interests of organized labour, many cases appealed over the last decade provided the labour movement with certain constitutional protections. Mandel hypothesizes that the Charter itself is the problem. “The whole idea of the *Charter*,” he explains, “can be seen as a legitimization of the basic inequalities of Canadian society, of which the subordination of labour to business is one of the most basic”.⁵⁸ While the truthfulness of this statement is open for debate, especially in light of the more recent decisions, the strict amending formula attached to the Charter and the populace’s generally strong attachment to the individual rights suggest that it will not be disappearing any time soon. With the Charter firmly in place, the best that labour can hope for is that courts will continue to ‘read in’ various collective rights and determine that certain actions—such as the right to strike—will one day be constitutionally protected.

After examining the case history of organized labour under the Charter, it is important to ask is if appeals to the Supreme Court are even in the interest of organized labour. The labour movement has become increasingly legalistic in its outlook and its strategy has centered largely on making appeals to collective rights that they assume to be protected by the Charter. Mandel argues that the Charter “provide[s] the union [movement] with a quick and politically costless way of appearing not to back down”.⁵⁹ He believes that even the Canadian Union of Postal Workers (CUPW), often seen as the most militant union in Canada, has fallen victim to the strategy of legalization offered by the Charter. A contrasting response on the part of CUPW to back-to-work legislation passed by the federal government in both 1978 and 1987 serves as a startling example. The 1978 back-to-work legislation was defied and CUPW president Jean-

⁵⁶ *U.F.C.W. Local 1518 v. KMart Canada*, Para 25

⁵⁷ *Dunmore v. Ontario (Attorney General)*, Para 168

⁵⁸ Mandel, *The Charter of Rights and the Legalization of Politics, Revised Edition* 260

⁵⁹ *Ibid* 278

Claude Parrot spent three months in jail as a result; the 1987 legislation was obeyed 'forthwith,' and the union's response to this was simply to challenge the impugned legislation in court.⁶⁰ However, the union eventually decided to simply drop its legal challenge. While the facts regarding CUPW cannot be disputed, one is forced to question if Mandel's proposed strategy of abandoning appeals under the Charter will actually strengthen the labour movement and improve the lives of Canada's working class.

It must first be noted that the *Charter of Rights and Freedoms* applies explicitly to government action. Thus, workers in the private sector cannot make appeals under the Charter in many instances, unless some form of government action is involved. While many cases have come originated in claims made by workers employed in private sector- *KMart*, *Pepsi-Cola*, *Dunmore*, among others- these were possible because of government (in)action. However, a ruling by the court that made the right to strike legal would offer little benefit for private sector workers engaged in job action, while the recent ruling that provided a procedural right to collective bargaining is not directly beneficial to many private sector workers seeking a first contract or a contract renewal from their employer. As the both of the aforementioned conflicts is between two private entities and is void of government action, the Charter would not be applicable and could provide no resolution. However, the labour movement likely has a legitimate claim if government legislation specifically bans collective bargaining, as it does in relation to Ontario's agricultural workers. The point here is simply that public sector workers can potentially gain more out of the Charter than those employed in the private sector as a result of the explicit involvement of the government in public sector labour relations. Yet in an era of privatization and downsizing, the public sector is not expanding and many services are being contracted out to the private sector, which eliminates the government from labour relations. For these reasons, the Charter has its limitations in providing significant advantages to Canadian workers and trade unions.

If one were asked in the early 1990s if labour should seek certain constitutional protections under the Charter, the answer would have likely been 'no.' Indeed, following the defeat of *Dolphin Delivery* and the Labour Trilogy, there was a noticeable lack of legal challenges under the *Charter* by labour unions. However, with the recent success of cases such as *KMart*, *Dunmore*, *Pepsi-Cola*, and *Health Services*, there is a growing tendency among many trade unions to once again rely on the *Charter* to seek further constitutional protection for labour rights. In fact, the Nova Scotia division of the Canadian Union of Public Employees (CUPE) believes that the recent decision in *Health Services* will put pressure on the Nova Scotia government to rethink its proposed ban on strikes in the health sector. In very public statements, the union has already hinted that a Charter challenge may be brought forward should these workers lose their legislative right to strike.⁶¹ Recent Supreme Court rulings that have extended collective rights to organized labour should be used as broadly as possible to further the rights of Canada's working class in cases in which such a strategy is possible. However, the labour

⁶⁰ Ibid 273-279

⁶¹ Smith, "Supreme Court Shifts on Right to Bargain," 31

movement must be sure to avoid solely relying upon a legalistic strategy to combat anti-union legislation and oppressive employers. As Judith Fudge has lamented:

*"...even if the Supreme Court is prepared to recognize collective bargaining as a fundamental right protected by the Charter, the shift in the site of legitimation for labour rights from the legislature to the courts does not bode well for unions or for working people. Courts have the power neither to foster new institutions nor to influence economic conditions...it is a sad commentary on democratic politics that the courts may be one of the few places where [labour rights have] some legitimacy."*⁶²

For many of Canada's workers, at least in the short term, the ends are far more pressing than the means used to achieve them. Protecting job security, increasing wages, ensuring access to pensions, and maintaining traditional trade union rights such as the right to organize, the right to bargain collectively, and the right to strike are pressing goals. In this light, the means used to achieve these goals- a reliance on the courts, the legislature, collective action, or some combination thereof- are of less importance than actually securing these goals. However, in the long term, the means used to achieve the desired ends are just as important, if not more important, than the ends themselves. Canada's labour unions cannot become overly reliant on one strategic outlook at the expense of another, for fear of losing the capacity to act outside of that selected strategy. While Canada's workers have fared well under the Charter in recent years, or at the very least better than they did in the 1980s, the labour movement must ensure that the strategies of maintaining a sense of class-consciousness, influencing the outcome of elections and the use of militant collective action are not forgotten. This paper has illustrated that relying on the court system and the Charter may not produce the desired results and the precedent created may take many years to be overturned. While this is less important in an era in which organized labour is faring well in the legal arena, there is no guarantee that the current legal climate will remain consistent and beneficial to labour's interests. In this sense, ensuring that their members have a strong sense of working-class consciousness and remain mobilized in the political arena must continue to be at the forefront of the strategy employed by Canada's unions. Neither a reliance on the court system, political action, or militant collective action represents a foolproof strategy for organized labour. However, employing a multi-pronged approach in which either of the potential courses of actions (or a combination of two or more) remains at a quick disposal is ultimately in the best interest of Canada's working class in both the short-term and the long-term.

⁶² Judith Fudge, "Labour is not a Commodity: The Saskatchewan Supreme Court of Canada and the Freedom of Association," *Saskatchewan Law Review* 67.2 (2004): 452

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Changing Federal-Provincial Relations and the Alberta Energy Sector

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Carbon-based energy is critical to the economy of Alberta and has also become a topic of political, economic and environmental contention. Previous Liberal governments have tended to take a more direct involvement in Alberta's energy sector while Conservative governments have generally refrained from this approach. Moreover, recent Liberal governments have appeared to be more concerned with environmental sustainability and have mobilized this concern to justify involvement in the provincial energy sector. This article examines intergovernmental relations between recent Canadian federal governments and the province of Alberta in this policy sector and provides us with an opportunity to review some aspects of the policy-making process. It provides an historical overview and will examine the role of the *Constitution Act*, the intervention of the federal government in this policy sector under the *National Energy Program* (NEP), and the potential for future federal involvement afforded by its role in setting environmental policy. This article deals extensively with government documents in the course of its analysis. The content of these documents should not be taken at face value and the limitations of such rhetoric should be duly acknowledged. I argue that Alberta, the lower level of government in intergovernmental relations, retains the authority to manage its natural resources, and as a consequence the carbon-based energy sector. In addition the federal government and the provinces share the ultimate authority to set the rules of the game in Canada.

History of Carbon-Based Energy Policy

The basis of provincial authority over natural resources was initially enshrined for the four original provinces, Ontario, Quebec, New Brunswick and Nova Scotia in the *British North*

America Act (BNA), Section 109. In 1982 the *Constitution Act* was ratified and the authority for natural resources – and as a consequence carbon-based energy management – was rewritten as Section 92A. This section of the *Constitution Act* states that

“In each province, the legislature may exclusively make laws in relation to exploration for non-renewable natural resources in the province; development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the primary production therefrom; and development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.”¹

The authority granted to the provinces by the Constitution to manage the ownership and governance of non-renewable natural resources is considerable. It has been noted that it is unusual in federal systems for so much authority to be assigned to sub-national units. For example, in other federations such as the United States and Australia the national governments have much broader powers over natural resources. In the United States, the *Commerce Clause* allows the national government wide reaching powers over natural resources while in Australia the national government’s powers are broad and have been further broadened by judicial decisions.²

It is true that the federal government has maintained a direct, if not at times fluctuating, interest and involvement in the management of the province’s carbon-based energy industries. This fluctuating interest and involvement of the federal government in this aspect of Alberta’s provincial affairs is indicative of its changing political agenda. Despite the designation of provincial jurisdiction over non-renewable resources under Section 109 of the BNA Act, Alberta, Manitoba and Saskatchewan did not gain authority for natural resources until 1930. The federal government retained control over natural resources in these newer provinces until 1930 through its authority for *Crown Lands under the Dominion Lands Act*, 1872. The British Government ratified the *Constitution Act* in 1930, which permitted the transference of authority for natural resources to the Prairie Provinces. As a direct result of this ruling the *Natural Resources Transfer Acts* were passed by the Parliament of Canada in the same year. The *Natural Resources Transfer Acts* gave jurisdiction of natural resources on former crown lands to Alberta, Manitoba and Saskatchewan, thus rendering the *Dominion Lands Act* obsolete.³

Major interest in Alberta’s carbon-based energy sector followed the significant discovery of oil and gas at Leduc in 1947. Until this point Canada had been primarily reliant upon imported oil. The discovery of carbon-based energy resources at Leduc generated a considerable shift in

¹ *Constitution Act* (Ottawa: Government of Canada, 1982).

² Robert D. Carins, "Natural Resources and Canadian Federalism: Decentralization, Recurring Conflict, and Resolution," *Publius* 22.1 (1992)

³ Keith Brownsey, "Energy Shift: Canadian Energy Policy Under the Harper Conservatives," *How Ottawa Spends 2007-2008: The Harper Conservatives – Climate of Change*, ed. Bruce Doern (Montreal: McGill-Queens University Press, 2007)

the provincial economy of Alberta and in the supply of oil and gas necessary to sustain Canadian transportation and electricity systems. In the 1950s further oil discoveries took place. As the Alberta carbon-based energy industry grew in economic and political importance, the federal government created the *National Oil Policy* (NOP) in an attempt to shape the growth of this sector. The NOP was implemented in 1961 and was guided by three principal aims. First, it proposed that production should reach an average of 800,000 barrels per day of crude oil by 1963. Second, it prevented imported crude oil refined into petroleum products in Montreal from entering the Ontario market in favour of crude oil from Alberta. Third, it attempted to, and successfully achieved, an increase in oil exports to the United States.

Although the NOP represented federal involvement in the provincial area of non-renewable natural resources its main tenets were consistent with the provincial aim of developing markets for a significant industry. As a result intergovernmental conflict was minimal. The response of the Alberta Government to the NOP, therefore, was generally positive, as the federal government did not attempt to interfere in petroleum pricing or in provincial revenue collection – two of the most important issues for the province. The 1960s and early 1970s represented a period whereby the federal government maintained minimal interest and participation in this policy sector.⁴

The creation and implementation of the NEP in 1980 on the other hand resulted in a very different response by the province of Alberta. This will be discussed in more detail below but the result of the NEP severely damaged intergovernmental relations between Alberta and the federal government and remains a haunting memory of federal intervention in provincial affairs. In the end it was short lived yet severely damaging to Alberta society and economy. When the Conservatives won the 1984 General Election they brought an end to this Liberal government policy.

The Conservatives under the leadership of Brian Mulroney sought to distance themselves from the previous government's tendency to act unilaterally without the involvement of the provinces and re-established multilateral intergovernmental relations and executive federalism in decision-making. Consultation with the provinces on a wide-range of policy issues once again became the foundation of federal-provincial relations under Mulroney. It should be noted that that in the first year of the new Conservative government under Mulroney, there were 438 federal-provincial meetings of first ministers, ministers and deputy ministers. This represented a significant increase on previous years under Trudeau's Liberal government. In addition to this change in the federal approach to policy-making, it also introduced the *Western Accord*. This document was signed in March 1985 by the federal government and the provinces of Alberta, British Columbia and Saskatchewan. The Accord was meant to address the role of the federal government in the taxation of oil and gas in each of the provinces. It was shaped by a commitment to principles of free enterprise and the need to promote investment in the industry

⁴ *The National Oil Policy*, (Ottawa: Government of Canada, 1961),

and to markedly reduce the role of the federal government.⁵ The Energy Council of Canada, in reviewing this era of Canadian federal-provincial relations, has noted that,

*"Canada's federal energy policy underwent a major reform during the mid 1980s, the result of which was a more market-oriented energy sector. Ownership restrictions...were relaxed and oil exploration and fuel switching subsidies removed."*⁶

This free-enterprise approach to the oil and natural gas industries has dominated public policy since then. This is reflected in the *North American Free Trade Agreement* (NAFTA) and the elimination of foreign ownership restrictions for production licenses on frontier lands. Prior to the formation of the Conservative federal government in 2006, the Liberal Government's federal energy policy under both Jean Chretien and Paul Martin was shaped by three overarching goals. These were to implement a framework that promoted long-term development and stewardship of energy resources, to ensure that the environmental impacts of energy development, and transport were addressed, (ensuring relevant environmental objectives would be integrated into all policies) and creating programs to ensure security of supply. According to the overarching goals of the Liberal energy approach, policy was predominantly driven by concern for environmental sustainability.⁷

Since taking office in 2006, the Conservative Government have not released an overarching energy policy similar to that developed, and discussed above, by the previous Liberal government. It would appear that the Conservative government's approach to the energy sector has been to avoid issuing an official policy, and consequently to keep the issue off the political agenda at the federal level. Most of the positions taken by the Harper Government, while sponsored by the Department of Natural Resources, are specific to energy type rather than the adoption of an overall energy policy. Unlike the previous Liberal governments the Harper government appears to have adopted a policy of economic maximization rather without any reference to the environment or sustainability.⁸ The present government has begun to express an interest in the environment, as evidenced by its inclusion as a policy issue in the 2007 Federal Budget and its recently unveiled official environment policy. In comparison to the official environmental commitments of previous Liberal governments, however, it falls well short of providing a strong and energetic environment policy.⁹

⁵ Bruce G. Pollard, "Canadian Energy Policy in 1985: Toward a Renewed Federalism," *Publius* 16.3 (1986)

⁶ *The Energy Economy in Canada*, (Ottawa: The Energy Council of Canada, 2007), <http://www.energy.ca/users/folder.asp?FolderID=2500>

⁷ The Government of Canada, 2004

⁸ *Energy Division*, (Ottawa: Natural Resources Canada, 2008),

⁹ Government of Canada, 2007

Carbon-Based Energy in Alberta

The exploitation and control of natural resources, particularly crude oil, bitumen and natural gas, is of critical importance to the provincial economy. The Alberta Ministry of Energy's 2004-05 overview report noted that the province's carbon-based energy sector continues to be a key economic driver, with the department collecting approximately \$10 billion in non-renewable resource revenues.¹⁰ More recently, Alberta Premier, Ed Stelmach, stated that "Alberta's tremendous economic success is due, in large part, to our secure, abundant and sustainable energy sector."¹¹

Alberta has the largest known oil sands resource in the world, with an estimated 174 billion barrels of recoverable bitumen, available with existing technology and economic conditions. Moreover, the potential of this energy resource is such that investment has at even this point surpassed six billion dollars.¹² Despite this level of investment, the economic potential of Alberta's oil and bitumen production has yet to be realized. It has been estimated that over the next thirty years demand for oil will increase by as much as 60% as the transportation systems of developing countries become increasingly motorized. Alberta possesses approximately 85% of the total bitumen resources worldwide. However, based on present economic recoverability, Alberta's resource base amounts to 100% of the recoverable bitumen.¹³ Natural gas is also of particular importance to the province's energy sector. While bitumen and conventional oil demand a higher price, natural gas has, for the past few years, represented the largest portion of carbon-based energy revenue in the province. In 2005 the province of Alberta accounted for 77 per cent of Canada's total natural gas production.¹⁴

The province has opted to minimize its involvement in the carbon-based energy industry. Michel Duquette has argued that the province adopted the main features of systems that were developed in the energy-producing American State of Texas. This included simple licensing regulations that provided the province with the means to maintain surveillance and control over general exploration activity without intervening in corporate strategy.¹⁵ In a recent report by Alberta Finance, the government outlined three official policies in relation to the carbon-based energy policy sector. The government is concerned with optimizing revenue from the oil and natural gas industries to maximize revenue share and public benefit from energy resources. It also wishes to maintain the accessibility, competitiveness and attraction of the province's resources in order to elicit domestic and international investment to further development of the energy sector. The province wants to ensure that a future supply of energy resources is secured,

¹⁰ Alberta Ministry of Energy, 2007

¹¹ Ed Stelmach, "Telvent Energy Conference Speech," September 18th 2007

¹² Department of Energy Operational Overview 2004-05, (Edmonton: Government of Alberta, Ministry of Energy 2005),

¹³ David L. Greene, "Have we run out of oil yet? Oil Peaking Analysis from an Optimist's Perspective," Energy Policy 34.5 (2006)

¹⁴ Department of Energy Operational Overview 2004-05,

¹⁵ Michael Duquette, "From Nationalism to Continentalism: Twenty years of Energy Policy in Canada," Journal of Socio-Economics 24.1 (1995)

and subsequently to remain a competitive producer and supplier of carbon-based energy resources in the global energy marketplace.

The Constitution and the Carbon-Based Energy Sector

Both the federal and provincial levels of government have a legitimate basis for claiming authority in this sector. To fully understand this argument it is necessary to examine the *Constitution Act*. The *Constitution Act* provides for provincial ownership and control over natural resources in section 109 and parts of section 92. In combination, these sections give each of the provinces powers of direct taxation; the authority to manage and sell public lands; the right to produce and generate electrical energy; the right of exploration for non-renewable natural resources within provincial boundaries; and the authority to develop, conserve and manage non-renewable natural resources.¹⁶

The powers of the federal government in this policy sector are based primarily on section 91 of the *Constitution Act*. This section states that the federal government may “make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.”¹⁷ The remaining portion of Section 91 lists the specific areas where the federal government might intervene. This includes responsibilities for the regulation of trade and commerce, the raising of money by any mode or system of taxation and lands reserved for Aboriginals. The federal government maintains an active role in the energy sector through its responsibilities to promote the harmonization of energy policy, and to help develop regional economic development, frontier lands, offshore development, interprovincial facilities, and trade at both the international and interprovincial level.¹⁸ This considerable list of responsibilities allows the federal government, albeit sometimes through indirect routes, a very real and extensive role in carbon-based energy policy.

A brief overview of the various federal government departments and acts of parliament give an indication of the scope and depth of its capacity to influence carbon-based energy policy. Federal departments which have direct bearing upon this sector include Foreign Affairs, International Trade, Fisheries and Oceans, Industry Canada, Intergovernmental Affairs, Human Resources and Skill Development, Western Economic Diversification, and Public Safety and Emergency Preparedness. While extensive, this list is not exhaustive as the federal government also plays a role through its direct responsibility for Aboriginal Reserves. This provides an additional avenue into carbon-based energy policy. The Department of Indian and Northern Affairs (INA) is involved in this policy sector when industry becomes keen to extract resources located beneath Reserve land. The exact role of the federal government in this case is derived

¹⁶ See “Constitution Act”, (1982) Sec 92 and 109

¹⁷ *Constitution Act*

¹⁸ *The Energy Economy in Canada*.

from legal obligations arising from section 91(24) of the *Constitution Act*, 1867. INA has jurisdiction over Indian Oil and Gas Canada (IOGC). IOGC works closely with Aboriginal communities to harvest and maximize the economic potential of carbon-based energy resources located under Reserve land.

Moreover, the number of federal acts of parliament that both directly and indirectly allow the federal government to play a role in carbon-based energy policy is equally as large. These include the *National Energy Board Act*, *Canada Labour Code*, *Canada Oil and Gas Operations Act*, *Canada Petroleum Resources Act*, *Canadian Environmental Assessment Act*, *Energy Administration Act*, *MacKenzie Valley Resource Management Act*, the *Northern Pipeline Act*, and the *Species at Risk Act*.¹⁹

The federal government, as detailed in the historical overview, has always maintained a role in determining how the rules of the game are set in relation to carbon-based energy policy in Canada. Despite this fact, the role performed by the federal government has been anything but consistent, varying greatly due to factors affecting its agenda, such as change in the governing party, economic conditions and social climate.²⁰

At the provincial level in Alberta there are also several departments and acts that have a direct bearing on the functioning of the carbon-based energy sector. There are three principal departments that take responsibility for governance of this policy area. These are the departments of Energy, Environment and Sustainable Resource Development. In addition to these departments, acts of the provincial legislature that have shaped the carbon-based energy sector include the *Energy Resources Conservation Act*, the *Energy Statutes Amendment Act*, the *Environment Protection and Enhancement Act*, the *Land Titles Act*, the *Oil and Gas Conservation Act*, the *Public Lands Act*, and the *Surface Rights Act*.

The involvement of two levels of government in the carbon-based energy policy sector is problematic because it has created an environment where two sets of actors wish to impose a distinct agenda of how the rules of the game should function. This has been a consistent theme of Canadian federal politics, according to Paul Thomas, with government interaction shaped by large and diverse enterprises pursuing multiple, vague, shifting and often conflicting policy goals through a wide range of policy instruments and varied organizational formats.²¹ Therefore, divergent views from the two levels of government concerning the appropriate agenda for this sector can become a significant point of friction. In this particular policy sector, however, Brownsey has noted that friction has often been created and exacerbated by a contradiction between the provincial policy of promoting exploration and production of carbon-based energy and the federal initiatives of sustainable development and greenhouse gas (GHG) reduction.²²

¹⁹ Keith Brownsey, "The Alberta Oilpatch: Multi-level Regulation Transformed," *Rules, Rules, Rules: Multi-level Regulatory Governance*, eds. Bruce Doern and Robert Johnson (Toronto: University of Toronto Press, 2006)

²⁰ See: Brownsey, "Energy Shift: Canadian Energy Policy Under the Harper Conservatives,"

²¹ Paul B. Thomas, "Central Agencies: Making a Mesh of Things," *Canadian Politics*, eds. James P. Bickerton and Alain-G. Gagnon, 2nd ed. (Peterborough, ON: Broadview Press, 1996)

²² Brownsey, "The Alberta Oilpatch: Multi-level Regulation Transformed,"

Since the Conservatives came to power in 2006 many of these concerns have been in abeyance, given the similar political vision shared by the federal and provincial Conservatives.

The National Energy Program

One of the most important developments in intergovernmental relations around carbon-based energy between the province of Alberta and the federal government was the implementation of the *National Energy Program* (NEP) in 1980. The NEP remains a significant example of an attempt by the federal government to replace multilateral relationships with the provinces, with unilateral policy by fiat. The creation and implementation of the NEP is a strong demonstration of the federal government's authority to set the rules of the game.

The implementation of the NEP by Pierre Elliot Trudeau's Liberal Government was in part a response to the belief that decentralizing tendencies in the Canadian federation had become too strong during the 1960s and 1970s. There were two reasons for Trudeau's action. One was his belief in a strong centralized state and the need to assert federal over provincial power an authority. The second was his political dependence on central Canada, especially Ontario and its need for cheaper oil.²³

Marc Lalonde, Minister of Energy in Trudeau's government, introduced the NEP on October 28, 1980. The program, however, was not entirely a Liberal invention. The NEP was actually developed by the Department of Energy, Mines and Resources during the short-lived Progressive Conservative government under Joe Clark. The rationale for the development of this policy by Clark's Conservative government was also politically based. As a minority government it appeared to be a means by which their position in office could be secured. This, as previously stated, was because of the program's intended appeal to the significant portion of voters located in central Canada. The Liberals, therefore, simply appropriated and implemented the program upon regaining office.²⁴ The NEP was a unilaterally implemented program and imposed a schedule of small, staged increases in the pricing of domestic oil and gas. The measures of the NEP to increase federal revenues from energy, as noted by Norrie, were dramatic as they included,

*"A Petroleum and Gas Revenues Tax of 8 percent [that] was applied to revenues of the industry, and an additional tax was placed on natural gas and gas liquids. By the federal government's own estimate, these measures would increase its share of petroleum revenue from 10 percent to 24 percent, primarily at the expense of producers, but also of provinces."*²⁵

²³ Pollard, "Canadian Energy Policy in 1985: Toward a Renewed Federalism."

²⁴ Paul Chastko, *Developing Alberta's Oil Sands: From Karl Clark to Kyoto* (Calgary: University of Calgary Press, 2004)

²⁵ Kenneth M. Norrie, "Energy, Canadian Federalism and the West," *Publius* 14.1 (1984)

The impetus for the implementation of the program was rooted in the oil shocks of the 1970s that led to significant rises in the price of crude oil as political instability characterized many of the prominent oil-exporting states. The first of these oil shocks occurred in 1973 following the Yom Kippur War, between Israel and a coalition of Arab states led by Egypt and Syria in Sinai and the Golan Heights. The price of oil per barrel was dramatically increased by the Organization of the Petroleum Exporting Countries (OPEC) which had a considerable negative impact on North America and Western Europe. On January 1, 1974 OPEC raised the price of oil from \$4.31 to \$10.11 (US), leading to the first dramatic price shock. In addition to this, the Arab members of OPEC, cut production and embargoed oil shipments to the Netherlands and the United States in retaliation to their support of Israel in the Yom Kippur War. The second oil shock came six years later in 1979 as a consequence of the Iranian Revolution and saw another dramatic increase in oil prices.²⁶

According to Bruce G. Pollard the NEP was governed by three central aims. These were to provide for security of the energy supply, to allow Canadians the opportunity to participate in the petroleum industry, and to establish a petroleum pricing and revenue sharing regime that would benefit all citizens.²⁷ Citizens from Central Canada were generally favourable toward the NEP, since they agreed with the view that the federal government was fulfilling its constitutionally designated responsibilities in price regulation and inter-provincial trade. In Alberta, however, the NEP was met with apprehension and hostility. The introduction of the NEP prompted Premier Peter Lougheed to state that "the Ottawa government has, without recognition, without agreement, simply walked into our home and occupied the living room." Moreover, he spoke repeatedly and passionately about the gains of 1930 when control over these resources was finally given to the Prairie Provinces and how this concession appeared threatened exactly fifty years later.²⁸ The NEP was a tactical error by the federal government that brought disastrous consequences. It might be argued that it in the short-term it contributed to the replacement of this government by the Conservatives in the 1984 General Election. In the long-term its repercussions have exacerbated mistrust of the federal government in the province on Alberta. It has been argued that this particular event ranks as the low point of relations between Alberta and the federal government.²⁹

The government of the province of Alberta had two principal concerns. The first was that the federal government was overstepping its authority and attempting to usurp provincial jurisdiction over the control of natural resource extraction. The second was that it feared that the newly imposed taxes would devastate the provincial economy as foreign-owned companies in the industry would be forced out, creating a climate of social unrest and an increase in unemployment. The Government of Alberta argued that the Petroleum and Gas Revenue Tax

²⁶ For further elaboration See: David Hammes and Douglass Wills, "Black Gold: The End of Bretton Woods and the Oil Price Shocks of the 1970s," *The Independent Review* 9.4 (2005)

²⁷ Pollard, "Canadian Energy Policy in 1985: Toward a Renewed Federalism,"

²⁸ Peter Lougheed, "Transcript of Televised Address to Albertans," October 30th 1980

²⁹ Norrie, "Energy, Canadian Federalism and the West,"

(PGRT), which was a tax on production revenues, was an illegitimate federal intrusion on a clearly sacrosanct provincial right. The federal government used the PGRT as a revenue-sharing mechanism. Specifically the government directed all revenue from this tax to Newfoundland until its fiscal capacity had reached 110 percent of the national average.³⁰ The Alberta government also opposed the Natural Gas and Gas Liquids Tax (NGGLT), an export tax placed upon natural gas, because it wanted to be able to export gas directly to the United States. The effects of the NEP on Alberta were damaging and widespread. Barry Cooper has argued that it resulted in "convoys of drilling rigs and their moving crews heading south, policy-induced unemployment in the province on an unprecedented scale, widespread and deliberate corporate and personal bankruptcy, and unmeasured social grief and despair."³¹

The government of Alberta made several responses to the NEP. It unilaterally announced that it would begin a progressive reduction in oil shipments to Eastern Canada. In addition it withheld approval for all new proposed oil sands and heavy oil projects and challenged the federal government in the courts on the validity of the federal tax.³² The NEP came to an abrupt end in 1984 with the election of a Conservative government under Brian Mulroney. The Progressive Conservatives dismantled and abandoned the NEP during its first term in office.

The Relationship between Energy and Environment:

The NEP was an attempt to gain control over the energy output of the province of Alberta through taxation. Michael Howlett has noted that the constitutional differences in regard to natural resource authority between Section 109 of the BNA Act and Section 92A of the Constitution Act, have to a large degree, greatly limited any possibility for a federally initiated program resembling the NEP. Howlett draws attention to the significant inclusion of the six clauses of Section 92A in the *Constitution Act*. These clauses in combination directly address the issues that were so highly contested under the NEP. These were specifically resource ownership and government taxation authority. The six schedules included under Section 92A have reaffirmed provincial authority in this sector, allowing the provinces to levy indirect taxes on natural resource revenue, and providing for provincial control of inter-provincial resource and energy exports.³³

There are other ways in which the federal government might become involved in the carbon-based energy policy sector. One of the most likely policy areas that might lead to such a situation would be environmental policy. The environment is a shared area of responsibility

³⁰ Bruce G. Pollard, "Canadian Energy Policy in 1985: Toward a Renewed Federalism," Ibid16.3 (1986)

³¹ Barry Cooper, "It's Déjà vu all Over Again," *The Calgary Herald*, August 22nd 2007

³² Pollard, "Canadian Energy Policy in 1985: Toward a Renewed Federalism,"

³³ Michael Howlett, "The Politics of Constitutional Change in a Federal System: Negotiating Section 92A of the Canadian Constitution Act (1982)," Ibid21.1 (1982)

between the provinces and the federal government, and the importance of this issue on the political agenda has increased substantially over the past decade.³⁴

The federal government deals with this issue primarily through the Department of Environment Canada. The *Department of the Environment Act* created Environment Canada in 1982 to ensure the preservation and improvement of the quality of the natural environment. Section 5 of this Act posits that the department should promote and encourage the institution of practices and conduct that will ensure better prevention and enhancement of the environmental quality.³⁵ The constitutional basis for the federal development of Environment Canada is the peace, order and good government clause under Section 91, and its responsibility to ensure these conditions for all Canadians.

The federal government's ability to develop authority in this sector has been challenging. This has been due in part to its relatively late development of interest in this policy area. By the late 1960s when the federal government first began to seek involvement in environmental policy there already existed a significant body of provincial legislation with an established constitutional basis. This was further exacerbated by restrictive judicial interpretation of the federal authority under Section 91.

Despite these difficulties the federal government has been able to act under clause 12 of Section 91 which gives responsibility for oceans and inland fisheries. Therefore, the federal government has been able to claim a role in inland waterway usage and protection where pollution might threaten aquatic life and habitat. In addition the *R. v. Crown Zellerbach Canada Ltd.* Supreme Court Case provided a powerful precedent favouring the federal government in this policy area. The court upheld the validity of the Ocean Dumping Act and ruled that all matters related to polluting the ocean are under the exclusive jurisdiction of the federal government. This gave the federal government authority for jurisdiction over inter-provincial and international waterways where pollution might be carried from one jurisdiction to another.³⁶ The federal government can also use its treaty making power to commit Canada to international agreements. One significant example of this is the previous Liberal government's decision under Jean Chretien to ratify the *Kyoto Accord* thus committing the country, and its composite provinces, to its mandate of GHG reduction.

The provinces, as stated above, had a strong constitutional basis for environmental authority prior to the federal government's attempt to create a role for itself in this sector. The most important constitutional basis for provincial environment legislation has been Section 92 (13) of the BNA Act. This section states that the provinces have the exclusive right to make laws pertaining to property and civil rights. This clause is significant because in 1867 property and civil rights were understood to represent all law governing relations between citizens. Therefore,

³⁴ The environment is a shared policy sector in a number of ways. For example the provinces have primary authority for permitting industrial waste discharges (e.g., to the air), and in determining acceptable air quality levels while the federal government is responsible for the management of toxic substances in the country.

³⁵ *The Department of the Environment Act*, (Ottawa: Government of Canada, 1982).

³⁶ See: *R. v. Crown Zellerbach Canada Ltd.* 1988. <http://sec.lexum.umontreal.ca/en/1988/1988rcs1-401/1988rcs1-401.html>.

as government intervention in the economy grew these laws were modified by government regulation to address areas such as land use, manufacturing and mining.³⁷ Another strong constitutional reinforcement for the role of provinces in environment policy has been Section 92 (16) of the BNA Act, dealing with all matters of a merely local or private nature. Due to the already broad and well-accepted constitutional basis for a provincial role provided by Section 92 (13), this clause is generally employed as a residual clause and supplementary support for the former.

In addition to Environment Canada at the federal level there are two standing committees in the parliament, one each in the House of Commons and the Senate, that play a role in this policy sector. They are namely the House of Commons Standing Committee on Environment and Sustainable Development and the Senate Standing Committee on Energy, the Environment and Natural Resources. Therefore, this could certainly provide a basis for intervention in the carbon-based energy sector in any of the provinces.

Alberta's carbon-based energy sector represents a massive, and still-growing, industry especially in terms of the extraction and sale of bitumen. In 2001 the oil production in Alberta from bitumen exceeded conventional oil production for the first time. The production of bitumen in particular, however, has become a source of concern primarily because of the potential environment damage that the extraction process can cause.³⁸ The exploitation of the Athabasca oil sands region in Northern Alberta in pursuit of bitumen could potentially cause permanent and irreparable damage to the regional air quality, fresh water supplies, including the Athabasca River, boreal forests and natural wildlife. Dan Woynillowicz, a critic of the environmental impact of the oil sands development, has argued that if recent economic growth rates continue in Alberta, by 2020 total emissions will rise to 72% above 1990 levels.³⁹ Despite the ongoing criticism, however, there is no current consensus on the impact or long-term consequences of oil sands exploitation. Another critic of the oil sand exploitation, Todd Hirsch, asserted that there is

*"No measure of the cumulative impacts of oil sands development on the environment, or any measure of how much change the ecosystem can support. There is also no consensus among stakeholders as to how much damage is being sustained...the debate over the environment is certain to grow in importance as an issue of public policy as the oil sands continue to be developed."*⁴⁰

As previously discussed, the federal government has stated that concern for the environment will remain a key factor in determining how all policy sectors conduct business.

³⁷ F.L. Morton, "The Constitutional Division of Powers with Respect to the Environment in Canada," Federalism and the Environment: Environmental Policymaking in Australia, Canada, and the United States, eds. Kenneth Holland, F.L. Morton and Brian Galligan (London: Greenwood Press, 1996)

³⁸ Murray Whyte, "At What Price Progress?," Toronto Star September 23rd 2006

³⁹ Dan Woynillowicz, Oil Sands Fever: Blueprint for Responsible Oil Sands Development (Calgary: Pembina Institute, 2007), http://pubs.pembina.org/reports/OS_Blueprint_FINAL_lc.pdf

⁴⁰ Todd Hirsch, Treasure in the Sand: An Overview of Alberta's Oil Sands Resources (Calgary: Canada West Foundation, 2005),

Provincial apprehension had developed due to the previous Liberal government's commitment to the *Kyoto Protocol*, which it was feared would re-establish unilaterally imposed federal interference in the provincial carbon-based energy sector.⁴¹ In 2007, however, the Conservative Government relinquished responsibility to these commitments. There is still concern in Alberta, however, that the environment may be used as a guise for the federal government to assume a larger role in the carbon-based energy sector, as it did previously through the NEP.

The current federal government under Stephen Harper could possibly use the environment as a justification to become more actively involved in Alberta carbon-based energy policy, perhaps through expressed concern for the aquatic habitat in the Athabasca River as a consequence of oil sand exploitation. There are, however, a number of indicators that suggest this will not occur. The political agenda of the current federal government, its official rhetoric and actions, demonstrate a strong support for maximization of the economic potential of carbon-based energy in Alberta, and that currently this policy goal trumps concern for the environment on the federal agenda. Despite the precedence set by the NEP, it is both feasible and possible that the federal government might act upon its established powers under Section 91 of the Constitution Act to influence policy-making in Alberta at some point in the future. It is very unlikely; however, that authority for the carbon-based energy sector in Alberta will cease to be exercised primarily by the province.

In early 2007 the Conservative administration unveiled an environmental plan called *Turning the Corner: An Action Plan to Reduce Greenhouse Gases and Air Pollution*. Included in the plan was the introduction of federally imposed greenhouse gas (GHG) emission targets for industry. The GHG targets have required industrial actors to reduce their production of air pollutants. Minister for the Environment, John Baird, stated that with the introduction of this environmental strategy Canada "now has one of the most aggressive plans to tackle green house gases and air pollution in the world."⁴² Such rhetoric might alarm the province of Alberta and its oil and gas industry partners. A further examination of government rhetoric and action, however, demonstrates that proposals such as this are clearly in the minority, and probably constitute little more than tactful political statements to maintain a 'catch-all' public appeal.

Six months prior to the unveiling of *Turning the Corner: An Action Plan to Reduce Greenhouse Gases and Air Pollution* the Prime Minister spoke to the Canada-UK Chamber of Commerce. During his speech he stressed the importance of Canada as an emerging global energy powerhouse, to which the exploitation of conventional crude oil, bitumen and natural gas originating in Alberta are central. This speech provides a very different scenario than the one outlined in the environmental action plan referred to above. In addition it is important to note that the rhetoric about the environmental plan were directed toward the Canadian public, while Harper's comments solely addressed industry.⁴³

⁴¹ Brownsey, "The Alberta Oilpatch: Multi-level Regulation Transformed."

⁴² Environment Canada, 2007

⁴³ "Harper touts Canada as Energy Superpower," *Canadian Press* July 15th 2006

A further government action that supports the argument that the federal government is not likely to become involved in policies affecting Alberta's carbon-based energy sector was its decision to abandon Canada's Kyoto commitments. The Canadian Government built upon this position at a recent UN Summit in Bali, where it put forward a proposal to address pollution and GHGs that avoided any direct reference to specific emission targets. At the same conference it also refused to accept a proposal requiring developed countries to reduce GHG emissions by 25-45% of 1990 levels by 2020. In response to inquiry over the Canadian government's stance on these issues, John Baird responded that to even attempt to meet such targets would be the equivalent to economic suicide.⁴⁴

Most recently, in January 2008, the federal government again demonstrated that it has no immediate intention to become involved in Alberta's carbon-based energy sector. In 2006, the then newly appointed Conservative government appointed a National Roundtable on the Environment and the Economy to provide recommendations for future action. The panel released its conclusions publicly in January 2008. Its principal recommendations were that the government should either initiate a carbon tax on emissions or set up a cap limiting the level of industrial emissions to induce a substantial and long-term reduction in the production of GHGs. Moreover, the panel also concluded that introducing these changes would have only a minimal impact on economic productivity. The government immediately issued a wholesale rejection of the panel's recommendations, with the Minister John Baird publicly stating that the concerns of the report were already addressed within *Turning the Corner: An Action Plan to Reduce Greenhouse Gases and Air Pollution*.⁴⁵

Therefore, despite evidence of minimal rhetoric suggesting a possibility of federal re-involvement in Alberta's carbon-based energy sector, it is highly unlikely that this government will pursue such policies. Furthermore, it becomes clear from the examples presented that the current federal government is concerned primarily with the economic possibilities of its energy sources, while the environmental impact associated with the extraction of these resources is a secondary concern.

Conclusion

The historical development of the carbon-based energy sector demonstrates the changing dynamics of intergovernmental relations between the federal government and Alberta. Moreover, it reveals how the two levels of government were able to act according to their respective constitutional authority and what forces acted as catalysts for the policy agendas that have been formulated and implemented. One of the most significant catalysts that have influenced intergovernmental relations and policy-making in the energy sector has been the issue of oil

⁴⁴ "Canada Signing Climate Treaty without US like 'unilateral disarmament': Baird," *CBC News* CBC 2007 <http://www.cbc.ca/canada/story/2007/12/09/climate-baird.html>.

⁴⁵ Mike DeSouza, "Feds Reject Carbon Tax," *Windsor Star* January 8th 2008

pricing and revenue collection. The rightful claim to economic benefit from the carbon-based energy industry in Alberta has been a source of contest and conflict with the federal government. This was most visible under the implementation of the NEP, and despite constitutional changes since that time significantly reducing the federal government's capacity to affect revenue collection and pricing, it continues to be a primary concern for the province.

In the case of intergovernmental relations between the federal government and the province of Alberta around carbon-based energy policy it seems that policy is formulated and implemented primarily by the lower level of government – the province of Alberta. The formulation of this policy, however, does not take place without any federal involvement. The federal government has used environmental policy to influence and restrict Alberta's management of its energy sector. This authority is based upon the constitutional documents of the BNA Act and later the *Constitution Act*. Section 91 of the *Constitution Act* gives the federal government the right to become involved in provincial affairs in certain circumstances. The significant powers granted to the provinces through Section 92A for natural resources, however, means that the carbon-based energy sector of Alberta is, and should remain under provincial jurisdiction.

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