2016/2018

CANADIAN YEARBOOK OF HUMAN RIGHTS

ANNUAIRE CANADIEN DES DROITS DE LA PERSONNE

VOL.II

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Editor-in-Chief	John Packer
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RÉDACTEURS

Rédacteur en chef	John Packer
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Rédacteur adjoint	João Velloso
Rédractrice exécutif (2016-2017)	Kirsten Fisher

CONTRIBUTORS

Jane Bailey, Professor, Faculty of Law, University of Ottawa

Dillon Black, doctoral candidate, Department of Criminology, Faculty of Social Sciences, University of Ottawa

Jacquelyn Burkell, Assistant Dean (Research) and Associate Professor, Faculty of Information & Media Studies, University of Western Ontario

Karen Busby, Professor of Law and Director, Centre for Human Rights Research, University of Manitoba

Jeffrey Drope, Scientific Vice President, Economic and Health Policy Research, American Cancer Society

Suzie Dunn, doctoral candidate, Faculty of Law, University of Ottawa

Pearl Eliadis, lawyer and member, Centre for Human Rights and Legal Pluralism, McGill University

Kirsten J. Fisher, Assistant Professor, Department of Political Studies, Faculty of Arts and Science, University of Saskatchewan

Lisa Forman, Associate Professor, Dalla Lana School of Public Health, University of Toronto

Sharon Friel, Professor of Health Equity and Director of the School of Regulation and Global Governance, Australian National University (ANU), and Director of the Menzies Centre for Health Policy ANU

Deborah Gleeson, Senior Lecturer, School of Psychology and Public Health, La Trobe University

Anand Grover, founder-member of the Lawyers Collective (New Delhi) and former United Nations Special Rapporteur on the right to health (2008-2014)

Anna Jeffery, lawyer, Ottawa

Ronald Labonté, Professor and Distinguished Research Chair in Globalization and Health Equity, School of Epidemiology and Public Health, University of Ottawa

Emma Larking, Postdoctoral Fellow at the Centre for International Governance and Justice, Australian National University, and Adjunct Research Fellow at the Centre for Applied Philosophy and Public Ethics, Charles Sturt University

Philip Leech-Ngo, Assistant Professor, Department of History and Politics, University of New Brunswick

Raphael Lencucha, Associate Professor, School of Physical & Occupational Therapy, McGill University

Anne Levesque, lawyer and Co-Director of the Law Practice Program, Faculty of Law, University of Ottawa

Courtney McNamara, Senior Research Fellow, Department of Sociology and Political Science, Faculty of Social and Educational Sciences, Norwegian University of Science and Technology

Lorraine Misquith, Senior Advocacy Officer, the Lawyers Collective (New Delhi)

Corinne Packer, Senior Research Associate, School of Epidemiology and Public Health, University of Ottawa

John Packer, Associate Professor of Law and Director of the Human Rights Research and Education Centre, University of Ottawa

Leslie Regan Shade, Associate Professor, Faculty of Information, University of Toronto

Priscilla M. Regan, Professor, Schar School of Policy and Government, George Mason University

Arne Ruckert, Senior Research Associate, School of Epidemiology and Public Health, University of Ottawa

Ted Schrecker, Professor of Global Health Policy, Institute of Health & Society, Newcastle University

Valerie Steeves, Professor, Department of Criminology, Faculty of Social Sciences, University of Ottawa

Cristina G. Stefan, Associate Professor, School of Politics and International Studies, Faculty of Social Sciences, University of Leeds

Emma Swan, doctoral candidate, School of International Development and Global Studies, Faculty of Social Sciences, University of Ottawa

Anne Marie Thow, Senior Lecturer, Health Policy, Menzies Centre for Health Policy, School of Public Health, University of Sydney

Madison Trusolino, doctoral candidate, Faculty of Information, University of Toronto

Gus Van Harten, Associate Dean (Academic) and Professor, Osgoode Hall Law School, York University

The Canadian Yearbook of Human Rights is published by the Human Rights Research and Education Centre at the University of Ottawa with financial support from the Ottawa-based NGO Human Rights Internet.

CONTRIBUTEURS

Jane Bailey, professeure, Faculté de droit, Section de droit civil, Université d'Ottawa

Dillon Black, candidat au doctorat, Département de criminologie, Faculté des sciences sociales, Université d'Ottawa

Jacquelyn Burkell, doyenne adjointe (recherché) et professeure agrégée, Faculté des sciences de l'information et des médias, University of Western Ontario

Karen Busby, professeure de droit et directrice, Centre for Human Rights Research, University of Manitoba

Jeffrey Drope, vice-président scientifique, Recherche sur les politiques économiques et de santé, American Cancer Society

Suzie Dunn, candidate au doctorat, Faculté de droit, Université d'Ottawa

Pearl Eliadis, avocate et membre, Centre pour les droits de la personne et le pluralisme juridique, Université McGill

Kirsten J. Fisher, professeure adjointe, Dé Assistant Professor, Département d'études politiques, Faculté des arts et des sciences, Université de la Saskatchewan

Lisa Forman, professeure agrégée, Dalla Lana School of Public Health, University ofToronto

Sharon Friel, professeure d'équité en matière de santé, directrice, School of Regulation and Global Governance, Australian National University (ANU) et directrice, Menzies Centre for Health Policy ANU

Deborah Gleeson, maître de conférences, École de psychologie et de santé publique, La Trobe University

Anand Grover, membre fondateur, Lawyers Collective (New Delhi) et ancien Rapporteur spécial des Nations Unies sur le droit à la santé (2008-2014)

Ronald Labonté, professeur et titulaire d'une Chaire de recherche distinguée en mondialisation et équité en santé, École d'épidémiologie et de santé publique, Université d'Ottawa

Emma Larking, boursier postdoctoral, Centre for International Governance and Justice, Australian National University, et chercheur associé, Centre for Applied Philosophy and Public Ethics, Charles Sturt University.

Philip Leech-Ngo, professeur adjoint, Département d'histoire et de politique, Université du Nouveau-Brunswick

Raphael Lencucha, professeur agrégé, École de physiothérapie et d'ergothérapie, Université McGill

Anne Lévesque, avocate et codirectrice, Programme de pratique du droit, Faculté de droit, Section de Common Law, Université d'Ottawa

Courtney McNamara, chercheuse principale, Département de sociologie et de sciences politiques, Faculté des sciences sociales et éducatives, Norwegian University of Science and Technology

Lorraine Misquith, agente principale des services d'assistance judiciaire, the Lawyers Collective (New Delhi)

Corinne Packer, associée principale de recherche, École d'épidémiologie et de santé publique, Université d'Ottawa

John Packer, professeur agrégé, Faculté de droit et directeur, Centre de recherche et d'enseignement sur les droits de la personne, Université d'Ottawa

Leslie Regan Shade, professeure agrégée, Faculté de l'information, Université de Toronto

Priscilla M. Regan, professeure, Schar School of Policy and Government, George Mason University

Arne Ruckert, associée principale de recherche, École d'épidémiologie et de santé publique, Université d'Ottawa

Ted Schrecker, professeur de politique de santé mondiale, Institute of Health & Society, Newcastle University

Valerie Steeves, professeure, Département de criminologie, Faculté des sciences sociales, Université d'Ottawa

Cristina G. Stefan, professeure agrégée, École de sciences politiques et d'études internationales, Faculté des sciences sociales, Université de Leeds

Emma Swan, candidate au doctorat, École de développement international et mondialisation, Faculté des sciences sociales, Université d'Ottawa

Anne Marie Thow, chargée de cours principale, politiques de santé, Menzies Centre for Health Policy, School of Public Health, Université de Sydney

Madison Trusolino, candidat au doctorat, Faculté de l'information, Université de Toronto

Gus Van Harten, doyen associé (études) et professeur, Osgoode Hall Law School, York University

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EDITOR'S INTRODUCTION

John Packer

A common notion of our times is "transition" – essentially a euphemism for change. It is accompanied by uncertainty and insecurity. Many don't like it, fearing losses of position or benefit, or simply the discomfort of the unknown. Yet change is the nature of life and a basic challenge for the human condition. And yet for those very many who suffer, lack opportunity or face worsening prospects, change must be welcome and not come soon enough. But how to engage with and influence such transitions to positive ends? Notably, how to affect improvements in the human condition – in our case and interest, how to further the realisation of human rights for everyone everywhere, beginning, but not ending, here at home in Canada?

The Canadian Yearbook of Human Rights began some years ago as an initiative to provide a platform for such discussions, aiming to fill a still largely existing gap in Canadian literature. The timing came amidst some light in favour of human rights in Canada, notably prospects for the rights of Indigenous Peoples and calls for reconciliation and a renewed positive disposition to immigration including refugees, but also, in some corners, evident "pushback" against human rights principles and consequential practices. While this tension of the last few years has been widely recognized (and perhaps getting worse), it is perhaps best understood as a constant and not surprising feature of the idea of human rights as part of a wider project for social justice and the struggle for civilizational development that prizes human decency, dignity and equal opportunities for capacitization and fulfilment. This is the call and challenge of freedom. The project and struggle is never ending and only reflects in its contemporary manifestations specific challenges arising from current issues.

The compilation and production of this second edition of the Canadian Yearbook of Human Rights has been something of a struggle in its own realisation. As such, it joins together contributions received at different moments, brought together over the last few years. While time has compromised some of its immediate currency, it nonetheless features important topics of ongoing and arguably increasing significance. We are grateful to the many contributors.

Again, the publication includes a number of articles grouped under a General Section comprising distinct topics, followed by two focused Special Sections, per our invitation, and as compiled and edited by Guest Editors. A short section of some Documentation follows.

In the General Section, five articles address very different issues of human rights arising within Canada and also regarding human rights within Canada's international relations. In terms of the former, there are articles about the federal government's failure to meet its obligations with regard to Indigenous children and about accountability for sexual violence within Canada's universities. In terms of Canada's foreign policy, the topics covered address: Canada's position(s) vis-à-vis international accountability for international crimes or gross and systematic violations of human rights; Canada's role in the fraught Israel-Palestine conflict; and the place of human rights in Canada's free trade negotiations or practices with China. All of these topics remain current and of pressing nature – none of them resolved despite the hopes (and some improved dispositions) linked with the coming to power in 2015 of the Trudeau Government and promise of "sunny ways".

The two Special Sections equally address very different and highly current topics: first, on trade, health and human rights, and, second, on human rights and digital connectivity arising from the Internet, social media and the emergence of Big Data. These are matters of tremendous complexity far from resolved in conceptual or, much less, practical terms. They will undoubtedly persist as substantial and multi-faceted challenges for some years ahead and may in part define human well-being and even affect the broad purchase of human rights.

Finally, under Documentation there is included reports from 2017 tackling the challenges of human rights in Canada – the year of our 150th anniversary of confederation. These indicate the state of affairs – some of the problems and prospects. They also underline that it is for us, in Canada, as a State and as civil society comprising groups and individuals, to stand up for human rights and work constantly for the full realisation of human rights for everyone, everywhere. This is the project – one in which we hope this Yearbook offers a modest positive contribution.

Une notion commune de notre époque est celle de la « transition » – essentiellement un euphémisme pour le changement. Elle s'accompagne d'incertitude et d'insécurité. Beaucoup n'aiment pas cela, craignant des pertes de position ou d'avantages, ou simplement l'inconfort de l'inconnu. Pourtant, le changement est la nature même de la vie et un défi fondamental pour la condition humaine. Néanmoins, pour ceux qui souffrent, qui manquent d'opportunités ou qui font face à des perspectives qui s'aggravent, le changement doit être le bienvenu et ne doit pas venir assez tôt. Comment s'engager et influencer de telles transitions à des fins positives? En particulier, comment influer sur l'amélioration de la condition humaine, dans notre cas et dans notre intérêt, comment faire progresser la réalisation des droits de la personne pour tous, partout, en commençant (mais pas en finissant) ici, au Canada?

L'Annuaire canadien des droits de la personne a vu le jour il y a quelques années en tant qu'initiative visant à fournir une plateforme pour de telles discussions et à combler une lacune encore largement existante dans la littérature canadienne. Le moment est venu de faire la lumière en faveur des droits de la personne au Canada, notamment des perspectives pour les droits des peuples autochtones et des appels à la réconciliation et à une nouvelle disposition positive envers l'immigration, y compris les réfugiés, mais aussi, dans certains coins, un « refoulement » évident contre les principes des droits de la personne et les pratiques conséquentes. Bien que cette tension des dernières années ait été largement reconnue (et peut-être s'est-elle aggravée), il est peut-être préférable de la comprendre comme une caractéristique constante et sans surprise de l'idée que les droits de la personne font partie d'un projet plus large de justice sociale et de lutte pour le développement civilisationnel qui prône la décence humaine, la dignité et l'égalité des chances pour la capacité et la réalisation. Tel est l'appel et le défi de la liberté. Le projet et la lutte ne s'arrêtent jamais et ne font que refléter dans leurs manifestations contemporaines les défis spécifiques posés par les problèmes actuels.

La compilation et la production de cette deuxième édition de l'Annuaire canadien des droits de la personne a été une sorte de lutte dans sa propre réalisation. À ce titre, il regroupe les contributions reçues à différents moments, rassemblées au cours des dernières années. Bien que le temps ait compromis une partie de son actualité immédiate, il n'en demeure pas moins qu'il porte sur des sujets essentiels dont l'importance ne cesse de croître. Nous sommes reconnaissants envers nos nombreux contributeurs.

Encore une fois, la publication comprend un certain nombre d'articles regroupés sous une section générale comprenant des sujets distincts, suivis de deux sections spéciales ciblées, selon notre invitation, et tels que compilés et édités par des éditeurs invités. Finalement, une rubrique Documentation se trouve à la fin.

Dans la section générale, cinq articles traitent de questions très différentes concernant les droits de la personne au Canada et les droits de la personne dans les relations internationales du Canada. Dans le premier cas, il y a des articles sur le non-respect par le gouvernement fédéral de ses obligations à l'égard des enfants autochtones et sur la responsabilité en matière de violence sexuelle dans les universités canadiennes. En ce qui concerne la politique étrangère du Canada, les sujets abordés sont les suivants : La position du Canada à l'égard de la responsabilité internationale pour les crimes internationaux ou les violations flagrantes et systématiques des droits de la personne; le rôle du Canada dans le lourd conflit israélo-palestinien; et, la place des droits de la personne dans les négociations ou pratiques de libre-échange du Canada avec la Chine. Tous ces sujets demeurent d'actualité et de nature urgente - aucun d'entre eux n'a été résolu malgré les espoirs (et certaines dispositions améliorées) liés à l'arrivée au pouvoir du gouvernement Trudeau en 2015 et la promesse de « voies ensoleillées » (sunny ways).

Les deux sections spéciales traitent également de sujets très différents et très actuels. La première section porte sur le commerce, la santé et les droits de la personne. La deuxième, sur les droits de la personne et la connectivité numérique découlant d'Internet, des médias sociaux et de l'émergence des grandes données. Il s'agit-là de questions extrêmement complexes qui sont loin d'être résolues en termes conceptuels ou, beaucoup moins, pratiques. Il ne fait aucun doute qu'elles persisteront en tant que défis importants et à multiples facettes dans les années à venir et qu'elles peuvent en partie définir le bien-être humain et même avoir une incidence sur l'acquisition générale des droits de la personne.

Enfin, sous la rubrique Documentation, vous trouverez des rapports de 2017 sur les défis des droits de la personne au Canada, l'année du 150e anniversaire de notre confédération. Ceux-ci indiquent l'état des choses, certains des problèmes et des perspectives. Ils soulignent également que c'est à nous, au Canada, en tant qu'État et en tant que société civile composée de groupes et d'individus, de défendre les droits de la personne et de travailler constamment à la pleine réalisation des droits humains pour tous, partout. C'est le projet dans lequel nous espérons que cet Annuaire apportera une modeste contribution positive.

GENERAL SECTION

THE ICC, R2P, AND CANADA'S "RETURN": OPPORTUNITY AND MORAL DUTY IN AN ANTI-COSMOPOLITAN GLOBAL CLIMATE

Kirsten J. Fisher
University of Saskatchewan*

Cristina G. Stefan
University of Leeds

INTRODUCTION

In the current international climate, Canada faces an opportunity and, we argue, an increased moral imperative to promote human rights and international policy and institutions that support and protect them. 2016 was the year of Britain's Brexit vote, the rise of right-wing nationalism throughout Europe, and the election of Donald Trump as President of the United States. All three exemplify the increased domestic popularity of protectionism and the slide away from cosmopolitan concern for individuals beyond one's borders and international cooperation. 2016 was also the year of great turmoil for the International Criminal Court (ICC or the Court), the aim of which is to deny impunity for egregious crimes and protect and promote human rights globally.[1] Three African countries announced their intention to withdraw from the Court: Burundi, Gambia, and South Africa. The African Union (AU) called for a mass withdrawal of member states in early 2017.[2] Despite South Africa[3] and Gambia's walking back their withdrawals, 2016 signalled a turning point for the Court, with real concerns and negative perceptions evolving into action that detrimentally affected the ICC.

With the election of Liberal Justin Trudeau in 2015 after almost a decade of Conservative Stephen Harper[4], Canada has—at least in theory—re-embraced its reputation and self-identity of a country of human rights, social equality, and a middle power promoting liberal institutionalism. Given the current international climate, now is the opportunity for Canada to reclaim its role as norm entrepreneur. Given its history and this climate, Canada has a moral obligation to use its reputation and institutional skills to promote the values and good work of international institutions that protect and promote human rights and promote the cooperation of states to these ends. A good start would be working towards just operations within the Court and the implementation of the Responsibility to Protect (R2P) doctrine.

* The inspiration for some of the foundational arguments of this paper was an invitation from David McGrane and Neil Hibbert to contribute to a book on *Canadian Political Theory*. Some of the basic theory of this paper was written as part of our response to that invitation and may be published as part of their edited volume. This article is a continuation of that work. We extend our appreciation to Neil and David for asking us to think about political rights and obligations in regard to Canada and its place in the world. We also thank the anonymous reviewers for the *Canadian Yearbook of Human Rights* for comments on this article. This article, included in a 2016/2017 yearbook, reflects that time period, but the moral arguments contained within are increasingly relevant as great swaths of the world and its politically powerful continue on the anti-cosmopolitan path in 2018.

1 Jack Goldsmith, "The Self-Defeating International Criminal Court" (2003) 70:1 U Chicago L Rev 89.

2 Emmanuel Igunza, "African Union Backs Mass Withdrawal from ICC", BBC (1 February 2017), online: <www.bbc.com/news/world-africa-38826073>.

3 It is unclear at the time of writing whether South Africa intends to abandon its aim to withdraw from the ICC or whether its decision to pull back from its plan to leave the Court is only the result of an internal obstacle that will be addressed as the withdrawal is pushed forward.

4 Stephen Harper served as Canada's 22nd Prime Minister from February 6, 2006 until November 4, 2015.

Originating from a common foundation of liberal cosmopolitanism, R2P and the ICC were conceived with the common objective of protecting individuals from crimes considered to be of concern for the international community based on their unique character.[5] R2P is activated by genocide, crimes against humanity, war crimes, and ethnic cleansing; the ICC's current jurisdiction covers genocide, crimes against humanity, and war crimes.[6] With a common purpose, parallel emergence at the turn of the 21st century, and contemporary introduction into the fore of United Nations Security Council (UNSC) resolutions, R2P and the international responsibility to prosecute atrocity crimes are norms whose time has come. Individually and together, they play important roles in the protection of individuals globally.

Canada was instrumental in the emergence of both the R2P norm and the ICC. Canadians identify with both as representing a duty of international cooperation and protection of human rights. The R2P norm is the product of the 2001 report of a Canadian-sponsored commission, the International Commission on Intervention and State Sovereignty (ICISS). Canada also played a central role in the establishment of the ICC by contributing to the development of its founding treaty—the Rome Statute—and by being the first country to ratify and complete the necessary implementing legislation for it in 2000, thereby pushing forward the emergence of the Court. Although Canadians generally identify with a history and ideology encapsulated in both the R2P norm and International Criminal Law (ICL), in recent years Canada's reputation and self-identity as a middle power promoting liberal institutionalism has begun to wane, if not abate, especially in relation to both the R2P and the ICC. And, in their short existences, the two emerging norms of the responsibilities to protect and prosecute have met real world challenges in the stumbling blocks of international politics.

The future of the R2P and the ICC, their effectiveness, and especially their legitimacy demand attention. The pressing conceptual and political task of this article, then, is to consider in what form and from whom this attention ought to originate. Despite some variation, all cosmopolitan views regard all human beings, regardless of their political affiliation, as citizens in a single global community. While no state can embrace this sentiment fully by denying the existence of special obligations between the state and its citizens, Canada has a history, and indeed embraces an identity, of pursuing its foreign policy according to a liberal cosmopolitan stance. It is against this history that we examine the moral obligations for promoting legitimate human rights protecting institutions, that is, institutions that are both themselves morally justified and politically stable. Arguably, those with greater ability have greater levels of obligation to promote and support these global institutions. Given its history, we argue that Canada has a significant opportunity and also a moral duty to right its course. To us, this means renewing its commitment to liberal cosmopolitanism that has waned in recent years and offering guidance and support again for international cooperation and human rights protection. Part of this moral duty can be met by helping these two institutions to shed their inherent political biases that hinder their ability to effectively protect and promote human rights globally as intended.

This article first provides the context of the Canadian involvement with both the R2P and the ICC. It shows Canada as the "norm entrepreneur" that it was—working to increase the legitimacy of these institutions by promoting global acceptance for the basic human rights—protecting norms underpinning the R2P and the ICC. It then argues that one condition currently inherent in both, namely the United Nations Security Council's (UNSC) powerful influence over each of the two, leaves them at risk of partiality and injustice. This power that the UNSC has over both allows for decisions to be made based on the morally problematic self-interests of the permanent members of the Council. The legitimacy of global institutions is strengthened or weakened by basic levels of international support and representation. Political acceptability must underwrite the institutions charged with bringing otherwise accepted norms into being. For this reason, we argue in the second section of the article that the current conditions of the international response for grave and systematic human rights abuses are morally insufficient. The third, and final, section

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[5] David Luban, "A Theory of Crimes against Humanity" (2004) 29 Yale J Intl L 85; Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007); Kirsten J Fisher, "The Distinct Character of International Crime: Theorizing the Domain" (2009) 8:1 Contemporary Political Theory 44; Cristina G Badescu, *Humanitarian Intervention and the Responsibility to Protect: Security and Human Rights* (London: Routledge, 2011).

[6] The fourth crime in the Rome Statute is the crime of aggression. The ICC will exercise jurisdiction over the crime of aggression, subject to its activation in December 2017, after the ratification of the amendment concerning this crime by at least 30 States Parties. At the time of writing, 15 states ratified the crime of aggression. This is in line with changes to the Rome Statute introduced during the 2010 Review Conference, in Kampala.

discusses Canada's potential role and moral duty in promoting a restructuring of the UNSC's influence that would bring the R2P and ICC activities more in line with the moral international responsibilities to protect and prosecute.

HISTORICAL CONTEXT: CANADA'S INVOLVEMENT WITH THE R2P AND THE ICC

Canada has a history of foreign policy grounded in liberal cosmopolitan principles such as the belief that the "ultimate units of moral concern are individual human beings" (recognized and supported by the UN Charter and the human rights regime)[7], the belief in collective decision-making, and an "avoidance of harm and the amelioration of urgent need."[8] Canada has long held itself to be a global leader in peacekeeping, the promotion and protection of human rights, and the development of international justice.[9] Support for this role has existed for so long that it has become part of the national identity and "is a celebrated part of what Canada is as a nation, and even who Canadians are as a people."[10] Canada was among the first UN members to participate in a UN peacekeeping operation, when it sent a contingent to Korea as part of the UN Temporary Commission on Korea in 1948. It was a Canadian, Foreign Minister Lester Pearson, who invented modern peacekeeping with his proposal for a UN peacekeeping force in the 1956 Suez Crisis. After Suez, an ideational framework increasingly shaped the views of foreign policy makers and Canadian responses to international events, with Canadians participating in every UN peacekeeping mission from the Suez Crisis until the end of the 1980s.[11] This changed during the first half of the 1990s, although Canada remained in the top ten contributors to UN peacekeeping list until 1997.[12]

Building on this early Pearsonian commitment to peacekeeping, in the latter half of the 1990s, under the political leadership of then Canadian Foreign Minister Lloyd Axworthy, Canada pushed the human security agenda to the forefront.[13] Axworthy's views placed the security of individuals at the centre of international relations and used a human security framework to replace the more traditional preoccupation with the security of states. Human security was regarded as a dominant theme in Canadian foreign policy in the late 1990s. It echoed the long-standing views of the Canadian public on the importance of helping others to keep global order. During 1999–2000, when Canada was a non-permanent member of the Security Council, Ottawa manifested its willingness to use military force in response to "humanitarian emergencies."[14] Post-Axworthy, the focus was less on the grand design of human security and more on finding practical ways to implement the agenda.

It was in this context that Canada played a key role in both the emergence of the R2P and the ICC. First, in regard to the R2P norm, the Canadian government established the International Commission on Intervention and State Sovereignty (ICISS) in 2000 to address the quest for solving the humanitarian intervention conundrum, a challenge posed by then UN Secretary-General, Kofi Annan. The Commission was launched in September 2000 and had two chairs: the former Australian Foreign Minister, Gareth Evans; and one of the UN Secretary-General's special advisers at

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7 David Held, "Principles of Cosmopolitan Order" in Garrett W Brown & David Held, eds, *The Cosmopolitan Reader* (Cambridge: Polity Press, 2010) 230.

8 *Ibid* at 232.

9 Walter Dorn, "Canada: The Once and Future Peacekeeper?", *Peace Magazine* 22:4 (October–December 2006) 16; Peter Stoett & Mark Kersten, "Beyond Ideological Fixation: Ecology, Justice, and Canadian Foreign Policy Under Harper" (2014) 20:2 Can Foreign Policy J 229 at 229; Global Affairs Canada, *Address by Minister Freeland on Canada's Foreign Policy Priorities*, By Chrystia Freeland, (6 June 2017) online: <www.canada.ca/en/global-affairs/news/2017/06/address_by_ministerfreelandoncanadasforeignpolicypriorities.html>.

10 Dorn, *supra* note 10 at 7.

11 Cristina G Badescu, "Canada's Continuing Engagement with United Nations Peace Operations" (2010) 16:2 Can Foreign Policy J 45.

12 Dorn, *supra* note 10 at 16.

13 Greg Donaghy, "All God's Children: Lloyd Axworthy, Human Security, and Canadian Foreign Policy, 1996–2000" (2003) 10:2 Can Foreign Policy 39.

14 Nik Hynek & David Bosold, "A History and Genealogy of the Freedom-From-Fear Doctrine" (2009) 64:3 Intl J 735 at 740–41

the time, Mohamed Sahnoun. Two Canadian scholars served as Commissioners in the ICISS, Gisèle Côté-Harper and Michael Ignatieff. Despite being established by the Canadian government, ICISS was an independent commission. The Commission's report, entitled *The Responsibility to Protect*, reflected its balance in composition, its comprehensiveness, outreach, and innovativeness.[15] The concept of R2P was then endorsed in the 2004 report of the UN High-Level Panel entitled *A More Secure World: Our Shared Responsibility*, and in the 2005 report of the former UN Secretary-General, *In Larger Freedom*. Its most significant normative advance came in September 2005, when heads of state and government supported R2P in paragraphs 138 and 139 of the World Summit Outcome Document. This moment marked the first time the concept was endorsed in a universal forum, which was also the largest gathering of heads of state and government to date. The UN Security Council has made specific references to R2P in over 50 resolutions since then, the UN Secretary-General has issued yearly reports on R2P, starting in 2009, and the General Assembly has discussed each of these reports on R2P, every September, in its annual informative dialogues on the topic.

R2P has been described as "the most dramatic normative development of our time."[16] Two particular elements are worth mentioning in this context, namely the demand-driven nature of the ICISS and the significant role Canada played, as norm entrepreneur, in the emergence of the R2P. The former is important, since the ICISS was created after recognizing the failures to protect civilians in the 1990s from the scourge of war or genocide. The 1994 Rwandan genocide epitomized such failures and also the need for new policy responses designed specifically to address similar crises. The need to find a consensus on the contested concept of humanitarian intervention increased the demands for an answer when the ICISS was launched.[17] However, despite the humanitarian intervention trigger, it is important to stress upfront that implementing R2P does not always mean the use of force.[18] The Canadian government appointed the international commission in 2000 "to wrestle with the whole range of questions—legal, moral, operational, and political—rolled up in this [humanitarian intervention] debate, to consult with the widest possible range of opinion around the world, and to bring back a report that would help the Secretary-General and everyone else find some new common ground."[19] The R2P report shifted the debate from the right of external actors to intervene in the internal affairs of states where gross violations of human rights take place to the responsibility of sovereign states to protect their populations in the first place, which proved to be a very clever and efficient formulation.

The role ICISS played in R2P's normative development is a result of a combination of fine research work and good ideas,[20] on the one hand, and of building political momentum and having the necessary political weight to advance such ideas, on the other hand.[21] If a commission produces work that is only restricted to the former, it risks being irrelevant. If it seizes the opportunities to advance its central thesis and receives enough political weight—as R2P did after the release of the ICISS report through the Canadian diplomatic machine—it may become another success, such as the anti-landmine or the ICC campaigns. The literature on international norms describes "persuasion by norm entrepreneurs" as a key mechanism in the first stage

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[15] Badescu, supra note 6 at 126. The balance in its composition is reflected, first, by the two co-chairs of ICISS (one representing the Global South, and the other the Global North) and, second, by the fact that it included commissioners, academics, and politicians from both the North and South, with opposing views regarding the intervention-sovereignty debate.

[16] Ramesh Thakur & Thomas G Weiss, "R2P: From Idea to Norm—and Action?" (2009) 1:1 Global Responsibility to Protect 22 at 22.

[17] Badescu, supra note 6 at 121.

[18] Cristina G Badescu & Linnea Bergholm, "The Responsibility to Protect and the Conflict in Darfur: The Big Let-down" (2009) 40:3 Security Dialogue 287.

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

[20] For more details on the power of ideas, see Ramesh Thakur, Andrew Cooper & John English, *International Commissions and the Power of Ideas* (New York: United Nations University Press, 2005).

[21] Badescu, *supra* note 6 at 120.

of a norm's "life cycle."[22] Canada's efforts to advance R2P up to its September 2005 endorsement in the UN Summit Outcome Document best illustrate this.

Canada's role as norm entrepreneur began with a great example of entrepreneurial leadership, namely its decision to answer Kofi Annan's call in the fall 1999 for UN Member States to find a compromise on humanitarian intervention. Canada established the ICISS in September 2000. In sponsoring ICISS and later on in promoting R2P, Canada built on its ongoing commitment to multilateralism, human security, and especially on its focus on promoting civilian protection. In 1999 and 2000, during its non-permanent membership in the Security Council, Canada lobbied for the adoption of two UN resolutions on civilian protection—Security Council Resolutions 1265 and 1296—that marked the Council's first-time recognition of the need to protect civilians in general, and not just humanitarian workers. Canada was thus already influential in introducing concerns about the safety of civilian population, and human rights law and international humanitarian law into discussions at the UN.

Canada started its advocacy campaign for R2P as soon as the ICISS report was released in December 2001, by promoting it both at home and abroad, among UN officials, other states, and the NGO community. The Canadian government invested significant resources of time, money, and reputation in the R2P campaign. An office inside the Global Issues Bureau within the Department of Foreign Affairs and International Trade Canada (DFAIT) was specifically mandated to promote the R2P framework, to advocate the adoption of the recommendations in the ICISS report, and to build a constituency of support among "like-minded" friends. In line with its active promoter reputation, many Canadian embassies abroad conducted briefings on R2P. Apart from raising the issue of R2P bilaterally, Canada also raised it in multilateral forums, such as "La Francophonie." Canadian officials used powerful rhetoric to make sure the R2P language was included in declarations, official documents and political statements, and placed on the agendas of various conferences and workshops on security.[23] By calling attention to R2P and to the recommendations in the ICISS report in its own statements, Canada helped "build" the language of R2P. Attracting civil society to promote R2P was part of the Canadian government's strategy. From 2001 to 2005, Canada funded civil society roundtable discussions all over the world using money from a ten-million-dollar human security program fund DFAIT was using for policy development on various human security issues, which included R2P as well. DFAIT sponsored several NGOs to seek feedback on the potential role of civil society in promoting R2P, such as the World Federalist Movement–Institute for Global Policy (WFM-IGP), the primary organizer of NGO support for R2P, and a Canadian NGO, Project Ploughshares, whose work included developing a series of consultations in Africa on R2P.[24]

Through persuasion, Canadian initiatives were directed toward convincing a critical mass of actors to embrace R2P. These efforts culminated with the Canadian officials' work behind the scenes for months in preparation for the 2005 World Summit to ensure that R2P would be included in the Outcome Document. In the final 48 hours before reaching an agreement in the negotiations, Paul Martin, then Prime Minister, made personal phone calls to five heads of the most opposing governments in the General Assembly, including Pakistan. As a result of this last-minute personal diplomacy, in at least three of the five cases, the permanent representatives in New York indicated the following day that they were under instructions from their capitals to change their position on R2P.[25]

Similarly, Canada played a pivotal role both in promoting the norm of international prosecution for atrocity crimes and in establishing the ICC by providing human and material resources to guide its development and early work. As was the case in regard to the R2P, the ICC was conceived as a response to a significant moral demand for there to be a better way for the international community to deal with mass atrocities. After the UNSC created two ad hoc tribunals to investigate atrocity crimes committed in the former Yugoslavia (the International Criminal Tribunal for the former Yugoslavia) and Rwanda (the International Criminal Tribunal for

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[22] Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52:4 Intl Organization 887 at 895.

[23] Information gathered during confidential interviews Cristina Stefan conducted with senior DFAIT officials involved in the process, Ottawa, 2–3 May and 1–2 August 2006.

[24] Specific examples of Canadian efforts to promote R2P were collectively gathered during the above mentioned interviews.

[25] Badescu, *supra* note 6 at 127.

Rwanda), there was a push for a permanent and independent institution that could react more quickly to crimes committed, while also, it was hoped, having a deterrent effect.

Canada chaired the 1998 Rome Conference that established the ICC. The Canadian delegation to the Rome Conference played a brokering role in the negotiations regarding significant elements concerning how the ICC would look. These included the Court's jurisdiction, definitions of the crimes within its jurisdiction, and the Court's procedures and general principles. The ICC's foundational treaty, formally known as the Rome Statute, was first open for signature on 17 July 1998.[26] Canada signed it on 18 December of the same year, indicating an intention to ratify. On 29 June 2000, Canada became the first country to adopt legislation to implement the Rome Statute domestically, when it enacted the Crimes against Humanity and War Crimes Act.[27] On 7 July 2000, Canada ratified the Rome Statute. The significance of Canada's "leadership and ratification" was praised in 2000 as marking the first time a UN Member State was simultaneously completing "... ratification of the Rome Statute while enacting comprehensive national cooperation legislation. The Canadian example and legislation will greatly assist other nations in their efforts toward ratification."[28] The Canadian government's website demonstrates a continuing pride in the country's guiding role in the establishment of the Court:

> After five weeks of negotiations, delegates at the Conference had made tremendous headway on hundreds of technical issues related to the creation of the ICC. However, substantial divisions still existed on difficult issues...Accordingly, it fell to the Chair of the Committee of the Whole, Philippe Kirsch, with the assistance of a Bureau of coordinators, to draft a final, global proposal for the ICC...On the final day of the Conference, the final proposal that was drafted under Canada's leadership received broad approval.[29]

Indeed, the Canadian lawyer and senior diplomat Philippe Kirsch was a central figure in the drafting of the Rome Statute, the establishment of the Court, and the steering of its initial work once it was established. Kirsch first chaired the Committee of the Whole at the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome which was held in 1998, then chaired the Preparatory Commission for the International Criminal Court from 1999 to 2002, and then became the first president of the Court from 2003 to 2009. Later on, during the 2010 Review Conference in Kampala, Canada facilitated one important compromise regarding an amendment to the Rome Statute, which included the definition of the crime of aggression in international law. However, as was the case with its relationship with R2P, Canada's relationship with the ICC became strained under the Harper government. As will be discussed below, and while still active in the ICC Assembly of State Parties negotiations, Canada became vocal and conservative about the ICC budget, in a way that could be seen as detrimental to the growth and effectiveness of the Court.

MEETING THE RESPONSIBILITIES TO PROTECT AND PROSECUTE

To be morally sufficient, an institution or doctrine must, minimally, not interfere with the satisfaction of basic human rights. In the case of an institution that imposes international order, it must be shaped so that all persons subjected to it are, if not equally able to benefit from it, not harmed by its arrangement. When an institutional order that coercively limits actions alternative to its own and itself avoidably fails to protect human rights, it is violating a duty of justice.[30] While the conceptions of global responsibilities to protect and to prosecute in cases of atrocity stem from a morally sound cosmopolitan foundation, the current global order that is entrusted to meet these responsibilities is far from adequately arranged for meeting them.

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[26] *Rome Statute of the International Criminal Court*, 17 July 17 1998, 2187 UNTS 90, UN Doc A/CONF.183/9.

[27] Despite ambitions and initial enthusiasm, however, Canada's contribution to the international fight against impunity in terms of domestic prosecutions of war crimes and crimes against humanity with this legislation has been uninspiring. See Jennifer Moore, "Canadian Domestic Prosecution of International Crime" (2015) 1:1 Can YB Human Rights 30.

[28] Coalition for an International Criminal Court (CICC), "Canada Ratifies Treaty to Establish A Permanent International Criminal Court", CICC (7 July 2000), online: <www.iccnow.org/documents/07.07.2000CANratification.pdf>.

[29] Government of Canada, *Canada and the International Criminal Court*, (26 February 2019) online: <www.international.gc.ca/world-monde/international_relations-relations_internationales/icc-cpi/index.aspx?lang=eng>.

[30] Thomas Pogge, "Human Rights and Human Responsibilities" in Andrew Kuper, ed, *Global Responsibilities* (New York: Routledge, 2005).

There is promise in the conceptions of the responsibility to protect and the responsibility to prosecute, themselves. Both of these responsibilities are young, with their respective layers at different stages of diffusion as far as international norms are concerned. There is continuing criticism about both, which is to be expected, but they are spreading worldwide in line with their universal agendas. Both the responsibility to protect and the responsibility to prosecute originate from a liberal cosmopolitan foundation[31] and both resemble novel ways to establish the global rule of law based on the universal promotion of human rights. As suggested in the 2001 ICISS report, the responsibility to protect is first and foremost a moral imperative, stemming from our "common humanity."[32] The responsibility to prosecute, as embodied in the ICC, makes this institution an innovative form of cosmopolitanism, developed from, and enhancing, Kant's conception of cosmopolitan law[33] aiming to hold accountable individuals most responsible for atrocity crimes.[34] Both the R2P and the ICC reflect challenges to the convention of international realism, extending the rule of law and concern for the individual from inside national borders to the international sphere. To various extents, both the responsibilities to protect and to prosecute have been institutionalized at the international level, embedded in various treaties and conventions, supported by the UN, recommended by leading non-governmental organizations, and endorsed by key states. Out of the two—the responsibility to prosecute—is the one most embedded within international law, which has implications for its practice.[35] This makes it "the safest legally—and morally—to invoke."[36]

Historically, criticisms of International Criminal Law (ICL) are typically based on two sets of questions, both alluding to the legitimacy of the system of law. The first concerns authority, and deals with the legal and moral basis for the judicial institution's existence and with the prosecution of those it deems in violation of promulgated criminal law. The second comprises questions regarding the objectivity and justness of the legal structure as a legitimate system of law. The norm entrepreneurship that Canada engaged in helped to establish the first, but the second form of legitimacy is compromised by current international politics. International criminal justice, as embodied in the ICC and other institutions, captures the essence of the responsibility to prosecute. We focus on the ICC in the remainder of this article to discuss the latter. In particular, we focus on the influence of the UNSC, which raises problems of overstepped authority, political biases, and partiality. In a similar vein, the selectivity of the UNSC's invoking R2P opens it up to criticism focused mainly on legitimacy concerns. And yet, R2P cannot be implemented without UNSC authorization for some of its more coercive tools, including authorizing the use of force to protect.[37]

The importance of the concept of legitimacy is key in such instances. In the context of international judicial institutions, legitimacy is not based only on the legal system's accordance with particular just foundations and principles, but also the perception of legitimacy by both the international and the local populations. Perceived legitimacy is not "whether or not a particular criminal justice approach can be justified as legitimate on a theoretical level [but] . . . whether or not various local and international communities are likely, as a practical matter, to 'buy in' to the approach and treat the activities of the institutions involved as legitimate."[38] It must be seen to exist as a legitimate authority over those it has jurisdiction and it must be seen to administer the law objectively, fairly applying the law to all subjects within its jurisdiction. Over its short existence, ICL has faced numerous challenges to its legitimacy and its ability to pursue "justice" in a just and objective manner. Challenges that were once touted

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[31] Kirsten J Fisher, *Moral Accountability and International Criminal Law* (London: Routledge, 2012) at 8–29.

[32] International Commission on Intervention and State Sovereignty, *supra* note 21 at 2.

[33] Immanuel Kant, *Grounding for the Metaphysics of Morals*, translated by James W Ellington (Indianapolis: Hackett, 1785).

[34] Fisher, *supra* note 32 at 8.

[35] Eric Leonard & Steven Roach, "From Realism to Legalization" in Steven Roach, ed, *Governance, Order and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court* (Oxford: Oxford University Press, 2009) 60–63.

[36] Kurt Mills, "R2P3: Protecting, Prosecuting, and Palliating in Mass Atrocity Situations?" (2013) 12:3 J Human Rights 333 at 341.

[37] Cristina G Badescu, "Authorizing Humanitarian Intervention: Hard Choices in Saving Strangers" (2007) 40:1 Can J Political Science 51.

[38] Laura Dickinson, "The Promise of Hybrid Courts" (2003) 97:2 American J Intl L 295 at 301

as a result of growing pains could shortly hamper the enterprise of international criminal law in being regarded as anything more than a political tool.

The ICC, a unique institution of ICL, faces the criticism of being a political instrument in an unjust global system. In this way, its authority as an arbiter of justice and right behaviour is undermined. In and of itself, the Court has faced criticisms for lacking democracy, inspiring debates as to whether this lack of democracy negatively affects the Court's legitimacy.[39] It is its relationship with the UNSC that is most problematic in terms of its real and perceived lack of authority as a just global legal order. An important question is whether the Court acquired legitimate political authority through international sources or tenets of ICL. Questions of authority deal with the legal basis for the judicial institution's existence. As a treaty-based institution, the ICC is on firm ground to investigate and prosecute situations connected to member states that have submitted to the jurisdiction of the Court. The Court has jurisdiction only over states which become its members or sign a declaration to accept the ICC's jurisdiction, with the exception of cases referred by the UNSC. This arrangement between the ICC and its member states lends the Court straightforward legal authority over cases that arise from the member states, but limits its ability to be a genuine global institution until all states have ratified the Rome Statute. The influence of the UNSC, written into the Rome Statute, allows the Court more global reach, but arguably negatively affects its legitimate authority. The ICC can establish jurisdiction in one of three ways: a member state can refer a situation, the Security Council acting under Chapter VII of the Charter of the United Nations can refer a situation, or the ICC Prosecutor can initiate an investigation in accordance with her *proprio motu* powers expressed in Article 15 of the Rome Statute. The first and the third options can set in motion only investigations concerning member states.

The UN Charter, which outlines the powers and functions of the UNSC, positions it as primarily responsible "for the maintenance of international peace and security."[40] The UNSC is not the only UN organ to possess this responsibility, but while it shares this responsibility with the General Assembly and the International Court of Justice (ICJ), the UNSC has grown to be understood as the paramount organ for this task. It is not only the Charter that determines the UNSC's role but also, as with any living constitution, practice shapes it. Since the end of the Cold War, the UNSC has become active in many conflicts, and while some interpret this as the UNSC fulfilling its mandate, others feel that it has overstepped its reach. In regard to international criminal law, the UNSC established the first two international criminal tribunals: the ICTY and the ICTR. Before this occurred, there was no expectation for the establishment of international trials and, in fact, some argue that the SC overstepped its Chapter VII authority by ordering the tribunals be created. Arguably, by establishing these courts the Council "came to demonstrate an extraordinarily broad interpretation of its responsibility to maintain international peace and security."[41]

Although independent of the UN, the ICC's special relationship with the UNSC is being utilized to initiate investigations that could not otherwise be opened. In this sense, some have wrongly criticized the ICC for engaging in "lawfare."[42] If the UNSC refers a situation to the ICC for investigation, the membership status of the state is extraneous. Cases referred by the UNSC are open not only to concerns regarding authority, but also objectivity. Because of the unique condition written into the foundation of this treaty-based institution, the UNSC is in the position of affecting the work and reputation of the Court by generating a condition in which its caseload is shaped by the concerns and self-interests of permanent members of the UNSC while not all of the members are themselves member states to the Court and therefore not under its jurisdiction. More specifically, because of this unique referral system, the cases that make it before the Court reflect not necessarily the worst or most deserving of all situations globally in which international crimes occurred; rather the Court's caseload reflects the membership of the Court and their judgment expressed through UNSC votes, including the P5 vetoes. Therefore, remarkable conflicting challenges exist in this arrangement, such as the need for the UNSC to refer some cases which would not otherwise fall under the jurisdiction of the Court, while recognizing that UNSC votes can themselves reflect bias.

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[39] Madeline Morris, "The Democratic Dilemma of the International Criminal Court" (2002) 5:2 Buffalo Crim L Rev 591; Aaron Fichtelberg, "Democratic Legitimacy and the International Criminal Court: A Liberal Defence" (2006) 4:4 J Intl Crim Justice 765.

[40] *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, art 24.

[41] Simon Chesterman, *Just War or Just Peace?* (Oxford: Oxford University Press, 2001) at 121.

[42] Kirsten J Fisher & Cristina G Stefan, "The Ethics of International Criminal 'Lawfare'" (2016) 16:2 Intl Crim L Rev 237.

We can explore what these questions mean practically, since both the R2P prescriptions and referrals to the ICC have been evoked by the UNSC in recent years. The institutionalization of R2P and ICC referral options is a significant step forward as a means to protect and promote basic human rights globally. Nevertheless, without some alteration to the way in which the Security Council can employ them, the legitimacy of both as effective and just instruments is questionable. The recent and ongoing political changes and transitions in the Middle East and North Africa (MENA) region underscore this issue, with the situations of Libya and Syria demonstrating some of these problems.

In the wake of the political uprisings in MENA countries known as the Arab Spring, there were calls for the involvement of the ICC and R2P in both Libya and Syria to deal with widespread and systemic violence.[43] The international community's involvement in Libya and lack of involvement in Syria demonstrates the political challenges related to implementing both the R2P and ICC referrals. The UNSC, "despite having an obligation to authorize international action when civilians are being slaughtered, has failed repeatedly to do so" in Syria.[44] Indeed, China and Russia both vetoed six resolutions on Syria since 2011, most recently on 28 February 2017. This last double-vetoed resolution, which was put forward by France, the UK, and the USA, would have ensured accountability for the use of chemical weapons in Syria. The resolution received nine supporting votes but was opposed by Russia, China, and Bolivia. However, Russia vetoed eight Security Council resolution on Syria to date, with the 12 April 2017 resolution condemning the gas attack on Khan Shaykhun in Idlib province being the last such example. China abstained in regard to this resolution, as it did a few months earlier in regard to S/2016/846 of 8 October 2016, when Russia used its veto once again.

The ICC's involvement or lack of involvement in these countries positioned it to face particularly damning criticisms regarding the legitimacy of the Court.[45] Because none of the Arab Spring countries but Tunisia is a member state of the ICC, the only way for ICC investigation into these cases to be initiated is by means of UNSC referral.[46] With the exception of Libya, which received the UNSC's unanimous vote to be referred to the ICC for investigation of its government led by Muammar el-Gaddafi, no other Arab Spring country has received attention from the Court.[47] The use of veto by some of the permanent five members of the Security Council meant that Syria was no exception in terms of the UNSC referring the situation in Syria to the ICC.[48] The lack of UNSC attention to Syria is arguably partly because of the ties between these countries and permanent members of the UNSC that possess veto power and can protect their allies from investigation by blocking any attempts to refer a case to the ICC. Bahrain and Yemen have close ties with the United States, and Syria has ties with both China and Russia. To some critics, this state of affairs reeks of politics in the absence of objective justice.[49]

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43 Adrian Blomfield, "Syria: President Bashar al-Assad Faces Indictment by the International Criminal Court", *Telegraph* (24 April 2011), online: <www.telegraph.co.uk/news/worldnews/middleeast/syria/8471338/Syria-President-Bashar-al-Assad-faces-indictment-by-the-International-Criminal-Court.html>; *Human Rights Watch*, "UN Security Council: Heed Call for Justice in Syria", Human Rights Watch (14 January 2013), online: <www.hrw.org/news/2013/01/14/un-security-council-heed-call-justice-syria>.

44 Kyle Matthews & Zach Paikin, "Opinion: Canadian Leadership Is Needed to End Syria's Suffering", *Montreal Gazette* (27 March 2015), online: <www.montrealgazette.com/news/world/opinion-canadian-leadership-is-needed-to-end-syrias-suffering>.

45 Kirsten J Fisher, "Selectivity, Legitimacy and the Pursuit of Post-Arab Spring International Criminal Justice" in Kirsten J Fisher & Robert Stewart, eds, *Transitional Justice and the Arab Spring* (London: Routledge, 2014); Fisher, supra note 42.

46 Bahrain, Egypt, Syria, and Yemen are all signatory states, each having signed the Rome Statute in 2000, but none has ratified the statute and all are therefore not full members or under the jurisdiction of the Court.

47 *Peace and Security in Africa*, S Res 1970 (2011), UNSC, 2011.

48 The six draft Security Council resolutions on Syria vetoed by both Russia and China so far include: one in 2011 (S/2011/612 on 4 October 2011); two in 2012 (S/2012/77 on 4 February 2012 and S/2012/538 on 19 July 2012); one in 2014 (S/2014/348 on 22 May 2014); one in 2016 (S//2016/1026 of 5 December 2016) and one in 2017 (S/2017/172 on 28 February 2017). In addition to these six resolutions, Russia vetoed two more resolutions for which China abstained, namely S/2016/846 on 8 October 2016 and SC/12791 on 12 April 2017.

49 Martin Chulov, "Libyan Government Asks Why ICC Isn't Also Seeking to Prosecute Syria", *The Guardian* (16 May 2011), online: <www.theguardian.com/world/2011/may/16/libya-icc-arrest-warrants-reaction>. Charlotte Proudman, "Syria Immune From Being Held Accountable By ICC For Atrocities", *New Statesman* (30 October 2013), online: <www.newstatesman.com/politics/2012/10/syria-immune-being-held-accountable-icc-atrocities>.

Despite the great strides forward in its pursuit of accountability for international crimes since its entry into force in 2002, the ICC's relationship with the UNSC is so problematic as to affect its legitimacy, both perceived and real. At the same time, this relationship both allows it more universal reach—and thus bolsters its legitimacy—and creates a more politicized foundation for its caseload, thus diminishing its legitimacy. As Aidan Hehir and Anthony Lang argue, we need to reform the current international order to ensure a better integration of R2P and the ICC into international law and practice, by "altering the Security Council's powers and developing new judicial structures to enable the more consistent application of international law."[50] They make a compelling case for the unjustness, and therefore illegitimacy, of the current system, using the R2P and the ICC "as evidence of the framework being consolidated that enables the selective and arbitrary use both of military force and punitive censure rather than strengthening the formal procedures of a normative legal order."[51] The effectiveness and legitimacy of both human rights protecting institutions are compromised by the exceptional powers held by the permanent members of the UNSC. Simply put, "we cannot expect R2P or the ICC to operate in a manner consistent with normatively sound principles of legal theory" if the international legal order remains unchanged.[52] Hehir and Lang make some reasonable suggestions for reform, which they argue are both necessary and possible in order to create a more just political and legal order, if political will to pursue them exists. They advocate for a more explicit constitutional order, in which the powers and practices of law making are separated from law enforcement. Included in this reform is a more purposeful law making, or legislative, function in which norms such as R2P can be translated into rules or laws.

However, our goal here is not to evaluate recommendations but to show that reform is needed and, in the next section, that Canada has a significant role to play as state champion of such reform. The UNSC wields a great deal of power, especially in regard to military intervention for the protection of individuals and prosecution of atrocity crimes. Chapter VII is the only legal basis for military intervention. Interestingly, Hehir and Lang argue that the current condition of UNSC power, and the fact that international political and legal order is shaped by practice as much as by written law, allows the P5 members to continue to increase their power; as they become more powerful, the efficiency of their moral advocacy is diminishing.[53] If we accept this argument, not only is UNSC reform necessary, but not reforming the UNSC would have increasingly negative consequences. Even as the status quo is problematic, the need for reform now may be more pressing than ever.

CANADA'S ROLE TO PLAY

With its history, Canada is well positioned to promote policies that could contribute to a more objective application of R2P and of encouraging ICC referrals. But as mentioned earlier, Canada has in recent years taken an approach more detrimental to international justice and global human rights protection. As David Petrasek shows, despite Prime Minister Harper and his various foreign ministers from 2006–2015 speaking publicly and often about promoting freedom and human rights in the world, "the Conservatives put a distinct mark on foreign policy, turning aside from the even handedness and preference for multilateralism characteristic of previous Canadian governments."[54] For example, Canada chose not to support the last Swiss-led initiative calling on the UNSC to refer the situation in Syria to the ICC, an initiative signed by over 60 countries, "including virtually all of Canada's European allies."[55] "Canada's silence on this symbolic gesture marks a subtle but notable shift in attitude away from endorsing the role of international criminal justice in international affairs."[56] In recent years, Canada has focused on budget concerns

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[50] Hehir Aidan & Anthony Lang, "The Impact of the Security Council on the Efficacy of the International Criminal Court and the Responsibility to Protect" (2015) 26:1 Crim L Forum 153 at 153.

[51] *Ibid* at 155.

[52] *Ibid* at 155.

[53] *Ibid* at 163.

[54] David Petrasek, "Human Rights in Conservative Party Foreign Policy, 2006-2015" (2015) 1:1 Can YB Human Rights 5 at 7.

[55] *Ibid* at 9.

[56] Stoett & Kersten, *supra* note 10 at 230.

and advocating a more conservative approach to the operations of the ICC in the Assembly of States Parties meetings, including demanding a "zero growth" budget for the organization in 2013,[57] which can be seen as an expression of its weakening commitment to international justice.[58] In what can be interpreted as an attempt to subvert the use of ICL, former Canadian Foreign Minister John Baird threatened that Palestine would lose access to Canadian aid if it referred its situation to the Court.[59]

Nevertheless, Canada can reverse this course, as it should. Even if Harper's Conservative government failed to invest the diplomatic energy to advance both the R2P and the work of the ICC in recent years, addressing serious human rights violations remains an issue of interest to Canadians. The election of the new Liberal government in the fall of 2015 was both a signal of Canadians' hope and an opportunity for change. Canada's "return" to the world stage has been the dominant Global Affairs rhetoric ever since the famous statement by Justin Trudeau (when he became the 23rd Canadian Prime Minister in October 2015) made the news around the world: "Many of you have worried that Canada has lost its compassionate and constructive voice in the world over the past 10 years…Canada is now back."[60] Early signs in this direction emerged with some recent foreign policy initiatives, such as the welcoming of Syrian refugees (including those asylum seekers crossing the border from the USA), the two-year extension of the military mission to help Ukraine defend itself, and the appointment of a Canadian R2P focal point earlier in 2017. Also significant, in March 2016, the Prime Minister of Canada announced Canada's bid to take a seat on the UNSC for a two-year term starting in 2021. While previously Canada had a seat on the UNSC every decade, its last term on the Council was actually in 1999–2000, since the Conservative government had to withdraw its candidacy for a seat in 2010 when it became apparent that its application would not garner the support necessary to be successful. Therefore, it is time Canada again takes a seat on the Council to restore its voice on the global stage and exude normative entrepreneurship, just as it did during its last term on the Council, in 2000, in regard to the Protection of Civilians agenda.

This would be in line with the perceived Canadian identity, but the need is now to move past the nostalgia associated with Canada's "return" to the world stage; there is a pressing need to focus instead on concrete efforts to redirect the international climate that seems poised to retract from positive advancements in global governance.

Canada's Minister of Foreign Affairs, Chrystia Freeland, pointed to this Canadian identity as a reason to choose a path that "upholds our broadly held national values… contributes to our collective goal of a better, safer, more just, more prosperous, and sustainable world."[61] This change could and should take the form of Canada meeting its moral obligations to the world to support and legitimate human rights protecting institutions by helping to ensure that the institutions are both morally justified and politically stable. This requires serious investment, since as Freeland put it "Canadian diplomacy and development sometimes require the backing of hard power. Force is of course always a last resort. But the principled use of force, together with our allies and governed by international law, is part of our history and must be part of our future…To have that capacity requires a substantial investment, which this government is committed to making".[62] Since the UNSC has such inherent influence over the situations in which the international community intervenes either coercively or non-coercively under R2P, or judiciously within the ICC framework, and reform of the UNSC is necessary to ensure objective assessment in line with the interests of justice, a moral duty to support and promote reform

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[57] Petrasek, *supra* note 54 at 11.

[58] Lilian Ochieng & Simon Jennings, "ICC Secures Budget Increase", *Institute for War and Peace Reporting* (20 January 2014), online: <www.iwpr.net/global-voices/icc-secures-budget-increase>.

[59] Paul Heinbecker, "Canada's Bluster Over Palestine's ICC Bid Betrays Its Principles", *The Globe and Mail* (28 January 2015), online: <www.theguardian.com/world/2011/may/16/libya-icc-arrest-warrants-reaction>; The Canadian Press, "Canada's $300-million Humanitarian Aid to the Palestinians Now Under Review", *Maclean's* (4 December 2012), online: <www.macleans.ca/general/canadas-300-million-in-humanitarian-aid-to-the-palestinians-now-under-review>.

[60] The Canadian Press, "'We're Back,' Justin Trudeau Says in Message to Canada's Allies Abroad", *National Post* (20 October 2015), online (video): <www.nationalpost.com/news/politics/were-back-justin-trudeau-says-in-message-to-canadas-allies-abroad/wcm/919c5f99-29ba-4082-a060-c341d0d2ff21>.

[61] Global Affairs Canada, *supra* note 10.

[62] *Ibid*.

exists for all actors who contribute to the structural injustice.[63] All states, as members of the UN system, have this responsibility to work towards change. We argue, however, that Canada may possess a stronger responsibility than others, based on its position in the system. Getting a seat at the UNSC would further help Canada act in line with this responsibility and, as a result, have more of an impact in regard to both the R2P and the ICC.

One of the areas where improvement could be achieved, and impact would be high, relates specifically to the one organ within the UN with significant decision-making power and influence in regard to the two responsibilities discussed in this article—the UN Security Council. The idea that reform of the UNSC is needed is not at all new. Calls for UNSC reform have a long history stretching back to almost the emergence of the UN itself. More recent attempts to UNSC reform include the Accountability, Coherency and Transparency (ACT) diplomatic initiative, and the French/Mexico initiative on veto restraint. Such initiatives emerged from the UNSC's failures to protect civilians from mass atrocity crimes. These crimes include genocide, war crimes, and crimes against humanity, which are covered by both responsibilities to protect and to prosecute—the latter through the work of the ICC. The most obvious illustration of such failures relates to the Syrian conflict, which is now in its seventh year, and is reflected by the veto being exercised by two of the UNSC's permanent members, Russia and China, as mentioned earlier. Such vetoes undermined the legitimacy of the UNSC, cost hundreds of thousands of lives, and ultimately show why voluntary restraint on the use of the veto by the permanent members of the UNSC (P5) is much needed in mass atrocity situations.

The Accountability, Coherence and Transparency (ACT) Group was launched in 2013, building on the "Small Five (S5) initiative,"[64] which aimed to improve the transparency of the UNSC by having members explain their use of the veto. In July 2015, the ACT Group proposed the "Code of Conduct regarding Security Council action against genocide, crimes against humanity, and war crimes." This initiative requires permanent and non-permanent members of the UNSC to refrain from voting against a resolution meant to prevent or stop mass atrocities. As of June 22 2017, the Code of Conduct has been signed by 111 member states and 2 observers.[65] The second important initiative developed in response to the use of the veto in mass atrocity situations is the so-called France/Mexico initiative on veto restraint, initiated by France back in 2001, with further support from Mexico more recently, alongside the 25-member ACT group at the UN.[66] The French Foreign Ministry organized a conference in Paris on 21 January 2015, which points to an important example of diplomatic entrepreneurship towards limiting the use of veto in the UNSC in cases of mass atrocities. This is something Canada could invest in and also emphasize during its bid to be on the Security Council, starting in 2021. The French "Political Declaration on suspension of veto powers in cases of mass atrocity," launched in 2015, asked all UN members states for support, but focuses only on the P5 members of the UNSC, by calling for their voluntary restraint of using their veto powers in cases of mass atrocities. The France/Mexico initiative calls for a "statement of principles" to be signed by the P5 that affirms their commitment to refraining from using the veto, and not a re-writing of the UN Charter. Regulating the use of the veto is much needed in order to avoid paralysis in the Security Council when mass atrocities are committed, and therefore the two responsibilities, to protect and to prosecute, need to be applied. This initiative currently has the support of 93 states.[67] Support for this initiative "would represent a major leap

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[63] Pogge, *supra* note 31; Iris M Young, "Responsibility and Global Justice: A Social Connection Model" (2006) 23:1 Soc Philosophy Policy Foundation 102.

[64] The so-called S5 are Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland. See *Revised Draft Resolution: Enhancing the Accountability, Transparency and Effectiveness of the Security Council*, UN Doc A/66/42/1 (3 May 2012) at para 20.

[65] Global Centre for the Responsibility to Protect (GCR2P), *UN Security Council Code of Conduct*, online: GCR2P <www.globalr2p.org/our_work/un_security_council_code_of_conduct>.

[66] The French Foreign Minister, Hubert Védrine, first mentioned the need for veto restraint in the context of mass atrocities back in 2001. The former President of France, François Hollande, referred to limiting the use of veto in his address to the 68th Session of the UN General Assembly in September 2013. Hollande asked the permanent five members of the Security Council (the P5) to "collectively renounce their veto powers" in cases of mass atrocity crimes. France's proposal, entitled the "responsibility not to veto" (RN2V), resembles a code of conduct focused on voluntary and collective commitment of the P5 not to veto in cases of mass atrocities.

[67] This is as of 27 June 2017. Donaghy, *supra* note 14.

forward in the fight to protect populations from some of the world's gravest crimes," but it is not enough.[68] The France/Mexico initiative is obviously just one part of the broader reform needed to adapt the UNSC to the multipolar reality of the 21st century, and especially to make the Council more effective in addressing mass atrocities. More serious reform is necessary, and this is where Canada can, and should, step in and retake its position as an honest broker of research and ideas.

As Iris Marion Young argues, it is not only that agents "bear responsibility for structural injustice because they contribute by their actions to the processes that produce unjust outcomes,"[69] but that "differences of kind and degree [of responsibility] correlate with an agent's position within the structural processes."[70] Peter Singer makes a similar argument that if one is in a better position to provide assistance, then the moral argument follows that that agent should act.[71] Young suggests that an agent's power and ability, among other characteristics, influence its responsibility. Furthermore, in line with a cosmopolitan ethic of protection, which is more "salient" in liberal states than non-liberal states,[72] Canada indeed has a "special" responsibility to do more to advance the two responsibilities it initially supported, in this case through assisting with Security Council-reform. Indeed, liberal states have "special responsibilities" in these situations.[73] Arguably then, Canada, with a strong history and reputation as an honest broker of international justice, possesses a stronger responsibility to promote the necessary UNSC reform to bring the international community's work in line with normatively sound principles of justice. Canada was instrumental in bringing about and championing R2P as a strong solution to a recognized problem. This experience, along with its reputation as a peaceful and liberal middle power and its relative wealth, positions Canada as uniquely powerful and able to succeed in this very challenging political battle. Building on its early Pearsonian commitment to peacekeeping and its experience championing R2P, Canada can again step in to clear muddy waters in regard to the impotence of the UNSC in the face of the global responsibilities to protect and prosecute.

It is in this context that we suggest a Canadian initiative, which could learn from, and build on, its own history with ICISS, as well as entrepreneurial initiatives such as the 2015 conference organized by the French Foreign Ministry on the topic, and the French pragmatism in putting forward a practical solution which does not seek to abolish the veto. The current Canadian bid for a two-year term in the UNSC beginning in 2021 could be used strategically in this sense. Canada should build on both existing initiatives (the ACT Code of Conduct and the France/Mexico initiative) to garner support, as well as organize and coordinate an "R2P multinational commission" to produce strategic and diplomatic planning to fix current institutional constraints in the UNSC. Strategically, this initiative makes sense with two broader Global Affairs' goals in mind: first, to show that Canada is indeed walking the talk of "returning" to playing an active role on the world stage and influencing key decision-making in regard to international peace and security when on the Security Council; and second, such a diplomatic effort and initiative would help its bid to get a seat on the UNSC.

Elected UNSC membership status provides a unique leverage for any state to push forward its own agenda and to advance moral imperatives important domestically.[74] The timing of diplomatic support[75] and the institutional context in the form of elected UNSC membership status are significant enabling factors, as they provide non-permanent members the platform to get closely engaged with, and to influence, issues

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[68] Matthews & Paikin, *supra* note 44.

[69] Young, *supra* note 63 at 119.

[70] *Ibid* at 127.

[71] Peter Singer, "Famine, Affluence, and Morality" (1972) 1:3 Philosophy Public Affairs 229 at 232.

[72] Alexander Wendt, *Social Theory of International Politics*, vol 67 (New York: Cambridge University Press, 1999) at 234, 238.

[73] Mlada Bukovansky et al, *Special Responsibilities: Global Problems and American Power*, (Cambridge: Cambridge University Press, 2012).

[74] Cristina G Stefan, "On Non-Western Norm Shapers: Brazil and the Responsibility While Protecting" (2017) 2:1 European J Intl Security 88.

[75] Kai M Kenkel & Cristina G Stefan, "Brazil and the 'Responsibility While Protecting' Initiative: Norms and the Timing of Diplomatic Support" (2016) 22:1 Global Governance 41.

concerning international peace and security.[76] As an elected member of the Council, Canada would be able to exercise influence which otherwise would not be possible, on precisely the kind of issues related to R2P and referrals to the ICC that its much-lauded "return" is based upon. The Canadian government was rightfully dubbed "R2P's state champion," for being the main advocate of R2P in the first four years after the release of the ICISS report, but that has clearly not been the case in the last decade.[77] With the 2017 appointment of a national R2P Focal Point, Canada has finally joined an important global network of R2P Focal Points, but has lots of catching up to do since this initiative's launch in September 2010.

By building on its most recent R2P appointment of a national Focal Point and especially on previous work with R2P, Canada can initiate and support an independent commission that would offer recommendations regarding UNSC reform to further strengthen R2P and to free the ICC from barriers to its administering objective international criminal law. This dedicated commission would be tasked with researching and evaluating options and likely outcomes and feasibility of options, just as the ICISS was at a time when an answer was needed on the "humanitarian intervention" debate. It could incorporate many of the ideas already articulated in disparate fashions. If accepted, the French proposal may enable the Security Council to take action against mass atrocities where interested parties might veto. Other specific suggestions toward UNSC reform, put forward by Hehir and Lang (and others), are worth considering. The commission, however, should exist to prioritize and comment on feasibility and necessary steps for implementation and consolidation. Canada should champion this initiative. It could again help to build language and advocate for the changes recommended, but minimally it should help the international community produce a platform of ideas from which to start and regain its historical position as an honest broker of ideas for the promotion of international cooperation and protection of human rights. Indeed, Canada has the reputation and experience to sponsor and champion the work of such a commission, and we argue, the moral duty to do so.

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[76] Stefan, *supra* note 74.

[77] Thakur & Weiss, *supra* note 18 at 34.

BIBLIOGRAPHY

Badescu, Cristina G. (2007) “Authorizing Humanitarian Intervention: Hard Choices in Saving Strangers,” *Canadian Journal of Political Science*, 40 (1): 51-78.

Badescu, Cristina G. and Linnea Bergholm (2009) “The Responsibility to Protect and the Conflict in Darfur: The Big Let-down.” *Security Dialogue*, 40 (3): 287-309.

Badescu, Cristina G. (2010) Canada’s Continuing Engagement with United Nations Peace Operations, *Canadian Foreign Policy Journal*, 16 (2): 45-60.

Badescu, Cristina G. (2011) *Humanitarian Intervention and the Responsibility to Protect: Security and Human Rights.* London: Routledge.

Blomfield, Adrian. (2011) “Syria: President Bashar al-Assad Faces Indictment by the International Criminal Court.” *Telegraph*, 24 April.

Bukovansky, Mlada, Ian Clark, Richard Price, Christian Reus-Smit, and Nicholas Wheeler. 2012. *Special Responsibilities. Global Problems and American Power.* Cambridge: Cambridge University Press.

Chesterman, Simon. (2001) Just War or Just Peace? Oxford: Oxford University Press.

Chulov, Martin. (2007) “Libyan Government asks why ICC isn’t also Seeking to Prosecute Syria.” *Guardian*, 16 May.

Coalition for an International Criminal Court. (2000). *Canada Ratifies Treaty To Establish A Permanent International Criminal Court.* http://www.iccnow.org/documents/07.07.2000CANratification.pdf.

Dickinson, Laura. (2003) “The Promise of Hybrid Courts.” *American Journal of International Law.* 97(2): 295-310.

Donaghy, Greg. (2003) All God’s children: Lloyd Axworthy, human security, and Canadian foreign policy, 1996-2000. *Canadian Foreign Policy*, 10(2): 39-58.

Dorn, Walter. (2006) “Canada: The once and future peacekeeper?” *Peace Magazine*. October-December issue.

Drumbl, Mark. (2007) Atrocity, Punishment, and International Law. Cambridge: Cambridge University Press.

Fichtelberg, Aaron. (2006) “Democratic Legitimacy and the International Criminal Court: A Liberal Defence.” *Journal of International Criminal Justice*. 4(4): 765-785.

Finnemore, Martha and Kathryn Sikkink (1998) “International Norm Dynamics and Political Change.” *International Organization*, 52 (4): 887-918.

Fisher, Kirsten J. (2009) “The Distinct Character of International Crime: Theorizing the Domain.” *Contemporary Political Theory*, 8(1):44-67.

Fisher, Kirsten J. (2012) *Moral Accountability and International Criminal Law*. London: Routledge.

Fisher, Kirsten J. (2014) “Selectivity, Legitimacy and the Pursuit of Post-Arab Spring International Criminal Justice” in Kirsten J. Fisher and Robert Stewart (eds) *Transitional Justice and the Arab Spring*. London: Routledge.

Fisher, Kirsten J. and Cristina G. Stefan (2016) “The Ethics of International Criminal ‘Lawfare’” *International Criminal Law Review* 16 (2): 237-257.

Freeland, Chrystia (2017) “Address by Minister Freeland on Canada’s Foreign Policy Priorities.” *Global Affairs Canada.*

Government of Canada. 6 June 2017. https://www.canada.ca/en/global-affairs/news/2017/06/address_by_minister-freelandoncanadasforeignpolicypriorities.html

Global Centre for the Responsibility to Protect, "UN Security Council Code of Conduct". Available online at: http://www.globalr2p.org/our_work/un_security_council_code_of_conduct (accessed May 15 2017).Goldsmith, Jack. (2003) "The Self-Defeating International Criminal Court." The University of Chicago Review."

Government of Canada. *Canada and the International Criminal Court.* Available from: http://www.international.gc.ca/court-cour/index.aspx?lang=eng.

Hehir Aidan and Anthony Lang. (2015) "The Impact of the Security Council on the Efficacy of the International Criminal Court and the Responsibility to Protect." *Criminal Law Forum*. 26: 153–179.

Heinbecker, Paul. (2015) "Canada's bluster over Palestine's ICC bid betrays its principles." *The Globe and Mail*. 28 January.

Held, David. (2010) "Principles of Cosmopolitan Order." in Garrett W. Brown and David Held (eds) *The Cosmopolitan Reader*. Polity.

Human Rights Watch. (2013) "UN Security Council: Heed Call for Justice in Syria." 14 January. Available online at www.hrw.org/news/2013/01/14/un-security-council-heed-call-justice-syria.

Hynek, Nik, &Bosold, David. (2009). A history and genealogy of the freedom-from-fear doctrine. *International Journal*, 64(3): 735-750.

Igunza, Emmanuel. (2017) "African Union Backs Mass Withdrawal from ICC." BBC. (Feb 1)

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

Kant, Immanuel. (1785) Grounding for the Metaphysics of Morals. Trans. James W. Ellington. Indianapolis, IL: Hackett.

Kenkel, Kai M. and Cristina G. Stefan (2016) "Brazil and the 'responsibility while protecting' initiative: norms and the timing of diplomatic support" *Global Governance*. 22 (1): 41-58.

Leonard, Eric and Roach, Steven (2009) "From realism to legalization" in Steven Roach (ed.), *Governance, Order and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court.* Oxford: Oxford University Press.

Luban, David. (2004) 'A Theory of Crimes against Humanity' *Yale Journal of International Law*, 29: 85–167.

Matthews, Kyle and Zach Paikin (2015) "Opinion: Canadian leadership is needed to end Syria's suffering." *Montreal Gazette*. 27 March. http://montrealgazette.com/news/world/opinion-canadian-leadership-is-needed-to-end-syrias-suffering.

Mills, Kurt. (2013) "R2P3: Protecting, Prosecuting, and Palliating in Mass Atrocity Situations?" *Journal of Human Rights* 12: 333-356.

Moore, Jennifer. (2017) "Canadian Domestic Prosecution of International Crime." *Canadian Human Rights Yearbook*. Issue 1:2015. Pages TBA

Morris, Madeline. (2002) "The Democratic Dilemma of the International Criminal Court." *Buffalo Criminal Law Review*. 5: 591-600.

National Post. (2012) “Canada’s $300-million humanitarian aid to Palestinians under review.” 4 December.

Ochieng, Lilian and Simon Jennings. (2014) “ICC Secures Budget Increase.” *Institute for War and Peace Reporting*. 20 January 2014.

Petrasek, David. (2017) “Human Rights in Conservative Foreign Policy, 2006-2015.” *Canadian Human Rights Yearbook*. Issue 1:2015. Pages TBA

Pogge, Thomas. (2005) “Human Rights and Human Responsibilities.” in Andrew Kuper (ed.) *Global Responsibilities*. New York: Routledge.

Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9, 2187 U.N.T.S. 90.

Singer, Peter. (1972) “Famine, Affluence, and Morality.” *Philosophy and Public Affairs*. 1(3): 229-243.

Stefan, Cristina G. (2017) “On Non-Western Norm Shapers: Brazil and the Responsibility while Protecting” *European Journal of International Security*, 2 (1): 88-110.

Stoett, Peter and Mark Kersten (2014) “Beyond ideological fixation: ecology, justice, and Canadian foreign policy under Harper.” *Canadian Foreign Policy Journal*, 20(2): 229-232

Thakur, Ramesh, Andrew Cooper and John English (2005) (eds). *International Commissions and the Power of Ideas*. New York: United Nations University Press.

Thakur, R. and Weiss T. G. (2009) “R2P: From Idea to Norm—and Action?” *Global Responsibility to Protect*, 1(1): 22-53.

Trudeau, Justin (2015). Video available from: http://nationalpost.com/news/politics/were-back-justin-trudeau-says-in-message-to-canadas-allies-abroad/wcm/919c5f99-29ba-4082-a060-c341d0d2ff21.

Young, Iris Marion (2006) “Responsibility and Global Justice: A Social Connection Model”. *Social Philosophy and Policy Foundation*. 102-130.

Wendt, Alexander (1999). *Social Theory of International Politics*. Vol. 67. New York: Cambridge University Press.

A 'DETERMINED PEACE-BUILDER'? ANALYSING CANADA'S ROLE IN THE ISRAEL-PALESTINE CONFLICT

Philip Leech-Ngo & Emma Swan
University of Ottawa | Human Rights Research and Education Centre

2017 marks 50 years since the beginning of Israel's occupation of the Palestinian territories. Technically, under various statutes of international law (Article 42 of the 1907 Hague Regulations and Article 2, of the four Geneva Conventions, 1949), temporary military occupation of foreign territory is permissible for self-defence purposes. However, the way Israel has prosecuted its control over Palestinian lands and Palestinian lives is in blatant violation of numerous international norms. While most countries around the world challenge the legality of particular aspects of Israel's occupation—though not always in its totality—a *de facto* consensus that accepts the *status quo* persists. Virtually, all major actors in international relations—Canada included—prioritize Israeli claims regarding its security over Palestinian aspirations for independence or self-determination. Yet, during the last days of 2016, the conflict appeared to be entering a period of potentially significant turbulence.

Canada has never been the most prominent or vocal actor on the question of Israel-Palestine; though across a range of international relations literature, it is seen as a "middle power" with a significant level of potential international influence—particularly around values of human rights and peacebuilding.[1] As a signature to seven major international human rights conventions,[2] Canada's long-standing perceived international influence related to values of human rights dates back to their role in the drafting of the Universal Declaration of Human Rights in 1947–1948. Moreover, Canada has long presented itself as an advocate for human rights and as a defender of human rights,[3] and since the late 1970s, "*all* Canadian governments have claimed to emphasize the promotion of human rights in their foreign policies."[4] This chapter assesses Canada's relationship to the conflict and examines whether Canada's reputation as a peac=emaker and human rights advocate are reflected by its record on Israel-Palestine. It also looks ahead to suggest ways in which Canada may better live up to these models in the future.

THE STATUS QUO UNDER STRAIN

Voting 14-0, and by virtue of a critical abstention—rather than veto—by the United States, on 23 December 2016, the United Nations Security Council passed Resolution 2334, which not only reaffirmed the need for Israel to "abide scrupulously by its legal obligations and responsibilities under the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War", but also stressed "that the cessation of all Israeli settlement activities is essential for salvaging the two-state solution."[5] In the days that followed the resolution, the outgoing administration of US President Barack Obama outlined a raft of criticisms of the Israeli

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1 Musu Costanza, "Canada and the MENA Region: The Foreign Policy of a Middle Power" (2012) 18:1 Can Foreign Policy J 65; Sid Rashid, "Preventive Diplomacy, Mediation and the Responsibility to Protect in Libya: A Missed Opportunity for Canada?" (2013) 19:1 Can Foreign Policy J 39; Emily Robinson, *An Integrated Neoclassical Realist and Constructivist Approach to the Study of Canadian Foreign Policy: Canada's Response to the 2011 Intervention in Libya*, (25 August 2014) online: <www.dalspace.library.dal.ca//handle/10222/54037>; John Kirton, "Vulnerable America, Capable Canada: Convergent Leadership for an Interconnected World" (2012) 18:1 Can Foreign Policy J 133.

2 International Convention on the Elimination of All Forms of Racial Discrimination (1970), International Covenant on Civil and Political Rights (1976). International Covenant on Economic, Social and Cultural Rights (1976), Convention on the Elimination of All Forms of Discrimination against Women (1981), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987), Convention on the Rights of the Child (1991), Convention on the Rights of Persons with Disabilities (2010).

3 See Chrystia Freeland, "Canada's Foreign Policy: Full Speech", *Maclean's* (6 June 2017), online: <www.macleans.ca/politics/ottawa/chrystia-freeland-on-canadas-foreign-policy-full-speech>; Sean M Maloney, "Insights into Canadian Peacekeeping Doctrine" (1996) 76:2 Military Rev 12; A Walter Dorn, "Canadian Peacekeeping: Proud Tradition, Strong Future?" (2005) 12:2 Can Foreign Policy J 7.

4 Peter Petrasek & Rebecca Tiessen, "Finding Their Stride: Ideology and the Emergence of a Conservative Human Rights Policy" in Ed Adam Chapnick & Christopher Kukucha, eds, *Canadian International Policy 2006–2015: Continuity and Change Under Conservative Minority and Majority Governments* (Vancouver: UBC Press, 2016) 249.

5 United Nations Security Council, Resolution 2334 (2016), S/RES/2334 (2016), online: <www.un.org/webcast/pdfs/SRES2334-2016.pdf>.

government and the prevailing direction of Israeli policy. In particular, in an unusually frank speech, US Secretary of State, John Kerry, warned of a range of impending threats to the so-called "two-state solution"—a plan for a peace agreement based on the partition of territory between Israel and a future, recognised, State of Palestine—that, he argued, are leading to "one state and perpetual occupation" and going on to warn that "[i]f the choice is one state, Israel can either be Jewish or democratic—it cannot be both—and it won't ever really be at peace."[6]

Such criticisms were immediately rebuffed by both Israel and the then US President-elect Donald Trump. Moreover, several of the US' closest allies offered quiet words of caution against the Obama administration's slightly firmer-than-usual line against Israeli settlements.[7] Yet, the Canadian government's response was conspicuously discreet. Neither the then Minister of Foreign Affairs, Stéphane Dion, nor any other high-level government representative was available for media interviews. Instead the only official word came in the form of a statement emailed to the media that reaffirmed Canada's self-awarded identity as "a determined peacebuilder" and reiterated its vague commitment to the two-state solution and "direct negotiations to find a comprehensive, just and lasting peace."[8] This lack of clarity lead many to question Canada's role in the contemporary Israel-Palestine conflict: *what is the relationship between Canada's interests in the middle east—particularly its strong relations with Israel—and the values it apparently upholds as a "determined peacebuilder" and an advocate for human rights*?

With a view to addressing such questions, this chapter offers an overview of Canadian policy toward the Israel-Palestine conflict regarding Canada's oft-touted commitment to "peacebuilding" and human rights advocacy. In so doing, this chapter is structured in the following way. First, it presents a brief overview of the main issues of concern regarding human rights in the context of the Israel-Palestine conflict and outlines the official Canadian government's response to it in terms of its language and diplomatic actions.[9]

Second, it seeks to put contemporary Canadian policy toward Israel-Palestine in the broader historical context by presenting an overview of its evolution since the foundation of the state of Israel in 1948. Third, focusing specifically on Canada's historical voting record at the UN on resolutions pertaining to Palestine, the chapter looks at the main determinants of Canadian policy toward Israel-Palestine—both in terms of the current international context as well as the domestic political environment—with emphasis on drawing out the significance of human rights norms relative to other policy drivers. Finally, the chapter looks ahead to the opportunities that Canada has to improve or adapt its role as "a determined peacebuilder" in the context of Israel-Palestine going forward.

Ultimately, this chapter argues that there is little evidence to suggest that Canada's reputation as a peacemaker and human rights advocate is reflected by its record on Israel-Palestine. In order to construct this argument, we looked at all available official government of Canada statements issued between 2008–2016 using a keyword search for the word "Israel" and then all statements with the word "Palestinian." Furthermore, we

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6 John Kerry, *Remarks on Middle East Peace*, (28 December 2016) online: US Department of State <www.2009-2017.state.gov/secretary/remarks/2016/12/266119.htm>.

7 Heather Stewart, "Theresa May's Criticism of John Kerry Israel Speech Sparks Blunt US Reply", *The Guardian* (29 December 2016), online: <www.theguardian.com/politics/2016/dec/29/theresa-may-john-kerry-comments-israel-palestine-un-resolution>.

8 Ministry of Foreign Affairs spokesperson, Chantal Gagnon, quoted in: Laura Stone, "Liberals Steer Clear of Kerry's Israel Comments, Reiterate Support for Two-State Solution", *The Globe and Mail* (29 December 2016), online: <www.theglobeandmail.com/news/politics/liberals-steer-clear-of-kerrys-israel-comments-reiterate-support-for-two-state-solution/article33452653>.

9 Although outside the scope of this paper, approximately $31 million dollars of Canada's international assistance envelope goes to Palestine through bilateral and multilateral channels. Canada's engagement in the Palestinian territories centers on: 1) supporting the interlinked justice and security sectors; 2) promoting sustainable economic growth based on a strong private sector; and 3) the delivery of humanitarian assistance largely focused on food security. In terms of spending, Canada's primary development focus in the region relates to justice and security sector reform (JSSR). Canada's commitment to JSSR is understood by some as a crucial contribution to protecting human rights and creating the foundation of a viable future state. However, as a result of the Oslo agreement, the occupying power has the right to intervene, supervise, and control the design and delivery of all international assistance. A justice/security system that is not accountable to its citizens is an existential threat to the future of a stable government due to loss of popular support and perceived government legitimacy. Therefore, by ignoring this dynamic and thus depoliticizing and decontextualizing international assistance towards JSSR, Canada may be contributing to not only further entrenching the occupation, but also eroding the social contract between justice/security institutions and Palestinians. Therefore, ironically, increasing support for JSSR, if conceived of in a political vacuum, can, rather than promoting and protecting, in fact contribute to furthering insecurity in the region and jeopardizing human rights.

collated voting results from the General Assembly of the United Nations voting records between the 55th session in 2000 and the 71st session in 2016.[10]

KEY HUMAN RIGHTS CONCERNS IN ISRAEL-PALESTINE AND CANADA'S RESPONSE

This section provides a brief overview of the broader structure of the contemporary Israel-Palestine conflict, before moving on to look specifically at human rights concerns.

BACKGROUND

Some two-and-half decades since peace talks began at the Madrid conference, in 1991, negotiations to resolve the Israel-Palestine conflict through the formation of two independent states have become entirely stagnant. Moreover, life in the West Bank and Gaza Strip—land which was occupied by Israel in the June war of 1967 and would ostensibly form the territory of a future Palestinian State—remains economically, politically, and socially supressed by the presence of Israel's occupation forces. For Israelis, the political environment has grown ever-more polarised; social divisions within Israeli society have deepened; and there remains a persistent threat of low-level violence both from Palestinians and far-right wing Israeli extremists. Yet, it is important to be categorical that while there is suffering on all sides of the conflict, there is neither parity between the conditions endured by Israelis and Palestinians, nor is the situation static.

Rather, while the State of Israel represents an economically advanced country that prosecutes sovereign power within, and beyond, its own territory and enjoys full recognition and support from most other states around the globe, occupied Palestine possesses few comparable advantages. Instead, occupied Palestine—despite claiming the status of a state—remains unrecognised by most of the world's powerful nations.[11] It is territorially divided between two large enclaves of the Gaza Strip and West Bank, with the latter subdivided again into an archipelago of administrative islands interwoven by a network of Israeli settlements and the infrastructure of Israel's occupation.[12]

In the Gaza Strip, the Hamas government—which rejects negotiations as a matter of principle—administers a densely-populated society that remains contained by both Israeli and Egyptian forces who have sealed its land and maritime borders, control its airspace, and harshly restrict the movement of goods and people in or out. Moreover, following a spate of devastating asymmetric military flare-ups between Israel and various armed insurgent groups within the Strip (the three major attacks were 2008–9, 2012, and 2014), poverty is rife, and the humanitarian situation remains extremely grave.

Turning to the West Bank, even though it is governed by the PA—an interim non-sovereign entity that is backed financially and politically by the West—and has avoided direct, large-scale military confrontation with Israel since the mid-to-late-2000s, the long-term situation is almost as hopeless, albeit not as immediately precarious. Palestinians have no uninhibited access to their own—internationally recognised—borders for the purposes of either trade or travel. They cannot move around within and between various Palestinian towns and cities, including—and particularly importantly—Palestine's *de jure* capital, East Jerusalem.[13] Moreover,

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[10] A full database of voting at the UN is available online: <www.un.org/en/ga/documents/voting.asp>.

[11] The "State of Palestine" is formally recognized by 138 states. However, those that do not recognize it as a state include the United States, Canada, the UK, and most European States, Australia, and Israel. Further, the "State of Palestine" has been considered a Non-member Observer State by the United Nations (UN) General Assembly since November 2012 and is party to a number of UN bodies. However, the UN Security Council does not recognize Palestine.

[12] Moreover, nearly 5 million Palestinian refugees from the 1948 war, and their decedents, live in perpetual exile outside their historic homeland. See Naseer Aruri, *Palestinian Refugees: The Right of Return* (Sterling, VA: Pluto Press, 2001); Ilan Pappe, *The Ethnic Cleansing of Palestine* (Oneworld, 2007); Sari Hanafi, Leila Hilal & Lex Takkenberg, *UNRWA and Palestinian Refugees: From Relief and Works to Human Development* (Routledge, 2014).

[13] This state of affairs not only cuts Palestinians off from families, land and interrupts centuries old economic networks, but it also separates most Palestinians from the holy sites in Jerusalem and constitutes an illegal annexation of land by Israel. See Nisreen Alyan, Ronit Sela & Michal Pomerantz, *Neglect and Suppression in East Jerusalem The Policies behind Widespread Poverty and Unemployment*, (May 2012) online: The Association of Civil Rights in Israel <www.acri.org.il/en/wp-content/uploads/2013/03/EastJlem-Poverty-ENG-web.pdf>; International Crisis Group, *Extreme Makeover? (II): The Withering of Arab Jerusalem - International Crisis Group*, (20 December 2012) online: <www.crisisgroup.org/en/regions/middle-east-north-africa/israel-palestine/135-extreme-makeover-ii-the-withering-of-arab-jerusalem.aspx>.

accessing natural resources or building property in the majority of the West Bank are free from the threat of molestation by occupation forces. Even within the areas that are unequivocally acknowledged as governed and administered by the PA, Palestinians still subsist under the constant threat of potential arbitrary arrest and detention by raiding Israeli forces.

More broadly, there is no meaningful Palestinian economic development in either enclave. The PA suffers from chronic fiscal instability and is highly dependent on foreign aid, while the Hamas government is subject to a decade-old international embargo on aid. Neither rival Palestinian governing body—the PA nor Hamas—can lay claim to a genuine democratic mandate, nor even much in the way of popular legitimacy.[14] Both governing bodies are responsible for a raft of human rights abuses of their own (primarily directed toward the Palestinian population under their control[15]) and neither exercises any meaningful ability to restrain Israeli forces from acting with impunity.

Israel, on the other hand, not only exercises ultimate sovereign power within the entirety of the occupied territories, it is also gradually increasing the scale and depth of its footprint in the West Bank through the construction of illegal settlements and the annexation of land—including East Jerusalem, which is highly symbolic to both sides—while engaging in a process of transforming its dominance over the Gaza Strip that began with the so-called "disengagement" strategy of 2005.[16] While the Israeli government regularly claims that its actions are justifiable as necessary security measures, and claims an official position of seeking peace through the creation of a "two-state solution," a majority of its most senior ministers—including the Prime Minister[17]—have publicly demurred on that commitment.

BACKGROUND TO CANADA'S RELATIONSHIP TO THE ISRAEL-PALESTINE CONFLICT

While there are various perspectives evident in the literature regarding the motivations behind Canadian involvement in the conflict, most mainstream views see Canada as a largely benign, but mostly disinterested, middle power that tended to see the conflict through a lens that was sympathetic to the Jewish cause—particularly immediately following the Holocaust in Europe, and underscored by familiarity with religious doctrine.[18] Canada's involvement with the conflict began with Canada's membership of the UN Special Committee on Palestine (UNSCOP) in 1947, which was set up with a view to dealing with the situation in the area between the Jordan river and the Mediterranean sea after Britain requested to withdraw from its responsibility for the region. UNSCOP responded to the issue by proposing the now infamous partition plan that would split the territory between the indigenous Palestinians and the growing Jewish population, whose numbers had been swelling as a result of several waves of immigration beginning in the late 19th Century. Canada remained on the side-lines of the conflict throughout the rest of the 20th Century—occasionally getting more directly involved, for example, through participating in the United Nations Disengagement Observer Force

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[14] For a detailed discussion of legitimacy of both Palestinian governments, see: Philip Leech, *The State of Palestine: A Critical Analysis (Routledge*, 2017) at 108.

[15] See Aisling Byrne, "Building a Police State in Palestine" (18 January 2011), *Foreign Policy Blogs*, online: <mideast.foreignpolicy.com/posts/2011/01/18/building_a_police_state_in_palestine>; Yezid Sayigh, "Inducing a Failed State in Palestine" (2007) 49:3 Survival 7; Amnesty International, *Shut Up We Are the Police: Use of Excessive Force by Palestinian Authority in the Occupied West Bank*, (23 September 2013) online: <www.amnesty.org/en/documents/MDE21/006/2013/en>; Philip Leech, "Who Owns 'the Spring' in Palestine? Rethinking Popular Consent and Resistance in the Context of the 'Palestinian State' and the 'Arab Spring'" (2014) 22:6 Democratization 1011.

[16] The so-called disengagement from the Gaza Strip refers to the mass withdrawal of settlements from the Gaza Strip and the armed redeployment of Israel's military forces to the enclave's perimeter. While it has become commonplace to highlight the "sacrifice" endured by Israel in reference to is policy it has effectively left Israel in an even more military advantageous position without any making any serious progress towards a peaceful settlement. In fact, it was described by former Israeli Foreign Minister, Sholmo ben Ami as a policy of "scorched earth." Shlomo Ben-Ami, *Scars of War, Wounds of Peace: The Israeli-Arab Tragedy* (Oxford University Press, 2006) at 187.

[17] During the 2015 election campaign, Netanyahu backed away from his earlier commitment to the "two-state solution." Despite reversing this position once again after the election, more recently, the Prime Minister told the Israeli Knesset that "Situation not ripe for two-state solution." Barak Ravid, "Netanyahu: If I'm Elected, There Will Be No Palestinian State", *Haaretz* (16 March 2015), online: <www.haaretz.com/israel-news/elections/1.647212>; Taylor Luck, "Poltics Not Ripe for Palestinian Statehood Bid - Fayyad", *Jordan Times* (21 December 2011), online: <archive.jordantimes.com/?news=43959>.

[18] See Rex Brynen, "Canada's Role in the Israel-Palestine Peace Process" in Paul Heinbecker & Bessma Momani, eds, *Canada and the Middle East: In Theory and Practice* (Wilfrid Laurier University Press, 2010) 73; Michael Keefer, Hard Truths for Canada About Israel and Palestine (Pandora Press, 2015).

peacekeeping mission in the Golan Heights 1974 and pursuing closer economic cooperation with Israel[19]—until the beginning of the so-called "Peace Process" in the early 1990s.

Following the rout of Saddam Hussain's occupation forces from Kuwait, the US—which had led a UN-mandated coalition against Iraq—sought to seize the opportunity to resolve a series of long term issues in the Middle East, including the Israel-Palestine conflict.[20] At these negotiations, Canada acquired a special role as chair of the Refugee Working Group—one of five sub-groups comprising the multilateral negotiations. In this role, Canada became directly involved in pursuing and promoting a range of important practical measures such as improvements in data collection, though there have been no significant political breakthroughs. As Brynen and Tansley explained in 1995, this was chiefly a result of the highly problematic nature of the issue of refugees itself, rather than a product of Canadian failure:

> The Refugee Working Group (RWG) has been perhaps the most difficult to manage. The other working groups (water, environment, regional economic development, and arms control and regional security) deal with technical issues on which progress is less dependent on the bilateral negotiations. The refugee issue, however, is at the core of the conflict and is the most politically and emotionally-laden question of the multilaterals.[21]

The formal multilateral discussions at Madrid were followed by further secret negotiations undertaken in the Norwegian capital throughout the early 1990s, giving rise to what would become known as the "Oslo Process." The two main achievements of this Oslo Process were a Declaration of Principles (DOP, 1993)[22] and an agreement on economic relations between the two sides, known as the Paris Protocol (1994)[23]. These were later supplemented by further agreements including the Interim Agreement on the West Bank and the Gaza Strip (Oslo II)[24], the Hebron Agreement[25], and the Wye River Memorandum.

Despite continued efforts by negotiators on all sides, a final settlement remained elusive and having come under significant strain from a range of spoilers on all sides in the first year of the new century the entire process crumbled. Instead, popular protests in Jerusalem gave way to a dramatic upsurge of violence in the form of the Second Intifada—a major popular uprising against Israel's occupation—and Israel's massive military response to it. This return to violence in Israel-Palestine coincided with another broad shift in international relations that occurred in response to the terrorist attacks on New York and Washington DC on 11 September 2001. According to the language of the then US President, George W Bush, the United States was now at war with "Global Terrorism." For Canada, a member of NATO and a firm ally of the United States, in the immediate term this meant joining in on the invasion and occupation of Afghanistan, beginning in 2001, though the Liberal government led by Jean Chrétien did not support the later US-led campaign in Iraq. But the impact of the "War on Terror" also reframed the way in which the Israel-Palestine conflict was seen internationally, a greater emphasis being placed on retraining and reinforcing the ability of Palestinian security forces as the first line of maintaining order without seriously challenging the broader strategic-military envelope of Israel's occupation.

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[19] Israel and Canada created a Joint Economic Commission and signed a double taxation agreement in 1976 and 1977 respectively. Additionally, of note, in 1979 the conservative government under Prime Minister Joe Clark briefly dabbled with the idea of moving Canada's embassy to Jerusalem in a move that would have jeopardised Canada's relations with most Arab countries.

[20] For further details see Mohamed Rabie, *U.S.-PLO Dialogue: Secret Diplomacy and Conflict Resolution* (Gainesville: University Press of Florida, 1995).

[21] Rex Brynen & Jill Tansley, "The Refugee Working Group of the Middle East Multilateral Peace Negotiations" (1995) 2:4 Israel-Palestine J.

[22] Full text available online at: BBC News, "Text: 1993 Declaration of Principles", *BBC News* (29 November 2001), online: <www.news.bbc.co.uk/1/hi/in_depth/middle_east/israel_and_the_palestinians/key_documents/1682727.stm>.

[23] B'Tselem, *The Paris Protocol*, (19 September 2012) online: <www.btselem.org/freedom_of_movement/paris_protocol>.

[24] Council on Foreign Relations, *Oslo II Accords (Interim Agreement on the West Bank and the Gaza Strip)*, (28 September 1995) online: <www.cfr.org/israel/oslo-ii-accords-interim-agreement-west-bank-gaza-strip/p9676>.

[25] For a critical discussion of the Hebron Agreement, see: Edward W Said, "The Real Meaning of the Hebron Agreement" (1997) 26:3 J Palestine Studies 31.

Though analyses differ over how one can judge the precise nature and intentions behind each of the agreements or the process as a whole[26]—including the way in which the Israeli military responded once the situation descended into violence—it is a demonstrable reality that Israel's control over the Palestinian territories has become increasingly more entrenched. Importantly though, despite the fact that the dynamics of the situation have very clearly shifted in this way, this has made very little impact on the official positions held by most external parties, including Canada, that profess to have an interest in promoting peace. In short, while it is very clear to virtually any engaged observer that the prospect of ending Israel's occupation and creating a truly independent Palestinian state in the West Bank and Gaza Strip has grown less likely over time—mostly, but not exclusively, as a direct result of unilateral Israeli actions—the rhetoric adopted by Canada, the US and other external parties, advocating a "two-state solution," has not changed correspondingly. Thus, it is perhaps unsurprising that Canada's official position on issues relating to contemporary human rights concerns in the conflict is patchy.

HUMAN RIGHTS CONCERNS RELATED TO ISRAEL'S OCCUPATION

Though it is not possible to provide an exhaustive list of all human rights concerns evident under Israel's occupation of the Palestinian territories here, it is useful to provide further detail on some of the most significant in order to gain a flavour of Canada's response to the situation.[27] According to Michael Lynk—the current Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 for the UN Council on Human Rights and a professor of Law at Western University—there are five broad, and intersecting, categories of direct human rights violations that relate to Israel's occupation of the Palestinian territories. These are: violence and lack of accountability; detention; the use of collective punishment and coercive environment; and forcible transfer.[28]

While these categories all represent areas of significant concern in terms of human rights in the occupied territories, the government of Canada simply does not engage with some of them in any official capacity.[29] For example, Canada does not take any official public line on the issue of detention and it offers only general, indirect, or intermittent responses to issues in the categories of violence and lack of accountability, collective punishment, and population transfer. Therefore, we first, briefly, summarise the areas highlighted by Lynk, before looking at areas where Canada takes a relatively more involved stance in more depth.

DETENTION

Since the beginning of Israel's occupation of the West Bank and the Gaza Strip in 1967, Israeli authorities have applied a military-legal regime to Palestinians resident there. Under this system, Israel regularly utilises a military courts system as well as the practice of internment without trial, known as administrative detention. According to both Israeli and Palestinian human rights groups, such detentions are often in violation of international human rights law and represent blatantly discriminatory legal practices. This is exemplified in the dual legal system in which "the sole factor in determining which laws apply to a person is his or her nationality and ethnicity."[30]

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[26] A useful discussion of the range of views in academia is available in: Mandy Turner, "Building Democracy in Palestine: Liberal Peace Theory and the Election of Hamas" (2006) 13:5 Democratization 739.

[27] The authors note that the issue of Human Rights abuses is obviously far broader than these categories can cover adequately. However, for the purposes of presenting a relatively coherent and manageable argument, we have elected to limit the scope of this discussion accordingly.

[28] Lynk also dedicates a large section of his report to "obstructions to the Palestinian right to development" which, while an extremely important topic, is both too complex and too broad to reflect on here. Michael Lynk, *Promotion and Protection of Human Rights: Human Rights Situations and Reports of Special Rapporteurs and Representatives: Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, UNGAOR, 71st Sess, UN Doc A/71/554 (2016).

[29] This conclusion is based on our analysis of the government of Canada's statements on the Global Affairs website, including its overview of "Canadian Policy on Key Issues in the Israeli-Palestinian Conflict" and those issued by ministers regarding Israel-Palestine which are included in the official database of statements. See Government of Canada, *Canadian Policy on Key Issues in the Israeli-Palestinian Conflict*, (28 November 2016) online: Global Affairs Canada <www.international.gc.ca/name-anmo/peace_process-processus_paix/canadian_policy-politique_canadienne.aspx?lang=eng>.

[30] As Defense for Children International note, this system has a particularly discriminatory impact on Children. As "Israel is the only country

According to Lynk, Israel's use of administrative detention is based on the Israeli government's interpretation of article 78 of the Fourth Geneva Convention, which allows the use of internment without trial "for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment."[31] However, Lynk also notes that the commentary to that same article makes clear one way in which Israel's use of administrative detention contravenes international law. Specifically, based on the internationally accepted standard that "internment" is specifically designed for use in non-criminal cases.[32] The fact that Israel regularly used administrative detention "against individuals whom the Israeli government initially tried to charge with a crime but failed to do so, indicates that many of these arrests are in contravention of this provision."[33]

According to B'Tselem—an Israeli human rights group—in August 2016, there were 644 Palestinians held in administrative detention.[34] This represents a slight decline from a recent peak of 692 in April 2016, though, more broadly, there has been an evident increase in average the number of detainees since the period 2009-mid 2013. Palestinian detainees are regularly held under harsh conditions. This often includes isolation, denial of access to legal or medical attention, and in some cases, physical abuse and torture.[35] Despite that fact that Canada has ratified several human rights treaties pertaining to arrests, imprisonment and torture, and despite (or perhaps due to) the close relations with Israel, Canada has remained silent on the subject of detention and the conditions faced by incarcerated Palestinian.

COLLECTIVE PUNISHMENT: PUNITIVE DEMOLITIONS AND RESTRICTIONS ON MOVEMENT

"Collective punishment," in this context refers to policies of punitive house demolition and restrictions on movement within the occupied West Bank. Punitive house demolition is the deliberate destruction of civilian property by Israel's occupation forces as a means by which to punish one, or several, of the inhabitants for a suspected crime. Between January and August 2016[36] there were 21 abodes destroyed by Israel as a punitive measure and as a result some 114 Palestinians were left homeless.[37] Yet, even though "punitive home demolitions are blatantly unlawful," and are regularly condemned by local, Israeli, and international human rights organisations, Canada takes no stance on the issue.[38]

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in the world that automatically prosecutes children in military courts that lack basic and fundamental fair trial guarantees. Since 2000, at least 8,000 Palestinian children have been arrested and prosecuted in an Israeli military detention system notorious for the systematic ill-treatment and torture of Palestinian children." See Defense for Children International, *Military Detention*, online: Defense for Children Palestine <www.dci-palestine.org/issues_military_detention>.

31 Lynk, *supra* note 28 at 26. The full text is available online: International Committee of the Red Cross, Article 78 of Geneva Convention (IV) on Civilians, 1949 - Security Measures. Internment and Assigned Residence. Right of Appeal, online: <www.ihl-databases.icrc.org/ihl/WebART/380-600085?OpenDocument>.

32 As stipulated in the commentary to article 78.

33 Moreover, the regular use of secret evidence in military trials in order to justify administrative detention runs contrary to the accepted view of legitimate internment. See Lynk, *supra* note 28 at 26.

34 August 2016 is the last month for which statistics are available.

35 It is also worth noting that similar allegations have been made by international human rights organizations such as Human Rights Watch and Amnesty International, as well as in local, international, and Israeli media. See Addameer, *Torture and Ill-Treatment,* (20 May 2014) online: Prisoner Support and Human Rights Association <www.addameer.org/key_issues/torture-and-ill-treatment>; Addameer, *Medical Negligence*, (20 May 2014) online: Prisoner Support and Human Rights Association <www.addameer.org/key_issues/medical_negligence>; Addameer, *Isolation*, (20 May 2014) online: Prisoner Support and Human Rights Association <www.addameer.org/key_issues/isolation>; Human Rights Watch, *Palestine: Israeli Police Abusing Detained Children*, (11 April 2016) online: <www.hrw.org/news/2016/04/11/palestine-israeli-police-abusing-detained-children>; Amnesty International, *Syrian Ambassador to UK Reprimanded over Harassment of Syrian Ex-Pats*, (13 October 2011) online: <www.amnesty.org.uk/news_details.asp?NewsID=19755>.

36 August 2016 is the last month for which statistics are available. Note that Israel suspended the use of this policy between 2004–14.

37 This includes Including residents from 2 nearby abodes that were also damaged as a consequence of punitive demolitions. B'Tselem, *Statistics on Punitive House Demolitions*, (27 October 2016) online: <www.btselem.org/punitive_demolitions/statistics>.

38 Joe Stork, deputy Middle East and North Africa director for Human Rights Watch, quoted in: Human Rights Watch, *Israel: Stop Punitive Home Demolitions*, (21 November 2014) online: <www.hrw.org/news/2014/11/21/israel-stop-punitive-home-demolitions>.

The issue or restriction of movement affects the Gaza Strip and West Bank very differently. In Gaza, it takes primarily the form of Israeli and Egyptian collusion over the imposition of a land, sea, and air blockade, which has the knock-on effect of limiting the local population's access to even the most basic goods and services. This is most obviously visible in the form of a large barrier—punctuated by highly militarized crossing points—that has separated the strip from Israel since its completion in 1996. Israel also imposes a 1 km buffer zone that runs adjacent to the wall on the Gazan side, which is regularly enforced through lethal measures.[39] More recently, the Israeli government has invested in a new scheme to extend its barrier down below ground level in order to prevent access to Israel through tunnels.[40] The consequences of the blockade are severe and multifaceted. They include the separation of families and the restriction of access to medical care, educational, and economic opportunities, which perpetuate unemployment and poverty. Additionally, both Egypt and Israel restrict access to construction materials to Gaza and which, combined with "a lack of funding have impeded reconstruction of the 17,800 housing units severely damaged or destroyed during Israel's 2014 military operation in Gaza."[41] In total, about 65,000 people remain displaced while 70 per cent of the population rely on humanitarian assistance.[42]

It is evident from available data that conditions in Gaza have declined dramatically since the blockade was imposed in 2007. The total quantity of exports from Gaza in 2016 has declined to around 16 per cent of their 2007 level. Additionally, the number of people allowed to exit the strip through the main crossing into Israel—a privilege generally reserved for merchants, medical, and humanitarian cases and occasional religious worshipers—in the first half of 2016 was a mere three percent of the number permitted to leave in 2000.[43]

In the West Bank, the question of territorial control is somewhat more complex. Broadly speaking, Israel retains control of all important strategically significant areas within the West Bank. This effectively grants Israel power over the most of the Palestinian population, most of the time.[44] While, similar to Gaza, there is a physical barrier and buffer zone, approximately 85 per cent of the West Bank wall follows a route that cuts across internationally recognised Palestinian territory, effectively annexing some nine per cent of the West Bank territory, including East Jerusalem.[45] Around 11,000 Palestinians living in 32 communities live between the Barrier and the internationally recognised border and are therefore dependent on special permission in order to live in their own homes. In some cases, the wall surrounds Palestinian communes, leaving them with few means of exit; it separates families from each other and people from their property, work, or access to basic amenities.

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[39] See Jesse Rosenfeld, "Israel Creates 'No Man's Land' in Gaza, Shrinking Strip by 40 Percent", *The Daily Beast* (28 July 2014), online: <www.thedailybeast.com/articles/2014/07/28/as-israel-enforces-its-buffer-zone-gaza-shrinks-by-40-per-cent.html>.

[40] Peter Beaumont, "Israel Builds Wall Deep Underground to Thwart Hamas Tunnels", *The Guardian* (8 September 2016), online: <www.theguardian.com/world/2016/sep/08/israel-wall-underground-strengthen-blockade-gaza-hamas-palestinian-tunnels>.

[41] Human Rights Watch, *World Report 2017: Israel/Palestine*, (12 January 2017) online: <www.hrw.org/world-report/2017/country-chapters/israel/palestine>.

[42] *Ibid*.

[43] *Gisha, The Gaza Cheat Sheet*, (10 August 2016) online: <www.gisha.org/UserFiles/File/publications/Info_Gaza_Eng.pdf>.

[44] Underlying this system is a legal normative structure that resulted from the Oslo agreements. In particular, the so-called Oslo II agreement of 1995 divided the territory of the West Bank and Gaza Strip into three different levels of administrative and military control. These were Areas "A", "B", and "C". Each represented a distribution of power between Israel and the PA. The PA exercises both civil and security control in Area A, which comprises some 18% of the West Bank and encompasses almost all of the West Bank's major urban centres; Area B is about 22% of the West Bank. It is under Palestinian civil administration while Israel exercises security control; Area C is under full Israeli control. The combination of Israel's closure policy and the net result of the various agreements established a number of islands of Palestinian autonomy, which were surrounded by areas under Israeli control. This process has been called cantonisation, or bantustanisation (after a similar policy implemented in South Africa under the apartheid regime). See Amira Hass, "Otherwise Occupied/Access Denied", *Haaretz* (10 April 2010), online: <www.haaretz.com/weekend/week-s-end/otherwise-occupied-access-denied-1.284725>; Amira Hass, "Israel's Closure Policy: An Ineffective Strategy of Containment and Repression" (2002) 31:3 J Palestine Studies 5; Amira Hass, "The VIPs' Hush Money", *Haaretz* (18 Janurary 2012), online: <www.haaretz.com/print-edition/opinion/the-vips-hush-money-1.407887>; Adi Ophir, Michal Givoni & Sari Hanafi, *The Power of Inclusive Exclusion: Anatomy of Israeli Rule in the Occupied Palestinian Territories (Cambridge*, Massachusetts: Zone Books, 2009); Eyal Weizman, *Hollow Land: Israel's Architecture of Occupation* (Verso, 2007); Sara Roy, *Failing Peace: Gaza and the Palestinian-Israeli Conflict* (Pluto Press, 2006).

[45] UN OCHA, *The Humanitarian Impact of the Barrier*, (July 2013) online: <www.ochaopt.org/documents/

Additionally, throughout the West Bank there are numerous permanent, semi-permanent, and temporary obstacles to movement. On 1 January 2017, there were 27 permanent staffed checkpoints and 16 temporarily staffed checkpoints in the West Bank. Further to this, there are 26 checkpoints between the occupied West Bank and the State of Israel, numerous roadblocks, and other obstacles to movement, as well as some 700 kilometres of roadway throughout the West Bank whereupon Palestinians are entirely forbidden while Israelis are permitted to travel freely.[46] The impact of these checkpoints on Palestinian human rights is difficult to quantify in its totality. Though it is clearly significant, as described by Gordan and Flic:

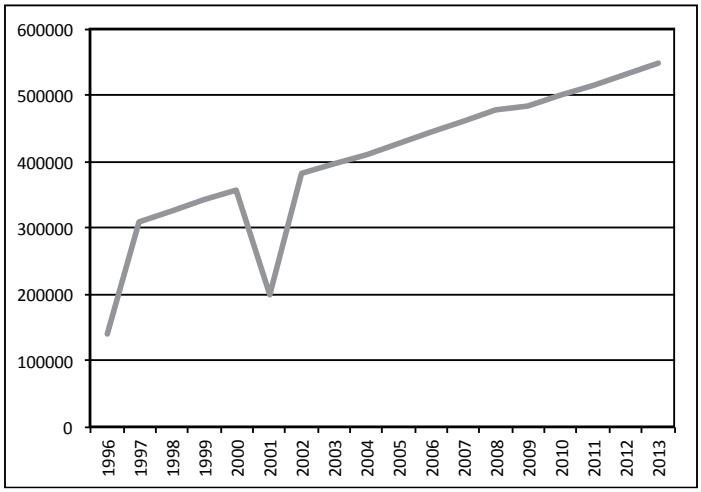
> Restrictions on movement as well as the destruction of the infrastructure of existence create a profound sense of disorientation; the possibility of calculating the future is accordingly undermined, and one tends to lose all sense of control. It is as if one is left at the mercy of fate, charity, and faith.[47]

COERCIVE ENVIRONMENT AND FORCIBLE TRANSFER

Coercive environment and forcible transfer refer to issues such as settlement construction, the non-punitive destruction of civilian property, and the forcible expulsion of civilians from their land.

In terms of settlements, there are numerous Israeli colonial outcrops throughout the West Bank.[48] These range in size and other characteristics significantly; though the fact that all are recognised as illegal under international law is a unifying feature.[49] As demonstrated by Graph 1, the total Israeli settler population in the West Bank has now reached approximately 547,000 compared to a local Palestinian population of 1.715 million.[50]

GRAPH 1: TOTAL ISRAELI SETTLEMENT POPULATION[51]



The impact of settlements on Palestinian human rights is broader and more complex than simply occupying territory in breach of international law. Rather, settlements—and their associated civilian-military infrastructure—are directly linked to the appropriation of Palestinian land and resources. Additionally, violent actions by settlers against Palestinians and Palestinian property frequently go unpunished.[52]

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ocha_opt_barrier_factsheet_july_2013_english.pdf>.

46 B'Tselem, *Statistics on Checkpoints and Roadblocks*, (1 January 2017) online: <www.btselem.org/freedom_of_movement/old/copy%20of%20 checkpoints>.

47 Neve Gordon & Dani Flic, "The Destruction of Risk Society and the Ascendancy of Hamas" in A Ophir, M Givoni & S Hanafi, eds, *The Power of Inclusive Exclusion: Anatomy of Israeli Rule in the Occupied Palestinian Territories* (Zone Books, 2009) 457.

48 According to B'Tselem there are 125 government- sanctioned Israeli settlements in the West Bank (not including East Jerusalem and settlement enclaves within Hebron) as well as at least 100 further not-officially-sanctioned outposts.

49 The illegality of settlements was recently reaffirmed by UNSCR 2334, see above.

50 A useful comparison to highlight the significant impact that settlers have on Palestinian society in the West Bank would be to note that, if the same ratios were applied to a population the size of Canada's, it would translate to a total of more than 10 million hostile foreign nations living in militarised enclaves throughout the country.

51 Graph originally used in Leech, The State of Palestine. All Data is from Bt'Selem. Figures for 2012–13 are estimates.

52 B'Tselem, *Background on Violence By Settlers*, (3 June 2012) online: <www.btselem.org/settler_violence>.

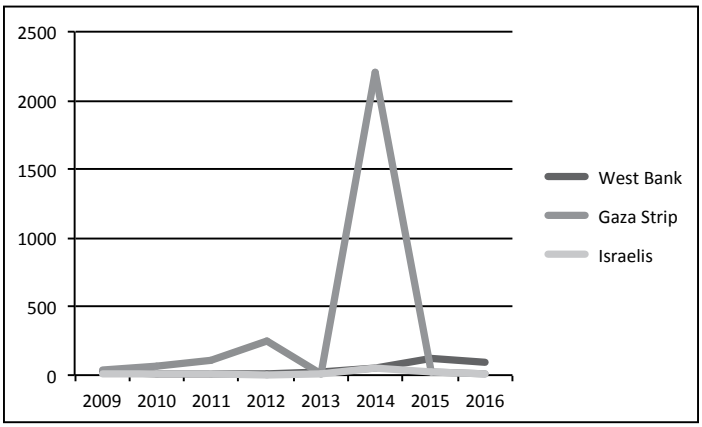
Settlements are not, however, the example of population transfers evident in the West Bank. Rather, a major—often under reported—concern is the forcible transfer of Palestinians within and from the occupied West Bank. The most obvious and most frequently targeted group are Palestinian Bedouins, whose communities are regularly uprooted and its inhabitants displaced under Israeli military orders. As UN OCHA notes, "over 60% of the approximately 6,000 Palestinians forcibly displaced since 2008 due to the demolition of their homes in Area C… lived in Bedouin/herding communities."[53] Yet, both issues discussed here, the transfer of Israeli settler populations into the West Bank and the forcible transfer of civilian populations within the West Bank, are expressly prohibited under article 49 of the Fourth Geneva Convention.[54]

While Canada's official stance is in that Israeli settlements are "an obstacle to the prospects for peace," it takes no obvious position on the forcible transfer of Palestinian populations.[55]

VIOLENCE AND LACK OF ACCOUNTABILITY

In terms of "violence and lack of accountability," Lynk highlights the notable recent trend of an uptick in violent confrontations between Palestinians and Israelis. He notes that "the large majority of those killed have been Palestinians—often as a result of disproportionate use of deadly force by Israeli security forces."[56] Indeed, statistics compiled by B'Tselem show that since 2009, there were some 3031 Palestinians killed in the occupied territories and 33 inside Israel, while, by contrast, a total of 98 Israelis have been killed over the same period. As Graph 2 clearly shows, the majority of these lives were lost in 2014 during an armed intervention into the Gaza strip in 2014.

GRAPH 2: TOTAL FATALITIES IN ISRAEL AND OPTS SINCE 2009[57]



Yet, while the 2014 peak is obviously the most striking aspect of these data, closer analysis highlights suggests that there are in fact multiple different trends evident that reflect a range of potential human rights issues of concern that could inspire different responses from the Canadian government. It is therefore important to address these separately.

LOSS OF LIFE IN THE CONTEXT OF MAJOR ARMED CONFLICT

Since the breakdown of peace talks and the "Oslo Process" in 2000, there have been three major surges of violent conflict involving Israel's armed forces and various Palestinian paramilitary factions. The first of these, the "second intifada" was primarily concentrated in the West Bank, while the two most recent upsurges of fighting have focused on the Gaza Strip. As we can see from Graph 3, during these episodes, the disparity between the two sides in terms of total number of deaths is very clear.

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[53] UN OHCHR, *Bedouin Communities at Risk of Forcible Transfer*, (September 2014) online: <www.ochaopt.org/documents/ocha_opt_communities_jerusalem_factsheet_september_2014_english.pdf>.

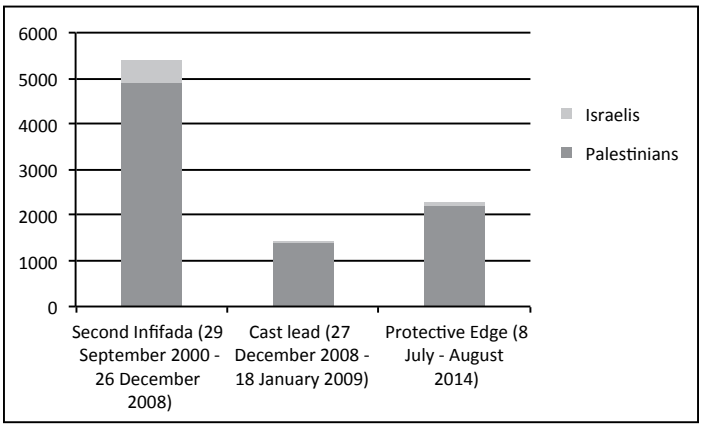
[54] It states: "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive." International Committee of the Red Cross, *Article 49 Geneva Convention (IV) on Civilians - Deportations, Transfers, Evacuations*, online: <www.ihl-databases.icrc.org/ihl/WebART/380-600056>.

[55] Government of Canada, "Canada Concerned by Settlement Expansion in East Jerusalem", *Canada News Centre*, online: <www.news.gc.ca/web/article-en.do?crtr.sj1D=&crtr.mnthndVl=12&mthd=advSrch&crtr.dpt1D=&nid=517899&crtr.lc1D=&crtr.tp1D=&crtr.yrStrtVl=2008&crtr.kw=Israel&crtr.dyStrtVl=1&crtr.aud1D=&crtr.mnthStrtVl=1&crtr.page=20&crtr.yrndVl=2013&crtr.dyndVl=1>.

[56] Lynk, *supra* note 28 at 5.

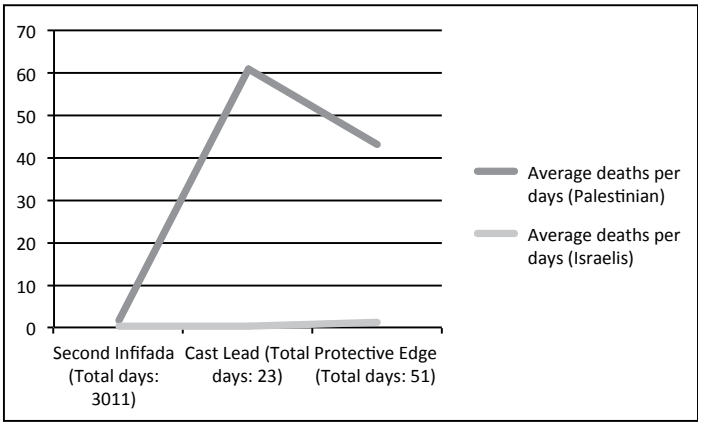
[57] Graph compiled by the authors, data from B'Tselem. Note: Fatalities include both military and civilian losses.

GRAPH 3: TOTAL DEATHS IN EPISODES OF MAJOR ARMED CONFLICT SINCE 2000[58]



While, prima facie, it may appear that there, the number of fatalities during conflict is in general decline, considering the different lengths of these episodes it is evident that the more recent two have been more intense. As Graph 4 shows, while in total there were fewer casualties in operation Cast Lead than the other two conflicts, in terms of the sheer number of casualties per day, it represented the highest.

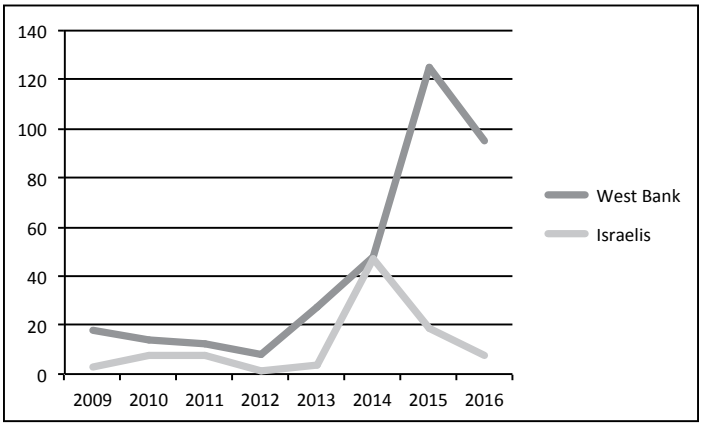
GRAPH 4: NUMBER OF FATALITIES PER DAY DURING EPISODE OF MAJOR ARMED CONFLICT[59]



LOSS OF LIFE OUTSIDE THE CONTEXT OF MAJOR ARMED CONFLICT

A different pattern is evident in the data dealing with loss of life outside the context of major armed conflict. Given that the preponderance of fatalities related to major armed conflict since the end of the second intifada were in Gaza, it is reasonable to focus this aspect of the analysis on the West Bank. From these data, represented in Graph 5, there is evidently a sharp spike both in terms of the number of Palestinians and Israeli's killed in 2015. This is largely as a result of small-scale attacks and what Lynk calls an "ingrained and systematic lack of accountability" that "helps to perpetuate a cycle of continued violence… with the message being sent that Palestinian lives do not matter, while the Palestinian population becomes both more fearful and more desperate."[60]

GRAPH 5: LOSS OF LIFE IN WEST BANK, ISRAEL 2009–16[61]



In response to this spike in fatalities, Lynk argues that while "violent attacks of any kind by anyone are unacceptable… [t]he fact that the attacks and alleged attacks by Palestinians against Israelis are, not infrequently, responded to with disproportionate and deadly force only compounds the violence."[62] Moreover, Lynk outlines

[58] Graph compiled by the authors, data from B'Tselem. Note: Fatalities include both military and civilian losses.

[59] Graph compiled by the authors, data from B'Tselem. Note: Fatalities include both military and civilian losses.

[60] Lynk, *supra* note 28 at 7.

[61] Graph compiled by the authors, data from B'Tselem. Note: Fatalities include both military and civilian losses.

[62] Lynk, *supra* note 28 at 26.

that there are two major human rights concerns related to these data: (1) that "lethal force is used so often, and frequently without justification"; and (2) that "in a majority of cases in which a member of the Israeli security forces used lethal force, no investigation was conducted, or if an investigation was conducted, it was closed without any action being taken against the perpetrator."[63]

LACK OF ACCOUNTABILITY

There are numerous examples that highlight this final point by Lynk. According to another Israeli NGO, Yesh Din:

> In 2014 the Military Police Criminal Investigations Division (MPCID) opened 229 investigations of suspected criminal offenses committed by soldiers against Palestinians in the West Bank and the Gaza Strip. Just 8 (3.5%) of the 229 investigations opened resulted in indictments—a decrease compared to 2013 figures, when 9 (4.5%) of 199 investigations opened led to indictments.[64]

18% of investigations opened by the Military Police related to fatalities, which Yesh Din notes is "an unusually high number of investigations into fatalities compared to previous years (15 investigations in 2013 and 2012, and nine in 2011)."[65] It is likely that this shift is due to a change in the nature of the investigation process, combined with a sharp uptick in the number of fatalities in the West Bank that year. Beyond this, there are also numerous examples of individual cases where apparently compelling evidence of human rights abuses towards Palestinians in the occupied territories, committed by both Israeli settlers and soldiers, have resulted in, to say the least, controversial outcomes.[66]

CANADA'S RESPONSES TO THE ISRAEL-PALESTINE CONFLICT THROUGH STATEMENTS

According to the Canadian government database, between January 1, 2008 and January 1, 2017, there were a total of 476 official statements that made some reference to "Israel" and 117 that referred to "Palestinian."[67] Based on our analysis of these statements, we found that 84 could be categorized as directly linked to the Israel-Palestine conflict, yet there were numerous others that demonstrate Canada's strong links to Israel.[68] Of these statements referring directly to the conflict, we found that Canada was motivated to issue statements condemning acts of violent terrorism by Palestinians 29 times and against violent acts by Israelis against Palestinians four times, though it did also condemn Israeli settlement construction twice and issue somewhat more even-handed commentary (i.e. criticizing both Israeli and Palestinian actions) 10 times. Moreover, Canada also spoke out in defence of Israel in international forums—primarily the UN but also the ICC—some 12 times.

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[63] *Ibid* at 7.

[64] Yesh Din, *December 2015 Data Sheet: Law Enforcement on IDF Soldiers Suspected of Harming Palestinians – Summary of 2014 Data*, (2 December 2015) online: <www.yesh-din.org/en/december-2015-data-sheet-law-enforcement-on-idf-soldiers-suspected-of-harming-palestinians-summary-of-2014-data>.

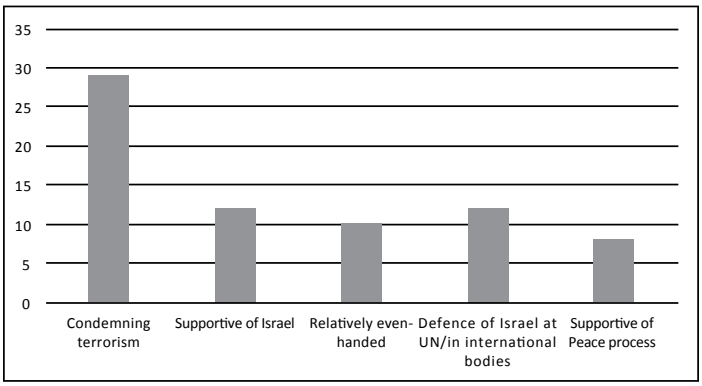
[65] *Ibid*.

[66] A recent example of this is the case of Elor Azaria, an Israeli soldier who was convicted of manslaughter after apparently shooting an immobilised Palestinian teen at point blank range in late 2016. It is worthy of note that Israeli Prime Minister, publicly called for Azaria to be pardoned in January 2017. See Peter Beaumont, "Netanyahu Backs Calls for Convicted Israeli Soldier to Be Pardoned", *The Guardian* (4 January 2017), online: <www.theguardian.com/world/2017/jan/04/israeli-soldier-guilty-manslaughter-shooting-palestinian-elor-azaria-abdel-fattah-al-sharif>. For further examples and a helpful overview by a reputable source see: Bill Van Esveld, "How Israeli Impunity Threatens Palestinian Children", *Human Rights Watch* (26 August 2015), online: <www.hrw.org/news/2015/08/26/how-israeli-impunity-threatens-palestinian-children>.

[67] These date ranges were selected purely on the basis of the data available. The authors note that not all Canadian diplomacy occurs in public and that the absence of public statements on any particular issue does not mean that the Canadian government has not taken other steps in private. Yet, for the purposes of consistency we compare only public statements here.

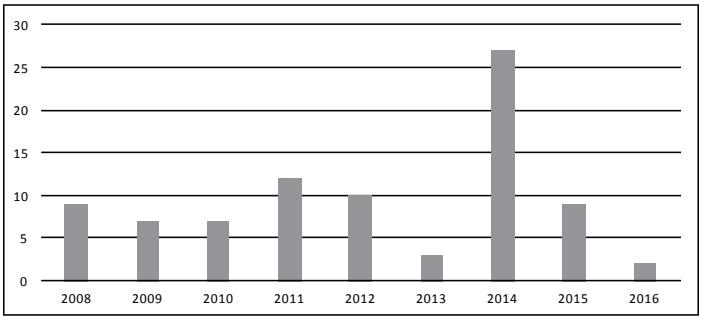
[68] Though there is inevitably an element of subjectivity inherent in this analysis we sought to differentiate statements that reflect either Canadian government policy towards the conflict or its reactions to from events from its more general statements on its friendship toward Israel etc. Examples of the latter include ceremonial statements that articulate Canadian-Israeli ties on major Jewish holidays or on Holocaust Memorial Day, for example, or those outlining plans to upgrade Canadian-Israeli trade relations through a memorandum of understanding in 2014.

GRAPH 6: CANADIAN GOVERNMENT STATEMENTS BY TOPIC[69]



Canada was, by far, the most vocal on this topic in 2014 when it issued 27 statements—including a high-profile speech by Prime Minister Stephen Harper to the Israeli Knesset, in February—totalling twice as many as in any other year, most of them condemning Palestinian terrorism.[70] As we have seen (above) this coincided with a major violent upsurge when Israel initiated operation "Protective Edge" against the Gaza Strip in July-August. Yet, despite the disproportionately high number of Palestinian lives lost compared to Israelis' evidence from the statements makes it very clear that Canada saw itself very much on Israel's side during this military endeavour. In particular, Canadian statements regarding the violence regularly referred to its support for Israel's "right to defend itself" in 13 statements that year, while it made no similar statement in support of a Palestinian right.

GRAPH 7: CANADIAN GOVERNMENT STATEMENTS IN ISRAEL-PALESTINE CONFLICT BY YEAR[71]



Yet, beyond the evident difference in the volume of statements issued against either side, we can also deduce Canada's pro-Israeli perspective from a qualitative comparison of Canada's response to two similar events acts of terrorism in mid-2014: the kidnap and murder of three Israeli teenagers in the West Bank in mid-June 2014; and the kidnap and murder of one Palestinian teenager in early-July 2014.[72] While both cases represent the loss of innocent civilian lives in the context of a highly charged political environment, Canada's response was quite different.

In response to the kidnap and murder of Naftali Fraenkel, 16, Gilad Shaer, 16, and Eyal Yifrah, 19—the Israeli teenagers—Canada's then Minister of Foreign Affairs authored an op-ed for *The Globe and Mail* and then later issued an official statement. Both of which condemned the crime as terrorism, but also tied responsibility for it directly to the PA and broader calls for a demilitarised West Bank and Gaza, even though PA Security Forces assisted Israel in the search and pursuit of the suspects.

> What should distinguish these latest attacks is that they have happened under the watch of a new Palestinian government that was announced two

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69 Graph compiled by the authors. All data from the Canadian government New Centre's database of statements, available online: <www.news.gc.ca/web/nwsprdct-en.do?mthd=tp&crtr.tp1D=980>. NB only topics where five or more statements were issued are included in this graph.

70 CBC, "Stephen Harper's Speech to the Israeli Knesset", *CBC News* (20 January 2014), online: <www.cbc.ca/news/politics/stephen-harper-s-speech-to-the-israeli-knesset-1.2503902>.

71 Graph compiled by the authors. All data from the Canadian government New Centre's database of statements, available online at: <www.news.gc.ca/web/nwsprdct-en.do?mthd=tp&crtr.tp1D=980>.

72 Details of each event were widely covered in the media at the time. Examples of such coverage include: Jodi Rudoren & Isabel Kershner, "Israel's Search for 3 Teenagers Ends in Grief", The New York Times (30 June 2014), online: <www.nytimes.com/2014/07/01/world/middleeast/Israel-missing-teenagers.html>; Isabel Kershner, "Israeli Convicted in Murder of Palestinian Teenager", The New York Times (19 April 2016), online: <www.nytimes.com/2016/04/20/world/middleeast/israel-murder-conviction-palestinian.html>.

> weeks ago … [w]e would like to take Mr. Abbas at his word when he says that things will change. But that change must begin now.[73]

Yet, in the aftermath of the murder of Mohammed Abu Khdeir, 16, while the Canadian government did send a representative to meet with his family, its public statement called for "the restoration of calm and an end to the cycle of violence and vigilantism" and further, it framed the statement with another demand for the PA put an end to Hamas' terrorism.

> We also urge the new Palestinian government to exercise its authority in Gaza and bring an immediate end to Hamas's rocket attacks on Israel. The escalation of violence we have seen over the last several days will do nothing to advance the interests of peace or the legitimate aspirations of the Palestinian people.[74]

Given the similarities between these two horrific crimes, including the irrefutably innocent nature of all the victims as well as Canada's oft stated commitment to human rights and a broader peace, there is no obvious reason why the Canadian government would consider one an act of "terrorism"—for which it also sees the Palestinian government as somewhat responsible—and one as an act of "vigilantism," which ostensibly it considers as entirely distinct from the actions and language of the Israeli government.

CANADA AT THE UN

Canada has also been a vocal defender of Israel in international forums, particularly the UN. This has been particularly evident since 2011 when the Palestine Liberation Organization adopted a new strategy of internationalizing the conflict through seeking membership of international bodies, such as the UN General Assembly (UNGA), as a state. Indeed, the majority of Canada's statements in defense of Israel in international forums have come in response to the Palestinian pursuit of non-member observer status in the UNGA and subsequent, related, efforts. In particular, in 2011 and 2012, Canada articulated a clear defense of Israel in high profiles speeches by John Baird based on Canada's support for a negotiated settlement and opposition to, what Baird called, unilateral measures.

> We do not believe that unilateral measures taken by one side can be justified by accusations of unilateralism directed at the other. That approach can only result in the steady erosion and collapse of the very foundations of a process which—while incomplete—holds the only realistic chance to bring about two peaceful, prosperous states living side-by-side as neighbours.[75]

Further, every year the General Assembly votes on 16 resolutions pertaining to issues around Palestine such as: settlements; human rights; refugees; international donor assistance; and statehood.[76] When examining Canada's voting history in relation to these 16 resolutions, from 2000 to today, several interesting trends emerge. Canadian voting has experienced a profound shift over the last 16 years from voting almost exclusively in favor of all 16 resolutions under Jean Chrétien (in office 1993–2003), to slightly less enthusiastic support under Paul Martin (2003–06), to by his second term—save one—exclusively against all 16 resolutions under Stephen Harper (2006–15). Perhaps

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[73] John Baird, "It's Time to Demilitarize the West Bank and Gaza", *The Globe and Mail* (19 June 2014), online: <www.theglobeandmail.com/opinion/its-time-to-demilitarize-the-west-bank-and-gaza/article19234762>.

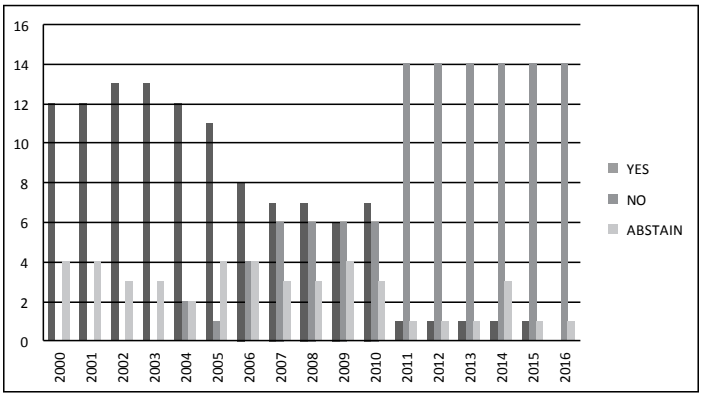
[74] Global Affairs Canada, "Address by Minister Baird to United Nations General Assembly in Opposition to Palestinian Bid for Non-Member Observer State Status", *Canada News Centre* (29 November 2012), online: <www.news.gc.ca/web/article-en.do?crtr.sj1D=&crtr.mnthndVl=2&mthd=advSrch&crtr.dpt1D=&nid=709749&crtr.lc1D=&crtr.tp1D=&crtr.yrStrtVl=2008&crtr.kw=Palestinian&crtr.dyStrtVl=1&crtr.aud1D=&crtr.mnthStrtVl=1&crtr.page=1&crtr.yrndVl=2013&crtr.dyndVl=8>.

[75] *Ibid*.

[76] In 2016, these were: A/RES/71/247 – *Permanent Sovereignty of the Palestinian People in the Occupied Palestinian Territory, Including East Jerusalem, and of the Arab Population in the Occupied Syrian Golan Over Their Natural Resources*; A/RES/71/184 – *The Right of the Palestinian People to Self-determination*; A/RES/71/126 – *Assistance to the Palestinian People*; A/RES/71/98 – *Israeli Practices Affecting the Human Rights of the Palestinian People in the Occupied Palestinian Territory, Including East Jerusalem*; A/RES/71/97 – *Israeli Settlements in the Occupied Palestinian Territory, Including East Jerusalem, and the Occupied Syrian Golan*; A/RES/71/96 – Applicability of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palest*inian Territory, Including East Jerusalem, and the Other Occupied Arab Territories*; A/RES/71/95 – *Work of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories*; A/RES/71/94 – *Palestine Refugees' Properties and Their Revenues*; A/RES/71/93 – *Operations of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*; A/RES/71/91 – *Assistance to Palestinian Refugees*; A/RES/71/23 – *Peaceful Settlement of the Question of Palestine*; A/RES/71/22 – Special Information Programme on the Question of Palestine of the Department of Public Information of the Secretariat; A/RES/71/21 – Divisio*n for Palestinian Rights of the Secretariat*; and A/RES/71/20 – *Committee on the Exercise of the Inalienable Rights of the Palestinian People*.

more concerning for the future of Canadian-Palestinian relations is the fact that despite the mild rhetorical shift around moving towards a more "balanced" approach, there has been absolutely no deviation in voting between the previous Harper government and the Trudeau Liberals. Graph 8 illustrates the 180° swing in voting from in favor of the above mentioned 16 resolutions, to categorically against them between 2000 to 2016.

GRAPH 8: CANADA'S VOTING AT THE UN[77]



Official Canadian policy states a commitment to "Palestinian *right to self-determination* and supports the creation of a sovereign, independent, viable, democratic, and *territorially contiguous* Palestinian state."[78] Canada's actions however, are hard to reconcile with this assertion. Evidence of this disparity can be seen in Canada's reaction to Palestine's efforts to engage with the international community. One way in which states can uphold and protect human rights is through international bodies such as the International Criminal Court (ICC), and the UN. By means of actions such as appointing regulatory bodies, rapporteurs, and tabling resolutions at the UNGA, Security Council, and the Human Rights Council, states can internationalize issues pertaining to human rights. However, Canada's relationship *vis-à-vis* protecting Palestinian human rights through international bodies, and their stated commitment to a Palestinian "right to self-determination," and their support for a "territorial contiguous Palestinian state," has been somewhat patchy. Despite the government's commitment to Palestinian's right to self-determination, every year since 2005, including the Trudeau Liberals in 2016, the Canadian government has voted against the draft resolution A/RES/71/184 *Right of the Palestinian People to Self-Determination*. Alongside Micronesia, Marshal Islands, Palau (all part of the "Compact of Free Association" with the United States which trades financial assistance in exchange for voting with the United States at the UN), the USA, and Israel, Canada was one of 7 countries of the 193 from who voted—to vote against this resolution that recognizes, "the right of *all* States in the region to live in peace within secure and internationally recognized borders."[79] Mirroring the language of the Canadian government's official position quoted above, the Resolution goes on to state, "the need for respect for and preservation of the territorial unity, *contiguity*, and integrity of all of the Occupied Palestinian Territory, including East Jerusalem." [80] Given the parallel in language used by the Canadian government and the UN Resolution, Canada's rejection of this Resolution is surprising. Not only is this voting pattern highly contradictory in the face of the stated government policy, it also places Canada in a select minority of international actors. Canadians are left pondering how to understand this divergence between the governments stated position and *de facto* practices. The Government of Canada's website states that:

> Canada believes that both Israel and the Palestinian Authority must fully respect international human rights and humanitarian law which is key to ensuring the protection of civilians and can contribute to the creation of a climate conducive to achieving a just, lasting, and comprehensive peace settlement.[81]

Yet, Canada has not voted in favour of any resolution that calls on the international community to recognize Israel's violation of international law, humanitarian

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[77] Graph compiled by the authors, data from General Assembly of the United Nations voting records: <www.un.org/en/ga/documents/voting.asp>.

[78] Government of Canada, *Canadian Policy on Key Issues in the Israeli-Palestinian Conflict*, (4 March 2018) online: <www.internationalgc.ca/world-monde/international_relations-relations_internationales/mena-moan/israeli-palistinian_policy-politique_israelo-palestinien.aspx?lang=eng>.

[79] General Assembly, *The Right of the Palestinian People to Self-Determination*, A/RES/71/184 (2017), online: <www.unispal.un.org/DPA/DPR/unispal.nsf/0/29C53ED838CFF4F1852580C000689DED>.

[80] *Ibid*.

[81] Government of Canada, *supra* note 78.

law, and human rights of the Palestinian people. More recently, as mentioned in the introduction, the UN Security Council unanimously voted in favour of United Nations Security Council Resolution (UNSCR) 2334 on Israeli settlement building in the West Bank.[82]

UNSCR 2334 aside, since coming into office, the Trudeau government has voted against numerous UN Resolutions addressing the rights of Palestinians. These include: Resolution A/71/20 *Committee on the Exercise of the Inalienable Rights of the Palestinian People*,[83] which highlights Palestinian "right to self-determination and the right to their independent State" where Canada was one of 9 who voted against, while 100 voted in favour;[84] Resolution A/71/98 *Israeli Practices Affecting the Human Rights of the Palestinian People in the Occupied Palestinian Territory, Including East Jerusalem*,[85] which "emphasizes the need to preserve and develop the Palestinian institutions and infrastructure for the provision of vital public services to the Palestinian civilian population and the promotion of human rights, including civil, political, economic, social, and cultural rights" where Canada was one of 7 who voted against, while 162 voted in favour;[86] and Resolution A/70/15 *Peaceful Settlement of the Question of Palestine,*[87] which "requests the Secretary-General to continue his efforts with the parties concerned, and in consultation with the Security Council, towards the attainment of a peaceful settlement of the question of Palestine and the promotion of peace in the region" where Canada was one of 7 who voted against, while 153 voted in favour.[88] Evidenced above, Canada's historical voting pattern at the UN paints an inconsistent picture given rhetoric around supporting a fair and equitable peaceful resolution to the conflict, the promotion of international law, and a commitment to human rights.

THE OTHER SIDE OF THE COIN: HUMAN RIGHTS IN CANADA

When exploring the nexus of Canada, Israel-Palestine, and human rights, important insights can be gained from exploring the impact of Canada's relationship with Israel-Palestine in relation to human rights, specifically the freedom of speech, in Canada. Abu-Laban & Bakan note that freedom of expression, freedom of assembly, and academic freedom, in regard to Canadian public discourse around the Israel-Palestine conflict, human rights abuses in the region, and criticisms of Israeli policies, is under threat. They argue that the growing normalization of relationship between Canada and Israel has implications for the basic human right of the freedom of speech domestically. They go on to note that the regulation of public discourse around Israel-Palestine "on the part of state and non-state actors in Canada is aimed to influence universities, civil society events, access to meetings and events with international speakers, and even the expressions of NGOs abroad."[89] Evidence of the erosion of the freedom of speech in Canada in relation to Israel-Palestine is evident in the Canadian governments outspoken hostility towards and obstruction of the Boycott, Divestment, and Sanction (BDS) Movement and the banning of Israeli Apartheid Week across several campuses. In 2013, then Minister of Citizenship, Immigration, and Multiculturalism, Jason Kenny, noted, "operating under the guise of academic freedom, Israel Apartheid Week is a misleading attempt

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[82] Canada lost its seat on the Security Council in 2010 and therefore did not vote on the resolution.

[83] General Assembly, *Committee on the Exercise of the Inalienable Rights of the Palestinian People*, A/RES/71/20 (2016), online: <www.documents-dds-ny.un.org/doc/UNDOC/GEN/N16/408/29/PDF/N1640829.pdf>.

[84] Australia, Canada, Guatemala, Israel, Marshal Islands, Micronesia, Nauru, Palau, United States voted against.

[85] General Assembly, *Israeli Practices Affecting the Human Rights of the Palestinian People in the Occupied Palestinian Territory, Including East Jerusalem*, A/RES/71/98 (2016), online: <www.documents-dds-ny.un.org/doc/UNDOC/GEN/N16/428/38/PDF/N1642838.pdf>.

[86] Australia, Canada, Israel, Marshal Islands, Micronesia, Palau, United States voted against.

[87] General Assembly, *Peaceful Settlement of the Question of Palestine*, A/RES/70/15 (2015), online: <www.documents-dds-ny.un.org/doc/UNDOC/GEN/N15/390/36/PDF/N1539036.pdf>.

[88] Canada, Israel, Marshal Islands, Micronesia, Palau, Nauru, United States voted against.

[89] Y Abu-Laban & A Bakan, "After 9/11: Canada, the Israel/Palestine Conflict, and the Surveillance of Public Discourse" (2012) 27:3 Can J L & Soc 319 at 320.

to delegitimize and demonize the only true liberal democracy in the Middle East."[90]

More recently, in 2015, Prime Minister Trudeau tweeted "The BDS movement, like Israeli Apartheid Week, has no place on Canadian campuses. As a @McGillU alum, I'm disappointed."[91] Statements such as these condemning non-violent civil society action calling for respect of international law draw the curtain back on a latent ideological partisanship within the Canadian government, to the highest level of government, and across administrations. Further proof of this is seen in the revoking of federal funding to groups and NGOs critical of Israel and its occupation of Palestine such as KAIROS[92] and Alternatives[93]. Moreover, under the Harper Conservatives, public speakers critical of Canada's foreign policy pertaining to Israel-Palestine, such as British Member of Parliament George Galloway in 2009, American journalist Amy Goodman in 2009, and retired US Army colonel and US State Department official Ann Wright in 2007, were either banned from entering the country or were detained for questioning and interrogation at the border. Under the *Canadian Charter of Rights and Freedoms* section 2(b), Canadians are guaranteed "freedom of thought, belief, opinion and expression, including freedom of the press and other media communications." Therefore, these examples not only infringe on Canadian's Charter rights, but also denies the Palestinian diaspora community access to public space.[94]

OPPORTUNITIES AND OBSTACLES FOR CANADA IN ISRAEL-PALESTINE

Although it is impossible for those outside of the government to truly know what goes on "behind the scenes" and the extent to which pressure is, or is not, being placed on countries in negotiations behind closed doors, based on available public data such as official government statements and UN General Assembly voting, it is fair to conclude that to date, there is little evidence to suggest that Canada's self-awarded status as a "determined peacebuilder" and human rights advocate is reflected by its record on Israel-Palestine. Moreover, as indicated by Canada's selective and unbalanced official government statements, policy, and voting at the UN, Canada's method of being a "determined peacebuilder" is clearly unfounded. From Canada's lopsided statements in regard to violence and human rights abuses in the region; its persistent silence on Israel's various violations of international law; to its decade long anti-Palestinian voting at the UN; Canada's legacy in the region has left many disappointed.

Yet, broadly speaking, September 2015 saw a substantial change in the tone of Canadian leadership. With a majority government, the Liberals under Justin Trudeau, have set to reshape Canada's policy and engagement with the world on a range of issues. However, in the short time since coming into office, the Trudeau Government's stance vis-à-vis Palestine-Israel has differed only moderately from its predecessor. On the one hand, the Liberal government restored $25 million in funding to the United Nations Relief and Works Agency for Palestine Refugees (UNRWA).[95] However, on the other hand, the Trudeau government has voted against nearly every UN Resolutions addressing the rights of Palestinians.

As often mentioned in international relations literature, Canada is a middle power. Although lacking the hard power of countries such as the USA, there are several formal and informal avenues open for Canada to increase its support for the protection of Palestinian human rights. Canada is well positioned to use both formal channels such as the ICC and the UN and

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[90] Immigration Government of Canada, "Minister Kenney Issues Statement Regarding 'Israel Apartheid Week'", *Canada News Centre*, online: <www.news.gc.ca/web/article-en.do?crtr.sj1D=&crtr.mnthndVl=12&mthd=advSrch&crtr.dpt1D=&nid=723739&crtr.lc1D=&crtr.tp1D=&crtr.yrStrtVl>.

[91] Justin Trudeau, "The BDS movement, like Israeli Apartheid Week, has no place on Canadian campuses. As a @McGillU alum, I'm disappointed. #EnoughIsEnough" (13 March 2015 at 12:31pm), online: Twitter <www.twitter.com/justintrudeau/status/576465632884981760?lang=en>.

[92] The KAIROS website is available online at: <www.kairoscanada.org>.

[93] The Alternatives website is available online at: <www.alternatives.ca/en/about-us>.

[94] Abu-Laban & Bakan, *supra* note 88 at 320.

[95] UNRWA had lost federal funding in 2010. This was a welcomed move towards contributing to a UN agency that supports education, health, and social services for millions of vulnerable Palestinian refugees.

informal mechanisms such as diplomatic relationships and legitimacy in order to uphold this important role. Although the first year of the new Liberal government has not signified a substantial shift in policy related to the region, there are a number of possibilities to turn the tide on this trend.

If Canada hopes to fulfil its pledge of promoting and protecting human rights, it must firstly understand how the actions of the Canadian government impact on these rights. Failing to take any meaningful action towards pressuring Israel to end the occupation of Palestine, complacency in one-sided coverage and statements related to events in the region, and perpetually voting against the majority of the world around issues of Palestinian right to self-determination, development, and statehood is not standing Canada in good stead. While Canada's strong relationship with Israel—or any particular state—is not a problem in and of itself, if such a relationship comes at the expense of Canada's commitments to human rights—both in Palestine and in Canada—it risks impugning Canada's self-awarded status as a "determined peacebuilder" and human rights champion. Instead, Canada must take bold steps towards signalling a move in the direction of a more even-handed stance regarding Israel-Palestine. To start, Canada must not hesitate to issue strong statements around UN resolutions, laws, and actions related to the protection of Palestinian rights. For example, Canada must make clear its position on the recently passed UNSCR 2334 on Israeli settlement building. Despite its absence from the Security Council, making a strong statement supporting this resolution can help to contribute to international pressure to encourage Israel to stop settlement building.

Second, at the 72nd session at the General Assembly in 2017, the Trudeau government should reverse the decade-long trend of voting uncritically against all 16 resolutions supporting Palestinian rights, and instead should consider the potential impact of these resolutions on the lives and rights of Palestinians. Last, Canada must ensure that across the board, its actions match its rhetoric. With a period of erratic new leadership in Washington, a foreign policy that is decisively different from that of its closest ally and neighbour will be more important than ever. Taking a more even-handed approach is a necessary step in Canada's future engagement with the world.

LA VICTOIRE DES ENFANTS DE PREMIÈRES NATIONS ET LEUR LUTTE CONTINUE POUR PARVENIR À L'ÉGALITÉ RÉELLE

Anne Levesque*

Résumé de l'article : *En janvier 2016, le Tribunal canadien des droits de la personne rend une décision historique dans l'affaire Société de soutien à l'enfance et al. c. Procureur général (Affaires indiennes et du Nord canadien) lorsqu'il conclut que le gouvernent du Canada discrimine contre plus de 163 000 enfants des Premières Nations en raison de ses formules de financement de services d'aide à l'enfance inéquitable et son manquement de mettre en œuvre pleinement le principe de Jordan. Par le truchement de cette décision et les deux ordonnances rendues en 2016 qui l'ont suivie, le Tribunal ordonne au gouvernement de prendre des mesures immédiates et concrètes pour remédier à la discrimination raciale envers les enfants des Premières Nations.*

Ce texte résume cette décision du Tribunal qui constitue une contribution importante à la jurisprudence en matière des droits de la personne au Canada. Il commence en offrant un survol des allégations de discrimination mises de l'avant dans la plainte déposée par l'Assemblée des Premières Nations du Canada et la Société de soutien à l'enfance et à la famille des Premières Nations du Canada et de l'historique procédural du litige. Il présente ensuite un résumé des conclusions de fait et de l'analyse juridique employée par les membres du Tribunal dans sa décision. Les défis affrontés par les plaignants au cours de l'année suivant la décision liée à la mise en œuvre de la décision sont examinés à titre de conclusion.

Abstact: *In January 2016, the Canadian Human Rights Tribunal (CHRT) released a historic decision in First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada) in which it held that Canada was discriminating against 163 000 First Nations children through its inequitably funding of child welfare services and its failure to implement Jordan's Principle. In this decision and the two orders that followed in 2016, the Tribunal ordered Canada to immediately cease its racially discriminatory conduct against First Nations children.*

This paper will examine the January 2016 order as it represents an important contribution to human rights jurisprudence in Canada. It will start be providing an overview of the allegation of discrimination put forward by the First Nations Child and Family Caring Society of Canada and the Assembly of First Nations as well as a procedural history of the case. It will then provide a summary of the factual findings and the legal reasoning used by the members of the Tribunal in the decision. The challenges experienced by the complainants in the implementation of the decision will be discussed as a conclusion.

INTRODUCTION

En janvier 2016, le Tribunal canadien des droits de la personne (ci-après « le Tribunal ») rend une décision historique dans l'affaire *Société de soutien à l'enfance et al. c. Procureur général (pour le ministre des Affaires indiennes et du Nord canadien)* lorsqu'il conclut que le gouvernent du Canada discrimine contre plus de 163 000 enfants des Premières Nations en raison de ses formules de financement de services d'aide à l'enfance inéquitable et son manquement de mettre en œuvre pleinement le principe de Jordan[1]. Par le truchement de cette décision et les deux ordonnances rendues en 2016 qui l'ont suivie, le Tribunal ordonne au gouvernement de prendre des mesures immédiates et concrètes pour

* B.A., LL.B., MSt (Oxon). L'auteur est une des avocates qui représente la Société de soutien à l'enfance et à la famille des Premières Nations du Canada dans sa plainte, déposée conjointement avec l'Assemblée des Premières Nations, contre le gouvernement du Canada. Elle est professeure à temps partiel au Programme de common law en français de l'Université d'Ottawa, où elle a enseigné le droit à l'égalité, la justice sociale et les litiges constitutionnels.

1 *Société de soutien à l'enfance et à la famille des Premières Nations du Canada et al. c. Procureur général du Canada (pour le ministre des Affaires indiennes et du Nord canadien)*, 2016 TCDP. Le Tribunal définit le principe de Jordan de la façon suivante au para 351 :

> Le principe de Jordan a été nommé en l'honneur de Jordan River Anderson, un jeune garçon né en 1999 dans une famille de la Première Nation crie de Norway House. Jordan avait un grave problème de santé et, à cause du manque de services dans la réserve, sa famille l'avait confié aux soins de la province afin qu'il puisse obtenir les traitements médicaux dont il avait besoin. Après avoir passé les deux premières années de sa vie à l'hôpital, il aurait pu recevoir des soins à domicile dans un foyer d'accueil spécialisé près de son établissement de santé à Winnipeg. Mais au cours des deux années qui ont suivi, AADNC, Santé Canada et la province du Manitoba se sont renvoyé la balle pour savoir qui devait financer les soins à domicile de Jordan. Jordan est donc demeuré hospitalisé. Ils se disputaient toujours lorsque Jordan est décédé, à l'âge de cinq ans, après avoir passé toute sa vie dans un hôpital.

remédier à la discrimination raciale envers les enfants des Premières Nations.

Ce texte résume cette décision du Tribunal qui constitue une contribution importante à la jurisprudence en matière des droits de la personne au Canada. Il commence en offrant un survol des allégations de discrimination mises de l'avant dans la plainte déposée par l'Assemblée des Premières Nations du Canada (« APN ») et la Société de soutien à l'enfance et à la famille des Premières Nations du Canada (« Société de soutien à l'enfance ») et de l'historique procédural du litige. Il présente ensuite un résumé des conclusions de faits et de l'analyse juridique employée par les membres du Tribunal dans sa décision. Les défis affrontés par les plaignants au cours de l'année suivant la décision liée à la mise en œuvre de la décision sont examinés à titre de conclusion.

HISTORIQUE DE LA PLAINTE

En février 2007, la Société de soutien à l'enfance et à la famille des Premières Nations du Canada et de l'Assemblée des Premières Nations dépose une plainte à la Commission canadienne des droits de la personne (« Commission ») alléguant une discrimination raciale de la part du gouvernement du Canada, et plus précisément le ministre des Affaires indiennes et du Nord canadien (« AADNC »), à l'égard des enfants de Premières Nations du Canada dans le contexte des services d'aide à l'enfance offerts sur les réserves[2]. La plainte, fondée sur l'article 5(b) de la *Loi canadienne sur les droits de la personne* (« LCDP »), met de l'avant deux allégations de discrimination[3]. La première allégation porte sur les conflits de compétence au sein du gouvernement fédéral et entre ses ministères, ainsi que les gouvernements provinciaux et territoriaux, qui font en sorte que les enfants des Premières Nations sont souvent laissés dans l'attente de services dont ils ont désespérément besoin ou se voient même refuser des services qui sont offerts aux autres enfants au Canada. La deuxième allégation de discrimination porte sur le traitement défavorable de 163 000 enfants des Premières Nations dans le cadre du financement du gouvernement fédéral du Programme des services à l'enfance et à la famille des Premières Nations (« Programme des SEFPN ») offerts sur les réserves. Plus particulièrement, la plainte allègue que le financement inéquitable des services d'aide à l'enfance offerts sur les réserves incite le placement des enfants à l'extérieur de leurs familles et de leurs communautés. En fait, la plainte souligne qu'il y avait, au moment de son dépôt, trois fois plus d'enfants des Premières Nations placés en famille d'accueil qu'il avait eu d'élèves autochtones dans les pensionnats indiens[4].

Dans le système fédéral des droits de la personne, la Commission est chargée de recevoir et d'examiner le bien-fondé des plaintes de discrimination relevant du champ de compétence du Parlement du Canada.[5] Si, compte tenu des circonstances, la Commission est d'avis qu'un examen de la plainte est justifié, elle peut alors la renvoyer au Tribunal pour une audience[6]. La Commission ne prend pas son rôle de filtrer les plaintes à la légère. Au contraire, elle exerce ses fonctions de gardien de but pour le Tribunal avec zèle. À titre d'exemple, en 2013, la Commission a reçu 1236 plaintes. La Commission a accepté d'examiner seulement 661 de ces plaintes alors que 380 ont été renvoyées à une autre voie de recours et 422 ont été rejetées ou pas traitées. Seulement 72 plaintes ont été renvoyées au Tribunal, soit moins de 6 pour cent des plaintes reçues au cours de l'année[7].

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[2] Socité de soutien et APN, « La plainte de l'APN et la Société de soutien à l'enfance » (23 février 2007) [*La plainte*] en ligne <https://fncaring-society.com/sites/default/files/Caring%20Society_AFN%20HR%20complaint%202007_0.pdf>.

[3] *Loi canadienne sur les droits de la personne*, LRC, 1985, ch. H-6 [LCDP], art. 5(b). L'article 5 prévoit : Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public :
a) d'en priver un individu;
b) de le défavoriser à l'occasion de leur fourniture.

[4] La plainte, *supra* note 3.

[5] LCDP, *supra* note 4, préambule et art 41(1).

[6] LCPD, *supra* note 4, art 44(3)(a)(i).

[7] Commission des droits de la personne du Canada, Rapport annuel de 2013 de la Commission canadienne des droits de la personne : 35 ans à promouvoir et protèger, 2014, en linge à <https://www.chrc-ccdp.gc.ca/fra/report/activites/statistiques> Les statistiques par rapport au traitement de plaintes déposées en 2007 ne sont pas présentées dans le rapport annuel de la Commission de 2007.

Déjouant les statistiques en réussissant de se faufiler à travers le filtre rigoureux de la Commission, la plainte de l'APN et de la Société de soutien à l'enfance est référée au Tribunal en octobre 20088. Cette décision fait l'objet d'une demande de contrôle judiciaire à la Cour fédérale du Canada déposée par le gouvernent du Canada9. Devant le Tribunal, le Canada dépose également une requête visant à faire radier la plainte de discrimination de façon préliminaire, une tactique juridique inusitée, voire inédite, qui n'avait jamais été utilisée dans le contexte du système fédéral des droits de la personne. Effectivement, ce système comprend un mécanisme interne rigoureux pour filtrer les plaintes frivoles ou vexatoires qui pourraient justifier ce genre de procédures en radiation d'instance.10 La Cour fédérale et la Cour d'appel fédérale rejettent les arguments du Canada, décidant qu'il serait déraisonnable d'écarter la plainte sans audience 11. Le Tribunal se saisit enfin du fond de la plainte le 25 février 2013 après plus de six ans de tactiques procédurales tendancieuses du Canada, lesquelles ont coûté plus de 3 millions de dollars en frais juridiques aux contribuables12.

LA VICTOIRE DES ENFANTS

L'audience sur le fond a lieu du 25 février 2013 au 24 octobre 2014[13]. Au cours du processus, le Tribunal entend plus de 25 témoins et examine plus de 500 documents mis en preuve[14]. À l'issue d'une audience de 72 jours et après quinze moins de délibérations, le Tribunal rend sa décision le 26 janvier 2016 et tranche en faveur des plaignants[15]. La décision est une victoire non équivoque pour les enfants des Premières Nations car la formation conclut au bienfondé de toutes les allégations de discrimination mise de l'avant par les parties requérantes. [16]

Par rapport à la première allégation de discrimination, le Tribunal conclut que la « définition étroite et l'application insuffisante du principe de Jordan entraînent des interruptions, des délais et des refus de services pour les enfants des Premières Nations portant sur le principe de Jordan »[17]. Selon le Tribunal, ces interruptions, délais et refus constituent des effets préjudiciables fondés sur la race et l'origine nationale ou ethnique au sens de la LCDP et sont ainsi discriminatoires[18]. Par rapport à l'allégation de discrimination portant sur le financement des services d'aide à l'enfance offerts aux enfants des Premières Nations, le Tribunal est d'avis que les formules de financement du Canada « ne reflètent pas fidèlement les besoins en matière de services d'un bon nombre des

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8 *Société de soutien à l'enfance et à la famille des Premières Nations du Canada et Assemblée des Premières Nations c. Procureur général du Canada (représentant le ministre des Affaires indiennes et du Nord canadien)*, 2011 TCDP 4, paras 63 et 64. Voir aussi la décision de la protonotaire Aronovitch, Cour fédérale du Canada (ordonnance non publiée, prononcée le 24 novembre 2009) en ligne à <https://fncaringsociety.com/sites/default/files/fnwitness/Federal_Court_Decision_Nov2009.pdf>

9 *Ibid*.

10 LCPD, *supra* note 4, art 41(1) et 44(3)(b).

11 *Canada (Procureur général) c. Commission canadienne des droits de la personne*, 2013 CAF 75

12 Voir Heather Scoffield, « Ottawa spends $3-million to battle first nations child welfare case », *Globe and Mail* (le 1 octobre 2012), en ligne à <https://www.theglobeandmail.com/news/national/ottawa-spends-3-million-to-battle-first-nations-child-welfare-case/article4581093>

13 *Société de soutien à l'enfance et et al c Canada*, 2016 TCDP 2, supra note 1.

14 Anne Levesque, Sarah Clarke et Cindy Blackstock, « La plainte de discrimination devant le Tribunal canadien des droits de la personne portant sur les services d'aide à l'enfance aux enfants des Premières Nations et le Principe de Jordan », *Enfances Familles Générations*, 25 | 2016, en ligne à <http://journals.openedition.org/efg/1196>

15 *Société de soutien à l'enfance et et al c Canada*, 2016 TCDP 2, *supra* note 1.

16 *Société de soutien à l'enfance et et al c Canada*, 2016 TCDP 2, *supra* note 1, para 458.

17 *Ibid*, para 458.

18 *Ibid*, para 458.

collectivités des réserves»[19]. Il souligne à la fois que le financement est insuffisant pour combler aux frais d'exploitation des agences qui offrent des services d'aide à l'enfance et nuit à leur capacité de s'adapter aux réalités culturelles des enfants et des familles des Premières Nations[20]. Selon le Tribunal, ceci crée « divers effets préjudiciables pour un grand nombre d'enfants et de familles des Premières Nations visant dans les réserves » dont l'incitation à placer les enfants en famille d'accueil[21].

À ces conclusions de fait accablantes s'ajoute le constat du Tribunal que AADNC savait depuis de nombreuses années que ses formules de financement de services d'aide à l'enfance nuisaient aux les enfants des Premières Nations. Malgré cette connaissance et les nombreuses études à la disposition de l'AADNC proposant des solutions concrètes aux problèmes, le Canada n'a pas agi pour réduire les incitations à prendre les enfants en charge et à les retirer de leur milieu familial[22]. Soulignant qu'il n'y a pas eu d'efforts réels pour réduire les effets néfastes des formules de financement, il qualifie de « rhétorique vide de sens » les déclarations et les engagements du Canada exprimés sur la scène internationale et au niveau national[23].

LES RÉPARATIONS NÉCESSAIRES POUR PARVENIR À L'ÉGALITÉ RÉELLE

Se fondant sur ses conclusions de fait que le Canada contrevient à la LCDP, le Tribunal ordonne le Canada de mettre fin immédiatement à ses actes discriminatoires en modifiant ses formules de financement illégales et en cessant d'appliquer une version étroite du principe de Jordan[24]. Or, compte tenu de la complexité du dossier et la portée des conséquences des réparations réclamées, le Tribunal choisit de ne pas dicter avec précision dans sa décision de janvier 2016 les mesures que doit prendre le Canada pour remédier à la discrimination[25]. Ayant besoin d'éclaircissement au sujet des mesures concrètes de réparations demandées, le Tribunal propose au lieu de communiquer avec les parties pour mettre au point un processus pour régler les questions liées aux réparations[26].

Si le Tribunal ne rend pas d'ordonnance précise en matière de réparation dans sa décision de janvier 2016, les motifs de sa décision donnent un avant-goût immanquable de ses attentes concernant l'étendue des mesures qui doivent être prises par le Canada pour remédier à la discrimination envers les enfants de Premières Nations. En effet, le Tribunal annonce clairement que de simples modifications aux formulaires de financement existantes seraient insuffisantes pour parvenir à l'égalité réelle. La réforme est nécessaire. Il écrit :

> AADNC apporte des améliorations à son programme et à sa méthode de financement. Toutefois, en le faisant, il incorpore un modèle dont il sait qu'il comporte des lacunes. [...] Par analogie, c'est comme si on ajoutait des piliers de soutien à une maison qui repose sur des fondations faibles, pour tenter de la redresser et de la soutenir. À un moment donné, il faut réparer les fondations, au risque de voir cette maison s'écrouler. Ainsi, il est nécessaire de procéder à une RÉFORME du Programme des SEFPN pour solidifier les fondations du programme afin de répondre aux véritables besoins des enfants et des familles des

[19] *Ibid*, para 458.

[20] *Ibid*, para 458.

[21] *Ibid*, para 458.

[22] *Ibid*, para 386.

[23] *Ibid*, para 454.

[24] *Ibid*, para 481.

[25] *Ibid*, para 483.

[26] *Ibid*, para 484.

Premières Nations vivant dans les réserves[27].

Prônant la réforme entière du système de financement des services d'aide à l'enfance sur les réserves, le Tribunal est d'avis que le Programme des SEFPN doit répondre aux besoins réels des enfants des Premières Nations et tenir compte de leurs circonstances uniques. Le Triubnal écrit :

> Autrement dit, les principes de droits de la personne, tant en droit canadien qu'en droit international, obligent AADNC à tenir compte des besoins distincts et de la situation particulière des enfants et des familles des Premières Nations vivant dans les réserves – y compris leur situation et leurs besoins culturels, historiques et géographiques – pour s'assurer qu'ils bénéficient de l'égalité dans la prestation des services à l'enfance et à la famille. Une stratégie reposant sur des niveaux de financement comparables et sur l'application de modèles types de financement ne suffit pas pour garantir aux enfants et aux familles des Premières Nations vivant dans les réserves l'égalité dans la prestation de services à l'enfance et à la famille[28].

LA PLACE IMPORTANTE DU DROIT INTERNATIONAL DE LA PERSONNE

Enfin, il y a lieu de mentionner la place importante qu'accorde le Tribunal au droit international de la personne dans ses motifs. L'intervention d'Amnistie internationale et les nombreuses recommandations faites par des organes conventionnels internationaux, dont le Comité des droits de l'homme des Nations Unies, le Comité des droits économiques, sociaux et culturels, le Comité pour l'élimination de la discrimination raciale et le Comité des droits de l'enfant, grâce aux activités internationales de la Société de soutien à l'enfance, ont sans doute contribué à ce développement[29]. Le Tribunal consacre une partie entière de la décision aux engagements internationaux du Canada envers les enfants et les Peuples autochtones au Canada. Il retrace l'adoption de sa loi habilitante au rôle central qu'a joué le Canada dans la rédaction de la première ébauche de la *Déclaration universelle des droits de l'homme* en 1948[30]. Il situe ainsi la LCDP dans le contexte de nombreuses obligations internationales du Canada en matière de droit à l'égalité et à la non-discrimination en écrivant :

> Des similitudes peuvent être observées dans le libellé des instruments nationaux et internationaux sur les droits de la personne, ainsi que dans la portée et le contenu de leurs dispositions. Le lien étroit entre le droit canadien et le droit international en matière de droits de la personne ressort également dans les rapports périodiques que le Canada présente à différents organismes internationaux de surveillance des traités sur les mesures prises à l'échelle nationale pour donner effet aux obligations découlant des traités, ainsi que dans les recommandations que ces organismes adressent au Canada[31].

Notant les préoccupations exprimées par de nombreux organes conventionnels internationaux liés aux allégations faisant l'objet de la plainte, le Tribunal conclut que les enfants des Premières Nations ont droit à des services à l'enfance de qualité égale aux services que reçoivent les autres Canadiens. [32] Surtout, selon le Tribunal, ces services doivent tenir compte des véritables besoins des enfants et des familles des Premières Nations et ne doivent pas perpétuer un désavantage historique, en vertu des obligations du Canada en droit international de la personne et sous la LCDP[33].

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[27] *Ibid*, para 463.

[28] *Ibid*, para 465.

[29] *Ibid*, para 428 et 429.

[30] *Ibid*, para 435.

[31] *Ibid*, para 436.

[32] *Ibid*, para. 455

[33] *Ibid*, para. 455.

LES DÉFIS LIÉS À LA MISE EN ŒUVRE DE LA DÉCISION

Le jour de la publication de la décision, les deux ministres concernées, la ministre de la Justice et la ministre des Affaires autochtones et du Nord du Canada annoncent lors d'un point de presse que c'est un « grand jour » pour le Canada et qu'elles accueillent favorablement les conclusions du Tribunal[34]. Moins d'un mois plus tard, la Société de soutien à l'enfance apprend par le biais d'un reportage à la télévision sur une chaine nationale que le gouvernement du Canada n'a pas l'intention de déposer une demande de contrôle judiciaire à la Cour fédérale pour contester l'ordonnance du Tribunal, une décision qui est ensuite confirmée le 10 mars 2016 dans le mémoire du Canada auprès du Tribunal au sujet des réparations[35].

Dans ce même mémoire, le Canada prétend qu'il a déjà pris des mesures pour mettre en œuvre la décision et que celles-ci seront annoncées dans le cadre du budget de 2016[36]. Il encourage ainsi le Tribunal de faire preuve de retenu dans ses ordonnances et d'être « sensible à la séparation des fonctions entre les branches exécutive et législative du gouvernement »[37]. Malgré ces affirmations prometteuses, le niveau de financement accordé aux services d'aide à l'enfance pour les enfants des Premières Nations réellement prévus dans le budget de 2016 ne correspond aucunement aux estimations faites par le gouvernement du Canada lui-même pour combler l'écart de financement entre les services offerts aux enfants hors réserves, encore moins pour offrir des services qui tiennent compte des besoins culturels, historiques et géographiques des enfants comme le fut ordonné par le Tribunal. À titre d'exemple, l'augmentation du financement pour les services d'aide à l'enfance pour les Premières Nations prévue dans le budget de 2016 pour l'année fiscale de 2016-2017 est de 71 millions $ alors que l'AAND avait estimé en 2012 que le manque à combler était de 200 millions $[38].

Se fondant sur les arguments présentés par les parties au sujet de Budget de 2016, le Tribunal rend donc une deuxième décision le 26 avril 2016[39]. Dans cette décision, le Tribunal exprime son mécontentement envers l'inaction du Canada et l'absence de mesures immédiates visant à réduire les impacts négatifs de son traitement discriminatoire envers les enfants des Premières Nations. Il explique :

> Le Tribunal comprend bien que certaines réformes du Programme des SEFPN requerront une stratégie à plus long terme; toutefois, la question n'est toujours pas claire de savoir pourquoi ou en quoi il n'a toujours pas été donné suite à certaines des conclusions précitées trois mois après le prononcé de la *décision*. Au lieu de constituer des mesures de redressement immédiates, certaines de ces mesures pourraient maintenant devenir des mesures de redressement à moyen terme[40].

Rejetant les arguments du Canada selon lequel les tribunaux des droits de la personne doivent faire preuve de réserve envers les choix politiques des gouvernements, particulièrement ceux ayant des répercussions financières, le Tribunal rappelle qu'il dispose de vastes pouvoirs en matière de réparation et que ceux-ci priment sur le droit d'une organisation de gérer

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[34] CBC News, «Bennett and Wilson Raybould react to the Human Rights Tribunal decision. » (le 26 janvier 2016), en ligne à <http://www.cbc.ca/news/bennett-and-wilson-raybould-react-to-the-human-rights-tribunal-decision-1.3420496>

[35] Société de soutien à l'enfance, « Lettre de David Taylor, avocat de la Société de soutien à l'enfance à Jonathan Tarlton, avocat du ministère de la Justice » (18 février 2016), en ligne à <https://fncaringsociety.com/sites/default/files/LT%20from%20Taylor%20to%20Tarlton%20February%2018%202016.pdf> Mémoire du ministère de la Justice au Tribunal (le 10 mars 2016), disponible en ligne à <https://fncaringsociety.com/sites/default/files/Federal%20government%20submissions%20on%20immediate%20relief.pdf>

[36] *Ibid*, para. 31.

[37] *Ibid*, para. 31.

[38] Société de soutien à l'enfance, « Mémoire au Tribunal » (le 31 mars 2016), disponible en ligne à <https://fncaringsociety.com/sites/default/files/FNCFCS%20Reply%20Submission_2016_03_31_reduced.pdf>

[39] *Société de soutien à l'enfance et à la famille des Premières Nations du Canada et al. c. Procureur général du Canada (pour le ministre des Affaires indiennes et du Nord canadien)*, 2016 TCDP 10.

[40] *Ibid*, para 21.

sa propre entreprise[41]. Il évoque son rôle de veiller à ce que les « ordonnances de redressement parviennent à promouvoir efficacement les droits » qu'il protège ainsi « élaborer des redressements visant à éduquer les gens au sujet des droits consacrés dans la LCDP[42]».

Exerçant ses pouvoirs et ses devoirs de veiller au respect de la LCDP, le Tribunal ordonne l'AADNC de lui produire un rapport détaillé par rapport aux éléments clés de sa décision[43]. L'objectif de ces rapports est de permettre au Tribunal, qui choisit de demeurer saisi de la plainte, de contrôler de près la mise en œuvre de ses ordonnances et de donner aux parties l'occasion de présenter leurs observations au sujet des démarches prises par le Canada[44].

Le Tribunal conclut l'ordonnance situant l'audience et la décision au sein d'un projet national de réconciliation avec les Autochtones. La présidente de la formation, Sophie Marchildon, écrit, avec l'appui du membre instructeur, Edwad Lustig :

> Les audiences dans la présente affaire ont été tenues dans un esprit de réconciliation, dans le but fondamental de maintenir une ambiance de paix et de respect. Le respect de toutes les parties en cause était primordial et, étant donné la nature de la présente affaire, le respect des Autochtones, non seulement ceux qui prenaient part à l'instance, mais aussi ceux qui suivaient l'instance en personne et sur le Réseau de télévision des peuples autochtones. Favoriser cette ambiance de paix et de respect est d'une importance primordiale considérant le rôle clé du Tribunal dans la détermination de droits fondamentaux de la personne et dans la sauvegarde de la confiance du public dans l'administration de la justice, surtout pour les Autochtones[45].

Dans ce contexte, la présidente invite les parties à collaborer en vue de rétablir les liens de confiance entre eux. Elle souligne que les communications efficaces et transparentes sont indispensables à la réconciliation et encourage les parties de donner suite aux deux décisions en travaillant ensemble pour apporter des changements positifs pour les enfants des Premières Nations. « C'est la saison du changement, » écrit-elle. « C'est maintenant le moment »[46].

LE NON-RESPECT CONTINU DE LA DÉCISION

Dans le cadre du processus établi par le Tribunal pour superviser la mise de ses ordonnances, le Canada présente au Tribunal le 24 mai 2016 un rapport de conformité résumant les mesures prises pour améliorer son Programme de SEFPN et la mise en œuvre du principe de Jordan[47]. De façon générale, le rapport résume vaguement les changements apportés à ses formules de financements du Programme des SEFPN sans préciser leurs liens avec les ordonnances avec le Tribunal[48]. Alors qu'il prétend d'avoir déployer tous les efforts possibles pour respecter les ordonnances du Tribunal, le Canada soutient aussi à plusieurs reprises dans le rapport qu'il doit avoir des « discussions » avec

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41 *Ibid*, para 17.

42 *Ibid*, para 17.

43 *Ibid*, para 22.

44 *Ibid*, para 22.

45 *Ibid*, para 39.

46 *Ibid*, para 42.

47 Ministère de la Justice, « Rapport de conformité du Canada au sujet de sa mise à oeuvre de la décision du Tribunal » (26 mai 2016), disponible en ligne à <https://fncaringsociety.com/sites/default/files/Respondent%27s%20Submissions%20-%20May%2024%2C%202016.pdf> Il importe de préciser que les mesures de redressements immédiates ne peuvent pas éliminer les discriminations raciales envers les enfants des Premières Nations. L'égalité réelle dans les services d'aide à l'enfance requiert la mise à œuvre d'un système fondé sur l'intérêt supérieur de l'enfant et qui répond aux besoins géographiques, culturels et géographiques de chaque communauté. Les mesures de redresssement immédiates visent donc à atténuer les effets néfastes du traitement discriminatoire du Canada jusqu'à ce que l'objectif d'égalité réelle soit atteint.

48 *Ibid*, paras 4 à 16.

des « partenaires » avant d'agir[49]. Il est pertinent de souligner, cependant, que le rapport ne précise pas qui sont ces « partenaires », quel serait l'objectif desdites discussions ou quand celles-ci auraient lieu.

Les plaignants et les autres parties impliquées dans la plainte sont unanimes dans leur position que le Canada n'a pas démontré qu'il a pris les mesures immédiates nécessaires pour remédier à formules de financement défectueuses et dans la mise en oeuvre du principe de Jordan[50]. Surtout, les parties soutiennent qu'une simple affirmation de vouloir faire des efforts pour améliorer les formules de financement du Programme de SEFPN et d'appliquer le principe de Jordan, sans preuve concrète à l'appui, ne devrait pas suffire pour satisfaire le Tribunal que ses ordonnances ont été respectées[51]. Les parties expriment aussi leur méfiance par rapport aux motifs suspects du Canada de vouloir avoir des « discussions » avant de prendre des mesures pour respecter la décision. La Société de soutien à l'enfance, ayant écrit au nouveau gouvernement en novembre 2015 pour proposer des solutions possibles et n'ayant jamais reçu une réponse, soutient qu'il s'agit d'une tentative déguisée du Canada de se gagner du temps et tenter de justifier après le coup sa décision de ne pas avoir agi plus rapidement pour respecter la décision du Tribunal[52].

Tenant compte du rapport du Canada et des arguments présentés par les parties, le Tribunal rend le 16 septembre 2017 sa troisième ordonnance contre le Canada. Faisant l'écho de son ordonnance d'avril 2016, le Tribunal conclut que le Canada n'a pas encore pris des mesures satisfaisantes pour respecter ses ordonnances. Il souligne à nouveau la tendance au sein de AADNC de ne pas agir pour promouvoir les intérêts supérieurs des enfants malgré les solutions à sa disposition. Il écrit :

> Le fait que des éléments clés [...] ont été remis à plus tard est le reflet de la vieille mentalité qui règne à AADNC et qui est à l'origine de la plainte. Cela peut supposer qu'AADNC est toujours alimenté par de l'information et des politiques qui relèvent de cette mentalité rétrograde et qui mènent à la discrimination. En effet, la formation a ciblé les défis auxquels font face les organismes et communautés de petite taille ou éloignés partout au Canada, et ce, à de nombreuses reprises dans la *décision*. AADNC a étudié ces questions et en est conscient depuis un certain temps; pourtant, il n'a toujours pas montré qu'il avait élaboré une stratégie pour y remédier[53].

Afin d'inciter un changement de la mentalité qui règne au sein de AADNC, le Tribunal dresse une liste de sept mesures concrètes liées au principe de Jordan et ces formules de financement qu'il ordonne le Canada de prendre immédiatement[54]. De plus, il ordonne aussi

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[49] *Ibid*, paras 15 à 21, 28, 30, et 31. Le terme « discussion » apparaît 11 fois dans le document de 12 pages.

[50] Société de soutien, « Mémoire au sujet du rapport de conformité du Canada au sujet de sa mise à oeuvre de la décision du Tribunal en date du 26 mai 2016 » (le 8 juin 2016), disponible en ligne à <https://fncaringsociety.com/sites/default/files/Caring%20Society%20Submission%20re%20INAC%20Compliance%20Report_0.pdf> ; Chefs de l'Ontario, « Mémoire au sujet du rapport de conformité du Canada au sujet de sa mise à oeuvre de la décision du Tribunal en date du 26 mai 2016 » (le 8 juin 2016), disponible en ligne à <https://fncaringsociety.com/sites/default/files/COO%20reply%20to%20INAC%20Compliance%20Report.pdf> ; APN, « Mémoire au sujet du rapport de conformité du Canada au sujet de sa mise à oeuvre de la décision du Tribunal en date du 26 mai 2016 » (le 24 juin 2016), disponible en ligne à <https://fncaringsociety.com/sites/default/files/2016_06_24%20AFN%20Submissions%20Pursuant%20to%20the%20Panel%27s%20June%2014%20Ruling.pdf>
La Commission pour sa part ne prend pas de position formelle sur les faits mais avance des arguments juridiques, Commission canadienne des droits de la personne, « Mémoire au sujet du rapport de conformité du Canada au sujet de sa mise à oeuvre de la décision du Tribunal en date du 26 mai 2016 » (le 24 juin 2016), disponible en ligne à <https://fncaringsociety.com/sites/default/files/CHRC%20Letter%20to%20tribunal%20enclosing%20reply%20submissions%20June%2024%202016_for%20web.pdf>

[51] Société de soutien, *ibid*, paras 4 et 69.

[52] Société de soutien, *ibid*, paras 52 et 53. Voir aussi, Société de soutien, « Lettre du Premier ministre Trudeau de Cindy Blackstock » (le 20 octobre 2015), disponible en ligne à https://fncaringsociety.com/sites/default/files/Letter%20to%20Justin%20Trudeau_20102015_0.pdf

[53] *Société de soutien à l'enfance et à la famille des Premières Nations du Canada et autres c. Procureur général du Canada (représentant le ministre des Affaires autochtones et du Nord canadien)*, 2016 TCDP 16, para 29

[54] *Ibid*, para 160. Le Tribunal ordonne :
1. AADNC ne peut diminuer ni limiter davantage le financement accordé aux Services à l'enfance et à la famille des Premières Nations ou aux services à l'enfance couverts par le principe de Jordan.
2. AADNC déterminera le budget de chaque organisme qui fournit des SEFPN en fonction de l'évaluation de ses circonstances et de ses besoins particuliers, notamment une évaluation appropriée sur la façon dont l'éloignement peut affecter la capacité des organismes qui fournissent des SEFPN à offrir des services.
3. Pour déterminer le financement pour les organismes qui fournissent des SEFPN, AADNC doit établir les hypothèses, seulement en tant que

au Canada de produire deux rapports de conformités détaillés à remettre en septembre et en octobre 2016 afin d'évaluer si d'autres ordonnances sont nécessaires[55].

À la lecture du rapport de conformité en date du 30 septembre 2016, les plaignants et les parties impliquées s'étonnent d'apprendre que le financement aux services d'aide à l'enfance prévu dans le Budget de 2016 a été établi au cours de l'automne de 2015, sous la direction du Government conservateur en se basant sur des formules de financement qui ont été jugés discriminatoires par le Tribunal sans y apporter le moindre changement pour tenir compte de la décision.[56] Ainsi, toutes corrélations entre les conclusions de fait du Tribunal et les changements apportés par le Canada dans ses formules de financement dans le cadre du Budget de 2016 sont purement fortuites. Les parties apprennent aussi dans le rapport du Canada en date du 31 octobre 2016 que le Programme de SEFPN touche maintenant 165 000 enfants de Premières Nations[57].

L'ANNÉE QUI FINIT EN QUEUE DE POISSON

Malgré le début prometteur de 2016 marqué par la victoire historique des enfants des Premières Nations, l'année se termine en queue de poisson. Constatant avec déception que le processus de rapport du Tribunal n'a pas eu le résultat escompté, les plaignants et les parties intéressées font recours à des tactiques juridiques plus fermes pour faire respecter les ordonnances du Tribunal. Ils déposent ainsi des avis de requête le 22 novembre 2016 au Tribunal implorant des déclarations non équivoques que le Canada n'a pas respecté ses ordonnances et revendiquant une série d'ordonnances spécifiques visant à remédier aux lacunes discriminatoires[58]. La preuve à l'appui des requêtes est déposée quelques semaines plus tard alors que les contre-interrogatoires auront lieu en février 2018. Les plaidoiries écrites et orales auront lieu en mars 2018, soit une décennie après le dépôt de la plainte initiale.

Alors que 165 000 enfants de Premières Nations sont touchés par les services discriminatoires du Canada, les conséquences réelles de la discrimination sur la vie d'un seul enfant sont tragiques. En effet, le délai de plus de 10 ans causé par les manigances procédurales employées par le Canada lors de l'adjudication de la plainte et, par la suite, par son inaction face à la décision du Tribunal représente pour un enfant en milieu d'accueil plus de 3650 dodos, et presque toute son enfance, loin de ses parents, sa famille et sa communauté. C'est dans cette perspective dans les plaignants et les parties intéressées continueront à mener la lutte pour l'égalité devant le Tribunal au-delà de 2018.

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norme minimale, voulant que 6 % des enfants soient pris en charge et que 20 % des familles aient besoin de services. AADNC ne réduira pas le financement accordé aux organismes qui fournissent des SEFPN si le nombre d'enfants pris en charge est de moins de 6 % ou si le nombre de familles ayant besoin de services est de moins de 20 %.

4. Pour déterminer le financement à accorder aux organismes qui fournissent des SEFPN ayant plus de 6 % d'enfants pris en charge ou plus de 20 % de familles, AADNC est tenu d'établir le financement pour ces organismes selon l'évaluation du nombre actuel d'enfants pris en charge et de familles ayant besoin de services.
5. Pour déterminer le financement accordé aux organismes qui fournissent des SEFPN, AADNC doit cesser de réduire le financement aux organismes qui desservent moins d'enfants que les 251 admissibles. Le financement devrait plutôt être établi selon une évaluation du niveau de besoin actuel de services pour chaque organisme qui fournit des SEFPN, indépendamment du niveau de la population.
6. AADNC cessera la pratique obligeant les organismes qui fournissent des SEFPN à couvrir les dépassements de coûts liés à l'entretien en puisant dans le financement des volets de l'exploitation et de la prévention.
7. AADNC doit appliquer immédiatement le principe de Jordan à tous les enfants des Premières Nations (pas seulement ceux qui vivent dans les réserves).

[55] *Ibid.*

[56] Ministère de la Justice, « Rapport de conformité au Tribunal » (le 30 septembre 2016) p 1, disponible en ligne à <https://fncaringsociety.com/sites/default/files/Tribunal%20Binder%20Material.pdf Le rapport dit :

> The rationale for the five-year plan was developped in fall 2015 as part of the 2016 federal Budget process, prior to the January 26, 2016 Tribunal decision. As part of this annual process, departments usually prepare their proposals bewtween September and November, after which time further deliberations are subject to Cabinet confidence until the Budget is announced.

[57] Ministère de la Justice, « Rapport de conformité au Tribunal » (le 31 octobre, 2016), disponible en ligne à <https://fncaringsociety.com/sites/default/files/INAC%27s%20report%20to%20the%20Tribunal.pdf>

[58] Société de soutien, « Avis de requête au Tribunal » (le 22 novembre 2016), en ligne à <https://fncaringsociety.com/sites/default/files/CaringSociety%20motions%20of%20non-compliance%20v.%20Attorney%20General%20of%20Canada%20November%2022%202016.pdf>

BIBLIOGRAPHIE

JURISPRUDENCE

Canada (Procureur général) c. Commission canadienne des droits de la personne, 2013 CAF 75

Société de soutien à l'enfance et à la famille des Premières Nations du Canada et Assemblée des Premières Nations c. Procureur général du Canada (représentant le ministre des Affaires indiennes et du Nord canadien), 2011 TCDP 4

Société de soutien à l'enfance et à la famille des Premières Nations du Canada et al. c. Procureur général du Canada (pour le ministre des Affaires indiennes et du Nord canadien), 2016 TCDP 2

Société de soutien à l'enfance et à la famille des Premières Nations du Canada et al. c. Procureur général du Canada (pour le ministre des Affaires indiennes et du Nord canadien), 2016 TCDP 10

Société de soutien à l'enfance et à la famille des Premières Nations du Canada et autres c. Procureur général du Canada (représentant le ministre des Affaires autochtones et du Nord canadien), 2016 TCDP 16

Société de soutien à l'enfance et à la famille des Premières Nations du Canada et Assemblée des Premières Nations c. Procureur général du Canada (représentant le ministre des Affaires indiennes et du Nord canadien), protonotaire Aronovitch, Cour fédérale du Canada (ordonnance non publiée, prononcée le 24 novembre 2009)

LÉGISLATION

Loi canadienne sur les droits de la personne, LRC, 1985, ch. H-6

AUTRES SOURCES

Assemblée des Premières Nations, « Mémoire au sujet du rapport de conformité du Canada au sujet de sa mise à oeuvre de la décision du Tribunal en date du 26 mai 2016 » (le 24 juin 2016)

CBC News, « Bennett and Wilson Raybould react to the Human Rights Tribunal decision » (le 26 janvier 2016)

Chefs de l'Ontario, « Mémoire au sujet du rapport de conformité du Canada au sujet de sa mise à oeuvre de la décision du Tribunal en date du 26 mai 2016 » (le 8 juin 2016)

Commission des droits de la personne du Canada, Rapport annuel de 2013 de la Commission canadienne des droits de la personne : 35 ans à promouvoir et protèger, 2014

Commission canadienne des droits de la personne, « Mémoire au sujet du rapport de conformité du Canada au sujet de sa mise à oeuvre de la décision du Tribunal en date du 26 mai 2016 (le 24 juin 2016)

ACCOUNTABILITY MECHANISMS IN UNIVERSITY SEXUAL VIOLENCE POLICIES*

Karen Busby
Professor of Law & Director, Centre for Human Rights Research, University of Manitoba

Abstract: In 2017, a critical mass of Canadian universities responded to new laws or ministerial directives requiring them to adopt sexual violence policies. A review of the policies now in place at 21 universities reveals that many policies impose enduring confidentiality requirements on participants which prohibit release of information about complaints to complainants, witnesses, the media, potential employers or others even after they have been adjudicated. Most policies also lack or have weak provisions on collection, analysis and public release of aggregate data. In consequence, very few people can assess whether justice has been done in individual cases. Nor is it possible to assess whether, in the aggregate, the policies are accomplishing their objectives.

INTRODUCTION

SEXUAL VIOLENCE AND THE CANADIAN CONSCIENCE

Concerns over the failure of various institutions to respond effectively to sexual violence and other forms of sexual misconduct gained purchase in the Canadian conscience in 2017. Early in the year, the Globe and Mail's "Unfounded" series focused on the inadequacy of police responses to sexual assault reports by women. The National Inquiry into Murdered and Missing Indigenous Women and Girls started its public hearings in May and issued its interim report in November.[1] The #MeToo movement, which helped expose pervasive workplace sexual harassment and violence, was born in October and quickly became an international force. The media continued[2] to take universities to task as details emerged about how, for example, the University of British Columbia (UBC),[3] University of Manitoba,[4] Concordia University,[5] and in 2018, the University of Windsor[6] handled sexual violence complaints.

But 2017 was also the year when a critical mass of universities across the country began to respond

* The author would like to thank Jody Woligroski, Denise McInnes, Joey Andrews, Helen Fallding, Jan Lederman, Jackie Gruber, Guillaume Dragon, and Richard Jochelson for their feedback. Ms. Woligroski's work was generously supported by the University of Manitoba Work-Study Program and Mr. Andrews work was generously supported by the University of Manitoba Legal Research Institute.

1 National Inquiry into Murdered and Missing Indigenous Women and Girls, *Our Women and Girls Are Sacred*, (2017) online: <www.mmiwg-ffada.ca/files/ni-mmiwg-interim-report-revised.pdf>.

2 For a review of some earlier high-profile complaints, see Elizabeth Sheehy & Daphne Gilbert, "Responding to Sexual Assault on Campus: What Can Canadian Universities Learn From U.S. Law and Policy" in Elizabeth Quinlan, Andrea Quinlan, Curtis Fogel & Gail Taylor, eds, *Sexual Violence at Canadian Universities: Activism, Institutional Responses, and Strategies For Change* (Waterloo: Wilfred Laurier University Press, 2017) 291.

3 See e.g. Marsha Lederman, "Under a Cloud: How UBC's Steven Galloway Affair Has Haunted a Campus and Changed Lives", *The Globe and Mail* (5 January 2017), online: <www.cbc.ca/news/canada/british-columbia/ubc-steven-galloway-letter-1.3851586>.

4 See e.g. Gordon Sinclair, "U of M Should Be Investigated, Troubling Questions About Jazz Prof Go Back Years", *Winnipeg Free Press* (16 September 2017), online: <www.winnipegfreepress.com/local/u-of-m-should-be-investigated-444809153.html>.

5 See e.g. Robert Everett-Green, "Concordia Says Allegations of Sexual Harassment 'Serious'", *The Globe and Mail* (9 January 2018), online: <www.theglobeandmail.com/news/national/concordia-says-allegations-of-sexual-harassment-serious/article37549425/>.

6 See e.g. Lori Ward & Mark Gollom, "Universities Should Protect Students, Not Reputation: Professors Call for Elimination of Confidentiality Deals", *CBC News* (7 May 2018), online: <www.cbc.ca/news/canada/windsor/university-windsor-non-disclosure-agreements-professor-1.4645268>.

concretely to calls from political leaders and others to reassess how they approached sexual violence on campuses. These calls were expressed in ministerial directives in Alberta and Nova Scotia [7] and legislation in British Columbia, Manitoba, Ontario, and Quebec.[8] In January, May and June 2017, new sexual violence policies came into effect at most universities in Ontario, British Columbia, and Alberta respectively. Universities in Nova Scotia, Manitoba, and Quebec continued or started working on their policies as mandated by 2017 legislation or, in Nova Scotia's case, a 2016 ministerial directive. Others (including Memorial University and Yukon College) voluntarily took on and now (as of July 2018) have completed revision projects on their own initiative.

The new university sexual violence policies share some key attributes. Most policies start with the recognition that universities have an ethical and legal responsibility to provide a work, learning, and living environment that is free of sexual violence.[9] Almost all policies also explicitly acknowledge that people who experience intersecting forms of disadvantage may be disproportionately affected by sexual violence and its consequences. Most policies mention prevention and support but the main (and sometimes exclusive) focus on is on individual and institutional accountability. This paper focusses on accountability mechanisms.

SEEING JUSTICE DONE

The complaint provisions in sexual violence policies are very complex. A good policy will, among other things, have provisions on: what kind of nexus needs to exist between the university and the people or events giving rise to the claim; the process for interim accommodation and whether university proceedings will be affected if there are parallel criminal proceedings; establishing confidentiality expectations (both during the investigation and afterwards); establishing who decision-makers will be; referentially incorporating privacy and other legislation, collective agreements, and other university by-laws such as student discipline codes; considering how to treat group-based or public violence; setting out procedural fairness rights (including hearing rights, impartiality and promptness); setting out range of sanctions and remedies; and providing for public accountability.

While researchers have asked the question, "why don't students who have been sexually assaulted make formal complaints?" no one has investigated what the small number who do take this action hope to achieve and, more specifically, no one has asked what substantive outcomes they or others think are appropriate in these cases.[10] While it seems obvious that complainants want respondents to be held accountable in some way, at best we can come up with a speculative list of the substantive outcomes or remedies they might want to see. Most complainants probably want an acknowledgment that what happened to them was wrong. Others might be seeking remedies such as an apology from the respondent or a promise he will take active steps to change behavior. Others may want to ensure their personal safety, obtain support, and protect others from harm. Some want the respondent to face punitive sanctions, and they may also want to send a message of deterrence. Researchers, administrators, and policy makers would also like to see data collected that would support analysis of whether institutional approaches are effectively addressing sexual violence.[11]

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[7] See Colette Derworiz, "Province Expects All Publicly Funded Alberta Universities and Colleges to Adopt Sexual Assault Policies", *Calgary Herald* (8 September 2016), online: <www.calgaryherald.com/news/local-news/campus-safety>; Michael Gorman, "Nova Scotia University MOU Gives Province Teeth, Minister Says", CBC News (23 June 2016), online: <www.cbc.ca/news/canada/nova-scotia/universities-nova-scotia-mou-1.3649515>.

[8] *Sexual Violence and Misconduct Policy Act*, SBC 2016, c 23; *The Advanced Education Administration Act*, CCSM c A-6.3; *Ministry of Training, Colleges and Universities Act*, RSO 1990, c M-19; and *An Act to Prevent and Fight Sexual Violence in Higher Education Institutions*, SQ 2017, c 32.

[9] On objectives, see: University of British Columbia Sexual Assault Panel, *Sexual Assault at the University of British Columbia: Prevention, Response, and Accountability*, (June 2016) online: UBC <www.fnis.arts.ubc.ca/sexual-assault-at-ubc-prevention-response-and-accountability>; Government of Ontario, *It's Never Okay: An Action Plan to Stop Sexual Violence & Harassment*, (6 March 2017) online: <www.ontario.ca/page/its-never-okay-action-plan-stop-sexual-violence-and-harassment-progress-update-2016-2017>; Government of Ontario, *Developing a Response to Sexual Violence: A Resource Guide for Ontario's Colleges and Universities*, (January 2013) online: Ontario Ministry of Children, Community and Social Services <www.citizenship.gov.on.ca/owd/english/ending-violence/campus_guide.shtml>.

[10] Chelsea Spencer et al, "Why Sexual Assault Survivors Do Not Report to Universities: A Feminist Analysis" (2017) 66:1 Family Relations 166.

[11] See e.g. Zoe Ridolfi-Starr, "Transformation Requires Transparency: Critical Policy Reforms to Advance Campus Sexual Violence Response" (2016) 125:7 Yale LJ 2156.

This paper focuses on whether the sexual violence policies now in force at Canadian universities provide mechanisms by which complainants and others who are directly affected by an alleged incident, as well as the broader community, can get the information they need to assess the adequacy of an institution's response to complaints in individual cases and in the aggregate. In other words, do these policies facilitate seeing that justice has been done?

To answer this question, I surveyed university sexual assault or sexual violence policies adopted as of June 30, 2018, touching on what individual complainants and some third parties can know and say about findings and outcomes in investigations, and what universities can say about complaints and ensuing investigations either in individual cases or in the aggregate. I reviewed recently adopted sexual violence policies at one of the largest universities or colleges (by enrollment) in most jurisdictions, as well as the policies from the nine other large institutions in Ontario and one other large university in both British Columbia and Alberta. As the University of Prince Edward Island, Nunavut Arctic College, and Aurora College in the Northwest Territories (the only colleges or universities in these jurisdictions) do not have stand-alone sexual assault policies, I did not include these institutions in this survey. A large number of Ontario universities, as well as an additional institution from both British Columbia and Alberta, are included in this review in order to explore whether these policies, which by statute or directive had to come into force in 2017, reveal common practices or set out alternatives. In all, the policies at 21 universities or colleges were reviewed. See the References for the complete list of institutions reviewed and references to their policies.

ACCOUNTABILITY IN INDIVIDUAL CASES

DISCLOSURES AND REPORTS

Under almost all of the policies reviewed, complainants can "disclose" a sexual assault with a view towards finding support and accommodation. They also have the option, but not the obligation, to "report" or to make a "complaint" which triggers the start of a more formal disciplinary process. Following some preliminary steps, the formal report process usually starts with the appointment of an investigator. Typically, the investigator interviews the respondent, the complainant, and any witnesses and then prepares a report. The report is provided to an administrator or a committee who determines whether to accept the findings. If the complaint is substantiated, the administrator, usually after hearing from the respondent regarding appropriate remedies or sanctions, issues a decision on outcomes. At most universities, the respondent can pursue a fresh hearing as provided for by student discipline by-laws, grievance procedures under collective agreements, or other policies if they disagree with the administrator's decisions on findings and outcomes.

PROHIBITIONS ON INFORMATION SHARING

Almost all of the reviewed policies restrict or prohibit administrators, complainants, respondents, witnesses, and supporters from sharing information about a complaint during and after an investigation, including: the parties' names; the existence of a complaint; details of the investigation, including the fact of having met with an investigator; investigators' reports; administrators' summaries or conclusions; and settlements, sanctions, or other outcomes. Some policies obliquely threaten sanctions against anyone who breaches confidentiality provisions. For example, McMaster University's policy states that "all those who meet with an Investigator are required to keep confidential the meeting and any information shared to ensure the integrity of the proceedings. Failure to do so could be considered a breach of privacy."[12] Some policies explicitly prohibit making public statements. For example, Carleton University's policy states that:

> To ensure procedural fairness, while a formal complaint process is underway, the Complainant and the Respondent and others who may have knowledge of the matter, including a support person, must maintain confidentiality in accordance with this Policy and not make public statements (for example: media, public and/or social media statements) that may jeopardize the proper handling of the matter.[13]

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[12] McMaster University, *Sexual Violence Policy*, (effective 1 January 2017) online at 14: <www.mcmaster.ca/vpacademic/Sexual_Violence_Docs/Sexual_Violence_Policy_effec-Jan_1,2017.pdf>.

[13] Carleton University, *Sexual Violence Policy* (effective 1 December 2016) online at 13: <www.carleton.ca/secretariat/wp-content/uploads/Sexual-Violence-Policy-December-1-2016.pdf>.

The University of Victoria takes a more nuanced and helpful approach than the other policies about what complainants can say. It provides:

> …survivors and those impacted by sexualized violence are free to tell the story of their own experiences. University community members must not disclose information that they learn solely as a result of an investigation or reporting process because under BC privacy law, this is personal information that must be kept confidential. See the procedures for more detailed information, and contact the intake office for guidance about confidentiality and privacy. Individuals are advised that, should they choose to make public statements about the investigation (including on social or other electronic media), they may compromise the investigation or be putting themselves at risk of civil lawsuits by those who believe they have been defamed or have had their privacy rights violated. Individuals should exercise care and judgment when deciding to make public statements, and should seek legal or other advice if unsure [section numbers removed, formatting simplified].[14]

The most commonly stated reason for confidentiality protections is to encourage reporting but some policies expand the list of reasons. The Ryerson University policy, for example, states that confidentiality is required "in order to protect the rights of those involved in the allegations, prevent an unjustified invasion of their personal privacy, and preserve the integrity of the investigation."[15] No policy clearly sets out an underlying rationale for enduring confidentiality other than protection of complainants' identities. Another, albeit unarticulated, reason for enduring confidentiality, could be the belief that respondents (especially young and foolish students) should not have to face the ruinous consequences of being publicly linked to a sexual violence complaint, even if it is substantiated. Clarity around the reasons for enduring confidentiality would facilitate assessment of both the reasons and the mechanisms designed to achieve this objective.

Almost every policy alludes to privacy legislation; the University of Victoria policy (noted above) is the only one that makes an attempt to explain privacy law restrictions. Many policies also refer to workplace safety and health laws which, in some jurisdictions, prohibit employers from disclosing the name of the complainant or an alleged harasser or circumstances related to the complaint except in limited circumstances. These laws have been interpreted to mean that no disclosure on any aspect of the case can be made to anyone, except the respondent and, in a limited way, the complainant.[16] One professor who left his position after allegations of sexual impropriety emerged has now sued 25 defendants, including the main complainant in the university complaint in defamation. Undoubtedly, at least some complainants will be confused about what they can say, ever and to whom, about what happened.

SHARING FINDINGS AND OUTCOMES WITH COMPLAINANTS

More than half the policies reviewed for this paper are silent on whether a complainant is to be provided with any information about the investigator's report or the administrator's response to this report. Only a few policies (Carleton University and University of Ottawa) provide, without stating any qualifications, that the investigation report will be provided to the complainant. Policies at five institutions allow administrators to provide formal complainants with a summary of investigator's findings or a redacted copy of investigators' reports.[17] University of Toronto's policy is typical in this regard. It provides that after the investigator files a report, the university will "inform the complainant and the respondent…in writing of the results of the investigation, with a reminder as to the provisions outlined in the 'Confidentiality and Privacy' section of this policy."[18] About half the policies provide that the administrator will provide the complainant with a written decision on findings.

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[14] University of Victoria, *Sexualized Violence Prevention and Response Policy*, (effective June 2017) online at 17: <www.uvic.ca/universitysecretary/assets/docs/policies/GV0245.pdf>.

[15] Ryerson University, *Sexual Violence Policy*, (effective 2016) online: <www.ryerson.ca/policies/policy-list/sexual-violence-policy/>.

[16] See e.g. *University of British Columbia v University of British Columbia Faculty Association*, 2018 CanLII 69595 (BC LA) [University of British Columbia]. See also supplemental award available at: <www.facultyassociation.ubc.ca/assets/media/25Sep18_UBC-UBCFA_Supplemental-Award.pdf>.

[17] These reports can be heavily redacted. See e.g. *University of British Columbia (Re)*, 2014 BCIPC 12 (CanLII).

[18] University of Toronto, *Policy on Sexual Violence and Sexual Harassment*, (effective 1 January 2017) online at 6: <www.governingcouncil.lamp4.utoronto.ca/wp-content/uploads/2016/12/p1215-poshsv-2016-2017pol.pdf>.

Under almost all policies, complainants are not entitled to be advised of remedies or sanctions or the policy is silent on this point. Carleton University's policy, for example, provides that "the complainant has a right to know the outcome of the investigation but not the details of the discipline unless sharing that information is permitted by [the Freedom of Information and Protection of Privacy Act] for health and safety reasons."[19] The Queen's policy is one of the very few that bucks the general trend. It provides that the complainant will be provided with the administrator's "decision and outcomes, with reasons will be provided to the Complainant and the parties."[20]

SHARING FINDINGS AND OUTCOMES WITH THIRD PARTIES

Witnesses do not have the express right to investigators' reports (except, under a few policies, to information related to their own statements) or administrators' decisions on findings and sanctions. While policies could be clearer on this point, unless a person is the formal complainant, those touched by group-based or public events (see section on "Group-based and Public Harassment") do not have informational rights.

As noted earlier, universities have been criticized in the media for not being more forthcoming about sexual violence investigations. In at least two recent cases, professors who left Canadian universities in the wake of sexual violence complaints found employment at other universities.[21] Statutory privacy laws across Canada prohibit public institutions (including universities) from sharing information about the sexual violence investigations with the media or with prospective employers. In contrast, private employers in some jurisdictions can disclose personal employee information to a potential employer without consent if the disclosure is, among other things, reasonable for the purposes of assisting that employer to determine the individual's eligibility or suitability for a position.[22] The consequences of breaching privacy laws can be significant. A Canadian university was ordered by a grievance arbitrator to pay a professor $167,000 for breaching his privacy rights when it confirmed to the media that it had suspended the professor and was conducting an investigation. Public comments made by the university following this award where found to be a new breach of the professor's privacy rights and an additional damages award of $60,000 was ordered by the arbitrator.[23]

GROUP-BASED AND PUBLIC HARASSMENT

Confidentiality and privacy issues become more complicated when students are alleged to have made misogynist comments about others in the university community in public fora, including performances or group events (such as orientation week activities) or through traditional or social media (such as satirical newsletters or Facebook postings). None of the sexual violence policies reviewed for this paper deal sensitively with the particular issues that arise in these cases.[24]

Group-based complaints are often instigated by an administrator and may take months to investigate. In the meantime, the usual information blackout, under threat of sanction, is imposed on everyone touched by the events or posts or the process. Such rules might make sense during the investigation stage of one-on-one complaints, but the blanket restrictions are questionable when many students, staff, and faculty have already witnessed the events or seen the social media postings or hardcopy broadsheets. Cautious people do not share copies of the allegedly offensive material with anyone or even discuss its possible effects on the learning environment, lest they be subject to discipline. The people

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[19] Carleton University, *Sexual Violence Policy*, (effective 1 December 2016) online at 19: <www.carleton.ca/secretariat/wp-content/uploads/Sexual-Violence-Policy-December-1-2016.pdf>.

[20] Queen's University, *Policy on Sexual Violence Involving Queen's University Students*, (effective 1 January 2017) online at 11: <www.queensu.ca/secretariat/sites/webpublish.queensu.ca.uslcwww/files/files/policies/board/SexualViolencePolicyFinal.pdf>.

[21] Ward & Gollom, *supra* note 7; Katie Nicholson, "Jazz Prof Steve Kirby Fired From Berklee College After U of M Students Share Harassment Complaints", *CBC News* (17 November 2016), online: <www.cbc.ca/news/canada/manitoba/steve-kirby-fired-berklee-college-harassment-complaints-1.4404394>.

[22] See e.g. *Information Protection Act*, SA 2003, c P-6.5, s 21(2); *The Personal Information Protection and Identity Theft Prevention Act*, SM 2013, c 17, ss 20–21.

[23] *University of British Columbia*, *supra* note 13.

[24] For a fuller analysis of policy deficiencies related to on-line harassment see: Shaheen Shariff, "Navigating the Minefield of Sexual Violence Policy in Expanding 'University Contexts'" (2017) 27:1 Education L J 39–58, XI–XII.

alluded to in the impugned posts do not have the right to know, even in summary form, whether the investigator found that the posts constitute sexual violence or harassment. The names of those implicated in creating the posts and the remedial or disciplinary measures recommended or taken will be forever secret. Insights that could have been gained from sharing the investigator's close examination of real-life examples are lost.

LIFTING DISCLOSURE RESTRICTIONS

Only three of the university policies reviewed have express policy provisions modifying the strict confidentiality requirements to allow case-specific information on either individual or group-based harassment to be shared more broadly. Dalhousie University's policy expressly provides that a university administrator "for educational purposes...may discuss specific Disclosures and Reports, and their resolutions without identifying personal information or other information that may result in identifying individuals."[25] McMaster University's policy permits "educational and preventive intervention measures" in appropriate cases.[26] The University of Manitoba's policy provides that a report or summary can be provided to others if it is necessary "to decide upon and implement discipline, mitigation steps, or remedial measures, ...necessary to implement due diligence to prevent similar or related Breaches in the future; [or]...necessary to protect or restore the reputation of those wrongly accused of causing or contributing to a Breach."[27] As these three policies demonstrate, more nuanced policies that further justice goals related to education are possible.

In sum, almost all policies have enduring prohibitions on information sharing. At best, under most policies, complainants may get a high-level summary of an investigator's or an administrator's report. They do not have the right to know what remedies or sanctions, if any, were imposed unless they are affected by a remedy, such as a no-contact order. Complainants may also be confused about what they can say, ever and to whom, about what happened. Almost all policies prevent information sharing with witnesses, the media or prospective employers of any details about investigators' reports, administrators' decisions, or the sanctions or remedies imposed. University administrators cannot explain their actions in the media or in any public forum. Nor can they meaningfully respond to requests for references or otherwise advise prospective employers of the events regardless of how egregious the respondent's conduct might have been. In consequence, most complainants cannot assess whether justice has been done in individual cases.

AGGREGATE DATA REPORTING

TYPES OF INFORMATION

In order to evaluate the effectiveness of universities' sexual violence and misconduct policies, data needs to be collected by institutions and made publicly available.[28] Data needs are diverse and could include:

- Metrics on services and programs;
- Aggregate anonymized data on complainant and respondent demographics, such as the person's role at the institution, race, gender identity, Aboriginal status or sexual orientation;
- Process factors such as the number of formal or informal sexual assault, harassment or other misconduct reports, investigations or violations found to have occurred, along with unfounded rates;
- Fairness factors such as time to process, number of appeals and results on appeal, and the identity of investigators or panel members; or
- Remedial measures used, such as interim no-contact orders, apologies, suspensions, expulsions and terminations.

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[25] Dalhousie University, *Sexualized Violence Policy*, (effective 26 June 2018) online at 10: <www.dal.ca/dept/university_secretariat/policies/human-rights---equity/sexualized-violence-policy.html>.

[26] McMaster University, *Sexual Violence Policy*, (effective 1 January 2017) online at 19: <www.mcmaster.ca/vpacademic/Sexual_Violence_Docs/Sexual_Violence_Policy_effec-Jan_1,2017.pdf>.

[27] University of Manitoba, *Respectful Work and Learning Environment Sexual Assault Procedures* (1 September 2016) online at 19: <http://umanitoba.ca/admin/governance/media/Respectful_Work_and_Learning_Environment_RWLE_and_Sexual_Assault_Procedures_-_2016_09_01.pdf>.

[28] Ridolfi-Starr, *supra* note 12. See also, Corey R Yung, "Concealing Campus Sexual Assault: An Empirical Examination of the Clery Act Data" (2015) 21:1 Psychology, Public Policy & L 1.

Without aggregate data at this level of detail, we cannot know, for example: how many "disclosures" crystalize into formal "reports"; if particular groups within the university community receive favorable or unfavorable treatment during investigation processes; or how many complaints are substantiated. We also know little about who accesses services or whether awareness activities are effective. A 2015 task force report from the University of Ottawa recommended that:

> ... the University direct all appropriate bodies to compile annual statistics on the number of sexual violence complaints lodged and that these be submitted to a central committee named by the Action Team and including representatives of all stakeholders principally affected by the complaints process. Because sexual violence is linked to larger issues of women's equality, annual publication of this data will help to track the progress being made toward achieving a culture of respect and equality.[29]

Therefore, it is important to ask: what kinds of data do currently-in-force sexual violence policies require to be collected (either under a statutory mandate or voluntarily) and do the policies facilitate public reporting?

STATUTORILY MANDATED REPORTING REQUIREMENTS

Four provinces—Ontario, British Columbia, Manitoba, and Quebec—now have statutory data collection and reporting requirements. The Ontario act requires institutions to provide the minister with such data as may be requested by the Minister regarding:

1. The number of times supports, services, and accommodation relating to sexual violence are requested and obtained by students enrolled at the college or university, and information about the supports, services, and accommodation;

2. Any initiatives and programs established by the college or university to promote awareness of the supports and services available to students;

3. The number of incidents and complaints of sexual violence reported by students, and information about such incidents and complaints; and

4. The implementation and effectiveness of the policy.[30]

The British Columbia act provides that "the president... must report to the governing body on the implementation of the post-secondary institution's sexual misconduct policy."[31] The Manitoba act imposes an obligation on the boards of post-secondary institutions to ensure that the institutions' "activities under the [new] policy and the results of those activities are reported to the public."[32] The Quebec law provides that:

> The educational institution must report on the application of its policy in its annual report or in any other document determined by the Minister. The policy application report must set out, using the methodology determined by the Minister:
>
> 12. (1) the prevention and awareness-raising measures implemented...;
>
> (2) the training activities...;
>
> (3) the safety measures implemented;
>
> (4) the number of complaints and reports received and the time frame in which they were processed;
>
> (5) the actions taken and the nature of the penalties applied;
>
> (6) the consultation process used in developing or amending the policy; and
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> (7) any other element determined by the Minister.
>
> 13. The Minister may require that the educational institution provide any additional information the

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[29] University of Ottawa, *Report of the Task Force on Respect and Equality: Ending Sexual Violence at the University of Ottawa*, (2015) at 36, online: <www.uottawa.ca/president/sites/www.uottawa.ca.president/files/report-of-the-task-force-on-respect-and-equality.pdf>.

[30] *Private Career Colleges Act*, 2005, SO 2005, c 28, Schedule L, s 32.1(8).

[31] *Sexual Violence and Misconduct Policy Act*, SBC 2016, c 23, s 6(2).

[32] Bill 15, *The Sexual Violence Awareness And Prevention Act*, 1st Sess, 41st Leg, Manitoba, 2016, 2.2(4)(c).

> Minister considers necessary about its policy and may prescribe any other accountability measure.[33]

A close reading of the new British Columbia, Ontario, Manitoba, and Quebec statutes reveals serious three limitations that compromise or undermine data collection and dissemination. First, only the Manitoba legislation requires a public report. Neither the British Columbia nor the Ontario law require that the report be made public, and the Quebec law is ambiguous on this point. The Ontario and British Columbia laws only require, respectively, a report to the minister or the university's board; the Quebec law requires that information be included in its "annual report." Second, the provisions governing each new regime on what must be reported could be thinly interpreted so as to omit, for example, data on demographics, process and fairness factors (other than timeliness), and the range of sanctions imposed. Only Quebec expressly requires information on the penalties applied. Third, the Ontario law states that the information is to be provided "in the manner and form directed by the Minister,"[34] but no such direction has been given. The Quebec law also requires the minister to set methodological requirements. These are not yet in place either.

How do the sexual violence policies reviewed for this paper implement the new statutory reporting requirements? The importance of public accountability permeates the 2016 report of a panel appointed by UBC to give advice on a new sexual assault policy. The panel recommended that "the University is not, and should not, be limited to the narrow reporting requirements of the new legislation."[35] This recommendation seems to have been ignored as the 2017 UBC policy has thin data collection and public accountability provisions. It simply requires a public report on the number of disclosures and reports received and the number of reports investigated or referred for alternative dispute resolution. The University of Victoria policy is similar. The University of Manitoba's 2016 policy (which has not yet been revised to comply with the legislation passed in 2017) is marginally more detailed than the UBC and University of Victoria policies on data collection and dissemination. It provides that a designated officer will produce an annual report containing de-identified data on sexual assault disclosures, the number and types of complaints received, the number and types of investigations conducted, and particularly important cases, as well as information on observable trends, educational activities, and any other relevant information that may further the implementation of the policy. The policy expressly provides that the annual report will be made available to the university community.

A survey of the policies that came into force on January 1, 2017 at the 10 largest Ontario universities reveals different approaches to the data collection and dissemination provisions. Only two universities (Carleton and McMaster) adopted policies requiring that some types of data be collected or that reports be made to the university's board or senate but neither policy explicitly provides that the report must be made public. Policies adopted at two universities (Toronto and Western) are silent on data collection and reporting. Six universities (Guelph, Ottawa, Queen's, Ryerson, Waterloo, and York) have, in the absence of ministerial direction, adopted what could be called a "wait and see" approach. The University of Ottawa policy, for example, provides that:

> ...the University will maintain annual statistics, without identifying information, on disclosed and reported incidents of sexual violence on campus and in accordance with legislative requirements. External reporting of such statistics will be done in accordance with legislative requirements.[36]

As there are no "legislative requirements," the University of Ottawa does not have to collect data or make a public report. This approach is surprising given the university's purported acceptance of all the recommendations, including the recommendation on data collection practices referenced earlier,[37] made by the 2015 task force report.

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[33] *An Act to Prevent and Fight Sexual Violence in Higher Education Institutions*, SQ 2017, c 32, ss 12–13.

[34] *Ministry of Training, Colleges and Universities Act*, RSO 1990, c M-19, s 7.

[35] University of British Columbia Sexual Assault Panel, *supra* note 10 at 16.

[36] University of Ottawa, *Prevention of Sexual Violence,* (effective 13 June 2016) online: <www.uottawa.ca/administration-and-governance/policy-67b-prevention-sexual-violence>.

[37] *Supra* note 19. See also, Johanne Adam, "Task Force on Respect and Equality: uOttawa to Adopt All Recommendations", *uOttawa Gazette* (29 January 2015), online: <www.uottawa.ca/gazette/en/news/task-force-respect-and-equality-uottawa-adopt-all-recommendations>.

The McGill University policy, which came into effect a year before the Quebec act mandating policies was passed and has not yet been revised, requires the institution to create a "confidential monitoring framework" and to report to Senate biannually on the number of disclosures and reports and measures taken to pursue prevention and education. The framework, if it has been created, is not yet public.

VOLUNTARY REPORTING PROVISIONS

The policies in effect at University of Alberta, Dalhousie University, and Memorial University have no provisions on gathering data or on public accountability. No legislative framework in these jurisdictions requires such provisions and none have been self-imposed. The University of Calgary, University of Saskatchewan, and Yukon College self-impose minimal data collection provisions. For example, University of Saskatchewan's 2015 policy states that "incidents of sexual assault or sexual misconduct that are reported to Protective Services will be logged and posted on the Protective Services website. This log will be updated on a regular basis."[38] The Yukon College policy requires that an annual report be prepared for senior administrators and the governing board on "reported incidents of sexualized violence on campus." That policy justifies limited circulation of information by noting that "based on our current population...the sharing of these statistics within the media and community may potentially revictimize the reporting individuals."[39]

Only one university not governed by a legislative direction—University of New Brunswick (UNB)—requires that some data on sexual misconduct be collected, analyzed, and then made public. The UNB's 2016 sexual assault policy requires a task force to:

> ...prepare an annual Statistical Report for the President and the University Community. The University is committed to collecting and storing information in such a way as to track and respond to patterns of behaviour. Data will include information collected directly by the Campus Sexual Assault Support Advocates and summary (non-identifying) information from individuals receiving Confidential Disclosures.[40]

As of June 15, 2018, only one annual report (Carleton University[41]) could be located easily on the website of the 21 universities whose policies were reviewed for this paper. It is possible that some annual reports could have been found attached to Senate or governing board agendas or minutes or could have been obtained through either an email request or more formal access to information request.

In summary, of the 21 polices surveyed, five policies have no provisions on data collection; six policies have provisions that are ineffective absent a regulatory framework; and eight policies require minimal data collection but have no or very weak public reporting provisions. No policy goes so far as to mandate accessible anonymized aggregate data on demographics, process factors, fairness factors, or remedial measures. Only UNB and University of Manitoba have adopted policies containing provisions that not only require some data collection and analysis but also require that at least some of the information is made public. Annual reports do not appear to be easily accessible on university websites. Public accountability under the new policies is, to date, illusory.

CONCLUSION

The sexual violence policies at most of the institutions surveyed in this study impose enduring confidentiality requirements on complainants and other witnesses. They also prohibit or restrict the release of any case-specific information about findings, reasons, remedies, and sanctions. Therefore, complainants are unlikely to be in a position to assess the adequacy of the university's response or whether they achieved the substantive

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[38] University of Saskatchewan, *Sexual Assault Prevention Policy*, (approved 14 December 2015) online at 11: <www.policies.usask.ca/policies/health-safety-and-environment/Sexual%20Assault%20Prevention%20Policy.php>.

[39] Yukon College, *Sexualized Violence Prevention and Response Policy*, (approved 6 June 2018) online at 9: <www.yukoncollege.yk.ca/sites/default/files/inline-files/HR-07%20Sexualized%20Violence%20Prevention%20and%20Response%20FINAL.pdf>.

[40] University of New Brunswick, *Procedures for UNB Sexual Assault Policy,* (effective 1 June 2016) online at 8: <www.unb.ca/fredericton/vp/_resources/documents/sexualassaultprocedures.pdf>.

[41] Carleton University, *2017 Annual Report on Sexual Violence presented to the Board of Governors Meeting*, (8 February 2018) online: <www.carleton.ca/studentsupport/wp-content/uploads/Carleton-2017-Annual-Report-on-Sexual-Violence-Feb-8-2018.pdf>.

outcomes that motivated them to make a report in the first place. Most policies also lack or have weak provisions on collection, analysis, and public release of aggregate data and reports on containing this data either are not publicly available or are difficult to find. Without this information, complainants and others cannot evaluate institutional responses and therefore do not know if justice is being done.

REFERENCES

SELECT UNIVERSITY SEXUAL VIOLENCE POLICIES

Carleton University, Sexual Violence Policy (effective December 1, 2016)
<https://carleton.ca/secretariat/wp-content/uploads/Sexual-Violence-Policy-December-1-2016.pdf>

Dalhousie University, Sexualized Violence Policy (effective June 26, 2018)
<https://www.dal.ca/dept/university_secretariat/policies/human-rights---equity/sexualized-violence-policy.html>

McGill University, Policy Against Sexual Violence (effective December 1, 2016)
https://www.mcgill.ca/secretariat/files/secretariat/policy_against_sexual_violence.pdf

McMaster University

- Sexual Violence Policy (effective January 1, 2017)
  <https://www.mcmaster.ca/vpacademic/Sexual_Violence_Docs/Sexual_Violence_Policy_effec-Jan_1,2017.pdf >

- Hearing Procedures for the Board-Senate Hearing Panel for Discrimination, Harassment, and Sexual (effective January 1, 2017) <https://www.mcmaster.ca/policy/General/HR/Hearing_Procedures_DHSV.pdf>

Memorial University

- Sexual Harassment and Sexual Assault (effective November 1, 2017) <http://www.mun.ca/policy/site/policy.php?id=321>

- University-Wide Procedures for Sexual Harassment and Sexual Assault Concerns and Complaints (effective November 1, 2017) <http://www.mun.ca/policy/site/procedure.php?id=563>

Queen's University, Policy on Sexual Violence Involving Queen's University Students (effective January 1, 2017)
<https://www.queensu.ca/secretariat/sites/webpublish.queensu.ca.uslcwww/files/files/policies/board/SexualViolencePolicyFinal.pdf>

Ryerson University, Sexual Violence Policy (approved 2015, 2016)
<https://www.ryerson.ca/policies/policy-list/sexual-violence-policy/>

University of Alberta

- Sexual Violence Policy (approved June 23, 2017)
  <https://policiesonline.ualberta.ca/PoliciesProcedures/Policies/Sexual-Violence-Policy.pdf>

- Sexual Violence Disclosures and Complaints Procedure (approved June 23, 2017) <https://policiesonline.ualberta.ca/PoliciesProcedures/Procedures/Sexual-Violence-Disclosures-and-Complaints-Procedure.pdf>

University of British Columbia, Sexual Assault and Other Sexual Misconduct (effective May 18, 2017)
<https://universitycounsel.ubc.ca/files/2017/04/policy131.pdf>

University of Calgary, Sexual Violence Policy (effective June 1, 2017)
https://www.ucalgary.ca/policies/files/policies/sexual-violence-policy.pdf

University of Guelph

- Sexual Assault and Sexual Violence Policy (effective December 6, 2016)
  <http://humber.ca/policies/sexual-assault-and-sexual-violence-policy>

- Employees' Sexual Assault and Sexual Violence Procedure (effective date December 6, 2016) <http://humber.ca/policies/procedures/employees%E2%80%99-sexual-assault-and-sexual-violence-procedure>

- Students' Sexual Assault and Sexual Violence Procedure (effective date December 6, 2016) <http://humber.ca/policies/procedures/students%E2%80%99-sexual-assault-and-sexual-violence-procedure>

University of Manitoba

- Sexual Assault Policy (effective September 1, 2016) <http://umanitoba.ca/admin/governance/media/Sexual_Assault_Policy_-_2016_09_01.pdf>

- Respectful Work and Learning Environment Sexual Assault Procedures (revised September 1, 2016) <http://umanitoba.ca/admin/governance/media/Respectful_Work_and_Learning_Environment_RWLE_and_Sexual_Assault_Procedures_-_2016_09_01.pdf>

University of New Brunswick

Sexual Assault Policy (effective June 1, 2016) http://www.unb.ca/fredericton/vp/learn/taskforcesexualassault.html

Sexual Assault Procedures (effective June 1, 2016) <http://www.unb.ca/fredericton/vp/learn/taskforcesexualassault.html>

University of Ottawa, Prevention of Sexual Violence (adopted June 13, 2016) <https://www.uottawa.ca/administration-and-governance/policy-67b-prevention-sexual-violence>

University of Saskatchewan

- Sexual Assault Prevention Policy Procedures Document (approved December 14, 2015) <https://teaching.usask.ca/documents/vptl/sexual-assault-procedures.pdf

- Sexual Assault Prevention (Approved December 14, 2015) <http://policies.usask.ca/policies/health-safety-and-environment/Sexual%20Assault%20Prevention%20Policy.php>

University of Toronto, Policy on Sexual Violence and Sexual Harassment (effective January 1, 2017) <http://www.governingcouncil.lamp4.utoronto.ca/wp-content/uploads/2016/12/p1215-poshsv-2016-2017pol.pdf>

University of Victoria

- Sexualized Violence Prevention and Response Policy (effective June 2017) <https://www.uvic.ca/universitysecretary/assets/docs/policies/GV0245.pdf>

- Sexualized Violence – Support Procedures (effective May 2017) <https://www.uvic.ca/universitysecretary/assets/docs/policies/GV0245.pdf 24>

- Sexualized Violence – Disclosure and Reporting Procedures (effective May 2017) <https://www.uvic.ca/universitysecretary/assets/docs/policies/GV0245.pdf>

- Sexualized Violence – Investigation, Adjudication, and Appeal Procedures for Students (effective March 2018) https://www.uvic.ca/universitysecretary/assets/docs/policies/GV0245.pdf

University of Waterloo (effective January 1, 2017)

- Sexual Violence Response Protocol and Procedures <https://uwaterloo.ca/secretariat/sexual-violence-response-protocol-and-procedures>

- Prevention and Response to Sexual Violence <https://uwaterloo.ca/secretariat/policy-42-prevention-and-response-sexual-violence>

Western University, Policy on Sexual Violence (effective January 1, 2017) <http://www.uwo.ca/univsec/pdf/policies_procedures/section1/mapp152.pdf>

York University, Policy on Sexual Violence (approved December 14, 2016) <http://secretariat-policies.info.yorku.ca/policies/sexual-violence-policy-on/>

Yukon College, Sexualized Violence Prevention and Response Policy (approved June 6, 2018) <https://www.yukoncollege.yk.ca/sites/default/files/inline-files/HR-07%20Sexualized%20Violence%20Prevention%20and%20Response%20FINAL.pdf >

PRIMARY SOURCES: PRIVACY LEGISLATION

Alberta. Freedom of Information and Protection of Privacy Act, RSA 2000, C F-25, ss 5, 40(1).

Alberta. Personal Information Protection Act (Alberta), SA 2003, c P-6.5, ss 20-21.

British Columbia. Freedom of Information and Protection of Privacy Act RSBC 1986, c 165, ss 22(3), 33.1, 79.

British Columbia. Personal Information Protection Act, SBC 2003, c 63, ss 18-19.

Canada. Personal Information Protection and Electronic Documents Act, SC 2000, c 5, s 7(3).

Canada. Privacy Act , RSC 1985, c P-21, s 8(2).

Manitoba. The Freedom of Information and Protection of Privacy Act, SM 1997, c 50 ss 5(2), 44(1).

Manitoba. The Personal Information Protection and Identity Theft Prevention Act, SM 2013, c 17, ss 20-21. [Not yet in force]

New Brunswick. Right to Information and Protection of Privacy Act, SNB 2009, c R-10.6, s 5, 46(1).

Newfoundland and Labrador. Access to Information and Protection of Privacy Act, SNL 2015, c A-1.2, ss 7, 33, 68.

Northwest Territories. Access to Information and Protection of Privacy Act, SNWT 1994, c 20, ss 4, 47.

Nova Scotia. Freedom of Information and Protection of Privacy Act, SNS 1993, c 5, ss 4, 31.

Nunavut. Access to Information and Protection of Privacy Act, SNWT (Nu) 1994, c 20, ss 4, 48.

Ontario. Freedom of Information and Protection of Privacy Act, RSO 1990, c F.31, ss 42, 67.

Ontario. Municipal Freedom of Information and Protection of Privacy Act, RSO 1990, c M.56, s 32.

Prince Edward Island. Freedom of Information and Protection of Privacy Act, RSPEI 1988, c F-15.01, ss 5(2), 37(1).

Quebec. Act respecting access to documents held by public bodies and the Protection of personal information, CQLR, c A-2.1, s 68.

Quebec. Act respecting the protection of personal information in the private sector, CQLR c P-39.1, s 18.

Saskatchewan. Local Authority Freedom of Information and Protection of Privacy Act, SS 1990-91, c L-27.1, ss 22, 28.

Saskatchewan. The Freedom of Information and Protection of Privacy Act, SS 1990-91, c F-22.01, ss 23, 29.

Yukon. Access to Information and Protection of Privacy Act, RSY 2002, c 1, ss 4, 36.

PRIMARY SOURCES: EMPLOYMENT LEGISLATION

British Columbia. Sexual Violence and Misconduct Policy Act. SBC 2016, c 23

Manitoba. The Advanced Education Administration Act, CCSM c A6.3

Manitoba. The Workplace Safety and Health Regulation Manitoba Regulation 217/2006

Nunavut. Occupational Health and Safety Regulations, Nu Reg-003-2016

Northwest Territories. Occupational Health and Safety Regulation NWT Reg-039-2015)

Ontario. Ministry of Training, Colleges and Universities Act R.S.O. 1990, c. M.19

Ontario. Occupational Health and Safety Act, R.S.O. 1990, c. O.1

Prince Edward Island. Employment Standards Act, R.S.P.E.I. 1988, c-6.2.

Quebec. An Act to prevent and fight sexual violence in higher education institutions, SQ 2017, c 32

Saskatchewan. The Occupational Health and Safety Regulations, 1996, RRS c O-1.1 Reg 1

PRIMARY SOURCES: CASE LAW

University of British Columbia (Re), 2014 BCIPC 12 (CanLII)

University of British Columbia v University of British Columbia Faculty Association, 2018 CanLII 69595 (BC LA). See also supplemental award available at: <https://www.facultyassociation.ubc.ca/assets/media/25Sep18_UBC-UBCFA_Supplemental-Award.pdf>

SECONDARY SOURCES

Adam, Johanne. “Task Force on Respect and Equality: uOttawa to adopt all recommendations.” *uOttawa Gazette*, January 29, 2015 <https://www.uottawa.ca/gazette/en/news/task-force-respect-and-equality-uottawa-adopt-all-recommendations>.

Carleton University. “2017 Annual Report on Sexual Violence presented to the Board of Governors Meeting February 8, 2018.” https://carleton.ca/studentsupport/wp-content/uploads/Carleton-2017-Annual-Report-on-Sexual-Violence-Feb-8-2018.pdf.

Dalhousie University. “Report of the Task Force on Misogyny, Sexism and Homophobia in Dalhousie University Faculty of Dentistry.” June 26, 2015. https://cdn.dal.ca/content/dam/dalhousie/pdf/cultureofrespect/DalhousieDentistry-TaskForceReport-June2015.pdf.

Derworiz, Colette. “Province expects all publicly funded Alberta universities and colleges to adopt sexual assault policies.” *Calgary Herald*, September 8, 2016. http://calgaryherald.com/news/local-news/campus-safety.

Gorman, Michael. “Nova Scotia university MOU gives province teeth, minister says.” *CBC News*, June 23, 2016. http://www.cbc.ca/news/canada/nova-scotia/universities-nova-scotia-mou-1.3649515.

Green, Robert Everett-Green. “Concordia says allegations of sexual harassment ‘serious’” *Globe and Mail*, January 9, 2018. <https://www.theglobeandmail.com/news/national/concordia-says-allegations-of-sexual-harassment-serious/article37549425/>.

Lederman, Marsha. “Under a cloud: How UBC’s Steven Galloway affair has haunted a campus and changed lives.” *Globe and Mail*, January 5, 2017. <https://www.theglobeandmail.com/news/british-columbia/ubc-and-the-steven-galloway-affair/article32562653/>

National Inquiry into Murdered and Missing Indigenous Women and Girls. “Our Women and Girls are Sacred, Interim Report (2017)” < http://www.mmiwg-ffada.ca/files/ni-mmiwg-interim-report-revised.pdf>.

Nicholson, Katie “Jazz prof Steve Kirby fired from Berklee College after U of M students share harassment complaints.” CBC, November 17, 2016 <http://www.cbc.ca/news/canada/manitoba/steve-kirby-fired-berklee-college-harassment-complaints-1.4404394>.

Ontario Ministry of Women’s Issues. “Developing a Response to Sexual Violence: A Resource Guide for Ontario’s Colleges and Universities,” January 2013. http://www.citizenship.gov.on.ca/owd/english/ending-violence/campus_guide.shtml.

Ontario. “It’s Never Okay: An Action Plan to Stop Sexual Violence & Harassment,” March 2015. http://docs.files.ontario.ca/documents/4136/mi-2003-svhap-report-en-for-tagging-final-2-up-s.pdf.

Ridolfi-Starr, Zoe. “Transformation Requires Transparency: Critical Policy Reforms to Advance Campus Sexual Violence Response.” *Yale Law Journal* 125, (May 2016): 2156-2181. https://heinonlineorg.uml.idm.oclc.org/HOL/Page?public=false&handle=hein.journals/ylr125&page=2156&collection=journals.

Shariff, Shaheen. “Navigating the Minefield of Sexual Violence Policy in Expanding “University Contexts”.” Education Law Journal 27, no. 1 (12, 2017): 39-58,XI-XII. <http://uml.idm.oclc.org/login?url=https://search-proquest-com.uml.idm.oclc.org/docview/1983613562?accountid=14569>.

Sheehy, Elizabeth & Daphne Gilbert. “Responding to Sexual Assault on Campus: What Can Canadian Universities Learn from U.S. Law and Policy,” in *Sexual Violence at Canadian Universities: Activism, Institutional Responses, and Strategies For Change*, edited by Elizabeth Quinlan, Andrea Quinlan, Curtis Fogel & Gail Taylor (Waterloo: Wilfred Laurier University Press, 2017), 291-327.

Sinclair, Gordon, “U of M should be investigated, Troubling questions about jazz prof go back years,” *Winnipeg Free Press*, September 16, 2017 https://www.winnipegfreepress.com/local/u-of-m-should-be-investigated-444809153.html.

Spencer, Chelsea, Allen Mallory, Michelle Toews, Sandra Stith, Leila Wood, “Why Sexual Assault Survivors Do Not Report to Universities: A Feminist Analysis.” *Family Relations*, 66(1) (February 2017): 166-179. https://doi-org.uml.idm.oclc.org/10.1111/fare.12241.

University of British Columbia Sexual Assault Panel. *Sexual Assault at the University of British Columbia: Prevention, Response, and Accountability.* June 2016. <http://www.academia.edu/28435055/Sexual_Assault_at_the_University_of_British_Columbia_Prevention_Response_and_Accountability>

University of Ottawa, Report of the Task Force on Respect and Equality: Ending Sexual Violence at the University of Ottawa (2015) https://www.uottawa.ca/president/sites/www.uottawa.ca.president/files/report-of-the-task-force-on-respect-and-equality.pdf.

Ward, Lori, Mark Gollom, “Universities should protect students, not reputation: Professors call for elimination of confidentiality deals.” *CBC*, May 7, 2018. http://www.cbc.ca/news/canada/windsor/university-windsor-non-disclosure-agreements-professor-1.4645268

Yung, Corey R. “Concealing Campus Sexual Assault: An Empirical Examination of the Clery Act Data”, *Psychology, Public Policy and Law* 21 (2015) 1-9. <DOI: 10.1037/law0000037>.

CANADA-CHINA FREE TRADE AGREEMENT NEGOTIATIONS AND HUMAN RIGHTS: A CANADIAN PERSPECTIVE

Anna Jeffery

1. INTRODUCTION

The Government of Canada conducted public consultation on the possibility of a free trade agreement ("FTA") with the People's Republic of China ("China") between March 4 and June 2, 2017.[1] The possibility of Canada-China FTA negotiations has also stirred a lot of debate, including its potential connection with human rights.[2]

The discussion around human rights in China is not a new topic, nor one that is free from controversy.[3] Rather, there continues to be debates on this contentious issue. There are often disagreements on the current state of human rights in China between the different actors involved, such as the Chinese government, foreign governments, human rights organizations, private companies, and Chinese citizens themselves. For example, the Chinese government and its supporters typically assert that the legal system and policy structure in China provides human rights protections.[4] Western non-governmental organizations ("NGOs"), on the other hand, often condemn the human rights situation in China, their reports focusing typically on violations of political rights, the freedom of speech, movement, and religion.[5]

As such, this paper surveys at some of the considerations that could be implicated if Canada and China decide to pursue FTA negotiations. Namely, critics have noted continued human rights issues in contemporary China, including ethnic minority rights of Tibetans and Uighur communities, religious freedoms, and labours rights.[6] With this context in mind, this paper focus on labour rights, the environment and human rights, and the detention of human rights defenders in China, in particular. It will then explain the ways in which Canada engages on human rights issues with China. It will also describe Canada-China trade relations, including Canada's trade obligations, the particular trade approach of the Trudeau administration in contrast with the Harper administration, and comment on the likelihood of

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1 Government of Canada. "What we heard: Public Consultations on a possible Canada-China free trade agreement", Government of Canada, 10 November 2017, available at: http://international.gc.ca/trade-commerce/consultations/china-chine/what_we_heard-que_nous_entendu.aspx?lang=eng.

2 CBC News. "Canada looks to China trade deal while knowing 'there are issues there,' McCallum says", CBC News, 23 September 2017, available at: http://www.cbc.ca/news/politics/john-mccallum-ambassador-free-trade-china-1.4302618; Huffington Post. "Free Trade With China? Canadian Businesses, Groups Not Sold On The Idea", Canadian Press, 14 November 2017, available at: http://www.huffingtonpost.ca/2017/11/14/free-trade-with-china-canadian-businesses-groups-not-sold-on-the-idea_a_23276902/.

3 See: Wan, Ming. *Human rights in Chinese foreign relations: defining and defending national interests*. University of Pennsylvania Press, 2001.

4 Potter, Pitman B. "Legal reform in China: institutions, culture, and selective adaptation", *Law & Social Inquiry* 29.2 (2004): 465-495; Permanent Mission of the PRC to UN. "White Paper: Fifty Years of Progress in China's Human Rights", Permanent Mission of the PRC to UN, 1 February 2002, available at: http://www.china-un.org/eng/zt/rqwt/t28675.htm.

5 Human Rights Watch. "China: Events of 2016", HRW, 2016, available at: https://www.hrw.org/world-report/2017/country-chapters/china-and-tibet; Amnesty International. "China 2017/2018," AI, 2018, available at: https://www.amnesty.org/en/countries/asia-and-the-pacific/china/report-china/.

6 See: The Wall Street Journal. "China Lags Behind in Rule-of-Law Ranking", The Wall Street Journal, 20 October 2016, available at: https://blogs.wsj.com/chinarealtime/2016/10/20/china-lags-behind-in-rule-of-law-ranking/; Financial Times. "China's contradictory war against corruption", Financial Times, available at: https://www.ft.com/content/68e99098-b764-11e4-8807-00144feab7de; Tang, Nancy, Keith Hand, Eva Pils, Taisu Zhang, and Thomas Kellogg. "China's 'Rule by Law' Takes an Ugly Turn", Foreign Policy, 14 July 2015, available at: http://foreignpolicy.com/2015/07/14/chinas-rule-by-law-takes-an-ugly-turn-rights-lawyers-crackdown-xi-jinping/; Blanchfield, Mike. "Human rights in China going in 'negative direction,' Canadian government report says," The Star, 12 July 2017, available at: https://www.thestar.com/news/canada/2017/07/12/human-rights-in-china-going-in-negative-direction-canadian-government-report-says.html; Burton, Charles, and Associates "Assessment of the Canada-China Bilateral Human Rights Dialogue", 1 August 2005, Department of Foreign Affairs and International Trade, available at: http://spartan.ca.ac.brocku.ca/~cburton/Assessment%20of%20the%20Canada-China%20Bilateral%20Human%20Rights%20Dialogue%2019APR06.pdf.

Canada-China FTA negotiations being initiated.[7] Finally, it will examine the options that could be available to Canada if Canada-China FTA negotiations are ever formally initiated, to ensure that human rights are integrated into the negotiation and final agreement.

Ultimately, many analysts recommend that Canada pursues FTA negotiation with China, since it remains an important trade partner. It is also suggested that an FTA and human rights objectives are not mutually exclusive, and an FTA should do no harm and advance human rights, where possible.[8] However, it is yet to be determine whether Canada and China will engage in such negotiations, given the current political climate. That being said, if Canada chooses to engage in an FTA negotiation process with China, this paper suggests that there are various contractual options available, as demonstrated in current Chinese and Canadian FTAs. This paper will ultimately suggest that, while there are many lessons learned from Canada and China's current FTAs, the most effective approach is likely a diplomatic one, particularly when facilitated through multilateral organizations that both Canada and China are members, to address human rights alongside a possible Canada-China FTA.

2. CURRENT STATE OF CANADA-CHINA ENGAGEMENT ON HUMAN RIGHTS

2.1 HUMAN RIGHTS IN CHINA

The possibility of Canada-China FTA negotiations reignited significant debate around human rights.[9] There are many differing opinions on the current situation regarding human rights standards in China. Yet, it is important to understand the human rights context in China within the international legal human rights framework and its objective standards to which China has voluntarily contented to be bound, as well as the rule of law and good governance.

2.1.1 CONTEMPORARY INTERNATIONAL GLOBAL SYSTEM OF PUBLIC INTERNATIONAL LAW

At the macro level, the *United Nations Charter of Human Rights* (the "*UN Charter*") provides the fundamental basis for the way countries relate to each other with regards to objective human rights instruments. In particular, the public international law ("PIL") framework is supported by the Preamble, Article 1(3) and 51 of the *UN Charter* that supports the wellbeing and welfare of people in their state, especially in terms of respect of human rights.[10] Article 55 of the *UN Charter* also addresses non-discrimination with regards to PIL.[11]

The *Universal Declaration of Human Rights* ("UDHR") also applies to China and Canada.[12] In fact, Vice-Chairman Peng Chung Chang of China was on the UN Commission on Human Rights, comprised of 18 members from various political, cultural, and religious backgrounds, who authorized its members "to formulate what it termed 'a preliminary draft international bill of human rights'" in 1947.[13] John Humphrey of Canada, Director of the UN's Human Rights Division, who prepared the Declaration's blueprint, was also a member

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7 See: Petrasek, David. "Human Rights in Conservative Foreign Policy, 2006-2015", Canadian Yearbook of Human Rights, 2015, vol. 1, available at: https://cdp-hrc.uottawa.ca/sites/cdp-hrc.uottawa.ca/files/ottawau_canadianyearbookofhumanrights_vol1_2015.pdf.

8 Greenspon, Edward, and Kevin Lynch. "Diversification Not Dependence: A Made-In Canada China Strategy", Public Policy Forum, October 2018.

9 See, for example: CBC News. "Canada looks to China trade deal while knowing 'there are issues there,' McCallum says", CBC News, 23 September 2017, available at: http://www.cbc.ca/news/politics/john-mccallum-ambassador-free-trade-china-1.4302618; Huffington Post. "Free Trade With China? Canadian Businesses, Groups Not Sold On The Idea", Canadian Press, 14 November 2017, available at: http://www.huffingtonpost.ca/2017/11/14/free-trade-with-china-canadian-businesses-groups-not-sold-on-the-idea_a_23276902/.

10 *UN Charter*, Art. 1(3) and 51.

11 *UN Charter*, Art. 55.

12 United Nations. "Universal Declaration of Human Rights", UN, available at: http://www.un.org/en/universal-declaration-human-rights/.

13 Brown, Gordon (ed.). "The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World", Cambridge: Open Book Publishers, 2016 (generated 27 January 2019), available at: http://books.openedition.org/obp/3016.

of the Commission.[14] Subsequently, China voted in favour of the UDHR in 1948.[15]

Other than the *UN Charter* and the UDHR, there is an elaborate body of PIL articulated at the UN, which is commented on by Canada and China (e.g., specialized treaties, declarations, standard minimum 'rules' or standards, resolutions).[16] This has happened ever since contemporary China arose in 1970.[17] Therefore, Canada and China have a common reference point vis-à-vis these various UN resolutions and the *UN Charter* itself.

The following are considered to be the nine 'core' international human rights instruments: (1) the *International Convention on the Elimination of All Forms of Racial Discrimination*; (2) the *International Covenant on Civil and Political Rights* ("ICCPR"); (3) the *International Covenant on Economic, Social and Cultural Rights* ("ICESCR"); (4) the *Conventions on the Elimination of All Forms of Discrimination against Women* ("CEDAW"); (5) the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("CAT"); (6) the *Convention on the rights of the Child*; (7) the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*; (8) the *International Convention for the Protection of All Persons from Enforced Disappearance*; and, (9) the *Convention on the Rights of Persons with Disabilities* ("CRPD").[18] Each of these instruments have a specialized UN monitoring body, and most also have additional Optional Protocols.[19]

The "international bill of human rights" is understood to comprise the following documents: the UDHR and the two 1966 covenants, the ICCPR and the ICESCR.[20] The prohibition against torture, as elaborated in the CAT, is now considered an *erga omnes* principle in customary international law ("CIL").[21] This means that no state can breach this universal legal norm, regardless of whether they have ratified the CAT or not.[22]

Regarding the applicability of nine 'core' international human rights instruments and the "international bill of human rights" in China on a micro level, China acceded to the VCLT in 1997 and ratified the ICCPR in 1998.[23] This obliges China to avoid acting in a way that is contrary to the Covenant's object and purpose.[24] As a Member State of the Declaration—the UDHR applies to China as well. In addition, China ratified the ICESCR in 2001 and the CAT in 1988, which obliges China to fully implement all provisions of the treaty, both substantially and procedurally.[25] However, China made

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[14] Brown, Gordon (ed.). "The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World", Cambridge: Open Book Publishers, 2016 (generated 27 January 2019), available at: http://books.openedition.org/obp/3016.

[15] United Nations. "Annex", UN, available at: http://www.gcc.ca/pdf/INT000000019b.pdf.

[16] E.g. Mr. Alain Pellet, Special Rapporteur, "Tenth Report on Reservations to Treaties, Agenda item 6," UN Office of Legal Affairs, Document A/CN.4/558 and Add.1–2.

[17] *Ibid*.

[18] United Nations Office of the High Commissioner for Human Rights. "The Core International Human Rights Instruments and the monitoring bodies", UNOHCHR, available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx.

[19] United Nations Office of the High Commissioner for Human Rights. "The Core International Human Rights Instruments and the monitoring bodies", UNOHCHR, available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx.

[20] See: *UDHR*, 1948; *ICCPR*, 1976; *ICESCR*, 1976; China Aid Association. *Chinese Law & Religion Monitor* (China Aid 2013), available at: https://197736a04a0d57705e9ede421e54425ec5c34ee4.googledrive.com/host/0BwO5hRHaKWdOWlNmR19tcHFDR28/Chinese_Law_and_Reli-CSP_Proof-07-03-14.PDF.

[21] Salcedo, Juan Antonio Carrillo. "Reflections on the Existence of a Hierarchy of Norms in International Law." *Eur. J. Int'l L.* 8 (1997): 583.

[22] Salcedo, Juan Antonio Carrillo. "Reflections on the Existence of a Hierarchy of Norms in International Law." *Eur. J. Int'l L.* 8 (1997): 583.

[23] *VCLT*, Art. 18. Human Rights Watch. "China: Ratify Key International Human Rights Treaty", 8 October 2013, available at: https://www.hrw.org/news/2013/10/08/china-ratify-key-international-human-rights-treaty.

[24] *VCLT*, Art. 18. Human Rights Watch. "China: Ratify Key International Human Rights Treaty", 8 October 2013, available at: https://www.hrw.org/news/2013/10/08/china-ratify-key-international-human-rights-treaty.

[25] United Nations. "International Covenant on Economic, Social and Cultural Rights", United Nations Treaty Collection, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en; "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", United Nations Treaty Collection, available at: https://treaties.un.org/pages/ViewDetails.

a reservation on Article 8 of the ICESCR.[26] Specifically, the Standing Committee issued a statement that "the Chinese government will only implement Article 8, Clause 1 of the Covenant within the parameters of the Chinese Constitution, Trade Union Law and the Labour Law."[27] As such, all instruments of the international bill of human rights apply to China in varying degrees.

From a cultural relativist perspective (*i.e,* that circumstances should be understood based on the experience and understanding of the particular culture in question), China has made improvements regarding human rights.[28] This is due, in part, to the fact that the Chinese Government defines human rights to include economic and social rights in relation to national culture and the level of development in China.[29] According to this definition, human rights have improved substantially in China given the advances in economic development that have taken place in the country over the past century.[30]

The question remains whether China has made progress compared to the universal standards that it has signed onto, to which everyone is entitled.[31] This provides an objective baseline to which China's current human rights situation can be assessed. This approach tends to result in a different conclusion than the Government of China's approach. For example, international media and NGOs have argued that there has been some back-sliding recently in China in the area of human rights.[32] For its part, a review by the UN Office of the High Commissioner for Human Rights ("OHCHR") in 2018 notes that, while there has been some progress on human rights in China (*e.g.*, adoption of laws that enhance human rights in China), there continue to be areas for improvement.[33]

Moreover, President Xi Jinping's address to the 19th Party Congress in October 2018 reaffirmed the recent Party documents forbidding all discussion of western political categories, including human rights, bourgeois democracy, and independent judiciary.[34] This further asserts that, perhaps, no rights are to be touted as 'universal' in China.

Although Canada and China are members of many international human rights instruments, there is still an important role for bilateral treaties to include specific mechanisms to further enforce human rights.[35]

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aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en.

[26] United Nations Treaty Collection. "Chapter IV: Human Rights, 3. International Covenant on Economic, Social and Cultural Rights", United Nations, updated as at 26 January 2019, available at: https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-3&chapter=4&clang=_en#6.

[27] China Labour Bulletin. "China Ratifies ICESCR: A Change in Sight or More of the Same?", China Labour Bulletin, 1 March 2001, available at: https://clb.org.hk/content/china-ratifies-icescr-change-sight-or-more-same.

[28] Wachman, Alan M. "Does the diplomacy of shame promote human rights in China?." *Third World Quarterly* 22.2 (2001): 257-281.

[29] China Daily. "Human rights can be manifested differently", China Daily, 12 December 2005, available at: http://news.xinhuanet.com/english/2005-12/12/content_3908887.htm.

[30] Information Office. "Progress in China's Human Rights Cause in 1996," Information Office of the State Council of the People's Republic of China, available at: http://www.china.org.cn/e-white/prhumanrights1996/index.htm.

[31] United Nations. *Universal Declaration of Human Rights*, Art. 2; Office of the High Commissioner for Human Rights (OHCHR). "China Homepage," available at: http://www.ohchr.org/EN/countries/AsiaRegion/Pages/CNIndex.aspx.

[32] Human Rights Watch. "China: Massive Crackdown in Muslim Region: Mass Arbitrary Detention, Religious Repression, Surveillance in Xinjiang", Human Rights Watch, 9 September 2018, available at: https://www.hrw.org/news/2018/09/09/china-massive-crackdown-muslim-region; Sceats, Sonya, and Shaun Breslin. *China and the international human rights system.* Chatham House, The Royal Institute of International Affairs, 2012, p 8; National Human Rights Action Plan of China (2012–2015), 'Introduction', available at: http://www.china.org.cn/government/whitepaper/node_7156850.htm.

[33] United Nations. *Universal Declaration of Human Rights*, Art. 2; Office of the High Commissioner for Human Rights (OHCHR). "China Homepage," available at: http://www.ohchr.org/EN/countries/AsiaRegion/Pages/CNIndex.aspx.

[34] Fewsmight, Joseph. "The 19th Party Congress: Ringing in Xi Jinping's New Age", 2018, China Leadership Monitor, No.55, available at: https://www.hoover.org/sites/default/files/research/docs/clm55-jf-final.pdf.

[35] See, for example: Peterson, Luke Eric, and Kevin R. Gray. "International human rights in bilateral investment treaties and in investment treaty arbitration," *International Institute for Sustainable Development (IISD), Winnipeg* (2003); Ruggie, John Gerard. «Business and human rights: the evolving international agenda,» *American Journal of International Law* 101.4 (2007): 819-840; Hafner-Burton, Emilie M. *Forced to be good: Why trade agreements boost human rights*, Cornell University Press, 2013.

Bilateral treaties, such as a possible Canada-China FTA, would allow both States to go more in-depth than a multilateral treaty.[36] For example, not all States would want to be subjected by the specific provisions to which Canada and China would both be amenable.[37] Therefore, there is still an important role for a Canada-China FTA to include human rights.[38]

2.1.2 THE RULE OF LAW

The state of the rule of law in China is a complex matter that is beyond the scope of this paper, but it is important to provide a basic overview of the connection between the rule of law and human rights. International law does not provide a universal definition of the rule of law. However, the International Commission of Jurists ("ICJ")—a highly persuasive international non-governmental organization ("INGO") since it is a body comprising of leading jurists from across the world—has defined it as a system where "the law is supreme and applies to both government officials and private citizens the same way".[39] Helen Clark, former Prime Minister of New Zealand and then administrator of the United Nations Development Programme ("UNDP"), has observed that the rule of law

> "refers to a principle of governance in which all persons, institutions, and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards".[40]

Amongst leading scholars, Albert Venn Dicey, a preeminent British jurist and constitutional theorist, has emphasized that these laws must be drafted in a just and transparent way, and be available and clear to the general public.[41]

The United Nations General Assembly ("UNGA") *Resolution on Human Rights, Democracy and the Rule of Law*, adopted in 2012, highlighted that it is the responsibility of the State to create an enabling environment in which the rule of law is able to flourish, and thus allow its citizens to exercise their human rights without fear of arbitrary punishment.[42] These two concepts are mutually enforcing: the rule of law provides an enabling environment in which human rights are respected and upheld, and an environment in which human rights are respected lends itself to a stronger rule of law.

2.2 ANALYSIS OF SELECTED HUMAN RIGHTS IN CONTEMPORARY CHINA

Some critics note a rolling-back of human rights in China, including rule of law issues with respect to Tibet and the Uighur community in China.[43] There are outstanding human rights issues in multiple areas in

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[36] Bradley, Curtis A., and Jack L. Goldsmith. "Treaties, human rights, and conditional consent," *University of Pennsylvania Law Review* 149.2 (2000): 399-468.

[37] Peterson, Luke Eric, and Kevin R. Gray. "International human rights in bilateral investment treaties and in investment treaty arbitration," *International Institute for Sustainable Development (IISD), Winnipeg* (2003).

[38] Human Rights Watch. "Human Rights Watch Submission to the Government of Canada on Possible Canada-China Free Trade Agreement," HRW, 2 June 2017, available at: https://www.hrw.org/news/2017/06/02/human-rights-watch-submission-government-canada-possible-canada-china-free-trade.

[39] Dicey, AV. *Introduction to the Study of the Law of the Constitution* (MacMillan & Co. Ltd. 1885).

[40] Clark, Helen. 'Rule of Law and Development: Times of Challenge and Opportunity', UNDP, 6 Dec 2012, available at: http://www.pk.undp.org/content/undp/en/home/presscenter/speeches/2012/12/06/helen-clark-rule-of-law-and-development-times-of-challenge-and-opportunity-/.

[41] Dicey, AV, *Introduction to the Study of the Law of the Constitution* (MacMillan & Co. Ltd. 1885).

[42] United Nations General Assembly (UNGA). *Resolution on Human Rights, Democracy and the Rule of Law*, 19 April 2012, A/HRC/RES/19/36, available at: daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G12/131/66/PDF/G1213166.pdf?OpenElement.

[43] See: The Wall Street Journal. "China Lags Behind in Rule-of-Law Ranking", The Wall Street Journal, 20 October 2016, available at: https://blogs.wsj.com/chinarealtime/2016/10/20/china-lags-behind-in-rule-of-law-ranking/; Financial Times. "China's contradictory war against corruption", Financial Times, available at: https://www.ft.com/content/68e99098-b764-11e4-8807-00144feab7de; Tang, Nancy, Keith Hand, Eva Pils, Taisu Zhang, and Thomas Kellogg. "China's 'Rule by Law' Takes an Ugly Turn", Foreign Policy, 14 July 2015, available at: http://foreignpolicy.com/2015/07/14/chinas-rule-by-law-takes-an-ugly-turn-rights-lawyers-crackdown-xi-jinping/; Blanchfield, Mike. "Human rights in China going in 'negative direction,' Canadian government report says," The Star, 12 July 2017, available at: https://www.thestar.com/news/canada/2017/07/12/human-rights-in-china-going-in-negative-direction-canadian-government-report-says.html.

China, such as religious freedoms, labour rights and the rights of ethnic minorities.[44] Of particular concern is the expansion and deepening of the "retraining" of both Uighurs and Tibetans in China, which some have called 'cultural genocide'.[45] This, in combination with the roll-out of the social credit system, which has ramifications for day-to-day life in terms of taking trains and places, as well as people's ability to get their children into a good school.[46]

Although there are many human rights aspects that can be discussed in relation to the current situation in China, this paper will focus on the following three areas: (i) labour rights; (ii) the environment and human rights; and, (iii) freedom from arbitrary detention for human rights defenders.

2.2.1 LABOUR RIGHTS

The International Labour Organization ("ILO") has listed the following as the eight 'fundamental' treaties: (1) the *Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87); (2) the *Right to Organise and Collective Bargaining Convention*, 1949 (No. 98); (3) the *Forced Labour Convention*, 1930 (No. 29); (4) the *Abolition of Forced Labour Convention*, 1957 (No. 105); (5) the *Minimum Age Convention*, 1973 (No. 138); (6) the *Worst Forms of Child Labour Convention*, 1999 (No. 182); (7) the *Equal Remuneration Convention*, 1951 (No. 100); and, (8) the *Discrimination (Employment and Occupation) Convention*, 1958 (No. 111).[47]

China has ratified the following four of the eight fundamental ILO treaties: No. 100; No. 111; No. 138; and, No. 182.[48] However, China has not yet ratified or signed the following two ILO treaties regarding the right to form a union and pursue collective bargaining: No. 87 or No. 98.[49] Canada has ratified all eight of the ILO's fundamental conventions.[50]

The lack of collective rights for Chinese workers means that they do not have the right to organize, strike or to bargain collectively.[51] This is "one of the major factors that render workers' individual rights vulnerable, hollow, unenforceable, or often disregarded. Labor legislation that enables workers to act collectively is crucial for safeguarding their individual rights".[52] As such, this is seen as one of the main issues regarding China's domestic human rights system, especially for countries who would potentially enter into an FTA with China, given the likelihood that Chinese companies may use the same labour standards in Canada as they would in

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[44] Burton, Charles, and Associates "Assessment of the Canada-China Bilateral Human Rights Dialogue", 1 August 2005, Department of Foreign Affairs and International Trade, available at: http://spartan.ca.ac.brocku.ca/~cburton/Assessment%20of%20the%20Canada-China%20Bilateral%20Human%20Rights%20Dialogue%2019APR06.pdf.

[45] Bureau of Democracy, Human Rights, and Labor. "2017 Report on International Religious Freedom", 29 May 2018, US Department of State, available at: https://www.state.gov/j/drl/rls/irf/2017/eap/280814.htm; DemDigest. "Uyghur 'cultural genocide'? China plays long game on human rights at UN", 21 September 2018, available at: https://www.demdigest.org/uyghur-cultural-genocide-china-plays-long-game-on-human-rights-at-un/; Er-Rafia, Fatima-Zohra. "Uighurs Victims of the Economic Interests of the States", 30 November 2018, available at: https://uhrp.org/news/uighurs-victims-economic-interests-states.

[46] Bureau of Democracy, Human Rights, and Labor. "2017 Report on International Religious Freedom", 29 May 2018, US Department of State, available at: https://www.state.gov/j/drl/rls/irf/2017/eap/280814.htm; DemDigest. "Uyghur 'cultural genocide'? China plays long game on human rights at UN", 21 September 2018, available at: https://www.demdigest.org/uyghur-cultural-genocide-china-plays-long-game-on-human-rights-at-un/; Er-Rafia, Fatima-Zohra. "Uighurs Victims of the Economic Interests of the States", 30 November 2018, available at: https://uhrp.org/news/uighurs-victims-economic-interests-states; Ma, Alexandra. "China has started ranking citizens with a creepy 'social credit' system — here's what you can do wrong, and the embarrassing, demeaning ways they can punish you", Business Insider, 29 October 2018, available at: https://www.businessinsider.com/china-social-credit-system-punishments-and-rewards-explained-2018-4.

[47] International Labour Organization (ILO). "The International Labour Organization's Fundamental Conventions". ILO, 2003. Online: <http://www.ilo.org/legacy/english/inwork/cb-policy-guide/ilodeclarationonfundamentalprinciplesandrightsatwork1998.pdf>.

[48] International Labour Organization (ILO). "Ratifications for China", available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103404.

[49] International Labour Organization (ILO). "Up-to-date Conventions and Protocols not ratified by China" International Labour Organization, available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210_COUNTRY_ID:103404.

[50] International Labour Organization. "Ratifications for Canada," ILO, available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102582.

[51] Chen, F. "Individual Rights and Collective Rights: Labor's Predicament in China." *Communist and Post-Communist Studies* 40.1 (2007): 59-79. Web. 21 July 2017.

[52] Chen, F. "Individual Rights and Collective Rights: Labor's Predicament in China." *Communist and Post-Communist Studies* 40.1 (2007): 59-79. Web. 21 July 2017.

China after a FTA is concluded.[53]

China has domestic legislation that affords protections for its workers, such as the 1994 *Labour Law* and the 2007 *Labour Contract Law*.[54] This is despite the fact that there were "strong pre-existing labor institutions [which] pre-empted organized labor mobilization at the beginning of capitalist development".[55] On its face, China's labour laws were considered to be well-crafted and comprehensive pieces of legislation.[56] The impetus for the change in China's labour policy and legislation in the last decades came "from the unemployment crisis at the end of the 1970s and the early 1980s. Since then, the state has relaxed its control over labor mobility and job allocation".[57]

Despite the domestic labour law framework in China, human rights NGOs and academics highlight that dangerous working conditions for labourers continue to persist throughout China.[58] Another issue is that of forced labour and trafficking in China, which was particularly prevalent in the 1970s, but has seen a recent decline.[59] This is in direct contravention of ILO treaties, to the extent that China has reached out to the ILO for capacity-building measures to work towards eradicating this human rights issue.[60]

Finally, economic development remains prioritised over labour rights, including safe working conditions, wages, and pensions.[61] In China's response to the most recent Universal Periodic Review in 2013, China noted that it "strongly advocates a scientific outlook on development, emphasizes 'putting people first', and takes the furtherance and protection of the right to subsistence and the right to development as first principles".[62] That being said, the report highlights that "China is still a developing country [...w]ith a large population and weak economic foundations, [and has] difficulties and challenges [...] in promoting and protecting human rights".[63] Given China's focus on economic development, the question remains whether there will be backsliding in

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[53] Ferreira, Jennifer. "Three things for Canada to consider as trade talks with China move forward", 23 February 2017, Open Canada, available at: https://www.opencanada.org/features/three-things-canada-consider-trade-talks-china-move-forward/.

[54] See: PRC. "Labour Law of the People's Rpublic of China", PRC, 1994, available at: https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/37357/108026/F1930029246/CHN37357%20Eng.pdf; NPC. "Labour Contract Law of the People's Republic of China", NPC, 2008, available at: http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471106.htm; Ngok, Kinglun. "The Changes of Chinese Labor Policy and Labor Legislation in the Context of Market Transition." *International Labor and Working Class History* 73.1 (2008): 45-64. Web. 21 July 2017.

[55] Qi, Xiaoying, et al. "China's Road to the Construction of Labor Rights." *Journal of Sociology* 52.1 (2016): 24-38. Web. 21 July 2017.

[56] China Labour Bulletin. "A decade on, China's Labour Contract Law has failed to deliver," CLB, 28 December 2017, available at: http://www.clb.org.hk/content/decade-china%E2%80%99s-labour-contract-law-has-failed-deliver.

[57] Ngok, Kinglun. "The Changes of Chinese Labor Policy and Labor Legislation in the Context of Market Transition." *International Labor and Working Class History* 73.1 (2008): 45-64. Web. 21 July 2017.

[58] Chan, Anita. "Labor standards and human rights: The case of Chinese workers under market socialism." *Human Rights Quarterly* 20.4 (1998): 886-904; Yu, Xiaomin. «Impacts of corporate code of conduct on labor standards: A case study of Reebok's athletic footwear supplier factory in China.» *Journal of Business Ethics* 81.3 (2008): 513-529; Shahnavaz, Houshang. «Workplace injuries in the developing countries.» *Ergonomics* 30.2 (1987): 397-404; Raworth, Kate. «Trading away our rights: Women working in global supply chains.» *Oxfam Policy and Practice: Private Sector* 1.1 (2004): 1-52.

[59] See: Global Slavery Index, "China", Global Slavery Index 2016, available at: https://www.globalslaveryindex.org/country/china/; Xu, Gregory. "Forced Labor in China", 1996; Lepillez, Karine. "The Dark Side of Labor in China", Human Rights & Human Welfare: An Online Journal of Academic Literature Review (2008).

[60] ILO. "Forced Labour and Trafficking: the Role of Labour Institutions in Law Enforcement and International Cooperation in China", ILO, 2008, available at: http://www.ilo.org/beijing/what-we-do/projects/WCMS_142261/lang--en/index.htm.

[61] Chen, F. "Individual Rights and Collective Rights: Labor's Predicament in China." *Communist and Post-Communist Studies* 40.1 (2007): 59-79. Web. 21 July 2017.

[62] United Nations. General Assembly. *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: China*. 2013.

[63] United Nations. General Assembly. *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: China*. 2013.

this area in the future.[64]

2.2.2 THE ENVIRONMENT AND HUMAN RIGHTS

The OHCHR explains that "a safe, clean, healthy and sustainable environment is integral to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation".[65] The UN Human Rights Council established a mandate on human rights and the environment "to study the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, and promote best practices relating to the use of human rights in environmental policymaking". Whether there is an independent right to a safe and clean environment is debatable.[66] However, the OHCHR argues that there is a general agreement that there is a connect between a 'healthy' environment and the enjoyment of human rights.[67]

China's economy has undoubtedly undergone significant growth over the past three decades.[68] However, this growth has happened at the expense of the environment, with increasing levels of pollution and energy consumption.[69] For example, in 2007, China overtook the US in carbon dioxide emissions from fossil fuels.[70] Given the importance of environmental protection efforts in Canada's FTAs, this is a significant issue area regarding possible negotiations.[71]

The main cause for the environmental problems is China's continued reliance on coal: approximately 80 percent of China's electricity output comes largely from coal, and there are no signs of reduction in the near future.[72] Current economic and energy-use trends demonstrate that China's reliance on coal and oil imports is unsustainable both from an economic and environmental perspective.[73] As such, there exist strong reasons for China to eventually change its current practice.

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64 Blanchfield, Mike. "Human rights in China going in 'negative direction,' Canadian government report says," The Star, 12 July 2017, available at: https://www.thestar.com/news/canada/2017/07/12/human-rights-in-china-going-in-negative-direction-canadian-government-report-says.html.

65 UNOHCHR. "Special Rapporteur on human rights and the environment (former Independent Expert on human rights and the environment)", UNOHCHR, available at: http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SRenvironmentIndex.aspx.

66 See: UN Environment. "Human Rights and the Environment", UN Environment, available at: http://web.unep.org/divisions/delc/human-rights-and-environment; Icelandic Human Rights Centre. "Human Rights and the Environment", available at: http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-in-relation-to-other-topics/human-rights-and-the-environment; Ecojustice. "Right to a Healthy Environment", available at: https://www.ecojustice.ca/case/right-to-a-healthy-environment/.

67 UNOHCHR. "Special Rapporteur on human rights and the environment (former Independent Expert on human rights and the environment)", UNOHCHR, available at: http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SRenvironmentIndex.aspx; Boyle, Alan. "Human Rights and International Environmental Law: Some Current Problems", 2011, available at: http://www. eui. eu/Documents/DepartmentsCentres/Law/ResearchTeaching/WorkingGroups/0803HumanRights. pdf.

68 See: OECD Observer. "China's economy: A remarkable transformation," OECD, September 2005, available at: http://oecdobserver.org/news/archivestory.php/aid/1685/China_92s_economy:_A_remarkable_transformation.html; The World Bank. "The World Bank in China: Overview," World Bank, 28 March 2017, available at: http://www.worldbank.org/en/country/china/overview; Lagarde, Christine. "China and the Global Economy: Creating New Ingredients for Growth," International Monetary Fund (IMF), 20 March 2015, available at: http://www.imf.org/en/News/Articles/2015/09/28/04/53/sp032015; Felipe, Jesus, Matteo Lanzafame, and Juzhong Zhuang. "The People's Republic of China's Potential Growth Rate: The Long-Run Constraints," Asian Development Bank (ADB), November 2014, available at: https://www.adb.org/sites/default/files/publication/149729/ewp-418.pdf.

69 Kahn, Joseph, and Jim Yardley. "As China Roars, Pollution Reaches Deadly Extremes," *New York Times*, August 26, 2007. Available at: http://www.nytimes.com/2007/08/26/world/asia/26china.html (Accessed on August 6, 2011).

70 Boden, T. A., G. Marland, and R. J. Andres. "Global, Regional, and National Fossil-Fuel CO_2 Emissions," Carbon Dioxide Information Analysis Center, Oak Ridge National Laboratory, U.S. Department of Energy 2011. Available at: http://cdiac.ornl.gov/trends/emis/tre_prc.html (Accessed on August 6, 2011).

71 Global Affairs Canada (GAC). "Trade and Environment", Global Affairs Canada, 16 September 2016, available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/env/trade-commerce-env.aspx?lang=eng; "Compendium of Canada's Engagement in International Environmental Agreements: Agreement on the Environment between Canada and the Hashemite Kingdom of Jordan", Environment and Climate Change Canada, 2017, available at: http://ec.gc.ca/international/335C7377-1B59-4825-AA21-6594D6A7B625/B13%202017%20IEA%20Factsheet%20Jordan%20EN%20Final.pdf.

72 Shealy, Malcolm, and James P. Dorian. "Growing Chinese coal use: dramatic resource and environmental implications." *Energy Policy* 38.5 (2010): 2116-2122.

73 Berrah, Noureddine. *Sustainable energy in China: the closing window of opportunity*. World Bank Publications, 2007.

This is not to say that China is void of any environmental laws. In fact, China adopted the *Renewable Energy Law* in 2005, which was amended in 2009. This legislation

> "established key policies including: national renewable energy targets; a mandatory connection and purchase policy; a national feed-in tariff system; and arrangements for cost-sharing and funding of renewable energy incentives".[74]

Despite this forward-thinking legislation, it is not implemented evenly across all regions in China.[75] For example, reports indicate that the environmental protection mechanisms that the *Renewable Energy Law* provides were weakened in the wake of the economic crisis in 2008, when Chinese companies prioritized economic growth over environmental protection.[76] In addition, there is evidence that lawsuits regarding pollution and related health problems implicate significant barriers.[77] These issues have caused some to call for further amendments to China's environmental protection laws, as well as renewed efforts on enforcement measures.[78]

2.2.3 FREEDOM FROM ARBITRARY DETENTION FOR HUMAN RIGHTS DEFENDERS IN CHINA

Human rights defenders are detained based on violations of various Chinese laws.[79] For example, human rights activists are regularly arrested for violating the *Chinese National Security Law* ("NSL").[80] There is some controversy over the validity, and legality, of such charges since this legislation uses unclear and "overbroad" language, giving the impression that it is arbitrary legislation.[81] This is made worse by the NSL's subsidiary regulations, as well as the weak accountability mechanisms that are said to apply to the implementing authorities.[82] The scope for abuse appears to be wide, with some scholars arguing that any action that Chinese authorities may consider threatening, such as protests or politically sensitive blog posts, could be deemed a national security threat warranting a sentence without the need for substantial evidence.[83] Therefore, there appear to be issues with the arbitrariness of the law itself (*i.e.*, the legal instruments and standards in China), as well as the practice of arrests and detentions that many INGOs call arbitrary.[84]

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[74] Schuman, Sara, and Alvin Lin. "China's Renewable Energy Law and its impact on renewable power in China: Progress, challenges and recommendations for improving implementation." *Energy policy* 51 (2012): 89-109.

[75] Huang, H. F. "*The China Environment Yearbook. Volume 5, State of Change: Environmental Governance and Citizens' Rights* (review)." *China Review International*, vol. 18 no. 2, 2011, pp. 31-45.

[76] Huang, H. F. "*The China Environment Yearbook. Volume 5, State of Change: Environmental Governance and Citizens' Rights* (review)." *China Review International*, vol. 18 no. 2, 2011, pp. 31-45.

[77] Huang, H. F. "*The China Environment Yearbook. Volume 5, State of Change: Environmental Governance and Citizens' Rights* (review)." *China Review International*, vol. 18 no. 2, 2011, pp. 121-129.

[78] Huang, H. F. "*The China Environment Yearbook. Volume 5, State of Change: Environmental Governance and Citizens' Rights* (review)." *China Review International*, vol. 18 no. 2, 2011, pp. 131-138.

[79] Human Rights Watch (HRW). "China: Events of 2017," HRW, 2018, available at: https://www.hrw.org/world-report/2018/country-chapters/china-and-tibet.

[80] Duggan, Jennifer. "China targets lawyers in new human rights crackdown," The Guardian, 13 July 2015, available at: https://www.theguardian.com/world/2015/jul/13/china-targets-lawyers-in-new-human-rights-crackdown.

[81] Ma, Ngok. "Civil society in self-defense: the struggle against national security legislation in Hong Kong." *Journal of Contemporary China* 14.44 (2005): 465-482.

[82] Fu, Hua Ling, and Richard Cullen. "National security law in China." *Colum. J. Transnat'l L.* 34 (1996): 449.

[83] Ma, Ngok. "Civil society in self-defense: the struggle against national security legislation in Hong Kong." *Journal of Contemporary China* 14.44 (2005): 465-482; Fu, Hua Ling, and Richard Cullen. «National security law in China.» *Colum. J. Transnat'l L.* 34 (1996): 449.

[84] See: Jurist. "Report: China targeting human rights defenders as national security threats", Jurist, 16 February 2017, available at: http://www.jurist.org/paperchase/2017/02/report-china-targeting-human-rights-defenders-as-national-security-threat.php; Amnesty International. "China: Submission on the Draft 'National Intelligence Law", 5 Amnesty International, June 2017, available at: https://www.amnesty.org/en/documents/asa17/6412/2017/en/; International Justice Resource Center. "Increased Oppression of Chinese Human Rights Defenders Draws International Criticism", IJRC, 22 February 2016, available at: http://www.ijrcenter.org/2016/02/22/increased-oppression-of-chinese-human-rights-defenders-draws-international-criticism/; Ma, Ngok. "Civil society in self-defense: the struggle against national security legislation in Hong Kong." *Journal of Contemporary China* 14.44 (2005): 465-482; Fu, Hua Ling, and Richard Cullen. «National security law in China.» *Colum. J. Transnat'l L.* 34 (1996): 449

Human rights defenders, journalists, labour protestors, and lawyers, have been detained in China.[85] Human rights lawyers working on politically sensitive cases have faced many challenges, including disbarment or suspension, violence. For example, threats, surveillance, arbitrary detention, and prosecution.[86] Risks include death.[87]

In fact, approximately 130 attorneys and legal staff were questioned by Chinese state agents in "a nationwide swoop in July 2015".[88] A recent conviction resulting from this questioning is Wang Quanzhang, a human rights lawyer sentenced to 4.5 years in jail.[89]

Another example is Liu Xiaobo, one of China's most prominent human rights defenders, died in July 2017 of liver cancer while in custody in China.[90] According to Xinhua, the Chinese Communist Party's official publication, Mr. Liu was "convicted of subversion of state power".[91] The Global Times, a publication with strong ties to the Party, noted that he was "a victim led astray by the West".[92] On the other hand, Western media outlets emphasized that Mr. Liu was a Nobel Peace Prize laureate and the outrage that "someone with terminal cancer was kept locked up till he died".[93] This demonstrates the difference between Western and Chinese media's characterization of the detention and treatment of human rights defenders in China.

2.3 CANADA'S HUMAN RIGHTS ENGAGEMENT WITH CHINA

Canada's history of engagement with contemporary China and the PRC began in the 1960s, when Canada started trading wheat with China.[94] Soon after, Prime Minister Pierre Elliott Trudeau established diplomatic relations with China in 1970, ahead of most other Western countries.[95] Since this time, Canadian-Chinese relations have continued to grow, including in terms of a human rights dialogue.[96]

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85 Amnesty International. "China: No Rule of Law when Defence Lawyers Cannot Perform their Legitimate Role" Amnesty International, 10 May 2010, available at: https://www.amnesty.org/en/documents/ASA17/022/2010/en/.

86 Clover, Charles, and Luna Lin. "China arrests labour rights activists as crackdown intensifies." *Financial Times*, 12 Jan. 2016, p. 3; "Walking on Thin Ice" Human Rights Watch, 28 April 2008, available at: http://www.hrw.org/reports/2008/04/28/walking-thin-ice-0.

87 Clover, Charles, and Luna Lin. "China arrests labour rights activists as crackdown intensifies." *Financial Times*, 12 January 2016, p. 3; Human Rights Watch. "Walking on Thin Ice," HRW, 28 April 2008, available at: http://www.hrw.org/reports/2008/04/28/walking-thin-ice-0.

88 Financial Times. "China jails human rights lawyer for 4 ½ years", *Financial Times*, 29 January 2019, available at: https://www.ft.com/content/ec9e5ee4-22b0-11e9-8ce6-5db4543da632?segmentId=1b0d1dae-d474-0320-49c5-faf00f214254.

89 Financial Times. "China jails human rights lawyer for 4 ½ years", *Financial Times*, 29 January 2019, available at: https://www.ft.com/content/ec9e5ee4-22b0-11e9-8ce6-5db4543da632?segmentId=1b0d1dae-d474-0320-49c5-faf00f214254.

90 Gracie, Carrie. "Liu Xiaobo: China's most prominent dissident dies", 13 July 2017, BBC, available at: http://www.bbc.com/news/world-asia-china-40597514; Phillips, Tom. "Liu Xiaobo, Nobel laureate and political prisoner, dies at 61 in Chinese custody," The Guardian, 13 July 2017, available at: https://www.theguardian.com/world/2017/jul/13/liu-xiaobo-nobel-laureate-chinese-political-prisoner-dies-61.

91 Zhuolun, Wang, and Wang Huihui. "China Voice: Diplomatic hat-trick no accident," Xinhuanet, 29 December 2016, available at: http://www.xinhuanet.com/english/2016-12/29/c_135942509.htm.

92 Gracie, Carrie. "Liu Xiaobo: China's most prominent dissident dies", 13 July 2017, BBC, available at: http://www.bbc.com/news/world-asia-china-40597514.

93 Buckley, Chris. "Liu Xiaobo, Chinese Dissident Who Won Nobel While Jailed, Dies at 61," NY Times, 13 July 2017, available at: https://www.nytimes.com/2017/07/13/world/asia/liu-xiaobo-dead.html; Phillips, Tom. "Liu Xiaobo, Nobel laureate and political prisoner, dies at 61 in Chinese custody," The Guardian, 13 July 2017, available at: https://www.theguardian.com/world/2017/jul/13/liu-xiaobo-nobel-laureate-chinese-political-prisoner-dies-61.

94 Jiang, Wenran. "Seeking a strategic vision for Canada-China relations." *International Journal* 64.4 (2009): 891-909.

95 See: Government of Canada. "Canada-China Diplomatic Relations", GoC, 15 December 2011, available at: http://www.canadainternational.gc.ca/china-chine/bilateral_relations_bilaterales/diplomatic_relations_diplomatiques.aspx?lang=eng; Government of Canada, "Pierre Elliott Trudeau – Canada's 15th Prime Minister", Library and Archives, 26 April 2016, available at: https://www.bac-lac.gc.ca/eng/discover/politics-government/prime-ministers/pmportrait/Pages/item.aspx?PersonId=15; Jiang, Wenran. "Seeking a strategic vision for Canada-China relations." *International Journal* 64.4 (2009): 891-909.

96 See generally: Jiang, Wenran. "Seeking a strategic vision for Canada-China relations," International Journal 64.4 (2009): 891-909; Government of Canada. "Bilateral Relations," Government of Canada, 26 August 2016, available at: http://www.canadainternational.gc.ca/china-chine/bilateral_relations_bilaterales/index.aspx?lang=eng.

According to the Government of Canada's website, Canada and China "enjoy an active working relationship in international fora, such as the G20, UN, APEC, and WTO".[97] It also explains that, since the establishment of diplomatic relations in 1970, Canada has had a "long-standing and comprehensive relationship" with China in many areas, including: trade, governance and values, health, education and culture.[98] Canada and China work on these areas through multiple different mechanisms, including the following: (i) the establishment of the Canada-China Foreign Affairs Ministers Dialogue; (ii) the Strategic Working Group ("SWG"), a Deputy Minister-level bilateral mechanism which focuses on multilateral cooperation, natural resources and energy, trade and investment; (iii) the promotion of trade and investment, in particular through the Joint Economic and Trade Committee ("JETC"), a bilateral consultation mechanism allowing senior officials to review and seek opportunities to advance two-way trade; (iv) the fostering of people-to-people links, notably through education and tourism; and, (v) the enhancement of judicial and law enforcement cooperation.[99]

2.3.1 CANADA-CHINA BILATERAL HUMAN RIGHTS ENGAGEMENT

Canada engages with China bilaterally through the Canadian missions in China by supporting "cooperation and engagement on the development of the rule of law, implementation of international human rights instruments, anti-corruption measures and policies".[100] In particular, Canadian missions in China—similar to other countries throughout the world—champion the following "values": (i) inclusive and accountable governance; (ii) peaceful pluralism and respect for diversity; and, (iii) human rights, including the rights of women and refugees.[101] For example, the Canada Fund for Local Initiatives "provides small grants for projects across China that address environmental sustainability, good governance, civil society development and rights protection for disadvantaged groups".[102] That being said, the Government of Canada no longer provides official development assistance to China, and made the decision to end its China program and terminate any direct foreign aid to China by December 31, 2013.[103] Therefore, any official Government of Canadian development programming in China must be delivered through a different mechanism.

One example of this type of programming is the Université de Montreal's "Labour Mediator and Arbitrator Capacity Building in China Project", which was supported by Government of Canada funding.[104] This program aims to strengthen "respect for international labour principles, including freedom of association and collective bargaining,"[105] and ultimately advancing rule of law.[106] According to a report by Global Affairs Canada, the project "has also promoted

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[97] Government of Canada. "Bilateral Relations" Government of Canada, 26 August 2016, available at: http://www.canadainternational.gc.ca/china-chine/bilateral_relations_bilaterales/index.aspx?lang=eng.

[98] Government of Canada. "Bilateral Relations" Government of Canada, 26 August 2016, available at: http://www.canadainternational.gc.ca/china-chine/bilateral_relations_bilaterales/index.aspx?lang=eng.

[99] Government of Canada. "Bilateral Relations" Government of Canada, 26 August 2016, available at: http://www.canadainternational.gc.ca/china-chine/bilateral_relations_bilaterales/index.aspx?lang=eng.

[100] Government of Canada. "Governance and Values", 26 August 2016, available at: http://www.canadainternational.gc.ca/china-chine/bilateral_relations_bilaterales/governance-gouvernance.aspx?menu_id=179&menu=L&lang=eng.

[101] Government of Canada. "Governance and Values", 26 August 2016, available at: http://www.canadainternational.gc.ca/china-chine/bilateral_relations_bilaterales/governance-gouvernance.aspx?menu_id=179&menu=L&lang=eng.

[102] Government of Canada. "Governance and Values", 26 August 2016, available at: http://www.canadainternational.gc.ca/china-chine/bilateral_relations_bilaterales/governance-gouvernance.aspx?menu_id=179&menu=L&lang=eng.

[103] Levitz, Stephanie. "Canada cuts direct foreign aid to China", The Globe and Mail, 20 March 2013, available at: https://www.theglobeandmail.com/news/politics/canada-cuts-direct-foreign-aid-to-china/article10027589/; CBA International Initiatives, "Rule of Law: Legal Aid for Marginalized Groups in China", Canadian Bar Association, accessed 26 January 2019, available at: http://cba.org/cba-international-initiatives/our-projects/past-projects/china/rule-of-law-legal-aid-for-marginalized-groups-in-c.

[104] Global Affairs Canada. "2015-2016 Report to Parliament on the Government of Canada's Official Development Assistance", 2016, available at: https://international.gc.ca/gac-amc/assets/pdfs/publications/daaa-lrmado_1516_report.pdf.

[105] Global Affairs Canada. "2015-2016 Report to Parliament on the Government of Canada's Official Development Assistance", 2016, available at: https://international.gc.ca/gac-amc/assets/pdfs/publications/daaa-lrmado_1516_report.pdf.

[106] Gruske, Carolyn. "Advancing rule of law at heart of University of Montreal's training program for Chinese judges", The Lawyer's Daily,

good governance through capacity building for Chinese mediators and arbitrators, and fostered workplace democracy by encouraging the participation of workplace partners in labour dispute resolution and prevention processes."[107]

In particular, the program allows Chinese judges to come to Québec and provides them with a "chance to study the fundamentals that underpin the province's legal system, namely the combination of common and civil law as well as the administration of justice."[108] While the university "has had links in China for 20 years, the judge's program is a result of a co-operation agreement signed in 2014 between the school's law faculty and China's National College of Supreme Court Judges."[109]

According to international affairs department vice-rector Guy Lefebvre, it allows Chinese judges to learn how Québec—a province with a civil code—engages in trade almost exclusively with other countries that operate under common law. One of the school's administrators has even stated that the program "could eventually inspire reforms in China."[110]

One historical endeavour was the development project "Rule of Law: Legal Aid for Marginalized Groups in China," which is a legal aid program run by the Canadian Bar Association ("CBA"), in partnership with Legal Aid Ontario ("LAO").[111] It was initiated in 2011, with financial support from the Government of Canada, to build on CBA's and LAO's previous work in The Canada-China Legal Aid and Community Services Project (2004-2009).[112] This subsequent program specifically aims to build capacity of China's National Legal Aid Centre ("NLAC") and to "strengthen legal aid in three provinces – Jilin, Liaoning and Yunnan – with a special focus on improving access to justice and due process for women and men from marginalized communities, such as ethnic minorities and migrant workers."[113]

Originally planned as a six-year project, shortened following the Government of Canada's decision to end all ODA to China by the end of 2013, the project "started with a high level study tour to Canada in June 2012, with senior legal aid staff and government justice officials from the national government and the three pilot provinces."[114] This was followed by multiple training programs in the pilot provinces on community-based legal aid needs assessments. Workshops were also held in September 2013 in each pilot province to introduce legal aid training managers on how to design effective training programs, to "form the foundation for a distance training module and training program design toolkit."[115]

Another historical example of Canada's bilateral engagement with China on human rights is the Canada-China bilateral dialogue, which was established in April 1997 "to encourage China to make progress on

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LexisNexis, 21 March 2018.

[107] Global Affairs Canada. "2015-2016 Report to Parliament on the Government of Canada's Official Development Assistance", 2016, available at: https://international.gc.ca/gac-amc/assets/pdfs/publications/daaa-lrmado_1516_report.pdf.

[108] Plante, Caroline. "Montreal university says training Chinese judges helps advance human rights", The Canadian Press, 26 February 2018, available at: https://www.ctvnews.ca/canada/montreal-university-says-training-chinese-judges-helps-advance-human-rights-1.3818792.

[109] Plante, Caroline. "Montreal university says training Chinese judges helps advance human rights", The Canadian Press, 26 February 2018, available at: https://www.ctvnews.ca/canada/montreal-university-says-training-chinese-judges-helps-advance-human-rights-1.3818792.

[110] Plante, Caroline. "Montreal university says training Chinese judges helps advance human rights", The Canadian Press, 26 February 2018, available at: https://www.ctvnews.ca/canada/montreal-university-says-training-chinese-judges-helps-advance-human-rights-1.3818792.

[111] Plante, Caroline. "Montreal university says training Chinese judges helps advance human rights", The Canadian Press, 26 February 2018, available at: https://www.ctvnews.ca/canada/montreal-university-says-training-chinese-judges-helps-advance-human-rights-1.3818792.

[112] CBA International Initiatives, "Rule of Law: Legal Aid for Marginalized Groups in China", Canadian Bar Association, accessed 26 January 2019, available at: http://cba.org/cba-international-initiatives/our-projects/past-projects/china/rule-of-law-legal-aid-for-marginalized-groups-in-c.

[113] CBA International Initiatives, "Rule of Law: Legal Aid for Marginalized Groups in China", Canadian Bar Association, accessed 26 January 2019, available at: http://cba.org/cba-international-initiatives/our-projects/past-projects/china/rule-of-law-legal-aid-for-marginalized-groups-in-c.

[114] CBA International Initiatives, "Rule of Law: Legal Aid for Marginalized Groups in China", Canadian Bar Association, accessed 26 January 2019, available at: http://cba.org/cba-international-initiatives/our-projects/past-projects/china/rule-of-law-legal-aid-for-marginalized-groups-in-c.

[115] CBA International Initiatives, "Rule of Law: Legal Aid for Marginalized Groups in China", Canadian Bar Association, accessed 26 January 2019, available at: http://cba.org/cba-international-initiatives/our-projects/past-projects/china/rule-of-law-legal-aid-for-marginalized-groups-in-c.

human rights issues".[116] This was a bilateral mechanism, which involved the Joint Committee on Human Rights ("JCHR") that met "annually alternating in Canada and China [with b]oth Canadian and Chinese delegations compris[ing] mid-level officials from various ministries and agencies, NGOs and academics".[117] There was also a regional component, which was called "the annual Plurilateral Human Rights Symposium in which Canada, Norway and China alternatively host a meeting of up to 20 [...] Asian countries to exchange views on a range of human rights issues".[118] This program has since been terminated, and assessments of this program remain mixed, mainly due to the lack of funds available for the desired human rights programming and follow-up.[119] However, this still provides an example of bilateral efforts in which Canada and China have engaged.

There have been positive outcomes from these dialogues and fora, with Chinese participants said to point to the following areas that have experienced significant developments from foreign input: "the presumption of innocence in the Criminal Procedures Law; legislations to address violence against women and sexual harassment; and, improved procedures in police conduct and prison management".[120] However, there remain areas of concern for Canada, including religious freedom, labour rights and the rights of ethnic minorities, as previously discussed.[121]

2.3.2 CANADA'S MULTILATERAL HUMAN RIGHTS ENGAGEMENT WITH CHINA

Notwithstanding the bilateral mechanisms through which Canada and China engage with each other, Canada and China take different approaches when engaging in human rights diplomacy in multilateral fora. Canada, on the one hand, has generally used a 'name and shame' approach.[122] In doing so, Canadian diplomats will deliver statements denouncing human rights abuses in foreign countries, including China.[123]

There is evidence that Canada could take advantage of its membership in multilateral organizations to bolster the weight of any statements it might make to call for greater adherence to international human rights standards in China. For example, Canada became a member of the World Trade Organization ("WTO") in 1995 before China joined in 2001.[124] In particular, "WTO members have used the GATT/WTO exceptions to advance human rights abroad or to protect human rights at home. Under Article XX, nations can restrict trade when necessary to "protect human, animal, or plant life or health" or to conserve exhaustible natural

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[116] Burton, Charles, and Associates "Assessment of the Canada-China Bilateral Human Rights Dialogue", 1 August 2005, Department of Foreign Affairs and International Trade, available at: http://spartan.ca.ac.brocku.ca/~cburton/Assessment%20of%20the%20Canada-China%20Bilateral%20Human%20Rights%20Dialogue%2019APR06.pdf.

[117] Burton, Charles, and Associates "Assessment of the Canada-China Bilateral Human Rights Dialogue", 1 August 2005, Department of Foreign Affairs and International Trade, available at: http://spartan.ca.ac.brocku.ca/~cburton/Assessment%20of%20the%20Canada-China%20Bilateral%20Human%20Rights%20Dialogue%2019APR06.pdf.

[118] Burton, Charles, and Associates "Assessment of the Canada-China Bilateral Human Rights Dialogue", 1 August 2005, Department of Foreign Affairs and International Trade, available at: http://spartan.ca.ac.brocku.ca/~cburton/Assessment%20of%20the%20Canada-China%20Bilateral%20Human%20Rights%20Dialogue%2019APR06.pdf.

[119] Burton, Charles, and Associates "Assessment of the Canada-China Bilateral Human Rights Dialogue", 1 August 2005, Department of Foreign Affairs and International Trade, available at: http://spartan.ca.ac.brocku.ca/~cburton/Assessment%20of%20the%20Canada-China%20Bilateral%20Human%20Rights%20Dialogue%2019APR06.pdf.

[120] Burton, Charles, and Associates "Assessment of the Canada-China Bilateral Human Rights Dialogue", 1 August 2005, Department of Foreign Affairs and International Trade, available at: http://spartan.ca.ac.brocku.ca/~cburton/Assessment%20of%20the%20Canada-China%20Bilateral%20Human%20Rights%20Dialogue%2019APR06.pdf.

[121] Burton, Charles, and Associates "Assessment of the Canada-China Bilateral Human Rights Dialogue", 1 August 2005, Department of Foreign Affairs and International Trade, available at: http://spartan.ca.ac.brocku.ca/~cburton/Assessment%20of%20the%20Canada-China%20Bilateral%20Human%20Rights%20Dialogue%2019APR06.pdf.

[122] Thompson, Andrew. *On the Side of the Angels: Canada and the United Nations Commission on Human Rights*. UBC Press, 2017, p 15.

[123] Vanderklippe, Nathan. "Canada, 10 other countries call out China for torturing human rights lawyers", The Globe and Mail, 20 March 2017, available at: https://beta.theglobeandmail.com/news/world/canada-10-other-countries-call-out-china-for-torturing-human-rights-lawyers/article34346186/?ref=http://www.theglobeandmail.com&.

[124] WTO. "Canada and the WTO", WTO, available at: https://www.wto.org/english/thewto_e/countries_e/canada_e.htm; WTO. "China and the WTO", available at: https://www.wto.org/english/thewto_e/countries_e/china_e.htm.

resources."[125] Another mechanism, "although it does not refer explicitly to human rights, the public morals clause of Article XX is widely seen as allowing WTO members to put in place trade bans in the interest of promoting human rights."[126] The most obvious approach in an organization such as the WTO is to discuss human rights issues "at trade policy reviews, when member states review the trade and governance performance of other member states."[127]

In addition, Canada decided to join the Asian Infrastructure Investment Bank ("AIIB"), "a China-led institution that has challenged the primacy of the World Bank", in March 2017.[128] Canada's membership in this type of multilateral organization has been deemed "part of a bid to rekindle relations with China".[129] As such, it provides another forum in which Canada could advocate for human rights in tandem with trade discussions generally.

Whereas Canada employs a more accusatory stance in multilateral fora, China typically takes a defensive position on its human rights record in these contexts.[130] Chinese diplomats typically use a cultural positivist approach to explain that China holds a different understanding of human rights than Western countries, and that the human rights situation in China is better than it is accused of being and continually improving.[131] In fact, China recently accused Canada of human rights violations in connection to Canada's arrest of Huawei's global chief executive officer.[132]

In objective terms, China's ratification of the ICESCR, its signature of the ICCPR, and its own Human Rights Action Plan (adopted in 2009) form the basis of increased multilateral engagement with China on human rights.[133] In addition, "China's participation in the periodic review [a universal, four-yearly peer-review of state practice] by the UN Human Rights Council suggests a greater willingness to participate in international human rights discourses".[134]

However, some analysts argue that China pressured countries (*e.g.*, Belt and Road Initiative partners)[135] to commend it for its positive human rights record in the periodic review process, with a few western

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[125] Aaronson, Susan Ariel. "Human Rights", World Bank Group, accessed 26 January 2018, available at: http://siteresources.worldbank.org/INTRANETTRADE/Resources/C21.pdf.

[126] Aaronson, Susan Ariel. "Human Rights", World Bank Group, accessed 26 January 2018, available at: http://siteresources.worldbank.org/INTRANETTRADE/Resources/C21.pdf.

[127] Aaronson, Susan Ariel. "Human Rights", World Bank Group, accessed 26 January 2018, available at: http://siteresources.worldbank.org/INTRANETTRADE/Resources/C21.pdf.

[128] Vanderklippe, Nathan. "Trudeau touches on trade, human rights in call for 'new era' with China", 30 August 2016, Globe and Mail, available at: https://www.theglobeandmail.com/news/politics/trudeau-calls-for-new-era-of-positive-collaboration-in-first-china-meetings/article31602377/.

[129] Barria, Carlos. "Canada joins China-backed Asian infrastructure bank," The Globe and Mail, 23 March 2017, available at: https://www.theglobeandmail.com/report-on-business/international-business/asian-pacific-business/canada-joins-china-backed-asian-infrastructure-bank/article34393706/.

[130] Human Rights Watch. "The Costs of International Advocacy: China's Interference in United Nations Human Rights Mechanisms", 5 September 2017, available at: https://www.hrw.org/report/2017/09/05/costs-international-advocacy/chinas-interference-united-nations-human-rights.

[131] Embassy of the People's Republic of China in the United States of America. "White Paper – The Progress of Human Rights in China", available at: http://www.china-embassy.org/eng/zt/ppflg/t36621.htm.

[132] CBC News. "China accuses Canada of having 'different' human rights standards when it comes to Meng Wanzhou arrest", CBC News, 24 December 2018, available at: https://www.cbc.ca/news/politics/china-responds-kovrig-sparpv-wanzhou-1.4958518; Blanchard, Ben. "China accuses Britain, EU of hypocrisy over Canada detention concerns", Reuters, 24 December 2018, available at: https://www.reuters.com/article/us-china-canada/china-accuses-britain-eu-of-hypocrisy-over-canada-detention-concerns-idUSKCN1ON0DN.

[133] Information Office of the State Council, "National Human Rights Action Plan of China" (2009-2010), available at: http://www.china.org.cn/archive/2009-04/13/content_17595407.htm (accessed April 13, 2011).

[134] UN Human Rights Council, Draft Report of the Working Group on the Universal Periodic Review: China A/HRC/WG.6/4/L.11 (Feb 11, 2009).

[135] For explanation of China's Belt and Road Initiative, refer to: The World Bank Group. "Belt and Road Initiative", The World Bank Group, 29 March 2018, available at: https://www.worldbank.org/en/topic/regional-integration/brief/belt-and-road-initiative.

countries—including Canada—voicing objections.[136] This is similar to when Greece blocked the European Union from sanctioning China for its human rights record in 2017.[137] That was likely because China provided assistance when Greece's economy was failing a number of years ago, with China now being a significant investor in Greece's infrastructure.[138]

On the environment, one very important tool that Canada has had for several decades, which no other country has access to, is its role in the China Council for International Cooperation on Environment and Development ("CCICED").[139] The CCICED Project is co-chaired by China and Canada's Minister's of the Environment, which is currently Catherine McKenna for Canada, and reports to the Vice Premier.[140] The Chief International Advisor is also a Canadian, who was just recently announced to be Scott Vaughan, replacing Art Hanson.[141] This forum contracts advice and reports from around the world and presents its reports to China's senior leadership.[142] The CCICED Project therefore offers possibilities to include environmental standards in its work.

2.3.3 CANADA'S DIPLOMATIC STANCE ON HUMAN RIGHTS WITH CHINA

Canada uses a more diplomatic approach when engaging with China on human rights, by raising human rights concerns during meetings with Chinese officials, while also making public statements that call on China to improve its human rights situation. For example, as early as 1997, Canada began a series of seven human rights 'dialogues' with China.[143] This was reinforced in 2009 during Prime Minister Steven Harper's visit to China in a joint statement that both countries "agreed to increased dialogue and exchanges on human rights, on the basis of equality and mutual respect, to promote and protect human rights consistent with international human rights instruments".[144] There are differences between the approaches to human rights in China by Harper's previous administration, and the current

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[136] Richardson, Sophie. "Is China winning its fight against rights at the UN?", Human Rights Watch, 12 December 2018, available at: https://www.hrw.org/news/2018/12/12/china-winning-its-fight-against-rights-un.; Cohen, Jerome A. "China, Xinjiang and UN Human Rights Review", Jerome A. Cohen, 7 November 2018, available at: http://www.jeromecohen.net/jerrys-blog/2018/11/7/china-xinjiang-and-un-human-rights-review.

[137] Human Rights Watch. "China: Events of 2017", Human Rights Watch, access on 26 January 2019, available at: https://www.hrw.org/world-report/2018/country-chapters/china-and-tibet#; Emmott, Robin, and Angeliki Koutantou. "Greece blocks EU statement on China human rights at U.N.", Reuters, 18 June 2017, available at: https://www.reuters.com/article/us-eu-un-rights/greece-blocks-eu-statement-on-china-human-rights-at-u-n-idUSKBN1990FP.

[138] Horowitz, Jason, and Liz Alderman. "Chastised by E.U., a Resentful Greece Embraces China's Cash and Interests", NY Times, 26 August 2017, available at: https://www.nytimes.com/2017/08/26/world/europe/greece-china-piraeus-alexis-tsipras.html; Apostolu, Nikolia. "China's economic lifeline for Greece tangles political relations with EU", Washington Times, 5 March 2018, available at: https://www.washingtontimes.com/news/2018/mar/5/chinas-investment-greece-tangles-europe-relations/.

[139] Government of Canada. "Canada-China agreement on China Council on Environment and Development", Government of Canada, 10 August 2017, available at: https://www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-countries-regions/asia/canada-china-agreement-environmental-cooperation.html; Government of Canada. "The China Council: global climate change cooperation", Government of Canada, 2 November 2018, available at: https://www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-organizations/china-council-climate-change-cooperation.html.

[140] Government of Canada. "Canada and China strengthen partnership on climate and environment", Government of Canada, 1 November 2018, available at: https://www.canada.ca/en/environment-climate-change/news/2018/11/canada-and-china-strengthen-partnership-on-climate-and-environment.html.

[141] International Institute for Sustainable Development. "New Horizons for IISD President and CEO, Scott Vaughan", IISD, accessed 26 January 2019, available at: https://www.iisd.org/media/new-horizons-iisd-president-and-ceo-scott-vaughan; China Council for International Cooperation on Environment and Development. "Membership", CCICED, accessed 26 January 2019, available at: http://www.cciced.net/cciceden/ABOUTUS/Membership/Membership/.

[142] Government of Canada. "Canada-China agreement on China Council on Environment and Development", Government of Canada, 10 August 2017, available at: https://www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-countries-regions/asia/canada-china-agreement-environmental-cooperation.html; Government of Canada. "The China Council: global climate change cooperation", Government of Canada, 2 November 2018, available at: https://www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-organizations/china-council-climate-change-cooperation.html.

[143] Burton, Charles. "China isn't listening", 16 June 2006, The Globe and Mail, available at: http://spartan.ac.brocku.ca/~cburton/China%20Isnt%20Listening.htm.

[144] Milewski, Terry. "China's 'microphone diplomacy' misfires again", 6 June 2016, CBC, available at: http://www.cbc.ca/news/politics/china-microphone-diplomacy-human-rights-1.3618929.

Trudeau administration, which will be further explored below. However, one element of continuity that can be seen from Prime Minister Trudeau's regular phone conversations with senior Chinese officials to continue this human rights dialogue.[145] Canadian diplomats also still raise human rights issues when meeting with Chinese diplomats, although there have been recent exceptions to this approach as well.[146] Other occasions are used to raise concerns. For example, Prime Minister Trudeau also called on China to "do more to promote and protect human rights" during his speech at an event hosted by the Canada China Business Council during his official visit to China in September 2016.[147]

Premier Li Keqiang's visit to Canada in September 2016 was seen as significant in strengthening Canada and China's cooperation.[148] Many issues were addressed in the bilateral discussions during this visit, such as strengthening judicial cooperation and a possible extradition treaty. Media outlets highlighted the focus on deepening multilateral cooperation between the two countries.[149] For example, it was agreed that it is in both China's and Canada's best interest to "expand co-operation on regional and global issues, and [...] to expand communication and co-operation in multilateral institutions such as the UN, Asia-Pacific Economic Co-operation, ASEAN Regional Forum and others".[150] Yet, subsequent events have not necessarily carried this optimism forward.[151]

The Government of Canada's website dedicated to the Canada-China FTA consultation process, in addressing some frequently asked questions, responds expressly—but generally—to the question of whether Canada will address human rights concerns in China through an FTA. It explains that the Canadian Government "is committed to a progressive and inclusive approach to international trade that takes into account the impact of trade on areas such as labour and human rights" and "the promotion and protection of human rights is an integral part of Canada's foreign policy and a priority in [Canada's] long-standing relationship with China".[152]

To note, some analysts speculate that Canada's efforts to secure a seat on the United Nations Security Council ("UNSC")[153] could implicate how it engages with China on human rights. Namely, China is a permanent member on the UNSC,[154] and appears that it has increased influence at the UN through its Belt and Road Initiative.[155] That being said, Canada's recent arrest of

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[145] Prime Minister Justin Trudeau. "Joint Statement Between Canada and the People's Republic of China", available at: http://pm.gc.ca/eng/news/2016/09/23/joint-statement-between-canada-and-peoples-republic-china.

[146] Prime Minister Justin Trudeau. "Joint Statement Between Canada and the People's Republic of China", available at: http://pm.gc.ca/eng/news/2016/09/23/joint-statement-between-canada-and-peoples-republic-china.

[147] Blatchford, Andy. "Trudeau Lectures China on Human Rights On Shanghai Stage", 1 September 2016, Huffington Post, available at: http://www.huffingtonpost.ca/2016/09/01/trudeau-china-human-rights-beijing_n_11818008.html; Blatchford, Andy. "Trudeau Tells Chinese Leaders That Canada's Human Rights Record Not Perfect, Either", 6 September 2016, Huffington Post, available at: http://www.huffingtonpost.ca/2016/09/06/trudeau-china-human-rights-hong-kong_n_11873422.html.

[148] Ministry of Foreign Affairs of the People's Republic of China. "Joint Press Release between the People's Republic of China and Canada", 1 September 2016, available at: http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1393787.shtml.

[149] Wentian, Wang. "A new golden decade for Canada-China relations", 9 October 2016, Globe and Mail, available at: https://beta.theglobeandmail.com/opinion/a-new-golden-decade-for-canada-china-relations/article32300566/?ref=http://www.theglobeandmail.com&.

[150] Wentian, Wang. "A new golden decade for Canada-China relations", 9 October 2016, Globe and Mail, available at: https://beta.theglobeandmail.com/opinion/a-new-golden-decade-for-canada-china-relations/article32300566/?ref=http://www.theglobeandmail.com&.

[151] See for example: Fife, Robert, and Steven Chase. "Canada arrests Huawei's global chief financial officer in Vancouver", The Globe and Mail, 5 December 2018, available at: https://www.theglobeandmail.com/canada/article-canada-has-arrested-huaweis-global-chief-financial-officer-in/.

[152] Government of Canada. "Resources", 6 April 2017, available at: http://www.international.gc.ca/trade-commerce/consultations/china-chine/toolkit-outils.aspx?lang=eng.

[153] Justin Trudeau. "Prime Minister announces Canada's bid for a non-permanent seat on the United Nations Security Council", Prime Minister of Canada, 16 March 2016, available at: https://pm.gc.ca/eng/node/40723.

[154] United Nations Security Council. "Current Members", UNSC, accessed 29 January 2019, available at: https://www.un.org/securitycouncil/content/current-members.

[155] The World Bank Group. "Belt and Road Initiative", The World Bank Group, 29 March 2018, available at: https://www.worldbank.org/en/topic/regional-integration/brief/belt-and-road-initiative.

Huawei's global chief executive officer in Vancouver in December 2018 suggests that this is potentially not the case.[156]

While it seems that Canada will continue to pursue its diplomatic efforts to engage with China on human rights, critics argue that these efforts make little substantive difference in China.[157] Notwithstanding the positive statements of Chinese officials and scholars, critics observe that there has not been much progress in "important areas of concern to Canada such as those relating religious freedom, labour rights and rights of ethnic minorities".[158] Indeed, it is unclear whether, and to which degree, the conversation with China results in changes.[159] Rather, evidence shows that China continues to employ the same defensive stance on human rights, defending itself from Canadian diplomats' human rights statements.[160]

For example, supporting consular files has become difficult, with Canadians being sentenced to prison time, with questionable evidence for the charges to be laid.[161] It begs the question of whether Canada's "balanced" approach of raising rights behind closed doors is viable when China does not appear open to engage in any such discussion at all. This continues to be a concern as statements such as President Xi Jinping's address to the 19th Party Congress in October 2018 reaffirmed the Party's opinion that no other country should comment in any way on its domestic affairs, which include any element of human rights.[162] This suggests that quiet bilateral diplomacy will not be an effective tool, therefore Canada may need to look to other mechanisms.

It is also difficult to quantify the effect of this type of 'soft' diplomatic approach (i.e., it is difficult even to know how much the dialogue affects internal policy-making and decisions regarding law and practice).[163] As such, there are calls on Canada to use FTA negotiations as a concrete means to secure greater human rights improvements in China since it appears China does not make changes regarding human rights based on these diplomatic conversations.[164]

While this paper will not delve into the underlying premises of why Canadians might expect or demand that human rights be implicated in a potential FTA negotiation with China, it is worth noting that a recent poll highlights that Canadian expect human rights to be a priority quidding "any relationship with China" and "show the importance of encouraging respect for human rights and environmental concerns in China".[165]

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[156] Fife, Robert, and Steven Chase. "Canada arrests Huawei's global chief financial officer in Vancouver", The Globe and Mail, 5 December 2018, available at: https://www.theglobeandmail.com/canada/article-canada-has-arrested-huaweis-global-chief-financial-officer-in/.

[157] Burton, Charles. "China isn't listening", 16 June 2006, The Globe and Mail, available at: http://spartan.ac.brocku.ca/~cburton/China%20Isnt%20Listening.htm.; Macleans. "Canada's Fruitless Human Rights Dialogue with China" 9 July 2007, available at: http://www.thecanadianency-clopedia.ca/en/article/canadas-fruitless-human-rights-dialogue-with-china/.

[158] Burton, Charles, and Associates "Assessment of the Canada-China Bilateral Human Rights Dialogue", 1 August 2005, Department of Foreign Affairs and International Trade, available at: http://spartan.ca.ac.brocku.ca/~cburton/Assessment%20of%20the%20Canada-China%20Bilateral%20Human%20Rights%20Dialogue%2019APR06.pdf.

[159] Wright, David. "Wright: Canada right to link free trade agreement to human rights in China", 15 July 2017, Calgary Herald, available at: http://calgaryherald.com/opinion/columnists/wright-canada-right-to-link-free-trade-agreement-to-human-rights-in-china.

[160] Milewski, Terry. "China's 'microphone diplomacy' misfires again", 6 June 2016, CBC, available at: http://www.cbc.ca/news/politics/china-microphone-diplomacy-human-rights-1.3618929; Wright, David. "Wright: Canada right to link free trade agreement to human rights in China", 15 July 2017, Calgary Herald, available at: http://calgaryherald.com/opinion/columnists/wright-canada-right-to-link-free-trade-agreement-to-human-rights-in-china.

[161] BBC. "Robert Schellenberg case: China accuses Canada of 'double standards'", BBC, 16 January 2019, available at: https://www.bbc.com/news/world-asia-china-46874922; McCuaig-Johnston, Margaret. "China's on the brink of losing some of its best friends and collaborators", The Ottawa Citizen, 26 January 2019, available at: https://ottawacitizen.com/opinion/columnists/mccuaig-johnston-chinas-on-the-brink-of-losing-some-of-its-best-friends-and-collaborators.

[162] Fewsmight, Joseph. "The 19th Party Congress: Ringing in Xi Jinping's New Age", 2018, China Leadership Monitor, No.55, available at: https://www.hoover.org/sites/default/files/research/docs/clm55-jf-final.pdf.

[163] Wright, David. "Wright: Canada right to link free trade agreement to human rights in China", 15 July 2017, Calgary Herald, available at: http://calgaryherald.com/opinion/columnists/wright-canada-right-to-link-free-trade-agreement-to-human-rights-in-china.

[164] *Ibid.*

[165] Greenspon, Edward, and Kevin Lynch. "Diversification Not Dependence: A Made-In Canada China Strategy", Public Policy Forum, October 2018.

3. CURRENT STATE OF CANADA-CHINA TRADE RELATIONS

3.1 CANADA'S TRADE OBLIGATIONS

Canada's international trade obligations have evolved throughout the progression from the initial Bretton Woods system, to the General Agreement on Tariffs and Trade ("GATT"), to the current World Trade Organization ("WTO").[166] The Bretton Woods meeting in 1944 was "the first conference to establish a permanent international institutional and legal framework for ensuring cooperation between states, requiring commitments by states to limit their sovereignty for the sake of cooperation and to observe specified rules".[167] The meeting intended to reduce obstacles to international trade, and proposed the creation of the International Monetary Fund ("IMF") and the International Trade Organization ("ITO").[168] While the IMF survived, the less-ambitious GATT was adopted instead of the ITO.[169] The WTO replaced the GATT in 1995, which now "provides a forum for negotiating agreements aimed at reducing obstacles to international trade and ensuring a level playing field for all".[170]

There are currently sixteen WTO multilateral agreements to which all WTO members are parties—including Canada and China—with the aim of reducing tariffs and other barriers to trade, while providing the WTO the mandate to monitor the application of these agreements and act as a dispute settlement mechanism whenever necessary.[171] As members of the WTO, both Canada and China are bound by these rules.[172]

Canada's current approach and disposition towards trade falls in line with the WTO's goal of reducing barriers to international trade.[173] Canadian Foreign Minister Chrystia Freeland's speech in Parliament on 6 June 2017 explained Canada's overall approach to trade, expressly reinforcing Canada's commitment to the Bretton Wood/GATT/WTO mandate, and calling for renewed dedication to an international rules-based order.[174] There is no indication that Canada has started to take such a 'hard' approach to trade relations, but some have speculated that Freeland's speech insinuated that Canada intends to engage aggressively during potential trade negotiations with China.[175]

No discussion of Canada's trade obligations would be complete without mention to the recently-concluded United States-Mexico-Canada Agreement ("USMCA"). It is alternatively called the Canada-United States-Mexico Agreement ("CUSMA") on the Government of Canada's website, which was signed on November 30, 2018 by the three countries on the margins of the G20 Leaders' Summit in Buenos Aires.[176] The Government of Canada's website goes on to highlight that, since 1994,

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[166] On this, see: Arewa, Olufunmilayo B. "TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks", Marq. Intell. Prop. L. Rev. 10 (2006): 157.

[167] James, Harold. *International monetary cooperation since Bretton Woods*. International Monetary Fund, 1996, p 57.

[168] James, Harold. *International monetary cooperation since Bretton Woods*. International Monetary Fund, 1996, p 57.

[169] Hudec, Robert E. "The role of the GATT Secretariat in the evolution of the WTO Dispute Settlement Procedure." *The Uruguay Round and Beyond: Essays in Honour of Arthur Dunkel* (1998): 101-120, at p 102.

[170] Gowa, Joanne, and Soo Yeon Kim. "An exclusive country club: the effects of the GATT on trade, 1950–94." *World Politics* 57.4 (2005): 453-478.

[171] World Trade Organization (WTO). "Overview", available at: https://www.wto.org/english/theWTO_e/whatis_e/wto_dg_stat_e.htm.

[172] World Trade Organization (WTO). "Overview", available at: https://www.wto.org/english/theWTO_e/whatis_e/wto_dg_stat_e.htm.

[173] Government of Canada. "Canada and the World Trade Organization", 13 July 2017, available at: http://www.international.gc.ca/world-monde/international_relations-relations_internationales/wto-omc/index.aspx?lang=eng.

[174] Government of Canada. "Address by Minister Freeland on Canada's foreign policy priorities", 6 June 2017, available at: https://www.canada.ca/en/global-affairs/news/2017/06/address_by_ministerfreelandoncanadasforeignpolicypriorities.html; Blanchfield, Mike. "Foreign Affairs Minister Chrystia Freeland calls for Canadian 'hard power' amid U.S. leadership questions", 6 June 2017, available at: http://www.torontosun.com/2017/06/06/foreign-affairs-minister-chyrstia-freeland-calls-for-canadian-hard-power-in-face-of-us-uncertainty.

[175] Smith, Marie-Danielle. "Canada to decide on potential free trade agreement with China this fall, with Asia seen as counterpoint to NAFTA renegotiation", National Post, 6 September 2017, available at: http://nationalpost.com/news/politics/canada-to-decide-on-potential-free-trade-agreement-with-china-this-fall-with-asia-seen-as-counterpoint-to-nafta-renegotiation.

[176] Government of Canada. "A new Canada-United States-Mexico Agreement", Government of Canada, 23 January 2019, available at: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/index.aspx?lang=eng.

the former North America FTA ("NAFTA") "generated economic growth and rising standards of living for the people of all three member countries," that total trilateral merchandise trade reached nearly USD $1.1 trillion in 2017, and that "total merchandise trade between Canada and the United States has more than doubled since 1993, and has grown over nine-fold between Canada and Mexico."[177]

Of note, many analysts think that clause 32.10 of the CUSMA/USMCA is a significant inhibiting factor for Canada's ability to engage in free trade with other countries, and most significantly in negotiating a new FTA with China.[178] It is a "unique provision apparently insisted upon by the Trump administration" allows any Party to terminate the agreement on a six-month notice if another Party enters into a FTA with a nonmarket economy ("NME")," such as China, and replace it with a bilateral agreement.[179] Some have viewed this as "a warning to Canada and Mexico not to negotiate a free trade deal with China, or at least to proceed very carefully."[180]

Realistically, "this provision may have little utility beyond what is already contemplated in the USMCA, as any Party can, in any event, choose to leave the USMCA on six-months' notice to the other Parties."[181] In fact, "this clause is likely meant to ensure that Canada carefully considers any concessions it will make in negotiations with China, and ensure that proper protections are put in place to protect the integrity of the North American market."[182] Former Prime Minister Brian Mulroney agrees that Canada did not give up its sovereignty to engage in FTA negotiations with other countries, including China, and that it was not a big concession for Canada.[183]

3.2 CANADA'S TRADE WITH CHINA UNDER THE TRUDEAU ADMINISTRATION

One constant between the previous Harper era and the current Trudeau administration is the importance of trade with China.[184] China is "Canada's second-largest single-country trading partner, with two-way merchandise trade totaling $85.4 billion in 2016 and accounting for 8.1 percent of Canada's total merchandise trade".[185] There are over 500 Canadian firms working in China in diverse sectors, including: health sciences, automotive, aerospace, transportation,

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[177] Government of Canada. "A new Canada-United States-Mexico Agreement", GoC, 23 January 2019, available at: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/index.aspx?lang=eng.

[178] Gantz, David A. "The United States-Mexico- Canada Agreement: Overview and Analysis", Rice University's Baker Institute for Public Policy, 11 December 2018; Executive Office of the President. "Agreement between the United States of America, the United Mexican States, and Canada Text", 30 November 2018, available at: https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.

[179] Gantz, David A. "The United States-Mexico- Canada Agreement: Overview and Analysis", Rice University's Baker Institute for Public Policy, 11 December 2018; Executive Office of the President. "Agreement between the United States of America, the United Mexican States, and Canada Text", 30 November 2018, available at: https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.

[180] Potter, Simon V., John W. Boscariol, Martha Harrison, Robert Glasgow, Carmen Francis, Sarah Ferguson and Geneviève St-Cyr Larkin. "Canada: United States-Mexico-Canada Trade Agreement: After A Year, New Terms Have Been Agreed Upon To Replace NAFTA", McCarthy Tétrault LLP, 5 October 2018, available at: http://www.mondaq.com/canada/x/742774/international+trade+investment/United+StatesMexicoCanada+Trade+Agreement+After+A+Year+New+Terms+Have+Been+Agreed+Upon+To+Replace+NAFTA.

[181] Potter, Simon V., John W. Boscariol, Martha Harrison, Robert Glasgow, Carmen Francis, Sarah Ferguson and Geneviève St-Cyr Larkin. "Canada: United States-Mexico-Canada Trade Agreement: After A Year, New Terms Have Been Agreed Upon To Replace NAFTA", McCarthy Tétrault LLP, 5 October 2018, available at: http://www.mondaq.com/canada/x/742774/international+trade+investment/United+StatesMexicoCanada+Trade+Agreement+After+A+Year+New+Terms+Have+Been+Agreed+Upon+To+Replace+NAFTA.

[182] Potter, Simon V., John W. Boscariol, Martha Harrison, Robert Glasgow, Carmen Francis, Sarah Ferguson and Geneviève St-Cyr Larkin. "Canada: United States-Mexico-Canada Trade Agreement: After A Year, New Terms Have Been Agreed Upon To Replace NAFTA", McCarthy Tétrault LLP, 5 October 2018, available at: http://www.mondaq.com/canada/x/742774/international+trade+investment/United+StatesMexicoCanada+Trade+Agreement+After+A+Year+New+Terms+Have+Been+Agreed+Upon+To+Replace+NAFTA.

[183] Gibillini, Nicole. "Canada didn't give up its sovereignty with 'non-market' USMCA clause: Mulroney", BNN Bloomberg, 18 October 2018, available at: https://www.bnnbloomberg.ca/canada-didn-t-give-up-its-sovereignty-with-non-market-usmca-clause-mulroney-1.1154614.

[184] Smith, Marie-Danielle. "Canada to decide on potential free trade agreement with China this fall, with Asia seen as counterpoint to NAFTA renegotiation", National Post, 6 September 2017, available at: http://nationalpost.com/news/politics/canada-to-decide-on-potential-free-trade-agreement-with-china-this-fall-with-asia-seen-as-counterpoint-to-nafta-renegotiation.

[185] Government of Canada. "Resources", 6 April 2017, available at: http://www.international.gc.ca/trade-commerce/consultations/china-chine/toolkit-outils.aspx?lang=eng.

financial services, information and communication technologies, and clean technologies.[186] China is also very important for Canada's agricultural exports, with China expected to become the world's largest agricultural importer by 2020.[187]

The Canada-China Foreign Investment Promotion and Protection Agreement ("FIPPA") was negotiated during the Harper government.[188] FIPPAs are different from FTAs insofar as they are bilateral agreements "intended to 'protect and promote' foreign investment through legally-binding rights and obligations", whereas FTAs are more comprehensive.[189] Some scholars have criticized the Canada-China FIPPA for being unique in its non-reciprocal nature, contrary to the claims from Canadian trade officials at the time.[190] For example, the Canada-China FIPPA provides a

> "general right of market access by Chinese investors to Canada but not by Canadian investors to China; allow[s] wider scope for investment screening by China than by Canada; omit[s] a long-standing Canadian reservation for performance requirements that favour Aboriginal peoples; and dilute[s] Canada's established position on transparency in investor-state arbitration".[191]

It is worth recalling that the Harper government "came to power in January 2006 committed to a principled foreign policy and a China policy substantially different from the engagement strategies of its Liberal and Progressive Conservative predecessors".[192] This initial approach of 'cool politics, warm economics' had, in the view of one commentator,

> near-disastrous consequences and was succeeded by a series of moves to revive the key elements of the strategic partnership and warm diplomatic relations in advance of [Harper's] visit to China in December 2009.[193]

Prime Minister Trudeau, on the other hand, has indicated that he would like to "remake Canada into a bridge between China and the world".[194] Prime Minister Trudeau explains that he aims to follow in his father Pierre Elliott Trudeau's footsteps, who took the initiative to open diplomatic relations with Beijing in 1970.[195] In fact, in a joint statement between Canada and China, the two governments "spoke highly" of the back-to-back visits between the two countries in 2016 and that this demonstrated "a renewed commitment for a growing relationship".[196] The statement also noted Prime Minister Trudeau's regular phone calls with Xi

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[186] Canadian Agri Food Trade Alliance. "Canada-China Trade", available at: http://cafta.org/trade-agreements/canada-china-trade/.

[187] Canadian Agri Food Trade Alliance. "Canada-China Trade", available at: http://cafta.org/trade-agreements/canada-china-trade/.

[188] Government of Canada. "Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments", 24 November 2016, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/china-chine/fipa-apie/index.aspx?lang=eng.

[189] Wyd, Adrian. "5 Things To Know About The Canada-China Investment Treaty", 27 October 2012, Huffington Post, available at: http://www.huffingtonpost.ca/2012/10/27/canada-china-trade-deal-fipa-apec_n_2032074.html.

[190] Van Harten, G. (2014). The Canada–China FIPPA: Its Uniqueness and Non-Reciprocity. *Canadian Yearbook of International Law/Annuaire Canadien De Droit International*, 51, 3-55.

[191] Van Harten, G. (2014). The Canada–China FIPPA: Its Uniqueness and Non-Reciprocity. *Canadian Yearbook of International Law/Annuaire Canadien De Droit International*, 51, 3-55.

[192] Evans, Paul. "Engagement with Conservative Characteristics: Policy and Public Attitudes, 2006–2011", in "Introduction: Changing Dimensions of the Canada-China Relations" Pitman B Potter and Thomas Adams, 2011, The Peter A. Allard School of Law Allard Research Commons, available at: http://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1263&context=fac_pubs.

[193] Evans, Paul. "Engagement with Conservative Characteristics: Policy and Public Attitudes, 2006–2011", in "Introduction: Changing Dimensions of the Canada-China Relations", Pitman B Potter and Thomas Adams (eds.), 2011, The Peter A. Allard School of Law Allard Research Commons, available at: http://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1263&context=fac_pubs.

[194] Vanderklippe, Nathan. "Trudeau touches on trade, human rights in call for 'new era' with China", 30 August 2016, Globe and Mail, available at: https://www.theglobeandmail.com/news/politics/trudeau-calls-for-new-era-of-positive-collaboration-in-first-china-meetings/article31602377/.

[195] Vanderklippe, Nathan. "Trudeau touches on trade, human rights in call for 'new era' with China", 30 August 2016, Globe and Mail, available at: https://www.theglobeandmail.com/news/politics/trudeau-calls-for-new-era-of-positive-collaboration-in-first-china-meetings/article31602377/.

[196] Prime Minister Justin Trudeau. "Joint Statement Between Canada and the People's Republic of China", available at: http://pm.gc.ca/eng/news/2016/09/23/joint-statement-between-canada-and-peoples-republic-china.

Jinping, highlighting how this "frequent dialogue not only promotes new areas for growth and deepened cooperation, but creates new avenues to promote common understanding on issues such as human rights and the rule of law".[197] While this is simply a joint statement, it is potentially a positive indication that China could be willing to include more human rights language in a future Canada-China FTA.

Trudeau's era can be characterized as 'soft' politics (compared with Harper's 'hard' politics) with the aim of building China's trust and ultimately negotiating an FTA that addresses both trade and human rights issues.[198] Again, the majority of Canadians appear to be of the opinion that is important that both of these concepts are included in an FTA due to the perceived interdependence of trade and human rights.[199] Yet, it is yet to be seen whether a softer approach to, and ultimately closer relationship with, China will prove effective in negotiating such an FTA.

3.3 EFFORTS MADE TOWARDS A CANADA-CHINA FREE TRADE AGREEMENT NEGOTIATIONS

Given the current state of Canada-China relations, this paper will not attempt to prophesize when, or whether, Canada-China FTA negotiations might commence. However, there have been some preliminary steps taken that can be highlighted. In addition, given the economic powerhouse that China has become, it would appear contrary to Canada's interests not to pursue a FTA with China, when the political climate allows for such negotiations to take place.

According to the World Bank, China is the second largest economy in the world, and is the world's largest economy by purchasing power parity according to the IMF (although China's National Bureau of Statistics denies this claim).[200] Canada stands to gain a considerable amount in terms of trade. This would create opportunities for Canadian firms of all sizes to improve "market access conditions for Canadian businesses operating in China", and benefit Canadian consumers with "enhanced access to safe and affordable goods from China".[201]

The question remains whether Canada is in a position to negotiate a beneficial FTA with China, or whether China would even be interested in entering into an FTA with Canada. On the one hand, the Canadian Government has been explicit that there would be sufficient economic benefits for both countries to justify entering into FTA negotiations with China.[202] However, some scholars argue that China already has access to Canadian markets due to Canada's low tariffs, business regulations and the impartial rule of law to adjudicate contract disputes.[203] Canada, on the other hand, does not have access to certain Chinese goods, services or investment. Some scholars conclude that "whether a free-trade agreement with China will shrink our current 3:1 trade deficit is very much an open question",[204]

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[197] Prime Minister Justin Trudeau. "Joint Statement Between Canada and the People's Republic of China", available at: http://pm.gc.ca/eng/news/2016/09/23/joint-statement-between-canada-and-peoples-republic-china.

[198] Blanchfield, Mike. "Human rights on the table in any Canada-China free trade deal: McCallum", 29 March 2017, Globe and Mail, available at: https://www.theglobeandmail.com/news/politics/human-rights-on-the-table-in-any-canada-china-free-trade-deal-mccallum/article34480066/.

[199] See, for example: Cottier, Thomas. "Trade and Human Rights: a relationship to discover", *Journal of International Economic Law* 5.1 (2002): 111-132; Vincent, Raymond John. *Human rights and international relations*, Cambridge University Press, 1986; Greenspon, Edward, and Kevin Lynch. "Diversification Not Dependence: A Made-In Canada China Strategy", Public Policy Forum, October 2018.

[200] World Bank. "The World Bank in China", WB, 28 March 2017, available at: http://www.worldbank.org/en/country/china/overview; International Monetary Fund. "Report for Selected Countries and Subjects"; Xinhua. "China denies being world's No. 1 economy", Xinhuanet, 20 January 2015, available at: http://www.xinhuanet.com/english/china/2015-01/20/c_133933504.htm.

[201] Canada Gazette. "Consultations on a potential free trade agreement with China", available at: http://www.gazette.gc.ca/rp-pr/p1/2017/2017-03-04/html/notice-avis-eng.php#ne15.

[202] Government of Canada. "Resources", 6 April 2017, available at: http://www.international.gc.ca/trade-commerce/consultations/china-chine/toolkit-outils.aspx?lang=eng.

[203] Canada Gazette. "Consultations on a potential free trade agreement with China", available at: http://www.gazette.gc.ca/rp-pr/p1/2017/2017-03-04/html/notice-avis-eng.php#ne15; Leblond, Patrick. "Toward a Free Trade Agreement with China: Opportunities, Challenges and Building Blocks for Canada", CIGI, 2017, available at: https://www.cigionline.org/sites/default/files/documents/China%20Canada%20Trade.pdf; Burton, Charles. "Free-trade talks with China: Proceed with caution", 5 June 2017, The Globe and Mail, available at: https://www.theglobeandmail.com/opinion/free-trade-talks-with-china-proceed-with-caution/article35192536/; .

[204] Burton, Charles. "Free-trade talks with China: Proceed with caution", 5 June 2017, The Globe and Mail, available at: https://www.theglobeandmail.com/opinion/free-trade-talks-with-china-proceed-with-caution/article35192536/; Canada Gazette. "Consultations on a potential free

although this is not necessarily a measure of success and simply one of many considerations implicated in a potential Canada-China FTA.

As for the steps that have been taken towards possible Canada-China FTA negotiation process, the Government of Canada initiated an exploratory process on September 22, 2016 and completed its public engagement about a possible FTA with China on June 2, 2017.[205] The next step was for the Government of Canada to publish a summary report of the exploratory process, as opposed to full transcripts as is typically the case for this process.[206] The Government of Canada has explained that this is due to the extent of the consultations completed across Canada, with a large number of stakeholders.[207] Following this step, the Government was to then deliberate on whether or not it would proceed with the FTA negotiations.[208] As of January 2019, however, the launch of trade talks continue to appear to be on hold.[209]

4. HOW HUMAN RIGHTS COULD BE INTEGRATED INTO A CANADA-CHINA FREE TRADE AGREEMENT

4.1 CANADA'S CURRENT FREE TRADE AGREEMENT PRACTICE

The Trudeau administration's "progressive trade agenda" is the Canadian Government's 'new' approach to international trade, which ultimately aims to "make trade real for people".[210] It aims to "reinforce Canada's leadership in inclusive and sustainable trade and investment" and to ensure that "all segments of society can take advantage of the opportunities that flow from trade".[211] The progressive trade agenda is to focus on women, indigenous people, youth, and small and medium-sized businesses, in particular.[212]

According to Canada's Minister of International Trade, François-Philippe Champagne, "Canada's progressive trade agenda is in line with the government's vision for more innovative and prosperous growth that benefits everyone, particularly with respect to the creation of jobs for the middle class and those working hard to join it."[213] Specifically, the Mandate Letter for the Minister of International Trade identifies the implementation and expansion of Canada's FTAs globally as one of the top

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trade agreement with China", available at: http://www.gazette.gc.ca/rp-pr/p1/2017/2017-03-04/html/notice-avis-eng.php#ne15.

[205] Canada Gazette. "Consultations on a potential free trade agreement with China", available at: http://www.gazette.gc.ca/rp-pr/p1/2017/2017-03-04/html/notice-avis-eng.php#ne15.

[206] Charles Burton. "Free-trade talks with China: Proceed with caution", 5 June 2017, The Globe and Mail, available at: https://www.theglobeandmail.com/opinion/free-trade-talks-with-china-proceed-with-caution/article35192536/; Canada Gazette. "Consultations on a potential free trade agreement with China", available at: http://www.gazette.gc.ca/rp-pr/p1/2017/2017-03-04/html/notice-avis-eng.php#ne15.

[207] Government of Canada. "Resources", 6 April 2017, available at: http://www.international.gc.ca/trade-commerce/consultations/china-chine/toolkit-outils.aspx?lang=eng.

[208] Government of Canada. "Resources", 6 April 2017, available at: http://www.international.gc.ca/trade-commerce/consultations/china-chine/toolkit-outils.aspx?lang=eng; Government of Canada. "What we heard", 5 December 2017, Government of Canada, available at: http://international.gc.ca/trade-commerce/consultations/china-chine/what_we_heard-que_nous_entendu.aspx?lang=eng.

[209] Blanchfield, Mike. "Canada-China delay launch of trade talks as Trudeau continues state visit", CTV News, 4 December 2017, available at: <https://www.ctvnews.ca/business/canada-china-delay-launch-of-trade-talks-as-trudeau-continues-state-visit-1.3705774>.

[210] Government of Canada. "International Trade Minister to promote Canada's progressive trade agenda at OECD ministerial meeting", 6 June 2017, available at: https://www.canada.ca/en/global-affairs/news/2017/06/international_tradeministertopromotecanadasprogressive-tradeagend.html; Italian Chambers. "Selling a progressive trade agenda: A conversation with the Honourable Francois-Philippe Champagne Canada's Minister of International Trade", 2017, available at: https://www.italchambers.ca/wp-content/uploads/2017/06/Champagne.pdf.

[211] Government of Canada. "International Trade Minister to promote Canada's progressive trade agenda at OECD ministerial meeting", 6 June 2017, available at: https://www.canada.ca/en/global-affairs/news/2017/06/international_tradeministertopromotecanadasprogressivet-radeagend.html.

[212] "Canada to adopt progressive trade agenda: envoy", Daily Star, 1 May 2017, available at: http://www.tfocanada.ca/news.php?item=4169&thisnewsyear=2017.

[213] Government of Canada. "International Trade Minister to promote Canada's progressive trade agenda at OECD ministerial meeting", 6 June 2017, available at: https://www.canada.ca/en/global-affairs/news/2017/06/international_tradeministertopromotecanadasprogressivet-radeagend.html.

priorities, including "advancing Canada's progressive trade agenda in order to create jobs for the middle class and those working hard to join it".[214]

The start of President Trump's administration has evidently affected the Trudeau government's progressive trade agenda: Canada's neighbour to the south is now pursuing a much more isolationist 'America-first' approach to trade, and has overhauled the North American Free Trade Agreement (NAFTA) to the newly-minted CUSMA, which is pre-occupying the Trudeau government since the US is Canada's largest trade partner.[215] However, Canada is still advancing with its progressive trade agenda in other areas of the world.[216]

The progressive trade agenda is most notably encapsulated in the Comprehensive Economic Trade Agreement ("CETA") between Canada and the European Union.[217] Mr. Champagne has called the CETA "the gold standard in the world", explaining that it is "the most progressive trade agreement negotiated by either Canada or the EU" because it includes provisions about the environment, labour standards, and the right of states to legislate in the interest of health and safety.[218]

Trudeau's Liberal progressive trade agenda is a slight deviation from the trade approach of the Harper administration, which has been described as 'brash' foreign policy.[219] When the Conservatives came into power in 2006, Canada had five FTAs; by the end of Harper's administration, Canada had 51 free trade deals.[220] The Conservatives' approach at that time was to be aggressive, making bold moves such as siding with Taiwan, which was not to their benefit in the long-run with China.[221] That being said, this 'new' trade agenda is still in its early stages, therefore it is yet to be seen whether the Liberal Party's rhetoric translates into tangible changes in FTAs other than the CETA, and demonstrate a marked deviation from Harper's earlier trade approach.

4.2 LESSONS LEARNED FROM CHINA'S CURRENT FREE TRADE AGREEMENTS

Looking at China's 14 FTAs as of the beginning of 2019—with a further seven currently being negotiated, and 11 more being officially considered—there are a few aspects that Canada should try to recreate in a potential Canada-China FTA.[222] Namely, the following China FTAs, with either Commonwealth or Western countries, provide particularly helpful human rights language that Canada should try to integrate in the possible Canada-China FTA negotiations: (i) the China-Australia FTA; (ii) the China-New Zealand FTA and update; and, (iii) the China-Switzerland FTA. While there are likely

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[214] Trudeau, Justin. "Minister of International Trade Mandate Letter", Prime Minister of Canada, available at: http://pm.gc.ca/eng/minister-international-trade-mandate-letter.

[215] Luke, David, and Phil Rourke. "Canada's Progressive Trade Agenda Starts in Africa", United Nations Economic Commission for Africa, available at: https://www.uneca.org/stories/canada%E2%80%99s-progressive-trade-agenda-starts-africa; Leece, David. "Towards a new American isolationism?." *United Service* 68.1 (2017): 3; Carmichael, Kevin. "Donald Trump's plan to overhaul NAFTA goes much deeper than a tweak", 18 July 2017, available at: http://www.macleans.ca/economy/economicanalysis/donald-trumps-plans-for-overhauling-nafta-go-much-deeper-than-a-tweak/; Al Jazeera. "What's driving Canada's progressive trade agenda?", 4 March 2017, available at: http://www.aljazeera.com/programmes/countingthecost/2017/03/driving-canada-progressive-trade-agenda-170304041343605.html.

[216] Luke, David, and Phil Rourke. "Canada's Progressive Trade Agenda Starts in Africa", United Nations Economic Commission for Africa, available at: https://www.uneca.org/stories/canada%E2%80%99s-progressive-trade-agenda-starts-africa.

[217] Italian Chambers. "Selling a progressive trade agenda: A conversation with the Honourable Francois-Philippe Champagne Canada's Minister of International Trade", 2017, available at: https://www.italchambers.ca/wp-content/uploads/2017/06/Champagne.pdf.

[218] Italian Chambers. "Selling a progressive trade agenda: A conversation with the Honourable Francois-Philippe Champagne Canada's Minister of International Trade", 2017, available at: https://www.italchambers.ca/wp-content/uploads/2017/06/Champagne.pdf; Al Jazeera. "What's driving Canada's progressive trade agenda?", 4 March 2017, available at: http://www.aljazeera.com/programmes/countingthecost/2017/03/driving-canada-progressive-trade-agenda-170304041343605.html; Global News. "CETA the centrepiece of Canada's 'progressive trade agenda'", 15 February 2017, available at: http://globalnews.ca/video/3250732/ceta-the-centrepiece-of-canadas-progressive-trade-agenda.

[219] Robertson, Colin. "Stephen Harper and a 'Rising' Canada", 12 December 2013, Canadian Information Processing Society, available at: http://www.cips-cepi.ca/2013/12/12/stephen-harper-and-a-rising-canada/.

[220] Bernier, Maxime. "Canada-China Free Trade – Speech", 18 July 2016, http://www.maximebernier.com/canada_china_free_trade_speech.

[221] Karalekas, Dean "Canada needs a Taiwan Relations Act", Inside Policy – The Magazine of the Macdonald-Laurier Institute, available at: http://www.macdonaldlaurier.ca/files/pdf/Karalekas--inside%20policy.pdf.

[222] China FTA Network. "China FTA Network", 25 July 2017, available at: http://fta.mofcom.gov.cn/english/; Cao, Huhua, and Vivienne Poy. *The China challenge: Sino-Canadian relations in the 21st century*. University of Ottawa Press/Les Presses de l'Université d'Ottawa, 2015, p 8.

lessons learned as to what to avoid in China's current FTAs, this paper will instead look to the positive and helpful human rights language.[223]

4.2.1 THE CHINA-AUSTRALIA FREE TRADE AGREEMENT

The China-Australia FTA ("ChAFTA"), which came into force in December 2015, is seen by some as the most ambitious and advanced FTA that China has negotiated to date.[224] This is due to the commitments in ChAFTA, which are consistent with China's "reform agenda to transform the growth model from being export-and investment-led to a consumption- and services-led model".[225] There are also those who argue that ChAFTA adopts a problem-solving approach to harvest "low-hanging fruit," such as tariff cuts.[226] However, ChAFTA could still serve as one test model of how China engages in bilateral agreements with larger advanced economies, which could pave the way for an FTA with a country such as Canada.[227]

The ChAFTA contains "WTO-based and WTO-friendly rules, it focuses on trade and investment facilitation through market liberalization and carefully written good governance norms".[228] Although it has a "short form investment chapter," the agreement is "not as shallow as one may first think".[229] It includes regulatory transparency and cooperation in financial services, regulatory autonomy in investment, and a "negative list" approach for services and investment, investor-state dispute settlement, and the investment facilitation arrangement.[230]

While the ChAFTA is beneficial from an economic standpoint, it also provides human rights-related aspects that would be helpful to include in a Canada-China FTA. In particular, it states that China and Australia aim "to create a living agreement that builds in review and ongoing interaction. FTAs should not be seen as one-shot deals".[231] In the case of the China-Australia FTA, this was in the context of both countries committing to improve on the investment chapter of ChAFTA, recognizing that it is not yet sufficient, especially from a human rights standpoint.[232]

There are significant safeguards for Australian workers built into the ChAFTA due to domestic Australian concerns that Chinese temporary workers would take Australian jobs, and that Chinese skilled temporary workers would work without having to meet the

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[223] Note: This section provides suggestions of human rights language in China's current FTAs, but with the caveat that some analysts suggest that most of the existing clauses in China's bilateral treaties seem essentially non-operative.

[224] Asia Pacific Foundation of Canada, "The China-Australia Free Trade Agreement: Lessons for Canada", available at: https://www.asiapacific.ca/canada-asia-agenda/china-australia-free-trade-agreement-lessons-canada.

[225] Asia Pacific Foundation of Canada, "The China-Australia Free Trade Agreement: Lessons for Canada", available at: https://www.asiapacific.ca/canada-asia-agenda/china-australia-free-trade-agreement-lessons-canada.

[226] Wang, Heng, An Assessment of the ChAFTA and Its Implications: A Work-in-Progress Type FTA with Selective Innovations? (January 30, 2017). Colin Picker, Heng Wang and Weihuan Zhou (eds), The China Australia Free Trade Agreement: A 21st Century Model (Hart Publishing), 2018. Available at SSRN: https://ssrn.com/abstract=2960440.

[227] Asia Pacific Foundation of Canada, "The China-Australia Free Trade Agreement: Lessons for Canada", available at: https://www.asiapacific.ca/canada-asia-agenda/china-australia-free-trade-agreement-lessons-canada.

[228] Wang, Heng, An Assessment of the ChAFTA and Its Implications: A Work-in-Progress Type FTA with Selective Innovations? (January 30, 2017). Colin Picker, Heng Wang and Weihuan Zhou (eds), The China Australia Free Trade Agreement: A 21st Century Model (Hart Publishing), 2018. Available at SSRN: https://ssrn.com/abstract=2960440.

[229] Wang, Heng, An Assessment of the ChAFTA and Its Implications: A Work-in-Progress Type FTA with Selective Innovations? (January 30, 2017). Colin Picker, Heng Wang and Weihuan Zhou (eds), The China Australia Free Trade Agreement: A 21st Century Model (Hart Publishing), 2018. Available at SSRN: https://ssrn.com/abstract=2960440.

[230] Wang, Heng, An Assessment of the ChAFTA and Its Implications: A Work-in-Progress Type FTA with Selective Innovations? (January 30, 2017). Colin Picker, Heng Wang and Weihuan Zhou (eds), The China Australia Free Trade Agreement: A 21st Century Model (Hart Publishing), 2018. Available at SSRN: https://ssrn.com/abstract=2960440.

[231] Asia Pacific Foundation of Canada, "The China-Australia Free Trade Agreement: Lessons for Canada", available at: https://www.asiapacific.ca/canada-asia-agenda/china-australia-free-trade-agreement-lessons-canada.

[232] Asia Pacific Foundation of Canada, "The China-Australia Free Trade Agreement: Lessons for Canada", available at: https://www.asiapacific.ca/canada-asia-agenda/china-australia-free-trade-agreement-lessons-canada.

standard Australian licensing requirements.[233] Given the importance of labour rights for Canada, and especially in the context of FTAs, this would be beneficial language to emulate in a possible Canada-China FTA.

While these two aspects of the ChAFTA would be beneficial for a possible Canada-China FTA, the question is whether Canada can provide China with the same economic benefits as its neighbouring Australia. Some argue that China stands to benefit significantly from an FTA with Canada.[234] Namely, to increase China's market share in Canada, to establish Canada as "a reliable supplier of the energy, mineral and agricultural resources necessary to sustain Chinese economic expansion", and to encourage Canada "to move away from its dependence on the U.S.A. to a geopolitical position more favourable to China's longer term power ambitions".[235]

Expanding trade with China is also alluring for Canada.[236] The two options, above, could provide Canadian negotiators with an appealing way to include important human rights language around labour rights, and establish a process whereby human rights language could continually be improved-upon following a 'living document' approach.

While there are clear benefits in the ChAFTA, there have been ongoing calls for Canada to be wary of negotiating an FTA with China. As a prominent example, some scholars point to the recent example where China threatened Australia's bilateral trade relations (*i.e.*, Australia's largest export market) if it did not adopt domestic legislation to implement an extradition treaty with China.[237] Therefore, Canada should be aware of the possibility that it could be placed in a situation where it is forced to act in a way that is not to its advantage economically because of its increased connection with China through an FTA, causing Canada to be more vulnerable due to its bilateral relations with China.[238]

One thing to note regarding the ChAFTA, however, is new evidence of Chinese interference—as opposed to influence—in Australia's political system and pressures on people of Chinese origin in Australia to help the 'motherland'.[239] There have been a few similar incidents in Canada, with evidence of pressures on Chinese Canadians to help the 'motherland', as well as on Chinese students in Canada to stay in-line and watch what other Chinese students do.[240] This does not necessarily speak to human right in China, but it demonstrates a potential extension of an abuse of rights in other countries with which China has free trade, which is perhaps worse. This will likely be an area that continues to develop in coming years.[241]

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[233] Asia Pacific Foundation of Canada, "The China-Australia Free Trade Agreement: Lessons for Canada", available at: https://www.asiapacific.ca/canada-asia-agenda/china-australia-free-trade-agreement-lessons-canada.

[234] Smith, Marie-Danielle. "Canada to decide on potential free trade agreement with China this fall, with Asia seen as counterpoint to NAFTA renegotiation", National Post, 6 September 2017, available at: http://nationalpost.com/news/politics/canada-to-decide-on-potential-free-trade-agreement-with-china-this-fall-with-asia-seen-as-counterpoint-to-nafta-renegotiation.

[235] Burton, Charles. "Can Canada Follow New Zealand's Model for Free Trade with China?", 19 October 2016, Asia Pacific Memo, available at: http://www.asiapacificmemo.ca/can-canada-follow-new-zealand.

[236] Nikotina, Alex. "Do the rewards outweigh the risks when it comes to trade with China?" Trade Ready – Blog for International Trade Experts, 29 January 2016, available at: http://www.tradeready.ca/2016/trade-takeaways/do-the-rewards-outweigh-the-risks-when-it-comes-to-trade-with-china/.

[237] Manthorpe, Jonathan. "From Down Under, a warning on the perils of getting cozy with China", 29 March 2017, iPolitics Insights, available at: http://ipolitics.ca/2017/03/29/from-down-under-a-warning-on-the-downside-of-getting-cozy-with-china/.

[238] Manthorpe, Jonathan. "From Down Under, a warning on the perils of getting cozy with China", 29 March 2017, iPolitics Insights, available at: http://ipolitics.ca/2017/03/29/from-down-under-a-warning-on-the-downside-of-getting-cozy-with-china/.

[239] Garnaut, John. "How China Interferes in Australia: And How Democracies Can Push Back", Foreign Affairs, 9 March 2018, available at: https://www.foreignaffairs.com/articles/china/2018-03-09/how-china-interferes-australia; Hamilton, Clive. "Australia's Fight Against Chinese Political Interference: What Its New Laws Will Do", Foreign Affairs, 26 July 2018, available at: https://www.foreignaffairs.com/articles/australia/2018-07-26/australias-fight-against-chinese-political-interference.

[240] Garnaut, John. "How China Interferes in Australia: And How Democracies Can Push Back", Foreign Affairs, 9 March 2018, available at: https://www.foreignaffairs.com/articles/china/2018-03-09/how-china-interferes-australia.

[241] Garnaut, John. "How China Interferes in Australia: And How Democracies Can Push Back", Foreign Affairs, 9 March 2018, available at: https://www.foreignaffairs.com/articles/china/2018-03-09/how-china-interferes-australia.

4.2.2 THE CHINA-NEW ZEALAND FREE TRADE AGREEMENT

New Zealand holds many similarities with Canada: it is tied to a larger neighbouring country, Australia, it is a Commonwealth country with similar human rights commitments, and exports primarily raw materials and agricultural products.[242] New Zealand signed an FTA with China in 2008, which is the first that China signed with a developed country.[243] This FTA provided significant economic benefits to both sides, with China becoming the second largest market for New Zealand products after Australia.[244]

China and New Zealand are undergoing an update to their FTA.[245] This followed the US' withdrawal from the Trans-Pacific Partnership ("TPP") negotiations in January 2017, which essentially made the TPP no longer possible.[246] However, New Zealand and Australia expressed their intention "to salvage the TPP by encouraging China and other Asian countries to join the trade pact after Trump kept an election pledge to abandon the accord".[247] The new configuration has been termed 'TPP 12 Minus One'.[248] Given the importance of being part of this type of multilateral trade agreement, especially its potential to put Canada in a more favourable light for China regarding a bilateral FTA, Canada signed the revised TPP January 2018.[249]

In the view of one scholar, Mr. Charles Burton, the difference between New Zealand and Canada is the differing levels of engagement of the domestic constituents on human rights.[250] Mr. Burton further explained that there was very little societal pushback in New Zealand regarding human rights concerns during its FTA negotiations with China, aside from a few politicians and non-governmental groups.[251] He goes on to explain that Canadians, on the other hand, have been much more vocal about the importance of human rights in possible FTA negotiations with China.[252] Therefore, although there are many similarities between the New Zealand and Canada characteristics, and things to learn from the China-New Zealand FTA, a possible negotiation process for a Canada-China FTA may not be as smooth a process as it was for New Zealand in 2008.

To note, there is also evidence of Chinese influence on New Zealand's politics, as well as calls for the Chinese diaspora in New Zealand to help the 'motherland', as it has been seen in Australia as noted above.

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[242] Elliott, Josh K. "Group calls for free movement between Canada, UK, Australia and New Zealand," CTV News, 7 February, available at: https://www.ctvnews.ca/canada/group-calls-for-free-movement-between-canada-u-k-australia-and-new-zealand-1.3793195.

[243] "Text of the New Zealand-China FTA Agreement," Government of New Zealand, available at: https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/nz-china-free-trade-agreement/text-of-the-new-zealand-china-fta-agreement/.

[244] "China and New Zealand Announce to Start Upgrading Negotiation of FTA" China FTA Network, 23 November 2016, available at: http://fta.mofcom.gov.cn/enarticle/ennewzealand/ennewzealandnews/201612/33763_1.html.

[245] China FTA Network. "China and New Zealand Announce to Start Upgrading Negotiation of FTA", 23 November 2016, available at: http://fta.mofcom.gov.cn/enarticle/ennewzealand/ennewzealandnews/201612/33763_1.html.

[246] BBC. "Trump executive order pulls out of TPP trade deal" 24 January 2017, available at: http://www.bbc.com/news/world-us-canada-38721056.

[247] Reuters. "China, New Zealand pledge support for free trade to counter global protectionism" 9 February 2017, available at: http://www.reuters.com/article/us-newzealand-china-idUSKBN15P058.

[248] BBC. "Australia and New Zealand to pursue 'TPP 12 minus one'" 24 January 2017, available at: http://www.bbc.com/news/business-38725807.

[249] Robins, Geoff. "Canada reaches deal on revised Trans-Pacific Partnership", CBC News, 23 January 2018, available at: http://www.cbc.ca/news/politics/tpp-champagne-deal-1.4499616; Asia Pacific Foundation of Canada. "Toward a Canada-China FTA", available at: https://www.asiapacific.ca/sites/default/files/filefield/canada-china_fta_report_final_1.pdf; Italian Chambers. "Selling a progressive trade agenda: A conversation with the Honourable Francois-Philippe Champagne Canada's Minister of International Trade", 2017, available at: https://www.italchambers.ca/wp-content/uploads/2017/06/Champagne.pdf.

[250] Burton, Charles. "Can Canada Follow New Zealand's Model for Free Trade with China?", 19 October 2016, Asia Pacific Memo, available at: http://www.asiapacificmemo.ca/can-canada-follow-new-zealand

[251] Burton, Charles. "Can Canada Follow New Zealand's Model for Free Trade with China?", 19 October 2016, Asia Pacific Memo, available at: http://www.asiapacificmemo.ca/can-canada-follow-new-zealand.

[252] Burton, Charles. "Can Canada Follow New Zealand's Model for Free Trade with China?", 19 October 2016, Asia Pacific Memo, available at: http://www.asiapacificmemo.ca/can-canada-follow-new-zealand.

4.2.3 THE CHINA-SWITZERLAND FREE TRADE AGREEMENT

There is a common opinion that European countries' FTAs have stronger human rights language than Canada's FTAs, notably preambular provisions.[253] While this is not necessarily the case, since Canada's general FTA template also includes "human rights" in the Preamble, it would be beneficial for Canada to emulate the China-Switzerland FTA's Preamble language so as to provide stronger human rights protections in a possible Canada-China FTA in the future.[254] Preambular language is important because it acts as an introduction to the entire treaty.[255] Examples include, in particular:[256]

> "Mindful that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development and that closer economic partnership can play an important role in promoting sustainable development" (pp. 4).
>
> "Recognising that this Agreement should be implemented with a view to promoting the public welfare in the Parties, including raising the standard of living, as well as creating new job opportunities and promoting sustainable development in a manner consistent with environmental protection and conservation" (pp. 5).
>
> "Committed to the promotion of prosperity, democracy, social progress and harmony and to uphold freedom, equality, justice and the rule of law, reaffirming their commitment to the Charter of the United Nations and fundamental norms of international relations" (pp. 7).

While Preamble language explains the general object and purpose of the treaty and is not enforced to the same extent as individual provisions, but this type of language would be helpful for Canada to include in an FTA with China so as to further reinforce human rights throughout the agreement.[257]

4.3 LESSONS LEARNED FROM CANADA'S CURRENT FREE TRADE AGREEMENTS

A review of Canada's current FTAs highlights certain aspects that could be integrated into a potential Canada-China FTA to provide human rights protections. As of March 2018, Canada has 14 FTAs in force, three signed (including the TPP) and seven being negotiated and a further five in the exploratory stage.[258] While the Canadian trade team will likely draw upon a range of lessons learned from across all of Canada's FTA negotiations, the following could be of particular use in a possible Canada-China FTA negotiation process: (i) use of Canada's FTA 'template'; (ii) provisions of the Canada-Ukraine FTA; (iii) provisions of the Canada-Colombia Human Rights Agreement; and, (iv) gender provisions of the Canada-Chile FTA.

4.3.1 CANADA'S FREE TRADE AGREEMENT 'TEMPLATE'

Certain elements are consistently included in Canada's FTAs which may now be seen to form the basis of Canada's FTA 'template'. Economic considerations, such as intellectual property rights and tariffs, are included in all Canadian FTAs.[259] There are also certain aspects that

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[253] Bartels, Lorand. "The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements." (2014); European Parliament. "The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements", EuroParl, 2014, available at: http://www.europarl.europa.eu/cmsdata/86031/Study.pdf; Velluti, Samantha. "The promotion and integration of human rights in EU external trade relations," *Utrecht J. Int'l & Eur. L.*32 (2016): 41.

[254] China FTA Network. "China-Switzerland FTA", available at: http://fta.mofcom.gov.cn/topic/enswiss.shtml.

[255] Robert, Henry M.; et al. (2011). Robert's Rules of Order Newly Revised (11th ed.). Philadelphia, PA: Da Capo Press. p. 107.

[256] China FTA Network. "Free Trade Agreement Between the Swiss Confederation and the People's Republic of China" Preamble.

[257] Robert, Henry M.; et al. (2011). *Robert's Rules of Order Newly Revised* (11th ed.). Philadelphia, PA: Da Capo Press. p. 107.

[258] Government of Canada. "Trade and investment agreements", 15 March 2018, available at: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng&menu_id=137.

[259] See: Government of Canada. "Canada-Colombia Free Trade Agreement", 18 April 2017, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/index.aspx?lang=eng; Government of Canada. "Canada-Peru Free Trade Agreement", 17 March 2017, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/index.aspx?lang=eng; Government of Canada. "Canada-Panama Free Trade Agreement", 24 November 2016, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/panama/fta-ale/index.aspx?lang=eng; Government of Canada; "Canada-Honduras Free Trade Agreement", Government of Canada, 23 November 2016, available at: http://international.gc.ca/

are commonplace in Canadian FTAs related to human rights, including certain preambular language, as well as chapters on the environment and labour.[260]

Regarding the human rights language included in Canadian FTAs, 'human rights' have been expressly stated in the Preamble since 2009.[261] General references are included, for example, in the Canada-Peru FTA (2009), the Canada-Jordan FTA (2012), the Canada-Panama FTA (2013), the Canada-Honduras FTA (2014) and the Canada-Ukraine FTA (2017) "affirming [the parties'] commitment to respect the values and principles of democracy and to promote and protect the human rights and fundamental freedoms identified in the *Universal Declaration of Human Rights*".[262] Beyond the preambular language, Canada's FTAs also include human rights-related language in chapters such as the environment and labour.[263]

In terms of the environment, Canada's FTAs generally include this issue as a chapter of the FTA itself or as an associated agreement that is to be read and enforced in tandem with the FTA.[264] For example, the Canada-Peru FTA, which entered into force August 2009, includes environment as a distinct chapter 17 out of 23.[265] Other FTAs with an environment chapter include: the Canada-Colombia FTA, the Canada-Jordan FTA, the Canada-Panama FTA, the Canada-Honduras FTA, among other recent Canadian FTAs.[266]

In terms of labour, Canada's FTAs generally include this issue as a chapter of the FTA itself or as an associated agreement that is to be read and enforced in tandem with the FTA. For example, in the Canada-Peru FTA, labour is included as chapter 16, coming one before that on the environment.[267] Other FTAs with a labour chapter include: the Canada-Colombia FTA, the Canada-Jordan

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trade-commerce/trade-agreements-accords-commerciaux/agr-acc/honduras/fta-ale/index.aspx?lang=eng.

[260] See: Government of Canada. "Canada-Colombia Free Trade Agreement", 18 April 2017, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/index.aspx?lang=eng; Government of Canada. "Canada-Peru Free Trade Agreement", 17 March 2017, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/index.aspx?lang=eng; Government of Canada; "Canada-Panama Free Trade Agreement", 24 November 2016, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/panama/fta-ale/index.aspx?lang=eng; Government of Canada. "Canada-Honduras Free Trade Agreement", Government of Canada, 23 November 2016, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/honduras/fta-ale/index.aspx?lang=eng.

[261] See: Government of Canada. "Canada-Colombia Free Trade Agreement", 18 April 2017, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/index.aspx?lang=eng; Government of Canada. "Canada-Peru Free Trade Agreement", 17 March 2017, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/index.aspx?lang=eng; Government of Canada; "Canada-Panama Free Trade Agreement", 24 November 2016, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/panama/fta-ale/index.aspx?lang=eng; Government of Canada. "Canada-Honduras Free Trade Agreement", Government of Canada, 23 November 2016, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/honduras/fta-ale/index.aspx?lang=eng.

[262] See: Government of Canada. "Canada-Colombia Free Trade Agreement", 18 April 2017, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/index.aspx?lang=eng; Government of Canada. "Canada-Peru Free Trade Agreement", 17 March 2017, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/index.aspx?lang=eng; Government of Canada; "Canada-Panama Free Trade Agreement", 24 November 2016, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/panama/fta-ale/index.aspx?lang=eng; Government of Canada. "Canada-Honduras Free Trade Agreement", Government of Canada, 23 November 2016, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/honduras/fta-ale/index.aspx?lang=eng.

[263] Government of Canada. "Canada-Peru Free Trade Agreement", 17 March 2017, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/index.aspx?lang=eng; Government of Canada. "Canada-Peru Free Trade Agreement", 17 March 2017, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/index.aspx?lang=eng.

[264] Morin, Jean-Frédéric, Laura Mordelet, and Myriam Rochette. "Since NAFTA, Canada and the US have included the largest number, worldwide, of environmental clauses in their trade agreements", Policy Options, 1 August 2017, available at: http://policyoptions.irpp.org/magazines/august-2017/the-environment-in-canadian-trade-agreements/.

[265] Government of Canada. "Canada-Peru Free Trade Agreement", 17 March 2017, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/index.aspx?lang=eng.

[266] Government of Canada. "Canada-Colombia Free Trade Agreement", 18 April 2017, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/index.aspx?lang=eng; Government of Canada. "Canada-Jordan Free Trade Agreement", 24 November 2016, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/jordan-jordanie/fta-ale/index.aspx?lang=eng; Government of Canada. "Canada-Panama Free Trade Agreement", 24 November 2016, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/panama/fta-ale/index.aspx?lang=eng; Government of Canada. "Canada-Honduras Free Trade Agreement", Government of Canada, 23 November 2016, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/honduras/fta-ale/index.aspx?lang=eng.

[267] Government of Canada. "Canada-Peru Free Trade Agreement", 17 March 2017, available at:

FTA, the Canada-Panama FTA, and the Canada-Honduras FTA.[268]

While these aspects are now commonplace in Canadian FTAs, it is not certain that they will be included in a possible Canada-China FTA.[269] Still, it is likely that there will be chapters on environment and labour in a potential Canada-China FTA because they have been included in Canada's FTAs since 2009.[270] However, it is unlikely that such extensive human rights language will be included in the hypothetical Preamble following the Chinese ambassador's comments in April 2017, berating a Canadian report and stating that human rights should not factor into an FTA with Canada.[271]

The 2016 Wang Yi lecturing of a Canadian journalist was really a flashpoint for Western countries as it demonstrated that China would no longer take public rebukes and was going to push back hard.[272] Unfortunately, Canada's Minister Dion was listening to the translation and, although he looked taken-aback by what he heard, did not address the issue further.[273]

4.3.2 CANADA-UKRAINE FREE TRADE AGREEMENT

The Canada-Ukraine FTA ("CUFTA") was concluded by Canada in 2016 and entered into force in August 2017.[274] It is seen as a 'milestone' agreement, and is part of a larger Government of Canada program to support for "democratic reforms, human rights and peace in Ukraine" and "is part of Canada's continued commitment to supporting Ukraine's efforts to build a

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http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/index.aspx?lang=eng.

[268] Government of Canada. "Canada-Colombia Free Trade Agreement", 18 April 2017, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/index.aspx?lang=eng; Government of Canada. "Canada-Jordan Free Trade Agreement", 24 November 2016, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/jordan-jordanie/fta-ale/index.aspx?lang=eng; Government of Canada. "Canada-Panama Free Trade Agreement", 24 November 2016, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/panama/fta-ale/index.aspx?lang=eng; Government of Canada. "Canada-Honduras Free Trade Agreement", Government of Canada, 23 November 2016, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/honduras/fta-ale/index.aspx?lang=eng.

[269] Morin, Jean-Frédéric, Laura Mordelet, and Myriam Rochette. "Since NAFTA, Canada and the US have included the largest number, worldwide, of environmental clauses in their trade agreements", Policy Options, 1 August 2017, available at: http://policyoptions.irpp.org/magazines/august-2017/the-environment-in-canadian-trade-agreements/; Bryden, Joan, and Joanna Smith. "Canada pushes inclusion of strong, progressive labour standards in NAFTA", CBC News, 26 September 2017, available at: http://www.cbc.ca/news/politics/nafta-labour-dias-union-1.4307099.

[270] Government of Canada. "Canada-Peru Free Trade Agreement", 17 March 2017, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/index.aspx?lang=eng; Government of Canada. "Canada-Peru Free Trade Agreement", 17 March 2017, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/index.aspx?lang=eng.

[271] Nash, Chelsea. "Chinese ambassador says human rights and democracy shouldn't factor in trade deal," Hill Times, 5 April 2017, available at: https://www.hilltimes.com/2017/04/05/chinese-ambassador-shaye-lu-says-human-rights-democracy-nothing-trade-deal/102010; Wall Street Journal. "China's Foreign Minister Berates Canadian Journalist", WSJ, 2 June 2016, available at: https://www.wsj.com/video/china-foreign-minister-berates-canadian-journalist/C9C79FA7-7E29-418E-9534-1976259059F6.html; Blanchfield, Mike. "Chinese foreign minister berates Canadian reporter for asking about human rights", CBC News, 1 June 2016, available at: http://www.cbc.ca/news/politics/chinese-foreign-minister-berates-reporter-1.3611510.

[272] Nash, Chelsea. "Chinese ambassador says human rights and democracy shouldn't factor in trade deal," Hill Times, 5 April 2017, available at: https://www.hilltimes.com/2017/04/05/chinese-ambassador-shaye-lu-says-human-rights-democracy-nothing-trade-deal/102010; Wall Street Journal. "China's Foreign Minister Berates Canadian Journalist", WSJ, 2 June 2016, available at: https://www.wsj.com/video/china-foreign-minister-berates-canadian-journalist/C9C79FA7-7E29-418E-9534-1976259059F6.html; Blanchfield, Mike. "Chinese foreign minister berates Canadian reporter for asking about human rights", CBC News, 1 June 2016, available at: http://www.cbc.ca/news/politics/chinese-foreign-minister-berates-reporter-1.3611510.

[273] Nash, Chelsea. "Chinese ambassador says human rights and democracy shouldn't factor in trade deal," Hill Times, 5 April 2017, available at: https://www.hilltimes.com/2017/04/05/chinese-ambassador-shaye-lu-says-human-rights-democracy-nothing-trade-deal/102010; Wall Street Journal. "China's Foreign Minister Berates Canadian Journalist", WSJ, 2 June 2016, available at: https://www.wsj.com/video/china-foreign-minister-berates-canadian-journalist/C9C79FA7-7E29-418E-9534-1976259059F6.html; Blanchfield, Mike. "Chinese foreign minister berates Canadian reporter for asking about human rights", CBC News, 1 June 2016, available at: http://www.cbc.ca/news/politics/chinese-foreign-minister-berates-reporter-1.3611510.

[274] Canada-Ukraine Trade & Investment Support Project. "CUFTA in 10 minutes", 14 March 2017, available at: https://cutisproject.org/en/publications/cufta-in-10-min/; Interfax-Ukraine. "Ukraine-Canada Free Trade Agreement enters force August 1", 29 June 2017, Kyiv Post, available at: https://www.kyivpost.com/ukraine-politics/ukraine-canada-free-trade-agreement-enters-force-august-1.html; Government of Canada. "Text of the Canada-Ukraine Free trade agreement – Table of contents", 15 September 2016, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ukraine/text-texte/toc-tdm.aspx?lang=eng.

stable, democratic, and prosperous country".[275] Canada could try to replicate the positive human rights language in the CUFTA in future Canadian FTAs, including one with China.

The CUFTA's Preamble is a good example of a Canadian FTA explicitly referring to 'human rights'.[276] In particular, it affirms Canada's and Ukraine's "commitment to respect the values and principles of democracy and to promote and protect human rights and fundamental freedoms as identified in the *Universal Declaration of Human Rights*".[277] This type of language is not typical in older Canadian FTAs (*i.e.*, those before 2000), let alone other countries' FTAs around the world.[278]

While Canada's FTAs typically include chapters or separate agreements on environmental and labour standards, the Government of Canada has declared that the ones negotiated in the CUFTA are particularly impressive and expansive.[279] A comparison of the table of contents for the CUFTA and another Canadian FTA that includes an environment and labour chapter, such as those listed above, demonstrates the increased level of detail in the CUFTA.[280] These chapters are now broken down into multiple sub-chapters, with the hope of establishing advanced quality regarding these two areas of trade. For example, the CUFTA includes a sub-section about the application of the FTA to the provinces of Canada with respect to environmental standards.

The negotiation process for the CUFTA evolved over time and took six rounds of negotiations, starting in 2010.[281] It is now likely that the CUFTA constitutes a new standard against which Canada's FTAs will be negotiated in the future, with detailed provisions in its environment and labour chapters, as well as strong human rights language in the Preamble. The question remains whether Canada will be able to replicate this level of language with China.

4.3.3 THE CANADA-COLOMBIA HUMAN RIGHTS AGREEMENT

The Canada-Colombia FTA ("CCOFTA") came into force in August 2011.[282] According to the Government of Canada, "Canada and Colombia enjoy good commercial and investment relations as the presence of Canadian companies, particularly in the mining, oil exploration and printing sectors, continues to grow".[283]

The CCOFTA is unique because of its associated Human Rights Agreement, upon which Canada and Colombia need to report annually. This agreement was created in the context of Harper's minority Conservative government needing Liberal support to

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[275] Trudeau, Justin. "Canada Signs Landmark Free Trade Agreement with Ukraine", Prime Minister of Canada, 11 July 2016, available at: http://pm.gc.ca/eng/news/2016/07/11/canada-signs-landmark-free-trade-agreement-ukraine; Government of Canada. "Canada reiterates support for democratic reforms, human rights and peace in Ukraine", 6 July 2017, https://www.canada.ca/en/global-affairs/news/2017/07/canada_reiterates-tessupportfordemocraticreformshumanrightsandpeacei0.html?=undefined&wbdisable=true.

[276] Government of Canada. "Text of the Canada-Ukraine Free trade agreement – Table of contents", 15 September 2016, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ukraine/text-texte/toc-tdm.aspx?lang=eng.

[277] Government of Canada. "Text of the Canada-Ukraine Free trade agreement – Table of contents", 15 September 2016, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ukraine/text-texte/toc-tdm.aspx?lang=eng.

[278] Government of Canada. "Trade and investment agreements", 26 October 2017, available at: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng.

[279] Champagne, Francois-Philippe. "Debates of Feb. 10th, 2017", House of Commons Hansard, available at: https://openparliament.ca/debates/2017/2/10/the-deputy-speaker-15/?singlepage=1.

[280] Government of Canada. "Text of the Canada-Ukraine Free trade agreement – Table of contents", 15 September 2016, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ukraine/text-texte/toc-tdm.aspx?lang=eng.

[281] Canada-Ukraine Trade & Investment Support Project. "CUFTA in 10 minutes", 14 March 2017, available at: https://cutisproject.org/en/publications/cufta-in-10-min/.

[282] Government of Canada. "Canada-Colombia Free Trade Agreement: Additional background information," Government of Canada, 18 April 2017, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/info.aspx?lang=eng.

[283] Government of Canada. "Canada-Colombia Free Trade Agreement: Additional background information," Government of Canada, 18 April 2017, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/info.aspx?lang=eng.

adopt the CCOFTA.[284] The Liberal Party insisted that Canada conduct a Human Rights Impact Assessment ("HRIA"), for which there are Guidelines from the UN.[285] In particular, Canada and Colombia have committed to publish results "only [on] the *impact* of actions taken by Canada" (emphasis added)[286] – leaving aside (apparently) the actions themselves.[287] As such, scholars have criticized Canada's associated reports, especially regarding the lack of reporting on foreign direct investment ("FDI").[288]

The two-way FDI relationship with China is significant for Canada, reaching $33 billion in 2015.[289] That same year, China became the 10th largest source of FDI in Canada, with Chinese investment in Canada continuing to increase, especially with the acquisition of several energy and mining companies.[290] Critics have pointed out that an FTA with China would not necessarily provide for a fair balance of FDI since China's economy is dominated by State-owned enterprises and there are tough restrictions on FDI in China.[291]

Canada's Minister of International Trade, François-Philippe Champagne, has explained that Canada tries to position itself as "a beacon of stability, predictability, rule-of-law, rule-based, principle-based trade, and as an inclusive nation that values diversity" in order to attract increased FDI.[292] Mr. Champagne has also pointed to Trudeau's progressive trade agenda, and its "focus on under-represented groups, like female entrepreneurs, small and medium-sized businesses", is another aspect that Canada is now focusing on "to make sure that trade is inclusive and that it can really make a tangible and positive difference in the lives of people".[293]

The UN Guidelines on HRIAs do not provide concrete examples or in-depth guidance on how to conduct these assessments.[294] HRIAs are typically used for project-specific funding and not FTAs as a whole.[295] To date, Canada and Colombia are the only countries to use the

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[284] Katz, Sheila, and Gauri Sreenivasan. "Against the Odds: Fighting Canada's Free Trade Deal With Colombia." *NACLA Report on the Americas* 43.3 (2010): 23-28, at p 26.

[285] See: OHCHR. "Report of the Special Rapporteur on the right to food, Olivier De Schutter", 19 December 2011, available at: http://www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-59-Add5_en.pdf&action=default&DefaultItemOpen=1.

[286] Government of Canada. "Text of the Canada-Ukraine Free trade agreement – Table of contents", 15 September 2016, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ukraine/text-texte/toc-tdm.aspx?lang=eng.

[287] Government of Canada. "Text of the Canada-Ukraine Free trade agreement – Table of contents", 15 September 2016, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ukraine/text-texte/toc-tdm.aspx?lang=eng.

[288] Grégoire, Etienne Roy. "Les Rapports Annuels sur les Impacts de l'ALE Canada-Colombie sur les Droits Humain au Regard des Enjeux Entourant l'Investissement Extractif en Colombie : Limites Méthodologiques, Crédibilité et Pertinence», Canadian Yearbook of Human Rights, Volume 1 (2015), pp. 19ff.

[289] Government of Canada. "Resources", 6 April 2017, available at: http://www.international.gc.ca/trade-commerce/consultations/china-chine/toolkit-outils.aspx?lang=eng.

[290] Canada China Business Council. "Canada China Relationship", available at: https://www.ccbc.com/zh-hant/research-reports-2/sectoral-research/canada-china-relationship/.

[291] See: Dobson, Wendy. "China's State-Owned Enterprises and Canada's FDI Policy." (2014); García-Herrero, Alicia, and Jianwei Xu. *How to handle state-owned enterprises in EU-China investment talks*. No. 2017/18. Bruegel Policy Contribution, 2017; Dufour, Fred. "Jack Mintz: China's state-owned enterprises will make us all weaker and poorer," Financial Post, 4 January 2018, available at: http://business.financialpost.com/opinion/jack-m-mintz-beware-the-chinese-dragon.

[292] Italian Chambers. "Selling a progressive trade agenda: A conversation with the Honourable Francois-Philippe Champagne Canada's Minister of International Trade", 2017, available at: https://www.italchambers.ca/wp-content/uploads/2017/06/Champagne.pdf.

[293] Italian Chambers. "Selling a progressive trade agenda: A conversation with the Honourable Francois-Philippe Champagne Canada's Minister of International Trade", 2017, available at: https://www.italchambers.ca/wp-content/uploads/2017/06/Champagne.pdf.

[294] OHCHR. "Report of the Special Rapporteur on the right to food, Olivier De Schutter", 19 December 2011, available at: http://www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-59-Add5_en.pdf&action=default&DefaultItemOpen=1.

[295] Nordic Trust Fund and The World Bank. "Human Rights Impact Assessments: A Review of the Literature, Differences with other forms of Assessments and Relevance for Development", February 2013, available at: http://siteresources.worldbank.org/PROJECTS/Resources/40940-1331068268558/HRIA_Web.pdf.

HRIA to assess an FTA.[296]

Some scholars have provided suggestions on ways that Canada could improve its reporting under the HRIA, mainly recommending that Canada integrate FDI-related issues into future reports so that it adequately captures the full human rights picture associated with the CCOFTA.[297]

While it is generally regarded as best-practice to include human rights language within the text of an FTA itself, having a separate human rights agreement might be a possible—and more realistic—route if the Canada-China FTA negotiations go ahead.[298] However, it is unlikely that Canada will negotiate a similar agreement for a potential Canada-China FTA given the overall negative response to its annual HRIA reports, although it was a creative approach to try to further incorporate human rights into FTAs.[299]

4.3.4 THE CANADA-CHILE FREE TRADE AGREEMENT

The Canada-Chile FTA ("CCFTA") came into force in July 1997.[300] An Amending Agreement was signed by the Foreign Affairs Ministers of both countries on June 5, 2017 "to modernize the CCFTA" to "support an open, inclusive and progressive rules-based trading environment".[301] According to the Government of Canada, "bilateral merchandise trade has more than tripled since the Canada-Chile FTA came into force, growing to $2.4 billion in 2016,"[302] at which point "the stock of Canadian investment in Chile was $16.5 billion, making Chile the top direct investment destination in South and Central America".[303]

In particular, Appendix II – Chapter N *bis*–Trade and Gender, was a first of its kind gender chapter in a FTA for a G7/G20 country.[304] This would be an important precedent for Canada to try to integrate into a potential FTA with China, especially given the current Trudeau administration's feminist trade agenda.[305]

4.4 LESSONS LEARNED FROM CANADA'S HUMAN RIGHTS ENGAGEMENT MECHANISMS WITH CHINA

One potential human rights issue implicated in a Canada-China FTA are the concerns regarding Chinese

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[296] Embassy of Canada to Colombia. "Annual Report Pursuant to the Agreement concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia," Government of Canada, 17 May 2017, available at: http://www.canadainternational.gc.ca/colombia-colombie/bilateral_relations_bilaterales/rep-hrft-co_2016-dple-rapp.aspx?lang=eng.

[297] Grégoire, Etienne Roy. "Les Rapports Annuels sur les Impacts de l'ALE Canada-Colombie sur les Droits Humain au Regard des Enjeux Entourant l'Investissement Extractif en Colombie : Limites Méthodologiques, Crédibilité et Pertinence».

[298] Hachez, Nicolas. "Essential elements' clauses in EU Trade Agreements: making trade work in a way that helps Human Rights?." *Cuadernos europeos de Deusto* 53 (2015): 81-106; Cardinal, Pierre-Alexandre. «Labour Rights and the Canada/Columbia FTA: A Fundamentally Flawed Culture.» *Rev. Quebecoise de Droit Int'l* 26 (2014): 1.

[299] Harrison, James. "Conducting a human rights impact assessment on the Canada-Colombia free trade agreement: Key issues." *Canada's Coalition to End Global Poverty* (2009); Harrison, James. «Human rights measurement: reflections on the current practice and future potential of human rights impact assessment.» *Journal of Human Rights Practice* 3.2 (2011): 162-187; Rochlin, James. «A golden opportunity lost: Canada›s human rights impact assessment and the free trade agreement with Colombia.» *The International Journal of Human Rights* 18.4-5 (2014): 545-566.

[300] Government of Canada. "Canada-Chile Free Trade Agreement: Additional background information," Government of Canada, 26 May 2017, available at: https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/info.aspx?lang=eng.

[301] Government of Canada. "Canada-Chile Free Trade Agreement: Additional background information," Government of Canada, 26 May 2017, available at: https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/info.aspx?lang=eng.

[302] Government of Canada. "Canada-Chile Free Trade Agreement: Additional background information," Government of Canada, 26 May 2017, available at: https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/info.aspx?lang=eng.

[303] Government of Canada. "Canada-Chile Free Trade Agreement: Additional background information," Government of Canada, 26 May 2017, available at: https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/info.aspx?lang=eng.

[304] Government of Canada. "Highlighting gender in trade: Working at the cutting edge of trade and gender in the Canada-Chile FTA", Government of Canada, 9 January 2018, available at: https://www.international.gc.ca/gac-amc/publications/blueprint_2020-objectif_2020/highlighting_gender_trade-mettre_accent_sur_genre_commerce.aspx?lang=eng.

[305] Government of Canada. "Canada's Feminist International Assistance Policy", Government of Canada, 21 December 2018, available at: https://international.gc.ca/world-monde/issues_development-enjeux_developpement/priorities-priorites/policy-politique.aspx?lang=eng.

FDI in Canada and the potential human rights issues that could arise from this Chinese investment.[306] For example, former Canadian Trade Minister, David Emerson, has stated that there are a few concerns regarding FDI in general, and from China in particular.[307] First, the fact that China has a State capitalist economy, with a significant amount of State ownership and intervention, means it could potentially cause unfair competition in the Canadian market.[308] Second, Mr. Emerson noted the "great debate about Dutch disease in Canada", which he thinks is misplaced.[309] There is a concern that FDI in Canada's natural resources could hurt the competitiveness of non-resource sectors in the Canadian economy and negatively affect Canada's exchange rate.[310] Mr. Emerson argues, however, that Canada could develop a labour-cost inflation if it does not manage its natural resources properly.[311] Therefore, Canada needs to have a proper regulatory framework in place so that FDI is "followed by corporate behaviour that is consistent with Canadian laws and fundamental objectives".[312]

Trudeau's four-day visit to China in December 2017 raised questions of the chances of success of a Canada-China FTA and the ability of including human rights into such an FTA.[313] During this visit, Prime Minister Trudeau raised environmental issues, gender rights, as well as labour standards concerns.[314] However, he was met with a lacklustre response from China, and media outlets also chastised Prime Minister Trudeau for failing to move forward with an FTA with China during his December 2017 visit.[315] In fact, many analysts understood the lack of a launch of FTA negotiations during this trip as China's rebuke to Canada's

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[306] Grant, Michael W. "Fear the Dragon? Chinese Foreign Direct Investment in Canada." (2012).

[307] Dawn Calleja. "Foreign investment in Canada: opportunity + danger", The Globe and Mail, 28 March 2013, available at: https://beta.theglobeandmail.com/report-on-business/economy/canada-competes/foreign-investment-in-canada-opportunity-danger/article10453367/?ref=http://www.theglobeandmail.com&.

[308] See: Dobson, Wendy. "China's State-Owned Enterprises and Canada's FDI Policy." (2014); García-Herrero, Alicia, and Jianwei Xu. *How to handle state-owned enterprises in EU-China investment talks*. No. 2017/18. Bruegel Policy Contribution, 2017.

[309] To Note: Dutch Disease is the negative impact on an economy of anything that gives rise to a sharp inflow of foreign currency, such as the discovery of large oil reserves. The currency inflows lead to currency appreciation, making the country's other products less price competitive on the export market. Dawn Calleja. "Foreign investment in Canada: opportunity + danger", The Globe and Mail, 28 March 2013, available at: https://beta.theglobeandmail.com/report-on-business/economy/canada-competes/foreign-investment-in-canada-opportunity-danger/article10453367/?ref=http://www.theglobeandmail.com&.

[310] Drummon, Don, and Kyle Clemens, "The Impact on Canada of the Rise of the Chinese Economy: Good, Bad or Indifferent?", Queen's University Policy Studies, 2014, available at: https://qspace.library.queensu.ca/bitstream/handle/1974/14843/Drummond_et_al_2014_Impact_on_Canada.pdf?sequence=1.

[311] Dawn Calleja. "Foreign investment in Canada: opportunity + danger", The Globe and Mail, 28 March 2013, available at: https://beta.theglobeandmail.com/report-on-business/economy/canada-competes/foreign-investment-in-canada-opportunity-danger/article10453367/?ref=http://www.theglobeandmail.com&.

[312] Calleja, Dawn. "Foreign investment in Canada: opportunity + danger", The Globe and Mail, 28 March 2013, available at: https://beta.theglobeandmail.com/report-on-business/economy/canada-competes/foreign-investment-in-canada-opportunity-danger/article10453367/?ref=http://www.theglobeandmail.com&.

[313] CBC Radio. "Trudeau's 'progressive' trade agenda with China seen as arrogant, say critics", CBC Radio, 8 December 2017, available at: http://www.cbc.ca/radio/thecurrent/the-current-for-december-08-2017-the-current-1.4437902/trudeau-s-progressive-trade-agenda-with-china-seen-as-arrogant-say-critics-1.4438225; Hall, Chris. "Trudeau says visit to China produced results despite failing to advance trade talks", CBC News, 7 December 2017, available at: http://www.cbc.ca/news/world/trudeau-china-1.4436779.

[314] CBC Radio. "Trudeau's 'progressive' trade agenda with China seen as arrogant, say critics", CBC Radio, 8 December 2017, available at: http://www.cbc.ca/radio/thecurrent/the-current-for-december-08-2017-the-current-1.4437902/trudeau-s-progressive-trade-agenda-with-china-seen-as-arrogant-say-critics-1.4438225; Hall, Chris. "Trudeau says visit to China produced results despite failing to advance trade talks", CBC News, 7 December 2017, available at: http://www.cbc.ca/news/world/trudeau-china-1.4436779.

[315] Gao, Charlotte. "Did Canada's Trudeau Really Fail in His Trip to China?", The Diplomat, 8 December 2017, available at: https://thediplomat.com/2017/12/did-canadas-trudeau-really-fail-in-his-trip-to-china/; Kilpatrick, Nathan. "On Trudeau's rocky China trip, Communist newspaper lashes out at Canadian media", The Globe and Mail, 6 December 2017, available at: https://www.theglobeandmail.com/news/world/on-trudeaus-rocky-china-trip-communist-newspaper-lashes-out-at-canadian-media/article37220194/; Ballingall, Alex. "Trudeau fails to come back from China with the trade talks he wanted", The Star, 7 December 2017, available at: https://www.thestar.com/news/canada/2017/12/07/trudeau-fails-to-come-back-from-china-with-the-trade-talks-he-wanted.html; Blanchfield, Mike. "Canada-China delay launch of trade talks as Trudeau continues state visit". CTV News, 4 December 2017, available at: https://www.ctvnews.ca/business/canada-china-delay-launch-of-trade-talks-as-trudeau-continues-state-visit-1.3705774.

progressive trade agenda.[316] However, this is not necessarily completely accurate.[317]

Subsequently, an op-ed by the Chinese Ambassador called for negotiation of an FTA but said it should not be encumbered by superfluous issues, namely human rights considerations.[318] This demonstrates how China was hanging tough on Xi Jinping's rejection of the three rights areas that Trudeau had raised, of environmental, gender and labour rights.[319] The stronger, more aggressive China, under President Xi Jinping in the past several years appears to be consistently rejecting any outside pressure on human rights.[320]

This raises other important questions about the bilateral nature of FDIs in the current international context. For example, Saudi Arabia does not adhere to the ILO's convention protecting workers' rights.[321] These ILO frameworks, in turn, will affect Saudi Arabia's FDI.[322] This demonstrates how multilateral agreements can affect bilateral ones.

Further, some scholars argue that a Canada-China FTA could make Canada "a more instrumental component of China's political development".[323] Such views are connected to the criticisms about the China-Canada FIPA negotiated during the Harper era, which many see as an instrument that makes it more difficult for Canada to enforce environmental, energy and financial policies.[324] Therefore, with an FTA, there is the belief that Canada has the ability to use the negotiations and its diplomatic channels for a positive effect on China's human rights situation.[325]

That being said, the main concern with regard to free trade with China continue to be Chinese nontariff barriers, China's coercive and covert transfer of proprietary technologies, as well as China's desire to remove restrictions on transfer of classified technologies and remove restrictions on Chinese State investment in key Canadian sectors as part of a comprehensive "strategic partnership."[326]

Overall, if Canada decides to engage in FTA negotiations with China, and if Canada is serious about improving the human rights situation in China, then it should note these concerns, prepare itself for intense negotiations with China, and use as many of the above-mentioned options available to it.[327] Canada should ultimately think long-term and engage in diplomatic and bilateral efforts,

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[316] Canadian Press. "China wants no 'progressive' elements in any free trade deal with Canada: envoy", iPolitics, 10 April 2018, available at: https://ipolitics.ca/2018/04/10/china-wants-no-progressive-elements-in-any-free-trade-deal-with-canada-envoy/.

[317] Gao, Charlotte. "Did Canada's Trudeau Really Fail in His Trip to China?", The Diplomat, 8 December.

[318] Starr, Katharine. "Chinese ambassador calls for Canada's cooperation in U.S. trade fight", CBC News, 6 April 2018, available at: https://www.cbc.ca/news/politics/chinese-ambassador-canada-trade-1.4609078.

[319] Starr, Katharine. "Chinese ambassador calls for Canada's cooperation in U.S. trade fight", CBC News, 6 April 2018, available at: https://www.cbc.ca/news/politics/chinese-ambassador-canada-trade-1.4609078.

[320] Fewsmight, Joseph. "The 19th Party Congress: Ringing in Xi Jinping's New Age", 2018, China Leadership Monitor, No.55, available at: https://www.hoover.org/sites/default/files/research/docs/clm55-jf-final.pdf.

[321] Chaffey, Dave. *E-business and E-commerce Management: Strategy, Implementation and Practice*. Pearson Education, 2007, p 49.

[322] See: *Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87); Chaffey, Dave. *E-business and E-commerce Management: Strategy, Implementation and Practice*. Pearson Education, 2007, p 49.

[323] Lacharite, Jason R, and Caroline M Clarke "Human Rights and a Canada-China free trade agreement", 1 February 2010, Politics Options, available at: http://policyoptions.irpp.org/magazines/after-copenhagen/human-rights-and-a-canada-china-free-trade-agreement/.

[324] Tencer, Daniel. "Canada-China Foreign Investment Promotion And Protection Agreement 'A Corporate Rights Pact,' Council Of Canadians Says." *The Huffington Post* 1 (2012).

[325] Lacharite, Jason R, and Caroline M Clarke "Human Rights and a Canada-China free trade agreement", 1 February 2010, Politics Options, available at: http://policyoptions.irpp.org/magazines/after-copenhagen/human-rights-and-a-canada-china-free-trade-agreement/.

[326] Burton, Charles, and Stephen Noakes. "Forging Free Trade with China: The Maple Leaf and the Silver Fern", Pacific Affairs 89, no. 4 (December 2016); The White House. "How China's Economic Aggression Threatens the Technologies and Intellectual Property of the United States and the World", White House Office of Trade and Manufacturing Policy, June 2018.

[327] The Canadian Chamber of Commerce. "Canada's Business Checklist for Trade Negotiations with China," The Canadian Chamber of Commerce, September 2017; Sears, Robin V. "Canada is playing the long game with China," The Star Opinion, 10 December 2017, available at:

in addition to negotiating an FTA, in the hopes that the human rights improvements that have happened in China over the past thirty years can be further built upon.[328]

5. CONCLUSION

There are many instruments that establish objective ground upon which to approach human rights, including: the *UN Charter*, specifically the Preamble, Articles 1(3), 51 and 55, the elaborate body of PIL articulated at the UN, notably the nine core international human rights instruments and the oft-quoted "international bill of human rights". While these are enforceable to varying degrees, based on Canada's and China's ratification status for treaties and official statements vis-à-vis other instruments such as UN declarations and resolutions, they provide existing shared norms and standards when examining human rights with regard to a potential Canada-China FTA. It is also arguably beneficial to include human rights language in a bilateral FTA since this involves only two States with a specific shared interest and does incur the complications or lead, arguably, to the lower common denominator of international agreements negotiated through multilateral organisations. Perhaps more importantly, the character of a bilateral trade agreement–with the powerful interests at play–may be more likely to compel the parties to comply with their undertakings for fear of the costs of failure to do so. From this perspective, there is an important role for a possible Canada-China FTA and human rights.

The rule of law presents some uncertainty in contemporary China, and there continue to be a range of serious issues regarding human rights in China. This paper has focused on three areas of concern from a Canadian perspective with a view to explore the possibility of including them in a future Canada-China FTA: (i) labour rights; (ii) the environment and human rights; and, (iii) the protection of human rights defenders. While there have been significant advances in these human rights areas in China, there continues to be need for improvement in general and specifically to satisfy Canadian concerns. The question remains whether it would be helpful to focus on these areas in an FTA to help support further improvements in China and facilitate the mutually beneficial and desirable trade.

Canada has engaged with China on human rights since the 1970s. This has taken place through bilateral mechanisms, such as bilateral dialogues, as well as in multilateral contexts. Canada also engages with China through diplomatic means, directly through meetings and phone calls as well as in multilateral fora. There are questions of how effective diplomatic efforts are in terms of effecting change on the human rights situation in China. Prime Minister Trudeau's recent visit to China also raised questions of whether human rights language could be included in a Canada-China FTA, if ever this process is commenced.

Both Canada and China have trade obligations under the WTO regime. Trade with China has been important for Canada over the past few decades. Although it has been important for the current Trudeau and recent Harper administrations, they have approached it differently. Trudeau uses a more diplomatic approach, wanting to create a bridge with China, whereas Harper had a more aggressive approach.

If Canada-China FTA negotiations proceed, there are a number of lessons to be learned from Chinese FTAs, including: (i) the China-Australia FTA, which includes labour protections included in this 'living document'; (ii) the China-New Zealand FTA and update, since New Zealand is a similar country to Canada and managed to include significant economic benefits; and, (iii) the China-Switzerland FTA, which includes stronger human rights language in the Preamble. Lessons learned from Canada's FTAs should also be incorporate, including those from the following: (i) Canada's FTA 'template', which includes human rights language in the Preamble, and chapters on labour and environment standards; (ii) the Canada-Ukraine FTA, which is seen as the strongest Canadian example of human rights protections in an FTA; (iii) the Canada-Colombia Human Rights Agreement, which included a Human Rights Reporting mechanism which will be unlikely to be replicated given the controversy over it; and, (iv) the gender chapter in the Canada-Chile FTA. Given the Trudeau administration's "progressive trade agenda" explained in this paper, it is yet to be seen whether, and how, these lessons learned would be implemented within this context.

While there are many options available for Canada to include human rights in a concrete way, such as

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https://www.thestar.com/opinion/star-columnists/2017/12/10/canada-is-playing-the-long-game-with-china.html; Majumdar, Shuvaloy. "China: The Dragon at the Door," Inside Policy, October 2017, available at: https://macdonaldlaurier.ca/files/pdf/MLI_201710_OCTOBER_InsidePolicy%20_WEB.pdf.

[328] Lacharite, Jason R, and Caroline M Clarke "Human Rights and a Canada-China free trade agreement", 1 February 2010, Politics Options, available at: http://policyoptions.irpp.org/magazines/after-copenhagen/human-rights-and-a-canada-china-free-trade-agreement/; Greenspon, Edward, and Kevin Lynch. "Diversification Not Dependence: A Made-In Canada China Strategy", Public Policy Forum, October 2018.

including human rights language in the final version of a Canada-China FTA, creating a stand-alone human rights agreement, or conducting a human rights impact assessment, the most likely approach is that of diplomatic efforts and investments. The question remains whether this would be enough. There is evidence that suggests that a diplomatic approach is the most effective way to include human rights language in an FTA, using Canada's position in multilateral organizations, such as the WTO, working towards improving human rights in China. That being said, there are also questions of whether this process could provide both economic and social benefits to both nations while also improving human rights standards.

BIBLIOGRAPHY

PRIMARY SOURCES

International Instruments

Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

Universal Declaration of Human Rights, 1948.

United Nations. "Annex". UN, available at: http://www.gcc.ca/pdf/INT000000019b.pdf.

United Nations Committee on Economic, Social and Cultural Rights. "Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China", 13 June 2014, E/C.12/CHN/CO/2.

United Nations General Assembly. *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: China*. 2013.

United Nations General Assembly (UNGA). *Resolution on Human Rights, Democracy and the Rule of Law*, 19 April 2012, A/HRC/RES/19/36, available at: daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G12/131/66/PDF/G1213166.pdf?OpenElement.

United Nations Office of the High Commissioner for Human Rights. "The Core International Human Rights Instruments and the monitoring bodies". UNOHCHR. Online: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>.

United Nations Treaty Collection. "Chapter IV: Human Rights, 3. International Covenant on Economic, Social and Cultural Rights", United Nations, updated as at 26 January 2019, available at: https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-3&chapter=4&clang=_en#6.

Canadian Domestic Instruments

Canadian Charter of Rights and Freedoms, 1982.

Chinese Domestic Instruments

National Security Law of the People's Republic of China, 2015.

NPC. "Labour Contract Law of the People's Republic of China". NPC, 2008, available at: http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471106.htm.

PRC. "Labour Law of the People's Republic of China". PRC, 1994, available at: https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/37357/108026/F1930029246/CHN37357%20Eng.pdf.

Other Domestic Instruments

"Text of the New Zealand-China FTA Agreement," Government of New Zealand, available at: https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/nz-china-free-trade-agreement/text-of-the-new-zealand-china-fta-agreement/.

SECONDARY SOURCES

Books

Berrah, Noureddine. *Sustainable energy in China: the closing window of opportunity*. World Bank Publications, 2007.

Brown, Gordon (ed.). “The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World”, Cambridge: Open Book Publishers, 2016 (generated 27 January 2019), available at: http://books.openedition.org/obp/3016.

Chaffey, Dave. *E-business and E-commerce Management: Strategy, Implementation and Practice*. Pearson Education, 2007.

Dicey, AV. *Introduction to the Study of the Law of the Constitution* (MacMillan & Co. Ltd. 1885).

James, Harold. *International monetary cooperation since Bretton Woods*. International Monetary Fund, 1996.

Jiang, Wenran. “Seeking a strategic vision for Canada-China relations.” International Journal 64.4 (2009).

Vincent, Raymond John. *Human rights and international relations*. Cambridge University Press, 1986.

Wan, Ming. *Human rights in Chinese foreign relations: defining and defending national interests*. University of Pennsylvania Press, 2001.

Wang, Heng, An Assessment of the ChAFTA and Its Implications: A Work-in-Progress Type FTA with Selective Innovations? (January 30, 2017). Colin Picker, Heng Wang and Weihuan Zhou (eds), The China Australia Free Trade Agreement: A 21st Century Model (Hart Publishing), 2018. Available at SSRN: https://ssrn.com/abstract=2960440.

Xu, Gregory. “Forced Labor in China”. 1996.

Journal Articles

Arewa, Olufunmilayo B. "TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks." *Marq. Intell. Prop. L. Rev.* 10 (2006).

Bartels, Lorand. "The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements." (2014).

Blanton, Shannon Lindsey, and Robert G. Blanton. "What attracts foreign investors? An examination of human rights and foreign direct investment." *The Journal of Politics* 69.1 (2007): 143-155.

Bradley, Curtis A., and Jack L. Goldsmith. "Treaties, human rights, and conditional consent." *University of Pennsylvania Law Review* 149.2 (2000): 399-468.

Cao, Huhua, and Vivienne Poy. The China challenge: Sino-Canadian relations in the 21st century. University of Ottawa Press/Les Presses de l’Université d’Ottawa, 2015.

Cardinal, Pierre-Alexandre. "Labour Rights and the Canada/Columbia FTA: A Fundamentally Flawed Culture." *Rev. Quebecoise de Droit Int'l* 26 (2014).

CBA International Initiatives, “Rule of Law: Legal Aid for Marginalized Groups in China”, Canadian Bar Association, accessed 26 January 2019, available at: http://cba.org/cba-international-initiatives/our-projects/past-projects/china/rule-of-law-legal-aid-for-marginalized-groups-in-c.

Chan, Anita. "Labor standards and human rights: The case of Chinese workers under market socialism." *Human Rights Quarterly* 20.4 (1998): 886-904.

Chen, F. "Individual Rights and Collective Rights: Labor's Predicament in China." *Communist and Post-Communist Studies* 40.1 (2007): 59-79. Web. 21 July 2017.

China Labour Bulletin. “China Ratifies ICESCR: A Change in Sight or More of the Same?”, China Labour Bulletin, 1 March 2001, available at: https://clb.org.hk/content/china-ratifies-icescr-change-sight-or-more-same.

Cottier, Thomas. "Trade and Human Rights: a relationship to discover." *Journal of International Economic Law* 5.1 (2002): 111-132.

Drummon, Don, and Kyle Clemens, “The Impact on Canada of the Rise of the Chinese Economy: Good, Bad or Indifferent?”, Queen’s University Policy Studies, 2014, available at: https://qspace.library.queensu.ca/bitstream/handle/1974/14843/Drummond_et_al_2014_Impact_on_Canada.pdf?sequence=1.

Fu, Hua Ling, and Richard Cullen. "National security law in China." *Colum. J. Transnat'l L.* 34 (1996): 449.

Gantz, David A. “The United States-Mexico- Canada Agreement: Overview and Analysis”, Rice University’s Baker Institute for Public Policy, 11 December 2018; Executive Office of the President. “Agreement between the United States of America, the United Mexican States, and Canada Text”, 30 November 2018, available at: https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.

García-Herrero, Alicia, and Jianwei Xu. *How to handle state-owned enterprises in EU-China investment talks*. No. 2017/18. Bruegel Policy Contribution, 2017.

Garnaut, John. “How China Interferes in Australia: And How Democracies Can Push Back”, Foreign Affairs, 9 March 2018, available at: https://www.foreignaffairs.com/articles/china/2018-03-09/how-china-interferes-australia.

Gowa, Joanne, and Soo Yeon Kim. "An exclusive country club: the effects of the GATT on trade, 1950–94." *World Politics* 57.4 (2005): 453-478.

Grant, Michael W. "Fear the Dragon? Chinese Foreign Direct Investment in Canada." (2012).

Grégoire, Etienne Roy. “Les Rapports Annuels sur les Impacts de l’ALE Canada-Colombie sur les Droits Humain au Regard des Enjeux Entourant l’Investissement Extractif en Colombie : Limites Méthodologiques, Crédibilité et Pertinence", Canadian Yearbook of Human Rights, Volume 1 (2015), pp. 19ff.

Hachez, Nicolas. "Essential elements' clauses in EU Trade Agreements: making trade work in a way that helps Human Rights?." *Cuadernos europeos de Deusto* 53 (2015): 81-106.

Hafner-Burton, Emilie M. F*orced to be good: Why trade agreements boost human rights*. Cornell University Press, 2013.

Hamilton, Clive. “Australia's Fight Against Chinese Political Interference: What Its New Laws Will Do”, Foreign Affairs, 26 July 2018, available at: https://www.foreignaffairs.com/articles/australia/2018-07-26/australias-fight-against-chinese-political-interference.

Harrison, James. "Human rights measurement: reflections on the current practice and future potential of human rights impact assessment." *Journal of Human Rights Practice* 3.2 (2011): 162-187.

Huang, H. F. "*The China Environment Yearbook.Volume 5, State of Change: Environmental Governance and Citizens' Rights* (review)." *China Review International*, vol. 18 no. 2, 2011, pp. 31-45.

Hudec, Robert E. "The role of the GATT Secretariat in the evolution of the WTO Dispute Settlement Procedure." *The Uruguay Round and Beyond: Essays in Honour of Arthur Dunkel* (1998): 101-120.

Katz, Sheila, and Gauri Sreenivasan. "Against the Odds: Fighting Canada's Free Trade Deal With Colombia." *NACLA Report on the Americas* 43.3 (2010): 23-28.

Lacharite, Jason R, and Caroline M Clarke "Human Rights and a Canada-China free trade agreement", 1 February 2010, Politics Options, available at: http://policyoptions.irpp.org/magazines/after-copenhagen/human-rights-and-a-canada-china-free-trade-agreement/.

Leece, David. "Towards a new American isolationism?." *United Service* 68.1 (2017).

Lepillez, Karine. "The Dark Side of Labor in China", *Human Rights & Human Welfare: An Online Journal of Academic Literature Review* (2008).

Ma, Ngok. "Civil society in self-defense: the struggle against national security legislation in Hong Kong." *Journal of Contemporary China* 14.44 (2005): 465-482.

Manthorpe, Jonathan. "From Down Under, a warning on the perils of getting cozy with China", 29 March 2017, iPolitics Insights, available at: http://ipolitics.ca/2017/03/29/from-down-under-a-warning-on-the-downside-of-getting-cozy-with-china/.

Ngok, Kinglun. "The Changes of Chinese Labor Policy and Labor Legislation in the Context of Market Transition." *International Labor and Working Class History* 73.1 (2008): 45-64. Web. 21 July 2017

Nikotina, Alex. "Do the rewards outweigh the risks when it comes to trade with China?" Trade Ready – Blog for International Trade Experts, 29 January 2016, available at: http://www.tradeready.ca/2016/trade-takeaways/do-the-rewards-outweigh-the-risks-when-it-comes-to-trade-with-china/.

Peterson, Luke Eric, and Kevin R. Gray. "International human rights in bilateral investment treaties and in investment treaty arbitration." *International Institute for Sustainable Development (IISD), Winnipeg* (2003).

Potter, Pitman B. "Legal reform in China: institutions, culture, and selective adaptation." *Law & Social Inquiry* 29.2 (2004): 465-495.

Potter, Simon V., John W. Boscariol, Martha Harrison, Robert Glasgow, Carmen Francis, Sarah Ferguson and Geneviève St-Cyr Larkin. "Canada: United States-Mexico-Canada Trade Agreement: After A Year, New Terms Have Been Agreed Upon To Replace NAFTA", McCarthy Tétrault LLP, 5 October 2018, available at: http://www.mondaq.com/canada/x/742774/international+trade+investment/United+StatesMexicoCanada+Trade+Agreement+After+A+Year+New+Terms+Have+Been+Agreed+Upon+To+Replace+NAFTA.

Qi, Xiaoying, et al. "China's Road to the Construction of Labor Rights." *Journal of Sociology* 52.1 (2016): 24-38. Web. 21 July 2017.

Raworth, Kate. "Trading away our rights: Women working in global supply chains." *Oxfam Policy and Practice: Private Sector* 1.1 (2004): 1-52.

Ruggie, John Gerard. "Business and human rights: the evolving international agenda." *American Journal of International Law* 101.4 (2007): 819-840.

Salcedo, Juan Antonio Carrillo. "Reflections on the Existence of a Hierarchy of Norms in International Law." *Eur. J. Int'l L.* 8 (1997): 583.

Sceats, Sonya, and Shaun Breslin. *China and the international human rights system*. Chatham House, The Royal

Institute of International Affairs, 2012.

Schuman, Sara, and Alvin Lin. "China's Renewable Energy Law and its impact on renewable power in China: Progress, challenges and recommendations for improving implementation." *Energy policy* 51 (2012): 89-109.

Shahnavaz, Houshang. "Workplace injuries in the developing countries." *Ergonomics* 30.2 (1987): 397-40.4

Shealy, Malcolm, and James P. Dorian. "Growing Chinese coal use: dramatic resource and environmental implications." *Energy Policy* 38.5 (2010): 2116-2122.

Van Harten, G. (2014). The Canada–China FIPPA: Its Uniqueness and Non-Reciprocity. *Canadian Yearbook of International Law/Annuaire Canadien De Droit International*, 51, 3-55.

Velluti, Samantha. "The promotion and integration of human rights in EU external trade relations." *Utrecht J. Int'l & Eur. L.*32 (2016).

Wachman, Alan M. "Does the diplomacy of shame promote human rights in China?." *Third World Quarterly* 22.2 (2001): 257-281.

Yu, Xiaomin. "Impacts of corporate code of conduct on labor standards: A case study of Reebok's athletic footwear supplier factory in China." *Journal of Business Ethics* 81.3 (2008): 513-529.

Online Newspaper Articles

Apostolu, Nikolia. "China's economic lifeline for Greece tangles political relations with EU", Washington Times, 5 March 2018, available at: https://www.washingtontimes.com/news/2018/mar/5/chinas-investment-greece-tangles-europe-relations/.

Ballingall, Alex. "Trudeau fails to come back from China with the trade talks he wanted". The Star, 7 December 2017, available at: https://www.thestar.com/news/canada/2017/12/07/trudeau-fails-to-come-back-from-china-with-the-trade-talks-he-wanted.html.

Barria, Carlos. "Canada joins China-backed Asian infrastructure bank". The Globe and Mail, 23 March 2017, available at: https://www.theglobeandmail.com/report-on-business/international-business/asian-pacific-business/canada-joins-china-backed-asian-infrastructure-bank/article34393706/.

BBC. "Australia and New Zealand to pursue 'TPP 12 minus one'" 24 January 2017, available at: http://www.bbc.com/news/business-38725807.

BBC. "Robert Schellenberg case: China accuses Canada of 'double standards'", BBC, 16 January 2019, available at: https://www.bbc.com/news/world-asia-china-46874922; McCuaig-Johnston, Margaret. "China's on the brink of losing some of its best friends and collaborators", The Ottawa Citizen, 26 January 2019, available at: https://ottawacitizen.com/opinion/columnists/mccuaig-johnston-chinas-on-the-brink-of-losing-some-of-its-best-friends-and-collaborators.

BBC. "Trump executive order pulls out of TPP trade deal" 24 January 2017, available at: http://www.bbc.com/news/world-us-canada-38721056.

Blanchard, Ben. "China accuses Britain, EU of hypocrisy over Canada detention concerns", Reuters, 24 December 2018, available at: https://www.reuters.com/article/us-china-canada/china-accuses-britain-eu-of-hypocrisy-over-canada-detention-concerns-idUSKCN1ON0DN.

Blanchfield, Mike. "Canada-China delay launch of trade talks as Trudeau continues state visit". CTV News, 4 December 2017, available at: https://www.ctvnews.ca/business/canada-china-delay-launch-of-trade-talks-as-trudeau-continues-state-visit-1.3705774.

Blanchfield, Mike. “Foreign Affairs Minister Chrystia Freeland calls for Canadian ‘hard power’ amid U.S. leadership questions”, 6 June 2017, available at: http://www.torontosun.com/2017/06/06/foreign-affairs-minister-chyrstia-freeland-calls-for-canadian-hard-power-in-face-of-us-uncertainty.

Blanchfield, Mike. “Human rights in China going in ‘negative direction,’ Canadian government report says,” The Star, 12 July 2017, available at: https://www.thestar.com/news/canada/2017/07/12/human-rights-in-china-going-in-negative-direction-canadian-government-report-says.html.

Blanchfield, Mike. “Human rights on the table in any Canada-China free trade deal: McCallum”, 29 March 2017, Globe and Mail, available at: https://www.theglobeandmail.com/news/politics/human-rights-on-the-table-in-any-canada-china-free-trade-deal-mccallum/article34480066/.

Blatchford, Andy. “Trudeau Lectures China on Human Rights On Shanghai Stage”, 1 September 2016, Huffington Post, available at: http://www.huffingtonpost.ca/2016/09/01/trudeau-china-human-rights-beijing_n_11818008.html

Blatchford, Andy. “Trudeau Tells Chinese Leaders That Canada's Human Rights Record Not Perfect, Either”, 6 September 2016, Huffington Post, available at: http://www.huffingtonpost.ca/2016/09/06/trudeau-china-human-rights-hong-kong_n_11873422.html.

Bryden, Joan, and Joanna Smith. “Canada pushes inclusion of strong, progressive labour standards in NAFTA,” CBC News, 26 September 2017, available at: http://www.cbc.ca/news/politics/nafta-labour-dias-union-1.4307099.

Buckley, Chris. “Liu Xiaobo, Chinese Dissident Who Won Nobel While Jailed, Dies at 61”. NY Times, 13 July 2017, available at: https://www.nytimes.com/2017/07/13/world/asia/liu-xiaobo-dead.html.

Canadian Press. “China wants no ‘progressive’ elements in any free trade deal with Canada: envoy”, iPolitics, 10 April 2018, available at: https://ipolitics.ca/2018/04/10/china-wants-no-progressive-elements-in-any-free-trade-deal-with-canada-envoy/.

Carmichael, Kevin. “Donald Trump’s plan to overhaul NAFTA goes much deeper than a tweak”, Macleans, 18 July 2017, available at: http://www.macleans.ca/economy/economicanalysis/donald-trumps-plans-for-overhauling-nafta-go-much-deeper-than-a-tweak/

CBC News. “Canada looks to China trade deal while knowing ‘there are issues there,’ McCallum says”. CBC News, 23 September 2017, available at: http://www.cbc.ca/news/politics/john-mccallum-ambassador-free-trade-china-1.4302618.

CBC News. “China accuses Canada of having 'different' human rights standards when it comes to Meng Wanzhou arrest”, CBC News, 24 December 2018, available at: https://www.cbc.ca/news/politics/china-responds-kovrig-sparpv-wanzhou-1.4958518

CBC Radio. “Trudeau’s ‘progressive’ trade agenda with China seen as arrogant, say critics”. CBC Radio, 8 December 2017, available at: http://www.cbc.ca/radio/thecurrent/the-current-for-december-08-2017-the-current-1.4437902/trudeau-s-progressive-trade-agenda-with-china-seen-as-arrogant-say-critics-1.4438225.

China Daily. “Human rights can be manifested differently”, China Daily, 12 December 2005, available at: http://news.xinhuanet.com/english/2005-12/12/content_3908887.htm.

Clover, Charles, and Luna Lin. "China arrests labour rights activists as crackdown intensifies." *Financial Times*, 12 Jan. 2016.

Daily Star. “Canada to adopt progressive trade agenda: envoy”, 1 May 2017, available at: http://www.tfocanada.ca/news.php?item=4169&thisnewsyear=2017.

Dawn Calleja. “Foreign investment in Canada: opportunity + danger”, The Globe and Mail, 28 March 2013, available at: https://beta.theglobeandmail.com/report-on-business/economy/canada-competes/foreign-investment-in-canada-opportunity-danger/article10453367/?ref=http://www.theglobeandmail.com&.

DemDigest. “Uyghur ‘cultural genocide’? China plays long game on human rights at UN”, 21 September 2018, available at: https://www.demdigest.org/uyghur-cultural-genocide-china-plays-long-game-on-human-rights-at-un/.

Duggan, Jennifer. “China targets lawyers in new human rights crackdown”. The Guardian, 13 July 2015, available at: <https://www.theguardian.com/world/2015/jul/13/china-targets-lawyers-in-new-human-rights-crackdown>.

Dufour, Fred. “Jack Mintz: China’s state-owned enterprises will make us all weaker and poorer,” Financial Post, 4 January 2018, available at: http://business.financialpost.com/opinion/jack-m-mintz-beware-the-chinese-dragon.

Elliott, Josh K. “Group calls for free movement between Canada, UK, Australia and New Zealand,” CTV News, 7 February, available at: https://www.ctvnews.ca/canada/group-calls-for-free-movement-between-canada-u-k-australia-and-new-zealand-1.3793195.

Emmott, Robin, and Angeliki Kou-tantou. “Greece blocks EU statement on China human rights at U.N.”, Reuters, 18 June 2017, available at: https://www.reuters.com/article/us-eu-un-rights/greece-blocks-eu-statement-on-china-human-rights-at-u-n-idUSKBN1990FP.

Er-Rafia, Fatima-Zohra. “Uighurs Victims of the Economic Interests of the States”, UHRP, 30 November 2018, available at: https://uhrp.org/news/uighurs-victims-economic-interests-states.

Financial Times. “China’s contradictory war against corruption”. Financial Times, available at: https://www.ft.com/content/68e99098-b764-11e4-8807-00144feab7de.

Financial Times. “China jails human rights lawyer for 4 ½ years”, Financial Times, 29 January 2019, available at: https://www.ft.com/content/ec9e5ee4-22b0-11e9-8ce6-5db4543da632?segmentId=1b0d1dae-d474-0320-49c5-faf00f214254.

Gao, Charlotte. “Did Canada’s Trudeau Really Fail in His Trip to China?”, The Diplomat, 8 December 2017, available at: https://thediplomat.com/2017/12/did-canadas-trudeau-really-fail-in-his-trip-to-china/.

Gibillini, Nicole. “Canada didn’t give up its sovereignty with ‘non-market’ USMCA clause: Mulroney”, BNN Bloomberg, 18 October 2018, available at: https://www.bnnbloomberg.ca/canada-didn-t-give-up-its-sovereignty-with-non-market-usmca-clause-mulroney-1.1154614.

Global News. “CETA the centrepiece of Canada’s ‘progressive trade agenda’”, 15 February 2017, available at: http://globalnews.ca/video/3250732/ceta-the-centrepiece-of-canadas-progressive-trade-agenda.

Gracie, Carrie. “Liu Xiaobo: China’s most prominent dissident dies”, 13 July 2017, BBC, available at: http://www.bbc.com/news/world-asia-china-40597514.

Gruske, Carolyn. “Advancing rule of law at heart of University of Montreal’s training program for Chinese judges”, The Lawyer’s Daily, LexisNexis, 21 March 2018.

Hall, Chris. “Free trade talks with China will not yet begin”. CBC News, 4 December 2017, available at: http://www.cbc.ca/news/politics/trudeau-china-meeting-1.4431136.

Hall, Chris. “Trudeau says visit to China produced results despite failing to advance trade talks”, CBC News, 7 December 2017, available at: http://www.cbc.ca/news/world/trudeau-china-1.4436779.

Horowitz, Jason, and Liz Alderman. “Chastised by E.U., a Resentful Greece Embraces China’s Cash and Inter-ests”, NY Times, 26 August 2017, available at: https://www.nytimes.com/2017/08/26/world/europe/greece-china-piraeus-alexis-tsipras.html.

Huffington Post. “Free Trade With China? Canadian Businesses, Groups Not Sold On The Idea”. Canadian Press, 14 November 2017, available at: http://www.huffingtonpost.ca/2017/11/14/free-trade-with-china-canadian-businesses-groups-not-sold-on-the-idea_a_23276902/.

Interfax-Ukraine. “Ukraine-Canada Free Trade Agreement enters force August 1”, 29 June 2017, Kyiv Post, available at: https://www.kyivpost.com/ukraine-politics/ukraine-canada-free-trade-agreement-enters-force-august-1.html.

Kahn, Joseph, and Jim Yardley. “As China Roars, Pollution Reaches Deadly Extremes,” *New York Times*, August 26, 2007. Available at: http://www.nytimes.com/2007/08/26/world/asia/26china.html.

Kilpatrick, Nathan. “On Trudeau’s rocky China trip, Communist newspaper lashes out at Canadian media”, The Globe and Mail, 6 December 2017, available at: https://www.theglobeandmail.com/news/world/on-trudeaus-rocky-china-trip-communist-newspaper-lashes-out-at-canadian-media/article37220194/.

Levitz, Stephanie. “Canada cuts direct foreign aid to China”, The Globe and Mail, 20 March 2013, available at: https://www.theglobeandmail.com/news/politics/canada-cuts-direct-foreign-aid-to-china/article10027589/.

Ma, Alexandra. “China has started ranking citizens with a creepy 'social credit' system — here's what you can do wrong, and the embarrassing, demeaning ways they can punish you”, Business Insider, 29 October 2018, available at: https://www.businessinsider.com/china-social-credit-system-punishments-and-rewards-explained-2018-4.

Macleans. “Canada’s Fruitless Human Rights Dialogue with China” 9 July 2007, available at: http://www.thecanadianencyclopedia.ca/en/article/canadas-fruitless-human-rights-dialogue-with-china/.

Milewski, Terry. “China’s ‘microphone diplomacy’ misfires again”, 6 June 2016, CBC, available at: http://www.cbc.ca/news/politics/china-microphone-diplomacy-human-rights-1.3618929.

Nash, Chelsea. “Chinese ambassador says human rights and democracy shouldn’t factor in trade deal,” Hill Times, 5 April 2017, available at: https://www.hilltimes.com/2017/04/05/chinese-ambassador-shaye-lu-says-human-rights-democracy-nothing-trade-deal/102010.

Phillips, Tom. “Liu Xiaobo, Nobel laureate and political prisoner, dies at 61 in Chinese custody”. The Guardian, 13 July 2017, available at: <https://www.theguardian.com/world/2017/jul/13/liu-xiaobo-nobel-laureate-chinese-political-prisoner-dies-61>.

Plante, Caroline. “Montreal university says training Chinese judges helps advance human rights”, The Canadian Press, 26 February 2018, available at: https://www.ctvnews.ca/canada/montreal-university-says-training-chinese-judges-helps-advance-human-rights-1.3818792.

Reuters. “China, New Zealand pledge support for free trade to counter global protectionism” 9 February 2017, available at: http://www.reuters.com/article/us-newzealand-china-idUSKBN15P058.

Sears, Robin V. “Canada is playing the long game with China,” The Star Opinion, 10 December 2017, available at: https://www.thestar.com/opinion/star-columnists/2017/12/10/canada-is-playing-the-long-game-with-china.html.

Smith, Marie-Danielle. “Canada to decide on potential free trade agreement with China this fall, with Asia seen as counterpoint to NAFTA renegotiation”, National Post, 6 September 2017, available at: http://nationalpost.com/news/politics/canada-to-decide-on-potential-free-trade-agreement-with-china-this-fall-with-asia-seen-as-counterpoint-to-nafta-renegotiation.

Starr, Katharine. “Chinese ambassador calls for Canada's cooperation in U.S. trade fight”, CBC News, 6 April 2018, available at: https://www.cbc.ca/news/politics/chinese-ambassador-canada-trade-1.4609078

Tang, Nancy, Keith Hand, Eva Pils, Taisu Zhang, and Thomas Kellogg. “China’s ‘Rule by Law’ Takes an Ugly Turn”. Foreign Policy, 14 July 2015, available at: http://foreignpolicy.com/2015/07/14/chinas-rule-by-law-takes-an-ugly-turn-rights-lawyers-crackdown-xi-jinping/.

Tencer, Daniel. "Canada-China Foreign Investment Promotion And Protection Agreement ‘A Corporate Rights Pact,’ Council Of Canadians Says." *The Huffington Post* 1 (2012).

The Wall Street Journal. “China Lags Behind in Rule-of-Law Ranking”. The Wall Street Journal, 20 October 2016, available at: https://blogs.wsj.com/chinarealtime/2016/10/20/china-lags-behind-in-rule-of-law-ranking/.

Thompson, Andrew. *On the Side of the Angels: Canada and the United Nations Commission on Human Rights*. UBC Press, 2017.

Vanderklippe, Nathan. “Canada, 10 other countries call out China for torturing human rights lawyers”, The Globe and Mail, 20 March 2017, available at: https://beta.theglobeandmail.com/news/world/canada-10-other-countries-call-out-china-for-torturing-human-rights-lawyers/article34346186/?ref=http://www.theglobeandmail.com&.

Vanderklippe, Nathan. “Trudeau touches on trade, human rights in call for ‘new era’ with China”, 30 August 2016, Globe and Mail, available at: https://www.theglobeandmail.com/news/politics/trudeau-calls-for-new-era-of-positive-collaboration-in-first-china-meetings/article31602377/.

Wall Street Journal. “China’s Foreign Minister Berates Canadian Journalist”. WSJ, 2 June 2016, available at: https://www.wsj.com/video/china-foreign-minister-berates-canadian-journalist/C9C79FA7-7E29-418E-9534-1976259059F6.html.

Wentian, Wang. “A new golden decade for Canada-China relations”, 9 October 2016, Globe and Mail, available at: https://beta.theglobeandmail.com/opinion/a-new-golden-decade-for-canada-china-relations/article32300566/?ref=http://www.theglobeandmail.com&.

Wright, David. “Wright: Canada right to link free trade agreement to human rights in China”, 15 July 2017, Calgary Herald, available at: http://calgaryherald.com/opinion/columnists/wright-canada-right-to-link-free-trade-agreement-to-human-rights-in-china.

Wyd, Adrian. “5 Things To Know About The Canada-China Investment Treaty”, 27 October 2012, Huffington Post, available at: http://www.huffingtonpost.ca/2012/10/27/canada-china-trade-deal-fipa-apec_n_2032074.html.

Xinhua. “China denies being world’s No. 1 economy”. Xinhuanet, 20 January 2015, available at: http://www.xinhuanet.com/english/china/2015-01/20/c_133933504.htm.

Zhuolun, Wang, and Wang Huihui. “China Voice: Diplomatic hat-trick no accident”. Xinhuanet, 29 December 2016, available at: <http://www.xinhuanet.com/english/2016-12/29/c_135942509.htm>.

Canadian Government Reports

Canada Gazette. “Consultations on a potential free trade agreement with China”, available at: http://www.gazette.gc.ca/rp-pr/p1/2017/2017-03-04/html/notice-avis-eng.php#ne15.

Embassy of Canada to Colombia. “Annual Report Pursuant to the Agreement concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia,” Government of Canada, 17 May 2017, available at: http://www.canadainternational.gc.ca/colombia-colombie/bilateral_relations_bilaterales/rep-hrft-co_2016-dple-rapp.aspx?lang=eng.

Global Affairs Canada (GAC). “Trade and Environment”, Global Affairs Canada, 16 September 2016, available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/env/trade-commerce-env.aspx?lang=eng; “Compendium of Canada’s Engagement in International Environmental Agreements: Agreement on the Environment between Canada and the Hashemite Kingdom of Jordan”, Environment and Climate Change Canada, 2017, available at: http://ec.gc.ca/international/335C7377-1B59-4825-AA21-6594D6A7B625/B13%202017%20IEA%20Factsheet%20Jordan%20EN%20Final.pdf.

Government of Canada. “A new Canada-United States-Mexico Agreement”, GoC, 23 January 2019, available at: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/index.aspx?lang=eng.

Government of Canada. “Address by Minister Freeland on Canada’s foreign policy priorities”, 6 June 2017, available at: https://www.canada.ca/en/global-affairs/news/2017/06/address_by_ministerfreelandoncanadasforeignpolicypriorities.html

Government of Canada. “Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments”, 24 November 2016, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/china-chine/fipa-apie/index.aspx?lang=eng.

Government of Canada. “Bilateral Relations” Government of Canada, 26 August 2016, available at: http://www.canadainternational.gc.ca/china-chine/bilateral_relations_bilaterales/index.aspx?lang=eng.

Government of Canada. “Canada and China strengthen partnership on climate and environment”, Government of Canada, 1 November 2018, available at: https://www.canada.ca/en/environment-climate-change/news/2018/11/canada-and-china-strengthen-partnership-on-climate-and-environment.html.

Government of Canada. “Canada and the World Trade Organization”, 13 July 2017, available at: http://www.international.gc.ca/world-monde/international_relations-relations_internationales/wto-omc/index.aspx?lang=eng.

Government of Canada. “Canada-Chile Free Trade Agreement: Additional background information,” Government of Canada, 26 May 2017, available at: https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/info.aspx?lang=eng.

Government of Canada. “Canada-China agreement on China Council on Environment and Development”, Government of Canada, 10 August 2017, available at: https://www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-countries-regions/asia/canada-china-agreement-environmental-cooperation.html.

Government of Canada. “Canada-China Diplomatic Relations”. GoC, 15 December 2011, available at: http://www.canadainternational.gc.ca/china-chine/bilateral_relations_bilaterales/diplomatic_relations_diplomatiques.aspx?lang=eng.

Government of Canada. “Canada reiterates support for democratic reforms, human rights and peace in Ukraine”, 6 July 2017, https://www.canada.ca/en/global-affairs/news/2017/07/canada_reiteratessupportfordemocraticreformshumanrightsandpeacei0.html?=undefined&wbdisable=true.

Government of Canada. “Canada-Colombia Free Trade Agreement”, 18 April 2017, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/index.aspx?lang=eng.

Government of Canada. “Canada-Colombia Free Trade Agreement: Additional background information,” Government of Canada, 18 April 2017, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/info.aspx?lang=eng.

Government of Canada. “Canada-Honduras Free Trade Agreement”, Government of Canada, 23 November 2016, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/honduras/fta-ale/index.aspx?lang=eng.

Government of Canada. “Canada-Jordan Free Trade Agreement”, 24 November 2016, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/jordan-jordanie/fta-ale/index.aspx?lang=eng.

Government of Canada. “Canada-Panama Free Trade Agreement”, 24 November 2016, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/panama/fta-ale/index.aspx?lang=eng.

Government of Canada. “Canada-Peru Free Trade Agreement”, 17 March 2017, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/index.aspx?lang=eng.

Government of Canada. “Canada’s Feminist International Assistance Policy”, Government of Canada, 21 December 2018, available at: https://international.gc.ca/world-monde/issues_development-enjeux_developpement/priorities-priorites/policy-politique.aspx?lang=eng

Government of Canada. “Governance and Values”, 26 August 2016, available at: http://www.canadainternational.gc.ca/china-chine/bilateral_relations_bilaterales/governance-gouvernance.aspx?menu_id=179&menu=L&lang=eng.

Government of Canada. “International Trade Minister to promote Canada’s progressive trade agenda at OECD ministerial meeting”, 6 June 2017, available at: https://www.canada.ca/en/global-affairs/news/2017/06/international_trade-ministertopromotecanadasprogressivetradeagend.html.

Government of Canada, “Pierre Elliott Trudeau – Canada’s 15th Prime Minister”. Library and Archives, 26 April 2016, available at: https://www.bac-lac.gc.ca/eng/discover/politics-government/prime-ministers/pmportrait/Pages/item.aspx?PersonId=15.

Government of Canada. “Resources”, 6 April 2017, available at: http://www.international.gc.ca/trade-commerce/consultations/china-chine/toolkit-outils.aspx?lang=eng.

Government of Canada. “Text of the Canada-Ukraine Free trade agreement – Table of contents”, 15 September 2016, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ukraine/text-texte/toc-tdm.aspx?lang=eng.

Government of Canada. “The China Council: global climate change cooperation”, Government of Canada, 2 November 2018, available at: https://www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-organizations/china-council-climate-change-cooperation.html.

Government of Canada. “Trade and investment agreements”, 7 July 2017, available at: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng&menu_id=137.

Government of Canada. “What we heard”, 5 December 2017, Government of Canada, available at: http://international.gc.ca/trade-commerce/consultations/china-chine/what_we_heard-que_nous_entendu.aspx?lang=eng.

Government of Canada. “What we heard: Public Consultations on a possible Canada-China free trade agreement”. Government of Canada, 10 November 2017. Online: <http://international.gc.ca/trade-commerce/consultations/china-chine/what_we_heard-que_nous_entendu.aspx?lang=eng>.

Justin Trudeau. “Prime Minister announces Canada’s bid for a non-permanent seat on the United Nations Security Council”, Prime Minister of Canada, 16 March 2016, available at: https://pm.gc.ca/eng/node/40723.

Chinese Government Reports

Information Office. “Progress in China’s Human Rights Cause in 1996” Information Office of the State Council of the People’s Republic of China, available at: http://www.china.org.cn/e-white/prhumanrights1996/index.htm.

Information Office of the State Council, “National Human Rights Action Plan of China” (2009-2010), available at: http://www.china.org.cn/archive/2009-04/13/content_17595407.htm (accessed April 13, 2011).

Ministry of Foreign Affairs of the People’s Republic of China. “Joint Press Release between the People’s Republic of China and Canada”, 1 September 2016, available at: http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1393787.shtml.

General Reports

Aaronson, Susan Ariel. “Human Rights”, World Bank Group, accessed 26 January 2018, available at: http://siteresources.worldbank.org/INTRANETTRADE/Resources/C21.pdf.

Al Jazeera. “What’s driving Canada’s progressive trade agenda?”, 4 March 2017, available at: http://www.aljazeera.com/programmes/countingthecost/2017/03/driving-canada-progressive-trade-agenda-170304041343605.html.

Amnesty International. “China 2017/2018”. AI, 2018, available at: https://www.amnesty.org/en/countries/asia-and-the-pacific/china/report-china/.

Amnesty International. “China: No Rule of Law when Defence Lawyers Cannot Perform their Legitimate Role” Amnesty International, 10 May 2010, available at: https://www.amnesty.org/en/documents/ASA17/022/2010/en/.

Amnesty International. “China: Submission on the Draft ‘National Intelligence Law”. Amnesty International, June 2017, available at: https://www.amnesty.org/en/documents/asa17/6412/2017/en/.

Asia Pacific Foundation of Canada, “The China-Australia Free Trade Agreement: Lessons for Canada”, available at: https://www.asiapacific.ca/canada-asia-agenda/china-australia-free-trade-agreement-lessons-canada.

Asia Pacific Foundation of Canada. “Toward a Canada-China FTA”, available at: https://www.asiapacific.ca/sites/default/files/filefield/canada-china_fta_report_final_1.pdf.

Boden, T. A., G. Marland, and R. J. Andres. “Global, Regional, and National Fossil-Fuel CO2 Emissions,” Carbon Dioxide Information Analysis Center, Oak Ridge National Laboratory, U.S. Department of Energy 2011. Available at: http://cdiac.ornl.gov/trends/emis/tre_prc.html (Accessed on August 6, 2011).

Boyle, Alan. "Human Rights and International Environmental Law: Some Current Problems". 2011, available at: http://www. eui. eu/Documents/DepartmentsCentres/Law/ResearchTeaching/WorkingGroups/08-03-HumanRights.Pdf.

Bureau of Democracy, Human Rights, and Labor. “2017 Report on International Religious Freedom”, 29 May 2018, US Department of State, available at: https://www.state.gov/j/drl/rls/irf/2017/eap/280814.htm.

Burton, Charles. “Can Canada Follow New Zealand’s Model for Free Trade with China?”, 19 October 2016, Asia Pacific Memo, available at: http://www.asiapacificmemo.ca/can-canada-follow-new-zealand.

Burton, Charles. “China isn’t listening”, 16 June 2006, The Globe and Mail, available at: http://spartan.ac.brocku.ca/~cburton/China%20Isnt%20Listening.htm.

Burton, Charles. “Free-trade talks with China: Proceed with caution”, 5 June 2017, The Globe and Mail, available at: https://www.theglobeandmail.com/opinion/free-trade-talks-with-china-proceed-with-caution/article35192536/.

Burton, Charles, and Associates “Assessment of the Canada-China Bilateral Human Rights Dialogue”, 1 August 2005, Department of Foreign Affairs and International Trade, available at: http://spartan.ca.ac.brocku.ca/~cburton/Assessment%20of%20the%20Canada-China%20Bilateral%20Human%20Rights%20Dialogue%2019APR06.pdf.

Canadian Chamber of Commerce. “Canada’s Business Checklist for Trade Negotiations with China,” The Canadian Chamber of Commerce, September 2017.

Canada China Business Council. “Canada China Relationship”, available at: https://www.ccbc.com/zh-hant/research-reports-2/sectoral-research/canada-china-relationship/.

Canada-Ukraine Trade & Investment Support Project. “CUFTA in 10 minutes”, 14 March 2017, available at: https://cutisproject.org/en/publications/cufta-in-10-min/.

Canadian Agri Food Trade Alliance. “Canada-China Trade”, available at: http://cafta.org/trade-agreements/canada-china-trade/.

CBA International Initiatives, “Rule of Law: Legal Aid for Marginalized Groups in China”, Canadian Bar Association, accessed 26 January 2019, available at: http://cba.org/cba-international-initiatives/our-projects/past-projects/china/rule-of-law-legal-aid-for-marginalized-groups-in-c.

China Aid Association. *Chinese Law & Religion Monitor* (China Aid 2013), available at: https://197736a04a0d57705e9ede421e54425ec5c34ee4.googledrive.com/host/0BwO5hRHaKWdOWlN-mR19tcHFDR28/Chinese_Law_and_Reli-CSP_Proof-07-03-14.PDF.

China Council for International Cooperation on Environment and Development. “Membership”, CCICED, accessed 26 January 2019, available at: http://www.cciced.net/cciceden/ABOUTUS/Membership/Membership/.

China FTA Network. “China and New Zealand Announce to Start Upgrading Negotiation of FTA”, 23 November 2016, available at: http://fta.mofcom.gov.cn/enarticle/ennewzealand/ennewzealandnews/201612/33763_1.html.

China FTA Network. “China FTA Network”, 25 July 2017, available at: http://fta.mofcom.gov.cn/english/

China FTA Network. “China-Switzerland FTA”, available at: http://fta.mofcom.gov.cn/topic/enswiss.shtml.

China FTA Network. “Free Trade Agreement Between the Swiss Confederation and the People’s Republic of China” Preamble.

China Labour Bulletin. “A decade on, China’s Labour Contract Law has failed to deliver”. CLB, 28 December 2017, available at: http://www.clb.org.hk/content/decade-china%E2%80%99s-labour-contract-law-has-failed-deliver.

Clark, Helen. ‘Rule of Law and Development: Times of Challenge and Opportunity’, UNDP, 6 Dec 2012, available at: http://www.pk.undp.org/content/undp/en/home/presscenter/speeches/2012/12/06/helen-clark-rule-of-law-and-development-times-of-challenge-and-opportunity-/.

Council of Canadians. “Trudeau government set to launch Canada-China Free Trade Agreement talks in December”. Council of Canadians, 18 November 2017. Online: <https://canadians.org/blog/trudeau-government-set-launch-canada-china-free-trade-agreement-talks-december>.

Dobson, Wendy. "China's State-Owned Enterprises and Canada's FDI Policy." (2014).

Ecojustice. “Right to a Healthy Environment”. Available at: https://www.ecojustice.ca/case/right-to-a-healthy-environment/.

European Parliament. “The European Parliament’s Role in Relation to Human Rights in Trade and Investment Agreements,” EuroParl, 2014, available at: http://www.europarl.europa.eu/cmsdata/86031/Study.pdf.

Evans, Paul. “Engagement with Conservative Characteristics: Policy and Public Attitudes, 2006–2011”, in “Introduction: Changing Dimensions of the Canada-China Relations” Pitman B Potter and Thomas Adams (eds.), 2011, The Peter A. Allard School of Law Allard Research Commons, available at: http://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1263&context=fac_pubs.

Felipe, Jesus, Matteo Lanzafame, and Juzhong Zhuang. “The People’s Republic of China’s Potential Growth Rate: The Long-Run Constraints”. Asian Development Bank (ADB), November 2014, available at: https://www.adb.org/sites/default/files/publication/149729/ewp-418.pdf.

Ferreira, Jennifer. “Three things for Canada to consider as trade talks with China move forward”, 23 February 2017, Open Canada, available at: https://www.opencanada.org/features/three-things-canada-consider-trade-talks-china-move-forward/.

Global Affairs Canada. “2015-2016 Report to Parliament on the Government of Canada’s Official Development Assistance”, 2016, available at: https://international.gc.ca/gac-amc/assets/pdfs/publications/daaa-lrmado_1516_report.pdf.

Global Slavery Index, “China”. Global Slavery Index 2016, available at: https://www.globalslaveryindex.org/country/china/.

Greenspon, Edward, and Kevin Lynch. “Diversification Not Dependence: A Made-In Canada China Strategy”, Public Policy Forum, October 2018.

Harrison, James. "Conducting a human rights impact assessment on the Canada-Colombia free trade agreement: Key issues." *Canada’s Coalition to End Global Poverty* (2009).

Harrison, James. "Measuring human rights: Reflections on the practice of human rights impact assessment and lessons for the future." (2010).

Human Rights Watch. “China: Events of 2016”. HRW, 2016. Online: <https://www.hrw.org/world-report/2017/country-chapters/china-and-tibet>.

Human Rights Watch (HRW). “China: Events of 2017”. HRW, 2018, available at: https://www.hrw.org/world-report/2018/country-chapters/china-and-tibet.

Human Rights Watch. “China: Ratify Key International Human Rights Treaty”, 8 October 2013, available at: https://www.hrw.org/news/2013/10/08/china-ratify-key-international-human-rights-treaty.

Human Rights Watch. “The Costs of International Advocacy: China’s Interference in United Nations Human Rights Mechanisms”, 5 September 2017, available at: https://www.hrw.org/report/2017/09/05/costs-international-advocacy/chinas-interference-united-nations-human-rights.

Icelandic Human Rights Centre. “Human Rights and the Environment”. Available at: http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-in-relation-to-other-topics/human-rights-and-the-environment.

International Institute for Sustainable Development. “New Horizons for IISD President and CEO, Scott Vaughan”, IISD, accessed 26 January 2019, available at: https://www.iisd.org/media/new-horizons-iisd-president-and-ceo-scott-vaughan.

International Justice Resource Center. “Increased Oppression of Chinese Human Rights Defenders Draws International Criticism”. IJRC, 22 February 2016, available at: http://www.ijrcenter.org/2016/02/22/increased-oppression-of-chinese-human-rights-defenders-draws-international-criticism/.

International Labour Organization (ILO). “Forced Labour and Trafficking: the Role of Labour Institutions in Law Enforcement and International Cooperation in China”. ILO, 2008, available at: http://www.ilo.org/beijing/what-we-do/projects/WCMS_142261/lang--en/index.htm.

International Labour Organization (ILO). “Ratifications for China”, available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103404.

International Labour Organization (ILO). “Up-to-date Conventions and Protocols not ratified by China” International Labour Organization, available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210_COUNTRY_ID:103404.

International Monetary Fund. “Report for Selected Countries and Subjects”.

Italian Chambers. “Selling a progressive trade agenda: A conversation with the Honourable Francois-Philippe Champagne Canada’s Minister of International Trade”, 2017, available at: https://www.italchambers.ca/wp-content/uploads/2017/06/Champagne.pdf.

Jurist. “Report: China targeting human rights defenders as national security threats”. Jurist, 16 February 2017, available at: http://www.jurist.org/paperchase/2017/02/report-china-targeting-human-rights-defenders-as-national-security-threat.php.

Karalekas, Dean “Canada needs a Taiwan Relations Act”, Inside Policy – The Magazine of the Macdonald-Laurier Institute, available at: http://www.macdonaldlaurier.ca/files/pdf/Karalekas--inside%20policy.pdf.

Lagarde, Christine. “China and the Global Economy: Creating New Ingredients for Growth”. International Monetary Fund (IMF), 20 March 2015, available at: http://www.imf.org/en/News/Articles/2015/09/28/04/53/sp032015.

Luke, David, and Phil Rourke. “Canada’s Progressive Trade Agenda Starts in Africa”, United Nations Economic Commission for Africa, available at: https://www.uneca.org/stories/canada%E2%80%99s-progressive-trade-agenda-starts-africa

Majumdar, Shuvaloy. “China: The Dragon at the Door,” Inside Policy, October 2017, available at: https://macdonaldlaurier.ca/files/pdf/MLI_201710_OCTOBER_InsidePolicy%20_WEB.pdf.

Morin, Jean-Frédéric, Laura Mordelet, and Myriam Rochette. “Since NAFTA, Canada and the US have included the largest number, worldwide, of environmental clauses in their trade agreements,” Policy Options, 1 August 2017, available at: http://policyoptions.irpp.org/magazines/august-2017/the-environment-in-canadian-trade-agreements/.

Mr. Alain Pellet, Special Rapporteur, “Tenth Report on Reservations to Treaties, Agenda item 6,” UN Office of Legal Affairs, Document A/CN.4/558 and Add.1–2.

Nordic Trust Fund and The World Bank. “Human Rights Impact Assessments: A Review of the Literature, Differences with other forms of Assessments and Relevance for Development”, February 2013, available at: http://siteresources.worldbank.org/PROJECTS/Resources/40940-1331068268558/HRIA_Web.pdf.

OECD Observer. “China’s economy: A remarkable transformation”. OECD, September 2005, available at: http://oecdobserver.org/news/archivestory.php/aid/1685/China_92s_economy:_A_remarkable_transformation.html.

Office of the High Commissioner for Human Rights (OHCHR). “China Homepage”, available at: http://www.ohchr.org/EN/countries/AsiaRegion/Pages/CNIndex.aspx.

OHCHR. “Report of the Special Rapporteur on the right to food, Olivier De Schutter”, 19 December 2011, available at: http://www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-59-Add5_en.pdf&action=default&DefaultItemOpen=1.

Robertson, Colin. “Stephen Harper and a ‘Rising’ Canada”, 12 December 2013, Canadian Information Processing Society, available at: http://www.cips-cepi.ca/2013/12/12/stephen-harper-and-a-rising-canada/.

Rochlin, James. "A golden opportunity lost: Canada's human rights impact assessment and the free trade agreement with Colombia." *The International Journal of Human Rights* 18.4-5 (2014): 545-566.

World Bank. “The World Bank in China: Overview”. World Bank, 28 March 2017, available at: http://www.worldbank.org/en/country/china/overview.

WTO. “Canada and the WTO”. WTO, available at: https://www.wto.org/english/thewto_e/countries_e/canada_e.htm.

WTO. “China and the WTO”. available at: https://www.wto.org/english/thewto_e/countries_e/china_e.htm.

UN Environment. “Human Rights and the Environment”. UN Environment, available at: http://web.unep.org/divisions/delc/human-rights-and-environment.

UN Human Rights Council, Draft Report of the Working Group on the Universal Periodic Review: China A/HRC/WG.6/4/L.11 (Feb 11, 2009).

UNOHCHR. “Special Rapporteur on human rights and the environment (former Independent Expert on human rights and the environment)”. UNOHCHR, available at: http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SRenvironmentIndex.aspx.

United Nations Security Council. “Current Members”, UNSC, accessed 29 January 2019, available at: https://www.un.org/securitycouncil/content/current-members.

World Trade Organization (WTO). “Overview”, available at: https://www.wto.org/english/theWTO_e/whatis_e/wto_dg_stat_e.htm.

Policy Statements

Embassy of the People’s Republic of China in the United States of America. “White Paper – The Progress of Human Rights in China”, available at: http://www.china-embassy.org/eng/zt/ppflg/t36621.htm.

National Human Rights Action Plan of China (2012–2015), ‘Introduction’, http://www.china.org.cn/government/whitepaper/node_7156850.htm.

Speeches

Bernier, Maxime. “Canada-China Free Trade – Speech”, 18 July 2016, http://www.maximebernier.com/canada_china_free_trade_speech.

Champagne, Francois-Philippe. “Debates of Feb. 10th, 2017“, House of Commons Hansard, available at: https://openparliament.ca/debates/2017/2/10/the-deputy-speaker-15/?singlepage=1.

Permanent Mission of the PRC to UN, 1 February 2002. Online: <http://www.china-un.org/eng/zt/rqwt/t28675.htm>.

Prime Minister Justin Trudeau. “Joint Statement Between Canada and the People’s Republic of China”, available at: http://pm.gc.ca/eng/news/2016/09/23/joint-statement-between-canada-and-peoples-republic-china.

Trudeau, Justin. “Canada signs Landmark Free Trade Agreement with Ukraine”, Prime Minister of Canada, 11 July 2016, available at: http://pm.gc.ca/eng/news/2016/07/11/canada-signs-landmark-free-trade-agreement-ukraine

Trudeau, Justin. “Minister of International Trade Mandate Letter”, Prime Minister of Canada, available at: http://pm.gc.ca/eng/minister-international-trade-mandate-letter.

SPECIAL SECTION
TRADE, HEALTH AND HUMAN RIGHTS

Guest Editors: Ronald Labonté, Arne Ruckert and Corinne Packer

PREFACE

This collection was crafted in early 2017 but delays in publication have the articles appearing in 2019. Trade policy is dynamic (treaties, negotiations), probably more so than in human rights; and, while the analyses outlined in this collection are still largely current, there have been a few developments that warrant prefatory comment.

First, some of the more egregious elements of investor-state dispute settlement (ISDS) chapters are being challenged, restrained, or disappearing altogether. The European Court of Justice in 2018 ruled that an ISDS claim for damages under a bilateral investment treaty between Slovakia and the Netherlands (and involving Austrian and Dutch banks) violated European Union law. The claim had been around Slovakia's decision to revoke a policy allowing for-profit private health insurers which the private insurance investors challenged, at first successfully. The claim was also denied by the Supreme Court of Germany, where Slovakia elected to launch its own appeal against the tribunal decision. The European Court decision effectively precludes any new ISDS treaties or claims between EU member states, although it does not affect international ISDS disputes between EU members and non-EU nations.

The recently signed agreement between the US, Mexico, and Canada (known as the USMCA in the US, CUSMA in Canada, and T-MEC in Mexico), which replaces the 1994 North American Free Trade Agreement (NAFTA), appears to be following suit. Ironically, NAFTA was largely responsible for extending the reach of ISDS provisions in subsequent bilateral and regional trade agreements yet in the new treaty (still to be ratified), ISDS provisions between Canada and the US have been eliminated and between the US and Mexico have been substantially narrowed. The agreement does permit new investor disputes ('legacy claims') to be initiated for up to three years under the old NAFTA rules, but if ratified and passed, and together with the European Court decision, it signals a growing international dissatisfaction with existing ISDS rules.

Second, and despite ISDS largely disappearing from the 'new NAFTA', US negotiating pressure succeeded in expanding intellectual property rights in the USMCA, which will benefit American patent-holding drug and agrichemical manufacturers. Provisions that the US wanted to see in the Trans-Pacific Partnership agreement (the TPP), suspended by other Parties when the Trump administration withdrew the US from the treaty in 2017, were reintroduced and strengthened in the USMCA. Of greatest health and human rights concern are rules allowing up to 10 years of effective market exclusivity for biologics, costly new generation drugs used to treat cancers, autoimmune disorders, and other chronic diseases, and will increase significantly public and private drug costs in all three countries (US, Canada, and Mexico). USMCA provisions also make it easier for 'evergreening' (creating new patents on pharmaceuticals whose protection period was expiring), further increasing the cost of drugs for governments or consumers without necessarily providing any new benefit.

Third, the new USMCA substantially hems governments' regulatory autonomy. The agreement begins by affirming the "inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities" but then immediately adds as long as regulations are "consistent with this Agreement". Such language is common in other trade treaties and essentially makes any new public health regulations subordinate to trade rules. The USMCA tightens up these trade rules by imposing new obligations on governments to harmonize regulations and to involve private actors (including corporations) in any review or consultation process involving new regulations that might affect trade. The trend in new trade agreements to ratchet up such obligations makes it less essential that they include ISDS provisions since corporations will have their say in the actual drafting of new government measures affecting their businesses. It also makes the absence of ISDS in the new USMCA less of the health and human rights victory it first appears.

Finally, provisions in the USMCA labour chapter make some improvements over similar chapters in other trade agreements. This includes government obligations to prevent various forms of employment discrimination (although the US effectively exempts itself in a post-signing footnote from having to make any changes to its current policies or practices); a requirement to increase wages for Mexican auto workers (essentially an attempt to make higher-waged jobs in the US more attractive to the integrated North American auto industry); and a requirement that Mexico increase the rights of workers to organize independent trade unions free of government or corporate interference (a move the new AMLO government in Mexico has pledged to implement). Otherwise the chapter suffers the same limitations noted in this collection. The USMCA environment chapter, however, is actually weaker in its provisions than the chapter found in the TPP, covering fewer environmental treaties and requiring governments to notify each other if they plan to negotiate or enter into any new multilateral environmental agreement. One positive contribution in the USMCA is that any formal trade challenge under the agreement that involved labour or environmental measures must include on its dispute panel experts in labour and environmental law, potentially improving the balance between trade interests and labour/environmental protection.

From a human rights vantage, however, the major concern over the past two years has been the apparent willingness of the US Trump administration to use tariffs and the threat of trade wars to get its way in new trade negotiations, including inveigling Canada and Mexico in its own competition with China and that country's state-supported companies. Given that the USMCA overall is a step backwards from health protection in other treaties (notwithstanding its excision or restrictive use of ISDS rules), the trade, health, and human rights frontier will continue to be subject to controversy and debate over the coming years. The articles in this collection still stand as important references to scholars and activists engaged in the expanding trade, health, and human rights policy space.

Ronald Labonté, March 13, 2019.

TRADE AND INVESTMENT LIBERALIZATION VS HUMAN RIGHTS: CONFLICTS, COMPROMISES, OR A CLEAR VICTOR?

Ronald Labonté

INTRODUCTION

Two of the international legal systems to arise from the destruction of the Second World War were the International Human Rights Covenants and the "free trade" regimes. Human rights law was not fully sorted out until 1966 when the Cold War led to agreement on two separate covenants: one emphasizing individual rights against the state (International Covenant on Civil and Political Rights, or ICCPR), and another prescribing state obligations towards their citizens (International Covenant on Economic, Social and Cultural Rights, or ICESCR). Both covenants, in differing ways, were intended to prevent the xenophobic atrocities committed during the War, while protecting against the autocratic state regimes that allowed or even fomented such atrocities. The first multilateral trade agreement was the General Agreement on Tariffs and Trade (GATT), in which high-income countries at the time (those that were largely responsible for precipitating the War) agreed to a gradual reduction in their protectionist tariff rates (border taxes): the steep rise that helped precipitate the War during the 1930s. The theory at the time was that by entwining countries' economic interests more deeply, there would be a greater disincentive for another War; powerful economic actors would be likely to lose if conflicts arose and could use their domestic political clout to put a brake on governments marching recklessly towards another conflagration.

Much has changed in both regimes since then. Human rights law has expanded with several new covenants. Many countries have internalized these covenants within their own constitutional or legal systems, rendering them justiciable within their own borders. General commentaries and new declarations continue to elaborate both on individual protective rights from state autocracy, and states' social obligations to ensure their citizens progressively enjoy their full entitlements enumerated in human rights covenants. The GATT, in turn, was initially primarily confined to rich, already industrialized nations, allowing developing and decolonizing countries (now more routinely described as least developed, low- or middle-income countries, or LMICs) to benefit through improved access to wealthy country markets without having reciprocal obligations. This was important for promoting LMIC economic development: goods from already industrialized countries were more likely to be of higher quality and lower-cost than those produced within LMIC borders, due to production efficiency and subsidies that rich countries achieved in earlier decades of their own protectionist policies.[1] As some LMICs began to grow economically, potentially challenging the industrial advantages of wealthier nations, and as the developing country debt crises of the 1980s led to structural adjustment policies that pried open the markets of many LMICs under loan programs of the International Financial Institutions,[2] GATT negotiations expanded to a much broader array of "non-tariff" barriers to trade and investment, including reciprocal obligations in these negotiations for an ever larger number of LMICs. These "free trade" rules were consolidated in the establishment of the World Trade Organization in 1995, with over 30 separate agreements that touch on almost every facet of modern life with a number of potential health impacts, some positive, others negative. "Free" is deliberately in quotations since some aspects of the expanded liberalization regime, notably intellectual property rights under the TRIPS agreement, were critiqued almost immediately for being protectionist for property rights holders (largely in rich world countries) rather than liberalizing in an open-borders sense.

The complexity of these new overlapping treaties with the WTO system, and the multiple concerns expressed by UN Special Rapporteurs on a number of human rights agreements (e.g. on health, water, and food

[1] See Yong-Shik Lee, *Reclaiming Development in the World Trading System* (New York: Cambridge University Press, 2006); Ha-Joon Chang, Kicking Away the Ladder (London: Anthem Press, 2002).

[2] See Ronald Labonté & David Stuckler, "The Rise of Neoliberalism: How Bad Economics Imperils Health and What to Do About It" (2016) 70:3 J Epidemiology & Community Health 312.

security) and raised in intergovernmental forums (such as the UN General Assembly and the World Health Organization), have created what can aptly be called a "wicked problem" of regime complexity in global governance. A theoretical and sequential review of this "wicked problem" would first note that most human rights treaties existed before the WTO and bilateral or regional trade and investment agreements came into force, and it is generally considered that provisions in newer international law instruments do not trump those in older instruments.[3] In cases where human rights instruments are decades old and some of their provisions may be viewed as outdated, the European Court of Human Rights has called upon the "principle of evolution," clarifying that the 1950 European Convention on Human Rights must be seen as a living instrument, to be interpreted according to present-day conditions.[4] Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties also calls for "coherence" in international law; the WTO treaty is to be interpreted so as to avoid conflicts with other treaties.

The WTO Dispute Settlement Understanding (Article 3) similarly requires interpreting WTO law "in accordance with customary rules of interpretation of public international law." In sum, the WTO Agreement, as with any other treaty, should be interpreted taking into account other relevant and applicable rules of international law, including human rights law. WTO provisions are to be interpreted "in a way that allows and encourages WTO members to respect all their international law obligations, including those of human rights law."[5] States must ensure that they respect their human rights obligations in the event that they clash with provisions of trade agreements. International economic law needs to be justified and evaluated in terms of justice and human rights even if human rights are not specifically incorporated in trade treaties.[6] Indeed, many of the world's most important trading nations now include human rights language in their preferential trade agreements. Aaronson estimates that over 75 percent of the world's governments have human rights provisions in their trade agreements.[7] Human rights provisions can be embedded in their non-derogation clauses, in language in the preamble, or in language extending Article XX of the GATT/WTO.[8] WTO dispute bodies have the capacity to seek expert opinions from any source they deem appropriate, with various human rights treaty bodies (such as the Office of the High Commissioner for Human Rights or the ILO) being obvious candidates for a request on a human rights issue. However, no such request has ever been made, unlike requests for opinions under international environmental law. While WTO dispute panel trade experts are not the right group to develop jurisprudence on human rights, neither should WTO enforcement of trade law become an impediment to the implementation of human rights. At the same time, if the potential for conflicts between the two regimes is to be mitigated, and if human rights are to exert more interpretative weight in trade challenges, it becomes incumbent upon states to raise human rights concerns at the WTO dispute or pre-dispute committee levels. As McBeth concludes in his assessment of the potential

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[3] See Gabrielle Marceau, "WTO Dispute Settlement and Human Rights" (2002) 13:4 European J Intl L 753 at 786.

[4] *Ibid* at 785.

[5] *Ibid* at 786.

[6] See Ernst-Ulrich Petermann, "The Promise of Linking Trade and Human Rights" in Daniel Drache & Lesley A Jacobs, eds, *Linking Global Trade and Human Rights: New Policy Space in Hard Economic Times* (New York: Cambridge University Press, 2015) 46 at 54.

[7] Susan Ariel Aaronson, "Human Rights" in Jean-Pierre Chauffour & Jean-Christophe Maur, eds, *Preferential Trade Agreement Policies for Development: A Handbook* (Washington, DC: World Bank, 2011) 443.

[8] *Ibid*.

for compromise between the two regimes, "[t]he major obstacle to greater complementarity of human fights and trade law is...the attitude of governments rather than the content of law itself."[9]

The reality is that conflicts between the two regimes remain. This special series of articles attempts to unpack some of the complexities underlying such conflicts, both known and potential, with an explicit focus on the extent to which our contemporary trade and investment rules support or weaken human rights treaties important to improvements in health outcomes, and to equity in these outcomes within and between countries. In theory, trade and investment liberalization and dispute settlement rules can indirectly strengthen certain aspects of state obligations under human rights treaties, by increasing economic growth and aggregate welfare gains that "trickle down" through pre-distribution labour gains or post-distribution tax and transfer measures. There is considerable evidence suggesting that most of the gains from trade and investment rules, however, are currently appropriated by wealthier nations,[10] especially by wealthier investors or corporations regardless of the home country from which they primarily conduct their transnational business interests. As another example, WTO and related Free Trade Agreement (FTA) rules on subsidies could potentially be used to challenge governments' fossil fuel subsidies estimated in the hundreds of billions of dollars,[11] which indirectly threaten climate change targets under the 2015 Paris Agreement and which, if unmet, risk massive health risks due to multiple forms of pollution, biodiversity loss, and rising sea levels, with such risks borne primarily by poorer populations in LMICs. Limitations on such a possibility, however, rest on such subsidies being shown to give an unfair trade or investment advantage to firms operating out of a given country. To date, the only WTO or investment challenges around energy subsidies have been for renewables (e.g. wind or solar) that may require a certain amount of local sourcing of materials to qualify for public support, which dispute panels have found in violation of axiomatic trade rules on non-discrimination.

OVERVIEW OF PAPERS IN THE SPECIAL SERIES

INTELLECTUAL PROPERTY RIGHTS AND ACCESS TO ESSENTIAL MEDICINES

Despite the adoption following LMIC pressure at the 2001 WTO Ministerial Meeting in Doha, Qatar, of the Doha Declaration on TRIPS and Public Health more firmly defining developing country flexibilities within the WTO system, the TRIPS agreement continues to evince most of the concern over conflicts between trade and investment rules, and obligations under the right to health (Article 12 of International Covenant on Economic, Social and Cultural Rights, technically "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health"). So emblematic have been these debates that the first two contributions to this special series, by Grover and Misquith, and by Gleeson and Forman, examine the current state of play on this topic. The first paper provides a historical and theoretical analysis of where conflicts persist, and how they might be managed more effectively. The second paper focuses more on particular cases and TRIPS Plus rules in new regional FTAs, such as the Trans-Pacific Partnership agreement (TPP). This second paper refers to the re-negotiated TPP agreement—minus the USA—which is now referred to as the "Comprehensive Progressive Agreement for Trans-Pacific Partnership" or CPTPP, with several contentious elements of the original chapter on IPRs, inserted on the insistence of the USA, now temporarily suspended. This outcome is indicative of: (a) the power of the USA and its IPR-holding transnationals in setting FTA rules; and, (b) the capitulation to this power by other countries that may yet re-institute these provisions to woo the USA back into the treaty, in order to gain preferential access for the exports to the American market.[12]

INVESTOR STATE DISPUTE SETTLEMENTS

In parallel with the expansion of trade rules was the proliferation of investment treaties, which allow

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[9] Adam McBeth, "Human Rights in Economic Globalisation" in Sarah Joseph & Adam McBeth, eds, *Research Handbook on International Human Rights Law* (Cheltenham: Edward Elgar, 2010) 139 at 164.

[10] See Sandra Polaski, *Winners and Losers: Impact of the Doha Round on Developing Countries* (Washington, DC: Carnegie Endowment for International Peace, 2006); Jomo Kwame Sundaram & Rudiger von Arnim, "Trade Liberalization and Economic Development" (2009) 323:5911 Science 211.

[11] See OECD, OECD *Companion to the Inventory of Support Measures for Fossil Fuels 2015* (Paris: OECD, 2015).

[12] See Deborah Gleeson et al, *The Trans-Pacific Partnership is Back: Experts Respond*, (14 November 2017) online: The Conversation <www.theconversation.com/the-trans-pacific-partnership-is-back-experts-respond-87432>.

private foreign investors (individuals, corporations, or investment funds) to sue governments if legislative or policy changes result in direct expropriation without compensation of an investor's assets, or indirect expropriation that is perceived as destroying the value of the investment, including future profits in some instances. The original intent of these bilateral investment treaties (BITs) was to incentivize foreign investments in LMICs perceived as having weak domestic laws or politically captured judiciaries, offering protection against egregious state expropriation by allowing investors direct access to international arbitration. As ongoing multilateral negotiations at the WTO stalled from the late 1990s onwards, high-income countries began to initiate new bilateral or regional FTAs to advance new non-tariff measures they were keen to pursue for their own economic interests. These FTAs frequently adopted and expanded upon existing agreements under the WTO system, while adding and sometimes expanding investor rights under previous BITs. The Trans Pacific Partnership Agreement, TPP, a focus for many of the articles in this special collection, is one such regional agreement, which in its re-negotiated CPTPP form retains much of the original investment chapter, even though dispute settlement rules have long been critiqued for a lack of transparency, conflict of interest amongst arbitrators ruling on disputes, and limited or no appeals or review process. Some of these concerns are raised in the contribution from Van Harten, as well as in the concluding paper by Schrecker.

PROTECTION OF ENVIRONMENTAL AND LABOUR RIGHTS

One of the marketing points of new FTAs is their inclusion of chapters on the environment and labour protections, purportedly to achieve improvements in environmental treaty compliance and labour rights under International Labour Organization Covenants. As the paper by McNamara and Labonté argue, at present, such language within FTAs may prevent an initially feared "race to the bottom" in regulatory standards, but hardly creates a "race to the top." With rare exceptions, countries are free to set their own labour and environment standards, however inadequate; only if a lowering or failure to enforce these standards leads to a trade or investment advantage does it become enforceable under dispute settlement rules. As this paper describes, the only such challenge advancing to a formal dispute and panel outcome to date was the US claim that Guatemala's failure to enforce its labour laws, as required under the Central-American Free Trade Agreement, led to it gaining a trade advantage. The dispute panel agreed that Guatemala was not enforcing its own labour laws, arguably violating a number of labour rights in the process, but ruled against the US challenge on the basis that there was insufficient evidence that this failure created a new and distinct trade advantage for the country. Similar limitations exist for environmental treaties, compliance with which not only applies to obligations under rights to food or to water—which have obvious health implications—but which is essential for persons to enjoy the fulfilment of most other human rights. To date, there have been no state-to-state disputes under an environmental chapter in any FTA.[13] Although this paper focuses on the "old" TPP, the new CPTPP does not have many improvements on either the environment or labour chapters.[14]

FOOD, TOBACCO, AND HUMAN RIGHTS

The contribution by Larking, Friel, and Thow take up the interrogation of trade, human rights, and health by examining the right to food. While initially showing how some UN bodies, such as the Food and Agriculture Organization, do not appear to see any conflict between trade rules and the right to food, research findings suggest several instances in which trade and investment treaties have directly affected food-related health outcomes and government's regulatory policy space. Food security, at least as expressed by the food sovereignty movement, is sacrificed to food-as-trade-commodity, creating what the authors describe a "schizophrenia" in the imbalance between powerfully enforceable trade and investment treaties, and weakly (normatively) enforceable human rights agreements. In a global context of rising non-communicable disease rates, under-nutrition, over-nutrition, and malnutrition

[13] See International Institute for Sustainable Development, *A Sustainability Toolkit for Trade Negotiators: Trade and Investment as Vehicles for Achieving the 2030 Sustainable Development Agenda: Process*, online: <www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/6-process>; Center for International Environmental Law, *The Trans-Pacific Partnership and the Environment: An Assessment of Commitments and Trade Agreement Enforcement*, (November 2015) online: <www.ciel.org/wp-content/uploads/2015/11/TPP-Enforcement-Analysis-Nov2015.pdf>.

[14] Canada, a CPTPP party, is nonetheless pushing for stronger labour rights in the re-negotiation of NAFTA now underway, calling on the USA to end its "right to work" laws (which undermine ILO Conventions on the right to unionize), and advocating for increases in minimum wages paid to Mexican workers. Pre-ratification pressure to improve labour standards has led to legislative changes in some countries, indicating the potential usefulness of such de jure clauses if not necessarily de facto.

(with evidence suggesting the prominent role played by ultra-processed global food commodities and sugar-sweetened beverages), the potential for conflicts between these two regimes (trade/investment and human rights) is likely to increase. This risk is particularly acute for investor-state disputes; as of 2017, 37 ISDS cases have been launched on food and beverage products or services,[15] while many trade policy analysts and public health researchers challenge claims that health regulations are protected from such disputes.[16]

By way of contrast, the paper by Lencucha, Drope, Packer, and Labonté suggests that tensions between tobacco control policies, and trade and investment treaty rules have become easier over time for government regulators to negotiate—provided the tobacco control measures are non-discriminatory. As the US clove cigarette case they discuss illustrates, this axiomatic trade principle could actually incentivize domestic tobacco control measures, fulfilling states' obligation under the right to health. Trade rules related to proving the "necessity" of a public health measure, including evidence that such a measure works, can allow governments to challenge such measures at the WTO committee level, creating a "regulatory chill" in which governments delay or alter aspects of their regulations. However, the WTO's dispute resolution system appears to accept public health protection as a legitimate policy concern, if it is non-discriminatory. An important WTO decision on the (now iconic) Australian plain packaging law, however, still awaits public release, although it is rumoured to have ruled in Australia's favour. Similarly, recent attempts by tobacco transnational companies to use ISDS rules to challenge tobacco control failed, and although such costly and "chilling" efforts may continue, the universally accepted health hazards of tobacco, and the well-documented history of tobacco firms lobbying and bullying LMICs into a pro-tobacco submission, is likely to substantially reduce the risk of future conflicts between human rights obligations, trade and investment rules, and tobacco control measures.

GLOBALIZATION AND A POLITICAL ECONOMY ANALYSIS OF TRADE AND INVESTMENT RULES

The final contribution by Schrecker appropriately pulls the discussion back from a focus on trade and human rights to a political economy analysis of why the economy enabled by the former, has succeeded in limiting the constraining power of the latter. He locates much of the inability of human rights covenants to put any substantive brake on an unbalancing global economy not simply on trade and investment rules, but on the distinct form of contemporary globalization "best understood as the transnational element of the neoliberal project of restoring the power and privilege of dominant classes." Although presenting a rather bleak forecast, the paper concludes with a call for stronger political coalitions at national and international scales for the effective advancement of human rights.

IS THERE A WAY FORWARD?

In an effort to avoid potential clashes between trade agreements and human rights in the future, in 2016, the United Nations Independent Expert on the Promotion of a Democratic and Equitable International Order, Alfred de Zayas, called for all future trade agreements to include provisions reinforcing the primacy of health rights. Already back in 2004, then Special Rapporteur on the Right to Health, Paul Hunt, issued a similar plea, calling upon WTO members to undertake a right to health impact assessment before signing new FTAs. He concluded:

> If a State chooses to engage in trade liberalization in those areas that impact upon the right to health, then it should select the form, pacing and sequencing of liberalization that is most conducive to the progressive realization of the right to health for all, including those living in poverty and other disadvantaged groups. The form, pacing and sequencing of liberalization should be selected on the basis of right to health impact assessments.[17]

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[15] See UNCTAD, *Investment Dispute Settlement Navigator*, (31 July 2017) online: <www.investmentpolicyhub.unctad.org/ISDS>.

[16] See Ronald Labonté, Ashley Schram & Arne Ruckert, "The Trans-Pacific Partnership: Is It Everything We Feared for Health?" (2016) 5:8 Intl J Health Policy & Management 487 [Labonté, "The Trans-Pacific Partnership"].

[17] *The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health: Report of the Special Rapporteur, Paul Hunt: Addendum: Mission to the World Trade Organization*, UNESCOR, 60th Sess, Provisional Agenda Item 10, UN Doc E/CN.4/2004/49/Add.1 (2004) 80.

During the negotiations of the TPP, another Special Rapporteur on the Right to Health asked all negotiating parties to provide details of any actions taken to ensure the enjoyment of the right. Of those that did reply, none stated that they had taken this step.[18] The Special Rapporteur's expressed allegation was "a negative impact on the access to medicines by the Trans Pacific Partnership Agreement…Some of the TPP's intellectual property provisions would…strengthen monopolies for life-saving medicines and create barriers for access to medicines."[19]

The Rapporteur went further to conclude that this will "result in high prices for medicines…[and]…negatively impact the ability of countries to take positive steps towards ensuring the enjoyment of the right to health of their citizens,"[20] although he articulated his concern to be particularly for "developing countries." As noted earlier, the withdrawal (for now) of the USA from this agreement has muted some of these concerns; however, the completed Comprehensive Economic and Trade Agreement between Canada and the EU contained TRIPS-Plus provisions that will result in much higher drug costs in Canada. Other special rapporteurs echoed these concerns over the TPP (e.g. Special Rapporteur on the Right to Food, Hilal Helver, in 2015, with regards to the right to adequate food and to income security). In the end, no government-initiated health impact assessment of the agreement was ever conducted, although assessments were undertaken independently by health and trade researchers in Australia[21] and in Canada.[22] Nor did the TPP negotiating parties ever hold discussions prior to finalizing the instrument on the potential impacts of the TPP on a number of fundamental human rights.

Despite all the theorizing of customary international law, the express acknowledgement of the primacy of human rights within many trade treaties, and the call for human rights impacts assessments of trade agreements being newly negotiated, there is little evidence that violations of human rights are being given much, if any, consideration in either trade negotiations or trade disputes.

This may be attributable to the fact that countries trying to defend their actions against other countries' or foreign investors' challenges to new regulatory measures rarely if ever advance human rights arguments in their cases. Reforms to WTO and ISDS agreements, which currently are the clear victors, can improve compromises between the two regimes. But it is still national governments that negotiate such rules, implement state-to-state disputes, and have the ability to bring human rights arguments into (if not investment treaty disputes) trade-related challenges to measures undertaken in whole, or in part, to advance citizens' health and health-related entitlements under international human rights law.

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[18] See Sanya Reid Smith, *Potential Human Rights Impacts of the TPP* (Penang: Third World Network, 2015) at 16.

[19] *Ibid.*

[20] *Ibid.*

[21] See Katie Hirono et al, *Negotiating Healthy Trade in Australia: Health Impact Assessment of the Proposed Trans-Pacific Partnership Agreement* (Liverpool, NSW: Centre for Health Equity Training Research and Evaluation, 2015).

[22] See Labonté, "The Trans-Pacific Partnership", supra note 16; Ronald Labonté, Ashley Schram & Arne Ruckert, "The Trans-Pacific Partnership Agreement and Health: Few Gains, Some Losses, Many Risks" (2016) 12:25 Globalization & Health 1.

IMPACTS OF INVESTMENT TREATIES ON HEALTH AND HUMAN RIGHTS

Gus Van Harten

Abstract: While investment treaties could help protect health and promote human rights, they are rather often used as a means to discourage governments from taking action. The treaties allow foreign investors to initiate investor-state dispute settlement (or ISDS) proceedings against states for their legislative, executive, administrative, and judicial decisions at any level. Thus, they provide a powerful tool for "foreign" investors to frustrate state action in virtually any area, including health and human rights. This article describes how ISDS provisions have impacted health-related decision-making by states and, in so doing, weakened their abilities to fulfill their human rights obligations.

Keywords: ISDS, foreign investor, investment treaty, NAFTA, MMT, fair and equitable treatment

INTRODUCTION

Investment treaties could play a positive and direct role in protecting health and promoting human rights by establishing enforceable international standards of conduct for governments and foreign investors in these fields. Yet, they have been designed instead to discourage governments from taking action to protect health or achieve other public priorities, where such actions may run afoul of the special protections granted in the treaties to foreign investors. The protections are far-reaching, partly because of the broadly defined concept of investment in the treaties to include, for example, "intangible" property, a "concession…to search for…natural resources," and "rights in relation to undisclosed information."[1] The resulting breadth of the treaties' coverage, in turn, makes the protections for foreign investors more powerful as a deterrent against governments and legislatures, especially for firms and individuals that are able to plan their ownership structure in ways that allow them to acquire "foreign" nationality creatively, even in relation to their home country, and who are wealthy enough to finance costly litigation under the treaties. Most importantly, the treaties allow foreign investors to initiate investor-to-state arbitration proceedings (also called investor-state dispute settlement or ISDS) against states for their legislative, executive, administrative, and judicial decisions at any level. Thus, the treaties provide a powerful tool for "foreign" investors to frustrate state action in virtually any area, including health and human rights. This chapter aims to shed light on how the tool works and how foreign investors and ISDS tribunals have used it to oppose health-related decisions by states.

FOREIGN INVESTOR PROTECTION IN INVESTMENT TREATIES

Investment treaties take two main forms. First, since the late 1960s and especially since the early 1990s, states have concluded over two thousand bilateral investment treaties (or BITs). These treaties are "bilateral" because they apply between two states; they are "investment" treaties because they serve to protect and promote foreign investment, broadly defined. Over the decades, BITs were concluded almost exclusively between: Western-developed countries on the one hand; and developing or transition countries, on the other. Additionally, they were concluded among developing and transition countries themselves. There are no BITs between major Western-developed countries. The premise behind earlier BITs was that the lack of independent judicial systems in developing countries could allow uncompensated nationalization of foreign investors' assets, thereby harming the economic interests of foreign investors and capital-exporting states.

Second, states, driven especially by US negotiating objectives, have concluded several dozen trade

[1] *Comprehensive Economic and Trade Agreement*, Canada and the European Union, 30 October 2016, art 8.1 (provisionally entered into force 21 September 2017).

agreements that contain a chapter on investment providing for ISDS.[2] Since the 1990s, and marked especially by the suite of World Trade Organization (WTO) agreements, the scope of trade agreements has been expanded to cover topics going well beyond conventional areas of trade quotas and tariffs reductions. The topics deal with food and product safety; allowance of gambling; operation of water and sewage systems; requirements for domestic content and diversity in cultural industries; creation of intellectual property rights; subsidies in agriculture and environmental industries; regulation of banking and insurance (including healthcare); and, as discussed in this paper, protection of foreign investors' assets from laws, regulations, and other state decisions that may reduce their profitability. This expansion of the realm of "trade" has been so multi-faceted and deep in its penetration of domestic law and policy that it has been characterized by some academic analysts as a form of constitutional reform at the international level.[3]

Even so, many trade agreements, including the WTO agreements, have not gone so far as to include an investment chapter allowing for ISDS. In this paper, only those trade agreements that take this step are characterized, along with BITs, as investment treaties. Within this group of trade agreements, the investment chapter of the agreement usually mimics a BIT. In particular, they usually mimic the US model BIT, as in the case of the North American Free Trade Agreement (NAFTA) of 1994.

Like BITs, trade agreements that have an investment chapter tend not to apply among developed countries, albeit with three important exceptions: (1) NAFTA applies between Canada and the US; (2) the Comprehensive Economic and Trade Agreement (CETA) would potentially apply between Canada and Western European countries, although it is not yet in force in this respect;[4] and, (3) the Energy Charter Treaty of 1994 provides for ISDS among Western European and former Soviet Bloc states in the energy sector only. Since the late 1990s, foreign investors have brought ISDS claims under investment treaties approximately 800 times, with a threat of such claims presumably invoked or identified even more frequently in internal state decision-making. Also, considering that about 25 percent of known treaty-based ISDS claims have been filed under NAFTA and the Energy Charter Treaty alone, there is a significant prospect for a major further expansion of ISDS in the event that ISDS provisions are included in new trade agreements between major developed states.

CASE-BASED ILLUSTRATIONS

In this section, two ISDS cases are presented as examples of how foreign investors have used investment treaties, and how ISDS tribunals have applied the treaties in ways that challenge or frustrate health-related initiatives. The first case, *Ethyl Corporation v Government of Canada*,[5] is discussed to show how governments have faced pressure to change decisions due to ISDS. The second, *Eureko BV v Republic of Poland*,[6] demonstrates how ISDS arbitrators have expanded their powers of review, and in turn, the compensatory promise of the treaties for foreign investors and corresponding risks and costs for states, by their rulings on what the treaties' ambiguous language should be taken to mean.

ETHYL CORPORATION V GOVERNMENT OF CANADA

The *Ethyl* claim under NAFTA was launched against Canada in 1997. Ethyl Corporation, based in the US, brought the claim after the Canadian federal government proposed to ban a gasoline additive called MMT, which Ethyl manufactured. The proposed ban

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[2] There are bilateral, regional, and multilateral trade agreements. Most trade agreements that permit ISDS are bilateral; a few are regional, e.g. the North American Free Trade Agreement (NAFTA) and the US Central American/Dominican Republic Free Trade Agreement (USCAFTA-DR).

[3] See David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge: Cambridge University Press, 2008); Stephen Clarkson & Stepan Wood, *A Perilous Imbalance: The Globalization of Canadian Law and Governance* (Vancouver: UBC Press, 2010).

[4] Key provisions of the CETA's investment chapter, including its ISDS provisions, were not approved for entry into force alongside the rest of the agreement and remain in limbo.

[5] (1998), Award, 38 ILM 708 at 723 (United Nations Commission on International Trade and Law) [*Ethyl*].

[6] (2005), Partial Award, IIC 98 (United Nations Commission on International Trade and Law) [*Eureko*].

responded to concerns from North American automobile manufacturers that MMT was incompatible with new automobile emissions control technology that had cost billions to develop. Also, health researchers had identified risks, especially for children, due to inhalation of MMT in gasoline fumes. At the time, MMT was banned or otherwise not in use in nearly all of the US for health or environmental protection reasons.

Ethyl promoted the use of MMT as a substitute for lead additives in gasoline that were eventually prohibited in North America, starting in the 1970s, on public health grounds. In the US, through the 1980s, Ethyl lobbied unsuccessfully for MMT to be approved in the US. The Canadian federal government took a less cautious approach by approving MMT in the 1980s on the basis that there was insufficient evidence to deny approval. When the federal government moved to ban MMT in the 1990s, based on new information about its health and its environmental risks, Ethyl lobbied actively against the proposed ban. Ethyl was joined in this respect by Canadian oil refineries, which balked at the cost, reportedly around $120 million, to re-tool refineries so that they could accommodate MMT substitutes. Ethyl and the refineries were in turn supported by several provincial governments, especially Alberta, which mounted a campaign against the proposed ban. In contrast, the automobile industry, environmental groups, and specialist health researchers advocated for the ban.

Ethyl's push for MMT was helped by two trade agreements: NAFTA, and an internal Canadian deal called the Agreement on Internal Trade (AIT) that was itself modeled on NAFTA. Both agreements came into force in the early 1990s and both provided new options for Ethyl or provincial governments to oppose or frustrate the federal government's plans. Ethyl (and its enterprising lawyers at the time) invoked NAFTA's little-known ISDS mechanism to challenge the proposed ban, arguing essentially that its NAFTA status as a US company that had invested in the manufacture and sale of MMT entitled it to compensation for its economic loss arising from the proposed ban, including lost profits and harm to its reputation. In a decision that reportedly surprised Canadian officials,[7] the NAFTA tribunal of three lawyers (sitting as arbitrators) that was established to hear the claim, permitted it to proceed. It became the first formal ISDS claim against Canada and one of the first under any investment treaty.

Meanwhile, Alberta pursued another option, newly available under the Agreement on Internal Trade, by challenging the proposed ban before an AIT panel on the grounds that it barred inter-provincial trade and was therefore impermissible. Before the NAFTA tribunal issued a ruling on the merits of Ethyl's ISDS claim, a majority of the three-member AIT panel decided in Alberta's favour.[8] Basically, the tribunal's majority objected to how the proposed ban was designed to limit trade in MMT, thus making its use infeasible, instead of banning MMT outright. Using a trade measure to achieve health and environmental purposes was, for the majority, an impermissible restraint on inter-provincial trade. In contrast, the dissenting member of the AIT tribunal concluded that a simple ban on MMT was not possible for the federal government because "on the evidence MMT, while noxious in large amounts, did not appear to be dangerous in small quantities" and MMT's environmental effects "are cumulative and indirect.".[9] Indirectly, then, the AIT decision appeared to highlight the limitations of Canada's legal framework for addressing chronic and uncertain health and environmental risks, with the AIT being used by the tribunal's majority to frustrate the federal government's attempt to use economic measures instead to address health and environmental risks. The dissenting tribunal member would have dismissed Alberta's claim, concluding that the federal government took action that "was necessary for air quality and the improvement of the environment" and that the AIT's purpose "was not to dilute the ability of responsible governments to improve the environment of Canadians."[10]

Having lost the AIT case and still facing Ethyl's ISDS claim under NAFTA, the federal government decided to drop the proposed ban and to settle with Ethyl partly on that basis. Also as part of the settlement, the federal government provided a statement to Ethyl that MMT was not a health or environmental threat and paid Ethyl about $19.5 million in compensation, which at the time

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[7] Interview of former federal minister (24 February 2014) (further reference information omitted to preserve author confidentiality).

[8] See Canada, *Agreement on Internal Trade: Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Canada Regarding the Manganese-Based Fuel Additives Act*, (Winnipeg, 1998).

[9] *Ibid* at 14.

[10] *Ibid*.

exceeded the federal environment department's budget for enforcement and compliance programs. In exchange, Ethyl withdrew the ISDS claim. Although some commentators and ISDS promoters do not regard the *Ethyl* case as an example of regulatory chill,[11] it was the existence of two trade agreements, and in particular the ISDS provisions under NAFTA, that led to the Canadian government decision.

MMT was eventually phased out of gasoline in Canada in 2004, about six years after the *Ethyl* case was settled. MMT had never been used widely in the US, where other additives replaced lead. Thus, it appears reasonable to conclude that NAFTA, for a substantial period, contributed to a policy decision that exposed Canadians to MMT and to the associated health, environmental, or economic costs of compromising automobile emissions control systems. Even if they have not been identified clearly, these costs are nonetheless an outcome, in significant part, of NAFTA and its ISDS provisions.

EUREKO BV V REPUBLIC OF POLAND

The *Eureko* claim against Poland provides a window into how, by bringing ISDS claims, foreign investors can require countries to subject their national health policy decisions to review by ISDS arbitrators and how the arbitrators, in turn, are empowered to interpret the treaties in expansive ways that enlarge their own review powers, expand foreign investor's access to compensation, and heighten the corresponding risks for states. Eureko (now Aecon) was a Dutch insurance company that negotiated an agreement with the Polish state treasury to buy into Poland's national health insurance provider, known as PZU. Facing a public outcry after 30 percent of PZU was sold to Eureko and another company, the Polish government declined to sell any more shares in PZU. In response, Eureko sought compensation under the Dutch-Polish BIT, while also bringing claims in Polish courts under its privatization contracts with the Polish treasury.

After hearing Eureko's BIT claim, two of the ISDS tribunal's three arbitrators allowed the claim to proceed and decided ultimately that Poland had violated the treaty by not proceeding with the further sale of PZU shares. Both of the arbitrators, Canadian Yves Fortier and American Stephen Schwebel, have been appointed repeatedly in ISDS cases and have tended to take expansive, pro-claimant approaches to various issues under the treaties.[12] The outcomes in the *Eureko* case were themselves premised on three claimant-friendly conclusions reached by Fortier and Schwebel, as follows.

First, it was questionable whether Eureko had invested anything in Poland as a basis for the BIT claim. Eureko's rights to buy shares in PZU involved an alleged contractual right to something that Eureko did not yet own, making its ownership hypothetical. Yet Fortier and Schwebel determined that Eureko acquired an "investment" under the BIT based on Eureko's hoped-for "ability to exercise substantial influence on the management and operation"[13] of PZU after purchasing further shares. This conclusion seemed to assume that Eureko's purchase of more shares would proceed, despite terms in the privatization contracts that limited the Polish treasury's obligation to sell the additional shares. The dissenting arbitrator in this case, who has not emerged as a repeat player in ISDS arbitrations, opposed Fortier and Schwebel on this point, describing their approach to the concept of investment as "completely novel."

Second, Fortier and Schwebel permitted Eureko to bring a BIT claim even though Eureko had previously agreed, under the privatization contracts, to resolve disputes regarding the contract in the Polish courts. Thus, Fortier and Schwebel took a permissive approach in allowing parallel BIT claims in circumstances where the dispute related to a contract with its own dispute settlement provisions. While this liberal approach to parallel treaty claims was contentious among ISDS tribunals at the

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[11] Christian Tietje, Freya Baetens & Ecorys, "The Impact of Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership", online at 43–44: Minister for Foreign Trade and Development Cooperation and the Ministry of Foreign Affairs of the Netherlands <http://media.leidenuniv.nl/legacy/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.pdf>.

[12] (Further reference omitted to preserve author confidentiality). Both arbitrators are usually appointed by foreign investors rather than states, although in *Eureko*, Fortier was the presiding arbitrator after having been appointed to that role by Schebel, as *Eureko's* chosen arbitrator, and by Poland's arbitrator.

[13] *Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investments*, 7 September 1992, at 9 (entered into force 1 February 1994).

time of the *Eureko* award, thanks to another ISDS tribunal decision over which Fortier presided,[14] it has since become well-entrenched among ISDS arbitrators and has been a key factor in expanding the remit of ISDS tribunals over foreign investor claims.[15]

The third claimant-friendly ruling by Fortier and Schwebel also dealt with Eureko's privatization contracts with the Polish treasury. Fortier and Schwebel decided that statements in the preamble to one of those contracts, which called on the Polish state treasury to make its "utmost efforts" to sell the further PZU shares to Eureko, amounted to a binding obligation that was frustrated by the Polish government's decision not to proceed with the further sale. Having pulled back from this step in the privatization process due to concerns about foreign private companies owning the country's national health insurer, Poland was said by Fortier and Schwebel to have acted "for purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character"[16] and to have violated Eureko's BIT right to "fair and equitable treatment". Further, Fortier and Schwebel decided, based again on an expansive interpretation of the relevant concepts, that Poland's conduct was an "expropriation" of Eureko's contractual rights and a violation of the BIT's complex "umbrella clause," which Fortier and Schwebel interpreted as having elevated Poland's contractual obligations in domestic law to the status of an international obligation under the BIT with the Netherlands.

Opposing this ruling, the dissenting arbitrator pointed to the fact that Eureko had not negotiated a binding right in its privatization contracts to purchase the further shares in PZU. The relevant contract between Eureko and the Polish treasury did not include a specific deadline for the treasury's best-efforts pledge to sell the shares. Also, the statements relied on by Fortier and Schwebel were found in the contract's preamble, which in Poland and many other jurisdictions, is understood to be aspirational rather than obligatory or binding. According to the dissenting arbitrator, Fortier and Schwebel clearly were "not satisfied with the clear content" of the actual contract and, to resolve the matter, resorted instead to "an interpretation bordering on manipulation" that was "incompatible with basic rules applicable under Polish law" (the law governing the contracts). Fortier and Schwebel had "not once referred to any relevant provisions of Polish civil law when interpreting the contracts" and this left "the impression that the Tribunal treats them as contracts "*sans loi*"—which facilitate their free interpretation."

Faced with the majority's award in *Eureko*, Poland agreed to settle the case and paid approximately 2 billion Euros to Eureko for not proceeding fully with the privatization of PZU. Therefore, by acting as a party to a privatization contract, Eureko was able to obtain a very large amount of public compensation based on two arbitrators' claimant-friendly approaches to: (1) vague language in an investment treaty; (2) the role of such treaties in relation to contractually-agreed dispute settlement forums; and, (3) Poland's conditional commitments to sell a controlling interest in PZU. More broadly, the case illustrates how the treaties give broad powers of review to ISDS arbitrators, and corresponding financial and political risks in the area of national healthcare policy.

EXCEPTIONAL ADVANTAGES FOR FOREIGN INVESTORS

Compared to domestic law and other areas of international law, investment treaties are extraordinarily powerful in their protection of foreign investors.[17] The extraordinary character of this protection, from a legal point of view, arises from the treaties' broad scope, far-reaching and often loosely-worded protections, and exceptional means of enforcement through ISDS.

In terms of scope, the treaties cover a very wide range of foreign-owned assets, including tangible assets like land and machinery, but also intangible assets like resource concession rights, patents, and other intellectual property rights. They usually define which investors are "foreign" liberally and apply to a very wide range of potential action or inaction of states, such as legislation, regulation, permits and approvals, standard-setting, and

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[14] *Compañía de Aguas del Aconquija SA & Vivendi Universal v Argentine Republic* (2002), Annulment Decision, (International Centre for Settlement of Investment Disputes).

[15] [Reference omitted to preserve author confidentiality].

[16] *Eureko*, *supra* note 6 at 233.

[17] [Reference omitted to preserve author confidentiality].

even judicial decision-making. Virtually any sovereign or regulatory activity, by any branch or at any level of the state, may be subject to the treaty's constraints.

Investment treaties also provide broadly-framed protections for foreign investors. They include, for example, rights to "fair and equitable treatment," "full protection and security," and to protection of a foreign investor's "legitimate expectations," all of which have tended to be interpreted in claimant-friendly ways by ISDS arbitrators.[18] The treaties have also been interpreted as entitling foreign investors to compensation where the assets are significantly reduced in value by the state's regulatory activities, referred in the treaties as "indirect" expropriation. Foreign investors are also entitled to no less favourable treatment than that which is given to domestic investors, thus precluding a range of programs that give preferences to local businesses and requiring compensation for foreign investors even if the state did not intend to treat the foreign investor less favourably. The treaties finally give foreign investors a right to move assets freely in and out of a state; different treaties limit this right in different ways, but in general, the right applies even in the context of a dire financial crisis that may call for controls on capital inflows or outflows. Although investment treaties usually include reservations and exceptions that protect, to a degree, aspects of the state's regulatory authority, the general principle is foreign investor protection, while the state's responsibility to protect its people is secondary, which depends on exceptions to the general principle.

When finding a violation of an investment treaty by a state, ISDS tribunals have relied most heavily on the standards of "fair and equitable treatment" (FET) and compensation for "indirect" expropriation. ISDS arbitrators have tended to interpret both of these protections as broad entitlements to compensation, despite qualifying terms or exceptions in some treaties that purport to protect health or environment measures. To illustrate, in a review of all ISDS awards from 1990 to 2010,[19] in 56 instances, ISDS arbitrators were found to have encountered the issue of whether FET was limited to the meaning of its most evident legal antecedent, the customary minimum standard of treatment for foreign nationals in international law, which is deferential to a state's regulatory choices. In these 56 instances, 73 percent of the arbitrators resolved this issue expansively, in favour of the position of ISDS claimants, by characterizing FET under the treaties as autonomous from customary international law and its well-established deferential position. Similarly, in 83 percent of 137 instances where they were found to have resolved the issue, ISDS arbitrators interpreted the meaning of "fair and equitable treatment" in language that went beyond the customary minimum standard of treatment, again with the effect of expanding the treaties' compensatory promise for foreign investors. On the issue of "indirect" expropriation, arbitrators in 72.5 percent of 120 instances took an expansive approach to the concept in one of two ways by: (1) focusing exclusively or primarily on the effect of a law, regulation, or other state decision on the foreign investor instead of other factors such as the public purpose of the state's decision; or, (2) adopting a relatively low threshold of impact on a foreign investor in order to find that a state decision qualified as a compensable indirect expropriation instead of a non-compensable general regulation.

Perhaps most importantly, the protections granted by the treaties are enforceable, not just in conventional forms of dispute settlement between states (where states have both rights and responsibilities across a range of issues), but also directly by foreign investors through ISDS. This option of direct enforcement, through international arbitration, leads to a range of extraordinary advantages for foreign investors. That is, beyond the treaties' broad scope, generous protections, and their allowance for direct ISDS claims, the treaties also empower foreign investors:

- to invoke the treaties' protections without having corresponding responsibilities that are enforceable, in an equivalent way, by states or by victims of a foreign investor's misconduct;
- to have their claims resolved by a tribunal whose members are not independent judges but rather for-profit arbitrators who, if they seek re-appointment, have an objective financial interest in the frequency of ISDS claims under the treaties (in a circumstance where only foreign investors can bring the claims);
- to appoint and pay repeat arbitrators in ISDS as counsel or experts in other ISDS cases;
- to control or influence 50 percent of the

[18] [Reference omitted to preserve author confidentiality].

[19] [Reference omitted to preserve author confidentiality].

membership of the tribunal by appointing one of three members and by having the right to require that appointment of the presiding arbitrator be referred to an outside appointing body;

- to benefit from awards by ISDS tribunals which are subjected to limited or no review in any court;

- to benefit from ISDS tribunals' favourable interpretations of ambiguous language in investment treaties, particularly in the case of the largest companies (with over USD10 billion in annual revenue), whose claims were allowed to proceed and led to a finding of a violation of the treaty by the state in 71 percent of 48 cases, compared to 42 percent of 166 cases for other foreign investors;[20]

- to determine which arbitration rules will apply to the foreign asset owner's claim against the state, thus determining the degree of openness of the proceedings and the degree to which the tribunal's decisions can be reviewed;

- to bring claims without resorting first to the state's courts and without having to provide any evidence that the courts have limitations which would justify allowing an international claim;

- to bring claims under the treaty when the underlying dispute relates to a contract that has its own agreed requirements to resolve disputes in another forum;

- to avoid doctrines of deference or balancing that often apply in domestic law when courts review decisions by elected legislatures or more expert regulators;

- to receive uncapped amounts of public compensation for state action, benefitting especially large companies (with over USD1 billion in annual revenue) and very wealthy individuals (with over USD100 million in net wealth) who, as claimants in eighty-six ISDS awards that favoured a foreign investor, received about 95 percent of the ordered compensation;[21]

- to receive public compensation in circumstances where, in domestic law and other areas of international law, a private party could only obtain non-monetary remedies or less than market-based compensation, out of respect for the state's regulatory authority and to preserve the ability of legislatures and executives to plan for the costs of their decisions;

- to receive public compensation on a retrospective basis, where other international forums, such as the World Trade Organization, give states an opportunity to avoid financial penalties or economic sanctions by bringing their decisions into compliance with a WTO ruling after the ruling has been issued;

- to seek enforcement of awards against a state's assets in other countries, where domestic courts and other international tribunals' decisions are not internationally enforceable in this way; and

- to avoid a right of standing in the process by any other affected party, except the state's national government, where principles of fair process would warrant full rights of participation by the other party.

In these respects, investment treaties go beyond domestic law and other treaties that seek to protect people from mistreatment or abuse, whether by states or foreign investors themselves, and that call for state action to protect health, human rights etc.

BROADER IMPACTS ON HEALTH AND HUMAN RIGHTS

Due to the extraordinary protections they provide to foreign investors alone, investment treaties give foreign investors a powerful tool with which to pressure states. The tool is not available to other affected actors and constituencies, thus putting them at a disadvantage in state decision-making. Faced with the prospect of a potentially vast, retrospective compensation order and the financial and reputational risks of litigation in ISDS, governments may pull back from decisions they would otherwise pursue. Even when the risk of violating an investment treaty is deemed to be low, if the amounts at stake are high enough, ISDS can serve as a powerful

[20] [Reference omitted to preserve author confidentiality].

[21] [Reference omitted to preserve author confidentiality].

deterrent for the state.

For states, the risks and costs of ISDS fall into four categories: awards, litigation fees, opportunity costs, and reputational or political costs. The first category includes the cost of compensation orders against the state, which in some ISDS cases have reached hundreds of millions and even billions of dollars. The second category includes the state's fees for ISDS arbitrators, lawyers, and experts, which usually run into millions and sometimes tens of millions of dollars per case and are typically paid by the state even if the foreign investor's claim ends up being dismissed. The third category includes the internal costs of vetting internal proposals for compliance with investment treaties and managing ISDS litigation, both of which require re-direction of staff and other resources away from other tasks. The fourth category accounts for the potential reputational or political costs of ISDS, which could affect a government's ability to attract foreign investment, its relations with other states and international organizations, or its ability to retain public support at home. Facing these complex risks carrying, in some cases, potentially severe consequences, it is reasonable to expect that states will alter their decision-making to downplay priorities of health or human rights protection in favour of avoiding the risk of foreign investor claims.

How do these special protections for foreign investors actually affect states and their populations in particular areas of policy, such as health? ISDS cases like *Ethyl v Canada* and *Eureko v Poland* that lead to a publicly-available settlement or award show us how investment treaties put pressure on states and give ISDS arbitrators profound authority over states' policy choices and budgets. The known impacts can be assessed for their corresponding health impacts where, as in *Ethyl*, the state's consent to an investment treaty allowing for ISDS was a significant factor in a related state decision to expose the population to health risks. As another indicator of how ISDS bears on health-related decisions, it was common in known ISDS cases, from 1990 to 2010, for foreign investors' claims to relate to health or environmental protection decisions.[22] Thus, in a review of 196 ISDS cases, it was found that 40 cases arose from state decisions on public health or environmental protection. The public health theme was evident in cases related to health insurance, drinking water quality, food safety, pharmaceuticals, environmental health, pesticides regulation, and anti-tobacco measures. The environmental theme emerged from cases related to state decisions on water, land, or biodiversity conservation, as well as pollution control, mining remediation, hazardous waste disposal, and liability for environmental contamination. A related group of 21 cases involved planning or permitting decisions by local governments. On this basis, we can conclude reasonably that cases like *Ethyl* and *Eureko* are not exceptional in ISDS and that foreign investors commonly bring ISDS claims that arise from states' health-related policy choices.

However, it is difficult to go further and draw comprehensive conclusions about ISDS' impacts on states and their human rights obligations in a context where the public is not given access to information about how a government dealt with ISDS risks in particular cases, and where states may have an interest not to reveal potentially embarrassing information about appeasement of a foreign investor at the expense of other actors. As a modest step toward addressing this research challenge, the author with a colleague carried out confidential interviews with 52 insiders—primarily current or former government officials in environment and trade-related ministries of the Ontario government—and found in summary that:

- Governments have changed their decision-making processes to account for trade concerns including ISDS, primarily by introducing new forms of internal vetting—by trade officials and government lawyers—of proposed decisions, with some insiders regarding the trade ministry and its regulatory assessment process as creating undesirable obstacles for environmental decision-making;

- ISDS puts pressure on government decision-making because of the financial and political risks, due to the opportunity costs that ISDS creates for government, and as a consequence of the career risks that it creates for individual officials. ISDS pressures may be overcome, especially if there is a strong political commitment to a proposed measure backed by legal capacity to scrutinize purported ISDS risks critically and throughout the policymaking process.[23]

[22] [Reference omitted to preserve author confidentiality].

[23] [Reference omitted to preserve author confidentiality].

Assessments of trade or ISDS risks involve value choices and the changes to government decision-making we documented elevated the role of "trade values" over competing values associated with health and environmental protection and human rights.

CONCLUSION

Investment treaties are broad in scope, far-reaching in the protections they provide to foreign investors, financially risk-laden for states due to their reliance on market-based compensation as the primary remedy for unlawful conduct, and highly enforceable against a state's assets in many countries. They provide extraordinary protections for foreign investors, including the ability to:

- bring international claims directly against a state;
- sidestep the state's domestic courts without having to provide any evidence of the courts' failings;
- seek compensation for their rights and protections without equivalent responsibilities in situations of foreign investor misconduct;
- have significant control over the make-up of ISDS tribunal;
- have their claims heard by arbitrators who have an objective financial interest in the frequency of foreign investor claims under the treaties;
- enforce ISDS tribunal awards with limited or no opportunity for review of the award in any court;
- avoid contractually-agreed dispute settlement forums;
- avoid doctrines of deference and balancing that would apply in domestic judicial review of state action;
- access potentially huge amounts of retrospective public compensation for state action in situations where domestic law and other areas of international law would not allow that remedy; and
- avoid having to argue against other parties whose rights or interested are affected by the foreign investor's claim but who are denied any right of standing in ISDS.

Cases such as *Ethyl v Canada* and *Eureko v Poland* demonstrate that, whenever a foreign investor files a claim, the treaties give profound powers of review to ISDS arbitrators and that arbitrators have issued expansive rulings that enlarged their own powers of review, the treaties' compensatory promise for foreign investors, and the risks for states. In this context, ISDS provisions have impacted on health-related decision-making by states significantly, even if the impact is hard to uncover and measure in particular cases, and in doing so have weakened states' abilities to fulfill their human rights obligations.

ACCESS TO AFFORDABLE MEDICINES IN THE TIMES OF INTELLECTUAL PROPERTY: A RIGHT TO HEALTH PERSPECTIVE

Anand Grover & Lorraine Misquith

Abstract: Affordable access to essential medicines, particularly for newer treatments, is an acute problem across the world. Millions of people who cannot afford high-priced, patented medicines are condemned to suffer needlessly and in violation of their right to health. On their part, states have failed to protect and give primacy to their right to health obligations under human rights treaties over those under trade agreements, which promote and enforce patent protection, in the process allowing corporate interests to trump human rights.

If countries are to meet the Sustainable Development Goal (SDG) 3 of "Good Health and Well-being" and its targets focused on eliminating disease, a right-to-health approach must be the underlying basis of their response. In this article, the authors provide an overview of the right to health under international law and discuss recent developments in the area of intellectual property rights and trade agreements as they impact affordable access to medicines, while calling upon countries to effectively use available legal mechanisms that protect and promote the right to health.

Keywords: Right to health, access to medicines, TRIPS, patent, intellectual property, ISDS.

INTRODUCTION

Considerable progress has been made in recent decades to improve access to essential medicines for millions of people around the world. Yet, a lot more remains to be done. Inequalities and inequities in access to health facilities, goods, and services between and even within countries have widened due to the lack of access to basic healthcare and essential life-saving medicines that continues to be a grim reality for most of the world's poor population. While newer, safer, and more efficacious medicines have been introduced with the potential to save millions, patents on these medicines have rendered them unattainable for many.

The SDGs, adopted by the UN General Assembly in September 2016, identify critical areas for action in global health that countries must work towards by 2030. Elimination of HIV, TB, and malaria, and combatting hepatitis are some of the main targets listed to achieve Goal 3. These cannot be fulfilled without ensuring access to affordable essential medicines for all those who need it. In turn, affordable access cannot be achieved without addressing the intellectual property (IP) barriers, which are largely responsible for the high price of essential, life-saving medicines.

What is the relationship between human rights treaties and those that deal with trade? Is there an inherent conflict, and if so, how are they reconciled? The UN Secretary General's High-Level Panel on Access to Medicines report released in 2016 recognizes the incoherence between international trade rules, which govern intellectual property on the one hand, and international human rights law with respect to access to medicines, on the other.[1] The position with respect to international law, however, is clear. States must, as is the hierarchy under international law, give primacy to their human rights obligations, particularly to the right to health and access to essential medicines for its people, over trade obligations prescribed under international trade agreements, which seek to protect and enforce IP rights of private parties.

THE WORLD'S ACCESS TO MEDICINES PROBLEM: OVERVIEW OF THE ISSUE

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) harmonized minimum intellectual property standards globally. But safeguards in the form of flexibilities were allowed to help developing countries tailor their IP laws to the level of their economic development. The use of TRIPS flexibilities

[1] United Nations, *Report of the United Nations Secretary-General's High-Level Panel on Access to Medicines: Promoting Innovation and Access to Health Technologies* (Geneva: UN, 2016).

was also reinforced in the WTO's Doha Declaration.[2] Yet, developing countries have time and again been targeted for their use of TRIPS flexibilities by developed countries to the point that they are now practically redundant.

Bilateral free trade and investment agreements (BFTIAs) are now the preferred trade model for developed countries at the behest of their pharmaceutical industry to ratchet up IP protections beyond the TRIPS Agreement. The provisions of these BFTIAs, in the context of the consequences that they lead to, are directly incompatible with the binding human rights obligations under international human rights treaties, specifically the right to health.

OVERVIEW OF THE RIGHT TO HEALTH FRAMEWORK IN THE CONTEXT OF IP

The right to health is recognized in many international legal human rights instruments. The 1946 preamble of the Constitution of the World Health Organization (WHO) was the first to recognize the right to health as a positive fundamental right i.e. not merely the absence of disease or sickness, but also a state of complete physical, mental, and social well-being. This was followed by Article 25 the Universal Declaration of Human Rights (UDHR) in 1948, where the right to health was recognized as part of the right to adequate living. The most comprehensive enunciation of the human right to health can be found under Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESR), which recognizes the *right of everyone to the highest attainable standard of physical and mental health*, as elaborated under General Comment (GC) 14 by the Committee on Economic, Social and Cultural Rights (CESCR).

Specifically, GC 14 carves out a core, a non-derogable, legally binding obligation on states to take steps to ensure that the right to health of its population is realized by ensuring access to life-saving, essential medicines. In the hierarchy of legal obligations under the right to health framework, the obligation to guarantee access to essential medicines takes precedence as an immediately realizable, non-derogable right, otherwise referred to as "core obligations" in comparison to other obligations described under the GC 14, which are generally understood to be progressively realizable. The right to health approach does not permit states to cite financial or other constraints as justifications for their failure to ensure a non-derogable obligation. In other words, denial or failure by the state to guarantee individuals' right to access essential medicines would be an infringement of the right to health.

Three layers of legal obligations on states underlie the right to health framework—the obligations to respect, protect, and fulfil the right to health. The obligation to "*respect*" casts a negative obligation on states to restrain themselves from interfering with the enjoyment of individuals' right to health in any manner. This may include denial of equal treatment to prisoners, asylum seekers, illegal immigrants, or even limiting access to contraceptives for women. States are also enjoined by the obligation to "*protect*" the right to health by legislation against interference by non-state actors in actions that infringe upon guarantees afforded under Article 12. This includes the obligation to regulate healthcare goods, services, and facilities provided by the private health sector including the pharmaceutical industry. To "*fulfil*" the right to health, states are under the obligation to enact legislation and rules, and take administrative measures on the right to health along with a national health policy for its realization. Such legislation and national health policy would also contain provisions to operationalize and specifically implement obligations to ensure safe, affordable, quality essential medicines.

The elements of availability, accessibility, acceptability, and quality underlie all aspects of the fulfilment of the right to health. In the context of access to medicines availability entails sufficient quantities of essential medicines. Accessibility entails non-discriminatory access, one which is within reasonable geographical reach of the public as also financially affordable based on the principle of equity that ensures equal access irrespective of financial status and particularly to ensure that poorer households are not disproportionately burdened with health expenses. Affordability in the context of medicines where it is paid out of pocket, as is the case in most developing and least developed countries, would be the ability to purchase medicines without causing undue financial hardship. At a population level, affordability may be determined by the price of the medicine, available budget, and the fiscal space

[2] WTO, *Declaration on the TRIPS Agreement and Public Health*, WTO Doc WT/MIN(01)/DEC/2 (2001), 4th Sess.

available to a government.[3]

Accessibility also contains the dimension of informational accessibility, which includes the right to seek and receive information regarding health issues, which would include areas like medicines' treatment literacy. Acceptability denotes appropriateness of health services, which are respectful of, and sensitive to, various cultures, minorities, and vulnerable groups, as well as compliance with ethically accepted standards of medical practice. The final underlying element of the right to health is ensuring quality of health goods and services indicating that they must be scientifically and medically appropriate. The manner and extent to which these elements, which underlie all forms and aspects of the right to health, are to be applied depends on the developmental conditions prevailing in states.

Access to essential medicines as a fundamental human right in the context of the right to health is significant in that its freedoms and entitlements are a right of every individual and not just to a group or community or population. In this respect, it differs from the public health approach, which looks at the benefit to the public rather than to the individual. As a consequence, when any individual is denied access to essential medicines, whether on the basis of discriminatory laws, policies, or actions; or where there are trade agreements that restrict access to affordable medicines; or where the state has failed to secure financial resources to enable access to medicines, it would amount to a violation of an individual's right to health.

NEW, EFFECTIVE MEDICINES STILL OUT OF REACH

Access to essential, life-saving medicines is still a major struggle for people across the world. The high cost of essential medicines, especially the newer, more effective treatments for hepatitis C, TB, HIV, and cancer has kept them out of reach of those who need them, severely impacting their quality of life and causing untold suffering to many millions. In developing and least-developed countries, this problem is compounded by the lack of any manner of health coverage driving individuals and families to impoverishment due to healthcare costs. The Lancet Commission on Essential Medicines estimates that it would cost a minimum USD13 per capita to ensure access to 201 essential medicines while most developing and least-developing countries spend much below this amount, half of which is out-of-pocket.[4]

At the same time, availability of health insurance does not mean access to medicines is guaranteed. High costs of essential medicines have also caused great strain on healthcare budgets in the developed world, where there is health insurance coverage. A case in point is Sofosbuvir, a new and effective treatment for hepatitis C, which is patented by Gilead in various countries. When it was introduced in the US in 2013, a single course of Sofosbuvir treatment was priced at USD84,000 a year and its combination with Ledipasvir, another of Gilead's patented medicines, was priced even higher than that. Four years later, the price has not reduced given Gilead's monopoly. The price of Sofosbuvir based treatments continues to remain upwards of USD60,000 in most developed countries.[5] This led to treatment rationing in Brazil, the UK,[6] and Switzerland, where only those who are very sick are put on treatment despite global recommendations that indicate that the earlier treatment is initiated the better the treatment outcome.

Contrast this with the situation in some developing countries like Egypt where Sofosbuvir is not patented, the lowest price for local generic Sofosbuvir is around USD50. Where there is local generic production through voluntary licenses, such as in India, the lowest price recorded is around USD170. Yet, most of the people who have received treatment with these new HCV medicines are from developed countries despite developing countries having the largest disease burden of HCV.[7]

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[3] Veronika J Wirtz et al, "Essential Medicines for Universal Health Coverage" (2017) 389:10067 Lancet 403.

[4] *Ibid*.

[5] Swathi Iyengar et al, "Prices, Costs, and Affordability of New Medicines for Hepatitis C in 30 Countries: An Economic Analysis" (2016) 13:5 PLoS Med.

[6] Sarah Boseley, "NHS 'Abandoning' Thousands by Rationing Hepatitis C Drugs", The Guardian (28 July 2016), online: <www.theguardian.com/society/2016/jul/28/nhs-abandoning-thousands-by-rationing-hepatitis-c-drugs>.

[7] World Health Organization, *Global Report on Access to Hepatitis Treatment: Focus on Overcoming Barriers* (Geneva: World Health Organization, 2016).

Claims made by multinational corporations (MNCs) that R&D for a new medicine costs around USD2.6 billion,[8] have been challenged by experts who propose that the actual is cost around USD60-80 million.[9] What is also overlooked is that much of the funding for R&D is generated from public money. Two-thirds of all upfront R&D costs is paid for by taxpayers' money[10] and a third of new medicines developed originate in public research institutions.[11] What they also fail to disclose is that these companies spend far more on marketing and buy-back of shares than on medical R&D.[12]

IMPACT OF TRADE AGREEMENTS ON HEALTH: TRIPS AND ACCESS TO MEDICINES

The coming into force of the TRIPS Agreement in 1995 obliged WTO Members to protect patents on products, including pharmaceuticals, for a period of 20 years. It was at the same time that the number of deaths of adults and children living with HIV had reached alarming proportions, driving the world's attention to the barriers posed by pharmaceutical patent monopolies in accessing life-saving medicines and giving rise to a global-access-to-medicines movement. The high costs of antiretroviral (ARV) medicines and their impact on the poorest living in the developing and least developing countries meant that people living with HIV were just left to die with no access to treatment.

During the negotiations for the TRIPS Agreement, countries like India and Brazil successfully negotiated and obtained flexibilities in domestic implementation of IP standards for developing and least developed countries. Key amongst these were flexibilities that allowed developing countries, which did not provide patent protection at the time of coming into force of TRIPS, a ten-year transition period to comply and further extensions for least developed countries. Countries were also granted freedom to determine criteria for patentability. India, having at that time a strong local pharmaceutical industry thanks to far-sighted policy decisions taken in the 1970's, took full advantage of the transition period. The generic industry excelled at producing formulations of medicines at some of the lowest prices in the world. When Indian generic pharmaceutical companies started supplying generic ARVs in the late 1990's, the market competition triggered substantial price reduction from USD10,000 per person, per year, to under USD300 by the early 2000's, earning India the title of being the "pharmacy of the developing world."

THREATS TO THE DEVELOPING WORLD'S PHARMACY

India's role as the developing world's pharmacy has been critical in promoting affordable access to medicines to millions of people across the world. Competition amongst Indian generics has been vital to achieving substantial price reductions in areas such as ARVs.[13]

In 2005, when India had to amend its laws to comply with its TRIPS obligations, it also ensured that only those medicines, which were truly innovative, would be granted patents. However, Indian lawmakers recognized the pernicious practice of "ever greening" by multinational pharmaceutical companies through which they sought patents on minor modifications on their existing patented medicines to further extend their market exclusivity by keeping competitors out, which would otherwise bring down prices. These deliberations are reflected in the amendment introducing Section 3(d), legislative debate, which documents how India's lawmakers recognized the health impact of high cost patented medicines on a country with millions of people living in poverty. It also ensured an uninterrupted supply of low cost, quality ARV generic medicines from India to other high burden developing countries.

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8 Joseph A DiMasi, Henry G Grabowski & Ronald W Hansen, "Innovation in the Pharmaceutical Industry: New Estimates of R&D Costs" (2016) 47 J Health Economics 20.

9 Donald W Light & Rebecca N Warburton, "Extraordinary Claims Require Extraordinary Evidence" (2005) 24:5 J Health Economics 1030.

10 Michele Boldrin & David K Levine, *Against Intellectual Monopoly* (Cambridge: Cambridge University Press, 2008).

11 Robert Kneller, "The Importance of New Companies for Drug Discovery: Origins of a Decade of New Drugs" (2010) 9:11 Nature Reviews Drug Discovery 867.

12 William Lazonick et al, "US Pharma's Financialized Business Model" (2017) Institute for New Economic Thinking Working Paper No 60.

13 Brenda Waning, Ellen Diedrichsen & Suerie Moon, "A Lifeline to Treatment: The Role of Indian Generic Manufacturers in Supplying Antiretroviral Medicines to Developing Countries" (2010) 13:35 J Intl AIDS Society 1.

Another important flexibility that the TRIPS Agreement allows under Article 31 is that of government use or compulsory licensing, which allows the government or a third party respectively to use a patented product without the authorization of the patent holder for a reasonable royalty fee. Several countries dealing with a high disease burden of HIV and HCV, where available patented medicines are unaffordable or made unavailable by the patent holders, have issued compulsory licenses.

However, TRIPS flexibilities have not been the legal tool that governments of developing countries hoped it would be to ensure access to life-saving medicines. Despite the 2001 Doha Declaration, which recognizes the use of TRIPS flexibilities as a right of WTO Members,[14] there have been constant political, legal, and economic threats by developed country lobbies supported by their governments to thwart and undermine their implementation,[15] privileging trade and profits over human life. The 301 and Special 301 Report of the United States Trade Representative, accordingly, categorizes countries based on the IP protections that meet the US industry standards, listing countries like India under the Priority Watch List for decades for its use of TRIPS flexibilities. Section 3(d) and the first and only compulsory license granted in India on Bayer's kidney cancer drug Nexavar are constantly cited in the Special 301 reports as alleged instances of poor IP protection.

The use of TRIPS flexibilities are often, albeit wrongly, blamed as discouraging pharmaceutical R&D investment in developing countries. In reality, the current R&D model driven by unconscionable profits of corporates invests in products only in those countries with the capacity to pay for high prices for medicines. This is evident from the data, showing that two-thirds of the global spending on pharmaceutical comes from the developed world, which represents 17 percent of the world's population. Low income countries represent a fifth of the world's population, but account for only 0.5 percent of global expenditure on pharmaceuticals.

The pressure on India to not use and implement TRIPS flexibilities has also extended to legal challenges before courts. In 2012, Novartis, a Swiss pharmaceutical company, unsuccessfully challenged not only the rejection of its patent application on Gleevec, its blockbuster anti-cancer medicine, but also Section 3(d) of the Indian Patent law as being non-compliant with the TRIPS Agreement. The use of the Bolar exception, an important flexibility that allows generics to get approvals for products whose patents are near expiry, has also been legally challenged by MNCs like Bayer. Litigations by MNCs against Indian generic companies have escalated in the recent past, with infringement actions and injunctions to keep generic competition out of the market being a routine occurrence at a great expense in terms of legal fees and costs for smaller generic companies to sustain.

A POST-TRIPS CHALLENGE TO AFFORDABLE TREATMENT ACCESS

The MNC agenda for IP had always been more than what was agreed under the minimum standards of IP protection and enforcement under the TRIPS Agreement, that is, to bring it in line with the IP laws of the developed world. The WTO as a multilateral trading forum was no longer a favourable avenue to push for standards that exceed the TRIPS Agreement. US, Japan, and EU based pharmaceutical companies continued, through their governments, to push for stronger intellectual property rights beyond the minimum standards negotiated under the TRIPS Agreement through bilateral treaties with trading partners.

These trade agreements contain measures designed to extend patent monopolies and block or delay the availability of generic medicines referred to commonly as TRIPS Plus provisions. Patent term extension is one such TRIPS Plus provision, which requires countries to further patent terms beyond the 20 years mandate by TRIPS Agreement. MNCs often cite delays in patent examination and regulatory approvals as a justification for extension of patent term while these aspects were already factored into the 20 year term agreed to under the TRIPS Agreement. Data exclusivity is another provision that is pushed for in most BFTIAs where drug regulatory authorities are prevented from relying on originator's clinical data to register any generic equivalents for a period of usually five years, effectively keeping generic products out of the market even where there may not be a patent on the product.

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[14] *WTO, Declaration on the TRIPS, supra* note 2.

[15] See United Nations, *High-Level Panel, supra* note 1 at 20.

Some of these trade agreements even require the drug regulatory authorities to seek the consent of the patent holder before generic products can be registered in what is known as "patent linkage." In effect, it obliges drug regulatory authorities, whose competence is limited to approving and regulating the safety and efficacy of medicines in the market, to also enforce the private rights of patent holders. Most of the US negotiated trade agreements contain such measures.[16]

IP is also protected under these BTIAs as "investment," thereby allowing third parties whose investments are impacted by any policy actions taken by the government—even where they are in public interest—to bypass domestic courts and jurisdictions and directly sue governments for millions of dollars in secret, international arbitration proceedings through the International Dispute Settlement System (ISDS). An example of these concerns coming to fruition is the case of *Eli Lily v Canada* where Canada was taken to arbitration proceedings for its violations of North Atlantic Free Trade Agreement (NAFTA) because its courts found patents of two of Eli Lily's drugs to be invalid under Canadian law. The threat of ISDS has a chilling effect on countries that take steps to increase affordable access to medicines. Ukraine was threatened with a USD800 million arbitration claim by Gilead at the same time that domestic legal proceedings were filed against the registration of generic Sofosbuvir. The matter was settled only after Ukraine agreed to withdraw the registration of the generic product.[17] Similarly, Colombia was also threatened with international investment arbitration by Novartis for attempting to issue a compulsory license on the anti-cancer medicine Glivec.[18]

RIGHT TO HEALTH TRUMPS TRADE IN THE HIERARCHY OF INTERNATIONAL LAW

Traditionally, international legal systems dealing with trade and human rights law have been treated as two separate regimes. Trade law developed under the WTO regime outside of the auspices of the UN, and human rights mainly under the UN regime.

The UN Charter, which enjoins state parties to respect human rights, has a supra-normative status in international law given its constitutional nature; it explicitly requires states to meet human rights obligations. Furthermore, it expressly declares under Article 103 that, where UN members' obligations under other treaties conflict with their obligations under the UN Charter, the latter will prevail. This is reinforced by the 1993 Vienna Declaration, which precedes the establishment of the WTO in 1994, where states themselves recognize the primacy of protection and promotion of human rights as "the first responsibility of Governments." Despite the importance of trade in the context of development, the paramount nature of states' obligations to fulfil and realize the economic, social, and cultural rights of their people has been overwhelmingly emphasized in numerous international instruments.[19] Independent human rights experts have even sought an advisory opinion of the International Court of Justice on the issue.[20] This position would extend even to obligations arising out of BFTIAs, which conflict with the human rights obligations enshrined under the UN Charter. Therefore, the clear conclusion is that human rights treaties trump trade agreements.

The right to health framework enjoins states to promote the right to health under international instruments and, further, to take steps to ensure that it is not adversely impacted in negotiating and concluding other

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[16] See United Nations, *High-Level Panel, supra* note 1 at 25–26 for a summary of the TRIPS Plus provision under various FTAs.

[17] See Luke Eric Peterson & Zoe Williams, "Gilead Pharma Corp Withdraws Investment Arbitration After Ukraine Agrees to Settlement of Dispute Over Monopoly Rights to Market Anti-Viral Drug", *ISDS Platform* (16 March 2017), online: <www.isds.bilaterals.org/?gilead-pharma-corp-withdraws>.

[18] See "Compulsory Licensing in Colombia: Leaked Documents Show Aggressive Lobbying by Novartis", *Public Eye* (12 April 2017), online: <www.publiceye.ch/en/media/press-release/compulsory_licensing_in_colombia_leaked_documents_show_aggressive_lobbying_by_novartis/>.

[19] See *Charter of Economic Rights and Duties of States*, GA Res 3281 (XXIX), UN Doc A/RES/3281 (1975); *Further Initiatives for Social Development*, GA Res S-24/2, UNGAOR, 24th Sess, Supp No 1, UN Doc.A/RES/S-24/2 (2000) at para 101; *United Nations Millennium Declaration*, GA Res 55/2, UNGAOR, 55th Sess, Supp No 49, UN Doc A/RES/55/2 (2000).

[20] *Ibid*. See also AGs UNSR report on TRIPS.

international agreements.[21] With respect to health, the TRIPS Agreement itself recognizes the need to balance the interest of trade with health by recognizing the rights of WTO Members to take steps to protect public health. The overarching principle of the TRIPS Agreement recognizes that WTO Members must adopt measures to protect public health and to promote public interest in key national socio-developmental sectors.[22] The Doha Declaration further clarifies that the TRIPS Agreement "can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all." TRIPS flexibilities are, therefore, a means to balance the rights of patent holders as against the right of the public to access affordable medicines, providing a way out of the conflict that often arises between high prices and access.

Thus, while it is clear that human rights treaties are the primary obligations of states, over and above trade and investment treaties, in practice, however, trade considerations often outweigh those related to health and human rights when it comes to entering into trade and investment treaties and implementing international legal obligations. Most countries do not consider their obligations under human rights treaties or even conduct a human rights impact assessment before signing on to harmful provisions of trade agreements. There are no punitive actions attached to violations of human rights obligations by states as there are for violations of WTO laws. The WTO dispute settlement has, till date, not referenced any human rights principles of treaties in deciding trade disputes. Even the ISDS mechanism does not require arbitrators to follow human rights treaty norms in deciding disputes, prompting the fourth Independent Expert to the UN General Assembly to call for abolishing ISDS mechanisms, citing these as incompatible with the provisions of human rights treaties such as the International Covenant of Economic, Social and Cultural Rights.[23]

CONCLUSION

To fulfil and realize the right to health for all, states must ensure affordable access to essential medicines. This requires states to recognize the primacy of the human right to health over trade considerations. It is not sufficient to merely include all available TRIPS flexibilities into domestic laws without ensuring their effective implementation. States must show leadership and commitment to the full use of TRIPS flexibilities and ensure that the BTIAs they negotiate (and the TRIPS Plus measures they contain) do not interfere with the enjoyment of affordable access to essential medicines. In the absence of such actions, targets under SDG 3 will not be met. Threat of retaliation, where countries declare their intention to use TRIPS flexibilities or pressure through such means as the Special 301 Report when flexibilities are being used, is incompatible with the right to health.

India's role as the pharmacy of the developing world must be sustained on the strength of its pro-access patents laws and any pressure to sign onto TRIPS Plus measures under BTIAs should be resisted and subject to impact assessments, particularly where it may affect the right to health and access to affordable medicines which have global implications.

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[21] See *General Comment No 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UNESCOR, 22nd Sess, Agenda Item 3, UN Doc E/C.12/2000/4 (2000) at para 14.

[22] See Article 8.

[23] See *Promotion of a Democratic and Equitable International Order*, UNGAOR, 70th Sess, Provisional Agenda Item 73b, UN Doc A/70/285 (2015).

IMPLICATIONS OF TRADE AND INVESTMENT AGREEMENTS FOR ACCESS TO AFFORDABLE MEDICINES AND THE RIGHT TO HEALTH

Deborah Gleeson & Lisa Forman

Abstract: Lack of access to affordable medicines is an ongoing problem for much of the world's population, undermining the right to health in international law. Rules incorporated into trade and investment agreements increasingly exacerbate this problem by delaying the market entry of cheaper generic medicines, placing constraints on pharmaceutical pricing and reimbursement programs, and providing pharmaceutical companies with rights to claim damages in international tribunals if a policy or law harms their investments. This paper describes the way these issues have played out in the negotiation of several trade agreements, discusses methods and tools available to assess the health and human rights implications of trade agreements including human rights impact assessment, and explores contemporary challenges and opportunities for ensuring that trade and investment agreements prioritize and respect affordable access to medicines and human rights.

Keywords: Access to medicines, pharmaceuticals, trade agreements, human rights impact assessment, health impact assessment

LACK OF ACCESS TO AFFORDABLE MEDICINES AND THE CONSEQUENCES FOR HEALTH AND HUMAN RIGHTS

Equitable access to affordable medicines and other health technologies is recognized by the World Health Organization as one of the fundamental building blocks of well-functioning health systems,[1] and the provision of affordable access to medicines and vaccines is a target under Goal 3 ("ensure healthy lives and promote well-being for all at all ages") of the Sustainable Development Goals.[2] The world's ability to meet several of the other targets under SDG3[3] will also depend on access to essential medicines.

The right to health, enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR)[4] and other international human rights treaties, has been interpreted by the United Nations Committee on Economic Social and Cultural Rights (UNCESCR) to impose a general duty on states to ensure access to affordable, available and safe drugs, and a minimum core duty to provide universal access to essential medicines.[5] Moreover the Committee has suggested that state parties "have a duty to prevent unreasonably high costs for access to essential medicines … from undermining the rights of large segments of the population to health."[6] These legal interpretations are buttressed by

[1] World Health Organization, *Everybody's Business: Strengthening Health Systems to Improve Health Outcomes: WHO's Framework for Action* (Geneva: WHO, 2017).

[2] United Nations, About the Sustainable Development Goals, online: <www.un.org/sustainabledevelopment/sustainable-development-goals/>.

[3] For example, SDG 3 Target 3 (By 2030, end the epidemics of AIDS, tuberculosis, malaria and neglected tropical diseases, and combat hepatitis, water-borne diseases, and other communicable diseases) and SDG 3 Target 4 (By 2030, reduce by one third premature mortality from non-communicable diseases through prevention and treatment, and promote mental health and well-being). United Nations, Goal 3: Ensure Healthy Lives and Promote Well-Being for All at All Ages," online: <www.un.org/sustainabledevelopment/health/>.

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

[5] See *General Comment No 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UNESCOR, 22nd Sess, Agenda Item 3, UN Doc E/C.12/2000/4 (2000) at paras 12(a)–(b), 43(d).

[6] *General Comment No 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific,*

political recognition within the United Nations General Assembly that access to essential medicines is a fundamental element of the right to health.[7]

But in an age where global spending on pharmaceuticals is projected to reach USD 1.4 trillion by 2020,[8] access to affordable medicines appears to be increasingly out of the reach of much of the world's population. In 2004, the World Health Organization estimated that almost two billion people (close to a third of the world's population) lacked access to essential medicines.[9] Despite concerted efforts to increase access to medicines in the intervening years, a report by the WHO and the World Bank[10] estimated that 400 million people still lacked access to essential healthcare in 2015—including access to medicines, vaccines, diagnostics, and medical devices.

Inadequate access to medicines is the result of many factors, including weak and under-resourced health systems, problems with supply chains, procurement and distribution, quality issues, regulatory obstacles, and inappropriate use of medicines.[11] However, the price of medicines remains a major issue underpinning lack of access, particularly in developing countries. For example, a study of access to four cardiovascular disease medicines in 18 countries found that they were unaffordable for 25 percent of households in upper middle-income countries, 33 percent of those in lower middle-income countries and 59–60 percent in low-income countries.[12] Increasing recognition of this problem has led to several global efforts to analyze the root causes and generate shared solutions, such as the United Nations Secretary-General's High-Level Panel on Access to Medicines and the recent WHO initiative "Toward Access 2030."[13]

High medicine prices and lack of affordable access have severe consequences for health and human rights in developing countries and for people in lower socio-economic groups in developed countries. A study of the affordability of four commonly used medicines in 16 low- and middle-income countries found that buying these medicines would impoverish up to 86 percent of the population.[14] A 2007 survey conducted in seven developed countries found that 3–20 percent of adults reported underusing medicines due to their cost; high out-of-pocket costs were associated with underuse.[15] Restricting medicine use due to cost has been shown to have a significant adverse effect on health outcomes.[16] A systematic review published in 2015 found that better insurance for prescription medicines had a positive

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Literary or Artistic Production of which He or She is the Author (Article 15, paragraph 1(c), of the Covenant), UNESCOR, 35th Sess, UN Doc E/C.12/GC/17 (2006) at para 35.

7 *Access to Medicines in the Context of the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, UNHRCOR, 23rd Sess, Agenda Item 3, UN Doc A/HRC/23/L.10/Rev.1 (2013) at para 2.

8 See Murray Aitken & Michael Kleinrock, *Global Medicines Use in 2020: Outlook and Implications* (Parsippany: IMS Institute for Healthcare Informatics, 2015) at 1.

9 World Health Organization, *WHO Medicines Strategy: Countries at the Core 2004–2007* (Geneva: WHO, 2004) at 3.

10 World Health Organization & World Bank, *Tracking Universal Health Coverage: First Global Monitoring Report* (France: WHO, 2015) at 2.

11 See High Level Panel on Access to Medicines, *Report of the United Nations Secretary-General's High Level Panel on Access to Medicines*, (Geneva: UN, 2016) at 15.

12 Rasha Khatib et al, "Availability and Affordability of Cardiovascular Disease Medicines and Their Effect on Use in High-Income, Middle-Income, and Low-Income Countries: An Analysis of the PURE Study Data" (2016) 387:10013 Lancet 61.

13 World Health Organization, *Towards Access 2030: WHO Medicines and Health Products Programme Strategic Framework 2016–2030* (Geneva: WHO, 2017).

14 Laurens Niëns et al, "Quantifying the Impoverishing Effects of Purchasing Medicines: A Cross-Country Comparison of the Affordability of Medicines in the Developing World" (2010) 7:8 PLoS Medicine 1.

15 Anna Kemp et al, "Determinants of Self-Reported Medicine Underuse Due to Cost: A Comparison of Seven Countries" (2010) 15:2 J Health Services Research & Policy 106.

16 See Michele Heisler et al, "The Health Effects of Restricting Prescription Medication Use Because of Cost" (2004) 42:7 Medical Care 626.

effect on health outcomes, whereas limited insurance coverage resulted in worse outcomes.[17] Indeed, the population health level impact of restricted access to medicines on the basis of cost is dramatically apparent in the exponential reduction in AIDS-related morbidity and mortality in Sub-Saharan Africa with the rapid scale-up of access to antiretroviral medicines: UNAIDS suggests that there have been 48 percent and 62 percent declines in AIDS-related mortality and morbidity on the continent since 2001.[18]

Those facing cost pressures are also often likely to spend less on other necessities or take on debt in order to pay for prescription drugs.[19] Indeed, studies suggest that ill people in low- and middle-income countries may be forced to decide whether to impoverish themselves by purchasing drugs at prices they can hardly afford or forego treatment for painful and life threatening health conditions.[20] Such outcomes vitiate the notion that everyone's right to health includes access to affordable medicines and derogate from a range of other human rights protections against poverty and its associated negative health impacts.

Rules included in trade and investment agreements can contribute to the rising cost of medicines through a number of mechanisms: by expanding intellectual property rights for pharmaceuticals, by imposing requirements for pharmaceutical pricing and reimbursement, and by providing pharmaceutical companies with mechanisms to contest pharmaceutical policies and laws. Below, we describe these rules with reference to the negotiation of several trade agreements, and discuss methods and tools available to assess the health and human rights implications of trade agreements. We conclude by exploring contemporary challenges and opportunities for ensuring that trade and investment agreements prioritize and respect access to affordable medicines and human rights.

HOW TRADE AND INVESTMENT AGREEMENTS AFFECT ACCESS TO MEDICINES AND HUMAN RIGHTS

INTELLECTUAL PROPERTY RIGHTS

The primary way in which trade and investment agreements can affect access to medicines is by expanding intellectual property rights (IPRs). The World Trade Organization's Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement)[21] (which came into effect in 1995, albeit with several transition periods for developing countries, least developed countries, post-Soviet countries, and countries that had not yet granted patents on pharmaceuticals) set a minimum standard for IPRs, including the requirement to grant 20-year patent protection for pharmaceuticals. While it was strongly criticized for circumscribing the autonomy of states,[22] the TRIPS Agreement allowed countries some discretion in developing their domestic patent laws as long as certain minimum standards were met, and included a number of limited "flexibilities" to protect public health (such as compulsory licensing and parallel importing).[23] The rights of countries to use these flexibilities and safeguards was reaffirmed in 2001 in the Doha Declaration on the TRIPS Agreement and Public Health.[24] Countries

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[17] Aaron Kesselheim et al, "Prescription Drug Insurance Coverage and Patient Health Outcomes: A Systematic Review" (2015) 105:2 American J Public Health e17.

[18] See *UNAIDS Data 2017* (Geneva: UNAIDS, 2017).

[19] See John Piette et al, "Medication Cost Problems among Chronically Ill Adults in the US: Did the Financial Crisis Make a Bad Situation Even Worse?" (2011) 5 Patient Preference & Adherence 187.

[20] Alexandra Cameron et al, *The World Medicines Situation 2011: Medicine Prices, Availability and Affordability* (Geneva: WHO, 2011) at 6; Niëns, supra note 14 at 2.

[21] *TRIPS: Agreement on Trade Related Aspects of Intellectual Property Rights*, 15 April 1994, 1869 UNTS 299 (entered into force 1 January 1995).

[22] See Susan Sell, "TRIPS-Plus Free Trade Agreements and Access to Medicines" (2007) 28:1 Liverpool L Rev 41 at 42 [Sell, "TRIPS-Plus Free Trade Agreements"].

[23] See Lisa Forman & Gillian MacNaughton, "Lessons Learned: A Framework Methodology for Human Rights Impact Assessment of Intellectual Property Protections in Trade Agreements," (2016) 34:1 Impact Assessment & Project Appraisal 55 [Forman & MacNaughton, "Lessons Learned"].

[24] WTO, *Declaration on the TRIPS Agreement and Public Health*, WTO Doc WT/MIN(01)/DEC/2 (2001), online: WTO <www.wto.org/english/

that attempt to use these rights, however, face considerable economic, legal, and political pressure from countries with large pharmaceutical industries.[25] In reality, existing TRIPS flexibilities have not been widely adopted or used.

Since the TRIPS Agreement came into force, IPRs have been further expanded in many countries through "TRIPS Plus" rules incorporated in many bilateral and regional trade agreements, particularly those negotiated by countries with large research-based pharmaceutical industries, such as the United States and the European Union.[26] Common TRIPS Plus rules include requirements to provide: (1) patents for new uses and new methods of using existing pharmaceutical products; (2) patent term extensions beyond the 20 years minimum mandated by TRIPS; (3) mechanisms linking marketing approval to patent status ("patent linkage"); (4) guaranteed exclusivity for clinical trial data submitted to regulatory authorities ("data exclusivity"); and, (5) rigorous enforcement mechanisms.[27] Each of these rules serves to delay the availability of cheaper generic medicines.

Two empirical studies of medicine prices in Jordan following its accession to the World Trade Organization and negotiation of a trade agreement with the US, demonstrate the impact of TRIPS Plus settings on prices and generic competition. A 2009 study by Oxfam International found that data exclusivity introduced in Jordan delayed generic entry for 79 percent of new medicines launched by 21 companies during the period 2002–2006; additional expenditures amounted to between USD6.3–22.04 million dollars.[28] Abbott and colleagues also found a 17 percent increase in total medicines expenditure per annum during 1999–2004, and estimated the costs to private consumers at approximately USD18 million in 2004.[29] Studies of the prospective US-Thailand Free Trade Agreement estimated that a one-year patent extension could increase drug costs ten-fold, from 257.24 to 2,636.78 million Baht (USD8- 88 million), while a ten-year extension would increase spending six-fold, from 33,466.69 to 216,464.53 million Baht (USD 1.1–7.2 billion).[30] The study concluded that the impact would

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thewto_e/minist_e/min01_e/mindecl_trips_e.htm>.

[25] See Forman & MacNaughton, "Lessons Learned," *supra* note 23 at 3.

[26] See Sell, "TRIPS-Plus Free Trade Agreements," *supra* note 22 at 57, 59.

[27] *Ibid* at 60–64.

[28] Rohit Malpani, *All Costs, No Benefits: How TRIPS-Plus Intellectual Property Rules in the US-Jordan FTA Affect Access to Medicines* (Oxfam International, 2009) at 2.

[29] Ryan Abbott et al, "The Price of Medicines in Jordan: The Cost of Trade-Based Intellectual Property" (2012) 9:2 J Generic Medicines 75.

[30] Thailand National Human Rights Commission, *Report on Results of Examination of Human Rights Violations* (2006) at 22–23 [TNHC]; and Lisa Forman, "From TRIPS-Plus to Rights-Plus? Exploring Right to Health Impact Assessment of Trade-Related Intellectual Property Rights Through the Thai Experience" (2012) 7:2 Asian J WTO & Intl Health Law & Policy 347.

be that drug costs would be too expensive or beyond people's purchasing power, and that the estimated increase required (over 100 billion Baht/USD3.3 billion) exceeded the annual health budget and would "undermine any earnest attempt to manage the health system in Thailand, particularly the health insurance scheme."[31]

Leaked documents from the negotiations for the twelve-country Trans Pacific Partnership (TPP) showed that the US sought to use the TPP to extend and expand IP rights for pharmaceuticals even further than in previous trade agreements.[32] Many of the US demands were mitigated during the negotiations;[33] however, the final TPP text agreed between the 12 parties in 2015 included a range of TRIPS Plus provisions including loosening of patentability criteria, extensions to patent terms, exclusivity for clinical trial data, patent-registration linkage, and stringent IP enforcement mechanisms.[34] Developing countries were to be provided only limited transition periods[35] to implement rules, which would have put essential medicines out of reach of many people in countries like Vietnam, where modelling indicated that HIV treatment coverage could be reduced from 68 percent to 30 percent of eligible people living with HIV.[36] Of particular concern were the novel rules for biologics (a new generation of biopharmaceuticals used, for example, in cancer treatments), which provide eight years of data exclusivity or five years plus an additional three years of equivalent market protection.[37] Five of the TPP countries (Brunei, Malaysia, Mexico, Peru, and Vietnam) would have had to provide data exclusivity for biologics for the first time under the TPP. Even in wealthy countries such as Australia with pharmaceutical coverage programs, any extension of monopoly rights for biologic products would have resulted in considerable costs for governments.[38] The Australian Government spent over A$2.2 billion subsidizing biologics in 2015–16 and could have saved at least A$367 million in that year if lower-cost alternatives (biosimilars) had been available.[39]

While the TPP appeared to be dead following the withdrawal of the US in 2017, the remaining 11 countries are attempting to resurrect the deal. In November 2017, trade ministers announced a list of 20 items to be suspended pending re-entry of the US.[40] The list included some of the most extreme IP rules sought by the US, but not all of the problematic text. The US is likely to seek TPP-level IP settings in the re-negotiated NAFTA, as the US negotiating objectives explicitly seek "a standard of protection similar to that found in US law."[41] Some similar IP provisions to those in the TPP, including patent term extensions and data exclusivity, have been proposed by Japan and South Korea for the Regional Comprehensive Economic Partnership, which

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[31] *Ibid* at 22.

[32] See Ruth Lopert & Deborah Gleeson, "The High Price of 'Free' Trade: US Trade Agreements and Access to Medicines" (2013) 41:1 JL Medicine & Ethics 199 at 207.

[33] See Deborah Gleeson, Hazel Moir & Ruth Lopert, "Costs to Australian Taxpayers of Pharmaceutical Monopolies and Proposals to Extend Them in the Trans-Pacific Partnership Agreement" (2015) 202:6 Medical J Australia 306.

[34] See Brook Baker, "Trans-Pacific Partnership Provisions in Intellectual Property, Transparency, and Investment Chapters Threaten Access to Medicines in the US and Elsewhere" (2016) 13:3 PLoS Medicine 3.

[35] See Deborah Gleeson et al, "The Trans Pacific Partnership Agreement, Intellectual Property and Medicines: Differential Outcomes for Developed and Developing Countries" (2018) 18:1 Global Social Policy 7.

[36] See Hazel Moir et al, "The Trans Pacific Partnership Agreement and Access to HIV Treatment in Vietnam" (2018) 13:4 Global Public Health 410.

[37] Baker, *supra* note 34 at 4.

[38] Gleeson, Moir & Lopert, *supra* note 33 at 1–3.

[39] See Deborah Gleeson et al, "Financial Costs Associated with Monopolies on Biologic Medicines in Australia" (2017) 43 Australian Health Rev 36.

[40] Department of Foreign Affairs and Trade, *Trans-Pacific Partnership Ministerial Statement, Annex II – List of Suspended Provisions*, (11 November 11 2017) online: <www.dfat.gov.au/trade/agreements/tpp/news/Pages/trans-pacific-partnership-ministerial-statement.aspx> at 1–2.

[41] US, Office of the United States Trade Representative, *Summary of Objectives for the NAFTA Renegotiation* (Washington, DC, 2017) at 9.

includes ASEAN and its six trading partners.[42] While RCEP is unlikely to include IPRs as extreme as those in the TPP, the implications of any expansion of IPRs are very serious for an agreement that includes 11 middle-income countries (six of which are lower-middle-income countries),[43] including India, which produces a large proportion of the generic medicines used in the developing world.

PHARMACEUTICAL PRICING AND REIMBURSEMENT

A second mechanism by which trade agreements can impact access to medicines is by mandating industry-favourable procedural requirements for listing medicines on national formularies and setting prices for reimbursement. These requirements include disclosure of information regarding listing and pricing decision-making, as well as the introduction of contestability requirements such as hearings, review and/or appeal mechanisms, and in one case, precluding the use of comparative cost-effectiveness evaluation as the basis for pricing. To date, these rules have been included only in agreements negotiated by the US; however, some similar disclosure and transparency rules have been negotiated in the EU-Singapore Free Trade Agreement.[44]

The first trade agreement to include these types of rules was the Australia-US Free Trade Agreement (AUSFTA), which came into force in 2005.[45] The US pharmaceutical industry saw Australia's Pharmaceutical Benefits Scheme (PBS) as an impediment to market access and sought to disable the use of therapeutic reference pricing and gain greater influence over decision-making processes around the listing and pricing of drugs.[46] These efforts were largely unsuccessful and despite the inclusion of some procedural rules that required changes to Australia's PBS, pricing was unaffected.[47] The subsequent bilateral trade agreement between the US and South Korea (KORUS), ratified in 2012, required far more extensive changes to South Korea's pricing mechanisms and reimbursement processes for pharmaceuticals and medical devices.[48]

Leaked TPP negotiating documents showed that the US initially proposed procedural rules similar to those in KORUS for national pharmaceutical and medical device reimbursement programs.[49] These proposals were vigorously opposed and the final text was much more similar to the AUSFTA rules. The procedural rules were listed for suspension in November 2017. However, if they are reinstated at a later stage, New Zealand's Pharmaceutical Management Agency (PHARMAC) will need to introduce new processes for considering proposals for listing pharmaceuticals within a specified period of time, and for reviewing decisions not to list a drug for reimbursement—changes which have been estimated to cost NZ $4.5 million initially and $2.2 million per year in ongoing costs.[50] These costs are significant given that PHARMAC's operating costs were approximately $25.9 million in the 2015-2016 financial year.[51] The provisions are also likely to constrain PHARMAC's flexibility and facilitate industry lobbying and pressure from other TPP parties. Developing

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[42] See Belinda Townsend, Deborah Gleeson & Ruth Lopert, "The Regional Comprehensive Economic Partnership, Intellectual Property Protection, and Access to Medicines" (2016) 28:8 Asia-Pacific J Public Health 682.

[43] Based on World Bank classifications, see World Bank, *World Bank Country and Lending Groups*, (2017) online: <www.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups>.

[44] See Annex 2-C: Pharmaceuticals and Medical Devices in *Free Trade Agreement Between the European Union and the Republic of Singapore*, 19 October 2018. This agreement was initialled in 2014 but has not yet been ratified by the European Parliament.

[45] Lopert & Gleeson, *supra* note 32 at 200.

[46] *Ibid* at 204.

[47] *Ibid* at 205.

[48] *Ibid* at 206.

[49] *Ibid* at 208.

[50] See New Zealand Ministry of Foreign Affairs and Trade, *Trans Pacific Partnership: Pharmaceutical and Medical Device Purchasing (Reimbursement): Fact Sheet* (Wellington, 2016).

[51] Pharmaceutical Management Agency, *Annual Report for the Year Ended 30 June 2016* (Wellington: Pharmaceutical Management Agency, 2016) at 43.

countries seeking to introduce an effective model for subsidizing medicines while containing costs may find that adopting these rules constrains their options considerably, while imposing formidable and unnecessary administrative costs.

INVESTOR-STATE DISPUTE SETTLEMENT

A third area of potential concern for access to medicines is the investor-state dispute settlement (ISDS) mechanism, which has become a standard feature of most contemporary trade and investment agreements. ISDS clauses enable investors from one party to bring an arbitral claim for compensation against the government of another party if they believe a decision, policy, or law has harmed their investments, including IP-based investments, via direct or indirect expropriation, violation of minimal standards of treatment, or prohibited discrimination.

In public health circles, ISDS is best known for the cases unsuccessfully brought by tobacco giant Philip Morris against Australia and Uruguay over their tobacco control policies.[52] However, a number of claims have been made by pharmaceutical companies,[53] most notably the (unsuccessful) claim brought by US pharmaceutical company Eli Lilly and Co against the Canadian Government over the revocation of patents on two medicines.[54] The final text of the TPP included intellectual property in the definition of investment, meaning that pharmaceutical companies would be able to utilize the ISDS mechanism to make IP-related claims;[55] a leaked draft of the RCEP investment chapter suggests that IP is similarly covered.[56]

United Nations Conference on Trade and Development (UNCTAD) figures indicate that the number of ISDS cases rose sharply during the decade leading up to 2015,[57] and the size of claims (where these were known) varied between USD 8 million to USD 2.5 billion.[58] An OECD survey found that the average cost of arbitration was over USD 8 million.[59] These financial risks, combined with uncertainty over the outcome of a dispute in the context of international arbitration, contribute to "regulatory chill," where governments may be reluctant to proceed with a new policy or law and risk a dispute—as in the case of Uruguay, which initially intended to weaken its tobacco control laws in response to the legal challenge by Philip Morris, before financial support to fight the claim was offered by the Bloomberg Foundation.[60] Two examples illustrate the potential chilling effect of ISDS on pharmaceutical policy: Colombia was reportedly dissuaded from issuing a compulsory license for imatinib (Glivec) following a notice of dispute filed by Novartis in 2016, and Ukraine de-registered a generic medicine for hepatitis C due to the threat of investment arbitration by Gilead.[61]

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[52] See Andrew D Mitchell, "Tobacco Packaging Measures Affecting Intellectual Property Protection Under International Investment Law: The Claims Against Uruguay and Australia" in Alberto Alemanno and Enrico Bonadio, eds, *The New Intellectual Property of Health: Beyond Plain Packaging* (Cheltenham: Edward Elgar, 2016).

[53] Lopert & Gleeson, *supra* note 32 at 209; Brook K Baker & Katrina Geddes, "The Incredible Shrinking Victory: Eli Lilly v. Canada, Success, Judicial Reversal, and Continuing Threats from Pharmaceutical ISDS" (2017) 49 Loyola U Chicago LJ 479.

[54] Baker & Geddes, *supra* note 53 at 479.

[55] Baker, *supra* note 34 at 4.

[56] Townsend, Gleeson & Lopert, *supra* note 42 at 690.

[57] UNCTAD, *Recent Trends in IIAs and ISDS* (Geneva: UNCTAD, 2015) at 5.

[58] *Ibid* at 7.

[59] See David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community* (Paris: OECD Publishing, 2012) at 19.

[60] See Eric Crosbie, Particia Sosa & Stanton A Glantz, "Defending Strong Tobacco Packaging and Labelling Regulations in Uruguay: Transnational Tobacco Control Network versus Philip Morris International" (2018) 27:2 Tobacco Control 185.

[61] Baker & Geddes, *supra* note 53 at 506–11.

ASSESSING THE IMPACT OF TRADE AND INVESTMENT AGREEMENTS ON ACCESS TO MEDICINES AND HUMAN RIGHTS

HUMAN RIGHTS IMPACT ASSESSMENT

The impact of trade-related intellectual property rights on access to medicines has motivated a growing call in the human rights community for policy-makers to take the right to health into account when entering trade agreements, including by assessing their impact through the lens of the right to health. Multiple United Nations treaty monitoring committees have cautioned states to conduct assessments of the potential adverse effects of trade agreements on access to affordable medicines and realization of the right to health.[62] These calls join a broader growing recognition that human rights impact assessment (HRIA) of existing and prospective trade-related intellectual property rights could enable policy-makers to assess and remedy the potential or actual impacts of trade-related intellectual property rights on access to medicines and the right to health.[63]

As a result, interest in developing HRIA has grown both within public health and human rights communities and within the domain of impact assessment practice.[64] HRIA have been used to predict the health and human rights consequences of a variety of interventions, including clinic operations, state, and local policy and foreign direct investment projects.[65]

Hunt and MacNaughton propose a set of key principles for HRIA, including that they: (1) use an explicit human rights framework; (2) aim for progressive realization; (3) promote equality and non-discrimination in process and policy; (4) ensure meaningful participation by all stakeholders; (5) provide information and protect the rights to freely express ideas; (6) establish mechanisms to hold the State accountable; and (7) recognize the interdependence of all human rights.[66] Hunt and MacNaughton also propose a six step process for HRIA that integrates rights considerations with standard impact assessment practice, namely: (1) preliminary check, (2) assessment plan, (3) information collection, (4) rights analysis, (5) debate options, and (6) decision and evaluation.[67]

HEALTH IMPACT ASSESSMENT

Health impact assessment (HIA) methods have also increasingly been used to assess the potential health impacts of trade agreements during the negotiation process. HIA has been recommended by the World Health Organization[68] for monitoring policies in all sectors in order to ensure policy coherence and improve health equity. HIA has been defined by the European Centre for Health Policy[69] as "…a combination

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[62] See e.g. *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ecuador*, UNESCOR, 32nd Sess, UN Doc E/C.12/1/Add.100 (2004) at para 55; *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Morocco*, UNESCOR, 36th Sess, UN Doc E/C.12/MAR/CO/3 (2006) at para 56; *Concluding Observations for Costa Rica*, UNESCOR, UN Doc E/C.12/CRI/CO/4 (2008) at paras 27, 48; *Consideration of Reports Submitted by States Parties under Article 44 of the Convention - Concluding Observations*, UNCRCOR, 36th Sess, UN Doc CRC/C/15/Add.232 (2004) at para 48.

[63] See Paul Hunt & Gillian MacNaughton, *Impact Assessments, Poverty and Human Rights: A Case Study Using the Right to the Highest Attainable Standard of Health* (31 May 2006) online: University of Essex <www.repository.essex.ac.uk/9784/1/impact-assessments-poverty-human-rights-report.pdf>; Lisa Forman & Gillian MacNaughton, "Moving Theory into Practice: Human Rights Impact Assessment of Intellectual Property Rights in Trade Agreements" (2015) 7:1 J Human Rights Practice 7 109.

[64] See Deanna Kemp & Frank Vanclay, "Human Rights and Impact Assessment: Clarifying the Connections in Practice" (2013) 31:2 Impact Assessment & Project Appraisal 85.

[65] See Saskia Bakker et al, "Human Rights Impact Assessment in Practice: The Case of the Health Rights of Women Assessment Instrument (HeRWAI)" (2009) 1:3 J Human Rights Practice 436; United Kingdom Department Of Health, *Human Rights in Healthcare Evaluation: Final Evaluation Report* (2008); International Centre of Human Rights and Democratic Development, *Human Rights Impacts for Foreign Direct Investment Projects: Learning from Community Experiences in the Philippines, Tibet, the Democratic Republic of Congo, Argentina, and Peru* (Montreal: Rights & Democracy, 2007).

[66] Hunt & MacNaughton, *supra* note 63.

[67] *Ibid.*

[68] See World Health Organization, Closing the Gap in a Generation: Health Equity Through Action on the Social Determinants of Health (Geneva: WHO, 2008).

[69] European Centre for Health Policy, *Health Impact Assessment: Main Concepts and Suggested Approach* (Brussels: European Centre for Health Policy, 1999) at 4.

of procedures, methods and tools by which a policy, program or project may be judged as to its potential effects on the health of a population, and the distribution of those effects within the population." It involves measuring both direct and indirect effects on health. There are a variety of different approaches to HIA: each follows a structured series of steps (similar to the steps outlined above for HRIA) to assess potential health impacts and derive recommendations for policy-making.[70]

The use of health impact assessment in the context of trade negotiations is a relatively recent but growing phenomenon. Examples include an advocacy-focused HIA examining the potential impact of the proposed TPP on health policy in Australia[71] and a summary health impact review based on the final text of the TPP.[72] A prospective HIA of the proposed Trans-Atlantic Trade and Investment Partnership has also been conducted.[73] It is difficult to evaluate the impact of these HIAs on trade policy decision-making due to the secrecy of trade negotiations; however, evidence suggested that the HIA undertaken during the TPP negotiations by Hirono et al "effectively engaged policy-relevant stakeholders, contributed to reframing the trade negotiations in relation to their impact on health while increasing the visibility of public health in the trade policy agenda."[74]

THE CASE FOR INTEGRATING HUMAN RIGHTS INTO HIA

Adding human rights to existing impact assessment practice would "provide an ethical and legal framework for HIA," including by providing HIA with "a universal system of values and standards...backed up by international and domestic laws and mechanisms of accountability."[75] Thus, using the right to health to motivate HRIA would not only add moral weight to the necessity of such measures, but also emphasize the legal responsibility that all states have to ensure the affordability of medicines or ensure broader access.[76] The use of HRIA in this context could also serve to mainstream "right to health concerns into trade policies so that policy makers making trade-related decisions may be more respectful of their health implications."[77] Use of HRIA could also enable affected communities to participate in HRIAs, gather evidence of harms to be used in advocacy, and potentially thereby influence policy formulation. It could also assist in building "networks and coalitions between social actors, policy makers and international actors that will collectively work to assure that affordable medicines are more broadly accessible within countries."[78]

The European Union Commission on Trade regularly conducts "trade sustainability impact assessments" to estimate the economic, social, and environmental impacts of trade agreements.[79] Yet HRIA of trade agreements at government behest have been relatively uncommon, with only one recorded HRIA conducted at the behest of a LMIC government, when in 2006 the Thai National Human Rights Commission (TNHRC)

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70 See Patrick Harris & Deborah Gleeson, "Assessing the Impact of the Trans-Pacific Partnership Agreement on the Health of Australians" (2014) 38:5 Australian & New Zealand J Public Health 496; See Katie Hirono et al, *Negotiating Healthy Trade in Australia: Health Impact Assessment of the Proposed Trans-Pacific Partnership Agreement* (Liverpool, NSW: Centre for Health Equity Training Research and Evaluation, 2015) at 3 [Hirono et al, *Negotiating Healthy Trade*].

71 Hirono et al, *Negotiating Healthy Trade*, *supra* note 70; Katherine Hirono et al, "Is Health Impact Assessment Useful in the Context of Trade Negotiations? A Case Study of the Trans Pacific Partnership Agreement" (2016) 6:4 BMJ Open 1 [Hirono et al, "Is Health Impact"].

72 Ronald Labonté, Ashley Schram & Arne Ruckert, "The Trans-Pacific Partnership: Is It Everything We Feared for Health?" (2016) 5:8 Intl J Health Policy & Management 487.

73 Usman Khan et al, *The Transatlantic Trade and Investment Partnership: International Trade Law, Health Systems and Public Health* (London: London School of Economics and Political Science, 2015).

74 Hirono et al, "Is Health Impact," *supra* note 71 at 8.

75 Gillian MacNaughton & Lisa Forman, "The Value of Mainstreaming Human Rights into Health Impact Assessment" (2014) 11:10 Intl J Environmental Research & Public Health 10076.

76 See Lisa Forman, "From Trips-Plus to Rights-Plus: Exploring Right to Health Impact Assessment of Trade-Related Intellectual Property Rights through the Thai Experience" (2012) 7:2 Asian J WTO & Intl Health L & Policy 347 at 57 [Forman, "From TRIPS-Plus to Rights-Plus"].

77 *Ibid*.

78 *Ibid*.

79 European Commission, *Trade Sustainability Impact Assessment of the Association Agreement to be negotiated between the EU and Central America*, (2009), online: <www.trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146042.pdf>.

assessed the potential impact of a prospective US-Thailand FTA on agriculture, the environment, intellectual property, and services and investment.[80] While the report concluded that the proposed trade agreement would raise drug costs beyond people's purchasing power and the government's annual health budget,[81] it was never implemented as a result of an intervening military coup.[82] Much of the evidence-base for the government use of HRIA in relation to trade agreements is therefore speculative, assuming that the significant health and human rights impacts of trade and intellectual property rights law, policies, and practices in and of themselves provide a strong rationale for integrating health and human rights standards and duties into impact assessment practice.

CONCLUSION

Ensuring equitable access to affordable medicines is crucial if the right to health is to be realized and the health-related Sustainable Development Goals and targets are to be met. But trade agreements, through a variety of mechanisms, can make it more difficult for states to meet their human rights obligations and provide affordable access to medicines for their populations. Recent and current negotiations for complex "mega-regional" free trade agreements with expanded IPRs, ISDS, and prescriptive rules for pharmaceutical coverage programs have created additional challenges. There is a need for further empirical research to provide evidence for policy-makers along with conceptual methods and skill development to equip advocates with the tools to assess the health and human rights impacts of trade agreements.

In recent years, high drug prices have begun to strain even developed country pharmaceutical budgets, and moves to explore alternative models of funding pharmaceutical research and development that do not rely on monopoly pricing have gained increasing traction. The degree of civil society opposition to regional trade agreements such as the TPP, the mitigation of the worst elements of the US IP proposals, and the ultimate failure of the agreement to be ratified before the 2016 US election suggests that communities are increasingly reluctant to hand more power to pharmaceutical companies in the context of rising drug prices. However, there are powerful vested interests working against change. To turn the tide will require a concerted and sustained effort by health and human rights advocates working in partnership with researchers, non-government organizations, and communities using existing TRIPS flexibilities augmented by human rights standards and tools that seek explicitly to protect and realize everyone's right to affordable medicines.

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[80] TNHC, supra note 30.

[81] *Ibid* at 22, 56.

[82] Forman, "From TRIPS-Plus to Rights-Plus," *supra* note 76 at 363.

TRADE AGREEMENTS, HUMAN RIGHTS, AND HEALTH IN THE CONTEXT OF LABOUR MARKETS AND ENVIRONMENTAL STANDARDS

Courtney McNamara & Ronald Labonté

Abstract: As the number of free trade agreements (FTAs) continues to rise, so too does public concern over associated labour market and environmental impacts. Many trade unionists, for example, have protested over expected increases in unemployment and declining wages. Others have denounced FTAs for their positioning of trade objectives ahead of climate goals and for undermining key climate targets. At the same time, labour market and environmental conditions are recognized as important determinants of health. The focus of this essay will be an exploration of whether FTAs address human rights obligations in a manner that is consistent with fundamental employment standards of the International Labour Organization (ILO), international human rights obligations of the United Nations (UN) (such as the right to work and the human right to health), and other environmental standards. The article begins with an overview of key human rights obligations in the context of labour markets and the environment and their connection to the human right to health. The article then discusses the extent to which FTAs account for these obligations.

Keywords: ILO, NAFTA, CETA, TPP, labour, environment, determinants of health

KEY HUMAN RIGHTS OBLIGATIONS IN THE CONTEXT OF LABOUR MARKETS AND THE ENVIRONMENT

Securing just and safe work for all are central purposes of both the ILO and the UN, and most countries are members of both organizations. Established in 1919, the ILO has been addressing unjust employment and working conditions for almost 100 years. Key to development of international norms for just employment and working conditions is the ILO's Declaration on Fundamental Principles and Rights at Work, which was adopted in 1998. The Declaration lays out eight Core Conventions, which all member countries have an obligation to respect, by virtue of their ILO membership.[1] This means that countries have an obligation to respect the Core Conventions even if they have not ratified them. The eight Conventions relate to four key issues:

1. Workers' freedom to join a union, organize, and collectively bargain (Freedom of Association and Protection of the Right to Organise Convention, 1948, No 87; Right to Organise and Collective Bargaining Convention, 1951, No 98);

2. The abolition of forced labour (Forced Labour Convention, 1930, No 29; Abolition of Forced Labour Convention, 1957, No 105);

3. The abolition of child labour (Minimum Age Convention, 1973, No 138; Worst Forms of Child Labour Convention, 1999, No 182); and

4. The right to work without discrimination (Equal Remuneration Convention, 1951, No 100; Discrimination (Employment and Occupation) Convention, 1958, No 111).

The UN's Universal Declaration of Human Rights (UDHR) similarly recognizes that "everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment" (Article 23). The UDHR further references specific work rights including time for rest and leisure, limitations on work hours, holidays with pay, and the freedom to join and form trade unions (Articles 23–24). Like the ILO's Core Conventions, which apply to all members of the ILO, the rights laid out in the UDHR apply to all UN member countries.

The right to work and associated labour rights are also established in international law by way of the 1966 International Covenant on Economic, Social and Cultural

[1] International Labour Organization, *The International Labour Organization's Fundamental Conventions* (ILO: Geneva, 2002).

Rights (ICESCR),[2] and apply to the 165 countries (as of June 15, 2017) that have ratified the treaty. The ICESCR recognizes four work rights: (1) the opportunity to gain a living in work that is freely chosen (Article 6.1); (2) under just and favourable conditions (Article 7(a)–(d)); (3) to form and join trade unions that function freely, including through strikes (Article 8(1)(a)–(c)); and, (4) to social security, including social insurance (Article 9).

Although there is no specific human rights covenant in relation to the environment, a 2013 report by then UN Independent Expert on "human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment," John H. Knox, mapped multiple explicit references to the environment in five global human rights treaties and several regional human rights systems.[3] The report also noted that 45 UN member states recognize the right to a healthy environment in their constitutions. The key procedural obligations on states are: "(a) to assess environmental impacts and make environmental information public; (b) to facilitate public participation in environmental decision-making, including by protecting the rights of expression and association; and (c) to provide access to remedies for harm."[4]

While acknowledging that "the contours of the specific environmental obligations are still evolving," Knox adds that States are required: "(a) to adopt and implement legal frameworks to protect against environmental harm that may infringe on enjoyment of human rights; and (b) to regulate private actors to protect against such environmental harm."[5] These requirements do not mean that any or all environmental harm must be avoided, since other societal needs may lead to such; but that this "cannot be unreasonable, or result in unjustified, foreseeable infringements of human rights."[6] These requirements further extend to obligations to protect against environmental harm from private actors including by "taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication,"[7] and "to protect human rights, particularly economic, social and cultural rights, from the extraterritorial environmental effects of actions taken within their territory."[8]

The United Nations Human Rights Council has recognised climate change as a global problem, which has implications for the enjoyment of human rights. The Office of the High Commissioner for Human Rights (OHCHR) further argues that the main objective of policies that address climate change (for example) should be to fulfil human rights, a point addressed in the 2015 Paris Agreement. This agreement stipulates that "[p]arties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights" (Preamble).[9] Human rights advocates argue that this statement creates opportunities for legal cases against governments and companies over contributions to, or failures to mitigate the impacts of climate change. Cases have already been won in courts in Pakistan, the Netherlands, and the USA.[10] The Dutch case ended in a ruling requiring the government to almost double its emissions reduction commitment.[11]

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2 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

3 *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H. Knox*, UNGAOR, 25th Sess, Agenda Item 3, UN Doc A/HRC/25/53 (2013).

4 *Ibid* at para 29.

5 *Ibid* at para 46.

6 *Ibid* at para 53.

7 *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, UNGAOR, 70th Sess, Agenda Item 3, UN Doc A/HRC/17/31 (2011) 6.

8 Knox, *supra* note 3 at para 64.

9 *Paris Agreement*, 12 December 2015, UNTS 54113 (entered into force 4 November 2016). It should be noted that preambular statements offer interpretative, but not binding guidance, and that this is the sole reference to human rights within the Paris Agreement.

10 See the Danish Institute for Human Rights, "Climate Change is a Human Rights Concern", *The Danish Institute for Human Rights* (4 November 2016), online: <www.humanrights.dk/news/climate-change-human-rights-concern>.

11 See Catherine Brahic & Rowan Hooper, "Dutch Government Loses World's First Climate Liability Lawsuit", *New Scientist* (24 June 2015), online:

Human rights related to labour standards and the environment also act as foundations for the realization of other human rights, especially the human right to health. A human right to health is established in international law by way of a series of treaties and, as discussed elsewhere in this special issue, the 1966 ICESCR, the most expansive and important treaty, which recognizes a human right to health.[12] The interpretation of the right to health in the ICESCR was expanded in 2000 by the UN Committee on Economic, Social and Cultural Rights (the monitoring body of the ICESCR). While original provisions established the right to medical care for all and required states to take action towards the prevention and treatment of diseases, the right to health provided by the ICESCR now accounts for a wide range of underlying determinants of health.[13] These underlying determinants of health include both safe and healthy working conditions, and a healthy environment.[14]

TO WHAT EXTENT DO FTAS ACCOUNT FOR HUMAN RIGHTS OBLIGATIONS IN THE CONTEXT OF LABOUR MARKETS?

The inclusion of labour clauses in FTAs[15] has evolved over time. The 1994 North American Free Trade Agreement (NAFTA) was amongst the first FTA to include provisions on employment standards. These provisions are contained within a side-agreement called the 1993 North American Agreement on Labor Cooperation (NAALC). The NAALC was not part of the original negotiation of NAFTA; rather it was introduced by former US president Clinton to appease strong political opposition from labour unions and their allies in the three countries party to the Agreement: Canada, the US, and Mexico.

The NAALC requires each of these countries to "improve working conditions and living standards in each Party's territory," and to promote "to the maximum extent possible" a set of 11 "guiding principles" which are "subject to each Party's domestic law." These guiding principles reflect values outlined in the ILO Core Conventions, such as the freedom to organize and collectively bargain, as well as labour rights found in other human rights' treaties, such as the elimination of employment discrimination and equal pay for men and women. However, major limitations have been pointed out with the NAALC resulting in the continuation of systematic violations of labour rights (especially in Mexico where workers might have benefitted the most from improvements in labour standards).

Criticisms of the NAALC relate first to the fact that the side-agreement merely commits the three countries to enforce their already existing labour legislation, rather than adopt any internationally recognized labour standards. Further, even though the NAALC references guiding principles that resemble ILO standards and other labour rights language, the Agreement merely *encourages* countries to promote these principle(s). Finally, because the NAALC was contained within a side-agreement, labour provisions are not enforceable through dispute settlement processes present in the main text of NAFTA.

This latter criticism led the US to begin placing labour clauses within the core text of FTAs. However, in the first set of FTAs that followed this approach, only one provision is subject to enforcement. This provision requires that countries "shall not fail to effectively enforce its labor laws," but enforcement is restricted only to those scenarios in which trade between countries is affected. This provision is thus not only restricted to a certain category of violation and worker (*e.g.* those

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<www.newscientist.com/article/dn27774-dutch-government-loses-worlds-first-climate-liability-lawsuit>.

[12] See Audrey R Chapman, "Globalization, Human Rights, and the Social Determinants of Health" (2009) 23:2 Bioethics 97. While only countries that have ratified the ICESCR are party to its obligations, every country is now party to at least one international agreement, which recognizes the right to health, and most are party to at least three.

[13] *Ibid*.

[14] See *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health, UNESCOR, 22nd Sess*, UN Doc E/C.12/2000/4 (2000).

[15] Free trade agreements (FTAs) describe bilateral and regional trade treaties that are separate from those under the multilateral World Trade Organization (WTO) system. FTAs offer preferential market access amongst member countries and often contain "WTO+" provisions that generally developed or high-income countries have been unable to obtain in WTO negotiations. Health concerns with these WTO+ provisions include extended intellectual property rights (including drug patents), increased privatization/commercialization of health services, rights of foreign investors to sue governments over measures that affect the perceived future value of their investments, and increased barriers to new regulations that might indirectly affect trade.

working in industries relevant to trade and investment), but also prioritizes trade over labour standards and workers' rights.[16] This provision may also lead resource-poor countries to disproportionately focus their resources on labour standards within export markets to the potential detriment of workers in domestic markets. It has been suggested that such a focus could lead to an increase in health inequalities between these classes of workers.[17]

Following political pressure, the US revised its approach to labour clauses again in 2007 with what is known as the "May 10th Agreement." This agreement was concluded between the Bush administration and bipartisan leadership in Congress and established a new template of labour and environmental provisions for future FTAs. The most significant modification to labour provisions following this Agreement requires countries to "adopt and maintain" labour standards (outlined in the ILO Declaration) in their laws and practices. An important limitation to this provision is that although explicit reference to the ILO Declaration might, at minimum, establish the normative importance of labour rights as an institution, the labour standards countries must uphold (in reference to the ILO Declaration) are distinct from the ILO Core Conventions. The main distinguishing feature between the ILO Declaration and the Conventions is that whereas the former refer to principles "that should [somehow] be respected," the latter "spell out these principles in concrete and specific rules,"[18] including a legal obligation to implement these rules as well as reporting requirements. Reference to the ILO Declaration serves merely as a reaffirmation of countries' membership in the ILO without providing any such implementation obligations.

Other provisions, which have been incorporated into FTAs following the May 10th Agreement, prohibit countries both from: (1) lowering their existing labour standards (but with enforcement limited only to scenarios in which trade between the countries is affected); and (2) from using a claim of insufficient resources to excuse their failure to enforce labour laws. New provisions also subject labour violations to the same dispute settlement mechanisms as other violations within the FTAs, meaning that trade sanctions or penalties can be imposed in cases of violation. In practice, however, dispute resolution mechanisms have only rarely been invoked and the first (and only) trade ruling over a labour dispute took place nine years after the original submission.[19]

The most current FTAs negotiated by the US replicate the May 10th model, though additional provisions were included in the recently agreed Trans-Pacific Partnership.[20] In addition to the provisions found in the May 10th model, the TPP requires that signatory countries "shall adopt and maintain statutes and regulations…governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health" (Article 19.3.2). A footnote to this provision, however, establishes that the acceptability of these working conditions is to be determined by each individual country, without reference to guidelines for establishing such standards. This provision thus appears to be primarily ornamental in nature. Another provision found in the TPP calls on parties to "recognize" the "goal of eliminating forced [and child] labour" and to "discourage" the importation of goods made under these circumstances "through initiatives it considers appropriate" (Article 19.6)—admonitory language that is a far cry from enforceable commitments to prohibit production of and trade in such goods.

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[16] Thus, in July 2017, the first ever trade dispute ruling over a labour complaint found that Guatemala's failure to enforce labour standards was not in violation of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR), since the violations did not occur "in a manner affecting trade." See ICTSD Bridges, "Trade Dispute Panel Issues Ruling in US-Guatemala Labour Law Case," International Centre for Trade and Sustainable Development (6 July 2017), online: <www.ictsd.org/bridges-news/bridges/news/trade-dispute-panel-issues-ruling-in-us-guatemala-labour-law-case> [ICTSD Bridges].

[17] See Courtney McNamara & Ronald Labonté, "Trade, Labour Markets, and Health: A Prospective Policy Analysis of the Trans-Pacific Partnership" (2017) 47:2 Intl J Health Services 277.

[18] International Labour Organization, *ACT/EMP Research Note: Labour and Social Policy Components in Current Trade Agreements in Asia and the Pacific* (Bangkok: ILO, 2015) 5.

[19] See ICTSD Bridges, *supra* note 12.

[20] Despite the US withdrawal from the TPP in early 2017, effectively terminating the agreement in its signed but not yet ratified form, most of the remaining 11 signatory countries are committed to its implementation in some form. The US itself appears interested in importing large sections of the TPP into its new bilateral negotiating strategy.

The TPP also establishes that countries "shall endeavor to encourage enterprises to voluntary adopt corporate social responsibility initiatives on labour issues" (Article 19.7). While corporate social responsibility codes have sometimes been associated with improved labour standards,[21] outcomes are largely dependent on the context within which they are implemented. It may also be argued that a provision emphasizing corporate social responsibility raises the power of corporate actors, and the institutional power of market-based regulation, relative to internationally recognized human rights. However, like other labour provisions, this one is hortatory only, as countries "shall [merely] endeavor to encourage" such initiatives. The agreement (Article 19.9) also requires all parties to develop and maintain a public submissions process for complaints over violations; such provisions in other trade treaties have proved cumbersome and so far, failed to resolve complaints in a timely fashion.[22]

Recent Canadian FTAs include relatively stronger labour provisions, which, in addition to the ILO Declaration, also reference the ILO's Decent Work Agenda (although the Canada-South Korea agreement of 2015 refers only to "internationally recognized labour rights").[23] As in the US, however, labour unions and other civil society organizations have raised issues with the effectiveness of these provisions in the context of widespread labour rights violations, especially, for example, in the case of the Canada-Colombia FTA. In its fifth annual report on "human rights and free trade" between the two countries, Canada engaged with many labour unions and civil society organizations in both countries, which documented deterioration in human rights in Colombia, with increased killings and death threats against union and Indigenous leaders, as well as human rights violations by Canadian extractive companies operating in Colombia. Business groups were more subdued in their comments on the FTA, but agreed with unions and civil society that it has had no effect in improving labour conditions or human rights in the country;[24] and after five years of public reporting of no change in conditions in Colombia, no dispute relating to the agreement's human rights provisions has been initiated. Instead, continuing dialogue appears to be the default measure.

In sum, FTAs to date fail to account for human rights obligations in a manner that is consistent with fundamental labour standards of the ILO and international human rights obligations of the UN.[25] Moreover, there are often neglected labour rights in FTAs, notably pertaining to social protection policies that are a major component of both the UDHR and work-related rights of the ICESCR. Social protection is also recognized as an important determinant of health.[26] One of the areas of greatest consensus, among both proponents and critics of free trade, is that trade is rarely, if ever, win-win: namely, one country's or sector's employment gain will likely be offset by the loss of another. Social protection can provide a means of mediating the health impact of job loss, for example, through unemployment insurance. Health deterioration for many workers losing their employment is thus a likely consequence of FTAs involving countries with weak social protection.

It is also important to consider whether FTAs are an appropriate place for labour provisions in the first place. Advocates of linking trade to labour standards typically seek to address two issues: (1) weak protections of workers in countries with relatively low labour standards; and (2) the perceived comparative and unfair advantage of countries this creates. This second concern is largely vocalized by labour organizations and governments in the Global North; governments of lower-income countries are concerned that strongly enforceable labour provisions could be

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[21] See Lance A Compa, "Corporate Social Responsibility and Workers' Rights" (2008) 30:1 Comparative Labor Law & Policy J 1.

[22] See US, Government Accountability Office, *Free Trade Agreements: U.S. Partners are Addressing Labor Commitments, but More Monitoring and Enforcement are Needed* (GAO-15-160) (Washington, DC: GAO, 2014).

[23] Laura Macdonald & Angella MacEwen, *Does the TPP Work for Workers? Analyzing the Labour Chapter of the TPP* (Ottawa: Canadian Center for Policy Alternatives, 2016).

[24] See Embassy of Canada to Colombia, *Fifth Annual Report on Human Rights and Trade Agreement*, (21 July 2016), online: <www.canadainternational.gc.ca/colombia-colombie/bilateral_relations_bilaterales/rep-hrft-co_2015-dple-rapp.aspx>.

[25] See Francesco Giumelli & Gerda van Roozendaal, "Trade Agreements and Labour Standards Clauses: Explaining Labour Standards Developments through a Qualitative Comparative Analysis of US Free Trade Agreements" (2017) 17:1 Global Social Policy 38. A recent study also finds that FTAs drafted by the US do not play a determinant role in improving labour standards in signatory states.

[26] See WHO Commission on Social Determinants of Health, *Closing the Gap in a Generation: Health Equity Through Action on the Social Determinants of Health* (Geneva: WHO, 2008).

used for protectionist purposes. Tying labour standards to trade agreements may also come at the expense of employment opportunities, which empower many, especially female, workers in lower-income countries.[27] While the full terms of this debate are beyond the scope of this essay, its relevance is simply that it should not be taken for granted that labour provisions should be included in FTAs, and that the goals of achieving internationally recognized labour rights may be best achieved through other multi-lateral institutions.

Finally, some support exists for the idea that FTAs can promote positive changes in labour standards. This support is mainly limited to cases where FTA partners are required to reform their labour laws before an agreement is concluded. For example, the 2013 Social Dimensions of Free Trade Agreements study by the ILO found that that some countries have made fundamental changes to their labour laws as a result of pre-ratification conditions. However, the impact of these conditions depends on the political will of the involved countries.

TO WHAT EXTENT DO FTAS ACCOUNT FOR HUMAN RIGHTS OBLIGATIONS IN THE CONTEXT OF THE ENVIRONMENT?

Limitations on FTA protection of human rights relative to the environment are predated by several agreements of the World Trade Organization (WTO), which constrain the abilities of member states to regulate for environmental health protection. The Technical Barriers to Trade (TBT) agreement, for example, precludes governments from imposing import restrictions on "like products" whose process and production methods involve environmental pollution or hazardous workplace conditions that exceed standards in their own country. It also requires any new regulations not create unnecessary obstacles to trade by pursuing any "less trade restrictive" option and using international standards as the basis of their regulations. The agreement on Sanitary and Phytosanitary Standards (SPS) requires governments to provide scientific risk assessments if their regulation exceeds any international standard.[28] Recent FTAs, such as the TPP and the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union, largely import these WTO provisions, but introduce further barriers that government regulations for environment protection must first overcome.[29]

The TPP, for example, requires new regulations to be less trade restrictive and international standards-compliant *before* they are promulgated; under the WTO rules, it is up to another government to challenge such a regulation in a formal dispute if it considers it discriminatory or trade-restrictive. The TPP also allows corporations from other TPP countries to participate in developing new regulations, potentially leading to regulatory capture. The SPS Chapters in both the TPP and CETA tighten the requirements for "documented and objective scientific evidence" if a new regulation exceeds an international standard, which arguably weakens the precautionary principle of acting on limited evidence, if the consequences of not doing so are potentially large. CETA's two parties issued a Joint Interpretative Instrument to clarify some of the agreement's measures that had provoked public criticism, including limitations on future environmental regulations. The Instrument; however, merely affirms a government's right to regulate provided it abides by the Agreement's rules.

Similarly, both FTAs contain statements affirming governments' right to regulate for health (e.g. in the Chapters on TBT, SPS and Investment), but invariably add restricting terms, such as the statement in the TPP TBT Chapter that "nothing…shall prevent a Party from adopting or maintaining technical regulations or standards" provided that these are "in accordance with its rights and obligations under this Agreement" (Article 8.3). Similarly, the TPP Investment Chapter reassures that "nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure…appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives" (Article 9.15), which is immediately contradicted by requiring that such measures "be consistent

[27] See Naila Kabeer, "Globalization, Labor Standards, and Women's Rights: Dilemmas of Collective (In)action in an Interdependent World" (2004) 10:1 Feminist Economics 3.

[28] See Ronald Labonté, Chantal Blouin & Lisa Forman, "Trade, Growth and Population Health: An Introductory Review" (2010) 2:1 Transdisciplinary Studies in Population Health Series.

[29] See Ronald Labonté, Ashley Schram & Arne Ruckert, "The Trans-Pacific Partnerships: Is It Everything We Feared for Health?" (2016) 5:8 Intl J Health Policy & Management 487.

with this Chapter."[30] As with WTO agreements, FTAs (including the TPP) allow exemptions for non-discriminatory regulations "necessary to protect human, animal or plant life or health" (GATT 1994, Article XX), which is understood to include broader environmental concerns, but only if these regulations meet the "necessity" test (that no less trade restrictive option exists). Of 32 disputes where this exemption was considered, 18 were dismissed for failing the necessity test.[31] So far, only one has succeeded in overcoming all the interpretative barriers: the EU ban on asbestos insulation imports from Canada.

As with FTA labour provisions, environmental provisions in FTAs such as the TPP are extremely weak. The TPP does not require (indeed only "encourages") member states to adopt their "own levels of environmental protection and...priorities" (Article 20.3). Only one of the seven Multilateral Environment Agreements (MEAs) in earlier US FTAs is directly enforceable under the TPP: The Convention on International Trade in Endangered Species.[32] Member states are not obliged to ratify any MEA that they have not already ratified, only to uphold their existing commitments; any failure to do so is not subject to dispute settlement or even consultations. Many FTAs acknowledge the need to protect biodiversity and refer to the Nagoya Protocol to the Convention on Biological Diversity, important to developing countries wanting to protect themselves against "biopiracy" through patenting of biological resources. But, "urging support" for this Convention does not specify any effective obligations to do so,[33] and there is no mention at all of this Convention within the TPP's environment Chapter.

The TPP did add one new element; however, an enforceable prohibition on subsidies "that negatively affect fish stocks that are in an overfished condition" (Article 20.16).This is an issue also gaining momentum in the WTO system after a decade of stalling.[34] Although stronger on resource-depleting fishing subsidies, the TPP is silent on climate change, pledging only to cooperate on a transition to a low-emissions economy (Article 20.15), and ducking any reference to ending member states subsidies for fossil fuel production or consumption. The Chapter's most telling weakness, however, mirrors that in the labour Chapter, provisions only become enforceable through dispute resolution if a member state fails to uphold its own environmental laws in a way that creates a trade or investment advantage. In both instances (labour and environment), this rule, should it prevail in a dispute, could forestall a regulatory "race to the bottom" by creating a disincentive for member states to reduce their existing levels of labour and environment protections. But, it is scarcely consistent that a state's obligation is to take steps towards the full (or progressive) realization of the rights protected in the Covenants they have ratified.

Apart from the TPP's reference to labour rights, reference to human rights specific to the environment, or more generally, is notable by its absence. CETA, at least, mentions in its Preamble "the importance of... human rights in the development of international trade" with reference to Parties to the Agreement ensuring that trade contributes to "sustainable development in its economic, social and environmental dimensions." [35] Its environment Chapter; however, like that of the TPP's, is largely hortatory.

The TPP also makes preambular nods towards sustainable development, stating parties resolve to "promote high levels of environmental protection, including through effective enforcement of environmental laws, and further the aims of sustainable development, including through mutually supportive

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[30] Many disputes initiated by foreign investors under bilateral and FTA investment rules have been over environmental regulations. See Chapter 2.

[31] See Public Citizen, *Only One of 40 Attempts to Use the GATT Article XX/GATS Article XIV 'General Exception' Has Ever Succeeded: Replicating the WTO Exception Construct will not Provide for an Effective TPP General Exception*, (August 2015) online: <www.citizen.org/documents/general-exception.pdf>.

[32] See Sander M Levin, *TPP Issue Analysis: Environment Chapter* (Washington, DC: Committee on Ways and Means, 2015).

[33] See International Institute for Sustainable Development, *A Sustainability Toolkit for Trade Negotiators: Trade and Investment as Vehicles for Achieving the 2030 Sustainable Development Agenda*, online: <www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/3-environmental-provisions/3-8-dispute-settlement-and-consultation>.

[34] See World Trade Organization, *Sustaining Fishing, Climate Change Among Issues Aired at Trade and Environment Committee*, (20 June 20 2017) online: <www.wto.org/english/news_e/news17_e/envir_20jun17_e.htm>.

[35] *Comprehensive Economic and Trade Agreement*, Canada and the European Union, 30 October 2016 (provisionally entered into force 21 September 2017).

trade and environmental policies and practices." Such statements surface a fundamental trade/environment contradiction. Trade and investment treaties are premised, in part, on increasing economic growth that date back to the 1987 UN Commission on Environment and Development (the Brundtland Report), which popularized the concept of sustainable development defined in the Report as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[36] The term also appears in the preambular founding document of the WTO (the Marrakesh Agreement), which specifically cites the need to "use...the world's resources in accordance with the objective of sustainable development."[37] At the same time, the WTO in practice emphasizes that "the system's overriding purpose is to help trade flow as freely as possible."[38] Yet as a 2009 joint (WTO/UNEP) report on trade and climate change acknowledged, continuing trade-related economic growth will only exacerbate greenhouse gas emissions in the energy and transportation sectors,[39] and that, as an issue, climate change "is not part of the WTO's ongoing work program."[40] The report acknowledges other environmental risks and the need for improved coherence between trade and MEAs, an issue more urgent now given the prominence of environment concerns (although not climate change per se) within the post-2015 Sustainable Development Goals. There is also a long-standing WTO Committee on Trade and the Environment, which discuss the relationship between trade and environment, generally distilling to reducing tariffs on "climate-friendly goods and technology."[41] New FTAs essentially replicate an environment (and labour) committee structure.

Multilateral talk is good, but the absence of specific recognition of the ecological limits to growth[42] in FTAs, or of any requirements of member states to ratify and comply with all existing and new MEAs, will continue to render them weak in protecting the human right to a healthy and sustainable environment. As with the labour protection Chapters (apart from its one negative dispute decision), there has yet to be a single dispute over provisions of environment protection Chapters in FTAs.

CONCLUSION

Human rights related to labour standards and the environment are not only important in their own right, but are also foundational for the realization of the human right to health. This essay has outlined a number of important labour and environmental human rights obligations and demonstrated that FTAs have thus far done little to effectively account for these obligations. In relation to labour standards, this is largely because of text which is ornamental and prioritizes trade over workers' rights. Moreover, social protection as a central component of labour rights and an important determinant of health has yet to be accounted for in any FTA labour text. While there is some evidence to suggest that FTAs can promote positive changes in labour standards before an agreement is concluded, it remains unclear whether attention should be directed to crafting labour clauses that are more effective in enhancing labour rights or whether achieving internationally recognized labour rights may be best achieved through other multi-lateral institutions.

The same question arises given the persisting limitations with environment protections within FTA environment Chapters. If anything, these provisions are getting progressively weaker by moving away from binding commitments to "the less binding end of the spectrum."[43]

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[36] UN, *Report of the World Commission on Environment and Development: Our Common Future* (Oxford: Oxford University Press, 1987).

[37] *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154 (entered into force 1 January 1995).

[38] WTO, *Understanding the WTO: Who We Are*, online: <www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm>.

[39] World Trade Organization, *Trade and Climate Change: A Report by the United Nations Environment Programme and the World Trade Organization* (Geneva: WTO, 2009)

[40] *Ibid* at 105.

[41] *Ibid* at 81.

[42] Tim Jackson, *Prosperity Without Growth? The Transition to a Sustainable Economy* (Sustainable Development Commission, 2009.

[43] See International Institute for Sustainable Development, A *Sustainability Toolkit for Trade Negotiators: Trade and Investment as Vehicles for Achieving the 2030 Sustainable Development Agenda*, online: <www.isd.org/toolkits/sustainability-toolkit-for-trade-negotiators/3-environmental-provisions/3-1-binding-or-non-binding-commitments>.

This policy approach to trade negotiations may create more opportunities for governments to talk about the need to harness trade for sustainable development or human rights purposes, but provide less actual room to incentivize or enforce any progressive action.

PROTECTING THE HUMAN RIGHT TO FOOD IN THE SPHERE OF INTERNATIONAL TRADE AND INVESTMENT

Emma Larking, Sharon Friel, & Anne Marie Thow

Abstract: Historically, international support for the human right to food has been uneven, with some organisations promoting it and others ignoring or even denying its existence. In this article, we provide an overview of the right to food in international law. We discuss how it should be implemented within states and look at the degree to which this implementation has occurred. We then assess the impact of international trade and finance regimes on enjoyment of the right to food, and ask whether schizophrenia persists concerning its very existence.

Keywords: Human right to food, food policy, food security, FAO, voluntary guidelines

BACKGROUND TO THE DEBATE

Throughout the 1980s and 1990s, it was widely heralded that liberalizing trade and investment was a sure path out of poverty—and associated shocking rates of undernutrition— for developing countries and towards perpetual prosperity for all nations. This view was championed by international trade and investment institutions, and mostly accepted by aid and development organisations. However, many also campaigned to improve the transparency, consistency, and fairness of trade liberalisation and investment agreements, and to expose asymmetries in their implementation. The global food crisis of 2008 shattered this fragile consensus.[1]

Since then, food activists and human rights experts have questioned whether further liberalizing trade and investment is likely to ensure universal realization of the right to food. They have also been wrestling with what was described in 2011 as "schizophrenia" in food policy, with some international agencies working to promote the human right to food, while "the Bretton Woods institutions, along with the Government of the United States of America and the World Trade Organization ["WTO"], refuse[d] to recognize [its] mere existence."[2] This schizophrenia was manifest within states as well, producing domestic policy incoherence, and at the level of foreign policy, a willingness to "vote for the right to food in the UN Human Rights Council and…vote against it in the [WTO]."[3]

THE RIGHT TO FOOD IN INTERNATIONAL LAW

The human right to food, and more broadly, to health, is recognized in a range of international, regional, and national instruments, although the scope of recognition varies.[4] The most comprehensive international recognition is contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR),[5] which includes rights to enjoy "the highest attainable standard

[1] For a discussion of the causes and impacts of the crisis, during which the cereal price index reached a peak 2.8 times higher than in 2000, see UNDESA, *The Global Social Crisis: Report on the World Social Situation 2011* (New York: UN, 2011) at 61–74.

[2] Jean Ziegler et al, *The Fight for the Right to Food: Lessons Learned* (Basingstoke: Palgrave MacMillan, 2011) at xiii.

[3] *Ibid*; and see Anne-Marie Thow & Biraj Patnaik, "The Politics of Malnutrition: Achieving Policy Coherence in a Globalized World" in Richard Parker & Jonathan Garcia, eds, *The Routledge Handbook on the Politics of Global Health* (New York: Routledge, 2011).

[4] See Food and Agriculture Organization, *Guide on Legislating for the Right to Food* (Rome: FAO, 2009) at 9–12 [FAO, Guide on Legislating].

[5] See *CESCR General Comment No 12: The Right to Adequate Food (Article 11)*, UNESCOR, 20th Sess, UN Doc E/C.12/1999/5 (1999) at para 1 [CESCR, General Comment No 12]; FAO, *Guide on Legislating, supra note 4 at 10. International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) [ICESCR].

of physical and mental health,"[6] "to an adequate standard of living…including adequate food,"[7] and "to be free from hunger."[8] ICESCR also obliges states "to ensure an equitable distribution of world food supplies in relation to need," "[t]aking into account the problems of both food-importing and food-exporting countries."[9]

Although parties to ICESCR are not required to implement all rights immediately, they must take positive steps towards progressive realization of the rights it contains.[10] These steps should be designed to respect, protect, and fulfil the Covenant rights;[11] they should utilize "the maximum of…available resources" and they should include not only individual actions by states, but also action achieved "through international assistance and co-operation, especially economic and technical."[12]

The Committee on Economic, Social and Cultural Rights (CESCR), which is responsible for overseeing the implementation of ICESCR, describes the right to adequate food as "inseparable from social justice" and as requiring "the adoption of appropriate economic, environmental and social policies, at both the national and international levels" targeted at eradicating poverty and fulfilling human rights for all.[13] Freedom from hunger represents the minimum baseline or core obligation of the right to food, to be assured for all individuals regardless of a state's level of development.[14] The right will be fully realized "when every man, woman and child, alone or in community with others, ha[s] physical and economic access at all times to adequate food or means for its procurement."[15]

CESCR specifies that the "core content" of the right implies availability of food "in a quantity and quality sufficient to satisfy the dietary needs of individuals, free [of] adverse substances, and acceptable within a given culture."[16] It also implies that food can be accessed sustainably and in a manner that does not interfere with the enjoyment of other rights.[17] The sustainability requirement means that the needs of future generations

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6 ICESCR, *supra* note 5, art 12(1).

7 *Ibid*, art 11(1).

8 *Ibid*, art 11(2).

9 *Ibid*, art 11(2)(b). In addition, it requires states to take measures, both "individually and through international co-operation" to "improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources" (*ibid*, art 11(2)(a)).

10 *Ibid*, art 2(1).

11 See CESCR, *General Comment No 12, supra* note 5 at para 15."Respect" involves a state ensuring its agents do not infringe on a right, "protect" involves taking measures to ensure third parties do not infringe a right, and "fulfil" involves positive action to ensure a right is realized. Thus, in relation to the right to food, CESCR explains that states must "not … take any measures that result in preventing…access [to adequate food]" ('respect'); they must take measures "to ensure that enterprises or individuals do not deprive individuals of their access to adequate food" ('protect'); and they must "facilitate" and "provide" the right to food ('fulfil'), by "proactively engag[ing] in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security," and by directly providing adequate food "whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal."

12 ICESCR, *supra* note 5, art 2(1). States parties also guarantee that ICESCR rights "will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (*ibid*, art 2(2)).

13 CESCR, *General Comment No 12, supra* note 5 at para 4. *CESCR General Comment No 14: The Right to the Highest Attainable Standard of Health*, UNESCOR, 22nd Sess, UN Doc E/C.12/2000/4 (2000) [CESCR, *General Comment No 14*]. In relation to the right to health in article 12, CESCR says this embraces "a wide range of socio-economic factors that promote conditions in which people can lead a healthy life", and incorporates "the underlying determinants of health, such as food and nutrition…" (*ibid* at para 4).

14 See *CESCR General Comment No 3: The Nature of States Parties Obligations (Art. 2, Para. 1, of the Covenant)*, UNESCOR, 5th Sess, UN Doc E/1991/23 (1990) at para 10 [CESCR, *General Comment No 3*]; CESCR, *General Comment No 12, supra* note 5 at paras 6, 17 & see para 21.

15 CESCR, *General Comment No 12, supra* note 5 at para 6.

16 *Ibid* at para 8.

17 *Ibid*.

must be taken into account.[18] The Special Rapporteur on the Right to Food is mandated by the Human Rights Council to promote the right to food globally. Like CESCR, successive Special Rapporteurs have emphasized the importance of sustainability. Former Special Rapporteur Olivier De Schutter argues against technological or other prescriptions for increasing food yields that have adverse environmental impacts over the long term, and that "ignore…the need to transition to sustainable production and consumption."[19]

An aspect of the right to food that should influence the development of law and policy, including at the international level, is public participation. CESCR calls for "peoples' participation" in the formulation of strategies for realizing the right to food.[20] De Schutter argues these strategies "should be conceived as participatory processes, co-designed by all relevant stakeholders, including in particular the groups most affected by hunger and malnutrition."[21]

CESCR stresses that all members of society, including national and transnational corporations, are responsible for ensuring that the right to food can be realized.[22] The UN's Guiding Principles on Business and Human Rights ("the Principles") are a non-binding framework designed to assist states and businesses to advance human rights protections.[23] They attempt to promote "policy coherence" by calling on states to ensure that all government departments and actors involved in regulating business activities know about and respect human rights obligations,[24] and take these into account "when pursuing business-related policy objectives with other states or business enterprises, for instance through investment treaties or contracts."[25] The Principles also call on states to ensure that as members of international organizations, they encourage these institutions to promote business respect for human rights, and do not hinder the capacity of states or businesses to respect human rights.[26] In 2014, a Human Rights Council Working Group was mandated to elaborate a legally binding instrument to regulate the human rights-related activities of transnational corporations.[27]

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[18] *Ibid* at para 7.

[19] *Final Report of the Special Rapporteur on the Right to Food, Olivier De Schutter: The Transformative Potential of the Right to Food*, UNGAOR, 25th Sess, Agenda Item 3, UN Doc A/HRC/25/57 (2014) at para 15 [De Schutter, *The Transformative Potential*].

[20] CESCR, General *Comment No 12* at para 23 & see para 24; *regarding the right to health*, see CESCR, *General Comment No 1: Reporting by State Parties*, UNESCOR, 13th Sess, UN Doc E/1989/22 (1981) at paras 11 & 54.

[21] De Schutter, *The Transformative Potential, supra* note 19 at para 44 & see para 3. See FAO, *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security* (Rome: FAO, 2005) [FAO, *Voluntary Guidelines*]. The Voluntary Guidelines emphasize that a human rights-based approach requires the participation of people—and particularly the poor and vulnerable—in the development of food policies that will affect them ("Introduction" and Guidelines 1, 2.6, 3.8, 3.9, 5.2 & 5.4). FAO, Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security, Rome, 2005 (adopted by the 127th session of the FAO Council, November 2004).

[22] See CESCR, "General Comment No 12", *supra* note 5 at para 20. At the time of writing, CESCR was in the process of drafting a new General Comment on State Obligations under ICESCR in the Context of Business Activities. The General Comment was adopted in August, 2017. General Comment No. 24 (2017) on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context *of Business Activities*, UNESCOR, UN Doc E/C.12/GC/24 (2017).

[23] Often referred to as "the Ruggie Principles": *Final Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, UNGAOR,17th Sess, Agenda Item 3, UN Doc A/HRC/17/31 (2011) 6–27. The Principles were endorsed by the Human Rights Council in its resolution 17/4 of 16 June 2011.

[24] *Ibid* at 11–12.

[25] *Ibid* at 12.

[26] *Ibid* at 12–13. See also *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Addendum: State Responsibilities to Regulate and Adjudicate Corporate Activities Under the United Nations Core Human Rights Treaties: An Overview of Treaty Body Commentaries*, UNGAOR, 4th Sess, Provisional Agenda Item 2, UN Doc A/HRC/4/35/Add.1 (2007). The Special Representative also produced *Addendum: Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators*, UNGAOR, 17th Sess, Agenda Item 3, UN Doc A/HRC/17/31/Add.3 (2011).

[27] See *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, GA Res 26/9, UNGAOR, 26th Sess, Agenda Item 3, UN Doc A/HRC/Res/26/9 (2014). The mandate also refers to "other business enterprises", defined as enterprises with a "transnational character", excluding "local businesses" (*ibid* at 1, n 1).

CESCR highlights the importance—indeed the "essential role"—of international cooperation for realizing the right to food.[28] It argues that state parties to the Covenant have obligations "to facilitate access to food…" "in other countries," and must take the right into account when entering international agreements, including with international organizations and multinational corporations.[29] As De Schutter points out, states are bound by the obligations they have accepted under human rights treaties, and thus "prohibited from concluding any agreements that would impose on them inconsistent obligations."[30] He developed "Guiding Principles" to assist states engaged in negotiating trade and investment agreements to assess the likely impacts on human rights and ensure that any obligations they accept are consistent with respect for human rights, and in particular, the right to food.[31] CESCR also encourages international financial institutions to factor the right to adequate food into their lending policies and credit agreements, and to ensure that structural adjustment programs do not encroach on it.[32]

While ICESCR has 165 parties, a notable outlier given its influence in the arenas of trade and investment is the United States,[33] which has signed but not ratified the Covenant. We discuss the implications of this further below. To date, discussions surrounding the right to food have largely focused on hunger, and thus access to *sufficient* food.[34] But with rising instances of micronutrient deficiencies, obesity, and other diet-related non-communicable diseases in low- and middle-income as well as high-income countries, attention is increasingly being directed at ensuring access to sufficient nutritious food.[35]

NATIONAL RECOGNITION OF THE RIGHT TO FOOD

Constitutional or legislative protection will usually be necessary to translate human rights as they are articulated in international instruments into actionable rights within national legal systems[36]—although it should be noted that legal protection in itself does not guarantee enjoyment of rights for all people. As the Food and Agriculture Organization (FAO) points out, "legislation frequently gathers dust on shelves while life goes on as before."[37]

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[28] CESCR, *General Comment No 12, supra note 5 at para 36. Regarding the right to health, see CESCR, General Comment No 14, supra* note 13 at para 38.

[29] CESCR, *General Comment No 12, supra note 5 at paras 36 & 19. Regarding the right to health, see CESCR, General Comment No 14, supra* note 13 at paras 45 & 50.

[30] See *Report of the Special Rapporteur on the Right to Food, Olivier De Schutter: Addendum: Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements*, UNGAOR, 19th Sess, Agenda Item 3, UN Doc A/HRC/19/59/Add.5 (2011) at Appendix at para 1.1 [De Schutter, *Guiding Principles*], citing the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 at arts 26 and 30, para 4(b) (entered into force 27 January 1980). Note, however, that some states became party to WTO Agreements before ratifying ICESCR.

[31] De Schutter, *Guiding Principles, supra* note 30. The authority and legitimacy of the principles are bolstered by the fact that they were prepared in consultation with a range of experts, other special procedures mandate holders, the human rights treaty bodies, and the Human Rights Council Advisory Committee (*ibid* at paras 4–5).

[32] CESCR, *General Comment No 12, supra* note 5 at para 41. Regarding the right to health, see CESCR, *General Comment No 14, supra* note 13 at para 39.

[33] The United States has a veto power at the World Bank, and exerts significant influence in the International Monetary Fund (IMF) and WTO.

[34] See CESCR, *General Comment No 12, supra* note 5 at paras 8 & 9. Although CESCR's account of the right to adequate food emphasizes the importance of food quality, arguing—as we saw earlier—that food must "satisfy the dietary needs of individuals," this implies a diet that "as a whole contains a mix of nutrients for physical and mental growth, development and maintenance, and physical activity…in compliance with human physiological needs at all stages throughout the life cycle." It says states must ensure "that changes in availability and access to food supply…do not negatively affect dietary composition and intake."

[35] See International Food Policy Research Institute, *2015 Global Nutrition Report: Actions and Accountability to Advance Nutrition and Sustainable Development* (Washington, DC: International Food Policy Research Institute, 2015); De Schutter, *The Transformative Potential, supra* note 19 at para 5; Thow & Patnaik, *supra* note 3.

[36] For a discussion of the national applicability of international treaties, and how applicability varies between monist and dualist legal systems, see FAO, *Constitutional and Legal Protection of the Right to Food around the World* (Rome: FAO, 2011) at 23–29 (FAO, *Constitutional and Legal Protection*).

[37] *Ibid* at 32. For example, because policy measures are inadequate to guarantee the right to all people, or because barriers to justice—such as

It is open to states to adopt the implementation strategies and form of recognition for ICESCR rights most suited to their particular context,[38] but CESCR recommends the adoption of a framework law setting out general principles and obligations in relation to the right to food.[39] De Schutter urges states to legislate to ensure that human rights impact assessments for new trade and investment agreements are conducted as a matter of course.[40] CESCR encourages states to secure the right to food by engaging with "all aspects of the food system."[41] Such strategies should thus take into account how food is produced, distributed, and marketed.[42] They should also "protect people's resource base for food,"[43] including by protecting self-employment,[44] maintaining land registries,[45] and—as indicated earlier—regulating the activities of private business and civil society.[46]

FAO has prepared Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security ("Voluntary Guidelines"),[47] and a Guide on Legislating for the Right to Food.[48] The Guidelines are notable for the fact that they characterize international trade as an "instrument for development"[49] with the potential to "play a major role in…the alleviation of poverty and improving food security at the national level."[50] They encourage states to improve their market and trade systems, "fostering food security for all through a non-discriminatory and market-oriented local, regional, national and world trade system."[51] While they suggest "[s]tates should take into account the shortcomings of market mechanisms in protecting the environment and public goods,"[52] they also encourage states to implement commitments under trade agreements, including improving market access,

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the prohibitive costs of pursuing legal remedies—prevent particular individuals or groups from litigating to ensure the legal right is implemented. It may also be that the right, although recognised in law, is inadequately defined, or the remedies for breach are inadequate. *Ibid* at 31 (regarding the inadequacy of existing framework laws recognizing the right to food).

38 Regarding the right to food, see CESCR, *General Comment No 12, supra* note 5 at para 21.

39 CESCR, *General Comment No 12, supra* note 5 at para 29. "[I]ncorporation in the domestic legal order of international instruments recognizing the right to food" (*ibid* at para 33). See also FAO, *Constitutional and Legal Protection, supra* note 36 at 30; and FAO, *Voluntary Guidelines, supra*, note 21 at 11. CESCR, *General Comment No 3, supra* note 14 at para 3. Note as well that article 2(1) of ICESCR encourages the adoption of legislative measures, and CESCR describes such measures as highly desirable or even "indispensable."

40 De Schutter, *Guiding Principles, supra* note 30 at para 3.

41 CESCR, *General Comment No 12, supra* note 5 at para 25. "[C]oordination between ministries and regional and local authorities" (ibid at para 22); FAO, *Voluntary Guidelines, supra* note 21. "States may wish to ensure the coordinated efforts of relevant government ministries, agencies and offices" (*ibid* at 14).

42 CESCR, *General Comment No 12, supra* note 5 at para 25.

43 *Ibid* at para 27.

44 *Ibid* at para 26.

45 *Ibid*.

46 *Ibid* at para 27.

47 FAO, *Voluntary Guidelines, supra* note 21.

48 FAO, *Guide on Legislating, supra* note 4.

49 FAO, *Voluntary Guidelines, supra* note 21 at 34.

50 Ibid.

51 *Ibid* at 14. They also note that an objective of the WTO Agreement on Agriculture is to "correct and prevent restrictions and distortions in world agricultural markets" in order "to establish a fair and market-oriented trading system" (*ibid* at 34).

52 *Ibid* at 14.

and reducing export subsidies and domestic support for agricultural products.[53] They caution that while states should protect consumers against "misinformation and unsafe food," this "should not constitute unjustified barriers to international trade and should be in conformity with the WTO agreements."[54]

Fifteen countries provide explicit constitutional recognition of the right to food, and a further eight countries provide constitutional recognition of the right only for a specific category of the population such as children or prisoners.[55] Many countries provide constitutional recognition for general rights that may be interpreted to incorporate the right to food in some form, such as to an adequate standard of living.[56] FAO suggests that the right to food is legally applicable in some form in a total of 106 countries.[57] The right has not, however, been widely litigated,[58] nor has there been much progress towards creating enabling environments for its realization through policy or institutional reform.[59] People continue to die in huge numbers, or to live stunted lives, as a result of malnutrition and hunger on the one hand, and because of diet related non-communicable disease on the other; this is the case in many countries in which the right to food is recognized.[60]

THE IMPACT OF INTERNATIONAL TRADE AND FINANCE REGIMES ON THE RIGHT TO FOOD

There is considerable evidence showing that trade agreements have affected national food environments in ways that limit the ability of consumers to make healthy choices and access nutritious food. In some instances, trade liberalization improves access to nutritious food, but such instances are dwarfed in scale by the increased access to, affordability, and market dominance of highly processed and energy dense foods,[61] and the deleterious impact of international trade and investment on the livelihoods and production practices of small scale farmers and local food manufacturers.[62]

Trade and investment agreements have created favourable conditions for the international distribution and market dominance of unhealthy commodities,[63] in part by limiting the independent capacity of states to develop and implement regulatory policies designed to

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[53] *Ibid* at 35 (the "three pillars of the Doha mandate" from the recommendations of the São Paulo Consensus, the eleventh session of the United Nations Conference on Trade and Development).

[54] FAO, *Voluntary Guidelines, supra* note 21 at 13.

[55] See FAO, *Constitutional and Legal Protection, supra* note 36 at 14–15, 21. As of 2011, the former are: Belarus, Bolivia, Brazil, the Congo, Ecuador, Guyana, Haiti, Kenya, Malawi, Moldova, and Nepal (individual right to food sovereignty), Nicaragua (right to be free from hunger), South Africa, Suriname, and Ukraine. The latter are: Colombia, Cuba, Guatemala, Honduras, Mexico, Panama, Paraguay, and Costa Rica.

[56] See FAO, *Constitutional and Legal Protection, supra* note 36 at 16–17, 21–22.

[57] *Ibid* at 32.

[58] *Ibid* at 13.

[59] See Nadia Lambek & Priscilla Claeys, "Institutionalizing a Fully Realized Right to Food: Progress, Limitations, and Lessons Learned from Emerging Alternative Policy Models" (2016) 40 Vermont L Rev 743 at 745.

[60] See *2015 Global Nutrition Report, supra* note 35. In 2015, 2 billion people suffered micronutrient malnutrition while 1.9 billion adults were overweight or obese (*ibid* at 3).

[61] See Amerita Ravuvu et al, "Protocol to Monitor Trade Agreement Food-Related Aspects: The Fiji case Study" (2018) 33:5 Health Promotion Intl 887; Arne Ruckert et al, "Policy Coherence, Health and the Sustainable Development Goals: A Health Impact Assessment of the Trans-Pacific Partnership" (2017) 27:1 Critical Public Health 86 at 87; Benn McGrady, *Trade and Public Health: The WTO, Tobacco, Alcohol, and Diet* (Cambridge: Cambridge University Press, 2011) 1–2; Thow & Patnaik, *supra* note 3.

[62] See De Schutter, *The Transformative Potential, supra* note 19 at para 10.

[63] See Ruckert et al, *supra* note 61 at 87. See also McGrady, *supra* note 61 at 2 & ff (identifying "tension between trade liberalization and [public health] measures to reduce the consumption of certain goods"); and Thow et al, "Will The Next Generation of Preferential Trade and Investment Agreements Undermine Prevention of Noncommunicable Diseases? A Prospective Policy Analysis of the Trans Pacific Partnership Agreement" (2015) 119:1 Health Policy 88 at 89.

advance public health outcomes.[64] For example, Samoa was able to join the WTO only after it agreed to remove its ban on fatty turkey tail imports—a ban based on health considerations. Thailand was pressured to give up a plan to label unhealthy snacks with the message, "children should eat less," after member countries raised concerns in the WTO's committee on Technical Barriers to Trade.[65] A case study of Vietnam demonstrates that when it became a member of the WTO and removed restrictions on sales and investment by foreign companies in accordance with WTO rules, consumption of sugar-laden soft drinks accelerated, with negative consequences for the health of consumers.[66]

Trade and investment agreements favour the interests of large-scale producers and corporations that benefit from economies of scale, and global marketing and distribution networks.[67] They make small-scale farming, production, and manufacturing less viable, partially because small-scale farmers have to compete with cheap food imports from developed countries, which continue to heavily subsidise their industrial scale agricultural producers while pressuring developing countries to open their markets to these products.[68] Developing countries are increasingly reliant on monoculture export crops and food imports.[69] Nor is it the case that consumers in poor countries have benefited from consistently lower food prices, with the cost of many staple foods increasing,[70] and international food price speculation on financial markets leading to volatility and spikes in food prices.[71]

Moreover, trade and investment agreements frequently include intellectual property protections that limit the ability of farmers, including traditional or subsistence farmers, to save and use seeds and other biological inputs.[72] The impacts of this may be far reaching, exacerbating the problem of corporate concentration and enhancing the influence of dominant corporations within the food and agricultural sectors on policy development, including in relation to trade.[73]

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64 See Ruckert, *supra* note 61 at 87. See also McGrady, *supra* note 61 at 9 (noting that it is not clear "whether the WTO Agreement leaves sufficient policy space for WTO Members to address the link between economic specialization [that may result from a lowering of trade barriers] and poor diet").

65 Both of these examples are taken from Thow et al, *supra* note 63, 88–89.

66 See Ashley Schram et al, "The Role of Trade and Investment Liberalization in the Sugar-Sweetened Carbonated Beverages Market: A Natural Experiment Contrasting Vietnam and the Philippines" (2015) 11:41 Globalization & Health 1.

67 See De Schutter, *The Transformative Potential, supra* note 19 at para 10; Ziegler et al, *supra* note 2 at 73.

68 See De Schutter, *The Transformative Potential, supra* note 19 at para 10; *Report of the Special Rapporteur on the Right to Food, Olivier De Schutter: Addendum: Mission to the World Trade Organization*, UNGAOR, 10th Sess, Agenda Item 3, UN Doc A/HRC/10/5/Add.2 (2009) at paras 10–16, 22; Ziegler et al, supra note 2 at 69.

69 See Wenonah Hauter, "The Limits of International Human Rights Law and the Role of Food Sovereignty in Protecting People from Further Trade Liberalization under the Doha Round Negotiations" (2007) 40 Vanderbilt J Transnational L 1071 at 1072–82; De Schutter, *The Transformative Potential, supra* note 19 at para 11; Ziegler et al, *supra* note 2 at 69.

70 Hauter, *supra* note 69 at 1076–77; Ziegler et al, *supra* note 2 at 70–71.

71 De Schutter, *The Transformative Potential, supra* note 19 at para 11; *Report of the Special Rapporteur on the Right to Food, Olivier De Schutter: Building Resilience: A Human Rights Framework for World Food and Nutrition Security*, UNGAOR, 9th Sess, Agenda Item 3, UN Doc A/HRC/9/23 (2008) at para 11 & Annex 1, para 3.

72 See Priti Darooka, "Women, Seeds and the Right to Food for All" (2015) Programme on Women's Economic, Social and Cultural Rights Discussion Paper No 4; Kevin Gray, *Right to Food Principles Vis á Vis Rules Governing International Trade* (London, British Institute of International and Comparative Law, 2003); Olivier De Schutter, *Seed Policies and the Right to Food: Enhancing Agrobiodiversity and Encouraging Innovation*, UNGAOR, 64th Sess, Provisional Agenda Item 71(b), UN Doc A/64/170 (2009).

73 See Ziegler et al, *supra* note 2 at 71.

RECOGNITION WITHIN INTERNATIONAL TRADE AND FINANCE REGIMES OF A HUMAN RIGHT TO FOOD—BUT SCHIZOPHRENIA PERSISTS BOTH INTERNATIONALLY AND NATIONALLY

Since former Special Rapporteur Jean Ziegler decried the schizophrenia in international food policy in 2011,[74] the global landscape has changed. Under President Trump, the United States has reversed its enthusiastic support for international trade liberalization. There is greater willingness among organizations such as the International Monetary Fund, the World Bank, and the WTO to employ the language of human rights. In the case of the United States, the immediate result is less hypocrisy—given the US never bound itself to the same trade liberalization standards to which it held others[75]—but only minor substantive changes in policy direction; it is unlikely the country will now move to ratify the ICESCR.[76] In the case of the international trade and investment institutions, the schizophrenia has been internalized. Although prepared to recognize the existence of a human right to food, these institutions refuse to prioritize it, or to treat it as imposing binding restrictions on policy development and implementation.[77]

This is not to say that trade and investment agreements make no concessions to human rights concerns. For example, the Doha Declaration on the TRIPS Agreement and Public Health specifies that the TRIPS Agreement should be implemented consistently with states' right to protect public health and, in particular, promote access to medicines.[78] Additionally, Abbott suggests that the TRIPS Agreement "allows for substantial flexibility in the development and application of competition rules" and as such, that national governments are entitled to take human rights into account when applying competition rules in conformity with their obligations under TRIPS.[79] While this may make it easier for states to justify trade restrictive measures that promote access to medicines, justifying such measures as warranted by the need to promote broader health goals—including the prevention of diet-related non-communicable diseases—is more difficult. This requires showing a direct causal connection between trade liberalization measures and the disease burden.[80] Attempts by countries to establish such a connection, in order to defend nutrition-labelling measures designed to allow consumers to make healthier food purchases, have been challenged at the WTO.[81]

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[74] *Ibid* at xiii.

[75] *Ibid* at 69.

[76] Even so, its status as a signatory means that it should refrain from action that would defeat the object and purpose of the treaty (UN Treaty Collection Website, *Glossary of Terms Relating to Treaty Actions*, online: UN <www.treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml>), citing the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 at arts 10 & 18 (entered into force 27 January 1980). This suggests that its involvement in international trade regimes should not fundamentally undermine the prospect of realizing ICESCR rights for all human beings. Furthermore, its participation in FAO and in the World Health Organization (WHO) mean that the US, along with other Member States, is accountable for the commitment made by FAO to realizing the right to food and by WHO to advancing the right to health.

[77] See Philip Alston, *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, UNGAOR, 69th Sess, Provisional Agenda Item 69(b), UN Doc A/69/297 (2014) at para 51; Philip Alston, *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, UNGAOR, 70th Sess, Provisional Agenda Item 73(b), UN Doc A/70/274 (2015) at para 30; Emma Larking, "Challenging Gendered Economic and Social Inequalities: An Analysis of the Role of Trade and Financial Liberalisation in Deepening Inequalities, and of the Capacity of Economic and Social Rights to Redress Them" in Sue Harris Rimmer & Kate Ogg, eds, *The Future of Feminist Engagement with International Law* (Cheltenham: Edward Elgar, 2018).

[78] See WTO, *TRIPS and Public Health*, online: <www.wto.org/english/tratop_e/trips_e/pharmpatent_e.htm>, for an account of the subsequent amendment to ensure continued application of this provision, and its ratification status.

[79] See Frederick M Abbott, "The 'Rule of Reason' and the Right to Health: Integrating Human Rights and Competition Principles in the Context of TRIPS" in Thomas Cottier, Joost Pauwelyn & Elisabeth Bürgi, eds, *Human Rights and International Trade* (Oxford: Oxford University Press, 2005) 279 at 300.

[80] See McGrady, *supra* note 61 at 8.

[81] See Anne Marie Thow et al, "Nutrition Labelling is a Trade Policy Issue: Lessons From an Analysis of Specific Trade Concerns at the World Trade Organization" (2018) 33:4 Health Promotion Intl 561.

While treaties such as ICESCR are legally binding on states parties, their enforcement mechanisms are weak in comparison with the highly punitive enforcement provisions contained in trade and investment agreements, and the incentives that states may have to attract trade and investment at the cost of lowering or dismantling human rights protections.[82] Nevertheless, recognition of the potentially disastrous impacts of international trade and investment on the capacity of states to assure the right to food has spurred the search for new development frameworks. The proposals suggested go beyond more conservative attempts— such as what we saw in the FAO Guidelines—to spur greater transparency and symmetry in the implementation of trade and investment treaties.[83] While recognizing these as laudable goals, the new proposals challenge the pre-eminence of market mechanisms for achieving the human right to food.

De Schutter argues that "[t]he multilateral trade regime as well as regional and bilateral trade agreements must allow countries to develop and implement ambitious food security policies including public food reserves, temporary import restrictions, active marketing boards, and safety net insurance schemes.[84] In his view, ensuring the right to food for all people will require a move away from the current model of internationalized industrial agriculture and a concerted effort globally to support and rebuild the productive capacities of small-scale farmers. Such a move would involve less reliance on international trade and would support the ability of states to buffer their domestic markets from price volatility in international financial markets.[85] It would involve states employing competition law proactively to challenge monopoly practices andreduce corporate concentration in agriculture and food markets.[86]

Civil society organizations and social movements such as the global peasants' network, Vía Campesina, have long championed policy shifts along the lines advocated by De Schutter. They argue that food is, first of all, a source of nutrition and only secondarily an item of trade; international trade and investment regimes must be redesigned to ensure that food fulfils its social function.[87] Their advocacy has played a role in emboldening developing countries in WTO negotiations and in seeking new terms for the conduct of international trade and investment more generally.[88] Negotiations in the WTO have now stalled, but countries such as the US have responded by shifting their focus to bilateral and regional treaties. Even so, the view that liberalizing trade and investment will automatically lift people out of poverty seems irreversibly tarnished. While many countries and international organizations continue to undermine the right to food in pursuit of other goals, it is more difficult for them to argue against its very existence. Schizophrenia persists in the gap between words and action, and in the pursuit within states of inconsistent policies, but advocates for the right to food are ensuring this schizophrenia does not go unnoticed.

ACKNOWLEDGEMENTS

We are grateful to the editors and to Belinda Townsend for their input and helpful comments on an earlier draft.

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[82] Holger P Hestermeyer, "Economic, Social and Cultural Rights in the World Trade Organization: Legal Aspects and Practice" in Eibe Riedel, Gilles Giacca & Christophe Golay, eds, *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* (New York: Oxford University Press, 2014) 260 at 263; Larking, *supra* note 77.

[83] By ensuring, for example, that developed countries dismantle their generous agricultural subsidy regimes.

[84] De Schutter, *The Transformative Potential, supra* note 19 at 27.

[85] *Ibid.*

[86] *Ibid.*

[87] Vía Campesina, "The Right to Produce Food and Access to Land" (Statement delivered at the NGO forum, World Food Summit, Rome, 11–17 November 1996).

[88] See Ziegler et al, *supra* note 2 for an account of the proposal by a number of developing countries for the inclusion of a "food security box" in the Agreement on Agriculture, which would allow developing countries to "protect and enhance…domestic food production capacity"; "protect farmers…from the onslaught of cheap imports," and "stop the dumping of cheap subsidized imports" (*ibid* at 75–76).

TOBACCO, TRADE, AND THE RIGHT TO HEALTH

Raphael Lencucha, Jeffrey Drope, Corinne Packer, & Ronald Labonté

Abstract: This article describes how states which have committed to the right to health in international human rights law are obligated to take measures to respect and fulfill this right for their citizens, including measures to protect against the harm to health caused by tobacco. It also reaffirms the duality of both international trade and investment law, and international human rights law. Yet challenges are faced in controlling tobacco production and sale, despite the WHO Framework Convention on Tobacco Control. Recent cases are reviewed wherein health and economic norms embodied in trade and investment rules have intersected.

Keywords: FCTC, ISDS, Uruguay, Australia

Trade and the human right to health occupy an uneasy space in the realm of international law in the case of tobacco. Despite efforts to control the production, sale, and marketing of tobacco, about 1.1 billion people—one in every three adults—today are smokers.[1] Behind each sale of a cigarette is the gargantuan business of the tobacco industry. Revenues from global tobacco sales are estimated to be close to USD500 billion. In 2015, tobacco companies spent USD8.9 billion marketing cigarettes and smokeless tobacco in the United States alone.[2] Agreements among countries to facilitate growth in trade and the freer flow of goods, including tobacco, are being negotiated and applied every day in almost every country in the world. And finally, there is the stark reality of tobacco's impact on health—the World Health Organization (WHO) qualifies the tobacco epidemic as "one of the biggest public health threats the world has ever faced, killing more than 7 million people a year."[3] It is an epidemic, which challenges any state's ability to provide timely and adequate life-saving health care and uphold the commitments it has made in ratifying international human rights treaties. This challenge is arguably greater for low and middle-income countries, since these countries have less money to spend on health care for their citizens, fewer resources to implement and oversee tobacco control measures, and, in a number of cases, an embedded reliance on tobacco exports for foreign currency earnings (in these countries, tobacco production is a general economic development strategy).[4]

EQUAL STANDING OF INTERNATIONAL HUMAN RIGHTS AND TRADE LAW

It has long been established that World Trade Organization (WTO) panels and other trade treaty dispute mechanisms must take into consideration human rights and public health concerns in interpreting the grounds of the disputes and deliberating their decisions.[5] Indeed, the Marrakesh Agreement Establishing the World Trade Organization recognizes the improvement of the human condition as the impetus for the creation of the Organization, declaring in its preamble that trade "should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income…while seeking both to protect and preserve the environment…"[6]

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1 See WHO, *Tobacco Fact Shee*t, (May 2017), online: <www.who.int/mediacentre/factsheets/fs339/en/> [WHO, Tobacco].

2 See Federal Trade Commission, *Federal Trade Commission Cigarette Report for 2015* (Washington, DC: Federal Trade Commission, 2017).

3 WHO, *Tobacco, supra* note 1.

4 See Raphael Lencucha, Jeffrey Drope & Ronald Labonté, "Rhetoric and the Law, or the Law of Rhetoric: How Countries Oppose Novel Tobacco Control Measures at the World Trade Organization" (2016) 164 Social Science & Medicine 100.

5 See Harold Hongju Koh, "Global Tobacco Control as a Health and Human Rights Imperative" (2016) 57:2 Global Tobacco Control 433 at 435.

6 *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154 (entered into force 1 January 1995).

In cases where human rights instruments are decades old and some of their provisions may be viewed as outdated in more modern times, we can draw insight from the European Court of Human Rights; this institution has called upon the "principle of evolution," clarifying that the 1950 European Convention on Human Rights must be seen as a living instrument, to be interpreted according to present-day conditions.[7] Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties also calls for "coherence" in international law; the WTO treaty is to be interpreted so as to avoid conflicts with other treaties.

The WTO Dispute Settlement Understanding (Article 3) similarly requires interpreting WTO law "in accordance with customary rules of interpretation of public international law." In sum, the WTO Agreement, as with any other treaty, should be interpreted taking into account other relevant and applicable rules of international law, including human rights law. However, trade law has taken precedence over other domains of international law. The global dominance of neoliberal norms has often perpetuated a legal context whereby trade and investment laws have eclipsed any attempts to foreground human rights norms or laws.[8] Attempts for coherence across domains have often been guided by the implicit assumption that health, environment, or other social considerations should not interfere with the rules of trade and investment.[9] This approach is illustrated most prominently through the rise in disputes around non-tariff barriers to trade, whereby national policies to protect health and environment have been met with strong opposition using trade and investment law.[10] On paper, WTO provisions are to be interpreted "in a way that allows and encourages WTO members to respect all their international law obligations, including those of human rights law."[11] States must ensure that they respect their human rights obligations in the event that they clash with provisions of trade agreements. It has been argued that trade and investment law can even serve as a tangible mechanism to ensure that human rights considerations condition trade and investment practices.[12] International economic law needs to be justified and evaluated in terms of justice and human rights, even if human rights are not specifically incorporated in trade treaties.[13]

Despite this recognition, trade and investment treaties have been used to challenge government policies intended to protect the rights of their citizens, whether it be their health, their environment, or another matter.[14] Under the WTO system, only state parties to the WTO can challenge another state's measures they regard as inconsistent with trade rules. Under investment treaties, this right extends to foreign investors, including corporations. Legal challenges to date under either type of treaty (trade or investment) are often determined with the right to health (and other human rights associated with health outcomes) vulnerable to being trumped by trade rule provisions. To better understand the challenges at hand, we have summarized the fundamental components of the right to health and how these can be threatened by trade agreements using specifically three cases involving tobacco.

TOBACCO CONTROL AND THE HUMAN RIGHT TO HEALTH

The human right of everyone to the enjoyment of the highest attainable standard of physical and mental health (referred to, in short, as the "right to health")

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7 See Gabrielle Marceau, "WTO Dispute Settlement and Human Rights" (2002) 13:4 European J Intl L 753 at 785.

8 See Andrew Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (Oxford: Oxford University Press, 2011).

9 See Philip Alston, "Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann" (2002) 13:4 European J Intl L 815.

10 Lang, *supra* note 8.

11 Marceau, *supra* note 7.

12 See Emilie M Hafner-Burton, "Trading Human Rights: How Preferential Trade Agreements Influence Government Repression" (2005) 59:3 Intl Organization 593.

13 See Ernst-Ulrich Petermann, "The Promise of Linking Trade and Human Rights" in Daniel Drache & Lesley A Jacobs, eds, Linking Global Trade and Human Rights: New Policy Space in Hard Economic Times (New York: Cambridge University Press, 2015) 46 at 54.

14 See Sol Picciotto, "Humanizing Global Economic Governance" in Daniel Drache & Lesley A Jacobs, eds, *Linking Global Trade and Human Rights: New Policy Space in Hard Economic Times* (New York: Cambridge University Press, 2015) 27 at 28.

extends "not only to timely and appropriate health care, but also to the underlying determinants of health..."[15] The right contains both freedoms and entitlements. In the case of trade and investment liberalization through the implementation of negotiated agreements, the greatest concern is with threats to "entitlements": *i.e.* actions that might impede a country's ability to protect and fulfil the right to health. The obligation to *protect* includes, *inter alia*, the duties of states to adopt legislation or to take other measures ensuring that third parties do not limit people's access to health services. The obligation to *fulfil* requires the state to take positive measures that enable and assist individuals and communities to enjoy the right to health.

The right to health, as with all other rights stipulated under the Covenant on Economic, Social and Cultural Rights (CESCR), in which the right to health appears, is meant to be achieved through progressive realization, meaning that states must move as expeditiously and effectively as possible towards the full realization of the right. New threats to health should also be considered by a state in consideration of its duty to protect and fulfil the right to health.

The legitimacy of state actions to enforce their citizens' right to health by controlling tobacco was strengthened by the WHO Framework Convention on Tobacco Control (FCTC), which came into force on 27 February 2005. As of writing, there are 181 Parties to the Convention. The treaty reaffirms, yet again for good measure, the right of all people to the highest standard of health. It also specifies the means by which states must ensure the protection and fulfilment of the right to health by enumerating specific measures to be adopted. For instance, according to Article 5.2 of the FCTC, countries must develop whole-of-government institutional mechanisms to coordinate efforts for tobacco control. The treaty places oversight for this whole-of-government approach squarely on the shoulders of ministries of health. It urges inter-sectoral coordination of tobacco reduction strategies across health, agriculture, trade, and other sectors, with overall monitoring and reporting undertaken by the state's ministry of health. However, this whole-of-government approach results in institutional challenges for tobacco control.[16] A major challenge is for agencies within one country to work towards the common goal of tobacco control; in short, the health sectors must now find ways to work with those ministries, which seek to bolster investment and trade in tobacco, placing them in direct contradiction of tobacco control objectives.[17]

Countries not only have internal tobacco control battles such as these to surmount in order to fulfil the rights of their citizens to health, but they also have international trade and investment agreements, with which they need to contend. For several decades, the tobacco industry has used governments' alleged commitments to international economic agreements in attempts to undermine governments' efforts to develop and implement new and sometimes innovative tobacco control interventions. Such interventions include plain, standardized packaging of tobacco products and bans on tobacco additives, among others. These efforts have challenged the normative underpinnings of these economic agreements, including in the WTO, and raised questions at the nexus of rights—particularly the right to health—and economic norms.

In industry/state challenges to tobacco control interventions, the actors defending the challenged measures often seek to foreground the health considerations. In the past, the disputes centered largely around the reading of the international laws specific to the economic issue(s), notably relying upon narrow interpretations of the necessity of the measure or an evaluation of whether it discriminates against the imports of another country. A familiar recent case involved the US ban of imports of clove-flavoured cigarettes from Indonesia on the basis that such cigarettes were favoured by adolescents, imperiling their present and future health. The WTO dispute panel agreed with the US argument, but found the ban discriminatory since the US permitted the sale of domestically-manufactured menthol-flavoured cigarettes, which were already known to be favoured by American teens in initiating smoking. This was a clear case of discrimination, and the panel emphasized that had the US government also sought to ban menthol-flavoured cigarettes, there would

[15] Office of the High Commissioner for Human Rights, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health*, UNESCOR, 22nd Sess, UN Doc E/C.12/2000/4 (2000).

[16] See Jeffrey Drope & Raphael Lencucha, "Evolving Norms at the Intersection of Health and Trade" (2014) 39:3 J Health Politics, Policy & Law 591.

[17] See Raphael Lencucha et al, "Investment Incentives and the Implementation of the Framework Convention on Tobacco Control: Evidence from Zambia" (2016) 25:4 Tobacco Control 483.

be no violation of trade rules.[18] To that extent, trade rules could be seen as an incentive for consistent public health regulations for governing tobacco control.[19] The dispute panel and appellate body decisions in this case are also indicative of a slow concomitant shift towards situating these measures and corresponding disputes in the broader health norms context, such as in this case reference to the FCTC as an interpretative document.[20] This slow shift has emboldened states to take more proactive and aggressive approaches to tobacco control, for example, exemptions or so-called "carve-outs" for tobacco from international economic agreements, such as the voluntary exclusion of tobacco control measures from rules in the investment chapter in the regional Trans-Pacific Partnership agreement (TPP). As with bilateral investment treaties (BITs), or with investment chapters in preferential Free Trade Agreements (FTAs) such as the TPP (now re-negotiated though not yet signed or ratified as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, or CPTPP), such rules allow foreign investors (such as corporations) to directly sue governments under international arbitration rules over perceived losses (direct or indirect expropriation) arising from new government measures, even if such measures are enacted for public health purposes (see Chapter 2 for this special issue).

The overall dynamic of such investor-state disputes is one that often pits the larger economic resources of a powerful plaintiff (in this instance, tobacco transnational corporations) against a weaker defendant (a low- or smaller middle-income country). Tobacco transnational corporations have specifically been targeting smaller countries with limited resources that are innovating on tobacco control.

At the same time, powerful economic actors seek to take advantage of their importance in economically weaker countries and use them to speak forcefully for their economic interests at the direct expense of a new health measure. Governments from countries low on the UN Human Development Index have sometimes appeared to act almost as if they are industry spokes-people in committee discussions regarding tobacco control that take place within the state-to-state rules governing WTO agreements. For example, some of the most vociferous questions targeted at Brazil's proposed ban on tobacco additives in the committee of the WTO Agreement on Technical Barriers to Trade have come from major African tobacco producers.[21]

RECENT CASES

In this section, we review two recent cases and a negotiation wherein health and economic norms embodied in trade and investment rules intersected. In these instances, health proponents placed health at the foreground of the arguments. Although they did not ignore the economic arguments, particularly the legal-institutional aspects of the cases, health considerations were expressed in their arguments in relation to trade and investment rules. The health arguments were an underlying justification, but alignment with trade and investment law remained the overarching consideration, i.e. flexibility *within* trade and investment law.

In 2008 and 2009, Philip Morris International (PMI) [22] challenged a set of tobacco control provisions promulgated by the Uruguayan government; these included health warnings that were 80 percent of the size of the package, and limited each brand to one presentation (i.e. there could not be a "Blue" and a "Red" version of the same cigarette brand). After domestic legal threats, PMI's Uruguayan subsidiary took the case to international investment arbitration through the ISDS mechanism in the Swiss-Uruguay BIT (PMI is headquartered in Switzerland).

Uruguay based its defense on the notion that it implemented these measures for the single purpose of protecting public health, arguing that: 1) the new warning labels were designed to increase consumer awareness about the harms of tobacco use, particularly

[18] See Robert Howse & Philip I Levy, "The TBT Panels: US–Cloves, US–Tuna, US–Cool" (2013) 12:2 World Trade Rev 327.

[19] See Jeffrey Drope & Raphael Lencucha, "Tobacco Control and Trade Policy: Proactive Strategies for Integrating Policy Norms" (2013) 34:1 J Public Health Policy 153.

[20] See Benn McGrady & Alexandra Jones, "Tobacco Control and Beyond: The Broader Implications of United States—Clove Cigarettes for Non-Communicable Diseases" (2013) 39:2-3 American J L & Medicine 265.

[21] Lencucha, Labonté & Drope, *supra* note 4.

[22] Philip Morris Brands SA & Abel Hermanos SA v Oriental Republic of Uruguay (2016), ICSID Case No ARB/10/7 (International Centre for Settlement of Investment Disputes).

for young people, while still permitting visible brands and logo; and 2) limiting brands served to halt a practice that implicitly suggested that some brand variants were safer than others. They also argued that they applied both regulations in a nondiscriminatory manner to all tobacco companies (domestic or foreign). The plaintiff argued that the measures impaired the use and enjoyment of their investments in Uruguay, denied them fair and equitable treatment and justice, and expropriated their brands, among others. In 2015, the arbitration panel ruled in favour of Uruguay's government. Although eventually winning this case, Uruguay relied on external financial support from the Bloomberg Philanthropies, set up by former New York City mayor and anti-tobacco advocate, Michael Bloomberg, in order to defend its measures before the international tribunal.

Since late 2012, Australia's government has compelled that all tobacco products sold in Australia must be in plain, standardized packaging with large and prominent warning labels. Even before implementation of the regulation, Ukraine—followed shortly thereafter by four additional countries—challenged the provision in the WTO's dispute settlement understanding. Australia placed health at the forefront of its defense stating that the measure was necessary for tobacco control innovation in a context where reductions in prevalence had slowed. Plain, standardized packaging removes logos and other branding, making packaging less attractive, particularly to young people. The Australians have argued that this branding increases initiation. In contrast, the plaintiffs, among other considerations, have focused on intellectual property issues, including the concept of positive versus negative trademarks. In brief, the plaintiff countries—several supported financially large tobacco multinationals—have argued that by not permitting firms to use their branding, e.g. through logos or signature color schemes, the Australian government is expropriating their intellectual property. The Australian government counters that in its right to protect the health of its citizens, it can limit the use of this branding due to its direct negative health effect, for example, by being an effective tool to recruit young people to initiate tobacco use. Moreover, the government is not using these trademarks to sell tobacco products, but instead for a legitimate health-related purpose. The case, as of December 2017, is still pending, although media reports suggest that an undisclosed dispute panel decision has ruled in Australia's favour. Earlier, Australia had won an investor-state challenge to its plain packaging law, once again brought by PMI, when the international investment tribunal dismissed the claim on the basis of jurisdiction, i.e. PMI was not eligible to advance a claim on the basis of the BIT it was citing (PMI had moved a subsidiary in what most observers considered an attempt to access a new venue mostly or perhaps entirely to pursue its claim).

The original Trans-Pacific Partnership agreement, a preferential FTA, which addressed many trade and investment issues, was notable from a health-rights perspective for including a provision for parties to opt-out of the investor-state dispute settlement (ISDS) mechanism specific to the tobacco sector. It was the only such opt-out provision in the agreement, and the only agreement, to date, with such a provision. The tobacco industry opposed the provision, while the US Chamber of Commerce expressed concerned of a precedent of an ISDS opt-out for other sectors in the future (notably those related to food, see Chapter 6 for this special issue). Proponents hailed it as a victory for health over economics, signaling a significant change in the negotiation of treaties. The US recently removed itself from the negotiations, but the provision has remained as of December 2017. Although some have noted that the ISDS mechanism by and large disadvantages states pursuing progressive social and environmental protection policies,[23] the selective "carving out" of tobacco is seen as a step towards more comprehensive protection of such policies.[24] Countries have started to take more comprehensive steps towards protecting tobacco control and other policies from investment disputes. For example, Australia and Japan removed ISDS altogether from its recent economic agreement.

[23] See Raphael Lencucha, "Is It Time to Say Farewell to the ISDS System?; Comment on "The Trans-Pacific Partnership: Is It Everything We Feared for Health?" (2017) 6:5 Intl J Health Policy & Management 289.

[24] See Andrew Mitchell & Elizabeth Sheargold, "Protecting the Autonomy of States to Enact Tobacco Control Measures Under Trade and Investment Agreements" (2015) 24 Tobacco Control 147.

CONCLUSION

At the nexus of tobacco control and trade policy, the right to health is gaining some traction when trade and health intersect. Economic arguments and trade/investment rules might still dominate, but health increasingly finds a place in deliberations about the application of trade and investment law. So while the protections offered by the right to health often have not been defended by states in the past when crafting tobacco control measures in compliance with international trade law, the goal is now to establish an equilibrium between the right and the measures. Thus, going forward, governments should first consider taking proactive steps to "trade-proof" prospective health policies. As seen in the US-Clove case, the principles guiding trade law may actually ensure the comprehensiveness of health policy (i.e. where the principle of non-discrimination led to the need to include harmful like domestic products). Such steps would include: 1) making a clear case for the necessity of the health measure if it might interfere with international trade; 2) making certain that there is no discrimination wherein a like domestic product is treated better than an imported counterpart; and, 3) explaining why there are no other comparable measures that are less trade restrictive than the one proposed.

Concomitantly, governments should be pushing for more health-centered trade policies: ones that favour laws pursuant of social and environmental goals over a "balance" between bounded economic and other interests. In the negotiations for the Trans-Pacific Partnership, against perceived odds, several parties sought the tobacco exemption in the ISDS provision and, to the surprise of many, the exemption gained traction. There are also more aggressive measures that governments can consider. For example, governments can demand the total exclusion of ISDS—a frequent tool used to block health-related measures—or negotiators can strengthen health exceptions that already exist in most agreements—such as the GATT's Article XX(b)—and make them a major starting point rather than an afterthought of how trade agreements are developed and implemented.

HEALTH, TRADE, AND HUMAN RIGHTS: PANGLOSS MEETS NEOLIBERALISM AND POST-DEMOCRACY

Ted Schrecker

Keywords: Pangloss, globalization, human rights, investment, trade

Shortly after the financial crisis spread across the world in 2007–08, my colleagues and I wrote that "[t]he market fundamentalist paradigm is now in tatters at the intellectual level."[1] We offered a cautiously optimistic view of the potential of the international human rights framework to challenge the destructive human consequences of neoliberalism, notably by asserting what historical sociologist Margaret Somers has called the "right to have rights" independent of the marketplace.[2] Several years on, sober reassessment of our conclusions is in order. Notably, despite the conceptual power of human rights discourse, it and the associated body of international instruments have had little impact on the course of post-crisis austerity and its negative health impacts,[3] despite a sharp critique by the United Nations' then-High Commissioner for Human Rights.[4] This critique was conspicuously ignored by mainstream media and even by most progressive political parties.

Depending on one's perspective, such developments have little or everything to do with the connection between trade and investment agreements, and health. I describe one perspective on the connections among trade, health, and human rights as Panglossian, after Dr. Pangloss' famous pronouncement that "all is for the best in the best of all possible worlds." The characteristics of this perspective are a presumption that: (a) the motives of most protagonists in the relevant policy contexts are benign, although they may share quite different perspectives and priorities; (b) inequalities in resources and opportunities to influence policy are not sufficient to create a *prima facie* case that outcomes are skewed or exploitative; and (c) contests about priorities can be resolved, at least in part, through improved information exchanges and other ways of working together to achieve "policy coherence"[5]—a term that occurs frequently in the literature on trade and health. The authors cited, to their credit, do recognise the existence of "tensions between the various policy objectives of national governments,"[6] while recommending the conventional approaches of health impact assessment: "dialogue and joint fact-finding."[7]

On this account, the issues are primarily ones of "managing the pursuit of health and wealth"—the title of

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1 Ted Schrecker et al, "Advancing Health Equity in the Global Marketplace: How Human Rights Can Help" (2010) 71:8 Social Science & Medicine 1520 at 1524.

2 Margaret R Somers, *Genealogies of Citizenship: Markets, Statelessness, and the Right to Have Right*s (Cambridge: Cambridge University Press, 2008). In the most powerful chapter of the book, Somers presents the devastation of New Orleans by Hurricane Katrina and its human consequences as a parable illustrating the contemporary collapse of citizenship under neoliberalism and its replacement with a series of exchange relations open only to those with the price of admission. Evacuation plans presumed that everyone had access to an automobile. Those who could afford to do so packed up the car and drove to higher ground. Others, overwhelmingly poor and African-American, were left to fend for themselves as refugees in their own country. "Unable to fulfill their side of the newly marketized exchange called citizenship, the left-behind of New Orleans…did not elicit much concern at any level of government because with their social exclusion they were no longer recognized as moral equals. They had become a surplus, superfluous, and disposable population" (*ibid* at 72).

3 See Sanjay Basu, Megan A Carney & Nora J Kenworthy, "Ten Years After the Financial Crisis: The Long Reach of Austerity and its Global Impacts on Health" (2017) 187 Social Science & Medicine 203.

4 Navi Pillay, *Report on Austerity Measures and Economic and Social Rights* (Geneva: Office of the High Commissioner for Human Rights, 2013).

5 See Chantal Blouin & Nick Drager, "Policy Coherence in Trade and Health" in Richard Smith, Chantal Blouin, Zafar Mirza, Peter Beyer & Nick Drager, eds, Trade and Health: Towards building a National Strategy (Geneva: World Health Organization, 2015) 7.

6 *Ibid*.

7 *Ibid* at 10.

the introductory article in a 2009 *Lancet* series on trade and health.[8] As in many other contexts, the language of management and the presumed plausibility of the "come, let us reason together" approach elide the possibility of intrinsic conflict, of incommensurable priorities and allegiances. Another example: at the conclusion of an article that makes telling points about the unpredictability and anti-regulatory bias of trade and investment law as implemented in the real world, Tania Voon argues that her analysis was "intended to help bridge the gap between trade and investment tribunals on the one hand and public health officials and policy-makers on the other, as each attempts to understand the other's world."[9] Such quotations suggest the value of critical discourse analysis[10] of the trade and health literature as a future direction for academic research, although that is not undertaken here.

Dr. Pangloss is probably on target, some of the time. Doubtless there are national policy contexts in which agencies of government, like health ministries, have taken seriously the potential negative consequences of trade for health. Although solid descriptive case studies of national-level policy processes are thin on the ground, the initiatives by a diverse group of low- and middle-income countries (LMICs) and civil society organisations that led to the 2001 Doha Declaration on TRIPS and Public Health, flawed though it is, stand out as a case in point.[11] But human rights norms do not necessarily or automatically carry weight in such contexts, and observable outcomes are far from bearing out the frequent insistence of human rights scholars and advocates that norms such as those associated with the right to health under the International Covenant for Economic, Social and Cultural Rights are "binding" on state parties under international law. Rather, adherence to such norms appears discretionary, at best.

Contra Pangloss, we can consider a political economy of health[12] in which inequalities in power and resources are central to the analysis and the broader context of trade policy is explicitly acknowledged. A starting point is the fact that, in trade negotiations, everything is on the table and a relatively small and poor country may have to make substantial concessions to larger, richer trading partners in order to secure modest gains in market access.[13] Such disparities affect not only initial bargaining positions, but also the ability to make use of dispute resolution even when the outcome is favourable. "The sanction for violating a WTO agreement is the imposition of duties. If Ecuador, say, were to impose a duty on goods that it imports from the United States, it would have a negligible effect on the American producer; while if the United States were to impose a duty on goods produced by Ecuador, the economic impact is more likely to be devastating."[14]

It is important also to pay attention to unequal distributions of political resources within national borders—described in the pre-globalization era by a thoroughly mainstream political scientist in terms of the "privileged position of business" in politics.[15] This privileged position is readily observable in the course of trade negotiations and disputes, as was evident in the United States during negotiations on the Trans-Pacific Partnership.[16] Like

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8 David P Fidler, Nick Drager & Kelley Lee, "Managing the Pursuit of Health and Wealth: The Key Challenges" (2009) 373:9660 Lancet 325.

9 Tania Voon, "Evidentiary Challenges for Public Health Regulation in International Trade and Investment Law" (2015) 18:4 J Intl Economic L 795 at 826.

10 See Norman Fairclough, *Analysing Discourse: Textual Analysis for Social Research* (London: Routledge, 2003).

11 See Ellen 't Hoen, "TRIPS, Pharmaceutical Patents and Access to Essential Medicines: A Long Way from Seattle to Doha" (2002) 3:1 Chicago J Intl L 27.

12 See Anne-Emanuelle Birn, Yogan Pillay & Timothy H Holtz, *Textbook of Global Health*, 4th ed (New York: Oxford University Press, 2017) at 92–95 and 285–334.

13 See Kenneth C Shadlen, "Exchanging Development for Market Access? Deep Integration and Industrial Policy under Multilateral and Regional-Bilateral Trade Agreements" (2005) 12:5 Rev Intl Political Economy 750.

14 Joseph E Stiglitz & Andrew H Charlton, "Common Values for the Development Round" (2004) 3:3 World Trade Rev 495 at 504.

15 See Charles E Lindblom, *Politics and Markets: The World's Political Economic Systems* (New York: Basic Books, 1977) at 170–221.

16 See Christopher Ingraham & Howard Schneider, "Industry Voices Dominate the Trade Advisory System", *Washington Post* (27 February 2014), online: <www.washingtonpost.com/wp-srv/special/business/trade-advisory-committees/>; Elizabeth Palmberg, "The Insider List", *Sojourners: Faith in Action for Social Justice* (29 June 2012), online: <www.sojo.net/blogs/2012/06/29/insider-list>.

earlier authors, notably Susan Sell,[17] Margot Kaminski[18] argues that US trade policy in the area of intellectual property—with important worldwide consequences for access to medicines—has been "captured" by industrial interests, and attributes this capture to legal and institutional arrangements that exempt the Office of the US Trade Representative from the information disclosure and accountability requirements that apply to other federal agencies. These arrangements are important for purposes of understanding the policy process, yet—like other manifestations of the privileged position of business—a political economy of health views them as demanding explanations, rather than providing them.

The privileged position of business in market economies, even under conditions of formal democracy, arises in the first instance from those economies' dependence on private investment, and from the ability of private investors (or capitalists), within very broad limits, to withhold that investment until conditions are more favourable. Globalization, of which trade and investment agreements are only a part (although they provide indispensable legal infrastructure), magnifies that privileged position in several ways. Most conspicuously, globalization gives business (or capital) the option of "exit" through offshoring and outsourcing, thereby enhancing its leverage in domestic politics. As just one example, credible options for moving production to an adjacent jurisdiction where labour costs are one-sixth as high—the situation of the United States and Mexico in 2015[19]—concentrate the minds of legislators and political executives, as does the even more conspicuous emergence of China as the world's workshop. The globalization of financial flows increases the power of the "markets" *vis-à-vis* even large, rich national governments,[20] such that financial markets often limit policy space in the same way as did the structural adjustment conditionalities of the World Bank and International Monetary Fund.[21]

The worldwide financial marketplace also offers elites (or ruling classes, depending on one's preferred terminology) the opportunity for tax minimization through capital flight, shifting not only assets, but also nationality to tax havens (**Figure 1**). A sociologist who trained as a private wealth manager concludes, based on extensive interviews in the financial services industry, that "many countries are already more receptive and accessible to wealth managers, who are acting on behalf of the world's richest people, than they are to elected representatives from their own governments… [T]he high-net-worth individuals of the world are largely ungoverned, and ungovernable." In a provocative analogy, she continues: "What this is doing to the Westphalian host system is similar in some respects to what e-commerce has done to bricks-and-mortar business, destroying it in a race to the bottom."[22]

Such observations provide the basis for a strong case against Pangloss, but there is more. Globalization has not "just happened." Rather, it is best understood as the transnational element of the neoliberal project of restoring the power and privilege of dominant classes that was described by David Harvey.[23] Two quotations suffice to identify key elements of the perspective. A panel of social scientists assessing prospects for "sustainable democracy" in the post-Cold War era described the era of debt crises and structural adjustment as one in which "[a]n alliance of the international financial institutions, the private banks, and the Thatcher-Reagan-Kohl governments was willing

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[17] Susan K Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge: Cambridge University Press, 2003).

[18] Margot E Kaminski, "The Capture of International Intellectual Property Law through the U.S. Trade Regime" (2014) 87 Southern California L Rev 977.

[19] See Conference Board, *International Comparisons of Hourly Compensation Costs in Manufacturing, 2015 - Summary Tables*, (16 February 2018) online: <www.conference-board.org/ilcprogram/index.cfm?id=38269>.

[20] See Wolfgang Streeck, "The Politics of Public Debt: Neoliberalism, Capitalist Development and the Restructuring of the State" (2014) 15:1 German Economic Rev 143.

[21] See Stephany Griffith-Jones & Barbara Stallings, "New Global Financial Trends: Implications for Development" in Barbara Stallings, ed, *Global Change, Regional Response: The New International Context of Development* (Cambridge: Cambridge University Press, 1995) 143.

[22] Brooke Harrington, *Capital Without Borders: Wealth Managers and the One Percent* (Cambridge, MA: Harvard University Press, 2016) at 296–297.

[23] David Harvey, *Spaces of Global Capitalism: A Theory of Uneven Geographical Development* (London: Verso, 2006) at 9–68.

to use its political and ideological power to back its ideological predilections."[24] Easing restrictions on trade and investment flows was, of course, a key element of World Bank and IMF conditionalities.[25] And an insightful economic historian makes the case that "[g]lobalization is a matter of deliberate organisation and collective effort on the part of elites concerned to maintain a specific distribution of resources that subordinates labour and preserves elite privileges. The discourse of globalization emphasizes the necessity of governments to adapt to newness and difference, a necessity that forecloses choice. But *government policies are designed, not to adapt to new circumstances, but to promote them*" (emphasis added).[26]

The content of trade and investment agreements must be viewed with this observation in mind. Grinspun and Kreklewich argue that governments in both Canada and Mexico used the North American Free Trade Agreement (NAFTA) to lock in neoliberal policy directions in order to prevent future governments from changing direction[27]—a process that has been described as constitutionalizing neoliberal norms, "in practice to confer privileged rights of citizenship and representation to corporate capital and large investors."[28] Investor-state dispute settlement (ISDS) provisions in bilateral and regional trade and investment agreements, whatever their other merits and demerits,[29] in general, represent a powerful instrument for achieving such objectives—including by way of anticipated reaction or "regulatory chill" even in well-resourced jurisdictions.[30] It is possible to avoid or correct for many of these effects through careful drafting,[31] but the governments in question must have the motivation, policy space, and high-priced legal talent to take advantage of that possibility. The motivations question alone could be the basis for an essay longer than this one, inviting comparative research on when and why national governments care about such issues.[32] Many LMIC governments, whose bargaining power in trade policy is limited, are likely also to lack the resources necessary to take advantage of what room for manoeuvre they have; ISDS settlements have tended to benefit in particular large, wealthy transnational

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[24] Adam Przeworski et al, *Sustainable Democracy* (Cambridge: Cambridge University Press, 1995) at 5.

[25] See Alexander E Kentikelenis, "Structural Adjustment and Health: A Conceptual Framework and Evidence on Pathways" (2017) 187 Social Science & Medicine 296.

[26] Sandra Halperin, *Re-Envisioning Global Development: A Horizontal Perspective* (London: Routledge, 2013) at 224.

[27] Ricardo Grinspun & Robert Kreklewich, "Consolidating Neoliberal Reforms: 'Free Trade' as a Conditioning Framework" (1994) 43:1 Studies in Political Economy 33.

[28] Stephen Gill, "New Constitutionalism, Semocratisation and Global Political Economy" (1998) 10:1 Pacifica Rev: Peace, Security & Global Change 23 at 23; see also David Schneiderman, "Investment Rules and the New Constitutionalism" (2000) 25:3 Law & Social Inquiry 757.

[29] The prudent among us might hesitate to entrust our pension savings to firms investing in many parts of the world if they had access only to the protections available through domestic judicial processes. That being said, whether ISDS provisions actually increase the ability of countries that agree to these remains uncertain. UNCTAD Trade and Development Report 2014: Global Governance and Policy Space for Development (New York and Geneva: UN, 2014). Based on econometric modelling, UNCTAD has concluded that "developing-country policymakers should not assume that signing up to BITs [bilateral investment treaties] will boost FDI. Indeed, they should remain cautious about any kind of recommendation to actively pursue BITs" (ibid at 159). However, the assumptions on which the model is based are not necessarily realistic, and a review of relevant studies that appeared the following year found that BITs, many of which contain ISDS provisions, tend to increase foreign direct investment, especially "when they can substitute for weak domestic legal and regulatory institutions in the host country." Lindsay Oldenski, "What Do the Data Say about the Relationship between Investor-State Dispute Settlement Provisions and FDI?," Peterson Institute for International Economics (11 March 2015), online: <www.piie.com/blogs/trade-investment-policy-watch/what-do-data-say-about-relationship-between-investor-state>. Another recent review is more cautious about the specific impacts of the presence or absence of ISDS in a BIT. See Srividya Jandhyala, "Why Do Countries Commit to ISDS for Disputes with Foreign Investors?" (2016) 16:1 AIB Insights 7. It does appear that once a country has been the target of a claim under ISDS, direct investment from countries with which it has a BIT falls off, and subsequent treaties have minimal effect. See Emma Aisbett, Matthias Busse & Peter Nunnenkamp, "Bilateral Investment Treaties Do Work: Until They Don't" (2016) Kiel Institute for the World Economy Working Paper No 2021.

[30] See Kyla Tienhaara, "Regulatory Chill and the Threat of Arbitration: A View from Political Science" in Chester Brown & Kate Miles, eds, *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011) 606; Gus Van Harten & Dayna Nadine Scott, "Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada" (2016) 7:1 J Intl Dispute Settlement 92.

[31] See UNCTAD, *World Investment Report 2017: Investment and the Digital Economy* (Geneva: UN, 2017) at 119–124 [UNCTAD, *World Investment Report 2017*].

[32] For an intriguing overview of potential explanations, albeit without the political economy perspective adopted here, see Jandhyala, *supra* note 26.

corporate investors.[33] An intriguing parallel exists between the growing number of ISDS provisions and disputes,[34] and the expanded domestic use of private arbitration provisions in US employment and commercial contracts that preclude access to the courts,[35] in effect—like ISDS—creating a parallel, private system of justice with quite different accountabilities, but still with access to most of the state's enforcement powers. On a political economy account, such phenomena must be understood in terms of the broader context—and especially the historical trajectory[36]—of neoliberalism *as a class project*, albeit one involving alliances that may be distinctive to particular national and regional contexts.

Fatalism and facile determinism must be avoided; the triumph of the marketplace over "the right to have rights" is not preordained, and imaginative and forceful critiques of contemporary trade and investment agreements from a human rights perspective continue to be advanced.[37] Yet there is still more to the case against Pangloss. Much of the trade and human rights literature embodies an implicit presumption of formal, if imperfect democracy, and the associated accountabilities. As suggested above, it is critically important to get inside the "black box" of domestic politics, not least because "many BITs [bilateral investment treaties] with ISDS were… concluded with despotic and corrupt governments that disregarded human rights and enriched themselves through collaboration with foreign investors (*e.g.* in the oil and minerals sector), as documented by civil society complaints to human rights bodies."[38] Historically, and with some notable exceptions, researchers working at the interface of health policy and human rights have been reluctant to investigate the contents of such black boxes. Even when not overtly despotic, an increasing number of governments are authoritarian[39] and their performance on basic indicators related to civil and political rights is deteriorating. Freedom House identifies 2006 as a turning point,[40] leading some observers to talk of a "democratic recession"[41] in sharp contrast to the optimism of an earlier period's literature on democratization.

The implications for trade policy and human rights are potentially profound, should the accountabilities presumed by the Panglossian perspective continue to disintegrate in parallel with (although not necessarily as a consequence of) the rise in economic inequality in countries rich and poor alike.[42] In line with the

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[33] See Gus Van Harten & Pavel Malysheuski, "Who Has Benefited Financially from Investment Treaty Arbitration? An Evaluation of the Size and Wealth of Claimants" (2016) 12:3 Osgoode Legal Studies Research Paper Series.

[34] See UNCTAD, *World Investment Report 2017, supra* note 28 at 109–19.

[35] See Jessica Silver-Greenberg & Robert Gebeloff, "Arbitration Everywhere, Stacking the Deck of Justice," *The New York Times* (31 October 2015), online: <www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>; Jessica Silver-Greenberg & Michael Corkery, "In Arbitration, a 'Privatization of the Justice System'," *The New York Times* (1 November 2015), online: <www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>.

[36] See David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005) at 39–63; Daniel Stedman Jones, *Masters of the Universe: Hayek, Friedman, and the Birth of Neoliberal Politics* (Princeton: Princeton University Press, 2012); Pierre Dardot & Christian Laval, *The New Way of the World: On Neoliberal Society* (London: Verso, 2013); Nancy MacLean, *Democracy in Chains: The Deep History of the Radical Right's Stealth Plan for America* (New York: Viking, 2017).

[37] See e.g. Roos van Os & Roeline Knottnerus, "Investment Protection Agreements, Human Rights and Sustainable Development: An Uneasy Mix" (2016) 59:1–2 Development 107.

[38] Vivian Kube & Ernst-Ulrich Petersmann, "Human Rights Law in International Investment Arbitration" (2016) European University Institute Working Paper LAW 2016/02 at 1. Philosopher Thomas Pogge has long pointed out the ethical perversity of the "resource privilege," which under international law allows such governments to dispose of the resources within their borders however they see fit, even if the proceeds are looted and sequestered in offshore financial centres (as they often are), and with no accountability for the welfare of their subjects. See Thomas Pogge, "Priorities of Global Justice" (2001) 32:1-2 Metaphilosophy 6; Thomas Pogge, "Recognized and Violated by International Law: The Human Rights of the Global Poor" (2005) 18:4 Leiden J Intl L 717.

[39] See e.g. Tobias Hagmann & Filip Reyntjens, eds, *Aid and Authoritarianism in Africa: Development Without Democracy* (London: Zed Books, 2016).

[40] Arch Puddington & Tyler Roylance, *Freedom in the World 2017: Populists and Autocrats: The Dual Threat to Global Democracy* (Washington, DC: Freedom House, 2017).

[41] See Larry Diamond, "Facing Up to the Democratic Recession" (2015) 26:1 J Democracy 141.

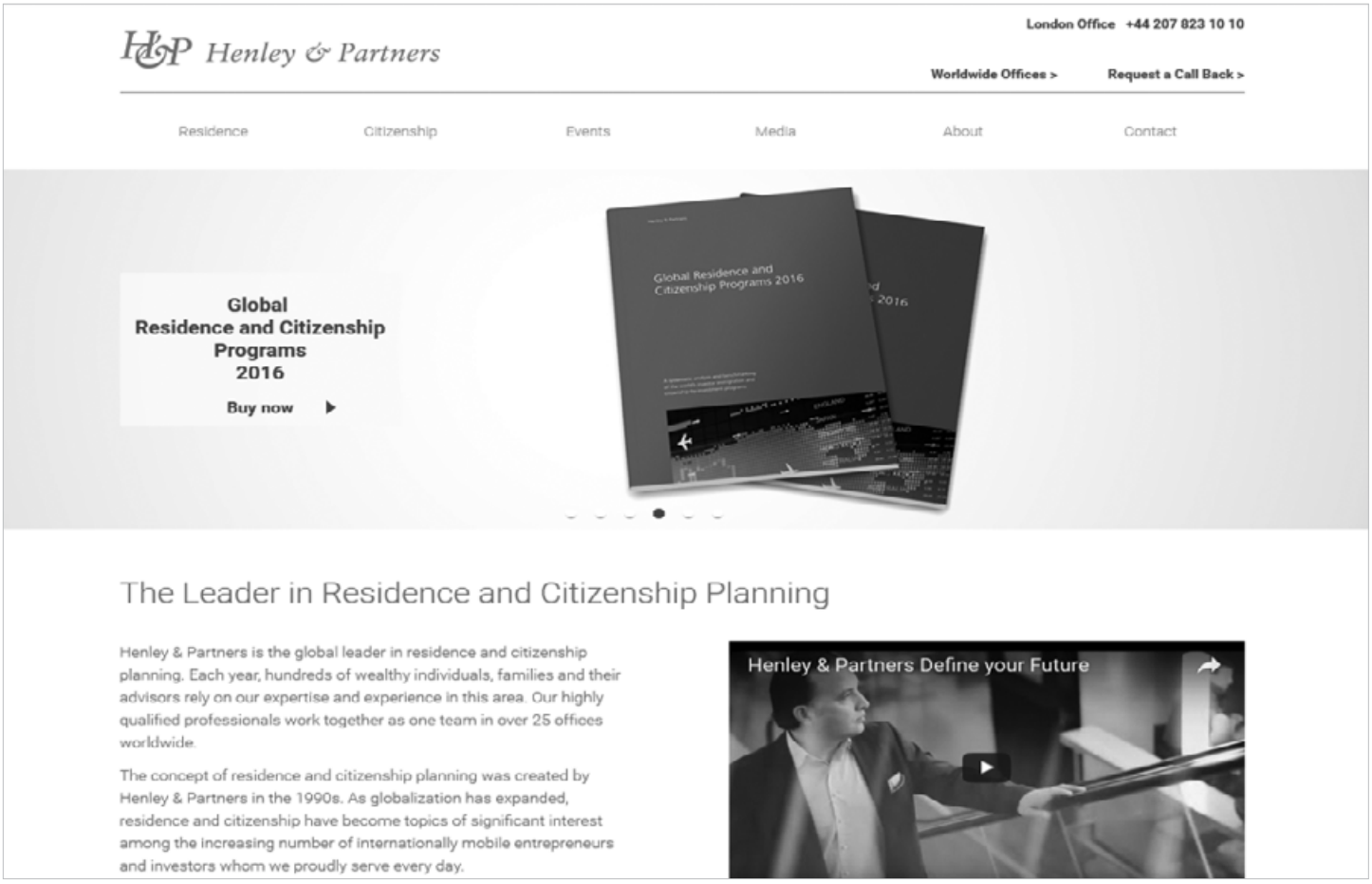
[42] See François Bourguignon, *The Globalization of Inequality* (Princeton: Princeton University Press, 2015) (among many other sources on this

persuasive view that post-war settlements between labour and capital with their associated declines in inequality and expansions of social provision represent an historical anomaly that is now nearing its end,[43] it may be premature to talk of a post-democratic era, but the apprehension is no longer unreasonable. Finally, any serious claim about meaningful progress in human rights must take into account such counter-examples (to offer just three) as the ongoing catastrophe in Syria, risks of famine in several African countries, and the war and epidemic in Yemen.[44] Above all, a sense of perspective is needed on the plausible intra- and international political coalitions that are a necessary condition for the effective defence and advancement of human rights.

ACKNOWLEDGEMENTS AND PROVENANCE

Portions of this argument were presented at the Trade and Health Workshop, Department of Sociology and Political Science, Norwegian University of Science and Technology, Trondheim in May, 2016, and at the Workshop on Critical Global Health, European Workshops on International Studies, Cardiff, in June 2017. An expanded version will appear in a forthcoming *Handbook of Global Health Politics* (Cheltenham: Edward Elgar).

Figure 1. Shopping for nationality: Screenshot from the website of Henley & Partners, https://www.henleyglobal.com/, "the global leader in residence and citizenship planning"



topic).

43 Halperin, *supra* note 23.

44 See Somini Sengupta, "Why 20 Million People Are on Brink of Famine in a 'World of Plenty'", *The New York Times* (22 February 2017), online <www.nytimes.com/2017/02/22/world/africa/why-20-million-people-are-on-brink-of-famine-in-a-world-of-plenty.html>; Shuaib Almosawa, Ben Hubbard & Troy Griggs, "'It's a Slow Death': The World's Worst Humanitarian Crisis", *The New York Times* (23 August 2017), online: <www.nytimes.com/interactive/2017/08/23/world/middleeast/yemen-cholera-humanitarian-crisis.html>; Alex de Waal, "The Nazis Used It, We Use It" (2017) 39:12 London Rev Books 9 (on famine as a strategy of suppressing political resistance).

SPECIAL SECTION
DIGITAL CONNECTIVITY: IT'S A MATTER OF HUMAN RIGHTS

Guest Editors: Suzanne Dunn and Dillon Black

PEOPLE IN, PEOPLE OUT: WHY BIG DATA NEED HUMAN RIGHTS

Valerie Steeves
The University of Ottawa, Department of Criminology, Full Professor

Abstract: Canada's private sector privacy legislation is based on a voluntary Code that was originally negotiated by industry, government, and civil society stakeholders. Because of that, the wording has been interpreted differently by corporations (who typically rely on a data protection approach) and civil society members (who typically use a human rights lens to connect privacy to people's lived experiences). The gap in interpretations has led to a number of incidents where products which technically comply with the narrow interpretation of data protection are met by outrage in the marketplace. This paper uses 3 examples of marketplace failures to explore why a failure to understand the importance of privacy as a human right has hampered corporations seeking to innovate in the information marketplace, and examines the UN's Guiding Principles on Business and Human Rights as a possible corrective.

Keywords: Big Data, Canadian Privacy Law, Data Protection, Corporate Social Responsibility, Privacy, Human Right, Equality, Canadian Law, Business, iRobot, Roomba

On July 24, 2017, Colin Angle, the CEO of iRobot, gave an interview to Reuters, talking about his company's plans to use the spatial data collected by its automated vacuum cleaner, Roomba, to generate detailed maps of consumers' homes. The touted benefit was that iRobot could then sell the data to technology companies like Google and Amazon, and those companies in turn could use the data to operate their smart home assistants. The market benefits seemed obvious; as Reuters reported, "So far investors have cheered Angle's plans, sending iRobot stock soaring to $102 in mid-June from $35 a year ago."[1] Although privacy concerns were identified as a "potential downside" or "headwind," [2] they were put on a par with the danger that consumers might chose to buy the cheaper knock-offs being made by iRobot's competition instead of Roomba: inconvenient, but workable.

From a business perspective, there was nothing really new or unusual in any of this. iRobot's plan to sell the maps was very much in keeping with the generally accepted wisdom that the first company that figures out how to monetize the vast amounts of data that will be generated by smart devices will make a fortune.[3] It is also generally understood that privacy concerns can be a barrier to that monetization, which is why companies require customers to consent to the collection of their

[1] Jan Wolfe, *Roomba Vacuum Maker iRobot Betting Big on the 'Smart' Home*, (24 July 2017) online: Reuters <www.reuters.com/article/us-irobot-strategy/roomba-vacuum-maker-irobot-betting-big-on-the-smart-home-idUSKBN1A91A5>.

[2] *Ibid*.

[3] See e.g. Research and Markets, "Global Big Data Market 2017–2030 – $76 Billion Opportunities", *PR Newswire* (21 September 2017), online: <www.prnewswire.com/news-releases/global-big-data-market-2017-2030---76-billion-opportunities-300523816.html>.

data; the assumption is that once a company has formal consent, privacy has been respected and the data it collects from that customer can be used to create new products.

However, when the *Washington Post* broke the story the next day, things went awry quickly largely because, according to the *Post*, the story was not about stock prices and monetization, but about privacy.[4] The news that iRobot was selling maps of consumers' homes was met by a firestorm of protest and, although Angle continued to state that his company would only sell that data with consent,[5] consumers continued to raise serious privacy concerns. As an open letter published by ZDNet, an online news site owned by CBS, put it:

> It's not just a worry that they might discover I like coffee and pitch me better coffee beans. It's that they might learn about medical conditions, lifestyle choices, or anything else we want to keep private. Where would that information go? Would you give it up to the government if you got a National Security Letter or subpoena? Now, at least, if our houses are searched by a government entity, we'd have a pretty good chance of knowing because someone will have to enter with a warrant. But if your robots are spending their days mapping, snapping, and spying, will we even know who our data is shared with?[6]

After approximately a week of trying to explain that its business plan complied with privacy laws, iRobot shifted focus and asked both Reuters and the Washington Post to correct the original stories by replacing the words "sell maps" with "share maps for free with customer consent."[7] This is consistent with the actions of other tech companies, like Google, who typically respond to demands for better privacy protections by manipulating the discourse around privacy to "educate" the user about self-help approaches and information rights.[8]

The interesting thing about iRobot's plans is that they arguably complied with the regulations the countries like Canada have put into place to protect privacy. So why did consumers continue to demonstrate strong concerns about privacy[9] when the company made it clear that their data would only be used with their consent?

I suggest that the answer lies in a latent ambiguity in the regulatory regime, which was drafted as a compromise between two different models or understandings of privacy. The first situates privacy as an informational right and relies on mechanisms like consent to both give individuals some control over their data and legitimize the commercial use of that data. The second situates privacy as a human right and instead looks for ways to ensure that commercial data practices are consistent with human dignity. This ambiguity is exacerbated by big data applications, like Roomba, where the minutiae of our lives is leaked by smart devices and then sorted by algorithms looking for unknown patterns. Although companies like iRobot strictly comply with the first understanding, their use of big data raises serious concerns about the second. Companies accordingly need to keep this second interpretation in mind if they want to avoid the kinds of market failures experienced by iRobot.

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4 Hamza Shaban, "Dust Isn't the Only Thing Your Roomba Is Sucking Up. It's Also Gathering Maps of Your House", Washington Post (25 July 2017), online: <www.washingtonpost.com/news/the-switch/wp/2017/07/25/the-company-behind-the-roomba-wants-to-sell-maps-of-your-home/?utm_term=.5a05745ebeb1>.

5 Angle affirmed his company's commitment to privacy, adding "[w]e do hope to extract value from the information, but would only do so with the permission of our customers" (*ibid*).

6 David Gewirtz, *Seriously Roomba, Now You're Spying on Us*?, (26 July 2017) online: ZDNet <www.zdnet.com/article/open-letter-seriously-roomba-now-youre-spying-on-us>.

7 Wolfe, *supra* note 1. Shaban, *supra* note 4.

8 Robert Bodle, "Privacy and Protection in the Cloud: Ethical Implications of Google's Privacy Practices and Public Communications" in Bruce E Drushel & Kathleen German, eds, *The Ethics of Emerging Media: Information, Social Norms and New Media Technology* (New York: Continuum International Publishing Group, 2011) 155.

9 Teresa Scassa & Anca Sattler, "Location-Based Services and Privacy" (2011) 9 CJLT 99.

PRIVACY ONE, PRIVACY TWO

When Canadian legislators first set out to enact private sector privacy legislation in the late 1990s, they were reacting to two distinct pressure points.[10] On the one hand, the European Union was threatening to restrict trade and commerce unless Canada passed laws to provide data subjects with certain rights over the collection, use, and disclosure of their personal information. From this perspective, privacy was a trade and commerce issue, and an integral part of federal policies to "grow" the information economy.[11] Indeed, when Canada's private sector data protection legislation, the *Protection of Personal Information and Electronic Documents Act* (PIPEDA), was enacted in 2001, it was passed expressly to legitimize the use of personal information by corporations. As the long title to the Bill reads, it was "An Act to support and promote electronic commerce by protecting personal information that is collected, used, or disclosed in certain circumstances."[12]

On the other hand, there were a number of parallel legislative processes that were exploring the ways in which new technologies were threatening our enjoyment of privacy as a human right. Most notable was the work of the House of Commons Standing Committee on Human Rights and the Status of Persons with Disabilities. The Committee conducted extensive public consultations on a number of emerging data uses, including genetic testing and biometric identification. Although the Committee acknowledged that privacy legislation was part of a larger economic agenda, it concluded that it was critical to approach that legislation from a human rights perspective to ensure that, "the solutions we arrive at will be rights-affirming, people-based, humanitarian ones."[13] It went on to add that, "if we adopt a market-based or economic approach, the solutions will reflect a different philosophy, one that puts profit margins and efficiency before people, and may not first and foremost serve the common good."[14]

This tension between privacy as an element of e-commerce and privacy as a human right was expressly embedded in section 3 of PIPEDA, which states that the purpose of the Act:

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[10] Valerie Steeves, "Now You See Me: Privacy, Technology and Autonomy in the Digital Age" in Gordon DiGiacomo, ed, *Current Issues and Controversies in Human Rights* (Toronto: University of Toronto Press, 2016) 461.

[11] Canada, Industry Canada, the Department of Justice, and the Task Force on Electronic Commerce, *Building Canada's Information Economy and Society: The Protection of Personal Information* (Ottawa: Canadian Radio-Television and Telecommunications Commission, 1998).

[12] *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [PIPEDA].

[13] House of Commons, Privacy: *Where Do We Draw the Line? Report of the House of Commons Standing Committee on Human Rights and the Status of Persons with Disabilities* (April 1997) (Chair: Shelia Finestone) at 33.

[14] *Ibid.*

> … is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.[15]

In drafting this section, legislators sought to walk a middle ground, rejecting stronger language—specifically "the *right* of organizations to collect" and "purposes that are *demonstrably justifiable in a free and democratic society*"—that would tip the balance in favour of the commercial or the human rights agenda.

Accordingly, when we look at the regulatory regime, it is important to remember that there are two tracks at work. The first privileges corporate access to data because it will advance innovation and encourage the development of new products in a variety of sectors, such as healthcare, commerce, education, and policing. From this perspective, privacy regulations are necessary because they enable that access; complying with regulations is seen as a way to legitimize the uses that will lead to the creation of informational products. This is consistent with regulatory approaches to big data as a whole, which typically seek to standardize corporate data practices for commercial and governance purposes.[16] Other people's data are therefore a valuable corporate asset that must be secured to protect its value to the corporation. This positions corporations as data/property holders.[17]

The second calls for privacy regulations to protect privacy as a human right. Even when the express goal is to increase innovation, this track would limit corporate collection to "purposes a reasonable person would consider appropriate in the circumstances,"[18] because the individual's right to privacy "trumps"[19] corporate property interests and practices. Similarly, the European Union's right to be forgotten (*i.e.* the right of individuals to require corporate search engines to de-index personal data that is no longer relevant) assumes that the human rights interest in shaping reputation overrides corporate interests in data transparency.[20] These kinds of restrictions make sense because from a human rights perspective, data is intricately tied to identity, reputation, and social relationships.[21] Regulation should accordingly secure it to protect what it means to individual people. This positions people as rights holders.

The language of PIPEDA was accordingly chosen to satisfy the needs of both tracks. However, big data has bothered this uneasy compromise because it exposes the assumptions in each and puts them into direct conflict.

REVISITING ROOMBA

The Roomba controversy makes sense once we interrogate the regulatory ambiguities exposed by big data practices. Consider that PIPEDA is built around a set of 10 fair information principles (FIPs) that include:

1. Accountability: Organizations are accountable to individuals for complying with all 10 FIPs;

2. Identifying Purposes: Organizations are required to identify that purposes for collection before or at the time personal information is collected;

3. Consent: Except for exceptional circumstances, personal information should only be collected, used and disclosed with the individual's express consent;

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[15] PIPEDA, *supra* note 12 at s 3.

[16] Rob Kitchin, *The Data Revolution: Big Data, Open Data, Data Infrastructures and Their Consequences*, 1st ed (London: Sage Publications, 2014).

[17] Rob Kitchin & Tracey P Lauriault, "Toward Critical Data Studies: Charting and Unpacking Data Assemblages and Their Work" in Jim Thatcher, Josef Eckert & Andrew Shears, eds, *Thinking Big Data in Geography: New Regimes, New Research* (Nebraska: University of Nebraska Press, 2014) 3.

[18] PIPEDA, *supra* note 12 at s 5.

[19] Ronald Dworkin, "Rights As Trumps" in Aileen Kavanagh & John Oberdiek, eds, *Arguing About Law* (New York: Routledge, 2009) 335.

[20] Lilian Mitrou & Maria Karyda, "EU's Data Protection Reform and the Right to be Forgotten—A Legal Response to a Technological Challenge?" (Paper presented at the 5th International Conference of Information Law and Ethics 2012, Corfu-Greece, 29–30 June 2012).

[21] Steeves, *supra* note 10.

4. Limiting Collection: Organizations should only collect personal information that is necessary to fulfill the expressed purpose for the collection;

5. Limiting Use, Disclosure, and Retention: Organizations should only use personal information for the stated purpose, and should only keep the information as long as necessary to fulfill that stated purpose;

6. Accuracy: Personal information should be as accurate, complete and up-to-date as required to meet the stated purpose;

7. Safeguards: Personal information should be held securely;

8. Openness: Organizational policies and practices should be transparent to the public;

9. Individual Access: Individuals should be able to access their own personal information and require the organization to correct it as appropriate;

10. Challenging Compliance: Organizations should have procedures in place to allow individuals to challenge their compliance with any of the FIPs.22

From a human rights perspective, principles 2 (Identifying Purposes), 3 (Consent), 4 (Limiting Collection), and 5 (Limiting Use, Disclosure and Retention) are designed to provide the individual with some control over her personal information because the consequences of a loss of control can be damaging or discriminatory. Disclosure of an iRoomba map that, for example, suggests a home includes electricity and water outlets that are consistent with growing medical marijuana, could affect someone's reputation in the community or be the reason they are not given a promotion at work. Consent must therefore be fully informed, so the individual can decide whether or not to share the information in that way; and for fully informed consent to occur, the corporation must identify precisely how it will use and/or disclose the information it collects. Moreover, once the corporation has the data, it can only use it for the purpose it identified and upon which consent was based—in this case, so the vacuum cleaner can function. The corporation should also collect as little information as possible and should delete it as soon as that purpose is completed. Turning it into maps that can be sold to third parties' steps outside this gambit.

However, from a big data perspective, a corporation cannot identify all its purposes because the goal is to collect as much information as possible, and then use algorithms to identify unexpected patterns in the data which can be used for new purposes. In other words, it cannot disclose every purpose because it does not know what it is looking for; it only knows that it will be looking for purposes in addition to the original goal of mapping the room to help the vacuum cleaner function more efficiently. The fact that a room is configured to grow cannabis may not be relevant to these emerging purposes at the time of collection, but the data should be collected and retained because it might prove relevant in the future. For the same reason, there is a need to collect as much information as possible and to keep all the information indefinitely because it might be useful down the road. Corporations are accordingly more likely to rely on broadly drafted consents with general wording, like "to help us develop our products and services" or "to serve you better" because their vagueness can cover emerging and unexpected future purposes.

Big data further muddies the waters because the consenting individual is not the only—or even the primary—source of data for big data applications. The goal is for corporations to collect personal information from the environment, including smart devices like Roomba, and combine it with any publicly available sources of information. Informed consent is therefore either impracticable or impossible to obtain since the individual is either largely unaware of when the information is being collected, or is overwhelmed by the constant barrage of data requiring consent. Either way, big data's interest in collecting everything erodes the position of the individual as a rights holder because it becomes difficult to exercise those rights in a meaningful way.

There are similar ambiguities embedded in principles 1 (Accountability), 7 (Safeguards), 8 (Openness), 9 (Individual Access), and 10 (Challenging Compliance). From the human rights perspective, security, openness, and accountability are linked; the corporation's practices must be transparent to the individual, so the individual can see if the corporation is complying with FIPs. Moreover, corporations are required to keep the

[22] Office of the Privacy Commissioner of Canada, *PIPEDA Fair Information Principles*, (January 2018) online: <www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/p_principle/>.

information secret from third parties, including other corporations who may be willing to pay for access to Roomba's maps, because that secrecy will protect the individual from potential harms to her personality and/or reputation should the information flow beyond the control of the corporation. On the other hand, the corporation's data holdings and analytics *cannot* be kept secret; transparency is required so the individual can continue to make informed decisions throughout the lifetime of the data cycle (i.e. not just at collection) and obtain a remedy if necessary.

However, from a big data perspective, secrecy is important because it protects the commercial value of the data. Not only is the data set itself a valuable business secret, the analytics the corporation develops must also be kept confidential because they confer a competitive advantage. In like vein, providing individuals with access to their own data is less about individual control and more about helping the corporation maintain the value of its data set by keeping it accurate. From this perspective, safeguards are not inherently tied to accountability, and non-transparency as opposed to openness is a necessary tool for protecting the corporation's property interests as a data holder.

So, it makes perfect sense for a corporation to rely on a broadly drafted terms of use that makes it clear that use of the product is dependent upon giving prior consent to the collection of any data collected by the device. This complies with the narrow understanding of privacy regulation as a tool to legitimize and advance e-commerce.

However, it also makes sense that consumers would be dissatisfied with this approach, primarily because the person at the heart of the data practice bought a vacuum cleaner, not a surveillance mechanism. Weak consent provisions that may technically allow a corporation to sell the data are experienced as manipulative or misleading, precisely because the data collection sidesteps the social negotiation that is at the heart of informed consent. In spite of a general clause in a terms of use agreement that the consumer likely did not read, the person in the house is not thinking about disclosing his floor measurements to Roomba in an informed and ongoing way. Roomba, rather, takes that data without his intervention or attention, and it is accordingly experienced as a violation of personal space and dignity. The level of outcry reflects the fact that the violation is particularly worrisome because it invades the sanctity of the home, a space which is traditionally afforded one of the highest levels of privacy protection.[23]

Certainly, if we are to get the mix right in the future, it is imperative that both understandings of privacy by respected. Until then, because of the contradictions built into the privacy regime itself, corporations that fail to take privacy as a human right into account are likely to find themselves in trouble when they release new information products into the marketplace that rely on mere consent to justify corporation collection, use, and disclosure of personal information as a marketable commodity.

[23] Jane Bailey, "Framed by Section 8: Constitutional Protection of Privacy in Canada" (2008) 50:3 Can J Corr 279.

BIBLIOGRAPHY

Bailey, Jane. (2008). Framed by Section 8: Constitutional Protection of Privacy in Canada. *Canadian Journal of Criminology and Criminal Justice*, 50, 3, 279-306.

Bodle, Robert. (2011). Privacy and Protection in the Cloud: Ethical Implications of Google's Privacy Practices and Public Communications. In Bruce E. Drushel and Kathleen German (Eds.), *The Ethics of Emerging Media: Information, Social Norms and New Media Technology I* (pp. 155-174). New York: Continuum International Publishing Group.

Burkert, Herbert. (2000). Privacy – Data Protection: A German/European Perspective. In C. Engel and K.H. Keller, (Eds.), Governance of Global Networks in the Light of Differing Local Values. Baden-Baden: Nomos.

Canada. House of Commons Standing Committee on Human Rights and the Status of Persons with Disabilities. 35th Parliament, 2nd Session. (1997). *Privacy: Where Do We Draw the Line?* Ottawa: Public Works and Government Services Canada.

Canada. Industry Canada and the Department of Justice. Task Force on Electronic Commerce. (1998). *Building Canada's Information Economy and Society: The Protection of Personal Information*. Ottawa: Public Works and Government Services Canada.

Dworkin, Ronald. (2009). Rights as Trumps. In Aileen Kavanagh and John Oberdiek (Eds.), *Arguing about law* (pp. 335-344). New York: Routledge.

Flaherty, David. (1979). Privacy and Government Data Banks: An International Perspective London: Mansell.

Gewirtz, David. (2017, July 26). Seriously Roomba, now you're spying on us? ZDNet. http://www.zdnet.com/article/open-letter-seriously-roomba-now-youre-spying-on-us/

Kitchin, Rob. (2014). *The Data Revolution: Big Data, Open Data, Data Infrastructures & their Consequences*. London: Sage.

Kitchin, Rob and Lauriault, Tracey. (2015). Toward Critical Data Studies: Charting and Unpacking Data Assemblages and Their Work. In Jim Thatcher, Josef Eckert and Andrew Shears (Eds.), *Thinking Big Data* in Geography: New Regimes, New Research. Lincoln, Nebraska: University of Nebraska Press.

Mitrou, Lilian, and Karyda, Maria. (2012). EU's Data Protection Reform and the Right to be Forgotten—A Legal Response to a Technological Challenge? *5th International Conference of Information Law and Ethics*, 29–30.

PRNewswire. (2017, Sept 21). Global Big Data Market 2017-2030 - $76 Billion Opportunities. PRNewswire. https://www.prnewswire.com/news-releases/global-big-data-market-2017-2030---76-billion-opportunities-300523816.html

Scassa, Theresa and Anca Sattler. (2011). Location-based Services and Privacy. *Canadian Journal of Law and Technology 9*, 99-134.

Shaban, Hamza. (2017, July 25). Dust isn't the only thing your Roomba is sucking up. It's also gathering maps of your house. *Washington Post*. https://www.washingtonpost.com/news/the-switch/wp/2017/07/25/the-company-behind-the-roomba-wants-to-sell-maps-of-your-home/?utm_term=.5a05745ebeb1

Steeves, Valerie. (2016.) Now You See Me: Privacy, Technology and Autonomy in the Digital Age. In Gordon DiGiacomo (Ed.), *Current Issues and Controversies in Human Rights*. Toronto: University of Toronto Press.

Wolfe, Jan. (2017, July 24). Roomba vacuum maker iRobot betting big on the 'smart' home. Reuters. https://www.reuters.com/article/us-irobot-strategy/roomba-vacuum-maker-irobot-betting-big-on-the-smart-home-idUSKB-N1A91A5

“IT’S THE POWER, STUPID”: FACEBOOK’S UNEQUAL TREATMENT OF GENDERED HATE SPEECH

Leslie Regan Shade
University of Toronto,
Faculty of Information & Media Studies, Associate Professor

Madison Trusolino
University of Toronto,
Faculty of Information & Media Studies,Ph.D. Student

Abstract: Whether and how social media platforms frame the human right to freedom of expression in their policies and practices is contentious. Women have been especially targeted by sexual and misogynistic content that constitutes harassment and potentially defamatory or hate speech. This article highlights a recent case, where in response to the #MeToo movement calling for an end to sexual violence and harassment, women posted variations of the phrase “men are scum” on Facebook and their accounts were locked out for violating Facebook’s policy on community standards. Female comedians then launched a coordinated day of action wherein their variations of the phrase resulted in Facebook banning their accounts. This example highlights tensions over how Facebook operationalizes their community standards policy, how they determine what constitutes hate speech, and how they define protected groups.

Keywords: Facebook, Feminist comedians, Online misogyny, Social media policies, Sexual harassment

Commenting on a wave of allegations of sexual harassment catalyzing the #MeToo movement that calls for an end to sexual violence and harassment, Facebook’s Chief Operating Officer (COO) Sheryl Sandberg remarked, “it’s the power, stupid,” evoking the phrase, “it’s the economy, stupid” used during the 1992 US Presidential election to highlight the importance of the economy as a key electoral issue.[1] More than just sharing stories about workplace sexual harassment, Sandberg called on “systemic, lasting changes that deter bad behavior and protect everyone, from professionals climbing the corporate ladder to workers in low-paid positions who often have little power. We need to end the abuse of power imbalances due to gender—and race and ethnicity, too. We must not lose this opportunity.”[2]

Enacting such structural change takes more than just, “leaning in,” referring to Sandberg’s popular self-described “sort of a feminist manifesto” book, *Lean In: Women, Work and the Will to Lead*, which entreated women to reach their full potential as leaders in their male-dominated workplaces.[3] Sandberg’s comments do not reflect the makeup of Facebook employees who are overwhelmingly white and male.[4] Nor does Sandberg address who has the privilege of “leaning in” ignoring, for example, the ways in which “gendered dynamics of power intersect with racial dynamics so that women of colour are structurally inhibited to an even greater degree.”[5] Indeed, Sandberg’s leadership in the male dominated and sexist culture of Silicon Valley provides her with the power to push for progressive change to create a conducive environment for women to participate on social media without fear of harassment, bullying, doxing, trolling, and sexual threats. This includes making transparent the operational basis of how algorithms shape user’s experiences and how sexism and racism can be endemic within computer

1 Sheryl Sandberg, “The 1992 Presidential Race was Once Summed Up in a Pointed Phrase: ‘It’s the Economy, Stupid’” (3 December 2017), posted on Sheryl Sandberg, online: Facebook <www.facebook.com/sheryl/posts/10159569315265177?pnref=story>.

2 *Ibid*.

3 Sheryl Sandberg, *Lean In: Women, Work, and the Will to Lead* (New York: Knopf, 2013).

4 Facebook Newsroom, *Facebook Diversity Update: Building a More Diverse, Inclusive Workforce*, (2 August 2017) online: <www.fbnewsroomus.files.wordpress.com/2017/08/fb_diversity_2017_final.pdf>.

5 Sarah Banet-Weiser & Kate M Miltner, “#MasculinitySoFragile: Culture, Structure and Networked Misogyny” (2016) 16:1 Feminist Media Studies 171 at 172.

code, creating what information studies scholar Safiya Noble calls "algorithmic oppression."[6] It also includes unpacking how policies, including acceptable use and community standards, handle abusive content and define hate speech—often to the detriment of freedom of expression and the protection of targeted users.

Misogynistic content is rife on social media; troubling the human right to freedom of expression on these commercial platforms, and how women and others targeted by such content (including hate speech, defamatory content, and harassment) can be both protected and seek redress from the perpetrators and the platform. This article highlights a recent case where women, responding to widespread allegations of sexual harassment and catalyzed by the #MeToo movement, posted variations of the phrase "men are scum" on Facebook and their accounts were locked for violating Facebook's community standards. Feminist comedians then launched a coordinated day of action wherein their variations of the phrase resulted in Facebook suspending their accounts. As this article details, these actions by Facebook highlight tensions over how they operationalize their policies for community standards, how they determine what constitutes hate speech, and how they define protected groups.

"MEN ARE"

In the fight against online harassment, comedians have entered the spotlight, with one of the most infamous that of Leslie Jones. In 2016 she catalyzed what Moya Bailey dubs a "misogynoir": *"co-constitutive, anti-Black, and misogynistic racism directed at Black women, particularly in visual and digital culture,"*[7] *after it was announced that Jones would co-star in the all-women remake of the film Ghostbusters.*[8] *This put women in comedy at the center of the debate about the responsibility of platforms in fighting racist and sexist harassment. In* October 2017, Nicole Silverberg, writer and editor of the satirical feminist magazine *Reductress*, tweeted out a list of how men can treat women better.[9] Receiving a barrage of harassment, Silverberg screen-shotted and posted these in a Facebook photo album entitled "attn.: men in my life," stating that its purpose was for men to realize "why it's difficult and exhausting for women to speak up, and why it's so important for men to advocate for women."[10] In response, stand-up comedian Marcia Belsky commented, "men are scum." Shortly thereafter, her comment was deleted, and Facebook banned Belsky's account for thirty days.

Posting about this incident in a private Facebook group for women in comedy, many of the women in the group detailed receiving the same treatment from Facebook. Comedian Kayla Avery told *The Daily Beast* that she got banned for writing "men continue to be the worst" after her page was flooded with trolls—one of whom threatened to find her house and beat her up.[11] Comedians like Avery and Belsky who use humour as a tool to critique traditional gender roles enact feminist discourse. Belsky, for example, started *The Headless Women of Hollywood* blog, which documents and satirizes the objectification of women in television and film and hosts a podcast entitled *Misandry with Marcia and Rae*.[12] As journalist Taylor Lorenz wrote, "ironic misandry has been a popular way for women to deal with living in a world where they're exposed to frequent abuse at the hands of powerful men."[13] Feminist communication scholars Carrie Rentschler and

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6 Safiya Umoja Noble, *Algorithms of Oppression: How Search Engines Reinforce Racism* (NY: New York University Press, 2018).

7 Moya Bailey, "Misogynoir in Media: On Caster Semenya and R. Kelly" (2016) 2:2 Catalyst: Feminism, Theory, Technoscience 1 at 2.

8 Anna Silman, "Timeline of Leslie Jones's Horrific Online Abuse", *The Cut* (24 August 2016), online: <www.thecut.com/2016/08/a-timeline-of-leslie-joness-horrific-online-abuse.html>.

9 Nicole Silverberg, "Men, You Want to Treat Women Better? Here's a List to Start with", *The Guardian* (16 October 2017), online: <www.theguardian.com/lifeandstyle/2017/oct/16/a-simple-list-of-things-men-can-do-to-change-our-work-and-life-culture>.

10 Nicole Silverberg, "Why it's Difficult and Exhausting for Women to Speak Up, and Why it's so Important for Men to Advocate for Women" (20 January 2018), posted on *Nicole Silverber*g, online: Facebook <www.facebook.com/nicole.silverberg>.

11 Taylor Lorenz, "Facebook is Banning Women for Calling Men 'Scum'", *The Daily Beast* (4 December 2017), online: <www.thedailybeast.com/women-are-getting-banned-from-facebook-for-calling-men-scum>.

12 Marcia Belsky, "About" (18 January 2018), Marcia Belsky (blog), online: <www.marciabelsky.com/about>.

13 Lorenz, *supra* note 10.

Samantha C. Thrift, in their study of the "Binders Full of Women"[14] meme, argued that viral comedic content, such as memes, establishes a feminist movement that "adheres less to formal movement organisations and established social media protest strategies, embracing instead a model of 'ironic activism' where satire and dissent interlink."[15] Feminist humour acts both as a way for women to cope and to connect.

As an online protest in response to their Facebook bans, over 500 comedians in the group posted some variation of "men are scum" to their Facebook pages on November 24, 2017. Almost all of the women who posted were either banned or informed that their posts had been reported for going against Facebook's Community Standards.[16] As an additional experiment, several of the women also wrote, "women are scum" and had their friends report them. To their surprise, those posts were not deleted.[17] A possible reason for this is because Facebook relies on its users to report content that goes against their Community Standards. Reporting, or "flagging" is a "mechanism for reporting offensive content to a social media platform."[18] As digital media scholars Kate Crawford and Tarleton Gillespie suggest, while flagging may appear only as a "single data point," it is a "tangle of system designs, multiple actors and intentions, assertions and emotions."[19] Despite the intention of reporting as an expression of "individual and spontaneous concern," Crawford and Gillespie describe several incidents of "organized" or "strategic" flagging where flagging or reporting systems are "gamed" by their users.[20] Flagging acts as a "coordinated proclamation of collective, political indignation," used by some groups as a tool of harassment or as a way to censor conversations, or in this case, feminist humour.[21] It can also be used by feminist groups, such as "Double Standards," to encourage people to flag disturbing content about women.[22] Facebook states that it prevents "mass reporting" by using automation to "recognize duplicate reports" and "caps the number of times it reviews a single post."[23]

In response to questions regarding the takedown of the "men are scum" posts, a Facebook spokeswoman said that while Facebook understands how "important it is for victims of harassment to be able to share their stories and for people to express anger and opinions about harassment," they draw "the line when people attack others simply on the basis of their gender."[24] Facebook's Community Standards policy states that Facebook removes hate speech that "directly attacks" people in protected groups, to include "race, ethnicity, national origin, religious affiliation, sexual orientation, sex, gender or gender identity, or serious disabilities or diseases."[25] In an investigative report on Facebook reporting and hate speech, *ProPublica*, an independent

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[14] The Binders Full of Women meme came from the 2012 presidential election where presidential candidate Mitt Romney commented that women's groups brought him "binders full of women" when he was looking for women to be in his cabinet.

[15] Carrie A Rentschler & Samantha C Thrift, "Doing Feminism in the Network: Networked Laughter and the 'Binders Full of Women' Meme" (2015) 16:3 Feminist Theory 329 at 336.

[16] Lorenz, *supra* note 10.

[17] *Ibid*.

[18] Kate Crawford & Tarleton Gillespie, "What is a Flag For? Social Media Reporting Tools and the Vocabulary of Complaint" (2016) 18:3 New Media & Society 410 at 411.

[19] *Ibid*.

[20] *Ibid* at 420.

[21] *Ibid* at 420.

[22] Ariana Tobin, Madeleine Varner & Julia Angwin, "Facebook's Uneven Enforcement of Hate Speech Rules Allow Vile Posts to Stay Up", *ProPublica* (28 December 2017), online: <www.propublica.org/article/facebook-enforcement-hate-speech-rules-mistakes>.

[23] *Ibid*.

[24] Levi Sumagaysay, "Facebook Defends Blocking Women Who Call Men 'Scum'", *Silicon Beat* (5 December 2017), online: <www.siliconbeat.com/2017/12/05/facebook-defends-blocking-women-who-call-men-scum>.

[25] See *Community Standards*, online: Facebook <www.facebook.com/communitystandards>.

non-profit newsroom, reviewed a number of internal documents that shed light on how Facebook distinguishes between hate speech and "legitimate political expression,"[26] and found that Facebook gives users a "broader latitude" when writing about subsets of these protected groups. For instance, one document, used for the purpose of training content reviewers, lists three groups: female drivers, black children, and white men, and asks, "which group is protected from hate speech?" Surprisingly, the correct answer is "white men."[27] Facebook applies a gender and colour-blind algorithm that, they suggest, will help them "apply consistent standards worldwide," thereby ignoring the complicated and intersecting identities and power dynamics of and between their users.[28] This echoes a view of the internet as a "level playing field where interlocutors are equal and voluntary participants in all conversations."[29] Interestingly, the protectionism of white men also reflects the anxieties that Sarah Banet-Weiser and Katie Milner identity within the trend of popular misogyny where men have responded to the "threat" of an "apparent feminine invasion" claiming an "underdog" mentality.[30]

Although Facebook claims to be consistent, *ProPublica* found that Facebook was markedly inconsistent in its treatment of posts. Considering, amongst other factors, the working conditions of the Facebook moderators, it is no surprise that inconsistencies occur. In a series entitled "The Facebook Files," *The Guardian* interviewed a Facebook content moderator who claimed that the training and support he and his colleagues received was "absolutely not sufficient," particularly given the nature of the material they were paid to review which included such horrifying content as child sexual abuse and beheadings.[31] The moderator said that the work was mainly contracted out to recent immigrants with limited English who do not feel comfortable seeking internal support for fear of losing their jobs.[32] *ProPublica* asked Facebook about 49 posts that were submitted by their readers who believed that Facebook had made the incorrect judgement either by "leaving hate speech up, or in a few instances by deleting legitimate expression."[33] Of the 49, Facebook agreed that reviewers made a mistake on 22 of the posts. While users can provide feedback, there is no formal appeal process and Facebook's process remains opaque. In addition to the formal waged labour of Facebook employees, digital scholar Lisa Nakamura argues that the work of women, particularly women of colour and sexual minorities "who post, tweet, re-post, and comment in public and semi-public social media spaces in order to respond to remediate racism and misogyny online"[34] are also labourers who add "traffic and value to social media platforms by attracting readers and followers."[35]

To call attention to these issues, Avery, after continuously being banned and having her posts deleted, started the blog *Facebook Jailed*: a "collection of real life experiences of Facebook users working to expose

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[26] Julia Angwin & Hannes Gressegger, "Facebook's Secret Censorship Rules Protect White Men From Hate Speech But Not Black Children", *ProPublica* (28 June 2017), online: <www.propublica.org/article/facebook-hate-speech-censorship-internal-documents-algorithms>.

[27] *Ibid*.

[28] *Ibid*.

[29] Emma A Jane, "'You're an Ugly, Whorish, Slut': Understanding E-Bile" (2014) 14:4 Feminist Media Studies 531 at 538.

[30] Banet-Weiser & Miltner, *supra* note 4.

[31] The content moderator, who wished to remain anonymous, described his day as going into work every day at 9am, turning on his computer and watching "someone have their head cut off. Every day, every minute, that's what you see. Heads being cut off." Olivia Solon, "Underpaid and Overburdened: The Life of a Facebook Moderator", *The Guardian* (25 May 2017), online: <www.theguardian.com/news/2017/may/25/facebook-moderator-underpaid-overburdened-extreme-content>. See also Sarah T Roberts, "Commercial Content Moderators: Digital Laborers' Dirty Work" in Safiya Umoja Noble & Brendesha M Tynes, eds, *The Intersectional Internet: Race, Sex, Class, and Culture Online* (New York: Peter Lang Publishing Inc, 2016) 147.

[32] *Ibid*.

[33] Tobin, Varner & Angwin, *supra* note 21.

[34] Lisa Nakamura, "The Unwanted Labour of Social Media: Women of Social Media: Women of Colour Call Out Culture As Venture Community Management" (2015) 86 New Formations 106 at 107.

[35] *Ibid* at 108.

the double standard when it comes to Facebook's community standards and monitoring hate speech."[36] *Facebook Jailed* calls on people to share their stories either of having posts removed, being banned, or if they have "tried to report real hate speech only to be told by Facebook that it wasn't in violation of their community standards."[37]

Facebook Jailed illustrates what Rentschler describes as "feminist media practice" where women "digitally record and transcribe personal stories based in their experiences of sexual violence and harassment" and act as witness to "others' harassment and experience of sexual violence."[38] While *Facebook Jailed* does not exclusively post stories about harassment towards women, the site takes on what could arguably be viewed as an intersectional approach by posting stories about a variety of hate speech and providing its community with an ability to have their voices heard after being silenced on Facebook.

Under their Statement of Rights and Responsibilities, Facebook is "not responsible for any offensive, inappropriate, obscene, unlawful, or otherwise objectionable content or information you may encounter on Facebook."[39] After *ProPublica* published their reports, and several news agencies picked up the story, Facebook committed itself to hiring more reviewers. Facebook has also reached out to *Facebook Jailed* to discuss their Community Standards. Just several days after they reached out, Avery was banned from Facebook for 30 days for posting "Comedian Hana Michels is banned for 7 days for a joke post."[40] Relishing the irony of this, Avery wrote back to Facebook saying that:

> ...unless Facebook intends on responding to this email by saying Facebook is wrong and they will stop banning accounts and removing posts as innocuous as 'men are the worst', then unfortunately, I will have to decline your offer to have a phone discussion. If Facebook is serious about getting better about this problem and not just giving lip service to appease shareholders, then I would be more open minded about having a more in-depth conversation with you.[41]

Because Facebook, like most social media sites, legally, has no obligation to change its standards, it makes pressure from the media and sites like *Facebook Jailed* all the more important.[42]

WHOSE VOICES COUNT?

Professor of Classics and television personality Mary Beard, has explored the many ways that women's voices have historically been silenced or banished. Reflecting on her personal experiences as a privileged white woman subjected to vitriolic attacks online, Beard writes that "the more I have looked at the threats and insults that women have received, the more they seem to fit into the old patterns...it doesn't matter what line you take as a woman, if you venture into traditional male territory, the abuse comes anyway."[43] The rhetorical abuse, she writes, "include a fairly predictable menu of rape, bombing, murder, and so forth (this may sound very relaxed; that doesn't mean it's not scary when it comes late at night). But a significant subsection

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[36] Facebook Jailed, online: <www.facebookjailed.com>.

[37] Facebook Jailed, *Contact*, online: <www.facebookjailed.com>.

[38] Carrie Rentschler, "Rape Culture and the Feminist Politics of Social Media" (2014) 7:1 Girlhood Studies 65 at 66.

[39] See *Statement of Rights and Responsibilities*, online: Facebook <www.facebook.com/legal/terms>.

[40] Kayla Avery, *Facebook Reached Out to Facebook Jailed Asking to Discuss Their Community Standards*, (4 January 2018) online: Facebook Jailed <www.facebookjailed.com/facebook-reached-out-to-facebook-jailed-asking-to-discuss-their-community-standards>.

[41] *Ibid*.

[42] In the U.S., Section 230 of the Communications Decency Act (CDA) of 1996, Section 230 protects online intermediaries including internet service providers (ISPs) and "interactive computer service providers" such as user-generated sites and social media platforms like Facebook. Section 230 affirms that, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." This legal protection is only available in the U.S.; no similar statute exists in Canada and the EU, along with other jurisdictions. See *Protection for Private Blocking and Screening of Offensive Material*, 47 USC § 230 (2011).

[43] Mary Beard, *Women & Power: A Manifesto* (NY: Liveright Publishing Corp, 2017) at 36–37.

is directed at silencing the women. 'Shut up you bitch' is a fairly common refrain."[44]

Beard's remarks are demonstrated forcefully by a study commissioned for Amnesty International by Ipsos MORI to examine the experiences of women 18–55 of age in the UK, EU (Spain, Denmark, Italy, Sweden, Poland), New Zealand, and the US, regarding their experiences of online abuse or harassment on social media platforms. The study concluded that "women's experiences of online abuse are not isolated incidents but in fact are part of a wider trend of both online and offline discrimination against women," and that most women who experienced abuse felt that responses by social media companies were inadequate. It is the responsibility of social media companies "to respect human rights and this includes the right to freedom of expression. This means ensuring that the women who use their platforms are able to do so equally, freely, and without fear," said Amnesty researcher Azmina *Dhrodia*.[45]

In a study examining how Google and Facebook frame and implement the human rights to freedom of expression and the right to privacy, human rights advocate Rikke Frank *Jørgensen* writes that despite the company's rhetorical flourish to democratize communication and as enablers of these rights, their numerous legal standards and policies restrict and "enforce boundaries for expression."[46] The challenge, *Jørgensen* details, is that only states need to adhere to human rights, unlike private companies like Facebook. While the right to privacy is regulated by national and global data protection legislation, this is not the case with freedom of expression.

Law professors Danielle Citron and Helen Norton earlier suggested that we are at an "important point in cyber hate's history" where the "norms of subordination may overwhelm those of equality if hatred becomes an acceptable part of online discourse."[47] Commenting on Facebook's policies regarding protected groups, Citron notes that it will "protect the people who least need it and take it away from those who really need it."[48] Women getting banned from Facebook for posting "men are scum," while their harassers receive little to no consequences, demonstrates that online behavior has mirrored or even amplified the voices and power of abusers. This creates palpable tensions for online feminist advocacy when corporate platforms, whose business model relies on behavioural marketing and surveillance capitalism,[49] mediate socio-political relationships. Anita Gurumurthy of IT for Change calls on feminists to thus reclaim the internet from accelerated marketization and a lax regulatory stance, "re-signifying them as the architecture of a just world where women's full range of social, economic, cultural, and political rights as individuals and collectivities are met."[50]

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[44] *Ibid* at 37.

[45] Azmina Dhrodia, *Unsocial Media: The Real Toll of Online Abuse Against Women*, (29 November 2017) online: Amnesty Global Insights, Medium <www.medium.com/amnesty-insights/unsocial-media-the-real-toll-of-online-abuse-against-women-37134ddab3f4>.

[46] Rikke Frank Jørgensen, "What Platforms Mean When They Talk About Human Rights" (2017) 9:2 Policy & Internet 280 at 281.

[47] Danielle Keats Citron & Helen Norton, "Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age" (2011) 91 BUL Rev 1435.

[48] Angwin, *supra* note 25.

[49] See Shoshanna Zuboff, "Big Other: Surveillance Capitalism and the Prospects of an Information Civilization" (2015) 30 J Information Technology 75.

[50] Anita Gurumurthy & Nandini Chami, *A History of Feminist Engagement with Development and Digital Technologies*, (May 2017) online: Association for Progressive Communication Issue Papers <www.apc.org/en/pubs/feminist-action-framework-development-and-digital-technologies> at 12.

BIBLIOGRAPHY

Angwin, Julia & Gressegger, Hannes. “Facebook’s Secret Censorship Rules Protect White Men From Hate Speech but Not Black Children.” *ProPublica*, June 28, 2017. URL: https://www.propublica.org/article/facebook-hate-speech-censorship-internaldocuments-algorithms.

Avery, Kayla. “Facebook Reached Out to Facebook Jailed Asking to Discuss Their Community Standards.” *Facebook Jailed*, January 4, 2018, URL: https://www.facebookjailed.com/facebook-reached-out-to-facebook-jailed-asking-todiscuss-their-community-standards/.

Bailey, Moya. “Misogynoir in Media: On Caster Semenya and R. Kelly.” *Catalyst: Feminism, Theory, Technoscience* 2, no.2 (2016): 1-31.

Beard, Mary. *Women & Power: A Manifesto* NY: Liveright Publishing Corp., 2017.

Belsky, Marcia. “About.” *Marcia Belsky*. Accessed: January 18, 2018. URL: http://www.marciabelsky.com/about/.

“Community Standards.” Facebook.com. Accessed January 3, 2018. URL: https://www.facebook.com/communitystandards.

“Contact.” *Facebook Jailed*, accessed: January 10, 2018, URL: https://www.facebookjailed.com/contact-2/.

Crawford, Kate & Tarleton Gillespie. “What is a Flag For? Social Media Reporting Tools and the Vocabulary of Complaint.” *New Media & Society* 18, no. 3 (2016): 410-428.

Day, Elizabeth. “Mary Beard: I almost didn’t feel such generic, violent misogyny was about me,” *The Guardian*, January 6, 2013. URL: http://www.theguardian.com/books/2013/jan/26/mary-beard-question-time-internet-trolls

Dhrodia, Azmina. “Unsocial media: the real toll of online abuse against women,” Amnesty Global Insights, *Medium*, November 29, 2017; retrieved from: https://medium.com/amnesty-insights/unsocial-media-the-real-toll-of-online-abuse-against-women-37134ddab3f4

Anita Gurumurthy. (2017). *A History of Feminist Engagement with Development and Digital Technologies*. APC (Association for Progressive Communication) Issue Papers, p. 12; retrieved from: https://www.apc.org/en/pubs/feminist-action-framework-development-and-digital-technologies

Facebook, “Statement of Rights and Responsibilities.” *Facebook*, revised: January 30, 2015. URL: https://www.facebook.com/legal/terms.

Facebook Jailed.” *Facebook Jailed*, accessed: January 10, 2018. URL: https://www.facebookjailed.com.

“Facebook Diversity Update: Building a More Diverse, Inclusive Workforce.” *Facebook Newsroom*, August 2, 2017, retrieved from: https://fbnewsroomus.files.wordpress.com/2017/08/fb_diversity_2017_final.pdf.

Keats, Danielle & Norton, Helen. “Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age.” *Boston University Law Review* 91 (2011): 1435-1484.

Lorenz, Taylor. “Facebook is Banning Women for Calling Men ‘Scum.’” *The Daily Beast*, December 4, 2017. https://www.thedailybeast.com/women-are-getting-banned-fromfacebook-for-calling-men-scum.

Jane, Emma A. “”Your a Ugly, Whorish, Slut” Understanding E-Bile.” *Feminist Media Studies* 14, no. 4 (2014): 531-546.

Jørgensen, Rikke Frank .“What platforms mean when they talk about human rights,” *Policy & Internet* 9(3): 280-296.

Miltner, Kate M. & Sarah Banet-Weiser. "#MasculinitySoFragile: Culture, Structure, and Networked," *Feminist Media Studies* 16, no. 1 (2016): 171-174.

Nakamura, Lisa. "The Unwanted Labour of Social Media: Women of Social Media: Women of Colour Call Out Culture as Venture Community Management." *New Formations: A Journal of Culture/Theory/Politics* 86, (2015): 106-112.

Noble, Safiya Umoja. *Algorithms of Oppression: How Search Engines Reinforce Racism*. NY: New York University Press, 2018.

Rentschler, Carrie. "Rape Culture and the Feminist Politics of Social Media." *Girlhood Studies* 7, no. 1 (2014): 65-82.

Rentschler, Carrie A. & Thrift, Samantha C. "Doing Feminism in the Network: Networked Laughter and the 'Binders Full of Women' meme." *Feminist Theory* 16, no. 3 (2015):329-359.

Silverberg, Nicole. "Men, you want to treat women better? Here's a list to start with." *The Guardian*. October 16, 2017. URL: https://www.theguardian.com/lifeandstyle/2017/oct/16/a-simple-list-of-things-mencan-do-to-change-our-work-and-life-culture.

"Nicole Silverberg's Facebook Page." Facebook.com. Accessed: January 20, 2018. https://www.facebook.com/nicole.silverberg.

Sandberg, Sheryl. *Lean In: Women, Work, and the Will to Lead*, New York: Knopf, 2013.

Solon, Olivia. "Underpaid and Overburdened: The Life of a Facebook Moderator." *The Guardian*, May 25, 2017. URL: https://www.theguardian.com/news/2017/may/25/facebook-moderator-underpaidoverburdened-extreme-content

Sumagaysay, Levi. "Facebook defends blocking women who call men 'scum.'" *Silicon Beat*, December 5, 2017. URL: http://www.siliconbeat.com/2017/12/05/facebook-defendsblocking-women-who-call-men-scum/.

Tobin, Ariana, Varner, Madeleine & Angwin, Julia. ""Facebook's Uneven Enforcement of Hate Speech Rules Allow Vile Posts to Stay Up." *ProPublica*, December 28, 2017. URL: https://www.propublica.org/article/facebook-enforcement-hate-speech-rules-mistakes.

United States Code, 2011 Edition, Title 47 – Telegraphs, Telephones, and Radiotelegraphs, Chapter 5, Wire or Radiocommunication, Subchapter II- Common Carriers, Part I - Common Carrier Regulation, Sec. 230 - Protection for private blocking and screening of offensive material. URL: https://www.gpo.gov/fdsys/pkg/USCODE-2011-title47/html/USCODE-2011-title47-chap5-subchapII-partI-sec230.htm

Zuboff, Shoshanna. "Big other: Surveillance capitalism and the prospects of an information civilization," *Journal of Information Technology*, 30, 75–89.

THE RIGHT TO BE FORGOTTEN AND YOUTH: PHILOSOPHICAL AND PSYCHOLOGICAL CONTEXTS

Jacquelyn Burkell
The University of Western Ontario
Faculty of Information & Media Studies
Assistant Dean, Research
Associate Professor

Priscilla M. Regan
George Mason University
Schar School of Policy and Government
Professor

Abstract: This chapter focuses on the relevance of the "right to be forgotten" for youth and the legal status of this right in Canada. We begin with a brief review of the general legal bases for such a right that are found in human rights law and common law, as well as the background for inclusion of this right in the General Data Protection Regulation (GDPR) effective in May 2018, and the questions surrounding implementation of the right. The particular importance of the right to be forgotten for youth is then examined through an analysis of theories of child development, ideas about adolescent exploration, the behavior of youth online, and public opinion about the value of forgiveness and the ability to start over without being hostage to the past. The legal bases for the right to be forgotten found in Canadian privacy statutes and court cases, as well as the recent actions of the Office of the Privacy Commissioner of Canada (OPC) and its recommendations regarding online reputation, are reviewed. The chapter closes with thoughts on the implementation challenges surrounding the OPC recommendations, especially as they apply to youth.

Keywords: Privacy, data protection, right to be forgotten, youth, Office of the Privacy Commissioner

INTRODUCTION

The idea that individuals should be able to make mistakes, learn from those mistakes, and move on, has roots in both philosophy and psychology, and is recognized as particularly important for young people. With the inclusion of a "right to be forgotten" in the European General Data Protection Regulation (GDPR), effective May 25, 2018, there is renewed international discussion and debate about the importance of this right. The goal of this paper is to explore the particular relevance of the "right to be forgotten" for youth. To that end, our analysis examines the philosophical and psychological bases underpinning the right to be forgotten as well as some of the legal issues surrounding this right. In our discussion, we highlight issues particular to youth including theories of child development, ideas about adolescent exploration, forgiveness, and starting over after paying one's debt to society. We also examine public opinion about the importance of being able to delete outdated, incorrect, or irrelevant information. We begin with a brief background on the current debate about the "right to be forgotten," turn next to examine the particular importance of such a right to young people, and finally explore how this debate is currently playing out in Canada.

BACKGROUND

Although the "right to be forgotten" is receiving much attention with its inclusion in the GDPR, it is not a new idea for those concerned with human rights and privacy; indeed, the right to be forgotten is rooted in French civil law[1] and reflected in the "right to personal identity" in Italian jurisprudence.[2] Concerns about being defined by one's computer record, reflected in terms such as a "dossier society" and "computerized man," were fundamental to privacy issues raised with the shift from paper records to computerized records.[3] The importance of being able to "start over" and not be bound by the details of one's past was viewed as not only integral to

[1] Jeffrey Rosen, "The Right to be Forgotten" (2012) 64 Stanford L Rev 88.

[2] Giorgio Pino, "The Right to Personal Identity in Italian Private Law: Constitutional Interpretation and Judge-Made Rights" in Mark Van Hoecke & François Ost, eds, *The Harmonization of Private Law in Europe* (Oxford: Hart Publishing, 2000) 225.

[3] Alan Westin, *Privacy and Freedom* (New York: Atheneum 1967); Arthur R Miller, *The Assault on Privacy: Computers, Data Banks, and Dossiers* (Ann Arbor: University of Michigan Press, 1971); Kenneth C Laudon, *Dossier Society: Value Choices in the Design of National Information Systems* (New York: Columbia University Press, 1986); David H Flaherty, *Protecting Privacy in Surveillance Societies: The Federal Republic of Germany, Sweden, France, Canada, and the United States* (Chapel Hill: University of North Carolina Press, 1989).

privacy but also essential to the ability to develop as an autonomous individual within a democratic society.[4] Blanchette and Johnson point out: "A world in which there is no forgetfulness— a world in which everything one does is recorded and never forgotten— is not a world conducive to the development of democratic citizens."[5] The ability to "start over" or "forgive and forget" is recognized in a number of national public policies, for example bankruptcy law and juvenile court records, in order that the past does not "inhibit their ability to reform their behavior, to have a second chance, or to alter their life's direction."[6]

Although the roots of a right to be forgotten can be found in human rights law (*e.g.* the importance of personal dignity and honor), as well as in civil and common law (*e.g.* privacy statutes and decisions and legal protections against slander, defamation, and being placed in a false light), these provisions do not easily translate into a general right to be forgotten. There is debate about the appropriate legal rationale and underpinnings for such a right: for example, whether it is derived from privacy or identity protection.[7] In the EU, in contrast to North America, privacy protection extends to rights to self-expression and personal identity[8] and is also further strengthened by the European tradition of protecting personality rights.[9] De Andrade[10] argues that identity rights provide a "normative root for the right to oblivion." There is also the question of balancing of rights, especially the balance among freedom of speech, the public's right to know, and a right to privacy.[11] Despite these complex legal and philosophical debates, there is agreement that legal approaches vary—with common law countries generally placing more emphasis on freedom of expression than a right to privacy, and civil law countries adopting the opposite position.[12] Additionally, the specifics of legal protection vary by country: for example, "under French law, the concept of a limitation on information is incorporated into both civil and criminal law, with the duration of forgetting depending on the subject matter."[13]

With the advent of the Internet and powerful search engines such as Google, debates about the "right to be forgotten" has taken on renewed importance; since the Internet is a global phenomenon, and the algorithms used by search engines make it easier to find information and thus, harder to maintain the practical obscurity that characterized physical (typically paper) records.[14] In 2012, the European Commissioner for Justice, Fundamental Rights, and Citizenship, Viviane Reding, proposed a formal "right to be forgotten," which was then incorporated in the proposed GDPR. As a result of the 2014 decision by the Court of Justice of the European Union in *Gonzales v Google Spain* and further strengthened by the GDPR, a citizen can "request the removal of links that contain, as a result of a search by surname name and given name, information that is

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4 Oscar Jr Gandy, *The Panoptic Sort: A Political Economy of Personal Information* (Boulder: Westview Press, 1993).

5 Jean-François Blanchette & Deborah G Johnson, "Data Retention and the Panoptic Society: The Social Benefits of Forgetfulness" (2002) 18:1 Information Society 33 at 36.

6 Daniel Solove, "A Taxonomy of Privacy" (2006) 154:3 U Pennsylvania L Rev 477 at 532.

7 Noberto Nuno Gomes de Andrade, "Oblivion: The Right to be Different … From Oneself: Re-Proposing the Right to be Forgotten" in Alessia Ghezzi, Angela G Periera & Lucia Vesnić-Alujević, eds, *The Ethics of Memory in a Digital Age: Interrogating the Right to Be Forgotten* (London: Palgrave MacMillan, 2014) 65; Pino, *supra* note 2.

8 Bart van der Sloot, "Privacy as Human Flourishing: Could a Shift Towards Virtue Ethics Strengthen Privacy Protection in the Age of Big Data?" (2014) 5 J Intellectual Property, Information Technology & Electronic Communication 230.

9 Bart van der Sloot, "Privacy As a Personality Right: Why the ECHTR's Focus on Ulterior Interests Might Prove Indispensable in the Age of Big Data" (2015) 31:80 Utrech J Intl & European L 25.

10 De Andrade, *supra* note 7 at 73.

11 Michael J Kelly & David Satola, "The Right to Be Forgotten" (2017) 1 U Illinois L Rev 1.

12 *Ibid*.

13 *Ibid* at 25.

14 Sophie Lecomte, "The Right To Be Forgotten In The Digital Age: Perspectives On Relevant Legislation In Europe, Canada And The US", Case Comment, (9 February 2017) CanLII Connects.

inappropriate, not or no longer relevant, or excessive in light of its purpose and the amount of time that has passed."[15] There is widespread discussion about the implementation of this decision,[16] with general agreement that the public has a greater interest in access to information about "public figures," while there is a stronger interest in the right for minors. In general, considerations reconcile the economic interest of the search engine company with the public's interest in knowing this information and with the rights of the individual in Article 8 of the *Charter of Fundamental Rights of the European Union*.

The Court's decision and the inclusion of a "right to be forgotten" in the GDPR have generated scholarly and policy debate about the meaning of such a right, when it should apply, and whether it is necessary.[17] Is the right in question one of being forgotten, which is also referred to as "oblivion"? Is it the right to have information "erased" or "deleted" at the source? Is it the right to consign information to practical obscurity though de-linking or de-indexing, thus removing the information from all search engine results, but leaving it intact in its original location? Is it the still more limited right to have the information de-listed, or removed from the results returned on searches of the name of the individual? From a human rights perspective, the "right to be forgotten" defined as the "right to oblivion" connotes a more fundamental right than do the latter concepts, which arguably are already protected to some extent in fair information principles.

From a somewhat more practical perspective, the key issues seem to be whether the individual herself posted the information in question, if she posted but others reposted, if someone else posted, or if it was arguably "public information" from the start.[18] If the individual posts, then there is general agreement that they should be able to have the information deleted. If, however, it has been reposted, then it becomes a bit problematic in that it is difficult to track and effect the removal of such repostings. The result may be to put search engines, such as Google, in the position of implementing the right to be forgotten through de-listing or de-indexing of information.[19] There is significant debate in the courts on the question of whether search engines can be considered "data controllers," and thus legally responsible for implementing a right to be forgotten.[20] Nonetheless, the solution of de-listing or de-indexing as an implementation of "forgetting" has the interesting and relevant result of reinstating the practical obscurity of paper records without completely deleting the information in question, which would help to address concerns about access to information and the integrity of the historical record.[21] Finally, if someone else posts or if the information is public, then there are conflicts with freedom of expression and the public's right to know. As Eloise Gratton argues in the Financial Post: "By allowing people to remove access to their personal information at will, important information might become inaccessible, incomplete, or misrepresentative. There might be a great public interest in the remembrance of information, especially since one can never predict what information might become useful in the future."[22] Additionally, questions have been raised as to whether information on the Internet really is permanent and whether there

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[15] *Gonzales v Google Spain*, C-131/12, [2014] I-317.

[16] See e.g. Article 29 Data Protection Working Party, *Guidelines on the Implementation of the Court of Justice of the Eurpoean Union Judgment on 'Google Spain and Inc V. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González'* C-131/2, (2014).

[17] Steven C Bennett, "The 'Right to be Forgotten': Reconciling EU and US Perspectives" (2012) 30:1 Berkeley J Intl L 161; Ignacio Cofone, "Google v. Spain: A Right to be Forgotten?" (2015) 15:1 Chicago-Kent J Intl & Comparative L 1; Michael L Rustad & Sanna Kulevska, "Reconceptualizing the Right to be Forgotten to Enable Transatlantic Data Flow" (2015) 28:2 Harvard J L & Technology 349; Emily Adams Shoor, "Narrowing the Right to be Forgotten: Why the European Union Needs to Amend the Proposed Data Protection Regulation" (2014) 39:1 Brooklyn J Intl L 487.

[18] Peter Fleischer, "Foggy Thinking About the Right to Oblivion" (9 March 2011), *Peter Fleischer: Privacy...?* (blog), online:<www.peterfleischer.blogspot.com/2011/03/foggy-thinking-about-right-to-oblivion.html>. Rosen, supra note 1.

[19] Patrician Sanchez Abril & Jacqueline D Lipton, "The Right to be Forgotten: Who Decides What the World Forgets" (2014-15) 103 Kentucky L J 363.

[20] See e.g. *ibid*.

[21] See e.g. International Federation of Library Associations and Institutions (IFLA), *IFLA Statement on the Right to be Forgotten*, (11 October 2016) online: <www.ifla.org/publications/node/10320>.

[22] Eloise Gratton & Jules Polonetsky, "Droit A L'Oubli: Canadian Perspective on the 'Right to be Forgotten' Debate" (2017) 15:20 Colorado Technology L J 337.

are technical solutions that can ensure that data is not permanent.[23] Concerns about the right to be forgotten are rooted at least in part on the presumed permanence of the digital record (and thus the temporally-related irrelevance or inaccuracy of the information in that record); an impermanent record, whether that impermanence is inherent or imposed, would ameliorate those concerns related to digital permanence.

RIGHT TO BE FORGOTTEN AND YOUTH

Academic and policy discussions about the "right to be forgotten" pay particular attention to youth recognizing that "born digital"[24] cohorts are living, and have lived, more of their lives online and are therefore particularly vulnerable to the risks of being haunted by a permanently accessible online record. Perhaps even more importantly, philosophical thinking and psychological research underscore that youth need to be able to experiment, to learn from their experiences and mistakes, and to move on in order to develop their own identities and value systems. Policymakers in Canada, Europe, and the US recognize this in their remarks about the "right to be forgotten." The Office of the Privacy Commissioner of Canada, in its discussion paper on online reputation, noted that:

...childhood is a time of experimenting and testing boundaries. The permanence of digital information means that childhood transgressions or follies will remain findable and may have an effect on reputations for a long time to come. As the first digital generation grows up, it remains to be seen whether youthful patterns of behaviour will be affected by the knowledge that what we do as children will follow us for the rest of our lives. More generally, what will be the effects of a permanent record of our entire lives? Will a child who has a reputation as a bully be followed by that label through adulthood? Will it be possible to forget past mistakes? Will the increased risks to one's online reputation in this day and age ultimately affect behavior and the kinds of choices, and non-choices, that are made?[25]

In the US, then Representative Edward Markey (D-MA) pointed out that: "for kids 15 and under, the right to be forgotten is also the right to develop, the right to grow up, the right to make mistakes, and the right to then have forgotten so what you did as a kid...doesn't come back to haunt you as an adult. The right to develop is a very important right for children and in an online world that is something that we must protect as being sacred."[26] In introducing the "right to be forgotten," Viviane Reding said, "[i]t is therefore important to empower EU citizens, particularly teenagers, to be in control of their own identity online."[27] And the GDPR notes the particular importance of the right to be forgotten "when the data subject has given their consent as a child, when not being fully aware of the risks involved by the processing, and later wants to remove such personal data especially on the Internet."[28]

Indeed, there is good reason to believe that consent (including consent to release personal information) should not be taken as a permanent decision, particularly for young people. There are at least three strands to this argument, rooted in psychological research on the nature of decision making. The issue with consent is that, in so giving, one commits their future self to (often unspecified) consequences by virtue of a current decision. When considering the potential consequences of the release of personal information online, the time horizon is long and the potential outcomes varied, ever-changing, and uncertain. This creates challenges for consent that apply to individuals of all ages; these

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[23] Meg Leta Ambrose, "It's About Time: Privacy, Information Life Cycles, and the Right to be Forgotten" (2013) 16:2 Stanford Technology L Rev 369.

[24] John Palfrey & Urs Glasser, *Born Digital: Understanding the First Generation of Digital Natives* (New York: Basic Books, 2008).

[25] Canada, Policy and Research Group, *Online Reputation: What Are They Saying About Me?*, Discussion Paper (Ottawa: Office of the Privacy Commissioner of Canada, 2016).

[26] Edward J Markey, *EU-US Conference on Privacy and the Protection of Personal Data*, (18 March 2012) online: Ed Markey <www.markey.senate.gov/news/press-releases/rep-markey-speaks-at-eu-us-conference-on-privacy-and-the-protection-of-personal-data>.

[27] Vivian Reding, "The EU Data Protection Reform 2012: Making Europe the Standard Setter for Modern Data Protection Rules in the Digital Age" (Presentation at the Innovation Conference Digital, Life, Design, Munich, Germany, 22 January 2017), online: <www.europa.eu/rapid/press-release_SPEECH-12-26_en.htm>.

[28] EC, *Commission Regulation (EC) 679/2016 of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation)*, [2016] OJ, L 119/1.

are exacerbated for adolescents, who are in a period of profound change, including significant changes in interpersonal relationships[29] with respect to which youth have significant and changing privacy concerns (*e.g.* increasing need for privacy from parents[30]). Psychological research reveals that people are not adept at predicting future preferences—that is, we are very poor at predicting what we will want[31] or how we will feel in the future;[32] tending to inappropriately project unchanging current preferences or feelings as the preferences or feelings of our future selves.[33] A second, and related, problem is that we show a systematic tendency to discount future outcomes, treating positive outcomes less positively, and negative outcomes less negatively the further away they are in time.[34] Temporally distant outcomes thus have less impact on our decisions than those same outcomes would have if they were to occur immediately. The third issue is that young people, particularly adolescents, are less risk-averse than adults,[35] perhaps due to the comparatively limited life experience that leaves them less aware of potential risks.[36] Each of these conditions makes it more difficult for adolescents to provide meaningful permanent consent to the release of personal information. Together, they suggest that adolescents in particular may require the right to revoke an earlier consent for the release of personal information; California recently enacted exactly such a right for adolescents in Senate Bill 568.[37]

While much of the literature on the right to be forgotten focuses on the impact of potentially harmful or negative information, the sheer *amount* of personal information available online can also have negative implications for personality and identity development. This concern, which is reflected in the remarks of Markey and Reding reported above as well as De Andrade's scholarship, is related to the relationship between autobiographical memory and identity.[38] Personal narratives, which are the "stuff" of identity,[39] require what Conway[40] has termed "coherence" and "correspondence": they must be consistent with the current view of the self, and they must reflect what we remember about ourselves. In order to maintain a strong personal narrative, and thus a strong identity, memories consistent with the self-image are reinforced—in turn strengthening the (typically favourable) self-image that those memories

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[29] Laurence Steinberg & Amanda Sheffield Morris, "Adolescent Development" (2001) 52:1 Annual Rev Psychology 83; Andrew W Collins & Brett Laursen, "Changing Relationships, Changing Youth: Interpersonal Contexts Of Adolescent Development" (2004) 24:1 J Early Adolescence 55.

[30] Emily Christofides, Amy Muise & Serge Desmarais, "Information Disclosure and Control on Facebook: Are They Two Sides of the Same Coin or Two Different Processes?" (2009) 12:3 CyberPsychology & Behavior 341.

[31] Georbe Loewenstein & Erik Angner, "Predicting And Indulging Changing Preferences" in George Loewenstein, Daniel Read & Roy Baumeister, eds, *Time And Decision: Economic And Psychological Perspectives On Intertemporal Choice* (New York: Russell Sage Foundation, 2003) 351.

[32] George Loewenstein & David Schkade, "Wouldn't It Be Nice? Predicting Future Feelings" in Daniel Kahneman, Ed Deiner & Norbert Schwarz, eds, *Well-Being: The Foundations of Hedonic Psychology* (New York: Russell Sage Foundation, 1999) 85.

[33] *Ibid*.

[34] Dilip Soman et al, "The Psychology of Interotemporal Discounting: Why are Distant Events Valued Differently from Proximal Ones?" (2005) 16:3/4 Marketing Letters 347.

[35] Valerie F Reyna & Frank Farley, "Risk and Rationality in Adolescent Decision Making" (2006) 7:1 Psychological Science in the Public Interest 1.

[36] Catherin Lewis, "How Adolescents Approach Decisions: Changes Over Grades Seven to Twelve and Policy Implications" (1981) 52:2 Child Development 538.

[37] James Lee, "SB 568: Does California's Online Eraser Button Protect the Privacy of Minors?" (2014) 48 U California at Davis L Rev 1173. In the Canadian context, *Facebook v Douez*, 2017 SCC 33, may have implications for the validity of consent.

[38] Jacquelyn A Burkell, "Remembering Me: Big Data, Individual Identity, and the Psychological Necessity of Forgetting" (2016) 18:1 Ethics & Information Technology 17.

[39] See e.g. Phillip L Hammack, "Narrative and the Cultural Psychology of Identity" (2008) 12:3 Personality & Soc Psychology Rev 222; Dan P McAdams, "Unity and Purpose in Human Lives: The Emergence of Identity As a Life Story" in Robert A Zucker et al, eds, *Personality Structure in the Life Course* (New York: Springer, 1992) 131; Dan P McAdams, "Narrating the Self in Adulthood" in J E Birren et al, eds, *Aging and Biography: Explorations in Adult Development* (New York: Springer, 1996) 131.

[40] Martin A Conway, "Memory and the Self" (2005) 53:4 J Memory & Language 594.

reflect.[41] Implicit in this process is the critical function of forgetting details that are inconsistent with the personal narrative. The integrity of the person, and self-determination, depend critically on the ability to forget—and to have *others* forget—not only potentially harmful information about the self, but also a plethora of inconsequential information that too closely ties the current self to the selves of the past. A world of "no forgetting" is a world that compromises identity formation.[42] Connerton explicitly notes that forgetting is critical "in the formation of a new identity."[43] Consistent with this position, Internet users report that persistent and rich archives of personal information online present particular challenges at times of transition,[44] and adolescence is nothing if not a period of transition. A "right to be forgotten" supports the critical projects of adolescence including role and identity exploration,[45] the evolvement of the sense of self,[46] and the development of a "coherent" identity;[47] by contrast, the lack of such a right puts these developmental projects at risk.

Although there has been a great deal of research on public attitudes toward privacy, measures of privacy concern do not typically address the idea of information deletion or a right to be forgotten.[48] Steinbart *et al*[49] demonstrate that although attitudes toward this right are highly correlated with responses to other aspects of privacy, the "right to be forgotten" remains a separate (and largely un-assessed) aspect of information privacy. Nonetheless, those data that do exist suggest that Internet users favour an Internet with the "ability to forget." In one study of German Internet users, 90% of respondents were in favour of an "Internet that is able to forget," citing a variety of reasons including privacy, control over personal information, and the ability to correct inaccurate information. There exists a variety of indirect evidence suggesting that attitudes about information sharing and use shift, as information "ages" with increasing desire for restriction as the time since posting (in the social media context) increases. Thus, for example, Zhao *et al*[50] suggest that over time, social media content moves from performance through exhibition to a personal archive space, with increasing access restriction at each stage. Ayolon and Toch[51] assessed users' willingness to share social media information over time, demonstrating that willingness to share drops as time from initial posting increases. Explicit assessments of behaviour support this "desire to delete" old information: one study of Twitter users found that over one-quarter of 6-year old tweets had been deleted by users or were associated with deleted accounts.[52] It appears, therefore, that Internet users are in support of a "right to be forgotten," and in some cases, put "forgetting" in practice by electing to delete

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41 Dan P McAdams & Kate C McLean, "Narrative Identity" (2013) 22:3 Current Directions in Psychological Science 233.

42 Burkell, *supra* note 39

43 Paul Connerton, "Seven Types of Forgetting" (2008) 1:1 Memory Studies 59.

44 Oliver L Haimson et al, "Digital Footprints and the Changing Networks During Online Identity Transitions" in *Proceedings of the 18th ACM Conference on Computer Supported Cooperative Work & Social Computing* (Vancouver, 2015) 1176, online: <www.doi.org/10.1145/2675133.2675152>.

45 Jeffrey J Arnett, "Emerging Adulthood: A Theory of Development From the Late Teens Through the Twenties" (2000) 55:5 American Psychologist 469.

46 Gordon W Allport, *Becoming: Basic Considerations For A Psychology Of Personality* (New Haven, CT: Yale University Press, 1955).

47 Erik H Erikson, *Identity, Youth and Crisis* (New York: Norton, 1968).

48 Keith P Steinbart, Mark Keith & Jeffry Babb, "Measuring Privacy Concerns and the Right to Be Forgotten" in *Proceedings of the 50th Hawaii International Conference on System Sciences* (2017) 4697.

49 *Ibid.*

50 Xuan Zhao et al, "The Many Faces of Facebook: Experiencing Social Media As Performance, Exhibition, and Personal Archive" in *Proceedings of the SIGCHI Conference on Human Factors in Computing Systems* (Paris, 2013) 1.

51 Oshrat Ayalon & Eran Toch, "Retrospective Privacy: Managing Longitudinal Privacy in Online Social Networks" in *SOUPS '13 Proceedings of the Ninth Symposium on Usable Privacy and Security* (Newcastle, 2013) Article 4.

52 Mainack Mondal et al, "Forgetting in Social Media: Understanding and Controlling Longitudinal Exposure of Socially Shared Data" in *Proceedings of the 12th Symposium on Usable Privacy and Security* (Denver, 2016) 287.

information that they have posted about themselves in the past.

STATUS OF RIGHT TO BE FORGOTTEN IN CANADA

In Canada, there is no explicit constitutional principle or law that protects the "right to be forgotten." The *Canadian Charter of Rights and Freedoms* does not mention specifically a right to privacy, although section 8 of the Charter is generally interpreted as providing a negative privacy right in the form of the right to be secure against unreasonable search and seizure. Canadian courts have recognized privacy as a "fundamental value that lies at the heart of democracy"[53] and one that has to be balanced against other rights, such as freedom of expression, and against the public interest. The Canadian Privacy Act, regulating the federal public sector (provincial governments have their own public-sector personal information protection laws), and the *Personal Information Protection and Electronic Documents Act (PIPEDA)*, regulating the overwhelming majority of the private sector, provide individuals with some control over the collection and use of information about themselves. If people learn that a commercial organization is inappropriately collecting, using, disclosing, or retaining their personal information, they can contact the Office of the Privacy Commissioner of Canada to lodge a complaint under the *Privacy Act* or *PIPEDA*. Among other provisions, *PIPEDA* requires that organizations must remove personal data when it is no longer necessary to achieve the specific ends for which it was collected and for which consent was sought; the *Privacy Act* has a similar provision that requires a public institution to dispose of personal information under its control as per directives or guidelines from the appropriate minister. There are also specific provincial laws, regarding cyber safety and protection of intimate details, that provide guidelines regarding the circumstances under which information should be removed from public view.[54] Additionally, the *Quebec Charter of Human Rights and Freedoms* (Article 5) expressly guarantees respect for every person's "private life" and Article 4 of the Quebec Charter explicitly protects reputation, but there are still limitations to that framework in addressing issues raised by the right to be forgotten.[55]

As none of these Canadian laws and principles provides a specific principle or protection for a "right to be forgotten," the Office of the Privacy Commissioner of Canada in 2016 posted a discussion paper and initiated a consultation on online reputation *in order to help "create an environment where individuals may use the Internet to explore their interests and develop as persons without fear that their digital trace will lead to unfair treatment."*[56] There were 28 comments submitted in response to the consultation including from academic researchers, press groups, youth and family advocates, law commissions, marketing associations, and technology platforms such as Facebook and Google. Some noted that specific opposition to a "right to be forgotten" on the basis that it was excessive and ill-conceived, would have a negative impact on freedom of expression, and would be unworkable. Many were cautious in their response, noting that such a right would need to be carefully framed and implemented. Still, others argued that the *PIPEDA* framework was sufficient and well positioned to address the issue of reputation management.

Close to half of the comments submitted to the Office of the Privacy Commissioner mentioned youth or children as either a "vulnerable" group or as a cohort particularly affected by online content that had the potential to damage their reputation in the future. Several noted that youth identity development and self-presentation increasingly occurs online with a need to be able to reinvent and revise as they learn from their experiences. For example, one academic pointed out that "children's re-inventability depends on some information impermanence: the capacity to adapt their identity and their views, without forever being tied to outdated information about themselves or views they no longer

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[53] *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers Local 401*, 2013 SCC 62 at para 19, [2013] 3 SCR 733.

[54] Lecomte, *supra* note 14.

[55] Eloise Gratton & Jules Polonetsky, "Droit a L'Oubli: Canadian Perspective on the 'Right to Be Forgotten' Debate" (2017) 15:20 Colorado Technology L J 375.

[56] Canada, *supra* note 25.

espouse."[57] Others pointed out that empirical research underscored that young people, especially females, are concerned about reputational harm, and that although "young people have developed a whole set of strategies and norms to mitigate this danger, [but] corporate practices and online architectures make it incredibly difficult for them to implement those strategies."[58]

In February 2017, the Federal Court of Canada in *A.T. v Globe24H.com* issued a ruling that may pave the way for a Canadian version of the right to be forgotten. "Globe24H.com" was a Romanian website that downloaded Canadian judicial decisions, available through the Canadian Legal Information Institute (CanLII) website, but not indexed by Google, and then posted them more widely and in searchable form online. The website had first generated complaints to the Privacy Commissioner from Canadians whose personal information had been accessed through Google searches and who were told they had to pay the website to have the information removed. The Privacy Commissioner recommended that the website take down the Canadian information and the Canadian Federal court followed up with a ruling that it (the court) had jurisdiction over the website, that the website had violated *PIPEDA*, and ordered the website to remove the Canadian content as there was no evidence that the website's goal was to inform the public on matters of public interest.[59] On a related issue, the Canadian Supreme Court recently established, in *Google Inc. v Equustek Solutions Inc.*[60] that Canadian courts can order the removal, worldwide, of search results, a critical step in establishing a "right to be forgotten." The scope of the decision may be limited by the fact that the information in question reflects activities (in this case the sale of counterfeit devices) that is in and of itself illegal in Canada and many other jurisdictions. At the same time, this decision represents an important step, as it grants an injunction against a search engine (not party to the original complaint) on the basis that the search engine "facilitated" the harm that resulted from the production and sale of illegal counterfeit product.

The Globe24h decision reinforces practical obscurity by removing from the searchable web links to information containing names and other identifying information, and is thus consistent with a right to be forgotten. The justification for the decision, however, is rooted in existing *PIPEDA* provisions and not in a new right to be forgotten in that the decision is a response to inappropriate re-use of personal information that is otherwise publicly available. In addressing the difficult implementation questions and concerns that search engines not be placed in the decisive role in implementing a right to be forgotten, Slane[61] suggests a co-regulatory approach that balances: the interests of service providers; individuals whose personal information is at stake; content providers who host the information; and the public, who would access the information. The goal would be to create a "neutral arbiter" to consider requests for content removal and complaints about inappropriate content, making recommendations with respect to de-listing, de-indexing, or complete removal of the content from the Internet.

CONCLUSION

The practical issues involving a "right to be forgotten" are likely to continue to be points of controversy and debate for several years. However, there appears to be a growing consensus that there should be a way for individuals to exert some control over the vast amount of outdated, no longer relevant, out of context, and incorrect information that now exists on the internet. Even less controversial is the recognition that young people are particularly vulnerable to such information and that a "right to be forgotten" is essential for their healthy moral and psychological development.

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[57] Canada, Office of the Privacy Commissioner of Canada, *Children's Right to be Forgotten*, by Yun Li-Reilly, Submission for the Consultation on Online Reputation (Ottawa: Office of the Privacy Commissioner of Canada, August 2016).

[58] Canada, Office of the Privacy Commissioner of Canada, *Online Reputation, Privacy and Young People: Lessons from Canadian Research*, by Jane Bailey & Valerie Steeves, Submission for the Consultation on Online Reputation (Ottawa: August 2016).

[59] Andrew Duffy, "The Internet Never Forgets. But Should It? That Legal Battle is Raging in Canada and Worldwide", *Ottawa Citizen* (6 August 2017), online: <www.ottawacitizen.com/feature/the-internet-never-forgets-but-should-it-that-legal-battle-is-raging-in-canada-and-worldwide>; Michael Geist, "Did a Canadian Court Just Establish a New Right to be Forgotten Online?" *The Globe and Mail* (6 February 2017), online: <www.theglobeandmail.com/report-on-business/rob-commentary/did-a-canadian-court-just-establish-a-new-right-to-be-forgotten-online/article33915916>.

[60] *Google Inc v Equustek Solutions Inc*, 2017 SCC 34, [2017] 1 SCR 824.

[61] Andrea Slane, "Search Engines and the Right to Be Forgotten: Squaring the Remedy with Canadian Values on Personal Information Flow" (2018) 55:2 Osgoode Hall L J 349.

The recent (January 26, 2018) release by the Office of the Privacy Commissioner of Canada of its draft Position on Online Reputation confirms these points of debate and areas of consensus. The key features of the solutions outlined by the OPC include the "right to ask search engines to de-index web pages that contain inaccurate, incomplete, or outdated information; removal or amendment of information at the source; and education to help develop responsible, informed online citizens."[62] The OPC specifically pointed to removal of links in the results of searches on the individual's name,[63] and "source takedown," which involves removal of content from the internet, as mechanisms consistent with *PIPEDA's* jurisdiction. According to the OPC draft position, under *PIPEDA*, search engines must allow individuals to challenge the accuracy, completeness, and currency of results returned as a result of searches of their name, and to have that information de-indexed if the challenge is successful. Additionally, under *PIPEDA*, individuals should have the ability to remove, in effect implement source takedown, information that they have posted online; the draft position extends a more qualified version of this ability if the information was posted by others.

The OPC also recognizes that both mechanisms involve complex issues of implementation, including the role of private sector companies especially search engines, and points out that "decisions to remove links should take into account the right to freedom of expression and the public's interest in the information remaining accessible." It also suggests that Parliament should study this issue and cautions that the OPC is not recommending an adoption of the European right to be forgotten but is rather interpreting "current Canadian law, and the remedies related to online reputation that can be found therein." With respect to youth, the OPC offers two specific recommendations to Parliament: first, "to consider enshrining in law the near absolute right for youth to remove any content from the internet that they have posted themselves or information they have provided to an organization to post"; and second, "to consider providing youth with some ability, upon reaching the age of majority, to request and obtain removal of online information posted about them by their parents or guardians."

The OPC Draft Position recognition of the "special case" of youth in the context of the right to be forgotten reflects the psychological and philosophical arguments that we have raised in this discussion. Given our analysis, we completely concur with the first of these recommendations. As we have discussed, youth have a relatively limited ability to understand the impact of information that they post online, and a long-time horizon in which to experience the consequences of such posting, both of which argue for a right to remove posted information. Some may argue against enshrining this right; arguing that this provision could limit public access to information about individuals who will, in the future, become public figures. Our position is that future "public figures" have the same limitations as all youth with respect to decision-making regarding personal revelations, and thus deserve the same considerations with respect to a right to be forgotten. Particularly in the case of self-posted information (which is not at the time of posting of widespread public interest), we believe that the right of the youth to remove this information should outweigh any potential future public interest. We further contend that individuals, whether "public figures" or not, should be afforded the right to de-index or de-list information posted about them as youth by others, including parents and other relatives, because the expressive rights of these individuals should not outweigh the privacy rights of youth. To decide otherwise would be to privilege the expressive rights of parents over the right of a child to construct their own identity—a privileging which would be difficult to justify in any case, but which is particularly fraught in the case of parent and child with the inherent differential of power and control. Finally, we are concerned about the age restriction for the requested removal of information posted about them by their parents or guardians. Youth, as well as adults, could have concerns about content posted about them, and could experience negative consequences as a result of that content. Indeed, as we have pointed out, the identity-related consequences of such posting could be *more* acute for youth than for adults, and as a result, youth may have a greater need for the removal of such information.

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[62] Canada, Office of the Privacy Commissioner of Canada, *Draft Position on Online Reputation*, (Ottawa: January 2018).

[63] A process they call "de-indexing," but which more appropriately fits the definition of "de-listing" used elsewhere; see *ibid*.

REFERENCES

Abril, Patricia Sanchez., and Jacqueline D. Lipton. "The Right to be Forgotten: Who Decides What the World Forgets." *Kentucky Law Journal* 103 (2014-15): 363-389.

Allport, Gordon W. *Becoming: Basic Considerations for A Psychology Of Personality*. New Haven, CT: Yale University Press, 1955.

Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401, [2013] 3 SCR 733.

Ambrose, Meg Leta. "It's About Time: Privacy, Information Life Cycles, and the Right to be Forgotten." *Stanford Technology Law Review* 16, no.2 (2013): 369-421.

Arnett, Jeffrey J. "Emerging adulthood: A theory of development from the late teens through the twenties." *American Psychologist*, 55, no.5 (2000): 469-480.

Article 29 Data Protection Working Party. "Guidelines on the Implementation of the Court of Justice of the Eurpoean Union Judgment on '*Google Spain and Inc V. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*' C-131/2". November 26, 2014.

Ayalon, Oshrat and Eran Toch. "Retrospective Privacy: Managing Longitudinal Privacy in Online Social Networks." In *SOUPS '13 Proceedings of the Ninth Symposium on Usable Privacy and Security*, Article 4. ACM, 2013.

Bailey, Jane and Valerie Steeves. "Online Reputation, Privacy and Young People: Lessons from Canadian Research." Submission to the Office of the Privacy Commissioner of Canada for the Consultation on Online Reputation (August, 2016). Accessed January 16, 2018. https://www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/consultation-on-online-reputation/submissions-received-for-the-consultation-on-online-reputation/or/sub_or_04/.

Bennett, Steven C. "The 'Right to be Forgotten': Reconciling EU and US Perspectives." *Berkeley Journal of International Law* 30, no.1 (2012): 161-195.

Blanchette, Jean-Francois and Deborah G. Johnson. "Data Retention and the Panoptic Society: The Social Benefits of Forgetfulness." *The Information Society* 18, no.1 (2002): 33-45.

Burkell, Jacquelyn A. "Remembering Me: Big Data, Individual Identity, and the Psychological Necessity of Forgetting." *Ethics and Information Technology* 18, no. 1 (2016):17-23.

Christofides, Emily, Amy Muise, and Serge Desmarais. "Information Disclosure and Control on Facebook: Are They Two Sides of the Same Coin or Two Different Processes?" *CyberPsychology & Behavior* 12, no.3 (2009): 341–345.

Cofone, Ignacio. "Google v. Spain: A Right to be Forgotten?" *Chicago-Kent Journal of International and Comparative Law* 15, no.1 (2015): 1-11.

Collins, W. Andrew and Brett Laursen. "Changing Relationships, Changing Youth: Interpersonal Contexts of Adolescent Development." *The Journal of Early Adolescence* 24, no.1 (2004): 55-62.

Connerton, Paul. "Seven types of forgetting." *Memory Studies* 1, no.1 (2008): 59-71.

Conway, Martin A. "Memory and the Self." *Journal of Memory and Language* 53, no. 4 (2005): 594-628.

de Andrade, Noberto Nuno Gomes. "Oblivion: The Right To Be Different ... From Oneself: Re-Proposing The Right To Be Forgotten." In *The Ethics of Memory in a Digital Age: Interrogating the Right to Be Forgotten*, edited by Alessia Ghezzi, Angela G. Periera and Lucia Vesnić-Alujević, 65-81. London: Palgrave MacMillan, 2014.

Duffy, Andrew. “The internet never forgets. But should it? That legal battle is raging in Canada and worldwide.” *Ottawa Citize*n, August 6, 2017. http://ottawacitizen.com/feature/the-internet-never-forgets-but-should-it-that-legal-battle-is-raging-in-canada-and-worldwide.

Erikson, Erik H. *Identity, Youth and Crisis*. New York: Norton, 1968.

Facebook v Douez, 2017 SCC 33.

Flaherty, David H. *Protecting Privacy in Surveillance Societies: The Federal Republic of Germany, Sweden, France, Canada, and the United States*. Chapel Hill: University of North Carolina Press, 1989.

Fleischer, Peter. 2011. “Foggy Thinking About the Right to Oblivion,” Privacy . . . ? (blog), March 9, 2011, http://peterfleischer.blogspot.com/2011/03/foggy-thinking-about-right-to-oblivion.html.

Gandy, Oscar Jr. *The Panoptic Sort: A Political Economy of Personal Information*. Boulder: Westview Press, 1993.

Geist, Michael. “Did a Canadian court just establish a new right to be forgotten online?” *The Globe and Mail*, Feb 6, 2017. https://www.theglobeandmail.com/report-on-business/rob-commentary/did-a-canadian-court-just-establish-a-new-right-to-be-forgotten-online/article33915916/.

Google Inc v Equustek Solutions Inc, 2017 SCC 34.

Gratton, Eloise. “Forget about bringing the ‘right to be forgotten’ to Canada.” *Financial Post*, May 9, 2016. http://business.financialpost.com/opinion/forget-about-bringing-the-right-to-be-forgotten-to-canada.

Gratton, Eloise and Jules Polonetsky. “Droit A L’Oubli: Canadian Perspective on the ‘Right to be Forgotten’ Debate.” *Colorado Technology Law Journal* 15, no. 20 (2017): 337-392.

Haimson, Oliver L., Jed R. Brubaker, Lynn Dombrowski, Gillian R. Hayes. “Digital Footprints and The Changing Networks During Online Identity Transitions.” In *Proceedings of the 18th ACM Conference on Computer Supported Cooperative Work & Social Computing*, pp. 1176-1190. ACM, 2016. https://doi.org/10.1145/2675133.2675152.

Hammack, Phillip L. “Narrative and The Cultural Psychology of Identity.” *Personality and Social Psychology Review* 12, no.3 (2008): 222-247.

Kelly, Michael J. and David Satola. “The Right to Be Forgotten.” *University of Illinois Law Review* 1 (2017): 1-63.

IFLA. “IFLA statement on the right to be forgotten” (2016). Accessed February 22, 2018. https://www.ifla.org/publications/node/10320.

Laudon, Kenneth C. *Dossier Society: Value Choices in the Design of National Information Systems*. New York: Columbia University Press, 1986.

Lecomte, Sophie. “The Right To Be Forgotten In The Digital Age: Perspectives On Relevant Legislation In Europe, Canada And The US.” *CanLII Connects*, February 9, 2017. http://canliiconnects.org/en/commentaries/44785.

Lee, James. “SB 568: Does California’s Online Eraser Button Protect the Privacy of Minors?” *University of California at Davis Law Review* 48 (2014): 1173-1205.

Lewis, Catherine C. “How Adolescents Approach Decisions: Changes Over Grades Seven to Twelve And Policy Implications.” (1981). *Child Development* 52, no.2: 538-544.

Li-Reilly, Yun. 2016. “Children’s Right to be Forgotten,” Submission to the Office of the Privacy Commissioner of Canada for the Consultation on Online Reputation (August, 2016). Accessed January 16, 2018.

https://www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/consultation-on-online-reputation/submissions-received-for-the-consultation-on-online-reputation/or/sub_or_26/.

Loewenstein, George, and Erik Angner. "Predicting and Indulging Changing Preferences." In *Time and Decision: Economic And Psychological Perspectives On Intertemporal Choice* edited by George Loewenstein, Daniel Read, and Roy Baumeister, 351-392. New York: Russell Sage Foundation, 2003.

Loewenstein, George, Ted O'Donoghue, and Matthew Rabin. "Projection Bias in Predicting Future Utility." *The Quarterly Journal of Economics* 118, no.4 (2003): 1209-1248.

Loewenstein, George and David Schkade. "Wouldn't It Be Nice? Predicting Future Feelings." In *Well-Being: The Foundations Of Hedonic Psychology*, edited by Daniel Kahneman, Ed Deiner, and Norbert Schwarz 85-105. New York: Russell Sage Foundation, 1999.

Markey, Edward J. "EU-US Conference on Privacy and the Protection of Personal Data." (March 18, 2012). Accessed January 17, 2018. https://www.markey.senate.gov/news/press-releases/rep-markey-speaks-at-eu-us-conference-on-privacy-and-the-protection-of-personal-data.

Mayer-Schonberger, Viktor. *Delete: The Virtue of Forgetting in the Internet Age*. Princeton: Princeton University Press, 2009.

McAdams, Dan P. "Unity and Purpose In Human Lives: The Emergence Of Identity As A Life Story." In Personality Structure in the Life Course, edited by Robert. A. Zucker, A.I. Rabin, Joel Aronoff & Sara J. Frank, 131-148. New York: Springer, 1992.

McAdams, Dan P. "Narrating the Self in Adulthood." In Aging and Biography: Explorations in Adult Development, edited by J.E. Birren, G.M. Kenyon, J. Ruth, J.J.F. Schroots & T. Svensson, 131-148). New York: Springer, 1996.

McAdams, Dan P., and Kate C. McLean. "Narrative Identity." *Current Directions in Psychological Science* 22, no. 3 (2013): 233-238.

Miller, Arthur R. *The Assault on Privacy: Computers, Data Banks, and Dossiers*. Ann Arbor: University of Michigan Press, 1971.

Mondal, Mainack, Johnnatan Messias, Saptarshi Ghosh, Krishna P. Gummadi and Aniket Kate. "Forgetting In Social Media: Understanding and Controlling Longitudinal Exposure of Socially Shared Data." In *Proceedings of the 12th Symposium on Usable Privacy and Security*, pp. 287-299. ACM, 2016.

Office of the Privacy Commissioner of Canada. "Online Reputation: What are they saying about me?" last modified January 21, 2016. Accessed January 17, 2018. https://www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2016/or_201601/.

Office of the Privacy Commissioner of Canada. "Draft Position on Online Reputation," last modified January 26, 2018. Accessed January 30, 2018. https://www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/consultation-on-online-reputation/pos_or_201801/.

Palfrey, John and Urs Glasser. *Born Digital: Understanding the First Generation of Digital Natives*. New York: Basic Books, 2008.

Pino, Giorgio. "The Right to Personal Identity In Italian Private Law: Constitutional Interpretation And Judge-Made Rights." In the Harmonization of Private Law in Europe, edited by Mark Van Hoecke and François Ost (Eds.), 225-237. Oxford: Hart Publishing, 2000.

Reding, Viviane. "The EU Data Protection Reform 2012: Making Europe the Standard Setter for Modern Data Protection Rules in the Digital Age," (presentation at the Innovation Conference Digital, Life, Design, Munich,

Germany, January 22 2017). http://europa.eu/rapid/press-release_SPEECH-12-26_en.htm.

Reyna, Valerie F. and Frank Farley. “Risk and Rationality In Adolescent Decision Making.” *Psychological Science in the Public Interest* 7, no.1 (2006): 1-44.

Rosen, Jeffrey. “The Right to be Forgotten.” *Stanford Law Review Online*, 64 (February, 2012): 88-92.

Rustad, Michael L. and Sanna Kulevska. “Reconceptualizing the Right to be Forgotten to Enable Transatlantic Data Flow.” *Harvard Journal of Law and Technology* 28 no.2 (2015): 349-417.

Shoor, Emily Adams. “Narrowing the Right to be Forgotten: Why the European Union Needs to Amend the Proposed Data Protection Regulation.” *Brooklyn Journal of International Law* 39 no.1 (2014): 487-519.

Slane, Andrea. “Search Engines and the Right to Be Forgotten: Squaring the Remedy with Canadian Values on Personal Information Flow.” *Osgoode Hall Law Journal* 55 no.2 (2018 Forthcoming). https://ssrn.com/abstract=3028072 or http://dx.doi.org/10.2139/ssrn.3028072<https://dx.doi.org/10.2139/ssrn.3028072>?.

Solove, Daniel. “A Taxonomy of Privacy.” *University of Pennsylvania Law Review* 154, no.3 (2006): 477-564.

Soman, Dilip, George Ainslie, Shane Frederick, Xiuping Li, John Lynch, et al. “The Psychology Of Interotemporal Discounting: Why Are Distant Events Valued Differently From Proximal Ones?” *Marketing Letters* 16, no.3/4 (2005): 347-360.

Steinbart, Keith P., Mark Keith, and Jeffry Babb. “Measuring Privacy Concerns and The Right To Be Forgotten.” In *Proceedings of the 50th Hawaii International Conference on System Sciences* (2017): 4697-4976.

Steinberg, Laurence, and Amanda Sheffield Morris. “Adolescent development.” *Annual Review of Psychology* 52, no. 1 (2001): 83-110.

Steinberg, L., & Morris, A. S. “Adolescent Development.” *Annual Review of Psychology* 52 no.1 (2001): 83-110.

van der Sloot, Bart. “Privacy As Human Flourishing: Could A Shift Towards Virtue Ethics Strengthen Privacy Protection In The Age Of Big Data?” *Journal of Intellectual Property, Information Technology and Electronic Communication* 5 (2014): 230-244.

van der Sloot, Bart. “Privacy As A Personality Right: Why The ECHTR’s Focus On Ulterior Interests Might Prove Indispensable In The Age Of Big Data.” *Utrech Journal of International and European Law* 31, no.80 (2015): 25-50.

Westin, Alan. *Privacy and Freedom*. New York: Atheneum 1967.

Zhao, Xuan, Niloufar Salehi, Sasha Naranjit, Sara Alwaalan, Stephen Voida, and Dan Cosley. “The Many Faces of Facebook: Experiencing Social Media as Performance, Exhibition, and Personal Archive.” In *Proceedings of the SIGCHI Conference on Human Factors in Computing Systems*, pp. 1-10. ACM, 2013.

UNLAWFUL DISTINCTIONS? CANADIAN HUMAN RIGHTS LAW AND ALGORITHMIC BIAS

Jacquelyn Burkell
The University of Western Ontario
Faculty of Information & Media Studies
Assistant Dean, Research
Associate Professor

Jane Bailey
University of Ottawa
Faculty of Law
Professor*

Abstract: Human rights legislation in Canada prohibits discrimination in the provision of goods and services to the public, in employment, and in accommodation based on certain grounds, such as race, gender, sexual orientation, and gender identity (*e.g. Canadian Human Rights Act*, sections 3 and 5). In so doing, it imposes equality-based restrictions on certain kinds of decision-making by public and private providers of goods, services, jobs, and accommodation. Increasingly, in order to access these resources, Canadians use and are subjects of online search engines that rely on machine-based algorithms to profile and sort users to personalize search results and ad placement, and to understand and identify cultural categories (*e.g.* images of "professional hairstyles"). These algorithms not only affect access to these resources but serve to shape people's lives in quite fundamental ways. Since the algorithms by which these decisions are made are not ordinarily open to the public, and since it can be difficult to determine the data over which the analyses are carried, it can be very difficult to determine the criteria used as the basis for the sorting or categorizing process. As a result, citizens are typically unaware whether decisions being made that affect specific individuals—for example, regarding the targeting of information (*e.g.* advertisements) or assessment or scoring results (*e.g.* credit risk score)—are based on grounds on which discrimination is prohibited by human rights legislation. However, recent findings suggest that prohibited grounds, such as race, are playing a role in determining who gets access to what information, and that these same algorithms are determining the prices charged for the goods and services purchased.[1] Further, algorithms produce representations that can fundamentally affect our understandings of others and ourselves. This paper begins to explore algorithmic bias and its relationship to human rights, highlighting some of the challenges for obtaining meaningful responses to algorithmic discrimination under Canadian human rights legislation as currently framed and interpreted.

Keywords: Algorithms, discrimination, profiling, equality, Canadian law

INTRODUCTION

I. ALGORITHMIC DISCRIMINATION

Algorithms are everywhere. A recent report from the PEW Research Center discusses the "pros and cons of the *algorithm age*"[2] [emphasis added]; Jack Balkin writes about a move "from the age of the Internet to the *Algorithmic Society*"[3] [emphasis added]; readers of a recent article in the New Republic were told that "algorithms rule the modern world, silent workhorses aligning datasets and systematizing the world."[4] Technology

* Thanks to Suzanne Dunn, Pat Herrera, and Bay Jaber for their research assistance and to SSHRC for funding *The eQuality Project*, a 7-year partnership initiative, the work of which this paper forms a part.

1 Cathy O'Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (New York: Broadway Books, 2017); Latanya Sweeney, "Discrimination in Online Ad Delivery" (2013) 11:3 Queue 1.

2 Lee Rainie & Janna Anderson, *Code-Dependent: Pros and Cons of the Algorithm Age*, (8 February 2017) online: Pew Research Center <www.pewinternet.org/2017/02/08/code-dependent-pros-and-cons-of-the-algorithm-age/>.

3 Jack M Balkin, "The Three Laws of Robotics in the Age of Big Data" (2017) 78:5 Ohio State L J 1217.

4 Alang Navneet, *Life in the Age of Algorithms*, (13 May 2016) online: The New Republic <www.newrepublic.com/article/133472/life-age-algorithms>; see also Tal Z Zarsky, "Understanding Discrimination in the Scored Society" (2015) 89 Washington L Rev 1375.

experts, scholars, and business and government leaders agree that algorithms are ubiquitous—invisibly woven into almost every aspect of modern life—and the use (and usefulness) of algorithms is only going to increase.[5] Algorithms are here to stay.

Algorithms are, as their ubiquitous application attests, useful. Algorithms determine the information returned in our online searches, helping to ensure that searchers are provided access to the information most relevant to them. Algorithms assist lending institutions to determine whether to accept a credit application by flagging "high risk" applicants. Algorithms suggest new entertainment possibilities based on what we, and others profiled as being like us, have previously enjoyed. Algorithms can reveal things about us that we have not shared,[6] understand us better than do our friends and family,[7] and are even purported to know us better than we know ourselves.[8] Algorithms categorize us, predict our activities, shape our preferences, and determine our outcomes.

Algorithms are also biased. Face recognition algorithms, for example, regularly fail to recognize the faces of racialized persons,[9] improperly identify expressions in images of non-Caucasian individuals,[10] and even mis-label such images in ways that are manifestly racist.[11] In many cases, the role of algorithms is to categorize and/or select content, with non-egalitarian results. For example, according to a Google search result in 2016, "unprofessional hairstyles for work" were those displayed by black women with natural hair; in contrast, "professional hairstyles for work" were hairstyles typically worn by white women.[12] The search engine also under-represents women in the category of images of CEOs, not just in terms of the proportion of women in the population as a whole, but also in relation to the proportion of CEOs who are women.[13] A program used in the American justice system to assess risk of reoffending demonstrated bias by assigning a higher "risk level" to black defendants who did not go on to reoffend than to white defendants in the same situation.[14] An algorithm that determined which areas were to be excluded from Amazon Prime delivery systematically excluded neighbourhoods in major US cities with a high proportion of black residents.[15]

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5 Rainie & Anderson, *supra* note 2.

6 Gus Lubin, *The Incredible Story of How Target Exposed a Teen Girl's Pregnancy*, (16 February 2012) online: Business Insider <www.businessinsider.com/the-incredible-story-of-how-target-exposed-a-teen-girls-pregnancy-2012-2>; Michal Kosinski, David Stillwell & Thore Graepel, "Private Traits and Attributes are Predictable from Digital Records of Human Behavior" (2013) 110:15 Proceedings of the National Academy of Sciences of the United States of America 5802.

7 Wu Youyou, Michal Kosinski & David Stillwell, "Computer-Based Personality Judgments are More Accurate Than Those Made by Humans" (2015) 112:4 Proceedings of the National Academy of Sciences of the United States of America 1036.

8 Walt Hickey, *Spotify Knows Me Better Than I Know Myself*, (18 September 2014) online: FiveThirtyEight <www.fivethirtyeight.com/features/spotify-knows-me-better-than-i-know-myself>.

9 Ian Tucker, "'A White Mask Worked Better': Why Algorithms are not Colour Blind", *The Guardian* (28 May 2017), online: <www.theguardian.com/technology/2017/may/28/joy-buolamwini-when-algorithms-are-racist-facial-recognition-bias>; Joy Buoalmwini, "How I'm Fighting Bias in Algorithms" (28 March 2017), online: YouTube <www.youtube.com/watch?v=UG_X_7g63rY>.

10 Adam Rose, "Are Face-Detection Cameras Racist?", *Time* (22 January 2010), online: <www.content.time.com/time/business/article/0,8599,1954643,00.html>.

11 Loren Grush, "Google Engineer Apologizes After Photos App Tags Two Black People As Gorillas", *The Verge* (1 July 2015), online: <www.theverge.com/2015/7/1/8880363/google-apologizes-photos-app-tags-two-black-people-gorillas>.

12 Leigh Alexander, "Do Google's 'Unprofessional Hair' Results Show it is Racist", *The Guardian* (8 April 2016), online: <www.theguardian.com/technology/2016/apr/08/does-google-unprofessional-hair-results-prove-algorithms-racist->. Search results originally Tweeted by MBA Student Bonnie Kamona @BonKamona (5 April 2016 at 14:04). Note that a recent search using the same terms suggests that the bias has been partially addressed.

13 University of Washington, "Who's a CEO? Google Image Results Can Shift Gender Biases", *EurekAlert!* (9 April 2015), online: <www.eurekalert.org/pub_releases/2015-04/uow-wac040915.php>.

14 Julie Angwin et al, "Machine Bias", *ProPublica* (23 May 2016), online: <www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.

15 David Ingold & Spencer Soper, *Amazon Doesn't Consider the Race of its Customers. Should It?*, (21 April 2016) online: Bloomberg <www.bloomberg.com/graphics/2016-amazon-same-day>.

Although algorithms can be biased and designed to overvalue or undervalue particular data with discriminatory effect, in many cases, algorithmic bias can be traced back to the data that feed the algorithm, and from there to the world that produces the data, rather than to the code itself: "It's not the algorithm, it's the data."[16] Many, if not most, artificial intelligence algorithms currently in use are essentially pattern extractors, identifying complex associations—correlations—in the data they analyze. Thus, these algorithms analyze data about, and collected from, the world as it is, and extract the systematic *but not necessarily causal* relationships reflected in those data. Sometimes, the problems with the dataset on which the algorithm is trained are evident. If face recognition algorithms are (inexplicably) "trained" on images of Caucasian faces, they will better (and perhaps only) recognize such faces.[17] In other cases, it is more difficult to identify the source of a discriminatory outcome.[18] If men who are CEOs are more likely to be the subject of photographs posted online because: there are more of them than women CEOs; they are more likely to be the subject of such photographs because of the profile of the companies they control; or because of a general societal bias that marks men as better representative CEOs than women, the search engine will return an inappropriately high proportion of images of men in response to a general request for images of CEOs, absent corrective action taken to avoid that result. Credit score algorithms that systematically disadvantage women and minorities can have that result even when the characteristics of gender and race are *nowhere* directly encoded in the data.[19] If the data *exclude* any explicit representation of race, but *include* a variety of measures correlated to race (such as income, educational status, neighbourhood of residence, *etc.*), those correlated measures can act as a *proxy* for race—with the result that racialized individuals, without ever being explicitly identified as such, may receive systematically lower credit scores. Moreover, the patterns recognized in—and extracted from—these historical data can *only* reflect the biases inherent in the data themselves (and thus in the world those data reflect), absent corrective action. If society is such that women and men are differentially likely to occupy different occupational roles, then algorithms that use those data will, unless extraordinary corrective action is taken,[20] necessarily reflect those same biases. Thus, it is entirely predictable Google translate would resolve gender-neutral pronouns (*e.g.* when translating from Turkish into English) applied to professions for which there is real-world gender inequity in ways consistent with these inequities; for example, identifying "soldiers" as male and "nurses" as female in the English translation when no such distinctions were made in the original Turkish.[21]

Broadly speaking, algorithmic biases result in two types of harms: allocative harms and representational harms.[22] Allocative harms are precisely the type of harm that human rights legislation is designed to address: the unjustified unequal distribution of outcomes or resources on the basis of a protected ground. From a human rights perspective, allocating or denying benefits based upon an individual's race, gender, sexuality, or other protected ground is degrading and dehumanizing because it communicates that the individual is to be judged *qua* group, rather than as a person, and because such decisions are frequently based on stereotypical assumptions about groups historically disadvantaged

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[16] Keith Kirkpatrick, "It's Not the Algorithm: It's the Data" (2017) 60:2 Communications of the ACM 21.

[17] Buoalmwini, *supra* note 9.

[18] Zarsky, *supra* note 4.

[19] Danielle Citron & Frank Pasquale, "The Scored Society" (2014) 89:1 Washington L Rev 1.

[20] Tolga Bolukbasi et al, "Man is to Computer Programmer as Woman is to Homemaker? Debiasing Word Embeddings" in Michael I Jordan, Yann LeCun & Sara Solla, eds, *Advances in Neural Information Processing Systems Conference Proceedings* (Cambridge, Mass: MIT Press, 2016) 4349; James Johndrow & Kristin Lum, "An Algorithm for Removing Sensitive Information: Application to Race-independent Recidivism Prediction" (2017) arXiv preprint arXiv:1703.04957; Michael Feldman et al, "Certifying and Removing Disparate Impact" in Longbing Cao et al, eds, *Proceedings of the 21th ACM SIGKDD International Conference on Knowledge Discovery and Data Mining* (ACM, 2015) 259.

[21] Nikhil Sonnad, *Google Translate's Gender Bias Pairs 'He' with 'Hardworking' and 'She' with Lazy and Other Examples*, (29 November 2017) online: Quartz <www.qz.com/1141122/google-translates-gender-bias-pairs-he-with-hardworking-and-she-with-lazy-and-other-examples>.

[22] Kate Crawford, "The Trouble with Bias" (12 December 2017), Keynote Speech (NIPS Conference), online: YouTube <www.youtube.com/watch?v=6Uao14elyGc>; see also Nancy Fraser, "Rethinking Recognition" (2000) 3:3 New Left Review 107; and Rebecca Cook & Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (Philadelphia: University of Pennsylvania Press, 2010).

by discrimination.[23] Thus, when Facebook's ad categories allow housing-related advertisers to exclude African-Americans, Hispanics, and Asian-Americans from seeing their ads, members of those groups have reduced opportunity to rent or purchase the properties in question,[24] raising the very kind of allocative harm human rights legislation aims to address. Similarly, when consumers from Asian-dominated neighbourhoods are charged a higher price for Princeton Review online SAT tutoring packages, they are experiencing price discrimination,[25] which should also be a concern of human rights legislation. Often allocative harms result from (or at least are linked with) biased representations and their associated representational harms.

Like allocative bias, representational biases that generalize about groups of people based on socially constructed categories like race degrade, diminish the dignity of, and marginalize[26] individuals who are understood to occupy the categories that come to be defined by these biased generalizations. They affect not only who others believe us to be, but also who we believe ourselves to be, and thus they influence psychological well-being and behaviour.[27] Biased search results, for example, teach young women that they do not fit the model of a CEO (and conversely suggest that young men necessarily do),[28] and that women, unlike men, are (and thus should aspire to be) nurses, not doctors.[29] Biased search results have implied that black women are "unprofessional" by identifying their hairstyles, in contrast to those of white women, as being "unfit" for professional settings.[30] These effects are equally as serious as the effects of allocative harms, but they may not attract human rights protection (due, in part, to concerns about protecting freedom of expression, which is discussed in Part II below).[31] In some cases, the point may be moot, since representational biases underlie and indeed form the basis for allocative harms, and addressing the latter will, to some extent, deal with the negative impact of the former.[32] At the same time, the fundamental and separate harm of representational bias is the entrenchment, exacerbation, and potentially even development of negative stereotypes.[33]

It would be easy to discount algorithmic biases on the ground that they represent statistically valid generalizations.[34] For example, COMPAS results that identify black offenders as more likely to recidivate do so precisely because recidivism among this group is more

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[23] *McKinney v University of Guelph*, [1990] 3 SCR 229 at para 413, 1990 CanLII 60 [*McKinney*] per Wilson J dissenting but not on this point, cited with approval in *Vilven v Air Canada*, 2009 FC 367 at paras 271–273, [2010] 2 FCR 189 [*Vilven*].

[24] Julia Angwin & Terry Parris Jr, "Facebook Lets Advertisers Exclude Users By Race", *ProPublica* (28 October 2016), online: <www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-race>.

[25] Jeff Larson, Surya Mattu & Julia Angwin, "Unintended Consequences of Geographic Targeting", *ProPublica* (1 September 2015), online: <www.static.propublica.org/projects/princeton-review/princeton-review-methodology.pdf>.

[26] Alexandra Timmer, "Judging Stereotypes: What the European Court of Human Rights Can Borrow From American and Canadian Equal Protection Law" (2015) 63:1 American J Comparative L 239.

[27] See e.g. Claude Steele, Steven Spencer & Joshua Aronson, "Contending with Group Image: The Psychology of Stereotype and Social Identity Threat" (2002) 34 Advances in Experimental Soc Psychology 379; Richard Delgado, "Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law" (1994) 143:2 U Pennsylvania L Rev 379.

[28] University of Washington, *supra* note 13.

[29] Matthew Kay, Cynthia Matuszek & Sean Munson, "Unequal Representation and Gender Stereotypes in Image Search Results for Occupations" in Bo Begole & Jinwoo Kim, eds, *Proceedings of the 33rd Annual ACM Conference on Human Factors in Computing Systems (CHI '15)* (ACM, 2015) 3819.

[30] Alexander, *supra* note 12. Note that a recent search using the same terms suggests that the bias has been partially addressed.

[31] Jane Bailey, "Twenty Years Later Taylor Still has it Right: Section 13 of the CHRA's Continuing Contribution to Equality" in Sheila McIntyre & Sanda Rodgers, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, Ontario: Supreme Court Law Review and LexisNexisCanada, 2010) 349.

[32] Crawford, *supra* note 22.

[33] *Ibid*.

[34] Zarsky, *supra* note 4.

common in the historical data that has been used to make the predictions. The problems with this reasoning are myriad, and include the reality that a *statistical* prediction based on group membership does not and cannot accurately reflect the truth about an individual,[35] as well as the moral position that some differences, and in particular those reflecting protected grounds, should be actively *ignored* in allocation decisions because they are themselves reflective of existing discrimination.[36] Many have recognized the self-reinforcing character of algorithmic discrimination,[37] whereby the discriminatory outcomes of the algorithms that affect so many aspects of our lives will exacerbate the very distinctions they reflect.[38] At the very least, as Cynthia Dwork argues, "historical biases in the training data will be learned by the algorithm, and past discrimination will lead to future discrimination."[39] In the absence of evidently discriminatory allocative outcomes, algorithmic bias can still have substantial negative effects due to the impact of harmful stereotypes. The results of these algorithms present a seemingly ever more sophisticated picture of "a good credit risk," or "a doctor," or a "gay" face,[40] in effect telling us how to identify those who fall into each of these (and many other) categories. These categorization rules, which often reflect discriminatory stereotypes and practices already present in society, are simply stereotypes in another guise. When the results of these categorizations are fed back to us in the form of loan decisions, images of physicians, or the identified sexual orientation of friends and acquaintances, they shape in turn our perceptions of the world and the way we act within it.[41]

Because algorithmic bias involves issues of discrimination, human rights legislation[42] seems particularly relevant as a source of redress. Indeed, the possibility for forward-looking remedies makes human rights legislation especially attractive when addressing systemic bias. As a result, cases alleging unlawful discrimination have surfaced in Australia and in the United States, with at least one in the US focused on the platform provider (Facebook) and another focused on companies who used the Facebook platform to deliver allegedly discriminatory ads.[43] While claims such as these, in which a platform provider has explicitly relied on a prohibited ground, such as race or sex, in a way that adversely differentiates a member of a protected group, existing Canadian human rights legislation seems well positioned to respond. However, our purpose in the remainder of this paper is to highlight some of the challenges to meaningful responses under current law, particularly in more complex cases.

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[35] Timmer, *supra* note 26.

[36] See Frederick Schauer, *Profiles, Probabilities and Stereotypes* (Boston: Harvard University Press, 2006).

[37] Rainie & Anderson, *supra* note 2; Zarsky, *supra* note 4.

[38] Citron & Pasquale, *supra* note 19; Oscar Gandy Jr, "Engaging Rational Discrimination: Exploring Reasons for Placing Regulatory Constraints on Decision Support Systems" (2010) 12:1 Ethics & Information Technology 29.

[39] Claire Cain Miller, "Algorithms and Bias: Q and A with Cynthia Dwork", *The Upshot* (10 August 2015), online: <www.nytimes.com/2015/08/11/upshot/algorithms-and-bias-q-and-a-with-cynthia-dwork.html>.

[40] Michal Kosinski & Yilun Wang, "Deep Neural Networks are more Accurate than Humans at Detecting Sexual Orientation from Facial Images" (2018) 114:2 J Personality & Soc Psychology 246.

[41] Timmer, *supra* note 26.

[42] US, Federal Trade Commission, *Big Data: A Tool for Inclusion or Exclusion?: Understanding the Issues* (Washington, DC: Federal Trade Commission, 2016) at 17–21.

[43] See e.g.: *Rana v Google Australia Pty Ltd*, 2013 FCA 60 (dismissed claim involving complaints under Australia's Disability Discrimination Act and the Racial Discrimination Act); *Casterlow-Bey v Google Internet Search Engine Co*, 2017 US Lexis 176156 (WD Wash 2017) (No. 3:17-cv-05621-RBL-JRC) (dismissed civil rights claim under 42 US Code § 1983); *Onuoha v Facebook Inc*, 2017 US Lexis 53963 (ND Cal 2017) (No. 5:16-cv-06440-EJD) (discovery enjoined pending determination of Facebook's motion to dismiss claims of discrimination under the Fair Housing Act and the Civil Rights Act on the basis that Facebook is immune under s. 230 of the Communications Decency Act); and *Communications Workers of America et al v T-Mobile US Inc, Amazon.com Inc, Cox Communications Inc et al* (Class Action Complaint, US District Ct for the N Dist of Cal), online: <www.scribd.com/document/367696742/CWA-v-Tmobile-Complaint> (class action complaint alleging age discrimination in job advertising on Facebook contrary to the DC Human Rights Act and other analogous anti-discrimination laws).

II. ALGORITHMIC CHALLENGES FOR HUMAN RIGHTS RESPONSES IN CANADA

Human rights legislation exists in every Canadian province and territory, as well as at the federal level.[44] Given that human rights legislation "is intended to give rise…to individual rights of vital importance,"[45] the Canadian courts treat it as quasi-constitutional.[46] As a result, "the rights enunciated [in human rights laws are to] be given their full recognition and effect" through such "fair, large, and liberal interpretation, as will best ensure that [their] objects are attained," [47] and exceptions to legislative protections are to be "narrowly construed."[48]

Addressing the kinds of algorithmic biases discussed in Part I through complaints under Canadian human rights legislation raises a number of issues—everything from which tribunal has jurisdiction,[49] to whether there must be a directly identifiable individual target of discrimination in order to initiate a claim.[50] All of these are issues that merit closer consideration, but given space constraints we propose to focus on two complexities of particular concern: (i) the ability of human rights legislation as currently framed to meaningfully respond to invidious representational harms that cannot immediately be linked to allocative harms or other discriminatory practices; and (ii) the complexity that statistical correlations underlying algorithmic sorting may introduce into human rights claims.

A. IS THERE A HUMAN RIGHTS REMEDY FOR REPRESENTATIONAL HARMS?

Canadian human rights legislation is primarily focused on allocative harms relating to distribution, denial, or adverse differentiation in areas such as employment, housing, and publicly available goods and services.[51] The legislation prohibits allocations based on prohibited grounds, such as race, gender, sexual orientation, age, and disability.[52] However, it also addresses certain kinds of representational harms, but generally only where they can be connected with a discriminatory practice (i.e. an allocative harm). For example, under section 12 of the *Canadian Human Rights Act (CHRA)*:

> It is a discriminatory practice to publish or display before the public or to cause to be published or displayed before the public any notice, sign, symbol, emblem or other representation that:
>
> (a) expresses or implies discrimination or an intention to discriminate; or
>
> (b) incites or is calculated to incite others to discriminate

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[44] *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 3; *Human Rights Code*, RSBC 1996, c 210, s 7; *Human Rights Code*, RSM c H-175, s 18; *Human Rights Act*, RSNB 2011, c 171, s 7; *Human Rights Act*, SNL 2012 c H-13.1, s 19; *Human Rights Act*, RSNS 1989, c 214, s 7; *Human Rights Act*, SNWT 2002, c 18, s 13; *Human Rights Act*, SNC 2003, c 12; *Human Rights Code*, RSO 1990, c H-19, s 13; *Human Rights Act*, PEI H-2, s 12; *Charter of Human Rights and Freedoms*, RSQ c C-12, s 11; *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1, s 14; *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA].

[45] *Canadian National Railway Company v Canada (Human Rights Commission)*, [1987] 1 SCR 1114 at para 1134 [CNRC].

[46] *Attorney General of Canada v Johnstone and Canadian Human Rights Commission*, 2014 FCA 110 at para 45, [2015] 2 FCR 595.

[47] *CNRC, supra* note 45 at para 1134.

[48] *Zurich Insurance Co v Ontario (Human Rights Commission)*, [1992] 2 SCR 32 at para 24, 1992 CanLII 67 [*Zurich*].

[49] For example, where responding parties are resident outside of Canada, the jurisdiction of a Canadian tribunal may need to be justified. Within Canada, some jurisprudence suggests that internet communication issues should be dealt with by the Canadian Human Rights Tribunal because it falls under the telecommunications power of the federal government under the Constitution: *Elmasry and Habib v Roger's Publishing and MacQueen (No 4)*, 2008 BCHRT 378. Other authorities suggest that it depends upon the centrality of the internet communication to the claim as a whole: *Paquette v Amaruk Wilderness and Another (No 4)*, 2016 BCHRT 35 at paras 84–85.

[50] The federal legislation, for example, permits claims to be initiated in some instances even where there is no identifiable individual victim of the discriminatory practice: *CHRA, supra* note 44 at s 40(5)(b).

[51] See e.g.: *CHRA, supra* note 44, ss 5–10.

[52] Canadian human rights statutes lay out a number of prohibited grounds of discrimination. The CHRA, for example, prohibits "discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability, or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered": *CHRA, supra* note 44, Preamble.

> if the discrimination expressed or implied, intended to be expressed or implied or incited or calculated to be incited would otherwise, if engaged in, be a discriminatory practice [proscribed by other provisions relating to denial or adverse differentiation with respect to employment, goods, services, accommodations, *etc.*].[53]

Similar provisions exist in the legislation of all provinces and territories.[54] It may be difficult to prove that algorithmic biases leading to public display of the kinds of stereotypes discussed in Part I fit within this framework, notwithstanding the harmful impacts they have on dignity and self-worth that go to the heart of the mandate of human rights legislation. We turn now to explore two issues that contribute to this challenge, using the unprofessional hairstyles example discussed above in Part I.[55]

First, legislative provisions like *CHRA* section 12 require a claimant to demonstrate a connection between the impugned representation and implied discrimination, that if engaged in would constitute a discriminatory practice. While the representations in Google results that depict "professional hairstyles for women" exclusively with images of hairstyles worn by white women would affect our understanding of whether black women are suited to professional environments,[56] connecting that to differential treatment of racialized women with respect to employment that would ground a discriminatory practice could be challenging. The challenge arises from the fact that, apart from situations where the image can be specifically connected to an employment related decision, practice, or policy of a respondent, it may be difficult to establish that connection. Relying on social science evidence would be difficult and costly: difficult because a real impact could be small and possibly only realized after multiple exposures to the biased representations, and costly because generalizable results would require multiple studies enrolling large and diverse groups of participants.

Second, individualistic understandings of freedom of expression have led Canadian courts to impose relatively strict limits on prohibiting discriminatory representations.[57] For example, the Supreme Court of Canada has twice ruled that human rights restrictions on overtly hateful speech will only be constitutionally justifiable where they relate to speech that poses the risk of inciting extreme behaviours and attitudes toward members of protected groups. In *Taylor*, the Court concluded that a legislative provision prohibiting telephonically-communicated expression that exposed members of protected groups to "hatred or contempt," defined as "unusually strong and deep-felt emotions of detestation, calumny, and vilification" struck the right balance between the equality rights of targeted groups and the expressive rights of speakers.[58] Subsequently, in *Whatcott*, the Court determined the constitutionality of a *Saskatchewan Human Rights Code* limitation on representations (among other things) ridiculing, belittling, or otherwise affronting the dignity of or that were likely to expose persons or groups of persons to hatred or contempt on a prohibited ground.[59] Adopting the logic of *Taylor*, the Court in *Whatcott* found that the portion of the provision relating to exposure to hate struck the right constitutional balance, but it struck out the portion relating to representations ridiculing, belittling, or dignity affronting because it found that aspect of the provision trenched too far on free expression, with Rothstein J (writing for the court) concluding:

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[53] *CHRA, supra* note 44 at s 12.

[54] Jane Bailey, "Canadian Legal Approaches to 'Cyberbullying' and Cyberviolence: An Overview" (2016) Ottawa Faculty of Law Working Paper No. 2016-37, online: <dx.doi.org/10.2139/ssrn.2841413>.

[55] The argument we present is not influenced by the choice of example: the same arguments would apply if an alternative example were chosen.

[56] Alexander, *supra* note 12.

[57] See e.g. Richard Moon, *Report to the Canadian Human Rights Commission Concerning Section 13 of the Canadian Human Rights Act and the Regulation of Hate Speech on the Internet*, (1 October 2008) online: <www.ssrn.com/abstract=1865282>.

[58] *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892 at para 21, 1990 CanLII 26.

[59] *Whatcott v Saskatchewan Human Rights Tribunal*, 2013 SCC 11 [*Whatcott*]. Determining the constitutionality of s 14(2)(b) of the *Saskatchewan Human Rights Code*, SS 1979, c S-24.1.

> In my view, prohibiting representations that are objectively seen to expose protected groups to "hatred" is rationally connected to the objective of eliminating discrimination and the other harmful effects of hatred. Prohibiting expression which "ridicules, belittles, or otherwise affronts the dignity of" protected groups is not rationally connected to reducing systemic discrimination against vulnerable groups. Those words unjustifiably infringe s. 2(b) of the *Charter* and are constitutionally invalid.[60]

While concerns to protect free expression obviously do not negate protections like those outlined in section 12 of the *CHRA*, they do underscore the importance of being able to connect public display of an impugned stereotype with the risk of inciting a discriminatory practice (which will most often be focused on allocative harms). There have always been good reasons in a digitally networked environment to doubt the wisdom of distinguishing between publicly displaying stereotypes and engaging in a discriminatory practice.[61] However, the more recent proliferation of algorithmic prediction in every aspect of our lives, coupled with the increasing sophistication of these algorithms and the availability of massive amounts of detailed data on which to base these predictions, raise the equality implications of such a distinction to a whole new level.

B. HOW MIGHT STATISTICAL CORRELATIONS UNDERLYING ALGORITHMS COMPLICATE HUMAN RIGHTS CLAIMS?

Human rights claimants in Canada need not prove an *intention* to discriminate on a prohibited ground in order to establish a discriminatory practice. It will be sufficient to show that an impugned rule or policy adversely differentiates individuals or groups identifiable on the basis of a prohibited ground of discrimination.[62] As a result, even a neutral rule applied to everyone can violate human rights legislation.[63] Under the *CHRA*, for example, a complainant can make out a *prima facie* case of discrimination if they "show that they have a characteristic protected from discrimination under [the legislation]; that they experienced adverse impact with respect to the service [good, employment, etc.]; and that the protected characteristic was a factor in the adverse impact."[64]

Recognition of adverse impact discrimination relieves a claimant of the often-impossible task of proving intention. However, showing that a protected characteristic was a factor in the adverse impact, can be exponentially complicated by the big data and algorithmic sorting environment in which we are now immersed. In some cases, prohibited grounds of discrimination will be known components of the statistics used to predict risk for such purposes as price setting.[65] Today, however, the sheer number of factors that may be taken into account in decision-making and the fact that combinations of seemingly innocuous factors can become proxies for prohibited grounds[66] immeasurably complicates the task of understanding how prohibited discriminatory outcomes occur. In fact, where such outcomes are generated through artificial intelligence, a humanly understandable explication may be completely unavailable.[67] These realities need to be taken into account in interpreting the burden on claimants to show

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[60] *Whatcott, supra* note 59 at para 99.

[61] For further discussion, see: Bailey, *supra* note 31.

[62] *Ontario Human Rights Commission v Simpsons-Sears*, [1985] 2 SCR 536, 1985 CanLII 18.

[63] For example, imposing a minimum aerobic capacity as a condition of being a firefighter was found to be discriminatory because, although neutral on its face, it disproportionately negatively affected women who are statistically likely to have a smaller lung capacity than men. *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 1999 CanLII 652.

[64] *Moore v British Columbia (Education)*, 2012 SCC 61 at para 33, 3 SCR 360 [Moore]. For an application of the same standard in a CHRA complaint, see: *Temple v Horizon International Distributors*, 2017 CHRT 30.

[65] See e.g. *Zurich, supra* note 48 at para 24.

[66] For example, in a racist society, lower income is positively correlated with race. Thus, use of income level as a factor in decision-making is likely to adversely differentiate based on race.

[67] Amir Gandomi & Murtaza Haider, "Beyond the Hype: Big Data Concepts, Methods, and Analytics" (2015) 35:2 Intl J Information Management 137.

that a prohibited ground was a factor in a discriminatory outcome in the context of a claim related to algorithmic discrimination.[68]

Even if a claimant demonstrates a *prima facie* case of discrimination on prohibited grounds, a respondent still has the opportunity to prove that such distinctions are justified. For example, under the *CHRA*, an employer who wishes to assert that an impugned rule constitutes a *bona fide* occupational requirement (BFOR) must show that: (i) their impugned rule is rationally connected to job performance; (ii) they adopted the rule "in an honest and good faith belief that it was necessary to the fulfillment of that job"; and (iii) the standard is reasonably necessary to a legitimate work-related purpose, in the sense that it is *impossible* for the employer to accommodate individual employees sharing the claimant's characteristics without incurring undue hardship (considering health, safety, and cost).[69] With respect to the third element, employers and service providers must show that they "could not have done anything else reasonable or practical to avoid the negative impact on the individual."[70]

Given the quasi-constitutional nature of human rights legislation, the burden of proving these exceptions is high.[71] This will be especially true where an impugned rule originates in a stereotype about a group (*e.g.* "the stereotype of older persons as unproductive, inefficient, and lacking in competence"), because in these cases the rule serves to reinforce disadvantages already suffered by those targeted by stereotypes.[72]

As noted in Part I, algorithmic biases are commonly defended on the basis of statistical correlation. As such, respondents may seek to rely on statistical correlations in defending human rights complaints relating to algorithmic discrimination. For example, as discussed above, COMPAS (the system sometimes used in US courts to predict recidivism for purposes of bail and even for sentencing) produces results that adversely affect members of racialized communities as a result of historic statistics that reflect a correlation between being racialized and being found guilty of additional offences subsequent to a conviction. The results generated by the COMPAS system, however, necessarily reflect the consequences of underlying social inequities (such as discriminatory over-surveillance of racialized populations and poverty), which themselves are the products of systemic discrimination and subordination.[73] Moreover, the statistical predictions produced by COMPAS are by definition uncertain, imperfectly predicting the actual outcome for any specific individual. In the case of COMPAS, the system correctly predicted recidivism only 61% of the time: better than chance, but far from perfectly predicting the outcome for every defendant.[74] Notwithstanding these flaws, individual members of racialized communities experience harsher bail conditions and sentences because of statistical generalizations about the community to which they belong.

Whether statistical profiling can form the basis for a *bona fide* justification has proven somewhat controversial in human rights jurisprudence. In *Zurich Insurance*, the Supreme Court of Canada concluded that charging single male drivers under the age of 25

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[68] For these same reasons, it seems likely that the most effective order where discrimination is made out will be simply to prohibit such discriminatory outcomes in the future, leaving it to those who choose to rely on algorithmic profiling to figure out how to achieve that outcome or risk facing future claims.

[69] *Waddle v Canadian Pacific Railway & Teamsters Canada Rail Conference*, 2017 CHRT 24 at para 98, citing *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 at para 54, 1999 CanLII 652 [BCGSEU].

[70] *BCGSEU, supra* note 69 at para 38; cited with approval in *Moore, supra* note 64 at para 49.

[71] *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*, [1990] 2 SCR 489 at para 518, 1990 CanLII 76; cited with approval in *Mills v Bell Mobility Inc*, 2017 CHRT 1 at para 41.

[72] *McKinney, supra* note 23 at para 413 per Wilson J dissenting but not on this point, cited with approval in *Vilven, supra* note 23 at paras 271–73.

[73] This has been recognized in some US jurisprudence that has rejected big data analytics as justification for discriminating against protected groups. "For example, an employer may not disfavor a particular protected group because big data analytics show that members of this protected group are more likely to quit their jobs within a five-year period. … Similarly, a lender cannot refuse to lend to single persons or offer less favorable terms to them than married persons even if big data analytics show that single persons are less likely to repay loans than married persons" [footnotes omitted]: US, Federal Trade Commission, *supra* note 42 at 18.

[74] Jeff Larson et al, "How We Analyzed the COMPAS Recidivism Algorithm", *ProPublica* (16 May 2016), online: <www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm>.

higher automobile insurance premiums discriminated on the basis of age, sex, and marital status. However, the majority concluded that this distinction was justified on the basis that data relating accident losses to demographic characteristics including gender, age, and marital status were the only readily available statistics on which to base decisions relating to risk.[75] Sopinka J, writing for the majority, held that the insurance context had to be distinguished from the employment context for purposes of setting the standard for proving a *bona fide* justification under the *Saskatchewan Human Rights Code* in part because that legislation provided a specific exception relating to insurance. In interpreting whether the insurer in that case had proven that it had reasonable and *bona fide* grounds for differentiating on the basis of age, sex, and marital status, Justice Sopinka concluded:

> ...a discriminatory practice is "reasonable" within the meaning of s. 21 of the Code if (a) it is based on a sound and accepted insurance practice; and (b) there is no practical alternative. Under (a), a practice is sound if it is one which it is desirable to adopt for the purpose of achieving the legitimate business objective of charging premiums that are commensurate with risk. Under (b), the availability of a practical alternative is a question of fact to be determined having regard to all of the facts of the case.

In order to meet the test of "*bona fides*," the practice must be one that was adopted honestly, in the interests of sound and accepted business practice and not for the purpose of defeating the rights protected under the Code.[76]

Although the majority concluded that, as a general matter, "to allow 'statistically supportable' discrimination would undermine the intent of human rights legislation" and could serve to "perpetuate traditional stereotypes with all of their invidious prejudices,"[77] it found that in this case it would have been impractical for the insurer to rely on other classifications that were not then in use by the industry.[78] Justice L'Heureux-Dubé, dissenting, rejected this analysis, concluding:

> The mere statistical correlation between a group and higher risk cannot suffice to justify discrimination on prohibited grounds. Such correlation accepts the very stereotyping that is deemed unacceptable by human rights legislation: prohibited grounds of discrimination are used to ascribe the characteristics of the group to all individuals in the class. I agree with the intervener the Alberta Human Rights Commission that:
>
> All generalizations on prohibited grounds are presumptively objectionable, whether they are capable of being reduced to statistics or not. It is the blind application of the stereotype to the individual, not the untruth of the stereotype, that makes such a generalization objectionable.
>
> Discrimination based on statistical correlation is simply discrimination in a more invidious form.[79]

While Justice L'Heureux-Dubé accepted that statistics may be able to be used to justify a discriminatory rating system, she found that absent statistical proof of a causal link between age, sex, or marital status and an insured person's risk of having a car accident, the statistics relied upon in *Zurich* fell short of meeting the *bona fide* standard.[80]

To a significant degree, the majority's logic in *Zurich* is isolated to the insurance industry, precisely because insurance rates are set on the basis of the best available estimate of individual risk, and because the best estimates of risk available depend on demographic information including information about otherwise protected grounds (*e.g.* gender). Justice Sopinka

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[75] *Zurich, supra* note 48 at para 24.

[76] *Ibid* at paras 23–24.

[77] *Ibid* at para 36.

[78] *Ibid* at para 38.

[79] *Ibid* at para 89.

[80] *Ibid* at paras 88–89.

specifically commented on the fact that "insurance rates are set based on statistics relating to the degree of risk associated with a class or group of persons,"[81] and suggested it would be "wholly impractical" for each person to be assessed on their own merits in that context.[82] In numerous other contexts outside of actuarially-based industries (like insurance and pensions), Canadian courts have confirmed that even if a generalization about a protected group is statistically supportable, employers and service providers will still be obligated to assess individuals within that group unless doing so would lead to undue hardship.[83]

Even so, the impact of the majority logic in *Zurich* was significant given the magnitude of the insurance industry at the time. Today, the impact of the majority's logic is significantly amplified to the extent that it turns on the actuarial basis of the industry. With the arrival of big data and algorithmic sorting, actuarial forecasting has become the backbone of industry—a world where institutions of all kinds rely on statistics about past behaviour to predict future behaviour in everything from commission of crimes, to probability of success in education, to likelihood to commit suicide, to consumption patterns. In today's environment, deference to statistical bases for discrimination, due to the actuarial underpinnings of an industry and its practices, could effectively eviscerate human rights protections in many areas. As a result, reasoning like that of the majority in Zurich should be reconsidered, whether in relation to insurance or to other industries (as should statutory exceptions like the one in *Zurich*).

CONCLUSION

Canadian human rights legislation aspires to ensure that individuals are free to live the lives of their choosing unimpeded by discrimination based on race, sex, gender expression, and other prohibited grounds. The allocative and representational harms of algorithmic bias represent what is perhaps *the* most fundamental challenge to that equality-based mission in decades. Maintaining that mission may require a fundamental re-thinking of legislative concepts, burdens and defences, and the jurisprudence interpreting them. This paper begins to unpack the examples of representational harms and complications associated with statistical correlations and resulting discrimination, which themselves represent only the tip of an iceberg. If human rights legislation is to play a meaningful role in addressing discrimination now and in the decades to come, much more work remains to be done to assess the implications of the algorithmic sort.[84]

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[81] *Ibid* at para 17.

[82] *Ibid.*

[83] See e.g.: *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 at para 32, 1999 CanLII 646 (re: exclusion of those diagnosed with a certain visual problem from qualifying for a driver's licence); *Moore, supra* note 64 (re: exclusion of child with dyslexia from general education).

[84] Oscar Gandy Jr, *The Panoptic Sort: A Political Economy of Personal Information* (Boulder, Colorado: Westview Press Inc, 2009).

BIBLIOGRAPHY

Alexander, Leigh. "Do Google's 'Unprofessional Hair' Results Show it is Racist." *The Guardian*, April 8, 2016. https://www.theguardian.com/technology/2016/apr/08/does-google-unprofessional-hair-results-prove-algorithms-racist-.

Angwin, Julia and Terry Parris Jr. "Facebook Lets Advertisers Exclude Users by Race." *ProPublica*, October 28, 2016. https://www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-race.

Angwin, Julia, Jeff Larson, Surya Mattu, & Lauren Kirchner. "Machine Bias." *ProPublica*, May 23, 2016. https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing.

Bailey, Jane. "Canadian Legal Approaches to 'Cyberbullying' and Cyberviolence: An Overview." *Ottawa Faculty of Law Working Paper* No. 2016-37 (2016). http://dx.doi.org/10.2139/ssrn.2841413.

——. "Twenty Years Later Taylor Still Has It Right: Section 13 of the CHRA's Continuing Contribution to Equality." In *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat*, edited by Sheila McIntyre and Sanda Rodgers, Ch. 12. Markham, Ontario: Supreme Court Law Review and LexisNexisCanada, 2010.

Balkin, Jack. "The Three Laws of Robotics in the Age of Big Data." *Ohio State Law Journal* 78 (forthcoming): 5, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2890965.

Bolukbasi, Tolga, Kai-Wei Chang, James Zou, Venkatesh Saligrama and Adam Kalai. "Man is to Computer Programmer as Woman is to Homemaker? Debiasing Word Embeddings." In *Advances in Neural Information Processing Systems Conference Proceedings*, edited by Michael I. Jordan, Yann LeCun, and Sara Solla, 4349-4357. Cambridge, Mass: MIT Press, 2016.

Buoalmwini, Joy. "How I'm Fighting Bias in Algorithms." TedxTalk, March 28, 2017. https://www.youtube.com/watch?v=UG_X_7g63rY.

Citron, Danielle and Frank Pasquale. "The Scored Society." *Washington Law Review* 89, 1 (2014): 1-33.

Cook, Rebecca and Simone Cusack. *Gender Stereotyping: Transnational Legal Perspectives*. Philadelphia: University of Pennsylvania Press, 2010.

Crawford, Kate. "The Trouble with Bias." Keynote Speech, NIPS Conference 2017 December 12, 2017. https://www.youtube.com/watch?v=6Uao14elyGc.

Delgado, Richard. "Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law." *University of Pennsylvania Law Review* 143, 2 (1994): 379-416.

Feldman, M., Friedler, S. A., Moeller, J., Scheidegger, C., & Venkatasubramanian, S., "Certifying and Removing Disparate Impact." In *Proceedings of the 21th ACM SIGKDD International Conference on Knowledge Discovery and Data Mining*, edited by Longbing Cao et al., 259-268. ACM, 2015.

Fraser, Nancy. "Rethinking Recognition." *New Left Review* 3 (2000): 107-120.

Gandomi, Amir and Murtaza Haider. "Beyond the Hype: Big Data Concepts, Methods, and Analytics." *International Journal of Information Management* 35, 2 (2015): 137-144.

Gandy, Oscar Jr. "Engaging Rational Discrimination: Exploring Reasons for Placing Regulatory Constraints on Decision Support Systems." *Ethics and Information Technology* 12, 1 (2010): 29-42.

——. *The Panoptic Sort: A Political Economy of Personal Information*. Boulder, Colorado: Westview Press Inc., 2009.

Grush, Loren. “Google Engineer Apologizes After Photos App Tags Two Black People as Gorillas.” *The Verge*, July 1, 2015. https://www.theverge.com/2015/7/1/8880363/google-apologizes-photos-app-tags-two-black-people-gorillas.

Hickey, Walt. “Spotify Knows Me Better Than I Know Myself.” *FiveThirtyEight*, September 18, 2014. https://fivethirtyeight.com/features/spotify-knows-me-better-than-i-know-myself/.

Ingold, David and Spencer Soper. “Amazon Doesn’t Consider The Race of its Customers. Should It?” *Bloomberg*, April 21 2016. https://www.bloomberg.com/graphics/2016-amazon-same-day/.

Johndrow, James and Kristin Lum. “An Algorithm for Removing Sensitive Information: Application to Race-independent Recidivism Prediction.” *arXiv preprint arXiv:1703.04957* (2017).

Kay, Matthew, Cynthia Matuszek, and Sean Munson. “Unequal Representation and Gender Stereotypes in Image Search Results for Occupations.” In *Proceedings of the 33rd Annual ACM Conference on Human Factors in Computing Systems (CHI ’15)*, edited by Bo Begole and Jinwoo Kim, 3819-3828. ACM, 2015.

Kirkpatrick, Keith. “It’s Not the Algorithm: It’s the Data.” *Communications of the ACM 60*, 2 (2017): 21-23.

Kosinski, Michal and Yilun Wang. “Deep Neural Networks are more Accurate than Humans at Detecting Sexual Orientation from Facial Images.” *Journal of Personality and Social Psychology* 114, 2 (2018): 246-258.

Kosinski, Michal, David Stillwell and Thore Graepel. “Private Traits and Attributes are Predictable from Digital Records of Human Behavior.” *Proceedings of the National Academy of Sciences of the United States of America* 110, 15 (2013): 5802–5805.

Larson, Jeff, Surya Mattu and Julia Angwin. “Unintended Consequences of Geographic Targeting.” *ProPublica*, 2017. https://static.propublica.org/projects/princeton-review/princeton-review-methodology.pdf.

Larson, Jeff, Surya Mattu, Lauren Kirchner, and Julia Angwin. “How we Analyzed the COMPAS Recidivism Algorithm.” *ProPublica*, May 16, 2016. https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm.

Lubin, Gus. “The Incredible Story of How Target Exposed a Teen Girl’s Pregnancy.” *Business Insider*, February 16, 2012. http://www.businessinsider.com/the-incredible-story-of-how-target-exposed-a-teen-girls-pregnancy-2012-2.

Miller, Claire Cain. “Algorithms and Bias: Q. and A. With Cynthia Dwork.” *The Upshot*, August 10, 2015. https://www.nytimes.com/2015/08/11/upshot/algorithms-and-bias-q-and-a-with-cynthia-dwork.html.

Moon, Richard. *Report to the Canadian Human Rights Commission Concerning Section 13 of the Canadian Human Rights Act and the Regulation of Hate Speech on the Internet*, October 2008. http://ssrn.com/abstract=1865282.

Navneet Alang. “Life in the Age of Algorithms.” *The New Republic*, May 13, 2016. https://newrepublic.com/article/133472/life-age-algorithms.

O’Neil, Cathy. *Weapons of math destruction: How big data increases inequality and threatens democracy*. New York: Broadway Books, 2017.

Rainie, Lee and Janna Anderson. “Code-Dependent: Pros and Cons of the Algorithm Age.” Pew Research Center, February 8, 2017. http://www.pewinternet.org/2017/02/08/code-dependent-pros-and-cons-of-the-algorithm-age/.

Ramirez, Edith, Julie Brill, Maureen Ohlhausen, Terrell McSweeney. *Big Data: A Tool for Inclusion or Exclusion?: Understanding the Issues*. Washington, DC: Federal Trade Commission, 2016. https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf.

Rose, Adam. “Are Face-Detection Cameras Racist?” *Time*, January 22, 2010. http://content.time.com/time/business/article/0,8599,1954643,00.html.

Schauer, Frederick. *Profiles, Probabilities and Stereotypes*. Boston: Harvard University Press, 2006.

Sonnad, Nikhil. "Google Translate's Gender Bias Pairs 'He' with 'Hardworking' and 'She' with Lazy and Other Examples." *Quartz*, November 29, 2017. https://qz.com/1141122/google-translates-gender-bias-pairs-he-with-hardworking-and-she-with-lazy-and-other-examples/.

Steele, Claude, Steven Spencer, and Joshua Aronson. "Contending With Group Image: The Psychology of Stereotype and Social Identity Threat." *Advances in Experimental Social Psychology* 34 (2002): 379-440.

Sweeney, Latanya. "Discrimination in Online Ad Delivery." *Queue* 11, 3 (2013): 1-19.

Timmer, Alexandra. "Judging Stereotypes: What the European Court of Human Rights Can Borrow from American and Canadian Equal Protection Law." *American Journal of Comparative Law* 63, 1 (2015): 239-284.

Tucker, Ian. "'A white mask worked better': Why Algorithms are not Colour Blind." *The Guardian*, May 28, 2017. https://www.theguardian.com/technology/2017/may/28/joy-buolamwini-when-algorithms-are-racist-facial-recognition-bias.

University of Washington. "Who's a CEO? Google Image Results can Shift Gender Biases." *EurekAlert!*, April 9, 2015. https://www.eurekalert.org/pub_releases/2015-04/uow-wac040915.php.

Youyou, Wu, Michal Kosinski, and David Stillwell. "Computer-based Personality Judgments are More Accurate Than Those Made by Humans." *Proceedings of the National Academy of Sciences of the United States of America* 112, 4 (2015): 1036-1040.

Zarsky, Tal Z. "Understanding Discrimination in the Scored Society." 89 *Washington Law Review,* 89 (2014): 1375-1412.

DOCUMENTATION

EDITORS' NOTE:

Amidst challenges of the last decade facing the human rights community, notably NGOs and individuals defending and advancing human rights and broader social justice across Canada, the coalition Voices-Voix (http://voices-voix.ca/) was created to share views and link arms in pushing back against the unmerited constraints. In this pursuit, the conference entitled "Enabling Civil Society" was held on 20 October 2017 (during Canada's 150th anniversary) and brought together many contributors and allowed a wrap-up of many efforts in the more hopeful light of the Trudeau Government where nonetheless issues remained (and still remain) to be redressed. The full Conference report is available on-line at: http://voices-voix.ca/en/document/conference-report-enabling-civil-society Here we reproduce just the Conference Introduction and Summary Conclusion to draw attention to the important subject matter and the ongoing need to ensure the political space and assure the confidence of civil society in asserting rights and freedoms, the rule of law and democratic governance which are vital for sustainable peace and development in Canada and elsewher

NOTE DE LA RÉDACTION :

Au milieu des défis de la dernière décennie auxquels est confrontée la communauté des droits de la personne, notamment les ONGs et les particuliers qui défendent et font progresser les droits de la personne et la justice sociale au Canada, la coalition Voices-Voix (http://voices-voix.ca/fr) a été créée pour échanger des points de vue et unir leurs forces afin de repousser les contraintes non méritées. Dans cette optique, la conférence intitulée « Favoriser un environnement pour la société civile » s'est tenue le 20 octobre 2017 (à l'occasion du 150e anniversaire du Canada), a réuni de nombreux intervenants et a permis de faire le point sur de nombreux efforts dans le contexte plus prometteur du gouvernement Trudeau où il restait (et il reste encore) des problèmes à régler. Le rapport complet de la conférence est disponible en ligne à l'adresse suivante : http://voices-voix.ca/en/document/conference-report-enabling-civil-society . Nous reproduisons ici uniquement l'Introduction et la Conclusion sommaire de la conférence pour attirer l'attention sur l'importance du sujet et la nécessité d'assurer l'espace politique et la confiance de la société civile dans l'affirmation des droits et libertés, la primauté du droit et la gouvernance démocratique qui sont essentiels à une paix et un développement durables au Canada et ailleurs.

Introduction

Pearl Eliadis[1]
Conference Co-Chair

"Enabling Civil Society" is a research initiative spearheaded by the national advocacy group Voices-Voix. Voices-Voix was founded in 2010 by Canadians, Canadian organizations and labour unions in response to the Harper government's unprecedented federal funding cuts to civil society organizations (CSOs) and to measures that targeted progressive organizations. The Voices-Voix coalition has been working to support a strong enabling environment for CSOs with a focus on protecting advocacy and dissent and ensuring a vibrant space for civil society. The "Enabling Civil Society" project began in 2013 to theorize the concept of an enabling environment. It aimed to develop more explicit connections to Charter rights, and to explore civil society's relationship to society at large, its policy and regulatory frameworks, and the role of human rights and fundamental freedoms in protecting CSOs and human rights defenders.

"Enabling Civil Society" invites us to reimagine civil society's relationship with government, with philanthropy, with citizens, and with itself. It asks how we can better defend civil society and the public sphere it occupies, enabling CSOs to contribute more effectively to the democratic project that is explicitly connected to human rights, where, as conference co-chair ***Julia Sanchez*** *says, civil society can become transformative and innovative.*

The "Enabling Civil Society" initiative was spurred by the Canadian context in 2013, but it quickly became apparent that the issue of advocacy for civil society extended well beyond

[1] Pearl Eliadis is a Montreal-based human rights lawyer. She serves as an adjunct professor at McGill University where she teaches civil liberties and is a member of the Centre for Human Rights and Legal Pluralism. Many thanks to the editorial team at Voices-Voix for their comments on earlier drafts, especially Michaela Mayer, Editorial Coordinator, and Nancy Thede, Associate Professor at Université du Québec à Montréal.

Canada and now is seen to form part of a wider international consciousness about the role of civil society and the imperative of advocacy and collaboration at a global level.

This report provides highlights and summaries of each of the panels of the October 2017 conference, which was held in Montreal at the Faculty of Law, McGill University. The "Enabling Civil Society" was the capstone event in the project.

Contributors to the conference highlighted key areas where fundamental changes are needed to meaningfully enable civil society:

- *recognizing the collective as well as the individual dimensions of fundamental freedoms (including freedom of expression, association and peaceful assembly) so that CSOs, including charities, can carry out their work in a manner that is consistent with their missions;*
- *imposing positive obligations on States to respect, protect and fulfil fundamental freedoms for CSOs, including establishing enabling legal / regulatory frameworks;*
- *"widening the circle" of civil society to ensure that unions, women and women's human rights defenders, people with disabilities, people of colour, and Indigenous peoples are regularly part of the conversation;*
- *protecting reproductive freedoms as prerequisites for women's equality and providing active support and development assistance to women's CSOs to achieve their goals;*
- *ensuring that funding frameworks respect principles of administrative fairness and do not hamper or stigmatize CSOs from seeking funding from legitimate sources, nationally or internationally;*
- *establishing regulatory frameworks for charitable organizations that are overseen by fully independent regulatory bodies, whose primary objectives are transparency, accountability, compliance, and the public good; and*
- *safeguarding the public interest, supporting the sustainability of charities and non-profits, and optimizing the policy environment for innovation and experimentation.*

Voices-Voix has published more than 120 case studies on these and related issues affecting Canadian civil society (www.voices-voix.ca). Most deal with the increasingly restrictive civic space in which CSOs operate, especially when their work involves policy advocacy and dissent on behalf of the poor, the vulnerable and the marginalized in Canada and internationally.

Background

At the outset of the research initiative in 2013, a coalition of CSOs had met in Montreal at McGill University. Convened by Voices-Voix and the Canadian Council on International Co-operation, the initiative was a response to what many commentators saw as an inhospitable environment for Canadian civil society under the Harper government. The idea was to create a new forum for civil society leaders and practitioners, together with academics, to

theorize emerging challenges to civil society in Canada, explore the idea of an enabling environment, and understand these new challenges in a global context.[2]

The 2013 meeting was among the first in Canada to convene a UN mandate-holder, international NGOs, and Canadian human rights defenders, along with immigration and settlement organizations, environmental organizations, women's groups, unions, academics and lawyers, on these topics. The project also engaged francophone Quebec organizations that are not always involved in other Canadian discussions. Feedback from participants at the 2013 meeting indicated that the event was a watershed moment; it allowed participants from CSOs with different organizational missions to understand the common trends in the broader policy environment and to see that threats to civil society are not only a phenomenon occurring in other countries, but are emerging in Canada as well.[3] The results of the 2013 meeting and the particular concerns raised in and about the Canadian context were noted in a 2014 report by Maina Kiai, the former UN Special Rapporteur on the rights to freedom of association and peaceful assembly, who attended the McGill meeting and heard first-hand about the experiences and impacts of a disenabling environment from CSOs in attendance.[4]

Why an enabling environment matters

At the global level, many of the concerns about narrowing spaces for civil society flagged in 2013 remained significant in 2017. In his final report, outgoing Special Rapporteur Maina Kiai noted,

> civil society's role in changing societies for the better is deeply contested. The space for civil society globally is closing rapidly. In established democracies as well as autocratic regimes and states in transition, laws and practices constraining freedoms of association and of peaceful assembly are flourishing.[5]

There are good, indeed urgent, reasons to debate the state of democracy and the role of civil society in it. According to **Nick Robinson** of the US-based International Center for Not-for-Profit Law (ICNL), only about 30% of people

[2] Voices-Voix, "Workshop on Civil Society: Dissent, Democracy, and the Law," Montreal, 2014.

[3] See also Eliadis, Reilly-King, and Skuce, "Silencing Voices and Dissent in Canada," in CIVICUS, "State of Civil Society 2013" at 129; Voices-Voix, "Dismantling Democracy: Stifling Debate and Dissent in Canada," 2015. Online <http://voices-coix.ca/en/document/dismantling-democracy-stifling-debate-and-dissent-canada>.

[4] Maina Kiai, "2014: The Year in Assembly & Association Rights. UN Special Rapporteur on the rights to freedom of association and peaceful assembly," 2015. Online <http://freeassembly.net/wp-content/uploads/2015/01/UNSR-FOAA-2014-annual-report_r.pdf>

[5] United Nations, 2017. Human Rights Council, "Imagining a World without Participation: Mapping the Achievements of Civil Society" (A/HRC/35/28). Online <http://freeassembly.net/reports/civil-society/>

born in the US in the 1980s agree that it is essential to live in a democratic society. ICNL has historically had an international focus, but it has now introduced a US Program, the US Protest Law Tracker, as a result of recent developments in the US. The US Protest Law Tracker monitors initiatives restricting the right to protest that have been introduced since Trump's inauguration in November 2016. In **Robinson's** view, we are witnessing a global democratic recession.

Democracy and dissent

CSOs play a central role in democratic society. Indeed, as Amnesty International (Canada) Secretary General **Alex Neve** says, CSOs are the lifeblood of democracy. CSOs are often pushed to test the boundaries of social norms and sometimes even legality. Government may be pressured to regulate or restrain CSOs, but in democratic societies where governments are accountable to the people and not the other way around, states that hinder advocacy groups' activities must justify their actions. And yet, vulnerable groups, including workers, the poor, migrants and, in many societies, women, are often the least able to challenge the state and advocate for their own interests.

Mathieu Vick, a senior researcher at the Canadian Union of Public Employees (CUPE), reminds us that the role of organized labour is vital in a democracy. The relationship between organized labour and civil society has perhaps waned over the last few decades, **Vick** says, but Voices-Voix has worked to create spaces for unions to re-engage with civil society in building a strong, truly progressive agenda. Legislative measures that hurt workers' ability to bargain collectively or engage in political debates must be considered as "disenabling" disabling factors. Though the many measures introduced under the Harper regime may have gone furthest in this respect, in the Canadian context, many of these issues persist under the current Liberal government.

Workers' rights are key in the current context where migration has become politically contentious. Human rights may be universal in theory but in practice, migrant workers are denied access to these rights, says **François Crépeau**. Migrant workers undertake significant risks to find work in other countries and form underground networks to support each other and push for improved working conditions and greater security for themselves and their families. These workers need real political clout to achieve real change. **Crépeau** advocates for a change to voting rights, so that long-time residents can vote and participate in democratic communities. The franchise would have a meaningful impact on the enabling environment for CSOs working with these communities.

Women human rights defenders and CSOs face specific, dangerous threats, especially from what **Françoise Girard** describes as ultra-conservative religious

groups who reject sexual and reproductive rights and, indeed, challenge basic human rights for women. **Girard** argues that "if gender roles are seen as preordained rather than socially constructed, then women are inherently precluded from attaining equality." The rise of populism and authoritarianism is a direct threat to women's CSOs. In fact, when women fight for — and win — rights and greater access to public debate, the risk of reprisal grows. CSOs need to be protected and human rights defenders shielded from reprisal. Human rights law provides an important protection for CSOs but to be meaningful in practice, women's rights, including reproductive rights, must be priorities.

Actively enabling civil society

The idea of an "enabling environment" is well-known in international development literature. Since the 1990s, the search for "what works" for CSOs in the development context has been influenced by the observation that policies and programs can fail for reasons other than the merit or capacity of the organizations responsible for delivering them.[6] External factors such as legal and policy frameworks, social attitudes, and political priorities can play important roles in determining success.

The concept of an "enabling environment" provides a platform from which we can identify and assess the factors that actively help civil society to thrive.[7] In the past, it has been based on three pillars: funding frameworks, participation in public policy development, and dialogue with government. And yet, in an era where nationalist and populist movements are gaining significant ground, **Nick Robinson** tells us that we must renew our focus on civic liberties like freedom of assembly and freedom of association.

The "Enabling Civil Society" project takes this as its starting point to explicitly integrate human rights-based approaches to the work of civil society as a starting point for any discussion about what an enabling environment means. As **Julia Sanchez** notes, there is a growing global consensus that civil society plays an important role in strengthening democracy and that governments should focus on promoting rights, establishing adequate mechanisms for accountability, and fostering institutionalized dialogue between the government and civil society on equal terms. Human rights may often be understood as individual rights, but CSOs offer a collective dimension and "amplify" the perspectives and work of individuals who come together in common cause. These rights operate to protect:

[6] Brinkerhoff, D. W. and A. A. Goldsmith, "Promoting the Sustainability of Development Institutions: A Framework for Strategy," (1992) World Development 20(3) 369.

[7] CIVICUS, "State of Civil Society 2013."

- CSOs' rights to dissent, including freedom of expression, association, and peaceful assembly;
- the right to information and access to information in particular;
- privacy rights;
- robust protections for human rights defenders;
- equality rights, especially for vulnerable and marginalized people; and
- a fair, independent, and equitable regulatory environment, including for charitable organizations, recognizing the essential role of free and independent media.

The concept of an enabling environment thus shifts from a passive status to an active one where the government has a positive role in establishing conditions and policies that help CSOs to thrive.

Human-rights based approaches bring into sharp focus the importance of protecting civil society, especially in a time when issues ranging from populism to national security, and from a resurgence of fundamentalism to violence against women, appear to threaten the progress of the 20th century.

In her analysis of the women's movement in the early 1970s, **Mary Eberts** recalls the enthusiasm for women's rights in Canada. The Royal Commission on the Status of Women and the federal government cooperated with the National Action Committee on the Status of Women (NAC) so that women's groups received government funding with relatively few restrictions. As one participant noted, women's groups were able to set their own agendas and priorities. Things changed quickly when NAC opposed certain amendments to the Charlottetown Accord in 1992. The government used what **Eberts** calls "intimidation tactics against women's organizations during and after the Charlottetown Accord, including ridiculing, smearing, vilification, trickery, physical violence, and surveillance."

Combined with neo-liberal policies and practices in government, this led to funding restrictions for all CSOs, but there was a particular impact on feminist organizations. The result was that many women's organizations had to reduce their services and activities. NAC was effectively "killed off" and women's organizations were reduced to delivering services for government rather than building liberating communities and critiquing government.

State officials stopped seeking advice from women's organizations on general policy issues. Instead, women were transformed into a "special interest group," suggesting that gender equality was simply one more "interest" to be played off against others. Today, **Eberts** argues, women's organizations are no longer full participants in general policy debates.

New restrictions on government funding in the 1990s affected all CSOs, notably the short-sighted and unsustainable practice of refusing to support core costs, which is also a practice among many philanthropic foundations. In fact, most major philanthropic foundations in Canada (especially private foundations) will not support core costs beyond those

that are prorated to support project funding. Project funding, by its very nature, isolates and highlights a particular initiative rather than supporting the whole of the grantee's work. Results are often disseminated in a manner that ensures the visibility of the philanthropic foundations as "innovators", sometimes to the detriment of established projects that are successful but need ongoing support. Project funding also has the effect of keeping wages low so that workers in the charitable sector, especially those CSOs focusing on advocacy, earn low wages and lack administrative support.

The result is that project-based funding can foster precisely the type of marginalization that social justice organizations purport to oppose.

Lisa Lalande of the Mowat Centre acknowledges that the overall trend has been to fund charities on a project basis instead of funding core costs, with a stronger focus on "outcomes". Concerns about such funding practices are long-standing for the non-profit sector and a part of a larger picture. **Greg Kealey** and **Mary Eberts** say that funding problems and contentious or deteriorating relationships with government have been part of the governance environment in Canada for decades.

Civil society's journey— and its relationship to government— has never been perfect, but its nadir occurred during the "dark decade" of the Harper years, between 2006 and 2015. That period exposed the vulnerability and fragility of CSOs. Canadian organizations were undermined and targeted by our own government. If we learned one thing during those years, **Alex Neve** says, it was that civil society is fragile, even in a country like Canada:

> Among CSO leaders and activists, there was sheer disbelief that this weakening of CSOs had been achieved so readily and quickly. Without massive law reform or public policy change, the Harper government simply used existing methods to shut down the means and avenues that CSOs need to thrive.

During this period, CSOs in Canada were criticized by government authorities for receiving support from international sources, as if receiving funding were somehow a seditious activity. Similar criticisms are common in other (often undemocratic) countries.

Kathryn Chan's research on charities and the law highlights that much of the debate in Canada about charities is connected to our approach to oversight and the legacy of longstanding strategies in dealing with the sector. The federal regulatory framework contains structural weaknesses that lie at the root of many of the problems noted during the Harper years and that the Conservative government was able to exploit. Many of those weaknesses are built into the regulatory framework that applies to charitable organizations in Canada, and are directly responsible for the way in which that framework was manipulated during the Harper decade.

Widening the circle

For many years, it has been apparent that certain groups have not even been part of the conversation about civil society. All human rights defenders experience some risk, says **Alex Neve**, but certain groups are particularly vulnerable, including women human rights defenders, LGBTQI defenders, youth defenders, and those working on issues related to territory, land, and the environment. As **Mathieu Vick** says, organized labour has also been the target of neo-liberal agendas to minimize its effectiveness, and while labour is best known for advancing workers' rights, we should not forget that it has also worked hand-in-hand with civil society as part of many other struggles around women's rights, minority rights, public services, and the environment, to name but a few.

In Canada, women's organizations and people with disabilities experience socio-economic, political, or physical barriers that prevent them from participating in civil society. **Mary Eberts** says that many women were and, in many instances, still are excluded from engaging in civil society. At the same time, women's CSOs need to broaden their own concerns and dialogue with excluded groups to become more inclusive.

People with disabilities have experienced different histories and face very different challenges. **Ravi Malhotra** underscores the fact that people with disabilities remain among the most marginalized Canadians, with higher-than-average rates of unemployment and poverty**.** According to **Malhotra**, the legislative framework in Canada is inadequate and lags significantly behind that of the US when it comes to the rights of persons with disabilities. Persons with disabilities require access to civil society's structures and spaces in order to engage with it. That access is often poor to non-existent.

New technologies and increasing globalization can potentially provide enabling environments for people with disabilities to engage in civil society. We need to collaborate with organizations working on disability issues, so that CSOs can incorporate disability rights into their work in developing countries, as well as in Canada. This approach requires a much more active and engaged approach—a positive approach — to realizing rights.

A key but contentious strategy for widening the circle is the creation of safe spaces where marginalized groups in particular can engage in discussion and debate without fewer constraints. **Nandini Ramanujam** says student populations have become more diverse and universities are increasingly subject to demands that they provide "safe spaces." **Sydney Warshaw** defines safe spaces as new normative spaces that shift the status quo towards the experiences, values, and needs of historically marginalized communities. These spaces, she argues, allow meaningful new conversations and debates to develop.

Nazampal Jaswal characterizes safe spaces as *inclusive spaces* for people of colour, whereas **Jeansil Bruyère** suggests a slightly different nuance, arguing that safe spaces are spaces in which people with divergent views can speak up and those who are uncomfortable with what is said can feel safe voicing their concerns. As **Shaheen Shariff** highlights, privacy and trust are key elements of safe spaces and, so, inclusivity may not be enough to create safe spaces at universities. Ongoing, meaningful participation and consultation may also be required.

Some academics and university administrators worry, however, that safe spaces threaten the university's role in knowledge creation and dissemination and prevent universities from serving as places of rigorous, open debate. Building on this theme, **James Turk** and **Celine Cooper** argue that freedom of expression and the pursuit of justice, including the pursuit of justice through safe spaces, are not in conflict because they both challenge the status quo. Reconciling the university's role in creating knowledge and fostering debate with the need for inclusive, democratic spaces on campus is a challenge, **Cooper** acknowledges. Safe spaces are relevant to civil society and universities alike, in that they are designed for the development of ideas, participatory engagement, and debate, which can then be shared with the rest of the university and with civil society at large.

National security and the protection of privacy

National security laws and surveillance of CSOs have a long history in Canada. **Greg Kealey** reminds us that minorities and labour movements throughout the twentieth century were targeted by police and security agencies in Canada. Motivated in part by the state's desire to defend Canada's capitalist system "against the connected threats of labour militancy and socialism," Canadian police targeted labour organizations with "Bolshevik tendencies" in the labour revolt of 1917–20. Throughout World War II, the RCMP targeted pro-communist Ukrainians as "potential security threats." During the Quebec FLQ crisis in 1970, police and security agencies targeted not only suspected FLQ members but also people on the left and labour organizations. And Indigenous activists and leaders have long been targets of surveillance and harassment.

National security concerns continue to be used to justify measures to repress activism and the work of CSOs, according to **Dominique Peschard,** who notes that surveillance measures and national security measures target movements or people who dissent and are considered to pose an *economic or political threat*.

In many countries, emergency powers are used to keep tabs on and restrict the activities of CSOs. **Nick Robinson** expresses concerns about the normalization of the use of emergency powers, for example. We have little

empirical data on how many emergency powers have been used in the past, why some leaders use such powers while others do not, or the situations in which they are used.

According to **Tim McSorley** and **Yavar Hameed**, two Canadian legislative initiatives are of particular concern: the *Anti-Terrorism Act, 2015* (ATA) and Bill C-59 (*An Act respecting national security matters*). Such legislation is consistent with states' historical tendency to justify repressive policies by labelling them as national security measures, while individuals and advocacy groups experience a chilling effect — the reduced or interrupted involvement in advocacy or activism — as a result of surveillance measures. These measures also risk undermining equality by disproportionately impacting racialized communities.

CSOs in Canada use social media extensively, but because of the close connections between privacy, surveillance and "dissent activities," CSOs are under a degree of scrutiny that many people may not fully understand. CSIS collects Canadians' information, but there are major implications for privacy, according to **Brenda McPhail**, especially given the quantity of data gathered by private enterprises such as Google and Facebook. Panellists also raised a generational concern: young people may underestimate the implications of sharing information online.

McPhail emphasizes that the scope of individuals' reasonable expectation of privacy regarding specific user-generated data has not yet been entirely determined and is decided on a case-by-case basis. Security agencies may use new technologies to capture information for years before the courts can intervene on questions of constitutionality. And, more generally, high levels of perceived danger related to terrorism increase the risk that rights violations will become more acceptable, politically and legally, for CSOs and their staff, not to mention the Canadian public.

In Quebec, amendments to the *Lobbying Transparency and Ethics Act*,[8] introduced by the Quebec government in 2015, would assimilate CSOs to special interest groups, requiring them to register publicly. This move would have an impact on individual rights and on 61,000 non-profit organizations in Quebec working for social justice. **Mercédez Roberge** says placing volunteers and activists on public government registers as "lobbyists" would be a direct disincentive to involvement due to the fear of being associated publicly with lobbying activities that are understood by most people in Quebec as being associated with political scandals and favouring private interests.

[8] *Lobbying Transparency and Ethics Act*, CQLR c T-11.011. Online <http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/T-11.011>

Infrastructure & Sustainability

Ensuring basic human rights for not-for-profit organizations in the charitable sector is a condition for the very existence of these organizations and their capacity to advocate. But much more is needed to ensure that organizations can thrive. Key elements sector-wide are knowledge and infrastructure.

By identifying elements of the external environment critical to CSO functioning, we can reduce uncertainty, increase financial viability, and improve the capacity of CSOs to build solidarity and partnerships. Panellist **Lisa Lalande** of the Mowat Centre identifies operational initiatives that can improve the sector, such as partnerships and alliances to build knowledge infrastructure. Key elements of an enabling environment include:

- data and information;
- financing and funding reform;
- labour force development;
- regulation;
- relationship between government and the sector; and
- research, development, and innovation.

Real focus on an enabling environment, and funding initiatives that build infrastructure for the sector, **Lalande** says, would breathe new life into the non-profit and charitable sector. It would ensure that the right systems and structures are in place for the sector to thrive. This focus would require broader reform, involving multiple levels of government. Examples of initiatives that have been researched by the Mowat Centre include collaborative data infrastructure models, "what works" centres, and innovations in community development and social finance.

Conclusion

Despite concerns about shrinking civic space, human rights advocacy remains resilient everywhere, even in other countries in the grip of totalitarianism. Human rights defenders persist in organizing and claiming their rights, no matter how "disenabling" the environment. A safe and enabling environment ensures that those responsible for human rights violations do not enjoy impunity. But resilience is not a reason for complacency. CSOs today require a resolutely enabling environment to thrive. Laws and policy frameworks must support a positive approach to fundamental freedoms and equality rights. Women's rights and reproductive rights in particular must be supported; persons with disabilities require robust supports, especially in technology, to be able to fully participate in civil society. Funding platforms need to support core costs and not-for profits should not be penalized for obtaining funding from international sources. Advocacy should be supported, not shunned.

Technical and operational infrastructure are also important across the sector.

CSOs need the means to communicate with each other and with decision-makers. Engagement with government and policy-makers who are receptive to new ideas and the voices of those who are marginalized and vulnerable is critical. Lastly, governments must demonstrate true conviction in these principles, manifested in legislation, funding, and consultative practices.

As **John Packer** of the University of Ottawa notes in his closing remarks, robust democracies value dissent, promote the rule of law, and protect human rights. Human rights defenders and civil society need "breathing space" to CSOs to do their best work, protected by the framework of human rights law.

The views expressed in this report reflect events up to October 2017

Closing Remarks

John Packer[1]

Madam Co-Chairs, Colleagues and friends,

It's an honour to be invited to provide some Closing Remarks at the end of this full day of exchanges on a topic which should be of the highest priority for our country as a free and democratic society.

I must admit that I am a novice amongst you, having lived and worked abroad for most of my adult life and career, and so not well placed to comment on the experiences of civil society in Canada the last many years. As such, allow me a few remarks about the subject from a distance, from that of a Canadian working for human rights, peace and justice abroad, while always relying upon and benefiting from these at home, or so I thought.

From a personal perspective, I have long been associated with a small but well-known American-then Canadian Human Rights NGO known as "Human Rights Internet" (HRI). After 40 years of existence, it was some years ago – out-of-the-blue subjected to a CRA assessment following an allegation of "political activity" in breach of its charitable status. The CRA specifically focused its investigation on the organization's delivery of educational training on human rights-based conflict analysis and prevention (including mediation) for staff of the Organisation of Islamic Cooperation (OIC). The OIC is a 57 member inter-Governmental organization with which Canada has a formal relationship including a Special Envoy and of which the Government of

[1] Professor John Packer is Associate Professor of Law and Director of the Human Rights Research and Education Centre (HRREC) at the University of Ottawa. He was appointed the Inaugural Neuberger-Jesin Professor of International Conflict Resolution in April 2018.

Canada occasionally funded some of the activity in question. It seems that the sole basis for CRA's concern and eventual decision to revoke HRI's charitable status (and impose a penalty of forfeiture of 100% of assets) was the simple correlation of the word "Islamic" with HRI's publicly available annual report of its activities. Following substantial costs and considerable fear among its Board (which has resulted in a still-existing chilling effect), HRI chose not to expend further time and money to contest the unsubstantiated yet damaging CRA determination. The result was that an excellent small organization, run almost entirely on the good will and non-remunerated efforts of concerned citizens, came near to closing and its reach, effects and initiative have been compromised. This is all due to the action of the Government of Canada which purports to uphold the fundamental values of democracy, respect for human rights, and the rule of law both at home and abroad.

I share this story mainly to convey my own shock that this happened in my own country while I was spending my professional life promoting responsible authority, democratic governance and robust civil society around the world, usually in so-called "transitional" societies. In my work, Canada was – or had been – a shining example, a reference point of good and democratic government. It is a notion we have the temerity to include in our national slogan and a trumpeted commitment to "peace, order and good government" to assert in our Constitution.

Unfortunately, at age 50, my eyes were opened to what this meant for any society, its fragile nature, the importance of vigilance and the institutional framework which is essential to realise and maintain for a genuinely free and democratic society following the rule of law.

Let me add that it is on this basis that my colleague Viviana Fernandez and I, on behalf of the HRREC at uOttawa, were pleased to join the initiative for this conference and to support it. Indeed, we believe that a vibrant civil society is a hallmark of a free and democratic society and sine qua non for its full functioning, for maintenance of the rule of law and for good and effective governance which contributes to the realization of full lives in dignity and rights for all human beings and for sustainable peace and development of society as a whole and for the world.

With regard to today's conference, permit me to share a few observations. First, I consider it poetic that the first panel began with remarks from **Mary Eberts** – among other things, a co-founder of the Women's Legal Education and Action Fund (LEAF). There is no doubt that Canada is a significantly better country because of LEAF. Thank you, Mary, and thank you to all those who have done so much, and continue to do so much to fight for better policies, laws, programmes and practices, in short, for better governance and better politics. And thank you today

for pointing out that in a democratic society government should be "making it possible" for interested and affected persons and groups to express and advance their concerns and positions to advocate change. For me, this is a basic value and instrumental to the realization of other values and goals, including peace and prosperity.

Not only should a robust civil society be protected from undue constraints, but it should be pro-actively facilitated to create the conditions necessary for the very society we purport to uphold.

An effective civil society does not replace government in general nor specific public authority. Rather, it is instrumental for a high quality of governance which is able to know and understand the "will of the people" beyond periodic elections – both as a range and in terms of specific issues. Civil society is fundamental for any governance to design policy, elaborate law and to implement it on the basis of the widest voluntary compliance as it should be the case for any democracy or even for responsible authorities seeking good (if not wholly democratic) government. The crucial element of such a system of governance is evidence-based policy and decision-making that is not arbitrary reflecting and serving the public interest rather than particular or private interests. This is important in an era where more and more governments are willing to act to quell those who dare to question or dissent and oppose.
Let me add that the evidence invoked this morning from Freedom House[2] is only ex post facto and confirms what we know from history and for which we have elaborated norms and standards to address both to protect and to facilitate. But this realization is coming late, as many countries – self-described "illiberal democracies" – assert a new politics of what one German commentator has dubbed "orderism"[3]. It refers to a political climate, where security trumps human rights and simplistic majoritarianism trumps the democratic principles of human rights, including minority rights, in a period of securitization of civil spaces purportedly for our own good. I am sorry to say that in the immediate aftermath of 9/11, our own compatriot Michael Ignatieff infamously wrote in the NY Times[4] and, later, in his book The Lesser Evil: Political Ethics in an Age of Terror that,

[2] Notably, the observed decade-long decline in Freedom in the World; *see* Freedom House, "Freedom in the World, annual reports and index." Online <https://freedomhouse.org/report-types/freedom-world>; and more specifically, Freedom House, "Q&A: 10 Years of Decline in Global Freedom," Freedom House, January 26, 2016. Online<https://freedomhouse.org/blog/q-10-years-decline-global-freedom>

[3] Jochen Bittner, "The New Ideology of the New Cold War," The New York Times, August 1, 2016. Online<https://www.nytimes.com/2016/08/02/opinion/the-new-ideology-of-the-new-cold-war.html>

[4] *See*, Michael Ignatieff, "Is the Human Rights Era Ending?" The New York Times, February 2, 2002. Online <https://www.nytimes.com/2002/02/05/opinion/is-the-human-rights-era-ending.html>

in essence, we can no longer afford to be nice with human rights in the face of such challenges to our security.[5]

This logic is self-defeating.

What kinds of "democracies" actively constrain freedoms and repress, and what is the perversion where we fear freedom and happily consent or demure in the face of spurious assertions that it is in OUR interest to be less free? Driven by fear, we seem to have been duped into accepting what is not in our interest – neither alone nor together.

Related to these questions is a basic matter of paradigm. Who is the State in a democratic society? Whose space, resources and powers? And what is the legitimacy of some government of the day usurping the resources to constrain "making it possible" (as Mary asserts) for the expression of views differing from those of that momentary government?

Surely the aim of better governance requires the full range of existing views genuinely and peacefully expressed – to be heard and considered, including both critiques and proposals. Broad deliberation will permit innovations to become manifest, for mistakes to be avoided, resulting in better lives for all. It implies a paradigm not of civil society versus government, but of both categories of society along with private actors to engage together, varyingly, consciously, thoughtfully and honestly in the construction of overall well-being reconciling public and private interests and their often overlapping manifestations. In this respect, while not mentioned during the day, conceptions of the new economy with growing so-called "third sector" participation and wealth creation are increasingly recognized and essential. We need to re-imagine the economy in terms of a future of more leisure, uncertain distribution and prevailing insecurity, amidst complex inter-relations. Imagining this in terms of a binary relationship between public and private interests is neither realistic nor good.

Civil society and community-based organisations are essential, and likely to be increasingly so.

I believe it is in this spirit that my colleague **Ravi Malhotra** asserted this morning that we should not fear the opportunities of globalization and technology. Indeed, social movements can benefit, and have benefitted, greatly from these, but on the condition that we have the right regulatory framework which is the vital condition and nub of our concerns.

[5] Michael Ignatieff, "The Lesser Evil: Political Ethics in an Age of Terror," Gifford Lectures, Penguin Group Canada, Toronto, 2004.

This optimism seemed to be present in some of the later morning presentations, where we saw examples of progressive innovation such as "What Works Centres" in the UK or Winnipeg's "Boldness Project" demonstrating bottom-up approaches generated with few resources yet achieving significant effect and reach. I realise that we also saw the sobering challenge of moving from where we are (i.e. the prevailing shortcomings) to where we can and want to be. Still, it is observable that a number of countries have advanced. Indeed, Canada is lagging behind, but we can learn from others.

While the third panel was more than sobering, we appear to know the problems, and the use of technology may help us to organize as citizens and to continue the old struggle for freedom and for good government. This may be the impetus for us to contest old assumptions, policies and laws. As one participant asked, is not political expression and activity protected by our Charter as a legitimate and even charitable activity at least for public interests and benefits and not party-partisan activity? We were again reminded that these questions and many others have been considered in depth by other countries with useful conclusions from which Canada is able to learn and may borrow.

In addressing "safe spaces" (both physical and virtual), the conference explored how we can imagine and construct a new and different policy which is sensitive, even comfortable, and thoughtful despite the obvious counter-vailing challenges of reductionist social media and pervasive discomfort and defensiveness.

The role of the academy has an undoubted role to play – for learning and to cultivate a culture of respect, inclusion, equity and collaboration. This implies a positive disposition to engage, even if critically, rather than to exclude the "Other".

"Safe" in this sense is not about being tepid or even correct, nor of "winning" anything, but rather of an approach I would call dialogic and deliberative ways of living together. This raises questions about general education, culture and a rich notion of democratic society that surely have deep implications and far reaches. Yet, I fear the mainstream is rather far behind with resorts to intimidation and violence that are at the other extreme of what we would hope. To the contrary, I fear more, the tendency is not encouraging.

I think this all tells us that we must return to and work from the well-known basic principles and repeat and rebuild. To end at the beginning, inspired by Mary's proposition, let me underline that we can and should make it possible for Canada to create the conditions for a better society where people can share and pursue their views without fear and on relatively equal bases for the overall public interest. Today, we are in many respects ahead of where we were generations ago and this conference has enabled us to take a positive step – at

least to better understand, analyse and commit to further steps.
Thank you to the organisers, the sponsors and participants for creating this opportunity.

We look forward to an eventual conference report and to continuing the conversation with a view to realizing the possibilities we know exist.

Thank you.