GADFLY

Volume 2, 2023

Undergraduate Journal of Political Science

Journal de science politique du premier cycle

Art created by Tasha Romeyn // Œuvre d'art réalisée par Tasha Romeyn

GADFLY
UNDERGRADUATE JOURNAL OF POLITICAL SCIENCE

Acknowledgements & Thanks / Reconnaissance & remerciements

Simon Fraser University's three campuses occupy the unceded traditional territories of xʷməθkʷəy̓əm (Musqueam), Sḵwx̱wú7mesh Úxwumixw (Squamish), səl̓ilw̓ətaʔɬ (Tsleil-Waututh), qʼíc̓əy̓ (Katzie), kʷikʷəƛ̓əm (Kwikwetlem), Qayqayt, Kwantlen, Semiahmoo and Tsawwassen peoples. We recognize and support the return of territorial sovereignty to the Indigenous peoples of these lands.

Les trois campus de l'Université Simon Fraser occupent les territoires traditionnels non-cédés des xʷməθkʷəy̓əm (Musqueam), Sḵwx̱wú7mesh Úxwumixw (Squamish), səl̓ilw̓ətaʔɬ (Tsleil-Waututh), qʼíc̓əy̓ (Katzie), kʷikʷəƛ̓əm (Kwikwetlem), les peuples Qayqayt, Kwantlen, Semiahmoo et Tsawwassen. Nous reconnaissons et soutenons la restitution de la souveraineté territoriale aux peuples autochtones de ces terres.

This volume is dedicated to every single person involved in its creation. Your work is unquestionable in its rigour, and your character unquestionable in its perseverance.

Cette édition est dédiée à chaque personne qui a contribué à sa création. La rigueur de votre travail et la persévérance de votre esprit sont incontestables.

Contents

Journal Staff / Personnel du journal

Letter from the Editor / Lettre des chefs du journal

The second volume of Gadfly is a testament to the perseverance of our contributing authors and editors. 2022, by most metrics, has been a year of tumult and social rupture.

The people who were able to dedicate valuable time and effort to the publication of these manuscripts had to do so while dealing with endless social and personal challenges. There were moments where we genuinely questioned the possibility of publishing this second volume. Indeed, publishing these manuscripts was anything but a race to the finish line. The difficulty, we'd imagine, was not in the labour of providing the right feedback to authors or preparing galleys; it was the slow sendoff of a community built out of passion and curiosity.

The team that has run Gadfly for the last two years is parting ways. The community we were able to build out of this team, however, will last a lifetime. We hope the people who take on our responsibilities are just as successful in building such a community, or better yet, join ours.

Ultimately, the goal of this community was—and we hope will remain—the facilitation of dialogue and the development of a critical consciousness concerned with political phenomena. As a pedagogical endeavor, Gadfly is an attempt to introduce the pupil to the study of politics through the processes of academic publication. And not only as observers, but as practitioners. To write, review, and publish is to engage in politics.

The study of politics being inherently political is no novel concept. In our reiteration, we looked to provide practical opportunities for those who sought it out. Beyond continued operation and publication, the custom of inclusivity—of different people, approaches, and disciplines—is something we hope will be well kept by future editors.

Parsa Alirezaei & Luke Faulks,
Editors-in-chief

Politics & Governance / La politique et la gouvernance

| Talking Heads: Forecasting Russian Aggression in 'Frozen' Separatist Conflicts

Michael Lenko

Keywords: Frozen Separatist Conflicts, Russian Aggression, Russian Oligarchs, Elite Rhetoric, Russo-Georgian War, Russo-Ukrainian War, Media Analysis

Mots-clés: conflits séparatistes gelés, agression russe, oligarques russes, rhétorique des élites, guerre russo-géorgienne, guerre russo-ukrainienne, analyse médiatique

In the last 14 years, Russia has militarily intervened in three 'frozen' separatist conflicts where hostilities have ceased without a resolution in sight: Georgia, Azerbaijan, and Ukraine. These conflicts have caused mass casualties, disrupted countless lives, unsettled regional security and acquired global significance by risking outbreak into wider international crises. To prevent such escalation, policy makers need ways to anticipate Russian intervention. This project uncovers how analyzing Russian elites' rhetoric can forecast Russian aggression in frozen conflicts. It compares Russian elites' quotes in news articles regarding the separatists regions in Georgia and Moldova between 1992-2002, 2003-2008, 2009-the present, and through computer-assisted text analysis, clarifies that their rhetoric could have forecasted the Russo-Georgian War during the Rose Revolution (2003-2008). In doing so, this paper provides a mechanism to forewarn Russian military aggression using the growing revolution of political science text analysis, which unlocks the analytical potential of meta-texts whose utility would be otherwise inaccessible or labour intensive.

Au cours des quatorze dernières années, la Russie a mené des interventions militaires lors de trois conflits séparatistes « gelés » – en Géorgie, en Azerbaïdjan et en Ukraine – dans lesquels il y a une cessation d'hostilités sans avoir de résolution à l'horizon. Ces conflits sont à l'origine des pertes massives et de la perturbation de la vie de nombreuses personnes, troublant la sécurité régionale et en même temps, ils ont acquis de l'importance à l'échelle mondiale puisqu'ils risquent de déborder en crise internationale. Afin d'éviter une telle intensification, les dirigeant.e.s doivent trouver des moyens pour prévoir les interventions

de la Russie. Ce projet met à jour la façon dont l'analyse de la rhétorique des élites russes pourrait pronostiquer l'agression russe dans les conflits gelés. Nous comparons des citations des membres de l'élite russe dans des articles de nouvelles qui touchent aux régions séparatistes en Géorgie et en Moldavie entre 1992 et 2002, 2003 et 2008, et en 2009 jusqu'au présent. En nous servant d'une analyse textuelle assistée par l'ordinateur, nous clarifions que leur rhétorique aurait pu prévoir la guerre russo-géorgienne pendant la révolution des Roses (2003-2008). Ce faisant, cet article démontre le fonctionnement d'un mécanisme qui pourrait prévoir l'agression militaire russe par le biais de la révolution croissante de l'analyse textuelle en science politique, qui dévoile le potentiel analytique du métatexte, sans quoi l'utilité serait inaccessible ou alors exigeant une forte intensité de travail.

Introduction

On December 30th, 2021, Vladimir Putin stated that Russia would act if NATO crossed Russia's 'red lines' in Ukraine (Reuters n.d.); less than 2 months later, Russia invaded Ukraine. The last time an elite Russian politician warned of crossing Russian 'red lines' was in Georgia in 2007 (Dawn 2007). Russia invaded Georgia almost a year later in support of Georgia's separatist provinces, South Ossetia and Abkhazia. In the seven weeks after Putin's 'red line' warning in December 2021, the world stood wondering whether Russia would invade Ukraine. Would policy makers have reacted differently if Russian aggression towards Ukraine had been forecasted earlier?

Despite world leaders' shock over the invasion, Russia signalled its intentions in many of the same ways it did prior to its invasion of Georgia in 2008. Russian elites' rhetoric has had a consistent presence surrounding such 'frozen' separatist conflicts in the former Soviet Union (FSU); that is, separatist conflicts which have no end in sight, but also little to no violence. This presents a question: can Russian military interventions in frozen separatist conflicts in the FSU be forecasted based on negative Russian elite rhetoric in cases where there is heightened power and ethnic concerns? Answering this question has significant regional and global implications. If Russian elite rhetoric can help to explain Russian aggression in certain former Soviet States, but not others, it would indicate that we could forecast these aggressive Russian actions. This paper will therefore help forecast future Russian aggression in the FSU. If policy makers could anticipate Russian aggression with greater accuracy, they could more decisively resolve conflicts and prevent future humanitarian and political crises.

Since their recognition of Kosovo in February 2008, Russia has militarily intervened in three frozen separatist conflicts: Georgia, Ukraine, and Azerbaijan. Russian intervention has further fractured these states, caused heavy casualties, and stunted any reconciliation efforts with

separatist regions. It has also created humanitarian challenges. The Internal Displacement Monitoring Centre estimated that in 2022, 305,000 Georgians remained internally displaced 14 years after the Russian invasion (Internal Displacement Monitoring Centre, 2021). In Ukraine, the Russian invasion displaced 12.8 million people—the largest number in Europe since World War Two (United Nations Office of the High Commissioner, 2022).

Russian intervention in frozen separatist conflicts is also a threat to international stability. The risk of wider international conflict increases with Russian aggression in the FSU. Recently, violence in Nagorno-Karabakh saw Turkey supporting Azerbaijan and Russia supporting Armenia. With NATO aligned states and Russia geopolitically posturing in separatist conflicts, the risk of a more serious conflict increases. Furthermore, Russia's invasion of Ukraine has brought Russian aggression closer to a NATO member's border than ever before. The result of an accidental misstep by either NATO or Russia could turn a regional conflict into a much more serious international conflict and, potentially, a nuclear war. If policy makers are able to predict when Russia will intervene in frozen separatist conflicts they will be able to react more decisively and prevent more serious conflict. My work seeks to answer the question of whether elite rhetoric is a viable mechanism for forecasting such Russian aggression.

This paper will not test the causal relationship between power and ethnicity in elite rhetoric nor does it attempt to identify why Russia intervenes in separatist conflicts. My contribution only identifies a mechanism to forecast such aggression. While previous scholarship has used elite rhetoric as a tool to explain conflict and political violence, this paper will attempt to use elite rhetoric to forecast aggression by examining the Russian Federation's involvement in frozen separatist conflicts in Georgia and Moldova (Jackson and Dexter, 2014; Gubler and Kalmoe, 2015). What makes the Russian Federation a unique case, is that it is a major world power involved in multiple frozen separatist conflicts within what it terms as its own 'sphere of special interest'.

This study begins with a short literature review followed by a theory section and a detailed explanation of my research design and methods. The final section presents my results, discusses their implications, and concludes by explaining why analysis of elite rhetoric is such an important tool for forecasting Russian aggression in a time where separatist conflicts have become integral to Russia's foreign policy goals.

Literature Review: Why Do Foreign States Intervene in Separatists Conflicts?

Why do states choose to intervene? Literature specific to Russian involvement in separatist conflicts in the FSU is sparse. Hence, a comparatively large body of scholarship surrounding

other states' motivations to intervene forms this study's theoretical foundation. Within the literature on foreign intervention in separatist conflicts, there are three main schools of thought: vulnerability, ethnicity, and power. These three schools correspond with the leading international relations theories of Realism, Liberalism, and Neo-Realism. Thus, they provide three explanations for why states may intervene in separatist conflicts. Understanding elite Russian government figures' motivations and decision-making around intervention is important for determining whether their rhetoric can forecast aggression.

Vulnerability Constraining Foreign States—The Realist Approach

Scholars have long regarded the vulnerability school of thought as conventional wisdom for understanding foreign intervention (Pavković and Radan 2011, 268-9). Vulnerability theory holds that states do not intervene in separatist conflicts to ensure the maintenance of existing borders and the international norm of non-intervention (Herbst 1989; Englebert 2005; Heraclides 1990; Griffiths 2016). The large majority of this school of thought was born through case studies of the African continent, which had relatively strong international borders despite internal conflicts in many African nations.

Beginning in the 1980s, schools studying secessionist and ethnic conflict were puzzled as to why Africa saw remarkably stable international borders, and relatively minor secessionist conflict (Herbst 1989; Englebert 2005). Attempting to make sense of this, Herbst (1989) argued that weak central governments and regional agreements affirming international sovereignty deterred political actors in Africa from intervening in separatist conflicts. Englebert (2005, 424) built on this work by asserting that norms of international sovereignty created material incentives against intervention.

Following the initial use of vulnerability to explain Africa's experiences with secessionist conflict, the vulnerability school of thought was expanded to other regions of the world and refined. Heraclides (1990, 374) through multiple case studies of secessionist conflict covering Africa, the Middle East, and Southeast Asia, confirmed the conventional wisdom surrounding vulnerability, but added a few notable caveats to the theory, namely that states would intervene on behalf of the side that is adjacent to their territory. In *Age of Secession* (2016), Griffiths argues the international system has acted as an insurance policy for weak states against foreign intervention in secessionist movements. While the vulnerability school of thought was once the dominant school of thought in the literature on foreign intervention in separatist conflicts, increasing challenges have arisen through the ethnicity and power schools of thought.

According to vulnerability theory, domestic separatist ambitions and international norms of non-intervention should have constrained Russia. This was, of course, not the case. Russia intervened in Georgia in 2008, Crimea in 2014, Nagorno-Karabakh in 2020, and Ukraine in 2022.

We must therefore seek other understandings of Russian intervention in separatist conflicts.

Ethnicity in Foreign Intervention in Separatist Conflict—The Liberal Approach

According to the ethnicity school of thought, ethnic ties motivate foreign intervention in separatist conflicts. Numerous scholars have suggested that domestic political incentives influence political elites to pursue a policy of intervention along ethnic lines (Saideman 2002; 2007; 1997; Nome 2013; Littlefield 2009). The most dominant scholar in pioneering and advancing the ethnicity school of thought has been Stephen M. Saideman. He argues that intervention in separatist conflict on behalf of ethnical kinship becomes a significant domestic political consideration for the intervening nation (Saideman 2002, 28).

More recently, scholars have gone beyond Saideman's work. For example, Nome (2013, 755-756) finds that ethnic composition is a better predictor of what side a state will support in a separatist conflict. Scott Littlefield (2009) adds to the ethnicity school of thought by highlighting that Russia used 'ethnic identity', in the form of passport distribution, to advance its geopolitical interest to involve itself on behalf of Georgia's regions in the Russo-Georgian War. The ethnicity school of thought explains, in part, Russia's decision to invade Georgia in 2008. Then Russian Prime Minister Vladimir Putin stated that Russian military operations in Georgia were "well-founded and legitimate and moreover necessary", in order to prevent what he interpreted as genocide by the Georgian government against South Ossetins (Shields 2008). Russia has not however intervened on behalf of separatists in other former Soviet states. For example, Moldova has seen pro-Russian separatism since the early 1990s but Russia has not intervened there. Such instances expose the ethnicity's schools limitations, especially in the FSU.

Power in Foreign State's Involvement in Separatist Conflict—The Neo-Realist Approach

The power school of thought sees states' motivations for intervening in separatist conflicts resulting from self-interest to maximize their power (Huddleston 2021; Abushov 2021; Sterio 2013; Sari 2019). The power maximization school of thought is divided on the scope of states power maximization goals. One group of scholars see power maximization being centered on a state's international power position (Sterio 2013; Huddleston 2021). However, a second group of scholars see power maximization as resulting from regional power concerns (Sari 2019; Abushov 2021). This school of thought has emerged as a rising challenge to conventional

wisdom on foreign intervention in separatist conflict and the primary challengers to the ethnicity school of thought.

Scholars have advanced power in two distinct forms. The first form asserts that power maximization is centred on the international system. Sterio (2013) advances that sovereignty is unequal, with major powers imposing 'conditional' sovereignty on weaker states. Sterio (2013) further advances that when states deny self-determination movements freedom and crush these rebellions, major powers are justified to act in secessionist conflicts to prevent human rights abuses. On the other hand, Huddleston argues that third parties intervene in separatist conflicts out of self-interest, in order to maintain the stability of the international system (2021, 1208). While power maximization through the international system has partly explained the reasons for states' support of foreign separatist conflicts, a set of scholars argue that the international system is too broad to cover the entirety of states' decisions to support foreign separatists.

The idea of regional power maximization has been advanced by some scholars as the reason for states support for foreign separatist groups. Sari (2019) advances that ethnicity is not an accurate predictor of foreign intervention in separatist conflict. Sari's (2019) analysis of Indonesia's involvement in multiple separatist conflicts reveals that Indonesia intervened in separatist conflicts to maximize its regional power instead of on ethnic and religious lines. Abushov (2021) applies power maximization to Russia's recognition of Georgia's separatist provinces—South Ossetia and Abkhazia—as Abushov (2021, 18) found that Russia recognized the separatist regions out of self-interests, as bilateral relations with Georgia broke down. Regional power maximization explains states' decisions to intervene in separatist conflicts not explained by the power maximization school's international system argument. However, what both these sets of scholars agree on is that power maximization is an important tool for understanding why states support separatist groups in foreign separatist conflicts.

Power maximization has become an emerging school of thought in the literature on foreign intervention in separatist conflicts, challenging both the vulnerability and ethnicity schools of thought. The power and ethnicity schools of thought have emerged as the most relevant schools of thought in my study on Russian elite rhetoric, forming the basis of the concepts I use in this paper.

Theory

Studies using elites' behaviour to understand foreign intervention in conflict have been undertaken in the past. Keller et al (2020, 289) uses US presidents' risk perception as a way to explain foreign intervention in conflicts. My work uses elite behaviour—rhetoric—to show that Russia's more assertive actions in frozen separatist conflicts in the FSU can be forecasted. While

my work is pioneering in the context of using elite rhetoric to forecast Russian aggression, previous literature has shown elite rhetoric to be a valuable tool in understanding foreign policy decisions (Keller, Grant, and Foster 2020; Sagarzazu and Thies 2019; Teles Fazendeiro 2018).

The literature on rhetoric explaining foreign policy behaviours has been used to describe a wide variety of international phenomena. Sagarzazu and Thies (2019, 212) found that increasing oil prices explained increasing anti-imperialist rhetoric from Hugo Chavez in Venezuela, which thus indicates the ability to pursue a more antagonistic foreign policy. Teles and Fazenderio (2018) found that as international pressures increased on Uzbekistan in the early 2000s, Islam Karimov's rhetoric became more exclusionary towards the West. Those pressures therein precipitated Uzbekistan's disengagement with the West (Teles Fazendeiro 2018). While some scholars in political science may not be convinced that rhetoric is an effective tool in foreign policy analysis, Teles and Fazenderio (2018), and Sagarzazu and Thies (2019) show that elite rhetoric can potentially be a valuable tool in understanding foreign policy decisions. My work will advance the literature that uses elite rhetoric in foreign policy analysis, through analyzing Russian elite rhetoric's ability to forecast Russian aggression in frozen separatist conflicts—an untapped field in text analysis research in the Russian studies field.

The use of text analysis methods in research relating to Russian foreign policy is extremely thin, and the literature that is available is concentrated on Russia's attempts to interfere in the 2016 US Presidential election (Badawy et al. 2019; Deb et al. 2019; Dutt, Deb, and Ferrara 2019; Ghanem, Buscaldi, and Rosso 2019). Further all of these studies centre their text analysis solely on Russia's social media campaigns directed at the 2016 US Election, neglecting Russian elites' rhetoric (Badawy et al. 2019; Deb et al. 2019; Dutt, Deb, and Ferrara 2019; Ghanem, Buscaldi, and Rosso 2019). My work intends to use the utility of elite rhetoric to understand the context of foreign policy decisions, while forming a new direction for text analysis research relating to the Russian federation.

To test whether Russian elite rhetoric can forecast Russian aggression in frozen separatist conflicts in the FSU, I have developed two hypotheses:

> H1: Russian elite rhetoric will be most concentrated on power and ethnic concerns surrounding Georgia between 2003-2008, compared to my other case studies.

I would expect to see references to NATO and humanitarian concerns to be prevalent in Russian elite rhetoric during the Rose Revolution in Georgia. If Russian elite government figures are increasingly talking about NATO and the abuses faced by Russian citizens living in Georgia's separatist provinces, it would signal Russian governmental figures' concerns over Russia's loss of control of this region. If Georgia during the Rose Revolution is my only case study to

experience increased rhetoric over power and ethnic concerns, then it will indicate that when Russian elites increase their rhetoric on power and ethnic concerns, we can forecast future Russian aggression.

> H2: Russian elite rhetoric relating to Georgia's separatists between 2003-2008 will be most negative out of my case studies.

I expect an increase in negative rhetoric by Russian elite government figures during the Rose Revolution in Georgia, as Russia felt threatened by potential NATO membership and access to peoples it says are ethnic Russians. I expect that due to these considerations, Russian elite rhetoric aimed at Georgia over its policy to its separatist region would be significantly more negative than any other case study I examine. If Russian elite rhetoric is significantly more negative during the Rose Revolution in Georgia, it will suggest that Russian elite rhetoric can signal future Russian aggression and thus can be used as a forecasting mechanism.
These hypotheses will allow me to test whether Russian elite rhetoric is able to forecast Russian aggression in frozen separatist conflicts, as it happened when Russian power and ethnic concerns were at a heightened period in Georgia—during the Rose Revolution. This is the only period in my cases that Russia militarily intervened.

Methods and Data

In order to test whether Russian elite rhetoric can forecast Russian military interventions in frozen separatist conflicts with heighted power and ethnic concerns, I have conducted various forms of text analysis. Text annotation has always been an important tool to political science research, but the rapid rise in the availability of text as data and the growing interest in text annotation has provided new opportunities for text analysis projects (Cardie & Wilkerson 2008). Despite the growing shift towards research methods involving text analysis in political science research, few research projects focusing on Russia have included text analysis in their research design. My project intends to fill a gap in the literature and provide a platform for the feasibility of subsequent research projects centered on elite Russian rhetoric.

To test whether Russian elite rhetoric can forecast Russian military aggression in frozen separatist conflicts, I collected 180 news articles containing elite Russian government figures' quotes, that relate to either Georgia or Moldova's separatist regions. The articles were selected based on the criteria of whether they included a quote from a Russian elite. These articles were found on Nexus Uni, Factiva, and Russia Today's websites. All articles are in English and contain quotes from Russian elite government figures that held senior executive, legislative, military posts, or represented governmental ministries—some articles include quotes from multiple Russian elite government figures. Some quotes have been adapted to include material the news articles authors included to provide context to the quote.

To account for the quotes' regional variations, I have divided them into two categories—Western origin and Russian origin. Quotes that are determined to be of Western origin are from North America and European Union countries. The quotes are focused on my two chosen case study regions—Moldova and Georgia—covering three time periods for each region: 1992-2002, 2003-2008, 2009-2022, forming a total of 6 case studies. The distribution of the news articles are as follows, 14 from each regional source regarding Moldova from 1992-2002, 11 from each regional source regarding Moldova from 2003-2008, 15 from each regional source from 2009-2022. In Georgia there are 19 from each regional source from 1992-2002, 17 from each regional source from 2003-2008, and 14 from each regional source from 2009-2022. The news articles I have collected were manually scraped for their text and inputted into a spreadsheet in order for computer assisted text analyses to test my hypotheses.

In order to test the collected elite Russian quotes, I have conducted various forms of computer assisted text analyses performed on the integrated development environment, R Studio. In order to test my first hypothesis, I graphically displayed the word frequency in the language used by Russian elites. I compare the word frequency that Russian elites used in their quotes across my case studies to determine whether certain Russian elite rhetoric was more prevalent during the Rose Revolution in Georgia from 2003-2008. This test will help to identify if certain words are more indicative of aggressive Russian intentions, as if certain words were more prevalent or only used frequently during the 2003-2008 Georgian case study, this would indicate those words could potentially identify future Russian aggression. This test will also be able to identify whether alternative explanations—domestic or international—explain Russian aggression or an increase in rhetoric, through the increased prevalence in the mention of certain words. I have also visually represented the results of the word frequency graphs, through word clouds to visually clarify Russian elites' rhetoric.

In order to visually represent the results of the word frequency graphs, I have taken the results of the word frequency tests and displayed the results in word clouds for each case study. Word Clouds have allowed me to graph the results in a more intuitive manner, as words are sized proportionately to their frequency. When combined with the results of the word frequency graphs, word clouds clarify which words I should take a deeper look into for my sentiment and bigram analyses.

I also employ bigram analysis of Russian elite quotes in each case study to better understand how Russian elite governmental figures signal aggressive intentions. Bigram analyses compare the relationships between words, by identifying the most common pairs of words within bodies of text (Silge & Robinson, 2017). This allows researchers to identify words that have been frequently used with one another, allowing for the potential identification of trends in the text

examined. I have performed two bigram analyses of the corpus of Russian elite quotes. First, I looked at what combinations of bigrams are most prevalent in Russian elite rhetoric and if this can identify trends in how Russian elites signal aggressive intentions. I only included word combinations that appear more than one time, in order to show the word combinations that appear most frequently. I hope to identify if pairs of words, or certain points of focus in Russian elites' word combinations in the Georgian case study differed from the five other case studies. This will help test hypothesis one (H1) as I will be able to further identify pairs of words that are connected providing further insight into the issues Russian elites focus on.

Second, I use bigram analysis to identify how Russian elites talk about the regional challenges Russia faced. By using the bigrams of 'NATO', 'Georgian', 'Leadership', and 'Russian', we can contextualize these politically charged words and better analyze their use.. Understanding key words relating to power challenges to Russian influence in the FSU will potentially provide insight into how Russian elites perceived these key words relating to power challenges. Understanding the words that are most associated with Russian aggression will allow me to refine my understanding of my second hypothesis and help determine whether Russian elite rhetoric's sentiment can potentially forecast Russian aggression.

To test my hypothesis of whether Russian elite rhetoric was most negative towards Georgia during the Rose Revolution, I have conducted a sentiment analysis of elite Russian quotes with the focus on negative sentiment. I have used the Bing Dictionary to compare sentiment scores within the corpus of Russian elite quotes for each case study. I have chosen the Bing Dictionary, as it classifies words in a binary fashion into positive and negative categories (Silge & Robinson, 2017). If I find that Russian elites' rhetoric was significantly more negative in sentiment during the Rose Revolution, this will offer evidence in support of my hypothesis that Russian elite rhetoric can forecast Russian interventions in frozen separatist conflicts. I am also conducting secondary analyses in addition to word frequency, sentiment, and bigram analyses, but these will be less generalizable than the previous methods.

I have analyzed the distribution of Russian elite governmental figures' rhetoric over my time periods. In order to do this, I have graphically displayed the distribution of Russian elite quotes, divided each case study region into separate categories, and displayed them within the corresponding time periods. I have only included cases where instances of elite rhetoric were greater than two to avoid cluttering the visualization of the distribution of the Russian elite rhetoric. I suspect that increased rhetoric by elite Russian governmental figures in important posts—such as the presidency, prime minister, and foreign minister—is likely during the Rose Revolution. Understanding not only what elite Russian government figures say, but who is saying it is extremely valuable for creating an effective forecasting mechanism for Russian aggression in frozen separatist conflicts. I will not be able to generalize any results I find in this

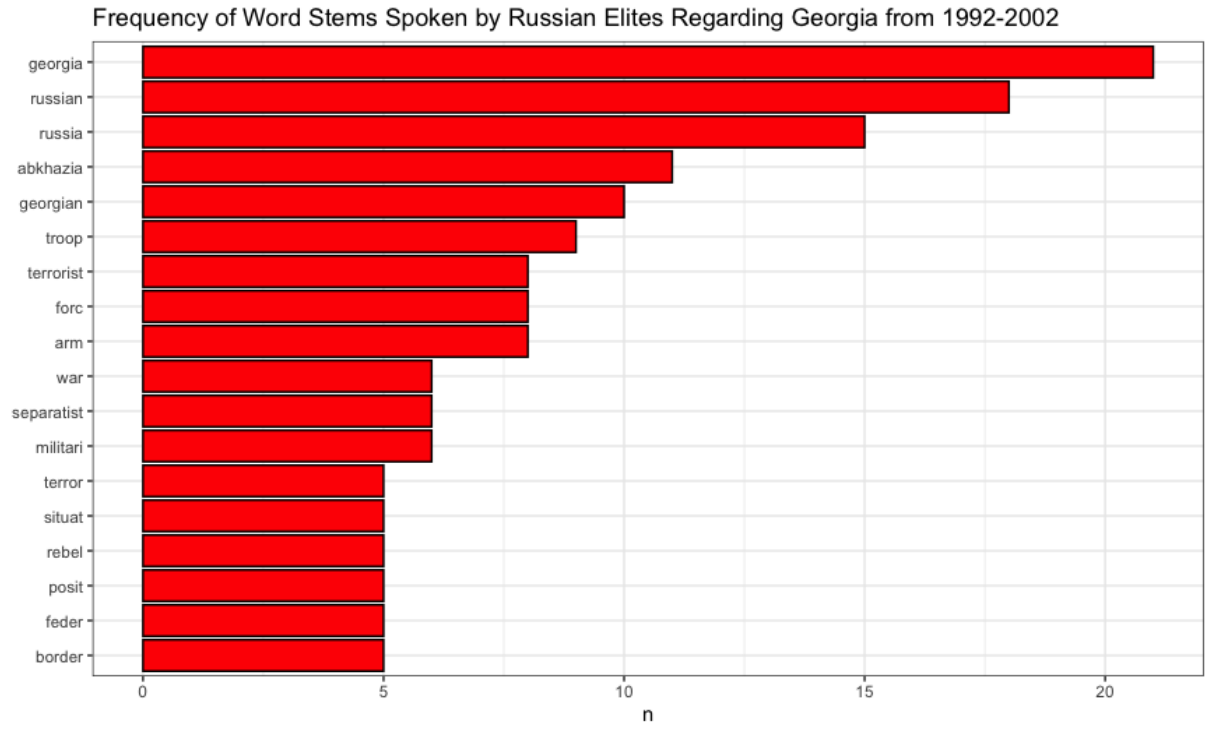
analysis, as my sample size is not adequate in covering the entirety of statements made by elite Russian governmental figures, but I predict that in future works my findings will hold.

The last major secondary analysis I have conducted is the overall sentiment difference between Western and Russian news sources. Understanding whether Russian and Western news sources cover Russian elites' interaction with frozen separatist conflicts differently could be a valuable tool in forecasting Russian aggression. If news articles from either source were significantly different in sentiment during the Rose Revolution in Georgia than in other periods and case studies, this could provide another avenue for forecasting Russian aggression in frozen separatist conflicts. While I have attempted to show the potential ability of Russian elite rhetoric in forecasting future Russian aggression, I do have to be careful with the selected data I am using.

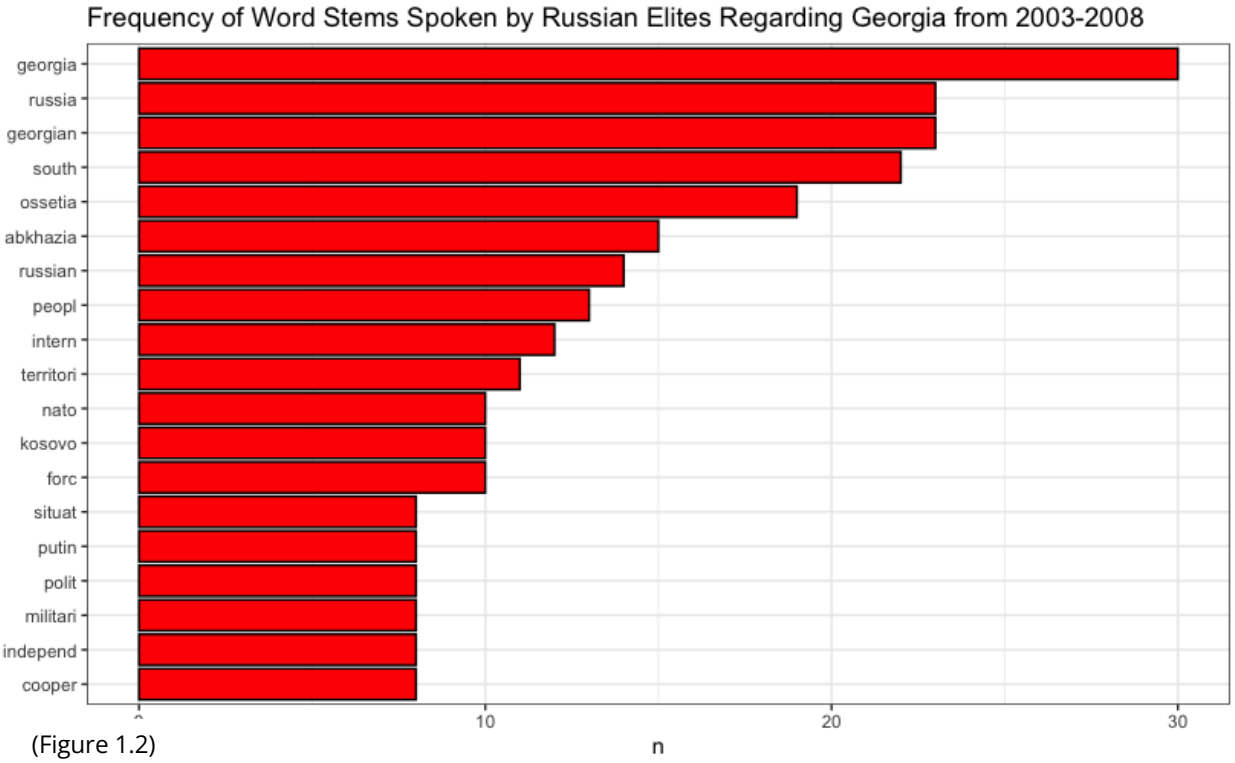
A potential bias that comes to mind in my research design is an interpretation bias. My research design inevitably includes the selection criteria and biases of the journalists that publish Russian elites' quotes. The omission of select portions of these quotes could alter the meaning or the way in which my text analysis interprets the quotes. A better source of data would have been Russian Duma transcripts, as they would have allowed me to analyze elite Russian rhetoric in Russia's legislative branch. However, these are only available in Russia, which is unfeasible for me to access due to budget, time, geopolitical conditions, and language constraints. Nonetheless, quotes published in news media offer the comparative advantage of including statements made outside the Duma and therein offer a more representative dataset. Hence, while the data sources I have chosen are inferior to Duma transcripts, the current data is sufficient for understanding the potential ability of Russian elite rhetoric to forecast Russian aggression in frozen separatist conflicts in the FSU. In future works I hope to access Duma transcripts as I expect my findings to hold with that data.

Results

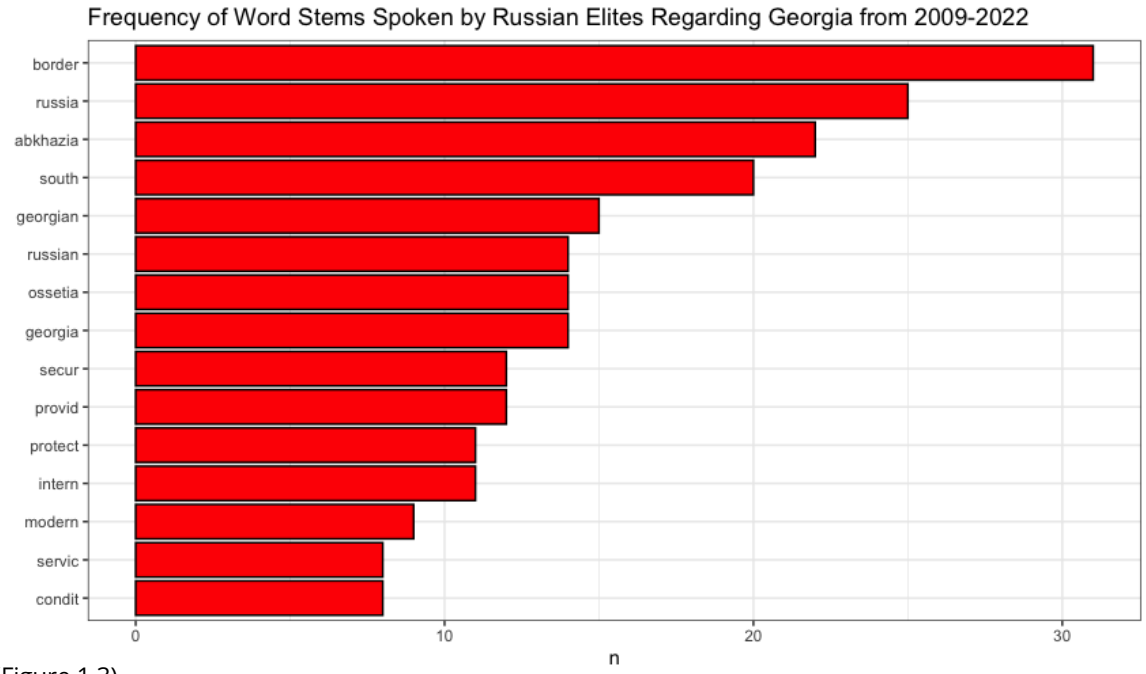
Russian elite rhetoric in news articles concerning Georgia and Moldova's separatist region from 1992-2022 showed significant trends which prove useful for identifying future Russian aggression.



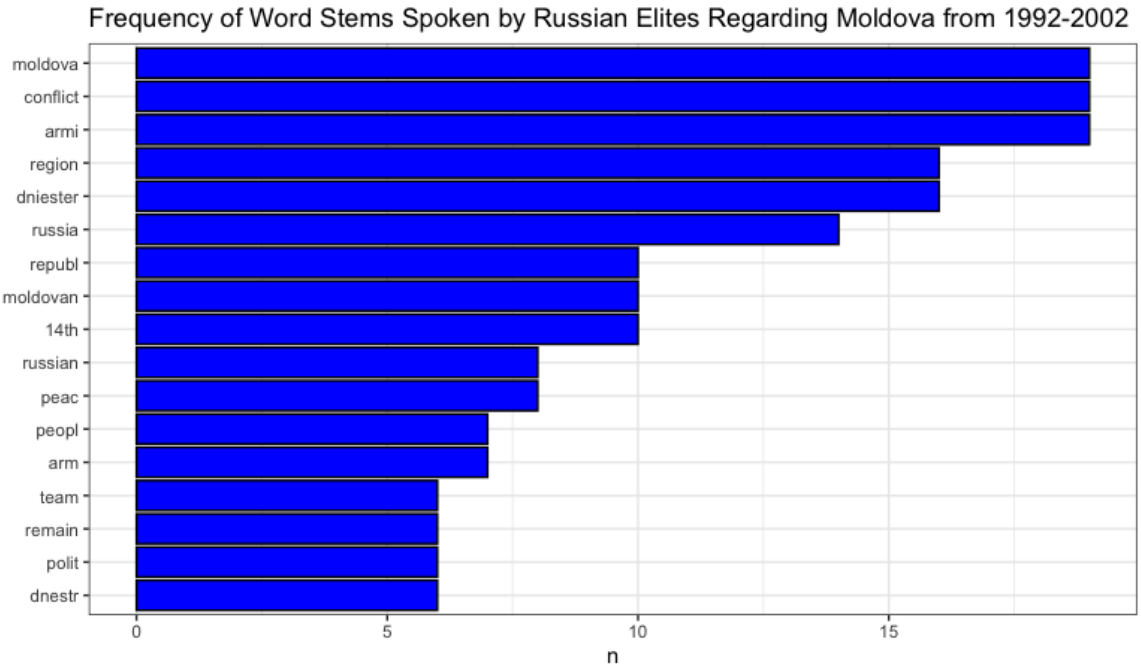
(Figure 1.1)



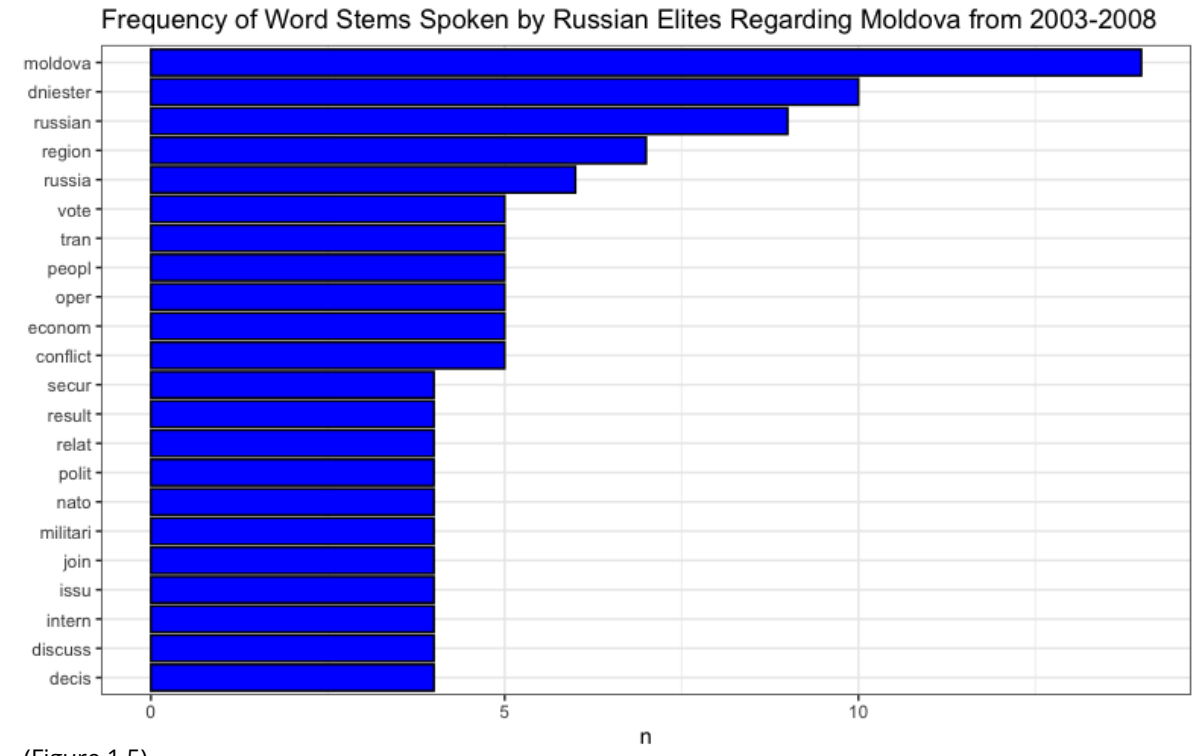
(Figure 1.2)



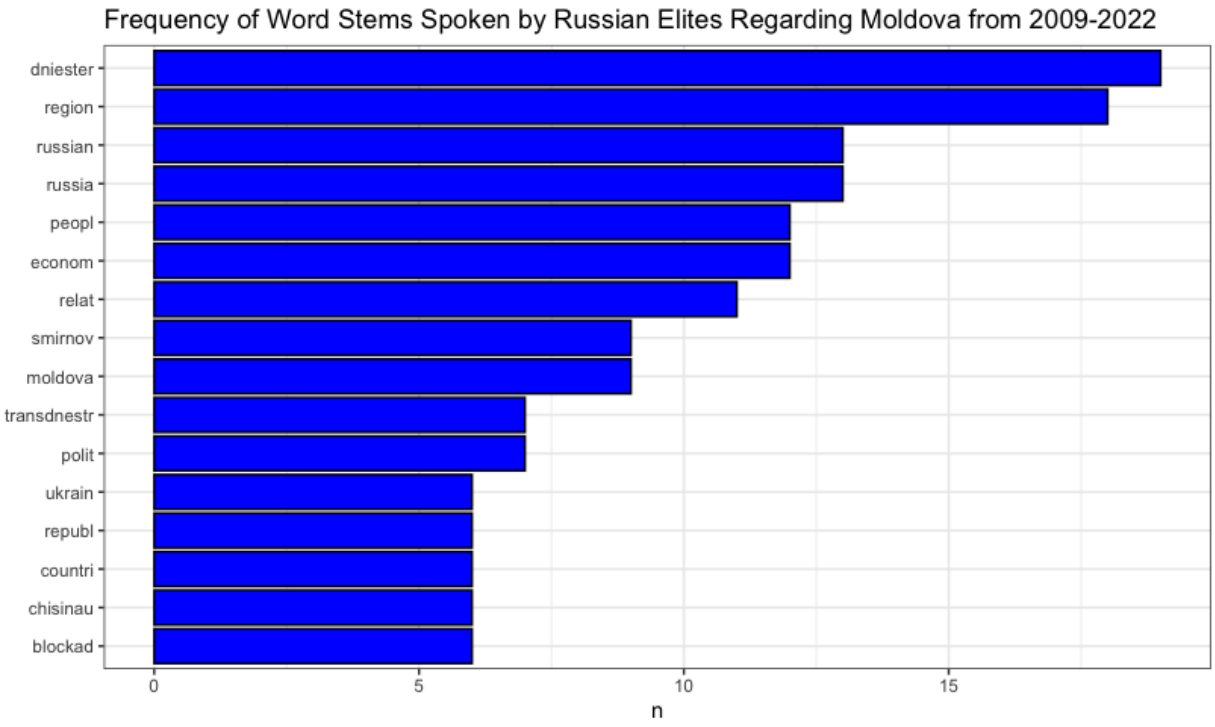
(Figure 1.3)



(Figure 1.4)



(Figure 1.5)



(Figure 1.6)

Figure 1.2 displays that Russian elite rhetoric centered mostly on power concerns during the period of 2003-2008 in Georgia out of any case study (See Figures 1.1-1.6). The prominent

presence of the stems of “NATO” and “Kosovo” in Russian elite rhetoric regarding Georgia between 2003-2008 highlights Russian elites’ concerns over Western challenges to Russia’s geopolitical power within the region. Geopolitical concerns for Russian elites such as “NATO” and “Kosovo” did not appear in any other word stem graph at close to the same frequency as the 2003-2008 Georgian case study. Instead, every other case study focused on domestic challenges. For example, in Figures 1.1 and 1.4, the majority of Russian elite rhetoric focused on the civil wars in Moldova and Georgia. In Figures 1.3 and 1.6, Russian elite rhetoric focused on economic relations between Russia and the separatists regions in Moldova and Georgia. These findings are reflected in the word clouds, as power concern words only dominate Russian elite rhetoric in the 2003-2008 Georgian case study.

(Figure 2.1)

(Figure 2.2)

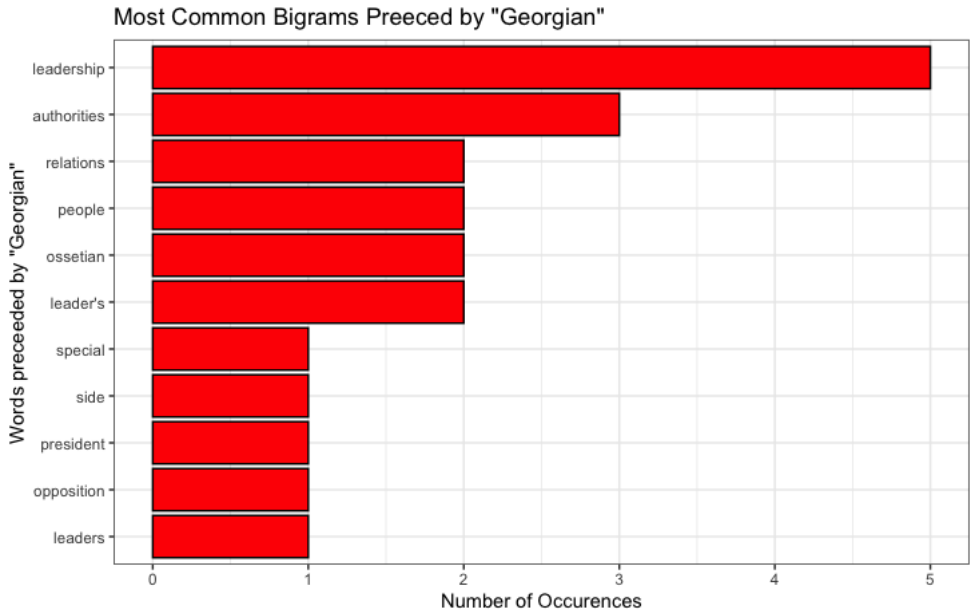
(Figure 2.3)

(Figure 2.4)

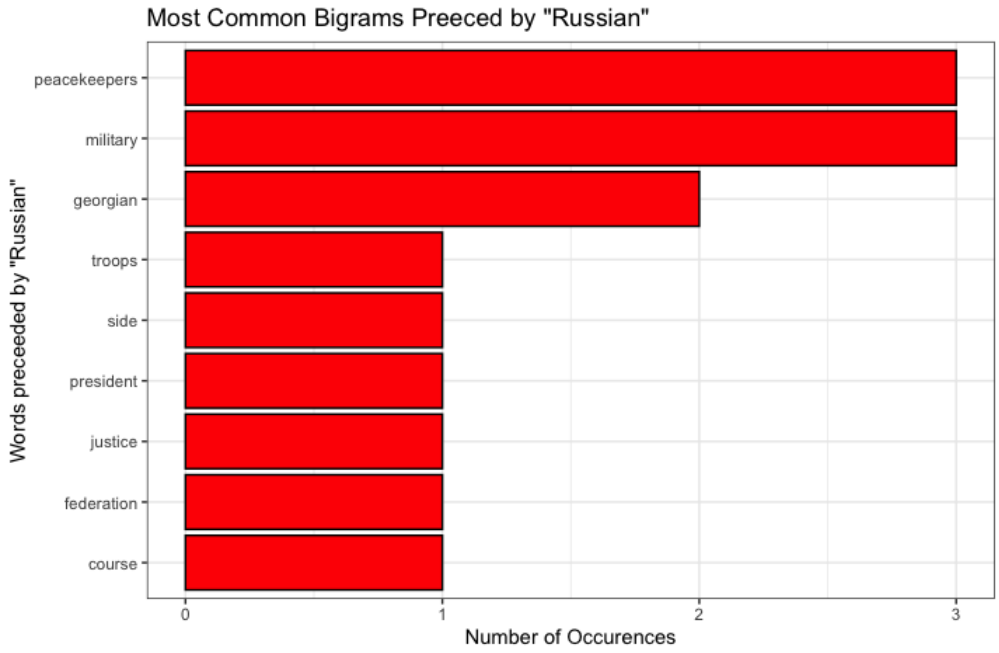
(Figure 2.5)

(Figure 2.6)

Figure 2.2 shows Russian elites' fear of challenges to its regional power, as stems like NATO and Kosovo continue to be highly represented. An interesting note from Figure 2.2 is the presence of "Independ" and "Recognit", as these words appear in a greater frequency—as highlighted by their size—than any other case study. This is a notable finding as it potentially shows Russian elites' actions to counteract Western challenges to its regional power in Georgia, through the recognition of its separatist regions. In combination with Figure 1.2, Figure 2.2 highlights a trend of Russian concern over regional power in elite rhetoric, which I further explore through understanding how Russian elites use these words.



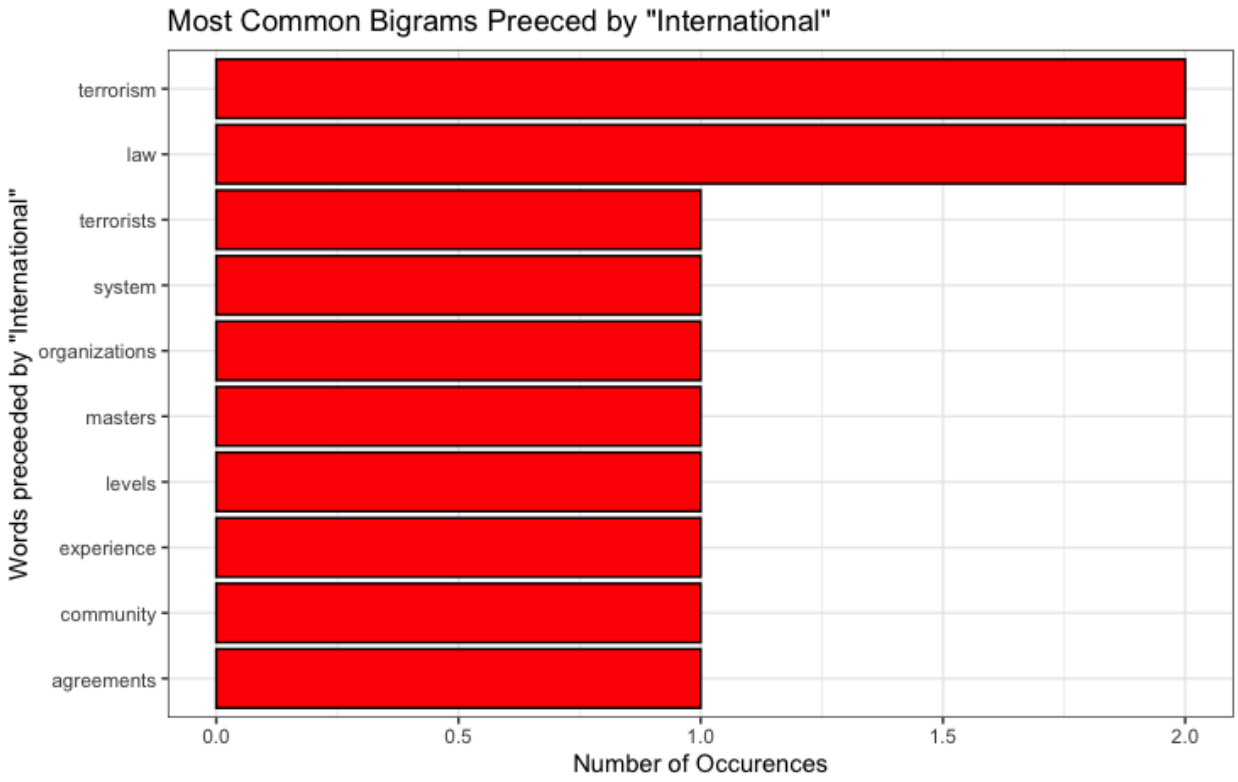
(Figure 3.1)



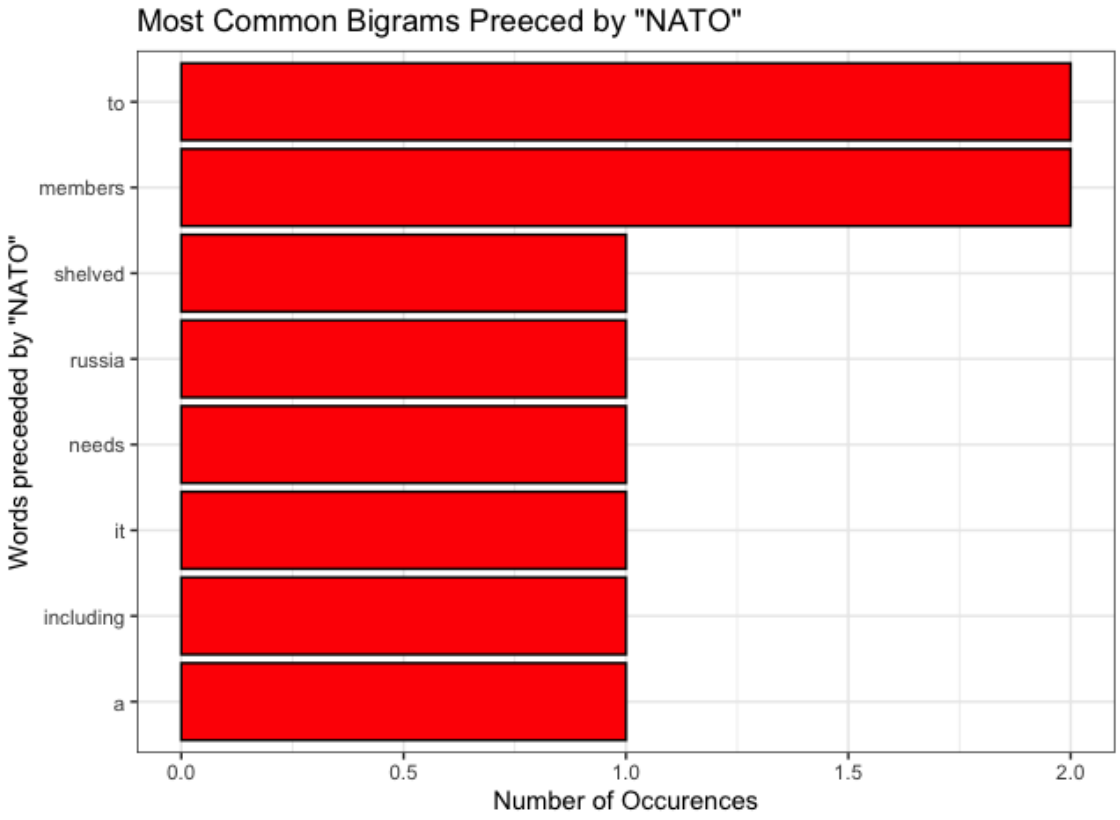
(Figure 3.2)

To further understand the intricacies of the Georgian case study, I analyzed words that were preceded by words related to Russian power concerns. Figures 3.1—3.4 display words related to key challenges against Russian power in the region. In Figure 3.1 Russian elites' rhetoric when using the word "Georgian" was most concentrated on Georgia's leadership. This most

likely results from Russian elites seeing Georgian leaders actions as detrimental to Russian interests in the region. Figure 3.2 saw a dominant focus on Russian peacekeepers. This makes sense as Russia maintains a military presence in regions where separatist conflicts are frozen, in order to strengthen Russia's presence and balance against Western expansion (Sagramoso 2020). These figures highlight Russian elites' focus on the regional actors and their effects on Russian power within the region, whereas Figures 3.3—3.4 focus on international actors' effects on Russian power within the FSU.

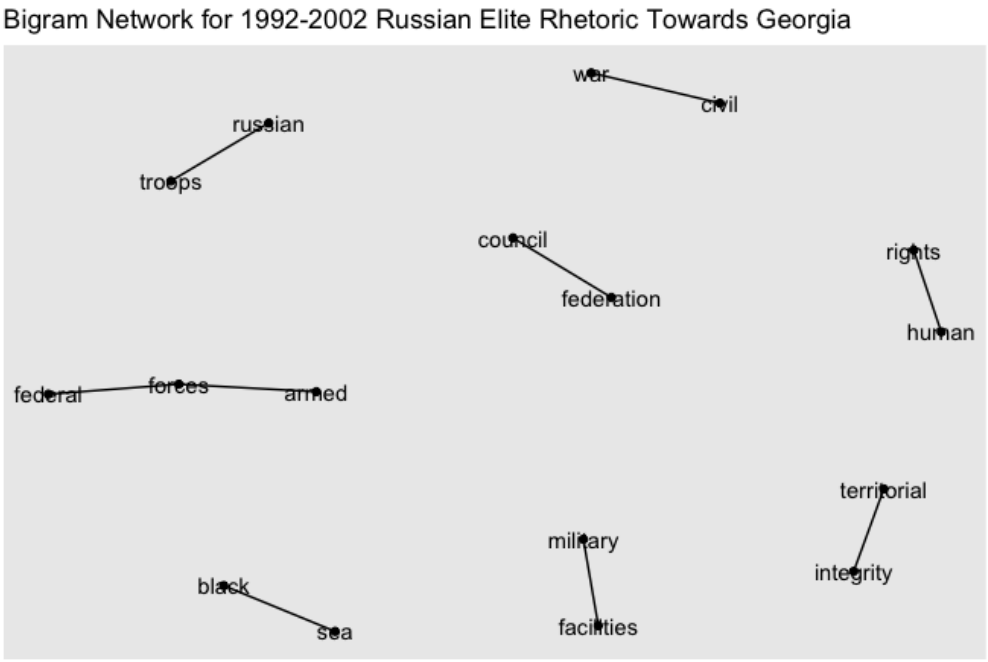


(Figure 3.3)

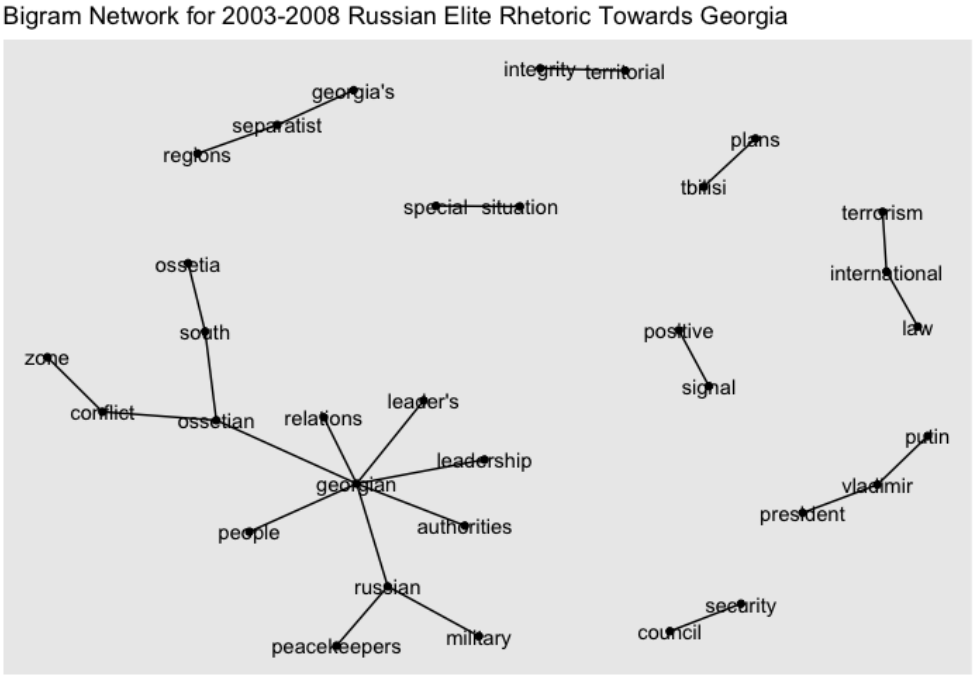


(Figure 3.4)

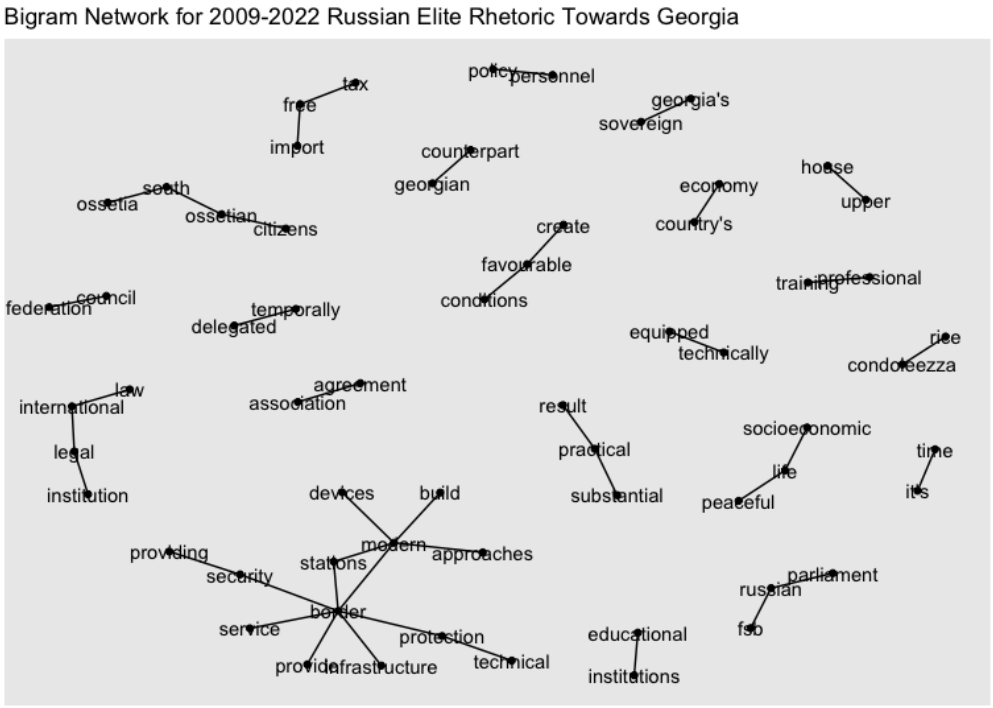
Figure 3.3 saw two areas of focus, the international community and law, as well as international terrorism. Russian focus on the international community and law again reinforces Russian fears of their geopolitical influence being undermined. An interesting note is that terrorism appeared frequently in Russian rhetoric regarding the international community. However, I did notice in the text scrapping of the articles that Russia continually criticized Georgian leadership over security threats regarding potential Georgian terrorist attacks against Russia, which relates back again to Russian criticism of Georgian leadership seen in Figure 3.1. Figure 3.4 highlights Russia's concerns with NATO members, as well as what I interpreted as shelving of NATO expansion. It is no surprise to see NATO expansion as a dominant focus for Russian elites, as Russia is extremely fearful of the alliance. Figures 3.1—3.4 shows that Russian elite rhetoric was concentrated on geopolitical concerns, which is further supported by the bigram chart for the Georgian case study between 2003—2008.



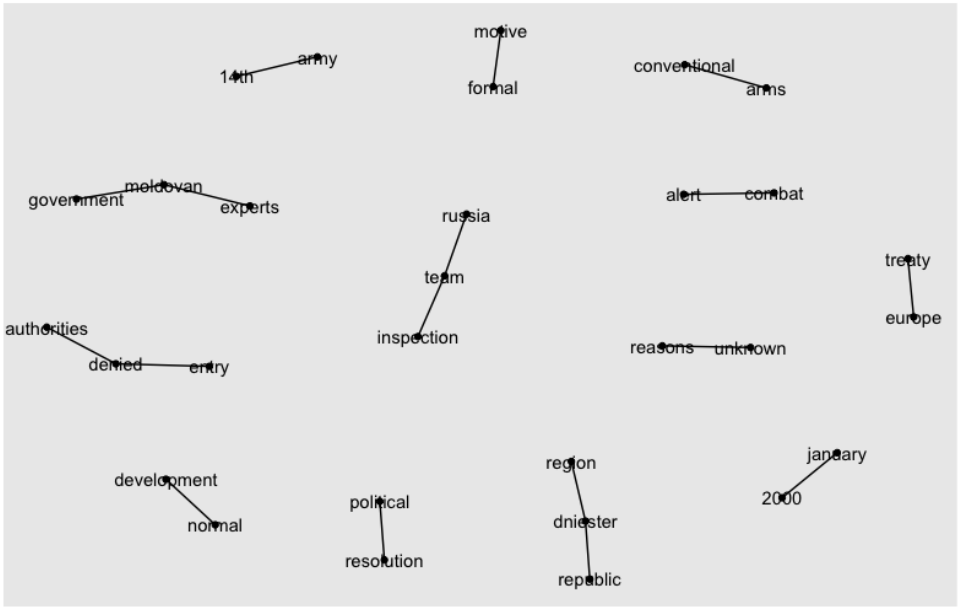
(Figure 4.1)



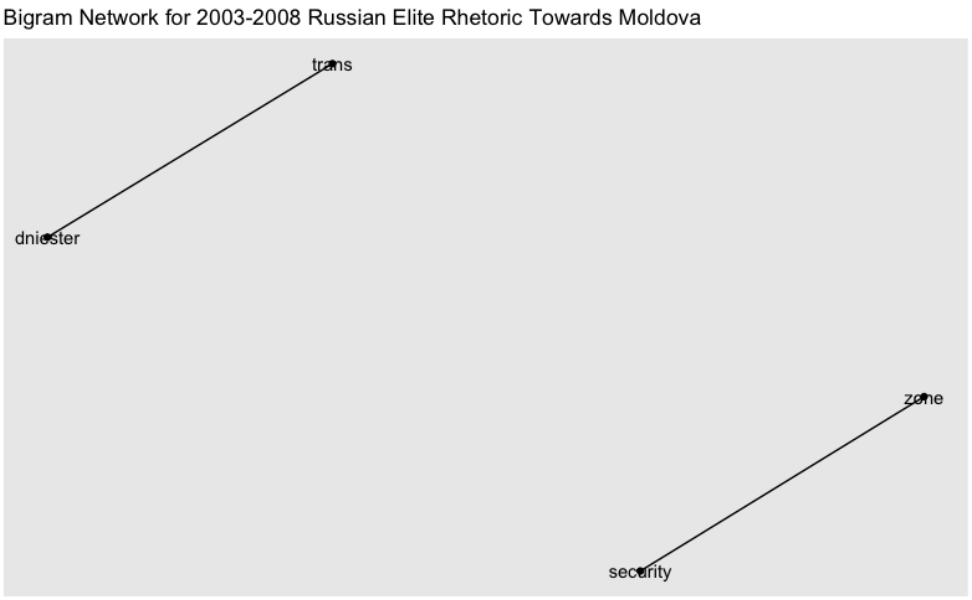
(Figure 4.2)



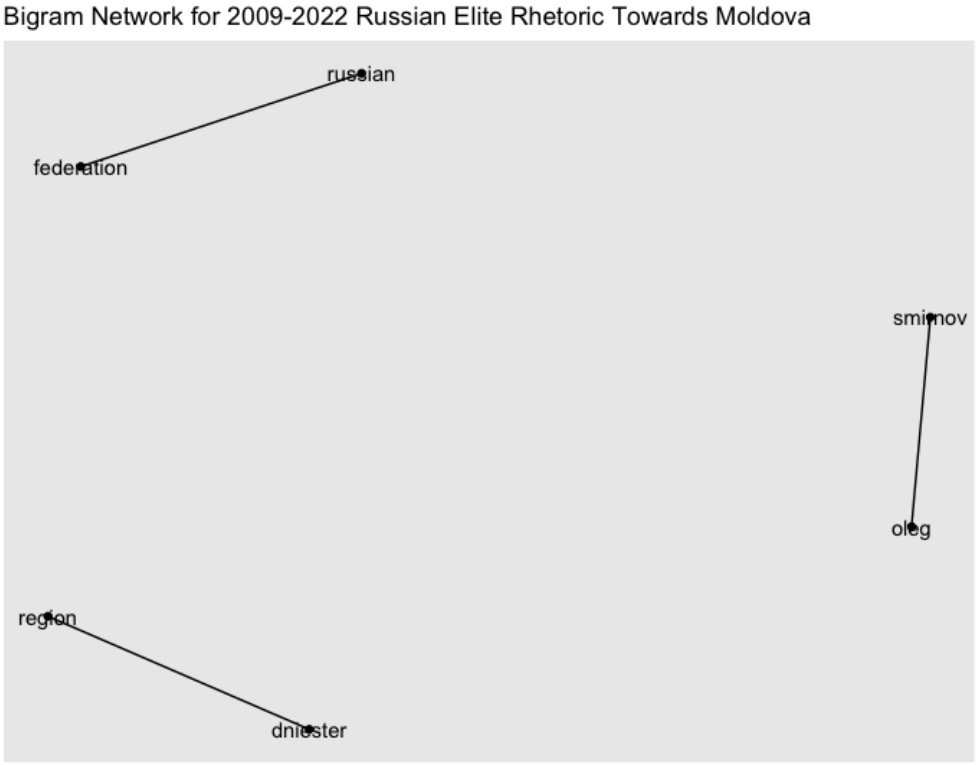
(Figure 4.3)



(Figure 4.4)



(Figure 4.5)

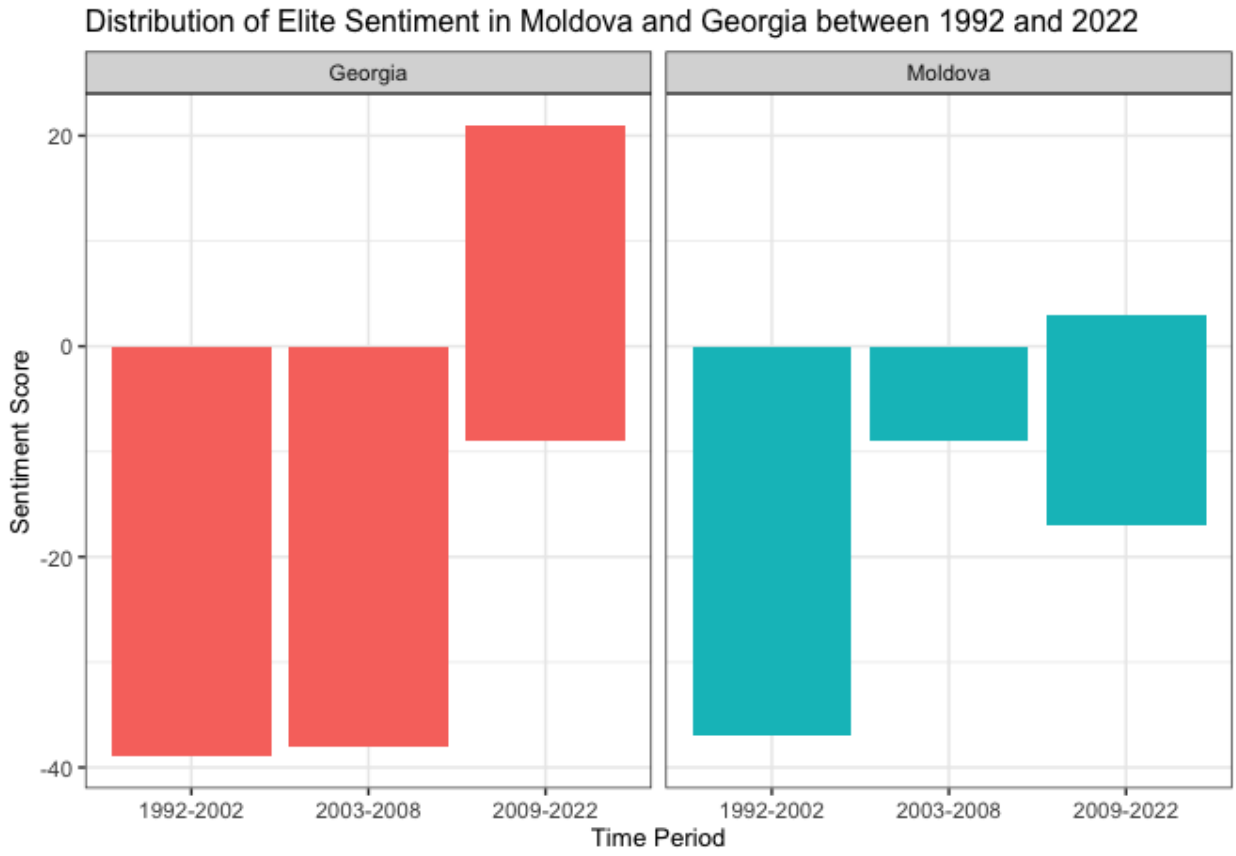


(Figure 4.6)

Using bigram analysis, Figure 4.2 identifies that the most frequent combination of Russian elite rhetoric regarding Georgia between 2003—2008 focuses on the lead—up to the 2008 Russo-Georgian War. Reading the bigram links on the graph, key topics such as Georgia's leadership, the United Nations Security Council, international law, and Russian peacekeepers are highlighted as the most frequently used combinations of words by Russian elites. These topics

do not appear in any other links in bigram charts for the other case studies covered (see Figures 4.1, 4.3—4.6). Russian elites in the other bigram charts instead focus on topics such as the civil wars in Moldova and Georgia in the early 1990s and focus on domestic security and society in the 2009—2022 case studies.

The results of both Figures 1.2 and 4.2 in part confirms hypothesis one (H1), since Russian elite rhetoric between 2003—2008 centered on power concerns regarding Georgia. However, I am not fully able to confirm my hypothesis one, as the data does not provide conclusive links between Russian elite rhetoric and increased ethnic concerns. Understanding that Russian elite rhetoric showed increased concerns over power between 2003—2008 regarding Georgia is valuable in helping to verify whether Russian elite sentiment was most negative within the case studies examined.



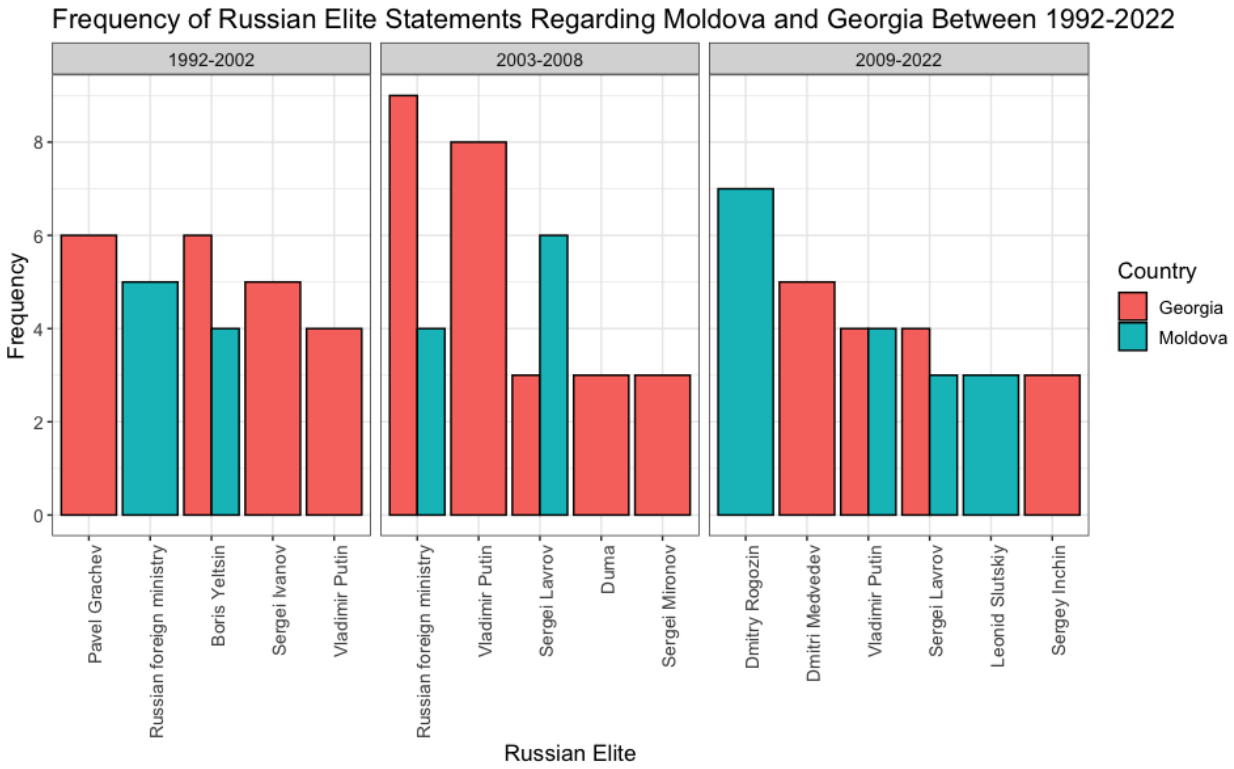
(Figure 5.1)

In testing hypothesis two (H2), Figure 5.1 shows that Russian elite rhetoric sentiment was actually most negative in Georgia from 1992—2002, with sentiment levels of around the same negativity level in Georgia from 2003—2008 and Moldova from 1992—2002. While the data does not completely confirm hypothesis two (H2), it nonetheless suggests that Russian elite

rhetoric can predict Russian aggression in frozen separatist conflicts. Moldova experienced a significant drop off in rhetorical attention after its separatist conflict reached a frozen state in the 1990s, while Georgia between 2003—2008 did not. Russia went to war with Georgia in 2008, while military conflict in Moldova deescalated after 1992 alongside a cooling in Russian elite rhetoric. Further, the fact that the 1992—2002 case study periods showed extremely significantly negative elite rhetoric is a positive finding for using elite rhetoric to predict Russian aggression in frozen separatist conflicts. The 1992—2002 case studies saw periods of separatist conflict in both Moldova and Georgia, as well as the introduction of a limited number of Russian 'peacekeepers'. These results are an interesting trend for identifying Russian aggression forecasted by elite Russian rhetoric, but as I have noted previously, understanding the content of what Russian elites are saying is needed for this to be effective.

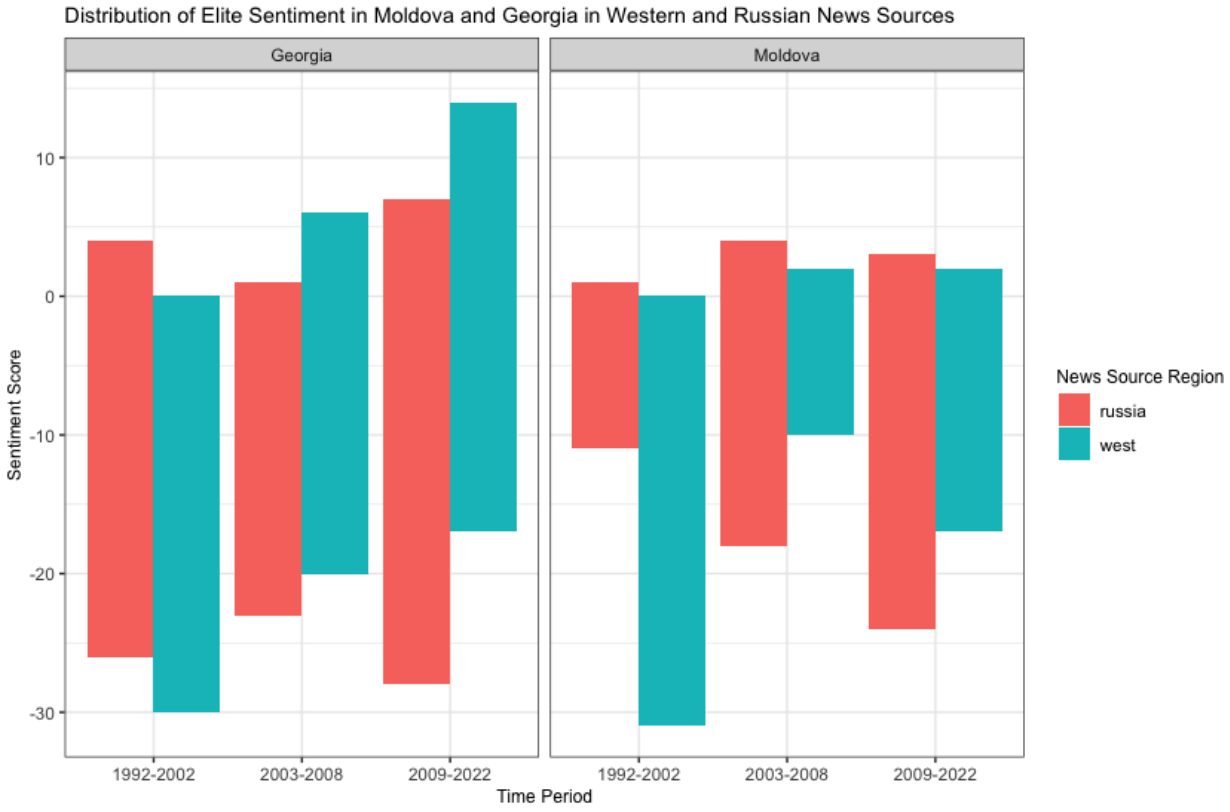
In Figure 4.1, Russian elite rhetoric is focused largely on two topics in Georgia between 1992—2002: The Georgian Civil War (1991—1993) and Russia's remaining military facilities following the war's conclusion. In comparison, Figure 4.2 shows that in Georgia between 2003—2008, Russian elite rhetoric focused on a multitude of topics associated with the lead up to the 2008 war. Russian elite rhetoric on Georgia between 2003—2008 focussed primarily on Georgian leadership, as illustrated by the bigram network in Figure 4.2. Russian elites' focus on Georgian leadership at that time signalled their growing frustration with Georgia's pull towards the West, which when combined with the results of Figure 5.1 allows for the identification of a potential forecasting mechanism of Russian aggression based on elite rhetoric.

To strengthen the forecasting capabilities of Russian elite rhetoric, more complete scrutiny of secondary tests undertaken in this paper is needed. Currently, these tests are not generalizable as they do not fully capture Russian elite rhetoric. The addition of documents that cover a more complete representation of statements from Russian elites needs to be undertaken in further work to determine whether these results will hold. A second way to increase these findings' utility is to analyze the independence that Russian political elites have in making these statements. I would expect limited autonomy in Russian elites' statements due to the authoritarian nature of the Russian political system. However, the results of these analyses provide some interesting findings, which I suspect will still hold with a more representative sample size.



(Figure 6.1)

In the first secondary test examining the distribution of elite Russian rhetoric, Figure 6.1 shows that Russian elite rhetoric regarding Georgia during the period of 2003—2008, was most concentrated between then President and Prime Minister Vladimir Putin, and the Russian Foreign Ministry. This is notable, as it is the only period in which Figure 6.1 demonstrates any discernible difference in the frequency of statements by both the Presidency, Prime Minister, and Foreign Ministry. This finding presents the possibility that when attempting to create a forecasting mechanism for Russian aggression it is necessary to consider which elites speak and how often.



(Figure 6.2)

In testing whether Russian and Western news sources covered Russian involvement in frozen separatist conflicts differently, Figure 6.2 shows no clear differences in regional variation of news coverage. The only time period in which Figure 6.2 shows significant variation between regional sources was Moldova between 1992—2002. During that time, Western media coverage was significantly more negative than Russian sources. This highlights that differences in the sentiment scores between Western and Russian news sources is a poor data source when seeking to forecast Russian aggression in frozen separatist conflicts since there was only marginal variation between the news source regions—barring Moldova between 1992—2002.

The figures presented in this paper show some notable observations regarding elite Russian rhetoric and its potential to forecast military intervention. If these findings are further expanded to other instances of Russian aggression towards states with frozen separatist conflicts, it may be possible to identify when and where the next instance of Russian aggression may strike.

Discussion

Russian elite rhetoric may be a method for forecasting future Russian aggression in frozen separatist conflicts. Key trends in my 2003—2008 Georgian case study point to this conclusion. When Russian elite rhetoric centred around concerns over Russia's regional power, sentiment scores turned negative and signalled intervention. Further, I found that Russian elite rhetoric distribution is potentially significant in forecasting future aggression. However, in order for my findings to be confirmed, the scope of my current project needs to be expanded to include more case studies and more sources of Russian rhetoric.

While my work does not cover enough case studies or include enough observations to be generalizable for all Russian intervention in frozen separatist conflicts in the FSU, some key trends signal the potential for Russian elite rhetoric to forecast such aggression. Russian elite rhetoric during the period of 2003—2008 regarding Georgia became increasingly centered on geopolitical power concerns, when compared to the other case studies. Russian elite rhetoric also showed significant variation in the Georgian case study between 2003—2008 when compared to the Moldovan case study covering the same time period. Combining these trends, Russian elite rhetoric's sentiment showed that it could forecast Russian aggression but is dependent on certain conditions.

Russian elite rhetoric that is centred on concerns that relate to geopolitical standing and power are potentially valuable tools for forecasting Russian aggression in frozen separatist conflicts. During the case study of Georgia between 2003—2008, Russian elite's rhetoric was more highly concentrated on NATO, Kosovo, and the international community. During this time, Russia was concerned over future NATO expansion and the recognition of Kosovo. The concentration of Russian elite rhetoric on these topics highlights Russian concerns over its perceived regional hegemon status. Russian hegemonic status has been a contentious issue for Russian elites since the dissolution of the Soviet Union. NATO's bombing of Yugoslavia in 1999 expounded these concerns. Russia felt threatened by the NATO military action and worried that its inability to prevent it meant being sidelined to a lesser power in world affairs. future NATO military action and perceived that Russia was being sidelined to a lesser player in world affairs (Pavković 2020, 86-87). The shift of Russian elite rhetoric to a focus on geopolitical concerns in the 2003—2008 Georgian case study underscores this fear of the West. This is further highlighted by the fact that Russian elites began using combinations of language related to their concerns over the challenge to Russian control over the region.

As highlighted by Figure 4.2, bigram links show increasingly concentrated elite Russian rhetoric on Russian power concerns. When compared to the 1990s case studies of Moldova and Georgia, the 2003—2008 case study focuses on international actors—such as the UN Security Council—and primarily on Georgian leadership. Russian elite rhetoric also became more

centered on international law, as Russia saw the recognition of Kosovo as contrary to international law (Saradzhyan 2006). The recognition of Kosovo was a particularly polarizing event for Russian elites, as it further brought fears of future Western domination to a key strategic ally in Serbia. These fears date back to NATO's bombing of the Federal Republic of Yugoslavia and its intervention in Kosovo. From that point, Russia increasingly saw NATO as an aggressive military alliance expanding eastward into the former Soviet Republics—something Russia understood as a direct security threat. Russia felt the need to counterbalance NATO's influence in the FSU (Thorun 2009). These bigram links combined with the increased frequency of words relating to power concerns in the 2003—2008 Georgian case study seems to be a part of how Russian elite's signalled their intent to respond to NATO's apparent power challenges through recognition of Georgia's separatist regions.

The 2003—2008 Georgian case study saw the most significant reference to recognition of separatist regions by Russian elites out of any case study examined. This is a notable finding because Russia recognized Georgia's separatist regions following the Russo-Georgian War. However, during the scraping of text, I observed that calls for recognition of these regions increased following the recognition of Kosovo in February of 2008. If Russian elites are frequently calling for recognition of separatist regions in the FSU, it again may point to Russia feeling geopolitically challenged. Thus, Russia is likely to militarily intervene in order to balance against this threat. Geopolitical power concerns were notably heightened in the bigram, word frequency graphs, and word clouds of the 2003—2008 Georgian case study, unlike any other case study I examined. This presents a potential combined mechanism of word frequency and sentiment negativity to potentially forecast future Russian aggression towards states in the FSU with frozen separatist conflicts.

While Russian elite sentiment was not the most negative during the 2003—2008 case study, the fact that it was the only case study that shows heightened negative sentiment and word frequency centred on geopolitical concerns presents potential viability of a combined mechanism for forecasting Russian aggression. Both Moldova and Georgia fought civil wars with separatist groups in the early 1990's, which has produced a large portion of the negative sentiment in Russian elite rhetoric—as highlighted by the bigram networks, word frequency, and sentiment contribution tests. These tests show that while Russian elite rhetoric was at similar scores for sentiment negativity, it was focused on different aspects related to the civil conflicts in both Moldova and Georgia. Further, when compared within the same time period, the Georgian case study highlights an interesting trend among the sentiment score of Russian elite rhetoric.

Between 2003—2008, Russian elite rhetoric regarding Georgia was significantly more negative than regarding Moldova. Russian elite rhetoric's significant drop in sentiment score for Moldova

between 2003—2008 is a notable trend because the 2003—2008 Moldovan case study shares similar characteristics to the Georgian case study for that time period but lacks the regional power threat to Russian hegemony and subsequent Russian invasion. We also see Russian sentiment rapidly improve in the 2009—2022 Georgian case study, as full NATO membership was taken off the table for Georgia and Russia-Georgian relations improved after the war. The fact that there was a significant drop in sentiment score in Russian elite rhetoric, when the presence of geopolitical power challenges were removed as well as the lack of Russian aggression in both the 2003—2008 Moldovan and 2009—2022 Georgian case studies, suggests that Russian elite rhetoric's sentiment score may be a viable tool in forecasting Russian aggression in frozen separatist conflicts.

When combined with the word frequency and bigram networks centred on regional power concerns, Russian elite rhetoric proves to be a viable framework for forecasting Russian aggression in frozen separatist conflicts in the FSU. This framework needs to be centred on the combination of both negative Russian elite rhetoric and the increased use of words relating to geopolitical challenges. Furthermore, forecasting Russian aggression in frozen separatist conflicts in the FSU based on Russian elite rhetoric can potentially be strengthened by looking deeper into Russian elites' language.

While the small sample size in this study is limited, the spike in rhetoric from both the Russian Foreign Ministry and then-Prime Minister and President Vladimir Putin is a notable trend that could add utility to a forecasting mechanism for Russian aggression in frozen separatist conflicts. Spikes in rhetoric out of such highly positioned Russian elites and their offices, are seen only in the Georgian case study between 2003—2008. No other case study examined saw such heightened elite rhetoric. If we are able to track when Russian elites are more active in addressing certain separatist regions within the FSU it could indicate increasing negative sentiment and signal potential intervention. Doing so equally requires analyzing which Russian elites are speaking.

Yet we must generalize these findings with caution. This study's sample size is too limited to reliably predict all Russian intervention. A robust forecasting methodology would have to pay greater attention to a greater number of variables. It would, for instance, have to more closely consider which Russian elites were speaking. It would also have to include Russian language media and interpret differences between Russian and non-Russian news sources.

Still, the lack of major regional variation in the coverage of Russian elite rhetoric was a surprising finding from my work. There were minimal differences between all the Moldovan and Georgian case studies in sentiment score, and hence my work did not identify regional variation as an accurate predictor of Russian aggression. I would have expected much stronger negative

sentiment scores from Russian news coverage than their Western counterparts given the different narratives that emerged during the build-up to Russian aggression in Georgia. I was also surprised to see a large difference in the sentiment score difference in the Moldovan 1992-2002 case study between Russian and Western news sources.

It is reasonable to assume that Western news sources would have covered the introduction of Russian peacekeepers more unfavourably than Russian media. Yet the fact that Russian news organizations saw such a significant variation in sentiment scores between the case studies is surprising. However, this may be a result of the spillover of terrorism from Russia's wars with Chechen separatists in the 1990s, which saw terror attacks in major Russian cities. Chechnya borders Georgia and during the scraping of text from the news articles I noticed where Russian elites made claims of Chechen terrorists crossing the border between Russia and Georgia. Scholars have found that since 1999, Russia had taken issue with Georgian leadership's position on the Chechen conflict and accused Georgia of hosting Chechen terrorists (Wilhelmsen and Flikke 2005, 397-398). The high levels of negativity seen from Russian elites towards Georgia in the 1990s and the early 2000s makes sense in this context of feeling challenged by Georgian positions on Chechnya, which would have been further reinforced as Georgia began its westward pull after the Rose Revolution. Hence, the results of the case studies suggest that regional variation in the coverage of Russian elite's rhetoric may not be significant for forecasting future Russian aggression in frozen separatist conflicts.

Rather than a robust mechanism of predicting aggression, this study serves as a framework for future studies. The trends identified through my findings provide a future path for research involving a greater number of observations, case studies, and new forms of data.

To build on my findings, future studies must attempt to replicate these case studies in other instances of Russian intervention in frozen separatist conflicts in the FSU. Another key case study that needs to be examined is Ukraine. Russia's 2022 invasion of Ukraine, and Russia's 2014 annexation of Crimea share similarities with the Georgian case study. After Russia's initial invasion of Crimea in 2014, the conflict moved into a 'semi frozen' state in 2015. Additionally, the Russian invasion of Ukraine was carried out against the backdrop of Ukraine joining NATO much like the Russian invasion of Georgia in 2008. If my findings from the Georgian case study hold in the case study of Ukraine, it would strengthen the case for using elite rhetoric to forecast Russian intervention is frozen separatist conflicts.

Conclusion

Russian aggression in 'frozen' separatist conflicts will continue to be a significant regional and international security problem, as Russia has shown no intention of stopping its use of frozen separatist conflicts as a foreign policy tool. Forecasting Russian intervention to better anticipate

and react to future aggression is therefore of great importance to policymakers globally. This paper has demonstrated that Russian elite rhetoric can potentially be used as a forecasting mechanism to identify when Russia is likely to involve itself in a frozen separatist conflict within the FSU. While this paper does not include enough cases and data to conclusively determine whether Russian elite rhetoric can be used to forecast future Russian aggression, it does highlight an interesting trend that—if holds true in other case studies—could be an invaluable tool in responding to future Russian military expansion.

The primary predictors of aggression identified in the case studies were increased negative sentiment and references to geopolitical power concerns in the language elite Russians use. Ultimately, these vocal concerns about Russia's geopolitical situation distinguished the 2003—2008 Georgian case study from the Moldovan and other Georgian case studies. During this time, Russian elite rhetoric regarding Georgia focused on geopolitical power struggles with the increased usage of the stems of "NATO", "Kosovo", and "Intern". This unique language is a significant variable in the forecasting mechanism because it preceded the only instance of military intervention studied. It indicates that significantly negative Russian elite rhetoric that references concerns over Russia's geopolitical standing within the FSU can anticipate aggressive Russian intentions.

Future research needs to be undertaken in order to determine whether my findings were an isolated case. However, if my findings do hold, the next time Russian elite rhetoric shows aggressive intentions, policy makers will be better suited to act and prevent brutal conflicts like the one currently unfolding in Ukraine.

References

Abushov, Kavus. 2021. "Explaining Foreign Policy Deviations: The Strategic Rationale of Russia's Recognition of Abkhazia's and South Ossetia's Independence." *Ethnopolitics* 21 (February): 401–422. https://doi.org/10.1080/17449057.2021.1882117.

"Azerbaijan Admits Shooting down Russian Helicopter in Armenia." BBC News. November 9, 2020. https://www.bbc.com/news/world-europe-54874162.

Badawy, Adam, Aseel Addawood, Kristina Lerman, and Emilio Ferrara. 2019. "Characterizing the 2016 Russian IRA Influence Campaign." *Social Network Analysis and Mining* 9 (1): 31. https://doi.org/10.1007/s13278-019-0578-6.

Cardie, Claire, and John Wilkerson. 2008. "Text Annotation for Political Science Research." *Journal of Information Technology & Politics* 5 (1): 1–6. https://doi.org/10.1080/19331680802149590.

Dawn. 2007. "Russia Draws 'Red Line' on Kosovo, US Missile Defence." September 4, 2007. https://www.dawn.com/news/264378/russia-draws-red-line-on-kosovo-us-missile-defence.

Deb, Ashok, Luca Luceri, Adam Badaway, and Emilio Ferrara. 2019. "Perils and Challenges of Social Media and Election Manipulation Analysis: The 2018 US Midterms." In *Companion Proceedings of The 2019 World Wide Web Conference*, 237–47. San Francisco USA: ACM. https://doi.org/10.1145/3308560.3316486.

Dutt, Ritam, Ashok Deb, and Emilio Ferrara. 2019. "'Senator, We Sell Ads': Analysis of the 2016 Russian Facebook Ads Campaign." In *Advances in Data Science*, edited by Leman Akoglu, Emilio Ferrara, Mallayya Deivamani, Ricardo Baeza-Yates, and Palanisamy Yogesh, 151–68. Singapore: Springer Singapore.

Englebert, Pierre and Rebecca Hummel. 2005. "Let's Stick Together: Understanding Africa's Secessionist Deficit." *African Affairs* 104 (416): 399–427. https://doi.org/10.1093/afraf/adi008.

Fazendeiro, Bernardo Teles. 2018. "Spirituality and Anti-Western Rhetoric in Uzbekistan in the Early 2000s: The Consequences of International Misrecognition." *Post-Soviet Affairs* 34 (4): 228–45. https://doi.org/10.1080/1060586X.2018.1468686.

Ghanem, Bilal, Davide Buscaldi, and Paolo Rosso. 2019. "TexTrolls: Identifying Russian Trolls on Twitter from a Textual Perspective." ArXiv:1910.01340 [Cs], October 2019. http://arxiv.org/abs/1910.01340.

Griffiths, Ryan D. 2016. *Age of Secession: The International and Domestic Determinants of State Birth*. New York: Cambridge University Press.

Gubler, Joshua R., and Nathan P. Kalmoe. 2015. "Violent Rhetoric in Protracted Group Conflicts: Experimental Evidence from Israel and India." *Political Research Quarterly* 68 (4): 651–64. https://doi.org/10.1177/1065912915608947.

Heraclides, Alexis. 1990. "Secessionist Minorities and External Involvement." *International Organization* 44 (3): 341–78. https://doi.org/10.1017/S0020818300035323.

Herbst, Jeffrey. 1989. "The Creation and Maintenance of National Boundaries in Africa." *International Organization* 43 (4): 673–92. https://doi.org/10.1017/S0020818300034482.

Huddleston, Joseph R. 2021. "Foulweather Friends: Violence and Third Party Support in Self-Determination Conflicts." *Journal of Conflict Resolution* 65 (6): 1187–1214. https://doi.org/10.1177/0022002721993226.

Internal Displacement Monitoring Centre, "Georgia." Accessed June 4, 2022. https://www.internal-displacement.org/countries/georgia.

Jackson, Richard, and Helen Dexter. 2014. "The Social Construction of Organised Political Violence: An Analytical Framework." *Civil Wars* 16 (1): 1–23. https://doi.org/10.1080/13698249.2014.904982.

Keller, Jonathan W, Keith A Grant, and Dennis M Foster. 2020. "Presidential Risk Propensity and Intervention in Interstate Conflicts." *Foreign Policy Analysis* 16 (3): 272–91. https://doi.org/10.1093/fpa/orz024.

Littlefield, Scott. 2009. "Citizenship, Identity and Foreign Policy: The Contradictions and Consequences of Russia's Passport Distribution in the Separatist Regions of Georgia." *Europe-Asia Studies* 61 (8): 1461–82. https://doi.org/10.1080/09668130903134848.

Nome, Martin Austvoll. 2013. "Transnational Ethnic Ties and Military Intervention: Taking Sides in Civil Conflicts in Europe, Asia and North Africa, 1944–99." *European Journal of International Relations* 19 (4): 747–71. https://doi.org/10.1177/1354066111425260.

Pavković, Aleksandar. 2020. "Military Intervention in Aid of Secession: Kosovo and Its Aftermath." In *Perspectives on Secession: Theory and Case Studies*, edited by Martin Riegl and Bohumil Doboš, 81–91. Cham: Springer International Publishing. https://doi.org/10.1007/978-3-030-48274-9_7.

Pavković, Aleksandar and Peter Radan. 2011. *The Ashgate Research Companion to Secession*. Farnham: Ashgate.

Silge, Julia and David Robinson. 2017. "2 Sentiment Analysis with Tidy Data | Text Mining with R." Accessed March 8, 2022. https://www.tidytextmining.com/sentiment.html.

Soldatkin, Vladimir and Andrew Osborn. "Putin Warns Russia Will Act If NATO Crosses Its Red Lines in Ukraine | Reuters." Reuters. November 30, 2021. https://www.reuters.com/markets/stocks/putin-warns-russia-will-act-if-nato-crosses-its-red-lines-ukraine-2021-11-30/.

Shields, Samantha. 2008. "Russia, Georgia Exchange Fire as Conflict Escalates." August 10, 2008. https://www.smh.com.au/world/russia-georgia-exchange-fire-as-conflict-escalates-20080810-3swy.html.

Sagarzazu, Iñaki, and Cameron G. Thies. 2019. "The Foreign Policy Rhetoric of Populism: Chávez, Oil, and Anti-Imperialism." *Political Research Quarterly* 72 (1): 205–214. https://doi.org/10.1177/1065912918784212.

Sagramoso, Domitilla. 2020. *Russian Imperialism Revisited: From Disengagement to Hegemony*. London; New York: Routledge, Taylor & Francis Group.

Saideman, Stephen M. 1997. "Explaining the International Relations of Secessionist Conflicts: Vulnerability Versus Ethnic Ties." *International Organization* 51 (4): 721–53. https://doi.org/10.1162/002081897550500.

Saideman, Stephen M. 2002. "Discrimination in International Relations: Analyzing External Support for Ethnic Groups." *Journal of Peace Research* 39 (1): 27–50. https://doi.org/10.1177/0022343302039001002.

Saideman, Stephen M. 2007. "Ties Versus Institutions: Revisiting Foreign Interventions and Secessionist Movements." *Canadian Journal of Political Science* 40 (3): 733–47. https://doi.org/10.1017/S000842390707045X.

Saradzhyan, Simon. 2006. "Russia Says Kosovo Will Set a Precedent." Moscow Times, September 21, 2006. https://advance-lexis-com.proxy.lib.sfu.ca/document/?pdmfid=1516831&crid=e09b8fb1-5c8e-42fd-93ec-781893d1649d&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4KXX-3HW0-TX7H-N31N-00000-00&pdcontentcomponentid=145252&pdteaserkey=sr0&pditab=allpods&ecomp=xzvnk&earg=sr0&prid=21878504-4a3f-4f2d-b099-9e6781a7cca5#.

Sari, Angguntari C. 2019. "A Neoclassical Realist Explanation of Indonesia's Involvement in Muslim-Related Secessions in Non-Muslim Countries." Asian Journal of Comparative Politics 4 (3): 213–41. https://doi.org/10.1177/2057891118787930.

Sterio, Milena. 2013. *The Right to Self-Determination under International Law: "Selfistans," Secession and the Rule of the Great Powers*. New York: Routledge.

Thorun, Christian. 2009. *Explaining Change in Russian Foreign Policy: The Role of Ideas in Post-Soviet Russia's Conduct towards the West.* London: Palgrave Macmillan. http://link.springer.com/book/10.1057/9780230589964.

United Nations Office of the High Commissioner. 2022. "Ukraine: Millions of Displaced Traumatised and Urgently Need Help, Say Experts." Press release, May 5, 2022. https://www.ohchr.org/en/press-releases/2022/05/ukraine-millions-displaced-traumatised-and-urgently-need-help-say-experts#:~:text=They%20are%20traumatised%20and%20need,through%20daily%20bombardment%20and%20violence.

Wilhelmsen, Julie, and Geir Flikke. 2005. "Evidence of Russia's Bush Doctrine in the CIS1." *European Security* 14 (3): 387–417. https://doi.org/10.1080/09662830500411277.

Legal Analysis / L'analyse juridique

| A New Threat to Life: Examining the Environmental Reach of Section 7 of the Canadian Charter of Rights and Freedoms

Esha Grewal

Keywords: Supreme Court of Canada, Canadian Charter of Rights and Freedoms, environmental law, section 7, right to a healthy environment, expanding Charter rights.

Mots-clés: Cour suprême du Canada, Charte canadienne des droits et libertés, droit de l'environnement, article 7, droit à un environnement sain, l'expansion des droits de la Charte.

Despite having one of the most progressive constitutions in the world, Canada's Charter of Rights and Freedoms lacks any explicit environmental protection rights. With the recent increase in global environmental advocacy, the search for environmental protections through the Canadian courts has never been higher. In this paper, I examine whether the Supreme Court of Canada (SCC) would expand the scope of section 7 of the Charter of Rights and Freedoms to encompass the right to a healthy environment. To answer this, I conduct a legal analysis of SCC case judgements involving s. 7 Charter claims within the last ten years. The two main variables that I am testing in this analysis are the scope of s. 7 and the presence of judicial activism. My findings indicate that SCC Justices would not find the right to a healthy environment in s. 7 due to a low presence of judicial activism and generally narrow interpretations of s. 7 in recent rulings. However, the findings do indicate that s. 7 could extend to environmental policy in a limited manner.

Malgré le fait que le Canada détient une des constitutions les plus progressives au monde, la Charte canadienne des droits et libertés est dépourvue de droits explicites à la protection environnementale. Étant donné la montée récente des plaidoyers environnementaux à l'échelle globale, la recherche des protections environnementales par le biais des tribunaux canadiens n'a jamais été aussi marquante. Dans le présent document, j'examinerai la possibilité de l'élargissement de la portée de l'article 7 de la Charte canadienne des droits et libertés par la Cour suprême du Canada (CSC) pour inclure le droit à un environnement sain.

Afin de répondre à cette question, j'effectuerai une analyse juridique des jugements de la CSC concernant l'article 7 de la Charte canadienne au cours des dix dernières années. J'évalue deux variables principales : la portée de l'article 7 et la présence de l'activisme judiciaire. Mes conclusions indiquent que les juges de la CSC n'incluraient pas le droit à un

Introduction

In recent years, environmental law has become increasingly relevant. The Constitution has become a key avenue for achieving environmental justice in Canada, likely the result of the global trend of environmental advocacy (Worstman 2019, 247; Cohen 2022). Canadian media in particular, has given environmental issues attention: the Trans-Mountain Pipeline project, Fairy Creek old-growth logging, and unclean water in Indigenous communities are just a few examples of environmental issues that have come under public scrutiny (Charlebois 2022; Nair 2021; Munro 2021). The search for environmental protections through the Canadian courts has never been more important.

Yet despite having one of the most influential constitutions in the world, Canada's Charter of Rights and Freedoms lacks any explicit environmental protection rights (Schwartz 2012). In contrast, the constitutions of 147 countries contain "explicit references to environmental rights and/or responsibilities" (Boyd 2012, 68). This has raised two important questions; would the Canadian government amend the Charter to adopt such a right, or would they expand the scope of an already existing constitutional basis for environmental protections? Based on Canada's historical hesitancy toward amending the Charter and its strict amendment procedures, it seems unlikely that the government would move forward with including such a right (Boyd 2012). This leaves us with the section option: expanding the scope of an already existing right.

The Charter right most relevant to environmental protection is section 7— "the right to life, liberty, and security of the person in accordance with the principles of fundamental justice" (Canadian Charter of Rights and Freedoms, 1982). In this paper, I examine how likely the Supreme Court of Canada (SCC) would be to expand the scope of s. 7 of the Charter to encompass the right to a healthy environment in Canada's current legal landscape. I will begin by examining academic literature on this topic. I will then describe my data and methodology, before moving to an analysis of the results. I will conclude with a discussion of my findings and their impact on academic and public discourse. I argue that the justices are unlikely to expand the scope of s. 7 due to its historically narrow interpretation and declining cases of judicial activism. I will define my assessment of a 'narrow interpretation' as well as 'judicial activism' in my research methods section.

Literature Review

Literature on environmental rights in relation to the Canadian Charter is extensive. There is consensus among academics that the Charter *should* and eventually will encompass the right to a healthy environment. In this literature, there are both normative and empirical fields. Both address the role of international norms, the living tree approach, positive rights, and direct threats to life or high risk of harm.

International Influence

Normative authors like Andrew Gage and David Boyd explore the influence of international law in promoting constitutionally protected environmental rights in Canada. Gage suggests that the scope of s. 7 may be expanded, considering international decisions made by the Human Rights Committee, Supreme Court of India, and courts in Pakistan and Bangladesh (2003, 8-10). The question that arises from this suggestion is how impactful international law is in domestic settings. Boyd asserts that "it is well established that international law influences national law"; however, it is unclear from this whether these international statutes and norms would directly encourage constitutionally protected environmental rights (2012, p. 122). Boyd's claim suggests that international law influences domestic policy making, but it is nonetheless distinct from constitutional law; thus, the influence of international environmental law in promoting an expansion of s. 7 is questionable.

The Living Tree Approach

Another point of contention in normative papers is the Court's use of the living tree approach, a doctrine that interprets the Constitution broadly to adapt it to contemporary values. Boyd claims that other scholars agree that the wording of s. 7 is broad enough to encompass the right to a healthy environment (2012, 177). He goes on to suggest that the courts have "deliberately left the door open" regarding incorporating environmental protection within s. 7 (Boyd 2012, 179). While it is possible for constitutionally protected environmental rights to emerge through an expansion of s. 7 as Boyd envisions, it is not clear how or when this may occur. Hence, the living tree approach does not adequately address all questions on this topic.

Positive Rights

Another main channel of scholarship focusses on the extent to which the Charter protects positive rights. Feasby et al. (2020) mention how s. 7 is commonly assumed to be a negative right, however, they do acknowledge that the distinction between positive and negative rights is not always clear (239). Despite this, they argue that s. 7 is unlikely to include a positive obligation for the environment due to the court's previous unwillingness to uphold positive rights (241). This argument contrasts Boyd, Worstman, Harmun, and Chalifour, who argue that

s. 7 should and does include a positive obligation (2012; 2019; 2010; 2015). Despite this claim, Boyd suggests the Court may not apply positive environmental rights soon (2012). He quotes former Chief Justice McLachlin, who wrote,

> Nothing in the jurisprudence thus far suggests that s.7 places a positive obligation on the state … Rather, s.7 has been interpreted as restricting the state's ability to deprive people of these [rights] … One day s.7 may be interpreted to include positive obligations … However, this is not such a case. (Boyd 2012, 179).

Thus, it remains unclear when the courts might interpret a positive obligation to a healthy environment.

Fulfilling the Section 7 Test

Other scholars argue that current interpretations of s. 7 already extend to environmental protections. Worstman (2019) argues that environmental issues can be a direct threat to life if courts use evidence demonstrating risk and probability of harm rather than direct causation. Gage, Chailifour, Nanda, and DeWolf contest this claim (2003; 2015; 2015; 2015). They argue that previous court cases suggest a substantial amount of evidence is required to prove a direct cause of harm rather than a possibility. Gage and DeWolf further assert that the best avenue for environmental cases is security of the person since it does not require direct causation (2003; 2015). This indicates that although there is a possibility of extending s. 7, it would be difficult to apply broadly.

Public health claims are difficult to establish under s.7 because they involve the actions of private companies rather than those of government. As Gage notes, "private activity" is not subject to the same Charter obligations as government action (2003, 12). The government could enact tighter environmental regulations on the basis of the right to a healthy environment, but it would then assume a new burden of Charter responsibility. Thus, the government hesitates to legislate the right to a healthy environment because it would broaden their vulnerability to further Charter challenges for "underinclusiveness" (Gage 2003, 12).

The right to a healthy environment under s.7 is limited and often idealistic. Chalifour observes that proving a causal relationship between harm and government action is difficult and would complicate enforcing the right to a healthy environment (2015, 1). DeWolf's thesis is the most critical of the scholarly literature; she asserts that much of the field's scholars do not conduct proper legal analysis for their s. 7 environmental claims and are therefore too normative. She claims Boyd and Collins "do not provide a neutral legal opinion on whether the approaches advocated for will actually be successful in front of a court of law" (DeWolf 2015, 12). Hence,

progressive scholars' claims to existing environmental protections under s. 7 are either too normative or are not based on current legal principles (DeWolf, 2015, 14).

Overall, literature advocating for environmental protections on the basis of s. 7 fails to recognize *when* and *how* this broadening of s. 7 may happen. Recent cases show declining levels of judicial activism and a narrowing of s. 7 which suggests that constitutionally protected environmental rights could be further away than they seem, and any possible protections may be limited in scope. Furthermore, proponents for environmental constitutional protections do not specify what types of environmental rights may be protected, or the contexts in which they may emerge. The following sections of this paper analyze recent Supreme Court cases to outline how, when, and why the right to a healthy environment may arise. In doing so, I hope to guide further scholarly and judicial interventions on the future of Canada's environment.

Research Methods

In this paper, I conduct a problem-solving legal analysis that predicts how the courts will respond to a new legal question). The data sources used for the analysis are legal cases based on a threefold criterion. The legal cases must: (1) be SCC judgements (2) decided within the last ten years (January 1, 2012 – January 1, 2022) and (3) involve a s. 7 Charter claim. This paper analyzes fourteen cases under these criteria, though no suitable cases were heard in 2017, 2018, 2020, and 2022. Alongside the aforementioned criteria, the analysis also considers the presence of judicial activism.

If my thesis is correct in arguing that prospects for constitutional protections for the environment are weak, then I expect decisions to indicate a narrowly defined scope of s. 7 and a low presence of judicial activism. If my thesis is incorrect, I expect to find a broadly defined scope of s. 7 and a high presence of judicial activism.

For a narrowly defined scope, judgements should rely heavily on precedent in their s. 7 analysis and not include language signifying the principles of the living tree approach. This type of language includes references to the evolving nature of the Charter, including the necessity to adapt the document to social issues rather than be interpreted in its original context. For a broadly defined scope, judgments should not rely heavily on precedent and should include language synonymous with the principles of the living tree approach.

Indicators of judicial activism include decisions requiring government expenditure, findings of s. 7 violations, the exercising of positive rights, justices 'reading-in', and a lack of deference to the legislature or the separations of powers between branches of government. Criticism of such

indicators in dissenting opinions would also suggest high levels of judicial activism.[1] For low levels of judicial activism, I expect to see remedies not requiring government expenditure, decisions finding no violations of s. 7, an emphasis on negative rights, 'reading-down', deference to the legislature, acknowledgement of the roles of different governmental branches, and dissenting opinions that appeal to judicial activism

There are some limitations to this methodology. First, the criteria for the data sources are quite narrow. This case selection does not account for judgements made in lower courts, parliamentary references, and cases prior to 2012. Second, the variables 'narrow/broad scope' and 'low/high judicial activism' are subjective and some scholars may disagree with my chosen measurements for these concepts. Yet I have chosen to restrict this paper in this way due to time and space constraints and because a narrow case selection provides a more in-depth analysis.

Findings

I have structured my results according to the factors that I will be testing the cases against. For each section, I have outlined the trends that I discovered among all cases and highlights from a few key cases. An overview of the results of all the cases is at the end of the analysis (see table 1).

Scope of Section 7—Precedent

In the majority of the fourteen cases, the SCC's decisions relied heavily on precedent. These cases include *R. v. St-Onge Lamoureux* (2012), *R. v. Khawaja* (2012), *Canada (Citizenship and Immigration) v. Harkat* (2014), *R. v. Anderson* (2014), *R. v. Smith* (2015), *R. v. Appulonappa* (2015), *R. v. Safarzadeh-Markhali* (2016), *R. v. Cawthorne* (2016), *R. v. Morrison* (2019), and *R. v. C.P* (2021). In these cases, Judges ruled conservatively by refusing to re-evaluate precendent. This is particularly evident in *Khawaja*, *Appulonappa*, and *Safarzadeh-Markhali* where the Court based their decisions on tests for overbreadth. In *Anderson*, the Court refused to broaden the scope of the principles of fundamental justice, citing strong precedent.

Canada (Attorney General) v. Bedford (2013) and *Canada (Attorney General) v. Federation of Law Societies of Canada* (2015) established significant precedent that remains important for s. 7 challenges today. The landmark decisions differed from previous cases because Judges departed from previous judgements and instead employed principles from past cases to

[1] This paper uses the definitions of "reading-in" and "reading-down" as provided by the Government of Canada. When courts 'read in', they are "broadening the reach of the legislation" to reject any "implied limitation on its scope" (Government of Canada, 2022). In contrast, 'reading down' involves limiting the reach of the legislation by narrowly defining it or placing it under exclusions (Government of Canada, 2022).

establish precedent. For example, Bedford departed from the 1990 *Prostitution Reference* by bringing about a new legal test that protected positive liberties under the s. 7 right to personal security. The decision therein suggested a commitment to positive principles of fundamental justice and as a result became a heavily cited decision in future cases. *Federation of Law Societies* (2015) also clarified that "the lawyer's duty of commitment to the client's cause" did not constitute a principle of fundamental justice protected under s. 7, though justices disagreed on this point (118-119).

Carter v. Canada (Attorney General) (2015) was unique because it both dismissed and embraced precedent. The Court chose to allow a re-evaluation of precedent set in *Rodriguez v. BC* (1993) after the emergence of a new legal issue and new evidence fundamentally shifted the parameters of the debate. At the same time, the Court refused to consider an expansive definition of the right to life, citing strong precedent despite legal arguments put forth by intervenors and dissenting judges in lower courts. *R. v Conception* (2014) cannot be classified in either category since s. 7 analysis was minimal and relied on lower court judgements.

Applying The Living Tree Approach

The majority of cases did not include language synonymous with the living tree approach in their s. 7 analyses. These cases include *R. v. St-Onge Lamoureux*, *R. v. Khawaja*, *R. v. Anderson*, *Carter v. Canada*, *R. v. Conception*, *R. v. Safarzadeh-Markhali*, *R. v. Cawthorne*, *R. v. Morrison*, and *R. v. C.P*.

The cases of *Canada (Attorney General) v. Bedford*, *Canada (Attorney General) v. Federation of Law Societies of Canada*, *R. v. Smith*, and *R. v. Appulonappa* adopted the living tree approach. In *Bedford*, the Judges note "the principles of fundamental justice have significantly evolved since the birth of the Charter" (2013 SCC 72, at para. 95). They argue that the principles of fundamental justice should be interpreted to capture laws that do not align with the Charter's values, rather than as principles of "natural justice" (at para. 95). This suggests that the majority judgement adopted the living tree approach in straying away from a narrow interpretation.

The case of *Canada (Citizenship and Immigration) v. Harkat* is unique because it renders a judgement while acknowledging that its decision is limited to the specific context of the case. The Court writes that its judgement is not universally applicable to all cases and judges must use their discretion to determine whether the scheme established in *Harkat* is constitutional in each given case (2014 SCC 37, at para. 77). This suggests that the Court acknowledges the living tree approach's value but limits its application.

Judicial Activism & Government Expenditure

Of all fourteen cases, only one contained a remedy that required government expenditure: *Carter v. Canada (Attorney General)*. The Court employed a rare remedy by requiring the government to pay for the appellants' legal costs (2015 SCC 5, at para. 148). The majority writes that although "it is unusual for a court to award costs against an Attorney General who intervenes in constitutional litigation as of right" the Attorney General is liable to pay legal fees just the same as any other party in litigation may be (at paras. 144, 146).

However, this unusual case is not evidence of judicial activism as it is not beyond the scope of the judiciary's function to award legal damages. In *Carter*, the Court promoted legal accessibility by assigning costs to the government in a public interest case that involved claimants unable to fund their legal claims. The Court, in other words, did not act outside its scope by requiring government expenditures normally under the parliament's jurisdiction.

Nor did the Court mandate government expenditures in other s. 7 challenges, including *R. v. Khawaja*, *Canada (Attorney General) v. Bedford*, *Canada (Citizenship and Immigration) v. Harkat*, *Canada (Attorney General) v. Federation of Law Societies of Canada*, *R. v. Smith*, *R. v. Appulonappa*, *R. v. Safarzadeh-Markhali*, and *R. v. Safarzadeh-Markhali*. In *R. v. St-Onge Lamoureux*, *R. v. Conception*, and *R. v. C.P*. the appeals were dismissed. Thus, no remedy was employed and these cases are not relevant to this section of the analysis.

Positive vs. Negative Rights

In no judgement between 2012—2022 did the Court explicitly champion for positive rights. This could be due to Gage's claim that s. 7 is an inherently negative right and does not place a positive obligation on the state (2003). The only decision that acknowledges any positive obligation is *Canada (Citizenship and Immigration) v. Harkat*, as the judges argue that s. 7 requires a fair process. However, the Justices dismissed Harkat's s. 7 claim and consequently, there was no exercise of positive rights. Similarly, in the cases of *R. v. St-Onge Lamoureux*, *R. v. Khawaja*, *R. v. Conception*, *R. v. Cawthorne*, *R. v. Morrison*, and *R. v. C.P.* all s. 7 claims were lost and no exercise of positive (or negative) rights occurred.

In the cases of *Canada (Attorney General) v. Bedford*, *R. v. Anderson*, *Carter v. Canada (Attorney General)*, *Canada (Attorney General) v. Federation of Law Societies of Canada*, *R. v. Smith*, *R. v. Appulonappa*, and *R. v. Safarzadeh-Markhali* the Court was found to be exercising negative rights. This was because the Court's remedies often involved striking down provisions that they argued the government erred in enacting. By preventing the government from limiting s. 7, these cases placed a negative duty on the state.

Reading In vs. Reading Down

No evidence of reading-in was found in any of the fourteen cases. This is because no case broadening the reach of legislation. Instead, the Court struck down legislation, severed words, or otherwise narrowly interpreted the Charter so that the Court found no violation of s. 7.

Critiques from Dissenting or Concurring Judges

Only in one case did a concurring or dissenting judge suggest that the Court was being too activist: *Canada (Attorney General) v. Federation of Law Societies of Canada*. In this case, the majority reasoned that the lawyer's duty of committed representation "satisfies the first and third requirements of a principle of fundamental justice" (2015 SCC 7, at para. 94). Chief Justice McLachlin and Justice Moldaver critiqued this decision in their concurring judgement, arguing that the principle "lacks sufficient certainty to constitute a principle of fundamental justice" as outlined in *R. v. Malmo-Levine* (2015 SCC 7, at para. 119). This suggests that the majority judgement took a broader or more activist approach in their classification.

In *R. v. Conception* and *R. v. Morrison* critiques in the concurring judgement suggest that the majority judgement displayed low levels of activism. In *R. v. Conception*, there is much discussion about the trial judge's right to issue a forthwith treatment order. According to the majority judgement, the trial judge erred in this order because the law requires hospital consent (2014 SCC 60). In contrast, the concurring judgement argues that the trial judge did have jurisdiction to make the order and only erred in the order's timing (2014 SCC 60, at para. 131). As a result, the majority judgement displayed low levels of judicial activism.

In *R. v. Morrison*, the concurring judgement suggests that the majority erred in their remedy. Justice Karakatsanis argues that "building a safety valve—residual discretion—into mandatory minimum provisions would … [allow] judges to make an exception in cases where the mandatory minimum would prove unconstitutional" (2019 SCC 15, para. 194). This is a more activist approach than the majority judgement, as Karakatsanis is arguing for the Court to engage in policy making.

In *R. v. St-Onge Lamoureux*, *Canada (Citizenship and Immigration) v. Harkat*, and *R. v. C.P.*, dissenting or concurring judges expressed no relevant critiques. In *R. v. Khawaja*, *Canada (Attorney General) v. Bedford*, *R. v. Anderson*, *R. v. Smith*, *R. v. Appulonappa*, *R. v. Safarzadeh-Markhali*, and *R. v. Cawthorne* there were no dissenting or concurring judgements to analyze; thus, these cases were not applicable for this section.

Deference to Legislature & Acknowledgement of Different Roles of Government

Six cases displayed evidence of some type of deference to parliament. These cases were *R. v. St-Onge Lamoureux*, *Canada (Attorney General) v. Bedford*, *R. v. Anderson*, *Carter v. Canada (Attorney General)*, *R. v. Cawthorne*, and *R. v. C.P.* In *St-Onge Lamoureux*, the Court asserted that they "must not second-guess parliament" in relation to the minimal impairment requirement (2012 SCC 57, at para. 39). In Bedford, the judges wrote that "it will be for Parliament, should it choose to do so, to devise a new approach, reflecting different elements of the existing regime" (2013 SCC 72, at para. 165). This is even clearer in *Anderson*, where the Court clearly defined that "judicial non-interference is a matter of principle based on the doctrine of separation of powers" and that "the prosecutor's decision is a matter of prosecutorial discretion which is reviewable by the courts only for abuse of process" (2014 SCC 41, at para. 1). In addition, they assert that "it is the judge's responsibility to impose sentence… [and] to craft a proportionate sentence" (2014 SCC 41, para. 25). *Carter* re-affirms the roles of the judiciary and legislature by acknowledging that issuing a constitutional exemption would "usurp Parliament's role" adding that "complex regulatory regimes are better created by Parliament than by the courts" (2015 SCC 5, at para. 125). The Court compounded their parliamentary deferral by stating, "we make no pronouncement on other situations where physician-assisted dying may be sought" (2015 SCC 5, at para. 127). *Cawthorne* and *C.P.* demonstrate more subtle deferrals to parliamentary power.

One case, *R. v. Safarzadeh-Markhali*, contained language that was more in favour of the court's expanded role. Here, the Court argued that "Parliament can limit a sentencing judge's ability to impose a fit sentence, but it cannot require a sentencing judge to impose grossly disproportionate punishment" (2016 SCC 14, at para. 71). Here, the Court reiterates parliament's reach rather than the judiciary's. *R. v. Appulonappa* displayed evidence of the Court being critical towards parliament, however, there was no discussion of the role of government.

Six cases contained no evidence of parliamentary critique: *R. v. Khawaja*, *Canada (Citizenship and Immigration) v. Harkat*, *Canada (Attorney General) v. Federation of Law Societies of Canada*, *R. v. Smith*, *R. v. Conception*, and *R. v. Morrison*.

Discussion

An overview of all the cases and their results are below. I will begin with some clarifications. First, I have decided to classify *R. v. Smith* as a broad scope decision despite its reliance on precedent because the Court was expanding the scope of s. 7 into a new policy area—medical marihuana—and because it uses the living tree approach. Second, I've defined Carter as narrow scope because the Court's re-evaluation of precedent was due to a fulfillment of a legal test that is a part of precedent. For this reason, I did not place much emphasis on the court's re-evaluation of their previous judgment as a broadening of the scope.

Table 1

Summary of Cases and Variables

Year	Case	Violation Found?	Scope	Judicial Activism
2012	R. v. St-Onge Lamoureux	No	Narrow	Low
2012	R. v. Khawaja	No	Narrow	Low
2013	Canada (Attorney General) v. Bedford	Yes	Broad	Low
2014	Canada (Citizenship and Immigration) v. Harkat	No	Narrow	Low
2014	R. v. Anderson	No	Narrow	Low
2015	Carter v. Canada (Attorney General)	Yes	Narrow	Low
2015	Canada (Attorney General) v. Federation of Law Societies of Canada	Yes	Broad	Low
2015	R. v. Smith	Yes	Broad	Low
2015	R. v. Conception	No	Narrow	Low
2015	R. v. Appulonappa	Yes	Broad	Low
2016	R. v. Safarzadeh-Markhali	Yes	Narrow	Low

2016	R. v. Cawthorne	No	Narrow	Low
2019	R. v. Morrison	No	Narrow	Low
2021	R. v. C.P.	No	Narrow	Low

Overall, my hypothesis is not entirely supported as demonstrated by a few cases of a broad scope cases—*Bedford*, *Federation of Law Societies*, *Smith*, and *Appulonappa*). However, there is a clear trend of low judicial activism. This suggests that s. 7 could encompass the right to a healthy environment in a very limited manner. Cases with a broad scope where the Court applied s. 7 were often in new policy areas—prostitution, independence of the bar, medical marihuana, and human trafficking. Nonetheless, s. 7 interpretations remained narrow.

Overall, the findings suggest that section 7 could move to the environmental policy area, but not broadly encompass the right to a healthy environment. The trend of low judicial activism suggests that the SCC is unlikely to broadly encompass the right to a healthy environment within s. 7 as this would constitute exercising positive rights, interfering with Parliament's role, and most likely involve government expenditure. In contrast to Boyd's argument (2012), my findings suggest that it would be difficult to bring an environmental case that creates a positive obligation on the state to the SCC.

The judgements indicate that the Court could possibly expand section 7 in cases where the government is directly causing a threat to life or security of the persons. This is, however, a strict and limiting criteria and would prove difficult to claim at the Supreme Court. Climate-related cases or cases involving third parties are not likely to succeed as per this criterion. This is especially evident in cases of contrasting expert evidence, such as in the case of the Trans-Mountain Pipeline, where no definitive risk of harm can be established.

Conclusion

This paper contributes to the literature by arguing that section 7 of the Charter is not likely to encompass the right to a healthy environment. Though many contemporary legal scholars argue it eventually will, recent cases of the SCC suggest otherwise. As outlined in the research methods section, this paper has limitations; there is a narrow case selection and it employs subjective measurements for abstract concepts. It is important to note that my thesis is grounded in the hypothetical question of whether judges would expand the scope of s. 7 if they received a case requiring such a decision based on current precedent. The answer to this

question will vary across time as the Court hears new environmental cases and discussions on current s. 7 tests evolve. Amid these developments, the Supreme Court may well expand the scope of s. 7. Until then, scholars would do well to study non-section 7 cases in lower courts outside of this paper's ten-year timeframe.

In terms of the impact of these findings on the Canadian public, I suggest that it encourages legal discussion on environmental rights. While political participation is crucial to creating change in Parliament, Canadians should also consider the Supreme Court as an actor in environmental politics. As evidenced in the findings, the SCC has re-evaluated judgements they have made in the past and expanded s. 7 to new policy areas. Bringing environmental politics into changing understandings of the Charter of Rights and Freedoms could benefit both environmental and judicial policy.

References

Boyd, David. R. 2012. The Right to a Healthy Environment: Revitalizing Canada's Constitution. UBC Press: Vancouver.

Canada (Attorney General) v. Bedford. 2013 SCC 72. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13389/index.do?q=section+7+and+life.

Canada (Attorney General) v. Federation of Law Societies of Canada. 2015 SCC 7. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14639/index.do?q=%22section+7%22.

Canada (Citizenship and Immigration) v. Harkat. 2014 SCC 37. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13643/index.do?q=%22section+7%22.

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

Carter v. Canada (Attorney General). 2015 SCC 5.https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do.

Chalifour, Nathalie. J. 2015. "Environmental justice and the Charter: Do environmental injustices infringe sections 7 and 15 of the Charter?" *Journal of Environmental Law and Practice* 28(1): 89-124. https://www.proquest.com/docview/1752588510?accountid=13800.

Charlebois, Brieanna. 2022, April 9. Indigenous leaders, protestors gather in Vancouver to oppose Trans Mountain pipeline. Global News. https://globalnews.ca/news/8749186/indigenous-leaders-protesters-gather-in-vancouver-to-oppose-trans-mountain-pipeline/.

Cohen, Steve. 2022, September 12. The growing awareness and prominence of environmental sustainability. *Columbia Climate School*. https://news.climate.columbia.edu/2022/09/19/the-growing-awareness-and-prominence-of-environmental-sustainability/.

DeWolf, Julie. 2015. "Linking Constitutional and Environmental Rights: Applying Section 7 of the Canadian Charter of Rights and Freedoms to Adverse Environmental Impacts." PhD diss., University of Waterloo. https://uwspace.uwaterloo.ca/bitstream/handle/10012/9384/DeWolf_Julie.pdf?sequence=1&isAllowed=y.

Feasby, Colin, David DeVlieger, and Matthew Huys. 2020. "Climate Change and the Right to a Healthy Environment in the Canadian Constitution." *Alberta Law Review* 58(2): 213-248. https://albertalawreview.com/index.php/ALR/article/view/2617/2576.

Gage, Andrew. 2003. "Public Health Hazards and Section 7 of the Charter." *Journal of Environmental Law and Practice* 13. https://nextcanada-westlaw-com.proxy.lib.sfu.ca/Document/Ieda5baa1384211db8382aef8d8e33c97/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0.

S. 52(1) of the *Constitution Act*, 1982. Schedule B to the *Canada Act,* 1982 (UK).

Government of Canada. April 14, 2022. Section 52(1) of the *Constitution Act*, 1982 – The supremacy clause. https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art521.html.

Harnum, James. 2010. "Deriving the Right to Water from the Right to Life, Liberty, and Security of the Person: Section 7 of the Canadian Charter of Rights and Freedoms and Aboriginal Communities in Canada." *Review of European Community & International Environmental Law* 19(3): 306-315. https://doi.org/10.1111/j.1467-9388.2010.00689.x.

Lee, T. 1985. "Section 7 of the Charter: An Overview." *University of Toronto Faculty Law Review* 43(2): 1-15.

MacDonnell, Vanessa. A. 2012. "The Protective Function and Section 7 of the Canadian Charter of Rights and Freedoms. *Review of Constitutional Studies* 17(1): 53-85. https://www.constitutionalstudies.ca/wp-content/uploads/2019/08/03_MacDonnell_final.pdf.

Munro, Jessica. 2021. "Indigenous group walks from Kingston to Parliament Hill to protest lack of clean water." Ottawa Citizen. https://ottawacitizen.com/news/indigenous-group-walks-from-kingston-to-parliament-hill-to-protest-lack-of-clean-water.

Nair, Roshini. 2021. "How B.C.'s newest war in the woods shows the complex web of environmental politics". CBC News. https://www.cbc.ca/news/canada/british-columbia/fairy-creek-blockade-election-1.6161196.

Nanda, Avnish. 2015. "Heavy Oil Processing in Peace River, Alberta: A Case Study on the Scope of Section 7 of the Charter in the Environmental Realm." *Journal of Environmental Law and Practice* 27(2): 109-140. https://issuu.com/nandacompany/docs/avnish_nanda_-_heavy_oil_processing.

R. v. Anderson. 2014 SCC 41. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14222/index.do?q=%22section+7%22.

R. v. Appulonappa. 2015 SCC 59. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15648/index.do?q=%22section+7%22.

R. v. Cawthorne. 2016 SCC 32. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16070/index.do.

R. v. Conception. 2014 SCC 60. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14376/index.do?q=%22section+7%22.

R. v. C.P. 2021 SCC 19.https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/18881/index.do?q=%22section+7%22.

R. v. Khawaja. 2012 SCC 69. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12768/index.do?q=%22section+7%22.

R. v. Morrison. 2019 SCC 15.https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17618/index.do?q=%22section+7%22.

R. v. Safarzadeh-Markhali. 2016 SCC 14. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15860/index.do?q=%22section+7%22.

R. v. Smith. 2015 SCC 34. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15403/index.do?q=%22section+7%22.

R. v. St-Onge Lamoureux. 2012 SCC 57. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12655/index.do?q=%22section+7%22.

Schwartz, Daniel. April 16, 2012. “Charter of Rights turns Canada into a ‘Constitutional’ Trendsetter.” CBC News. https://www.cbc.ca/news/canada/charter-of-rights-turns-canada-into-a-constitutional-trendsetter-1.1216350.

Worstman, Lauren. 2019. “‘Greening’ the Charter: Section 7 and the Right to a Healthy Environment.” *Dalhousie Journal of Legal Studies* 28: 245-285. https://digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=1397&context=djls.

Legal Analysis / L'analyse juridique

Administrative Segregation as Cruel, Inhuman or Degrading Treatment: The Relationship Between Section 12 of the Canadian Charter and the International Covenant on Civil and Political Rights' Article 7

Jared Wegenast

Keywords: Charter, ICCPR, segregation cases, international treaties, cruel and unusual punishment, prisoner rights

Mots-clés: Charte, ICCPR, affaires de ségrégation, accords internationaux, peine cruelle et inhabituelle, droits des prisonnierères

This legal analysis compares the Canadian Charter Section 12 provisions regarding "cruel and unusual treatment or punishment" to the International Covenant on Civil and Political Rights' (ICCPR) Article 7 regarding "cruel, inhuman, and degrading treatment or punishment" in the context of administrative segregation in the Canadian prison system. These deceptively similar legal concepts are integral to the Canadian government's contemporary policy on administrative segregation (also known as solitary confinement) and thus their relationship warrants investigation. The cases of BCCLA, CCLA, Capay, and Reddock, occurring between 2018 and 2019, are selected and analyzed to show that the use of international expert evidence and decisions of justices construct a S. 12 which more closely resembles the norms of solitary confinement established in the ICCPR's Article 7, which may improve the conditions and rights of incarcerated persons. Furthermore, the analysis suggests how profoundly international expert evidence can affect the outcome of domestic legal cases.

Dans le contexte de l'isolement carcéral dans le système pénitentiaire canadien, cette analyse juridique compare l'article 12 de la Charte canadienne des droits et libertés concernant « les traitements ou les peines cruels et inhabituels » avec l'article 7 du Pacte international relatif aux droits civils et politiques (ICCPR), concernant « les traitements ou les peines inhumains, cruels et inhabituels. » Ces phénomènes juridiques faussement similaires

font partie intégrante de la politique contemporaine du gouvernement canadien sur l'isolement carcéral (aussi connu comme l'isolement cellulaire), et leur relation mérite donc d'être étudiée. Les cas BCCLA, CCLA, Capay et Reddock, se produisant entre les années 2018 et 2019, sont sélectionnés et analysés pour montrer que l'utilisation de témoignages d'expert.e.s internationaux.ales et les décisions des juges construisent un article 12 de la Charte qui ressemble davantage aux normes de l'isolement carcéral établies dans l'article 7 du ICCPR, ce qui a le potentiel d'améliorer les droits et les conditions des personnes incarcérées. Par ailleurs, l'analyse suggère que les témoignages des expert.e.s internationaux.ales peuvent avoir une incidence profonde sur le résultat des affaires juridiques nationales.

Introduction:

Cruel and Unusual Punishment's Domestic and International Nature

The Canadian Charter of Rights and Freedoms offers cruel and unusual punishment its own section within legal rights: Section 12. S. 12 reads that "everyone has the right not to be subjected to any cruel and unusual treatment or punishment" (Constitution Act [1982], at part 1). Prior to the Charter, the 1789 United States Bill of Rights' 8th Amendment read more restrictively, prohibiting "… cruel and unusual punishments inflicted [emphasis added] (Bianco and Canon 2017, A11)."[2] The historical root of this legal principle came from the 1688 English Bill of Rights which addressed both "… illegal and cruell Punishments inflicted" and "… cruell and unusuall punishments inflicted" (At sec. 10). Notably, both earlier sources did not include the interpretation of "treatment'' as the Charter does. Similarly, the 1966 International Covenant on Civil and Political Rights' (ICCPR) Article 7 states "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation (1966)." The specific use of "or'' and the inclusion of the adjectives "inhuman" and "degrading" advance a broader array of interpretations for the legal principle.

Canada acceded to the ICCPR in 1976, six years before the creation of the Charter. Thus, Canadian jurisprudence and the Charter are not completely insulated from how the

[2] Self-Location: Settler Law as a Settler

I am a Settler of German, Irish, Scottish, and English descent. I am a Political Science major at Simon Fraser University.My connection to a place is not as deep as it is broad; I have moved 16 times from childhood to adulthood. My patrilineal ancestry, Wegenast and Giesbrecht, came to Stó:lō territory in the early 1950s from Germany, having lived between 100-200 years prior on the Black Sea as German Lutheran and Mennonite Settlers in Romania (now modern day Moldova). My matrilineal ancestry, Fischer and Flack, comes from multigenerational Settlers, some coming to Turtle Island from Western Europe during the 16th and 17th centuries, with others as recent as the 19th Century from Ireland. This matrilineal ancestry coincides with American imperialistic and genocidal expansionism from east to west across Turtle Island and countless Indigenous Nations' territories. I was born on Chinook territory. I was raised across Stó:lō, Lummi, Tsuut'ina, Siksika, Stoney,

international community and other jurisprudential traditions outside Canada interpret what cruel and unusual treatment or punishment constitutes (2019 ONSC 535, at para. 152). Indeed, Canada is beholden to many international treaties that affect and have the opportunity to guide the path of Canadian jurisprudence. What, then, is the relationship between s.12 of the Charter and the ICCPR's Article 7 regarding incarcerated persons facing administrative segregation? I argue this relationship has become closer with the use of international expert evidence in Canadian jurisprudence, thus expanding Canadian interpretation towards the international views on solitary confinement and administrative segregation. The current application of s. 12 follows a particular path may provide some protections for incarcerated persons—and thus some connection to Article 7. Nonetheless, s. 12 is not without its flaws; divergent interpretations may for potentially too narrow or broad interpretation within Canadian jurisprudence. I will be using the terms of solitary confinement and administrative segregation interchangeably to match their reference in international law and Canadian jurisprudence contexts. For the purposes of this paper, they should be understood as the same practice.

This area of research is important because it reveals human rights issues that incarcerated persons face in the Canadian state. Within the settler colonial state of Canada, the carceral state and institution disproportionately affects Indigenous and racialized peoples. This paper uses administrative segregation to bring attention to unconstitutional aspects of the Canadian prison system from an international human rights perspective. Changing interpretations of "cruel and unusual treatment or punishment" towards cruel, inhumane, and degrading treatment (CIDT) will move carceral administration further away from isolationist methods towards just, rehabilitative, and decolonial methods of prevention and healing. The organization of this paper is as follows: I begin with a literature review. I then problematizes. 12's current interpretations in Canadian jurisprudence by presenting the current international interpretation of CIDT. In this section I reveal how Canadian interpretation is moving closer to international CIDT interpretation, as well as how expert evidence from international actors and scholars contributes to further CIDT developments. Following that, I analyze recent Canadian court decisions concerning administrative segregation and their use of international expert evidence. I provide a brief subsection on case selection and methodology for the use of the segregation and post-segregation cases. Finally, possible critiques of the proposed thesis, the analysis of the evidence, and research limitations are entertained.

Kootenay, Peigan, Hul'qumi'num, and Te'mexw territories. I have spent most of my adult life living on unceded Songhees, Esquimalt and W̱SÁNEĆ territories, with a brief stint living and learning on the unceded Squamish, Tsleil-Waututh, and Musqueam territories.

Canadian legal analyses are inseparable from settler colonialism and Indigenous genocide through assimilatory and eliminatory policy and law. Ultimately, any discussion about European Settler law on stolen land should inspire caution and critique.

Literature Review: Bringing Together Domestic and International Legal Contexts

Section 12 Analysis and Tracks

As legal scholar Deborah Parks has suggested, s. 12 jurisprudence regarding incarcerated persons has "had remarkably little impact in litigation concerning conditions of confinement" (Parks 2007). This changed with two landmark s. 12 challenges in 2018: British Columbia Civil Liberties Association v. Canada (Attorney General) and (BCCLA) and Canadian Civil Liberties Association v. Canada (CCLA). Since then, s. 12 analysis made a dominant appearance across cases regarding administrative segregation. Kerr and Berger note that s. 12 runs along two tracks: the severity track and the methods track. They note the importance of clear distinction between these two tracks to avoid analytic confusion and failure of s. 12 challenges (Berger and Kerr 2020, 2, 7). The methods track asks if the treatment or punishment in question "is intrinsically cruel and unusual" and is thus "in its very nature, constitutionally offensive." The severity track measures the degree of treatment or punishment against normative standards to determine whether the extent to which it is applied makes it "grossly disproportionate" and thereby cruel and unusual (Berger and Kerr 2020, 5-6). The 2008 Supreme Court of Canada's (SCC) judgement in R. v. Ferguson affirmed the test for cruel and unusual punishment as a sanction "'so excessive as to outrage the standards of decency' and disproportionate to the extent that Canadians 'would find the punishment abhorrent or intolerable'" (2008 SCC 6, at para. 14). Challenges to confinement most often appeal to the methods tracks, though in practice s. 12 analysis blends the two tracks and applies them imperfectly. As a result, these legal principles leave room for a wide range of conclusions and decisions (Berger and Kerr 2020, 6). [11]

Colton Fehr notes the historic conjunctive use of "cruel and unusual" in the English Bill of Rights and American Bill of Rights is problematic. As seen in the Alberta Court of Appeal's ruling in R. v. Hills, the requirement that treatment or punishment must be cruel and unusual creates the potential of too narrow an interpretation of s. 12, which goes against the direction of s. 12 jurisprudence (Fehr 2021, 235-238). An amendment to s. 12 to adjust the wording to mirror ICCPR Article 7 's "cruel, inhuman or degrading treatment or punishment" could mitigate the potential of narrower interpretations. In the 2017 Ontario Court of Appeal case, Ogiamien v. Ontario (Ministry of Community Safety and Correctional Services), Justice Laskin noted that "to establish violation of s. 12 a claimant need not show separately that the treatment is both cruel and unusual" (2017 ONCA 667, at para. 8). This ruling and interpretation discards some of the literal textualist reading of the s. 12 conjunction seen in Hills, returning focus to the methods and severity tracks.

Ogiamien set key precedent for the BCCLA and CCLA cases (collectively, the segregation cases). Thus, a brief examination of the case's outcome is warranted. Ogiamien features the application of s. 12's two-step test of prison conditions which asks (i) what is the treatment of incarcerated persons "under 'appropriate' conditions" and (ii) to what extent does the treatment depart "from the benchmark?" (2017 ONCA 667, at para. 10). In Ogiamien the Court determined that frequent lockdowns were not a violation of incarcerated persons' s. 12 rights because they did not far exceed the "treatment under ordinary living conditions" (2017 ONCA 667, at para. 68). This decision bore great relevance to the segregation cases because understandings of administrative segregation in relation to ordinary living conditions and the practice's inherently and grossly negative effects on incarcerated persons became points of contention in BCCLA and CCLA. Despite Ogiamien's clarification, the severity track remained mixed with the methods track in both segregation cases.

International Treaties and Standards

International law through legally binding treaties influences domestic courts. In Ng v. Canada for instance, the SCC prohibited the extradition of incarcerated persons to states that would violate Article 7 of the ICCPR (Smith 2016, 64). Hathaway's quantitative analyses of countries' treaty ratification and human rights records reveals that nations with ICCPR ratification "appear to have better average civil liberties and fairer trails" than those without its ratification (2002, 1978). However, Hathaway also notes that human rights treaties do not necessarily make state practices better or worse, but that the "pervasive culture of human rights and processes of norm internalization tend to affect states regardless" of ratification (2002, 2002). In Canadian jurisprudence, the focus on treaties is largely dependent on the relatability of legal concepts and their ease of application into domestic law.

States' fears that binding international law could impose superiority over a state's judicial sovereignty continues in contemporary conversations around domestic legal orders and international customary law (Harrington 2007, 220-221). Waters claims that "as the debate over the role of foreign and international law in domestic courts matures, it is time to move beyond discussions of 'foreign authority' and to examine these issues through a series of narrower lenses" (2007, 632). In the same vein, this paper considers the ICCPR's expansion into Canada's legal sphere and its subsequent effects on jurisprudence and s. 12 analysis. Waters' assertion that "some uses of foreign or international legal sources may prove to be perfectly legitimate and well within the ambit of the judiciary's traditional role, while other, more ambitious techniques may give us pause," rings true in contemporary conversation on solitary confinement and the treatment of incarcerated persons (Waters 2007, 632). Though here, the expanding Canadian legal definition of administrative segregation to something intrinsically "cruel, inhuman, and degrading" hints at ICCPR art. 7's profound influence on domestic law.

Domestic and International Intersections.

Is there a clear path of communication between domestic constitutionalism and international treaty obligations? Canadian courts' mandates include interpreting the Charter, but what about the ICCPR? Harrington notes that while the Charter does not directly incorporate the ICCPR into domestic jurisprudence, "Canada's periodic reports to... the UN Human Rights Committee, clearly show that Canada relies on the Charter to meet its Covenant obligations" (Harrington 2007, 233). Smith argues that "inevitably, less recourse is available for the aggrieved individual at [the] international level than at [the] national level (Smith 2016, 69)." Thus, the Charter will have to make do and require the transfer of treaty obligations and international interpretation to shift and influence Canadian judges' interpretations and methods of analysis in s. 12 cases. The UN Human Rights Committee's interpretation of treaty obligations through "concrete cases of alleged violation" are rarely referenced in Canadian jurisprudence and case law, which Harrington attributes to either the lack of legislated mandate to do so or the judicial choice "not to 'communicate' with... the UN Human Rights Committee..." (Harrington 2007, 233).[26]

Additionally, there is an important intersection between Canadian court cases that use international expert evidence and the reports of the Human Rights Council since

> "the work of the Council is supported by a range of special procedures (rapporteurs) — private individuals, serving in their individual capacity to monitor compliance with human rights in different states through official visits, conceptualize potential developments in human rights, consider claims of violations of rights and freedoms, and articulate and address concerns" (Harrington 2007, 71).

As will be seen across the cases selected for this research, the reports and expert evidence of Argentine lawyer and professor, Juan E. Méndez and other experts in international law appeared frequently in recent s. 12 jurisprudence. Therefore, the reports of special rapporteurs should be considered under the banner of "international interpretation" of human rights treaties and their articles, similar to Human Rights Committee case decisions.

Expert Evidence and Special Rapporteurs: Expanding CIDT and Applying ICCPR Article 7 to Charter Section 12

The concept of CIDT is normalizing and becoming a part of Canadian jurisprudence. Article 7 of the ICCPR is affecting s.12 of the Charter by broadening interpretations of treatment and punishment with its principle of "cruel, inhuman, and degrading treatment". Canada's courts and public are increasingly adopting this definition as the standard of unacceptable treatment in administrative segregation. Whether this shift began in the Canadian public's changing

standards of decency or in judicial interpretation is a matter of debate. Nonetheless, its impacts on incarcerated persons and carceral methods are far reaching. In exploring this, it is first integral to lay out the international community's contemporary definition of what constitutes CIDT relative to administrative segregation in the Canadian cases. Over the last decade, both special rapporteur reports and ICCPR interim reports have expanded upon the context of CIDT to relate directly to administrative segregation. I chose these sources because they display the international community's understandings, interpretations, and expectations regarding human rights across international and domestic contexts.

Juan E. Méndez's 2011 Report to the UN General Assembly as the Special Rapporteur of the Human Rights Council is crucial for understanding Canada's shift towards the CIDT standard. Méndez's report helped expand CIDT and art. 7 to cover administrative segregation and as a result, had particular importance for the segregation cases and subsequent segregation jurisprudence in Canada.[28] In the 2011 interim report, Méndez unraveled solitary confinement's history and its definition as 22 to 24 hours of physical isolation. He concluded that that "the social isolation and sensory deprivation that is imposed by some States does, in some circumstances, amount to cruel, inhuman and degrading treatment and even torture" (Méndez 2011, 7-8). Méndez also established a direct connection to ICCPR art. 7, stating that "prolonged solitary confinement of the detained or imprisoned prison"—being more than 15 consecutive days—might violate the ICCPR (2011, 9). Importantly, Méndez reported that the health risks of solitary confinement, including anxiety, depression, and self-harm increased after "each additional day spent in such conditions" (17-18). In short, Méndez's report allowed ICCPR art. 7 to touch upon Canadian administrative segregation.

The UN Human Rights Committee has consistently voiced concern over Canadian prison conditions even after 2018 segregation cases (UNHRC 2015 and UNHRC 2021). . The Concluding observations on the sixth periodic report of Canada in UNHRC 2015 shows the Committee's concern for the "many cases of administrative or disciplinary segregation," commenting on the length of segregation and its use on incarcerated persons with mental illnesses. It recommended that Canada:

> (i) use alternative means of detention,
> (ii) ensure segregation is a "last resort for as short a time as possible"
> (iii) prohibit the practice's use on those with mental illnesses (UNHRC 2015).

It must be noted that Article 7 is not considered in this part of the report, but Article 10 — specific guidelines for incarcerated persons' treatment, differentiated unconvicted and juvenile treatments, and the penitentiary system's goal as rehabilitation—is the key focus (ICCPR 1966, at art. 10). In 2021, the UN Human Rights Committee asked Parliament to respond to reports

that Canada's 2019 adjustments to the Corrections and Conditional Release Act (CCRA) following the segregation cases had "not been effective at addressing the use of prolonged solitary confinement within the prison system" (UNHRC CCPR/C/CAN/QPR/7 2021, 4). The report cautiously questioned Canada's adherence to ICCPR arts. 7 and 10. Unlike its 2015 Concluding Observations, this report directly connected Canadian prison conditions to art. 7 just as the Méndez Report had in 2011. The omission of art. 7 in the 2015 Report suggests a level of inconsistency in the UN's treatment of Canadian administrative segregation standards. I suspect the shift between reports is due to the segregation cases' use of s. 12—at least in the CCLA case—which then increased art. 7's relevance.

Analyzing Jurisprudence: Administrative Segregation, Section 12, and the ICCPR

Many elements of the segregation and post-segregation cases are similar relative to s. 12 and art. 7. These cases are: British Columbia Civil Liberties Association v. Canada (Attorney General), Canadian Civil Liberties Association v. Canada, R. v. Capay, and Reddock v. Canada (Attorney General). Almost all cases reference the ICCPR and other international treaties and agreements including the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (UNCAT), and the Mandela Rules. Likewise, almost all cases reference the 2011 Méndez Report, with some cases having him directly provide expert evidence. These cases are important because they show the application and non-application of s. 12, make reference to international law and treaty obligations, and reveal the current reasoning for whether administrative segregation procedures are CIDT. These four cases clarify the relationship between s. 12 and art. 7 and how well s. 12 measures up to international interpretations of CIDT.

Methodology and Case Selection

This analysis looks at s. 12 challenges related to administrative segregation across Canada between 2018 and 2020. In reference to the literature review, analyzing these particular cases shows how the Courts and the ICCPR interact and how international law communicated through expert evidence testimonies influences domestic courts. It also considers the severity and methods tracks in order to better understand how s. 12 jurisprudence and Canada's judicial system are developing.

As seen in the 2017 Ogiamien case, a two-step test guides Judges' interpretations of cruel and unusual treatment or punishment by asking what appropriate treatment is under ordinary conditions and the extent to which additional measures depart from those conditions. But does this entirely explain administrative segregation's infringement of s. 12? These cases were selected because they show some variation in interpretation of s. 12 infringement. BCCLA did not infringe s. 12, whereas CCLA, Capay, and Reddock did. They also vary in their impugned

legislation and officials, and in remedy. The selected cases are both chronologically and substantively similar. Their substantive similarity is significant because it allows for a deeper analysis of the relationship between the ICCPR and the Charter. This depth will provide a background for future research that asks how Canadian courts interpret s. 12 and international law.

Future cases will determine whether this period of s. 12 infringement for incarcerated persons was a progression for future use of s. 12 or if it was a unique, one-time occurence. Due to the limitations of this paper and breadth of each case, I was unable to add additional cases like the 2019 Ontario Supreme Court case Brazeau v. Attorney General (Canada), and the 2020 Ontario Superior Court of Justice case Francis v. Ontario, both of which dealt with administrative segregation in class-action cases akin to Reddock.

British Columbia Civil Liberties Association v. Canada (Attorney General)

Justice Leask of the BC Supreme Court examined s. 12 considerations for administrative segregation in the 2018 BCCLA case. The impugned laws were the CCRA ss. 31-33 and 37 regarding prolonged administrative segregation which the British Columbia Civil Liberties Association and John Howard Society argued infringed Charter ss. ss. 7, 9, 10, 12, and 15 (2018 BCSC 62, at para. 2). The case directly references ICCPR art. 7 by citing the 2011 Méndez Report and considers UNCAT arts. 1 and 16, and the Mandela Rules (2018 BCSC 62, at para. 58). This case comes up short in terms of understanding the relationship between s. 12 and art. 7 because s. 12 was not found to be infringed. However, this does show some of the logic of Canadian jurisprudence to not include s. 12. From the expert evidence provided, Justice Leask notes that s. 31's administrative segregation "is a form of solitary confinement that places all Canadian federal inmates subject to it at significant risk of serious psychological harm" (2018 BCSC 62, at para. 247). Yet, Justice Leask emphasizes that the plaintiffs "argue that certain conditions experienced by inmates placed in administrative segregation are" unconstitutional, not that the practice itself constitutes a s. 12 infringement (2018 BCSC 62, at para. 533-534). Likewise, Justice Leask agreed with the federal government in that administrative segregation was a form of s. 12 "treatment," but asserted that "cruel and unusual" was a high threshold that the plaintiffs did not meet (2018 BCSC 62, at para. 527).

Differentiating from the other cases I have selected, Justice Leask notes that "the plaintiffs focused their submissions on s. 7 of the Charter." This led to the s. 52 invalidation of those impugned CCRA sections pursuant to s. 7 and s. 15 which were based on administrative segregation's effects on the mentally ill and disabled, and discrimination against incarcerated Aboriginal peoples (2018 BCSC 62, at para. 609). The lack of a s. 12 foundation in this case should not detract from the important work of a s. 15 foundation. The deaths of Ashley Smith and Edward Snowshoe in administrative segregation are critical examples of the

disproportionate impacts of administrative segregation on Indigenous Peoples (White 2020). An example of the determining preference of other Charter rights is the West Coast Women's Legal Education and Action Fund's work in BCCLA as an intervenor. Notably, their written submission focuses substantively on ss. 7 and 15 infringements and makes no mention of s. 12 (WCWLEAF 2018). This case was appealed in the BC Court of Appeal, where Justice Fitch upheld the s. 7 infringement but found no s. 15 infringement (Imrie 2020).

Canadian Civil Liberties Association v. Canada

The CCLA case was similar to BCCLA as it was based on the CCRA's ss. 31-37 uses of administrative segregation; primarily being argued was that the sections infringed ss. 12 and 11(h), with the appeal to the Ontario Court of Appeal including a s. 7 infringement (2019 ONCA 243, at para. 3). This case specifically frames "prolonged administrative segregation"—that which exceeds 15 consecutive days—as causing "foreseeable and expected harm which may be permanent and which cannot be detected through monitoring until it has already occurred," thus "outraging the standards of decency" (2019 ONCA 243, at para. 5). While the Ontario Court of Appeal case does not explicitly mention the ICCPR, Justice Benotto notes that the application judge used Méndez's expert evidence on the basis of , his expertise as "a professor of human rights law" and his six-year role as the United Nations Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (2019 ONCA 243, at paras, 26-29). As previously stated, his 2011 interim report as special rapporteur is integrally tied to ICCPR art. 7.

The result was that CCRA ss. 31-37 infringed s. 12 because the sections did not protect against the grossly disproportionate treatment of prolonged administrative segregation (2019 ONCA 243, at para. 19). The infringement did not pass the reasonable objective stage of s. 1 analysis because the practice's objective "to ensure the safety of persons in and the security of the penitentiary" through the use of reasonable alternatives and done in the shortest amount of time was not being practiced. Ultimately, Justice Benotto rhetorically asks whether s. 1 can ever justify a s. 12 breach (2019 ONCA 243, at para. 122-124).[50] In CCLA, Justice Benotto applied the Ogiamien two-step test by questioning the severity of the punishment relative to ordinary prison conditions. Nonetheless, Kerr and Berger (2020) state that his answer also leaned towards the methods track in viewing the practice as inherently cruel and having harmful effects on incarcerated persons (16).

Finally, a s. 52(1) remedy was given to take away the force and effect of administrative segregation through the impugned CCRA sections (2019 ONCA 243, at para. 139-140). The CCLA case most mirrors art. 7 because it follows international interpretation that considers prolonged solitary confinement as CIDT. The harmful effects of administrative segregation were what determined the practice's infringement of s. 12. Importantly, the Attorney-General of

Canada, David Lametti, sought to appeal both the BCCLA and CCLA cases to the SCC. However, Lametti discontinued the appeal in April 2020 allowing the lower courts' decisions to stand (White 2020).

R. v. Capay

The Capay case was a criminal case heard in the Ontario Superior Court of Justice in 2019 by Justice Fregeau. Capay, from Lac Seul First Nation, spent 1,647 days "continuously held in segregation in a cell by himself" despite suffering from serious childhood trauma and mental illness (2019 ONSC 535, at paras. 4, 8-14, 39. He sought a s. 24(1) stay of proceedings for his first-degree murder case due to his claim that his detention in administrative segregation violated his ss. 7, 9, 12, and 15 rights (2019 ONSC 535, at paras. 484, 487). The policy governing administrative segregation practices in this case was Ontario's Ministry of Correctional Services Act, Regulation 778, s. 34 (2019 ONSC 535, at para. 143). Arguing for a s. 12 infringement, Professor Stephen Toope provided expert evidence revealing that Capay's confinement was CIDT under international law. The Crown agreed that correctional officers had subjected Capay to CIDT (2019 ONSC 535, at para. 361). Justice Fregau concluded the treatment was "outrageous, abhorrent, and inhumane" and stayed proceedings on the grounds that Capay's confinement violated his s. 12, 7, 9, and 15 rights and a trial would amount to "ongoing prejudice to the accused" (2019 ONSC 535, at paras. 415, 496, 534-535).

In his decision, Justice Fregeau cited ICCPR arts. 7 and 10 and Canada's accession to other international treaties that "set out limits on the use of segregation and the standards for the conditions to which segregated inmates may be subjected" (2019 ONSC 535, at paras. 151-153). Other treaties referenced were UNCAT, the Convention on the Rights of Persons with Disabilities, and the Mandela Rules (2019 ONSC 535, at paras. 154-157). Professor Toope described Canada as "legally bound to the terms of" the ICCPR and UNCAT, stating that ICCPR arts. 7 and 10 "collectively create an obligation to ensure prisoners are protected against torture and cruel, inhuman or degrading treatment or punishment" (2019 ONSC 535, at paras. 180-181). Some key differences in this case were the substantive connections to art. 7 and the clear s. 12 infringement. While it should be noted that this is an extreme and obvious case that looks specifically at government correctional officers' infringing an incarcerated individual's s. 12 rights, it also shows the current and potentially horrific outcomes under Canadian administrative segregation legislation. As an individual case, the framing towards a s. 24(1) remedy fits better than one under s. 52(1) considering the Crown could argue that most cases are dissimilar to Capay. Yet the staying of a first-degree murder charge is not insignificant; ultimately, Ontario did not appeal the case (Affleck and Barrison 2021).

Reddock v. Canada (Attorney General)

The Reddock case was heard by Justice Perell in the Ontario Superior Court of Justice in 2019. Reddock sued the federal government under the Class Proceedings Act (1992) for the Correctional Service of Canada's maladministration of administrative segregation in federal penitentiaries which he claimed infringed "inmates' rights" pertaining to ss. 7, 9, 11(h), and 12 of the Charter. Notably, the case's 8,934 Class Members were "prisoners who [had] spent more than fifteen consecutive days in administrative segregation" (2019 ONSC 5053, at paras. 2-3, 6-7). In Reddock, Justice Perell takes into account the BCCLA and CCLA cases, which at the time the federal government was planning to appeal to the SCC (2019 ONSC 5053, at para. 5). In connection to the ICCPR, Justice Perell notes Canada is "bound by the provisions of both the [UNCAT] and the [ICCPR]" and Professor Méndez provided expert evidence directly relating to his 2011 Report connecting solitary confinement to art. 7 2019 ONSC 5053, at paras. 119-120).

The Reddock decision regarding s. 12 infringement directly called upon the CCLA decision in stating "that the maximum time after which segregation constitutes cruel and unusual treatment on a class-wide basis is fifteen days" and that anything prolonged now outrages the standards of decency and is a s. 12 infringement (2019 ONSC 5053, at paras. 285-287). Justice Perell answers the question Justice Benotto asks in CCLA, responding that "in the context of current moral norms, once it has been established that treatment is cruel and unusual, it cannot ever justify a s. 12 breach," and thus the s. 12 infringement in Reddock fails s. 1 justification (2019 ONSC 5053, at para. 301). The s. 24(1) remedy meant $500 per Class Member—a base level compensatory award—and the "base level of Charter damages" was a $20 million value (2019 ONSC 5053, at paras. 396-397). The case was appealed to the Ontario Court of Appeal, which unanimously upheld Justice Perell's decision (Tétrault 2021).

Summary of Case Analysis

What is clear after the BCCLA and CCLA cases is the shift and effect on Capay and Reddock, showing similar or increasing ICCPR reference and administrative segregation being defined as CIDT. Thus, the reference of international treaties establish a link between international law and the Charter. The use of international expert evidence establishes the extent of influence and substantiveness of international interpretation in Canadian courts. Notably, there were no references in any of the cases to relevant Human Rights Committee cases seeking to adjudicate ICCPR articles. If Human Rights Committee cases were being drawn up by Canadian courts, plaintiffs, applicants, or intervenors, they could create a connection and, if accepted, substantiate international interpretations of art. 7 to s. 12. This connects with Harrington's observation of the ICCPR's lack of incorporation into the judiciary.

Another element that differentiated the BCCLA case from the other cases was that the plaintiffs and intervenors focused the case on ss. 7 and 15 more heavily than they did s. 12. While the BC Supreme Court still denied there was s. 12 infringement, future incarcerated persons' cases

should be careful to select and support specific Charter section infringements. While BCCLA had the expert evidence and connection to the ICCPR, the plaintiffs did not adequately argue that administrative segregation was in itself cruel and unusual punishment vis a vis the methods track. Capay and Reddock also show the importance of s. 24(1) remedy for those who have been aggrieved by the now impugned practice of prolonged administrative segregation.

How do these cases help build understanding of the relationship between the Charter's s. 12 and the ICCPR's art. 7 regarding incarcerated persons facing administrative segregation? It is clear that most of the cases analyzed show a general agreement that administrative segregation is not constitutional as per s. 12. There is a clear connection between the ICCPR through the evidence presented by international experts in each case. These cases show that there is room in Charter interpretation for international perspectives; Canada has international obligations to incarcerated persons and this gives Canadian judges space to consider jurisprudence beyond the Charter in their decisions. The specifics of s. 12 analysis and tracks across these cases also shows that Canada's legal system faces frequent muddying of the severity and methods tracks. This uncertainty can alter s. 12's understanding domestically, making it harder to align with art. 7 of the ICCPR.

Critiques and Responses

Could s. 12 be developing on its own as Canadian society begins seeing administrative segregation as outraging the standards of decency? I posit that while the psychological expert evidence revealing the negative effects of administrative segregation indeed outrages Canadian standards of decency, they are connected well to the development of solitary confinement as CIDT in the international legal context. The work of international legal scholars citing art. 7 such as professors Méndez and Toope thread the definition of an abhorrent practice. Future research might do well to compare post-case legislative action against courts' s. 12 analysis results, as well as comparing the legislation (i.e., Bill C-83) against interpretation of ICCPR Article 7 and the Human Rights Committee's reports on Canada. This paper faced substantial limitations given the lengthy expert evidence posed with each lower court case. Other data I would have liked to have included were additional factums and written submissions from intervenors and Human Rights Committee cases concerning CIDT and incarcerated persons. While it is clear that the latter data had relatively little effect on the cases, it would be interesting if future plaintiffs were to consider utilizing Human Rights Committee cases to hold Canada accountable to its ICCPR obligations. Courts' responses to plaintiff's use of international cases would also be enthralling.

The slower development of s. 12 analysis and its relationship to art. 7 of the ICCPR regarding administrative segregation might also be this way due to the use of other Charter claims in defense of incarcerated persons. Parkes notes that most incarcerated persons' cases have

taken the route of s. 7 to protect their rights to life, liberty, and security of person (Parkes 2007, 642). Indeed, the BCCLA case follows more closely to Canadian judicial norms because it was deemed a s. 7 infringement at both the BC Supreme Court and BC Court of Appeal. Conversely, the CCLA case breaks ground with maintaining the claim and decision of a s. 12 infringement, while also connecting back with a s. 7 infringement.

There is also the argument that these cases misrepresent incarcerated persons' rights because all of these cases are very similar in their result. To respond, these cases are indeed very specific in that they only regard the treatment of solitary confinement and administrative segregation. Similarly, and connecting to Parkes, s. 12 has not seen as much use as s. 7 when regarding incarcerated persons' rights. These are recent developments that must be expanded upon as future jurisprudence on s. 12 interpretations and incarcerated persons' rights develop.

Conclusion

The Canadian segregation cases and their successor cases show that when plaintiffs and applicants prioritize s. 12 and supplement their cases with expert evidence that connects Charter violations to international law and treaties, jurisprudence begins to build more substantive s. 12 protections for incarcerated persons. Notably, human rights bodies and special rapporteurs can be utilized to help expand concepts of CIDT to be applied by s. 12 analysis. It is important not to interpret this as Justices transposing international law directly onto s. 12 interpretation; in some cases, mention of the ICCPR and other international laws and norms could be superficial recognition of treaty obligations.

The Charter and s. 12 would directly connect with the ICCPR if Canadian courts were to also include reference or dialogue between the Human Rights Committee's cases regarding Article 7 and Article 10. A Charter s.12 that more closely resembles ICCPR art. 7 would better protect all Canadians—incarcerated or otherwise—from "cruel, inhuman or degrading treatment or punishment." This follows a similar vein to Parkes consideration of "the role that litigation might play in ending this human rights crisis, as well as the relationship of prisoner rights litigation to broader, anti-carceral social movements" (Parkes 2017, 166). Future research should look at whether the legislation enacted by Bill C-83, the Act to Amend the Corrections and Conditional Release Act (2019), and other affected legislation captures the outcomes of administrative segregation cases and Canada's commitment to the ICCPR.

As of Bill C-83's royal assent, it now stands that the amended CCRA "eliminate[s] the use of administrative segregation and disciplinary segregation" and provides guidelines for the use of "Structured Intervention Units" (SIUs) to prevent the negative effects of administrative segregation (S.C. 2019 c.27). Nonetheless, reports in April 2022 found that solitary confinement has continued in the form of SIUs; from November 2019 to August 2021 1,732 incarcerated

persons were in SIUs, with 55% exceeding 30 days and 22.5% between 60 and 552 days, as well as 30% of persons not receiving 4 hours outside of isolation, and 10% meeting torture standards (CBC News 2022). It would seem that the Human Rights Committee's fears of SIUs continuing solitary confinement under a new name are true. As it currently stands, administrative segregation in Canada compares relatively close to solitary confinement's definition in international treaties and CIDT, but s. 12 and art. 7 could be more closely aligned. If s. 12 and Article 7 were one and the same, then administrative segregation as solitary confinement, SIUs, and any related form of administrative segregation would be unconstitutional and more humane methods of correctional justice and rehabilitation would be at the forefront of legislation. Until s. 12 and Article 7 align, we will likely continue to see repeated forms of administrative segregation that come in different names yet garner the same harmful results.

References

Affleck & Barrison LLP. "Ontario Will Not Appeal Decision to Stay Murder Charge Against Adam Capay." Accessed November 27, 2021. https://criminallawoshawa.com/ontario-will-not-appeal-decision-to-stay-murder-charge-against-adam-capay/.

Berger, Benjamin and Lisa Kerr. "Methods and Severity: The Two Tracks of Section 12."
12." Supreme Court Law Review 94, no. 2d (2020): 1-21.

Bianco, William T. and David T. Canon. American Politics Today. New York: W. W. Norton & Company, 2017.

Bill of Rights (Act) 1689 (England) 1688 c.2 (1 Will and Mar Sess 2).

British Columbia Civil Liberties Association v. Canada (Attorney General) [2018] 43 C (7th) 1 - 402 CRR (2nd) 53, 2018 BCSC 62. https://www.canlii.org/en/bc/bcsc/doc/2018/2018bcsc62/2018bcsc62.html.

Canadian Charter of Rights and Freedoms, s. 12, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11.

Canadian Civil Liberties Association v. Canada [2019] 144 OR (3d) 641- 433 DLR (4th) 157, 2019 ONCA 243. https://www.canlii.org/en/on/onca/doc/2019/2019onca243/2019onca243.html.

CBC News. "Canadian Inmates Still Face Isolation Amounting to Torture, Experts Say."

CBC News, April 7, 2022. https://www.cbc.ca/news/canada/montreal/federal-inmates-solitary - confinement-enquete-1.6410882.

Fehr, Colton. "Tying Down the Tracks: Severity, Method, and the Text of Section 12 of the Charter." Canadian Criminal Law Review 25, no. 3 (2021): 235-253.

Government of Canada, Department of Justice. Overrepresentation of Indigenous People inthe Canadian Criminal Justice System: Causes and Responses. https://www.justice.gc.ca/eng/rp-pr/jr/oip-cjs/p3.html.

Government of Canada. An Act to amend the Corrections and Conditional Release Act and another Act, S.C. 2019, c. 27. https://laws-lois.justice.gc.ca/eng/annualstatutes/2019_27/page-1.html.

Harrington, Joanna. "The Democratic Challenge of Incorporation: International Human Rights Treaties and National Constitutions." Victoria University of Wellington Law Review 38, no. 2 (2007): 217-235.

Hathaway, Oona A. "Do Human Rights Treaties Make a Difference?" Yale Law Journal 111, no. 8 (2002): 1935-2042.

Imrie, Alison. "SCC to Determine Constitutionality of Administrative Segregation." The Court, March 18, 2020. https://www.thecourt.ca/scc-to-determine-constitutionality-of-administrative-segregation/.

McCarthy Tétrault LLP. "Ontario Court of Appeal releases its decision in Reddock v. Canada." Accessed November 27, 2021. https://www.mccarthy.ca/en/work/cases/ontario-court-appeal-releases-its-decision-reddock-v-canada.

Ogiamien v. Ontario (Community Safety and Correctional Services) [2017], 2017 ONCA 667. https://www.canlii.org/en/on/onca/doc/2017/2017onca667/2017onca667.html.

Parkes, Debra. "A Prisoners' Charter? Reflections on Prisoner Litigation Under the Canadian Charter of Rights and Freedoms." UBC Law Review 40, no. 2 (2007): 629-676.

Parkes, Debra. "Solitary Confinement, Prisoner Litigation, and the Possibility of a Prison Abolitionist Lawyering Ethic." Canadian Journal of Law and Society 32, no. 2 (2017): 165-185.

R. v. Capay [2019] CR-13-0070, 2019 ONSC 535. https://www.canlii.org/en/on/onsc/doc/2019/2019onsc535/2019onsc535.html.

R. v. Ferguson [2008] 1 SCR 96, 2008 SCC 6. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2406/index.do.

Reddock v. Canada (Attorney General) [2019] 441 CRR (2d) 1, 2019 ONSC 5053. https://www.canlii.org/en/on/onsc/doc/2019/2019onsc5053/2019onsc5053.html.

Smith, Rhona K. M. “Human Rights in International Law.” In Human Rights: Politics and Practice, edited by Michael Goodhart, 60-76. Oxford: Oxford University Press, 2016.

United Nations General Assembly. International Covenant on Civil and Political Rights, 1966. https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

United Nations General Assembly. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment and punishment, A/66/268, 2011. https://digitallibrary.un.org/record/710177?ln=en.

United Nations Human Rights Committee. International Covenant on Civil and Political Rights: Concluding observations on the sixth periodic report of Canada, CCPR/C /CAN/CO/6, 2015. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/CAN/CO/6&Lang=En.

United Nations Human Rights Committee. International Covenant on Civil and Political Rights: List of issues prior to submission of the seventh periodic report of Canada, CCPR/C/CAN/QPR/7, 2021. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fCAN%2fQPR%2f7&Lang=en.

Waters, Melissa A. “Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties.” Columbia Law Review 107, no. 3 (2007): 628-705.

West Coast Women’s Legal Education and Action Fund. “Written Submission of West Coast LEAF.” British Columbia Civil Liberties Association v. Canada (Attorney General) [2018] 43 CR (7th) 1 - 402 CRR (2nd) 53, 2018 BCSC 62. http://www.westcoastleaf.org/wp-content/uploads/2018/06/2017-08-25-West-Coast-LEAF-Written-Submission-Compressed.pdf.

White, Patrick. “Canada Abandons Solitary Confinement Appeal to Supreme Court.” The Globe and Mail, April 22, 2020. https://www.theglobeandmail.com/canada/article-canada-abandons-solitary-confinement-appeal-to-supreme-court/.

Legal Analysis / L'analyse juridique

Bring Them Home? Canadian Supreme Court Responses to Section 7 Challenges on Behalf of Former Canadian ISIS Members Detained in Syria

Grace Zulynik

Keywords: Canadian Charter, Section 7, Positive Rights, ISIS, Overseas Detention, Legal Analysis.

Mots-clés: Charte canadienne, article 7, droits positifs, Daesh, détention outre-mer, analyse juridique

As of September 2022, the Canadian government has failed to publicly address the legal condition of detained Canadian foreign fighters. A legal case being brought on the fighters' behalf argues that the lack of consideration is a violation of the detainees' section 7 Charter rights. This paper finds that there is sufficient precedent in the Canadian legal cannon to support this assertion. This conclusion is reached through an analysis of key s. 7 Charter cases similar to the case at hand, including the application of the Charter overseas, a discussion of the Canadian anti-terrorism regime, and the potential for positive rights under s.7. There is little existing literature on this topic, so broader academic writings on s. 7 rights were considered alongside the selected cases. Although this paper is limited by a lack of information pertaining to the individuals involved, there appears to be strong evidence that the non-action of the Canadian state constitutes a violation of the detainees' s. 7 rights.

Depuis septembre 2022, le gouvernement canadien n'a pas réussi à aborder publiquement la condition juridique des combattantes étrangères canadiennes détenues. Une affaire judiciaire est engagée au nom des combattantes pour faire valoir que ce manque de considération constitue une violation des droits des détenues, selon l'article 7 de la Charte. Cet article constate qu'il existe un précédent suffisant dans le canon juridique canadien pour suggérer que la position du gouvernement est une violation des droits des combattantes selon l'article 7. Cette conclusion s'appuie sur une analyse des principales affaires relatives à l'article 7 de la Charte, contenant des éléments similaires à l'affaire en question, y compris

l'application de la Charte à l'étranger, la discussion du régime antiterroriste canadien et la possibilité pour des droits positifs sous l'article 7. Il existe peu de littérature sur ce sujet, alors les écrits universitaires plus larges sur les droits de l'article 7 sont examinés en même temps que les cas sélectionnés. Bien que le manque d'informations concernant les individus concernés limite cette analyse, il y a néanmoins des preuves solides que l'inaction de l'État

Introduction

In 2019, the Islamic State of Iraq and al-Sham (ISIS) ceded the final remnants of its territorial holdings to internationally backed Kurdish-Syrian forces. Since then, the Syrian government has detained many of the remaining members, including foreign fighters from Western democracies pending repatriation for trial in their home states. Although France, Germany, and the United States have all successfully repatriated at least a portion of their citizens, Canada appears to have no plans of doing so. This has led to a Charter challenge being brought by the relatives of the detainees alleging that the government of Canada has shirked their responsibilities towards their detained citizens. To assess whether the Canadian courts would find in the detainees' favour, I have determined the Charter sections that these cases are most likely to invoke based on the specific rights allegedly violated; selected analogous cases from the Canadian legal cannon for analysis; and examined the potential counterarguments that could lead the courts to not find in the detainee's favour.

This case has the potential to challenge key aspects of Charter jurisprudence including the use of the Charter outside Canadian soil, the expansion of positive-rights discourse, and the need to balance Canada's anti-terrorism agenda with the individual Charter rights and protections enjoyed by citizens. Although this paper is limited by a lack of information pertaining to the individuals involved, there does appear to be strong evidence that the non-actions of the Canadian state constitute a violation of the detainees' section 7 Charter rights. I base this prediction on landmark Charter cases that share key elements with the case the media has dubbed "Bring Our Canadians Home."

Case Background and Choice of Section 7

The challenge to the Canadian government's refusal to repatriate is being brought by Lawrence Greenspon, who in 2020 won a case that led to the repatriation of "Amira"—a five-year old Canadian orphan stranded in a Syrian detention camp. In 2020, Amira was the only Canadian removed from Syria by the Canadian government and according to Prime Minister Justin Trudeau, the state has no plans to offer assistance to any of the Canadians remaining in detention. In a statement from October 2020, Trudeau stated that "Amira's case [is] exceptional because she was orphaned" and that "no other operations of the sort" are in progress (Coletta

2020). Since then, a group of the detainees' relatives have retained Greenspon to bring the remaining Canadians and their children back to Canada. The Greenspon case concerns approximately 35 individuals held in the Roj and al-Hol detention camps in Northeastern Syria (Glavin 2021). Alexandra Bain, founder of Families Against Violent Extremism, plans to bring a similar case before the Canadian courts on behalf of 26 other Canadians also scattered between the two camps (Farooq 2021). It is unclear whether Bain's case has come before any Canadian courts yet or whether it overlaps with individuals from the Greenspon case. The detained individuals and their families have remained anonymous to protect their safety and privacy. At least forty other Canadians have been imprisoned in Syrian detention camps, although estimates are difficult to verify. As of October 2022, the Canadian government has repatriated only an additional two women and two children. Hearings for repatriating other Canadians detained in Syria are set for December 2022, but Canadian officials have indicated that repatriation efforts are currently limited to those with severe illness (Mazigh and Neve, 2022; Fine, 2022).

Challenges arguing for repatriation will most likely invoke section 7 of the Charter and as a result, s.7 is this paper's main focus. MacIvor (2013) provides a succinct summary of s.7, stating that it prohibits "any law or government action that threatens life, liberty or physical security" and it is "sufficient to prove that any one of the three is infringed" to bring a challenge. This paper foregoes discussion of section 1 of the Charter because the cases in question concern a government action (or inaction) as opposed to a bill or law. Hence, the Oakes Test's justification for limiting a Charter right is not relevant. Though section 15 provisions for equal rights may also be relevant in detainee repatriation cases, there is insufficient precedent to apply due process rights outside Canadian soil. Section 7 has a wider scope than s. 15 and provides the strongest basis for a challenge to the state's inaction on behalf of the detainees.

Contributions and Literature Review

The foreign fighter phenomenon will continue to involve the Canadian state and Canadian citizens. The UN Office on Drugs and Crime identifies the growth in the number of foreign fighters as "unprecedented" and anticipates "a significant threat to peace and security" in their home countries if the problem is not effectively dealt with (UNODC, para. 1-3); Canada needs to determine how its legal apparatus will handle this ever-growing crisis and it is inevitable that the Charter will be involved in questions of balance between freedom and security. This paper aims to create a foundation for assessing foreign fighter repatriation under s. 7.

Because Canadian participation in Islamist militarism is a unique and developing phenomenon, there is relatively little academic literature on the subject. Even less has been published on its relationship with the Charter. Academic discourses on the repatriation of Canadian militants have tended to be moral and ethical debates rather than legal ones. Govier and Boutland (2020) consider various strategies for re-entry into Canadian society in "Dilemmas Regarding

Returning ISIS Fighters". This paper assumes that the detainees will be successfully repatriated but does not examine the role of the Charter in repatriation. Govier and Boutland claim that "to take away citizenship, or leave citizens exposed to hasty trials in harsh circumstances outside the country [would] deny rights" but make no direct reference to the Charter (2020, 99). Yet as the primary source of Canadians' rights, their thesis implies reference to the Charter. International obligations also feature frequently as a central question of the existing works on the topic. West et al. (2019) urge the Canadian state to take responsibility for citizens radicalized on Canadian soil and cites the failure of the Canadian security apparatus to honour its international security commitments by preventing these individuals from leaving the country. The article goes on to argue that to refuse to take action on repatriation is "to shirk [Canada's] responsibility as a nation" (West et al., 2019). Once again, the authors do not make direct reference to Charter but assert that there is sufficient precedent for the inclusion of international laws, norms, and objectives to support Charter challenges. This is especially important given the lack of precedent in cases arguing for the repatriation of Canadian militants.

A more substantial body of work that applies here is literature which explores an expanded definition of s. 7 in a more general fashion. Of particular importance is the question of positive rights, which remains a heavily contested topic within the cannon of Charter scholarship. Latimer's (2014) piece concerning the rights of children suggests expanding s. 7. She argues that "the unique nature of children and their relation to the state as well as Canadian laws and jurisprudence support recognition of positive rights [...] under section 7 of the Charter" (Latimer, 2014, 544). This piece examines an aspect of s. 7 that may be interpreted to confer positive rights on certain groups—specifically, children. Although not all detained Canadian citizens are children, Latimer's contribution is relevant because it expands possible interpretations of s. 7 when it comes to predicting the outcome of foreign fighter cases. It is worth noting that many of the Canadians detained overseas are children whose rights must be considered uniquely in light of their age (Mazigh & Neve, 2022).

Michael Da Silva explores the potential for positive rights recognition in the future in a paper examining the current status of positive rights in ss. 7, 12, and 15 of the Charter. Da Silva writes that positive rights are currently not conferred by these sections but that "new legislative and social facts, like changes in transnational law and expert or public opinion on relevant issues" could lead to the overruling of this precedent (Da Silva, 2021, 13). MacIvor's work on the definition of s. 7 offers one of the most salient reasons for the courts to find in favour of ordering repatriation by asserting that "as long as the claimant can establish a causal connection between our government's participation and the deprivation ultimately affected the guarantees of section 7 may apply to the actions of a foreign power" (MacIvor, 2013). The government of Canada is not keeping the detainees indefinitely imprisoned in unsafe and unhealthy conditions, but the state's lack of concrete action has prevented fighters from leaving

making the government of Canada ultimately responsible for the s. 7 violations that have resulted from prolonged incarceration in the detention camps. Conversely, MacIvor also states that s. 7 does "not impose positive duties on the state" despite the works mentioned above which do not negate the possibility of positive s. 7 rights under certain circumstances or more broadly at some point in the future (MacIvor 2013, 132).

Case Selection

MacIvor's legal text (2013) sets out a clear precedent for the use of s. 7 as it applies to the actions of or in a foreign state. The Canadian government is not committing actions that harm the Canadians detained in the camps but their lack of willingness to repatriate has prolonged the detention and suffering of the detainees, therein causing indirect harm. Their refusal to reclaim their citizens is the causal connection that MacIvor states is necessary to invoke s. 7. There are a number of key Canadian legal cases that back up MacIvor's assertion, including *Bedford* (2013), *Suresh* (2002), and *Hape* (2007). These cases were selected for analysis based on shared characteristics to the Greenspon case, including a consideration of positive rights, the use of s. 7, the involvement of Canada's international obligations and its anti-terrorism regime, and a discussion of indirect harm caused by state action. As there is no perfect precedent, not all of the analyzed cases feature every element listed. If these cases only supported Charter application to direct government action or if no precedent for positive s. 7 rights could be found, this paper's thesis would be disproven. In other words, the government's failure to repatriate would not violate s. 7 rights.

Section 7 Rights Violations

The conditions in the camps violate all three of the detained individuals' s. 7 rights. Human Rights Watch reports that the conditions in the two camps are unfit for human habitation. The report cites severe overcrowding, inadequate shelter from the elements, rapid and uncontrolled spread of disease, and a lack of sanitation and water management to the extent that sleeping areas have been flooded with waste. The Kurdish Red Crescent has also reported the deaths of over 400 people in the larger al-Hol camp, many of whom died from "preventable diseases" (Human Rights Watch, 2020). These conditions violate Canadian detainees' rights to personal security and even to the most basic human right to life.

The Amira case illustrates the extent of the camps' squalid conditions. Overcrowding combined with a lack of even rudimentary medical resources and sanitation infrastructure create severe health risks. The camp's impact on Amira's body was evident upon her release, at which time "her cheeks were so swollen from an untreated tooth infection that she couldn't close her mouth" (Coletta, 2020). Detainees are also at risk of emotional and psychological harm. One woman living in the women's camp detailed her physical and mental deterioration as a result of detention. In a letter to a Canadian relative, she wrote that "this place guarantees you lost your sanity, your dignity, your humanity one way or another…It's exhausting trying to protect myself

all day, all night. I can't do it anymore" (Somos 2021). Lack of sanitation and poor living conditions are not the only threats to the security and lives of the detained Canadians. In a separate report, Human Rights Watch details an interview with one of the women who described being raped and threatened with "an ISIS 'kill list' for not supporting the group" (2020). The squalid conditions and threats of ISIS retaliation is akin to both physical and psychological torture. The precedent cases discussed below will make clear that the Canadian state bears some level of responsibility for the duration of the rights violations. By allowing the detainees to remain in unsafe conditions, the Canadian state is in clear and direct violation of its Charter obligations, and I argue that when the Greenspon case or another like it makes to court, that the Canadian legal system will find in their favour and order the repatriation of the Canadian citizens from the camps in Northern Syria.

Legal Analysis

Bedford

Canada v. Bedford (2013) provides a strong precedent for government culpability in the case of harm caused by indirect government actions. In this case, the court ruled that government restrictions on prostitution violated sex workers' right to security of the person because "while it is ultimately the client who inflicts violence upon a prostitute … the law plays a sufficient contributory role in preventing a prostitute from taking steps that could reduce the risk of such violence" (2013 SCC 72, at para. 18). There is a parallel here to the repatriation cases. The state caused indirect harm to sex workers through prostitution laws just as the state is causing indirect harm to the detainees by refusing to repatriate them. Although the Canadian government did not imprison Canadians in Syrian detention camps or create the camps' inhumane conditions, its lack of actions which has kept Canadians there and thereby allowed violations of Charter rights and human rights. The important difference between *Bedford* and the repatriation cases is that the former caused indirect harm through action, while the latter caused indirect harm through inaction. Yet this does not negate the similarities to *Bedford*, making it plausible that the court would rule the same way as they did in that landmark case.

Bedford also sets precedent regarding the "actions have consequences" argument that has appeared in various news articles concerning the case. This argument posits that since these citizens left of their own free will to take part in terrorist activities, they have thus waived any protections the Charter may have offered them had they remained in Canada. This argument appears in *Malmo-Levine*, where it the Court stated that "lifestyle choices [are] not constitutionally protected" (2003 SCC 74). Some argue that joining ISIS falls under the "lifestyle choice" argument and thus, the detainees have voided their rights to Charter protections. The same argument was brought up during the *Bedford* case; the Crown argued that prostitution is a lifestyle choice that voids Charter protections because it is inherently dangerous. The justices did not accept this reasoning as "realistically, while [prostitutes] may retain some minimal

power of choice …these are not people who can be said to be truly 'choosing' a risky line of business" (2013 SCC 72, 2013). According to the sister of one of the detained Canadians, the fighter in question was coerced and brainwashed into both joining ISIS and leaving Canada while "suffering from post-traumatic stress and facing other challenges" (Blanchfield 2021). Cult indoctrination makes the case of detainees more similar to *Bedford* than to *Malmo-Levine*. Although this would be difficult to prove as long as the woman remains in Syria, Alexandra Bain describes the detainees as "victims of a bizarre cult" (Farooq 2021). Because coercion, psychological manipulation, and intimidation are likely in this scenario I believe the courts would apply the logic of *Bedford* to at least some of the detained Canadians and extend s. 7 protections to them.

An additional issue is the children in the camps, who are unable to choose the circumstances in which they now find themselves. Latimer (2014) argues that "recognition of positive rights for children, even where claims for such rights may have failed for adults in the past, is consistent with Canada's legal/political traditions, current laws, and jurisprudence" (538). There are children detained, as well individuals who were likely restricted in their choices to leave Canada and join the group. There is no way of determining who left of their own free will and who was coerced unless a fair trial is brought against all of the detainees. This trial cannot happen without repatriation. Human Rights Watch's report termed this a form of collective punishment—a condition forbidden by international law and a violation of basic human rights (Human Rights Watch, 2020). This is not an action in accordance with the "principles of fundamental justice" detailed in the text of s. 7, and thus strengthens the case for ordering repatriation on the grounds of s. 7 Charter violations.

Suresh

A case containing many of the key elements present in the case of the ISIS detainees is *Suresh v. Canada* (2002). This case centered around the potential deportation of an individual with refugee status who was denied citizenship on the grounds of association with a terrorist organization. *Suresh* is a key precedent for the case of the ISIS detainees, as both cases share two key elements: overseas detention and the presence of a terrorist organization. This does not mean that major differences like the 'deportation to' versus 'repatriation from' situations of rights violations should be ignored.

Although there is scope for positive rights recognition in the interpretation of s. 7, the ruling in *Suresh* concerned a negative right that is more germane to the Court's purview. What *Suresh* does for the current case is establish that "that the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our [Canadian] government, if there is a sufficient causal connection between our government's participation and the deprivation ultimately affected" (2002 SCC 1, at para. 54). In other words, *Suresh* establishes that the Canadian government has a responsibility under the Charter for what may

happen to its citizens at the hands of a foreign government or on the soil of a foreign country, as long as the Canadian state played a role in placing them there. In the *Suresh* ruling, this principle was used to keep *Suresh* in the country on the grounds that he would likely face torture if extradited. Because the Canadian government would be the entity responsible for placing him in the situation where torture was likely, the state would bear responsibility despite not directly causing him harm. This is an important principle to consider in this case; the Canadian government did not force the former ISIS fighters to leave Canada, but without the interference of the Canadian state they cannot leave the situation in which their rights are being violated. Even before *Suresh*, *R. v. Cook* (1998) affirmed the need for Charter protections to not be constrained by Canada's physical borders stating that "the Charter can in certain limited and rare circumstances apply beyond Canada's territorial boundaries" (R. v. Cook 1998). As in *Suresh*, Canada's national security and anti-terrorism regime are embedded in the facts of this case. The courts will have to consider the implications of repatriation in the context of collective security, but the precedent set in *Suresh* is that collective security is not worth sacrificing collective values. The final judgement in *Suresh* reads "in the end, it would be a pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those [Charter] values" (2002 SCC 1, at para. 4). In other words, the court has previously placed Charter rights at the forefront of the discussion when it comes to balancing individual and collective security. While the state would have to carefully consider the security implications of repatriation, the judgement in *Suresh* makes it clear that simply ignoring the detained individuals and refusing to consider their rights is not an acceptable solution.

Hape

A final case worth considering as a piece of key precedent is *R. v. Hape* (2007). Like our previous cases, *Hape* suggests that the courts may find in favour of a s. 7 Charter challenge in the repatriation cases. There are numerous reports from Human Rights Watch suggesting that Canada is shirking its international duties in its inaction on behalf of its detained citizens. In *Hape*, the Supreme Court found that "in interpreting the scope of application of the Charter, a court should seek to ensure compliance with Canada's binding obligations under international law" (2007 SCC 26, para. 56). Conditions in the camps violate various international human rights statutes to which Canada is signatory, which should lend weight to a Charter challenge. For example, Canada is a signatory to the UN Convention on the Rights of the Child which entitles all children to "the provision of adequate nutritious foods and clean drinking-water" (UNICEF 1990). As described above, the al-Hol and Roj camps lack these basic provisions. Camp conditions also violate other UN statutes designed to protect all imprisoned persons (UNHCR 1988). The violation of domestic and international norms is likely to sway the courts towards a ruling in favour of the Charter challenge. *Hape* also makes it clear that an overseas violation of rights does not mean the government of Canada is not implicated; "deference to foreign law," the judgement reads, "ends where clear violations of international law and fundamental justice

begin" (2007 SCC 26). This adherence to international norms is reaffirmed in *Suresh*, where the justices in this case maintain that their inquiry into the principles of fundamental justice in the text of s. 7 was informed by Canada's international obligations. This body of jurisprudence means that the Charter should not be considered in a vacuum and that "a complete understanding of the Act and the Charter requires consideration of the international perspective" (2002 SCC 1).

Counterarguments and Limitations

As repatriation is a positive right, the question of whether section 7 can be interpreted this way is a central one and a potential pitfall for the Greenspon case. Global Affairs Canada has stated their views in their Framework to Evaluate the Provision of Extraordinary Assistance, stating that "the government of Canada has no positive rights obligations under domestic and international law to provide consular assistance, including repatriation" (Public Safety Canada 2019). This is unsurprising considering that most of the Charter is based on negative rights. The courts have also proven reluctant to rule in favour of positive rights, but there is a small body of precedent suggesting that s. 7 positive rights could soon have their day in court. Case in point, *Gosselin v. Quebec* (2002) denied the positive application of s. 7 in 2002, but this case did not deny the potential for a positive interpretation in the future. One of the justices in that case opined that "one day s. 7 may be interpreted to include positive obligations," and that "it would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined" (2002 SCC 84). This case further affirmed a potentially positive future for s. 7, detailing a need for the courts to remain flexible in their interpretations of s. 7 in future cases. (2002 SCC 84, at para. 82). Commenting on the continued evolution of this Charter section, Da Silva writes that "the 'door' to positive rights recognition remains 'slightly ajar'" (Da Silva 2021, 667). This jurisprudence and academic literature analysis suggest that the Courts may accept a s.7 challenge based on positive rights in the cases of the detained Canadian foreign fights.

Despite the Court's potential openness to positive rights cases, there are still some significant counterarguments that could lead rulings against my predicted outcome. The strongest of these is the principle that international relations are typically the exclusive domain of the executive branch of the Canadian government. Diplomatic relations, or a lack thereof, with any government entity in Syria has been cited by the Canadian government as a major reason for the lack of action in the case of the detained Canadians. In a report released on the ISIS fighters detained overseas, Global Affairs Canada stated that "in certain locations such as countries without permanent consular staff or with a complex security situation, GAC's ability to provide basic consular services could be severely limited. This currently holds true for the case in Syria." (Public Safety Canada, 2019). Trudeau has also remarked on the situation, citing a lack of Canadian diplomats on the ground as the reason more repatriation efforts are not being launched. In an interview with CBC News, he said, "while there are countries that have

diplomats on the ground in Syria, Canada is not one of them" (Levitz, 2020). Several news outlets covering the Greenspon case have been extremely critical of this stance, but international diplomacy in Canada is generally considered the sole domain of the executive. The courts have been very hesitant to become involved in consular relations in the past, such as in the case of Omar Khadr. It is beyond the scope of this paper to examine the relationship of the Charter and Canadian diplomatic relations, or the courts' role in this relationship. However, the Charter does not exist in a vacuum and despite the strong Charter support for government intervention, the current lack of diplomatic relations may override a Charter challenge.

There is also the potential revival of the controversial Bill C-24, which may have the power to override a Charter challenge in the case of the ISIS detainees. This bill was passed by Stephen Harper's government and included a provision to revoke the citizenship of dual citizens if serious crimes have been committed. Affiliation with a known terrorist organization would fall under this category, and at least one of the detained women is confirmed to hold dual citizenship (Human Rights Watch, 2020). If the detainees were no longer considered Canadian citizens, any Charter case would become significantly weaker. There is some precedent for non-citizen Charter applications, but these occur exclusively on Canadian soil. The Trudeau government partially repealed Bill C-24 and is unlikely to reinstate it. As part of his "a Canadian is a Canadian is a Canadian" critique of the bill, Trudeau said that he opposed "mak[ing] citizenship for some Canadians conditional on good behavior, [because] you devalue citizenship for everyone" (Vice News 2015). This does not preclude the possibility of a future government reinstating legislation of this kind. In such a scenario, the courts may point to a bill like C-24 to remove Charter responsibility from the Canadian government. Further research would be required in order to determine if a reinstated Bill C-24 would be compatible with the Charter.

A limitation of this paper is lack of information concerning the detained individuals. The analysis cannot consider how the particulars of each case may affect Charter challenges and therefore, its conclusions may not be relevant to all foreign fighter cases. As more information becomes available, scholars can undertake more specific predictions. This paper is overall restricted by a lack of specific information about the camps and the individuals involved in both Syria and Canada. These details are not publicly available to protect those involved. This case is also complex and will inevitably involve many Canadian legal codes beyond the Charter, such as the Criminal Code. Due to the scope of this project, I have had to consider only the Charter, but there is no doubt that this is to the exclusion of documents and legal procedures that may lead the court to rule very differently than the way that I have predicted based on my Charter-narrowed perspective. Although I have tried to find and analyse the cases that are the most important to an understanding of Section 7 and its possible interpretations, it would be impossible for a paper of this length to read and consider every s. 7 case to pass through the Canadian court system. For this reason, it is possible that there is a body of precedent that has been excluded from this analysis.

Conclusion

Despite these shortcomings, there is a strong body of Section 7 Charter jurisprudence that suggests that the Canadian government's inaction in the case of the Canadian former ISIS fighters is a violation of their Charter rights. An analysis of s. 7 case law has provided evidence that s. 7 protects Canadians from harm caused by indirect government action, places a burden on the state to protect its citizens overseas and from the hands of foreign governments and has the potential to more broadly confer positive rights. The examined cases also illustrate the importance of considering international law and context in the judgement of Charter cases. The Charter must be treated as an ever-evolving document as the Canadian state and its legal apparatus confront an increasingly globalized world. What remains to be seen is whether the predicted judgement of this paper will come to pass and if Canada will ever "Bring Our Canadians Home".

References

Bahrami, Somayeh. 2014. "Critical Review of the New Canadian Citizenship Law Bill C-24." *Bilingual Corner 2014, Simon Fraser University Centre for Education, Law, and Society*. https://www.sfu.ca/education/cels/bilingual/bilingual-corner/bill-c-24.html.

Bell, Stewart. 2021. "Families of ISIS Detainees Held in Syria Take Canada to Court Over Inaction." Global News. September 28. https://globalnews.ca/news/8226945/families-canadian-isis-detainees-file-case-government/.

Bergeron-Oliver, Annie and Ben Cousins. 2021. "'Bring Our Canadians Home': Lawyer Files Suit On Behalf of 26 Canadians Stuck in Syrian Camps." CTV News. October 11. https://www.ctvnews.ca/canada/bring-our-canadians-home-lawyer-files-suit-on-behalf-of-26-canadians-stuck-in-syrian-camps-1.5619422.

Bergeron-Oliver, Annie and Christy Somos. 2021. "Canadian Woman Released From ISIS Detention Camp In Syria." CTV News. June 28. https://www.ctvnews.ca/world/canadian-woman-released-from-isis-detention-camp-in-syria-1.5489007.

Bill C-24, *An Act to amend the Citizenship Act and to make consequential amendments to other Acts*. 2nd session, 41st Parliament, 2014 (assented June 19, 2014). SC 2014, c. 22. https://www.parl.ca/DocumentViewer/en/41-2/bill/C-24/royal-assent/page-30.

Black, Liam. 2018. "The Meaning of "Everyone": Reconsidering the Scope of S. 7." Master Thesis, University of Manitoba. https://mspace.lib.umanitoba.ca/bitstream/handle/1993/32980/Liam_Black.pdf;jsessionid=7D42F93B87B1D42284610B832CEB3078?sequence=3.

Blanchfield, Mike. 2021. "Families of Canadians Trapped In Syria Turn to Federal Court for Ottawa's Help." The Globe and Mail. September 30. https://www.theglobeandmail.com/canada/article-families-of-canadians-trapped-in-syria-turn-to-federal-court-for/.

Canada (Attorney General) v. Bedford. 2013 SCC 72. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13389/index.do.

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

Coletta, Amanda. 2020. "Canada To Bring 5-Year Old Orphan Home from Syrian Camp While Others Remain Stranded." The Washington Post. October 5. https://www.washingtonpost.com/world/the_americas/canada-amira-syria-orphan-repatriated/2020/10/05/bafe08ea-0723-11eb-859b-f9c27abe638d_story.html.

Da Silva, Michael. 2021. "Positive Charter Rights: When Can We Open the "Door?" *Osgoode Hall Law Journal* 58 (3): 669-718.

Farooq, Umar A. 2021. "Families of Suspected IS-Linked Detainees in Syria File Court Action Against Canada." Middle East Eye. September 28. https://www.middleeasteye.net/news/canada-families-suspected-islamic-state-detainees-syria-file-court-action.

Fine, Sean. 2022. "Two Canadian women return from Islamic State detention camp in Syria, one faces terrorism charges." The Globe and Mail. October 26. https://www.theglobeandmail.com/canada/article-syria-isis-detention-camps-canadian-women/.

Glavin, Terry. 2021. "Bring Them Home." Maclean's. February 17. https://www.macleans.ca/news/world/bring-them-home/.

Gosselin v. Québec (Attorney General). 2002 SCC 84. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2027/index.do.

Govier, Trudy and David Boutland. 2020. "Dilemmas Regarding Returning ISIS Fighters." *Ethics and Global Politics* 13 (2): 93-107. https://doi.org/10.1080/16544951.2020.1756562.

Hogg, Peter.W. 2012. "The Brilliant Career of Section 7 of the Charter." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 58: 195-210. https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1253&context=scl

Human Rights Watch. 2020. ""Bring Me Back to Canada": Plight of Canadians Held in Northeastern Syria for Alleged ISIS Links." June 29. https://www.hrw.org/report/2020/06/29/bring-me-back-canada/plight-canadians-held-northeast-syria-alleged-isis-links#.

Human Rights Watch. 2020. "Canada: Bring Home ISIS Suspects and Relatives from Syria." June 29. https://www.hrw.org/news/2020/06/29/canada-bring-home-isis-suspects-and-relatives-syria#.

Immigration, Refugees and Citizenship Canada. 2018. "Changes to the Citizenship Act as a Result of Bill C-6." Government of Canada. August 22. https://www.canada.ca/en/immigration-refugees-citizenship/news/2017/10/changes_to_the_citizenshipactasaresultofbillc-6.html

Latimer, Alison M. 2014. "A Positive Future for Section 7?: Children and Charter Change." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 67: 538-560. https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1299&context=sclr.

Levitz, Stephanie. 2020. Family of Canadian Child Stuck In Syria Taking Government to Court. CBC News. July 14. https://www.cbc.ca/news/canada/toronto/canadian-girl-stuck-in-syria-family-going-to-court-1.5649522.

MacDonnell, Vanessa A. (2012). "The Protective Function and Section 7 of the Canadian Charter of Rights and Freedoms." *Constitutional Studies* 17 (1): 53-85. https://www.constitutionalstudies.ca/wp-content/uploads/2019/08/03_MacDonnell_final.pdf.

MacIvor, Heather. 2013. *Canadian Government and Politics in the Charter Era*. Don Mills, ON: Oxford University Press.

Mazigh, Monia and Alex Neve. 2022. "It's Time to Bring Detained Canadians Home from Northeast Syria." The Globe and Mail. November 7. https://www.theglobeandmail.com/opinion/article-its-time-to-bring-detained-canadians-home-from-northeast-syria/.

Public Safety Canada. 2019. "Government of Canada Policy Framework to Evaluate the Provision of Extraordinary Assistance: Consular Cases In North-Eastern Syria." Government of Canada. December 20. https://www.scribd.com/document/559332768/Gac-Policy#fullscreen&from_embed.

Puzic, S. (2016, February 25). 'All Canadians Are Equal': Liberals to Repeal Parts of Bill C-24. CTV News. https://www.ctvnews.ca/politics/all-canadians-are-equal-liberals-to-repeal-parts-of-bill-c-24-1.2792013.

R. v. Cook. [1998] 2 SCR 597. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1653/index.do?q=cook

R. v. Hape. 2007 SCC 26. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2364/index.do.

R. v. Malmo-Levine; R. v. Caine. 2003 SCC 74. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2109/index.do.

Roach, Kent. 2010. ""The Supreme Court at the Bar of Politics": The Afghan Detainee and Omar Khadr Cases." *National Journal of Constitutional Law; Toronto* 28 (1): 115-155. https://www.proquest.com/docview/820918343?accountid=13800&parentSessionId=5IWjo2Cq%2Bzz%2FNEnQ6ZOKjhikqXDuykuibtq2cO7E0n0%3D&pq-origsite=primo&forcedol=true#.

Somos, Christy. 2021. "Families of Canadian ISIS Detainees in Syria Take Feds to Court Over Inaction on Repatriation." CTV News. September 30. https://www.ctvnews.ca/canada/families-of-canadian-isis-detainees-in-syria-take-feds-to-court-over-inaction-on-repatriation-1.5606308.

Stewart, Hamish. 2015. "Bedford and the Structure of Section 7." *McGill Law Journal/ Revue de droit de McGill* 60 (3): 575–594. https://doi.org/10.7202/1032679ar.

Suresh v. Canada (Minister of Citizenship and Integration). 2002 SCC 1. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1937/index.do.

United Nations Human Rights Office of the High Commissioner. 1988. "Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment." December 9. https://www.ohchr.org/en/instruments-mechanisms/instruments/body-principles-protection-all-persons-under-any-form-detention.

United Nations Office on Drugs and Crime. N.d. "Foreign Terrorist Fighters." https://www.unodc.org/unodc/en/terrorism/expertise/foreign-terrorist-fighters.html.

United Nations International Children's Emergency Fund. 1990. "Convention on the Rights of the Child." September 2. https://www.unicef.org/child-rights-convention/convention-text.

Vice News. 2015. "'A Canadian Is A Canadian': Liberal Leader Says Terrorists Should Keep Their Citizenship." Vice News. September 28. https://www.vice.com/en/article/7xaxby/a-canadian-is-a-canadian-liberal-leader-says-terrorists-should-keep-their-citizenship.

West, Leah, Amarnath Amarasingam, and Jessica David. 2019. “Where’s the Plan for Canadian ISIS Members In Custody Overseas?” Policy Options. June 17. https://policyoptions.irpp.org/fr/magazines/juin-2019/wheres-plan-canadian-isis-members-custody-overseas/.


GADFLY
UNDERGRADUATE JOURNAL OF
POLITICAL SCIENCE