

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS AND PUBLIC INTERNATIONAL LAW

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Perhaps no event in the modern legal-political history of Canada is likely to have so significant an impact on the interaction of Canadian public law with the international legal system as will the Canadian Charter of Rights and Freedoms in the years to come. Traditionally, Canadian courts have been cautious in using the language and modalities of customary international and conventional law to assist in interpreting domestic legislation or public policy. This is often the case where statutes or regulations do not clearly state that the enactment was intended to implement a specific international obligation. Judicial views are likely to be altered materially by the links of language and concept now in effect between the family of international human rights principles and conventions and the specific duties, internationally, undertaken by Canada and reflected directly or indirectly by the Charter or by related federal and provincial statutes. Indeed, this process, joined with the older issues of the "adoption" or "incorporation" of international law, will doubtless reach new levels of professional concern and judicial involvement. Canadian courts and Canadian lawyers will henceforth have a markedly broader range of policy options and technical resources (concepts and documents) with which to approach the interpretation of important constitutional or statutory provisions or policy rules, that have their origins or their parallels in general international law or under some conventional instrument. In any case the art and scope of "interpretation" will never again be the same for public law in Canada.

Dans l'avenir, aucun événement sans doute de l'histoire moderne du Canada en matière politico-juridique n'aura vraisemblablement une telle portée sur l'influence réciproque du droit public canadien et du système juridique international que la Charte canadienne des droits et libertés. Traditionnellement, les tribunaux canadiens ont usé de prudence dans leur recours au langage et aux modalités du droit international coutumier et conventionnel lorsqu'ils avaient à interpréter la législation interne ou à déterminer l'ordre public; c'est ce qui arrive souvent lorsque les lois ou les règlements n'établissent pas clairement que leur promulgation est destinée à mettre en oeuvre une obligation internationale spécifique. Il est vraisemblable que les opinions des tribunaux vont se trouver sensiblement modifiées par les liens de langage et de concepts qui existent maintenant entre les principes et les traités internationaux sur les droits de l'homme et les obligations spécifiques internationalement souscrites par le Canada, et qui se retrouvent directement ou indirectement dans la Charte ou dans des lois fédérales et provinciales connexes. A vrai dire, ce processus, ajouté aux questions antérieures de "l'adoption" ou de "l'incorporation" du droit international atteindra sans aucun doute de nouveaux niveaux d'intérêt professionnel et judiciaire. Les tribu-

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naux et les juristes canadiens disposeront désormais d'un champ considérablement plus étendu d'options quant à la politique à suivre et les moyens techniques (concepts et documents) pour pouvoir interpréter des dispositions constitutionnelles ou légales importantes, ou même des règles établissant la politique à suivre ayant leur origine ou leur parallèle dans le droit international général ou quelque traité. De toute manière, l'art et la portée de "l'interprétation" ne seront plus jamais les mêmes en droit public canadien.

Introduction

This article attempts to describe and analyze the interaction of the Canadian Charter and the international legal instruments, general principles and ideas with which it is now inextricably associated. A particular concern also will be to understand the views and practices of Canadian courts in dealing with customary and conventional international law questions as these have arisen in Canada; and then to focus on international law concepts and language that directly or indirectly are reflected in the Charter. For both of these traditions and techniques inevitably will influence future arguments and claims about the interpretation and application of this new *Magna Carta Canadensis*.

The article is divided into three main parts: Part I deals with certain historical-conceptual considerations, both domestic and international, which have resulted in the creation of the Charter system. For that system now suggests that there will be fundamental changes in approaches to public law in Canada. Part II investigates, specifically, and in some detail, the possible effects of the Charter on the decisions of Canadian courts bearing in mind past approaches by the Canadian judiciary to international law problems; analogous approaches of the courts of the United Kingdom and of the United States; and likely trends in the entire process of "transformation" that the Charter will stimulate through defining and implementing Canada's varied international obligations in the human rights field. Part III draws some general conclusions from the foregoing analysis and suggests where difficulties are likely to arise in future Canadian legislative programmes deriving not only from the Charter but from the increasing number of Canada's international obligations under the many human rights instruments which it has ratified or may ratify in the near future. This last section will search for a broad assessment, from the international law aspect, of this grand constitutional adventure.

I. Some General Considerations Concerning the Canadian Charter and International Law.

There will be little debate that the Canadian Charter less than a year after its "birth" may already be perhaps the most far-reaching change to take place in the Canadian legal-political system since Confederation itself. Of course, many important incremental advances have already emerged since the Constitution Act 1867 was passed. It was itself followed by many

amendments, climaxed, legally, by the Statute of Westminster and, politically, by the sovereign independence as a nation-state finally enjoyed by Canada since the end of World War I. Yet, whatever the developments en route, no single event compares with this Patriation-Amendment-Charter of Rights and Freedoms "package" that has altered forever the dynamics of the Canadian system of public law.¹

The related development of the treaty-making power was crystallized by the Halibut Convention of 1923 from which point on Canadian treaty-making was entirely and securely Canadian.² Similarly customary international law was "adopted" or "incorporated" into the law of Canada over time and through the cases.³ But none of these experiences may have had quite the same penetrating effect on the evolving Canadian legal order, in its relationship to the international legal order, as will this Charter of Rights and Freedoms.

For here is an instrument supremely authoritative and binding on all Canadian tribunals and institutions, yet whose conceptual content and individual governing phrases will be seen to be derived often from the international legal system, its principles and instruments; of course other parts of the Charter are indigenously Canadian or at least within the older Anglo-Canadian constitutional tradition. The very fact, therefore, that the "supreme law of Canada"⁴ represented in part by the Charter, is indissolubly linked by language and ideology to important international instruments and principles to which Canada subscribes, assures the inevitability of some resort to these "external" international legal documents and ideas in order to be certain that on appropriate occasions the "proper" meaning is given to that Charter.

Hence the principal initial and introductory problem, for Bench and Bar alike in dealing with the Charter, will be to determine the specific substantive sources from whence a given article of the Charter derives and the appropriate techniques and rules for its prospective interpretation—a lawyer's task that will be much influenced by the very nature of the "documentary" sources themselves.⁵

¹ Tarnopolsky and Beaudoin (eds), *The Canadian Charter of Rights and Freedoms* (1982), p. iii and *passim*; McDonald, *Legal Rights in the Canadian Charter of Rights and Freedoms* (1982), pp. 1-3 and *passim*.

² Gotlieb, *Canadian Treaty Making* (1968), pp. 1-10; for a valuable reference to the Canadian literature see Castel, *International Law* (3rd ed., 1976), pp. 910-911.

³ Macdonald, *The Relationship between International Law and Domestic Law in Canada*, in Macdonald, Morris and Johnston (eds), *Canadian Perspectives on International Law and Organization* (1974), pp. 88-136; Gotlieb, *op cit.*, *ibid.*, *passim*.

⁴ Art. 52 (1) of the Canadian Charter of Rights and Freedoms, being Part I, of the Constitution Act, 1982, as enacted by the Parliament of the United Kingdom as Schedule B to the Canada Act, 1982, 1982, c. 11, (U.K.) in force April 17th, 1982.

⁵ For a somewhat reverse perspective on the lawyers' problem of applying or referring to the judgments of international tribunals before domestic courts, see Schreuer, *Decisions*

If a principal source of Charter language is to be found in the many international instruments under which Canada has varying degrees of obligation, or where the language derives from certain widely accepted principles of general international law, the Charter then becomes a bridge between municipal law and international law to a degree, and with an intensity, not heretofore known in any of the multitude of links between the Canadian and international legal orders. Hence, it is unlikely that the practicing Bar and, in turn, the courts, will be able to avoid the thrust of these associations since they will compel a resort to international law materials. Indeed, what is initially characterized as a problem of "constitutional law" interpretation, in applying the Charter, will often be seen to involve the international law origins, in concept and language, of the Charter itself. In short, the "characterization" problem will no longer be a simple search for Canadian or classical United Kingdom sources to assist in defining an issue or interpreting its substance. Almost every article of the Charter except for those uniquely Canadian, such as Official Languages of Canada (articles 16-22) and Minority Language Educational Rights (article 23) will be seen to have some major or minor connection with the large network of international human rights instruments on the one hand, or general international human rights law, at the customary law or general principles level, on the other. Such clearly recognizable links between the Canadian Charter system and the international human rights system may alter forever the perception of Canadian "interpretation" approaches, constitutional and otherwise. The caution of Canadian courts in using treaty materials to help interpret domestic Canadian statutes (as set out in Part II of this article) may now have to yield to the two powerful influences. Professional acumen will suggest the need to resort to all relevant sources to construe a related Canadian document. Equally, where the Canadian Charter reflects a direct or indirect Canadian effort to implement Canadian obligations under specific international instruments by which it is bound, or under general principles of international human rights law to which—absent a treaty—Canada would not wish to stand in opposition, the Bench and Bar will not be able to resist the attraction of such sources.

What are some of these principal sources with which the Canadian lawyers will deal as they approach the Charter?

The following are suggestive of the course the cases will take:

1. *Classical Anglo-Canadian Constitutional Rules.*

A substantial part of the Charter undoubtedly incorporates rules and ideas that were well embedded in the common law of the Constitution, in "carried over" statutes and other parliamentary instruments, as well as in the long interpretation of the British

of International Tribunals Before Domestic Courts (1981), pp. 1-19; similarly for certain basic and "liberal" principles in the interpretation of treaties, see arts. 31-32, Vienna Convention on the Law of Treaties, 1969 (1970), 63 Am. J. Int. L. 875.

North America Act itself where, in the process of interpretation, particularly the distribution of powers, certain rights and liberties were dealt with and sometimes grandly so.⁶ Of course, even here, this Anglo-Canadian systemic tradition owed much to the whole of western civil libertarian thought. And while Magna Carta, *Habeas Corpus*, the Bill of Rights, the Act of Settlement and the rest, together with some of the great common law cases in support of the "rule of law", are often looked upon as uniquely an Anglo-Commonwealth contribution, the comparative influences of other systems, moving from the medieval to the modern world in western society, particularly France and the United States, significantly prepared a common climate for all to share. The Canadian Bill of Rights of 1960, whatever its failures, doubtless advanced Canadian readiness for a constitutional Charter which, of course, that Bill did not succeed in becoming. But even as a statute much of its language, and of the debates during its presentation to Parliament and afterwards, influenced the content and the direction of the present Charter. Indeed, lawyers, paradoxically, may be resorting more often to that 1960 federal statute and its history, to assist with the interpretation of the present constitutional Charter as well as with its alleged omissions, than did those same lawyers (and the courts) for purposes of utilizing the Bill itself. A final irony for Mr. Diefenbaker's devotion to his cause may be its fulfillment in Mr. Trudeau's Charter.

In the internal Canadian debates the first ministers in 1968-71 and 1978-81 could not agree on a proposed Charter until the final compromise. Indeed, most provinces chose to rely upon this classical tradition and to reject the need for anything better. Canadian lawyers in search of the Charter's meaning therefore will find many of their footnotes from these established norms of Anglo-Canadian constitutionalism.⁷

2. *Older Treaty and International Law Rules Protecting the Individual in Peace and War.*

While a principal source for the Charter may be in the older Anglo-Canadian constitutional system, there was, moving into the awareness of western states by the mid-nineteenth century and thereafter, a variety of international rules that displayed a community of interests in the plight of the individual faced with the authority of a nation-state not his own. Yet the international law doctrines, for example, to protect aliens abroad and prevent either

⁶ Hogg, *Constitutional Law in Canada* (1977), pp. 1-26.

⁷ See the useful Index, Special Joint Committee on the Constitution of Canada, Senate and House of Commons (the Hays-Joyal Committee), Nov. 1980-Feb. 1981, *passim*, for the many references to United Kingdom and Canadian constitutional traditions and practices.

a "denial of justice" to them or assuring them a "minimum standard of treatment", may be viewed skeptically by some as the western colonial protection of mobile capital and its proprietors abroad. That denigrating observation so frequent among some ex-colonial critics of international law, does not deserve the credibility it sometimes has been given. Indeed, these old rules often helped to penetrate the barrier of sovereigns behaving arbitrarily behind their sovereignty.⁸

To these doctrines should be added "humanitarian intervention" and the growth of minorities treaties, before and after World War I, for the multi-ethnic and multi-lingual societies faced with majorities exercising an authority that often concealed the oppression of vulnerable languages and peoples within.⁹ Finally, the so-called "golden age" of international law ended with World War I, and was symbolized in the Hague Conventions of 1899 and 1907. Here were principles to protect the individual soldier from maltreatment in the field or as a prisoner of war, and individual civilians from the cruelty of the victor-occupier.¹⁰ While the laws of war already had been dealing with some of these matters since Grotius' day at least, the Hague Conventions suggested a heightened civility where the individual was to be protected by the international system even when it appeared to have broken down in the alleged anarchy of war.¹¹ But international lawyers had had the wisdom to try to ameliorate the conditions of warfare touching on the individual human being; indeed, basic to international law was the appropriate replacement of the regime of peace by a legal regime of war. The impact of this international concern for the condition of the individual in peace and in war carried over to World War I and afterward and was among the foundations for the "quantum leap" taken in the League of Nations—International Labour Organization era.

3. *The League—International Labour Organization System.*

The Covenant of the League of Nations was the first serious effort to develop a "constitutional order" for mankind, however fragile it proved to be. Apart from the peace-keeping and war-preventing objectives of the League Covenant, perhaps the most important contribution that system made to the human rights of the individual was to be found in the creation of the International Labour Orga-

⁸ McDougal, Laswell and Lung-Chu Chen, *Human Rights and World Public Order* (1980), pp. 739-40 and particularly the reference in footnote 8, on p. 739.

⁹ Sohn, *The Rights of Minorities in Henkin (ed.), The International Bill of Rights* (1981), pp. 270-289.

¹⁰ McDougal *et al.*, *op. cit.*, footnote 8, pp. 181-183.

¹¹ For a very useful compendium of early and more recent documents on the laws of war, see Roberts and Guelff, *Documents on The Laws of War* (1982), *passim*.

nization, the treatment of Refugees and Statelessness, in the Nansen passport system, as well as in the obligation of the victor states to "colonies" under the new Mandates regime. So significant, however, was the influence of the International Labour Organization in its approach to basic freedoms such as the right of labour to organize and to be assured of basic human requirements such as the assurance of safe and decently paid conditions of work, that several of the Conventions developed by the International Labour Organization from 1922 onwards remain in effect today.^{11a} Some of these were of enough importance to Canada that they were adopted and "transformed" into Canadian statutes, that became, in part, the subject matter for the most celebrated case on the treaty-making power, the *Labour Conventions* case of 1937.¹²

Indeed, the International Labour Organization was the only entity of the League system that survived and Canada is now party to a number of important conventions that derive from the International Labour Organization's convention-making system. Some of those International Labour Organization Conventions are among the very instruments about which the basic question must be asked: where do these "treaty" or other conventional obligations stand today in Canadian statute law, federal or provincial, and what will be the effect of these obligations on the Charter? These questions will be addressed in Parts II and III of this article.

4. *The United Nations System—and Beyond.*

The modern international complex of human rights standards, claims, principles and obligations, is essentially a product of the United Nations Charter and the many instruments that have come out of the United Nations Charter system.¹³ Some of these have indeed led to formal treaty obligations of which two of the most important are the Covenant on Civil and Political Rights and the Covenant on Social Economic and Cultural Rights, with the Optional Protocol of the former as a central part of that obligatory framework. But while many Conventions have come out of the United Nations family of agencies, and particularly out of the work of the United Nations General Assembly, almost of equal importance are certain general principles that have emerged from varieties of resolutions in the United Nations and Specialized Agencies. Of these the most important, of course, was the 1948 Universal Declaration of Human Rights.

^{11a} Kaplansky, *Canada and The International Labour Organizations* (1981), *passim*.

¹² *A.G. for Canada v. A.G. for Ont. and others*, [1937] A.C. 326.

¹³ Henkin, Introduction, in Henkin, *op. cit.*, footnote 9, pp. 1-31; and Pechota, The Development of the Covenant on Civil and Political Rights, in Henkin, *ibid.*, pp. 32-71.

Recall H. Lauterpacht's prescient study in 1944-45, entitled "An International Bill of Rights of Man". It represented a very early attempt to escape the ambiguities and unenforceability of moral goals and rhetoric by providing a code of "positive" treaty law with an enforcement provision for such a code and system. Wise though Lauterpacht was, his imagination did not encompass the powerful consequences only three years later of a "non-binding" United Nations General Assembly Declaration. For the adoption of the Universal Declaration in 1948 certainly did not then create binding obligations, but its status within a generation was closer to an obligatory *jus cogens* than Lauterpacht could realistically have expected.

Footnote 80 in Part II sets out a list of twenty-three human rights instruments ratified by Canada. These indicate the significance that this framework of international obligations has, for not merely knowing the condition and scope of Canada's international duties here but equally important because of their relationship to the Charter. For any relationships these instruments bear to the Charter may help in determining the Charter's meaning on the assumption that the Charter was intended possibly to implement or at the least to "reflect" these Canadian treaty obligations in whole or in part.

It was a consensual "breakthrough" of significance among the nations that resulted in converting social, economic and cultural claims, new and old, into a juridically definable human rights code. For this untraditional list of rights became a powerful equivalent in values and law to the well-established system of civil and political rights. Without that achievement from, among other streams, the International Labour Organization efforts, the United Nations Charter and above all the Universal Declaration of 1948, it is doubtful whether the large complex of equality—non-discrimination rights of article 15 of the Canadian Charter would have been so readily accepted for entrenchment. And even the 1966 Social Economic Cultural Covenant itself might not have attained its formidable basis, for the universality of the social side of the "rights" ledger, without that basic breakthrough.

It takes little imagination to recognize at once how fundamental will be the role of both 1966 Covenants particularly the Civil and Political Covenant, in almost every article of the Charter with the possible exception of the uniquely Canadian experiments with "Official Languages of Canada", "Minority Education Language Rights" and "Aboriginal Rights".

And what is not in the Charter in relation to some of these twenty-three international instruments must surely invite the question as to the other relevant Canadian statutes that already do or will reflect these Canadian obligations, for instance the Criminal Code (genocide, hate propaganda), The Merchant Shipping Act (Distressed Seamen), The Immigration Act (refugees and statelessness), federal and provincial Human Rights Codes (discrimination). Then too there will necessarily emerge the difficult

question as to what is to be the effect of the Charter on these many Canadian statutes if they do not adequately reflect the relevant international conventions or are in conflict with the Charter even if they appear intended to implement, technically, a particular convention, for instance refugees and statelessness. Indeed, given the continuing difficulties caused by the *Labour Conventions* case—even though the Supreme Court of Canada now seems ready to “back off” slowly from it—a new level of federal-provincial cooperation will be required to assure the review and adequate amendment of all relevant federal and provincial legislation. For these will be affected by a supreme Charter and the Charter will now also stimulate a re-examination as to how far all other of Canada’s human rights obligations have or have not been duly implemented by statute or otherwise.

This formidable task, at the federal level, is now being undertaken by a special committee led by the Human Rights Section of the Department of Justice, and similar approaches may be developing in the provinces. Most important will be the work of the Continuing Federal-Provincial Committee on Human Rights whose membership comprises all the Deputy Attorneys General and is chaired by the Under-Secretary of State. Given the magnitude of this particular technical and policy programme of changes to statutes, orders in council, and so on, in order to adapt them specifically to both the Charter and to Canada’s other international human rights obligations, the profession will perform a service by bringing to the attention of the Attorneys General all gaps and deficiencies found in practice. In turn, the Attorneys General, federal and provincial, will wish to bring to the immediate attention of the Bar any such changes that are actually completed or those that are contemplated.

A brief overview of the Charter’s provisions is now necessary for some preliminary suggestions with respect to inevitable influences of interpretation from international sources. Detailed comments also will be made, *inter alia* in Part II, about the possible role of the European Convention of Human Rights based particularly upon British cases of the last generation. Reference also should be made here to the uses of the Reports and Recommendations (“Final Views”) of the United Nations Human Rights Committee under the Optional Clause of the 1966 Convention on Civil and Political Rights.¹⁴ Indeed, while some reservations have been suggested as to the immediate jurisprudential value of these committee “Views”, counsel and the courts of Canada over the years, and aided

¹⁴ Novak, *The Effectiveness of the International Covenant on Civil and Political Rights—Stocktaking after the First Eleven Sessions of the Human Rights Committee*, Vol. 1 (1980), 1 Human Rights L.J. 88; see also, *Final “Views” of the UN Human Rights Committee in (1981)*, 2 Human Rights L.J. 130; Novak, *Survey of Decisions Seven Cases Given Up Till July 1981*, *ibid.* at p. 168.

The Human Rights L.J. also includes opinions from the European Court of Human Rights and the Inter-American Court of Human Rights. These “reported cases” are often in the form of summaries but may very well become an “official” source.

by scholarship, will determine the usefulness of these documents for Canadian Charter interpretation and, they will prove helpful and in due course, important. Of course, it is a momentary irony that two distinguished Canadians now sit on both the European Court of Human Rights (Professor R.St.J. Macdonald) and on the United Nations Human Rights Committee (Professor Walter Tarnopolsky). It will be surprising, considering the professional respect with which both are held, and considering the experience they are now deriving from high office, if over the years to come they do not, in their writings, help to introduce influences into Canadian Charter thinking from these two important but very different sources.

In briefly reviewing the articles of the Charter only short comments will be made here as to possible international sources of interpretation without prejudging what is set out below in Part II about (1) the extent to which the Charter may be said to implement any specific Canadian international obligation, and (2) the likely approaches of Canadian courts, based on past experience, to the use of international law to interpret a Canadian constitutional instrument.

It is quite clear that both the United Nations Covenants of 1966 and the European Convention will be used to support arguments against derogation due to the impact of article 1, which together with article 33 constitute the celebrated double "override" provisions of the Charter. Articles 2 on "fundamental freedoms", 7-14 on "legal rights" and 15 on "equality rights" also are vulnerable to a possible federal and provincial "override" under article 33. There is little doubt, again, that the United Nations Covenants and other instruments will be used to convince the courts where possible to strictly construe any federal or provincial attempt to use the *non-obstante* clause in relation to these articles. Similarly, the United Nations Civil and Political Covenant and the European Convention likely will be employed to interpret the concept of "cruel and unusual punishment" as well as the detailed list of "legal rights" in article 11 which are at the heart of the classical differences between the "open society and its enemies"—protection of life and liberty; searches and seizures; arbitrary imprisonment; fair trials; retroactive legislation except for war crimes, and so on. "Equality rights", of course, will have the powerful supportive language of both Covenants. Official languages (rights) are uniquely Canadian and probably will reflect little technical influences from abroad. Similarly with minority language educational rights—even the Swiss and the Belgians may not, through the European Convention, always have a great deal to inform Canadians about. "Enforcement" measures will be able to refer to the Covenants and other instruments. "Aboriginal rights" are again more or less uniquely Canadian. The special care taken in article 28 to re-state the case for equality of the sexes will be reinforced not only by the Covenants but also by so recent a Convention as the 1981 "Elimination

of all Forms of Discrimination Against Women'' which Canada ratified on December 10th, 1981.

One may, therefore, envisage a generation of lawyership that, for the first time in Canadian professional history, will roam the libraries of the law schools and the government departments to find those once exotic footnotes to help define the unruly adjectives of a charging Charter.

The instant problem, it would seem, is for the Bar and the Bench to have an evolving appreciation of what it means to shape a progressive and disciplined approach to the interpretation of the Charter. Given the complex history of the problem of the relation of international law to municipal law, and the special experience here of the United States and the United Kingdom, Part II of this article will deal with the central difficulties of estimating the approach of the Canadian courts to international law, treaties, customs and principles, for use in Canadian judicial proceedings and in the interpretation of Canadian instruments. Without such an analysis it will not be clear how far the Charter will invite, and indeed require, employment of these many international sources for the Charter's own language and style may now demand such aids for its own effective future.

II. The Canadian Courts' Attitudes Towards International Law and Prospects for the Charter.

In order to comprehend the relationship between the Charter and international law it is necessary to consider one of the central issues in any discussion of international law, namely the relationship of international law to domestic or municipal law. The rules which have evolved concerning the relationship between international law and municipal law are attempts to reconcile a variety of policies: protection of national sovereignty, protection of the supremacy of Parliament and the Legislatures from the powers of the executive, satisfaction of Canada's international obligations, realization by individuals of the benefits which international norms intend to be conferred. Different considerations for harmonizing these policies arise for conventional and customary international law. The result has been that the relationship between international law and municipal law in Britain and in Canada has historically received a different response in respect of customary international law as compared with conventional international law.

The different ways of reconciling these policies are formulated in two general theories about the relationship between municipal law and international law, the adoption or incorporation theory *and* the transformation theory. The adoption theory states that international law is part of domestic law automatically, that is without an act of incorporation, except where it conflicts with statutory law, or well-established rules of the common law. Transformation theory expresses the view that international law is only part of domestic law when it has been incorporated into domestic law.

A. Customary International Law and Domestic Law.

1. United Kingdom.

The Canadian attitude to the issue of the relationship between customary international law and domestic law has its source in the British approach. The earliest British cases took an adoption theory view, that is, they considered customary international law to be part of the law of England without an act of transformation.¹⁵ The qualification as expressed in later cases is that customary international law must yield to conflicting statute law¹⁶ and conflicting well-established rules of the common law.¹⁷

Some of the British cases are ambiguous and there are conflicting opinions as to whether, what have been relied upon in Canadian courts as leading cases, are in fact adoptionist or transformationist.¹⁸ It is clear however, as James Crawford points out, that British courts have never required express adoption of customary international law by statute,¹⁹ nor express acceptance of the customary rule by the United Kingdom itself.²⁰

Furthermore, there has been a clear statement in the recent English case of *Trendtex Trading Corporation v. Central Bank of Nigeria* of the adoption or incorporation theory response to the question of the place of international customary law in English law.²¹

¹⁵ *Buvot v. Barbut* (1736), 3 Burr. 1481; *Triquet v. Bath* (1774), 3 Burr. 1478.

¹⁶ *Mortensen v. Peters* (1906), 14 Scots L.T.R. 227.

¹⁷ *R. v. Chung Chi Cheung*, [1939] A.C. 160, at p. 168.

¹⁸ For example, *R. v. Chung Chi Cheung*, *ibid.*, see: adoptionist understanding of *Cheung*: MacDonald, *The Relationship Between International Law and Domestic Law in Canada*, *op. cit.*, footnote 3, pp. 98-99; Vanek, *Is International Law Part of the Law of Canada?* (1949-50), 8 U. of T.L.J. 251, at p. 263, and for a transformation understanding of *Cheung*: Crawford, (1976-77), 48 Br. Y. Int. L. 357.

¹⁹ *Chung Chi Cheung*, [1939] W.W.R. 232, at p. 235 and *R. v. Keyn* (1876), 2 Ex. D. 63, at p. 202, seem to suggest that an act of adoption or acceptance of the customary rule by at least the courts is required. But see the analysis of Brownlie, *Principles of Public International Law* (3rd ed., 1979), pp. 46-49, and the criticism of Crawford, *op. cit.*, *ibid.*, at p. 358.

²⁰ Crawford, *op. cit.*, *ibid.*, at p. 358; see however, *West Rand Central Gold Mining Co. v. R.*, [1905] 2 K.B. 391, at p. 406 where assent of Britain was taken to flow from the "common consent of civilized nations". However, this is explicitly rejected in *Trendtex Trading Corporation Ltd v. Central Bank of Nigeria*, [1977] 1 All E.R. 881, at p. 903, (leave to the House of Lords was granted but the case settled); followed in *I. Congreso del Partido*, [1978] 1 Q.B. 500, [1980] 1 Lloyd's Rep. 36 (C.A.); *Planmount v. Republic of Zaire*, [1980] 2 Lloyd's Rep. 393; *Hispano Americana Mercantile S.A. v. Central Bank of Nigeria*, [1979] 2 Lloyd's Rep. 277 (C.A.) (leave granted to House of Lords); *Trendtex* not followed in *The Uganda Co. (Holdings) Ltd v. Government of Uganda*, [1979] 1 Lloyd's Rep. 481.

²¹ In *Trendtex*, *ibid.*, a case involving the customary international law of sovereign immunity, Lord Denning explicitly reviewed "the two schools of thought", "the doctrine of incorporation" and "the doctrine of transformation", and stated at pp. 889-890: "As between these two schools of thought, I now believe that the doctrine of incorporation is correct. Otherwise I do not see that our courts would ever recognize a change in the rules of

2. *Canada.*

The Canadian case law on this question is however more ambivalent. Early cases concerning admiralty law noted with approval early British cases²² supporting an adoption approach.²³ In *Reference Re Power of Municipalities to Levy Rates on Foreign Legations and High Commissioner's Residences*²⁴ however, the question was raised of the extent of the international law doctrine of diplomatic immunity, specifically whether a foreign legation was liable for municipal taxation. The Ontario Assessment Act²⁵ embodied the general power of municipal corporations to levy property taxes and did not expressly exempt foreign legations. The majority of the court took a broad view of the extent of diplomatic immunity and found foreign legations to be exempt from such a tax. But ambiguous statements²⁶ were made, such as Duff C.J.C.'s comment:²⁷

There are some general principles touching the position of the property of a foreign State and the Minister of a foreign State that have been accepted and adopted by the law of England (which except as modified by statute, is the law of Ontario) as part of the law of nations.

Did, Duff C.J.C. mean by "accepted" an act of transformation? Rinfret J. stated:²⁸

It must be held . . . that amongst the principles of international law which have acquired validity in the domestic law of England, and therefore in the domestic law of Canada, it is generally admitted that a foreign Minister is not subject to the laws of the State to which he has been sent. . . .

To what do the words "acquired validity" refer? To an act of transformation?

Despite these ambiguities most commentators assert that the case embodies an adoption theory.²⁹ Similar ambiguous responses to the relationship between customary international law and domestic law are to be found in *Reference Re Exemption of U.S. Forces from Canadian Criminal*

international law. . . . It seems that the rules of international law have changed—and do change—and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law."

²² *Triquet v. Bath*, *supra*, footnote 15.

²³ *Dunbar v. Sullivan* (1907), 11 Ex. C.R. 179, at p. 188 and see MacDonald, *op. cit.*, footnote 3, pp. 99-100.

²⁴ [1943] 2 D.L.R. 481.

²⁵ R.S.O. 1937, c. 272, s. 4.

²⁶ This is pointed out by MacDonald, *op. cit.*, footnote 3, p. 101.

²⁷ *Supra*, footnote 24 at p. 484.

²⁸ *Ibid.*, at pp. 502-503.

²⁹ MacDonald, *op. cit.*, pp. 101-102; Vanek, *op. cit.*, footnote 18, at pp. 277-279; Rigaldies & Woehrling, *Le juge interne canadien et le droit international* (1980), 21 C. de D. 293, at p. 303.

Law.³⁰ The case however is usually understood as reflecting an adoptionist approach.³¹

Subsequent cases also tend to support the adoptionist approach. Recently, in *Re Alberta Union of Provincial Employees et al. v. The Crown in Right of Alberta*³² the Alberta Court of Queen's Bench was asked to consider whether the right to strike in the public service (except in the case of essential services) was part of customary international law. The initial submission was made that international customary law becomes part of the law of the land without the need for enabling legislation. The court, after considering the evidence presented to establish the existence of a rule of customary law, found the right was not part of customary international law. The assumption was made in carrying out the substantial analysis of the status of the right, that if it had existed it would have been part of the law of Alberta.³³ The Alberta Court of Appeal affirmed the lower court's decision that the provincial legislation did not violate international law (therefore either customary or conventional law) for the reasons the lower court had stated.³⁴

The recent case of *Pan American World Airways Inc. et al. v. The Queen et al.*³⁵ however, is another example of confusing articulation of the relationship between international law and municipal law. In the Supreme Court an argument was raised "based on alleged customary international law forbidding the exercises of sovereignty by any State in the air space over the high seas". The court said that this argument failed "for want of relevance even if it were otherwise an acceptable principle in a domestic court".³⁶ The court continued:³⁷

... there is no occasion here to apply a principle of construction favouring the compatibility of domestic law with international law. Either international law invoked in this case is effective because expressly incorporated into Canadian law or these actions are not in any event authorized under Canadian law. . . .

Did the court mean by "expressly incorporated" an act of transformation is necessary for the incorporation of customary international law into domestic law? It appears more likely that the court meant that in this case the only relevant international law was conventional law and not customary interna-

³⁰ [1943] 4 D.L.R. 11. at p. 41, per Taschereau J.

³¹ Macdonald, *op. cit.*, footnote 3, pp. 103-104; Vanek, *op. cit.*, footnote 18, at p. 285; Claydon, *The Application of International Human Rights Law by Canadian Courts* (1981), 39 Buffalo L. Rev. 727, at p. 730.

³² (1981), 120 D.L.R. (3d) 591.

³³ This of course does not answer the second issue which was raised, namely whether the province could legislate in violation of customary international law.

³⁴ (1982), 130 D.L.R. (3d) 191. Leave to the Supreme Court of Canada was refused Dec. 7th, 1981.

³⁵ (1980), 96 D.L.R. (3d) 367, at p. 374 (F.C.T.D.).

³⁶ (1982), 129 D.L.R. (3d) 257, at p. 258.

³⁷ *Ibid.*, at pp. 258-259.

tional law and that therefore the applicability of the international law depended upon its express incorporation, since with respect to conventional international law it is the transformation theory that prevails.

At the same time a number of Canadian cases have accepted corollaries of an adoption approach. In *Gordon v. R. in Right of Canada*³⁸ the British Columbia Supreme Court indicated that conflicting statutory³⁹ rules will modify or prevent the incorporation of customary international law into domestic law.⁴⁰

Recent cases also take up the British approach, articulated in the *Trendtex* case, to the capacity of Canadian law to change as customary international law changes; this would appear to assume an adoptionist approach.⁴¹

Most Canadian commentators maintain that the Canadian view of the relation of customary international law and municipal law is adoptionist.⁴² Certainly the cases have not responded to the issue as directly as they have in the United Kingdom.⁴³ Nevertheless, there is a marked absence of any clear statement that there exists a general condition that implementing legislation is necessary for customary international law to become part of the law of Canada in contrast to direct judicial pronouncements to that effect in the context of conventional international law. Furthermore, the existence of cases affirming corollaries of an adoption theory namely, that Canadian law can change as customary international law changes and statutory provisions will be applied by the courts where they conflict with customary international law, all imply an adoptionist approach to the

³⁸ [1980] 5 W.W.R. 668, at p. 671 (B.C.S.C.), (1980), 22 B.C.L.R. 17 (C.A.). The case was dismissed by the British Columbia Court of Appeal on different grounds.

³⁹ The view has been expressed that provincial statutory law is in a different position than federal statutory law. See for discussion of issue whether provinces can legislate in violation of customary international law: La Forest, *May the Provinces Legislate in Violation of International Law?* (1961), 39 Can. Bar Rev. 78; Claydon, *op. cit.*, footnote 31, at pp. 730-732; Rigaldies & Woehrling, *op. cit.*, footnote 29, at p. 311; Jacomy-Millette, *Treaty Law in Canada* (1975), p. 189; MacDonald, *op. cit.*, footnote 3, p. 119.

⁴⁰ See also *Armed Forces Reference*, [1943] S.C.R. 483, at pp. 517-518.

⁴¹ *Venne v. Democratic Republic of the Congo* (1969), 5 D.L.R. (3d) 128 (Que. C.A.); *Democratic Republic of the Congo v. Venne* (1972), 22 D.L.R. (3d) 669 (S.C.C.); *Penthouse Studios v. Republic of Venezuela* (1970), 8 D.L.R. (3d) 686; *Zodiak International Prod. Inc. v. Polish People's Republic* (1978), 81 D.L.R. (3d) 656 (Que. C.A.); *Corriveau v. Republic of Cuba* (1980), 26 O.R. (2d) 674; *Re Royal Bank of Canada & Corriveau et al.* (1981), 30 O.R. (2d) 653.

⁴² MacDonald, *op. cit.*, footnote 3, p. 111; Vanek, *op. cit.*, footnote 29, at p. 264; Claydon, *op. cit.*, footnote 31, at pp. 729, 730; Rigaldies & Woehrling, *op. cit.*, footnote 29, at p. 307. This is also the position of the Department of External Affairs. See: Notes for a speech by the Secretary of State, Canada, Relationship between International Treaties and Internal Canadian Law, Federal-Provincial Ministerial Conference on Human Rights, Feb. 2nd-3rd, 1981, Ottawa.

⁴³ See *Trendtex Trading Corporation Ltd v. Central Bank of Nigeria*, *supra*, footnote 20.

relationship between domestic law and customary international law in Canada.

3. *Customary International Law and the Case of the Charter.*

Assuming therefore that an adoption theory prevails in Canada, customary international law including customary human rights law is part of the law of Canada in the absence of conflicting statutes or well-established rules of the common law, or of course provisions of the Constitution. What is the relationship of this customary international law, and in particular customary international human rights law, to the Charter? The answer is two-fold. Firstly, according to section 26 of the Charter: "The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada." Hence, rights or freedoms embodied in customary international law and which under an adoption theory exist as part of the law of Canada continue to exist with the enactment of the Charter. This will be relevant with respect to "other" rights embodied in customary international human rights law which bear little or no connection to or reflection in rights and freedoms guaranteed by the Charter.⁴⁴ In other words, in human rights areas where the common law has not been settled, and a conclusive statute or constitutional provision does not exist, customary international human rights law can continue to fill in the gaps.⁴⁵

Secondly, there exists a presumption at common law that Parliament and the legislatures⁴⁶ do not intend to act in breach of international law, both customary and conventional.⁴⁷ There is a principle of construction that statutes are to be interpreted as far as possible consistently with

⁴⁴ Examples of acts found in U.S. courts to violate the law of nations (under the Alien Tort Claim Act, 28 U.S.C. s. 1350 making actionable a "tort . . . committed in violation of the law of nations") and which are not reflected in Charter rights and freedoms are: the unlawful seizure of a vessel and its disposition as a prize; the seizure of neutral property upon the ship of a belligerent; the concealment of a child's true nationality coupled with the wrongful inclusion of that child on another's passport. See Barenblat (1981), 16 Texas Int. L.J. 117.

⁴⁵ See Rigaldies & Woehrling, *op. cit.*, footnote 29, at pp. 308-309 for an example of how customary international law fills gaps in the existing legal regime, and Duffy, *English Law and the European Convention on Human Rights* (1980), 29 Int. & Comp. L.Q. 585, at p. 601 for the suggestion that the parts of the European Convention on Human Rights which in his view can be considered customary law, can be used where the common law is not settled.

⁴⁶ Legislatures are added here in the sense that provincial legislation will be "read down" so as to avoid conflicting with international law. See *supra*, footnote 39.

⁴⁷ *Bloxam v. Favre* (1883), 8 P.D. 101, at p. 107; *Reference Re Power of Municipalities to Levy Rates on Foreign Legations and High Commissioner's Residences supra*, footnote 24, at p. 502, per Duff C.J.C.; *The Ship "North" v. The King* (1906), 37 S.C.R. 385, at p. 398; *Salomon v. Commissioners of Customs and Excise*, [1967] 2 Q.B. 116, at pp. 141, 143, per Diplock L.J.; and see Maxwell, *Interpretation of Statutes* (12th ed., 1976), pp. 183-185.

international law. In other words, there is an interpretative presumption, applicable in the context of construing the Charter,⁴⁸ that Parliament and the legislatures intend to fulfill Canada's international obligations. This presumption is supported in the context of customary international law by section 26 of the Charter. Section 26, in expressly permitting other rights existing in Canada to survive the Charter, suggests that the Charter be interpreted or construed (as far as possible) consistently with other rights, such as those existing by virtue of customary international law.⁴⁹ Hence, rights and freedoms in the Charter should be construed (as far as possible) in conformity with customary international law.⁵⁰

Customary international human rights law has thus been used as an aid to interpret United States law and the United States Constitution itself. In the United States, like in Canada, in the case of customary international law: "International law is a part of our law, and must be ascertained and administered by the Courts of Justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."⁵¹ In *Fernandez v. Wilkinson*⁵² the District Court granted a writ of *habeas corpus* to a Cuban refugee being held in indefinite detention pending deportation on the ground that while United States law and the United States Constitution afforded no help in these circumstances, international law prohibited arbitrary detention and hence that the action was an abuse of the discretion of the Attorney General.⁵³ On appeal,⁵⁴ the case was affirmed, not on the basis of a right granted by customary international law, but on a construction given to the Immigration and Naturalization Act and the United States Constitution's Fifth Amendment supported by "international law principles". The Court of Appeals in considering the Fifth Amendment of the United States Constitution said:⁵⁵

... the Supreme Court has expanded the constitutional protection owed aliens apart from the right to enter or stay in this country. . . . Due process is not a static concept, it undergoes evolutionary change to take into account accepted current notions of

⁴⁸ See Gibson, Interpretation of the Canadian Charter of Rights and Freedoms: Some General Considerations, in Tarnopolsky and Beaudoin (eds.), *op. cit.*, footnote 1, pp. 31-32, for other presumptions applicable to the Charter despite constitutional status.

⁴⁹ Any inconsistency would result in the denial of these other rights, as a consequence of s. 52 of the Charter (by which inconsistent law is rendered of no force or effect) and the common law rule itself that customary international law is to give way to inconsistent legislation (*Mortensen v. Peters*, *supra*, footnote 16; *Gordon v. R. in Right of Canada*, *supra*, footnote 38).

⁵⁰ The presumption, of course, is all the more critical if customary international law is not considered automatically part of the law of Canada (in which case s. 26 provides no assistance).

⁵¹ *The Pacquette Habana* (1900), 175 U.S. 677, at p. 700.

⁵² (1980), 505 F. Supp. 787 (D. Kan.).

⁵³ (1981), 654 F. 2d 1382, at p. 1388 (10th Cir.).

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, at p. 1388.

fairness. . . . It seems proper to consider international law principles for notions of fairness as to propriety of holding aliens in detention. No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment.

Section 9 of the Charter addresses the right not to be arbitrarily detained or imprisoned. The customary international law principle may suggest for instance, interpretations of section 9 which would require a strict scrutiny of the circumstances and time acceptable in a delay in executing a removal order under the Immigration Act.⁵⁶

In *Lareau v. Manson*⁵⁷ standards for the treatment of prisoners embodied in international instruments were cited primarily as an aid in interpreting the Eighth Amendment of the United States Constitution. The question at issue was whether certain conditions of confinement for pre-trial detainees amounted to "punishment" without due process in violation of the Fourteenth Amendment and whether, for sentenced inmates (who may be punished) that punishment was "cruel and unusual" within the meaning of the Eighth Amendment. The District Court, in the course of developing standards for determining when overcrowding in prisons exists, looked to the United Nations Standard Minimum Rules for the Treatment of Prisoners⁵⁸ "as expression of the obligations to the international community of the member states of the United Nations . . . and as part of the body of international law (including customary international law) concerning human rights . . .".⁵⁹ They also suggested such standards might explain article 5 of the United Nations Declaration of Human Rights⁶⁰ which they noted is widely held to have the status of customary international law.⁶¹ They determined that the international standards embodied in the United Nations Standard Minimum Rules " . . . are relevant to the 'canons of decency and fairness which express the notion of justice' embodied in the Due Process Clause".⁶² *Lareau v. Manson* was affirmed in part, and modified and remanded in part, on other grounds.⁶³ The United States Court of Appeals for the Second Circuit decided "that under the totality of these circumstances, subjecting the sentenced inmates

⁵⁶ See Immigration Act, S.C. 1976, c. 52, ss 50, 53; under the previous Immigration Act, R.S.C. 1970, c. 1-2: *Re Rojas and the Queen* (1978), 40 C.C.C. (2d) 316 (Ont. H.C.), 20 O.R. (2d) 590 (Ont. C.A.).

⁵⁷ (1981), 507 F. Supp. 1177 (D. Conn., 1980); mod. 651 F. 2d 96 (2nd Cir.).

⁵⁸ These standards were adopted by the first U.N. Congress on the Prevention of Crime and Treatment of Offenders in 1955 and approved by the Economic and Social Council of the U.N. by its Resolution 663C (LLIV) on July 31st, 1957 and 2076 (LXII) on May 13th, 1977 (and are not contained in a treaty or General Assembly Declarations).

⁵⁹ 507 F. Supp. 1177, at p. 1188.

⁶⁰ This article prohibits "cruel, inhuman or degrading treatment or punishment".

⁶¹ 507 F. Supp. 1177, at p. 1193.

⁶² *Ibid.*, 507 F. Supp. 1177, at pp. 1188 and 1192, 1193.

⁶³ 651 F. 2d 96.

in the H.C.C.C. to the combination of double-bunking and over-crowded day rooms violates their constitutional rights . . .".⁶⁴ In reaching this conclusion they referred to the fact that the District Court considered guidelines and standards from a number of sources including the United Nations Standard Minimum Rules for the Treatment of Prisoners.⁶⁵

Section 12 of the Charter addresses the right not to be subjected to cruel and unusual treatment or punishment. Defining and strengthening this right in the context of prison conditions for instance, could be aided by international human rights norms, embodied in such instruments as the United Nations Standard Minimum Rules for the Treatment of Prisoners, which may be found to have the status of customary international law.

The main obstacle however in using customary international human rights law in defining the Charter's rights and freedoms, is the uncertainty of customary international human rights law itself. United States cases suggest certain elementary human rights are now recognized as customary international law, such as freedom from torture⁶⁶ and freedom from arbitrary imprisonment.⁶⁷ The International Court of Justice in the *Barcelona Traction* case suggested freedom from slavery and racial discrimination "have entered into the body of general international law".⁶⁸ It has also been asserted that the United Nations Declaration of Human Rights and its provisions have the status of customary international law, but this is not yet a universally accepted doctrine.⁶⁹

Beyond these examples, how can domestic courts respond to the task of determining what is customary international law? International jurisprudence clearly sets two conditions for the existence of a customary rule of international law: (a) evidence of a sufficient degree of state practice and (b) a determination that states conceive themselves as acting under a legal obligation. This has been put as the requirement for a "constant and uniform usage, accepted as law".⁷⁰ Usage (meaning that usage to be found

⁶⁴ *Ibid.*, at p. 108.

⁶⁵ There are other examples of U.S. cases which utilized international human rights norms in finding violations of constitutional provisions, although these norms do not clearly have the status of customary international law. See for instance: *Sterling v. Cupp* (1981), 625 P. 2d 123, at p. 131.

⁶⁶ *Filartiga v. Pena-Irala* (1980), 630 F. 2d 876 (2nd Cir.); and see for instance: Bassiouni and Derby, *An Appraisal of Torture in International Law and Practice* (1977), 48 Rev. int. dr. pénal 17.

⁶⁷ *Fernandez v. Wilkinson*, *supra*, footnote 52, *aff'd sub. nom.* (1981), *Fernandez v. Wilkinson*, 654 F. 2d 1382 (10th Cir.).

⁶⁸ I.C.J. Rep. 1970, p. 4 at p. 32, paras 33 and 34.

⁶⁹ Humphrey, (1978-79), 24 N.Y.L.S.L. Rev. J. 31, at p. 32; Claydon, *op. cit.*, footnote 31, at p. 733; Schluter, *The Domestic Status of the Human Rights Clauses of the U.N. Charter* (1973), 61 Cal. L. Rev. 145 but see D.J. Harris, *Cases and Materials on International Law* (2nd ed., 1979), p. 571.

⁷⁰ *Asylum Case (Columbia v. Peru)*, I.C.J. Rep. 1950, p. 266.

in the practice of states), has to exhibit a number of characteristics:⁷¹ substantial uniformity, consistency and substantial generality.⁷² Secondly, the requirement that states "feel that they are conforming to what amounts to a legal obligation",⁷³ that is exhibit *opinio juris*, is to be contrasted with motives of courtesy, fairness and morality. In this regard, there is some suggestion that establishment of a general practice will give rise to a presumption of the existence of *opinio juris*.⁷⁴

Domestic courts have in fact concentrated on the establishment of the requisite state practice. Forms which state practice can take are listed by the International Law Commission as including: treaties, decisions of international and national courts, national legislation, diplomatic correspondence, opinions of national legal advisors, and the practice of international organizations.⁷⁵ Brownlie adds: policy statements, press releases, official manuals on legal questions and executive decisions and practices.⁷⁶ In *Trendtex* the English Court of Appeal, per Stephenson L.J., stated that proof could take the form of "'international treaties and conventions, authoritative textbooks, practice and judicial decisions' of other courts in other countries".⁷⁷ In the *Alberta Union* case, Sinclair C.J.Q.B. considered in the course of examining the argument that the right to strike in the public service, except in the case of essential services, was part of customary international law: International Labour Organization Committee Reports (Freedom of Association Committee), International Labour Organization Conventions, the International Covenant on Economic, Social and Cultural Rights, and reports of an International Labour Conference (on the Freedom of Association and Procedures for Determining Conditions of Employment in the Public Service).⁷⁸

Articulating customary international law is not a simple task. A degree of judicial crystallization of a rule embodied in state practice and

⁷¹ These are characteristics for establishing a general, rather than a local, custom.

⁷² See Brownlie, *op. cit.*, footnote 19, pp. 6-7.

⁷³ *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, I.C.J. Rep. 1969, p. 3.

⁷⁴ Judge Sorensen, dissenting in *North Sea Continental Shelf Cases*, *ibid.*; Lauterpacht, (1950), 27 Br. Y. Int. L. 376, at p. 395; and See, Brownlie, *op. cit.*, footnote 19, pp. 8-10.

⁷⁵ Y.B.I.L.C. 1950, II, pp. 368-372.

⁷⁶ Brownlie, *op. cit.*, footnote 19, p. 5; see also Castel, *op. cit.*, footnote 2, pp. 26-27.

⁷⁷ He acknowledged that such proof of the rule went to "show that they have attained the position of general acceptance by civilized nations . . . and those sources come seldom if ever from every civilized nation or agree upon a universal rule. . .". *Supra*, footnote 20, at p. 902.

⁷⁸ Sinclair J. incorrectly required however, that the establishment of customary international law needed "universal consent on the subject of the right to strike in the public service" (*supra*, footnote 38, at p. 621, italics added) although his examination of the material led him to the conclusion that the evidence in fact fell "far short" of establishing the requisite consent.

state intentions will often be necessary. But the project is clearly analogous to the familiar task of the Canadian judge in defining the common law.

B. *Conventional International Law and Domestic Law.*

The use of customary international human rights law by domestic courts will likely be greater in those states which have ratified few international human rights conventions, such as the United States.⁷⁹ Britain and Canada⁸⁰ however, have ratified a considerable number of international human rights treaties. In Britain and Canada ratification of treaties is a prerogative power not requiring therefore Parliamentary consent (although a form of Parliamentary "approval" has become traditional for certain Agreements in Canada). The use which domestic courts in Britain and in Canada can and do make of these conventions often will reflect the effort to protect the authority of Parliament from any attempt by the Crown to change the law simply by the exercise of the prerogative. This was not a concern with respect to customary international law, where obligations arose out of the consent of nations not merely an act of executive authority.

⁷⁹ The United States has failed to ratify the major human rights conventions. This is a consequence of the fact that treaties require, for ratification, the advice and consent of the Senate and once ratified, if they are self-executing, become part of the law of United States without the need for legislation (U.S. Constitution, art. II, s. 2, cl. 2).

⁸⁰ As of January, 1982, Canada had ratified 23 principal international conventions on human rights. These are: International Covenant on Economic, Social and Cultural Rights (in force for Canada: Aug. 19th, 1976), International Covenant on Civil and Political Rights (in force for Canada: Aug. 19th, 1976), Optional Protocol on Civil and Political Rights (in force for Canada: Aug. 19th, 1976), International Convention on the Elimination of All Forms of Racial Discrimination (in force for Canada: Nov. 13th, 1970), Convention on the Elimination of All Forms of Discrimination Against Women (in force for Canada: Jan. 10th, 1982), Convention on the Prevention and Punishment of the Crime of Genocide (in force for Canada: Dec. 2nd, 1952), Constitution of the International Refugee Organization (in force for Canada: Aug. 20th, 1948), Convention Relating to the Status of Refugees (in force for Canada: Sept. 2nd, 1969), Agreement Relating to Refugee Seaman (in force for Canada: Aug. 28th, 1969), Protocol Relating to Status of Refugees (in force for Canada: June 4th, 1969), Protocol Relating to Refugee Seamen (in force for Canada: Feb. 10th, 1975), Convention on the Reduction of Statelessness (in force for Canada: Oct. 15th, 1978), Convention on the Political Rights of Women (in force for Canada: Jan. 30th, 1957), Convention on the Nationality of Married Women (in force for Canada: Oct. 21st, 1959), Slavery Convention (in force for Canada: Aug. 6th, 1928), Protocol Amending the Slavery Convention of Sept. 25th, 1926 (in force for Canada: Dec. 17th, 1953), Supplementary Convention on the Abolition of Slavery (in force for Canada: Jan. 10th, 1963), Convention Concerning the Freedom of Association (I.L.O.) No. 87 (in force for Canada: March 23rd, 1973), Convention Concerning Equal Remuneration (I.L.O.) No. 100 (in force for Canada: Nov. 16th, 1973), Convention Concerning the Abolition of Forced Labour (I.L.O. No. 105) (in force for Canada: July 14th, 1960), Convention Concerning Discrimination in Respect of Employment and Occupation (I.L.O.) No. 111 (in force for Canada: Nov. 26th, 1965), Convention Concerning Employment Policy (I.L.O.) No. 122 (in force for Canada: Sept. 16th, 1957), Convention on the Prevention and Punishment of Crimes Against Internationally-Protected Persons (in force for Canada: Aug. 4th, 1976).

1. *United Kingdom.*

The constitutional rule developed in the United Kingdom, and followed in Canada, embodies a transformation approach to the relationship of conventional international law to domestic law. A treaty will only be part of the law of England if it is implemented by legislation.⁸¹ The classic statement of this principle was made in *The Parlement Belge*.⁸² It has been repeated many times.⁸³

(a) *Incorporated Conventional Law.*

The issue which must then be addressed is, when is domestic legislation to be considered as implementing a convention so that the treaty in whole or in part is the law of the land? There are a number of possibilities.⁸⁴ Crawford includes among them legislation implementing a treaty but containing no reference to it.⁸⁵

Other authors as well as the case law support the existence of this possible form of implementing legislation. Brownlie identifies a category of implementing legislation as "legislation to give effect in domestic law to the provisions 'of a convention through which the statute employs' its own substantive provisions to give effect to a treaty, the text of which is not directly enacted". Such legislation he says may or may not refer to the convention in its titles or preambles or schedules.⁸⁶ Thus in *Salomon v. Commissioners of Customs and Excise*⁸⁷ the Court of Appeal had to construe a provision of the Customs and Excise Act which the court considered as "embodying the convention"⁸⁸ although no express reference was made to the convention in the statute. Diplock L.J. said:⁸⁹

⁸¹ The exception is treaties relating to the conduct of war or treaties affecting belligerent rights and treaties of cession: *Porter v. Freudenberg*, [1915] 1 K.B. 857; Brownlie, *op. cit.*, footnote 19, p. 49.

⁸² (1878-79), 4 P.D. 129, rev'd on a different point (1880), 5 P.D. 197.

⁸³ See e.g., *Walker v. Baird*, [1892] A.C. 491; *Cheney v. Conn*, [1968] 1 W.L.R. 242; *Malone v. Commissioner of Police of the Metropolis*, [1979] 2 All E.R. 620.

⁸⁴ Different categories are identified by a number of authors: Crawford, *The International Law Standard in the Statutes of Australia and the United Kingdom* (1979), 73 Am. J. Int. L. 628; Sinclair, *The Principles of Treaty Interpretation and Their Application by the English Courts* (1963), 12 Int. & Comp. L.Q. 508 at 528; Mann, *The Interpretation of Uniform Statutes* (1946), 62 L.Q. Rev. 278, at p. 279. It is submitted that Mann and Sinclair's categories of implementing legislation have both been outdated by more recent English case law. Crawford's analysis is drawn from modern legislation and case studies and is considerably more refined and is therefore adopted here.

⁸⁵ "... by no means every act that implements a treaty contains a reference to it." Crawford, *op. cit.*, *ibid.*, at p. 631.

⁸⁶ *Op. cit.*, footnote 19, p. 50.

⁸⁷ *Supra*, footnote 47.

⁸⁸ *Ibid.*, per Diplock, at p. 145.

⁸⁹ *Ibid.*, at p. 144 (italics added).

It has been argued that the terms of an international convention cannot be consulted to resolve ambiguities or obscurities in a statute unless the statute itself contains either in the enacting part or in the preamble an express reference to the international convention which it is the purpose of the statute to *implement*. . . . If from extrinsic evidence it is plain that the enactment was intended to fulfill Her Majesty's Government's obligations under a particular convention, it matters not that there is no express reference to the convention in the statute.⁹⁰

Similar pronouncements are made in other British cases.⁹¹

Although implementing legislation then is commonly legislation either enacting the treaty in whole, or scheduling it, or referring to it in a preamble, sometimes legislation passed to give effect in domestic law to the provisions of a treaty does not expressly refer to that treaty.⁹² The suggestion from the cases appears to be that comparison of the words of the statute with those of the convention, combined with an acknowledgement of the statute's legislative history or other "extrinsic evidence" will reveal whether it is the purpose of the statute to implement the convention or to

⁹⁰ In comparing the language of a provision of the Act and the terms of the Convention, Diplock L.J. remarked that: "The terms of the statute and the Convention are nearly identical. . . .", *ibid.* Russell L.J. referred to the reference to a treaty where "a statute plainly intended to carry out its terms, even when that intention is not stated in a statute", *ibid.*, at p. 152.

Note that as Diplock L.J. points out in *Salomon*, the case of *Ellerman Lines v. Murray*, [1930] All E.R. Rep. 503, ought not to be cited as suggesting that an implementing statute must make express reference to the international convention. In that case the statute concerned expressly referred to the convention in its preamble and set the convention out in its first schedule. *Ibid.*, at p. 144. *Corocraft Ltd v. Pan American Airways Inc.*, [1968] 3 W.L.R. 1273, per Lord Denning M.R., at p. 1281. *Ellerman Lines v. Murray* does on the other hand appear to take a narrow view as to when international conventions can be referred to in interpreting domestic legislation. See, *infra*, at pp. 288-289.

⁹¹ See: *Post Office v. Estuary Radio Ltd*, [1967] 3 All E.R. 663, at p. 682, per Diplock L.J.; *The Jade, The Escherchein*, [1976] 1 All E.R. 920, at p. 924; *Rio Tinto Zinc Corp. and others v. Westinghouse Electric Corp.*, [1978] 1 All E.R. 434, at p. 449, per Viscount Dilhorne, at p. 468, per Lord Fraser, at p. 477, per Lord Keith (see note by Crawford, (1978), 49 Br. Y. Int. L. 28); *The Annie Hay*, [1968] 1 All E.R. 657, at p. 664; *James Buchanan & Co. Ltd v. Babco Forwarding and Shipping (U.K.) Ltd*, [1978] A.C. 141; and specifically with respect to the European Convention on Human Rights: *R. v. McCormick*, [1977] N. 1. 105, where the court interpreted a provision of the Northern Ireland (Emergency Provisions) Act 1973, as implementing in part of the European Convention on Human Rights, although no express mention was made in the Act of the Convention. The Northern Ireland Act used similar words to article 3 of the Convention and was passed at a time when a complaint concerning the United Kingdom on a subject matter similar to that being considered by the court was before the European Commission of Human Rights. Generally, however the remark is made that the Convention does not form part of English law (see for instance: *A.G. v. B.B.C.*, [1980] 3 W.L.R. 109, at p. 128, per Lord Fraser, [1976] 3 All E.R. 843, at p. 847, per Lord Denning M.R.).

⁹² *Pan American World Airways Inc. v. Department of Trade*, [1976] 1 Lloyd's Rep. 257, at p. 261, per Scarman L.J.: "Such a convention . . . should then be considered by the courts even though no statute expressly or impliedly incorporates it into our law." (Italics added.)

give it legal effect in domestic law, in other words whether it is implementing legislation.

Along with the constitutional rule that conventional international law is not part of the law of the land unless it is incorporated or implemented by legislation, there exists a rule of construction, namely that there is a presumption that Parliament does not intend to violate international obligations,⁹³ and hence that where possible domestic legislation ought to be construed in conformity with international law.⁹⁴ However, if the domestic law cannot be interpreted consistently with the treaty or that interpretation is not a plausible meaning of the domestic legislation⁹⁵ then it is the domestic language which must take effect. Sometimes this is put: the domestic law must be reasonably capable of being ascribed more than one meaning,⁹⁶ or the domestic law must be ambiguous.

It is unclear however whether ambiguity is then used as a preliminary test, operating prior to any examination of the treaty, or whether it is a conclusion which is reached upon reflecting upon the terms of the treaty in conjunction with those of the statute.⁹⁷ The British cases are not clear on their approach. Many British cases apparently espouse a test of ambiguity operating prior to an examination of the treaty. Thus in *Ellerman Lines Ltd v. Murray*,⁹⁸ the House of Lords considered the statute to be unambiguous and assigned it a meaning without reference to the (scheduled) Convention, they acknowledged to which it was the purpose of the Act to give effect.⁹⁹ On the other hand, the suggestion has been made in a number of other cases that where domestic legislation is passed in order to give effect to a convention then it is legitimate to look at the convention in construing the

⁹³ *Salomon v. Commissioners of Customs and Excise*, *supra*, footnote 47, at p. 143, per Diplock L.J.; *Post Office v. Estuary Radio Ltd*, *supra*, footnote 91, at p. 682; *The Annie Hay*, *supra*, footnote 91, at p. 663; *Corocraft Limited v. Pan American Airways Inc.*, [1968] 3 W.L.R. 1273, at p. 1281.

⁹⁴ In the context of implementing legislation, or where domestic legislation has been passed to give effect to a treaty, one could consider there to be a presumption of consistency between implementing statutes and the convention.

⁹⁵ *Post Office v. Estuary Radio Ltd*, *supra*, footnote 91, at p. 682.

⁹⁶ *Salomon v. Commissioners of Customs and Excise*, *supra*, footnote 47, at p. 143, per Diplock L.J.

⁹⁷ See criticism of the test of ambiguity as operating prior to examination of the treaty, by Brownlie, *op. cit.*, footnote 19, p. 51, and Crawford (1979), 50 Br. Y. Int. L. 231. And see for suggestion that reference to the convention is an example of the application of *Heydon's Case* (1854), 3 Co. Rep. 7: Crawford (1976-77), 26 Br. Y. Int. L. 341, n. 4; *Pan-American World Airways v. Dept. of Trade*, *supra*, footnote 92.

⁹⁸ *Supra*, footnote 90.

⁹⁹ *Ibid.*, at p. 511; see also: *Salomon v. Commissioners of Customs and Excise*, *supra*, footnote 47; *James Buchanan & Co. Ltd v. Babco Forwarding and Shipping (U.K.) Ltd*, [1977] 3 All E.R. 1048; but see *James Buchanan & Co. Ltd v. Babco Forwarding and Shipping (U.K.) Ltd*, [1977] 3 All E.R. 148, at p. 153, per Lord Wilberforce where he states: "*Ellerman Lines v. Murray* should no longer be followed."

Act, without first finding an ambiguity looking at the convention in isolation.¹⁰⁰

It is therefore unclear under what circumstances a domestic court will have regard to an international treaty in a situation where the domestic legislation, in whole or in part, is intended to give effect to an international obligation. The presumption that in passing domestic law Parliament does not intend to violate its international obligations and that implementing legislation is consistent with the convention, clearly suggests in this context reference to the treaty should be had for interpretation of the domestic law. Furthermore, it is *not* the case that such a prior condition to considering a treaty is necessary to ensure that domestic courts only give effect to the domestic legislation itself, or that they will only formulate an interpretation which the language of the domestic law can reasonably or plausibly bear.

(b) *Unincorporated Conventional Law.*

If no implementing legislation is enacted international conventional law may still be relevant to the interpretation of domestic law, through the operation of the presumption that Parliament does not intend to violate its international obligations or that statutes will not be interpreted as violating international law, where possible. Thus in *A.G. v. B.B.C.*,¹⁰¹ the House of Lords in construing the scope of a domestic statute concerning contempt of court¹⁰² considered the European Convention on Human Rights, stating:¹⁰³ “... there is a presumption albeit rebuttable, that our municipal law will be consistent with our international obligations.”¹⁰⁴ Consequently, although it cannot be said in this context that the domestic legislation was passed to give effect to the treaty, there operates a presumption that

¹⁰⁰ *Quazi v. Quazi*, [1979] 3 W.L.R. 833, at p. 845, per Lord Fraser, at pp. 852-853, per Lord Scarman; but see Lord Diplock at p. 840 where the *Ellerman Lines v. Murray* view was expressed. *Post Office v. Estuary Radio Ltd*, *supra*, footnote 91, at p. 681, per Lord Diplock; *Pan American World Airways Inc. v. Department of Trade*, *supra*, footnote 7, at p. 261, per Scarman L.J.; *Benin v. Whimster*, [1976] 1 Q.B. 297, at p. 309, per Lord Denning M.R.; *The Jade, The Eschershein*, *supra*, footnote 91, at p. 924, per Lord Diplock; *James Buchanan & Co. Ltd v. Babco Forwarding and Shipping (U.K.) Ltd*, [1977] 3 All E.R. 1048, at p. 1052, per Lord Wilberforce: “... The inherent flexibility of the English ... language may make it necessary for the interpreter to have recourse to a variety of aids. There is no need to impose a preliminary test of ambiguity.” But see *contra*: Lord Edmund-Davies, at p. 1065 (Lord Fraser concurring).

¹⁰¹ *Supra*, footnote 91.

¹⁰² Specifically the court considered the application of the statute to local valuation courts. R.S.C., Order 52, rule 1.

¹⁰³ *Supra*, footnote 91, at p. 130.

¹⁰⁴ See Duffy, *English Law and the European Convention on Human Rights* (1980), 29 Int. & Comp. L.Q. 585, at p. 589.

domestic law will not be interpreted as violating international obligations imposed by a treaty, where possible.

It is in this context that United Kingdom courts have generally¹⁰⁵ considered the European Convention on Human Rights. In the case of *Waddington v. Miah*,¹⁰⁶ the House of Lords made use of article 7 (protection against retroactivity of criminal law) of the European Convention in interpreting sections 24(1)(a) and 26(1)(d) of the Immigration Act 1971 as not having retroactive effect.¹⁰⁷

In the subsequent case of *Birdi v. Secretary of State for Home Affairs*¹⁰⁸ the Court of Appeal rejected the assertion of the applicant that the immigration procedures used against him constituted a violation of article 6(1) of the European Convention.

In *R. v. Secretary of State for Home Affairs ex p. Bhajan Singh*¹⁰⁹ the Court of Appeal considered the argument that an illegal immigrant, detained pending deportation, had the right to facilities to marry under article 12 of the European Convention. The court held that the right to marry under article 12 had to be read in conjunction with article 5(1)(f) (the right to deprive a person of his liberties when lawfully detained with a view to deportation). In coming to this conclusion the court stated:¹¹⁰

The Court can and should take the Convention into account. They should take it into account whenever interpreting a statute which affects the rights and liberties of the individual. It is to be assumed that the Crown, in taking its part in legislation, would do nothing which was in conflict with treaties. So the Court should construe the Immigration Act 1971 so as to be in conformity with the convention and not against it.

The European Convention has been used for the interpretation of English law in other cases.¹¹¹ Its ultimate impact varies from suggesting or

¹⁰⁵ See the exception: *McCormick*, *supra*, footnote 91.

¹⁰⁶ [1974] 2 All E.R. 377.

¹⁰⁷ *Ibid.*, at p. 379.

¹⁰⁸ *The Times* (London), Feb. 12th, 1975.

¹⁰⁹ [1976] Q.B. 198.

¹¹⁰ *Ibid.*, at p. 207.

¹¹¹ *R. v. Secretary of State for Home Department, ex p. Phansopkar*, [1976] Q.B. 606, at p. 626, per Scarman L.J.; *R. v. Chief Immigration Officer, ex p. Salamat Bibi*, [1976] 3 All E.R. 843; *Ahmad v. Inner London Education Authority*, [1978] 1 All E.R. 574; *R. v. Deery* (Northern Ireland Court of Criminal Appeal) (1977), 20 E.C.H.R. Yearbook 837; *R. v. Secretary of State for Home Affairs, ex p. Hosenball*, [1977] 3 All E.R. 452; *Ostereicher v. Secretary of State for the Environment*, [1978] 1 All E.R. 591; *R. v. Bd of Visitors of Hull Prison, ex p. St. Germain*, [1978] Q.B. 678; *ibid.*, in the Court of Appeal, [1979] Q.B. 425; *R. v. P.L.C., ex p. Burgess*, [1978] I.C.R. 991; *Uppal v. Home Office* (1978), 21 E.C.H.R. Yearbook 797; *Gleaves v. Deakin*, [1979] 2 W.L.R. 667, [1980] A.C. 447; *Allgemeine Gold-undsilberscheideanstalt v. Customs and Excise Commissioners*, [1980] 2 W.L.R. 564; *U.K.A.P.E. v. Acas*, [1979] 1 W.L.R. 570; *ibid.*, in the House of Lords, [1980] 2 W.L.R. 254; *Panesar v. Nestlé Company Ltd.*, [1980] I.C.R. 144; *Morris v. Beardmore*, [1980] 3 W.L.R. 283; *A.G. v. B.B.C.*, *supra*, footnote 91, at p. 130, per Scarman L.J.

supporting the interpretation given,¹¹² to reference to the Convention only as a gesture without any actual difference being made to the case, to remarking that in the face of statutory language or common law to the contrary¹¹³ the Convention cannot make a difference since it has not been incorporated into English law. The Convention is however, a clearly acceptable and not unusual consideration of British courts concerned with human rights matters in the course of interpretation of domestic law.

It is unclear¹¹⁴ whether or not utilization of the European Convention, as a guide to interpretation first requires a finding of ambiguity in the domestic statute taken alone.¹¹⁵ It is certainly more plausible in light of the policy interests in this situation where there is no implementing legislation. Recognition ought to be had however, of the danger that artificially rigid declarations of the necessity of establishing ambiguities without considering the terms of the international obligation may work to inhibit the force or operation of the presumption that Parliament does not intend to act inconsistently with international conventions.

2. Canada.

Treaty-making in Canada, as in the United Kingdom, is an executive power. The constitutional rule in Canada concerning the relationship of

¹¹² The degree to which the Convention is utilized to support conclusions obviously varies from case to case, sometimes even within the same case: see for instance, *Morris v. Beardmore*, *ibid.*, at p. 296, per Lord Scarman, and at p. 288, per Lord Diplock.

¹¹³ *Malone v. Commissioner of Police of the Metropolis*, *supra*, footnote 83. This case concerned an interpretation of the common law and its failure to embody a right to privacy. *Gleaves v. Deakin*, *supra*, footnote 111, at p. 482. This case concerned the common law of criminal libel and Lord Diplock invoked the Convention as a measure of the inadequacy of domestic law. McCouch, *Implementing the European Convention on Human Rights in the United Kingdom* (1982), 18 *Stan. J. Int. L.* 147, at p. 154, comments: "The areas where English law is deficient under the Convention standards apparently reflect parliamentary inaction rather than parliamentary action contrary to the Convention."

¹¹⁴ Comp. Lord Scarman's language in *A.G. v. B.B.C.*, *supra*, footnote 111, 130 and Lord Denning in *R. v. Chief Immigration Officer, ex p. Salamat Bibi*, *supra*, footnote 111, at p. 847. *Pan American World Airways Inc. v. Department of Trade*, *supra*, footnote 92, at pp. 261-262, per Lord Scarman: "If statutory words have to be construed or a legal principle formulated in an area of law where Her Majesty has accepted international obligations, our Courts . . . will have regard to the convention or part of the full content or background of the law. Such a convention especially a multilateral one, should then be considered by Courts even though no statute expressly or impliedly incorporates it into our law. See recent decisions of this Court interpreting the Immigration Act 1971 in the light of the European Convention on Human Rights 1950 (*Bhajan Singh; Phansopkar*)". Duffy, *op. cit.*, footnote 104, at p. 590, however expresses the view that the cases indicate ambiguity. Is a preliminary test answered by considering the statute in isolation so that the British courts will not consider the European Convention in the course of statutory interpretation to indicate an ambiguity? Such an interpretation though appears to be somewhat artificially imposed on cases utilizing the Convention in a variety of ways.

¹¹⁵ This is not to be confused with the accepted principle that unambiguous domestic law will be given effect to even if contrary to the Convention. *Supra*, at p. 288.

conventional international law to domestic law is a consequence of the same transformation approach as adopted in the United Kingdom. Generally speaking, a treaty will only be part of the law of Canada if it is implemented by legislation.¹¹⁶ This principle was stated in the case of *Re Arrow River and Tributaries Slide & Boom Co. Limited*.¹¹⁷ It has been reiterated on numerous occasions.¹¹⁸

In a federal state the rule raises a number of unique issues.¹¹⁹ Most important, can the federal Parliament legislate in implementation of a treaty upon matters which would otherwise be within provincial jurisdiction? This question was answered in the negative in *A.-G. Can. v. A.-G. Ont. et al. (Labour Conventions case)* decided by the Judicial Committee of the Privy Council.¹²⁰ According to the *Labour Conventions* case although treaty-making is a power of the federal executive, treaty-implementation, which is a distinct power, is distributed between the federal government and the provinces.

The authority of *Labour Conventions* has however been under considerable strain.¹²¹ Recently, the Supreme Court of Canada has explicitly directed its criticism at the *Labour Conventions* case. In *MacDonald v. Vapour Canada Ltd*¹²² one of the issues raised on behalf of the constitutional validity of the federal Trade Marks Act was that the legislation was

¹¹⁶ Exceptions exist with respect to treaties which "give recognition of incidents of sovereignty" or concern "matters in exclusively sovereign aspects", but could probably be described as not extending to matters which "affect the rights of individuals". See *Francis v. The Queen* (1956), 3 D.L.R. (2d) 41, at p. 47; *Secretary of State of Canada v. Alien Property Custodian for the United States*, [1931] S.C.R. 170, at p. 198; *Ritcher v. The King*, [1943] Ex. C.R. 64; *Bitter v. Secretary of Canada as Custodian of Enemy Property*, [1944] Ex. C.R. 61; *Mastini v. Bell Telephone Canada* (1971), 18 D.L.R. (3d) 215, at p. 218. And see Jacomy-Millette, *op. cit.*, footnote 39, pp. 208-221; Macdonald, *op. cit.*, footnote 3, pp. 120-121.

¹¹⁷ [1932] 2 D.L.R. 250, at pp. 260-261.

¹¹⁸ *Francis v. The Queen*, [1956] S.C.R. 618, per Kerwin J., at p. 621, per Rand J., at p. 626; *A.G. Can. v. A.G. Ont. (Labour Conventions case)*, [1937] 1 D.L.R. 673, at p. 678; *Capital Cities Communications v. Canadian Radio-Television and Telecommunications Commission* (1978), 81 D.L.R. (3d) 609, at p. 631.

¹¹⁹ One issue which cannot be dealt with in detail here is the question whether a province can legislate in violation of conventional international law. See: *supra*, footnote 39 and Jacomy-Millette, *op. cit.*, footnote 39, pp. 282-290; Macdonald, *op. cit.*, footnote 3, p. 119; LaForest, *The Labour Conventions Case Re-visited* (1974), 12 Can. Y. Int. L. 137; Rigaldies and Woehrling, *op. cit.*, footnote 29, at p. 311; and *Re Arrow River & Tributaries Slide & Boom Co. Ltd*, *supra*, footnote 117.

¹²⁰ *Supra*, footnote 118, at pp. 682-683.

¹²¹ In *Reference by the Governor-General-in-Council Concerning the Ownership of and Jurisdiction Over Offshore Mineral Rights*, [1967] S.C.R. 792, at p. 821; *Denison Mines v. Attorney-General of Canada* (1973), 32 D.L.R. (3d) 419, at p. 430; *MacDonald v. Vapour Canada Ltd* (1976), 66 D.L.R. (3d) 1 (S.C.C.), at p. 29; *Schneider v. The Queen* (1982), 43 N.R. 91, at pp. 113-114 (S.C.C.).

¹²² (1976), 66 D.L.R. (3d) 1.

supportable on the grounds that it was implementing legislation, specifically of the International Convention for the Protection of Industrial Property (the Convention of the Union of Paris) 1883 and its amendments. The Supreme Court noted that reference to the Convention is made in a limited way in the Act, these references being in the court's words "for a very narrow purpose of trade marks regulation".¹²³ The court held that they did not have to directly consider the authority of *Labour Conventions* because the section of the Act before them was not enacted in implementation of an international obligation. At the same time, however, in *obiter* the court went so far as to say "... the foregoing references would support a reconsideration of the *Labour Conventions* case", and "... assuming it was open to Parliament to pass legislation in implementation of an international obligation by Canada under a treaty or Convention (being legislation which it would be otherwise beyond its competence) ...".¹²⁴

In *Schneider v. The Queen*¹²⁵ the Supreme Court considered the constitutional validity of provincial legislation (the Heroin Treatment Act) and *inter alia* concerned itself with the issue of whether the provincial legislation fell within a federal power to legislate for the implementation of treaties.¹²⁶ The court repeated the dicta of *MacDonald v. Vapour* in relation to the *Labour Conventions* case, but concluded that no federal legislation implementing Canada's international obligations, within whose scope the Heroin Treatment Act might have fallen, existed.¹²⁷

Labour Conventions, therefore, is still good law but its authority is clearly diminishing.

¹²³ *Ibid.*, at p. 30.

¹²⁴ *Ibid.*, at p. 29.

¹²⁵ (1982), 43 N.R. 91.

¹²⁶ *Ibid.*, at pp. 113-114.

¹²⁷ The court's handling of the matter, however, appears to be confused since the issue of the *Labour Conventions* case, as taken up in *MacDonald v. Vapour*, is whether federal legislation may be passed pursuant to implementing a treaty in jurisdiction which is otherwise provincial. The court seems to have been contemplating that one might move from there to the possibility that provincial legislation can be *ultra vires* because it is an area potentially within federal competence under a treaty-implementing power. This however would bring to reality all the difficulties for federalism (which do not necessarily follow an overruling of *Labour Conventions*), that *Labour Conventions* foresaw.

The court noted that the Narcotic Control Act was not enacted in implementation of Canada's treaty obligations under the Single Convention on Narcotic Drugs 1961—inferring if it had been implementing legislation this would have made a difference. But this should have been irrelevant in view of the fact that the Narcotics Control Act does not purport to deal with treatment of addicts (*ibid.*, at p. 111). And in fact the court specifically pointed out the federal government had failed to involve itself in active treatment (*ibid.*, at p. 114).

(a) *Incorporated Conventional Law.*

The cases which have concerned themselves with the issue of the treaty-implementing power as a matter of division of powers have issued statements, about the requisite form of implementing legislation. International conventional law is not part of the law of Canada unless implemented. And various implications follow for the legitimacy of considering treaties and interpreting domestic law from a determination that legislation is implementing legislation. Hence it becomes important to discover just when domestic legislation is to be considered as implementing a convention.

The Canadian answer, in the most recent Supreme Court cases, unfortunately has been given in the context of division of powers. It appears to diverge from the British response. In particular this apparent divergence is manifested with respect to legislation which contains no reference to the treaty.¹²⁸ The British cases suggest that legislation passed to give effect in domestic law to the provisions of a treaty need not expressly refer to that treaty; comparison of the words of the statute with those of the Convention and a consideration of extrinsic evidence can reveal that the purpose of the statute is to implement the Convention or give it legal effect in domestic law, in other words that it is implementing legislation.¹²⁹

In *MacDonald v. Vapour*, Laskin C.J.C., speaking for four other members of the court, stated that section 7 of the Trade Marks Act did not implement a treaty because:¹³⁰

In my opinion, assuming Parliament has power to pass legislation implementing a treaty or a convention in relation to matters covered by the treaty or convention which would otherwise be for provincial legislation alone, the exercise of that power must be manifested in the implementing legislation and not be left to inference. The Courts should be able to say, on the basis of the expression of the legislation, that it is implementing legislation. . . . In the absence of an express declaration in the Trade Marks Act that the Act as a whole, including section 7, or section 7 itself was enacted in implementation of the obligations of the Convention, . . . I would not hold that there has been a valid exercise in this case of the federal treaty or Convention implementing power, assuming such a power exists in the present case.

The requisite form of implementing legislation was clearly demanded in the context of a potential authorization of federal jurisdiction in an other-

¹²⁸ See for examples of other forms of implementing legislation: *Composers, Authors and Publishers Association v. C.T.V. Television Network et al.*, [1968] S.C.R. 676, at p. 681; *Montreal Trust Company v. C.P. Air*, [1977] 2 S.C.R. 793, at p. 796; *R. v. Kupiyana* (1973), 36 D.L.R. (3d) 381, at p. 382; *Daniels v. The Queen* (1969), 2 D.L.R. (3d) 1, at p. 24. For other instances of implementing legislation see Jacomy-Millette, *op. cit.*, footnote 39, Appendix 6, p. 363; Emmanuelli and Slosar, *L'application et l'interprétation des traités internationaux par le juge canadien* (1978), 13 R.J.T. 69, at pp. 73-74.

¹²⁹ See *supra*, at pp. 286-289.

¹³⁰ *Supra*, footnote 122, at p. 31.

wise provincial field. It is therefore possible that the requirement be confined to this context and not preclude less rigid forms of implementation where federal or provincial governments are acting, within their respective spheres, in the absence of a treaty.¹³¹

The Supreme Court of Canada in *Schneider v. The Queen* repeated the language of *MacDonald v. Vapour*.¹³² Note that Estey J., in a separate concurring opinion, said, of Part II of the Narcotics Control Act which does not expressly refer to the Convention, "Part II of the Narcotics Control Act was enacted in 1961 . . . presumably in implementation of the Single Convention on Narcotics Control 1961, to which Canada is a signatory".¹³³

It is doubtful that the policy of facilitating Canada's satisfaction of its international obligations will be met by a very narrow conception of when legislation or legislative provisions are aimed to give legal effect in domestic law to a treaty. Express reference to the treaty or an explicit statement that a provision or Act is being enacted in order to implement a treaty appears to be an excessive requirement for satisfying the policy that the executive not infringe on the authority of Parliament or the legislatures. Where there is a possibility, however, that implementing legislation will permit Parliament to trench on provincial jurisdiction, the requirement of explicit reference to the treaty or to the purpose of implementing a treaty is more comprehensible.

As in the United Kingdom, there exists an additional principle to the constitutional rule that unimplemented treaties do not have the force of law in Canada. There is a rule of construction that Parliament and the legislatures are presumed not to intend to act in violation of Canada's international legal obligations.¹³⁴ In accordance with the presumption therefore, the

¹³¹ In a second opinion concurring in the result, De Grandpré speaking for two other members of the court, found upon looking at the Convention, its purpose as set out in art. 1, and other provisions, that the treaty did not support the constitutionality of the particular provision of the Trade Marks Act because the treaty did not deal with the same matter or direct prohibition of the same acts as did the domestic provision. The implication perhaps is that it was the deficiency in the overlap or similarity between the terms of the Convention and the domestic legislation, and not a lack of an express declaration of implementing intent, that prevented an otherwise "attractive submission" that the legislation was in implementation of a treaty, from succeeding.

¹³² *Supra*, footnote 125, at p. 114.

¹³³ *Ibid.*, at p. 121; see additional case on the form of implementing legislation: *Minister of Manpower and Immigration v. Feuntes* (1975), 52 D.L.R. (3d) 463, at p. 468. But see Pigeon J. dissenting in *Ernewein v. M.E.I.* (1980), 103 D.L.R. (3d) 1, on a different point, stated after quoting this passage from *Fuentes*: "I have grave doubts as to the correctness of this decision which, in effect, denies to refugees the rights contemplated in the Convention. . . ." (at p. 17).

¹³⁴ In a concurring judgment in *Daniels v. The Queen*, *supra*, footnote 128, at p. 23, Pigeon J. *Ernewein v. M.E.I.*, *ibid.*, at p. 17, Pigeon J. (dissenting). And see *Re Arrow River & Tributaries Slide & Boom Co. Limited*, *supra*, footnote 117, in which two of the

courts will interpret domestic implementing legislation in conformity with a convention insofar as the domestic legislation permits. There is no doubt in Canada that where the domestic legislation cannot be given a possible meaning in conformity with the treaty it is the domestic legislation which will take effect.¹³⁵

In some Canadian cases, as in some British cases,¹³⁶ there is a tendency to then move beyond the idea that domestic legislation where unambiguous must take effect over inconsistent terms of a treaty. The suggestion is added that only domestic legislation appearing on its face, as ambiguous prior to consideration of the treaty, will permit consideration of the treaty as an aid to construction.

In *Schavernoeh v. Foreign Claim Commission et al.*¹³⁷ the Supreme Court considered regulations¹³⁸ promulgated under the Appropriation Act No. 9¹³⁹ which the court accepted "were an implementation of the Agreement"¹⁴⁰ between Czechoslovakia and Canada in 1973. The Agreement provided for the receipt of a sum of money in return for the release of all claims by Canadians against Czechoslovakia by reasons of actions taken prior to the date of the Agreement. The "purpose of the Regulation was to implement a plan for the distribution" of the Fund established upon receipt of the monies under the Agreement. Estey J. speaking for the court, said:¹⁴¹

The narrow problem which arises is whether or not the Commission or a Court reviewing the decision of the Commission may interpret the provisions of Reg. 73-681 by reference to the Agreement of 1973 or such clearly extraneous matters as the report from negotiators of the Agreement, including the Canadian Ambassador. . . . If one could assert an ambiguity, either patent or latent, in the Regulations it might be that a Court could find support for making reference to matters external to the Regulations in order to interpret its terms. Because, however, there is in my view no ambiguity arising from the above-quoted excerpt from these Regulations there is no authority and none was drawn to our attention in argument entitling the Court to take recourse either to an underlying international agreement or to textbooks or international law with reference to the negotiation of agreements or to take recourse to reports made to the Government of Canada by persons engaged in the negotiation referred to in the Regulations.

In other words the court concluded that regard could not be had to the Agreement to interpret domestic law without determination that in isolation

five judges who all concurred in the result (Smith and Rinfret JJ.) upheld the constitutionality of the provincial legislation by construing the statute so as to avoid conflict with the terms of the treaty.

¹³⁵ *Daniels v. The Queen*, *supra*, footnote 128, at p. 23, per Pigeon J.; *Capital City Communications et al. v. C.R.T.C.* (1978), 81 D.L.R. (3d) 609, at p. 631, Laskin C.J.C.

¹³⁶ *Supra*, footnote 99.

¹³⁷ (1982), 136 D.L.R. (3d) 447.

¹³⁸ Regs. SOR/73-681.

¹³⁹ S.C. 1966-67, c. 55.

¹⁴⁰ *Supra*, footnote 137, at p. 453.

¹⁴¹ *Ibid.*, at pp. 451-452.

the domestic law contained an ambiguity. This conclusion seems to have resulted from the erroneous assumption¹⁴² that this must follow from the undisputed constitutional rule that unambiguous domestic law must take priority over the terms of a treaty.¹⁴³

Although the court denied the legitimacy of interpreting domestic law by reference to the Agreement, it did in fact carefully consider the Agreement itself, finding it to be of no assistance in interpreting the regulations.¹⁴⁴ The court also seemed to differentiate between the acceptability of referring to the Agreement and referring to the "clearly extraneous matters" which were presented, in this situation where the Agreement itself was unambiguous.¹⁴⁵

It is unfortunate the court did not appear to have before it the case of the English Court of Appeal in *Benin v. Whimster* with which it appears to be clearly inconsistent.¹⁴⁶ This case concerned interpretation of an order-in-council¹⁴⁷ which was made in order to implement an Agreement between the United Kingdom and Egypt under which the Egyptian Government paid the United Kingdom a certain sum in settlement for certain claims of compensation. The order-in-council provided for the distribution of the sums received under the Agreement. The Court of Appeal, in construing the meaning of the order-in-council stated:¹⁴⁸

It is very material to turn to that Agreement: because the Order-in-Council must be construed so as to give effect to it. . . . It is clear, therefore, that when the United Kingdom Government has come to a treaty or Agreement or Convention with a formed Government, and afterwards a statute or Order-in-Council is made to implement it, it is of the first importance that they should be construed together and both given the same meaning and effect. I turn therefore to the Agreement of 1971 which preceded the Order-in-Council.

¹⁴² See *supra*, at pp. 288-289.

¹⁴³ "Nowhere . . . is there any clear principle enunciated that in these circumstances international law somehow overrides or imposes its interpretations on validly enacted domestic law. . . . There is, as I have said, no ambiguity, latent or patent, in the terminology of the Order-in-Council as regard to the appellant's claim. There is therefore no authority for a court to adopt other than the plain meaning of the words used . . . in these Regulations." *Supra*, footnote 137, at p. 454.

¹⁴⁴ *Ibid.*, at pp. 453-454.

¹⁴⁵ *Ibid.*, at p. 452. But note that use of travaux préparatoires in a case where consideration is properly given to an international convention is an accepted principle of treaty interpretation. See: Vienna Convention on the Law of Treaties, art. 32. *Fothergill v. Monarch Airlines Ltd.*, [1980] 3 W.L.R. 209; Crawford (1980), 51 Br. Y. Int. L. 316. Note with respect to the dangers of failure to consider the travaux préparatoires *Quazi v. Quazi*, *supra*, footnote 100, and note by Crawford (1979), 50 Br. Y. Int. L. 32.

¹⁴⁶ *Supra*, footnote 100.

¹⁴⁷ The Foreign Compensation (Egypt) Order 1971.

¹⁴⁸ *Supra*, footnote 100, at pp. 308-309.

Schavernoeh, however, suggests¹⁴⁹ in contrast then to some British cases,¹⁵⁰ that reference to a treaty to interpret domestic legislation even in the context of implementing legislation can only be had if there is found to be an ambiguity in the domestic legislation when considered alone. On the other hand, substantial use was made of the Agreement in *Schavernoeh* despite the rigidity of the ruling, and there are other cases which consider treaties in the context of implementing legislation which make no pronouncement about the necessity of finding an ambiguity looking to the domestic legislation in isolation.¹⁵¹

Hence, although there is little direct consideration of the issue, cases such as *Schavernoeh* tend to support the proposition, that in Canada, in the context of implementing legislation, an ambiguity must first be established before the treaty becomes relevant as an aid to interpretation.

(b) *Unincorporated Conventional Law.*

In the absence of implementing legislation the presumption that Parliament and the legislatures do not intend to legislate in violation of Canada's treaty obligations still operates.¹⁵² Accordingly wherever possible, statutes are not to be interpreted as violating international conventional law, even in the absence of domestic legislation passed to give effect to the treaty. In this context, however, the constitutional rule, that without implementing legislation the treaty is not part of domestic law, will suggest that a stronger need for having recourse to international conventional law will have to be established.¹⁵³ This greater need may take the form of a definite requirement that ambiguity be established by looking at the domestic law on its own. Such an artificial barrier though, particularly in cases where domestic legislation is in "an area of the law", where Canada has accepted international obligations,¹⁵⁴ especially if applied too rigidly, might serve to restrict the appropriate reach of the presumption.

There tend to be few cases on point where Canadian courts have made use of unincorporated treaties in interpreting domestic legislation. The opportunities to do so have undoubtedly been restricted by the reluctance of counsel to utilize international conventional law in argument. Hence, generalizations about the use the courts have made of the notion of establishing an ambiguity before considering the treaty are difficult to make, although clearly if the *Schavernoeh* approach prevails in the context

¹⁴⁹ See also: *Composers, Authors and Publishers Association v. C.T.V. Television Network et al.*, *supra*, footnote 128, at p. 682.

¹⁵⁰ *Supra*, footnote 100 and compare with footnote 99 and accompanying notes.

¹⁵¹ See for example, *R. v. Kupiyana*, *supra*, footnote 128, and see Emmanuelli and Slosar, *op. cit.*, footnote 128, at p. 79.

¹⁵² See *supra*, at pp. 289-290.

¹⁵³ See *supra*, at pp. 290-291.

¹⁵⁴ See *Pan-American World Airways v. Department of Trade*, *supra*, footnote 92.

of incorporated treaties, it is all the more likely to dominate in the context of unincorporated treaties. One case which takes up the *Schavernoeh* approach is *Capital Cities Communications v. Canadian Radio-Television and Telecommunications Commission*.¹⁵⁵ In *Capital Cities* Laskin C.J.C., speaking for five other members of the court stated that he would not consider the Inter-American Radio Communications Convention 1937 in interpreting the Broadcasting Act, which did not implement the Convention, stating "I do not find any ambiguity that would require resort to the Convention . . .".¹⁵⁶

Human rights treaties specifically have been considered in a number of lower court decisions. Generally, the use of international human rights conventions binding on Canada by Canadian courts stands in contrast to the British courts' use of the European Convention on Human Rights.¹⁵⁷ Sometimes the cases tend to ignore any benefits which might be gained from using the treaties as aids to statutory interpretation, not explicitly on the grounds that no ambiguity appears in the legislation, but on the basis that an unincorporated treaty is of no possible legal effect. As Pigeon J. stated in dissent in *Capital Cities*,¹⁵⁸ this is an oversimplification, and in fact is clearly at odds with the presumption that Parliament and the legislatures do not intend to breach Canada's international obligations. Thus, in the case of *A.G. Canada v. Stuart*¹⁵⁹ the Federal Court of Appeal refused to consider the Convention on the Elimination of Discrimination against Women (article 11) in interpreting the Unemployment Insurance Act stating:¹⁶⁰

The effect of Canada's signature to this Convention is that Canada undertakes to do things provided for in the Convention. The Convention cannot be used by this Court in construing and interpreting sections of the Unemployment Insurance Act particularly in cases where a definitive interpretation has been made by the Supreme Court of Canada.

The case may, however, be understood as rejecting the usefulness of the treaty where prior case law indicates what is, in the court's view, the only possible interpretation of the Act.¹⁶¹

In *Re Dixon and Manitoba Labour Board et al.*¹⁶² the Manitoba Court of Queen's Bench rejected the contention that the Manitoba Labour Rela-

¹⁵⁵ *Supra*, footnote 118.

¹⁵⁶ *Ibid.*, at p. 631; Pigeon in dissent, said in contrast "it is an over-simplification to say that treaties are of no legal effect unless implemented by legislation", [1978] 2 S.C.R. 141, at p. 188.

¹⁵⁷ See *supra*, at pp. 312-314.

¹⁵⁸ *Supra*, footnote 118.

¹⁵⁹ (1982), 137 D.L.R. (3d) 740 (F.C.A.).

¹⁶⁰ *Ibid.*, at pp. 748-749.

¹⁶¹ In the view of the court the *Bliss v. A.G. Can.*, [1979] 1 S.C.R. 183, and *Stuart* cases were "indistinguishable". *Supra*, footnote 159, at p. 9.

¹⁶² (1982), 127 D.L.R. (3d) 752.

tions Act 1972¹⁶³ was *ultra vires* as contrary to the right to freedom of association. The court also said, however, that the Covenant on Civil and Political Rights did not "have the force of law in the Province of Manitoba",¹⁶⁴ another "oversimplification" of the role of international law in interpretation of domestic law.

On the other hand, in *Re Alberta Union of Provincial Employees et al. and the Crown in Right of Alberta*¹⁶⁵ the Alberta Court of Queen's Bench considered the International Covenant on Economic, Social and Cultural Rights, and the International Labour Organization Convention No. 87 concerning the Freedom of Association and Protection of the Right to Organize. It did so in the context of determining whether the Public Service Employees Relations Act was contrary to international law as infringing the right to strike with respect to public servants. The court found that the Act was not "contrary to international conventional law"¹⁶⁶ because it held international conventional law did not provide the right to strike in the public service. The decision presents a serious consideration of the requirements of international law, clearly acknowledging their potential relevance in the interpretation of domestic law.¹⁶⁷

With respect to the Charter itself at least one case has already considered Canada's international conventions in the course of its decision. In the *Queen v. Cameron*¹⁶⁸ MacDonald J. referred to article 9(3) of the International Covenant on Civil and Political Rights¹⁶⁹ in determining that there had been no violation of the right of the accused under section 11(b) of the Charter "to be tried within a reasonable time".¹⁷⁰ No mention was made of establishing an ambiguity before considering international conventional law. Lord Wilberforce's statement in *James Buchanan & Co. Ltd v. Babco Forwarding and Shipping Ltd*¹⁷¹ that "... the inherent flexibility of the English . . . language may make it necessary for the interpreter to have

¹⁶³ C. 75 (C.C.S.M., c. 1-10).

¹⁶⁴ *Supra*, footnote 162, at p. 760.

¹⁶⁵ (1981), 120 D.L.R. (3d) 590.

¹⁶⁶ *Ibid.*, at p. 621.

¹⁶⁷ Note that the court took into account in determining the substance of international law the interpretations of international law made by an expert international decision-making body, here the International Labour Organization's Freedom of Association Committee. (*Queen v. Cameron*, Alberta Queen's Bench, File No. 8001-C-0947, Aug. 17th, 1982). See for the potential relevance of interpretation of treaty by international bodies with respect to the European Convention on Human Rights: *A-G v. B.B.C.*, *supra*, footnote 109, per Lord Scarman; *R. v. Secretary of State for Home Affairs*, *ex. p. Hosenball*, *supra*, footnote 111, per Lord Denning M.R.; *R. v. Bd. of Visitors of Hull Prison*, *ex. p. St. Germain*, *supra*, footnote 111, per Cumming-Bruce L.J.

¹⁶⁸ *Ibid.*

¹⁶⁹ McDonald, J. also referred to the European Convention on Human Rights.

¹⁷⁰ *Supra*, footnote 168.

¹⁷¹ *Supra*, footnote 100, at p. 1052; and see that footnote and accompanying notes.

recourse to a variety of aids. There is no need to impose a preliminary test of ambiguity" would appear likely to be considered appropriate in the context of the Charter itself.¹⁷²

(c) *Conventional International Law to which Canada is not a Party.*

There is a third possible context in which international conventional law may affect the interpretation of domestic law, namely in relation to international conventions to which Canada is not a party. The use of norms culled from such non-binding international law is analagous to our courts' consideration of decisions of courts of other states to interpret domestic law.¹⁷³ The helpfulness of such non-binding international conventions also stems from the fact that Canadian international conventions, such as the Covenant on Civil and Political Rights, have been drafted in very similar language to these non-binding conventions, and in similar international forums as these conventions. And in fact in the short time in which the Charter has been in force, at least three cases have already referred to the European Convention on Human Rights: *The Queen v. Cameron*,¹⁷⁴ *The Queen v. McGregor*¹⁷⁵ and *Que. Assoc. of Protestant School Boards v. A.G. Quebec*.¹⁷⁶ In *The Queen v. McGregor* mention was made by Charles J. of Britain's subjection to the European Convention.¹⁷⁷ In *Wing Woo* use was made of the European Convention and cases decided by the European Court of Human Rights: Deschênes C.J. considered the Convention and its jurisprudence relevant in determining whether the means set out in Quebec's Bill 101 constituted a "reasonable" limit on section 23 of the Charter within the scope of section 1 of the Charter.¹⁷⁸

3. *Conventional International Law and the Case of the Charter.*

As previously noted, Canada has ratified a number of human rights treaties,¹⁷⁹ among the most important and comprehensive are: The Interna-

¹⁷² See with respect to rules of treaty interpretation, and appropriate use of the travaux préparatoires: *supra*, footnote 145 and Vanek, *op. cit.*, footnote 29, at p. 289; *Re Noble and Wolfe*, [1948] 4 D.L.R. 123, at p. 135 (Ont. H.C.) (use of minutes of drafting committee).

¹⁷³ See for the use of international human rights law as simply a guide to interpreting federal and state civil liberties and civil rights law in the United States "in the same way that they refer to legislative history": Human Rights Advocates, *International Human Rights Law: What it is and How it Can be Used in State and Federal Courts* (1982), pp. 6, 49-55.

¹⁷⁴ *Supra*, footnote 168.

¹⁷⁵ Provincial Court (Criminal Division) Judicial District of York, Aug. 30th, 1982.

¹⁷⁶ (1982), 40 D.L.R. (3d) 33 (S.C.).

¹⁷⁷ Charles J. added, "and its Five Protocols" (at p. 9). Britain however, has not ratified the Fourth Protocol.

¹⁷⁸ *Supra*, footnote 176, at pp. 72, 73, 82.

¹⁷⁹ See *supra*, footnote 80.

tional Covenant on Civil and Political Rights, The International Covenant on Economic, Social and Cultural Rights, The Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women.¹⁸⁰ By ratification of these human rights treaties Canada is obligated to implement these conventions in areas within both federal and provincial jurisdiction.¹⁸¹ As a result, federal policy, in the case of these human rights conventions which clearly require implementation at both federal and provincial levels, has been to consult with the provinces prior to accession.

As pointed out in the earlier part of this article, the Charter reflects the development of international human rights law and those international human rights obligations. In what way more precisely then, can conventional international human rights law be used to understand and interpret the Charter?

There are three possible uses of conventional international law in the interpretation of the Charter. They are: (a) consideration of the Charter as in part implementing legislation of Canadian human rights conventions, (b) interpretation of the Charter using unincorporated Canadian human rights conventions, and (c) interpretation of the Charter using non-binding international human rights conventions.

The first use of Canadian international human rights conventions in interpretation of the Charter involves the possible determination that parts of the Charter may be "implementing" legislation, provisions whose purpose is to fulfill Canada's international obligations under a particular convention. There is, however, no express reference¹⁸² to the conventions in the Charter or express declaration in the Charter that it was enacted in implementation of any of the conventions. If one can confine the restrictions suggested in *MacDonald v. Vapour*¹⁸³ Canadian courts might be encouraged to adopt the United Kingdom approach which, in the absence of a federal-provincial jurisdictional issue, is clearly not to require express

¹⁸⁰ The obligations Canada undertook under these conventions is somewhat different in nature depending on the precise words used. Comp. The Civil and Political Covenant, art. 2(1), 2(2), The Economic Covenant, art. 2(1), The Convention on Discrimination Against Women (for ex.), art. 2.

¹⁸¹ The Civil and Political Covenant, art. 50, and the Economic, Social and Cultural Covenant, art. 28, are particularly concerned to make this clear by explicitly extending their provisions to "all parts of federal States without any limitation or exception".

¹⁸² The only *express* reference to international law is in s. 11(g). S. 11(g) explicitly incorporates international law as a standard. (For commentary see: Tarnopolsky and Beaudoin (eds), *op. cit.*, footnote 1, Protection upon Arrest or Detention and Against Retroactive Penal Law, by Chevrette, pp. 328-329.) See as well the extensive reference to international law in the proceedings of the joint Senate-House Committee on the Constitution.

¹⁸³ *Supra*, footnote 122. Confinement refers to the context of determining federal-provincial jurisdiction.

statutory reference to the convention; rather it is to consider the words of the domestic provision and of the convention¹⁸⁴ together with extrinsic evidence¹⁸⁵ in order to determine whether the purpose of the enactment was to implement the convention or give it legal effect in domestic law.¹⁸⁶ The appropriate question for our courts to ask therefore, is whether a provision of the Charter was included in order to give effect to Canada's international obligations.¹⁸⁷ If a provision is thus found to be implementing international law the presumption that Parliament and the legislatures do not intend to breach Canada's international obligations suggests that the court may look to the treaty as part of the process of interpreting the domestic language. (*Schaverno*¹⁸⁸ would suggest the necessity of finding an ambiguity looking at the domestic legislation in isolation before such reference is permissible.)

On this approach then, an example of what might be considered to be implementing legislation is part of section 15. Section 15(1) states:

Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law *without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.* (Italics added)

Article 26 of the Covenant on Civil and Political Rights states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against *discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status.* (Italics added)

The open-endedness embodied in section 15(1) with respect to the possible grounds of discrimination was introduced¹⁸⁹ as a result of representations made to the Hays-Joyal Committee specifically on the basis of Canada's obligations under the Civil and Political Covenant.¹⁹⁰ Consequently, the

¹⁸⁴ Identical language is not however necessary: see *Post Office v. Estuary Radio Ltd*, *supra*, footnote 91, at p. 682; *The Jade, the Escherchein*, *supra*, footnote 91, at p. 924; *The Annie Hay*, *supra*, footnote 91, at p. 664.

¹⁸⁵ *Salomon v. Commissioners of Customs and Excise*, *supra*, footnote 47.

¹⁸⁶ See discussion, *supra*, at pp. 310-311.

¹⁸⁷ See for example, *Salomon v. Commissioners of Customs and Excise*, *supra*, footnote 47; *Post Office v. Estuary Radio Limited*, *supra*, footnote 91; *Rio Tinto Zinc Corporation and others v. Westinghouse Electric Corporation*, *supra*, footnote 91; *The Annie Hay*, *supra*, footnote 91.

¹⁸⁸ *Supra*, footnote 137.

¹⁸⁹ S. 15(1) in the 1980 Proposed Resolution before the Hays-Joyal Committee stated: "Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex."

¹⁹⁰ Fairweather, Chairman, Canadian Human Rights Commission, 5:8; Humphrey, President, Canadian Human Rights Foundation, 11:28; Canadian Bar Association Submission to the Hays-Joyal Committee Study on the Charter and the Covenant, Nov. 1980.

presumption that Parliament and the legislatures do not intend to breach Canada's international obligations can be brought to bear to assist, in case of doubt, in interpreting section 15(1) to mean that the grounds of discrimination therein set out are only exemplary. Any ground of discrimination can potentially serve as a basis for a determination that there is an inequality within the meaning of section 15. The Covenant also suggests other grounds which can come within section 15(1) such as political or other opinion, illegitimacy, and marital status.

Another example of what might be construed as implementing legislation is section 24. Section 24(1) of the Charter states:

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The Civil and Political Covenant, article 2(3), states:

Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedies; . . .

Section 24 was added¹⁹¹ to the proposed resolution which was before the Hays-Joyal Committee upon specific representation by the Canadian Bar Association that the omission of such a remedy provision was contrary to the Civil and Political Covenant article 2(3)(a).¹⁹² Section 24(1) bases the availability of remedies upon what the court in its discretion finds to be appropriate and just. The question of interpretation will arise: when is a court to consider the circumstances appropriate and just? What kinds of considerations ought to guide the exercise of their discretion? Gibson suggests for instance, the consideration of the existence of alternative remedies.¹⁹³ It might further be asked what kind of equitable considerations should play a part in determining what is appropriate and just? Understanding section 24(1) as intended to give effect to the Civil and Political Covenant, and presuming Parliament and the legislatures to have intended not to breach their international obligations, one could reach the following conclusion. A wide scope for discretion as to whether a remedy should or should not be granted where rights have been infringed or denied is clearly inappropriate. This follows (a) because the Civil and Political

¹⁹¹ This might be more appropriately put, as "reinstated", since a similar provision had been in an earlier draft. See: the Constitutional Amendment Bill, June, 1978, s. 24.

¹⁹² 15:20; Canadian Bar Association Submission to the Hays-Joyal Committee Study on the Charter and the Covenant, Nov. 1980.

¹⁹³ Tarnopolsky and Beaudoin (eds), *op. cit.*, footnote 1, Enforcement of the Canadian Charter of Rights and Freedoms (section 24) by Gibson, p. 494.

Covenant states that remedies *shall* be available and (b) that what is appropriate and just is the provision of an *effective* remedy.

Hence, the first way by which Canada's international human rights conventions might be used in interpreting the Charter is by the means of a determination that some of the Charter's provisions are intended to implement provisions of Canada's human rights conventions.

The second manner, and potentially most significant, by which conventional international law may affect interpretation of the Charter, is in the context of the possible use of unincorporated Canadian conventions. Although an unincorporated treaty is not part of the law of the land, there is still a presumption that Parliament and the legislatures do not intend to legislate in violation of Canada's treaty obligations.¹⁹⁴ It is in this context that British courts have made use of the European Convention on Human Rights.¹⁹⁵ The use of this presumption to construe the Charter as far as its language permits, in conformity with Canada's international obligations, ought to be even more significant than its use in the context of the European Convention on Human Rights by British courts. Here, we have comprehensive human rights legislation, as opposed to isolated statutes touching human rights matters, and which was enacted after the fairly recent assumption of international obligations under major human rights conventions. In addition, the similarity, in certain areas in particular, of subject matter and of language ought to make the presumption that Parliament and the legislatures did not intend to breach Canada's treaty obligations under the Conventions a significant tool of interpretation. The preliminary hurdle of finding an ambiguity in the domestic law while examining it in isolation of any convention has been invoked in Canada¹⁹⁶ occasionally in very rigid fashion, presumably to protect the sovereignty of Parliament from the powers of the executive.¹⁹⁷ Such a hurdle has not, however, precluded the British courts from utilizing the European Convention on Human Rights in domestic interpretation. In the context of the Charter, where considerable difficulty of interpretation will arise, and the conventions are potentially helpful, it would seem justifiable for our courts to lean against a narrow application of the ambiguity requirement and in favour of having recourse to these aids.¹⁹⁸

The following are a number of examples of the usefulness of the conventions as aids to interpretation, introduced in accordance with the presumption of conformity with Canada's international obligations.

¹⁹⁴ See *supra*, at p. 298.

¹⁹⁵ See *supra*, at pp. 289-291.

¹⁹⁶ See *Schavernoich, supra*, footnote 137 and accompanying notes.

¹⁹⁷ See *supra*, at p. 285.

¹⁹⁸ See *James Buchanan & Co. Ltd v. Babco Forwarding and Shipping (U.K.) Ltd, supra*, footnote 100, at p. 1052, per Lord Wilberforce.

Section 1 of the Charter states:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In the Civil and Political Covenant limitations to rights are defined within each section rather than in a general overall clause. But some rights are explicitly defined as non-derogable in times of public emergency threatening the life of the nation (the existence of which is officially proclaimed).¹⁹⁹ These rights include:²⁰⁰ article 6 (the right to life), article 7 (freedom from torture, or cruel, inhuman or degrading treatment or punishment), article 15 (retroactive criminal offences,²⁰¹ including the right to benefit from lighter penalties) and article 18 (freedom of thought, conscience and religion). The fact that derogation from these rights is not to be permitted in times of emergency suggests that a very limited scope as to what constitutes a "reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society" ought to be applied to proposed restrictions of these rights.²⁰²

Another example of the potential usefulness of the conventions as unincorporated conventional international law, in accordance with the presumption of conformity with treaty obligations, is section 2(d) of the Charter. Section 2 states:

Everyone has the following fundamental freedoms:

(d) Freedom of association.

Article 22(1) of the Civil and Political Covenant states:²⁰³

Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

Canada has also ratified the International Labour Organization Freedom of Association and Protection of the Right to Organize Convention, 1948.²⁰⁴

¹⁹⁹ Art. 4(2).

²⁰⁰ The rights stated here are the only ones which resemble rights in the Charter.

²⁰¹ Explicit recognition of the ability to try and punish persons for acts which were criminal according to general principles of law recognized by the community of nations is made in art. 15(2).

²⁰² Reference having been made to art. 4(2) of the Civil and Political Covenant and to the importance of the Charter complying with the Covenant, Mr. Tassé, Deputy Minister of Justice, said in the Hays-Joyal Committee (3:28-29): "Mr. Robinson, I would think that in effect the courts will read this as an objective test that is being spelled out in Section 1 in that in effect they would have to address their mind as to whether the restrictions that are being challenged before the courts are generally acceptable ones in a democratic society. I think in coming to that conclusion it would be quite legitimate for them to look at the International Covenant and see whether in the kind of society that we live that is the kind of restrictions that are being challenged and are before the Courts and should stand as a legitimate and justifiable restriction."

²⁰³ See restrictions in art. 22(2), 22(3).

²⁰⁴ March 23rd, 1972. See Kaplansky, *op. cit.*, footnote 11a, for a review of Canadian policies and legislation in response to I.L.O. Conventions.

Recourse to Canada's international obligations should encourage an interpretation of freedom of association that protects the vitality of trade unions.

Section 28 of the Charter states:

Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Section 15(2) of the Charter states:

Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Article 4(1) of the Convention of the Elimination of All Forms of Discrimination Against Women states:

Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in this Convention, but shall in no way entail, as a consequence, the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

The convention helps to clearly reject any possible suggestion made upon reading section 28 and section 15(1) of the Charter together, that the words of section 28 "Notwithstanding anything in this Charter" deny the constitutionality of affirmative action programs with respect to women.²⁰⁵

Section 11 of the Charter states:

Any person charged with an offence has a right

- (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Article 15(1) of the Civil and Political Covenant states:

No one shall be guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. *If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.* (Italics added)

The covenant provision which is clearly broader in its extension of the right to benefit from a lesser penalty, suggests that the "time of sentencing" in section 11(i) ought to be broadly construed to mean the determination of the final appeal as to sentence.

The second way then by which international conventions can be utilized in interpreting the Charter, where a convention clearly is not implemented by the Charter, is as an aid to resolving ambiguities in accordance with the presumption that Parliament and the legislatures do not intend to breach Canada's international obligations.

²⁰⁵ See for other arguments in rejection of this suggestion: Tarnopolsky and Beaudoin (eds), *op. cit.*, footnote 1, *The Equality Rights*, by Tarnopolsky, p. 437.

The third context by which international conventional law may be used in the interpretation of the Charter is with respect to non-binding international human rights conventions. Much of Canadian legal tradition is inherited from the United Kingdom which itself is a party to the European Convention on Human Rights.²⁰⁶ As well as being applicable to a state with a similar legal heritage, the potential usefulness of the European Convention on Human Rights arises from the fact that the system associated with the European Convention produces judicial decisions on its meaning and content.²⁰⁷ The legitimacy of reference to a non-binding international convention is suggested by similar use Canadian courts have made of judicial decisions of United States courts.²⁰⁸

One primary example of its potential assistance in interpreting the Charter is in relation to section 1. Section 1 of the Charter defines acceptable limitations in terms of what can be demonstrably justified in a free and democratic society. The European Convention on Human Rights in articles 8 to 11 uses the phrase "necessary in a democratic society". It is unlikely that the Charter's unusual language "demonstrably justified" is appreciably different in impact from "necessary". The words both require judges to consider the reasons for the imposition of a restriction and to evaluate their adequacy for themselves.²⁰⁹ Further, the words "demonstrably justified" as qualified by the phrase "in a free and democratic society" suggests the practice with respect to the European Convention on Human Rights may be relevant. Under the European Convention on Human Rights the understanding of "necessary in a democratic society" involves looking to the practices of other democratic societies or systems of law within the ambit of the Council of Europe. As Jacobs notes, ". . . if other systems manage without such a restriction, it can hardly be said to be 'necessary in a democratic society'".²¹⁰

²⁰⁶ See with respect to the effects of the European Convention on Human Rights on the United Kingdom and the Canadian implications: Bayefsky, *The Impact of the European Convention on Human Rights in the United Kingdom: Implications for Canada* (1981), 13 *Ottawa L. Rev.* 507 and generally: Dale, *Human Rights in the United Kingdom—International Standards* (1976), 25 *Int. L. Comp. L.Q.* 292; Duffy, *op. cit.*, footnote 104; McCough, *op. cit.*, footnote 113.

²⁰⁷ See with respect to the operation of the European Convention on Human Rights: O'Boyle, *Practice and Procedure under the European Convention on Human Rights* (1980), 20 *Santa Clara L. Rev.* 697.

²⁰⁸ See *supra*, at p. 301.

²⁰⁹ Under the European Convention on Human Rights, in interpretation of acceptable restrictions on rights, the issue becomes in whose view is the restriction necessary, the government's or the court's? And assuming it is the latter, how carefully will the court investigate the reasons put forward by the government as establishing the necessity for the restrictions? See Morrison, *Margin of Appreciation in European Human Rights Law* (1973), 6 *Rev. Droits de l'homme* 263.

²¹⁰ Jacobs, *The European Convention on Human Rights* (1975), p. 197. And see Vegleris, *Valeur et Signification de la Clause "Dans une Société Démocratique"* Dans la *Convention Européenne des Droits de l'homme* (1962), 2 *Rev. Droits de l'homme* 219.

In these ways, international conventional law can be utilized by our courts in interpreting the Charter. The capacity, however, of such conventional law for assistance should not be exaggerated. International conventions are drafted in political forums which tend to encourage textual ambiguities since these might better satisfy competing political interests.²¹¹ More particularly in a human rights context, defining rights in the international as well as the national context will also require balancing conflicting rights and hence international human rights conventions may not themselves provide clear resolutions to a domestic Canadian debate over values and priorities. Nevertheless, their potential for assistance in some circumstances, along with the properly understood role of domestic courts in having recourse to conventional international law, should clearly be recognized.²¹²

III. *Concluding Observations.*

It is now possible to draw some conclusions from the above analysis. If these are set out as a series of propositions, putatively and more or less hopefully, it is because they will reflect an ambivalence inevitably associated with the risks of prediction.

1. The Canadian Charter while "Canadian" in every sense of the word—and there were many of them in the great debate—nevertheless is a fusion of old "classical liberties" and new "human rights" representing contrasting political generations, social styles and cultures, and shifting ideologies. To that extent while the temptation to interpret the Charter within the compass of its own language and history will be very inviting, to yield to that approach would be denying the inherently "multi-cultural" sources of the Charter's legal and political syntax.
2. The effect of these international-multi-cultural origins or parallels in some important sections of the Charter language will inevitably require methods of interpretation familiar to the very sources from which this language arose. And here the international law tradition with its heavy reliance upon "*travaux préparatoires*" stands in contrast to the tentative and reluctant Canadian attitudes to materials outside the mainstream habits of Canadian approaches to interpretation. Of course, Laskin C.J., and Beetz J. in the *Anti-Inflation Reference*,²¹³ and Deschênes C.J. in the *Wing Woo* case,²¹⁴ demonstrated how issues may compel the

²¹¹ See with respect to the use of *travaux préparatoires*, *supra*, footnotes 145 and 172.

²¹² Query whether generally in addition conventional international law may be a source of public policy: *Re Drummond Wren*, [1945] 4 D.L.R. 674; *Re Noble and Wolf*, [1949] O.R. 503 (Ont. C.A.); *Noble and Wolf v. Alley*, [1951] 1 D.L.R. 321; *Bhadauria v. The Board of Governors of the Seneca College of Applied Arts and Technology* (1980), 105 D.L.R. (3d) 707, at pp. 713-714; *Brown v. Gow* (1961), 29 D.L.R. (2d) 673; *Blathwayt v. Cawley*, [1976] A.C. 397; See Claydon, *op. cit.*, footnote 31, at pp. 748-749.

²¹³ [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452.

²¹⁴ *Supra*, footnote 176.

integrity of a wider search for meaning than internal language often can provide when isolated or restrictively viewed. The prospects of a broadening, therefore, of materials used to assist with the interpretation of the Charter are very heady. But there is little likelihood of any early and increased dissociation from the traditional Canadian hesitancy in its approach to "extrinsic" materials in constitutional interpretation.

3. Nevertheless a probable consequence of any multi-national-transcultural-international approach to patterns of interpretation, and the technical familiarity it will bring in the use of United Nations materials and other "*travaux préparatoires*", may very well be to broaden Canadian theories of constitutional and statutory interpretation, more generally. In short, once familiarity with this interpretive technique evolves to some level of disciplined sophistication, it could have a pervasive effect upon the whole of the national judicial approach towards the parliamentary process and its diverse progeny—Constitution, statutes, delegated legislation and the rest.
4. This assumption of a changing approach to interpretation, if it is correct, is likely to alter the attitudes of Canadian courts toward all other international instruments in cases: where they have been specifically implemented through a schedule in a statute; where they have been referred to in an Act without being scheduled; where the statute or delegated legislation concerned refers by implication or indirectly to a specific "Agreement"; or where, even without any such reference it is evident that some international instrument was involved that led to the substance of the statute or order concerned. In all of these cases it is improbable that the reserve shown so far by Canadian courts—generally requiring, as set out in Part II, "ambiguities" in the statute or order in council, regulations, and so on, concerned, before admitting the propriety of a reference back to the Agreement involved—will continue in its present form. The British model will be tempting to follow and the exemplary language of Lord Scarman, Lord Wilberforce and Lord Denning referred to above, may become launching platforms for Canadian arguments now strengthened by a more generalized admission of international materials because the Charter has taught the Canadian profession the value and, indeed, the necessity for so doing.
5. With respect to "customary international law" or "general principles of international law", the "adoption" or "incorporation" theories may come to have less and less significance as a necessary and formal rationale for taking account of some identifiable international law principle. This is, of course, a more difficult matter than the interpretation of conventional international instruments (in any hierarchy from formal treaties down to exchanges of notes or memoranda of intent and so on). As indicated, the Bench and Bar, however, are likely to move more readily in this direction of referring to customary law—general principles—given the impetus of the Charter and the interpretation

techniques developing in the course of its day to day application in Canada. Of course customs, *opinio juris*, general principles, consensus, state practice, even *jus cogens*, are all subject to the problems of ascertaining their existence and weighing their credibility. Hence it will not be surprising if the rate of professional change in this area will be seen to shift more slowly than in the treatment of conventional international law in those cases directly or indirectly touching on Canadian legislation, however defined. Some of these difficulties might have been lessened for the future if a modern Canadian Constitution had stated, in some acceptable form, that "international law was part of the law of Canada"—as does the Constitution of the Federal Republic of Germany, along with a number of other states that have adopted a similar "basic law" approach.

6. With the strong language of the United Nations Covenants, the European Convention and the Universal Declaration, as guidelines to meaning, "legal rights" in articles 7-14 for example, are likely to be defended against attempts to favour some tilt toward police powers—even at a time of high urban crime and chronic violence in custodial institutions. Of special Canadian interest, although not influenced by the Covenants, is the "tainted evidence" doctrine now specifically, if somewhat ambiguously, articulated in the Charter, and likely to find fertile ground for debate and development under the new regime of article 24(2).
7. Many substantial problems face the various federal and provincial authorities in: 1) bringing existing legislation into conformity with Charter obligations, standards and so on; and 2) systematically determining which (already ratified) treaties, conventions and so on, have yet to be fully or adequately implemented, federally and provincially; and 3) deciding which human rights instruments so far unsigned or unratified, or both, should be re-examined for possible acceptance by Canada. Examples may be found in some of the provisions of both Covenants and the 1979 International Convention Against the Taking of Hostages, signed in 1980 but not ratified. So comprehensive a programme as the above may require "crash programmes" for the more urgent statutory or subordinate legislative changes required by this Charter. Nevertheless, complexity and delay will be present in trying systematically to survey the totality of federal and provincial legislation affected by all the human rights instruments to which Canada is a party and to determine whether these are within, or are reflected by, the Charter. Finally, this federal-provincial programme of legislative changes and administrative accommodation will also be confronted by court decisions that may alter proposed amendments and so on, in a given case even before the new drafts have been completed or begun.
8. An unexpected dividend from the Charter relationship to international law, as described above, will be perhaps the broadening interest of the

Bar and the Bench in public international law more generally because, linked to the Charter, it will suddenly appear to be a "bread and butter" subject—as with "international business transactions"—in the years of litigation ahead. If the Charter is not artificially isolated from its varied international roots, then the Bar will be compelled to undertake the continuing exercise of footnoting arguments from the world of the United Nations and European Human Rights systems, and doubtless from elsewhere as well, as these arise and multiply. One curious result may well be that the most severely fought Canadian constitutional battle of recent times, perhaps the most bitter since Confederation, should have as one of its more important consequences the intellectual and technical linking of the Canadian and world legal systems. Through common or similar human rights documents these systems will now share values, and language to express those values. Shared, too, will be an evolving jurisprudence from many regional and national sources. In this context the civil law of Quebec may find fresh support and political comfort from participating in a Charter that is not a mono-cultural Anglo-Canadian document, but one that reflects the times and the world more generally. French Canada will now have a sense of a European and civilian contribution to the Charter that might have been denied it by any artificial and inaccurate over-emphasis on its Britannic origins.

Over fifteen years ago it was suggested that there was some danger of the international human rights movement becoming a "catchall" for every social grievance and thus losing the trenchant character of its original and disciplined definition. That concern was expressed before the final versions of the two United Nations Covenants were completed and before experience with the European Convention had reached relative maturity. But clearly one great advance has been to place social, economic and cultural rights on the same level of human claims, if not of state obligations, that classical civil liberties and political rights already had established for themselves in many instruments and systems. While it may be argued that the Canadian Charter is deficient in the specifics with which it purports to implement the Covenant on Economic, Social and Cultural Rights—indeed most Canadian students so believe—at the same time the recognition of "collective rights" has been reinforced by the links ideologically and politically between the Charter and that Covenant. The best illustration of this will emerge as the debate over collective rights, primarily affecting Quebec and aboriginal peoples, begins to mature. To these must be added the likely use of this doctrine of collective rights by those other Canadian minority groups wishing to institutionalize the now vaguely stated claims represented by multiculturalism policy. It is now quite evident, however, that too much may be asked from the human rights family of concepts and instruments since in effect they have raised levels of expectation for the performance of governments that are profoundly altering even "free" societies through the involvement of the state in the affairs of people. The positive side of "non-discrimination", "equality of oppor-

tunity” and “decent minimums” for all, or “minimal decencies”, too, if you will, are clearly to be supported. But a final irony may be emerging, namely, that a system of international human rights law aimed at protecting and advancing social justice for the individual human being on so many fronts, also invites increasing degrees of state interference, the full implications of which have yet to be assessed. Inevitably each political culture, therefore, will be designing its own equilibrium, protecting old liberties while welcoming new rights. The coming debate over “aboriginal rights” and “property rights” will unite the “old” and the “new” in a dialectic that may influence the main direction of the Charter—the individual and the state; the individual and the “collective” in Canadian life.
