

TWENTY-FIVE YEARS OF PUBLIC INTERNATIONAL LAW AT THE SUPREME COURT OF CANADA

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The Secession Reference crowns a quarter-century of significant contributions to public international law. The Court pioneered the use of international human rights law in the interpretation of constitutional rights and freedoms. Its methodology has been adopted in other jurisdictions where constitutional instruments, like the Charter, have drawn on international models. Still, there remains some resistance in the Court to any wholesale application of international case law. Where international law has been incorporated directly, such as the Refugee Convention, the Court offers important insights into treaty interpretation. Regrettably, the Court has yet to tackle the fascinating area of customary international law.

Le renvoi sur la sécession couronne un quart de siècle de contributions au droit international public. La Cour a été une pionnière dans l'utilisation du droit international des droits de la personne pour l'interprétation des droits et libertés. Sa méthodologie a été adoptée dans d'autres pays dont les instruments constitutionnels, comme la Charte canadienne, s'inspirent des modèles internationaux. Toutefois, il existe encore une certaine résistance à une application générale de la jurisprudence internationale. Lorsque le droit international est incorporé directement - comme dans le cas de la Convention sur les réfugiés - la Cour propose des interprétations intéressantes des traités. Malheureusement, la Cour n'a pas encore abordé le domaine fascinant du droit international coutumier.

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Introduction

The new “analytical search” engine on the Supreme Court of Canada’s internet site, when questioned about “international law”, generates only two “hits” over the twelve years of reported decisions available. The first, of course, is the *Secession Reference* of 1998,¹ the second, a less celebrated 1992 case dealing with sovereign immunities.² This dismal harvest is misleading, however, for

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¹ *Reference re Secession of Québec*, [1998] 2 S.C.R. 217.

² *Re Canada Labour Code*, [1992] 2 S.C.R. 50.

over that period the Court has dealt with international law issues in a large number of cases. Most of these involve *Charter* construction and human rights norms, an area Canadian tribunals have found to be a rich reservoir of interpretative material. But the Court has also addressed several complex international law issues concerning extraterritoriality, sovereign immunity, prosecution of war crimes, treaty interpretation and the relationship between domestic and international law.

The term “international law” apparently owes its origin to Bentham, and has prevailed since then over the more ancient expression “law of nations” or *jus gentium*. The adjective “public” was added in an 1802 translation of Bentham, helpfully distinguishing the field from that of “private international law”, which we more properly refer to as “conflict of laws.”³ As a general rule, the latter regulates the application and interrelationship of domestic legislation rather than generating an autonomous normative system.⁴ However, so-called “private international law” matters may be regulated by treaty, as in the case of child abduction. There the line between public and private international law is thin indeed.

It would be misleading, however, to affirm that public international law is a law created by States. While two of the principal sources of public international law are treaties and international custom, the *Statute of the International Court of Justice*⁵ also recognizes “general principles” drawn from national legal systems. In *Finta*,⁶ the Court found that the most solid base for “crimes against humanity” was such general principles of law. In addition, the *Statute* turns to judicial decisions, including those of national courts. Thus, the Supreme Court of Canada not only applies and interprets public international law, it may also create it. There now seems little doubt that its important pronouncement on the right to self-determination in the *Secession Reference* constitutes a significant contribution to evolving law in this area. Increasingly, international tribunals cite the authority of the Supreme Court of Canada. For example, in *Barayagwiza v. The Prosecutor*,⁷ the Appeals Chamber of the International Criminal Tribunal for Rwanda referred to the Supreme Court of Canada decision in *McMartin*,⁸ dealing with admissibility of new evidence at the appeal stage. *Finta* has been considered by both the Appeals Chamber and a Trial Chamber

³ A. Pellet, P. Daillier, *Droit international public*, 6th ed., Paris: L.G.D.J., p. 37.

⁴ *Serb Loans*, P.C.I.J., Series A, Nos. 20-21, at 41-42.

⁵ *Statute of the International Court of Justice*, annex to the *Charter of the United Nations*, [1945] C.T.S. 7, as amended by (1963), 557 U.N.T.S. 143, (1965), 638 U.N.T.S. 306, [1973] C.T.S. 4 [hereinafter, statute].

⁶ *R. v. Finta*, [1994] 1 S.C.R. 701.

⁷ *Barayagwiza v. The Prosecutor* (ICTR-97-19-AR72), Decision (Prosecutor’s Request for Review or Reconsideration), March 31, 2000. A Trial Chamber of the ICTY also cited *Smithers v. The Queen*, [1978] 1 S.C.R. 506 in *Prosecutor v. Delalic et al.* (Case no. IT-96-21-T), Judgment, (16 November 1998), (1999) 38 I.L.M.57, para. 424, fn. 435.

⁸ *McMartin v. The Queen*, [1964] S.C.R. 484.

of the International Criminal Tribunal for the former Yugoslavia.⁹

Nor would it be entirely accurate to define public international law as a system regulating the affairs of nations or States. While this might have been a relatively comprehensive description some decades ago, it fails to take account of the increasingly important fields of international human rights law, international humanitarian law, and international criminal law, which aspire to the establishment of a body of norms applicable to individuals. Such elements of international law are similar in effect to national law, in that the litigation usually takes place between individuals and some public authority. The difference, when we speak of international law, is that the norms exist independently of the will of domestic legislators. The international law prohibitions of torture, slavery and genocide are international norms of *jus cogens* that no State or legislative authority may contravene.

During the *Secession Reference*, the *amicus curiae* submitted an expert opinion by University of Ottawa Law professor Yves Le Boutillier, who argued the Supreme Court was without jurisdiction to rule on a question that solely concerned international law. Section 3 of the *Supreme Court Act* defines the Court as “an additional court for the administration of the laws of Canada”,¹⁰ echoing section 101 of the *Constitution Act, 1867* which authorizes the creation of “a General Court of Appeal for Canada ... for the better Administration of the Laws of Canada.” Of course, the Court applies international law to the extent that it is also part of the “Laws of Canada.” This is especially the case with treaties that have been incorporated in domestic statutes, and with customary international law. But the Court also interprets international law, and whether or not this is *intra vires* is hardly of concern to us here. In the *Secession Reference*, the Court dismissed the argument as “groundless”, noting that the questions posed were not matters of “pure international law” and that in any case, a consideration of international law within the context of the request for an advisory opinion was “not only permissible but unavoidable.”¹¹

⁹ *Prosecutor v. Tadic* (Case No. IT-94-1-A), Judgment, (15 July 1999), at paras. 266-67, 290; *Prosecutor v. Tadic* (Case no. IT-94-1-T), Opinion and Judgment, (7 May 1997), (1997) 36 I.L.M. 908, 112 I.L.R. 1, at para. 169. Basically, the Prosecutor appealed the Trial Chamber’s finding concerning the mental element of crimes against humanity. The Trial Chamber had relied on *Finta* in reaching its conclusions. Ironically, the Prosecutor who appealed the *Finta* precedent was Louise Arbour, now a justice of the Supreme Court. In *Finta* the Court upheld a judgment of the Ontario Court of Appeal in which Justice Arbour, as she then was, had participated: *R. v. Finta* (1990), 92 D.L.R. (4th) 1 (C.A.).

¹⁰ R.S.C. 1985, c. S-26, s. 3.

¹¹ *Reference re Secession of Québec*, *supra* note 1, 109 at paras. 21-23.

1. *Applying International Treaties and Custom*

International conventions or treaties, “whether general or particular, establishing rules expressly recognized by the contesting States”, are one of the principal sources of public international law.¹² According to the *Vienna Convention on the Law of Treaties*, a treaty is an “international agreement concluded between States in written form and governed by international law.”¹³ Terms like covenant, convention, charter, act, pact and so on are nothing more than synonyms for “treaty.” Note that the requirement these be “concluded between States” eliminates the many treaties executed with aboriginal groups over the centuries, and on which the Supreme Court has frequently pronounced itself.

Under Canadian law, it is axiomatic that treaties do not have a direct effect before national courts where they have only been ratified by the executive and not implemented by the legislature. Historically, this is explained by the English parliamentary tradition. The sovereign, who actually makes treaties with foreign States, cannot usurp Parliament’s law-making power.¹⁴ Canadian federalism adds an additional twist: the federal government, which holds the treaty-making power, cannot alter the division of powers set out in the *Constitution Act*.¹⁵ On two occasions, the “Laskin court” suggested that it was reconsidering the 1937 *Labour Conventions* case, but ultimately retreated from this challenge.¹⁶ There are several examples of treaties being fully or partially implemented by legislation, and application of such legislation often involves interpretation of the treaty itself. The recent case law of the Supreme Court provides examples in the areas of refugees, child abduction, extradition, taxation, intellectual property, and trade. Generally, the Court turns not to the domestic implementing legislation but the treaty itself, and it applies rules of interpretation specific to international treaties rather than the statutory or common law canons of Canadian law.

But there is some early authority for a conservative approach, using the treaty only to assist in interpreting the domestic legislation, and then only when the Court has determined that the latter is unclear. In *Schavernoich v. Foreign Claims Commission*, Justice Estey wrote that an “underlying international agreement” should only be consulted when there is ambiguity in the Canadian

¹² *Statute of the International Court of Justice*, *supra* note 5, art. 38(1)(a).

¹³ *Vienna Convention of the Law of Treaties*, (1979) 1155 U.N.T.S. 331, art. 2(1)(a).

¹⁴ *Re Arrow River and Tributaries Slide & Boom Co. Limited*, [1932] S.C.R. 495, at 510 (*per* Lamont J.); also: *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141, at 173 (*per* Laskin C.J.).

¹⁵ *A.-G. Canada v. A.-G. Ontario (Labour Conventions Case)*, [1937.] A.C. 326 (J.C.P.C.), at 347-48 (*per* Lord Atkin).

¹⁶ *MacDonald v. Vapour Canada Ltd*, [1977] 2 S.C.R. 134, at 171 (Laskin C.J.); *Schneider v. The Queen*, [1982] 2 S.C.R. 112, at 134-35 (Dickson J.). But: *Thomson v. Thomson*, [1994] 3 S.C.R. 551, at 611-12 (L’Heureux-Dubé J.).

legislation being considered.¹⁷ But in a subsequent judgment, Justice Gonthier observed that consideration of the international agreement might be necessary precisely in order to determine some latent ambiguity in a legal text, and that it is therefore appropriate to consult the “underlying international agreement” at “the preliminary stage of determining if an ambiguity exists.”¹⁸

On several occasions,¹⁹ the Court has noted that provisions of the *Convention Relating to the Status of Refugees*²⁰ have been incorporated into Canadian law, the vehicle being the *Immigration Act*.²¹ In *Pushpanathan*, Justice Bastarache said that because “the purpose” of the *Immigration Act* was to incorporate provisions of the *Convention*, “the Court must adopt an interpretation consistent with Canada’s obligations under the Convention.”²² Hence, the exercise is one of treaty interpretation and not statutory interpretation. His 1998 remarks seem bold, indeed, when compared with the very reticent approach of Justice Estey 1982 and the liberal gloss given it by Justice Gonthier in 1990. Not only does the *Act* specifically incorporate the definition of “refugee” drawn from the *Convention*, including the “exclusionary clauses” by which persons otherwise eligible for refugee status are deprived of protection, it also asserts, in section 3(g), entitled “Immigration objectives”, that Canadian immigration policy and the rules and regulations made under the *Act* shall “fulfil Canada’s legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and the persecuted.”²³ Yet, in *MacDonald v. Vapour Canada*, the Court deemed a preambular mention of the *International Convention for the Protection of Industrial Property* and two definitions invoking the *Convention* to be inadequate evidence that the *Trade Marks Act* was adopted in order to implement Canada’s treaty obligations.²⁴

The crimes against humanity prosecution provisions of the *Criminal Code* literally invite resort to international law, because, as Justice La Forest put it in *Finta*, they “are designed to enforce the prescriptions of international law.”²⁵

¹⁷ [1982] 1 S.C.R. 1092, at 1098. Also: *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, *supra* note 14, at 173 (Laskin C.J.).

¹⁸ *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at 1353.

¹⁹ *Ernewein v. Minister of Employment and Immigration*, [1980] 1 S.C.R. 639, at 658 (per Pigeon J.); *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at 193 (per Wilson J.); *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 3 (per Bastarache J.).

²⁰ [1969] C.T.S. 6 [hereinafter the *Convention*].

²¹ R.S.C., 1985, c. I-2.

²² *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, *supra* note 19, at para. 51.

²³ Cited by La Forest J. in *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, at para. 57.

²⁴ *MacDonald v. Vapour Canada Ltd*, *supra* note 16 at 171 (per Laskin C.J.C.). Also: *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, *supra* note 16 at 173, Laskin C.J.C.

²⁵ *R. v. Finta*, *supra* note 6 at 728, La Forest J.

The *Code* defines crimes against humanity with reference to “customary international law or conventional international law” and entitles the accused to invoke available defences at international law.²⁶ Accordingly, Justice Cory assessed the mental element of crimes against humanity as well as the scope of the defence of superior orders or obedience to law, citing case law of the post-World War I war crimes prosecutions at Leipzig, the Nuremberg judgment and other precedents from the corpus of international humanitarian law.²⁷ Debates during the drafting of the *Statute of the International Criminal Court* demonstrate how vexing these questions still are.²⁸ The *Finta* judgments, both the majority and the minority, are often cited by specialists during such exchanges in international fora.

In its interpretation of treaties like the *Refugee Convention*, the Court considers that it should apply the norms set out in articles 31 and 32 of the *Vienna Convention on the Law of Treaties* rather, for example, than those enumerated in the *Interpretation Act*.²⁹ The *Vienna Convention* codifies customary rules of treaty interpretation. The *Convention* sets out a “general rule of interpretation”, requiring that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”³⁰ Moreover, as “supplementary means of interpretation”, the *Convention* invites consultation of the “preparatory work of the treaty” when application of the general rule “leaves the meaning ambiguous or obscure” or “leads to a result which is manifestly absurd or unreasonable.”³¹ According to Justice La Forest, referring to these provisions, “[b]y and large, international treaties are interpreted in a manner similar to statutes.” He noted, however, a “significant difference” in the use that may be made of the legislative history and other preparatory material.³² And in *Parisien*, he referred to the canon by which “that interpretation should be adopted which involves the minimum obligation for the parties and which is most favourable to the freedom and independence of States.”³³

²⁶ *Criminal Code*, R.S.C., 1985, c. C-46, ss. 7(3.76), (3.73). For example, under limited circumstances belligerent reprisal is a defence to war crimes: G.H. Aldrich, “The Laws of War on Land” 9 (2000) 94 A.J.I.L. 42, at 57-58.

²⁷ *R. v. Finta*, *supra* note 6 at 811-19, 828-39, Cory J.

²⁸ “Rome Statute of the International Criminal Court”, U.N. Doc. A/CONF.183/9, (1998) 37 I.L.M. 999. See: R.S. Lee, ed., *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results*, The Hague/London/Boston: Kluwer Law International, 1999; F. Lattanzi, W.A. Schabas, eds., *Essays on the Rome Statute of the ICC*, Rome: Editrice il Sirente, 2000.

²⁹ *R. v. Parisien*, [1988] 1 S.C.R. 950, at 958, La Forest J.; *Crown Forest Industries Ltd. v. Canada*, [1995] 2 S.C.R. 802, at 827, Iacobucci J.; *Thomson v. Thomson*, *supra* note 16 at 577-78, La Forest J.; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, *supra* note 19 at para. 52, Bastarache J.

³⁰ *Vienna Convention on the Law of Treaties*, *supra* note 13, art. 31(1).

³¹ *Ibid.* art. 32.

³² *Thomson v. Thomson*, *supra* note 16 at 577. Also, *Crown Forest Industries Ltd. v. Canada*, [1995] 2 S.C.R. 802, para. 54, Iacobucci J.

³³ *R. v. Parisien*, *supra* note 29, at 959, La Forest J., citing *The Case of the S.S. “Lotus”* (1927), P.C.I.J. Ser. A, No. 10.

Pushpanathan reversed a decision of the Federal Court of Appeal principally because it failed to apply the *Vienna Convention* principles of treaty interpretation.³⁴ In the Federal Court of Appeal, Justice Strayer had dismissed the “object and purpose” analysis of the *Refugee Convention* as well as the relevance of the *travaux préparatoires*, in effect marginalizing the *Vienna Convention* scheme. The case involved one of the exclusionary clauses, article 1F(c), applicable to persons “guilty of acts contrary to the purposes and principles of the United Nations.” *Pushpanathan* had been denied refugee status because of his involvement in drug traffic, but he argued this was not what the *Convention* meant by an act contrary to the purposes and principles of the United Nations. The preparatory work of the *Convention*, which was adopted in 1951, strongly suggests that the provision was only aimed at war criminals, and that it was phrased broadly in order to capture offenders not contemplated by the still rather limited categories recognized by international criminal law, such as those responsible for egregious human rights violations in peacetime.³⁵

Because the “purposes and principles” of the United Nations are set out in the preamble and articles 1 and 2 of the *Charter of the United Nations*,³⁶ the Court was also compelled to interpret that instrument. Justice Bastarache³⁷ explained that the term should be construed with reference to other sources of international law, such as General Assembly resolutions³⁸ and decisions of the International Court of Justice.³⁹ explained Justice He said that “if the international community were ever to adopt” the *Draft Statute of the International Court*, which included trafficking in narcotics as a crime within its subject matter jurisdiction, this would increase the likelihood of the offence falling within the exclusionary clause. In fact, the *Draft Statute* was adopted within two months of the judgment in *Pushpanathan*, but without any reference to narcotics trafficking, somewhat confirming the Court’s reasoning and, perhaps, its intuition. But a resolution included in the Final Act of the Rome Conference, which adopted the *Statute*, recommends that a future review conference “consider the crimes of terrorism and drug crimes with a view to arriving at an

³⁴ *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1996] 2 F.C. 49 (C.A.).

³⁵ *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, *supra* note 19 at paras. 59-60, Bastarache J.

³⁶ [1945] C.T.S. 7.

³⁷ *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, *supra* note 19 at paras. 66-68.

³⁸ *Declaration on the Protection of All Persons from Enforced Disappearance*, G.A. Res. 47/133, art. 1(1); *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 3452 (XXX), art. 2; *Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism*, G.A. Res. 51/210, Annex, art. 2).

³⁹ *United States Diplomatic and Consular Staff in Tehran*, I.C.J. Reports 1980, 3 at para. 91; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, I.C.J. Reports 1971, 16 at para. 131.

acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court.”⁴⁰

Justice Cory dissented: he criticized the restrictive interpretation of the exclusionary clauses which relied primarily on the *travaux préparatoires* of the *Convention*. Instead, he argued International treaties must be capable of dynamic or “evolutive” interpretation⁴¹, a principle confirmed in international jurisprudence but nowhere mentioned in the *Vienna Convention*.⁴² Dynamic interpretation is particularly appropriate for human rights treaties, and is in many ways conceptually comparable with the “living tree” principle of constitutional interpretation.⁴³ What this shows, of course, is that the international community – and international law – remains divided on the question of where the prohibition of drug trafficking fits within the spectrum of evil, an ongoing debate rather faithfully reflected in the minority and majority judgments of the Supreme Court of Canada.

In the same way, the *travaux préparatoires* of the *Hague Convention on the Civil Aspects of Child Abduction* have been studied in considerable detail by the Court in appeals concerning provincial statutes which purport to implement the *Convention*.⁴⁴ The Court has noted the “the common objective of the Act and the Convention calling for the two documents to be interpreted consistently with each other.”⁴⁵

Article 32 of the *Vienna Convention* also invites consultation of other sources for the purposes of interpretation. In refugee cases, the Court has been a strong advocate of reference to the United Nations High Commissioner for Refugees’ *Handbook on Procedures and Criteria for Determining Refugee Status* («UNHCR Handbook») in interpreting the *Convention*.⁴⁶ According to Justice La Forest in *Ward*, “[w]hile not formally binding on signatory states, the Handbook has been endorsed by the states which are members of the Executive Committee of the UNHCR, including Canada, and has been relied upon by the courts of signatory states.”⁴⁷ International lawyers call such sources “soft law.” The Court has used the Manual for guidance in construing terms like “persecution”, “membership in a particular social group” and “well-founded

⁴⁰ Final Act of the Conference, Resolution E, U.N. Doc. A/CONF.183/C.1/L.76/Add.14, p. 8. See: H. Von Hebel, D. Robinson, “Crimes within the Jurisdiction of the Court”, in R.S. Lee, ed., *supra* note 28 at 79-126, especially 85-87.

⁴¹ *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, *supra* note 19 at paras. 128-29.

⁴² *Soering v. United Kingdom*, July 7, 1989, Series A, No. 161; *Loizidou v. Turkey* (Preliminary objections), Series A, Vol. 310.

⁴³ *Edwards v. Attorney General of Canada*, [1930] A.C. 124 (J.C.P.C.).

⁴⁴ *Thomson v. Thomson*, *supra* note 16; *W.(V.) v. S.(D.)*, [1996] 2 S.C.R. 108.

⁴⁵ *W.(V.) v. S.(D.)*, *ibid.* at para. 48, L’Heureux-Dubé J.

⁴⁶ *Chan v. Canada (Minister of Employment and Immigration)*, *supra* note 23 at paras. 46, 57, 74-81, La Forest J.; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, *supra* note 19 at para. 54, Basatarache J.

⁴⁷ *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at 713-14.

fear”, all of which appear in the definition of *Convention* refugee, as well as related matters such as dual nationality and state complicity in persecution.

The generally recognized statement of the sources of public international law, article 38 of the *Statute of the International Court of Justice*, puts customary international law alongside treaties. As “blackletter” law, treaties are considerably easier to prove. But there is no hierarchy in the sources, and to the extent custom can be established, it is equally binding upon States. Moreover, from the standpoint of domestic effect, at common law customary international law has a leg up on conventional law because it does not require implementing legislation. Customary international law is “the law of the land”, subject of course to the right of the legislature to override it.⁴⁸

The references to customary international law in the *Criminal Code* and in section 11(g) of the *Charter* were considered in *Finta*.⁴⁹ In *Re Canada Labour Code*, the Court studied “the international law doctrine of sovereign immunity”, that is, the customary law of sovereign immunity, to the extent that it was codified in the *State Immunity Act*.⁵⁰ But the Supreme Court missed a wonderful chance to apply customary law norms in *Baker*,⁵¹ which raised the issue of application of the “best interests of the child” principle to circumscribing the discretion exercised by immigration officials when making decisions on the basis of compassionate and humanitarian grounds.⁵² The norm is set out in article 3 of the *Convention on the Rights of the Child*,⁵³ in force in Canada since January 8, 1992. The majority confirmed the application of article 3 in Canadian law, at least for the purposes of interpretation of Canadian statutes, but two dissenters charged the Court with usurping the role of Parliament. This unfortunate debate might have been avoided had the Court accepted that article 3 of the *Convention* simply codifies the customary norm of “best interest of the child.” Arguably, all provisions of the *Convention* that have not been subject to any reservations, and article 3 is such a text, constitute customary law, given that only two States in the world have not ratified the *Convention*, and that one of them (the United States of America) has signed it, indicating its intent to abide by the *Convention*’s provisions.⁵⁴

⁴⁸ *Trendtex Trading Corporation v. Central Bank of Nigeria*, [1977] 1 All E.R. 881 (H.L., Denning L.J.); R. St. J. Macdonald, “The Relationship Between International Law and Domestic Law in Canada”, in R. St. J. Macdonald, G.L. Morris, D.J. Johnston, eds., *Canadian Perspectives on International Law and Organization*, (Toronto, University of Toronto Press, 1974) 88 at 111. See also the Attorney-General of Canada’s factum in the *Secession Reference*, at paras. 206-209.

⁴⁹ *R. v. Finta*, *supra* note 6.

⁵⁰ S.C. 1980-81-82-83, c. 95 (now R.S.C., 1985, c. S-18).

⁵¹ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 70-71, L’Heureux-Dubé J.

⁵² *Immigration Regulations, 1978*, SOR/78-172, as amended by SOR/93-44, s. 2.1.

⁵³ [1992] C.T.S. 3.

⁵⁴ In accordance with article 18(a) of the *Vienna Convention on the Law of Treaties*, *supra* note 13. Somalia is the only State that has neither signed nor ratified the *Convention*, a situation attributable to domestic political disorder rather than any ideological disagreement.

2. *Interpreting Canadian Law with Reference to International Law*

For the vast majority of Canada's international obligations, there is no implementing legislation and often none is required. But if the treaty is not formally incorporated by Parliament or a provincial or territorial legislature, it can have no direct effect before Canadian courts. Indeed, as Justice L'Heureux-Dubé noted in *Thomson v. Thomson*, "according to the Canadian constitutional system, both the federal Parliament and the provincial legislatures may enact statutes that contradict the country's international obligations. A statute is not void or inoperative simply because it violates international custom or convention."⁵⁵ The principle, well-explained in all textbooks on statutory interpretation, is that the legislator is deemed to seek harmony between domestic laws and the country's international obligations.⁵⁶ Faced with two possible constructions, that which better corresponds to applicable international law is to be favoured. This canon ought to apply even when the legislation is not designed to implement treaty obligations. Accordingly, in *Zingre*, the Court gave a "fair and liberal interpretation" of the *Canada Evidence Act* "with a view to fulfilling Canada's international obligations."⁵⁷

Even quite recently, a dissenting judgment of the Court contended that a treaty ratified by Canada but not yet incorporated into domestic law by way of implementing legislation is "irrelevant", although Justice Iacobucci's remarks were limited to the application of statutory legislation and specifically excluded the *Charter*, given the Court's decision in *Slaight*.⁵⁸ Otherwise, he warned, "appellant is able to achieve indirectly what cannot be achieved directly, namely, to give force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament."⁵⁹ Justice L'Heureux-Dubé's majority decision rejected this narrow approach.⁶⁰

Use of international law by the Court goes beyond the "presumption of conformity." A good example of use of international law as a "context" to assist in interpreting domestic norms is provided by Justice L'Heureux-Dubé, who

⁵⁵ *Thomson v. Thomson*, *supra* note 16 at 618, citing P.A. Côté, *The Interpretation of Legislation in Canada*, 2nd ed., (Cowansville: Editions Yvon Blais, 1991) at 308. See also: *Daniels v. White and The Queen*, [1968] S.C.R. 517, at 541, Pigeon J.

⁵⁶ *Maxwell on Interpretation of Statutes*, 12th ed., (London: Sweet and Maxwell, 1969) at 54; *Ellerman Lines Ltd. v. Murray*, [1931] A.C. 126, [1930] All E.R. 503.

⁵⁷ *Zingre v. The Queen*, [1981] 2 S.C.R. 392, at 409-10, Dickson J.

⁵⁸ See *infra*. note 84.

⁵⁹ *Baker v. Canada (Minister of Citizenship and Immigration)*, *supra* note 51 at para. 80.

⁶⁰ *Ibid.* at paras. 70-71. But note Justice Wilson's remarks in *National Corn Growers*, *supra* note 18 at 1349, where an administrative tribunal's reference to international law was challenged in judicial review. She said: "I do not think that it is this Court's role on an application for judicial review to look beyond the Tribunal's statute to determine whether the Tribunal's interpretation of that statute is consistent with Canada's international obligations. If the interpretation is not consistent with Canada's obligations under the GATT, then it is for the legislature to address this matter."

used international law to construe section 23 of the Québec *Charter of Human Rights and Freedoms*, which provides for due process rights.⁶¹ Section 23 is in many ways closer to the international models than the corresponding provisions in the *Canadian Charter*. Her review of “the relevant law ... which served as a source of inspiration for the legislature in completing the drafting of the *Charter*”⁶² included several international instruments. She described section 23 of the *Québec Charter* as “a sort of digest of the wording of the *Universal Declaration of Human Rights*.”⁶³ However, the other existing models distinguished between criminal and civil proceedings and, she wrote, “[i]f the Québec legislature had really intended to make s. 23 applicable to both ‘non-penal’ and ‘penal’ matters, would it not have been much simpler for it to use the explicit wording” of the international instruments.⁶⁴

Occasionally, the presumption of conformity seems to reach into the realms of the common law. In *Ewanchuk*,⁶⁵ Justice L’Heureux-Dubé suggested that the scope of common law defences to sexual assault charges ought to be circumscribed by evolving norms of international human rights law. Essentially, her point was that Canadian criminal law tended to be too friendly to defendants, and that this was based on stereotypical views of sexual assault that international law endeavoured to condemn. She referred specifically to the *Convention on the Elimination of All Forms of Discrimination against Women*,⁶⁶ the general recommendations of the Committee on the Elimination of Discrimination against Women and the United Nations General Assembly’s *Declaration on the Elimination of Violence against Women*.⁶⁷ In a similar vein, Justice Major used international human rights norms to help argue for a change in the common law with respect to the protection of unborn children.⁶⁸ Here he cited the controversial preamble of the 1959 *Declaration of the Rights of the Child*, which states that “... the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth ...”⁶⁹

⁶¹ L.R.Q., ch. C-12.

⁶² 2747-3174 *Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at para. 238.

⁶³ *Ibid.* at para. 239.

⁶⁴ *Ibid.* at paras. 242, 244.

⁶⁵ *R. v. Ewanchuk*, [1999] 1 S.C.R. 330.

⁶⁶ [1982] C.T.S. 31.

⁶⁷ G.A. Res. 48/104, U.N. Doc. A/48/49 (1993).

⁶⁸ *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925.

⁶⁹ *Declaration of the Rights of the Child*, G.A. Res. 1384(XIV). Justice Major would have strengthened his argument by mentioning that this part of the preamble to the 1957 declaration is repeated in the preamble to the 1989 *Convention on the Rights of the Child*, *supra* note 53. Justice Major incorrectly referred to Canada as a “signatory” to the 1957 *Declaration*. There are no signatories to a resolution of the United Nations General Assembly.

3. Charter Interpretation and International Law

The most frequent resort to international law by the Supreme Court of Canada has been in the interpretation of the *Canadian Charter of Rights and Freedoms*. Faced in 1982 with a new and unfamiliar instrument, Canadian courts turned to the case law of international tribunals like the European Court and Commission of Human Rights for guidance, particularly with respect to application of the enigmatic "limitations clause" in section 1. The Court approached the matter initially with the caution typical of its historically conservative approach to international law. In *R. v. Big M Drug Mart*, Chief Justice Dickson used language similar to that of article 9(2) of the *European Convention*, which establishes limits on freedom of religion, but made no direct reference to the instrument in his reasons.⁷⁰

The first sign of a methodology came in Justice Lamer's reasons in *B.C. Motor Vehicle Act*. He said that "principles of fundamental justice", for the purposes of applying section 7 of the *Charter*, represented "principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the *Charter*."⁷¹ Many subsequent judgments have used international law to develop the scope of section 7. Justice La Forest found a right to choose one's place of abode in section 7's liberty interest with the help of article 12 of the *International Covenant on Civil and Political Rights*.⁷² Justice Wilson, relying on article 8(1) of the *European Convention* as well as article 2 of its *Protocol No. 1*,⁷³ concluded that the liberty interest protected the right of parents to educate children in accordance with their religious and philosophical convictions.⁷⁴ In *Reference Re ss. 193 and 195.1(1) c) of the Criminal Code (Man.)*, Justice Lamer referred to article 7 of the *European Convention* in support of the notion that section 7 of the *Charter* encompasses a "void for vagueness" doctrine.⁷⁵ The best interests of the child standard, used in custody matters, was judged to be not "unconstitutionally vague"⁷⁶ because it is recognized in the *Convention on the Rights of the Child*.

But the result has not always been enlargement of the scope of the *Charter*. In *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, Chief Justice Lamer referred to decisions of the Human Rights Committee in concluding that economic interests were not within the realm of section 7.⁷⁷ Similarly, Justice

⁷⁰ [1985] 1 S.C.R. 295.

⁷¹ [1985] 2 S.C.R. 486, at 512

⁷² *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 69, La Forest J.

⁷³ *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, (1955) 213 U.N.T.S. 262, E.T.S. 9.

⁷⁴ *R. v. Jones*, [1986] 2 S.C.R. 284.

⁷⁵ [1990] 1 S.C.R. 1123. See also Justice Gonthier, who canvassed a number of European authorities on the "void for vagueness" doctrine, in *R. v. Nova Scotia Pharmaceutical Society*, *ibid.* at 637.

⁷⁶ *Young v. Young*, [1993] 4 S.C.R. 3, at 75; See also: *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141, at 180.

⁷⁷ *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R.315, at 349-50.

Sopinka used European human rights jurisprudence to bolster his conclusion in *Rodriguez v. B.C.(A.G.)* that voluntary euthanasia was “excluded from the concept of privacy by virtue of their trespass on the public interest of protecting life.”⁷⁸

In the 1987 right to strike trilogy, Chief Justice Dickson proposed a rather sophisticated doctrine distinguishing between two categories of international sources. In a general sense, international human rights instruments were part of the *Charter*’s context of adoption, he said, and “provide a relevant and persuasive source for interpretation of the provisions of the *Charter*.” In the case of international human rights norms to which Canada is a party, Chief Justice Dickson said he believed “the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents.”⁷⁹ Significantly, he did not cite precedents concerning statutory interpretation and international treaties, relying instead upon a *Charter* case, *R. v. Big M Drug Mart Ltd.*, which is authority for purposive interpretation.⁸⁰

But since the right to strike cases, the Court has never really focussed on a distinction between ratified and unratified instruments. There are, to be sure, references to the status of instruments *vis-à-vis* Canada, but little to suggest this is being done in order to implement Chief Justice Dickson’s doctrine. In *Zundel*, Justice McLachlin argued that there was no need to retain the “false news” provision of the *Criminal Code* because it was not “necessary to fulfil any international obligation undertaken by Parliament.”⁸¹ Examining whether the obscenity provisions of the *Criminal Code* met a “pressing and substantial” objective, Justice Sopinka noted that the enactment of the impugned provision was consistent with Canada’s international obligations.⁸²

Although Chief Justice Dickson’s theoretical framework continues to be cited on occasion,⁸³ far more frequently the Court refers to a subsequent, simpler pronouncement. In *Slaight Communications Inc. v. Davidson*, Chief Justice Dickson said that “..Canada’s international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the *Charter*, but also the interpretation of what can constitute pressing and substantial s. 1 objectives, which may justify restrictions upon those rights.”⁸⁴ Referring to *Slaight*, Justice L’Heureux-Dubé has said recently: “our *Charter*

⁷⁸ *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at 602-03, Sopinka J.

⁷⁹ *Reference Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313, at 348-50.

⁸⁰ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at 344.

⁸¹ *R. v. Zundel*, [1992] 2 S.C.R. 731, at 764-65.

⁸² *R. v. Butler*, [1992] 1 S.C.R. 452, at 498.

⁸³ The “Dickson doctrine” has since been cited by the Court in: *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038, at 1056, Dickson C.J., in reasons supported by La Forest, L’Heureux-Dubé and Wilson JJ.; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at 750, Dickson C.J.; *R. v. Zundel*, [1992] 2 S.C.R. 731, at 811, Cory and Iacobucci JJ.

⁸⁴ *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at 1056-57.

is the primary vehicle through which international human rights achieve a domestic effect.”⁸⁵

There is no shortage of examples. Dealing with a prohibition on publication of poll results, Justice Bastarache referred to the case law of the European Court and European Commission of Human Rights under article 3 of *Protocol No. 1* to the *European Convention*, which sets out electoral rights, in determining constitutionality of the legislation.⁸⁶ In *Cotroni*, Justice La Forest concluded that had section 6(1) of the *Charter* been intended to protect solely against expulsion, banishment or exile, this would have been expressed clearly, adding that his approach was “fortified by the fact that in enacting this clause several familiar models appear to have been ignored.”⁸⁷ The familiar models included article 3(1) of the *Protocol No. 4* to the *European Convention*, whose explanatory reports suggest that extradition is “outside the scope” of the provisions. Justice La Forest referred to the *European Convention on Human Rights* and the jurisprudence of the European Court of Human Rights in *Rahey* in order to resolve ambiguity in section 11(b).⁸⁸ In *Lippé*, Justice Gonthier’s concurring judgment cited article 2.02 of the *Universal Declaration on the Independence of Justice*, supporting the proposition that independence from government is an important aspect of judicial independence.⁸⁹ In *Oakes*, Chief Justice Dickson referred to international instruments and jurisprudence on the presumption of innocence, which provide “further evidence of the widespread acceptance of the principle of the presumption of innocence”, he said.⁹⁰ “The priority given to the right to interpreter assistance of criminally accused persons...is echoed in international human rights instruments”, wrote Chief Justice Lamer in *R. v. Tran*.⁹¹ The right to an appropriate remedy has been construed with reference to article 8 of the *Universal Declaration of Human Rights* and article 2 of the *International Covenant on Civil and Political Rights*,⁹² not surprising given that section 24(1) was clearly drawn from international texts.⁹³ According to

⁸⁵ *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 73, L’Heureux-Dubé J.

⁸⁶ *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 83.

⁸⁷ *United States of America v. Cotroni*, *United States of America v. El Zein*, [1989] 1 S.C.R. 1469, at 1481.

⁸⁸ *R. v. Rahey*, [1987] 1 S.C.R. 588, at 633; Justice La Forest did not however rely on *Wemhoff* in the same fashion when the question arose as to whether the right “d’être jugée” includes the delay necessary for hearing of an appeal to a conviction. Such was the conclusion of the European Court, but on this point Canada’s Supreme Court has not reached the same view: *R. v. Conway*, [1989] 1 S.C.R. 1659.

⁸⁹ *R. v. Lippé*, [1991] 2 S.C.R. 114, at 154.

⁹⁰ *R. v. Oakes*, [1986] 1 S.C.R. 103, at 120.

⁹¹ *R. v. Tran*, [1994] 2 S.C.R. 951, at 969.

⁹² *R. v. Mills*, [1986] 1 S.C.R. 863, at 881. Also: *B.C.G.E.U. v. Attorney-General of British Columbia*, [1988] 2 S.C.R. 214.

⁹³ Hays-Joyal Committee, 15:20. The availability of an appropriate and just remedy for *Charter* violations was directly inspired by article 2(3) of the *International Covenant on Civil and Political Rights*, and was added after the Canadian Bar Association noted that Canada’s international obligations required its existence.

Justices Cory and Iacobucci in *Zundel*, the model for section 27 of the *Charter*, which recognizes the multicultural heritage of Canadians, is article 27 of the *International Covenant on Civil and Political Rights*.⁹⁴

Section 1 of the *Charter* has been a real paradise for international law. The model, clearly, was article 29(2) of the *Universal Declaration of Human Rights*, and subsequent iterations in the *European Convention on Human Rights*⁹⁵ and the *International Covenant on Civil and Political Rights*.⁹⁶ The Court's shot heard round the world – the *Oakes* judgment⁹⁷ – is known to constitutional lawyers and judges in many countries. Though original in some respects, it is unquestionably inspired by the European jurisprudence.⁹⁸ The Supreme Court has found international law to be particularly relevant in freedom of expression matters.⁹⁹ Here *Keegstra*, a constitutional challenge to the *Criminal Code* hate propaganda provision, is the leading case. Chief Justice Dickson, writing for the majority, made important use of international law references in the section 1 debate. These were relevant to the “pressing and substantial concern” aspect of the debate as well as in assessing the legislative objective. He invoked article 4 of the *International Convention for the Elimination of All Forms of Racial Discrimination* and article 20(2) of the *International Covenant on Civil and Political Rights*, both of which require States parties to punish by law any incitement to racial discrimination.¹⁰⁰ Canada boasted about the majority's references to international law in its latest periodic report to the United Nations Human Rights Committee.¹⁰¹

Dissenting Justice McLachlin disagreed with the relevance of international models, arguing that the *Charter* guarantee of freedom of expression was far closer in philosophy to the first amendment of the United States Constitution.¹⁰² Justice McLachlin said that the *Charter* follows “the American approach in method” rather than that of international law. She focussed not on the norms requiring prohibition of hate propaganda, but rather on the freedom of expression provisions. The *International Covenant* and the *European Convention on Human Rights* have very specific limitations clauses, she noted. Absent in the *Charter*, she said, this indicated that “the Canadian guarantee of free expression is more comprehensive.”

⁹⁴ *R. v. Zundel*, [1992] 2 S.C.R. 731, at 815. See also: *R. v. Mercure*, [1988] 1 S.C.R. 234, at 268, *La Forest J.*

⁹⁵ (1955) 213 U.N.T.S. 221, arts. 8(2), 9(2), 10(2) and 11(2).

⁹⁶ (1976) 999 U.N.T.S. 171, arts. 18(2), 19(3), 20, 21.

⁹⁷ *R. v. Oakes*, *supra* note 90.

⁹⁸ See for example: *Arrowsmith v. United Kingdom* (App. No. 7050/75), (1979) 22 *Yearbook* 446, 19 D.R. 5, 3 E.H.R.R. 218.

⁹⁹ *Irwin Toy Ltd. v. Québec (Procureur général)*, [1989] 1 S.C.R. 927, at 969; *Edmonton Journal v. Alta (A.-G.)*, [1989] 2 S.C.R. 1326, at 1374; *R. v. Lucas*, [1998] 1 S.C.R. 439, at para. 50.

¹⁰⁰ *R. v. Keegstra*, *supra* note 83, at 749-55. See also: *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, at 919-21.

¹⁰¹ “Fourth periodic report of Canada”, U.N. Doc. CCPR/C/103/Add.5, at para. 9.

¹⁰² *R. v. Keegstra*, *supra* note 83 at 822.

The *Kindler* case never got to section 1. The Court had earlier considered capital punishment in 1976, under the *Canadian Bill of Rights*. In that judgment it referred to international human rights norms for the first time, citing the *Universal Declaration of Human Rights*.¹⁰³ International human rights law on abolition of the death penalty was still in its infancy. Today however, it has been moving consistently towards abolition,¹⁰⁴ though not fast enough for the Canadian government, which prides itself of its place in the vanguard of international human rights. Canada continues to extradite capital offenders to the United States, whose brutal death penalty establishment has been denounced by the European Parliament as well as prestigious international non-governmental organizations like the International Commission of Jurists. A 1989 judgment of the European Court of Human Rights, *Soering v. United Kingdom*, ruled extradition of a young offender to violates article 3 of the *European Convention on Human Rights*, the cruel punishment prohibition which corresponds to section 12 of the *Charter*.¹⁰⁵

To a great extent, the Court quarrelled over the substance of international human rights law, not its relevance to the debate. Justice La Forest noted that there was no general international norm prohibiting capital punishment. He conceded however, that if it were to be imposed within Canada it would probably contravene section 12.¹⁰⁶ He distinguished the European Court's *Soering* case, finding it based in the very specific characteristics of the case.¹⁰⁷ Justice McLachlin said that in any case, the case law of the European institutions sent contradictory signals. Justice Sopinka, for the minority, reminded Justice La Forest that he had invoked European law in an earlier case to prohibit extradition to a country where torture was threatened.¹⁰⁸ Justice Cory, also for the dissent, listed the numerous international norms pointing to the evolving condemnation of capital punishment.¹⁰⁹ He also disagreed with the very narrow scope given by Justice La Forest to the *Soering* case, which he considered fully applicable.¹¹⁰

¹⁰³ *Miller v. The Queen*, [1977] 2 S.C.R. 680, at 687, Laskin C.J.C. Chief Justice Laskin referred to article 4(2), but he obviously meant article 5.

¹⁰⁴ W.A. Schabas, *Abolition of the Death Penalty at International Law*, 2nd ed., (Cambridge: Cambridge University Press, 1997).

¹⁰⁵ *Supra* note 42.

¹⁰⁶ *Kindler v. Canada*, [1991] 2 S.C.R. 779, at 833-34.

¹⁰⁷ *Ibid.* at 835. This narrow construction of the *Soering* decision was criticized in a judgment of the Judicial Committee of the Privy Council: *Pratt et al. v. Attorney General for Jamaica et al.*, [1993] 4 All.E.R. 769 (P.C.), [1994] 2 A.C. 1. See also: *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General et al.* (1993), 1 Z.L.R. 242 (S); *Makwanyane and Mchunu v. The State* (1995), 16 H.R.L.J. 154 (Constitutional Court of South Africa).

¹⁰⁸ Referring to *Altun v. Germany* (1983), 5 E.H.R.R. 611, a European Commission on Human Rights case cited in *Canada v. Schmidt*, [1987] 1 S.C.R. 500, at 522, La Forest J.

¹⁰⁹ *Kindler v. Canada*, *supra* note 106 at 804-07.

¹¹⁰ *Ibid.* at 823.

International law has assisted the Supreme Court in delimiting the extraterritorial application of the *Canadian Charter*. Nothing in the *Charter* answers this question explicitly except section 32(1) which states that it applies “to the Parliament and government of Canada in respect of all matters within the authority of Parliament...” In *Cook*,¹¹¹ Canadian police officers had allegedly violated the right to counsel set out in section 10(b) when they interviewed a suspect in the United States.

The Supreme Court noted that as a general rule, international law effects a “general prohibition” on extraterritorial application of domestic laws. It cited a classic judgment of the Permanent Court of International Justice, (forerunner of the International Court of Justice) affirming a general prohibition on extraterritorial legislation, “failing the existence of a permissive rule to the contrary.” The Crown argued that the “general prohibition” on extraterritorial scope in effect ruled out the *Charter*’s reach into the United States. But the Supreme Court said that “although territory is clearly a critical element in determining the scope of a state’s jurisdiction, territory alone is not determinative of jurisdictional competence under international law.”¹¹²

The Supreme Court also noted that international law recognized nationality of the person as a valid basis of jurisdiction, a concept admitted in the *Lotus* case. This allowed the Court to distinguish the facts from those in *Terry*,^{112 a} where the interrogators were Americans.¹¹³ The Court explained that “nationality” and “citizenship” were not synonymous, citing in support the *International Convention on Certain Questions Relating to the Conflict of Nationality Laws (Hague Convention on Conflict of Nationality Laws)*.¹¹⁴ Because the police were acting in their official capacity as state representatives, the Court considered them to be Canadian nationals.¹¹⁵

It might be said that this is merely a matter of interpreting section 32 in a way consistent with international law, but the Court took some pains to explain that its *ratio* goes further.¹¹⁶ Thus, the Court relied upon norms of public international law in order to create a new rule in Canadian law, applicable to the delimitation of the extraterritorial effects of the *Canadian Charter*. Justice Bastarache, in his perceptive individual judgment, questioned the importance given to international law in *Charter* construction, asking whether a conflict with international law could limit a *Charter* right.

In my view, using international law as an interpretative aid in defining the content of the various rights in the *Charter* is an entirely different exercise from using non-human rights aspects of international law to circumscribe the *Charter* as a whole. Even

¹¹¹*R. v. Cook*, [1998] 2 S.C.R. 597.

¹¹²*Ibid.* at para. 27.

^{112 a} (1927), P.C.I.J., Series A, no. 10.

¹¹³*R. v. Terry*, [1996] 2 S.C.R. 207.

¹¹⁴[1937] C.T.S. 7, art. 1.

¹¹⁵*R. v. Cook*, *supra* note 111 at para. 42.

¹¹⁶*Ibid.* at para. 26.

when the application of those *Charter* rights directly conflicts with non-human rights principles of international law, the usual presumption that Parliament intends to legislate in conformity with international law should not be applied automatically... That an interpretation of such rights might place the state in violation of its international law obligations should be accorded less weight than, in the case of a mere statute, an expression of the legislative will of the state as it may exist from time to time.¹¹⁷

In *Cook*, jurisdictional norms of international law were being used to enlarge the scope of the *Charter*, not to restrict it. But a scenario such as the one evoked by Justice Bastarache is far from hypothetical. It might arise, for example, in the context of international criminal prosecution of war criminals, where norms in the applicable law of the International Criminal Court or the *ad hoc* tribunals might fall short of the *Charter*.

The Court seemed unaware of the important international case law dealing with territorial scope of human rights treaties. The European Court of Human Rights, for example, has held that the *Convention's* jurisdiction is not restricted to the territory of contracting States.¹¹⁸ States are responsible for the acts of their officials in other countries, and this has nothing to do with the rather far-fetched notion of the nationality of the official.¹¹⁹ The Human Rights Committee has taken a similar approach to the *International Covenant on Civil and Political Rights*,¹²⁰ which establishes State responsibility for the respect of the rights of all individuals "within its territory" and "subject to its jurisdiction."¹²¹ In accordance with Chief Justice Dickson's doctrine by which the *Charter* should as a minimum ensure the respect of Canada's international human rights obligations, ought not section 34 of the *Charter* to be interpreted in the relatively broad way contemplated by article 2(1) of the *Covenant*?

4. *The Secession Reference*

In the *Secession Reference*, the Supreme Court was required to pronounce itself on the extent of international law. The Attorney-General asked in Question 2 whether international law authorize or prohibit unilateral secession in the case of Québec? The Court's conclusions are in some ways unremarkable, in that they do little more than echo the writings of the vast majority of academic commentators. Here, the Court relied extensively on the work of Italian law professor Antonio Cassese,¹²² an eminent authority on the subject of self-determination. It did not however refer to most of the other "usual suspects", whose expertise had been sought and obtained by the Attorney-General or the *amicus curiae* or, earlier, by the Bélanger-Campeau Commission.

¹¹⁷ *Ibid.* at para. 147.

¹¹⁸ *Loizidou v. Turkey (Preliminary Objections)*, March 23, 1995, Series A, no. 310, at para. 62.

¹¹⁹ *X. v. Germany* (App. 1611/62), (1965) 8 *Yearbook* 158, at 168.

¹²⁰ M. Nowak, *CCPR Commentary*, (Kehl, Germany: Engel, 1992) at 42.

¹²¹ *Supra* note 96, art. 2(1).

¹²² A. Cassese, *Self-determination of Peoples: A Legal Reappraisal*, (Oxford: Clarendon Press, 1995).

Self-determination of peoples has an internal and an external dimension, the Court explained.¹²³ Its external dimension, that is, secession, only becomes operative in special cases. The two circumstances clearly recognized in such positive law statements as the 1970 *Declaration on Friendly Relations*¹²⁴ are decolonisation and severe national oppression.¹²⁵ Neither is applicable to contemporary Québec. A possible third exception is denial of the right to meaningful internal self-determination. But if such an exception exists, the Supreme Court found that it would not be applicable to Québec, where difficulties in negotiating constitutional reform could hardly be claimed to reach such a threshold. These conclusions, consistent with most academic writing, nevertheless constitute the most important judicial decision on the matter. For that reason alone the judgment has undoubtedly made its mark on international jurisprudence.

The Court might have speculated on whether the law in this area is being transformed. It seemed to touch on the matter when it considered a perceived contradiction in the documents of the Organisation for Security and Cooperation in Europe (OSCE), which recognize a right to self determination but also insist upon the sanctity of international borders.¹²⁶ The OSCE membership has grown from thirty-five, when the body was first created in 1975, to fifty-four at present, without any change to the territory it covers. This suggests that something to do with secession and the creation of new States is afoot. A Commission established by the European Communities in 1991 and presided over by French constitutional judge Robert Badinter, steered neatly through the Scylla and Charabdis of this question when dealing with Yugoslavia's breakup. The Commission found that Slovenes and Macedonians could secede and create new States, because they respected administrative boundaries within Yugoslavia. However, Serbs within Bosnia could not leave and join a greater Serbia. The Badinter jurisprudence corresponded rather conveniently to European and American foreign policy, but now has the rather inconvenient consequence of ruling out sovereignty for Kosovo or, for that matter, Chechnya. The Court failed to refer to the Badinter Commission decisions, which is unfortunate, as these constituted the only recent case law of any significance in the area. It might also have taken the trouble to refer to the, albeit occasional and perfunctory, pronouncements of the International Court of Justice on self-determination.¹²⁷

¹²³ *Reference re Secession of Québec*, *supra* note 1 at para. 126.

¹²⁴ *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, G.A. Res. 2625(XXV).

¹²⁵ *Reference re Secession of Québec*, *supra* note 1 at paras. 133, 135, 138.

¹²⁶ *Ibid.* at para. 129.

¹²⁷ *Barcelona Traction, Light and Power Co. (Second Phase)*, [1970] I.C.J. Reports 3, at 304; *The Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, [1971] I.C.J. Reports 16, at 31-32, paras. 52-53; *Western Sahara, Advisory Opinion*, [1975] I.C.J. Reports 12, at 31-33, paras. 54-59; *Case concerning East Timor (Portugal v. Australia)*, (30 June 1995), [1995] I.C.J.R. 90, at 102, para. 29.

Several paragraphs in the Advisory Opinion are devoted to the definition of "peoples", who are, after all, the beneficiaries of this right to self-determination.¹²⁸ There is no recognized definition of "peoples" in positive international law, and academic writers have adopted a variety of views on that question.¹²⁹ But this issue too is sidestepped, the Court stating that it is unnecessary to determine whether the Québécois are a "people" given that, in any case, there is no right to secede under the circumstances.

The most significant and original contribution of the Court to the development of international law lies not in its answer to Question 2 but rather in its discussion of Question 1, concerning the existence of a right to secede in Canadian law. Most of the applicable considerations set out in that portion of the opinion will resonate in all democratic States. The Court's conclusion that *unilateral* self-determination was prohibited under Canadian law corresponded to its opinion with respect to international law, obviating any need to answer Question 3, asking which body of law should prevail in the event of conflict. But its observations with respect to Question 1 on the importance of such principles as democracy, constitutionalism and the rule of law, and respect for minorities, help to define relations between peoples, minorities and governments. Entrenchment of these examples in Canadian law is echoed in such important international instruments as the human rights covenants, the regional human rights conventions, and the documents of the OSCE. International law may well attribute more importance to the original and innovative comments on Question 1 than it does to the somewhat more pedestrian answer to Question 2.

5. *The Supreme Court and International Tribunals*

Since Canada acceded to the *Optional Protocol to the International Covenant on Civil and Political Rights* in 1976,¹³⁰ litigants have had an international forum for human rights challenges. There are now three international remedies available in Canada, of which the most popular by far is a "communication" to the Human Rights Committee of the United Nations under the *Protocol*. It is also possible to petition the Inter-American Commission on Human Rights for alleged breach of the *American Declaration of the Rights and Duties of Man*¹³¹ and the United Nations Committee Against Torture with respect to the *Convention Against Torture and Other Cruel, Inhuman and*

¹²⁸ Reference re *Secession of Québec*, *supra* note 1 at paras. 123-25.

¹²⁹ A. Critescu, *The Right to Self-determination: Historical and Current Developments on the Basis of the United Nations Instruments*, U.N. Doc. E/CN.4/Sub.2/404/Rev.1; M.N. Shaw, "The Definition of Minorities in International Law", (1991) 20 Israel Y.B. Human Rights 13, at 19.

¹³⁰ (1976) 999 U.N.T.S. 302, [1976] C.T.S. 47.

¹³¹ *American Declaration of the Rights and Duties of Man*, O.A.S. Doc. OEA/Ser. L./VII.23, doc. 21, rev. 6; *Statute of the Inter-American Commission of Human Rights*, O.A.S. Doc. OEA/Ser. L.V/II.71 Doc. 6 rev 1, art. 20(a); *Regulation of the Inter-American Commission of Human Rights*, O.A.S. Doc., OEA/Ser. 49/660, art. 51.

Degrading Treatment or Punishment.¹³² All three international remedies impose as an admissibility requirement the exhaustion of all domestic remedies.

As a result, Supreme Court judgments are now regularly reviewed at an international level. Although this international "appeal" cannot be executed by Canadian courts, the ruling has a powerful impact upon government, and usually legislative or policy changes will result. But in one case, it was too late. Charles Ng successfully challenged the decision of the Minister of Justice to extradite him to California where he was subject to the death penalty.¹³³ His application for judicial review of the Minister's decision had been dismissed by the Supreme Court at the same time as it ruled in the *Kindler* case.¹³⁴ The Human Rights Committee focussed on the method of execution, asphyxiation in the gas chamber, deeming it a form of cruel, inhuman and degrading punishment. When the Supreme Court rejected Ng's petition, the Committee had issued a request for a stay of extradition pending its consideration of the application, but the Minister of Justice refused to honour it and sent Ng back to California. Ng has since been sentenced to death in California and is awaiting execution.

In 1985, the Court dismissed a claim that CN's refusal to allow Sikh electricians to wear their turbans because of a hard hat requirement was religious discrimination.¹³⁵ Bhinder successfully appealed the case to the Human Rights Committee,¹³⁶ although by then the Court had admitted it was wrong and reversed the earlier decision.¹³⁷ The Human Rights Committee also ruled against Canada in a case concerning section 12(1)(b) of the *Indian Act*, since repealed.¹³⁸ Essentially, this was the same case that the Supreme Court had dismissed in *Lavell*,¹³⁹ based on restrictive reading of the equality rights provision in the *Canadian Bill of Rights*. But the Committee's views were based on the minority rights provision of the *International Covenant on Civil and Political Rights*, and not its non-discrimination clause, so it is difficult to speak of the Court being "overruled." The reasoning of the *Ford* case, holding the prohibition of the use of English for commercial purposes to violate freedom of expression,¹⁴⁰ was endorsed in its entirety by the Committee, including the

¹³² *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, (1987) 1465 U.N.T.S. 85, art. 22.

¹³³ *Ng v. Canada* (No. 469/1991), U.N. Doc. A/49/40, Vol. II, at 189.

¹³⁴ *Reference Re Ng Extradition (Can.)*, [1991] 2 S.C.R. 858. *Kindler's* petition to the Human Rights Committee was dismissed: *Kindler v. Canada* (No. 470/1991), U.N. Doc. A/48/40, Vol. II, at 138.

¹³⁵ *Bhinder v. Canadian National*, [1985] 2 S.C.R. 561.

¹³⁶ *Bhinder v. Canada* (No. 208/1986), U.N. Doc. A/45/40, Vol. II, p. 50, [1989-90] C.H.R.Y. 306.

¹³⁷ *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489.

¹³⁸ *Lovelace v. Canada* (No. 24/1977), U.N. Doc. CCPR/3/Add.1, Vol. II, at 320, U.N. Doc. CCPR/C/OP/1, p. 83, [1983] C.H.R.Y. 306.

¹³⁹ *A.G. of Canada v. Lavell; Isaac v. Bédard*, [1974] S.C.R. 1349.

¹⁴⁰ *Ford v. Attorney-General of Québec*, [1988] 2 S.C.R. 712.

Court's suggestion that bilingual or multilingual signs in which the French language had priority would be acceptable.¹⁴¹ The case went to the Committee after Québec invoked the notwithstanding clause, which had effectively neutered section 2(b) of the *Charter* but was of no effect whatsoever with respect to article 19(2) of the *Covenant*.

Recently, the Human Rights Committee declared that the availability of funded separate schools in Ontario constitutes discrimination, and that Canada is required to support confessional schools for other religious groups if it continues to subsidize the Roman Catholic system. In 1996, the Supreme Court of Canada dismissed such an application, with Justices McLachlin and L'Heureux-Dubé in dissent.¹⁴² The reasons of Justice L'Heureux-Dubé relied on section 15 of the *Charter*, and are favourably echoed in the "views" of the Human Rights Committee, which applied the corresponding provision, article 26, of the *International Covenant on Civil and Political Rights*.¹⁴³

Conclusion

The discipline of international law has been radically transformed in the past twenty-five years, from a State-centred approach focussing on reciprocal rights in the field of nationality, immunities and territory, to a people-centred approach concerned with the human security of the individual and of vulnerable groups. The Supreme Court of Canada's case law in the field of international law faithfully reflects this evolution. No attempt has been made in this paper to compare the work of the Supreme Court of Canada in the area of international law in its fifth quarter-century with that of the previous four. In the past, the Court has dealt with matters that raised matters of treaty interpretation, especially in the area of extradition, but nothing to compare with the diversity and volume of its current international law caseload. In the late 1970s, the Court looked as if it might resist these changes, periodically reciting the old mantra of Parliamentary sovereignty. The *Charter* forced it to take a giant step forward. Its openness to international law has been an example for other constitutional courts. A quarter century from now, we may speak of this as the dawn of judicial globalization.

¹⁴¹ *Ballantyne and Davidson, and McIntyre v. Canada* (Nos. 359/1989 and 385/1989), U.N. Doc. A/48/40, Vol. II, at 91. Also *Singer v. Canada* (No. 455/1991), U.N. Doc. A/49/40, Vol. II, at 155.

¹⁴² *Adler v. Ontario*, [1996] 3 S.C.R. 609.

¹⁴³ *Waldman v. Canada* (No. 694/1996), U.N. Doc. CCPR/C/67/D/694/1996.