Case Comment
Commentaire d'arrêt

HAVE CHARTER, WILL TRAVEL? EXTRATERRITORIALITY IN CONSTITUTIONAL LAW AND CANADIAN EXCEPTIONALISM

Amir Attaran*

Ask any Canadian in a foreign land about their country and human rights, and it will take only seconds to see how much pride they feel for the nation's superb reputation. But ask any Canadian lawyer or judge if the human rights in the *Canadian Charter of Rights and Freedoms* extend to foreign lands, and decades after the *Charter* became law you are still apt to get puzzled looks.

The Supreme Court knows the problem. Its recent decision in *R. v. Hape*[1] is unanimous in the result, but as riven a judgment as there is. The Court's three separate sets of reasons, written for five, three and one judges, reveal a lively exchange, at times mildly querulous, but also marked by friendly nods to one another's points of view. There is a real sense of humility, as if the judges understood that, despite their efforts, *Hape* is an imperfect judgment that cannot last.

This article aims to explain and consider *Hape*. Contrary to the usual approach to case comments, I prefer not to dwell on the retrospective forensic analysis of the *Hape* judgment. The facts of *Hape* are far too unusual to merit that treatment, and it is a safe bet that another case quite like it is unlikely to occur again. Instead, I think it is more useful to probe the Court's reasons, and specifically, to inquire into the way the majority relied on international law to reach its judgment. Unfortunately, it is my conclusion that the majority lost its way in this unfamiliar terrain – they considered a few international law rules, but misunderstood and even ignored others – to such a degree that the majority reasons cannot be said to have precedential value. I conclude with some suggestions of how the Court might do better in future cases about the *Charter*'s extraterritorial application.

1. The (Unusual) Facts

Lawrence Richard Hape, a Canadian, carried on a murky business in the offshore financial haven of the Turks and Caicos Islands. He came to the

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* University of Ottawa Faculty of Law, Common Law, and Faculty of Medicine.

[1] 2007 SCC 26, [2007] 2 S.C.R. 292 [*Hape*].

attention of the Royal Canadian Mounted Police (RCMP), which approached the Turks and Caicos police for assistance.[2] One Detective Superintendent Lessemun agreed to help, on the condition that the RCMP defer to him and that the investigation in the Turks and Caicos proceed under his personal authority. The RCMP agreed to these terms.

A decision was taken to break covertly into Hape's office. At a meeting in the nearby Bahamas, ten RCMP and American police officers, but notably not a single Turks and Caicos officer, laid the plans, which were presented to Lessemun as a *fait accompli*. In fact, the easygoing Lessemun seemed prepared to let the RCMP have their way in almost anything. He said that he didn't trust his fellow officers in the Turks and Caicos force to deal with a major figure like Hape.

The RCMP plan succeeded in grand style. Twice in one day, Canadian technical experts defeated the locks and alarms protecting Hape's office so that Canadian officers could enter and copy paper and electronic business records. To keep the operation secret, not a single Turks and Caicos officer participated in the break-in. In fact, Lessemun stood outside as a lookout, to reassure and divert any passing Turks and Caicos police officers who might wonder what all the activity was about.

It was not until the final raid on Hape's office a year later that the Turks and Caicos police played an operational role. Six RCMP officers, together with Lessemun and three Turks and Caicos officers, swept down on the office and confiscated approximately one hundred boxes of documents. Lessemun prevented the RCMP from transporting these documents to Canada, although he allowed them to make copies.

It is at this point that the facts of *Hape* become inimitable, making it the sort of case that is so unusual it will almost certainly never recur, and which accordingly makes for imperfect precedent.

Prior to the two covert break-ins and the raid a year later, it was agreed that Lessemun would secure search warrants on behalf of the RCMP in accordance with Turks and Caicos law, and it seems he did not disappoint. Somehow, however, while the RCMP were busy copying and recording the chain of custody for some 40,000 documents belonging to Hape's business, they *forgot* to copy the warrants.

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[2] The facts in this section are detailed in the Supreme Court's decision at 302-05, and supplemented by facts found by Juriansz J. in the trial level motions decision at [2002] O.J. No. 3714 (QL).

Predictably, the RCMP's colossal mistake turned into a protracted battle over the admissibility of all the documents, because the warrants could not be proved in evidence. At trial, two RCMP officers who participated in the covert break-ins recalled that Lessemun had told them about or shown them warrants, but neither officer could authenticate copies of the warrants that the prosecutors belatedly secured. As for the final raid, no witness could recollect a warrant, nor could the prosecutors even locate one.

Thus when all the evidence was called, the trial judge received unauthenticated Turks and Caicos warrants for the two break-ins, and no warrant at all for the final raid in which tens of thousands of Hape's documents were carted away.

A situation like this must torment the judicial mind. No judge who is shown two unauthenticated warrants can possibly feel comfortable letting an accused have a free pass merely because the RCMP failed to authenticate the warrants, as they know they must. But similarly, no judge wants to convict an accused on the basis of evidence which arrived in the court record through warrantless and therefore illegal searches. Indeed, even the Supreme Court felt compelled to fudge the issue, so it flipped the usual burden of proof, saying that there was no proof the searches were *not* authorized under Turks and Caicos law.[3]

It may be hackneyed, but the adage is rarely wrong. Hard cases make bad law.

2. The Supreme Court Judgment

All the members of the Supreme Court of Canada decided to refuse Hape's appeal, but for very different reasons. LeBel J. wrote for the majority of five judges; Bastarache J. wrote for a vocal plurality of three who disagreed with the majority on almost everything; and Binnie J., who wrote alone, critiqued the majority with Shakespearean wit.[4] Of the collegial chiding, one could say the Supreme Court has seldom been in such heated agreement.

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[3] *Hape*, *supra* note 1 at 358.

[4] At 385-87, Binnie J. was unhappy that the majority's reasons "make far-reaching pronouncements before being required by the facts … to do so." Thus he recommended "heeding the cautionary words of the poet":

> *There are more things in heaven and earth, Horatio,*
> *Than are dreamt of in your philosophy*.
> (Hamlet, Act I, Scene v, 11. 166-67).

There is no *ratio decidendi* common to all three sets of concurring reasons. There are nonetheless two things about which the whole Court agreed, and it is worth reciting these. First, the whole Court agreed that, as a general rule, the *Charter*'s scope is decided by section 32(1), and nothing in the words of section 32(1) *stricto sensu* limits the extraterritorial reach of the *Charter*.[5] Second, the Court agreed that if the territorial reach of section 32(1) were to become limited, the limit must be emplaced as a matter of interpretation and the common law. So far, so uncontroversial, but that is where the consensus ends.

LeBel J.'s majority reasons held that the *Charter* normally would not apply extraterritorially, and as it did not on the facts of *Hape*, whether any *Charter* breach occurred was beside the point. Bastarache J.'s plurality reasons found that the *Charter* does apply extraterritorially, but was not breached on the facts.

Let us unpack the majority's reasons. LeBel J. thought that certain principles of customary international law, such as sovereign equality, comity and non-interference, are "adopted" by the common law in such a way as to obviate extraterritorial application of the *Charter*.[6] The reason is that the overseas enforcement of Canadian law is, practically speaking, outside of Parliament's jurisdiction, so section 32(1) has to be read down in that light. "Since extraterritorial enforcement is not possible," wrote Justice LeBel, "and enforcement is necessary for the *Charter* to apply, extraterritorial application of the *Charter* is impossible."[7]

Accordingly, the majority said, as a general rule the *Charter* will not apply extraterritorially. But there are two rather murky exceptions to the rule where the *Charter* will apply, and I call these by the shorthand names of "the consent exception" and "the human rights exception." The interplay between the rule and these exceptions is shown in the figure below, with solid lines for decided rules of law, and dashed lines for rules adverted to in *obiter dicta*.

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[5] Recall that section 32(1) says that the *Charter* applies "in respect of all matters within the authority of" Parliament or the provincial legislatures.

[6] *Hape*, *supra* note 1 at 319-20:

> Every principle of customary international law is binding on all states unless superseded by another custom or by a rule set out in an international treaty. As a result, the principles of non-intervention and territorial sovereignty may be adopted into the common law of Canada in the absence of conflicting legislation. These principles must also be drawn upon in determining the scope of extraterritorial application of the Charter.

[7] *Ibid*. at 340-41.

The majority's consent exception is self-explanatory; it says that where the foreign sovereign gives its consent, section 32(1) is re-engaged and the *Charter* again applies. Confusion arises, however, because the majority omitted to define what it meant by "consent."[8] Does it require the foreign sovereign to consent to the Canadian enforcement action generally; or to consent to the *Charter*'s application specifically; or perhaps even to consent to the exact section or subsection of the *Charter* that arises in a case? Nowhere in its reasons did the majority answer these questions, and thus what constitutes a valid "consent" remains a cipher for the lower courts to crack.

As for the second exception, the majority wrote - but only in *obiter dicta* – that Canadian officers may be prohibited from participating in extraterritorial activities that violate international human rights law. Where Canadian officers act extraterritorially and "violate Canada's international human rights obligations," wrote LeBel J., this "might justify a remedy under section 24(1) of the *Charter*."[9] The implication is that violations of international human rights law deserve a remedy, even where autonomous *Charter* violations do not.

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[8] *Ibid*. at 332:

> Simply put, Canadian law, whether statutory or constitutional, cannot be enforced in another state's territory without the other state's consent. This conclusion, which is consistent with the principles of international law, is also dictated by the words of the Charter itself. The Charter's territorial limitations are provided for in s. 32, which states that the Charter applies only to matters that are within the authority of Parliament or the provincial legislatures. In the absence of consent, Canada cannot exercise its enforcement jurisdiction over a matter situated outside Canadian territory. Since effect cannot be given to Canadian law in the circumstances, the matter falls outside the authority of Parliament and the provincial legislatures.

[9] *Ibid*. at 349-50:

> … there is an argument that comity cannot be invoked to allow Canadian authorities to participate in activities that violate Canada's international obligations. As a general rule, Canadian officers can participate in investigations abroad, but must do so under the laws of the foreign state. The permissive rule that allows Canadian officers to participate even when there is no obligation to do so derives from the principle of comity; the rule that foreign law governs derives from the principles of sovereign equality and non-intervention. But the principle of comity may give way where the participation of Canadian officers in investigative activities sanctioned by foreign law would place Canada in violation of its international obligations in respect of human rights. In such circumstances, the permissive rule might no longer apply and Canadian officers might be prohibited from participating. I would leave open the possibility that, in a future case, participation by Canadian officers in activities in another country that would violate Canada's international human rights igations might justify a remedy under s. 24(1) of the Charter because of the impact of those activities on Charter rights in Canada.

Ironically, not long after the five to three to one split decision in *Hape*, the human rights exception made a reappearance, and reunified the Court in unanimous harmony – meaning that the precedential weight of the formerly *obiter dicta* exception has now overtaken the rest of *Hape*! In *Canada (Justice) v. Khadr*, the Court unanimously ruled that Omar Khadr, a child soldier imprisoned by the United States (US) military in Guantánamo Bay, Cuba, was entitled to a *Charter* remedy when Canadian officials, including agents of the Canadian Security and Intelligence Service (CSIS), travelled abroad and interrogated him on behalf of the Americans.[10] The Court's decision cited an earlier determination by the US Supreme Court that imprisonment in Guantánamo Bay violated the rights of detainees to *habeas corpus* and their rights under the *Geneva Conventions*. Since those rights are among the ones that international human rights law obliges Canada to uphold, the Court reasoned that when the Canadian officials became involved in the Guantánamo Bay process and complicit in the international law violations, they also became bound by the *Charter*.

Some might believe that the *Khadr* decision vindicates the majority's approach in *Hape*. This is not so; the triumphant human rights exception cannot reaffirm the whole. Further, in *Khadr* we see how the human rights exception contains a logical paradox. Under the general rule in *Hape*, the customary international law of sovereign equality is adopted and deflate extraterritorial *Charter* rights; but thanks to the human rights exception in *Hape*, now made law in *Khadr*, international human rights law (whether found in custom or treaty) is capable of re-inflating extraterritorial *Charter* rights. This "accordion effect," as British Columbia Civil Liberties Association counsel Joe Arvay, Q.C., aptly called it during oral argument in *Khadr*, is not intellectually satisfactory because it places the question of whether a breach of international human rights law occurred ahead of the threshold question of whether the *Charter* at all applies – that is, locating the rights breach usurps and *becomes* the threshold question. Not only does this approach have an odd cart-before-the-horse feel to it, but it will often add surplus complexity, particularly where the Court has previously observed that *Charter* rights are frequently tantamount (or almost tantamount) to rights under international human rights law.[11]

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[10] *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125.

[11] For example, the Court has many times had regard to the *International Covenant of Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, arts. 9-14, Can. T.S. 1976 No. 47 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*] particularly in the early days of the *Charter* when the *ICCPR* practically underpinned the *Charter*'s development, in cases such as *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Keegstra* [1990] 3 S.C.R. 697; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779. The *ICCPR* continues to be cited today, for

However, the much larger problem with the majority's approach in *Hape* is that it depends on an incorrect understanding of international law to oust the ordinary application of the *Charter*. That criticism is the focus of this paper.

International law does not normally preclude the application of Canadian laws, any more than a sovereign sitting in some foreign land can vouchsafe whether or not a particular Canadian law is valid. Had the majority held that international law could trump ordinary Canadian statutes, it would have been surprising; but for the majority to hold, as it did, that international law can trump the mighty Canadian constitution is positively breathtaking. Where it might lead is unfathomable. If *Hape* makes it fair game to interpret and read down s. 32(1) of the *Charter* in light of Canada's obligations (to respect sovereign equality) in customary international law, then logically it must be permissible to cast about for other international laws creating other obligations for Canada – in treaties, for example – and use those to interpret and read down other parts of the constitution. Long before *Hape*, the classic judgment in *Reference re: Weekly Rest in Industrial Undertakings Act* case (the *Labour Conventions* case) said that the international law obligations Canada undertook to the world would not force sections 91 to 95 of the *British North America Act* to be reinterpreted; the constitution would not be reshaped by treaties.[12] But now *Hape* says something quite opposite: that international law actually can require that the constitution, specifically s. 32(1) of the *Charter*, be reinterpreted. Since obviously no single part of the constitution is more or less sacrosanct than any other, might it also now be true that *Labour Conventions* is obsolete?

Of course, the *Labour Conventions* case probably will not be overturned soon, but that is only because grace and nostalgia sometimes count for more in jurisprudence than reason. The frank reality is that once the *Hape* majority decided the constitution must be read down because of international law, no principled line can be drawn exempting some parts of the constitution from this dilution but not others.

The starting point for the majority's remarkable constitutional dilution is actually a rule of statutory, rather than constitutional, interpretation. In *Hape*, the majority said that international law can become automatically "adopted" into the common law, except if there is

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example in *Health Services and Support v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391 [*Health Services*].

[12] *Reference re*: *Weekly Rest in Industrial Undertakings Act*, [1937] A.C. 326, 1 D.L.R. 673 [*Labour Conventions*].

a contrary legislative intention.[13] This is correct, and among the ways that international law may become so adopted is by the presumption that statutes conform to international law. Thus if a Canadian statute can bear multiple meanings, then absent a clear intention to the contrary, the ambiguity should be resolved by favouring the interpretation which best conforms with international law.[14]

And so, too, it is with the *Charter*, the majority reasoned. Where the ambiguity to be decided is whether or not the *Charter* applies extraterritorially, and the language of section 32(1) of the *Charter* evinces no clear intention on the issue, then international law – specifically the principles of sovereign equality and non-interference – should be called in.[15]

I have strong doubts about the wisdom of using statutory interpretation principles on the constitution in this fashion. The *Charter*, obviously, is not an ordinary statute – certainly not hierarchically, and not linguistically either. Statutes tend to speak in great detail, in complex schemes or abundant subparagraphs, but the *Charter* speaks tersely, in maxims seldom exceeding a sentence or two. Thus an ambiguous statute is usually one that is accidentally or otherwise poorly worded, but the *Charter* manages to be ambiguous without being poorly worded. Perhaps a better word than "ambiguous" is that the *Charter* is deliberately *equivocal*, for contained in its terse maxims are many intentionally

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[13] *Hape*, *supra* note 1 at 313-14, 316.

[14] *Ibid.* at 323:

> It is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law. The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result… First, the legislature is presumed to act in compliance with Canada's obligations as a signatory of international treaties and as a member of the international community. In deciding between possible interpretations, courts will avoid a construction that would place Canada in breach of those obligations. [Second,] the legislature is presumed to comply with the values and principles of customary and conventional international law. Those values and principles form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them. The presumption is rebuttable, however. Parliamentary sovereignty requires courts to give effect to a statute that demonstrates an unequivocal legislative intent to default on an international obligation.

[15] *Ibid.*at 313:

> [C]ertain fundamental rules of customary international law govern what actions a state may legitimately take outside its territory. Those rules are important interpretive aids for determining the jurisdictional scope of s. 32(1) of the Charter.

meaningful silences. It would be a travesty to let the constitution's meaningful silences be mishandled according to rules of statutory interpretation intended for ordinary ambiguities such as those in poorly worded legislation.[16]

Section 32(1) is, I think, an example of meaningful silence. In leaving section 32(1) of the *Charter* equivocal as to differences between acts of the state on Canadian and foreign soil, the *Charter's* architects probably wanted no distinction drawn. Those same architects did not hesitate to fill the *Charter* with national distinctions where they wanted them; section 23 applies only to persons in Canada, for example, and sections 3, 6 and 23 apply only to citizens of Canada.[17] In failing to consider seriously the possibility that section 32(1) is meaningfully silent when it draws no distinction between national and foreign jurisdiction, the *Hape* majority dashed prematurely to international law as an interpretive aid. Ironically, this "aid" actually hurts matters more than it helps, because customary international law, a body of law scarcely understood by most Canadian lawyers and judges, is harder to interpret and much less succinct than the plain wording of section 32(1).

The majority's reach for international law to trump the *Charter* has been criticized before, most recently by Professor Kent Roach, who calls *Hape* "a dangerous and unnecessary precedent" that creates "*Charter*-free zones" in defiance of the rule of law.[18] I am concerned with a related but somewhat different question. Once the majority in *Hape* decided to use international law to interpret section 32(1), did it ultimately resort to the correct rules of international law?

As the next section explains, it is here that the majority erred most seriously. It relied on an incomplete – frankly, incorrect – view of international law to justify its conclusion that the extraterritorial enforcement actions of Canadian officers are outside the authority of

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[16] Consider the differences in reading a *haiku*, as a compared to a computer instruction manual. If one expects to interpret the poetry's spare words as one does the manual's verbose technical prose, probably one will fail to understand the *haiku*. Interpreting the constitution with rules made for regular statutes is a similarly misleading mistake.

[17] While I am not keen on applying the rules of statutory interpretation to the *Charter*, if one were to do so, a sort of *inclusio unius est exclusio alterius* argument could be made around these facts, which would argue that no blanket national limitation (of territory or of citizenship) ought to be read into section 32(1), because those limitations are attached to the individual rights to different extents.

[18] Kent Roach, "*R. v. Hape* Creates Charter-free Zones for Canadian Officials Abroad" (2007) 53 *Crim. L. Q.* 1.

Parliament and the Canadian state.[19] A complete, current view of international law leads to exactly the opposite conclusion, in which extraterritorial enforcement actions of Canadian officers are deemed by law the Canadian state's responsibility. Succinctly put, the majority hinged its decision on international law but misunderstood it, and thus reasoned incorrectly in *Hape*.

3. State Responsibility and "Jurisdiction" in International Law

As already explained, the majority's views derive from the principles of sovereign equality and non-interference. In explaining the importance of these principles, LeBel J. considered *The Case of the S.S. Lotus* of 1927,[20] writing:

> The Permanent Court of International Justice stated in the *Lotus* case that jurisdiction "**cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention**." According to the decision in the *Lotus* case, extraterritorial jurisdiction is governed by international law rather than being at the absolute discretion of individual states. While extraterritorial jurisdiction – prescriptive, enforcement or adjudicative – exists under international law, it is subject to strict limits under international law that are based on sovereign equality, non-intervention and the territoriality principle. According to the principle of non-intervention, states must refrain from exercising extraterritorial enforcement jurisdiction over matters in respect of which another state has, by virtue of territorial sovereignty, the authority to decide freely and autonomously. *Consequently, it is a well-established principle that a state cannot act to enforce its laws within the territory of another state absent either the consent of the other state or, in exceptional cases, some other basis under international law*.[21]

The passage of the *Lotus* case quoted by LeBel J, which I highlight in bold text, is the seed of the *Hape* majority's belief that the *Charter* normally will not apply to the extraterritorial actions of Canadian officers, "except by virtue of a permissive rule derived from international custom" – except by consent, in other words. The trouble is, what the majority views as the requirement of a "permissive rule" before exercising extraterritorial jurisdiction is so highly qualified in

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[19] *Hape*, *supra* note 1 at 352.

[20] (1927), P.C.I.J. Ser. A No. 10 [*Lotus*], online: http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_ lotus/.

[21] *Hape*, *supra* note 1 at 329-30 [citations omitted; emphasis added.].

international law – including in the *Lotus* case itself – that it is not a requirement at all. Here is what the *Lotus* case goes on to say, commencing at the very next paragraph following where LeBel J.'s quotation of that same case precipitously and selectively left off:

> It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law…. [T]his is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.[22]

By making the error of selectively quoting the *Lotus* case, the *Hape* majority altered the meaning of that case greatly. The *Lotus* case emphatically does not say that a state must have a *permissive* rule of international law before exercising jurisdiction over an extraterritorial subject matter. Rather, the *Lotus* case says that so long as there is no *prohibitive* rule of international law, a state may exercise jurisdiction over an extraterritorial subject matter *within its own territory*.

Thus when a court on Canadian territory (in Toronto) took jurisdiction in Hape's criminal trial on charges of extraterritorial money laundering, it was acceptable because, according to the *Lotus* case, states may "extend the … jurisdiction of their courts to persons, property and acts outside their territory."[23] Further, had the trial judge sitting in Toronto decided to exclude the warrantless evidence against Hape under section 24(1) of the *Charter*, that too accords with the *Lotus* case, which says that states have "a wide measure of discretion" within their jurisdiction.

Thus, based on a complete, less selective reading of the *Lotus* case, the majority's view that the *Charter* could not apply in *Hape* is clearly wrong.

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[22] *Lotus*, *supra* note 20; see also the contemporaneous case comment of George Wendell Berge, "The Case of the S. S. 'Lotus'" (1928) 26 Michigan L.R. 361.

[23] Some may question if really money laundering done overseas is a crime in Canada. It is, and Hape was convicted in respect of money he illicitly received in the Turks and Caicos; see the trial level decision at *R. v. Hape*, [2002] O.J. No. 5044, at paras. 85-87 (QL).

It is worth understanding how the majority in *Hape* erred and misunderstood extraterritorial jurisdiction, to not propagate the mistake in future jurisprudence. Explaining this requires a brief digression upon the meaning of the word "jurisdiction."

The majority in *Hape* drew distinctions between three different flavours of jurisdiction: 1) prescriptive jurisdiction; 2) enforcement jurisdiction; and 3) adjudicative jurisdiction. International lawyers often regard these three terms as discrete, as indeed they are, yet international law scholarship contains much shockingly incorrect commentary about them.[24] The distinctions matter, because prescription of laws, enforcement of laws, and adjudication of cases raise different concerns when Canada projects each extraterritorially. LeBel J. used the famous hypothetical of smoking in Paris to illustrate how some types of extraterritorial jurisdiction are more troublesome than others:

> In the classic example, Parliament might pass legislation making it a criminal offence for Canadian nationals to smoke in the streets of Paris, thereby exercising extraterritorial prescriptive jurisdiction on the basis of nationality. If France chooses to contest this, it may have a legitimate claim of interference with its territorial sovereignty, since Canada's link to smoking on the Champs-Élysées is less real and substantial than that of France. France's territorial jurisdiction collides with Canada's concurrent claim of nationality jurisdiction. The mere presence of the prohibition in the Criminal Code of Canada might be relatively benign from France's perspective. However, France's outrage might be greater if Canadian courts

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[24] For example, a recent, highly regarded international law textbook repeats this incorrect claim about the *Lotus* case: that the "except by virtue of a permissive rule" passage (*i.e.* the passage quoted by the *Hape* majority) pertains to cases of enforcement jurisdiction, while the passage that follows it a paragraph later (*i.e*. the passage I append above) pertains to cases of prescriptive jurisdiction. But there is not an iota of evidence for this claimed distinction. When one reads the *Lotus* case in and around the relevant passages (paras. 18-19) *nowhere* does the Permanent Court of International Justice express the view that one passage concerns enforcement while the other concerns prescription. The words "prescriptive" and "enforcement" do not even appear in the *Lotus* judgment, and the distinction those words represent is not at the heart of the case. The textbook account of the case grafts the enforcement/prescription distinction onto the *Lotus* case, although it is not there in the original; see John H. Currie. *Public International Law,* 2nd edition (Toronto: Irwin Law, 2008), at 335-341.

Therefore, as occasionally happens in scholarship, a myth has taken root that the *Lotus* case is authority for the enforcement/prescriptive distinction, when it is not. For this reason, one must approach the international law scholarship with caution, since much of it carelessly adopts the enforcement/prescription distinction without inquiring into its origins. Regrettably, among the academic studies to make this mistake is the one that was cited by the majority in *Hape*; see Steve Coughlan *et al.*, "Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization" (2007) 6 C.J.L.T. 29.

> tried a Canadian national in Canada for violating the prohibition while on vacation in Paris. It would be greater still if Canadian police officers marched into Paris and began arresting Canadian smokers or if Canadian judges established a court in Paris to try offenders.[25]

What this passage argues is that extraterritoriality becomes increasingly problematic as one ratchets up from mild prescriptive jurisdiction to potentially offensive enforcement or adjudicative jurisdiction. Legislating to forbid Canadians smoking on the Paris streets – prescriptive jurisdiction – is perhaps tolerable to France; but dispatching the RCMP to patrol the Champs-Élysées and to frisk scofflaw Canadians for their *Gauloises Bleu* – enforcement jurisdiction – almost certainly is not. Somewhere a point is reached where projecting Canadian power extraterritorially is likely to offend France, unless of course France consents.

As a diplomatic or political statement, the smoking-in-Paris analogy is apt; some impositions of extraterritorial jurisdiction will irritate foreign sovereigns and upset the delicate balance of comity more than others. But as a legal statement, the analogy breaks down and is dangerously misleading. Can it honestly be imagined that if the RCMP were frisking Canadians for tobacco on the Champs-Élysées without French consent, but Canada sought to restore comity by stripping those Canadians of their *Charter* rights, suddenly the French would breathe a sigh of relief and stop being irritated? That makes no sense whatsoever – yet it is what the majority in *Hape* implied would have to be done to preserve comity and sovereign equality.

The better view is that the irritant to comity and sovereign equality, whether in the smoking analogy or in *Hape*, lies in the conduct of the state organ (here the RCMP) on foreign soil – and withholding the *Charter*, practically speaking, does nothing to remove that irritant.

Accordingly, the question I am concerned with is whether, *as a true matter of international law*, and not just smoking metaphors or imagined diplomatic or political opinion, Canadian officers exercising enforcement jurisdiction abroad *truly* exceed the jurisdiction of the Canadian state. This, after all, is the fundamental reason the *Hape* majority concluded that section 32(1) cannot apply extraterritorially – except where the foreign sovereign consents – and so it deserves precise scrutiny.

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[25] *Hape*, *supra* note 1 at 328.

To enter this inquiry, it is first helpful to distinguish the imprecise and fraught word "jurisdiction" – note its two different meanings in the preceding paragraph – from the related concept of "state responsibility." This is not just a matter of semantics, but a highly meaningful re-conceptualization.[26]

In fact, it is the difference between "jurisdiction" and "state responsibility" that causes the breakdown in the smoking analogy. *Hape* says that Canada has "jurisdiction" to dispatch the RCMP to patrol the Champs-Élysées, provided that France consents. But suppose the RCMP began patrolling the Champs-Élysées secretly without France's consent, or suppose that France gave its consent but the RCMP flouted it by patrolling Montmartre instead. In those cases, surely Canada would still bear "state responsibility" for the RCMP's actions in France, even though "jurisdiction" according to *Hape* would be lacking.

A convenient way to think of the difference is this. A state's jurisdiction in international law refers to whether or not it may lawfully engage in some conduct, having regard to considerations of sovereignty, territoriality, nationality and similar signifiers of statehood. A state's responsibility in international law refers to whether, once a state has engaged in some conduct, whether lawful or not, that conduct is attributed to the state, such that it bears accountability for the conduct and its consequences. Whether a certain instance of a state's extraterritorial conduct is classified as enforcement, prescription, or adjudication matters to whether that conduct is *intra vires* or *ultra vires* the state's jurisdiction – the smoking hypothetical tells us that - but sheds no light on whether or not the state is deemed *responsible* and made accountable for its conduct in international law.[27]

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[26] But even if it were no more than a semantic adjustment, there would still be much to recommend it. "Jurisdiction" is a word often used in imprecise ways, and the fact that international lawyers and the *Hape* court need to carve up the word into three separate domains – prescriptive, enforcement and adjudicative jurisdiction – shows that the word on its own lacks precision. Throw in the added complexity that in international law, "jurisdiction" can be territorial, universal, protective, of nationality, *in personam*, or *in rem*, among other variants, and it rapidly becomes clear that a more exact lexicon would be helpful.

[27] A corollary of this distinction is that states are responsible for conduct *ultra vires* their jurisdiction. For instance, if a state acted without defensive justification and randomly dropped a nuclear bomb on some other state, obviously that aggressive act is *ultra vires* any sensible notion of state jurisdiction, but that does not mean the state is not responsible for having broken international law, in this case, the laws of armed conflict.

A second difference is that the law governing states' jurisdiction is less normative and more fact-dependent than the law governing states' responsibility. The latter requires only finding which state acted, and making the attribution of state responsibility accordingly under codified rules of international law (as are discussed further down this page). The former requires answering a litany of vexing factual questions, before it is established that the state acted within its jurisdiction. For example, all the following questions may need to be answered before "jurisdiction" can exist in the *Hape* sense. Is the foreign sovereign competent to consent to the extraterritorial application of the *Charter*? Does a particular gesture by that sovereign signify true consent? Does a particular extraterritorial act by Canada fall inside or outside the four corners of consent that was given? Canadian courts face a difficult evidentiary task assessing and deciding these and similar questions; a shifting, uncertain jurisprudence is inevitable under the *Hape* construct.

Thus, if the goal of the majority in *Hape* was to make extraterritorial application of the *Charter* more predictable while conforming to international law, it should not have focused on jurisdiction. Instead, the majority should have relied on the international law of state responsibility, which is more appropriate to the issues and helpfully normative.

4. The International Law of State Responsibility

The International Law Commission (ILC) of the United Nations is the world's pre-eminent body of scholars and jurists responsible for "the progressive development of international law and its codification."[28] Over the course of about half a century, from 1954 to 2001, the ILC painstakingly studied, reached consensus about, and codified the rules by which states come to be responsible for their acts.[29] Mostly, these rules are convenient when two states are finger-pointing at one another to attribute responsibility for a wrongful act, as implied by the title of the ILC's work, the *Articles on Responsibility of States for Internationally Wrongful Acts*; but the same rules of attribution apply when talking of the

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[28] See Article 1, paragraph 1, of the *Statute of the International Law Commission*, adopted by the General Assembly in Resolution 174 (II) of 21 November 1947, as amended.

[29] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002). Note that the ILC's *Articles* were approved by the U.N. General Assembly in Resolution 56/83 adopted 12 December 2001; see online: http://daccess-ods.un.org/TMP/2638919.html.

rightful or ordinary acts of a state, for attribution of responsibility for an act does not depend upon whether or not the act is wrongful.[30]

For present purposes, Article 4 of the ILC's *Articles* is the most important attribution rule. It reads:

> *The conduct of any State organ shall be considered an act of that State under international law*, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.[31]

At the risk of restating language the ILC perfected, it cannot be pointed out too strongly that under international law, *any* conduct by Canada's state organs, such as the police, is deemed to be an act of the Canadian state. Whether one labels the conduct prescriptive, enforcement, or adjudicative jurisdiction is totally beside the point; Article 4 attributes *all* conduct by Canadian state agents to Canada. For those who believe international law is complex and forbidding, here the rule could hardly be more straightforward.

It is impossible to reconcile the ILC's codification of international law in Article 4 with the mistaken version of international law propounded by the majority in *Hape*. Article 4 does not contemplate that when Canadian police officers sojourn abroad, the customary international law of sovereign equality can intervene to prevent their conduct being attributable to Canada. Rather, under Article 4, the extraterritorial conduct of Canadian police officers is *always* attributable to Canada. That reality seems to make untenable the conclusion that their conduct is outside the (I hesitate to use the word) "jurisdiction" of Canada's Parliament and section 32(1) of the *Charter* – for if that were so, whose jurisdiction *are* they under? Some other Parliament?

One might object that the straightforward attribution rule in Article 4 was not meant for the situation where Canada co-operates with another

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[30] As the ILC explains:

> The attribution of conduct to the State as a subject of international law is based on criteria determined by international law and not on the mere recognition of a link of factual causality. As a normative operation, attribution must be clearly distinguished from the characterization of conduct as internationally wrongful. Its concern is to establish that there is an act of the State for the purposes of responsibility.

See *ibid*. at 39-39, and also ILC Article 2, which treats as distinct issues the attribution of an action to a state, and whether that action is in breach of the state's international obligations and therefore wrongful.

[31] *Ibid*. at 40 [emphasis added].

state – as in *Hape*, for example, where the Canadian police subordinated themselves to the authority of the Turks and Caicos police. Another ILC Article, specifically Article 6, deals with the most extreme cases of interstate co-operation – of which *Hape* is not one – that permit deviation from the Article 4 rule.

Article 6 contemplates that responsibility for conduct may pass from one state to another state where one state places its organs at the disposal of the other.[32] The threshold for state responsibility to pass, however, is vertiginously high; the ILC writes that "ordinary situations of inter-State cooperation or collaboration" do not engage Article 6, and the conditions needed are exacting:

> Not only must the organ be appointed to perform functions appertaining to the State at whose disposal it is placed, but in performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State.[33]

These conditions are not met on the facts of *Hape*. In the interest of comity, Canada agreed that its police would respect the authority of the Turks and Caicos police, but on no conceivable view did Canada ever surrender "exclusive direction and control" of the RCMP officers. Indeed, the RCMP officers planned the break-ins to Hape's office without Turks and Caicos police officers in attendance, and did all the breaking in themselves, except for Lessemun who stood outside as a lookout. Article 6, therefore, does not negate Canada's state responsibility in *Hape*, but reconfirms it.[34]

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[32] Article 6 reads:

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

[33] *Ibid.* at 44 [emphasis added].

[34] So when is Article 6 engaged? The ILC cites the illustrative example of the House of Lords, sitting as the Judicial Council of the Privy Council. In that example, a state organ of the United Kingdom (UK) is so thoroughly placed at the disposal of a Commonwealth state that the direction and control no longer belongs to the UK, notwithstanding that the UK pays the salary of the Law Lords. For instance, the Privy Council follows not English law, but the law of the other state. That is very different indeed from *Hape*, where the Canadian police were amassing evidence for a Canadian prosecution in a Canadian court under Canadian law; and international law regards it as immaterial that they had to sojourn to Turks and Caicos to gather the evidence; see *ibid.* at 45.

In fact, if there is any lesson the *Hape* majority might have drawn from using international law to interpret the *Charter* in extraterritoriality cases, it is this: far from precipitating a rupture with the *Charter*, a correct view of current international law, based on something more than an incomplete reading of the *Lotus* case, actually *reinforces* the existing jurisprudence on section 32(1). Not only is international law far simpler than the *Hape* majority made out, but the degree of conformity between international law and *Charter* law before *Hape* was already extensive and striking. ILC Article 4, which reads that the legislative, executive, and judicial acts of state organs are attributable to the state, is almost identical to the *Charter* law rule in *R.W.D.S.U. v. Dolphin Delivery Ltd*.[35] Similarly, ILC Article 6, which creates an exception for state organs whose conduct is under the exclusive direction and control of an entity other than the state, is virtually the same as the *Charter* law rule in the "university cases" of *McKinney v. University of Guelph* and *Douglas/Kwantlen Faculty Association v. Douglas College*.[36] How ironic that the majority in *Hape* struggled to achieve greater conformity between international law and *Charter* law, when that conformity was already there.

There is therefore *no reason* under international law to approach section 32(1) in extraterritorial *Charter* cases any differently than in domestic cases. However, that emphatically does not mean that when extraterritorial cases arise, courts must or should blind themselves to the foreign context. For example, a court might decide that there is no *Charter* infringement because the rights accorded under foreign law are tantamount to the rights under the *Charter* (the approach of Bastarache J. in *Hape*). Also, a court might consider evidence that comity toward another sovereign would be offended by granting a *Charter* remedy, which could be taken into account at the section 1 stage of justifying an

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[35] *R.W.D.S.U. v. Dolphin Delivery Ltd*., [1986] 2 S.C.R. 573, at 598-99, *per* McIntyre J.: "It is my view that s. 32 of the *Charter* specifies the actors to whom the *Charter* will apply. They are the legislative, executive and administrative branches of government."

[36] Both cases concerned whether a mandatory retirement age for staff was consistent with the *Charter*, but they were decided very differently, based on the presence or absence of effective state control. In *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, the Court at 272 exempted an internal university retirement policy from the application of the *Charter* because the policy was a creation of the university's Board, which acted essentially autonomously and only nominally under state control: "The government … has no legal power to control the universities even if it wished to do so." Contrast that with *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570, where the Court at 579 found that unlike a full university, "[t]he Minister, however, exercises direct and substantial control over the college," and so the *Charter* applied accordingly.

infringement of *Charter* rights. These aspects of judicial control over the *Charter* will always be available in extraterritorial cases, so there is no need to pretend that international law obliges a special approach to section 32(1).

Finally, and so as not to leave the unfair impression that the *Hape* majority was in all respects wrong, one aspect of its reasons is very well supported by international law. Recall the human rights exception, reaffirmed in *Khadr*, which stipulates that "participation by Canadian officers in activities in another country that would violate Canada's international human rights obligations might justify a remedy under section 24(1) of the *Charter*." Here one is not solely concerned with attribution under the ILC's Articles but also with an internationally wrongful act, such as a war crime or torture. International law (both customary and treaty) forbids such acts, and under ILC Article 16, Canada is responsible for a violation if its agents participate in another state's wrongdoing. Article 16 reads:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
>
> (b) the act would be internationally wrongful if committed by that State.[37]

Thus if Canada's state agents knowingly aid another state to commit a wrongful act in international law, that breach is attributed by international law to Canada's too.[38] This does indeed place hard limits on the co-operative activities that Canada may lawfully engage in and, as LeBel J. wrote, "Comity cannot be invoked to allow Canadian authorities to participate in activities that violate Canada's international obligations."[39] Making *Charter* remedies available in such circumstances, as is now the law after *Khadr*, comports with international law and provides a mechanism in domestic law for situations where Canada is involved in internationally wrongful conduct. It is also arguably wise policy, since individuals who suffer breaches of their internationally-protected human rights often have few, if any, other judicial forums to turn to.

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[37] Crawford, *supra* note 29.

[38] By analogy, ILC Article 16 is like the common law rule of culpability by reason of aiding or abetting an offence committed by another.

[39] *Hape*, *supra* note 1 at 349-50.

5. Alternatives – and What Does Europe Do?

How should future cases of *Charter* extraterritoriality be decided following *Hape*? I offer three recommendations.

First, there is little point debating whether section 32(1) should be read and interpreted in its own right as Bastarache J. preferred, or whether it should be read and interpreted in view of international law, as LeBel J. suggested. If the correct rules of international law had been used in *Hape* – namely those concerning state responsibility – then the most significant differences between the approaches of LeBel J and Bastarache J. would have fallen away (though I prefer Bastarache J.'s approach, for reasons that will soon become clear).

Second, to rectify the majority's error in following the "permissive rule" proposition in the *Lotus* case while ignoring the rest of that judgment and the rules of state responsibility, the Court should abandon its new requirement that a foreign sovereign must consent before the *Charter* will apply. Bastarache J. complained in his judgment that consent is a fraught criterion, and he is correct.[40] Indeed, the concept of consent is a minefield of extraordinarily difficult questions. I pose some questions below.

Whose consent should Canadian courts favour when multiple governments all claim to be the territorial sovereign? Exactly that problem existed when Canadian soldiers went to the former Yugoslavia. It exists today when Canadian diplomats act in Taiwan. A court forced to choose one would-be sovereign over another in settings of overlapping territorial claims is bound to cause offence; it even risks provoking a diplomatic incident.

What about the activities of the Canadian state that by their nature must proceed without consent - are they automatically exempt from Charter scrutiny? Unlike Canadian diplomats or police, Canadian spies or soldiers often have to act without the consent, or even the knowledge, of foreign sovereigns. It is absurd to talk of receiving a foreign sovereign's consent to spy on its territory or to invade and overthrow its government. Since consent is never forthcoming in such contexts, agencies such as the Communications Security Establishment or the Canadian Forces could deliberately flout human rights abroad, knowing they could never be stopped before a violation occurred; it would only be

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[40] *Ibid*. at 383: "There is obviously consent to the participation of Canadian officers in all cases where they operate in another country. Thus, in my view, consent is not a useful criterion to determine *Charter* application."

after a violation of Canada's international human rights obligations that the *Hape/Khadr* human rights exception would become justiciable. The peril of giving the security services *carte blanche* to violate the *Charter* should be obvious.[41]

How should the courts guard against having consent turned into a dangerous scalpel, one wielded by foreign sovereigns to slice at the corpus of Canadian law, leaving only the laws they like, and excising those they don't? At this writing, thousands of Canadian soldiers, police, diplomats and aid workers are deployed in Kandahar, Afghanistan, where the Afghan government consents to them carrying out sweeping civilian and military functions under the *National Defence Act* and other Canadian laws, including killing Afghan citizens. The Canadian government says that Afghanistan has never consented to the application of section 7 of the *Charter*, and depends on that fact when the Canadian Forces engage in one highly illegal function in particular – the transfer of war detainees to Afghan prisons, when evidence shows that many are tortured. Remarkably, the Federal Court[42] and, more recently, the Federal Court of Appeal[43] have accepted that the *Charter* does not apply in *Amnesty International Canada v. Canadian Forces*. That decision is now likely to go to the Supreme Court.[44] If it stands, then ironically Afghan officials possess a line-item veto over Canada's constitution that no Canadian official can have, which could be an invitation to other human rights abuses.[45]

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[41] But if it be doubted, the US Central Intelligence Agency, engages in secret imprisonment, extraterritorial abduction and "extraordinary rendition" of persons to states that torture, the use of interrogation techniques such as waterboarding, and targeted assassination of persons overseas – all made possible because the agency is outside the scrutiny of the *Bill of Rights*, the American counterpart to the *Charter*; see Tim Weiner. *Legacy of Ashes: The History of the CIA* (Doubleday: New York, 2007).

[42] *Amnesty International Canada v. Canadian Forces*, 2008 FC 336, (2008), 320 F.T.R. 2576 [*Amnesty International*].

[43] 2008 FCA 401, [2008] F.C.J. No. 1700. In the interest of disclosure, it should be noted that I acted as co-counsel in the first hearing of this case at the Trial Division; I ceased acting before it reached the Court of Appeal.

[44] In *Hape*, *supra* note 1 at 385-87, Binnie J. cited the *Amnesty International* litigation, and noted that it was the sort of case "on which we can expect to hear extensive and scholarly argument in relation to the extraterritorial application of the *Charter*."

[45] Suppose that Afghanistan's government reformed its ways on torture, but held a particular revulsion to Jews or women – not exactly unheard of in that country's history. Could Afghanistan then consent to Canada's extraterritorial application of section 7 of the *Charter* to prevent torture, but withhold consent to sections 2(a) and 15 of the *Charter*, so that the Canadian government could accommodate the host nation's anti-Semitism and misogyny by never deploying a woman or a Jew on its sovereign territory? *Liebmann v. Canada (Minister of National Defence*, [2002] 1 F.C. 29 (Fed.C.A.) [*Liebmann*], discussed *infra*, shows that something of this kind has actually already happened when

How may an applicant whose rights have been violated extraterritorially prove the foreign sovereign consented to him or her having a Charter remedy? Here the law of evidence poses almost insuperable barriers, because foreign sovereigns are not compellable witnesses, and the Canadian government treats communications with them as tightly-held diplomatic secrets, ordinarily not discoverable in court.[46] Thus if the court will not look to publicly observable facts to *infer* apparent consent, the applicant is put in the nearly impossible position of having to pierce diplomatic secrecy to *prove* actual consent. The unjust effect is to impose on the applicant a difficult reverse onus, for if the Canadian government alleges that a foreign sovereign has not consented to its application that ends the matter unless the applicant succeeds to demonstrate otherwise – and all the diplomatic evidence is in the Canadian government's hands.

Indeed, might Canada's government even go so far as to manipulate the Hape requirement for consent to escape its own obligations under the Charter?[47] This is not too cynical a question to ask. The Canadian Forces once refused to promote an officer to a foreign post in a Muslim country because he was Jewish.[48] He sued for discrimination, and in their defence the Forces retorted that it was "better not to send a Jew to the Middle East."[49] The problem, obviously, is the disgraceful attitude toward Jews in the Canadian Forces, but had *Hape* had been the law at the time, the Forces might have slyly deflected their anti-Semitism by putting up a canard such as this: "Our Muslim ally won't consent to the equality provisions of the *Charter* applying and requiring our Jewish soldiers on its territory."[50] In short, Canada could have blamed the foreign sovereign to evade the consequences of what was a wholly made-in-Canada *Charter* breach.

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the Canadian government sent its soldiers to a Muslim country.

[46] Whatever evidence Canada possesses of a foreign sovereign's consent (testimonial or documentary) is a confidence of that foreign sovereign, and would be exempt from discovery by section 38 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. If an applicant wishes to pierce section 38 secrecy, it requires a second proceeding to be filed in Federal Court, most of which is conducted *ex parte* and *in camera*; see *Ribic v. Canada (AG)*, 2003 FCA 246, [2005] 1 F.C.R. 33.

[47] Perhaps that is what is happening in the *Amnesty International* case, *supra* notes 42 and 43; note that it is *Canadian* officials, not Afghan officials, who say Afghanistan has not consented.

[48] *Liebmann*, *supra* note 45.

[49] *Ibid*. at 38.

[50] The example in the *Liebmann* case amplifies the preceding paragraph of the text; if the Court were to keep the consent test (and my opinion is that it would be better jettisoning it altogether), then at very least it has to stipulate that the applicant need only prove consent by inference from public facts, and not that the applicant must prove the

I find it alarming that none of these scenarios is hypothetical; all are actually real examples, and some have already come before the courts. In none is a requirement of consent as a threshold question for applying section 32(1) unproblematic. In several, it would do frank injustice. Fortunately, the majority in *Hape* did not clutch the consent tar baby so tightly that it cannot now be dropped. As LeBel J. wrote, consent was "neither demonstrated nor argued on the facts [of *Hape*] … so it is unnecessary to consider when and how it might be established."[51] The Court has left itself an easy way back from *Hape's* doctrinal precipice. But if it does take that step back, what next?

That leads then to the third recommendation, and the major one of this paper. Since the resort to consent in *Hape* is so unsatisfactory, the Court should in future cases of *Charter* extraterritoriality have regard to a "control test." Such a test could be worded in countless ways but, at bottom, it should focus on this question: *Do Canadian state agents abroad effectively control an area, or exercise authority over a person, in respect of which their conduct foreseeably leads to a Charter breach?*[52] If so, then the *Charter* breach is possibly under Canada's control – perhaps not Canada's exclusive control, but enough control that Canadian agents ought to question if changing their conduct could stop the breach.[53]

I cannot take credit for this recommendation. The use of a control test was proposed by Bastarache, Abella and Rothstein JJ. in *Hape*, and a decade ago in *Charter* extraterritoriality jurisprudence.[54] And as will be shown, control tests are fundamental to how courts around the world resolve extraterritorial human rights problems – Canada is the glaring exception.

The European Court of Human Rights (EurCtHR) adjudicates for the forty-seven countries (or "High Contracting Parties," as they are known

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actual consent itself. Liebmann succeeded because he had evidence for a good inference: the American military had deployed Jews to the same Muslim country, so why should Canada's military not do the same? See *Liebmann*, *ibid*., at 47-48.

[51] *Hape*, *supra* note 1 at 351-52.

[52] I do not suggest this is an ideal form of words for the test, just a highly condensed and convenient one.

[53] I phrase this sentence in the conditional because it is not always true that control over an area will give Canada the option to abrogate a *Charter* breach. The threshold in international law for when a state controls an area is not very high; see *Ilascu and Others v. Moldova and Russia*, [2004] ECHR 48787/99 (DC 196-200) [*Ilascu*] discussed *infra*. That threshold may be attained without having all the power necessary to stop a *Charter* breach occurring.

[54] See the discussion of *R. v. Cook*, [1998] 2 S.C.R. 597 [*Cook*], *infra*.

in the Council of Europe's argot) that subscribe to the *European Convention of Human Rights (ECHR)*.[55] Europe, with its patchwork of small states and porous borders, is a remarkably good incubator for extraterritorial state action, and the EurCtHR has more experience with such cases than any court in the world. As a model to emulate, it is hard to surpass.

Briefly, the EurCtHR's jurisprudence recognizes two heads of a control test.[56] The first head arises when a state possesses *effective control of an area* (ECA) outside its sovereign territory; the second head arises when *state agent authority* (SAA) is exercised on persons outside the state's sovereign territory.[57] It is a question of fact whether a particular case fits best under the ECA or SAA doctrine, or both, and the EurCtHR has to be satisfied on the evidence that a state exercises control over an area or person before it will take jurisdiction under Article 1 of the *ECHR*.[58] In keeping with Article 4 of the ILC's *Articles*, the ECtHR is concerned in the ECA and SAA doctrines with the *de facto* issue of which state is responsible for which conduct, and this may be different from the *de jure* question of who is sovereign in the territory where the conduct occurs.

In *Ilascu and Others v. Moldova and Russia*, the EurCtHR (sitting as the Grand Chamber) faced a situation of disputed jurisdiction over a territory contested by two sovereigns, and it resolved the issues using the ECA version of control.[59] The case centred on a secessionist enclave of the Republic of Moldova known as the Moldavian Republic of Transdniestria (MRT), which declared independence from the former in 1991. Not being entirely viable on its own, the MRT government sought and received political and military support from Russia to separate from Moldova. Armed conflict resulted, but was de-escalated under multilateral peace agreements signed in 1997 and 1998, in which all sides agreed that a small Russian military presence (actually numbering about

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[55] 4 November 1950, 213 U.N.T.S. 221 at 223, Eur. T.S. 5 [*ECHR*].

[56] For a review of the EurCtHR case law, see Michal Gondek, "Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?" (2005) Neth. Int'l L. Rev. 349.

[57] I am indebted to Lord Justice Brooke of the English Court of Appeal, who coined the ECA and SAA shorthand in *Al-Skeini & Ors, R (on the application of) v Secretary of State for Defence* [2005] EWCA Civ 1609 [*Al-Skeini CA*]. His digest of the cases, starting at para. 48, is exceptionally lucid and was not disagreed with by the House of Lords, although it should be noted the Law Lords preferred the ECA approach.

[58] Article 1 can be thought of as analogous to section 32(1) of the *Charter*, and it is the threshold that must be crossed before the EurCtHR can take jurisdiction. Article 1 reads: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

[59] *Supra* note 53.

300 soldiers) could remain in the MRT as a peacekeeping force.[60] Russia continued providing much political and economic support to the MRT, fostering an appearance of MRT government's dependence on Russian aid.[61]

The question therefore arose whether Moldova, as the internationally recognized territorial sovereign, or Russia, as having partial *de facto* control over the MRT, short of a military occupation, bore responsibility for violating the plaintiffs' human rights.

(Before answering that question, pause briefly to consider the inadequacy of *Hape*-style consent in a case like this. Whose consent ought to govern if Canadian officers want to enforce laws in the MRT? Certainly one cannot credit the MRT government's consent, since it only speaks for an internationally unrecognized secessionist enclave. Formally, one could rely on Moldova's consent as the true territorial sovereign, but to no practical end. Moldova's writ over the hostile, occupied MRT is more imaginary than real, and any Canadian foolish enough to profess Moldovan consent to journey into the MRT risks being shot at. Finally, that leaves only Russia to consent, which although not an occupier (recall that the 1997-1998 peace agreements legitimized the Russian military presence), it clearly does manipulate and control the MRT without being the true sovereign. Pity the Canadian judge who would have to apply *Hape* and give primacy to one of these consents over the others, for his or her decision is more likely to trigger a diplomatic incident than defend the human rights of the long-suffering inhabitants of the MRT.).

The EurCtHR's answer to the dilemma is that *both* Moldova and Russia have concurrent "jurisdiction" over human rights in the MRT (in the meaning of the word "jurisdiction" as defined in Article 1 of the *ECHR*). Although such a result is impossible to reach by way of the customary law of state sovereignty – one territory cannot have two sovereigns – it is entirely reasonable under the international law of state responsibility.[62] The EurCtHR found that Moldova's "jurisdiction" arose from its status as territorial sovereign, and that Russia's "jurisdiction" arose from its *de facto* control in the ECA sense. As the EurCtHR reasoned:

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[60] *Ibid.* at paras. 96-97, 103.

[61] *Ibid.* at paras. 137-147.

[62] There is a curious exception where one territory can find itself under a "condominium" of two sovereigns, but it is a historical anachronism of the colonial era (the British-Egyptian condominium over Sudan; the British-French condominium over what became Vanuatu). The MRT is not a condominium, but a territory where competing claims to sovereignty clash. Some such clashes go on for centuries, such as the British

> [T]he concept of "jurisdiction" within the meaning of Article 1 of the Convention is not necessarily restricted to the national territory of the High Contracting Parties. The Court has accepted that in exceptional circumstances the acts of Contracting States performed outside their territory, or which produce effects there, may amount to exercise by them of their jurisdiction within the meaning of Article 1 of the Convention.
>
> According to the relevant principles of international law, a State's responsibility may be engaged where, as a consequence of military action – whether lawful or unlawful – it in practice exercises *effective control of an area* situated outside its national territory. *The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control*…
>
> It is not necessary to determine whether a Contracting Party actually exercises detailed control over the policies and actions of the authorities in the area situated outside its national territory, since even overall control of the area may engage the responsibility of the Contracting Party concerned.
>
> Where a Contracting State exercises overall control over an area outside its national territory its responsibility is not confined to the acts of its soldiers or officials in that area but also extends to acts of the local administration which survives there by virtue of its military and other support.[63]

Thus, *de facto* effective control of an area is sufficient to establish the EurCtHR's jurisdiction, exactly as should be the case under international law (recall Article 4 of the ILC Articles). To be sure, Russia did not have exclusive control over the MRT, neither as a sovereign, nor as an occupying military force. Nevertheless, a small Russian military presence as peacekeepers, plus the larger evidence of Russia's political and economic support to the MRT government, led EurCtHR to hold that Russia was no less responsible for violating human rights under the *ECHR* than Moldova, the territorial sovereign.[64] The *ratio decidendi* of

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claim to Gibraltar, which the Spanish reject.

[63] *Ilascu*, *supra* note 53 at paras. 314-316 [citations omitted; emphasis added].

[64] Would the ECA doctrine apply in a place such as Afghanistan, where the North Atlantic Treaty Organization (NATO) countries have carved up the nation into areas in which each gives extensive political and military support? These little armed bailiwicks are called "Provincial Reconstruction Teams (PRTs) in NATO argot, and the only obvious difference between them and the MRT is that instead of pursuing the hope of secession from Moldova, PRTs pursue the hope of unity with the Afghan government in Kabul - they are integrationist, rather than separatist.

In southern Afghanistan, Canada's leads an important PRT in downtown Kandahar city, and an associated military force at Kandahar Airfield, comprising hundreds of Canadian civilian officials and a battle group of about 2,500 Canadian soldiers (which makes it almost ten-fold larger than the Russian military presence in the MRT). This civilian-military emplacement in Kandahar acts as the supporting power for the Afghan

Ilascu is therefore this: Even nonexclusive *de facto* control over another sovereign's territory, achieved by way of modest political and military assistance falling well short of military occupation, is sufficient to trigger state responsibility.

In the case of *Issa v. Turkey (No. 2)*, the EurCtHR (sitting as the Chamber) ruled that a state engaged in an extraterritorial war might bear responsibility for its soldiers' acts in the SAA sense.[65] Before examining that case, however, there is a common misunderstanding about *Issa* and the SAA case law that needs clearing up.

The SAA case law, it is true, is less abundant than the ECA case law. This fact caused the House of Lords (erroneously) in a recent case to doubt *Issa* and the SAA doctrine's validity, and to believe only in the

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government, and seems little, if at all, different from the Russian presence in support of the MRT government in *Ilascu*. Since the most controversial aspect of the Canada's involvement is the detention and transfer of suspected enemy persons to Afghan officials in Kandahar, putting them at risk of torture, it is cautionary to consider what the EurCtHR said in *Ilascu* about the Russian Forces' involvement in a similar detention and transfer scheme for enemies of the MRT at paras. 384, 385, 392, 393:

> …the events which gave rise to the responsibility of the Russian Federation must be considered to include not only the acts in which the agents of that State participated, like the applicants' arrest and detention, but also their transfer into the hands of the Transdniestrian police and regime, and the subsequent ill-treatment inflicted on them by those police…
>
> In addition, regard being had to the acts the applicants were accused of, the agents of the Russian Government knew, or at least should have known, the fate which awaited them…
>
> [T]he MRT, set up in 1991-92 with the support of the Russian Federation, vested with organs of power and its own administration, remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation. That being so, the Court considers that there is a continuous and uninterrupted link of responsibility on the part of the Russian Federation for the applicants' fate. [underlining added]

Since Kandahar too is "at very least under the decisive influence" of Canada's military and political support – for it is often said that Kandahar and perhaps Afghanistan would fall to the Taliban but for foreign help – Canada's state responsibility in an ECA sense absolutely cannot be doubted, if European law were taken as a guide; see *Ilascu, supra* note 50 at paras. 384 to 393.

But even if this were doubted, it is certain that the prison at Kandahar Airfield where the detainees are held and processed for transfer is an area under Canada's effective control, and that is sufficient to fix state responsibility on Canada for acts occurring there. As Mactavish J. found in the *Amnesty International* case, "Canada does, however, have command and control over the Canadian Forces' detention facilities at the Kandahar Airfield."; see *Amnesty International*, *supra* note 42 at para. 58.

[65] [2004] ECHR 31821/96 (DC 202-8; 217-8) [*Issa*].

ECA doctrine as expressed in an earlier EurCtHR case, *Bankoviç v. Belgium*.[66] Unfortunately, the Law Lords set up a false foil, and viewed SAA and ECA not as the *concurrent* doctrines that they are, but as competing doctrines, which is definitely not the case. In *Bankoviç*, the facts of the case fitted ECA reasoning but not SAA reasoning, so the EurCtHR hinged its decision on the former – but even in that case the respondents *conceded* in argument that the SAA doctrine remained good law.[67] Thus, *Bankoviç* is *not* authority that the SAA doctrine is overruled or has ceased to exist, and this is a fiction. The later *Issa* case uses SAA reasoning, and this is consistent with the consensus of a large number of international law scholars who agree the SAA doctrine is alive and well.[68]

Now we return to *Issa*.[69] The applicants before the EurCtHR were the relatives of a number of Iraqi shepherds who had allegedly been captured, assaulted and killed by Turkish soldiers during an invasion of Iraq. The evidence established that the Turkish military presence was

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[66] See e.g. the reasons of Lord Brown in *Al-Skeini and others v. Secretary of State for Defence* [2007] UKHL 26, at paras. 125-127, expressing skepticism of the SAA rule, and preferring the principles in *Bankoviç and Others v. Belgium and Others* [2001] ECHR (52207/99) [*Bankoviç*].

[67] *Bankoviç, ibid*., concerned the aerial bombing by NATO of facilities in Belgrade. One feature of aerial bombing is that the luckless victims are not placed under the control of the bomb-dropping states until the moment the bomb explodes, whereupon they came under instantaneous and total (indeed, fatal) control. For this reason the SAA doctrine is ill-suited to the aerial bombing context, though it has a place in other contexts – such as that of a prisoner – who is under the direct and total control of state agents for an extended period. As Christopher Greenwood, counsel for the respondent United Kingdom in *Bankoviç*, conceded to the EurCtHR in that case, "A prisoner is the archetypal example of someone who comes within the jurisdiction of the detaining state which exercises the most extreme type of control over him". Thus even as the SAA doctrine of control was inapplicable on the facts of *Bankoviç*, all were agreed in *Bankoviç* that it continues to exist; see Verbatim Record of the hearing held in *Bankoviç*, 24 October 2001, at 10, quoted in Michael O'Boyle, "The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on 'Life after *Bankoviç*'" in Fons Coomans and Menno Kamminga, eds., *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2004).

[68] The majority of international law scholarship criticizes any suggestion that *Bankoviç* put an end to the SAA rule. See Alexandra Rüth and Mirja Trilsch, "*Bankoviç v. Belgium* (Admissibility)" (2003) 97 Am. J. Int'l L. 168; Colin Warbrick, "The European Response to Terrorism in an Age of Human Rights" 15 E.J.I.L. 989 (2004); Kerem Altiparmak, "*Bankoviç*: An Obstacle to the Application of the European Convention on Human Rights in Iraq?" (2004) 9 J. Confl. & Sec. L. 213; Erik Roxstrum, Mark Gibney and Terje Einarsen, "NATO Bombing Case (*Bankoviç et al. v. Belgium et al*.) and the Limits of Western Human Rights Protection" (2005) 23 B. U. Int'l L. J. 55.

[69] *Supra* note 65.

fleeting (it lasted only a month) and unaccompanied by any larger political efforts to control the invaded Iraqi territory – so unlike in *Ilascu*, the ECA doctrine could not apply. Thus the EurCtHR considered whether Turkey had control over the Iraqi shepherds in the SAA sense, and it reasoned:

> *Moreover, a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State*. Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.
>
> In the light of the above principles the Court must ascertain whether the [persons] were under the authority and/or effective control, and therefore within the jurisdiction, of the respondent State as a result of the latter's extra-territorial acts.[70]

Thus when state agents exercise "authority and/or effective control" in a de *facto* sense over persons – SAA control, that is – the EurCtHR will take jurisdiction; control over an area is not required. The reason the EurCtHR cites for this is beguilingly simple: "The [*European*] *Convention* cannot be interpreted so as to allow a State party to perpetrate violations of the *Convention* on the territory of another State, which it could not perpetrate on its own territory."[71]

The *Ilascu* and *Issa* cases illustrate a correct approach to international law which differs markedly from that of the *Hape* majority. In both those cases, the EurCtHR sought *evidence of state responsibility* consistent with ILC Articles 4 and 16 at the threshold of taking jurisdiction, namely that the state effectively controlled an area, or that state agents exercised authority over persons (which are the ECA and SAA doctrines, respectively); and evidence of partial, nonexclusive, or transient control suffices in *Ilascu* and *Issa* to cross the threshold. In contrast to the Supreme Court in *Hape*, however, the EurCtHR in *Ilascu* and *Issa* is unconcerned with the international law of "sovereign equality" or "comity;" so extraneous are these concepts that the words are not found in either judgment. Nor does the EurCtHR query in *Ilascu* and *Issa* whether the governments of Moldova and Iraq, respectively, consented to another country's extraterritorial human rights obligations. One must

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[70] *Ibid*. at paras. 71-2 [citations omitted; emphasis added].

[71] *Ibid*. at para. 71. As it turns out in *Issa*, the evidence was insufficient to prove Turkish solders detained or killed the shepherds. The EurCtHR accordingly held there was no *de facto* control and Turkey was not responsible.

concede that the EurCtHR has greater expertise in international law than the Supreme Court of Canada – and tellingly, these are factors it does not consider.

It would be too lengthy an exercise for this paper to review all the other courts and tribunals which, like the EurCtHR, have adopted control tests in extraterritoriality cases.[72] Suffice it to say that control tests are by far the most widely accepted method of determining state responsibility for extraterritorial conduct that allegedly violates human rights. Their relevance extends well beyond Europe and the *European Convention*. In the recent *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case, arising over Israel's erection of a security wall through the occupied West Bank, the International Court of Justice (ICJ) wrote this about extraterritorial legal obligations:

> The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, *States parties to the Covenant should be bound to comply with its provisions*. The constant practice of the [United Nations] Human Rights Committee is consistent with this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory...
>
> [The Court then quotes the Committee with approval, as follows:] the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law.
>
> In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.[73]

The ICJ uses a control test to decide the *Security Wall* case, and helpfully, the Court makes clear that it opts for that approach because the "State

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[72] Among those tribunals are the Inter-American Court of Human Rights, the United Nations Human Rights Committee (now Commission), and the International Court of Justice. They too adopt control tests, not much different from the EurCtHR. The approaches of these tribunals are as creditable as the EurCtHR's, and my excluding them from this paper is not meant to connote otherwise. See generally Lord Justice Brooke's decision in *Al-Skeini CA*, *supra* note 57; and Coomans and Kamminga, *supra* note 67.

[73] Advisory Opinion of the International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (ICJ, 9th July 2004) at paras 108-111 [*Security Wall*; emphasis added].

responsibility of Israel under the principles of public international law" requires it. The ICJ is the highest arbiter of international law in the world. Thus the correctness of using the international law rules of state responsibility, as previously described in this paper, to decide whether a state is responsible for extraterritorial human rights violations should not be doubted.

6. Canadian Exceptionalism

These examples all show that the reasoning in the *Hape* majority judgment is practically *sui generis*; it bears almost no resemblance to the reasoning that the world's other courts use when faced with the extraterritorial application of human rights obligations. I think that ought to be seen as a warning sign. Much of the Supreme Court's most enduring and celebrated *Charter* jurisprudence came into being when the Court wisely emulated international jurisprudence and authority such as the *ICCPR*.[74] Conversely, some of the Court's least satisfactory *Charter* jurisprudence, the sort it had to revisit and overturn years later, came into being when the Court deliberately rejected international jurisprudence and the *ICCPR*.[75] Certainly the United Nations Human Rights Committee, which oversees the *ICCPR*, could not be clearer as to Canada's obligations as a party to that treaty:

> States Parties are required … to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. *This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party*… This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.[76]

Given enough time, reason has a way of grinding down the differences that national courts erect between their constitutional human rights standards and prevailing international standards. A challenge for

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[74] See the authorities cited at *supra* note 12.

[75] The Court considered but did not follow the *ICCPR* when deciding *Reference re Public Service Employee Relations Act* [1987] 1 S.C.R. 313. Twenty years later, it reversed that decision in *Health Services*, *supra* note 12.

[76] United Nations Human Rights Committee. General Comment 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004) at para. 10 [emphasis added].

all jurists is to achieve that alignment quickly and gracefully, rather than to be seen clutching to national exceptionalism. Hesitation all too often becomes a source of regret, as it did for the US Supreme Court, which avoided for several years to extending constitutional human rights protections to foreign war detainees in Guantánamo Bay – years in which America's global reputation for human rights withered – until it reversed itself in *Boumediene v. Bush*, and found that even those hated detainees were entitled to the constitutional protection of *habeas corpus*. What finally caused the US Supreme Court to change its outlook was, consistently with what I have recommended here, a control test:

> We therefore do not question the Government's position that Cuba, not the United States, maintains sovereignty, in the legal and technical sense of the term, over Guantanamo Bay. But this does not end the analysis. Our cases do not hold it is improper for us to inquire into the objective degree of control the Nation asserts over foreign territory.
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> […]
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> Nothing in [our jurisprudence] says that de jure sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus. Were that the case, there would be considerable tension [in the jurisprudence]. A constricted reading of [the jurisprudence] overlooks what we see as a common thread: … the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism. [77]

The great body of human rights law holds that certain fundamental rights belong to all persons; borders and nationalities create no exceptions. If that is earnestly so, and not thin propaganda, then one truth must exist: The state that ventures extraterritorially and that brings a foreign human's fate into its hands must respect his or her human rights, without engaging the charade that it lacks an obligation. To be sure, hard circumstances such as war will mean that the state is often unable to respect each and every right as fully as it usually would, but that fact only raises a problem of calibration, distinct from the threshold question of whether the state accords foreigners abroad with dignity and respect for their human rights in the first place.[78] As other courts around the world have concluded, a pragmatic control test, freed of legal formalism, can best translate this impulse of human decency into the jurisprudence.

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[77] *Boumediene v. Bush*, 553 U.S. ___ (2008), at 23, 34.

[78] For a more extended treatment affirming that human rights law applies concurrently with the law of armed conflict see Noam Lubell, "Challenges in Applying Human Rights Law to Armed Conflict" (2005) 87 *Int'l Rev. of the Red Cross* 737.

7. A Final Idea

So what is to be done? The most obvious solution is to overrule *Hape*, since the majority erred in law both where it selectively read the *Lotus* case, and where it neglected the pivotal international law rules of state responsibility.

That said, there is a more face-saving way out. The Court could instead leave *Hape* quietly undisturbed and turn again to its earlier jurisprudence - particularly the judgment in the *R. v. Cook*, which preceded *Hape* by about a decade.[79] Although it is often assumed that *Hape* implicitly overruled *Cook*, on closer examination the majority considered and stopped just short of overruling it, so it is thus timely to revisit and re-examine the reasoning in *Cook*.[80]

Specifically, I recommend that the Court carefully study Bastarache J.'s superb reasons in *Cook*. In those reasons, he cited the *Lotus* case in all its sophistication, and avoided the error of selectively quoting the case as the majority in *Hape* did. Bastarache J. did not explicitly cite the international law of state responsibility in his reasons, but state responsibility reasoning nonetheless pervades his analysis.

In short, what Bastarache J. wrote in *Cook* is strikingly similar to the best practices of the international jurisprudence a decade later, in cases such as *Ilascu*, *Issa* and the *Security Wall*. Perhaps his greatest moment of prescience is in the following passage, where he points out that the application of section 32(1) of the *Charter* to actions under the control of Canadian officials abroad is perfectly reconcilable with international law:

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[79] *Supra* note 54.

[80] Here is how the *Hape* majority approached the threshold of overruling *Cook*, but refused to cross it: LeBel J. expressed the view at 339-40 that "*Cook* is subject to a number of difficulties and criticisms, both practical and theoretical." This led Binnie J. in his concurring reasons at 385 to complain that LeBel J. "effectively overrules *Cook.*" Binnie J. went on to protest at *ibid*. that "we should avoid premature pronouncements" and, at 389-90, that acting in haste would unwisely "foreclose *Charter* options that are now open … under the flexible principles enunciated in *Cook.*" In a lively dialogue, LeBel J. then replied to Binnie J.'s criticism, and gave an assurance that overruling *Cook* was not his intention. LeBel J. wrote at 346 that his judgment strove only to "rethink and refine … the law when confronted by jurisprudence that has demonstrated practical and theoretical weaknesses." Since obviously rethinking and refining the law amounts to less than overruling it, there can be no doubt that the possibility of overruling *Cook* was considered by the majority, but the leap was not taken. Accordingly, despite their obvious incompatibilities, both *Cook* and *Hape* are good law for the moment. (Perhaps for this reason, the unsung authors of the headnotes in the S.C.R. got it right when they printed that *Cook* was "distinguished" in *Hape* rather than "overruled".)

> [T]he application of the Charter to Canadian officials abroad as prescribed by s. 32(1) does not conflict with any principle of territorial jurisdiction. There is no need, therefore, in this case to apply the special rule of statutory of interpretation that Parliament normally intends to conform with international law.[81]

Bastarache J. could not be more right. Here he proposed a control test of the SAA kind at the threshold of section 32(1) of the *Charter*, much as the EurCtHR has used at the threshold of Article 1 of the *ECHR*. Since in European hands, the control test jurisprudence has survived and proved workable even in hideously difficult fact situations such as foreign military invasions (*Issa*), separatist crises (*Ilascu*), aerial bombings (*Bankoviç*), and foreign kidnappings of terrorist suspects (*Illich Sánchez Ramirez v. France*), emulating Europe is probably a rather good idea.[82] Certainly European judges have had far tougher issues to deal with than the warrantless search of Hape's Caribbean money laundering haven, which sounds picayune by comparison.

There can be no doubt the Supreme Court must think again about extraterritoriality. The majority's reasons in *Hape* are well-intentioned, but so flawed that they cannot last. Bastarache J. has offered the Court a robust, pragmatic and commendable approach, one which would align Canada's *Charter* jurisprudence with international law and build on the accumulated wisdom of courts in Europe and elsewhere. Realizing this vision does not require the Supreme Court to boldly innovate so much as to humbly emulate. Not many case comments can end with the observation that the solution to a legal problem is straightforward and easily at hand, but happily, this is one.

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[81] *Cook*, *supra* note 54 at 676. It is worth comparing Bastarache J.'s statement of a decade ago with the irreconcilably different approach of the majority in *Hape* at 332, as quoted at *supra* note 8.

[82] See *Issa*, *supra* note 65; *Ilascu*, *supra* note 53; *Bankoviç*, *supra* note 65; and *Illich Sánchez Ramirez v France* [1996] ECHR (28780/95).